non-responsive records

From: Mastropasqua, Kristina (PAO (b) (6)
Sent: Friday, April 16, 2021 9:06 AM
To: Phillips, Kristin (b) (6)
Subject: Re: BOP/home confinement/OLC memo

?
?Hi Kristine,

Attributable to DOJ official:

This is an important legal issue about the language Congress itself used in the CARES Act. And it's important to recognize that even under OLC's reading of the statute, BOP will have discretion to keep inmates on home confinement after the pandemic if they're close to the end of their sentences. For the harder cases, where inmates still have years left to serve, this will be an issue only after the pandemic is over. That's clearly not imminent the President recently extended the national emergency and the Department of Health and Human

Services has said the public health crisis is likely to last for the rest of the year. So BOP is focused right now onexpanding the criteria for home confinement and taking steps to ensure individualized review of more inmates who might be transferred.

Kristina Mastropasqua
Office of Public Affairs
Department of Justice
(b) (6)

On Apr 15, 2021, at 3:15 PM, Phillips, Kristine (b) (6) > wrote:

?
Hey again Kristina,

I understand you also handle BOP-related requests…wanted to see if DOJ would comment on this.

Michael Carvajal was asked a few times during his testimony on the Hill today about an OLC memo from January saying prisoners who were sent to home confinement because of the pandemic, and would not otherwise have been eligible for home confinement if not for the CARES Act, must be brought back to prison after the COVID national emergency ends. I've talked to a few inmates on home confinement who are anxious about the memo and are worried they will be brought back to prison even after they've already found full-time jobs and gone back to school.

Advocacy groups have been asking DOJ to rescind the memo. Is this something DOJ can do? Or is it bound by the OLC memo? Have there been conversations to either rescind the memo or to abide by it if/when the national emergency does end?

My deadline is 3pm tomorrow.

Thanks,

Kristine Phillips | Justice correspondent
<image002.jpg>
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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' 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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Regulations

INTRODUCTION

In March 2020, Congress granted the Federal Bureau of Prisons (the "Bureau" or "BOP") expanded authority to place federal inmates in home confinement as part of a package of emergency measures to address the COVID-19 pandemic. Using that expanded authority, in June 2020, the Bureau transferred Plaintiff Dianthe Martinez-Brooks to home confinement from a federal correctional institution where she was serving a sentence for a fraud conviction.

Plaintiff now challenges a January 15, 2021 opinion of the Office of Legal Counsel ("OLC") in the Department of Justice that provides legal advice on addressing such home confinements under the CARES Act when the national emergency declaration regarding COVID-19 ends. BOP has not issued any position on implementation of the OLC Opinion. Indeed, the COVID-19 emergency declaration is still in place, and there are no signs that President Biden will lift it in the near term. Nonetheless, Plaintiff seeks a judgment from this Court under the Administrative Procedure Act ("APA") identifying the OLC Opinion as a "final agency action," throwing it out as improper, and declaring that, under all circumstances, the Bureau must exercise discretion to keep her on home confinement until the end of her term of imprisonment.

Attorney General Merrick Garland, the Department of Justice, Bureau Director Michael Carvajal, and the Bureau (together, the "Defendants") move to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Four independent grounds require dismissal at the threshold. First, Plaintiff's claims are not ripe because the emergency

declaration remains in place, and depending on when it is lifted, Plaintiff may remain in home confinement or receive a community correctional placement under existing federal law or even have completed her prison term altogether. Second, in 18 U.S.C. § 3625, Congress expressly barred APA actions for challenges to federal inmate placement, and there is no independent basis for a declaratory judgment without an APA cause of action here. Third, Plaintiff has not met the APA requirement of a "final agency action" because BOP has taken no action to adopt a post-emergency plan. Finally, there can be no APA cause of action here because Plaintiff has at least one other avenue for relief, which she is actively pursuing in parallel to this action.

BACKGROUND

I. Plaintiff's Criminal Conviction and Placement by the Bureau

On July 11, 2017, Martinez-Brooks pleaded guilty to a criminal information filed in this District charging her with wire fraud in violation of 18 U.S.C. §§ 2, 1343, 1346. *See* Information (docket no. 1), *United States v. Martinez-Brooks*, 2:18-cr-00038-CCC (D.N.J. Jan. 29, 2018); Plea Agreement (docket no. 5), *United States v. Martinez-Brooks*, 2:18-cr-00038-CCC (D.N.J. Jan. 29, 2018). Plaintiff admitted to "scheming to defraud the Newark Watershed Conservation and Development Corporation ('NWCDC') of honest services, money and property[.]" Plea Agreement, *supra*. The court sentenced Martinez-Brooks to 48 months of imprisonment with 3 years' supervised release to follow. Criminal Judgment (docket no. 14), *United States v. Martinez-Brooks*, 2:18-cr-00038-CCC (D.N.J. Sep. 18, 2018). She appealed that sentence, and the United States Court of Appeals for the Third Circuit

affirmed it. *See* Mandate (docket no. 30), *United States v. Martinez-Brooks*, 2:18-cr-00038-CCC (D.N.J. Apr. 7, 2020) (docketing the Opinion in *United States v. Martinez-Brooks*, No. 18-3194 (3d Cir. Mar. 16, 2020)).

As set forth in her Complaint, Martinez-Brooks surrendered to the Bureau on January 31, 2019, to begin serving her sentence. Compl. ¶ 27. The Bureau placed Martinez-Brooks at the Federal Correctional Institution in Danbury, Connecticut ("FCI Danbury"). *Id*. ¶ 28. This was pursuant to the authority granted BOP by Congress in Subchapter C of Chapter 229 of Title 18. *See* 18 U.S.C. § 3621.

The Bureau transferred Martinez-Brooks to home confinement on June 4, 2020. Compl. ¶ 39. This was a transfer pursuant to the CARES Act (discussed further below), not pursuant to the prerelease custody authority vested in BOP by Congress prior to the pandemic (*see* 18 U.S.C. § 3624(c)). Martinez-Brooks continues in such home confinement under "the supervision of BOP's Residential Reentry Management New York field office." Compl. ¶ 40. Assuming she receives all available good time credit, Martinez-Brooks's term of imprisonment concludes in June 2022. Compl. ¶ 41.

II. The COVID-19 Pandemic, the Response of the Department of Justice, and the CARES Act

The United States reported its first case of COVID-19 in late January 2020.[1] Federal, state, and local governments took a variety of steps to address the looming

[1] Defendants ask this Court to take judicial notice pursuant to Fed. R. Evid. 201 of various foundational facts regarding the COVID-19 pandemic, which can be found in multiple reliable sources including here: Centers for Disease Control &

pandemic. The Bureau began making plans to manage pandemic conditions and announced its first COVID-19 "Action Plan" on March 13, 2020.[2]

On March 26, 2020, as part of the Department of Justice's COVID-19 response, the Attorney General issued a Memorandum on expanded home confinement for qualifying Bureau inmates, i.e., "at-risk inmates who are non-violent and pose minimal likelihood of recidivism and who might be safer serving their sentences in home confinement rather than in BOP facilities." United States Attorney General, Memorandum for the Director of Bureau of Prisons (Mar. 26, 2020).[3] In making that determination, the Bureau "consider[s] the totality of circumstances for each individual inmate" based on the following non-exhaustive, discretionary factors:

> - The age and vulnerability of the inmate to COVID-19, in accordance with [CDC] guidelines;
>
> - The security level of the facility currently holding the inmate, with priority given to inmates residing in low and minimum security facilities;
>
> - The inmate's conduct in prison, with inmates who have engaged in violent or gang related activity in prison or who have incurred a BOP violation within the last year not receiving priority treatment[;]

Prevention, CDC Museum COVID-19 Timeline, available at https://www.cdc.gov/museum/timeline/covid19.html (last visited Sep. 5, 2021).

[2] *See* Federal Bureau of Prisons, COVID-19 Action Plan – Agency-wide Modified Operations (Mar. 13, 2020), available at https://www.bop.gov/resources/news/20200313_covid-19.jsp (last visited Sep. 5, 2021).

[3] Available at https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement.pdf (last visited Sep. 5, 2021). Additional information regarding BOP's home confinement procedures and policies can be found in BOP Program Statement 7320.01, Home Confinement, available at https://www.bop.gov/policy/progstat/7320_001_CN-1.pdf (last visited Sep. 5, 2021).

- The inmate's score under PATTERN, with inmates who have anything above a minimum score not receiving priority treatment under this Memorandum;

- Whether the inmate has a demonstrated and verifiable re-entry plan that will prevent recidivism and maximize public safety[;] and

- The inmate's crime of conviction, and assessment of the danger posed by the inmate to the community[.]

Id. at 1-2.

