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10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 RICHARD ANTHONY WILFORD,  
13 Petitioner,  
14 v.  
15 JAMES ENGLEMAN, Warden,  
16 Respondent.

No. 2:24-cv-01470-DDP-GJS

RESPONDENT'S RESPONSE TO BRIEF OF  
AMICI CURIAE AMERICAN CIVIL  
LIBERTIES UNION FOUNDATION AND  
ACLU FOUNDATION OF SOUTHERN  
CALIFORNIA

17  
18 Respondent James Engleman, Warden of the Federal Correctional  
19 Institution at Terminal Island, by and through his counsel of record,  
20 the United States Attorney for the Central District of California and  
21 Assistant United States Attorney Matthew Tang, hereby files this  
22 Response to the American Civil Liberties Union Foundation and the  
23 American Civil Liberties Union Foundation of Southern California's  
24 amici curiae brief.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

The American Civil Liberties Union Foundation and the American Civil Liberties Union Foundation of Southern California (collectively, "amici") claim that the Bureau of Prisons ("BOP") removed petitioner from his "home, jobs, and loved ones" with "no process whatsoever." Doc. No. 21-3 ("Amici Br.") at 3. That is not true. Petitioner received the full panoply of due process protections when he was convicted, and then sentenced, in 2014 to a term of 340 months' imprisonment.<sup>1</sup> Accordingly, it is not fundamentally unfair for petitioner to serve the remainder of his sentence, which is set to end on August 4, 2030<sup>2</sup>, in a secured BOP facility.

The question before the Court is not whether the BOP may deprive petitioner of liberty without due process -- petitioner was already provided due process. Rather, the question is whether the BOP, having placed petitioner in home confinement on June 15, 2023, pursuant to the Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, 134 Stat. 281 ("CARES Act"), properly removed petitioner from home confinement after the coronavirus pandemic had ended. The answer is yes.

Although the CARES Act granted the BOP authority to place inmates in extended home confinement, it did so on a temporary basis to address the impact of the COVID-19 pandemic on overcrowded

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<sup>1</sup> Petitioner's sentence was later reduced to 280 months' imprisonment after the sentencing court granted in part Petitioner's motion for compassionate release.

<sup>2</sup> That is, assuming petitioner earns all available Good Conduct Time and Earned Time Credits under the First Step Act.

1 prisons. Under the CARES Act, the BOP's extended home confinement  
2 authority expired on May 10, 2023, when the "covered emergency  
3 period" defined by the CARES Act ended. The BOP could therefore  
4 return petitioner to a secured facility because: (1) the BOP exceeded  
5 its authority when it placed petitioner in home confinement after May  
6 10, 2023; and (2) the BOP in any case had discretion to remove  
7 petitioner from home confinement after the end of the "covered  
8 emergency period."

9 **II. BACKGROUND**

10 **A. Petitioner's Projected Release Date is August 4, 2030**

11 On August 7, 2014, petitioner was sentenced in the District of  
12 Maryland to 340 months' imprisonment following his conviction for  
13 conspiracy to distribute and possess with intent to distribute  
14 cocaine in violation of 21 U.S.C. § 846. Doc. No. 8-1 ("Sanchez  
15 Decl.") ¶ 4(a). On July 1, 2022, the Maryland district court granted  
16 in part petitioner's Motion for Compassionate Release, reducing his  
17 sentence from 340 months' to 280 months' imprisonment. See United  
18 States v. Wilford, No. CR ELH-11-258, 2022 WL 2392237, at \*50 (D. Md.  
19 July 1, 2022). Based on this reduced sentence, petitioner's  
20 projected release date is August 4, 2030, assuming he earns all  
21 available Good Conduct Time and Earned Time Credits under the First  
22 Step Act. Sanchez Decl. ¶¶ 4(c), (d).

23 **B. The BOP's Authority to Place Inmates in Home Confinement**  
24 **Pursuant to the CARES Act Expired on May 10, 2023**

25 Under 18 U.S.C. § 3624(c)(1), a prisoner is only eligible for  
26 prerelease custody, including home confinement, in the final twelve  
27 months of his or her sentence. See 18 U.S.C. § 3624(c)(1); United  
28 States v. Robles, No. CR-15-08033-PCT-DGC, 2021 WL 5299682, at \*2 (D.



