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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MICHAEL ROMANO, *Petitioner*, v. WARDEN, FCI FAIRTON, *Respondent*.	Civil Action No.: 1:23-cv-02919-CPO **BRIEF OF AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER'S MOTION FOR SUMMARY JUDGMENT**

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INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization dedicated to the principles of liberty and equality embodied in our nation's Constitution and civil rights laws. The American Civil Liberties Union of New Jersey ("ACLU-NJ") is a state affiliate of the ACLU whose mission is to preserve, advance, and extend the individual rights and liberties guaranteed to every New Jerseyan by the State and Federal Constitutions in courts, in legislative bodies, and in our communities.

Since its founding over a century ago, the ACLU has regularly appeared as counsel and as *amicus curiae* in this nation's courts on a variety of civil-rights issues, including to advocate for the rights of the criminally accused and convicted. The ACLU has an interest in this matter because we regularly engage in litigation and advocacy to uphold the due process rights of people involved in the criminal legal system like those conditionally released from prison. For example, as relevant here, the ACLU has litigated multiple Freedom of Information Act ("FOIA") requests to obtain records regarding people placed on home confinement pursuant to the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act" or "the Act") and people who the Bureau of Prisons ("BOP") later revoked from that placement. *See* ACLU, *American Civil Liberties Union v. Federal Bureau of Prisons (CARES Act FOIA)*, https://www.acludc.org/en/cases/american-civil-

liberties-union-v-federal-bureau-prisons-cares-act-foia; Complaint, *American Civil Liberties Union v. Federal Bureau of Prisons*, No. 1:24-cv-00699 (D.D.C filed Mar. 11, 2024), ECF No. 1. Additionally, the ACLU filed an *amici curiae* brief in *Wilford v. Engleman*, a similar case challenging the federal government's authority to revoke home confinement absent any alleged violation or due process. No. 24-cv-1470 (C.D. Cal. Nov. 17, 2024), ECF Nos. 21-3 (proposed brief), 27 (granting motion to appear as *amici*). Further, the ACLU has authored reports regarding the constitutional rights of people subject to correctional supervision, including *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (2020), https://www.aclu.org/publications/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states. Thus, the ACLU can offer a wide perspective on the due process issues presented in this case.[1]

SUMMARY OF ARGUMENT

This case is about whether the Bureau of Prisons ("BOP") may remove people from their community and remand them to federal prison absent *any* alleged violation and with no process whatsoever. It also raises the question of whether the court is empowered to order a meaningful remedy if it determines that re-imprisonment violated the U.S. Constitution.

[1] The parties have consented to the ACLU's participation as *amici curiae* and this Court granted the ACLU leave to file this *amici curiae* brief. ECF No. 39.

In June 2022, BOP released Michael Romano to home confinement pursuant to the CARES Act. Mr. Romano spent one month at home reconnecting with his loved ones and reintegrating into his community. Then in July 2022—absent any alleged wrongdoing—BOP suddenly revoked Mr. Romano's home confinement and re-imprisoned him. Since then, Mr. Romano has spent over two years in prison, absent any alleged violation or opportunity to contest his revocation. This violates due process.

The Supreme Court has confirmed that home is far different from prison. In *Morrissey v. Brewer*, 408 U.S. 471 (1972), the Court held that people conditionally released from prison have a vested liberty interest that cannot be revoked absent an alleged violation, notice, and opportunity to be heard. Twenty-five years later, the Court applied *Morrissey*'s protections to a preparole program that "was sufficiently like parole[.]" *Young v. Harper*, 520 U.S. 143 (1997). Home confinement is materially indistinguishable from parole and preparole. Thus, as multiple district courts have held, people on home confinement have a protected liberty interest that BOP cannot revoke without the level of due process required by *Morrissey*.

