

No. 25-5930

IN THE
Supreme Court of the United States

WILLIAM MAXWELL,
Petitioner,

v.

SANDRA DINIS, ACTING WARDEN,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit**

**BRIEF OF NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AND
NATIONAL ASSOCIATION OF FEDERAL
DEFENDERS AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

BARBARA E. BERGMAN
*National Co-Chair
NACDL Amicus Comm.*

JESSICA STENGEL
*Co-Chair,
NAFD Amicus Comm.*

[Additional counsel listed on
signature page]

CLAIRE MADILL*
*Assistant Fed. Pub.
Defender*

MARYLAND FEDERAL
PUBLIC DEFENDER
6411 Ivy Lane
Suite 710
Greenbelt, MD 20770
(301) 750-8517
claire_madill@fd.org

**Counsel of Record*

Counsel for Amici Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
INTERESTS OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	3
I. Passed with overwhelming congressional support, the First Step Act seeks to reduce the costs of incarceration while improving public safety.	3
II. The First Step Act created a mandatory statutory right to earned time credits that the Bureau of Prisons lacks discretion to deny.....	6
A. The First Step Act uses mandatory language (“shall”) with respect to the earned time credit system.....	7
B. The First Step Act lays out the earned time credit system in excruciating detail, rather than leaving it to the Bureau of Prison’s discretion.	9
C. Congress imposed multiple oversight programs on the Bureau of Prisons. ...	11
III. The Bureau of Prisons’ implementation of the First Step Act’s earned time credit system has been delayed, incomplete, and unlawful.	12

TABLE OF CONTENTS—Continued

	Page
A. The Bureau of Prisons’ rulemaking for the First Step Act was severely delayed.	12
B. The Bureau of Prisons’ implementation efforts missed or ignored aspects of the First Step Act.	15
1. Lawmakers were forced to call out statutory errors in the Bureau of Prisons’ initial proposed rule.	16
2. The Bureau of Prisons’ various iterations of the earned time credit system have contained errors that needed correction.	17
i. Prisoners were initially threatened with reincarceration.	17
ii. The Bureau of Prisons made arbitrary implementation decisions that conflicted with the First Step Act.	19
iii. The automatic calculator continues to err, resulting in delayed or denied release.	20
iv. The Bureau of Prisons has improperly expanded ineligibility. .	21
C. The Bureau of Prisons’ staffing crisis and lack of training have further hindered First Step Act implementation.	22

TABLE OF CONTENTS—Continued

	Page
D. The Bureau of Prisons has failed to transfer prisoners as required by the First Step Act.....	24
IV. Habeas corpus under 28 U.S.C. § 2241 affords an equitable remedy for unlawful confinement in violation of the First Step Act’s community transfer requirement....	26
CONCLUSION	33

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Barber v. Thomas</i> , 560 U.S. 474 (2010).....	5
<i>Benson v. Edgefield</i> , 174 F.4th 348 (4th Cir. 2026)	8, 10, 31
<i>Bivens v. Six Unknown Fed. Narcotics Agents</i> , 403 U.S. 388 (1971).....	29, 31
<i>Boumediene v. Bush</i> , 553 U.S. 723 (2008).....	27, 29
<i>Cazares v. Hendrix</i> , 575 F. Supp. 3d 1289 (D. Or. 2021).....	17, 31
<i>Garza v. Davis</i> , 596 F.3d 1198 (10th Cir. 2010).....	30
<i>Gonzalez v. Herrera</i> , 151 F.4th 1076 (9th Cir. 2024)	4, 6, 9
<i>Goodman v. Ortiz</i> , No. CV 20-7582 (RMB), 2020 WL 5015613 (D.N.J. Aug. 25, 2020).....	17, 31
<i>Greenlaw v. United States</i> , 554 U.S. 237 (2008).....	30
<i>Halbert v. Michigan</i> , 545 U.S. 605 (2005).....	30
<i>Hudson v. Hardy</i> , 424 F.2d 854 (D.C. Cir. 1970).....	28
<i>Jones v. Cunningham</i> , 371 U.S. 236 (1963).....	27

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Jones v. Hendrix</i> , 599 U.S. 465 (2023).....	27, 28
<i>Kingdomware Techs., Inc. v. United States</i> , 579 U.S. 162 (2016).....	7
<i>Komando v. Luna</i> , No. 22-CV-425-SE, 2023 WL 310580 (D.N.H. Jan. 13, 2023)	32
<i>Komando v. Warden</i> , No. 22-CV-425-SE, 2023 WL 1782034 (D.N.H. Feb. 6, 2023).....	32
<i>Lexecon Inc. v. Milberg Weiss Bershad Hynes & Leach</i> , 523 U.S. 26 (1998)).....	8
<i>Maine Cmty. Health Options v. United States</i> , 590 U.S. 296 (2020)	7, 8
<i>Mateo v. Warden, FCI Danbury</i> , No. 3:25-CV-00814 (VAB), 2025 WL 2625263 (D. Conn. Sept. 11, 2025).....	22
<i>McCarthy v. Madigan</i> , 503 U.S. 140 (1992).....	30
<i>Miles v. Bowers</i> , 173 F.4th 372 (1st Cir. 2026).....	8, 10, 31
<i>Nettles v. Grounds</i> , 830 F.3d 922 (9th Cir. 2016).....	29

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Noe v. True</i> , No. 21-1373, 2022 WL 5080196 (10th Cir. Oct. 5, 2022)	21-22, 31
<i>Preiser v. Rodriguez</i> , 411 U.S. 475 (1973).....	26-27
<i>Ramirez v. Phillips</i> , No. 2:23-cv-02911-KJM-JDP, 2023 WL 8878993 (E.D. Cal. Dec. 22, 2023).....	32
<i>Rodriguez v. Copenhaver</i> , 823 F.3d 1238 (9th Cir. 2016).....	28
<i>Rodriguez v. Smith</i> , 541 F.3d 1180 (9th Cir. 2008).....	28
<i>Skinner v. Switzer</i> , 562 U.S. 521 (2011).....	27
<i>Thompson v. Choinski</i> , 525 F.3d 205 (2d Cir. 2008)	28
<i>Trump v. J.G.G.</i> , 604 U.S. 670 (2025).....	28
<i>United States v. Brooker</i> , 976 F.3d 228 (2d Cir. 2020)	5
<i>Valladares v. Ray</i> , 130 F.4th 74 (4th Cir. 2025)	6, 8, 10, 21, 31
<i>Ward v. Chavez</i> , 678 F.3d 1042 (9th Cir. 2012).....	30
<i>West v. Atkins</i> , 487 U.S. 42 (1988).....	29

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Woodall v. Federal Bureau of Prisons</i> , 432 F.3d 235 (3d Cir. 2005)	28
<i>Woodley v. Warden</i> , No. 24-3053-JWL, 2024 WL 2260904 (D. Kan. May 15, 2024)	32
<i>Ziglar v. Abbasi</i> , 582 U.S. 120 (2017)	29
CONSTITUTION, STATUTES, REGULATIONS, AND GUIDELINES	
18 U.S.C. § 3006A	1
18 U.S.C. § 3006A(a)(2)(B)	1, 30
18 U.S.C. § 3582(c)(1)(A)	5
18 U.S.C. § 3621(e)(2)(B)	8
18 U.S.C. § 3621(h)(1)	13
18 U.S.C. § 3621(h)(2)	13
18 U.S.C. § 3621(h)(6)	7, 9, 10, 19
18 U.S.C. § 3624(b)	6
18 U.S.C. § 3624(c)(2)	8
18 U.S.C. § 3624(g)(1)	11, 21
18 U.S.C. § 3624(g)(1)(A)	11
18 U.S.C. § 3624(g)(11)	25
18 U.S.C. § 3624(g)(2)	7, 9
18 U.S.C. § 3631	11
18 U.S.C. § 3632	7
18 U.S.C. § 3632(a)	11, 12

