No. 09-5201

In the Supreme Court of the United States

MICHAEL GARY BARBER, ET AL., PETITIONERS

v.

J.E. THOMAS, WARDEN

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

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 3624(b), which provides that a federal inmate may receive credit toward the service of his sentence for exemplary conduct, requires the Federal Bureau of Prisons to calculate such credit on the basis of the sentence imposed rather than on the basis of time served.

2. Whether Congress has delegated the interpretation of 18 U.S.C. 3624(b) to the United States Sentencing Commission rather than to the Federal Bureau of Prisons.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1-2) is unreported. The opinions and orders of the district court (Pet. App. 3-12, 13-22) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 2009. The petition for a writ of certiorari was filed on July 8, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-19a.

STATEMENT

Petitioners are current federal prisoners convicted of various drug and weapons offenses. Pursuant to 28 U.S.C. 2241, they filed petitions for writs of habeas corpus to challenge the method used by the Federal Bureau of Prisons (Bureau) for calculating "good conduct time." Good conduct time is credit that a federal prisoner may earn toward the service of his sentence. The Bureau awards such credit for exemplary behavior while incarcerated. Petitioners claim that instead the Bureau should award credit on the basis of the sentence imposed by the district court. Because petitioners will not serve their entire sentences as a result of accumulated credit, they thus contend that they should receive credit for the time that they will never spend in prison. The district court ruled that the Bureau's method is lawful and denied the petitions. Pet. App. 3-12, 13-22. The court of appeals affirmed. *Id.* at 1-2.

1. Federal prisoners may receive credit toward the service of their sentences for exemplary behavior while incarcerated. Before 1984, their eligibility for such credit was governed by 18 U.S.C. 4161 (1982) (repealed 1984), which provided that

> [e]ach prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run.

Section 4161 previously required that a prisoner receive a good time deduction on the day that he began serving

his federal sentence, subject to forfeiture for misconduct while the prisoner was incarcerated. See 18 U.S.C. 4165 (1982) (repealed 1984). The amount of good time credit to which a prisoner was entitled depended on the length of his sentence. Section 4161 set forth five different rates for calculating credit, ranging from five days per month (for sentences of six months to a year) to ten days per month (for sentences of ten years or more).[1]

In addition to that statutory good time, a federal prisoner could earn industrial good time for "actual employment in an industry or camp." 18 U.S.C. 4162 (1982) (repealed 1984). A prisoner so employed could earn up to "three days for each month * * * for the first year or any part thereof" and "five days for each month of any succeeding year or part thereof." *Ibid.* Thus, unlike statutory good time, industrial good time was not a prospective entitlement: prisoners received industrial good time only after completing the actual labor. Moreover, industrial good time accrued at only two different rates depending on the length of a prisoner's employment, rather than five different rates depending on the length of a prisoner's sentence.

2. In 1984, Congress adopted the Comprehensive Crime Control Act, which broadly reformed the federal criminal code in such areas as sentencing, forfeiture, bail, and drug enforcement. See Pub. L. No. 98-473, Tit. II, 98 Stat. 1976. As part of that larger bill, Congress enacted the Sentencing Reform Act of 1984 (SRA),

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[1] Specifically, Section 4161 provided that federal prisoners were entitled to five days of good time deduction per month for sentences of six months to a year; six days per month for sentences of one to three years; seven days per month for sentences of three to five years; eight days per month for sentences of five to ten years; and ten days per month for sentences of ten years or more.

Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987. The SRA made a number of important changes to sentencing at the federal level. It directed the promulgation of determinate sentencing guidelines by a newly created United States Sentencing Commission; it abolished parole in favor of a system of supervised release; and it sharply curtailed reductions in sentences based on good conduct time. See, *e.g.*, *Report of the Federal Courts Study Committee* 133 (1990).

Congress reduced the amount of available good conduct time in two ways in the SRA. First, it repealed 18 U.S.C. 4161 and 4162 (1982), which had the effect of eliminating industrial good time. See § 218(a)(4), 98 Stat. 2027. Second, it enacted a new provision, 18 U.S.C. 3624 (1988), which contains a different method for the calculation of credit for good conduct. See sec. 212(a)(2), § 3624, 98 Stat. 2008; see also S. Rep. No. 225, 98th Cong., 1st. Sess. 146 (1983) (*Senate Report*). Specifically, the calculation of good time credit is governed by Section 3624(b)(1), which presently provides in part that

> a prisoner who is serving a term of imprisonment of more than 1 year[,] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. * * * [C]redit 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.

18 U.S.C. 3624(b)(1) (footnote omitted).

Section 3624(b)(1) changed prior law in important respects. Rather than awarding good time credit at different rates depending on the length of a prisoner's sentence, it establishes a uniform rate of 54 days per year for each prisoner. In addition, good time credit is no longer awarded prospectively when a prisoner begins serving his sentence. Instead, the Bureau must determine "at the end of each year" whether, "during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations." 18 U.S.C. 3624(b)(1). During the "last year or portion of a year" that the prisoner is in custody, any good conduct time is "prorated and credited within the last six weeks of the sentence." *Ibid.*

3. In the SRA, Congress provided that the new method of crediting good time would not take effect until November 1, 1987, for offenses committed after that date. See 18 U.S.C. 3551 note. In late 1984 or early 1985, members of the Bureau's Office of General Counsel and Regional Counsel Offices met to discuss the effect of the SRA on the calculation of good time. They concluded that, "in light of the statutory changes made by the SRA," good time credit once the SRA became effective should be based "[up]on the amount of time an inmate had served, not upon the sentence imposed." J.A. 153-154. In their view, the existing prospective method "would have been inconsistent with vesting of [credit] in annual increments of 54 days based on good conduct for one year." J.A. 154.

By contrast, calculating good time credit based on time served "was consistent with the Bureau's under-

standing of the SRA." J.A. 154. It also 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 expect to be released from prison." *Ibid.* The Bureau's legal staff recognized that "the time served methodology was different from [the Bureau's] experience with the good time provisions of 18 U.S.C. § 4161 (repealed)," but they viewed the methodology "as similar to the operation of Industrial Good Time under 18 U.S.C. § 4162 (repealed)." *Ibid.* Statutory good time would be awarded retrospectively, without regard to the length of an inmate's sentence, as industrial good time had been.

Consistent with that understanding, the Bureau's General Counsel, Clair A. Cripe, issued an internal memorandum in November 1988 "to advise staff of the procedures for annual awards of good conduct time credit" under Section 3624. J.A. 120-121 (capitalization omitted throughout). He informed staff that "the Comprehensive Crime Control Act of 1984 * * * established a new form of good time credit * * *, which is referred to as 'good conduct time' (GCT)." J.A. 121. He explained that good conduct time "is earned on sentences of 1 year and 1 day or more at a rate of 54 days for each year of time served[,] unless the Bureau determines that the inmate has not satisfactorily complied with the institution disciplinary regulations." *Ibid.* Finally, General Counsel Cripe detailed the specific administrative procedures that would govern the calculation and awarding of good conduct time. J.A. 122-128.

4. For the last 21 years, the Bureau has calculated credit for good conduct on the basis of time served by federal prisoners. During that period, the Bureau has issued both informal and formal guidance explaining its

precise method of calculation. The first such statement, *Program Statement No. 5880.28: Sentence Computation Manual (CCA of 1984)* (*Program Statement 5880.28*), was issued on February 21, 1992. As it explains, "54 days of GCT may be earned for each full year served on a sentence in excess of one year, with the GCT being prorated for the last partial year." J.A. 91. Under that method, "a prisoner earns fifty-four days per year for each year served, and then the last portion of the year served is prorated based on a rate of 54/365." *Perez-Olivo* v. *Chavez*, 394 F.3d 45, 50 (1st Cir. 2005); see *Mujahid* v. *Daniels*, 413 F.3d 991, 996 (9th Cir. 2005) ("The [Bureau] prorates awards during the last year that a prisoner is incarcerated, awarding 0.148 days credit [54/365 = 0.148] per day *actually served* that year."), cert. denied, 547 U.S. 1149 (2006).

The Bureau also has promulgated formal guidance on its method of calculating good time credit. On September 26, 1997, the Bureau published an interim rule, 28 C.F.R. 523.20, for public comment. J.A. 62-66. As the Bureau recognized in its notice, "[t]he awarding and vesting of good conduct time at a rate of 54 days per year (prorated when the time served by the inmate for the sentence during the year is less than a full year) had been clearly stated by statute since the implementation of the Sentencing Reform Act of 1984." J.A. 63. Section 523.20 did not purport to disturb that general practice. Rather, the interim rule responded to other legal changes resulting from the Violent Crime Control and Law Enforcement Act of 1994 (VCCLEA), Pub. L. No. 103-322, § 20412, 108 Stat. 1828, and the Prison Litigation Reform Act of 1995 (PLRA), Pub. L. No. 104-134, Tit. I, § 101(a) [Tit. VIII], 110 Stat. 1321-66. The Bu-

reau did not receive any comments on Section 523.20, which became effective on November 3, 1997. J.A. 63.[2]

More than five years later, on June 25, 2003, the Bureau published a proposed change to Section 523.20 for public comment. J.A. 70-79. The change exempted certain aliens from Section 523.20's requirement of educational progress. J.A. 70-71. On November 3, 2005, after addressing a handful of comments, the Bureau finalized the rule. J.A. 80-89.

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[2] The SRA governs credit for prisoners, like petitioner Barber, who committed their offenses between November 1, 1987 and September 12, 1994. See 18 U.S.C. 3624 (1988); App., *infra*, 13a-16a. Under the SRA, credit is awarded on the basis of good behavior; it must be awarded within 15 days after the end of each year of the sentence; and it vests when awarded and is not subject to later forfeiture. As relevant here, in 1994, the VCCLEA added the requirement that a prisoner make satisfactory progress toward a high school diploma or equivalent degree, and provided that credit would not vest unless a prisoner was making such progress. See 18 U.S.C. 3624 (1994); App., *infra*, 8a-13a. Those changes apply to prisoners, like petitioner Jihad-Black, who committed their offenses between September 13, 1994 and April 25, 1996. As relevant here, in 1996, the PLRA eliminated the requirement that the Bureau award credit within 15 days after the end of each year and provided that all credit would vest on the date of a prisoner's release. See 18 U.S.C. 3624 (Supp. II 1996); App., *infra*, 7a-8a. Those changes apply to prisoners who committed their offenses after April 25, 1996. Finally, in 2008, Congress amended the provisions of Section 3624 involving prerelease custody and supervised release. See Second Chance Act of 2007, Pub. L. No. 110-199, § 251(a), 122 Stat. 692 (to be codified at 18 U.S.C. 3624(c) (Supp. II 2008)); App., *infra*, 4a-7a.

Unless otherwise noted, references to Section 3624 are to the version currently in effect. Petitioners' brief (at 2-3) likewise sets forth the current version as the relevant provision of law involved. Although earlier versions are applicable to petitioners, the substantive meaning of those versions is identical to the current version on the questions presented.

