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CASE COMMENTS

Administrative Law—Bureau of Prisons Statutory Mandate Permits Creation of Categorical Rules to Guide Prison Placement Discretion—*Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 115 (2008)

Congress delegates authority to the Bureau of Prisons (BOP) to place inmates.¹ In determining inmate placement, the BOP must consider five individualized factors before selecting a suitable penal facility for each inmate.² In 2005, the BOP created regulations (2005 regulations) that categorically denied placement and transfer to community correction centers (CCCs) until the last 10 percent of a sentence.³ In *Muniz v. Sabol*,⁴ the First Circuit Court of Appeals considered whether the 2005 regulations were contrary to the BOP's congressional mandate by denying the BOP authority to render individualized placement assessments.⁵ The First Circuit held the BOP could make rules of general applicability to guide the individualized application of its statutory discretion and concluded that the 2005 regulations were a reasonable exercise of that discretion.⁶

Two prisoners, Richard Muniz and Victor J. Gonzalez, sought writs of habeas corpus in the United States District Court for the District of Massachusetts challenging their prison placement.⁷ Muniz and Gonzalez

1. See 18 U.S.C. § 3621(b) (2000) (conferring inmate placement authority to BOP).

2. See *infra* note 18 and accompanying text (providing and explaining placement statute). See generally Yana Dobkin, *Cabining the Discretion of the Federal Bureau of Prisons and the Federal Courts: Interpretive Rules, Statutory Interpretation, and the Debate over Community Confinement Centers*, 91 CORNELL L. REV. 171 (2005) (describing history of BOP's inmate placement discretion and interaction with courts).

3. See *infra* note 23 and accompanying text (explaining effect of 2005 regulations); see also *Muniz v. Sabol*, 517 F.3d 29, 31 n.1 (1st Cir. 2008) (noting CCCs similar to halfway houses).

4. 517 F.3d 29 (1st Cir. 2008), *cert. denied*, 129 S. Ct. 115 (2008).

5. See *id.* at 34-35 (outlining issue presented to First Circuit).

6. See *id.* at 40 (holding promulgation of 2005 regulations valid exercise of discretion).

7. See *Muniz v. Winn*, 462 F. Supp. 2d 175, 177 (D. Mass. 2006) (noting petitioners' claims among

contended that the BOP policy in place before 2002 (pre-2002 policy) would have allowed them to be considered for CCC placement earlier than the 2005 regulations permit.⁸ Their placement and ability to seek transfer were determined, however, pursuant to the BOP's 2005 regulations, and they were ineligible for placement in a CCC until the last 10 percent of their sentences, for a period not to exceed six months.⁹ Muniz and Gonzalez argued the 2005 regulations did not allow for the individual consideration that the BOP was statutorily required to undertake, which rendered the regulations unenforceable.¹⁰ They requested that the court invalidate the 2005 regulations and allow for a good-faith evaluation of their placement with the possibility of CCC placement under the BOP's pre-2002 policy.¹¹

The district court began its analysis with a consideration of the BOP's statutory authority to issue the 2005 regulations.¹² After analyzing the language of 18 U.S.C. § 3621(b), the statute authorizing the BOP to place inmates, and its legislative history, the district court interpreted congressional intent to require consideration of each of the enumerated factors when designating places of imprisonment.¹³ The court found the 2005 regulations contradicted the statute's plain meaning and granted the habeas petitions.¹⁴ The court reasoned the regulations were invalid because they foreclosed the possibility of placement in one facility to each prisoner without regard to the

"flurry of indistinguishable habeas petitions" challenging BOP's 2005 regulations), *rev'd sub nom.* Muniz v. Sabol, 517 F.3d 29 (1st Cir. 2008). The petitions were consolidated for consideration by the district court. *Id.*; see also 28 U.S.C. § 2241 (2006) (permitting writs of habeas corpus for petitioners seeking relief from manner of execution of sentence).

8. See Muniz v. Winn, 462 F. Supp. 2d 175, 177 (D. Mass. 2006) (detailing petitioners' claim for relief), *rev'd sub nom.* Muniz v. Sabol, 517 F.3d 29 (1st Cir. 2008). Muniz was serving a thirty-month term of imprisonment and would have been eligible for CCC placement three months earlier under the 2002 regulations than the 2005 regulations. *Id.* Gonzalez was serving a sixty-three month term of imprisonment and, similarly, would have been eligible for CCC placement one month earlier under the pre-2002 regulations. *Id.*; see also *infra* notes 20-23 and accompanying text (explaining BOP's CCC regulation changes from 2001 to 2005).

