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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY TO RESPONDENTS' ARGUMENTS

Respondents' arguments reveal why this case merits review. Respondents fail to address head-on how the decision below conflicts with this Court's *ex post facto* precedent. *See* part I below. Respondents also fail to address the circuit split on the specific and important threshold issue, which is whether the Ex Post Facto Clause applies to parole board policies. In other words, is a parole board policy a "Law" within the meaning of the Ex Post Facto Clause? *See* part II. Part III replies to Respondents' argument that the question presented is unimportant. Part IV replies to Respondents' argument that this case is a "poor vehicle," which is based on recycled procedural default arguments that the court below correctly rejected.

I. The Fourth Circuit's *Ex Post Facto* Analysis Conflicts With This Court's Decisions.

Respondents do not directly dispute Petitioner's point (Pet. 8-10) that parole board policies are subject to *ex post facto* limitations. They instead argue that Petitioner's claim is speculative; he might have lost good time credits under prior law; or the parole board policy at issue was "wholly non-binding." These arguments are inconsistent with this Court's *ex post facto* decisions.

Respondents do acknowledge (BIO 21) that the controlling inquiry in *ex post facto* claims is whether a change in law creates a "significant risk" of prolonging a prisoner's incarceration. *Garner v. Jones*, 259 U.S. 244, 255 (2000). But Respondents then argue (BIO 21) Petitioner's claim is based on "mere speculation or conjecture." This argument ignores the record. Respondents' own documentation shows that, on August 3, 2015, Petitioner had 23 years, 8 months, and 11 days of

good time imposed on his sentence under the 1994 statutory amendment and 1995 parole board policy that were enacted *after* he was sentenced in the 1980s. *See* JA 156 (also in this brief's Appendix).

The August 3, 2015 Virginia Department of Corrections document states that "effective 5/11/95, per policy of the Virginia Parole Board under code section 53.1-159, all time not physically served on applicable sentences prior to mandatory parole will be served." *Id.* Section 53.1-159 had been amended in 1994 specifically to give the parole board authority to require mandatory parole violators to serve their full sentences without regard to good time credit. *See* Pet. 3-4. Thus, Petitioner *was* punished via the retroactive application of a new statute or regulatory rule, and there is nothing speculative about it.

Respondents also argue (BIO 20-22) Petitioner has "failed to show the parole board would not have exercised its discretion to revoke his good time credits under its prior policy." There is no support for placing such a burden on Petitioner. He does not have to prove a negative—that he would not have had good time credit revoked under prior law—when the new parole board policy by its own terms shows a significant risk of increased punishment and the parole board's records show the new policy was actually applied to him. *See Garner*, 529 U.S. at 255. He easily satisfies the "significant risk" test because the new board policy was actually applied to him.

Respondents' argument is that they did not violate the Ex Post Facto Clause by applying their policy retroactively to revoke Petitioner's good time credits

because they *might* have done so under a different law. Besides the Fourth Circuit, no other court—and certainly not this Court—has excused *ex post facto* violations based on such reasoning. And the Fourth Circuit has elsewhere rejected a similar governmental argument that "'if we hadn't done it wrong, we would have done it right.'" *United States v. Thomas*, 955 F.2d 907, 910 (4th Cir. 1992) (holding inevitable discovery exception to Fourth Amendment violation did not apply).

Respondents state (BIO 21) it is not clear whether the 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." That's wrong. This Court does not recognize a distinction between a "change in manner in which the Board exercises its discretion" and a "new Board policy." *See Garner*, 529 U.S. at 256 ("Absent a demonstration to the contrary, we presume the Board follows its . . . internal policies in fulfilling its obligations.").

Respondents claim (BIO 22) this Court "has not applied the Clause to wholly non-binding policy statements of how an agency intends to exercise its discretion in the future." That ignores this Court's precedent. *See Garner*, 529 U.S. at 257 (holding that "formal, published statement[s] as to how the Board intends to enforce its Rule" are subject to *ex post facto* review). It is also factually incorrect. The 1995 policy carried the force of law as of May 11, 1995, and is fully binding, not "wholly non-binding." Parole board policies published in the board's manual are the rules "governing the granting of parole and eligibility requirements" in Virginia. *See* Va. Parole Board Policy Manual, Introduction (Oct. 2006); Va. Code Ann. § 53.1-136.1.