5. Petitioners Michael Barber and Tahir Jihad-Black are both currently incarcerated in federal prison for various firearms and narcotics offenses.

a. On September 10, 1993, petitioner Barber was sentenced to 320 months of imprisonment, to be followed by five years of supervised release. Because of credit for time already served, the end of Barber's first full year in prison was January 4, 1994. At that time, Barber had his first annual review for credit, and he received the full 54 days. Since that time, he has received 54 days of credit at each annual review.

To date, Barber has served more than 17 years of his sentence. He has earned 918 days of good time credit (17 x 54 = 918). For the next six years, if he maintains good behavior, he will receive another 324 days of good time credit (6 x 54 = 324). On January 4, 2016, he will have earned 1242 days of credit, shortening his sentence by more than three years. Although petitioner will have 97 days of service remaining, he will continue to earn credit during that time. Specifically, after serving 85 days, he will have earned 12 additional days of credit (85 x .148 = 12). He will therefore have served his entire term of imprisonment less any time awarded for good conduct, see 18 U.S.C. 3624(a), and he will be released on March 29, 2016, after slightly more than 23 years in prison. In total, Barber will have received 1254 days of good time credit—54 days for each of his 23 full years spent in prison and a prorated 12 days for the portion of his last year spent in prison.

b. On October 3, 1997, petitioner Jihad-Black was sentenced to 262 months of imprisonment, to be followed by five years of supervised release. Because of credit for time already served, the end of Jihad-Black's first full year in prison was May 14, 1998. At that time,

Jihad-Black had his first annual review for credit, and he received the full 54 days. Since that time, he has received 54 days of credit at each annual review.

To date, Jihad-Black has served more than 12 years of his sentence. He has earned 648 days of good time credit (12 x 54 = 648). For the next seven years, if he maintains good behavior, he will receive another 378 days of good time credit (7 x 54 = 378). On May 14, 2016, he will have earned 1026 days of credit, shortening his sentence by almost three years. Although petitioner will have eight days of service remaining, he will continue to earn credit during that time. Specifically, after serving one week, he will have earned one additional day of credit (7 x .148 = 1). He will therefore have served his entire term of imprisonment less any time awarded for good conduct, and he will be released on May 21, 2016, after slightly more than 19 years in prison. In total, Jihad-Black will have received 1027 days of good time credit—54 days for each of his 19 full years spent in prison and a prorated single day for the last week spent in prison.

6. a. Petitioners claim (Br. 17-46) that they should receive good time credit for the portion of their sentences that they will never serve. Specifically, petitioner Barber contends that he should receive good time credit for the three years and five months of his sentence that he will never serve. He seeks another 186 days of good time credit: 162 days for the full three years that he will not serve (3 x 54 = 162) and 24 days for the additional five months that he will not serve (159 x .148 = 24). Petitioner Jihad-Black contends that he should receive good time credit for the nearly three years that he will never serve. He seeks another 152 days of good time credit: 108 days for the full two years that he will not

serve (2 x 54 = 108) and 44 days for the additional ten months that he will not serve (297 x .148 = 44).

b. Petitioners therefore filed petitions for writs of habeas corpus pursuant to 28 U.S.C. 2241. They claimed that when the Bureau promulgated its good time credit regulation, 28 C.F.R. 523.20, it violated the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A), by failing to articulate a rational basis for its interpretation of Section 3624(b)(1). They also claimed that the United States Sentencing Commission, not the Bureau, had the authority to interpret Section 3624(b)(1) and had adopted a method of calculating credit on the basis of the sentence imposed rather than time served. The district court rejected petitioners' arguments and denied them relief. Pet. App. 3-10, 13-20.

c. The court of appeals affirmed. Pet. App. 1-2; see *id.* at 23-38.[3] Under its decision in *Arrington* v. *Daniels*, 516 F.3d 1106 (9th Cir. 2008), the court held that the Bureau was required to articulate the rationale for 28 C.F.R. 523.20 in the accompanying administrative record. Pet. App. 3-31. The Bureau conceded that it had not done that when promulgating Section 523.20, Pet. App. 31; the court held, however, that even in the absence of the regulation, it would defer to the internal guideline that predated the regulation, *Program Statement 5880.28*. Pet. App. 32-35. Finally, the court rejected petitioners' argument that the Sentencing Commission rather than the Bureau is the agency charged with interpreting Section 3624. *Id.* at 37.

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[3] Recognizing that the outcome of these cases was controlled by the court of appeals' decision in *Tablada* v. *Thomas*, 533 F.3d 800 (9th Cir. 2008), petition for cert. pending, No. 08-11034 (filed June 18, 2009), the parties jointly requested summary affirmance in light of that decision. Pet. App. 1-2.

SUMMARY OF ARGUMENT

I. A. Section 3624(b)(1) unambiguously requires the calculation of good time credit at the end of each full or partial year that a prisoner serves of his "term of imprisonment." The statute requires that the Bureau award credit at the end of each year of a prisoner's term; that the Bureau do so only if the prisoner has earned such credit through his behavior and educational progress; and that the Bureau prorate the final award of credit within the last six weeks of the sentence. Taken together, the statute's requirements of annual calculation, good conduct and educational progress, and proration indicate that credit should be awarded on the basis of time served by each prisoner. Section 3624(b)(1)'s clear text makes it unnecessary to consider other subsections and indeed other statutes. In any event, those other provisions do not demonstrate that the phrase "term of imprisonment" has a different meaning than time served in Section 3624(b)(1).

B. That textual conclusion is confirmed by the history of previous good time credit statutes and the legislative history of Section 3624(b)(1). Before the statute's enactment, a prisoner was entitled to a good time deduction from his sentence, based on its length, at the time he entered federal custody. Section 3624(b)(1) replaced that system of prospective entitlement with a system of retrospective award. Consistent with that change, Section 3624's legislative history indicates that good time credit should be calculated on the basis of time served. Petitioners rely on the post-enactment statements of three congresspersons, but those statements, aside from being a shaky ground for inferring congressional intent, do not indicate any intent to calculate credit based on the length of a prisoner's sentence.

II. A. Even if Section 3624(b)(1) were ambiguous, the Bureau's interpretation of the statute resolves that ambiguity. Congress and the Executive Branch have charged the Bureau, not the Sentencing Commission, with responsibility for prison administration generally and the computation of good time credit specifically. For that reason, this Court has twice deferred to the Bureau's interpretation of statutes that govern credit toward the service of prisoners' sentences. See *Reno* v. *Koray*, 515 U.S. 50, 60 (1995); *Lopez* v. *Davis*, 531 U.S. 230, 242 (2001). As those decisions demonstrate, the rule of lenity does not displace the Bureau's interpretive authority. Section 3624 is not a criminal statute to which lenity applies, and in any event the purposes of lenity are not implicated in this case.

B. The Bureau's authoritative interpretation of the statute that it is charged with administering is reasonable and entitled to deference. The court of appeals erred by holding that the Bureau had failed to explain the rationale for its regulation, 28 C.F.R. 523.20. One of the Bureau employees involved in the administrative decision-making process submitted a declaration in this case, and it shows that the Bureau's decision to adopt a time-served methodology was neither arbitrary nor capricious. But even if Section 523.20 were invalid, the court of appeals correctly held that *Program Statement 5880.28* is entitled to deference. That statement reasonably interprets the statutory language, avoids serious practical difficulties posed by petitioners' contrary interpretation, and represents the Bureau's longstanding position based on its extensive expertise in this area.

ARGUMENT

Petitioners agree (Br. 21, 37) that because this case involves an administrative agency's construction of a statute, this Court asks first "whether Congress has directly spoken to the precise question at issue," and then if the statute is "silent or ambiguous," whether "the agency's answer is based on a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984) (*Chevron*). Here, Congress has directly spoken to the precise question at issue: Section 3624(b)(1) unambiguously requires that good conduct time be calculated retrospectively on the basis of the time served by the prisoner, rather than prospectively on the basis of the sentence imposed by the district court. Even assuming, however, that Section 3624(b)(1) is ambiguous as to the appropriate method for calculating good conduct time, the Bureau's interpretation of the statute is reasonable and entitled to deference.

I. SECTION 3624(b)(1) UNAMBIGUOUSLY REQUIRES THE ANNUAL CALCULATION OF GOOD CONDUCT TIME ON THE BASIS OF TIME SERVED BY INMATES IN COMPLIANCE WITH INSTITUTIONAL REGULATIONS

In this case, the precise statutory question is when and on what basis the Bureau must calculate good conduct time for federal inmates. If Congress has "directly spoken" to that question in Section 3624(b)(1), "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-843; see *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). In determining whether Congress has spoken to the question, this Court looks to "the language itself, the specific context in which that

language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997). Here, those indicia all point in a single direction: that good conduct time must be calculated annually on the basis of time served by inmates in compliance with disciplinary regulations. That textual conclusion is confirmed by the history of previous good conduct time statutes and the legislative history accompanying Section 3624's enactment.

A. Section 3624(b)(1) Requires Awarding Credit At The End Of Each Year Served For Good Conduct During That Year

1. Section 3624(b)(1) authorizes credit for each full or partial year served of the prisoner's "term of imprisonment"

a. The eligibility of federal prisoners for good conduct time is governed by 18 U.S.C. 3624(b)(1), which provides in relevant part that

> a prisoner who is serving a term of imprisonment of more than 1 year[,] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. * * * [I]f the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall re-

> ceive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. * * * [C]redit 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.

Ibid. (footnote omitted). Section 3624(b)(1) thus authorizes the Bureau to determine, in its discretion, whether certain federal prisoners have earned credit toward the service of their sentences. Specifically, the Bureau may award "up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term." *Ibid.* The question here is whether the phrase "term of imprisonment" refers to the sentence imposed by the district court or to the time served by the prisoner.

Petitioners contend (Br. 22-23) that the phrase "term of imprisonment" is a legal term of art that refers to the sentence imposed by the district court. In their view (Br. 23-28), "term of imprisonment" has that meaning wherever it appears in Section 3624, the remainder of Title 18, and indeed the entirety of the United States Code. As a result, petitioners maintain, they should be eligible for up to 54 days of credit for each year of their respective sentences—even the years that they will never serve as a result of their accumulated good time credit. Petitioners' interpretation is inconsistent with the statutory language, which they discuss (Br. 24-25) only in passing. In addition, petitioners do not address the implementation of their proposed method—*i.e.*,

when the Bureau is supposed to calculate such credit (if the prisoner does not serve the year in federal custody) and on what basis (if the prisoner cannot demonstrate good behavior during that year).[4]

But petitioners' one-size-fits-all interpretation suffers from a more fundamental flaw. The phrase "term of imprisonment" does not have only one plausible meaning. Rather, it has two distinct and equally plausible meanings. On the one hand, it is the period of incarceration that a court imposes on a criminal defendant who has been found guilty of violating the law. On the other hand, it is the period of incarceration that the wrongdoer serves pursuant to that judgment of conviction. See *Webster's Third New International Dictionary of the English Language* 1137 (1993) (*Webster's*) (defining "imprisonment" as "the act of imprisoning or the state of being imprisoned"); see also 7 *The Oxford English Dictionary* 746 (2d ed. 1989) (defining "imprisonment" as "[t]he action of imprisoning, or fact or condition of being imprisoned"). Which usage a speaker intends will be clear only in context. *Ardestani* v. *INS*, 502 U.S. 129, 135 (1991) (recognizing that when a term has "many dictionary definitions," it "must draw its meaning from its context"). Accordingly, this Court should begin by examining the precise context in which "term of imprisonment" appears in the provision at issue, Section 3624(b)(1).

