No. 09-5201

IN THE

Supreme Court of the United States

MICHAEL GARY BARBER, *et al.*,

Petitioner,

v.

J.E. THOMAS, Warden,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, THE FEDERAL PUBLIC AND COMMUNITY DEFENDERS IN THE UNITED STATES, FAMILIES AGAINST MANDATORY MINIMUMS, THE AMERICAN CIVIL LIBERTIES UNION, AND LAW DEANS AND FACULTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nonprofit corporation with membership of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in its House of Delegates.

Amicus curiae, the National Association of Federal Defenders, formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

Amici curiae, Federal Public and Community Defenders in the United States (not including the Federal Defender representing the petitioner in this matter), have offices in nearly all federal judicial districts and represent tens of thousands of individuals sentenced in federal court each year. These *amici* are listed in the Appendix hereto.

Amicus curiae, Families Against Mandatory Minimums ("FAMM"), is a national, nonprofit, nonpartisan organization of over 24,500 members founded in 1991. FAMM's primary mission is to promote fair and proportionate sentencing policies

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae*, their members, and their counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certify that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing in letters on file with the Clerk's office.

and to challenge inflexible and excessive penalties required by mandatory-sentencing laws. By mobilizing prisoners and their families who have been adversely affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform. FAMM advances its charitable purposes in part through education of the general public and through *amicus* filings in important cases.

Amicus curiae, the American Civil Liberties Union ("ACLU"), is a nationwide, non-profit, nonpartisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Consistent with that mission, the National Prison Project of the ACLU Foundation was established in 1972 to protect and promote the civil and constitutional rights of prisoners. Since its founding, the Project has challenged unconstitutional conditions of confinement and over-incarceration at the local, state and federal level through public education, advocacy and successful litigation.

Amici curiae, Erwin Chemerinsky, Dean, University of California—Irvine School of Law; Nora Demleitner, Dean and Professor, Hofstra University School of Law; Margaret L. Paris, Dean, University of Oregon School of Law; David N. Yellen, Dean, Loyola University Chicago School of Law; Janet Ainsworth, Professor, Seattle University School of Law; Laura I Appleman. Assistant Professor, Willamette University College of Law; Tamar R. Birckhead, Assistant Professor, University of North Carolina School of Law; John M. Burkoff, Professor, University of Pittsburgh School of Law; Gabriel J. Chin, Professor, University of Arizona James E. Rogers College of Law; Donna Coker, Professor, University of

Miami School of Law; J. Herbie DiFonzo, Professor, Hofstra University School of Law; Tigran W. Eldred, Visiting Clinical Professor, Hofstra University School of Law; Richard Klein, Professor, Touro Law School; Arthur B. LaFrance, Visiting Professor, University of Arizona James E. Rogers College of Law; Wayne A. Logan, Professor and Associate Dean, Florida State University College of Law; Erik Luna, Professor, Washington and Lee University School of Law; Susan F. Mandiberg, Professor, Lewis & Clark Law School; Stephen A. Saltzburg, Professor, The George Washington University Law School; Jeffrey J. Pokorak, Professor and Director of Clinical Programs, Suffolk University Law School; and Charles D. Weisselberg, Professor, University of California—Berkeley School of Law, have longstanding commitments to criminal justice issues, including those related to criminal defendants' periods of incarceration.

Amici appear in support of Petitioners because the decision below improperly permits incarceration of defendants convicted in federal courts for periods longer than Congress intended. 18 U.S.C. § 3624(b)(1) unambiguously requires the Federal Bureau of Prisons ("BOP") to award federal prisoners a maximum of 54 days of good time credit ("GTC") for each year of the sentence imposed, and BOP's policy of awarding less than this full measure of credits carries enormous human, social, and financial costs. As advocates, practitioners, and scholars working in the field of criminal law and sentencing, *amici* and their clients urge the Court to correct the Ninth Circuit's error of deferring to BOP's construction. Such deference is unwarranted because the words of the statute are unambiguous and, in all events, is incompatible with the time-honored rule of lenity,

which governs the resolution of any textual ambiguity that might be found in this case.

SUMMARY OF ARGUMENT

This Court has long held that freedom from unlawful imprisonment lies at the heart of liberty. See, *e.g.*, *Zadvydas* v. *Davis*, 533 U.S. 678, 690 (2001). Yet the Bureau of Prisons has improperly interpreted the statute governing the award of credits for good behavior so as to deprive hundreds of thousands of federal prisoners of the full measure of such credits, thereby unlawfully delaying their release dates, in many cases by weeks or months. The GTC statute's plain language supports a straightforward methodology for calculating prisoners' release dates, providing that a prisoner may earn 54 days of credit per year of the sentence imposed. Thus, in a sentence of twelve months and one day, a prisoner could earn 54 days' credit by serving 312 days. By contrast, BOP has imposed an awkward reading that defines the provision's key phrase differently each time it appears within the very same sentence. The resulting construction necessitates a pages-long, obscure formula that, by its eighth and final step, results in the awarding of only a maximum 47 days of GTC per prisoner per year, rather than the 54 days the statute requires.

Although the statute's plain language and legislative history foreclose any reading other than that advocated by Petitioners, even if there were any statutory ambiguity, the rule of lenity would require that any such ambiguity be construed in the prisoners' favor, given that the statute at issue determines the length of sentences and therefore is penal. Thus, there can be no remaining ambiguity for BOP to resolve, and therefore no deference to its

views is warranted. Moreover, BOP has already conceded that it did not properly promulgate its interpretation of the GTC statute, so *Chevron*-type deference is inapplicable in any event. Nor does BOP's interpretation merit *Skidmore*-type respect, for the agency never intended to construe any ambiguities in the law, and thus its countertextual understanding of the statute fails to satisfy even the most elementary requirements for affording deference to an agency decision.

In this time of fiscal stress, continually-expanding prison populations and resulting overcrowding, the Court should effectuate the GTC policy Congress prescribed and which BOP has improperly disregarded. Doing so will not only serve substantially to conserve federal resources and to improve conditions for those still in prison, but it will also restore, according to the schedule Congress intended, the liberty of prisoners who have served their time and behaved well during incarceration.

ARGUMENT

I. THE TEXT OF 18 U.S.C. § 3624(B)(1) UNAMBIGUOUSLY REQUIRES GOOD TIME CREDITS TO BE AWARDED FOR EACH YEAR OF THE SENTENCE IMPOSED, NOT THE TIME SERVED.