TABLE OF AUTHORITIES—Continued

	Page(s)
18 U.S.C. § 3632(a)(1).....	10
18 U.S.C. § 3632(d).....	6
18 U.S.C. § 3632(d)(4)	9
18 U.S.C. § 3632(d)(4)(A).....	6, 7, 9, 10, 20
18 U.S.C. § 3632(d)(4)(B).....	10
18 U.S.C. § 3632(d)(4)(C).....	6, 7
18 U.S.C. § 3632(d)(4)(D)	9, 10, 21, 31
18 U.S.C. § 3632(d)(4)(D)(i)-(lxviii).....	10
§ 3632(d)(4)(D)(lviii).....	21
18 U.S.C. § 3632(d)(4)(E).....	10
18 U.S.C. § 3632(d)(4)(E)(i)	21
18 U.S.C. § 3632(g).....	11
18 U.S.C. § 3633(a).....	11
18 U.S.C. § 3634	22
18 U.S.C. § 3635(3).....	9
18 U.S.C. § 3635(5).....	9
18 U.S.C. § 4322	5
21 U.S.C. § 846	22
28 U.S.C. § 2241	2, 3, 21, 26-32
28 U.S.C. § 2241(c)	29
28 U.S.C. § 2255	27
28 U.S.C. § 2255(h).....	27

TABLE OF AUTHORITIES—Continued

	Page(s)
34 U.S.C. § 60541(a)(2).....	8
42 U.S.C. § 1983	29
CARES Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (2020) ..	8
First Step Act, 132 Stat. 5194 (Dec. 21, 2018).....	5
§ 102(b), 132 Stat. 5210	5
§ 301(a), 132 Stat. 5217	5
§ 603, 132 Stat. 5239	5
FSA Time Credits, 85 Fed. Reg. 75268 (proposed Nov. 25, 2020)	13
FSA Time Credits, 87 Fed. Reg. 2705 (Jan. 19, 2022) (to be codified at 28 C.F.R. pts. 523 & 541)	13, 20
 LEGISLATIVE MATERIALS	
115 Cong. Rec. S7838 (Dec. 19, 2018).....	4
118 Cong. Rec. S5974 (Dec. 14, 2023).....	4
164 Cong. Rec. S7642 (daily ed. Dec. 17, 2018).....	5
164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018).....	3
164 Cong. Rec. S7746 (daily ed. Dec. 18, 2018).....	9

TABLE OF AUTHORITIES—Continued

	Page(s)
Congressman Hakeem Jeffries, Comment Letter on Proposed Rule FSA Time Credits (Jan. 25, 2021), https://www.regulations.gov/comment/BOP-2020-0003-0119	16
Letter from Senator Dick Durbin, Chairman, Comm. on the Judiciary, and Senator Chuck Grassley, Ranking Member, Comm. on the Judiciary, to Merrick Garland, Attorney Gen., Dep’t of Justice (Nov. 16, 2022), https://cdn.flowcode.com/prodassets/2022-11-16_Letter_to_AG_Garland_on_FSA_Earned_Time_Credits.pdf?ts=1668698222297607346&fce_id=28d4dbd3-7bbc-4e86-80c9-4d15ba58ce3c	14, 15 18-20, 23
Letter from Slade Bond, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Senator Dick Durbin, Chairman, Comm. on the Judiciary (2022), https://www.judiciary.senate.gov/imo/media/doc/2022-09-29_-_qfr_responses_-_peters.pdf	14, 22
<i>Oversight of the Bureau of Prisons: Hearing Before the Subcomm. on Crime and Fed. Gov’t Surveillance of the Comm. on the Judiciary</i> , 118th Cong. (2023), https://www.govinfo.gov/content/pkg/CHRG-118hhrg54125/html/CHRG-118hhrg54125.htm	23

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Oversight of the Federal Bureau of Prisons: Oversight Hearing Before the U.S. Senate Comm. on the Judiciary</i> , 117th Cong. (2022), https://www.judiciary.senate.gov/imo/media/doc/FE51F122-ED96-A4AB-F778-625E8E663F77/hearing_on_oversight_of_the_federal_bureau_of_prisons.pdf	13
Senators Sheldon Whitehouse and John Cornyn, Comment Letter on Proposed Rule FSA Time Credits (Jan. 25, 2021), https://www.regulations.gov/comment/BOP-2020-0003-0113	16, 17
MISCELLANEOUS	
Ames C. Grawert & Patricia L. Richman, <i>The First Step Act’s Prison Reforms</i> , Brennan Ctr. For Justice, (Sept. 23, 2022), https://www.brennancenter.org/our-work/research-reports/first-step-acts-prison-reforms	6
Ames Grawert & Tim Lau, <i>How the FIRST STEP Act Became Law — and What Happens Next</i> , Brennan Ctr. for Just. (Jan. 4, 2019), http://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next	4

TABLE OF AUTHORITIES—Continued

	Page(s)
Ben Harrington & Nathan James, Cong. Rsch. Serv., <i>Federal Correctional Reform and the First Step Act of 2018</i> (updated Dec. 28, 2018), https://www.congress.gov/crs-product/IF10573	5
Drew Friedman, <i>Bureau of Prisons to close six institutions, citing ‘extreme staffing challenges’</i> , July 2, 2026, https://federalnewsnetwork.com/workforce/2026/07/bureau-of-prisons-to-close-six-institutions-citing-extreme-staffing-challenges/	22
Federal Bureau of Prisons, <i>Director Marshall Launches FSA Task Force</i> , (July 14, 2025), http://bop.gov/news/20250714-director-marshall-launches-fsa-task-force.jsp	21
Federal Bureau of Prisons, <i>FBOP Updates to Phone Call Policies and Time Credit System</i> , (Oct. 4, 2024), https://www.bop.gov/news/20241004-fbop-updates-to-phone-call-policies-and-time-credit-system.jsp	21
Nathan James, Cong. Rsch. Serv., R45558, <i>The First Step Act of 2018: An Overview</i> (2019), https://sgp.fas.org/crs/misc/R45558.pdf	4, 11

TABLE OF AUTHORITIES—Continued

	Page(s)
Press Release, U.S. Dep’t of Justice, Justice Department Announces New Rule Implementing Federal Time Credits Program Established by the First Step Act, (Jan. 13, 2022), https://www.justice.gov/archives/opa/pr/justice-department-announces-new-rule-implementing-federal-time-credits-program-established	5-6
Remarks by President Trump at Signing Ceremony for S. 756, the “First Step Act of 2018” and H.R. 6964, the “Juvenile Justice Reform Act of 2018,” 2018 WL 6715859, White House (Dec. 21, 2018)	4
Tim Lau, <i>Historic Criminal Justice Reform Legislation Signed into Law</i> , Brennan Ctr. for Just. (Dec. 21, 2018), https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reform-legislation-signed-law	4
U.S. Gov’t Accountability Off., GAO-26-107268, Federal Prisons: Improvements Needed to the System Used to Assess and Mitigate Incarcerated People’s Recidivism Risk (2026), https://www.gao.gov/assets/gao-26-107268.pdf	24, 25

TABLE OF AUTHORITIES—Continued

	Page(s)
U.S. Gov’t Accountability Off., GAO-26-107353, Bureau of Prisons: Actions Needed to Better Achieve Financial and Other Benefits of Moving Individuals to Halfway Houses on Time (2026), https://www.gao.gov/assets/gao-26-107353.pdf .	26
Walter Pavlo, <i>Bureau of Prisons’ Challenges with First Step Act Release Dates</i> , FORBES (Sept. 17, 2023), https://www.forbes.com/sites/walterpavlo/2023/09/17/bureau-of-prisons-challenges-with-first-step-act-release-dates/	21, 23
Walter Pavlo, <i>Bureau of Prisons’ Failure to Communicate First Step Act</i> , FORBES (Oct. 15, 2022), https://www.forbes.com/sites/walterpavlo/2022/10/15/bureau-of-prisons-failure-to-communicate-first-step-act/	18, 23
Walter Pavlo, <i>Bureau of Prisons Halfway Houses Must Change Due To First Step Act</i> , FORBES (Nov. 23, 2024), https://www.forbes.com/sites/walterpavlo/2024/11/23/bureau-of-prisons-halfway-houses-must-change-due-to-first-step-act/	25

TABLE OF AUTHORITIES—Continued

	Page(s)
Walter Pavlo, <i>Bureau of Prisons' Interpretation of First Step Act Will Leave Thousands of Inmates Incarcerated</i> , FORBES (Sept. 9, 2022), https://www.forbes.com/sites/walterpavlo/2022/09/09/bureau-of-prisons-interpretation-of-first-step-act-will-leave-thousands-of-inmates-incarcerated/?sh=4c0b42832f94	19
Walter Pavlo, <i>Bureau of Prisons Task Force Taking Shape, Challenges Remain</i> , FORBES (July 23, 2025), https://www.forbes.com/sites/walterpavlo/2025/07/23/bureau-of-prisons-task-force-taking-shape-challenges-remain/	23-24
Walter Pavlo, <i>Working Out The Bugs On The Bureau of Prisons' First Step Act Calculator</i> , FORBES (Jan. 12, 2023), https://www.forbes.com/sites/walterpavlo/2023/01/12/working-out-the-bugs-on-the-bureau-of-prisons-first-step-act-calculator/	20

