No. _____

IN THE SUPREME COURT
OF THE UNITED STATES

IRVIN MORENO,

Petitioner,

v.

DEWAYNE HENDRIX, Warden,
FCI Sheridan,

Respondent.

On Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 18 U.S.C. § 3621(e)(2)(B), Congress authorized the Bureau of Prisons (BOP) to grant a sentence reduction of up to one year for federal prisoners "convicted of a nonviolent offense" who successfully complete in-prison residential drug abuse treatment. In addition to statutory disqualifications, the regulation implementing the statute adds "current felony conviction[s]" deemed as disqualifying and lists "prior felony or misdemeanor conviction[s]" that also disqualify prisoners. 28 C.F.R. § 550.55(b)(4) & (5). The questions presented are:

I. Did the BOP violate the plain meaning of the relevant sentencing statutes and regulations by categorically disqualifying a prisoner convicted of a nonviolent drug trafficking offense from eligibility for a sentence reduction under 18 U.S.C. § 3621(e) based on a supervised release violation for a prior conviction that is not included among the disqualifying prior offenses in 28 C.F.R. § 550.55(b)(4)?

II. In the alternative, did the BOP violate §§ 553 and 706 of the Administrative Procedure Act by promulgating what is functionally a substantive rule without notice-and-comment that irrationally and arbitrarily denied the petitioner categorical eligibility for a sentence reduction?

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The petitioner, Irvin Moreno, respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on December 22, 2020, affirming the denial of habeas corpus relief from his categorical disqualification from eligibility for a sentence reduction.

1. Opinions Below

The Oregon district court ordered the petitioner's habeas corpus petition dismissed for lack of jurisdiction in unpublished orders on June 26, 2018, and September 27, 2018.

Appendix 14, 18. On December 23, 2020, the Ninth Circuit held that the district court had jurisdiction but affirmed the district court on the merits, with one judge dissenting, in a memorandum opinion. Appendix 1. The Ninth Circuit denied a timely petition for panel rehearing and rehearing en banc on March 2, 2021. Appendix 20.

2. Jurisdictional Statement

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

3. Relevant Constitutional And Statutory Provisions

The constitutional separation of powers "flow[s] from the scheme of a tripartite government adopted in the Constitution[.]" *Stern v. Marshall*, 564 U.S. 462, 482-83 (2011).

In the Sentence Reform Act of 1987, Congress required the Bureau of Prisons to provide prisoners with appropriate substance abuse treatment. 18 U.S.C. § 3621(b) ("The Bureau [of Prisons] shall make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addition or abuse.") In 1990, Congress amended the statute to phase in a program of in-prison "residential substance abuse treatment." 18 U.S.C. § 3621(e). In 1994, Congress added an incentive of a sentence reduction of up to one year for inmates who successfully complete the program.

> The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. § 3621(e)(2)(B). The full text of 18 U.S.C. § 3621 (Imprisonment of a convicted person) is included in the Appendix at 23-25.

Also as part of the Sentencing Reform Act, Congress provided authority for courts to impose consecutive and concurrent sentences in 18 U.S.C. § 3584. Subsection (c) states, "Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single aggregate term of imprisonment."

The Bureau of Prisons promulgated a regulation and program statements implementing the regulation. The regulation narrowed the qualifications for the sentence reduction beyond the statutorily eligible class of prisoners "convicted of a nonviolent offense" to exclude prisoners with certain prior convictions:

> As an exercise of the Director's discretion, the following categories of inmates are not eligible for early release:
>
> * * *
>
> (4) Inmates who have a *prior felony or misdemeanor conviction* for:
>
> [Listing homicide, robbery, forcible rape, aggravated assault, arson, kidnaping, and an offense that by its nature or conduct involves sexual abuse offenses committed upon minors];. . .

28 C.F.R. § 550.55(b) (emphasis added). The regulation also narrowed the qualifications of statutorily eligible prisoners by creating on a broader swath of disqualifying offenses for "current" convictions, which disqualified prisoners based on additional current convictions that were not also disqualifying prior convictions in subsection (4):

> (5) Inmates who have a *current felony conviction* for:
>
> (i) An offense that has as an element, the actual, attempted, or threatened use of physical force against the person or property of another;
>
> (ii) An offense that involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or

> explosive device); (iii) An offense that, by its nature or conduct, presents a serious potential risk of physical force against the person or property of another; . . . .

28 C.F.R. § 550.55(b) (emphases added). The full regulation is incorporated in the program statement that implements the regulation, Program Statement 5331.02. Appendix 26.

4. Summary Of Reasons For Granting The Petition

This case presents an important separation of powers issue implicating the length of incarceration nonviolent prisoners must serve who successfully complete in-prison residential drug treatment. Congress has spoken plainly to describe persons eligible for the sentence reduction of up to one year: "a prisoner convicted of a nonviolent offense." 18 U.S.C. § 3621(e)(2)(B). Although this Court approved of the Bureau of Prisons' administrative authority to expand the class of prisoners disqualified from the sentence reduction incentive in *Lopez v. Davis*, 531 U.S. 230 (2001), this case involves an even further expansion of disqualified prisoners – an expansion that is neither consistent with the statute nor with the plain language of the applicable regulations. As the dissenting judge in the Ninth Circuit found, the wording of the regulation – referencing "current felony conviction" and "prior conviction for a felony or misdemeanor" – leaves no room for informal disqualifications beyond the plain meaning.

