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

REPLY BRIEF FOR PLAINTIFF-APPELLANT ARTHUR MILES

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Introduction and Summary of Argument

BOP is silent on two issues. First, it does not defend its regulation prohibiting prisoners from earning credits until after arriving at their designated BOP facility. Nor could it credibly do so: Its regulation flouts the First Step Act's text by defining "commence" to directly contradict the statutory definition. *See* Opening Br. 18-20. Second, BOP appears not to dispute that it must provide programming throughout a prisoner's entire term of incarceration, *see* 18 U.S.C. § 3621(h)(6), and that it has not done so. BOP's silence implicitly acknowledges that it repeatedly fails to comply with its statutory obligations, and, as a result, punishes prisoners by withholding credits they have rightfully earned.

These two examples of statutory noncompliance have begotten others. BOP's requirement that a prisoner undergo a risk and needs assessment before earning credits impermissibly adds a condition found nowhere in the statute. And, as a result, the extra-statutory assessment requirement becomes just another way for BOP to implement its invalid regulation. By delaying the assessment until after a prisoner arrives at his designated facility, BOP bars prisoners from earning credits until they arrive at their designated facility—something that BOP may not do.

BOP's arguments also ignore that, while at the Marion County Jail, Miles successfully participated in programming under the statute. He made every effort at the jail to access all available programming—

something that BOP ordinarily treats as successful participation entitling an inmate to credits. He also worked there—something that the FSA and BOP's own manual define as a qualifying activity. Under BOP's reading, there was literally nothing that Miles could have done to participate or earn credits for a fifteen-month period, as long as BOP refused to administer a risk and needs assessment. Adopting BOP's argument would allow it to unilaterally void the statutory scheme. The FSA does not allow that result.

Argument

BOP improperly failed to award Miles credits.

A. The FSA imposes on BOP a mandatory obligation to provide programming and credits.

Our opening brief explains (at 14-15) that the FSA obligates BOP to provide programming and award credits to eligible prisoners. BOP does not dispute that the statute imposes this mandate. Instead, it emphasizes that its obligation to provide credits does not kick in unless a prisoner participates in programming. *See* Resp. Br. 15-18. In making this argument, BOP both attacks a straw man and fails to grapple with the statutory meaning of "successful participation."

To begin, BOP mischaracterizes our argument. We've never suggested that prisoners earn credits simply for time spent in prison, *contra* Resp. Br. 15-16, and we take no issue with BOP's statement that the statute effects an "exchange," Resp. Br. 17. Instead, we disagree about what sort

of exchange is required, or, put differently, what a person must do to earn credits. By "work[ing] productively as a Unit Orderly, never refus[ing] to participate in any programming or FSA Risk Assessments and attempt[ing] to access programming when available," Miles did everything he could to fulfill his end of the statutory bargain. JA 6.

The FSA's "participation" requirement must, as BOP repeatedly emphasizes, "be drawn from the context in which it is used." Resp. Br. 19 (quoting *Reno v. Koray*, 515 U.S. 50, 56 (1995)); *see* Resp. Br. 13, 17, 19-21. That context supports Miles's position. The FSA's participation provision is part of a scheme requiring that BOP "*shall* provide *all* prisoners with the opportunity to actively participate in [programming] throughout their *entire term of incarceration*." 18 U.S.C. § 3621(h)(6) (emphases added). So, when the FSA provides that prisoners earn time credits for "successful participation" in programming, *id.* § 3632(d)(4)(A)(i), that provision operates against the backdrop that programming must be available to all prisoners throughout their entire sentence. Put differently, the FSA's understanding of "participation" takes as a given that prisoners have the opportunity to access programming in accordance with BOP's statutory obligations.

When BOP complies with its statutory duty to provide programming, 18 U.S.C. § 3621(h)(6), it is easy to determine whether a prisoner has participated in it: When BOP provides programming, a prisoner "participates" by engaging in that programming. But BOP disrupts that

bargain when it fails to comply with its statutory duty to provide programming, even when the prisoner is making every effort to engage in all available programming. In that circumstance—which no one disputes is the situation Miles found himself in—BOP, not the prisoner, is failing to meet the statute's terms.