1 Ariz. Nov. 15, 2021) (“Because Defendant is not presently serving the  
2 final year of his term of imprisonment, he is not eligible for early  
3 release to home confinement or a residential reentry center under the  
4 SCA.”). Moreover, under 18 U.S.C § 3624(c)(2), the BOP is only  
5 permitted to place prisoners in home confinement “for the shorter of  
6 10 percent of the term of imprisonment of that prisoner or 6 months.”  
7 18 U.S.C. § 3624(c)(2).

8 In response to the coronavirus pandemic, however, Congress  
9 passed the CARES Act, which the President signed on March 27, 2020.  
10 Under the CARES Act, the Director of the BOP could “lengthen the  
11 maximum amount of time for which the Director is authorized to place  
12 a prisoner in home confinement” under 18 U.S.C. 3624(c)(2) “as the  
13 Director determines appropriate.” CARES Act, § 12003(b)(2). The  
14 CARES Act thus permitted the BOP to place a prisoner in home  
15 confinement for more than six months, and before the final twelve  
16 months of his or her sentence.

17 Importantly, section 12003 of the CARES Act was a temporary  
18 measure meant to address the impact of the coronavirus pandemic on  
19 overcrowded prisons. See United States v. Gutierrez, No. 1:11-CR-  
20 30009-AA-3, 2020 WL 6743000, at \*1 (D. Or. Nov. 17, 2020). The  
21 Director of the BOP only had authority to lengthen the maximum home  
22 confinement time “[d]uring the covered emergency period.” Id. The  
23 “covered emergency period,” in turn, “means the period beginning on  
24 the date on which the President declared a national emergency . . .  
25 with respect to the Coronavirus Disease 2019 (COVID-19) and ending on  
26 the date that is 30 days after the date on which the national  
27 emergency declaration terminates.” Id. § 12003(a)(2).

1 On April 10, 2023, the President signed a joint resolution of  
2 Congress terminating the COVID-19 national emergency. H.J.R. Res. 7,  
3 118th Cong. (2023) (enacted). The "covered emergency period" thus  
4 ended on May 10, 2023, 30 days after the termination of the COVID-19  
5 national emergency. Accordingly, after that date, the BOP no longer  
6 had authority under the CARES Act to lengthen the maximum amount of  
7 time for which a prisoner may be placed on home confinement.  
8 Instead, under 18 U.S.C. § 3624(c)(2), the BOP could only place  
9 petitioner in home confinement for a maximum of six months. And  
10 under 18 U.S.C. § 3624(c)(1), the BOP could only place petitioner in  
11 home confinement during the final twelve months of his sentence.

12 **C. The BOP Placed Petitioner in Home Confinement on June 15,**  
13 **2023, After Its Authority to Do So Under the CARES Act Had**  
14 **Expired, and Revoked Petitioner's Home Confinement Soon**  
15 **Afterward**

16 On May 9, 2023, one day before the end of the covered emergency  
17 period, the Warden of the Federal Correctional Institution at  
18 Terminal Island in San Pedro, California ("FCI Terminal Island")  
19 referred petitioner to placement in a Residential Reentry Center  
20 ("RRC") and stated that petitioner was "being reviewed for immediate  
21 Home Confinement (HC) based on guidelines due to the COVID-19  
22 pandemic." Sanchez Decl. ¶ 5, Ex. B at 2. The BOP, however, did not  
23 place petitioner in home confinement until June 15, 2023, over one  
24 month after its authority to do so under the CARES Act had expired.  
25 Sanchez Decl. ¶ 6(b). The BOP subsequently revoked petitioner's home  
26 confinement, and on August 2, 2023, the United States Marshal Service  
27 removed petitioner from home confinement. Sanchez Decl. ¶ 6(c).

