No. 19-35201

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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

Petitioners-Appellants,

v.

JOSIAS SALAZAR, WILLIAM BROWN,

Respondents-Appellees.

Appeal from the United States District Court
for the District of Oregon
Portland Division
No. 3:19-cv-00256-MO
The Honorable Michael W. Mosman

OPENING BRIEF OF APPELLANTS

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STATEMENT OF JURISDICTION

The eight petitioners appeal from the district court's order denying their joint petition for a writ of habeas corpus seeking relief from the Bureau of Prisons' extension of their imprisonment by denying seven days of good time credits for each year of their terms of imprisonment. The petitioners asserted that the district court had jurisdiction over the respondents, named in their official BOP capacities as warden and manager of community corrections, under 28 U.S.C. §§ 1331, 1343(4) and 2241, as well as under ancillary jurisdiction and the constitutional right to habeas corpus review originating in Article I, section 9, clause 2, of the Constitution. Appellants' Excerpts of Record (ER) 82. The district court entered its judgment denying the habeas corpus petition and dismissing this action on March 13, 2019. ER 4. The petitioners filed a timely notice of appeal on March 13, 2019. ER 5. This Court has jurisdiction to review the district court's denial of relief and dismissal of the petition under 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF ISSUES

Under former 18 U.S.C. § 3624(b), federal prisoners were entitled to 54 days of good time credits "at the end of each year of the prisoner's term of imprisonment." The Bureau of Prisons calculated good time credits against time actually served rather than against the term of imprisonment, resulting in seven days fewer good time credits for every year of the sentence. In the First Step Act signed into law on December 21, 2018, Congress clarified that good time credits were to be based on the term of imprisonment, retroactively confirming that seven additional days should be provided for each year. The questions presented relate to delayed implementation of the good time fix:

I. Where the effective date provision refers to "this subsection," do the rules of statutory construction permit the interpretation that legislative intent and context mean that the good time credit fix does not require delayed implementation?

II. If the statutory language relating to delayed implementation applies to the good time fix, should the amendment be construed to be effective immediately under the reasoning of *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991), as addressing a drafting oversight inconsistent with congressional intent?

III. If delay is statutorily required, does the delay of over 90 days in implementation that is contingent on promulgation of unrelated rules violate the equal protection and due process clauses of the Fifth Amendment?

IV. Does the clarification of the original statute provide an independent basis for relief?

STATEMENT OF THE CASE

Nature of the Case

This is the direct appeal from the denial of habeas corpus relief entered by the Honorable Michael W. Mosman, Chief United States District Court Judge for the District of Oregon, requested by eight federal prisoners whose incarceration is being extended by delayed implementation of the good time credit amendment in the First Step Act, which was signed by the President on December 21, 2018. Because the prisoners are facing continuing irreparable harm from delayed release or transfer to community corrections, they have filed a motion to expedite briefing and calendaring contemporaneously with the filing of this opening brief.

Course of Proceedings

On February 20, 2019, eight federal prisoners, each close to their projected release dates from federal custody, filed a joint petition for a writ of habeas corpus raising the legal question whether the First Step Act's amendment to the good time credit statute should be deemed in effect, thereby accelerating their dates for transfer to community corrections or release. ER 80. They asserted the change in law should lead to earlier freedom from custody based on rules of statutory construction, constitutional protections against arbitrary and discriminatory deprivation of liberty, and clarification of the meaning of the former good time credit statute. ER 85-86.

The petitioners also filed a memorandum in support of relief on the merits (ER 62), along with later-withdrawn requests for interim relief and class certification (ER 11). The government filed its opposition to issuance of a temporary restraining order on February 25, 2019, raising procedural and substantive objections. ER 8.

On February 26, 2019, Judge Mosman held a hearing regarding interim relief. ER 15. Although finding that the "balance of hardships favors" the petitioners, the district court declined to grant interim relief based on the conclusion that the text imposes a delayed start for the amendments and that administrative needs provided sufficient reason for the delay. ER 43-45. On March 6, 2019, the parties filed a joint status report narrowing the issues and requesting an expedited ruling on two questions: "(1) is exhaustion of administrative remedies required for the petitioners to receive relief, and (2) is the First Step Act's change to calculating credit for good conduct effective today?" ER 10.

