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EBONI EL, ANDREW HASKELL, SUNG JOO LEE, AKEEM WILLS, CHARLES GAMBER, DAVID KRAH on behalf of themselves and all persons similarly situated, *Petitioners*, v. 38TH JUDICIAL DISTRICT, Hon. THOMAS M. DEL RICCI, President Judge (in his official capacity), MICHAEL GORDON, Chief Adult Probation and Parole Officer (in his official capacity), MICHAEL R. KEHS, Court Administrator (in his official capacity), and LORI SCHREIBER, Clerk of Courts (in her official capacity), *Respondents*.	COMMONWEALTH COURT OF PENNSYLVANIA ORIGINAL JURISDICTION No. 376-MD-2021

NOTICE TO PLEAD

To: 38TH JUDICIAL DISTRICT, Hon. THOMAS M. DEL RICCI, MICHAEL GORDON, MICHAEL R. KEHS, and LORI SCHREIBER:

You are hereby notified to file a written response to the enclosed Application For Special Relief In The Form Of A Preliminary Injunction within fourteen (14) days, or within the time set by order of the court, of service hereof or a Judgment may be entered against you.

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PETITIONERS' APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION UNDER PA. R.A.P. 1532

Petitioners Eboni El, Andrew Haskell, Sung Joo Lee, Akeem Wills, Charles Gamber, and David Krah, individually and as representatives of a class of current and future people on probation or parole in Montgomery County, hereby move for special relief in the form of a preliminary injunction pursuant to Rule 1532 of the Pennsylvania Rules of Appellate Procedure. Petitioners ask the Court to enjoin Respondents' continued incarceration of those on probation or parole without providing (1) an initial hearing (a "*Gagnon* I hearing") to assess probable cause within 72 hours; and (2) a corollary assessment of whether they need to be detained pending final proceedings (a "preliminary detention assessment"), with corresponding procedural protections and on the same timeline. In support of their application, Petitioners incorporate the Verified Petition for Review filed in this action on October 26, 2021, as well as their brief and declarations in support of this Application. Petitioners further state the following:

BACKGROUND

1. As set forth more fully in the Verified Petition for Review filed on October 26, 2021, as well as the brief filed in support of this Application, Respondents—the 38th Judicial District and certain of its employees, sued in their official capacities—have systematically denied thousands of people in Montgomery County their due process rights by automatically and indiscriminately imprisoning them for months, with no opportunity to be heard, pending a hearing to determine whether their supervision should be revoked.

2. Respondents do not promptly determine whether there is probable cause to believe that people detained for alleged supervision violations in fact violated the terms of their supervision. Nor do they ever assess whether detention pending the final revocation proceeding (a "*Gagnon* II" hearing) is appropriate.

3. This automatic detention without a prompt *Gagnon* I hearing or a preliminary detention assessment violates the due process guarantees of Article 1, Sections 1, 9, and 11 of the Pennsylvania Constitution, and of the Fourteenth Amendment to the United States Constitution.

4. Between January 1, 2019, and May 18, 2021, Respondents incarcerated at least 89 percent of people in Montgomery County who were awaiting a final revocation hearing. Declaration of Nori Reid Mehta, dated December 9, 2021 ("Mehta Decl.") at ¶ 7. Approximately 92 percent of people received no *Gagnon* I hearing. *Id.* at ¶ 37.

5. Almost all people accused of supervision violations have no opportunity to be heard until their *Gagnon* II hearing, after months of sitting in jail. On average, Respondents provide individuals with their first hearing some 70 days after detention. *Id.* at ¶ 7. Before that hearing, no impartial arbiter ever determines whether there is probable cause to believe there was a supervision violation or whether the individual poses a risk of flight or threat to public safety.

6. Months of unnecessary incarceration causes Petitioners and putative class members continued and irreparable harm, as they face the daily trauma of jail and separation from their homes, families, and careers. Their incarceration imposes immense stress on their families and communities. Incarcerated individuals' children lose their parents and families are left scrambling to pay their bills. Needless incarceration also inhibits successful rehabilitation, further harming detained people and their communities. Declaration of David Muhammad, dated December 13, 2021 ("Muhammad Decl.") at ¶ 23.

INJUNCTIVE RELIEF

7. Petitioners seek a preliminary injunction enjoining Respondents' (1) failure to provide a prompt *Gagnon* I hearing and (2) indiscriminate incarceration pending a *Gagnon* II hearing without (A) a prompt opportunity for detained people to be heard on their suitability for release and to rebut any justifications for detention; (B) notice of that opportunity and the reasons

supporting the request for detention; (C) a neutral decision-maker; and (D) if detention is required, an explanation as to why and the evidence relied on, either on the record or in writing.

8. A preliminary injunction is warranted if: (1) the petitioner is likely to prevail on the merits; (2) relief is necessary to prevent immediate and irreparable harm; (3) greater injury will occur from refusing to grant the injunction than from granting it; (4) the injunction will not adversely affect the public interest; (5) the injunction will restore the status quo as it existed before the alleged wrongful conduct; and (6) the injunction is reasonably suited to abate the offending activity. *See SEIU Healthcare Pennsylvania v. Commw*., 104 A.3d 495, 502 (Pa. 2014). If a preliminary injunction would "compel[] the defendant to perform an act, rather than merely refrain[] from acting," a plaintiff must show "a clear right to relief," but need not "establish his or her claim absolutely." *Sovereign Bank v. Harper*, 674 A.2d 1085, 1092 (Pa.Super. 1996). Regardless of the standard applied, Petitioners have met each condition here.

9. Petitioners' request for a preliminary injunction prohibiting detention without a *Gagnon* I hearing within 72 hours (absent extraordinary circumstances or a request for an extension by the detained individual) meets the preliminary injunction requirements.

10. ***First,*** Petitioners are likely to succeed on the merits of their claim that Respondents' failure to hold *Gagnon* I hearings violates their procedural due process rights. Petitioners have a clear right to relief on that claim. The Supreme Court held that the government must hold an initial hearing "as promptly as convenient after arrest" for supervision violations. *Morrissey* v. *Brewer*, 408 U.S. 471, 485 (1972); *see also Gagnon v. Scarpelli,* 411 U.S. 778, 786 (1973). Respondents nonetheless systematically incarcerate people accused of supervision violations without *Gagnon* I hearings. Those detained for alleged supervision violations must wait for months for a *Gagnon* II hearing, which does not satisfy Respondents' constitutional obligations. *See* Pet'rs' Br. I.A.

11. ***Second,*** Respondents' prolonged incarceration of Petitioners and putative class members inflicts two immediate and irreparable harms. First, the failure to conduct *Gagnon* I hearings risks lengthy incarceration where there is no probable cause to believe the individuals violated the terms of their supervision. Second, it violates their legal right to that hearing, which is a *per se* harm. *See Reading Anthracite Co. v. Rich*, 577 A.2d 881, 885 (Pa. 1990). These injuries are ongoing and cannot be remedied after the fact. *See* Pet'rs' Br. I.B.

12. ***Third***, this irreparable harm far outweighs any harm that granting the injunction might cause. Petitioners seek the constitutional due process to which they are entitled. Respondents' only harm is the cost of compliance with the law, which is necessarily outweighed by the harm inherent in constitutional violations. *See Pa. Pub. Util. Comm'n v. Israel*, 52 A.2d 317, 321 (Pa. 1947). *See* Pet'rs' Br. I.C.

13. ***Fourth,*** an injunction will not adversely affect the public interest. Petitioners' preliminary injunction is narrowly tailored to protect "[s]ociety['s] interest in not having parole revoked because of erroneous information." *Morrissey*, 408 U.S. at 484. *See* Pet'rs' Br. I.D.

14. ***Fifth,*** Petitioners' requested injunction would restore the "*status quo* as it existed between the parties before the event that gave rise to the lawsuit." *SEIU Healthcare Pa.*, 104 A.3d at 506. The status quo prior to Respondents' unconstitutional conduct was when they provided prompt *Gagnon* I hearings to people accused of supervision violations. Petitioners' preliminary injunction seeks to restore that state of affairs. *See* Pet'rs' Br. I.E.

15. ***Sixth,*** Petitioners' requested injunctive relief is reasonably suited to abate Respondents' unconstitutional conduct. It requires only compliance with clearly established law: holding prompt *Gagnon* I hearings. As the experience of other jurisdictions has shown, 72 hours

is a reasonable deadline to hold an initial hearing and avoid prolonged deprivations of core, physical liberty. *See* Pet'rs' Br. I.F.

16. Petitioners also ask the Court to enjoin Respondents from incarcerating those accused of supervision violations pending a *Gagnon* II hearing without a preliminary detention assessment that provides (1) a prompt opportunity for detained individuals to be heard on their suitability for release and to rebut any justifications for detention; (2) notice of that opportunity and the reasons supporting the request for detention; (3) a neutral decision-maker; and (4) if detention is required, an explanation as to why and the evidence relied on, either on the record or in writing. This request also meets the preliminary injunction conditions.

17. ***First*,** Petitioners are likely to succeed on the merits and have a clear right to this relief because the indiscriminate detention of Petitioners pending a *Gagnon* II hearing (1) violates procedural due process, (2) violates substantive due process, and (3) is premised upon an unconstitutional irrebuttable presumption. *See* Pet'rs' Br. II.

18. Respondents' policy of indiscriminate incarceration violates procedural due process. All three factors under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)—(1) Petitioners' private interest; (2) the risk of erroneous deprivation without the requested safeguards; and (3) the public interest—weigh heavily in Petitioners' favor. Detention strips fundamental liberty from those suspected of supervision violations. The risk of erroneous deprivation is severe. Respondents indiscriminately incarcerate virtually everyone, including people who presumptively are not dangerous or risks of flight, either because they are accused of only technical violations or because other judges have released them on the separate criminal charge that forms the basis for the alleged supervision violation. A hearing would prevent such errors. Mandatory detention is also contrary to the public's interest in safety, rehabilitation, and preserving public resources.

Notice and an opportunity to be heard will help identify the individuals who should be released. Those who pose genuine threats will remain in detention pending a final revocation hearing. Each *Mathews* factor supports an injunction prohibiting further imprisonment without prompt detention assessments. *See* Pet'rs' Br. II.A.1.

19. Respondents' policy of indiscriminate incarceration also violates substantive due process. Incarceration with neither a determination that the detained person committed the punishable act nor of risk to the public violates federal substantive due process. *See, e.g.*, *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001). The Pennsylvania Constitution provides even greater protection than its federal counterpart. *Shoul v. Commw., Dep't of Transp.*, 173 A.3d 669, 676–77 (Pa. 2017). Respondents' practice of indiscriminately incarcerating nearly everyone accused of supervision violations for months without an initial detention assessment is irrationally excessive in relation to the goals of preventing flight or harm to the community. That practice violates Petitioners' substantive due process rights. *See* Pet'rs' Br. II.A.2.

20. Respondents' policy of indiscriminate incarceration also rests on an unconstitutional irrebuttable presumption that every person suspected of a supervision violation is a flight or safety risk. *See, e.g.*, *In re J.B.*, 107 A.3d 1, 14–15 (Pa. 2014). This presumption is not universally true, most obviously because many detained people are accused of technical violations or have been released in the separate criminal proceedings that underlie the alleged supervision violation. Individualized detention assessments are a "reasonable alternative means of ascertaining" whether incarceration is necessary. *Id.*; *see* Pet'rs' Br. II.A.3.

21. Petitioners are likely to prevail on each of these claims and have a clear right to a preliminary detention assessment pending their *Gagnon* II hearings.

22. ***Finally*,** Petitioners' proposed injunction satisfies the remaining preliminary injunction prongs. The injunction is necessary to prevent the immediate and irreparable harm of unnecessary incarceration for months awaiting a *Gagnon* II hearing. Greater injury would result from refusing an injunction than from granting it, as Petitioners ask only that Respondents consider the appropriateness of detention pending a final revocation hearing. The preliminary injunction will also benefit the public because incarceration imposes a financial burden on society, deprives communities of productive members, and stunts rehabilitation. The preliminary injunction will thus allow a return to the peaceable and lawful non-contested status quo that is constitutionally guaranteed. Last, the requested relief is reasonably suited to end Respondents' unconstitutional conduct. Petitioners seek to protect their clear right to be free of incarceration without due process of law and to enforce Respondents' corresponding duty. *See* Pet'rs' Br. II.B.

23. **WHEREFORE,** for the foregoing reasons and those in the Petition for Review, Petitioners respectfully request that this Court grant their Application for Special Relief in the Form of a Preliminary Injunction and enter an order enjoining Respondents, their agents, servants, and officers, and others from incarcerating Petitioners and putative class members pending a *Gagnon* II hearing without providing (1) a *Gagnon* I hearing and (2) a preliminary detention assessment, each within 72 hours of arrest on the supervision detainer.

Respectfully submitted,

Date: December 14, 2021

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CERTIFICATION OF COMPLIANCE

I, Lori A. Martin, certify that his filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: December 14, 2021 /s/ Lori A. Martin

Lori A. Martin (PA 55786)

CERTIFICATE OF SERVICE

I, Lori A. Martin, hereby certify that on December 14, 2021, a true and correct copy of the foregoing document entitled Petitioners' Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532, together with all supporting materials thereto, was served upon all counsel of record by and through this Court's electronic filing system.

Date: December 14, 2021

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[PROPOSED] ORDER GRANTING APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION

AND NOW, this _____ day of _____ 2021, upon consideration of Petitioners' Petition for Review and Application for Special Relief in the Form of a Preliminary Injunction, it is hereby **ORDERED** that said Application is **GRANTED**.

IT IS FURTHER ORDERED that Respondents and any of their agents, servants, officers, and other persons or entities acting on behalf of Respondents, are hereby **ENJOINED** from depriving Petitioners and class members of a prompt *Gagnon* I hearing within 72 hours of detention, absent extraordinary circumstances or the detainee's request for an extension.

IT IS FURTHER ORDERED that Respondents' and any of their agents, servants, officers, and other persons or entities acting on behalf of Respondents, are hereby **ENJOINED** from incarcerating those under supervision conditions pending a final *Gagnon* II hearing without (1) a prompt opportunity for the detained individuals to be heard on their suitability for release and to rebut any justifications for detention; (2) notice of that opportunity and the reasons supporting the request for detention; (3) a neutral decision-maker; and (4) if detention is required, an explanation as to why and the evidence relied on, either on the record or in writing. Those accused of technical violations or who would otherwise be released on any underlying criminal charges are to be presumptively released pending a *Gagnon* II hearing.

BY THE COURT:

_____

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

EBONI EL, ANDREW HASKELL, SUNG JOO LEE, AKEEM WILLS, CHARLES GAMBER, DAVID KRAH on behalf of themselves and all persons similarly situated,	:	No. 376 MD 2021 Class Action Original Jurisdiction
Petitioners,	:	
v.	:	
38TH JUDICIAL DISTRICT, Hon. THOMAS M. DEL RICCI, President Judge (in his official capacity), MICHAEL GORDON, Chief Adult Probation and Parole Officer (in his official capacity), MICHAEL R. KEHS, Court Administrator (in his official capacity), and LORI SCHREIBER, Clerk of Courts (in her official capacity),	:	
Respondents.	:	

PETITIONERS' BRIEF IN SUPPORT OF THE APPLICATION FOR SPECIAL RELIEF IN THE FORM OF A PRELIMINARY INJUNCTION UNDER PA. R.A.P. 1532

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Petitioners Eboni El, Andrew Haskell, Sung Joo Lee, Akeem Wills, Charles Gamber, and David Krah submit this brief in support of their motion for a preliminary injunction under Rule 1532 of the Pennsylvania Rules of Appellate Procedure. Petitioners seek to enjoin Respondents' denial of due process to people alleged to have violated the terms of their probation or parole. Respondents indiscriminately and unconstitutionally detain people accused of supervision violations pending a final revocation hearing without promptly (1) providing an opportunity to be heard as to whether there is probable cause to believe they committed the alleged violation or (2) assessing whether incarceration pending a hearing is required to protect public safety or because the person is a flight risk. Without immediate relief from this Court, Respondents will continue their practice of unconstitutional, indiscriminate detention.

