

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

October 9, 2026

Thomas B. Plunkett, III
Clerk

No. 25-50315

DENNIS MICHAEL HOGAN,

Petitioner—Appellant,

versus

FCI, *La Tuna Case Manager, K. Rodriguez*; FCI, *La Tuna, Warden, Edge*;
DIRECTOR OF BUREAU OF PRISONS, C.S. PETERS,

Respondents—Appellees.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 3:24-CV-360

Before SOUTHWICK, GRAVES, and WILSON, *Circuit Judges*.

CORY T. WILSON, *Circuit Judge*:

David Michael Hogan, federal prisoner # 20924-085, was sentenced in August 2020. Roughly ten months later, he arrived at his designated Bureau of Prisons (BOP) facility. Proceeding *pro se*, he filed the instant habeas petition under 28 U.S.C. § 2241, seeking First Step Act (FSA) time credits allegedly earned during post-sentencing detention before arrival at his designated BOP facility.

The district court dismissed his petition. We affirm.

I.

Hogan pled guilty to enticement of a minor and was sentenced to 180 months' imprisonment on August 26, 2020. Following sentencing, he spent time in a series of facilities before arriving at his designated BOP facility, Federal Correctional Institution (FCI) La Tuna, on June 28, 2021.

On October 4, 2024, after exhausting administrative remedies, Hogan filed a petition for writ of habeas corpus under 28 U.S.C. § 2241. He contended that his FSA credits began accumulating the day of his sentencing, and that he was entitled to immediate placement in home confinement. He also requested that the court "[o]rder the BOP to recognize and follow" certain calculations of his credits, including that his projected date of transfer to prerelease custody was March 25, 2025.

The BOP moved for summary judgment, maintaining Hogan was not entitled to his requested relief. Hogan countered that the BOP's regulation regarding when a prisoner becomes eligible to earn credits conflicts with, and is therefore invalidated by, the FSA. The district court granted the BOP's motion, concluding that Hogan was not eligible to earn credits before arriving at his BOP facility, and that the court was without authority to order Hogan's placement in home confinement. Hogan timely appealed.

II.

We review the dismissal of a habeas corpus petition via summary judgment *de novo*. *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 327 (5th Cir. 2004). Summary judgment is warranted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). If there is sufficient evidence to reach a verdict for the nonmoving party, genuine factual disputes exist that preclude summary judgment. *Ahders v. SEI Priv. Tr. Co.*, 982 F.3d

312, 315 (5th Cir. 2020). All facts and reasonable inferences should be drawn in favor of the nonmoving party. *Id.*

A § 2241 petition is the proper procedural vehicle for “attack[ing] the manner in which a sentence is carried out or the prison authorities’ determination of its duration.” *Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000). To prevail, a prisoner must show he is “in custody in violation of the Constitution or laws or treaties of the United States.” § 2241(c)(3). Because Hogan is proceeding under § 2241, he did not need to obtain a certificate of appealability to proceed with this appeal. *Padilla v. United States*, 416 F.3d 424, 425 (5th Cir. 2005).

III.

We begin by surveying the FSA’s framework and relevant provisions. We then address Hogan’s contentions.

A.

Congress enacted the FSA in 2018. Among other provisions, the law provides eligible federal inmates with time credits to shorten their sentence in exchange for participation in recidivism reduction programs. *See* Pub. L. No. 115-391, §§ 101–102, 132 Stat. 5194. The FSA charged the Attorney General with developing a “risk and needs assessment system,” which the BOP uses to determine (1) “the recidivism risk of each prisoner as part of the intake process,” and (2) “the type and amount of evidence-based recidivism reduction [(EBRR)] programming” for each prisoner “based on the prisoner’s specific criminogenic needs.” 18 U.S.C. § 3632(a)(1), (3).

The FSA mandates that the BOP “shall provide all prisoners with the opportunity to actively participate in [EBRR] programs or productive activities [(PAs)], according to their specific criminogenic needs, throughout their entire term of incarceration.” *Id.* § 3621(h)(6). An eligible prisoner

who “successfully completes” EBRR programming “shall earn 10 days of time credits for every 30 days of successful participation in [EBRR] programming or [PAs].” *Id.* § 3632(d)(4)(A)(i). A prisoner is entitled to an additional five days of credits for every 30 days of EBRR participation if the BOP determines he is “at a minimum or low risk for recidivating” and has not increased his recidivism risk over two consecutive assessments. *Id.* § 3632(d)(4)(A)(ii). Earned credits cannot be applied toward time in prerelease custody or supervised release, however, until the prisoner has earned them “in an amount that is equal to the remainder of [his] imposed term of imprisonment.” *Id.* § 3624(g)(1)(A).

