No. 99-7504

In the Supreme Court of the United States

CHRISTOPHER A. LOPEZ, PETITIONER

v.

RANDY J. DAVIS, WARDEN, ET AL.

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

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Whether the Bureau of Prisons may exercise its discretion under 18 U.S.C. 3621(e)(2)(B) to deny eligibility for early release from custody, based on the successful completion of a substance abuse treatment program, to the category of prisoners whose current offense is a felony that "involved the carrying, possession, or use of a firearm." 28 C.F.R. 550.58(a)(1)(vi)(B).

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 23-28) is reported at 186 F.3d 1092. The opinion of the district court (J.A. 8-20) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1999. A petition for rehearing was denied on September 16, 1999 (J.A. 29). The petition for a writ of certiorari was filed on December 15, 1999, and was granted on April 24, 2000. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 3621(e) of Title 18 of the United States Code provides in relevant part:

> (e) SUBSTANCE ABUSE TREATMENT.—
>
> (1) PHASE-IN.—In order to carry out the requirement of the last sentence of subsection (b) of this section, that every prisoner with a substance abuse problem have the opportunity to participate in appropriate substance abuse treatment, the Bureau of Prisons shall, subject to the availability of appropriations, provide residential substance abuse treatment (and make arrangements for appropriate aftercare)—
>
> (A) for not less than 50 percent of eligible prisoners by the end of fiscal year 1995, with priority for such treatment accorded based on an eligible prisoner's proximity to release date;
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> (B) for not less than 75 percent of eligible prisoners by the end of fiscal year 1996, with priority for such treatment accorded based on an eligible prisoner's proximity to release date; and
>
> (C) for all eligible prisoners by the end of fiscal year 1997 and thereafter, with priority for such treatment accorded based on an eligible prisoner's proximity to release date.

(2) INCENTIVE FOR PRISONERS' SUCCESSFUL COMPLETION OF TREATMENT PROGRAM.—

(A) GENERALLY—Any prisoner who, in the judgment of the Director of the Bureau of Prisons, has successfully completed a program of residential substance abuse treatment provided under paragraph (1) of this subsection, shall remain in the custody of the Bureau under such conditions as the Bureau deems appropriate. If the conditions of confinement are different from those the prisoner would have experienced absent the successful completion of the treatment, the Bureau shall periodically test the prisoner for substance abuse and discontinue such conditions on determining that substance abuse has recurred.

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

2. Section 550.58 of Title 28 of the Code of Federal Regulations provides in relevant part:

Consideration for early release.

* * * * *

(a) *Additional early release criteria.* (1) As an exercise of the discretion vested in the Director of

> the Federal Bureau of Prisons, the following categories of inmates are not eligible for early release:
>
> * * * * *
>
> (vi) Inmates whose current offense is a felony:
>
> * * * * *
>
> (B) That involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives (including any explosive material or explosive device) * * * .

3. The Bureau of Prisons' Program Statement 5162.04 (Oct. 9, 1997) is reproduced in the appendix to petitioner's brief at Pet. Br. App. 29-54.

STATEMENT

Section 3621(e)(2)(B) of Title 18 of the United States Code provides that the Bureau of Prisons (BOP or Bureau) may reduce by up to one year the prison term of a prisoner convicted of a nonviolent offense who successfully completes a substance abuse treatment program. Petitioner was denied eligibility for such early release by the application of a BOP regulation, 28 C.F.R. 550.58(a)(1)(vi)(B), and BOP Program Statement 5162.04 (Oct. 9, 1997), which implement Section 3621(e)(2)(B). The basis for that denial was that his current offense is a felony that involved the carrying, possession, or use of a firearm. The United States District Court for the District of South Dakota held that the Bureau's interpretation of Section 3621(e)(2)(B) is inconsistent with the language of the statute, and it ordered the Bureau to reconsider petitioner for early release in accordance with the court's

opinion. J.A. 8-20. The court of appeals reversed and upheld the Bureau's regulation and Program Statement 5162.04 as an appropriate exercise of discretion under Section 3621(e)(2)(B). J.A. 23-28.

1. a. In 1990, Congress amended Section 3621 of Title 18 of the United States Code to require that the Bureau "make available appropriate substance abuse treatment for each prisoner the Bureau determines has a treatable condition of substance addiction or abuse." 18 U.S.C. 3621(b). In 1994, Congress created an incentive for federal prisoners to participate in BOP's residential substance abuse treatment program.[1] Congress amended Section 3621 of Title 18 of the United States Code to provide, *inter alia*, that BOP may reduce a prisoner's sentence by up to one year if the prisoner is convicted of a nonviolent offense and successfully completes BOP's residential substance abuse treatment program. See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Tit. III,

[1] BOP's residential substance abuse treatment "is a course of individual and group activities provided by a team of drug abuse treatment specialists and the drug abuse treatment coordinator in a treatment unit set apart from the general prison population, lasting a minimum of 500 hours over a six to twelve-month period. Inmates enrolled in a residential drug abuse treatment program shall be required to complete subsequent transitional services programming in a community-based program and/or in a Bureau institution." 28 C.F.R. 550.56.

Subtit. T, § 32001, 108 Stat. 1896-1898 (1994 Crime Control Act). Section 3621(e) provides, in relevant part:

> SUBSTANCE ABUSE TREATMENT.—
>
> * * * * *
>
> (2) INCENTIVE FOR PRISONERS' SUCCESSFUL COMPLETION OF TREATMENT PROGRAM.—
>
> * * * * *
>
> (B) PERIOD OF CUSTODY.—The period a prisoner convicted of a nonviolent offense remains in custody after successfully completing a treatment program may be reduced by the Bureau of Prisons, but such reduction may not be more than one year from the term the prisoner must otherwise serve.

