

No. 25-2609

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Ivan J. Stark, Jr.,

Petitioner-Appellant,

v.

Brian Lammer, Warden,

Respondent-Appellee.

On Appeal from a Final Judgment of the
United States District Court for the Northern District of Illinois
Case No. 3:24-cv-50236, Hon. Iain D. Johnston

**REPLY BRIEF FOR PETITIONER-APPELLANT
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Table of Contents

	Page(s)
Introduction and Summary of Argument	1
Argument.....	3
I. BOP must award Stark credits for the eleven months after his sentencing but before he arrived at his designated BOP facility.	3
A. Stark’s arguments are properly preserved.	3
B. Under the First Step Act, a prisoner earns credits without first undergoing a risk and needs assessment.....	7
C. BOP is using the assessment requirement to implement an unlawful regulation.	15
D. Even if an assessment is required, the assessment does not have to predate the programming that earns a prisoner credits.	18
II. BOP must award Stark credits for the period he spent at MCC Chicago.	19
III. This case is not moot.	20
IV. Stark properly brought a habeas claim.	21
Conclusion	23

Table of Authorities

Cases	Page(s)
<i>Bittner v. United States</i> , 598 U.S. 85 (2023).....	9
<i>Bufkin v. Collins</i> , 604 U.S. 369 (2025).....	7
<i>Cazares v. Hendrix</i> , 575 F. Supp. 3d 1289 (D. Or. 2021)	12
<i>Church of Scientology v. United States</i> , 506 U.S. 9 (1992).....	20
<i>Clarke v. United States</i> , 703 F.3d 1098 (7th Cir. 2013).....	22
<i>Corner Post, Inc. v. Bd. of Governors</i> , 603 U.S. 799 (2024).....	11
<i>Covalt v. Carey Canada Inc.</i> , 860 F.2d 1434 (7th Cir. 1988).....	11
<i>Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare Servs.</i> , 7 F.4th 555 (7th Cir. 2021)	4
<i>Dunaev v. Engleman</i> , 2025 WL 1558454 (C.D. Cal. Apr. 28, 2025)	18
<i>Giovinco v. Pullen</i> , 118 F.4th 527 (2d Cir. 2024).....	22
<i>Gonzalez v. Herrera</i> , 151 F.4th 1076 (9th Cir. 2025)	22
<i>Goodman v. Ortiz</i> , 2020 WL 5015613 (D.N.J. Aug. 25, 2020)	12

Graham v. Broglin,
922 F.2d 379 (7th Cir. 1991)..... 22, 23

Hare v. Ortiz,
2021 WL 391280 (D.N.J. Feb. 4, 2021)..... 12

Hargrove v. Healy,
155 F.4th 530 (6th Cir. 2025) 22

Harris v. Duckworth,
909 F.2d 1057 (7th Cir. 1990)..... 22

Jackson v. Carlson,
707 F.2d 943 (7th Cir. 1983)..... 22

Johnson v. Prentice,
29 F.4th 895 (7th Cir. 2022) 5

Kavaja v. Emmerich,
2025 WL 1983889 (7th Cir. 2025) 22

Kisor v. Wilkie,
588 U.S. 558 (2019)..... 17

Loper Bright Enters. v. Raimondo,
603 U.S. 369 (2024)..... 12, 17

Lopez v. Emmerich,
2025 WL 3172841 (7th Cir. 2025) 22

Mohammed v. Stover,
2024 WL 1769307 (D. Conn. Apr. 23, 2024)..... 14

Pittman v. Warden, Pontiac Corr. Ctr.,
960 F.2d 688 (7th Cir. 1992)..... 5

Puana v. Williams,
2024 WL 4932514 (D. Colo. Dec. 2, 2024) 14

Puffer v. Allstate Ins. Co.,
675 F.3d 709 (7th Cir. 2012)..... 6

Ricci v. Salzman,
976 F.3d 768 (7th Cir. 2020)..... 6

Soo Line R.R. Co. v. Consol. Rail Corp.,
965 F.3d 596 (7th Cir. 2020)..... 5

United States v. Olano,
507 U.S. 725 (1993)..... 3

Valladares v. Ray,
130 F.4th 74 (4th Cir. 2025) 22

Williams v. Dieball,
724 F.3d 957 (7th Cir. 2013)..... 6

Wong v. Warden, Yankton Fed. Prison Camp,
2024 WL 4027918 (D.S.D. Sep. 3, 2024)..... 17

