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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MICHAEL ROMANO,	:	
Petitioner	:	
v.	:	Civil Action No. 23-2919
	:	Honorable Christine P.
	:	O'Hearn
WARDEN, FCI FAIRTON,	:	
Respondent	:	
	:	

PETITIONER'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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I. Preliminary Statement

Two and a half years ago, Michael Romano was released from FCI Fairton to home confinement under the CARES Act. He had been incarcerated since 2014, and in June of 2022 was released consistent with BOP guidelines during the COVID-19 pandemic. 27 days after his release, he was suddenly revoked and returned to custody. He did not commit a violation. He did not receive notice. He did not receive a hearing. He did not even receive an accurate explanation for years. Only recently has the discovery shown that Mr. Romano was revoked because a group of prosecutors were dissatisfied with his home confinement, and continued to press BOP until it revoked him. The action appears largely unprecedented and plainly violated Mr. Romano's due process rights.

The government has taken uniformly untenable positions throughout this litigation. It has offered shifting explanations for Mr. Romano's revocation. It has claimed this Court lacks jurisdiction or that the issue is moot. It has asserted that due process is only available to inmates on home confinement if they commit a violation, not those who are in compliance. It has even asserted that there is no possible remedy here, and, at best, this Court can order it to hold a sham hearing that the government has already averred will never result in Mr. Romano's return to home confinement. This Court has been rightly dubious of the government's arguments because the government is wrong.

This Court should grant Mr. Romano summary judgment on his petition for habeas corpus relief under Federal Rule of Civil Procedure 56. The Court has

jurisdiction under 28 U.S.C. § 2241. The BOP violated Mr. Romano's due process rights by revoking him from home confinement contrary to the protections of *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Young v. Harper*, 520 U.S. 143 (1997). The appropriate remedy is to issue a writ of habeas corpus unless the BOP reinstates Mr. Romano's placement on home confinement, the qualified liberty he had been legitimately granted before the BOP's unlawful revocation.

<u>II.</u> <u>Facts</u>

The record facts are laid out in greater detail in Petitioner's Statement of Undisputed Material Facts ("SUMF") filed pursuant to Local Civil Rule 56.1. There is no genuine dispute that:

- Michael Romano is serving a 240-month sentence imposed in the Eastern District of New York for conspiracy to commit mail fraud and money laundering. SUMF, ¶¶ 1-2. He has been in continuous custody since he self-surrendered to FCI Fort Dix on April 26, 2014. SUMF, ¶ 3.

- As part of his sentence, Mr. Romano was ordered to pay approximately $9 million in restitution, and he has consistently made payments while in custody. SUMF, ¶¶ 2, 7.

- Mr. Romano has been an exemplary inmate and has received positive reports from staff because of his work in the prison helping other inmates. He never received a single disciplinary infraction. SUMF, ¶¶ 5-6.

- Mr. Romano transferred to the camp at FCI Fairton in July 2021. SUMF, ¶ 8.

- Starting as soon as the COVID-19 pandemic was declared, Congress extended the BOP's authority to release inmates to home confinement before the 1month/six percent cap of 18 U.S.C. § 3624(c)(2). *See* Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, sec. 12003(b)(2), 134 Stat. 281, 516 (2020) (''CARES Act'').

- As part of the BOP's efforts, in February 2022, Mr. Romano was reviewed by BOP staff and recommended to be placed on home confinement. SUMF, ¶¶ 25-26. Mr.

Romano satisfied all of the criteria for placement, and had completed approximately 47 percent of his sentence, which meant his case was not prioritized for placement, but was also not prohibited. SUMF, ¶¶ 331.

- The Assistant United States Attorneys for the Eastern District of New York (AUSAs), and the victims of Mr. Romano's offense were appropriately notified in advance. SUMF, ¶¶ 33, 36.

- The AUSAs registered their objections and the victims' objections to Mr. Romano's placement on home confinement with BOP staff at FCI Fairton. SUMF, ¶ 33. These "major concerns" would be noted in the narrative portion of Mr. Romano's BP-210 form. SUMF, ¶ 40.

- The AUSAs also registered their objections with NER Legal Counsel for the BOP. Legal Counsel advised the AUSAs that Mr. Romano met the criteria and that "Wardens will most likely continue to rely on the current guidance in order to avoid the appearance of being unduly influenced in their decision making." SUMF, ¶ 34.

- The AUSAs then registered their objections with a former AUSA from the E.D.N.Y. who was now Senior Counsel in the Office of the Deputy Attorney General (ODAG). SUMF, ¶ 38.

- The AUSA wondered to her former colleague if "perhaps the AG is reconsidering these guidelines allowing the release of so many white collar defendants extremely early." SUMF, ¶ 39.

- Mr. Romano signed home confinement paperwork specifying he could be revoked for violating release conditions, and was also told not to violate the conditions lest he be returned to custody. SUMF, ¶¶ 28-29, 41.

- On June 22, 2022, Mr. Romano was released from FCI Fairton and picked up by his brother and fiancée. He first reported to his designated halfway house (RRM) in Brooklyn, New York, and then went to live in his sister's house in Levittown, New York. SUMF, ¶ 43.

- Mr. Romano spent time with his family, particularly his fiancée and 84-year-old mother, and visited his father's grave. He applied for jobs, health insurance, his social security card, to renew his driver's license, and made doctors' appointments. He was in full compliance with the conditions of home confinement. SUMF, ¶¶ 44-54.

- Around July 11, 2022, the AUSAs again reached out to their former colleague at the ODAG to complain about Mr. Romano's release. SUMF, ¶ 55.

- ODAG reached out to senior level staff at the BOP's Central Office inquiring about Mr. Romano's case. SUMF, ¶ 56.

- This inquiry generated a flurry of emails and oral communications between 16 BOP staff members, including several senior positions at the Correctional Programs Division, to consider the circumstances of Mr. Romano's placement on home confinement. SUMF, ¶ 57. Finding that Mr. Romano met all the criteria for placement, the Home Confinement Committee nonetheless reviewed his placement as if he had not already been placed on home confinement. SUMF, ¶ 58; Ex. D

- Mr. Romano is the only BOP inmate who was ever reassessed for placement on home confinement once he had already been placed. SUMF, ¶ 59 ("After a reasonably diligent search, BOP does not have within its possession, custody, or control information or documents regarding inmates that transferred to home confinement under the CARES Act and were reviewed post-transfer by specifically the Home Confinement Committee.").

- Mr. Romano is the only confirmed inmate at the BOP who was revoked from home confinement without an alleged violation of any kind, or any problem that could be deemed an RRC failure. SUMF, ¶67.

