No. 99-137

IN THE SUPREME COURT OF THE UNITED STATES

GARNER, J. WAYNE, et al.,
Petitioners,

v.

JONES, ROBERT L.,
Respondent.

BRIEF OF *AMICI CURIAE* THE AMERI CAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION OF GEORGIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

Filed December 13, 1999

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INTEREST OF *AMICI CURIAE*[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to preserving the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Georgia is one of its statewide affiliates. Since its founding in 1920, the ACLU has appeared before this Court in numerous cases involving the fair administration of justice, both as direct counsel and as *amicus curiae*. The proper interpretation of the Ex Post Facto Clause is therefore a matter of great concern to the ACLU and its members, as it was to the Framers of the Constitution.

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense lawyers, public defenders and law professors. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3 of this Court. Pursuant to Rule 37.6, *amici curiae* state that their counsel authored this brief in its entirety. No person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives is the promotion of the proper administration of justice.

SUMMARY OF THE ARGUMENT

The question presented in this case is whether the retroactive application of a Georgia regulation governing parole consideration is a violation of the Ex Post Facto Clause of the United States Constitution. The regulation, as amended in 1986, extended the time between parole reconsideration reviews from three years to eight years for life-sentenced inmates who previously have been denied parole. In 1991, the Eleventh Circuit held that the retroactive application of the amendment to inmates sentenced before the amendment was adopted was an ex post facto violation. *Akins v. Snow*, 922 F.2d 1558 (11th Cir. 1991). In 1995, after this Court decided *California Dep't of Corrections v. Morales*, 514 U.S. 499 (1995), the Georgia State Board of Pardons and Paroles concluded that *Akins* had been overruled and again began to apply the eight-year rule retroactively to inmates whose offenses occurred before 1986. Reaffirming *Akins*, in *Jones v. Garner*, the United States Court of Appeals for the Eleventh Circuit carefully applied *Morales* to the Georgia regulation and again prohibited its retroactive application. *Jones v. Garner*, 164 F.3d 589 (11th Cir. 1999).

The Petitioners ask the Court to reverse the Eleventh Circuit and to hold that a Georgia law retroactively extending the time between parole reconsiderations from three years to eight years for all Georgia inmates serving life sentences does not violate the Ex Post Facto Clause. They ask the Court to do so despite the fact that the result

of this retroactive change in the law will certainly be an increase in jail time for a significant number of inmates, since Georgia law contains virtually no procedural safeguards to ensure that inmates whose parole reconsideration is set off would not otherwise have a chance of release in the interim.

Petitioners rely entirely on *Morales*, in which the Court examined a California statute permitting the state parole board to delay parole reconsideration hearings from every year to up to every three years, but only for inmates convicted of multiple murders and only where the board made an individual, particularized finding that the inmate had no reasonable chance of parole in the intervening years. Petitioners' reliance on *Morales* is misplaced and overlooks the critical distinctions between the Georgia law at issue here and the California law considered in *Morales*. These distinctions include the following: the class of prisoners affected by the change in the law is much broader in Georgia; the true purpose of the Georgia amendment is to maximize time served for the affected class; the Georgia law contains no procedural safeguards, such as the right to a hearing and particularized findings that the chance of the inmate being found suitable for release before the next review is highly unlikely; the duration of Georgia's allowable setoff is much greater; and there are insufficient mechanisms under Georgia law to remedy any impermissible effect of retroactive application of the amendment.

These distinctions go to the heart of the Ex Post Facto Clause, which the Framers of the U.S. Constitution believed essential to protect citizens' settled expectations regarding the punishment attached to crimes at the time

they are committed and to protect against arbitrary, vindictive, and politically inspired legislation. The Court has always understood the Clause to prevent state legislatures from retroactively increasing punishment beyond what it was at the time of the crime's commission. The Court has always understood, too, that the retroactive deprivation of opportunities for release on parole is a form of increased punishment and is therefore unconstitutional under the ex post facto prohibition.

The Eleventh Circuit correctly applied *Morales* to the Georgia amendment, which poses a sufficient risk of retroactively increasing time served for a broad class of inmates to violate the Ex Post Facto Clause. The Eleventh Circuit's opinion should therefore be affirmed.

ARGUMENT

RETROACTIVE APPLICATION OF THE GEORGIA REGULATION SETTING OFF PAROLE RECONSIDERATION FOR EIGHT YEARS, FOR PRISONERS WHO HAD BEEN ENTITLED TO RECONSIDERATION EVERY THREE YEARS, VIOLATES THE EX POST FACTO CLAUSE.

An examination of the history and purposes of the Ex Post Facto Clause, the Court's consistent application of the Clause to forbid laws that retroactively increase punishment, and the Court's recent opinions in *Morales* and *Lynce v. Mathis*, 519 U.S. 433 (1997), compels the conclusion that the Georgia regulation permitting an eight-year delay in parole reconsideration is an ex post facto violation.

A. The History and Purposes of the Ex Post Facto Clause Demonstrate Its Enduring Importance.

> The Framers of the U.S. Constitution adopted the Ex Post Facto Clause to protect future Americans against oppressive, retroactively imposed legislative enactments. The enduring prominence of the clause stems as much from its location in Article I, a position otherwise reserved for structural issues of broad democratic governance, as from its empathic prohibition:
>
> "No state shall . . . pass any . . . ex post facto law."[2]

Wayne A. Logan, *The Ex Post Facto Clause and the Jurisprudence of Punishment*, 35 Am. Crim. L. Rev. 1261, 1275 (1998) (quoting U.S. Const., art. I, § 10, ¶ 1). At its essence,

> [t]he ex post facto prohibition forbids the Congress and the States to enact any law "which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed."

