No. 24-

IN THE

Supreme Court of the United States

CHARLES ANTHONY GIOVINCO,

Petitioner,

v.

TIMETHEA PULLEN, WARDEN,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The First Step Act of 2018 ("FSA") provides that an eligible prisoner "shall earn" time credits if he participates in the FSA's flagship recidivism-reduction programming. 18 U.S.C. § 3632(d)(4). The FSA further provides that a prisoner "is ineligible" for time credits "if the prisoner is serving a sentence for a conviction under any" of sixty-eight designated provisions of the United States Code.

The important question presented is whether a prisoner convicted of both an eligible and ineligible offense, who (i) finished serving the sentence imposed on the ineligible offense, and (ii) is serving out only the concurrent sentence imposed on his eligible offense, is eligible for time credits.

The second question presented is whether, in a case shaped by *Chevron* but decided after *Loper Bright*, the Second Circuit's uncritical acceptance of an agency's interpretation of the FSA, amounting to deference in fact if not in name, violates *Loper Bright*'s clear mandate and spirit.

LIST OF PARTIES AND RELATED CASES

The names of all parties appear in the caption of the case on the cover page.

The cases in other courts that are directly related to this case are:

Giovinco v. Pullen, No. 3:22-cv-1515, U.S. District Court for the District of Connecticut. Judgment entered Feb. 10, 2023.

Giovinco v. Pullen, No. 23-251, U.S. Court of Appeals for the Second Circuit. Judgment entered Oct. 8, 2024.

United States v. Giovinco, 2:08-cr-14052, U.S. District Court for the Southern District of Florida. Judgment entered Feb. 18, 2009.

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The decision of the United States Court of Appeals for the Second Circuit affirming the judgment of the District Court (App. 1a) is reported at 118 F.4th 527 (2d Cir. 2024). The order of the United States Court of Appeals for the Second Circuit, dated December 19, 2024, denying rehearing and rehearing *eon banc* in the same matter (App. 20a) is unreported. The United States District Court decision for the District of Connecticut (App. 13a) is reported at 2023 WL 1928108 (D. Conn. February 10, 2023).

JURISDICTION

The United States Court of Appeals for the Second Circuit entered its order denying rehearing and rehearing *en banc* on December 19, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3632(d)(4)(D) of Title 18 of the United States Code (part of the First Step Act of 2018) provides in pertinent part as follows:

> "A prisoner is ineligible to receive [First Step Act] time credits under this paragraph if the prisoner *is serving a sentence for* a conviction under any of the following provisions of law…" 18 U.S.C. § 3632(d)(4)(D) (emphasis added).

Section 3584(c) of Title 18 of the United States Code (captioned "Multiple sentences of imprisonment") provides in pertinent part as follows:

> "Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated *for administrative purposes* as a single, aggregate term of imprisonment." 18 U.S.C. § 3584(c) (emphasis added).

STATEMENT OF THE CASE

Petitioner Charles Anthony Giovinco was convicted on his guilty plea in the United States District Court for the District of Florida of two crimes: possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B), and use of the internet to entice a minor to engage in sexual activity, in violation of 18 U.S.C. §2242(b). Giovinco was sentenced in February 2009 to concurrent terms of ten years on the pornography conviction (the statutory maximum) and 235 months for enticement.

Nearly a decade later, on December 21, 2018, the First Step Act ("FSA") became law. Relevant here, the statute mandates that all prisoners "except for an ineligible prisoner" who successfully participate in the FSA's flagship recidivism-reduction program "shall earn time credits." 18 U.S.C. § 3632(d)(4). Under the plainly worded FSA definition, "[a] prisoner is ineligible to receive time credits . . . if the prisoner is serving a sentence for a conviction under any of" the sixty-eight provisions of the United States Code the statute then lists. Id., §3632(d)(4)(D). The child pornography statute that Giovinco violated *is* one of the listed disqualifiers, but enticement *is not.*

Accordingly, in early 2019, when Giovinco had fully served the ten-year sentence for his ineligible offense, he asked the BOP to classify him as "eligible" for FSA time credits. Giovinco relied on the plain language of the statute—*i.e.*, Congress's election to define eligibility so distinctly, in the present tense ("*is serving* a sentence"), with the focus on the offense-specificity of a sentence in the singular ("*a sentence* for *a conviction* under…"), but the BOP denied his request. Citing its in-house revision of the key eligibility provision, the BOP explained to Giovinco that, in its view, "[a]n inmate cannot earn FTC credits if he or she is serving a sentence for a disqualifying offense *or has a disqualifying prior conviction.*" (emphasis added).

Giovinco challenged the BOP's refusal to classify him as time-credit eligible in a *pro se* petition pursuant to 28 U.S.C. §2241 in the District of Connecticut. The district court, rejecting Giovinco's plain-meaning argument, held that the statute was "ambiguous on its face" and that the Court, therefore, "must accept" the BOP's interpretation, citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984). App. 17a-18a. The BOP "interpretation" to which the district court afforded the force of law was that 18 U.S.C. § 3584(c) required that Giovinco's concurrent terms be treated as a single sentence. App. 18a. The government continued to press the BOP's earlier view that Section 3632(d)(4)(D) "categorically delineates which inmates are never eligible to earn FSA credits."