BOP is therefore wrong that our reading "destroy[s]" the statutory connection between program participation and the award of time credits. Resp. Br. 18. Instead, it is BOP's failure to comply with its statutory obligation to provide programing that breaks that connection. Under BOP's reading, when it fails to meet its statutory obligations, a prisoner can do nothing to participate in programming or earn credits. In contrast, our reading best preserves the connection between programming and credits: When a prisoner attempts to access all available programming and never refuses to participate, he is fulfilling his end of the statutory bargain to the maximum extent that BOP's statutory noncompliance allows him. Under the FSA, nothing more is required.

Even if more is required, Miles actually engaged in an evidence-based recidivism reduction program: He "worked productively as a Unit Orderly." JA 6. BOP has not disputed that work counts as a qualifying program. Nor could it. The FSA itself and BOP's own manual designate work as a qualifying program. *See* 18 U.S.C. § 3635(3)(C)(xi); Opening Br. 29. The only reason that BOP has suggested that Miles's work doesn't count is that he had not yet undergone a risk and needs assessment.

Resp. Br. 18-27. But prisoners can participate in programming regardless of whether they have undergone an assessment. *See infra* at 7-14; Opening Br. 20-27.

B. BOP does not and cannot defend its regulation that delays awarding credits until after a prisoner arrives at his designated facility.

In the district court, BOP sought to deny Miles credits by invoking its regulation that allows a prisoner to earn credits only after arriving at his designated BOP facility. Mem. Supp. Mot. to Dismiss (ECF 14) at 1, 7-8 (citing 28 C.F.R. § 523.42(a)). That regulation is unlawful because it's at war with the statutory text. *See* Opening Br. 18-20. On appeal, BOP does not defend the legality of its regulation. Nor could it: The regulation's definition of "commence" flatly contradicts the definition contained in the FSA. *Compare* 28 C.F.R. § 523.42(a), *with* 18 U.S.C. § 3585(a).

BOP's concession is significant. BOP's unlawful regulation "gave rise to a BOP policy and practice of waiting until after the transfer to a designated facility before undertaking the necessary risk-and-needs assessment and assignment of programming." *Borker v. Bowers*, 2024 WL 2186742, at *2 (D. Mass. May 15, 2024). BOP may not "do indirectly (through policy and practice) what the BOP cannot do directly (through the [invalid] regulation)." *Id.* Put differently, no meaningful distinction exists between (1) refusing to award credits until a prisoner arrives at his designated facility and (2) refusing to award credits until a prisoner

undergoes an assessment when BOP refuses, as matter of policy, to administer an assessment until a prisoner arrives at his designated facility. Given that refusal, the assessment requirement becomes a proxy for arriving at the facility. BOP may not implement its invalid regulation by other means, and the Court should reverse on this basis alone.[1]

At the very least, BOP's concession requires a remand for the district court to evaluate BOP's rationale for denying Miles credits. Previously, BOP has put forth two reasons to withhold credits: that Miles had not yet arrived at his designated facility, and Miles had not yet undergone an assessment. It seems that BOP's actual reason was the former because, as discussed, BOP regularly awards credits separately from any risk and needs assessment and begins awarding credits as soon as prisoners arrive at their designated facility, before they have undergone a risk and needs assessment. *See infra* at 13-14; Opening Br. 24-27. It also seems likely that the two are related insofar as BOP's unlawful definition of "commence" gave rise to BOP's policy delaying the administration of assessments until after a prisoner's arrival. *See Borker*, 2024 WL

[1] In a footnote, BOP suggests that Miles's sentence did not "commence" until after his second sentencing on April 28, 2023. Resp. Br. 18 n.4. BOP's footnote is insufficient to preserve this argument. *See Solis-Alarcon v. United States*, 662 F.3d 577, 584 (1st Cir. 2011); *Segrain v. Duffy*, 118 F.4th 45, 71 (1st Cir. 2024). BOP also did not raise this argument below, and the district court did not address it, so this Court should not consider the issue in the first instance on appeal. *See Ms. S. v. Reg'l Sch. Unit 72*, 829 F.3d 95, 109-10 (1st Cir. 2016).