On March 13, 2019, the district court issued its opinion and order denying relief. ER1. On administrative remedies, the court stated, "I find that Petitioners are excused from the requirement that they exhaust their administrative remedies because by the time they exhaust their remedies within the BOP, they will, in many cases, be incapable of getting the relief sought because their claimed correct release

dates are either passed or imminent." ER 2. On the statutory construction arguments, the court found that the text foreclosed the constructions requested by the petitioners:

> [T]he text of the Act establishes that this provision is not immediately effective. Section 102(b)(2) of the Act provides that the amendments made in subsection 102(b) of the Act take effect only when the Attorney General completes the "risk and needs assessment system" required by Section 101(a) of the Act. Section 101(a) does not require completion of the system until 210 days after the Act's enactment. Section 102(b)(1) therefore will not take effect until approximately July 2019. I cannot, as Petitioners invite me to do, ignore Section 102(b)(2)'s express and unambiguous text and conclude that, despite what it clearly said, Congress really intended the "good time fix" to be effective immediately.

ER 2. The district court did not address the constitutional argument that the delay was irrational and arbitrary as linked to delay for promulgation of unrelated rules.

Standard of Review

The district court's statutory and constitutional rulings are legal determinations of law that this Court reviews de novo. *Berger v. City of Seattle*, 569 F.3d 1029, 1035 (9th Cir. 2009) (en banc); *United States v. Olson*, 856 F.3d 1216, 1219 (9th Cir. 2017).

Custody Status

The petitioners are in custody participating in prerelease community corrections in Oregon or in FCI Sheridan with the following projected release dates: Darren Bottinelli, 07/17/2019; Pamela Marie McGowan, 07/28/2019; Timothy

Lashawn Allen, 04/09/2019; Ricardo Cesar Ramirez, 05/09/2019; Juan Jesus Borrego, 04/02/2019; Michael Eugene Davis, 03/27/2020; Mark Nutter, 07/08/2019; and Alex Durand Williams Davis, 06/30/2019. Each would be eligible for earlier release if the good time fix is in effect. The passing of projected release dates does not render the appeals moot because a partial remedy may be available under 18 U.S.C. § 3583(e). *See Reynolds v. Thomas*, 603 F.3d 1144, 1148 (9th Cir. 2010); *Mujahid v. Daniels*, 413 F.3d 991, 994-95 (9th Cir. 2005).

STATEMENT OF FACTS

The relevant facts include the history of the federal good time credit statute, the clarification provided in the First Step Act, and the effect of the amended good time credit statute on the petitioners.

The Good Time Credit Statute Before The First Step Act

Under federal statutes, a term of imprisonment is satisfied through actual time in custody plus good time credits. 18 U.S.C. § 3624(a) and (b). The Sentencing Reform Act of 1984 eliminated the parole system and sharply cut back on the rate at which federal prisoners could earn good time credit, providing in § 3624(b) that prisoners could 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." For years, the BOP has interpreted the good time credit statute to permit a maximum credit of only 47 days per year of the sentence imposed, despite the statutory reference to 54 days of credit.

The legislative history of the original bill is rife with references to providing a maximum 15 percent reduction for good time credits, which would require 54 days of credit per year of the sentence imposed. *See, e.g.*, 131 Cong. Rec. S4083-03 (1985) (statement of Sen. Kennedy) (under the Act, the "sentence announced by the sentencing judge will be for almost all cases the sentence actually served by the

defendant, with a 15 percent credit for 'good time.'"); 131 Cong. Rec. E37-02 (1985) (statement of Rep. Hamilton) ("Now sentences will be reduced only 15% for good behavior."); *see also* 141 Cong. Rec. S2348-01, S2349 (1995) (statement of Sen. Biden) (as co-author of § 3624(b), on a sentence of ten years, "you are going to go to prison for at least 85 percent of that time . . . . You can get up to 1.5 years in good time credits[.]"). However, the BOP follows a mathematical formula for counting the 54 days against time actually served, as opposed to the sentence imposed, resulting in prisoners receiving only 47 days of credit for each year of the term of imprisonment, thereby requiring them to serve 87.2 percent of their sentences.

