UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL BERGAMASCHI; and FREDERICK ROBERSON; on behalf of themselves and all others similarly situated, *Plaintiffs*, v. ANDREW M. CUOMO, Governor of New York State, in his official capacity; and TINA M. STANFORD, Chairperson of the New York State Board of Parole, in her official capacity; *Defendants*.	Case No. 1:20-cv-02817

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Page(s)

Statutes, Rules, and Regulations

PRELIMINARY STATEMENT

This motion asks the Court to immediately end the mandatory detention of people accused of violating conditions of parole and, instead, require that they have an opportunity to be considered for release pending a final hearing on the merits. People accused of parole violations often spend months in jail, often only to be released back to their communities under parole supervision. The typical cost of incarceration on their lives is substantial: months wasted, jobs lost, and families destabilized.

The need to end New York's Board of Parole's indiscriminate pre-hearing incarceration scheme takes on even greater urgency amidst the COVID-19 pandemic, which has claimed the life of a proposed class member, a 53 year-old man arrested not for any new crime, but for breaking a technical parole rule. The virus has also exacerbated the harms of incarceration by straining the already dysfunctional parole adjudication system, suspending and delaying normal processes, and leaving many stranded in City jails with no idea when their cases will progress.

Because the Board does not evaluate anyone for release, it needlessly detains people, primarily people of color, who pose no risk if released pending resolution of their case. New York re-incarcerates more people on parole for mere rule violations, called technical violations, than every other state in the country except one. On any given day in March 2020, an average of 738 people in New York City were detained in jail simply because they were accused of a technical parole violation like a missed curfew or failing to report changing jobs.

The absence of any individualized consideration of the appropriateness of detention pending the adjudication of their alleged parole violations is a violation of due process, following the well-established principles set forth in long-standing Supreme Court precedent. There is no reasonable justification for indiscriminate, mandatory detention. The COVID-19 virus raises the consequences of this constitutional violation to life-threatening proportions, requiring immediate injunctive relief.

STATEMENT OF FACTS

In support of their motion, the named plaintiffs and the putative class (collectively "plaintiffs") submit declarations from the named plaintiffs,[1] an analyst who has examined data obtained about the parole revocation process,[2] and from the director of the Legal Aid Society's Parole Revocation Defense Unit; [3] and supporting exhibits.[4] Because the preliminary injunction procedure is less formal than trial, this Court may consider hearsay evidence in granting plaintiffs' relief. *See Mullins v. City of New York*, 626 F.3d 47, 52 (2d Cir. 2010).

New York's Parole System

Parole gives people an opportunity to regain their freedom and rebuild their lives among family and community rather than serving their full sentences in prison. New York's Board of Parole requires that people on parole follow a set of universal parole conditions, like reporting to their parole officer, and special parole conditions specific to each individual, such as a curfew or

[1] Decl. of Michael Bergamaschi Supp. Pls.' Mot. For Prelim. Inj. ("Bergamaschi Decl.") (April 6, 2020); Decl. of Frederick Roberson Supp. Pls.' Mot. For Prelim. Inj. ("Roberson Decl.") (April 6, 2020).
[2] Decl. of Michelle Shames Supp. Pls.' Mot. for Prelim. Inj. ("Shames Decl.") (April 6, 2020).
[3] Decl. of Lorraine McEvilley Supp. Pls.' Mot. for Prelim. Inj. ("McEvilley Decl.") (April 6, 2020).
[4] *See* Desgranges Decl.

treatment programs. 9 N.Y.C.R.R. § 8003.2. Parole officers monitor people's compliance with parole conditions. Desgranges Decl. ¶ 3, Exhibit A. Parole officers can arrest people for new criminal behavior, "absconding" from supervision, or technical (rule, non-criminal) violations. *See* N.Y. Exec. Law § 259-i(3); *see also* 9 N.Y.C.R.R. § 8004.2(a), (c). When people are arrested, they are "temporarily detained" in a county jail. 9 N.Y.C.R.R. § 8004.2(f). Those whose violations are based on an arrest for a new crime are arraigned through the criminal court process, but even if the criminal court orders release, they remain detained because of the parole warrant. McEvilley Decl. ¶ 6. Then, they begin the parole revocation process.

Statewide, DOCCS supervises around 34,000 people on parole, with about half in New York City. Typically, 1,500 people are in jail in New York City for parole violations, and about 700 for technical parole violations. Shames Decl. ¶¶6, 19. As of April 6, over a thousand people remain in New York City jails for alleged parole violations, of whom 447 are incarcerated solely for technical parole violations. Shames Decl. ¶¶ 7, 11, and 19.

I. THE BOARD OF PAROLE INDISCRIMINATELY JAILS PEOPLE ACCUSED OF PAROLE VIOLATIONS FOR MONTHS UNTIL THEIR HEARING ON THE MERITS.

The Executive Law provides people detained in jail on a parole warrant with a preliminary probable cause hearing and a final revocation hearing. N.Y. Exec. Law § 259-i. At the preliminary hearing, a hearing officer, an employee of DOCCS, determines if there is probable cause to believe that a person has violated a condition of release in an important respect. N.Y. Exec. Law § 259-i(3)(c)(iv); 9 N.Y.C.R.R. § 8000.2(f). Those already convicted of the misdemeanor that causes the parole violation are not entitled to a preliminary hearing because the conviction establishes probable cause. N.Y. Exec. Law § 259-i(3)(c)(iv).

