No. 15-1217

In the Supreme Court of the United States

ARI BAILEY, PETITIONER

v.

J. PATRICIA SMOOT, CHAIR, UNITED STATES PAROLE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether two decisions of the United States Parole Commission, in which the Commission stated that petitioner did not qualify for parole under the 1987 regulations of the D.C. Board of Parole that were in effect at the time of petitioner's offense, violated the Ex Post Facto Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 793 F.3d 127. The opinion of the district court (Pet. App. 27a-31a) is reported at 945 F. Supp. 2d 62.

JURISDICTION

The judgment of the court of appeals was entered on July 14, 2015. A petition for rehearing was denied on October 30, 2015 (Pet. App. 32a-33a). On January 15, 2016, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including March 28, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1994, following a jury trial in the Superior Court of the District of Columbia, petitioner was convicted on one count of rape, in violation of D.C. Code § 22-2801 (1981). Pet. App. 27a; *Bailey* v. *United States*, 699 A.2d 392, 393 & n.1 (D.C. 1997). The trial court sentenced petitioner to 15 to 45 years of imprisonment. Pet. App. 27a. In 2004, 2007, 2010, and 2012, petitioner applied for parole and was denied. *Id.* at 2a. In 2013, the United States District Court for the District of Columbia dismissed a civil suit by petitioner, in which he claimed that the decisions denying him parole in 2010 and 2012 had violated the Ex Post Facto Clause. *Id.* at 27a-31a. The court of appeals affirmed. *Id.* at 1a-26a.

1. In 1993, petitioner forcefully raped a Howard University sophomore with whom he was casually acquainted. *Bailey*, 699 A.2d at 393. After gaining entry to her apartment to use her telephone, he went into her bedroom, ripped off her bedcovers, climbed on top of her, choked her, and then had forcible nonconsensual intercourse with her. *Id.* at 394. When the victim subsequently locked herself in the bathroom, petitioner circumvented the lock, carried her back to the bedroom, and had forcible nonconsensual intercourse with her for a second time. *Ibid.* Petitioner was convicted on one count of rape, in violation of D.C. Code § 22-2801 (1981), and sentenced to 15 to 45 years of imprisonment. *Id.* at 393 & n.1.

2. The law in effect at the time of petitioner's offense provided that the District of Columbia Board of Parole "may authorize" parole "[w]henever it shall appear" to the Board "that there is a reasonable probability that a prisoner will live and remain at liberty

without violating the law, that his release is not incompatible with the welfare of society, and that he has served the minimum sentence." D.C. Code § 24-204(a) (1989). Pursuant to that law, the Board's administrative regulations for parole determinations (1987 Regulations) provided that the Board "may release a prisoner on parole" following completion of one-third of the prison sentence, if (1) the prisoner substantially complied with prison rules, (2) the prisoner had a "reasonable probability" of not violating the law after release, and (3) "[i]n the opinion of the Board," releasing the prisoner would not be "incompatible with the welfare of society." D.C. Mun. Regs. tit. 28, § 200.1 (1987).

The 1987 Regulations established a numerical scoring system—focused on offender history, offense characteristics, and behavior in prison—"to aid in the exercise of [the Board's] discretion." *McRae* v. *Hyman*, 667 A.2d 1356, 1360 (D.C. 1995); see D.C. Mun. Regs. tit. 28, §§ 204.1 *et seq.* (1987) (reproduced at Pet. App. 34a-41a). Although the Board's decision was typically driven by a prisoner's numerical score, see D.C. Mun. Regs. tit. 28, §§ 204.19 and 204.21 (1987) (Pet. App. 40a-41a), "[t]he numerical system [wa]s not a rigid formula, * * * because the Board [wa]s not required to either grant or deny parole based upon the score attained," *McRae*, 667 A.2d at 1360-1361. Instead, the 1987 Regulations "ma[de] clear the Board's authority, in unusual cases, to ignore the results of the scoring system and either grant or deny parole in the individual case, conditioned upon the Board's setting forth in writing those factors it relied on in departing from the result indicated by the scoring system." *Id.* at 1361;

see D.C. Mun. Regs. tit. 28, § 204.22 (1987) (Pet. App. 41a).

