No. 25-1291

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Arthur Miles,

Plaintiff-Appellant,

v.

Warden Bowers,

Defendant-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the District of Massachusetts
Civil Action No. 1:24-cv-11243, Judge Richard G. Stearns

OPENING BRIEF FOR PLAINTIFF-APPELLANT ARTHUR MILES

Yasmeen Rose
Anshuman Siripurapu
Emma Watson
Student Counsel

Becca Steinberg
Brian Wolfman
Regina Wang
GEORGETOWN LAW APPELLATE
COURTS IMMERSION CLINIC
600 New Jersey Ave., NW
Suite 312
Washington, D.C. 20001
(202) 662-9549

Counsel for Plaintiff-Appellant

May 5, 2025

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Introduction

The Bureau of Prisons is disregarding its obligations under the First Step Act, and prisoners are paying the price. Through the Act, Congress sought to promote rehabilitation by awarding a new form of time credits to prisoners who participate in recidivism-reduction programs. Unlike earlier enacted statutes that vest substantial discretion in BOP, the First Step Act *requires* BOP to provide programming and award credits to prisoners who participate. But BOP has disregarded that mandate, categorically denying programming and credits to an entire class of eligible prisoners: those who are serving their federal sentences but have not yet been transferred to their BOP-designated facility.

To justify categorically excluding these prisoners, BOP relies on two invented barriers. First, it says that a prisoner's sentence doesn't commence until he arrives at his BOP-designated facility, even though the text of the First Step Act says that a sentence commences as soon as the prisoner is in custody, regardless of where he is incarcerated. Second, BOP refuses to award credits until after a prisoner undergoes a risk and needs assessment, even though the statute doesn't require that. Together, these restrictions serve one purpose: to deny credits to prisoners who are serving their sentences but are not yet in their BOP-designated facility. This Court should reject BOP's circumvention of the First Step Act and enforce it as written.

Statement of Jurisdiction

On May 8, 2024, Arthur Miles filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241.[1] The district court had jurisdiction under 28 U.S.C. §§ 2241(a) and 1331. On February 6, 2025, the district court granted BOP's motion to dismiss Miles's petition, Addendum (Add.) 8-9, and it entered judgment for BOP on February 7, 2025, Add. 10. Miles timely filed a notice of appeal on March 24, 2025, Joint Appendix (JA) 18, and an amended notice of appeal on April 7, 2025, JA 19. This Court has jurisdiction under 28 U.S.C. § 1291.[2]

Issue Presented

Whether the district court erred in concluding that Arthur Miles, a federal prisoner, was ineligible to accrue Earned Time Credits under the First Step Act for the fifteen months he was incarcerated after he was sentenced but before he was transferred to Federal Medical Center Devens, the designated BOP facility where he was to serve his sentence.

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[1] Miles's challenge to the "computation of [his] sentence by prison officials" is an attack on the execution of his sentence appropriately brought under Section 2241. *Barr v. Sabol*, 686 F. Supp. 2d 131, 136 (D. Mass. 2010) (quoting *Levine v. Apker*, 455 F.3d 71, 78 (2d Cir. 2006)).

[2] Although the district court purported to deny a certificate of appealability, Add. 9 n.1, that has no bearing on this Court's jurisdiction because a certificate of appealability is not required when a habeas petition is brought under Section 2241, *see Gonzalez v. Justs. of Mun. Ct.*, 382 F.3d 1, 12 (1st Cir. 2004), *vacated on other grounds*, 544 U.S. 918 (2005).

Statement of the Case

I. Legal background

First Step Act. The First Step Act of 2018 (FSA), Pub. L. No. 115-391, 132 Stat. 5194, was hailed as "once-in-a-generation criminal justice reform" to combat overincarceration and reduce recidivism. 164 Cong. Rec. S7838 (daily ed. Dec. 19, 2018) (statement of Sen. Chuck Grassley). The FSA both shortened the length of federal sentences and imposed affirmative obligations on the Bureau of Prisons to change how it administers those sentences. Relevant here, the FSA obligates BOP to develop a risk and needs assessment system that provides prisoners with appropriate recidivism-reduction programs and incentivizes prisoners to participate in that programming. 18 U.S.C. § 3632.

Through the system, BOP shall determine each prisoner's recidivism risk and assess each prisoner's risk of violent or serious misconduct. 18 U.S.C. § 3632(a)(1)-(2). It must also periodically reassess each prisoner's risk of recidivism. *Id.* § 3632(a)(4), (d)(5). Those assessments provide BOP with "guidance on the type, amount, and intensity" of the evidence-based recidivism-reduction programs to be assigned to each prisoner. *Id.* § 3632(b); *see id.* § 3632(a)(3).

BOP also "shall provide" all eligible prisoners with the "opportunity to actively participate in evidence-based recidivism reduction programs or productive activities, according to their specific criminogenic needs, throughout their entire term of incarceration." 18 U.S.C. § 3621(h)(6).

The statute defines "evidence-based recidivism reduction program" to mean an activity that (1) has been shown by empirical evidence or research to reduce recidivism or be likely to reduce recidivism and (2) "is designed to help prisoners succeed in their communities upon release from prison." *Id.* § 3635(3)(A)-(B). Examples of these programs "include" certain classes, trainings, and prison jobs. *Id.* § 3635(3)(C).

BOP also "shall provide incentives and rewards for prisoners to participate in and complete evidence-based recidivism reduction programs." 18 U.S.C. § 3632(d). Among other incentives, prisoners can earn credits that reduce their period of incarceration. *Id.* § 3632(d)(4). Here's how prisoners earn credits under the FSA.

The FSA first details *who* may earn credits toward early release. All prisoners who complete programming "shall earn" credits, 18 U.S.C. § 3632(d)(4)(A), subject to two eligibility-related exceptions. First, prisoners convicted of a disqualifying offense, primarily violent and terrorism-related offenses, are ineligible. *Id.* § 3632(d)(4)(D). Second, prisoners subject to final immigration removal orders are also ineligible. *Id.* § 3632(d)(4)(E).

Next, the FSA outlines *how* eligible prisoners earn credits. Eligible prisoners "shall earn 10 days of time credits for every 30 days of successful participation" in programming. 18 U.S.C. § 3632(d)(4)(A)(i). Prisoners at "minimum or low risk for recidivating" and who have not "increased their risk of recidivism" over two "consecutive" assessments

"shall earn an additional 5 days of time credits for every 30 days of successful participation." *Id.* § 3632(d)(4)(A)(ii).

Next, the FSA states *when* eligible prisoners earn credits. All eligible prisoners earn credits for participation in programming, subject to two time-based limitations. 18 U.S.C. § 3632(d). First, prisoners may not earn credits for participation in programming "prior to the date of enactment" of the FSA. *Id.* § 3632(d)(4)(B)(i). Second, credits are not available for participation in programming "during official detention prior to the date that the prisoner's sentence commences under section 3585(a)." *Id.* § 3632(d)(4)(B)(ii). A prisoner's sentence "commences on the date the defendant is received in custody awaiting transportation to … the official detention facility at which the sentence is to be served." *Id.* § 3585(a).

How a prisoner *earns* credits is distinct from when those credits may be *applied*. As just discussed, all eligible prisoners can earn credits. But only minimum- and low-risk prisoners (as determined by a risk and needs assessment) may have those credits applied toward early release. 18 U.S.C. §§ 3632(d)(4)(C), 3624(g)(1)(B). Those credits are then applied once a prisoner has "earned time credits under the risk and needs assessment system ... in an amount that is equal to the remainder of the prisoner's imposed term of imprisonment." *Id.* § 3624(g)(1)(A); *see id.* § 3632(d)(4)(C).

BOP regulations. BOP issued regulations to implement the FSA's time-credits provision. 28 C.F.R. §§ 523.40-.44. Although the FSA

obligates BOP to provide credits to eligible prisoners who participate in programming, 18 U.S.C. § 3632(d), BOP's regulations are permissive, providing that those prisoners "may earn" credits, 28 C.F.R. § 523.40(b). Here's how the regulations operate.

