No. 09-5201

In the Supreme Court of the United States

MICHAEL GARY BARBER, *et al.*,
Petitioners,

v.

J. E. THOMAS, Warden, FCI Sheridan,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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MISCELLANEOUS

Introduction

This case involves the amount of available federal good time credits under 18 U.S.C. § 3624(b). The Bureau of Prisons (BOP) argues the meaning of "term of imprisonment" from the assumption that those credits are based on time served. This puts the cart before the horse. The mechanics of implementing the statute depend on an initial correct determination of what credits Congress intended to make available, which in turn depends on whether "term of imprisonment" means the sentence imposed. Once "term of imprisonment" is determined to be the sentence imposed, the mechanics of implementing the statute easily follow. Throughout the briefing, the BOP claims the petitioners are seeking credit for time not served, which is simply not the case: if "term of imprisonment" means the sentence imposed, the up to 54 days credit plus actual custody each year fully accounts for all the time in the judgment and commitment order.

The BOP's alternative plea for deference is undercut by its assertion that the statute is unambiguous and its Federal Register claim that the good time provisions are "clearly stated." If any deference is due, the Sentencing Commission's prior interpretation, which is the same as the petitioners' interpretation, should govern. Even if deference to the BOP were appropriate, the absence of a rationale for deviating from the Commission's interpretation renders the BOP's rule invalid and unreasonable. At each level of the protocols for statutory interpretation,

this Court's precedent supports construction of "term of imprisonment" as meaning the sentence imposed.

A. In Federal Sentencing, "Term Of Imprisonment" Is A Term Of Art Meaning The Sentence Imposed.

The BOP disregards the Sentencing Reform Act (SRA)'s use of "term of imprisonment" to describe the judicial authority to impose sentence and, instead, resorts to dictionaries to find that "imprisonment" – not "term of imprisonment" – is susceptible to an equally plausible meaning of "time served." Resp. 17. But "imprisonment" is not the phrase being construed: the statute uses "term of imprisonment." Within the SRA, Congress has repeatedly described the judicial action of committing a defendant to federal custody as imposing a "term of imprisonment" for all purposes. Pet. Br. 22. Congress has thus authoritatively defined the relevant phrase in a manner inconsistent and irreconcilable with the BOP's interpretation.

The BOP claims "term of imprisonment" must mean "time served" in the part of § 3624(b) that reads "at the end of each year of the prisoner's term of imprisonment." Resp. 18-19. On the contrary, sentence imposed is the only reasonable meaning of "term of imprisonment" in this context: each year of the term of imprisonment comprises actual incarceration and good time credits. Just as a prisoner completes the term of imprisonment by serving 85 percent of the sentence imposed while earning enough good time to fulfill the remaining 15 percent of the

term, "[t]he same is true with respect to each particular year of [the] sentence; upon serving 311 days of actual time, [the prisoner] earns 54 days credit, which immediately vests and thus wipes out the remainder of that year." *Moreland v. Fed. Bureau of Prisons*, 363 F. Supp. 2d 882, 893 (S.D. Tex. 2005), *rev'd*, 431 F.3d 180 (5th Cir. 2005). "In other words, this is purely a matter of bookkeeping." *Id.* at 894. The BOP's contrary interpretation ignores the text of the statute in which "each year" is immediately qualified by the adjectival phrase "of the prisoner's term of imprisonment."[1]

The BOP's interpretation also ignores the common usage in standard judgment and commitment orders, which sentence defendants to "imprisonment" for a "term of" a number of months. "Generally, courts use a standard form (AO245B) to impose judgment in a criminal case and provide reasons for that judgment." United States Sentencing Commission, Christine Kitchens, *Introduction to the Collection of Individual Offender Data by the United States Sentencing Commission*, May 2009, at 3. The Administrative Office's Form 245B commits the defendant to be imprisoned for a "term of" months under the heading

[1] In other words, the BOP's claim that the petitioners seek credit for time not served depends on prisoners *not* receiving credit toward the service of their term, beyond time served, at the end of each year of the term of imprisonment.

"imprisonment."[2] Just as "hike" does not mean a football maneuver in the context of a walk outdoors, "term of imprisonment" means sentence imposed in the context of the SRA.

B. The BOP Provides No Basis For An Unprecedented Deviation From Intra-Statutory Consistency Within A Single Sentence.

The BOP concedes "term of imprisonment" unambiguously means the sentence imposed in the first two of its three appearances in the first sentence of § 3624(b). Resp. 23. The BOP can cite no precedent where the same phrase used multiple times in a single sentence is given different meanings. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). There is simply no reason legislative drafters would violate the norms of their craft by using the same phrase in two different ways in such close proximity. *See* HOUSE OFFICE OF LEGISLATIVE COUNSEL, MANUAL ON DRAFTING STYLE (1995) § 102(d)(5) at 3 ("Avoid Utraquistic Subterfuges"); *see also* SENATE OFFICE OF THE LEGISLATIVE COUNSEL, LEGISLATIVE DRAFTING MANUAL (2000) § 105(a) at 6 ("Consistent Usage"). The BOP also fails to explain why, if "term of

[2] Administrative Office Form 245B (available at http://www.uscourts.gov/forms/ao245B.pdf). *Accord* AO245B (rev. 3/01); AO245B (rev. 8/96); AO245B (rev. 4/90).

imprisonment" means "time served," Congress would use "time served" to mean "time served" elsewhere in that same sentence. Pet. Br. 24-25.

