No. 22-5747

In the Supreme Court of the United States

DEMMERICK ERIC BROWN,

Petitioner,

v.

KAREN D. BROWN, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

JASON S. MIYARES
Attorney General of Virginia

CHUCK SLEMP
Chief Deputy Attorney General

M. JORDAN MINOT
Assistant Solicitor General

ANDREW N. FERGUSON
Solicitor General
Counsel of Record

ERIKA L. MALEY
Principal Deputy Solicitor General

KEVIN M. GALLAGHER
Deputy Solicitor General

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
aferguson@oag.state.va.us

Counsel for Respondents

QUESTION PRESENTED

Whether the revocation of "good conduct" credits after a parolee reoffended violated the *Ex Post Facto* Clause when state law permitted the revocation at the time the parolee was sentenced for the underlying offense.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

The petition should be denied because Petitioner Demmerick Brown asks this Court to engage in fact-bound error correction of a correctly decided judgment that does not create a circuit split. Fourth Circuit precedent does not conflict with the precedent of other courts of appeals or of this Court. The question presented also lacks ongoing significance: its resolution turns on the correct interpretation of a 1995 policy statement of the Virginia Parole Board (VPB or parole board). It will affect very few inmates in Virginia—only those subject to mandatory parole for sentences entered before 1995—and none in other States. Further, this case is a poor vehicle to revisit this Court's *Ex Post Facto* Clause jurisprudence, because Brown's claim was procedurally defaulted under state law and therefore barred by an adequate and independent state-law ground.

Brown is a career criminal who has been repeatedly convicted of larceny, burglary, and armed robbery. He has been released on parole three times and has promptly committed felonies after every release. Most recently, he committed grand larceny in 2014, less than six months after being released on parole. Upon his conviction, the Virginia Parole Board revoked "good time" credits that Brown had accumulated during his prior period of incarceration and reimposed the unserved portion of his prior sentence that was originally imposed in 1988. Brown contends that the revocation violates the *Ex Post Facto* Clause

because it applied a 1995 parole board policy statement that Brown argues "creat[ed] a significant risk of increased punishment" for crimes committed before the parole board issued the policy statement. Pet. 16. But, as the Fourth Circuit has held since *Warren* v. *Baskerville*, 233 F.3d 204 (4th Cir. 2000), the 1995 policy statement does not violate the *Ex Post Facto* Clause because it "was within the parameters of *existing* state law" dating back to the initial passage of Virginia's mandatory parole statute in 1982, and was therefore not "the retroactive application of a *new* statutory or regulatory rule." Pet. App. 17a.

Brown's argument that there is a circuit split between the Fourth Circuit and several other circuits fails. Brown contends that other circuits consider whether a "policy violates the *Ex Post Facto* Clause by creating a significant risk of increased punishment." Pet. 16. The Fourth Circuit does too. It has consistently held that that "[t]o state a claim for a violation of [the *Ex Post Facto* Clause], a plaintiff must plead facts showing the retroactive application of a new rule . . . creates a 'significant risk' of extending the period of incarceration to which he is subject." *Burnette* v. *Fahey*, 687 F.3d 171, 184 (4th Cir. 2012); see also *United States* v. *Lewis*, 606 F.3d 193, 198 (4th Cir. 2010) ("The *Ex Post Facto* Clause prohibits retroactive laws that create a 'significant risk' of increased punishment for a crime.").

The Fourth Circuit's precedent also does not conflict with *Garner* v. *Jones*, 529 U.S. 244 (2000). It

correctly explained that *Warren*, which was decided after *Garner*, "can be read harmoniously" with *Garner* because it "was not based solely on the fact that the relevant [parole board] policy lacked 'the force of law,'" but rather found the policy not to be a significant change from existing Virginia law. Pet. App. 16a. Brown contends that the Fourth Circuit erred in its analysis of Virginia's parole laws, and that the 1995 policy was a significant change. But the correct interpretation of a nearly 30-year-old Virginia parole law is not a significant federal question warranting this Court's review. To the contrary, the question lacks ongoing importance given that it affects only a narrow set of Virginia prisoners who, like Brown, were initially sentenced before 1995, were released on parole after 1995, and reoffended while on parole.

This case also is a poor vehicle for this Court's review of the question presented. Brown's claim is both procedurally defaulted and untimely under the federal statute of limitations. It is procedurally defaulted because the Virginia Supreme Court held that Brown's state habeas petition was untimely under Virginia's habeas limitations period. It is untimely because Brown filed it more than a year after his claim accrued—no matter how one calculates the date of accrual—outside of the federal statute of limitations. Because Brown's state petition was not "properly filed," he is not entitled to tolling of the federal habeas statute of limitations set out in 28 U.S.C. § 2244(d), and the district court correctly dismissed his petition.