Within New York City, people accused of violating parole are not assigned an attorney until immediately before the preliminary hearing. McEvilley Decl. ¶ 7. Prior to obtaining counsel, many waive the preliminary hearing. McEvilley Decl. ¶ 7. For those who do not waive the preliminary hearing, the hearing is supposed to take place within fifteen days from their arrest. N.Y. Executive Law § 259-i(3)(c)(iv).

The Board of Parole's regulations governing the revocation process require mandatory detention of all people accused of violating parole. Under 9 N.Y.C.R.R. § 8005.7(a)(5), if a preliminary hearing is held and probable cause is found, the hearing officer "shall direct that the alleged violator be held for further action pursuant to section 8004.3." Under section 8004.3, when probable cause is established, the person waives the hearing, or the person is convicted of a misdemeanor crime, a supervising officer may issue "a declaration of delinquency and, where the releasee is in custody, or . . . has absconded, order . . . a final revocation hearing."

Combined, these mandatory detention regulations permit a final revocation hearing *only* if the person is in custody or has absconded. *See* 9 N.Y.C.R.R. § 8005.7(a)(5) and § 8004.3. Under the Board's mandatory detention regulations, every person scheduled for a final revocation hearing must be detained pending their hearing without any evaluation of whether detention is necessary. *See id.* Regardless of the alleged parole violation, the person's likelihood of returning for the final hearing, or whether the person poses no public safety risk, the Board treats everyone awaiting a final revocation hearing the same: locking them up in jail until their final hearing.[5] *See id.*

[5] There are only two ways under the Board's regulations that an individual can be released before the final revocation hearing: first, if an ALJ or three members of the Board decide to end revocation proceedings after the preliminary hearing by canceling the declaration of delinquency and vacating the warrant, and second, if the same people vacate the warrant and agree to cancel the declaration of delinquency contingent on a person successfully completing a treatment program. 9 N.Y.C.R.R. § 8004.3(e).

By law, the final revocation hearing must be scheduled within 90 days from a finding of probable cause at the preliminary hearing or its waiver. N.Y. Exec. Law § 259-i(3)(f)(i). At the final hearing, an administrative law judge (ALJ), a DOCCS employee, determines whether the preponderance of the evidence demonstrates that the person has violated parole, and if so, the appropriate response to the violation. N.Y. Exec. Law § 259-i(3)(e)(x); 9 N.Y.C.R.R. § 8000.2(e). These statutory time limits, however, are often extended. As of April 6, 2020, 17% of people being held on a technical parole violation in New York City jails had been in custody for over 90 days, 24 of whom had been in custody for six months or more. Shames Decl. ¶ 9. Even prior to the delays caused by the COVID-19 pandemic, for those on parole charged with misdemeanors, the average time in jail pending the final hearing has been 100 days (compared with 12 days for pretrial detainees in the criminal system); for those charged with felonies, the average time has been 169 days (compared with 36 days in the criminal system). Mayor's Office of Criminal Justice's 2018 Report, (attached as Exhibit B to the Shames Decl.).

Crisis of the Parole System During the COVID-19 Pandemic

COVID-19 is spreading like wildfire in the New York City jails. The rate of infection at Rikers Island is eight times higher than the infection rate in New York City, which remains the global epicenter of the virus. Shames Decl. ¶ 14. As of April 5, 2020, 273 people incarcerated in City jails have COVID-19 and one person has already died. Shames Decl. ¶ 13 and Desgranges Decl. ¶ 11, Exhibit I. Nearly 2,000 people are housed in quarantine units for people potentially exposed to the virus, amounting to more than 40% of the total jail population. *Id.* In addition, more than 284 Department of Correction and Correctional Health Service staff members have tested positive. Shames Decl. ¶ 13. These numbers grow rapidly every day.

On March 7, 2020, Governor Cuomo issued an executive order declaring a state emergency in response to documented cases of the spread of COVID-19 in New York. Desgranges Decl. ¶ 5, Exhibit C. On March 20, 2020 Governor Cuomo issued an executive order suspending "any specific time limit for" any court process or proceeding prescribed by any law until April 19, 2020. Desgranges Decl. ¶ 6, Exhibit D.

In the wake of these events, the parole revocation system has largely come to a halt. The overwhelming majority of parole hearings have been suspended, with scant information available about when they will be reinstated, leaving people confined in limbo in New York City jails. McEvilley Decl. ¶¶ 16, 18-21. For example, named plaintiff Michael Bergamaschi, arrested on March 11, had a preliminary hearing scheduled for March 24 and postponed to April 1, but it never happened. Bergamaschi Decl. ¶ 8. He only received the notice about the scheduled April 1 hearing in the afternoon of that day, after it had been scheduled to take place but did not, without explanation. Bergamaschi Decl. ¶ 8. The cost of delayed hearings is substantial. In New York City, almost a quarter of people who have a preliminary hearing are released because probable cause cannot be established when a hearing officer examines the allegations. Shames Decl. ¶ 19.

While some hearings previously scheduled are now being placed back on a hearing calendar for telephonic hearings, DOCCS had not yet tested the telephonic hearing system as of April 3. McEvilley Decl. ¶ 15. It is not clear if or when that system will be functional to carry out hearings. McEvilley Decl. ¶¶ 15-17. Moreover, only cases previously calendared for hearings have been slated for new hearings; the class members and their lawyers have been provided no certain information about whether and when the vast majority of hearings will take place. McEvilley Decl. ¶¶ 16, 18-21. The COVID-19 pandemic has also caused delays in sending cases to the Parole

Violations Unit ("PVU") to be prosecuted. McEvilley Decl. ¶ 28. There are often long delays in this process normally, and even more now.[6] McEvilley Decl. ¶ 11.