- The Home Confinement Committee (Rick Stover and Dana DiGiacomo) met and emerged with the statement that "Mr. Romano is not appropriate for home confinement at this time" and with the order that Mr. Romano should be returned to secure custody. SUMF, ¶ 61.

- In the early morning of July 18, 2022, Mr. Romano was called back to the halfway house but not told why. He was made to stay there overnight but was not told why. He was then picked up by the Marshals and not told why he was being taken into secure custody. He was taken to MDC Brooklyn where he was quarantined for several weeks, the whole time not being told the reason for his revocation. SUMF, ¶¶ 60-63.

- Once back in FCI Fairton in mid-August 2022, he was informally, and incorrectly, told by the Camp Administrator, C. Masters, that he was revoked because he had not yet served 50 percent of his sentence and that his application would be resubmitted once he did. SUMF, ¶ 64.

- Several hundred BOP inmates were released under the CARES Act before completing 50 percent of their sentence, including at least seven inmates from FCI Fairton between 2020 and 2022. SUMF, ¶ 32.

- Staff at FCI Fairton again moved to place Mr. Romano on home confinement in October 2022 when Mr. Romano had served 50 percent of his sentence. SUMF, ¶ 67.
- Mr. Romano's institutional referral for home confinement placement was dated November 4, 2022, but was not signed by the warden until December 23, 2022. SUMF, ¶¶ 68-69.
- Mr. Romano was denied release to home confinement based on a new internal memo that had issued on December 21, 2022, and directed that the RRM manager (the final level of approval for placement on home confinement) should seek out prosecutorial input where an inmate had more than five years left on his sentence. SUMF, ¶¶ 23, 69-71.

This Court should treat these facts as established.

III. Procedural History

Mr. Romano started his administrative remedy process on January 3, 2023, the day he learned he was denied placement on home confinement. SUMF, ¶ 70.

In February 2023, Mr. Romano filed a pro se petition under 28 U.S.C. § 2241 challenging his unlawful revocation, as well as the subsequent denial of placement on home confinement, which was docketed at Civil Action No. 23-1052. This Court ordered a limited response on the issues of jurisdiction and whether Mr. Romano had a liberty interest in remaining on home confinement. Ultimately, this Court denied the petition because Mr. Romano had not yet exhausted his administrative remedies. *Romano v. Warden*, 2023 WL 3303450, at *8 (May 8, 2023).

Mr. Romano exhausted his administrative remedies on April 24, 2023, when he was denied relief at the final stage of BOP review by an Administrator for the National Inmate Appeals. SUMF, ¶ 72.

Mr. Romano refiled a pro se petition under 28 U.S.C. § 2241 which was docketed

at Civil Action No. 23-2919. This Court ordered the Clerk of Court to appoint counsel, ECF No. 2, and undersigned counsel moved to be appointed, a request this Court granted, ECF No. 4. The government filed an Answer, with a Declaration from Jason Raguckas, the Case Management Coordinator at FCI Fairton. ECF No. 7. Through this declaration and legal argument, the government explained, again incorrectly, that it returned Mr. Romano to institutional confinement because of a "clerical error": he had not served 50 percent of his statutory sentence "as BOP requires." ECF No. 7, at 2, 6, 7, 17-18. It explained it had transferred Mr. Romano to home confinement "before he was eligible" and that he was returned to BOP custody "once BOP discovered this error." ECF No. 7 at 17. This was not true.

This Court then held a status conference on August 17, 2023, and granted undersigned counsel leave to file an amended petition. At that conference, the government continued to provide incorrect information and "clarif[ied] . . . that the return to FCI Fairton, the basis was not meeting the time-served requirement. . . . [The] rumblings about victim concerns . . . was the basis for the second resubmission denial." ECF No. 9, at page 11.

On October 20, 2023, undersigned counsel filed an amended petition for a writ of habeas corpus, along with a request for bail (called enlargement in the habeas context) and a request for discovery as authorized by Rule 6(a) of the Rules Governing Section 2254 Cases. ECF Nos. 14-17. The memorandum in support of the petition and corresponding exhibits provided a data set of thousands of BOP inmates placed on

CARES Act home confinement that had been produced by the BOP in response to FOIA litigation by the ACLU. The BOP's own data established that more than 500 people were released before serving 50 percent of their term, including seven people from FCI Fairton. SUMF, ¶ 32.

The government filed an Answer to the amended petition, this time with a revised certification from Jason Raguckas, ECF No. 20-11, as well as one from Rick Stover, who was the Correctional Programs Administrator and the Chairperson of the BOP's Home Confinement Committee in July 2022, ECF No. 20-2, at ¶ 2. This Second Raguckas declaration abandoned the first reason that "it was discovered that the transfer was in error," ECF No. 7-1, at ¶ 15, and now explained that shortly after Mr. Romano's release, "Petitioner was deemed inappropriate for CARES Act home confinement and returned to secure custody on July 19, 2022. It is my understanding that this decision was made in the Bureau's central office by the Home Confinement Committee." ECF No. 20-1, at ¶ 18. The Stover declaration stated that victims and AUSAs had been "voicing extreme concerns" and so the Home Confinement Committee had been tasked with deciding whether "Mr. Romano remaining on home confinement was appropriate." ECF No. 20-2, at ¶ 3. None of the ultimate reasons the Committee produced to justify revocation reflected any misconduct, change in circumstances, or even information that was not known before Mr. Romano's placement on home confinement. *See id.*, at ¶ 4. Stover's declaration also misstated the date Mr. Romano returned to FCI Fairton, the amount of Mr. Romano's restitution obligation,

and that Mr. Romano had not paid any of it – he had. SUMF, ¶ 7.

Petitioner filed a reply. ECF No. 21.

The parties also filed supplemental briefing on whether the case was moot. The government argued that it was, ECF No. 25, and Mr. Romano argued that it was not, ECF No. 24.

This Court held oral argument on April 23, 2024. At that time, seemingly relying on Stover's declaration, the government represented that in July 2022, "continued concerns expressed by the prosecuting U.S. Attorney's Office and now concerns from the victims that had trickled in . . . had caused Mr. Romano's placement to be referred to the Home Confinement Committee." ECF No. 31, at 29. Mr. Romano's first placement had been determined by staff at FCI Fairton and the government explained that the "BOP has the discretion" to "look[ ] at that again" in the Central office. *Id.* at 31. It cited no authority for that position. The government also explained that even if the court were to order or the BOP were to give Mr. Romano process, "the end result of that is not something BOP can do anything about." *Id.* at 47. Simply put, the government claimed there was no authority for BOP or even the Court to remedy any violation. This Court then ordered limited discovery about what the BOP knew at the time of the revocation, and also how many people got revoked because they had similarly been let out having not yet served 50 percent of their sentence. *Id*. at 50. This Court also denied bail at that time. *Id.* at 57.

