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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

RICHARD ANTHONY WILFORD, Petitioner, vs. JAMES ENGLEMAN, Respondent.	Case No. 2:24-cv-01470-DDP-GJS **BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION FOUNDATION AND ACLU FOUNDATION OF SOUTHERN CALIFORNIA, IN SUPPORT OF PETITIONER**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1,[1] Amici Curiae American Civil Liberties Union Foundation and American Civil Liberties Union Foundation of Southern California disclose that they have no parent corporations and that no publicly held corporations hold 10% or more of their stock.

Further, pursuant to L.R. 7.1-1, amici curiae certify that no persons, associations of persons, firms, partnerships, or corporations have a pecuniary interest in the outcome of the case.

Dated: November 18, 2024

/s/ Melissa Camacho
Melissa Camacho
Counsel for Amici Curiae

[1] "[T]he Federal Rules of Civil Procedure do not address requests to participate as amici, therefore, district courts rely on Federal Rule of Appellate Procedure 29 ('Rule 29')." *Stoyas v. Toshiba Corp.*, No. 15-cv-4194, 2021 WL 2315200, at *2 (C.D. Cal. June 7, 2021) (internal quotation marks and citation omitted).

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TABLE OF AUTHORITIES

Cases

Albrecht v. Birkholz, No. 23-cv-1587, 2023 WL 5417099 (C.D. Cal. June 23, 2023), *report and recommendation adopted*, 2023 WL 5409781 (C.D. Cal. Aug. 21, 2023) 17, 23

Borchers v. Belcher, No. 11-cv-1018, 2012 WL 1231742 (D. Ariz. Mar. 9, 2012), *report and recommendation adopted*, 2012 WL 1231032 (D. Ariz. Apr. 12, 2012) 21

Bristol v. Peters, No. 17-cv-788, 2018 WL 6183274 (D. Or. Nov. 27, 2018) 20

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Daniels v. Martinez, No. 22-cv-918 (E.D.N.Y. Feb. 23, 2022), Order 13

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Freeman v. Pullen, 658 F. Supp. 3d 53 (D. Conn. 2023) 13, 18

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Greenholtz v. Inmates of Nebraska Penal & Corr. Complex, 442 U.S. 1 (1979) .. 15, 20

Harper v. Young, 64 F.3d 563 (10th Cir. 1995) 24, 25

Hatch v. Lappin, 660 F. Supp. 2d 104 (D. Mass. 2009) 17

Hilton v. Braunskill, 481 U.S. 770 (1987) 22

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1 *Jacks v. Crabtree*, 114 F.3d 983 (9th Cir. 1997) 20

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10 *Nunes v. Mueller*, 350 F.3d 1045 (9th Cir. 2003)....................23

11 *Ortega v. Bonnar*, 415 F. Supp. 3d 963 (N.D. Cal. 2019)....................21

12 *Reeb v. Thomas*, 636 F.3d 1224 (9th Cir. 2011).................... 15, 18, 19

13 *Romano v. Warden, FCI Fairton*, No. 23-cv-1052, 2023 WL 3303450 (D.N.J. May
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15

16 *Scott v. Marshall*, No. 07-cv-8366, 2010 WL 3928942 (C.D. Cal. Sept. 15, 2010), *report and recommendation adopted,* 2010 WL 3909891 (C.D. Cal. Sept. 30,
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18 *Tetterton v. Warden, FCI Fort Dix*, No. 23-cv-1394, 2023 WL 4045086 (D.N.J.
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20 *Tompkins v. Pullen,* No. 22-cv-00339, 2022 WL 3212368 (D. Conn. Aug. 9, 2022)
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22 *Touizer v. Att'y Gen. of the U.S.*, No. 20-cv-25169, 2021 WL 371593 (S.D. Fla.
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Triplett v. FCI Herlong, Warden, No. 22-cv-83, 2023, WL 2760829 (E.D. Cal. Apr. 3, 2023), *report and recommendation adopted*, 2023 WL 3467145 (E.D. Cal. May 15, 2023) 13, 14

Wiggins v. Stover, No. 3:23-cv-842 (D. Conn. July 27, 2023), Order 13

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Statutes

18 U.S.C. § 3624 .... 10, 19

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CARES Act, Pub. L. No. 116-136, div. B, tit. II, § 12004, 134 Stat. 517 (Mar. 27, 2020) 27

Rules

Home Confinement Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, 88 Fed. Reg. 19830 (Apr. 4, 2023) 10

Other Authorities

C.J. Ciaramella, *Senate Resolution Would Send Federal Offenders Back to Prison 3 Years After Being Released to Home Confinement*, Reason (Nov. 6, 2023, 11:49 AM) 26