At issue in these cases is the proper construction of the language in 18 U.S.C. § 3624(b)(1). "It is axiomatic that '[the] starting point in every case involving construction of a statute is the language itself.'" *Landreth Timber Co.* v. *Landreth*, 471 U.S. 681, 685 (1985) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)) (alteration in original). Here, because the meaning of the statute's language is

unambiguous, the language of § 3624(b) "is also where the inquiry should end." *United States* v. *Ron Pair Enters.*, 489 U.S. 235, 241 (1989).

The "normal rule of statutory construction" is that "identical words used in different parts of the same act are intended to have the same meaning." *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986) (quoting *Helvering* v. *Stockholms Enskilda Bank*, 293 U.S. 84, 87 (1934) (quoting *Atlantic Cleaners & Dyers, Inc.* v. *United States*, 286 U.S. 427, 433 (1932)) (internal quotation marks omitted). That presumption is "surely at its most vigorous when a term is repeated within a given sentence." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

BOP ignores this presumption and interprets the phrase "term of imprisonment" to have multiple meanings within the same statute and, indeed, the same sentence. Although this presumption may be overcome when context so requires, see *Atlantic Cleaners*, 286 U.S. at 433, the context of § 3624 in no way requires BOP's unnatural reading. To the contrary, when "term of imprisonment" is read to have the same meaning throughout § 3624, it is possible to apply the statute in a straightforward manner that gives effect to each of its words—with no linguistic gymnastics required.

A. Petitioner's Reading Supports An Interpretation Under Which Each Word Of 18 U.S.C. § 3624 Can Be Given Its Ordinary and Natural Meaning.

Petitioners' understanding of 18 U.S.C. § 3624—under which 54 days of GTC are awarded for each year of the sentence imposed—can be effectuated through a reading that gives every word its ordinary and natural meaning. In § 3624(a), Congress

provided that "[a] prisoner shall be released . . . on the date of the expiration of the prisoner's *term of imprisonment*, *less any time credited* toward the service of the prisoner's sentence as provided in subsection (b)." 18 U.S.C. § 3624(a) (emphasis added). Because the time a prisoner serves is based on the difference between the "term of imprisonment" and any GTC awarded, Congress could only have meant "term of imprisonment" here to mean the sentence imposed, not the time actually served. Congress likewise used "term of imprisonment" to mean the sentence imposed when it provided in § 3624(b) that a prisoner "may receive credit toward the service of the prisoner's sentence" if he "is serving a *term of imprisonment* of more than 1 year other than a *term of imprisonment* for the duration of the prisoner's life . . . ." 18 U.S.C. § 3624(b)(1) (emphasis added).

Section 3624(b)(1) sets forth not only the conditions of good behavior that a prisoner must meet to remain eligible for the maximum credit, but the schedule on which the credit will be earned. Specifically, it provides that a prisoner "may receive credit toward the service of the prisoner's sentence, *beyond the time served*, of up to 54 days *at the end of each year of the prisoner's term of imprisonment*, beginning at the end of the first year of the term," so long as the prisoner has met the behavior criteria "during that year." *Id.* (emphasis added). Because Congress required the credit to be applied "at the end" of each year of the term, not *after* the end, the prisoner should receive the credit during the same year in which he accrues it.[2] Thus, a prisoner will serve his sentence through

[2] Both dictionary definitions and common usage demonstrate that the prepositions "at" and "after" have distinct meanings. *Merriam-Webster* defines "at" primarily "as function word used

a combination of days actually incarcerated and GTC, such that a prisoner earning the maximum credit will face only 311 days of actual incarceration for each year of the term of imprisonment. During the last part of each such year of that sentence, assuming good conduct since the last award, the prisoner will receive "credit" toward the full term of the sentence of an additional 54 days "beyond the time served," *id.*, even though the prisoner was not actually incarcerated for the final 54 days attributable to that year.

In practice, this means that after the prisoner is incarcerated for 311 days, with good conduct, the remaining 54 days of the year should be credited as having been served, even though the prisoner was not actually incarcerated for those days. As a result, the 312th day of incarceration then should be counted not as Day 312 of Year 1 of the sentence, but as Day 1 of Year 2. The days in each subsequent year of the sentence may be counted in similar fashion, such that a well-behaved prisoner receives 54 days of credit after every 311 days of actual incarceration (or 312 for leap years). Thus, by adding 54 days of credit on each 311th day of actual incarceration, the prisoner

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to indicate presence in, on, or near," but "after" as "behind in place" or "subsequent in time or order." *Webster's Ninth New Collegiate Dictionary* 63, 111 (Merriam-Webster 1987). Moreover, as the district court amply explained in *Moreland* v. *Federal Bureau of Prisons*, the phrase "at the end" ordinarily is used to signify occurrence during the latter part of something, not occurrence subsequent to it. 363 F. Supp. 2d 882, 887 (S.D. Tex. 2005) ("King Lear dies at the end of the play, not after the play. . . . Halloween comes at the end of October, not after."), *reversed by* 431 F.3d 180 (5th Cir. 2005). Under BOP's method, however, GTC is never credited to a prisoner in the same year in which it is accrued, except for during the final year of incarceration. *See infra* 10–11.

should receive the GTC at "the end of each year of the prisoner's term of imprisonment," with each year being the sum of days actually incarcerated and days credited for good behavior.

Because many sentences end in partial years, the last portion should be counted differently: "[C]redit for the last year or portion of a year of the term of imprisonment [is] prorated and credited within the last six weeks of the sentence." § 3624(b)(1). For example, Mr. Barber was sentenced to a term of 320 months' imprisonment, which equals 26 years and 8 months. After he is credited for service of the first 26 years through a combination of actual incarceration and GTC, the maximum GTC available for the final eight-month period should be prorated and credited not "at the end of the year," but sometime "within the last six weeks" before the date on which his sentence would be complete, should full GTC be awarded.[3] Because eight months is two-thirds of a year, prorating 54 days yields 36 days of GTC available to Mr. Barber for the last eight months of his term of imprisonment. The end result is that the total maximum GTC available to a prisoner equals the number of years in the term of imprisonment multiplied by 54.[4]

Under this reading of § 3624, the phrase "term of imprisonment" carries the same meaning wherever it

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[3] This advanced six-week window in which to apply the final GTC toward a prisoner's sentence makes practical sense, as it enables both BOP and the prisoner to plan in advance for a specific release date.