Discovery produced by the government consisted of: (1) the production of

relevant documents, Exs. A-D, (2) Respondent's Objections And Responses To Petitioner's First Set of Interrogatories (the BOP elected not to serve any on Mr. Romano); ECF No. 43, at A22; (3) Responses to Petitioner's letter regarding discovery deficiencies, ECF No. 43, at A35-36. Most of the documents produced covered public information and BOP forms to which Mr. Romano already had access. The government produced a series of emails from July 11 to July 18, 2022, that showed the AUSAs raised the exact same objections to Senior Counsel at ODAG, ODAG then contacted senior BOP officials, and then the Home Confinement Committee moved to retroactively evaluate Mr. Romano for home confinement and revoke him. SUMF, ¶¶ 55-58; Ex. D.

This Court held another status conference on August 27, 2024, where the parties agreed to continue with limited discovery on the issue of remedy before filing cross-motions for summary judgment. This Court also granted the ACLU leave to file a brief as amicus curiae. ECF No. 39.

Mr. Romano renewed his request for bail on September 27, 2024, ECF No. 42, and that motion is outstanding.

IV. Standard of review

Rule 56(a) provides that summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). On a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party, *Tolan v. Cotton*, 572 U.S. 650, 656–57 (2014) (per curiam) (citation and

quotation omitted), and draw all reasonable inferences in that party's favor, *Scott v. Harris*, 550 U.S. 372, 378 (2007) (citations omitted). Nonetheless, the court must prevent factually unsupported claims and defenses from proceeding to trial. Fed. R. Civ. P. 56(a). In general, a dispute is "genuine" if a reasonable jury could find for either side. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251–52 (1986). And a fact is "material" if it "could affect the outcome." *Lamont v. New Jersey*, 637 F.3d 177, 181 (3d Cir. 2011). Accordingly, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment[.]" *Anderson*, 477 U.S. at 247-48 (emphasis in original).

V. Argument

Mr. Romano exhausted his administrative remedies, this Court has jurisdiction, the BOP violated Mr. Romano's constitutional rights, and the remedy is to issue a writ of habeas corpus unless the BOP reinstates him to home confinement.

A. Exhaustion

It is undisputed that Mr. Romano exhausted his administrative remedies on April 24, 2023, when he raised claims about his unlawful revocation and subsequent denial of placement on home confinement through all stages of the BOP's appeal process. *See* SUMF, ¶ 72; *see also Woodford v. Ngo*, 548 U.S 81, 88 (2006) (explaining exhaustion requires "complet[ion of] the [BOP's] administrative process in accordance with applicable procedural rules . . ."); 28 C.F.R. §§ 542.1-542.19.

B. Jurisdiction

This Court has jurisdiction to hear Mr. Romano's claim that he was revoked from home confinement and returned to institutional confinement in violation of the due process protections of *Morrissey v. Brewer*, 408 U.S. 471 (1972) and *Young v. Harper*, 520 U.S. 143 (1997).

A writ of habeas corpus under 28 U.S.C. § 2241 is the appropriate vehicle for Mr. Romano to challenge the revocation of his home confinement as a violation of due process. Section 2241 codifies the power of federal courts to grant writs of habeas corpus on behalf of prisoners who are "in custody in violation of the Constitution or laws or treaties of the United States." The Due Process Clause of the Fourteenth Amendment to the Constitution provides that no state shall "deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1. Under this clause, a court reaches the "question of what process is due only if the inmates establish a constitutionally protected liberty interest." *Wilkinson v. Austin*, 545 U.S. 209, 221 (2005). The central question here is whether Mr. Romano had a liberty interest in remaining on home confinement. The answer is yes.

Section 2241 has been interpreted, as relevant here, to be the proper procedural vehicle for a federal prisoner to challenge "not the validity but the execution of his sentence." *Coady v. Vaughn*, 251 F.3d 480, 485 (3d Cir. 2001). By contrast, a general attack on a condition of confinement should generally be raised in a civil-rights suit. *See Leamer v. Fauver,* 288 F.3d 532, 544 (3d Cir. 2002); *see also Porter v. Nussle,* 534 U.S.

516, 520 (2002) (discussing broad definition of "prison conditions").

"[T]he precise meaning of 'execution of the sentence' is hazy." *Woodall v. Fed. Bureau of Prisons*, 432 F.3d 235, 243 (3d Cir. 2005). One formulation of execution is actions by the BOP that are "somehow inconsistent with a command or recommendation in the sentencing judgment." *Cardona v. Bledsoe*, 681 F.3d 533, 537 (3d Cir. 2012). These prominent cases explaining "execution of the sentence" are factually inapposite to Mr. Romano's case: none involved release to home confinement, outside of institutional confinement, and then subsequent revocation with no notice or process. In *Woodall*, the court found jurisdiction under 2241 to hear a challenge to a regulation the BOP had promulgated shortening the petitioner's time in a halfway house below the length recommended by the sentencing court. 432 F.3d at 243. In *Cardona*, the court did not find jurisdiction under 2241 to review a referral to the special management unit of a prison, a program that severely limits an inmate, including his contact with other inmates. 681 F.3d at 537. As relevant here, challenges to prison disciplinary actions can constitute a challenge to the execution of sentence. *See Woodall*, 432 F.3d at 242 (citing *Jiminian v. Nash*, 245 F.3d 144 (2d Cir. 2001); *see also Jones v. Hendrix*, 599 U.S. 465, 475 (2023) (providing example of traditional challenge under Section 2241 when "an *administrative sanction* affecting the conditions of [ ] detention is illegal" (emphasis added).

