**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

Vanessa CROWE and Glen GALEMMO,
*individually and on behalf of all others similarly situated*

Plaintiffs,

v.

FEDERAL BUREAU OF PRISONS, *et al.*

Defendants.

No. 1:24-cv-03582

**MOTION FOR CLASS CERTIFICATION AND APPOINTMENT OF COUNSEL AND SUPPORTING MEMORANDUM OF LAW**

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Pursuant to Federal Rule of Civil Procedure 23 and Local Rule 23.1, Plaintiffs Vanessa Crowe and Glen Galemmo respectfully move for certification of a plaintiff class in this action.

## INTRODUCTION

Plaintiffs Crowe and Galemmo, on behalf of themselves and all others similarly situated, file this lawsuit to challenge the Bureau of Prisons' ("BOP") and BOP Director Peters' (collectively "Defendants") failure to follow Congress's unequivocal directives about when eligible people must be moved out of prison so that they may work towards successful rehabilitation and reentry in a halfway house or home confinement. As alleged in the Complaint, ECF No. 1, Defendants are failing to comply with the requirements Congress imposed in the First Step Act of 2018 ("FSA"). The BOP is administering the earned time credit program in the FSA according to a regulation it promulgated that is inconsistent with the law, leaving thousands of people facing incarceration longer than the law permits. *See* 28 C.F.R. § 523.44, Application of FSA Time Credits.

Accordingly, Plaintiffs seek to vacate the regulation and compel Defendants to implement the FSA's earned time credit program consistent with the law's mandatory directives and ensure that—as required by the FSA—class members are moved out of prison no later than the date upon which their earned time credits are equal to the remainder of their sentences.

Plaintiffs seek to certify a proposed class of:

> All incarcerated people who have earned or will earn time credits under the First Step Act, who meet or will meet the prerequisites for prerelease custody in 18 U.S.C. § 3624(g)(1), and who have not been or will not be moved out of prison on or before the date when their time credits equal their remaining sentences.

Plaintiffs' proposed class satisfies all of the requirements of Federal Rule of Civil Procedure 23(a). First, the class is numerous, consisting of thousands of individuals, making joinder inherently impracticable for that reason alone. Second, the class members' claims share common questions of fact and law, including but not limited to: (1) Whether the BOP is violating the First Step Act by

failing to move class members out of prison no later than the date upon which their earned time credits are equal to the remainder of their sentence; (2) Whether the BOP regulation entitled Application of FSA Time Credits, 28 C.F.R. § 523.44 is a final agency action; (3) Whether the regulation is not in accordance with the First Step Act and is in excess of statutory authority in violation of the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A), (2)(C). The resolution of these questions will drive the outcome of the litigation. Third, Plaintiffs' claims are typical of the class as a whole because, just like all proposed members, each Plaintiff faces the prospect of being incarcerated past the date that each will be statutorily entitled to be transferred to prerelease custody, and each of their claims arises from Defendants' actions taken pursuant to the same regulation. Fourth, Plaintiffs are adequate class representatives who meet all of the requirements of Rule 23(a)(4). They have no conflicts of interest with other proposed class members in this case, they will fairly and adequately represent the interests of the class, and each understands the responsibilities of being a class representative. Counsel for Plaintiffs will vigorously prosecute the interests of the class and include attorneys with extensive experience with the factual and legal issues involved in representing incarcerated people, in asserting constitutional and statutory rights, and/or in pursuing class actions.

Certification of Plaintiffs' proposed class is warranted under Rule 23(b)(2) because Defendants are "act[ing] or refus[ing] to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Plaintiffs have requested that this court vacate and set aside 28 C.F.R. § 523.44, Application of FSA Time Credits, pursuant to 5 U.S.C. §§ 706(2)(A), (2)(C); and that this court enter declaratory and injunctive relief mandating that Defendants implement a system that

ensures, consistent with the First Step Act, that class members are moved out of prison no later than the date upon which their earned time credits are equal to the remainder of their sentences.

Therefore, this Court should certify the class and appoint undersigned counsel as counsel for the class.[1]