1 **III. ARGUMENT**

2 **A. The BOP Could Take Petitioner Out of Home Confinement**  
3 **Because It Never Had Authority to Place Petitioner in Home**  
4 **Confinement in the First Place**

5 1. The BOP Had the Power to Correct the Mistake It Made  
6 When It Placed Petitioner in Home Confinement

7 The BOP's authority to place petitioner in home confinement for  
8 more than six months expired on May 10, 2023, when the "covered  
9 emergency period" under the CARES Act ended. Although the warden of  
10 the facility where petitioner was incarcerated indicated that  
11 petitioner was being reviewed for placement in home confinement on  
12 May 9, 2023 -- one day before the end of the "covered emergency  
13 period" -- the BOP did not actually place petitioner in home  
14 confinement until June 15, 2023. As the CARES Act only authorized  
15 the Director of the BOP to "lengthen the maximum amount of time for  
16 which the Director is authorized to place a prisoner in home  
17 confinement" during the "covered emergency period," the BOP exceeded  
18 its authority when it transferred petitioner to home confinement well  
19 before the final twelve months of his sentence and purported to  
20 lengthen the amount of time it could place petitioner in home  
21 confinement from six months to over seven years<sup>3</sup> after the "covered  
22 emergency period" had already ended. See CARES Act, § 12003(b)(2).

23 The BOP erroneously placed petitioner in home confinement before  
24 he was eligible for home confinement. See United States v. Ricks,  
25 No. CR 15-00132 SOM, 2023 WL 6216910, at \*2 (D. Haw. Sept. 25, 2023)  
26 ("The BOP Director's emergency authorization to transfer incarcerated  
27 \_\_\_\_\_

28 <sup>3</sup> Petitioner was placed in home confinement on June 15, 2023,  
over seven years before his projected release date of August 4, 2030.

1 people to home confinement more than six months before their  
2 anticipated release date expired earlier this year.”). The BOP could  
3 therefore take petitioner out of home confinement to rectify that  
4 mistake. In Green v. Christiansen, 732 F.2d 1397 (9th Cir. 1984),  
5 for example, the Ninth Circuit held that “prison authorities had the  
6 power to recommit [petitioner] after he was released by mistake so  
7 long as his sentence would not have expired had he remained in  
8 confinement.” Id. at 1399. If prison authorities can recommit an  
9 inmate after a mistaken release from prison, it follows a fortiori  
10 that they can return an inmate from one custodial arrangement to  
11 another after a mistaken placement. See id. (“A ministerial mistake  
12 does not necessarily excuse [petitioner] from serving the rest of his  
13 sentence.”).

14 2. The BOP’s Mistake Did Not Violate Petitioner’s Due  
15 Process Rights

16 The Ninth Circuit has found that in a narrow set of  
17 circumstances, the government may violate due process by  
18 reincarcerating an erroneously released prisoner. See Johnson v.  
19 Williford, 682 F.2d 868 (9th Cir. 1982). Such a violation, however,  
20 requires government misconduct that amounts to “more than  
21 negligence.” Id. at 873. Indeed, the government’s actions must be  
22 “so affirmatively improper or grossly negligent that it would be  
23 unequivocally inconsistent with ‘fundamental principles of liberty  
24 and justice’ to require a legal sentence to be served in its  
25 aftermath.” United States v. Martinez, 837 F.2d 861, 864 (9th Cir.  
26 1988) (quoting Green, 732 F.2d at 1399).

27 In Johnson, for example, the petitioner was ineligible for  
28 parole, but the government nevertheless “encouraged and heightened”

1 the petitioner's expectation of release on parole through "at least  
2 eight separate administrative reviews" spanning two years. Johnson,  
3 682 F.2d at 870, 872. This "culminat[ed] in 15 months of parole  
4 release" before the government realized its error and returned  
5 petitioner to custody. Id. The court held that the government's  
6 actions justified the petitioner's expectation that his parole would  
7 continue such that the government could be estopped from returning  
8 the petitioner to custody. Id.