On March 27, Governor Cuomo announced an intention to release up to 600 people in New York City held on technical parole violations because of COVID-19, but to date only around two hundred people have been released. McEvilley Decl. ¶¶ 30-32. This release process has been completely opaque: defendants have not identified the criteria used and no one has had an opportunity to be heard about their release. McEvilley Decl. ¶ 30. None of the class members held on technical violations have had any opportunity to indicate why release would be appropriate. McEvilley Decl. ¶30; *see also* Roberson Decl. ¶8; Bergamaschi Decl. ¶8. The Legal Aid Society has clients who seemed to fit the criteria but have not been released. McEvilley Decl. ¶30.

II. THE BOARD'S MANDATORY DETENTION REGULATIONS NEEDLESSLY HARM NEW YORKERS.

New York's parole system is oriented towards re-incarceration. Forty-one percent of new admissions to New York State prisons in 2017 were for parole violations. Shames Decl. ¶ 20. New York sends more people back to prison for technical parole violations than every other state except one. Shames Decl. ¶ 16. The Board typically imposes re-incarceration for parole violations, with 62% of technical violations resulting in a return to prison. Shames Decl. ¶ 17.b.

The rates of reincarceration for technical parole violations fall especially hard on Black and Latinx communities. Of those detained for technical violations in New York City's jails as of March 2020, 90% are Black and Latinx. Shames Decl. ¶ 18, Exhibit C. Although most accused of

[6] In some cases, prosecutors in the PVU have worked with lawyers for alleged parole violators to offer "revoke and restore" plea bargains, in an effort to release more people in light of the COVID-19 crisis. McEvilley Decl. ¶ 28. However, these offers have been made available in only a limited number of cases and are not available for the large number of people currently incarcerated in City jails on a parole warrant who have not either waived or not yet had a preliminary hearing, and thus whose information is not yet in the custody or control of the PVU. *Id*.

misdemeanors offenses are not detained pre-trial, because of the Board's mandatory detention regulations, people are jailed for parole violations for misdemeanors for which they would otherwise be released. Of those on parole who were detained as a result of new misdemeanor charges as of February 2020, 97% were Black and Latinx. Shames Decl. ¶ 18, Exhibit C.

The number of people incarcerated on parole violations is increasing, and the increase is largely due to technical violations. For example, the New York City jail population dropped by 23% between 2014 and 2018, with decreases for nearly every subgroup, except for people jailed for technical parole violations. Shames Decl. ¶ 12. Between January 2018 and March 2020, the jail population decreased by 40%, while the number of people held on technical parole violations grew by 9%. Shames Decl. ¶ 12. These trends are sure to resume after the pandemic.

Health, Financial, and Emotional Harms

People who go to jail for alleged parole violations lose the freedom they had only recently earned. Their agency is taken from them: where they can move, what they can read, even what they can eat at any moment. They are monitored as they sleep and use the bathroom. Roberson Decl. ¶ 9. Removed from their families, people face the humiliation, stress, and trauma of being in jail alone. Incarceration also can have severe consequences for a person's health. In the case of Mr. Roberson, for example, it has exacerbated his underlying conditions, causing swelling of the legs, increases in blood sugar, and hypertension. Roberson Decl. ¶¶ 15.

The jailing of people who are waiting for their final hearing, especially for months at a time, has a destructive impact on people on parole and their families. Even a few weeks in jail causes people to lose their jobs, their homes, and even custody of their children. McEvilley Decl. ¶ 10. People living in homeless shelters immediately lose their spot in the shelter. Bergamaschi Decl. ¶ 5. Families that depend on incarcerated breadwinners for child or elder care are put in

precarious financial positions. McEvilley Decl. ¶ 10. And the toll of parents being separated from their children can lead to their children suffering lasting psychological consequences. Desgranges Decl. ¶ 9, Exhibit G. Roberson Decl. ¶ 19 (has not seen his children or grandchildren since he was arrested); Bergamaschi Decl. ¶ 3 (son has been noticeably upset).

COVID-19's Medical Harms

On April 5, 2020, COVID-19 claimed the first life of an incarcerated person on Rikers Island. Desgranges Decl. ¶ 11, Exhibit I. He was one of the putative class members, detained in jail for alleged technical parole violations. *See id.* COVID-19 significantly increases the harms that individuals on parole may suffer in jail while awaiting their final hearing. The very nature of jails confines people in congregate spaces and forces them to interact with others, making it impossible to engage in social distancing as recommended by health officials. *See* Roberson Decl. ¶¶ 10-11; s*ee also* Bergamaschi Decl. ¶ 10-12 and Desgranges Decl. ¶ 10.

According to the New York City Department of Health, those aged 50 and above and those with underlying medical issues face a higher risk of severe illness or death if they contract the COVID-19 virus. Desgranges Decl. ¶ 13, Exhibit K. As of April 3, 2020, 21% of people being held on technical parole violations (92 people) were 50 years of age or older. Shames Decl. ¶ 10. Mr. Roberson is a 58 year-old man with high blood pressure, diabetes, and chronic pancreatitis. Roberson Decl. ¶ 14-15. Dr. Rachel Bedard, a geriatric doctor on Rikers Island, deemed Mr. Roberson part of the "highest risk group" for suffering serious complications from COVID-19, based on his age and underlying conditions. Roberson Decl. ¶ 19. Despite Dr. Bedard's letter, Mr. Roberson remains in jail, where he uses a towel to cover his face and socks to cover phone receivers when calling his family. Roberson Decl. ¶ 10.