INTERESTS OF THE *AMICI CURIAE*¹

The National Association of Criminal Defense Lawyers (NACDL), founded in 1958, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. It has a membership of many thousands of direct members and approximately 40,000 affiliated members. NACDL files numerous amicus briefs each year, seeking to assist courts in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The National Association of Federal Defenders (NAFD) was originally created in 1995 as a nonprofit organization made up of attorneys who worked for federal public defender offices and community defender organizations authorized under the Criminal Justice Act, 18 U.S.C. § 3006A (CJA). In 2026, NAFD was reconstituted as an association of the heads of each of the nation's CJA-authorized federal public and community defender offices. Each year, federal public and community defenders represent tens of thousands of indigent criminal defendants in federal court. Additionally, these lawyers are directly involved in the representation of federal prisoners bringing challenges to the Bureau of Prisons' implementation and interpretation of the First Step Act's earned time

¹ Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and that no person other than amicus or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. *Amici curiae* timely provided counsel of record notice of our intention to file an *amicus curiae* brief supporting Petitioner.

credit program because courts have the discretion to appoint counsel in such cases. *See* 18 U.S.C. § 3006A(a)(2)(B).

SUMMARY OF ARGUMENT

This case asks whether federal prisoners can use a habeas corpus petition under 28 U.S.C. § 2241 to seek judicial review when the Bureau of Prisons (BOP) fails in its statutory obligation to accelerate community-based placements for individuals who successfully engage in the First Step Act's (FSA) recidivism-reducing programs. This Court should hold that § 2241 provides the proper vehicle to enforce the FSA's guarantee of transfer into the community.

In this brief, amici examine the gap between how the FSA's earned time credit system works on paper as prescribed by the (exacting) statute and how BOP has (improperly) implemented the law in practice, to highlight the need for meaningful judicial review. It ends by explaining why § 2241 petitions must be available when BOP fails to provide the community placements the statute requires.

First, amici briefly set out the history surrounding the passage of the FSA. Passed with overwhelming bipartisan support, the Act sought to reduce the prison population and improve public safety. It was passed against the backdrop of prior BOP policy failures.

Second, amici explain how the text of the FSA's earned time credit system works, with a focus on how the text removes BOP's authority from the operation of the program. As the text makes clear, Congress aimed to create a *mandatory* community-placement benefit for qualifying federal prisoners. This benefit incentivizes engagement in recidivism-reducing programs and boosts the cost-efficiency of the federal

prison system as well as the safety of communities where prisoners will eventually be released. The statutory text makes the FSA's credit earning and transfer provisions compulsory; BOP has neither the authority nor discretion to refuse to release qualifying individuals to community placements.

Third, amici address the failures that have plagued BOP's implementation of the FSA's earned time credit system, which underscores the importance of judicial review. Even today, years after the FSA became law, the relevant data reflects the agency's continued, widespread failures to comply with its statutory obligation to transfer individuals into the community. Without judicial review via a § 2241 petition to address this noncompliance, the FSA becomes an unenforceable promise rather than a statutory mandate.

Finally, amici explain why a petition under § 2241 is the proper vehicle to challenge BOP's failure to transfer a prisoner to a community setting. Amici demonstrate through case law that the availability of § 2241 has already proven critical to realizing the FSA's purpose and remedying unlawful confinement in violation of that law.

ARGUMENT

I. Passed with overwhelming congressional support, the First Step Act seeks to reduce the costs of incarceration while improving public safety.

In 2018, a bipartisan Congress passed the FSA to combat the burgeoning costs of lengthy prison sentences while improving public safety.

The FSA was described as “the most significant criminal justice reform bill in a generation.” 164 Cong. Rec. S7649 (daily ed. Dec. 17, 2018) (statement of Sen. Chuck Grassley). It is a “transformative law with far-reaching implications[.]” *Gonzalez v. Herrera*, 151 F.4th 1076, 1078 (9th Cir. 2024). Passed by a Republican Congress, and signed into law by President Trump in 2018, the law had “incredible bipartisan support.”²

The FSA offered smarter-on-crime reform that sought to reduce the federal prison population while enhancing public safety. It “was the culmination of several years of congressional debate about what Congress might do to reduce the size of the federal prison population while also creating mechanisms to maintain public safety.” Nathan James, Cong. Rsch. Serv., R45558, *The First Step Act of 2018: An Overview* (2019), <https://sgp.fas.org/crs/misc/R45558.pdf>. Congress recognized the state of mass incarceration as untenable both economically and socially. *Id.* Accordingly, the resulting law “revise[d] policies that

² Remarks by President Trump at Signing Ceremony for S. 756, the “First Step Act of 2018” and H.R. 6964, the “Juvenile Justice Reform Act of 2018,” 2018 WL 6715859, at *2, White House (Dec. 21, 2018); *see also* Nathan James, Cong. Rsch. Serv., R45558, *The First Step Act of 2018: An Overview* (2019), <https://sgp.fas.org/crs/misc/R45558.pdf>. Indeed, the FSA passed the Senate by a vote of 87-12 and the House of Representatives by 358-36. Tim Lau, *Historic Criminal Justice Reform Legislation Signed into Law*, Brennan Ctr. for Just. (Dec. 21, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/historic-criminal-justice-reform-legislation-signed-law>; Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law — and What Happens Next*, Brennan Ctr. for Just. (Jan. 4, 2019), <http://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next>.

have led to overcrowded prisons and, of course, ballooning taxpayer expenses.”³

Several provisions of the FSA that sought to implement these goals were explicit responses to past, well-publicized BOP policy missteps. For example, the FSA ended BOP’s absolute control over compassionate release due to BOP’s “failures” in managing that program. *United States v. Brooker*, 976 F.3d 228, 231-32 (2d Cir. 2020); *see also* 18 U.S.C. § 3582(c)(1)(A); FSA § 603, 132 Stat. 5194, 5239 (Dec. 21, 2018).⁴ The FSA also overturned BOP’s manner of calculating good-time credits, which had turned the 54-day-per-year benefit to, in effect, only 47 days of credit. FSA § 102(b), 132 Stat. at 5210.⁵ And the FSA prohibited BOP’s practice of restraining pregnant inmates. 18 U.S.C. § 4322; FSA § 301(a), 132 Stat. at 5217.

³ 115 Cong. Rec. S7838 (Dec. 19, 2018) (statement of Sen. Chuck Grassley); *see also* 118 Cong. Rec. S5974 (Dec. 14, 2023) (statement of Sen. Cory Booker) (co-sponsor stating that the country was “investing billions of dollars in warehousing people”); Ben Harrington & Nathan James, Cong. Rsch. Serv., *Federal Correctional Reform and the First Step Act of 2018* (updated Dec. 28, 2018), <https://www.congress.gov/crs-product/IF10573> (noting that “[c]oncerns about the financial and social costs of incarcerating a growing number of federal inmates” motivated the FSA).

⁴ Previously, BOP alone could file reduction-in-sentence motions under 18 U.S.C. § 3582(c)(1)(A). *Brooker*, 976 F.3d at 233. The FSA amended that statute to allow prisoners themselves to file such motions, after first requesting relief from the warden.

⁵ *See, e.g.*, 164 Cong. Rec. S7642 (daily ed. Dec. 17, 2018) (statement of Sen. John Cornyn) (stating that Congress intended prisoners to receive 54 days of credit); *Barber v. Thomas*, 560 U.S. 474 (2010).

But the new earned time credit system is the flagship of the FSA’s prison reform provisions.⁶ The FSA’s new earned time credits accrue on top of existing good-time credits for federal prisoners. *See* 18 U.S.C. § 3632(d)(4)(A); 18 U.S.C. § 3624(b). The earned time credit system incentivizes prisoners to engage in recidivism-reducing programs by awarding credits that entitle individuals to early release from a BOP prison, either directly to supervision or to a community-based placement. 18 U.S.C. § 3632(d); *see also Gonzalez*, 151 F.4th at 1078; *Valladares v. Ray*, 130 F.4th 74, 85 (4th Cir. 2025). In so doing, the system achieves the dual goals of reducing the federal prison population while improving public safety. The details of this earned time credit system are described in the next section.

II. The First Step Act created a mandatory statutory right to earned time credits that the Bureau of Prisons lacks discretion to deny.