The petition for a writ of certiorari should be denied.

STATEMENT

1. Brown has a "lengthy criminal history": aside from "three short stints on parole," he has "spent the last 40 years in the custody of" the Virginia Department of Corrections. Pet. App. 3a.

In 1981, Brown was sentenced to seven years and six months in prison for grand larceny and burglary. Pet. App. 6a. He was released on discretionary parole in December 1983. *Ibid.* He was arrested one month later for burglary and grand larceny. *Ibid.* Three years later, Brown was again released on parole. *Ibid.* Four months after that release, he committed a string of new crimes including four robberies, one armed robbery, and use of a firearm in a felony. *Ibid.* In 1988, Brown was convicted of these offenses and was sentenced to 43.5 years of incarceration. *Ibid.*

2. On October 2, 2013, Brown was released on mandatory parole. Pet. App. 6a. Virginia's mandatory parole system required the release of every prisoner "by the Virginia Parole Board six months prior to his date of final release." Va. Code § 53.1-159. Brown's final release date was calculated using "good conduct credits" he had accumulated while incarcerated. Pet. App. 6a–7a. At the time of his release, the unserved portion of Brown's term of imprisonment was almost 24 years. Pet. App. 19a.

Two Virginia statutes authorize the parole board to order a parolee who reoffends while on parole to serve the unserved portion of his originally imposed imprisonment. Virginia Code § 53.1-165, which was passed into law before Brown was ever incarcerated, authorizes the Virginia Parole Board to "revoke the parole and order the reincarceration of the prisoner for the unserved portion of the term of imprisonment originally imposed" when "any parolee or felon serving a period of postrelease supervision is arrested and recommitted." Virginia Code § 53.1-159—a provision concerning mandatory parole, as amended in 1994—provides that when a prisoner is released on mandatory parole and that parole is "subsequently revoked," "[f]inal discharge may be extended to require the prisoner to serve the full portion of the term imposed by the sentencing court which was unexpired when the prisoner was released on parole." In light of these statutes, the Virginia Parole Board adopted a policy in 1995 that specified that all mandatory parole violators would be required to serve the entirety of their original sentences. *Warren* v. *Baskerville*, 233 F.3d 204, 206 (4th Cir. 2000) (citing Virginia Parole Board Policy Manual, Part II.J.4 (July 1997)).

"[A] mere five months after his release on mandatory parole," Brown again committed grand larceny in 2014. Pet. App. 7a, 27a. After remaining "at large" for eight months, Brown was arrested, convicted, and sentenced to three years of active incarceration. *Ibid.* On August 3, 2015, after his conviction, the parole

board revoked Brown's parole and reimposed the unserved portion of his 1988 sentence, to run consecutively with his new grand larceny sentence. Pet. App. 7a.

3. Brown filed a petition for a writ of habeas corpus in the Virginia Supreme Court on December 10, 2015, arguing, among other things, that the parole board violated the *Ex Post Facto* Clause of the U.S. Constitution by "arbitrarily ignor[ing] the law and apply[ing] retroactively 1994 and 1995 parole laws to his 1984 and 1987 [] convictions." Pet. App. 7a. All of his claims "involve[d] or derive[d] from his October 2, 2013 release on mandatory parole." Pet. App. 23a. Specifically, Brown asserted that "he was forced to accept mandatory parole even though he had not wanted to be released on October 2, 2013 because the 1994 change in the law imposed the risk of loss of all accumulated earned good time." *Ibid.* (quotation marks omitted). Accordingly, the Virginia Supreme Court dismissed Brown's petition in May 2016, holding that "the petition was not filed within one year after October 2, 2013, when Brown alleges he was unlawfully released on mandatory parole and the cause of action accrued." Pet. App. 36a. The court held that Brown's petition was therefore "not timely filed" under Virginia Code § 8.01-654(A)(2). *Ibid.*