9. See Muniz v. Winn, 462 F. Supp. 2d 175, 177 (D. Mass. 2006) (explaining inmate placement regulations and effect upon petitioners), *rev'd sub nom.* Muniz v. Sabol, 517 F.3d 29 (1st Cir. 2008); see also *infra* note 23 and accompanying text (summarizing 2005 regulations).

10. Muniz v. Winn, 462 F. Supp. 2d 175, 177 (D. Mass. 2006) (noting petitioners argued placement under 2005 regulations illegal), *rev'd sub nom.* Muniz v. Sabol, 517 F.3d 29 (1st Cir. 2008).

11. Muniz v. Winn, 462 F. Supp. 2d 175, 177 (D. Mass. 2006) (explaining petitioners argued for placement determinations under pre-2002 policy), *rev'd sub nom.* Muniz v. Sabol, 517 F.3d 29 (1st Cir. 2008); see *infra* note 20 and accompanying text (detailing pre-2002 placement policy).

12. Muniz v. Winn, 462 F. Supp. 2d 175, 181-85 (D. Mass. 2006) (analyzing BOP's authority to promulgate regulations), *rev'd sub nom.* Muniz v. Sabol, 517 F.3d 29 (1st Cir. 2008).

13. Muniz v. Winn, 462 F. Supp. 2d 175, 180-81 (D. Mass. 2006) (finding regulations contrary to plain meaning of statute), *rev'd sub nom.* Muniz v. Sabol, 517 F.3d 29 (1st Cir. 2008). The command requiring consideration of the enumerated factors was intended to guide the BOP's determination of what is an "appropriate and suitable" facility. *Id.* at 180-81. This plain requirement foreclosed the possibility of a categorical rule that declined to evaluate any one of the factors. *Id.* at 181.

14. Muniz v. Winn, 462 F. Supp. 2d 175, 182, 185 (D. Mass. 2006) (invalidating 28 C.F.R. §§ 570.20-.21 for disregarding required considerations and ordering BOP to reconsider petitioner's CCC placement), *rev'd sub nom.* Muniz v. Sabol, 517 F.3d 29 (1st Cir. 2008).

congressional command requiring consideration of the enumerated factors.¹⁵ Citing the division among district courts within the First Circuit over the validity of the 2005 regulations and the need for effective dispute resolution, the District Court of Massachusetts certified the case for immediate appeal.¹⁶ The First Circuit reversed the district court and held that the BOP could apply categorical rules to assist in the exercise of its discretion while still complying with § 3621(b).¹⁷

Congress vested the BOP with the authority to assign inmates to any available penal or correctional facility that meets the minimum standards of health and habitability after considering five factors.¹⁸ Additionally, the BOP must prepare prisoners for re-integration into society by placing them, if practicable, in CCCs at the end of their prison term.¹⁹ Historically, the BOP permitted CCC placement for the last six months of a prisoner's term, regardless of the length of the sentence, and honored judicial recommendations for CCC placement for lower-level offenders' entire terms.²⁰ This policy changed in 2002, when the BOP adopted and implemented the Department of Justice Office of Legal Counsel's (OLC) position that the BOP's CCC placement policy was contrary to its statutory mandate, and CCC placement

15. *Muniz v. Winn*, 462 F. Supp. 2d 175, 180-81 (D. Mass. 2006) (determining that discretion to decide appropriate placement limited by enumerated factors), *rev'd sub nom. Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008).

16. *Muniz v. Winn*, 462 F. Supp. 2d 175, 183-84 (D. Mass. 2006) (explaining reasons for certification of appeal), *rev'd sub nom. Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008).

17. 517 F.3d at 40 (holding BOP's 2005 regulations reasonable and not contrary to BOP's statutory authority).

18. 18 U.S.C. § 3621(b) (2000) (conferring placement authority to BOP).

The Bureau may designate any available penal or correctional facility . . . considering—(1) the resources of the facility contemplated; (2) the nature and circumstances of the offense; (3) the history and characteristics of the prisoner; (4) any statement by the court that imposed the sentence—(A) concerning the purposes for which the sentence to imprisonment was determined to be warranted; or (B) recommending a type of penal or correctional facility as appropriate; and (5) any pertinent policy statement issued by the Sentencing Commission pursuant to § 994(a)(2) of title 28.

18 U.S.C. § 3621(b) (2000). The statute proscribes that the BOP may place a prisoner wherever it wants, provided it consider the five specified factors. *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 245 (3d Cir. 2005) (analyzing meaning and history of § 3621(b)).

19. 18 U.S.C. § 3624(c)(1) (2000) (requiring BOP to "afford" prisoners "reasonable opportunity to adjust to and prepare for . . . reentry"). The Second Chance Act's amendment of § 3624(c) resulted in twelve-month maximum placement in CCCs, rather than the previous six-month maximum. Second Chance Act § 251, 122 Stat. 657, 692 (2007).