Two appendices included with the 1987 Regulations, Appendix 2-1 (Pet. App. 42a-50a) and Appendix 2-2 (Pet. App. 51a-52a), provided "[w]orksheet[s]" for applying the numerical system and making parole determinations. The 1987 Regulations required the Board to "explain[]" a decision "falling outside the numerically determined guideline * * * by reference to the specific aggravating or mitigating factors as stated in Appendices 2-1 and 2-2." D.C. Mun. Regs. tit. 28, § 204.1 (1987) (Pet. App. 34a). In *McRae* v. *Hyman*, the Court of Appeals for the District of Columbia (D.C. Court of Appeals) considered that requirement in the context of a challenge to a parole rehearing that took place shortly before petitioner here committed his crime. *McRae*, 667 A.2d at 1357, 1358 n.1, 1361 n.15. In that rehearing, the Board had departed from a numerical recommendation favoring parole and identified grounds for doing so that were not explicitly mentioned in either Appendix 2-1 or Appendix 2-2. Compare *id.* at 1361 (listing grounds for Board's decision), with Pet. App. 42a-52a (Appendices 2-1 and 2-2). The court nevertheless held that the Board had "complied with" the regulatory requirement. *McRae*, 667 A.2d at 1361 n.15.[1]

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[1] The D.C. Circuit has indicated that the Board at some point "supplemented [the] appendices with an 'Addendum to Board Order' which laid out four additional factors that could justify deviating from the numerical guidelines." *Ellis* v. *District of Columbia*, 84 F.3d 1413, 1416 (1996). The factors on which the Board relied in *McRae* appear to have been factors included in that Addendum. Compare *McRae*, 667 A.2d at 1361, with *Ellis*, 84 F.3d at 1416 n.3. This Office has been unable to obtain a copy of

The 1987 Regulations and appendices were later supplemented by an unpublished policy guideline (1991 Policy Guideline), the purpose of which was "[t]o define criteria and parameters for determining the applicability of descriptive terminology used in the Parole Guidelines for release decisionmaking, and to facilitate consistency in Guideline application." Board of Parole, Gov't of the District of Columbia, *Policy Guideline* (Dec. 16, 1991) (reproduced at Pet. App. 65a-77a). Among the terms defined in the 1991 Policy Guideline were terms describing "factors countervailing a recommendation to grant parole." 1991 Policy Guideline § VI.C (Pet. App. 72a) (boldface and capitalization omitted). In defining one such term, the 1991 Policy Guideline expressly presupposed that the term represented a factor that would cut against granting a renewed application for parole, notwithstanding that the term did not appear in either Appendix 2-1 or Appendix 2-2. *Id.* § VI.C.7.b (defining "repeated or extremely serious negative institutional behavior" in the context of "parole reconsideration cases") (Pet. App. 75a).[2]

3. In 2004, petitioner became eligible for parole. Pet. App. 2a. By that time, Congress had transferred authority over "any imprisoned felon who is eligible for parole or reparole under the District of Columbia Code" from the Board to the United States Parole Commission. National Capital Revitalization and Self-Government Improvement Act of 1997, Pub. L. No. 105-33, Tit. XI, § 11231(a), 111 Stat. 745. And the Commission had issued its own regulations for the

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this Addendum and thus cannot provide complete information about the date on which it was issued or its contents.

[2] This appears to be one of the factors described in the Addendum discussed at note 1, *supra*. See *Ellis*, 84 F.3d at 1416 n.3.

grant and denial of parole requests. See 65 Fed. Reg. 45,885 (July 26, 2000) (28 C.F.R. 2.70 *et seq.*).

In 2004 and 2007, in decisions that are not at issue in this case, petitioner was denied parole based on the Commission's own regulations. Pet. App. 2a, 4a. In 2008, a district court held that differences between the Commission's regulations and the Board's 1987 Regulations "could give rise to an *ex post facto* violation in individual cases" in which the Commission's regulations were applied to prisoners whose crimes occurred while the 1987 Regulations provided the governing law. *Sellmon* v. *Reilly*, 551 F. Supp. 2d 66, 88 (D.D.C.). Following that decision, the Commission promulgated a rule requiring that the 1987 Regulations, rather than the Commission's regulations, be applied to all prisoners who satisfied certain criteria. 74 Fed. Reg. 58,540 (Nov. 13, 2009) (28 C.F.R. 2.80(*o*)). As a result, the 1987 Regulations "governed [petitioner's] 2010 and 2012 parole rehearings—the two rehearings at issue in this case." Pet. App. 4a.

