



March 13, 2023

Submitted online via regulations.gov

Re: Opposition to Proposed Rule Amendments to Inmate Financial Responsibility Program Procedures

On behalf of the Southern Poverty Law Center (“SPLC”), we write to oppose the Bureau of Prison’s (“the Bureau”) proposed amendment to 28 C.F.R. 545.11 regarding the Inmate Financial Responsibility Program (“IFRP”). We urge the Bureau to abandon the proposal, which would disproportionately harm Black and low-income incarcerated people and their families while doing little to increase restitution payments to crime victims.

The SPLC is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. In furtherance of this mission, the Economic Justice Project at SPLC works to ensure that people living in poverty in the Deep South, especially Black, Brown, and Indigenous communities, are not punished or exploited because of their economic status.

Under the proposed rule, the Bureau would garnish incarcerated peoples’ wages at significantly higher rates; eliminate the safeguard guaranteeing minimal access to the prison telephone system; extract 75 percent of any funds family and friends deposit into commissary accounts; and disqualify someone who chooses not to participate in the IFRP from receiving earned First Step Act time credits.

The Bureau formulated the proposed rule in response to media reports about a very small, unrepresentative fraction of incarcerated people—those who are wealthy and owe restitution to victims.¹ However, these individuals do not represent the average person in Bureau custody: an indigent person who does not owe restitution.² The proposed rule, in reacting to the actions of a few wealthy people who have withheld restitution, disregards the realities and needs of the vast majority of people in federal prison.

We implore the Bureau to abandon the proposed rule because it would disproportionately extract money from Black and low-income communities and undermine the future financial security of incarcerated people, most of whom will one day leave federal custody.

¹ See Devlin Barrett, *Federal Prisoners Hold \$100 Million in Government-run Accounts*, Wash. Post (June 9, 2021), https://www.washingtonpost.com/national-security/bureau-of-prisons-bank-system/2021/06/08/2aff9766-c3d1-11eb-8c18-fd53a628b992_story.html (last visited March 12, 2023).

² See Adam Looney & Nicholas Turner, *Work and Opportunity Before and After Incarceration* 8 (March 2018), https://www.brookings.edu/wp-content/uploads/2018/03/es_20180314_looneyincarceration_final.pdf (finding that over half of people entering prison “have essentially no annual earnings”); U.S. Gov’t Accountability Off., *Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved* 17 (Feb. 9, 2018), <https://www.gao.gov/assets/690/689998.pdf> (reporting that federal district courts did not order restitution for 85 percent of criminal defendants from 2014 to 2016).



Instead, as President Biden’s Executive Order 13985 mandates, the Bureau “must recognize and work to redress inequities in [its] policies and programs,” such as the IFRP, “that serve as barriers to equal opportunity” for Black, Brown, Indigenous, and low-income people, who have been “historically underserved, marginalized, and adversely affected by persistent poverty and inequality.”³

The Bureau should adopt or advocate for policies that would bolster the successful re-entry and social stability of incarcerated people and their families—and, by extension, increase payment of restitution and other financial obligations. These policies would “[a]ffirmatively advance[e] equity, civil rights, racial justice, and equal opportunity,” which “is the responsibility of the whole of our Government.”⁴

- 1. Because the majority of individuals in federal custody are low-income, struggle to afford basic hygiene items and supplemental food, and are underpaid for prison labor, the Bureau should increase wages and lower costs associated with incarceration to enable payment of restitution and other financial obligations.**

The proposed rule was designed to address the problem of high-profile individuals with vast personal wealth withholding money in their prison accounts from crime victims to whom they owe restitution. Specifically, the media reported that approximately .01 percent of the 144,000 people in federal prison hold more than \$100,000 in their prison financial accounts, and that some of those individuals still owe restitution.⁵ But those individuals are extreme outliers, and concerns about their financial wealth and obligations should not shape a general rule governing 144,000 incarcerated people, most of whom are indigent and do not owe restitution.

First, most federal defendants—approximately 85 percent—do not owe restitution at all⁶ and are thus only paying IFRP obligations for fines and fees, court costs, federal taxes, state child support obligations, and cost of incarceration fees.

Second, and more importantly, most people in federal prison are indigent, entering federal prison with virtually no income and exiting at an increased risk of living in poverty.⁷ In the two years before their incarceration, 56 percent of people earned under \$500 per year, and 86 percent earned

³ Exec. Order No. 13985: Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (Jan. 20, 2021), <https://www.regulations.gov/document/EPA-HQ-OPPT-2021-0202-0010>; see also 28 C.F.R. § 551.90 (prohibiting Bureau staff from “discriminat[ing] against [incarcerated people] on the basis of race,” including when making administrative decisions).