This Court upheld the BOP's method of computation by deferring to the agency's construction of a silent or ambiguous statute in *Pacheco-Camacho v. Hood*, 272 F.3d 1266, 1269-70 (9th Cir. 2001) (*Chevron* deference), *Mujahid*, 413 F.3d at 997 (*Chevron* deference), and *Tablada v. Thomas*, 533 F.3d 800, 807-08 (9th Cir. 2008) (*Skidmore* deference).[1] The Supreme Court approved the 47-day formula using time of actual custody as within the BOP's authority in *Barber v. Thomas*, 560 U.S. 474, 488-89 (2010). With the BOP's calculation based on actual time of

[1] The referenced administrative deference cases are *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), and *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

custody, prisoners receive maximum reductions of only 12.8 percent of the sentence imposed, not the 15 percent Congress contemplated.

Shortly after *Barber*, the Department of Justice and the BOP supported legislation that would shift the 54-day calculation from actual time served to the sentence imposed, thereby increasing the maximum available good time credits from 47 to 54 days per year. *See Hearing on the Oversight of the Federal Bureau of Prisons Before the Subcomm. on Crime, Terrorism, Homeland Security and Investigations of the H. Comm. on the Judiciary*, 113th Cong., at 23-24 (2013) (Statement of Charles E. Samuels, Jr. Director, Federal Bureau of Prisons).[2] By doing so, the statute would conform to the intent of the original legislation to grant a maximum 15 percent reduction. However, the provision was not enacted for many years until recently attached to the First Step Act.

The First Step Act's Amendment To The Good Time Credit Statute

Title I of the First Step Act, entitled "Recidivism Reduction," consists of seven sections. The bulk of the title is set out in Section 101, which provides instructions for the Attorney General to create and to implement a "risk and needs assessment system," referred to in the legislation as "the System," along with

[2] Available at https://www.govinfo.gov/content/pkg/CHRG-113hhrg82847/pdf/CHRG-113hhrg82847.pdf, at 23-24.

recidivism reduction programming. Pub. L. 115-391, § 101, 132 Stat. 5194, 5195-5208 (2018) (promulgating 18 U.S.C. §§ 3631-3635). The legislation instructs that the System must provide incentives for participation in programming, with the central incentive being the possibility of earning "earned time credit" to be "applied toward time in prerelease custody or supervised release." § 101, 132 Stat. at 5198 (promulgating 18 U.S.C. § 3632(d)(4)(C)). Section 101 explicitly provides that prisoners cannot earn time credits for the completion of any program prior to the date of enactment of the First Step Act. 132 Stat. at 5198.

As part of the earned time credit system, Section 102 of the law adds subsection (g) to 18 U.S.C. § 3624. § 102(b)(1)(B), 132 Stat. at 5210-13. Under that provision, the BOP can place an "eligible prisoner" who has earned time credits equal to the time remaining on his or her sentence in prerelease custody (home confinement or residential reentry center) or transfer the prisoner to supervised release up to 12 months early. *Id*. Section 3624(g)(1) starts with a reference to the eligible prisoners to whom "this subsection" applies. *Id*. at 5210. Nestled within Section 102(b) of the First Step Act is the two-paragraph "good time fix" amendment to 18 U.S.C. § 3624(b) that provides in full:

> Section 3624 of title 18, United States Code, is amended—
>
> (A) in subsection (b)(1)—

> (i) by striking "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," and inserting "of up to 54 days for each year of the prisoner's sentence imposed by the court,"; and
>
> (ii) by striking "credit for the last year or portion of a year of the term of imprisonment shall be prorated and credited with in the last six weeks of the sentence" and inserting "credit for the last year of a term of imprisonment shall be credited on the first day of the last year of the term of imprisonment[.]"

