No.

IN THE SUPREME COURT OF THE UNITED STATES

WILLIAM A. WHITE, PETITIONER

v.

WARDEN OF FEDERAL CORRECTIONAL INSTITUTION - CUMBERLAND, RESPONDENT.

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

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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Appendix A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7116

WILLIAM A. WHITE,

Petitioner - Appellant,

v.

WARDEN OF FEDERAL CORRECTIONAL INSTITUTION - CUMBERLAND,

Respondent - Appellee.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Deborah K. Chasanow, Senior District Judge. (1:22-cv-02371-DKC)

Argued: September 9, 2025 Decided: January 13, 2026

Before WILKINSON, NIEMEYER, and KING, Circuit Judges.

Affirmed by published opinion. Judge Niemeyer wrote the opinion, in which Judge Wilkinson joined. Judge King wrote a dissenting opinion.

ARGUED: Claire Victoria Madill, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Greenbelt, Maryland, for Appellant. Beatrice Campbell Thomas, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee. **ON BRIEF:** James Wyda, Federal Public Defender, Patricia L. Richman, Assistant Federal Public Defender, OFFICE OF THE FEDERAL PUBLIC DEFENDER, Greenbelt, Maryland, for Appellant. Kelly O. Hayes, United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Baltimore, Maryland, for Appellee.

NIEMEYER, Circuit Judge:

As a federal prisoner, William White is entitled to jail-time credits under the First Step Act of 2018 (FSA) for participating in specified programming administered by the Bureau of Prisons (BOP) and designed to reduce his risk of recidivism. *See* 18 U.S.C. § 3632(d)(4). Contending that the BOP failed to provide him with programming that would have allowed him to earn FSA time credits during a three-day period while he was housed in a federal transfer center — during transfer from one federal prison to another — he filed this petition for a writ of habeas corpus under 28 U.S.C. § 2241 to obtain an award of such credits. He also contends that the BOP's denial of these jail-time credits violated his rights under the Due Process Clause of the Fifth Amendment by unlawfully extending his incarceration without due process.

The district court denied White's petition, ruling that the BOP's denial of FSA time credits for the three-day transit period was consistent with the BOP's regulations and policy statement. The court noted that an eligible prisoner, such as White, generally will not be considered to be successfully participating in FSA programs when in transit for a few days, explaining that prisoners in transit "are not 'successfully participating' in [recidivism reduction programs] and accordingly they are not able to accrue [FSA time credits]." Because the district court's ruling follows the text of the FSA itself, we need not assess further whether the BOP's regulations and policy statement were correctly applied or, indeed, were even valid. The FSA provides that "[a] prisoner . . . who successfully completes evidence-based recidivism reduction programming or productive activities, shall earn time credits" based on time participating in such programming. 18 U.S.C.

§ 3632(d)(4) (emphasis added). Because White does not claim that he participated in such programming or activities during the three days he was in transit, he cannot claim that he "earned" FSA time credits. Accordingly, we affirm. Moreover, White's argument that the BOP should have offered him such programming during his transfer so that he could have earned the FSA time credits cannot, even if successful, lead to a ruling awarding him such credits because he still would not have shown that he had earned them by actually participating in the programming, as required by the FSA.

I

White is serving a 349-month term of imprisonment with a projected release date in 2037. While he was housed in Federal Correctional Institution (FCI) Terre Haute in Indiana, the BOP decided to transfer him to FCI Cumberland in Maryland. Thus, on July 21, 2022, he was transferred first to a transfer center — Federal Transfer Center Oklahoma City — for three full days and then, on July 25, 2022, to FCI Cumberland, where he is currently housed. Moreover, while in the Federal Transfer Center, he was held in a "Special Housing Unit" for security concerns.

White does not allege that he participated in any FSA programming while in the Transfer Center, and apparently the BOP did not offer him any. As the BOP explains, a transfer center is "a transitory institution" where the BOP often lacks the tools and prisoner documentation necessary to perform the FSA's recidivism risk assessments and provide programming more generally. Apparently, White understood this because there is no evidence that he expected to be given programming while in transfer or that he requested it.

Thus, in calculating White's FSA time credits, the BOP denied White any credits for the three days he spent in the Transfer Center, citing 28 C.F.R. § 523.41(c)(4), which provides that a prisoner "will generally not be considered to be 'successfully participating'" in an FSA program when he is, among other situations, housed in a "Special Housing Unit" or designated "outside the institution."

Acting pro se, White filed this petition for a writ of habeas corpus under 28 U.S.C. § 2241, seeking an order awarding FSA time credits based on the three days he spent in the Transfer Center. He alleged that under BOP's regulations and practices, he was entitled to FSA time credits regardless of his participation in programming because, as he claims, "a prisoner needs to do little more than be in the BOP and not refuse [FSA] programming." And he asserts that the only reason he could not earn FSA time credits under that standard was that he was placed in a Special Housing Unit and in transfer status and that the BOP placed him there without due process, thus denying him programming. But, he added, "This is not about [a Special Housing Unit] confinement per se. The BOP may or may not have been permitted to place me in [Special Housing Unit]. But, the BOP was not permitted to impose loss of [FSA time credits] as a collateral consequence of [Special Housing Unit] confinement without Due Process." Thus, White maintains that he was effectively denied FSA time credits because he was placed in these designations without due process, which presumes that if he had not been placed in the Special Housing Unit or in transfer status, he would have then received FSA time credits even without participating in programming. White requested an order directing the BOP to award FSA time credits for the three days he was detained at the Transfer Center, which would have amounted to one day less in prison. *See* 18 U.S.C. § 3632(d)(4)(A)(i).

The district court denied White's petition, ruling that the BOP's decision based on its regulations and policy statement was at least entitled to respect. It observed that the BOP's regulations were a permissible interpretation of the FSA under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and that its policy statement was entitled to respect under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). It found that denying FSA time credits for "time spent in transfer status in [Oklahoma] City makes sense and thus is entitled to respect." Thus, the court held that White "is not entitled to the credit that he seeks." The district court also rejected White's due process argument under the Fifth Amendment, reasoning that the FSA did not provide White with a protected liberty interest in earning credits during each day of incarceration. And it concluded that White was not entitled to process before the BOP transferred him from FCI Terre Haute, via the Transfer Center, to FCI Cumberland.

From the district court's judgment dated July 31, 2023, White filed this appeal. And to represent White on appeal, we appointed the Federal Public Defender for the District of Maryland.*

* We are especially grateful to Ms. Claire Madill, who ably represented White in this appeal.

II

White contends first that the district court erred in applying *Chevron*, which has since been overruled by the Supreme Court, to uphold the BOP regulation that, he argues, "contravenes the plain text of the FSA." He notes that this regulation, 28 C.F.R. § 523.41(c)(4), creates exceptions to when FSA programming must be provided, whereas the FSA itself "mandates that all eligible people earn FSA time credits any time after the date their sentence commences." (Citing 18 U.S.C. § 3632(d)(4)(B)); *see also* 18 U.S.C. § 3585(a).

White is, of course, correct that the Supreme Court overruled *Chevron* in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), explaining that proper judicial function requires courts to exercise independent judgment to determine a statute's "single, best meaning" rather than deferring to an agency's interpretation when a statute is ambiguous. *Id.* at 400. That said, however, *Loper* also noted that courts remain free to seek aid from "the interpretations of those responsible for implementing particular statutes." *Id.* at 394. But at bottom, the Court held that a court construing a statute has the responsibility itself of finding the best reading of the statute — "the reading the court would have reached if no agency were involved." *Id.* at 400 (cleaned up).

We thus must determine whether, *under the best reading* of the FSA, the district court correctly ruled that White is not entitled to FSA time credits for his three-day transitory stay in the Federal Transfer Center Oklahoma City, where no FSA programming was offered and where there is no evidence that White even requested such programming while there.

Title I of the First Step Act of 2018 was enacted to promote the release of prisoners who possess a reduced risk of recidivism and thus to reduce the federal prison population. In general, the Act requires that the Attorney General develop a "risk and needs assessment system" to be used by the BOP (1) to determine each federal prisoner's "recidivism risk" and "risk of violent or serious misconduct"; (2) to assign the prisoner to "appropriate evidence-based recidivism reduction programs or productive activities"; and (3) to assess when a prisoner is "ready to transfer into prerelease custody or supervised release." 18 U.S.C. § 3632(a). The Act also charges the BOP with the task of providing "all prisoners with the opportunity to actively participate in evidence-based recidivism reduction programs or productive activities . . . throughout their entire term of incarceration." *Id.* § 3621(h)(6).

Prisoners are given incentives and rewards "to participate in and complete evidence-based recidivism reduction programs" with various privileges, benefits, and, as applicable here, jail-time credits that may reduce a prisoner's time of incarceration. *Id.* § 3632(d). Thus, the FSA provides that "[a] prisoner . . . who successfully completes evidence-based recidivism reduction programming or productive activities, shall earn time credits" "for every 30 days of successful participation" in such programming or productive activities. *Id.* § 3632(d)(4)(A). In particular, a prisoner can "earn 10 days of time credits for every 30 days of successful participation," and, if that prisoner has been assessed to have a "minimum or low risk of recidivating," he can "earn an additional 5 days of time credits for every 30 days of successful participation." *Id.* In short, a prisoner who "successfully *completes*" qualified programming "shall *earn* time credits" "for every 30 days of successful *participation*" in the programming. The requirements of completing, earning, and participating are defined with active verbs requiring conforming action by the prisoner.

In this case, the record does not demonstrate, nor does it at all suggest, that White participated in or completed any programming to earn credits during his three days in the Federal Transfer Center Oklahoma City while transferring from FCI Terre Haute to FCI Cumberland. Nor does White contend that he participated in any programming there. Indeed, the BOP provides practical reasons for why it did not offer programming during the transfer. Because White did not participate in programming, he could not earn credits, and therefore the BOP was correct in denying them for that three-day period. The statute is plain; it requires *participation* for *credits*.

Nonetheless, White seeks an order awarding credits, not based on his participation in programming but based on his claim that the BOP wrongfully failed to provide him with programming, as required by the FSA. He points to the statutory requirement that the BOP is required to provide prisoners with the opportunity to participate in programming "throughout their entire term of incarceration," 18 U.S.C. § 3621(h)(6), and therefore argues that it should have given him that opportunity while he was in the Transfer Center. Moreover, he argues that the statute mandates the blanket awarding of credits to every eligible inmate *for each day* that he has not affirmatively opted out of qualifying programming, and that anything less thwarts Congress's goal of reducing the inmate's risks of recidivism. Thus, he asserts, the BOP must either provide him programming or award him credits, even without his actual participation in programming.

First, we observe that the record evidence indicates that White has thus far been provided the opportunity to participate in programming throughout his incarceration, at least since FSA time credits became available, as evidenced by the large number of credits — at least 520 credit days — that he had already received as of the time of proceedings before the district court, more than two years ago. Those credits remain applicable, as provided by statute and regulation. *See* 18 U.S.C. § 3624(g); 28 C.F.R. § 523.44. Moreover, the record contains no evidence that the BOP ever denied a request by White to participate in programming.

In addition, White's claim that the BOP is required to provide programming *every day* throughout his incarceration is belied by the broader requirements of the FSA and by common sense. For instance, the BOP is directed to determine "the type and amount" of programming that is appropriate *for each prisoner*, 18 U.S.C. §§ 3632(a)(3), 3621(h)(2), indicating that programming is not a matter that flows continuously every day, but is customized for and provided to each prisoner. It would defy common sense and be inconsistent with the FSA to conclude that under such a scheme, a prisoner must be provided programming every single day. A prisoner often cannot receive programming while being taken to a hospital or even sick bay for medical care; or while being transported by bus to another prison or similar institution; or while being delivered to court, as required. Yet, the FSA also requires the BOP to fulfill these functions. *See id.* § 3621(i) (requiring the BOP to provide access to medical care); *id.* § 3621(b) (authorizing the BOP to transfer prisoners from one facility to another); *id.* § 3621(d) (requiring the BOP to deliver prisoners to court, as required). And the BOP's regulations attempt to implement these obligations.