The FSA also provides when a prisoner cannot earn credits. One such exclusion is “during official detention prior to the date that the prisoner’s sentence commences under [18 U.S.C. §] 3585(a).” *Id.* § 3632(d)(4)(B)(ii). Section 3585(a), in turn, provides that “[a] sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.”

On its passage, the FSA did not require immediate implementation; instead, it laid out a timeline for the BOP to scale its obligations. *See* 18 U.S.C. § 3621(h). The BOP was initially required to “implement and complete the initial intake risk and needs assessment for each prisoner” within 180 days after the Attorney General released the risk and needs assessment system, 18 U.S.C. § 3621(h)(1)(A), a deadline that fell on January 15, 2020. Congress then afforded the BOP two years after completing those assessments to “provide such evidence-based recidivism reduction programs and productive activities for all prisoners.” *Id.* § 3621(h)(2)(A). The statute also directed that, during that two-year period, “the priority for such programs and activities shall be accorded based on a prisoner’s proximity to

release date.” *Id.* § 3621(h)(3). The phase-in period thus spanned January 15, 2020, through January 15, 2022, bracketing the entire time at issue in Hogan’s case.¹

In 2022, just after the phase-in period concluded, the BOP promulgated regulations setting forth “procedures for the earning and application of Time Credits as authorized by 18 U.S.C. § 3632(d)(4) and Section 101 of the [FSA].” 28 C.F.R. § 523.40(a). Among other things, the BOP defined “[w]hen an eligible inmate begins earning FSA Time Credits”: They start to accrue “after the inmate’s term of imprisonment commences (the date the inmate arrives or voluntarily surrenders at the designated [BOP] facility where the sentence will be served).” *Id.* § 523.42(a).

B.

With that statutory framework in view, we now turn to Hogan’s claims. First, he asserts entitlement to credits for the 308-day period in between his sentencing and arrival at FCI La Tuna. He also asserts that he is entitled to “a windfall of credits” under an “interim procedure” of the FSA. Third, he argues the district court erred by not ordering his placement in home confinement. Last, he maintains the district court’s judgment should be overturned due to judicial bias.

¹ The record does not reveal precisely how and when the BOP implemented its programming obligations during the phase-in period at the facilities where Hogan was held before arriving at FCI La Tuna in June 2021. But whatever programming was available at the time, as discussed *infra* above the line, the FSA awards time credits only for actual participation, 18 U.S.C. § 3632(d)(4).

1.

Hogan first contends that, although he did not participate in EBRR programs or PAs prior to his arrival at FCI La Tuna, he is entitled to credits for that period because he was wrongfully denied the ability to earn them. He takes aim at BOP regulation § 523.42(a) which, as stated, provides that an inmate may not earn credits until his “term of imprisonment commences (the date the inmate arrives or voluntarily surrenders at the designated [BOP] facility where the sentence will be served).” He contends this regulation conflicts with 18 U.S.C. §§ 3585(a) and 3621(h)(6) by rewriting when a sentence begins and delaying when a prisoner can start accruing credits.

Hogan’s argument raises a novel question for our court: Can the BOP deny prisoners the opportunity to earn time credits after sentencing but before they arrive at their designated facility? Put differently, does 28 C.F.R. § 523.42(a) conflict with the FSA?

Hogan’s position has some textual appeal. If § 3585(a) defines the commencement of a sentence as “the date the defendant is received in custody awaiting transportation to” his official detention facility, and if § 3621(h) mandates that prisoners must have the opportunity to participate in credit-earning programs “throughout their entire term of incarceration,” then how could the BOP deny Hogan those credit-earning opportunities for ten months after his sentence commenced?

That said, the BOP’s argument is also grounded in statutory text. Under its interpretation of the FSA, earning credits requires the completion of a detailed process. First, it contends, the BOP designates a prisoner’s facility by considering the factors listed in § 3621(b), which can “take some time.” Upon arrival at the facility, the prisoner undergoes a risk and needs assessment “as part of the intake process.” 18 U.S.C. § 3632(a). The BOP

then provides EBRR programming or PAs “based on the prisoner’s specific criminogenic needs.” *Id.* § 3632(a)(1). And finally, the prisoner is entitled to credits *only* when he “successful[ly] participates” in that programming. *Id.* § 3632(d)(4)(A)(i). That statutory scheme, the BOP argues, would be upended if Hogan’s interpretation of the FSA were correct.