Weaver v. Graham, 450 U.S. 24, 28 (1981) (quoting *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325-326 (1867)).

The strength of the Framers' fears over ex post facto laws can scarcely be exaggerated. They considered retroactive laws to be "contrary to the first principles of the

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[2] The Framers prohibited Congress, as well as the states, from passing ex post facto laws. U.S. Const. art. I, § 9, ¶ 3; *see Weaver v. Graham*, 450 U.S. 24, 28 n.8 (1981) (" 'So much importance did the [c]onvention attach to [the ex post facto prohibition], that it is found twice in the Constitution' ") (quoting *Kring v. Missouri*, 107 U.S. 221, 227 (1883)).

social compact, and to every principle of sound legislation." The Federalist No. 44, at 282 (James Madison) (Clinton Rossiter ed., 1961); *see* The Federalist No. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (ex post facto prohibition is among the three "greate[st] securities to liberty and republicanism [the Constitution] contains.").

For the Framers, the first or fundamental principles of republicanism included the idea that government must have both reliability and regularity.[3] Reliability in government means that citizens must have fair notice of the law and be able to rely on it to protect their settled expectations. Regularity encompasses the idea that laws should be prospective, general, and impartial.[4] It is from these concepts that the Framers' distrust of ex post facto laws derived.[5]

First, "[t]hrough [the ex post facto] prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. at 28-29; *see Calder v. Bull*, 3 U.S. (3 Dall.)

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[3] *See* Laurence H. Tribe, American Constitutional Law at 629 (2d ed. 1988).

[4] As Chief Justice John Marshall eloquently stated these principles, "a government of laws, and not of men" is the "very essence of civil liberty." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

[5] This Court has observed that "[t]he ex post facto prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal law." *Weaver*, 450 U.S. at 29 n.10.

386, 388 (1798). In the parole context, retroactive lawmaking evokes this concern because, as the Court has long recognized, a " 'prisoner's eligibility for reduced imprisonment is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed.' " *Lynce v. Mathis*, 519 U.S. at 445-446 (quoting *Weaver*, 450 U.S. at 32); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974); *Warden v. Marrero*, 417 U.S. 653, 658 (1974).

A second but no less significant concern giving rise to the Ex Post Facto Clause was the fear of "arbitrary and potentially vindictive legislation" and the questionable motives and passing political forces that can give rise to it. *Weaver v. Graham*, 450 U.S. at 29. As Chief Justice John Marshall observed:

> Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the Framers of the Constitution viewed, with some apprehension, the violent acts which might grow out of the feelings of the moment. . . .

Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 137-38 (1810).[6] Retroactive parole laws have many of the earmarks of

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[6] This Court has applied the Clause relatively infrequently since its origin, most often, as Chief Justice Marshall predicted, in response to legislative enactments directed towards maligned persons "of the moment." *Fletcher*, 10 U.S. (6 Cranch) at 138. Thus, for example, the Court has addressed ex post facto challenges to retroactive legislation resulting in deportation on the basis of political sympathies during "red scares," *see Galvan v. Press*, 347 U.S. 522 (1953); changes in resident alien status during times of ethnic distrust, *Chae Chan Ping v. United States*, 130 U.S. 581 (1889); and revocation of professional privileges enjoyed by those sympathetic to the cause of the Confederacy in the wake of the Civil War. *See Ex parte Garland*, 70 U.S. (4 Wall.) 333 (1867); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867).

politically motivated legislation feared by the Framers because such laws, by definition, affect society's most despised and least politically powerful element.

In striking down a law that delayed inmates' eligibility for early release, this Court recently reaffirmed the vitality of the ex post facto prohibition in the parole context:

> The specific prohibition of ex post facto laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its law-making power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and powerful, . . . but also the indigent defendant engaged in negotiations that may lead to an acknowledgement of guilt and a suitable punishment.

Lynce, 519 U.S. at 440 (citations omitted).

B. The Framework Established by *Morales* and Its Precedents Absolutely Forbids Retroactive Application of Laws That Pose a Risk of Increasing Punishment.

In *Calder v. Bull*, the Supreme Court interpreted the Ex Post Facto Clause to encompass not only every law that criminalizes an act that was not criminal at the time the act was done, but also "[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed." 3 U.S. (3 Dall.) at 390. In *Beazell v. Ohio*, 269 U.S. 167 (1925), the Court noted that it "is settled, by decisions of this Court so well known that their citation may be dispensed with, that any statute . . . which makes more burdensome the

punishment for a crime, after its commission, . . . is prohibited as ex post facto." 269 U.S. at 169-170. Recently, in *Collins v. Youngblood*, 497 U.S. 37, 43 (1990), the Court held that: "[T]he Beazell formulation is faithful to our best knowledge of the original understanding of the Ex Post Facto Clause: Legislatures may not retroactively . . . increase the punishment for criminal acts."[7]

In *California Dept. of Corrections v. Morales*, the Court applied this formulation to determine whether retroactive alteration of a law governing the frequency of parole consideration hearings violated the Ex Post Facto Clause, holding, "the focus of the ex post facto inquiry is . . . on whether any such change . . . increases the penalty by which a crime is punishable." 514 U.S. at 506 n.3; *see Lynce v. Mathis*, 519 U.S. at 443.[8]

In *Morales*, the Court expressed wariness of an approach that might require invalidation of "minor . . . mechanical [legislative] changes" that "might create some speculative, attenuated risk of affecting a prisoner's actual term of confinement by making it more difficult for him to make a persuasive case for early release," 514 U.S. at 508, 509; such as, for example, "restrictions on the hours that prisoners may use the prison law library." 514

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[7] In the criminal context, a law is retroactive if it "applies to prisoners convicted for acts committed before the [law's] effective date." *Weaver v. Graham*, 450 U.S. at 31. Petitioners have not challenged that the regulation at issue here is retroactive.