See, e.g., 28 C.F.R. § 523.41(c)(4) (noting that programming will generally not be available to prisoners in certain situations, such as when a prisoner is in a Special Housing Unit or is "outside the institution").

Moreover, if White believed that the BOP had wrongfully denied him programming on any given day during his incarceration, he could have requested, as the remedy, an administrative correction of the omission or even a court order directing the BOP to provide the claimed programming. But the fact that White was not provided with programming and therefore was unable to earn FSA time credits does not provide a basis for an order awarding time credits as a remedy. Congress made clear that time credits have to be *earned* by successful *participation* in programming, and we are not free to award such credits for periods during which a prisoner does not satisfy Congress's requirement.

At bottom, because White did not participate in programming while at Federal Transfer Center Oklahoma City, he cannot claim that, under the FSA, he earned time credits for a period during which he did not participate in programming. That conclusion flows straight from the FSA, which is not ambiguous in this regard. The Act provides that "a prisoner . . . who successfully completes evidence-based recidivism reduction programming or productive activities, shall earn time credits" "for every 30 days of successful participating" in such programming or productive activities. 18 U.S.C. § 3632(d)(4)(A). White has not satisfied those statutory requirements and therefore is not entitled to the credits for the three days he spent at the Federal Transfer Center.

White argues nonetheless that the BOP often awards FSA time credits to inmates in situations in which the prisoner has opted into FSA programming but has not actually participated in a program, basing the awards of such credits on the prisoner's "earning status" and not on participation in and completion of programming. Although the BOP's program statements and practice about this approach are neither clear nor consistent, we conclude that if they reflect that the BOP awards credits for non-participation, that practice goes beyond the text of the FSA and its regulations. But more importantly, the BOP's decision to award credits absent actual participation does not expand its statutory obligations under the FSA. The law remains clear that a prisoner's statutory right to FSA time credits is tied to his actual participation in qualified programming. And in the absence of evidence that White participated in programming during his three-day stay at the Transfer Center, the BOP did not have a statutory obligation to award him FSA time credits for those days. *See, e.g.*, *Dunlap v. Warden FMC Devens*, Civ. A. No. 24-11462, 2024 WL 5285006, at *8 (D. Mass. Dec. 13, 2024) ("It is difficult to discern much consistency in the BOP's practices, which sometimes grant [FSA time credits] to prisoners without regard to any actual participation, but that does not mean that the FSA creates an entitlement to receive [FSA time credits] under such circumstances").

Finally, White contends that, in any event, the BOP intentionally waived the actual-participation argument before the district court by relying exclusively on a definition of "successful participation" in the regulations that provides exceptions to actual participation. He argues that because the BOP made the intentional choice to steer the district court toward its regulatory argument, the BOP waived its ability to advance the more fundamental statutory argument that "successful participation" requires some actual participation.

This argument, however, focuses far too myopically on the BOP's arguments before the district court and, indeed, its arguments before this court. To be sure, before the district court, the BOP did argue that White was not entitled to FSA time credits because he was in a transitory status, as well as being housed in a Special Housing Unit, relying on those exceptions provided in 28 C.F.R. § 523.41(c)(4). Although those arguments are grounded in specific regulatory exceptions to the requirement of successful participation contained in the statute, they still address the statutory requirement of "participation." Indeed, 28 C.F.R. § 523.41(c) begins, "An eligible inmate *must be* '*successfully participating*' [in programming] to earn FSA Time Credits," parroting the statutory language in § 3632(d)(4)(A). (Emphasis added). The district court understood the BOP's argument to be that "Mr. White was statutorily ineligible to earn [FSA time credits]" based on regulatory exceptions, and it agreed with that argument, concluding that it made sense. But throughout the proceedings, the BOP did not waive or forfeit the underlying requirement that White had to show he successfully participated in FSA programming to earn credits, as required by the terms of the FSA and the regulation. The parties' arguments before the district court were various and wide-ranging, but both parties were, in essence, addressing whether White, directly or indirectly, satisfied the statutory requirement for earning FSA time credits by participating in programming during his stay in the Federal Transfer Center.

Moreover, the BOP continues the same argument on appeal, arguing more specifically, "White's argument is counter *to the plain text of the FSA*, which ties the award of [FSA time credits] to the successful participation in [programming] and not to an inmate's mere presence in a BOP facility during transfer status." (Emphasis added). The

BOP argues further that "Congress's intent to link [FSA time credits] directly to recidivism-reduction program *participation* rather than passive confinement . . . means he earned no" FSA time credits during his time at the Transfer Center.

Finally, we understand that both parties have been focusing throughout on the question whether White earned FSA credits by participating in FSA programming at the Transfer Center. To be sure, the parties' arguments may have wandered into regulations, program statements, practices, and even waiver and forfeiture, but all were essentially aimed at the same question — FSA compliance. In these circumstances, we cannot conclude that statutory arguments were waived or forfeited by either party.

In short, relying on the FSA, we affirm the district court's conclusion that White has not shown that he earned FSA time credits with respect to his stay at the Federal Transfer Center Oklahoma City, where he did not participate in any qualified programming. For White, it is not a question of whether he *successfully* participated; it is a question of whether he participated *at all*, and the record shows that he did not.

III

White also contends that the "FSA has created a legitimate expectation that qualifying individuals will earn FSA time credits . . . affect[ing] whether a person is getting out of prison" and thus has created a liberty interest in those credits protected by the Due Process Clause of the Fifth Amendment. He argues that the FSA created that expectation by using "mandatory language and limit[ing] the government's discretion to withhold [FSA time credits]." *See Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S.

1, 11–12 (1979). And, in advancing this argument, he recognizes that for the Due Process Clause to apply, the statutory or regulatory language must create "an entitlement" in order to receive constitutional protection.

The Fifth Amendment provides, in relevant part, that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. Const. amend V. And to show a violation as to liberty, "a plaintiff must (1) identify a protected liberty . . . interest and (2) demonstrate deprivation of that interest without due process of law." *Cartagena v. Lovell,* 103 F.4th 171, 182 (4th Cir. 2024) (quoting *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015) (addressing the Due Process Clause of the Fourteenth Amendment)).

Addressing the first requirement, we conclude that a prisoner claiming rights to FSA time credits cannot show that he has a statutory entitlement to those credits. Although awarding FSA time credits is mandatory *if* the prisoner qualifies for and earns them, those conditions, which are solely determinative of the right to credits, indicate that the prisoner cannot legitimately expect that he has *a right* to them. Under the FSA, a prisoner must first qualify for the opportunity to earn credits by an initial assessment of his recidivism risk and regular reassessments thereafter under a comprehensive and complex "risks and needs assessment system." 18 U.S.C. § 3632. Moreover, even if a prisoner is eligible for the opportunity to earn FSA time credits, he may lose that opportunity during certain periods for reasons untethered to his conduct, such as due to practical limitations on the BOP's ability to provide qualifying programming in given situations. *See, e.g.*, 18 U.S.C. § 3621. Additionally, an eligible prisoner with the opportunity to earn credits can only do so through "successful participation" in and "successful[] complet[ion]" of programming that is designed specifically for him, based on the BOP's assessments. *Id.* § 3632(d)(4). And in any event, the credits, even after they have been earned, are subject to withdrawal if the prisoner violates certain rules in prison. *See id.* § 3632(e). In addition, they may only be applied to reduce the prisoner's term of incarceration if he has a sufficiently low risk of recidivism or if the warden approves a waiver of that requirement. *See id.* § 3624(g).

Because the earning and application of FSA time credits are contingent upon numerous conditions both within and outside of a prisoner's control, the FSA does not create a statutory entitlement to those credits.

In so concluding, we join the other courts of appeals that have addressed the issue and concluded that the FSA does not create a protected liberty interest in earning FSA time credits. *See Vargas v. Rivers*, No. 24-10703, 2025 WL 1380067, at *1 (5th Cir. May 13, 2025) (per curiam) (concluding inmates have "no fundamental liberty interest in either participation in [qualifying programming] or the incentives associated with that voluntary participation, including the ability to earn FSA time credits"); *Sedlacek v. Rardin*, No. 24-1254, 2025 WL 948485, at *1 (6th Cir. Jan. 21, 2025) (concluding "because the FSA earned-time credits are conditional [on the inmate's participation in qualifying programs], they do not create a protected liberty interest"); *see also Cheng v. United States*, 132 F.4th 655, 659 (2d Cir. 2025) (per curiam).

At bottom, because the text of the FSA does not create a statutory entitlement for a prisoner to earn FSA time credits, we conclude that White did not have a constitutionally protected liberty interest in earning them, and the BOP therefore did not violate his rights under the Due Process Clause in denying them to him.

* * *

While FSA time credits are mandatorily granted to federal prisoners who earn them by participating in qualifying programming, White did not participate in any programming at all during the three-day period during which he was transferred from one federal institution to another. He therefore did not earn FSA time credits during that period, nor did he have a protected liberty interest in doing so. For the reasons we give herein, we affirm the district court's judgment denying White's § 2241 petition.

AFFIRMED

KING, Circuit Judge, dissenting:

Petitioner William A. White has asserted claims — one statutory and the other constitutional — that he was wrongly denied a single time credit under the First Step Act of 2018 (the "FSA"). The district court rejected both claims, and my distinguished friends in the panel majority now affirm the court's judgment.

In rejecting White's statutory claim, however, the district court improperly accepted the patently meritless theory that the respondent Warden (the "government") relied on below. I would reverse the court's judgment on this simple basis.[1]

I also take issue with the panel majority's decision, which adopts a new theory with respect to White's statutory claim that the government raises for the first time on appeal and thus never presented to the district court. There are three significant problems with the panel majority's decision. First, the new theory adopted by the majority was waived by the government. Second, the new theory lacks factual substantiation. And third, the new theory runs headlong into the plain text of the FSA, along with Bureau of Prisons ("BOP") policies and practices.

Consequently, I dissent.

[1] To be clear, I would heed the constitutional avoidance doctrine and reverse the judgment without unnecessarily reviewing the district court's rejection of White's separate constitutional claim. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (explaining that we do "not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of").

I.

I begin by addressing the theory that was advanced by the government below and accepted by the district court with respect to White's statutory claim. Again, I would reverse the court's judgment on the simple basis that this theory is patently meritless.

A.

1.

As brief background, under the FSA, an eligible prisoner "who successfully completes evidence-based recidivism reduction programming or productive activities, shall earn time credits." *See* 18 U.S.C. § 3632(d)(4). At a minimum, such "[a] prisoner shall earn 10 days of time credits for every 30 days of successful participation." *Id.* § 3632(d)(4)(A)(i). The FSA makes no exceptions for when the programs and activities are to be provided. Rather, Congress instructed the BOP to "provide all prisoners with the opportunity to actively participate in evidence-based recidivism reduction programs or productive activities, according to their specific criminogenic needs, *throughout their entire term of incarceration*." *Id.* § 3621(h)(6) (emphasis added).

By way of regulations that took effect on January 19, 2022, the BOP has sought to define "successful participation." *See* 28 C.F.R. § 523.41(c). Notably, the regulations contemplate that there may be "[t]emporary operational or programmatic interruptions authorized by the [BOP] that would prevent an inmate from participation." *Id.* § 523.41(c)(3). According to the regulations, such interruptions "will not ordinarily affect an eligible inmate's 'successful participation' for the purposes of FSA Time Credit eligibility." *Id.*

The regulations provide, however, that a prisoner "will generally not be considered to be 'successfully participating' . . . in situations including, but not limited to," the following:

(i) Placement in a Special Housing Unit [hereinafter, the "SHU"];

(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 [programs or activities] that the [BOP] has recommended based on the inmate's individualized risk and needs assessment).