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[4] Petitioners inaccurately state that they "are losing seven days of good time credit for every year of their sentence." Br. 17. They have received—and with good behavior, will continue to receive—the full 54 days of good time credit for every year of their sentences spent in federal custody. What petitioners will not receive is any good time credit for each year of their sentences that is not spent in federal custody because of accumulated good time credit.

b. Petitioners' interpretation cannot be reconciled with Section 3624(b)(1)'s text, which requires that good time credit be calculated on the basis of time served by a federal inmate. Section 3624(b)(1) states that a prisoner may receive "up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term." The context thus clarifies that "term of imprisonment" in that phrase refers to the time that the prisoner spends incarcerated, and good time credit is earned after each year of service. The statute states that "beginning at the end of the first year of the term," and thereafter "at the end of each year," the prisoner may be awarded good time credit. See *Moreland* v. *Federal Bureau of Prisons*, 431 F.3d 180, 186 (5th Cir. 2005) ("Given its context, this language has a temporal meaning and can only refer to the end of each year the prisoner serves."), cert. denied, 547 U.S. 1106 (2006). That method of determination requires the passage of time, as the prisoner serves his "term of imprisonment," and permits the prisoner to earn good time credit only in annual increments.

Petitioners do not argue that the word "year" means anything other than "[a] consecutive 365-day period beginning at any point" or "a span of twelve months." *Black's Law Dictionary* 1754 (9th ed. 2009); see *Webster's* 2648 (defining "year" as "the period of about 365¼ solar days required for one revolution of the earth around the sun"). One district court, however, has held that by requiring calculation of credit "at the end of each year," Section 3624(b)(1) intends that the calculation occur after only 311 days of each year. See *Moreland* v. *Federal Bureau of Prisons*, 363 F. Supp. 2d 882, 887 (S.D. Tex.), rev'd, 431 F.3d 180 (5th Cir. 2005), cert. denied, 547 U.S. 1106 (2006). On that court's view, if the

prisoner receives the full 54 days of good time credit, then the 311 days served and the 54 days credited will amount to one year of the sentence imposed. *Ibid.*

That approach has at least three serious flaws. First, the statute's language does not provide any "indication that 'year' has an unusual or extraordinary meaning for purposes of [S]ection 3624." *Moreland*, 431 F.3d at 186. This Court should construe that term "in accordance with its ordinary or natural meaning," *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994), as a continuous 365-day or 12-month period. Second, Section 3624(b)(1) requires the awarding of credit "at" the end of each year, not 54 days before the end of each year. Awarding credit after only 311 days of each year would replace the preposition "at" with the different preposition "before."[5] Third, as discussed in more detail below, see p. 51, *infra*, practical difficulties result from assuming that prisoners will re-

[5] Petitioners' amici assert that credit should be applied "'at the end' of each year of the term, not after the end." NACDL Br. 7 (emphasis omitted). That assertion misunderstands Congress's statutory scheme. When a prisoner enters federal custody, the Bureau calculates his projected release date based on the assumption that he will earn all possible credit. It then sets a fixed review date for credit at the end of the prisoner's first year served. For example, a prisoner whose sentence commences on January 1 has an annual review date for credit of December 31. In the case of prisoners sentenced under the PLRA, the Bureau makes a credit determination for the preceding year on that review date; in the case of prisoners sentenced under the SRA and VCCLEA, the Bureau has 15 days from the review date to make its determination. See 18 U.S.C. 3624(b)(1) (1994). On the review date (or in some cases within 15 days thereof), if the prisoner has demonstrated good behavior and educational progress during the preceding year, he is awarded 54 days of credit. If the prisoner receives less than 54 days of credit, his projected release date is moved back accordingly. When the prisoner reaches the last year or partial year of his sentence, his final installment of credit is awarded within his last six weeks in prison.

ceive the full 54 days of credit, because their conduct and educational progress during the year often will result in some lesser award. For those reasons, the statute should be interpreted according to its terms: a prisoner's good time credit should be calculated at the end of each 365-day period that he spends in federal custody.

Moreover, unless petitioners believe that the word "year" means something less than a 365-day period, their interpretation leads to absurd results. On petitioners' interpretation, the Bureau would calculate good time credit "at the end of each year of" the sentence imposed. 18 U.S.C. 3624(b)(1). But petitioners will be relieved of serving entire years at the end of their sentences because of accumulated good time credit. Petitioners give no indication when the Bureau is supposed to calculate credit "at the end" of those deducted years, because they will no longer be in federal custody. *Ibid.* Nor do they give any indication on what basis the Bureau is to make such a calculation, because they will not have been able to demonstrate good behavior and educational progress "during th[ose] year[s]." *Ibid.*

c. Section 3624(b)(1) provides that "at the end of each year of the prisoner's term of imprisonment," the Bureau must determine whether, "during that year," the prisoner has earned good time credit. 18 U.S.C. 3624(b)(1). Specifically, the Bureau must consider whether the prisoner "has displayed exemplary compliance with institutional disciplinary regulations" and "has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree." *Ibid.* If the Bureau finds that, "during that year, the prisoner has not satisfactorily complied with such institutional regulations," it may award "no such credit" or "such lesser credit as [it] determines to be appropriate."

Ibid. The Bureau's annual determination whether to award good time credit is critically important, because "[c]redit that has not been earned may not later be granted." *Ibid.* Again, that method of annual determination requires the passage of time served, so that the Bureau can assess an inmate's conduct and educational progress during a given year.

Petitioners' approach, which would require the Bureau to award credit for time never actually served, would conflict with Section 3624(b)(1)'s requirement "that prisoners 'earn' credit under the GCT statute by 'display[ing] exemplary compliance with institutional disciplinary regulations' during the year." *Yi* v. *Federal Bureau of Prisons*, 412 F.3d 526, 532 (4th Cir. 2005) (brackets in original) (quoting 18 U.S.C. 3624(b)(1)); see *Sash* v. *Zenk*, 428 F.3d 132, 137 (2d Cir. 2005) (Sotomayor, J.) (noting "§ 3624's directive that good time be calculated at the end of each year on the basis of behavior 'during that year'—in other words, on the basis of a prisoner's actual behavior"), amended on reh'g, 439 F.3d 61 (2d Cir.), cert. denied, 549 U.S. 920 (2006); *Moreland*, 431 F.3d at 187; *White* v. *Scibana*, 390 F.3d 997, 1001 (7th Cir. 2004), cert. denied, 545 U.S. 1116 (2005).

d. Petitioners' approach is also inconsistent with the statute's requirement 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." 18 U.S.C. 3624(b)(1). The Bureau prorates such credit by awarding a fraction of 54 days, depending on what portion of a final year the prisoner serves. Thus, the Bureau's "method of calculation could not be simpler: a prisoner earns fifty-four days per year for each year served, and then the last portion of the year served is prorated based on a rate of 54/365." *Perez-*

Olivo v. *Chavez*, 394 F.3d 45, 50 (1st Cir. 2005); see *Mujahid* v. *Daniels*, 413 F.3d 991, 996 (9th Cir. 2005) ("The [Bureau] prorates awards during the last year that a prisoner is incarcerated, awarding 0.148 days credit [54/365 = 0.148] per day *actually served* that year."), cert. denied, 547 U.S. 1149 (2006).

Petitioner Barber will serve three months as "the last * * * portion of a year" of his sentence, and petitioner Jihad-Black will serve one week. Yet instead of their prorated credit, each wants the full 54 days for that "portion" of the last year (as well as for the full years that each will not serve because of accumulated good time credit). See *Pacheco-Camacho* v. *Hood*, 272 F.3d 1266, 1268 (9th Cir. 2001) ("Instead of a prorated portion, Pacheco wants the entire fifty-four days of credit—even though he never served the full 365 days."), cert. denied, 535 U.S. 1105 (2002); see also *Yi*, 412 F.3d at 532. By requiring the final award of good time credit in "the last six weeks of the sentence," Congress indicated that prisoners should receive prorated credit based on the last portion of time served, not the last portion of the sentence imposed.

e. Finally, petitioners note (Br. 24-25) that Section 3624(b)(1) refers to "time served." It states that a prisoner "may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment." 18 U.S.C. 3624(b)(1). In petitioners' view, "Congress used 'time served' to mean actual time in custody, and 'term of imprisonment' to mean the sentence imposed." Br. 25. The more natural reading of the statutory language, however, is that the phrase "beyond the time served" indicates that credited time does not actually need to be served. See *Sash*, 428 F.3d at 137 ("[T]he

phrase 'beyond the time served' might be intended merely to explain that time credited need not be served."). In other words, the preposition "beyond" means "in addition to" in Section 3624(b)(1). See *Webster's* 210 (defining "beyond" as "in addition to"). For each year of service, a prisoner is credited not only with the 365 days spent in confinement but also with an additional 54 days not so spent.

2. The presumption of intrastatutory consistency does not indicate that "term of imprisonment" refers to the sentence imposed rather than the time served

Petitioners maintain that "'term of imprisonment' means the sentence imposed under the rule of intra-statutory consistency." Br. 23 (emphasis and capitalization omitted). As every court of appeals to consider the issue has concluded, the presumption of intrastatutory consistency is of no assistance here, because the statute does not use the phrase "term of imprisonment" consistently.

a. The phrase "term of imprisonment" appears four times in Section 3624(b)(1). The third reference is the one at issue in this case. The first two references describe when a prisoner is eligible for good time credit: "a prisoner who is serving a term of imprisonment of more than 1 year[,] other than a term of imprisonment for the duration of the prisoner's life" may receive good time credit. 18 U.S.C. 3624(b)(1) (footnote omitted). Those uses of the phrase "term of imprisonment" refer to the sentence imposed by the district court, because "the Bureau has to determine whether a prisoner is eligible for the credit on the first day he arrives in prison." *White*, 390 F.3d at 1001; see *Wright* v. *Federal Bureau of Prisons*, 451 F.3d 1231, 1234 (10th Cir. 2006). If the phrase referred instead to time served, "then a prisoner

'who initially would be eligible for the credit because his sentence was, say, 366 days, would become ineligible once the credit was taken into account.'" *Ibid.* (quoting *White*, 390 F.3d at 1001).

The fourth reference occurs in Section 3624(b)(1)'s final sentence, 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." Context here indicates that "term of imprisonment" means time served. Congress required proration in the last six weeks of a prisoner's sentence because "the Bureau cannot predict precisely the length of the partial year at the end of a prisoner's sentence when he first sets foot in prison, for everything depends on whether good time is awarded at the end of each year." *White*, 390 F.3d at 1001-1002. On petitioners' view that "term of imprisonment" means the sentence imposed, there would be no reason to prorate the final award of credit "within the last six weeks of the sentence"; proration of a partial year could be calculated the moment that the prisoner begins serving his sentence.

b. Petitioners do not address the remainder of Section 3624, which further shows why "it is impossible to make sense of 18 U.S.C. § 3624 while giving the phrase 'term of imprisonment' one meaning throughout." *White*, 390 F.3d at 1002. For instance, Section 3624(a) provides that "[a] prisoner shall be released * * * on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence." In that context, "term of imprisonment" means the court-imposed sentence, because the Bureau must calculate a prisoner's release date by deducting good time credit from the end of that sentence. See *Perez-Olivo*, 394 F.3d at 49.