Brown filed a federal habeas petition in the United States District Court for the Eastern District of Virginia on January 12, 2017. Pet. App. 8a. Because "October 2, 2013 [wa]s the genesis and linchpin of the

claims" in Brown's petition, the district court dismissed the petition as untimely—"by over two years"—under the federal habeas statute of limitations. See Pet. App. 22a–25a; see also Pet. App. 25a ("over three years passed" between the date Brown's cause of action accrued and the date he filed his federal petition, "making the instant petition untimely by over two years"). The district court also rejected Brown's argument for tolling of the limitations period, holding that his state habeas petition had not been "properly filed" because the Virginia Supreme Court had held it untimely, and therefore the time period for filing a federal petition was not tolled by the filing of that state habeas petition pursuant to 28 U.S.C. § 2244(d)(2). Pet. App. 25a. The district court further held that his claim was procedurally defaulted because Brown had not filed his state habeas petition within the limitations period imposed by Virginia law, and that failure was an adequate and independent state bar to federal habeas review. Pet. App. 27a–28a (citing Va. Code § 8.01-654(A)(2)). Finally, the district court held that even if Brown could overcome his untimeliness and procedural default, Brown's *ex post facto* claim was "without merit," because the "Fourth Circuit has explicitly rejected the ex post facto challenge [Brown] presents." Pet. App. 29a–30a. The court denied Brown a certificate of appealability. Pet. App. 35a.

Brown appealed to the Fourth Circuit, which granted him a certificate of appealability on four

questions, "three of which concern whether [Brown's] petitions were untimely or otherwise procedurally barred and one of which concerns the merits" of Brown's *Ex Post Facto* Clause claim. Pet. App. 9a.[1] In an unpublished, per curiam opinion, Chief Circuit Judge Gregory and Circuit Judges Thacker and Harris affirmed the district court's dismissal of Brown's habeas petition. Pet. App. 3a. The panel declined to decide whether Brown had procedurally defaulted his claim or whether Virginia's statute of limitations constituted an adequate and independent state-law bar. Instead, the court "assume[d]" without deciding that an exception to procedural default applied and "turn[ed] to the merits." Pet. App. 13a.

The Fourth Circuit rejected Brown's *Ex Post Facto* Clause claim as "wholly without merit." Pet. App. 13a. The court noted that the Fourth Circuit had "rejected the precise argument [Brown] raises here over twenty years ago, in *Warren* v. *Baskerville*, 233 F.3d 204 (4th Cir. 2000)." Pet. App. 13a–14a. The "crux" of Brown's argument, the court explained, "is not that *Warren* is distinguishable, but that it was wrongly decided . . . in the face of *Garner* v. *Jones*, 529 U.S. 244 (2000)." Pet. App. 15a. The court explained that it was free to

[1] Specifically, the Fourth Circuit "grant[ed] a certificate of appealability on the following issues: (1) Whether Brown's state and federal habeas petitions were filed timely, (2) whether Brown's claims are procedurally defaulted, (3) whether the state court declined to consider his claims' merits on the basis of an adequate and independent state procedural rule, and (4) whether Brown has suffered the denial of constitutional rights the state violated." C.A. ECF No. 20.

"decline to follow *Warren* if its reasoning were inconsistent with Supreme Court authority." Pet. App. 16a. It concluded, however, that *Garner* and *Warren* "can be read harmoniously" because *Warren* "was not based solely on the fact that the relevant VPB policy lacked 'the force of law.'" *Ibid.* Specifically, *Warren*, unlike *Garner*, dealt with "a policy decision that was within the parameters of *existing* state law rather than the retroactive application of a *new* statutory or regulatory rule." Pet. App. 17a (citation and quotation marks omitted). *Warren*, rather than *Garner*, controlled Brown's case, the panel reasoned, because the 1995 policy was not a new regulatory rule in light of the power of the parole board to reimpose a sentence on a reoffending parolee when Brown was first sentenced. *Ibid.*

Brown filed a petition for rehearing en banc. Pet. App. 37a. No judge requested a poll under Federal Rule of Appellate Procedure 35, and the petition was accordingly denied. *Ibid.* Brown timely filed a petition for a writ of certiorari.

REASONS FOR DENYING THE PETITION

The Court should deny this petition. Fourth Circuit precedent does not conflict with precedent of other United States courts of appeals or of this Court. The decision below also lacks ongoing importance and is correct on the merits. Finally, Brown's procedurally defaulted and untimely claims present a poor vehicle to consider the question presented.

I. Fourth Circuit precedent does not conflict with precedent of other federal courts of appeals

First, the petition should be denied because there is no split in authority. Brown contends that there is a "[c]ircuit split over the proper analysis for the retroactive application of parole board policies." Pet. 16. But no such circuit split exists, much less a square, entrenched, and acknowledged split. See, *e.g.*, Ruth Bader Ginsburg, *Workaways of the Supreme Court*, 25 T. Jefferson L. Rev. 517, 517 (2003) ("For the most part, the Supreme Court will consider for review only cases presenting what we call deep splits—questions on which other courts . . . have strongly disagreed."). Rather, in this highly fact-intensive area of law, the cases on which Brown relies consistently apply this Court's *ex post facto* precedents to highly varied factual and regulatory situations. And many of those cases hold—like the court below—that there is no *Ex Post Facto* Clause violation.