See 28 C.F.R. § 523.41(c)(4).

As the government explained in its submissions to the district court in these proceedings, Congress enacted the FSA on December 21, 2018, and required the BOP to fully implement the FSA time credit system by January 2022. *See* J.A. 143-44.[2] In an exercise of discretion, the BOP resolved to retroactively award FSA time credits to eligible prisoners as of the FSA's enactment date of December 21, 2018. *Id.* at 144.

Under the government's own evidence, the BOP outlined the standards for awarding FSA time credits in an "Inmate Message" issued to all prisoners on August 30, 2022. *See*

[2] Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

J.A. 76-77, 98-99. The Inmate Message delineated December 21, 2018, through January 14, 2020, as a "presumed participation" period. *Id.* at 98. Relevant here, the Inmate Message further advised that from January 15, 2020, forward:

> The earning of [FSA time credits] is based on "earning status," and NOT participation and/or completion of individual programs. Inmates who refuse or fail to complete any portion of the needs assessment and/or refuse or decline any program recommended to address a[] specific identified need area, is considered "opted out" and will not earn [FSA time credits].

Id. Consistent with the Inmate Message, the government's evidence shows that prisoners who maintain "earning status" by not "opting out" or otherwise falling within an exception to "successful participation" set forth in 28 C.F.R. § 523.41(c)(4) have been automatically awarded FSA time credits. Moreover, there is no evidence that the BOP has ever tracked, or even had the means to track, the actual day-to-day participation of any prisoner.

2.

Proceeding pro se, White filed his handwritten petition for a writ of habeas corpus under 28 U.S.C. § 2241 in the District of Maryland in September 2022, asserting his statutory and constitutional claims. White challenges the denial of a single FSA time credit for the three full days he spent in the Federal Transfer Center ("FTC") at Oklahoma City, Oklahoma, in late July 2022 while being transferred from the Federal Correctional Institution at Terre Haute, Indiana, to that at Cumberland, Maryland. The government responded to White's § 2241 petition in late October 2022 with a motion for dismissal or, in the alternative, an award of summary judgment.

Relevant to the statutory claim, White and the government agreed in the motion proceedings on how the FSA time credit system works. That is, both parties portrayed the

FSA time credit system in a manner consistent with the government's evidence, including the Inmate Message of August 2022 advising that "[t]he earning of [FSA time credits] is based on 'earning status,' and NOT participation and/or completion of individual programs." *See* J.A. 98.

For his part, White described "successful participation" as a "default condition" for prisoners who do not "opt out" of programming or otherwise fall within one of the exceptions set forth in 28 C.F.R. § 523.41(c)(4). *See* J.A. 7. White emphasized that "[t]o earn [FSA time credits], a prisoner needs to do little more than be in the BOP and not refuse programming." *Id.* at 8. Rather than disputing White's description, the government similarly described an "opt-in" process under which prisoners automatically earn FSA time credits absent "opting out" or being subject to another § 523.41(c)(4) exception. *Id.* at 144-46. Moreover, the parties agreed that White is statutorily eligible to earn FSA time credits, that he has largely maintained "earning status," and that he has been automatically awarded FSA time credits while doing so.

Where the parties disagreed is on whether White fell within a § 523.41(c)(4) exception during his short stint in FTC-Oklahoma City. White's § 2241 petition suggested that the only exception that could apply was the § 523.41(c)(4)(i) exception for SHU placement. *See* J.A. 8-9. The petition explicitly asserted that the other § 523.41(c)(4) exceptions, "such as when on a medical trip or psychiatric hold, are also likely unlawful or un-Constitutional, but, are not at issue here." *Id.* at 8 (specifically identifying the § 523.41(c)(4)(ii) and (iv) exceptions as inapplicable to White).

In its responsive motion, the government initially contended that White lacked "earning status" because he was both placed in the SHU and in so-called "transfer status." *See* J.A. 17, 26. The government invoked § 523.41(c)(4)(i) as to its SHU contention, but it cited no particular § 523.41(c)(4) exception as to its "transfer status" contention.

By the time of its final submission to the district court — a supplemental submission of March 2023 — the government had abandoned its SHU contention and was relying entirely on its "transfer status" contention. *See* J.A. 165. In the supplemental submission, the government finally identified a basis for its "transfer status" contention: the § 523.41(c)(4)(ii) exception for "[d]esignation status outside the institution (e.g., for extended medical placement in a hospital or outside institution, an escorted trip, a furlough, etc.)." Specifically, the government asserted — without elaboration — that White "was in transfer status" and could not earn FSA time credits "while in a designation outside the institution." *Id.* at 166.

3.

For reasons explained in its Memorandum Opinion of July 2023, the district court denied White's 28 U.S.C. § 2241 petition. *See White v. Warden of Fed. Corr. Inst. – Cumberland*, No. 1:22-cv-02371 (D. Md. July 31, 2023), ECF No. 12 (the "Opinion"). In rejecting White's statutory claim, the court recognized that the issue before it was whether the BOP properly denied White an FSA time credit for the three full days he spent in FTC-Oklahoma City because he was in "transfer status." *See* Opinion 5. Referring to the government's supplemental submission of March 2023, the court described the government's theory as being that White was "not entitled to credit for the days that he was in transfer status," in that he could not earn FSA time credits "'while in a designation outside the institution.'" *Id.* (quoting J.A. 166).

The district court was thus left to assess whether White was subject to the 28 C.F.R. § 523.41(c)(4)(ii) exception. Significantly, the court was thereby presented with at least two distinct questions: (1) whether § 523.41(c)(4)(ii) is a valid interpretation of the FSA; and (2) whether, as the government finally contended late in the motion proceedings, White's "transfer status" at FTC-Oklahoma City constituted "[d]esignation status outside the institution" within the meaning of § 523.41(c)(4)(ii), or whether, as White had asserted at the very start of the motion proceedings, the § 523.41(c)(4)(ii) exception was inapplicable to him.

The district court analyzed only the first question, concluding that § 523.41(c)(4)(ii) is indeed a valid interpretation of the FSA. *See* Opinion 17-18. In so doing, the court observed that because the FSA does not define "successful participation," Congress allowed the BOP to resolve that ambiguity in the statute. The court further recognized that the BOP's interpretation of the FSA was entitled to deference under the then-controlling precedent of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), which was later overruled by *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024). Applying *Chevron* deference, the court upheld the BOP's § 523.41(c)(4)(ii) exception as "reasonable" and "a 'permissible construction of the statute.'" *See* Opinion 18 (quoting *Chevron*, 467 U.S. at 843).

Meanwhile, the district court never grappled with the second question, i.e., whether or not White's "transfer status" at FTC-Oklahoma City constituted "[d]esignation status outside the institution" within the meaning of § 523.41(c)(4)(ii). Rather, the court just accepted that it did, summarily reciting that "successful participation" as defined by § 523.41(c)(4)(ii) excludes "'[d]esignation status outside the institution . . .' *such as Mr. White's few days in transfer status in Oklahoma City*." *See* Opinion 18 (second alteration in original) (emphasis added). Accordingly, the court specified that "Mr. White is not entitled to the credit that he seeks" and rejected his statutory claim. *Id.* at 19.

B.

Of course, the theory advanced by the government below and accepted by the district court with respect to White's statutory claim — that his "transfer status" at FTC-Oklahoma City constituted "[d]esignation status outside the institution" within the meaning of 28 C.F.R. § 523.41(c)(4)(ii) — is patently meritless. In the words of White, who is now represented by appointed appellate counsel, "the text of [§ 523.41(c)(4)(ii)] does not apply to [him]" because he "was not 'outside the institution' when he was in [FTC-Oklahoma City]." *See* Br. of Appellant 25.

White emphasizes that whereas "a '[d]esignation status outside the institution' suggests someone who is physically exterior to a building or property owned and operated by the BOP," FTC-Oklahoma City "is owned and operated by the BOP" and he "was inside it." *See* Br. of Appellant 26. Additionally, White underscores that

> [t]he examples of "outside the institution" provided in [§ 523.41(c)(4)(ii)] confirm this reading. . . . Here, the general term "[d]esignation status outside the institution" is followed by specific examples, including "extended medical placement in a hospital or outside institution," "an escorted trip," and "a furlough." Those specific terms share an essential feature: they all refer to situations where a prisoner is physically located somewhere other

> than a BOP facility. That does not describe White while in [FTC-Oklahoma City].

Id. at 26-27 (fourth alteration in original) (citing, inter alia, *Lexington Cnty. Hosp. v. Schweiker*, 740 F.2d 287, 290 (4th Cir. 1984), for the proposition that, in interpreting a regulation, the principle of *ejusdem generis* requires "general language" to "be read as referring only to units similar to those specifically enumerated").

According to White, the inapplicability of § 523.41(c)(4)(ii) is a "fundamental problem" that alone requires reversal of the district court's judgment. *See* Br. of Appellant 25; *see also* Reply Br. of Appellant 2 (reiterating that "this Court could reverse on the narrow ground that the regulation at issue did not apply to White, as he was not 'outside the institution' while at [FTC-Oklahoma City]"). As such, our Court need not reach and decide any other issue regarding the statutory claim, including whether the district court properly deemed § 523.41(c)(4)(ii) to be a valid interpretation of the FSA by according now-defunct *Chevron* deference. Nor do we need to review the court's rejection of White's separate constitutional claim.

I readily agree with White and would reverse the district court's judgment on the simple basis that the court erred in accepting the government's theory with respect to White's statutory claim that his "transfer status" at FTC-Oklahoma City constituted "[d]esignation status outside the institution" within the meaning of § 523.41(c)(4)(ii).

II.

I turn to the panel majority's decision and its adoption of a new theory with respect to White's statutory claim that the government raises for the first time on appeal. In so doing, I address in turn the three significant problems therewith.

A.

First, the new theory was waived by the government. Pursuant to the new theory, the plain text of the FSA requires *actual participation* for "successful participation." And White did not actually participate in programming at FTC-Oklahoma City because no programs or activities were provided to him during his short stint there. As the panel majority explains in adopting the new theory: "Because White did not participate in programming, he could not earn credits, and therefore the BOP was correct in denying them for that three-day period. The statute is plain; it requires *participation* for credits." *See ante* 8.

Obviously, the new theory is wholly different from the theory that the government relied on — and thus preserved — below. Under the preserved theory, the meaning of "successful participation" cannot be discerned from the plain text of the FSA, and the BOP allowably resolved that ambiguity in the statute by devising an "opt-in" process under which prisoners automatically earn FSA time credits absent "opting out" or being subject to another exception to "successful participation" set forth in 28 C.F.R. § 523.41(c)(4). The government contended in the district court that White could not earn FSA time credits while at FTC-Oklahoma City simply and solely because his "transfer status" constituted "[d]esignation status outside the institution" within the meaning of § 523.41(c)(4)(ii).

In these circumstances, the government's waiver of the new theory is clear. The majority may say otherwise, *see ante* 11-13, but its reasoning is convoluted and unpersuasive.[3]

B.

Second, the new theory lacks factual substantiation. The record is silent on whether programming was or was not provided to White at FTC-Oklahoma City, as the parties understandably did not present evidence to the district court on this then-irrelevant topic. Yet that does not stop the government from proclaiming on appeal — and the panel majority from accepting — that White was offered no programming at all.