INTRODUCTION

Revocation of probation or parole is a "serious deprivation" of liberty. *Gagnon v. Scarpelli,* 411 U.S. 778, 781 (1973). It "inflicts a grievous loss" both on those who are incarcerated "and often on others." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972) (internal quotation marks omitted). In short, imprisonment is often an "immediate disaster." *Wolff v. McDonnell*, 418 U.S. 539, 560–61 (1974). Respondents—the 38th Judicial District and several of its employees, sued in their official capacities—nonetheless indiscriminately imprison nearly everyone accused of violating the terms of their parole or probation for months pending a revocation hearing. This mandatory incarceration is unconstitutional. Respondents entirely fail to consider whether there is probable cause to believe these persons violated the terms of their supervision or whether incarceration pending a hearing is appropriate to protect public safety or to ensure that the detained person appears for the revocation proceeding. Both the United States and Pennsylvania Constitutions forbid such arbitrary, excessive imprisonment without individualized consideration and an opportunity to be heard.

For nearly 50 years, the law has been clear that the Commonwealth cannot detain people for alleged parole or probation violations without providing an initial probable cause hearing (a "*Gagnon* I hearing") "as promptly as convenient after arrest." *Morrissey*, 408 U.S. at 485. Respondents have ignored that constitutional right and their corresponding duty, providing no prompt hearing in the vast majority of cases. Instead, Respondents imprison people accused of supervision violations for months until the court holds a single, final revocation hearing (a "*Gagnon* II hearing") to determine both whether the accused in fact violated the terms of their release and whether incarceration is appropriate. Respondents' prolonged incarceration of individuals accused of supervision violations without providing prompt *Gagnon* I hearings violates Petitioners' well-established procedural due process rights.

Respondents also fail to assess whether people accused of supervision violations are safety or flight risks such that imprisonment pending a final *Gagnon* II hearing is justified. That failure is unconstitutional. *First*, it violates Petitioners' and putative class members' procedural due process rights. Montgomery County deprives those suspected of supervision violations of their core liberty interests by failing to consider whether incarceration pending a *Gagnon* II hearing is necessary. That failure guarantees the erroneous detention of individuals who pose no threat to public safety and are not a flight risk. The risk of error is particularly high for individuals who are accused of mere technical violations or whose alleged violations are premised on separate arrests but who were released (or would otherwise have been released) in connection with those separate charges. Such individuals are easy to identify and presumptively should not be detained pending a *Gagnon* II hearing. *Second*, Respondents have deprived those suspected of supervision violations of their substantive due process rights. The only legitimate ends that incarceration pending a *Gagnon* II hearing might serve are preventing flight and keeping the community safe. Indiscriminate

incarceration is an irrationally excessive means of achieving those ends. *Third*, Respondents incarcerate nearly everyone suspected of supervision violations based on an unconstitutional irrebuttable presumption that they all pose a risk of flight and danger to the community. That presumption is untrue, and prompt detention assessments are a readily available means of providing the necessary individualized consideration.

Petitioners—individually and as representatives of a putative class—irreversibly suffer from Respondents' policy of indiscriminate and automatic incarceration. Their injuries are ongoing. The Court should enjoin Respondents from incarcerating people accused of supervision violations without providing (1) a prompt *Gagnon* I hearing and (2) a corollary assessment of whether they need to be detained pending final revocation proceedings, with corresponding procedural protections (a "preliminary detention assessment"). Absent extraordinary circumstances, these determinations should take place within 72 hours of detention. Petitioners' requested relief is narrowly tailored to prohibit Respondents' constitutional violations and to address the ongoing and irreparable harm to Petitioners, members of the putative class, their families, and their communities.[1]

STATEMENT OF FACTS

A. Respondents Indiscriminately Jail People Accused of Parole and Probation Violations for Months Without a Hearing

Montgomery County incarcerates nearly everyone who is accused of a supervision violation without having a neutral arbiter make an initial determination that there is probable cause to

[1] In making this narrowly tailored request for preliminary relief, Petitioners do not concede that this is all the U.S. or Pennsylvania Constitutions require. There is a strong argument that Respondents must *also* assess whether incarceration is appropriate *before* initially detaining those suspected of supervision violations. It would be relatively straightforward to establish a process to identify, pre-arrest, those who clearly do not merit incarceration pending a *Gagnon* II hearing. *See, e.g.*, The Fifth Judicial District of Pennsylvania Allegheny County Adult Probation, *Policy Bulletin* 3 (Nov. 20, 2019) (requiring probation officers to "exhaust[]" all other efforts before detaining a person for a "lower-level" technical violation or an arrest for a non-violent offense).

believe they in fact committed such a violation. Publicly available information from the Administrative Office of Pennsylvania Courts shows that, between January 1, 2019, and May 18, 2021, approximately 92 percent of detainees received no *Gagnon* I hearing at all. Declaration of Nori Reid Mehta, dated December 9, 2021 ("Mehta Decl.") at ¶ 37.

Respondents never assess whether detention pending the *Gagnon* II hearing is warranted. *See* Declaration of Dean Beer, dated December 10, 2021 ("Beer Decl.") at ¶ 7. Yet many people accused of violations are not dangerous or flight risks. *See* Declaration of David Muhammad, dated December 13, 2021 ("Muhammad Decl.") at ¶¶ 16–21. Parole and probation agreements in Montgomery County include technical requirements to, for example: (i) notify a probation officer within 72 hours of a change in employment; (ii) notify and receive approval from a probation officer at least 72 hours in advance of travel beyond counties adjoining Montgomery County; (iii) notify a probation officer of medical treatment or psychological counseling; or (iv) notify a probation officer before using prescription or over-the-counter medication. *Id.* ¶ 19. In 2018, over 56 percent of revocations in Montgomery County were due to technical violations. Pa. Bd. of Prob. & Parole, *County Adult Probation and Parole Annual Statistical Report* 64 (2018).[2] On one day in October 2019, 42 percent of people in Montgomery County jail for supervision violations were being held for alleged rule violations. Human Rights Watch & ACLU, *Revoked: How Probation & Parole Feed Mass Incarceration in the United States* 5 (July 2020).[3] These minor violations land people in the Montgomery County Correctional Facility ("MCCF") for months awaiting a final hearing, even when it is obvious that the person who allegedly committed the violation

[2] This report is available at https://www.cor.pa.gov/About%20Us/Statistics/Documents/Reports/2018%20CAPP%20Annual%20Statistical%20Report.pdf.

[3] This report is available at https://www.aclu.org/report/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states.

poses no flight risk or danger to the community, and that the court is unlikely to order further imprisonment at the final hearing.

Many people who are arrested for new minor criminal violations are also needlessly detained. Indeed, Montgomery County often imprisons people on supervision detainers after the judges handling the new charges release them on bail or non-monetary conditions because they pose no risk of flight or harm to the public. *See* Beer Decl. at ¶ 8; *see also infra* at 6–7 (describing Petitioners' experiences). Because Respondents never consider whether incarceration is necessary or advisable pending the *Gagnon* II hearing, they leave these individuals unnecessarily imprisoned for months, even though courts have already found they should not be detained.

Rather than promptly deciding whether there is probable cause and whether detained individuals are flight risks or otherwise dangerous, Respondents detain nearly everyone alleged to have committed a supervision violation in the MCCF to await a single hearing. *See* Beer Decl. ¶ at 4; Declaration of Akeem Wills, dated October 21, 2021 ("Wills Decl.") at ¶¶ 13, 14. That first and final hearing occurs long after arrest. On average, people are detained for 70 days before having any hearing at all and for 88 days before their revocation proceedings are resolved. Mehta Decl. at ¶¶ 35–36. Many individuals are immediately released with time served. *See, e.g.*, Declaration of Charles Gamber, dated October 15, 2021 ("Gamber Decl.") at ¶ 5; Wills Decl. at ¶ 14.

This needless imprisonment imposes substantial costs on imprisoned people, their families, and their communities. Muhammad Decl. at ¶¶ 22–24. People in detention cannot work and so may lose their employment or fall behind on bills and lose their homes or cars; they cannot care for their children and so may lose custody; they often cannot easily receive treatment while incarcerated and so may suffer health crises. *Id.* at ¶ 22. Those factors, in turn, make it more difficult for detained people to successfully reenter society and avoid recidivism. *Id.* at ¶ 23.

B. Petitioners Have Suffered Irreparable Harm Due to These Constitutional Violations

Petitioners currently are or previously were detained at the MCCF for alleged probation or parole violations. Petitioners' individual cases illustrate the tragic consequences of Respondents' unlawful conduct.

- Eboni El is a 41-year-old woman on dialysis who is suffering from end-stage kidney disease. As of the time the class action complaint in this matter was filed, Ms. El had been detained in Montgomery County since September 14, 2021, without a *Gagnon* I hearing or preliminary detention assessment. Her alleged supervision violation is premised on a marijuana possession and first-time DUI charge in Philadelphia. The Philadelphia court released her on unsecured bail. The Montgomery County probation detainer alone delayed Ms. El from pursuing a kidney transplant. Declaration of Eboni El, dated October 6, 2021 ("El Decl.") at ¶¶ 1–2, 5, 11, 13, 16.

- David Krah is a 31-year-old man who, at the time the complaint was filed, had been held in Montgomery County on a probation detainer since September 15, 2021, because of an alleged violation stemming from a misdemeanor possession offense for which he was released on his own recognizance. He never had a *Gagnon* I hearing or preliminary detention assessment. Mr. Krah was unable to care for his son and subject to a violent attack while in prison. Declaration of David Krah, dated October 21, 2021 ("Krah Decl.") at ¶¶ 1, 3, 6–7, 13, 16.

- Akeem Wills is a 26-year-old man who has been held in Montgomery County on a probation detainer for more than seven months. The alleged probation violations stem from two charges in Philadelphia for which he was released on his own recognizance. He has never had a *Gagnon* I hearing or preliminary detention assessment. Wills Decl. at ¶¶ 1–2, 6, 12.

- Sung Joo Lee is a 30-year-old man who was held on a probation detainer in Montgomery County from August 25, 2021 to September 28, 2021. He was convicted in 2021 of a misdemeanor DUI offense that occurred two years prior, in 2019, and sentenced to 48 hours' incarceration. Mr. Lee was picked up on a probation detainer around three months later. He never had a preliminary detention assessment. Mr. Lee, the primary breadwinner of his family, missed the birth of his first child while in detention, despite his pleas to be released. Desperate to go home to his newborn, he did not contest the violation. Declaration of Sung Joo Lee, dated October 1, 2021 ("Lee Decl.") at ¶¶ 1–2, 4–6, 13–14, 16–17.

- Charles Gamber is a 45-year-old man who was held on a parole detainer in Montgomery County from August 13, 2021, to October 5, 2021, because of alleged technical parole violations. He allegedly failed to complete a voluntary psychiatric program, did not take his medication as prescribed, and could not afford to pay $100 in fines. He

did not receive a *Gagnon* I hearing or a preliminary detention assessment. On October 5, 2021, desperate to get out of jail, Mr. Gamber waived his right to an initial hearing and declined to contest the allegations. Gamber Decl. at ¶¶ 1–2, 6, 10, 13.

- Andrew Haskell is a 44-year-old man who was arrested for a misdemeanor DUI charge on April 20, 2021. In July 2021, the judge in the separate criminal proceeding found him releasable on $100 bail, but the probation detainer would have kept him imprisoned even if he paid. Because of that detainer, Mr. Haskell remained in jail through the time of filing. He never received a *Gagnon* I hearing or preliminary detention assessment. Mr. Haskell has three children, including one with autism, and was unable to see or provide for them while detained. Trying to return to his family, he did not contest the criminal charges or the supervision violation. Declaration of Andrew Haskell, dated October 21, 2021 ("Haskell Decl.") at ¶¶ 1, 3, 5, 8, 10, 12–13.[4]

Every Petitioner, except Mr. Gamber and Mr. Lee, remained incarcerated in Montgomery County even though a judge found mandatory detention inappropriate for the alleged offense underlying the alleged supervision violation. The judge in Mr. Lee's case found a mere 48 hours of incarceration sufficient on the underlying criminal charge. Mr. Gamber did not appear before another judge because his alleged supervision violations were merely technical. Those violations did not suggest he was a flight risk or danger to the community. All Petitioners were held (or are being held) without a prompt, constitutionally required revocation hearing to determine if probable cause exists to believe they committed a violation. Respondents never assessed the appropriateness of Petitioners' detention pending the final revocation hearing. Those constitutional failures have had devastating effects on Petitioners, their families, and their communities.

ARGUMENT

This Court should issue a preliminary injunction prohibiting Respondents' ongoing constitutional violations. *First*, the Court should bar Respondents from continuing to incarcerate people accused of supervision violations without providing *Gagnon* I hearings promptly after arrest.

[4] Counsel for Petitioners believes that Ms. El and Mr. Krah have stopped being held on supervision detainers since the filing of the class action complaint in this matter, while Mr. Wills remains in jail on a probation detainer.

Second, the Court should bar Respondents from incarcerating those accused of supervision violations based on an irrebuttable presumption of dangerousness and risk of flight rather than an individualized assessment of whether detention pending a final hearing is appropriate. That assessment should be subject to the same procedural protections as *Gagnon* I hearings. In the normal course, and absent a request for extension from the person being detained, both hearings should occur within 72 hours of arrest.

Parties seeking a preliminary injunction must show that (1) they are likely to prevail on the merits; (2) the injunction is necessary to prevent immediate and irreparable harm; (3) greater injury would result from refusing the injunction than from granting it; (4) the injunction will not adversely affect the public interest; (5) the injunction will properly restore the *status quo* as it existed immediately prior to the alleged wrongful conduct; and (6) the injunction is reasonably suited to abate Respondents' unconstitutional activity. *SEIU Healthcare Pa. v. Commw.*, 104 A.3d 495, 502 (Pa. 2014). If a preliminary injunction would "compel[] the defendant to perform an act, rather than merely refrain[] from acting," a plaintiff must show "a clear right to relief," although a plaintiff need not "establish his or her claim absolutely." *Sovereign Bank v. Harper*, 674 A.2d 1085, 1092 (Pa.Super. 1996). Under either standard, each condition is met here.

I. The Court Should Enjoin Respondents from Subjecting Those Accused of Supervision Violations to Prolonged Detention Without Prompt *Gagnon* I Hearings

In the early 1970s, the U.S. Supreme Court held that due process requires the government to provide two hearings to anyone it seeks to imprison on an alleged supervision violation. At a *Gagnon* I hearing, a neutral arbiter determines whether there is probable cause to believe there was in fact a violation. A *Gagnon* I hearing thus guards against erroneously imprisoning those who did not violate the terms of their release. *Morrissey*, 408 U.S. at 484. Consistent with that goal, this hearing must take place "as promptly as convenient after arrest." *Id.* at 485. This initial

hearing cannot be a charade: the accused are entitled to "notice of the alleged violations of probation or parole, an opportunity to appear and to present evidence in [their] own behalf, a conditional right to confront adverse witnesses, an independent decisionmaker, and a written report of the hearing." *Gagnon*, 411 U.S. at 786 (citing *Morrissey*, 408 U.S. at 487). The *Gagnon* II hearing then finally addresses (1) whether the facts warrant revocation, and (2) if so, whether incarceration is appropriate or "other steps [should] be taken to protect society and improve chances of rehabilitation." *Id.* at 784 (quoting *Morrissey*, 408 U.S. at 480). The Pennsylvania Constitution independently requires *Gagnon* hearings. *See Commw. v. Davis*, 336 A.2d 616, 619–622 (Pa.Super. 1975); *Commw. ex rel. Rambeau v. Rundle*, 314 A.2d 842, 844–47 (Pa. 1973).