Christopher H. Schroeder, *Discretion to Continue the Home-Confinement Placements of Federal Prisoners After the COVID-19 Emergency*, Memorandum Opinion for the Attorney General (Dec. 21, 2021) 26

Columbia University Justice Lab, *Too big to succeed: The impact of the growth of community corrections and what should be done about it* (Jan. 29, 2018)............9

Department of Health & Human Services, *COVID-19 Public Health Emergency* .27

Human Rights Watch & ACLU, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (2020)..9

Jennifer L. Mascott, *Home Confinement of Federal Prisoners After the Covid-19 Emergency*, Memorandum Opinion for the General Counsel, Federal Bureau of Prisons (Jan. 15, 2021) 26

Senator Cory Booker, *CARES Act Home Confinement Three Years Later* (June 2023)... 8, 11, 27

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) 11

U.S. Dep't of Just., Fed. Bureau of Prisons, *Home Confinement Program Statement* (Aug. 1, 2016)...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* (Dec. 10, 2021).......................... 10, 11

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union Foundation ("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 Foundation of Southern California ("ACLU SoCal") is a regional affiliate of the ACLU that regularly engages in litigation and advocacy dedicated to upholding the rights of people who live in Southern California, including the rights of people in the criminal legal system. 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 and those serving terms of post-incarceration supervision.

For example, as relevant here, the ACLU has litigated multiple Freedom of Information Act ("FOIA") requests to obtain records regarding people placed on CARES Act home confinement and people who 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 has been granted leave to file an *amicus curiae* brief in *Romano v. Warden, FCI Fairton*, No. 1:23-cv-2919 (D.N.J. filed May 26, 2023), a similar case challenging the federal government's authority to revoke CARES Act home confinement absent any alleged violation or due process. 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 helpful, unique, and wide perspective on the due process issues presented in this case, and the potential ramifications of the Court's ruling for other people on home confinement across the United States.[2]

[2] Under Fed. R. App. P. 29(a)(4)(e), the undersigned counsel certifies that no counsel for a party authored this brief in whole or in part and that no person other than amici curiae made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

This case is about whether the Bureau of Prisons ("BOP") may remove people from their homes, jobs, and loved ones and remand them to federal prison absent *any* alleged violation and with no process whatsoever.

In June 2023, BOP released Richard Wilford to home confinement pursuant to the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. *Wilford v. Engleman*, No. 24-cv-1470, 2024 WL 3973063, at *1 (C.D. Cal. June 27, 2024). Mr. Wilford spent nearly two months reintegrating into his community. Then suddenly in August 2023—absent any alleged wrongdoing—BOP revoked Mr. Wilford's home confinement and re-imprisoned him. BOP provided no notice of any alleged violation and did not afford Mr. Wilford any chance to explain that he had not violated a home confinement rule, and that revocation was unwarranted. Mr. Wilford has now spent over one year in federal prison—absent any alleged violation or opportunity to contest his revocation. *Id.* 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 an opportunity to be heard by a neutral decisionmaker. Twenty-five years later, the Supreme Court held in *Young v. Harper* that a preparole program "was sufficiently like parole that a person in the program was entitled to

1 the procedural protections set forth in *Morrissey* before he could be removed from
2 it." 520 U.S. 143, 144-45 (1997) (citation omitted).
3 Home confinement is materially indistinguishable from parole and preparole.
4 On home confinement, while people remain technically in "custody" and must
5 follow certain rules, they may live and visit with family at home, seek and maintain
6 gainful employment, attend religious services, and otherwise reintegrate into the
7 community. Thus, as multiple district courts have held, people on home confinement
8 have a liberty interest in remaining in the community that BOP cannot revoke
9 without the level of due process required by *Morrissey*.
10 The Magistrate Judge erred in rejecting this conclusion based on (a) non-
11 binding district court cases that did not reach the merits and erroneously rejected
12 jurisdiction and (b) a cursory footnote in a Ninth Circuit case that addressed a
13 distinguishable prison-based program. Indeed, it appears the Magistrate Judge's
14 decision is the *only* opinion that has analyzed *Morrissey* and *Young* and concluded,
15 on the merits, that people released to their community on home confinement have
16 no protected liberty interest in that placement. This Court should not adopt the
17 Magistrate Judge's recommendation and should instead hold that BOP
18 unconstitutionally revoked Mr. Wilford's home confinement without due process.
19 To remedy this violation, the Court should restore Mr. Wilford to home
20 confinement. The Magistrate Judge's contention that it lacks such power rests on a
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1 fundamental misconception of the question presented. The Magistrate Judge relied
2 on cases that rejected courts' authority to grant home confinement placement in the
3 *first instance*. But that is not what this case is about. Mr. Wilford agrees such
4 authority lies exclusively with BOP. This case is about—where BOP has already
5 *granted* home confinement—the Court's power to remedy an unconstitutional
6 revocation of that placement by restoring the individual to home confinement. This
7 Court plainly can. Indeed, that is precisely what happened in the directly applicable
8 Supreme Court precedent of *Young v. Harper*: The Court held that the petitioner's
9 conditional release was erroneously revoked without any alleged violation or
10 process, and ordered him restored to conditional release.
11
12 Accordingly, this Court should reject the Magistrate Judge's Report and
13 Recommendation, hold that BOP revoked Mr. Wilford's home confinement in
14 violation of the Due Process Clause, and order him restored to home confinement.
15
16 **ARGUMENT**
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18 **I. BOP Revoked Mr. Wilford's Home Confinement Without Due Process.**
19 **A. Formerly incarcerated people conditionally released to their homes have a liberty interest protected by the due process clause.**
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21 The Supreme Court has confirmed that a person conditionally released from
22 prison lives a life far different than one who remains incarcerated. Thus, in *Morrissey*
23 *v. Brewer*, the Court held that people who have been conditionally released from