[8] In *Lynce*, the Court squarely held what was implicit in *Morales*, that "retroactive alteration of parole . . . provisions, like the retroactive application of provisions that govern initial sentencing, implicates the Ex Post Facto Clause. . . ." *Lynce*, 519 U.S. at 445.

U.S. at 508. The Court therefore refined the test as follows: "In evaluating the constitutionality of the [change at issue], we must determine whether it produces a sufficient risk of increasing the measure of punishment attached to the covered crimes."[9] *Morales*, 514 U.S. at 509.

In determining whether the amendment produces "a sufficient risk of increasing the measure of punishment," the Court held that "what legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition' must be a matter of 'degree.' " 514 U.S. at 509 (quoting *Beazell*, 269 U.S. at 171). In *Morales*, however, it was clear to the Court that the amendment at issue created "only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes" which, the Court held, was "insufficient under any threshold we might establish under the Ex Post Facto Clause." 514 U.S. at 509. Subsequently, in *Lynce v. Mathis*, the Court emphasized that its holding in *Morales* "rested squarely on the conclusion that 'a prisoner's ultimate date of release would be *entirely unaffected* by the change in the timing of [parole] suitability hearings.' " *Lynce*, 519

[9] The requirement of more than a *de minimus* risk of increasing the punishment appears to be the *Morales* majority's reformulation of the principle that "merely procedural" changes that substantively do not increase punishment do not violate the Ex Post Facto Clause. *Weaver v. Graham*, 450 U.S. at 31 n.12 (quoting *Hopt v. Utah*, 110 U.S. 574, 590 (1884)). The "procedural" test was difficult to apply because, as the Court recognized, substantial rights may be altered by statutes taking a "seemingly procedural form." *Weaver*, 450 U.S. at 31 n.12; *see Lynce*, 519 U.S. at 447 n.17. The "procedural" language therefore "imported confusion into the interpretation of the Ex Post Facto Clause." *Collins v. Youngblood*, 497 U.S. at 45-46.

U.S. at 444 (quoting *Morales*, 514 U.S. at 513) (emphasis added).[10]

C. Disregard of the *Morales* Analysis, as Urged by the Petitioners, Renders *Morales* Meaningless.

Morales' "conclusion that 'a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings,' " *Lynce*, 519 U.S. at 444 (quoting *Morales*, 514 U.S. at 513), was based on the application of two major factors: First, the change in the law affected only a very limited class of prisoners for whom the likelihood of release was found to be "quite remote" (*i.e.*, multiple murderers). Second, after applying a number of individual factors, the Court concluded that under the California amendment, the parole board's authority was carefully tailored to achieve the amendment's purpose of eliminating futile hearings for those who have no chance of release in the interim. Thus, in *Morales*, the Court engaged in a very fact-specific inquiry leading to its conclusion that there was virtually no risk that the prisoner's ultimate release date would be

[10] *Morales* reaffirmed that to establish a sufficient risk of prohibited effect, "a party asserting an ex post facto claim need not carry the burden of showing that he would have been sentenced to a lesser term under the measure or range of punishments in place under the previous statutory scheme. . . ." *Morales*, 514 U.S. at 510; *see Miller v. Florida*, 482 U.S. 423, 432 (1987) ("One is not barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he might have received under the old."); *Weaver v. Graham*, 450 U.S. at 33 ("The inquiry looks to the challenged provision, and not to any special circumstances that may mitigate its effect on the particular individual.").

affected by the amendment. *See also Lynce*, 519 U.S. at 443-444.

In *Morales* the Court declined to articulate a general proposition or "formula" for identifying ex post facto violations beyond the extreme unlikelihood of harm present in *Morales*, 514 U.S. at 509, and specifically, the Court "express[ed] no view as to the constitutionality of any of the number of other statutes that might alter the timing of parole hearings under circumstances different from those present" in *Morales*. 514 U.S. at 510 n.5.

Despite *Lynce's* reemphasis of *Morales'* case-by-case, fact-specific approach, some courts have read *Morales* too broadly, essentially discarding its analysis to conclude that no retroactive deferral of parole reconsideration presents an Ex Post Facto Clause problem. For example, in *Roller v. Gunn*, 107 F.3d 227 (4th Cir. 1997), and *Hill v. Jackson*, 64 F.3d 163 (4th Cir. 1995), the Fourth Circuit upheld the retroactive application of state laws decreasing the frequency of parole reconsideration hearings. In both cases, the class of inmates to which the amendments applied was considerably broader than the class in *Morales*. And, in both cases, there was virtually no discussion of the absence of the procedural safeguards that *Morales* deemed essential to protect inmates against the possibility of an increase in punishment.[11] *See also Shabazz v. Gabry*, 123 F.3d 909 (6th Cir. 1997) (Michigan law at issue decreased the frequency of mandatory parole reconsideration interviews for a very broad class – all inmates

