APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 24-1325

DION HORTON; DAMON JONES; CRAIG BROWNLEE; RAHDNEE ODEN-PRITCHETT; TATE STANFORD; ELIJAH BRONAUGH, individually and on behalf of a class of similarly situated persons,

Appellants,

v.

ADMINISTRATIVE JUDGE JILL RANGOS, in her official capacity; FRANK SCHERER, DIRECTOR OF ADULT PROBATION AND PAROLE, in his official capacity; ANTHONY M. MARIANI, COURT OF COMMON PLEAS JUDGE; KELLY BIGLEY, COURT OF COMMON PLEAS JUDGE, in their official and individual capacities; CHARLENE CHRISTMAS, PROBATION HEARING OFFICER; ROBERT O'BRIEN, PROBATION HEARING OFFICER; STEPHEN ESSWEIN, PROBATION HEARING OFFICER; RENAWN HARRIS, PROBATION HEARING OFFICER, in their official and individual capacities; WARDEN OF ALLEGHENY COUNTY JAIL

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. No. 2:22-cv-01391)
District Judge: Honorable J. Nicholas Ranjan

Argued: February 19, 2025
Filed: May 2, 2025
Before: CHAGARES, *Chief Judge*, and BIBAS and RENDELL, *Circuit Judges*

* * *

OPINION OF THE COURT

BIBAS, *Circuit Judge*.

Probationers are different from arrestees. Someone who has only been arrested is presumed innocent; someone who has been convicted and is serving his sentence of probation is not. This difference is why the government owes probationers less process before revoking their conditional liberty. Even so, it must give probationers *some* process.

Here, it has—but only in part. Plaintiffs are probationers who sued several county judges and officials for detaining them without first finding that detention was necessary to prevent them from fleeing or committing more crimes. Yet the Supreme Court has already spelled out exactly what process they are due, and it does not include such a finding of necessity. So we will not recognize this novel due-process right. Still, we see material factual disputes about whether the county is following existing due-process rules for probationers. We will thus affirm in part and reverse in part the District Court's summary judgment for the county.

I. PROBATIONERS WERE HELD FOR MONTHS

Probation lets convicted criminals free under certain conditions. This freedom gives probationers a limited constitutional liberty interest. So, before the

government may change or take away this freedom, it must give them both (1) a preliminary hearing to decide whether there is probable cause to believe that the probationer violated the conditions of his probation and (2) a revocation hearing to decide whether to revoke probation. *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *see also Morrissey v. Brewer*, 408 U.S. 471, 485-89 (1972).

Plaintiffs are probationers who say they were deprived of these rights. They sued several Pennsylvania judges, probation officers, and the county warden, bringing two relevant claims. First, the probationers asked the District Court to recognize a new procedural right: that the government cannot detain them between the preliminary and revocation hearings unless it first makes "an adequate assessment to ensure such detention is necessary" to prevent them from fleeing or committing more crimes. App. 89 ¶162. Second, they accused the county of violating their existing rights by holding inadequate preliminary hearings that lacked, among other things, credible probable-cause findings and by detaining them for an unreasonably long time between hearings.

The District Court not only denied a preliminary injunction, but also announced that it planned to convert its ruling on that injunction into a summary judgment. Two months later, it entered summary judgment for defendants on both claims.

On the first one, it held that plaintiffs' novel claim collides with contrary Supreme Court precedent. On the second claim, the court found no genuine dispute of material fact about whether the county had followed existing constitutional rules in its initial hearings. Though its opinion focused on whether to allow plaintiffs more discovery, it covered several important disputed facts.

Two batches of facts are relevant here. The first relates to whether probationers are told ahead of time about their hearings. Probationers arrested for allegedly violating their conditions wait a week or two to get their preliminary hearings. Despite this wait, often no one tells a probationer about his hearing until right before it starts.

The second relates to whether detention was justified. Probationers cannot be detained unless an independent officer finds probable cause to suspect that the probationer violated his conditions of release. *Morrissey*, 408 U.S. at 486-87. But plaintiffs alleged that two county judges had adopted blanket detention policies that effectively assumed probable cause. Those alleged policies led these two judges to order detention between the two hearings more than 85% of the time, while the other judges in the county did so only 71.5% of the time. Plaintiffs submitted declarations that hearing officers reflexively find probable cause in cases presided over by those two judges, but the District Court implicitly rejected that assertion. Once the officer finds probable cause, detention between the hearings can be long: As of March 2023, the six named plaintiffs had been detained on average for 230 days before getting a revocation hearing, and four of the six still had not yet had one.

On appeal, we review the District Court's grant of summary judgment de novo, viewing all facts in favor of these plaintiffs. *Tundo v. County of Passaic*, 923 F.3d 283, 286-87 (3d Cir. 2019).

II. PROBATIONERS MAY BE DETAINED WITHOUT A FINDING OF NECESSITY

Plaintiffs' claims rest on due process. In due-process cases, we first figure out "the contours of the substantive right" that the government is depriving someone of.

Washington v. Harper, 494 U.S. 210, 219-21 (1990). If the Constitution covers that right, we then gauge "what procedural protections are necessary to protect" it. *Id.* at 220.

When it comes to revoking probation, the Supreme Court has already identified the contours of the substantive right and what process must be followed to deprive someone of it. In *Morrissey*, it explained parolees' liberty interest and the process that they are due. 408 U.S. at 481-89. Then in Gagnon, it applied *Morrissey* to probationers. 411 U.S. at 782. Under those cases, there must first be a preliminary hearing at which the hearing officer finds probable cause to believe that the probationer violated his probation conditions. If so, he may be detained for a "reasonable time." *Morrissey*, 408 U.S. at 488. Plaintiffs argue that this requirement is just a floor and that sometimes the preliminary-hearing procedures described in those cases are insufficient. But *Morrissey* and *Gagnon* stand in their way. In the Supreme Court's words, if the hearing officer finds probable cause to believe that a probationer violated his conditions, "[s]uch a determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision." *Id.* at 487.

A. After a probable-cause hearing, probationers may be detained

Probationers have a limited substantive right to bodily liberty. Because the probationer has already been adjudged guilty, the government "has an overwhelming interest in being able to" detain him "without the burden of a new adversary criminal trial." *Id.* at 483. Thus, his liberty is "conditional"; it depends on his following "special [probation] restrictions." *Id.* at 480.

Still, depriving him of that liberty "inflicts a grievous loss." *Id.* at 482 (internal quotation marks omitted). The government may inflict that loss only after following certain processes.

Due process guarantees a probationer two hearings. *First*, he gets a preliminary hearing to gauge "whether there is probable cause or reasonable ground to believe that" he has violated his conditions. *Id.* at 485. The process surrounding the preliminary hearing is "summary": informal, flexible, and economical. *Gagnon*, 411 U.S. at 786, 788. That is why *Morrissey* requires only one "independent [hearing] officer," who need not be a judge. 408 U.S. at 486. Probationers have no automatic constitutional right to counsel. *Gagnon*, 411 U.S. at 790. And evidence inadmissible at trial is admissible here. *Morrissey*, 408 U.S. at 489.

Though the hearing is informal, it still has some strict requirements. The probationer must get notice of the hearing and "its purpose": to test probable cause for the alleged violations, which should be identified in the notice. *Id.* at 486-87. The probationer has the right not only to appear in person and to speak, but also to bring relevant witnesses and documents. *Id.* at 487. Plus, if the government has a witness, the probationer gets to confront the informant unless disclosing the informant's identity might cause harm. *Id.* Based on this information, the hearing officer must decide "whether there is probable cause to hold the [probationer] for the final decision of the [probation] board on revocation." *Id.*

"Such a [probable-cause] determination would be *sufficient* to warrant the [probationer's] continued detention ... pending the final decision." *Id.* (emphasis added). But this detention may last only for "a reasonable time." *Id.* at 488 (noting that a two-month delay

"would not appear to be unreasonable"). The additional safeguard limiting detention to a "reasonable time" makes sense because the process at the first hearing is thorough but not robust.

Second, the probationer gets more formal process later, at the revocation hearing. The revocation hearing is held to decide whether to revoke probation. *Id.* at 487-88. For this hearing, the probationer gets notice of the alleged violation again (this time in writing), disclosure of the evidence against him, and the opportunity to be heard and put on his own evidence and witnesses. *Id.* at 489. If the government puts on witnesses, the probationer may confront and cross-examine them, unless the hearing officer finds good cause not to allow it. *Id.* All of this happens before a neutral hearing body, like a probation board, but its members need not be judges or even lawyers. *Id.* If the board decides to revoke probation, it must explain its reasons and evidence in writing. *Id.*

Though the second hearing has more process than the first, neither hearing is like a "criminal prosecution in any sense." *Id.*

B. Plaintiffs ask us to supplement this process, but we cannot

Plaintiffs want us to add on another requirement: Before the preliminary-hearing officer can order a probationer to be detained until his revocation hearing, the officer would have to find that detention "serves a compelling government interest." Appellants' Br. 1. Yet the Supreme Court held that a finding of probable cause at the preliminary hearing is "*sufficient* to warrant the [probationer's] continued detention" for a reasonable time until the revocation hearing. *Morrissey*, 408 U.S.

at 487 (emphasis added). No further finding is needed. The Court set this bar low; we cannot raise it.

Plaintiffs try to get around that statement two ways, but both are dead ends. First, they try to demote *Morrissey*'s holding about detention to mere dicta. Six of the eleven judges of the en banc Seventh Circuit agreed with that reading. *See Faheem-El v. Klincar*, 841 F.2d 712, 725 (7th Cir. 1988) (en banc). We do not. As the other five judges agreed, *Morrissey* set out a comprehensive "set of constitutional rules." *Id.* at 730 (Easterbrook, J., concurring in part). In comprehensive opinions like *Morrissey*, no rule is dicta; the Court has stated all the relevant legal rules in the area, even if it could have rested on just one of them. *Id.* (giving as a similar example *Miranda v. Arizona*, 384 U.S. 436 (1966)).

Our partially dissenting colleague tries to carve this part of *Morrissey* out of the rest of the opinion by construing *Morrissey*'s question presented in a novel way. *See* Partially Dissenting Op. at 7 (citing Respondents' Brief for the question presented). But in the Court's words, it "granted certiorari in this case to determine whether the Due Process Clause of the Fourteenth Amendment requires that a State afford an individual some opportunity to be heard prior to revoking his parole." *Morrissey*, 408 U.S. at 472. The Court could have held that the parolees there were given no opportunity to be heard before revocation and reached the same result without explaining all the required process. *Id.* at 475-76 (explaining that the state had asserted that the parolees were given a hearing for the first time in its answering brief and that this hearing occurred *after* revocation).

In the narrowest sense, one might say that the sole right "at issue" in *Morrissey* related to the revocation hearing itself. *See* Partially Dissenting Op. at 9. But we may not simply ignore that the Court went well beyond that. It laid out *all* the constitutional rules in the area: a prompt preliminary hearing, a finding of probable cause to justify further detention, a reasonable limit on the period of custody before the revocation hearing, and then the revocation hearing itself. Which of these other rules might be dicta under our colleague's view? *See Faheem-El*, 841 F.2d at 730 (Easterbrook, J., concurring in part) ("[A]lmost all of the opinion could be labeled dicta."). Plus, the Court said the point of the preliminary hearing is to decide if there is enough evidence based on probable cause "to *hold* the [probationer] for the final decision ... on revocation." *Morrissey*, 408 U.S. at 487 (emphasis added). The Court did not overlook whether to add a necessity requirement; it deliberately chose not to.

Second, plaintiffs analogize to cases requiring the government to show a specific interest in detaining a person. They argue that the same logic should operate here. For instance, before detaining an arrestee, a magistrate must first find that he poses a risk of flight or a danger to the community. 18 U.S.C. § 3142(e)(1). Such a showing is indeed required—but only for people presumed innocent. *See, e.g.*, *United States v. Salerno*, 481 U.S. 739, 751 (1987) (pretrial detainees); *Schall v. Martin*, 467 U.S. 253, 263-64 (1984) (juvenile pretrial detainees); *Kansas v. Hendricks*, 521 U.S. 346, 357-60 (1997) (sexually dangerous people who are about to be released from prison at the end of their sentences). What is more, unlike in many of the cases cited by our partially dissenting colleague, the detention here is only for a reasonable time. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001) (discussing risk of "potentially permanent"

detention when deportation is not feasible); *Foucha v. Louisiana*, 504 U.S. 71, 82, 85 (1992) (addressing indefinite civil commitment for insanity); *Jackson v. Indiana*, 406 U.S. 715, 727 (addressing indefinite civil commitment for incompetency to stand trial that "is permanent in practical effect").

Probationers are different. They are no longer presumed innocent. Like parolees, they have already been adjudged guilty and are still serving their criminal sentences. *Morrissey*, 408 U.S. at 483. Probation is still "a form of criminal sanction." *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987). That is why a state may infringe on a probationer's liberty in ways that would be intolerable for those not serving a criminal sentence. *Id.* at 877-78. That is why the bar for detaining them is lower. *Morrissey*, 408 U.S. at 483. And that is why "[s]tates have wide latitude under the Constitution to structure [probation] revocation proceedings." *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 365 (1998). Thus, finding probable cause that a probationer violated his conditions *suffices* to detain him for a reasonable time before the revocation hearing. *Morrissey*, 408 U.S. at 487. We cannot expand the requirements already set by the Supreme Court.

Finally, two amici ask us to give probationers more protections than the parolees in *Morrissey* because probation supposedly no longer serves rehabilitation and drives over-imprisonment. But the Supreme Court "do[es] [not] perceive" "any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation." *Gagnon*, 411 U.S. at 782. Our Court has also treated probationers and parolees "as indistinguishable for constitutional purposes." *United States v. Quailes*, 126 F.4th 215, 222 n.9 (3d Cir. 2025). So we must treat them the same.

III. There Are Disputes over Material Facts

But plaintiffs' other federal claim, that the county did not follow *Morrissey* and *Gagnon's* established rules, survives. We see material factual disputes over whether the county followed due process.

Before the preliminary hearing, probationers must get "notice that the hearing will take place" and of "what [probation] violations have been alleged." *Morrissey*, 408 U.S. at 486-87. It follows logically that this notice must be enough to vindicate probationers' other rights, like speaking and putting on evidence or witnesses. *See id.* at 487. On this record, we cannot say plaintiffs got enough notice. For instance, one plaintiff was not notified of his hearing until "right before it happened," so he had no time to prepare. App. 20 ¶40. Likewise, another plaintiff got "no advance notice before the hearing." App. 21 ¶50. We thus reverse and remand to let plaintiffs proceed on this claim.

This remand renews plaintiffs' chance to press two potentially meritorious points that they forfeited on appeal by failing to argue them in their opening brief. First, the long detentions, averaging 230 days, could be unreasonable. Second, there could be a material dispute about whether detention is mandatory: Are the hearing officers truly making independent findings of probable cause? Also, on this record, we have questions about whether plaintiffs were given enough of a chance to speak at their preliminary hearings. On remand, plaintiffs may advance these arguments properly, and we trust the District Court to move this case forward from this unusual posture.

* * * * *

Probationers get due process, but only what the Supreme Court has already prescribed. We cannot give them more. Yet because there are still factual disputes about whether the county followed those processes, we will reverse and remand in part.

RENDELL, *Circuit Judge*, concurring in part and dissenting in part:

In Allegheny County, probationers are routinely held in jail awaiting their revocation hearings, sometimes for months. This detention is notwithstanding the fact that there has been no determination that they would pose a danger to society or flight risk upon release. In our constitutional scheme, "freedom from physical restraint 'has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action[.]'" *Kansas v. Hendricks*, 521 U.S. 346, 356 (1997) (Thomas, J.) (quoting *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992)). But the majority concludes that dicta in a Supreme Court opinion that focuses on the ultimate revocation determination—not interim detention—controls and forces us to permit this unlawful detention.[1] The majority also draws a firm constitutional line between probationers and arrestees, which obscures the *Morrissey* and *Gagnon* Courts' robust conception of probationers' liberty interests. Both conclusions are misguided. Accordingly, I dissent from the

[1] As I discuss at length below, *Morrissey*'s statement on pre-revocation detention is wholly unrelated to its holding, which for the first time, established the scheme of preliminary and final revocation hearing.

Majority's conclusion and reasoning as to Count II of Appellants' complaint.[2]

A sentence of probation in theory aims to give "young and new violators of law a chance to reform and to escape the contaminating influence of … imprisonment." *United States v. Murray*, 275 U.S. 347, 357-58 (1928).[3] Probationers, like parolees, carry out their sentences not behind bars, but in society, as they have been adjudged to show "reasonable promise" of being able to be a part of "society and function as a responsible, self-reliant person." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). In *Morrissey*, the Court stressed that "the liberty of a parolee [and probationer], although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." *Id.* It is because of the important nature of this liberty that the *Morrissey* and *Gagnon* Courts rejected the view that parole and probation represent an "act of grace" that can be revoked absent due process. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973) (quoting *Escoe v. Zerbst*, 295 U.S. 490, 492 (1935)). Instead, they established a scheme to comport with due process—they required a preliminary and final hearing prior to revocation. *Id.* at 782.

The preliminary hearing is an informal proceeding "to determine whether there is probable cause or reasonable ground to believe that the arrested

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[2] I agree with the majority's conclusion and reasoning as to Count I, that is, that there are material factual disputes over whether the county's practices comply with due process as set forth in *Morrissey* and *Gagnon*.

[3] Amici have detailed how today's probation practices stray far from these original goals. *See generally* Brief for American Civil Liberties Union as Amicus Curiae Supporting Appellants.

[probationer] has committed acts that would constitute a violation of [probation] conditions." *Morrissey*, 408 U.S. at 485. The final hearing is where the state makes its final revocation decision. *Id.* at 487-88. This final decision encompasses two questions. The first is factual: has the individual violated one or more of their conditions? 408 U.S. at 479. If so, the second and "more complex" question arises: "should the [probationer] be recommitted to prison or should other steps be taken to protect society and improve chances of rehabilitation?" *Morrissey*, 408 U.S. at 479-80.

Many alleged probation violators in Allegheny County never have a true final revocation determination, as they are detained for so long that no further punishment is warranted. Plaintiff Oden-Pritchett was detained for over seven months before Judge Bigley sentenced him to time served at his final revocation hearing, thereby ending his probationary sentence. Plaintiff Brownlee was also sentenced to time served at his final revocation hearing after being detained for over seven months. Indeed, it is common that probationers remain detained after the initial hearing, but far less common that probationers are incarcerated after their final hearing. In these circumstances, a probable cause finding amounts to a de facto final revocation decision.

Detention after only a probable cause finding is especially unfair because 82.3% of Allegheny County's condition violations are misdemeanors or summary offenses (e.g., a minor, non-traffic citation). Many of these offenses do not allow for a sentence of imprisonment, or only allow for a sentence of imprisonment not to exceed twenty or ninety days, depending on the offense. *See* 30

Pa. Cons. Stat. § 923(a)(1)-(7).[4] So detention before revocation inflicts more punishment in these cases than would otherwise be legally imposed. The median pre-revocation detention period in Allegheny County is 68 days and each named Plaintiff was detained for an average of over 230 days. These detentions far exceed the statutory maximum for certain offenses.

Plaintiff-Appellants' complaint details many scenarios in which detention seems plainly unjust. Several named plaintiffs were detained based on new criminal charges (i.e., a violation of their probation condition to not commit new crimes). In each case, the judge in the parallel criminal proceeding set bail, but the probationers remained detained regardless of whether they were able to, or whether they did, in fact, post bail. App. 159

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[4] The statutory maximum sentences for summary offenses and misdemeanors are:

> (1) For a summary offense of the first degree, a fine of $250 or imprisonment not exceeding 90 days.
>
> (2) For a summary offense of the second degree, a fine of $150 or imprisonment not exceeding 20 days.
>
> (3) For a summary offense of the third degree, a fine of $75.
>
> (4) For a summary offense of the fourth degree, a fine of $25.
>
> (5) For a misdemeanor of the third degree, a fine of not less than $250 nor more than $5,000, or imprisonment not exceeding 90 days, or both.
>
> (6) For a misdemeanor of the second degree, a fine of not less than $500 nor more than $5,000, or imprisonment not exceeding two years, or both.
>
> (7) For a misdemeanor of the first degree, a fine of not less than $1,500 nor more than $10,000, or imprisonment not exceeding five years, or both.

30 Pa. Cons. Stat. § 923(a)(1)-(7).

(Plaintiff Horton "could have and would have posted [bail] if not for the probation detainer lodged against [him]."); App. 184 (same situation for Plaintiff Frazier); App. 188 (same situation for Plaintiff Robinson); App. 192 (same situation for Plaintiff Todd); App. 201 (same situation for Plaintiff Stanford); App. 204 (same situation for Plaintiff Bronaugh); App. 165 (Plaintiff Jones arrested on new criminal charges, posted bond, but re-arrested and detained because new charges violated probation conditions); App. 171 (same outcome for Plaintiff Brownlee); App. 175 (Plaintiff Oden-Pritchett "did not even bother" posting bond or attempting to get it lowered, reasoning that "because of [his] probation detainer," "[t]here's no point because even if [his bond]'s reduced [he] won't be able to get out of jail anyway."); App. 180 (Plaintiff Johnson declaring "As far as I can tell, this probation detainer is the only reason I can't get out of jail, because I have a bond set on the new charges.").

In some instances, the state dropped probationers' underlying criminal charges, or gave probationers a non-custodial sentence for their new criminal charges, while the probationer awaited their final revocation hearing. Those probationers nevertheless remained detained prior to their final revocation hearing because of Allegheny County's probation detainer practices. *See, e.g.*, App. 361 (Plaintiff Stanford remained detained pending his final revocation hearing even after state prosecutors withdrew all charges against him); App. 435-37 (Plaintiff Oden-Pritchett had some charges dropped, and took a plea for probation for others, but was told by his trial judge that his detainer could not be lifted "because [his] probation wasn't under her").

The majority sees no problem with this, given that *Morrissey* said in passing that the preliminary hearing officer's probable cause determination "would be

sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision." 408 U.S. at 487. True, that line appears in *Morrissey*. But "[j]udicial opinions are not statutes, from which we squeeze all we can out of every last word. Rather, we try to understand the Court's language against the backdrop of the particular controversy that the Court was resolving." *In re Plavix Mktg., Sales Pracs. & Prods. Liab. Litig. (No. II)*, 974 F.3d 228,235 (3d Cir. 2020). Every other court that has considered this statement in *Morrissey* in this context has concluded that it is nonbinding dictum. *See Faheem-El v. Klincar*, 841 F.2d 712, 724-25 & n.16 (7th Cir. 1988); *Roberson v. Cuomo*, 524 F. Supp. 3d 196, 211 (S.D.N.Y. 2021); *see also* App. 476-77 (District Court remarking "I know it's dicta, but that language in *Morrissey* … seems to suggest that a Court can just detain a probationer immediately as it's sorting out these things.").

The majority concludes that *Morrissey*'s statement on pre-revocation detention binds us because *Morrissey* "set out a comprehensive 'set of constitutional rules'" which collectively bind the lower courts. Maj. Op. at 10 (quoting *Faheem-El*, 841 F.2d at 730 (Easterbrook, J., concurring)). Rather than separating dictum from holding by interpreting *Morrissey*'s "language against the backdrop of the particular controversy that the Court was resolving," *Plavix Mktg.*, 974 F.3d at 235, the majority throws up its hands and concludes that we must assume each pronouncement in *Morrissey* is part of its holding. I see no reason to stray from the well-established idea that "[a] judge's power to bind is limited to the issue that is before him[.]" *United States v. Rubin*, 609 F.2d 51, 69 n.2 (2d Cir. 1979) (Friendly, J., concurring). Like any other decision, then, we can and should

separate dictum from holding by considering which issues were before the Court.

The Court in *Morrissey* addressed the due process implications of the total lack of any hearing prior to the state's revocation of parole.[5] Thus, the portions of *Morrissey* that address this issue—that due process requires not only a hearing, but two hearings, which must have certain minimum procedures—represent the Court's holding. But its statements regarding detention after the preliminary hearing do not. Not only was detention after the preliminary hearing not at issue, it was specifically conceded when counsel told the Court that the issue was not important to the case.[6] *See Art & Antique*

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[5] *See, e.g.*, Respondents' Br. 2, *Morrissey v. Brewer*, 408 U.S. 471 (1972) (No. 71-5103) ("The question presented for review is whether the due process clause of the Fourteenth Amendment to the United States Constitution requires an evidentiary hearing prior to the revocation by the Iowa Board of Parole of a parole which had been granted by said State Board of Parole."); Pet. Reply Br. 3, *Morrissey*, 408 U.S. 471 (No. 71-5103) ("Petitioners submit that what is at issue in this case is not whether or not a parolee shall remain in a position of conditional liberty *pending determination of a parole violation*, but whether or not his conditional liberty as a parolee shall be revoked … without due process of law.").

[6] Petitioners' reply brief stated:

> If the only interest of the parolee which were involved in this case was the question of whether or not he should be imprisoned pending a determination of the fact of parole violation, Petitioners may well concede that the interests of society may outweigh his interest in remaining free during the relatively short period of time required to determine whether or not his parole had in fact been violated.

Pet. Reply Br. 3, *Morrissey*, 408 U.S. 471 (No. 71-5103).

Additionally, at oral argument, counsel for Petitioners engaged in the following colloquy:

Dealers League of Am., Inc. v. Seggos, 121 F.4th 423, 437 (2d Cir. 2024) ("[A] party's concession on a disputed issue of law may control the outcome of the particular dispute between the parties, but it does not necessarily establish a legal precedent, which, under the rule of *stare decisis*, will control the decision of other unrelated cases."); *Wright v. Spaulding*, 939 F.3d 695, 704 (6th Cir. 2019) ("Our hands are not tied in a later case just because, in an earlier one, a party conceded an issue and the panel took that concession at face value.").

All in all, the issue of detention pending the final revocation hearing was not at issue in *Morrissey*, and its statement regarding such detention was therefore dictum. *See United States v. Bennett*, 100 F.3d 1105, 1110 (3d Cir. 1996) ("A court's statement concerning an issue not raised on appeal is dicta."); *Cohens v. State of Virginia*, 19 U.S. 264, 399 (1821) ("[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control

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> Q: That is, you don't object to the fact that, having found out what he found out, the parole officer could arrest them? And detain them?
>
> A: No, I don't object to that, Your Honor.
>
> Q: So that arrest and detention pending a hearing would be satisfactory, as far as you're concerned?
>
> A: So far as I'm concerned in this case, Your Honor, that would be satisfactory[.]
>
> Q: Unless there is some finding that [a parolee] is dangerous, he must be—he has to be released after bail, is that it?
>
> A: No, I really don't think that's important to the case, Your Honor.

Oral Arg. Tr. 11-12, 16, *Morrissey*, 408 U.S. 471 (No. 71-5103).

the judgment in a subsequent suit when the very point is presented for decision."). And, as this Court has remarked, "the Supreme Court has repeatedly cautioned that it 'does not decide important questions of law by cursory dicta[.]'" *Diggs v. United States*, 740 F.2d 239, 245 (3d Cir. 1984) (quoting *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968)).

While "[w]e should not idly ignore considered statements the Supreme Court makes in dicta," *In re McDonald*, 205 F.3d 606, 612-13 (3d Cir. 2000), we should also acknowledge that:

> Dicta are often dangerous. Because they are unmoored from any concrete set of facts and are frequently the product of judicial musing rather than adversarial presentations from parties with a vested interest in exploring issues in detail, dicta can be ill-informed. … "[T]he problem is that dicta no longer have the insignificance they deserve. They are no longer ignored. Judges do more than put faith in them; they are often treated as binding law. The distinction between dictum and holding is more and more frequently disregarded."

Doe ex rel. Doe v. Boyertown Area Sch. Dist., 897 F.3d 515, 517 (3d Cir. 2018) (Jordan, J., joined by Chagares & Bibas, JJ., dissenting) (quoting Pierre N. Leval, *Judging Under the Constitution: Dicta about Dicta*, 81 N.Y.U. L. REV. 1249, 1250 (2006)).

The *Morrissey* and *Gagnon* Courts did not have the benefit of adversarial presentation of the issue of pre-revocation hearing detention. But we do. Rather than hanging our hat on *Morrissey*'s dictum, we should assess for ourselves whether it is well-reasoned—that is, whether due process requires a suitability-for-release

determination prior to prolonged pre-revocation detention. I would conclude that due process requires a suitability-for-release determination prior to pre-revocation detention. At the very least, I would conclude that further factual finding is needed for a proper procedural due process analysis.

In the analogous pretrial context, an individual can be briefly detained based on a probable cause finding, *Gerstein v. Pugh*, 420 U.S. 103, 120 (1975), but the government must determine that such detention serves a "legitimate and compelling" regulatory purpose for prolonged pretrial detention, *United States v. Salerno*, 481 U.S. 739, 752 (1987). Similarly, in the probation context, probable cause alone cannot support prolonged detention prior to a determination that the probationer has, in fact, violated the conditions of their probation.

The majority urges that we cannot draw from *Gerstein* and *Salerno* because they apply to pretrial detainees who have not been convicted of any crime, whereas here, probationers have a prior conviction. But the prior conviction is not the issue. Even cognizant of the prior convictions, *Morrissey* and *Gagnon* recognized that parolees and probationers possess a liberty interest that "includes many of the core values of unqualified liberty," the termination of which "inflicts a 'grievous loss' on the [probationer] and often on others." *Morrissey*, 408 U.S. at 482; *see also Black v. Romano*, 471 U.S. 606, 610 (1985) ("The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation." (citing *Bearden v. Georgia*, 461 U.S. 660, 666 & n.7 (1983))). A prior conviction does not justify doing away with *Gerstein* and *Salerno*'s implication that probable cause alone is not enough to justify prolonged deprivation of an individual's liberty interest. *Cf. Schall v.*

Martin, 467 U.S. 253, 265, 278 (1984) (remarking that "The juvenile's countervailing interest ... is undoubtedly substantial as well. But that interest must be qualified. ... [T]he juvenile's liberty interest may, in appropriate circumstances, be subordinated to the State's parens patriae interest in preserving and promoting the welfare of the child" and concluding that detention scheme satisfied due process where it required "a finding that there is a 'serious risk' that the juvenile, if released, would commit a crime prior to his next court appearance" (citations omitted)).

The majority is correct that a probationer's liberty can be taken away "without the burden of a new adversary criminal trial" unlike a pretrial detainee, as it is "dependent on observance of special … restrictions." *Morrissey*, 408 U.S. at 483, 480. Those restrictions curtail a probationer's day-to-day life "substantially beyond the ordinary restrictions imposed by law on an individual citizen." *Id.* at 478. An ordinary citizen's liberty is conditional on compliance with criminal laws—if they commit a crime, they might be sent to prison. So too with a probationer, though they also risk being sent to prison if they do not comply with their probation conditions—for instance, if they miss a meeting with their probation officer, consume alcohol, or associate with a gang member. While *Morrissey* stated that "the full panoply of rights due a defendant in [a revocation] proceeding does not apply to [probation] revocations," 408 U.S. at 480, it clarified that this is not because of the limited nature of a probationer's liberty interest. Instead, it is due to the state's interest in sending probation violators to prison "if in fact [the probationer] has failed to abide by the conditions of his [probation]." *Id.* at 483. It follows, a fortiori, that this interest does not carry commanding weight unless and until the probationer has been shown to have

violated the conditions of their probation at the final revocation hearing.

In every other scenario in which the government detains an individual, courts have concluded that due process requires a finding that such detention serves a governmental interest. These scenarios include pretrial detention of adults, *Salerno*, 481 U.S. at 751, pretrial detention of juveniles (a context where, as here, an individual's liberty interest is more easily subordinated to the state's), *Schall*, 467 U.S. at 274-75, 281, civil commitment of individuals not convicted by reason of insanity, *Foucha*, 504 U.S. at 81-82; *see also Jackson v. Indiana*, 406 U.S. 715, 738 (1972), civil commitment of individuals likely to engage in "predatory acts of sexual violence," *Hendricks*, 521 U.S. at 357-58, detention of deportable noncitizens, *Zadvydas v. Davis*, 533 U.S. 678, 690 (2001), and detention of deportable noncitizens with felony convictions, *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 775 (9th Cir. 2014). Under the majority's view, pre-probation revocation detention—before anyone has determined that there is anything more than probable cause to believe the probationer has violated his conditions—is apparently anomalous.

Apart from questions of what substantive due process may require here, at the very least, a *Mathews v. Eldridge*, 424 U.S. 319 (1976), procedural due process analysis is appropriate. I view *Faheem-El's* balancing of the three *Mathews* factors as well-reasoned. *See* 841 F.2d at 725-27. Like the Seventh Circuit in *Faheem-El*, we should remand for further factual finding on the fiscal and administrative burdens stemming from requiring hearing officers to make suitability- for-release determinations at the preliminary "*Gagnon* I" hearings.

Rather than engaging in the analysis dictated by precedent, the majority relies on *Morrissey*'s nonbinding dicta to avoid balancing the individual's interest versus the interest of the state. In so doing, it does great damage to the probationer's liberty interest and pushes us closer to the long-disfavored view of probation as an "act of grace." *Escoe*, 295 U.S. at 492. A sentence of probation represents a determination that an individual will not be incarcerated unless it is determined that (1) they violated the conditions of their probation and (2) they can no longer live in society without committing antisocial acts. *See Morrissey*, 408 U.S. at 479-80. But the majority blesses prolonged detention where neither determination has been made. I would have weighed probationers' interests against the State's to determine the permissible bounds of such detention, as I believe controlling precedent requires. Accordingly, I respectfully dissent from the Court's conclusion that Appellants' Count II fails as a matter of law.

* * *

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

22-CV-1391-NR

DION HORTON, ET AL.,
Plaintiffs,

v.

JILL RANGOS, ET AL.,
Defendants.

Filed February 21, 2024

MEMORANDUM OPINION

J. Nicholas Ranjan, United States District Judge

Before the Court is the question of whether it should convert its decision on Plaintiffs' preliminary-injunction motion into a summary-judgment decision. On December 22, 2023, the Court notified the parties of its intent to do so. ECF 140. On January 24, 2024, Plaintiffs filed a response to that notice (ECF 144); on February 14, 2024, Defendants filed their responses (ECF 145, ECF 146).

After careful review of the complaint, the Court's prior decision on the preliminary-injunction motion, the exhibits that were submitted as part of that motion, evidence presented at the preliminary-injunction hearing, and the parties' responses to the notice, the Court will enter summary judgment on Counts I and II of the

complaint, and decline to exercise supplemental jurisdiction over Counts III and IV, the state-law claims.[1]

LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no matter of law." Fed. R. Civ. P. 56(a). At summary judgment, the Court must ask whether the evidence presents "a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986). In making this determination, "all reasonable inferences from the record must be drawn in favor of the nonmoving party and the court may not weigh the evidence or assess credibility." *Goldenstein v. Repossessors, Inc.*, 815 F.3d 142, 146 (3d Cir. 2016) (cleaned up). The moving party bears the initial burden to show the absence of a genuine dispute of material fact, and "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party[,]" summary judgment is improper. *Id.* (citation omitted).

But if the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment is warranted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

"[D]istrict courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to

[1] The Court previously set forth the facts and procedural background in this case. *Horton v. Rangos*, No. 22-1391, 2023 WL 8865872 (W.D. Pa. Dec. 22, 2023) (Ranjan, J.). Because the parties are familiar with the record, the Court will not repeat the facts and procedural background here.

come forward with all of her evidence." *Id.* at 326. Under Rule 56, "[a]fter giving notice and a reasonable time to respond, the court may: (1) grant summary judgment for a nonmovant; (2) grant the motion on grounds not raised by a party; or (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute." Fed. R. Civ. P. 56(f). "From a procedural standpoint, the Federal Rules of Civil Procedure clearly require that parties be given ten days notice that a motion for summary judgment is being considered." *Gibson v. Mayor and Council of City of Wilmington*, 355 F.3d 215, 223 (3d Cir. 2004). "The purpose [of giving notice] is to give the losing party the opportunity to marshal all the evidence that would be used to oppose summary judgment." *Forrest v. Parry*, 930 F.3d 93, 111 (3d Cir. 2019).

Courts can treat a preliminary-injunction request as a motion for summary judgment "if there are no issues of material fact and the party is entitled to judgment as a matter of law." *Krebs v. Rutgers*, 797 F. Supp. 1246, 1252-53 (D.N.J. 1992). "A district court might also convert a decision on a preliminary injunction into a final disposition of the merits by granting summary judgment on the basis of the factual record available at the preliminary injunction stage[,]" so long as the notice requirements of Rule 56 are met. *Air Line Pilots Ass'n, Int'lr v. Alaska Airlines, Inc.*, 898 F.2d 1393, 1397 n.4 (9th Cir. 1990).

Summary judgment is properly granted *sua sponte* as to a non-moving party when notice is given and there is no genuine dispute of material fact. *Lee v. Sixth Mt. Zion Baptist Church of Pittsburgh*, 903 F.3d 113, 118 (3d Cir. 2018) (affirming *sua sponte* grant of summary judgment against a non-moving party where the district court's order providing notice specifically referenced

Rule 56(f) and gave the parties an opportunity "to present all relevant arguments and evidence"). If a plaintiff offers no explanation as to how it would benefit from further evidence or briefing, summary judgment is proper. *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 280 (3d Cir. 2010).

DISCUSSION & ANALYSIS

I. Plaintiffs have not shown that a genuine dispute of material fact exists that would preclude summary judgment on Count II.

Count II is clearly foreclosed by the Court's prior finding that there is no constitutional right to a release-suitability determination as part of the *Gagnon I* hearing. This count concerned Defendants' alleged mandatory detention policies, and was the clear focus of the preliminary-injunction proceedings. As the Court previously noted, "While the Court has reviewed and considered the extensive evidentiary record, ultimately, the motion before the Court is resolved almost entirely on the law. At its core, Plaintiffs' due-process claims essentially distill down to this question: are probationers entitled to an initial detention hearing and bail or release determination when arrested for a probation violation?" *Horton v. Rangos*, No. 22- 1391, 2023 WL 8865872, at *8 (W.D. Pa. Dec. 22, 2023) (Ranjan, J.). Based on that question of law, the Court then concluded that well-settled Supreme Court decisions make clear that there is no right to a release determination:

> Plaintiffs contend that the federal and state constitutions require more protections than Allegheny County provides. But they are wrong under the well-settled Supreme Court precedents of *Morrissey* and *Gagnon*. Due process as applied to probationers requires that an

> independent officer determine at the *Gagnon I* hearing "whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972). The probationer must be given notice of this hearing and its purpose, and is permitted to speak and present exhibits or individuals to testify. *Id.* at 486-87. The hearing officer then determines whether probable cause exists to hold the probationer until a final revocation hearing. *Id.* at 487. The final revocation hearing (the *Gagnon II* hearing) is a "somewhat more comprehensive hearing prior to the making of the final revocation decision." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). Nothing in these decisions requires that a probation officer or judge also make a bail or release decision as part of the *Gagnon* hearings. Indeed, *Morrissey* presumes that so long as the procedures for the hearings are satisfied, the probationer can be detained with really no further inquiry or procedure at all. *Morrissey*, 408 U.S. at 487 ("Such a [probable cause] determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision.").

Horton, 2023 WL 8865872, at *8-9.

Thus, the Court's prior holding was premised fundamentally on a legal question. No additional discovery or facts will change the Court's legal determination. Summary judgment is therefore appropriate on Count II of the complaint.

II. Plaintiffs have not shown that a genuine dispute of material fact exists that would preclude summary judgment on Count I.

The Court reaches the same conclusion as to Count I. As part of the decision on the preliminary-injunction motion, the Court noted that it was unclear whether Plaintiffs were bringing a standalone claim that, irrespective of Defendants' detention policies, they nonetheless violated the basic procedures of *Gagnon* (*i.e.*, no notice of the hearing, no right to present evidence, no probable-cause determination at the *Gagnon I* hearing, and excessive delays in scheduling the *Gagnon I* and *II* hearings). *Horton*, 2023 WL 8865872, at *12 n.10. Out of an abundance of caution, the Court construed Count I as presenting standalone violations, and then concluded that injunctive relief was not appropriate because Defendants complied with procedures set forth by *Gagnon*. *Id.* at *12.

In their response to the Court's notice, Plaintiffs make clear that they are, in fact, alleging a standalone claim. *See* ECF 144, p. 8 ("despite the Court's understanding to the contrary, Plaintiffs did bring a standalone claim challenging Defendants' failure to comply with *Morrissey* and *Gagnon*." (cleaned up)). Assuming that to be the case,[2] Plaintiffs haven't raised a genuine dispute of fact for this claim to proceed.

Plaintiffs primarily argue that they need more discovery. The Court disagrees. The parties conducted discovery over an approximately four and a half-month

[2] It's still unclear to the Court whether such a claim has been brought, or at least properly alleged. For example, all of the Defendants in this case are named solely due to their role in implementing detention policies and practices. ECF 1, ¶¶ 49-55.

period. During that time, the Court ordered initial disclosures to be made, which should have captured virtually all of the relevant documents in this case. Beyond that, the Court authorized discovery of 10 requests for production and 20 hours of depositions per side. ECF 17. The Court also considered and granted various requests to modify the case management schedule along the way. ECF 45; ECF 46; ECF 55; ECF 58; ECF 61.

According to Defendants, Plaintiffs' counsel did not utilize all of the authorized discovery. ECF 145, p. 7 n.7 ("Notably, Plaintiffs used only roughly one-third of the time permitted for depositions[.]"). Such efficiency is perfectly acceptable. But, notably, there is nothing to suggest that Plaintiffs limited the scope of discovery to issues and topics that were only relevant to Count II—which was the focus of the complaint and most of the preliminary-injunction proceedings. Put differently, this isn't a case where there were specific topics of discovery pertaining to Count I that were naturally severable—the named Plaintiffs' *Gagnon* proceedings would have been discoverable and relevant to every issue in the case. The exhibits, testimony, and briefing associated with the preliminary-injunction hearing bear this out.

Perhaps more importantly, the relevant discovery here is largely within Plaintiffs' control. For example, the named Plaintiffs know when they were arrested; they know when their *Gagnon I* and *Gagnon II* hearings were held; they know whether charges in separate newly filed cases contributed to delays; and they know about their communications with their own criminal defense lawyers. Plaintiffs haven't come forward with any documents or declarations to show that there was excessive delay before the *Gagnon I* hearings; that their lawyers were unable to put on a case at the *Gagnon I* hearing; that the hearing officers did not make the requisite

probable-cause findings; and that Defendants refused probationer counsel's requests for a *Gagnon II* hearing.[3] Nor do Plaintiffs explain any disputes with the exhibits in this case that reflect, among other things, that Plaintiffs had their *Gagnon I* hearings within about a month (usually less) of being arrested; and that the hearing officers completed the forms establishing the existence of probable cause. Plaintiffs' Exs. 6, 7, 8, 9, 15, and 16 (named Plaintiffs' declarations setting forth the dates of their arrests); Def. Exs. 15, 16, 17, 18, 19, and 20 (*Gagnon I* forms indicating a finding of probable cause as to each named Plaintiff).

Finally, Plaintiffs are correct in noting that the Court, in denying the motion for preliminary injunction, mentioned that the preliminary-injunction record was not fully developed on whether probationers' lawyers made strategic decisions during the *Gagnon* hearings, such as opting not to contest probable cause or to delay holding the *Gagnon II* hearing to negotiate a more favorable plea agreement. *Horton*, 2023 WL 8865872, at *13. But that doesn't mean that there are genuine disputes of material fact on those issues. If there were a genuine dispute of material fact concerning those issues, the Court expected Plaintiffs to come forward with facts in response to the notice of intent to enter summary judgment. ECF 140 (Court's Order, indicating intent to enter summary judgment) (citing *Anderson*, 621 F.3d at 280); *Forrest*, 930 F.3d at 111 ("The purpose [of giving

[3] Plaintiffs had court watchers present at many *Gagnon I* hearings, and these court watchers confirmed that the probationers had counsel present and had the ability to present evidence. *Horton*, 2023 WL 8865872, at *13 ("As evident from the court watchers' testimony, the probationer and counsel are present at the hearing, are able to put on evidence, and then the hearing officer makes a probable-cause determination.").

notice] is to give the losing party the opportunity to marshal all the evidence that would be used to oppose summary judgment.").[4] Plaintiffs did not do so.

In short, discovery was more than sufficient to capture the relevant information as to Count I, and from the record before the Court and responses to the notice that the Court issued, there are no genuine disputes of material fact to warrant allowing this claim to proceed.

III. The Court declines to exercise supplemental jurisdiction over Plaintiffs' state law claims (Counts III and IV).

The complaint alleges two companion state-law claims, and the Court will decline to exercise supplemental jurisdiction over those claims.

District courts may exercise supplemental jurisdiction over state-law claims that are related to federal claims. 28 U.S.C. § 1367. A district court may decline to exercise supplemental jurisdiction, however, if it has dismissed all federal claims or if the claim raises a "novel or complex issue of State law[.]" 28 U.S.C. § 1367(c)(1), (3). Here, because the Court is granting summary judgment on the federal constitutional claims, the Court will

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[4] The Court would expect that the named Plaintiffs, through their counsel here, could have procured documents or information directly from the probationers' criminal attorneys without the need to resort to formal discovery. "A client's ownership of the contents of his attorney's file is a matter of state law." *In re Bounds*, 443 B.R. 729, 733 (Bankr. W.D. Tex. 2010). In Pennsylvania, legal materials belong to the client. *Maleski by Chronister v. Corp. Life Ins. Co.*, 641 A.2d 1, 6 (Pa. Commw. Ct. 1994) (noting that attorney "[n]otes and memoranda are part of the package of goods and services" to which the client has the right), *opinion after grant of reh'g sub nom. Maleski v. Corp. Life Ins. Co.*, 646 A.2d 1 (Pa. Commw. Ct. 1994).

decline to exercise supplemental jurisdiction over the Pennsylvania constitutional claims.

Additionally, Plaintiffs contend that "no Pennsylvania court has decided what procedural or substantive due process protections the Pennsylvania constitution affords probationers at the *Gagnon I* stage, particularly in light of the prolonged incarceration they will experience until the *Gagnon II* hearing." ECF 144, p. 12. Because Plaintiffs' claims raise a novel issue of state law, that is another basis for the Court to decline to exercise supplemental jurisdiction.

CONCLUSION

For these reasons, the Court will grant summary judgment as to Counts I and II of the complaint, and decline to exercise supplemental jurisdiction over Counts III and IV.[5] A separate judgment order will issue.

DATED this 21st day of February, 2024.

BY THE COURT:

/s/ *J. Nicholas Ranjan*
United States District Judge

[5] The pending motions for reconsideration filed by Defendants (ECF 111, ECF 113, and ECF 114) will be denied as moot.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

22-CV-1391-NR

DION HORTON, ET AL.,
Plaintiffs,

v.

JILL RANGOS, ET AL.,
Defendants.

Filed February 21, 2024

ORDER

AND NOW, this **21st day of February, 2024**, in accordance with the foregoing Memorandum Opinion,

IT IS HEREBY ORDERED that summary judgment is **ENTERED** in favor of Defendants on Counts I and II of Plaintiffs' complaint (ECF 1). Further, the Court declines to exercise supplemental jurisdiction over Counts III and IV of Plaintiffs' complaint pursuant to 28 U.S.C. § 1367. As such, Counts III and IV are **DISMISSED** without prejudice.

BY THE COURT:

/s/ *J. Nicholas Ranjan*
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

22-cv-1391-NR

DION HORTON, ET AL.,
Plaintiffs,

v.

JILL RANGOS, ET AL.,
Defendants.

Filed December 22, 2023

OPINION

J. Nicholas Ranjan, United States District Judge

This case is a putative class action brought by probationers in the Allegheny County, Pennsylvania court system. Plaintiffs allege that the probation procedures implemented by Allegheny County fall short of constitutional due-process requirements because when they were arrested for probation violations, they should have been—but were not—given a meaningful opportunity to seek release from jail pending a final revocation determination.

Before the Court is Plaintiffs' motion for a preliminary injunction. After extensive fact and expert discovery, several rounds of briefing, and a complete evidentiary record—which includes the live testimony of five witnesses and exhibits submitted before, during, and after the April 18, 2023, injunction hearing—the motion is ready for disposition. For the reasons that follow, the

Court finds that Plaintiffs are not substantially likely to succeed on the merits and so the Court will deny the motion on that basis.

FINDINGS OF FACT

The Court makes the following findings based on the evidentiary record before it. This specifically includes any undisputed allegations in the pleadings; the pre-hearing and post-hearing exhibits that were submitted by the parties; the exhibits that were admitted into evidence at the preliminary-injunction hearing; and the testimony from the injunction hearing.[1]

The Parties

1. Plaintiffs are Dion Horton, Damon Jones, Craig Brownlee, Rahdnee Oden-Pritchett, Tate Stanford, and Elijah Bronaugh. They were all serving probationary sentences imposed by judges in the Allegheny County Court of Common Pleas. They were all charged and arrested for violating the terms of their probation. ECF 1, ¶¶ 40-48.

2. Several of them picked up new charges, which gave rise to their probation violations and also led to separate criminal actions against them. *Id.*, ¶¶ 40 (Mr. Stanford), 41 (Mr. Bronaugh), 42 (Mr. Horton), 44 (Mr. Jones), 46 (Mr. Brownlee).

3. The "County Defendants" are Judge Jill Rangos in her capacity as the Administrative Judge of the

[1] The parties dispute whether the Court may consider the expert declaration of Vincent N. Schiraldi, which was submitted by Plaintiffs as pre-hearing Exhibit 23. ECF 121, pp. 8-10; ECF 128, pp. 14-18. The Court has considered the declaration, but in light of the other evidence presented, limits its consideration of the declaration to Mr. Schiraldi's opinions pertaining to the impact that prolonged detention has on probationers generally.

Criminal Division; Frank Scherer, the former Director of Adult Probation and Parole of Allegheny County; and Orlando Harper, the former Warden of the Allegheny County Jail. *Id.*, ¶¶ 49-52.

4. The "Judicial Defendants" are Allegheny Court of Common Pleas Judges Anthony Mariani and Kelly Bigley. *Id.*, ¶¶ 53-54.

5. The "Hearing Officer Defendants" are Charlene Christmas, Robert O'Brien, Stephen Esswein, and Renawn Harris. They are probation officers with Allegheny County and aspects of their jobs have included conducting what are referred to as "*Gagnon I*" hearings.[2] *Id.*, ¶ 55.

The *Gagnon* hearings generally, and the County's Detainer Policy.

6. Once arrested for a probation violation, probationers remain incarcerated until they appear for a *Gagnon I* hearing, which usually occurs within two weeks of the arrest. ECF 116, 10:21-24, 87:20-23; ECF 1, ¶ 10.

7. A hearing officer presides over the *Gagnon I* hearing. ECF 1, ¶ 11.

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[2] As discussed below, a *Gagnon I* hearing is the initial preliminary hearing where the probationer is given notice of the charge, and a hearing officer determines whether there is probable cause that the probationer violated his probation. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973). If probable cause is found, then the probationer appears for the *Gagnon II* hearing, which, in Allegheny County, is before a judge. Deposition of Frank Scherer (Scherer Dep.), Def. Ex. 6, 23:8-17. The *Gagnon II* hearing typically provides a probationer a more fulsome opportunity to defend against the charges, before a judge determines whether a violation was committed and, if appropriate, imposes a sentence for that violation. *See* ECF 116, 95:8-14.

8. Hearing officers are employed by Allegheny County Adult Probation and Parole and are neither judges nor attorneys. *Id.*

9. Hearing officers receive a copy of each probationer's violation report the day before the *Gagnon I* hearing. Deposition of Robert O'Brien (O'Brien Dep.), Def. Ex. 7, 52:24-53:9.

10. Probationers are represented by counsel (usually county public defenders) at the *Gagnon I* hearings. ECF 116, 12:8-11. But, for reasons that are unclear from the record, sometimes those attorneys do not confer with their clients in advance of the *Gagnon I* hearings. *Id.*, 12:10-22, 89:10-12.

11. At the *Gagnon I* hearings, the probationers are informed of the charge against them. *Id.*, 12:24-13:7

12. Probationers are given the opportunity to speak at the *Gagnon I* hearings, even without being formally called as a witness. *Id.*, 68:11-13.

13. Probationers' counsel also can speak, and present evidence. O'Brien Dep., Def. Ex. 7, 170:6-10.

14. *Gagnon I* hearings can be relatively short, and generally may last between two and 20 minutes, but that may also depend on the specific hearing officer who conducts the hearing. ECF 3-1, Ex. 3 at ¶ 9; O'Brien Dep., Def. Ex. 7, 74:17-75:3 ("[M]y hearings go long … I'm very confident of that.").

15. Hearing officers fill out a form after the *Gagnon I* hearing that memorializes whether they have determined that probable cause exists that the probationer has violated his or her probation. Plaintiffs' Ex. 19.

16. With respect to the probable-cause determination, the hearing officer can make several findings,

including whether probable cause has been established, whether it has not been established, and when the *Gagnon II* hearing should be scheduled. *Id.*

17. In addition to the probable-cause determination, the hearing officers may make recommendations as to whether a probationer should be released pending the *Gagnon II* hearing (*i.e.*, that the probationer's probation detainer should be lifted). This decision is guided by a formal Detainer Policy, among other policies. *Id.*

18. The Detainer Policy was made effective November 20, 2019, and was approved by Judge Rangos, as the administrative judge, and Mr. Scherer, as the then-director of probation. Detainer Policy, Def. Ex. 3, p. 1.

19. In 2018, the Adult Probation Office engaged in a Safety and Justice Challenge, which was a program to reduce the length and number of probation detainers. Declaration of Alan Pelton (Pelton Decl.), Def. Ex. 1, ¶¶ 12-13.

20. The Adult Probation Office instituted the Detainer Policy in collaboration with the Safety and Justice Challenge to "have a consistent practice in deciding whether to lodge a detainer for a violation and to reduce incarceration[.]" *Id.*, ¶ 14.

21. The Detainer Policy provides the hearing officers with criteria to determine whether the probationer should be detained pending the *Gagnon II* hearing. Detainer Policy, Def. Ex. 3, p. 1.

22. For example, under the Detainer Policy, the probationer must be detained if he violated a zero tolerance or mandatory detention court condition, or he has a new charge that represents a serious threat to public safety. *Id.*

23. Zero tolerance and mandatory court conditions depend on the sentencing judge's description of probation conditions; for example, a judge may impose as a mandatory condition a "no victim contact" condition for a domestic violence sentence. O'Brien Dep., Def. Ex. 7, 99:21-100:16.

24. That said, it is somewhat rare for zero-tolerance conditions to be imposed by sentencing judges. Pelton Decl., Def. Ex. 1, ¶ 37 ("As of April 4, 2023, there were 399 probationers with zero tolerance sentencing conditions, which is approximately 4% of total supervision population.").

25. For other violations (*i.e.*, "lower-level technical violations" and "arrests for non-violent offenses"), the Detainer Policy instructs the hearing officer to exhaust non-custodial options, such as halfway houses, treatment facilities, and release on electronic monitoring. Detainer Policy, Def. Ex. 3, p. 1.

26. The hearing officers then, based on the Detainer Policy, make a recommendation as to release on the violation report form: (1) lift detainer; (2) remain detained; (3) transfer to alternative housing; or (4) recommend for the Drug and Alcohol Diversion Program. O'Brien Dep., Def. Ex. 7, 62:2-10.

27. Hearing officers may, in some instances, base their recommendation on the nature of the charges, without as much emphasis placed on the underlying facts giving rise to the charge. *Id.*, 157:5-158:13.

28. Hearing officers can keep a probationer detained after the *Gagnon I* hearing, but, if that occurs, under the Detainer Policy, the judge is notified of that decision. Deposition of Frank Scherer (Scherer Dep.), Def. Ex. 6, 102:14-17.

29. If a judge disagrees with the hearing officer's recommendation, the judge will notify the probation office through the court liaison. *Id.*, 156:15-158:17.

30. A judge must sign off on every request to lift or transfer a detainer. *Id.*, 102:4-13.

31. Two particular judges (Judges Bigley and Mariani) allegedly have their own "no lift" policies, where they have informed the hearing officers that detainers shouldn't be lifted for any probation violations. O'Brien Dep., Def. Ex. 7, 112:5-12; Scherer Dep., Def. Ex. 6, 96:16-97:1.

32. While Defendants contest whether there is such a no-lift policy for Judges Bigley and Mariani, the statistics bear out that these judges rarely lift detainers, and it appears that these judges, at a minimum, have a routine practice to not lift detainers when a probationer has been arrested on a warrant. O'Brien Dep., Def. Ex. 7, 112:13-16, 127:11-25; Scherer Dep., Def. Ex. 6, 159:5-161:8.

33. Judge Mariani lifts probation detainers in approximately 6 percent of cases. ECF 116, 77:22-78:5.

34. Judge Bigley lifts probation detainers in approximately 3.7 percent of cases. *Id.*, 78:1-2, 6-7.

35. That said, overall, in Allegheny County, detention appears to be the exception rather than the rule. As of April 4, 2023, just 6% of people being supervised by Adult Probation in Allegheny County were detained in the Allegheny County Jail or alternative housing sites in the county. Declaration of Sanjeev Baidyaroy (Baidyaroy Decl.), Def. Ex. 2, Exhibit 1, p. 2.

36. As of April 4, 2023, 2,308 people on probation had new pending criminal charges and only 510 of them were detained. *Id.*

Plaintiffs' *Gagnon I* hearings and court watcher observations

37. In addition to the declarations that were filed, two Plaintiffs and two court watchers testified at the preliminary-injunction hearing, and the Court makes additional findings based on that testimony.

38. While on probation, Plaintiff Tate Stanford was arrested in September 2022 for possession of a firearm and having marijuana. ECF 116, 8:25-9:5, 10:4-5.

39. Mr. Stanford had a *Gagnon I* hearing approximately two weeks after his arrest. *Id.*, 10:21-24.

40. In Mr. Stanford's opinion, he was not able to prepare for his hearing because he only received notice of it right before it happened. *Id.*, 10:25-11:2, 11:12-17.

41. There was a hearing officer, a public defender, and a probation officer at Mr. Stanford's hearing, but he was not able to speak with the public defender before or after the hearing. *Id.*, 12:10-22.

42. At the hearing, the hearing officer read Mr. Stanford's pending charges and told him that he would be detained because he was supervised by Judge Mariani. *Id.*, 12:23-13:7.

43. Mr. Stanford's *Gagnon I* hearing lasted three to five minutes. *Id.*, 14:20-21.

44. Mr. Stanford was not initially detained pending his *Gagnon II* hearing; rather, at some point, he was released to a halfway house. *Id.*, 15:5-8.

45. However, Mr. Stanford was ultimately re-arrested and detained at the Allegheny County Jail because he got into a verbal altercation while staying at the halfway house. *Id.*, 16:6-10.

46. At some point, Mr. Stanford's counsel filed a motion to lift his probation detainer. *Id.*, 33:13-15.

47. Mr. Stanford remained detained, but it appeared that was the case because he was waiting on an opening at an in-patient substance-abuse treatment facility. *Id.*, 18:18-23, 33:24-35:5.

48. Mr. Stanford's criminal defense attorney did not testify at the preliminary-injunction hearing.

49. Plaintiff Rahdnee Oden-Pritchett was also on probation when he was arrested for burglary, criminal trespassing, simple assault, and a PFA violation. *Id.*, 86:22-87:4.

50. Mr. Oden-Pritchett's *Gagnon I* hearing was held around 12 days after his arrest, and he received no advance notice before the hearing; he was simply brought to the "video call room." *Id.*, 87:20-88:3.

51. Mr. Oden-Pritchett was not able to meet with the public defender before his *Gagnon I* hearing. *Id.*, 89:10-12.

52. At the hearing, the hearing officer told Mr. Oden-Pritchett that he would be detained pending the outcome of his charges. *Id.*, 89:24-90:11.

53. Mr. Oden-Pritchett's *Gagnon I* hearing lasted "probably not even five minutes." *Id.*, 91:17-20.

54. Mr. Oden-Pritchett's counsel discussed with him the possibility of filing a motion to lift his probation detainer, but it appears counsel did not do so for strategic reasons. *Id.*, 96:10-17.

55. After Mr. Oden-Pritchett's new criminal case resolved, he had his *Gagnon II* hearing, and reached an agreement of time served on his probation violation. *Id.*, 93:15-95:10.

56. Mr. Oden-Pritchett's criminal defense attorney did not testify at the preliminary-injunction hearing.

57. The court watch program at the Abolitionist Law Center trains volunteers, referred to as court watchers, to watch court proceedings, including Gagnon I hearings, and record their observations. *Id.*, 39:18-41:1.

58. Dr. Redcross, who observed many *Gagnon I* hearings, testified that, in her opinion, the probationers were not truly heard at the hearings. *Id.*, 44:10-15.

59. Dr. Redcross further testified that when a probationer tried to explain themselves, at the hearing, they were often not allowed to fully explain themselves. *Id.*, 45:5-11.

60. Dr. Redcross testified that she "felt that people were not being listened to." *Id.*, 45:21-22.

61. Dr. Redcross testified that the probationer's public defender would also sometimes speak at the *Gagnon I* hearing. *Id.*, 57:10-12.

62. Dr. Redcross wasn't privy to the materials that the hearing officer had; she is not an attorney; and did not have knowledge of whether defense counsel strategically were opting not to contest probable cause or otherwise put on a more fulsome case at the *Gagnon I* hearings. *Id.*, 56:13-15, 51:20-24, 54:4-55:7, 48:17-23 ("I have never seen the chart the probation officer is going by.").

63. Emma Fenstermaker, a volunteer court watcher, testified that at the *Gagnon I* hearing, "the hearing officer would read the charges, either they

would read the charges or pass it off to the probation officer to read the charges, and then the public defender would make arguments or they are supposed to make arguments in favor of the defendant, and then the defendant would be given a chance to speak." *Id.*, 60:4-9.

64. Ms. Fenstermaker also testified that the probationers were allowed to speak at the hearing, although sometimes the hearing officer would stop them from speaking if they spoke for more than a few minutes. *Id.*, 60:12-21.

65. Ms. Fenstermaker wasn't privy to the materials that the hearing officers had before them, and she also is not an attorney. *Id.*, 67:17-68:4, 66:5-9.

Impact of prolonged detention on Plaintiffs

66. Plaintiffs were impacted in various ways by their detention. Mr. Stanford no longer has a stable housing situation to return to—he had been living with a roommate but does not know if that space is still available. *Id.*, 18:24-19:8.

67. Mr. Stanford has also lost government assistance, he has been unable to pay his bills, and his relationships with his family and loved ones has been strained. He is worried about his younger sister because his mother, who is his sister's primary caretaker, has brain cancer. *Id.*, 19:25-20:13.

68. Mr. Stanford has also experienced a worsening of his mental health because of his incarceration. *Id.*, 20:16-22:13.

69. Mr. Oden-Pritchett also lost an opportunity for housing, had to drop out of school, missed important moments with his children, and experienced a worsening of

a medical condition (psoriasis) and his mental health. *Id.*, 97:20-103:10.

70. Plaintiff Craig Brownlee was detained between his *Gagnon I* and *Gagnon II* hearings. Declaration of Craig Brownlee (Brownlee Decl.), Plaintiffs' Ex. 8, ¶¶ 3-4.

71. Due to Mr. Brownlee's detention, he was unable to spend time with is four-year-old son. While his son does not live with him, Mr. Brownlee sees him frequently and not being able to spend that time together has been hard for both of them. *Id.*, ¶ 8.

72. Mr. Brownlee also has an elderly mother who relies on him to help with shopping for food, so his detention negatively impacted her life, as well. *Id.*, ¶ 9.

73. Plaintiff Dion Horton's medication was unexpectedly stopped during his detention. Declaration of Dion Horton (Horton Decl.), Plaintiffs' Ex. 6, ¶ 15.

74. Mr. Horton also had to have a tooth pulled because a root canal was not available at the jail. *Id.*, ¶ 14.

75. Mr. Horton also missed the birth of his second child. *Id.*, ¶ 8.

76. Plaintiff Damon Jones lost his housing, his possessions, and his ability to receive demolition and cleaning jobs due to his detention. Declaration of Damon Jones (Damon Decl.), Plaintiffs' Ex. 7, ¶¶ 13, 15.

77. More generally, there is little doubt that detention can disrupt probationers' lives. It can cause loss of employment, disruption to family relationships, and disruption to treatment. Declaration of Vincent Schiraldi (Schiraldi Decl.), Plaintiffs' Ex. 23, ¶ 37.

78. Detention also has the potential to increase recidivism and can result in lost wages and increase poverty. *Id.*, ¶¶ 39, 41.

PROCEDURAL BACKGROUND

Plaintiffs filed their complaint and motion for preliminary injunction on October 2, 2022. ECF 1; ECF 2. The complaint sets forth four counts: Right to Procedural Due Process Under the Fourteenth Amendment to the United States Constitution (Count I), Right to Procedural and Substantive Due Process Under the Fourteenth Amendment to the United States Constitution (Prolonged Detention) (Count II), Right to Procedural Due Process Under the Pennsylvania Constitution (Count III), and Right to Procedural Due Process Under the Pennsylvania Constitution (Prolonged Detention) (Count IV). ECF 1.

Defendants filed motions to dismiss. ECF 49; ECF 62; ECF 64. On April 14, 2023, the Court denied the motions, rejecting Defendants' procedural challenges. ECF 104. With respect to Defendants' arguments that the complaint failed to state a claim and that they were entitled to immunity, the Court found that the record was not yet developed to decide those issues, and so denied relief on that basis, but without prejudice to re-raising those arguments at a later stage. *Id.*[3]

Pursuant to the Court's case management order, as modified, the parties engaged in extensive fact and expert discovery for two months. The Court then held a one-day evidentiary hearing on Plaintiffs' preliminary-injunction motion on April 18, 2023. ECF 106; ECF 116.

[3] Defendants filed motions for reconsideration of the Court's denial of their motions to dismiss, which remain pending. ECF 111; ECF 113; ECF 114.

Prior to the hearing, the parties submitted 52 exhibits to the Court. During the hearing, the Court heard evidence and testimony from five witnesses, followed by oral argument from counsel. ECF 116. Following the hearing, the parties filed supplemental briefs supporting and opposing the preliminary-injunction motion, which included additional exhibits. ECF 121; ECF 126; ECF 127; ECF 128; ECF 130; ECF 131; ECF 132.

LEGAL STANDARD

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted). Under Third Circuit precedent, "a movant for preliminary equitable relief must meet the threshold for the first two 'most critical' factors: it must demonstrate that it can win on the merits … and that it is more likely than not to suffer irreparable harm in the absence of preliminary relief. If these gateway factors are met, a court then considers the remaining two factors[.]" *Reilly v. City of Harrisburg*, 858 F.3d 173, 179 (3d Cir. 2017), *as amended* (June 26, 2017). "The decision to grant or deny a preliminary injunction is within the sound discretion of the district court." *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 114 (3d Cir. 2018) (citation omitted). However, preliminary-injunctive relief is an "extraordinary remedy" that "should be granted only in limited circumstances." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004) (cleaned up).

To begin its analysis, the Court must first determine if any injunction issued would be mandatory or

prohibitory. *C.G. by & through P.G. v. Saucon Valley Sch. Dist.*, 571 F. Supp. 3d 430, 439 (E.D. Pa. 2021). "A prohibitory injunction, the more common type, maintains the status quo until a decision on the merits of a case is rendered." *Id.* at 438 (cleaned up). A mandatory injunction "alters the status quo by commanding some positive action or providing the moving party with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Id.* (cleaned up).

This distinction matters because it affects the burden that plaintiffs must meet to show a likelihood of success on the merits. *Id.* at 439. "For a prohibitory injunction, the moving party must show that his or her likelihood of success on the merits are significantly better than negligible but not necessarily more likely than not." *Id.* (cleaned up). By contrast, for mandatory injunctions, a heightened standard applies. *Hope v. Warden York Cnty. Prison*, 972 F.3d 310, 320 (3d Cir. 2020). For that relief, the moving party must show "a substantial likelihood of success on the merits and that their right to relief is indisputably clear." *Id.* (cleaned up).

Here, the proposed order to Plaintiffs' preliminary-injunction motion clearly establishes that the injunction they seek is mandatory. The order asks for the Court to impose a new set of Bail Reform Act-type procedures on Allegheny County that would be aligned with what federal courts do. ECF 121-1.[4] This fundamentally alters

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[4] The full text of Plaintiffs' proposed order is as follows:

It is hereby **ORDERED** that County Defendants are enjoined from detaining at the Allegheny County Jail any putative mandatory detention subclass member who has been arrested for an alleged violation of probation and who has not received, at a minimum, the procedural and substantive safeguards delineated below. For

the status quo. As such, the heightened standard of review applies.

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purposes of the subclasses, "mandatory detention" refers to circumstances in which individuals are automatically detained because they 1) are accused of violating a zero tolerance condition of probation; 2) are supervised by Judge Mariani or Judge Bigley; or 3) are accused of a new charge "that represents a serious threat to public safety."

A. Substantive Standard. No person may be detained pending their Gagnon II hearing pursuant to a mandatory detention policy or practice. Putative mandatory detention subclass members may not be detained unless a judicial officer has made a finding, accompanied by all procedural requirements in subsection B of this order, that 1) probable cause exists to believe that they violated their probation, and 2) no condition or combination of conditions of release will reasonably protect the safety of the community or ensure that the person returns to court.

B. Procedural Requirements. In order to determine whether a person's ongoing detention is necessary in accordance with the standard above, the person must be given a meaningful, individualized hearing within a reasonable time period after arrest that includes:

1. Representation by counsel;
2. Notice to the individual of the purpose of the hearing;
3. A neutral and detached decision-maker, i.e., a judicial officer;
4. The opportunity to be heard and present evidence;
5. The opportunity to rebut evidence presented by Probation;
6. Factual findings on the record, including a statement of reasons for the outcome, including a) the necessity of detention in relation to the State's compelling interests (i.e., protecting community safety and against non-appearance); and b) the least restrictive conditions of release that will reasonably protect community safety and ensure return to court.

ECF 121-1.

DISCUSSION & ANALYSIS

I. Plaintiffs cannot demonstrate a substantial likelihood of success on the merits of their claims because there is no constitutional right to an initial detention determination.

Plaintiffs' sole claim is essentially that federal and state due process requires that once they were arrested for probation violations, they should have been given, but were not, a meaningful opportunity to seek release from jail pending a final revocation determination.

While the Court has reviewed and considered the extensive evidentiary record, ultimately, the motion before the Court is resolved almost entirely on the law. At its core, Plaintiffs' due-process claims essentially distill down to this question: are probationers entitled to an initial detention hearing and bail or release determination when arrested for a probation violation?

In federal court, that is certainly the standard. Under Federal Rule of Criminal Procedure 32.1, a federal probationer is arrested, afforded counsel, and brought before a federal magistrate judge, for an initial appearance, probable-cause determination, and individualized detention determination. On the question of detention, the magistrate judge must weigh the relevant factors under the Bail Reform Act, and can only order the probationer detained if the judge finds by "clear and convincing evidence that the person will not flee or pose a danger to any other person or to the community rests with the person." Fed. R. Crim. P. 32.1(a)(6). The magistrate judge makes the appropriate findings on the record, and then the district judge—typically after consultation with counsel—will promptly schedule a final revocation hearing. Fed. R. Crim. P. 32.1(b).

This is the precise procedure that Plaintiffs now ask the Court to impose as a form of injunctive relief, but applicable to state-court probationers in Allegheny County. ECF 121-1.

Currently, the procedure for probationers in Allegheny County is different than the one in federal courts. In Allegheny County, once a probationer is detained, he or she is afforded counsel and then brought before an independent probation hearing officer. That probation hearing officer determines whether there is probable cause for the violation (though the parties dispute how thorough that determination is). The hearing officer also makes certain detention/release decisions, based on the probation office's Detainer Policy.

For example, under that policy, certain offenses are deemed to be "zero tolerance," and so those probationers will be automatically detained pending the final hearing. For lower-level technical offenses and substance-abuse violations, the hearing officer looks to non-custodial options. Two judges (Judges Bigley and Mariani) allegedly have their own separate "no lift" policies, where they have informed the probation office that detainers shouldn't be lifted for probation violations. After this initial hearing, the probationer may remain detained, and, based on mostly strategic decisions of counsel, counsel confers with the trial judge for scheduling the final hearing. Detainer Policy, Def. Ex. 3.

Plaintiffs contend that the federal and state constitutions[5] require more protections than Allegheny

[5] The parties' briefing focuses exclusively on federal law, and no party has argued that the Pennsylvania state constitution provides greater or lesser rights. As such, the Court finds that the due-process rights guaranteed by the Pennsylvania Constitution as applied in this case are co-extensive with those under the U.S.

County provides. But they are wrong under the well-settled Supreme Court precedents of *Morrissey* and *Gagnon*.

Due process as applied to probationers requires that an independent officer determine at the *Gagnon I* hearing "whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions." *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972). The probationer must be given notice of this hearing and its purpose, and is permitted to speak and present exhibits or individuals to testify. *Id.* at 486-87. The hearing officer then determines whether probable cause exists to hold the probationer until a final revocation hearing. *Id.* at 487. The final revocation hearing (the *Gagnon II* hearing) is a "somewhat more comprehensive hearing prior to the making of the final revocation decision." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973).

Nothing in these decisions requires that a probation officer or judge also make a bail or release decision as part of the *Gagnon* hearings. Indeed, *Morrissey* presumes that so long as the procedures for the hearings are satisfied, the probationer can be detained with really no further inquiry or procedure at all. *Morrissey*, 408 U.S. at 487 ("Such a [probable cause] determination would be sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision.").

Constitution. *See Tulp v. Educ. Comm'n for Foreign Med. Graduates*, 376 F. Supp. 3d 531, 539 n.3 (E.D. Pa. 2019) ("Pennsylvania law generally treats the Due Process Clause of the United States Constitution and Article I, Section 9 of the Pennsylvania Constitution as coextensive." (cleaned up)).

Plaintiffs here essentially ask the Court to create a new right, by layering onto the *Gagnon* hearings a right to a bail-type or detention-type analysis, where a judge or a hearing officer would consider risk of flight and danger to the community before making a determination to release the probationer pending a final hearing. Similar arguments have been tried before, and courts have rejected them

For example, in *Faheem-El v. Klincar*, the Seventh Circuit held "that due process does not require that parolees receive a bail hearing conducted by a judicial officer prior to the conclusion of the revocation proceedings." 841 F.2d 712, 723-24 (7th Cir. 1988). In that context, the court found that the state's compelling interest in regulating parole outweighed the parolee's liberty interest. *Id.* at 724. The court did not, however, decide whether due process required some other type of release-suitability hearing, such as by a probation or parole hearing officer or as part of the revocation hearings. *Id.* at 727. But the Southern District of New York recently did. *Roberson v. Cuomo*, 524 F. Supp. 3d 196, 203 (S.D.N.Y. 2021), *vacated and remanded on other grounds sub nom. Roberson v. Hochul*, No. 21-877, 2022 WL 19224518 (2d Cir. Sept. 27, 2022).

In *Roberson*, the court explained that a release-suitability hearing, even by parole officials, would not "add value [to] existing procedures" that were already had in place for parolees. *Id.* In assessing the parolees' due-process claim under the familiar *Mathews* balancing test, the court concluded that the risk of an erroneous deprivation (*i.e.*, a parolee being wrongly accused of a violation) would not be mitigated by a release determination. The court stated:

> A parolee's suitability for release—which Plaintiffs have couched in terms of flight risk and public safety risk—has little to no bearing on whether s/he violated a condition of parole… In other words, the 'process' Plaintiffs assert is 'due' to parolees whose liberty interest is conditioned on their compliance with parole rules does not track that condition. Thus, it adds no value to the relevant inquiry, which is whether a parolee violated parole.

Id. at 210 (cleaned up). The court further found that the government "has a strong public interest in ensuring that persons who are released on parole [and probation] comply with the conditions of their release, and in protecting society from those who will not." *Id.* at 211.

The Court finds both *Faheem-El* and *Roberson* persuasive in this case.[6] As in *Faheem-El*, the Court concludes that there is no due-process right to a judge making an individualized release decision at the Gagnon I hearing, which is what Plaintiffs request as part of their proposed order for injunctive relief. And as in *Roberson*, the Court concludes that there is similarly no due-process right to a hearing officer or some type of probation official making such a release decision, based on an assessment of the *Mathews* factors, as was done by the court in *Roberson*.

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[6] Although *Faheem-El* and *Roberson* both concerned parolees, not probationers, the analysis applies equally to both groups, given that probationers have the same conditional liberty interest as parolees. *Gagnon*, 411 U.S. at 782 ("Petitioner does not contend that there is any difference relevant to the guarantee of due process between the revocation of parole and the revocation of probation, nor do we perceive one.").

Plaintiffs attempt to get around these cases by arguing that other Supreme Court decisions have layered onto *Morrissey* and *Gagnon* a constitutional right to a bail-like or release-suitability determination. But the decisions that they cite[7] are inapposite because they arise in a materially different context, or do not go as far as Plaintiffs here suggest. A few points about those cases.

First, the cited decisions, for the most part, arise in the pre-trial detention context.[8] That is significant, of course, because pre-trial detainees have a complete liberty interest, not a conditional one, like a probationer. *Morrissey*, 408 U.S. at 480 ("Revocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions."). Moreover, the purposes of probation are very different. At the pre-trial stage, considerations of risk of flight and danger to the community are more important. At the probation-revocation stage, while those interests might be relevant, the government's primary interests concern supervision and rehabilitation, and thus require that the probation officer and supervising judge have much more decision-making flexibility than

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[7] *Zadvydas v. Davis*, 533 U.S. 678 (2001); *Kansas v. Hendricks*, 521 U.S. 346 (1997); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *United States v. Salerno*, 481 U.S. 739 (1987); *Schall v. Martin*, 467 U.S. 253 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Jackson v. Indiana*, 406 U.S. 715 (1972).

[8] The one cited case that did not involve pre-trial detention is *Zadvydas*, which involved post-removal detention of aliens. The Court finds that this case is still inapposite, as the issue there centered exclusively on whether the statute at issue allowed for unlimited and potentially permanent detention of an alien. *Zadvydas*, 533 U.S. at 690.

in a pre-trial setting where courts are dealing with defendants who are presumed innocent. *Roberson*, 524 F. Supp. 3d at 211; *see also Ross v. Young*, 736 F. Supp. 1525, 1527 (E.D. Mo. 1990) (concluding that a Missouri statute that "blanketly deni[ed] bail to parolees arrested for alleged parole violations" did not violate due process).

Second, the cited cases concerned challenges to statutes that prescribed when detainees could and couldn't be released. *See Zadvydas*, 533 U.S. at 699 (holding that Immigration and Nationality Act did not authorize indefinite or permanent detention of aliens subject to removal); *Hendricks*, 521 U.S. at 357 (recognizing that a Kansas statute only allowed civil commitment proceedings "when a person 'has been convicted of or charged with a sexually violent offense,' and 'suffers from a mental abnormality or personality disorder which makes the person likely to engage in the predatory acts of sexual violence.'" (quoting Kansas Sexually Violent Predator Act, Kan. Stat. Ann. § 59-29a02(a)); *Foucha*, 504 U.S. at 78-79 (holding that Louisiana statute could not allow the government to confine a person using civil commitment if that person is not mentally ill); *Salerno*, 481 U.S. at 750-751 (holding that the Bail Reform Act properly balanced the liberty interests of pretrial detainees with the government's interest because pretrial detainees could only be held after a showing that "an arrestee presents an identified and articulable threat to an individual or the community[.]"); *Schall*, 467 U.S. at 269-271 (upholding New York statute (FCA § 320.5) permitting pretrial detention of juveniles after a showing that the juvenile might commit further crimes); *Bell*, 441 U.S. 520 (upholding security restrictions for pretrial detainees); *Jackson*, 406 U.S. at 729-730 (holding that Indiana statute subjecting certain inmates to a "more lenient

commitment standard" and "more stringent standard of release" violated the Fourteenth Amendment).

In each of those cases, the Supreme Court decided whether the statutory release procedures and criteria complied with due process. Some of those statutes set forth criteria such as risk of flight and danger to the community as considerations in making release decisions. Importantly, none of the decisions went so far as to mandate, in a vacuum, that detainees have a standalone right to receive a release determination predicated on risk of flight and danger to the community. Put differently, just because the Supreme Court in *Salerno*, for example, held that the procedures under the Bail Reform Act satisfied due process, it does not mean that the absence of those procedures here offends due process.

Third, of all the cases Plaintiffs cite, this case is probably closest to *Schall*, where the Supreme Court determined that, in the context of the juvenile system, the state's "combined interest in protecting both the community and the juvenile himself from the consequences of future criminal activity" outweighed the juveniles' liberty interest where pretrial detention was predicated on a finding of "serious risk." *Schall*, 467 U.S. 263-66. Likewise, in the probation context, "a person under sentence for a conviction of a crime who cannot or will not follow the rules [of probation] presents a danger to society without more." *Roberson*, 524 F. Supp. 3d 196 at 206. This danger allows the state to detain probationers who are suspected of violating their probation once the state has made a probable-cause determination. The state's "overwhelming interest" in being able to return an individual to imprisonment if he has failed to abide by the conditions of parole or probation, *Morrissey*, 408 U.S. at 483, outweighs any need for a bail-like determination.

Finally, while the Court has held that there is no right to a bail-like determination at the *Gagnon I* hearing, this doesn't mean that Defendants have provided no procedures to address release of probationers. Indeed, Defendants have gone beyond the constitutional minimum in adopting the Detainer Policy. And the Court finds as credible at least certain of the statistics showing that detention is rare for probation violations, and that non-detention alternatives are often sought. Baidyaroy Decl., Def. Ex. 2, Exhibit 1, p. 2. This is also borne out in some of the testimony at the injunction hearing concerning Plaintiffs—for example, while Mr. Stanford complained about his prolonged detention, after he was initially detained, he was released to a halfway house before he allegedly violated the rules and was then re-arrested. ECF 116, 15:3-5; 16:6-10. From the snapshot that the Court has seen here, the application of the Detainer Policy reflects what the Supreme Court in *Morrissey* and *Gagnon* envisioned—a more flexible process to account for the ups and downs of supervision and rehabilitation. *Morrissey*, 408 U.S. at 481 ("due process is flexible and calls for such procedural protections as the particular situation demands.").[9]

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[9] In light of *Morrissey* and *Gagnon*, the Court finds that it need not engage in a *Mathews*-type due-process analysis. But if the Court were required to do so, it would find that the current procedures in place satisfy due process. Under *Mathews*, courts consider three factors to determine "what process is due to an individual in a particular circumstance: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Roberson*, 524 F. Supp. 3d at 203. Here, Plaintiffs have a limited private interest due to their

In sum, there is no federal or state constitutional right that mandates the process that Plaintiffs now seek with their preliminary injunction. Because of that, they are not substantially likely to succeed on the merits, and cannot meet the threshold requirement for obtaining preliminary-injunctive relief.

II. Plaintiffs' suggestions that the current *Gagnon* hearings are inadequate also do not warrant injunctive relief.

The complaint makes clear that the claims in this case focus on the mandatory detention policies in Allegheny County. However, in the course of the parties' briefing and during the injunction hearing, there were suggestions that Allegheny County fails to comply with *Morrissey* and *Gagnon* for three reasons. To the extent that Plaintiffs are making such a standalone claim, though, the Court finds that it is unlikely to succeed on the merits.[10] The Court will discuss each of the claimed "deficiencies," in turn.

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status as probationers, and their proposed procedural safeguards would not add value to the procedures already in place, which already appear to result in low detention rates. Defendants' interest in probationers' detention pending the *Gagnon II* hearing is substantial given the supervisory nature of probation. As to increased administrative and fiscal burdens on Defendants, while the record is not fully developed, in light of the number of probationers in the Allegheny County system and the limited number of judges, it would seem that Plaintiffs' requested injunction (which includes an individualized judicial determination as to release suitability at the *Gagnon I* hearing) would create significant administrative and fiscal problems.

[10] As the Court understands it, Plaintiffs' complaints about the current *Gagnon* procedures are not standalone claims. It appears that the theory is that the absence of some type of detention/release process in conjunction with otherwise deficient *Gagnon* hearing

First, Plaintiffs claim that they do not receive sufficient notice before the *Gagnon I* hearing, and that their access to counsel is limited. ECF 116, 54:10-21. However, the evidence is clear that probationers are given notice of the charges, at least at the hearing itself, which comports with *Morrissey* and *Gagnon*. *Gagnon*, 411 U.S. at 786; ECF 116, 12:23-13:1. Additionally, probationers are afforded counsel. While there was some testimony at the injunction hearing indicating that certain probationers were not able to speak to their attorney before their *Gagnon I* hearings, ECF 116, 12:17-19, there is no evidence before the Court that Defendants' policies caused this, as opposed to something else, such as the practices of the local public defender's office. In fact, Frank Scherer, the former Director of Adult Probation in Allegheny County, testified at his deposition that individuals not having time to meet with their counsel is "not a probation issue" but "more of an issue for the Public Defender's Office." Scherer Dep., Def. Ex. 6, 19:1-9. Significantly, no one from the Public Defender's Office testified during the injunction hearing.

Second, Plaintiffs allege the *Gagnon I* hearing is perfunctory because no real evidence is presented, and probationers do not have an opportunity to speak. At the injunction hearing, the Court heard from multiple court watchers, who were volunteers that observed

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procedures creates or exacerbates a constitutional problem. But, as discussed above, there is no constitutional right to a detention or release decision at the *Gagnon* hearings. And if Plaintiffs are right that the *Gagnon* hearings are deficient, that doesn't mean that the remedy would be to impose a new detention/release policy. Rather, the remedy would be an injunction to order that Defendants comply with *Gagnon*. *Meyer v. CUNA Mut. Ins. Soc.*, 648 F.3d 154, 170 (3d Cir. 2011) ("injunctive relief should be no broader than necessary to provide full relief to the aggrieved party." (cleaned up)).

many *Gagnon I* proceedings. For example, Dr. Redcross testified that "[o]ften, the defendants would try to explain" the facts of their new charges, "and those facts would not be heard." ECF 116, 44:14-15. In fact, she testified that sometimes a probationer would be expressly told not to try to explain themselves. ECF 116, 45:5-11. But Dr. Redcross also testified that the probationer's public defender would sometimes speak to the facts of the new charges at the *Gagnon I* hearing and that the hearing officer would respond. ECF 116, 57:10-16.

Emma Fenstermaker, another court watcher, testified that at the *Gagnon I* hearing, "the hearing officer would read the charges, either they would read the charges or pass it off to the probation officer to read the charges, and then the public defender would make arguments or they are supposed to make arguments in favor of the defendant, and then the defendant would be given a chance to speak." ECF 116, 60:4-9. The proceeding that Ms. Fenstermaker described is exactly the type of proceeding contemplated in *Morrissey* and *Gagnon*.

As evident from the court watchers' testimony, the probationer and counsel are present at the hearing, are able to put on evidence, and then the hearing officer makes a probable-cause determination.[11] Moreover, as

[11] Overall, the Court views the court watchers' testimony as not entirely helpful on the issue of whether probationers were allowed to present a case related to whether probable cause exists, which is the purpose of the *Gagnon I* hearing. Rather, it was clear that the court watchers were observing the proceedings with an eye toward the separate issue of whether probationers were given an opportunity to present a case for suitability for release. Moreover, the short duration of the hearings as noted by the court watchers is also not really a sign of anything. Probationers are represented by counsel. There may be strategic reasons why the *Gagnon I* hearings

reflected in the record, the hearing officers fill out a form that memorializes whether they have determined that probable cause exists that the probationer violated his or her probation—this is evidence that the officers are doing what they are supposed to be doing. Plaintiffs' Ex. 15 at p. 6.

Third, Plaintiffs argue that the length of time between the *Gagnon I* and *Gagnon II* hearings is impermissibly long. It certainly is possible that there could be a due-process violation if a probationer is detained and there is a long delay between the *Gagnon I* and *Gagnon II* hearings. "The denial of due process caused by a delay in a conducting a [*Gagnon II*] hearing requires a plaintiff to establish that the delay was both unreasonable and prejudicial." *Ray v. Thompson*, No. 17-0608, 2021 WL 1565149, at *2 (E.D. Pa. Feb. 16, 2021) (collecting cases discussing various lengths of detention before a *Gagnon II* hearing as reasonable). The Court cannot tell on this record whether the delay for Plaintiffs' hearings (let alone hearings for a putative class) was reasonable or prejudicial, or even whether the delay was caused by Defendants' policies or lack thereof.

Indeed, it appears that sometimes the delay may be by design of the parties. For example, Mr. Oden-Pritchett testified that his attorney advised him not to file a motion to lift his probation detainer because his attorney was hoping to be able to negotiate a plea deal for Mr. Oden-Pritchett's new charges. ECF 116, 115:12-23. After Mr. Oden-Pritchett's new charges were resolved

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are short—*e.g.*, defense counsel may not want to dispute probable cause or put on evidence to avoid prejudicing the defendant at the *Gagnon II* hearing or a hearing on any underlying criminal charges. Again, no public defenders or criminal defense lawyers testified at the injunction hearing.

(through a plea), Mr. Oden-Pritchett was able to stipulate to a probation violation and receive credit for time served between his *Gagnon I* and *Gagnon II* hearings. *Id.* at 117:3-16. This is just one example of strategic decisions by counsel causing the delay, not Defendants' policies.[12]

Thus, to the extent that Plaintiffs are attacking the current hearing procedures as failing to comply with the requirements of *Gagnon*, the Court finds that there is insufficient evidence to support that claim and to warrant any injunctive relief.

III. The Court does not reach the remaining injunction factors.

Because the Court has concluded that Plaintiffs are unlikely to prevail on their claims, the Court need not address the remaining injunction factors. Lack of likelihood of success on the merits is fatal to the motion. *Thomas v. Blocker*, 799 F. App'x 131, 135 (3d Cir. 2020) (affirming denial of motion for preliminary injunction after determining that plaintiff failed to show a likelihood of success on the merits); *In re Arthur Treacher's Franchisee Litig.*, 689 F.2d 1137, 1143 (3d Cir. 1982) ("a failure to show a likelihood of success or a failure to demonstrate irreparable injury, must necessarily result in the denial of a preliminary injunction.").

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[12] On the form that the hearing officers complete at the *Gagnon I* hearing, they can schedule a *Gagnon II* hearing right away. Plaintiffs' Ex. 19. No evidence was adduced as to why probationers' counsel are unable to ask for the *Gagnon II* to be scheduled immediately and memorialized on that form.

CONCLUSION

For the reasons above, the Court will deny Plaintiffs' motion for preliminary injunction. An appropriate order follows.

DATED this 22nd day of December, 2023.

BY THE COURT:

/s/ *J. Nicholas Ranjan*
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 22-CV-1391-NR

DION HORTON, et al.,
Plaintiffs,

v.

JILL RANGOS, et al.,
Defendants.

Filed December 22, 2023

ORDER

AND NOW, this **22nd day of December, 2023**, upon consideration of Plaintiffs' motion for preliminary injunction (ECF 2) and for the reasons stated in the foregoing Opinion, it is **HEREBY ORDERED** that the motion is **DENIED**.

Furthermore, as stated in the Court's Opinion, the Court has found, among other things, as a matter of law, that no release-suitability determination is constitutionally necessary at the *Gagnon I* hearing, pursuant to *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). As such, the Court intends to convert its decision on Plaintiffs' motion for preliminary injunction to a decision on summary judgment, as permitted under Fed. R. Civ. P. 65(a)(2) and Fed. R. Civ. P. 56(f). *Anderson v. Wachovia Mortg. Corp.*, 621

F.3d 261, 280 (3d Cir. 2010) ("district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*, so long as the losing party was on notice that she had to come forward with all of her evidence." (cleaned up)); *Yates Real Est., Inc. v. Plainfield Zoning Bd. of Adjustment*, 435 F. Supp. 3d 626, 646 (D.N.J. 2020) (converting preliminary injunction to summary judgment).[1] Accordingly, it is hereby **ORDERED** as follows:

1. By January 24, 2024, Plaintiffs may file a brief, not to exceed 15 pages, showing cause why the Court's Opinion and this Order should not be converted into a ruling granting summary judgment to Defendants.

2. By February 14, 2024, Defendants may file responding briefs, not to exceed 15 pages.

3. The parties may assume that the Court is familiar with the arguments made for and against preliminary-injunctive relief and shall not repeat them unnecessarily.

BY THE COURT:

/s/ *J. Nicholas Ranjan*
United States District Judge

[1] The Court anticipates that the Third Circuit will likely review this case at some point. Converting the preliminary-injunction decision to a final decision on the merits may also assist in streamlining the matter for resolution before the Third Circuit.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Case No. __

DION HORTON, DAMON JONES,
CRAIG BROWNLEE, RAHDNEE ODEN-PRITCHETT,
TATE STANFORD, AND ELIJAH BRONAUGH,
individually and on behalf of a class of
similarly situated persons;

Plaintiffs,

v.

JILL RANGOS, ADMINISTRATIVE JUDGE,
in her official capacity;

FRANK SCHERER, DIRECTOR OF
ADULT PROBATION AND PAROLE,
in his official capacity;

ANTHONY MARIANI AND KELLY BIGLEY,
COURT OF COMMON PLEAS JUDGES,
in their official and individual capacities;

CHARLENE CHRISTMAS, ROBERT O'BRIEN,
STEPHEN ESSWEIN, AND RENAWN HARRIS,
PROBATION HEARING OFFICERS,
in their official and individual capacities;

And ORLANDO HARPER,
in his official capacity.

Defendants.

Filed October 2, 2022

COMPLAINT—CLASS ACTION
JURY TRIAL DEMANDED

STATEMENT OF THE CASE

1. This case is about hundreds of individuals, like Plaintiff Dion Horton, who are jailed for months on end without a lawful justification and with virtually no way out.

2. Nearly eight months ago, Mr. Horton was jailed after being accused of certain offenses. A judicial officer ordered he could be released on an unsecured monetary bond, meaning he could get out without an upfront payment. But because he happened to be on probation at the time of his arrest, a probation detainer—or an order prohibiting his release from jail—issued against him.

3. At a pro forma proceeding shortly after his arrest, a bureaucrat from the probation department ordered Mr. Horton to stay in jail with no explanation and with no option to bond out.

4. Mr. Horton has not been found guilty of any wrongdoing.

5. Mr. Horton's unjustified incarceration has taken a toll on him. He lost his job (and the ability to provide for his family). He missed the birth of his child.

6. Mr. Horton has virtually no recourse. By virtue of the probation detainer, he is trapped in jail. He has no idea when he will regain his liberty.

7. Mr. Horton's case is not an aberration. Probation detainers are the single largest driver of incarceration at

the Allegheny County Jail (ACJ). For people arrested for violating probation in Allegheny County, detention prior to a hearing on the merits of the alleged violation is the rule rather than the exception.

8. On any given day over the last two years, roughly one third of the people caged at the ACJ (or upwards of 600 people daily) have had a probation detainer lodged against them.

9. Once arrested for violating probation, individuals do not have a meaningful opportunity to obtain release. The majority are forced to remain in jail until a final determination on the merits of the alleged violation—a period that lasts months or even years.

10. The decision to jail them for this duration is made at a perfunctory proceeding (referred to as a "*Gagnon* I" proceeding) that occurs up to 14 days after their arrest.[1]

11. Bureaucrats in the probation department—who are neither judges nor lawyers— serve as hearing officers and preside over these proceedings ("Hearing Officers").

12. Hearing Officers are supposed to determine probable cause and whether arrested individuals should remain detained until the final hearing on the merits of their alleged violation of probation (the "*Gagnon* II" hearing).

13. *Gagnon* I proceedings are cursory in nature. Despite the appearance of a hearing, they are devoid of basic, constitutionally required procedural and substantive safeguards.

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[1] *Gagnon v. Scarpelli*, 411 U.S. 778 (1973).

14. Individuals do not have an opportunity to consult with their assigned public defender before the proceeding. They have no opportunity to prepare a defense. A probation officer reads the untested allegations against the individual. A Hearing Officer makes a determination with little to no additional information; no witnesses or evidence are ever presented.

15. Hearing Officers do not consider, let alone find, whether the individual's incarceration is necessary to protect the community or ensure their appearance in court, as due process requires for prolonged incarceration.

16. Hearing Officers do not have ultimate authority over the decisions they make during the *Gagnon* I proceedings. Instead, they issue recommendations to a judicial officer who has no first-hand knowledge of what transpired. That officer then determines ex parte whether to leave the detainer intact.

17. As a matter of course, these judicial officers rubber stamp detention decisions but scrutinize recommendations to lift the detainer or transfer it to alternative housing (which would allow the individual to be detained at an alternative housing facility rather than at the ACJ).

18. Hearing Officers make their recommendations based on a policy (approved by Administrative Judge Jill Rangos and Director of Probation Frank Scherer on behalf of Allegheny County) that requires *mandatory* detention in some cases. In other words, no matter the particular facts of the alleged probation violation and no matter any mitigating circumstances presented at the *Gagnon* I proceeding, the Hearing Officer must recommend detention.

19. The policy requires mandatory detention if an individual is alleged to have violated a "zero tolerance" condition of probation or "has a new charge that represents a serious threat to public safety."

20. Hearing Officers rely on the "new charge" provision to circumvent any decision-making regarding the necessity of detention. For specific offenses, based on the type of charge alone, they require mandatory detention—frequently refusing to hear any facts regarding what is alleged to have transpired.

21. In a similar vein, they refuse to lift detainers where a zero-tolerance violation is alleged, typically where the individual is accused of using of drugs or alcohol. Even drinking a single can of light beer has been enough to trigger this provision in the past.

22. Based on instructions they receive from their bosses (the judges), Hearing Officers treat the detainer policy as a floor for mandatory detention decisions, systematically expanding its reach. Specifically, Hearing Officers apply "no lift" policies required by Court of Common Pleas Judges Anthony Mariani and Kelly Bigley ("Judicial Defendants"), categorically refusing to recommend a detainer lift for anyone supervised by these judges.

23. In these cases, Hearing Officers typically also refuse to recommend transferring the detainer to alternative housing.

24. Judge Rangos and Director Scherer sanction this systematic expansion of the written detainer policy through their inaction. Despite the policymaking authority that enabled them to issue the detainer policy, they contend that they are not empowered to prohibit Judicial Defendants' no-lift policies.

25. Because of the probation detainers, individuals are jailed until their violation of probation proceedings conclude. It does not matter whether a judicial officer has authorized their release on a new charge that forms the basis for the violation of probation. They are stuck.

26. In practice, it is nearly impossible to get the detainer lifted once a hearing officer recommends detention at the *Gagnon* I proceeding.

27. From the conclusion of the *Gagnon* I until shortly before the *Gagnon* II, a period that can last months or even years, individuals are not assigned a public defender on their probation case. So, they have no practical way to challenge their probation detainers, aside from hiring a private attorney to file a motion to lift a detainer on their behalf—which most cannot afford.

28. For those who can afford to hire an attorney, filing a motion to lift the detainer does not allow them to avoid languishing in jail. Judges routinely delay ruling on these motions, and often deny them without a hearing or even an explanation.

29. As a result, over the last two years, an average of 622 individuals per month (or 35% of the people caged at the Allegheny County Jail) have had a probation detainer lodged against them.[2] As of September 23, 2022,

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[2] This data comes from the Allegheny County Jail Population Management Dashboard, which includes historical data regarding numbers of people incarcerated at the jail and the type of hold they were subjected to. *See Current and Historical Holding Statuses*, ALLEGHENY COUNTY JAIL POPULATION MANAGEMENT DASHBOARDS, https://bit.ly/3SnUQMK (last visited Sept. 21, 2022). Plaintiffs retrieved jail population data from the last two years and computed the average.

651 individuals were lodged on a detainer.[3]

30. Each is trapped in the jail for months on end before her *Gagnon* II proceeding.

31. Such incarceration would only pass constitutional muster if a judicial officer found that detention pending the *Gagnon* II was necessary to prevent flight risk or ensure public safety. Hearing Officers make no such findings.

32. As has been widely reported, the Allegheny County Jail has been a site of rampant human rights abuses.

33. In recent years, the Allegheny County Jail has been the subject of litigation regarding excessive force, mistreatment of individuals with psychiatric disabilities, poor conditions, and inadequate medical treatment.

34. The jail has also repeatedly been in the press for its overuse of solitary confinement, chronic understaffing, and unsanitary conditions.

35. At least 17 people have died while in custody of the Allegheny County Jail since April 2020.[4]

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[3] *See Current Population Hold Types*, ALLEGHENY COUNTY JAIL POPULATION MANAGEMENT DASHBOARDS, https://bit.ly/3BCmzTc (last visited Sept. 23, 2022).

[4] Brittany Hailer, Hours *before he died, the Allegheny County Jail released an incarcerated man with intellectual disability from custody*, PITTSBURGH INSTITUTE FOR NONPROFIT JOURNALISM (Sept. 23, 2022), https://bit.ly/3fk3e1S ("Talotta is the 17th man to die after entering the jail since the onset of the pandemic, the sixth such death in 2022."). According to local reporting, the jail does not "count" deaths of incarcerated individuals who are transferred from the jail to a hospital on medical release and die at the hospital. Brittany Hailer, *Thirteen men died after going to the Allegheny County Jail. Here are their stories.*, PITTSBURGH INSTITUTE FOR

36. At least five of them had a probation detainer lodged against them when they died.[5]

37. On behalf of themselves, and all others similarly situated, Plaintiffs seek a declaration that Defendants' policies and practices violate their rights under the United States and Pennsylvania Constitutions, an injunction against the continuation of these unconstitutional practices, and monetary compensation for the harm they have suffered.

JURISDICTION AND VENUE

38. Plaintiffs bring this civil rights action under 42 U.S.C. § 1983, 28 U.S.C. § 2201, *et seq.*, and the Fourteenth Amendment to the United States Constitution. This Court has subject matter jurisdiction under 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1367 (supplemental jurisdiction), and 28 U.S.C. § 2201 (Declaratory Judgment Act).

39. Venue is proper in this judicial district and division pursuant to 28 U.S.C. § 1391. A substantial part of the events giving rise to the claims take place at the Fifth Judicial District Courts and the Allegheny County Jail in Pittsburgh, Pennsylvania.

NONPROFIT JOURNALISM (March 13, 2022), https://bit.ly/3BYef1r. As such, 17 may be an undercount, and Allegheny County's official report of in-custody deaths is likely even lower. *See id.* This approach is of dubious validity under federal law. *See* Bureau of Justice Assistance, *Death In Custody Reporting Act: Reporting Guidance and Frequently Asked Questions*, U.S. DEPARTMENT OF JUSTICE (March 2022) at 5, https://bit.ly/3S6Si68.

[5] Based on publicly available court records, this includes Robert Blake (May 24, 2020); Cody Still (Oct. 1, 2020); Paul Allen (Oct. 9, 2021); Gerald Thomas (March 6, 2022); and Ronald James Andrus (Aug. 14, 2022).

PARTIES

I. Plaintiffs

Pre-*Gagnon* I Plaintiffs

40. Tate Stanford is a 22-year-old Black man. In March of this year, Judge Anthony Mariani sentenced him to a total of three years of probation. On or around September 27, 2022, he was arrested for allegedly committing new offenses. A magistrate judge set a $2,000 bond on those charges. But a probation detainer was issued against him, precluding his release from jail. Five days after his arrest, Mr. Stanford still does not know when he will have his *Gagnon* I proceeding.

41. Elijah Bronaugh is a 23-year-old Black man who was arrested on or around September 27, 2022, for allegedly committing offenses that include burglary and carrying a firearm without a license. A magistrate judge set monetary bond at a total of $7,500, an amount Mr. Bronaugh could manage to pay. But he was on probation at the time of his arrest, and he was lodged on a detainer. Mr. Bronaugh has been jailed for about five days and, as far as he is aware, his *Gagnon* I proceeding has not yet been scheduled.

Post-*Gagnon* I Plaintiffs

42. Dion Horton is a 22-year-old Black man who has been in jail since February 2022. He was arrested on two new cases while on probation (including charges of firearm possession and aggravated assault). A magistrate judge ordered his release on $5,000 unsecured bond in each case, but he could not get out of jail because of a probation detainer.

43. At Mr. Horton's *Gagnon* I proceeding, which lasted only a few minutes, the Hearing Officer read the

charges and refused to lift the detainer because of the nature of those charges. The Hearing Officer gave no other reason for why he needed to be jailed, stating only that Mr. Horton would have to stay in jail until his new case resolved. Eight months later, Mr. Horton remains in jail, with both his new case and *Gagnon* II still pending.

44. Damon Jones is a 23-year-old Black man who has been in jail since February 2022. He was arrested on two new firearms-related charges while on probation. A magistrate judge set a $25,000 secured financial condition of release, and Mr. Jones managed to pay a nonrefundable fee to a bail agent to get out of jail. Two days later, he was arrested for allegedly violating his probation.

45. At Mr. Jones's *Gagnon* I proceeding, the Hearing Officer explained that the alleged probation violation was based on Mr. Jones's new charges. No one testified about the charges and the Hearing Officer did not consider the facts of the case, or the fact that Mr. Jones had been released from jail on those charges. The Hearing Officer refused to lift the detainer based on the nature of the new charges alone. The probation detainer is the only reason Mr. Jones is still in jail, nearly eight months after his arrest.

46. Craig Brownlee is a 51-year-old Black man who was arrested on a violation of probation warrant after being released from jail on a $10,000 unsecured bond on the charges that formed the basis of the alleged violation. A probation detainer was issued against him. At his *Gagnon* I proceeding, the Hearing Officer refused to lift the detainer because Mr. Brownlee is supervised by Judge Mariani.

47. Rahdnee Oden-Pritchett is a 23-year-old Black man. He was arrested in September of this year, and a magistrate judge set a $10,000 bond. At the time of his arrest, he was on probation supervised by Judge Kelly Bigley. Despite being determined eligible for release on the new charges, a probation detainer was imposed.

48. At Mr. Oden-Pritchett's cursory *Gagnon* I proceeding, the Hearing Officer refused to lift the detainer, explaining that he would need to take it up with Judge Bigley at his *Gagnon* II hearing—and that he would not get the opportunity to do so until his new charges resolved.

II. Defendants

County Defendants

49. Judge Jill Rangos is a Court of Common Pleas Judge in Allegheny County. She serves as the Administrative Judge of the Criminal Division.

50. Frank Scherer is the Director of Allegheny County Adult Probation and Parole ("Adult Probation").

51. In these capacities, Judge Rangos and Director Scherer approved a detainer policy for Adult Probation, requiring mandatory detention without regard to the individual circumstances of the alleged violation of probation. County Defendants are sued in their official capacities for declaratory, injunctive, and monetary relief.

52. Orlando Harper is the Warden of the Allegheny County Jail. In this capacity, he has custody of all individuals detained at the jail, including those subject to probation detainers. Decisions to lodge and maintain probation detainers are thus ultimately executed by Warden Harper. He is sued in his official capacity for declaratory, injunctive, and monetary relief.

Judicial Defendants

53. Judge Anthony Mariani and Judge Kelly Bigley are Court of Common Pleas Judges in Allegheny County. They are assigned to the Criminal Division. In this capacity, they sentence people to probation and oversee their probationary terms.

54. Judges Mariani and Bigley have a blanket, administrative "no-lift" policy, meaning anyone they supervise who is arrested for allegedly violating their probation may not have their detainer lifted at their *Gagnon* I proceeding. Judicial Defendants are sued in their individual and official capacities for declaratory relief.

Hearing Officer Defendants

55. Charlene Christmas, Robert O'Brien, Stephen Esswein, and Renawn Harris are managing probation officers at Adult Probation, a subdivision of the Court of Common Pleas. They report to the Court of Common Pleas criminal division judges, including Judicial Defendants. In this capacity, they serve as Hearing Officers overseeing *Gagnon* I proceedings and make decisions or recommendations regarding whether to lift a detainer. Hearing Officers are sued in their individual and official capacities for declaratory relief.

OVERVIEW OF APPLICABLE LAW

56. Revocation of probation is a loss of liberty. People facing revocation are entitled to procedural and substantive due process protections. *See Gagnon*, 411 U.S. 778; *Morrissey v. Brewer*, 408 U.S. 471 (1972); *Commonwealth v. Turner*, 80 A.3d 754, 764 (Pa. 2013), *cert. denied*, __ U.S. __, 134 S. Ct. 1771 (2014).

57. The Court must provide people charged with violating their supervision with a "prompt" hearing,

referred to in Pennsylvania as a "*Gagnon* I" proceeding, to determine whether there is probable cause to believe that they committed the violation alleged and whether they should be detained during the pendency of their violation proceedings.

58. At the *Gagnon* I proceeding, the court must provide individuals notice of the alleged violation(s) of probation, an opportunity to appear and present evidence on their own behalf, a conditional right to confront adverse witnesses, an independent decision-maker, and a written report of the hearing. *See Gagnon*, 411 U.S. at 786 (citing *Morrissey*, 408 U.S. at 489).

59. After the *Gagnon* I proceeding, the court must then conduct a hearing within a "reasonable time" to determine whether the person under supervision violated the conditions of release, and, if so, whether that person should be committed to prison or if other steps should be taken to protect society and improve chances of rehabilitation. *See id.* at 784-85; *Morrissey*, 408 U.S. at 479-80, 488. This final revocation hearing is referred to in Pennsylvania as a "*Gagnon* II" hearing.

60. Prolonged incarceration pending the *Gagnon* II hearing is justified only if the government proves, and a neutral arbiter finds, that detention is necessary to prevent flight or ensure public safety. *See Zadvydas v. Davis*, 533 U.S. 678, 690-92 (2001); *Kansas v. Hendricks*, 521 U.S. 346, 358-69 (1997); *Foucha v. Louisiana*, 504 U.S. 71, 80-81 (1992); *United States v. Salerno*, 481 U.S. 749, 751 (1987). Given the absence of such procedural and substantive safeguards, Defendants' systemic detention practices are unconstitutionally punitive.

STATEMENT OF FACTS

I. Defendants' Employ a Detainer Policy That Requires Mandatory Detention.

61. County Defendants Judge Rangos and Director Scherer have approved a formal, written Detainer Policy for Allegheny County Adult Probation ("Detainer Policy") that governs detention decisions when someone is accused of violating their probation.

62. The Detainer Policy provides the "criteria" that probation officers should apply to determine whether an individual who is arrested "will be lodged in the jail on a detainer."

63. It includes a "mandatory detention provision," requiring that the individual "shall be detained if he or she has a zero tolerance or mandatory detention court condition that has been violated, or the offender has a new charge that represents a serious threat to public safety."

64. "Zero tolerance or mandatory detention court condition" typically refers to any use of alcohol or drugs.

65. When an individual is accused of violating the terms of their probation, a probation officer applies this Detainer Policy to make a preliminary decision regarding whether the individual should be caged. If so, the probation officer lodges a "detainer" against them.

66. Individuals jailed on probation detainers wait as long as 14 days after arrest to have their *Gagnon* I proceeding, an excessively long delay.

67. At the *Gagnon* I proceeding, Hearing Officer Defendants are charged with determining whether there is probable cause for the probation violation and

whether the individual should remain detained until their *Gagnon* II proceeding.

II. Hearing Officers Systematically Conduct Perfunctory *Gagnon* I Proceedings.

68. Hearing Officers routinely and systematically conduct the *Gagnon* I proceedings in a perfunctory manner.

69. In a sample of 2,259 *Gagnon* I proceedings observed by volunteer court watchers between January 10, 2021, and September 16, 2022, 427 (19%) were under 2 minutes; 782 (25%) were between 2 and 5 minutes, and 805 (36%) were marked as somewhere over 5 minutes. Only one proceeding was noted as 10 minutes; two were 15 and 20 minutes, respectively (all >1%).

70. The proceedings take place via video conference over Microsoft Teams, with all individuals participating remotely.

71. At the outset of the proceeding, Hearing Officers inform the detained individuals that the Hearing Officer will be making a decision about their detainer and that there is a public defender present who can speak on their behalf.

72. A probation officer proceeds to read a report regarding the alleged violation of probation. They present no witnesses to testify, even where the probation officer does not have first-hand knowledge.

73. The assigned public defender may then advocate for the detainer to be lifted or transferred to alternative

housing (another form of detention, albeit outside the ACJ).[6]

74. The public defender does so without having had the opportunity to meet with their client, investigate the alleged violation, or obtain information that could be used in their client's defense. This prevents the public defender from presenting any evidence or challenging the factual basis for the alleged violation.

75. Hearing Officers render a decision on the detainer without making any finding that detention is necessary to prevent flight or to ensure public safety. Indeed, because Hearing Officers systematically fail to consider information relevant to these factors, they do not have a basis for such a finding.

76. In the vast majority of cases, Hearing Officers decline to release the individual.

77. Based on a sample of 1,269 *Gagnon* I proceedings observed by volunteer court watchers between January 10, 2021, and September 16, 2022, release was recommended in only 255 cases (20.1%).

78. Hearing Officers were responsible for 1,252 of these cases. Broken down by individual hearing officer, Charlene Christmas recommended release in only 70 of 418 cases (16.75%); Robert O'Brien recommended release in only 45 of 294 cases (15.31%); Stephen Esswein recommended release in only 106 of 372 cases (28.49%); and Renawn Harris recommended release in only 27 of 141 cases (16.1%).

79. Hearing Officers' release rates were significantly low in cases involving technical violations and

[6] On rare occasions, an individual's privately retained defense counsel appears.

direct violations (new criminal charges) alike. In a sample of 1,121 cases notated by court watchers during the same time period, release was recommended in only 11% of cases involving a direct violation (26 out of 227 cases), 30% involving a technical violation (108 out of 354 cases), and 17% involving both (91 out of 540 cases).

80. Though Hearing Officers inform detained individuals that the purpose of the *Gagnon* I proceeding is to make a decision about the detention, they routinely couch their "decision" in terms of a recommendation to be reviewed by a judicial officer.

81. When Hearing Officers recommend detention, the recommendation is routinely rubber stamped by the reviewing judicial officer ex parte.

82. Conversely, when Hearing Officers recommend that the detainer be transferred or lifted, the judicial officer scrutinizes and frequently overrides the recommendation.

83. When recommending detention, Hearing Officers systematically fail to make any finding that detention pending the *Gagnon* II is necessary to prevent flight risk or to ensure public safety.

III. Hearing Officers Systematically Order Mandatory Detention Pursuant to County Defendants' Detainer Policy and Judicial Defendants' No-Lift Policy.

84. In certain categories of cases, Hearing Officers systematically order mandatory detention, without regard to any individualized circumstances and without a case-specific finding regarding the necessity of detention. This occurs where the two mandatory detention provisions of the Detainer Policy are implicated, or for all people supervised by Judge Mariani and Judge

Bigley, based on a blanket "no-lift" administrative policy Judicial Defendants have issued.

Mandatory Detention Pursuant to
County Defendants' Detainer Policy

85. In cases where an individual is alleged to have violated a "zero tolerance" condition of probation, Hearing Officers automatically order detention based solely on the nature of the alleged violation in accordance with the Detainer Policy's mandatory detention provision. They do not consider any evidence about the circumstances surrounding the alleged violation, nor do they make a finding that detention is necessary to prevent flight or ensure public safety.

86. Even drinking a single can of light beer has been enough to trigger this provision in the past.

87. Hearing Officers have also ordered mandatory detention for individuals battling opioid use disorder, no matter the fact that the ACJ is not equipped to provide proper medical treatment.

88. Similarly, applying the mandatory detention provision of the Detainer Policy regarding "a new charge that represents a serious threat to public safety," Hearing Officers systematically order mandatory detention based on the nature of the underlying offense alone.

89. Hearing Officers apply this mandatory detention provision to alleged offenses like aggravated assault and possession of a weapon, without reference to the facts of the alleged crime or the necessity of detention pending the *Gagnon* II proceeding.

90. Hearing Officers' indifference to the factual record holds true even where a judicial officer has already determined that there is no need to detain the individual

pretrial until their new case resolves and set conditions for the individual's release on the new offense.

91. Indeed, Hearing Officers routinely require detention without even considering the individual's eligibility for release on the new charges.

92. For example, Plaintiff Jones was arrested on two new charges while on probation. He was not only deemed eligible for release on these charges—he was released. He posted a $25,000 bond and got out of jail. A few days later, he was rearrested on the basis that the new charges were a violation of probation.

93. At his *Gagnon* I proceeding, the Hearing Officer refused to lift the detainer because of the nature of the new charges, not considering the fact that Mr. Jones was not even being detained on those offenses.

94. Plaintiff Horton was also accused of violating probation after being arrested in two new cases. A magistrate judge ordered his release on a $5,000 unsecured bond in each case. At the *Gagnon* I, the hearing officer did not take the magistrate's release order into account and refused to lift his detainer based on the nature of the offenses.

95. Unsecured bond entitles a person to release with no up-front payment of bail. But for the detainer, Mr. Horton would have been released from jail.

96. Despite the fact that judicial officers determined that neither Mr. Jones nor Mr. Horton needed to be jailed pretrial, Hearing Officers forced them to stay in jail pending their *Gagnon* II proceedings.

Mandatory Detention Pursuant to
Judicial Defendants' No-Lift Policy

97. Hearing Officers also routinely and systematically expand on the two mandatory detention provisions codified in the Detainer Policy by automatically recommending mandatory detention for anyone supervised by Judge Mariani or Judge Bigley. This is because Judicial Defendants have a categorical "no-lift" policy, meaning that every individual they supervise arrested for a probation violation will be jailed regardless of the specific circumstances of the alleged violation or the individual's risk of flight or harm to the community.

98. In so doing, Hearing Officers frequently remark that Judicial Defendants have instructed them not to lift detainers for any individuals they supervise, or even recommend a transfer to alternative housing; that their hands are tied; and that they are powerless to provide any relief.

99. Hearing Officers have made comments like: "It's Judge Mariani, I have no discretion in this case"; "I don't have the liberty to lift Mariani's detainers and that's that"; "There's nothing we can do here, even if all three of us [hearing officer, public defender, and probation officer] want you out, Mariani won't let it happen"; "This is Judge Bigley. I'm not allowed to lift the detainer"; "This is Judge Bigley--I'm not allowed to release you."

100. Frequently, the assigned public defender echoes the same sentiment, explaining to detained individuals that the detainer will not be lifted at the *Gagnon* I because of Judicial Defendants' preferences regarding detainers: "There is very little we can do because you have Judge Mariani and a zero tolerance condition"; "Judge Mariani does not give much leeway for hearing officers"; "The difficulty is the sentencing judge is

Mariani and I'm not sure how much leeway the hearing officer has until the judge sees you"; "Judge Mariani wants everyone detained before he sees them for [*Gagnon*] IIs"; "The big problem is you have Judge Mariani on both of these cases, and he prefers to have people detained… We're dealing with a judge who doesn't want to let you out"; "Bigley makes her own decisions"; "Judge Bigley wants to see people personally who have new charges"; "Judge Bigley likes to make her own decisions"; "I'm limited in what I can do for you in part because Bigley likes to make her own decisions"; "[Judge Bigley] likes to see everyone who violates"; "Judge Mariani likes to make his own decisions."

101. In other words, Judicial Defendants divest Hearing Officers of the ability to make an independent, individualized determination regarding the necessity of detention.

102. Judicial Defendants do so through a blanket policy that anyone they supervise should remain detained. Hearing Officers defer to these instructions from their bosses, rendering the *Gagnon* I proceeding for the people they supervise utterly meaningless; the procedural protections it purports to afford ring hollow.

103. This was the precise experience of Plaintiffs Brownlee and Oden-Pritchett. At their *Gagnon* I proceedings, Hearing Officers refused to lift the detainers because they were supervised by Judge Mariani and Judge Bigley, respectively.

104. County Defendants sanction Judicial Defendants' expansion of the Detainer Policy.

105. Despite the policymaking authority they have exercised by issuing the Detainer Policy (and despite Judge Rangos's general authority as the Administrative

Judge), County Defendants do not prohibit Judicial Defendants from imposing a no-lift policy, or Hearing Officers from abiding by it.

IV. After the *Gagnon* I Proceeding, Detained Individuals Have No Meaningful Opportunity for Release.

106. Once a Hearing Officer orders someone detained at the *Gagnon* I proceeding, they are effectively relegated to languish in jail until their *Gagnon* II proceeding, which is typically months later.

107. As a matter of local custom, after the *Gagnon* I proceeding, only the supervising Common Pleas judge has the authority to lift the probation detainer.

108. County Defendants could promulgate a policy allowing automatic review of detainer decisions after the *Gagnon* I proceeding.

109. In fact, Allegheny County does this very thing for bail determinations, allowing a specific Court of Common Pleas judge to review pretrial incarceration decisions within a few days after a magistrate judge makes the initial determination.[7]

110. Instead, no review of the detainer ever occurs unless an individual files a motion to lift the detainer.

111. As a practical matter, most people on probation do not have access to an attorney to file such a motion—even if they are indigent and qualify for a public defender. While an individual may on paper be represented by the Public Defender's Office between their *Gagnon* I and *Gagnon* II proceedings, in reality there

[7] Plaintiffs do not pass on the constitutional sufficiency of the initial bail setting proceedings or these bail review proceedings.

are often long gaps during which defendants lack access to representation.

112. The Public Defender's Office employs horizontal representation, meaning that a different attorney represents an individual during different stages of their case.

113. Between the conclusion of the *Gagnon* I hearing and shortly before the *Gagnon* II hearing, a period that can last months or even years, individuals are not assigned a public defender on their probation case.

114. For example, when Plaintiff Horton met with a public defender months after his arrest, that attorney was there only to work with him on his new charges—not his alleged probation violation. A public defender has yet to meet with him about his probation case, nearly eight months into his incarceration.

115. At the *Gagnon* I proceedings, Hearing Officers and the assigned public defender alike routinely tell individuals they should hire an attorney if they would like to move to lift the detainer.

116. So, for the vast majority of people, who cannot afford to hire an attorney, even the prospect of filing such a motion is illusory.

117. The few people who are able to hire an attorney for this purpose are still unable to avoid spending months in jail, as judges routinely delay ruling on these motions and they frequently deny them—often without a hearing or explanation.

118. Plaintiff Jones, for example, hired an attorney to file a motion to lift his detainer. His supervising judge, Judge Rangos, denied it without a hearing.

V. Detainer Practices Are Widespread and Contribute Significantly to Pretrial Detention in the Allegheny County Jail.

119. The reach of Defendants' unconstitutional and illegal policies and practices is significant.

120. On any given day, about one third of the people caged at the Allegheny County Jail have a probation detainer lodged against them.

121. As of September 23, 2022, 651 individuals—or 39.4% of the 1,651 total people in jail—had a probation detainer lodged against them.[8]

122. The vast majority of these people would be eligible for release but for the detainer.

123. 264 individuals with a detainer (or 16% of the overall jail population) appear to be detained only because of a technical violation of probation.[9]

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[8] Allegheny County, *Current Population Hold Types*, ALLEGHENY COUNTY JAIL POPULATION MANAGEMENT DASHBOARDS, https://bit.ly/3BCmzTc (last visited Sept. 23, 2022), applying these filters:

County Sentenced	Allegheny County Prob. Detainer	PA State Prob. Detainer	Awaiting Trial	External Detainer	Family Court	Release Condition
(All)	(All)	(All)	(All)	(All)	(All)	(All)
Yes	Yes	Yes	Yes	Yes	Yes	Yes
No	No	No	No	No	No	No

[9] *Id.*, applying these filters:

County Sentenced	Allegheny County Prob. Detainer	PA State Prob. Detainer	Awaiting Trial	External Detainer	Family Court	Release Condition
(All)	(All)	(All)	(All)	(All)	(All)	(All)
Yes	Yes	Yes	Yes	Yes	Yes	Yes
No	No	No	No	No	No	No

124. 280 individuals with a detainer (or 17% of the overall jail population) are awaiting trial on a new charge (i.e. the primary basis of the alleged probation violation is a new charge).[10]

125. About 24 of those with a probation detainer had resolved their new cases and were in jail solely awaiting their *Gagnon* II proceeding.[11]

126. Most of those with a new criminal case pending are eligible for release on the new case (i.e., as is the case with each of the Named Plaintiffs, a judicial officer has set monetary or non-monetary conditions for release). But because of the detainer, they are stuck in jail.

127. Due to Defendants' unconstitutional and illegal policies and practices, people subject to probation detainers in Allegheny County are often detained for extended periods of time.