prison have a "valuable" constitutionally protected liberty interest in remaining in the community. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). 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 held, 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,

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whether circumstances in mitigation suggest that the violation does not warrant revocation. *Id.* 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 a neutral and detached 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 the 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 v. Harper*, 520 U.S. 143, 147 (1997) (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

1 generally free of the incidents of imprisonment.'" *Id.* at 148. Further, he relied on an
2 "'implicit promise' that his liberty would continue so long as he complied with the
3 conditions of his release." *Id.* at 150 (quoting *Morrissey*, 408 U.S. at 482). Thus,
4 although preparole differed in some ways from parole, it "was sufficiently like
5 parole that a person in the program was entitled to the procedural protections set
6 forth in [*Morrissey*] before he could be removed from it." *Id.* at 145.

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

9 Home confinement is materially indistinguishable from the parole program
10 considered in *Morrissey* and the preparole program at issue in *Young*. During home
11 confinement, while people remain technically in "custody" and must follow certain
12 rules, they may participate in a wide array of activities open to people who have not
13 been convicted of crimes, including living at home with their loved ones, seeking
14 and maintaining gainful employment, and engaging with their community.[3] Some
15 home confinement conditions, such as electronic monitoring, were not at issue in
16 *Morrissey* or *Young*, but given "technological advancements" in the decades since
17 those decisions, *Tompkins v. Pullen,* No. 22-cv-00339, 2022 WL 3212368, at *10
18 (D. Conn. Aug. 9, 2022), and a general shift toward punitive supervision, such

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22 [3] *See* Senator Cory Booker, *CARES Act Home Confinement Three Years Later*, at 9 (June 2023),
23 https://www.booker.senate.gov/imo/media/doc/cares_act_home_confinement_policy_brief1.pdf.

conditions are now commonplace for people on post-prison supervision.[4] Even with 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. *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.[5] For example, Congress

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

[5] Contrary to the Magistrate Judge's characterization, these sources are not asserted as "the source of a claim of constitutional right or violation." *See Wilford*, 2024 WL 3973063, at *9. Rather, they give rise to an "implicit promise" that release will not be revoked arbitrarily, which is a factor that courts may consider when determining if people have a protected liberty interest under *Morrissey* and *Young*. As the *Tompkins v. Pullen* court observed, "it is not clear how heavily this promise or this reliance weighed in the overall analysis" in *Morrissey* and *Young*, but "[r]egardless

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 home confinement placement "for service of the remainder of their sentences."[6] Moreover, the 2023 Department of Justice Final Rule for home confinement under the CARES Act permits people to remain on home confinement following expiration of the CARES Act, and authorizes remand to prison only "[i]n the event that a prisoner violates the conditions of supervision[.]"[7] 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."[8] As

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of the weight to be given this factor, [] there is ample evidence in the record which could lead Petitioner [on home confinement] to reasonably expect that she would not be reincarcerated without cause." 2022 WL 3212368, at *10.

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

[7] 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.

[8] 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 (Aug. 1, 2016),

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." 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 home confinement pursuant to the CARES Act, 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.

Finally, 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.[9] For example, BOP

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https://www.bop.gov/policy/progstat/7320_001_CN-1.pdf ("major violations [] could result in the inmate's termination from the program").

[9] *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.

revoked home confinement and re-imprisoned Virginia Lallave, who was caring for her young children including a ten-month-old baby;[10] Quinteria Daniels, a mother to three young children;[11] and Eva Cardoza, the primary caregiver for four young children and her fiancé, who suffers from cancer and heart disease[12]—all for alleged non-criminal technical violations and without notice or any opportunity to be heard. As discussed below, federal courts reviewing these cases held that BOP's revocation practices likely violated due process, and thus granted release pending adjudication of their habeas petitions.[13]

Given the fundamental similarities between parole in *Morrissey* and preparole in *Young,* multiple district courts have held that these precedents apply to home confinement revocation. Since the Magistrate Judge's decision and objections to the report and recommendation were briefed, a Northern District of New York court 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

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[10] 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.
[11] 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.
[12] 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.
[13] *See infra* note 14.