9 The BOP did not foster a similar expectation here, nor were its  
10 actions "so affirmatively improper or grossly negligent" as to  
11 require petitioner's placement in home confinement for the remaining  
12 seven years of his sentence. The record indicates that the BOP  
13 conducted a single administrative review in May 2023 before placing  
14 petitioner in home confinement in June 2023, and that the BOP quickly  
15 rectified its error in August 2023. Sanchez Decl. ¶¶ 5, 6, Exs. B,  
16 C. The BOP did not "encourage and heighten" petitioner's expectation  
17 of a particular custodial placement through multiple rounds of  
18 interviews, nor were petitioner's expectations cemented by having  
19 remained in home confinement for an extended period of time.

20 Petitioner could not have spent much longer than a month waiting to  
21 be placed in home confinement; and he was only in home confinement  
22 for fewer than seven weeks. These timescales pale in comparison to  
23 the two years of anticipation and fifteen months of parole described  
24 in Johnson. See also Martinez, 837 F.2d at 864 (government's seven  
25 and one-half year delay in incarcerating petitioner "[did] not  
26 constitute action so affirmatively wrong or inaction so grossly  
27 negligent that fundamental fairness [was] violated").

28

1           Importantly, unlike the petitioner in Johnson, petitioner here  
2 was never released from custody. A release from prison carries with  
3 it an expectation of finality that a custodial transfer does not.  
4 Whereas the BOP generally does not have unfettered discretion to  
5 return an inmate to prison, it has sole authority to "designate the  
6 place of [a] prisoner's imprisonment." 18 U.S.C. § 3621(b).  
7 Petitioner therefore could not have had the same expectation of  
8 remaining in home confinement as he would have had remaining released  
9 on parole.

10           Moreover, parole is a longstanding part of our criminal justice  
11 system. Home confinement as a form of pre-release custody, on the  
12 other hand, is a much more recent addition. See Crime Control Act of  
13 1990, Pub. L. No. 101-647, 104 Stat. 4789 (enacted November 29,  
14 1990). And since its introduction, the use of home confinement has  
15 generally been limited to the final six months of an inmate's  
16 sentence. 18 U.S.C. § 3624(c)(2). Although the CARES Act eventually  
17 permitted periods of home confinement exceeding six months, it did so  
18 in response to a unique emergency and on a temporary basis. Given  
19 that the coronavirus pandemic had ended by the time petitioner was  
20 placed in home confinement, and that the remaining seven years of  
21 petitioner's sentence far exceeded the typical six months of home  
22 confinement allowable under 18 U.S.C. § 3624(c)(2), petitioner's  
23 mistaken placement in home confinement for only one and a half months  
24 before his return to BOP facilities is not "unequivocally  
25 inconsistent with 'fundamental principles of liberty and justice.'"

26           The BOP's mistake in placing petitioner in home confinement for  
27 one and a half months may have constituted negligence, but it "did  
28 not rise to the level of gross negligence, thereby violating due

1 process.” Martinez, 837 F.2d at 865. Because Petitioner’s short  
2 time in home confinement does not entitle him to seven additional  
3 years of pre-release custody, the Court should reject amici’s  
4 arguments to the contrary.

5 **B. Alternatively, The BOP Could Take Petitioner Out of Home**  
6 **Confinement Because Its Decision to Do So is Purely**  
7 **Discretionary**

8 1. The CARES Act Permitted Placement and Removal from  
9 Home Confinement on a Purely Discretionary Basis

10 The BOP has sole authority to “designate the place of [a]  
11 prisoner’s imprisonment.” 18 U.S.C. § 3621(b). Such “a designation  
12 of a place of imprisonment . . . is not reviewable by any court.”  
13 Id.; see also United States v. Ceballos, 671 F.3d 852, 855 (9th Cir.  
14 2011) (“The [BOP] has the statutory authority to choose the locations  
15 where prisoners serve their sentence.”).

16 The BOP’s authority to designate the place of imprisonment  
17 extends to home confinement, subject to the limitation that the BOP  
18 can only “place a prisoner in home confinement for the shorter of 10  
19 percent of the term of imprisonment of that prisoner or 6 months.”  
20 18 U.S.C. § 3624(c)(2). In the wake of the Coronavirus pandemic,  
21 however, Congress drafted the CARES Act to temporarily lift that  
22 limitation. CARES Act, § 12003(b)(2). But in doing so, Congress was  
23 careful to state that “the Director of the [BOP] may lengthen the  
24 maximum amount of time for which the Director is authorized to place  
25 a prisoner in home confinement . . . as the Director determines  
26 appropriate.” Id. (emphasis added). The Director’s authority to  
27 lengthen petitioner’s home confinement placement under the CARES Act  
28

1 is therefore discretionary. See Doc. No. 13 (“Report and  
2 Recommendation”) at 5-6 (citing cases).