2186742, at *2. At the motion-to-dismiss stage, it is impossible to know BOP's actual reason for denying Miles credits. And BOP's current justification is immaterial because "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Even assuming that there could be both valid and invalid reasons for denying Miles credits, BOP would need to produce the administrative record so that the court could determine BOP's actual reasons.

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

1. BOP argues that Miles could not earn credits while at Marion County Jail because he had not yet undergone a risk and needs assessment. Resp. Br. 18-27. But nothing in the FSA requires an inmate to undergo an assessment before earning credits. *See* Opening Br. 21-24. BOP cautions against reasoning by negative implication, Resp. Br. 19-20, but it does not appreciate the significance of this statutory omission.

This case is not a situation where Congress said something in one statutory provision and was silent elsewhere, leaving a negative implication about the latter's meaning. *Contra* Resp. Br. 19 (quoting *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013)). The FSA expressly prohibits awarding credits in certain circumstances, 18 U.S.C. § 3632(d)(4)(B), (D); *see* Opening Br. 4-5, but it is *not* silent as to other

circumstances. Instead, in all other circumstances, the FSA makes clear that the award of credits is mandatory. *See* Opening Br. 14-15, *supra* at 2-5. So, unlike in the cases on which BOP relies, a court need not infer what Congress intended in the absence of a listed exception. Instead, Congress said so explicitly: Unless there's a listed exception, a prisoner "shall" receive credits. 18 U.S.C. § 3632(d)(4)(A).

2. Resisting this conclusion, BOP puts forward a grab bag of arguments to defend its position that the FSA conditions credits on an assessment. Each argument is wrong.

BOP first zooms in on the requirement that a prisoner have "successfully" participated in programming. Resp. Br. 20-21. In BOP's telling, the only way to be a successful participant is to work toward the goals set forth in the risk and needs assessment.

BOP's narrow definition of success ignores that the word's meaning depends on context. BOP likens participation to a piece of coursework that a student can't complete successfully before it is assigned. Resp. Br. 20. But the word "success" has other uses as well. A student can successfully study for a test even if her teacher never gave her a study guide, and a runner can successfully participate in a race even if nobody demanded that she show up. In each case the participant can "achieve" the "desired result or outcome," *Success*, Oxford English Dictionary

Online (June 2025)[2]: She can ace the test or do well in the race. And her success does not depend on having been assigned certain goals or tasks beforehand.

Here, context demonstrates that "success" does not depend on a risk and needs assessment. BOP's argument hinges on a specific meaning of "success," but the statute's understanding of this word does not comport with BOP's. Consider subparagraph 3632(d)(4)(B), which says that a prisoner may not earn time credits for programs "that the prisoner successfully completed" before the FSA's enactment. Assessments did not exist before the FSA's enactment. So, if "successful completion" depended on a risk and needs assessment, it would not have been possible to "successfully complete" programming before the FSA's enactment. But subparagraph 3632(d)(4)(B) expressly states that a prisoner *could* "successfully complete[]" programming during this time. The necessary implication is that successful completion does not depend on any assessment.

The statute's definition of evidence-based recidivism-reduction programs reinforces this point. *See* 18 U.S.C. § 3635(3). These programs "ha[ve] been shown by empirical evidence to reduce recidivism" and are "designed to help prisoners succeed in their communities upon release from prison." *Id.* § 3635(3)(A)-(B). This definition does not define these

[2] Available at https://doi.org/10.1093/OED/4351349770.

programs as those assigned to a prisoner after an assessment or based on an individual prisoner's needs. True, "[t]he System shall provide guidance" on the amount and type of programming assigned to a prisoner. *Id.* § 3632(b). But it is also true that "[t]he System shall provide guidance" on housing assignments, *id.* § 3632(c), and BOP (obviously) must assign prisoners housing even if they haven't yet undergone an assessment. The term "guidance" has a "heavily optional flavor." *Pub. Citizen v. Nuclear Regul. Comm'n*, 901 F.2d 147, 155 (D.C. Cir. 1990). And where the connection between an assessment and programming is optional, successful participation in the programming does not depend on an assessment.