§ 102(b)(1)(A), 132 Stat. at 5210. With the amendment, the good time credit now states in relevant part that a prisoner "may receive credit toward the service of the prisoner's sentence of up to 54 days for each year of the prisoner's sentence imposed by the court, subject to determination by the Bureau of Prisons that, during that year, the prisoner has displayed exemplary compliance with institutional disciplinary regulations." 18 U.S.C. § 3624(b).

As stated in the summary of the Senate Report on the First Step Act, the good time fix was intended "to clarify congressional intent":

> Amends Section 3624 of title 18 of the U.S. Code *to clarify congressional intent* behind good time credit, which is earned for "exemplary compliance with institutional disciplinary regulations," to ensure that a prisoner who is serving a term of imprisonment of more than 1 year may receive good time credit of 54 days per year toward the service of the prisoner's sentence.

Staff of S. Comm. on the Judiciary, 115th Cong., S.3649, *The First Step Act Section-by-Section Summary*, at 3 (Nov. 15, 2018) (emphasis added).[3] Further, the Senate Report only linked the delayed effective date to the "earned time credit" provisions linked to the system, not the good time credits already earned. *Id.* at 4 (The delayed effective date concerns "amendments in this section *related to prerelease custody*," which "shall take effect on the date that the Attorney General completes and releases the new risk and needs assessment system.") (emphasis added). The legislative history repeatedly references the good time amendment as a "fix" to conform the statute to the original intent:

- "In fact, many of the provisions in this bill are there because they specifically asked for them. For example, Democrats asked for a fix to the way the Bureau of Prisons calculates good time credit. *We made changes to clarify congressional intent on that section*."[4]

- "Turning to the bill we are debating today, I recognize that the FIRST STEP Act includes *a fix to the calculation of good time credit*, which I

[3] Available at https://www.judiciary.senate.gov/download/revised-first-step_-section-by-section.

[4] 115 Cong. Rec. H4318 (daily ed. May 22, 2018) (statement of Rep. Bob Goodlatte) (emphasis added) (available at http://ca11.uscourts.libguides.com/ld.php?content_id=46447705).

have sought for many years. *Calculating good time credit as Congress had originally intended is a serious improvement made by this bill*."[5]

- "On the prison reform side, this legislation includes several positive reforms from the House-passed FIRST STEP Act. *The bill makes a good time credit fix and revises the good-time credit law to accurately reflect congressional intent by allowing prisoners to earn 54 days of credit per year, rather than 47 days*."[6]

- "The Leadership Conference wrote: 'Bringing fairness and dignity to our justice system is one of the most important civil and human rights issues of our time. This bipartisan bill offers some modest improvements to the current federal system—such as revising mandatory minimum sentences for certain drug offenses and *fixing the "good time" credit calculation*. For this reason, we urge the Senate to vote yes on cloture and no on all amendments [to the FIRST STEP Act].'"[7]

The First Step Act provides timelines for the implementation of the risk and needs assessment system. Specifically, it gives the Attorney General 210 days after enactment of the law within which to develop and publicly release the risk and needs

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[5] 115 Cong. Rec. H4319 (daily ed. May 22, 2018) (statement of Rep. Bobby Scott) (emphasis added) (available at http://ca11.uscourts.libguides.com/ld.php?content_id=46447705).

[6] 115 Cong. Rec. S7314 (daily ed. Dec. 5, 2018) (statement of Sen. Ben Cardin) (emphasis added) (available at http://ca11.uscourts.libguides.com/ld.php?content_id=46447490).

[7] 115 Cong. Rec. S7775 (daily ed. December 18, 2018) (statement of Rep. Dianne Feinstein) (emphasis added) (available at https://www.congress.gov/congressional-record/2018/12/18/senate-section/article/s7753-1?s=1&r=25).

assessment system. 132 Stat. at 5196 (promulgating 18 U.S.C. § 3632). Within 180 days after that, the Director of the BOP must assess each prisoner and begin to provide appropriate programming. 132 Stat. at 5208 (promulgating 18 U.S.C. § 3621(h)). There is a two-year "phase-in" for the BOP to make programming available to all prisoners. 132 Stat. at 5209. At the end of Section 102(b), the law provides a delayed effective date for "this subsection" contingent on the release of the risk and needs assessment system:

> (2) EFFECTIVE DATE.—The amendments made by this subsection shall take effect beginning on the date that the Attorney General completes and releases the risk and needs assessment system under subchapter D of chapter 229 of title 18, United States Code, as added by section 101(a) of this Act.