Statutes

18 U.S.C. § 3585(a)..... 16, 17

18 U.S.C. § 3621(h)(1) 8

18 U.S.C. § 3621(h)(1)(A) 8

18 U.S.C. § 3621(h)(6) 7, 9

18 U.S.C. § 3621(g)(1)..... 8

18 U.S.C. § 3621(g)(1)(B)..... 12

18 U.S.C. § 3624(g)(3)..... 23

18 U.S.C. § 3632 7

18 U.S.C. § 3632(b)..... 10

18 U.S.C. § 3632(c) 10

18 U.S.C. § 3632(d)(4)(A)..... 8, 14

18 U.S.C. § 3632(d)(4)(A)(i) 7, 8, 9

18 U.S.C. § 3632(d)(4)(A)(ii) 8
18 U.S.C. § 3632(d)(4)(C)..... 20, 21, 23
18 U.S.C. § 3632(d)(4)(D) 11
18 U.S.C. § 3635(3)..... 8
18 U.S.C. § 3635(3)(C)(xi)..... 18

Regulations

28 C.F.R. § 523.41(c)(4)(ii)..... 19
28 C.F.R. § 523.42(a) 16, 17
28 C.F.R. § 523.42(b)(2)..... 12
28 C.F.R. § 523.42(b)(3)..... 4

Other Authorities

164 Cong. Rec. S7838 (daily ed. Dec. 19, 2018) (statement of
Sen. Charles Grassley) 11
Fed. Bureau of Prisons, Male PATTERN Risk Scoring Tool,
[www.bop.gov/inmates/fsa/docs/male_pattern_form.pdf?v=](http://www.bop.gov/inmates/fsa/docs/male_pattern_form.pdf?v=1.3)
1.3..... 14

Introduction and Summary of Argument

The First Step Act creates a statutory bargain: When prisoners participate in qualifying programs, they earn credits. Ivan Stark fulfilled his end of the bargain. Under the FSA, prison work is a qualifying program, and BOP recognized that work was one of Stark's needs. And Stark did work: While he was waiting for BOP to transfer him, Stark worked three prison jobs and enrolled in drug-treatment and mental-health programs. So, under the FSA, he should have earned credits.

But BOP didn't uphold its side of the deal. BOP denied Stark credits even though it does not dispute (1) that he did work and other qualifying programs or (2) that work was one of his identified needs. Instead, BOP waited nearly a year to assess Stark's needs and now says that Stark was categorically ineligible to earn credits during that eleven-month wait.

BOP's position is at odds with both the First Step Act and BOP's own practices. Begin with the statute. The FSA obligates BOP to both provide programming and award corresponding credits. Contrary to BOP's assertions, the FSA does not relieve BOP of its obligations just because BOP waited to administer an assessment.

BOP's practices reinforce this interpretation. Because BOP regularly awards credits to prisoners who have not undergone an assessment, it is disingenuous for BOP to now say that an assessment is required. Stark participated in programming for eleven months after sentencing and

before he arrived at his designated facility. He is entitled to credits for this entire period.

Stark is entitled to credits for a second period, too. BOP denied Stark credits the entire time he was at MCC Chicago—a BOP facility—*after Stark had already undergone multiple assessments*. Stark was participating in programming during this time. So, even assuming (wrongly) that an assessment must predate earned credits, Stark should have earned credits for his post-assessment time at MCC Chicago.

Instead of seriously debating the merits, BOP tries to erect three procedural barriers. None has merit.

First, BOP says that Stark's arguments are forfeited. That's wrong. Stark has consistently argued that his pre-assessment programming entitled him to credits. That's the same argument he is making now.

BOP also says that Stark's case is moot. That's wrong, too. A favorable decision will award Stark meaningful relief because Stark's credits can be used to reduce his term of supervised release.

Finally, BOP says that Stark can't bring a habeas claim. But courts—including this one—have recognized that habeas is the proper vehicle when a person challenges the denial of credits that impact their sentence.

Consistently, BOP has sought to shirk its obligations under the FSA. Under BOP's logic, it could withhold assessments forever, and prisoners could never earn credits. The FSA forecloses both BOP's reasoning and its result. This Court should reverse.

Argument

I. BOP must award Stark credits for the eleven months after his sentencing but before he arrived at his designated BOP facility.

A. Stark's arguments are properly preserved.

To start, BOP says that Stark's arguments are forfeited.¹ That's wrong both as a matter of fact and law.

1. First, the facts. BOP points to three overlapping arguments it says are forfeited: (1) Stark can earn credits without first undergoing an assessment; (2) BOP's assessment requirement conflicts with the FSA; and (3) an assessment doesn't have to predate programming. Resp. Br. 7.