⁴ Exec. Order No. 13985, *supra* note 3.

⁵ See Barrett, *supra* note 1 (“[I]here are more than 20 inmate accounts holding more than \$100,000 each[.]”); Fed. Bureau of Prisons, *Population Statistics*, https://www.bop.gov/mobile/about/population_statistics.jsp#ccm_pop_table (last visited March 9, 2023).

⁶ *Federal Criminal Restitution*, *supra* note 2, at 17 (explaining that from 2014 to 2016, the “majority of federal offenders were sentenced for immigration or drug-related offenses,” which “do not typically have victims with actual losses”).

⁷ See U.S. Dep’t of Health & Hum. Servs., *Incarceration and Reentry*, <https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0> (last visited March 13, 2023).



under \$15,000 per year.⁸ Accordingly, nine out of 10 federal defendants cannot afford to hire a private attorney and are appointed legal representation.⁹ And mass incarceration itself is “a major driver of poverty.”¹⁰ Nearly 5 million fewer Americans would have been living in poverty between 1980 and 2014 had federal and state governments not pursued mass incarceration as a policy; approximately 1 in 28 children in this country has a parent behind bars.¹¹

Once inside, incarcerated people struggle to afford myriad supplies and services essential for daily life. As a matter of policy, the Bureau marks up the price of nearly every item sold in the commissary by 30 to 40 percent—including food, hygiene products, over-the-counter medicines, clothing, mailing supplies, and photocopy services.¹² Incarcerated people must also pay for the use of the phone and email system,¹³ medical visit co-pays,¹⁴ correspondence courses,¹⁵ laundry facilities,¹⁶ and more.

For individuals who participate in prison employment programs, incarcerated workers’ below-market wages are insufficient to afford these necessities.¹⁷ The Bureau pays 92 percent of incarcerated

⁸ Looney & Turner, *supra* note 2, at 8.

⁹ Hon. Kathleen Cardone, et al., Ad Hoc Comm. to Review the Crim. Just. Act, *2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act XIV*, 158 (2017), <https://cjastudy.fd.org/sites/default/files/public-resources/Ad%20Hoc%20Report%20June%202018.pdf>; *see also* U.S. Courts, *Defender Services*, <https://www.uscourts.gov/services-forms/defender-services> (last visited March 13, 2023) (“Federal defender organizations, together with the more than 12,000 private ‘panel attorneys’ who accept CJA assignments annually, represent the vast majority of individuals who are prosecuted in our nation’s federal courts.”).

¹⁰ *Incarceration and Reentry*, *supra* note 7.

¹¹ *Id.*

¹² Fed. Bureau of Prisons, *Program Statement 4500.12: Trust Fund/Deposit Fund Manual* 38 (March 14, 2018), <https://www.bop.gov/policy/progstat/4500.12.pdf> (describing the markup policy and listing the only commissary items not sold at a markup: stamps, “[s]elf-improvement textbooks,” correspondence courses, tools and materials for educational or vocational training, legal materials, religious articles, smoking cessation materials, and Passover meals).

¹³ 28 C.F.R. 540.105(a) (“An inmate is responsible for the expenses of inmate telephone use.”); Off. of the Inspector Gen., *Audit of the Federal Bureau of Prisons’ Monitoring of Inmate Communications to Prevent Radicalization*, 21 (March 2020), <https://oig.justice.gov/sites/default/files/reports/a20042.pdf> (“Inmates are charged \$.05 per minute to use TRULINCS [email system][.]”); *see also* Fed. Bureau of Prisons, *Stay in Touch*, <https://www.bop.gov/inmates/communications.jsp> (last visited March 10, 2023).

¹⁴ 28 C.F.R. § 549.70(b); *see also* Fed. Bureau of Prisons, *Program Statement No. P6031.02: Inmate Copayment Program* 2 (Oct. 3, 2005), https://www.bop.gov/policy/progstat/6031_002.pdf (requiring copayment for non-emergency medical visits requested by the incarcerated person or by non-clinical staff on the person’s behalf).

¹⁵ 28 C.F.R. 544.21(b)(2); *see also* Fed. Bureau of Prisons, *Program Statement No. P5354.03: Postsecondary Education Programs for Inmates* 3 (Dec. 19, 2003), https://www.bop.gov/policy/progstat/5354_003.pdf (“The inmate will incur all costs, including tuition, books, materials, and all other related fees, associated with correspondence courses.”).