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 other courts have found such claims "substantial" and granted release pending disposition of the habeas petitions.[14]

i. No other court has rejected this conclusion on the merits.

The Magistrate Judge's statement that other courts "have reached the opposite conclusion" is mistaken. *See Wilford*, 2024 WL 3973063, at *8 (citing *Triplett v. FCI Herlong, Warden,* No. 22-cv-83, 2023, WL 2760829 (E.D. Cal. Apr. 3, 2023), *report and recommendation adopted*, 2023 WL 3467145 (E.D. Cal. May 15, 2023); *Tetterton v. Warden, FCI Fort Dix*, No. 23-cv-1394, 2023 WL 4045086 (D.N.J. June

[14] *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.

16, 2023); *Romano v. Warden, FCI Fairton*, No. 23-cv-1052, 2023 WL 3303450 (D.N.J. May 8, 2023)). All of these cases were *pro se*, and none reached the merits or addressed the directly applicable precedents of *Morrissey* and *Young*. Indeed, to amici's knowledge, the Magistrate Judge's decision is the *only* opinion that analyzed *Morrissey* and *Young* and concluded, on the merits, that people already released to their community on home confinement have no protected liberty interest in maintaining that placement.

In *Triplett v. FCI Herlong, Warden*, the court dismissed for lack of standing and jurisdiction, without reaching the merits. 2023 WL 2760829, at *3-4. And the court's justiciability analysis was fatally flawed. The court mistakenly focused on BOP's discretion to grant or deny placement onto home confinement *in the first instance*—holding that "placement in home confinement is a discretionary decision" for BOP, and thus the court could not consider the case. *Id.* at *3 (citing 34 U.S.C. § 60541(g)(1)(B)).

But BOP's *initial-placement* discretion is not at issue. Rather, the relevant question is whether, once BOP *has already granted* home confinement, people have a protected liberty interest in remaining on home confinement that cannot be revoked without due process. That is a fundamentally different question. As the Supreme Court has explained, "[t]he differences between an initial grant of parole and the revocation of the conditional liberty of the parolee are well recognized." *Greenholtz*

1 *v. Inmates of Nebraska Penal & Corr. Complex*, 442 U.S. 1, 10 (1979). This is
2 because "[i]t is not sophistic to attach greater importance to a person's justifiable
3 reliance in maintaining his conditional freedom so long as he abides by the
4 conditions of his release, than to his mere anticipation or hope of freedom." *Id.*
5 (citation omitted).[15] Moreover, regardless of BOP's statutory discretion, courts have
6 jurisdiction "to review claims alleging constitutional or federal law violations by the
7 BOP." *Wilford*, 2024 WL 3973063, at *5 (citing *Reeb v. Thomas*, 636 F.3d 1224,
8 1227 (9th Cir. 2011)). Thus, reliance on *Triplett* is misplaced.
9
10 Nor do *Tetterton* and *Romano* support the Magistrate Judge's conclusion.
11 Those cases, decided by the same judge, likewise did not reach the merits, instead
12 dismissing on jurisdiction and exhaustion grounds. *See Tetterton*, 2023 WL
13 4045086, at *2-8; *Romano*, 2023 WL 3303450, at *2-8.[16] The opinions discussed
14 the petitioners' liberty interests only in the context of exhaustion—specifically,
15 whether the exception to the exhaustion requirement for actions that "clearly and
16 unambiguously violate Petitioner's constitutional rights" applied. *See Tetterton*,
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[15] The *Triplett* court also erroneously held that jurisdiction under 28 U.S.C. § 2241 was improper because "petitioner's claims do not fall within the core of habeas[.]" *Id.* at *2-3. As the Magistrate Judge correctly concluded here, "Petitioner's due process claim involves the execution" of his sentence and thus is properly raised under § 2241. *Wilford*, 2024 WL 3973063, at *4.

[16] The courts' jurisdiction analyses repeated the same errors as *Triplett*, discussed above.

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2023 WL 4045086, at *5, 7-8 (cleaned up); *accord Romano*, 2023 WL 3303450, at *4, 7-8. The courts held that, given "sparse" caselaw, they "[could] not conclude that the decision to revoke Petitioner's home confinement without a hearing" *clearly and unambiguously* violated the Due Process Clause, and thus dismissed for failure to exhaust. *Tetterton*, 2023 WL 4045086, at *8; *accord Romano*, 2023 WL 3303450, at *8. 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. Moreover, the petitioner in *Romano*—originally *pro se*—subsequently obtained counsel and filed an amended petition. *See* Amended Complaint, *Romano v. Warden*, No. 23-cv-2919 (D.N.J. Oct. 20, 2023), ECF No. 14. The parties engaged in discovery and are currently briefing the merits of the petitioner's due process claim. *See id.* at ECF No. 36.[17] Thus, the cited decisions in *Tetterton* and *Romano* are irrelevant to the question before this Court.

