UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DION HORTON, *et al.*, Plaintiffs, v. JILL RANGOS, *et al.*, Defendants.	Case No. 22-cv-1391

PLAINTIFFS' MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTIVE RELIEF

(EVIDENTIARY HEARING REQUESTED)

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INTRODUCTION

On any given day, dozens or more individuals accused—but not found guilty of—probation violations are trapped in the Allegheny County Jail (ACJ), confined under unconstitutional mandatory detention policies that prohibit individualized consideration of their release. Shortly after arrest, at a pro forma proceeding, Hearing Officers apply mandatory detention policies—ordering detention without any individualized consideration of whether detention is in fact necessary—and decide that individuals must remain caged until their probation cases resolve. Hearing Officers systematically do so even if a judicial officer in a separate proceeding has determined that the individuals need not be jailed pretrial.

These people are jailed because Administrative Judge Jill Rangos and Director of Adult Probation and Parole ("Adult Probation") Frank Scherer have promulgated a probation detainer policy requiring mandatory detention for people accused of certain offenses or who have violated a "zero-tolerance" condition of probation. Beyond this written policy, Judge Rangos and Director Scherer also allow Court of Common Pleas Judges Anthony Mariani and Kelly Bigley to require hearing officers to enforce blanket "no-lift" policies, such that anyone they supervise must remain detained regardless of the circumstances. In all cases, Hearing Officers fail to conduct an individualized determination regarding the necessity of detention.

Plaintiffs Tate Stanford and Elijah Bronaugh were recently arrested for allegedly violating probation and seek an injunction on behalf of themselves and those similarly situated prohibiting their incarceration pursuant to any mandatory detention policy.[1] Plaintiffs Dion Horton, Damon

[1] Plaintiffs Stanford and Bronaugh represent the Pre-*Gagnon* I Mandatory Detention Subclass, defined as: 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. *See* Doc. 1 at 25.

Jones, Craig Brownlee, and Rahdnee Oden-Pritchett have been languishing in jail for months (and suffered incalculable harm) because of Defendants' mandatory detention practices, with no end in sight.[2] They likewise seek an order on behalf of themselves and those similarly situated enjoining their continued detention absent the procedural and substantive safeguards constitutionally required as a prerequisite to such detention.[3]

STATEMENT OF THE FACTS[4]

I. Preliminary Statement

A person accused of violating probation cannot be lawfully detained pending final resolution unless a judicial officer has both found probable cause and determined that detention is necessary. *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973). Because the loss of liberty associated with the revocation of probation "is a serious deprivation," *id.* at 781, a hearing is necessary to ensure people accused of probation violations are restored "to normal and useful life" wherever possible, *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). But in Allegheny County, this clear constitutional dictate is blatantly defied. On any given day, upwards of six hundred people—more than a whopping one third of the people caged at the Allegheny County Jail—are unable to obtain

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"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."

[2] These Plaintiffs represent the Post-*Gagnon* I Mandatory Detention Subclass, defined as: All individuals who, at any time since October 3, 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. *See* Doc. 1 at 25.

[3] Though Plaintiffs bring both federal and state due process claims challenging all *Gagnon* I proceedings in Allegheny County, which they contend systematically occur in a constitutionally deficient manner, Plaintiffs move for preliminary injunctive relief only under the U.S. Constitution as to individuals who are detained subject to Defendants' mandatory detention practices. *See* Doc. 1 at 28-31.

[4] Plaintiffs seek leave to take limited discovery before an evidentiary hearing on this motion.

their freedom because a probation detainer is imposed against them, at least dozens of whom are detained pursuant to a mandatory detention order.[5]

This is because local officials conduct these constitutionally required proceedings (referred to locally as a "*Gagnon* I") in name only. Up to 14 days after arrest, people arrested for allegedly violating probation appear before a Hearing Officer—a bureaucrat who supervises probation officers in Allegheny County Adult Probation and Parole ("Adult Probation").[6] Hearing Officers are supposed to make two separate-but-related findings during this proceeding: 1) whether there is probable cause that the person has violated the terms of probation, and 2) whether the person should be detained pending the final resolution of the alleged violation (the "*Gagnon* II").[7] In practice, however, Hearing Officers do not even purport to make probable cause determinations. And while they do make detention decisions, they do not make any findings of necessity.

In flagrant disregard for Plaintiffs' constitutional rights, Hearing Officers routinely defer to local policy, custom, and practice that allow for mandatory detention without making any individualized assessments. Local policymakers have promulgated a written policy governing detention decisions, requiring mandatory detention in certain categories of cases. And, in practice, Defendants have systematically broadened the scope of automatic detention. Due process does not permit detention pursuant to these farcical proceedings.

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[5] Frequently, there are more people in jail because of a probation detainer than those awaiting trial. *See, e.g.*, Ex. 2, Allegheny County Jail Population Summary (July 2022) (on July 6, 2022, 42% of the jail population was lodged on a probation detainer while just 25% was detained pretrial only).

[6] Hearing Officers are not judges, nor are they attorneys.

[7] If there is not probable cause, there is no basis for detention. *See infra* at 13-14. If there is probable cause, the Hearing Officer is required to make an additional finding that detention is necessary pending the *Gagnon* II hearing. *See infra* at 21-25.

II. Defendants Apply a Formal Detainer Policy to *Gagnon* I Detention Decisions

Probation detainers are issued by Adult Probation, a creature of the Court of Common Pleas. Adult Probation has promulgated a "Detainer Policy," an official document approved by Judge Rangos and Director Scherer that provides the foundation for detention decisions.[8] *See* Ex. 1, Detainer Policy. When a person is accused of violating the terms of probation, the probation officer applies the Detainer Policy in determining whether to lodge a "detainer" against them.[9]

In specific categories of cases, the Detainer Policy requires mandatory detention: if the individual 1) "has a zero tolerance or mandatory detention court condition that has been violated," or 2) "has a new charge that represents a serious threat to public safety." Detainer Policy at 1.[10] In practice, a third category exists: individuals who are supervised by Judge Anthony Mariani or Judge Kelly Bigley are also mandatorily detained, based on a blanket "no-lift" administrative policy these two Court of Common Pleas judges have issued. *See* Ex. 3, Redcross Decl. ¶¶ 20-22; Ex. 4, Fenstermaker Decl. ¶ 14. Under any of these circumstances, Hearing Officers do not even purport to consider any case-specific facts before requiring continued detention.