20. *See* *Fults v. Sanders*, 442 F.3d 1088, 1089 (8th Cir. 2006) (detailing pre-2002 policy on CCC placement); *see also* *Iacoboni v. United States*, 251 F. Supp. 2d 1015, 1017 (D. Mass. 2003) (discussing pre-2002 policy). The *Iacoboni* court noted "that recommendations to CCCs have been made in thousands of cases by hundreds of judges continuously since at least 1965, and in nearly all instances accepted by the BOP." *Iacoboni v. United States*, 251 F. Supp. 2d 1015, 1017 (D. Mass. 2003); *see also* Todd Bussert et al., *New Time Limits on Federal Halfway Houses*, 21 CRIM. JUST. 20, 21 (2006) (explaining BOP history and policy prior to 2002). Prior to 2002, the BOP openly promoted the use of CCCs for low-risk offenders, and where appropriate, the BOP designated CCCs for the entirety of a prisoner's sentence. *See* Bussert et al., *supra*, at 20.

should instead be limited to the lesser of 10 percent of the total sentence or six months.²¹ Affected prisoners challenged the 2002 policy change, and it was invalidated; in response, the BOP enacted the 2005 regulations.²² The 2005 regulations were termed a “categorical exercise of discretion,” restricting the amount of time inmates may spend in CCCs to the last 10 percent of their sentences, not to exceed six months, with exceptions only for inmates involved in specific statutorily created programs.²³

The 2005 regulations prompted challenges from affected prisoners contending that the BOP policy behind the 2005 regulations contradicts its statutory authority.²⁴ To guide judicial review of an agency’s interpretation of its statutory authority, the Supreme Court in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,²⁵ set forth a two-part test.²⁶ The *Chevron* inquiry begins with a consideration of whether Congress expressed clear intent regarding the “precise question at issue.”²⁷ If the statute is silent or ambiguous

21. See *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 240 (3d Cir. 2005) (noting OLC’s interpretation of CCC placement authority stemmed exclusively from 18 U.S.C. § 3624); see also *Bussert et al.*, *supra* note 20, at 22-24 (discussing OLC reasoning and 2002 BOP rule changes). The OLC relied on the sentencing guidelines to determine that community confinement was not a place of imprisonment for § 3621 purposes. *Bussert et al.*, *supra* note 20, at 22. The OLC also opined that the timeframe for community re-integration in § 3624(c) acted as a restriction on the grant of discretion contained in § 3621. *Bussert et al.*, *supra* note 20, at 22. The BOP issued a memorandum to federal judges, announcing that the OLC’s interpretation was to be effective immediately and applied retroactively. *Bussert et al.*, *supra* note 20, at 22. Some prisoners, who were currently located in CCCs but deemed no longer eligible for that placement, challenged the policy. *Bussert et al.*, *supra* note 20, at 23-24.

22. See *Elwood v. Jeter*, 386 F.3d 842, 845 (8th Cir. 2004) (considering 2002 policy’s denial of CCC placement); *Goldings v. Winn*, 383 F.3d 17, 19 (1st Cir. 2004) (determining 2002 policy inconsistent with statutory mandates); 28 C.F.R. §§ 570.20-.21 (2005) (responding to invalidity of 2002 policy and creating categorical exercise of discretion). The First Circuit concluded the 2002 policy was inconsistent with the BOP’s statutory authority because the statute allowed placement, or transfer, of a prisoner to a CCC at any time during the prison term. *Goldings v. Winn*, 383 F.3d 17, 28-29 (1st Cir. 2004). The court determined that § 3621(b) was not limited by § 3624(c). *Goldings v. Winn*, 383 F.3d 17, 28-29 (1st Cir. 2004). The court further concluded that the BOP’s affirmative obligation to provide re-integration via CCC placement at a term’s end does not limit the BOP’s discretion to designate CCC placement at an earlier time. *Id.* at 24. The Eighth Circuit similarly held that § 3621(b) gave the BOP discretion to direct prisoners to CCCs at any time during their prison terms. *Elwood v. Jeter*, 386 F.3d 842, 847 (8th Cir. 2004).

23. 28 C.F.R. §§ 570.20-.21 (2005) (limiting inmate CCC placement). The time limitations may only be exceeded where required by separate statutory authority, such as substance abuse treatment required by § 3621(e)(2)(A). *Id.*; see *Community Confinement*, 69 Fed. Reg. 51213 (Aug. 18, 2004) (codified at 28 C.F.R. §§ 570.20-.21) [hereinafter *Community Confinement*] (proposing 2005 regulations).

