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FRED KRUG,

Plaintiff-Petitioner,

VS.

NEW JERSEY STATE PAROLE BOARD,

Defendant-Respondent.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 089603
APP. DIV. DKT. NO. A-2875-22

CIVIL ACTION

On Certification Granted from a Final Judgment of the Superior Court of New Jersey, Appellate Division

Sat Below:
Honorable Arnold L. Natali, Jr., J.A.D.
Honorable Lisa A. Puglisi, J.A.D.

AMENDED BRIEF OF AMICUS CURIAE, THE AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY FOUNDATION

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STATEMENT OF INTEREST OF PROPOSED *AMICUS CURIAE*

For over 60 years, the American Civil Liberties Union of New Jersey ("ACLU-NJ") has defended liberty and justice guided by the vision of a fair and equitable New Jersey for all. Its mission is to preserve, advance, and extend the individual rights and liberties guaranteed to every New Jerseyan by the State and Federal Constitutions in courts, in legislative bodies, and in our communities.

Founded in 1960 and based in Newark, the ACLU-NJ is a non-partisan organization that operates on several fronts – legal, political, cultural – to bring about systemic change and build a more equitable society. The ACLU-NJ is the state affiliate of the American Civil Liberties Union ("ACLU"), which was founded in 1920 for identical purposes, and is composed of more than one million members nationwide.

ACLU-NJ pushes to re-envision the role of police in our communities, confront the disproportionate power of prosecutors in criminal cases, and advocate for the decarceration of New Jersey's jails and prisons – which have the worst Black-white disparity of any state in the nation. ACLU-NJ has served

as *amicus curiae* before this Court in dozens of criminal cases, including those involving alleged *ex post facto* ("EPF") violations.[1]

The question presented in this case is whether the Board's retroactive application of the "All-Information Provision" in the New Jersey Parole Act's 1997 Amendments to Petitioner Fred Krug ("Krug")—which permitted the Board to consider "old" information, including Krug's criminal history and the severity of the underlying crimes for which he is imprisoned (the consideration of which would have been expressly prohibited under the version of the Parole Act that was in force when he was convicted), to deny him parole—violated the EPF Clause of the United States and New Jersey Constitutions.

ACLU-NJ has a strong interest in the outcome of this case, because it gives New Jersey's highest Court the opportunity to resolve conflicting case law and finally and definitively rule on the proper standard that courts should apply when analyzing EPF challenges. ACLU-NJ urges the Court to reject the

[1] See, e.g., Acoli v. N.J. State Parole Bd., 250 N.J. 431 (2022) (examining an alleged EPF violation in connection with New Jersey State Parole Board's ("Board") decision to deny parole); State v. Bailey, 251 N.J. 101 (2022) (addressing whether admission of text messages under crime-fraud exception to marital communications privilege violated EPF laws where Legislature adopted exception more than a year after messages were exchanged); State v. Brown, 245 N.J. 78, 81 (2021) (considering whether EPF laws prohibit defendants to be charged with and convicted of the enhanced third-degree offense of failure to comply with sex offender registration requirements when each defendant's registration requirement arose from a conviction that occurred before the penalty for registration noncompliance was raised a degree).

Appellate Division's continued use of an outdated and incorrect substantive-versus-procedural standard when considering EPF challenges, and to instead mandate that courts consider whether the retroactive application of a law "creates a significant risk of prolonging [the plaintiff's] incarceration" when determining whether it violates the EPF Clause.

This case allows the Court to address a significant issue that Krug and similarly situated incarcerated persons (those who are still confined for crimes committed prior to 1997) are facing: although these persons committed crimes before the enactment of the 1997 Amendments to the Parole Act, when the Board was prohibited from considering "old" information in connection with successive parole decisions and was limited to considering only "new" information developed since the last parole hearing, the Board is applying the "All-Information Provision" of the 1997 Amendments when deciding whether to grant these persons parole, and thereby considering and basing denial decisions on "old" information. As demonstrated by Krug's case, this practice poses a significant risk of prolonging the incarceration of this discrete population of inmates, which has a statistically low rate of recidivism. ACLU-NJ therefore advocates for a finding that application of the 1997 Amendments' "All-Information Provision" to persons still confined for crimes committed prior to 1997 constitutes a facial EPF violation.