18 U.S.C. 3621(e).

b. In May 1995, the Bureau amended its rule on drug abuse treatment programs to implement Section 3621(e)(2)(B). The amended rule allowed consideration of early release of prisoners who met the statutory prerequisites of successful completion of a treatment program and conviction of a nonviolent offense. 60 Fed. Reg. 27,692-27,695. The rule provided that a prisoner who completed a residential substance abuse treatment program may be eligible for early release unless, *inter alia*, the prisoner's "current offense is determined to be a crime of violence as defined in 18 U.S.C. 924(c)(3)." 28 C.F.R. 550.58 (1995).[2] Section 924(c)(3) defined "crime

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[2] The regulation also excluded from early release inmates who were INS detainees, pretrial inmates, contractual boarders (for

of violence" to mean a felony that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another," or that "by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. 924(c)(3).

On July 24, 1995, the Bureau issued Program Statement 5162.02,[3] to implement provisions of the 1994 Crime Control Act relating to the notification of release of prisoners, credit of "[g]ood [t]ime," and substance abuse treatment programs, all of which made reference to "nonviolent offense" or "crime of violence." Pet. Br. App. 7. The program statement defined "crime of violence" as it was used in those statutory provisions and provided a framework to assist BOP employees in determining which criminal offenses fell within the definitions. *Ibid.* The program statement included as a crime of violence a drug trafficking conviction under 21 U.S.C. 841 (except for 841(e)) or 846, if the inmate received a two-level increase in his offense level under Sentencing Guidelines §§ 2D1.1, 2D1.11, for possession of a dangerous weapon during commission of the offense. Pet. Br. App. 17-18, 20, 23.

The courts of appeals reached differing conclusions on the validity of the Bureau's 1995 regulation and Program Statement 5162.02. Two courts of appeals found the Bureau's definition of a crime of violence to

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example, D.C., state, or military inmates), inmates who were eligible for parole, and inmates who had a prior federal or state conviction for homicide, forcible rape, robbery, or aggravated assault. 28 C.F.R. 550.58 (1995).

[3] Program Statement 5162.02 (July 24, 1995) is reproduced in the appendix to petitioner's brief at Pet. Br. App. 7-28.

be reasonable. See *Pelissero* v. *Thompson*, 170 F.3d 442, 445-446 (4th Cir. 1999) (BOP's definition of crime of violence to include drug offenses that involved possession of a firearm is permissible and reasonable interpretation of early release statute, although definition may not harmonize with judicial interpretations of "crime of violence" under Section 924(c)(3)); *Venegas* v. *Henman*, 126 F.3d 760, 763 (5th Cir. 1997) (BOP reasonably interpreted Section 3621(e)(2)(B) to allow it to determine what offenses are violent for purposes of that statute), cert. denied, 523 U.S. 1108 (1998). Other courts, however, found that the Bureau's definition conflicted with the statutory text. See *Fristoe* v. *Thompson*, 144 F.3d 627, 631 (10th Cir. 1998) (BOP's interpretation of "nonviolent offense" violated the plain language of Section 3621(e)(2)(B) which "does not permit resort to sentencing factors or sentencing enhancements attached to the nonviolent offense"); *Byrd* v. *Hasty*, 142 F.3d 1395, 1398 (11th Cir. 1998) ("BOP exceeded its statutory authority when it categorically excluded from eligibility those inmates convicted of a nonviolent offense who received a sentencing enhancement for possession of a firearm."); *Bush* v. *Pitzer*, 133 F.3d 455, 456-457 (7th Cir. 1997) (BOP's Program Statement 5162.02 adopted "overbroad definition of a violent offense," but BOP's current regulation rationally denies early release to prisoners whose underlying conduct is violent or prone to violence); *Martin* v. *Gerlinski*, 133 F.3d 1076, 1079 (8th Cir. 1998) (BOP's "inclusion of sentencing enhancement factors in the determination of what is a 'nonviolent offense'" is in conflict with the plain language of the statute which uses the term "convicted"); *Roussos* v. *Menifee*, 122 F.3d 159, 161-164 (3d Cir. 1997) (BOP interpretation of "nonviolent offense" is in conflict with statute and regulation); *Downey* v. *Crabtree*, 100 F.3d

662, 668 (9th Cir. 1996) (rejecting BOP's interpretation because statute "addresses the act of convicting, not sentencing or sentence-enhancement factors").

c. Effective October 9, 1997,[4] the Bureau again revised its rule on drug abuse treatment programs "to demonstrate more clearly the discretion granted to the Director of the Bureau of Prisons under 18 U.S.C. 3621(e) by listing the criteria that would preclude an inmate from receiving a sentence reduction as determined by the Director of the Bureau of Prisons." 62 Fed. Reg. 53,690.[5] In the introduction to the rule, the Bureau Director noted that, because of differing holdings in the federal courts on the effect of BOP's reliance on 18 U.S.C. 924(c)(3) to define the term "crime of violence," some crimes were not clearly covered by BOP's definition. 62 Fed. Reg. at 53,690. The rule "avoid[ed] this complication by using the discretion allotted to the Director of the Bureau of Prisons in granting a sentence reduction to exclude inmates whose current offense is a felony" that, *inter alia*, "involved the carrying, possession, or use of a firearm." *Ibid.*

As revised, BOP's current regulation provides that an inmate may be eligible for early release if the inmate was sentenced for a nonviolent offense, is determined to have a substance abuse problem, and successfully com-

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[4] The rule was filed for public inspection at the Federal Register on October 9, 1997, see 62 Fed. Reg. at 53,691, and was published on October 15, 1997.

