TZEDEK
ASSOCIATION
Save A Life, Save A World

Statement of
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President of the Tzedek Association

before the
HOUSE JUDICIARY COMMITTEE

October 21, 2021

Chairman Nadler, Ranking Member Jordan and distinguished members of the House Judiciary Committee: thank you for this opportunity to address this honorable committee for this important hearing titled "Oversight of the United States Department of Justice".

With this statement, I would like to address several important matters:

1) Recommendations and requests that the Department of Justice (DOJ) under this new administration review, revise, and expand policies and rules put in place by the DOJ under the previous administration as it pertains to implementation of the First Step Act (FSA).

2) Recommendation to establish a new policy that removes the need for BOP to quarantine vaccinated individuals leaving prison and to replace that with testing.

3) Recommendations regarding the 4,000 individuals out on home confinement under the CARES Act.

I. FIRST STEP ACT IMPLEMENTATION

On July 21, the Tzedek Association was honored to be included and participate along with 19 prestigious national advocacy organizations and stakeholders at the DOJ FSA Listening Session. Indeed, we have been invested since the first draft back in 2012, well before it was called the "First Step Act" (the bill had many names over the years). It is our sincere prayer that the two

listening sessions on July 15 & July 21 are translated by the DOJ into bold action that will truly implement this monumental bill in accordance with the spirit and intent of the bill, and robustly maximize its potential.

However, I am concerned to see that this Administration seems to still be continuing to support the past policies on First Step Act implementation, as reflected in a number of pending cases and by the fact that the way the previous Administration interpreted the FSA into erroneous policy is today still the current BOP policy and how they are implementing this law every day in BOP facilities across the nation. One such example was reported in Reuters, as you may have seen:

https://www.reuters.com/world/us/us-justice-dept-clashes-with-inmates-over-credits-shave-prison-time-2021-08-10/

For your convenience, I am enclosing the memo we sent to you with FSA implementation recommendations, as well as our presentation at the listening session.

CONCLUSION

In conclusion, I pray that you will agree with all these recommendations and implement them as DOJ/BOP policy going forward. We believe each one of these recommendations are legitimate, legally well-founded, and indeed representative of the spirit and intent of the FSA. Some should especially be easy to implement, which would be so appreciated by so many. One thing is for certain, that should these recommendations be implemented it will have a tremendously positive benefit for the reentry prospects of thousands of men and women throughout BOP facilities across the nation, and I believe will reduce recidivism and thus make our society safer.

II. INHUMANE QUARANTINE POLICY

I would like to also follow up on our letter regarding serious concerns pertaining to current BOP quarantine policy; please see the letter enclosed. We received an unsatisfactory response from BOP last week. The BOP informed us that the CDC themselves do not agree with the DOJ memo to BOP to outright routinely quarantine all inmates being released from prison even if they were vaccinated. And yet this is what they are doing!

In truth, the BOP's hands are tied because they are bound by a memo from Attorney General Barr dated June 9, 2020, that states that all inmates need to be quarantined before being released, and no discretion or distinction is made to include vaccinated inmates. I am confused by this. I am shocked that the DOJ is still insisting on an outdated policy from 16 months ago! Lots have changed since then, like vaccines. Although the memo states 14 days, in actuality the quarantine lasts for 21 days because the individual is tested at the end of the 14 days and remains quarantined for another 7 days until the test results come in.[1]

[1] https://www.justice.gov/file/1266661/download

The CDC states: "incarcerated/detained persons who are fully vaccinated and do not have symptoms of COVID-19 do not need to quarantine at intake, after transfer, or following exposure to suspected or confirmed COVID-19."[2] The CDC is of course under the jurisdiction of the HHS and thus under the President, as is the DOJ. They are the experts on COVID. I fail to understand why the DOJ has a policy on COVID that blatantly contradicts the CDC? What it boils down to is that if they're vaccinated and have tested negative it makes zero sense to quarantine them. It's torture for no reason.

CONCLUSION

Please consider changing this policy for vaccinated inmates who test negative for COVID. Replacing the quarantine with testing makes sense, is in line with the science, is more humane and this is what the CDC is recommending.

III. CARES ACT HOME CONFINEMENT

It goes without saying that we all remain exceedingly concerned regarding the fate of the more than 4,000 human beings on home-confinement under the CARES Act and the terrible option of potentially sending them back to prison. I have yet been able to grasp the situation, how President Trump and AG Barr compassionately sent these individuals who are vulnerable to COVID and other illnesses out of prison, and President Biden and you, Attorney General, would take an enormous step backwards and send them back to prison?

I, for one, believe that rescinding the OLC memo is an easy thing for the DOJ to do, as is well-argued in the enclosed letter led by Democracy Forward that we were honored to join.

Alternatively, we are also exceedingly supportive of the President granting clemency to all these 4,000 individuals so long as they haven't seriously violated any rules. I am very concerned that this Administration is considering carve-outs and exclusions for clemency for these folks, all of whom -- every single one of them -- are already nonviolent (namely, people with less than 4 years to their sentence and only those with drug convictions). Why only drug convictions? Why the arbitrary choice of 4 years? Please keep in mind that these are carve-outs on top of already existing carve-outs! This is because the individuals who received CARES Act home confinement were carved out from thousands of others who are also vulnerable to COVID but did not benefit from this life-saving program due to exclusions made by the previous administration. Hence, while we are happy for those who will receive clemency, we are not at all satisfied as we remain extremely concerned about the rest of the population.

CONCLUSION

The OLC memo is wrong as a matter of law and should be rescinded. Clemency should be granted to all 4,000 individuals, not just a select carve out.

[2] https://www.cdc.gov/coronavirus/2019-ncov/community/quarantine-duration-correctional-facilities.html

We would welcome the opportunity to meet and discuss these matters further. Please feel free to reach out to rabbimoshe@tzedekassociation.org.

Sincerely,

Rabbi Moshe Margaretten
President
Tzedek Association

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August 4, 2021 Letter to DOJ re: FSA Implementation

Memorandum from the Tzedek Association

April 13, 2021

The Honorable Merrick B. Garland
Attorney General of the United States
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: First Step Act Implementation

Dear Attorney General Garland,

We write to respectfully request that you review, revise, and expand policies and rules put in place by the Department of Justice (DOJ) under the previous administration as it pertains to implementation of the First Step Act (FSA).

With much fanfare, the FSA was signed into law on December 20, 2018.[1] Backers correctly hailed this historic legislation as a milestone that marked a "meaningful break from decades of failed policies that led to mass incarceration."[2] This position was adopted by the DOJ along with a press release on its website announcing, "Beginning today, inmates will have even greater incentive to participate in evidence-based programs that prepare them for productive lives after incarceration. This is what Congress intended with this bipartisan bill. The First Step Act is an important reform to our criminal justice system, and the Department of Justice is committed to implementing the Act fully and fairly."[3]

The main goal of the FSA is straightforward: reduce recidivism by providing incarcerated individuals the tools they need to successfully reenter society. One of the major incentives introduced are the "earned time credits," whereby one can earn early transfer to Prerelease Custody through successful participation in Evidence Based Recidivism Reduction Programming (EBRRP) and Productive Activities. And while time credits can be applied to an early transfer to supervised release, the FSA caps early access to supervised release at 12 months.

One of the most reliable guarantors of success after incarceration is education. Indeed, the Independent Review Committee (IRC), which was created by the FSA, noted in a recent report

[1] See P.L. 115-391 (Dec. 2018).

[2] See Marie Gottschalk, Did You Really Think Trump was Going to Help End the Carceral State?, Jacobin Mag., Mar. 12. 2019, quoting Sen. Cory Booker.

[3] U.S. Dep't of Justice, Department of Justice Announces Enhancements to the Risk Assessment System and Updates on First Step Act Implementation, Jan. 15, 2020, available online, https://www.justice.gov/opa/pr/department-justice-announces-enhancements-risk-assessment-system-and-updates-first-step-act

that correctional education for incarcerated adults reduces the risk of post-release re-incarceration by 13%. The IRC added: "These conclusions are consistent with the Pew Charitable Trusts' 2011 national estimate: 43.3 percent of releasees who did not receive correctional education are re-incarcerated within three years, compared to 30.4 percent of those who did receive correctional education in prison."[4] In addition, a recent meta-analysis found that other in-prison programming correlated with an 11% reduction in recidivism.[5]

The DOJ and BOP are tasked by law to implement the FSA. Accordingly, DOJ interpretations of the FSA and the policies DOJ adopts in implementing the law dictate how robustly and faithfully the goals will be achieved. This memo highlights several examples of how the DOJ, under the previous administration, took a very narrow—and often erroneous—approach in interpreting many of the FSA's provisions. These interpretations threaten to undermine the spirit of this bill if not redressed. We ask and strongly recommend that the current DOJ review the issues identified here and adopt a more expansive and broader interpretation of the FSA that allows for full and *proper* implementation. We need to set up incarcerated individuals for success, not the opposite.

Furthermore, the timing of the pandemic could not have been worse, hampering many programming efforts and incentives that were well underway throughout the BOP, and causing delays in further adoption of new programming. In light of the delays, several incarcerated individuals instead turned to the courts, yielding several milestone-wins that offer glimmers of hope to those who have genuinely applied themselves toward self-betterment and personal growth. This process, however, which entails filing a *habeas* case, is extremely daunting. In fact, most incarcerated individuals do not have the resources, education, and tools necessary to win (let alone even file) such a judgment. They also often fear retaliation. For these reasons, it is important that the DOJ send an updated memo to the BOP and establish strong policies enforcing proper and broad implementation of the FSA in all BOP facilities throughout the country.

Specifically, we recommend that the DOJ make the following policy changes:

ISSUE ONE: PROGRAMMING ELIGIBILITY

A BOP Memorandum dated November 25, 2020 ("BOP Memo")[6] lists the extensive range of qualifying EBRRP and Productive Activities set forth in the law.

§ 3535 (3) states: "**The term Evidence based Recidivism Reduction Programming** means either a group or individual activity that—

Has been shown by empirical evidence to reduce recidivism or is based on research indicating that its likely to be effective in reducing recidivism;

[4] See James M. Byrne, The Effectiveness of Prison Programming: A Review of the Research Literature, published December 2019 by the First Step Act Independent Review Committee, at 14, available online, https://firststepact-irc.org/wp-content/uploads/2019/12/IRC-Effectiveness-of-Prison-Programming.pdf

[5] Id.

[6] https://www.federalregister.gov/documents/2020/11/25/2020-25597/fsa-time-credits

Is designed to help prisoners succeed in their communities upon release from prison; and may include:
(iv) academic classes
(vii) substance abuse treatment
(viii) vocational training
(ix) faith-based classes or services
(xi) a prison job, including through a prison work program."

Unfortunately, many programs that fall directly under and are clearly referenced by the above subsection are absent from the November 25, 2020 memorandum which embodies the BOP's proposed implementation rules and standards, based on defining guidance provided by the DOJ under the previous administration.

Take for instance faith-based classes or services. The BOP Memo makes no mention of faith-based classes or services being eligible for earned time credits, yet the First Step Act clearly lists "§3535(3)(ix) faith-based classes or services" as being a conforming programming category. In addition, on the publicly available BOP website, https://www.bop.gov/inmates/fsa/faq.jsp#fsa_time_credits, the FAQ section asks: "Can religious programs be considered as evidence-based recidivism reduction programs and taken to earn time credits?" and the answer posted is clear: "Yes, under the FSA, 'faith-based classes or services' that otherwise meet the criteria for evidence-based recidivism reduction programming will qualify for time credits as approved by BOP in the same manner as other approved non-faith based programming."

In addition, § 3535 (a)(5)(B) provides explicitly for "the ability for faith-based organizations to function as a provider of educational evidence-based programs ***outside*** of the religious classes and services provided through the chaplaincy." Hence, the statement in the memorandum that all eligible programs must be BOP approved is inaccurate and directly contradicts this subsection. Here, an individual may participate in programming provided by outside faith-based organizations regardless of affiliation with the BOP and its chaplaincy program.

Productive Activities under the FSA differ from EBRRP in that they need not be 'assigned' to an individual. EBRRP, outlined in §3532(a)(3), requires BOP to "determine the type and amount of evidence-based recidivism reduction programming that is appropriate for each prisoner and assign each prisoner to such programming accordingly, and based on the prisoner's specific criminogenic needs." Productive Activities simply requires "a group or individual activity that is designed to allow prisoners determined as having a minimum or low risk of recidivating to remain productive and thereby maintain a minimum or low risk of recidivating, and may include the delivery of the programs described in paragraph (1) to other prisoners."

