RACHAEL A. HONIG
Acting United States Attorney
JOHN STINSON
Assistant U.S. Attorney
401 Market Street, 4th Floor
Camden, NJ 08101
Tel. 856-757-5139
Email: John.Stinson@usdoj.gov
Attorney for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

DIANTHE MARTINEZ-BROOKS, *Plaintiff*, v. MERRICK GARLAND, Attorney General, *et al.*, *Defendants*.	HON. BRIAN R. MARTINOTTI, U.S.D.J. HON. JESSICA S. ALLEN, U.S.M.J. Civil Action No. 21-11307 (BRM)(JSA)

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 12(b)(1)

On the Brief:

John Stinson
Assistant U.S. Attorney

MOTION DAY: November 15, 2021

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ARGUMENT IN REPLY

For most of their arguments, the Defendants stand on the points and authorities in their opening brief. They provide the following additional argument to dispel key inaccuracies or misunderstandings in Plaintiff's opposition.

I. Plaintiff's "Quantity Theory" of Home Confinement Is Incorrect, and Further Demonstrates That the OLC Opinion Does Not Constitute "Final Agency Action" and Plaintiff's Claims Are Not Ripe

In their opening brief, the Defendants explained that Plaintiff's home confinement under the CARES Act would not affect her eligibility for prerelease placements by BOP under 18 U.S.C. § 3624(c), including home confinement under subsection (c)(2), when the pandemic emergency concludes. *See, e.g.,* Defs.' Br. at 13. Plaintiff contests this and reads the OLC Opinion to establish a "quantity limit" for home confinement. That is, according to Plaintiff, a federal inmate may not exceed a total amount of time in home confinement of 10% of her sentence or six months if she wants to be considered for prerelease custody in home confinement under Section 3624(c). *See, e.g.,* Pl.'s Br. at 6, 9, 13. Plaintiff posits that if an inmate like her and others similarly situated served more time than that on CARES Act home confinement during the pandemic, the inmate cannot be placed on home confinement for even one more day after the end of the emergency.

Defendants disagree. Section 3624(c) discusses temporal limits, not total quantity or volume limits. The subsection is titled "prerelease custody" and addresses "the final months" of a term of federal incarceration in order to "afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community." 18 U.S.C. § 3624(c)(1). The OLC Opinion

similarly addresses the temporal aspect of expanded home confinement, not any total quantity limits:

> The question now is what will happen when BOP's emergency authority under section 12003(b)(2) of the CARES Act ends. That issue has important practical consequences because **many of these thousands of prisoners are currently in home confinement earlier than section 3624(c)(2) would permit**. . . . we believe that **BOP must respect the time limits under section 3624(c)(2) for all federal prisoners, including those who had been transferred to home confinement prior to the final months of their term** under the special CARES Act placement authority.

OLC Op. at 4 (emphasis added). Crucially, the OLC Opinion sums up its analysis in a way that makes clear that prerelease custody options for the end of a term of incarceration will remain in place post-emergency:

> Because the CARES Act authorizes the Director of BOP to place prisoners in home confinement only while the authority of section 12003(b)(2) remains in effect, BOP must recall prisoners in home confinement to correctional facilities once that authority expires, **unless they would otherwise be eligible for home confinement under section 3624(c)(2)**.

OLC Op. at 15 (emphasis added).

Plaintiff erroneously asserts that Director Carvajal's testimony to the Senate Judiciary Committee on April 15, 2021 supports her quantity theory, Pl.'s Br. at 8, but the Director merely said that BOP must follow the law as written by Congress.[1] As set forth above, Congress spoke about a period of prerelease custody at the end of

[1] Plaintiff does not provide any citation to the hearing, but Defendants believe that the pertinent portion of the Director's testimony can be found on an official videorecording of the Senate Judiciary Committee hearing between 00:55:28 and 1:00:20. *See* https://www.judiciary.senate.gov/meetings/04/08/2021/oversight-of-the-federal-bureau-of-prisons (last visited November 8, 2021).

a term of incarceration, and set forth temporal guidelines, not absolute volume limits.