PRELIMINARY STATEMENT

James Madison wrote in the Federalist Papers that "ex post facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation."[2] Alexander Hamilton echoed the sentiment, describing ex post facto laws as "formidable instruments of tyranny."[3] Accordingly, the EPF Clause prohibits the government from retroactively increasing an inmate's punishment. Such retroactive laws are constitutionally infirm because they deprive the inmates of fair notice of the punishment they may face.[4] The EPF Clause thus helps to prevent inmates from being subjected to the whims of the public that are then codified by the legislature.[5]

Unfortunately, some inmates in New Jersey are being systematically deprived of the protection of the EPF Clause—specifically, inmates who have been convicted of crimes prior to 1997 to whom the Board is retroactively applying the "All-Information Provision" to deny parole and are thereby unfairly prolonging their prison sentences. These crimes, which were serious and likely violent, had resulted in lengthy sentences. When these inmates were considered

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[2] The Federalist No. 44, p. 301 (J. Cooke ed. 1961) (J. Madison)).
[3] Id. (quoting The Federalist No. 84, at 577 (A. Hamilton).
[4] See, e.g., Lynce v. Mathis, 519 U.S. 433, 441, 117 S. Ct. 891, 896 (1997).
[5] See, e.g., Fisher v. Beard, No. 03-788, 2018 U.S. Dist. LEXIS 125279, at *18 (E.D. Pa. July 25, 2018) ("[T]he Framers perceived ex post facto laws as a threat, precisely because they could be a massive sword wielded via the whims of the legislature").

for parole, the Board was prohibited from considering and basing successive parole decisions on "old" information (such as the inmate's criminal history and the severity of the underlying crimes), and was strictly limited to considering "new" information developed since the previous denial of parole. The focus of parole hearings for these inmates was the likelihood of re-offense upon release.

In the 1990s, New Jersey, swayed by public sentiment, experienced a movement towards tougher parole rules after a few parolees committed violent crimes after being released.[6] As a result, New Jersey's governor appointed a Study Commission on Parole, which had the express purpose of recommending legislation "designed only to enlarge the discretion of the Board to deny parole"—in other words, to make it easier for the Board to extend terms of imprisonment.[7] The State accomplished this by amending the Parole Act in 1997 to permit the Board to consider "old" information, such as the nature of the original offense and other prior history, at every parole hearing. This "All-Information Provision" has been consistently applied against inmates who committed their crimes before the 1997 Amendments were enacted.

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[6] See Greg Trevor, N.J. enacts sweeping reform of parole law, Asbury Park Press (Aug. 20, 1997) (Psa 110).

[7] Governor's Study Commission on Parole, Report of the Study Commission on Parole at 21 (Dec. 1996) (Psa 092) (emphasis in original).

The effect of this shift is clear in cases like Krug's and other similarly situated inmates (i.e., those who are currently incarcerated for crimes committed before 1997): it poses a significant risk of prolonging their imprisonment, and makes it nearly impossible for them to ever be released, notwithstanding (1) their old age; (2) the substantial lapse in time between their commission of the underlying crime(s) and the parole decision; and (3) the potential absence of any "new" bases for the denial of parole. Because this discrete class of inmates faces a significant risk of extended prison terms as a result of the application of an amended parole rule that was enacted after their incarceration, the Board is continually running afoul of the EPF Clause.

The Appellate Division has repeatedly and wrongfully sanctioned this unconstitutional practice in reliance on the 2000 Appellate Division decision, Trantino v. N.J. State Parole Bd., 331 N.J. Super. 577 (App. Div. 2000) ("Trantino V"), which applied an incorrect standard for EPF challenges that hinges on whether the challenged rule is substantive or procedural in form. Every inmate that has challenged the application of the "All-Information Provision" as a violation of the EPF Clause since that decision has been rebuffed, as a result of New Jersey courts' rote adherence to Trantino V and their failure to recognize that Trantino V contravenes binding United States Supreme Court precedent. Indeed, the Supreme Court has rejected the

substantive-versus-procedural approach and clarified that the "controlling inquiry" for EPF challenges is not based on the substantive/procedural inquiry to which our lower courts cling, but rather asks whether the retroactive application of a law "creates a significant risk of prolonging [the plaintiff's] incarceration." See, e.g., Garner v. Jones, 529 U.S. 244, 250-51 (2000).