With the number of sick people exceeding the space in the Communicable Disease Unit, housing units are "quarantining" to limit the spread between housing units. *See* Desgranges Decl. ¶ 12, Exhibit J. But there's no hiding within housing units. Mr. Bergamaschi is in a quarantine housing unit and has been tested for COVID-19, with no result as of yet, and has heard that several people in his unit have tested positive. Bergamaschi Decl. ¶ 12. Beds are around one foot apart and meals happen with less than an arm's length of space between people. Roberson Decl. ¶ 11. There is simply no place within New York City's jails that is safe.

ARGUMENT

Plaintiffs seek an injunction enjoining defendants' mandatory detention scheme and ordering defendants to immediately provide an opportunity for individualized consideration of release pending the final parole revocation hearing. The standard for a preliminary injunction is well established. Plaintiffs must show a "clear or substantial" likelihood of success on the merits, a "strong showing" of irreparable harm in the absence of preliminary relief, and that such an injunction is in the public interest. *See N.Y. ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) (setting forth standard for mandatory relief) (citations and internal quotation marks omitted). Plaintiffs here are suffering irreparable harm each day they are incarcerated due to the Board's mandatory detention scheme, which violates the due process clauses of the United States and New York Constitutions, and the injunction is decidedly in the public interest.[7]

[7] On April 4, 2020, plaintiffs filed their motion for class certification. *See* ECF Nos. 2-8. When the Court rules on the motion for preliminary injunction, it "may conditionally certify the class or otherwise award a broad preliminary injunction, without a formal class ruling, under its general equity powers." *Strouchler v. Shah*, 891 F. Supp. 2d 504, 517 (S.D.N.Y. 2012) (citation and internal quotations omitted).

I. UNCONSTITUTIONAL INCARCERATION INFLICTS IRREPERABLE HARM ON THE PLAINTIFFS.

"A showing of irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction." *Pearson Educ., Inc. v. Labos*, No. 19 CIV. 487 (CM), 2019 WL 1949820, at *5 (S.D.N.Y. Apr. 23, 2019) (quotation marks and citation omitted). The harm alleged must "be imminent, not remote or speculative" and "incapable of being fully remedied by monetary damages." *Reuters Ltd. V. United Press Int'l, Inc*., 903 F.2d 904, 907 (2d Cir. 1990).

Constitutional violations by definition qualify as irreparable harm. *See, e.g., Bery v. City of New York*, 97 F.3d 689, 693-94 (2d Cir. 1996); *Peralta-Veras v. Ashcroft*, No. CV 02-1840 (IRR), 2002 WL 1267998, at *6 (E.D.N.Y. Mar. 29, 2002) ("[t]he deprivation of . . . liberty is, in and of itself, irreparable harm."). People on parole who go to jail lose not only their recently gained liberty but also their freedom from minute-to-minute surveillance. Roberson Decl. ¶ 9. An abrupt arrest may cause them, and their families, to lose their income sources or homes. McEvilley Decl. ¶ 10. Their children face emotional and psychological damage from being separated from a parent. Desgranges Decl. ¶ 9; s*ee also* Roberson Decl. ¶ 20; Bergamaschi Decl. ¶ 13.

Compounding this irreparable harm is the fact that COVID-19 presents a grave risk to plaintiffs' health and, for the most vulnerable, their lives. It has already cost the life of one class member. On Sunday, April 5, Michael Tyson died from COVID-19 while detained at Rikers for technical parole violations. Desgranges Decl. ¶ 11, Exhibit I. As set forth more fully in the section COVID-19's Medical Harms, each day that class members are in the jail facilities, they are subject to higher risks of contracting COVID-19. Rikers Island physician Dr. Rachel Bedard has written a letter on behalf of Mr. Roberson requesting that courts release him because he is in the "highest risk group" for COVID-19. Roberson Decl. ¶ 19. As a result, plaintiffs have demonstrated irreparable harm.

II. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THEIR DUE PROCESS CHALLENGE TO THE MANDATORY DETENTION OF PEOPLE ACCUSED OF PAROLE VIOLATIONS.

The Board's mandatory detention regulations require that every person scheduled for a final parole revocation hearing must be detained pending that hearing without any evaluation of whether detention is necessary. *See* 9 N.Y.C.R.R. § 8005.7(a)(5) and § 8004.3. These regulations violate the plaintiffs' federal and state due process rights because they are inherently arbitrary and there is no set of circumstances under which they are valid. *Reno v. Flores*, 507 U.S. 292, 300–301 (1993). Given plaintiffs' rights to not be arbitrarily detained, due process requires additional procedural safeguards in the parole revocation process to prevent their erroneous detention.

A. Plaintiffs Have a Due Process Interest Against Mandatory Detention Pending a Hearing on the Merits of their Alleged Parole Violations.

Due process, at its core, protects individual liberty from "arbitrary" government action. *See Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). As the Supreme Court recognized, the conditional liberty interest of people on parole is valuable and protected by due process. *Morrissey v. Brewer*, 408 U.S. 471, 484 (1972). In *Morrissey*, petitioners were detained for allegedly violating the conditions of their parole and, based solely on the reports of their parole officers, the parole board revoked parole without any hearing. *Id. at* 472-74. The Supreme Court rejected this lack of process and required that anyone accused of a parole violation have a preliminary probable cause hearing and a final revocation hearing "to assure that the finding of a parole violation will be based on verified facts and that the exercise of discretion will be informed by an accurate knowledge of the parolee's behavior." *Id.* at 484. Since *Morrissey*, the Supreme Court has addressed other procedural issues during the revocation process, *see, e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (establishing when indigent parolees have the right to appointed counsel in the revocation

process), but it has not addressed a state's scheme requiring the mandatory detention of every person on parole until a hearing on the merits of their alleged violations.