¹⁶ *Program Statement 4500.12: Trust Fund/Deposit Fund Manual*, *supra* note 12, at 55 (“[Incarcerated people] purchase laundry cards through the Commissary.”).

¹⁷ The Bureau requires all incarcerated people “who are physically and mentally able to work [] to participate in the work program.” 28 C.F.R. 545.20(a)(2).



workers between 12 and 40 cents an hour for “institution work.”¹⁸ Another 8 percent of workers earn between 23 cents and \$1.15 an hour in UNICOR positions.¹⁹

Table 1 of the Appendix reports how many hours incarcerated people in institutional jobs must work to purchase basic goods from the commissary under current and proposed IFRP rules, illustrating the high cost of existing within the closed prison economy.²⁰

For example, incarcerated people working at the lowest pay rate, 12 cents per hour, for one day cannot afford to buy a single hair tie, floss, or soap.²¹ Buying a stick of deodorant requires 21 hours of labor at the lowest pay rate; medicine for an upset stomach, 23 hours; a roll of toilet paper, 45 hours; a sweatshirt, 140 hours.²² To afford the \$2.00 copay for medical visits,²³ they must work full-time for over two days. And they must labor for 525 hours—approximately 3 months of full-time work—to afford the monthly limit of 300 phone minutes, at 21 cents a minute for domestic long-distance calls.²⁴

The Bureau’s current policy of underpaying incarcerated workers ensures that victims go decades without compensation: incarcerated people are unable to meaningfully pay any amount of restitution when earning cents on the hour no matter how many hours they work. Paying incarcerated workers cents on the dollar also harms the families of incarcerated people, who bear the cost of providing basic nutritional and hygiene needs to their loved ones in prison through monetary deposits.²⁵

¹⁸ Fed. Bureau of Prisons, *Work Programs*, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp (“Institution work assignments include employment in areas like food service or the warehouse, or work as an inmate orderly, plumber, painter, or groundskeeper.”); see Fed. Bureau of Prisons, *UNICOR: Program Details*, https://www.bop.gov/inmates/custody_and_care/unicor_about.jsp (noting that “only 8% of work-eligible inmates participate in [UNICOR]”); see also Am. Civ. Liberties Union & Univ. of Chicago Law Sch. Global Human Rights Clinic, *Captive Labor: Exploitation of Incarcerated Workers* 94 (2022), https://www.aclu.org/sites/default/files/field_document/2022-06-15-captivelaborresearchreport.pdf.

¹⁹ *UNICOR: Program Details*, *supra* note 18.

²⁰ The commissary items and prices appearing in Table 1 of the Appendix represent a sample of the merchandise sold in the commissary at the federal correctional institution in Talladega, Alabama. See FCI Talladega Commissary Sales List (March 31, 2020), https://www.bop.gov/locations/institutions/tdg/TDG_commlist090820.pdf (last visited March 10, 2023); see also *Program Statement 4500.12: Trust Fund/Deposit Fund Manual*, *supra* note 12, at 30–37 (listing items generally sold in Bureau commissaries).

²¹ See *infra* Appendix Table 1.

²² *Id.*

²³ See 28 C.F.R. § 549.70(b).

²⁴ See Fed. Bureau of Prisons, Video Visiting and Telephone Calls Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 85 Fed. Reg. 37335, 37336 (June 22, 2022), <https://www.govinfo.gov/content/pkg/FR-2020-06-22/pdf/2020-13004.pdf>.

²⁵ The Bureau does not allow family and friends to send incarcerated people packages containing food or other basic necessities; depositing money in a commissary account is the only way to help an incarcerated loved one obtain basic necessities in prison. See Fed. Bureau of Prisons, *Program Statement 5800.16: Mail Management Manual* 10, 24 (April 5, 2011), https://www.bop.gov/policy/progstat/5800_016.pdf; *Stay in Touch*, *supra* note 13 (“The



These exploitative labor conditions and predatory pricing structures are issues that the Bureau should address. Instead, it is proposing to further impoverish incarcerated people and their families by garnishing between 25 to 50 percent of incarcerated workers' wages and seizing 75 percent of funds in their commissary accounts, even when deposited by families and friends to support their loved one's basic needs. As explained below,²⁶ the families of incarcerated people, who are often themselves financially vulnerable, will be placed in the position of paying court fines and fees, cost of incarceration fees, back taxes, and restitution, while the Bureau continues to benefit from incarcerated people's underpaid labor.

Black people disproportionately bear the brunt of these policies. Although they represent only 14 percent of the U.S. population, they make up 39 percent of the prison population, due to systemic over-policing and racially discriminatory sentencing laws.²⁷ Due to a historic lack of economic opportunities and generational wealth-building, Black families earn less than other racial groups on average²⁸ and are therefore less able to protect family members and friends from the poor nutritional standards in prison and the high cost of essential hygiene products.