III. *Gagnon* I Proceedings Are a Mere Formality

Systematically, *Gagnon* I proceedings in Allegheny County occur in a perfunctory fashion. Up to 14 days after arrest, an individual lodged on a detainer is brought before a Hearing Officer

[8] Judge Rangos and Director Scherer, in addition to Orlando Harper, Warden of the ACJ, comprise the "County Defendants" in this case.

[9] A probation detainer is an order (enforced by Warden Harper) mandating that an individual be detained at the jail pending a probation violation hearing, which is usually months or sometimes even years later. Probation detainers trump bail decisions, such that someone who is deemed bailable and even posts bail will not be released (or will be rearrested after release) if there is a probation detainer imposed against them.

[10] On its face, the Detainer Policy applies to probation officers making detention decisions immediately upon arrest. In practice, though, Hearing Officers apply the Detainer Policy during the *Gagnon* I proceedings as well.

for the proceeding. At the *Gagnon* I proceeding, the Hearing Officer is charged with determining 1) whether there is probable cause for the probation violation, and 2) whether the probation detainer should be lifted pending the *Gagnon* II hearing. Hearing Officers rely on the Detainer Policy—but just as the floor for the detention decisions they make at the *Gagnon* I proceeding. They issue recommendations, which are reviewed by judicial officials ex parte.[11]

Although individuals arrested for probation violations are entitled by law to be heard and provided with an individualized determination regarding the necessity of their detention, Defendants consistently do not provide these protections in cases implicating the mandatory detention policy.[12] Instead, the *Gagnon* I proceedings are carried out merely as a formality, typically lasting less than five minutes. Hearing Officers hear from a probation officer who reads the untested allegations from a report. Redcross Decl. ¶¶ 9, 12; Fenstermaker Decl. ¶ 7; *See* Ex. 5, Snyder Decl. ¶ 5. In situations involving allegations of new crimes, there are never witnesses with firsthand knowledge to testify about the allegations. Redcross Decl. ¶¶ 16, 23; Fenstermaker Decl. ¶¶ 8, 15. While a public defender has a theoretical opportunity to speak on the detained individual's behalf, they do so without having had the opportunity to meet with their client, to investigate the alleged violation, or obtain any information that they could apply in defense of their client's interests; nor are they given the opportunity to present or confront evidence. As a result, the advocacy they do at the hearings is typically limited. *See* Snyder Decl. ¶ 4; Ex. 9, Oden-Pritchett Decl. ¶ 3; Ex. 10, Johnson Decl. ¶ 4; Ex. 13, Todd Decl. ¶ 6; Ex. 14,

[11] 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).

[12] Plaintiffs contend that, in all cases, *Gagnon* I proceedings are devoid of the required procedural and substantive safeguards. But for purposes of the preliminary injunctive relief they seek at this time, they focus on the unconstitutionality of *Gagnon* I proceedings where individuals detained are pursuant to a mandatory detention policy.

Cordoba Decl. ¶ 4. At the conclusion of the brief proceeding, Hearing Officers do not make express findings of probable cause; they simply announce a decision regarding the detainer.

The vast majority of people arrested for a probation violation are kept in custody, even without a "mandatory detention" violation. Redcross Decl. ¶¶ 18-19 (in samples of more than 1,000 cases, individuals were ordered detained about 80% of the time); *see also* Fenstermaker Decl. ¶ 13 (detainer lifted in less than 20% of the Gagnon I proceedings she observed). Hearing Officers make no findings as to whether there are any alternatives to incarceration that would adequately ensure public safety or ensure appearance for future hearings, nor do they make any individualized findings that a person's detention is necessary pending their *Gagnon* II hearing. S*ee generally* Redcross Decl. ¶¶ 14-16. They do not ask about ties to the community. *Id.* They do not ask whether the person has a method for being kept abreast of court dates. *Id.* They do not determine whether there are any other methods to ensure a person's appearance at the *Gagnon* II hearing, such as a supervised release plan. *Id.* They do not consider the effect that detention may have on the positive progress someone may have made out of custody, such as their employment, familial relationships, or treatment programs. *Id.* Instead, they detain. Redcross Decl. ¶¶ 18-19.

IV. Defendants Require Mandatory Detention in Three Categories of Cases

In mandatory detention cases (for which Plaintiffs seek preliminary relief), Hearing Officers automatically order detention—no matter the individualized circumstances surrounding the alleged violation and without considering whether the detained individual is a flight or safety risk. In particular, Hearing Officers enforce a mandatory "no-lift" policy (a blanket administrative policy requiring detention for any individual arrested for violating probation) required by specific judges, in addition to the two mandatory detention provisions of the Detainer Policy.

A. No-Lift Policy

Judges Anthony Mariani and Kelly Bigley ("Judicial Defendants") have instituted a blanket policy that if any person whose case they supervise is arrested for violating probation, that person must remain detained. This no-lift policy applies regardless of the underlying facts of their alleged violation or any information presented to the Hearing Officers at the *Gagnon* I proceeding. Indeed, Hearing Officers routinely inform detained individuals that they are powerless over people supervised by one of the Judicial Defendants and therefore cannot recommend a lift. For instance:

- "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";
- "It's [Judge Bigley's] decision, not mine"; and
- "[Judge Bigley] is my boss, I'm not hers."

Redcross Decl. ¶ 21; Fenstermaker Decl. ¶ 14. Even the public defenders assigned to represent detained individuals during these proceedings express similar sentiments:

- "[Judge Bigley] likes to see everyone who violates";
- "Judge Mariani likes to make his own decisions";
- "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 Gag II's"; and
- "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."

Redcross Decl. ¶ 22. In 13% of the cases that a volunteer court watcher observed, the hearing officer refused to lift the detainer for this very reason. Fenstermaker Decl. ¶¶ 3, 14.