Accordingly, regarding Productive Activities, there is no assignment or recommendation required and any programming described in paragraph (1) (see above) will constitute eligible programming for earned time credits. The reason for this is simple: once an individual is a minimum and even a low, for many, this will be the lowest risk assessment score they can achieve. At this point, Productive Activities plays its role to "maintain a minimum or low risk of

recidivating" versus *lowering* the risk of recidivism should one be scored as medium or high risk of recidivating.

Currently, as it pertains to Productive Activities, the FSA is not being implemented properly. This is because the BOP has chosen to only grant certain programs approval as Productive Activities. Furthermore, prisoners are very limited in their choice of programming and as to what constitutes a Productive Activity. For example, the DOJ under the previous administration refused to include religious services and work assignments as Productive Activities, even though these are clearly activities that are productive in nature.[7]

Reference is made to two recent *habeas* decisions in *Goodman v. Ortiz*[8] and *Hare v. Ortiz*,[9] both decided in the District of New Jersey, which took an expansive but accurate view of the programming for which First Step Act credit should be received. In *Goodman*, the petitioner sought credit for a variety of salutary activities in which he participated while in prison, including not only BOP-sponsored education and prison jobs but also religious study and prayer. The court noted that "[a]gencies exercise discretion only in the interstices created by statutory silence or ambiguity; they must always 'give effect to the unambiguously expressed intent of Congress," and that the Congressional intent of the First Step Act includes the opportunity for "every prisoner… to participate in and complete *the type and amount* of evidence-based recidivism reduction programs or productive activities *they need*" (emphasis added) – i.e., that the scope of available programs should center on the prisoner's needs, not the BOP's. Needs may be physical, educational, moral or spiritual, and the spectrum of human needs militates against restricting credit-earning activities to a narrow list.

Indeed, we note that in *Goodman*, the BOP did not even dispute that Goodman should earn credit for his religious activities, arguing only that such activities should not accrue credit until the end of a three-year phase-in period. The BOP's 180-degree turn on this subject is truly inexplicable, all the more so in light of the *Goodman* court's emphasis on the BOP's broad remedial scope and Congress' intent that credit-accruing programs and activities should suit inmates' individual needs.

In *Hare*, likewise, the petitioner sought credit for his work as a cook and his participation in 26 programs and activities. The court observed, as in *Goodman*, that "the FSA requires the BOP to determine the type and amount of EBRR programming that is appropriate for each prisoner based on their specific criminogenic needs," and to reassess and reassign each individual periodically. Again, the mandate for need-tailored programming is not best achieved by restricting the qualifying activities to a narrow list or even restricting them to activities administered by the BOP, which has limited resources and cannot meet all prisoners' needs on its own (and which, indeed, should best leave such things as spiritual development and care to the religious professionals who know them best and can provide them while maintaining separation of church and state).

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[7] https://www.bop.gov/inmates/fsa/docs/2021_fsa_program_guide.pdf

[8] 2020 WL 5015613 (D.N.J. Aug. 25, 2020)

[9] 2021 WL 391280 (D.N.J. Feb. 4, 2021)

We are aware of the need for the BOP to retain some control and discretion over what constitutes EBRRP and Productive Activities. Incarcerated individuals have a strong motivation to leave prison, and we are aware that other programs with similar incentives, such as RDAP, have been vulnerable to fraud. But the solution to this is not to exclude genuine, and genuinely effective, programming from eligibility for First Step Act credits, which would be contrary to both the letter and spirit of this important law. Instead, the BOP should establish a central office to vet programs and activities for which participants wish to obtain credit, and to approve for credit all programs and activities that are bona fide and administered according to professional standards.

Recommendations 1-3:

1. *All* bona fide programming covered under § 3535 (3) that an individual participated in should be counted towards his or her "earned time credits" accrual, regardless of whether the programming is administered by the BOP. The BOP should maintain a central office to which incarcerated individuals may submit for review any program in which they are participating, and only those programs which are not bona fide and/or which are not administered according to professional standards should be disapproved for credit. All requests for review submitted to the central office should be approved or disapproved within a reasonable time not to exceed 60 days.

2. For individuals at minimum or low risk of recidivism, any Productive Activities should be counted without requiring prior assignment, as the law clearly states. Simply by participating, individuals will earn time credits.

3. Productive Activities should include religious services and BOP work assignments assigned to incarcerated individuals.

ISSUE TWO: LENGTH REQUIREMENTS FOR SUCCESSFUL PARTICIPATION

§3632(d)(4) makes it abundantly clear that those who successfully participate in evidence-based recidivism reduction programming or productive activities are entitled to earn time credits as follows:

"(i) A prisoner shall earn 10 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities.

(ii) A prisoner determined by the Bureau of Prisons to be at a minimum or low risk for recidivating, who, over two consecutive assessments, has not increased their risk of recidivism, shall earn an additional 5 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities."

The law does not specifically define the term "day." But the BOP defined the requirement in its BOP Memo as requiring 240 hours of programming, which is equivalent to eight hours every day for an entire month, or *30 full workdays* of programming. That is not a reasonable way to interpret the term "30 days of successful participation." Rather, to define successful

participation, one need not look further than the many federal and state courts nationwide that have mandated participation in many programs including drug and alcohol treatment, job training, anger management, victim impact panels, sexual offender therapy, and other similar endeavors. In these programs, **a "day" is not eight hours – it is a single day's session, however long that session may be.**

§3632 makes no mention of hours of participation, nor does it require that a program take up an entire working day in order to count toward FSA credits; rather, the legislators chose "30 days of successful participation" as the metric of compliance that yields time credits, indicating that successful participation in a session of programming on any given day should count. The following are examples of jurisdictions that have defined the terms "successful participation" in various programs.

Maryland:

"What does the program consist of: A minimum of a year of ***participation***, including regular and frequent testing, treatment, frequent court attendance, Recovery Support meeting attendance, obtaining employment and appropriate housing, and continued abstinence, leading to graduation from the program."[10]

New York:

"Commencement: Successful ***participants*** will complete Drug Court after finishing Phase III, remaining drug and alcohol free for 12 continuous months, and finishing treatment (including satisfying outstanding financial obligations). In addition, he/she must have obtained meaningful employment or be engaged in a course of study or training to achieve that goal. Prior to commencement, all potential graduates will be required to fill out a graduation application and attend a graduation review panel. Participants must also resolve all pending cases and pay all outstanding fines, surcharges, and restitution prior to commencement. The presiding judge will have final say regarding satisfaction of program requirements and participants' readiness to graduate. The Drug Court Program consists of three phases, each lasting a minimum of 12-24 weeks…"[11]

Santa Clara County, California:

Drug Court: "In this program, new participants attend intensive orientation sessions to familiarize themselves with program requirements during their first thirty days of ***participation*** in the program. These "jump starts" may be very helpful in orienting the new participant to program regulations."

Participation is defined as: "participate in individual and group counseling, participate in drug education, participate in educational or vocational counseling where appropriate, subscribe to

[10] https://www.stmarysmd.com/sao/substance-abuse-recovery/

[11] http://ww2.nycourts.gov/courts/6jd/broome/binghamton/drug/reqs.shtml

drug testing, and successfully complete any additional requirements that the court believes will be helpful to the offender. [S]eek and/or maintain employment, attend school, dress appropriately for court, submit to drug testing, meet regularly with a probation officer, and satisfy any other requirements that the court believes would be beneficial."

Residential Drug Abuse Treatment Program (RDAP):

RDAP provides intensive drug abuse treatment to incarcerated individuals who have been diagnosed with a substance abuse disorder. This program has proven to be a great success. Individuals in the residential program are housed together in a treatment unit that is set apart from the general population. However, the total time in the program depends on the individual's progress in treatment. Importantly, there is *no minimum of hours* needed to be considered as successful participation.

Bureau of Prisons – Federal Correctional Complex, Petersburg, Virginia:

"The Residential Drug Abuse Program (RDAP) is an evidenced-based residential treatment program…RDAP participants are expected…to **fully participate** in all treatment activities in the unit…**To successfully complete the RDAP, inmates are required to participate** in the Community Transition Drug Abuse Treatment component of the program…Treatment is provided for a minimum of nine months."

It is clear from the above that participation does **not** mean 24 hours a day or even 8 hours a day, nor does any court measure terms of participation by how many hours of each day are programmed. Rather, so long as the individual is participating in accordance with the schedule and within the requirements of that particular program, the participation counts. Therefore, 30 days of successful participation means an individual's participation over a given 30-day time period, including attending all scheduled meetings and participating in a meaningful way that demonstrates positive growth.

In addition, requiring that an individual program for 8 hours per day for 30 days, totaling 240 hours per month, is not practical, is not reasonable, and even more to the point, is generally unavailable. Even when an individual works in Unicor Prison Industries (a BOP program that consumes the most hours per day), the maximum they can participate (aside from occasional overtime) is 6.25 hours per day, and even that is only on weekdays (as most Unicor jobs are closed on weekends and holidays) and providing that there are no scheduling conflicts or off-nominal prison operations (lockdowns etc). This equates to only 125 hours per month, significantly less than the memorandum's 240-hour requirement.

The FSA goes a step further and Sec 103(3) mandates that an audit be conducted to ensure "whether the Bureau of Prisons is offering the type, amount, and intensity of recidivism reduction programs and productive activities for prisoners to **earn the maximum amount of time credits** for which they are eligible." The FSA makes it clear that every individual must be afforded a meaningful opportunity to maximize the time credits accrual for which they are eligible. The interpretation set forth in the BOP Memo, on the contrary, makes it impossible to

ever maximize time credits for individuals by placing hourly thresholds that are totally out of reach.

Recommendation 4:

Revise the guidance to clarify that in order to earn credit for successful participation in a specified program, an individual must maintain acceptable attendance and meaningful participation in full compliance with required meetings and activities, and that one day of participation in a program consists of successful participation in one day's session however long that may be. The policy that a day is defined as 8 hours of participation should be rescinded.

ISSUE THREE: COMPLETION vs. SUCCESSFUL PARTICIPATION

The key word used by the FSA is not "completion," rather than "successful participation," which clearly illustrates the legislative intent. As set forth in full above, §3632(d)(4) makes it very clear that **participation** and *not* completion was the benchmark of choice to earn time credits.

A core reason behind choosing "participation" as opposed to "completion" is that there are many instances in which completion is not possible. For example, how would the BOP go about gauging an individual who successfully completed a religious prayer as a program? Religion is a lifelong journey, and an individual's ongoing and regular successful participation, healthy practice, and pursuit are strongly encouraged and celebrated by chaplains and religious leaders alike. *Participation* makes sense here in this instance. In addition, what if an individual has earned enough time credits to be transferred to prerelease custody, but is still in the middle of a program? In this instance, the individual would be transferred to prerelease custody to complete the programming outside of the confines of the prison walls, which the FSA strongly supports.

In *Goodman v. Ortiz*, discussed above, Mr. Goodman's affidavit stating that he prayed and studied daily went unchallenged by the BOP, and the *habeas* petition was granted in its entirety by Judge Bumb of the U.S. District Court of the District of New Jersey. There was no mention of program completion; rather, successful participation. And the *Hare* court went still further and found that the statute *required* credit for programs completed after the effective date of the First Step Act – i.e., December 21, 2018 – even if those programs were assigned before that date or if the incarcerated individual began participating before that date. We submit that the *Hare* court's holding is consistent with both the letter and spirit of the statute, in that it provides maximal recognition to incarcerated individuals' efforts to rehabilitate and improve themselves according to their individual needs.

Recommendation 5:

Earned time credits should be accrued upon successful participation, as the FSA states, and participation should not be interpreted to require program completion. Whether an individual's participation in any given program or activity is "successful" shall be determined based on evaluations by the director and/or supervisor of the program, and may be evaluated periodically, for instance once a week or once a month.

ISSUE FOUR: DATE WHEN INDIVIDUALS MAY START EARNING TIME CREDITS

With regard to when an individual can start earning time credits, the FSA makes a clear distinction between EBRRP and Productive Activities.

Evidence-Based Recidivism Reduction Programming:

The FSA states in §3632(d)(4)(B) "A prisoner may not earn time credits under this paragraph for an **evidence-based recidivism reduction program** that the prisoner successfully completed- (i) prior to the date of enactment of this subchapter." The "date of enactment of this subchapter" has been confirmed in case law as **December 21, 2018**.

Productive Activities:

Please note that §3632(d)(4)(B) only excludes time credits earned prior to the enactment of this Subchapter for evidence-based recidivism reduction programming. There is no similar provision with regard to participation in Productive Activities. This deliberate and unambiguous distinction means all inmate participation in Productive Activities from the inception of incarceration is eligible. In clear terms, this places no restrictions on the look-back period an individual can apply all Productive Activities in which they successfully participated from the beginning of incarceration.