The Government rejects this conclusion and stunningly asserts that—*even if* BOP illegally re-imprisoned Mr. Romano—this Court is powerless to consider Mr. Romano's claims or restore him to home confinement. That is patently wrong. BOP mistakenly focuses on agency discretion to grant CARES Act home confinement

placement in the *first instance*. But that is not at issue here. Mr. Romano agrees that such authority lies exclusively with BOP and ended 30 days after the expiration of the COVID-19 emergency period.[2]

This case is about the Court's authority where BOP has *already granted* home confinement. Specifically, it concerns the Court's authority to (a) consider whether BOP revoked that placement unlawfully and, if so, (b) remedy that violation by restoring the petitioner to home confinement. This Court plainly can. Federal courts review revocation decisions and order people restored to forms of conditional release that they could not grant in the first place. Indeed, courts do so even when the original authority for the conditional release is abolished prior to the restoration. Moreover, the government's view would permit untenable results: due process violations without a meaningful remedy. If this view prevails, BOP could arbitrarily re-imprison anyone and everyone on home confinement and, even if federal courts found the revocations unconstitutional, courts would be powerless to restore people to their lawful home confinement status.

Notably, Mr. Romano's unlawful incarceration is particularly harmful now. On December 12, 2024, President Biden commuted the sentences of nearly 1,500 people who were placed on home confinement pursuant to the CARES Act.[3] Even

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[2] *See* CARES Act, Pub. L. No. 116-136, div. B, tit. II, § 12003(2), 134 Stat. 517 (Mar. 27, 2020) ("CARES Act").

[3] White House, *Fact Sheet: President Biden Announces Clemency for Nearly 1,500*

though Mr. Romano was placed on CARES Act home confinement, and has a pending commutation petition, his sentence was not commuted.[4] Presumably, absent his current unlawful incarceration, Mr. Romano would have been among those individuals granted clemency.

Accordingly, this Court should exercise jurisdiction over this matter, hold that BOP revoked Mr. Romano's home confinement in violation of the Due Process Clause, and order Mr. Romano restored to home confinement.

ARGUMENT

I. This Court has jurisdiction to consider Mr. Romano's § 2241 petition.

This Court has jurisdiction to consider Mr. Romano's § 2241 petition challenging BOP's erroneous revocation of his home confinement. Critically, this case is not about BOP's *initial decisions* to grant or deny home confinement placement pursuant to the CARES Act. As this Court has held, "BOP's decisions on that issue are not reviewable by any court." *Tetterton v. Warden, FCI Fort Dix*, No. 23-cv-1394, 2023 WL 4045086, at *2-3 (D.N.J. June 16, 2023) (citation omitted); *see* 18 U.S.C. § 3621(b).

Americans (Dec. 12, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/12/12/fact-sheet-president-biden-announces-clemency-for-nearly-1500-americans/.

[4] White House, *Clemency Recipient List* (Dec. 12, 2024), https://www.whitehouse.gov/briefing-room/statements-releases/2024/12/12/clemency-recipient-list-7/; Michael Romano, Clemency Case No. C309866 (2024) (pending), https://www.justice.gov/pardon/search-clemency-case-status.

Rather, this case is about BOP's authority—once it has *already granted* home confinement—to revoke that placement without due process. This is a fundamentally different question. As the Supreme Court explained, "[t]he differences between an initial grant of parole and the revocation of the conditional liberty of the parolee are well recognized." *Greenholtz v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 10 (1979). This is because "[i]t is not sophistic to attach greater importance to a person's justifiable reliance in maintaining his conditional freedom so long as he abides by the conditions of his release, than to his mere anticipation or hope of freedom." *Id.* (citation omitted). Further, irrespective of BOP's statutory discretion, "judicial review remains available for allegations that BOP action violates the United States Constitution[.]" *Dababneh v. Warden Loretto FCI*, No. 19-2370, 792 Fed. App'x 149, 151 (3d Cir. 2019).

Section 2241 is the proper vehicle for Mr. Romano's claim. Mr. Romano does not challenge any conditions of confinement. Rather, he challenges the "'execution' of his sentence[,]" which is cognizable under § 2241. *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 241 (3d Cir. 2005); *see Wilford v. Engleman*, No. 24-cv-1470-DDP, 2024 WL 3973063, at *4 (C.D. Cal. June 27, 2024) (challenge to home confinement revocation proper under § 2241 because "relief would affect the manner and location of the execution of his sentence"). Moreover, the Supreme Court has explained that habeas is "the specific instrument to obtain release" where—as here—

the petitioner's conditional release "was unlawfully revoked, causing him to be reincarcerated in prison[.]" *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973) (citing *Morrissey*, 408 U.S. 471). Thus, this Court plainly has jurisdiction to consider this constitutional due process question.