132 Stat. at 5213. The petitioners assert that the correct reading of the statute is that the delayed effective date in § 102(b)(2) applies only to the earned time transfer provisions in § 102(b)(1)(B), despite the BOP's claim that it also delays implementation of the independent good time fix in § 102(b)(1)(A).

The Stipulated Effects Of The District Court Ruling

As reflected in the custody status for each of the petitioners, each prisoner is within four months or shorter of the projected release date. Under the BOP's program statements, programming for community corrections is to begin at least 30

months before the projected release date. BOP Program Statement 5325.07 (2007).[8]

In their joint status report, the parties agreed as follows:

- The petitioners do not dispute that their sentence computations are correct if the Bureau of Prisons is not required to calculate credit for good conduct in the manner provided in § 102(b)(1)(A) of the First Step Act.

- The Government does not dispute that the petitioners' sentence computations are incorrect if the manner of calculating good time credits in § 102(b)(1)(A) of the First Step Act is effective today, either expressly, by implication based on clarifying legislation, or as constitutionally required.

ER 10. Each petitioner is therefore facing irreparable harm due to prolongation of incarceration beyond the proper projected release date or delay in participation in community corrections.

SUMMARY OF ARGUMENT

This case involves the first application of the rules of statutory construction to the First Step Act's good time credit amendment to determine whether, as is generally the case, such clarifying statutes are immediately effective upon signing, or whether the delayed effective date for "this subsection" that applies to a different and new amendment regarding "earned time credits" also requires that the good time credit provision be delayed. The district court failed to apply the rules of construction

[8] Available at https://www.bop.gov/policy/progstat/5325_007.pdf.

required by governing precedent. Instead, the court "assum[ed] the answer to the question at issue" (*Watt v. Alaska*, 451 U.S. 259, 266 (1981)) by ignoring congressional intent and instead accepting the government's view that the words "this subsection" applied to both "earned time credits" and "good time credits."

This Court should engage in the required construction that, in light of the statutory context and the legislative intent and the irrationality of delay, requires an interpretation of the statute requiring implementation without further delay:

- The phrase "this subsection" is more reasonably read to refer to the newly created subsection (g) of § 3624, which applies only to the "earned time credits" that only come into play after the new needs and risks assessment system is in place;
- The use of "this subsection" does not constitute the clear statement required for exceptions to the general rule of statutes being effective upon presidential signing;
- The statutory context and legislative history only support application of the delayed effective date for "earned time credits" and not for "good time credits";
- The application of the delayed effective date only to the "earned time credits" amendments avoids absurd and unreasonable results;
- By construing the delayed effective date to only apply to "earned time credits, the Court avoids the serious constitutional problems of keeping prisoners incarcerated beyond the expiration of their sentences based on irrational delay unrelated to legitimate government interests.

In the event the Court determines that the delayed effective date must be read to apply to the good time credit amendment, the Court should apply the methodology

that the Supreme Court applied in *Gozlon-Peretz v. United States*, 498 U.S. 395 (1991), where the face of the statutes on post-sentencing supervision resulted in no supervision for serious drug offenders. The Court construed the statutes to make supervised release immediately effective because, "[g]iven 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." *Id.* at 404-05. If the government interest in supervision can be served by such construction, the exact same principle applies here where individual liberty is at stake. Congress clarified that the earlier application of the good time credit statute incorrectly denied seven days for each year of the sentence. Where the legislation rectified the earlier mistake, Congress would only have intended the correction to go into effect without undue delay.