A. Petitioners Are Likely to Prevail on Their Procedural Due Process Challenge to Prolonged Detention Without a *Gagnon* I Hearing

Respondents systematically deprive people on probation and parole of their clear constitutional right to due process by incarcerating them without *Gagnon* I hearings. *Cf.* Mehta Decl. at ¶ 38 (finding that only 8 percent of detainees received a Gagnon I hearing followed by a separate Gagnon II hearing). Petitioners in this case are no exception. At the time of the filing of this class action on October 26, 2021, for example, Akeem Wills, Eboni El, and David Krah had been detained since April 14, September 8, and September 15, 2021, respectively. None received a hearing to determine whether their detention was justified by probable cause. El Decl. at ¶¶ 11–13, 15; Krah Decl. at ¶¶ 8–12; Wills Decl. at ¶¶ 2, 7, 12.

The *Gagnon* II hearing does not satisfy Respondents' constitutional obligations to provide a prompt probable cause hearing. The Superior Court has "determined that the combining of *Gagnon* I and *Gagnon* II hearings is not permitted." *Commw. v. Larkins*, No. 1652 EDA 2017, 2018 WL 2295876, at *2 (Pa.Super. May 21, 2018). "Running them together or holding them on the same day does not meet the constitutional due process requirements set forth in *Gagnon*." *Commw.*

v. Homoki, 605 A.2d 829, 831 (Pa.Super. 1992). Combining the "prompt" *Gagnon* I hearing with the *Gagnon* II final revocation hearing is legally insufficient because separation affords the accused "the time and opportunity to prepare a defense against charges after review of them by a neutral body." *Id.* The purported waiver of a *Gagnon* I hearing at a belated *Gagnon* II hearing likewise does not meet due process requirements. In Montgomery County, these hearings occur months after arrest. By then, Respondents have already disregarded their legal duty to provide a *Gagnon* I hearing "as promptly as convenient after arrest." *Morrissey*, 408 U.S. at 485.

People accused of supervision violations languish in jail for an average of 70 days before receiving any hearing at all. Mehta Decl. at ¶ 35. Other courts have found a likelihood of success (and granted preliminary injunctions) based on similar or shorter delays. *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"). A 70-day delay is patently unconstitutional. *See 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) ("[C]onfining Loomis in the county jail for thirty-eight days before affording him a hearing to determine whether there was any reasonable ground for his arrest was palpably unreasonable and a deprivation of Loomis's liberty without due process."); *Williams v. Superior Ct.*, 230 Cal. App. 4th 636, 654 (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).

Due process prohibits incarcerating individuals pending *Gagnon* II hearings without prompt *Gagnon* I hearings. Yet Respondents routinely incarcerate those accused of supervision violations in Montgomery County without any such hearing. Petitioners are therefore likely to prevail on the merits and have a clear right to relief.

B. Prolonged Detention Without a *Gagnon* I Hearing Immediately and Irreparably Harms Those Accused of Supervision Violations

Prolonged incarceration without *Gagnon* I hearings threatens Petitioners and putative class members with two separate immediate and irreparable harms: (1) further incarceration without probable cause to believe that they violated the terms of their supervision, and (2) violating their due process right to a hearing. These injuries are ongoing and cannot be remedied after the fact.

Due process prohibits prolonged imprisonment without an initial hearing precisely because the risk of "having parole revoked because of erroneous information" is otherwise too great to bear. *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) (alterations, citations, and internal quotation marks omitted). The threat of a wrongful loss of liberty therefore satisfies the "irreparable harm" requirement for a preliminary injunction. *See L.H. v. Schwarzenegger*, No. Civ. S-06-2042, 2008 WL 268983, at *7 (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); *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). Timely *Gagnon* I hearings prevent that irreparable harm.

The Pennsylvania Supreme Court also recognizes that denial of the right to have one's claims "considered in an orderly manner, in accord with concepts of fairness and due process," is

an "irreparable harm." *Reading Anthracite Co. v. Rich*, 577 A.2d 881, 885 (Pa. 1990). That injury is greater when a person's fundamental liberty is at stake. As one federal court recognized in granting a similar injunction, "the very facts that injunctive relief is essential to afford plaintiffs a real remedy and that a due-process-violative deprivation of liberty is at stake are enough to satisfy" the irreparability requirement. *Pinzon*, 675 F. Supp. at 430. "Each time a parolee is incarcerated" without such a hearing, "another individual is harmed." *King*, 2006 WL 8456959, at *10.

Most fundamentally, the Pennsylvania Supreme Court has affirmed that, "where the offending conduct sought to be restrained through a preliminary injunction violates a statutory mandate, irreparable injury will have been established." *SEIU Healthcare Pa.*, 104 A.3d at 508. That proposition is equally true when the Constitution declares certain conduct to be unlawful. *See Dillon v. City of Erie*, 83 A.3d 467, 474 (Pa.Cmwlth. 2014) (holding that a plaintiff facing potential prosecution under a local ordinance had shown irreparable injury because the ordinance unconstitutionally conflicted with state law).

C. The Irreparable Harm of Detention and Violation of Constitutional Rights Far Outweighs Any Harm that Granting the Injunction Might Cause

Petitioners "merely seek the constitutional due process protections to which they are entitled," which "include the right under *Morrissey* to have a prompt preliminary parole [or probation] revocation hearing at or near the place of the alleged parole [or probation] violation or arrest." *King*, 2006 WL 8456959, at *10. As discussed below, *see infra* at 14–15, a hearing within 72 hours (absent extenuating circumstances) is reasonably prompt. Thus, the only "harm" the injunction may impose on Respondents is the cost of compliance with the law. That is no harm at all, as the U.S. Supreme Court has made clear that "the State has no interest in revoking parole without some informal procedural guarantees." *Morrissey*, 408 U.S. at 483.

Moreover, the harm of constitutional violations necessarily outweighs the cost of compliance. "The argument that a violation of law can be a benefit to the public is without merit. When the Legislature declares certain conduct to be unlawful it is tantamount in law to calling it injurious to the public. For one to continue such unlawful conduct constitutes irreparable injury." *Pa. Pub. Util. Comm'n v. Israel*, 52 A.2d 317, 321 (Pa. 1947). The same holds true for constitutional commands. "Even if compliance with the . . . law they are duty bound to follow could somehow be viewed as a 'harm' to defendants, it is perforce far outweighed by the already-identified harms to the plaintiff class." *Pinzon*, 675 F. Supp. at 432. "The injuries of which the [petitioners] complain are deprivations of liberty, one of the most serious deprivations that can occur." *L.H.*, 2008 WL 268983, at *8. Respondents' burden of complying with the law pales in comparison.

D. The Public Interest Is Best Served by Prohibiting Prolonged Incarceration Without Prompt *Gagnon* I Hearings

The requested preliminary injunction will not adversely affect the public interest. "Society . . . has an interest in not having parole revoked because of erroneous information." *Morrissey*, 408 U.S. at 484. "And society has a further interest in treating the parolee with basic fairness: fair treatment in parole revocations will enhance the chance of rehabilitation by avoiding reactions to arbitrariness." *Id.* Like similar injunctions issued by other courts, the requested preliminary injunction "does not place any member of the plaintiff class at liberty," but rather "assures only that deprivation of such liberty must take place within the boundaries marked out by the Constitution." *Pinzon*, 675 F. Supp. at 432. "That cannot by definition disserve the public interest." *Id.*

E. The Preliminary Injunction Will Properly Restore the Status Quo as it Existed Immediately Prior to Respondents' Denial of *Gagnon* I Hearings

Petitioners' requested injunction would restore the "*status quo* as it existed between the parties before the event that gave rise to the lawsuit." *SEIU Healthcare Pa.*, 104 A.3d at 596.

"The status quo to be maintained by a preliminary injunction is the last actual, peaceable and lawful noncontested status which preceded the pending controversy." *Valley Forge Hist. Soc'y v. Wash. Mem'l Chapel*, 426 A.2d 1123, 1129 (Pa. 1981). Here, that status quo is the process that existed when individuals accused of supervision violations received constitutionally required *Gagnon* I hearings. Petitioners' requested preliminary injunction would restore that state of affairs.

F. An Injunction Prohibiting Prolonged Incarceration Without *Gagnon* I Hearings Is Reasonably Suited to Abate Respondents' Unconstitutional Practices

The requested injunctive relief is narrowly tailored to prohibit Respondents' unconstitutional conduct. Petitioners' proposed injunction would require Respondents to stop incarcerating people accused of supervision violations without fulfilling their corollary constitutional duty to provide a *Gagnon* I hearing promptly after arrest.

These hearings should occur within 72 hours of detention for the alleged supervision violation, absent extraordinary circumstances or a request for an extension by the detained person. In the general course, when the state's witnesses are readily available, "it should pose no great burden upon the state to hold a [*Gagnon* I] hearing within one or two days." *Gawron v. Roberts*, 743 P.2d 983, 990 (Idaho Ct. App. 1987). Other Pennsylvania counties have already adopted this standard. *See e.g.*, Washington R. Crim. P. L-708 ("a Gagnon I hearing shall be held . . . within (3) Court business days if the offender is incarcerated as a result of the violation(s)"). Pennsylvania law already imposes 72-hour detention limits in similar situations. *See, e.g.*, 234 Pa. Code § 150 A.5.b (prohibiting detention on a bench warrant without a hearing longer than 72 hours); Pa. R. Juv. Ct. P. 240(C) (pre-adjudication hearing must be held within 72 hours to review whether juvenile detention is appropriate). And other jurisdictions require holding *Gagnon* I hearings within similar or shorter time frames. *See, e.g.*, Minn. R. Crim. P. 27.04(1)(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). Respondents cannot credibly claim that the common practice of holding an initial probable cause hearing within three days is unduly burdensome. Indeed, given the crushing harm that incarceration inflicts on detained individuals, three days is likely longer than the Supreme Court envisioned when it required a *Gagnon* I hearing "as promptly as convenient after arrest." *Morrissey*, 408 U.S. at 485; *see Luther v. Molina*, 627 F.2d 71, 74 n.3 (7th Cir. 1980) (*Morrissey* court "seemed to be contemplating an almost immediate hearing").

The law is straightforward and long-standing. Respondents cannot detain people accused of supervision violations without holding prompt *Gagnon* I hearings. Yet that is precisely what they are doing. Every factor thus favors a preliminary injunction requiring Respondents to recognize Petitioners' constitutional rights and fulfill their own corresponding duty.

II. The Court Should Enjoin Respondents from Subjecting Those Accused of Supervision Violations to Prolonged Detention Without Preliminary Detention Assessments

Petitioners are also entitled to a preliminary injunction prohibiting Respondents from incarcerating those accused of supervision violations without an assessment of whether detention pending a *Gagnon* II hearing is necessary and appropriate due to a public safety or flight risk. Petitioners are likely to succeed in showing that detention without such an assessment is unconstitutional in three separate ways. *First*, it violates Petitioners' and putative class members' procedural due process rights. Incarceration implicates fundamental liberty interests under the United States and Pennsylvania Constitutions. Respondents never consider whether the people they incarcerate pending *Gagnon* II hearings are flight risks or dangers to the community. That failure naturally means Respondents incarcerate large numbers of people who should not be in jail at all. This indiscriminate imprisonment is counterproductive to public safety and wastes scarce public

resources. *Second*, indiscriminate incarceration pending a *Gagnon* II hearing violates substantive due process. Respondents' only legitimate interest in detention pending a *Gagnon* II hearing is preventing flight or harm to the community. Incarceration for every alleged violation is an arbitrarily excessive way to achieve that goal. Most technical violations do not suggest dangerousness or a risk of flight. And where the alleged violation stems from a separate arrest, judges in those separate proceedings often determine that there is no flight or public safety risk. *Third*, Respondents' practice of indiscriminate incarceration rests on an unconstitutional irrebuttable presumption that everyone who violates the terms of their supervision is a risk of flight or danger to the public.

The Court should therefore issue a preliminary injunction prohibiting Respondents from incarcerating those accused of probation or parole violations without (1) a prompt opportunity to be heard on their suitability for release; (2) notice of that opportunity and the reasons supporting the request for detention; (3) a neutral decision-maker; and (4) if detention is required, an explanation as to why and the evidence relied on, either on the record or in writing. Like the *Gagnon* I hearings, this assessment should generally occur within 72 hours of arrest. Petitioners have clear due process rights to these protections, which mirror those required for *Gagnon* I hearings, and Respondents have a corresponding legal duty to provide them.

A. Petitioners Are Likely to Prevail on Their Constitutional Challenges to Respondents' Policy of Indiscriminate Detention Pending *Gagnon* II Hearings

1. Indiscriminate Incarceration Pending *Gagnon* II Hearings Violates Procedural Due Process

Courts weigh three key factors when deciding what process is required to justify the deprivation of a protected interest:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's

> interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

The Pennsylvania Constitution requires similar analysis. *See, e.g.*, *McFalls v. 38th Jud. Dist.*, No. 4 M.D. 2021, 2021 WL 3700604, at *12 (Pa.Cmwlth. Aug. 6, 2021) (applying *Mathews* factors to determine that plaintiffs had stated viable due process claims under Pennsylvania law against many of these same Respondents). However, while the due process guarantees of the federal Constitution are "generally coextensive with those under the Pennsylvania Constitution," *In re F.C. III*, 2 A.3d 1201, 1212 (Pa. 2010), the Pennsylvania Constitution is in some cases more protective of the due process rights of people under supervision. *See Commw. v. Davis*, 586 A.2d 914, 917 (Pa. 1991) (due process under the Pennsylvania Constitution prohibits revoking juvenile probation "solely on the basis of hearsay," even if the U.S. Constitution does not); *Commw. v. Edmunds*, 586 A.2d 887, 894 (Pa. 1991) ("[E]ach state has the power to provide broader standards, and go beyond the minimum floor which is established by the federal Constitution.").

Each *Mathews* factor weighs heavily in favor of finding that Respondents' indiscriminate detention scheme violates due process and that people accused of supervision violations deserve an opportunity to be heard on the appropriateness of incarceration pending a *Gagnon* II hearing.

i. Detention Deprives Petitioners of a Core Liberty Interest

The "liberty of a parolee enables him to do a wide range of things open to persons who have never been convicted of any crime. . . . Subject to the conditions of his parole, he can be gainfully employed and is free to be with family and friends and to form the other enduring attachments of normal life." *Morrissey*, 408 U.S. at 482. "Probation revocation" similarly "result[s] in

a loss of liberty." *Gagnon*, 411 U.S. at 782; *see also Commw. v. Hoover*, 231 A.3d 785, 793–94 (Pa. 2020) (emphasizing importance of the liberty interests highlighted in *Gagnon* and *Morrissey*).

Petitioners' experiences underscore the gravity of this loss of liberty. Mr. Wills has been held on a probation detainer since April 14, 2021. Wills Decl. at ¶ 2. Eboni El has end-stage kidney disease and diabetes, yet Respondents failed to provide her with the special diet she needs, repeatedly ignored her requests for medical attention, and prevented her from meeting with specialists to get on a transplant list. El Decl. at ¶¶ 16–18. Petitioner Sung Joo Lee missed the birth of his child while being held without a preliminary detention assessment. *See* Lee Decl. at ¶¶ 6–7, 11–14. Petitioners' families suffer both financially and psychologically while they remain detained for months. *See, e.g.*, Haskell Decl. at ¶ 10 (fiancé and elderly parents struggle to pay bills and care for children); Lee Decl. at ¶ 14 (depleting savings to pay rent); Wills Decl. at ¶ 15 (social security disability income is halted every time he is detained); Krah Decl. at ¶¶ 13, 16 (inability to co-parent or support his son).