[11] Neither the South Carolina amendment considered in *Roller* nor the Virginia statute at issue in *Hill* required any factual findings regarding the likelihood that parole would be granted in the intervening years. *See Roller*, 107 F.3d at 234-237; *Hill*, 64 F.3d at 169.

serving parolable life or long indeterminate sentences – and required no findings regarding parolability).[12]

Petitioners argue here that *Morales* stands for the general proposition that any law decreasing the frequency of parole reconsiderations can be applied retroactively consistently with the Ex Post Facto Clause. Petitioners' interpretation, if accepted, leads to the inexorable conclusion that a state legislature or parole board's power to increase the time between parole considerations

[12] Other cases cited by Petitioners likewise selectively embrace portions of the *Morales* inquiry and ignore other portions, instead of considering the effect of the parole scheme as a whole, as *Morales* commands. *See, e.g., Furnari v. Zavaras*, 914 P.2d 508, 510 (Colo. Ct. App. 1996) (retroactive statute affected much larger class than in *Morales* and required no express finding regarding likelihood of parole during the intervening years); *Jordan v. Tennessee Board of Paroles*, 1997 Tenn. App. LEXIS 27, * 3 (Jan. 16, 1997) (court engaged in no analysis of *Morales* factors but merely stated conclusively that earlier release under the prior rule was "highly speculative"); *Tuff v. State*, 732 So.2d 461 (Fla. 3 DCA 1999) (statute at issue applied to a much broader class of inmates than in *Morales*, including all inmates convicted of murder, sexual battery, attempted sexual battery, or whose sentences were 25 years minimum mandatory); *Fletcher v. Williams*, 688 N.E.2d 635 (Ill. 1997) (retroactive statute affected all state prisoners).

The Eleventh Circuit's opinion below is not necessarily at odds with the cases cited here because the Georgia amendment goes so far beyond what the Court found acceptable in *Morales*. The Georgia regulation not only applies to the broadest of classes and contains virtually no safeguards, but it also permits the longest setoff between parole reconsiderations of all the statutes considered in the cases cited here. *Cf. Roller*, 107 F.3d at 236 (noting that the South Carolina law only decreased the frequency of parole hearings by one year, while the California statute considered in *Morales* potentially changed the frequency by two years).

is unlimited; therefore, the state could retroactively effectively deny parole altogether by simply delaying reconsideration. For example, the state could retroactively require that an inmate who is first considered for and denied parole a few years into a ten-year sentence need not be reconsidered for another ten years, thus forcing these inmates to serve the entire sentence, even though the inmate was eligible for parole and entitled to annual parole reconsideration when convicted. The central holding of *Morales* and *Lynce*, that laws delaying parole reconsideration do implicate the Ex Post Facto Clause, is meaningful only if the *Morales* inquiry is strictly applied.

D. Under *Morales*, the Georgia Regulation Poses a Sufficient Risk of Increasing the Measure of Punishment to Violate the Ex Post Facto Clause.

The Georgia regulation differs from the California statute examined in *Morales* in several significant ways: (1) the class of affected inmates is much broader; (2) the purpose behind the Georgia regulation is to increase the length of confinement for life-sentenced inmates; (3) the Georgia scheme does not require a hearing and particularized written findings to support a setoff; (4) the setoff under the Georgia regulation is of much longer duration; (5) there is no mechanism to rectify a delayed parole suitability decision; (6) the possibility of Board discretion to expedite reviews, standing alone, is insufficient and too speculative to prevent a sufficient risk of increased punishment; and (7) there is no opportunity for an administrative appeal. Thus, unlike the California amendment, the Georgia amendment poses a constitutionally significant risk of increasing the measure of punishment.

1. The Georgia Regulation Covers Inmates Sentenced for a Vast Array of Crimes for Whom Release on Parole Is Likely.

First, unlike the California amendment, which allowed the parole board to extend the time between parole reconsideration hearings only for those prisoners who had been convicted of "more than one offense which involves the taking of a life," 514 U.S. at 511, the Georgia regulation applies to all inmates serving life sentences. Presumably multiple murderers constitute a very small number of prisoners; in contrast, the Georgia Board of Pardons and Paroles has announced that this case affects some 1400 Georgia inmates. *See* State of Georgia Board of Pardons and Paroles, *News Releases*, "Parole Board Pursues Appeal" (visited Dec. 8, 1999), <http://www.pap.state.ga.us/NewRelea.nsf> (press release dated June 2, 1999).[13] Inmates serving life sentences in Georgia include prisoners convicted not only of (one) murder, but also rape, armed robbery, more than one count of child molestation, and more than one count of possession or

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[13] Indeed, the affected number could be much higher because the 1400 might not include life-sentenced inmates convicted before 1979, who were entitled to annual parole reconsideration. *See Akins*, 922 F.2d at 1560. Also, the 1400 might include only the "limited" subset of life-sentenced inmates to which the Board claims to be retroactively applying the regulation. *See* Petitioners' Brief at 18 n.2. That claim is contradicted by the Board's own written policy, however, which states that the policy is applicable to "all Life Sentence Cases." (J.A. 56). Therefore, the number affected could be much higher, since, according to last year's figures, there were over 5,000 inmates serving parolable life sentences in Georgia prisons. James Salzer, *Managing Prison Overflow; Commission Formed to Develop Guidelines*, The Fla. Times-Union, Georgia Ed., June 2, 1998, at A1.