24. See generally *Bussert et al.*, *supra* note 20, at 20 (detailing circuit courts’ contradictory rulings on BOP’s authority).

25. 467 U.S. 837 (1984).

26. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (outlining steps necessary to review agency’s interpretation of its controlling statute).

27. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984) (requiring inquiry into congressional intent). Courts should apply the ordinary canons of statutory construction to determine if Congress spoke to the precise question at issue. See David M. Hasen, *The Ambiguous Basis of Judicial Deference to Administrative Rules*, 17 YALE J. ON REG. 327, 328 (2000) (introducing Supreme Court’s standard for review of agency regulations). See generally Matt Kenna, *Chevron Deference to Agencies: A Two-Way Street*, 15 SE. ENVTL. L.J. 395 (2007) (outlining how courts should apply *Chevron* deference).

with respect to this precise question at issue, the court should defer to the agency's construction if it is permissible—that is, if it is not “arbitrary, capricious, or manifestly contrary to the statute.”²⁸ In 2001, the Supreme Court, in *Lopez v. Davis*,²⁹ considered whether the BOP was entitled to agency deference for a regulation created pursuant to 18 U.S.C. § 3621(e)(2)(b).³⁰ Based on the permissive language used in the statute, the Supreme Court concluded that once the two prerequisites for sentence reduction—conviction of a non-violent offense and completion of drug treatment—were met, the BOP had discretionary authority, but not a duty, to grant early release, and to create rules to resolve issues of general applicability.³¹

The first four federal courts of appeals to consider the 2005 regulations' validity concluded the categorical exercise of discretion was unlawful because they do not allow for the individualized consideration required by statute.³²

28. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984) (requiring deference to permissible agency interpretation of ambiguous statute). If congressional intent is clear, then the court and the agency are both required to give effect to this unambiguous intent. *Id.* at 842-43. The Court, however, explicitly noted that where a statute is ambiguous, the reviewing court should not impose “its own construction.” *Id.* at 843. Administrative agencies will necessarily be required to create their own policies to fill gaps left by Congress, whether left implicitly or explicitly. *Id.* If Congress explicitly left a gap for the administrative agency to fill, authority was delegated to the agency to craft regulations and the regulation created with this authority is controlling unless “arbitrary, capricious, or manifestly contrary.” *Id.* at 844. Where the gap is implicit, the interpretation is still given deference if it is reasonable. *Id.*

29. 531 U.S. 230 (2001).

30. *Lopez v. Davis*, 531 U.S. 230, 238 (2001) (considering BOP's categorical rulemaking power). The statute provides that the sentence of a prisoner who was convicted of a nonviolent offense and who has successfully completed a treatment program may be reduced by the BOP. 18 U.S.C. § 3621(e)(2)(B) (2000). In creating this regulation, the BOP systematically excluded categories of inmates from early release eligibility, while asserting that this categorical exclusion was within its discretion to prescribe additional early release criteria. See *Lopez v. Davis*, 531 U.S. 230, 235-36 (2001). The Supreme Court in *Lopez* addressed whether the BOP had discretion to delineate additional categories of inmates who would be ineligible for early release. *Id.* at 238.

31. *Lopez v. Davis*, 531 U.S. 230, 240 (2001) (analyzing BOP's categorical rulemaking authority under 18 U.S.C. § 3621(e)(2)(b)). The Supreme Court held that § 3621(e)(2)(B) gave the BOP discretion to make sentence reductions if the prisoner met two factors, but did not address how to exercise the discretion. *Id.* at 242. The Court noted that where Congress enacts a law that does not answer “the precise question at issue,” the only judicial inquiry is whether the agency has reasonably filled the statutory gap. *Id.* at 242. The Court reasoned that even a statutory scheme that requires individualized determinations allows the decision-maker the discretion to create rules to resolve issues of general applicability, unless prohibited by clear congressional intent. *Id.* at 243-44 (quoting *Am. Hospital Ass'n v. NLRB*, 499 U.S. 606, 612 (1991)).

32. See *Wedelstedt v. Wiley*, 477 F.3d 1160, 1168 (10th Cir. 2007) (invalidating 2005 regulations as contrary to statutory mandate); *Levine v. Apker*, 455 F.3d 71, 87 (2d Cir. 2006) (deciding regulations failed to consider factors required by statutory mandate); *Fults v. Sanders*, 442 F.3d 1088, 1092 (8th Cir. 2006) (concluding analysis of required factors on categorical basis impossible); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 249 (3d Cir. 2005) (deciding regulations constitute impermissible construction of statute). After the First Circuit's *Muniz* decision, the Ninth Circuit considered the same issue and agreed with the other four circuits. *Rodriguez v. Smith*, 541 F.3d 1180, 1187-88 (9th Cir. 2008) (agreeing regulations conflict with statute and declining to follow First Circuit). See generally Michael P. Bracken, *The Proper Interplay of the Voluntary Departure and Motion to Reopen Provisions of the Illegal Immigration Reform and Immigrant Responsibility Act*, 57 CATH. U. L. REV. 511, 538-39 (2008) (discussing ways to resolve circuit splits like one created by First Circuit in *Muniz*).