By contrast, Section 3624(d) provides that "[u]pon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner" with "suitable clothing," "an amount of money," and "transportation" to one of several locations. 18 U.S.C. 3624(d)(1)-(3). In that context, "it is beyond debate that * * * the same phrase means the time the prisoner has actually served, not the sentence[] imposed." *Moreland*, 431 F.3d at 188; see *Perez-Olivo*, 394 F.3d at 49. Congress intended that a prisoner "be furnished with these items upon release after completion of his 'time served.'" *Ibid.* Congress could not have intended that a prisoner receive those items at the expiration of the sentence imposed, "which is obviously too late in the case of an inmate who (as a result of annual GCT credits) has been released from prison before serving the full sentence imposed." *Yi*, 412 F.3d at 533.

Section 3624(c) contains the two remaining references to "term of imprisonment." It provides that the Bureau "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), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community." Second Chance Act of 2007 (Second Chance Act), Pub. L. No. 110-199, § 251(a), 122 Stat. 692 (to be codified at 18 U.S.C. 3624(c)(1)); see Second Chance Act § 251(a), 122 Stat. 693 (to be codified at 18 U.S.C. 3624(c)(2)) (providing that the Bureau may "place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months"). Congress intended that such prerelease custody occur in the "final months" of a prisoner's time served, not his

sentence imposed. Indeed, the contrary interpretation would lead to absurd results. Many inmates, including both petitioners Barber and Jihad-Black, will never serve the final 12 months of their court-imposed sentences because of accumulated good time credit. At least with respect to Section 3624(c)(1), if "term of imprisonment" meant the court-imposed sentence, petitioners—and all other federal prisoners with more than one year of good time credit—would not be eligible for prerelease custody.

c. Even assuming that petitioners were correct about the meaning of "term of imprisonment" elsewhere in Section 3624, the presumption of intrastatutory consistency would give way to the contrary contextual evidence. See *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 595 (2004) ("[T]he presumption is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent.") (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)); *Moreland*, 431 F.3d at 188. As explained above, when Section 3624(b)(1) states that the Bureau may award "up to 54 days at the end of each year of the prisoner's term of imprisonment," the statutory context clarifies that "term of imprisonment" means the period of time that a prisoner spends in federal custody.

3. Other legal provisions do not demonstrate that "term of imprisonment" refers to the sentence imposed rather than the time served

Petitioners claim (Br. 22, 25-28) that other provisions of Title 18, Title 21, and the Sentencing Guidelines use

the phrase "term of imprisonment" to refer to a prisoner's judicially imposed sentence. But those provisions expressly concern the act of sentencing a defendant. They therefore shed no light on the use of "term of imprisonment" in Section 3624(b)(1), which concerns the different subject of prison administration.

a. Petitioners point (Br. 22, 26 n.14, 27) to a handful of provisions in Title 18 that govern the judicial imposition of a period of confinement, not the subsequent service of that period by a prisoner. For instance, a number of those provisions explicitly refer to imposition of sentence by the court rather than its service by the prisoner. See 18 U.S.C. 3581(a), 3582(a); see also 18 U.S.C. 924(c)(1)(D)(ii), 3561(a)(3), 3614(b), 4046(a). Other provisions expressly refer to the length of the sentence that may be imposed by the court. See, *e.g.*, 18 U.S.C. 3142(e), 3156(a)(3), 3559(a). Likewise, petitioners cite various provisions in Title 21 that prescribe "maximum and minimum penalties" for certain drug offenses. Br. 26 n.14.[6]

All of those statutes are addressed to district courts at the time of sentencing. By definition, they use "term of imprisonment" in relation to "the act of imprisoning." *Webster's* 1137. That does not resolve the separate question of whether statutes like Section 3624 that govern prison administration use "term of imprisonment" in relation to "the state of being imprisoned." *Ibid.* It is

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[6] Petitioners also rely (Br. 22, 28 & n.18) on various provisions of the Sentencing Guidelines. But as petitioners concede, those provisions involve "the maximum or minimum sentence, the concurrent or consecutive sentence, and the type of sentence imposed by the judge." Br. 28. As explained in the text, provisions that relate to the judicial imposition of a sentence are not relevant in the separate context of prison administration.

hardly surprising that Section 3624 would use "term of imprisonment" in a different way than sentencing statutes do. Unlike those other statutes, Section 3624 concerns the awarding of credit for a prisoner's conduct while incarcerated. On its face, Section 3624 is concerned with the manner of time served by federal inmates, not the type of sentences imposed by federal courts.[7]

b. Nor are the few statutes that concern the administration of imprisonment, see 18 U.S.C. 3621-3626 (2006 & Supp. I 2007), helpful in determining the meaning of "term of imprisonment" in Section 3624(b)(1). Contrary to petitioners' assertion (Br. 26), Section 3621(a) adds nothing to the analysis. That provision states that "[a] person who has been sentenced to a term of imprisonment * * * shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed, or until earlier released for satisfactory behavior." On its face, Section 3621(a) uses the phrase "term of imprisonment" in its judicial sense— *i.e.*, the "sentence[]" "imposed" by a court pursuant to which an offender is committed to federal custody. And although Section 3621(a) recognizes that prisoners may earn early release through satisfactory behavior, it says nothing about how the Bureau is to calculate such credit.

The only other use of the phrase "term of imprisonment" is related to 18 U.S.C. 3622, which permits the Bureau to temporarily release a prisoner from confine-

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[7] Contrary to petitioners' assertion (Br. 27 n.16), 18 U.S.C. 3553(a) is not relevant. Section 3553(a) instructs district courts to impose sentences that are "sufficient, but not greater than necessary" to accomplish certain purposes of the criminal laws. Section 3553(a) applies to courts in imposing sentences, not to the Bureau in awarding good time credit.

ment for certain reasons. Section 3622 does not refer to a prisoner's "term of imprisonment," but a related Executive Order does. On December 29, 1973, President Nixon issued Executive Order No. 11,755, which explains that "the [Bureau] is empowered [under Section 3622] to authorize Federal prisoners to work at paid employment in the community during their terms of imprisonment." 3 C.F.R. 113 (1975). In that context, "terms of imprisonment" clearly refers to the time served by federal prisoners; during the service of their terms, Section 3622 allows prisoners to seek paid employment in the community under certain conditions. "Term of imprisonment" carries that same ordinary meaning in the usage at issue in Section 3624(b)(1), and petitioners cannot avoid Section 3624(b)(1)'s clear text by resorting to interpretive rules about intrastatutory or interstatutory consistency.

B. Section 3624(b)(1)'s Statutory And Legislative History Confirm That Credit Must Be Calculated On The Basis Of Time Served

Petitioners incorrectly argue (Br. 29-36) that "traditional tools of statutory construction" support their interpretation. *Chevron*, 467 U.S. at 843 n.9. The text of Section 3624(b)(1) is unambiguous that good conduct time must be calculated annually on the basis of time served. But even moving beyond text, both the history of previous good time credit statutes and the legislative history of Section 3624 confirm that Congress intended the Bureau to look back each year before awarding annual good time credit. Because Section 3624's statutory and legislative history confirm that "Congress had an intention on the precise question at issue, that intention

is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

1. The statutory history of Section 3624 indicates that awarding credit for time served is the proper method

Petitioners claim that "the history of the federal good time credit statute demonstrates congressional intent that good time credits be calculated against the sentence imposed." Br. 29 (capitalization omitted). Before the Sentencing Reform Act took effect in 1987, good time credit was a prospective entitlement rather than a retrospective award. Federal inmates received deductions on the day that they set foot in prison, but could forfeit them during the service of their sentences for misconduct. One of the purposes of the SRA was to reverse that default rule: to require prisoners to earn credit during their incarceration. Petitioners' position would improperly roll back the clock to the pre-1987 era.

a. In 1867, Congress first made allowance for good time deductions. See Act of Mar. 2, 1867, ch. 146, 14 Stat. 424 (Rev. Stat. § 5543 (1878)). In 1902, Congress specified that such a deduction was to be awarded prospectively on the basis of a prisoner's sentence. It provided that any prisoner serving a sentence other than life imprisonment

> whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence to be estimated, as follows, commencing on the first day of his arrival at the penitentiary, or jail.

Act of June 21, 1902 (1902 Act), ch. 1140, § 1, 32 Stat. 397. Congress thus made clear that the "deduction" from a prisoner's sentence "commenc[ed] on the first

day" of his arrival into federal custody, although the prisoner could forfeit his deduction for misconduct while incarcerated. 1902 Act §§ 1-2, 32 Stat. 397. In order to calculate how much of a deduction each prisoner should receive, Congress set forth five different rates, depending on the length of a prisoner's sentence. *Id.* § 1, 32 Stat. 397.

b. In 1930, Congress created an additional system of good time deductions for "prisoners engaged in any industry, or transferred to any camp." Act of May 27, 1930, ch. 340, § 8, 46 Stat. 392. It provided that

> each prisoner, without regard to length of sentence, may, in the discretion of the Attorney General, be allowed * * * a deduction from his sentence of not to exceed three days for each month of actual employment in said industry or said camp for the first year or any part thereof, and for any succeeding year or any part thereof not to exceed five days for each month of actual employment.

Ibid. Unlike statutory good time, industrial good time was not a prospective entitlement: prisoners received industrial good time only after completing the actual labor. Moreover, industrial good time accrued at only two different rates depending on the length of a prisoner's employment, rather than five different rates depending on the length of a prisoner's sentence.

c. In 1948, Congress codified the provisions for statutory and industrial good time at 18 U.S.C. 4161, 4162, and 4165 (Supp. II 1948), but with one important change. See Act of June 25, 1948 (1948 Act), ch. 645, §§ 4161, 4162, 4165, 62 Stat. 853, 854. For statutory good time, it provided that the "deduction" was "to be credited as earned and computed monthly." 1948 Act

§ 4161, 62 Stat. 853. The Bureau had recommended that Congress "credit good time only as it is earned," because under the previous system a prisoner received all of his deduction upon entry into the federal institution. 18 U.S.C. 4161 note (Supp. II 1948). If the prisoner's misconduct resulted in the loss of his entire good time allowance, then "he had no incentive to good behavior" during the remainder of his sentence. *Ibid.*

Despite that concern, in 1959, Congress removed the requirement that statutory good time "be credited as earned and computed monthly." As petitioners note (Br. 30), Congress expressly recognized that some courts had construed the 1948 amendment "as requiring good time to be computed on the basis of time served rather than on the basis of the term of the sentence as imposed by the court." H.R. Rep. No. 935, 86th Cong., 1st Sess. 2 (1959) (*1959 House Report*). Congress rejected that interpretation, which "require[d] well-behaved prisoners to serve longer periods of confinement than they would under the method of computation which had been used through half a century." *Ibid.*

d. The dual system for statutory and industrial good time remained in effect until 1984, when Congress enacted the SRA, which took effect in 1987. Among the other changes in the SRA, Congress sharply reduced the amount of available good time credit in two ways. First, it repealed 18 U.S.C. 4161 and 4162 (1982), which had the effect of eliminating industrial good time. See SRA § 218(a)(4), 98 Stat. 2027. Second, it replaced Section 4161 with Section 3624, which sets forth a different method for the calculation of statutory good time. Petitioners claim (Br. 31) that Section 3624 was not intended to alter the practice of awarding credit on the basis of a

prisoner's sentence, but that ignores the statutory text and history.