Instead of directly addressing the third use of "term of imprisonment" in the same sentence, the BOP jumps to the final sentence of the statute, which states that "credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited within the last six weeks of the sentence." This sentence is completely consistent with "term of imprisonment" as the sentence imposed: the 54 days of potential credit for the last year or portion of the term of imprisonment shall be "prorated." The definition of "prorate" is "[t]o divide, assess, or distribute proportionately." BLACK'S LAW DICTIONARY 1340 (9th ed. 2009). Federal sentences are generally a number of months that only coincidentally might match the twelve months in a year. For any number of months (or days) over an exact year, proration of 54 days of potential credit is simple: the prorated available credits for six months is 27 days; for two months is 9 days; for three months is 18 days; for *n* months is *n*/12 months x 54.[3] For example, Mr. Barber's 320 month sentence is 26 years and eight months. This yields 36 days of potential good time credits for that "portion of the last year" (8/12 x 54 = 36). The amount

[3] Because the number of days varies from month to month, as well as in leap years, the formula can be reduced to days instead of months. Pet. Br. 32. If the sentence ends in an even twelve months, the full 54 for days is available as the "last year," rather than the alternative – "or" – "portion of the last year," of the term of imprisonment.

of available credit is known from the day the defendant sets foot in prison and can then be "credited" depending on behavior within the last six weeks before the projected release date.[4]

Further, the BOP leaves out the statute's use of the verb "credit" in the last sentence of subsection (b), which skews the relevant phrase. *Compare* Resp. 12 ("The statute requires . . . that the Bureau prorate the final award of credit") *with* 18 U.S.C. § 3624(b) ("credit for the last year or portion of the term of imprisonment shall be prorated *and credited* within the last six weeks of the sentence") (emphasis added). The proration can occur at the outset of incarceration, as the BOP acknowledges, but the crediting occurs in the last six weeks. *See Jama v. ICE*, 543 U.S. 335, 343 (2005) (a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase it immediately follows). Grammatically, the last sentence of § 3624(b) requires proration of the 54 days and crediting that prorated time within six weeks of release.[5]

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[4] For prisoners under the 1996 amendment, the credit does not vest until release.

[5] The BOP echoes the erroneous assumption in *Pacheco-Camacho v. Hood*, 272 F.3d 1266 (9th Cir. 2001), that "term of imprisonment" in the last sentence refers to all the days of actual custody, Resp. 22, which is inconsistent with the statute's text: "In the case of inmates sentenced to 366 days, the plain reading of subsection [b] would allow the awarding of 54 days for the first year of the sentence imposed and a proration of the portion of the final year, i.e. the single day." *Williams v. Dewalt*, 351 F. Supp. 2d 412, 417 n.5 (D. Md. 2004), *vacated*, 2005 WL 4705074 (D. Md. Dec. 22, 2005).

C. Throughout Federal Sentencing Statutes, "Term Of Imprisonment" Means The Sentence Imposed, Including The Exceptions Claimed By The BOP.

The BOP does not dispute that "term of imprisonment" is used hundreds of times in the SRA and the Guidelines to mean the sentence imposed by the court. There is no textual basis for not giving the same phrase the same meaning throughout the federal sentencing statutes. Even as it concedes that "term of imprisonment" unambiguously means the sentence imposed in 18 U.S.C. § 3624(a), the BOP claims that "term of imprisonment" means time served in two other subsections. Resp. 24. Neither provision, linguistically or logically, uses "term of imprisonment" for any other meaning than sentence imposed.

The provisions for pre-release custody in 18 U.S.C. § 3624(c) plainly refer to the sentence imposed, both before and after the Second Chance Act amendment. Prior to 2008, § 3624(c) allowed "a prisoner serving a term of imprisonment" to spend "the last 10 per centum of the term," not to exceed six months, in community corrections. 18 U.S.C. § 3624(c) (repealed 2008). The meaning of this phrase is simple: for sentences greater than 60 months, the maximum time was 6 months in a halfway house or home confinement; for sentences less than 60 months, community corrections was available for no more than 10 percent (*e.g.*, 18 month sentence permitted 1.8 months; 37 month sentence permitted 3.7 months). The amended form of § 3624(c) is even more clear: the BOP "shall, to

the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months)" in community corrections, retaining the six month or 10 percent formula as to home confinement. 18 U.S.C. § 3624(c)(1) and (2) (Supp. II 2008). Nothing in the text of § 3624(c) in any version suggests "term of imprisonment" is anything other than the sentence imposed.