The two cases the Magistrate Judge briefly referenced in a footnote—*Cardoza v. Pullen* and *Touizer v. Att'y Gen. of the U.S.*—likewise fail to support the Magistrate Judge's ruling. *See Wilford*, 2024 WL 3973063, at *8 n.7. The Magistrate Judge aptly noted that the court in *Cardoza* initially dismissed the petition. *Id.* But the Magistrate Judge failed to recognize that the petitioner subsequently filed an

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[17] Amici ACLU is scheduled to submit an amicus brief in *Romano*. *See id.* at ECF No. 39.

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amended petition, and the Court held that "the Petitioner raises a substantial claim of a violation of her procedural due process rights" under *Morrissey* and *Young*, and thus granted release pending disposition of her habeas petition. Order, *Cardoza v. Pullen*, No. 22-cv-591 (D. Conn. Aug. 22, 2022), ECF No. 39. Thus, *Cardoza supports* Mr. Wilford's claims.

Meanwhile, *Touizer* repeats the same fundamental error as *Triplett*, *Tetterton*, and *Romano*: erroneously focusing on BOP's discretion to release people onto home confinement in the first instance, rather than the authority to revoke that home confinement placement without due process. Further, the court did not even cite to the binding, directly-relevant opinions in *Morrissey* and *Young*. *See 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).[18]

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[18] The Magistrate Judge did not cite *Albrecht v. Birkholz*, which held that the court lacked jurisdiction over a challenge to home confinement revocation. No. 23-cv-1587, 2023 WL 5417099, at *1-2 (C.D. Cal. June 23, 2023), *report and recommendation adopted*, 2023 WL 5409781 (C.D. Cal. Aug. 21, 2023). *Albrecht* is inapposite because it repeated the same errors as the cases cited above and failed to address the directly applicable precedents of *Young* and *Morrissey*. *See id.* Additionally, the Magistrate Judge did not cite *Hatch v. Lappin*, which held that "regression from home confinement to imprisonment" did not "deprive [petitioner] of a liberty interest[.]" 660 F. Supp. 2d 104, 112 (D. Mass. 2009). However, *Hatch* is not binding on this Court, failed to address *Young* and *Morrissey*, and may no longer be good law. As a court considering the constitutionality of home confinement revocation 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

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Accordingly, contrary to the Magistrate Judge's representation, numerous courts have concluded that people on home confinement have a constitutionally-protected liberty interest that cannot be revoked without due process.

ii. The Ninth Circuit's decision in *Reeb v. Thomas* does not control the analysis.

Contrary to the Magistrate Judge's conclusion, the Ninth Circuit's decision in *Reeb v. Thomas* does not "govern[] this case." *See Wilford*, 2024 WL 3973063, at *9. There, the Circuit dismissed an individual's challenge to their expulsion from "RDAP"—a prison-based drug treatment program—for lack of jurisdiction. *Reeb*, 636 F.3d at 1226. *Reeb* does not control here for three reasons.

First, RDAP is materially distinguishable from home confinement. RDAP is based inside federal prisons. *Id.* at 1225 (petitioner expelled from RDAP located "at the Federal Correctional Institution at Sheridan, Oregon."). Further, RDAP carries only the *potential* for early release from institutional confinement. As the *Reeb* Court explained, "[a]s an incentive for successful completion of RDAP, the BOP *may* reduce a prisoner's sentence by up to one year" at its discretion. *Id.* at 1226 (citing 18 U.SC. § 3621(e)(2)(B)) (emphasis added).

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confinement) indeed have a liberty interest in remaining in the program." *Freeman*, 658 F. Supp. 3d at 64. Thus, *Albrecht* and *Hatch* likewise fail to support the Magistrate Judge's holding.

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A person's interest in remaining on already-granted home confinement is fundamentally different from someone's interest in remaining in the RDAP program. People on home confinement are not in prison. They may live at home with their loved ones, obtain gainful employment, and otherwise reintegrate into the community. *See supra* Section I(B) (describing home confinement). And they do not have the mere *potential* for early release from prison—BOP *already* released them from prison early by granting home confinement for the "final months" of their term. 18 U.S.C. § 3624(c)(1). Thus, whether people have a liberty interest in *RDAP* does not control whether people have a liberty interest in *home confinement*.