3 Amici acknowledge that the BOP’s initial placement of an inmate  
4 in home confinement under the CARES Act is discretionary. Amici Br.  
5 at 14. Amici, however, attempt to distinguish the BOP’s initial  
6 decision to place an inmate in home confinement and the BOP’s  
7 subsequent decision to remove an inmate from home confinement. Id.  
8 This distinction has no basis in the law. The CARES Act temporarily  
9 permitted the BOP to place a petitioner in home confinement for  
10 longer than six months. Nowhere does the CARES Act require such a  
11 placement to be for the remainder of an inmate’s sentence.

12 “In passing the CARES Act, Congress expanded the authority of  
13 the [BOP] to utilize the home confinement authorized by 18 U.S.C.  
14 § 3624(c) to address the exigencies and dangers of crowded prisons  
15 during a pandemic.” Gutierrez, 2020 WL 6743000, at \*1. It stands to  
16 reason that after such exigencies and dangers have passed, the BOP  
17 can return the inmates it had transferred to home confinement  
18 pursuant to the CARES Act back to prison. Notably, the Department of  
19 Justice’s (“DOJ”) Office of Legal Counsel (“OLC”) previously  
20 concluded that “all home-confinement prisoners who did not fall  
21 within section 3624(c)(2)’s time limits must be returned to a  
22 correctional facility” after the expiration of the “covered emergency  
23 period.” See Discretion to Continue the Home-Confinement Placements  
24 of Fed. Prisoners After the Covid-19 Emergency, 2021 WL 6145876, at  
25 \*3 (O.L.C. Dec. 21, 2021) (emphasis added). The OLC has now softened  
26 its position, opining that the CARES Act “give[s] the [BOP]  
27 discretion over which inmates to return to facilities and which to  
28 leave in home confinement at the end of the emergency period.” Id.



1 at \*4. But given the temporary nature of the CARES Act, the question  
2 has always been whether the CARES Act mandated the return of home-  
3 confinement prisoners to secured facilities at the end of the  
4 emergency period, or whether the CARES Act gave the BOP discretion to  
5 permit some prisoners to remain in home confinement after the  
6 emergency period had ended. Under either interpretation, the BOP  
7 could lawfully remove petitioner from home confinement after the end  
8 of the emergency period.

9 Amici nevertheless take the extreme position that the CARES Act,  
10 a temporary measure, mandates a permanent solution, i.e., the  
11 placement of prisoners in home confinement beyond the "covered  
12 emergency period." Amici argue that Congress intended home  
13 confinement to be served during "the final months" of an inmate's  
14 sentence. Amici Br. at 9-10 (quoting 18 U.S.C. § 3624(c)(1)). This  
15 is not accurate. 18 U.S.C. § 3624(c)(1) expresses an intention that  
16 "a portion of the final months" be spent in pre-release custody,  
17 which can include RRC placement, not just home confinement, and only  
18 "to the extent practicable." Id. (emphasis added). Nor is it  
19 relevant. Amici rely on Congressional intent as it relates to a  
20 statute enacted several decades before the CARES Act, and not the  
21 CARES Act itself. Even accepting amici's assertion, however, the BOP  
22 may still allow petitioner to spend the final months of his sentence  
23 in home confinement without allowing petitioner to spend the final  
24 seven years of his sentence in home confinement. The BOP's removal  
25 of petitioner from home confinement several years before the end of  
26 his sentence is therefore consistent with both the CARES Act and 18  
27 U.S.C. § 3624(c).