Section 3624(d) also uses "term of imprisonment" to mean the sentence imposed. In providing prisoners with necessary support upon release, the statute states: "Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment," the BOP shall provide clothing, money, and transportation. 18 U.S.C. § 3624(d). "Term of imprisonment" here plainly means the sentence imposed because the sentence only expires, permitting the prisoner's release, when the components of a term of imprisonment – actual incarceration plus good time credits – have accounted for all the time in the judgment and commitment order.[6]

[6] The BOP also cited 18 U.S.C. § 3622, which does not use "term of imprisonment," and an accompanying executive order that, by stating "during their terms of imprisonment," simply means during the sentence imposed by the court. Resp. 28-29.

D. The History Of The Good Time Credit Statute Unequivocally Demonstrates That Congress Intended That "Term Of Imprisonment" Means The Sentence Imposed, Resulting In Minimum Service Of 85 Percent Of The Term.

As in § 3624(b), the antecedent good time credit statutes based good time credits on the sentence imposed. Pet. Br. 29-31. The BOP uses the same basic structure requiring an initial determination of the amount of available credits, followed by adjustment if the time is lost:

- Under the former statute, "[f]ederal inmates received deductions on the day that they set foot in prison, but could forfeit them during the service of their sentences for the misconduct." Resp. 30.

- Under the present statute, "[w]hen a prisoner enters federal custody, the Bureau calculates his projected release date based on the assumption that he will earn all possible credit." Resp. 19 n.5.

The purposes of § 3624(b), as well as the explicitly expressed intention of legislators, fully support the construction of the statute to provide 15 percent in good time credits, not 12.8 percent, based on the sentence imposed.

1. The Antecedent Good Time Statutes Established The Norm Of Basing Credits On The Sentence Imposed.

The petitioners' interpretation of "term of imprisonment" comports with the basic structure of the predecessor good time statutes. For most of the twentieth century, good conduct time was computed by multiplying the number of months of a sentence as imposed by the court by the appropriate number of days prescribed by the statute. *Moreland*, 363 F. Supp. 2d at 887. The BOP suggests that, rather than following statutory good time predecessor statutes, the construction should be modeled on the defunct industrial good time statute. But that statute included language – absent in § 3624(b) – pinning the credit to each month "of actual employment in an industry or camp." 18 U.S.C. § 4162 (repealed 1984). The use of "actual employment" demonstrates that Congress knows how to set good time against "actual" time and, when it does so, uses appropriate language. *See Leatherman v. Tarrant County*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio alterius*.").

2. The 85 Percent Rule Furthers The Congressional Goal Of Simplicity.

The 85 percent rule is simple to apply, while the BOP's mathematically complex 87.2 percent rule is not. The statute provides that the prisoner 1) "receive" 2) "credit toward the service of the prisoner's sentence" 3) "beyond the time served" 4) "at the end of each year of the prisoner's term of imprisonment." The statute

leaves to the BOP the determination whether the credit is earned, and the BOP can make the determination regarding behavior at the 311th day, the 365th day, the 380th day, or somewhere in between.[7] But once the determination is made, assuming the prisoner earned all available "credit toward the service of the prisoner's sentence," the year of the term of imprisonment is completed at day 311 of actual time in custody (365-54) of the first year or the 311th day of actual custody after the previous year's computation.[8]

The BOP's complaints about computation are simply a matter of failing to implement the bookkeeping required by the statute's plain meaning. An annual adjustment for good time credit – exactly what the statute calls for – resolves the BOP's practical complaints. The BOP's adherence to an anniversary date based on the date the sentence commenced, with no adjustment for credits the defendant should "receive" "at the end of each year of

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[7] As the *Moreland* district court vividly illustrated, the phrase "at the end" does not mean "after." 363 F. Supp. 2d at 886-87.

[8] "The use of the phrase 'beyond time served' dictates that prisoners should receive 54 days credit against their term of imprisonment based on 311 days in custody, plus 54 days of good conduct credit 'beyond time served,' equaling 365 days – a year of the sentence imposed." *Williams*, 351 F. Supp. 2d at 417.

the term of imprisonment," defies the statutory text.[9] Further, the BOP's algorithm results in absurdities. For example, for a sentence with 294 days remaining, "the [good conduct time] formula does not produce a result that will allow the number of days actually served plus the [good conduct time] to equal 294 days." JA-98. The BOP has it backwards: the 87.2 percent rule presents difficulties in application, and the 85 percent rule makes sense and is easy to apply.

3. Congress Articulated Its Intent That Good Time Credits Account For 15 Percent – Not 12.8 Percent – Of The Sentence Imposed.

There is no record support for the BOP's claims regarding the legislative history. Resp. 35-36. First, the Senate Report – in addition to individual Senators – articulated the good time credits as a percentage of the "term of imprisonment." Pet. Br. 34. Second, the words of the legislators explicitly referred to minimum service of 85 percent of the sentence pronounced by the judge:

> [I]f a judge says you are going to go to prison for 10 years, you know you are going to go to prison for at least 85 percent of that time – 8.5 years, which is what the law mandates. You

[9] Under the BOP system, the prisoner does not "receive" credit at the end of each year of the term of imprisonment, while the projected release date remains the same unless, due to failure to earn credits, the projected release date is moved back. Resp. 19 n.5.