Compelling as the question is, we need not resolve the parties’ debate over the interplay between these statutory provisions and the BOP’s regulation. Hogan’s claim fails for a far simpler reason: He does not substantiate *any* participation—even attempted participation—in EBRR programming or PAs that would entitle him to the time credits he seeks. The district court concluded, and Hogan does not dispute, that he made “no showing” that he “was engaged in EBRR programs or PAs targeted at reducing his risk of recidivism before his transfer” to FCI La Tuna. Hogan only generally alleges that COVID-19 restrictions shut programming down, which confirms that he did not participate. That failure is fatal to Hogan’s claim, as participation in those activities is a necessary predicate to earning credits under the FSA. *See id.* § 3632(d)(4)(A).²

As the Fourth Circuit recently observed, “a prisoner who ‘successfully *completes*’ qualified programming ‘shall *earn* time credits’ ‘for every 30 days of successful *participation*’ in the programming. The requirements of completing, earning, and participating are defined with active verbs requiring conforming action by the prisoner.” *White v. Warden of Fed. Corr. Inst. – Cumberland*, 164 F.4th 326, 330 (4th Cir. 2026) (quoting § 3632(d)(4)(A)) (emphasis in original). The Tenth Circuit similarly held

² Our dissenting colleague points to other fact disputes in the record as frustrating summary judgment. *See post*, at 15–17. Even if those fact disputes are genuine, however, they are not material given Hogan’s failure to allege or substantiate any qualifying participation (or even attempted participation) in EBRR programs or PAs.

that credits “are granted only to federal prisoners who earn them by *participating* in qualifying programming.” *Harris v. Warden, FCI – Leavenworth*, No. 25-3086, 2026 WL 1146299, at *6 (10th Cir. Apr. 28, 2026) (emphasis added).

Nor do other circuit decisions in favor of prisoners help Hogan, because each rested on substantiated participation. *See Benson v. Warden FCI Edgefield*, 174 F.4th 348, 357–58 (4th Cir. 2026) (vacating dismissal where the *pro se* petitioner alleged he completed programs, and distinguishing *White* on that ground); *Miles v. Bowers*, 173 F.4th 372, 385–86 (1st Cir. 2026) (invalidating § 523.40(a) but limiting that holding to the petitioner’s actual work as an orderly and noting that pre-designation detainees are not automatically entitled to credits (citing *Brenneman v. Salmonson*, No. 5:22-CV-7-RWS-JBB, 2025 U.S. Dist. Lexis 56851, at *5 n.2. (E.D. Tex. Feb. 25, 2025))).

We agree with our sister circuits. “For [Hogan], ‘it is not a question of whether he *successfully* participated; it is a question of whether he participated *at all*, and the record shows that he did not.’” *Id.* (quoting *White*, 164 F.4th at 333 (emphasis in original)). Accordingly, he is not entitled to credits for the period between his sentencing and arrival at FCI La Tuna.

2.

Hogan also points to multiple BOP employee declarations in various district court cases, contending an interim procedure referenced in those declarations entitles him to “a windfall of credits.” In support of his position, he furnishes, for the first time on appeal, an exhibit showing BOP assessment dates.

Hogan’s reliance on evidence outside the summary-judgment record is misplaced. *See Topalian v. Ehrman*, 954 F.2d 1125, 1131 n.10 (5th Cir. 1992)

(“This court’s inquiry is limited to the summary judgment record before the trial court: [T]he parties cannot add exhibits, depositions, or affidavits to support their positions on appeal.”). He is therefore not entitled to a “windfall” of time credits under any such procedure.

3.

Next, Hogan asserts the district court erred by not ordering the BOP immediately to submit a referral for placement in a residential reentry center or home confinement. His contention fails. As the district court concluded, only the BOP has the authority to designate a prisoner’s place of incarceration. *See United States v. Voda*, 994 F.2d 149, 151 (5th Cir. 1993). Even if Hogan were eligible for such placement (an issue we do not reach), his designation “is not reviewable by any court.” 18 U.S.C. § 3621(b).

4.

Finally, Hogan contends the district judge was biased against him, and he requests that we set aside the district court’s judgment on that basis. His failure to move for recusal in district court limits our review, “[a]t most,” to plain error. *Noack v. YMCA of Greater Hous. Area*, 418 F. App’x 347, 353 (5th Cir. 2011) (citing *United States v. Gray*, 105 F.3d 956, 968 (5th Cir. 1997)). Under that standard, Hogan must “show (1) there was error, (2) the error was plain, (3) the error affected his ‘substantial rights,’ and (4) the error seriously affected ‘the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Mendoza*, 170 F.4th 921, 925 (5th Cir. 2026) (citation omitted). Given the conclusory nature of his allegation of bias, Hogan fails to show the requisite plain error. *See id.*

* * *

Based on the foregoing, the judgment of the district court is

AFFIRMED.