## FACTUAL BACKGROUND

### I. Statutory and Regulatory Framework of the First Step Act of 2018

The bipartisan First Step Act of 2018 established a system of "incentives and rewards" for incarcerated people to encourage them to "participate in and complete evidence-based recidivism reduction programs." 18 U.S.C. § 3632(d). At the heart of this system—designed to reduce crime and foster rehabilitation—is the earned time credit program, whereby an eligible person "*shall* earn 10 days of time credits for every 30 days of successful participation in evidence-based recidivism reduction programming or productive activities," and after certain conditions are met, "*shall*" earn 15 days of credits for every 30 days of participation in programming. 18 U.S.C. §§ 3632(d)(4)(A)(i), (ii) (emphasis added). Congress instructed that "[t]ime credits earned under this paragraph … *shall* be applied toward time in prerelease custody or supervised release." *Id.* § 3632(d)(4)(C) (emphasis added). And it further provided that the BOP "*shall* transfer eligible prisoners … into prerelease custody or supervised release" once they have accumulated time credits equal to the remainder of their sentences and certain other conditions are met. *Id.* (emphasis added); *see also id.* § 3624(g)(11) ("The Director of the Bureau of Prisons *shall* ensure there is sufficient prerelease custody to accommodate all eligible prisoners.") (emphasis added); *id.* § 3632(d)(6) ("The incentives described in this subsection shall be in addition to any other rewards or incentives for which a prisoner may be

[1] Plaintiffs have been unable to meet and confer with Defendants' counsel regarding this motion because no counsel have yet appeared for the Defendants. Plaintiffs believe Defendants will not consent to the granting of this motion.

eligible.").

Despite the First Step Act's clear language, Defendants are treating Congress's mandates as discretionary. In a regulation implementing the FSA's earned time credit system, the BOP adopted the position that it "*may* apply FSA Time Credits toward prerelease custody or early transfer to supervised release" if a person meets the statutory criteria. 28 C.F.R. § 523.44(b) (emphasis added). And in litigation, Defendants have resisted application of the statute's plain language, reasoning that where a person earns time credits under the FSA, the question of whether that person ultimately benefits from those credits is a matter of the BOP's discretion. *See, e.g.,* Sur-reply to Pet'r's Reply in Supp. of Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 at 7, *Gattis v. Jacquez*, 3:23-cv-00301 (D. Ore. Oct. 2, 2023), ECF No. 23 (asserting that "[t]he FSA thus merely accelerates when an inmate may be considered for prerelease custody, but the FSA does not strip BOP's discretion to make that decision."); Decl. of Alisha Gallagher at 3, *Mercedes-Valdez v. Warden*, 1:23-cv-04079 (D.N.J. Sept. 25, 2023), ECF No. 5-1 (Senior Consolidated Legal Center Attorney employed by the BOP stating "Petitioner is also now eligible to have his remaining 340 days of earned time credits applied toward prerelease custody…. Petitioner's placement in a pre-release community placement is ultimately subject to resource availability and the consent of a residential reentry center…."). Neither of those courts reached the issue of whether the BOP's position was correct.

## II. The BOP Is Knowingly Imprisoning People Longer than the Law Allows

As a result of Defendants' failure to administer the First Step Act according to the unambiguous statutory requirements, the named Plaintiffs and the class members they seek to represent have been or will be held in prison for months after they have a clear statutory right to be transferred to prerelease custody. Plaintiff Vanessa Crowe will be held in prison for approximately five months past the date on which she should be released pursuant to her FSA earned time credits,

and Plaintiff Glen Galemmo will be held in prison for approximately three months past the date on which he should be released pursuant to his FSA earned time credits. V. Crowe Decl. ¶ 18 ("Crowe Decl."); G. Galemmo Decl. ¶ 6 ("Galemmo Decl."). Their predicament is common among people incarcerated in federal prisons who are or will be eligible for transfer to prerelease custody pursuant to their FSA earned time credits.

Defendants' failure to implement the earned time credit system according to the plain text of the statute affects not only the named Plaintiffs but also thousands of incarcerated people who make up the proposed class. As of January 28, 2024, the United States Department of Justice reported that over 87,000 people in BOP custody were eligible to earn these credits based on their crime of conviction. The BOP considers over 47,000 of those people as having a low or minimum risk of recidivism. *See* C. Gates Decl. Ex. 1 (U.S. Dep't of Just., *First Step Act Annual Report* 19 (2024), https://www.ojp.gov/pdffiles1/nij/309223.pdf) ("DOJ FSA Report"). If those 47,000-plus people maintain their recidivism risk levels, the FSA requires the BOP to move them out of prison once they have earned time credits in an amount equal to the time remaining on their sentences.

Indeed, while giving sworn testimony to the House Judiciary Committee, Defendant Peters was recently asked if it is accurate that more than 60,000 FSA-eligible people are facing 3-12-month delays in transfer to FSA prerelease or full release to freedom. She responded: "I'd want to confirm with my team on the accuracy of those numbers but anecdotally that is what I'm hearing." *See* C. Gates Decl. Ex. 2 (*Oversight of the Federal Bureau of Prisons Before the Subcomm. on Crime and Fed. Gov't Surveillance of the H. Comm. on the Judiciary*, 118th Cong. at 2:05:34 (2024) (Testimony of Colette Peters, Director, BOP), https://www.youtube.com/watch?v=fqwvjvDaWPY&t=7s (last visited Dec. 18, 2024)) ("Peters Testimony"). These delays exist in prisons around the country. *See* P. Richman Decl. ¶¶ 12–14 (stating knowledge of multiple people at a prison within the jurisdiction

of the Fourth Circuit experiencing FSA prerelease delays, as well as reports of cases in California, Oregon, Massachusetts, New Hampshire, Connecticut, Pennsylvania, and South Carolina); A. Guernsey Decl. ¶ 22 (stating knowledge of people receiving delayed FSA prerelease dates at prisons in California, Florida, Virginia, and South Carolina).