On appeal, Giovinco argued that the district court's decision contravenes the clear objectives of the FSA because it favors *in*eligibility and raises due process concerns because it extends the penal consequences of his pornography conviction beyond the ten-year statutory maximum. Giovinco further argued that *Chevron* deference was error. The district court failed to conduct the bona fide plain-meaning and context analysis that shows how clearly and completely Congress spoke on time-credit ineligibility. Finally, Giovinco urged that

Giovinco further argued on appeal that imputing Congressional intent to delegate interpretive power to the BOP in this setting was particularly inappropriate, given that much of the FSA was a response to Congress's displeasure with the BOP on several fronts. Giovinco urged that the BOP-authored interpretation necessarily "goes beyond the meaning that the statute can bear," *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) because it takes the form of a constructive amendment of the statute—to wit, the addition of the BOP-authored disjunctive clause, "or disqualifying prior conviction." Finally, Giovinco argued the then-overturning of *Chevron* would require reversal of the *Chevron*-based district court decision.

One week after oral argument in the Second Circuit, this Court did overturn *Chevron*. *Loper Bright*, 603 U.S. 369, 412 (2024). The Second Circuit's decision affirming the district court, excising *Chevron* from the analysis, nevertheless adopted the BOP's interpretation and held that "[p]ursuant to th[e] aggregation provision, a prisoner 'is serving a sentence for' any offense that is part of his aggregated term of imprisonment." App. 2a.

Giovinco then petitioned for rehearing and rehearing *en banc* on the ground, *inter alia,* that the Second Circuit panel had lost sight of the exceptional importance of the FSA as landmark criminal justice reform legislation by holding its interpretation hostage to a statute that directs "aggregation" only for bona fide "administrative purposes" (computational and other operations functions). The aggregation statute, Giovinco further argued, is not authority for the BOP to diminish substantive rights such as the statutorily-created time credits or to engage in the legislative act of rewriting the FSA. Giovinco's rehearing petition also advanced the several grounds urged here as reasons to grant the writ. The Second Circuit denied the petition. App 20a.

REASONS FOR GRANTING THE WRIT

POINT I

THE SECOND CIRCUIT DECISION REWRITES THE FSA'S CLEAR CREDIT-ELIGIBILITY PROVISION AND UNDERMINES CONGRESS'S REHABILITATIVE MISSION

The FSA states that a prisoner is ineligible for time credits only if he "is serving a sentence for a conviction for any of" the sixty-eight listed statutes. Congress spoke simply, plainly, and clearly in the singular ("a sentence") and in the present tense ("is serving a sentence for"). Congress also delineated a specific connection between that singular "sentence" and the "conviction for" which it was imposed (*i.e.*, "any" of the listed provisions). There is simply no

room in this lawfully enacted statutory language for importing or inferring the concept of aggregating convictions or sentences.[1] The superimposing of aggregation onto this plain language, as the Second Circuit has done, alters Congress's explicit statutory criterion and violates the most basic canon of statutory interpretation. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992) (this Court "has stated time and time against that courts must presume that a legislature says in a statute what it means and means in a statute what it says there") (cleaned up).

The Second Circuit's adoption of the BOP's aggregation-first lens has resulted in an impermissible constructive amendment of Section 3632(d)(4)(D). Congress wrote, "is serving a sentence for a conviction under" a disqualifying statute. The BOP and the Second Circuit have added, in substance, "or has a disqualifying prior conviction," and "even if some or most of an administratively aggregated prison sentence is for a time-credit-eligible offense." This Court in *Loper Bright* spoke without equivocation: "no matter how impenetrable," statutes "must have a single best meaning," and "if it is not the best, it is not permissible." 603 U.S. at 400. An interpretation that imports additional language on this scale cannot be the required "best." It is therefore impermissible.

The Second Circuit's adoption of the BOP's position impermissibly diminishes the availability of a statutory entitlement. By favoring *in*eligibility, the decision conflicts with the FSA's undisputed and important rehabilitative goals. Congress designed the statute to incentivize rehabilitation and reentry readiness, not to exclude inmates through administrative

[1] As additional relevant context, the FSA's "definitions" section reflects the same specificity of relation between a single offense of conviction and single term. It provides, in relevant part that "[t]he term 'prisoner' means a person who has been sentenced to *a term* of imprisonment pursuant to *a conviction* for *a Federal criminal offense*." 18 U.S.C. § 3635(4).

reinterpretation of that statute. The phrase for which "First Step" is an acronym for Formerly Incarcerated Reenter Society Transformed Safely Transitioning Every Person, speaks bluntly of Congress's intentions. See H. Rept. 115-699 (May 22, 2018).

In sum, this Court should grant the writ to correct the Second Circuit's incorrect interpretation of this important provision of an important statute. Years of eligible-prisoner time are at stake.

POINT II

DEFERENCE IN FACT IF NOT IN NAME TO THE BOP CONFLICTS WITH *LOPER BRIGHT*

It cannot be overstated that the Second Circuit entered a jurisprudential conversation defined by courts affording deference to the BOP under *Chevron*, that the district court decision the Circuit affirmed rested entirely on the exercise of *Chevron*-mandated deference, and that the position the Second Circuit adopted is the BOP's. While appearing to interpret the statute *de novo*, the Second Circuit, in reality, allowed the agency's flawed position to dictate the framework and result of its analysis.

Most critically, the Second Circuit adopted the BOP's bias in treating the aggregation statute as a "mandate" while overlooking, first, that the FSA is a mandate as well. In seizing on the aggregation statute as the interpretive key for the FSA, the Second Circuit gives it undue weight at the expense of the FSA's clear and specific statutory criteria and landmark status. This is evident from the outset of the Second Circuit's decision, which frames its holding as follows: "*Pursuant to this aggregation provision*, a prisoner 'is serving a sentence for' any offense that is part of his aggregated term of imprisonment." App. 2a (emphasis added). The FSA's precise

language, historical significance, and overt rehabilitative objectives should have alerted the Second Circuit that more than "administrative" aggregation is at stake.