use of certain types of firearms during the commission or attempted commission of a series of enumerated offenses (such as robbery, involuntary manslaughter, sale or possession of controlled substances, influencing witnesses, and criminal gang activity).[14] *See Jones v. Garner*, 164 F.3d at 593-594 and statutes cited therein. Inmates serving life sentences also include inmates convicted of more than one count of any offense involving the manufacture, delivery, sale, or distribution of certain controlled substances. *See* O.C.G.A. § 16-13-30 (1999). Violence is not an element of these drug-related offenses. *Id.*

As the Eleventh Circuit concluded, because Georgia law does not impose a sentence of life in prison without parole for each of these offenses, the set of inmates whose parole will be affected by the regulation must include many inmates who can expect to be paroled at some point. *Jones*, 164 F.3d at 594. Indeed, according to recent statistics, the average Georgia inmate serving a life sentence was released on parole after serving twelve years. *See* JoAnne D. Spotts, *Sentence and Punishment: Provide for the Imposition of Life Sentence Without Parole*, 10 Ga. St. U. L. Rev. 183, 183 (1993). Thus, in contrast to the statute considered in *Morales*, the Georgia regulation is not limited "only to a class of prisoners for whom the likelihood of release on parole is quite remote." 514 U.S. at 510. To the contrary, it broadly applies to a class of prisoners who have been released historically after serving an average of twelve years.

[14] The enumerated offenses are set forth in O.C.G.A. § 16-11-160 (1999).

2. The Georgia Regulation's Purpose Is to Maximize the Length of Confinement for Life-Sentenced Inmates.

Unlike *Morales*, in which the record contained an articulated legislative purpose of saving time and money, the record here contains no evidence whatsoever of the purpose behind the amended regulation.[15] The Petitioners' unsubstantiated assertion that there could be no other purpose than to save time and expense, in the absence of evidence of the legislative purpose, is insufficient. *See Lynce*, 519 U.S. at 445.[16] Here, the Board's own statements demonstrate that the amendment was not intended to save time and expense that would otherwise be incurred in reviewing inmates who have only the remotest chance of making parole, as was the case in California.[17] Rather, as in *Lynce*, the regulation was

[15] In *Lynce*, the Court recognized that it had never had the occasion to decide whether a legislative change with the purpose, but not the effect, of increasing punishment would be a sufficient basis for concluding that the law violated the Ex Post Facto Clause. *Lynce*, 519 U.S. at 444. The Court nevertheless emphasized the need to assess the purpose behind the change in the sentencing scheme as well as the possible effect on offenders' sentences. *Id.* at 444-445; *see Jones*, 164 F.3d at 593.

[16] The Court concluded in *Lynce*:

> Here, unlike in *Morales*, there is no evidence that the legislature's change in the sentencing scheme was merely to save time or money. Rather, it is quite obvious that the retrospective change was intended to prevent the early release of prisoners convicted of murder-related offenses. . . .

Id.

[17] Indeed, since Georgia inmates are not entitled to formal, in-person hearings as they would be in California, there has

changed to increase the time life-sentenced inmates actually serve and thereby to avoid criticism (and defeat political efforts to abolish parole) by impressing upon the public and the legislature that the Board is doing everything in its power to keep offenders in prison as long as possible. *See, e.g., Effects of 2-Strikes Law Eyed*, Chattanooga Free Press, June 20, 1998, at A3 ("The Board of Pardons and Paroles is already limiting the number of violent criminals being freed. . . . 'We want the public to realize . . . [o]btaining parole on a life sentence case is increasingly rare,' said Walter Ray, the board's chairman."); *see* State of Georgia Board of Pardons and Paroles, *News Releases*, "It's a Fact" (visited Dec. 8, 1999), <http://www.pap.state.ga.us/NewRelea.nsf> (press release dated Oct. 7, 1998) ("It's a fact: In Georgia, parole has already been abolished for the seven most violent crimes. . . . Under current Georgia law and parole board policy, the majority of violent criminals must serve all or very close to all of their court-imposed sentences. . . . ").

Furthermore, the California statute in *Morales* was carefully designed to permit a brief setoff only for as long as an inmate could not reasonably expect to be paroled. Here, in contrast, the Board's own policy states that its goal is "to establish the maximum possible interval, in a Life Sentence Case, between a decision to deny parole and the time at which reconsideration for parole will occur," State Board of Pardons and Paroles Policy No.

been no showing that holding reviews at least every three years, as the Board was required to do under prior law, imposed any real burden on the Board.

4.110 (J.A. 56), without regard to any reasonable likelihood that the inmate might be released.

This evidence entitles the Court to find, as the Court found in *Lynce*, that "it is quite obvious" that the retrospective change in Georgia law was intended to keep prisoners convicted of certain offenses in prison longer. *Lynce*, 519 U.S. at 445; *see Jones*, 164 F.3d at 593. This purpose supports the conclusion that the Georgia amendment violates the ex post facto prohibition.

3. The Georgia Regulation Does Not Afford Inmates a Hearing and Particularized, Written Findings to Ensure That No Delay in Parole Release Results, Whether Intentionally or Through Error.