The experience of Ricardo Ferrell, in state custody in Michigan, is illustrative of the nature of the prison economy and the difficulties incarcerated individuals face to save money for their eventual release and re-entry into society. Mr. Ferrell works within a state prison facility as an observation aide, where his duties include monitoring incarcerated individuals under suicide watch, and he works as a reading and writing tutor.²⁹ He is paid approximately 84 cents per hour and can earn \$250 to \$300 per month.³⁰ He stated in an interview with The Marshall Project that his two main expenses are his phone credit account and commissary store purchases, because the food in his prison is deplorable and commissary prices are high.³¹ He is 64 years old and has saved \$3,100 for his release, an amount that

only packages an inmate may receive from home are those containing release clothing and authorized medical devices.”).

²⁶ See *infra* Part 3.

²⁷ Quick Facts – United States, U.S. Census Bureau, <https://www.census.gov/quickfacts/fact/table/US/PST045221> (last visited March 10, 2023); Fed. Bureau of Prisons, *Inmate Race* (March 4, 2023) https://www.bop.gov/about/statistics/statistics_inmate_race.jsp (last visited March 10, 2023); see Ruth Delaney, et al., Vera Institute of Justice, *Reimagining Prison* 31–46 (Oct. 2018), https://www.vera.org/downloads/publications/Reimagining-Prison_FINAL3_digital.pdf (discussing the connection between the nation's history of racism and its history of incarceration); see also Zaw, Hamilton & Darity, Jr., *Race, Wealth, and Incarceration: Results from the National Longitudinal Survey of Youth*, 8 *Race & Soc. Probs.* 103, 103 (2016), <https://www.prisonpolicy.org/scans/wealthraceincarcerationrates.pdf> (concluding that “although higher levels of wealth were associated with lower rates of incarceration, the likelihood of future incarceration still was higher for blacks at every level of wealth compared to the white likelihood”).

²⁸ See Raj Chetty et al., *Race and Economic Opportunity in the United States: An Intergenerational Perspective*, 135 *Q.J. of Econ.* 711, 711 (May 2020), <https://academic.oup.com/qje/article/135/2/711/5687353>.

²⁹ Beth Schwartzapfel, *Prison Money Diaries: What People Really Make (and Spend) Behind Bars*, Marshall Project (Aug. 4, 2022), <https://www.themarshallproject.org/2022/08/04/prison-money-diaries-what-people-really-make-and-spend-behind-bars>.

³⁰ *Id.*

³¹ *Id.*



may not cover first and last month's rent in most places in America since the median rent for available apartments is above \$2,000 nationally.³² Despite these challenges, Mr. Ferrell finds his prison labor therapeutic and described his positive social impact on other incarcerated individuals.³³

There are alternative policies that would better meet the Bureau's goals of facilitating restitution payments while also addressing the racial inequities and exploitative labor practices in our federal prison system, including instituting a minimum wage or fair pay for labor and market-rate pricing for commissary merchandise and services. These policies would allow incarcerated people to build savings with which to pay restitution, financially support their children and families, and prepare for re-entry.

2. The Bureau should make prison phone calls free to encourage communication between incarcerated individuals and their support systems as a means of rehabilitation, not eliminate the current safeguard for prison phone calls.

The Bureau should abandon its proposal to eliminate a \$75 minimum account balance in an incarcerated individual's account which ensures that incarcerated people can maintain telephone contact with family and friends. Under the current policy, the Bureau allows each incarcerated person to maintain at least \$75 in an account for telephone calls and that amount is considered exempt from any IFRP payment obligations. Under the proposed rule, the Bureau would eliminate this safeguard for prison phone calls. The Bureau justifies this proposal because wardens must “provide at least one collect call each month for [an incarcerated person] without funds”—defined by the regulation as a person “who has not had a trust fund account balance of \$6.00 for the past 30 days.”³⁴

One collect phone call per month is inadequate to maintain social connections with family and other support systems and is insufficient to justify abandoning this safeguard and low-cost rehabilitative policy. Studies show that removing barriers to communication for incarcerated individuals would lower the likelihood of recidivism, improve adherence to prison rules, and enhance parent-child relationships.³⁵ Morgan Godvin, a formerly incarcerated person who graduated college

³² Chris Arnold, *Rents Across U.S. Rise Above \$2,000 a Month for the First Time Ever*, NPR (June 9, 2022), <https://www.npr.org/2022/06/09/1103919413/rents-across-u-s-rise-above-2-000-a-month-for-the-first-time-ever> (last visited March 13, 2023).