*A. Plaintiff Vanessa Crowe*

Plaintiff Vanessa Crowe is incarcerated at FCI Marianna in Florida and was convicted of aiding and abetting possession with intent to distribute methamphetamine; she has been incarcerated for nearly 10 years. C. Gates Decl. Ex. 3 (Bureau of Prisons, *Find An Inmate*, https://www.bop.gov/inmateloc/ (search: "Vanessa Crowe")); C. Gates Decl. Ex. 4 (Vanessa Crowe Sentence Monitoring Computation Data (March 15, 2024)) at 1-2. The BOP's own documents reflect that she will have earned enough credits to be moved out of prison and into prerelease custody on December 24, 2024. *See* C. Gates Decl. Ex. 5 (FSA Assessment of Vanessa Crowe (Oct. 8, 2024)) at 2. But the BOP intends to incarcerate Ms. Crowe until May 2025. *See* Crowe Decl. ¶ 16. Ms. Crowe has repeatedly informed employees of the BOP that this date is after her First Step Act earned time credit date but she has been told nothing is going to change. *See* Crowe Decl. ¶ 19.

*B. Plaintiff Glen Galemmo*

Plaintiff Glen Galemmo is incarcerated at FCI Williamsburg in South Carolina and was convicted of wire fraud and money laundering; he has spent over 10 years in prison. C. Gates Decl. Ex. 6 (Bureau of Prisons, *Find An Inmate*, https://www.bop.gov/inmateloc/ (search: "Glen Galemmo")); C. Gates Decl. Ex. 7 (Glen Galemmo Sentence Monitoring Computation Data (Jan. 17, 2024)) at 1. The BOP's own documents reflect that he will have earned enough credits to be moved out of prison and into prerelease custody on February 26, 2025. *See* C. Gates Decl. Ex. 8 (FSA Assessment of Glen Galemmo (Oct. 13, 2024)) at 2. But the BOP intends to incarcerate Mr.

Galemmo until May 2025. *See* Galemmo Decl. ¶ 2. Mr. Galemmo has repeatedly informed employees of the BOP that this date is after his First Step Act earned time credit date but he has been told nothing is going to change. *See* Galemmo Decl. at ¶ 4.

*C. Putative class members*

In addition to Plaintiffs Crowe and Galemmo, other proposed class members are experiencing similar harms. The examples below are meant to be illustrative, and based on the BOP's own numbers cited above, do not even scratch the surface of the problem.

Richard Rudisill is 66 years old and has been incarcerated for over 23 years. C. Gates Decl. Ex. 9 (Bureau of Prisons, *Find An Inmate*, https://www.bop.gov/inmateloc/ (search: "Richard Rudisill")); C. Gates Decl. Ex. 10 (Richard Rudisill Sentence Monitoring Computation Data (Apr. 2, 2024)) at 1-2. He is currently incarcerated at FCI Petersburg in Virginia. C. Gates Decl. Ex. 9. He was convicted of conspiracy to possess with intent to distribute cocaine and sentenced to 360 months. C. Gates Ex. 10 at 1. The BOP has continuously classified his risk recidivism level as low since December 2018. *See* C. Gates. Decl. Ex. 11 (FSA Assessment of Richard Rudisill (March 30, 2024)) at 2. The BOP's own records reflect that as of March 30, 2024, he had earned 415 credits towards prerelease custody. Upon information and belief, as of November 30, 2024, he had earned 535 days towards prerelease custody and had only 435 days left on his sentence. C. Gates. Decl. Ex. 10 at 2 (documenting Mr. Rudisill's final "statutory release … with [applied] FSA credits" as February 8, 2026). He is currently over-detained and has lost over 100 days in prerelease custody.

Danyell Roberts is 51 years old and has spent over six years in prison. C. Gates Decl. Ex. 12 (Bureau of Prisons, *Find An Inmate*, https://www.bop.gov/inmateloc/ (search: "Danyell Roberts")); C. Gates Decl. Ex. 13 (Judgment in a Criminal Case, *United States v. Roberts*, 2:17-cr-00129 (N.D. Tex. Oct. 17, 2018)) at 2. She is currently incarcerated at FCI Marianna in Florida. C. Gates Decl.