Strikingly, the government and the majority sometimes state this in definitive terms, asserting, e.g., that "no FSA programming was offered" at FTC-Oklahoma City. *See ante* 6; *see also* Br. of Appellee 1, 43 (claiming that White "participated in no programming" at FTC-Oklahoma City because it "is a transitory institution" where the staff "does not have the necessary documentation and resources to perform the initial risk and needs or aid in programming"). At other times, however, their assertions are not so absolute. For example, the government states that "successful participation in programming is *not necessarily*

[3] In addition to waiving the new theory, the government now shamelessly blasts White for describing "successful participation" in his 28 U.S.C. § 2241 petition as a "default condition" for prisoners who do not "opt out" of programming or otherwise fall within a § 523.41(c)(4) exception, *see* J.A. 7 — a description that the government agreed with below. In its attack, the government misstates White's position as being that a prisoner is entitled to FSA time credits "merely for being incarcerated" and "passively residing in prison." *See* Br. of Appellee 33. And the government purports that White thereby seeks "to rewrite the FSA and gut Congress's recidivism-reduction mandate." *Id.* at 21.

offered" by the BOP at its transfer centers. *See* Br. of Appellee 19 (emphasis added). And the majority observes that the BOP "*apparently*" did not offer White programming at FTC-Oklahoma City, as "'a transitory institution' where the BOP *often* lacks the tools and prisoner documentation necessary to perform the FSA's recidivism risk assessments and provide programming more generally." *See ante* 3 (emphasis added).

Simply put, the use of "not necessarily," "apparently," and "often" underscores the lack of evidence — the absence of proof crucial to the new theory — that White was provided no programming at FTC-Oklahoma City.[4]

C.

Third and finally, the new theory runs headlong into the plain text of the FSA, along with BOP policies and practices. Contrary to the notion that the BOP need not provide programming at its own transfer centers, the FSA expressly requires the BOP to "provide all prisoners with the opportunity to actively participate . . . *throughout their entire term of incarceration*." *See* 18 U.S.C. § 3621(h)(6) (emphasis added). And contrary to the notion that prisoners cannot earn FSA time credits when the BOP has failed to provide programming, the BOP's regulations specify that although "[t]emporary operational or programmatic interruptions" may "prevent an inmate from participation," such

[4] In his reply brief, White emphasizes that "[t]here is no evidence in the record about [his] supposed failure to participate in [programming] while in [FTC-Oklahoma City], nor the availability of programming [there]." *See* Reply Br. of Appellant 8. White thus rightfully requests, "at minimum, reversal and remand" for factual development. *Id.* The majority, however, disregards White's remand request.

interruptions "will not ordinarily affect an eligible inmate's 'successful participation' for the purposes of FSA Time Credit eligibility." *See* 28 C.F.R. § 523.41(c)(3).

The new theory further conflicts with the BOP's Inmate Message of August 2022, which the government submitted to the district court as evidence in these proceedings. Whereas the government now insists that "successful participation" requires actual participation, the Inmate Message advised that "[t]he earning of [FSA time credits] is based on 'earning status," and NOT participation and/or completion of individual programs." *See* J.A. 98. Moreover, there is no evidence that the BOP has ever tracked, or even had the means to track, the actual day-to-day participation of any prisoner.

The panel majority fails to fully or satisfyingly deal with these contradictions, which are all raised by White in his reply brief. For example, the majority acknowledges the FSA's directive to the BOP to provide prisoners with programming "throughout their entire term of incarceration," *see ante* 7 (quoting 18 U.S.C. § 3621(h)(6)), but rejects the proposition that the BOP is thereby "required to provide programming *every day*," *id.* at 9. The majority reasons that — because "the broader requirements of the FSA" include, inter alia, the customization of programming for each prisoner — "[i]t would defy common sense and be inconsistent with the FSA to conclude that under such a scheme, a prisoner must be provided programming every single day." *Id.* Thus, the majority excuses the failure to provide programming in circumstances including — but in no way limited to — when a prisoner is outside a BOP facility (as covered by exceptions to "successful participation" set forth in 28 C.F.R. § 523.41(c)(4), such as being taken to a hospital) and when, like White, a prisoner is in a BOP transfer center (a situation not covered by a specific § 523.41(c)(4) exception). *See id.* at 9-10.

Meanwhile, the majority fails to acknowledge either the BOP's regulation specifying that interruptions in programming "will not ordinarily affect an eligible inmate's 'successful participation' for the purposes of FSA Time Credit eligibility," *see* 28 C.F.R. § 523.41(c)(3), or the BOP's Inmate Message of April 2022 advising that "[t]he earning of [FSA time credits] is based on 'earning status,' and NOT participation and/or completion of individual programs," *see* J.A. 98. Rather, the majority only summarily declares:

> White argues nonetheless that the BOP often awards FSA time credits to inmates in situations in which the prisoner has opted into FSA programming but has not actually participated in a program, basing the awards of such credits on the prisoner's "earning status" and not on participation in and completion of programming. Although the BOP's program statements and practice about this approach are neither clear nor consistent, we conclude that if they reflect that the BOP awards credits for non-participation, that practice goes beyond the text of the FSA and its regulations. But more importantly, the BOP's decision to award credits absent actual participation does not expand its statutory obligations under the FSA.

See ante 10-11.

To make matters worse, the majority further rules that when a prisoner claims that the BOP wrongly failed to provide programming, the prisoner's only recourse is to "request[], as the remedy, an administrative correction of the omission or even a court order directing the BOP to provide the claimed programming." *See ante* 10. That is, the prisoner is not entitled to "an order awarding time credits as a remedy." *Id.* To be entitled to time credits, the prisoner must prove "his actual participation in qualified programming." *Id.* at 11.

So, under the majority's decision, the BOP is excused, without clear limitations, from providing programming to prisoners every day; the BOP can award FSA time credits to some prisoners based on their mere "earning status," but require actual participation of others; prisoners who claim a wrongful denial of programming can seek only future programming; and no back credits can be awarded unless a prisoner can come up with evidence of actual participation, something that, on this record, the BOP itself does not track. As such, the majority does not just flout the plain text of the FSA and the BOP's policies and practices. Its decision also threatens chaos, unequal treatment, and other unfairness in the FSA time credit system.

III.

Pursuant to the foregoing, I dissent.

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

WILLIAM A. WHITE, *

Petitioner, *

v. * Civil Action No. DKC-22-2371

WARDEN, FEDERAL CORRECTIONAL INSTITUTION – CUMBERLAND,[1] *

*

Respondent.

***

MEMORANDUM OPINION

William A. White, a federal prisoner incarcerated at Federal Correctional Institution – Cumberland ("FCI-Cumberland"), filed a petition for habeas corpus relief pursuant to 28 U.S.C. § 2241 seeking restoration of "about 10 days" of Earned Time Credits ("ETCs") under the First Step Act. ECF No. 1 at 1. Since the filing of the petition, some of those days have been granted, due to the ongoing revision and refinement of Bureau of Prisons ("BOP") policy and procedures. A few days remain in contention, however, so the entire action is not moot.

Pursuant to the court's Order directing Respondent to file a response to the petition (ECF No. 2), Respondent filed a motion to dismiss, or in the alternative, for summary judgment. ECF No. 3. Mr. White was advised of his right to respond (ECF No. 4), and did so on November 10, 2022. ECF No. 5. Respondent sought an extension of time within which to file a reply to Mr. White's response (ECF No. 6), which was granted by this court. ECF No. 7. Respondent's reply was filed December 28, 2022. ECF No. 8. Thereafter, Mr. White filed a motion for leave to supplement response to motion to dismiss. ECF No. 9. His motion shall be granted, and the court

[1] The proper respondent in an action for habeas corpus is Mr. White's custodian. *See* 28 U.S.C. § 2242; *Rumsfeld v. Padilla*, 542 U.S. 426, 435–36 (2004). The Warden of Federal Correctional Institution – Cumberland, the facility where Mr.White is incarcerated, is the proper respondent in this case. The Clerk shall amend the docket accordingly.

will construe this filing as a surreply. On March 3, 2023, Respondent filed correspondence with the court, offered as an update in conjunction with the Respondent's reply, regarding the recent recalculation of Mr. White's sentence. ECF No. 10. Mr. White has moved to strike this letter as an impermissible surreply. ECF No. 11. This motion will be denied.

Having reviewed the papers, and finding no hearing necessary, *see* Md. Loc. R. 105.6 (D. Md. 2021), the court grants respondent's motion to dismiss, or in the alternative for summary judgement, and denies the petition for writ of habeas corpus.

I. Background

A. Factual Background

The parties agree on the factual background underlying this case. Specifically, on July 21, 2022, Mr. White was transferred from Federal Correctional Institution ("FCI")–Terre Haute to Federal Transfer Center ("FTC")–Oklahoma City. Compl., ECF No.1 at 2; Resp., ECF No. 3-1 at 2. He remained at FTC—Oklahoma City until July 25, 2022. *Id.* While there, he was placed in the Special Housing Unit ("SHU") "for allegedly being a 'domestic terrorist.'" ECF No. 1 at 1, 2; *see also* ECF No. 3-1 at 2 (noting that while Mr. White was in Oklahoma City he was "held in the SHU because he had several security threat group assignments."). On July 25, 2022, Mr. White was transferred to FCI-Cumberland, where he remains to this day. ECF No. 1 at 2; ECF No. 3-1 at 2. Upon arrival at FCI-Cumberland, he was again "placed in the SHU from July 25, 2022 to August 22, 2022 due to unavailable bed space in general population." ECF No. 3-1 at 2; *see also* ECF No. 1 at 2. On August 22, 2022, he was released from the SHU to the general population at FCI-Cumberland. *Id.*

B. The Positions of the Parties

Based on these facts, Mr. White explains that, pursuant to 28 CFR § 523.40, federal inmates are guaranteed to earn ETCs throughout their incaraceration, except in several circumstances, including while an inmate is housed in the SHU. ECF No. 1 at 2-3. Accordingly, while housed in SHU while in transfer status at FTC-Oklahoma City, and again once transferred to the SHU at FCI-Cumberland, Mr. White was prevented from earning ETCs. *Id.* at 3. He explains that his issue is "not about SHU confinement per se," but rather that "the BOP was not permitted to impose loss of ETCs as a collateral consequence of SHU confinement without due process." *Id.* at 6. Mr. White states that he was "arbitrarily placed" in SHU due to an "idiosyncratic 'domestic terrorist' designation" and the BOP's "inability to manage its bedspace," which cost him the ability to earn ETCs without any due process. *Id.* at 6. As relief, he seeks a declaration that he was "deprived . . . of ETCs without Due Process" and restoration of "all said ETCs (about 10 days)." *Id.* at 7.

In response, Respondent argues that Mr. White is not entitled to relief because he has failed to exhaust his administrative remedies or alternatively, that Mr. White's current security designation within the institution allows him only to *earn* credits, but they cannot be *applied* until he obtains a lower security designation. ECF No. 3-1 at 9. Additionally, Respondent argues that under 28 C.F.R. § 523.41(c), Mr. White was statutorily ineligible to earn ETCs based on his housing in SHU. *Id.* at 12.

Mr. White responded to the Respondent's motion.[2] ECF No. 5. In addition to discussing exhaustion, Mr. White states that Respondent "didn't properly request summary judgment." *Id.* at 4. He does not elaborate on what was improper about Respondent's pursuit of summary judgment.[3] *Id.* Next, he explains that Respondent misconstrues his Petition, as he "agree[s] that

[2] In his Response, Mr. White asserts that he was not provided notice of his right to respond pursuant to *Roseboro v. Garrison*, 528 F.2d 309 (4th Cir. 1975). ECF No. 5 at 1. However, the docket reflects that Mr. White was provided such notice (*see* ECF No. 4). And, in any event, his Response was timely filed.