The Second Circuit echoed and channeled the agency's reasoning throughout rather than conducting a truly independent review, overlooking that nothing in the aggregation statute authorizes the BOP to tinker with statutory language or substantive rights. A critical error is the Court's categorical acceptance of the notion that every sentence-reduction eligibility determination the BOP makes is necessarily administrative (and, therefore, within the "administrative purposes" clause of Section 3584(c)). But this is absolutely not so.

The fallacy is subtle but critical: FSA time-credit eligibility stands apart from other sentence-credit programs, such as good-time credits under 18 U.S.C. § 3624 and residential drug-abuse program credits under 18 U.S.C. § 3621, where Congress did expressly place eligibility entirely in the hands of the BOP. Eligibility for good-time credits is "subject to determination by the [BOP] that" a prisoner displayed the requisite good conduct, 18 U.S.C. § 3624(b)(1), and for drug abuse treatment credits, an "eligible prisoner means—a prisoner who is determined by the [BOP] to have a substance abuse problem." 18 U.S.C. § 3621(e)(5)(B)(i). By contrast, Congress defined FSA eligibility very distinctly and completely, leaving no room for the discretion the BOP appropriately exercises in these other two sentence-reduction programs at the eligibility stage (and which discretion, within the umbrella of traditional prison management functions, comfortably falls under the "administrative purposes" constraint of Section 3584(c)).

There is, of course, an "administrative" aspect to determining FSA eligibility—the simple clerical task of examining prisoners' judgments. A bounty of additional administrative tasks is also part of administering the time-credit program, including the initial risk assessments, assigning prisoners to appropriate programs, monitoring their performance, and performing

necessary computations, placements, and transfers. But no permissible construction of the phrase "administrative purposes" can include the legislative act of interpreting the FSA and, thereby, altering Congress's determination of the availability of a substantive right. *Cf. United States v. Martin*, 974 F.3d 124 (2d Cir. 2020) (addressing the limited reach of "administrative purposes" as used in Section 3584(c) when a substantive statutory entitlement is at stake). Again, as noted, the BOP's reliance on *Chevron* to defend its practice of determining time-credit eligibility establishes that it knew it was performing the legislative act of rewriting a statute, not an "administrative" act authorized by Section 3584(c). In the end, this is what the Second Circuit has uncritically adopted. Such deference to an agency in substance, if not in name, does not comport with the Court's decision in *Loper Bright*.

POINT III

THE SECOND CIRCUIT'S DECISION RAISES SERIOUS DUE PROCESS CONCERNS

A statutory maximum sets a clear constitutional boundary for the penal effect of a sentence. For Giovinco's child pornography conviction, that boundary is ten years. 18 U.S.C. § 2252(a)(b)(2). FSA time credits are a substantive statutory entitlement that Congress unequivocally stated "all" eligible prisoners "shall earn." 18 U.S.C. § 3632(d)(4)(A). The Second Circuit's decision allows an expired sentence to disqualify a prisoner from statutory benefits indefinitely, thereby extending the penal consequences of a fully served sentence. This interpretation conflicts with established constitutional principles limiting punishment to the sentence imposed by statute and the judiciary. *See, e.g., Apprendi v. New Jersey,* 530 U.S. 466, 476-490 (2000).

At the very least, before affording its blessing to this outcome, a court would have to be absolutely certain that this is what Congress intended by its definition of ineligibility. The plain language of the FSA's ineligibility definition, as discussed, cannot supply the necessary certainty that when Congress wrote, "is serving a sentence for," it meant "has previously been convicted of." Likewise, the aggregation statute, for the reasons discussed, also fails to provide this level of certainty. This Court should grant the writ to address this critical constitutional concern.[2]

CONCLUSION

For the foregoing reasons, Petitioner Charles Anthony Giovinco respectfully requests that a writ of certiorari be issued to review the Second Circuit Court of Appeals decision in this matter.

Dated: Bay Shore, New York
March 19, 2025

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[2] The Second Circuit notes that it has reached the same result as four other circuits. App. 11a (citing *Martinez v. Rosalez*, No. 23-50406, 2024 U.S. App. LEXIS 914 (5th Cir. Jan. 12, 2024); *Keeling v. LeMaster*, No. 22-6126, 2023 U.S. App. LEXIS 31169 (6th Cir. Nov. 22, 2023), *Sok v. Eischen*, No. 23-1025, 2023 U.S. App. LEXIS 21463 (8th Cir. Aug. 17, 2023); *Teed v. Warden Allenwood FCI Low*, No. 23-1181, 2023 U.S. App. LEXIS 18026 (3d Cir. July 17, 2023)). It is respectfully submitted that each is also wrongly decided for one or more of the reasons discussed in this petition.

APPENDIX

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Giovinco v. Pullen

In the
United States Court of Appeals
FOR THE SECOND CIRCUIT

AUGUST TERM 2023
No. 23-251

CHARLES ANTHONY GIOVINCO,
Petitioner-Appellant,

v.

TIMETHEA PULLEN, WARDEN,
Respondent-Appellee.

On Appeal from the United States District Court
for the District of Connecticut

ARGUED: JUNE 21, 2024
DECIDED: OCTOBER 8, 2024

Before: LIVINGSTON, *Chief Judge*, and LOHIER and MENASHI, *Circuit Judges*.

The First Step Act of 2018 ("FSA") permits an eligible prisoner to earn time credits if he participates in certain programs or activities. *See* 18 U.S.C. § 3632(d)(4). A prisoner is not eligible to earn such credits if he "is serving a sentence for a conviction" of certain enumerated offenses. *Id*. § 3632(d)(4)(D). The question in this case is

whether a prisoner serving a term of imprisonment for multiple offenses—only some of which are ineligible for FSA time credits—may earn FSA time credits for the portion of his term attributable to an eligible offense.