Ex 12. She was convicted of possession with intent to distribute cocaine and sentenced to 121 months. C. Gates Decl. Ex. 14 (Danyell Roberts Sentence Monitoring Computation Data (May 29, 2023)) at 2. The BOP has continuously classified her risk recidivism level as minimum since January 2019. C. Gates Decl. Ex. 15 (FSA Assessment of Danyell Roberts (July 30, 2024)) at 2. As of July 30, 2024, she had earned 610 days towards prerelease custody. *Id.* at 1. Upon information and belief, by November 30, 2024, she had earned 670 days towards prerelease custody and had 632 days left on her sentence. C. Gates Decl. Ex. 14 (D. Roberts Sentence Monitoring) at 2 (documenting Ms. Roberts' final "statutory release … with [applied] FSA credits" as August 24, 2026). Upon information and belief, the BOP's own documents reflect that by November 30, 2024, Ms. Roberts had earned enough credits to be moved out of prison and into prerelease custody. But Ms. Roberts is still incarcerated. She is currently over-detained and the BOP intends to continue incarcerating Ms. Roberts until March 19, 2025. C. Gates Decl. Ex. 16 (Email from Danyell Roberts to Emma Andersson (September 25, 2024)) at 1.

Richard Armbre Williams is 53 years old and has been incarcerated for over 10 years. C. Gates Decl. Ex. 17 (Bureau of Prisons, *Find An Inmate*, https://www.bop.gov/inmateloc/ (search: "Richard Armbre Williams"); C. Gates Decl. Ex. 18 (Richard Williams Sentence Monitoring Computation Data (Sept. 9, 2024)) at 1–2. He is currently incarcerated at FCI Williamsburg in South Carolina. C. Gates Decl. Ex. 17. He was convicted of being a felon in possession of a firearm and ammunition and sentenced to 180 months. C. Gates Decl. Ex. 18 at 1. The BOP has continuously classified his recidivism risk as low since December 2018. C. Gates Decl. Ex. 19 (FSA Assessment of Richard Williams (Sept. 5, 2024)) at 2. The BOP's own records reflect that as of September 5, 2024, he had earned 625 credits towards prerelease custody, *id* at 1; at that time, he had only had 406 days left on his sentence. C. Gates Decl. Ex. 19 (documenting Mr. Williams' final "statutory

release date … with [applied] FSA credits" as October 16, 2025). He is currently over-detained and has lost over 200 days in prerelease custody.

Jamie Sigmon is 37 years old and has spent over five years in prison. C. Gates Decl. Ex. 20 (Bureau of Prisons, *Find An Inmate*, https://www.bop.gov/inmateloc/ (search: "Jamie Sigmon"); C. Gates Decl. Ex. 21 (Jamie Sigmon Sentence Monitoring Computation Data (July 10, 2024)) at 1. She is currently incarcerated at FCI Pekin in Illinois. C. Gates Decl. Ex. 20. She was convicted of conspiracy to distribute and possession with intent to distribute methamphetamine and sentenced to 114 months. C. Gates Decl. Ex. 21 at 1. The BOP classified her risk recidivism level as low from November 2019 until May 2023 and as minimum since May 2023. C. Gates Decl. Ex. 22 (FSA Assessment of Jamie Sigmon (Oct. 14, 2024)) at 3. The BOP's own records reflect that Ms. Sigmon will have earned enough credits to be moved out of prison and into prerelease custody on January 6, 2025. *Id.* at 4. The BOP intends to continue incarcerating Ms. Sigmon until March 21, 2025. C. Gates Decl. Ex. 23 (Letter from Jamie Sigmon to Emma Andersson (Nov. 5, 2024)) at 1.

Kay Gow is 74 years old and has spent over five years in prison. C. Gates Decl. Ex. 24 (Bureau of Prisons, *Find An Inmate*, https://www.bop.gov/inmateloc/ (search: "Kay Gow")) ("K. Gow Inmate Locator"); C. Gates Decl. Ex. 25 (Kay Gow Sentence Monitoring Computation Data (Oct. 8, 2024)) ("K. Gow Sentence Monitoring) at 1. She is currently incarcerated at FCI Marianna in Florida. C. Gates Ex. 24 (K. Gow Inmate Locator). She was convicted of conspiracy to commit wire fraud, wire fraud, conspiracy to commit money laundering, and illegal monetary transactions, and sentenced to 120 months. C. Gates Decl. Ex. 25 (K. Gow Sentence Monitoring) at 1. The BOP has continuously classified her risk recidivism level as minimum since June 2019. C. Gates Decl. Ex. 26 (FSA Assessment of Kay Gow (Oct. 15, 2024)) at 1. The BOP's own records reflect that Ms. Gow will have earned enough credits to be moved out of prison and into prerelease custody on March

27, 2025. *Id.* at 2. But the BOP has expressed its intent to incarcerate Ms. Gow until September 9, 2025. C. Gates Decl. Ex. 27 (Response to Request for Administrative Remedy (Sept. 3, 2024)) at 1.