Recently, the United States Court of Appeals for the Third Circuit took this issue on in Holmes v. Christie, 14 F.4th 250 (3d Cir. 2021). Unlike the New Jersey state courts' handling of this issue, the Third Circuit in Holmes allowed the inmate's EPF claim to proceed, expressly noting that states courts were continuing to apply the discredited substantive/procedural standard. In doing so, the Third Circuit directly addressed Trantino V, dissecting its reasoning and finding that the decision was based on an outdated and repeatedly rejected substantive/procedural test for assessing EPF challenges. The Appellate Division has since largely ignored or glossed over Holmes, continuing to rely on Trantino V to affirm the Board's parole denial decisions and thereby unfairly prolonging certain inmates' incarceration.

This case presents a significant opportunity for the Court to clarify the proper standard that New Jersey courts should apply when faced with EPF challenges. In that regard, the Court should rule that Trantino V's substantive-versus-procedural approach is incorrect and mandate that courts instead consider

whether the retroactive application of a rule "creates a significant risk of prolonging [the inmate's] incarceration" when analyzing an EPF challenge. The Court should further rule that application of the 1997 Amendments' "All-Information Provision" to prisoners convicted of crimes prior to 1997 constitutes a facial violation of the EPF Clause. This would ensure the Board uniformly applies the proper standard for parole decisions regarding this discrete class of prisoners.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

ACLU-NJ accepts and adopts the Statement of Facts and Procedural History sections contained within Krug's brief to this Court, which in turn refers to the Statement of Facts set forth in Krug's previously submitted Appellate Division briefing and Petition for Certification.

ARGUMENT

I. The Court Should Clarify the Proper Standard Applicable to *Ex Post Facto* Challenges

The Appellate Division has been adhering to Trantino V without hesitation, even after the Third Circuit determined that it contravenes binding Supreme Court precedent. See Holmes, 14 F.4th 250. Because Trantino V applies an incorrect standard, and because the Appellate Division repeatedly has passed on opportunities to correct the error identified in Holmes, it is imperative

that this Court intervene and clarify the proper standard applicable to EPF challenges such as the one at issue here.

In Trantino V, the Parole Board "gave substantial weight to Trantino's abuse of his wife in 1963" in denying parole over thirty years later. 331 N.J. Super. at 608. The Board argued that "the 'information' clause of the amendment to N.J.S.A. 30:4-123.56c applies to all inmates, regardless of when they were convicted, permitting the Board to consider all information, old and new, in its June 1999 decision." Id. at 610. Accordingly, the Board deprived Trantino of the protections afforded in the 1979 Parole Act, which otherwise applied to him, under which his actions in 1963 could not have been considered. The Appellate Division agreed with the Board that "application of the 1997 amendments to N.J.S.A. 30:4-123.56c to Trantino's parole hearing did not violate the ex post facto clause" on the grounds that the "change in the law is a **procedural modification** that does not constitute a substantive change in the parole release criteria." Id. (emphasis added). As a result, even though the 1979 Parole Act would have prevented the Board from considering information from 1963, the Board was permitted to use that information against Trantino, thereby denying him parole and extending his imprisonment.

In Holmes, the Government urged the Third Circuit to adopt Trantino V's substantive-versus-procedural approach to a similarly situated inmate's EPF

challenge, which the court rejected, elucidating the errors in Trantino V. See Holmes, 14 F.4th at 264-65. The Third Circuit explained:

> More than a century ago, the Court resolved a pair of ex post facto cases by deciding whether the challenged rules assumed substantive or procedural form. See Kring v. Missouri, 107 U.S. 221, 224, 2 S. Ct. 443, 27 L. Ed. 506 (1883); Thompson v. Utah, 170 U.S. 343, 351-52, 18 S. Ct. 620, 42 L. Ed. 1061 (1898). **But the Court has long since overruled those cases and renounced their reasoning**. See Collins v. Youngblood, 497 U.S. 37, 46, 110 S. Ct. 2715, 111 L. Ed. 2d 30 (1990) ("[B]y simply labeling a law 'procedural,' a legislature does not thereby immunize it from scrutiny under the Ex Post Facto Clause.") (citation omitted)). Time and again, the Court has refused "to define the scope of the Clause along an axis distinguishing between laws involving 'substantial protections' and those that are merely 'procedural.'" Carmell v. Texas, 529 U.S. 513, 539, 120 S. Ct. 1620, 146 L. Ed. 2d 577 (2000). **Instead, the "controlling inquiry" is whether a law "creates a significant risk of prolonging [the plaintiff's] incarceration."** [Garner v. Jones, 529 U.S. 244, 250-251].

Holmes, 14 F.4th at 264-65 (emphasis added). The Third Circuit concluded that "despite [its] best efforts," it found "no way to reconcile the Appellate Division's formalist analysis [in Trantino V] with the functional approach embodied in Morales, Richardson, and Garner," and noted that "few of the Appellate Division's cases grapple thoroughly with the Ex Post Facto Clause." Id. at 265. Applying Garner's risk-based standard, the Holmes court recognized that the Board's consideration of "old" information through application of the 1997 Amendments' "All-Information Provision" may have created significant risk of prolonging Holmes's incarceration and remanded the case to allow the

parties to engage in discovery regarding the basis of the Board's denial decision. Id. at 266-67.

Inexplicably, the Appellate Division's adherence to Trantino V and failure to thoroughly grapple with the EPF Clause continued even after Holmes was decided. For example, in Berta v. N.J. State Parole Bd., 473 N.J. Super. 284 (App. Div. 2022), the court was presented with an EPF argument and asked to square it with the holding in Holmes. The court sidestepped the issue, because it previously concluded on other grounds that old information was improperly considered and declined to address constitutional arguments under the doctrine of constitutional avoidance. Id. at 315. More recently, in Lumumba v. N.J. State Parole Bd., No. A-1997-22, 2024 N.J. Super. Unpub. LEXIS 923 (App. Div. May 21, 2024), the plaintiff raised an argument under Holmes, but the court glossed over it. Id. at **7-8. It "reject[ed]" the plaintiff's argument that consideration of "old" information violated the EPF clauses of the federal and state constitutions without any discussion of Holmes. Id. The sole explanation was that the court "rejected a similar argument" in Trantino V. Id.

In Kiett v. N.J. State Parole Bd., No. A-0894-21, 2023 N.J. Super. Unpub. LEXIS 1212 (App. Div. July 18, 2023), the Appellate Division had another opportunity to consider the impact of Holmes but loosely "distinguished" it on the basis that Holmes was decided on the pleadings. Id. at *32. The Appellate

Division curiously found, in a conclusory manner, that "[t]here is nothing in the Holmes decision that expressly overrules Trantino." Id. Similarly, in Coburn v. N.J. State Parole Bd., No. A-2766-22, 2024 N.J. Super. Unpub. LEXIS 862 (App. Div. May 14, 2024), the Appellate Division concluded that the Third Circuit did not overrule Trantino V in Holmes on the grounds that Holmes's EPF claim was merely reinstated and permitted to proceed to discovery. Id. at **5-6. The Appellate Division has failed to recognize that regardless of the outcome of the decision as to Holmes individually, the Third Circuit held that the procedural-versus-substantive test applied in Trantino V contravenes binding U.S. Supreme Court precedent. That Trantino V is still viewed as controlling in New Jersey, notwithstanding its constitutional infirmities as outlined in Holmes, underscores why the Court should reverse the decision below.[8]

Here, the Appellate Division erred by adhering to Trantino V. See Krug v. N.J. State Parole Bd., No. A-2875-22, 2024 N.J. Super. Unpub. LEXIS 1321, at *15 (App. Div. June 24, 2024) ("[W]e reject Krug's claim the Board violated