We conclude that the answer is no. Under 18 U.S.C. § 3584(c), "[m]ultiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment." *Id.* § 3584(c). Pursuant to this aggregation provision, a prisoner "is serving a sentence for" any offense that is part of his aggregated term of imprisonment. Accordingly, the Bureau of Prisons must aggregate a prisoner's sentence pursuant to § 3584(c) for the administrative purpose of determining his eligibility for FSA time credits under § 3632(d)(4). We affirm the judgment of the district court.

JOHN R. QUINN, Law Office of John R. Quinn, Bay Shore, NY, *for Petitioner-Appellant*.

JOHN W. LARSON, Assistant United States Attorney (Sandra S. Glover, Assistant United States Attorney, *on the brief*), *for* Vanessa Roberts Avery, United States Attorney for the District of Connecticut, New Haven, CT, *for Respondent-Appellee*.

MENASHI, *Circuit Judge*:

Petitioner-Appellant Charles Anthony Giovinco appeals the judgment of the district court denying his petition for a writ of habeas corpus under 28 U.S.C. § 2241. In 2008, Giovinco pleaded guilty to enticement of a minor and possession of child pornography. He was

sentenced to concurrent terms of 235 months of imprisonment on the enticement count and 120 months of imprisonment on the possession-of-child-pornography count.

In 2018, Congress enacted the First Step Act of 2018 ("FSA"). The FSA permits an eligible prisoner to earn time credits if he participates in certain programs or activities. A prisoner is not eligible to earn time credits if he "is serving a sentence for a conviction" of certain enumerated offenses, including possession of child pornography. 18 U.S.C. § 3632(d)(4)(D).

Giovinco argues that § 3632(d)(4)(D) renders him ineligible to earn time credits only while serving the individual sentence attributable to the ineligible offense. He contends that once he completed serving the maximum sentence on his ineligible conviction—possession of child pornography—he was no longer "serving a sentence for" an ineligible offense and was therefore eligible to earn FSA time credits for the remainder of his term of imprisonment. The Bureau of Prisons ("BOP") argues that Giovinco is ineligible to earn FSA time credits for his entire aggregated term of imprisonment. The BOP contends that 18 U.S.C. § 3584(c)—which requires that "[m]ultiple terms of imprisonment ordered to run consecutively or concurrently … be treated for administrative purposes as a single, aggregate term of imprisonment"—applies to the BOP's administration of the FSA time credit program.

We conclude that, pursuant to the aggregation provision, a prisoner "is serving a sentence for" any offense that is part of his aggregated term of imprisonment. Accordingly, the BOP must aggregate a prisoner's sentence pursuant to § 3584(c) for the purpose of determining his eligibility for FSA time credits under § 3632(d)(4). We affirm the judgment of the district court.

BACKGROUND

In 2008, Giovinco pleaded guilty to a two-count indictment charging him with (1) using the internet to entice a minor to engage in sexual activity in violation of 18 U.S.C. § 2242(b), and (2) possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). He was sentenced to concurrent terms of 235 months of imprisonment on the enticement count and 120 months of imprisonment on the child-pornography count, to be followed by a lifetime term of supervised release.

In 2018, Congress enacted the First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, a criminal justice reform statute. Among other reforms, the FSA provides that an eligible prisoner may earn time credits if he successfully participates in certain evidence-based recidivism reduction programs or productive activities. *See* 18 U.S.C. § 3632(d)(4). The time credits are applied toward pre-release custody or supervised release. *Id.* § 3632(d)(4)(C). A prisoner is not eligible to earn FSA time credits if he "is serving a sentence for a conviction" of certain enumerated offenses. *Id.* § 3632(d)(4)(D). The ineligible offenses include possession of child pornography under § 2252. *See id.* § 3632(d)(4)(D)(xli). The FSA tasks the BOP with administering the FSA time credit program under the supervision of the Attorney General. *See id.* §§ 3621(h), 3631.

In 2022, Giovinco sought to be reclassified as eligible for FSA time credits. He asserted that he had served the maximum sentence on his ineligible conviction—possession of child pornography—so he was no longer "serving a sentence for" an ineligible offense. The BOP denied his request and his subsequent appeals. In denying his final appeal, the BOP's Office of General Counsel explained its conclusion

that Giovinco was not eligible to earn time credits for the entirety of his term of imprisonment:

> An eligible prisoner means the prisoner is not currently serving a sentence for a conviction that is on the list of ineligible offenses as listed in the FSA and 18 U.S.C. § 3623(d)(4)(D). This applies to your current commitment in its entirety, not the individual terms of imprisonment. Accordingly, your assertion that the counts of conviction are separate and that [time credits] can be applied separately to the "eligible" portion is incorrect.

App'x 28.

Giovinco then filed a habeas petition, which the district court denied. *See Giovinco v. Pullen*, No. 22-CV-1515, 2023 WL 1928108, at *1 (D. Conn. Feb. 10, 2023). The district court explained that the aggregation provision, 18 U.S.C. § 3584(c), applies to the administration of FSA time credits and indeed that "[c]ourts have consistently held that sentence calculation by the BOP and the BOP's administration of incentives which reduce the length of a prisoner's term of imprisonment are administrative functions of the BOP subject to § 3584(c)." *Id.* at *2 (quoting *Sok v. Eischen*, No. 22-CV-458, 2022 WL 17156797, at *5 (D. Minn. Oct. 26, 2022), *report and recommendation adopted*, No. 22-CR-458, 2022 WL 17128929 (D. Minn. Nov. 22, 2022), *aff'd*, No. 23-1025, 2023 WL 5282709 (8th Cir. Aug. 17, 2023)). The district court observed that the FSA "is silent on how to determine the eligibility of an inmate, like Mr. Giovinco, convicted of multiple charges, not all of which render him ineligible for time credits." *Id.* at *3. The district court deferred to the BOP's "reasonable interpretation of the statute," *id.* (citing *Chevron v. NRDC*, 467 U.S. 837, 842-44 (1984), *overruled by Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024)), recognizing that the FSA "must be read in the context of the BOP's

statutory obligation to aggregate concurrent and consecutive sentences for administrative purposes," *id.*