If the delay of over 90 days in implementing the good time fix is required by the statute, then the continued delay violates the due process and equal protection clauses. The good time fix simply told the BOP that good time credits already earned should be calculated to increase the time against the sentence by seven days for each year of the term of imprisonment. The time involved could be from seven days for sentences of a year and a day, to 70 days for ten year sentences, to 140 days for 20 year sentences. The amount of corrected time is relatively slight and easily adapted

to the prerelease custody scheduled for months prior to projected release dates. And they have nothing to do with the risk and needs assessment system for "earned time credit." Under these circumstances, the irrational, arbitrary, and discriminatory denial of liberty violates based Fifth Amendment rights.

Lastly, the Court can analyze the petitioners' claims under the prior statute that applies if the First Step Act amendment does not already apply as a matter of statutory construction or constitutional law. Usually, such an argument would be foreclosed by the binding precedent upholding the BOP's method of calculation. But this Court has held that, especially in light of difficulty ascertaining the intent of the original Congress, "a decision by the current Congress to intervene by expressly clarifying the meaning of [the statute] is worthy of real deference." *ABKCO Music, Inc. v. LaVere*, 217 F.3d 684, 690 (9th Cir. 2000). The current Congress has repeatedly described the good time credit amendment in the First Step Act as a "clarification." Therefore, this Court should "honor Congress' 'clarification' label and accept [the new] provisions as a statement of what [the statute] has meant all along," *id.* at 690, by granting relief under the old statute if the new statute is not yet available.

ARGUMENT

I. The Good Time Fix Should Be Construed To Be Effective Immediately Because The Delayed Effective Date Provision Referring To "This Subsection" Is Rationally Connected Solely To The New Risk And Needs Assessment System That Applies To A Different Part Of The Statute.

This Court should construe the First Step Act's delayed effective date provisions in the first instance because the district court failed to apply the applicable rules of statutory construction to determine congressional intent, instead "assum[ing] the answer to the question at issue." *Watt*, 451 U.S. at 266-67. Based on the text – "this subsection" – the district court found itself unable to inquire further whether "Congress really intended the 'good time fix' to be effective immediately." ER 2. But controlling authority requires that the tools of statutory construction be applied to determine the statute's meaning: "[E]ven the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *Schwenke v. Sec'y of the Interior*, 720 F.2d 571, 576 (9th Cir. 1983) (quoting *National Railroad Passenger Corp. v. National Association of Railroad Passengers*, 414 U.S. 453, 458 (1974)).

"[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); *accord United States v. Clizer*, 464 F.2d 121, 123 n. 2 (9th Cir. 1972); *United States v. Bafia*, 949 F.2d 1465, 1480 (7th Cir. 1991). Here, the only potentially relevant effective

date provision in Title I of the First Step Act explicitly links the need for a delay to the risk and needs assessment system: "The amendments made by this *subsection shall take effect beginning on the date that the Attorney General completes and releases the risk and needs assessment system* under subchapter D of chapter 229 of title 18, United States Code, as added by section 101(a) of this Act." § 102(b)(2), 132 Stat. at 5213 (emphasis added). Although that provision considered on its own could be read to encompass the good time fix, which is included within § 102(b), the full statutory context as well as potential constitutional infirmities militate in favor of construing "this subsection" narrowly to mean only the newly promulgated subsection (g) of § 3624, which governs the new earned time credit transfer authority, leaving the good time fix to be effective immediately in the absence of "clear direction by Congress to the contrary" within the meaning of *Gozlon-Peretz*.

The statutory context of "this subsection" favors application of the delayed effective date only to transfer based on earned time credits as opposed to release based on good time credits. "[S]tatutory interpretation turns on 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'" *Nken v. Holder*, 556 U.S. 418, 426 (2009) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)). On its face, the text of the delayed effective date clause provides good reason to construe "this subsection" as referencing solely

the new earned time credit transfer provision because of its contingency on the "date that the Attorney General completes and releases the risk and needs assessment system." Only the earned time credit provision has any relation to the risk and needs assessment system. 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. Moreover, the amendments in § 102(b)(1)(B) repeatedly use the same phrase "this subsection" to mean subsection (g) of § 3624, which will govern earned-time transfer to prerelease custody. That phrase—"this subsection"—does not appear in the § 102(b)(1)(A) good time fix. Thus, context strongly favors the narrow reading of delay applying only to subsection (g).