II. The Circuits Are Split On Whether This Court's Significant Risk *Ex Post Facto* Test Applies to Parole Board Policies.

Respondents argue (BIO 11) a circuit split is illusory because "[t]he Fourth Circuit has in fact expressly adopted [the significant risk test] for deciding *Ex Post Facto* Clause claims." However, the circuit split results from the Fourth Circuit's (and Second Circuit's) failure to apply the significant risk test specifically *to parole board policies*, not to all *ex post facto* claims.

The Third, Sixth, Seventh, Ninth, and D.C. Circuits recognize that the significant risk test applies to parole policy changes. *See Mickens-Thomas v. Vaughn*, 321 F.3d 374, 386 (3d Cir. 2003) ("A Parole Board policy, although partly discretionary, is still subject to ex post facto analysis"); *Dyer v. Bowlen*, 465 F.3d 280, 288 (6th Cir. 2006) ("The Supreme Court has explicitly held . . . that discretion in parole considerations does not insulate the state from ex post facto violations"); *Glascoe v. Bezy*, 421 F.3d 543, 547 (7th Cir. 2005) (stating *Garner* "confirm[ed] the possibility that changes to parole practices may . . . violate the Ex Post Facto Clause"); *Himes v. Thompson*, 336 F.3d 848, 864 (9th Cir. 2003) (applying significant risk analysis to parole board guidelines change); *Fletcher v. D.C.*, 391 F.3d 250, 251 (D.C. Cir. 2004) (interpreting *Garner* to apply to parole policy statements).

In stark contrast, the Fourth and Second Circuits do not extend the significant risk analysis to parole board policies. *See Burnette v. Fahey*, 687 F.3d 171, 185 n.6 (4th Cir. 2012) ("As we observed in *Warren*, the Ex Post Facto Clause, by its text, applies only to 'laws.'"); *Barna v. Travis*, 239 F.3d 169, 171 (2d Cir. 2001)

("The *Ex Post Facto* Clause does not apply to guidelines that . . . are promulgated simply to guide the parole board in the exercise of its discretion.").

Additionally, Respondents argue (BIO 11) the Fourth Circuit accepted that "the Supreme Court 'foreclosed a categorical distinction between a measure with the force of law,' . . .and discretionary guidelines," in *United States v. Lewis*, 606 F.3d 193, 202 (4th Cir. 2010) (quoting *Fletcher*, 433 F.3d at 876). However, the Fourth Circuit later clarified that it does not apply this language to parole policies. *See Burnette*, 687 F.3d at 185 fn. 6 (limiting *Lewis* to Sentencing Guidelines due to their "unique role"). Therefore, the Fourth and Second Circuits' decisions not to apply the significant risk test to parole board policies conflicts with other circuits.

Simply put, Petitioner's case would be decided differently in other circuits. In *Mickens-Thomas*, for example, the Third Circuit analyzed the retroactive application of a parole board policy emphasizing public safety in parole decisions. 321 F.3d 374, 376 (3d Cir. 2003). In 1996, Pennsylvania amended its parole statute to primarily consider public safety in parole decisions. *Id.* at 377. In response, the parole board adopted a similar policy. *Id.* at 380. The court held the retroactive application of the new policy violated the Ex Post Facto Clause even though the parole board had already had discretion to consider public safety in parole decisions. *Id.* at 384. The court determined that the policy disadvantaged the prisoner because "*in practice*" it altered how the board exercised its discretion. *Id.* at 384-85;[1] *see also*

[1] While Respondents attempted to distinguish the other circuit decisions in Petitioner's petition for certiorari, they failed to cite *Mickens-Thomas*. *See* BIO iii-v.

Flemming v. Oregon Bd. of Parole, 998 F.2d 721, 724 (9th Cir. 1993) (rejecting argument that pre-existing parole board discretion to determine sentence length foreclosed *ex post facto* challenges).

Rather than examine new parole board policies "in practice," the Fourth Circuit holds that a retroactively applied parole board policy does not violate the Ex Post Facto Clause if it was enacted "within the parameters of existing state law." Pet. 17a (quoting *Warren*, 233 F.3d at 208). Because the parole board might theoretically have revoked Petitioner's good time credit under a different statute in existence when he was convicted, the Fourth Circuit did not engage in a significant risk analysis of the new policy actually applied to him. Pet. 16a-17a. But under the Third Circuit's approach, the inquiry would be whether in practice the 1994 amendment to § 53.1-159 and resulting 1995 parole board policy change disadvantaged Petitioner. The conclusion would be that they did disadvantage Petitioner because his good-time credits were revoked under § 53.1-159 and the new parole board policy.