On March 27, 2020, in response to the growing COVID-19 pandemic, Congress passed the "Coronavirus Aid, Relief, and Economic Security Act" (or the "CARES Act"). *See* Pub. L. 116-136, 134 Stat. 281 (Mar. 27, 2020). This emergency response legislation covered many areas of public health, economic activity, and governing in the United States, including the management of federal prisons. Section 12003 of the CARES Act addressed the Bureau and stated in pertinent portions as follows:

> (a) DEFINITIONS.—In this section—
>
> (1) the term "Bureau" means the Bureau of Prisons;
>
> (2) the term "covered emergency period" means the period beginning on the date on which the President declared a national emergency under the National Emergencies Act (50 U.S.C. 1601 *et seq*.) with respect to the Coronavirus Disease 2019 (COVID-19) and ending on the date that is 30 days after the date on which the national emergency declaration terminates; and
>
> (3) the term "Secretary" means the Secretary of Health and Human Services.
>
> (b) SUPPLY OF PERSONAL PROTECTIVE EQUIPMENT AND TEST KITS TO BUREAU OF PRISONS; HOME CONFINEMENT AUTHORITY.—

[. . .]

> (2) HOME CONFINEMENT AUTHORITY.—During the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate.

CARES Act § 12003.

On April 3, 2020, the Attorney General updated his directives to the Bureau by issuing an additional Memorandum following the passage of the CARES Act. United States Attorney General, Memorandum for the Director of Bureau of Prisons (Apr. 3, 2020).[4] The CARES Act authorized the Attorney General "to expand the cohort of inmates who can be considered for home release upon [his] finding that emergency conditions are materially affecting the functioning of [the Bureau]." *Id.* The CARES Act expanded the authority for the Bureau to review "all at-risk inmates -- not only those who were previously eligible for transfer." *Id.* at 2.

The Bureau began to act immediately in response to the Attorney General's March 26 and April 3, 2020 memoranda. Since March 26, 2020, the Bureau has transferred more than 31,000 inmates to home confinement. *See* Bureau of Prisons, Frequently Asked Questions regarding potential inmate home confinement in

[4] Available at https://www.justice.gov/file/1266661/download (last visited Sep. 5, 2021).

response to the COVID-19 pandemic.[5] *See also* Compl. ¶ 42 (citing same source from April 30, 2021).

III. Plaintiff's Efforts to Seek Release During the COVID-19 Pandemic

Martinez-Brooks was the lead plaintiff in a class action seeking inmate releases from FCI Danbury by way of writs of habeas corpus pursuant to 28 U.S.C. § 2241. *See* Petition (docket no. 1), *Martinez-Brooks et al. v. Easter*, 20-cv-569 (D. Conn. Apr. 27, 2020). Through her habeas action, she also sought immediate release by way of a temporary restraining order/preliminary injunction. Emergency Motion for TRO & Motion for PI (docket no. 14), *Martinez-Brooks et al. v. Easter*, 20-cv-569 (D. Conn. Apr. 30, 2020). On June 12, 2020, Martinez-Brooks voluntarily dismissed her claims in the habeas action. Notice (docket no. 105), *Martinez-Brooks et al. v. Easter*, 20-cv-569 (D. Conn. Apr. 27, 2020). Presumably, Martinez-Brooks dismissed her claims because they were mooted when the Bureau transferred her to home confinement pursuant to the CARES Act.

Ten days after initiating the above habeas action, on May 8, 2020, Martinez-Brooks moved for compassionate release or reduction in sentence before her sentencing court. Motion (docket no. 31), *United States v. Martinez-Brooks*, 2:18-cr-00038-CCC (D.N.J. May 8, 2020) (the "CR/RIS Motion"). This form of relief, available through 18 U.S.C. § 3582(c)(1)(A), must be sought through the original criminal action that resulted in the sentence from which an inmate seeks relief. On

[5] Available at https://www.bop.gov/coronavirus/faq.jsp (last visited Sep. 5, 2021).

August 13, 2020, after her transfer to home confinement, Martinez-Brooks changed her prayer for relief in her CR/RIS Motion, asking that the sentencing court "terminate Ms. Martinez-Brooks's period of home confinement, reduce her sentence to time served, and order that her period of Supervised Release commence immediately without any restrictions on her ability to leave her home to attend to her medical and personal needs." Suppl. Br. (docket no. 45), *United States v. Martinez-Brooks*, 2:18-cr-00038-CCC (D.N.J. Aug. 13, 2020). On May 7, 2021, Martinez-Brooks filed another supplemental brief, again "seeking an Order from the Court terminating the home confinement portion of her sentence, reducing her sentence, and re-sentencing her to time served." Suppl. Br. (docket no. 49), *United States v. Martinez-Brooks*, 2:18-cr-00038-CCC (D.N.J. May 7, 2021). Martinez-Brooks's CR/RIS Motion remains pending before her sentencing court.

IV. The OLC Opinion and Martinez-Brooks's APA & DJA Action

Following the passage of the CARES Act and the Bureau's efforts to transfer qualifying federal inmates to home confinement under it, the Department of Justice internally considered what happens to home confinement placements once the COVID-19 national emergency declaration terminates. On January 15, 2021, the Office of Legal Counsel of the Department of Justice issued a legal analysis of this issue. *See* Office of Legal Counsel, Home Confinement of Federal Prisoners After the COVID-19 Emergency (Jan. 15, 2021) (slip op.) (the "OLC Opinion").[6]

[6] A true copy of the OLC Opinion is attached to this brief. It is also available here: https://www.justice.gov/olc/file/1355886/download (last visited Sep. 5, 2021).

The OLC Opinion analyzes both the CARES Act and 18 U.S.C. §§ 3621 and 3624, among other authorities. The OLC Opinion concludes as follows:

> We conclude that the CARES Act authorizes the Director of BOP to place prisoners in home confinement only during the statute's covered emergency period and when the Attorney General finds that the emergency conditions are materially affecting BOP's functioning. *See* [CARES Act § 12003(b)(2)]. Should that period end, or should the Attorney General revoke the finding, the Bureau would be required to recall the prisoners to correctional facilities unless they are otherwise eligible for home confinement under 18 U.S.C. § 3624(c)(2). We also conclude that the general imprisonment authorities of 18 U.S.C. § 3621(a) and (b) do not supplement the CARES Act authority to authorize home confinement under the Act beyond the limits of section 3624(c)(2).

OLC Op. at 1-2. At present, neither the Attorney General nor the Bureau has acted on this advice by setting forth a policy to govern CARES Act home confinement placements after the end of the COVID-19 emergency.

On May 17, 2021, Plaintiff Martinez-Brooks initiated this action by filing a Complaint in this District, where she currently resides on home detention. ECF 1 (the "Complaint" or "Compl."). The Complaint brings a claim under the judicial review provisions of the APA, 5 U.S.C. §§ 701-706, and seeks relief under the Declaratory Judgment Act ("DJA"), 28 U.S.C. §§ 2201-02. *Id*. She argues that the OLC Opinion is an erroneous reading of federal law that violates the APA and will harm her if implemented by the Bureau. *Id*. ¶ 5. For relief, she seeks a judgment under the APA setting aside the OLC Opinion as well as a declaration "that Section 12003(b) of the CARES Act and 18 U.S.C. §§ 3621 and 3624 vest discretion with the Bureau to allow Ms. Martinez-Brooks to serve the remainder of her sentence on home confinement." *Id*. ¶¶ 66, 72.

Martinez-Brooks admits in her Complaint that she remains in Bureau custody while on home confinement. *Id*. ¶ 40. She does not offer any pleading regarding seeking administrative remedies for her purported claims.

At the time Plaintiff initiated this action, the federal emergency declaration regarding COVID-19 was still in place. Executive Notice, "Continuation of the National Emergency Concerning the Coronavirus Disease 2019 (COVID-19) Pandemic," 86 Fed Reg. 11599 (Feb. 24, 2021) (citing 50 U.S.C.§ 1622(d)). As of the filing of this motion, it remains in place, as does the Attorney General's 2020 finding of conditions that were "materially affecting the Bureau of Prisons".

STANDARD OF REVIEW

Defendants request dismissal of Martinez-Brooks's Complaint pursuant to Fed. R. Civ. P. 12(b)(1). "A motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(1) challenges the existence of a federal court's subject matter jurisdiction." *Brill v. Velez*, No. 13-5643, 2014 WL 2926086, at *2 (D.N.J. June 27, 2014). "'When subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion.'" *Id*. (quoting *Symczyk v. Genesis Healthcare Corp.*, 656 F.3d 189, 191 n.4 (3d Cir. 2011)).

Here, the Defendants bring a "facial attack" (perceptible on the face of the complaint) on grounds of lack of ripeness as well as under 18 U.S.C. § 3625 and for failure to proceed on a "final" agency action. Defendants also bring a "factual attack" (addressable upon consideration of additional facts) on grounds of the availability of alternative remedies. The Third Circuit sets forth the standard for these two jurisdictional challenges as follows:

> A challenge to subject matter jurisdiction under Rule 12(b)(1) may be either a facial or a factual attack. The former challenges subject matter jurisdiction without disputing the facts alleged in the complaint, and it requires the court to "consider the allegations of the complaint as true." *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 n. 3 (3d Cir. 2006) (quoting *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977)). The latter, a factual challenge, attacks the factual allegations underlying the complaint's assertion of jurisdiction, either through the filing of an answer or "otherwise present[ing] competing facts." *Constitution Party of Pa. v. Aichele*, 757 F.3d 347, 358 (3d Cir. 2014). In contrast to a facial challenge, a factual challenge allows "a court [to] weigh and consider evidence outside the pleadings." *Id*. (internal quotation marks omitted). When a factual challenge is made, "the plaintiff will have the burden of proof that jurisdiction does in fact exist," and the court "is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Mortensen*, 549 F.2d at 891. "[N]o presumptive truthfulness attaches to [the] plaintiff's allegations . . . ." *Id*.