The encroachment of Executive Branch authority beyond the bounds of the statute and the regulation infringed on legislative prerogatives regarding the length of punishment. *See Abramski v. United States*, 573 U.S. 169, 191 (2014) ("The critical point is that criminal laws are for courts, not for the Government, to construe."); *see Crandon v. United States*,

494 U.S. 152, 177 (1990) (Scalia, J., concurring) ("The law in question, a criminal statute, is not administered by any agency but by the courts."). Nevertheless, in denying relief, the majority of the Ninth Circuit deferred to the administrative interpretation without the requisite application of the rules of construction to the regulation, stating: "BOP's determination here that Mr. Moreno's 2012 conviction was 'current' was based on its interpretation of its own regulation, 28 C.F.R. § 550.55(b)(5)(ii), which is an exercise of discretion allowed under 18 U.S.C. § 3621(e)(2)(B)." Even in the civil context, no deference is appropriate unless the regulation proves "genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019).

In the context of implementing a criminal statute, the Ninth Circuit majority, rather than deferring to the administrative agency, should have engaged in full statutory interpretation of the regulation, including application if needed of the rule of lenity. *Crandon*, 494 U.S. at 177 ("The Justice Department, of course, has a very specific responsibility to determine for itself what this statute means, in order to decide when to prosecute; but we have never thought that the interpretation of those charged with prosecuting criminal statutes is entitled to deference."). The rule requiring the Judiciary to determine the meaning of criminal rules without deference to the Executive Branch "enforces the separation of powers by foreclosing the executive agency from law-making beyond what has been authorized and delegated by Congress." *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019); *see Guedes v. Bureau of Alcohol, Tobacco, Firearms &*

Explosives, 140 S. Ct. 789, 790 (2020) ("[W]hatever else one thinks about *Chevron*, it has no role to play when liberty is at stake.") (Gorsuch, J., statement regarding denial of certiorari).

Instead of providing an independent judicial construction of the regulation, the majority below deferred to the administrative construction and applied an unrelated statute to the regulation. In contrast, the dissent pointed to the failure to construe the plain language of the regulation and the majority's importation of the concurrency statute to apply far beyond its narrow administrative purposes. Although this Court permitted a properly promulgated regulation to limit the scope of § 3621(e) in *Lopez*, this Court has not allowed less formal forms of administrative rule-making to trump the plain language of both the statute and regulation. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) ("The type of reflexive deference exhibited in some of these cases is troubling" and "suggests an abdication of the Judiciary's proper role in interpreting federal statutes.") (Kennedy, J., concurring).

This case provides an excellent vehicle for resolving the critical separation of powers issues where the Judiciary defers to informal Executive Branch determinations that affect categorical eligibility for a sentence reduction. First, the decision affects a large number of prisoners who do not receive an incentive to participate in programming and who end up serving more time than necessary to accomplish the goals of sentencing. Second, the district courts below have come out differently on the question, with a reasoned district court opinion concluding, in accord with the dissent, that the plain language of the

regulation forecloses treatment of a prior gun conviction as a current offense of conviction. *Lewis v. Daniels*, 528 F. Supp. 2d 1099 (D. Or. 2007). Third, the litigation in this case is unusual because prisoners are generally not represented by counsel and, as a consequence, the Executive Branch's over-reach evades effective judicial review.

In the alternative, the Court should grant, vacate, and remand the case for the Ninth Circuit to address the contention that, because the administrative treatment of "current offense" to include a prior conviction constitutes a substantive rule, the rule is invalid in violation of the Administrative Procedure Act. In footnote 6 of *Lopez*, this Court declined to address whether the promulgation of the regulation violated the APA because it had not been raised below. In the present case, the issue was squarely presented in the Ninth Circuit, but the court failed to address the administrative law claims. Just as after *Lopez* courts found the same regulation was reviewable under the APA, this Court should provide Mr. Moreno the opportunity to be heard regarding the informal rule's invalidity for violation of notice-and-comment and reasoned justification requirements.

5. Statement Of The Case

A. Litigation History Of The Sentence Reduction Under 18 U.S.C. § 3621(e)

The legal background of the § 3621(e)(2)(B) sentence reduction incentive provides necessary context for the issues before the Court.

1. Background And Purpose Of 18 U.S.C. § 3621(e)

In 1990, Congress mandated the creation of BOP programs to address prisoners' needs for substance abuse treatment, stating: "The Bureau shall make available appropriate

substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." Crime Control Act of 1990, Pub. L. No. 101-647, § 2903, 104 Stat. 4789, 4913 (codified at 18 U.S.C. § 3621(b)). In 1994, Congress, recognizing that prisoners were not undertaking the rigorous in-prison residential treatment program, enacted § 3621(e)(2)(B) to create a sentence reduction incentive of up to one year to encourage prisoners to enroll in residential substance abuse programs:

> **2) Incentive for prisoners' successful completion of treatment program.–**
>
> **(A) Generally.**– Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.
>
> **(B) Period of custody.**– The period *a prisoner convicted of a nonviolent offense* remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 32001, 108 Stat. 1796, 1897 (emphasis added) (codified at 18 U.S.C. § 3621(e)). In addition to incentivizing participation in treatment, Congress has recognized reduction of prison overcrowding as a benefit of the program: "To the greatest extent possible, BOP shall prioritize the participation of nonviolent offenders in the Residential Drug Abuse Treatment Program (RDAP) in a way that *maximizes the benefit of sentence reduction*

opportunities for reducing the inmate population." *Conf. Rep. to Consolidated Appropriations Act of 2010*, 155 Cong. Rec. H13631 03, at H13887 (daily ed. Dec. 8, 2009), Pub. L. 111 117, 123 Stat. 3034 (Dec. 16, 2009) (emphasis added).

