No. 12-408

IN THE

Supreme Court of the United States

GEORGE H. EDWARDS, JR.,

Petitioner,

v.

STEPHEN DEWALT, WARDEN,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF OF PETITIONER

The court below held that when Congress calls for an agency to make a "determin[ation]," the agency may nullify the statute by promulgating a rule to dispatch with all such determinations. This holding created a 1-2 conflict between the circuits and exacerbated another conflict 4-1. These serious divisions in the law could arbitrarily affect the time spent in jail by thousands of federal parolees, while thousands more federal prisoners may be affected by them in the future.

In response to Mr. Edwards's petition for certiorari, the government waived its right to respond. When called to respond by this Court, the government answered with a brief in opposition that largely echoed merits arguments made to the court of appeals, including four pages addressing an issue that court did not decide. The government's reluctance to engage with the reality and importance of disagreements among the circuits should not induce this Court to do the same.

I. THE CONFLICTS ARE REAL.

These two conflicts concern the validity of a United States Parole Commission regulation purporting to interpret a federal statute. More specifically, they concern whether the Commission may construe a statute, requiring it to make a "determin[ation]" in accordance with specified procedures, as categorically resolving that issue against all newly convicted parolees in every case. As Mr. Edwards explained in his petition for certiorari, the Sixth Circuit was the first court of appeals to hold that "prison street time" could be automatically forfeited by regulation. Pet. 10-11. Before that, the Ninth and Tenth Circuits had

held that it could not. *Id.* Separately, on the issue of whether "true street time" could be automatically forfeited by regulation, the Sixth Circuit deepened the split between the Ninth Circuit and other courts. Pet. 12-13.

The government attempts to show that there is no circuit split regarding prison street time because "Section 2.52(c)(2) does not address 'prison street time' at all. Rather, . . . 28 C.F.R. 2.47(e)(2) sets forth the Parole Commission's determination" on that issue. Opp. 19 n.3. But the government's argument relies on the false premise that "[t]hat regulation was enacted several months after the Tenth Circuit's decision in *Harris v. Day*, 649 F.2d 755 (1981)." Opp. 19 n.3. In fact, 28 C.F.R. § 2.47 was enacted five years before *Harris* was decided. 41 Fed. Reg. 19,326, 19,337 (May 12, 1976). And so, contrary to the government's claim, *Harris* certainly can "be considered a ruling on the validity of the Parole Commission's" regulation. Opp. 19 n.3. Section 2.47 was also, of course, in effect when the Ninth Circuit refused to allow the Commission to automatically forfeit prison street time in *Rizzo v. Armstrong*, 921 F.2d 855 (9th Cir. 1990). The first court of appeals to hold prison street time automatically forfeited was the Sixth Circuit, below. And despite the government's claim that Section 2.47, rather than Section 2.52, is the instrumental provision in forfeiting prison street time, it was cited by none of the courts of appeals to consider this issue.

In fact, Section 2.47 plays little if any role in the actual forfeiture of prison street time, which is effected through Section 2.52 alone. It is Section 2.52(c)(2) that sets the start date and end date of any forfeiture

when it declares that "forfeiture of time from the date of [initial] release to the date of execution of the warrant is an automatic statutory penalty."

According to Section 2.52(c)(2), all time in prison is forfeited until "the date of the execution of the warrant," which is not required until release. Section 2.47, governing parole-violation warrants and their role as a detainer,[1] relies upon Section 2.52(c)(2)'s rule that forfeiture begins "upon [a parolee's] last release from federal confinement on parole," 28 C.F.R. § 2.47(e)(2), which is not apparent on the face of the statute, *see* 18 U.S.C. § 4210(b). And when Section 2.47(e)(2) purports to set an outer limit of forfeiture upon "release from the confinement portion of the new sentence or the date of reparole granted pursuant of these rules, whichever comes first," it is unclear what effect, if any, this actually has on the duration of any forfeiture. And so because Section 2.52(c)(2) definitively causes automatic forfeiture, the Sixth Circuit created a real conflict by upholding it in the face of Mr. Edwards's challenge.

The government concedes the second split in this case, regarding true street time. Opp. 18-20. It simply argues that it is unimportant.

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[1] A detainer is a "writ authorizing a prison official to continue holding a prisoner in custody." *Black's Law Dictionary* 513 (9th ed. 2009).

II. THE CONFLICTS ARE IMPORTANT BEYOND THE CONTEXT OF PAROLE, BY ADDRESSING PROPER LIMITS ON AGENCY REGULATIONS ENACTED TO NULLIFY STATUTORY COMMANDS.