The FSA’s provisions outlining the new earned time credit system take a fresh approach to implementing its benefits. Unlike prior criminal justice reforms, the

⁶ Press Release, U.S. Dep’t of Justice, Justice Department Announces New Rule Implementing Federal Time Credits Program Established by the First Step Act, (Jan. 13, 2022), <https://www.justice.gov/archives/opa/pr/justice-department-announces-new-rule-implementing-federal-time-credits-program-established> (describing the earned time credit system as an “important program”); Ames C. Grawert & Patricia L. Richman, *The First Step Act’s Prison Reforms*, Brennan Ctr. For Justice, (Sept. 23, 2022), <https://www.brennancenter.org/our-work/research-reports/first-step-acts-prison-reforms> (describing the earned time credit system as “[t]he core of the First Step Act’s corrections reforms”).

FSA includes detailed statutory mandates that remove authority from BOP, rather than leaving the statute’s implementation to BOP discretion. This is reflected in the statutory text by (1) the use of compulsory language mandating that BOP award and apply earned time credits; (2) the statute’s exhaustive, detailed description of the contours of the earned time credit system that leaves little to BOP discretion; and (3) the imposition of explicit oversight to monitor BOP compliance.

A. The First Step Act uses mandatory language (“shall”) with respect to the earned time credit system.

The FSA’s mandatory language makes clear that earning and using the FSA’s earned time credits is a statutory entitlement, not a benefit to be awarded or withheld at BOP’s discretion. “Unlike the word ‘may,’ which implies discretion, the word ‘shall’ usually connotes a requirement.” *Maine Cmty. Health Options v. United States*, 590 U.S. 296, 310 (2020) (quoting *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016)). Repeatedly, the FSA uses mandatory language to describe the earned time credit system. It states that prisoners “*shall* earn time credits” at a specified rate,⁷ that credits earned “*shall* be applied” for transfer to prerelease custody or supervised release,⁸ and that BOP “*shall* provide all prisoners” with an opportunity to earn credits “throughout their entire term of incarceration.”⁹ Indeed, 18 U.S.C.

⁷ 18 U.S.C. § 3632(d)(4)(A) (emphasis added).

⁸ 18 U.S.C. § 3632(d)(4)(C) (emphasis added); *see also* 18 U.S.C. § 3624(g)(2) (“A prisoner *shall* be placed in prerelease custody”) (emphasis added).

⁹ 18 U.S.C. § 3621(h)(6) (emphasis added).

§ 3632—only one portion of the FSA’s earned time credit provisions—uses the word “shall” thirty-two times. This mandatory language signifies that the award and application of earned time credits are “obligation[s]” that are “impervious to . . . [BOP’s] discretion.” *Maine Cmty. Health Options*, 590 U.S. at 310 (ellipsis in original) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998)).¹⁰

The FSA’s repeated use of the mandatory “shall” stands in stark contrast to antecedent criminal justice reforms that conferred discretion on BOP. For example, to encourage prisoners to “successfully complete[] a program of residential substance abuse treatment,” Congress previously passed a law stating that a prisoner’s sentence “*may* be reduced by the Bureau of Prisons” after completion of that program. 18 U.S.C. § 3621(e)(2)(B) (emphasis added). Similarly, in response to the COVID-19 pandemic, Congress passed a law stating that BOP “*may* lengthen the maximum amount of time for which the Director [of BOP] is authorized to place a prisoner in home confinement.” CARES Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281 (2020) (emphasis added); *see also* 18 U.S.C. § 3624(c)(2) (requiring up to 12 months of prerelease community placement “to the extent practicable”). Another law allows, as an “[i]ncentive[] for a prisoner who participates in reentry and skills development programs,” the maximum

¹⁰ Lower courts have recognized that the award and application of earned time credits is “mandatory,” and BOP has no authority to refuse to properly apply the statutory requirements. *Valladares*, 130 F.4th at 77, 79; *see also, e.g., Miles v. Bowers*, 173 F.4th 372, 381 (1st Cir. 2026); *Benson v. Edgefield*, 174 F.4th 348, 357 (4th Cir. 2026).

allowable time in home confinement “at the discretion of the [BOP].” 34 U.S.C. § 60541(a)(2). But the FSA does not say that BOP “may” award or apply earned time credits at its “discretion.” It says that BOP “shall” (*i.e.*, *must*) do so. 18 U.S.C. § 3632(d)(4); 18 U.S.C. § 3624(g)(2); 18 U.S.C. § 3621(h)(6).

The mandatory aspect of the FSA’s earned time credit system is not accidental; rather, it is critical to the system’s effectiveness. As Senator Cornyn explained, achieving desired outcomes through incentives takes advantage of a fundamental aspect of human nature: “I think we, as human beings, all operate based on incentives, and the incentive for prisoners is to go through the program, gain the earned credit so that they can be released[.]” 164 Cong. Rec. S7746 (daily ed. Dec. 18, 2018) (statement of Sen. John Cornyn). If BOP can arbitrarily refuse to award or apply earned time credits in violation of the plain statutory text, then the credits “lose their worth as an incentive” to participate in recidivism-reducing programming. *Gonzalez*, 151 F.4th at 1088. That, in turn, undermines the FSA’s twin goals of cost savings and enhancing community safety.

B. The First Step Act lays out the earned time credit system in excruciating detail, rather than leaving it to the Bureau of Prison’s discretion.

In addition to using mandatory language, Congress crafted the provisions of the earned time credit system in exacting detail so as to leave virtually no significant aspect of the program up to BOP.

For example, the statute specifies precisely *who* earns credits. All prisoners earn credits unless they fall into specific exclusionary categories. 18 U.S.C.

§ 3632(d)(4)(A), (D). In particular, the statute says that only individuals serving a sentence following a conviction for certain listed offenses are ineligible to earn time credits. 18 U.S.C. § 3632(d)(4)(D).¹¹ And the statute lays out 68 disqualifying offense categories. 18 U.S.C. § 3632(d)(4)(D)(i)–(lxviii). As courts have recognized, because the statute is mandatory, BOP has no discretion to expand or create new categories of exclusion. *Valladares*, 130 F.4th at 83-85.

The FSA also dictates precisely *when* individuals earn credits: “*all* prisoners” should be able to earn credits “throughout their *entire* term of incarceration,” 18 U.S.C. § 3621(h)(6) (emphases added), subject to two specifically articulated time-based exceptions, 18 U.S.C. § 3632(d)(4)(B). Again, courts have recognized that BOP has no authority to create additional time-based exceptions to these statutorily prescribed rules. *E.g.*, *Miles v. Bowers*, 173 F.4th 372, 380 (1st Cir. 2026); *Benson v. Edgefield*, 174 F.4th 348, 357 (4th Cir. 2026).

And the FSA also decrees precisely *how* prisoners earn and use earned time credits. It specifies the precise number of credits a person can earn (10 or 15 days of credit for every 30 days of successful participation in programming, depending on the person’s recidivism risk category). 18 U.S.C. § 3632(d)(4)(A).¹² It statutorily defines the programming for which credits can be earned. 18 U.S.C.

¹¹ The FSA also specifies that noncitizens “subject to a final order of removal” are ineligible to apply credits. 18 U.S.C. § 3632(d)(4)(E).

¹² The statute even lays out the four levels BOP must use when evaluating a prisoner’s recidivism risk: minimum, low, medium, and high. 18 U.S.C. § 3632(a)(1).

§ 3635(3), (5). And it lays out the formula for determining precisely when BOP must apply credits for accelerated release. 18 U.S.C. § 3624(g)(1)(A).¹³ Further, as detailed below, the statute lays out precise timelines for implementing these measures.

C. Congress imposed multiple oversight programs on the Bureau of Prisons.

Finally, the FSA includes provisions aimed at monitoring BOP's implementation of the earned time credit system. The statute vests the ultimate authority to implement the FSA with the Attorney General, rather than with BOP. 18 U.S.C. § 3632(a). It requires that the FSA's implementation be overseen by a nonpartisan and nonprofit independent committee. 18 U.S.C. § 3631; 18 U.S.C. § 3632(a); 18 U.S.C. § 3633(a). And it calls for annual audits and other reports of BOP compliance. 18 U.S.C. § 3632(g); *see also* 18 U.S.C. § 3634; James, *The First Step Act of 2018: An Overview, supra*, at 7 (discussing the "several reports" required to be submitted about implementing the earned time credit system).