> can get up to 1.5 years in good time credits, but that is all.

Pet. Br. 35. Third, Congress in its entirety acted on the assumption that federal prisoners receive up to 15 percent credits in seeking to align the federal and state standards, requiring service of "not less than 85% of the sentence imposed." Pet. Br. 35-36. The legislative history of § 3624(b) demonstrates that Congress meant what it said in establishing 54 days of good time credits for each year of the "term of imprisonment."

One further point regarding the legislative history: the BOP asserts the petitioners "cannot possibly claim to have lacked fair warning of the manner in which the Bureau calculates good time credit." Resp. 44. Of course they can. If legislators, including a co-author of the bill, were unaware of the BOP's idiosyncratic method of good time computation, a decade after § 3624(b)'s enactment, prisoners certainly did not know. The BOP never – in any regulation or program statement – spelled out that its method results in fewer available credits. Had fair notice been given, prisoners, families of prisoners, and advocates for defendants undoubtedly would have commented. The lack of fair notice is definitively established by the BOP's admission that the agency received no comments when its regulation was promulgated.

E. Any Ambiguity In The Statute Should Be Resolved By Application Of The Rule Of Lenity.

If there is ambiguity in Congress's use of "term of imprisonment" in § 3624(b), the Court should first consider the rule of lenity, which resolves any residual ambiguity and trumps agency deference.[10]

1. Section 3624(b) Is A Penal Statute Because The Available Good Time Credits Formed The Basis For The Sentencing Table And Determine The Actual Duration Of Incarceration.

The BOP's claim that the rule of lenity does not apply to § 3624(b) depends on Circuit rulings predicated on insufficient information. Resp. 41-44.[11] The courts were not informed that the Sentencing Commission had incorporated the 85 percent rule into the Sentencing Table utilized by sentencing judges in determining the length of sentences. The courts also assumed, incorrectly, that the BOP properly promulgated the regulation to which they deferred.

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[10] The BOP's summary of *Chevron* is incomplete, Resp. 14, given the rule of lenity, delegation, and promulgation issues in this case.

[11] Contrary to the BOP's suggestion, only three courts found that § 3624(b) was not the type of statute to which the rule of lenity applies, while the remainder found that the rule of lenity applied but was trumped by *Chevron* deference. *Compare* Resp. 41 *with* Pet. Br. 14-15 *and* NACDL Pet. *Amicus* 6-7.

Without citation, the First Circuit initially asserted that the good time credit statute "is not, strictly speaking, a 'criminal' statute, and thus we do not believe the rule of lenity would apply." *Perez-Olivo v. Chavez*, 394 F.3d 45, 53 (1st Cir. 2005). Following *Perez-Olivo*, the Second Circuit held that, "[b]ecause § 3624(b) is not a criminal statute, the rule of lenity is not relevant to this case." *Sash v. Zenk*, 428 F.3d 132, 134 (2d Cir. 2005). On petition for rehearing, the petitioner only invoked this Court's *ex post facto* rulings to argue that the good time credit statute is penal and therefore covered by the rule of lenity. In response, the court asserted that the notice function of the *ex post facto* prohibition was accomplished by the promulgation of the good time credit regulation. *Sash v. Zenk*, 439 F.3d 61 (2d Cir. 2006).

With fuller factual development and briefing, the reasoning underlying *Sash* no longer supports its conclusion. Pet. Br. 37-40; NACDL *Amicus* 14-16. First, the Sentencing Commission's incorporation of the 85 percent rule into the construction of the Sentencing Table eliminates any distinction between sentencing and prison administration because the sentence imposed is premised on the assumption of 15 percent available good time credits. Second, the assumption of an APA compliant regulation is not valid where the record establishes that the BOP violated the APA in promulgating the rule and never provided notice regarding the differential in available

credits.[12] Third, in *Sash*, the briefing, and therefore the court's decision, involved only *ex post facto* claims, not due process liberty, habeas corpus, and former jeopardy precedents of this Court that also treat good time credit statutes as penal.

This Court's precedents establish that § 3624(b) is penal, or criminal, for the purposes of the rule of lenity because the amount of available good time credit is essential to determining actual time of physical custody. Pet. Br. 37-40. Contrary to the BOP's suggestion, the Court's decisions in *Reno v. Koray*, 515 U.S. 50 (1995), and *Lopez v. Davis*, 531 U.S. 230 (2001), did not state that statutes regarding the administration of sentences are not penal statutes. Resp. 42-43. The Court in *Koray* concluded that the rule of lenity did not apply to the jail credit statute and "related sentencing provisions" because the statute was not ambiguous. 515 U.S. at 58, 65. The Court found the statute in *Lopez* unambiguously permitted the categorical exercise of discretion. 531 U.S. at 244 n.7. The question of available good time credit – from a statute in the Title 18 subchapter entitled "Imprisonment" – involves all the functions served by the rule of lenity: protecting against violation of the

[12] The lack of notice is not only apparent from Congress's 85 percent assumption, "courts and practitioners have commonly understood that federal inmates are eligible for a reduction of up to 15% of their sentence, through the earning of good time credits." *Williams*, 351 F. Supp. 2d at 419. *See also Halbert v. Michigan*, 545 U.S. 605, 620-21 (2005) (noting difficulties prisoners confront in navigating legal issues).

separation of powers, avoiding unwarranted loss of liberty, and assuring that statutes provide unambiguous notice regarding the extent of incarceration resulting from the imposition of a term of imprisonment.