Davis v. Wells Fargo, 824 F.3d 333, 346 (3d Cir. 2016). "If the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." *See* Fed. R. Civ. P. 12(h)(3).

Defendants rely on the allegations in Martinez-Brooks's Complaint as well as records and materials referenced, or relied upon, within it, such as the OLC Opinion at issue. Defendants also rely upon publicly filed documents in her criminal and other civil proceedings; and matters of public reporting about the COVID-19 pandemic, which are amenable to judicial notice.

ARGUMENT

This Court lacks jurisdiction for any of the following four, independent reasons. Accordingly, the Court should dismiss this action under Fed. R. Civ. P. 12(b)(1).

I. This Issue Is Not Ripe for Adjudication

The Court should dismiss this matter because there is no ripe, concrete controversy. Given the current state of the pandemic and the shortness of Plaintiff's remaining sentence, Martinez-Brooks may never face the prospect of being recalled to FCI Danbury, and it may never be necessary for this Court to adjudicate the claims presented in the Complaint.

Ripeness is an issue of federal jurisdiction designed "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner,* 387 U.S. 136, 148-149 (1967), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977). This civil action is not ripe because Plaintiff seeks prospective relief or an "advisory opinion" from this Court. She remains on home confinement and cannot say when, or even if, that fact will change before the end of her term of imprisonment. Accordingly, this dispute is not ripe and must be dismissed for lack of jurisdiction.

The national COVID-19 emergency declared by the President in 2020 (*see* Complaint ¶ 37) is ongoing, and the Attorney General has not rescinded the 2020 finding of conditions that were "materially affecting the Bureau of Prisons" (*see id.* ¶ 38). Accordingly, there has been no trigger of the 30-day transition period to bring expanded home confinement to a close. *See* CARES Act § 12003(a)(2), 134 Stat. at

516. Given the current state of the pandemic, no such trigger seems imminently foreseeable.

Plaintiff remains on discretionary home confinement as decided by the Bureau. *Id*. ¶¶ 39-40. Assuming she receives all good time credit available to her, Martinez-Brooks's term of imprisonment concludes in June 2022, less than ten months from the filing of this motion. Compl. ¶ 41. Under the "Release" statute in Subchapter C of Chapter 229 of Title 18, the BOP has the authority to place an inmate in home confinement for the last six months, or 10%, whichever is less, of her term of imprisonment. 18 U.S.C. § 3624(c)(2). In addition, the statute directs BOP to consider transferring an inmate to a placement for a portion of the final months of her term "that will afford [her] a reasonable opportunity to adjust to and prepare for the reentry . . . into the community," including "a community correctional facility." 18 U.S.C. § 3624(c)(1). Thus, even without the CARES Act, Martinez-Brooks currently falls within the category of inmates to be considered for placement in a community correctional facility, and by early 2022, she would fall within the category to be considered for home confinement for the final months of her imprisonment. 18 U.S.C. § 3624(c)(1), (2). Her ersatz injury—being "return[ed] to prison" (Compl. ¶ 55)—is speculative at best.

The ripeness doctrine "serves to determine whether a party has brought an action prematurely and counsels abstention until such time as a dispute is sufficiently concrete to satisfy the constitutional and prudential requirements of the doctrine." *County Concrete Corp. v. Town of Roxbury,* 442 F.3d 159, 164 (3d Cir.

2006) (cleaned up). "Determining whether administrative action is ripe for judicial review requires [a court] to evaluate (1) the fitness of the issues for judicial decision and (2) the hardship to the parties of withholding court consideration." *Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 808 (2003). This same ripeness test applies to actions seeking relief under the DJA. *See Abbott*, 387 U.S. at 148 ("The injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution."); *Endo Pharms. Inc. v. Fed. Trade Comm'n*, 345 F. Supp. 3d 554, 562 (E.D. Pa. 2018) (applying the fitness and hardship test for ripeness to a DJA request).

Under *Abbott*, the "hardship inquiry assesses whether the impact of the administrative action would be felt immediately by those subject to it, while the fitness inquiry takes stock of the legal issues of the case, assessing whether further factual development, by way of an expanded administrative record, would improve the court's ability to adjudicate the issues." *New Jersey v. U.S. Dep't of Health & Hum. Servs.*, Civ. No. 07-4698-JAP, 2008 WL 4936933, at *9 (D.N.J. Nov. 17, 2008). "Indicia of both factors is essential for a finding of ripeness." *Id*.

This action is not ripe under either the hardship or the fitness factor. Regarding hardship, and as addressed in greater depth below, BOP has yet to take any action adopting a post-emergency plan, and the OLC Opinion does not of its own force impose any change in Plaintiff's status. Further, the expanded authority to place individuals in home confinement provided by the CARES Act can continue

until 30 days after the President of the United States rescinds or otherwise abrogates the 2020 emergency declaration. CARES Act § 12003. Given the current state of the pandemic, there is no imminent prospect of that declaration being terminated.

President Biden formally extended the 2020 COVID-19 emergency declaration on February 24, 2021. *See* 86 Fed Reg. 11599, *supra*. The President continues to take steps to extend and expand various federal protections associated with pandemic impacts. *See, e.g.,* The White House, "Fact Sheet: President Biden to Announce New Actions to Protect Americans from COVID-19 and Help State and Local Leaders Fight the Virus" (August 18, 2021).[7] The CARES Act requires a period of 30 days after the lifting of the state of emergency before home confinements would be affected by any Bureau action. In short, Martinez-Brooks faces no concrete hardship. Her assertion that she needs and is entitled to relief under the APA is purely speculative at this point; she certainly does not face an *immediate* prospect of being harmed on the grounds she sets forth in the Complaint: being "return[ed] to prison." Compl. ¶ 55.

Nor is this dispute "fit" for resolution at this stage. It is not possible to say at present whether, or when, the OLC Opinion will have any operational effect, in this case or otherwise. At least three scenarios are possible here depending on when and

[7] *See* https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/18/fact-sheet-president-biden-to-announce-new-actions-to-protect-americans-from-covid-19-and-help-state-and-local-leaders-fight-the-virus/ (last visited Sep. 5, 2021).

how BOP addresses the issue of home confinement after the end of the state of emergency:

First, as noted above, with less than one year left in her term, Plaintiff is currently eligible for placement in a community corrections center under federal law. While Plaintiff might prefer to stay in home confinement, such a placement would avoid any return to FCI Danbury and could provide structure, supervision, and high-quality programmatic opportunities to her. *See* BOP Program Statement 7310.04 ¶ 1.[8] Plaintiff discusses the statutory option of community correctional centers, but takes no position on whether a post-emergency placement there by the Bureau would constitute a redressable injury to her under the APA.

Second, if the federal emergency stays in place until early 2022, Martinez-Brooks could be eligible to remain in home confinement. 18 U.S.C. § 3624(c)(2). She suggests in her Complaint that the OLC Opinion would require her return to a federal correctional facility, but the Opinion states on its face that "the Bureau would be required to recall the prisoners to correctional facilities **unless they are otherwise eligible for home confinement under 18 U.S.C. § 3624(c)(2)**." OLC Op. at 2 (emphasis added). For example, if the federal emergency continued until early January 2022, during the 30-day transition period established under the CARES Act, the Bureau could grant Martinez-Brooks "final phase" home confinement under Section 3624(c)(2).

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[8] Available at https://www.bop.gov/policy/progstat/7310_004.pdf (last visited Sep. 5, 2021).

Third, if the state of emergency continues until June 2022, Plaintiff's term of imprisonment would conclude before the Bureau ever reconsidered her home confinement. This is not merely theoretical given current pandemic conditions. *See* Centers for Disease Control & Prevention, "Covid Data Tracker Weekly Review" (Sep. 3, 2021).[9] The fact that Plaintiff's term of imprisonment may end before the state of emergency lifts strongly counsels for dismissal of this matter as unripe. *See Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'"); *In re Rickel Home Ctrs., Inc.*, 209 F.3d 291, 307 (3d Cir. 2000) (dismissing a claim as unripe where it is possible that "no dispute may arise").

In sum, even if the OLC Opinion were immediately "adopted" by BOP, the impact of it on Martinez-Brooks will remain speculative until the Bureau has the opportunity to create an administrative record determining Plaintiff's placement in the last year of her term of imprisonment. Right now, because the federal emergency is still in place and is likely to stay in place, that record cannot develop.

II. Congress Expressly Barred APA Actions Regarding the Placement of Federal Inmates

Martinez-Brooks states in her Complaint that this Court has federal question jurisdiction here because "this action arises under federal law, specifically the Administrative Procedure Act, 5 U.S.C. § 702, Section 12003(b)(2) of the

[9] Available at https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html (last visited Sep. 5, 2021).

Coronavirus Aid, Relief and Economic Security Act, P.L. 116-136, 134 Stat. 281 (2020), and 18 U.S.C. §§ 3621, 3624." Compl. ¶ 12. However, she fails to acknowledge that Congress expressly barred judicial review of inmate placement challenges like this brought through the APA.