JAMES E. GRAVES, JR., *Circuit Judge*, dissenting.

Dennis Michael Hogan appeals the district court's grant of summary judgment to federal prison officials pursuant to his 28 U.S.C. § 2241 petition for writ of habeas corpus challenging the calculation of his earned time credits. Because I would vacate and remand, I respectfully dissent.

I.

Hogan was sentenced in August 2020. He was then transferred between various facilities in various states before arriving at his designated facility, Federal Correction Institute (FCI) La Tuna in Anthony, Texas, on June 28, 2021. Hogan asserts that the Federal Bureau of Prisons (BOP)/FCI La Tuna officials failed to allow him to earn time credits (ETCs) under the First Step Act of 2018 (FSA), Pub. L. No. 115-391, 132 Stat. 5194, for the more than 300 days between his sentencing and his arrival at FCI La Tuna.

Hogan filed a habeas petition asking the district court to order the BOP to recognize that his FSA ETCs began accumulating on the date of his sentence and that his projected date of transfer to prerelease custody was March 25, 2025. He also asked the district court to order the BOP to submit a referral for home confinement or placement in a residential reentry center. Hogan asserted that BOP regulation 28 C.F.R. § 523.42(a) conflicts with 18 U.S.C. § 3585(a), but the statute is controlling. He also relied on 18 U.S.C. § 3621(h)(6) as authority. The district court ordered the respondents to show cause why the writ should not be granted.

The respondents filed a motion for summary judgment asserting that the petition should be dismissed. They also provided a declaration from Bertha Tovar, the case management coordinator at FCI La Tuna, an assessment of FSA time credit, and a public information act inmate data sheet. According to that summary judgment evidence offered by the respondents, Hogan's projected release date was October 21, 2031. Tovar

said that once a prisoner arrives at his designated facility, prison staff complete a two-part needs and risk assessment and then create an individualized plan of evidence-based recidivism reduction (EBRR) programming or productive activities (PAs) for the prisoner, who will then be reassessed on a regular basis. Prisoners who participate in the EBRR and PA plan earn FSA time credits. Hogan’s “[s]tart [i]ncarceration” date was August 26, 2020, and his computation began on August 26, 2020. But Hogan did not begin earning credits until June 28, 2021, when he arrived at FCI La Tuna as a “minimum risk.” As of October 15, 2024, he had accrued 1,205 program days and 570 FSA time credits. Of the 570 FSA credits, 365 were applied to reduce his release date from October 20, 2032, to October 21, 2031. Tovar said that the 205 remaining time credits could be applied to prerelease custody once the credits equaled the remainder of his imposed term of imprisonment. Under the BOP’s “Best Case Scenario” projection, if Hogan’s status remained the same, he would accrue up to 985 days of FSA time credits which would make either February 9, 2028, or February 8, 2029, the earliest he would be eligible for prerelease custody.³

In response to the motion for summary judgment, Hogan asserted various factual disputes to preclude summary judgment. Hogan also asserted that the BOP was statutorily required to make EBRR and PA programming “available to all inmates in custody.” He disagreed with the assertion that the “BOP has sole designation authority,” in light of the “shall be transferred” language of 18 U.S.C. § 3632. The district court disagreed, granted the respondents’ motion for summary judgment, and dismissed the § 2241 petition with prejudice. Hogan appealed.

³ The motion for summary judgment used the date of February 9, 2028, but the declaration used February 8, 2029.

II.

When considering the denial of habeas relief, this court reviews the district court's findings of fact for clear error and rulings on issues of law de novo. *Padilla v. United States*, 416 F.3d 424, 425 (5th Cir. 2005). Because Hogan brought his action under § 2241, he is not required to obtain a certificate of appealability. *Id.* The dismissal of a habeas corpus petition on summary judgment is also reviewed de novo. *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 327 (5th Cir. 2004); *see also Pack v. Yusuff*, 218 F.3d 448, 451 (5th Cir. 2000).

In reviewing a district court's grant of summary judgment, this court views all of the evidence in the light most favorable to the nonmoving party and draws all reasonable inferences in that party's favor. *Dediol v. Best Chevrolet*, 655 F.3d 435, 439 (5th Cir. 2011). Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This court has reiterated the general principle that Rule 56 "relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000).