* * *

As shown above, to achieve the goal of reducing the prison population, the FSA created a mandatory right for federal prisoners to earn and use earned time credits for early transfer to supervised release or community-based placement. And it imposed a

¹³ BOP is required to apply earned time credits, and thus transfer the individual to the community, if they have "earned time credits . . . in an amount that is equal to the remainder of the prisoner's imposed term of imprisonment," have had the remainder of their sentence calculated, and have maintained a "minimum" or "low" recidivism risk score. 18 U.S.C. § 3624(g)(1).

corresponding obligation on BOP to carry out the statutory scheme by mandating the transfer when earned. The law specifies exactly who gets the benefits of earned time credits and when. It would thus be quite odd if federal inmates had no viable means to secure judicial review when BOP fails to comply with the FSA's precise and exacting language.

III. The Bureau of Prisons' implementation of the First Step Act's earned time credit system has been delayed, incomplete, and unlawful.

Despite the FSA's mandatory and detailed statutory text, the BOP has again and again failed to implement the law's directives.

To start, BOP's rulemaking to implement the FSA's earned time credit system was severely delayed. And since then, BOP has repeatedly erred in implementing the FSA, has missed or ignored aspects of the law, and has failed to properly train its under-resourced staff to understand and carry out the law. Critically, BOP today remains unable to track transfer dates and has consistently failed to transfer prisoners out of prison and into the community as the FSA requires. In short, federal prisoners need a pathway to judicial review because BOP has proven unable or unwilling to faithfully enforce the FSA's mandates.

A. The Bureau of Prisons' rulemaking for the First Step Act was severely delayed.

President Trump signed the FSA into law on December 21, 2018. The law included a number of deadlines to ensure BOP promptly implemented the groundbreaking changes. The risk and needs assessment system, a foundational component of the earned time credit system, was to be developed within

210 days of the FSA becoming law (*i.e.*, July 19, 2019). 18 U.S.C. § 3632(a). BOP then had 180 days to complete all initial assessments of prisoners (*i.e.*, January 15, 2020). 18 U.S.C. § 3621(h)(1). Finally, BOP had a two-year phase-in period within which to provide programming to all prisoners (*i.e.*, January 15, 2022). 18 U.S.C. § 3621(h)(2). Despite this statutorily mandated schedule, BOP did not propose rules to implement earned time credits until November 25, 2020, nearly a year into the phase-in period. FSA Time Credits, 85 Fed. Reg. 75268 (proposed Nov. 25, 2020).¹⁴ It then took BOP another year-plus to publish a final set of rules (which varied significantly from the proposed rules). FSA Time Credits, 87 Fed. Reg. 2705 (Jan. 19, 2022) (to be codified at 28 C.F.R. pts. 523 & 541).

Throughout this process, lawmakers expressed dissatisfaction with BOP's delays. On September 29, 2022, then BOP Director Collette Peters testified before the Senate Judiciary Committee regarding the status of FSA implementation. Senator Chuck Grassley lamented that when the former BOP Director testified the prior year, he had “misled” Congress about BOP's progress.¹⁵ Senator Grassley followed up the hearing with written requests, including a pointed one: “Please provide an estimated timeline for the full

¹⁴ Even when finally published, the proposed rule failed to enact the FSA as written. *See* Section III.B.

¹⁵ *Oversight of the Federal Bureau of Prisons: Oversight Hearing Before the U.S. Senate Comm. on the Judiciary*, 117th Cong. 1 (2022) (statement of Senator Chuck Grassley), https://www.judiciary.senate.gov/imo/media/doc/FE51F122-ED96-A4AB-F778-625E8E663F77/hearing_on_oversight_of_the_federal_bureau_of_prisons.pdf.

implementation of the First Step Act[.]”¹⁶ In response, BOP provided a non-answer that omitted any timeline:

The FSA touches almost everything we do. The FSA is an important law, and it motivates those in our care to take part in programming, rehabilitate, and prepare themselves for reentry. While FSA has a lot of moving parts, we have worked hard to meet its requirements. We continue to meet all deadlines set by the law and look forward to continuing to see the benefits of the FSA impact individuals in our care, our employees, and the Bureau as a whole.¹⁷

Unsatisfied with BOP’s lack of progress, Senators Grassley and Dick Durbin sent the DOJ a letter outlining “continued failures by the [BOP] to adequately implement the Earned Time Credit (ETC) provisions of the bipartisan [FSA].”¹⁸ The Senators noted that “almost four years after the FSA was signed into law, implementation of its ETC provisions

¹⁶ Letter from Slade Bond, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Senator Dick Durbin, Chairman, Comm. on the Judiciary (2022), https://www.judiciary.senate.gov/imo/media/doc/2022-09-29_-_qfr_responses_-_peters.pdf.

¹⁷ *Id.*

¹⁸ Letter from Senator Dick Durbin, Chairman, Comm. on the Judiciary, and Senator Chuck Grassley, Ranking Member, Comm. on the Judiciary, to Merrick Garland, Attorney Gen., Dep’t of Justice (Nov. 16, 2022), https://cdn.flowcode.com/prodassets/2022-11-16_Letter_to_AG_Garland_on_FSA_Earned_Time_Credits.pdf?ts=1668698222297607346&fce_id=28d4dbd3-7bbc-4e86-80c9-4d15ba58ce3c [hereinafter *Durbin & Grassley Letter*].

continues to fall short.”¹⁹ For one, “the ETC implementation process has been characterized by excessive delays. It took the Department until January 2022, three years after the enactment of the FSA, to issue a final rule on ETCs.”²⁰ This delay had real-world impacts: the Senators recounted the testimony of a formerly incarcerated person who had served 11 months longer in prison than she would have if she had been able to take part in the earned time credit system.²¹

The real-world impacts continued even after the final rulemaking was complete: “significant numbers of adults in custody again waited months to receive the benefit they were owed as BOP developed an error-riddled system to automate ETC calculations.”²² The Senators expressed concern that “BOP has struggled to develop and implement consistent and fair policies to this effect,” and noted that “enough time has passed that further delay cannot be excused.”²³

B. The Bureau of Prisons’ implementation efforts missed or ignored aspects of the First Step Act.

Both during and after the rulemaking process, BOP has erred in interpreting and implementing the FSA, undercutting the law’s objectives.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

1. Lawmakers were forced to call out statutory errors in the Bureau of Prisons' initial proposed rule.

BOP's proposed rule to implement the FSA's earned time credit system contained multiple conflicts with the statute. Senators Sheldon Whitehouse and John Cornyn and, separately, Congressman Hakeem Jeffries, submitted public comments that summarized some of those errors.

Both comments laid out three problems with the proposed rule, though these were “not the only problems with th[e] proposed rule” Congressman Hakeem Jeffries, Comment Letter on Proposed Rule FSA Time Credits (Jan. 25, 2021), <https://www.regulations.gov/comment/BOP-2020-0003-0119>. The three problems were “1) unnecessarily delaying the date when individuals may begin earning time credits; 2) denying individuals the ability to earn time credits while in residential reentry centers (RRCs); and 3) restrictively defining when someone has participated in a ‘day’ of programming for the purpose of earning time credits.” Senators Sheldon Whitehouse and John Cornyn, Comment Letter on Proposed Rule FSA Time Credits (Jan. 25, 2021), <https://www.regulations.gov/comment/BOP-2020-0003-0113>. Together these errors “reduce[d] individuals’ incentives to participate in EBRRs²⁴ and PAs²⁵ and limit[ed] the Act’s ability to achieve its other goals.” *Id.* And worse, these limitations were “not mandated by the statute or its legislative history, and [we]re contrary to the intent of Congress.” *Id.* Each of these provisions needed to be

²⁴ Evidence-based recidivism reduction programs (EBRR).

²⁵ Productive activities (PA).

revised “[i]n order to ensure that the [FSA could] fulfill its promise of prison reform” *Id.*

Courts agreed with the lawmakers’ criticisms and ruled against several of these aspects of the proposed rule. *See, e.g., Goodman v. Ortiz*, No. CV 20-7582 (RMB), 2020 WL 5015613, at *6 (D.N.J. Aug. 25, 2020) (“The Court finds no evidence in the statutory framework for delaying application of incentives earned by all prisoners during the phase-in program until January 15, 2022, the final date when BOP must complete the phase-in with respect to ‘all prisoners.’”); *Cazares v. Hendrix*, 575 F. Supp. 3d 1289, 1300 (D. Or. 2021) (agreeing that BOP lacked discretion to delay awarding earned time credits and also holding that the proposed rule calculating one day of programming as eight hours was “contrary to Congress’s intent”). BOP needed to, and ultimately did, change the proposed rule to align with the FSA.