Recommendations 6-7:

6. All **Evidence Based Recidivism Reduction Programming** in which an individual participated from December 21, 2018 forward should count towards earned time credits. Individuals are being told that the BOP has not yet started to phase in the FSA.

7. All **Productive Activities** in which an individual participated from inception of incarceration, regardless of the date (even prior to December 21, 2018), should count towards earned time credits. This is because the FSA makes no mention of a retroactive look-back limitation regarding Productive Activities. At the very least, Productive Activity participation should count from December 21, 2018.

ISSUE FIVE: PHONE CREDITS

As it currently stands, every incarcerated individual under BOP is provided a limit of 300 minutes a month of phone time.[12] During certain times, such as before holidays, or during this

[12] https://oig.justice.gov/sites/default/files/archive/special/9908/callsp4.htm -- see footnote 22 -- this rule of 300 minutes has been in place since 1997.

COVID-19 pandemic,[13] the limit of phone time may be increased. FSA gives "up to 510 minutes per month" as an incentive for successful participation in the recidivism reduction programs. Specifically, the law states:

"EVIDENCE-BASED RECIDIVISM REDUCTION PROGRAM INCENTIVES AND PRODUCTIVE ACTIVITIES REWARDS.—The System shall provide incentives and rewards for prisoners to participate in and complete evidence-based recidivism reduction programs as follows:

(1) PHONE AND VISITATION PRIVILEGES.—A prisoner who is successfully participating in an evidence-based recidivism reduction program shall receive—

(A) phone privileges, or, if available, video conferencing privileges, for up to 30 minutes per day, and up to 510 minutes per month".

It is clear from the law that the "up to 510 minutes per month" reward should be *in addition* to the regular minutes individuals already receive, whether the regular minutes are 300 minutes, 500 minutes, or any other amount of time.[14] Otherwise it would not be much of an incentive. Indeed, therefore it is called a "reward". In fact, the law clearly terms this addition of 510 minutes as "incentives and rewards" so as to encourage "prisoners to participate" in programming.

Moreover, additional telephone time is a valuable aid to rehabilitation in of itself, given that it enables the individual to have more contact with supportive friends and family members and to exercise parenting responsibilities, (especially since in-person visitation is still restricted due to pandemic conditions). This goal toward rehabilitation was surely the underlining intent of Congress in adding this provision in the FSA as an incentive for participation in recidivism reduction programming.

Recommendation 8:

This DOJ should create a policy in implementing the FSA that the (up to 510) extra minutes earned by individuals who successfully participate in EBRRP or Productive Activities should be *in addition to* the regular phone time provided to all incarcerated individuals each month, in line with the letter and spirit of the FSA.

[13] "During modified operations in response to COVID-19, the BOP suspended social visitation, however, inmates were afforded 500 (vs. 300) telephone minutes per month at no charge to help compensate for the suspension of social visits." https://www.bop.gov/coronavirus/covid19_status.jsp

[14] Also, given that it is 2021, isn't it about time incarcerated individuals be provided cell phones to speak to close family and friends? Technology now permits cell phone usage to be fully monitored and enables calls to be restricted to an approved list of contacts, just as would be the case on the facility phones, and permitting cell phones would reduce the incidence of conflicts over facility phone time. See Hannah Riley, *Just Let People Have Cellphones in Prison*, Slate, February 15, 2021, https://slate.com/news-and-politics/2021/02/cellphones-in-prisons.html.

ISSUE SIX: RELATION TO OTHER INCENTIVE PROGRAMS

The FSA states under "(6) RELATION TO OTHER INCENTIVE PROGRAMS":

"The incentives described in this subsection shall be *in addition to* any other rewards or incentives for which a prisoner may be eligible." (emphasis added)

Additionally, in Section 602 of the FSA, it states:

"The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph."

With Section 602, a "shall" rule, the intent of Congress is clear: to mandate BOP to give the full amount of home confinement available to lower-risk individuals, i.e., 6 months or 10% of the sentence. Prior to the FSA, BOP would periodically give incarcerated individuals *less than* the maximum home confinement for which they qualified by law. In Section 602, Congress sought to end this practice. The full amount of home confinement is now a mandated reward and incentive for which lower-risk prisoners are eligible.

Recommendation 9:

Credits an individual earns through participation in recidivism reduction programs and productive activities should be *in addition to* the home confinement that they earn in accordance with Section 602 of the FSA. This should be implemented in policy by the DOJ. Indeed, this would align with the spirit of the FSA, which is to maximize as much as possible the reentry prospects of federally incarcerated individuals. Since participation in recidivism reduction programs have been shown to improve recidivism, it stands to reason providing greater incentives to participate will improve reentry and reduce recidivism.

CONCLUSION

I believe I speak for numerous other advocacy organizations, as well as thousands of incarcerated individuals and their families, in expressing that it is our sincere hope that the DOJ and BOP will adopt the above recommendations into a revised memorandum with revised policy. This will set the stage for the FSA to truly have the full impact this bipartisan legislation has the potential to have, in accordance with the intent of Congress in passing this monumental law. In addition, it will place the very incentives the FSA was meant to have well within the reach of the target individuals, thereby triggering a culture of hope and fostering a safer society.

The goal of the FSA is to profoundly reduce recidivism and alleviate overcrowded prisons, improving outcomes for individuals and society and saving millions in taxpayer dollars. The FSA has the capability to change lives for the better and dramatically improve our justice system, but only if fully and properly implemented. Hence, the bolder it is, and the more individuals can participate, the greater the results.

We would welcome the opportunity to meet and discuss these matters further. Please feel free to reach out to rabbimoshe@tzedekassociation.org.

Sincerely,

Rabbi Moshe Margaretten
President
Tzedek Association

July 21, 2021 Presentation Re: FSA Implementation

RABBI JACOB WEISS STATEMENT
DOJ FIRST STEP ACT LISTENING SESSION
July 21, 2021

Thank you for the opportunity to address you today. My name is Rabbi Jacob Weiss and I am the Executive Director of the Tzedek Association. "Tzedek" in Hebrew means "justice" or "righteousness." Our nonprofit Jewish organization seeks to promote the welfare of incarcerated individuals by supporting programs and legislation that provide them with a fair shot to move beyond their incarceration to become productive members of society upon their release from prison. Beginning in 2012, we, with other policy minded stakeholders, spearheaded an effort to introduce creative and effective prison reform legislation. The goal of this legislation was to create a reward-based system that would incentivize incarcerated individuals to take advantage of recidivism reduction programs that would enable them to transform their lives for the better, while earning credits toward an earlier transfer to home-confinement. Our efforts, thank G-d, paid off, when in 2018, Congress passed the momentous First Step Act. Since its passage, we have been on the ground, monitoring the manner in which the Act has been carried out by the DOJ and Bureau of Prisons. We have been involved with numerous incarcerated individuals who have sought to participate in the First Step Act's programs and activities.

I am here today to provide you with a first-hand account of how we are seeing the First Step Act play out, which has become of great concern to us. The First Step Act is an ambitious law with a clear purpose: to reward incarcerated individuals who make the most of their time in prison and prepare themselves for a successful reentry. The idea is that inmates who prove themselves to be low-risk, who avoid trouble in prison, and who take part in work, education, and other productive programs to prepare themselves for life outside, should be rewarded with credit to early home-confinement. But based on the cases that have come to our attention, this is not what is happening. Instead, the Bureau of Prisons – based on erroneous policies established by the DOJ under the previous Administration -- is effectively nullifying the First Step Act by systematically denying incarcerated individuals any meaningful credit – and what's worse, the way in which the BOP is doing this penalizes the hardest-working, best-adjusted inmates the most.

Briefly, the BOP has developed an assessment system where it evaluates low-risk inmates for a set of needs. This list of needs includes Anger/Hostility, Finance/Poverty, Antisocial Peers, Medical, Cognitions, Mental Health, Dyslexia, Recreation/Leisure/Fitness, Education, Substance Abuse, Family/Parenting, Trauma, and Work. Once the BOP determines that an inmate has a particular need or set of needs, then it will only count for First Step Act credit the programs and activities that it considers relevant to those needs. The practical effect of this is that the best-behaved inmates who have done the most to educate themselves and prepare for re-entry have the fewest options for First Step Act credit, because these are the inmates that the BOP considers to have the fewest needs. This makes no sense.

But then it gets even worse. The BOP has prepared a provisional list of programs and activities that it considers relevant to each need, and for several of its list of needs, only a few programs qualify. This means that an inmate who is assessed with those needs will have very few options to earn credit, and the total credits earned will not amount to much. For instance, if there are five programs that are designated for a given inmate's needs, and each of those programs is 30 hours long, then based on the BOP's determination that eight hours of program participation counts as one day, that inmate is eligible for less than 20 days of sentence reduction. Why would an inmate bother to participate in such a program?

And it gets even worse than *that*. According to the BOP, participation in prison work assignments only counts for First Step Act credit if the inmate is assessed with a Work need – and the BOP does not consider inmates with skills, who will be able to seek employment after release, to have such a need. Thus, for many or even a majority of inmates, participation in prison jobs – which, unlike programs, is something that they do every day for years and which would allow them to accumulate meaningful sentence credits – simply doesn't count for credit against their sentences.

This is not what the First Step Act was intended to be, and in fact, it is turning the FSA into a cruel joke toward precisely the inmates it is most intended to help.

I'd like to illustrate the way this works by talking about a particular inmate as a case in point. His name is Justin DiStefano and he is an inmate at Otisville Correctional Facility in upstate New York. Justin grew up with parents who were both substance abusers; his mother was unable to care for him and his father was never around, ultimately dying of alcoholism. Because of his parents' neglect, he was shipped off to live with relatives in Houston and Miami. He felt abandoned and depressed, and compensated by abusing alcohol and drugs and getting involved in petty crime, including theft of a computer and possession of half a gram of marijuana when he was in high school.

At the age of 20, this culminated in Justin being recruited to mule drugs across the border from Mexico to Texas to earn a few thousand dollars to fuel his drug habit. He was caught at the border on his first try, indicted in federal court, and was sentenced to the statutory minimum term of ten years in jail. The sentencing judge said at his sentencing that she "felt horrible" about imposing this harsh sentence on a young man who was then 21 years old and stated that she wished the law didn't require it.

As Justin has since said, however, going to prison turned out to be the best thing that ever happened to him. Up to the point where he was sentenced to federal prison, he was on a very bad path, which he now realizes would have ultimately cost him his life. But when he arrived in prison, he turned himself around. The very first thing he did was seek drug treatment, which he successfully completed. Then, when he could think clearly, he began participating in every program the jail offered – effective speaking, money management, mental health classes, nutrition, psychology, history, Russian, and conversational Spanish. He reconnected with his Jewish faith, participating in prayer and study and finding an inner peace and purpose.

Justin also worked, and began making focused plans toward a career. In November 2018, he was transferred to the Federal Correctional Institution at Otisville, New York, which has its own sewage treatment plant. This led him to look into the field of wastewater management and learn that there was a huge demand for such workers, and as a result, he took college courses in the operation of wastewater treatment plants through California State University. This enabled him to take the New York State licensure exam in Sewer Treatment Operations Management, which

he recently passed. Ultimately, he was able to get a job at the Otisville treatment plant, working for the prison itself eight hours a day, five to six days a week. He loved the work and most importantly, he now had the education, skills, and experience to obtain a well-paying, in demand job, when he was released from prison.

Justin has consistently been evaluated as a low-risk inmate. In both 2019 and 2020, he received a low PATTERN score, which, as you know, is the BOP's metric for determining risk of recidivism. He has complied with all the recommendations made by his counselor, such as successfully completing a 16-week victim impact course. He has taken on responsibilities in addition to his job, such as serving as a chapel orderly at the Otisville synagogue and working as a fitness instructor in the recreational department.

In sum, Justin is the poster child for how effective programing in the prison system can thoroughly reform, rehabilitate, reinvigorate, and transform an individual into a productive and thriving citizen.

One might think that an inmate like Justin DiStefano – someone who has turned his life around, stayed out of trouble, educated himself, worked hard, and made a plan – would receive maximum First Step Act credit. But instead, he will get none at all. That's right. None. Zero. And the reason for this is the needs assessment system I spoke of earlier.

When the BOP evaluated Justin, it found that he had only one need – Finance/Poverty. The BOP didn't find that he had any needs in the way of Work, even though everyone needs work and holding a job is a necessary part of life in modern society. Nor, despite his history of drug abuse, childhood neglect, and depression, was he assessed with any needs in the areas of Mental Health, Substance Abuse, or Family/Parenting. And despite him being diabetic, he was not assessed with any Medical needs. This means that the eight hours a day he put in working 6 to 7 days a week at the sewage treatment plant does not count. The faith-based programs he has participated in does not count. The victim impact panel does not count. And all the education, nutrition programs, and substance abuse treatment he has undertaken – none of those count either.