Plainly, Judges Mariani and Bigley have divested the Hearing Officers of the ability to make independent, individualized determinations regarding the necessity of detention, rendering

the *Gagnon* I proceeding utterly pointless for the individuals they supervise. Plaintiffs Brownlee and Oden-Pritchett, in addition to countless other putative class members, have experienced this firsthand. Ex. 8, Brownlee Decl. ¶ 3; Oden-Pritchett Decl. ¶ 3; Cordoba Decl. ¶ 5; Todd Decl. ¶ 7; Ex. 12, Robinson Decl. ¶ 5; Ex. 11, Frazier Decl. ¶ 5; Johnson Decl. ¶ 5. Similarly, Plaintiff Stanford, who is supervised by Judge Mariani, is jailed on a detainer as he awaits his *Gagnon* I proceeding. Ex. 15, Stanford Decl. ¶ 4. Despite the fact that Administrative Judge Rangos and Director Scherer are vested with the policy-making authority that allowed them to put the Detainer Policy into place, they have done nothing to block enforcement of Judicial Defendants' no-lift policy that results in unlawful detention.

B. Nature of New Offense

Hearing Officers also refuse to lift detainers when individuals are accused of new charges and therefore of violating probation, enforcing the provision of the Detainer Policy that requires detention for a "new charge that represents a serious threat to public safety." Detainer Policy at 1. Hearing Officers generally apply this provision to any alleged offenses involving weapons, in addition to aggravated assault and other charges. Redcross Decl. ¶ 23; Fenstermaker Decl. ¶ 15. In so doing, Hearing Officers categorically refuse to consider the alleged facts underlying the charge. No witnesses with firsthand knowledge of the allegations testify at the hearing, nor is any other evidence introduced.

What's worse, Hearing Officers recommend detention even if a judicial officer has already determined that the individual is eligible for release on the new charge. In most cases, when a person is accused of a new offense, a magistrate sets monetary or non-monetary conditions of release—a determination that pretrial incarceration is not necessary to reasonably ensure public safety or court appearance. In some cases, individuals post bond on the new charge, only to be rearrested for the alleged probation violation. *See, e.g.*, Ex. 7, Jones Decl. ¶ 4. In others, the

detainer is imposed before they are able to get out of jail. *See, e.g.*, Ex. 6, Horton Decl. ¶ 2; Frazier Decl. ¶ 6; Todd Decl. ¶ 3; Cordoba Decl. ¶ 2; Oden-Pritchett Decl. ¶ 2; Ex. 16, Bronaugh Decl. ¶ 3. At *Gagnon* I proceedings, Hearing Officers systematically apply the mandatory detention provision, forcing all such individuals to remain in jail by virtue of the probation detainer.

C. Zero-Tolerance Violations

The Detainer Policy requires detention for any individual accused of violating a "zero tolerance" condition of probation. Detainer Policy at 1. Hearing Officers abdicate their duty to make an independent determination regarding the necessity of detention when an individual is accused of violating a "zero-tolerance" condition of probation imposed by the sentencing judge, which typically pertains to the use of drugs or alcohol. For example, a hearing officer enforced a zero-tolerance drug policy against a man in his seventies who was experiencing severe withdrawal symptoms during his *Gagnon* I proceeding, even though he had been in active recovery with medication-assisted treatment for two years. ACJ did not have the resources to support his recovery or provide his prescribed medication; and he had a support system who could care for him at home. Redcross Decl. ¶ 25. Hearing Officers say they have no discretion to recommend release in these cases, mandating detention without any consideration of the basis of the violation or findings regarding the necessity of detention.

V. The Harm of Incarceration is Widespread and Devastating

The harm of these illegal mandatory detention practices is immense. Pretrial incarceration harms people's lives beyond their loss of liberty. People who are not released at their *Gagnon* I proceedings endure degrading and life-threatening conditions in jail.

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. By being incarcerated, people undergo numerous external consequences as well, including loss of income (people often lose their jobs while detained); loss of housing and missed payments on utilities and other bills (people cannot make rent and other payments when jailed); and loss of physical or legal custody of their children (children of incarcerated parents regularly end up in the dependency system due to no caregiver being available outside of jail).

People jailed on probation detainers have a more difficult time communicating with their 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 arrest on new charges for even low-risk persons.[15]

Conversely, reducing reliance on incarceration makes communities safer. For example, under a consent decree approved by a federal court in November 2019, Harris County, Texas has been promptly releasing most people arrested for misdemeanors and has modified procedures at

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

[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://goo.gl/jr7sMg.

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% and the share of cases dismissed or resulting in acquittal has nearly doubled.[16]

The harmful effects of pretrial incarceration are particularly acute at the Allegheny County Jail. The inhumane conditions at the jail have been widely reported in the local media and are regularly discussed at monthly Jail Oversight Board meetings.[17] These reports are consistent with Plaintiffs' and class members' lived experiences. *See* Horton Decl. ¶¶ 11-18 (describing moldy food with bugs, dirty cells, delays in medical care, and frequent lockdowns); Jones Decl. ¶¶ 10-12 (describing moldy food, gnats, poor medical care, and limited out-of-cell time); Brownlee Decl. ¶¶ 6-7; *see also* Oden-Pritchett Decl. ¶ 7; Cordoba Decl. ¶ 9; Johnson Decl. ¶ 9; Frazier Decl. ¶ 8; Todd Decl. ¶¶ 9-12; Robinson Decl. ¶ 7 (all describing similar conditions). There are also several pending lawsuits against Allegheny County regarding the mistreatment of individuals caged at the jail.

Plaintiffs themselves have experienced devastating collateral consequences of their incarceration. During the eight months he has been jailed, Mr. Jones, for example, lost his housing and all of his belongings; had his dog taken to a dog pound; and faces diminished job prospects

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

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

and pay upon release. Jones Decl. ¶¶ 13-15. Mr. Horton has been unable to care for his children, putting severe financial stress on his family. Horton Decl. ¶¶ 7-9. He also missed the birth of a child while in jail, a loss that is impossible to compensate. *Id.* ¶ 7. Mr. Oden-Pritchett was on the verge of starting college, and a new job, before he was jailed. Oden-Pritchett Decl. ¶¶ 9-10. *See also* Brownlee Decl. ¶¶ 8-9; Cordoba Decl. ¶¶ 14-15; Johnson Decl. ¶¶ 10-11; Frazier Decl. ¶¶ 9-11; Todd Decl. ¶ 13; Robinson Decl. ¶ 8 (all describing the effects of incarceration, including losing jobs or housing and the inability to support their families).