[5] On May 17, 1996, BOP had amended its rule on drug abuse treatment programs to include a transitional treatment phase. 61 Fed. Reg. 25,121-25,122. That rule, the May 1995 rule, and the October 1997 rule were all issued as interim rules with requests for comments, as BOP sought to avoid a gap in its rules for consideration of early release for qualified inmates. See 62 Fed. Reg. at 53,690.

pletes a residential substance abuse treatment program. 28 C.F.R. 550.58. The regulation further provides, however, that "[a]s an exercise of the discretion vested in the Director of [BOP]," certain categories of inmates are not eligible for early release. 28 C.F.R. 550.58(a). Those categories are not identified by incorporating the definition of a crime of violence set forth in 18 U.S.C. 924(c)(3) (1994 & Supp. IV 1998). Rather, the rule enumerates the categories. The categories include inmates whose current offense is a felony that involved carrying, possession, or use of a firearm (or other dangerous weapon or explosive), as well as inmates who committed a felony that falls into one of three other categories—two of which correspond to the provisions in 18 U.S.C. 924(c)(3) (1994 & Supp. IV 1998), and one that applies to inmates whose offense, "by its nature or conduct involves sexual abuse offenses committed upon children." 28 C.F.R. 550.58(a)(vi)(A)-(D). The regulation also continues to exclude from eligibility for early release inmates in the other categories defined in the 1995 regulation. See note 2, *supra*.

On October 9, 1997, the Bureau promulgated Program Statement 5162.04 (Pet. Br. App. 29-54) to assist its employees in implementing various policies and programs. The statement lists in Section 6 offenses that the Bureau categorizes as "crimes of violence as that term is used in various statutes," and lists in Section 7 "offenses that in the Director's discretion shall preclude an inmate's receiving certain Bureau program benefits." *Id.* at 29. The Bureau explained that Section 7 "lists offenses that are not categorized as crimes of violence, but would nevertheless preclude an inmate's receiving certain Bureau program benefits at the Director's discretion." *Id.* at 30. It further explained that some BOP policies or programs, such as the one

governing inmate discipline and special housing units, require a determination that an inmate committed a crime of violence, but others, such as the one governing early release under 18 U.S.C. 3621(e)(2)(B), also allow denial of the benefit in the discretion of the BOP Director. Pet. Br. App. 30-31. The introductory portion of Section 7 of Program Statement 5162.04 provides that,

> [a]s an exercise of the discretion vested in the Director, an inmate serving a sentence for an offense that falls under the provisions described below shall be precluded from receiving certain [BOP] program benefits.
>
> Inmates whose current offense is a felony that:
>
> * * * * *
>
> involved the carrying, possession, or use of a firearm or other dangerous weapon or explosives * * *.

Id. at 40-41.

Subsection 7(b) further specifies that certain offenses may or may not preclude benefits in the Director's discretion, depending on whether the offense involved certain characteristics that reflect that the offense was committed with force. Pet. Br. App. 44. Program Statement 5162.04 indicates that the danger of violence is increased "when drug traffickers possess weapons" during the commission of a drug felony in violation of 21 U.S.C. 841(a). Pet. Br. App. 44. Thus, under Section 7(b) of Program Statement 5162.04, the BOP Director declines, as a matter of discretion, to grant early release to an inmate who was convicted under 21 U.S.C. 841 (except subsection (e)) and 846 (1994 & Supp. IV 1998), if he received a two-level increase in his offense

level under Sentencing Guidelines § 2D1.1 for carrying, possession or use of a firearm. Pet. Br. App. 44, 48. See also Program Statement 5330.10, CN-03, ch. 6, at 1-2 (Oct. 9, 1997) (implementing early release incentive in drug abuse treatment program in accordance with 28 C.F.R. 550.58 as amended and Program Statement 5162.04).

2. On February 21, 1997, petitioner was convicted in the United States District Court for the Southern District of Iowa of possession of methamphetamine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 72 months' imprisonment. That sentence was based in part on a two-level enhancement of petitioner's offense level under Sentencing Guidelines § 2D1.1(b)(1) because petitioner possessed a firearm in connection with his offense. Presentence Report 4, ¶ 7; *id.* at 6, ¶ 17; J.A. 9.

We have been informed that, while serving his term of imprisonment, petitioner obtained a place on a waiting list to participate in a BOP residential drug abuse treatment program. On December 21, 1998, petitioner was notified that he qualified for participation in that program, but that it appeared that he was not provisionally eligible for early release upon completion of the program because his current offense is one that the BOP Director, in her discretion, has identified as an offense that excludes him from early release. J.A. 5-7. The currently scheduled date for petitioner's release from prison, taking into account good conduct time, is June 2, 2002. Pet. 3.

3. Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District Court for the District of South Dakota, challenging the provisional denial of his early release. J.A. 8. On

January 6, 1999, the district court granted the petition for habeas relief. J.A. 8-20.

The district court held that the Bureau "may not, in the first instance, exclude those convicted of nonviolent offenses from early release consideration." J.A. 17. The court reasoned that the Bureau's interpretation of 18 U.S.C. 3621(e)(2)(B), as reflected in its current regulation, 28 C.F.R. 550.58, and Program Statement 5162.04, is inconsistent with the statutory language because it allows the Bureau "to rely upon factors other than whether the crime of conviction was nonviolent in making the initial determination as to whether a prisoner is eligible to be considered for early release under section 3621(e)(2)(B)." J.A. 18.