Subchapter C of Chapter 229 of Title 18 concerns the imprisonment of federal inmates. 18 U.S.C. §§ 3621-3626. It includes Sections 3621 and 3624, which are central to Martinez-Brooks's APA arguments here regarding her current home confinement. But Congress expressly barred APA actions that address such placement decisions or other challenges arising out of Subchapter C:

> The provisions of sections 554 and 555 and 701 through 706 of title 5, United States Code, do not apply to the making of any determination, decision, or order under this subchapter.

18 U.S.C. § 3625. The Third Circuit has applied this jurisdictional bar in APA challenges by federal inmates to various placement decisions by the Bureau. *Murray v. Bledsoe*, 650 F.3d 246, 247 n.1 (3d Cir. 2011) (holding that a cell placement decision in a BOP facility was "exempt from challenge under the APA" by Section 3625); *Dababneh v. Warden Loretto FCI*, 792 F. App'x 149, 151 (3d Cir. 2019) ("Congress has expressly foreclosed judicial review of the BOP's individual RDAP placement decisions" in Section 3625 unless "BOP action violates the United States Constitution . . . or is contrary to established federal law"). A court in this District just cited this jurisdictional bar to hold that "[e]xtended home confinement under the CARES Act falls under § 3624(c), and is thus exempted from judicial review." *Goodchild v. Ortiz*, Civ. No. 21-790-RMB, 2021 WL 3914300, at *19 (D.N.J. Sep. 1, 2021).

There can be no remedy under the DJA without federal question jurisdiction for the APA cause of action as a predicate. 28 U.S.C. § 2201(a) (requiring "a case of actual controversy within its jurisdiction" in order for a federal court to issue a declaratory judgment). The Declaratory Judgment Act does not itself "provide a cause of action." *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011); s*ee Corzine v. 2005 Def. Base Closure & Realignment Comm'n*, 388 F. Supp. 2d 446, 449–50 (D.N.J. 2005) (rejecting that "the Court has jurisdiction under the DJA" and holding that "plaintiffs must look to another statute to provide a jurisdictional basis for the cause of action at issue"). The DJA simply "enlarge[s] the range of remedies available in the federal courts" for cases that already can be litigated there. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). A "cause of action" refers to the legal authority allowing a plaintiff to "judicially enforce the statutory rights or obligations" and is "analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239 (1979). The Third Circuit long ago recognized that DJA Section 2201 "authorized declaratory judgment actions but conferred no jurisdictions on the district courts and merely made a new remedy available in cases where jurisdiction already existed." *Lam v. Bouchard*, 314 F.2d 664, 674 n.2 (3d Cir. 1963).

Accordingly, this Court lacks jurisdiction to hear Plaintiff's APA challenge, and she cannot obtain a declaration under the DJA without such jurisdiction. At bottom, this is a question of BOP's possible future placement of Martinez-Brooks under the imprisonment scheme established by Congress in Subchapter C. Congress

has determined that such placement challenges are non-justiciable under the APA (*see also* ripeness argument, *supra*). Plaintiff does not bring a constitutional claim that would pierce the jurisdictional bar of Section 3625. Nor can she frame her complaint as a challenge to a BOP action that is "contrary to established law." *Dababneh*, 792 F. App'x at 151. After all, Martinez-Brooks is asking this Court to resolve a novel statutory interpretation question. *Cf. Wilkerson v. Super't Fayette SCI*, 871 F.3d 221, 228 (3d Cir. 2017) ("A state court decision is 'contrary to' clearly established federal law if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts.") (cleaned up). There is no jurisdiction for Martinez-Brooks's challenge to her possible, future placement by the Bureau, and accordingly, the Complaint must be dismissed.

III. The OLC Opinion Does Not Constitute "Final Agency Action" under the APA

Plaintiff's APA action presupposes that the OLC Opinion constitutes "final agency action" as to her future placement by BOP. Compl. ¶¶ 64-66. That is incorrect as a matter of law, and this Court lacks subject matter jurisdiction to proceed on the APA claim as a result. *Minard Run Oil Co. v. U.S. Forest Serv.*, 670 F.3d 236, 247 (3d Cir. 2011) (describing "final agency action" as "a jurisdictional issue").

The APA provides for judicial review of decisions by a federal agency "made reviewable by statute and final agency action for which there is no other adequate

remedy in a court." 5 U.S.C. § 704. Plaintiff does not argue that any statute makes the OLC Opinion reviewable, so it is thus reviewable only if it constitutes "final" agency action. Under the construction established by the Supreme Court in *Bennett v. Spear*, 520 U.S. 154 (1997), an agency action is "final" for purposes of the APA only if it both (1) "mark[s] the 'consummation' of the agency's decisionmaking process" and (2) is "one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Id.* at 177-78; *see, e.g., Smith v. Berryhill*, 139 S. Ct. 1765, 1775-76 (2019) (applying the *Bennett* framework); *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 135 S. Ct. 1807, 1813-14 (2016) (same). The OLC Opinion here satisfies neither requirement.

A. ***Bennett* factor one: BOP's process is not complete**

First, the Opinion does not "mark the 'consummation' of [BOP's] decisionmaking process" about whether, when, and how to address Plaintiff's placement following the end of the pandemic state of emergency. Rather, it contains internal legal advice addressing only certain aspects of those questions. *See Bennett*, 520 U.S. at 178 (to be final, decision must be more than "tentative or interlocutory"). One of the cases Plaintiff cites—*Goldings v. Winn*, 383 F.3d 17 (1st Cir. 2004)—shows what it takes for an OLC opinion to reflect the "consummation" of a Bureau decisionmaking process regarding the placement of federal inmates, and that case is a far cry from this one.

In *Goldings*, an inmate was challenging a change in BOP policy, dictated by the Department of Justice, that limited his eligibility for placement in community confinement after he had begun serving his sentence:

> On December 13, 2002, about three-and-a-half months after Goldings began serving his sentence, the Office of Legal Counsel of the United States Department of Justice (OLC) forwarded to Deputy Attorney General Larry D. Thompson an eight-page memorandum that characterized as "unlawful" the BOP's decades-long practice of placing certain offenders in CCCs to serve all or part of their sentences. . . . On December 16, 2002, the Deputy Attorney General adopted the OLC Memorandum and forwarded it to the Director of the BOP, with a memorandum that directed the BOP to "take all steps necessary to ensure that its sentencing decisions are in full compliance with the governing law"[.] . . . On December 20, 2002, the Assistant Directors for the General Counsel and Chief Programs Division of the **BOP issued a memorandum that directed all BOP officers to implement immediately a "revised procedure" based on the OLC Memorandum**.

383 F.3d at 19-20 (emphasis added).[10] As this description makes clear, the OLC memorandum alone was not the culmination of BOP's decisionmaking in *Goldings*, but merely advice which policymakers considered. BOP's decisionmaking did not reach its consummation until the agency issued its memorandum instructing BOP offices to implement the revised procedure.

Here, there have been no such BOP directives to implement the OLC Opinion, and BOP has developed no "revised procedure" based upon it. *Id*. Indeed, the OLC Opinion itself acknowledges that in the future, "BOP must plan for an eventuality" of where to place prisoners when the pandemic ends. OLC Op. at 1 (emphasis added). In short, the decisionmaking regarding federal inmates like Plaintiff placed in home confinement under the CARES Act remains in process.

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[10] Defendants note that the Court of Appeals in *Golding* did not address the various jurisdictional issues raised in this motion, but instead addressed the merits of the inmate's constitutional and statutory claims.

B. *Bennett* factor two: the OLC Opinion determines no "rights or obligations" and produces no "legal consequences"

Second, and relatedly, the OLC Opinion itself, standing alone, determines no "rights or obligations" of private parties such as Plaintiff and produces no "legal consequences." *Bennett*, 520 U.S. at 177-78. OLC legal memoranda are predecisional and deliberative documents, produced at the request of the President or an agency, containing legal advice and opinions to aid in a governmental decisionmaking process. *See* 28 C.F.R. § 0.25(a), (c) (delegating responsibility to OLC to "render[] informal opinions and legal advice to the various agencies" and "to the heads of the various organizational units of the Department [of Justice]"). As legal advice, OLC's opinions do not, without more, have binding legal force upon any inmate supervised by the BOP.

Freedom of Information Act ("FOIA") case law supports the conclusion that OLC opinions do not, of their own accord, have operative effect on private parties. FOIA requires agencies to make public "the 'working law' of the agency," meaning legal interpretations that "have the force and effect of law." *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 152-53 (1975). On several occasions, parties have sued under FOIA to compel disclosure of OLC opinions on the theory that they constitute the "working law" of an agency. Rejecting the theory that OLC opinions constitute working law in and of themselves, courts of appeals have instead recognized that it is the actions taken by the agency receiving OLC's legal advice that alter legal rights and obligations of the public. *See Citizens for Respons. & Ethics in Wash. v. U.S. Dep't of Justice*, 922 F.3d 480, 486 (D.C. Cir. 2019) ("An OLC opinion . . .

qualifies as the 'working law' of an agency only if the agency has 'adopted' the opinion as its own."); *see also ACLU v. Nat'l Sec. Agency*, 925 F.3d 576, 593-600 (2d Cir. 2019); *Electronic Frontier Found. v. U.S. Dep't of Justice*, 739 F.3d 1, 8 (D.C. Cir. 2014).