In *United States v. Salerno*, the Supreme Court addressed whether the federal Bail Reform Act was unconstitutional for denying bail to people after a hearing and judicial determination that doing so would endanger the public. 481 U.S. 739 (1987). The Court upheld the Act because it was not some "scattershot attempt to incapacitate those who are merely suspected of these serious crimes." *Id.* at 749-50. Instead, the Supreme Court explained, the Act required that the government "demonstrate probable cause to believe that the charged crime has been committed by the arrestee, *but that is not enough*. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person." *Id.* at 750 (emphasis added). In so ruling, the Supreme Court affirmed the constitutional principle that probable cause is "a prerequisite to extended restraint of liberty following arrest," *see Gerstein v. Pugh*, 420 U.S. 103, 114 (1975), but it is not enough to justify detention until a hearing on the merits without more process.

Although the parole revocation process is not a criminal proceeding, and thus "the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations," people on parole are still entitled to protection from arbitrary detention. *See Morrissey,* 408 U.S. at 480, 482. In a similar civil detention scheme where the government sought to detain people with mental illnesses, for example, the Supreme Court upheld the detention only after an individualized evaluation of the illness and the person's risk to public safety. *See, e.g.*, *Addington v. Texas*, 441 U.S. 418 (1979) (permitting the civil detention of mentally unstable individuals only after individualized findings on instability and a danger to the public). As the Supreme Court explained in *O'Connor v. Donaldson*, "[a] finding of 'mental illness' alone cannot justify a State's locking a

person up against his will . . . there is [] no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom." 422 U.S. 563, 575 (1975). In the criminal context, the Supreme Court has upheld detention until a hearing on the merits only after an individualized evaluation of the accuracy of the allegations and of the individual's risk of flight or risk to public safety.[8] *See, e.g., Schall v. Martin,* 467 U.S. 253, 275-77 (1984) (upholding the pretrial detention of juveniles only with individualized findings of probable cause and dangerousness); *cf. Bell v. Wolfish*, 441 U.S. 520, 534 (1979) (stating that the justice system has properly functioned on the notion that pretrial detention is justified when there is probable cause to believe someone committed a crime and that the person poses a risk of flight.).

The Seventh Circuit is the only circuit court to have addressed a state's mandatory detention law under which "[a]ll parolees, regardless of the seriousness of the prior conviction or the alleged parole violation, are detained" prior to a hearing on the merits. *Faheem-El v. Klincar*, 841 F.2d 712, 725 (7th Cir. 1988) (en banc). In *Faheem-El*, the Seventh Circuit en banc court first observed that *Morrissey* "presumed a system in which [a] probable cause determination would not *necessarily* result in incarceration pending the final revocation hearing."[9] *Id.* at 724, n. 16 (emphasis added). The court next recognized that "[d]ue process requires some minimum

[8] In the last century, the Supreme Court has upheld mandatory detention schemes in only two narrow circumstances: the first involves the mandatory detention of non-citizens during war, and the second involves the mandatory detention of a narrow group of non-citizens during deportation proceedings. *See Ludecke v. Watkins,* 335 U.S. 160 (1948) (upholding the unreviewable executive power under the Alien Enemy Act to detain enemy aliens in time of war); *Demore v. Kim*, 538 U.S. 510, 513 (2003) (upholding the mandatory detention of immigrants who concede they are deportable based on certain criminal convictions for the brief period necessary for removal proceedings).

[9] The en banc court said this in reference to language in *Morrissey* that stated that probable cause is "sufficient to warrant" continued detention or "to hold" someone in detention. *Id.* at 725. But this is no different than *Gerstein* stating that probable cause is a "prerequisite to extended restraint of liberty." *Gerstein*, 420 U.S. 114. Requiring probable cause in advance of continued detention is decidedly different than mandating detention.

procedural protection against the deprivation of an individual's liberty interest before an actual determination of wrongdoing is made." *Id.* at 723. It further recognized that the state and parolees "have a similar interest in avoiding inappropriate detention of parolees pending their final revocation hearing." *Id.* at 725. And it noted that the lack of any individualized evaluation of the appropriateness of detention pending the final revocation hearing "'smacks of arbitrariness.'" *Id.* at 726 (quoting the district court's finding). Ultimately, the Seventh Circuit was unable to make a determination about what additional process was due because there was no evidence in the record about the burden the parole board would face if required to hold "release suitability hearings." *Id.* The court remanded the case, *see id.* at 727, but the parties settled and entered into a consent decree requiring that people accused of parole violations receive an individualized evaluation of their suitability for release pending their final revocation hearing,[10] the very process plaintiffs seek here.