4. In 2010, the Commission notified petitioner that it had "applied the D.C. Board of Parole's 1987 guidelines" and had denied him parole. C.A. App. 74. Although petitioner's numerical score "indicate[d] that parole should be granted," the Commission informed petitioner that "a departure from the guidelines" was "warranted because the Commission finds there is a reasonable probability that you would not obey the law if released and your release would endanger the public safety." *Ibid.*

The Commission explained that petitioner was "a more serious parole risk than shown by your point score because you have not completed any programs that address the underlying cause of your criminal

conduct of rape." C.A. App. 74. "At the time you committed the rape offense in the District of Columbia," the Commission continued, "there was an outstanding warrant for your arrest based on another rape in Baltimore, MD. You have continued to deny the offense conduct in the District of Columbia by stating that you had only consensual sex with your victim and you have never expressed an interest in participating in relevant programming to address the criminal conduct that led to the current period of confinement." *Ibid.* The Commission additionally observed that "over the past 2 years, you have completed no other rehabilitative programs that would indicate your risk to the community has been lessened. However, during this time, you have continued to incur incident reports for threatening and assaultive conduct." *Ibid.*

In 2012, the Commission notified petitioner that he "continue[d] to be scored under the 1987 guidelines of the D.C. Board of Parole" and had again been denied parole. C.A. App. 79. As in 2010, the Commission informed petitioner that although his numerical score "indicate[d] that parole should be granted," a "departure from the guidelines" was "warranted because the Commission finds there is a reasonable probability that you would not obey the law if released, and your release would endanger public safety." *Ibid.* The Commission explained that petitioner was still "a more serious risk than indicated by your point score because you have not completed any programs that address the underlying cause of your criminal conduct of rape." *Ibid.* The Commission again noted the outstanding Maryland warrant at the time of his offense and observed that "[y]ou have been confined in a

closed prison setting for the past two years based on your prior institution misconduct and you have not continued significant programming since that time." *Ibid.*

5. Petitioner subsequently filed this suit, alleging that the 2010 and 2012 parole decisions violated his rights under the Ex Post Facto Clause. Pet. App. 6a.[3] The district court dismissed the complaint for failure to state a claim. *Id.* at 27a-31a.

The district court explained that its "review of the record" made "apparent" that the Commission "applied the Parole Board's 1987 Regulations" in both proceedings. Pet. App. 29a. The court found "no ex post facto violation where, as here, the [Commission] applied the regulations which were in effect at the time the plaintiff committed the underlying criminal offense." *Ibid.* It observed that, under the 1987 Regulations, the Commission "may deny parole even if an individual's point score indicates otherwise." *Ibid.* And it determined that the Commission's "upward departure" here was "adequately supported by the record and explained in the" Commission's written decisions. *Id.* at 31a; see *id.* at 29a-30a.

6. The court of appeals affirmed. Pet. App. 1a-26a. It concluded that petitioner's contention that the Board had violated the Ex Post Facto Clause by relying on "factors that were impermissible" under the

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[3] Petitioner also raised an unsuccessful ex post facto challenge to the 2010 parole decision in a habeas action filed in a different district court. See *Bailey* v. *Fulwood*, No. 11-cv-00435, 2012 WL 5928302, at *1, *6-*7 (M.D. Pa. Nov. 26, 2012). Like the district court here, the court in that case reasoned that the 2010 parole decision was a permissible application of the 1987 Regulations in effect at the time of his offense. See *id.* at *6-*7.