³³ Schwartzapfel, *supra* note 29.

³⁴ 28 C.F.R. 540.105(b) (emphasis added). As elaborated below, \$6.00 is about the cost of buying a roll of toilet paper from a prison commissary; it is also more than what the Bureau pays many incarcerated people for a week of labor. See Work Programs, Fed. Bureau of Prisons, https://www.bop.gov/inmates/custody_and_care/work_programs.jsp (reporting that incarcerated people earn 12 to 40 cents per hour for institutional work assignments) (last visited March 10, 2023); see, e.g., FCI Talladega Commissary Sales List (March 31, 2020), https://www.bop.gov/locations/institutions/tdg/TDG_commlist090820.pdf (last visited March 10, 2023) (listing price of toilet paper as \$5.45).

³⁵ Leah Wang, *Research Roundup: The Positive Impacts of Family Contact for Incarcerated People and Their Families*, Prison Pol'y Initiative (Dec. 21, 2021), https://www.prisonpolicy.org/blog/2021/12/21/family_contact/ (last visited https://www.prisonpolicy.org/blog/2021/12/21/family_contact/).



after completing her federal sentence, recently wrote, one’s “motivation to keep living” while incarcerated “comes from the outside world.”³⁶

Having no money in prison destroys your social ties and perpetuates criminality. This is the fate to which we condemn most of our prisoners. The people who need to maintain their social connections the most, who are most vulnerable because of the toll that poverty takes, are the least able to do so.³⁷

Congress recognized this when they made all federal prison calls free and increased the allowance to five hundred minutes per month for the duration of the pandemic under the CARES Act.³⁸ The proposed rule change comes just as CARES Act relief will end in the spring of 2023. Additionally, President Biden recently signed the Martha Wright-Reed Just and Reasonable Communications Act, a bipartisan bill that will allow the Federal Communications Commission (FCC) to regulate the price of in-state prison phone calls across the country.³⁹ Across every sector of the federal government and in several states, there is growing recognition that allowing incarcerated individuals to remain in contact with family members and support systems leads to better outcomes upon release.

If the Bureau wants to facilitate successful re-entry and ensure restitution payments, it should make prison phone calls free instead of proposing to remove safeguards that help ensure incarcerated people’s contact with the outside world. Many jurisdictions, such as California⁴⁰ and New York City,⁴¹ have already done so and other states are considering similar proposals. The high cost of prison phone calls undermines the ability of incarcerated people to pay restitution, leaves many families in debt,⁴² and only benefits the prison phone industry, which earns \$1.2 billion every year.⁴³

³⁶ Morgan Godvin, *Money Changed Everything for Me in Prison*, Marshall Project, <https://www.themarshallproject.org/2019/04/11/money-changed-everything-for-me-in-prison> (last visited March 10, 2023).

³⁷ *Id.*

³⁸ See Video Visiting and Telephone Calls Under the Coronavirus Aid, Relief, and Economic Security, *supra* note 24; see also John Hendel, *Federal prisons make inmate calling, video visits free during pandemic*, Politico.com (April 14, 2020), <https://www.politico.com/amp/news/2020/04/14/federal-prisons-make-inmate-calling-free-186383>.

³⁹ Fed. Comm’n. Comm’n, *Congress Enacts Martha Wright-Reed Just and Reasonable Communications Act of 2022* (updated Jan. 9, 2023), <https://www.fcc.gov/congress-enacts-martha-wright-reed-just-and-reasonable-communications-act-2022-updated-link> (last visited March 13, 2023).

⁴⁰ CDCR *Launching Free Audio Calls for Incarcerated Population*, Cal. Dep’t of Corr. & Rehab., <https://www.cdcr.ca.gov/news/2022/12/30/cdcr-launching-free-audio-calls-for-incarcerated-population/> (last visited Mar. 8, 2023).

⁴¹ Lauren M. Johnson, *New York Is the First Major City to Allow Free Calls From Jail*, CNN (May 1, 2019), <https://www.cnn.com/2019/05/01/us/free-calls-from-jail-nyc-trnd/index.html>.

⁴² Saneta deVuono-powell, et al., Ella Baker Center, Forward Justice, Research Action Design, *Who Pays? The True Cost of Incarceration on Families* 7 (Sept. 2015), <https://www.whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf>.

⁴³ *Fees Consume 38% Of the \$1 Billion Spent Each Year on Calls From Collection Facilities*, Prison Policy Initiative, https://www.prisonpolicy.org/graphs/phone_fees_national.html (last visited Mar. 8, 2023).