A shocking number of people have paid the ultimate cost of incarceration: death. Six people incarcerated at the Allegheny County Jail died this year alone, and at least seventeen people have died at the jail since the onset of the pandemic in 2020.[18] At least four of them (two this year) were in jail solely because of a probation detainer.[19]

DISCUSSION

I. Governing Standard

To obtain preliminary injunctive relief, Plaintiffs must show "a reasonable probability of eventual success in the litigation" and that they will more likely than not suffer "irreparable harm" without the preliminary relief. *Reilly v. City of Harrisburg*, 858 F.3d 173, 176, 179 (3d Cir. 2017), *as amended* (June 26, 2017). If Plaintiffs meet these "gateway factors," *id.* at 179, the court must weigh "the possibility of harm to other interested persons" and the "public interest," *id.* at 176. Plaintiffs do not have the burden of showing that these last two factors weigh in their favor;

[18] Brittany Hailer, *Hours before he died, the Allegheny County Jail released an incarcerated man with intellectual disability from custody*, PITTSBURGH INST. FOR NONPROFIT JOURNALISM (Sept. 23, 2022), https://bit.ly/3fk3e1S.

[19] 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).

the court most simply consider them and determine "in its sound discretion if all four factors, taken together, balance in favor of granting the requested preliminary relief." *See id.* at 179.

II. Plaintiffs Are Likely to Succeed on the Merits of Their Claims

Plaintiffs satisfy the first factor. While they must make more than a negligible showing that they will win on the merits, they need not demonstrate that they are more likely than not to prevail. *Reilly*, 858 F.3d at 179 & n.3. At any rate, the constitutional violations they raise in this litigation are manifest. Defendants maintain a systemic practice of inadequate *Gagnon* I proceedings, devoid of the procedural due process protections unambiguously guaranteed by the U.S. Constitution, as set forth in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). The pro forma nature of the proceedings is especially pronounced in the specific categories of cases for which Plaintiffs seek preliminary injunctive relief, where Defendants require mandatory detention no matter the circumstances of the alleged probation violation. Through their mandatory detention practices, Defendants also violate Plaintiffs' procedural and substantive due process rights by ordering prolonged detention pending the *Gagnon* II hearing without any finding that such detention is necessary to serve a legitimate government interest.

A. Defendants Violate Plaintiffs' Procedural Due Process Rights Under the U.S. Constitution (Count I) by Failing to Conduct Adequate *Gagnon* I Proceedings

The loss of liberty resulting from the revocation of probation is, like that resulting from the revocation of parole, "a serious deprivation requiring that the parolee be accorded due process." *Gagnon*, 411 U.S. at 781. A probationer "is entitled to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his [probation], and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision." *Id.* at 781–82. Defendants fall well short of providing the requisite safeguards in mandatory-detention cases.

Morrissey v. Brewer, 408 U.S. 471 (1972), sets forth the process due at the *Gagnon* I proceeding. *See Gagnon*, 411 U.S. at 782 (holding that probationers are "entitled to a preliminary and a final revocation hearing, under the conditions specified in in *Morrissey v. Brewer*"). Under *Morrissey*, individuals are entitled to notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe they have committed a probation violation, as well as notice of the violations alleged. 408 U.S. at 486–87. At the hearing, the individual has the right to: 1) appear and speak in their own behalf; 2) present documentary evidence or witnesses; and 3) question "the person who has given adverse information" regarding the alleged violation. *Id.* at 487. A neutral officer is then required to make a summary of what happened at the proceeding in terms of the probationer's response and evidence. *Id.* Finally, the officer must determine, "based on the information before [them]," whether there is probable cause to believe the individual committed the alleged violation and whether they should be detained pending the *Gagnon* II hearing. *Id.*

Defendants conduct *Gagnon* I proceedings in name only. Critically, Hearing Officers do not even purport to make a probable cause determination at these proceedings. They also fail to provide the requisite procedural safeguards. Hearing Officers categorically deprive detained individuals of the opportunity to present witnesses or evidence at the proceedings. They do not give detained individuals an opportunity to question the probation officer who has alleged the violation, either, frequently silencing them when they attempt to speak. Fensterkamker Decl. ¶ 11. When the basis of the alleged violation is a new charge, Hearing Officers routinely do not consider the factual basis for the new charge. Redcross Decl. ¶ 23; Fenstermaker Decl. ¶ 15. They do not maintain a record of what occurs during these proceedings or the basis of their decisions, either. The harm is compounded in the mandatory detention cases at issue here, where Hearing Officers

wholly refuse to consider case- or individual-specific factors before ordering detention. Fenstermaker Decl. ¶¶ 9-10 (describing Hearing Officers' patronizing and dismissive comments when individuals attempted to advocate for their release). Put simply, what pass for "*Gagnon* I" proceedings in Allegheny County are not meaningful hearings.

By denying Plaintiffs adequate *Gagnon* I proceedings, Defendants force them to languish for months or years in jail until their *Gagnon* II hearing for a determination on the merits of the alleged probation violation. Horton Decl. ¶¶ 2–3, 5 (in jail for nearly eight months, *Gagnon* II not yet scheduled); Jones Decl. ¶ 3 (same); Ex. 8, Brownlee Decl. ¶¶ 2–4 (in jail for eight months before *Gagnon* II); Robinson Decl. ¶ 9 (in jail for nearly three months, *Gagnon* II not yet scheduled); Frazier Decl. ¶¶ 5, 12 (in jail for two months, *Gagnon* II not yet scheduled). Courts have found that significantly shorter periods of detention sufficed to establish a likelihood of success on the merits and to warrant preliminary injunctive relief under similar circumstances. *See, e.g.*, *King v. Walker*, No. 06 C 204, 2006 WL 8456959, at *9 (N.D. Ill. May 8, 2006) (finding likelihood of success where "parolees are systematically denied a preliminary parole revocation hearing for weeks"); *Pinzon v. Lane*, 675 F. Supp. 429, 431 (N.D. Ill. 1987) (same where class members were denied *Gagnon* I hearings "for periods from over a month to nearly *two years*"); *see also Valdivia v. Davis*, 206 F. Supp. 2d 1068, 1078 (E.D. Cal. 2002) (holding that a "system allowing a delay of up to forty-five days or more before providing the parolee an opportunity to be heard" does not pass "constitutional muster"); *Loomis v. Killeen*, 21 P.3d 929, 933 (Idaho Ct. App. 2001) (caging an individual for 38 days before conducting a hearing to determine whether there was any reasonable ground to arrest him for an alleged parole violation "was palpably unreasonable and a deprivation of [his] liberty without due process"); *Williams v. Superior Ct.*, 230 Cal. App. 4th 636, 654, 659 (2014) (finding it "manifest that the due process rights of parolees

are being systematically violated" where they averaged more than 16 days in custody before their first court appearance), *disapproved of on other grounds by People v. DeLeon*, 3 Cal. 5th 640, 399 P.3d 13 (2017).[20]