1987 Regulations and associated 1991 Policy Guideline "fail[ed] in two respects." *Id.* at 6a.

First, the court of appeals determined that the challenged decisions "were a permissible exercise of [the Commission's] statutory discretion, which was cabined neither by the 1987 [Regulations] nor by the 1991 Policy Guideline." Pet. App. 6a. The court observed that the governing D.C. parole statute at the time of petitioner's offense was phrased "in discretionary terms," *id.* at 7a (quoting *McRae*, 667 A.2d at 1360), providing that the Board "*may* authorize [a prisoner's] release on parole" if it makes certain findings, *ibid.* (quoting D.C. Code § 24-204(a) (1989) (emphasis and brackets added by court)). Turning to the 1987 Regulations, the court explained that decisions of the D.C. Court of Appeals interpreting those regulations "compel the conclusion" that the regulations "did not diminish the broad discretion to deny parole afforded to the Board" under the statute. *Id.* at 8a; see *id.* at 7a-8a (citing *McRae*, 667 A.2d 1356; *Davis* v. *Henderson*, 652 A.2d 634 (D.C. 1995); *White* v. *Hyman*, 647 A.2d 1175 (D.C. 1994)). The court found that conclusion to be "further bolstered" by its "own 'independent review of the regulations'" in a prior case, which had "held that under D.C. law, 'parole is never *required*'—even where 'the Board determines that [a prisoner meets] the necessary prerequisites' for release." Pet. App. 9a-10a (quoting *Ellis* v. *District of Columbia*, 84 F.3d 1413, 1419, 1420 (D.C. Cir. 1996) (emphasis in *Ellis*, brackets added in decision below)).

The court of appeals specifically considered and rejected the possibility that the 1991 Policy Guideline itself imposed limitations on the Board's discretion. Pet. App. 10a-11a. The court observed that none of

the judicial decisions it had surveyed had even mentioned that possibility and reasoned that "[i]f the 1991 Policy Guideline had altered the scope of the Board's discretion, the judicial response would not have been silence." *Id.* at 10a. The court also highlighted the D.C. Court of Appeals' conclusion that the 1991 Policy Guideline "'reflect[ed], rather than limit[ed]'" the Board's statutory and regulatory discretion in the context of parole set-offs, and it saw "no reason to believe this conclusion, for which the [c]ourt cites [decisions addressing parole determinations], does not apply with the same force to parole determinations themselves." *Id.* at 11a (quoting *Hall* v. *Henderson*, 672 A.2d 1047, 1053 (D.C. 1996)). The court additionally noted that "it would be somewhat unusual to deem that the unpublished 1991 Policy Guideline trumps a statutory enactment or published regulation." *Ibid.*

Second, the court of appeals concluded that even if the Commission "had failed in its effort properly to apply the 1987 Regulations and 1991 Policy Guideline, such a mistake could not be the basis for a claim under the *Ex Post Facto* Clause." Pet. App. 12a. The court recognized that, under this Court's decision in *Garner* v. *Jones*, 529 U.S. 244 (2000), "changes to regulations and even guidelines governing the parole process" can potentially violate the Ex Post Facto Clause. Pet. App. 12a. But, citing *Garner* and other cases, it reasoned that "a necessary feature of any *ex post facto* claim is a rule to which the government seeks to give retroactive effect." *Ibid.* "Here," the court observed, "the [Commission] justified its decisions without invoking any retroactive laws." *Id.* at 13a; see *id.* at 6a-7a (noting that the Commission "did not base its deni-

al on an application" of its own regulations, but "explicitly relied on" the 1987 Regulations).

Judge Rogers concurred in part and dissented in part. Pet. App. 17a-26a. She agreed that petitioner's ex post facto challenge failed because "the factors on which the * * * Commission relied were permissible under the * * * Board's 1987 Regulations and 1991 Guideline." *Id.* at 25a-26a; see *id.* at 18a-19a. But she "dissent[ed] from the court's alternative analysis," expressing doubts about its correctness and viewing the issue to be underdeveloped by the parties and unnecessary to the disposition of the case. *Id.* at 18a; see *id.* at 19a-26a.