II. BOP revoked Mr. Romano's home confinement without due process.

A. People conditionally released from prison have a protected liberty interest.

The Supreme Court has confirmed that a person conditionally released from prison lives a life far different than one who remains incarcerated. In *Morrissey v. Brewer*, the Court held that people on parole have a "valuable" constitutionally protected liberty interest in remaining in the community. *Morrissey*, 408 U.S. at 482. This is because, even while such people remain in "custody" and must abide by certain conditions, they enjoy "many of the core values of unqualified liberty." *Id.* That liberty "enables [them] to do a wide range of things open to persons who have never been convicted of any crime" such as obtaining gainful employment, living at home, spending time with loved ones, and "form[ing] the other enduring attachments of normal life." *Id.* Further, a person on parole is "entitled to retain his liberty as long as he substantially abides by the conditions of his parole," and therefore relies on "at least an implicit promise that parole will be revoked only if he fails to live up to the parole conditions." *Id.* at 479, 482. Finally, revocation "inflicts a 'grievous loss' on the parolee and often on others." *Id.* at 482.

Accordingly, the Court determined that "the Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of [] conditional liberty[.]" *Black v. Romano*, 471 U.S. 606, 610 (1985) (summarizing *Morrissey*). Substantively, revocation is only permissible if the accused "fails to abide by the rules" of their conditional release. *Morrissey*, 408 U.S. at 479. The "decision to revoke" therefore entails "a retrospective factual question whether the [supervisee] has violated a condition[.]" *Black*, 471 U.S. at 611. Where the record is "so totally devoid of evidentiary support" that the petitioner in fact violated a supervision rule, revocation is impermissible. *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (invalidating revocation absent evidence of a violation).

Procedurally, the government cannot deprive people conditionally released from prison of their liberty without certain basic due process protections. These include (a) written notice of the allegation and their rights; (b) a prompt preliminary hearing before an independent decisionmaker to determine whether there is probable cause to support the alleged violation, including the right to appear at the hearing, present witnesses and documentary evidence, and confront adverse witnesses; and (c) a final revocation hearing before a neutral decisionmaker within a reasonable time to determine whether they committed a violation and, if so, whether circumstances in mitigation suggest that the violation does not warrant revocation. *Morrissey*, 408 U.S. at 485-89. Rights at the final revocation hearing include: (1)

disclosure of the evidence against them; (2) the opportunity to be heard in person before an independent decisionmaker and to present witnesses and documentary evidence; (3) the right to confront and cross-examine adverse witnesses; and (4) a written statement by the decisionmaker as to the evidence relied on and reasons for revoking home confinement. *Id.* at 488-89. People also have a due process right to assistance of counsel under certain circumstances, including if the accused has a "colorable claim" of innocence or of substantial mitigating factors that are difficult to develop or present. *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

Twenty-five years after *Morrissey*, the Supreme Court extended *Morrissey's* due process protections to a "preparole" program in *Young v. Harper*. There, the Court explained that "[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence." *Young*, 520 U.S. at 147 (quoting *Morrissey*, 408 U.S. at 477). The Court held that the preparole program "differed from parole in name alone." *Id.* at 145. Like parolees, the preparolee in *Young* "was released from prison before the expiration of his sentence. He kept his own residence; he sought, obtained, and maintained a job; and he lived a life generally free of the incidents of imprisonment."' *Id.* at 148. Further, he relied on an "'implicit promise' that his liberty would continue so long as he complied with the conditions of his release." *Id.* at 150 (quoting *Morrissey*, 408 U.S. at 482). Thus, although preparole differed

in some ways from parole, it "was sufficiently like parole" that *Morrissey*'s due process protections applied *Id.* at 145.