But Stark presented these arguments to the district court. He argued that the work he performed before July of 2021 (as an orderly, shower orderly, meal tray distributor, and in drug-treatment and mental-health programs) constituted successful participation. App. 3-4. He also said that this programming matched his "work need based on a computer survey taken in Aug of 21." App. 3. He has always argued that his pre-assessment work counted for credits, full stop. That's the same argument at issue in this appeal.

¹ BOP says that Stark *waived* his arguments, *see* Resp. Br. 7-12, but is actually accusing Stark of *forfeiture*. *See United States v. Olano*, 507 U.S. 725, 733 (1993) (citation omitted) (contrasting "the failure to make the timely assertion of a right" (which is forfeiture), with "the intentional relinquishment or abandonment of a known right" (which is waiver)).

Stark's habeas petition also straightforwardly argued that "[t]he BOP denial comes from its own internal policy not the FSA law." App. 3; *see also* App. 5 (contending that *Chevron* deference to BOP policy is no longer proper). He then referenced BOP's program statement 5410.01, which defines successful participation. App. 3. And his petition attached (and therefore incorporated) a response he received to an administrative grievance, stating that the program statement bars prisoners from earning credits "for participating in [programs] that are not tied to the inmate's individualized risk and needs assessment." App. 12.

To be sure, it is BOP's regulation, not the program statement, that imposes the assessment requirement. The relevant regulations state that a prisoner's programming must be recommended by BOP "based on" an assessment. 28 C.F.R. § 523.42(b)(3); *accord id.* § 523.41(c)(2).

But that distinction doesn't matter for three reasons. First, whether BOP's assessment requirement comes from the regulation or the program statement, Stark's argument is the same. Parties forfeit issues, not authorities, so even if Stark pointed to the wrong authority, that doesn't create a forfeiture. *See Dr. Robert L. Meinders, D.C., Ltd. v. United Healthcare Servs.*, 7 F.4th 555, 561 (7th Cir. 2021). Second, Stark's reference to the program statement was proper because the program statement includes the full text of the relevant regulations. *See* App. 64, 70. Put differently, the regulations are part of the program statement. Third, BOP itself told Stark that the assessment requirement came from

the program statement. *See* App. 12. BOP should not be able to (1) tell Stark that the policy statement imposes the assessment requirement, App. 12, and then (2) later say that Stark’s challenge improperly cited the policy statement instead of the regulations.

2. BOP is also wrong on the law. BOP articulates a far more expansive version of waiver and forfeiture than what this Court’s decisions contemplate. “Waiver doctrine rests on concerns about fair notice and the proper roles of the trial and appellate courts in our adversarial system.” *Johnson v. Prentice*, 29 F.4th 895, 903 (7th Cir. 2022).

To start, “an appellate court can always consider the merits of any theory relied on by the district court.” *Pittman v. Warden, Pontiac Corr. Ctr.*, 960 F.2d 688, 690 (7th Cir. 1992). The district court determined that Stark wasn’t “participating” in programming because his programming wasn’t recommended based on an assessment. App. 127. This Court is entitled to consider whether the district court’s reasoning is correct.

BOP is also wrong about the level of specificity needed to preserve an argument. True, “a conclusory argument that amounts to a little more than an assertion does not preserve a question.” *Johnson*, 29 F.4th at 903 (quoting *Soo Line R.R. Co. v. Consol. Rail Corp.*, 965 F.3d 596, 601 (7th Cir. 2020)). But an argument “need not be present in all its particulars” before the district court, and “a party may elaborate in its appellate briefs.” *Id.* (quoting *Soo Line R.R. Co.*, 964 F.3d at 601).

BOP cherry-picks language from three decisions to demand a level of exactitude not required from any litigant, let alone a pro se litigant like Stark. In one case, a counseled party had not preserved an argument because he “did nothing more than give a barebones recitation of the relevant standard ... then conclusorily say it was met.” *Williams v. Dieball*, 724 F.3d 957, 962 (7th Cir. 2013). In another, a party could not raise a disparate-impact theory of discrimination on appeal, when the plaintiff had previously argued only a pattern-or-practice theory, never argued that a facially neutral policy resulted in a disparate impact, and cited no disparate-impact cases. *See Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718 (7th Cir. 2012). In the third, a party forfeited its argument that the *state* court had jurisdiction (therefore granting the federal court derivative jurisdiction) when it had previously invoked only *federal* mandamus jurisdiction. *See Ricci v. Salzman*, 976 F.3d 768, 770-71 (7th Cir. 2020). The throughline of these three cases is that a party cannot rely on an entirely unpreserved theory of the case.

By contrast, Stark acknowledged in the district court that he did not receive an assessment until July 20, 2021, but argued that he participated in work and other programming that should have earned him credits before then. App. 3-4. That is the same argument we are making here.