[3] The court will not consider this argument further. Respondent styled its motion as a "Motion to Dismiss, or in the Alternative, for Summary Judgment," and provided the applicable standards of review for each type of Motion. When the court treats a motion to dismiss as a motion for summary judgment, "[a]ll parties must be given a reasonable opportunity to present all the

the earning and application of ETCs are separate concepts." *Id.* at 5. He states that he does not seek to have his credits *applied*, but rather, challenges his inability to *earn* credits during his time in SHU. *Id.* He states that by misconstruing his claim, and thus not responding to it directly, Respondent "forfeits" this argument. *Id.* at 6.

Respondent replied on December 28, 2022, arguing again that Mr. White has not exhausted available administrative remedies, that he was provided notice pursuant to *Roseboro v. Garrison*, that the court should afford deference to the BOP "in the application of First Step Act (FSA) Time Credits and related statutes pursuant to *Chevron, U.S.A., Inc. v. NRDC*, Inc., 467 U.S. 837, 865 (1984)," and finally, that the "BOP is in full compliance with FSA's statutory mandate regarding the earning of Time Credits." ECF No. 8. Additionally, Respondent discusses at length recent revisions to the First Step Act (*see* ECF No. 8 at 8-11), and indicated that all federal inmates' credits would soon be recalculated. *Id.* at 12. At the time, Respondent indicated that "if Petitioner is entitled (which is determined based on whether he was in earning status while in the SHU) to additional Time Credits, any available Time Credits may be applied accordingly, if able and in accordance with BOP Program Statement 5410.01." *Id.*

Petitioner filed a Motion seeking leave to reply, which the court now grants.[4] ECF No. 9. Therein, he argues that Respondent's information regarding the updated BOP policies cannot be

material that is pertinent to the motion." *Id.* When the moving party styles its motion as a "Motion to Dismiss or for Summary Judgment," as is the case here, and attaches additional materials to its motion, the nonmoving party is, of course, aware that materials outside the pleadings are before the court, and the court can treat the motion as one for summary judgment. *See Laughlin v. Metro. Wash. Airports Auth.*, 149 F.3d 253, 260-61 (4th Cir. 1998).

[4] Generally, no party is entitled to file a surreply unless authorized by the court. *See* Local Rule 105.2(a) (D. Md. 2021). A surreply is most often permitted when the moving party must respond to matters raised for the first time in a reply. *See Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D. D.C. 2001). Moreover, the latest filings by both parties are not truly replies or surreplies, but rather updates of events that are highly relevant, and thus should be labelled supplements or amendments, rather that replies. The distinction is not material. All information will be considered.

accepted because it is raised for the first time in a Reply, and thus prohibited under *United States v. Alston*, 722 F.3d 603 (4th Cir. 2013).[5] *Id.* at 3. He indicates that, under the new BOP program statement, "SHU inmates would be permitted to earn ETCs while in SHU unless deprived of them by a disciplinary hearing officer." *Id.* He includes a FSA Time Credit recalculation sheet with his surreply, which indicates that most of the credits he seeks through this Petition were awarded to him through the recalculation done pursuant to the updated program statement. *See* ECF No. 9-1. However, even with the new calculations in place, he is still being denied ETCs for his time spent in transfer status in Oklahoma City, from July 21 until July 25, 2002. *Id.*; ECF No. 9 at 4. He states that "though this action now involves only one day of ETC, the point – that a prisoner cannot be deprived of ETCs without due process – is of increased importance." ECF No. 9 at 4.

On March 3, 2023, Respondent filed correspondence with the court, and requested that it be construed as "an update in conjunction with the Respondent's Reply." ECF No. 10 at 2. In this correspondence, Respondent confirms what Petitioner stated in his surreply. Namely, that "[o]n January 19, 2023, Petitioner received a recalculation of his FSA Time Credits pursuant to BOP Program Statement 5410.01 wherein . . . The BOP has restored the days he lost while he was held in the Special Housing Unit ("SHU"). Accordingly, Petitioner's FSA worksheet reflects only three disallowed program days for the time he was in transfer status from Terre Haute, Indiana to Oklahoma City, Oklahoma." *Id.* at 1. Based on the program statement, Respondent indicates that Mr. White is not entitled to credit for the days that he was in transfer status. *Id.* Specifically, "Petitioner cannot earn Time Credits while in a designation outside the institution." *Id.* (citing

[5] Mr. White misunderstands the procedural posture of *Alston.* There, Alston's case was before the Fourth Circuit on appeal. *United States v. Alston*, 722 F.3d 603, 606 (4th Cir. 2013). The court noted that "an issue first argued in a reply brief is not properly before a court of appeals." *Id.* (quoting *Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n. 2 (4th Cir.1996)).

BOP Program Statement 5410.01, First Step Act of 2018 – Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d)(4)).

Mr. White has moved to strike Respondent's correspondence as an impermissible surreply. ECF No. 11. His motion will be denied, as the court views this filing as a relevant update to Respondent's Reply rather than as an impermissible surreply. Further, it does not add any new information beyond what Mr. White himself proferred in his surreply, so he is not prejudiced by the inclusion of these facts in the record before the court.

II. Exhaustion

Habeas corpus relief is available when a prisoner is held "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3). Challenges to the execution of a federal sentence are properly brought under 28 U.S.C. § 2241. *See Setser v. United States*, 566 U.S. 231, 244 (2012). It is the responsibility of the United States Attorney General, the Department of Justice and the Federal Bureau of Prisons to compute sentences of prisoners committed to the custody of the United States or the District of Columbia and apply credit where it is due. *See* 18 U.S.C. § 3624, *see also Leavis v. White*, 898 F.2d 154 (6th Cir. 1990) (citing *United States v. Norman*, 767 F.2d 455, 457 (8th Cir.1985)); *United States v. Clayton*, 588 F.2d 1288, 1292 (9th Cir. 1979). In the event a prisoner disputes the computation of his sentence or the application of credits, he is permitted to seek a remedy for the grievance through the administrative remedy process in place in the Bureau of Prisons ("BOP") facilities. *See* 28 C.F.R. 542.10 *et seq.*; *see also United States v. Mitchell*, 845 F.2d 951, 952 (11th Cir. 1988) ("[A] federal district court does not have jurisdiction to entertain a federal prisoner's petition for jail time credit until the prisoner has exhausted his administrative remedies with the Attorney General under 18 U.S.C. § 3568.").

It is well-established that a petitioner seeking judicial review of agency actions must first have exhausted available remedies within the agency prior to filing suit. *See McKart v. United States*, 395 U.S. 185, 193-95 (1969). "The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence," that is, "to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies." *Parisi v. Davidson*, 405 U.S. 34, 37 (1972). Petitioners seeking relief under § 2241 are subject to this exhaustion requirement. *See Branden v. 30 Judicial Cir. Ct*., 410 U.S. 484, 489-92 (1973); *McClung v. Shearin*, 90 Fed. Appx. 444, 445 (4th Cir. 2004) (Petitioner must exhaust administrative remedies prior to filing § 2241 petition seeking restoration of good conduct credits); *Asare v. United States Parole Commission*, 2 F.3d 540, 544 (4th Cir. 1993) (challenging BOP projected release date requires exhaustion). "Although § 2241 does not contain a statutory exhaustion requirement, courts have consistently required a petitioner to exhaust his administrative remedies prior to petitioning for a writ of habeas corpus." *Wright v. Warden, FCI-Cumberland*, No. CIV.A. RDB-10-671, 2010 WL 1258181, at *1 (D. Md. Mar. 24, 2010). "Exhaustion of administrative remedies may not be required where a petitioner demonstrates futility, the actions of the agency clearly and unambiguously violate statutory or constitutional rights, or the administrative procedure is clearly shown to be inadequate to prevent irreparable harm." *Id.* (citing *Lyons v. U.S. Marshals*, 840 F.2d 202, 205 (3rd Cir.1988).

Mr. White and Respondent vehemently disagree on whether this claim is properly exhausted. And because the court's ability to address the merits of this case turns on whether Mr. White has properly exhausted his claim, it is worth carefully examining the arguments on both sides.

In his petition, Mr. White preemptively addresses his attempts to exhaust this claim. ECF No. 1 at 3. Mr. White states that on July 26, 2022, he "submitted a BP-8" form[6] to Counselor Rice raising the issue of being placed in SHU without due process. *Id.* Counselor Washington confirmed to Mr. White that the BP-8 form was received. *Id.* Mr. White states that he subsequently made numerous oral and written requests to Counselor Washington for a BP-9 form, but was not provided one. *Id.* He concludes that because he was not "able to timely obtain a BP-9, [he] was not able to access the administrative remedy system." *Id.*

Respondent counters that Mr. White's claims are unexhausted. ECF No. 3-1 at 9. Contrary to Mr. White's assertion that he was not able to access the administrative remedy system, Respondent states that "[b]etween January 1, 2022 through October 12, 2022," which encompasses the complained-of time period at issue here, Mr White "filed fifty-seven administrative remedies, which clearly demonstrates his familiarity with the process." *Id.* Of those 57 administrative remedies, only four related to credits under the First Step Act. *Id.* Further, "[w]hen the institution closed or rejected his requests, [Mr. White] failed to correct the errors and/or appeal to Central Office," thereby failing to complete the process of exhausting his claims.

Respondent includes the Declaration of Misty Shaw, Paralegal at the Mid-Atlantic Regional Office of the BOP, in support of the argument that Mr. White has failed to exhaust his claims. ECF No. 3-3. Ms. Shaw avers that Mr. White "has filed an innumerable total of remedies since being in BOP custody," and has filed 57 remedies between January 1, 2022 and October 12, 2022. *Id.* at 4. Of those 57, only four referenced the First Step Act. *Id.* Those four remedies referencing the First Step Act were filed on March 22, 2022, May 24, 2022, and two were filed on June 10, 2022. *Id.*; *see also* ECF No. 3-3 at 15-45, Attachment B to the Decl. of Misty Shaw, Petitioner's BOP grievance history from 1/1/22 until 10/12/22. The court notes that the dates of

[6] Mr. White does not clarify what the different forms are used for.

Mr. White's grievances related to the FSA predate the relevant time period at issue in Mr. White's petition: from July 21, 2022 until August 22, 2022. Ms. Shaw concludes that "[b]ecause [Mr. White] neither resubmitted his appeals when they were rejected in accordance with instruction and did not appeal to Central Office, he has not properly exhausted his administrative remedies." ECF No. 3-3 at 5.

In reply, Mr. White again states that he filed a "BP-8" on July 26, 2022 regarding denial of ETCs while housed in SHU. ECF No. 5 at 2. He states that he then requested a "BP-9" form on several occasions, but Counselor Washington "failed to provide [him] with a BP-9 form because the BP-8 was never returned." *Id.* He states that he was required to file the remedy within 20 days time on the appropriate form, a BP-9, and with that form "unavailable" he could not exhaust his administrative remedies. *Id.* He indicates that he was able to file regional-level claims (on BP-10 and BP-11 forms) during the relevant time period. *Id.*

Mr. White includes a sworn declaration averring that "para. 5-10 of Doc. 1", the portion of his petition which contains information regarding exhaustion, "are true." ECF No. 5-1. He further states that while he was able to obtain BP-10 and BP-11 forms from Counselor Washington during the time period at issue, Counselor Washington specifically denied him the BP-9 forms he needed properly to advance his claim through the administrative remedy process. *Id.* Respondent replied, again reiterating that Mr. White failed properly and fully to exhaust his administrative remedies. ECF No. 8.