BOP highlights that because Section 3632's title is "Development of risk and needs assessment system," a "close connection" exists between the assessment and credits. Resp Br. 22. No one disputes that a connection exists. But that doesn't mean that an assessment is *required* to trigger entitlement to credits. To the contrary, Congress's recognition of this connection meant that Congress could have conditioned credits on an assessment if it had wanted to. And in other circumstances, it did. For example, all prisoners earn ten credits for every thirty days of participation, 18 U.S.C. § 3632(d)(4)(A)(i), but prisoners categorized as low- or minimal-risk earn an extra five days above this baseline, *id.* § 3632(d)(4)(A)(ii). The FSA conditioned these additional five days of credits on an assessment, *id.*, and did the same when it came to *applying*

credits to early or supervised release, *id.* §§ 3624(g), 3632(d)(4)(C). But Congress did not condition the baseline credit award on an assessment.

BOP next turns to Subsection 3632(d)'s structure. In BOP's telling, Section 3632 discusses the assessment, then programming, and finally incentives and credits, attempting to create a mandatory chronological sequence that starts with an assessment and results in credits. *See* Resp. Br. 22-23. BOP's argument is doubly wrong. First, Section 3632 is not organized in a chronological structure. The Section ends with Subsection 3632(h), which concerns dyslexia screening that occurs during the same "intake process" discussed in Subsection 3632(a). And even if Section 3632 had been structured chronologically, that would not mean that an assessment *must* happen before a prisoner could earn credits, only that Congress assumed that it would in many circumstances.

BOP then turns to Subection 3624(g), arguing that because prisoners must undergo a risk and needs assessment before credits can be *applied* to move a prisoner to prerelease custody or supervised release, it follows that prisoners must also undergo an assessment before they can *earn* credits. Resp. Br. 24-25. But the logic cuts in the opposite direction. By including this requirement in one place but not the other, Congress "convey[ed] a difference in meaning." *Bittner v. United States*, 598 U.S. 85, 94 (2023); *see* Opening Br. 23.

BOP pushes back, suggesting that it would be "anomalous" for a system to distinguish between prisoners who can earn credits and

prisoners for whom those credits can be applied to early or supervised release. Resp. Br. 25. But this is the regime that Congress created. No one disputes, for example, that prisoners who are not categorized as minimum or low risk can earn credits, *see* 18 U.S.C. § 3632(d)(4)(A)(i), but only minimum- and low-risk prisoners can have those credits applied, *see id.* § 3624(g)(1)(B). And BOP's own regulations distinguish between earning and applying FSA credits. *Compare* 28 C.F.R. § 523.42 ("Earning [FSA] Time Credits"), *with id.* § 523.44 ("Application of FSA Time Credits"). At any rate, Congress might have had logical reasons to create this distinction, such as wanting to incentivize all prisoners to participate in programming while ensuring that prisoners would not actually be released earlier until they posed a lower risk to society.

Finally, BOP contends that programming must be based on prisoners' specific criminogenic needs, and those needs can be determined only after a risk and needs assessment. *See* Resp. Br. 26. But none of these provisions can carry the load that BOP demands of requiring programming to be based on a risk and needs assessment.

BOP first points to Paragraph 3621(h)(6), which requires that BOP "shall provide all prisoners with the opportunity to actively participate in [programming], according to their specific criminogenic needs, throughout their entire term of incarceration." But the clause "according to their specific criminogenic needs" modifies "the opportunity to actively participate in [programming]." It does not modify BOP's obligation that

it "shall" provide this programming "throughout [a prisoner's] entire term of incarceration," and not just after a risk and needs assessment.