Moreover, whether people have a constitutionally-protected liberty interest in RDAP was not squarely presented in *Reeb*. The parties did not brief the issue on appeal.[19] And the Circuit only addressed the liberty interest question in a single sentence in a cursory footnote. The Circuit's due process analysis, in its entirety, states, "To the extent that Reeb alleges equal protection and due process violations, these claims must necessarily fail . . . Reeb [] cannot prevail on his due process claim because inmates do not have a protected liberty interest in either RDAP participation or in the associated discretionary early release benefit." *Reeb*, 636 F.3d at 1228 n.4

[19] *See* Appellant's Br., *Reeb v. Thomas*, No. 09-35815 (9th Cir. filed Feb. 1, 2010); Answering Br., *Reeb v. Thomas*, No. 09-35815 (9th Cir. filed Mar. 3, 2010); Reply Br., *Reeb v. Thomas*, No. 09-35815 (9th Cir. filed Mar. 17, 2010).

1 (citing *Greenholtz*, 442 U.S. at 7; *Moody v. Daggett*, 429 U.S. 78, 88 n.9 (1976); and
2 *Jacks v. Crabtree*, 114 F.3d 983, 986 n.4 (9th Cir. 1997)).
3 Finally, this Court should not read *Reeb* to "caution[] against extending the
4 procedural due process protections required by *Morrissey*" to other contexts.
5 *Wilford*, 2024 WL 3973063, at *9. Since *Reeb*, multiple district courts in the Ninth
6 Circuit have extended *Morrissey* and *Young* to analogous forms of conditional
7 release. The Magistrate Judge failed to address any of these cases.
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9 For example, an Oregon federal court held that a "Short Term Transitional
10 Leave Program" "provided [the petitioner] with sufficient freedom to confer a
11 protected liberty interest requiring *Morrissey's* procedural protections." *Bristol v.*
12 *Peters*, No. 17-cv-788, 2018 WL 6183274, at *6 (D. Or. Nov. 27, 2018). Like home
13 confinement, the leave program allowed people to reintegrate into the community
14 prior to their prison-release date, subject to compliance with conditions including a
15 curfew, geographical restrictions, and drug testing. *Id.* at *5. The court held that even
16 though the petitioner "was subject to a few conditions not present in *Young*[,]" there
17 was "no serious dispute that freedoms [Petitioner] enjoyed on release were
18 'significantly greater' than while in prison." *Id.* at *5-6. Notably, the court applied
19 *Morrissey* and *Young* even though the leave program explicitly afforded the
20 Department of Corrections "discretion [to] immediately remove or suspend an
21 inmate from the program . . . without a hearing, for administrative reasons." *Id.* at
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1 *5 (quoting OAR § 291-062-0150(2)(a)). The court reasoned (1) that authority
2 "raises serious due process concerns" and (2) the petitioner's "belief that [the
3 Department of Corrections] would not revoke his release arbitrarily in the absence
4 of a violation was a reasonable belief[.]" *Id.*
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6 Other courts within this Circuit have applied *Morrissey/Young* to revocation
7 of placement in a civil commitment treatment program, *Borchers v. Belcher*, No. 11-
8 cv-1018, 2012 WL 1231742, at *7-8 (D. Ariz. Mar. 9, 2012), *report and*
9 *recommendation adopted*, 2012 WL 1231032 (D. Ariz. Apr. 12, 2012), and to
10 release pending immigration proceedings, *Ortega v. Bonnar*, 415 F. Supp. 3d 963,
11 969-70 (N.D. Cal. 2019). Thus, the Magistrate Judge erred in construing *Reeb* to
12 limit the application of *Morrissey* and *Young* and in failing to address these relevant
13 authorities.
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15 Accordingly, this Court should hold that people on home confinement have a
16 liberty interest that cannot be revoked without *Morrissey* due process protections.
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18 **C. BOP revoked Mr. Wilford's home confinement absent any alleged violation and without providing *Morrissey* protections.**
19 This Court should hold that BOP unlawfully revoked Mr. Wilford's home
20 confinement absent (1) any alleged violation or (2) due process. First, revocation is
21 only permissible if the accused "fails to abide by the rules" of their conditional
22 release. *Morrissey*, 408 U.S. at 479. Indeed, *Morrissey* demands hearings precisely
23 to determine whether a person "violate[d] the conditions" and, if so, whether

"circumstances in mitigation suggest that the violation does not warrant revocation." *Id.* at 488. The Supreme Court has accordingly invalidated revocations where the record is "so totally devoid of evidentiary support" that the petitioner in fact violated a supervision rule. *Douglas v. Buder*, 412 U.S. 430, 432 (1973). Here, revocation was erroneous because BOP did not accuse Mr. Wilford of violating any home confinement condition. *See Wilford*, 2024 WL 3973063, at *1.