B. Under the First Step Act, a prisoner earns credits without first undergoing a risk and needs assessment.

Our opening brief explains that a prisoner earns credits without first undergoing a risk and needs assessment. This conclusion is clear from the FSA, which (1) requires that BOP *shall* provide programming and credits; and (2) does not tether programming or credits to an assessment. *See* Opening Br. 17-20. And it's also clear from BOP's practice: The agency regularly awards credits prior to and unrelated to any assessment. *See id.* at 21-23.

1. To start, the FSA imposes mandatory obligations on BOP: BOP "shall" provide programming and award corresponding credits. 18 U.S.C. §§ 3621(h)(6), 3632(d)(4)(A)(i). BOP argues that the FSA affords it discretion in administering credits because the word "shall" must be read in context. Resp. Br. 13-15. In BOP's view, "shall" means only that BOP shall "create the risk-needs system" but otherwise gives BOP authority (and discretion) in choosing how to implement that system. *Id.* at 15.

It's true that the FSA uses the word "shall" in a range of contexts. Section 3632 alone uses the word "shall" thirty-two times. *See* 18 U.S.C. § 3632. But the prevalence of that word underscores our point: that the FSA is replete with "mandatory command[s]" that BOP must follow. *Bufkin v. Collins*, 604 U.S. 369, 379 (2025). And the particular "shall" requirements on which BOP relies don't undercut the mandatory nature of the requirements at issue here.

BOP first highlights subparagraph 3632(d)(4)(A), which says that prisoners who “successfully complete[]” programming “shall earn” credits. 18 U.S.C. § 3632(d)(4)(A); *see* Resp. Br. 16. That provision doesn’t say that programming (or its completion) must be tied to an assessment. And it implicitly incorporates the definition of “evidence-based recidivism reduction program[s],” which *also* doesn’t require programming to be tied to an assessment. 18 U.S.C. § 3635(3). The absence of an express assessment requirement in these provisions is telling because, in other circumstances, an assessment *is* expressly required. *E.g., id.* §§ 3624(g)(1), 3632(d)(4)(A)(ii); *see* Opening Br. 19-20. But not here.²

BOP also argues that paragraph 3621(h)(1) requires an assessment to precede credits. *See* Resp. Br. 17-18. This provision describes BOP’s obligations to roll out its implementation of the FSA. *See* 18 U.S.C. § 3621(h)(1). BOP focuses on isolated phrases, such as the requirements that BOP “implement and complete the initial intake” assessment and “begin to assign prisoners to appropriate” programming. *Id.* § 3621(h)(1)(A); *see* Resp. Br. 18. But, in their proper context, those

² BOP suggests that Stark has no claim because only minimum- and low-risk prisoners are entitled to earn credits. Resp. Br. 17. That’s clearly wrong. To arrive at this assertion, BOP cites a provision stating that minimum- and low-risk prisoners earn five *extra* days of credits beyond the baseline. *See* 18 U.S.C. § 3632(d)(4)(A)(ii). But all prisoners earn the baseline ten days for each thirty days of program participation. *See id.* § 3632(d)(4)(A)(i). (For example, Stark progressed from high to medium to low risk, and he earned credits at each risk level. App. 43 ¶¶ 15-19.)

phrases don't require a assessment to predate credits; they just mean that BOP had to start implementing assessments, something it hadn't done prior to the FSA's enactment.

BOP next turns to paragraph 3621(h)(6), which requires BOP to “provide all prisoners with the opportunity to actively participate in [programming] according to their specific criminogenic needs, throughout their entire term of incarceration.” 18 U.S.C. § 3621(h)(6); *see* Resp. Br. 19. BOP argues because it must provide programming based on prisoners’ “specific criminogenic needs,” the programming must be based on an assessment for a prisoner to earn credits. Resp. Br. 19. That’s wrong for two reasons.

First, this language appears in a context discussing *BOP’s* obligations, not in a provision about what a *prisoner* must do to earn credits. *Compare* 18 U.S.C. § 3621(h)(6), *with id.* § 3632(d)(4)(A)(i). BOP has to make available programming that’s consistent with each prisoner’s specific criminogenic needs. But Congress declined to impose a reciprocal requirement on prisoners before they could earn credits. That omission “convey[s] a difference in meaning.” *Bittner v. United States*, 598 U.S. 85, 94 (2023). A prisoner is not bound by the same requirement as BOP.

Second, if BOP were correct, it would be violating the statute in another way. The FSA mandates that BOP provide programming (1) to “all prisoners” (2) “according to their specific criminogenic needs” (3) “*throughout their entire term of incarceration.*” 18 U.S.C. § 3621(h)(6)

(emphasis added). Under BOP's reading, programming "according to [prisoners'] specific criminogenic needs" means programming recommended *after an assessment*. See Resp. Br. 19. BOP concededly spent nearly a year not providing Stark with post-assessment programming. By attempting to avoid one statutory duty, BOP tacitly acknowledges that it is violating another.