3. The Bureau should abandon its proposal to include family and community contributions to an inmate’s commissary fund in calculating the amount that incarcerated people must pay under the IFRP.

The proposed rule change would require that funds deposited by family and friends be subject to garnishment when calculating IFRP payments. Under the current rule, funds deposited by family and friends are not automatically considered when calculating payments, although Bureau staff may exercise discretion to so.⁴⁴ The Bureau should abandon the proposed rule change because accounting for money that family and friends have deposited into a commissary account would unfairly shift the burden of payment to individuals who are not legally responsible for any court-ordered fines, fees, and restitution.

The families of incarcerated people are generally unable to subsidize the poor-quality food and nutrition and the many costs associated with incarceration without financial hardship. Over 80 percent of people incarcerated at around age 30 were born into families in the bottom half of the family income distribution.⁴⁵ Forty-seven percent come from families in the bottom 20 percent of family income, and 15 percent come from families in the bottom 5 percent of family income. Indeed, because “boys from the poorest families are 40 times more likely to end up in prison compared to boys from the richest families,” more men from the bottom 1 percent of the income distribution are incarcerated than from the top 15 percent.⁴⁶ According to one survey, almost two-thirds of families with an incarcerated member cannot meet their basic needs, including food and housing.⁴⁷ One in three families went into debt to pay for prison phone calls and visits alone.⁴⁸

Beyond covering the costs associated with surviving incarceration, 63 percent of families shoulder the costs of paying their loved one’s court-ordered financial obligations.⁴⁹ And among families, it is nearly always women—and disproportionately Black women—who pay. One study of non-justice involved individuals in Alabama, for instance, found that “middle-aged African-American women were more likely than any other group to be paying someone else’s debt.”⁵⁰ Of those individuals, just over a third (37.6%) “had to take out a high-cost payday or title loan to help cover someone’s court debt” and “half of them (49.5%) had given up necessities like rent, food, medical bills, or car payments to help someone else pay their court debt.”⁵¹ The study noted that, “[w]hile others their age were saving money for retirement, helping their children with college or other expenses, paying down mortgages, or taking vacations, these African American women were

⁴⁴ See 28 C.F.R. 545.11(b)(1) (noting a “minimum payment may exceed \$25.00, taking into consideration the inmate’s specific obligations, institution resources, and community resources.” (emphasis added)).

⁴⁵ Looney & Turner, *supra* note 2, at 13.

⁴⁶ *Id.* at 12.

⁴⁷ deVuono-powell, *supra* note 42, at 7–8.

⁴⁸ *Id.* at 9.

⁴⁹ *Id.*

⁵⁰ Leah Nelson, et al., Alabama Appleseed, UAB-TASC, Greater Birmingham Ministries, Legal Services Alabama, *Under Pressure: How fines and fees hurt people, undermine public safety, and drive Alabama’s racial wealth divide* 4 (Oct. 2018), <https://www.alabamaappleseed.org/wp-content/uploads/2018/10/AA1240-FinesandFees-10-10-FINAL.pdf>.

⁵¹ *Id.* at 35.



disproportionately burdened with paying court debt for their families.”⁵² This study is consistent with other reports that have similarly concluded that Black women disproportionately bear the burden of other people’s legal financial obligations.⁵³

Most states prohibit the government from considering the financial resources of family and friends who are not legally responsible for a defendant when imposing fines and costs and appointing counsel. In Alabama, for instance, a court may only consider a defendant’s personal financial resources when evaluating ability to pay and cannot consider the financial resources of “friends or relatives not legally responsible for the defendant.”⁵⁴ The Bureau should not do on the back end when attempting to collect financial obligations what Alabama and other states prohibit on the front-end when assessing them.

4. The federal courts are better situated than the Bureau to structure and oversee the payment of legal financial obligations.

The proposed rule attempts to solve a particularized problem that federal courts are better positioned to address: the withholding of payments towards restitution and other financial obligations by a small subset of wealthy federally incarcerated people.⁵⁵ As the proposal recognizes, federal court payment plans are the “province of the district courts,” which are best positioned to decide the terms under which a defendant should satisfy his or her monetary sentence.⁵⁶ For instance, federal courts

⁵² *Id.* at 2.