This basic principle is central to two cases that Plaintiff herself discusses. As noted above, the process in the *Goldings* case involved a formal directive by BOP to all its officers to "implement immediately a 'revised procedure' based on the OLC Memorandum." 383 F.3d at 20. Plaintiff also cites *Public Citizen v. Burke*, 655 F. Supp. 318, 321-22 (D.D.C. 1987), *aff'd* 843 F.2d 1473 (D.C. Cir. 1988), for the broad proposition that OLC's Opinion at issue here is "the culmination of its decisionmaking process and is binding on BOP." Compl. ¶ 64. But the existence of the OLC Opinion alone does not mean that BOP has decided what specific policy to adopt, much less how it might apply to Plaintiff. In *Burke*, by contrast to this matter, OLC produced a legal opinion at the request of the Office of Management and Budget on issues of executive privilege as applied to regulations issued by the Archivist of the United States. 843 F.2d at 1473-74. The Archivist then expressly "adopted" OLC's reasoning and "acquiesced" to its conclusions. *Id.* at 1474, 1477.

The OLC Opinion here is not final agency action for the same reasons discussed in the FOIA decisions above and in *Goldings* and *Burke*. BOP retains the authority and discretion to develop plans and take actions regarding inmates placed by BOP on home confinement when the pandemic state of emergency comes to a close, and BOP is not currently using the OLC Opinion to impose "legal

consequences" on Plaintiff or any other BOP inmate. Indeed, absent further action from BOP, the OLC Opinion will have no effect on, or consequences for, Plaintiff or any other BOP inmate.

Without a concrete and final agency action by the Defendants on the home confinement issue here, there is no jurisdiction for this civil action to proceed.

IV. Even If This Court Finds a Basis for Jurisdiction, It Should Dismiss This Case *In Toto* Because Plaintiff Has Another Avenue for Relief That She Is Actively Pursuing

There is at least one other avenue to judicial relief for Plaintiff, offering another independent reason to dismiss this APA and DJA action. Martinez-Brooks initiated this lawsuit in parallel to her CR/RIS Motion, pending before her sentencing court, wherein she seeks a reduction in her term of imprisonment to time served. If she prevails on her CR/RIS Motion, she cannot be subjected to any future changes in her BOP placement—much less a "return to prison." Compl. ¶ 55. Accordingly, this Court should decline jurisdiction to review this ersatz APA claim in favor of Plaintiff's other path to a remedy.

Judicial review is permitted under the APA only where "there is no other adequate remedy in a court[.]" 5 U.S.C. § 704. *See also Citizens for Resp. & Ethics in Wash. v. United States Dep't of Justice*, 846 F.3d 1235, 1245 (D.C. Cir. 2017) (examining APA Section 704 and concluding that "where Congress has provided an independent cause of action or an alternative review procedure in a purported alternative, we have found clear markers of legislative intent to preclude") (cleaned up). The existence of another remedy is the crucial consideration here, and "another remedy is not inadequate merely because the complainant cannot pursue it

successfully." *Turner v. Sec'y, Dep't of Hous. & Urb. Dev.*, 449 F.3d 536, 541 (3d Cir. 2006).

Similarly, the DJA permits federal courts to decline a requested remedy where other avenues for relief exist. Congress directed that review under the DJA is wholly discretionary: "any court of the United States, upon the filing of an appropriate pleading, **may** declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a) (emphasis added). *See Brillhart v. Excess Ins. Co. of Am.*, 316 U.S. 491, 494 (1942) (concluding that while the DJA permitted review, the court "was under no compulsion to exercise" jurisdiction and grant relief). In the Third Circuit, a federal court's discretionary decision to accept or decline review for a judicial declaration is subject to various considerations, including "the availability and relative convenience of other remedies" and the "avoidance of duplicative litigation[.]" *Reifer v. Westport Ins. Corp.*, 751 F.3d 129, 146 (3d Cir. 2014).[11]

While Martinez-Brooks seeks a judgment invalidating the OLC Opinion, at bottom she seeks an order allowing her to remain at home and avoid any "return to prison."[12] *See* Compl. ¶ 55 and Prayer for Relief. Plaintiff has another avenue for

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[11] The other applicable *Reifer* factors here point in large measure to (1) the ripeness issue, *supra*; and (2) the reality that Plaintiff seeks a judicial ruling on what is a larger public policy debate. In the totality of circumstances of this action, this Court should decline review under the DJA even if it finds a cause of action permitting jurisdiction.

[12] Plaintiff does not request this expressly because placement decisions rest solely in the discretion of BOP. *See* 18 U.S.C. § 3621(b); *Meachum v. Fano,* 427 U.S. 215, 224–25 (1976) (holding that placement decisions do not implicate a due process

similar relief through 18 U.S.C. § 3582(c)(1), where she can apply for compassionate release or reduction in sentence from her sentencing court. Plaintiff pursued such relief prior to the Bureau granting her home confinement as an administrative matter. *See* CR/RIS Motion, *supra*. Even after the Bureau placed her on home confinement, Martinez-Brooks continued to press for relief under 18 U.S.C. § 3582(c)(1), asking that her sentencing court issue an order "terminating the home confinement portion of her sentence, reducing her sentence, and re-sentencing her to time served." Letter Brief (docket no. 49), *United States v. Martinez-Brooks*, 2:18-cr-00038-CCC (D.N.J. May 7, 2021).

Notably, Martinez-Brooks filed her latest substantive brief on her CR/RIS Motion ten days before initiating this separate APA action on May 17, 2021. She appears to be using this APA action as a backstop, seeking to ensure that she will remain on home confinement even if her sentencing court declines to reduce her term of imprisonment to time served, as requested.

Accordingly, in light of Plaintiff's current efforts to obtain relief from her sentencing court, relief that would obviate any "return to prison," this Court should dismiss the Complaint.

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interest). Nonetheless, Martinez-Brooks makes plain that she seeks to avoid any return to FCI Danbury.

CONCLUSION

For the foregoing reasons, 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: September 7, 2021

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

(Slip Opinion)

Home Confinement of Federal Prisoners After the COVID-19 Emergency

The Coronavirus Aid, Relief, and Economic Security Act authorizes the Director of the Bureau of Prisons to place prisoners in home confinement only during the Act's covered emergency period and when the Attorney General finds that the emergency conditions are materially affecting BOP's functioning. Should that period end, or should the Attorney General revoke the finding, the Bureau would be required to recall the prisoners to correctional facilities unless they are otherwise eligible for home confinement under 18 U.S.C. § 3624(c)(2).

BOP's authority under 18 U.S.C. § 3621(a) and (b) does not provide an alternative basis for authorizing continued home confinement for prisoners ineligible for continuing home confinement under section 3624(c)(2).

January 15, 2021

MEMORANDUM OPINION FOR THE GENERAL COUNSEL
FEDERAL BUREAU OF PRISONS

The Federal Bureau of Prisons ("BOP" or "the Bureau") has statutory authority to place a prisoner serving a term in a federal prison in home confinement for the concluding portion of his sentence. *See* 18 U.S.C. § 3624(c)(2). In connection with the COVID-19 pandemic, Congress expanded the authority of the Director of BOP to place federal prisoners in home confinement earlier than that statutory period. *See* Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 12003(b)(2), 134 Stat. 281, 516 (2020) ("CARES Act"). The question is what happens to these prisoners once the pandemic emergency ends. At that time, some inmates will have completed their sentences or be sufficiently close to the end to be eligible for home confinement. Other inmates, however, may have a substantial time to go before becoming eligible. Although the pandemic emergency remains ongoing, the issue arises because BOP must plan for an eventuality where it might need to return a significant number of prisoners to correctional facilities.

We conclude that the CARES Act authorizes the Director of BOP to place prisoners in home confinement only during the statute's covered emergency period and when the Attorney General finds that the emergency conditions are materially affecting BOP's functioning. *See id.* Should that period end, or should the Attorney General revoke the find-

ing, the Bureau would be required to recall the prisoners to correctional facilities unless they are otherwise eligible for home confinement under 18 U.S.C. § 3624(c)(2). We also conclude that the general imprisonment authorities of 18 U.S.C. § 3621(a) and (b) do not supplement the CARES Act authority to authorize home confinement under the Act beyond the limits of section 3624(c)(2).

I.

Section 3621(a) of title 18 of the United States Code instructs BOP to maintain custody of a person sentenced to a term of imprisonment until "the expiration of the term imposed, or until earlier released for satisfactory behavior pursuant to the provisions of section 3624." Section 3621(b) assigns BOP the responsibility of "designat[ing] the place of the prisoner's imprisonment" at a "facility," subject to several considerations such as bed availability, the security designation of the prisoner, and proximity to the prisoner's residence. Section 3621(b) also authorizes the Bureau "at any time," subject to those same factors, to "direct the transfer of a prisoner from one penal or correctional facility to another."