What does count? Nothing! In the BOP's list of qualifying programs, only three are deemed to be relevant to the Finance/Poverty need. One of these is AARP Foundation Finances 50+, for which Justin, at age 27, is ineligible. Another is Square One: Essentials for Women, for which Justin is also ineligible because he is a man. And the third and final program – Money Smart for Older Adults – is one that Justin already took before the First Step Act was passed. So despite all his hard work, despite all the effort he has made to remold himself into a law-abiding and productive citizen, his sentence will not be reduced under the First Step Act, even by a single millisecond.

Make no mistake about it, the system the BOP has developed is nothing short of a declaration of war on the First Step Act and an attempt to nullify the intent of Congress. By defining inmates' needs so narrowly on the one hand, and listing so few programs as relevant to each need on the other hand, the BOP has ensured that most inmates will never receive significant FSA credit, and that the ones who have worked the hardest, and are thus considered to have the fewest needs, will get the least credit and sometimes even none at all.

What can be done about this? Most obviously, the BOP can be instructed not to take such a stingy view of inmates' areas of need. As I mentioned earlier, Work is something *everyone* needs, and the more work experience and skills an inmate acquires, the better he or she will be able to function after release. Every inmate, without exception, should be classified as having a need in the area of Work, and should receive full FSA credit for working at his or her prison job and for any employment skills programs that he or she undertakes.

Nor is Work the only universal need in the BOP's list. Mental health, for instance, is important to everyone – even those who do not have a history of mental illness (as Justin does) still need to engage in self-care and take care of their emotional well-being. Physical health is also a universal human need, and one that requires lifelong maintenance even for those who are currently healthy. Recreation/Leisure/Fitness, Education, and Family/Parenting are also universal human needs which pertain to fundamental life skills, relationships, and well-rounded personality growth. To say that any human being has no need for fitness, family or learning on a lifelong basis is to deny humanity itself.

Thus, we recommend that *every* federal inmate, no matter his or her history and current circumstances, should be classified as having needs in at least these areas – Work, Mental Health, Medical, Recreation/Leisure/Fitness, Education, and Family/Parenting.

Second, the BOP should be directed to take a much less narrow view of what is relevant to each particular need. To go back to Justin's example, why is his job at the Otisville Sewage Plant considered irrelevant to Finance/Poverty? There is an obvious connection between having a job and the need to avoid poverty – after all, people with jobs are much less likely to be poor. Employment also helps avoid debt and promote savings, both of which are key to avoiding poverty and maintaining sound finances. In other words, direct finance education programs are by no means the only activities that relate to finance. In this and in other areas, the BOP should re-examine its list and qualify any program that has a *reasonable* relationship to each assessed need.

Third, the BOP should be directed to give credit for outside educational programs rather than only for its own programs. Again, going back to Justin, the course he took in waste water management and the license he earned will not count toward sentence reduction because – in addition to the BOP's completely inexplicable decision that he has no need for work – they are not BOP programs and are not included on its list. I certainly recognize that outside programs might be subject to fraudulent completion schemes, but all that means is that if an inmate completes an outside program, the BOP should investigate it and determine whether it is a bona fide program. If so, then the program should be accepted for credit, no ifs, ands or buts – after all, one of the things we *want* inmates to do is take the initiative to find and complete education courses on their own.

Fourth, as we have mentioned in the past, the BOP's determination that eight hours of program participation are necessary to obtain a day of First Step Act credit is a serious obstacle to inmates receiving their due credit. Most prison programs and even some prison jobs don't have eight-hour sessions. Thus, an inmate who participates in a program with two-hour sessions will only get a quarter of a day of credit for each day he actually participates, and a prisoner who works a

four-hour shift as a janitor or food service worker will get only a half-day of credit for each day of work. This is inequitable given that it isn't up to the prisoner how long programs meet or how long his or her shifts are. Instead, one session of conscientious participation in a qualifying program or activity should count as a full day, because that is what a "day" of participation means in the context of that activity.

Finally, BOP should give inmates credit for all programs and activities completed on or after December 21, 2018. The First Step Act itself sets December 21, 2018 as the earliest date for which inmates can receive credit for completed programs, but the BOP has taken it upon itself to set a later start date in January 2020. This means that the inmates that Congress intended to help are set to be deprived of more than a year of potential credits, even though the FSA was already in effect and even though the programs and work activities will have exactly the same productive value in 2019 as in 2020 or later.

As I have said, we at Tzedek are very concerned with the way the First Step Act is being implemented, because the DOJ policies by which BOP is forced to adhere to are systematically minimizing the amount of credit inmates can earn and even denying it outright to the prisoners who deserve it most. With a few simple fixes, however, the intent of Congress can be accomplished and low-risk, hard-working inmates can be rewarded according to their merit.

I also find it hard to understand why US Attorneys across the nation under the Biden Administration are continuing to fight inmates in court, like Justin and many others, from receiving credits or other examples of fighting FSA cases. Do they have nothing better to do with their time than to use taxpayer dollars to make sure nonviolent inmates do not get earlier home-confinement? I can understand why the DOJ under AG Bill Barr fought these cases. But I fail to understand why *this* Administration, one that has and continues to laud criminal justice reform, including cutting the prison population by 50%, would fight these cases when, in the overwhelming majority of them, the law can be and should be interpreted in favor of the inmate.

Accordingly, our recommendation is that the DOJ cease fighting FSA court cases where inmates are trying to benefit from the FSA when at all possible, in addition to our recommendation to create new policies for the BOP that translates the FSA in a much broader manner.

In addition to the recommendations that I have outlined today on how to properly implement the FSA, Tzedek Association has also written Attorney General Garland a memo, which encapsulates these recommendations and other policy changes, which I am dispersing to you today for your consideration.

Thank you for your time, and I hope this presentation has been helpful.

Rabbi Jacob Weiss
Tzedek Association
Executive Director
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Follow up re: FSA Implementation

FOLLOW-UP TO RABBI WEISS STATEMENT TO D.O.J.

As a follow up to my previous Statement, I would like to also point out another issue that has come to attention pertaining to FSA implementation. I recently learned that on July 14, 2021, BOP issued their FSA Incentives Policy. I was very concerned to see that only completion of an EBRR will result in free additional phone minutes of up to 30 minutes/day and up to 510 minutes/month, and not Productive Activities. (I was happy to see that incentives will include adding achievement awards, preferential housing, and access to incentive events like movie nights, parent/child events, etc.)

This is problematic as EBRR programs is a smaller list of programs that are more intensive and longer to complete than the full Productive Activity list. Indeed, in general BOP has very few EBRRs and they are all lengthy and difficult to complete.

Though it can be argued that in accordance with 18 U.S.C. 3632(d)(1)-(3) the additional incentives apply specifically to EBRR programs, I do thing a reasonable argument can be made why these incentives should also apply to Productive Activities.

Firstly, the FSA specifically contemplated awarding incentives for Productive Activities (PAs). In Section 3632(a) of the act itself, it says the risk needs assessment system "shall be used to…(6) determine when to provide incentives and rewards for successful participation in evidence-based recidivism reduction programs or productive activities…" So clearly Congress intended for PAs to also be eligible for incentives.

Secondly, Congress clearly intended PAs to get incentives as they are of less import than time credits so it does not make sense that PAs could only get time credits and not avail themselves to lesser/smaller incentives.

Finally, even if you interpret the statute to say that the FSA does not require the BOP provide these additional incentives for the completion of PAs, there is certainly nothing *barring* BOP from providing those incentives! So they may not be *required* to give additional phone time, visitation and parent/child events to incentivize successful participation in Productive Activities, but the BOP certainly *can* – and arguably *should* – provide those incentives for successful PA participation.

The fact is that these activities keep federally incarcerated individuals productive. That is indisputably a positive thing. No good comes from inmates wasting their lives playing cards and watching television all day. The Productive Activities, as in its name, are proven – and commonsense states so – to keep incarcerated individuals productive. This is certainly helpful for their rehabilitation and eventual reentry. Thus, this should be encouraged, which is what these additional incentives would do. I would also note that these incentives in of themselves are very positive for an inmate's reentry – such as strengthening their ties with their families through more phone time and family events.

As I emphasized in my presentation, we ask that the DOJ interpret and implement the FSA as broadly as is possible. This includes apply all additional incentives for PA participation, not just EBRR participation.

Additionally, as noted in our memo to the Attorney General dated April 13, in "Issue #5", we believe that phone credits should be in addition to the phone time every inmate already receives. Please refer to that memo for more details. It appears that this recent July 14 BOP memo would not accommodate that interpretation. We ask that you reconsider this position.

Thank you for considering our recommendations.

Rabbi Jacob Weiss
Executive Director
Tzedek Association

August 10, 2021 Letter to DOJ Re: BOP Quarantine

TZEDEK
ASSOCIATION

Save A Life, Save A World

August 10, 2021

The Honorable Merrick Garland
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

Re: Current BOP Quarantine Policy

Dear Attorney General Garland,

I hope this letter finds you in the best of health and spirits.

By way of introduction, I am the Executive Director of Tzedek Association, a faith-based national organization that focuses on religious liberty, criminal justice reform and humanitarian cases.

I write to express deep concern regarding the current COVID-19 quarantine policy of federal inmates. The specific policies that are concerning are:

1. For individuals who are voluntarily surrendering to begin their sentence, the Bureau of Prisons (BOP) quarantine policy requires "inmates who arrive asymptomatic *and* test negative will be placed in quarantine... for at least 14 days."[1] In actuality, they are quarantined for 21 days – an entire three weeks straight – because after the 14 days they get tested and must remain quarantined for an *additional* 7 days.

2. The BOP also quarantines inmates for three weeks prior to release, including home confinement under the CARES act, and has been applying this policy to all inmates, whether vaccinated or not, regardless of the result of their COVID-19 test.

This policy is based on a memo from AG Barr dated April 3, 2020.[2]

This policy is inconsistent with CDC Guidelines updated as of June 19, 2021which states: "Clarification that incarcerated/detained persons who are fully vaccinated and do not have symptoms of COVID-19 do not need to quarantine at intake, after transfer, or following exposure to suspected or confirmed COVID-19."[3]

[1] https://www.bop.gov/coronavirus/covid19_status.jsp
[2] https://www.justice.gov/file/1266661/download
[3] https://www.cdc.gov/coronavirus/2019-ncov/community/quarantine-duration-correctional-facilities.html

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Inmates placed in quarantine are treated exactly like inmates placed in the Special Housing Unit (SHU) for disciplinary reasons. They are typically housed alone or with one other inmate in a small cell for at least 23 hours a day. They are allowed a shower only two or three times per week. They are given access to phones no more than twice per week. Many times, they have no access to email at all. They cannot have legal calls because those calls take place in the office of their Unit Manager, and they can't go to that office while quarantined. Should they need to speak with their counselor they are severely restricted. Many inmates experience serious mental health issues while quarantined for these three weeks, including depression, suicidal thoughts, extreme anxiety, etc., because in essence this is almost like solitary confinement. It is extremely lonely.

It is almost as if the inmate is being punished for being released. Instead of looking forward to being reunited with their families, they are placed in the most severe confinement. Many of these inmates are minimum custody having been housed at camps and in dorms.

What's frustrating is that this makes no sense, and the science simply doesn't back it up. I understand the need to protect the community from inmates who may be positive for COVID-19. And I can understand the purpose of the quarantine if they haven't been fully vaccinated. However, if they have been fully vaccinated, and they are given a PCR and the results are negative, why put them through this torture of quarantine for three weeks, which has or may have profound ramifications and collateral consequences? Frankly, while well-intentioned, this erroneous policy results in cruel and unnecessary treatment.

One such collateral consequence is religious accommodations and rights. For example, Orthodox Jewish inmates who are required to pray three times a day with a minyan, read and listen to the Torah, attend Sabbath prayer services and observe Jewish holidays are deprived of their ability to perform these religious obligations while quarantined. Instead, they must recite their prayers in the presence of a toilet which is prohibited by Jewish law. If it's a holiday, they are not accommodated their religious needs because they cannot go to the chapel. The list of examples goes on and on. This is a substantial, unjustified, and unnecessary deprivation of religious rights.