2. The Rule Of Lenity Controls Any Ambiguity, Whether At The First Or Second Step Of Chevron *Analysis.*

The BOP ignores footnote 9 of *Chevron*, which requires application of substantive rules of statutory construction such as lenity at *Chevron*'s first step. Pet. Br. 40-42. Instead, the BOP relies on a footnote in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704 n.18 (1995), that addressed a supplemental argument claiming the rule of lenity applied to "facial challenges to administrative regulations whenever the governing statute authorizes criminal enforcement." Resp. 44. The *Sweet Home* footnote distinguished facial challenges from the normal application of the rule of lenity to ambiguous criminal statutes, citing *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 & n.9 (1992).

Unlike the present case, the Secretary in *Sweet Home* acted pursuant to a specific delegation from Congress and provided full and fair notice with a properly promulgated rule. Further, the *Sweet Home* regulation filled a statutory gap, while the phrase at issue in the present case purportedly has two meanings – with one meaning resulting in a harsher

sentence than the other. Thus, there is no gap left for the agency to fill. The as-applied challenge in the present case directly addresses actual incarceration and no valid regulation. This Court's precedent applying the substantive rule of lenity at the first step of *Chevron* controls.

At the second step of *Chevron*, the BOP claims it does not "act in a prosecutorial role in administering good time credit." Resp. 42 n.12. The reasoning of the *Crandon* concurrence, which was adopted at least in part in *Gonzales v. Oregon*, 546 U.S. 243, 264 (2006) (citing *Crandon v. United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring)), is based on separation of powers concerns that are as common to Justice Department agencies as to prosecutors themselves. Pet. Br. 42-46. This case starkly illustrates the prescience of the warning that giving persuasive effect to the Justice Department's statutory construction would replace "the doctrine of lenity with a doctrine of severity." *Crandon*, 494 U.S. at 178 (Scalia, J., concurring).

F. The BOP Received No Congressional Delegation To Determine The Amount Of Available Good Time Credits, While Congress's Delegation To The Sentencing Commission Necessarily Incorporated Such A Determination.

The BOP cites no statutory language authorizing it to determine the amount of available good time credits, relying only on the fiction of implied delegation

as an adjunct to its ministerial duties. The Sentencing Commission, on the other hand, received authorization to implement policy in the detailed congressional instructions underlying the creation of the Sentencing Table.

1. The Sentencing Commission's Statutory Mission Included Application Of The Good Time Credit Statute.

The BOP's position on the Sentencing Commission is based on legal and factual errors. Resp. 39-40. The legal argument relies on a citation that purports to demonstrate recognition of the BOP's post-SRA authority, but in fact only describes the pre-SRA regime. In *Mistretta v. United States*, 488 U.S. 361, 364-65 (1989), this Court described the pre-SRA parole system: "[W]ith the advent of parole, Congress moved toward a 'three-way sharing' of sentencing responsibility by granting corrections personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge." The BOP quotes a fragment of this passage as suggesting that *Mistretta* recognized the BOP's "distinct" role from the post-SRA Commission. Resp. 40. But the next sentence in *Mistretta* clarifies that the reference to Executive Branch personnel was to the pre-SRA Parole Board: aside from the roles of Congress and Judiciary, "the Executive Branch's parole official eventually determined the actual duration of imprisonment." 488 U.S. at 365. With the SRA, parole was abolished. *Mistretta* directly addressed the delegation of the SRA's implementation

to the Sentencing Commission, including calibration of the Sentencing Table under 28 U.S.C. § 994(m). Pet. Br. 47-51.

The BOP's legal error is compounded by factual errors. First, the BOP claims that the Commission's report documenting the calibration of the Sentencing Table using the 85 percent rule is "merely 'an estimate' that represented" "an amalgam of decision making processes." Resp. 41 n.10. But the citations do not support the quotations. The Commission's supplemental report establishes that the *baseline amount of actual custody*, not the *amount of good time credits*, was an "estimate" and based on the "amalgam" of decisions. JA-144 n.64. The report clearly describes the good time credits available as requiring minimum service of 85 percent of the sentence imposed. JA-146; *see also* JA-3, No. 24, Appx. C, at 8-20.