For similar reasons, BOP's invocation of subsection 3632(b) gets it nowhere. See Resp. Br. 21-22. This provision states that the risk-and-needs assessment system "shall provide guidance on the type, amount, and intensity" of programming. 18 U.S.C. § 3632(b); see Opening Br. 19. BOP argues that the word "shall" means that the assessment is mandatory before programming can happen.

But, as just explained, BOP offers no good reason why BOP's obligations restrict how a prisoner may earn credits, especially when BOP is failing to comply with those obligations. And, separately, although the assessment may impact whether BOP directs a prisoner to one program over another, it makes no sense to say that an assessment determines whether credit-bearing programming is available *at all*. As a parallel, when the FSA discusses housing assignments, it uses the exact same language as when it discusses programming—the assessment system "shall provide guidance on ... housing assignment determinations." 18 U.S.C. § 3632(c). But BOP can hardly say that an assessment must happen before a prisoner can be given a place to sleep.

2. Finding insufficient support for its position in the FSA’s text, BOP turns its attention to Congress’s purpose. Of course, a statute’s text—not Congress’s purported aims—generally determines a statute’s meaning. *See Corner Post, Inc. v. Bd. of Governors*, 603 U.S. 799, 815 (2024). But to the extent that purpose and context are relevant in discerning the text’s meaning, they support our reading of the statute, not BOP’s.

The FSA resulted from “once-in-a-generation criminal justice reform.” 164 Cong. Rec. S7838 (daily ed. Dec. 19, 2018) (statement of Sen. Charles Grassley). It “offers a fresh start to those who put in the work when they were in prison to get right with the law,” and “revises policies that have led to overcrowded prisons.” *Id.* Invoking BOP’s own delays to needlessly deny credits to prisoners who are actually participating in programming fails to reduce sentences for those who are doing everything they can “to get right with the law.” *Id.*

BOP relies on two press releases to suggest otherwise. *See* Resp. Br. 20-21. No case of which we are aware has suggested that a press release is “legislative history” that bears on the meaning of statutory text. *See Covalt v. Carey Canada Inc.*, 860 F.2d 1434, 1438 (7th Cir. 1988). In any event, the press releases don’t support BOP’s position. They state that violent offenders and likely recidivists can’t benefit from credits. *See* Resp. Br. 20-21. True, but irrelevant. These statements track *other* mechanisms in the FSA that (1) categorically exclude certain violent offenders categorically from receiving credits, 18 U.S.C. § 3632(d)(4)(D),

and (2) allow only minimum- and low-risk prisoners to apply credits toward early release, *id.* § 3624(g)(1)(B).

3. BOP's litigation position is inconsistent with its own practices. BOP in fact has repeatedly awarded credits that aren't based on assessments.

Start with the credits that BOP awarded before the assessment tool was created. Several district-court decisions discussed BOP's obligations to award credits before the creation of the assessment. *See Goodman v. Ortiz*, 2020 WL 5015613 (D.N.J. Aug. 25, 2020); *Cazares v. Hendrix*, 575 F. Supp. 3d 1289 (D. Or. 2021); *Hare v. Ortiz*, 2021 WL 391280 (D.N.J. Feb. 4, 2021). BOP takes issue with each. *See* Resp. Br. 22-23. But BOP ignores its own regulation that categorically awarded credits to prisoners who participated in programming before January 14, 2020, without regard to any assessment. *See* 28 C.F.R. § 523.42(b)(2); *see* Opening Br. 21 (discussing this regulation).

At any rate, BOP's arguments make no sense. BOP tries to distinguish these cases by saying that they focus on *applying* credits, not *earning* credits. *See* Resp. Br. 22. But, of course, if a prisoner has not earned credits, he has nothing to apply. BOP also points out these decisions predated *Loper Bright*. *See* Resp. Br. 23. But that especially makes no sense—after *Loper Bright*, BOP is entitled to *less* deference, not more. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13 (2024).