The government, in addition to arguing that one of the conflicts does not exist, Opp. 19 n.3, suggests that the other conflict "does not warrant this Court's review," Opp. 19-20. In his petition for certiorari, Mr. Edwards detailed the substantial impact a resolution of these conflicts would have on those directly affected. Pet. 13-15. But resolving them would also help to clarify an important issue of administrative law offended by the decision below—the scope of an agency's authority to resolve issues by rulemaking rather than by adjudication. Put simply, the government contends that when Congress requires an agency to make a "determin[ation]" with respect to particular individuals, the agency may instead make a categorical decision that will apply in all cases.[2]

The government tries to mask the importance of this issue by asserting it was settled by cases like *Lopez v. Davis*, 531 U.S. 230 (2001). Opp. 16. But far from requiring an agency determination, the statute in *Lopez* merely permitted the Bureau of Prisons to give sentence credit to the graduates of prison drug-treatment programs. 531 U.S. at 233. The statute said the sentence of "a prisoner convicted

[2] As demonstrated by the persistent conflicts in the courts of appeals, there is reason to question the government's objections on the merits. Opp. 8-18. Substantive responses to the government are contained in Mr. Edwards's reply brief filed in the Sixth Circuit on May 9, 2011.

of a nonviolent offense [who] successfully complet[ed] a treatment program *may* be reduced by the Bureau of Prisons." *Id.* (quoting 18 U.S.C. § 3621(e)(2)(B)) (emphasis added). The Bureau "exercise[d]" its "discretion" and promulgated a regulation that disallowed sentence credits for nonviolent felons whose convictions "involved the carrying, possession or use of a firearm." *Id.* at 235 (quoting 28 C.F.R. § 550.58(a) (2000)). The Court reasoned that "Congress simply did not address how the Bureau should exercise its discretion within the class of inmates who satisfy the statutory prerequisites for early release." *Id.* at 239 (quotation marks omitted).

In other words, the statute in *Lopez* only "categorically denie[d] early release . . . to inmates convicted of violent offenses"; the treatment of nonviolent felons was left within the agency's discretion. *Id.* at 238. In enacting 18 U.S.C. § 4210(b)(2), by contrast, Congress categorically *required* the Commission to "determine, in accordance with the provisions of section 4214(b) or (c), whether" parolees convicted of a new offense would forfeit their street time.

Why this determination could not simply be performed once, by rulemaking, is nicely illustrated by the *Lopez* Court itself in its discussion of *INS v. Yueh-Shaio Yang*, 519 U.S. 26 (1996). *See Lopez*, 531 U.S. at 243 n.4. *Yang* involved a statute that permitted, but did not require, the Attorney General to allow any alien who committed entry fraud to stay in the United States by waiving deportation proceedings. *See* 519 U.S. at 29 & n.2 (citing 8 U.S.C. § 1251(a)(1)(H)). The Court stated categorically that this statute *could not* be construed by the agency to deny waiver of deportation proceedings for *every* al-

ien who committed entry fraud. "[I]f the Attorney General determined that *any* entry fraud or misrepresentation, no matter how minor and no matter what the attendant circumstances, would cause her to withhold waiver, she would not be exercising the conferred discretion at all, but would be making a nullity of the statute." *Id.* at 31 (cited by *Lopez*, 531 U.S. at 243 n.4). *Yang*'s reasoning is precisely analogous to what the Parole Commission did in enacting 28 C.F.R. § 2.52(c)(2). It "determined that *any* [subsequent conviction], no matter how minor and no matter what the attendant circumstances, would cause [it] to withhold [street time credit]," and so in turn it was "not . . . exercising the conferred discretion at all, but [was] making a nullity of the statute." *Yang*, 519 U.S. at 31.

This Court has repeatedly disallowed attempts by agencies to nullify statutorily required, individualized determinations via rulemaking. *Sullivan v. Zebley*, 493 U.S. 521 (1990), considered the procedures for determining children's eligibility for Social Security disability benefits. By statute, a child is considered disabled by "any medically determinable physical or mental impairment of comparable severity" to one that would qualify an adult for benefits. 42 U.S.C. § 1382c(a)(3)(A) (1990) (cited by *Zebley*, 493 U.S. at 524). Regulations of the Secretary of Health and Human Services, however, provided different procedures for adults and children. *Zebley*, 493 U.S. at 524-26. While both groups could prove disability by showing their impairments were equal to or more severe than impairments on a given list, only adults were given an opportunity to show why their particular condition was disabling despite not appearing on

the list. *Id.* The Court required "the Secretary . . . [to] give child claimants an opportunity for individualized assessment of their functional limitations." *Id.* at 527. "The Secretary's regulations," as written, "nullif[ied]" the statutory requirements. *Id.* at 537.

Similarly, *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), addressed a private right of action in the Migrant and Seasonal Agricultural Worker Protection Act, which allowed "[a]ny person aggrieved" under the Act to file in court "without regard to exhaustion of any alternative administrative remedies provided herein." 29 U.S.C. § 1854(a) (1982 ed. and Supp. V) (cited by *Adams Fruit Co.*, 494 U.S. at 641 n.1). The Department of Labor's regulation held state "workers' compensation benefits [to be] the exclusive remedy for loss under this Act in the case of bodily injury or death," thereby denying access to an individualized hearing under the Act. 29 C.F.R. § 500.122(b) (1989) (cited by *Adams Fruit Co.*, 494 U.S. at 649). The Court rejected the regulation, preventing the Department from limiting individualized determinations via rulemaking.

So too here, the Commission may not nullify the statutory requirement for an individualized determination via rulemaking. But the law is far from clear in this area, and requires guidance from this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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