[4] Because GTC does not vest until the prisoner is released, 18 U.S.C. § 3624(b)(2), it is possible that GTC previously awarded may later be revoked prior to the release date (such as, for example, when prior bad conduct is only discovered after GTC has been awarded).

is used, and every word of the statute is given its ordinary meaning. Cf. *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) ("When interpreting a statute, we must give words their 'ordinary or natural' meaning.") (quoting *Smith* v. *United States*, 508 U.S. 223, 228 (1993)). For instance, under petitioner's reading, the word "year" carries its normal meaning—a period of 365 days (or 366 in leap years), and, as the statute requires, each 365-day period is counted as a combination of calendar days and GTC days. Likewise, by reading "term of imprisonment" to mean "sentence imposed" in every instance, it becomes possible to reconcile its meaning in subsections (a) and (d) of § 3624: Section 3624(d) lists BOP's obligations to a prisoner upon the "expiration" of the term of imprisonment, and § 3624(a) provides that this "date of the expiration" of the term of imprisonment is arrived at by subtracting the days of GTC from the number of days in the sentence imposed.

Moreover, this method of counting confers no windfall upon any prisoner, since it accounts for every day of the sentence imposed and awards no more than 54 days of GTC for each full year of the sentence and the prorated portion for the final stub year. In other words, this reading does not require any prisoner to be released earlier than Congress intended.

B. BOP's Convoluted Reading Of The Statute Is Impermissible.

BOP, in contrast, applies the statute to allow for a maximum of 54 days of GTC *after* each full year of *actual incarceration*, with credit prorated for the final partial year of incarceration. See 28 C.F.R. § 523.20 (2008); BOP Sentence Computation Manual, Program Statement ("PS") 5880.28, 1-40–1-61B (July 20, 1999). Unlike the plain reading that supports

Petitioners' approach, BOP's convoluted method does inescapable violence to the words of the statute.

BOP itself admits that calculating the total GTC available under its method is "arithmetically complicated." PS 5880.28 at 1-44. For example, if a prisoner is sentenced to a term of ten years' imprisonment, BOP will credit him with a maximum 54 days per year of GTC for the first eight years of actual incarceration, for a total of 432 days of GTC—enough to qualify him for release sometime during his ninth year of actual incarceration. The prisoner will receive an additional, prorated amount of GTC for the amount of time he is incarcerated during the ninth year, but that amount will depend on the number of days he is incarcerated during the ninth year, which will in turn depend on the amount of GTC awarded for the ninth year. To resolve this circular dilemma, BOP employs a complex eight-step formula, *id.* at 1-44–1-48; applying that formula to the partial ninth year in the example here yields a result of 38 days of GTC, for a total of 470 GTC days earned during the entire incarceration.[5] In contrast, the straightforward method Petitioner reads § 3624(b) as requiring would result in a maximum 540 days of GTC (54 days x 10 years)—a difference of 70 days, or ten full weeks.

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[5] If a prisoner earns the maximum 432 days GTC after being incarcerated for eight years on a ten-year sentence, he will enter his ninth year of incarceration with 298 days left to serve (assuming no leap years in the ninth and tenth years). Under the BOP formula, GTC in the final year accrues at a rate of 0.148 per day (54 days GTC divided by 365 days in a year). After serving 260 days in the ninth year, the prisoner will have accrued 38 days of GTC in that year (260 x 0.148 = 38.48), which, when awarded and added to the 260 days of actual incarceration, bring the prisoner to the 298 days he began the year needing to serve.

BOP's complex calculations are certainly not mandated by the text of § 3624, since Petitioner's approach faithfully interprets the statute while giving every word its ordinary meaning. See *supra* 6–10. Neither is BOP's approach based on a permissible alternative reading of the text. The statute provides that a prisoner may accrue a credit "beyond the time served, of up to 54 days at the end of each year of the prisoner's term of imprisonment," § 3624(b)(1); BOP's accrual method can only accord with this text if "term of imprisonment" is read to mean "time served." But Congress used the phrase "term of imprisonment" repeatedly in § 3624, and, even under BOP's interpretation, the phrase in those contexts necessarily must refer to the sentence imposed, not time served.

First, in § 3624(a), Congress set a prisoner's release date as the date on which his "term of imprisonment" expires, less any GTC awarded under § 3624(b). 18 U.S.C. § 3624(a). In other words, the time of actual incarceration is equal to the "term of imprisonment" minus GTC; "term of imprisonment" thus cannot mean anything here but the sentence imposed. But because BOP necessarily treats "term of imprisonment" as having different meanings in subsections (a) and (b), BOP's reading can only stand if this Court makes the extraordinary assumption that Congress intended for a *single* variable—"term of imprisonment"—to have *multiple* meanings within a *single* calculation of a prisoner's release date.

Second, BOP itself interprets "term of imprisonment" to have two separate meanings within the first sentence of § 3624(b)(1). When a prisoner is sentenced to imprisonment for a year and a day, BOP will award the prisoner a maximum 47 days of GTC (rather than the full 54) because, once the GTC is

applied, the prisoner's time of actual incarceration will be less than one year. See PS 5880.28 at 1-44–1-47. Yet this construction violates the plain terms of the statute because, under § 3624(b)(1), GTC may only be awarded if the prisoner "is serving a term of imprisonment of more than 1 year"; if "term of imprisonment" here meant time served, BOP would improperly be awarding GTC to a prisoner serving a *sentence* of a year and a day that, with GTC applied, results in *time served* of less than a year. Thus, BOP's application of § 3624(b)(1) is based on an interpretation of "term of imprisonment" that means "sentence imposed" at the beginning of the sentence and "time served" in the very next clause.

Third, the phrase "term of imprisonment" is used consistently in sentencing statutes and common parlance to refer to the sentence imposed, such that it has developed usage as a term of art. See Pet'rs. Br. 25–31. By using this term of art, rather than the phrase "time served," Congress strongly indicated that it meant to use the ordinary meaning of the phrase. Cf. *Arlington Cent. Sch. Dist. Bd. of Educ.* v. *Murphy*, 548 U.S. 291, 297 (2006).

In contrast to the plain language reading of § 3624 that supports Petitioners' view, BOP's stilted interpretation is simply not a permissible reading of § 3624(b)(1). See *Sorenson*, 475 U.S. at 860; *Brown*, 513 U.S. at 118. As such, it should be accorded no deference. See *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837, 842–43 & n.9.