The Georgia regulation contains no mandatory procedural safeguards to ensure that the delaying of parole reconsideration does not increase the time actually served by any inmate.[18] Crucial to the Court's decision in *Morales* was the fact that the California statute required that the parole board (1) conduct "a full hearing and review" of all facts relevant to the prisoner's eligibility for parole, 514 U.S. at 511; (2) make "particularized findings," 514 U.S. at 512, that "it is not reasonable to expect that parole would be granted at a hearing during the following years," 514 U.S. at 511; and (3) state in writing the basis for those findings. *Id.* The "full hearing and

[18] *See Tuff*, 432 So.2d at 466 (concluding that, because of its mandatory procedures and findings, the Florida law at issue was much more like the California statute in *Morales* than the Georgia regulation considered in *Akins* and *Jones*: "[The Florida law] does not share the defects of the Georgia rule noted by the Eleventh Circuit.").

review" afforded by the California statute gives the inmate the right to review his or her file and to enter a written response to anything contained in the file; to "be present, to ask and answer questions, and to speak on his or her own behalf;" to request and receive a transcript of all proceedings; and to have legal counsel or another designated person present at the hearing to ensure that "all facts relevant to the decision" are presented. Cal. Penal Code § 3041.5 (West 1999). Moreover, the California parole board must send the prisoner a written statement of the reasons for the denial and also suggest activities in which the prisoner might participate while in prison to increase his or her chances for parole the next time. *Id.*

In contrast, the Georgia regulation provides in its entirety:

> Reconsideration of those inmates serving life sentences who have been denied parole shall take place at least every eight years. The Board will inform inmates denied parole of the reasons for such denial without disclosing confidential sources of information or possible discouraging diagnostic opinions.

Ga. Comp. R. & Regs. r. 475-3-.05(2) (1995). The prisoner gets no hearing; the "reconsideration" is merely a paper review by the individual Board members of the inmate's file. *Jones*, 164 F.3d at 594-595; *see* State of Georgia Board of Pardons and Paroles, *Frequently Asked Questions*, "How is a decision reached by Board Members?" (visited Dec. 8, 1999), <http://www.pap.state.ga.us/FQFrames.htm>. Georgia law does not require the Board to make any findings that the inmate will not be suitable for parole before the next reconsideration and the Board is not required to state the reasons for any setoff between reconsiderations up to eight years. *See Jones*, 164 F.3d at 594,

595; *see, e.g.*, J.A. 52-54 (Jones' notices of parole denial and setoff giving no reason for the setoff). Indeed, the Board gives only the most conclusory and general reasons for the parole denial itself. *See* J.A. 54 ("The main reasons for the [Board's] decision [to deny parole at this time] cited by the Board members during their individual study of your case are circumstances and nature of the offense, and multiple offenses."). The inmate has no right even to review his parole file to see if it includes incomplete or erroneous information. *See* O.C.G.A. § 42-9-53 (1997).

Petitioners' argument, that because Georgia law does not require a hearing or any procedural safeguards when the Board considers an inmate for parole, it should not have to hold a hearing or extend any procedural safeguards simply to delay reconsideration, misses the point. The procedural safeguards essential to the Court's decision in *Morales* served to ensure that, in fact, the "quantum of punishment" would not be increased by the retroactive application of the amendment. 514 U.S. at 508 (quoting *Dobbert v. Florida*, 432 U.S. 282, 293-294 (1977)). Put differently, retroactive application of the California law was, on its face, violative of the Ex Post Facto Clause. However, the stringent procedural safeguards California law imposed saved that particular law by reducing the probability of an impermissible effect (*i.e.*, increasing the prisoner's length of confinement) arising from the retroactive application to virtually zero. In Georgia, there is simply nothing to save the retroactive application of the regulation by limiting its effect to a constitutionally insignificant possibility of increasing the inmate's jail time.

4. The Length of the Setoff Permitted by the Georgia Regulation Is Much Greater and, Therefore, the Harm Is Not as Speculative or Easily Cured.

The change in the timing of parole consideration authorized by the Georgia regulation is much more drastic than in *Morales*. The California amendment entitles the inmate to a reconsideration hearing every year by default, but permits the parole board to depart from the default and delay hearings for one to two years upon specified, individual findings. The Georgia regulation, in contrast, increases the allowable time between reconsiderations in all cases to eight years, an interval five years longer than was permitted before the amendment. *See* Ga. Comp. R. & Regs. r. 475-3-.05(2) (1995) (reconsideration "shall take place at least every eight years.").[19]

This drastic increase in the time between parole reconsiderations places the Georgia regulation well beyond the "micromanagement" of "innocuous" legislative adjustments that the Court sought to avoid in *Morales*. 514 U.S. at 508. As the Eleventh Circuit concluded in *Akins* after careful analysis of the Georgia parole statutes and regulations, inmates are effectively ineligible for parole between such reviews:

[19] For inmates convicted before 1979, who were eligible for annual parole reconsideration under the regulation in effect at that time, the change in the law increased their allowable setoff by seven years. *See Akins*, 922 F.2d at 1560; Ga. Comp. R. & Regs. r. 475-3-.05(2) (1969).

The length of the allowable setoff, as well as the change in the allowable setoff, is greater under the Georgia amendment than under any of the state laws delaying parole reconsideration that have been upheld by other courts. *See* cases cited *supra* at 13 n.12.

> Under the Georgia parole system, an inmate serving a life sentence becomes eligible for parole consideration after serving seven years of his sentence. This means that the inmate is given a parole consideration hearing, and the Board then determines if he is suitable for release based on a number of factors. If the inmate is denied parole at this initial hearing the Board schedules a parole reconsideration hearing at a later date. If the inmate is denied parole at the reconsideration hearing, the Board schedules the inmate for another reconsideration hearing at a later date. Since the Board is required to hold some type of parole reconsideration hearing before granting parole, an inmate is effectively ineligible for parole between two parole reconsideration hearings. Because an inmate is not paroled without a parole reconsideration hearing, the hearing must be considered an essential part of parole eligibility.