As a textual matter, former Section 4161 awarded good time deductions at different rates depending on the length of a prisoner's sentence. By contrast, Section 3624 establishes a uniform rate of 54 days per year for all prisoners. In addition, former Section 4161 provided that a prisoner was "entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences." Section 3624(b)(1), however, provides that "credit" is awarded "at the end of each year," if it has been "earned" by the prisoner "during that year." Indeed, as originally enacted, Section 3624 provided that "[t]he Bureau's determination [of credit] shall be made within fifteen days after the end of each year of the sentence." 18 U.S.C. 3624(b)(1) (1988). The textual differences between the two statutes reveal a purpose to move from a system of prospective entitlement to a system of retrospective award.

As a historical matter, Congress knew from the 1948 amendment and its 1959 repeal that awarding credit on the basis of time served would "require well-behaved prisoners to serve longer periods of confinement." *1959 House Report* 2. Yet Congress returned to a system that calculates credit after, not when, an inmate enters a federal institution. Although the 1948 amendment required monthly calculation and Section 3624(b)(1) requires annual calculation, the point remains that Congress well understood the consequences of a retrospective system.[8]

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[8] Since 1987, Congress has amended Section 3624 on five separate occasions. It has never disturbed the Bureau's method of calculating credit on the basis of time served by federal prisoners. That fact provides "further evidence * * * that Congress intended the [Bureau's]

2. The legislative history of Section 3624 indicates that awarding credit for time served is the proper method

a. Petitioners point (Br. 31-32) to the SRA's accompanying Senate Report. That report does not directly address whether good time credit should be calculated on the basis of the sentence imposed or time served, but it strongly suggests the latter. See *Senate Report* 56 ("A sentence that exceeds one year may be adjusted *at the end of each year* by 36 days for a prisoner's compliance with institutional regulations.") (emphasis added); *id.* at 147 ("[S]ection 3624(b) provides a uniform maximum rate of 36 days a year for all *time in prison* beyond the first year.") (emphasis added).[9] At the least, "the legislative history of the current statute does not indicate any Congressional intent to calculate credits based on the sentence imposed." *Wright*, 451 F.3d at 1235; see *Perez-Olivo*, 394 F.3d at 50.

b. As petitioners note (Br. 31-32), Congress enacted Section 3624 in part to decrease "the complexity of current law" and "the uncertainty of the prisoner as to his release date." *Senate Report* 147; see *Perez-Olivo*, 394 F.3d at 50. Congress achieved that goal in multiple ways. First, it eliminated parole, thus ensuring that courts would not impose "artificially high sentences * * * to allow for the operation of the parole system." *Senate Report* 146. Second, it eliminated industrial good time credit, and replaced the five different rates for statutory good time credit with a uniform maximum rate

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interpretation, or at least understood the interpretation as statutorily permissible." *Barnhart* v. *Walton*, 535 U.S. 212, 220 (2002).

[9] In the final version of Section 3624, Congress increased the amount of available good time credit from 36 to 54 days a year. See H.R. Conf. Rep. No. 1159, 98th Cong., 2d Sess. 415 (1984).

of up to 54 days per year. *Id.* at 146-147; see p. 34 n.9, *supra*. Third, it provided "for automatic vesting of credit toward early release at the end of each year of satisfactory behavior." *Senate Report* 147.

Petitioners incorrectly argue (Br. 31-32) that because Congress simplified the system of good time credit, it therefore follows that it intended to adopt the simplest possible method of calculation: multiplying 54 days by the number of years in a prisoner's sentence. As explained above, "[Section] 3624 simplified the calculation in other ways." *Sash*, 428 F.3d at 137. If Congress' only goal had been simplicity, "it could have chosen not to award *any* good time credits during the last year of imprisonment (as it does for sentences of a year or less), or to award the full fifty-four days regardless of whether or not the prisoner serves the full year in prison." *Pacheco-Camacho*, 272 F.3d at 1269-1270. Instead, Congress required proration of credit in the final year because it "chose to tolerate the additional complexity in order to arrive at a more equitable result." *Ibid.* Petitioners exaggerate the degree of complexity of the time-served method, which is not overly difficult to apply to petitioners themselves or to other prisoners. See pp. 9-10, 19 n.5, *supra*. That method enables prisoners "to calculate with reasonable certainty the end of their imprisonment." *Pacheco-Camacho*, 272 F.3d at 1270-1271; see *Perez-Olivo*, 394 F.3d at 50-51.

c. Finally, petitioners rely (Br. 34-36) on certain post-enactment statements by Senator Biden, Senator Kennedy, and Representative Hamilton. Petitioners do not point to any instance in which this Court has deferred to a handful of post-enactment statements in the interpretation of a federal statute. This Court has recognized that "the views of a subsequent Congress form

a hazardous basis for inferring the intent of an earlier one," *United States* v. *Price*, 361 U.S. 304, 313 (1960), and that hazard is magnified where only a few individual congresspersons express their views. See *Doe* v. *Chao*, 540 U.S. 614, 626-627 (2004) ("[W]e have said repeatedly that subsequent legislative history will rarely override a reasonable interpretation of a statute that can be gleaned from its language and legislative history prior to its enactment.") (internal quotation marks and citation omitted).

In any event, those congresspersons' statements do not even address the proper method for calculating good time credit. The statements describe the SRA as allowing prisoners to earn a 15% reduction in their sentences. Looking only at the statute's 54-day rate of credit, it would be natural to assume that the reduction functions in that way (54/365 = 14.8%). But in practice, because prisoners must serve an entire year (and not merely 311 days) to earn credit, the reduction is closer to 13% (54/419 = 12.9%). None of the congressmen's statements addressed the difference between a 13% reduction and a 15% reduction—or between calculating credit based on the time served and calculating credit based on the sentence imposed. See, *e.g.*, 141 Cong. Rec. 4174 (1995) (statement of Sen. Biden); 131 Cong. Rec. 7431 (1985) (statement of Sen. Kennedy); *id.* at 488 (statement of Rep. Hamilton). Accordingly, their "general statements" do not evince "a clear Congressional intent to calculate credits based on the sentence imposed." *Wright*, 451 F.3d at 1235; see *Perez-Olivo*, 394 F.3d at 51.

II. THE BUREAU'S INTERPRETATION OF THE STATUTE THAT IT ADMINISTERS IS REASONABLE AND ENTITLED TO DEFERENCE

Even if Section 3624(b)(1) were ambiguous, this Court should uphold the Bureau's method of calculating good time credit on the basis of time served. Those courts of appeals that have found the statute to be ambiguous have uniformly concluded that the Bureau is the agency charged with administering Section 3624 and that its interpretation of the statute is reasonable. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (*Brand X*); *Chevron*, 467 U.S. at 843. Those courts have correctly held that the Bureau's interpretation accords with the statutory language, important penological considerations, and its own longstanding practice.

A. The Bureau Is Charged With The Administration Of Federal Prisons

The Bureau has been charged by Congress and the Attorney General with responsibility for prison administration generally and the computation of good time credit specifically. Petitioners argue that the Bureau does not have interpretive authority because the United States Sentencing Commission has such authority (Br. 47-50) and because Section 3624 is a criminal statute to which the rule of lenity applies (*id.* at 37-46). Neither of those arguments is persuasive.

1. The Bureau is charged with administering the awarding of good time credit

a. For well more than a century, the Attorney General has been granted authority over "the imprisonment or discharge of convicted offenders," Act of Mar. 5, 1872,

ch. 30, 17 Stat. 35, including the authority to promulgate rules for "the control and management" of federal prisons, Act of Mar. 3, 1891, ch. 529, § 4, 26 Stat. 839. See 5 U.S.C. 301; 28 U.S.C. 509 and 510. The Attorney General has delegated to the Bureau "the authority, functions, or duties conferred or imposed upon the Attorney General by any law relating to the commitment, control, or treatment of persons * * * charged with or convicted of offenses against the United States." 28 C.F.R. 0.96; see 18 U.S.C. 4042(a)(1). Of particular relevance here, the Attorney General has delegated to the Bureau the responsibility for "[a]pproving inmate disciplinary and good time regulations (18 U.S.C. 3624)." 28 C.F.R. 0.96(s).

In light of that legal framework, this Court has recognized that "[a]fter a district court sentences a federal offender, the Attorney General, through [the Bureau of Prisons], has the responsibility for administering the sentence." *United States* v. *Wilson*, 503 U.S. 329, 335 (1992); see, *e.g.*, *United States* v. *Clayton*, 588 F.2d 1288, 1292 (9th Cir. 1979). Moreover, this Court has twice deferred to the Bureau in the interpretation of statutes that govern credit toward the service of prisoners' sentences. In *Reno* v. *Koray*, 515 U.S. 50, 60-61 (1995), this Court deferred to the Bureau's interpretation of 18 U.S.C. 3585(b), which provides "credit toward the service of a term of imprisonment for any time that [a prisoner] has spent in official detention prior to the date the sentence commences." See *Koray*, 515 U.S. at 60 (deferring to "[t]he Bureau, as the agency charged with administering the credit statute"). And in *Lopez* v. *Davis*, 531 U.S. 230, 240 (2001), this Court deferred to the Bureau's interpretation of 18 U.S.C. 3621(e)(2)(B), which provides that the sentences of nonviolent offenders "may

be reduced" up to a year for "successfully completing a [substance abuse] treatment program." See *Lopez*, 531 U.S. at 242 (deferring to "the Bureau, the agency empowered to administer the early release program").

b. According to petitioners, the Bureau lacks "statutory authorization to set the maximum amount of available good time credit." Br. 49. Of course, Section 3624(b)(1) sets the maximum amount of available credit at 54 days for each year served by the prisoner. If what petitioners mean is that the Bureau lacks authority to determine the manner in which good time credit is calculated, that is incorrect. Section 0.96(s) delegates responsibility to the Bureau for approving "good time regulations," without prescribing any limits on that authority. Moreover, Section 3624(b)(1) expressly conditions awarding of credit on a "determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations." The statute thus "makes it clear that it is the Bureau of Prisons, not the court, that determines whether a federal prisoner should receive good time credit." *United States* v. *Evans*, 1 F.3d 654, 654 (7th Cir. 1993) (per curiam); see *Perez-Olivo*, 394 F.3d at 52; *White*, 390 F.3d at 1001.