The district court recognized that Section 3621(e)(2)(B) allows the Bureau to exercise discretion to determine who should be granted early release, but concluded that the Bureau cannot exercise its discretion to deny "recognition of eligibility" to inmates who are eligible for consideration under the statute. J.A. 19. The court declared that "[t]he exercise of discretion requires a careful consideration of each individual case." *Ibid.* It concluded that the categorical denial of early release to "all cases within one general group without individual consideration" was not an exercise of discretion. *Ibid.* The court ordered BOP to reconsider petitioner for early release under Section 3621(e)(2)(B) in accordance with its opinion. *Ibid.*

4. The court of appeals reversed. J.A. 23-28.[6] The court emphasized that Section 3621(e)(2)(B) "vests broad discretion in the BOP to determine which indi-

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[6] The court of appeals consolidated cases brought by ten federal prisoners that involved the same early-release issue. J.A. 23-24.

viduals, among the group of statutorily eligible inmates convicted of nonviolent offenses, are appropriate candidates for early release." J.A. 25. The court observed that the statutory language is discretionary and does not mandate that BOP grant early release to any individual or group of prisoners. J.A. 26. Moreover, the court concluded that Section 3621(e)(2)(B) does not "mandate that the BOP exercise its discretion by making individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses." J.A. 26. It noted that, "[i]n fact, Congress expected the BOP to make early-release determinations 'based on criteria to be established and uniformly applied.'" *Ibid.* (citing H.R. Rep. No. 320, 103d Cong., 1st Sess. 6 (1993)).

The court of appeals further reasoned that, to the extent that Congress left a gap in the statute for BOP to fill, deference is owed BOP's interpretation under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-845, 866 (1984), if the interpretation constitutes a permissible construction of the statute. J.A. 26. The court observed that BOP had exercised discretion to exclude from eligibility for early release certain categories of prisoners convicted of nonviolent offenses because "their underlying conduct indicates that they pose a serious risk to public safety." J.A. 26-27. That decision, the court concluded, "represent[ed] a manifestly permissible construction of the statute and an appropriate exercise of the BOP's discretion." J.A. 26-27.

The court of appeals rejected the contention that BOP's current regulation and Program Statement 5162.04 are contrary to its earlier decision in *Martin*, 133 F.3d at 1079-1081, which invalidated BOP's 1995 regulation and Program Statement 5162.02. The court

explained that, in *Martin*, it addressed only BOP's attempt to interpret the statutory term "nonviolent offense." The *Martin* court did not address whether "BOP may, as an exercise of its discretion, *see* 28 C.F.R. § 550.58(a)(1), look to sentencing factors in deciding which individuals among statutorily eligible inmates are appropriate candidates for early release." J.A. 27. Facing that issue, the court of appeals held that such an exercise of discretion is permissible. J.A. 27.

SUMMARY OF ARGUMENT

As an incentive to encourage prisoners with a substance abuse problem to participate in drug treatment programs while in prison, Congress provided a limited opportunity for the Bureau of Prisons to reduce an inmate's term of imprisonment under 18 U.S.C. 3621(e)(2)(B). Congress also vested the Bureau with broad discretion to determine which of the prisoners who meet the statutory prerequisites of Section 3621(e)(2)(B) (serving a sentence for a nonviolent offense and completion of a substance abuse program) should be granted early release. The statutory language is clear that a grant of early release is not mandatory for a prisoner who meets the statutory prerequisites. It provides that the prison term of a prisoner convicted of a nonviolent offense who successfully completes a drug treatment program "may be reduced by the Bureau of Prisons," by up to one year. 18 U.S.C. 3621(e)(2)(B). The structure and history of the statute confirm the discretionary nature of the authority accorded the Bureau to grant early release.

The Bureau validly exercised its discretion in a categorical manner through promulgation of a regulation, 28 C.F.R. 550.58(a)(1)(vi)(B), and Program Statement 5162.04. Under those provisions, BOP denies early

release to prisoners, including petitioner, whose current offense is a felony that involved the carrying, possession, or use of a firearm. That exercise of discretion does not contradict the statute. Congress limited early release to prisoners convicted of a nonviolent offense, but Congress did not intend that all prisoners convicted of a nonviolent offense must be found eligible for the incentive. Rather, Congress vested the Bureau with discretion to grant or deny early release to prisoners convicted of a nonviolent offense. BOP validly exercised discretion to deny early release to certain groups of prisoners on a categorical basis. That action is consistent with the statutory text and legislative purpose, as well as with well-established administrative law principles. See, *e.g.*, *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612 (1991); *INS* v. *Yang*, 519 U.S. 26 (1996). Moreover, the categorical denial of early release to the group involved here—prisoners whose felony conviction involved the carrying, possession, or use of firearm—constitutes a sound exercise of BOP's discretion, because of the increased potential of danger to public safety that such prisoners exhibit.