Faheem-El was right to rely on *Morrissey* and *Mathews v. Eldridge* for its reasoning. *See id.* at 723-27. In the parole context, *Morrissey* establishes that people on parole have a "liberty interest" within the meaning of due process because "its termination inflicts a grievous loss." *Morrissey*, 408 U.S. at 482 (internal citation omitted). But *Morrissey* does not address a system where people are mandatorily jailed until a hearing on the merits because there was no hearing on the merits to begin with. Since *Morrissey*, the Supreme Court affirmed that "some form of hearing is required before an individual is finally deprived of" interests within the meaning of due process. *Mathews v. Eldridge* 424 U.S. 319, 333 (1976). When interests within the meaning of due process are at stake, the principle that people have the "right to be heard before being condemned to suffer grievous loss of any kind . . . is a principle basic to our society." *Id.* (citation and internal quotation marks omitted). As discussed below, *Mathews* provides the framework to determine what, if any,

[10] *Faheem-El* Consent Decree at ¶¶ 2-3, 5, attached as Ex. 15 to the Desgranges Decl.

additional process is due before the infliction of grievous loss. But *Morrissey* and *Mathews* together reinforce the principle that at least some process is due to people on parole, and mandatory detention by definition forecloses any process.

In reviewing the due process rights of similar groups in analogous contexts, other courts have recognized that, in addition to probable cause findings, detention before a hearing on the merits must be accompanied by an individualized evaluation of the appropriateness of detention. For example, courts have required individualized evaluations of the appropriateness of detention for juveniles, who have a reduced liberty interest. *See Schall*, 467 U.S. at 265, 277 (finding procedural safeguards sufficient for pretrial detention of juveniles because they required an individualized evaluation of the "serious risk" of juveniles, whose liberty interest in qualified because they "are always in some form of custody"). Courts have required individualized evaluations of the appropriateness of detention when the government has characterized a population as inherently risky. *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 784 (9th Cir. 2014) (finding an Arizona law mandating the detention of undocumented pretrial detainees as unmanageable flight risks unconstitutional because it does not afford them "an individualized hearing to determine whether a particular arrestee poses an unmanageable flight risk."). And courts have required individualized evaluations of the appropriateness of detention when the government has sought the detention of certain individuals in light of their prior convictions. *Mental Hygiene Legal Serv. v. Spitzer*, No. 07 CIV. 2935(GEL), 2007 WL 4115936, at *15 (S.D.N.Y. Nov. 16, 2007) (enjoining a New York state law requiring the mandatory civil commitment of people with sex offense convictions).

Mental Hygiene Legal Serv. v. Spitzer is instructive because, like here, the case involved a challenge to a New York law mandating detention until a hearing on the merits. *Id.* In *Mental*

Hygiene Legal Serv., then-District Judge Lynch addressed a challenge to a state law mandating detention for certain people with sex offense convictions from the time their criminal sentence was completed until a final civil commitment merits hearing. *Id.* Among the provisions plaintiffs challenged was a provision that mandated a person's involuntary civil detention pending a commitment trial without an individualized finding of dangerousness. *Id.*

Calling the statutory provision "perverse," Judge Lynch granted plaintiffs' request for a preliminary injunction and held that "New York may not automatically detain any individual who may be subject to the statute for a significant period of time without proving that there is at least probable cause to believe that he is dangerous." *Id.* at *14-15. The state argued plaintiffs could not demonstrate a likelihood of success on a facial challenge because plaintiffs could not establish that "there is no set of circumstances under which the statute would be valid." *Id.* at *15, n. 19 (quoting *Salerno*, 481 U.S. at 745). Judge Lynch explained that "[t]he question is not whether *detention pending trial* will ever be valid—plaintiffs concede it sometimes will be—but whether *mandatory* detention pending trial, without the showing of dangerousness necessary to justify such detention, is on its face invalid." *Id.* (emphasis in original). Judge Lynch held that the challenged provision "can never be constitutional, because individuals subject to these provisions, and faced with a substantial period of detention, are entitled to an individualized determination that they are in fact dangerous."[11] *Id.* On appeal, the Second Circuit agreed that plaintiffs demonstrated a likelihood of prevailing on their constitutional challenge of this provision. *Mental Hygiene Legal Servs. v. Paterson*, No. 07-5548-CV, 2009 WL 579445 (2d Cir. Mar. 4, 2009) (summary affirmance).

[11] Judge Lynch further held that finding someone merely dangerous is not enough; courts must find "that a person is sufficiently dangerous that less intrusive conditions than detention cannot guarantee the safety of the community pending trial." *Id.*

By not even evaluating whether a person on parole can be released pending their final hearing, defendants' mandatory detention scheme is arbitrary because it is devoid of any reasonable relationship to a legitimate government purpose. *Jackson v. Indiana,* 406 U.S. 715, 738 (1972) (holding that due process prohibits the detention of an incompetent pretrial detainee without an individualized process because "[a]t the least, due process requires that the nature [] of commitment bear some reasonable relation to the purpose for which the individual is committed."). Because the Board's regulatory scheme does not provide any evaluation of the appropriateness of an individual's detention, there is no set of circumstances in which the Board's mandatory detention regulations do not violate due process. There is no justification for subjecting over a thousand people accused of parole violations to mandatory detention for months at a time, which courts have consistently found to be arbitrary in violation of due process.[12]

B. Given the Due Process Interest Against Mandatory Detention, Plaintiffs Cannot Be Jailed Until Their Final Revocation Hearings Without Additional Process.