Applying *Chevron*, these courts determined the statute had a plain meaning requiring consideration of enumerated factors, which legislative history supported.³³ The courts concluded that giving full effect to the statute's plain meaning was impossible under the 2005 regulations.³⁴ The courts of appeals distinguished *Lopez*, because § 3621(b), in contrast to § 3621(e)(2)(B), contains guidance for the exercise of discretion, rather than a lack of discretion.³⁵ Although the BOP asserted it had considered the enumerated factors when promulgating the regulations, the courts determined that this was without merit because of the factors' individualized nature.³⁶ Each majority decision was accompanied by a dissent, maintaining the 2005 regulations were consistent with the statute and deferring to the BOP's construction.³⁷

In *Muniz v. Sabol*, the First Circuit created a circuit split by holding that Congress authorized the BOP to implement a categorical rule denying placement in CCCs to all prisoners during the first 90 percent of their sentences or for terms exceeding six months.³⁸ Applying *Chevron*, the court concluded the plain language of § 3621(b) and its legislative history were ambiguous with

33. See *Wedelstedt v. Wiley*, 477 F.3d 1160, 1165-67 (10th Cir. 2007) (discerning plain meaning of placement statute without considering legislative history); *Levine v. Apker*, 455 F.3d 71, 80-83 (2d Cir. 2006) (finding plain meaning and quoting Senate Judiciary Committee report); see also *Fults v. Sanders*, 442 F.3d 1088, 1092 (8th Cir. 2006) (confirming plain meaning with support in legislative history); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 245-47 (3d Cir. 2005) (noting support in legislative history of determined plain meaning). The legislative history stated that "[i]n determining the availability or suitability of the facility selected, the Bureau [was] specifically required to consider such factors as [those listed in § 3621(b)]." S. REP. NO. 98-225 (1983), as reprinted in 1984 U.S.C.C.A.N. 3182, 3324-25.

34. See *Wedelstedt v. Wiley*, 477 F.3d 1160, 1168 (10th Cir. 2007) (indicating consideration of individualized factors impossible under regulations); *Levine v. Apker*, 455 F.3d 71, 86-87 (2d Cir. 2006) (deciding regulations do not provide required individualized consideration); *Fults v. Sanders*, 442 F.3d 1088, 1092 (8th Cir. 2006) (determining not possible to consider factors on individualized basis); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 245-46 (3d Cir. 2005) (concluding regulations do not allow full consideration of required factors).

35. See *Wedelstedt v. Wiley*, 477 F.3d 1160, 1168 (10th Cir. 2007) (deciding agency's authority to create categorical rules limited by contrary congressional intent); *Levine v. Apker*, 455 F.3d 71, 85 (2d Cir. 2006) (reasoning categorical rulemaking must not contradict congressional guidelines); *Fults v. Sanders*, 442 F.3d 1088, 1091 (8th Cir. 2006) (distinguishing *Lopez* holding because statute at issue offers no specific criteria to consider); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 246-47 (3d Cir. 2005) (reasoning because individualized factors required by § 3621(b) not generally applicable, *Lopez* therefore not controlling).

36. See *Wedelstedt v. Wiley*, 477 F.3d 1160, 1168 (10th Cir. 2007) (determining three factors require individual consideration); *Levine v. Apker*, 455 F.3d 71, 86 (2d Cir. 2006) (concluding consideration of required factors entails individualized decisions); *Fults v. Sanders*, 442 F.3d 1088, 1092 (8th Cir. 2006) (concluding consideration of factors beforehand impossible); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 248 (3d Cir. 2005) (deciding individual consideration required).

37. See *Wedelstedt v. Wiley*, 477 F.3d 1160, 1169-71 (10th Cir. 2007) (Hartz, J., dissenting) (reasoning statute requiring individualized consideration and regulations governing particular housing choice possibly consistent); *Levine v. Apker*, 455 F.3d 71, 87-91 (2d Cir. 2006) (Raggi, J., dissenting) (construing regulations' rejection of CCCs suitability permissible); *Fults v. Sanders*, 442 F.3d 1088, 1093 (8th Cir. 2006) (Riley, J., dissenting) (reasoning individualized determinations only required for transfer); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 251-52 (3d Cir. 2005) (Fuentes, J., dissenting) (determining factors need not be considered until inmate considered for transfer).