## LEGAL STANDARD

Federal Rule of Civil Procedure 23 authorizes federal courts to determine, "[a]t an early practicable time after a person sues" as a class representative, "whether to certify the action as a class action." Fed. R. Civ. P. 23(c)(1)(A). To obtain class certification, plaintiffs must first satisfy the four Rule 23(a) requirements: numerosity, commonality, typicality, and adequacy. Fed. R. Civ. P. 23(a)(1)–(4); *see Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349 (2011). Plaintiffs must then show that the case meets the requirements of one of Rule 23(b)'s subsections. As relevant here, Rule 23(b)(2) provides that class certification is proper if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see Wal-Mart*, 564 U.S. at 360.

Upon certifying a class, the Court must also appoint class counsel. Fed R. Civ. P. 23(g). To do so, the Court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A)(i)–(iv). The court "may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(1)(B).

## ARGUMENT

This case satisfies all of Rule 23's requirements. Defendants (1) have promulgated a regulation that is not in accordance with law and is in excess of statutory authority in violation of the APA, 5 U.S.C. §§ 706(2)(A), (2)(C); and (2) are administering the earned time credit system

according to that regulation and therefore failing to ensure that people are moved out of prison no later than the date upon which their earned time credits are equal to the remainder of their sentences as required by the First Step Act. This systemic failure affects all members of the class who face the prospect of spending more time in prison than the law allows. Vacatur of the regulation, declaratory relief, and a single injunction requiring Defendants to administer the earned time credit system in accordance with the FSA will remedy these injuries. The Court should therefore certify the class.

## I. The Proposed Class Satisfies the Requirements of Rule 23(a)

### *A. The Proposed Class Satisfies the Numerosity Requirement.*

The proposed class satisfies the requirement that a class be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). Although Rule 23(a)(1) does not impose any specific numerical threshold, courts in this District have generally concluded that "numerosity is satisfied when a proposed class has at least forty members." *Howard v. Liquidity Servs., Inc.*, 322 F.R.D. 103, 117 (D.D.C. 2017) (quoting *Coleman ex rel. Bunn v. District of Columbia*, 306 F.R.D. 68, 76 (D.D.C. 2015)); *accord Radosti v. Envision Emi, LLC,* 717 F. Supp. 2d 37, 51 (D.D.C. 2010). In considering "the number of potential class members, the Court need only find an approximation of the size of the class, not 'an exact number of putative class members.'" *Coleman*, 306 F.R.D. at 76 (citation omitted). In addition, "classes including future claimants generally meet the numerosity requirement due to the 'impracticality of counting such class members, much less joining them.'" *J.D. v. Azar*, 925 F.3d 1291, 1322 (D.C. Cir. 2019) (citation omitted). Here, the proposed class has thousands of members and also includes future class members. According to DOJ, there were over 47,000 people as of January 2024 who were both eligible to earn FSA time credits and whose recidivism risk—if maintained—was low enough to qualify for prerelease custody when their credits are equal to the remaining time on their sentences. *See* C. Gates Decl. Ex. 1 (DOJ FSA Report). And

when Defendant Peters was asked earlier this year if it is accurate that more than 60,000 FSA-eligible people are facing 3-12-month delays in transfer to FSA prerelease or full release to freedom, she responded: "I'd want to confirm with my team on the accuracy of those numbers but anecdotally that is what I'm hearing." C. Gates Decl. Ex. 2 (Peters Testimony). Moreover, the proposed class encompasses additional thousands of individuals who will earn time credits under the First Step Act and become eligible for prerelease custody in the future but "whose identities are currently unknown and who are therefore impossible to join." *D.L. v. District of Columbia*, 302 F.R.D. 1, 11 (D.D.C. 2013) ("*D.L. II*"), *aff'd*, 860 F.3d 713 (D.C. Cir. 2017) ("*D.L. III*").

Besides the sheer number of class members and inclusion of future class members, joinder is also impracticable here on account of the "financial resources of class members[]" and their "ability … to institute individual suits." *Id.* (citation omitted). Many of the putative class members are restricted in their ability to bring individual suits because of their limited financial resources and challenges in finding counsel. *See* A. Guernsey Decl. ¶ 7 ("We litigate [sentence-reduction motions under 18 U.S.C.] § 3582(c) and [habeas petitions challenging earned-time-credit designations and home-confinement issues under 28 U.S.C.] § 2241 on a pro bono basis, and we have focused on litigating these types of cases because petitioners are not entitled to counsel."); P. Richman Decl. ¶¶ 10–11, 14 (noting limitations on capacity to represent individuals with FSA claims seeking to file habeas petitions).