Mr. Romano's case fits squarely within Supreme Court precedent that certain government actions, as opposed to legislative authorization, create an independent

constitutional liberty interest. The Supreme Court has found such an independent constitutional liberty interest where release from institutional life has been revoked, as in the case of a parolee, or where the restrictions imposed go beyond the original conditions of confinement. *See Morrissey v. Brewer,* 408 U.S. 471 (1972) (independent constitutional due process protection in case of *revocation* of parole); *Vitek v. Jones,* 445 U.S. 480, 491–94 (1980) (independent due process protection in involuntary transfer to mental hospital). Although these cases were from state prisoners and did not proceed under 28 U.S.C. § 2241, they are nonetheless controlling here. In *Morrissey v. Brewer*, the Supreme Court held that individuals on parole under an Iowa statute who remained "in the legal custody of the warden or superintendent" and could be reincarcerated "at any time," nevertheless had a due process right to adequate notice and a hearing before a neutral decisionmaker before their parole could be revoked. 408 U.S. at 481; *see also id.* at 493 n.2 (Douglas, J., dissenting in part) (describing parole regime). In *Young*, the Court found Oklahoma's program of preparole, and the "nature of the [releasee's] interest . . . in his continued liberty," was sufficiently similar to the parole program of *Morrissey.* 520 U.S. at 147-48. Once a person is at liberty, the interest in remaining at liberty is protected by the Due Process Clause, of its own force. *See Greenholtz v. Inmates of Nebraska Penal and Corr. Complex*, 442 U.S. 1, 9 (1979) (stressing the "crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires"); *cf. Asquith v. Department of Corrections*, 186 F.3d 407, 412 (3d Cir. 1999) (finding inmate had no liberty interest in remaining on work release program while

living in a halfway house: "His home was a penal institution. He might have resided beyond actual penitentiary walls, but he had not been 'released' from prison or liberated from institutional life").

The government has argued that people have no liberty interest in remaining on home confinement. It reasons that it is not a "release from federal custody" and inmates remain subject to the "rigorous conditions of community supervision." ECF No. 20, at pages 21-22. This position is belied by the AUSA's vehement objection to Mr. Romano's "release."[1] Though Mr. Romano's movements were restricted through an ankle monitor and he was required to stay home unless he had permission to leave, his state of life remained "very different from that of confinement in a prison." *Morrissey*, 408 U.S. at 482. Mr. Romano applied for a job, managed his own health by applying for health insurance and making doctor and dental appointments, opened a bank account, and made an appointment to get identification documents and renew his driver's license. SUMF, ¶¶ 49-53. He also was approved for approximately 15 day passes to

[1] Further evidence of this liberty interest is that, but for the government's unlawful conduct, Mr. Romano would have received a commutation of his sentence from President Biden yesterday, December 12, 2024. The government's unlawful revocation took him off the list of grants. *See* Statement from President Joe Biden on Providing Clemency for Nearly 1,500 Individuals on Home Confinement and Pardons for 39 Individuals Convicted of Non-Violent Crimes (Dec. 12, 2024) ("These commutation recipients, who were placed on home confinement during the COVID pandemic, have successfully reintegrated into their families and communities and have shown that they deserve a second chance."), *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2024/12/12/statement-from-president-joe-biden-on-providing-clemency-for-nearly-1500-individuals-on-home-confinement-and-pardons-for-39-individuals-convicted-of-non-violent-crimes/.

make the appointments discussed above, go grocery shopping, and visit his father's gravesite. SUMF, ¶ 48, 54. He also spent significant time with his fiancée and his 84-year-old mother, who had not been able to visit him in prison for several years due to her frailty. SUMF, ¶¶ 46-47. In sum, with permission and always following appropriate protocol, Mr. Romano did not remain isolated in his residence. It is clear that "the liberty associated with a life outside the walls of a penal facility dwarfs that available to an inmate." *Harper v. Young*, 64 F.3d 563, 566 (10th Cir. 1995) (emphasis added), *aff'd sub nom.*, *Young v. Harper*, 520 U.S. at 147.[2]

This liberty interest is also derived from the BOP's implicit promise that it would only revoke Mr. Romano's home confinement if he committed a major infraction, and certainly not in the absence of any problems at all. *See Morrissey*, 408 U.S. at 477 (referencing implicit promise as one of a constellation of features of the community release program to be considered in determining that the "nature of the interest" in continued liberty is protected by the Due Process Clause); *Young*, 520 U.S. at 148 (same).

[2] Several cases out of the Second Circuit, specifically the District of Connecticut and Eastern District of New York, have found that the protections of *Morrissey* and *Young* apply in the CARES Act home confinement setting. *See Tompkins v. Pullen*, Civ. No. 22-339, 2022 WL 3212368, at *11 (D.Conn. Aug. 9, 2022) (Williams, J.) (granting writ); *Lallave v. Martinez et al.*, Civ. No. 22- 791 (E.D.N.Y. Feb. 11, 2022) (Garaufis, J.) (granting bail); *Cardoza v. Pullen et al*, Civ. No. 22-591, DE # 33 (D. Conn. June 3, 2022) (Nagala, J.) (granting bail); *Freeman v. Pullen*, 658 F.Supp.3d 53 (D. Conn. March 2, 2023) (Williams, J.) (granting writ); *Wiggins v. Stover*, Civ. No. 23-842, DE # 19 (D. Conn. July 27, 2023) (Dooley, J.) (granting bail for claims of unlawful revocation and also dispute over calculation of First Step Act credits). Accordingly, this Court can conclude that the BOP's home confinement program bears the same "essential" features as the programs at issue in *Morrissey* and *Young*, and, as such, that jurisdiction is proper here.

Such implicit promises were evident in the BOP's policies governing home confinement. *See, e.g.*, BOP Program Statement 7320.01 (obligating Residential Reentry Management field offices ensure system which meets the "due process criteria of *Wolff v. McDonnell* and includes provisions for dealing with minor infractions of program rules and with major violations that could result in the inmate's termination from the program").[3] Senior BOP and Department of Justice officials also made these implicit promises. SUMF, ¶ 14 (BOP Director Michael Carvajal before the Senate Judiciary Committee); SUMF, ¶ 21 (opinion of Office of Legal Counsel that inmates on home confinement can remain there after the COVID-19 Emergency ends). In addition, BOP staff at FCI Fairton and Mr. Romano's case manager at the RRM who would supervise him on home confinement similarly communicated the message that he would remain on home confinement absent any violations. SUMF, ¶¶ 28-29, 41. Mr. Romano "relied on at least an implicit promise that [home confinement] will be revoked only if he fail[ed] to live up to the [ ] conditions of release." *Morrissey*, 408 U.S. at 482 (discussing implicit promise made to parolees).

Here, the facts supporting this Court's jurisdiction are undisputed. Mr. Romano

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[3] *Available at* https://www.bop.gov/policy/progstat/7320_001_CN-1.pdf. *Wolff v. McDonnell*, 418 U.S. 539, 563-66 (1974) requires, at a minimum, that an inmate be afforded: 1) written notice of the charges against him at least 24 hours in advance of the hearing, 2) a written statement by the fact-finder with respect to the evidence relied upon and the reasons for the disciplinary action and 3) the opportunity to call witnesses and present documentary evidence (so long as it will not be unduly hazardous to institutional safety or correctional goals).

gained a liberty interest when he was properly released to home confinement. Placement on home confinement, like parole and preparole, "includes many of the core values of unqualified liberty" and that valuable liberty "must be seen as within the protection of the Fourteenth Amendment." *Morrissey*, 408 U.S. at 482; *Young*, 520 U.S.at 148 (explaining that limited liberty does not render it "beyond procedural protection"). The unconstitutional revocation of that qualified liberty is a proper matter for this Court's consideration under 28 U.S.C. § 2241.