Second, Mr. Wilford's revocation is independently unconstitutional because BOP failed to provide the due process protections required by *Morrissey*. BOP uprooted Mr. Wilford from his home and remanded him to federal prison absent *any* notice and with no opportunity to be heard whatsoever. *See id.* Thus, BOP violated Mr. Wilford's constitutional due process rights.

II. This Court has authority to restore Mr. Wilford to home confinement.

This Court has authority to restore Mr. Wilford to home confinement to remedy his erroneous revocation. The Supreme Court and this Circuit have made clear that "[i]n habeas cases, federal courts have broad discretion in conditioning a judgment granting relief" and may "dispose of habeas corpus matters as law and justice require." *Lujan v. Garcia*, 734 F.3d 917, 933 (9th Cir. 2013) (citing *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987)). This Circuit specified that "the purpose of habeas remedies is to 'put the defendant back in the position he would have been in

1 if the [constitutional] violation never occurred.'" *Id.* at 935 (quoting *Nunes v.*
2 *Mueller*, 350 F.3d 1045, 1057 (9th Cir. 2003)) (alteration in original).
3 The Magistrate Judge's contention that it lacks power to restore Mr. Wilford
4 to home confinement, *Wilford*, 2024 WL 3973063, at *5, rests on a fundamental
5 misconception of the issues presented in this case. The Magistrate Judge cited a
6 litany of cases holding that courts lack jurisdiction to order a person's placement
7 onto home confinement *in the first instance*. *See id.* at *5 (collecting cases).[20] But,
8 as discussed above in Section I(B)(i), this case is not about the Court's authority to
9 make initial home-confinement placement decisions—which Mr. Wilford agrees are
10 "within the BOP's discretion." *See id.* at *7; 18 U.S.C. § 3621(b). Rather, this case
11 is about the Court's power—where BOP has *already granted* home confinement—
12 to remedy erroneous revocations by restoring people to their lawful home
13 confinement status.
14 Courts plainly can remedy unlawful revocations by restoring people to
15 conditional release, regardless of their authority to order that conditional-release
16 placement in the first instance. That is precisely what happened in *Young v. Harper*.
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[20] One case cited by the Magistrate Judge, *Albrecht v. Birkholz*, held that the court lacked jurisdiction to order the petitioner onto home confinement to remedy an erroneous revocation. 2023 WL 5417099, at *2. However, *Albrecht* itself erroneously rested on cases that addressed the authority to place people on home confinement in the first instance, thus repeating the same error discussed in-text. *See id.* (collecting cases).

1 There, the Supreme Court held that the government unlawfully revoked the
2 petitioner's preparole absent any alleged violation and without due process, and
3 affirmed the Tenth Circuit's remedy: remand to the district court "with instructions
4 to issue the writ of habeas corpus unless Mr. Harper is reinstated to the [preparole]
5 Program." *Harper v. Young*, 64 F.3d 563, 567 (10th Cir. 1995), *aff'd*, 520 U.S. 143
6 (1997). The Court confirmed that "[a]fter reinstatement, any attempt to remove Mr.
7 Harper from the Program must, of course, comply with the procedures mandated by"
8 *Morrissey*. *Id.* Whether the Court could have authorized the petitioner's *initial*
9 release from prison to preparole was wholly irrelevant to its power to *restore* the
10 petitioner to preparole as a remedy.
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12 Moreover—while Mr. Wilford is *not* seeking release in the first instance—
13 this Circuit *has* granted habeas relief ordering release on parole. In *McQuillion v.*
14 *Duncan*, the Circuit held that the California parole board unconstitutionally
15 rescinded the petitioner's parole-grant and, as a remedy, "remanded to the district
16 court with instructions to 'grant the writ' [of habeas corpus]" and "order his
17 immediate release" from prison. 342 F.3d 1012, 1014-15 (9th Cir. 2003). Other
18 courts in this District have likewise issued habeas relief directing that "decisions
19 granting Petitioner parole are reinstated[.]" *Hinkles v. Vaughn*, No. 05-cv-24, 2009
20 WL 6312276, at *23 (C.D. Cal. Dec. 4, 2009), *report and recommendation adopted,*
21 2010 WL 1233408 (C.D. Cal. Mar. 25, 2010) (holding California Governor
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1 unlawfully reversed parole-grant and ordering petitioner's reinstatement to
2 parole);[21] *see also Scott v. Marshall*, No. 07-cv-8366, 2010 WL 3928942, at *11-
3 13 (C.D. Cal. Sept. 15, 2010), *report and recommendation adopted,* 2010 WL
4 3909891 (C.D. Cal. Sept. 30, 2010) (same). The courts granted this relief even
5 though they plainly lacked power to place people on state parole in the first instance.
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7 Here, the Court can issue a writ of habeas corpus restoring Mr. Wilford to
8 home confinement to put him "back in the position he would have been in if the
9 [constitutional] violation never occurred.'" *Lujan*, 734 F.3d at 935. Alternatively, as
10 in *Young*, the Court may issue a writ of habeas corpus unless BOP reinstates Mr.
11 Wilford to the home confinement program. Any future attempt to revoke Mr.
12 Wilford's home confinement must comply with *Morrissey*. *See Young*, 64 F.3d at
13 567.
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15 **A. The Magistrate Judge's opinion permits untenable results: masse**
16 **unconstitutional revocations with no recourse.**
17 The Magistrate Judge's decision invites arbitrary and unconstitutional
18 revocations. Under the Magistrate Judge's view, BOP could arbitrarily re-imprison
19 anyone and everyone on home confinement—without cause; due to an error; based
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[21] California law provides a "a presumption that parole release will be granted" which "gives rise to a cognizable liberty interest in release on parole." *Hinkles*, 2009 WL 6312276, at *11. The California Governor has authority to reverse parole-grants, subject to appellate review. *Id.* at *14-16.