We are therefore respectfully requesting that you please issue a new memo (rescinding AG Barr's April 3, 2020 memo) clarifying the following:

1. When an inmate arrives and surrenders to their designated facility to begin their sentence, they should not be required to quarantine if: a) they are fully vaccinated, b) they can show evidence that they received a negative PCR test within 72 hours of arrival, and c) they have no COVID-19 symptoms. This policy should be put into effect immediately, and not be delayed (which I heard is what may happen.)

2. Vaccinated inmates need not be quarantined before being released unless they are symptomatic or test positive. Rather, vaccinated inmates should be released upon negative results of a PCR test given within 3-5 days prior.

This revised policy would be entirely consistent with current CDC guidelines.

If you would like to discuss this further, please contact me at 786-365-3009 or rabbiweiss@tzedekassociation.org.

Thank you very much considering this important issue and may G-d bless you.

Very respectfully,

Rabbi Jacob Weiss
Tzedek Association
Executive Director

August 24, 2021 Letter Seeking Reconsideration of OLC Home Confinement Memo of August 4, 2021

August 4, 2021

VIA ELECTRONIC MAIL & U.S. MAIL

Dawn E. Johnsen
Acting Assistant Attorney General
Office of Legal Counsel
United States Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20530

Lisa O. Monaco
Deputy Attorney General
U.S. Department of Justice
950 Pennsylvania Ave NW
Washington, DC 20530

Dear Ms. Johnsen and Ms. Monaco:

We write with respect to the Office of Legal Counsel's January 15, 2021, memorandum entitled "Home Confinement of Federal Prisoners After the Covid-19 Emergency" (Memo).[1] During the last days of the Trump administration, the Memo concluded that federal prisoners who have been granted home confinement pursuant to emergency CARES Act authority must be returned to federal prison when the emergency surrounding the Covid-19 pandemic terminates. Based on currently reported numbers, the Memo's conclusion will require that somewhere between 2,000 and 3,800 prisoners—who were sent to home confinement after the Bureau of Prisons concluded they will not be a threat to public safety—will be recalled to prison when the emergency ends.[2] Many organizations, including some of ours, have called on President Biden to use his clemency power to commute the sentences of those individuals to avoid this logistically problematic and unfair result.[3]

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[1] Jennifer L. Mascott, *Home Confinement of Federal Prisoners After the Covid-19 Emergency,* "Memorandum Opinion for the General Counsel, Federal Bureau of Prisons" (Jan. 15, 2021), *available at* https://www.justice.gov/olc/file/1355886/download.

[2] Kristine Phillips, *ACLU, NAACP among those pressing Biden to grant clemency to inmates sent home during COVID-19*, USA Today (July 19, 2021), https://www.usatoday.com/story/news/politics/2021/07/19/biden-pressed-grant-clemency-inmates-sent-home-during-covid/7980882002/; Ken Hyle, *Response from BOP re compassionate release during Covid* at 5 (Apr. 16, 2021).

[3] *See, e.g.*, ACLU, Coalition Letter to President Biden on CARES Act Clemency (July 19, 2021), *available at* https://www.aclu.org/letter/coalition-letter-president-biden-cares-act-clemency.

We write separately to call to your attention to another way to address this pressing issue. In particular, OLC may reasonably determine that the Memo does not reflect the best (or even a permissible) reading of the relevant statutory language. Specifically, the Memo read into the CARES Act a new requirement to revoke home confinement—immediately, and without discretion, at the end of the emergency—that does not exist anywhere in that statutory text. Under a plain reading of the CARES Act, the authority of the Bureau of Prisons to grant and revoke home confinement is the same as it always was under the pre-existing statutory scheme, except that BOP was authorized to "lengthen" the period of time a person may serve on home confinement. Additionally, the Memo did not consider the affected prisoners' reliance interests, potentially triggering a wave of hundreds or thousands of challenges when and if BOP attempts to implement the Memo's instructions[4] and placing BOP in legal jeopardy under recent Supreme Court precedent.[5]

We have great respect for OLC's non-partisan stance and the office's general practice of stare decisis. Consistent with OLC policy, however, we encourage you to reassess the Memo because it is incorrect and will present serious practical obstacles to BOP and the U.S. Attorneys' Offices, not to mention the thousands of affected prisoners. We provide the analysis below on why we believe that OLC should reconsider the Memo.

I. Home Confinement and the Memo

A. BOP's Longstanding Home Confinement Authority

Under section 3624(c) of title 18, the Bureau of Prisons has authority to place federal prisoners with "lower risk levels and lower needs" on home confinement for "a *portion of the final months of [their] term*."[6] The statute directs that BOP "shall, to the extent practicable," place eligible prisoners on home confinement "for the maximum amount of time permitted" and that the eligibility period under the statute is generally no longer than six months.[7] BOP's home confinement authority is expressly intended to "afford th[e] prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community."[8]

BOP's long-held position is that it retains discretion under section 3624(c) to recall prisoners once they have been placed on home confinement.[9] In our experience, BOP has historically sought to recall prisoners who BOP believes to have violated the stated terms of their

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[4] *Cheek v. Warden of Fed. Med. Ctr*., 835 F. App'x 737, 739 (5th Cir. 2020) (prisoners may seek *habeas* relief related to home confinement decisions); *Galle v. Clark*, 346 F. Supp. 2d 1052, 1053 (N.D. Cal. 2004) (granting writ of *habeas corpus* because BOP attempted to modify an early release decision).

[5] *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020).

[6] 18 U.S.C. § 3624(c)(1)–(2) (emphasis added).

[7] *Id*. § 3624(c)(2).

[8] *Id*. § 3624(c)(1).

[9] *E.g.*, Memo at 4.

home confinement. To our knowledge, the government has never interpreted section 3624(c) to *require* BOP to recall prisoners from home confinement.

B. The CARES Act and Home Confinement During the Covid-19 Pandemic Emergency

During the Covid-19 pandemic, home confinement was expanded to reduce the infection risk in prisons. The CARES Act included a provision authorizing BOP to expand the amount of time a person can spend on home confinement following a declaration of emergency by the President and a finding by the Attorney General:

> During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may *lengthen the maximum amount of tim*e for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, *as the Director determines appropriate*.[10]

The "'covered emergency period'" starts on "the date on which the President declared a national emergency under the National Emergencies Act with respect to the Coronavirus Disease 2019 (COVID-19)" and ends "on the date that is thirty days after the date on which the national emergency declaration terminates."[11] The CARES Act did not alter BOP's home confinement authority other than to lengthen the maximum period of time that BOP can place a prisoner on home confinement.

The President declared an emergency related to Covid-19 on March 13, 2020. That emergency remains in effect today. On March 26, 2020, even before the CARES Act was enacted, Attorney General Barr issued a memorandum ordering BOP to prioritize the use of its discretion to grant home confinement to eligible prisoners.[12] The memo included a list of factors BOP should consider, including an "assessment of the danger posed by the inmate to the community" and "[w]hether the inmate has a demonstrated and verifiable re-entry plan that will prevent recidivism and maximize public safety."

On March 27, 2020, the CARES Act was signed into law. On April 3, 2020, Attorney General Barr issued a second memorandum making the requisite finding under the CARES Act that the pandemic materially affects the functioning of BOP.[13] The April 3 memo characterized the CARES Act as "authoriz[ing] me to expand the cohort of inmates who can be considered for

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[10] Coronavirus Aid, Relief, and Economic Security Act (CARES Act) Pub. L. No. 116-136, § 12003(a)(2), (b)(2), 134 Stat. 281, 515–16 (emphasis added).

[11] *Id*. § 12003(a)(2).

[12] The Att'y Gen., *Prioritization of Home Confinement as Appropriate in Response to COVID-19 Pandemic*, Mar. 26, 2020 (Mar. Barr Memo), *available at* https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf.

[13] The Att'y Gen., *Increasing Use of Home Confinement at Institutions Most Affected by COVID-19*, Apr. 3, 2020 (Apr. Barr Memo), *available at* https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf.

home release." The memo ordered BOP to immediately start reviewing the prisoners with Covid risk factors at certain facilities and to immediately process for transfer all prisoners that BOP deemed suitable for home confinement.

As a BOP official testified to Congress, BOP began aggressively screening prisoners to be placed on home confinement "for service of the *remainder* of their sentences,"[14] following the criteria in the March 26 memo to determine eligibility.[15] As of July 22, 2021, BOP's website reported that it had 7,250 inmates on home confinement.[16] While the exact number of people on home confinement who still have more than six months remaining on their sentence is unknown, estimates range from approximately 2,000 to up to 3,600 prisoners.[17]

C. The Memo

A week before President Biden took office, OLC issued a Memo opining that, once the Covid-19 emergency ends, BOP must re-incarcerate all prisoners who qualify for home confinement only as a result of the CARES Act.[18]

The Memo interprets the CARES Act to mean that BOP has authority to "place prisoners on home confinement" using CARES Act authority only during the emergency period, as declared by the President, and only when the Attorney General finds that the emergency conditions materially affect BOP's functioning.[19] The Memo goes on to infer from this that, once BOP no longer has authority to *place* prisoners on home confinement, it also loses authority to allow prisoners *previously* placed on home confinement to continue their home confinement term. The Memo supports this conclusion by referencing other provisions of the CARES Act, which it states provide "temporary emergency relief," and with the assumption that the reason Congress extended BOP's authority to thirty days beyond the Covid emergency period must have been to allow BOP time to re-imprison people.[20] Finally, the Memo argues that a home

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[14] Dep't of Just., Statement of Michael D. Carvajal, Director, and Dr. Jeffrey Allen, Medical Director, Director, Federal Bureau of Prisons Before the U.S. Senate Committee on the Judiciary (Carvajal and Allen Statement) at 6 (June 2, 2020), https://www.judiciary.senate.gov/imo/media/doc/Carvajal-Allen%20Joint%20Testimony.pdf (emphasis added).

[15] *Frequently Asked Questions regarding potential inmate home confinement in response to the COVID-19 pandemic*, Fed. Bureau of Prisons, https://www.bop.gov/coronavirus/faq.jsp (last visited July 30, 2021).

[16] *Id*.

[17] As of April 16, 2021, BOP reported that 3,814 people then on home confinement originally became eligible under the CARES Act. *See* Hyle, *supra* note 2. More recent news reports estimate that approximately 2,000 people are still at risk of being recalled from home confinement to federal prison. *See* Phillips, *supra* note 2.

[18] *See* Memo at 1.

[19] *Id*. at 1.

[20] *Id*. at 5–6.

confinement placement decision is not a discrete action requiring authority only at the time it is made, but an "ongoing action" requiring "continuing legal authority."[21] According to the Memo, this is because BOP and the probation system "have a continuing relationship with prisoners in prerelease custody and home confinement." The Memo does not consider any reliance interests or due process rights that those on home confinement may have but concludes that BOP is "required to recall" those individuals who have been released solely under CARES Act authority.

Generally speaking, the Memo's requirement would apply to anyone on home confinement who has more than six months remaining on their sentence when the emergency period ends. The Memo leaves no discretion for BOP to continue home confinement for these individuals—individuals whom BOP has already determined bear little risk to the community—and who are presumably in compliance with the terms of their release.

II. The Statutory Interpretation in the Memo Is Incorrect.

It is common ground that, as of thirty days after the Covid emergency ends, BOP will no longer have authority to continue granting home confinement for prisoners with more than six months remaining on their sentences.[22] But the Memo makes an unsupported leap by inferring that the anticipated expiration of authority to *grant* home confinement for longer periods of time has any effect on whether people who previously received home confinement may continue as they are.[23] This conclusion is contrary to the plain statutory text and assumes, contrary to case law, that BOP must retain authority for a past placement decision.

A. The CARES Act Authorizes BOP to Lengthen an End-of-Sentence Home-Confinement Period and Makes No Other Changes to BOP's Pre-Existing Authority.

A plain reading of section 3624(c) in combination with the CARES Act shows that home confinement was, and still is, an end-of-sentence option. Under section 3624(c), BOP has the authority to "place" prisoners on home confinement for "a portion of the final months of [their] term" of up to six months to "afford th[e] prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community."[24] The only change made by the CARES Act was, as the relevant statutory text states, to authorize BOP, during the emergency period, to "*lengthen the maximum amount of time* for which the Director is authorized to place a prisoner in home confinement" from the six-month maximum "under the first sentence of section 3624(c)(2) of title 18."[25] The CARES Act does not include any language that could be said to rescind the provision in section 3624(c) specifying that BOP's authority is to place prisoners on home confinement for "a portion of the final months of [their] term." And courts do not presume

[21] *Id*. at 7.

[22] *See* Memo at 1.

[23] *Id*. at 1–2.

[24] 18 U.S.C. § 3624 (c)(1)–(2).