38. 517 F.3d at 31 (reversing district court holding and creating circuit split).

respect to a congressional intent to foreclose all rulemaking to assist the BOP in its individualized determinations.³⁹ The court compared § 3621(e)(2)(B) with § 3621(b) and concluded that the two sections contained the same permissive language.⁴⁰ While Congress intended consideration of the five factors in placement decisions, the court did not perceive this to be a clear expression of congressional intent to exclude all rulemaking.⁴¹ After concluding that the plain language of the statute was ambiguous as to rulemaking to guide placement decisions, the court considered the legislative history and observed that it was similarly vague.⁴²

In the second step of the *Chevron*-doctrine analysis, the First Circuit determined that it should defer to the BOP's statutory construction.⁴³ The court concluded that the BOP was reasonable in deciding that some placement facilities were categorically unsuitable for inmates during the first 90 percent of their sentences or for terms exceeding six months.⁴⁴ The court next observed that the 2005 regulations did not categorically decide all placements, with which the statute charged the BOP, but rather the regulations resolved a narrower issue: placement within CCCs for specific durations.⁴⁵ In addition, the court concluded the BOP specifically took into account some of the five factors in creating the 2005 regulations.⁴⁶ Based on its analysis, the First Circuit held the 2005 regulations were a permissible statutory construction and upheld the BOP's categorical exercise of discretion.⁴⁷

39. *Id.* at 34-38 (analyzing plain language of placement statute and legislative history and determining no clear congressional intent). The court began its analysis by conducting the two-step *Chevron* doctrine analysis, in light of the Supreme Court's decision in *Lopez*. *Id.* at 34. The analysis required the court to ask whether the categorical exercise of discretion was permissible and, if so, whether the regulation's substance comported with congressional intent. *Id.* The court determined the statute's plain language revealed a grant of discretion and an instruction that the BOP consider five factors when utilizing its discretion. *Id.* at 35. The court determined the requirement of individualized determinations was insufficient to infer congressional intent to disallow rulemaking. *Id.* at 36.

40. *Id.* at 35-36 (identifying "near-identical language" when comparing statutory provisions at issue in *Muniz* and in *Lopez*). The First Circuit determined the intent Congress expressed in the placement statute was not the type of clear expression of intent to withhold rulemaking authority required by *Lopez*. *Id.* at 36.

41. *Id.* at 36 (relying on *Lopez* to support conclusion on BOP's rulemaking authority).

42. 517 F.3d at 37-38 (concluding legislative history ambiguous). The court determined that the legislative history could support both its reading of the statute, as well as the other circuits' readings, which made the statute sufficiently ambiguous. *Id.* at 38.

43. *Id.* at 38-40 (asking whether 2005 regulations reasonably interpreted statute and deferring to BOP's interpretation). The congressional mandate instructed the BOP to place each prisoner in a suitable facility after considering five factors. *Id.* at 38.

44. *Id.* at 38 (determining regulations reasonable exercise of BOP's statutory discretion).

45. *Id.* at 39 (concluding regulations create "background rule"). The First Circuit determined that § 3621(b) required consideration of the factors in a broader context than the regulations accomplish alone. *Id.* The court reasoned that deciding a subissue on a categorical basis was different than if the BOP were to have decided the final issue of placement categorically. *Id.*

46. 517 F.3d at 39 (discussing 2005 regulations' consideration of deterring future crime and inmates' financial resources); *see also* Community Confinement, *supra* note 23, at 51214-15 (considering all statutorily specified factors when creating regulations).

47. 517 F.3d at 40 (upholding 2005 regulations).

By failing to recognize that the 2005 regulations contradict unambiguous congressional intent, the First Circuit erroneously upheld the BOP's policy, leaving the placement of prisoners in the circuit governed by impermissible regulations.⁴⁸ The BOP has discretion under § 3621(b) to assign prisoner placement in a suitable facility, considering five enumerated factors.⁴⁹ The First Circuit did not dispute this interpretation, but came to its incorrect conclusion by posing the issue too generally when considering congressional intent in conducting the first step of *Chevron*.⁵⁰ To discern accurately congressional intent regarding the precise issue, the inquiry must be phrased more narrowly than, as the First Circuit posed the question, whether Congress intended to foreclose all rulemaking to assist in individualized determinations.⁵¹ The appropriate inquiry asks whether Congress intended the BOP to have the discretion to create a categorical rule deciding that an otherwise available facility is unsuitable, without first considering the factors specified in the statute.⁵² The correct answer to the inquiry is "no," because congressional intent is clear that the factors must be considered before the BOP can exercise its discretion in assigning appropriate placement.⁵³

In its conclusion that the statutory language is ambiguous, the First Circuit incorrectly relied on the Supreme Court precedent of *Lopez*.⁵⁴ The statutory scheme considered by the First Circuit is notably different because, unlike the statutory gap that left a lack of guidance in *Lopez*, Congress has expressly outlined factors for the BOP to consider in placement decisions.⁵⁵ While the

48. *Id.* (holding regulations valid exercise of discretion); *see also supra* note 32 (noting five other circuit courts invalidated 2005 regulations).