Like the FSA, the regulations detail *who* may earn credits toward early release. They track the eligibility provisions of the FSA, providing that "[a]ny inmate sentenced to a term of imprisonment pursuant to a conviction for a Federal criminal offense … is *eligible to earn* FSA Time Credits." 28 C.F.R. § 523.41(d)(1). Likewise, they reiterate that prisoners rendered statutorily ineligible under 18 U.S.C. § 3632(d)(4)(D) may not earn credits. 28 C.F.R. § 523.41(d)(2).

Next, BOP regulations outline *how* eligible prisoners earn credits. Inmates earn credits for "successfully participat[ing]" in programming. 28 C.F.R. §§ 523.41(c)(1), 523.42(c). Unlike the regulations just discussed, these regulations add new requirements not contained in the statute. "[S]uccessful participation" requires that BOP staff determine that a prisoner has participated in programs that BOP has "recommended based on the inmate's individualized risk and needs assessment." *Id.* § 523.41(c)(2). And inmates may not successfully participate, and thus cannot earn credits, if they are placed in a special housing unit, transferred outside their designated BOP institution, or opt out of participation. *Id.* § 523.41(c)(4). But when "[t]emporary operational or programmatic interruptions authorized by the Bureau" prevent a

prisoner from participating in programming, BOP "ordinarily" deems him to have successfully participated. *Id.* § 523.41(c)(3).

BOP regulations also state *when* eligible prisoners earn credits. Like the FSA, these regulations state that eligible prisoners earn credits for participation in programming, subject to two time-based limitations. 28 C.F.R. § 523.42. The first limitation tracks the FSA: Eligible inmates cannot earn credits for participation in programming or activities before the "date of enactment" of the FSA. *Id.* § 523.42(b)(1). Second, BOP regulations provide that inmates can start to earn credits "after the inmate's term of imprisonment commences." *Id.* § 523.42(a). But, in contrast to the FSA, *see* 18 U.S.C. § 3585(a), BOP's regulations define the commencement of an inmate's sentence—and thus the date on which eligibility begins—as "the date the inmate arrives … at the designated [BOP] facility where the sentence will be served," 28 C.F.R. § 523.42(a). That is, in contrast to the statutory definition, time served under a federal sentence at an institution other than the prisoner's designated BOP facility does not count under BOP's regulations.

BOP program statement. On November 18, 2022, BOP published a program statement to implement its regulations and clarify its procedures for awarding and applying credits under the FSA. Fed. Bureau of Prisons, U.S. Dep't of Just., Program Statement 5410.01, First

Step Act of 2018 – Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d)(4) (2022) [Program Statement 5410.01].[3]

In the program statement, BOP outlined the tool it developed to conduct assessments. The tool consists of two components: the Prisoner Assessment Tool Targeting Estimated Risk and Needs (PATTERN), which measures an inmate's risk of recidivism, and the Standardized Prisoner Assessment for Reduction in Criminality (SPARC-13), which identifies criminogenic needs. Program Statement 5410.01 at 8. The statement noted that BOP administers inmates' initial assessments only after they arrive at their designated facility. *Id.* Although PATTERN is "[o]rdinarily" completed within twenty-eight days of the inmate's arrival at his designated facility, and SPARC-13 within thirty days, the program statement contemplates that further delays are possible. *Id.* Regardless of when the assessment is administered, the program statement does not purport to alter BOP's regulation providing that inmates begin earning credits immediately upon arrival at the facility, not after the assessment is completed. *See* 28 C.F.R. § 523.42(a).

After an inmate's assessment is completed, BOP recommends programming based on that assessment. Program Statement 5410.01 at 8. If the inmate agrees to participate, he is either placed in an available

[3] Program Statement 5410.01 is available in BOP's latest change notice at https://www.bop.gov/policy/progstat/5410.01_cn2.pdf. We have also archived the original version at https://perma.cc/7R4E-46X7.

program or added to a waitlist. *Id.* In either scenario, the inmate earns credits by virtue of opting in to programming, even if he is not actively participating, "as long as the inmate has not refused or declined to participate." *Id.* at 4.

II. Factual and procedural background

Arthur Miles was convicted of two separate federal drug and firearm offenses in the Southern District of Indiana. Add. 1-2; JA 6. He was sentenced on October 3, 2022, and April 26, 2023. Add. 1-2, JA 6. Miles is currently serving a sentence of twenty-five years of imprisonment, followed by five years of supervised release. JA 6. He was designated to serve his sentence at a BOP facility, FMC Devens. Add. 2.

Miles was in custody at Marion County Jail in Indianapolis, Indiana, when his first sentence was imposed on October 3, 2022. Add. 2. He was not transferred to FMC Devens until December 28, 2023—451 days later. JA 6-7, 15. While at the jail, Miles "worked productively as a Unit Orderly, never refused to participate in any programming or FSA Risk Assessments and attempted to access programming when available." JA 6.

On May 8, 2024, Miles, acting pro se, filed a petition for a writ of habeas corpus under 28 U.S.C. § 2241. JA 6. Miles maintained that BOP improperly withheld credits during the fifteen months he was held at Marion County Jail after his sentencing. JA 6-7. Had BOP credited Miles

for these activities during his time awaiting transfer to FMC Devens, his sentence would be about 150 days shorter. JA 7.

BOP moved to dismiss Miles's petition. Mot. to Dismiss (ECF 13). BOP argued that it properly calculated Miles's credits because his sentence commenced only after he arrived at FMC Devens. Mem. Supp. Mot. to Dismiss (ECF 14) at 7. As support, BOP relied on its regulation stating that a prisoner's sentence does not commence until he arrives at the "designated [BOP] facility where [his] sentence will be served." *Id.* at 7 (quoting 28 C.F.R. § 523.42(a)).

A magistrate judge recommended that BOP's motion be denied, concluding that the FSA required BOP to award Miles credits as soon as he was sentenced. Add. 5-7. The FSA's "unambiguous" language, the magistrate judge concluded, "plainly requires that a prisoner 'shall' earn time credits" for participation in programming "after the person's 'sentence commences,'" rendering BOP's "contrary" regulation invalid. Add. 6 (quoting *Yufenyuy v. Warden, FCI Berlin*, 659 F. Supp. 3d 213, 217-18 (D.N.H. 2023)).

Although noting that BOP's regulation is "arguably unfair," the district court overruled the magistrate judge's recommendation. Add. 8-9. The court's reasoning was brief. It relied entirely on its prior decision in *Dunlap v. Warden FMC Devens*, 2025 WL 35248 (D. Mass. Jan. 6, 2025), which upheld a separate BOP regulation providing that inmates temporarily held in non-BOP facilities are "generally not" considered to

be successfully participating in programming and thus are ineligible for credits, 2024 WL 5285006, at *2 (D. Mass. Dec. 13, 2024), *report and recommendation adopted*, 2025 WL 35248 (quoting 28 C.F.R. § 523.41(c)(4)). The court reasoned that Congress left gaps in the FSA for BOP to fill and the regulation did not contravene the FSA. Add. 9. The district court therefore granted BOP's motion to dismiss. Add. 8-9.

Standard of Review

A district court's "dismissal of a petition for a writ of habeas corpus" is reviewed "*de novo*." *McCants v. Alves*, 67 F.4th 47, 51 (1st Cir. 2023). "Interpreting a statute or a regulation presents a purely legal question" and is also "subject to *de novo* review." *Strickland v. Comm'r, Me. Dep't of Hum. Servs.*, 48 F.3d 12, 16 (1st Cir. 1995). Because Miles proceeded pro se, his district-court filings must be "construe[d] … liberally." *McCants*, 67 F.4th at 53 n.4.

Summary of Argument

A. Miles is entitled to credits under the First Step Act for the time he was incarcerated at Marion County Jail. The FSA mandates that BOP "shall provide" programming and "shall provide" credits. 18 U.S.C. §§ 3621(h)(6), 3632(d). It further mandates that prisoners "shall earn" credits upon successful participation in programming. *Id.* § 3632(d)(4)(A). And by specifying the few exceptions where credits *may not* be awarded,

see id. § 3632(d)(4)(B), (D)-(E), Congress reinforced that, in all other cases, awarding credits is not optional—it is required.