Second, the BOP cites to Appendix D of the Commission's fifteen year assessment that includes a description of the BOP's 13 percent "good time discount," Resp. 40, without mentioning that, in the substantive text of that same document, the Commission cites to § 3624(b) for the following: "In the SRA, Congress mandated that all offenders would serve at least *85 percent of the sentence imposed by the sentencing judge*, with a maximum reduction of about 15 percent as a reward for good behavior while in prison." United States Sentencing Commission, *Fifteen Years Of Guidelines Sentencing*, November 2004, at 45 (emphasis added). Contrary to the BOP's claim, the Commission recognized that, regardless of the BOP

practice, the statutory language of the SRA contemplates minimum service of the sentence imposed at 85 percent, not 87.2 percent.

Third, the BOP errs regarding the Commission's 1990 amendment to the introductory commentary regarding honesty in sentencing. The BOP asserts that the Commission's statement that "sentences" are reduced by approximately 15 percent was "a general estimate of the Bureau's practices, not an authoritative interpretation of Section 3624." Resp. 41 n.10. First, the phrase from the commentary is that "the sentence imposed by the court" is reduced by approximately 15 percent, not just "sentences." Pet. Br. 7. Second, 14.8 percent is a much closer approximation to 15 percent, than the 12.8 percent or 13 percent the BOP offers. Third, the Commission would be stretching the far reaches of irony to end a sentence that begins "[h]onesty is easy to achieve" with a 2.2 percent variance in the actual time defendants serve.

The Sentencing Commission based the most fundamental icon of the Guidelines regime – the Sentencing Table – on the assumption of the availability of 15 percent good time credit toward the sentence imposed. No amendment in compliance with the SRA has negated the Commission's approach. Given the express delegation of the SRA's implementation to the Sentencing Commission, any available discretion in interpreting the amount of available good time credits belongs to the Commission.

2. Congress Did Not Delegate To The BOP The Authority To Determine The Amount Of Available Good Time Credits.

Authorized delegations are not hidden in legislation. *Gonzales*, 546 U.S. at 267 (Congress does not delegate by hiding "elephants in mouseholes") (quoting *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)). The BOP is unable to point to any statutory delegation of authority to set the amount of available good time credits, instead relying on an implicit delegation. The BOP, under the direction of the Attorney General, has "charge of the management and regulation" of all federal prisons. 18 U.S.C. § 4042(a)(1). Congress delegated to the BOP only the determination whether a prisoner should receive good time credits, not the authority to determine how much credit is available. *See* Delegation of Authority, 53 Fed. Reg. 10871-01 (Apr. 4, 1988) (referring to the BOP's preexisting "general authority to implement disciplinary regulations"). In *Gonzales*, this Court held that deference is warranted only where the subject matter of agency action is clearly within the scope of delegated authority and where the agency acted in the exercise of that authority. 546 U.S. at 258. Neither predicate exists here. It is pure fiction that Congress decided to let the BOP determine whether the minimum actual custody for a sentence should be 85 percent or 87.2 percent of the term of imprisonment.

Unlike *Lopez*, Congress did not leave a statutory gap to be filled. Resp. 38-39. In *Lopez*, the Court found congressional delegation to narrow the class of

prisoners eligible for certain programming. 531 U.S. at 244. In contrast, the question in this case involves the kind of "pure question of statutory construction for the courts to decide." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987). Further, the Court specifically left open in *Lopez* the procedural validity of BOP rules, which is at issue here. 531 U.S. at 244 n.6. Unlike the present case, *Lopez* involved discretionary action within the scope of an unambiguous statute.

G. Under Basic Principles Of Administrative Law, The BOP Should Receive No Deference Because The Agency Acted Based On An Error Of Law, Did Not Properly Promulgate Any Rule, And Implemented An Unreasonably Harsh Limitation On Good Time Credits.

The BOP seeks *Chevron* deference despite its concession below that, under § 706 of the APA, the agency failed to sufficiently articulate the basis for its "time served" regulation. Resp. 46. Contrary to the BOP's assertion that the Ninth Circuit "erred" in accepting the concession, Resp. 13, the Court should find the concession was proper. Regardless of the concession, however, under well-established administrative law, the BOP interpretation should receive no deference, leaving the Commission's 85 percent standard as the default rule. *See also* 28 U.S.C. § 2243 (the Court shall dispose of habeas petitions "as law and justice require").

1. The BOP Conceded That It Failed To Sufficiently Articulate The Basis For The Regulation Governing Good Time Credits.

In the lower court, the BOP submitted a letter before oral argument citing *Arrington v. Daniels*, 516 F.3d 1106 (9th Cir. 2008), in which the Ninth Circuit held "the Bureau of Prisons violated the [APA] when it failed to sufficiently articulate the basis for a regulation . . . ." JA-8-20. The BOP acknowledged, under *Arrington*, "the regulation governing good conduct time credits suffers the same procedural infirmity . . . ." *Id.* Based on the BOP's concession that it violated § 706(2)(A) of the APA by failing to articulate a rational basis for its decision, the court found the regulation invalid, then addressed the remedy. JA-38, 46.