49. 18 U.S.C. § 3621(b) (2000) (providing BOP authority to designate inmates to any available penal facility after five-factor consideration); *see supra* note 18 and accompanying text (setting forth language of § 3621(b)).

50. *See* 517 F.3d at 34-35 (framing issue under *Chevron* doctrine analysis); *see also supra* note 39 and accompanying text (analyzing First Circuit's treatment of *Chevron*'s first question).

51. *See supra* notes 27-28 and accompanying text (explaining *Chevron* doctrine analysis for judicial review of agency's construction of statutory mandate); *see also* *Miller v. Whitehead*, 527 F.3d 752, 755-758 (8th Cir. 2008) (holding regulation with categorical exercise of discretion permissible under § 3621(b)).

52. *See* *Levine v. Apker*, 455 F.3d 71, 84 (2d Cir. 2006) (considering whether BOP can create categorical limitation on CCC placement); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 241 (3d Cir. 2005) (considering whether new regulations contradict congressional directives).

53. *See* S. REP. NO. 98-225 (1983), *as reprinted in* 1984 U.S.C.A.N. 3182, 3324-25 (stating BOP "specifically required" to consider the factors in deciding placement). *Id.* The First Circuit determined that the order was tempered, and thus the legislative history was ambiguous, because it also stated that the inclusion of the factors was not intended as a limitation of the BOP's discretion. *Id.* *But see* *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 244 (3d Cir. 2005) (concluding statute's text and history unambiguous and only indicated intent to not limit overall discretion).

54. *See* 517 F.3d at 34-37 (deeming *Chevron* and *Lopez* analyses "interrelated" and determining § 3621(e) and § 3621(b) contain "near-identical language"); *Levine v. Apker*, 455 F.3d 71, 85-86 (2d Cir. 2006) (deciding *Lopez* inapplicable); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 246-47 (3d Cir. 2005) (distinguishing *Lopez*); *see also supra* notes 30-31 and accompanying text (explaining Supreme Court's analysis and holding in *Lopez*).

55. *See* *Fults v. Sanders*, 442 F.3d 1088, 1090-91 (8th Cir. 2006) (distinguishing § 3621(b) and §

Supreme Court held that categorical rules are a permissible way to resolve issues of general applicability, the individualized nature of the factors indicate that placement will not always be the same, and thus placement cannot be generally applicable.⁵⁶ Instead of a lack of guidance, the statute's plain language reveals just the opposite—five factors to assist in determining which facility is suitable for a prisoner.⁵⁷ The analysis ends there; a regulation that deems a facility is unsuitable before consideration of the factors is contrary to the plain meaning of the statute and cannot be upheld.⁵⁸

The resulting circuit split will cause unequal administration of the law until resolved by Congress or the BOP.⁵⁹ For most prisoners, there is only a short time period in which a habeas petition will be ripe—after the pre-2002 policy allowed consideration for CCC placement and before he or she is eligible for placement under the 2005 regulations.⁶⁰ Therefore, petitions may become moot by CCC placement before litigation can settle the conflict, leaving the prisoner without relief and the problem without resolution.⁶¹ As such, the issue is particularly time sensitive and should be dealt with in the most expedient manner to provide fair, equal, and legally permissible prison placement, regardless of in which circuit the inmate is imprisoned.⁶² The BOP may draft a

3621(e)(2)(B)). The section considered in *Lopez*, § 3621(e)(2)(B), offered no guidance other than initially requiring that the prisoner be a nonviolent offender to be eligible; thus, the BOP had discretion to make categorical decisions within that class. *Id.* at 1091. Conversely, § 3621(b) is distinct because it outlines five factors to guide placement decisions. *Id.*

56. See *Lopez v. Davis*, 531 U.S. 230, 240 (2001) (holding BOP may create categorical rules to resolve issues of general applicability); *Levine v. Apker*, 455 F.3d 71, 86 (2d Cir. 2006) (concluding factors require individualized consideration). At least three of the five factors that Congress enumerated require an individualized assessment: “the nature and circumstances of the prisoner’s offense, the history and characteristics of the prisoner, and any statement by the court that imposed the sentence.” *Levine v. Apker*, 455 F.3d 71, 86 (2d Cir. 2006) (citing 18 U.S.C. § 3621(b)(1)-(4)(2000)).