B. *Morrissey* and *Young* apply to home confinement.

Home confinement is materially indistinguishable from the parole program considered in *Morrissey* and the preparole program at issue in *Young*. During home confinement, while people remain technically in "custody" and must follow certain rules, they may participate in a wide array of activities open to people who have not been convicted of crimes, including living at home with their loved ones, seeking and maintaining gainful employment, and engaging with their community.[5] Some home confinement conditions, such as electronic monitoring, were not at issue in *Morrissey* or *Young*, but given "technological advancements" in the decades since those decisions, *Tompkins v. Pullen,* No. 22-cv-00339, 2022 WL 3212368, at *10 (D. Conn. Aug. 9, 2022), and a general shift toward punitive supervision, such conditions are now commonplace for people on post-prison supervision.[6] Even with

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[5] *See* Senator Cory Booker, *CARES Act Home Confinement Three Years Later*, at 9 (June 2023), https://www.booker.senate.gov/imo/media/doc/cares_act_home_confinement_policy_brief1.pdf.

[6] *See* Columbia University Justice Lab, *Too big to succeed: The impact of the growth of community corrections and what should be done about it*, at 5 (Jan. 29, 2018), https://justicelab.columbia.edu/sites/default/files/content/Too_Big_to_Succeed_Report_FINAL.pdf (discussing increased use of electronic monitoring on parole and probation); Human Rights Watch & ACLU, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (2020),

these added conditions, the status of people on home confinement "is very different from that of confinement in a prison." *See Morrissey*, 408 U.S. at 482; *Young*, 520 U.S. at 147; *Tompkins*, 2022 WL 3212368, at *10.

Moreover, those on home confinement—and their loved ones—rely on an "implicit promise" that they will remain on home confinement as long as they comply with conditions of release.[7] *See Young*, 520 U.S. at 147-48 (quoting *Morrissey*, 408 U.S. at 482). Their home confinement conditions "sa[y] nothing" about revocation without cause. *Id.* at 151; *see Tompkins*, 2022 WL 3212368, at *10. This implicit promise has further been communicated through governing statutes, rules, BOP policies, and statements by senior BOP officials. For example, Congress specified that home confinement is intended to be served during "the *final months* of [the individual's] term." 18 U.S.C. § 3624(c)(1) (emphasis added). Senior BOP officials have explained that they screened people for CARES Act home confinement placement "for service of the remainder of their sentences."[8]

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https://www.aclu.org/publications/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states (discussing punitive shift in supervision).

[7] "[I]t is not clear how heavily this promise or this reliance weighed in the overall analysis" in *Morrissey* and *Young*, but "[r]egardless of the weight to be given this factor, [] there is ample evidence in the record which could lead Petitioner to reasonably expect that []he would not be reincarcerated without cause." *Tompkins*, 2022 WL 3212368, at *10.

[8] U.S. Dep't of Just., Statement of Michael D. Carvajal, Director, and Dr. Jefferey Allen, Medical Director, Federal Bureau of Prisons, Before the U.S. Senate

Further, the 2023 Department of Justice Final Rule for home confinement under the CARES Act confirms that, following expiration of the Act, people already on CARES Act home confinement can remain there—and may only be remanded to prison "[i]n the event that [the person] violates the conditions of supervision[.]"[9] This comports with BOP statements that people are subject to "transfer back to secure correctional facilities if there are any significant disciplinary infractions or violations of the [home confinement] agreement."[10] As former BOP General Counsel Kenneth Hyle explained, generally people on home confinement "would not be returned to a secured facility, unless there was a disciplinary reason for doing so, as the benefit of home confinement is to adjust to life back in the community, and therefore removal from the community would obviously frustrate that goal."[11]

Committee on the Judiciary, at 6 (June 2, 2020), https://www.judiciary.senate.gov/imo/media/doc/Carvajal-Allen%20Joint%20Testimony.pdf.

[9] Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 88 Fed. Reg. 19830, at 19840 (Apr. 4, 2023) https://www.govinfo.gov/content/pkg/FR-2023-04-04/pdf/2023-07063.pdf.

[10] U.S. Dep't of Just., Fed. Bureau of Prisons, Memorandum for Christopher H. Schroeder, Assistant Att'y Gen., Office of Legal Counsel, from Kenneth Hyle, Gen. Couns., Re: Views Regarding OLC Opinion, *Home Confinement of Federal Prisoners After the COVID-19 Emergency*, at 5 (Dec. 10, 2021) ("BOP Memo"), https://www.aclu.org/sites/default/files/field_document/bop_cares_memo_12.10.21.pdf; *see also* U.S. Dep't of Just., Fed. Bureau of Prisons, *Home Confinement Program Statement*, at 7 (Sept. 6, 1995), https://www.bop.gov/policy/progstat/7320_001_CN-1.pdf ("major violations [] could result in the inmate's termination from the program").