Given that there is no reasonable justification for the mandatory detention of all people alleged to have violated parole, the remaining question before the Court is what additional process is due. Answering this question starts with the Supreme Court's recognition that "[t]he fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews*, 424 U.S. at 333 (internal quotations omitted). Consistent with this, well-established law supports the conclusion that people accused of violating parole are

[12] This is not a bail case. Plaintiffs do not seek the right to have judges set bail in their parole revocation cases because there is no statutory right to bail in such cases. *Argro v. United States*, 505 F.2d 1374, 1377 (2d Cir. 1974) (stating that there is "no constitutional right to bail" in parole revocation cases); *People ex rel. Calloway v. Skinner*, 33 N.Y.2d 23, 33 (1973) (rejecting plaintiffs argument that "a due process right to bail exists for a parolee detained in advance of a revocation hearing" because the State Constitution does not decree a right to bail . . . The right to bail is purely statutory").

entitled to the following additional process: (1) an immediate evaluation for those currently in jail, and a prompt hearing for future arrestees, where the people detained in jail on a parole warrant have an opportunity to be heard on their suitability for release and to rebut the Board's justifications for detention; (2) notice of when the Board will conduct this hearing and the reasons supporting the Board's request for detention; (3) a neutral decision-maker, such as someone from the Board not involved in the decision to arrest and detain the parolee; and (4) if detention is required, an explanation as to why and the evidence relied on, either on the record or in writing. *See, e.g., Morrissey*, 408 U.S. at 486-87, 489 (requiring similar protections at the preliminary and final hearings to ensure that the parole violation will be based on verified facts and an informed use of discretion); *Wolff v. McDonnell*, 418 U.S. 539, 565 (1974) (requiring written decision-making for prisoners because it "helps to assure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly.") These four procedures are necessary to protect "against erroneous and unnecessary deprivations of liberty." *Schall*, 467 U.S. at 274; *see also Carey v. Piphus,* 435 U.S. 247, 259 (1978) ("Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property"). As discussed below, the balancing of the private interests, risk of erroneous deprivation, and government interests, *see Mathews*, 424 U.S. at 335, favors these procedural safeguards.

First, the private interests here involve the conditional liberty interests of people on parole and the public's interest in their rehabilitation. As the Supreme Court found, "the liberty of a parolee, 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," making it valuable and "within the

protection of the Fourteenth Amendment." *Morrissey*, 408 U.S. at 482 (internal citation omitted). In addition, the public has an interest in their rehabilitation and "treating the parolee with basic fairness . . . in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Id.* at 484 (citation omitted).

Second, without these four procedural safeguards, there is a high risk of erroneous deprivation of both the conditional liberty interest of individuals on parole and society's interest in their rehabilitation. Just as no one has an interest in the erroneous revocation of parole based on false information, *see Morrissey*, 408 U.S. at 485-89, no one has an interest in the "inappropriate detention" of individuals on parole pending their final hearing. *Faheem-El*, 841 F.2d at 725.

Defendants afford *no* procedural protections to prevent inappropriate detentions because every person is detained on a parole warrant until their final hearing without regard to the seriousness of their alleged parole violations, likelihood of returning for the final hearing, or whether the person poses a public safety risk. The *Morrissey* preliminary probable cause hearing is an insufficient safeguard. As the Seventh Circuit explained, there is a "substantial difference between the determination that there is probable cause to believe a condition of parole has been violated (the issue at the preliminary revocation hearing) and a determination that an individual should be detained pending his or her final revocation hearing." *Id.* As a result, people are jailed even when they are suitable for release pending the final hearing because, for example, they do not pose an "unmanageable flight risk," *see Lopez-Valenzuela*, 770 F.3d at 784, or they are not so dangerous that "less intrusive conditions than detention cannot guarantee the safety of the community pending trial." *Mental Hygiene Legal Serv.,* 2007 WL 4115936 at *12. These needless errors in detention are exactly what the due process requirements of notice, an opportunity to be heard in a meaningful time and manner, and reasoned decision-making are intended to prevent.

In addition, these procedural safeguards would prevent the significant risk of erroneous detention, often for months on end, while people await their final revocation hearings. The Board detains large numbers of people who are ultimately released after their final hearing, resulting in a needless destruction of people's newly rebuilt lives. After languishing in jail for an average of 57 days even prior to COVID-19, 38% of people accused of technical violations are released at their final hearing because they were found not guilty or because the Board determined that a return to prison was not the appropriate response. For those detained based on new arrests, 40% were later released from jail because they were found not to have committed a parole violation. Shames Decl. ¶ 17.c; *see also Faheem-El*, 841 F.2d at 726 (While these data are "by no means dispositive of due process . . . they reinforce the importance of an inquiry into the 'probable value, if any, of additional or substitute procedural safeguards.'") (citing *Schall*, 467 U.S. at 272-73).

This risk of erroneous detention for months on end is exacerbated by the COVID-19 crisis as final revocation hearings have been largely suspended and delayed. Class members and their lawyers have been provided no information about whether and when the vast majority of hearings – preliminary and final – will take place. McEvilley Decl. ¶ 18-21. People who would have been released at their final hearing after 57 days in custody, are now detained even longer in conditions that can be deadly for their health.

Third, as discussed above, the government has no interest in the unnecessary and inappropriate detention of people accused of parole violations. As for the impact of additional process on the government, affording parolees a meaningful opportunity to be heard on their suitability for release pending their final hearing may result in some additional burden. But constitutional imperatives "must have priority over the comfortable convenience of the status quo." *Williams v. Illinois*, 399 U.S. 235, 244-45 (1970). Given the important constitutional concerns

presented in this case, concerns over the government's administrative convenience should be subordinated in favor of preventing inappropriate detention.[13] Nonetheless, the increased burden on the government here should be minimal because a release-suitability hearing could be folded into the preliminary hearing to take place immediately after the probable cause determination.