ARGUMENT

Petitioner renews (Pet. 15-31) his contention that the Commission violated the Ex Post Facto Clause when it denied him parole in 2010 and 2012. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. "The heart of the *Ex Post Facto* Clause, U.S. Const., Art. I, § 9, bars application of a law 'that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.'" *Johnson* v. *United States*, 529 U.S. 694, 699 (2000) (quoting *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)). To establish a violation of that prohibition, an individual subject to punishment must "show both that the law he challenges operates retroactively (that it applies to conduct completed before its enactment) and that it raises the penalty from whatever the law provided when he acted." *Ibid.*

In *Garner* v. *Jones*, 529 U.S. 244 (2000), this Court discussed the application of the Ex Post Facto Clause in the context of parole determinations. The Court explained that "to the extent there inheres in *ex post facto* doctrine some idea of actual or constructive notice to the criminal" of the penalty for his offense, "we can say with some assurance that where parole is concerned discretion, by its very definition, is subject to changes in the manner in which it is informed and then exercised." *Id.* at 253. The Court accordingly took as a given that "[n]ew insights into the accuracy of predictions about the offense and the risk of recidivism consequent upon the offender's release, along with a complex of other factors, will inform parole decisions." *Ibid.*; see *ibid.* ("The idea of discretion is that it has the capacity, and the obligation, to change and adapt based on experience."). And it held that although a retroactively applied parole law or rule may violate the Ex Post Facto Clause, it will do so only if "by its own terms," or based on "evidence drawn from [its] practical implementation," it creates a "significant risk" of "a longer period of incarceration than under the earlier rule." *Id.* at 255. The Court explained that an implementing agency's "policies and practices" may be relevant to that inquiry, but emphasized that "[a]bsent a demonstration to the contrary," an agency is "presum[ed]" to "follow[] its statutory commands and internal policies in fulfilling its obligations." *Id.* at 256.

2. It is undisputed that, for purposes of petitioner's 2010 and 2012 parole rehearings, the Commission's regulations required it to apply the law in effect at the time of his offense in determining whether to grant or deny him parole. See Pet. App. 4a; p. 6, *supra*. It is

also undisputed that in both the 2010 and 2012 decisions, the Commission explained that it was, in fact, applying the 1987 Regulations. See C.A. App. 74 ("The Commission has applied the D.C. Board of Parole's 1987 guidelines to the initial parole decision in your case."); *id.* at 79 ("You continue to be scored under the 1987 guidelines of the D.C. Board of Parole."); see also Pet. 1.

Petitioner nevertheless contends (Pet. 1) that the decisions violated the Ex Post Facto Clause, on the theory that the Commission—contrary to its own express representations—"was in fact * * * retroactively applying its [own] new regulations." In petitioner's view, clandestine application of the new regulations is the only explanation for denying him parole, which he asserts would be mandatory under the law that existed at the time of his offense. As petitioner sees it, under the 1987 Regulations and the 1991 Policy Guideline, the Board "did not have the discretion to deny parole when the Regulations indicated a numerical recommendation to grant parole." Pet. 7. He contends that Appendices 2-1 and 2-2 set forth an exhaustive list of reasons for departing from a numerical score's recommendation and that those reasons are solely "reasons to *grant* parole," not to deny it. *Ibid.* Petitioner's argument is unsound.

a. The court of appeals correctly found it "clearly established under D.C. law that the factors set forth in the 1987 Regulations and the definitions articulated in the 1991 Policy Guideline never constrained the discretion of the Board." Pet. App. 7a. The statute governing parole at the time of petitioner's offense was "phrased in discretionary terms," providing that "'the Board *may* authorize . . . release'" in certain cir-

cumstances. *McRae* v. *Hyman*, 667 A.2d 1356, 1360 (D.C. 1995) (quoting D.C. Code § 24-204(a) (1989)) (emphasis added). The parole regulations "mirror[ed] the statute," *ibid.*, and "incorporate[d] this discretionary approach," *id.* at 1359. "Although a numerical scoring system [was] created to guide the Board in making the decision whether to grant or deny parole, the purpose of the system [was] 'to enable the Board to exercise its discretion.'" *White* v. *Hyman*, 647 A.2d 1175, 1179 (D.C. 1994) (quoting D.C. Mun. Regs. tit. 28, § 204.1 (1987)). "The numerical system [was] not a rigid formula, * * * because the Board [was] not required to either grant or deny parole based upon the score attained." *McRae*, 667 A.2d at 1360-1361.