Because Defendants clearly fail to comply with the explicit textual requirements of *Gagnon* and *Morrissey*, Plaintiffs are likely to prevail on the merits of their procedural due process claims under the U.S. Constitution.

B. Defendants Violate Plaintiffs' Procedural and Substantive Due Process Rights Under the U.S. Constitution (Count II) by Subjecting Them to Prolonged Incarceration Without Considering and Making Findings Regarding the Necessity of Detention

Defendant's mandatory detention practices systemically result in prolonged detention—months on end—before a merits determination at the *Gagnon* II proceeding. *See, e.g.*, Jones Decl. ¶ 3; Horton Decl. ¶¶ 2–3, 5; Brownlee Decl. ¶¶ 2–4; Robinson Decl. ¶ 9; Frazier Decl. ¶¶ 5, 12. Prolonged detention triggers both procedural and substantive safeguards: The government may not deprive individuals of their fundamental interest in bodily liberty without a determination that their incarceration is necessary to further a legitimate governmental interest. Because Defendants ignore this responsibility, Plaintiffs are likely to prevail on the merits of Count II.

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[20] Indeed, "it should pose no great burden" for Defendants to conduct *Gagnon* I proceedings on a more expedited timeline, *see Gawron v. Roberts*, 743 P.2d 983, 990 (Idaho Ct. App. 1987), particularly given that 14 days is far longer than it takes for detained individuals to begin to feel the harms of incarceration. This already occurs elsewhere in Pennsylvania. *See e.g.*, PA R WASHINGTON CTY RCRP Rule L-708(A) ("[A] Gagnon I hearing shall be held . . . . within (3) Court business days if the offender is incarcerated as a result of the violation(s)."). And Pennsylvania law imposes 72-hour detention limits in analogous situations. *See, e.g.*, 234 Pa. Code Rule 150(A)(5)(b) (72-hour limit for detention on a bench warrant); PA ST JUV CT Rule 240(C) (pre-adjudication hearing must be held within 72 hours to review whether juvenile detention is appropriate). Other jurisdictions also require *Gagnon* I proceedings within similar or shorter time frames. *See, e.g.*, Minn. R. Crim. P. 27.04(2)(f) (requiring a hearing "not later than 36 hours after arrest, not including the day of arrest"); Miss. Code § 47-7-37(3) (requiring "informal preliminary hearing" within 72 hours).

1. Defendants Violate Plaintiffs' Procedural Due Process Right to an Inquiry into the Necessity of Prolonged Detention

In addition to the general safeguards recognized under *Gagnon*, Plaintiffs have a procedural due process right to be free of prolonged incarceration without an assessment regarding the necessity of detention. Under the federal standard first enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), courts assessing procedural due process are to weigh three factors: (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 value of "additional or substitute procedural safeguards," and (3) the "public interest." *Montanez v. Sec. Pennsylvania Dept. of Corr.*, 773 F.3d 472, 483 (3d Cir. 2014) (quoting *Mathews*, 424 U.S. at 335).

Here, each of the *Mathews* factors weighs in Plaintiffs' favor, establishing that Defendants' detention scheme violates due process and that Plaintiffs are entitled to an opportunity to be heard on the necessity of incarceration pending a *Gagnon* II hearing.

a. Detention Implicates a Core Liberty Interest

Revocation of probation is a "serious deprivation" that "does result in a loss of liberty." *See Gagnon*, 411 U.S. at 781–82. "Implicit in the system's concern with [probation] violations is the notion that the [probationer] is entitled to retain his liberty as long as he substantially abides by the conditions of his [probation]." *Morrissey*, 408 U.S. at 479. Such "liberty is valuable and must be seen as within the protection of the Fourteenth Amendment." *Id.* at 482. It allows a probationer to be "gainfully employed" and leaves them "free to be with family and friends and to form other enduring attachments of normal life." *Morrissey*, 408 U.S. at 482.

Plaintiffs' experiences demonstrate the loss of liberty attendant to their probation detainers. Most have already been in jail—torn away from their homes, families, and livelihoods—for months, with no end in sight. The vital liberty interest at risk in their revocation proceedings weighs

heavily in favor of procedural safeguards designed to ensure that they are only detained if necessary.

b. Defendants' Procedures Systematically Result in the Incarceration of People Who Pose No Threat to Public Safety and No Risk of Flight

As for the second *Mathews* factor, the risk of erroneous deprivation is great. People accused of probation violations are erroneously incarcerated if 1) they did not violate the terms of their supervision, or 2) they posed no public safety or flight risk and they could be better rehabilitated in the community. By ordering mandatory detention without inquiring into or making findings regarding either of these factors at the *Gagnon* I proceeding, Defendants guarantee that they are erroneously incarcerating indviduals. This is doubly true given that the vast majority of people who are mandatorily detained (including all Plaintiffs) have been determined, in a separate proceeding, to be eligible for release on the new charge that forms the basis of the alleged probation violation, or have been accused of only a technical violation of probation. *See* Horton Decl. ¶ 2; Jones Decl. ¶ 4; Brownlee Decl. ¶ 2; Oden-Pritchett Decl. ¶ 2; Stanfrod Decl. ¶ 3; Bronaugh Decl. ¶ 3. In neither of these circumstances could Defendants credibly argue that Plaintiffs pose a risk of flight or harm to others.