Throughout its response brief, the BOP cites to the declaration of BOP attorney Harlan Penn as providing a rationale for the BOP's rules. However, courts do not rely on *post hoc* litigation affidavits in reviewing agency action. *See*, *e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 49-50 (1983); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419 (1971); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168-69 (1962). The Court should hold the BOP to its concession. No exception is warranted on this record. In any event, when considered in the light of the administrative record, *Bagdonas v. Dept. of Treasury*, 93 F.3d 422, 427 (9th Cir. 1996) (citing *Overton Park*, 401 U.S. at 420), the declaration does not salvage the BOP's violation of the

APA, which the petitioners established in three different ways. Pet. Br. 46-58. Indeed, the district court agreed with the petitioners that the declaration did not establish exercise of discretion. JA-163-66 (further discovery and hearing unnecessary given that the declaration was consistent with the administrative record demonstrating no discretion was exercised).

2. The BOP Adopted Its Time Served Methodology Based On An Error Of Law.

The BOP has long argued that § 3624(b) is unambiguous. Because the BOP followed its mistaken view of the law, the agency necessarily did not exercise discretion in choosing between two viable meanings. Assuming the phrase "term of imprisonment" is ambiguous, the BOP acted based on a mistake of law that forecloses deference under the reasoning of *Securities and Exchange Comm'n v. Chenery Corp.*, 318 U.S. 80 (1943). Pet. Br. 52-53. The BOP's suggestion that it chose between two possible meanings is belied by its assertion in the Federal Register that the time-served method was "clearly stated by statute." JA-63. Because of its legal error in failing to recognize two available interpretations, the BOP deserves no deference under *Chenery* and *Negusie v. Holder*, 129 S. Ct. 1159, 1167 (2009). Pet. Br. 51-53.

3. The BOP Violated § 706 Of The APA When It Failed To Provide An Adequate Rationale For Its Rule.

The administrative record is barren, failing to provide any rationale for a harsher rule and failing to consider the Sentencing Commission's use of the 85 percent rule. Pet. Br. 53-56. The BOP relies solely on the Penn declaration's assertion that the time served method was consistent with "the correctional goals of effectively using [good conduct time] as a tool to reward good behavior and providing inmates knowledge of when they could be expected to be released from prison." Resp. 49 n. 16. Those goals are accomplished by any good time credit system. Indeed, they are better achieved based on the 85 percent rule because 1) the full available incentive for good behavior is provided, and 2) any inmate or sentencing judge just needs to multiply the sentence by .85, or subtract 15 percent from the sentence, to know when the earliest release from prison can be expected.

4. The Rule Requiring Service Of 87.2 Percent Of The Sentence Imposed Is Unreasonable.

The BOP's mission is served when "inmates earn as much good time as is allowed under the law." NACDL *Amicus* at 31 (quoting the Director of the BOP). The BOP's interpretation is unreasonable because the agency has never explained why, if two options exist, the harsher option should apply and why, given the calibration of the Sentencing Table using the 85 percent rule, the BOP should not give

credit at the same rate. Even in the briefing, even outside the administrative record, no explanation is given beyond describing the purposes of good time credit statutes in general and mechanical problems that presuppose the time served construction.[13] The BOP's rule is irrationally harsh and unreasonably inconsistent with the Sentencing Commission's previous implementation of the statute.

H. The BOP's Invocation Of "Practical Difficulties" Does Not Provide A Basis For The BOP's Reading Of The Statute.

The BOP invokes "practical difficulties" along with the passage of time as reasons to defer to informal agency action. Resp. 61-62. Such considerations do not warrant continued over-incarceration of 36,000 cumulative years at the cost of almost $1 billion that Congress did not clearly authorize.

1. The Duration Of The Agency's Misinterpretation Is Irrelevant To The Correct Interpretation Of The Statute.

"[O]nce Congress has spoken it is 'the province and duty of the judicial department to say what the law is.'" *Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980)

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[13] The BOP suggests a rationale might be provided in an interim rule yet to be unveiled. Resp. 47 n.14. Such *post hoc* justifications in response to litigation do not warrant deference, *supra* at 24, and any new rule should not apply retroactively. *See Lynce v. Mathis*, 519 U.S. 433, 439-40 (1997).

(quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). The construction of statutes is the bread and butter work of this Court, as Congress agreed in 5 U.S.C. § 706 (providing that courts "shall decide all questions of law [and] interpret constitutional and statutory provisions"). As entrenched administrative error in *Rapanos v. United States*, 547 U.S. 715, 752 (2006) (plurality), did not warrant "a sort of 30-year adverse possession that insulates disregard of statutory text from judicial review," the BOP's long-standing misinterpretation of § 3624(b) does not provide a basis for ruling against the petitioners. The primacy of the text and the rules of construction are especially appropriate where in the administrative record the BOP never asserted that the good time credit statute was ambiguous; never purported to make a decision between competing methods of calculating available good time credits; and never advised anyone that the method adopted by the BOP resulted in seven fewer days of available good time credits each year.