2. The Sentencing Commission has no authority over the administration of good time credit

a. Petitioners assert that "Congress explicitly delegated" to the Sentencing Commission "the administration of the SRA, of which § 3624(b) is a part." Br. 47. As their sole support for that assertion, petitioners cite this Court's decision in *Mistretta* v. *United States*, 488 U.S. 361 (1989). In *Mistretta*, the Court upheld the constitutionality of the Commission, which is "an independent

rulemaking body" that is "locate[d] * * * within the Judicial Branch" and that has been "entrusted by Congress with the primary task of promulgating sentencing guidelines." *Id.* at 385. But the Commission's authority to promulgate sentencing guidelines, see 28 U.S.C. 991-998 (2006 & Supp. I 2007), is distinct from the Bureau's authority over sentence administration for federal prisoners, 18 U.S.C. 3621-3626 (2006 & Supp. I 2007). Indeed, in *Mistretta* itself, this Court recognized that Congress long ago "grant[ed] corrections personnel in the Executive Branch the discretion to release a prisoner before the expiration of the sentence imposed by the judge." 488 U.S. at 364-365.

b. Nor is there any evidence to suggest that the Commission has ever exercised interpretive authority under Section 3624. To the contrary, the Commission has recognized that the Bureau has the authority to interpret Section 3624. See Glenn Schmitt et al., U.S. Sentencing Comm'n, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive* 23 (Oct. 3, 2007) <http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf> (assuming for purposes of statistical analysis that "the sentence for each offender would be reduced based on the maximum good conduct credit *allowed by the BOP*") (emphasis added); cf. *id.* at 8 n.23. The Commission has further recognized and relied on the Bureau's precise method for the calculation of credit. See United States Sentencing Comm'n, *Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* at D-6 (2004) <http://www.ussc.gov/15_year/15_year_study_full.pdf> ("For new law guideline sentences * * * , the good time discount of 13 percent was applied by reducing the

sentence by 365/419 for sentences between 13 months and life."). In the last 21 years, the Commission has never voiced any objection to the Bureau's interpretation, including during the two comment periods on the Bureau's good-time regulation, 28 C.F.R. 523.20.[10]

3. The rule of lenity does not apply to Section 3624

a. Petitioners argue (Br. 37-46) that Section 3624 is a criminal statute to which the rule of lenity applies.[11] Every court of appeals to consider that argument has rejected it. The rule of lenity applies "to interpretations of the substantive ambit of criminal prohibitions" and "also to the penalties they impose." *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Section 3624, however, sets forth neither a criminal prohibition nor a criminal

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[10] Petitioners rely (Br. 48) on a supplementary report that the Sentencing Commission submitted to Congress in June 1987 explaining its development of the Guidelines. J.A. 140-151. The Commission's statement that "[p]rison time was increased by dividing by 0.85 good time when the term exceeded 12 months," J.A. 146, was merely an "estimate[]" that represented "[a]t best, * * * an amalgam of decision making processes," J.A. 144 n.64; see J.A. 143 n.63. The Commission recognized that "the length of time [an inmate] was expected to remain in prison" depended on "rules that the Bureau routinely employs to estimate release dates." J.A. 141. Petitioners also point (Br. 48) to the Commission's 1990 amendment to the Guidelines Manual. The Commission's statement that sentences are reduced by "approximately fifteen percent for good behavior," 55 Fed. Reg. 19,189 (1990), was a general estimate of the Bureau's practices, not an authoritative interpretation of Section 3624.

[11] One of petitioners' amici argues in more limited fashion that if Section 3624 is a criminal statute, then certain legal principles, including the rule of lenity, should apply. O'Donnell Amicus Br. 5, 10. But as that amicus has recognized, Section 3624 "is not a criminal statute." Appellee Br. at 53, *United States* v. *O'Donnell*, No. 09-50296 (9th Cir. argued Jan. 13, 2010).

penalty. *Sash*, 428 F.3d at 135 ("[T]he provision interpreted here defines neither the scope of criminal liability nor the penalty applicable to criminal punishment. It is not criminal in nature."); see *Wright*, 451 F.3d at 1236; *Perez-Olivo*, 394 F.3d at 53. Rather, Section 3624 sets forth an "administrative reward for compliance with prison regulations," and that such compliance results in a "sentence reduction does not make that administrative reward part of the process of criminal sentencing." *Sash*, 428 F.3d at 134.[12]

Petitioners incorrectly contend that Section 3624 triggers the rule of lenity because "[it] determines how much time is spent in custody." Br. 38. This Court has explained the rule of lenity's function as precluding an interpretation of "a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Bifulco*, 447 U.S. at 387 (quoting *Ladner* v. *United States*, 358 U.S. 169, 178 (1958)). As just noted, Section 3624 is not a criminal statute, and no interpretation of it can increase the penalty for an offense. To the contrary, the credit awarded pursuant to Section 3624 is a reduction in the punishment that has been imposed for the commission of a

[12] Petitioners argue (Br. 43-44) that the Executive Branch is not entitled to deference in the interpretation of a criminal statute. See *Crandon* v. *United States*, 494 U.S. 152, 177 (1990) (Scalia, J., concurring in the judgment). That argument depends on petitioners' erroneous characterization of Section 3624 as a criminal statute. Unlike the statute at issue in *Crandon*, Section 3624 does not define a criminal offense, and thus the Bureau does not act in a prosecutorial role in administering good time credit. *Id.* at 169, 177 (Scalia, J., concurring in the judgment). Similarly, petitioners cite (Br. 39-40, 44-45) inapposite cases involving statutes that define the scope of criminal liability or the penalty applicable to such liability.

crime.[13] Accordingly, although the credit statutes at issue in *Koray* and *Lopez* also affected how much time was spent in federal custody, this Court rejected the application of the rule of lenity to both statutes. See *Koray*, 515 U.S. at 64-65; *Lopez*, 531 U.S. at 244 n.7.

Petitioners also incorrectly contend (Br. 37-38) that Section 3624 is a criminal statute for lenity purposes because the revocation of good time credit can trigger the protections of the Ex Post Facto Clause. See *Lynce* v. *Mathis*, 519 U.S. 433, 443 (1997); *Weaver* v. *Graham*, 450 U.S. 24, 33 (1981). As then-Judge Sotomayor explained in *Sash*, "it is clear that sentencing-administration statutes may be 'criminal' for some purposes but not for others." 439 F.3d at 63. Specifically, "[t]here are good reasons to treat the *ex post facto* doctrine as more expansive than the rule of lenity." *Id.* at 64; see *id.* at 65-66 (detailing concerns of retroactivity and unfairness that call for broader application of the *ex post facto* doctrine than the rule of lenity). Application of the rule of lenity therefore must be evaluated in light of its own purposes, *id.* at 66, and as explained below, those purposes are not implicated here.

b. Even assuming that, despite *Koray* and *Lopez*, Section 3624 were a criminal statute in some sense, the rule of lenity still would not apply. Lenity is intended to

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[13] According to petitioners, "the government conceded that § 3624(b) is a penal statute" before the district court in *Moreland*, *supra*. Br. 38. What the government stated is that "Section 3624(b) is a 'penal statute' in the sense that it defines how the Bureau of Prisons is to enforce a term of imprisonment with respect to the calculation of 'good conduct time.'" Gov't Additional Briefing at 6, *Moreland*, *supra* (No. 4:04-cv-03658). The government argued, before both the district court and the court of appeals in *Moreland*, that the rule of lenity did not apply and that the Bureau's interpretation was entitled to deference. *Id.* at 6-8; Gov't C.A. Br. at 49-51, *Moreland*, *supra* (No. 05-20347).

ensure both that "legislatures and not courts * * * define criminal activity" and that regulated parties have "fair warning" of the law's content. *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931)). With respect to the former, Section 3624 does not define a criminal offense or impose a criminal penalty. And with respect to the latter, Section 3624(b)(1)'s text provides notice on its face of how and when good time credit is to be calculated. At the least, the Bureau's guidance on the subject, both informal and formal, provides such notice. The Bureau's interpretation has been a matter of public record since it issued *Program Statement 5880.28* in 1992 and 28 C.F.R. 523.20 in 1997. Petitioners cannot possibly claim to have lacked fair warning of the manner in which the Bureau calculates good time credit.

Nor can petitioners claim that lenity trumps the Bureau's interpretation of Section 3624. In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (2005), this Court interpreted a provision of the Endangered Species Act of 1993, 16 U.S.C. 1538(a)(1)(B), that imposed civil and criminal penalties on certain actions harmful to endangered species. 515 U.S. at 690-691, 696 n.9. In interpreting that provision, the Court deferred to a regulation issued by the Department of Interior. *Id.* at 703-704. It expressly rejected the argument that "the rule of lenity should foreclose any deference * * * because the statute includes criminal penalties." *Id.* at 704 n.18. It held that the regulation at issue provided "[]adequate notice of potential liability" because it had "existed for two decades" and gave "fair warning of its consequences." *Ibid.* As in *Babbitt*, the Bureau's interpretation of Section 3624(b)(1) is a longstanding one that offers ade-

quate notice of the procedures governing computation of good time credit. And no less than in *Babbitt*, the Bureau has "acted within a clearly delegated area of expertise." Pet. Br. 46 n.31.

For those reasons, the courts of appeals have held that the rule of lenity does not foreclose deference to the Bureau's interpretation of Section 3624. See *Yi*, 412 F.3d at 535 ("Rather than apply a presumption of lenity to resolve the ambiguity, *Chevron* requires that we *defer* to the agency's reasonable construction of the statute."); see also *Brown* v. *McFadden*, 416 F.3d 1271, 1273 (11th Cir. 2005) (per curiam); *O'Donald* v. *Johns*, 402 F.3d 172, 174 (3d Cir. 2005) (per curiam), cert. denied, 547 U.S. 1106 (2006); *Perez-Olivo*, 394 F.3d at 53. Moreover, courts have held that lenity does not apply, even if Section 3624 is a criminal statute in some sense. See *Sash*, 439 F.3d at 63 ("[T]he rule of lenity does not apply to our interpretation of § 3624(b) because the calculation of good time credit does not concern criminal punishment in a way that implicates either of the purposes of the rule of lenity."); *id.* at 67 ("[E]ven if we accepted [defendant's] argument that § 3624(b) is a 'criminal' regulation in this context, we would find that adequate notice was given by the BOP regulations that interpreted it."); *Yi*, 412 F.3d at 535 ("BOP Program Statement 5880.28 and 28 C.F.R. § 523.20 provide the public with sufficient notice that GCT shall be awarded based upon time actually served."); *Pacheco-Camacho*, 272 F.3d at 1271-1272.

B. The Bureau's Interpretation Of Section 3624(b)(1) Is Reasonable And Entitled To Deference

The court of appeals erred by holding that the Bureau's regulation, 28 C.F.R. 523.20, is arbitrary and ca-

pricious under Section 706(2)(A) of the APA. Having set aside the regulation, however, the court of appeals correctly deferred to the Bureau's interpretive guidance, *Program Statement 5880.28*. Whether this Court looks to Section 523.20 or *Program Statement 5880.28*, the Bureau's interpretation of Section 3624(b)(1) is reasonable and entitled to deference.