This factor conclusively favors Petitioners because their liberty interest in remaining free is fundamental, and the consequences of prolonged detention are grave.

ii. Indiscriminate Detention Erroneously Incarcerates People Who Pose No Risk to Public Safety and No Risk of Flight

The second *Mathews* factor—the risk of erroneous deprivation—also weighs heavily in the Petitioners' favor. People accused of supervision violations are erroneously incarcerated if either (1) they did not in fact violate the terms of their supervision *or* (2) they posed no flight risk or risk to public safety and their rehabilitation would be better served by living in their community. That is true whether the incarceration occurs before or after the *Gagnon* II hearing. By categorically detaining people accused of supervision violations in all cases, particularly for facially minor technical violations and when judges in separate proceedings have found no risk of flight or harm to

others, Respondents guarantee that thousands of individuals will be unconstitutionally stripped of their physical liberty for months pending a *Gagnon* II hearing.

The U.S. Supreme Court held that due process requires two ultimate findings before people alleged to have violated the terms of their supervision can be incarcerated. *First*, the accused must have "in fact acted in violation of one or more conditions of his parole" or probation. *Morrissey*, 408 U.S. at 479. *Second*, the probation or "parole authority" must exercise its "expertise" and "discretion[]" to find that the person on probation or parole should "be recommitted to prison," meaning other steps would not better "protect society and improve chances of rehabilitation." *Id.* at 480. This second requirement is essential. "[T]he whole thrust of the probation-parole movement is to keep men in the community" and to use "revocation only as a last resort when treatment has failed or is about to fail." *Gagnon*, 411 U.S. at 785. Because "not every violation of parole conditions automatically leads to revocation," each person accused of a supervision violation "must have an opportunity to be heard and to show, if he can, that he did not violate the conditions, or, if he did, that circumstances in mitigation suggest that the violation does not warrant revocation." *Morrissey*, 408 U.S. at 479, 488.

Incarcerating people who neither violated the terms of their supervision nor pose a danger to the community is equally erroneous when it occurs before a final revocation hearing. An initial hearing that addresses probable cause is therefore necessary but not sufficient; the accused must also be heard as to whether "circumstances in mitigation suggest that" incarceration is inappropriate. *Id.* at 488. After all, "[t]he hearing required by the Due Process Clause must be meaningful, and appropriate to the nature of the case. It is a proposition which hardly seems to need explication that a hearing which excludes consideration of an element essential to the decision . . . does not meet this standard." *Bell v. Burson*, 402 U.S. 535, 541–42 (1971) (citations and internal quotation

marks omitted); *see also In re J.B.,* 107 A.3d 1, 17 (Pa. 2014) ("[A] process which eliminates consideration of the paramount factor . . . does not provide procedural due process, as it blocks the opportunity to be heard on the relevant issue."). Detaining non-threatening individuals *before* a *Gagnon* II hearing cannot be constitutional when detention of those same individuals will clearly not be permitted *after* a *Gagnon* II hearing.

If, as is now the case, Respondents fail to determine whether incarceration is justified, then they will inevitably detain thousands of individuals without justification. Certainly, the mere fact that probable cause exists to believe someone violated the terms of their supervision does not mean that they are likely to be a flight risk or danger to the community while awaiting a final revocation hearing.[5] *See United States v. Salerno*, 481 U.S. 739, 750 (1987) (holding that a probable cause finding is not enough to demonstrate a danger to the community); Muhammad Decl. at ¶¶ 16–21. Approximately half of the people detained in Montgomery County for alleged supervision violations are suspected of committing merely technical violations. *See supra* at 4. Mr. Gamber, for example, failed to comply with his supervision's medication conditions and could not afford to pay a fine. Gamber Decl. at ¶ 10. As for those whose alleged violations stem from arrests on new charges, judges in those proceedings often find no threat to flee or harm others. *See* Beer Decl. at ¶ 8. That was the case for every Petitioner accused of violating the terms of their supervision by committing new crimes. *See supra* at 6–7. These individuals pose no demonstrable threat and should never have been incarcerated at all, much less for months pending a *Gagnon* II hearing.

Other jurisdictions (including the Commonwealth) recognize that many individuals who violate the terms of their supervision should not be detained. These jurisdictions have built in

[5] As discussed below, Respondents' presumption that everyone suspected of a supervision violation poses a risk of flight or danger is itself unconstitutional. *See infra* Part II.A.3.

safety valves to avoid even temporarily imprisoning individuals who are not threats to their communities or risks of flight. *See, e.g.*, Muhammad Decl. at ¶¶ 28, 31, 34 (describing California system permitting detention only if a parole agent believes the accused is a danger or poses a risk of flight; Pennsylvania state parole system allowing those who commit technical violations to be detained in "Community Correction Centers" rather than jails; and the federal system, which allows notice of a hearing rather than arrest).

Providing notice and an opportunity to be heard will significantly mitigate the risk of erroneously detaining people who pose no flight or public safety risk. At a minimum, people who are alleged to have committed only a technical violation or who have been, or otherwise would be, released on the underlying criminal charges should presumptively be released pending a *Gagnon* II hearing. The required fundamental protections include (1) a prompt opportunity for detained people to be heard on their suitability for release and to rebut any justifications for detention; (2) notice of that opportunity and the reasons supporting the request for detention; (3) a neutral decision-maker; and (4) if detention is required, an explanation as to why and the evidence relied on, either on the record or in writing. The U.S. Supreme Court has held that these procedural safeguards are necessary at *Gagnon* I hearings to ensure there is probable cause to believe the accused in fact violated the terms of their supervision. *See Morrissey*, 408 U.S. at 486–87. Due process necessarily requires these same protections to assess whether incarceration is appropriate.

iii. Counter to the Public Interest, Indiscriminate Detention Destabilizes Communities and Impedes Rehabilitation

"[T]he final factor to be assessed is the public interest," including "the administrative burden and other societal costs" associated with the additional process. *Mathews*, 424 U.S. at 347. This factor weighs decidedly in Petitioners' favor. Mandatory detention pending a *Gagnon* II

hearing that occurs months after arrest is counterproductive to the public safety, the successful rehabilitation of people on supervision, and preserving scarce public resources.

Petitioners do not ask the Court to release any people who pose a public safety threat or flight risk. They seek a fair, constitutionally required preliminary procedure to determine whether there is good cause to believe an individual accused of a supervision violation should be incarcerated in the months pending a *Gagnon* II hearing. If the government shows good cause to think an individual poses a public danger or risk of flight, that person can be detained. Simply ensuring "that the exercise of discretion will be informed by an accurate knowledge of" the behavior of those under supervision carries very little risk that individuals who pose genuine threats to public safety will be released. *Morrissey*, 408 U.S. at 484. On the other hand, unnecessary detention imposes severe costs on the families and communities who lose their members. Moreover, "[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." *Id.* at 484; *see also Gagnon*, 411 U.S. at 785 (highlighting the public interest in not "interrupting a successful effort at rehabilitation"); Muhammad Decl. at ¶ 23.

The administrative and financial costs of an injunction will be minimal, particularly when compared to the financial savings from no longer incarcerating individuals who pose no risk of flight or to public safety. Respondents are already constitutionally obligated to provide timely *Gagnon* I hearings with the same procedural protections Petitioners seek here; the requested relief poses little additional burden. The experience of other Pennsylvania counties proves as much. For example, Allegheny County requires probation officers to "exhaust[]" all efforts before a person is detained for a "lower-level" technical violation or an arrest for a non-violent offense. *See* The Fifth Judicial District of Pennsylvania Allegheny County Adult Probation, *Policy Bulletin* 3 (Nov.

20, 2019). Adams County authorizes bail to be set at a probable cause hearing pending a final revocation hearing. *See* Adams C. R. Crim. P. 708.1.

The federal government and many other states have similar requirements to those in Allegheny and Adams Counties. *See, e.g.*, Fed. R. Crim. P. 32.1(a)(6) (permitting magistrate judges to "release" people on probation if they "will not flee" and pose no "danger to any other person or to the community"); N.J. Stat. § 30:4-123.62(g) (West 2020) (instructing hearing officers to consider "whether the parolee shall be retained in custody or released on specific conditions pending action by the appropriate board panel"); 15 Cal. Code Regs. § 3751(a) (permitting preliminary detention only if the "parolee is a danger" or "at high risk to abscond"); N.Y. Exec. L. § 259-i(vi) (McKinney) ("[T]he court may order that the releasee be detained pending a preliminary or final revocation hearing only upon a finding that the releasee currently presents a substantial risk of willfully failing to appear at the preliminary or final revocation hearings"). In any event, a "hearing always imposes some costs in time, effort, and expense, and it is often more efficient to dispense with the opportunity for such a hearing. But these rather ordinary costs cannot outweigh the constitutional right." *Fuentes v. Shevin*, 407 U.S. 67, 92 n. 22 (1972).

The private interests, risk of erroneous deprivation, and public interest thus require that Respondents be prohibited from imprisoning individuals charged with supervision violations without an opportunity to be heard on their suitability for release. Petitioners are therefore likely to prevail on the merits of this procedural due process claim and indeed have a clear right to relief.

2. Indiscriminate Incarceration Pending *Gagnon* II Hearings Violates Substantive Due Process

The Court should require prompt detention assessments for the independent reason that incarceration pending a *Gagnon* II hearing in the absence of any danger to the community or risk of flight violates substantive due process. The government may not punish Petitioners or putative

class members for alleged supervision violations before a final determination that they in fact committed the alleged violation. Detention is therefore justified only if it meaningfully furthers another legitimate purpose, such as preventing flight and removing dangers to the public. Wholesale incarceration pending a *Gagnon* II hearing is irrationally excessive in relation to those goals.

The federal constitutional right to substantive due process protects against arbitrary government actions. *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Punitive incarceration without a determination that the detainee committed a punishable act is the quintessential violation of this substantive guarantee. *See, e.g.*, *Bell v. Wolfish*, 441 U.S. 520, 535 (1979) ("[U]nder the Due Process Clause, a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law."). "Absent a showing of an express intent to punish," whether a restriction is unconstitutionally punitive "generally will turn on whether an alternative purpose to which the restriction may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." *Schall v. Martin*, 467 U.S. 253, 269 (1984) (alterations and internal quotation marks omitted). "[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." *Wolfish*, 441 U.S. at 539.

Article I, Section 1 of the Pennsylvania Constitution provides even greater protection against "arbitrary and unjust laws" than its federal counterpart. *Shoul v. Commw., Dep't of Transp.*, 173 A.3d 669, 676–77 (Pa. 2017). Government practices that "infringe upon certain rights considered fundamental" are subject to strict scrutiny, meaning they must be "narrowly tailored to a compelling state interest." *Nixon v. Commw.*, 839 A.2d 277, 287 (Pa. 2003). "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process

Clause." *Foucha*, 504 U.S. at 80; *see also Salerno*, 481 U.S. at 755 ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."). Policies that subject individuals to imprisonment are therefore subject to strict scrutiny. Even absent infringement on a fundamental liberty, government action that "purports to be an exercise of the police power must not be unreasonable, unduly oppressive or patently beyond the necessities of the case, and the means which it employs must have a real and substantial relation to the objects sought to be attained." *Gambone v. Commw.*, 101 A.2d 634, 637 (Pa. 1954). This is a "a more restrictive" test than under the federal Constitution. *Nixon*, 839 A.2d at 288 n.15.

The U.S. Supreme Court has consistently held that incarceration violates substantive due process without a finding that the imprisoned person either (1) in fact committed a punishable act or (2) poses a risk to the public. In *Salerno*, for example, the Court upheld the federal Bail Reform Act because it was not "a scattershot attempt to incapacitate those who are merely suspected of these serious crimes." 481 U.S. at 750. It instead authorized pretrial detention only for "individuals who have been arrested for a specific category of extremely serious offenses," and required the Government to "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.* The Court also sustained New York's pretrial detention of juveniles only because the law 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, and 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).

Consistent with these rulings, the U.S. Supreme Court has rejected detention regimes that did not require the government to prove dangerousness to a neutral arbiter after providing the detained person an opportunity to be heard. The Court rejected an interpretation of a federal law authorizing detention of noncitizens pending deportation even when deportation was no longer reasonably foreseeable because that reading rendered the regime unconstitutionally punitive. *Zadvydas v. Davis*, 533 U.S. 678, 692 (2001). The detention regime in *Zadvydas* applied "broadly to aliens ordered removed for many and various reasons," for whom the only common denominator was "the alien's removable status, itself, which bears no relation to a detainee's dangerousness." *Id.* at 691–92. "Moreover, the sole procedural protections available" were administrative proceedings where the noncitizen bore "the burden of proving he is not dangerous." *Id.* at 692. The Court likewise rejected the detention of people found to be permanently incompetent to stand trial when there was no finding of danger, *Jackson v. Indiana*, 406 U.S. 715, 736–38 (1972), and a similar detention regime in Louisiana for people acquitted on the basis of insanity that "place[d] the burden on the detainee to prove that he is not dangerous," *Foucha*, 504 U.S. at 81–82.

Indiscriminately incarcerating nearly everyone accused of a supervision violation is similarly excessive in relation to the goals of preventing flight and ensuring safety to the community. Unlike in *Salerno* and *Hendricks*, where the detention policy was limited to a subset of people reasonably believed to be particularly dangerous, Respondents' policy applies to a broad group of people—one in every 37 adults in Pennsylvania is under supervision, Muhammad Decl. at ¶ 16—with no common denominator that suggests uniform dangerousness or a likelihood to flee. The mere existence of probable cause to believe someone violated the terms of their supervision, like the mere fact that a noncitizen is deportable, "bears no relation to a detainee's dangerousness." *Zadvydas*, 533 U.S. at 692; *see also supra* at 20–21.

Similarly, unlike the detention regimes upheld in *Salerno*, *Hendricks*, and *Schall*, Respondents provide no process to determine whether detention pending a *Gagnon* II hearing is justified. Indeed, Respondents provide far less process than in the detention regimes the U.S. Supreme Court struck down in *Zadvydas* and *Foucha*. There, the Court held that due process demanded more than requiring the detained persons to affirmatively show that release was appropriate. Here, Petitioners do not even have that chance; Respondents provide no opportunity to be heard at all. Regardless of the severity of the alleged violation, the person's likelihood of returning for the final hearing, whether the person poses a public safety risk, or the impediment to rehabilitation that jail time might pose, Respondents treat everyone accused of a supervision violation the same: locking them away for months until their one and only *Gagnon* II hearing.[6]

Respondents' indiscriminate detention practices are thus not "reasonably related," *Wolfish*, 441 U.S. at 539—much less substantially related, *Gambone*, 101 A.2d at 637, or "narrowly tailored," *Nixon*, 839 A.2d at 287—to ensuring that those suspected of supervision violations attend their hearings and do not endanger their communities. That disconnect alone is fatal under the Pennsylvania Constitution. This means-end mismatch also confirms that Respondents' policy punishes Petitioners and putative class members for their alleged supervision violations before their guilt has been determined. Such punishment violates the substantive due process guarantees of the federal Constitution. Petitioners have a clear, substantive right to be free of incarceration without prompt, individualized detention assessments, and are therefore likely to succeed on their substantive due process claim.

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[6] Even assuming detention is justified at the outset—a dubious proposition given the many cases where the accused are obviously neither dangerous nor flight risks—prolonged detention requires specific justification. *See e.g.*, *German Santos v. Warden Pike Cnty. Corr. Facility*, 965 F.3d 203, 209 (3d Cir. 2020) (holding that the burden of prolonged detention of noncitizens "outweighs a mere presumption that the alien will flee or pose a danger," even if it did not initially).

3. Indiscriminate Incarceration Pending *Gagnon* II Hearings Relies on an Unconstitutional Irrebuttable Presumption

Respondents separately violate Petitioners' and putative class members' due process rights by incarcerating them pending *Gagnon* II hearings based on an irrebuttable presumption of dangerousness. The Pennsylvania Supreme Court has been clear that the government violates due process when it infringes on a protected interest based on an irrebuttable presumption that is "not universally true," and where "reasonable alternative means of ascertaining that presumed fact are available." *In re J.B.*, 107 A.3d at 14–15. Imposing lifelong sex-offense registration requirements on certain juveniles thus violated due process because it relied on an irrebuttable presumption of recidivism. *Id.* at 19–20. Automatically revoking driving privileges after one epileptic seizure violated due process because it relied on an unconstitutional irrebuttable presumption of unfitness to drive. *Commw., Dep't of Transp., Bureau of Driver Licensing v. Clayton*, 684 A.2d 1060, 1064–65 (Pa. 1996). And automatically excluding juveniles adjudicated delinquent from regular public schools unconstitutionally relied on an irrebuttable presumption that they were dangerous and disruptive. *D.C. v. Sch. Dist. of Phila.*, 879 A.2d 408, 418–19 (Pa.Cmwlth. 2005).