⁵³ See deVuono-powell, *supra* note 42, at 9 (reporting that 40 percent of Black women have an incarcerated family member); Alexes Harris, Natasha Hicks & Courtney Sanders, *A Pound of Flesh: Fines and Fees Have a Devastating Effect on Black Women and Their Communities. Abolishing Them Is the Only Option* (May 18, 2022), <https://inquest.org/a-pound-of-flesh/> (“For Black women in particular, even if they are not themselves convicted and incarcerated, they are often the ones who care financially and emotionally for their brothers, uncles, fathers, cousins, and sons, when any one of them faces incarceration or arrest.”).

⁵⁴ Ala. R. Crim. P. 6.3 cmt.; see also *Ex parte Sanders*, 612 So. 2d 1199, 1201 (Ala. 1993) (“[T]he earnings or property of various persons other than the accused, but in some way related to him, [should] not be considered in determining his indigency, the test being the personal means of the accused.” (citation omitted)). In Alabama, a person is indigent if he or she “has an income level at or below 125 percent of the United States poverty level.” Ala. Code § 15-12-1(4) (establishing guidelines for indigency for purposes of appointed counsel). The Alabama Supreme Court has adopted this standard for fines and costs. See Ala. Sup. Ct., *Collection of Fines and Court Costs* 2 (2015) (on file with author).

⁵⁵ See Devlin Barrett, *Federal Inmates Would Pay More to Victims Under New Justice Dept. Rule*, Wash. Post (Jan. 9, 2023), https://www.washingtonpost.com/national-security/2023/01/09/prisoner-accounts-new-rules-victims/?nid=top_pb_signin&arcId=CQIN65IQGFC4RML5UEH6OSW5QI&account_location=ONSITE_HEADER_ARTICLE (last visited March 13, 2023) (reporting that “Deputy Attorney General Lisa Monaco . . . urged federal prosecutors to request specific and immediate restitution plans as part of the sentences imposed by judges”).

⁵⁶ Fed. Bureau of Prisons, *Inmate Financial Responsibility Program: Procedures*, 88 Fed. Reg. 1331, 1333 (Jan. 10, 2023) (citing *United States v. Gunning*, 339 F.3d 948 (9th Cir. 2003) and *United States v. Prouty*, 303 F.3d 1249, 1254-1255 (11th Cir. 2002)).



may order the seizure of large sums held in prison accounts.⁵⁷ Furthermore, federal prosecutors—not the Bureau—are “charged with enforcing orders of restitution, and monitor[ing] efforts in enforcing a Judgment if defendant assets or income are identified.”⁵⁸ The Bureau’s involvement should focus on transparency and proper accounting of individual financial accounts to reveal which accounts actually hold large sums.⁵⁹

Thus, unless a court has ordered a person to pay financial obligations while incarcerated, the Bureau should not require it. Indeed, many states do not require payment while a person is incarcerated because of the financial hardship incarceration imposes. For example, Alabama does not require anyone in state prison “to pay any outstanding court-assessed fines, fees, or costs while incarcerated” or “[d]uring the 180-day period immediately after an inmate is released.”⁶⁰ Alabama passed the law in recognition of the difficulties that formerly incarcerated people face in finding jobs, housing, and getting a driver’s license upon release.⁶¹ These concerns are reinforced by empirical studies showing that “[a]lmost half of ex-prisoners have no reported earnings in the first several years after leaving prison; among those who do find work, half earn less than \$10,090 a year or less than a full time job at minimum wage.”⁶² As discussed above, this hardship is only magnified by the low wages that incarcerated people earn if employed while incarcerated.

Because federal courts are better positioned to address payment of legal financial obligations, the Bureau should not penalize incarcerated people who elect not to participate in the IFRP, as both the current and proposed rule would do. The proposed rule, specifically, would exclude non-participants from earning time credits toward earlier release under the First Step Act. The First Step Act was a preliminary important step in recognizing and correcting the devastating effects of harsh sentencing guidelines on Black and Brown communities.⁶³ By depriving non-IFRP participants of FSA credits, the proposed rule would undermine this effort to address racial disparities in sentencing practices and support rehabilitation and re-entry.

⁵⁷ This recently occurred in the high-profile case of R. Kelly, when a federal district court judge ordered the seizure of \$28,000 to pay court-ordered restitution to his victims. Devlin Barrett, *Judge Orders R. Kelly’s Prison-Account Money Be Turned Over to Court*, Wash. Post (Sept. 9, 2022), <https://www.washingtonpost.com/national-security/2022/09/09/r-kelly-prison-account/> (last visited March 13, 2023).

⁵⁸ U.S. Dep’t of Justice, *Restitution Process*, <https://www.justice.gov/criminal-vns/restitution-process> (last visited March 13, 2023).

⁵⁹ See *U.S. v Kelly*, 19-CR-286-AMD, -- F. Supp. 3d --, 2022 WL 4125485 (E.D.N.Y. Sept. 9, 2022).