Brown contends that Fourth Circuit precedent conflicts with precedent from the Third, Sixth, Seventh, Ninth, and D.C. Circuits because, he argues, the Fourth Circuit "fail[ed] to address whether a discretionary parole board policy violates the *Ex Post Facto* Clause by creating a significant risk of increased punishment." Pet. 16 (citing *Holmes* v. *Christie*, 14 F.4th 250 (3d Cir. 2021); *Michael* v. *Ghee*, 498 F.3d 372 (6th Cir. 2007); *Glascoe* v. *Bezy*, 421 F.3d 543 (7th Cir. 2005); *Himes* v. *Thompson*, 336 F.3d 848 (9th Cir. 2003); *Fletcher* v. *Reilly*, 433 F.3d 867 (D.C. Cir.

2006)). He argues that the Fourth Circuit has thereby rejected the "significant risk" test for *ex post facto* claims.

This split is entirely illusory. The Fourth Circuit has in fact expressly adopted this very test for deciding *Ex Post Facto* Clause claims. In *Burnette* v. *Fahey*, for instance, the Fourth Circuit held that "[t]o state a claim for a violation of [the *Ex Post Facto* Clause], a plaintiff must plead facts showing the retroactive application of a new rule that 'by its own terms' or through 'practical implementation' creates a 'significant risk' of extending the period of incarceration to which he is subject." 687 F.3d 171, 184 (4th Cir. 2012) (quoting *Garner*, 529 U.S. at 255). Similarly, in *United States* v. *Lewis,* the Fourth Circuit held that "the question we must resolve is whether application of the amended 2008 Guidelines would have resulted in a 'significant'—rather than 'speculative and attenuated'—risk of an increased sentence." 606 F.3d 193, 199 (4th Cir. 2010) (quoting *Garner*, 529 U.S. at 251–55). *Lewis* even expressly approved the D.C. Circuit's holding in *Fletcher*—a case which Brown places on the other side of his putative "split"—that "the Supreme Court 'foreclosed a categorical distinction between a measure with the force of law,' on the one hand, and discretionary guidelines, on the other." *Id.* at 202 (quoting *Fletcher*, 433 F.3d at 876). And, far from repudiating *Lewis* in the nonprecedential decision

below, the Fourth Circuit repeated this same holding. Pet. App. 15a.[2]

The cases Brown cites do not reveal a circuit split. They instead demonstrate that the application of the same *ex post facto* test turns on the highly varied factual and regulatory circumstances present in each case. As the court below explained, "[c]ontrary to [Brown's] suggestion otherwise, the *Warren* decision was not based solely on the fact that the relevant VPB policy lacked 'the force of law.'" Pet. App. 16a. Rather, the court held that the law had not changed in a manner that triggered the *Ex Post Facto* Clause because the 1995 parole board "policy decision . . . was within the parameters of *existing* state law rather than the retroactive application of a *new* statutory or regulatory rule." Pet. App. 17a. (quotation marks omitted). Brown argues that the Fourth Circuit has misinterpreted the Virginia parole board's historical authority. Brown is wrong, see pp. 17–18, *infra*, but even if he were right, the "misapplication of a properly stated rule of law" to a particular case does not create a circuit split and does not warrant this Court's review. Sup. Ct. R. 10.[3]

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[2] Only one of the cases Brown places on the other side of the "split" even cites *Warren*, and it did so in concluding that the court did not need to address the issue decided in *Warren*. See *Glascoe*, 421 F.3d at 548.

[3] Similarly, the Second Circuit, the only circuit which Brown contends is on the Fourth Circuit's side of the "split," see Pet. 18–19 (citing *Barna* v. *Travis*, 239 F.3d 169 (2d Cir. 2001) (per curiam)), has also expressly adopted the D.C. Circuit's "significant risk"

The cases Brown cites demonstrate the highly fact-intensive nature of the *ex post facto* analysis. *Glascoe*, for instance, emphasized that "*Garner* does not categorically bring every change in parole guidelines within the realm of the Ex Post Facto Clause." 421 F.3d at 547–549. The Seventh Circuit found it unnecessary to consider whether "discretionary guidelines" can fall "within the ambit of the Ex Post Facto Clause." *Ibid.* Instead, the court looked to "the consequence of the new practice on the sentence of the particular inmate bringing the challenge," and found no violation of the *Ex Post Facto* Clause because the inmate "would have been denied parole under either set of guidelines." *Ibid.* Similarly, *Michael* v. *Ghee*, 498 F.3d 372 (6th Cir. 2007), held that "the retroactive application of [parole] guidelines" did not violate the *Ex Post Facto* Clause because the "plaintiffs have not attempted to show how any one individual defendant faces a substantial risk of serving more time under the new guidelines." *Id.* at 384. Finally, *Fletcher* v. *Reilly*, 433 F.3d 867 (D.C. Cir. 2006), found that an inmate had stated an *Ex Post Facto* Clause claim regarding the retroactive application of regulations that "do not take post-incarceration behavior into account," where