The Administrative Remedy Procedure ("ARP") provides that if an inmate is unable to resolve his complaint informally, he may file a formal written complaint on the proper form within 20 calendar days of the date of the occurrence on which the complaint is based. *See* 28 C.F.R. § 542.14(a). If an inmate is not satisfied with the Warden's response, he may appeal to the Regional Director within 20 calendar days of the Warden's response. *See* 28 C.F.R. § 542.15(a). If the inmate still is not satisfied, he may appeal the Regional Director's response to the Office of General Counsel, Washington, D.C., using the appropriate forms. The inmate must file this final appeal within 30 calendar days of the date the Regional Director signed the response. *See id.* An inmate is not deemed to have exhausted his administrative remedies until he has filed his complaint at all levels. *See* 28 C.F.R. § 542.15(a).

The record before the court reflects a dispute of material fact between the parties regarding whether Mr. White was able to access the grievance procedures needed to exhaust this claim. Mr. White avers that he filed a "BP-8" form regarding his claims on July 26, 2022. Thereafter, he states that he repeatedly requested a "BP-9" form from Counselor Washington, but Counselor Washington would not provide him with the required BP-9 form. If, in fact, Counselor Washington was denying Mr. White these forms, Mr. White may have been unable to access the grievance procedure. Thus, there is a material dispute of fact as to whether Mr. White was prevented from accessing the forms required to complete the grievance process. The record, at this point, does not support an affirmative finding that Mr. White failed to exhaust this claim. Accordingly, the court must reach the merits of Mr. White's claim.

III. Motion to Dismiss or for Summary Judgment

A. Standards of Review

To survive a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), the factual allegations of a complaint "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations omitted). "To satisfy this standard, a plaintiff need not 'forecast' evidence sufficient to prove the elements of the claim. However, the complaint must allege sufficient facts to establish those elements." *Walters v. McMahen*, 684 F.3d 435, 439 (4th Cir. 2012) (citation omitted).

Rule 56(a) provides that summary judgment should be granted "if the movant shows that there is no *genuine* dispute as to any *material* fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (emphases added). "A dispute is genuine if 'a reasonable jury could return a verdict for the nonmoving party.'" *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013) (quoting *Dulaney v. Packaging Corp. of Am.*, 673 F.3d 323, 330 (4th Cir. 2012)). "A fact is material if it 'might affect the outcome of the suit under the governing law.'" *Id.* (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Accordingly, "the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]" *Anderson*, 477 U.S. at 247-48 (emphasis in original). The court must view the evidence in the light most favorable to the nonmoving party, *Tolan v. Cotton*, 572 U.S. 650, 656-57 (2014) (per curiam) (citation and quotation omitted), and draw all reasonable inferences in that party's favor, *Scott v. Harris*, 550 U.S. 372, 378 (2007) (citations omitted); *see also Jacobs v. NC. Admin. Office of the Courts*, 780 F.3d 562, 568-69 (4th Cir. 2015). At the same time, the court must "prevent factually unsupported claims and defenses from proceeding to trial." *Bouchat v. Balt. Ravens Football Club, Inc.*, 346 F.3d 514, 526 (4th Cir. 2003) (quoting *Drewitt v. Pratt*, 999 F.2d 774, 778-79 (4th Cir. 1993)).

B. Entitlement to Credits

Only the Attorney General, acting through the BOP, may administer a federal inmate's sentence. *See* 18 U.S.C. § 3621; *United States v. Wilson*, 503 U.S. 329, 335 (1992). This includes determining where an inmate serves his sentence as well as time credit. *See* 18 U.S.C. § 3621(b); *Wilson*, 503 U.S. at 335. "A claim for credit against a sentence attacks the computation and execution of the sentence rather than the sentence itself." *United States v. Miller*, 871 F.2d 488, 490 (4th Cir. 1989). Such challenges must be brought in a petition for habeas corpus relief under 28 U.S.C. § 2241 in a prisoner's district of confinement. *Id.*; *Fontanez v. O'Brien*, 807 F.3d 84, 87 (4th Cir. 2015) (recognizing "attacks on the execution of a sentence are properly raised in a § 2241 petition") (internal quotation and citation omitted).

1. The First Step Act

The First Step Act of 2018 (the "FSA"), P.L. 115-391, § 102(b)(1), 132 Stat 5194, 5210 (Dec. 21, 2018), amended 18 U.S.C. § 3621 which governs the calculation of federal prison sentences. Section 102(b) of the FSA also amended 18 U.S.C. § 3624(b), allowing federal inmates to earn additional good time credits. *See* P.L. 115-391, § 102(b)(1). The FSA, among other things, allows the BOP to award inmates a maximum of 54 days of good time credits per year of their imposed sentence rather than 54 days of credit per year of their sentence served. *See Pizarro v. White*, 2019 WL 1922437, at *1 (M.D. Pa. Apr. 30, 2019).

The FSA was enacted on December 21, 2018. *See* 18 U.S.C. § 3632. Within 210 days of enactment, the Attorney General was charged with developing and releasing a Risk and Needs Assessment System ("the System"). *Id.* The System is for: (1) determining an inmate's risk of recidivism; (2) assessing an inmate's risk of violence or serious misconduct; (3) determining the type and amount of evidence-based recidivism reduction programming ("EBRRs") appropriate for each inmate; (4) periodically assessing an inmate's recidivism risk; (5) reassigning an inmate to appropriate EBRRs and productive activities ("PAs") as needed; (6) determining when to provide incentives and rewards for successful participation in EBRRs and PAs; and (7) determining when the inmate is ready to transfer to pre-release custody or supervised release. *See id.* § 3632(a). Further, the System provides guidance on the "type, amount, and intensity of EBRR programs and PAs to be assigned to each inmate based on the inmate's specific criminogenic needs." *Kurti v. White*, No. 1:19-cv-2109, 2020 WL 2063871, at *4 (M.D. Pa. Apr. 29, 2020) (citing 18 U.S.C. § 3632(b)).

The FSA allows eligible[7] inmates who successfully complete EBRRs or PAs to receive earned time credits (ETCs) to be applied toward time in pre-release custody or supervised release. *See* 18 U.S.C. § 3632(d)(4)(A). An inmate may earn ten (10) days of credit for every thirty (30) days of successful participation in EBRRs or PAs. *See id*. Additionally, eligible inmates who have been assessed at a minimum or low risk of recidivism, who maintain their low risk of recidivism over two (2) consecutive assessments, may earn an additional five (5) days of time credit for every thirty (30) days of successful participation. *See id*.

On July 19, 2019, the System was released for use throughout the BOP in compliance with the timeline set in the FSA. *See Holt v. Warden,* 539 F. Supp. 3d 1005, 1010 (D.S.D. 2021). Thereafter, within 180 days, the BOP was to implement and complete an initial intake risk and needs assessment for each prisoner. 18 U.S.C. § 3621(h)(1)(A). On January 15, 2020, the BOP announced that all inmates had been screened using the System, known as the Prisoner Assessment Tool Targeting Estimated Risk and Needs ("PATTERN"). *Holt*, 539 F. Supp. 3d at 1010. The implementation phase of the FSA, a two-year phase-in period for providing EBRRs and PAs, commenced after all inmates had been screened. 18 U.S.C. §§ 3621(h)(2)–(3). During the phase-in period, the BOP had until January 15, 2022 to provide EBRRs and PAs to all inmates. *Id*. § 3621(h)(2).

Thereafter, on January 19, 2022, the BOP published and codified its "procedures regarding the earning and application of Time Credits as authorized by the First Step Act of 2018" (the "January Final Rule"). *See* FSA Time Credits, p.1, 87 Fed. Reg. 12, 2705 (January 19, 2022) (codified at 28 C.F.R. pt. 523); *see also* ECF No. 3-6. Notably, under the January Final Rule, eligible inmates received retroactive time credits for programming and activities they participated

[7] To be eligible to earn ETCs, inmates must not have a conviction for a disqualifying offense. *See* 18 U.S.C. § 3632(d)(4)(D). Additionally, certain deportable non-U.S. citizens are not eligible for ETCs. 18 U.S.C. § 3632(d)(4)(E).

in beginning December 21, 2018, the date of the FSA's enactment. ECF No. 3-6 at 4, 15. In determining how to award ETCs during the period before individualized risk and needs assessments had been completed for every inmate (from the FSA's enactment on December 21, 2018 until January 14, 2020), the BOP, in its discretion, determined that eligible inmates will be afforded a "presumption of participation" for that period and will be awarded ETCs accordingly. *Id.* at 5, 15. Importantly, for Mr. White's case, the BOP indicated that "[i]nmates will not receive credit for any period in which they were in a special housing unit, in a designation status outside the institution, temporarily transferred to the custody of another Federal or non-Federal government agency, in mental health/psychiatric holds … , or for refusing mandatory programming." *Id.* at 5, 15. It is this provision, codified at 28 CFR pt. 523.41(c)(4), that Mr. White challenges.

On October 5, 2022, Mr. White's ETCs were calculated by the BOP pursuant to these procedures. Decl. of Brittny May, ECF No. 3-4 at 4. Under the January Final Rule, once Mr. White was "transferred on July 21, 2022, he stopped earning any FSA credit." *Id.* at 5. Thereafter, he remained in "disallow status, i.e. the time he spent in transfer status or the SHU," and between July 21, 2022, and August 23, 2022 "he lost thirty-three days of possible calendar days accrued." *Id.* at 5-6.

Importantly, on November 18, 2022, the BOP published BOP Program Statement 5410.01, First Step Act of 2018 – Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d). *See* BOP Program Statement 5410.01, First Step Act of 2018 – Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d). This Program Statement implements the January Final Rule, and further clarifies the BOPs procedures for awarding and applying ETCs under the FSA. *Id.* Relevant here, this policy update clarified what "successful participation" in EBRRs and PAs means, and now provides that "[i]nmates in Disciplinary Segregation status will not be considered to be 'successfully participating.' Inmates in restrictive housing for Administrative Detention shall obtain [E]TCs if they otherwise remain in earning status under the policy." *See* BOP Program Statement 5410.01 at 4. SHUs are "housing units in B[OP] institutions where inmates are securely separated from the general inmate population . . . to help ensure the safety, security, and orderly operation of correctional facilities, and protect the public." *See* BOP Program Statement 5270.11, Special Housing Units. An inmate placed in SHU can either be designated "administrative detention status" or "disciplinary segregation status." *Id.*; 28 CFR 541.22. Administrative detention status is a "status which removes you from the general population when necessary to ensure the safety, security, and orderly operations of correctional facilities, or to protect the public. It is non-punitive." *Id.* at 3. Disciplinary segregation status is a "punitive status imposed only by the Discipline Hearing Office as a sanction for committing a prohibited act(s)." BOP Program Statement 5410.01 at 4. Under the updated program statement, only those inmates in SHU on disciplinary segregation status are ineligible to earn ETCs.

Because Mr. White was in administrative detention status, not disciplinary segregation status, following his transfer from Oklahoma City to FCI-Cumberland, this BOP policy update directly impacted Mr. White. His sentence was recalculated, and he was given credit for his time in SHU when he was first transferred to FCI-Cumberland. ECF No. 9 at 4; ECF No. 10 at 1. He has not been credited for the days he was in transfer status from Terra Haute to Okalahoma City. *Id.*

2. Mootness

A case becomes moot when issues presented are no longer live controversies or if parties lack a legally cognizable interest in the outcome. *Murphy v. Hunt*, 455 U.S. 478, 481 (1984). Therefore, a case becomes moot when there is no viable legal issue left to resolve. *See Powell v. McCormick*, 395 U.S. 486, 496 (1969). If developments occur during the course of a case which render the court unable to grant a party the relief requested, the case must be dismissed as moot. *Blanciak v. Allegheny Ludlum Co*., 77 F.3d 690, 698–699 (3d Cir. 1996). Mootness, a doctrine of standing, may occur at any stage of a federal judicial proceeding when there is no longer a case or controversy as required by Article III, § 2, of the Constitution. Standing requires that the petitioner maintain a personal interest at the commencement of litigation and throughout the entirety of the action, *Spencer v. Kemna*, 523 U.S. 1, 7 (1998); the parties must have a personal stake in the outcome of a lawsuit at all stages of the proceeding, *United States v. Verdin*, 243 F.3d 1174, 1177 (9th Cir. 2001). "This means that, throughout the litigation, the plaintiff 'must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable decision." *Spencer*, 523 U.S. at 7. If a case becomes moot, the lack of a case or controversy requires this court to dismiss the case for lack of jurisdiction. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983).