2. The Bureau of Prisons’ various iterations of the earned time credit system have contained errors that needed correction.

Even after BOP made adjustments and published a final set of rules, its earned time credit system has repeatedly erred. This has meant prisoners have been unsure if their calculations are correct, have not known when they were going to be released, and some prisoners already in the community were threatened with return to prison.

i. Prisoners were initially threatened with reincarceration.

After BOP’s auto-calculator to track earned time credits launched in September 2022, it became obvious that it was littered with issues. “Prisoners who were

transferred to a halfway house after receiving an interim calculation of their sentence[] were called in and told they would be returning to prison after the new calculation took away their year [of early release].”²⁶ This reversal was a mistake of BOP’s own creation.

BOP requires prisoners to complete the FSA’s needs assessment survey when they arrive at their designated facility or be deemed in non-earning status. But when BOP began enforcing that new disqualification, they failed to tell the people impacted.²⁷ In other words, BOP created a crucial initiating event without broadcasting it and, as a result, the auto-calculator surprised some prisoners with news that they would be returned to prison, despite believing they were in full compliance. Senators Durbin and Grassley commented: “If DOJ takes away previously earned ETCs based on incomplete needs assessment surveys where impacted individuals could not have known that the completion of these surveys would become a retroactive requirement that would be used against them, the incentive effects of the FSA will be lost.”²⁸

²⁶ Walter Pavlo, *Bureau of Prisons’ Failure to Communicate First Step Act*, FORBES (Oct. 15, 2022), <https://www.forbes.com/sites/walterpavlo/2022/10/15/bureau-of-prisons-failure-to-communicate-first-step-act/>.

²⁷ *Id.*

²⁸ *Durbin & Grassley Letter*, *supra* note 18.

ii. The Bureau of Prisons made arbitrary implementation decisions that conflicted with the First Step Act.

BOP also decided to arbitrarily disadvantage some people in custody while building the earned time credit system. For instance, at one point, BOP posted a memorandum stating that prisoners would earn time credits toward early release to supervision only until they either accumulated 365 days (the maximum) or were “18 months from their release date, whichever happens first.”²⁹ This 18-month rule conflicted with the FSA’s directive that BOP “shall provide all prisoners” an opportunity to earn credits “throughout their *entire* term of incarceration,” 18 U.S.C. § 3621(h)(6) (emphasis added), and would result in those with shorter sentences remaining longer in prison than was intended by the FSA.³⁰ The 18-month rule was rescinded shortly after it took effect, but not before sowing considerable confusion.

Later, in January 2023, BOP posted a statement on its website that “that those in prerelease custody were going to have their calculation treated differently by

²⁹ Walter Pavlo, *Bureau of Prisons’ Interpretation of First Step Act Will Leave Thousands of Inmates Incarcerated*, FORBES (Sept. 9, 2022), <https://www.forbes.com/sites/walterpavlo/2022/09/09/bureau-of-prisons-interpretation-of-first-step-act-will-leave-thousands-of-inmates-incarcerated/?sh=4c0b42832f94>.

³⁰ Senators Durbin and Grassley took square aim at this decision: this “‘18-month rule’ is not supported by the FSA, nor does it further the FSA’s goal of incentivizing recidivism reduction programming for returning persons. . . .” *Durbin & Grassley Letter*, *supra* note 18.

not calculating them at all.”³¹ Prisoners in prerelease custody who had earned time credits would therefore “languish in BOP custody, albeit in a better situation than being in prison, [] for months more than necessary.”³²

Finally, prisoners still do not earn time credits for some portions of their prerelease custody time despite the statutory directive that prisoners shall be able to earn time credits throughout their entire time of imprisonment. During the rulemaking process, lawmakers made it clear that this was a mistake,³³ and BOP stated it would fix it in the final rule,³⁴ but this error remains.

iii. The automatic calculator continues to err, resulting in delayed or denied release.

BOP’s auto-calculator still needs help. At one point, BOP’s auto-calculator was not properly detecting the second PATTERN risk assessment that would increase a prisoner’s earning rate from 10 earned time credits to 15, thereby undercounting the number of credits earned.³⁵ See 18 U.S.C. § 3632(d)(4)(A) (prescribing rate of earning). Further, BOP has acknowledged at multiple points that it needs to improve its

³¹ Walter Pavlo, *Working Out The Bugs On The Bureau of Prisons’ First Step Act Calculator*, FORBES (Jan. 12, 2023), <https://www.forbes.com/sites/walterpavlo/2023/01/12/working-out-the-bugs-on-the-bureau-of-prisons-first-step-act-calculator/>.

³² *Id.*

³³ *Durbin & Grassley Letter*, *supra* note 18.

³⁴ FSA Time Credits, 87 Fed. Reg. 2705 (Jan. 19, 2022) (to be codified at 28 C.F.R. pts. 523 & 541).

³⁵ Pavlo, *supra*, note 31.

system so it can release prisoners on time,³⁶ when they have “earned time credits . . . in an amount that is equal to the remainder of the prisoner’s imposed term of imprisonment” 18 U.S.C. § 3624(g)(1). On July 14, 2025, six and a half years after the FSA was signed into law, BOP even created a dedicated FSA task force to “manually identify[] and correct[] community placement dates” in order to “alleviate pressure on institution staff while ensuring that eligible inmates are transferred to community confinement as soon as possible.”³⁷

iv. The Bureau of Prisons has improperly expanded ineligibility.

Although the FSA carefully delineates which prisoners are ineligible to earn time credits, BOP has ruled additional prisoners ineligible in contravention of the FSA. 18 U.S.C. § 3632(d)(4)(D); 18 U.S.C. § 3632(d)(4)(E)(i). Prisoners have been forced to bring § 2241 petitions in situations where BOP has improperly considered relevant conduct, *Valladares*, 130 F.4th at 83 (“All of this leads to the conclusion that ineligibility under (lviii) is limited only to those convicted of the death-resulting enhancement element. BOP may not look to other uncharged facts.”); expanded the list of ineligible convictions, *Noe v. True*, No. 21-1373, 2022

³⁶ Walter Pavlo, *Bureau of Prisons’ Challenges with First Step Act Release Dates*, FORBES (Sept. 17, 2023), <https://www.forbes.com/sites/walterpavlo/2023/09/17/bureau-of-prisons-challenges-with-first-step-act-release-dates/>; Federal Bureau of Prisons, *FBOP Updates to Phone Call Policies and Time Credit System*, (Oct. 4, 2024), <https://www.bop.gov/news/20241004-fbop-updates-to-phone-call-policies-and-time-credit-system.jsp>.

³⁷ Federal Bureau of Prisons, *Director Marshall Launches FSA Task Force*, (July 14, 2025), <https://www.bop.gov/news/20250714-director-marshall-launches-fsa-task-force.jsp>.

WL 5080196, at *24-25 (10th Cir. Oct. 5, 2022) (holding that a conviction under 21 U.S.C. § 846 for conspiring to commit a controlled-substance offense did not render the movant ineligible because the list of disqualifying convictions does not include § 846); and added additional ineligibility criteria beyond those in the statute, *see, e.g., Mateo v. Warden, FCI Danbury*, No. 3:25-CV-00814 (VAB), 2025 WL 2625263, at *10 (D. Conn. Sept. 11, 2025) (“By choosing to exclude only those with final orders of removal, Congress chose not to include lesser categories of individuals with pending or unresolved immigration issues.”). In each of these situations, courts played a vital role in ensuring prisoners did not spend additional time in prison, possibly years, due to BOP’s violations of the FSA.

C. The Bureau of Prisons’ staffing crisis and lack of training have further hindered First Step Act implementation.

BOP’s staffing crisis and failure to train available staff have exacerbated the troubled FSA implementation process.³⁸ Lawmakers at various times during the implementation of the earned time credit system have questioned what effect BOP’s critical staffing shortages have had on FSA implementation.³⁹

³⁸ *See generally* Drew Friedman, *Bureau of Prisons to close six institutions, citing ‘extreme staffing challenges’*, (July 2, 2026), <https://federalnewsnetwork.com/workforce/2026/07/bureau-of-prisons-to-close-six-institutions-citing-extreme-staffing-challenges/>.