Akins, 922 F.2d at 1561.[20] Thus, an eight-year setoff in parole reconsideration is effectively an eight-year delay in parole unless it could somehow be shown that the inmate had "no reasonable chance" of parole during that eight years. *Morales*, 514 U.S. at 507. Such a showing is impossible when the setoff is eight years long.

While it is true that the Board of Pardons and Paroles exercises complete discretion in determining whether or not to parole any individual inmate,[21] the statutory

[20] In using the terms "parole consideration hearing" and "parole reconsideration hearing," the Eleventh Circuit did not imply that the inmate receives an actual hearing. *See id.* at 1561 n.8.

[21] This Court has repeatedly rejected the Board's argument that because it enjoys broad discretion whether to parole any

scheme clearly contemplates parole for the affected class, prisoners serving life sentences. O.C.G.A. § 42-9-45(f) (1997). Recent statistics show that, in fact, the average term actually served on a life sentence was twelve years. While the Board makes light of the Eleventh Circuit's observation that "eight years is a long time," Petitioner's Brief at 27 (quoting *Jones v. Garner*, 164 F.3d at 595), the average life sentence actually served puts this number in context. Contrary to the Board's unsupported assertion that no one serving a life sentence has other than the remotest chance of release on parole, *see* Petitioner's Brief at 18 n.2; statistically, under the law in effect when Mr. Jones and other inmates were sentenced, the average life-sentenced inmate could reasonably expect to be paroled sometime between his second parole consideration, which would have occurred at ten (7 + 3) years, and his third, at thirteen years. Under the amended regulation, however, if an inmate is turned down for parole at his first consideration, he will have served fifteen years before the Board is even required to reconsider him.[22]

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individual inmate under Georgia law, no ex post facto claim is cognizable against it. *See Weaver*, 450 U.S. at 29-30 ("a law need not impair a 'vested right' to violate the ex post facto prohibition. . . . Thus, even if a statute merely alters penal provisions accorded by the grace of the legislature, it violates the Clause if it is both retrospective and more onerous than the law in effect on the date of the offense.").

[22] In contrast, *Morales* noted that in California, 85 percent of inmates were found to be unsuitable for release at the second reconsideration hearing, which, under the amended California law, would occur after the inmate had served 12 years, at the latest. *See* 514 U.S. at 510-511.

The Eleventh Circuit's conclusion that eight years is too long is supported by its finding that under the Georgia parole scheme, "[m]uch can happen in the course of eight years to affect the determination that an inmate would be suitable for parole." 164 F.3d at 595. For example, Georgia law dictates that the Board,

> in considering any case within its power, *shall* cause to be brought before it all pertinent information on the person in question. *Included therein shall be*:
>
> (1) A report . . . upon *the conduct of record of the person while in such jail or state or county correctional institution;*
>
> (2) The results of such of *physical and mental examinations* as may have been made of the person;
>
> (3) *The extent to which the person appears to have responded to the efforts made to improve his social attitude;*
>
> (4) The *industrial record of the person while confined, the nature of his occupations while so confined* . . . ; and
>
> (5) The *educational programs in which the person has participated and the level of education which the person has attained* based on standardized reading tests.

O.C.G.A. § 42-9-43 (1997) (emphasis added). Moreover, "[g]ood conduct, achievement of a fifth grade level or higher . . . and efficient performance of duties by an inmate *shall be considered by the board* in his favor. . . . " O.C.G.A. § 42-9-42 (1997). These statutes, passed by the Georgia legislature and binding on the Board, contradict the Board's assertion that only the nature and circumstances of the offense are relevant to parole decisions for life-sentenced inmates. *See* Petitioners' Brief at 19-20, 26

n.8. Moreover, by their very nature, each one of these factors is likely to change substantially over an eight-year period.[23]

Oddly, the Board argues that the delay in parole reconsideration from every three to eight years will somehow have the effect of encouraging inmates' attempts at rehabilitation. Petitioners' Brief at 16-17. The Board offers absolutely no support for what is not even a logical proposition since, according to the Board, the primary factors in parole decisions for inmates like Mr. Jones, who are most likely to suffer the longest setoffs, are the nature and circumstances of the crime and criminal history, which the inmate cannot change. The Board's bold assertion that a setoff for eight years, without giving the prisoner any reasons for the setoff and without any indication of what the Board expects the prisoner to do to improve himself (unlike the California statute, which requires both), somehow "provides an indication of how extensive [the prisoner's] efforts [at self-improvement] must be" is nonsensical. Petitioner's Brief at 17.

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[23] By Georgia law, an inmate may not obtain parole until he receives the favorable vote of a majority (three) of the five member Board. *See* O.C.G.A. § 42-9-42(a) (1997). The Board serves seven-year, staggered terms by appointment of the Governor. Ga. Const. art. IV, § 2, ¶ 1. The composition of the Board therefore can change greatly during an eight-year setoff, which is longer even than the term of the Board members. Indeed, three of the five Board members, including the chairman, have changed since Jones filed his lawsuit in November 1995. *See* Petitioners' Brief at ii. Not only will the composition of the Board change during such a long setoff, but attitudes about punishment and the role of education, rehabilitation, occupation, and retribution are likely to change as well.