Mr. White's Petition seeks restoration of credits he believed he was entitled to from July 21, 2022 until July 25, 2022 while in transfer status in Oklahoma City, and then from July 26, 2022 until August 22, 2022 while housed in SHU at FCI-Cumberland. ECF No. 1 at 3. The record reflects that, based on the BOP's recalculation of credits pursuant to updated policies, Mr. White has now been awarded all applicable credits for the period from July 26, 2022 until August 22, 2022. See ECF No. 9, 9-1, 10. Thus, this portion of Mr. White's claim is dismissed as moot. The court must then consider only whether Mr. White is entitled to credit for his time spent in transfer status in Oklahoma City from July 21, 2022 until July 25, 2022. Additionally, the court considers Mr. White's argument that that "a prisoner cannot be deprived of ETCs without due process." ECF No. 9 at 4.

3. Entitlement to ETCs while in transfer status

The record supports that Mr. White's sentence has been properly calculated, and he is not entitled to the credit he seeks.

The BOP is entitled to deference in the application of FSA ETCs. *Chevron, U.S.A., Inc. v. NRDC, Inc*., 467 U.S. 837, 865 (1984). Courts defer to an agency's interpretation of a statute when Congress has "charged [the agency] with responsibility for administering the provision[.]" *See Chevron*, 467 U.S. at 865; *see also Smiley v. Citibank, N.A*., 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."). There exists a "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley*, 517 U.S. at 740-41.

An agency's interpretation of a statute it administers is always given some judicial deference, but the deference level varies. When Congress gives authority to an agency to make rules with the force of law, and the agency acted pursuant to that delegated authority in interpreting the statute, then courts review the agency's interpretation under the standards articulated in *Chevron*. *See United States v. Mead Corp*., 533 U.S. 218, 226-27 (2001). The *Chevron* standard provides that where the statute being interpreted by the agency is silent or contains ambiguity, courts give deference to the agency's interpretation if it "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 845; *see also Lopez v. Davis*, 531 U.S. 230, 242 (2001) (holding the BOP had the authority to fill the "statutory gap" in § 3621(e)'s early release provision in a reasonable manner in light of the Congress' "revealed design"). Therefore, if 18 U.S.C. § 3632(d)(4), at issue here, is clear, the BOP must apply it as written. However, if ambiguity exists, "the question for the court is whether" the BOP's interpretation of 18 U.S.C. § 3632(d)(4) is reasonable and reflects a "permissible construction of the statute." *Chevron*, 467 U.S. at 843.

Here, 18 U.S.C. § 3632(d)(4)(A) explains that "[a] prisoner, except for an ineligible prisoner under subparagraph (d), who successfully completes [EBRRs or PAs], shall earn [ETCs]." However, ambiguity exists, because what constitutes 'successful completion' was not defined by Congress. Thus, the BOP, after allowing for notice and comment, published 28 C.F.R. § 523.41(c). There, the BOP outlined that "[a]n eligible inmate . . . generally will not be considered to be 'successfully participating' in EBRR Programs or PAs in situations including . . . (ii) Designation status outside the institution . . ." such as Mr. White's few days in transfer status in Oklahoma City. This is a permissible construction of the statute, and thus the BOP is entitled to *Chevron* deference.

Further, the promulgation of the BOP's policy statement[8] maintaining that inmates in a "[d]esignation status outside the institution," such as transfer status, are not "successfully participating" in EBRRs or PAs, and accordingly they are not able to accrue ETCs, is an "internal agency guideline that has not been subjected to the rigors of notice and comment rulemaking." *Cunningham v. Scibana*, 259 F. 3d 303, 306 (4th Cir. 2001); *see also* BOP Program Statement 5410.01, First Step Act of 2018 – Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d). While policy statements are not given the force of law, they are entitled to respect. *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000). An agency's interpretation of a statute, such as the BOP's program statement at issue here, is afforded respect when it has the "power to persuade" as defined by the Supreme Court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

> We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and

[8] *See* BOP Program Statement 5410.01, First Step Act of 2018 – Time Credits: Procedures for Implementation of 18 U.S.C. § 3632(d).

> litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

Id. The BOP's program statement that led to the determination that Mr. White *was* entitled to credit for his time spent in SHU at FCI-Cumberland, but *was not* entitled to credit for his time spent in transfer status in Okalahoma City makes sense and thus is entitled to respect. Mr. White is not entitled to the credit that he seeks.

Next, the court considers Mr. White's argument that, prior to placement in transfer status, he was entitled to Due Process because of the corresponding lack of ability to earn ETCs while in such a status. In general, when analyzing a claim of denial of Due Process, "[w]e first ask whether there exists a liberty or property interest of which a person has been deprived, and if so we ask whether the procedures followed by the State were constitutionally sufficient." *Swarthout v. Cooke*, 562 U.S. 216, 219 (2011) (citing *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989)). The United States District Court for the Distrtict of Minnesota considered an analogous issue to that raised by Mr. White in *Fiorito Fikes*, No. 22-CV-0749 (PJS/TNL), 2022 WL 16699472 (D. Minn. Nov. 3, 2022). There, the court addressed whether the petitioner "was entitled to additional procedural protections before being placed in the SHU" given the corresponding inability to earn ETCs. *Fiorito*, 2022 WL 16699472 at *4. The court explained that "Federal prisoners have long been entitled to time credits resulting from good behavior, *see* 18 U.S.C. § 3624(b), and challenges to the loss of good-time credits following prison disciplinary proceedings are a regular and unexceptional feature of modern habeas litigation." *Fiorito*, 2022 WL 16699472, at *5 (citing *Preiser v. Rodriguez*, 411 U.S. 475, 487-88 (1973); *Portley-El v. Brill*, 288 F.3d 1063, 1066-67 (8th Cir. 2002)). Therefore, "it is not absurd to argue that [E]TCs, like good-time credits, might also implicate protected liberty interests that could be vindicated through a habeas petition." *Fiorito*, 2022 WL 16699472, at *5.

However, two critical differences exist between good-time credits and ETCs earned pursuant to the First Step Act:

> First, good-time credits entitle a prisoner to a reduction in his sentence, period. ETCs[9] are not quite so straightforward. In contrast to prisoners who earn good-time credits, prisoners who earn ETCs may not be able to *apply* those ETCs. *See* 18 U.S.C. § 3624(g)(1)(D). Instead, application of ETCs is contingent on maintaining a minimal or low risk of recidivism as assessed by the BOP or, alternatively, on receiving an exception to that requirement from the warden of the facility where the prisoner is detained. *Id.* Further, even when a prisoner may apply ETCs, § 3632(d)(4)(C) directs that those ETCs may be applied by the BOP 'toward time in prerelease custody *or* supervised release.' Prerelease custody, however, is just another form of BOP custody, *see* 18 U.S.C. § 3624(g)(2), and '[a] legal action seeking transfer from one form of BOP custody to another (like a legal action seeking transfer from one BOP facility to another) is not a challenge to the fact or duration of confinement.' . . . This contingency makes it doubtful that ETCs are a protected liberty interest.
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> * * *
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> Second, unlike good-time credit accumulated under § 3624(b), ETCs are not a general entitlement. Instead, prisoners are merely afforded the opportunity to earn ETCs by participating in recidivism-reduction programming. Although ETCs themselves are a recent creation, many courts examining similar time-credit schemes have held that the loss of a mere opportunity to accumulate credit towards a sentence is not sufficient to create a protected liberty interest. . . . The general rule that the loss of an opportunity to earn a reduction in sentence does not amount to infringement of a protected liberty interest makes particular sense in the context of ETCs, as the opportunity to participate in recidivism-reduction programming can be lost for several reasons, including reasons having nothing to do with the conduct or blameworthiness of the prisoner. For example, a prisoner who is temporarily transferred from the custody of the BOP to a non-BOP facility to testify at trial, *see* 28 U.S.C. § 2241(c)(5), would be unable to successfully participate in BOP

[9] The United States District Court for the District of Minnesota utilizes the acronym "FTC," for First Step Act time credits, rather than ETCs, which has been used by the parties here. Accordingly, any reference to FTCs in this quoted language has been changed to ETCs for consistency, but the analysis is unaltered.

> recidivism-reduction programming during the time that the prisoner remained outside the custody of the BOP, *see* 28 C.F.R. § 523.41(c)(4)(iii). The same would be true of a prisoner who is transferred to a hospital for extended treatment of a serious medical need. *See id.* § 523.41(c)(4)(ii). The statute and accompanying regulations betray no expectation that ETC credits could reasonably be regarded as an entitlement, rather than as a benefit that a prisoner might or might not be able to earn at various times during his detention. This is too flimsy an expectation to give rise to a protected liberty interest. And because the opportunity to earn ETCs is not a protected liberty interest, [Petitioner] was not entitled to due process before he lost that opportunity by getting sent to the SHU.

Fiorito, 2022 WL 16699472, at *5, 6. This analysis is sound, and applicable to Mr. White's current Due Process claims. For the reasons outlined above, Mr. White did not have a liberty interest in the opportunity to earn ETCs, and thus was not entitled to any additional Due Process protections prior to being placed in transfer status.

IV. Conclusion

Mr. White has received all the credit to which he is entitled, and his arguments regarding Due Process fail. Accordingly, the court will deny Mr. White's request for habeas relief. Respondent's motion to dismiss, or in the alternative for summary judgment (ECF No. 3), will be granted. Mr. White's motion for leave to supplement response to motion to dismiss (ECF No. 9) will be granted, and motion to strike (ECF No. 11) will be denied.

A separate Order follows.

July 31, 2023

/s/
DEBORAH K. CHASANOW
United States District Judge

Appendix C

FILED: April 22, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 23-7116
(1:22-cv-02371-DKC)

WILLIAM A. WHITE,

Petitioner - Appellant,

v.

WARDEN OF FEDERAL CORRECTIONAL INSTITUTION - CUMBERLAND,

Respondent – Appellee.

O R D E R

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 40.

Judge Wilkinson and Judge Niemeyer voted to deny the petition for panel rehearing. Judge King voted to grant the petition for panel rehearing.

For the Court

/s/ Nwamaka Anowi, Clerk

NIEMEYER, Circuit Judge, with whom Judge WILKINSON joined, denying the motion for panel rehearing:

William White, the petitioner in this habeas case, has come forward with new information that he claims should justify our withdrawing the opinion we issued in this case. Nonetheless, we vote to deny his motion for panel rehearing.

Based on the record in this case, we concluded in our opinion that White was not entitled to First Step Act time credits for the three-day period he was held at the Federal Transfer Center Oklahoma City because he did not, during that time, "participate" in recidivism reduction programming, much less "successfully complete[]" such programming, as required to earn First Step Act time credits. *See* 18 U.S.C. § 3632(d)(4). Indeed, the government stated that such programming was not offered to prisoners in transit centers, and particularly to a prisoner assigned to a Special Housing Unit, as White was for security reasons during that three-day period.