BOP next points to other statutory language indicating that programming should be "based on" and "according to" prisoners' criminogenic needs. 18 U.S.C. § 3632(a)(3), (b)(1); *see* Resp. Br. 26-27. This argument fares no better. These provisions state that "[t]he System shall provide *guidance* on the type, amount, and intensity of" programming. 18 U.S.C. § 3632(b); *see id.* § 3632(a)(3) (programming is determined and assigned "in accordance with subsection (b)"). That an assessment provides guidance for programming does not make an programming contingent on an assessment, *see* Opening Br. 22, and it certainly does not mean that programming can take place only *after* an assessment, *see Dunaev v. Engleman*, 2025 WL 1558454, at *4 (C.D. Cal. Apr. 28, 2025), *report and recommendation adopted*, 2025 WL 1555493 (C.D. Cal. May 28, 2025).

3. BOP also cannot square its current reading of the statute with its own regulations and practices. As shown, BOP regularly awards credits to prisoners who have not completed a risk and needs assessment. *See* Opening Br. 24-27. While it is certainly true that BOP's regulations and practices could not overcome the FSA's text, it is nonetheless telling that BOP's litigation position is at odds with the interpretation that it has adopted elsewhere.

Notably, BOP regulations allowed eligible inmates to earn credits for *all* programming between December 21, 2018, and January 14, 2020. *See* 28 C.F.R. § 523.42(b)(2). Those regulations did not require an assessment until January 15, 2020. *See id.* § 523.42(b)(3).[3] BOP cannot now say that the assessment requirement is imposed by statute while also having issued a regulation that awarded credits based on programming that took place before an assessment scheme even existed.

Even now, eligible inmates begin earning credits immediately upon arriving at their designated BOP facility. 28 C.F.R. § 523.42(a). That occurs even when the prisoner has not yet completed an assessment, which is usually (but not always) performed within 28 days of an inmate's arrival. *See* Opening Br. 24-25; Resp. Br. 6. This gap belies the argument that BOP starts the clock only after a risk and needs assessments: Under its own regulations, BOP begins awarding credits earlier.

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

No matter how BOP frames its arguments, the result is the same. BOP is failing to comply with the statutory requirement that it provide programming, and insists that, as a result, it is relieved of its obligations to award Miles credits. But at no point has BOP suggested that Miles could have done something differently to earn credits. The FSA created a

[3] BOP did not complete any assessments until January 2020. *See* Opening Br. 25.

statutory scheme to govern programming and credits, and BOP unilaterally made the entire scheme inaccessible to Miles. That result is fundamentally unfair—and one, as we have explained, that the FSA does not permit.

The necessary implication of BOP's argument is that any time it fails to comply with its statutory obligations, it can use its own noncompliance to justify withholding credits from prisoners. BOP suggests that these practical effects won't come to pass because it is unlikely that BOP would violate its statutory obligations. But BOP is missing the point: It *is* violating its statutory obligations. BOP has not argued that it may lawfully withhold programming from Miles—only that it does not have to give him credits when it does so unlawfully. And our examples of other statutory violations are not theoretical. We have pointed to several examples where BOP's own statutory violations—like failing to designate a facility—provided the excuse for withholding credits impermissibly. *See* Opening Br. 32-33 (collecting cases).

So, regardless of whether BOP's reading of the statute is correct, the FSA does not "authoriz[e] unreasonable delay—or even bad faith—in the administration of the assessment." *Dunaev*, 2025 WL 1558454, at *4. "Any such unreasonable delay on the part of the BOP in assessing the prisoner should not inure to the detriment of the prisoner." *Id.*

This result is particularly problematic in the context of the FSA, which resulted from a "once-in-a-generation criminal justice reform," "offers a

fresh start to those who put in the work when they were in prison to get right with the law," and sought to "revise[] policies that have led to overcrowded prisons." 164 Cong. Rec. S7838 (daily ed. Dec. 19, 2018) (statement of Sen. Chuck Grassley). Needlessly denying prisoners credits because of BOP's own delays undercuts these purposes by failing to reduce sentences for those who are doing everything they can "to get right with the law." *Id.*

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,

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July 23, 2025

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