STANDARD OF REVIEW

We review the denial of a petition for a writ of habeas corpus de novo. *Drake v. Portuondo*, 321 F.3d 338, 343 (2d Cir. 2003). We also consider questions of statutory interpretation de novo. *Fisher v. Aetna Life Ins. Co.*, 32 F.4th 124, 135 (2d Cir. 2022).

DISCUSSION

The FSA provides that a "prisoner is ineligible to receive time credits … if the prisoner is serving a sentence for a conviction" of an ineligible offense. 18 U.S.C. § 3632(d)(4)(D). The FSA does not address whether a prisoner serving concurrent or consecutive sentences—at least one of which is for an ineligible offense—may earn FSA time credits for the portion of his term that is attributable only to an eligible offense. Thirty-four years before Congress enacted the FSA, however, Congress adopted 18 U.S.C. § 3584. That statute provides that "[m]ultiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment." *Id.* § 3584(c).

Giovinco argues that the plain meaning of § 3632(d)(4)(D) directs that a prisoner be ineligible for FSA time credits only while he "is serving" the individual sentence for the ineligible offense. He further argues that the aggregation provision does not apply to the BOP's determination of a prisoner's eligibility for FSA time credits because Congress rather than the BOP set the criteria for eligibility—so the determination of a prisoner's eligibility is not an "administrative purpose" of the BOP.

The BOP acknowledges that the most natural reading of § 3632(d)(4)(D), standing alone, might render ineligible only the individual sentence applicable to the ineligible offense.[1] But the BOP argues that the text must be read in light of the statutory scheme—including, in particular, the BOP's obligation to aggregate sentences under § 3584(c). According to the BOP, the statutory scheme requires it to aggregate multiple terms of imprisonment when administering the FSA time credit program.

I

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (quoting *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989)). We therefore "consider not only the bare meaning of the critical word or phrase but also its placement and purpose in the statutory scheme." *Kar Onn Lee v. Holder*, 701 F.3d 931, 936 (2d Cir. 2012) (quoting *Holloway v. United States*, 526 U.S. 1, 6 (1999)). "Our duty, after all, is to construe statutes, not isolated provisions." *King v. Burwell*, 576 U.S. 473, 486 (2015) (internal quotation marks omitted).

In construing a statutory text, we recognize that "Congress may establish a 'background principle of interpretation' to guide courts in understanding subsequently enacted statutes." *Everytown for Gun Safety Support Fund v. ATF*, 984 F.3d 30, 34 (2d Cir. 2020) (quoting *Dorsey v. United States*, 567 U.S. 260, 274 (2012)). While "an earlier statute cannot bind a later Congress" that seeks to depart from the background principle, *id.* (internal quotation marks omitted), the "preferred meaning of a statutory provision is one that is consonant

[1] *See* Oral Argument Audio Recording at 28:07.

with the rest of the statute" and with "the whole statutory scheme," *Auburn Hous. Auth. v. Martinez*, 277 F.3d 138, 144 (2d Cir. 2002).

A

The aggregation provision establishes a background principle according to which "[m]ultiple terms of imprisonment … shall be treated for administrative purposes as a single, aggregate term of imprisonment." 18 U.S.C. § 3584(c). Courts have recognized that the "administrative purposes" referenced in § 3584(c) include the BOP's administration of other types of sentencing credits, such as time-served credits (§ 3585), good-time credits (§ 3624), and residential drug-abuse program credits (§ 3621). *See United States v. Martin*, 974 F.3d 124, 136 (2d Cir. 2020) (holding that the aggregation provision applies to time-served credits under § 3585); *Chambers v. Warden Lewisburg USP*, 852 F. App'x 648, 650 (3d Cir. 2021) (holding that the aggregation provision applies to good-time credits under § 3624); *Moreno v. Ives*, 842 F. App'x 18, 21 (9th Cir. 2020) (holding that the aggregation provision applies to residential drug-abuse program credits under § 3621); *see also United States v. LaBonte*, 520 U.S. 751, 758 n.4 (1997) (noting that §§ 3585, 3621, and 3624 "fall[] within [§ 3584(c)'s] 'administrative purposes' carve-out").

In light of this legal background, we conclude that the aggregation provision applies to the BOP's administration of the FSA time credit program. The BOP is charged with administering the FSA time credit program, and for that reason its implementation of § 3632(d)(4)(D) is an "administrative purpose" for which multiple terms of imprisonment are to be treated as a single, aggregate term. The text of § 3632(d)(4)(D) is consistent with that understanding. Section 3632(d)(4)(D) provides that a prisoner who "is serving a sentence for" an ineligible offense may not earn FSA time credits.

18 U.S.C. § 3632(d)(4)(D). That phrase can be read to refer to an individual sentence for an individual conviction. But the phrase can also be read to refer to an aggregate term of imprisonment.[2] In the context of the aggregation provision and precedent holding that the aggregation provision applies to other sentencing credit programs, the phrase "is serving a sentence for" is best understood as referring to the prisoner's aggregate term of imprisonment.