1 on a protected characteristic such as religious or political affiliation; or for some
2 other unlawful basis—and, even if courts found the revocations unconstitutional, the
3 federal judiciary would be powerless to restore people to their lawful home
4 confinement status. That is untenable.

5 Such prospects are not far-fetched. In January 2021, the Trump
6 Administration threatened to re-imprison everyone on home confinement following
7 expiration of the COVID-19 emergency period.[22] While the Biden Administration
8 reversed course in a December 2021 memorandum,[23] allies of former President
9 Trump have continued attempting to invalidate the December 2021 memo and
10 needlessly force people back to prison.[24] There is a serious risk that the incoming
11 Trump Administration will return to its prior plan and seek to re-imprison the
12 remaining people on CARES Act home confinement. Re-imprisoning these
13 individuals without cause and without due process would be unconstitutional and
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18 [22] Jennifer L. Mascott, *Home Confinement of Federal Prisoners After the Covid-19 Emergency*, Memorandum Opinion for the General Counsel, Federal Bureau of
19 Prisons (Jan. 15, 2021), https://www.justice.gov/olc/file/1355886/dl.
[23] Christopher H. Schroeder, *Discretion to Continue the Home-Confinement*
20 *Placements of Federal Prisoners After the COVID-19 Emergency*, Memorandum
21 Opinion for the Attorney General (Dec. 21, 2021), https://www.justice.gov/olc/file/1457926/dl.
22 [24] *See* C.J. Ciaramella, *Senate Resolution Would Send Federal Offenders Back to Prison 3 Years After Being Released to Home Confinement*, Reason (Nov. 6, 2023,
23 11:49 AM), https://reason.com/2023/11/06/senate-resolution-would-send-federal-offenders-back-to-prison-3-years-after-being-released-to-home-confinement/.

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unwise. The CARES Act has been a resounding success: 99 percent of the over 13,000 people released to home confinement under the CARES Act have successfully reintegrated into their communities without committing new offenses.[25] Indeed, everyone who is still on CARES Act home confinement has spent at least one year—and some up to four and a half years –working, caregiving for loved ones, and reintegrating into their communities without recidivating.[26]

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.

CONCLUSION

For the foregoing reasons, this Court should hold that BOP violated Mr. Wilford's constitutional due process rights and, to remedy the violation, restore him to home confinement.

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[25] Senator Cory Booker, *CARES Act Home Confinement Three Years Later*, at 4.
[26] BOP began releasing people to CARES Act home confinement in March 2020, after the CARES Act was signed. The latest releases occurred in June 2023, 30 days after the COVID-19 national emergency period ended. *See* Department of Health & Human Services, *COVID-19 Public Health Emergency*, https://www.hhs.gov/coronavirus/covid-19-public-health-emergency/index.html#:~:text=The%20timeline%20below%20highlights%20some,remains%20a%20public%20health%20priority (last visited Nov. 14, 2024) (end of emergency period); CARES Act, Pub. L. No. 116-136, div. B, tit. II, § 12004, 134 Stat. 517 (Mar. 27, 2020) (defining CARES Act covered emergency period).

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned, counsel of record for amici curiae, certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2) because this brief contains 6,490 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). In making this certification, I have relied on the word count of the word-processing system used to prepare the brief.

This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5), the type-style requirements of Fed. R. App. P. 32(a)(6), and the font requirements of L.R. 11-3.1.1 because this brief has been prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word word-processing software.

Dated: November 18, 2024

/s/ Melissa Camacho
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CERTIFICATE OF SERVICE

On this date, I caused a true and correct copy of the foregoing Brief of Amici Curiae in Support of Petitioner to be served upon all counsel of record via the Court's ECF system.

Dated: November 18, 2024

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