Section 3624(c) governs both home confinement and other forms of what the statute calls "prerelease custody" lower-security conditions of confinement that help prepare a prisoner for eventual release. Section 3624(c)(1) provides that BOP "shall, to the extent practicable, ensure that a prisoner serving a term of imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community," such as a community correctional facility. Section 3624(c)(2) then states that BOP "may" use its prerelease custody authority to place a prisoner in home confinement "for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." Section 3624(c)(2) thus constrains BOP's confinement authority by limiting a prisoner's time in home confinement to no more than six of the final months of a prisoner's term.

Recognizing that the COVID-19 pandemic was having a substantial effect on federal correctional institutions, Congress in section 12003(b)(2) of the CARES Act expanded BOP's preexisting discretion to employ home confinement. Section 12003(b)(2) provides that

> [d]uring the covered emergency period, if the Attorney General finds that emergency conditions will materially affect the functioning of the Bureau, the Director of the Bureau may lengthen the maximum amount of time for which the Director is authorized to place a prisoner in home confinement under the first sentence of section 3624(c)(2) of title 18, United States Code, as the Director determines appropriate.

The "'covered emergency period'" starts on "the date on which the President declared a national emergency under the National Emergencies Act with respect to the Coronavirus Disease 2019 (COVID-19)" and ends "on the date that is 30 days after the date on which the national emergency declaration terminates." CARES Act § 12003(a)(2), 134 Stat. at 516 (citation omitted).

The President declared the COVID-19 pandemic a national emergency on March 13, 2020, two weeks before the enactment of the CARES Act. *See* Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak, Proc. No. 9994, 85 Fed. Reg. 15,337 (Mar. 18, 2020). On April 3, 2020, the Attorney General found that COVID-19 emergency conditions were "materially affecting the functioning of the Bureau of Prisons." Memorandum for the Director of the Bureau of Prisons from the Attorney General, *Re: Increasing Use of Home Confinement at Institutions Most Affected by COVID-19* at 1 (Apr. 3, 2020), https://www.bop.gov/coronavirus/docs/bop_memo_home_confinement_april3.pdf ("Attorney General Memorandum").

You have advised us that following that determination, the BOP Director exercised his CARES Act authority by transferring thousands of federal prisoners into home confinement. As of December 2020, BOP had transferred 18,112 inmates to home confinement since enactment of the authority, out of a federal prison population of approximately 150,000 inmates. *See* Statement of Michael D. Carvajal, Director, BOP, Before the Subcommittee on Crime, Terrorism, and Homeland Security, U.S. House Judiciary Committee 2, 6 (Dec. 2, 2020) ("Carvajal Testimony"). We understand that approximately 40 percent of those prisoners would not have been eligible for such transfers absent the emergency authority.[1]

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[1] *See* E-mail for Jennifer Mascott & Conor Clarke, Office of Legal Counsel, from Kenneth P. Hyle, BOP, *Re: Draft OLC Opinion on the CARES Act Home Confinement Authority* (Jan. 14, 2021, 2:46 PM).

BOP has indicated that it will continue to conduct individualized assessments to make home confinement placements for the duration of the pandemic. *Id.* at 6. These transfers have carried out the Attorney General's instructions to, where possible, move vulnerable inmates with Centers for Disease Control-established COVID-19 risk factors out of institutions with significant infection rates, following a 14-day quarantine period to prevent transmission during transfer. Attorney General Memorandum at 1 2.

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. You have explained that BOP has always had the discretion to return inmates to BOP facilities upon, or even prior to, the termination of the covered pandemic period. But you have suggested that BOP might continue home confinement placements afterwards, on the theory that BOP properly exercised its authority to "lengthen the maximum amount of time" for home confinement during the emergency and that the consequences of those decisions might continue, even though the authority to make the decision in the first instance has lapsed. *See* Bureau of Prisons, *Home Confinement Under the CARES Act* at 2 (Nov. 20, 2020).

We agree that the CARES Act does not alter BOP's discretion to return prisoners to facilities either during the covered period or right when it ends. But once that authority expires, 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.

II.

Section 12003(b)(2) allows the Director, "[d]uring" the covered emergency period and based on a finding from the Attorney General, to "lengthen the maximum amount of time for which [he] is authorized to place a prisoner in home confinement." Once the Director's authority in section 12003(b)(2) expires, then so too does his authority to keep inmates in home confinement under this provision.

Section 12003(b)(2) is the sole source of the Director's "authori[ty]" to "lengthen the maximum amount of time" that applies to the sentence of an inmate subject to home confinement "under the first sentence of section 3624(c)(2)." Section 3624(c)(2), in turn, limits a term of home confinement to "the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." In connection with the pandemic, Congress conferred upon the Director broad authority to disregard the ordinarily strict time limitations of section 3624(c)(2) in favor of any length that he "determines appropriate." The scope of that authority, however, is keyed to, and circumscribed by, the emergency nature of the circumstances that Congress addressed both in this particular provision and in provisions throughout the bill.

Accordingly, we think that once the CARES Act authority evaporates, the maximum term of home confinement must govern. *See 62 Cases, More or Less, Each Containing Six Jars of Jam v. United States*, 340 U.S. 593, 600 (1951) ("[W]e must take care not to extend the scope of the statute beyond the point where Congress indicated it would stop."); *see also Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2380 (2020) ("Our analysis begins and ends with the text." (internal quotation marks omitted)); *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 174 75 (2003) (Scalia, J., dissenting) ("When a power is conferred for a limited time, the *automatic* consequence of the expiration of that time is the expiration of the power."). Once the CARES Act authority expires, BOP's obligation to respect section 3624(c)(2)'s time limit applies to all prisoners remaining in BOP custody, including those who had been placed early in home confinement in response to the COVID-19 emergency.

This reading of section 12003(b)(2) is consistent with the structure of the CARES Act, which provided a variety of forms of temporary emergency relief to address a once-in-a-century global pandemic. *See, e.g.*, CARES Act § 1109 (providing loan programs during the national emergency); *id.* § 1113 (authorizing bankruptcy relief to address the emergency); *id.* § 1114 (providing emergency rulemaking authority to the Administrator of the Small Business Administration); *id.* § 1102(a)(2) (ending the "covered period" for paycheck protection on June 30, 2020); *id.* § 1108(c)(1) (authorizing the waiver, for a 3-month period starting on the date of enactment, of requirements that minority business centers provide

matching funds when receiving certain federal grants if the center is unable to raise the funds or has lost revenue); *id.* § 2102(b), (c)(2) (creating a new unemployment assistance benefit, for people otherwise ineligible for such compensation, that terminates after 39 weeks); *id.* §§ 3201 3226 (covering health care provisions during the national emergency). The Director has used the particularized pandemic-related emergency authority in the CARES Act to put thousands of prisoners in home confinement who were not otherwise eligible, including inmates whose terms of imprisonment might stretch far beyond the pandemic long after the emergency conditions that prompted the granting of this authority will have ceased, and well beyond the default time limits for home confinement specified in section 3624(c)(2). If Congress had fundamentally altered the structure of home confinement beyond the emergency circumstance that prompted the enactment of section 12003(b)(2), then it would have said so. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) ("In ascertaining the plain meaning of [a] statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole."); *cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (recognizing that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions").

This interpretation finds further support from section 12003's expiration provision, which specifies that the Director's expanded discretion over home confinement ends "on the date that is 30 days *after* the date on which the national emergency declaration terminates" (emphasis added). If Congress had expected that the termination of the Director's expanded authority would have no operational effects on prisoners already in home confinement, then his placement authority could simply have terminated with the emergency. *See, e.g.*, *Murphy v. Smith*, 138 S. Ct. 784, 789 (2018) (noting that "surrounding statutory structure" may reinforce a conclusion about an individual provision); *cf. Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018) (finding confirmation for the Court's interpretive analysis where an alternative reading would make aspects of the relevant statutory and regulatory scheme unnecessary). We think that this 30-day period suggests that Congress had recognized that the termination of the emergency would have operational consequences and thus gave BOP 30 days to engage in the logistical operations needed to remove

prisoners from home confinement who were not otherwise eligible to serve there.

We do not believe that an alternative interpretation of section 12003(b)(2) one that reads the decision "to place a prisoner in home confinement" as though it were a discrete action requiring statutory authority only at the time that it is made would be tenable. The decision "to place" a prisoner in home confinement is not a permanent, final decision, and BOP has the discretion to reconsider home confinement at any point. That decision requires ongoing action, and therefore continuing legal authority. *Cf.* CARES Act § 12003(b)(2), 134 Stat. at 516 (defining the emergency authority as authority to "*lengthen* the maximum amount of time" for the Director's exercise of home confinement authority action involving an ongoing time period (emphasis added)); 8 *Oxford English Dictionary* 825 (2d ed. 1989) ("lengthen": "[t]o make longer, increase the length of"). BOP and the probation system, further, have a continuing relationship with prisoners in prerelease custody and home confinement. Under section 3624(c)(3) of title 18, for instance, the United States probation system "shall, to the extent practicable, offer assistance" to prisoners in home confinement. BOP's home confinement program guidance further contemplates daily monitoring, weekly in-person meetings, drug and alcohol testing, counseling, and more. *See generally* BOP Program Statement, CCD No. 7320.01 (Sept. 6, 1995) (updated and reissued Dec. 15, 2017) ("Home Confinement Program Statement"). These ongoing administrative duties make clear that the decision to place a prisoner in "home confinement" is not a one-time event and that BOP retains the discretion to reassess the prisoner's status at any time during home confinement. The time limits of section 3624(c)(2) therefore apply.