Automatically detaining virtually everyone suspected of a violation pending their *Gagnon* II hearing similarly relies on an irrebuttable presumption that every such person is a flight or safety risk. That presumption is nowhere near universally true. *See* Muhammad Decl. at ¶¶ 16–21. As mentioned above, nearly half of revocations in Montgomery County are due to technical violations. *See supra* at 4. And judges found that every Petitioner charged with a new crime was not a flight or safety risk. *See* El Decl. at ¶ 5; Krah Decl. at ¶ 6; Wills Decl. at ¶ 6; Haskell Decl. at ¶ 5. Respondents' presumption that these individuals pose a flight or safety risk has no basis in fact.

An individualized hearing to determine risk is a reasonable alternative to Respondents' automatic incarceration scheme. *See In re J.B.*, 107 A.3d at 19 (holding that a presumption of

dangerousness was unconstitutional because an individualized assessment was a reasonable alternative); *R.C. v. Evanchick*, No. 223 M.D. 2019, 2021 WL 1017421, at *10–11 (Pa.Cmwlth. Mar. 17, 2021) (overruling preliminary objections where an individual assessment would provide a reasonable alternative to determining whether petitioner presents a high risk of recidivism). An initial detention assessment is feasible and would allow Respondents to identify those who pose a flight or safety risk and spare others from unnecessary incarceration. Petitioners are therefore likely to prevail on their irrebuttable presumption claim and indeed have a clear right to relief.

B. Petitioners Have Met the Other Requirements for a Preliminary Injunction

Petitioners have met the other five requirements for a preliminary injunction requiring a preliminary detention assessment. The requested injunction is necessary to prevent immediate and irreparable harm to Petitioners and members of the putative class. Respondents' unconstitutional presumption that detention is always necessary naturally results in needlessly jailing people for months without any evidence that they pose a risk of harm to the community or fleeing the proceedings. Incarceration causes massive harms to people on parole or probation, who lose their most fundamental liberties; to their families, who may lose their income sources and are separated from loved ones; and to society, which bears the direct financial cost of incarceration, loses the contributions of a productive member, and faces the risks of stunting successful rehabilitation. *See supra* at 11–12. This Court need look no further than to the Petitioners themselves. *See supra* at 6–7. Mitigating these injuries would not harm Respondents and is squarely in the public interest.

The proposed preliminary injunction requires a return to the "peaceable and lawful noncontested" status quo that is constitutionally guaranteed and exists in many other jurisdictions. *Valley Forge Hist. Soc'y*, 426 A.2d at 1129. And it is reasonably suited to prohibit Respondents' unconstitutional activity. Petitioners seek the same procedural protections that the U.S. Supreme

Court has already prescribed for *Gagnon* I hearings. Parallel protections for the equally important detention assessment would be straightforward, as the experience of other jurisdictions, including Pennsylvania counties, makes clear. *See supra* at 22–23. Similar experience shows that 72 hours is a reasonable deadline. *See supra* at 14–15. Respondents know who is accused of a merely technical violation or has already been released on any underlying criminal charges. Identifying these individuals, who are presumptively not dangerous or risks of flight, would be simple.

More importantly, Petitioners seek only to protect their substantive right to be free of irrationally excessive incarceration, their procedural right to an individualized hearing, and their overarching right not to have their liberty revoked based on a false yet irrebuttable presumption of dangerousness. "[T]he Constitution recognizes higher values than speed and efficiency," and "the Due Process Clause in particular" was "designed to protect the fragile values of a vulnerable citizenry from the [government's] overbearing concern for efficiency and efficacy." *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). Respondents systematically imprison those accused of violating terms of their supervision, with no individualized regard to whether imprisonment is remotely necessary or in fact affirmatively harmful. The most minor violation can lead to months in jail. Such indiscriminate deprivation of liberty is unconstitutional. It cannot stand.

CONCLUSION

For the foregoing reasons, Petitioners' Application for Special Relief in the Form of a Preliminary Injunction should be granted, and the Court should enjoin Respondents from incarcerating individuals accused of supervision violations without (1) *Gagnon* I hearings and (2) preliminary detention assessments, each to be held within 72 hours of arrest on the supervision detainer, absent extraordinary circumstances.

Respectfully submitted,

/s/ Lori A. Martin

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CERTIFICATION

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Date: December 14, 2021

/s/ Lori A. Martin
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CERTIFICATE OF SERVICE

I, Lori A. Martin, hereby certify that on December 14, 2021, a true and correct copy of the foregoing document entitled Petitioners' Brief in Support of the Application for Special Relief in the Form of a Preliminary Injunction Under Pa. R.A.P. 1532, together with all supporting materials thereto, was served upon all counsel of record by and through this Court's electronic filing system.

Date: December 14, 2021

/s/ Lori A. Martin
Lori A. Martin (Pa. 55786)

EXHIBIT 1

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

EBONI EL, ANDREW HASKELL, SUNG JOO LEE, AKEEM WILLS, CHARLES GAMBER, DAVID KRAH, on behalf of themselves and all persons similarly situated,	:	No. 376 MD 2021
	:	Class Action
	:	Original Jurisdiction
Petitioners,	:	
v.	:	
38TH JUDICIAL DISTRICT, Hon. THOMAS M. DEL RICCI, President Judge (in his official capacity), MICHAEL GORDON, Chief Adult Probation and Parole Officer (in his official capacity), MICHAEL R. KEHS, Court Administrator (in his official capacity), and LORI SCHREIBER, Clerk of Courts (in her official capacity),	:	
Respondents.	:	

DECLARATION OF NORI MEHTA IN SUPPORT OF PETITIONERS' APPLICATION FOR PRELIMINARY INJUNCTION

I. QUALIFICATIONS

1. I, Nori Mehta, am a Manager at Analysis Group, an economic and financial consulting firm that provides complex analyses in litigation.

2. I received a B.A. in economics from Kenyon College in 2010, and an M.B.A. from the Tuck School of Business at Dartmouth College in 2016.

3. My expertise is in data analytics, economics, and statistics, particularly those relying on large datasets, including government and private administrative claims records. I have over ten years' experience in data analytics and have worked on over 20 large projects involving data analytics for litigation. A copy of my curriculum vitae summarizing my professional experience and education is attached as Appendix A.

II. ASSIGNMENT

4. I have been retained by Petitioners, through Wilmer Cutler Pickering Hale and Dorr LLP, American Civil Liberties Union ("ACLU"), and the ACLU of Pennsylvania (collectively, "Petitioners' Counsel" or "Counsel") to analyze data regarding parole and probation revocation proceedings in Montgomery County, Pennsylvania, between January 1, 2019 and May 18, 2021. I am providing my services in this action on a pro bono basis.

5. Petitioners' Counsel asked me to apply my training and expertise to analyze the data and assess the following:

a. What percentage of people accused of probation or parole violations does Montgomery County detain pending a final revocation adjudication?

b. What percentage of people accused of probation or parole violations receive a *Gagnon* I hearing followed by a *Gagnon* II hearing on a later date?

c. What is the average length of detention prior to a final revocation hearing that a person detained by Montgomery County for an alleged probation or parole violation experiences?

III. SUMMARY OF CONCLUSIONS

6. My conclusions are based on work that I performed, or that other personnel at Analysis Group performed under my supervision and at my direction.

7. Based on our review of publicly available information from the Administrative Office of Pennsylvania Courts ("AOPC") about Montgomery County cases for the period between January 1, 2019 and May 18, 2021 and my understanding of *Gagnon* proceedings:

a. 3,814 people in Montgomery County had revocation proceedings and Montgomery County detained at least 89 percent of these people while awaiting a final parole- or probation-revocation adjudication.

b. Montgomery County conducted a *Gagnon* I preliminary revocation hearing followed by a *Gagnon* II final revocation hearing on a later date in eight percent of the total revocation cases.

c. Montgomery County jailed people for an average of 70 days before an initial hearing, and 88 days (confinement date to sentence date) before final disposition.

8. The statistics in points b. and c. pertain specifically to the detained population and exclude individuals who were not detained.

IV. MATERIALS REVIEWED AND METHODOLOGY

9. My conclusions are based on data obtained from the AOPC. I have been informed and understand that the ACLU obtained the data through a public access request pursuant to the Electronic Case Record Public Access Policy of the Unified Judicial System.[1] The dataset was retrieved in May 2021, released to the ACLU in June 2021, and soon thereafter, forwarded directly to Analysis Group.

10. My understanding is that the dataset includes all criminal cases with a sentence recorded in 2019 or 2020 in Montgomery County, as documented in the Common Pleas Case Management System, and all associated data that may or may not fall outside the 2019-2020 period. The dataset includes the following information: Case & Disposition Data, Sentence Data, Sentence Link Data, Warrant Data, Calendar Event Data, Confinement Data, Alias Data, and Docket Entries Data. I further understand that AOPC excluded non-public cases from the dataset.

[1] Electronic Case Record Public Access Policy of the Unified Judicial System (amended Sep. 15, 2020), https://www.pacourts.us/Storage/media/pdfs/20210508/214127-file-10048.pdf.

11. I identified individuals incarcerated pending probation or county parole (collectively, "supervision") revocation proceedings and length of detention using the following data: (1) "Calendar Events Data," which record events that were calendared on a person's criminal docket, such as their revocation hearings and the dates they occurred; (2) "Confinement Data," which record when and where a person was incarcerated and (3) "Sentence Data," which record when an individual was initially sentenced and subsequently resentenced following revocation of supervision.

12. The AOPC dataset included individuals who did not receive a *Gagnon* hearing. To isolate persons subjected to revocation proceedings, I limited my analysis to people who received a *Gagnon* (revocation) hearing by searching the "Calendar Event Type" and "Sentencing Event Type" fields for the word "*Gagnon*." To isolate unique persons across dockets, I grouped dockets by people's last names and dates of birth.[2] I then removed the Sentence and Calendar Event observations that were not related to a docket with a *Gagnon* hearing, as well as Confinement Data for people with no recorded *Gagnon* hearing.

13. To determine the length of time each person was incarcerated during their revocation proceeding, I first identified the most recent scheduled *Gagnon* hearing (the "Last *Gagnon*"). To do this, I extracted the most recent, "Scheduled" (*i.e.,* not "Moved" or "Cancelled") Calendar Event or Sentencing Event for a "*Gagnon*" hearing.

[2] To ensure that all individuals were matched, I identified additional matches through the following process. For each docket, I pulled the defendant's last name, first name, date of birth, gender, and sex. These variables are unique at the docket level in the AOPC data. Next, I converted all characters to capital letters, removed all spaces, and removed any special characters from defendants' last names. Finally, I identified the following individuals at the same person: (i) defendants who shared the same date of birth, last name, sex, and race, (ii) defendants who shared the same date of birth, sex, race, and whose last name is wholly contained within the other's (e.g., Jane Smith and Jane Smith-Doe, both Black females born on 2/22/1992), and (iii) defendants who shared the same date of birth, sex, race, first name, and whose last names differ by only a single letter (e.g., John Ciabatta and John Ciobatta, both white males born on 1/22/1984). I manually reviewed each of the additional matches to confirm the accuracy of this process.

14. Next, I identified the date on which the person was initially incarcerated as part of their revocation proceeding (the "Confinement Date"). To do this, I found the confinement date from the Confinement Data that occurred on the same day as, or the closest date prior to, the Last *Gagnon* date. I removed Confinement Dates that predated activity in an individual's *Gagnon*-associated dockets.[3]

15. This methodology for selecting the "Confinement Date" is conservative and likely underestimates the share of people who were detained and the average length of confinement pending revocation proceedings. First, it may underestimate the proportion of people who were detained pending their revocation proceedings because, for the purposes of my analysis, individuals for whom no Confinement Date could be identified were presumed to have not been confined pending their revocation proceedings.

16. Second, it may underestimate the length of confinement pending revocation proceedings because, as I have been informed and understand, in cases where an individual was arrested outside of Montgomery County and held in a local jail until they could be extradited to Montgomery County, the period of incarceration outside of Montgomery County before extradition is not recorded in the persons' Confinement Data.

17. To determine the date that a person was sentenced following the Confinement Date (the "Final Disposition Date"), I identified the date of the first Sentencing Event in the dockets recording *Gagnon* events that occurred on, or after, the Last *Gagnon*.

18. Finally, I identified the first scheduled *Gagnon* hearing that occurred between the Confinement Date and the Final Disposition Date (the "First *Gagnon*"). To do this, I found the

[3] For any given defendant, this analysis only includes their most recent revocation proceedings (*i.e.*, if someone were to have a revocation proceeding in 2019 and a second revocation proceeding in 2020, this analysis would only include the revocation proceeding in 2020).

first scheduled Calendar Event or Sentencing Event that recorded a "*Gagnon*" event and that occurred on, or after, the Confinement Date.

19. After determining these dates of interest, I removed 195 people from the analysis for whom: (i) the Final Disposition Date could not be identified, as it is possible these individuals are still pending revocation, or (ii) the Final Disposition Date occurred before January 2019, as these individuals were sentenced prior to the period of this analysis. The remaining 3,814 people constitute the universe of persons with a revocation proceeding within the time period considered in my analysis and represent the denominator in my calculation of the percentage of individuals who were detained pending their revocation proceedings.

20. Next, I identified 326 people who I could not confirm were detained pending their revocation hearing. Specifically, these include:

a. People with no listed Confinement Date.

b. People who had their Confinement Date and Final Disposition Date on the same date.

c. People whose First *Gagnon*, Last *Gagnon*, and Final Disposition Date could not be attributed to a single docket number.

d. People who had a Sentencing Event between the Confinement Date and Final Disposition Date.

e. People who had a Sentencing Event (across all of the individual's dockets) in which the person was sentenced to "Confinement" or "IPP" within 7 days before the Confinement Date.

21. These various assumptions and steps are reasonable based on my understanding of how the parole and probation system works.

22. For each remaining person, I calculated the number of days between the Confinement Date and the First *Gagnon*, the number of days between the First *Gagnon* and the Final Disposition Date, and the number of days between the Confinement Date and the Final Disposition Date.

23. Based on these calculations, I classified 104 people as outliers. I have been told to assume that people with over a year between the Confinement Date and Final Disposition Date are to be considered outliers for whom there may be additional pertinent information not captured in the data. As such, I removed these individuals to avoid distorting the average period of confinement. Accordingly, this methodology likely underestimated the length of pre-revocation detention in Montgomery County.

24. The remaining 3,384 individuals represent the numerator in my calculation of the percentage of people who were detained pending their revocation proceedings, and the group on which I calculate average length of detention.

25. I have been informed of the terms used to describe the hearings and calendar notations to determine whether the remaining people had a scheduled *Gagnon* I hearing followed by a scheduled *Gagnon* II hearing during their revocation proceedings. Based on my understanding, I identified the first date within a person's Confinement Date and Final Disposition Date (inclusive) that a person had a *Gagnon* I hearing. I determined that an individual had a *Gagnon* I hearing if there was either a scheduled Calendar Event or a Sentencing Event with a description of "*Gagnon* I Hearing" or "Video *Gagnon* I." I then identified the last date between a person's Confinement Date and Final Disposition Date (inclusive) that a person had a *Gagnon* II hearing. I determined that an individual had a *Gagnon* II hearing if there was either a scheduled Calendar Event or a Sentencing Event with a description of "Contested *Gagnon* Hearing,"

"*Gagnon* II Hearing," "*Gagnon* Sentencing," or "Video *Gagnon* II." I considered individuals whose first *Gagnon* I hearing occurred on a date before their last *Gagnon* II hearing date to have been given both a *Gagnon* I and a *Gagnon* II hearing during their revocation proceedings.