II. IF THE STATUTE IS AMBIGUOUS, LENITY REQUIRES THE STATUTE BE CONSTRUED IN PETITIONERS' FAVOR AND PRECLUDES DEFERENCE TO BOP'S INTERPRETATION.

Even if this Court were to conclude that the words of § 3624(b) are ambiguous, the rule of lenity nonetheless would require it to interpret the statute in Petitioners' favor. *United States* v. *Granderson*, 511 U.S. 39, 54 (1994). Because § 3624(b) defines a defendant's penalty by specifying the minimum time that defendant must serve in prison, it qualifies as a penal statute to which the rule of lenity applies. That conclusion ends the inquiry. As a tool of statutory construction, the Court must apply lenity to resolve the ambiguity before even considering deferring to an agency interpretation. Moreover, the principles underpinning the rule of lenity are inconsistent with deference to administrative agencies, especially when that agency also acts as the prosecutor.

A. Section 3624(b) Is a Penal Statute To Which the Rule of Lenity Applies.

As this Court has recognized, the rule of lenity applies not just to statutes prescribing criminal conduct, but to statutes defining the scope of criminal penalties. *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980) (invoking lenity to resolve doubts in defendant's favor about Congress's intent to impose a special parole term); *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992) (plurality op.) (lenity should resolve any ambiguity "about the severity of sentencing"); *id.* at 307–11 (Scalia, J., concurring, joined by Kennedy, J., and Thomas, J.) (agreeing that lenity should apply to the sentencing statutes).

Under those precedents, there can be no doubt that § 3624(b) is a penal statute, because it defines the minimum time defendants must serve in prison if convicted. See *Lynce* v. *Mathis*, 519 U.S. 433, 440 n.12, 445–46 (1997) (recognizing that statutes governing parole and the award of good-behavior credits are penal, just like statutes that govern initial sentencing, because they affect the duration of imprisonment) (citing *Weaver* v. *Graham*, 450 U.S. 24, 32 (1981)). More than just a statute ancillary to the conditions of incarceration, § 3624(b) defines the length of incarceration itself and thus "is a significant factor entering into both the defendant's decision to plea bargain and the judge's calculation of the sentence to be imposed." *Weaver*, 450 U.S. at 32 (citing *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974)).

Indeed, when compared to other statutes that courts have deemed penal and construed leniently, this case requires the most forceful application of the lenity doctrine. Courts apply lenity even in the context of statutes that, at least facially, appear more regulatory than penal; for example, courts will apply lenity to a statute that regulates the use of proper machine safeguards if it subjects violators to fines or the loss of use of a machine. See *Krugh* v. *Miehle Co.*, 503 F.2d 121, 125 (6th Cir. 1974). Likewise, because the construction of § 3624(b) determines whether a person is deprived of his or her liberty, the statute is penal. Cf. *Mourning* v. *Family Publ'ns Serv., Inc.*, 411 U.S. 356, 376 (1973) (holding that a law subjecting defendants to "modest" fines does not require the court to "construe [the statute] as narrowly as a criminal statute providing graver penalties, such as prison terms").

Accordingly, if the Court finds that § 3624(b) is ambiguous, the Court must "apply the rule of lenity

and resolve the ambiguity in [the defendant's] favor." *Granderson*, 511 U.S. at 54 (adopting interpretation of statutory minimum sentence that was more favorable to defendant because the "text, structure, and history fail to establish that the Government's position is unambiguously correct").

B. The Rule of Lenity Requires Resolving Ambiguity in Favor of the Defendant.

The rule of lenity is one of the oldest tools of construction in existence, "perhaps not much less old than construction itself," *United States* v. *Wiltberger*, 18 U.S. 76, 95 (1820) (Marshall, J.), and continues to apply as a "venerable" canon. *R.L.C.*, 503 U.S. at 305 (plurality op.); *United States* v. *Santos*, 128 S. Ct. 2020, 2025 (2008) (plurality op.). It requires that "before a man can be punished, his case must be plainly and unmistakably within the statute," *United States* v. *Lacher*, 134 U.S. 624, 628 (1890), such that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity'." *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)). Thus, "[w]here the law may be so construed as to give a penalty, and also, and as well, so as to withhold the penalty, it should be given the latter construction." *Black's Handbook on the Construction and Interpretation of the Laws* 455 (2d ed. 1911).

As this Court has long explained, the rule rests upon two foundations. First, it "is founded on the tenderness of the law for the rights of individuals," *Wiltberger*, 18 U.S. at 95, and "vindicates the fundamental principle that no citizen should be . . . subjected to punishment that is not clearly prescribed." *Santos*, 128 S. Ct. at 2025. Accordingly, "'a fair warning should be given to the world in language that the common world will understand, of

what the law intends to do if a certain line is passed.'" *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (2005) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)). See also *United States* v. *Aguilar*, 515 U.S. 593, 600 (1995).

Second, the rule rests on "the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Wiltberger*, 18 U.S. at 95. Quite simply, "within our federal constitutional framework the legislative power, including the power to define criminal offenses and to prescribe the punishments to be imposed upon those found guilty of them, resides wholly with the Congress." *Whalen* v. *United States*, 445 U.S. 684, 689 (1980). Penal statutes defining the scope of punishment require clear legislative action "because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community." *United States* v. *Bass*, 404 U.S. 336, 348 (1971). "This policy embodies 'the instinctive distaste against men languishing in prison unless the *lawmaker* has clearly said they should.'" *Id.* (quoting H. Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, *in Benchmarks* 196, 209 (1967)) (emphasis added). Indeed, it has been noted that, compared with that of the executive and the judiciary, "[t]he nature of [the legislature's] public trust implies a personal influence among the people, and that they are more immediately the confidential guardians of the rights and liberties of the people." *The Federalist No. 49*, at 315 (James Madison) (Penguin Books 1987).

Of course, because the rule of lenity applies "when choice has to be made between two readings" of a statute, *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952), ambiguity is a

threshold question. "Where there is no ambiguity in the words, there is no room for construction," *Wiltberger*, 18 U.S. at 95–96, and it would indeed be improper to rely on lenity to create an ambiguity where none otherwise exists. See *id.* at 95. Where, however, the words are susceptible to more than one possible interpretation, the rule of lenity definitively resolves the matter. See *Whalen*, 445 U.S. at 694 ("To the extent that the Government's argument persuades us that the matter is not entirely free of doubt, the doubt *must* be resolved in favor of lenity.") (emphasis added); *Bifulco*, 447 U.S. at 400 (same); *R.L.C.*, 503 U.S. at 307–08 (Scalia, J., concurring) ("The rule of lenity, in my view, prescribes the result when a criminal statute is ambiguous: The more lenient interpretation must prevail.").