Because the Fourth and Second Circuits do not apply the significant risk test to parole policies, in conflict with the Third, Sixth, Seventh, Ninth, and D.C. Circuits, and Petitioner's case would have been decided differently in other circuits, this case merits review.

III. The Application Of *Ex Post Facto* Limitations To Parole Board Policies Is Important.

Respondents argue (BIO 15-17) that the question presented is unimportant because it turns on "nuances" and "idiosyncrasies" of state law, but that argument is flawed for two reasons. First, there is nothing nuanced about Petitioner's claim. The parole board used a policy not in effect when Petitioner was sentenced to revoke more than twenty-three years of good time credit he earned under prior law. Second, the Ex Post Facto Clause commands the states not to pass *ex post facto* laws, which necessarily requires federal courts to examine challenged state laws carefully. *See* Constitution Art. I, Sec. 10, Cl. 1 ("No State shall . . . pass any . . . ex post facto Law . . . ."). Indeed, this Court has done so for more than 150 years. *See Cummings v. Missouri*, 71 U.S. 277 (1867) (holding provisions of Missouri Constitution violated Ex Post Facto Clause).

Respondents' argument (BIO 16) that the question presented affects "only a small subset of inmates" ignores the reality that changes to parole like the one at issue here happen all the time. *See* David M. Reutter, *Virginia Parole Board Changes "Three-Strikes" Interpretation*, Prison Legal News (July 6, 2018), https://www.prisonlegalnews.org/news/2018/jul/6/virginia-parole-board-changes-three-strikes-interpretation/ (describing change in VPB interpretation of policy); Michael Pope, *Changes are on the horizon for Virginia's Parole Board*, Radio IQ (March 7, 2022), https://www.wvtf.org/news/2022-03-07/changes-are-on-the-horizon-for-virginias-parole-board (reporting on replacement of VPB members with intent to change VPB policies and practices).

In the past year alone, parole changes similar to the one at issue have been made in both Tennessee and West Virginia. On May 5, 2022, Tennessee passed a "Truth in Sentencing" amendment to Tennessee Code § 40-35-501. One provision, similar to the loss of good time credit policy Petitioner challenges, provides that:

> there is no release eligibility for a person committing an offense, *on or after July 1, 2022*, that is enumerated in subdivision (cc)(2). The person shall serve one hundred percent (100%) of the sentence imposed by the court undiminished by any sentence reduction credits the person may be eligible for or earn.

2022 Tenn. Pub. Acts 988 (cc)(1) (emphasis added). Unlike the Virginia statute and parole board policy at issue here, the Tennessee legislature avoided an *ex post facto* problem by making the amendment apply only to offenses on or after July 1, 2022.

Similarly, the West Virginia Supreme Court of Appeals considered just last year whether a statute affecting an inmate's good time credits would apply to a recently reincarcerated parolee. *State v. Roberts*, 858 S.E.2d 936 (W. Va. 2021). The court held that application of the new good time calculation would violate both the federal and state Ex Post Facto Clauses because the law was not expressly retrospective and "the triggering date is the date of the offense." *Id.* at 946 (quoting *State v. Deel*, 788 S.E.2d 741, 749 (W. Va. 2016)).

In addition to those recent examples, Respondents have not disputed Petitioner's points about the immense power of parole boards and the need for *ex post facto* limitations when they adopt punitive policy changes. *See* Pet. 19-25; Wayne A. Logan, *"Democratic Despotism" and Constitutional Constraint: An Empirical Analysis of Ex Post Facto Claims in State Courts*, 12 W&M Bill of Rts. J.

349, 466, 469 (2004) (finding that from 1992-2002 there were more than 200 *ex post facto* challenges to custody modifications and that claims involving retroactive forfeiture of "imprisonment time credits" were among the most successful).