Summary judgment "must be employed cautiously because it is a final adjudication on the merits." *Jackson v. Cain*, 864 F.2d 1235, 1241 (5th Cir. 1989) (citation omitted). In prisoner pro se cases, because summary judgment "consequences are so severe, however, we must always guard against premature truncation of legitimate lawsuits merely because of unskilled presentations." *Id.* (quoting *Murrell v. Bennett*, 615 F.2d 306, 311 (5th Cir. 1980)).

III.

Hogan asserts that the district court erred in finding that he was not entitled to accumulate ETCs until he arrived at his BOP designated facility. Hogan asserts that the BOP failed to provide him with an opportunity to participate in an EBRR program and accumulate FSA time credits for the 308-day period he was in federal custody between his sentencing and his arrival at FCI La Tuna. He also asserts that the FSA mandates that prisoners be allowed to earn time credits from the time of sentencing regardless of where they are housed, and that he is entitled to FSA time credits from the date his sentence commenced. He cites 18 U.S.C. § 3585(a) and 18 U.S.C. § 3621(h)(6) as authority.

The respondents' assert that, by design, the FSA contemplates that a prisoner will not begin earning credits immediately upon sentencing and will need to wait "some amount of time" to arrive at the designated facility and undergo an assessment. They assert that the FSA is silent as to when they must allow a prisoner to begin earning time, only requires them to allow it after the prisoner successfully completes the activities, and raise the practicalities of applying credits. They rely on BOP regulation § 523.42(a) to support their calculations.

In granting the respondents' motion for summary judgment, the district court found that "[t]he FSA does not mandate that the prisoner begin accumulating ETCs as soon as he is sentenced. Instead, it provides that a prisoner's ability to accumulate ETCs does not begin until his sentence commences." (Citing 18 U.S.C. § 3632(d)(4)(B)). The district court acknowledged that "[a] sentence commences under section 3585(a) when 'the defendant is received in custody awaiting transportation to ... the official detention facility at which the sentence is to be served.'" 18 U.S.C. § 3585(a)." However, the district court also adopted the respondents'

practicality arguments and said “[t]here are several practical reasons for denying a prisoner ETCs before he enters BOP custody,” including the following:

First, because the prisoner is usually not held in a BOP facility at the time of his sentencing, he cannot complete the risk and needs assessments required by the FSA. Second, because the prisoner has not completed the risk and needs assessment, BOP staff members cannot make a recommendation concerning his participation in an EBRR program or PA. Finally, because the prisoner is not in a BOP facility, BOP staff members likely cannot evaluate whether the prisoner is successfully participating in an EBRR program or PA.

The district court then relied on various noncontrolling district court cases to find that “Hogan makes no showing that he completed the risk and needs assessments required by the FSA and was engaged in EBRR programs or PAs targeted at reducing his risk of recidivism before his transfer to BOP custody on June 28, 2021.” The district court also found “as a matter of law that Hogan is not entitled to accumulate ETCs during his official detention prior to the date that his sentence commenced under 18 U.S.C. 3585(a) on June 28, 2021. 18 U.S.C. § 3632(d)(4)(B).” But the district court’s findings are contradictory, erroneous, and improperly place the burden on Hogan for proving something that is outside of his control. Again, Hogan’s sentence commenced on August 26, 2020, not June 28, 2021.⁴

To reiterate, under the FSA, the BOP is required to assess and determine the recidivism risk of each prisoner as part of the intake process, determine the type and amount of recidivism-reduction programming is appropriate, and assign each prisoner to such programming accordingly. *See* 18 U.S.C. § 3632(a). The BOP must also reassess periodically and reassign

⁴ The majority fails to address any of the district court’s erroneous findings.

as appropriate. *Id.* The BOP must do this in a manner to ensure that: (A) all prisoners “have a meaningful opportunity to reduce their classification during the period of incarceration;” (B) it addresses “the specific criminogenic needs of the prisoner; and (C) all prisoners are able to successfully participate in such programs.” 18 U.S.C. § 3632(a)(5). Prisoners who participate in and complete evidence-based recidivism reduction programs or activities receive various incentives and rewards, including ETCs. *See* 18 U.S.C. § 3632(d)(4)(A); *see also* 18 U.S.C. § 3621(h)(6); 28 C.F.R. § 523.42(b)(3). The FSA states that the ETCs shall be applied toward an early release to supervised release or an early transfer into prerelease custody. 18 U.S.C. § 3632(d)(4)(C). However, a prisoner may not earn ETCs for programs completed “during official detention prior to the date that the prisoner’s sentence commences under section 3585(a).” 18 U.S.C. § 3632(d)(4)(B)(ii). Section 3585(a) provides that “[a] sentence to a term of imprisonment *commences on the date the defendant is received in custody awaiting transportation to*, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served.” 18 U.S.C. § 3585(a) (emphasis added).⁵