[11] BOP Memo at 5.

Indeed, BOP's own data reflects that revocation of home confinement is "atypical," which "reasonably could instill an expectation that one would continue on home confinement absent good cause for revocation." *Tompkins*, 2022 WL 3212368, at *11. Of the 13,204 people released to CARES Act home confinement, only 499—or just 4 percent—were removed from home confinement for an alleged violation. Senator Booker, *CARES Act Home Confinement Three Years Later* at 5.

Revocation of home confinement is an "immediate disaster," *Wolff v. McDonnell*, 418 U.S. 539, 561 (1974), and "inflicts a 'grievous loss' on the parolee and often on others," *Morrissey*, 408 U.S. at 482—ripping people away from their jobs, homes, caregiving obligations, and community ties.[12] For example, BOP revoked home confinement and re-imprisoned Virginia Lallave, who was caring for her young children including a ten-month-old baby;[13] Quinteria Daniels, a mother to three young children;[14] and Eva Cardoza, the primary caregiver for four young children and her fiancé, who suffers from cancer and heart disease[15]—all for alleged

[12] *See* Tiffany Cusaac-Smith, *They were released from prison because of COVID-19. Their freedom didn't last long*, USA Today (July 20, 2022, 5:59 AM), https://www.usatoday.com/story/news/nation/2022/07/20/prison-home-confinement-covid-incarceration/7536257001/?gnt-cfr=1.

[13] Petition for Writ of Habeas Corpus at 2, *Lallave v. Martinez*, No. 22-cv-791 (E.D.N.Y. filed Feb. 11, 2022), ECF No. 1.

[14] Petition for Writ of Habeas Corpus at 5, *Daniels v. Martinez*, No. 22-cv-918 (E.D.N.Y. filed Feb. 18, 2022), ECF No. 1.

[15] Petition for Writ of Habeas Corpus at 12-13, *Cardoza v. Pullen*, No. 22-cv-591 (D. Conn. filed Aug. 17, 2022), ECF No. 33.

non-criminal technical violations and without notice or any opportunity to be heard. As discussed below, courts reviewing these cases held that BOP's revocation practices likely violated due process, and thus granted release pending adjudication of their habeas petitions.[16]

Given the fundamental similarities to parole in *Morrissey* and preparole in *Young,* multiple district courts have held that these precedents apply to home confinement revocation. A Northern District of New York court recently held that "as in *Young* and *Morrissey*, Petitioner's home confinement allowed Petitioner to live at home 'free of the incidents of imprisonment'" and thus "Petitioner possesses a liberty interest in home confinement" that could not be revoked without "*Morrissey* protections[.]" *Mason v. Alatary*, No. 9:23-cv-193, 2024 WL 3950643, at *6-10 (N.D.N.Y. Aug. 27, 2024). Similarly, two District of Connecticut decisions held that "home confinement within one's community unquestionably is more analogous to parole and to pre-parole than it is to confinement within a prison" and therefore people on home confinement have a "liberty interest that trigger[s] due process protections as described in *Morrissey*." *Tompkins*, 2022 WL 3212368, at *10-11; *accord Freeman v. Pullen*, 658 F. Supp. 3d 53, 65-66 (D. Conn. 2023). Numerous

[16] *See infra* note 17.

other courts have found such claims "substantial" and granted release pending disposition of the habeas petitions.[17]

Some district courts have rejected challenges to home confinement revocation, but this Court should not rely on those decisions. All but two courts dismissed without reaching the merits or addressing the directly applicable precedents of *Morrissey* and *Young*. For instance, in *Triplett v. FCI Herlong, Warden*, the court dismissed for lack of standing and jurisdiction, without reaching the merits. No. 22-cv-83, 2023 WL 2760829, at *3-4 (E.D. Cal. Apr. 3, 2023), *report and recommendation adopted*, 2023 WL 3467145 (E.D. Cal. May 15, 2023).[18] Moreover, the court's justiciability analysis was fatally flawed. The court mistakenly addressed BOP's authority to grant home confinement placement *in the first instance* rather than the relevant question: BOP's authority, once it *has already granted* home confinement, to revoke that placement without due process. *See supra* Section I.