[25] CARES Act § 12003(a)(2), (b)(2) (emphasis added); 18 U.S.C. § 3624 (c)(2).

that provisions of prior statutes are repealed by new statutes except to the extent that "the later statute expressly contradict[s] the original act."[26]

Crucially, Congress did not make any change to BOP's pre-existing authority other than to allow BOP to lengthen the period of home confinement. The CARES Act does not include any language creating any new requirements that BOP revoke home confinement under any particular circumstance. In fact, the CARES Act does not address revocation at all. So whatever discretion or authority BOP may have to revoke home confinement (for, say, violation of a condition of home confinement) is the same as it was under section 3624(c), before the CARES Act was passed.[27] Nothing under section 3624(c) indicates that BOP is ever *required* to revoke home confinement status, and the government itself has never taken the position that such a requirement exists under section 3624(c).[28] The requirement that BOP take immediate, non-discretionary steps to revoke home confinement once the Covid emergency ends simply does not exist in the text of either statute.

This plain-text reading is confirmed by the fact that Congress chose *not* to incorporate this expanded CARES Act authority into a separate statutory provision: 18 U.S.C. § 3622, which authorizes BOP to place prisoners on furlough under certain circumstances. That provision allows BOP to "release a prisoner from the place of his imprisonment for a limited period" to engage in certain activities.[29] Section 3622, unlike section 3624(c), expressly provides for a *temporary* release from a federal facility, with the expectation that the prisoner will return to a federal facility at the end of the furlough period. If Congress had intended for the new CARES Act authority to require BOP to recall prisoners to federal facilities, Congress would have expanded BOP's authority under the furlough provision rather than under section 3624(c). The fact that it did not do so suggests that Congress did not contemplate that people granted home confinement under the CARES Act would be returned to prison for any reason not already covered under section 3624(c).

The nature of home confinement itself further confirms that Congress intended for people granted home confinement under the CARES Act to serve the remainder of their sentences away from federal facilities. This is because home confinement is a form of physical separation from prison in which the prisoner is required to take steps to reintegrate back into society. It is a form of stepped-down custody from physical confinement that some courts have even concluded "constitutes release from custody."[30] Attorney General Barr similarly described home

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[26] *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 662 (2007).

[27] BOP's position is that it has broad discretion to revoke home confinement once granted. *See* Memo at 4. While we do not necessarily agree with this position, the *degree* of discretion available to BOP under section 3624(c) is not relevant to this analysis. The point is that section 3624(c) does not *require* BOP to revoke home confinement under any particular circumstance, and the CARES Act did not impose an additional revocation requirement that did not previously exist.

[28] *E.g.*, Memo at 4.

[29] 18 U.C.S. § 3622.

[30] *Cheek*, 835 F. App'x at 739 (internal quotation marks omitted).

confinement decisions as "granting an[] inmate discretionary *release*"[31] and explained that prisoners who meet certain criteria are considered "appropriate candidates for home confinement *rather than continued detention*" at BOP prisons.[32] A statute lengthening the period of time prisoners may serve on home confinement necessarily means that prisoners may begin the process of stepped-down custody and reintegration into society at an earlier time. Of course such a process will generally take place at the end of a sentence. And requiring people on home confinement to return to prison would disrupt their reintegration, affecting jobs, housing, relationships, and family responsibilities they may have acquired during their period of home confinement—in direct opposition to the stated goals of the home confinement statutory provision.

BOP itself has interpreted the CARES Act in a manner consistent with this analysis. Prior to the Memo, BOP believed that the CARES Act simply allowed BOP to lengthen the end-of-sentence period that prisoners could serve on home confinement. In testimony before Congress shortly after passage of the CARES Act, BOP officials said that the Act "*expanded* our ability to place inmates on Home Confinement by *lifting the statutory limitations* contained in Title 18 U.S.C. § 3624(c)(2)."[33] BOP went on to tell Congress that it was aggressively screening prisoners who could be placed on home confinement "for service of the *remainder* of their sentences."[34] And BOP has told courts that it was granting prisoners home confinement rather than placing them on furloughs precisely to avoid the uncertainty of "temporary, but indeterminate, release, because nobody can be sure when the pandemic will end."[35]

While no court has addressed the issue of mandatory revocation, courts that have had occasion to discuss the CARES Act have generally described it as allowing prisoners to serve a longer portion of their sentences on home confinement or expanding the pool of prisoners eligible under section 3624(c). For example, the Tenth Circuit said that Congress "amended 18 U.S.C. § 3624(c)(2) to permit *longer home confinement* in certain circumstances."[36] The Sixth Circuit described the CARES Act as "allow[ing] the Attorney General to *expand* the BOP's ability to move prisoners to home confinement."[37] Former Attorney General Barr similarly

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[31] Mar. Barr Memo, *supra* n.12, at 2.

[32] Apr. Barr Memo, *supra* n.13, at 2 (emphasis added).

[33] Carvajal and Allen Statement, *supra* n.14, at 6 (emphasis added).

[34] *Id*.

[35] Decl. of Sukenna W. Stokes, ECF No. 34-1, *United States v. Bayard*, No. 18-CR-771 (S.D.N.Y. July 23, 2020) (BOP Correctional Programs Administrator declaration).

[36] *United States v. Hammons*, 833 F. App'x 215, 216 n. 2 (10th Cir. 2021) (emphasis added); *see also United States v. Lang*, 835 F. App'x 790, 792 n.5 (5th Cir. 2021) (the CARES Act "authorizes prison authorities to *lengthen the maximum amount of time* to place a prisoner in home confinement under 18 U.S.C. § 3624(c)(2)." (emphasis added).

[37] *Wilson v. Williams*, 961 F.3d 829, 847 (6th Cir. 2020) (Cole, dissenting) (emphasis added); *see also United States v. Williams*, 829 F. App'x 138, 139 (7th Cir. 2020) (The CARES Act "*expanded* [BOP's] power to 'place a prisoner in home confinement' under § 3624(c)(2)." (emphasis added)).

described the Act as "authoriz[ing] me to *expand the cohort of inmates* who can be considered for home release" to include those who have more than six months remaining on their sentence.[38] No authority aside from the Memo has described the CARES Act as instead creating some new, temporary mid-sentence option that did not previously exist under section 3624(c).

In reaching the opposite conclusion, the Memo points to other portions of the CARES Act that, the Memo states, provide various forms of "temporary emergency relief."[39] Of course, it is axiomatic that one provision in an Act may be different from another portion of the same Act, and that different language in different portions of the same statute may have different meanings.[40] In any event, those other provisions reveal that some of the very provisions the Memo cites provide relief that does in fact last beyond the end of the emergency period.

For example, the Memo points to section 1113 of the CARES Act, noting only that it "authoriz[es] bankruptcy relief to address the emergency."[41] What section 1113 actually shows is "that Congress knew how to draft" a benefit intended to be temporary,[42] and made such temporariness clear, and that some benefits under section 1113 nonetheless last beyond the end of the emergency period. Section 1113 makes several amendments to the bankruptcy process, such as excluding payments received under the CARES Act from the monthly income calculation in bankruptcy applications,[43] and allowing debtors to amend pre-existing bankruptcy plans due to hardship created by the Covid-19 pandemic.[44] Both changes expressly "sunset" one year after enactment of the CARES Act,[45] but a debtor plan approved under the CARES Act, which can provide for payments for a seven-year period, would remain in place after the emergency period.[46]

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[38] Apr. Barr Memo, *supra* n.13, at 1 (emphasis added).

[39] Memo at 5–6.

[40] *See*, *e.g.*, *Grand Trunk W. R.R. Co. v. U.S. Dep't of Labor*, 875 F.3d 821, 825 (2017) ("'Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks omitted)).

[41] Memo at 5.

[42] *E.g.*, *City of Chicago v. Env'tl. Def. Fund*, 511 U.S. 328, 337–38 (1994) ("Our interpretation is confirmed by comparing [the disputed statute] with another statutory exemption in [the same act]. . . . [T]his [other] provision shows that Congress knew how to draft a waste stream exemption . . . when it wanted to." (internal quotation marks omitted)).

[43] CARES Act § 1113(b)(1)(A).

[44] *Id.* § 1113(b)(1)(C).

[45] *Id.* § 1113(b)(2).

[46] *See id.* § 1113(b)(1)(C) (contemplating debtor plans providing for payments over a seven-year period, despite the one-year sunset of the provision allowing approval of such plans).

In another example, the Memo points to section 1109 of the CARES Act, noting only that it "provides[es] loan programs during the national emergency."[47] But this section, too, shows that benefits initially provided during the Covid-19 emergency period may last for a longer period of time. Section 1109 authorizes the Department of the Treasury to issue regulations allowing insured depository institutions and credit unions to provide loans under the Paycheck Protection Program (separately described in section 1102 of the CARES Act) "until the date on which the national emergency . . . expires."[48] But the loans issued under the Paycheck Protection Program do not disappear when the emergency expires; they generally mature in two to five years.[49] This makes perfect sense, given the nature of a loan. It is granted and then repaid over a course of time, just as home confinement is granted and then served over a course of time.

The Memo's review of other provisions of the CARES Act does not take into account the "specific context in which th[e] language is used" or the "broader context of the statute as a whole," as is required to properly discern the meaning of a statutory provision.[50] Indeed, another portion of the CARES Act *not* considered in the Memo illustrates that Congress was far more explicit when it intended to limit the duration of a benefit for prisoners. Section 1103(c)(1), which gives BOP authority to allow no-cost video and telephone visitations, expressly limits the benefit to the emergency period itself: "During the covered emergency period, if the Attorney General [makes a sufficient finding], the Director of the Bureau shall promulgate rules regarding the ability of inmates to conduct visitation through video teleconferencing and telephonically, free of charge to inmates, during the covered emergency period." Unlike in section 1103(b)(2) (the provision on home confinement), Congress used the phrase "during the covered emergency period" in section 1103(c)(1) twice: once at the beginning of the provision to indicate *when* BOP may issue a rule, and once at the end of the provision to indicate that the no-cost video and telephone visitations could only occur during the emergency period. Section 1103(b)(2) uses the same phrase only at the beginning of the provision to indicate *when* BOP has authority to lengthen a period of home confinement, but does not repeat the phrase to limit the period of home confinement. Despite the close proximity of section 1103(c)(1) to section 1103(b)(2), the Memo did not reconcile Congress's means for indicating temporariness in 1103(c)(1) with the lack of any such indication in 1103(b)(2).

The Memo attempts to discern congressional intent by pointing to the definition of "covered emergency period" as the period beginning on the date the President declared a national emergency and ending "30 days after" that emergency expires.[51] According to the Memo, "[w]e think that this 30-day period suggests that Congress had recognized that the termination of the emergency would have operational consequences and thus gave BOP 30 days to engage in the

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[47] Memo at 5.

[48] CARES Act § 1109.

[49] *See* Sean Ludwig, *How to Get Your PPP Loan Forgiven*, CO (June 1, 2021) https://www.uschamber.com/co/run/business-financing/getting-ppp-loan-forgiven#:~:text=All%20PPP%20loans%20have%20an,paid%20back%20in%20five%20years.

[50] *Nken v. Holder*, 556 U.S. 418, 426 (2009).

[51] *See* Memo at 6 (quoting CARES Act § 12003(a)(2)).

logistical operations needed to remove prisoners from home confinement."[52] In divining this unstated congressional intent, the Memo does not point to any legislative history supporting the view that Congress had reason to suppose it would be practical, or even possible, to recall several thousand prisoners within thirty days.[53] Indeed, arranging the staff and facilities alone would likely take much longer, not to mention transportation. Other possible explanations for the thirty-day buffer are more plausible. As Congress was no doubt aware, the process of placing a prisoner on home confinement is lengthy, involving multiple levels of review and often a 14-day quarantine.[54] Congress may have intended to give BOP a thirty-day period to complete placements that had already begun. Or, perhaps Congress believed that pandemic-related improvements in federal prisons may lag behind improvements in the general population such that the end of a national emergency does not immediately end the more acute BOP emergency. More importantly, statutory interpretation requires that we "give effect to the language Congress has enacted, not to read additional meaning into the statute that its terms do not convey."[55] The Memo's unfounded assumptions about Congress's thought process are insufficient, particularly given its inability to reconcile that assumption with the statutory text.

B. A Decision Whether to Place a Prisoner on Home Confinement is a Discrete Decision, Requiring Authority Only at the Time It Is Made.

A primary rationale in the Memo is that a BOP decision to place a prisoner on home confinement "is not a permanent, final decision," but rather an ongoing one that "requires ongoing action and therefore continuing legal authority" during the entire period of home confinement.[56] According to the Memo, the fact that "BOP and the probation system . . . have a continuing relationship with prisoners in prerelease custody and home confinement" means that a decision to place a prisoner on home confinement "is not a one-time event."[57] That conclusion is inconsistent with the plain language of the CARES Act, the nature of home confinement, and the way courts have interpreted BOP's section 3624(c) authority.