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test and has applied it to discretionary guidelines. See *United States* v. *Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010) ("We think the 'substantial risk' standard adopted by the D.C. Circuit appropriately implements the *Ex Post Facto* Clause in the context of sentencing under the advisory Guidelines regime, and is faithful to Supreme Court jurisprudence."); see also *United States* v. *Ramirez*, 846 F.3d 615, 624 (2d Cir. 2017); *United States* v. *Riggi*, 649 F.3d 143, 149 n.4 (2d Cir. 2011).

the inmate "shows numerous rehabilitative accomplishments" while incarcerated. *Id.* at 879.

The other cases on which Brown relies are not even relevant to the claimed split because, unlike this case, those cases involve changes to statutes or regulations, rather than a "parole board policy." In *Holmes* v. *Christie*, 14 F.4th 250 (3d Cir. 2021), for instance, the New Jersey legislature implemented amendments to its parole law, and the parole board "applied these changes to all prisoners, including those convicted before the Amendments came into force." *Id.* at 255–56. In *Himes* v. *Thompson*, 336 F.3d 848 (9th Cir. 2003), there was a "fundamental alteration in the regulatory scheme" between the prisoner's conviction in 1978 and his parole revocation in 1994. *Id.* at 858.

The Fourth Circuit's precedents in no way conflict with the precedents of other circuits. The circuits apply essentially the same "significant risk" test derived from *Garner*. That test turns upon the details of state regulations and their implementation. The outcomes in those cases do not reflect a split of authority; they reflect the realities of applying a highly fact-specific test to different factual circumstances. The petition should be denied.

II. The decision below turns upon the proper interpretation of pre-1995 Virginia parole law and does not present an important question of federal law

The petition should also be denied because it turns upon the proper interpretation of pre-1995 Virginia law and its implementation only to Virginia prisoners who were sentenced before 1995, paroled after 1995, and who reoffended and had their sentence restored after 1995. Thus, the petition does not present a question of "substantial practical importance" that is "frequently recurring." Stephen M. Shapiro et al., *Supreme Court Practice*, § 4.15, at 277 (10th ed. 2013); *id.* at 507–08 (petitions should generally be denied "if the facts of the case are unusual or unique, such that a ruling would only apply to a few people or have little real-world importance").

Again, the "significant risk" test derived from *Garner* requires fact-intensive "case-by-case judgments," turning upon the nuances of state statutory and regulatory regimes and how they have been implemented for inmates in the petitioner's circumstances. *Peugh* v. *United States*, 569 U.S. 530, 539 n.3 (2013); see pp. 10–14, *supra*. Thus, while Brown argues that the application of the *Ex Post Facto* Clause to parole board policies in general is important, a ruling in this case would not have any significant effect beyond other Virginia prisoners similarly situated to Brown.

Even in Virginia, the issue rarely arises and is of diminishing importance because the purported

changes in law and policy occurred nearly thirty years ago. In 1994, the Virginia General Assembly prospectively abolished parole for felony offenses effective January 1, 1995. See Va. Code § 53.1-165.1 ("Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense."); *Mosby* v. *Commonwealth*, 482 S.E.2d 72, 72 (Va. Ct. App. 1997) ("Pursuant to Code § 53.1-165.1, an accused convicted of a felony committed after January 1, 1995 is ineligible for parole."). Any ruling by this Court would affect only a small subset of inmates in one State—inmates who committed a crime over 27 years ago, who are released on parole, and who then reoffend while on parole. There is no "compelling reason" for this Court to revisit the Fourth Circuit's twenty-two-year-old interpretation of Virginia's 1994 and prior 1982 parole statutes, particularly given that they impact only those convicted of felonies before January 1, 1995. See Sup. Ct. R. 10; *Volt Info. Scis., Inc.* v. *Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (this Court "does not sit to review" "question[s] of state law").

In addition, the decision below is unpublished and nonprecedential, see App. 2a, further demonstrating that it presents no "compelling reasons" for this Court's review. Sup. Ct. R. 10; see Stephen M. Shapiro et al., *Supreme Court Practice* § 6.37(i)(3), at 508 (10th ed. 2013) (noting that while review of unpublished decisions is sometimes granted, "the fact

that an opinion is unpublished may nevertheless be relevant to the Court's consideration of the need for review").