Plaintiff's incorrect arguments on this issue further illustrate why (1) the OLC Opinion, of itself, does not constitute "final agency action"; and (2) Plaintiff's claims here are not ripe. On the first point, the OLC Opinion provides a legal interpretation, but BOP must adopt a policy to create a "final agency action" under the APA. *See* 5 U.S.C. § 704. *Goldings v. Winn*, 383 F.3d 17, 20 (1st Cir. 2004) (observing that BOP issued a memorandum directing staff to implement a revised procedure based upon OLC advice). Here, BOP has yet to issue any procedures regarding the status and management of inmates placed into home confinement under the CARES Act. Such procedures might well address the varying circumstances of different inmates in CARES Act home confinement, including inmates like Plaintiff who qualify presently for "prerelease custody" options under Section 3624(c) and those with more than 12 months remaining in their term as of the lifting of the emergency declaration. The fact remains that, as of the filing of this reply brief, BOP has not issued guidance or procedures for the period following the state of emergency. The OLC Opinion does not create final agency action in the face of BOP's ongoing consideration.[2]

[2] Defendants note that the Attorney General recently informed the Senate Judiciary Committee that the Department is reviewing the OLC Opinion, and that this review "will be accomplished before the end of the CARES Act provision which extends until the end of the pandemic . . . so we are not in a circumstance where anybody will be returned before we have completed that review and implemented any changes we need to make." *See* Recording of Senate Judiciary Committee

As to ripeness, Plaintiff's position relies on the non-sequitur that the mere existence of the OLC Opinion makes her individual claim justiciable. That flawed argument does not address the factual realities of the COVID-19 pandemic or Martinez-Brooks's term of incarceration—which were the basis for the Defendants' ripeness argument. A claim has to be personal and concrete to the party who files it, and there must be a cognizable injury for key justiciability factors like ripeness and standing to exist. *Plains All Am. Pipeline L.P. v. Cook*, 866 F.3d 534, 539 (3d Cir. 2017) ("'It is sometimes argued that standing is about *who* can sue while ripeness is about *when* they can sue, though it is of course true that if no injury has occurred, the plaintiff can be told either that *she* cannot sue, or that she cannot sue *yet*.'" (quoting *Presbytery of N.J. of Orth. Presb'n Church v. Florio*, 40 F.3d 1454, 1462 (3d Cir. 1994))).

As of the filing of this reply brief, the President's COVID-19 emergency declaration remains in place. At the point that declaration is lifted, there is a 30-day transition period required under the CARES Act before any changes to home confinement designations can be affected. CARES Act § 12003(a)(2). And as of the filing of this reply brief, Martinez-Brooks is (1) currently eligible for placement in a community correctional center pursuant to Section 3624(c)(1); and (2) less than 90 days from eligibility for home confinement under the prerelease custody provisions

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Hearing at 2:44:05-2:45:00, https://www.judiciary.senate.gov/meetings/10/20/2021/oversight-of-the-department-of-justice (last visited November 8, 2021).

of Section 3624(c)(2).[3] Her claim is not yet ripe and in very short order, it will be moot.

II. Section 3625 Bars This Lawsuit

Plaintiff admits, as she must, that Congress barred APA actions challenging matters arising under Subchapter C of Chapter 229 of Title 18. *See* 18 U.S.C. § 3625. Nonetheless, she contends that this lawsuit falls under an exception for BOP actions that are "contrary to established federal law."

Martinez-Brooks offers no definition of the phrase "contrary to established federal law," even though the Defendants briefed a well-known legal standard for those terms (which is not met here). Defs.' Br. at 20. Plaintiff made no attempt to explain or distinguish the recent ruling in *Goodchild v. Ortiz*, Civ. No. 21-790-RMB, 2021 WL 3914300, at *19 (D.N.J. Sep. 1, 2021), which applied Section 3625 to a CARES Act home confinement challenge. What's more, she does not even indicate whether the "established federal law" she relies on is the CARES Act, Section 3624, Section 3621, some combination of those three, or something else. The fact remains that the CARES Act § 12003, which is central to this dispute, is a recent enactment

[3] Plaintiff argues in her opposition that she may not be eligible for release in June 2022 if she does not receive all good conduct time available under 18 U.S.C. § 3624(b). Without some concrete reason why BOP might deny her such good time, this argument is bare speculation and a far cry from the concrete injury required for justiciability. Similarly, Martinez-Brooks repeatedly argues that BOP has the authority to place federal inmates in home confinement at any time under 18 U.S.C. § 3621(b), but this (incorrect) argument is beside the point because Plaintiff falls under the provisions of Section 3624(c) regarding prerelease custody.

that lacks clear and established judicial interpretations. Due to Section 3625, this APA action is an improper vehicle to initiate such review.