1. In *Lopez*, this Court upheld as within the Bureau's discretion its interpretation of 18 U.S.C. 3621(e)(2)(B), which provides for early release of prisoners who successfully complete a residential substance abuse program. 531 U.S. at 242. Yet the Court declined to address whether the Bureau had complied with the APA in promulgating its regulation. *Id.* at 244 n.6. In *Arrington* v. *Daniels*, 516 F.3d 1106 (9th Cir. 2008), the court of appeals resolved that question against the Bureau. The court held that it could "look only to the administrative record," which in its view "failed to set forth a rationale" for the Bureau's regulation. *Id.* at 1112, 1114. Rather than remand to allow the Bureau to explain its rationale, see *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 420 (1971), the court set aside the regulation as arbitrary and capricious. *Arrington*, 516 F.3d at 1116.

In this case, the Bureau conceded before the court of appeals that it could not prevail under the reasoning of *Arrington*. When the Bureau first promulgated 28 C.F.R. 523.20 in 1997, it was responding to changes that Congress made to Section 3624 in the mid-1990s in the VCCLEA and PLRA. See J.A. 62-66. The Bureau did not address the rationale for its underlying time-served methodology in the 1997 regulation, because that methodology had been in effect for nearly a decade without challenge. See Pet. Br. 13-14. In 2003, the Bureau pub-

lished an unrelated change to Section 523.20 for public comment, see J.A. 70-79, and, in 2005, the Bureau finalized the rule as amended, see J.A. 80-89. By that time, every court of appeals to consider the issue had upheld the Bureau's interpretation as reasonable. The Bureau did not address the rationale for its methodology in the 2005 regulation, because no prisoner had argued that the earlier administrative record was insufficient. Petitioners raised that argument for the first time in this case.[14]

Petitioners contended below that Section 523.20 is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A). Although judicial review under that standard is ordinarily based on the administrative record before the agency at the time of its decision, *Overton Park*, 401 U.S. at 420, this Court has drawn a narrow exception for informal agency action when "there was such failure to explain [the] action as to frustrate effective judicial review," *Camp* v. *Pitts*, 411 U.S. 138, 142-143 (1973) (per curiam). In that case, the correct remedy is "to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Id.* at 143; see, *e.g.*, *Public Power Council* v. *Johnson*, 674 F.2d 791, 793 (9th Cir. 1982); Charles Alan Wright & Charles H. Koch,

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[14] In order to correct any perceived oversight in the administrative record, the Bureau is submitting an interim rule (to be codified at 28 C.F.R. 523.20) to the Department of Justice and the Office of Management and Budget (OMB) for their consideration. The OMB will have 90 days to review the interim rule, after which the rule will become effective. The text of the rule is unchanged from its current version, but the accompanying notice explains the rationale for the Bureau's interpretation of Section 3624(b)(1).

Jr., *Federal Practice and Procedure: Judicial Review* § 8306, at 78 (2006); cf. *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985).

This case presents the rare circumstance in which remand to the agency is not necessary, because the Bureau has supplied a declaration that explains its reasons for adopting a time-served methodology. J.A. 152-155. The declaration is from Harlan W. Penn, one of the Bureau's attorneys who participated in the decision-making process.[15] See, *e.g.*, *Bagdonas* v. *Department of Treasury*, 93 F.3d 422, 426 (7th Cir. 1996) ("Here, however, the agency provided something more than counsel's argument. It provided the court with an explanation for the agency's action submitted by the officer who had the authority to act on the application."); *Clifford* v. *Pena*, 77 F.3d 1414, 1418 (D.C. Cir. 1996) (affirming district court's consideration of an affidavit from an agency employee who had participated in decision-making process).

Mr. Penn explains that, after the SRA's enactment, members of the Bureau's Office of General Counsel and Regional Counsel Offices met to discuss the Act's effect on the calculation of good time. They concluded that, "in light of the statutory changes made by the SRA," good time credit should be based "[up]on the amount of time an inmate had served, not upon the sentence imposed." J.A. 153-154. In their view, the previous method "would

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[15] Before the district court, petitioners objected to consideration of Mr. Penn's declaration. Pet. Br. 12 n.8. The district court overruled that objection and held that the declaration was part of the record. J.A. 165-166. Contrary to petitioners' assertion (Br. 12 n.8), neither the district court nor the government stated that the declaration failed to add any information to the record (although the court did not rely on the declaration in rejecting petitioners' claims, J.A. 16-24).

have been inconsistent with vesting of [credit] in annual increments of 54 days based on good conduct for one year." J.A. 154. By contrast, calculating good time credit based on time served "was consistent with the Bureau's understanding of the SRA." *Ibid.* It also 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 expect to be released from prison." *Ibid.* Thus, the Bureau altered its method of calculating credit because Congress enacted a new statute, 18 U.S.C. 3624 (1988), and the methodology chosen to implement that statute served the policy goals of using credit as an incentive for good behavior and giving prisoners notice of their expected release dates.[16] The Bureau's decision to adopt a time-served methodology was hardly arbitrary or capricious.

2. Even assuming that Section 523.20 is invalid, the court of appeals correctly held that *Program Statement 5880.28* is entitled to deference. The Bureau has extensive expertise in administering credit programs generally; the complex question of how to calculate good time credit is central to the administration of Section 3624;

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[16] Contrary to petitioner's assertion (Br. 47, 51-53), the Bureau exercised interpretive authority in adopting a time-served methodology. See *Negusie* v. *Holder*, 129 S. Ct. 1159, 1167 (2009) (holding that an agency must exercise such authority to receive deference). As the Penn declaration explains, the Bureau concluded that its interpretation was consistent with "[its] understanding of the SRA" and 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 expect to be released from prison." J.A. 154. Thus, the Bureau made a policy choice to harmonize with statutory language and to serve important penological interests that are uniquely within the Bureau's province. Its decision is therefore entitled to deference.

and the Bureau has carefully considered that question over a long period of time. Those factors "all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the [a]gency interpretation here at issue." *Barnhart* v. *Walton*, 535 U.S. 212, 222 (2002); cf. *United States* v. *Mead Corp.*, 533 U.S. 218, 229-231 (2001). For that reason, this Court held in *Koray* that although "the Bureau's interpretation appear[ed] only in a 'Program Statemen[t],'" which is "an internal agency guideline," it was "still entitled to some deference, * * * since it is a 'permissible construction of the statute.'" 515 U.S. at 61 (quoting *Chevron*, 467 U.S. at 843). Notwithstanding this Court's decision in *Koray*, at the very least *Program Statement 5880.28* is entitled to deference under *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944), because it reasonably interprets the statutory language, avoids serious practical difficulties caused by petitioners' contrary interpretation, and represents the Bureau's consistent position. Pet. App. 33-35; *Perez-Olivo*, 394 F.3d at 52 n.6.

As a threshold matter, the text of Section 3624(b)(1) is at the least reasonably read to permit annual calculation of credit on the basis of a prisoner's conduct. The Bureau's interpretation accords with Section 3624(b)(1)'s requirements of annual calculation, good conduct and educational progress, and proration. It also accords with Congress' desire to simplify the computation of credit and its repeal of the pre-SRA regime. Whether Section 3624(b)(1)'s text and history compel the Bureau's interpretation, they certainly render it reasonable. See, *e.g.*, *O'Donald*, 402 F.3d at 174 ("[T]he BOP's interpretation comports with the language of the statute, effectuates the statutory design, establishes a 'fair prorating scheme,' enables inmates to calculate the

time they must serve with reasonable certainty, and prevents certain inmates from earning GCT [credit] for time during which they were not incarcerated.") (quoting *Pacheco-Camacho*, 272 F.3d at 1270).

In addition, petitioners' interpretation presents serious practical difficulties. Although petitioners do not address their proposed implementation, some prisoners have argued that credit should be assessed every 311 days. See *Moreland*, 363 F. Supp. 2d at 887. That approach would mean that every federal prisoner, instead of having a fixed annual review date (*i.e.*, a prisoner whose sentence commences on January 1 has an annual review date of December 31), would have an ever-shifting review date. More important, such an approach assumes that the prisoner will receive the full 54 days of credit, and that together the served time and credited time will amount to one year of the sentence imposed. *Ibid.* If the prisoner does not receive the full 54 days at the end of each 311-day review cycle, then there will be some period at the end of the prisoner's sentence when he is no longer eligible for credit—and thus has no incentive to comply with institutional regulations.

Finally, *Program Statement 5880.28* represents the longstanding position of the Bureau, based on its expertise in this area. See *Walton*, 535 U.S. at 222; *Skidmore*, 323 U.S. at 140. Since 1988, the Bureau has taken the position that Section 3624(b)(1) requires calculation of credit on the basis of time served. Petitioners' interpretation would require recalculation of the sentences of approximately 190,000 federal inmates—approximately 5,000 of whom would be eligible for immediate release. The resulting penological consequences and administrative difficulties would be severe in the Bureau's expert judgment. The interrelated nature of the credit stat-

utes, the vast number of credit determinations that they require, and the consequent need for agency expertise and administrative experience all counsel in favor of deference to the Bureau's reasonable and longstanding interpretation. *Walton*, 535 U.S. at 222, 225.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 18 U.S.C. 3624 (2006) provides in pertinent part:

Release of a prisoner

(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—(1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year[1] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during

[1] So in original. Probably should be followed by a comma.

the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), 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.

(2) Notwithstanding any other law, credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

(3) The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

(4) Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

* * * * *

(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of the prisoner's conviction, to the prisoner's bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

* * * * *

(f) MANDATORY FUNCTIONAL LITERACY REQUIREMENT.—

(1) The Attorney General shall direct the Bureau of Prisons to have in effect a mandatory functional literacy program for all mentally capable inmates who are not functionally literate in each Federal correctional institution within 6 months from the date of the enactment of this Act.

(2) Each mandatory functional literacy program shall include a requirement that each inmate participate in such program for a mandatory period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy, and appropriate incentives which lead to successful completion of such programs shall be developed and implemented.

(3) As used in this section, the term "functional literacy" means—

(A) an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test;

(B) functional competency or literacy on a nationally recognized criterion-referenced test; or

(C) a combination of subparagraphs (A) and (B).

(4) Non-English speaking inmates shall be required to participate in an English-As-A-Second-Language program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.

(5) The Chief Executive Officer of each institution shall have authority to grant waivers for good cause as determined and documented on an individual basis.

2. Second Chance Act of 2007, Pub. L. No. 110-199, § 251(a), 122 Stat. 692-693 (to be codified at 18 U.S.C. 3624(c) (Supp. II 2008)) provides:

Sec. 251. **CLARIFICATION OF AUTHORITY TO PLACE PRISONER IN COMMUNITY CORRECTIONS.**

(a) PRERELEASE CUSTODY.—Section 3624(c) of title 18, United States Code, is amended to read as follows:

"(c) PRERELEASE CUSTODY.—

"(1) IN GENERAL.—The Director of the Bureau of Prisons 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), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into

the community. Such conditions may include a community correctional facility.