BOP next takes issue with our statement that once prisoners arrive at their designated facility, BOP awards credits without regard to any

assessment (or even any participation). *See* Resp. Br. 23-24. We agree with BOP that prisoners who *refuse* programming don't get credits. And we also agree that, when BOP is actually providing programming, credits incentivize prisoners to participate. But for many prisoners who are at their designated facility, BOP is either not providing programming based on an assessment or not providing programming at all. *See* Opening Br. 21-23. And yet, BOP nonetheless awards credits to prisoners in these circumstances. *See id.*

In fact, BOP awarded pre-assessment credits to Stark himself: It gave him credits starting the day he arrived at FCI Pollock, not on the date that he was assessed. App. 42 ¶ 10. BOP says this is wrong because Stark was assessed immediately upon arrival. Resp. Br. 27. The record belies that assertion. Stark's pleadings allege that he arrived at FCI Pollock on July 1, 2021, but wasn't assessed until July 20. App. 3. The gap between his arrival and his assessment is supported by BOP's own evidence. BOP emphasizes that Stark's first assessment period was July 1, 2021 through July 29, 2021. Resp. Br. 27-28; *see* App. 43 ¶ 15. BOP's statements elsewhere indicate that the assessment is administered at the *end* of an assessment period, not the beginning of it. For example, BOP indicates that his second assessment reflecting a low PATTERN score occurred on January 15, 2024, which was at the *end* of his second "low" assessment period. *See* App. 43 ¶¶ 17-18; App. 54. BOP has offered no reason why this wouldn't hold true for the first assessment period as well.

And BOP fails to grapple with the fact that its practice extends far beyond its treatment of Stark. As a general matter, “BOP allows inmates to begin immediately earning time credits upon their arrival at their designated BOP facility, even if the assessment has not yet been completed.” *Mohammed v. Stover*, 2024 WL 1769307, at *6 (D. Conn. Apr. 23, 2024); *see* Opening Br. 24-25. BOP also regularly administers assessments and then backdates them to an earlier date. *See Puana v. Williams*, 2024 WL 4932514, at *1 (D. Colo. Dec. 2, 2024). The position that BOP now takes is at odds with BOP’s across-the-board practices.

4. BOP invokes a range of practical considerations. *See* Resp. Br. 24-25. None may be employed to evade the statute’s text. But, even on their own terms, none is persuasive.

To start, BOP argues that prisoners can’t receive an assessment until after they arrive at their designated facility. Resp. Br. 24-25; *see id.* at 17. But BOP never explains why that’s so. The assessments are straightforward and could presumably be administered anywhere. *See, e.g.*, Fed. Bureau of Prisons, Male PATTERN Risk Scoring Tool³ (risk assessment); App. 91 (needs reassessment). And, even if BOP were correct that an assessment needs to wait, BOP doesn’t explain why the same must be true of programming, which, under the FSA, is what entitles a prisoner to credits. *See* 18 U.S.C. § 3632(d)(4)(A).

³ www.bop.gov/inmates/fsa/docs/male_pattern_form.pdf?v=1.3.

BOP also protests that when a prisoner is not at a BOP facility, BOP staff members can't evaluate whether he is successfully participating in programming. Resp. Br. 25. This argument might strike a different chord if BOP actually did these types of evaluations. But, as we've explained, once a prisoner is at his designated facility, BOP simply awards credits as the default, whether he has successfully participated in programming or not. *See* Opening Br. 21-25; *supra* at 13-14.

Finally, BOP says that our interpretation impermissibly loosens the connection between programming and credits. *See* Resp. Br. 25-26. To the contrary, it is BOP's position that breaks that connection. Under BOP's reading, there's nothing a prisoner can do to earn credits until he's at his designated facility. That eliminates the statutory incentive for him to participate in programs that might help him lower his recidivism risk before he arrives at his designated facility. By contrast, our reading best preserves the connection between programming and credits: When a prisoner completes programming, he gets credits. Under the FSA, nothing more is required.

C. BOP is using the assessment requirement to implement an unlawful regulation.

BOP purports to tether credits to the date of an assessment. But it actually ties credits to a prisoner's arrival at his designated facility. *See* Opening Br. 24-25; *supra* at 13-14. BOP both (1) refuses to administer an assessment until after a prisoner arrives at his designated facility; and

(2) begins awarding credits on the date of arrival, not the date of assessment. In doing so, BOP invokes the assessment to delay credits until after a prisoner has arrived at his designated facility. That practice implements a regulation—28 C.F.R. § 523.42(a)—which states that a prisoner’s sentence commences on “the date the inmate arrives or voluntarily surrenders at” his designated BOP facility.

We have already explained that this regulation is unlawful because it directly contradicts the statute, which states that a prisoner’s sentence commences once he is both sentenced and “received in custody awaiting transportation” to his designated BOP facility. 18 U.S.C. § 3585(a); *see* Opening Br. 26-28. The regulation and statute define the commencement of a sentence differently, so the statute, not the regulation, controls. *Compare* 18 U.S.C. § 3585(a), *with* 28 C.F.R. § 523.42(a).