2. *A Majority Of Circuit Courts Of Appeal Held That The BOP's 1995 Regulation And Program Statement Conflicted With The Statute's Definition Of A "Nonviolent Offense."*

In May 1995, the BOP promulgated a regulation that defined "nonviolent offense" as the statutory converse of "crime of violence" as defined in 18 U.S.C. § 924(c), while also categorically disqualifying any prisoner with certain prior convictions. 28 C.F.R. § 550.58 (May 1995). At the same time, through a program statement, the BOP categorically excluded from sentence reduction eligibility persons whose current offense was for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), or involved drug trafficking, in violation of 21 U.S.C. § 841 with a two-level specific offense characteristic for possession of a firearm under U.S.S.G. § 2B1.1(b). BOP Program Statement No. 5162.02 (July 24, 1995). Asserting that the program statement was inconsistent with the statutory definition of "nonviolent offense," prisoners brought successful challenges to the program statement in the Eighth, Ninth, Tenth, and Eleventh Circuits. *Downey v. Crabtree*, 100 F.3d 662, 670 (9th Cir. 1996); *Martin v. Gerlinski*, 133 F.3d 1076, 1079 (8th Cir. 1998); *Fristoe v. Thompson*, 144 F.3d 627, 631 (10th Cir. 1998); *Byrd v. Hasty*, 142 F.3d 1395, 1398 (11th Cir. 1997). The Fourth and Fifth Circuits upheld the BOP's interpretation. *Pelissero v. Thompson*, 170 F.3d 442, 447 (4th Cir. 1999); *Venegas v. Henman*, 126 F.3d 760, 763 (5th Cir. 1997).

Prisoners further challenged disqualifications for early release based on prior convictions, arguing that § 3621(e) only allowed the BOP to consider the current offense of conviction for purposes of disqualification. *See, e.g., Jacks v. Crabtree*, 114 F.3d 983 (9th Cir. 1997). The BOP conceded that the statutory language of § 3621(e) – "convicted of a nonviolent offense" – referenced only the current offense of conviction but argued that it nonetheless had authority to designate non-statutory categories of ineligibility. *Jacks*, 114 F.3d 985 n.2 ("Here, the Bureau concedes that petitioners are eligible under section 3621(e)(2)(B), but argues that they are ineligible under the Bureau's regulation creating an additional eligibility requirement."). Under the BOP's rationale, courts upheld the regulation, which barred eligibility for prisoners with prior convictions appearing in the presentence report for "homicide, forcible rape, robbery, or aggravated assault." *Id.* at 984 (citing 28 C.F.R. § 550.58).[1]

3. The BOP's 1997 Program Statement And Regulation Failed To Address The 1995 Regulation's Inconsistencies With Statutory Text And Congressional Purpose.

After the first wave of litigation, the BOP published an interim rule and accompanying program statement, effective immediately, that modified the crime of violence construct by substituting the Director's discretion to disqualify § 922(g) offenders

[1] The companion program statement mirrored the language of the first interim rule, allowing BOP staff to look to "the FBI Rap Sheet to determine if the inmate has *any previous state or federal convictions* for robbery, forcible rape, aggravated assault, or homicide." BOP Program Statement No. 5330.10 Ch. 6 at 1 (May 25, 1995) (emphasis added)

and drug offenders with a gun enhancement. BOP Program Statement No. 5330.10 Ch. 6 at 1 (Oct. 9, 1997); 62 Fed. Reg. 53690-01 (Oct. 15, 1997). Prisoners again challenged the offense-of-conviction rules precluding offenses involving firearms, both as retroactively applied and as violating the statute. The Circuits again split. *See Lopez v. Davis*, 531 U.S. 230, 238 (2001) (collecting cases).

In *Lopez*, this Court upheld the BOP's statutory authority to categorically disqualify additional classes of statutorily eligible prisoners from the sentence reduction incentive. *Lopez*, 531 U.S. at 244. The *Lopez* opinion explicitly left unresolved the BOP's compliance with the Administrative Procedure Act (APA) in promulgating the interim rule. *Lopez*, 531 U.S. at 244 n.6.

Following *Lopez*, the Ninth Circuit affirmed a grant of § 2241 relief for sixteen prisoners who challenged the same interim rule at issue in *Lopez* under § 553(b) of the Administrative Procedures Act because it was promulgated without notice-and-comment compliance. *Paulsen v. Daniels*, 413 F.3d 999, 1005-06 (9th Cir. 2005). After *Paulsen*, the BOP promulgated a final version of the 1997 interim rule in 2000, with essentially identical language, explaining that the agency was exercising its discretion to disqualify prisoners that the agency conceded were statutorily eligible:

> Thus, *even as the Bureau concedes that offenses related to this regulation are "non-violent" offenses*, the implementing statute does not mandate that all "non-violent" offenders must receive an early release. The statute merely indicates that the sentence may be reduced by the Bureau of Prisons.

65 Fed. Reg. 80745-01 (Dec. 22, 2000) (emphasis added).

Prisoners again brought challenges to the 2000 rule pursuant to § 2241. First, prisoners asserted that the BOP's failure to articulate a rationale for denying early release to statutorily eligible prisoners violated § 706 of the APA. In *Arrington v. Daniels*, the Ninth Circuit affirmed its jurisdiction to review the petitioners' APA claim, and held that the BOP's final rule was arbitrary and capricious under § 706(2)(A) because the BOP had "failed to set forth a rationale for its decision to categorically exclude prisoners convicted of [firearm possession] offenses." 516 F.3d 1106, 1114 (9th Cir. 2008) (citing *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)).

Prisoners also challenged the BOP's failure to articulate a rationale for relying on prior convictions to exclude classes of prisoners from the sentence reduction program. *Crickon v. Thomas*, 579 F.3d 978, 982 (9th Cir. 2009). As it had in *Arrington*, the Ninth Circuit held that the agency's lack of a rationale for excluding statutorily eligible prisoners from the early release incentive based on prior convictions rendered the rule invalid under the Administrative Procedures Act. *Crickon*, 579 F.3d at 982-86. The court observed that the BOP's professed compliance with congressional intent was "difficult to square with Congress's expressed intent to provide an incentive to encourage maximum participation in the BOP's substance abuse programs." *Id.* at 986. However, other Circuits found the regulation properly promulgated.