Under *Gagnon* and *Morrissey*, due process requires two ultimate findings necessary to justify the incarceration of an individual alleged to have violated her probation. First, there must be a finding that she did in fact violate one or more terms of probation. *See Morrissey*, 408 U.S. at 479. If so, Adult Probation must exercise its discretion to determine whether the individual should be committed to prison, or whether other sanctions would better protect society and improve her chances of rehabilitation. *Id.* at 479-80. This second inquiry is essential. It underscores that the whole purpose of probation is to keep people in the community and to use revocation only as a last and final resort. *See Gagnon*, 411 U.S. at 785; *see also Bearden v. Georgia*, 461 U.S. 660, 670

(1983) ("The decision to place the defendant on probation, however, reflects a determination by the sentencing court that the State's penological interests do not require imprisonment."). Because not every supervision violation automatically leads to revocation, each individual facing such an accusation must have an opportunity to show that she did not commit the violation or that, if she did, "circumstances in mitigation suggest that the violation does not warrant revocation." *Morrissey*, 408 U.S. at 488.

The same principles hold true at the *Gagnon* I proceeding. It would undermine the purpose of the *Gagnon* II hearing if a person could be jailed for months after a perfunctory *Gagnon* I proceeding—as is customary in Allegheny County—only for a judicial officer to ultimately determine that probation need not be revoked and the individual need not be jailed.

Inevitably, Defendants' routine and systematic failure to consider whether incarceration is necessary at the *Gagnon* I proceeding results in the impermissible detention of countless people. Even if probable cause exists to believe that an individual violated probation—which Defendants do not overtly find—this certainly does not mean that detention is necessary (i.e., to prevent flight or ensure public safety). *See United States v. Salerno*, 481 U.S. 739, 747-49 (1987) (holding that pretrial incarceration must be justified by a legitimate governmental interest, such as preventing danger to the community). Indeed, a judicial officer has made the exact opposite determination for the vast majority of people lodged on a detainer who are accused of violating probation by committing a new crime, by setting either monetary or non-monetary conditions of release. *See, e.g.*, Frazier Decl. ¶ 6 ($1 nominal bond set); Jones Decl. ¶ 4 (posted bond on new charges before being rearrested on probation warrant); Horton Decl. ¶ 2 ($10,000 unsecured bond set); Robinson Decl. ¶ 3 ($20,000 bond set). What's more, about 16% of the individuals caged because of a

probation detainer are accused only of a technical violation of probation.[21] *See e.g.*, Cordoba Decl. ¶ 2 (jailed on technical violation); Todd Decl. ¶ 3 (same). In mandatory detention cases, Hearing Officers categorically refuse to consider such factors, let alone make a necessity determination.

c. No Government Interest Justifies the Pervasive Use of Detention

The third *Mathews* factor also supports Plaintiffs. The Court must consider Defendants' interests, to include "the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail," as well as "other societal costs." *Mathews*, 424 U.S. at 335, 347.

The societal costs are steep. Detention imposes severe costs on Plaintiffs and others lodged on detainers at the Allegheny County Jail. *See supra* at 9-12. Defendants' illegal detention practices have resulted in some individuals losing their lives while incarcerated at the ACJ. This includes Gerald Thomas, a 26-year-old devoted father, son, and brother, who was jailed pursuant to Judge Mariani's no-lift policy.[22] Additionally, "[t]he parolee is not the only one who has a stake in his conditional liberty. Society has a stake in whatever may be the chance of restoring him to normal and useful life within the law." *Morrissey*, 408 U.S. at 484; *see also Gagnon*, 411 U.S. at 785 (highlighting the public interest in not "interrupting a successful effort at rehabilitation").

Additionally, "when pre-deprivation process could be effective in preventing errors, that process is required." *Montanez*, 773 F.3d at 484. Here, a robust *Gagnon* I proceeding would definitely prevent errors—it would ensure that no individual is detained pending their *Gagnon* II hearing without a clear finding that such detention is necessary (as opposed to the indiscriminate detention that results from Defendants' mandatory detention processes). And requiring Defendants

[21] *Current Population Hold Types*, ALLEGHENY COUNTY JAIL POPULATION MANAGEMENT DASHBOARDS, https://bit.ly/3BCmzTc (last visited Sept. 23, 2022).
[22] *Death Making Institutions: How Police, Probation, and the Judiciary Caused Gerald Thomas to Die in Jail*, ABOLITIONIST LAW CENTER (2022) at 6, https://bit.ly/3dFqcjt.

to provide adequate process before jailing people for months would not be administratively burdensome. Defendants already gather the relevant parties and conduct *Gagnon* I proceedings, albeit in name only. Converting *Gagnon* I proceedings to meaningful hearings with the required procedural protections would be minimally administratively burdensome. Nor would it be fiscally burdensome. To the contrary. Blanket detention wastes scarce public resources incarcerating people who should instead be with their families and loved ones.

Based on the fundamental liberty interest at stake, the risk of erroneous deprivation, and the public good, it is apparent that Plaintiffs have a clear right to basic procedural safeguards and findings before they can be jailed pending their *Gagnon* II hearings. Plaintiffs are likely to prevail on their claims that Defendants may not order detention at the *Gagnon* I proceeding without first giving individuals a meaningful hearing providing an opportunity for release.

2. Defendants' Violate Plaintiffs' Substantive Due Process Rights By Subjecting Them to Prolonged, Punitive Incarceration Pending Their Gagnon *II Proceedings*

Defendants' detainer policies and practices also violate substantive due process. Their only legitimate interest in detention pending a *Gagnon* II hearing is preventing flight or ensuring public safety. Incarceration for alleged violation without considering these interests results in arbitrary detention and does not advance any legitimate interests. Technical violations do not suggest dangerousness or a risk of flight, but those supervised by Judicial Defendants who are jailed for alleged technical violations are automatically ordered to stay in jail at their *Gagnon* I proceedings. And where the alleged violation stems from a separate arrest, judicial officers in those separate proceedings often determine that there is no flight or public safety risk—Defendants' mandatory policies require detention anyway.

It is a fundamental precept of substantive due process that it "bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them."