In *Davis* v. *Henderson*, 652 A.2d 634 (1995), the D.C. Court of Appeals "held that the scoring system * * * did not supersede the discretion the Board possessed pursuant to statute." *McRae*, 667 A.2d at 1360. In *McRae* v. *Hyman*, the court "ma[de] explicit what was implied by" prior decisions, namely, that the "parole scheme confers discretion to grant or deny parole and the scoring system creates no liberty interest overriding the exercise of that discretion." *Id.* at 1357. And the D.C. Circuit's own "independent review of the regulations," while not conclusive, was consistent with the D.C. Court of Appeals' interpretation (to which the D.C. Circuit deferred). *Ellis* v. *District of Columbia*, 84 F.3d 1413, 1418-1419 (1996); see *id.* at 1426 (Tatel, J., concurring in part and dissenting in part) ("The D.C. Court of Appeals has recently made clear that it interprets the regulations as not ever requiring the Board to release a prisoner on parole.").

McRae, in particular, disproves petitioner's assertion (Pet. 7) that the Board lacked authority at the time of his offense to deny parole in a rehearing where the numerical score indicated that parole should be granted. In that case, the D.C. Court of Appeals considered a prisoner's challenge to the denial of parole on rehearing in June 1993, six months before petitioner's offense here. See *McRae*, 667 A.2d at 1357, 1358 n.1; *Bailey* v. *United States*, 699 A.2d 392, 393 (D.C. 1997). The court accepted that the prisoner's numerical score had favored parole, 667 A.2d at 1360, but found it "evident that the Board could readily determine, in the words of the governing statute, * * * that there was no reasonable probability that [the prisoner] would 'live and remain at liberty without violating the law' or that release would be compatible 'with the welfare of society,'" *id.* at 1361 (quoting D.C. Code § 24-204(a) (1989)).

One of the grounds on which the Board had relied in denying parole in *McRae*—that "although given the opportunity, [the prisoner] had made little or no effort towards rehabilitation," 667 A.2d at 1361—was also a ground for both parole denials here. See C.A. App. 74 ("You are a more serious parole risk than shown by your point score because you have not completed any programs that address the underlying cause of your criminal conduct of rape."); *id.* at 79 (nearly identical statement). And although neither Appendix 2-1 nor Appendix 2-2 identified that as a ground for deviating from the disposition suggested by the prisoner's numerical score, see Pet. App. 42a-52a, the court in *McRae* nonetheless concluded that the denial of parole was consistent with the very procedural regulations on which petitioner bases his argument here. See 667

A.2d at 1361 & n.15 (citing D.C. Mun. Regs. tit. 28, §§ 204.1 and 204.22 (1987)); see also note 1, *supra*.[4]

b. In any event, even assuming *arguendo* that the 1987 Regulations and 1991 Policy Guideline did not allow parole to be denied for the reasons given by the Commission in this case, that still would not show that the Commission violated the Ex Post Facto Clause by covertly applying its own regulations retroactively. It would simply suggest that the Commission—along with every judge who has considered the matter, see Pet. App. 6a (panel majority); *id.* at 18a-19a (Judge Rogers); *id.* at 29a, 31a (district court); *Bailey* v. *Fulwood*, No. 11-cv-00435, 2012 WL 5928302, at *1, *6-*7 (M.D. Pa. Nov. 26, 2012) (rejection of petitioner's habeas challenge to 2010 parole denial)—misconstrued the scope of its authority under the law at the time of

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[4] Petitioner notes (Pet. 13) that *McRae* and the other cases interpreting D.C. parole law were decided before this Court's decision in *Garner* v. *Jones*. But *Garner*, while relevant to the application of the Ex Post Facto Clause to retroactive parole rules (see p. 12, *supra*), does nothing to undermine the consistent interpretation of the particular D.C. parole laws in effect at the time of petitioner's offense. Petitioner also notes (Pet. 13) that none of the decisions interpreting those D.C. parole laws expressly mentions the 1991 Policy Guideline. But the deciding courts were undoubtedly aware of the 1991 Policy Guideline, see, *e.g.*, Brief for Appellees at 4-5, *Ellis*, *supra* (Nos. 95-7090 and 95-7109) (mentioning the 1991 Policy Guideline), and it makes little sense to conclude that they all neglected to consider a dispositive legal document, cf. *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 386 (2008) (reviewing court should not lightly presume error by lower court). In any event, petitioner's argument that the 1991 Guidelines are determinative here, see Pet. 7, presupposes that Appendix 2-2 set forth the exclusive grounds on which the Board could depart from the numerical score's recommendation—a presupposition that cannot be squared with *McRae*.

petitioner's offense. That would be a mistake of statutory and regulatory interpretation, not a violation of the Ex Post Facto Clause.