C. Due process violation

Next, Mr. Romano seeks judgment as a matter of law that his due process rights were violated. Due process does not permit revocation of home confinement without some violation or change that undermines the initial determination. *Morrissey*, 408 U.S. at 480 (contemplating some reason for revocation by speaking of "the conditional liberty properly dependent on observance of special parole restrictions"). When there is an alleged violation, *Morrissey* calls for a robust two-step process before a person is returned to institutional confinement: a probable cause hearing that ends with an articulated decision with citations to the evidence, and then a revocation hearing on whether an inmate should be returned to prison. 408 U.S. at 489. Even the procedural protections inmates are afforded for intra-carceral disciplinary hearings require written notice, a written statement of facts, and an opportunity to confront. *Wolff v. McDonnell*, 418 U.S. 539, 570 (1974).

Here, the facts are undisputed that Mr. Romano's due process rights were

violated. He did not commit any alleged violation of his home confinement, nor was there even any new information obtained between his release home on June 22, 2022 and the BOP's revocation on July 18, 2022. The email traffic surrounding Mr. Romano's revocation supports this: the decision to revoke him was based on the "Director's Office" seeking review of his case. It is undisputed that Mr. Romano did not receive any kind of notice or process before his revocation.

1. Mr. Romano was lawfully released to home confinement

Throughout much of Mr. Romano's ordeal, the government's chief rejoinder to claims of a due process violation has been that no violation occurred because the BOP was simply correcting his unlawful placement on home confinement. Indeed, the government falsely told Mr. Romano, SUMF, ¶ 64, and later this Court, ECF No. 9, at page 11, that he was only revoked because he was erroneously and impermissibly released before serving 50 percent of his sentence. The government has since reluctantly acknowledged that 50 percent was not a requirement. ECF No. 31, at 30 (agreeing 50 percent "was one of the factors that BOP had identified as something to consider for inmates"). Of course, it should not have taken years to acknowledge that serving 50 percent was not a requirement; the Home Confinement Committee was routinely tasked with considering cases where inmates had served less than 50 percent of their sentence, or were otherwise outside of criteria and priority. SUMF, ¶ 18. Still, the government only disclosed the actual reason for Mr. Romano's revocation through discovery approximately two years after it revoked Mr. Romano, rather than at some

time during the three levels of the prison grievance process, two Answers, and three declarations. An inquiry from the "Director's Office" triggered by the AUSAs' unrelenting objection through a colleague now at ODAG caused the BOP to single out Mr. Romano. SUMF, ¶¶ 55-58. Stated another way, prosecutors used their power and connections to unprecedentedly revisit Mr. Romano's home confinement status, and then institutional actors lied to him for years about what had transpired. Indeed, Mr. Romano was the only inmate to ever receive a second look on placement by the Home Confinement Committee once he was already living at home, SUMF, ¶ 59, and the only person revoked for no legitimate reason.[4]

Still, it must be reiterated that Mr. Romano's initial home confinement placement was proper. The BOP had the authority to place Mr. Romano on home confinement in 2022. 18 U.S.C. § 3624(c)(2) authorizes the BOP to place inmates on home confinement "for the shorter of 10 percent of the term of imprisonment of that prisoner or 6 months." When Congress enacted comprehensive pandemic legislation, it eliminated these time limitations. *See* Coronavirus Aid, Relief, and Economic Security Act, Public Law 116–136, sec. 12003(b)(2), 134 Stat. 281, 516 (2020) (''CARES Act''). The BOP thereafter circulated internal guidance, but never implemented any regulations or official policies, that governed how to make and prioritize placement decisions under its expanded

4 The government has informally proffered that there might have been another inmate revoked from home confinement because of complaints from an AUSA. ECF No. 41, at 10. It has not produced another similar case.

home confinement authority. *Cf. Reno v. Koray*, 515 U.S. 50, 61 (1995) (characterizing BOP Program Statements as interpretive rules, in comparison to regulations which are "subject to the rigors of the Administrative Procedure Act, including public notice and comment" (internal citation omitted)); BOP Program Statement 1221.66, Chapter 2.1 (referring to BOP program statements as "policies," not rules). First then-Attorney General Barr made a finding "emergency conditions [ ]materially affect[ing] the functioning of the Bureau," thus triggering the CARES Act's expansion of its home confinement authority. SUMF, ¶¶ 11-12. Senior BOP officials issued subsequent internal guidance on which inmates should be given priority for release during the pandemic. SUMF, ¶¶ 13, 15, 17, 21. These criteria were:

- Clear disciplinary history for 12 months and no violence or gang-related activities
- Verified release plan
- No violent, sexual, or terrorism related offenses
- No detainers
- Low or minimum security
- Minimum PATTERN recidivism risk score
- COVID vulnerability

SUMF, ¶ 15.

In addition to these criteria, the BOP *prioritized* inmates who had served more than 50 percent of their sentence or more than 25 percent of their sentence who had less than 18 months remaining. *See id.* At some point, a Home Confinement Committee run out of the Correctional Programs Division of the BOP was "utilized to review specific inmates for CARES Act home confinement when factors outside the BOP's enumerated

list may affect the appropriateness of their placement." SUMF, ¶ 18. No single factor would automatically disqualify an inmate for placement on Home Confinement, including having served 50 percent (or 25 percent with less than 18 months remaining). SUMF, ¶ 19. Several hundred people were released before serving fifty percent of their sentence. SUMF, ¶ 32. Some politically connected inmates were place on home confinement well before reaching these priority thresholds. For example, Paul Manafort served only 23 months of a 77-month sentence before being released to home confinement in May 2020.[5]

In March 2022, the process to recommend Mr. Romano for placement on CARES Act home confinement began. SUMF, ¶ 26. Mr. Romano had almost completed 50 percent of his sentence and met all of the criteria for placement. SUMF, ¶ 30. The United States Attorney's Office (USAO) was in communication with FCI Fairton and victim notifications were sent out. SUMF, ¶¶ 33, 36. Prosecutors registered their complaints to Mr. Romano's case manager at FCI Fairton, to the Northeast Region Legal Counsel,[6] and to a former colleague who had since moved to the Office of the Deputy Attorney

[5] Des Moines Register, *Ex-Trump campaign chairman Paul Manafort released from prison amid coronavirus pandemic* (May 13, 2020), *available at* https://www.desmoinesregister.com/story/news/politics/2020/05/13/coronavirus-paul-manafort-released-home-confinement-amid-covid-19/5181984002/.