III.

Separate from the CARES Act, you have suggested that BOP may have discretion under 18 U.S.C. § 3621(a) and (b) to keep prisoners in home confinement who had been properly placed there during the emergency period.[2] Indeed, the home confinement statute makes clear that nothing in it "shall be construed to limit or restrict" the Director's authority "under

[2] *See* E-mail for Liam P. Hardy et al., Office of Legal Counsel, from Kenneth Hyle, BOP, *Re: 2002 OLC Memorandum on BOP Discretion* (Dec. 7, 2020, 9:27 AM).

section 3621." *Id.* § 3624(c)(4). But we do not agree that BOP's authority under section 3621(a) and (b) provides additional discretionary authority to address home confinement in the first place.

A.

Section 3621 states, in relevant part, that persons sentenced to imprisonment "shall be committed to the custody of the Bureau of Prisons until the expiration of the term imposed." *Id.* § 3621(a). It then provides standards by which the Bureau "shall designate the place of the prisoner's imprisonment" but only at a "penal or correctional facility." *Id.* § 3621(b). The text indicates that BOP is not free under this provision to designate a "place" of any type as the site of the prisoner's confinement, but rather contemplates that it will be at a "facility." *See id.* ("The Bureau of Prisons shall designate the place of the prisoner's imprisonment, and shall . . . place the prisoner in a facility."); *id.* ("In designating the place of imprisonment or making transfers under this subsection, . . . [t]he Bureau may at any time . . . direct the transfer of a prisoner from one penal or correctional facility to another."); *id.* § 3622 (specifying when a prisoner may be temporarily released from the "place of his imprisonment" before being "return[ed] to the same or another facility"). We do not believe that home confinement constitutes a "facility" within the meaning of section 3621(b).

The statute does not define "facility," but the ordinary meaning of the term is not readily understood to mean a "home." *Compare Webster's Third New International Dictionary* 812 13 (1961) (defining "facility" as "something" like "a hospital," that is "built . . . or established to perform some particular function or to serve or facilitate some particular end"), *with id.* at 1082 (defining "home" as "the house and grounds . . . habitually occupied by a family"); *compare also The Random House Dictionary of the English Language* 690 (2d. ed. 1987) (defining "facility" as "something designed, built, installed, etc., to serve a specific function affording a convenience or service," such as "transportation facilities" or "educational facilities" or "a new research facility"), *with id.* at 913 (defining "home" as "a house, apartment, or other shelter that is the usual residence of a person"). Other provisions in title 18 speak of "facility" in a manner inconsistent with thinking the term would include a "home." Section 3585 of title 18, for instance, provides that "a term of imprisonment" com-

mences on a date connected to the prisoner's transportation to "the official detention facility at which the sentence is to be served." Section 3624 itself reinforces the distinction between a "home" and a "facility": section 3624(c)(1) refers to a "community correctional *facility*" (emphasis added) a reference followed immediately by subsection (c)(2)'s separate provision governing "home confinement." *See also* 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, div. B, § 2411(a)(1), 116 Stat. 1758, 1799 (2002) (distinguishing between "community corrections facilities" and "home confinement"). And section 3621(b) contrasts a prisoner's "residence" with his "place of imprisonment" and "facility," requiring BOP to ensure to the extent practicable that the imprisonment facility is within 500 miles of the prisoner's primary residence. This distinction would be anomalous if a "facility" could, under the discretion of that provision, include one's ordinary residence or home.

This reading accords with the few district court decisions that have similarly observed that BOP's discretion under section 3621(b) to select a "penal or correctional facility" does not extend to home confinement under the current version of 18 U.S.C. § 3624(c)(2).[3] Numerous courts have similarly read section 3624(c)(2) to impose a firm limit on BOP's home confinement discretion.[4] We have not identified any case concluding otherwise.

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[3] *See, e.g.*, *United States v. Orozco*, No. 3:15-CR-00038-RCJ-WGC, 2020 WL 3047471, at *1 n.1 (D. Nev. June 8, 2020) ("While Congress ordered the BOP to consider court recommendations about the most appropriate 'penal or correctional facility' in § 3621(b), it failed to include 'home confinement' in this provision."); *Toole v. Krueger*, No. 12-CV-2445-PJS-TNL, 2012 WL 6621681, at *3 (D. Minn. Dec. 19, 2012) ("It may be true that an inmate's home is not a 'penal or correctional facility' within the meaning of § 3621(b).").

[4] *See Bonneau v. Salazar*, 754 F. App'x 624, 624 (9th Cir. 2019) ("18 U.S.C. § 3624(c)(2) barred the BOP from placing him in home confinement for more than six months or 10 percent of the underlying sentence, whichever is less."); *Guess v. Werlinger*, 421 F. App'x 215, 217 (3d Cir. 2011) ("The 6 months of home confinement is not additional to the 12 months of prerelease custody. . . . We also reject Guess's contention that the scheduling of the prerelease hearing at 17 to 19 months before a projected release date runs afoul of 18 U.S.C. § 3621(b)."). Our reading of the statute also is consistent with multiple district court decisions to have considered the issue. *See, e.g.*, *Lyttle v. Inch*, No. 2:17-CV-00153-JMS-DLP, 2018 WL 1410192, at *2 (S.D. Ind. Mar. 21, 2018) ("[T]his statute gives the BOP discretion to place Mr. Lyttle in a community correctional facility

Our interpretation is also consistent with a related body of precedent interpreting section 3585(b) of title 18, which mandates that "[a] defendant . . . be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences." The Supreme Court has held that a defendant must be in a "penal or correctional facility," as used in section 3621(b), to receive credit for "official detention." *See Reno v. Koray*, 515 U.S. 50, 58 (1995). Lower courts have applied *Koray* to conclude that "home detention" does not constitute time in a "penal or correctional facility" for purposes of this provision. *See, e.g.*, *United States v. Piper*, 525 F. App'x 205, 209 10 (3d Cir. 2013) ("Although he was confined at home, he was not detained in a penal or correctional facility."); *United States v. Polydore*, 493 F. App'x 496, 506 (5th Cir. 2012) (Owen, J., concurring) ("Although confinement in a community center was at issue in *Koray*, and the statute under scrutiny was § 3585, the rationale of *Koray* applies with equal force to home detention."). We think that section 3624(c)(2) should be given a similar reading.

Finally, our reading is consistent with BOP's own regulations and program guidance. A 2008 interim rule (while not currently in force) stated that "[i]nmates may be designated to home detention as a condition of pre-release custody and programming during the final months of the inmate's term of imprisonment, not to exceed the shorter of ten percent of the inmate's term of imprisonment or six months." 28 C.F.R. § 570.21(b).[5] BOP's own home confinement program guidance emphasiz-

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for no more than 12 months and in home confinement for no more than 6 months. Any determination must be made in a manner consistent with the five factors in § 3621(b)."); *United States v. Miranda*, No. 3:16-CR-00250-GPC, 2017 WL 3219941, at *3 n.2 (S.D. Cal. July 28, 2017) ("Although Miranda has asked the Court to grant him three months in home confinement, the Court notes that the maximum time allowable in home confinement is 'the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months.'" (citation omitted)).

[5] This rule was initially promulgated in 2008 as an interim final rule. *See* Pre-Release Community Confinement, 73 Fed. Reg. 62,440, 62,443 (Oct. 21, 2008). While this text remains codified, *see* 28 C.F.R. § 570.21(b) (2020), the interim rule was vacated on procedural grounds for failure to follow Administrative Procedure Act notice-and-comment procedures and was not finalized. *See Sacora v. Thomas*, No. CV 08-578-MA, Doc. No. 57 at 22–25, 34 (D. Or. June 16, 2010) (vacating the rule for failure to establish good cause to forgo notice and comment); *see also Sacora v. Thomas*, 628 F.3d 1059,

es that it "does *not* have statutory authority to designate a home confinement program for an inmate at the beginning of his or her sentence," given section 3621(b)'s requirement that the Bureau "designate any available *penal or correctional* facility as the place of a prisoner's imprisonment." Home Confinement Program Statement at 1; *see also id.* att. B, at 2 ("Inmates on home confinement shall return to the facility at least twice each week."); BOP, *Legal Resource Guide to the Federal Bureau of Prisons* 46 (2019) ("Inmates may participate in home confinement only during the last 10% of their sentence or 6 months prior to their Good Conduct Release date, whichever is less."). We think these statements clearly rule out an interpretation that section 3621(a) and (b) provide BOP with freestanding authority to permit home confinement of any duration.

B.