Accordingly, even if the text of § 3624(b) were ambiguous, traditional and time-honored rules of construction would require this Court to read the statute in favor of lenity—which here requires granting Petitioners the greater measure of credit toward their sentences.

C. Doctrines of Administrative Deference Are Incompatible With The Rule of Lenity.

Doctrines of administrative deference do not direct a contrary result. To be sure, courts defer to reasonable agency interpretations of the statutes that Congress delegated them authority to administer, *Chevron*, 467 U.S. at 843–44. And, as to agency interpretations formed in the absence of a congressional grant of authority to bind parties with legal force, courts apply a lesser degree of deference under *Skidmore* v. *Swift*, 323 U.S. 134 (1944). See *United States* v. *Mead Corp.*, 533 U.S. 218, 226–27 (2001). But neither of these standards provides a

basis for this Court to defer to a law enforcement agency's interpretation of a statute where that interpretation ignores as fundamental a rule of construction as the lenity canon. When the rule of lenity applies, there can be no ambiguity for deference to resolve; moreover, the rationales that drive deference flatly contradict and must yield to the principles that mandate lenity.

1. By Resolving Statutory Ambiguity, the Rule of Lenity Eliminates Any Need to Consider Agency Interpretations.

Deference to agency interpretations is fundamentally at odds with the rule of lenity because a basic prerequisite to deference is a determination that the statute is ambiguous, and does not "unambiguously require[ ] the court's construction." *Nat'l Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 984–85 (2005). Courts, not agencies, are "the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Chevron*, 467 U.S. at 842–43 & n.9. Accordingly, the judiciary must decide whether the statute reflects Congress's intent on the issue at hand or instead is ambiguous. *Id.* Absent the prerequisite ambiguity, there can be no deference to a contrary agency interpretation.

Yet, when a penal statute is under review, any ambiguity that could open the door to deference is shut by the rule of lenity. In determining whether a statute is ambiguous, courts employ the "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. The rule of lenity is such a "tool[] of statutory construction," *Busic* v. *United States*, 446 U.S. 398, 406–407 (1980), and has been employed as

such for centuries. See *supra* 16. And, because the rule "*constrain*[*s*]" courts "to interpret any ambiguity in the statute in [the defendant's] favor," *Leocal*, 543 U.S. at 11 n.8 (emphasis added), the rule of lenity resolves any ambiguity, leaving no room for deference to a contrary agency interpretation. Indeed, in *Brand X*, this Court specifically identified the rule of lenity as a "rule of construction" that would "requir[e] [the court] to conclude that the statute was unambiguous." 545 U.S. at 985.

Giving the rule of lenity priority over deference is consistent with this Court's cases holding that other substantive canons that resolve statutory ambiguity precede agency deference. For example, in *INS* v. *St. Cyr*, 533 U.S. 289 (2001), an agency had interpreted an otherwise ambiguous statute against an alien contrary both to the "presumption against retroactive application" and the "'longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *Id.* at 320 (quoting *INS* v. *Cardoza & Fonseca*, 480 U.S. 421, 449 (1987)). The Court held that it can "only defer, however, to agency interpretations of statutes that, applying the normal tools of statutory construction, are ambiguous." *Id.* at 320 n.45 (internal quotation marks omitted). Deference, therefore, was inappropriate because the applicable substantive canons resolved any ambiguity as a threshold matter. *Id.*

In *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988), the Court explained that the canon of constitutional avoidance plays a similar role in reviewing an agency interpretation. The Court found that the statute's text and legislative history did not unambiguously compel the agency's view, *id.* at 588,

and acknowledged that the agency's view would normally be entitled to *Chevron* deference. *Id.* at 575. But, because the agency's view raised serious constitutional questions, the Court declined to defer, holding that under the applicable canon of construction, "the Court *will* construe the statute to avoid [constitutional] problems." *Id.* at 575 (emphasis added). See also *Wyeth* v. *Levine*, 129 S. Ct. 1187, 1194–95, 1201 (2009) (applying the presumption against preemption of state police powers and declining to defer to agency interpretation); *Solid Waste Agency* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (canon against "federal encroachment upon a traditional state power" displaces agency deference).

These holdings are perfectly consistent with the notion that *Chevron* deference is justified because "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). First, the very essence of canons of construction like lenity is to direct the court when a statute's text is unclear. They are part and parcel of the search for ambiguity, which itself is a precondition of deference. See *Chevron*, 467 U.S. at 843 n.9. Second, substantive canons, such as those requiring lenity or the avoidance of serious constitutional questions, operate so that courts must interpret ambiguity to mean that Congress intended certain substantive results. See, *e.g.*, *Bass*, 404 U.S. at 348 (courts must not give ambiguous penal statutes the more expansive reading because "legislatures and not courts should define criminal activity"); *St. Cyr*, 533 U.S. at 336 (O'Connor, J., dissenting) ("The doctrine of constitutional doubt is meant to effectuate, not to subvert, congressional

intent, by giving ambiguous provisions a meaning that will . . . conform with Congress's presumed intent not to enact measures of dubious validity.") (emphasis omitted). Because Congress is presumed to have intended for ambiguity to require these results, Congress cannot also be presumed to have intended for the same ambiguity to authorize contrary results through the administrative process. See *Solid Waste Agency*, 531 U.S. at 172–73 (the canon of avoidance trumps *Chevron* deference based on "our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority.")[6]

And, just as the rule of lenity is one of the tools of construction that courts must utilize before they may defer under *Chevron* to agency interpretations, so too must courts utilize this rule prior to deferring under *Skidmore*. Under *Skidmore*, courts are to defer to agency interpretations only to the extent that they have the "power to persuade," 323 U.S. at 140, and an interpretation that misapplies fundamental interpretive canons is hardly persuasive. Accord *Gen. Dynamics Land Sys.* v. *Cline*, 540 U.S. 581, 600 (2004) (an agency interpretation that is "clearly wrong" is entitled to no deference under either *Chevron* or *Skidmore*).

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[6] The rule of lenity shares a particular kinship with the avoidance canon because "a lenient interpretation of a criminal statute obviates inquiries into underlying due process concerns." William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 600 (1992).