This Court should decline to address an issue that turns so heavily on the idiosyncrasies of Virginia law, and which is of such limited and diminishing importance. Review predicated on fact-bound error correction is unwarranted.

III. The decision below is correct

The petition should also be denied because the court of appeals correctly held that there is no *Ex Post Facto* Clause violation in this case.

Brown argues at length that, over two decades ago, the Fourth Circuit, the Virginia Supreme Court, and the Virginia Attorney General "wrongly" interpreted Virginia's parole statutes. Pet. 10–13. Not only is this a state-law question that lacks ongoing importance, see pp. 15–16, *supra*, it is also a question the Fourth Circuit answered correctly. Virginia Code § 53.1-165 was passed into law in 1982, before Brown's 1988 incarceration. It authorizes the Virginia Parole Board to "revoke the parole and order the reincarceration of the prisoner for the unserved portion of the term of imprisonment originally imposed" when "any parolee or felon serving a period of postrelease supervision is arrested and recommitted." Thus, "[u]nder the plain terms of § 53.1-165, the Parole Board possessed the authority to reincarcerate [the inmate] for the entire portion of his original sentence" if he reoffended while

on parole, and "the law governing [the inmate's] parole has not changed." *Warren*, 233 F.3d at 207. While Brown argues that legislative history suggests a contrary conclusion, Pet. 10–11, the Fourth Circuit correctly held that there is "little reason to disregard the plain meaning of the statutory text in favor of some snippets of legislative history," *Warren*, 233 F.3d at 207.

The Fourth Circuit's ruling also comports with Virginia's interpretation of its own statutes. As *Warren* noted, "the Virginia Supreme Court has already addressed [the inmate's] claim" in its unpublished order resolving his state habeas petition, "and dismissed it as frivolous, presumably because his argument is so at odds with the plain meaning of § 53.1-165." *Warren*, 233 F.3d at 207. In addition, "the Virginia Attorney General issued an opinion in 1986 interpreting § 53.1-165 to bestow such discretion upon the Parole Board." *Ibid.* (citing 1985–86 Va. Op. Atty. Gen. 222, 1986 WL 221263 (concluding that "Section 53.1–165 makes it clear that a parole violator may be required, in the discretion of the Parole Board, to serve the balance of the term of imprisonment to which the court or the jury originally sentenced him")). There is no basis for the federal courts to "declare that the Virginia Supreme Court and the Virginia Attorney General misinterpreted Virginia law." *Warren*, 233 F.3d at 207; see *City of Chicago* v. *Morales*, 527 U.S. 41, 61 (1999).

Brown's alternative argument that the 1995 policy statement violates the *Ex Post Facto* Clause "even if

the VPB had possessed authority to revoke the good time credit of mandatory parole violators before 1995," Pet. 12, was not raised in the lower courts and therefore was not decided below. See *City of Austin* v. *Reagan Nat'l Advertising of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) ("This Court . . . is 'a court of final review and not first view,' and it does not 'ordinarily . . . decide in the first instance issues not decided below.'" (quoting *Zivotofsky* v. *Clinton*, 566 U.S. 189, 201 (2012))). And, in any event, it is equally erroneous. In 1995, the VPB issued a policy statement that specified that all mandatory parole violators would be required to serve the entirety of their original sentences. *Warren*, 233 F.3d at 206 (citing Virginia Parole Board Policy Manual, Part II.J.4 (July 1997)). Brown contends that the "1995 policy change plainly altered the legal consequences of crimes committed before its effective date," and therefore violates the *Ex Post Facto* Clause. Pet. 12–13. But Brown fails to demonstrate that the 1995 policy "created a significant risk of increasing his punishment." *Garner*, 529 U.S. at 255. The cases Brown relies upon emphasize that the significant-risk test does not ask "whether the new parole practice is harsher for a class of prisoners generally"; instead, courts "must focus on the consequence of the new practice on the sentence of the particular inmate bringing the challenge." *Glascoe*, 421 F.3d at 547–48; see *Michael*, 498 F.3d at 384 (same).