B

Giovinco argues that the determination of a prisoner's eligibility to earn FSA time credits is legislative—not administrative—because Congress set the eligibility criteria by statute and made the awarding of credits mandatory. *See* 18 U.S.C. § 3632(d)(4) ("A prisoner, except for an ineligible prisoner under subparagraph (D), … shall earn time credits as follows."). He observes that other sentencing credit programs—such as residential drug-abuse program credits under § 3621—delegate to the BOP the authority to determine the eligibility of a prisoner. *See Moreno*, 842 F. App'x at 21 ("[C]ompletion of RDAP does not automatically mean that an inmate is eligible for the sentence reduction incentive, and Congress delegated the authority to make those determinations

[2] We note that in 18 U.S.C. § 3584(c), Congress used the terms "sentence" and "term of imprisonment" interchangeably. The heading of § 3584 is "Multiple sentences of imprisonment" and the caption of § 3584(c) is "Treatment of multiple sentence as an aggregate" while § 3584(c) itself refers to "terms of imprisonment." Pub. L. No. 98-473 (Oct. 12, 1984), 98 Stat 1837, 2000 (capitalization omitted); *see Yates v. United States*, 574 U.S. 528, 540 (2015) ("The title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute.") (alteration omitted) (quoting *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)).

to BOP."); 18 U.S.C. § 3621(e)(1), (e)(5)(B)(i); *see also id.* § 3624(b)(1). For this reason, he argues, the FSA time credit program is different from the other sentencing credit programs to which the aggregation provision has been held to apply.

We disagree. To administer the FSA, the BOP must determine whether a prisoner meets the eligibility criteria set forth in § 3632(d)(4)(D). An agency's implementation of statutory standards is a regular feature of "the administrative work of executing a statute's mandate."[3] The aggregation provision directs that, when implementing the statutory criteria, the BOP must aggregate a prisoner's sentence. If "Congress intended to depart from the background principle" set by the aggregation provision and to direct the BOP to apply the statutory criteria of § 3632(d)(4)(D) to each individual sentence, it could have expressed that intention either expressly or by fair implication in the FSA. *Everytown*, 984 F.3d at 39. But it did not do so.

Our interpretation does not, as Giovinco suggests, improperly alter the judicially imposed punishment for his crime. We recognize that "sentences within judgments of conviction are imposed for particular counts of conviction." *Martin*, 974 F.3d at 135; *accord United States v. Young*, 998 F.3d 43, 55 (2d Cir. 2021). In *Martin*, we distinguished statutes that created sentencing credit programs for the BOP to administer from statutes that authorized judicial resentencing. We explained that while the implementation of a statutorily authorized credit program qualifies as an administrative purpose, judicial resentencing does not. We concluded that "courts' judicial decisions under § 3582 do not constitute an 'administrative

[3] Eli Nachmany, *Deference to Agency Expertise in Statutory Interpretation*, 31 Geo. Mason L. Rev. 587, 594 (2024) (internal quotation marks omitted).

purpose,'" that "to so find would essentially rewrite the statute to extend aggregation to *all* purposes," and that therefore the aggregation provision "provides no textual support for the position that sentences may be aggregated for the purpose of resentencing." *Martin*, 974 F.3d at 137 (internal quotation marks omitted). As we have previously emphasized, "[a]gencies are not courts." *Vera Punin v. Garland*, 108 F.4th 114, 125 (2d Cir. 2024) (quoting *Garcia v. Garland*, 64 F.4th 62, 70 (2d Cir. 2023)).

In this case, Congress has directed that—for the purpose of administering a judicially imposed sentence—the BOP must aggregate multiple terms of imprisonment. That "administrative purpose" includes the implementation of the FSA time credit program that may reduce the sentence. In reaching this conclusion, we agree with every other circuit court to have considered the question.[4]

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[4] *See Martinez v. Rosalez*, No. 23-50406, 2024 WL 140438, at *3 (5th Cir. Jan. 12, 2024) ("We agree with the district court that aggregation in the administrative context … was proper for purposes of FSA time credits."); *Keeling v. Lemaster*, No. 22-6126, 2023 WL 9061914, at *1 (6th Cir. Nov. 22, 2023) ("[C]ourts have consistently and correctly held that the calculation of a prisoner's sentence, and the awarding of credits that reduce the length of that sentence, are administrative functions of the BOP subject to § 3584(c). The district court therefore did not err in concluding that [the petitioner's] aggregated sentence precluded him from receiving earned time credit under the FSA.") (internal quotation marks and citation omitted); *Sok v. Eischen*, No. 23-1025, 2023 WL 5282709, at *1 (8th Cir. Aug. 17, 2023) ("[W]e conclude that … the BOP correctly treated [the petitioner's] prison terms as a single aggregated sentence for all 3 offenses, and therefore properly denied him FSA credits."); *Teed v. Warden Allenwood FCI Low*, No. 23-1181, 2023 WL 4556726, at *2 (3d Cir. July 17, 2023) ("Calculation of an inmate's term of imprisonment is widely recognized as an 'administrative purpose' well within the BOP's responsibilities as charged by Congress. Accordingly,

II

The parties here agree that, even if the statute were ambiguous, the district court improperly applied *Chevron* deference and should have applied *Skidmore* deference. Because we conclude, without deference, that the best reading of the applicable statutes required the BOP to aggregate Giovinco's sentence to determine his eligibility for FSA time credits, we need not decide whether the BOP's interpretation warrants some level of deference.

CONCLUSION

For the foregoing reasons, we affirm the judgment of the district court.

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here, we view BOP's aggregation of [the petitioner's] sentence and FSA ineligibility designation to be proper.") (citation omitted).