ARGUMENT

THE DIRECTOR OF THE BUREAU OF PRISONS DID NOT ABUSE HER DISCRETION IN CATEGORICALLY DENYING EARLY RELEASE UNDER 18 U.S.C. 3621(e)(2)(B) TO PRISONERS, INCLUDING PETITIONER, WHOSE CURRENT OFFENSE IS A FELONY THAT INVOLVED THE CARRYING, POSSESSION, OR USE OF A FIREARM

A. Section 3621(e)(2)(B) Commits To The Discretion Of The Bureau Of Prisons The Determination Of Which Prisoners Who Satisfy The Statutory Prerequisites For Early Release Are Granted Such Release

1. Section 3621(e)(2)(B) states that the period a prisoner convicted of a nonviolent offense remains in custody after his successful completion of a BOP substance abuse treatment program "may be reduced by the Bureau of Prisons" by up to one year. By using the term "may," Congress placed the ultimate decision whether to grant a prisoner early release in the discretion of the Bureau. "The word 'may,' when used in a statute, usually implies some degree of discretion." *United States* v. *Rodgers*, 461 U.S. 677, 706 (1983); *Cortez Byrd Chips, Inc.* v. *Harbert Constr. Co.*, 120 S. Ct. 1331, 1336 (2000) (citing *Rodgers*). Although that "common-sense principle of statutory construction" can be "defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute," *Rodgers*, 461 U.S. at 706, that is not the case here. The structure, purpose, and history of Section 3621(e)(2)(B) all compel a reading of the statutory text that is consistent with the usual meaning of "may."

The text of Section 3621(e)(2)(B) places two conditions on the Bureau's authority to grant early release: (1) the prisoner must be serving a sentence for a nonviolent offense, and (2) he must successfully complete a substance abuse treatment program. Section 3621(e)(2)(B) does not mandate that early release be granted to all prisoners who meet the statutory prerequisites. Nor does it place restrictions on the factors that may be considered by the Bureau in exercising its discretion whether to grant early release to prisoners who satisfy the statutory prerequisites.

The discretionary nature of the authority accorded the Bureau under Section 3621(e)(2)(B) is evident when contrasted to the grant of authority under Section 3621(e)(1). Section 3621(e)(1) governs the scope of BOP's responsibility to provide a residential substance abuse treatment program to prisoners. That section states that BOP "shall, subject to the availability of appropriations, provide" a program to "all eligible prisoners." 18 U.S.C. 3621(e)(1). By using the term "shall," Congress imposed a mandatory obligation on BOP under Section 3621(e)(1). If Congress had intended to impose a similar mandate on BOP under Section 3621(e)(2)(B), to require that early release be granted to all persons who committed nonviolent offenses, Congress would have used the term "shall" in Section 3621(e)(2)(B) as well. Congress's decision to employ the two different terms in neighboring statutory provisions reflects a difference in the authority it thereby granted in the two instances. That interpretation accords with "the normal inference" that is drawn when the same statute uses both "may" and "shall"—"that each is used in its usual sense—the one act being permissive, the other mandatory." *Anderson* v. *Yungkau*, 329 U.S. 482, 485 (1947); *United States ex*

rel. Siegel v. *Thoman*, 156 U.S. 353, 360 (1895) (use of "shall" in one provision of a statute and "may" in another "indicat[es] command in the one and permission in the other").

Moreover, by using the term "eligible prisoners" in Section 3621(e)(1), a term it expressly defined in 18 U.S.C. 3621(e)(5)(B), Congress evidenced an intent to exert greater control over the scope of BOP's obligation under Section 3621(e)(1) than under Section 3621(e)(2)(B), where it specified only two statutory prerequisites, leaving to BOP's discretion the actual decision whether to grant early release. Congress's definition of "eligible prisoner" cannot support petitioner's argument that Congress intended all prisoners who meet Section 3621(e)(2)(B)'s requirements to be "eligible for a sentence reduction" (Pet. Br. 18-19), because the phrase "eligible prisoner" is nowhere used in Section 3621(e)(2)(B).[7]

Section 3621(e)(2)(A) further confirms that Congress granted the Bureau broad discretionary authority under Section 3621(e)(2)(B). Section 3621(e)(2)(A) provides that, "[g]enerally," any prisoner who, "in the judgment of the Director of the Bureau of Prisons," successfully completes a residential substance abuse treatment program "shall remain in the custody of the

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[7] In addition, the definition of "eligible prisoner" in Section 3621(e)(5)(B) is clearly related only to whether substance abuse treatment should be offered, not to whether early release is warranted. That section states:

> (B) the term "eligible prisoner" means a prisoner who is—
>
> (i) determined by the Bureau of Prisons to have a substance abuse problem; and
>
> (ii) willing to participate in a residential substance abuse treatment program * * *.

Bureau under such conditions as the Bureau deems appropriate." When Section 3621(e)(2)(B) (the very next paragraph) is read against that backdrop, it is apparent that early release is not mandatory for prisoners who meet the statutory prerequisites. Rather, it is left to the discretion of the Bureau. That is consistent with the grant to the Bureau of the broad authority to judge when a prisoner successfully completes a substance abuse treatment program, and to determine the conditions under which a prisoner who completes a treatment program should thereafter be held in custody under Section 3621(e)(2)(A). Congress's grant to the Bureau of such discretion also accords with the broad discretionary powers entrusted it for the overall supervision of federal prisoners. See 18 U.S.C. 4042(a)(1) (BOP "shall * * * have charge of the management and regulation of all Federal penal and correctional institutions"); *United States* v. *Wilson*, 503 U.S. 329, 335 (1992) (BOP "has the responsibility for administering the sentence" of federal offender); *Hewitt* v. *Helms*, 459 U.S. 460, 467 (1983) (prison officials have "broad administrative and discretionary authority over the institutions they manage").[8]