Foucha v. Louisiana, 504 U.S. 71, 80 (1992) (internal quotation marks and citation omitted). One manifestation is that the government cannot punish individuals with incarceration—the ultimate restriction of bodily liberty—without first determining that they committed an act worthy of punishment. *See id.* ("As *Foucha* was not convicted, he may not be punished."); *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[A] detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). Where there is no express intent to punish, a court must consider whether there is a legitimate governmental purpose to which the incarceration may be rationally connected, and whether it is excessive in relation to the desired objective. *Schall v. Martin*, 467 U.S. 253, 269 (1984). "[I]f a restriction or condition is not reasonably related to a legitimate goal—if it is arbitrary or purposeless—a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." *Bell*, 441 U.S. at 539.

Put simply, the government violates substantive due process by jailing people without a finding that they committed a punishable act (which does not happen at the *Gagnon* I stage), or that they pose a public safety risk in "narrow" non-punitive "circumstances," *see Foucha*, 504 U.S. at 80. For example, in *Salerno*, the Supreme Court upheld a law governing pretrial incarceration on the basis that the government had a legitimate and compelling interest in preventing crime and because the statute was narrowly focused and "carefully limit[ed] the circumstances under which detention could be sought to those involving the most serious of crimes." *Salerno*, 481 U.S. at 747-49. And in *Schall*, the Supreme Court upheld a New York law permitting the pretrial detention of juveniles only because 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." *Schall,* 467 U.S. at 278. Likewise, the Supreme Court sustained a Kansas statute permitting civil detention of people with

mental illnesses who committed sexually violent crimes only because it "limited confinement to a small segment of particularly dangerous individuals," "provided strict procedural safeguards," and "permitted immediate release upon a showing that the individual is no longer dangerous or mentally impaired." *Kansas v. Hendricks*, 521 U.S. 346, 368–69 (1997).

Conversely, the Supreme Court has rejected incarceration schemes that did not require the government to prove, and a neutral arbiter to find, that the individual poses a public safety risk. In *Zadvydas v. Davis*, for instance, the Court rejected an interpretation of federal law that allowed non-citizens to be detained pending deportation even when deportation was no longer reasonably foreseeable, because such detention would be unconstitutionally punitive. *Zadvydas v. Davis*, 533 U.S. 678, 699 (2001). The detention scheme applied "broadly to [individuals] ordered removed for many and various reasons," the only common denominator being their removable status, "which bears no relation to a detainee's dangerousness." *Id.* at 691-92. Making matters worse, "the sole procedural protections available" were administrative proceedings where the detained individual bore "the burden of proving he is not dangerous." *Id.* at 692 ("The serious constitutional problem arising out of a statute that, in these circumstances, permits an indefinite, perhaps permanent, deprivation of human liberty without any such protection is obvious."). Similarly, the Supreme Court struck down a law requiring detention of people found to be permanently incompetent to stand trial absent a particularized dangerousness finding, *Jackson v. Indiana*, 406 U.S. 715, 736–38 (1972), as well as a detention regime that required people found not guilty by reason of insanity to prove that they were not dangerous, *Foucha*, 504 U.S. at 81-82.

The bottom line is this: Defendants may not order an individual's detention at the *Gagnon* I proceeding—which results in, at minimum, several months of incarceration before the *Gagnon* II hearing—absent a finding that the detention is necessary to meet a legitimate government interest

(i.e. prevent flight or ensure public safety). While Defendants make a decision regarding detention at the *Gagnon* I proceeding, they undertake no public safety assessment at all. In a broad swath of cases, they order mandatory detention based on non-specific facts like the identity of the supervising judge or the nature of the charge while refusing to consider the underlying facts.

Plainly, Defendants' practices cannot be likened to the limited detention schemes upheld in *Salerno*, *Hendricks*, and *Schall*, which all required a concrete finding regarding the necessity of detention. In fact, Defendants fall short of the process afforded in *Zadvydas* and *Foucha*, where the Supreme Court said that due process requires more than giving individuals the opportunity to show that release is appropriate. The mere fact that someone is believed to have violated the terms of their probation while supervised by a specific judge or by committing a certain offense "bears no relation to [their] dangerousness," s*ee Zadvydas*, 533 U.S. at 692, but Defendants routinely order detention based solely on this fact. Defendants do not give individuals a meaningful opportunity to be heard—or present evidence—on this factor, let alone require the government to meet the taxing standard demonstrating the necessity of prolonged detention. Indeed, Defendants' detention decisions frequently conflict with a finding made in a separate judicial proceeding that the person can be released on secured, unsecured, or even nominal bail on their new charges. *See* Frazier Decl. ¶ 6; Jones Decl. ¶ 4; Horton Decl. ¶ 2; Robinson Decl. ¶ 3.

It follows, then, that Defendants' systemic practices are not "reasonably related" to their legitimate interests addressing flight risk and ensuring community safety. The implications of prolonged incarceration without the appropriate inquiry and findings means that, in practice, Defendants are punishing individuals for their alleged probation violations for months before their guilt is determined at a *Gagnon* II proceeding. This practice flies in the face of the federal Constitution's substantive due process guarantee. Plaintiffs have a clear, substantive right to be

free of months of incarceration pending their *Gagnon* II hearings without prompt, individualized detention assessments and findings. They are likely to succeed on the merits of their substantive due process claim in Count II.

III. Without Preliminary Injunctive Relief, Plaintiffs Will Be Irreparably Harmed

"In order to demonstrate irreparable harm the plaintiff must demonstrate potential harm which cannot be redressed by a legal or an equitable remedy following a trial." *Instant Air Freight Co. v. C.F. Air Freight, Inc.,* 882 F.2d 797, 801 (3d Cir. 1989). Those subject to Defendants' mandatory detention practices will suffer (or have already suffered) the following irreparable harms that cannot be retroactively cured: (1) incarceration without the safeguards guaranteed by *Gagnon* and *Morrissey*; (2) incarceration without a hearing to determine whether detention pending the *Gagnon* II hearing is necessary to prevent flight risk or ensure public safety; and (3) prolonged and unconstitutionally punitive incarceration.