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHARLES ANTHONY GIOVINCO, *Petitioner*, v. TIMETHEA PULLEN, *Respondent.*	No. 3:22-cv-1515 (VAB)

RULING ON PETITION FOR WRIT OF HABEAS CORPUS

Charles Anthony Giovinco ("Petitioner") filed this petition for writ of habeas corpus under 28 U.S.C. § 2241 seeking application of First Step Act ("FSA") time credits. Pet., ECF No. 1 (Nov. 29, 2022) ("Pet.").

Timethea Pullen ("Respondent") claims that Mr. Giovinco is not eligible to earn FSA time credits. Respondent's Opp'n to Pet. For Writ of Habeas Corpus, ECF No. 7 (Jan. 12, 2023) ("Opp'n").

For the following reasons, the petition for writ of habeas corpus is **DENIED**.

I. BACKGROUND

On December 21, 2018, Congress enacted the First Step Act ("FSA"), which was intended to encourage federal inmates to participate in evidence-based recidivism reduction programs ("EBRRs") and other productive activities ("PAs"). *See* 18 U.S.C. §§ 3632(d)(4)(C), 3624(g)(1)(A). Inmates earn time credits upon successful participation in these activities and the time credits qualify the inmates for early release from custody. *See id.*

With enough time credits, an inmate may be transferred sooner to prerelease custody, either in a residential reentry center or on home confinement, or supervised release. *See* 18

U.S.C. § 3624(g)(2). Inmates classified as minimum or low risk of recidivism are eligible to earn either ten or fifteen days of credit for every thirty days of successful participation in EBRRs or PAs. *See* 18 U.S.C. § 3632(d)(4)(A). If the inmate's sentence includes a period of supervised release, "the Director of the Bureau of Prisons may transfer the prisoner to begin any such term of supervised release at an earlier date, not to exceed 12 months." 18 U.S.C. § 3624(g)(3).

There are some situations, however, where an otherwise eligible inmate will not be considered as "successfully participating" in EBRRs or PAs to be considered for FSA time credit. Such situations include, but are not limited to:

> i) Placement in a Special Housing Unit;
> ii) Designation status outside the institution (e.g. for extended medical placement in a hospital or outside institution, an escorted trip, a furlough, etc.);
> iii) Temporary transfer to the custody of another Federal or non-Federal government agency (e.g., on state or Federal writ, transfer to state custody for service of sentence, etc.);
> iv) Placement in mental health/psychiatric holds; or
> v) "Opting out" (choosing not to participate in the EBRR programs or PAs that the Bureau has recommended based on the inmate's individualized risk and needs assessment).

28 C.F.R. § 523.41(c)(4)(i)-(v).

In addition, the statute includes a list of 68 statutes, the violation of which renders an inmate ineligible for FSA time credits. *See* 18 U.S.C. § 3632(d)(4)(D).

Mr. Giovinco was convicted in the United States District Court for the Southern District of Florida for using the internet to entice a minor to engage in sexual activity ("Count One") and possession of child pornography ("Count Two"). Ex. 1 to Opp'n at 1, ECF No. 7-1 ("J."). On February 17, 2009, he was sentenced to 235 months on Count One and 120 months on Count Two, with the sentences to be served concurrently. *Id.* at 1. Mr. Giovinco concedes that

possession of child pornography, Count Two, is included in the list of ineligible offenses. Pet. ¶ 7.

II. STANDARD OF REVIEW

Section 2241 affords relief only if the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). A petition filed under Section 2241 may be used to challenge the execution of a prison sentence. Thus, Section 2241 petitions are appropriately used to challenge conditions of confinement or sentence calculations. *See Levine v. Apker*, 455 F.3d 71, 78 (2d Cir. 2006) (finding that "execution of a sentence . . . is properly filed pursuant to § 2241" which includes "matters such as the administration of parole, computation of a prisoner's sentence by prison officials, prison disciplinary actions, prison transfers, type of detention[,] and prison conditions" (citations and quotation marks omitted)).

III. DISCUSSION

Mr. Giovinco challenges the Bureau of Prisons's ("BOP") determination that he is ineligible to earn FSA time credits. Pet. ¶ 7. He notes that of the two charges of which he was convicted, only possession of child pornography is included in the list of ineligible offenses. *Id.* Mr. Giovinco argues that the BOP should consider his sentence as two separate sentences and, as he has already completed the 120-month sentence for possession of child pornography, he should be eligible to earn FSA time credits on the eligible charge for which he is still serving his sentence. *See* Mem. in Supp. of Giovinco's § 2241 Habeas Corpus Mot. at 1–2, ECF No. 1-1 ("Mem.").

The Respondent argues that the BOP is required to aggregate sentences for all

administrative purposes and contends that, when Mr. Giovinco's sentence is considered as one aggregate sentence, he is not eligible for FSA time credits. Opp'n at 1.

Mr. Giovinco acknowledges that the BOP is required to aggregate all consecutive and concurrent sentences for administrative purposes, but argues that determining eligibility for FSA time credits is not an administrative task. *See* Reply to Gov't Resp. to Pet. For Relief at 4, ECF No. 8 ("Reply"); *see also* 18 U.S.C. § 3584(c) ("Multiple terms of imprisonment ordered to run consecutively or concurrently shall be treated for administrative purposes as a single, aggregate term of imprisonment.").

Mr. Giovinco further argues that a plain reading of the FSA supports his claim. Mem. at 4–5; Reply at 1–3. The statute provides: "A prisoner is ineligible to receive time credits under this paragraph if the prisoner is serving a sentence for a conviction under any of the following provisions of law[.]" 18 U.S.C. 3632(d)(4)(D). Mr. Giovinco contends that the use of the singular, "a sentence," requires the BOP to consider the components of his sentence separately. *See* Reply at 1–2.

The Court disagrees.