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[8] See also 18 U.S.C. 4081 (BOP discretion to classify and segregate prisoners); 18 U.S.C. 3621(b) (BOP discretion to transfer prisoner from one penal or correctional facility to another); 18 U.S.C. 3622 (BOP discretion to temporarily release prisoner for specified reasons "consistent with the public interest"); *Moody* v. *Daggett*, 429 U.S. 78, 88 n.9 (1976) (federal prison officials have "full discretion" to control prisoner classification and eligibility for rehabilitative programs); *United States* v. *Sotelo*, 94 F.3d 1037, 1041 (7th Cir. 1996) (district court has no authority to order restriction on persons with whom prisoner can communicate; court can only recommend that BOP impose such restriction); *United States* v. *Williams*, 65 F.3d 301, 307 (2d Cir. 1995) (sentencing court has no authority to order prisoner confined in particular facility or placed

2. The legislative background of Section 3621(e)(2)(B) demonstrates Congress's intent to vest the Bureau of Prisons with substantial discretion to determine which prisoners should be granted early release. The report of the House Judiciary Committee that accompanied the House bill (H.R. 3350, 103d Cong., 1st Sess. (1993)) containing the original early release provision described the operation of the provision as follows: "In effect, this subparagraph authorizes the Bureau of Prisons to shorten by up to one year the prison term of a prisoner who has successfully completed a treatment program, based on criteria to be established and uniformly applied by the Bureau of Prisons." H.R. Rep. No. 320, *supra*, at 6. During the floor debate in the House, the chairman and the ranking member of the Crime and Criminal Justice Subcommittee of the House Judiciary Committee emphasized that release was not guaranteed by the statute, but is a decision that is left to the BOP. See 139 Cong. Rec. 27,255 (1993) (statement of Rep. Schumer) ("[T]his is not mandatory time off, it is an option, up to the prison authorities."); *id.* at 27,250 (statement of Rep. Sensenbrenner) ("[T]hat is in the discretion of the Bureau of Prisons on whether or not the prisoner's term ought to be reduce[d] upon completion of the program.").

During the floor debate in the Senate on a bill (S. 1607, 103d Cong., 1st Sess. § 1304(d)(2)(1993)) that contained an early release provision that was identical in

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in particular treatment program; such decisions are within BOP's sole discretion); *Prows* v. *BOP*, 981 F.2d 466, 469 (10th Cir. 1992) (BOP retains broad discretion to decide where prisoner may be confined during pre-release period), cert. denied, 510 U.S. 830 (1993).

relevant respects to the original House version, some Senators voiced concern about the legislation allowing the early release of violent criminals. 139 Cong. Rec. at 27,209 (statement of Sen. Hatch); *id.* at 27,221 (statement of Sen. Grassley). The Senate addressed that concern by amending the early release provision to limit the availability of the incentive to those prisoners who were convicted of nonviolent offenses. See *id.* at 27,505, 27,588, 27,606, 32,286, 32,326. The Senate did not otherwise alter the broad grant of discretion to BOP. The amendment was drafted in a manner that prohibits BOP from releasing prisoners convicted of violent offenses, not in a manner that mandates the release of prisoners convicted of nonviolent offenses.

When the House and Senate went to conference, the House agreed to the Senate's amendment and the Conference Report stated that the House version was being amended "to limit the early release incentive for successful program completion to non-violent offenders." H.R. Rep. No. 711, 103d Cong., 2d Sess. 381 (1994); H.R. Rep. No. 694, 103d Cong., 2d Sess. 411 (1994). The Conference Report also emphasized that the authority provided to the Bureau under the early release provision was "not to be construed as limiting any authority already possessed by the Bureau of Prisons with respect to the release of inmates." H.R. Rep. No. 711, *supra*, at 381; H.R. Rep. No. 694, *supra*, at 411.[9]

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[9] Because it is evident from Section 3621(e)(2)(B)'s text, structure, and history that Congress conferred discretion on BOP to determine which prisoners should be granted early release, there is no basis for applying the rule of lenity as petitioner urges, Pet. Br. 32-33. See *Muscarello* v. *United States*, 524 U.S. 125, 138 (1998); *Reno* v. *Koray*, 515 U.S. 50, 64-65 (1995).

B. The Bureau Of Prisons' Categorical Denial Of Early Release Is Well Within The Broad Discretion Granted It By Congress

As demonstrated above, the Bureau's interpretation of Section 3621(e)(2)(B) as vesting it with discretion to make early release determinations for prisoners who meet the statutory prerequisites is compelled by the natural meaning of the statutory language read in the context of the statute as a whole. Nonetheless, petitioner essentially contends (Pet. Br. 17-18, 23-24, 29-30) that the Bureau cannot create categorical exclusions from early release and, in particular, that Congress intended to preclude the Bureau from categorically denying eligibility for early release based on characteristics of the offense, once it is found to be a "nonviolent offense."[10] Congress, however, did not address how the Bureau should exercise its discretion within the class of inmates who satisfy the statutory prerequisites for early release. Instead, it left BOP with the responsibility to "strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984). The Bureau's identification in its regulation, 28 C.F.R. 550.58, and Program Statement 5162.04, of certain categories of prisoners to whom it will not grant early release

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[10] See *Ward* v. *Booker*, 202 F.3d 1249, 1256 (10th Cir.) (the fact that Section 3621(e)(2)(B) focuses on the nature of the prisoner's conviction, *i.e.*, "nonviolent offense," precludes BOP from basing a categorical decision not to allow early release on the underlying facts of the offense that resulted in sentencing enhancement), petition for cert. pending, No. 00-18.

represents a considered judgment by the agency authorized by Congress to make such penological determinations.