³⁹ *See, e.g.*, Letter from Slade Bond, Deputy Assistant Attorney Gen., U.S. Dep’t of Justice, to Senator Dick Durbin, Chairman, Comm. on the Judiciary (2022), https://www.judiciary.senate.gov/imo/media/doc/2022-09-29_-_qfr_responses_-_peters.pdf (Senator Mike Lee asking how BOP was addressing “chronic staffing shortages” given that “[a]dequate staffing is essential to

And the agency’s available staff have continuously expressed confusion and a lack of understanding of the FSA. “BOP itself report[ed] that nearly half of staff interviewed for a March [2022] report indicated no familiarity with, or declined comment on, the needs assessment process and FSA incentives policies.”⁴⁰ A year later, case managers still were not able to explain how FSA release dates were calculated.⁴¹ Even last year, when BOP created its FSA task force, it noted that “the most significant training that we can provide is to the case managers who are on the front lines of this issue. . . . Once the new time credit calculations take effect, our target audience to explain the updates will be the case managers throughout the Bureau.”⁴²

providing the significant programming under the First Step Act and reducing recidivism”); *Oversight of the Bureau of Prisons: Hearing Before the Subcomm. on Crime and Fed. Gov’t Surveillance of the Comm. on the Judiciary*, 118th Cong. (2023), <https://www.govinfo.gov/content/pkg/CHRG-118hhrg54125/html/CHRG-118hhrg54125.htm> (statement of Rep. Andy Biggs, Member, H. Comm. on the Judiciary) (“However, there’s a larger underlying issue that has persistently plagued the successful operation of BOP, including the implementation of the First Step Act. BOP consistently grapples with challenges of low staffing and high attrition rates, intensifying the risk in an already hazardous profession.”).

⁴⁰ *Durbin & Grassley Letter*, *supra* note 18; *see also* Walter Pavlo, “Failure to Communicate,” *supra*, note 26 (recounting BOP case managers stating they had not been trained on FSA and did not know how the calculation worked).

⁴¹ Pavlo, “Challenges,” *supra*, note 36 (“As one prisoner told me, ‘My case manager said, ‘the computer tells your release date and it could be tomorrow, or next week, or next year, it does not matter to me. But I don’t have the ability to make that decision myself.’”)

⁴² Walter Pavlo, *Bureau of Prisons Task Force Taking Shape, Challenges Remain*, FORBES (July 23, 2025), <https://www.forbes>

Without properly trained case managers and other frontline BOP staff, implementation efforts will continue to flounder.

D. The Bureau of Prisons has failed to transfer prisoners as required by the First Step Act.

Even if the numerous errors during the initial years of the FSA's implementation can be chalked up to growing pains, BOP today remains unable to transfer prisoners to prerelease custody on time as the FSA requires. By statute, when a qualifying prisoner has accrued earned time credits in an amount equal to the remainder of the term of imprisonment, BOP must transfer the person to prerelease custody, either in a residential reentry center or on home confinement. Yet BOP has consistently failed to meet this requirement. Accordingly, the FSA's key incentive remains unrealized.

A recent Government Accountability Office report analyzed FSA transfers for "eligible people incarcerated in a BOP facility as of March 30, 2024, and who could have been transferred to prerelease custody from March 31, 2024, to December 31, 2024."⁴³ The GAO found "that BOP did not apply all the earned time credits toward prerelease custody for about 71 percent of these individuals (21,190 of 29,934

[.com/sites/walterpavlo/2025/07/23/bureau-of-prisons-task-force-taking-shape-challenges-remain/](https://www.gao.gov/assets/gao-26-107268.pdf).

⁴³ U.S. Gov't Accountability Off., GAO-26-107268, Federal Prisons: Improvements Needed to the System Used to Assess and Mitigate Incarcerated People's Recidivism Risk 49 (2026), <https://www.gao.gov/assets/gao-26-107268.pdf>.

people).”⁴⁴ This means that, six years after the FSA was signed, nearly 22,000 people were made to forfeit some or all of the time they had earned in prerelease custody under the FSA.

BOP offered the GAO several explanations for this failure, including issues specific to some prisoners such as unresolved detainers, but also systemic issues like prior BOP policies failing to provide accurate and timely release dates, staff workloads, and resource constraints within prerelease custody.⁴⁵ BOP has made much of this last reason, claiming that it does not have the necessary bed space to move all FSA-eligible prisoners to prerelease custody.⁴⁶

This last putative reason is not an excuse at all; it is yet another violation of the FSA. The FSA provides that the BOP “shall ensure there is sufficient prerelease custody capacity to accommodate all eligible prisoners.” 18 U.S.C. § 3624(g)(11). BOP’s admission that it does not have sufficient bed space is just another example of BOP failing to properly implement the FSA.

Moreover, despite the BOP knowing it lacks adequate bed space over seven years after the FSA’s signing, BOP still “does not know the full extent of this shortage because it has not comprehensively assessed its capacity and related budgetary needs. Without these assessments, BOP cannot ensure it has enough

⁴⁴ *Id.*

⁴⁵ *Id.* at 49-54.

⁴⁶ See, e.g., Walter Pavlo, *Bureau of Prisons Halfway Houses Must Change Due To First Step Act*, FORBES (Nov. 23, 2024), <https://www.forbes.com/sites/walterpavlo/2024/11/23/bureau-of-prisons-halfway-houses-must-change-due-to-first-step-act/>.

space for incarcerated individuals to transfer on time.”⁴⁷ Even now, BOP has not taken necessary action to correct its most glaring FSA failure, and it does not even know the scope of the problem it must fix.

* * *

While progress has been made on improving the earned time credit system, BOP’s implementation problems highlight the importance of ensuring that federal prisoners are not without recourse when BOP fails to award the benefits they have earned under the FSA.

IV. Habeas corpus under 28 U.S.C. § 2241 affords an equitable remedy for unlawful confinement in violation of the First Step Act’s community transfer requirement.

As Sections I through III explain, the FSA lays out precise, mandatory obligations for BOP to award earned time credits and transfer qualifying individuals into the community. But BOP has repeatedly demonstrated its inability to carry out those obligations. Accordingly, enforcement through judicial review is critical to realizing the FSA’s purpose. This Court should recognize what several circuits’ case law has already made clear: that 28 U.S.C. § 2241 affords a remedy for unlawful confinement in prison that violates the FSA.

Habeas corpus is “the specific instrument” available to challenge unlawful imprisonment. *Preiser v.*

⁴⁷ U.S. Gov’t Accountability Off., GAO-26-107353, Bureau of Prisons: Actions Needed to Better Achieve Financial and Other Benefits of Moving Individuals to Halfway Houses on Time (2026), <https://www.gao.gov/assets/gao-26-107353.pdf>.

Rodriguez, 411 U.S. 475, 486 (1973). Under 28 U.S.C. § 2241, the writ of habeas corpus extends to a person who is “in custody in violation of the Constitution or laws or treaties of the United States[.]” From the time of the founding, “[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom.” *Boumediene v. Bush*, 553 U.S. 723, 739 (2008). That is why this Court has recognized that habeas corpus “never has been a static, narrow, formalistic remedy; its scope has been to achieve its grand purpose—the protection of individuals against erosion of their right to be free from wrongful restraints upon their liberty.” *Jones v. Cunningham*, 371 U.S. 236, 243 (1963).

This Court has repeatedly confirmed that habeas, not a civil rights remedy, is the appropriate vehicle for federal prisoners to challenge unlawful confinement short of seeking outright release. *See, e.g., Skinner v. Switzer*, 562 U.S. 521, 534 (2011) (recognizing that a claim seeking to reduce a prisoner’s “level of custody” should be brought in habeas); *see also Preiser*, 411 U.S. at 499 (stating that habeas may lie “to remove the restraints making the custody illegal”). Just three years ago, in *Jones v. Hendrix*, this Court addressed whether 28 U.S.C. § 2241 allows federal prisoners to raise statutory claims challenging their sentences that would otherwise be barred by the restriction on second or successive motions under 28 U.S.C. § 2255(h). 599 U.S. 465, 470 (2023). In delineating the scope of § 2241 as compared to § 2255, the Court explained that a § 2241 petitioner can challenge “‘the legality of his *detention*’ without attacking the validity of his *sentence*.” *Id.* at 475 (emphases in original). As examples of legitimate § 2241 petitions, the Court included claims that would not lead to outright

release, including that the petitioner “is being detained in a place or manner not authorized by the sentence[.]” *Id.* at 475–76; *see also Trump v. J.G.G.*, 604 U.S. 670, 672 (2025) (“[I]mmediate physical release is not the only remedy under the federal writ of habeas corpus.”) (simplified).