It might be argued, however, that this conclusion conflicts with court decisions holding that, under a prior version of the statute, BOP's authority under section 3621(b) included discretionary authority to order an inmate into prerelease custody separate from the timing provisions of section 3624(c). *See Rodriguez v. Smith*, 541 F.3d 1180, 1184 85 (9th Cir. 2008); *Wedelstedt v. Wiley*, 477 F.3d 1160, 1166 67 (10th Cir. 2007); *Goldings v. Winn*, 383 F.3d 17, 28 29 (1st Cir. 2004); *Elwood v. Jeter*, 386 F.3d 842, 847 (8th Cir. 2004). These decisions were contrary to an opinion this Office issued in 2002, which had concluded that the discretionary authority in section 3621(b) did not give BOP such authority. *See* Memorandum for Larry D. Thompson, Deputy Attorney General, from M. Edward Whelan III, Principal Deputy Assistant Attorney General, Office of Legal Counsel, *Re: Bureau of Prisons Practice of Placing in Community Confinement Certain Offenders Who Have Received Sentences of Imprisonment* at 6 7 (Dec. 13, 2002) ("*Community Confinement*").

We need not revisit this debate because the reasoning of these court decisions has been overtaken by subsequent amendments to the statute in particular, by amendments made to the statute in the Second Chance

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1065 n.6 (9th Cir. 2010) (noting that the vacatur order was not appealed). BOP proposed an identical rule for notice and comment in 2011, *see* Pre-Release Community Confinement, 76 Fed. Reg. 58,197 (Sept. 20, 2011), but no final rule was promulgated.

Act of 2007, Pub. L. 110-199, 122 Stat. 657 (2008).[6] These amendments substantially altered the framework for prerelease custody and for home confinement. Among other things, the Act created a separate subsection addressing home confinement, with an independent limitation requiring that this form of prerelease authority only "be used to place a prisoner in home confinement for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months."[7] 18 U.S.C. § 3624(c)(2); Pub. L. 110-199, § 251(a), 122 Stat. at 693. By so doing, the amended statute distinguished between prerelease custody more generally, including in a "community correctional facility," and prerelease custody in "home confinement."

These amendments mooted the disagreement between our 2002 *Community Confinement* opinion and the several circuit court decisions that addressed BOP's discretion to place prisoners in community correctional facilities. In 2004, the First and Eighth Circuits reasoned that the pre-Second Chance Act time limit "not to exceed six months, of the last 10 per centum of the term" described only the period for which BOP was *required* to consider the use of community corrections, not the maximum period for which it was *authorized* to use community corrections. *Goldings*, 383 F.3d at 26 (making the distinction "between a qualified obliga-

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[6] Between 1990 and 2008, 18 U.S.C. § 3624(c) read:

> *Pre-release custody.*—The Bureau of Prisons shall, to the extent practicable, assure that a prisoner serving a term of imprisonment spends a reasonable part, not to exceed six months, of the last 10 per centum of the term to be served under conditions that will afford the prisoner a reasonable opportunity to adjust to and prepare for the prisoner's re-entry into the community. The authority provided by this subsection may be used to place a prisoner in home confinement. The United States Probation System shall, to the extent practicable, offer assistance to a prisoner during such pre-release custody.

BOP's current home confinement program statement continues to refer to this pre-2008 text of 28 U.S.C. § 3624(c). *See* Home Confinement Program Statement at 1.

[7] We note that section 602 of the First Step Act of 2018, Pub. L. 115-391, 132 Stat. 5194, revised 18 U.S.C. § 3624(c)(2) by adding a second sentence that is not relevant here: "The Bureau of Prisons shall, to the extent practicable, place prisoners with lower risk levels and lower needs on home confinement for the maximum amount of time permitted under this paragraph." *Id.* § 602, 132 Stat. at 5238. The First Step Act also created a separate home confinement program for low-risk offenders—now codified at 18 U.S.C. § 3624(g)—that the CARES Act does not mention and that we do not consider here. *Id.* § 102(b), 132 Stat. at 5210–13.

tion imposed on the BOP and a grant of discretionary authority to it"); *Elwood*, 386 F.3d at 847 (relying on *Goldings* to reach a similar conclusion).[8] Therefore, those courts held that BOP retained its discretionary authority to extend prerelease custody to community correctional facilities beyond the specific time window in then-section 3624(c). But the Second Chance Act amended the statute to include in section 3624(c)(2) an express limit on any such discretionary authority as it applies to home confinement: BOP "may" (not "shall") use home confinement "for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months."

The Second Chance Act also distinguished prerelease custody in a community correctional facility from home confinement. The circuit court decisions involved inmates who wished to be transferred to community correctional facilities. *See Goldings*, 383 F.3d at 18, 28; *Rodriguez*, 541 F.3d at 1181 & n.1; *Wedelstedt*, 477 F.3d at 1161, 1166; *Elwood*, 386 F.3d at 843. In that context, these courts reasoned that "[a] community correction center is a correctional facility and therefore may serve as a prisoner's place of imprisonment." *Goldings*, 383 F.3d at 28; *see Elwood*, 386 F.3d at 846 (noting that a community correctional facility is a "penal or correctional facility"). But prior to the Second Chance Act, it was not clear whether or how such reasoning extended to home confinement: the pre-Second Chance Act version of the statute did not distinguish between "home confinement" and other forms of prerelease custody; all such authorities were included.[9] But the Second Chance Act sets off "home

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[8] The Ninth and Tenth Circuits similarly concluded that the pre-Second Chance Act statutory scheme did not cap the maximum time frame authorized for home confinement, finding unlawful BOP regulations that categorically excluded prerelease custody outside of the section 3624 time limits. *See Rodriguez*, 541 F.3d at 1184–87; *Wedelstedt*, 477 F.3d at 1166–67.

[9] *Goldings* itself acknowledged, but left unresolved, the question of whether a "home" could constitute a "penal or correctional facility" and thus a "place of imprisonment." *See* 383 F.3d at 28 (internal quotation marks omitted); *see also United States v. Cintrón-Fernández*, 356 F.3d 340, 346 n.6 (1st Cir. 2004) ("[W]e need not reach the issue of whether Cintron-Fernandez's home could ever qualify as a 'penal or correctional facility' under 18 U.S.C. § 3621(b)."). Prior to enactment of the Second Chance Act, however, several district courts relied on the reasoning of *Goldings* and *Elwood* to suggest that BOP's section 3621(b) authority encompassed home confinement. *See, e.g.*, *Goebel v. Morrison*, No. 06-168-JRT-SRN, 2006 WL 1314322, at *2 (D. Minn. May 12, 2006) (ordering the government "to immediately reconsider its decision as to whether petitioner

confinement" in a statutory subsection separate from the subsection generally authorizing prelease custody, including custody at a "community correctional facility." The decisions interpreting the earlier version of the statute therefore do not undermine our conclusion that home confinement does not involve confinement at a "facility" for purposes of section 3621(b).

If BOP had general discretion to place prisoners in home confinement under section 3621, then many other statutory provisions would have been unnecessary. Most notably, there would have been no need for Congress to carefully "lengthen the maximum" home confinement time in the CARES Act surplusage that would deprive the text of meaning. *See United States v. Nordic Vill., Inc.*, 503 U.S. 30, 36 (1992) ("[A] statute must, if possible, be construed in such fashion that every word has some operative effect."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012) (explaining the canon that no word or provision "should needlessly be given an interpretation that causes it to . . . have no consequence" (citing *United States v. Butler*, 297 U.S. 1, 65 (1936)). There would have been no point to Congress separately addressing, and imposing time constraints on, home confinement authority through the Second Chance Act, because BOP would have already possessed a home confinement discretion free from any such limits under section 3621.[10] And there would have been no reason for Congress, in a separate prerelease custody program for low-risk offenders authorized by the First Step Act of 2018, to mention that the "time

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should be assigned to a Community Corrections Center or home confinement, in light of the criteria set forth in 18 U.S.C. § 3621(b)"); *Young v. Caraway*, No. CIV. 05-1476-JNE-JJG, 2006 WL 562143, at *9 (D. Minn. Mar. 7, 2006) (finding "that § 3621(b) requires the BOP to consider the five factors listed in the statute when deciding whether, and when, a prisoner should be assigned to a CCC or home confinement arrangement"). But for reasons we have explained, we think that the subsequent Second Chance Act provisions eliminate that reading as a plausible interpretation of sections 3621 and 3624.

[10] In enacting the Second Chance Act of 2007, Congress created a new section 3624(c)(2), consisting of just the first sentence of the current provision, that imposed a time limit on the duration of home confinement as a form of prerelease custody. *See* Pub. L. 110-199, § 251(a), 122 Stat. at 692–93. The current second sentence of subsection 3624(c)(2), requiring the Bureau to place lower-risk prisoners in home confinement "to the extent practicable" was enacted approximately ten years later, in the First Step Act of 2018. *See* Pub. L. 115-391, § 602, 132 Stat. 5194, 5238.

limits" of section 3624(c) "shall not apply to prerelease custody" under the newly created subsection 3624(g). First Step Act of 2018, Pub. L. 115-391, § 102(b), 132 Stat. 5194, 5208 13 (quoted language codified at 18 U.S.C. § 3621(g)(10)). The Supreme Court has noted "time and time again" that it is "obliged to give effect, if possible, to every word Congress used." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (internal quotation marks and citation omitted). We cannot adopt an interpretation of the text that would result in so much surplusage across so many different sections of the Code.

IV.

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). BOP's authority under 18 U.S.C. § 3621 does not provide an alternative basis for authorizing continued home confinement for prisoners ineligible for home confinement under section 3624(c).

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