2. Department of Justice Regulations Permit Removal from Home Confinement on a Purely Discretionary Basis

Under 28 C.F.R. § 0.96, the BOP may “permit[]” a prisoner who had been placed in home confinement prior to the expiration of the “covered emergency period” to remain on home confinement after the expiration of the “covered emergency period,” but only “as the Director determines appropriate,” and “provided the prisoner is compliant with all conditions of supervision.” 28 C.F.R. § 0.96(u)(2). Consistent with the OLC’s position described above, the rule does not require the BOP to permit a prisoner to remain in home confinement beyond the “covered emergency period,” it allows the BOP to do so. Moreover, the requirement that a prisoner comply with the terms of home confinement is a necessary, but not a sufficient, condition of remaining in home confinement past the “covered emergency period.”

Amici cite to 28 C.F.R. § 0.96, but misread it. They assert that the rule “authorizes remand to prison only “[i]n the event that a prisoner violates conditions of supervision[.]” Amici Br. at 10 (alterations in original). To be clear, the rule states: “In the event a prisoner violates the conditions of supervision, Bureau staff may return the prisoner to secure custody . . . .” 28 C.F.R. § 0.96(u)(2). Intentional or not, amici’s addition of the word “only” completely changes the rule’s meaning. Just because the BOP may return a prisoner to secure custody in the event of a violation, does not mean that the BOP may return a prisoner to secure custody only in the event of a violation.

Amici next cite a BOP memorandum opinion, claiming that it supports their position that prisoners can only be transferred back

1 to secure correctional facilities if they violate the conditions of  
2 home confinement. Amici Br. at 10-11. The opinion does not lend  
3 amici the support they think it does. It states that “[u]nder  
4 regular circumstances, inmates who have made [the] transition to home  
5 confinement would not be returned to a secured facility, unless there  
6 was a disciplinary reason for doing so.” Views Regarding OLC  
7 Opinion, “Home Confinement of Federal Prisoners After the COVID-19  
8 Emergency” dated January 15, 2021, at 5 (Dec. 10, 2021) (“BOP  
9 Memorandum”) (emphasis added). The negative implication is that  
10 there are circumstances where home-confinement inmates would be  
11 returned to a secured facility without a disciplinary reason for  
12 doing so. Indeed, a later-published OLC memorandum opinion, citing  
13 the BOP Memorandum, has taken the position that the CARES Act “is  
14 ‘most reasonably interpreted’ to give the [BOP] discretion over which  
15 inmates to return to facilities and which to leave in home  
16 confinement at the end of the emergency period.” Discretion to  
17 Continue the Home-Confinement Placements of Fed. Prisoners After the  
18 Covid-19 Emergency, 2021 WL 6145876, at \*4 (O.L.C. Dec. 21, 2021)  
19 (quoting BOP Memorandum).

20 Taken together, 28 C.F.R. § 0.96 and the two memorandum opinions  
21 make clear that the BOP has discretion to decide whether prisoners  
22 placed in home confinement pursuant to the CARES Act should remain in  
23 home confinement. As such, the BOP’s exercise of discretion to  
24 remove petitioner from home confinement remained well within the  
25 ambit of its authority.

26 3. Discretionary Acts Do Not Require Process

27 “[T]he Due Process Clause does not require process unless, in  
28 the individual case, there is a relevant factual dispute between the

1 parties.” Gonzalez-Fuentes v. Molina, 607 F.3d 864, 894 (1st Cir.  
2 2010) (quoting Sandin v. Conner, 515 U.S. 472, 503 (1995) (Breyer,  
3 J., dissenting)). Absent a factual dispute, a hearing would serve no  
4 purpose. Codd v. Velger, 429 U.S. 624, 627 (1977) (“[I]f the hearing  
5 mandated by the Due Process Clause is to serve any useful purpose,  
6 there must be some factual dispute . . . which has some significant  
7 bearing on [the underlying deprivation].”).

