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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

DARREN BOTTINELLI, PAMELA MARIE MCGOWAN, TIMOTHY LASHAWN ALLEN, RICARDO CESAR RAMIREZ, JUAN JESUS BORREGO, MICHAEL EUGENE DAVIS, MARSHALL ALLEN STUCKY, YENI NIEBLAS-ESCARREGA, MARK NUTTER, and ALEX DURAND WILLIAMS-DAVIS,

Petitioners,

v.

JOSIAS SALAZAR, Warden, Federal Correctional Institution, Sheridan, and

WILLIAM BROWN, Bureau Of Prisons Community Corrections Manager,

Respondents.

Case No. 3:19-cv-00256-MO

PETITIONERS' EMERGENCY APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND MEMORANDUM IN SUPPORT OF APPLICATION

(EXPEDITED CONSIDERATION REQUESTED)

Introduction

The petitioners, through their attorney, Stephen R. Sady, respectfully move this Court for a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure. Petitioners have filed a petition and memorandum on the merits in this Court, which is incorporated herein and made part of this motion by reference. They have also moved for class certification. Pursuant to Rule 65(b) and District of Oregon Local Rule 65-1, the petitioners respectfully move this Court for an emergency order for their conditional release pending this litigation. A temporary restraining order should issue here because, as explained in the motion and memorandum on the merits, "immediate and irreparable injury, loss, or irreversible damage will result" if the order does not issue. Fed. R. Civ. P. 65(b); *see also Hensley v. Municipal Court, 411* U.S. 345, 352 (1973) (habeas authority includes the power to "order [a] petitioner's release pending consideration of his habeas corpus claim") (citing *In re Shuttlesworth*, 369 U.S. 35 (1962)); *Marino v. Vasquez*, 812 F.2d 499, 507 (9th Cir. 1987) (the authority of the court to conditionally release a prisoner pending habeas proceedings derives from the power to issue the writ itself).

Argument

A temporary restraining order should be issued if "immediate and irreparable injury, loss, or irreversible damage will result" to the applicant in the absence of immediate relief. Fed. R. Civ. P. 65(b). The standard for issuing a temporary restraining order is the same as the standard for issuing a preliminary injunction. *See Stuhlbarg Int'l Sales Co. v. John D. Brush & Co*., 240 F.3d 832, 839 n.7 (9th Cir. 2001). To obtain a preliminary injunction, plaintiffs must demonstrate that (1) they are likely to succeed on the merits, (2) they are likely to suffer irreparable harm in the absence of preliminary relief, (3) the balance of equities tips in their favor, and (4) an injunction

is in the public interest. *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1127 (9th Cir. 2009) (quoting *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 22 (2008)). "A preliminary injunction is appropriate when a plaintiff demonstrates . . . that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor." *Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (quoting *Lands Council v. McNair*, 537 F.3d 981, 97 (9th Cir. 2008) (en banc)). As set forth below and in petitioners' memorandum on the merits, the BOP's denial of good time credits is not only inconsistent with clear congressional intent, it violates statutory and constitutional law. Petitioners will suffer immediate and irreparable harm absent emergency relief.

A. Petitioners Are Likely To Succeed On The Merits.

Under the unique circumstances of this case, the petitioners are likely to succeed on the merits, both as being entitled to the full 54 days of good time credits against their term of imprisonment, and as measured against the delayed implementation of the good time credit fix. The former standard arises from the retroactive clarification of 18 U.S.C. § 3624(b) as having been congressionally intended to accrue good time credits using the term of imprisonment. The retroactive statute means that the BOP's application of the statute has always shorted prisoners by seven days per year of the term of imprisonment, because the Bureau of Prisons calculated good time credit using a formula based on time served, not time imposed: the more good time credit one received, the less time served, the less good time credit was allowed. The petitioners should receive an additional seven days for each year of their term of imprisonment because the BOP's method of calculation, both before and after the First Step Act, is now untenable given Congress's

expressed intent. The petitioners are certain to ultimately prevail on their contention that the proper computation of good time credits provides 54 days against each year of the term of imprisonment.

Similarly, the petitioners are likely to prevail on their contention that the clarification provided by Section 102(b) of the First Step Act should be implemented without delay. As demonstrated by its legislative history, Congress intended to clarify congressional intent behind the good time calculation in § 3624(b). Mem. at 4-5. Congress intended to fix the calculation of the good time credit so that prisoners earn 54 days of credit per year of sentence, rather than 47 days. Mem. at 4. The immediate implementation of the good time fix is required because "this subsection" can and should be interpreted as applying only to the "earned time credit" provisions of the First Step Act. In the alternative, even if the statute erroneously applied a delayed effective date to the good time fix, the Supreme Court's decision in *Gozlon-Peretz v. United States*, 498 U.S. 395, 403 (1991), which called for immediate implementation where the delay provision in a statute was due to an oversight, controls. In the second alternative, the delayed implementation would violate the due process and equal protection provisions of the Constitution by resulting in irrational and arbitrary over-incarceration. Further, now that the former statute has been clarified by Congress, the petitioners would be entitled to immediate implementation under the former version of the statute, with any delay barred by the protections against ex post facto laws.