[17] *See* Order, *Cardoza v. Pullen*, No. 22-cv-591 (D. Conn. Aug. 22, 2022), ECF No. 39 ("Petitioner raises a substantial claim of a violation of her procedural due process rights"); Order, *Daniels v. Martinez*, No. 22-cv-918 (E.D.N.Y. Feb. 23, 2022) (similar); Order, *Lallave v. Martinez*, No. 22-cv-791 (E.D.N.Y. Feb. 11, 2022) (similar); Order, *Wiggins v. Stover*, No. 3:23-cv-842 (D. Conn. July 27, 2023), ECF No. 19 (similar). Each case ultimately was dismissed on other grounds, given the petitioner was no longer incarcerated, and accordingly the courts did not reach this issue on the merits.

[18] *See also Touizer v. Att'y Gen. of the U.S.*, No. 20-cv-25169, 2021 WL 371593, at *4 (S.D. Fla. Feb. 3, 2021), *aff'd,* 2021 WL 3829618 (11th Cir. Aug. 21, 2021) (similar).

To counsel's knowledge, only two decisions rejected the petitioner's claim on the merits, and neither controls. In *Wilford v. Engleman*, a Magistrate Judge recommended rejecting a challenge to home confinement revocation absent any alleged violation or due process. No. 24-cv-1470-DDP, 2024 WL 3973063 (C.D. Cal. June 27, 2024).[19] But *Wilford* is not binding on this Court. Moreover, the Magistrate erroneously relied on (a) district court cases that, as explained above, did not reach the merits and wrongly rejected jurisdiction, *id.* at *8 (citing *Triplett*, 2023 WL 2760829; *Touizer*, 2021 WL 371593)[20] and (b) a cursory footnote in a Ninth Circuit case that concerned a distinguishable prison-based program, "RDAP," that is not comparable to home confinement, *id.* (citing *Reeb v. Thomas*, 636 F.3d 1224, 1228 n.4 (9th Cir. 2011)).[21]

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[19] The petitioner filed Objections to the Report and Recommendation, *Wilford v. Engleman*, No. 24-cv-1470 (C.D. Cal. July 17, 2024), ECF No. 16, and the ACLU filed a supporting *amici curiae* brief, *id.* at ECF No. 21-3. As of today's filing, the District Judge has not ruled on the Objections.

[20] *Wilford* inaccurately characterized this Court's prior ruling in this case and in *Tetterton* as holding that people on home confinement lack a liberty interest. *See id.* However, those decisions did not reach the merits. Rather, this Court concluded that the exception to the exhaustion requirement for actions that "*clearly and unambiguously* violate … [Petitioner's] constitutional rights" did not apply. *Tetterton*, 2023 WL 4045086, at *7-8; *Romano v. Warden, FCI Fairton*, No. 23-cv-1052, 2023 WL 3303450, at *7-8 (D.N.J. May 8, 2023). That is a distinct inquiry from whether, as a matter of *first impression*, people on home confinement have a liberty interest in remaining in the community.

[21] The *Reeb* Court cursorily stated that people do not have a protected liberty interest in RDAP. That is irrelevant here because (1) RDAP is materially distinguishable from home confinement as it is based inside federal prisons, rather than the

Additionally, a Massachusetts federal court held that "regression from home confinement to imprisonment" did not "deprive [petitioner] of a liberty interest[.]" *Hatch v. Lappin*, 660 F. Supp. 2d 104, 112 (D. Mass. 2009). However, *Hatch* is not binding on this Court, entirely failed to address the relevant precedents in *Young* and *Morrissey*, and may no longer be good law. As the *Freeman* court explained, "it is not clear whether *Hatch* survived the First Circuit's finding in *Gonzalez-Fuentes v. Molina*, 607 F.3d 864 (1st Cir. 2010), that people in Puerto Rico's electronic supervision program (a program similar to home confinement) indeed have a liberty interest in remaining in the program." *Freeman*, 658 F. Supp. 3d at 64. Thus, neither *Wilford* nor *Hatch* control.