2. Properly Interpreted, The Statute Can Be Implemented With Relative Ease.

Although irrelevant to the interpretation of the statute, the BOP raises concerns regarding the difficulties of recalculating the sentences of "approximately 190,000 federal inmates – approximately 5,000 of whom would be eligible for immediate release." Resp. 51. The BOP can follow the law with relative ease because the statutory correction involves a simple computerized math fix. Each prison

has staff involved with prisoners' release plans, so the number of prisoners in each administrative unit is relatively small, especially when prioritized based on proximity to release. To assure no incorrect releases, the computerized recalculation is easily confirmed manually by multiplying the years of the term of imprisonment by seven days and assuring the new projected release date is not adjusted by more than the resulting number of days. The time periods are relatively short individually: 35 days for a five-year sentence; 70 days for a ten-year sentence; 140 days for a twenty-year sentence.

For the approximately 26.7 percent of the prison population who are aliens, the change in calculation merely accelerates referral to immigration authorities for removal. Likewise, transfer alone is at issue for those with state detainers. For most of the remaining prisoners, the BOP has placed or will place them in community corrections including home detention. The effect on probation offices will be diffused over 94 districts in the United States, and, as with crack cocaine retroactivity over-incarceration, case loads can be mitigated by early terminations for those already on supervised release.[14]

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[14] Sentencing Commission commentary recognized the availability of early termination of supervised release under 18 U.S.C. § 3583(e) for potential beneficiaries of retroactive Guidelines amendments who already completed terms of imprisonment. U.S.S.G. § 1B1.10, comment. (n.4(B)). If the petitioners prevail, district courts would have the same authority "in the interests of justice" to invoke § 3583(e) to reduce supervised release terms for those already released.

Recent experience with the retroactive crack cocaine amendment demonstrates that the BOP's concerns are exaggerated and that practical implementation can be accomplished with relative ease. In considering crack retroactivity, the Justice Department and the defense bar disagreed about the practical difficulties where each crack retroactivity case would involve review of the individual underlying case, rather than a simple math fix. "Despite 'sky-might-fall' concerns expressed by the Department of Justice," "the federal criminal justice system appears to have handled smoothly and effectively the various administrative challenges posed by making retroactive a Guideline fix that impacted nearly 10 percent of the entire federal prison population." Douglas A. Berman, *Exploring The Theory, Policy, And Practice Of Fixing Broken Sentencing Guidelines*, 21 Fed. Sent. Rptr. 182, 185 (Feb. 2009).[15] The BOP is fully capable of implementing in good faith the properly construed good time credit statute.

[15] *See also* United States Sentencing Commission, Public Hearing, July 29, 2009, statement of Vice Chair Castillo, at 204 ("I think [the implementation of retroactive crack amendment] is one of the greatest untold stories of federal sentencing, 20,000 individuals having their sentences reduced, and over 5,000 individuals have actually been released with very little recidivism problems . . . .").

3. Any Practical Difficulties With Implementing The Statute As Intended By Congress Are Outweighed By The Benefits Of Doing So.

The federal prisoner population constantly increases beyond the resources available to the BOP, resulting in overcrowded prisons, program cuts, and danger to guards and inmates alike. Federal prisons are currently at 137 percent of capacity. Rehabilitative programs such as the successful UNICOR work training program and the federal boot camp have been cut back or terminated entirely. The increase in prison population is accompanied by increased violence as the number of corrections officers trails the increase in inmates. Correct interpretation of the good time statute would reduce the general prison population and would allow increased utilization of community resources through earlier access to Second Chance Act programs.

The effect on prisoners is profound. While those working in the criminal justice system can become inured to days, months, and years of incarceration, each individual prisoner feels every extra day behind bars, away from family and friends, unable to pursue employment and life's passions. Each day of separation can be deeply felt by fathers, mothers, siblings, and especially children. The value our society and Constitution place on human freedom is betrayed by a rule that allows the administrative difficulty of correcting over-incarceration to justify more over-incarceration.

Lastly, the cost to the taxpayers in a time of scarce economic resources is tremendous. The non-capital costs of incarceration average about $25,894 a year. With the average term of imprisonment for eligible prisoners of about 9.5 years, at seven extra days for 195,435 prisoners, the cost to taxpayers is about $96.2 million per year. This cost only increases with every year that the misinterpretation of the statute continues, multiplying the distortion of the BOP budget and expense to taxpayers for incarceration Congress never clearly authorized.

Conclusion

This Court's precedent on statutory construction and protection of liberty requires construction of "term of imprisonment" to mean the sentence imposed. The mechanics of implementing the statute based on 54 days for each year of the "term of imprisonment" is easy because "each year" means actual custody plus good time credits. Any statutory ambiguity should be resolved in favor of lenity and the Sentencing Commission's assumption of 15 percent credits in calibrating the Sentencing Table, not the BOP's faulty rule favoring irrational severity. Not only is the 85 percent rule supported by the language and the context of the statute, reversal of the lower court furthers the strong policies favoring human freedom and protection of the public fisc.

Respectfully submitted this 15th day of March, 2010.

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