B. To get around this mandatory obligation, BOP has invented two barriers to block prisoners not yet at a BOP facility from earning credits. Both contravene the FSA's mandates. First, BOP delays credit accrual by redefining when a sentence "commences" to begin only when a prisoner arrives at a designated BOP facility. 28 C.F.R. § 523.42(a). But that definition isn't up for debate—Congress already defined it: A sentence "commences" when a prisoner is received into custody, not only when he arrives at his designated facility. 18 U.S.C. § 3585(a).

C. BOP also claims that a prisoner cannot successfully participate in programming, and therefore cannot earn credits, until he has completed a risk and needs assessment. But the FSA allows nothing of the sort. Instead, the FSA requires BOP to provide programming, and therefore award credits, throughout a prisoner's entire term of incarceration. 18 U.S.C. §§ 3621(h)(6), 3632(d). The statute's text does not make an assessment a prerequisite to earning credits. *See id.* § 3632(d)(4)(A)(i). In fact, BOP routinely awards credits that prisoners earn before an assessment is completed.

D. BOP may not penalize Miles by denying him credits because of its own failure to uphold its statutory obligation to provide programming. Miles, in contrast, did everything he could to participate in programming. That's all the statute requires of him.

If not for BOP's categorical denial of credits to prisoners awaiting transfer, Miles would have received credits. BOP's stance undermines the FSA's goal of incentivizing participation in recidivism-reduction programs. And it contravenes the rule of lenity, which requires ambiguous sentencing statutes to be construed in prisoners' favor.

Argument

BOP must award Miles credits for the period after his sentencing but prior to his arrival at his designated BOP facility.

BOP's blanket denial of credits to prisoners not yet in their designated BOP facilities violates the FSA. The statute imposes mandatory, complementary duties: BOP must offer programming and must award credits to eligible, participating prisoners. *See* 18 U.S.C. §§ 3621(h)(6), 3632(d). Yet BOP failed to deliver: It incarcerated Miles but offered him no programming at all and then denied him credits he had a right to earn for more than a year.

BOP has erected two baseless barriers to deny prisoners credits if they are not at a BOP facility. First, BOP issued a regulation barring prisoners from earning credits before they arrive at their designated facility. This regulation directly conflicts with the statute, which provides that prisoners begin earning credits when they are in custody awaiting transfer to their designated facility. Second, BOP claims no prisoner can successfully participate in programming without first completing a risk

and needs assessment. This artificial requirement collapses under the weight of both statutory text and BOP's own practice. In short, BOP has added restrictions that the statute does not allow, and, as a result, denied Miles credits he is entitled to under the FSA.

A. BOP is required to provide programming and credits to eligible prisoners.

The FSA imposes an affirmative obligation on BOP to provide programming and award credits to eligible prisoners. The statute repeatedly uses mandatory language. BOP "shall provide" recidivism-reduction programs to prisoners for the entire time they are incarcerated. 18 U.S.C. § 3621(h)(6). BOP also "shall provide" incentives and rewards for prisoners who participate. *Id.* § 3632(d). Critically, eligible prisoners who participate in programming "shall earn" credits. *Id.* § 3632(d)(4)(A). This language leaves no room for discretion—BOP must award credits for all programming it is required to provide.

Congress's repeated use of the word "shall" establishes this obligation. "Shall" imposes a "mandatory command" on BOP. *Bufkin v. Collins*, 145 S. Ct. 728, 737 (2025). It creates a "duty" and expresses "the mandatory sense that drafters typically intend." *Shall*, Black's Law Dictionary (12th ed. 2024). Where Congress intends to confer discretion to BOP, it uses "may," not "shall." *Lopez v. Davis*, 531 U.S. 230, 241 (2001); *see Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346 (2005). For example, Congress did so in Section 3624(c)(2), which affords BOP discretion over

where a prisoner's pre-release reentry occurs. *See Brandon v. Cauley*, 2010 WL 750355, at *2 (E.D. Ky. Mar. 2, 2010).

BOP's obligation to award credits is reinforced by Congress's express declaration about when credits *may not* be awarded. The FSA sets forth disqualifying criteria for earning credits, none of which apply to Miles. 18 U.S.C. § 3632(d)(4)(B), (D)-(E). These "express exception[s]" to eligibility "impl[y] that there are no *other* circumstances under which" a prisoner can be rendered ineligible. *Jennings v. Rodriguez*, 583 U.S. 281, 300 (2018). Put differently, this statutory list of exceptions precludes additional "implicit" exclusions. *Id.* (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012)).

BOP seeks to narrow the scope of the FSA's mandate, arguing that Section 3632(d)(4)(A) governs only how credits are calculated, not when they must begin to accrue. *See* Mem. Supp. Mot. to Dismiss (ECF 14) at 8-9. That reading is untenable. Although Section 3632(d)(4)(A) does set the rate at which credits accrue, it does so only after imposing a mandate to award credits: Eligible prisoners "shall earn" credits upon successful completion of qualifying programming.

B. Prisoners earn credits under the FSA from the date of sentencing and imprisonment.

The FSA mandates that a prisoner earns credits starting on the date his sentence "commences." 18 U.S.C. § 3632(d). That is, he earns credits as soon as he is sentenced and in custody awaiting transfer to his

designated BOP facility. *Id.* § 3585(a). BOP's regulation says something entirely different: that a sentence "commences" on the date the prisoner arrives at the prisoner's designated facility. 28 C.F.R. § 523.42(a). Because this regulation contradicts the FSA's text, it is invalid.

Statutory requirements. As shown (at 14-15), BOP must award Miles credits unless one of the FSA's eligibility- or time-based exceptions applies. It is undisputed that Miles is an eligible prisoner under the FSA. Therefore, BOP must award him credits for programming unless that programming was completed (1) before the FSA was enacted or (2) before the date his "sentence commence[d]." 18 U.S.C. § 3632(d)(4)(B). The first exception is inapplicable, as Miles was sentenced after the FSA's enactment. Thus, the only question is whether the second exception applies.

It does not. The FSA prohibits awarding credits "prior to the date that the prisoner's sentence commences under section 3585(a)." 18 U.S.C. § 3632(d)(4)(B)(ii). Section 3585(a), in turn, says that a sentence "commences" on the date the prisoner is "received in custody awaiting transportation" to a BOP facility. Where, as here, the statute itself defines a disputed term, "[s]tatutory definitions control the meaning of statutory words." *Burgess v. United States*, 553 U.S. 124, 129 (2008) (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)). And here, Congress defined when a sentence commences.

Many courts have agreed, holding that a prisoner's sentence commences, for credit-earning purposes, when the prisoner is sentenced and enters federal custody rather than the date he arrives at his designated facility.[4] Miles's sentence commenced on October 3, 2022, the date he was taken into custody after sentencing. JA 6. From that date