2. The Principles Underlying the Rule of Lenity Override the Rationales for Administrative Deference.

Deference would be particularly inappropriate in this case because the foundational principles on which the rule of lenity is built—fair notice and legislative supremacy, see *supra* 16–17—are incompatible with deference to BOP's interpretation.

a. The rule of lenity recognizes that criminal sanctions should be imposed only on someone who received "'a fair warning . . . in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *Arthur Andersen LLP*, 544 U.S. at 703 (quoting *McBoyle*, 283 U.S. at 27). Deference to an agency interpretation, however, is predicated upon a court finding that the statute is ambiguous, a finding that necessarily implies that Congress has not given "fair warning." Here, the requisite "warning" was not supplied by BOP, either. At the time of Petitioners' sentencing—which preceded the promulgation of 28 C.F.R. § 523.20—BOP's interpretation was contained in an internal memorandum that was implemented without any public notice or comment. See Pet'rs. Br. 8–9. Although the notion that statutes "give adequate notice to the citizen is something of a fiction, . . . necessary fiction descends to needless farce" if courts deem BOP's obscure Program Statement to be sufficient notice. See *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring).[7]

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[7] The result should not be any different for a prisoner who was sentenced after BOP's method became codified as a federal regulation. Particularly in light of the legislature's supremacy in defining punishment, even the most robust administrative notice does not obviate the need for courts to apply the lenity

The need for "a fair warning" is particularly acute with respect to calculating GTC because "a prisoner's eligibility for reduced imprisonment" often factors into a defendant's decision to enter a guilty plea. See *Weaver*, 450 U.S. at 32. But strong evidence suggests that many of the people most familiar with § 3624 understand it to provide for more GTC than BOP allows. See Pet'rs. Br. 33–36. If BOP imposes a cap on GTC that is lower than defendants reasonably expect, those defendants will end up being incarcerated for longer than the time for which they thought they had bargained.

b. Deference here also would undermine the fundamental precept that the task of defining punishment rests solely with the legislature. See *supra* 16–17. Penal statutes carry the weight of a community's "moral condemnation," *Bass*, 404 U.S. at 348, and Congress represents the popular will in a way that the judiciary, the executive, and the agencies simply cannot. See *The Federalist No. 49*, *supra* 17. If Congress cannot be presumed to have abdicated this responsibility by allowing the judiciary to define penalties that are not clearly within a statute, neither can it be presumed to have intended to effect a similar abdication through the agencies. Cf. *Solid Waste Agency*, 531 U.S. at 172–73.

Deference to BOP's construction of penal statutes is especially inappropriate because, as a branch of the Department of Justice, BOP is an agent of the prosecutor, the Attorney General. The justifications for deference are never more in conflict with the values underlying lenity than when an agency of the prosecuting authority interprets a law governing the

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canon. But because the notice in this case is particularly deficient, this Court need not go that far in its analysis.

duration of criminal incarceration. For this reason, Justice Department interpretations of criminal statutes traditionally receive skepticism, not deference. See *Santos*, 128 S. Ct. at 2028 (plurality op.) ("We interpret ambiguous criminal statutes in favor of defendants, not prosecutors.").

Indeed, the statutes under which BOP operates provide compelling evidence that Congress never intended for courts to defer to BOP's construction of statutes governing the duration of criminal incarceration. Whereas Congress vested the "control and management" of the federal prisons in the Attorney General,[8] 18 U.S.C. § 4001(b)(1), it specifically reserved that "[n]o citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *Id.* § 4001(a). Likewise, under § 3624 itself, Congress delegated to BOP only the authority to determine *whether* prisoners have qualified for good-time credit,[9] *not* to determine how much credit is allowed under the statute.

Thus, although Congress plainly envisioned deference to the Attorney General in running the

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[8] BOP, "under the direction of the Attorney General," has "charge of the management and regulation" of all federal prisons. 18 U.S.C. § 4042(a)(1).

[9] *See* 18 U.S.C. § 3624(b) (conditioning an award of good-time credit on BOP's determination that the prisoner has "satisfactorily complied" with established expectations). Such a determination, which requires agency expertise in the assessment of prisoner behavior, may be entitled to deference. *See Lopez* v. *Davis*, 531 U.S. 230, 242, 244 (2001) (deferring to BOP rulemaking regarding prisoners' eligibility for early release after participation in substance abuse program, where BOP was delegated broad authority to determine eligibility criteria and imposed stringent criteria based upon its expertise).

day-to-day affairs of prison facilities, it is implausible to think that Congress also intended for the Attorney General—the very authority that advocates sentences before the courts, often at levels higher than ultimately imposed—to *dictate* the interpretation of statutes governing the duration of criminal incarceration. To allow this "would turn the normal construction of criminal statutes upside down, replacing the doctrine of lenity with a doctrine of severity." *Crandon* v. *United States*, 494 U.S. 152, 178 (1990) (Scalia, J., concurring).

This Court's decision in *Reno* v. *Koray*, 515 U.S. 50 (1995), is not to the contrary. At issue in *Koray* was BOP's interpretation of a statute regarding whether a prisoner's time spent in a community treatment center while "released" on bail counted toward his time served. See *id.* at 61, 65. The Court first determined that BOP's construction was prescribed by the statute's text, structure, and history. *Id.* at 59–61. Taken in context, then, the Court's suggestion that BOP's interpretation was "entitled to some deference" meant simply that the interpretation matched the statute's unambiguous meaning. *Id.* at 61 (BOP's understanding was "the most natural and reasonable reading"); see also *id.* at 62 (rejecting prisoner's reading not based on the agency's view, but "in light of the foregoing textual and historical analysis"). Accordingly, the Court declined to apply lenity, not out of deference to BOP's position, but because the "statute [was] not 'ambiguous.'" *Id.* at 64–65 (citation omitted).

c. These principles put the lie to any notion that Congress intended for BOP to resolve statutory ambiguity in opposition to lenity. And indeed, the Ninth Circuit correctly recognized that *Chevron* deference is not available to BOP's interpretation of

§ 3624(b). JA-44–45, JA-46–48. The court, however, then erroneously assumed that it should instead defer under *Skidmore*. JA-48. That is incorrect, for so-called *Skidmore* deference is just as fundamentally inconsistent with the rule of lenity as is *Chevron* deference; in fact, the inconsistency is even greater.