[8] In Acoli v. N.J. State Parole Bd., the Court ultimately did not have to square Holmes with Trantino V in the context of that case, because it overturned the Appellate Division and granted Acoli parole based on the lack of evidence in the record to support the Board's decision to deny parole. See 250 N.J. 431, 452 (2022) (plaintiff argued "Board failed to meet its burden of showing that there is a substantial likelihood he will commit a crime if released on parole"). Accordingly, this Court has not addressed an inmates' EPF argument post-Holmes.

the Ex Post Facto Clauses of the federal and state constitutions by considering information that preceded the Board's prior parole denial, thereby allegedly violating the 1979 Parole Act, which limited the Board's consideration for parole after an initial denial to 'new information' contained in a pre-parole report or hearing" on the grounds that "[w]e rejected a similar argument in [Trantino V]"). Although the Appellate Division implicitly acknowledged the risk-based standard from Holmes by holding that it was "satisfied application of the 1997 amendment in this case did not create **a significant risk** of increasing Krug's punishment so as to violate the Ex Post Facto Clauses in the federal and state constitutions" (id. at *16 (citing and applying Garner, 529 U.S. at 255) (emphasis added)), it still expressly abided by Trantino V, which cannot be squared with Holmes. In addition, and most importantly, the Appellate Division relied heavily on (1) Krug's original convictions and (2) Krug's refusal to submit to a search in 2017—all of which constitute "old" information, as they predated Krug's prior 2022 parole hearing—in affirming the Board's denial of parole. Accordingly, the Appellate Division has left the issue unsettled by adhering to Trantino V and failing to even mention Holmes.

The Court should definitively rule that Trantino V's substantive-versus-procedural approach is incorrect and that the risk-based standard embraced by Holmes is the proper standard to be applied to EPF challenges.

II. Applying the Proper *Ex Post Facto* Analysis, Application of the 1997 Amendments' "All-Information Provision" to the Small Population of Prisoners to Which Krug Belongs (Those Who Committed Crimes Prior to 1997 and Have Been Denied Parole Under the 1997 Amendments) Creates an "Inherent" Risk of Lengthening the Term of Imprisonment

In Holmes, the Third Circuit explained that there are two ways to establish an EPF violation under the risk-based standard (which provides that "[w]hen a parole rule produces a 'significant' risk of increasing a plaintiff's time behind bars, retroactively applying the rule frustrates fair notice, and thus thwarts the [EPF] Clause"). Holmes, 14 F.4th at 258 (citing Cal. Dep't of Corr. v. Morales, 514 U.S. 499, 508 (1995)). One is where the inmate seeking parole establishes that risk of prolonging imprisonment is "inherent" in the new rule; the second is when the inmate establishes that, although the rule does not "by its own terms show a significant risk," a sufficient risk nevertheless arises from the rule's "practical implementation." Id. The Third Circuit noted that showing an EPF violation through the first path "presents a question of law courts can answer at the pleading stage," but that successfully doing so is rare. Id. at 259.

This is one of those rare cases where retroactive application of the 1997 "All-Information Provision" creates an inherent risk of prolonging imprisonment and thus facially violates the EPF Clause. Here, the "All-Information Provision" was adopted for the express purpose of granting the Parole Board more discretion in **denying** parole—i.e. increasing the term of

imprisonment for someone who might have otherwise been released under the prior rules. See Assembly Law and Public Safety Committee Statement to Assembly, No. 21, L.1979, c.441 (Psa 009-010); Senate Law and Public Safety Committee Statement to Assembly, No. 21, L.1979, c.441 (Psa 011-012). The Amendment was a product of the Governor's Study Commission on Parole, which issued a December 1996 Report recommending that the State reform laws "that unduly restrict the discretion of the Parole Board **to deny parole and thus hamper the ability of the Board to protect the public.**" Governor's Study Commission on Parole, Report of the Study Commission on Parole at 21-22 (Dec. 1996) (Psa 036-037) (emphasis added). After signing the bill, the Office of Governor Christie Whitman issued a press release stating that the new law "will **toughen** standards for inmate **release**," thereby "keep[ing] violent criminals **behind bars where they belong**." Office of the Governor, News Release (Aug. 19, 1997) (Psa 013) (emphasis added). There can be no dispute that the inherent purpose of the "All-Information Provision" was to keep serious offenders in prison longer.