[4] *See Yufenyuy v. Warden*, 659 F. Supp. 3d 213, 218 (D.N.H. 2023); *Brenneman v. Salmonson*, 2025 WL 957216, at *4 (E.D. Tex. Feb. 25, 2025), *report and recommendation adopted*, 2025 WL 914352 (E.D. Tex. Mar. 26, 2025); *Gale v. Warden FCI Milan*, 2025 WL 223870, at *4 (E.D. Mich. Jan. 16, 2025); *Heath v. Knight*, 2024 WL 5198863, at *4-5 (D.N.J. Dec. 23, 2024); *Puana v. Williams*, 2024 WL 4932514, at *4-5 (D. Colo. Dec. 2, 2024); *Tantuwaya v. Birkholz*, 2024 WL 4805423, at *2 (C.D. Cal. Oct. 10, 2024), *report and recommendation adopted*, 2024 WL 4803522 (C.D. Cal. Nov. 15, 2024); *Jackson v. Doerer*, 2024 WL 4719489, at *9 (C.D. Cal. Nov. 7, 2024); *Sharma v. Peters*, 756 F. Supp. 3d 1271, 1281-82 (M.D. Ala. 2024); *Kvashuk v. Warden, FCI Berlin*, 2024 WL 4349850, at *6 (D.N.H. Sept. 30, 2024); *Perevoznikov v. Stover*, 747 F. Supp. 3d 329, 333 (D. Conn. 2024); *Eytcheson v. Caternolo*, 2024 WL 3969227, at *3 (W.D. Wash. July 26, 2024), *report and recommendation adopted in part*, 2024 WL 3965611 (W.D. Wash. Aug. 28, 2024); *Jobin v. Warden, FCI-Mendota*, 2024 WL 1367902, at *4 (E.D. Cal. Apr. 1, 2024), *report and recommendation adopted*, 2024 WL 2786898 (E.D. Cal. May 30, 2024); *Borker v. Bowers*, 2024 WL 2186742, at *1-2 (D. Mass. May 15, 2024); *Mohammed v. Stover*, 2024 WL 1769307, at *2 n.2 (D. Conn. Apr. 23, 2024); *Corrales v. Ricolcol*, 2024 WL 5275574, at *5 (C.D. Cal. Jan. 10, 2024); *Patel v. Barron*, 2023 WL 6319416, at *4-5 (W.D. Wash. Sept. 5, 2023), *report and recommendation adopted*, 2023 WL 6311281 (W.D. Wash. Sept. 28, 2023); *Huihui v. Derr*, 2023 WL 4086073, at *5 (D. Haw. June 20, 2023); *Komando v. Warden, FCI Berlin*, 2023 WL 4101540, at *4 (D.N.H. Mar. 16, 2023), *report and recommendation adopted*, 2023 WL 4101457 (D.N.H. Apr. 23, 2023); *Umejesi v. Warden*, 2023 WL 4101471, at *4 (D.N.H. Mar. 16, 2023), *report and recommendation adopted*, 2023 WL 4101455, at *4 (D.N.H. Mar. 30, 2023).

forward, he should have started earning credits. If Congress wanted the rule to be otherwise, it could have said so by stating that a sentence commences upon arrival at a designated BOP facility. But Congress wrote a different definition, and its chosen statutory definition controls.

BOP regulation. BOP has a different definition of commences. BOP defines "commences" as the "date the inmate arrives … at the designated Bureau facility where the sentence will be served." 28 C.F.R. § 523.42(a). Courts have consistently rejected this regulation, recognizing that it is irreconcilable with the statute. *See supra* note 4. That's because Congress defined when a sentence commences rather than leaving it to the agency to do so. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 374 (2024). And the statutory definition is clear that a prisoner's sentence commences before, not after, he arrives at his designated facility.

BOP's attempt to reconcile its regulation with the statute fails. It argues that Section 3632(d)(4)(B)(ii)—which states that a prisoner "may not earn time credits" before his "sentence commences"—merely *prohibits* credit accrual before sentencing, while its regulation *requires* BOP to award credits after a prisoner arrives at his designated BOP facility. *See* Mem. Supp. Mot. to Dismiss (ECF 14) at 7-8. But that argument sidesteps the core conflict: The statute defines when a sentence commences, which is as soon as a sentenced person is in custody awaiting transportation to his designated facility. BOP's regulation contradicts that definition. The phrase "may not" in Section 3632(d)(4)(B)(ii) does not

alter—and does not purport to alter—the statutory meaning of "commences" in Section 3585(a).

BOP's argument also misunderstands how this time-based provision operates within the broader statute. True, the statute says that a prisoner "*may not* earn time credits" before his sentence commences. 18 U.S.C. § 3632(d)(4)(B), (B)(ii) (emphasis added). But the corollary is that a prisoner *must* earn credits once his sentence commences. As shown (at 14-15), BOP shall award credits where no exclusion applies. Congress—not BOP—defines eligibility under the FSA. *See Sharma v. Peters*, 756 F. Supp. 3d 1271, 1284-85 (M.D. Ala. 2024). BOP has acknowledged as much, stating that "[i]t is outside [its] authority to alter the exclusions as stated in the FSA." FSA Time Credits, 87 Fed. Reg. 2705, 2713 (Jan. 19, 2022) (codified at 28 C.F.R. pts. 523, 541). So, although Section 3632(d)(4)(B)(ii) speaks in the negative, the rest of the statute supplies the affirmative: Once a prisoner's sentence commences, credit accrual must begin. The regulation, by contrast, delays credit accrual until arrival at a designated BOP facility. 28 C.F.R. § 523.42(a). These two positions cannot be reconciled, and when that occurs, the statute trumps.

This logic illustrates why the district court was wrong to rely on its prior decision in *Dunlap v. Warden*, 2025 WL 35248 (D. Mass. Jan. 6, 2025). In *Dunlap*, the court upheld a BOP regulation that "generally" denies credits to prisoners on temporary transfer to non-BOP facilities.

2024 WL 5285006, at *2 (D. Mass. Dec. 13, 2024), *report and recommendation adopted*, 2025 WL 35248 (D. Mass. Jan. 6, 2025) (quoting 28 C.F.R. § 523.41(c)(4)). *Dunlap* acknowledged that BOP cannot create new categories of ineligible prisoners but held that the regulation at issue was not a "categorical bar" to earning credits because it created a "general[]," rather than absolute, exception. *Id.* at *2, 9. But *Dunlap*'s reasoning does not apply to Miles's situation because the BOP regulation challenged here categorically bars all inmates not yet at their designated BOP facility from earning credits. *See* 28 C.F.R. § 523.42(a).

In any case, *Dunlap* is wrong. BOP may not use its regulations in a way that "add[s] an additional exclusion to general eligibility not found in the FSA's unambiguous eligibility provisions." *Pelullo v. Warden, FCC Coleman - Low*, 2024 WL 3771691, at *4 (M.D. Fla. Aug. 13, 2024); *see supra* at 14-15. BOP "does not have the discretion to exclude an eligible prisoner." *Kuzmenko v. Phillips*, 2025 WL 779743, at *5 (E.D. Cal. Mar. 10, 2025). Here, by redefining when a sentence commences, BOP has done just that.

C. Prisoners do not need to complete a risk and needs assessment before earning credits.

BOP offers a second basis for denying credits before a prisoner arrives at a BOP facility: It claims prisoners cannot successfully participate in programming under Section 3632(d) until after undergoing a risk and needs assessment. Mem. Supp. Mot. to Dismiss (ECF 14) at 7-8. That is

wrong. Nothing in the FSA makes completion of an assessment a precondition for participating in programming or earning credits. BOP regularly awards credits to prisoners who have not yet completed an assessment. And it also awards credits to prisoners who are not participating in programming related to their assessment. Both the statute and BOP's own practice confirm that prisoners can, and do, successfully participate, and therefore begin earning credits, before any assessment takes place.

Statutory text. BOP cannot make an assessment a precondition for participating in programming because the FSA does not tether programming to the completion of an assessment. Instead, BOP "shall provide all prisoners" with programming "throughout their *entire term of incarceration*," 18 U.S.C. § 3621(h)(6) (emphasis added), which necessarily includes any time before an assessment occurs. Incarceration means "confinement in a jail or penitentiary." *Incarceration*, Black's Law Dictionary (5th ed. 1979). So, the "entire term of incarceration" begins once a prisoner is confined at a jail or penitentiary. And the FSA recognizes that: It defines "a sentence to a term of imprisonment" as commencing on the date a prisoner is "received in custody." 18 U.S.C. § 3585(a); *see supra* at 5. Accordingly, BOP's obligation to provide programming begins at the start of custody, not upon completion of an assessment.

This statutory obligation makes sense because the assessment provides only "guidance" as to appropriate programming for each prisoner. 18 U.S.C. § 3632(b). Congress's use of the word "guidance"—not "requirement"—indicates that a prisoner is not limited to programming assigned through the assessment to earn credits. *See Pub. Citizen v. Nuclear Regul. Comm'n*, 901 F.2d 147, 154-55 (D.C. Cir. 1990). If programming need not be assigned through an assessment, then credit eligibility cannot rationally turn on whether one has occurred. *See infra* at 20-27.