III. This Court Can Consider Defendants' Argument Regarding Alternative Relief As Another Independent Grounds to Dismiss

Martinez-Brooks argues that this Court cannot consider Defendants' jurisdictional argument on the availability of alternative remedies because no answer has been filed and her CR/RIS motion does not offer an adequate alternative remedy. She is incorrect on both points.

There is no strict requirement in the Third Circuit that a defendant file an answer before lodging a factual attack on jurisdiction. The requirement is that any pleaded material facts be controverted, whether through answer or other means. *See Const. Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014) (noting that defendant lodged a factual attack "before it filed any answer to the Complaint or otherwise presented competing facts" (emphasis added)). Here, the Defendants directed the Court to publicly filed records in Plaintiff's criminal prosecution, *United States v. Martinez-Brooks*, 2:18-cr-00038-CCC, and discussed why they are suitable for judicial notice. Defs.' Br. at 25-27. That constitutes a presentation of competing facts by Defendants. What's more, even if Defendants' alternative remedy argument were read as a facial attack, this Court can take notice of such public filings under the well-established Fed. R. Civ. P. 12(b)(6) standard. *See In re Rockefeller Ctr. Props., Inc., Sec. Litig.,* 184 F.3d 280, 287 (3d Cir.1999) (concluding that, in reviewing a Rule 12(b)(6) motion, a court may consider matters of public record, documents "integral to or explicitly relied upon in the complaint," or an

"undisputedly authentic document"). Plaintiff concedes that this standard of review applies to facial attacks under Fed. R. Civ. P. 12(b)(1).

As to the substance, Plaintiff asserts that "she is simply asking this Court to set aside the OLC Opinion and require BOP to make an individualized determination in her case"—despite the fact that her Complaint repeatedly demonstrates that she seeks to avoid any return to FCI Danbury or similar BOP facility. The more direct relief available through her criminal case—the "time served" order she requested—offers a complete solution for that goal, and thus is entirely adequate. *Manafort v. United States Dep't of Just.*, 311 F. Supp. 3d 22, 33-34 (D.D.C. 2018) (holding that Fed. R. Crim. P. 12(b)(3) offered a pathway to dismiss an indictment based on "a defect in instituting the prosecution" which constituted an adequate remedy precluding APA review). As the D.C. Circuit has noted, as long as there is no "yawning gap" between the alternative relief available and the relief sought under the APA, the APA pathway will be barred. *Citizens for Resp. & Ethics in Wash. v. United States Dep't of Just.*, 846 F.3d 1235, 1246 (D.C. Cir. 2017) (dismissing an APA claim in favor of alternative relief "despite some mismatch between the relief sought and the relief available").

CONCLUSION

For the foregoing reasons and the reasons set forth in their opening brief, the Defendants respectfully request that this Court dismiss this action for lack of subject matter jurisdiction.

Respectfully submitted,

RACHAEL A. HONIG
Acting United States Attorney

Dated: November 8, 2021

By: / s / *John Stinson*
JOHN STINSON
Assistant U.S. Attorney

CERTIFICATE OF SERVICE

I hereby certify that, on the date below, I electronically filed a copy of the reply brief of defendants Merrick Garland, Attorney General; the Department of Justice; Michael Carvajal, Director of the Federal Bureau of Prisons; and the Federal Bureau of Prisons in accordance with the procedures of this U.S. District Court for the District of New Jersey. Pursuant to Local Rule 5.2, the ECF system affected service upon the following counsel who is an "ECF Filing User" under this Court's Electronic Case Filings Policies and Procedures:

Kara Rollins, Esq.
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street NW, Suite 450
Washington, DC 20036
kara.rollins@ncla.legal
Attorney for plaintiff

Dated: November 8, 2021
Camden, New Jersey

By: *s/John Stinson*
JOHN STINSON
Assistant United States Attorney
Counsel for defendants