As the court of appeals concluded, deference is due the Bureau's regulation, 28 C.F.R. 550.58, and Program Statement 5162.04, because those provisions constitute "an appropriate exercise of the BOP's discretion," J.A. 26-27. See also *Reno* v. *Koray*, 515 U.S. 50, 61 (1995).[11] Congress's decision affirmatively to bar early release for prisoners convicted of violent offenses does not imply that the Bureau must treat prisoners who carried, possessed, or used a firearm in the commission of a nonviolent felony the same as prisoners who did not. Rather, the statute leaves the Bureau discretion in that area, and it is a reasonable exercise of that discretion for the Bureau to determine that prisoners who carried, possessed, or used firearms in the commission of a felony, even a nonviolent offense, pose more of a danger to society than other prisoners, such that service of their entire prison term is warranted before release to the community.[12]

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[11] Indeed, the Bureau implemented the statute & exercised its discretion in this case by denying petitioner early release (J.A. 7)—a delegated agency action the Bureau is authorized to take under the statute. Cf. *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (deference is owed to an agency interpretation of its regulation that "assume[d] a form expressly provided for by Congress").

[12] Petitioner's amici raise a claim (Nat'l Ass'n of Crim. Defense Lawyers et al. Amici Br. 19-24), not raised or passed upon below, or pressed by petitioner, that BOP's regulation is invalid because it was promulgated without a notice and comment period before going into effect, as required under the Administrative Procedure Act (APA), 5 U.S.C. 553. Neither the notice nor advance comment period requirements apply, however, to substantive rules where there is good cause for noncompliance, to interpretive rules, or to

1. The court of appeals correctly held that Section 3621(e)(2)(B) does not "mandate that the BOP exercise

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general statements of policies. 5 U.S.C. 553(b)(A) and (B), 553(d)(2) and (3). The advance comment period also does not apply to substantive rules that grant or recognize an exemption or relieve a restriction. 5 U.S.C. 553(d)(1). The Bureau's regulation falls within one or more of those categories. This Court has described "general statements of policy," 5 U.S.C. 553(b)(A), 553(d)(2), as "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 n.31 (1979) (quoting Attorney General's Manual on the Administrative Procedure Act 30 n.3 (1947)); *Lincoln* v. *Vigil*, 508 U.S. 182, 197 (1993) (same quotation). That term thus includes a regulation like 28 C.F.R. 550.58, in which the Bureau announces the manner in which it intends to exercise the discretion granted it by Congress under 18 U.S.C. 3621(e)(2)(B). Moreover, to the extent that the regulation constitutes a substantive rule, it "grants or recognizes an exemption or relieves a restriction," 5 U.S.C. 553(d)(1), because it guides the Bureau in granting early release to certain prisoners and thereby exempts or relieves those prisoners from service of their full terms of imprisonment. And there was good cause, see 5 U.S.C. 553(b)(B), 553(d)(3), for BOP to promulgate the regulation as an interim rule with an immediate effective date. As BOP explained, it published the change as an interim rule "in order to solicit public comment while continuing to provide consideration for early release to qualified inmates." 62 Fed. Reg. at 53,690. And whatever the merits of amici's APA claim, it will not be of ongoing significance after promulgation of the Bureau's final regulation.

Of course, Program Statement 5162.04 is an internal agency guideline that was not subject to the notice and comment requirement and would warrant deference, in any event, as a permissible implementation of the statute that it administers, under *Koray*, 515 U.S. at 61, and *Christensen* v. *Harris County*, 120 S. Ct. 1655, 1662-1663 (2000). See also Program Statement 5330.10, CN-03, ch. 6, at 1-2 (Oct. 9, 1997) (implementing early release incentive in drug abuse treatment program in accordance with regulation and Program Statement 5162.04).

its discretion by making individual, rather than categorical, assessments of eligibility for inmates convicted of nonviolent offenses." J.A. 26. Petitioner contends (Pet. Br. 23, 29-30) that, because Congress categorically limited BOP's early release discretion to prisoners convicted of nonviolent offenses, BOP cannot exercise its discretion categorically to establish additional criteria for granting early release. But this Court has upheld analogous exercises of authority by agency officials charged with administering a statute. See *INS* v. *Yang*, 519 U.S. 26 (1996) (statutory provision that established certain prerequisites for obtaining a waiver of deportation did not limit the factors that the Attorney General could consider in determining who, among the class of aliens that satisfied those prerequisites, should be granted a waiver). Indeed, the legislative record is directly to the contrary—Congress intended that early release determinations be made "based on criteria to be established and uniformly applied" by the Bureau. H.R. Rep. No. 320, *supra*, at 6. Thus, Section 3621(e)(2)(B) in no way precludes the Bureau from "particularizing statutory standards through the rulemaking process and barring at the threshold" those prisoners who do not "measure up to them." *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U.S. 33, 39 (1964) (similar, in upholding authority of agency to set general standards notwithstanding Administrative Procedure Act's requirement of a "hearing").

The Bureau's consideration of petitioner's case in a categorical manner under 28 C.F.R. 550.58(a) and Program Statement 5162.04 is consistent with well-recognized administrative law principles. The Court has held that, "even if a statutory scheme requires individualized determinations," an agency "has the authority to rely on rulemaking to resolve certain

issues of general applicability unless Congress clearly expresses an intent to withhold that authority." *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 612 (1991); see *Heckler* v. *Campbell*, 461 U.S. 458, 467 (1983) (Social Security Act's contemplation of individualized determinations of disability claims based on evidence adduced at a hearing does not bar Secretary "from relying on rulemaking to resolve certain classes of issues"); *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U.S. at 44 (agency not required to repeatedly relitigate issues that may be fairly and efficiently established in single rulemaking proceeding); *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 205 (1956) (even where agency's enabling statute requires it to hold hearing, agency may rely on rulemaking authority to determine issues that do not require case-by-case consideration); cf. *Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 760-761 (1989) ("law in general * * * does not interpret a grant of discretion to eliminate *all* 'categorical rules'"). That Congress vested BOP with the discretion to grant early release "does not imply a mandate that this must be inevitably done by examining each case rather than by identifying groups." Kenneth Culp Davis, *Administrative Law Text* 145 (3d ed. 1972) (quoting *Fook Hong Mak* v. *INS*, 435 F.2d 728, 730 (2d Cir. 1970)).[13]