Further, the statutory provision that outlines how baseline credits are earned does not condition them on the completion of an assessment. *See Mohammed v. Stover*, 2024 WL 1769307, at *4 (D. Conn. Apr. 23, 2024). Only one provision governs a prisoner's eligibility for credits. *See* 18 U.S.C. § 3632(d)(4). It includes four specified limitations on earning credits, none of which is an assessment. *See id.* § 3632(d)(4)(B), (D)-(E). The inclusion of certain eligibility conditions on credits implies the exclusion of others. Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 107 (2012). Congress could have made the assessment a prerequisite to earning credits, but it chose not to.

This statutory silence contrasts with a separate FSA provision under which an assessment *is* a stated prerequisite for earning credits above the baseline. Prisoners who are assessed to have a "minimum or low risk" of recidivism earn an additional five days of credits. 18 U.S.C.

§ 3632(d)(4)(A)(ii). A prisoner who has not undergone an assessment cannot receive those additional days. *See id.* Congress did not impose that condition on the baseline ten days earned through successful participation. *See id.* § 3632(d)(4)(A)(i).

That omission is telling. When Congress includes "language in one section of a statute but omits it from a neighbor," it "convey[s] a difference in meaning." *Bittner v. United States*, 598 U.S. 85, 94 (2023). The absence of any assessment requirement for baseline credits confirms that no assessment is needed to earn them.

Elsewhere, too, the FSA makes clear when an assessment is required. Section 3624(g)(1) states that a prisoner must have undergone an assessment to be eligible for transfer into prerelease custody or supervised release. This provision is incorporated by reference into Section 3632(d)(4)(C), which requires BOP to effectuate these transfers. But these provisions govern when credits may be *applied* to early or supervised release, not when credits may be *earned*. Nothing in either provision, or elsewhere in the statute, makes completion of an assessment a prerequisite to *earning* credits. *See Mohammed*, 2024 WL 1769307, at *3. And this case concerns only whether Miles earned credits—not whether he is eligible for application of those credits.

Resisting the statutory text, BOP argues that, because the assessment must occur during the "intake process," it is a precondition to earning credits. *See* Mem. Supp. Mot. to Dismiss (ECF 14) at 9-10 (citing 18

U.S.C. §§ 3632(a)(1), (3); 3635(6)(A)). But neither provision BOP cites references credits, let alone makes the completion of an assessment a precondition for earning them. These provisions define only BOP's responsibility in setting up the risk and needs assessment *system*, not the criteria for earning credits.

BOP practice. BOP's argument that the FSA requires a prisoner to undergo an assessment before earning credits is also contradicted by its own practice. It regularly awards credits to prisoners who have not undergone an assessment and who are not participating in programming based on an assessment. In doing so, BOP recognizes that these prisoners are successfully participating within the meaning of the statute and therefore eligible to earn credits.

BOP itself has acknowledged that prisoners start earning credits as soon as they arrive at their designated facility, regardless of whether an assessment has been completed. 28 C.F.R. § 523.42(a).[5] But a prisoner does not necessarily complete an assessment on the same date that he arrives at his designated facility. Instead, under BOP's own policy, a prisoner's initial assessment is "[o]rdinarily" completed within twenty-

[5] *See, e.g.*, *Mohammed v. Stover*, 2024 WL 1769307 (D. Conn. Apr. 23, 2024) (quoting Reply to Pet'r's Supp. Br. at 3 n.2); *Kvashuk v. Warden, FCI Berlin*, 2024 WL 4349850, at *4 (D.N.H. Sept. 30, 2024) (quoting Decl. of B. Beegle ¶¶ 12-13); *Dunlap v. Warden FMC Devens*, 2024 WL 5285006, at *2 (D. Mass. Dec. 13, 2024), *report and recommendation adopted*, 2025 WL 35248 (D. Mass. Jan. 6, 2025) (citing Decl. of A. Bourke ¶¶ 18-19).

eight or thirty days of the prisoner's arrival at his designated facility, not immediately upon arrival. Program Statement 5410.01 at 8. But BOP's program statement contemplates that the assessment might occur even later. *Id.* So even when a prisoner undergoes an assessment on day twenty-eight or later, he has earned credits from day one.

Indeed, an assessment cannot be a prerequisite to earning credits because prisoners earned credits before the assessment tool ever existed. When the FSA took effect in December 2018, BOP lacked an operational assessment tool. *Goodman v. Ortiz*, 2020 WL 5015613, at *3 (D.N.J. Aug. 25, 2020). That tool was not released until July 2019, and no individual assessments were completed until January 2020. *Id.* at *4. District courts have held that the FSA required credits to be awarded starting on the statute's enactment date notwithstanding the absence of any assessment.[6]

Even when an assessment has been completed, BOP routinely awards credits for programming that has no connection to that assessment. As a practical matter, "inmates are not necessarily required to be participating in [programming] specifically assigned to them at any given time to earn credits." *Borker v. Bowers*, 2024 WL 2186742, at *2 (D. Mass. May 15, 2024) (quoting Decl. of Darla Wolf ¶ 14); *see also Dunlap v. Warden FMC Devens*, 2024 WL 5285006, at *2 (D. Mass. Dec. 13, 2024),

[6] *See, e.g.*, *Hare v. Ortiz*, 2021 WL 391280, at *6-7 (D.N.J. Feb. 4, 2021); *Cazares v. Hendrix*, 575 F. Supp. 3d 1289, 1304 (D. Or. 2021).

report and recommendation adopted, 2025 WL 35248 (D. Mass. Jan. 6, 2025) (quoting Decl. of A. Bourke ¶ 17). When BOP awards prisoners credits for programming unrelated to a prisoner's assessment, the assessment is not serving any function.

Other BOP practices confirm that credits are not contingent on the completion of assessment-related programming. Under BOP's own policy, prisoners are successfully participating if they are "'able and willing … to complete' programming." *Borker*, 2024 WL 2186742, at *2 (quoting Decl. of Darla Wolf ¶ 14). That standard exposes any assessment requirement as artificial: If willingness alone is enough to earn credits, as BOP's practice in many circumstances shows, then BOP cannot impose on Miles (or others similarly situated) an assessment requirement before participation or credit accrual can begin. To elaborate: BOP policy provides that prisoners who are able and willing to participate, but are waitlisted due to lack of program availability, are successfully participating and thus earn credits. Program Statement 5410.01 at 4. Courts have accepted BOP's representations on this point, and rightly so.[7] The FSA rewards productive behavior—that's exactly what able and willing waitlisted prisoners are attempting to do.

[7] *See, e.g.*, *Borker v. Bowers*, 2024 WL 2186742, at *2 (D. Mass. May 15, 2024); *Mohammed*, 2024 WL 1769307, at *6; *Dunlap*, 2024 WL 5285006, at *4; *Kvashuk*, 2024 WL 4349850, at *5.

BOP's regulation on temporary program interruptions makes the same point. It provides that "[t]emporary operational or programmatic interruptions authorized by the Bureau that would prevent an inmate from participation in [programming] will not ordinarily affect an eligible inmate's 'successful participation.'" 28 C.F.R. § 523.41(c)(3). In other words, even when prisoners cannot participate because BOP suspends operations or interrupts programming, they are still successfully participating so long as they remain willing to participate.

The takeaway is simple: Successful participation has nothing to do with whether a prisoner has completed an assessment. The FSA requires BOP to provide a prisoner with an opportunity to earn credits through programming during his entire sentence. But BOP is erecting an artificial barrier that a prisoner must have undergone an assessment before he can earn credits. In doing so, BOP is shirking its statutory obligations. In contrast, Miles has done everything in his power to earn credits under the statute. For fifteen months, he remained willing to participate in any programming. In comparable circumstances, BOP awards credits to prisoners. It should do the same here.

D. Miles should not be penalized for BOP's failure to provide programming.

The FSA creates a two-way street. BOP must provide recidivism-reduction programs to all prisoners. If prisoners are willing to participate, they uphold their end of the bargain. So, BOP must award

them credits. Prior to his transfer to FMC Devens, Miles did everything he could to participate in programming, but BOP refused to provide any. By denying Miles credits, BOP arbitrarily penalized him for its own statutory noncompliance. That cannot be right.