First, while the rule of lenity constitutes a binding mandate on courts, *Skidmore* does not. To the contrary, *Skidmore* affirmed that agency interpretations are "not controlling upon the courts by reason of their authority." 323 U.S. at 140. Rather, *Skidmore* stated only that "courts and litigants *may* properly resort" to agency interpretations "for guidance." *Id.* (emphasis added). Further, *Skidmore* suggests a court should give weight to agency interpretations "only to the extent that those interpretations have the 'power to persuade,'" which is to say, to the extent the court agrees with them. *Christensen* v. *Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140). In stark contrast, when a court finds a penal statute ambiguous, the rule of lenity provides that the ambiguity "*must* be resolved in favor of lenity." *Whalen*, 445 U.S. at 694 (emphasis added).

Second, the reasons why a court may accord weight to an agency view under *Skidmore* are inapposite to most penal statutes. *Skidmore* suggested that the courts may rely on agency interpretations that are based on "'specialized experience and broader investigations and information'" than the court possesses. *Mead*, 533 U.S. at 234 (quoting *Skidmore*, 323 U.S. at 139). Thus, *Skidmore* merely stands for the truism that agency interpretations may "constitute a body of experience and informed judgment." 323 U.S. at 140.

As with most penal statutes, however, interpreting § 3624(b) does not require any "specialized experience." To the contrary, Congress intended § 3624(b) to provide a clear-cut and easily administered formula. See Pet'rs. Br. 31–33. Indeed, the needless complexities associated with BOP's scheme are entirely of BOP's making, and cannot justify a bid for deference.

The rare instance in which this Court has contemplated deferring to an agency construction of a penal statute proves the rule that deference is generally unavailable. In *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), the agency acted pursuant to a clear congressional grant of "latitude" over a complex environmental protection scheme that demanded a high "degree of regulatory expertise." *Id.* at 703–04. In contrast, § 3624(b) grants no agency latitude to interpret what Congress believed to be a straight-forward calculation, nor does interpreting the statute require administrative expertise. Indeed, "sentencing is a field in which the Judicial Branch long has exercised substantive or political judgment," such that the branch of government with the greatest "special knowledge and expertise" may, in fact, be the judiciary itself. *Mistretta* v. *United States*, 488 U.S. 361, 396 (1989).

Finally, even if so-called *Skidmore* deference could coincide with the rule of lenity, such deference should not be accorded to BOP's Program Statement. BOP applied no special expertise in formulating it, has no congressionally-delegated authority to construe § 3624(b), and has conceded that it failed to engage in reasoned deliberation. JA-45, JA-46. Cf. *Gonzales* v. *Oregon*, 546 U.S. 243, 269 (2006) (denying *Skidmore* deference to Attorney General's legal conclusion

where—as here—the Attorney General purported to establish an interpretation beyond his delegated power, "lack[ed] expertise in this area," and failed to engage in "reasoned" decisionmaking).

III. CORRECTLY CALCULATING GTC WILL CONSERVE FEDERAL RESOURCES, EASE PRISON OVERCROWDING, AND PROTECT PRISONERS' LIBERTY INTERESTS.

The difference between these two readings of the statute carries enormous human, social, and financial costs. At stake is a full week per year of additional incarceration; to put it in perspective, "[o]ne day in prison is longer than almost any day you and I have had to endure." Justice Anthony M. Kennedy, Speech at the American Bar Ass'n Annual Meeting (Aug. 9, 2003). And these additional days add up: for instance, in Mr. Barber's case, under BOP's methodology he will serve 186 days—or more than half a year—more than Congress provided. Once the legislature has determined the amount of credit that a prisoner exhibiting good behavior is due, any additional incarceration inappropriately deprives a prisoner of the '"priceless gift"' of liberty. *Id.*; cf. *Glover* v. *United States*, 531 U.S. 198, 203 (2000) ("Authority does not suggest that a minimal amount of additional time in prison cannot constitute prejudice. Quite to the contrary, our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance."). During that time, prisoners being held longer than authorized could miss a child's graduation, a chance to be with an ill parent in her last days, or the opportunity to spend the holidays with a family from which they have long been separated. Indeed, BOP's standard for awarding GTC deprives current prisoners collectively

of 36,000 years of liberty that Congress never intended for them to lose. Pet'rs. Br. 11.

In addition to the costs to individual prisoners and their loved ones, society incurs substantial and unnecessary burdens through this overincarceration. At a time when the federal budget is severely strained, BOP is nonetheless incurring approximately $97 million per year in unnecessary costs due to its incorrect GTC policy; over the course of incarcerating all current prisoners, BOP will pay nearly $1 billion extra from the federal Treasury due to this policy. See *id.*; see also 18 U.S.C. § 4007 (costs of incarcerating federal prisoners "shall be paid out of the Treasury of the United States"). Particularly given the $25,894.50 average cost per year to incarcerate each federal prisoner, Admin. Office of U.S. Courts Press Release, http://www.uscourts.gov/newsroom/2009/costsOf Imprisonment.cfm, and the billions spent annually on the federal prison system, see Bureau of Justice Statistics, Dep't of Justice, http://bjs.ojp.usdoj.gov/ index.cfm?ty=tp&tid=16, "[w]hen it costs so much more to incarcerate a prisoner than to educate a child, we should take special care to ensure that we are not incarcerating too many persons for too long." ABA Justice Kennedy Commission, Reports with Recommendations to the ABA House of Delegates, August 2004, at 3. Moreover, in addition to such direct costs, the government incurs the significant collateral costs of maintaining and caring for the dependents of inmates, as well as lost tax revenues that could be derived from the income that inmates would have earned upon re-integration into the community. *Id.* at 17.

Further, the additional incarceration caused by BOP's policy ultimately increases the headcount in a

prison system that is already badly overcrowded. See Federal Bureau of Prisons: Oversight Hearing Before the Subcomm. on Crime, Terrorism and Homeland Security of the H. Comm. on the Judiciary, 111th Cong. (July 21, 2009) (statement of Harley G. Lappin, Director, BOP), at 2, *available at* http://judiciary.house.gov/hearings/pdf/Lappin080506.pdf (noting that BOP is operating at 37% above its rated capacity). Such overcrowding significantly undermines a wide variety of important penological interests. A BOP study found that a mere one percent increase in a prison's inmate population boosted an institution's annual serious assault rate by 4.09 per 5000 inmates. *Id.* at 3. Further, overcrowding and corresponding BOP understaffing is substantially inhibiting BOP's ability to "provide all inmates with the breadth of programs they need to gain skills and training necessary to prepare them for a successful reentry into the community." *Id.* at 2. This Court has long recognized that "[t]he problems of administering prisons within constitutional standards are indeed complex and intractable, but at their core is a lack of resources allocated to prisons." *Rhodes* v. *Chapman*, 452 U.S. 337, 357 (1981) (internal quotation marks and citations omitted). Reducing overcrowding by giving effect to Congress's intended 85% GTC rule would be a significant step towards ameliorating these problems.