26. I have summarized these figures in Appendix B.

27. My methodology for calculating key dates and accounting for outliers is common in the field of statistical analysis.

28. My methodology is replicable by those in my field using the publicly accessible AOPC data and a validated computing tool.

29. Although I performed these calculations across thousands of individuals, each individual calculation can be computed by addition and subtraction between the key dates.

30. Given the volume of data and the number of calculations necessary for my analysis, manual calculation would not have been practical or efficient, and would have increased the likelihood of individual errors. When executing standardized calculations over a large dataset, it is common to use computer software to automate the process of conducting the calculations. This applies to a wide range of statistical analyses. The software I used to apply my calculations was SAS Enterprise Guide (statistical software developed by SAS Institute) and Microsoft Excel.

31. The use of each of these tools is generally accepted in my field to perform similar analyses.

V. CONCLUSIONS

32. Based on the methodology described above, I determined that 3,814 people underwent revocation proceedings in Montgomery County between January 1, 2019, and May 18, 2021.

33. I determined that between January 1, 2019, and May 18, 2021, Montgomery County detained at least 3,384 of the 3,814 people facing probation or county parole revocation, which is 89 percent of the total.

34. Because I cannot confirm from AOPC records whether the remaining 11 percent of individuals were detained pending revocation proceedings, I excluded these people from the further analyzed population.

35. Subject to the methodology described above, I determined that from January 1, 2019, to May 18, 2021, Montgomery County incarcerated people for an average of 70 days before their first scheduled *Gagnon* hearing.

36. Montgomery County incarcerated people who were detained for an alleged probation or parole violation for an average of 88 total days before the final disposition of their revocation proceedings.

37. 92 percent of the people (3,104 out of 3,384) who underwent revocation proceedings in Montgomery County between January 1, 2019, and May 18, 2021, did not go through my understanding of the required process of having a *Gagnon* I "preliminary" revocation hearing followed by a separate *Gagnon* II "final" revocation hearing.

38. Eight percent of the people (280 out of 3,384) who underwent revocation proceedings in Montgomery County during this period were scheduled for a *Gagnon* I hearing followed by a *Gagnon* II hearing on a later date.

39. Less than two percent of the people (54 of the 3,384) facing revocation in Montgomery County during this period were given a contested *Gagnon* hearing, which, as I understand, is a revocation hearing that allows a person to contest the allegation that they have violated the terms of their supervision.

40. My conclusions, and the bases for my conclusion, are presented in this declaration and the appendix attached hereto. My work on these matters is on-going, and I may make necessary revisions or additions to the conclusions in this declaration should new information become available or to respond to any opinions and analyses proffered by Respondents. I am prepared to testify on the conclusions in this declaration, as well as to provide any additional relevant background. I reserve the right to prepare additional exhibits to support any testimony.

I, Nori Mehta, declare under penalty of perjury under the law of the Commonwealth of Pennsylvania, 42 Pa. C.S.A. § 6206, that the above statement is true and correct.

Signed on the 9th day of December 2021 in Boston, MA .

Nori Mehta

EXHIBIT 1: Appendix A

Curriculum Vitae
Nori Mehta

Direct: 617 425 8201
Fax: 617 425 8001
nori.mehta@analysisgroup.com

111 Huntington Avenue
14th Floor
Boston, MA 02199

Ms. Mehta has experience conducting complex economic analyses related to commercial litigation and health economics and outcomes research. She has analyzed a range of issues, including those related to delays in emergency housing provisions, alleged kickbacks, off-label marketing, market definition and antitrust, trade flows, and but-for pricing and sales. Ms. Mehta also has extensive experience analyzing large datasets, including government and private administrative claims records. Her litigation experience has involved economic research across a variety of industries, including pharmaceuticals, agriculture, technology, and financial services. In her health economics and outcomes research work, Ms. Mehta has conducted research on potentially avoidable hospitalizations in Alzheimer's patients, and designed algorithms for the execution of value-based contracts across multiple disease states and treatment areas, among other projects.

EDUCATION

2016	M.B.A. (Edward Tuck Scholar, with distinction), Tuck School of Business at Dartmouth College
2010	B.A. economics (*magna cum laude*, with honors), Kenyon College

PROFESSIONAL EXPERIENCE

2016–Present	Analysis Group, Inc. *Manager (2019–Present)* *Associate (2016–2018)*
2015	Medtronic PLC *M.B.A. Summer Associate*
2010–2014	Analysis Group, Inc. *Senior Analyst (2012–2014)* *Analyst (2010–2012)*

SELECTED CONSULTING EXPERIENCE

Health Care Litigation

- **Antitrust litigation related to pharmaceuticals and generic entry**
  Supported expert testimony on behalf of pharmaceutical manufacturers in multiple cases related to claims that the market entry of generic versions of brand-name drugs was improperly delayed. Addressed questions of class certification, market definition, liability, and damages.

- **Government investigations and litigation concerning prescription drug marketing practices**
  Evaluated alleged conduct, quantified relevant sales, and assessed the causal connection, if any, between the allegations in the case and at-issue sales using economic, biostatistical, and epidemiological approaches. Supported expert testimony related to these issues.

- **False advertising**
  Supported expert testimony on behalf of manufacturers in cases related to claims that the manufacturers misleadingly withheld information or provided inaccurate information related to their products (e.g., withheld safety information or provided false information on product manufacturing practices). Addressed questions of class certification, causation, and damages.

Other Litigation

- **Commercial dispute in the agriculture industry**
  Supported an expert in the assessment of class certification and liability issues and in the analysis of damages associated with genetically modified corn found in US corn exports to China.

- **Labor dispute market definition in the entertainment industry**
  Supported an expert in the assessment of the screenwriter labor market by reviewing employee contracts, job requirements, and wage comparisons.

- **Class action related to shelter placement**
  Supported plaintiffs in calculating key metrics related to delays in the provision of emergency housing for at-risk families with children.

Health Economics and Outcomes Research

- **Pharmaceutical outcomes-based contract development**
  On behalf of a pharmaceutical manufacturer, evaluated potential outcomes-based contracting arrangements to allow the manufacturer to engage in risk sharing with clients and potentially capitalize on cost savings realized from its products.

- **Investigation of racial disparities in breast and cervical cancer patient outcomes**
  Conducted a targeted literature review and interviewed patient advocacy groups to determine disparities in breast and cervical cancer outcomes and the causes of these disparities for Black and Hispanic patients relative to white patients.

ARTICLES AND PUBLICATIONS

- Desai U, Kirson NY, Ye W, **Mehta NR**, Wen J, Andrews JS. Trends in health service use and potentially avoidable hospitalizations before Alzheimer's disease diagnosis: A matched, retrospective study of US Medicare beneficiaries. *Alzheimer's & Dementia: Diagnosis, Assessment & Disease Monitoring* 2019;11:125–135.

EXHIBIT 1: Appendix B

Analysis of Gagnon Hearings in Montgomery County, PA

January 1, 2019 - May 18, 2021

Category	Statistic
Percent Detained	
All defendants[1]	3,814
Detained defendants[2]	3,384 (88.7%)
Detained Defendant Counts [2]	
Detained defendants	3,384
Included with a contested Gagnon hearing	54 (1.6%)
Processed Correctly	
Defendants with a Gagnon I held prior to a Gagnon II	280 (8.3%)
Processed Incorrectly	
Defendants without a Gagnon I held prior to a Gagnon II	3,104 (91.7%)
Average Length of Incarceration for Detained Defendants (days) [2]	
Confinement Date to first scheduled Gagnon hearing	70
First scheduled Gagnon hearing to Sentence Date	18
Confinement Date to Sentence Date	88

Notes:

[1] There are 4,009 unique defendants in the data with a Gagnon event. This analysis is limited to defendants with at least one Gagnon proceeding and with the Sentencing Date for their most recent revocation between January 1, 2019 and May 18, 2021 (n=3,814).

[2] The confinement analysis also excludes 326 defendants, including those 1) with no listed Confinement Date, 2) with their Confinement Date and Final Disposition Date on the same date, 3) where their First Gagnon, Last Gagnon, and Final Disposition Date could not be attributed to a single docket number, 4) with a Sentencing Event between the Confinement Date and Final Disposition Date, and 5) with a Sentence Event (across all of the individual's dockets) in which the person was sentenced to "Confinement" or "IPP" within 7 days before the Confinement Date. Additionally, the confinement analysis excludes 104 defendants considered to be outliers due to having a confinement to sentence period of over one year (n=3,384).

Source: AOPC data (PA2639809_ACLU_Deliverable.xlsx).

EXHIBIT 2

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

EBONI EL, ANDREW HASKELL, SUNG JOO LEE, AKEEM WILLS, CHARLES GAMBER, DAVID KRAH, on behalf of themselves and all persons similarly situated,	:	No. 376 MD 2021
	:	Class Action
	:	Original Jurisdiction
Petitioners,	:	
v.	:	
38TH JUDICIAL DISTRICT, Hon. THOMAS M. DEL RICCI, President Judge (in his official capacity), MICHAEL GORDON, Chief Adult Probation and Parole Officer (in his official capacity), MICHAEL R. KEHS, Court Administrator (in his official capacity), and LORI SCHREIBER, Clerk of Courts (in her official capacity),	:	
Respondents.	:	

DECLARATION OF DEAN BEER IN SUPPORT OF PETITIONERS' APPLICATION FOR PRELIMINARY INJUNCTION

I, Dean Beer, hereby declare that the following is true and correct to the best of my knowledge and belief:

1. I am an attorney licensed in the Commonwealth of Pennsylvania and have been admitted to the Pennsylvania bar since 1982. I make this declaration based on personal knowledge.

2. I have practiced law in Pennsylvania since 1982 with the exception of a few years where I lived out of state. From 2013 until 2020, I served in the Montgomery County, Pennsylvania Office of the Public Defender (the "Public Defender's Office"). I was appointed Chief Public Defender in January 2016. In this position, I was responsible for overseeing the day-to-day operations of the office and direct supervision of over 60 employees including multiple trial units and an appellate unit. The office handled the majority of probation and parole revocation

proceedings in Montgomery County. I represented people charged with probation or parole violations in Montgomery County, and I supervised hundreds of probation or parole revocation cases each year I was the Chief Public Defender.

3. I was terminated from the Public Defender's Office in February 2020; I settled a lawsuit related to my termination in February 2021.

4. In my experience as a criminal defense lawyer, Montgomery County detains individuals charged with supervision violations, regardless of the nature or circumstances of the alleged violation. During my time in the Public Defender's Office, many of our clients were incarcerated for alleged technical violations of a condition of their supervision. These alleged technical violations did not involve new criminal charges, but instead included things such as failure to report to a Probation Officer, failure to notify Adult Probation and Parole of a change of address, "dirty" urine tests, and failure to complete a required program (e.g., for drug and alcohol treatment or mental health treatment). I do not recall a case in the years that I was in the Public Defender's Office where a client remained in the community for a supervision violation.

5. In my experience, Montgomery County does not conduct *Gagnon I* hearings before a judge or other appropriate neutral authority at or near the time of arrest. In my experience, Montgomery County schedules the *Gagnon I* hearing often months after an individual's arrest. In many cases, *Gagnon I* hearings never actually occur. In my seven years of practice in the Public Defender's Office, the office generally did not conduct separate *Gagnon I* hearings—meaning a *Gagnon I* hearing that occurs on a separate date from the *Gagnon II* hearing. I recall individuals received only one hearing in front of a judge that combined both proceedings. At that hearing, individuals would often agree to the probation officer's sentence recommendation. That was the quickest way to be released. I recall multiple examples where the probation officer's

recommended sentence was for a shorter period of incarceration than the length of time that the individual had already been detained while awaiting a hearing. In those cases, the violation hearing was set for a date *after* the recommended sentence. I don't recall a consistent or standard process for scheduling hearings on alleged supervision violations.

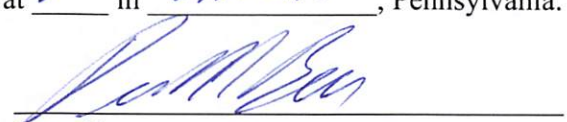
6. These practices further lengthen the period of time that individuals are held solely due to the probation or parole-related detainer.

7. During my tenure at the Public Defender's Office, I do not recall Montgomery County ever providing my clients facing revocation proceedings with any opportunity to challenge their detention and advocate for release before their incarceration. In fact, during my seven years working as a Public Defender in Montgomery County, I do not believe that any of my clients was given a separate *Gagnon* I hearing.

8. During my tenure at the Public Defender's Office, I saw numerous clients who were held on probation or parole detainers in Montgomery County stemming from separate arrests on other criminal charges, even though the judge in that separate criminal proceeding had or would have released the client on bail or non-monetary conditions.

I, Dean Beer, declare under penalty of perjury under the law of the Commonwealth of Pennsylvania, 42 Pa.C.S.A. § 6206, that the above statement is true and correct.

Signed on the 10th day of December, 2021 at 3pm in Philadelphia, Pennsylvania.



Dean Beer

EXHIBIT 3

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

EBONI EL, ANDREW HASKELL, SUNG JOO LEE, AKEEM WILLS, CHARLES GAMBER, DAVID KRAH on behalf of themselves and all persons similarly situated,	:	No. 376 MD 2021
	:	Class Action
	:	Original Jurisdiction
Petitioners,	:	
v.	:	
	:	
38TH JUDICIAL DISTRICT, Hon. THOMAS M. DEL RICCI, President Judge (in his official capacity), MICHAEL GORDON, Chief Adult Probation and Parole Officer (in his official capacity), MICHAEL R. KEHS, Court Administrator (in his official capacity), and LORI SCHREIBER, Clerk of Courts (in her official capacity),	:	
	:	
Respondents.	:	

DECLARATION OF DAVID MUHAMMAD IN SUPPORT OF PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION

I, David Muhammad, declare and state:

1. I have been retained by Wilmer Cutler Pickering Hale and Dorr LLP, American Civil Liberties Union, and the American Civil Liberties Union of Pennsylvania on behalf Eboni El, Andrew Haskell, Sung Joo Lee, Akeem Wills, Charles Gamber, and David Krah ("Petitioners"). I understand that Petitioners have filed a lawsuit against the 38th Judicial District, Thomas Del Ricci, Michael Gordon, Michael R. Kehs, and Lori Schreiber, which is pending in the Commonwealth Court of Pennsylvania, State of Pennsylvania, under Case No. 376 MD 2021.[1]

2. I have been asked to offer my opinion on the necessity of detaining individuals suspected of supervision violations pending a final revocation proceeding, harms from such incarceration, and steps other jurisdictions have taken to mitigate those harms.

[1] *See* Class Action Complaint in the matter *Eboni El, et al. v. 38th Judicial District, et al.* (376 MD 2021) ("Complaint").

II. QUALIFICATIONS

3. I am the Executive Director of the National Institute for Criminal Justice Reform (NICJR), a non-profit organization that provides technical assistance, training, and consultation to government agencies, community-based organizations, and philanthropies in the areas of criminal law reform, youth development, and violence prevention.

4. I am also a Senior Advisor to the Probation and Parole Reform Project at the Columbia University Justice Lab. Through this role, I am a co-leader of Executives Transforming Probation and Parole ("EXiT"), a coalition of more than 60 current and former probation and parole chiefs.[2]

5. I have more than two decades of experience working in criminal-legal systems, including probation and parole systems.

6. In 2010, I was appointed the Deputy Commissioner of the New York City Department of Probation, the second largest Probation Department in the United States.

7. In 2011, I was appointed the Chief Probation Officer of Alameda County in California, where I was responsible for overseeing 20,000 adults and children on probation, two juvenile facilities, a staff of 600, and a $90 million budget.

8. I served as the Federal Court appointed Monitor of the *Morales v. Findley* Settlement Agreement overseeing mandated reforms to the Illinois parole revocation process.[3]

9. Through my various roles, I have analyzed probation and parole revocation systems in jurisdictions across the country, including policies and practices to determine whether individuals should be jailed pending their revocation proceedings.

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[2] *See* https://www.exitprobationparole.org/membership.

[3] *See generally* Final Settlement Agreement, Jan. 13, 2017, *Morales v. Findley*, 13-cv-7572 (N.D. Ill.), ECF No. 133-1.

10. A copy of my curriculum vitae summarizing my professional experience and education is attached as **Exhibit A**. It includes a list of all publications I have authored in the last 10 years and cases in which I have provided expert testimony at trial or by deposition during the past four years.

III. ASSIGNMENT

11. I have been asked, based on my training, experience, research, and review of publicly available documents and the record in this case, to provide testimony on:

a. Whether individuals accused of supervision violations necessarily pose a flight risk or public safety risk.

b. What harms are attributable to incarcerating individuals accused of supervision violations who are not risks of flight or dangers to the community pending a final revocation hearing.

c. Whether and to what degree other states and the federal system provide mechanisms to avoid incarcerating individuals accused of supervision violations who are not risks of flight or dangers to the community pending a final revocation hearing.

12. I am receiving compensation of $300 per hour for services provided in this action. My compensation in this matter is not contingent upon the content of the opinions I form or the outcome of the case.

IV. SUMMARY OF CONCLUSIONS

13. My affirmative opinions, which will be subsequently explained in detail, are that:

a. The fact that probable cause exists to believe a person has committed a supervision violation does not, by itself, indicate that person is a risk of flight or danger to the community.

b. Incarcerating people accused of supervision violations who are not risks of flight or dangers to the community results in individual, family, and societal harms, including job loss, housing loss, loss of child custody, loss of mental health and addiction treatment, and increased recidivism.

c. Many other jurisdictions have mechanisms to minimize incarcerating individuals accused of supervision violations who are not risks of flight or dangers to the community pending a final revocation hearing.

14. My opinions, and the bases for my opinions, are presented in this declaration and the exhibits attached hereto. I hold all of the opinions provided in this declaration to a reasonable degree of professional certainty. My work on these matters is ongoing, and I may make any necessary revisions or additions to this declaration should new information become available or to respond to any additional opinions and analyses proffered by Respondents' experts. I am prepared to testify at trial on the topics provided in this declaration, as well as to provide any additional relevant background. I reserve the right to prepare additional exhibits to support any testimony at trial.

V. MATERIALS REVIEWED AND METHODOLOGY

15. Exhibit B lists the materials that I reviewed when preparing this declaration. In addition to those materials, I relied on my more than two decades of work in corrections, a review of practices and outcomes in several states related to parole and probation revocation proceedings, and the judgment and experience developed in my career directing, implementing, and evaluating parole and probation systems across the country. My assessment was conducted pursuant to evidence-based methodologies that are generally accepted in the criminal justice field.

VI. OPINIONS

A. The fact that probable cause exists to believe a person has committed a supervision violation does not, by itself, indicate that person is a risk of flight or danger to the community.

16. In 2019, 4.4 million adults in the US, or one in every 59, were under supervision.[4] In Pennsylvania, 278,000 adults, or one in every 37, were under supervision.[5] Nearly half of state prison admissions in the United States arise from supervision violations.[6] In 2017, 54% of Pennsylvania prison admissions stemmed from probation and parole violations.[7]

17. In Pennsylvania and elsewhere across the state and federal judicial systems, people may be held in jail for two types of supervision violations pending parole or probation revocation proceedings. First, individuals may be held for an alleged new "criminal violation"; and second, individuals may be held for an alleged non-criminal, or "technical violation." Both criminal and technical violations range from jurisdiction to jurisdiction, but based on my experience and according to research, people who have committed either type of violation are not necessarily threats to the community or risks of flight, nor is incarceration ultimately appropriate for every supervision violation no matter how minor.[8]

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[4] Barbara Oudekerk & Danielle Kaeble, *Probation and Parole in the United States, 2019*, BUREAU OF JUSTICE STATISTICS, at 1 (July 2021), https://bjs.ojp.gov/content/pub/pdf/ppus19.pdf.

[5] *Id.* at 21.

[6] Council of State Governments Justice Center, *Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets* (June 18, 2019), https://csgjusticecenter.org/publications/confined-costly.

[7] *Id.*

[8] *See, e.g.*, Fiona Doherty, *Obey All Laws and Be Good*, 104 Georgetown L. J. 291, 291 (2016), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=6155&context=fss_papers (arguing that "the standard conditions of probation, which make a wide variety of noncriminal conduct punishable with criminal sanctions, construct a definition of recidivism that contributes to overcriminalization"); Human Rights Watch & ACLU, *Revoked: How Probation & Parole Feed Mass Incarceration in the United States* at 92–94, 101 (July 2020), https://www.aclu.org/report/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states.("[E]ven if there is probable cause to believe that an individual violated their supervision by using drugs or missing a meeting, evidence might show they pose no demonstrable risk of committing harm or fleeing the jurisdiction, or that other factors, such as health issues that would be aggravated by incarceration or childcare obligations, counsel against incarceration.").

18. As research has documented, technical violations do not necessarily indicate a likelihood of future *criminal* conduct. For instance, a 2014 Washington State study shows that, contrary to "[a] long-held assumption in corrections," technical violations "are *not* proxies of new crime" for people on supervision.[9] Jurisdictions across the United States, including Montgomery County, nevertheless impose a wide range of technical supervision conditions.[10] Many of these conditions are not inherently related to public safety or risk of flight.

19. In Montgomery County, people on probation or parole must comply with 12 standard rules and several other discretionary "special conditions."[11] Standard conditions include failure to notify a probation officer within 72 hours of a change in employment; travel beyond counties adjoining Montgomery County without 72 hours' notice and prior approval of a probation officer; failure to pay fines or costs; failure to notify a probation officer of medical treatment or psychological counseling; or failure to notify a probation officer prior to using prescription or over-the-counter medication.[12] Such violations do not necessarily raise safety or flight concerns.

20. As with technical violations, individuals who are accused of a new crime that violates the terms of their supervision are not necessarily dangerous or flight risks. Often, for example, individuals under supervision are released on bail for the alleged new criminal conduct (i.e., after a determination that they are not a flight or public safety risk). The fact that a judge has already determined that someone poses no flight risk or public safety risk in that separate criminal

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[9] Christopher M. Campbell, *It's Not Technically a Crime: Investigating the Relationship Between Technical Violations and New Crime*, 27 CRIM. JUST. POL'Y REV. 643 (2014), https://journals.sagepub.com/doi/10.1177/0887403414553098.

[10] *See* Human Rights Watch & ACLU, *Revoked*, *supra* note 8 at 41–52.

[11] Montgomery County, *Rules and Conditions Governing Probation/Parole and Intermediate Punishment (IP)*, https://www.montcopa.org/DocumentCenter/View/721/Rules-and-Conditions-for-General-Supervision?bidId= (last accessed Dec. 1, 2021).

[12] *Id*.

proceeding strongly suggests that person is not a risk of flight or danger to the community during the pendency of revocation proceedings.

21. While working in supervision departments in New York, Washington, D.C., and California, I regularly encountered individuals accused of technical supervision violations and low-level new crimes. In my judgment, many such individuals did not present a risk of willfully fleeing the jurisdiction or of harming another person. In each jurisdiction I served as a community corrections administrator, I helped implement measures to reduce the number of technical violations filed by probation officers. Those measures generally helped those on supervision reintegrate into their communities and did not negatively impact public safety. As discussed further below, other jurisdictions similarly provide an opportunity for release pending prompt revocation proceedings. Based on my experience and conversations with those on supervision in those systems, releasing such individuals has not resulted in increased crime or willful flight from revocation proceedings.

B. Incarcerating people accused of supervision violations who are not risks of flight or dangers to the community results in individual, family, and societal harms, including job loss, housing loss, loss of child custody, loss of mental health and addiction treatment, and increased recidivism.

22. Social science studies have identified harm to individuals, their families, and their communities from incarceration. The harms include unemployment; housing instability; mental health challenges; loss of child custody; disrupted access to health care and public benefits; and

exposure to violence, abuse, and illness in jail.[13] Incarceration has also been associated with increased recidivism[14] and has not been demonstrated to reduce drug abuse.[15] Based on my experience and according to research, noncustodial interventions for supervision violations reduce these harms.[16]

23. Indeed, in my experience and according to research, incarceration is no more effective than noncustodial sanctions at reducing recidivism and can even deepen illegal involvement for some people, inducing the very negative behaviors incarceration is intended to

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[13] *See, e.g.*, Moschion & Johnson, *Homelessness and Incarceration: A Reciprocal Relationship?*, *35* J. QUANT. CRIMINOL. 855 (2019), https://doi.org/10.1007/s10940-019-09407-y (discussing link between homelessness and incarceration); KAZEMIAN & WALKER, *Effects of Incarceration*, THE OXFORD HANDBOOK OF DEVELOPMENTAL AND LIFE-COURSE CRIMINOLOGY, at 576 (2018), https://doi.org/10.1093/oxfordhb/9780190201371.013.28 (discussing mental health impacts of incarceration); Melissa Li, *From Prisons to Communities: Confronting Re-entry Challenges and Social Inequality*, AMERICAN PSYCHOLOGICAL ASSOCIATION (March 2018), https://www.apa.org/pi/ses/resources/indicator/2018/03/prisons-to-communities (discussing re-entry barriers for people returning home from incarceration); Human Rights Watch & ACLU, *Revoked*, *supra* note 8 at 103 n.363–64 (collecting studies and describing harms of pre-revocation confinement); Chrystal Garcia, *Psychological Effects of Long Term Incarceration*, NATIONAL INCARCERATION ASSOCIATION (Feb. 15, 2021), https://joinnia.com/psychological-effects-of-long-term-incarceration/ (explaining increased psychological harms of long-term confinement).

[14] William D. Bales & Alex R. Piquero, *Assessing the Impact of Imprisonment on Recidivism*, 8 J. EXP CRIMINOL. 71 (2012), https://doi.org/10.1007/s11292-011-9139-3.

[15] *See* The Pew Charitable Trusts, *More Imprisonment Does Not Reduce State Drug Problems: Data Show No Relationship Between Prison Terms and Drug Misuse* (March 8, 2018), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2018/03/more-imprisonment-does-not-reduce-state-drug-problems; Alexi Jones, *The 'Services' Offered by Jails Don't Make Them Safe Places for Vulnerable People*, PRISON POLICY INITIATIVE (March 19, 2020), https://www.prisonpolicy.org/blog/2020/03/19/covid19-jailservices/; Human Rights Watch & ACLU, *Revoked*, *supra* note 8 at 175-76 (discussing harms of incarcerating people for drug use).

[16] *See, e.g.,* The Pew Charitable Trusts, *Reducing Incarceration for Technical Violations in Louisiana* (Nov. 6, 2014), https://www.pewtrusts.org/en/research-and-analysis/issue-briefs/2014/11/reducing-incarceration-for-technical-violations-in-louisiana (finding that alternatives to incarceration implemented in Louisiana effectively reduced the percentage of parolees and probationers who returned to custody for violating the terms of their community supervision, without having an adverse impact on public safety); Alex Roth, et al., *The Perils of Probation: How Supervision Contributes to Jail Populations*, VERA INSTITUTE OF JUSTICE, at 29 (Oct. 2021), https://www.vera.org/downloads/publications/the-perils-of-probation.pdf (recommending community-based alternatives to incarceration for violations of supervision).

punish.[17] Meta-analyses of various studies have found that incarceration has, at best, no impact on reducing re-arrests as compared with community-based alternatives.[18] Another study focusing specifically on supervision violations showed that punishing such violations with jail stays did not improve probation and parole outcomes and offered no benefits over community-based sanctions.[19]

24. Even incarceration for short periods awaiting trial or a revocation hearing can cause the detained person to lose their job, custody of their children, and housing, with worse consequences for those people who are incarcerated for longer periods.[20]

C. Many other jurisdictions have mechanisms to minimize incarcerating individuals accused of supervision violations who are not risks of flight or dangers to the community pending a final revocation hearing.

25. Many jurisdictions provide a detention assessment prior to the final hearing and sentencing for supervision violations. In my experience, parole and probation reforms can be relied upon interchangeably as exemplars for how jurisdictions treat supervision violations. These jurisdictions' experience and related studies show that implementing administrative sanctions as an alternative to incarceration can reduce the percentage of parolees and probationers who return

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[17] *See* Damon M. Petrich, et al., *Custodial Sanctions and Reoffending: A Meta-Analytic Review*, 50 CRIME & JUST. (2021), https://www.journals.uchicago.edu/doi/pdf/10.1086/715100 (finding that "custodial sanctions have no effect on reoffending or slightly increase it when compared with the effects of noncustodial sanctions such as probation"); Martin Killias & Patrice Villetaz, *Effects of Custodial versus Non-Custodial Sanctions on Re-Offending*, THE CAMPBELL COLLABORATION (2015), https://onlinelibrary.wiley.com/doi/abs/10.4073/csr.2015.1 (finding no significant difference in terms of re-offending between custodial and non-custodial sanctions).

[18] *Id.*

[19] E.J. Wodahl et al., *Responding to Probation and Parole Violations: Are Jail Sanctions More Effective Than Community-Based Graduated Sanctions?*, *43* J. CRIM. JUST. 242 (2015), https://doi.org/10.1016/j.jcrimjus.2015.04.010

[20] Alexander Holsinger, *Researching Bond Supervision Survey Data: The Effects of Pretrial Detention on Self-Reported Outcomes*, Crime and Justice Institute, June 2016, http://www.crj.org/assets/2017/07/13_bond_supervision_report_R3.pdf.

to custody for alleged violations of the terms of their community supervision, without having an adverse impact on public safety.[21]

26. More than twenty states have adopted "administrative response grids" for technical probation and parole violations.[22] "These grids aim to outline proportionate sanctions, other than incarceration, for responding to noncompliant behavior and sometimes list incentives as well."[23] The impact of this approach has been documented in South Carolina for both probation and parole violations:

> In South Carolina, the 2010 Sentencing Reform Act (SB 1154) included enhancements to the use of administrative sanctions—such as verbal or written reprimands—for technical violations as an alternative to incarceration. An evaluation of this change found several positive outcomes, including increased use of administrative sanctions, a 46 percent decline in the number of revocations, and a decrease in the proportion of people incarcerated during the first year of supervision, from 10 percent for the fiscal year 2010 cohort to less than 5 percent among the fiscal 2014 cohort. Even after controlling for demographic and case-specific characteristics, people who began their supervision after implementation of SB 1154 were 33 percent less likely than previous cohorts to be incarcerated after one year.[24]

27. Allegheny County, Pennsylvania, requires that "all efforts to safely maintain the offender in the community must have been exhausted before the offender is detained for . . . 'lower-

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[21] *See, e.g.*, The Pew Charitable Trusts, *Reducing Incarceration for Technical Violations in Louisiana*, *supra* note 15.

[22] The Pew Charitable Trusts, *Policy Reforms Can Strengthen Community Supervision: A Framework to Improve Probation and Parole*, at 26 n.94 (Apr. 23, 2020), https://www.pewtrusts.org/-/media/assets/2020/04/policyreform_communitysupervision_report_final.pdf ("Alabama, Alaska, Arkansas, Delaware, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Montana, Nebraska, Nevada, North Carolina, North Dakota, Pennsylvania, South Carolina, South Dakota, Texas, Utah, and West Virginia."). Idaho and Oklahoma are also moving in this direction. *Id.* at 26.

[23] *Id*.