BOP's interpretation undermines both the statutory bargain and the statutory goal of reducing recidivism through programming. If BOP's views are upheld, the agency could evade its statutory obligations in a host of other ways. And upholding BOP's interpretation would run counter to the rule of lenity, which requires that ambiguous sentencing statutes be construed in prisoners' favor.

Statutory bargain. Although BOP claims that Miles did not successfully participate in programming, any gap resulted from BOP's failures, not Miles's. "Surely the BOP cannot refuse to comply with the directive to complete a risk and needs assessment and fail to offer … programming for [fifteen] months because it delayed in transferring petitioner to his designated facility." *Wong v. Warden, Yankton Fed. Prison Camp*, 2024 WL 4027918, at *3 (D.S.D. Sept. 3, 2024). That is precisely what BOP did to Miles. Miles alleges that while at Marion County Jail, he "worked productively as a Unit Orderly, never refused to participate in any programming or FSA Risk Assessments and attempted to access programming when available." JA 6. Denying him credits—solely because he had not yet been transferred to his designated BOP facility—is not only contrary to the statute but is fundamentally unfair.

If not for BOP's delays in transferring Miles, BOP would have awarded Miles credits. Under the FSA, a prisoner earns credits for participating in "evidence-based recidivism reduction" programs, which are activities that have "been shown by empirical evidence to reduce recidivism" and are "designed to help prisoners succeed in their communities upon release from prison." 18 U.S.C. § 3635(3)(A)-(B). Work squarely fits that definition. Research confirms that "inmates who worked in prison industries were 24 percent less likely to recidivate and 14 percent more likely to be gainfully employed after release from custody than other inmates."[8] Recognizing this, Congress listed a "prison job, including through a prison work program," as a qualifying activity that earns a prisoner credits. 18 U.S.C. § 3635(3)(C)(xi). And BOP identifies "Work" as a "Need" and formally designates certain prison labor programs as qualifying programming.[9] Had Miles been in a BOP facility, he would have earned credits. That BOP instead held him at a county jail should not disqualify him.

Courts have recognized that similarly situated prisoners are entitled to credits under the statute. *See, e.g.*, *Borker v. Bowers*, 2024 WL

[8] Prison Reform: Reducing Recidivism by Strengthening the Federal Bureau of Prisons, U.S. Dep't of Just., https://www.justice.gov/archives/prison-reform (Nov. 29, 2023).

[9] Fed. Bureau of Prisons, U.S. Dep't of Just., First Step Act Approved Programs Guide 2, 23 (2024), https://www.bop.gov/inmates/fsa/docs/fsa-approved-program-guides-en.pdf.

2186742, at *3 (D. Mass. May 15, 2024); *Gale v. Warden FCI Milan*, 2025 WL 223870, at *1 (E.D. Mich. Jan. 16, 2025). In *Borker*, the court ordered BOP to award credits to a prisoner who, like Miles, "worked productively as a unit orderly [at a non-BOP institution], never refused to participate in any programming or FSA risk assessments, attempted to access programming when available and maintained clear conduct." 2024 WL 2186742, at *3 (citations omitted). The court found that BOP's refusal to award credits until a prisoner arrives at his designated facility "contravenes the language and intent of the FSA and is arbitrary and capricious as applied." *Id.* Similarly, in *Gale*, the court required BOP to recalculate credits for a prisoner who "worked at the detention facilities where he was housed and never opted out of any programming." 2025 WL 223870, at *1 (citations omitted).

In short, Miles met the statutory criteria. He did the work and attempted to access all available programming. The only thing standing between him and the credits Congress intended him to earn is BOP's own delay.

Statutory purpose. BOP's position would also defeat the statute's aims. Statutes are interpreted in accordance with their "object, purposes, and underlying policy." *United States v. Holmquist*, 36 F.3d 154, 160 (1st Cir. 1994); *accord Wooden v. United States*, 595 U.S. 360, 371 (2022). The FSA was enacted "with the purpose of modifying prior sentencing law and expanding vocational training, early-release programs, and other

initiatives designed to reduce recidivism." *Kvashuk v. Warden, FCI Berlin*, 2024 WL 4349850, at *3 (D.N.H. Sept. 30, 2024) (quoting *United States v. Venable*, 943 F.3d 187, 188 (4th Cir. 2019)).

That purpose is apparent from the statute's text. The statute offers at least seven incentives for prisoners to participate in recidivism-reduction programs, such as phone privileges, additional visitation, and increased commissary spending. 18 U.S.C. § 3632(d)(1)-(4). The FSA requires the Attorney General to study the effectiveness of recidivism reduction, *id.* § 3633, establish a scheme to implement recidivism-reduction programs, *id.* § 3632, and periodically report to Congress on recidivism rates and the effectiveness of BOP's programming, *id.* § 3634. Section 3632 alone uses the word "recidivism" two dozen times.

Lawmakers recognized that "[n]ot only is it in the fiscal interest of the government to reduce recidivism, it is in the public safety interest as well" and emphasized that any savings from the FSA should be reinvested in programming to "ensure that eligible prisoners have access to such programs and productive activities offered by the Bureau of Prisons." H.R. Rep. No. 115-699, at 22 (2018). Congress wanted to maximize access to programming because doing so would make it less likely that prisoners would return after their release.

BOP's refusal to provide programming and award credits to prisoners like Miles who are awaiting transfer thus undermines the statute's purpose by categorically exempting a class of prisoners. By rendering

these prisoners ineligible to earn credits, BOP has "create[d] a system where BOP is not responsible for administering the FSA with respect to a sizeable class of federal inmates." *Pelullo v. Warden, FCC Coleman - Low*, 2024 WL 3771691, at *5 (M.D. Fla. Aug. 13, 2024). And if those prisoners can't earn credits while they are awaiting transfer (in Miles's case, for more than a year), then there is less incentive for them to opt in to programming. "If anything," BOP's refusal to award credits to a prisoner while outside of his designated facility seems "purposed to dissuade [Miles] from participating in programing." *Id.*

Practical consequences. Adopting BOP's position would open the door to undermining the statute in other ways. If BOP could deny prisoners credits based on its own delay, inaction, or failure to meet its statutory obligations, BOP could categorically exclude a wide range of prisoners in contravention of the FSA. For example, BOP could also withhold credits from prisoners by refusing to designate a BOP facility, as required by the statute. *Contra Huihui v. Derr*, 2023 WL 4086073, at *7 (D. Haw. June 20, 2023). BOP could allow only prisoners with a minimum- or low-risk of recidivism to earn credits, in contravention of the statutory requirement that *all* prisoners be able to earn credits. *Contra Tantuwaya v. Birkholz*, 2024 WL 4805423, at *3 (C.D. Cal. Oct. 10, 2024), *report and recommendation adopted*, 2024 WL 4803522 (C.D. Cal. Nov. 15, 2024). Or it could withhold credits from prisoners who are outside their designated facility on a temporary writ to pursue or defend

litigation. *Contra Pelullo*, 2024 WL 3771691, at *5. The FSA does not allow BOP to skirt its obligations in these ways.

Lenity. As we've shown, the FSA unambiguously requires that Miles be awarded credits. But if ambiguity existed, the rule of lenity would put a dispositive thumb on the scale for Miles. BOP cannot penalize Miles by denying him credits "where text, structure, and history fail to establish that the Government's position is unambiguously correct." *United States v. Granderson*, 511 U.S. 39, 54 (1994).

When a criminal statute is ambiguous, "it is well settled ... that all reasonable doubts concerning its meaning ought to operate in favor of [the defendant]." *Wooden v. United States*, 595 U.S. 360, 393 (2022) (Gorsuch, J., concurring) (quoting *Harrison v. Vose*, 50 U.S. 372, 378 (1850)). The rule "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980). Thus, one court has agreed that lenity applies when deciding whether a prisoner is eligible to earn time credits under the FSA. *See Turner v. Keyes*, 2022 WL 17338577, at *4 (W.D. Wis. Nov. 30, 2022).