Accordingly, this Court should hold that people on home confinement have a liberty interest that cannot be revoked without *Morrissey* due process protections.

i. **BOP revoked Mr. Romano's home confinement absent any alleged violation or process.**

Here, BOP unlawfully revoked Mr. Romano's home confinement absent (1) any alleged violation or (2) due process. First, revocation was substantively erroneous because BOP did not accuse Mr. Romano of violating any home confinement condition. While BOP's justification for re-imprisoning Mr. Romano

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community, and carries only the *potential* for early release from prison, whereas people on home confinement have *already* been released to the community, *id.* at 1225-26, and (2) the due process question was not squarely presented in *Reeb*, *id.* at 1228 n.4.

has shifted over time, all of its fleeting reasons essentially boil down to: After granting Mr. Romano home confinement, BOP changed its mind. Thus, BOP unlawfully revoked Mr. Romano's home confinement absent an alleged violation. *See Morrissey*, 408 U.S. at 479.

Second, Mr. Romano's revocation is independently unconstitutional because BOP failed to provide the procedural protections required by *Morrissey*. *See id.* at 485-89. Indeed, BOP did not even provide the bare minimum process—which *amici* contend is constitutionally inadequate—required under BOP's own "inmate discipline" procedures, which include notice, an initial disciplinary committee proceeding followed by a hearing before a Detention Hearing Officer, and assistance of a staff representative.[22] Rather, BOP uprooted Mr. Romano from his home and remanded him to federal prison with no notice or opportunity to be heard whatsoever. Thus, BOP violated Mr. Romano's constitutional due process rights.

III. This Court Has the Power to Order Mr. Romano Restored to Home Confinement.

A. Courts have broad discretion to fashion habeas relief.

The U.S. Supreme Court has made clear that "a court has broad discretion in conditioning a judgment granting habeas relief." *Hilton v. Braunskill*, 481 U.S. 770,

[22] *See* U.S. Dep't of Justice, Fed. Bureau of Prisons, *Inmate Discipline Program*, Program Statement 5270.09, at 23-36 (July 8, 2011), https://www.bop.gov/policy/progstat/5270_009.pdf.

775 (1987). Federal courts may "dispose of habeas corpus matters 'as law and justice require.'" *Id.* (quoting 28 U.S.C. § 2243). Indeed, "[h]abeas 'is, at its core, an equitable remedy.'" *Boumediene v. Bush*, 553 U.S. 723, 780 (2008) (quoting *Schlup v. Delo*, 513 U.S. 298, 319 (1995)). The purpose of habeas remedies is to "restore [the petitioner] to the position in which he would have been had the deprivation of his right . . . not occurred." *Boyd v. Nish*, No. 06-cv-491, 2007 WL 403884, at *5 (E.D. Pa. Jan. 31, 2007), *rev'd on other grounds*, 579 F.3d 330 (3d Cir. 2009) (collecting cases); *see also Lujan v. Garcia*, 734 F.3d 917, 935 (9th Cir. 2013) (same).

Restoring Mr. Romano to home confinement is the appropriate remedy here. This case is similar to *Young v. Harper*, where the Supreme Court held that the government unlawfully revoked the petitioner's preparole absent any alleged violation or process, and affirmed the Tenth Circuit's remedy: remand to the district court "with instructions to issue the writ of habeas corpus unless Mr. Harper is reinstated to the [preparole] Program." *Harper v. Young*, 64 F.3d 563, 567 (10th Cir. 1995), *aff'd*, 520 U.S. 143 (1997). The Court confirmed that "[a]fter reinstatement, any attempt to remove Mr. Harper from the Program must, of course, comply with the procedures mandated by" *Morrissey*. *Id.*

Likewise here, the proper remedy is restoration to home confinement. Given, as in *Young*, Mr. Romano has not been accused of any violation, there is no need to

remand for a revocation hearing. Any future attempt to revoke his home confinement "must, of course, comply with" *Morrissey*. *See id.*

B. The expiration of the CARES Act does not prevent BOP or this Court from restoring Mr. Romano to home confinement

The CARES Act's expiration deprives neither BOP nor this Court of the power to restore Mr. Romano to home confinement. Here again, the authority to grant CARES Act home confinement *in the first instance* is irrelevant: federal courts never had that ability, *see Tetterton*, 2023 WL 4045086, at *2, and BOP lost it with the expiration of the CARES Act. Instead, this case is about the power—where BOP has *already granted* home confinement—to remedy erroneous revocations by restoring people to their lawful home confinement status.