On January 14, 2009, the BOP published revised rules governing § 3621(e) sentence reductions, which were applicable to all prisoners who applied to the program after March 16, 2009. 74 Fed. Reg. 1892-01 (Jan. 14, 2009). The 2009 rule incorporated the provisions

contained in the 2000 final rule that the Ninth Circuit invalidated in *Arrington*, responded to comments relating to participation in treatment, and added disqualifications. The BOP also issued new companion program statements. BOP Program Statement No. 5331.11 (Mar. 16, 2009); BOP Program Statement No. 5162.05 (Mar. 16, 2009); BOP Program Statement No. 5331.02 (Mar. 16, 2009). These rules were upheld in *Peck v. Thomas*, 697 F.3d 767 (9th Cir. 2012).

The rules continue to provide that, as "an exercise of the Director's discretion," inmates with a current felony conviction for an offense involving "the carrying, possession, or use of a firearm or other dangerous weapon or explosives" are not eligible for early release under the RDAP incentive. 28 C.F.R. § 550.55(b)(5)(ii) (Mar. 16, 2009). The rules again permit that, in the Director's discretion, prisoners with prior convictions for homicide, forcible rape, robbery, aggravated assault, arson, kidnaping, or an offense involving sexual abuse of minors are ineligible for early release. 28 C.F.R. § 550.55(b)(4) (Mar. 16, 2009). In 2016, the BOP amended the regulation to place a ten-year limit on the disqualifying effect of the prior convictions. BOP Program Statement No. 5331.02, CN-1, *Early Release Procedures Under 18 U.S.C. § 3621(e)* (April 25, 2016) (disqualifying "[i]nmates who have a prior felony or misdemeanor conviction for [certain offenses] within the ten years prior to the date of sentencing for their current commitment").

Under all versions of the regulations and program statements, Mr. Moreno's current conviction for drug trafficking renders him categorically eligible for a sentence reduction

under 28 C.F.R. § 550.55(b)(5), and his prior conviction for being a felon in possession of a firearm has never been a basis for disqualification under 28 C.F.R. § 550.55(b)(4).

B. Petitioner's Plea And Sentencing

On February 23, 2012, the district court for the Western District of Washington imposed a sentence of 37 months incarceration and a three-year term of supervised release upon Mr. Moreno's plea of guilty to possession of a firearm by a felon, in violation of 18 U.S.C. §§ 922(g) and 924(c). *United States v. Moreno*, No. 2:11CR00376TSZ, Docket 33 (W.D. Wash. Feb. 23, 2012). On March 23, 2016, Mr. Moreno was arrested on a criminal complaint on drug trafficking charges that resulted in an indictment on March 31, 2016. *United States v. Moreno*, No. 2:16CR92-RSL, Docket 1 and 12 (W.D. Wash., Mar. 23 and 31, 2016). The parties entered into a plea agreement, which provided for joint recommendations of the mandatory minimum five-year sentence for drug trafficking and a recommendation of six months for the supervised release violation on the prior case to run concurrently with the drug sentence. *Id.* at Docket 27.

On November 15, 2016, the Honorable Robert S. Lasnik imposed a sentence of 60 months on the 2016 drug charge with a recommendation that Mr. Moreno be designated to serve his sentence at FCI Sheridan and participate in the Bureau of Prisons' in-prison residential drug abuse program known as RDAP. *Moreno*, No. 2:11CR00376TSZ, Docket 33. On the same day, Judge Lasnik entered judgment in the 2012 case for violation of supervised release by committing the drug offense, sentencing Mr. Moreno to six months to run concurrently with the drug case. *Id.* at Docket 50. Nothing in the drug case's

complaint or plea agreement suggests that a firearm was involved in the 2016 offense. *See Id.* at Docket 1 and 24.

C. Petitioner's Pro Se Exhaustion Of Remedies

On May 15, 2017, after having been found ineligible for the § 3621(e) sentence reduction, Mr. Moreno sought informal resolution of the RDAP coordinator's finding. *Moreno v. Ives*, Ninth Circuit No. 18-35888, Docket 14 at 41. After this request was summarily rejected, Mr. Moreno sought further review from the Warden on August 22, 2017. *Id.* at 42, 43. In denying this request on August 28, 2017, the Warden relied on subsection (b)(5) of the regulation regarding "current felony conviction." *Id.* at 44. On September 1, 2017, Mr. Moreno appealed to the Regional Director, stating that the supervised release violation involved a prior conviction, not his current conviction. *Id.* at 45.

On October 27, 2017, the Regional Director for the first time indicated that the determination of ineligibility would be upheld based on a statute separate from the sentence reduction provisions of § 3621(e) and its implementing rules:

> Program Statement 5880.28 CN 5, Sentence Computation Manual, Multiple Sentences of Imprisonment, citing, Title 18 U.S.C. 3584 subsection (c), provides for the aggregation of multiple terms of imprisonment. Specifically, when a term of imprisonment is imposed on a defendant who is already subject to an undischarged term of imprisonment, the sentences shall be aggregated to form a single sentence for computation purposes. The Designation and Sentence Computation Center (DSCC) certified your sentence computation correct on December 14, 2016.

Id. at 46. On November 16, 2017, Mr. Moreno appealed to the Central Office of the BOP, explaining that the aggregation statute relates to computing release dates and does not transform a prior conviction into a "current offense." On January 8, 2018, the Administrator of National Inmate Appeals denied the appeal, stating:

> We find you received proper early release consideration in compliance with the governing program statements applicable to RDAP and early release procedures, as well as, federal regulations set forth in 28 C.F.R. § 550.55,(b)(5) (i) and (iii).

Id. at 48.