Tellingly, BOP has not cited a single case finding that the regulation can be reconciled with the statute. Across the board, courts have held that the regulation is invalid. *See* Opening Br. 27 n.7. This Court should do the same.

BOP protests that the regulation is valid because it “does not re-define when the term of imprisonment commences but rather ... sets forth when a prisoner begins earning FSA time credits.” Resp. Br. 29. That’s wrong. The regulation sets forth when a prisoner earns time credits *by defining* when a term of imprisonment commences. It says that a prisoner begins earning credits “after the inmate’s term of imprisonment *commences* (the

date the inmate arrives or voluntarily surrenders at [his designated BOP facility]).” 28 C.F.R. § 523.42(a) (emphasis added). That’s exactly the thing—commencement of a sentence—that the statute defines differently. *See* 18 U.S.C. § 3585(a).

This matters because BOP has used the assessment requirement to delay the start of credits beyond what the FSA allows. Even if an assessment were required, BOP could not delay the assessment, programming, and credits simply “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. Sep. 3, 2024). “Any such unreasonable delay on the part of the BOP in assessing the prisoner should not inure to the detriment of the prisoner.” *Dunaev v. Engleman*, 2025 WL 1558454, at *4 (C.D. Cal. Apr. 28, 2025).

BOP invokes *Auer* deference to argue that this Court should defer to its reading of its regulation and program statement. *See* Resp. Br. 29-31. *Auer* deference is irrelevant. It is true that, under certain circumstances, courts defer to agencies’ interpretations of their own regulations. *See Kisor v. Wilkie*, 588 U.S. 558, 568 (2019). But here BOP’s problem is statutory: BOP’s regulations and policy statement are at war with the FSA. Deference does not help BOP with that. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13 (2024).

D. Even if an assessment is required, the assessment does not have to predate the programming that earns a prisoner credits.

If the Court prefers not to reach the issues discussed above, it could take a narrower path. Stark's earliest assessment identified that he had a work need. App. 3, 14-16, 18. Before he arrived at his designated facility, Stark successfully participated in several prison jobs. App. 3-4. Prison jobs are qualifying programming. 18 U.S.C. § 3635(3)(C)(xi). So, as our opening brief explains (at 30-33), this Court simply could hold that even if an assessment is required, it need not predate a prisoner's participation in programming. Once the assessment occurs, the prisoner receives credits for all programming he has participated in, even if that programming predated the assessment.

BOP agrees that "a prisoner, like Stark, could complete programming prior to a determination of that prisoner's risk of recidivating." Resp. Br. 17. BOP also agrees "that the programming could later relate to a determined [need]." *Id.* The necessary conclusion of those two statements is that when a prisoner participates in programming related to a later-determined assessment-based need, the prisoner earns credits.

BOP resists this conclusion. It seems to argue that both an assessment and programming must happen *before* a prisoner can earn credits. Resp. Br. 17. We've already explained (at 3-17) why an assessment isn't required. But even if it were, BOP does not explain why the assessment

must happen first. Stark completed programming. He underwent multiple assessments. He should have earned credits.

II. BOP must award Stark credits for the period he spent at MCC Chicago.

Our opening brief explains (at 33-34) that BOP was wrong to deny Stark credits for the 31 days BOP imprisoned him at MCC Chicago (a BOP facility). BOP agrees that he had already undergone an assessment. Resp. Br. 27; *see* Opening Br. 11 n.3. BOP's only answer, without citation to the record, is that "Stark was not engaged in approved programming during th[is] time[]." Resp. Br. 23.

That's wrong. Stark adequately alleged that, while at MCC Chicago, he was enrolled in drug education and met with a psychologist "numerous times." App. 5. That programming lined up with his assessed needs. *See* AR 14 (recommending Stark for nonresidential drug treatment).

BOP's conclusory assertion is also at odds with its practice. BOP categorically excludes prisoners from participating when they are at any facility other than their designated institution—whether they are engaged in programming or not. *See* 28 C.F.R. § 523.41(c)(4)(ii). That's the rationale BOP invoked in the district court for denying Stark credits. App. 36-37. And it lines up with what the district court held: that the only reason Stark wasn't "successfully" participating is because BOP's regulations categorically exclude participation by prisoners not at their designated facility. App. 127-28; *see* 28 C.F.R. § 523.41(c)(4)(ii).

BOP's argument on this score also calls into question its previous claim that an assessment is a necessary predicate for earning credits. BOP has adopted a blanket rule: When a prisoner is outside of his designated institution, he won't earn credits, no matter what programming he has completed, and when a prisoner is at his designated institution, he earns credits, even if he hasn't completed any programming at all.