57. See *Levine v. Apker*, 455 F.3d 71, 81 (2d Cir. 2006) (concluding plain meaning of § 3621(b) requires considering factors before placement).

58. See *Wedelstedt v. Wiley*, 477 F.3d 1160, 1168 (10th Cir. 2007) (holding regulations invalid because they conflict with statute’s plain meaning); *Levine v. Apker*, 455 F.3d 71, 81 (2d Cir. 2006) (holding consideration of statutory factors mandatory); *Fults v. Sanders*, 442 F.3d 1088, 1092 (8th Cir. 2006) (holding BOP’s 2005 regulation invalid because it conflicts with § 3621(b) duty to consider five factors); *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 249 (3d Cir. 2005) (concluding 2005 regulations conflict with statute’s plain meaning). Given the individualized nature of the factors, a blanket rule without exceptions cannot address each individual prisoner’s circumstances. *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 248 (3d Cir. 2005). *But see* *Community Confinement*, *supra* note 23, at 51214-15 (maintaining all statutorily specified factors considered by BOP when creating regulations).

59. Compare 517 F.3d at 40 (upholding BOP’s 2005 regulations), with *Woodall v. Bureau of Prisons*, 432 F.3d 235, 249-51 (3d Cir. 2005). The Supreme Court could potentially resolve the circuit split; however, the Court denied certiorari in *Muniz*. See 129 S. Ct. 115 (2008).

60. See *Fults v. Sanders*, 442 F.3d 1088, 1089-90 (8th Cir. 2006) (explaining temporal differences in CCC placement under pre-2002 and 2005 regulations).

61. See *Levine v. Apker*, 455 F.3d 71, 76-77 (2d Cir. 2006) (explaining when habeas corpus petition becomes moot).

62. See *Muniz v. Winn*, 462 F. Supp. 2d 175, 183-85 (D. Mass. 2006) (certifying for expedited appeal to ensure inmates’ placement resolved promptly), *rev’d sub nom.* *Muniz v. Sabol*, 517 F.3d 29 (1st Cir. 2008). Litigation of habeas corpus petitions is slow, and inmates stand to lose their individual rights while waiting for

superseding regulation bearing in mind a recent decision by the Eighth Circuit, which affirmed a categorical rule for CCC placement with an exception for extraordinary circumstances.⁶³ Because previous circuit splits over BOP regulations have prompted the BOP to modify its policy and because new regulations will likely provide the quickest resolution, the BOP should consider drafting a new regulation to provide uniform prisoner placement in all circuits.⁶⁴

The failure to consider first the congressionally mandated factors resulted in the BOP's 2005 regulations, which restrict prisoner placement without authority of law. By upholding these regulations, and disagreeing with four other federal courts of appeals, the First Circuit injects inconsistency into the application of policies intended to be applied uniformly. Moreover, the continued application of these regulations violates each First Circuit prisoner's congressionally given right to be placed in a facility deemed suitable to their individual circumstances. It is possible that this disparity will be resolved by the BOP, as it has when such unequal administration of BOP policy has occurred previously, and the BOP has recognized the need for uniform prisoner treatment by acting promptly to cure the discord. Until resolved, prisoners in the First Circuit will continue to be categorically denied placement in CCCs, in violation of unambiguous congressional intent.

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resolution of their petitions. *Id.* at 183-84. Many petitions, including petitioner Muniz's, become moot before prisoners complete the process of appeals, which enhances the necessity of an expedited decision. *Id.* at 184.

63. See *Miller v. Whitehead*, 527 F.3d 752, 755-58 (8th Cir. 2008) (determining new regulation PS 7310.04 a permissible exercise of discretion under statutory mandate). In response to *Fults v. Sanders*, the BOP directed officials at facilities in the Eighth Circuit to place prisoners under the 1998 plan, Program Statement (PS) 7310.04. *Id.* at 754-55. Under PS 7310.04, the BOP would "normally" decide whether to place prisoners in a CCC eleven to thirteen months before their expected release date, unless "extraordinary justification" necessitated longer CCC placement. *Id.* The Eighth Circuit determined that PS 7310.04 was permissible even though the regulation required prisoners to make a stronger showing to justify longer CCC placement. *Id.* at 758. Unlike the 2005 regulations, PS 7310.04 did not categorically remove the BOP's exercise of discretion. *Id.*

64. See *Bracken*, *supra* note 32, at 538-39 (discussing resolution of circuit split). An administrative regulation provides a fair resolution to the circuit split, and its attainment is less arduous than that of either a congressional amendment or a Supreme Court decision. *Id.* at 538-39.