Other traditional tools of statutory construction support a narrow construction of § 102(b)(2) to solely include § 3624(g) within the delayed effective date. First and foremost, courts "do not construe statutes in a manner that would lead to absurd results," nor do courts "impute to Congress an intent to create a law that produces an unreasonable result." *United States v. Casasola*, 670 F.3d 1023, 1029 (9th Cir. 2012); *see also Mellouli v. Lynch*, 135 S. Ct. 1980, 1982, 1989 (2015) (rejecting agency construction of statute that "makes scant sense" given the need to avoid "consequences Congress could not have intended") (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 200 (2013)). There is an obvious need to delay implementation of the

earned time transfer provision. The entirely new risk and needs assessment system must be in place before the BOP can begin using time credits earned under that system to determine which prisoners should be transferred to prerelease custody or supervised release.

By contrast, the good time credit system is not new, and it operates on a separate plane from the earned time credit transfer and programming provisions of Title I. The BOP has been touting the need for this amendment for many years. The good time credit amendment is a simple calculation, subtracting an additional seven days of good time credit for each year of the term of imprisonment for compliant prisoners' sentences. The time involved for individuals is relatively small and needs no programming to implement. Unlike larger sentence reductions, such as those implemented by retroactive guideline amendments, prisoners impacted by the good time fix are already close to release and prepared for reentry. Delaying the good time fix makes scant sense and undermines rather than furthers coherent implementation of the First Step Act. *See United States v. Juvenile Male*, 900 F.3d 1036, 1040 (9th Cir. 2018) (statutory definition may yield to context where definition would "lead to 'obvious incongruities' or would 'destroy one of the major congressional purposes' of the statute") (citing *United States v. Olson*, 856 F.3d at 1223 (quoting *Lawson v. Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 201 (1949)).

Relatedly, construing the good time fix statute to be effective immediately avoids serious constitutional problems. *Jonah R. v. Carmona*, 446 F.3d 1000, 1008 (9th Cir. 2006) ("We must interpret statutes to avoid such constitutional difficulties whenever possible."); *see Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (describing the principle of constitutional avoidance); *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (same). Applying the delayed effective date to the good time fix would irrationally and unconstitutionally discriminate against prisoners who earned the requisite good time credits sufficient for immediate release. Those prisoners presently close to their release dates who have abided by all institutional rules during their incarceration would be held in custody to await the satisfaction of an unrelated condition precedent—the implementation of the risk and needs assessment system. 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.").

The delayed effective date was not intended to delay the good time fix in § 3624(b). The amendment to the good time credit statute is independent of the

prerelease custody provisions in Title I and, as a clarification of congressional intent, immediately effective. In the context of the overall legislation and purpose of the statute, "this subsection" in the effective date provision relates only to § 3624(g), which means the good time fix is immediately effective.

II. If The Statutory Language Is Only Susceptible To Construction Consistent With Delay, The Court Should Apply The Supreme Court's Reasoning In *Gozlon-Peretz* To Correct A Drafting Oversight.

Courts should construe legislation aimed at remedying prior drafting oversights to be immediately effective. In *Gozlon-Peretz*, the Supreme Court considered the effective date of a statutory amendment to correct an apparent mistake in the Controlled Substances Penalties Amendments Act of 1984, which inexplicably mandated post-confinement supervision for many small-time drug offenders but exempted big-time narcotics offenders. 498 U.S. at 404-05. The new Act removed that disparity and mandated post-confinement supervision for all Schedule I and II drug offenders. *Id*. Despite the Sentencing Reform Act's delayed effective date, the Supreme Court held, "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." *Id*. at 405.

Similarly, in this case, 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. *See also* Steven Nelson, *Drafting error stalls inmate release under Trump plan*, Washington Examiner (Jan. 25, 2019).[9] As in *Gozlon-Peretz*, it is unlikely Congress intended the rectification of the good time credit calculation to be delayed. Accordingly, the provision should be construed to take effect immediately.