D. Petitioner's Pro Se Requests For Habeas Corpus Relief

After successfully completing the in-prison residential treatment component of RDAP, Mr. Moreno filed in the district court for habeas corpus relief on March 23, 2018. Appendix 14. He argued that, under the plain meaning of "current felony conviction" and "prior felony conviction," his prior § 922(g) conviction could not provide a basis for exclusion under the applicable regulation and well-established law on the meaning of "prior conviction." He asserted that the aggregation of sentences provision only provided guidance on calculating the length of the total term of imprisonment, with no relevance to eligibility under § 3621(e) and its implementing rules.

Without requiring the government to respond, the district court adopted the recommendation of the magistrate judge and summarily dismissed the petition for lack of jurisdiction on June 26, 2018. In reliance on 18 U.S.C. § 3625, the district court held that "a decision regarding individual eligibility for a post-RDAP reduction in sentence is not

subject to judicial review." Appendix 16. The district court declined to issue a certificate of appealability. *Id.* Mr. Moreno filed his notice of appeal on October 22, 2018.

E. Proceedings On Appeal

Mr. Moreno appealed the court's ruling to the Ninth Circuit, where he received appointed counsel for the first time in his habeas proceedings. *Moreno*, Ninth Circuit No. 18-35888, Docket 14 at 50-51. In his opening brief filed on July 1, 2020, Mr. Moreno again maintained that the BOP had violated the plain meaning of the sentence reduction statute and its implementing regulation by treating his prior conviction as a current conviction.[2] In the alternative, he asserted that the BOP's decision to transform a sanction for supervised release violation into a "current," rather than a "prior" conviction amounted to arbitrary rulemaking without notice-and comment, in violation of §§ 553 and 706 of the Administrative Procedures Act.

The two-judge majority determined that the district court had erred by finding that it lacked jurisdiction, but concluded on the merits that Mr. Moreno's supervised release violation rendered him ineligible for the § 3621(e) sentence reduction. Appendix 1-6. Accordingly, the court reversed the district court's jurisdictional holding and remanded the matter to the district court with instructions to deny the petition. In so ruling, the majority

[2] Mr. Moreno's commencement of his term of supervised release years after he filed for administrative relief altered the requested remedy in his opening brief to encompass reduction of the term in the interests of justice under 18 U.S.C. § 3583(e). *See Reynolds v. Thomas*, 603 F.3d 1144, 1148 (9th Cir. 2010) (citing *United States v. Johnson*, 529 U.S. 53, 60 (2000).

observed that the "BOP's interpretation of 'current' to mean any conviction for which the inmate is still serving time is consistent with governing law." Appendix 5 (citing *United States v. Paskow*, 11 F.3d 873, 881-83 (9th Cir. 1993), and 18 U.S.C. § 3584). Specifically, the "BOP followed the plain meaning of § 3584(c)" the sentencing aggregation statute, "to aggregate Mr. Moreno's two sentences." Appendix 6. The majority deferred to the BOP's position as "based on its interpretation of its own regulation, 28 C.F.R. § 550.55(b)(5)(ii), which is an exercise of discretion allowed under 18 U.S.C. § 3621(e)(2)(B)." *Id.*

The court also held that it lacked jurisdiction to adjudicate Mr. Moreno's claim under the Administrative Procedures Act. The majority explained that "Congress has specified that decisions regarding Bureau of Prison's individualized determinations of Residential Drug Abuse Treatment Program (RDAP) are not reviewable under the Administrative Procedures Act." *Id.* at 20 (citing *Reeb v. Thomas*, 636 F.3d 1224, 1227 (9th Cir. 2011)).

Judge Collins dissented from the two-judge majority's opinion, stating that he would have reversed the district court's ruling because the BOP – whose interpretation the district court and appellate majority relied on – "incorrectly interpreted a federal statute when it denied Petitioner-Appellate Irvin Moreno's request for early release under 18 U.S.C. § 3621(e)(2)." Appendix 7. The dissent recognized that the BOP's interpretation of its own regulation relied not on permissible discretion, but rather on the flawed assumption that "§ 3584(c) required it to deem the six-month concurrent sentence on the § 922(g) offense as being a 'current' sentence for purposes of § 550.55(b)(5) throughout the entirety

of Moreno's 60-month aggregate term of incarceration." Appendix 10 (emphasis in original).

The dissent deemed the BOP's construction of § 3584(c) "plainly incorrect," observing that "[n]othing in the language of the statute supports the BOP's position that § 3584(c) requires it to treat the aggregate term of incarceration as *fully* applicable to *each* count of conviction." Appendix 10 (emphases in original). The dissent recognized that, notwithstanding the BOP's discretionary authority to establish new restrictions to prisoners' eligibility for reduced sentences, the BOP lacked the authority to make determinations that conflict with the plain, unambiguous terms of existing regulations. "Having adopted a regulation that distinguishes between 'current' and 'prior' convictions, the BOP may not then proceed on the legally erroneous view that Congress, in § 3584(c), has dictated what counts as a 'current' conviction and for how long." Appendix 13 n.2.

Following the Ninth Circuit's ruling, Mr. Moreno timely filed a Petition for Panel Rehearing and for Rehearing En Banc contending that the majority opinion violated the separation of powers by deferring to the Executive Branch interpretation instead of construing the plain language of the regulation. No. 18-35888, Dkt. No. 36 (9th Cir. Feb. 5, 2021). Judges Bybee and Bastian of the majority voted to deny the petition for panel rehearing and recommended denial of the petition for rehearing en banc. 18-35888, Dkt. No. 37. Judge Collins voted to grant the petition for panel rehearing to deny the petition for rehearing en banc. *Id.*

6. Reasons For Granting The Writ

A. This Case Presents An Issue Of National Importance Regarding The Expansion Of Executive Branch Law-Making Authority By Deference To The Agency's Failure To Follow The Plain Language Of Its Regulation As Well As The Underlying Criminal Statute.