Notably, the 1997 Amendments do not limit application of the "All-Information Provision" to persons who committed the crime for which they are seeking parole on or after the effective date of the amendment. Such a limitation would have prevented an EPF violation. Because the rule is not so limited, it

applies retroactively today to inmates who were not on notice of this rule when they were charged with the crime for which they are incarcerated. In other words, an inmate charged with an offense prior to 1997 was subject to a rule in which the nature of their crime would not be considered at subsequent parole hearings. For these inmates, the retroactive application of the "All-Information Provision," which permits this "old" information to be considered in successive parole hearings, runs afoul of the EPF Clause.

The low-hanging (yet inadequate) retort is that, under the terms of the "All-Information Provision," the Board may exercise its discretion by declining to use old information against an inmate or that such information may not always or necessarily increase the term of imprisonment. But it is not necessary for an inmate making an EPF challenge to establish that the use of old information would result in an **actual** or a universal increase in punishment; a claim is established merely if use of the old information would result in a **sufficient risk** of increased punishment. See, e.g., Dyer v. Bowlen, 465 F.3d 280, 288 (6th Cir. 2006) ("Rather than requiring Dyer to prove that the retroactive application of the parole statutes created a sufficient risk of increased punishment, the state court demanded that Dyer prove he actually received a more serious punishment. In doing so, the state court subjected Dyer to a more exacting standard—a

standard that is contrary to the clearly established law as stated in Morales and Garner.").

Today, the Board is applying the "All-Information Provision" to inmates who committed their crime **at least 27 years ago** and, in some cases, substantially longer ago. By way of example, Krug is serving a life sentence for a murder committed 50 years ago in 1974. Krug is now in his late seventies, blind in one eye, and in poor and rapidly declining health. In the past twenty years, Krug has had only one, non-violent, non-drug related infraction, and has otherwise engaged in significant rehabilitative efforts and maintained jobs and minimum-custody status in the prison. All this notwithstanding, the Board denied Krug parole following his fifth parole hearing, largely if not solely based on "old" information that may only be considered under the 1997 Amendments' "All-Information Provision," and thereby prolonged his incarceration.

Like Krug, inmates who are still in prison for a crime committed nearly three decades ago, if not more, almost certainly committed serious or violent crimes. When the nature of such a crime, along with other prior history, is considered by the Board, it poses a substantial risk of leading the Board to deny parole, thereby increasing these inmates' terms of imprisonment. Yet these inmates who committed serious crimes 30 or 40 years ago are also almost certainly of an old age and are at a statistically low risk of reoffending if released

on parole. See, e.g., J.J. Prescott et al., Understanding Violent-Crime Recidivism, 95 Notre Dame L. Rev. 1643 (2020) (analyzing the statistically low recidivism rates of older inmates who committed violent offenses). Thus, they are being denied parole largely because of the old information that the Board is permitted to consider under the "All-Information Provision."

For this reason, the Court should find that the retroactive application of the 1997 Amendments' "All-Information Provision" to this limited population of inmates inherently creates a significant risk that these inmates' incarcerations will be prolonged and therefore constitutes a facial EPF violation.

CONCLUSION

The 1997 Amendments' "All-Information Provision" was **expressly** designed to increase punishment and significantly prolong incarceration. The retroactive application of this provision to a certain class of inmates who are statistically otherwise unlikely to reoffend allows the Board to unfairly and significantly increase their punishment and prolong their incarceration, even in the absence of any new information that would justify the denial of parole. Although a facial EPF violation may generally be more challenging to establish, a finding by this Court of a facial EPF violation is warranted here and would enable simpler, uniform application of a rule to protect the greatest number of impacted inmates. A ruling that the "All-Information Provision" facially

violates the EPF Clause, as opposed to a case-by-case as-applied violation, will enable the Board to be collectively and uniformly advised on what information it may consider for the discrete population of inmates that are imprisoned for crimes committed prior to 1997.

Dated: December 4, 2024

Respectfully submitted,

/s/ Ian S. Marx

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