⁶⁰ Ala. Code § 15-18-64.1.

⁶¹ Mike Carson, *Alabama House Approves Grace Period for Paying Fines After Release From Prison*, AL.COM (Feb. 15, 2022), <https://www.al.com/news/2022/02/alabama-house-approves-grace-period-for-paying-fines-after-release-from-prison.html> (last visited March 13, 2023).

⁶² Adam Looney, *5 Facts About Prisoners and Work, Before and After Incarceration*, The Brookings Institution (March 14, 2018), <https://www.brookings.edu/blog/up-front/2018/03/14/5-facts-about-prisoners-and-work-before-and-after-incarceration/> (last visited March 13, 2023).

⁶³ Ames Grawert & Tim Lau, *How the FIRST STEP Act Became Law—and What Happens Next*, Brennan Ctr. (Jan. 4, 2019), <https://www.brennancenter.org/our-work/analysis-opinion/how-first-step-act-became-law-and-what-happens-next#:~:text=The%20FIRST%20STEP%20Act%20is%20consequential%20because%20it%20includes%20provisions,legislation%20for%20criminal%20justice%20reform> (last visited March 13, 2023).



5. Conclusion

There is much at stake for the nearly 144,000 incarcerated people in federal custody⁶⁴ and their families as the Bureau considers this proposed rule. The overrepresentation of Black, Brown, and low-income individuals in the federal system should serve as a reminder of the legal system's active role as a driver of racial inequality and inter-generational poverty in this country. As Congress and the White House consider how to repair the current and past harms of our legal system, as evidenced by the First Step Act and President Biden's Executive Order on Racial Equity, the Bureau's own acknowledgement that the current proposed rule is less equitable than other proposals it tested should require the agency to abandon this current course of action and pursue a new avenue. The Bureau should instead engage with stakeholders to assess the needs of Black, Brown, and low-income incarcerated individuals and victims to adopt policies that will enhance public safety, rehabilitation, and re-entry, while also facilitating payment of legal financial obligations. Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in blue ink that reads 'Ellen Degnan'.

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⁶⁴Fed. Bureau of Prisons, *Population Statistics*, https://www.bop.gov/mobile/about/population_statistics.jsp#ccm_pop_table (last visited March 9, 2023).



Appendix

Table 1: Hours of Work in Institutional Job Required to Purchase Commissary Items – Federal Correctional Institution Talladega, Ala.*					
Commissary Item	Sale Price	Hours of Work \$0.12 per Hour		Hours of Work - \$0.40 per Hour	
		Current Rule	Proposed Rule	Current Rule	Proposed Rule
Masterlock	\$7.55	63	84	19	25
Toe nail clipper	\$1.15	10	13	3	4
Ponytail holder	\$1.20	10	13	3	4
Mouthwash	\$2.20	18	24	6	7
Denture adhesive	\$4.80	40	53	12	16
Dental floss	\$1.60	13	18	4	5
Deodorant	\$2.55	21	28	6	9
Band-aid	\$2.60	22	29	7	9
Eucerin lotion	\$14.10	118	157	35	47
Hand sanitizer	\$1.20	10	13	3	4
Sunblock	\$1.70	14	19	4	6
Sulfur 8 Lock & Twist	\$3.65	30	41	9	12
Head & Shoulders	\$7.80	65	87	20	26
Charmin toilet paper	\$5.45	45	61	14	18
Legal pads	\$2.00	17	22	5	7
Dial soap	\$1.30	11	14	3	4
Washcloth	\$2.60	22	29	7	9
Folger’s coffee	\$6.50	54	72	16	22
Flour tortillas	\$1.95	16	22	5	7
Light tuna	\$2.50	21	28	6	8
Spam	\$1.10	9	12	3	4
Honey roasted oats cereal	\$5.85	49	65	15	20
Aspirin	\$1.50	13	17	4	5
Clortimazole antifungal	\$1.60	13	18	4	5
Pink bismuth	\$2.75	23	31	7	9
Sweatshirt	\$16.80	140	187	42	56
Longsleeve shirt	\$10.40	87	116	26	35
Boxer briefs XL	\$7.45	62	83	19	25
Gray crew socks	\$3.50	29	39	9	12

*The information in the Commissary Item and Sale Price columns is pulled from the commissary list for FCI Talladega, in Talladega, Alabama. *See* FCI Talladega Commissary Sales List (March 31, 2020), https://www.bop.gov/locations/institutions/tdg/TDG_commlist090820.pdf (last visited March 10, 2023).