In *Bowles v. Seminole Rock & Sand Co.*, this Court stated that an administrative agency's interpretation of its own regulation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." 325 U.S. 410, 414 (1946). The standard articulated in *Seminole Rock* has, over time, been recognized to apply to all administrative interpretations of regulations under judicial review. *Auer v. Robbins*, 519 U.S. 452, 458 (1997). Having now "metastasized" beyond "*Seminole Rock*'s humble origins," the doctrine known as *Seminole Rock* deference, or *Auer* deference, has faced sharp criticism for facilitating a "'transfer of the judge's exercise of interpretive judgment to the agency.'" *United Student Aid Funds, Inc. v. Bible*, 136 S. Ct. 1607, 1608 (2016). (Thomas, J., dissenting from denial of certiorari) (quoting *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 124 (2015) (Thomas, J., concurring)). "Members of this Court have repeatedly called for its reconsideration in an appropriate case." *Id.* (collecting opinions from Chief Justice Roberts and Justices Alito, Scalia, and Thomas).

In *Kisor v. Wilkie*, this Court unanimously agreed to revisit the scope of *Auer* deference in order to "clear up some mixed messages we have sent" about the doctrine's application. 139 S. Ct. 2400, 2414 (2019). Clarification was needed to correct the common practice by which courts have incorrectly afforded "*Auer* deference without significant

analysis of the underlying regulation" and "without careful attention to the nature and context of the interpretation," suggesting a mere "caricature of the doctrine, in which deference is 'reflexive.'" *Id.* at 2414-15 (collecting cases).

To preserve "a strong judicial role in interpreting rules" required by the constitutional separation of powers, the *Kisor* opinion reiterated strict limitations that "cabin[] *Auer*'s scope in varied and critical ways." *Id.* at 2418. Before *Auer* deference can apply to an administrative interpretation, *Kisor* teaches that a court must first ensure that (1) "the regulation is genuinely ambiguous" after "exhaust[ing] all the 'traditional tools' of construction,'" (2) the agency's interpretation of an ambiguous regulation is "reasonable"; and (3) the interpretation, even if reasonable, satisfies the court's "independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *Id. Kisor* therefore prescribed a three-step test that courts must follow before applying *Auer* deference to an agency's interpretation of its own regulation. *Id.* at 2420 ("Courts first decide whether the rule is clear; if it is not, whether the agency's reading falls within its zone of ambiguity; and even if the reading does so, whether it should receive deference.")

Although *Kisor* aimed to "clear up mixed messages," post-*Kisor* rulings among the federal circuit courts of appeal have so far demonstrated further confusion and discord. Courts have now come into sharp disagreement, for example, as to whether *Kisor* requires reconsideration and invalidation of Application Note 1 to U.S.S.G. § 4B1.2(b) on grounds that it includes elements beyond the scope of § 4B1.2(b)'s definition of "controlled

substance offense."[3] Furthermore, the Circuits disagree as to whether to even apply *Kisor*'s third step, requiring an independent inquiry into content and context.[4]

The issue of when and whether courts defer to agencies such as the BOP remains vitally important to the national interest in maintaining government transparency and accountability through the constitutionally-mandated separation of powers. Here, the BOP formulated a categorical ground to deny Mr. Moreno for a § 3621(e) sentence reduction that he qualified for under the agency's own regulation as written. Rather than referencing the language of its own regulation, 28 C.F.R. 550.55(b), or the language statute that authorizes it, 18 U.S.C. § 3621(e)(2)(B), the BOP instead chose to rely on 18 U.S.C. § 3584(c), a statute that governs judicial sentencing determinations with no clear relevance to prison programming. The majority below simply deferred to the BOP's interpretation of an extraneous sentencing statute without first determining (1) that the BOP regulation was

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[3] The Third, Sixth, and D.C. Circuits have invalidated Application Note 1 following more rigorous post-*Kisor* reconsideration. *United States v. Nasir*, 982 F.3d 144 (3d Cir. 2020); *United States v. Havis*, 927 F.3d 382, 385-87 (6th Cir. 2019); *United States v. Winstead*, 890 F.3d 1082, 1090-92 (D.C. Cir. 2018). Other circuits, however, have held that *Kisor* did not require reconsideration of earlier rulings that upheld Application Note 1 as consistent with § 4B1.2(b). *United States v. Martinez*, 602 F.3d 1166, 1174 (10th Cir. 2010); *United States v. Adams*, 934 F.3d 720, 729 (7th Cir. 2019); *United States v. Lewis*, 963 F.3d 16, 24 (1st Cir. 2020); *United States v. Crum*, 934 F.3d 963, 966 (9th Cir. 2019), *United States v. Tabb*, 949 F.3d 81, 87 (2d Cir. 2020).

[4] The First and Eighth Circuits have applied *Auer* deference without mentioning or complying with *Kisor*'s third step. *Compare United States v. Broadway*, 815 F. App'x 95, 96 (8th Cir. 2020); *United States v. Lewis*, 963 F.3d 16 (1st Cir. 2020), *with Nat'l Lifeline Ass'n v. Fed. Commc'ns Comm'n,* 983 F.3d 498, 511 (D.C. Cir. 2020) ("We should make it clear, however, that even if the rules are seen to be genuinely ambiguous, "the character and context of the agency interpretation entitles it to controlling weight.")

sufficiently ambiguous to require importation of outside statutory definitions, (2) that the BOP's interpretation was "reasonable," and (3) that deference is warranted following an independent inquiry into the content and context of the BOP's interpretation.