"Courts have consistently held that sentence calculation by the BOP and the BOP's administration of incentives which reduce the length of a prisoner's term of imprisonment are administrative functions of the BOP subject to § 3584(c)." *Sok v. Eischen*, No. 22-cv-458 (ECT/LIB), 2022 WL 17156797, at *5 (D. Minn. Oct. 26, 2022) (collecting cases), *report and recommendation adopted*, 2022 WL 17128929 (Nov. 22, 2022); *see also United States v. Martin*, 974 F.3d 124, 136 (2d Cir. 2020) (finding that "administrative purposes" referenced in § 3584(c) are described in, "among other provisions, 18 U.S.C. § 3585, which authorizes the BOP to

provide inmates with credit towards their sentence for various reasons, including for time spent in detention prior to commencement of the sentence"); *Chambers v. Warden Lewisburg USP*, 852 F. App'x 648, 650 (3d Cir. 2021) ("The BOP was permitted to aggregate Chambers's otherwise-consecutive sentences into a single unit for purely administrative purposes, such as—at issue here—calculating GTC under 18 U.S.C. § 3624."); *Moreno v. Ives*, 842 F. App'x 18, 21–22 (9th Cir. 2020) (considering an administrative purpose the determination eligibility for early release for completion of residential drug treatment program and finding that, "[i]nsofar as Mr. Moreno argues that § 3584(c) is limited to sentence computation, no such limit exists in the language of the statute, and other courts have recognized that the statute applies to all administrative determinations made by BOP"); *United States v. Wilson*, 503 U.S. 329, 335 (1992) ("After a district court sentences a federal offender, the Attorney General, through the BOP, has the responsibility for administering the sentence.").

While the FSA is silent on how to determine the eligibility of an inmate, like Mr. Giovinco, convicted of multiple charges, not all of which render him ineligible for time credits and where he has served a term of imprisonment greater than the length of the sentence on the ineligible charge, *see Sok*, 2022 WL 17156797, at *3 (acknowledging that section 3632(d)(4)(D) is ambiguous on how to treat prisoners serving sentences based on more than one charge), the plain language of the statute does not support Mr. Giovinco's desired result.

Where a federal statute is ambiguous on its face and the federal agency responsible for administering the statute has adopted a reasonable interpretation of the statute, the Court must accept the federal agency's interpretation. *See Chevron U.S.A, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984); *Braithwaite v. Garland*, 3 F.4th 542, 552 (2d Cir.

2021) (stating that, where statute is ambiguous, court "must defer to an agency's 'permissible construction of the statute'") (citing *Chevron*, 467 U.S. at 843).

And when interpreting a statute, the language must be read in context. *See McCarthy v. Bronson*, 500 U.S. 136, 139 (1991) ("[S]tatutory language must always be read in its proper context."); *Pharaohs GC. Inc. v. U.S. Small Bus. Admin*., 990 F.3d 217, 226 (2d Cir. 2021) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." (citation omitted)). Thus, this provision must be read in the context of the BOP's statutory obligation to aggregate concurrent and consecutive sentences for administrative purposes.

Few courts have yet had the opportunity to address this type of claim. In *Sok*, the petitioner had been convicted of multiple offenses, one of which was on the list of ineligible charges. 2022 WL 17156797, at *2. He sought FSA time credits arguing that the length of his sentence relevant to the ineligible charge had elapsed and he was now serving a sentence only for eligible offenses. *Id.* The court found the BOP's interpretation of the statute was reasonable, and even mandatory, in light of the statute requiring aggregation of sentences. *Id*. at *5.

In another case challenging eligibility for FSA time credits, the petitioner's sentence for the ineligible charge was ordered to run consecutively to the sentences on his other charges. *See Teed v. Warden*, No. 1:22-CV-1568, 2023 WL 1768121, at *3 (M.D. Pa. Feb. 3, 2023). The petitioner argued that, because the sentence on the ineligible charge was consecutive, he was not yet serving a sentence for an ineligible offense and, therefore, was eligible for FSA time credits. *Id.* at *2. The court found the petitioner's claim "lack[ed] merit" and held that, in light of the statutory mandate to aggregate sentences, "the BOP properly aggregated [petitioner's] sentences

into one sentence for administrative purposes and found that he [was] ineligible for earned time credits under the FSA based on his disqualifying offense." *Id.* at *3; *see also Keeling v. LeMaster*, Civil No. 0:22-cv-00096-GFVT, 2022 WL 17407966, at *2 (E.D. Ky. Dec. 2, 2022) (rejecting claim that sentence should be bifurcated so petitioner could earn FSA time credits for eligible offenses).

This Court agrees that the BOP's interpretation of section 3632(d)(4)(D) is reasonable in light of its long-standing obligation[1] to aggregate sentences for administrative purposes.

Accordingly, the petition for writ of habeas corpus will be denied.

IV. CONCLUSION

For the reasons described above, the petition for writ of habeas corpus is **DENIED**.

The Clerk of Court is respectfully directed to enter judgment and close this case.

SO ORDERED this 10th day of February, 2023 at Bridgeport, Connecticut.

/s/ Victor A. Bolden
Victor A. Bolden
United States District Judge

[1] The Court notes that section 3584 was enacted in 1984 and, as seen above, has been considered in numerous decisions. If Congress had wanted inmates to receive FSA time credits for the portion of their sentences attributed solely to eligible offenses, it would have included such language in the statute. As Congress did not do so, the statute is properly interpreted in light of the statutory mandate.

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 19th day of December, two thousand twenty-four.

Charles Anthony Giovinco,

Petitioner - Appellant,

v.

Timethea Pullen, Warden,

Respondent - Appellee.

ORDER

Docket No: 23-251

Appellant, Charles Anthony Giovinco, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk