

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

NORDIA TOMPKINS,

Petitioner-Plaintiff,

v.

TIMETHEA PULLEN, Warden of Federal
Correctional Institution Danbury, in her official
capacity,

PATRICK MCFARLAND, Residential
Reentry Manager, in his official capacity, and

MICHAEL CARVAJAL, Director, Federal
Bureau of Prisons, in his official capacity,

Respondents-Defendants.

Civil Action No. 22-339

**PETITION FOR WRIT OF
HABEAS CORPUS
PURSUANT TO 28 U.S.C. §
2241, REQUEST FOR
ORDER OF
ENLARGEMENT &
COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

March 2, 2022

PRELIMINARY STATEMENT

1. Petitioner-Plaintiff Nordia Tompkins is a 37-year-old mother of two young daughters who spent a year on home confinement reconnecting with her daughters, furthering her education, and preparing for a future career in cosmetology. Despite her close family ties and connections to the community, in early July 2021, the Federal Bureau of Prisons (“BOP”), through Respondents-Defendants, imprisoned Ms. Tompkins based on an allegation that she was in a so-called “unauthorized location.” But Ms. Tompkins had merely stopped by an AT&T store to try to get her cell phone fixed on the way home from reporting to the Bronx Community Reentry Center (“RRC”)—which she told RRC staff she was going to do and understood the BOP to allow her to do. Nevertheless, BOP imprisoned her without providing her with a fair hearing in front of a neutral decisionmaker to justify her separation from her family and community.

2. Respondents-Defendants' imprisonment of Ms. Tompkins violates her constitutional and statutory rights and, further, does not even comply with the rudimentary regulations the BOP has promulgated for disciplining individuals serving a federal sentence. Respondents-Defendants denied Ms. Tompkins the assistance of counsel and the opportunity to present evidence and confront witnesses at a hearing before a neutral and detached decisionmaker before they proceeded to separate her from her children and incarcerate her.

3. Ms. Tompkins petitions this Court for a Writ of Habeas Corpus to remedy her unlawful imprisonment and consequences therefrom, and seeks an order of enlargement pending a decision on the underlying petition. She also seeks declaratory and injunctive relief.

PARTIES

4. Petitioner-Plaintiff Nordia Tompkins is a 37-year-old mother who, until being re-imprisoned by BOP, had been successfully enrolled in school, taking care of her daughters, and participating in her community in Sullivan County, New York. She is currently imprisoned at the Federal Correctional Institution Danbury ("FCI Danbury") and is in custody of the BOP.

5. Respondent-Defendant Timethea Pullen is the Warden at FCI Danbury. She is the immediate custodian of Ms. Tompkins. She is sued in her official capacity.

6. Respondent-Defendant Patrick McFarland is a Residential Reentry Manager at the BOP's New York Community Corrections Office. On information and belief, he is the BOP official who determines if individuals supervised by the New York Community Corrections Office will be returned to prison for violations while on home confinement and notifies the U.S. Marshals to detain individuals and remand them to prison. He is sued in his official capacity.

7. Respondent-Defendant Michael Carvajal is the Director of the BOP. He has ultimate authority over the decision to confine Ms. Tompkins and the conditions and location of her confinement. He is sued in his official capacity.

JURISDICTION AND VENUE

8. This Court has jurisdiction pursuant to Article I, § 9, cl. 2 of the U.S. Constitution; the Fifth and Eighth Amendments of the U.S. Constitution; 28 U.S.C. §§ 1331, 1346, 1651, 2201-2202, and 2241.

9. Venue is proper in the District of Connecticut because Petitioner-Plaintiff is physically present in the District of Connecticut and in the custody of the Respondents-Defendants in this district. 28 U.S.C. § 1391(b).

FACTUAL ALLEGATIONS

Background

10. Ms. Tompkins was on home confinement from June 2020 until early July 2021.

11. Home confinement is a program of the BOP whereby individuals serving a federal sentence are released from prison earlier than the expiration of their imposed sentence. 18 U.S.C. § 3624(c).

12. On March 27, 2020, due to the COVID-19 pandemic, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), Pub. L. No. 116-136, § 12003(b)(2) (2020), which expanded the authority of the BOP to place individuals on home confinement under 18 U.S.C. § 3624(c)(2)—previously capped at the shorter of 10% of their sentence or 6 months—provided that the Attorney General makes a finding that “emergency conditions will materially affect the functioning of the Bureau.” Attorney General Barr made that finding on April 3, 2020, issuing a memo indicating that the BOP was “experiencing significant

levels of infection at several of our facilities, including FCI Oakdale, FCI Danbury, and FCI Elkton.” Noting the Bureau's “profound obligation to protect the health and safety of all inmates,” Attorney General Barr directed the BOP to “move with dispatch in using home confinement, where appropriate, to move vulnerable inmates out of these institutions.”¹

13. At the time the COVID pandemic hit, Ms. Tompkins was serving a sentence at FCI Danbury for her conviction of conspiracy to distribute a controlled substance. Because of the dangers of the pandemic and Ms. Tompkins’ low public safety risk, the BOP released Ms. Tompkins from FCI Danbury to home confinement in June 2020 under the CARES Act.

14. At the time of conviction, Ms. Tompkins was the sole caretaker of her daughters, then ages 12 and 15. When she was initially incarcerated, Ms. Tompkins attempted to keep her daughters together in the care of a friend, but her younger daughter was ultimately placed in the foster care system.

15. During her imprisonment, Ms. Tompkins participated in, among other things, parenting, drug treatment, and mental health programming. She also served as a trustee for the prison, providing assistance to other imprisoned women.

16. According to BOP’s website, Ms. Tompkins’ prison sentence is projected to expire on or around December 5, 2022.

17. While on home confinement, Ms. Tompkins re-established strong personal and community ties. She successfully petitioned for her younger daughter to be returned to her from the foster care system, and she lived in Sullivan County, New York with her two daughters. During her time on home confinement, Ms. Tompkins worked for a car service, Sureway Taxi

¹ Office of the Attorney General, *Memorandum for Director of Bureau of Prisons* (April 3, 2020), <https://www.justice.gov/file/1266661/download>.

and enrolled in Capri Cosmetology Learning Center, where she attended a cosmetology course five days a week. She was due to graduate in August 2021 and then planned to take her State Exams.

18. Ms. Tompkins has anxiety, depression, and migraines that substantially affect her ability to perform major life activities. Her anxiety, depression, and migraines affect her such that she was prescribed medication while incarcerated. Her anxiety is severe, and triggers frequent panic attacks that disrupt her sleep. Since returning to prison, she has had panic attacks approximately 3 to 5 times a week. When Ms. Tompkins gets migraines, they can last for days and restrict her ability to work, drive, and do everyday chores.

19. Throughout her time on home confinement, Ms. Tompkins was supervised by the RRC, which contracts with BOP to provide supervision to individuals placed on home confinement in the area.

20. Ms. Tompkins' home is approximately two hours away from the RRC. Ms. Tompkins was working towards getting her driver's license but in the interim was forced to rely on friends and family members to drive her to the RRC. She went to the RRC twice a month to drug test and report to a staff member.

21. Ms. Tompkins, while on home confinement, was required to have a working cell phone so that staff could check in with her when she was away from the house on "passes"—time spent away from home that was permitted by the RRC.

Disciplinary Action Against Ms. Tompkins

22. On June 21, 2021, Ms. Tompkins reported to the RRC for a regular drug test. Before she left the RRC, Ms. Tompkins informed a RRC staff member (Mr. Gill) that she would stop on the way home at the AT&T store in Yonkers, NY to try to get her phone fixed, which she

understood she needed to do in order to be reachable by the RRC as required by the terms of her home confinement. After making the stop, Ms. Tompkins went home. She did not stop anywhere else. When she got home, she received a call from the RRC telling her to report to the RRC the next day with clothing (meaning she would be required to stay there).

23. The next day, the RRC issued an incident report to Ms. Tompkins charging her with a violation of Code 309 of the BOP's Inmate Discipline Program,² which it described as a "violation a condition of a community program." In the report, a staff member stated that the electronic monitoring system showed that Ms. Tompkins was in "an unauthorized area without authorization, 94 Market street, Yonkers, 10710" at 5:32pm on June 21, 2021. The incident report did not indicate that Ms. Tompkins faced the possibility of revocation of home confinement. RRC staff told Ms. Tompkins she was required to stay at the RRC.

24. After learning from the RRC that it intended to meet with Ms. Tompkins to initiate a discipline process for allegedly being in an unauthorized location, BOP Residential Reentry Manager Patrick McFarland instructed the RRC to detain Ms. Tompkins so that BOP could send her back to prison.³

25. On June 28, 2021, Ms. Tompkins provided a written statement to her case manager explaining that her cell phone had been broken, which meant the facility was unable to

² A list of conduct that can result in disciplinary sanctions by BOP is set forth in 28 C.F.R. § 541.3 ("Prohibited acts and available sanctions"). BOP Program Statement 5270.09 further describes the BOP's Inmate Discipline Program.

³ Without providing any specific details or evidence, the RRC Director told Mr. McFarland: "She has received three 309 IR for unauthorized locations from May into June. Staff continues to have to remind her to charge her ankle monitor because she will allow it to die." Based on this information alone, Mr. McFarland instructed the RRC to "pull her in today" and once the RRC confirmed they met with her "we will send remand." The RRC did not provide any further information relating to these allegations of prior misconduct before BOP imprisoned Ms. Tompkins, and BOP gave her no notice or opportunity to respond to these claims before imprisoning her.

reach her if she went out. Ms. Tompkins said that she stopped by the AT&T store on the way home from the RRC to try to get her phone fixed, and she had informed a staff member that she planned to do so. She said: “Upon my release I did everything I set out to do. I got my daughter out of foster care back into my care, I got a job and I reenrolled in school. . . . Up until now I have worked so hard to settle back into society the right way.” Ms. Tompkins expressed fear of losing her daughter back into the foster care system should she be sent back to prison.

26. Later that day, Ms. Tompkins met with staff at the RRC. Ms. Tompkins understood from the meeting that she would not be returning to prison and would just need to stay at the RRC for a total of 14 days.

27. The “unauthorized location” named in the incident report—94 Market Street, Yonkers, NY—is the location of an AT&T cell phone store.⁴

28. On July 8, 2021, a BOP Discipline Hearing Officer (“DHO”) determined that Ms. Tompkins’ sanction for a violation of Code 309 was “14 days loss of privileges deemed appropriate by the RRC staff.” The DHO decision said nothing relating to revocation of home confinement.

29. Ms. Tompkins was not given an opportunity to appear in front of the DHO.

30. On or around July 8, 2021, U.S. Marshals detained Ms. Tompkins at the RRC and brought her to the Metropolitan Detention Center Brooklyn. Thereafter, she was transferred to FCI Danbury, where she has been incarcerated since.

⁴ See AT&T Store Yonkers, 94 Market Street, <https://www.att.com/stores/new-york/yonkers/210622>

31. Ms. Tompkins received no written notice of the BOP's decision to revoke her home confinement and imprison her, and no explanation of the basis of the revocation decision and the evidence relied upon in reaching that decision.

32. When she was re-imprisoned, Ms. Tompkins was not told how long she would have to remain in prison.

33. No BOP official has provided Ms. Tompkins any accommodations that would allow her to meaningfully participate in the home confinement program.

34. Ms. Tompkins did not receive a hearing before BOP decisionmakers before she was imprisoned. She did not receive the opportunity at a hearing before decisionmakers to present witnesses or evidence in support of remaining on home confinement or to cross-examine adverse witnesses, did not have the determination of imprisoning her made before a neutral and detached decisionmaker who had heard the evidence, and did not receive a written statement by the decisionmakers as to the evidence relied on and reasons for revoking home confinement.

35. The June 28, 2021 meeting with RRC staff was not a hearing before a neutral and detached decisionmaker.

36. Ms. Tompkins' continued incarceration will cause irreparable harm in that she is unable to care for her family and pursue her education and employment.

37. Ms. Tompkins has pursued a timely administrative appeal of the BOP's actions. After receiving a negative response from the Regional Director, she sent an appeal to the BOP's General Counsel. Although it has been over six months since she sent her appeal, she is still awaiting a response.

38. There is no statutory requirement of exhaustion in this case.

39. On information and belief, there was no administrative remedy available to Ms. Tompkins while on home confinement to prevent her current imprisonment.

40. Ms. Tompkins' younger daughter, age 17, is staying temporarily with a friend of Ms. Tompkins until Ms. Tompkins can return home. She attends high school and suffers from a learning disability. Ms. Tompkins' older daughter, age 19, is living on her own in an apartment and has taken a leave of absence from college so that she can work full time to try to support herself. Both daughters are suffering without the support of their mother.

41. If Ms. Tompkins is released, she can live with her older daughter in her apartment in Monticello, New York. Her younger daughter will also be able to live with them.

COUNT ONE
(Violation of Procedural Due Process)

42. Petitioner-Plaintiff realleges and incorporates by reference each and every allegation contained in the proceeding paragraphs as if set forth fully herein.

43. Ms. Tompkins has a liberty interest, protected by the Due Process Clause of the Fifth Amendment, in remaining on home confinement.

44. Under the Due Process Clause, before revoking Ms. Tompkins' home confinement, the BOP was required to provide Ms. Tompkins with (1) written notice of the claimed violations of home confinement; (2) disclosure of the evidence against her; (3) the opportunity to be heard in person before the decisionmaker and to present witnesses and documentary evidence; (4) the right to confront and cross-examine adverse witnesses at the hearing; (5) a "neutral and detached" decisionmaker; and (f) a written statement by the decisionmaker as to the evidence relied on and reasons for revoking home confinement. *See Young v. Harper*, 520 U.S. 143 (1997); *Morrissey v. Brewer*, 408 U.S. 471 (1972). She also had a due process right to the assistance of her counsel in the revocation process.

45. Respondents-Defendants' imprisonment of Ms. Tompkins violates procedural due process because it deprived Ms. Tompkins adequate notice, the ability to review and confront the evidence against her, the right to a hearing in front of a neutral and detached official making the revocation decision, and a written statement by the decisionmaker as to the evidence relied on and reasons for revoking home confinement.

46. Respondents-Defendants' denial of Ms. Tompkins' access to counsel in the revocation proceeding also violates her procedural due process rights.

COUNT TWO
(Substantive Due Process)

47. Petitioner-Plaintiff realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

48. Ms. Tompkins has a liberty interest, protected by the Due Process Clause of the Fifth Amendment, in remaining on home confinement.

49. The BOP's decision to separate Ms. Tompkins from her daughters and imprison her based her decision to stop by a cell phone store to try to get her phone fixed violates substantive due process because it is egregious, arbitrary, and shocks the conscience.

COUNT THREE
(Eighth Amendment)

50. Petitioner-Plaintiff realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

51. The BOP's imprisonment of Ms. Tompkins for the alleged violation—stopping by a cell phone store to try to get her phone fixed—is excessive and grossly disproportionate punishment in violation of the Eighth Amendment.

52. The BOP's imprisonment of Ms. Tompkins for the alleged violation serves no legitimate penological purpose and in fact undermines penological goals, in violation of the Eighth Amendment.

COUNT FOUR
(*Accardi*)

53. Petitioner-Plaintiff realleges and incorporates by reference each and every allegation contained in the preceding paragraphs as if set forth fully herein.

54. Under the principle set forth by the U.S. Supreme Court in *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), the BOP must follow its own regulations.

55. The imprisonment of Ms. Tompkins violates the *Accardi* principle because the agency did not follow even its own rudimentary regulations in disciplining Ms. Tompkins.

56. The BOP's Inmate Discipline Program regulations set forth a number of procedures Respondents-Defendants were required to follow before disciplining Ms. Tompkins. These procedures include, *inter alia*, written notice of the allegations, appearance before a committee that reviewed the allegations, a hearing before a BOP Discipline Hearing Officer ("DHO"), the ability to present evidence, and a written report by the DHO that provides the sanction imposed by the DHO, the evidence relied on by the DHO, and the reasons for the sanction imposed. *See* 28 C.F.R. §§ 541.5 to 541.8.

57. Respondents-Defendants' imprisonment of Ms. Tompkins failed to comply with the BOP's own regulations. Among other failures, Ms. Tompkins was denied a hearing before the DHO where she could present evidence and did not receive a written report setting forth the decision to revoke her home confinement, the evidence relied upon in the revocation decision, the reasons for revocation, and the length of the revocation. Indeed, BOP has not disclosed what person or office made the revocation decision.

58. By failing to follow its own regulations in its treatment of Ms. Tompkins, the BOP violated the *Accardi* principle.

**COUNT FIVE
(Rehabilitation Act)**

59. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

60. Section 504 of the Rehabilitation Act of 1973 (“Section 504”) provides that “no otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.” 29 U.S.C. § 794(a).

61. Disability is defined to include “(A) a physical or mental impairment that substantially limits one or more major life activities . . .” 29 U.S.C. § 705(2)(B); 42 U.S.C. § 12102.

62. Ms. Tompkins suffers from a qualifying disability under the Rehabilitation Act and is otherwise a qualified individual to participate in the BOP’s programs and services.

63. Home confinement, and placement in an RRC, are both federal programs and services under the Rehabilitation Act.

64. The BOP’s actions in this case are denying Ms. Tompkins equal and effective access to BOP’s programs and services, including its home confinement program, on the basis of disability.

65. Ms. Tompkins has provided Respondents-Defendants with notice of her disabilities.

**COUNT SIX
(Declaratory Judgment Act)**

66. All of the foregoing allegations are repeated and realleged as though fully set forth herein.

67. The Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, provides that “[i]n a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a).

68. There is an actual controversy between the parties because Respondents-Defendants have refused to provide Ms. Tompkins with adequate process before re-imprisoning her in violation of the Due Process Clause, have engaged in arbitrary and egregious conduct that shocks the conscience also in violation of the Due Process Clause, and have imposed disproportionate and excessive punishment that serves no legitimate penological purpose in violation of the Eighth Amendment. The Court should exercise its authority under the Declaratory Judgment Act to declare that Respondents-Defendants have violated Ms. Tompkins’ Constitutional, statutory, and regulatory rights.

REQUEST FOR ENLARGEMENT AS A PROVISIONAL REMEDY

69. Federal district courts have authority, when habeas actions are pending, to “enlarge” the custody of petitioners. Enlargement is a provisional remedy that modifies custody by expanding the site at which it takes place, upon order of the court, from a particular prison to another setting.

70. The enlargement power stems from Congress’s authorization of federal judges under the habeas statutes to “summarily hear and determine the facts, and dispose of the matter as law and justice require” as well as the courts’ inherent powers. *See* 28 U.S.C. § 2243.

71. To qualify for the enlargement remedy, an individual must show “extraordinary circumstances” and that the underlying claim raises “substantial claims.” *Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001).

72. Here, extraordinary circumstances exist given that Ms. Tompkins continued imprisonment will cause irreparable harm to her children and will prevent her from pursuing her education and employment opportunities.

73. Ms. Tompkins has also raised substantial claims, as she was summarily imprisoned by the Respondent-Defendants without the opportunity to present and rebut evidence in front of a neutral decisionmaker, and with no notice of the basis for the revocation decision and the evidence relied upon.

74. Ms. Tompkins requests that the Court enlarge her custody to permit her to live at her daughter’s residence, subject to the terms of home confinement in place prior to her re-imprisonment.

PRAYER FOR RELIEF

WHEREFORE, Petitioner-Plaintiff respectfully requests that the Court:

- a) Grant enlargement to Ms. Tompkins pending disposition of the underlying habeas petition;
- b) Enter a judgment against Respondents-Defendants and award the following relief:
 - a. Declare that Respondents-Defendants have no basis under the Due Process Clause of the Fifth Amendment, the Eighth Amendment, and *Accardi* to hold Ms. Tompkins;

- b. Declare that Respondents-Defendants' failure to reasonably accommodate Ms. Tompkins' disabilities, or their failure to provide Ms. Tompkins equal and effective access to a federal program, violates the Rehabilitation Act of 1973;
- c. Declare Ms. Tompkins' current imprisonment unlawful;
- d. Enjoin Respondents-Defendants from continuing to imprison Ms. Tompkins until they provide her the rights she is entitled to;
- e. Grant a writ of Habeas Corpus requiring Respondents-Defendants to release Ms. Tompkins immediately or issue an order directing them to show cause within three days why the Writ of Habeas Corpus should not be granted, pursuant to 28 U.S.C. § 2243;
- f. Award Petitioner-Plaintiff's reasonable attorneys' fees and costs;
- g. Grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

Dated: March 2, 2022

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**PETITIONER'S MEMORANDUM IN SUPPORT OF ENLARGEMENT AS A
PROVISIONAL REMEDY AS THE COURT CONSIDERS HER HABEAS ACTION**

The Petitioner-Plaintiff Nordia Tompkins respectfully submits this memorandum in support of her request that the Court grant enlargement as a provisional remedy while her habeas action brought pursuant to 28 U.S.C. § 2241 is pending.

The BOP separated Ms. Tompkins from her children and imprisoned her based on her decision to stop at an AT&T store to try to get her cell phone fixed—something she needed to do to be in contact with her home confinement supervisors. Before taking this drastic action, the BOP gave Ms. Tompkins insufficient process—no opportunity to present and rebut evidence at a hearing in front of a neutral decisionmaker. To date, the BOP has not informed Ms. Tompkins who made this decision and the basis for it.

This Court can and should grant Ms. Tompkins' request to enlarge her custody to home confinement during the pendency of this action. This provisional relief is required in order to

make the remedy of release effective if she prevails in this action. Indeed, two federal district courts have recently granted enlargement requests in closely analogous circumstances. *See* Order of Feb. 11, 2022, *Lallave v. Martinez et al.*, 1:22-cv-00791-NGG (E.D.N.Y.) (granting enlargement request within hours of petition being filed on behalf of woman challenging her remand to prison from home confinement without a fair hearing based on allegation of a positive marijuana test);¹ Order of Feb. 23, 2022, *Daniels v. Martinez, Jr. et al.*, 1:22-cv-00918-LDH (E.D.N.Y.) (granting enlargement request 5 days after petition filed on behalf of woman BOP re-imprisoned without a fair hearing based on allegation of possession of alcohol).² Like in those cases, and as discussed below, Ms. Tompkins has demonstrated “extraordinary circumstances” and presented “substantial claims” supporting enlargement pending adjudication of her Petition-Complaint.

I. Legal Standard

Enlargement is a provisional remedy that federal courts may order in habeas cases that modifies custody, pending adjudication of a case, by expanding the site at which the custody takes place. *See Mapp v. Reno*, 241 F.3d 221, 226 (2d Cir. 2001) (describing the authority of

¹ As in Ms. Tompkins’ case, BOP re-imprisoned Ms. Lallave without a hearing in front of a neutral and detached decisionmaker and with no explanation of the reasons for the revocation decision. Instead, Ms. Lallave’s only chance to discuss the allegation of misconduct was at a meeting with staff of the Bronx Community Reentry Center—the same RRC that was supervising Ms. Tompkins. Like Ms. Tompkins, Ms. Lallave asserted claims under the Due Process Clause, Eighth Amendment, and Rehabilitation Act, as well as pursuant to the *Acardi* doctrine. Within hours of her filing her petition-complaint and requesting enlargement as a provisional remedy, Judge Garafus entered an order directing the BOP to release Ms. Lallave to home confinement forthwith.

² In Ms. Daniel’s case, BOP provided no hearing before a neutral and detached decisionmaker before sending Ms. Daniels to prison from the Bronx Community Reentry Center. Ms. Daniels filed a petition-complaint, raising Due Process, Eighth Amendment, and *Arcardi* claims, and requesting enlargement. Five days later, Judge DeArcy Hall granted the request for enlargement, ordering Ms. Daniels to be released forthwith and for BOP to “reinstitute the status quo prior to remand.”

district courts to release habeas petitioners pending a ruling on the merits, using the term “bail” instead of “enlargement”). That is, the petitioner remains legally in custody, but the place of custody is changed, or “enlarged,” upon order of the court, from a particular prison to a hospital, halfway house, a person’s home, or another setting. *See Whitted v. Easter*, 20-cv-569 (MPS), ECF 1, Ex. B, Declaration of Professor Judith Resnik Regarding Enlargement and the Use of Provisional Remedies for Detained Individuals ¶¶ 28-29. Enlargement is part and parcel of Congress’s authorization of federal judges under the habeas statutes to “summarily hear and determine the facts, and dispose of the matter as law and justice require.” 28 U.S.C. § 2243.

An order of enlargement pending the merits of a habeas decision is appropriate if a petitioner demonstrates “extraordinary circumstances” and that the underlying petition raises “substantial claims.” *See Mapp*, 241 F.3d at 226. Courts have recognized that “extraordinary circumstances” include those in which the grant of provisional release is necessary to make the habeas remedy effective. *See, e.g., Martinez-Brooks v. Easter*, No. 3:20-CV-00569 (MPS), 2020 WL 2813072, at *2 (D. Conn. May 29, 2020) (concluding that provisional release was necessary to make habeas remedy effective with respect to some medically vulnerable people incarcerated at FCI Danbury, observing that keeping people detained increased the chances of contracting COVID, “the very outcome that Petitioners seek to avoid, and one that would render their requested relief entirely ineffective”);³ *S.N.C. v. Sessions*, No. 18 CIV. 7680 (LGS), 2018 WL

³ Numerous courts with the Second Circuit have granted enlargement/bail requests from people seeking habeas relief based on the risk of COVID at detention facilities. *See, e.g., Coronel v. Decker*, 449 F. Supp. 3d 274, 290 (S.D.N.Y. 2020) (“In order to secure a meaningful bond hearing and therefore preserve the effectiveness of the remedy sought on habeas, Petitioners must be released until they receive their bond hearings.”); *Basank v. Decker*, No. 20 CIV. 2518 (AT), 2020 WL 1953847, at *13 (S.D.N.Y. Apr. 23, 2020) (“Detention of Petitioners pending final adjudication of this action could cause severe illness or death—precisely the harm their petition seeks to avert. The effectiveness of the habeas remedy can only be preserved, therefore, by Petitioners’ remaining released for the duration of this matter.”); *Barbecho v. Decker*, No. 20-

6175902, at *6 (S.D.N.Y. Nov. 26, 2018) (“Petitioner’s case . . . presents extraordinary circumstances that require granting bail for any remedy related to the adjudication of her visa applications to be effective.”); *Boyer v. City of Orlando*, 402 F.2d 966 (5th Cir. 1968) (granting release while habeas pending resolution because, given the short length of the sentence, if release were denied and the habeas petition were eventually granted, the defendant would already have served the sentence).

II. Enlargement is Appropriate and Necessary Here

This Court should grant enlargement pending resolution of Ms. Tompkins’ habeas petition because extraordinary circumstances exist and she raises substantial claims in her Petition-Complaint.

A. Extraordinary Circumstances Exist

Extraordinary circumstances exist here, warranting a grant of enlargement, because provisional relief in the form of enlargement is necessary to make the habeas remedy effective for Ms. Tompkins. In her Petition-Complaint, Ms. Tompkins seeks a fair hearing consistent with the Due Process Clause and Rehabilitation Act where she can effectively advocate, with the assistance of counsel, for remaining on home confinement. Moreover, she asserts that her detention based on a trip to the cell phone store violates her Eighth Amendment and substantive due process rights. Ms. Tompkins continued confinement deprives her of the remedy she seeks—

CV-2821 (AJN), 2020 WL 1876328, at *8 (S.D.N.Y. Apr. 15, 2020) (“If these Petitioners—whose medical conditions place them at a higher risk of severe illness, or death, from COVID-19—were to remain detained, they would face a significant risk that they would contract COVID-19—the very outcome they seek to avoid.”); *Avendano Hernandez v. Decker*, 450 F. Supp. 3d 443, 449 (S.D.N.Y. 2020) (“[I]mmediate release is necessary to ‘make the habeas remedy effective.’”); *United States v. Nkanga*, 452 F. Supp. 3d 91, 96 (S.D.N.Y. 2020) (granting release, citing *Mapp*).

to be home with her children. Accordingly, extraordinary circumstances exist that make the enlargement “necessary to make the habeas remedy effective.” *Mapp*, 241 F.3d at 226.

B. Ms. Tompkins Raises Substantial Claims

Ms. Tompkins’ Petition-Complaint raises numerous substantial claims. For purposes of this enlargement motion, the Court need look no further than Ms. Tompkins’ procedural due process claim to grant her motion.⁴

Ms. Tompkins plainly has a liberty interest, protected by the Due Process Clause, in remaining on home confinement. Before BOP can deprive her of this interest, the parole revocation procedures of *Morrissey v. Brewer*, 408 U.S. 471 (1972) must be utilized. *See Young v. Harper*, 520 U.S. 143 (1997) (holding that preparole conditional supervision program was sufficiently similar to parole to require same due process protections); *see also Kim v. Hurston*, 182 F.3d 113, 118 (2d Cir. 1999) (“The work release program in which Kim participated, at least the final phase in which she lived at home and worked at a job, while regularly reporting to Parkside, is virtually indistinguishable from either traditional parole or the Oklahoma program considered in *Young*. While participating in this phase of the TRP, Kim enjoyed a liberty interest, the loss of which imposed a sufficiently ‘serious hardship’ to require compliance with at least minimal procedural due process.”).⁵

⁴ Should the Court determine that Ms. Tompkins has not raised a substantial claim that she has been imprisoned in violation of her procedural due process rights, she respectfully requests the opportunity to submit briefing on the other claims raised in her Petition-Complaint.

⁵ Home confinement revocation decisions are governed by the *Morrissey* parole revocation requirements rather than the prison discipline procedures forth in *Wolff v. McDonald*, 418 U.S. 539 (1974), given the heightened liberty interest people possess in remaining at home with their families and connected to their jobs and communities. In addition, the fact that home confinement revocation hearings can take place in the community rather than in correctional facilities means that concerns about institutional safety at issue in *Wolff* do not apply in the home confinement revocation setting.

Under the Due Process Clause, per *Morrissey*, before revoking Ms. Tompkins' home confinement, the BOP was required to provide Ms. Tompkins with (1) written notice of the claimed violations of home confinement; (2) disclosure of the evidence against her; (3) the opportunity to be heard in person and to present witnesses and documentary evidence before the decisionmaker; (4) the right to confront and cross-examine adverse witnesses at the hearing; (5) a "neutral and detached" decisionmaker; and (f) a written statement by the decisionmaker as to the evidence relied on and reasons for revoking home confinement.

Ms. Tompkins also had a due process right to the assistance of her counsel when she faced revocation of home confinement. In *Gagnon v. Scarpelli*, 411 U.S. 778, 791 (1973), the Supreme Court held that individuals facing probation or parole revocation must be advised of their limited right to counsel and counsel presumptively should be appointed where requested if the person claims either (1) innocence of the alleged misconduct or (2) the existence of substantial mitigating factors that are difficult to present. In addition, in determining whether counsel should be appointed, authorities must consider the individual's ability to speak on his own behalf. If a request for counsel is denied, the reasons for denial must be explained in the record. The Second Circuit has concluded that the use of counsel as described in *Gagnon* extends to parole rescission hearings as well. See *Drayton v. McCall*, 584 F.2d 1208, 1220 (2d Cir. 1978).

Here, the BOP provided no opportunity *at all* for Ms. Tompkins to appear in front of the person or group of people making the home confinement revocation decision. Contrary to the requirements of *Morrissey*, Ms. Tompkins had no ability to present and confront evidence at a hearing in front of a neutral and detached decisionmaker. Instead, she merely had a meeting with RRC staff members, who had no decisionmaking authority whatsoever with respect to home

confinement revocation. In addition, Ms. Tompkins was not provided advance notice of the time and date of the RRC meeting or the fact that she faced the possibility of imprisonment for her alleged conduct. The BOP also failed to give Ms. Tompkins a written explanation of the reasons for revocation and the evidence relied upon, as *Morrissey* requires. Finally, in violation of *Gagnon*, the BOP failed to notify Ms. Tompkins of her right to counsel in some circumstances and did not give her the chance to request appointment of counsel before home confinement was revoked.

Indeed, it appears that Ms. Tompkins' fate was sealed by Patrick McFarland, a BOP Residential Reentry Manager, who indicated Ms. Tompkins would be re-imprisoned based on a conclusory email he received from the RRC Director and before any investigation of the allegation had been conducted. It does not appear that the home confinement revocation decision was revisited—even after the Disciplinary Hearing Officer concluded that good time credit should not be forfeited and instead the appropriate sanction was “14 days loss of privileges deemed appropriate by the RRC staff.”

Such conduct by BOP plainly violated Ms. Tompkins' procedural due process rights and entitles her to release to home confinement until a fair hearing is provided.

III. This Court Should Grant Ms. Tompkins' Enlargement Request

For the reasons described above, this Court should grant Ms. Tompkins' enlargement request and allow her to return to home to care for her daughters and resume her employment and education. Ms. Tompkins proposes that the enlargement order direct the BOP to place her on home confinement at her daughter's residence in Monticello, New York, pending the resolution of this Petition-Complaint, subject to all conditions of home confinement that were in place prior to her re-imprisonment.

Respectfully submitted,

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