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[52] Memo at 6–7.

[53] Indeed, to the extent legislative history on the point exists, it points the other direction. For example, soon after the CARES Act passed, DOJ officials testified to Congress that BOP was using CARES Act authority to transfer prisoners to home confinement "for service of the remainder of their sentences." Carvajal and Allen Statement, *supra* n.14, at 6.

[54] Apr. Barr Memo, *supra* n.13, at 2; Andre Metevousian, Assistant Director, Correctional Program Division, *Memorandum for Chief Executive Officer: Home Confinement,* Nov. 16, 2020, *available at* https://www.bop.gov/foia/docs/Updated_Home_Confinement_Guidance_20201116.pdf.

[55] *Yates v. Collier*, 868 F.3d 354, 369 (5th Cir. 2017); *see also Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) ("It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts." (internal quotation marks omitted).

[56] Memo at 7.

[57] *See* Memo at 7.

A decision to grant home confinement is a discrete decision in time. This is evident first from the plain statutory text. BOP's authority under section 3624(c)(2) is to "*place* a prisoner in home confinement."[58] And the CARES Act likewise changed the length of time "for which [BOP] is authorized to *place* a prisoner in home confinement."[59] To "place" a prisoner on home confinement is a specific, one-time event. The verb "to place" means "to put in or as if in a particular place or position" or "to assign a position in a series of or category."[60] In the statutory context, this means that BOP's authority is "to put" or "assign" a prisoner to the "particular place" or "category" of home confinement. One does not "put" or "assign" on an ongoing basis. These activities are complete once they have occurred. If Congress had intended to require that BOP have ongoing authority in order for prisoners to complete their home confinement terms, Congress could easily have used a different word, such as "maintain" or "supervise." But it did not.

The discrete nature of a home confinement placement decision is also evident from the very nature of home confinement. As noted above, moving to home confinement is not merely a change in confinement conditions, like moving to a different cell; it is a form of release from physical custody.[61] Before granting home confinement, BOP assesses whether the prisoner is an appropriate candidate and decides whether the "inmate[] should be granted home confinement"; if so, BOP must "transfer" the prisoner to home confinement.[62] As with decisions for early release, decisions of whether to grant home confinement are discrete decisions about custody that even give rise to a right to petition for *habeas corpus*.[63]

Importantly, if BOP were to *revoke* home confinement for a particular person, that, too, would be a discrete decision, based on BOP's rationale, and subject to challenge.[64] For example, in *Paige*, after a county corrections department attempted to revoke a prisoner's home confinement, he was able to bring due process challenges to that discrete decision under section 1983.[65] In *Kim*, a similar example, after a prisoner challenged a discrete decision to remove her

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[58] 18 U.S.C. § 3624(c)(2) (emphasis added).

[59] CARES Act § 12003(a)(2), (b)(2) (emphasis added).

[60] "Place," Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/place.

[61] *Cheek*, 835 F. App'x at 739.

[62] Mar. Barr Memo, *supra* n.12, at 1.

[63] *See*, *e.g.*, *Galle*, 346 F. Supp. 2d at 1053 (granting writ of *habeas corpus* because BOP attempted to modify an early release decision); *Cheek*, 835 F. App'x at 739.

[64] *Ortega v. U.S. Immigr. & Customs Enf't*, 737 F.3d 435, 439 (6th Cir. 2013); *Paige v. Hudso*n, 341 F.3d 642, 643–44 (7th Cir. 2003) (transferring probationer from home confinement to jail was a "sufficiently large incremental reduction in freedom to be classified as a deprivation of liberty" that triggers due process and subjects the government to tort liability); *Kim v. Hurston*, 182 F.3d 113, 117–19 (2d Cir. 1999) (due process, including a hearing, was owed before a person could be returned to prison from a work release program, regardless of the degree of discretion maintained by prison officials under state law).

[65] *Paige*, 341 F.3d at 643–44.

from a work release program, the court held that she had a protected liberty interest and was entitled to a hearing.[66] The Memo's position that home confinement release is some sort of ongoing, continuing decision is not reconcilable with the case law establishing that modification or revocation of such decisions is discrete and challengeable.

The Memo is also wrong to conclude that the continuing relationship between BOP, the parole system, and people on home confinement affects the nature of the home confinement decision. The relationship here is akin to the continuing relationship that BOP has with a person on supervised release or probation or with prisoners in federal facilities. For example, the Supreme Court has held that the terms of supervised release must be set at the time of the release decision, under the law in place at the time of the decision.[67] An early release decision might result in an ongoing supervision relationship, but it is nonetheless a discrete decision that may not be disturbed by later changes in authority.[68] An initial sentencing decision has ongoing consequences but is a discrete, challengeable decision that does not require reassessment of authority absent a rare basis for retroactive relief.[69] In all three instances, the carceral decision itself is a one-time event, based on authority at the time of the event. And as in those instances, a home confinement decision—whether solely under BOP's section 3624(c) authority or under its expanded CARES Act authority—is a discrete decision that merely has ongoing consequences. As such, BOP needs to have authority to place a person in home confinement only at the time of its decision to do so.

Put another way, BOP needs authority to grant home confinement for a particular portion of the end of a prisoner's term at the time that BOP makes the placement decision. Any subsequent change in BOP's authority does not affect such a decision previously made.[70] Therefore, when BOP's CARES Act authority ends thirty days after the end of the Covid emergency, previously authorized releases will not be retroactively invalidated. And any discretion BOP will have to revoke home confinement at that time will remain the same as it always was under section 3624(c) because Congress, in the CARES Act, did not disturb that authority.

III. The Memo Overlooked Important Reliance Interests.

The statutory arguments laid out above provide ample reason to revisit the Memo. In addition, however, the Memo's conclusion that BOP is "required to recall the prisoners to

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[66] *Kim*, 182 F.3d at 115.

[67] *Johnson v. United States*, 529 U.S. 694, 702 (2000).

[68] *E.g.*, *Galle*, 346 F. Supp. 2d at 1053 (granting writ of *habeas corpus* because BOP attempted to modify a prisoner's early release decision after changing regulations to exclude similar prisoners from eligibility).

[69] *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (laying out test for retroactive relief).

[70] *See*, *e.g.*, *Galle*, 346 F. Supp. 2d at 1053 (granting writ of *habeas corpus* because BOP attempted to modify an early release decision).

correctional facilities"[71] overlooked the impact this would have on the people most affected. Specifically, the Memo overlooked the reliance interests acquired by those placed in home confinement given what BOP and others have previously said about the CARES Act home-confinement authority, as well as any process due to people on home confinement before they may be re-incarcerated. The absence of any consideration of these issues potentially places BOP in legal jeopardy and provides an additional ground for reconsidering the legal advice provided to that agency.

Somewhere between 2,000 and 3,600 prisoners are serving their sentences on home confinement under CARES Act authority.[72] BOP officials have told Congress and courts that those released under the CARES Act could serve the "remainder of their sentences" on home confinement.[73] Even beyond that, we have received reports that many of these individuals were told by BOP employees and probation officers that they would serve the remainder of their sentences on home confinement so long as they complied with the conditions of their release (e.g., gaining employment). People living on home confinement reestablished relationships and made investments and commitments to their families, current or prospective employers, and others whose help they need to reintegrate themselves into their communities. Indeed, demonstrating that such support was available to them was necessary to establish their eligibility for release in the first place.[74] The Memo's conclusion that those released pursuant to the CARES Act *must be* returned to prison came as a shock to the thousands who had been released over the prior eleven months, as well as to the families, employers, and communities with which

[71] Memo at 1.

[72] *See supra* Section I.B.

[73] Carvajal and Allen Statement, *supra* n.14, at 6; *see also* BOP Correctional Programs Administrator declaration, *supra* n.35.

[74] *See* Mar. Barr Memo, *supra* n.12, at 2 (requiring BOP to consider whether "the inmate has a demonstrated and verifiable re-entry plan" that accounts for limiting the risk of COVID-19 exposure); U.S. Bureau of Prisons, *Memorandum for Chief Executive Officers* at 2–3 (Apr. 13, 2021), *available at* https://bit.ly/2Tjn6ag (requiring consideration of, among other factors, where individual will be living, with whom, and whether "the inmate's medical needs can be met in the community"); *See* Statement of Michael D. Carvajal, Director, Federal Bureau of Prisons to the U.S. Senate Committee on the Judiciary at 5 (Apr. 15, 2021), *available at* https://www.judiciary.senate.gov/imo/media/doc/BOP%20Director%20-%20%20Written%20Statement%202021-04-15%20SJC%20Hearing%20.pdf ("[We cannot transfer inmates who do not have safe housing for themselves or housing with appropriate safeguards to home confinement."); Statement of Michael D. Carvajal, Director, Federal Bureau of Prisons to the U.S. Senate Committee on the Judiciary at 4 (Dec. 2, 2020) *available at* https://www.congress.gov/116/meeting/house/111100/witnesses/HHRG-116-JU08-Wstate-CarvajalM-20201202.pdf (asserting that BOP uses "home confinement to assist inmates reintegrate into their communities prior to completing their prison terms").

they had reconnected.[75] Requiring them to return to federal prison would upset settled reliance interests, including by negating investments made by the released prisoners and their families, friends, and employers.[76]

We encourage OLC to reconsider the Memo's conclusion that BOP is "required to recall the prisoners to correctional facilities" in light of these reliance interests. Federal agencies must engage in "reasoned decisionmaking,"[77] as reflected in the grounds laid out by the agency when it takes an action.[78] And *Department of Homeland Security v. Regents* eliminated any doubt that, when changing course from a prior policy, agencies must take into account any "serious reliance interests" in the prior policy.[79] An agency decision that fails to consider reliance interests before making a policy change is arbitrary and capricious and may be set aside.[80] For this reason, the Supreme Court held in *Regents* that the Department of Homeland Security violated the Administrative Procedure Act when it took action to implement a DOJ legal determination that a prior policy was illegal without considering reliance interests that would be affected by that course of action.[81]

BOP's policy prior to the Memo was to use CARES Act authority to release prisoners to home confinement for the "remainder of their sentences,"[82]and, as noted, it has communicated that policy publicly. The Memo represents a change in this policy. Typically, when OLC interprets an agency's statutory authority, how the agency will move forward in light of that interpretation "involve[s] important policy choices" that would be made by the agency.[83] But here, the Memo goes beyond statutory interpretation to instruct BOP "to recall the prisoners to

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[75] *See, e.g.*, Sarah Lynch, *Thousands of low-level U.S. inmates released in pandemic could be headed back to prison*, Reuters (Apr. 11, 2021), https://www.reuters.com/world/us/thousands-low-level-us-inmates-released-pandemic-could-be-headed-back-prison-2021-04-11/.

[76] *See, e.g.*, *id.* (noting that the uncertainty created by the Memo "is taking a toll on [the] mental health" of a disabled veteran of the Iraq War, "who was sentenced to five years on a drug-related offense" and released on home confinement pursuant to the CARES Act"); *see also Letter from Kevin A. Ring, President, Families Against Mandatory Minimums to the Hons. Dick Durbin and Chuck Grassley* at 4 (Apr. 14, 2021), https://bit.ly/3bHaqQY (describing the anguish of a woman whose father's status changed multiple times as BOP prepared to release individuals to home confinement).

[77] *Regents*, 140 S. Ct. at 1905.

[78] *Id.* at 1907.

[79] *Id.* at 1913 (internal quotation marks omitted); *see also Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125–26 (2016).

[80] *Regents*, 140 S. Ct. at 1913.

[81] *See id*. at 1910, 1913.

[82] Carvajal and Allen Statement, *supra* n.14, at 6; *see also* BOP Correctional Programs Administrator declaration, *supra* n.35.

[83] *Regents*, 140 S. Ct. at 1910.

correctional facilities,"[84] and BOP is required to abide by the Memo regardless of any reliance interests engendered by prior policy.[85] Not only did the Memo itself include no consideration of reliance interests; its instruction will also subject DOJ and BOP to *Regents* liability similar to that faced by the Department of Homeland Security.[86]

We also encourage OLC to consider, in reevaluating its Memo, the constitutionally protected due process rights held by people living on home confinement. "The Due Process Clause protects liberty, and 'freedom from bodily restraint' is at the very core of that protected interest."[87] A person who has been released from physical confinement has a liberty interest that derives not from any statute, but from "the fact of release from the incarceration" and the Constitution itself.[88] "The Supreme Court has repeatedly held that in at least some circumstances, a person who is in fact free of physical confinement—even if that freedom is lawfully revocable—has a liberty interest that entitles him to constitutional due process before he is re-incarcerated."[89] And both the Supreme Court and several other federal courts have recognized that removal from "preparole" and home confinement amounts to a deprivation of a liberty interest warranting protection of due process.[90] This is because "disparities between

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[84] Memo at 1.

[85] 28 C.F.R. § 0.25 (delegating authority of the Attorney General to render legal opinions to the Office of Legal Counsel).

[86] The Memo itself is subject to the requirements of *Regents*. *Regents* applies to final agency actions under the Administrative Procedure Act. *See Regents*, 140 S. Ct. at 1913. This Memo constitutes final agency action under *Bennett v. Spear*, 520 U.S. 154, 177 (1997) because it (1) determined the obligations of BOP (to recall prisoners) and the rights of prisoners released under CARES Act authority (to remain on home confinement only for a limited period), and (2) marks the consummation of agency decisionmaking because it is binding on BOP. But even if this were not the case, the Memo places BOP in jeopardy under *Regents* when it complies with the Memo's instruction.

[87] *Hurd v. D.C., Gov't*, 864 F.3d 671, 682–83 (D.C. Cir. 2017) (citing U.S. Const. amend. V, XIV); *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972); *see also Washington v. Glucksberg*, 521 U.S. 702, 719 (1997) ("the absence of physical restraint" is the uncontested baseline liberty the Due Process Clause protects).

[88] *Harper v. Young*, 64 F.3d 563, 566 (10th Cir. 1995); *aff'd*, 520 U.S. 143 (1997) (quoting *Morrissey v. Brewer*, 408 U.S. 471 (1972); *see also Baptiste v. Elrod*, No. 85 C 2015, 1986 WL 5747, at *2 (N.D. Ill. May 14, 1986) (finding that a state statute "providing for early release create[d] a constitutionally protected liberty interest" and "that once the state has created such 'extra' liberties they cannot be taken away without due process of law.").

[89] *Hurd*, 864 F.3d at 682 (citing *Young v. Harper*, 520 U.S. 143, 152 (1997) (pre-parole conditional supervision); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (probation); *Morrissey*, 408 U.S. at 482 (parole)).

[90] *Young v. Harper*, 520 U.S. at 144–45 (pre-parole conditional supervision); *Paige*, 341 F.3d at 643–44; *see also Gonzalez-Fuentes v. Molina*, 607 F.3d 864, 889–90 (1st Cir. 2010) (holding that "the Due Process Clause is particularly protective of individuals participating in non-institutional forms of confinement"); *Tarapchak v. Lackawanna Cnty.*, No. CV 15-2078, 2016

individual liberty in the" home confinement context, "as opposed to" the prison context, "amount to significant differences in kind, not degree."[91] More than merely facilitating creature comforts, home, "unlike institutional confinement of any kind, allow[s] the [prisoner] to live with their loved ones, form relationships with neighbors, lay down roots in their community, and reside in a dwelling of their own choosing (albeit subject to certain limitations) rather than in a cell designated by the government."[92]

At least two courts have held that these constitutional protections apply even in the more extreme circumstance where the removal of a prisoner from physical confinement was not authorized in the first place. In *Hurd v. District of Columbia*, the D.C. Circuit held that a person mistakenly released before the end of his sentence under circumstances "he reasonably believed reflected a deliberate sentence reduction" had a right to due process before he could be re-incarcerated to serve the remainder of his lawful sentence. And in *Johnson v. Williford*, noting due process concerns, the Ninth Circuit held that the government was prevented from enforcing a statutory provision that disallowed parole against a prisoner who had already been placed on parole.[93] Especially given what they have been told about the circumstances of their home confinement, if BOP moves to recall people living on home confinement to federal facilities, those people would have the right to raise these and similar claims in *habeas* petitions.[94] By failing to consider whether there is a constitutional or other legal barrier to recalling these individuals, the Memo has created a substantial logistical issue for BOP and DOJ, not to mention the thousands of affected prisoners. And the Memo's failure to account for constitutional

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WL 6821783, at *5–6 (M.D. Pa. Nov. 17, 2016) (finding that a prisoner's "interest in remaining . . . in home confinement"—after release on bail in that case—"falls within the contemplation of the liberty language of the [Due Process Clause].").

[91] *Ortega*, 737 F.3d at 439. To state the obvious:

> A prison cot is not the same as a bed, a cell not the same as a home, from every vantage point: privacy, companionship, comfort. And the privileges available in each are worlds apart—from eating prison food in a cell to eating one's own food at home, from working in a prison job to working in one's current job, from attending religious services in the prison to attending one's own church, from watching television with other inmates in a common area to watching television with one's family and friends at home, from visiting a prison doctor to visiting one's own doctor.

Id.

[92] *Gonzalez-Fuentes*, 607 F.3d at 889–90; *see also Kim*, 182 F.3d at 118 (a prisoner "enjoyed a liberty interest, the loss of which imposed a sufficiently 'serious hardship' to require compliance with at least minimal procedural due process" where the prisoner was permitted to live at home during the final phase of a work release program).

[93] *Johnson v. Williford*, 682 F.2d 868, 871–73 (9th Cir. 1982).

[94] *Cheek*, 835 F. App'x at 739 (prisoners may seek *habeas* relief related to home confinement decisions); *Galle*, 346 F. Supp. 2d at 1053 (granting writ of *habeas corpus* because BOP attempted to modify an early release decision).

ramifications further weakens its statutory interpretation, as the CARES Act should be read to avoid any conflict with these constitutional rights.

IV. OLC Should Not Apply Stare Decisis Here.

Although OLC does not routinely overrule prior opinions,[95] the home confinement memo presents a case where a reversal of course is appropriate.

OLC has adopted a form of stare decisis that permits the office to revisit prior decisions only in narrow circumstances. As the current best practices memo explains, "OLC opinions should consider and ordinarily give great weight to any relevant past opinions of Attorneys General and the Office. The Office should not lightly depart from such past decisions, particularly where they directly address and decide a point in question."[96] But that principle has its exceptions. "[A]s with any system of precedent, past decisions may be subject to reconsideration and withdrawal in appropriate cases and through appropriate processes."[97]

Although the best practices memo does not state precisely how to identify an "appropriate case" for withdrawal of a prior opinion, commentators including Trevor Morrison and Harold Koh have suggested the framework adopted by the Supreme Court for revisiting its own precedent in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854–55 (1992).[98] That is, "we may ask [1] whether the rule has proven to be intolerable simply in defying practical workability; [2] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; [3] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or [4] whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[99] Similarly, prior OLC opinions have reasoned that withdrawing precedent is appropriate "when intervening developments in the law appear to cast doubt upon [OLC's] conclusions"; "where the factual predicates have shifted or [OLC] ha[s] come to a better understanding of them"; where the reversed precedents "themselves had reversed established

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[95] *See* Trevor W. Morrison, *Stare Decisis in the Office of Legal Counsel*, 110 Colum. L. Rev. 1448, 1481 (2010) (finding that 5.63% of published OLC opinions between the beginning of the Carter administration and the first year of the Obama administration overruled or modified OLC precedent).

[96] David J. Barron, Office of Legal Counsel, Memorandum for Attorneys of the Office Re: Best Practices for OLC Legal Advice and Written Opinions 2 (July 16, 2010), https://www.justice.gov/sites/default/files/olc/legacy/2010/08/26/olc-legal-advice-opinions.pdf (OLC Best Practices Memo).

[97] *Id*.

[98] *See* Morrison, *supra* n. 95, at 1504; Harold Hongju Koh, *Protecting the Office of Legal Counsel from Itself*, 15 Cardozo L. Rev. 513, 523 (1993).

[99] *Casey*, 505 U.S. at 854–55 (internal quotation marks and citations omitted).

positions of the Executive Branch"; or "after identifying errors in the supporting legal reasoning."[100]

The Memo warrants a departure from stare decisis under the *Casey* test and the analogues to that test previously cited by OLC. Because the Memo is so recent, the third and fourth factors are not particularly illuminating here. The second factor weighs in favor of abandoning stare decisis here because, as set forth above, all the reliance interests are on the side of those released on home confinement. In any case, it would be impossible to say that BOP currently has a reliance interest in recalling prisoners when none have yet been recalled. And as to the first factor, although the ruling is not yet in practical effect while the state of emergency continues, it will likely defy workability if implemented: under the Memo's reasoning, BOP will have thirty days within which it must process the re-incarceration of thousands of prisoners, including finding and allocating bed space, ensuring appropriate staffing, arranging transportation logistics, and coordinating with probation officers across the country, likely while defending scores of legal challenges—all tasks that BOP did not plan for at the time it released these individuals to home confinement.[101] Moreover, as noted above, the Memo includes several "errors in the supporting legal reasoning," including a failure to consider important points of law. The most effective course, then, is to reconsider and rescind the Memo now.

Professor Morrison suggests that, in addition to the *Casey* factors, OLC undertake "a version of [the Supreme Court's] concern for the Court's integrity, credibility, and institutional role."[102] For example, in the context of the infamous torture memos (which OLC eventually overruled), he opined that "harm to OLC's institutional reputation was itself a sufficient basis upon which to withdraw the Memorandum, even though a replacement was not yet ready."[103] This consideration, too, counsels in favor of withdrawing the home confinement Memo.

The reasoning of the Memo is flawed and potentially harmful to the credibility of the office. It overlooks important points of law and does not address reliance or due process issues that might apply to its analysis. This does not comport with OLC's stated practice of ensuring that opinions "candidly and fairly address[] the full range of relevant legal sources and significant arguments on all sides of a question."[104] The Memo also includes errors of fact. For instance, it points to the statutory requirement that the U.S. Probation System offer assistance to

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[100] Office of Legal Counsel, *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling* at 20–21 (Nov. 2, 2018), *available at* https://www.justice.gov/sites/default/files/opinions/attachments/2018/12/20/2018-11-02-wire-act.pdf (Wire Act Memo).

[101] *See* Carvajal and Allen Statement, *supra* n.14, at 6 (expressing expectation that BOP was transferring prisoners to home confinement "for the service of the remainder of their sentences").

[102] Morrison, *supra* n. 95, at 1510.

[103] *Id.*

[104] OLC Best Practices Memo, *supra* n. 96, at 2; *see also* Wire Act Memo, *supra* n. 100, at 21 ("Several factors justify reconsideration here. Although the 2011 Opinion directly addressed the question now before us, we believe that the 2011 Opinion devoted insufficient attention to the statutory text and applicable canons of construction . . . .).

people on home confinement as evidence of BOP's ongoing relationship with those individuals,[105] but the U.S. Probation Office is part of the U.S. Court system, not BOP.[106] The Memo likewise conflicts with other best practices of the office, such as the principle that it is "imperative that the Office's advice be clear, accurate, thoroughly researched, and soundly reasoned."[107] OLC should not permit these errors to stand.

To be sure, "OLC's practice of 'adhering to its own precedents even across administrations' is [a] means by which the Office seeks to establish 'some distance and relative independence from the immediate political and policy preferences of its clients across the executive branch.'"[108] But stare decisis serves those purposes only if the underlying analysis itself does not undermine those goals. Adhering to the flawed Memo would not serve these purposes.

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For these reasons, we respectfully request that OLC review the Memo and rescind it. Time is of the essence. Each day that this Memo remains in place is a day that interferes with the ability of people living on home confinement to make the kinds of investments in families and employment necessary to successfully reintegrate into society.

If you would like to discuss this request further, please contact Samara Spence and Jessica Morton at 202-701-1785, 202-843-1642, sspence@democracyforward.org, or jmorton@democracyforward.org.

Sincerely,

Democracy Forward Foundation
FAMM
Justice Action Network
The Leadership Conference on Civil and Human Rights
National Association of Criminal Defense Lawyers
Tzedek Association

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[105] Memo at 7.

[106] *Probation and Pretrial Services - Mission*, U.S. Courts, https://www.uscourts.gov/services-forms/probation-and-pretrial-services/probation-and-pretrial-services-mission (last visited July 30, 2021).

[107] *Id.*

[108] Emily Berman, *Weaponizing the Office of Legal Counsel*, 62 B.C. L. Rev. 515, 535 (2021) (quoting Curtis A. Bradley & Trevor W. Morrison, Essay, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum. L. Rev. 1097, 1133 (2013)); *see also* Mark Tushnet, *Legislative and Executive Stare Decisis*, 83 Notre Dame L. Rev. 1339, 1352 (2008).

CC: Merrick Garland, Attorney General, Department of Justice
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