Brown argues that the 1995 policy must have created a significant risk of increased punishment

because of the number of good-time credits at stake in his case, and because he surmises that the parole board revoked credits only in some cases prior to 1995. See Pet. 13. But Brown is a career criminal with numerous convictions, who has serially and promptly reoffended shortly after being released on parole. See p. 4, s*upra*. The rationale for revocation of credits applies most strongly to chronic recidivists like Brown. See, *e.g.*, *Brown* v. *Plata*, 563 U.S. 493, 537 (2011) (purpose of good-time credits system in California was to "allow the State to give early release to only those prisoners who pose the least risk of reoffending"). Given the strong likelihood that the parole board would have exercised its discretion to revoke Brown's credits regardless of the 1995 policy, that policy did not create a significant risk of increased punishment. See *California Dep't of Corr.* v. *Morales*, 514 U.S. 499, 509 (1995) (where the changed law gives rise to "only the most speculative and attenuated possibility of . . . increasing the measure of punishment . . . such conjectural effects are insufficient under any threshold we might establish under the ex post facto clause").

Brown also misreads *Garner*. There, the Court reversed an Eleventh Circuit judgment that "the retroactive application of a Georgia law permitting the extension of intervals between parole considerations" was "necessarily an *ex post facto* violation." *Garner*, 529 U.S. at 246. This Court held that retroactive application of the changed law would not necessarily violate the *Ex Post Facto* Clause. Rather, the petitioner

was required to demonstrate that retroactive application "created a significant risk of increased punishment" in that it "will result in a longer period of incarceration than under the earlier rule." *Ibid.* Brown has made no such showing here, because he has failed to demonstrate that the parole board would not have exercised its discretion to revoke his good time credits under its prior policy. "[M]ere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish a violation of the *Ex Post Facto* Clause." *Peugh*, 569 U.S. at 539.

In any event, it is far from clear that the *Ex Post Facto* Clause applies to "a mere change in the manner in which the Board exercises its discretion"—as opposed to "a new Board policy" or regulation. *Burnette*, 687 F.3d at 185 n.6. The Clause refers to "law," not to policy statements or the exercise of official discretion in particular cases. U.S. Const. art. I, § 10 ("No state shall . . . pass any . . . ex post facto law."). Thus, to run afoul of the Clause, a regulation must be a "change in law." *Peugh*, 569 U.S. at 539; see also *id.* at 563 (Thomas, J., dissenting) ("The law provides the defendant with only one assurance: He will be sentenced within the range affixed to his offense by statute. Legal changes that alter the *likelihood* of a particular sentence within the legally prescribed range do not deprive people of notice and fair warning, or implicate the concerns about tyranny that animated the adoption of the *Ex Post Facto* Clause.").

This Court has held that "the coverage of the *Ex Post Facto* Clause is not limited to *legislative* acts." *Peugh*, 569 U.S. at 545. But it has not applied the Clause to wholly non-binding policy statements of how an agency intends to exercise its discretion in the future. In *Garner*, the Court considered a regulation that bound the parole board and concretely cabined its discretion. *Garner*, 529 U.S. at 247. And in *Peugh*, the Court considered federal Sentencing Guidelines which, while advisory, "nevertheless impose a series of requirements on sentencing courts that cabin the exercise of [their] discretion." *Peugh*, 569 U.S. at 543. Here, Brown challenges the application of a 1995 policy statement, not a regulation or guideline that the agency is legally bound by or procedurally required to consult. The 1995 policy statement did not constitute a "change in law" because it "was a policy decision that was within the parameters of *existing* state law, rather than the retroactive application of a *new* statutory or regulatory rule." Pet. App. 17a. (quotation marks omitted).

This Court's review is unwarranted because Brown seeks factbound error correction, and the decision below is correct.

IV. This case is a poor vehicle to consider the question presented

Finally, the petition should be denied because this case would be a poor vehicle to resolve the question presented. As the district court held, Brown's habeas petition is procedurally barred for two reasons: (1) it

is procedurally defaulted because Brown failed to file timely his state habeas petition, and that failure is an adequate and independent state-law ground precluding review of his petition, and (2) it is untimely under the federal statute of limitations contained in the Antiterrorism and Effective Death Penalty Act (AEDPA), 28 U.S.C. § 2244(d)(1). See Pet. App. 8a, 25a, 27a–28a. The Fourth Circuit did not hold otherwise; rather, the court elided the procedural-default and timeliness questions by holding that Brown's *Ex Post Facto* Clause claim is "wholly without merit." Pet. App. 13a; see 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). Even if this Court disagreed with the Fourth Circuit's judgment on the merits, it would still have to deny relief on his habeas petition because the petition is defaulted and untimely. These procedural bars make this case particularly ill-suited to resolve the question presented.