[6] https://www.bop.gov/about/agency/org_ogc.jsp ("The primary responsibility of the regional legal offices is to provide litigation support for inmate litigation arising out of the prisons located within the region, and to provide legal advice to regional office and prison administrators.").

General, and they also communicated the complaints of victims. SUMF, ¶¶ 33-34, 37-38, 40. The institutional referral, which stated the prosecutors' objections, was reviewed and signed off on by at least five people, Camp Administrator C. Masters, Inmate Systems Management (ISM) Staff D. Berger, Case Management Coordinator (CMC) Jason Raguckas, Warden Michael J. Harris, and Community Corrections Manager Patrick McFarland. SUMF, ¶ 26. Moreover, the BP-210 form itself required other information be forwarded with the home confinement referral, including the "Current Progress Report," *id.*, which would have included how much time Mr. Romano had served to date.[7] In sum, the BOP was well within its authority, Mr. Romano fully satisfied the criteria for release, and BOP staff exercised appropriate discretion in deciding to place Mr. Romano on home confinement, even a few months shy of serving 50 percent of his sentence.

2. **Nothing that occurred in July 2022 merited revocation or undermined that initial determination that placement on home confinement was appropriate**

Here, Mr. Romano was in complete compliance with the rules and regulations of home confinement. SUMF, ¶ 54. He was never accused of any infraction. The decision to re-evaluate his placement on home confinement was not based on any change in circumstance that would logically undermine the appropriateness of that initial

[7] BOP Program Statement 5803.008 (discussing Section 524.42(j) (listing required contents of Progress Reports), *available at* https://www.bop.gov/policy/progstat/5803_008.pdf.

determination. *Cf.* SUMF, ¶ 67 (excerpt of RRC failure log showing example of placement failure as "HC address no longer viable"). Everything about Mr. Romano's case was already known at the time of his release to home confinement on June 22, 2022. The circumstances of his offense, which had ended in 2008, were static. The AUSAs had already registered its concerns to whomever it could. SUMF, ¶¶ 33-34, 37-38. There was no additional communication from any victims. SUMF, ¶ 55. Mr. Romano had served 98 months, almost 50 percent of his sentence. Simply put, Mr. Romano was not revoked because of anything he did, but because institutional actors disagreed with his already-granted home confinement and then arbitrarily revoked him. Mr. Romano is the only person ever to be revoked from home confinement without committing some sort of violation and, thereafter, receiving some notice and process. SUMF, ¶ 67. The government's admission that his situation is unprecedented, SUMF, ¶ 59, and that it misrepresented its reasons for revoking, lays bare how obviously unconstitutional its conduct was.

What precipitated Mr. Romano's revocation was that AUSAs from the Eastern District of New York who had prosecuted Mr. Romano contacted ODAG *again* on July 11, 2022, and this time ODAG responded and requested further information about Mr. Romano's case from the BOP. SUMF, ¶¶ 55-56. There was then a frenzy of communications with at least 16 BOP officials copied, to get Mr. Romano's case retroactively evaluated by the Home Confinement Committee, SUMF, ¶¶ 57-58, a committee out of the central office that was set up to review cases for placement where

the inmate did not meet all the BOP's criteria for CARES Act release. SUMF, ¶ 18. The Committee was established to review candidates *before* their release to home confinement, and never before Mr. Romano's case or never again after Mr. Romano's case did it review candidates who had already been placed. With the strong urging from other senior officials, that Committee of two (Rick Stover and Dana DiGiacomo) retroactively decided Mr. Romano was not appropriate for home confinement. SUMF, ¶ 61. The Committee also immediately moved for Mr. Romano to be brought back to secure custody. *Id*. In fact, Mr. Romano had already been called back to the halfway house that morning, before the actual decision issued from the Home Confinement committee. SUMF, ¶ 60.

Mr. Romano was told none of this. When he arrived at the halfway house, he was given no information. SUMF, ¶ 60. He stayed one night at the halfway house, was transferred to MDC Brooklyn, and then transferred back to FCI Fairton, the whole time given no information. SUMF, ¶¶ 62-63. He was even held for several days without the ability to contact his family. SUMF, ¶ 63. One month later, Mr. Romano was informally told why he was revoked, because he had not served 50 percent of his sentence, a reason that was not true. SUMF, ¶ 64. This misinformation continued through July 2023 when Mr. Romano reviewed internal BOP emails produced in discovery. Those emails established Mr. Romano's case was pulled for review by the Home Confinement Committee because of an inquiry from the Director's Office. SUMF, ¶ 66. His was the only case ever reconsidered for Home Confinement placement once he was living in the

community. SUMF, ¶ 59. In sum, Mr. Romano was revoked without violation, without reason, without notice, without process, and without the basic courtesy of the government's candor.

A revocation without an infraction or any material change in facts violates due process, and most directly the protections established by the United States Supreme Court in *Young v. Harper*. Indeed, Mr. Romano's circumstances mirror the case of Ernest Harper (the respondent from *Young v. Harper*), who had been simultaneously recommended for parole and placed on Preparole Conditional Supervision Program (preparole), a temporary program created to ease prison overcrowding in Oklahoma. *See Harper v. Young*, 64 F.3d 563, 565 (10th Cir. 1995), *aff'd*, 520 U.S. 143 (1997). Five months after Mr. Harper had been living in the community on preparole, he was denied parole. He was then directed to report back to prison, without any hearing about whether his return to prison was warranted. *Id.* Oklahoma first claimed in the courts below that it had to return Mr. Harper to prison because the Governor's denial of parole made him ineligible for preparole, but the statute set forth the opposite presumption, that denial of parole *would not* affect preparole status. *Id.* Oklahoma then claimed it could return preparolees to prison "for any reason or no reason," and so fact-finding was unnecessary and a hearing would be pointless. *Young v. Harper*, 1996 WL 559872, at *17-18 (Sept. 26, 1996) (Brief of Respondent before the U.S. Supreme Court). The Supreme Court disagreed that Oklahoma could revoke Mr. Harper for no reason and agreed with the Tenth Circuit that Mr. Harper's constitutional rights were violated.

Without requiring any further proceedings or process, the Supreme Court also affirmed the remedy ordered by the Tenth Circuit: "issue the writ of habeas corpus unless Mr. Harper is reinstated to the Program by the State of Oklahoma." *See* 64 F.3d at 567.