Accordingly, the proposed class satisfies the numerosity requirement of Rule 23(a)(1).

*B. The Proposed Class Satisfies the Commonality Requirement.*

The proposed class also satisfies Rule 23(a)(2)'s requirement of presenting "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). To meet this requirement, the class members' claims "must depend upon a common contention" that is "capable of classwide resolution—which

means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 564 U.S. at 350. In other words, commonality requires a showing that there is "some glue" holding the claims together. *Id.* at 352. "[E]ven a single common question will do," *id.* at 359 (cleaned up), if that question has the capacity to yield an answer that drives litigation for the class as a whole. *See also J.D.*, 925 F.3d at 1321 ("The presence of a single such common question [susceptible to class-wide proof and resolution] can suffice to satisfy Rule 23(a)(2).").

Courts have consistently held that "commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members." *Thorpe v. District of Columbia*, 303 F.R.D. 120, 147 (D.D.C. 2014) (quoting *Lane v. Kitzhaber*, 283 F.R.D. 587, 597 (D. Or. 2012)). The common question "must be more specific than simply asking whether plaintiffs 'have all suffered a violation of the same provision of law….'" *Id.* at 145 (quoting *Wal-Mart*, 564 U.S. at 350). But where "plaintiffs allege widespread wrongdoing by a defendant," as in civil rights cases challenging institutional wrongdoing, they can establish commonality notwithstanding individual factual variations by identifying a "uniform policy or practice that affects all class members." *D.L. II*, 302 F.R.D. at 12 (quoting *D.L. I*, 713 F.3d at 128); *see Parsons v. Ryan*, 754 F.3d 657, 682 (9th Cir. 2014) ("In a civil rights suit such as this one … commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members. Under such circumstances, individual factual differences among class members pose no obstacle to commonality." (quoting *Rosas v. Baca*, No. 12-cv-428, 2012 WL 2061694, at *3 (C.D. Cal. June 7, 2012))); *Pappas v. District of Columbia*, No. 19-cv-2800, 2024 WL 1111298, at *6 (D.D.C. Mar. 14, 2024) (explaining that an "overarching policy failure [in *Thorpe*] generated a common question" notwithstanding individual variation among class members concerning

disabilities under the Americans with Disabilities Act). Indeed, "factual variations among the class members will not defeat the commonality requirement, so long as a single aspect or feature of the claim is common to all proposed class members." *Bynum v. District of Columbia*, 214 F.R.D. 27, 33 (D.D.C. 2003)*; see also Stephens v. Farmers Rest. Grp.*, 329 F.R.D. 476, 483 (D.D.C. 2019) (quoting *Bynum*, 214 F.R.D. at 33).

The Court's decision in *Bynum* is instructive on this point. There, this Court certified an "overdetention" class of at least 93 people who were in the custody of the District of Columbia's Department of Corrections and alleged they had been detained beyond the point at which their release had been ordered, for periods ranging from one extra day to many days or even months. *Bynum*, 214 F.R.D. at 33, 42. In its opinion granting class certification, the Court explained that the proposed class of over-detained people satisfied the commonality requirement because "despite the fact that some of the plaintiffs might have been detained past their release date for a longer time period than other plaintiffs, there are questions of law and fact that are common to the class," including whether defendants "follow[ed] a practice of holding persons in its custody later than their scheduled release date." *Id.* at 34.

The same is true here. Proposed class members have, at least, the following key legal issues in common: (1) Whether the BOP is violating the First Step Act by failing to move class members out of prison no later than the date upon which their earned time credits are equal to the remainder of their sentence; (2) Whether the BOP regulation entitled Application of FSA Time Credits, 28 C.F.R. § 523.44, is a final agency action; (3) Whether the regulation is not in accordance with the First Step Act and is in excess of statutory authority in violation of the Administrative Procedure Act, 5 U.S.C. §§ 706(2)(A), (2)(C).

The resolution of these questions is a necessary prerequisite to the adjudication of each class member's claim, and these questions can be resolved for the "class as a whole." *Wal-Mart*, 564 U.S. at 360; *see also Thorpe*, 303 F.R.D. at 146–47 ("[R]esolution of these common contentions will generate common answers for the entire class and resolve issues that are central (and potentially dispositive) to the validity of each plaintiff's claim and the claims of the class as a whole.").