The circuits have also historically relied on § 2241 when BOP has unlawfully denied eligibility for community placement or early release. *See, e.g., Rodriguez v. Copenhaver*, 823 F.3d 1238, 1242 (9th Cir. 2016) (holding that § 2241 is available to “decide whether the Bureau of Prisons acted contrary to established federal law, violated the Constitution, or exceeded its statutory authority” in designating the place of imprisonment); *Rodriguez v. Smith*, 541 F.3d 1180, 1189 (9th Cir. 2008) (granting § 2241 relief for claim seeking statutorily mandated eligibility for placement in prerelease community corrections); *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008) (“This court has long interpreted § 2241 as applying to challenges to the execution of a federal sentence, including such matters as the . . . type of detention and prison conditions.”); *Woodall v. Federal Bureau of Prisons*, 432 F.3d 235, 242 & n.5 (3d Cir. 2005) (holding that challenge to BOP regulations limiting placement in community confinement could proceed by way of habeas corpus); *see also Hudson v. Hardy*, 424 F.2d 854, 856 n.3 (D.C. Cir. 1970) (“Habeas corpus tests not only the fact but also the form of detention.”).

Recognizing the availability of habeas corpus for community-placement claims arising under the FSA is not only supported by precedent, it also makes sense.

Unlike an implied cause of action under *Bivens*⁴⁸, which is intended to “enforce a damages remedy,” *Ziglar v. Abbasi*, 582 U.S. 120, 131 (2017), habeas “is, at its core, an equitable remedy” that confers on courts “broad equitable powers” to fashion a just remedy for unlawful confinement, *Boumediene*, 553 U.S. at 780. In *Ziglar*, the Court noted that, by comparison to the plaintiffs’ drawn-out *Bivens* suit, “[a] successful habeas petition would have required officials to place respondents in less-restrictive conditions immediately[.]” 582 U.S. at 145. Federal prisoners seeking to enforce the benefits of the FSA’s earned time credit system are not seeking damages. They seek equitable relief via an order to effectuate their transfer out of a BOP prison and into the community.

Federal prisoners are also uniquely reliant on § 2241 to cure unlawful confinement because there is no alternative statutory civil rights remedy. A civil rights cause of action under 42 U.S.C. § 1983 provides relief only against persons acting “under color of” state law. 42 U.S.C. § 1983; *West v. Atkins*, 487 U.S. 42, 48 (1988). But BOP is a federal agency, not a state law actor. Recognizing that § 2241 affords a remedy for unlawful confinement ensures that federal prisoners have at least as broad access to the federal courts as state prisoners. *See Nettles v. Grounds*, 830 F.3d 922, 946 (9th Cir. 2016) (en banc) (Berzon, J., dissenting) (noting the lack of “alternative statutory remedy for federal prisoners” and reasoning that § 2241(c) should not be construed more narrowly in that context).

⁴⁸ *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971).

Nor does § 2241 bypass BOP's internal mechanisms for redress or leave courts as the initial arbiters of issues that have not been administratively vetted. "As a prudential matter, courts require that habeas petitioners exhaust all available judicial and administrative remedies before seeking relief under § 2241." *Ward v. Chavez*, 678 F.3d 1042, 1045 (9th Cir. 2012); *accord Garza v. Davis*, 596 F.3d 1198, 1203 (10th Cir. 2010). Administrative remedies can be skipped only when "the litigant's interests in immediate judicial review outweigh the government's interests in the efficiency or administrative autonomy that the exhaustion doctrine is designed to further." *McCarthy v. Madigan*, 503 U.S. 140, 146 (1992). Thus, judicial review under § 2241 remains a backstop available only when BOP has failed to remedy unlawful confinement brought to its attention.

Moreover, in petitions for habeas corpus, courts have discretion to appoint counsel when "the interests of justice so require[.]" 18 U.S.C. § 3006A(a)(2)(B). The availability of appointed counsel is crucial, because it means that important cases determining the lawfulness of restraints on prisoners' liberty need not be litigated primarily by pro se prisoners facing off against government attorneys. As this Court has recognized, the United States is "the richest, most powerful, and best represented litigant to appear before us." *Greenlaw v. United States*, 554 U.S. 237, 244 (2008). By contrast, individuals in federal prison are more likely to "have learning disabilities and mental impairments or lack basic education and literacy skills, making it difficult to articulate their concerns with nuance." *Halbert v. Michigan*, 545 U.S. 605, 621 (2005). That imbalance could skew development of the law. Because the Criminal Justice Act authorizes (but does not require) the appointment

of counsel for habeas proceedings, courts can receive the benefit of more fully developed legal arguments before issuing significant rulings regarding the legality of a federal prisoner's confinement. In contrast, no mechanism to appoint counsel for pro se prisoners exists for any other theoretically (but not in actuality) available remedies, like an implied *Bivens* claim.

The need for § 2241 as a vehicle to enforce the mandates of the FSA's earned time credit system is acute. In the seven-plus years since the law's enactment, the lower courts have stepped in repeatedly to remedy unlawful confinement. For example:

- When BOP refused to award earned time credits for programming completed during the two-year phase-in, courts provided a remedy under § 2241. *See Cazares*, 575 F. Supp. 3d at 1300; *Goodman*, 2020 WL 5015613, at *6.
- Courts in § 2241 proceedings have held that the BOP's regulation prohibiting individuals from earning time credits for programming completed before they arrive at their designated BOP prison conflicts with the FSA. *See Miles*, 173 F.4th at 379-83; *Benson*, 174 F.4th at 357.
- Courts in § 2241 proceedings have granted relief to federal prisoners improperly deemed ineligible to earn time credits for reasons not permitted by the FSA. *See Valladares*, 130 F.4th at 81 (rejecting BOP's categorical exclusion based on relevant conduct); *Noe*, 2022 WL 5080196, at *24–25 (rejecting ineligibility based on offense of conviction not listed in § 3632(d)(4)(D)).
- Most critically, courts have over and over again granted relief to federal prisoners who were denied the community-based placement to which

they were entitled under the FSA. *See, e.g., Woodley v. Warden*, No. 24-3053-JWL, 2024 WL 2260904, at *3-4 (D. Kan. May 15, 2024); *Ramirez v. Phillips*, No. 2:23-cv-02911-KJM-JDP, 2023 WL 8878993, at *2-4 (E.D. Cal. Dec. 22, 2023); *Komando v. Luna*, No. 22-CV-425-SE, 2023 WL 310580, at *4-8 (D.N.H. Jan. 13, 2023), *report and recommendation approved sub nom. Komando v. Warden*, 2023 WL 1782034 (D.N.H. Feb. 6, 2023).

Absent the remedy authorized by § 2241, countless federal prisoners would have remained in prison for longer than the law allows.

In sum, this Court should hold that § 2241 is available for federal prisoners to challenge BOP's failure to award community-based placement as guaranteed by the FSA. In the FSA, Congress made the award of earned time credits and the concomitant transfer benefit mandatory, yet BOP has repeatedly shown that it either cannot or will not properly implement the law. Habeas under § 2241 provides a flexible, equitable, and historically recognized remedy for that unlawful confinement.

CONCLUSION

For the foregoing reasons, the Court should reverse.

Respectfully submitted,

JESSICA STENGEL
Co-Chair, Amicus Comm.

JUDITH MINZER

ROBERT MEYERS

CATHI SHUSKY
*Assistant Federal Public
Defenders*

NATIONAL ASSOCIATION OF
FEDERAL DEFENDERS

BARBARA E. BERGMAN
*National Co-Chair
NACDL Amicus Curiae
Committee*

1660 L St., NW
Suite 12
Washington, D.C. 20036

TREVOR PARKES
Counsel & Project Director
NATIONAL ASSOCIATION
OF CRIMINAL DEFENSE
LAWYERS

1660 L St. NW, 12th Fl.
Washington, DC 20036
(202) 872-8600
tparkes@nacdl.org

Counsel for Amici Curiae

August 12, 2026

ELIZABETH G. DAILY
*Assistant Federal Public
Defender & Appellate
Chief*

OREGON FEDERAL PUBLIC
DEFENDER
101 SW Main St.
Suite 1700
Portland, OR 97202
(503) 326-2123
liz_daily@fd.org

CLAIRE MADILL*
*Assistant Federal Public
Defender*

MARYLAND FEDERAL
PUBLIC DEFENDER
6411 Ivy Lane
Suite 710
Greenbelt, MD 20770
(301) 750-8517
claire_madill@fd.org

**Counsel of Record*