First, the subsection enacting the good time fix should not be read to delay its effective date. "[A]bsent a *clear direction by Congress to the contrary*, a law takes effect on the date of enactment." *Gozlon-Peretz,* 498 U.S. at 403 (emphasis added). Although some sections of the First Step Act have a delayed effective date, the subsection enacting the good time fix should not be construed to fall within the delayed provisions. The delayed effective date applies to the earned

time credit provision because of its contingency on the "date that the Attorney General completes and releases the risk and needs assessment system." In contrast, the good time fix merely adjusts a calculation that the BOP has been making for decades; it requires no new system to implement and, thus, requires no delay. The Court should construe "this subsection" to apply only to the earned time credits before transfer to community corrections, not to the good time credit fix. Mem. at 6.

Second, Congress did not intend to delay implementation of the good time fix. The purpose of the good time fix was to rectify the computation based on actual time served that provided seven days per year fewer than intended, as evidenced by the legislative history treating the amendment as a clarification of Congress's intent regarding good time credits. Mem. at 4-5. Congress demonstrated no intention that the rectification of the good time credit calculation to be delayed, especially given the language in the delayed effective date section relating only to the system relevant to earned time credits. "Given the apparent purpose of the legislation to rectify an earlier mistake, it seems unlikely that Congress intended the effective date to be any time other than the date of enactment." *Gozlon-Peretz*, 498 U.S. at 404-05. As in *Gozlon-Peretz*, the Court should construe the effective date provisions to put the law into effect immediately to implement congressional intent regardless of potentially inconsistent language. Mem. at 6-9.

Third, if read to prevent the good time fix from going into effect, the delayed effective date would violate constitutional protections against arbitrary and irrational deprivation of liberty. Mem. at 11-13. Delaying the implementation of the good time fix to an uncertain time in the future would be arbitrary, capricious, and cruel in violation of the Fifth Amendment's due process and equal protection clauses, because it would require prisoners who have shown "exemplary

compliance with institutional disciplinary regulations" throughout their sentences to serve more incarceration than Congress has now clearly stated it intended. The disparate treatment of those whose sentences were calculated before versus after the uncertain future effective date of the risk and needs assessment system "might well trigger equal protection concerns." *Jonah R. v. Carmona*, 446 F.3d 1000, 1008 (9th Cir. 2006) (construing pretrial credit statute to avoid disparate treatment of juveniles and adults).

Lastly, the First Step Act's good time fix constitutes a clarification of congressional intent regarding the BOP's original construction of the statutory provision that the Ninth Circuit previously found ambiguous and that the Supreme Court found reasonable. Where Congress itself has designated its amendment as a clarification, which is also the material effect of the amendment itself, the original form of the good time statute should be subject to reinterpretation consistent with congressional intent and immediately applicable to the petitioners. *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 689-90 (9th Cir. 2000).To the extent that the delayed effective date provision would be construed to apply to the old statute, the provision injurious to the liberty interests of the petitioners would constitute an ex post facto law and, therefore, be invalid. *See Weaver v. Graham*, 450 U.S. 24, 30-31 (1981) (retrospective loss of statutory gain time would violate the Ex Post Facto Clause).

B. Petitioners Are Likely To Suffer Irreparable Harm In The Absence Of Emergency Relief.

As a practical matter, litigation of this question will take more time than is available without causing irreparable harm, especially if discovery needed in response to contested facts in the petition. The petitioners face imminent irreparable harm in the form of over-service of their sentences, given that their correct release date is either imminent or has passed. "It is well

established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). Extending an individual's deprivation of liberty with no countervailing purpose would violate the Due Process Clause and its equal protection component in violation of the Fifth Amendment. *See Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects.").

Although the amount of additional custody is relatively small, "'[t]o a prisoner,' this prospect of additional 'time behind bars is not some theoretical or mathematical concept.'" *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (quoting *Barber v. Thomas*, 560 U.S. 474, 503 (2010)) (Kennedy, J., dissenting). "'[A]ny amount of actual jail time' is significant, and 'ha[s] exceptionally severe consequences for the incarcerated individual [and] for society which bears the direct and indirect costs of incarceration[.]'" *Id*. (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001), and *United States v. Jenkins*, 854 F.3d 181, 192 (2d Cir. 2017)). In addition to actual release at issue, the petitioners are also prejudiced to the extent their community corrections planning, which by BOP program statement begins 30 months before the projected release date, is delayed. As the Ninth Circuit has recognized, the petitioners' interest in community corrections – in a reentry center or home confinement under 18 U.S.C. § 3624(c) – provides a sufficient individual interest to warrant habeas corpus review. *See, e.g.*, *Sacora v. Thomas*, 628 F.3d 1059, 1066-67 (9th Cir. 2010) (affirming BOP's implementation of community correction provisions of the Second Chance Act); *Rodriguez v. Smith*, 541 F.3d 1180, 1185-86 (9th Cir. 2008) (rejecting BOP construction of community correction statute).