The BOP's regulation and its administration of the earned time credit system affects all class members. It does not arise out of circumstances unique to each member and it results in "common harms." *D.L. III*, 860 F.3d at 724. Accordingly, the proposed class satisfies the commonality requirement of Rule 23(a)(2).

*C. The Proposed Class Satisfies the Typicality Requirement.*

Plaintiffs' claims are also "typical of the claims … of the class." Fed. R. Civ. P. 23(a)(3). "The typicality requirement is satisfied 'if each class member's claim arises from the same course of events that led to the claims of the representative parties and each class member makes similar legal arguments to prove the defendant's liability.'" *Radosti*, 717 F. Supp. 2d at 52 (quoting *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 27 (D.D.C. 2001)). "The typicality and commonality requirements often overlap because both serve as guideposts to determine whether a class action is practical and whether the representative plaintiffs' claims are sufficiently interrelated with the class claims to protect absent class members." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 181 (D.D.C. 2015) (internal quotations and citations omitted).

The typicality requirement "has been liberally construed." *Bynum*, 214 F.R.D. at 34. As with commonality, "[f]actual variations between the claims of class representatives and the claims of other class members do not negate typicality." *Id.*; *see also Wagner v. Taylor*, 836 F.2d 578, 591 (D.C. Cir. 1987) ("Typicality is not destroyed merely by 'factual variations.'" (internal citations

omitted)). "Rather, if the named plaintiffs' claims are based on the same legal theory as the claims of the other class members, it will suffice to show that the named plaintiffs' injuries arise from the same course of conduct that gives rise to the other class members' claims." *Bynum*, 214 F.R.D. at 35; *see also N.S. v. Hughes,* 335 F.R.D. 337, 354 (D.D.C. 2020) ("Some factual variations between claims are permitted so long as the class representative's claim is based on the same allegedly unlawful conduct."); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 196 (D.D.C. 2013) ("[C]ourts have found the typicality requirement satisfied when class representatives suffered injuries in the same general fashion as absent class members." (internal quotation marks and citation omitted)).

Here the named Plaintiffs' claims are typical of the proposed class members' claims. As explained above, their claims arise from the BOP's regulation and Defendants' systemic failure to ensure that class members are not imprisoned beyond the date when their earned time credits are equal to the time remaining on their sentences. These claims "arise from the same course of conduct that gives rise to the other class members' claims," *Bynum*, 214 F.R.D. at 35, and are based on the same legal theories as all class members' claims. The harm that Plaintiffs will imminently suffer—namely, overdetention in a federal prison—arises from Defendants' common course of conduct and this harm is typical of the prospective harm faced by the class as a whole. Notwithstanding any individual differences that may exist between the Plaintiffs and other members of the proposed class, Plaintiffs' claims "are sufficiently interrelated with the class claims to protect absent class members." *R.I.L-R*, 80 F. Supp. 3d at 181.

Accordingly, Plaintiffs' claims satisfy the typicality requirement of Rule 23(a)(3).

*D. The Proposed Class Representatives Satisfy the Adequacy Requirement.*

Finally, the class representatives also will "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Rule 23(a)(4)'s adequacy requirement "embraces two components: the class representative (i) must not have antagonistic or conflicting interests with the unnamed members of the class and (ii) must appear able to vigorously prosecute the interests of the class through qualified counsel." *J.D.*, 925 F.3d at 1312 (internal quotation marks omitted) (quoting *Twelve John Does v. District of Columbia*, 117 F.3d 571, 575 (D.C. Cir. 1997)). Both requirements are easily met here.

First, Plaintiffs do not have antagonistic or competing interests with the unnamed members of the class. Plaintiffs and class members face the prospect of the same harms. They assert the same legal claims, seek the same litigation outcomes, and would benefit from the same declaratory and injunctive relief. Moreover, Plaintiffs are not seeking monetary relief, so there is no risk that a financial conflict would arise between Plaintiffs and other class members. Thus, there is no conflict between Plaintiffs and unnamed class members.

Second, as the proposed class representatives, Plaintiffs are competent to represent the class. Adequacy "does not require either that the proposed class representatives have legal knowledge or a complete understanding of the representative's role in class litigation." *Garnett v. Zeilinger*, 301 F. Supp. 3d 199, 210 (D.D.C. 2018) (citation omitted). It requires only that the named plaintiff have "some rudimentary knowledge of her role as a class representative and [be] committed to serving in that role in litigation." *Id.* (citation omitted). The declarations of Plaintiffs Crowe and Galemmo demonstrate a sufficient "awareness of the facts of this case," *id.* at 211, to satisfy the adequacy factor. *See generally* Crowe Decl.; Galemmo Decl.

Accordingly, the proposed class meets all requirements of Rule 23(a).