1. This case would be a poor vehicle to consider the question presented because Brown's procedural default is an adequate and independent state-law ground precluding review of the merits of Brown's claim. "A federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule." *Davila* v. *Davis*, 137 S. Ct. 2058, 2064 (2017). A state

procedural rule is "adequate" if it is "firmly established and regularly followed." *Beard* v. *Kindler*, 558 U.S. 53, 60 (2009) (quoting *Lee* v. *Kemna*, 534 U.S. 362, 376 (2002)). Procedural default "promote[s] federal-state comity" by "protect[ing] against 'the significant harm to the States that results from the failure of federal courts to respect' state procedural rules." *Shinn* v. *Ramirez*, 142 S. Ct. 1718, 1732 (2022) (quoting *Coleman* v. *Thompson*, 501 U.S. 722, 750 (1991)).

The Virginia Supreme Court dismissed Brown's state habeas petition because it did not comply with Virginia's one-year statute of limitations. Pet. App. 36a (citing Va. Code § 8.01-654(A)(2)). The district court held that Virginia's limitations provision "is an adequate and independent bar that precludes federal review of a claim." Pet. App. 28a. The Fourth Circuit declined to rule on this issue, instead "assum[ing]" without deciding that Brown "is correct that *if* his claim is procedurally defaulted, an exception applies," before dismissing his claim on the merits. Pet. App. 13a. Even if this Court were to agree with Brown's *Ex Post Facto* Clause theory, Brown would not be entitled to relief because the Virginia statute of limitations as applied by the Virginia Supreme Court was an adequate and independent state bar, and Brown has not demonstrated "cause and prejudice" to excuse the procedural default. Pet. App. 23a–29a; see Pet. App. 11a–13a.

2. This Court should decline review for the additional reason that Brown's petition was untimely

under AEDPA's statute of limitations. AEDPA requires a state prisoner to file a federal habeas petition within one year of his claim accruing. 28 U.S.C. § 2244(d)(1). This limitation period "quite plainly serves the well-recognized interest in the finality of state court judgments" and "reduces the potential delay on the road to finality by restricting the time that a prospective federal habeas petitioner has in which to seek federal habeas review." *Duncan* v. *Walker*, 533 U.S. 167, 179 (2001).

To calculate the one-year federal limitations period, a court excludes time during the pendency of a "properly filed application for State post-conviction" relief. 28 U.S.C. § 2244(d)(2). To be "properly filed," a state petition must comply with the applicable state-law time limits. *Pace* v. *DiGuglielmo*, 544 U.S. 408, 417 (2005). "When a postconviction petition is untimely under state law, 'that [is] the end of the matter' for purposes of § 2244(d)(2)." *Id.* at 414.

As the district court explained, regardless of whether Brown's claim accrued on October 2, 2013 (the date on which he contends he was "'forced' to accept mandatory parole") or August 3, 2015 (the date on which his parole was revoked), his claim was untimely. See Pet. App. 24a–25a. Brown filed his federal habeas petition on January 12, 2017, over a year after even the later of the two potential trigger dates for claim accrual. Pet. App. 8a. To overcome that clear untimeliness, Brown contended below that AEDPA's one-year statute of limitations was tolled during the

pendency of his state habeas petition, which he filed in December 2015 and which the Virginia Supreme Court dismissed in May 2016. Pet. App. 7a, 11a–12a. But the Virginia Supreme Court dismissed Brown's state petition as time-barred. See Pet. App. 36a ("Accordingly, the Court is of the opinion that the petition was not timely filed.").

Because his state petition was dismissed as time-barred, Brown's petition was not "properly filed" and he was not entitled to tolling of his federal time limit. See *Pace*, 544 U.S. at 417. That time limit therefore expired in August 2016 at the latest, several months before he filed his federal petition. Pet. App. 7a. AEDPA's statute of limitations therefore bars Brown's habeas petition, meaning that this Court's review of his claim would be an exercise in futility.

Because Brown's claims were procedurally defaulted and untimely under AEDPA, this case presents a poor vehicle for this Court's review. These procedural issues bar Brown's *ex post facto* claim irrespective of its merits. See *Pearson* v. *Callahan*, 555 U.S. 223, 241 (2009) ("The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." (quotation marks omitted)).

* * *

There is no split in authority to merit this Court's review, this case is a poor vehicle for considering the

question presented, and error-correction review is not appropriate. This case does not warrant this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Respectfully submitted,

JASON S. MIYARES
Attorney General of Virginia

CHUCK SLEMP
Chief Deputy Attorney General

M. JORDAN MINOT
Assistant Solicitor General

ANDREW N. FERGUSON
Solicitor General
Counsel of Record

ERIKA L. MALEY
Principal Deputy Solicitor General

KEVIN M. GALLAGHER
Deputy Solicitor General

OFFICE OF THE VIRGINIA ATTORNEY GENERAL
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-2071
aferguson@oag.state.va.us

Counsel for Respondents