8 Amici contend that a hearing is needed to determine whether  
9 petitioner violated the conditions of home confinement. Amici Br. at  
10 21-22. But such a hearing would serve no purpose -- the BOP does not  
11 claim that petitioner violated any conditions of home confinement.  
12 Instead, as discussed above, the BOP could, and did, exercise its  
13 discretion to remove petitioner from home confinement for the sole  
14 reason that the “covered emergency period” under the CARES Act has  
15 ended. Because the “exigencies and dangers of crowded prisons during  
16 a pandemic” no longer exist, the BOP has discretion to return  
17 prisoners placed in home confinement pursuant to the CARES Act back  
18 to a secured facility. The exercise of such discretion does not  
19 implicate a prisoner’s due process rights. See Olim v. Wakinekona,  
20 461 U.S. 238, 249 (1983) (“If the decisionmaker is not required to  
21 base its decisions on objective and defined criteria, but instead can  
22 deny the requested relief for any constitutionally permissible reason  
23 or for no reason at all, the State has not created a constitutionally  
24 protected liberty interest.” (citation and internal quotation marks  
25 omitted)); Reeb v. Thomas, 636 F.3d 1224, 1229 n.4 (9th Cir. 2011)  
26 (“discretionary determinations regarding conditions of confinement do  
27 not create due process rights” (citing Moody v. Daggett, 429 U.S. 78,  
28 88 n.9 (1976))); Triplett v. FCI Herlong, Warden, No. 2:22-CV-0083 AC

1 P, 2023 WL 2760829, at \*3 (E.D. Cal. Apr. 3, 2023) (“Because the BOP  
2 has the discretion to return petitioner to home confinement, to keep  
3 him in prison, or to place him in a residential reentry program,  
4 petitioner was not deprived of any constitutionally protected liberty  
5 interest when the BOP opted to have him returned to prison”).

6 Amici attempt to analogize CARES Act home confinement to parole  
7 as described in Morrissey v. Brewer, 408 U.S. 471 (1972), by  
8 asserting that the prisoners placed in home confinement enjoy almost  
9 as much liberty as those released on parole. Amici Br. at 8-9.

10 Amici miss the point. Home confinement under the CARES Act differs  
11 from parole primarily because home confinement under the CARES Act  
12 was meant to be temporary, and the BOP has discretion to return CARES  
13 Act home-confinement prisoners to secure custody after the end of the  
14 “covered emergency period” for any reason, or for no reason at all.  
15 This discretion does not exist in the parole context, where parole is  
16 expected to last until the expiration of the sentence, and where a  
17 parole-revocation decision “involves a . . . factual question:  
18 whether the parolee has in fact acted in violation of one or more  
19 conditions of his parole.” Morrissey, 408 U.S. at 479.

20 Petitioner’s reliance on Young v. Harper, 520 U.S. 143 (1997) is  
21 similarly misplaced because Young, like Morrissey, did not involve a  
22 purely discretionary decision. There, Oklahoma’s parole board had  
23 revoked an inmate’s participation in a preparole conditional release  
24 program. Id. at 145-46. The Supreme Court rejected the state  
25 officials’ assertion that the parole board “had authority to  
26 reimprison a preparolee for any reason or for no reason” because they  
27 brought up the argument “for the first time in this Court” and  
28 “point[ed] to nothing to support their contention.” Id. at 151 n.3.

1 Instead, it held that the inmate had a protected liberty interest in  
2 the program, basing its decision in large part on its finding that  
3 “preparole as it existed at the time of respondent’s release was  
4 equivalent to parole as understood in Morrissey.” Id. at 147.  
5 Parole as understood in Morrissey, in turn, could not be revoked for  
6 any reason or no reason at all -- it required “an appropriate  
7 determination that the individual has in fact breached the conditions  
8 of parole.” Morrissey, 408 U.S. at 483-84.

9 Here, the BOP did not need to make a factual determination that  
10 petitioner violated the conditions of home confinement in order to  
11 return him to a secured facility. The legal basis for placing  
12 petitioner in home confinement in the first place ended with the  
13 conclusion of the CARES Act’s “covered emergency period.” The BOP  
14 could therefore remove petitioner from home confinement for the  
15 simple reason that it could safely return petitioner to a prison that  
16 was not overcrowded or affected by the pandemic.