[24] *Id*.

level' technical violations and arrests for non-violent offenses."[25] Adams County, Pennsylvania, authorizes bail to be set at a probable cause hearing pending a final revocation hearing.[26]

28. Under the federal supervision system, once a warrant or summons is issued, the individual facing revocation is either taken into custody or summoned to appear at a hearing. If detained, the individual "must be taken without unnecessary delay before a magistrate judge" for an initial appearance.[27] The magistrate judge **"**may release or detain the person" pending revocation proceedings.[28]

29. In Georgia, some people on probation accused of rule violations and non-violent misdemeanor offenses go through an alternative process called "Probation Options Management."[29] "These individuals are held in jail for a shorter period of time than those facing revocation—on average, eight days—before administrative sanctions are imposed."[30]

30. New York requires authorities to hold a recognizance hearing within 24 hours of arrest on a parole violation where courts must evaluate the individual's employment, family, community ties, history of timely reporting, and other indicators of stability. Those accused of parole violations can be detained pending a revocation hearing "only upon a finding" that they "currently present[] a substantial risk of willfully failing to appear" and that "no non-monetary

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[25] The Fifth Judicial District of Pennsylvania Allegheny County Adult, *Probation Policy Bulletin* 3 (Nov. 20, 2019).

[26] *See* Adams C. R. Crim. P. 708.1.

[27] Fed. R. Crim. P. 32.1(a)(1).

[28] Fed. R. Crim. P. 32.1(a)(6).

[29] Robina Institute of Criminal Law and Criminal Justice, *Use of Structured Sanctions and Incentives in Probation and Parole Supervision* (July 2020), https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/sanctions_and_incentives.pdf.

[30] Human Rights Watch & ACLU, *Revoked*, *supra* note 8 at 91.

condition or combination or conditions in the community will reasonably assure the releasee's appearance."[31]

31. In California, alleged parole violators "can be detained in a county jail on a parole hold if a parole agent believes the person is a danger to anyone or their property or poses a high risk of absconding. At any time while a parole hold or revocation petition is pending, the court can release the person from custody if the court deems it appropriate to do so (unless the person is serving a period of 'flash [or very short-term] incarceration')."[32] At the initial probable cause hearing, judges allow alleged parole violators to argue for their release pending the revocation hearing. According to a supervisor within the Division of Adult Parole Operations I interviewed for this report, judges often release alleged parole violators on their own recognizance at the probable cause hearing.

32. In the State of Illinois, the Illinois Prisoner Review Board (PRB) imposes release conditions for offenders exiting correctional facilities and conducts hearings to determine whether parolees have violated conditions of parole.[33] During preliminary hearings, the hearing officer is required to determine whether probable cause exists.[34] If the hearing officer finds probable cause, the parolee has the right to request release from custody pending a final revocation hearing and to present evidence in support of this request.[35]

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[31] 2021 NY S.B. 1144 § 4 (iv)–(vii).

[32] Heather MacKay & The Prison Law Office, *The California Prison and Parole Law Handbook*, at 383 (2019), https://prisonlaw.com/wp-content/uploads/2019/01/Handbook-Chapter-11.pdf (emphasis added) (citations omitted); see also Cal. Penal Code §§ 1203.2(a); 1203.25(a) (A.B. 1228); 15 Cal. Code Regs. § 3751.

[33] *Prisoner Review Board*, ILLINOIS DEPARTMENT OF CORRECTIONS, https://www2.illinois.gov/idoc/parole/Pages/PrisonerReviewBoard.aspx.

[34] Final Settlement Agreement, *Morales v. Findley*, *supra* note 2 at 5 ¶ (c); *see also* Ill. Admin. Code tit. 20 § 1610.140.

[35] *Id*. at 6 ¶ (m); *see also* Ill. Admin. Code tit. 20 § 1610.140.

33. Minnesota categorizes violations in four distinct severity levels; absent aggravating factors, the presumption in state guidelines is that parolees with Level I or II (meaning lower severity) violations will have their parole conditions restructured without any revocation of supervision.[36] This approach recognizes that there is no public safety interest implicated by a host of primarily technical or low-level criminal violations and thus the harmful and expensive effects of incarceration are unwarranted.

34. "Following reforms in Pennsylvania in 2012, some people charged with state parole rule violations, though not new offenses, are now detained in "Community Correction Centers"—akin to halfway houses, which allow people to work during the day and are generally closer to their communities—instead of jails."[37]

35. Numerous jurisdictions have also enacted time limits for revocation hearings—particularly where individuals are incarcerated pending those proceedings. Despite the high rate of individuals under supervision, the federal system and other state systems both have mechanisms for holding a preliminary hearing within a reasonable time.[38]

VII. DEMONSTRATIVE EXHIBITS

36. In the event that I am asked to provide testimony to the Court, I may use exhibits, including demonstrative exhibits that I have not yet created, to summarize and illustrate my testimony.

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[36] Minnesota Department of Corrections, *Review of Guidelines for Revocation of Parole and Supervised Release: 2009 Report to the Minnesota Legislature*, at 8 (Mar. 2009), https://www.lrl.mn.gov/docs/2009/mandated/090347.pdf.

[37] Human Rights Watch & ACLU, *Revoked*, *supra* note 8 at 94.

[38] *See, e.g.,* 49 M.S.A. Rules Crim. Proc., Rule 27.04(4)(b); 2021 NY S.B. 1144 § 5(B); Fed. R. Criminal Proc. 32.1(a), (b).

I, David Muhammad, declare under penalty of perjury under the law of the Commonwealth of Pennsylvania, 42 Pa.C.S.A. § 6206, that the above statement is true and correct.

Signed on the 13th day of December 2021 at 7pm.

David Muhammad

EXHIBIT 4

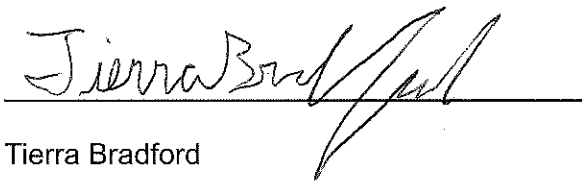
Tierra Bradford Declaration

I, Tierra Bradford, hereby declare that the following is true and correct to the best of my knowledge and belief:

1. I am over the age of eighteen and otherwise competent to testify.
2. I have been employed since December 2020 by the American Civil Liberties Union of Pennsylvania (ACLU of PA) as a Criminal Justice Policy Advocate.
3. On September 30, 2021, I met with the Director and Deputy Director of Allegheny County's Probation Department. At this meeting, I requested the agency's current policy for how to handle probation detainers.
4. On October 1, 2021, the Deputy Director of Allegheny County Probation emailed me the policy attached to this declaration with a representation that this is Allegheny County's current Probation Detainer Policy.

I, Tierra Bradford, declare under penalty of perjury, pursuant to 42 Pa.C.S.A. § 6206, that the above statement is true and correct.

Signed on the 9th day of December, 2021 at 11:20pm (time) in Pittsburgh, Pennsylvania.



Tierra Bradford

THE FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA
ALLEGHENY COUNTY ADULT PROBATION
POLICY BULLETIN

APPROVED BY: Administrative Judge Jill E. Rangos Adult Probation Director Frank J. Scherer	EFFECTIVE DATE November 20, 2019

TITLE: DETAINER POLICY

POLICY: Allegheny County Adult Probation is committed to consistent practices for lodging detainers against probation offenders and conducting ongoing casework with offenders once they have been detained.

PROCEDURE: Probation officers will use the criteria outlined below to determine if an offender will be lodged in the jail on a detainer.

- The offender shall be detained if he or she has a zero tolerance or mandatory detention court condition that has been violated, or the offender has a new charge that represents a serious threat to public safety.
- If the offender has neither, all efforts to safely maintain the offender in the community must have been exhausted before the offender is detained for these "lower-level" technical violations and arrests for non-violent offenses. These efforts include, but are not limited to, referrals to CRC or community services, inpatient or outpatient treatment services, or a revised supervision plan. The probation officer should also consider the strengths of the offender, including employment, caregiving activities, or treatment involvement, and the impact that detention will have on these positive factors.
    - When the primary concern is substance abuse that poses an imminent danger to the offender, the probation officer should encourage the use of voluntary treatment options through Renewal, The Program Center, Cove Forge, Pyramid, etc.
    - When the primary concern is a perceived mental health crisis, the probation officer should utilize community resources such as Resolve and the Mercy CRC, except when there are officer, offender, or public safety concerns
- If the offender cannot be maintained in the community, the probation officer will consider if release can be recommended at the Gagnon 1 hearing.
    - Electronic monitoring may be recommended if appropriate. Officers must obtain pertinent information as outlined in the EM pre-screening tool prior to recommending EM.

In the event that the offender must be detained, probation officers will follow the procedures outlined below.

- A notice of the detainer is to be sent to the supervising judge within 24 hours of detention via inter-office mail. A notice should also be sent to the offender, the envelope must include his/her DOC number. A copy of the detainer is also to be mailed to the Department of Court Records for scanning.
- Upon detention, the probation officer will obtain pertinent information to formulate release planning where appropriate (addresses, Court ordered conditions, program referrals, officer expectations, detention alternatives (ie. Electronic monitoring), employment verification, treatment needs, etc). Program referrals should be discussed and made at this stage to include referrals to specialty Courts.
- Examples of accomplishing this task could be:
    - Collateral/family contacts
    - Email or contact with ACJ caseworkers/program managers
    - Field visits to the Allegheny County Jail and Alternative Housing
    - Videoconference interviews with offenders set up via Allegheny County Jail procedure
    - This information and proposed plan should be outlined with all parties at the Gagnon 1 hearing.
- Follow up on the proposed plan and detention status should occur monthly thereafter with the offender, caseworker, program manager, family, etc., to review the offender's status when appropriate. Officers should use the options outline above for offender contacts and updates.
- The probation officer will review his or her detainer list every two weeks and include a follow up note about any pending release options or referrals. The note should also include detailed progress (or lack thereof).
    - Supervisory case reviews should include identification of possible detainer lifts that incorporate and reinforce criteria set forth in this policy.
- If an offender was brought to jail on a warrant for a missed Gagnon 1 hearing or with non-violent charges, a Gagnon 1 hearing should be held and the offender should be released back into the community with appropriate case planning as established upon detention.
- If an offender was brought to jail on a warrant for a missed Gagnon 2 hearing, attempts should be made upon detention to assess his or her status and potential for release if a viable address is available and rescheduling of the hearing date.
- If charges are disposed without conviction or reduced to an offense that would not have led to detention, the probation officer will request to lift the detainer. The detainer lift request will include a release plan that was formulated by the probation officer. Technical violations, if cited, may be address at a Gagnon 2 hearing from the community if necessary. Supervisory approval is necessary if the probation officer believes that the offender must remain detained.
- If the offender is convicted of lesser charges at their trial/plea, their detainer may be lifted pending a convicted violation hearing before the Court. The detainer lift request will include a release plan that was formulated by the probation officer. Supervisory approval is necessary if the probation officer believes that the offender must remain detained.

- If the offender completes a program through alternative housing or has a JRS plan completed, the probation officer may request to lift the detainer. Supervisory approval is necessary if the probation officer believes that the offender must remain detained.
    - Officers will request lifts for recommendations made by the hearing officer at Gagnon 1 hearings when the release requirements are in place or completed.
- If the offender is in an alternative housing program that does not have a specific completion date, the probation officer may assess progress made and request a detainer lift, as appropriate, when goals, such as obtaining and maintaining employment, have been completed. This also applies to offenders completing programming in the Allegheny County Jail.
- If the probation officer wants to request a detainer lift, but an offender has a hold with another county, the probation officer should contact the other county or counties to see if release can be coordinated (ex. Diversion) when appropriate.

❖ Case by case exceptions may be made with consideration for public safety concerns that would not warrant release in the above captioned policies.
❖ Detention location should be updated in the detainer note/screen in a timely manner.

PROCEDURE:

Procedure for lifting detainers.

- All detainer lifts will be processed via email by the Court Liaison Unit. Emails should be sent to all CLU officers, the immediate supervisor, CLU supervisor, and John Mannion.
- When sending the request, officers will include the following information:
    - Offender's name
    - Allegheny County Jail DOC number (if offender is in another county or state facility, please include the facility name, proper identifying information, and fax number)
    - Case number(s) and corresponding OTN(s)
    - Supervising Judge
    - Reason for detainer lift and pertinent information explaining the request
- Requests must be sent to the Court Liaison Unit by 3pm for same day processing
    - CLU will process requests within the same business day except when received after 3pm
    - CLU will respond to all parties included in the email request to serve as notification that the lift has been processed.
    - If a detainer is not lifted within 48 hours of request, the officer should email the request to all parties to follow up.
        - If the detainer is still not lifted, the immediate supervisor will contact the CLU supervisor to investigate the matter.

WORK PROCESS FOR INMATE CONTACTS BY PROBATION OFFICERS

In Person Visits to ACJ

Face to face interviews with ACJ inmates may be conducted by Allegheny County probation and parole officers during their detention

- Officers should use the main entrance on Second Avenue for entry to the jail.
- Officers should bring as few items as possible and bring a quarter for necessary items to be stored in a locker in the foyer. Jackets, outerwear, and sweatshirts must be stowed in a locker, along with wallets, purses, and keys. Officers will be required to walk through the metal detector and have their items viewed through the x-ray machine.
- A notepad, pen, and pertinent paperwork for the interview are permitted. Paperclips are prohibited
- Officers should use their Allegheny County identification for presentation at the visitor desk along with the inmate's full name and DOC number.

  Prohibited Items:
  - Chewing gum
  - Technological devices, including cellular phones and smart watches
  - Weapons

  Dress Code Provisions:
  - No open toed shoes
  - No sleeveless or off the shoulder tops
  - No formfitting or sheer clothing
  - No solid red or orange attire
  - No scarves
  - No denim
  - No horizontal stripes
  - No floor length skirts or dresses

Scheduling a Visit

- When possible, officers should schedule visits ahead of time, even a few hours is helpful, but not necessary. Emails requesting visits should be sent to Deputy Warden Beasom at Jason.Beasom@alleghenycounty.us and Deputy Warden Zetwo at David.Zetwo@alleghenycounty.us

*Any issues encountered regarding jail visits should be proceeded through the chain of command. Director Scherer or Deputy Pelton will contact jail administration to resolve any issues.

Videoconference Interviews with ACJ Inmates

Videoconferences with ACJ inmates are available to all Allegheny County probation and parole officers to conduct interviews with their offenders during their detention.

- Video interviews will be scheduled between the hours of 8:15 am and 10:45 am and 12:30 pm and 2:45 pm.
    - No interviews will be scheduled during count time, 10:45am – 12:30pm
- All video interview requests should be sent via email to the following ACJ staff at least 24 hours in advance of the desired videoconference date:

    Joseph.Scassera@alleghenycounty.us
    William.Mistick@alleghenycounty.us
    Franklin.Seymour@alleghenycounty.us
    David.Weber@alleghenycounty.us
    Thomas.Boozel@alleghenycounty.us
    Matthew.Olean@alleghenycounty.us

- All video requests shall include:
    - Inmate(s) name
    - Inmate(s) DOC number
    - Inmate (s) date of birth
    - Approximate time required for the interview
    - Date and time requested for interview
    - Video conference location

ACJ Caseworker Correspondence With Inmates

Allegheny County Probation and Parole officers may contact Allegheny County Jail caseworkers to obtain basic information to assist with an offender's case management during detention.

- Information requested from caseworkers should be limited to basic inmate information pertinent to release planning and case planning
    - Release address
    - Collateral contact information (ie. name, relationship, phone number)
    - Jail based program enrollment/completion
        - Officers may ask the caseworker to schedule the inmate for a free phone call via the "blue phones" to obtain and relay information.
- The preferred way of contact for caseworkers is email
    - Refer to caseworker contact list and use the format of firstname.lastname@alleghenycounty.us
    - Morning is the best time to contact the caseworkers
    - Please allow 48 hours for a response from the caseworker before a follow-up email is sent

Any issues experienced with caseworker communication should be sent to Cindy McSwiggen, caseworker supervisor at Cynthia.mcswiggen@alleghenycounty.us