"(2) HOME CONFINEMENT AUTHORITY.—The authority under this subsection may be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months.

"(3) ASSISTANCE.—The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during prerelease custody under this subsection.

"(4) NO LIMITATIONS.—Nothing in this subsection shall be construed to limit or restrict the authority of the Director of the Bureau of Prisons under section 3621.

"(5) REPORTING—Not later than 1 year after the date of the enactment of the Second Chance Act of 2007 (and every year thereafter), the Director of the Bureau of Prisons shall transmit to the Committee on the Judiciary of the Senate and the Committee on the Judiciary of the House of Representatives a report describing the Bureau's utilization of community corrections facilities. Each report under this paragraph shall set forth the number and percentage of Federal prisoners placed in community corrections facilities during the preceding year, the average length of such placements, trends in such utilization, the reasons some prisoners are not placed in community corrections facilities, and any other information that may be useful to the committees in de-

termining if the Bureau is utilizing community corrections facilities in an effective manner.

"(6) ISSUANCE OF REGULATIONS.—The Director of the Bureau of Prisons shall issue regulations pursuant to this subsection not later than 90 days after the date of the enactment of the Second Chance Act of 2007, which shall ensure that placement in a community correctional facility by the Bureau of Prisons is—

"(A) conducted in a manner consistent with section 3621(b) of this title;

"(B) determined on an individual basis; and

"(C) of sufficient duration to provide the greatest likelihood of successful reintegration into the community.

3. 18 U.S.C. 3624(e) (Supp. I 2007) provides:

(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run

during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. Upon the release of a prisoner by the Bureau of Prisons to supervised release, the Bureau of Prisons shall notify such prisoner, verbally and in writing, of the requirement that the prisoner adhere to an installment schedule, not to exceed 2 years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner, and of the consequences of failure to pay such fines under sections 3611 through 3614 of this title.

4. 18 U.S.C. 3624 (Supp. II 1996) provides in pertinent part:

* * * * *

Release of a prisoner

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—(1) Subject to paragraph (2), a prisoner who is serving a term of imprisonment of more than 1 year[1] other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations. Subject to paragraph (2), if the Bureau determines that, during that year, the

[1] So in original. Probably should be followed by a comma.

prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. In awarding credit under this section, the Bureau shall consider whether the prisoner, during the relevant period, has earned, or is making satisfactory progress toward earning, a high school diploma or an equivalent degree. Credit that has not been earned may not later be granted. Subject to paragraph (2), 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.

(2) Notwithstanding any other law , credit awarded under this subsection after the date of enactment of the Prison Litigation Reform Act shall vest on the date the prisoner is released from custody.

* * * * *

(f) MANDATORY FUNCTIONAL LITERACY REQUIREMENT.—

* * * * *

5. 18 U.S.C. 3624 (1994) provides:

Release of a prisoner

(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of the prisoner's term of imprisonment, less any time credited toward the service of the prisoner's sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal

holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—(1) A prisoner (other than a prisoner serving a sentence for a crime of violence) who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of the prisoner's life, shall receive credit toward the service of the prisoner's sentence, beyond the time served, of fifty-four days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that during that year, the prisoner has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. A prisoner who is serving a term of imprisonment of more than 1 year for a crime of violence, other than a term of imprisonment for the duration of the prisoner's life, may receive credit toward the service of the prisoner's sentence, beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment, beginning at the end of the first year of the term, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with such institutional disciplinary regulations. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, the prisoner shall receive no such credit toward service of the prisoner's sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Credit that has not been earned may not later be

granted. 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.

(2) Credit toward a prisoner's service of sentence shall not be vested unless the prisoner has earned or is making satisfactory progress toward a high school diploma or an equivalent degree.

(3) The Attorney General shall ensure that the Bureau of Prisons has in effect an optional General Educational Development program for inmates who have not earned a high school diploma or its equivalent.

(4) Exemptions to the General Educational Development requirement may be made as deemed appropriate by the Director of the Federal Bureau of Prisons.

(c) PRE-RELEASE CUSTODY.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of the prisoner's term of imprisonment, the Bureau of Prisons shall furnish the prisoner with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of the prisoner's conviction, to the prisoner's bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

(f) MANDATORY FUNCTIONAL LITERACY REQUIREMENT.—

(1) The Attorney General shall direct the Bureau of Prisons to have in effect a mandatory functional literacy program for all mentally capable inmates who are not functionally literate in each Federal correctional institution within 6 months from the date of the enactment of this Act.

(2) Each mandatory functional literacy program shall include a requirement that each inmate participate in such program for a mandatory period sufficient to provide the inmate with an adequate opportunity to achieve functional literacy, and appropriate incentives which lead to successful completion of such programs shall be developed and implemented.

(3) As used in this section, the term "functional literacy" means—

(A) an eighth grade equivalence in reading and mathematics on a nationally recognized standardized test;

(B) functional competency or literacy on a nationally recognized criterion-referenced test; or

(C) a combination of subparagraphs (A) and (B).

(4) Non-English speaking inmates shall be required to participate in an English-As-A-Second-Language program until they function at the equivalence of the eighth grade on a nationally recognized educational achievement test.

(5) The Chief Executive Officer of each institution shall have authority to grant waivers for good cause as determined and documented on an individual basis.

(6) A report shall be provided to Congress on an annual basis summarizing the results of this program, including the number of inmate participants, the number successfully completing the program, the number who do not successfully complete the program, and the reasons for failure to successfully complete the program.

6. 18 U.S.C. 3624 (1988) provides:

Release of a prisoner

(a) DATE OF RELEASE.—A prisoner shall be released by the Bureau of Prisons on the date of the expiration of his term of imprisonment, less any time credited toward the service of his sentence as provided in subsection (b). If the date for a prisoner's release falls on a Saturday, a Sunday, or a legal holiday at the place of confinement, the prisoner may be released by the Bureau on the last preceding weekday.

(b) CREDIT TOWARD SERVICE OF SENTENCE FOR SATISFACTORY BEHAVIOR.—A prisoner who is serving a term of imprisonment of more than one year, other than a term of imprisonment for the duration of his life, shall receive credit toward the service of his sentence, beyond the time served, of fifty-four days at the end of each year of his term of imprisonment, beginning at the end of the first year of the term, unless the Bureau of Prisons determines that, during that year, he has not satisfactorily complied with such institutional disciplinary regulations as have been approved by the Attorney General and issued to the prisoner. If the Bureau determines that, during that year, the prisoner has not satisfactorily complied with such institutional regulations, he shall receive no such credit toward service of his sentence or shall receive such lesser credit as the Bureau determines to be appropriate. The Bureau's determination shall be made within fifteen days after the end of each year of the sentence. Such credit toward service of sentence vests at the time that it is received. Credit that has vested may not later be withdrawn, and credit that has not been earned may not later be granted. 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.

(c) PRE-RELEASE CUSTODY.—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for his re-entry into the community. The United States Probation System shall, to the extent

practicable, offer assistance to a prisoner during such pre-release custody.

(d) ALLOTMENT OF CLOTHING, FUNDS, AND TRANSPORTATION.—Upon the release of a prisoner on the expiration of his term of imprisonment, the Bureau of Prisons shall furnish him with—

(1) suitable clothing;

(2) an amount of money, not more than $500, determined by the Director to be consistent with the needs of the offender and the public interest, unless the Director determines that the financial position of the offender is such that no sum should be furnished; and

(3) transportation to the place of his conviction, to his bona fide residence within the United States, or to such other place within the United States as may be authorized by the Director.

(e) SUPERVISION AFTER RELEASE.—A prisoner whose sentence includes a term of supervised release after imprisonment shall be released by the Bureau of Prisons to the supervision of a probation officer who shall, during the term imposed, supervise the person released to the degree warranted by the conditions specified by the sentencing court. The term of supervised release commences on the day the person is released from imprisonment and runs concurrently with any Federal, State, or local term of probation or supervised release or parole for another offense to which the person is subject or becomes subject during the term of supervised release. A term of supervised release does not run during any period in which the person is imprisoned

other than during limited intervals as a condition of probation or supervised release, in connection with a conviction for a Federal, State, or local crime unless the imprisonment is for a period of less than 30 consecutive days. No prisoner shall be released on supervision unless such prisoner agrees to adhere to an installment schedule, not to exceed two years except in special circumstances, to pay for any fine imposed for the offense committed by such prisoner.

7. 18 U.S.C. 4161 (1982) provides:

Computation generally

Each prisoner convicted of an offense against the United States and confined in a penal or correctional institution for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence beginning with the day on which the sentence commences to run, as follows:

Five days for each month, if the sentence is not less than six months and not more than one year.

Six days for each month, if the sentence is more than one year and less than three years.

Seven days for each month, if the sentence is not less than three years and less than five years.

Eight days for each month, if the sentence is not less than five years and less than ten years.

Ten days for each month, if the sentence is ten years or more.

When two or more consecutive sentences are to be served, the aggregate of the several sentences shall be the basis upon which the deduction shall be computed.

8. 18 U.S.C. 4162 (1982) provides:

Industrial good time

A prisoner may, in the discretion of the Attorney General, be allowed a deduction from his sentence of not to exceed three days for each month of actual employment in an industry or camp for the first year or any part thereof, and not to exceed five days for each month of any succeeding year or part thereof.

In the discretion of the Attorney General such allowance may also be made to a prisoner performing exceptionally meritorious service or performing duties of outstanding importance in connection with institutional operations.

Such allowance shall be in addition to commutation of time for good conduct, and under the same terms and conditions and without regard to length of sentence.

9. 18 U.S.C. 4165 (1982) provides:

Forfeiture for offense

If during the term of imprisonment a prisoner commits any offense or violates the rules of the institution, all or any part of his earned good time may be forfeited.

10. 28 C.F.R. 523.20 provides:

Good conduct time

(a) For inmates serving a sentence for offenses committed on or after November 1, 1987, but before September 13, 1994, the Bureau will award 54 days credit toward service of sentence (good conduct time credit) for each year served. This amount is prorated when the time served by the inmate for the sentence during the year is less than a full year.

(b) For inmates serving a sentence for offenses committed on or after September 13, 1994, but before April 26, 1996, all yearly awards of good conduct time will vest for inmates who have earned, or are making satisfactory progress (see § 544.73(b) of this chapter) toward earning a General Educational Development (GED) credential.

(c) For inmates serving a sentence for an offense committed on or after April 26, 1996, the Bureau will award

(1) 54 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has earned or is making satisfactory progress toward earning a GED credential or high school diploma; or

(2) 42 days credit for each year served (prorated when the time served by the inmate for the sentence during the year is less than a full year) if the inmate has not earned or is not making satisfactory progress toward earning a GED credential or high school diploma.

(d) Notwithstanding the requirements of paragraphs (b) and (c) of this section, an alien who is subject to a final order of removal, deportation, or exclusion is eligible for, but is not required to, participate in a literacy program, or to be making satisfactory progress toward earning a General Educational Development

(GED) credential, to be eligible for a yearly award of good conduct time.

(e) The amount of good conduct time awarded for the year is also subject to disciplinary disallowance (see tables 3 through 6 in § 541.13 of this chapter).