This Court has considered the application of lenity to a related statutory provision—the calculation of good-time credits under 18 U.S.C. § 3624(b). *See Perez-Olivo v. Chavez*, 394 F.3d 45, 53-54 (1st Cir. 2005); *see also Barber v. Thomas*, 560 U.S. 474, 488 (2010). But *Perez-Olivo* invoked *Chevron* deference to resolve the statutory ambiguity, finding it

"unnecessary to resort to the rule of lenity." 394 F.3d at 54. With *Chevron* overruled, *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 395 (2024), the rule of lenity resolves any statutory ambiguity in Miles's favor.

Conclusion

This Court should reverse and instruct the district court to direct BOP to recalculate and award the credits that Miles has earned.

Respectfully submitted,

/s/ Becca Steinberg
Becca Steinberg
Brian Wolfman
Regina Wang
GEORGETOWN LAW
APPELLATE COURTS
IMMERSION CLINIC
600 New Jersey Ave., NW
Suite 312
Washington, D.C. 20001
(202) 662-9549

Yasmeen Rose
Anshuman Siripurapu
Emma Watson
Student Counsel

Counsel for Plaintiff-Appellant

May 5, 2025

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), this document contains 7,961 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2024 in 14-point Century Schoolbook.

/s/ Becca Steinberg
Becca Steinberg

Counsel for Plaintiff-Appellant

May 5, 2025

CERTIFICATE OF SERVICE

I certify that, on May 5, 2025, this brief was filed using the Court's CM/ECF system. All attorney participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ Becca Steinberg
Becca Steinberg

Counsel for Plaintiff-Appellant

ADDENDUM

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Addendum

Joint Appendix

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ARTHUR MILES, Petitioner, v. WARDEN BOWERS, Respondent.	)	Civil Action No. 24-11243-RGS

REPORT AND RECOMMENDATION ON RESPONDENT'S
MOTION TO DISMISS PETITION FOR WRIT OF HABEAS CORPUS
[Docket No. 13]

January 15, 2025

Boal, M.J.

Arthur Miles, an inmate serving a sentence at Federal Medical Center-Devens ("FMC Devens"), filed a pro se petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 (the "Petition"). Docket No. 1. Respondent Warden Bowers has filed a motion to dismiss the Petition. Docket No. 13.[1] For the reasons set forth below, this Court recommends that Judge Stearns deny the motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 3, 2022, the United States District Court for the Southern District of Indiana sentenced Miles to a total of 240 months of imprisonment, to be followed by a total of five years

[1] On September 6, 2024, Judge Stearns referred the motion to the undersigned. Docket No. 16. On December 11, 2024, Judge Stearns dismissed the case due to Petitioner's failure to file a response to Respondent's motion to dismiss. See Docket No. 19. On December 23, 2024, Judge Stearns reopened the case and again referred the motion to the undersigned. Docket Nos. 23, 25.

of supervised release, after he was convicted of possession with intent to distribute and being a felon in possession of a firearm. United States v. Miles, No. 19-cr-00183-TWP-MG (S.D. Ind.) (ECF Nos. 264, 268).[2]

On April 26, 2023, the United States District Court for the Southern District of Indiana sentenced Miles to 60 months and 1 day of imprisonment (to run consecutively with his prior sentence), to be followed by four years of supervised release (to run concurrently with his prior sentence), after a conviction for possession with intent to distribute methamphetamine and committing a felony while on pretrial release. United States v. Miles, No. 21-cr-00118-TWP-KMB (S.D. Ind.) (ECF Nos. 80, 81). These two terms were aggregated and Miles is currently serving a sentence of 300 months and one day of imprisonment, to be followed by five years of supervised release. See Docket No. 1 at 1.[3]

When his sentences were imposed, Miles was in custody at the Marion County Jail in Indianapolis, Indiana until he arrived at his designated facility, FMC Devens, on December 28, 2023. See Declaration of Amber Bourke (Docket No. 15)[4] ("Bourke Decl.") at ¶¶ 14-15; Docket

[2] The sentence was imposed on October 3, 2022 but the judgment was entered on October 7, 2022. See United States v. Miles, No. 19-cr-00183-TWP-MG (S.D. Ind.) (ECF No. 268). On December 6, 2023, the District Court amended the sentence to vacate a multiplicitous count. Id. at ECF No. 291. After revision, the District Court again sentenced Miles to a total of 240 months of imprisonment, to be followed by a total of 5 years of supervised release. Id. at ECF No. 299.

[3] Citations to "Docket No. ___" are to documents appearing on the Court's electronic docket. They reference the docket number assigned by CM/ECF, and include pincites to the page numbers appearing in the top right corner of each page within the header appended by CM/ECF.

[4] While review of a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure is generally confined to the complaint and documents expressly incorporated in the complaint, courts have considered declarations by Bureau of Prisons ("BOP") officials regarding matters not in dispute, such as inmate history, criminal history, sentence monitoring computations data, FSA credits assessments, and the like in connection with motions to dismiss

No. 1 at 1. Miles filed the Petition on May 8, 2024, arguing that he was improperly denied credits under the First Step Act ("FSA"). Docket No. 1. According to Miles, the FSA requires the BOP to start awarding inmates time credits immediately upon their sentencing, including while they remain detained awaiting transfer to their designated BOP facility. Id. at 4-8. Respondent, on the other hand, argues that the FSA does not mandate that the BOP allow an inmate to start earning time credits immediately upon his sentencing and that the BOP has properly calculated Miles's time credits beginning with his arrival at FMC Devens.[5] Docket No. 14 at 7-10. He therefore requests dismissal of the Petition. Docket No. 13.

II. DISCUSSION

A. Standard of Review

Section 2241 is available to inmates who are "in custody under or by color of the authority of the United States." 28 U.S.C. § 2241(c)(1). "Section 2241 provides the standard habeas remedy for individuals detained in violation of federal law, and can be used, among other things, to challenge the 'manner of execution' of a federal sentence." Cockerham v. Boncher, __ F.4th __, 2024 WL 5232696, at *1 (1st Cir. 2024) (internal citations omitted). Section 2241 traditionally has been available to prisoners challenging the computation of their sentences by

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Section 2241 petitions. See, e.g., Haley v. Bowers, No. 24-cv-10458-MJJ, 2024 WL 3329071, at *2, n.2 (D. Mass. Jul. 8, 2024); Walsh v. Boncher, 652 F.Supp.3d 161, 165 (D. Mass. 2023).

[5] Miles acknowledges that he has not exhausted administrative remedies as generally required before a petitioner may seek relief from a federal court via a Section 2241 petition. See Docket No. 1 at 2. However, exhaustion of administrative remedies is not a jurisdictional requirement and it is subject to waiver in certain circumstances. See Patel v. Barron, No. C23-937-JHC-MLP, 2023 U.S. Dist. LEXIS 175906, at *5-6 (W.D. Wash. Sept. 5, 2023), R&R approved and adopted, 2023 U.S. Dist. LEXIS 174601 (W.D. Wash. Sept. 28, 2023). Here, the Respondent has not cited Miles' failure to exhaust as a basis upon which it seeks dismissal and, therefore, this Court declines to evaluate the issue sua sponte.

the BOP. Yufenyuy v. Warden, 659 F.Supp.3d 213, 215 (D.N.H. 2023) (citation omitted).

"A court examines 'a motion to dismiss a habeas petition according to the same principles as a motion to dismiss a civil complaint under Federal Rule of Civil Procedure 12(b)(6).'" Walsh v. Boncher, 652 F.Supp.3d at 164 (citations omitted). To survive a motion to dismiss, the complaint "must contain sufficient factual matter . . . to state a claim to relief that is plausible on its face." Abdisamad v. City of Lewiston, 960 F.3d 56, 59 (1st Cir. 2020) (quoting Saldivar v. Racine, 818 F.3d 14, 18 (1st Cir. 2016)). "If the factual allegations in the complaint are too meager, vague, or conclusory to remove the possibility of relief from the realm of mere conjecture, the complaint is open to dismissal." Id. (quoting Barchock v. CVS Health Corp., 886 F.3d 43, 48 (1st Cir. 2018)).