There is no evidence that Hogan arrived voluntarily to commence his sentence at FCI La Tuna on June 28, 2021. But there is evidence that Hogan was received in custody and awaiting transportation to FCI La Tuna on August 26, 2020, and was then transferred between seven different facilities

⁵ The BOP relies on contradictory language in its own regulations that state “[a]n eligible inmate begins earning FSA Time Credits after the inmate’s term of imprisonment commences (*the date the inmate arrives* or voluntarily surrenders at the designated Bureau facility where the sentence will be served).” 28 C.F.R. § 523.42(a) (citing 18 U.S.C. 3632(d)(4)) (emphasis added). But that is contradictory to the plain language of the FSA. *See* 18 U.S.C. § 3632(d)(4) and § 3585(a). Hogan is correct that the statute controls in such a situation based on this court’s longstanding, controlling authority.

in five different states before arriving at FCI La Tuna. While a prisoner does have to be assessed and participate in the requisite activities, the FSA is not silent as to when the BOP must allow a prisoner to begin earning time. Instead, the BOP “shall provide all prisoners with the opportunity” to earn credits “throughout their entire term of incarceration.” 18 U.S.C. § 3621(h)(6). Section 3585(a) clearly sets out when a sentence commences. The district court acknowledged that and then basically said that it means something other than the plain language of the statute. Thus, the district court erred in finding “as a matter of law that Hogan is not entitled to accumulate ETCs during his official detention prior to the date that his sentence commenced under 18 U.S.C. 3585(a) on June 28, 2021.” At the very least, there is a genuine issue of material fact whether Hogan’s sentence commenced on August 26, 2020, under § 3585(a), as quoted above.

Further, there is no basis for the district court’s repeated statements quoted above suggesting that Hogan was not yet in “BOP custody” or not held in a “BOP facility” during the time in question. Section 3585(a) clearly states only “in custody” and “awaiting transportation to” the designated facility. Regardless, there is nothing to establish that Hogan was not in BOP custody or held at any BOP facility during that time. The district court did not even make such findings here, instead, it said a “prisoner is *usually* not held in a BOP facility at the time of his sentencing” and “BOP staff members *likely* cannot evaluate whether the prisoner is successfully participating in an EBRR program or PA” in generally discussing practical considerations. (Emphasis added).

The prisoner cannot schedule, create or perform his own assessment or programming. The prisoner can only participate and complete such once the BOP performs its duty. Notwithstanding that the FSA is *not* silent as to when the BOP must allow a prisoner to begin earning credit, even if it was silent, that would not foreclose allowing an eligible prisoner to retroactively

receive credits for the time period in which the BOP delayed the assessment, creation and assignment of requisite programming, provided the inmate had no disciplinary issues during that time. Otherwise, there is nothing to prevent the BOP from delaying those assessments and assignments for extended periods of time, as happened here, or disallowing ETCs despite the fact that they “shall provide all prisoners with the opportunity” to earn credits “throughout their entire term of incarceration.” 18 U.S.C. § 3621(h)(6) (emphasis added). The respondents also offer no clear explanation as to why the BOP cannot do the assessments until a prisoner arrives at his final destination when it involves one uniform risk and needs assessment system that is supposed to be done during intake. Moreover, the majority fails to cite any summary judgment evidence to contradict Hogan’s assertion that the FSA needs assessment consists only of a written, multiple choice questionnaire that could be completed at any location.

The majority essentially concedes that the statutory support is on Hogan’s side. However, the majority then claims that “the BOP’s argument is also grounded in statutory text.” As examples, the majority points only to the BOP’s “*interpretation* of the FSA.” (Emphasis added). The BOP’s “interpretation,” which contradicts the plain language of the FSA, in no way grounds its argument in statutory text. In the end, the majority opts to rely on the circular logic of concluding that Hogan’s failure to participate in the required programs prior to the date that the BOP finally decided to create such programs and allow him to participate is “fatal” to his claim.⁶ In doing so, the majority states:

⁶ Although the majority recounts the history of the implementation of the program as overlapping with the time period at issue, it concedes that there is no evidence as to how or when the BOP implemented programming at any of the facilities in which Hogan was housed or that it had any impact in this case. Significantly, the BOP makes no such argument here. Further, even if it had, that would raise additional questions regarding the

As the Fourth Circuit recently observed, “a prisoner who ‘successfully *completes*’ qualified programming ‘shall *earn* time credits’ ‘for every 30 days of successful *participation*’ in the programming. The requirements of completing, earning, and participating are defined with active verbs requiring conforming action by the prisoner.” *White v. Warden of Fed. Corr. Inst. – Cumberland*, 164 F.4th 326, 330 (4th Cir. 2026) (quoting § 3632(d)(4)(A)) (emphasis in original). The Tenth Circuit similarly held that credits “are granted only to federal prisoners who earn them by *participating* in qualifying programming.” *Harris v. Warden, FCI – Leavenworth*, No. 25-3086, 2026 WL 1146299, at *6 (10th Cir. Apr. 28, 2026) (emphasis added).