Respondents repeatedly (BIO 1, 3, 4, 5, 9, 16, 20) belittle Petitioner as a "career criminal" or the like. It is sad but true that Respondents' incarceration of Petitioner failed to rehabilitate him. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 71 (2010) (noting the four legitimate goals of incarceration are "retribution, deterrence, incapacitation, and rehabilitation"); *Jordan v. Commonwealth*, 809 S.E.2d 622, 623 (Va. 2018) (same). But that is not the issue. The issue—which affects all parole violators, not just recidivists (*see* Pet. 21)—is whether a parole board policy retroactively applied to revoke good time credits violates the Ex Post Facto Clause. This Court's guidance on this important issue is needed.

Finally, Respondents argue (BIO 16) that the question presented is unimportant because the Fourth Circuit's decision below is unpublished. The decision, however, directly applied two prior circuit decisions that *were* published and remain precedential, *Warren* and *Burnette*. And the decision below was reached after appointment of counsel, lengthy briefing, and oral argument. Moreover, numerous Justices on this Court have noted that a Fourth Circuit opinion's unpublished status can be either a "reason to grant review" or is "irrelevant" to the decision of whether to grant certiorari. *See Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas, J., with whom Scalia, J., joined, dissenting from denial of certiorari) (stating unpublished status "is yet another disturbing aspect of the

Fourth Circuit's decision, and yet another reason to grant review"); *Smith v. United States*, 502 U.S. 1017, 1019 n.* (1991) (Blackmun, J., with whom O'Connor, J., and Souter, J., joined, dissenting from denial of certiorari) ("The fact that the [Fourth Circuit]'s opinion is unpublished is irrelevant. Nonpublication must not be a convenient means to prevent review. An unpublished opinion may have a lingering effect in the Circuit and surely is as important to the parties concerned as is a published opinion.").

In short, the question presented undoubtedly has "real-world importance" (BIO 15) warranting review.

IV. This Case Is A Good Vehicle To Consider The Question Presented.

This case tees up an important question about how the Ex Post Facto Clause applies to parole board policies. No subsidiary issues would get in the way of the Court's review of the question presented.

Respondents repeat procedural arguments (BIO 22-26) that were successful when Petitioner acted *pro se* but that the court below rightly rejected after counseled briefing and oral argument. In a nutshell, Petitioner's *ex post facto* claim was timely filed even if any other claim was not.

Boiled down, Respondents' argument is that Petitioner's *ex post facto* claim did not accrue in August 2015, when his good time credits were revoked, and somehow accrued in October 2013, before he was harmed, when he received mandatory parole. There is no legal support anywhere for such an accrual theory.

Petitioner had no crystal ball back in October 2013 that revealed Respondents would violate his *ex post facto* rights twenty-two months later.

Petitioner filed his state habeas petition in December 2015, only four months after his good time credits were revoked and well before the one-year time limit, which tolled the one-year time limit for his federal habeas petition. He in turn filed his federal habeas petition in January 2017, within one-year of the state court's denial of his state petition in May 2016. That is all there is to Respondents' "poor vehicle" argument.

After briefing and oral argument, the court below concluded that "[m]any" of Petitioner's procedural default contentions were "compelling." Pet. 13a. For example, even if Petitioner's *ex post facto* claim had been procedurally defaulted based on it somehow accruing before his harm, such a rule would not be "adequate" because it was not regularly followed. *See Walker v. Martin*, 562 U.S. 307, 316 (2011) (holding that procedural ground must be both firmly established and regularly followed in order to be "adequate"). As to the federal statute of limitations, the district court failed to determine the statute of limitations on a claim-by-claim basis. *See Pace v. DiGulielmo*, 544 U.S. 408, 416 n.6 (2005) ("[28 U.S.C. 2244(d)(1)(D)] provides . . . three [means] that require claim-by-claim consideration, [including] § 2244(d)(1)(D)(new factual predicate)."); *Zack v. Tucker*, 704 F.3d 917, 920-22 (11th Cir. 2013) (en banc) ("subsection D's reference to 'claim or claims' indicates that Congress meant for courts to determine timeliness on a claim-by-claim basis"); *Fielder v. Varner*, 379 F.3d 113, 118-22 (3d Cir. 2004) (Alito, J.)

(holding 28 U.S.C. § 2244(d)(1) must be applied on a claim-by-claim basis). Petitioner also had a strong cause and prejudice contention that was based on the novelty of Respondents' accrual theory, which Respondents chose to "not engage with." Pet. 13a.

In sum, there is no procedural bar to Petitioner's *ex post facto* claim. The case is a good vehicle for this Court to address the important question presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

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