The opinions below demonstrate that, although "the winds have changed" following *Kisor*, many courts nonetheless provide inadequate judicial review under a "slumber of reflexive deference." *United States v. Nasir*, 982 F.3d 144, 177 (3d Cir. 2020) (Bibas, J., concurring). Mr. Moreno's petition offers this Court the much-needed opportunity to correct the lower courts' inconsistent adherence to the clear interpretive mandate spelled out in *Kisor*.

B. This Case Presents An Issue Of National Importance Because The Majority's Opinion Undermines Congressional Action To Provide An Incentive For Treatment While Easing Over-Incarceration Of Nonviolent Offenders In Federal Prisons.

The majority below premised its opinion on an interpretation of § 3621(e)(2)(B) that serves only to undermine and contradict Congress's original purpose behind permitting RDAP sentence reductions. After the initial authorization of residential drug treatment, Congress intended the creation of the sentence reduction incentive through its 1994 amendment to encourage increased participation by federal prisoners in the demanding program. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 32001, 108 Stat. 1796, 1897. And Congress in 2009 explicitly recognized the concurrent benefit of reduction of the federal prison population by directing that nonviolent offenders should receive the maximum available sentence reduction: "To the greatest extent possible,

BOP shall prioritize the participation of nonviolent offenders in the Residential Drug Abuse Treatment Program (RDAP) in a way that *maximizes the benefit of sentence reduction opportunities for reducing the inmate population.*" *Conf. Rep. to Consolidated Appropriations Act of 2010*, 155 Cong. Rec. H13631 03, at H13887 (daily ed. Dec. 8, 2009), Pub. L. 111 117, 123 Stat. 3034 (Dec. 16, 2009) (emphasis added).

The Ninth Circuit majority's decision to follow the BOP in counting a supervised release violation as a "current" rather than a "prior" violent felony conviction flies in the face of Congress's clearly stated intentions. Not only is this interpretation counter-textual to the BOP's own regulation, it also erodes the fundamental purposes for which Congress enacted the sentence reduction statute. The majority's decision can only hinder the purposes Congress envisioned by discouraging enrollment in drug treatment programs and by contributing to overcrowding. The Court should grant Mr. Moreno's petition in order to ensure that § 3621(e)(2)(B) provides the benefits Congress intended of mitigating the serious social harms of drug addiction, permitting earlier release for nonviolent offenders, and reducing prison overcrowding.

The Court should also grant a writ of certiorari because of the need for national uniformity on how the Bureau of Prisons executes the sentences of prisoners throughout the federal prison system. District courts, usually with pro se petitioners against government attorneys, have approved the agency's interpretation of the regulation with minimal analysis. The *Lewis* opinion provides a conflicting view based on the plain language of the regulation. 528 F. Supp. 2d 1099. The majority's memorandum disposition

does not settle the matter even in the Ninth Circuit because it is "not precedent." Ninth Circuit Rule 36-3(a). To avoid disparities in treatment of similar situated defendants, this Court should grant certiorari to assure national uniformity in administering sentence reductions.

C. The Present Case Provides An Excellent Vehicle For Reviewing The Important Issues At Stake.

Mr. Moreno's circumstances provide an ideal opportunity for this Court to address timely and pressing concerns regarding the separation of powers and the role of the judiciary in interpreting the law as well as Congress's express goals of treating substance abuse, reducing long sentences, and mitigating prison overcrowding. The facts of this case present a paradigmatic example an agency over-reaching its administrative authority while the majority below effectively averted its gaze through deference to the Executive Branch. The Court should grant Mr. Moreno's petition to send a clear message regarding the limitations on administrative lawmaking and the importance of effective judicial review.

The administrative record in this case demonstrates that the pro se prisoner consistently and emphatically presented the argument regarding the plain language of the regulation requiring that he be considered categorically eligible for the § 3621(e) sentence reduction. With counsel on appeal, the issues were fully developed based on the plain language of the applicable statutes and regulation as well as the administrative law grounds for relief, as authorized by the appellate order of appointment. Once the Ninth Circuit majority deferred to the BOP's interpretation without applying the rules of construction to

the regulation, Mr. Moreno raised the separation of powers and limitations on administrative law-making raised here, to no avail. The issues are squarely raised for this Court's resolution.

D. The Majority Opinion Is Incorrect.

Applying the methodology directed in *Kisor*, the plain language of the regulation resolves Mr. Moreno's claims in his favor. The Court instructed that courts should "exhaust all the 'traditional tools' of construction" and only defer to the agency if the regulation were "genuinely ambiguous." *Kisor*, 139 S. Ct. 2400 at 2414 ("And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation.").

Here, the plain language of the regulation should resolve the matter in favor of Mr. Moreno, as the district court did in *Lewis*, 528 F. Supp. 2d at 1099. In that case, addressing the identical question before the Court here, the judge stated: "The question presented here, however, does not involve an inmate who possessed a firearm in connection with his current offense, but rather one who has a prior conviction for possessing a firearm." *Id.* at 1101. The judge elaborated on the plain meaning of the relevant terms:

> It is true that petitioner has been serving a concurrent eighteen-month supervised release violation term "imposed in connection with the prior firearms offense." . . . However, that firearms conviction is undeniably a "prior offense," and not a current offense.

Id. at 1001 n.2. The court found that the text to the BOP's regulation foreclosed the BOP's position that a prior conviction for felon in possession of a firearm can disqualify a

defendant from early release eligibility. *Lewis*, 528 F. Supp. 2d at 110 ("[T]he BOP improperly deemed petitioner ineligible for a discretionary sentence reduction under 18 U.S.C. § 3621(e)(2)(B).").