We agree with our sister circuits. “For [Hogan], ‘it is not a question of whether he *successfully* participated; it is a question of whether he participated *at all*, and the record shows that he did not.’” *Id.* (quoting *White*, 164 F.4th at 333 (emphasis in original)). Accordingly, he is not entitled to credits for the period between his sentencing and arrival at FCI La Tuna.

But *White* is easily distinguishable. In that case, the prisoner was seeking FSA time credits for three days he spent in Federal Transfer Center Oklahoma City, as opposed to the more than 300 days Hogan spent at other

disparate treatment of inmates such as Hogan. The majority then states “[b]ut whatever programming was available at the time . . . the FSA awards time credits only for actual participation.” Therein lies the issue: We have no evidence that any programming was made available to Hogan because, as the BOP argues, Hogan had not yet arrived at his designated facility and a risk and needs assessment had not yet been completed. Additionally, I would be remiss if I did not point out that the majority’s new argument somewhat contradicts what the BOP actually did argue. For example, in disputing Hogan’s argument that no inmates were assessed prior to April 28, 2021, the BOP argued that date was merely “the date the version of PATTERN [the Prisoner Assessment Tool Targeting Estimated Risk and Needs] including auto-calculation went live. . . . Also contrary to Hogan’s assertions, BOP began utilizing the PATTERN tool in July 2019 to assess inmates, as required by the FSA.”

facilities and prisons. *White*, 164 F.4th at 328. More importantly, White was already eligible to participate in programming and the court said that he could have requested that it be provided during those three days. *Id.* at 332. Hogan was not eligible to participate in programming because the BOP had failed to both perform his needs and risk assessment and create his programming plan. As discussed previously, Tovar said in her declaration that the BOP first had to complete a needs and risk assessment before an individualized plan of EBRR programming or PAs would even be created. In *Harris*, an unpublished decision, the Tenth Circuit simply relied on *White*—while ignoring the distinction—and developed the nonsensical circular logic upon which the majority now relies. *Id.* 2026 WL 1146299, *6.

Unlike those cases, we have summary judgment evidence here to establish that the BOP was directly responsible for prohibiting Hogan from participating in any programming. Despite that summary judgment evidence, the majority states that those facts “are not material given Hogan’s failure to allege or substantiate any qualifying participation (or even attempted participation) in EBRR programs or PAs.” I disagree, as the facts establishing that the BOP prevented Hogan from participating in any programming for more than 300 days are clearly material to Hogan’s constitutional claims. Material facts are those “that might affect the outcome of the suit under the governing law.” *Anderson*, 477 U.S. at 248. A dispute is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

Tellingly, the majority fails to explain how Hogan would ever be able to establish any participation, absent the requisite action by the BOP. Perhaps that is because even the BOP regulations reveal the overwhelming circular flaw in the majority’s conclusion. The BOP regulations define “successful participation” as “requir[ing] a determination by Bureau staff that an eligible inmate has participated in the EBRR programs or PAs *that the*

Bureau has recommended based on the inmate's individualized risk and needs assessment, and has complied with the requirements of each particular EBRR Program or PA.”⁷ 28 C.F.R. § 523.41(c)(2) (emphasis added). According to the BOP's interpretation, the very first component of successful participation is action by the BOP; an inmate cannot establish successful participation unless and until the BOP completes that individualized risk and needs assessment requirement and recommends the programming. The regulations also state that: “Temporary operational or programmatic interruptions authorized by the Bureau that would prevent an inmate from participation in EBRR programs or PAs will not ordinarily affect an eligible inmate's ‘successful participation’ for the purposes of FSA Time Credit eligibility.” 28 C.F.R. § 523.41(c)(3). Yet here we are.

The majority then cites additional cases “in favor of prisoners” that it says also do not “help Hogan, because each rested on substantiated participation.”⁸ I disagree, as these cases help Hogan as much or more than they help the majority's flawed conclusion.