B. The FSA

On December 21, 2018, Congress enacted the FSA, "with the purpose of modifying prior sentencing law and expanding vocational training, early-release programs, and other initiatives designed to reduce recidivism." Yufenyuy, 659 F.Supp.3d at 216 (citation omitted). The FSA requires the BOP to implement a risk and needs assessment system to track each prisoner's risk of recidivism and to expand access to "productive activities" and other programs to reduce the risk of recidivism by federal prisoners. 18 U.S.C. § 3621(h). The FSA also requires the BOP to "provide incentives and rewards for prisoners to participate and complete evidence-based recidivism reduction programs." 18 U.S.C. § 3632(d).

Among other things, the FSA provides time credits for successful completion of evidence-based recidivism reduction programs ("EBRRs") and productive activities ("PAs"). See id. at § 3632(d)(4)(A). The FSA requires that prisoners who complete EBRRs or PAs, "except an ineligible prisoner under subparagraph (D)," "shall earn time credits" for successfully

completing such programming. Id. The FSA allows eligible prisoners to earn ten days of time credits, or in some cases, fifteen days of credits, for every thirty days of EBRRs and PAs they participate in while serving the custodial component of their sentences. See id.

The FSA limits the availability of time credits by identifying only two circumstances in which eligible prisoners may not earn them. As relevant here, a prisoner cannot accrue FSA time credits "during official detention prior to the date that the prisoner's sentence commences under [18 U.S.C.] section 3585(a)." 18 U.S.C. § 3632(d)(4)(B)(ii). Section 3585, in turn, states that any "sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to . . . the official detention facility at which the sentence is to be served."

C. Miles's Challenge To The BOP Regulations

The BOP has implemented regulations codifying its procedures regarding the earning and application of time credits under the FSA. See 28 C.F.R. § 523.40(a). Under the BOP regulations, "[a]ny inmate sentenced to a term of imprisonment pursuant to a conviction for a Federal criminal offense . . . is eligible to earn FSA Time Credits." 28 C.F.R. §523.41(d)(1). With respect to when an eligible inmate begins earning FSA time credits, the regulations provide that accrual of FSA time credits "begins . . . after the inmate's term of imprisonment commences," which in the BOP's view happens on "the date the inmate arrives . . . at the designated [BOP] facility where the sentence will be served." 28 C.F.R. § 523.42(a).

Miles argues that the BOP's regulation conflicts with the FSA and that the BOP is improperly denying him FSA time credits for the period from October 3, 2022 to December 28, 2023, when he arrived at FMC Devens. Docket No. 1 at 4-8. Respondent argues that the FSA contemplates that an inmate will not begin earning time credits immediately upon sentencing,

and will instead need to wait some time to arrive at his BOP-designated facility and undergo a risk and needs assessment during the intake process. Docket No. 14 at 10.

Upon consideration of the plain language of the relevant FSA provisions, the regulations, and the relevant caselaw, this Court agrees with those courts that have found that the BOP regulations are contrary to the express language of the FSA. As those decisions have explained, the FSA plainly requires that a prisoner "shall" earn time credits at the rate described for all EBRRs and PAs the prisoner completes, so long as such programming occurred after the enactment of the FSA and after the person's "sentence commences." Yufenyuy, 659 F.Supp.3d at 217-218. The definition of when a "sentence commences" is also clear; it is "the date the defendant is received in custody awaiting transport to" whatever facility the BOP designates. Id. The statutory language is unambiguous. The BOP's regulation, however, "does not mirror the language in the FSA defining when a prisoner can begin earning FSA time credits," and instead "specifies a different date as the one when the prisoner can begin to earn FSA time credits." Id. at 218 (emphasis added). See also Umejesi v. Warden, No. 22-cv-251-SE, 2023 U.S. Dist. LEXIS 56661, at *9-10 (D.N.H. Mar. 16, 2023), R&R approved & adopted, 2023 U.S. Dist. LEXIS 54587 (D.N.H. Mar. 30, 2023) (granting habeas petition claiming entitlement to FSA time credits between the date of sentencing and date of transfer to designated facility); Patel, 2023 U.S. Dist. LEXIS 175906, at *13 (same); Borker v. Bowers, No. 24-cv-10045-LTS (D. Mass. Apr. 9, 2024) (same). Accordingly, this Court finds that the BOP regulations do not justify dismissal of Miles's Petition.[6]

[6] This Court notes that Miles is serving an aggregate term that includes two separately imposed sentences, one on October 3, 2022 and one on April 26, 2023. This presents a potential question regarding which of those dates marked the commencement of Miles's sentence. See, e.g., Borker v. Bowers, No. 24-cv-10045-LTS (ECF No. 20 at 9) (D. Mass. Apr. 9, 2024). The

III. RECOMMENDATION

For the foregoing reasons, this Court recommends that Judge Stearns deny the Respondent's motion to dismiss the Petition.

IV. REVIEW BY DISTRICT JUDGE

The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72(b), any party who objects to these proposed findings and recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of service of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. See Fed. R. Civ. P. 72. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Fed. R. Civ. P. 72(b) will preclude further appellate review of the District Court's order based on this Report and Recommendation. See Phinney v. Wentworth Douglas Hospital, 199 F.3d 1 (1st Cir. 1999); Sunview Condo. Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962 (1st Cir. 1997); Pagano v. Frank, 983 F.2d 343 (1st Cir.1993).

/s/ Jennifer C. Boal
JENNIFER C. BOAL
United States Magistrate Judge

parties, however, have not addressed this issue and this Court finds that it is not necessary to address it at this time.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 24-11243-RGS

ARTHUR MILES,
Petitioner

v.

WARDEN BOWERS,
Respondent

ORDER ON REPORT AND RECOMMENDATION
OF THE MAGISTRATE JUDGE

February 6, 2025

STEARNS, D.J.

I agree that the position taken by Magistrate Judge Boal is thoughtful and compassionate, but I cannot distinguish the case from my prior conclusion in *Dunlap v. Warden FMC Devens*, 2025 WL 35248 (D. Mass. January 6, 2025), that the decision of the Bureau of Prisons (BOP) to deny petitioner Earned Time Credits (ETCs) under the for the time that he was detained in a non-BOP designated facility awaiting his final sentence, "while arguably unfair, was not unlawful." *Id.*, at *1. As I noted in *Dunlap*, Congress in enacting the First Step Act (FSA) left certain lacunae for the BOP as the administrative agency to fill. As pertinent here, the FSA left it to the

BOP to implement rules for determining when an inmate commences eligibility to earn ETCs. The pertinent rule as promulgated specifically excludes an inmate's participation in programming while temporarily transferred to the custody of non-BOP designated institution. While personally I might have drafted a fairer rule, as Magistrate Judge Levenson aptly stated in *Dunlap*, we are "constrained to consider only whether the Rule, or the BOP's application of its Rule, contravenes the FSA or otherwise violates [an inmate's] federal rights." 2024 WL 5285006, at *6. (D. Mass. Dec. 13, 2024). Here, I conclude, as before, that it does not. Consequently, the Recommendation is OVERRULED, and the Respondent's motion to dismiss is GRANTED with prejudice. The Clerk will enter judgment for the Respondent and close the case.[1]

SO ORDERED.

/s/ Richard G. Stearns
UNITED STATES DISTRICT JUDGE

[1] Petitioner is advised that any request for the issuance of a Certificate of Appealability pursuant to 28 U.S.C. § 2253 of the court's Order granting Respondent's motion to dismiss is also DENIED, the court seeing no meritorious or substantial basis supporting an appeal.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

* *

Arthur Miles
Plaintiff

v.

CIVIL ACTION NO.:
1:24-cv-11243-RGS

Warden Bowers
Defendant

* *

JUDGMENT
February 7, 2025

Stearns, D.J.

In accordance with the Order entered on February 6, 2025, GRANTING Respondent's Motion to Dismiss for Failure to State a Claim, Judgment is entered in favor of the Respondent, Warden Bowers. This case is hereby DISMISSED.

SO ORDERED.

/s/ Richard G. Stearns
RICHARD G. STEARNS
United States District Judge