Due process and fundamental fairness prohibit revocation under the circumstances here. *Cf. Douglas v. Buder,* 412 U.S. 430 (1973) (*per curiam*) (due process violation to require a probationer to report a citation for driving too fast after a traffic accident as an arrest, as this would constitute *so unforeseeable and surprising* an interpretation of the special probation condition as to violate due process); *McQuillion v. Duncan*, 306 F.3d 895, 900 (9th Cir. 2002) (holding rescission of parole based on mere disagreement with grant of parole violated due process); *see also Black v. Romano*, 471 U.S. 606, 621 (1985) (Marshall, J. concurring) ("To the probationer, who is integrating himself into a community, it is fundamentally unfair to be promised freedom for turning square corners with the State but to have the State retract that promise when nothing he has done legitimately warrants such an about-face."); *see id.* at 621 & n.18 ("Thus, while the State can define the rules of punishment initially, choosing probation or imprisonment, the State cannot change the rules in the middle of the game. This norm of regularity in governmental conduct informs numerous doctrines." (citing cases such as *Atchison, T. & S.F.R. Co. v. Wichita Bd. of Trade,* 412 U.S. 800, 807-08 (1973) ("There is, then, at least a presumption that [previously chosen] policies will be carried out best if the settled rule is adhered to.")).

Due process prevents revocation under these facts, and no hearing is required to

reach that conclusion. This is where Mr. Romano's procedural due process claim breaks from the other cases that have found a liberty interest to attach to home confinement placement. In each other case, the inmate was alleged to have committed a violation. They were given some process pursuant to the BOP Inmate Discipline Program. Program Statement 5100.08 (Inmate Security Designation and Custody Classification); 28 C.F.R. §§ 541.5 to 541.8 (BOP's Inmate Discipline Program). However, these procedures did not comply with the more robust requirements of *Morrissey*, particularly that process is required before revocation. For example, in another unlawful revocation case, Carolyn Freeman, an inmate placed on home confinement under the CARES Act, had been accused of having a positive breathalyzer for alcohol use. She was told by the halfway house she would lose 41 days of good time credit. Then, two weeks later she was called back to the halfway house, revoked, and returned to institutional confinement. A disciplinary hearing back at the prison affirmed the loss of credits and revocation. *Freeman v. Pullen*, 658 F.Supp.3d 53, 58 (D. Conn. 2023). The district court concluded these procedures did not satisfy *Morrissey* protections and granted the writ. *Id.* at 69. Mr. Romano's case is considerably more egregious.

Here, Mr. Romano did nothing wrong during his home confinement placement, and, as an untenable consequence of his own good behavior, received no process. The government has explained that any process would have been meaningless, precisely because Mr. Romano's revocation was not based on his conduct or anything negative that occurred. ECF No. 31, at 47. This Court already expressed concern over the

absurdity of the government's position—that those who commit infractions would get some process before revocation, while those who committed no infractions received no such benefit. *See id.* at 25-28. It is not just fundamentally unfair that a person who has not been accused of any violation would receive less process than one who has been, it is a system that permits arbitrary enforcement and cannot stand. *See* Hershkoff & Resnikal, *Constraining and Licensing Arbitrariness: The Stakes in Debates about Substantive-Procedural Due Process*, 76 SMU L. Rev. 613, 617-18 (2023) ("Due process marks obligations that governments owe to the body politic to structure decision making in ways that constrain arbitrariness and prevent idiosyncratic, unfair treatment of individuals.").

3. Mr. Romano received no process at all

The BOP not only revoked Mr. Romano without justification, it did so without providing any sort of procedural protections that are the hallmark of procedural due process. As explained above, a hearing now is not an appropriate remedy for the violation of Mr. Romano's constitutional rights. But the lack of a hearing or any process before Mr. Romano's revocation bespeaks its unconstitutionality.

Before being revoked from home confinement, it is undisputed that Mr. Romano did not receive oral or written notice of the reason for revocation nor that he would be remanded back to institutional confinement. It is also undisputed that he had no opportunity to view the evidence that supported the BOP's decision, and was not given a hearing before a decisionmaker to present witnesses and evidence, cross-examine

adverse witnesses, and challenge the severe consequence of being returned to institutional confinement, as opposed to other incremental punishment. Nor did he receive a written statement as to the evidence relied on and reasons for revoking his home confinement. Instead, he was actually given misinformation that stalled his ability to seek relief in court. SUMF, ¶64. This Court should treat the government's actions as particularly suspect because it has not been forthcoming about them. Rather than acknowledge the reasons for Mr. Romano's revocation, it has called his placement on home confinement a "clerical error," ECF No. 7-1, ¶ 15, and also incorrectly told him he was being revoked only because he had not served 50 percent of his sentence, SUMF, ¶ 64, an error repeated to this Court, ECF No. 31, at 29.

Coupled with the absence of a violation by Mr. Romano, the government's failure to employ any process before his revocation violated the due process protections of *Morrissey*, 408 U.S. at 485–87. It did not even satisfy the slimmer procedural protections of intra-carceral disciplinary hearings. *See Wolff v. McDonnell*, 418 U.S. 539, 570 (1974). It did not satisfy the three-factor test from *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (gauging what process is due based on (1) "the private interest that will be affected by the official action," (2) "the risk of an erroneous deprivation of such interest through the procedures used, and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail"). It did not comply with the BOP's Inmate Discipline Program. *See* 28 C.F.R. §§ 541.5 to 541.8. At a minimum, due process

requires a "meaningful" hearing that provides "a fair opportunity to rebut the [g]overnment's factual assertions before a neutral decisionmaker." *Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004). Mr. Romano got nothing but evasion. By comparison, Ernest Harper was at least immediately told he was being revoked from preparole because he had been denied parole, although ultimately the Tenth Circuit found and the Supreme Court agreed that his revocation to be unlawful. *Harper v. Young*, 64 F.3d at 567.

D. Remedy

This Court should order that Mr. Romano be returned to home confinement, and further that any future revocations must be based on an actual violation or material change in his home confinement, and then include the robust procedural protections of *Morrissey*. Mr. Romano established that this Court has jurisdiction, and that he had a constitutionally protected liberty interest in remaining on home confinement, which the BOP plainly violated. He now asks this Court to issue a writ of habeas corpus unless the BOP reinstates him to home confinement. These instructions closely follow the instructions by the Tenth Circuit in *Harper v. Young*, affirmed by the United States Supreme Court, "to issue the writ of habeas corpus unless Mr. Harper is reinstated to the [preparole] Program by the State of Oklahoma. After reinstatement, any attempt to remove Mr. Harper from the Program must, of course, comply with the procedures mandated by this opinion." 64 F.3d at 567. *See also Freeman v. Pullen*, 658 F.Supp.3d at 69 ("Given the total lack of any process prior to Petitioner's reincarceration, her current imprisonment appears unlawful. Therefore, she must be returned to home confinement

under the same conditions as were imposed upon her release in December 2020, pending the BOP's compliance with the procedures described herein.").