In *Benson v. Warden FCI Edgefield*, 174 F.4th 348 (4th Cir. 2026), Rahshjeem Benson was sentenced in December 2020 but was not transferred to his designated facility until March 2022. *Id.* at 350. Benson did not receive a risk and needs assessment until his arrival at the designated facility. However, unlike in this case, Benson alleged that he was able to participate in some programs at one of the non-designated facilities—again, prior to his

⁷ This is consistent with Tovar's testimony and establishes that the ability to “substantiate any qualifying participation” is at the whim of the BOP, which may then use any means available to frustrate the entire ETC portion of the FSA with the majority's blessing.

⁸ Again, “participation” can only happen once the BOP performs its initial duty, which it failed to timely perform here.

risk and needs assessment and that were not created based on his specific assessment. The BOP then refused to give him credit for those hours. *Id.* at 351. The district court dismissed his habeas petition, and the Fourth Circuit vacated and remanded. The district court relied on much of the same argument being presented here by the BOP and reiterated by the majority—that Benson could not successfully participate in any program until he arrived at his designated facility and the BOP completed a risk and needs assessment. *Id.* at 352-53. The district court also rejected Benson’s argument that the BOP erred by failing to administer his risk and needs assessment sooner.

Relevant here, one of Benson’s issues on appeal was whether “the BOP’s interpretation of ‘successful participation’ is inconsistent with the FSA and is therefore not entitled to deference under *Chevron*[*U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)], which the Supreme Court overturned in *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024).” *Id.* at 355. The Fourth Circuit vacated and remanded “for the district court to decide in the first instance whether the BOP’s interpretation survives scrutiny under *Loper Bright*.” *Id.* It is the same definition at issue here. In doing so, the Fourth Circuit reached multiple conclusions, including: “Critically, the FSA does not hinge the commencement of a prisoner’s sentence on his *arrival* to his BOP-designated facility.” *Id.* at 356-57. The same definition at issue in *Benson* is at issue here. Under the statutory language and *Benson*, the district court’s findings regarding the commencement of Hogan’s sentence are erroneous because “[Hogan’s] ability to ‘earn time credits’ is not tied to his arrival at FCI [La Tuna]” and his arrival at La Tuna “is irrelevant to the commencement of his sentence for FSA purposes.” *Id.* at 357. Likewise, the First Circuit has concluded that the risk and needs assessment is not a prerequisite for a prisoner’s entitlement to FSA time credits. *Miles v. Bowers*, 173 F.4th 372 (1st Cir. 2026).

That gets us down to the BOP's refusal to allow Hogan to participate in programming that he was clearly entitled to participate in before his arrival at the designated facility.

The majority purports to be answering the “novel question” of whether the BOA can deny prisoners the opportunity to earn time credits after the commencement of their sentence but before they arrive at their designated facility in contradiction to the FSA. The fact that the BOA denied Hogan the ability to participate in any programs during that period—thereby establishing the “fatal” defect relied on by the majority—in no way lessens the significance or severity of that contradiction here. The majority concedes the contradiction but then essentially concludes that it need not resolve the issue because the BOP-created “fatal” defect allows the BOP to prevail in every such case. In other words, because Hogan is unable to prove that he participated in the programming during the time period the BOP refused to offer it, Hogan loses on summary judgment. Such compounding of error is a legal absurdity and reprehensible. Summary judgment is not a rebuttable presumption. Hogan does not have to disprove that the BOP is entitled to summary judgment. The BOP has to prove that there are no genuine disputes of material fact. *See Fed. R. Civ. P. 56(a)*. Additionally, we are required to view all of the evidence in the light most favorable to Hogan and draw all reasonable inferences in Hogan's favor. *See Dediol*, 655 F.3d at 439. The record before us establishes the BOP's erroneous position that it was not required to offer any programming until Hogan arrived at his designated facility and it performed a risk and needs assessment. That is also the basis of the district court's order. But the statutory authority and every case the majority alludes to establish that neither an inmate's arrival at a designated facility nor a risk and needs assessment is a prerequisite to EBRR programming or PAs. The majority cannot even get to whether Hogan participated in such programming without first determining that it was

actually offered to Hogan. The question of whether the BOP even offered such programming is clearly material and the record provides a genuine dispute. *See Anderson*, 477 U.S. at 248. Those facts clearly preclude summary judgment.

IV.

As we have repeatedly said, summary judgment must be cautiously employed, particularly in pro se prisoner cases. *See Jackson*, 864 F.2d at 1241. That remains so here, where there are genuine disputes of material fact. For these reasons, I would vacate and remand. Thus, I respectfully dissent.