C. The Balance of Equities Favors Relief.

The balance of equities also favor petitioners. On the prisoners' side, they have met the standards for receiving good time credits and common fairness should require the government to keep up its part of the reward for good behavior. On the other hand, there is no legitimate interest in continuing to erroneously calculate good time credits in a manner that shorts prisoners by seven days for every year of their term of imprisonment, especially when every other prisoner after the arbitrary time when unrelated rules are promulgated will receive exactly those credits. Even worse, the government does not appear to be taking legally required steps to promulgate the unrelated rules. The First Step Act requires the Attorney General to establish an Independent Review Committee within 30 days after the date of enactment of the Act. The Independent Review Committee is then tasked with assisting the Attorney General develop the risk and needs assessment system, which is to be released "[n]ot later than 210 days after the enactment of this subchapter." No such Independent Review Committee has been established; the Attorney General failed to meet the 30-day deadline to establish the Independent Review Committee last month, necessarily delaying the release of the risk and needs assessments system that the BOP claims triggers the good time fix. Because the prisoners have earned their good time credits for their exemplary behavior, and because delay is both unnecessary and aggravated by further delay of the government's own doing, the equities support interim relief for petitioners.

Additionally, while the relief requested would impose almost no burden on the BOP because its SENTRY computer system could implement the adjustment virtually overnight, the requested relief would help reduce "the major hardship posed by needless prolonged detention." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir. 2013). Any "administrative cost" to the

government would be "far outweighed by the considerable harm to Plaintiffs' constitutional rights" in the absence of an injunction. *Hernandez v. Sessions*, 872 F.3d 976, 996 (9th Cir. 2017) ("Faced with such a conflict between financial concerns and preventable human suffering, we have little difficulty concluding that the balance of hardships tips decidedly in plaintiffs' favor.") (citing *Lopez v. Heckler*, 713 F.2d 1432, 1437 (9th Cir. 1983)).

D. An Injunction Is In The Public Interest.

Finally, the public interest favors granting the injunction because it would ensure that the government's conduct complies with congressional intent. Mem. at 4-5. The immediate implementation of the good time fix could also potentially save taxpayers vast sums in costs of incarceration. Although the delay of seven days sounds small, if the average sentence the petitioners have served is five years, so each is being delayed in release by 35 days, and there are at least 250 potential beneficiaries, the days at issue would equal 8,750 days of unnecessary imprisonment. Federal incarceration costs $94.82 per day, with community corrections housing at $88.52. 83 Fed. Reg 18863, *Annual Determination of Average Cost of Incarceration* (April 4, 2018). The continued unnecessary custody amounts to hundreds of thousands of wasted taxpayer dollars. And the public has no interest in over-incarceration rather than protecting the statutory and constitutional rights of well-behaved federal prisoners. *See Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) ("Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution."); *Innovation Law Lab v. Nielsen*, 310 F. Supp. 3d 1150, 1163 (D. Or. 2018) (in granting emergency relief for immigration detainees, "it is always in the public interest to prevent the violation of a party's constitutional rights."). Injunctive relief well serves the public interest.

Relief Requested

The petitioners have demonstrated that they will suffer immediate and irreparable harm in the absence of emergency relief from this Court. They respectfully request that the Court grant this motion for a temporary restraining order and issue an emergency order to:

1) certify the petitioners as representing the class consisting of all federal prisoners sentenced in the District of Oregon or serving sentences in the District of Oregon for whom the Bureau of Prisons has calculated a projected release date within 18 months of December 21, 2018, and who have been or are expected to be denied the benefit of the First Step Act's amendment of 18 U.S.C. § 3624(b);

2) require the Bureau of Prisons to provide a list of all class members with their contact information to petitioners' counsel;

3) grant interim relief in the form of a temporary restraining order providing conditional release on the terms provided in the supervised release conditions listed in the judgment and commitment order or accelerated transfer to community corrections;

4) grant the writ of habeas corpus;

5) require that the Bureau of Prisons recalculate the petitioners' good time credits forthwith based on the term of imprisonment as required by the amended good time credit statute;

6) declare that the new recalculated projected release date governs over the former computation for the purposes of determining the expiration of the term of imprisonment;

7) release the petitioners without delay if the recalculated release date demonstrates that the term of imprisonment has expired;

8) for those petitioners eligible for but not yet in community corrections, order recalculation of the transfer date based on the difference between the old and new projected release date;

9) for those whose sentences expired prior to release, modify the term of supervision to either begin on the correct date the sentence expired for those in community custody or adjust the date for release from the term of supervision to accomplish the same reduction in the interests of justice; and

10) grant such other and further relief, pursuant to 28 U.S.C.§ 2243, as law and justice require.

Respectfully submitted this February 20, 2019.

/s/ Stephen R. Sady
Stephen R. Sady
Attorney for Petitioners