The habeas statute gives this Court wide discretion in choosing a remedy. Courts are not limited to issuing a final order granting or denying the writ, but are more broadly permitted to "dispose of the matter as law and justice require." 28 U.S.C. § 2243; *see also Boumediene v. Bush,* 553 U.S. 723, 780 (2008) (quoting *Jones v. Cunningham,* 371 U.S. 236, 243 (1963) ("Habeas is not a static, narrow, formalistic remedy; its scope has grown to achieve its grand purpose.")); *see, e.g.*, *Wright v. Boles*, 303 F.Supp. 872, 873 n.1 (N.D.W.Va. 1969) (relief consists of allowing the state the opportunity to vacate Petitioner's sentence and to resentence him in a constitutionally permissible manner, which would start the clock on a new statutory period for appeal); *Crawford v. Bailey*, 234 F. Supp. 700, 702 (E.D.N.C. 1964) (relief consists of continuing in effect the stay of execution).

This Court is not constrained by the government's dubious and self-serving litigation position that Mr. Romano's petition is moot because the CARES Act expired. First, the government has repeated throughout this litigation that Mr. Romano's case should be analyzed in the same framework as inmates denied home confinement who never left their facility. *See, e.g.*, ECF No. 43, at A35 (providing example of an inmate whose approval for home confinement was rescinded before he left the institution, and thus never returned home). The Supreme Court has repeatedly articulated the many differences between the hope of release from prison and termination once already

released:

> The fallacy in respondents' position is that parole release and parole revocation are quite different. There is a crucial distinction between being deprived of a liberty one has, as in parole, and being denied a conditional liberty that one desires. The parolees in *Morrissey* [*v. Brewer*, 408 U.S. 471 (1972)] (and probationers in *Gagnon* [*v. Scarpelli*, 411 U.S. 778 (1973)]) were at liberty and as such could "be gainfully employed and [were] free to be with family and friends and to form the other enduring attachments of normal life." 408 U.S. at 482. The inmates here, on the other hand, are confined and thus subject to all of the necessary restraints that inhere in a prison.

Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 9-10 (1979). Whether the BOP no longer has authority to release inmates under the CARES Act, that is non-responsive to Mr. Romano's claim here of unlawful revocation from home confinement, whether that placement had been granted under the CARES Act or any other law.

Along the same lines, the government has also provided another self-serving litigation position: because Mr. Romano was not *placed* on home confinement *at the time of the expiration*, the BOP cannot restore Mr. Romano to home confinement to remedy a violation. ECF No. 41, at 22. This is certainly a distinction (not necessarily with a difference), but also one entirely a product of the BOP's unlawful action and then persistent lack of candor. It would violate due process principles by again singling Mr. Romano out for differential treatment with no recourse. *Cf. Boumediene*, 553 U.S. at 739-46, 765 (tracing history and origins of the writ of habeas corpus as an "indispensable mechanism for monitoring the separation of powers," particularly abuses by the Executive branch).

Several hundred people remain placed on home confinement under the CARES Act. *See* SUMF, ¶ 22 (explaining 3,434 inmates on CARES Act home confinement as of January 2023).[8] The Department of Justice has promulgated a Rule that the CARES Act authorizes their continued placement after the Act expired and the BOP has said over and over that it will promulgate guidelines for when a return to secure custody would be acceptable. SUMF, ¶ 24 No guidelines have yet issued. Moreover, BOP Program Statement 5270, governing home confinement violations, confirms that BOP has a process to restore people *already* on home confinement if their placement was erroneously revoked.[9] The Statement lists levels of prohibited acts and available sanctions, which are, of course, only available "upon finding the inmate committed the prohibited act(s)." *See* Section 541.3. If the BOP process results in a finding that revocation is unwarranted, presumably BOP returns the individual to home confinement. Otherwise, there would be no point in having *any* hearing or process whatsoever. If the BOP erred in imposing a sanction, it should return an inmate to the status quo ante. It simply cannot be that nobody—not the BOP nor this Court—has the power to correct the BOP's procedural errors and constitutional violations.

The CARES Act's expiration only bars the BOP from releasing *new people* to CARES Act home confinement. That has no bearing on the BOP's authority to leave

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[8] These sentences will be commuted shortly. *See* note 1, *supra.*

[9] *See* https://www.bop.gov/policy/progstat/5270_009.pdf.

people on CARES Act home confinement, or to return a person who was erroneously revoked. But, more importantly, it clearly has no bearing on this Court's habeas authority to grant a writ of habeas corpus. The writ of habeas corpus, premised on the finding of a constitutional violation, gives a court power to order certain outcomes even if a court did not originally have the authority to order it. *See, e.g.*, *Baker v. United States*, 109 F.4th 187, 204 (3d Cir. 2024) (granting writ of habeas corpus under 28 U.S.C. § 2255 and remanding to the District Court with an instruction to order the government to reoffer the original plea agreement to the petitioner); *Gutierrez v. Ashcroft*, 289 F.Supp.2d 555 (D.N.J. 2003) (district court ordering immigration authorities to grant new hearing), *affd sub. nom. Gutierrez v. Gonzales*, 125 Fed. Appx. 406 (3d Cir. 2005) (not for publication). This habeas authority extends to ordering actions that would restore someone to certain forms of release that no longer exist. For example, district courts continue to review the legality of parole revocation decisions although Congress abolished federal parole for all new cases in 1984. *See, e.g.*, *John v. U.S. Parole Comm'n*, 122 F.3d 1278, 1283-85 (9th Cir. 1997) (holding revocation proceeding violated *Morrissey* and remanding for new revocation hearing that could result in restoration to parole).

"[T]he essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and that the traditional function of the writ is to secure release from illegal custody." *Preiser v. Rodriguez*, 411 U.S. 475, 483 (1973). The "common-law roots" of the writ contemplate relief that "terminates custody, accelerates the future date of release from custody, [or] *reduces the level of custody*." *See Wilkinson v. Dotson*, 544

U.S. 74, 86 (2005) (Scalia, J., concurring) (emphasis added).

The relief requested here is not controversial: it is well within this Court's authority to grant the writ unless a government actor performs the action itself.

VI. Conclusion

The Court should grant Petitioner's motion and grant him summary judgment for the aforementioned relief under Rule 56.

Date: December 13, 2024

Respectfully submitted,

/s/ Alison Brill

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