BOP and this Court plainly have such authority, regardless of their ability to place people on conditional release in the first instance. That is precisely what happened in *Young v. Harper*: The Supreme Court ordered the petitioner restored to preparole to remedy his unlawful revocation—even though the Court plainly could not have authorized the petitioner's *initial* placement on a state preparole program. *See Young*, 64 F.3d at 567.

Indeed, government entities restore people to forms of conditional release that no longer exist. Take federal parole, which Congress eliminated for federal crimes

committed on or after November 1, 1987.[23] The U.S. Parole Commission ("USPC") cannot grant parole for any crime committed on or after that date, and courts cannot impose parole-eligible sentences for such crimes. But USPC still administers revocation hearings for people *already* on parole prior to abolition, and, if it determines revocation is unwarranted, restores them to parole. *See* 28 C.F.R. §§ 2.50, 2.52 (a)(1). Likewise, federal courts review the legality of federal parole revocations and, if unlawful, order people restored to federal parole. *See, e.g.*, *John v. U.S. Parole Com'n*, 122 F.3d 1278, 1283-86 (9th Cir. 1997) (holding federal parole revocation violated due process and remanding for new hearing that could result in petitioner being "restored [to] parole"); *Darouse v. U.S. Parole Com'n,* No. 03-6861, 90 Fed. App'x 675, 676 (4th Cir. 2004) (ordering district court to consider challenge to legality of federal parole revocation hearing). This is so even though neither entity can place people on federal parole for crimes committed today.

The same is true for home confinement. The CARES Act's expiration bars BOP from releasing *new people* to CARES Act home confinement, but it has no bearing on (a) BOP's authority to restore people *already* on home confinement if their placement was revoked erroneously or (b) this Court's authority to order such

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[23] *See* U.S. Department of Justice, *United States Parole Commission*, https://www.justice.gov/doj/organization-mission-and-functions-manual-united-states-parole-commission#:~:text=The%20Sentencing%20Reform%20Act%20of,under%20the%20witness%20protection%20program. (last visited Dec. 9, 2024).

restoration. Accordingly, if the Court determines that Mr. Romano's revocation was unlawful, it can order him restored to home confinement. Alternatively, as in *Young*, the Court may issue a writ of habeas corpus unless BOP reinstates Mr. Romano to the home confinement program. *See Young*, 64 F.3d at 567.

The Government's position, in contrast, invites arbitrary and unconstitutional revocations. Under the Government's view, BOP could arbitrarily re-imprison anyone and everyone on home confinement—without cause; due to an error; based on a protected characteristic such as religious or political affiliation; or for some other unlawful basis—and, even if courts found the revocations unconstitutional, the federal judiciary would be powerless to restore people to their lawful home confinement status. That is untenable. It is thus critical that courts both recognize and exercise their power to remedy erroneous revocations by restoring people to home confinement when they have been unlawfully removed from that placement.

Notably, Mr. Romano's unlawful incarceration is particularly harmful now. On December 12, 2024, President Biden commuted the sentences of nearly 1,500 people who were placed on home confinement pursuant to the CARES Act—recognizing that the Act has been a resounding success.[24] Indeed, of the over 13,000 people released under the Act, more than 99 percent have safely and successfully

[24] White House, *Fact Sheet: President Biden Announces Clemency for Nearly 1,500 Americans*.

reintegrated into their communities.[25] Although Mr. Romano was placed on CARES Act home confinement, and has a pending commutation petition, his sentence was not commuted.[26] Presumably, absent his current unlawful incarceration, Mr. Romano would have been among those individuals serving CARES Act home confinement who were granted clemency.

CONCLUSION

This Court should hold that BOP violated Mr. Romano's constitutional due process rights and, to remedy the violation, restore him to home confinement.

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Respectfully Submitted,

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[25] Senator Cory Booker, *CARES Act Home Confinement Three Years Later*, at 4.
[26] White House, *Clemency Recipient List*; Michael Romano, Clemency Case No. C309866 (2024) (pending).

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