17 Amici nevertheless argue that those on CARES Act home  
18 confinement “rely on an ‘implicit promise’ that they will remain on  
19 home confinement as long as they comply with conditions of release.”  
20 Amici Br. at 9. Amici, however, provide no legal authority for this  
21 assertion. As discussed above, the DOJ rule and memorandum amici  
22 cite demonstrate the opposite. Petitioner therefore has no due  
23 process right in his temporary placement in home confinement. See  
24 Cardoza v. Pullen, No. 3:22-CV-00591 (SVN), 2022 WL 3212408, at \*6  
25 (D. Conn. Aug. 9, 2022) (“Petitioner has not plausibly alleged that  
26 she had a liberty interest in remaining in home confinement because  
27 she has not set forth allegations forming the basis of an implicit  
28

1 promise that she would remain on home confinement status if she  
2 behaved properly.”).

3 4. Courts Have Held That the BOP Has Discretion to Return  
4 Prisoners on CARES Act Home-Confinement to Secured  
5 Facilities

6 Contrary to amici’s suggestion, courts have held that prisoners  
7 in home confinement pursuant to the CARES Act have no  
8 constitutionally protected interest in remaining in home confinement.  
9 In Triplett, for example, the court stated that “petitioner was not  
10 deprived of any constitutionally protected liberty interest when the  
11 BOP opted to have him returned to prison” without process. Triplett,  
12 2023 WL 2760829, at \*3. Although amici are correct that Triplett  
13 ultimately dismissed the petition for lack of standing, it did so  
14 based on its conclusion that the BOP’s revocation of home confinement  
15 did not violate due process. See id. (“Without a violation of a  
16 constitutional right, petitioner has no standing to file a petition  
17 under Section 2241 . . .”). Additionally, Touzier directly held  
18 that the BOP’s removal of a prisoner from home confinement did not  
19 violate the prisoner’s due process rights because “a duly convicted  
20 prisoner does not have a liberty interest in his place of  
21 confinement.” Touzier v. Att’y Gen. of United States, No. 20-CV-  
22 25169, 2021 WL 371593, at \*4 (S.D. Fla. Feb. 3, 2021). The Eleventh  
23 Circuit affirmed, noting that “[j]ust as the BOP has the authority  
24 to release prisoners to home confinement, so too does it have the  
25 power to revoke that release.” Touzier v. U.S. Att’y Gen., No. 21-  
26 10761, 2021 WL 3829618, at \*2 (11th Cir. Aug. 27, 2021).

27 Amici note that other courts have dismissed similar due process  
28 claims on jurisdictional grounds. Amici Br. at 15-17. These courts,

1 however, held that they lack jurisdiction because the BOP's decision  
2 to revoke home confinement is discretionary. See, e.g., Albrecht v.  
3 Birkholz, No. CV 23-1587-GW(E), 2023 WL 5417099, at \*2 (C.D. Cal.  
4 June 23, 2023) ("Petitioner's claim that the BOP violated due process  
5 by revoking his home confinement placement alleges only a challenge  
6 to the BOP's individualized placement decision. The Ninth Circuit  
7 squarely has held that a federal court lacks jurisdiction under  
8 Section 2241 to review the BOP's individualized placement  
9 decision."); Tetterton v. Warden, FCI Fort Dix, No. CV 23-1394 (CPO),  
10 2023 WL 4045086, at \*3 (D.N.J. June 16, 2023) (dismissing petition  
11 challenging revocation of home confinement for lack of jurisdiction  
12 because "the federal CARES Act . . . vests in the Director of the  
13 Bureau of Prisons discretion to transfer an inmate to home  
14 confinement"); Romano v. Warden, FCI Fairton, No. CV 23-1052 (CPO),  
15 2023 WL 3303450, at \*2 (D.N.J. May 8, 2023) (same).

16 The weight of authority thus favors an interpretation of the  
17 CARES Act that allows the BOP to exercise its authority to return  
18 prisoners from home confinement to secure custody now that the  
19 "covered emergency period has ended."

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1 **IV. CONCLUSION**

2 For the foregoing reasons, Respondent respectfully requests that  
3 this Court adopt the Report and Recommendation and dismiss the  
4 Petition.

5

6 Dated: December 16, 2024

Respectfully submitted,

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/s/  
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