## II. Class Certification Is Appropriate Under Rule 23(b)(2).

In addition to satisfying the four criteria of Rule 23(a), this class qualifies for certification under Rule 23(b)(2). That rule permits certification where "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). As the Supreme Court has explained, "[t]he key to the (b)(2) class is the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Wal-Mart*, 564 U.S. at 360 (cleaned up). Civil rights cases such as this one are paradigmatic examples of Rule 23(b)(2) class actions. *See, e.g.*, *Postawko v. Missouri Dep't of Corr.*, 910 F.3d 1030, 1039–40 (8th Cir. 2018) (affirming 23(b)(2) certification where plaintiffs challenged defendants' policy that affected all incarcerated people with a particular medical condition because such claims "describe a party acting 'on grounds generally applicable to the class.'"); *Yates v. Collier*, 868 F.3d 354, 367–8 (5th Cir. 2017) (affirming 23(b)(2) certification where defendants' climate control policy was "the source of any injury for the entire [class of incarcerated people]"); *Baby Neal for & by Kanter v. Casey*, 43 F.3d 48, 58–59 (3d Cir. 1994) ("It is the (b)(2) class which serves most frequently as the vehicle for civil rights actions and other institutional reform cases that receive class action treatment."); *Scholl v. Mnuchin*, 489 F. Supp. 3d 1008, 1047 (N.D. Cal. 2020) (provisionally certifying under Rule 23(b)(2) a nationwide class of individuals who are or were incarcerated and were eligible to receive stimulus checks from the Internal Revenue Service but did not).

Courts in this District have interpreted Rule 23(b)(2) to impose two requirements: "(1) the defendant's action or refusal to act must be generally applicable to the class, and (2) plaintiff must

seek final injunctive relief or corresponding declaratory relief on behalf of the class." *Steele v. United States*, 159 F. Supp. 3d 73, 81 (D.D.C. 2016) (quotations and citations omitted); *Bynum*, 214 F.R.D. at 37; *R.I.L-R*, 80 F. Supp. 3d at 182. Both elements are easily satisfied. First, Defendants' challenged regulation and their implementation of it apply to everyone who is eligible to earn FSA earned time credits and use them toward prerelease custody. Second, Plaintiffs seek final declaratory and injunctive relief that would benefit the whole class. Even if there are variations in how the BOP applies each incarcerated person's FSA earned time credits, its failing here is common to the class and warrants a single, class-wide injunction: the BOP is not administering the FSA earned time credit system as required by the law, and as a result, injunctive relief is required to ensure people are moved out of prison and into prerelease custody on the dates required under the First Step Act.

Therefore, certification pursuant to Rule 23(b)(2), and class-wide relief, is appropriate.

## III. The Court Should Designate Plaintiffs' Counsel as Class Counsel.

Upon certifying a class, the Court must also appoint class counsel. Fed R. Civ. P. 23(g)(1). To do so, the Court must consider: "(i) the work counsel has done in identifying or investigating potential claims in the action; (ii) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (iii) counsel's knowledge of the applicable law; and (iv) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A). The court "may also consider any other matter pertinent to counsel's ability to fairly and adequately represent the interests of the class.'" Fed. R. Civ. P. 23(g)(1)(B).

Plaintiffs' counsel satisfy all four criteria. Plaintiffs are jointly represented by the American Civil Liberties Union Foundation, the American Civil Liberties Union of the District of Columbia, and Jenner & Block LLP. Counsel from all three organizations are experienced litigators, most of

whom have specific expertise in representing criminal defendants, incarcerated people, and/or civil rights plaintiffs, and most of whom have extensive experience in class action litigation. *See*; S. Michelman Decl. ¶¶ 4–12; E. Henthorne Decl. ¶¶ 4–11; E. Andersson Decl. ¶¶ 4–7. As reflected in the complaint, counsel have already devoted "substantial time and resources to identifying and investigating potential claims in the action," and will continue to do so. *Encinas v. J.J. Drywall Corp.*, 265 F.R.D. 3, 9 (D.D.C. 2010). ("The plaintiffs have shown that they will adequately represent the class…. Counsel have already committed substantial time and resources to identifying and investigating potential claims in the action.").

Accordingly, the Court should appoint Plaintiffs' counsel as class counsel in this case.

**CONCLUSION**

For the foregoing reasons, the Court should grant the motion for class certification and appointment of class counsel.

[signatures on following page]

Dated: December 20, 2024

Respectfully submitted,

*/s/ Elizabeth Henthorne*
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*Attorneys for Plaintiffs and the Proposed Class*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that, on the 20th day of December, 2024, I caused the foregoing to be electronically filed with the Clerk of the Court by using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

By: /s/ *Elizabeth Henthorne*
Elizabeth Henthorne