128. The vast majority of people accused of violating probation because they allegedly committed a new criminal offense must wait three months (on average) between the resolution of their new case and the *Gagnon* II hearing—in addition to the months it takes for the new case to resolve.[12]

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[10] *Id.*, applying these filters:

County Sentenced	Allegheny County Prob. Detainer	PA State Prob. Detainer	Awaiting Trial	External Detainer	Family Court	Release Condition
(All)	(All)	(All)	(All)	(All)	(All)	(All)
Yes	Yes	Yes	Yes	Yes	Yes	Yes
No	No	No	No	No	No	No

[11] *Id.*, applying these filters:

County Sentenced	Allegheny County Prob. Detainer	PA State Prob. Detainer	Awaiting Trial	External Detainer	Family Court	Release Condition
(All)	(All)	(All)	(All)	(All)	(All)	(All)
Yes	Yes	Yes	Yes	Yes	Yes	Yes
No	No	No	No	No	No	No

[12] *See, e.g.*, Allegheny County Safety + Justice Challenge, *Year Three Report (January 2021 – December 2021)* at 3, https://bit.ly/

129. There is no legal requirement for the *Gagnon* II to be delayed until after the new case resolves, let alone for months afterward—this is purely a matter of local practice, at the expense of individual liberty.

130. Throughout this time, individuals suffer the incalculable harm of pretrial incarceration.

131. Pretrial incarceration harms people's lives beyond their loss of liberty. People who are jailed awaiting trial endure degrading and life-threatening conditions.

132. For instance, people who are incarcerated pretrial can experience worsening mental illness, since conditions in jail can put a person under extreme stress and restrict access to needed medications;[13] a high likelihood of being assaulted, including sexual assault, especially in the first few days of incarceration; exposure to communicable diseases; inability to exercise; deprivation of sunlight and fresh air; and forcible separation from children and family.

133. Other consequences of pretrial incarceration include loss of income, since people often lose their jobs while detained; loss of housing and missed payments on utilities and other bills, since people cannot make rent and other payments when jailed; and loss of physical or legal custody of children.

134. Those few people who can actually afford an attorney to represent them in probation violation proceedings have a more difficult time communicating with their

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3DMYDPM (suggesting that it takes an average of 84 days between resolution of a new case and resolution of the probation violation).

[13] *See Incarceration's Front Door: The Misuse of Jails in America*, VERA INSTITUTE OF JUSTICE (July 29, 2015), at 12, https://bit.ly/3rvEwyp.

counsel, making it harder to prepare a defense. In the analogous pretrial incarceration context, detained individuals are more likely to be convicted, and sentenced to longer terms of incarceration, than comparable individuals who can prepare their defense out of custody.[14] And incarceration makes communities less safe, too: just two or three days of pretrial detention increases the risk of recidivism for low-risk persons.[15]

135. Conversely, reducing reliance on incarceration makes communities more safe. For example, under a consent decree approved by a federal court in November 2019, Harris County, Texas has been releasing most people arrested for misdemeanors promptly and following modified procedures at bail hearings to comply with the Constitution. Since the consent decree has been in place, the number of persons arrested for misdemeanors who had a new charge filed within a year has decreased, while the percentage of misdemeanor cases resulting in conviction has dropped by more than 50 percent.[16]

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[14] *See* Christopher T. Lowenkamp et al., Laura & John Arnold Found., *Investigating the Impact of Pretrial Detention on Sentencing Outcomes* 12, 14, 16, 18 (2013), https://bit.ly/3PjDgbO; Megan T. Stevenson, *Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes*, 34 J.L. ECON. & ORG. 511, 535–36 (2018).

[15] *See* Timothy R. Schnacke, Nat'l Inst. of Corr., *Fundamentals of Bail: A Resource Guide for Pretrial Practitioners and a Framework for American Pretrial Reform* 15-16 (2014), https://bit.ly/3y6jNVk; Christopher T. Lowenkamp, Marie VanNostrand, & Alexander Holsinger, The Hidden Costs of Pretrial Detention (Laura & John Arnold Found. 2013).

[16] Brandon L. Garrett et al., *Monitoring Pretrial Reform in Harris County: Fourth Report of the Court-Appointed Monitor*, ODonnell v. Harris County, 16-cv-1414 (S.D. Tex.) at v-vi (Apr. 18, 2022), https://bit.ly/3PG3rt8; *see also* Fola Akinnibi, *Texas Bail*

136. The harmful effects of pretrial incarceration are particularly acute at the Allegheny County Jail.

137. The inhumane conditions at the jail have been widely reported in the local media and are regularly discussed at monthly Jail Oversight Board (JOB) meetings. Recently, JOB members have heard concerns over "lockdown" practices at the jail, which potentially violate a local ban on the use of solitary confinement;[17] inadequate access to medications;[18] and unsanitary food that incarcerated individuals are forced to consume.[19]

138. There are several pending lawsuits against Allegheny County regarding the mistreatment of individuals caged at the jail, including litigation regarding excessive force, mistreatment of individuals with psychiatric disabilities, poor conditions, and inadequate medical treatment.

139. Six people incarcerated at the Allegheny County Jail died this year alone. Seventeen individuals have died at the jail since the onset of the pandemic in 2020.[20] Based on publicly available court records, at

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Reform Reduced Jail Time and Crime, New Study Says, BLOOMBERG (Aug. 30, 2022), https://bloom.bg/3C9bdYp.

[17] Julia Zenkevich, *Allegheny County Jail was on lockdown in June, some worry it may have violated the solitary confinement referendum*, 90.5 WESA (July 8, 2022), https://bit.ly/3UCTako.

[18] Juliette Rihl, *Mixed-up meds & long waits: How understaffing hurts medical treatment at Allegheny County Jail*, PUBLIC SOURCE (Jan. 7, 2021), https://bit.ly/3SwJO7V.

[19] Hannah Wyman, *Food at the forefront of Jail Oversight Board meeting*, PITTSBURGH POST-GAZETTE (May 6, 2022), https://bit.ly/3Uy5m61.

[20] Brittany Hailer, *Hours before he died, the Allegheny County Jail released an incarcerated man with intellectual disability from*

least five of them were in jail solely because of a probation detainer.

140. Named Plaintiffs themselves have paid significant personal costs of incarceration.

141. Mr. Horton lost the job he had at Wal-Mart. He has two kids, a one-year-old son and a one-month-old daughter. Mr. Horton missed the birth of his daughter because he was in jail. He can no longer help support his girlfriend or either of his kids, putting a financial strain on their mothers. For instance, his son's mother lost her job because she could not afford a babysitter; had Mr. Horton not been in jail, he could have cared for his son while her mother was at work.

142. Mr. Jones lost his housing and all of his belongings. His dog was taken to a dog pound. His siblings have been sending him money so he can buy commissary, which is in turn negatively impacting their ability to provide for their kids.

143. Mr. Brownlee was infected with the COVID-19 virus twice while jailed at the ACJ. Being in jail has prevented him from seeing his four-year-old son or caring for his aging mother.

CLASS ACTION ALLEGATIONS

144. Plaintiffs bring the claims in this action, on behalf of themselves and all other similarly situated, as a class action under Federal Rules of Civil Procedure 23(a)(1)-(4) and 23(b)(2)-(3).

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custody, PITTSBURGH INSTITUTE FOR NONPROFIT JOURNALISM (Sept. 23, 2022), https://bit.ly/3fk3e1S.

145. In accordance with these Rules, Plaintiffs seek to certify the following classes and subclasses:[21]

> **Pre-*Gagnon* I Class:** All individuals, who are now or will in the future be, detained at the Allegheny County Jail on an Allegheny County probation detainer awaiting a *Gagnon* I proceeding. This class is represented by Plaintiffs Stanford and Bronaugh, who seek certification under Rule 23(b)(2).
>
> **Pre-*Gagnon* I Mandatory Detention Subclass:** All individuals, who are now or will in the future be, detained in the Allegheny County Jail on an Allegheny County probation detainer pursuant to a mandatory detention policy and awaiting a *Gagnon* I proceeding. This class is represented by Plaintiffs Stanford and Bronaugh, who seek certification under Rule 23(b)(2).
>
> **Post-*Gagnon* I Class:** All individuals who, at any time since October 3, 2020 through the present, were ordered detained on an Allegheny County probation detainer at their *Gagnon* I proceeding without a finding that such detention was necessary to satisfy a legitimate government interest. This class is represented by Plaintiffs Horton, Jones, Brownlee, and Oden-Pritchett, who seek certification under Rule 23(b)(3).
>
> **Post-*Gagnon* I Mandatory Detention Subclass:** All individuals who, at any time since October 3,

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[21] For purposes of the subclasses, "mandatory detention" refers to circumstances in which individuals are automatically detained because they 1) are accused of violating a zero tolerance condition of probation; 2) are supervised by Judge Mariani or Judge Bigley; or 3) are accused of a new charge "that represents a serious threat to public safety."

2020 through the present, were ordered automatically detained on an Allegheny County probation detainer at their *Gagnon* I proceeding pursuant to a mandatory detention policy. This subclass is represented by Plaintiffs Horton, Jones, Brownlee, and Oden-Pritchett, who seek certification under Rule 23(b)(3).

146. A class action is the only practicable means by which Plaintiffs and class members can challenge Defendants' unconstitutional policies, practices, and procedures. On any given day, upwards of 600 individuals incarcerated at the Allegheny County Jail have a probation detainer lodged against them.

147. There are questions of law and fact common to all class and subclass members, including:

- What procedural protections and substantive standards Defendants apply at *Gagnon* I proceedings before ordering people jailed for the pendency of their violation of probation proceedings.
- Whether Defendants require mandatory detention for certain categories of individuals at their *Gagnon* I proceedings, regardless of the specific circumstances of their alleged violations of probation.
- Whether Defendants' custom, policy, or practice of perfunctory *Gagnon* I proceedings violates the procedural and substantive due process rights of people on probation.
- Whether Defendants' custom, policy, or practice of mandatory detention at *Gagnon* I proceedings violates the procedural and substantive due process rights of people on probation.

- Whether Plaintiffs are entitled to a finding that detention pending the *Gagnon* II proceeding is necessary to satisfy a legitimate government interest (i.e., ensuring public safety or preventing flight risk).
- How much money individuals should be compensated for each day of unconstitutional detention following a *Gagnon* I proceeding.

148. Plaintiffs' claims are typical of the claims of the classes and subclasses. That typicality stems from the fact that Defendants have detained every class member in violation of the same constitutional rights, through the application of the same systemic customs, policies, or practices. Put differently, Plaintiffs, like every other class member, are injured by the same unconstitutional customs, policies, and practices maintained by Defendants.

149. The individual Named Plaintiffs will fairly and adequately represent the interests of the classes and subclasses. Named Plaintiffs do not have any known conflicts of interest with the unnamed members of the proposed classes.

150. Named Plaintiffs are represented by attorneys from Civil Rights Corps and the Abolitionist Law Center who have experience in litigating complex civil rights matters, including class action lawsuits, in federal court and extensive knowledge of both the details of Defendants' practices and the relevant law. Counsel have the resources, expertise, and experience to prosecute this action.

151. Defendants have acted and failed to act in a manner that applies generally to the classes and subclass as a whole, rendering class-wide relief appropriate.

152. Because Plaintiffs challenge systemic customs, policies, or practices that apply to all class and subclass members, the questions of law and fact that are common to the Plaintiffs and the putative class predominate over individual questions, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

153. The putative class is easily ascertainable, as it is defined in accordance with objective criteria that can be readily determined from records that Defendants keep.

CLAIMS FOR RELIEF

COUNT I:
Right to Procedural Due Process Under the Fourteenth Amendment to the United States Constitution
All Plaintiffs Against All Defendants
Declaratory Judgment, Injunctive Relief, and Monetary Damages

154. Plaintiffs re-allege and incorporate by reference the preceding allegations in this Complaint as if fully set forth herein.

155. Plaintiffs have a right to an adequate hearing near the time of their arrest to determine whether there is probable cause to believe they violated the terms of their probation. *Gagnon*, 411 U.S. at 782.

156. Defendants' unlawful custom, policy, or practice of conducting perfunctory *Gagnon* I proceedings up to 14 days after arrest and depriving Plaintiffs of an opportunity to present evidence, challenge the evidence against them, or have a determination made by an independent decision maker violates Plaintiffs' right to an

adequate, timely hearing that provides basic procedural safeguards.

157. Defendants' unlawful custom, policy, or practice of imposing mandatory detention following the *Gagnon* I proceedings in certain categories of cases, without regard to any individualized considerations, further violates Plaintiffs' rights.

158. All Plaintiff classes and subclasses seeks a declaration that Defendants' policies and practices violate their rights under the Fourteenth Amendment.

159. All Plaintiff classes and subclasses also seek injunctive relief against County Defendants enjoining the enforcement of their unlawful detainer custom, policy, or practice.

160. The Post-*Gagnon* I class and subclass additionally seek compensation from County Defendants for every day of unconstitutional detention they suffered.

COUNT II:
Right to Procedural and Substantive Due Process Under the Fourteenth Amendment to the United States Constitution (Prolonged Detention)
All Plaintiffs Against All Defendants
Declaratory Judgment, Injunctive Relief, and Monetary Damages

161. Plaintiffs re-allege and incorporate by reference the preceding allegations in this Complaint as if fully set forth herein.

162. Defendants' unlawful custom, policy, or practice of detaining hundreds of individuals arrested for probation violations for prolonged periods pending final revocation proceedings without an adequate assessment to ensure such detention is necessary creates a risk of

erroneous detention, in violation of individuals' procedural due process rights.

163. Defendants' unlawful custom, policy, or practice of detaining people charged with supervision violations for prolonged periods without justification is punitive and does not bear a reasonable relationship to any legitimate purpose for detention, in violation of individuals' substantive due process rights.

164. Defendants' unlawful custom, policy, or practice of prolonged incarceration following a mandatory detention decision at the *Gagnon* I proceeding in certain categories of cases, without regard to any individualized considerations, further violates individuals' rights.

165. All Plaintiff classes and subclasses seek a declaration that Defendants' policies and practices violate their rights under the Fourteenth Amendment.

166. All Plaintiff classes and subclasses also seek injunctive relief against County Defendants enjoining the enforcement of their unlawful detainer custom, policy, or practice.

167. The post-*Gagnon* I class and subclass additionally seek compensation from County Defendants for every day of unconstitutional detention they suffered.

COUNT III:
Right to Procedural Due Process Under the Pennsylvania Constitution
All Plaintiffs Against All Defendants
Declaratory Judgment, Injunctive Relief, and Monetary Damages

168. Plaintiffs re-allege and incorporate by reference the preceding allegations in this Complaint as if fully set forth herein.

169. Pennsylvania Constitution art. 1, §§ 1, 9, and 11 protect an individual's rights to procedural due process, which are, at minimum, coextensive with federal due process requirements.[22] The due process protection includes the right to a prompt and adequate hearing at the time of arrest to determine whether there is probable cause to believe that the detainee has committed a violation of parole or probation.

170. Defendants' unlawful custom, policy, or practice of conducting perfunctory *Gagnon* I proceedings up to 14 days after arrest and depriving Plaintiffs of an opportunity to present evidence, challenge the evidence against them, or have a determination made by an independent decision-maker violates Plaintiffs' right to an adequate, timely hearing that provides basic procedural safeguards.

171. Defendants' unlawful custom, practice, or policy of ordering mandatory detention at the *Gagnon* I proceedings in certain categories of cases, without regard to any individualized considerations, further violates Plaintiffs' rights.

172. All Plaintiff classes and subclasses seek a declaration that Defendants' policies and practices violate their rights under the Pennsylvania Constitution.

173. All Plaintiff classes and subclasses also seek injunctive relief against County Defendants enjoining the enforcement of their unlawful detainer custom, policy, or practice.

174. The Post-Gagnon I class and subclass additionally seek compensation from County Defendants for every day of unconstitutional detention they suffered.

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[22] *Com. v. Aziz*, 724 A.2d 371, 377 (Pa. Super. 1999).

COUNT IV:
Right to Procedural and Substantive Due Process Under the Pennsylvania Constitution (Prolonged Detention)
All Plaintiffs Against All Defendants
Declaratory Judgment, Injunctive Relief, and Monetary Damages

175. Plaintiffs re-allege and incorporate by reference the preceding allegations in this Complaint as if fully set forth herein.

176. Pennsylvania Constitution art. 1 §§ 1, 9, and 11 protect an individual's right to due process of law.

177. Defendants' unlawful custom, policy, or practice of detaining hundreds of individuals arrested for probation violations for prolonged periods pending final revocation proceedings without an adequate assessment to ensure such detention is necessary creates a risk of erroneous detention, in violation of individuals' procedural due process rights.

178. Defendants' unlawful custom, policy, or practice of detaining people charged with supervision violations for prolonged periods without justification is punitive and is not narrowly tailored to any legitimate purpose for detention, nor does it bear any real and substantial relation to such a purpose, in violation of individuals' substantive due process rights.

179. All Plaintiff classes and subclasses seek a declaration that Defendants' policies and practices violate their rights under the Pennsylvania Constitution.

180. All Plaintiff classes and subclasses also seek injunctive relief against County Defendants enjoining the enforcement of their unlawful detainer custom, policy, or practice.

181. The Post-*Gagnon* I class and subclass additionally seek compensation from County Defendants for every day of unconstitutional detention they suffered.

REQUEST FOR RELIEF

182. Plaintiffs request that this Court hold a jury trial, enter judgment in their favor, and issue the following relief:

a. Class certification under Rule 23 of the Federal Rules of Civil Procedure;

b. A declaration that Defendants violate Plaintiffs' rights under the United States and Pennsylvania Constitutions by detaining those arrested for violating their probation for prolonged periods without meeting the substantive and procedural standards required for such detention;

c. Preliminary and permanent injunctions as to County Defendants and Judicial Defendants, requiring them to terminate their unconstitutional customs, policies, or practices, and to require constitutionally sufficient protections at the *Gagnon* I proceedings;

d. Compensatory damages against County Defendants as determined at a jury trial;

e. Reasonable attorneys' fees, expenses, and costs of litigation pursuant to 42 U.S.C. § 1988 and other applicable law; and

f. Such other relief as the Court deems just and proper.

Respectfully submitted this 2nd day of October, 2022.

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**pro hac vice* application forthcoming