III. This case is not moot.

This Court should reach the merits. This case is not moot because Stark's remaining credits must be applied to reduce the term of Stark's supervised release. The availability of "meaningful relief"—here, the application of earned-time credits—defeats BOP's invocation of mootness. *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992).

We agree with BOP that any credits can no longer be applied to transfer Stark from prison to prerelease custody or from prerelease custody to supervised release. *See* Resp. Br. 6-7. While this appeal was pending, Stark completed his home confinement and is now on supervised release. *See* Opening Br. 13 n.5; Resp. Br. 7.

But that doesn't moot the case because the credits at issue can be applied to reduce the remaining period of Stark's supervised release. The First Step Act says as much: "Time credits ... shall be applied toward time in prerelease custody or supervised release." 18 U.S.C. § 3632(d)(4)(C).

“[A]ppl[ying]” credits “toward time in ... supervised release” means using those credits to reduce the overall length of a supervised release term. That reading is consistent with both the statute’s plain meaning and with how comparable statutory language is used throughout the U.S. Code. And because, for the most part, BOP does not contest our understanding of subparagraph 3632(d)(4)(C), we rely on our opening brief (at 35-38).

BOP’s only rejoinder is that we ignored the FSA’s use of “or.” *See* Resp. Br. 31-32. In BOP’s telling, this word confers discretion and means that BOP gets to choose how to apply any credits. That’s wrong, and Congress’s use of “or” does not confer discretion. BOP can apply credits “toward time in prerelease custody.” 18 U.S.C. § 3632(d)(4)(C). *Or* it can apply credits “toward time ... in supervised release.” *Id.* Credits can be applied in multiple ways, but when credits are available, they “shall be applied.” *Id.* The only way Stark’s remaining credits can now be applied is toward supervised release.

Stark was wrongly denied credits. He is no longer in prerelease custody. If his credits are reinstated, a remedy remains: BOP must apply those credits to reduce his term of supervised release.

IV. Stark properly brought a habeas claim.

BOP contends that Stark’s claim doesn’t sound in habeas. That argument is easily dispensed with. “If [a] prisoner is seeking what can fairly be described as a quantum change in the level of custody ... then

habeas corpus is his remedy.” *Graham v. Broglin*, 922 F.2d 379, 381 (7th Cir. 1991). Thus, this Court has long held that habeas is the appropriate vehicle for challenges implicating good-time and earned-time credits. *See, e.g., Harris v. Duckworth*, 909 F.2d 1057, 1058 (7th Cir. 1990); *Jackson v. Carlson*, 707 F.2d 943, 946 (7th Cir. 1983).

FSA earned-time credits should not be treated any differently. Across the board, courts of appeals—including this one—have reviewed claims related to the denial of FSA credits raised via a Section 2241 habeas petition. *See, e.g., Lopez v. Emmerich*, 2025 WL 3172841 (7th Cir. 2025); *Kavaja v. Emmerich*, 2025 WL 1983889 (7th Cir. 2025); *see also, e.g., Gonzalez v. Herrera*, 151 F.4th 1076 (9th Cir. 2025); *Valladares v. Ray*, 130 F.4th 74 (4th Cir. 2025); *Giovinco v. Pullen*, 118 F.4th 527 (2d Cir. 2024).

This principle applies equally regardless of whether a petitioner has moved to supervised release, as Stark has. A petitioner who is on supervised release is still in custody and therefore able to bring a habeas petition. *Clarke v. United States*, 703 F.3d 1098, 1101 (7th Cir. 2013); *see also Hargrove v. Healy*, 155 F.4th 530, 532 (6th Cir. 2025).

BOP suggests that Stark can’t bring a habeas petition because credits are applied to move him from prison into prerelease custody. Resp. Br. 33-34. Put differently, BOP contends that he challenges only the *location* of his imprisonment. *See id.*

This argument misunderstands how the FSA credit scheme operates. Credits may be applied to start a prisoner's term of supervised release early, 18 U.S.C. § 3624(g)(3), or, as we argue, to end the supervised release term early, *id.* § 3632(d)(4)(C); *see* Opening Br. 34-42. The latter is the only option still available to Stark. *See* Opening Br. 34. Either way, both of these transitions constitute a “quantum change in the level of custody,” so Stark's habeas petition is proper. *Graham*, 922 F.2d at 381.

Conclusion

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

Respectfully submitted,

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Certificate of Compliance

In accordance with Federal Rule of Appellate Procedure 32(g), I certify that this brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B) and Circuit Rule 32(c) because it contains 5,405 words, including footnotes and excluding the parts of the brief exempted by Rule 32(f); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word, set in Century Schoolbook in 14-point type.

/s/ Becca Steinberg

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