

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
NEWARK VICINAGE**

NEW CIVIL LIBERTIES ALLIANCE
KARA ROLLINS (Attorney ID 107002014)
Litigation Counsel
1225 19th Street NW, Suite 450
Washington, DC 20036
(202) 869-5210

Counsel to Plaintiff

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)

Motion Day: November 15, 2021

[ORAL ARGUMENT REQUESTED]

**PLAINTIFF'S SUR-REPLY IN OPPOSITION TO
DEFENDANTS' MOTION TO DISMISS**

FACTS & PROCEDURAL HISTORY

On October 27, 2021, during Defendant Attorney General Merrick Garland's testimony before the Senate Judiciary Committee, he was questioned about the Office of Legal Counsel Opinion that is the subject of this lawsuit. *See* Recording of *Oversight of the Department of Justice: Hearing Before the Full Senate Judiciary Committee* (Oct. 27, 2021) available at <https://bit.ly/Oct27JudiciaryHearing>. On November 10, 2021, the Court granted Plaintiff leave to file a sur-reply addressing the narrow question of how the testimony supports the allegations made in her complaint and militates in favor of denying Defendants' motion to dismiss. (Dkt. 16).

During the hearing, Chairman Dick Durbin and Senator Corey Booker both made statements or asked questions about the OLC Opinion. Chairman Durbin plainly stated that the Opinion "wrongly declar[ed] in [his] estimation that federal inmates released to home confinement under the bipartisan CARES Act must return to [BOP] custody following the COVID-19 emergency." *Id.* at 00:24:16–00:24:31. Regarding "the home confinement issue" Chairman Durbin asked Attorney General Garland whether he "agree[d] that recalling the thousands of individuals who successfully transitioned back into society would be contrary to the purpose of home confinement." *Id.* at 00:51:42–00:52:24. Attorney General Garland responded that the program under the CARES Act "ha[d] proven successful." *Id.* at 00:52:24–00:52:30. He also indicated that he was "strongly in favor of being able to continue [the home confinement program]."

Id. at 00:52:45–00:52:49. In response, Chairman Durbin stated: “I’m hoping that we can get a definitive *reversal* of the OLC Opinion.” *Id.* at 00:52:51–00:53:08 (emphasis added).

Senator Booker asked Attorney General Garland where he stood on the issue. *Id.* at 02:42:19–02:44:53. AG Garland responded “I agree, it is a terrible policy to return these people to prison after they have shown that they are able to live in home confinement without violations ... And, as a consequence, we are reviewing the OLC memorandum.” Adding that the Department of Justice (“DOJ”) was reviewing “other authorities,” he suggested that Congress may have given DOJ permission “to keep people on home confinement.” *Id.* at 02:43:53–02:44:17. He also said that President Biden was exploring “his clemency authority.” *Id.* at 02:44:18–02:44:28. Asked by Senator Booker how long he expected the review to take before a determination was made, Attorney General Garland said he was unsure but indicated that “we’re not in a circumstance where anybody will be returned before we have completed that review and implemented any changes we need to make.” *Id.* at 02:44:26–02:45:30.

ARGUMENT

Attorney General Garland’s colloquy with Senators Durbin and Booker establishes that last January’s OLC Opinion was “final agency action.” That DOJ is now reviewing that OLC Opinion with an eye to “reverse,” “rescind,” or find workaround for it demonstrates that the Opinion currently binds the Bureau of Prisons (otherwise it would not need to be undone). *See id.* at 00:51:42–00:53:08; 02:42:19–02:44:28. Attorney General Garland’s testimony is consistent with Defendant BOP Director

Carvajal’s April testimony to the same committee, saying “the agency had no power to continue the terms of home confinement and ‘ask[ed] that the ‘statute be changed.’” Compl. ¶¶ 47-54; *see also* Pl. Resp. Br. in Opp. at 12-13 (Dkt. 14).

Even if DOJ identifies other authority from Congress giving BOP permission to keep people on home confinement, Attorney General Garland’s statements on the subject verify that he views the OLC Opinion as requiring either an alteration or a workaround in order to permit individuals released under the CARES Act to remain on home confinement. That Defendants cannot—according to their own testimony—change their policy without some additional action or legislative authority establishes that they are bound by the OLC Opinion, despite disagreeing with its interpretation. If the Opinion were not a final agency action, but rather were merely tentative or interlocutory, as Defendants assert, then they could simply change it. But they admit that they cannot change course absent repeal of the Opinion or additional authority permitting them to do so. In sum, the OLC Opinion marks the “consummation” of Defendants’ decision-making process, binds them, and subjects Ms. Martinez-Brooks to an automatic return to prison at the end of the covered emergency period. *See Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also* Pl. Resp. Br. in Opp. at 13-18.

CONCLUSION

For the foregoing reasons as well as those stated in the response in opposition, Plaintiff respectfully requests that this Court deny Defendants’ motion to dismiss this action for lack of subject-matter jurisdiction.

Dated: November 12, 2021

Respectfully submitted,

/s/ Kara Rollins

KARA ROLLINS (Attorney ID 107002014)

Litigation Counsel

NEW CIVIL LIBERTIES ALLIANCE

1225 19th Street NW, Suite 450

Washington, DC 20036

(202) 869-5210

Counsel to Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that on November 12, 2021, I electronically filed the foregoing Response in Opposition to Defendants' Motion to Dismiss with the Clerk of Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

s/ Kara Rollins

KARA ROLLINS (Attorney ID 107002014)

Litigation Counsel