As BOP has repeatedly indicated, it does not believe it has the authority to apply GTC the way Congress prescribed. This Court should correct the Bureau's misunderstanding and enable it to fulfill its commitment to use "all of the tools at its disposal to ensure that inmates earn as much good time as is allowed under the law." Lappin at 4. Doing so would immediately improve prison conditions, conserve

precious federal funds, and protect prisoners' liberty interests. See *Zadvydas*, 533 U.S. at 690.

CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit should be reversed.

Respectfully submitted,

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APPENDIX

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Miriam Conrad, Federal Public Defender, Districts of Massachusetts, New Hampshire and Rhode Island

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Michael L. Desautels, Federal Public Defender, District of Vermont

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Richard Coughlin, Federal Public Defender, District of New Jersey

Lisa B. Freeland, Federal Public Defender, Western District of Pennsylvania

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Michael S. Nachmanoff, Federal Public Defender, Eastern District of Virginia

Mary Lou Newberger, Federal Public Defender, Southern District of West Virginia

Claire Rauscher, Executive Director, Federal Defenders of Western North Carolina, Inc., Western District of North Carolina

Larry W. Shelton, Federal Public Defender, Western District of Virginia

Parks Nolan Small, Federal Public Defender, District of South Carolina

James Wyda, Federal Public Defender, District of Maryland

FIFTH CIRCUIT:

Richard A. Anderson, Federal Public Defender, Northern District of Texas

Henry J. Bemporad, Federal Public Defender, Western District of Texas

G. Patrick Black, Federal Public Defender, Eastern District of Texas

Rebecca L. Hudsmith, Federal Public Defender, Western District of Louisiana

Samuel Dennis Joiner, Federal Public Defender, Southern District of Mississippi

Marjorie A. Meyers, Federal Public Defender, Southern District of Texas

Virginia Schlueter, Federal Public Defender, Eastern District of Louisiana

SIXTH CIRCUIT:

Elizabeth Ford, Executive Director, Federal Defender Services of Eastern Tennessee, Inc., Eastern District of Tennessee

Ray Kent, Federal Public Defender, Western District of Michigan

Henry A. Martin, Federal Public Defender, Middle District of Tennessee

S. S. Nolder, Federal Public Defender, Southern District of Ohio

Stephen B. Shankman, Federal Public Defender, Western District of Tennessee

Miriam L. Siefer, Chief Federal Defender, Legal Aid & Defender Assoc. of Detroit, Eastern District of Michigan

Dennis G. Terez, Federal Public Defender, Northern District of Ohio

Scott Wendelsdorf, Executive Director, Western Kentucky Federal Community Defender, Inc., Western District of Kentucky

SEVENTH CIRCUIT:

Carol Brook, Executive Director, Federal Defender Program, Northern District of Illinois

Jerome T. Flynn, Executive Director, Federal Community Defenders, Inc., Northern District of Indiana

Phillip J. Kavanaugh, Federal Public Defender, Southern District of Illinois

William E. Marsh, Executive Director, Indiana Federal Community Defender, Inc., Southern District of Indiana

Richard H. Parsons, Federal Public Defender, Central District of Illinois

Daniel Stiller, Federal Defender, Eastern & Western Districts of Wisconsin

EIGHTH CIRCUIT:

Raymond C. Conrad, Jr., Federal Public Defender, Western District of Missouri

Nicholas T. Drees, Federal Public Defender, Southern District of Iowa

Jenniffer Morris Horan, Federal Public Defender, Eastern and Western Districts of Arkansas

Lee Lawless, Federal Public Defender, Eastern District of Missouri

Katherian D. Roe, Federal Public Defender, District of Minnesota

David Stickman, Federal Public Defender, District of Nebraska

Jana M. Miner, Acting Federal Public Defender, Districts of North Dakota and South Dakota

NINTH CIRCUIT:

Daniel J. Broderick, Federal Public Defender, Eastern District of California

Reuben Cahn, Executive Director, Federal Defenders of San Diego, Inc., Southern District of California

Fred Richard Curtner, Federal Public Defender, District of Alaska

Frances A. Forsman, Federal Public Defender, District of Nevada

Tony Gallagher, Executive Director, Federal Defenders of Montana, District of Montana

John T. Gorman, Federal Public Defender, District of Guam

Thomas W. Hillier II, Federal Public Defender, Western District of Washington

Sean Kennedy, Federal Public Defender, Central District of California

Roger Peven, Executive Director, Federal Defenders of Eastern Washington, Eastern District of Washington

Barry J. Portman, Federal Public Defender, Northern District of California

Samuel Richard Rubin, Executive Director, Federal Defender Services of Idaho, Inc., District of Idaho

Jon M. Sands, Federal Public Defender, District of Arizona

Peter C. Wolff, Jr., Federal Public Defender, District of Hawaii

TENTH CIRCUIT:

Cyd Gilman, Federal Public Defender, District of Kansas

Steven B. Killpack, Federal Public Defender, District of Utah

Stephen P. McCue, Federal Public Defender, District of New Mexico

Raymond P. Moore, Federal Public Defender, Districts of Colorado and Wyoming

Julia L. O'Connell, Federal Public Defender, Northern and Eastern Districts of Oklahoma

Susan M. Otto, Federal Public Defender, Western District of Oklahoma

ELEVENTH CIRCUIT:

Donna Lee Elm, Federal Public Defender, Middle District of Florida

Christine Freeman, Executive Director, Middle District of Alabama Federal Defender Program, Inc., Middle District of Alabama

Christopher Jarrard, Acting Community Defender, Federal Defenders of the Middle District of Georgia, Inc., Middle District of Georgia

Stephanie Kearns, Executive Director, Georgia Federal Defender Program, Inc., Northern District of Georgia

Randolph P. Murrell, Federal Public Defender, Northern District of Florida

Carlos Williams, Executive Director, Southern Federal Defender Program, Inc., Southern District of Alabama

Kathleen Williams, Federal Public Defender, Southern District of Florida

DISTRICT OF COLUMBIA CIRCUIT:

A. J. Kramer, Federal Public Defender, District of District of Columbia