5. In Georgia, There Is No Mechanism to Rectify the Harmful Effect of a Delay in an Inmate's Parole Suitability Finding.

Morales concluded that the California statute had a negligible risk of increasing any inmate's punishment because, under the California parole scheme, an inmate's actual release date often comes years after a finding of suitability. The Court therefore reasoned that any delay in the finding of suitability could be rectified by an earlier release date. There is no analog to this factor in Georgia law; if there were, the Board clearly would have made such an argument, but it did not.

6. The Remote Possibility of an Expedited Review, Not Enshrined in Georgia Law, is Insufficient Protection Against Increased Punishment.

In *Morales*, the Court also considered that under California law, in the years between reconsideration hearings, a prisoner could cure any possible delay through the opportunity to request an expedited hearing in the event of new information or a change in the inmate's circumstances. Even assuming that the same opportunity is available in Georgia, the Court did *not* hold that the opportunity for an expedited hearing, *in the absence of any other safeguards*, is sufficient to prevent an impermissible delay in parole, and it is not sufficient here.

Despite its internal policy statement,[24] which states that inmates "may receive expedited parole reviews in

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[24] Unlike the statute passed by the California legislature, this internal operating policy does not have the force of law – as the Board implicitly acknowledges by characterizing the policy merely as the Board's "own interpretation of the requirements

the event of a change in their circumstance or where the Board receives new information that would warrant a sooner review" (J.A. 56), the Board offers no evidence that any inmate ever has or will be released on parole between regular reconsiderations. To the contrary, the Georgia statutory scheme and regulations indicate that Board members do not vote on whether to parole an inmate other than during formal reconsiderations; and an inmate cannot be released on parole except by a majority vote. O.C.G.A. § 42-9-42(a); *see Akins*, 922 F.2d at 1561.

Furthermore, Georgia law requires the Board to make a regulation setting periodic parole reconsideration, at which time reconsideration shall be "automatic." O.C.G.A. § 42-9-45. In contrast, the fact that inmates "may receive" an expedited review under the Board's internal "policy" based on changed circumstances or new information shifts the burden to the inmate to request, subject to the Board's absolute discretion, what previously came

upon it." Petitioners' Brief at 27 n.10. Indeed, the Board has consistently maintained that its own policies and procedures are not binding upon it, a position which the courts have repeatedly affirmed. *See, e.g., Sultenfuss v. Snow*, 35 F.3d 1494, 1500-1503 (11th Cir.), *cert. denied*, 513 U.S. 1191 (1995). In addition, an internal operating policy like the one cited by the Board has been held to be incapable of creating a right protectable by the Ex Post Facto Clause because of its purely discretionary and unenforceable nature, *see Shabazz v. Gabry*, 123 F.3d at 915; *Ruip v. United States*, 555 F.2d 1331, 1335 (6th Cir. 1977); *Bailey v. Gardebring*, 940 F.2d 1150, 1156-1157 (8th Cir. 1991); *Smith v. United States Parole Commission*, 875 F.2d 1361, 1367 (9th Cir. 1988); therefore, such a policy should not be capable of curing an ex post facto violation.

to him automatically.[25] Indeed, the denial and setoff notice given to inmates does not even inform them of their right to petition for an expedited review based on changed circumstances. *See, e.g.*, J.A. 52-54.

7. There is No Opportunity for an Administrative Appeal Under the Georgia Parole Scheme.

In addition to the opportunity for expedited interim review, in *Morales* the Court also suggested that the possibility of an administrative appeal "would remove any possibility of harm." 514 U.S. at 513. Petitioners do not contend here that any administrative appeal is available.

In sum, it simply cannot be said that there is "only the most speculative and attenuated possibility" of increased punishment in this case. The amended regulation applies to a large, broad class of prisoners. No hearing or particularized findings of any kind, including that the inmate is unlikely to be suitable for parole before the next reconsideration, are required. The length of the setoff is five years longer, more than two and one-half times greater, than the longest setoff permitted under the California law at issue in *Morales*. Eight years can pass without any requirement that the Board consider the inmate's case. Given the large class of affected inmates, this eight-year interval seems certain to ensure that a significant

[25] This Court has held that an ex post facto violation is cognizable when a prisoner is deprived of automatic benefits or advantages even where they are replaced by "purely discretionary" ones. *Weaver*, 450 U.S. at 35-36 & n.20; *Lindsey v. Washington*, 301 U.S. 397, 401 (1937). Thus, the Board's purely discretionary application of its policy cannot cure the ex post facto violation here.

number of inmates will find the length of their confinement extended in violation of the Ex Post Facto Clause. *See Jones*, 164 F.3d at 595.

CONCLUSION

For the foregoing reasons, the *amici curiae* respectfully pray that the Court affirm the decision of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

JILL A. PRYOR
Counsel of Record
BONDURANT, MIXSON & ELMORE, LLP
1201 W. Peachtree Street, N.W.
3900 One Atlantic Center
Atlanta, Georgia 30309-3417
(404) 881-4100

STEVEN R. SHAPIRO
American Civil Liberties Union
Foundation
125 Broad Street
New York, New York 10004
(212) 549-2500

GERALD WEBER
ROBERT L. TSAI
American Civil Liberties Union
Foundation of Georgia, Inc.
142 Mitchell Street, Suite 301
Atlanta, Georgia 30303
(404) 523-6201