III. If The Statutory Language Is Not Construed To Be Effective By Now, The Delayed Effective Date Of The Good Time Fix Is Irrational, Arbitrary, And Capricious In Violation Of The Due Process And Equal Protection Clauses Of The Constitution.

Irrational and arbitrary classifications violate the equal protection clause. *Chapman v. United States*, 500 U.S. 453, 465 (1991). The equal protection clause applies to the federal government through the Fifth Amendment's due process clause. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Delaying the effective date of the good time fix to an uncertain time in the future would be arbitrary, capricious, and cruel 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.

[9] Reported at https://sentencing.typepad.com/sentencing_law_and_policy/2019/01/latest-discussion-of-fixing-timing-problems-with-expansion-of-good-time-credit-in-the-first-step-act.html.

"Disparate treatment of similarly situated defendants triggers equal protection concerns when there is no rational basis for the distinction." *Juvenile Male*, 900 F.3d at 1043. Here, 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.*, 446 F.3d at 1008 (construing pretrial credit statute to avoid disparate treatment of juveniles and adults); *Myers v. United States*, 446 F.2d 232, 234 (9th Cir. 1971) (holding that the Fifth Amendment requires that all similarly-situated federal prisoners receive credit under 18 U.S.C. § 3568); *Stapf v. United States*, 367 F.2d 326, 329 (D.C. Cir. 1966) ("Denial of credit . . . where others guilty of crimes of the same or greater magnitude automatically receive credit, would entail an arbitrary discrimination within the power and hence the duty of the court to avoid.").

The delayed effective date is irrational and discriminatory. Based on arbitrary time for promulgation of irrelevant rules, these petitioners are denied days of freedom earned both before and after the First Step Act's enactment. These are well-behaved prisoners singled out for denial of credits that every federal prisoner will eventually be receiving, after it is too late to free these petitioners. The only conceivable reason for delay – administrative convenience – makes no sense when the BOP participated in the promulgation of the change and, in any event, has had

over 90 days and counting to implement the computerized adjustment to update release dates.

Although the amount of additional custody is relatively small, "'To 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*, 560 U.S. at 504) (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)). Delay in implementing what the statute has always meant violates the Fifth Amendment.

IV. The Good Time Fix Clarifies Congressional Intent Regarding The Original Statute, Which Provides An Alternative Statutory Basis For Relief.

In any event, 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 this Court previously found ambiguous and that the split 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*, 217 F.3d at 689-90 ("Given the extraordinary difficulty that the courts have found in divining the intent of the original Congress, a decision by the current Congress to intervene by expressly clarifying the meaning of [the statute] is worthy of real deference...We therefore honor Congress' 'clarification' label and accept [the new] provisions as a statement of what [the statute] has meant all along.") (quoting *Beverly Community Hosp. Ass'n. v. Belshe*, 132 F.3d 1259, 1265 (9th Cir. 1997)).

Just as an authoritative construction of a statute explains what the law has always meant, Congress's clarification of its intent says what the law has always meant. *See United States v. Aguilera-Rios*, 769 F.3d 626, 631 (9th Cir. 2014) (citing *Rivers v. Roadway Express Inc.*, 511 U.S. 298, 312-13 (1994)). The fact that Congress expressly prohibited prisoners from receiving earned time credits for programs completed before the date of enactment, 132 Stat. at 5198, but omitted any such restriction for good time credits, confirms Congress's intent for the good time fix to have both retroactive and prospective effect. *Gozlon-Peretz*, 498 U.S. at 846-47 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The petitioners should therefore prevail under the former statute as well as the amended statute. Even if the delayed effective date provision could be construed to delay clarification – which it could not – 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 time credits would violate the Ex Post Facto Clause).

Conclusion

For the foregoing reasons, the Court should grant expedited review and reverse the district court, ordering that the writ be granted, that the BOP grant release or transfer to community corrections forthwith, and that the cases be remanded for the district court to consider what further relief "law and justice" require under 28 U.S.C. § 2243.

Respectfully submitted this 25th day of March, 2019.

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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FOR THE NINTH CIRCUIT

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