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[13] The two courts of appeals that invalidated the Bureau's current regulation and Program Statement 5162.04 relied on circuit precedent that had held the Bureau's original regulation and program statement to be invalid based on the conclusion that the Bureau had improperly defined a particular statutory term, "convicted of a nonviolent offense." See *Ward*, 202 F.3d at 1254 (relying on *Fristoe* v. *Thompson*, 144 F.3d 627 (10th Cir. 1998)); and *Kilpatrick* v. *Houston*, 197 F.3d 1134 (11th Cir.) (per curiam), aff'g 36 F. Supp. 2d 1328 (N.D. Fla. 1999) (relying on *Byrd* v. *Hasty*, 142

2. The Bureau of Prisons permissibly construed its discretionary authority under Section 3621(e)(2)(B) to allow it to determine that prisoners convicted of a felony that involved the carrying, possession, or use of a firearm or other dangerous weapon pose a sufficient risk of danger to public safety that they should be denied early release. The fact that Congress responded to concerns about the release of prisoners convicted of violent offenses by drafting the statute to bar their release does not preclude BOP from considering a prisoner's potential dangerousness, as reflected by his prior involvement with a firearm during the commission of a felony, as a factor in determining whether to grant early release. The Court made clear in *INS* v. *Yang* that where Congress confers discretionary authority on a decisionmaker to grant a benefit to persons who satisfy certain statutory prerequisites, the decisionmaker is not precluded from considering factors that are connected to the statutory prerequisites, so long as such consideration does not make a nullity of the statute. 519 U.S. at 30-31. The Bureau's consideration of whether a prisoner's conviction involved the carrying, possession, or use of a firearm certainly does not render Section 3621(e)(2)(B) a nullity; many prisoners may satisfy both the statutory prerequisites and the regulatory criteria for early release. "In Fiscal Year

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F.3d 1395 (11th Cir. 1998)), petition for cert. pending, No. 99-2008. The court of appeals correctly recognized (J.A. 27) that its own circuit precedent striking down the original regulation, *Martin* v. *Gerlinski*, 133 F.3d 1076 (8th Cir. 1998), was limited to the Bureau's prior interpretation of "convicted of a nonviolent offense" and, therefore, was not of relevance to the present case which relies on the discretion provided to the Bureau. See also *Bowen* v. *Hood*, 202 F.3d 1211, 1219-1220 (9th Cir.), petitions for cert. pending, Nos. 99-10159 & 99-10221.

1999, 2,633 inmates were released early pursuant to 18 U.S.C. § 3621(e). Since the Bureau implemented this provision, a total of 6,559 inmates have been granted a reduction in their term of imprisonment." Bureau of Prisons, *Substance Abuse Treatment Programs in the Federal Bureau of Prisons, Report to Congress* 12 (Jan. 2000). Moreover, the Bureau's early release regulation, 28 C.F.R. 550.58(a)(1)(vi)(B), and Program Statement 5162.04, in no way bar a prisoner like petitioner from participating in the Bureau's residential substance abuse treatment program. They only deny one type of incentive to certain prisoners in a categorical manner, while leaving them eligible for other types of incentives. See 28 C.F.R. 550.57(a).[14]

Denial of early release to prisoners like petitioner is not inconsistent with congressional intent. Although evidence before Congress indicated that an early release incentive would encourage prisoners to participate in highly effective substance abuse treatment programs (see Pet. Br. 24-29), Congress chose not to mandate that the incentive be granted to all prisoners convicted of a nonviolent offense. See pages 17-22, *supra*. Rather, it charged BOP with deciding whether to grant such prisoners early release. BOP has fulfilled that responsibility in a reasonable manner, consistent with its grant of discretion, and in light of its longstanding expertise and experience in protecting the public safety through its classification of prisoners and

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[14] The other incentives include "[l]imited financial awards, based upon the inmate's achievement/completion of program phases"; "[c]onsideration for the maximum period of time (currently 180 days) in a Community Corrections Center"; and "[l]ocal institution incentives such as preferred living quarters or special recognition privileges," 28 C.F.R. 550.57(a)(1)-(3).

determination of their appropriate custody status. See pages 20-21, *supra*. In addition to the category at issue here (felony involving firearm possession), BOP has established categories that deny early release to, *inter alia*, inmates "who have a prior felony or misdemeanor conviction for homicide, forcible rape, robbery, or aggravated assault, or child sexual abuse offenses," 28 C.F.R. 550.58(a)(1)(iv), and inmates whose current offense is a felony "[t]hat by its nature or conduct involves sexual abuse offenses committed upon children," 28 C.F.R. 550.58(a)(1)(vi)(D). Those categories rationally ensure that prisoners whose backgrounds suggest that they pose a particular risk to the public, notwithstanding their current conviction of a non-violent offense, serve their full prison terms. By promulgating these standards as categorical rules, BOP brings to early release determinations, which are made by a large number of BOP employees at facilities located throughout the country, a predictability and uniformity that would otherwise be lacking. See H.R. Rep. No. 320, *supra*, at 6 ("criteria to be established and uniformly applied" by BOP).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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