The plain language of the regulation is fully supported by its context. The term "prior conviction" has an unmistakable meaning in federal criminal law. In addition to the dictionary difference between "current" and "prior," Congress routinely legislates using "prior" convictions to apply to offenses resulting in violated terms of supervised release: a conviction underlying a term of supervised release can be one "of two or more prior Federal, State, or local felony convictions" under the career offender definition in 28 U.S.C. § 994(i)(1); one of "three previous convictions" under the armed career criminal enhancement in 18 U.S.C. § 924(e)(1); and a "prior conviction" under the many Controlled Substance Act enhancements under 21 U.S.C. § 841(b). The Ninth Circuit majority considers the supervised release offense to be a "current" offense even though it unquestionably would be treated as a "prior" under all three of these statutes.

And the legislative purpose is entirely consistent with the plain meaning and context of the regulation. Congress wanted more prisoners to participate in residential treatment and wanted statutorily eligible prisoners to have the benefit of sentence reductions while easing the costs and attendant social problems of prisoners serving more time than needed to accomplish the legitimate goals of sentencing.

In the face of the plain language, context, and legislative purposes, the majority's deference to the Bureau of Prisons' claim that a separate and unrelated statute – 18 U.S.C.

§ 3584(c) – requires that a prior conviction must be considered "current" finds no support. The original authorizing statute made Mr. Moreno eligible under the plain meaning of "convicted of a nonviolent offense." The regulation, on its face, continues with Mr. Moreno as an eligible prisoner. As the dissenting judge stated: "Indeed, nothing in the language of § 3584(c) suggests that the statute says anything about the relationship between the aggregate term of imprisonment and each constituent individual charge that produced it." Appendix 11. "Section 3584(c) does not speak to the charge-allocation issue, and it does not replace the courts' allocations, as reflected in the sentencing orders, with concurrent, identical aggregate sentences on each and every charge." *Id.* (citing *United States v. Llewlyn*, 879 F.3d 1291, 1295 (11th Cir. 2018) (for purposes of sentencing reductions under 18 U.S.C. § 3582(c)(2), § 3584(c) "refers to the Bureau of Prisons' administrative duties, such as computing inmates' credit for time served" (collecting cases)); *see also United States v. Haymond*, 139 S. Ct. 2369, 2382 (2019) (recognizing that rehabilitative post-prison supervised release, unlike parole, does not "replace a portion of the defendant's prison term.").

The Court should grant certiorari because the majority below ruled incorrectly in a manner that assures the agency will continue to unlawfully disqualify prisoners intended to receive an incentive in an area that evades review due to prisoners' lack of resources to litigate against the power of the federal agency.

E. In The Alternative, The Court Should Grant The Writ, Vacate The Decision Below, And Remand For The Lower Court To Address The Administrative Procedure Act In The First Instance.

In footnote 6 of its opinion in *Lopez*, this Court left open the question of whether the regulation at issue was validly promulgated under the Administrative Procedure Act. 531 U.S. at 244 n.6. After *Lopez*, the Ninth Circuit upheld a district court determination that the Bureau of Prisons violated the notice-and-comment provisions of the APA in *Paulsen*, *supra*, and later held that the regulation violated the requirements of an administrative records establishing a valid basis for the regulations in *Arrington*, *supra*, and *Crickon*, *supra*. Other Circuits disagreed on the merits but also found the BOP's rules subject to APA review. *See*, *e.g.*, *Licon v. Ledezma*, 638 F.3d 1303, 1311 (10th Cir. 2011); *Handley v. Chapman*, 587 F.3d 273, 276–77 (5th Cir. 2009); *Gardner v. Grandolsky*, 585 F.3d 786, 792 (3d Cir. 2009); *Gatewood v. Outlaw*, 560 F.3d 843, 847 (8th Cir. 2009).

The extension of a non-statutory categorical sentence reduction disqualification for a sentence reduction incentive of up to one year constitutes a substantive, or legislative, rule. *See Perez v. Mortg. Bankers Ass'n* 575 U.S. 92, 96 (2015) ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'") (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 302-03 (1979)). The unwritten rule expanding current offense disqualifications to include prior convictions where there is a supervised release violation has the force and effect of law, leaving BOP staff with no discretion in denying eligibility for up to one year of freedom. *See Christensen v. Harris County*, 529 U.S. 576, 588 (2000) (informal expansion of a

regulation by an opinion letter would "permit the agency, under the guise of interpreting a regulation, to create *de facto* a new regulation.").

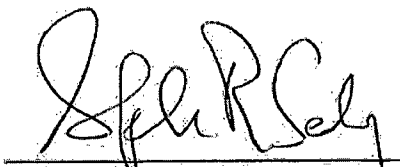
The lower court claimed that, contrary to the abundant authority reviewing BOP regulations under the Administrative Procedure Act, review was barred under 18 U.S.C. § 3625. Appendix 15-16 (citing *Reeb v. Thomas*, 636 F.3d 1224, 1228 (9th Cir. 2011)). But in *Reeb*, the court explicitly recognized authority to provide judicial review "for allegations that BOP action is contrary to established federal law, violates the United States Constitution, or exceeds its statutory authority." *Reeb*, 636 F.3d at 1228. Mr. Moreno's claim was that the informal rule was contrary to the Administrative Procedure Act and exceeded the agency's statutory authority. As Congress stated in promulgating § 3625, "The phrase 'determination, decision, or order' is intended to mean adjudication of specific cases as opposed to promulgation of generally applicable regulations." 1984 U.S. Code & Cong. News, at 3332; *see also id.* at n.363 ("The APA continues to apply to regulation-making authority of the Bureau of Prisons.").

The Ninth Circuit failed to provide a merits ruling on the alternative APA ground that this Court recognized as open in *Lopez* and that the Circuits have generally recognized applies to BOP rulemaking. If the Court does not grant certiorari based on the plain language of the regulations, the Court should grant the writ, vacate the decision below, and remand for a decision on the merits of the APA claim.

7. Conclusion

For the foregoing reasons, the Court should issue a writ of certiorari.

Dated this 28th day of May, 2021.



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