Due process prohibits prolonged incarceration without adequate procedural and substantive safeguards precisely because the risk of "having [probation] revoked because of erroneous information" is otherwise too great to bear. *See Morrissey*, 408 U.S. at 484. "Any amount of actual jail time is significant[] and has exceptionally severe consequences for the incarcerated individual and for society which bears the direct and indirect costs of incarceration." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1907 (2018) (cleaned up). The threat of a wrongful loss of liberty therefore satisfies the "irreparable harm" requirement for a preliminary injunction. *See United States v. Washington*, 549 F.3d 905, 917 & n.17 (3d Cir. 2008) (recognizing that the "potential for excess prison time" is irreparable harm); *Forchion v. Intensive Supervised Parole*, 240 F. Supp. 2d 302, 310 (D.N.J. 2003) (finding irreparable harm where plaintiff was currently incarcerated because "this is a harm which cannot be redressed following a trial"); *see*

also L.H. v. Schwarzenegger, No. Civ. S-06-2042, 2008 WL 268983, at *8 (E.D. Cal. Jan. 29, 2008) (finding that the denial of counsel to juvenile parolees at *Gagnon* I hearings imposed "a significant threat of irreparable injury" and granting a preliminary injunction). Constitutionally adequate *Gagnon* I proceedings prevent that irreparable harm.

IV. The Balance of Equities and Public Interest Favor Plaintiffs

An injunction halting practices that result in the unconstitutional detention of dozens or more people unquestionably outweighs any harm to Defendants and is in the public interest.

First, "[c]ivil rights plaintiffs with meritorious claims 'appear before the court cloaked in a mantle of public interest.'" *Hensley v. Eckerhart*, 461 U.S. 424, 443 n.2 (1983) (Brennan, J., concurring in part, dissenting in part) ((quotation omitted)). It is axiomatic "the enforcement of an unconstitutional law vindicates no public interest." *K.A. v. Pocono Mt. Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013). And where, as here, Plaintiffs are likely to succeed on the merits, "the public interest leans even more toward granting the injunction." *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 290 F.3d 578, 597 (3d Cir. 2002); *see also Am. Tel. & Tel. Co. v. Winback & Conserve Program, Inc.*, 42 F.3d 1421, 1427 n.8 (3d Cir. 1994) ("[I]f a plaintiff demonstrates both a likelihood of success on the merits and irreparable injury, it almost always will be the case that the public interest will favor the plaintiff.").

The serious harms facing Plaintiffs as a result of perfunctory and unconstitutional *Gagnon* I proceedings far exceed any harm Defendants would suffer if the Court issues an injunction, given the duration of their incarceration and the resulting collateral consequences. *See supra* at 9-12. The general public is also harmed by Defendants' practices. Even brief periods of incarceration result in harms that ripple throughout the community, including disrupted employment and fractured relationships. *See ODonnell v. Harris Cnty.*, 892 F.3d 147, 155 (5th Cir. 2018), *overruled on other grounds*. Empirical research shows that incarceration increases poverty, harms family members,

and causes recidivism. *See supra* at 9-10. Additionally, unnecessarily (and illegally) detaining individuals wastes scarce public resources that could instead be used to address other needs that enhance community safety. *See generally Jones v. City of Clanton*, No. 2:15-CV-34, 2015 WL 5387219, at *3 (M.D. Ala. Sept. 14, 2015). And while Defendants may argue that detention pending *Gagnon* II hearings is necessary to ensure community safety, any such argument is transparently disingenuous: Their illegal practices result in the detention of hundreds of individuals who do not credibly pose a public safety threat, having been accused only of a technical violation of probation or found eligible for release by a different judicial officer. Defendants' mandatory detention practices bar individualized consideration of public safety at the *Gagnon* I proceedings.

V. Plaintiffs Should Not Be Required to Post Security to Obtain Preliminary Relief

Plaintiffs request that they not be required to give security in order to obtain a preliminary injunction. *Cf.* Fed. R. Civ. P. 65(c). The Third Circuit has "indicated that there may be instances in which a strict reading of the rule [requiring imposition of a bond] is not appropriate." *Elliott v. Kiesewetter*, 98 F.3d 47, 59 (3d Cir. 1996). In non-commercial cases like this one, "the court should consider the possible loss to the enjoined party together with the hardship that a bond requirement would impose on the applicant." *Id.* (quoting *Temple University v. White*, 941 F.2d 201, 219 (3d Cir. 1991)). This exception "involves a balance of the equities of the potential hardships that each party would suffer as a result of a preliminary injunction." *Id.* at 60. Where the balance of these equities weighs overwhelmingly in favor of the party seeking the injunction, the district court may waive the bond requirement. *Id.* The court may also waive a bond when plaintiffs seek "to enforce important federal rights or public interests." *Temple University*, 941 F.2d at 220.

This case falls squarely within both exceptions to the bond requirement. A preliminary injunction commanding Defendants to comply with the federal Constitution (by prohibiting

mandatory incarceration and requiring enhanced procedures at *Gagnon* I proceedings) will hardly harm them. Compliance may even provide some relief to Defendants' personnel and financial resources. On the other hand, Plaintiffs are actively experiencing incalculable harm as a result of their illegal incarceration. Plus, they are overwhelmingly indigent, and they bring this case (and seek preliminary injunctive relief) to enforce a fundamental constitutional right. The Court should thus waive the bond requirement. *See Gilliam v. U.S. Dept. of Agric.*, 486 F. Supp. 3d 856, 882 (E.D. Pa. 2020) (declining to require a bond "given [Plaintiffs'] financial position, and the fact that Defendants have failed to allege any true harm they would sustain as a result of the injunction"); *see also Schrader v. Sunday*, 1:21-CV-01559, 2022 WL 1542154, at *11 (M.D. Pa. May 16, 2022) (imposing nominal bond "in consideration of the fact that Schrader seeks a preliminary injunction to protect an important constitutional right").

CONCLUSION

Defendants' policies and practices threaten imminent harm to the pre-*Gagnon* I mandatory detention class, whose *Gagnon* I proceedings are imminent, and have resulted ongoing harm to the post-*Gagnon* I mandatory detention subclass. Without immediate relief from this Court, these people, and more people who are arrested every day, will suffer irreparable harm caused by illegal incarceration pursuant to mandatory detention practices. This Court should grant an injunction requiring County Defendants to immediately adopt constitutionally compliant policies and practices (including halting mandatory detention practices) and requiring Defendant Harper not to jail individuals on probation detainers who have not received the requisite constitutional safeguards. *See* Doc. 2-1, Proposed Order.

Respectfully submitted this 3rd day of October, 2022.

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