Both the district court and the court of appeals stated that a "review of the record" made "apparent" that the Commission "applied the Parole Board's 1987 Regulations—not [its own later regulations]—in 2010 and again in 2012." Pet. App. 17a (court of appeals); *id.* at 29a (district court). Petitioner provides no sound basis for concluding that the Commission in fact violated its own rules, see 28 C.F.R. 2.80(*o*), and misrepresented its own actions, see C.A. App. 74, 79, by doing otherwise. See *Garner*, 529 U.S. at 258 ("Absent a demonstration to the contrary," an agency is "presum[ed]" to "follow its statutory commands and internal policies in fulfilling its obligations."); see also *Ashcroft* v. *Iqbal*, 556 U.S. 662, 681 (2009) (explaining that dismissal of complaint is proper where allegations are "more likely explained by * * * lawful * * * behavior").

3. Neither of the issues on which petitioner seeks certiorari warrants review in this Court.

a. Petitioner first contends that the court of appeals erred in "h[olding] that courts may ignore a parole board's prior internal policy statements and need not consider the parole board's practical implementation of its regulations at the time the prisoner was convicted." Pet. 20; see Pet. i. The court of appeals, however, made no such holding.

Previous decisions of the court of appeals—including one discussing the Board's 1987 Regulations and cited in the decision below—have explicitly recognized that parole board practices are relevant to the ex post facto inquiry under *Garner*. See *Fletcher* v.

Reilly, 433 F.3d 867, 876 (D.C. Cir. 2006) ("The controlling inquiry under *Garner* is how the Board or the Commission exercises discretion in practice.") (cited at Pet. App. 4a, 13a); see also, *e.g.*, *Daniel* v. *Fulwood*, 766 F.3d 57, 61 (D.C. Cir. 2014) (inmate may establish an ex post facto violation by presenting "'evidence drawn from [a new regulation's] practical implementation'") (quoting *Garner*, 529 U.S. at 255); *United States* v. *Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008) (quoting *Fletcher*). And the decision below is consistent with that approach.[5]

Petitioner wrongly asserts (Pet. 20) that the court of appeals in this case "flatly refused to consider the definitions in the Parole Board's internal 1991 Policy Guideline in determining the practical effect of the Board's application of its 1987 Regulations." To the contrary, the court of appeals expressly considered the 1991 Policy Guideline and rejected petitioner's contention that it limited the Board's discretion to deny parole. See Pet. App. 10a-11a. Specifically, the court reasoned that (1) no previous judicial decision addressing the scope of the Board's discretion to deny parole had even mentioned the 1991 Policy Guideline, suggesting that it imposed no relevant limitations; (2) the D.C. Court of Appeals, citing *McRae* and another parole-determination case, had found the Guideline not to impose any limitations on the Board's discretion in a related context; and (3) it would be anomalous for unpublished guidance to trump a statute or

[5] Even assuming *arguendo* that the decision below had departed from prior circuit precedent on this issue, that would be a matter for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

regulation. *Ibid.* Although petitioner disagrees with the court of appeals' conclusion about the 1991 Policy Guideline's effect, it is clear the court explicitly conducted the requisite analysis.

Accordingly, no conflict exists between the decision below and decisions in other circuits that petitioner cites for the proposition that internal policy statements are relevant evidence of prior agency practice in the context of an ex post facto claim. See Pet. 17-20. And nothing suggests that those circuits would disagree with the decision below's interpretation of D.C. parole law at the time of petitioner's offense.

b. Petitioner also challenges "the panel majority's further holding that a prisoner cannot state an ex post facto claim as long as the parole agency says it applied the correct parole regime." Pet. 27; see Pet. i. Further review of such an alternative holding is unwarranted. The result below is fully supported without reference to any such principle, as Judge Rogers' concurring opinion illustrates. See Pet. App. 18a-19a.