Judge King would opt to begin this habeas proceeding all over again — after more than three years of litigation — because White now claims that he met a psychologist while in the Transfer Center, who provided him with some materials. He argues that this could be considered participation in recidivism reduction programming. While this new factual claim would hardly satisfy the First Step Act requirements, his new information and argument are totally inconsistent with the position that White has consistently taken throughout this litigation up to now. The habeas record supports *only* the conclusion that White was never given recidivism reduction programming at the Transfer Center *so as to enable* him to earn time credits.

In his pro se habeas petition, White claimed that while in the Transfer Center, he was confined, without due process, to a Special Housing Unit (sometimes "SHU") where no programming was offered and that therefore he was denied "*the ability* to earn credits." (Emphasis added). He thus argued that the lack of due process in confining him to the SHU "permitted [the BOP] to impose loss of [time credits] as a collateral consequence of SHU confinement without Due Process. . . . [The BOP] had to either give me programming and [time credits] or not place me in SHU at all." White thereupon concluded that "[his placement in the SHU] . . . *cost him the ability to earn* [time credits] without any due process." (Emphasis added).

After counsel was appointed for White, White's counsel continued to press the same position taken by White, arguing:

> But it is fundamentally unfair to deny White FSA time credits when it's the BOP's flaunting of its statutory obligation to provide [recidivism reduction programming] in all facilities during the entirety of an individual's incarceration that caused *the unavailability of programming*.

(Emphasis added).

And White's position was consistent with the government's position that the BOP did not offer recidivism reduction programming to prisoners while at the Transfer Center, and, in particular, to prisoners confined in a Special Housing Unit.

Finally, the district court, reviewing the habeas record, found:

> Accordingly, while housed at SHU while in transfer status at FTC-Oklahoma City . . . Mr. White *was prevented* from earning [First Step Act time credits].

(Emphasis added).

As reflected by this record, White took the position and maintained it throughout this three-year litigation that confining him to a Special Housing Unit without due process denied him the *ability* to earn First Step Act credits because no programming was offered there. Moreover, during these years, he had numerous opportunities to come forward with any correction of that position, but he did not do so. The information he now presents to us is thus not only new, but inconsistent with the information he provided to us over the years, including while represented by counsel.

For these reasons, we opt to stand with the opinion that we issued and which still, we conclude, properly denies White First Step Act time credits because he failed to "participate" in and "successfully complete" recidivism reduction programming, as required by the First Step Act to earn credits, during the three days he spent at Federal Transfer Center Oklahoma City.

KING, Circuit Judge, dissenting from the denial of panel rehearing:

In this matter, petitioner William A. White challenges the district court's rejection of his statutory and constitutional claims alleging the wrongful denial of a single time credit under the First Step Act of 2018 (the "FSA") relating to three days he spent in the Federal Transfer Center ("FTC") at Oklahoma City, Oklahoma. Over my dissent, our Court's panel majority affirmed. *See White v. Warden of Fed. Corr. Inst. – Cumberland*, 164 F.4th 326 (4th Cir. 2026). With respect to the statutory claim, the majority relied on a theory that only actual participation qualifies as "successful participation" under the plain text of the FSA, *see* 18 U.S.C. § 3632(d)(4), and that White did not actually participate in programming at FTC-Oklahoma City because no programming was provided to him during his short stint there.

Among the flaws in the majority's actual participation theory that I identified and discussed in my dissent are that (1) the government waived the theory by failing to raise it in the district court and (2) the theory lacked factual substantiation. *See White*, 164 F.4th at 339-40 (King, J., dissenting). As I explained, the government having relied on a wholly different theory in the district court — i.e., that a Bureau of Prisons ("BOP") regulation had rendered White categorically ineligible to earn FSA time credits at FTC-Oklahoma City due to his so-called "transfer status," as well as his assignment to a special housing unit (the "SHU") — the parties understandably did not present evidence on the then-irrelevant topic of whether programming was or was not available to White at FTC-Oklahoma City. *Id.* at 340.

It was not until this appeal that the government raised the actual participation theory, in its response brief. Even then, the government offered only uncorroborated and equivocal assertions that programming is not — or "is *not necessarily*" — offered at FTC-Oklahoma City and other federal transfer centers. *See White*, 164 F.4th at 340 (King, J., dissenting) (quoting Br. of Appellee 19). In reply, a blindsided White emphasized the lack of relevant evidence and "rightfully request[ed], 'at minimum, reversal and remand' for factual development." *Id.* at 340 n.4 (quoting Reply Br. of Appellant 8). Nevertheless, the majority disregarded White's remand request, excused the government's waiver, and took the government at its word that White was not provided and thus did not participate in any programming at FTC-Oklahoma City.

White has now filed a petition for panel rehearing and rehearing en banc, attaching not only a declaration executed under penalty of perjury in which he swears that he was provided and actually participated in programming at FTC-Oklahoma City, but also a corroborating BOP record. *See White v. Warden of Fed. Corr. Inst. – Cumberland*, No. 23-7116, at 21-22 (4th Cir. Feb. 23, 2026), ECF No. 43. Specifically, the declaration states — and the BOP record corroborates — that upon White's arrival at FTC-Oklahoma City, he "met with a psychologist [who] provided [him] with the workbooks for the [BOP]'s Evidence-Based Recidivism Reduction (EBBR) Trauma and Criminal Thinking programs, which [he] completed at the transfer facility." *Id.* The declaration confirms that White, who had initially proceeded *pro se*, "did not mention [his FTC-Oklahoma City programming] in [his] *pro se* pleadings before the district court because the government only ever objected to [his statutory claim for an FSA time credit] on the ground that [he] was ineligible due to [his] transfer status, not due to any lack of participation." *Id.* at 21. Further, the declaration specifies that "[i]f the government had argued that [White] failed to sufficiently allege participation, [he] would have amended [his] habeas petition to plead the participation described above and/or would have provided evidence to the [district court] of this participation." *Id.*

In its response to White's rehearing petition, the government has no good answer to White's declaration and the corroborating BOP record. *See White v. Warden of Fed. Corr. Inst. – Cumberland*, No. 23-7116, at 11-14 (4th Cir. Mar. 12, 2026), ECF No. 46. Rather, the government gripes that the BOP record is partially redacted and does not irrefutably show that the materials provided to White at FTC-Oklahoma City "constitute approved, qualifying FSA programming." *Id.* at 12-14. The government also accuses White of seeking to improperly expand the record, in contravention of Rule 10 of the Federal Rules of Appellate Procedure. *Id.* at 11-12. Quite brazenly, the government asserts that "[t]he mere fact that [White's] litigation strategy evolved between the record below and the arguments on appeal does not permit him to introduce new factual information that was available at the time he filed his [habeas petition]." *Id.* at 12. Of course, White is just now proffering his declaration and the corroborating BOP record not because of a change in his litigation strategy, but because of the government's change in its litigation strategy.

Based on White's declaration and the corroborating BOP record, I have urged the majority to join me in granting panel rehearing, vacating the prior decision, and remanding for the district court to consider the evidence of White's FTC-Oklahoma City programming in the first instance. Regrettably, however, my distinguished colleagues stubbornly refuse to do so and continue to condone the government's very troubling and unfair conduct in this matter.

The majority seeks to justify its denial of panel rehearing by summarily declaring that the activities described in White's declaration and the corroborating BOP record "would hardly satisfy the [FSA] requirements." *See ante* 1. Additionally, the majority rewrites history, asserting that White claimed from the start of the district court proceedings to be aggrieved by a lack of programming at FTC-Oklahoma City, and that the government promptly responded with the actual participation theory. As the majority would thus have it, White's "new information and argument are totally inconsistent with the position that White has consistently taken throughout this litigation up to now." *Id.*

For support, the majority cherry-picks quotations from White's *pro se* habeas petition, his appellate reply brief, and the district court's opinion. Meanwhile, the majority quotes nothing from the government's district court pleadings. I have carefully reviewed all those documents and can confidently say that, under any fair reading of them, none substantiates the majority's version of events.

First of all, White's habeas petition neither alleges that he was provided no programming at FTC-Oklahoma City nor blames a lack of programming for the challenged FSA time credit denial. Rather, the petition clearly ties the denial to White's categorical ineligibility under the BOP regulation, regardless of the availability of programming. Indeed, the petition specifies that the BOP regulation rendered White categorically ineligible to earn time credits "*even if I program*," belying any notion that White was alleging or complaining of a lack of programming. *See* J.A. 8-9 (emphasis added) (explaining that "[w]hen not [subject to the BOP regulation], I earn 10 days of [time credits] for every 30 days I'm imprisoned as long as I do not refuse programming," but "[w]hen [subject to the BOP regulation], I earn 0 days, even if I program").

For their part, the government's district court pleadings in no way raise and preserve the actual participation theory. Those pleadings fail to state, inter alia, that programming is unavailable at federal transfer centers, that no programming was provided to White at FTC-Oklahoma City, or that White was denied the sought-after FSA time credit because of a lack of programming or failure to actually participate.

As for the district court's opinion, the language quoted by the majority merely says that "Mr. White *was prevented* from earning [FSA time credits at FTC-Oklahoma City]." *See White v. Warden of Fed. Corr. Inst. – Cumberland*, No. 1-22-cv-02371, at 3 (D. Md. July 31, 2023), ECF No. 12 (emphasis added). Importantly, that language does not say that White was prevented from earning FSA time credits *by a lack of programming*. Rather, the quoted language is part of a larger passage in which the opinion describes White's argument as being that he was prevented from earning FSA time credits *by the BOP regulation*. Under the heading "The Positions of the Parties," the opinion states:

> Mr. White explains that, pursuant to [the BOP regulation], federal inmates are guaranteed to earn [FSA time credits] throughout their incarceration, except in several circumstances, including while an inmate is housed in the SHU. Accordingly, while housed in SHU while in transfer status at FTC-Oklahoma City, . . . Mr. White was prevented from earning [FSA time credits].

Id. at 2-3 (citation omitted). The balance of the opinion confirms that, in the district court, it was understood by all involved — White, the government, and the court itself — that the parties' dispute was over the applicability and enforceability of the BOP regulation, not the availability of programming.

Finally, White's appellate reply brief firmly maintains that because of the government's failure to raise the actual participation theory until this appeal, the availability of programming was never at issue in the district court. *See, e.g.*, Reply Br. of Appellant 3 (arguing that the actual participation theory "should not even be considered, as it is brand new, differs from the argument and reasoning below, and relies on facts not in the record"). Far from conceding a lack of programming, the reply brief emphasizes the absence of relevant evidence and addresses the legal implications "*if*" no programming was provided to White. *See, e.g.*, *id.* at 8 (underscoring that "[t]here is no evidence in the record about White's supposed failure to participate in [programming] while in the FTC, nor the availability of programming at the FTC"); *id.* at 12 (contending that "[i]f White did not participate in [programming] in the FTC, that is because BOP violated its statutory obligation to provide programming").

In these circumstances, it is entirely appropriate and reasonable that White is just now presenting evidence — with his petition for panel rehearing and rehearing en banc — demonstrating that he was provided and did actually participate in programming at FTC-Oklahoma City. What is not justified is the majority's refusal to grant panel rehearing, vacate our prior decision, and remand for the district court to consider White's evidence in the first instance. I therefore dissent.*

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* To be clear, I have not requested a poll on rehearing en banc in this matter, but I believe it likely that our en banc Court will need to revisit the panel majority's opinion in a future case. As I said in my earlier dissent, the majority's ruling on the merits of White's statutory claim "does not just flout the plain text of the FSA and the BOP's policies and practices," but "also threatens chaos, unequal treatment, and other unfairness in the FSA time credit system." *See White*, 164 F.4th at 342 (King, J., dissenting). Additionally, White's rehearing petition alleges serious errors in the majority's ruling on his separate constitutional claim, which I did not address in my dissent because I would have granted relief on the statutory claim. *See id.* at 335 n.1 (invoking the constitutional avoidance doctrine under *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).