More than most, plaintiffs recognize that the parole system is under significant stress as a result of the COVID-19 pandemic and its spread in jail facilities. But even in difficult times, it is "fundamental that the right to notice and an opportunity to be heard must be granted at a meaningful time and in a meaningful manner. These essential constitutional promises may not be eroded." *See Hamdi v. Rumsfeld*, 542 U.S. 507, 533 (2004) (holding that even in times of war "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."). While these essential elements of due process are always required, due process is flexible. *See Connecticut v. Doehr*, 501 U.S. 1, 10 (1991) ("due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." (quoting *Mathews*, 424 U.S. at 334)). Given the current limitations on in-person and even video hearings, the Board immediately can provide *some* process during this acute emergency via a telephone hearing system.

Governor Cuomo has the authority to end the mandatory detention of people accused of parole violations and direct the Board conduct hearings to consider people's suitability for release from jail pending their final hearings. *See* N.Y. Exec. Law §§ 29, 29-a (giving the governor authority during an disaster emergency to direct state agencies to provide assistance, and to

[13] Indeed, the federal government and numerous other states evaluate people accused of parole violations for release pending their final revocation hearings. *See, e.g.*, FED. R. CRIM. P. 32.1(a)(6); N.J. STAT. ANN. § 30:4-123.62(g) (West 2019); 37 PA. ADMIN. CODE § 71.3(10) (West 2020); CAL. PENAL CODE § 3000.08 (West 2017).

suspend laws, like the Board's mandatory detention regulations). Governor Cuomo has already used this emergency authority to direct DOCCS to review and release some individuals held on alleged technical violations. McEvilley Decl. ¶¶ 30-32. But this review does not provide constitutionally adequate process. McEvilley Decl. ¶ 30. Defendants have not identified to class members or their counsel who has been reviewed for release, and has not provided an opportunity to be heard on why release is appropriate or notified the people who have been denied release to tell them so or explain why. This completely opaque one-sided review process does not come close to affording people the basic requirements of due process. As the Supreme Court explained, "when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations . . . can be prevented. . . fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights." *Fuentes v. Shevin*, 407 U.S. 67, 81 (1972) (citation and internal quotation marks omitted).

III. PLAINTIFFS SATISFY THE REMAINING ELEMENTS FOR A PRELIMINARY INJUNCTION.

The balance of equities and public interest are also decidedly in plaintiffs' favor. Any interest that the defendants have is outweighed by the ongoing irreparable harm plaintiffs are suffering as a result of defendants' constitutional violations. *See Am. Beverage Ass'n v. City & Cty. of San Francisco*, 916 F.3d 749, 758 (9th Cir. 2019) ("'[I]t is always in the public interest to prevent the violation of a party's constitutional rights.'") (quoting *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012)); *Rodriguez v. Robbins*, 715 F.3d at 1127 (concluding that the government "cannot suffer harm from an injunction that merely ends an unlawful practice or reads a statute to avoid constitutional concerns."). The plaintiffs seek only fair opportunities for release, not actual release, which negates any claim of meaningful harm to the state.

Moreover, as there is no justification for jailing people accused of parole violations who are suitable for release pending their final hearing, defendants' mandatory detention scheme does not serve the public interest. *Cf. Ligon v. City of New York*, 925 F. Supp. 2d. 478, 541 (S.D.N.Y. 2013) (granting injunction to protect constitutional rights and finding the "lack of rational justification" for unconstitutional stops makes them "presumably of less value to public safety").

In fact, the public interest is served in releasing people held on parole warrants who are suitable for release from City jails. As a result of COVID-19, the chief medical officer at Rikers along with other doctors have called for the release of hundreds of people to save lives and enable more adequate care for those left behind. *See* Desgranges Decl. ¶ 10, Exhibit H. The Board of Correction, New York City's independent monitor of the city's jails, has called for the release of people held in the city's jails on parole warrants. Desgranges Decl. ¶ 7, Exhibit E. After the death of Mr. Tyson in Rikers on April 5, 2020, even the New York City Department of Corrections has taken the unprecedented step of calling for release, stating that "[I]t is a simple clinical fact: public health is better served with fewer people held in our jails." Desgranges Decl. ¶ 14, Exhibit L.

IV. REMEDY.

Because plaintiffs meet the criteria for a preliminary injunction, plaintiffs request an order enjoining the defendants from continuing their mandatory detention of people accused of parole violations pending their final revocation hearing and respectfully request that this Court order the defendants to provide plaintiffs with the following process: (1) an immediate evaluation for those currently in jail, and a prompt hearing for future arrestees, where the people detained on a parole warrant have an opportunity to be heard on their suitability for release and to rebut the Board's justifications for detention; (2) notice of when the Board will conduct this hearing and the reasons supporting the Board's request for detention; (3) a neutral decision-maker, which can be someone from the Board who is not involved in the decision to arrest and detain the parolee; and (4) if

detention is required, an explanation as to why and the evidence relied on, either on the record or in writing. As noted, in recognition of the acute COVID-19 emergency, plaintiffs are amenable to review starting via telephone at first, then via video conferencing hearings when that capability exists, and finally via in-person hearings when public health officials determine that social distancing in New York City's jails is no longer necessary.

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully request that the Court grant their motion for a preliminary injunction on behalf of the named plaintiff and the putative class, enjoin defendants' mandatory detention scheme, and require defendants to provide a prompt hearing on whether individuals may be suitable for release as set forth above.

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Respectfully submitted,

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