In any event, petitioner fails to show that any other circuit would have granted him relief on ex post facto grounds notwithstanding the Commission's express representations, in both challenged parole decisions, that it was applying the law at the time of his offense. None of the Third Circuit cases cited by petitioner (Pet. 21-22) appears to have involved such an express representation. Rather, those cases appear simply to reflect the view, consistent with the decision below, that silence or potential ambiguity about what law is being applied does not foreclose a determination that an agency applied new law in violation of the Ex Post Facto Clause. See *Newman* v. *Beard*, 617 F.3d 775, 785 (2010), cert. denied, 563 U.S. 950 (2011); *Mickens-*

Thomas v. *Vaughn*, 355 F.3d 294, 306-307 (2004); *Richardson* v. *Pennsylvania Bd. of Prob. & Parole*, 423 F.3d 282, 292 (2005).

Petitioner similarly fails to demonstrate a conflict between the decision below and *Porter* v. *Ray*, 461 F.3d 1315 (11th Cir.), cert. denied, 549 U.S. 996 (2006). In that case, the Eleventh Circuit rejected a claim that a state parole board had, contrary to its express representations, "retroactively applied a secret parole policy." *Id.* at 1316, see *id.* at 1318-1322. The court found no proof of such a policy in the plaintiffs' statistics about parole outcomes, and it expressed doubt that more relevant statistics could prove the plaintiffs' case, given that the parole board had "always had 'virtually unfettered discretion'" to make the relevant determinations. *Id.* at 1321. The court also found that the plaintiffs had "failed to offer any evidence that the [parole board] applied a de facto [retroactive] policy" to the plaintiffs' own individual cases, concluding that the parole board had permissibly exercised its discretion under the law at the time of the prisoners' offenses. *Id.* at 1321-1322. The result in that case is consistent with the result here, where both lower courts determined from a "review of the record" that the Commission applied the 1987 Regulations and permissibly exercised its discretion under them. Pet. App. 17a, 29a.

The decision below is also consistent with this Court's decision in *Kansas* v. *Hendricks*, 521 U.S. 346 (1997) (cited at Pet. 28-29). The Court in that case rejected an attempt to classify a civil-commitment statute, expressly designated by the state legislature as civil rather than criminal, as a "newly enacted 'punishment'" subject to the Ex Post Facto Clause. *Id.* at

360-362. The Court explained that although "a civil label is not always dispositive," a challenger would have to present "the clearest proof" before it would be disregarded. *Id.* at 361 (internal quotation marks and citations omitted). The inquiry into whether a law imposes "punishment" is distinct from the inquiry at issue here, which concerns whether an agency has cloaked its de facto application of new law with a statement that it applied old law in reaching a particular decision. Even assuming the *Hendricks* standard were applicable, petitioner could not satisfy it. His only "proof" that the Commission was applying newer regulations retroactively is his argument that the 1987 Regulations required that he be granted parole. As explained above, that argument lacks merit.

4. A further reason for denying certiorari is that the bottom-line issue on which petitioner's entitlement to relief ultimately turns—the amount of discretion granted to the Board under D.C. parole law at the time of his offense—has very limited application beyond this case. In 1995, the District of Columbia amended the 1987 Regulations to make clear that the numerical score is not even presumptively controlling of the Board's decision, Technical Amendments Act of 1994, D.C. Act 10-302, § 52(c)-(e); repealed Appendices 2-1 and 2-2, *id.* § 52(f); and replaced the 1991 Policy Guideline with a new guideline that made explicit that "it [was] not intended in any way to restrict the Board's discretion in individual cases." Board of Parole, Gov't of the District of Columbia, *Policy Guideline* (Oct. 23, 1995). The issue raised by petitioner applies only to prisoners who committed felonies under the D.C. Code between 1991 and 1995, were incarcerated for long enough to still have active

cases, and who have been denied parole in decisions similar to petitioner's. Petitioner offers no reason to believe that the D.C.-parole-law question at the core of this case has sufficient prospective importance to warrant this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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