UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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

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

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PRELIMINARY STATEMENT

The defendants' submissions highlight the urgent need for this Court to act and reveal the narrow legal dispute between the parties. Starting with the law, the defendants make no effort to argue their mandatory-detention regime comports with *Mathews v. Eldridge*; rather, they rely entirely on the proposition that the Supreme Court's earlier decision in *Morrissey v. Brewer* bars this Court from assessing the due process implications of mandatory detention under *Mathews*. This position simply misreads *Morrissey*, as the Seventh Circuit explained in the one Court of Appeals case that squarely addresses the issues before this Court. As for the need for immediate relief, while the defendants have released several hundred class members following a review of their cases, it is uncontested that hundreds more remain in city jails facing the risk of death from COVID-19 without having had their cases reviewed at all. In addition, hundreds more remain in jail and in peril following a constitutionally defective review process in which they had no notice of the review nor any opportunity to be heard.

For decades, New York's parole system has avoided accountability for the failure of its mandatory-detention scheme to provide the basic elements of due process required by the Supreme Court. As a result, thousands of people every year are incarcerated in New York's jails for mere technical violations or on minor charges for which a criminal court judge would have them released pending trial. The need to address this long-standing constitutional problem would be urgent at any time. Today, in the midst of the COVID-19 pandemic, it is a matter of life and death.

ARGUMENT

I. PLAINTIFFS ARE SUBSTANTIALLY LIKELY TO SUCCEED ON THEIR DUE PROCESS CHALLENGE.

A. Defendants' Mandatory Detention Scheme Violates Due Process.

Relying on *Morrissey v. Brewer, Mathews v. Eldridge*, and other supporting cases in their initial papers, the plaintiffs demonstrated why they are substantially likely to succeed on the merits of their due process challenge to the mandatory detention of people merely accused of parole violations. *See* Pls.' Mem. at 11-23. In response, the defendants disregard *Mathews*, issued shortly after *Morrissey*, misconstrue *Faheem-El*, and rely on an inapposite Second Circuit case.

First, *Morrissey* does not foreclose the plaintiffs' argument that additional process is due beyond the preliminary and final revocation hearings to prevent the inappropriate detention of people subject to the defendants' mandatory detention scheme.[1] Defs.' Mem. at 16-17. The Supreme Court's statement that probable cause is "sufficient to warrant the parolee's continued detention and return to the state correctional institution pending the final decision," *Morrissey v. Brewer*, 408 U.S. 471, 487 (1972), must be read to mean that a probable-cause finding is a necessary prerequisite to detention. That is, without probable cause, detention is not warranted. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 114 (1975) (using similar language that probable cause is a "prerequisite to extended restraint of liberty."). In a different context, the Supreme Court made clear that probable cause, by itself, is insufficient to justify detention until a hearing on the

[1] Defendants also cite *Calhoun v. New York State Div'n of Parole Officers*, 999 F.2d 647, 652 (2d Cir. 1993), which simply re-states the informal hearings that parolees are entitled to under *Morrissey* and that New York law affords these hearings as required. In addition, the defendants cite to *David v. Rodriguez*, No. 88 Civ. 2115, 1989 WL 105804, *4 (S.D.N.Y. Sept. 5, 1989), an unpublished opinion involving a pro se plaintiff who challenged his mandatory detention. The Court noted the lack of "any support" for the pro se plaintiff's arguments, that the plaintiff "merely urges" relief, and that the plaintiff "entirely ignored" procedural rules required in the case. *Id.*

merits. *United States v. Salerno*, 481 U.S. 739, 750 (1987) (holding that probable cause "is not enough" to justify pretrial detention until trial, and approving the Bail Reform Act because it required the government further justify detention by convincing a neutral decision-maker that "no conditions of release can reasonably assure the safety of the community or any person.").

The Supreme Court in *Morrissey* simply did not address the issue of mandatory detention pending a parole-revocation hearing; rather it addressed the complete lack of *any* process in Iowa's parole-revocation scheme and held that due process required a preliminary probable cause hearing and a final revocation hearing. *See* 408 U.S. at 484. In fact, the Court specifically avoided addressing every due process issue in the parole revocation process. *See* 408 U.S. at 489 (refraining from deciding whether a parolee is entitled to appointed counsel if indigent). Defendants make an unwarranted logical leap to argue that *Morrissey* forecloses the plaintiffs' challenge to the defendants' mandatory detention scheme.

The Seventh Circuit is the only circuit court to have addressed a similar challenge of a state's mandatory detention scheme under which "[a]ll parolees, regardless of the seriousness of the prior conviction or the alleged parole violation, are detained" prior to a hearing on the merits. *Faheem-El v. Klincar*, 841 F.2d 712, 725 (7th Cir. 1988) (en banc). The en banc court first looked to *Morrissey* for guidance and found that it "presumed a system in which [a] probable cause determination would not *necessarily* result in incarceration pending the final revocation hearing." *Id.* at 724, n. 16 (emphasis added). Because *Morrissey* did not foreclose the plaintiffs' due process challenge of Illinois' mandatory detention law, the court then applied *Mathews v. Eldridge* to determine what, if any, additional process was due. *Id.* at 725. The en banc court ultimately remanded for the district court to weigh the third factor. *Id.* at 726-27. But in the course of applying *Mathews*, the Seventh Circuit made a number of conclusions that should

guide this Court. Notably, the Seventh Circuit recognized "[d]ue process requires some minimum procedural protection against the deprivation of an individual's liberty interest before an actual determination of wrongdoing is made." *Id.* at 723. It further recognized that the state and parolees "have a similar interest in avoiding inappropriate detention of parolees pending their final revocation hearing" and noted that the state's failure to evaluate the appropriateness of detention "'smacks of arbitrariness.'" *Id.* at 725-26 (quoting the district court's finding).

Defendants make no effort to argue that their mandatory detention scheme would survive a *Mathews* analysis. Instead, defendants ignore *Mathews* altogether. As the plaintiffs explained in their opening brief, the record demonstrates that New York's mandatory detention regime implicates the most fundamental of interests – liberty – poses a high risk of erroneous deprivations of liberty, and could be remedied with minimal burden on the defendants. *See* Pls.' Mem. at 20-21; *accord Mental Hygiene Legal Serv. v. Spitzer,* No. 07 CIV. 2935(GEL), 2007 WL 4115936, at *4, *15, n. 9 (S.D.N.Y. Nov. 16, 2007) (applying the risk of erroneous deprivation standard under *Mathews* to the mandatory detention provision and concluding it "can never be constitutional, because individuals subject to these provisions, and faced with a substantial period of detention, are entitled to an individualized determination that they are in fact dangerous."),[2] *aff'd* 2009 WL 579445 (2d Cir. Mar. 4, 2009) (summary affirmance).

In lieu of grappling with *Mathews*, the defendants argue that *Faheem-El* should not guide this Court because it conflicts with *Galante v. Warden, Metro. Corr. Ctr.*, 573 F.2d 707 (2d Cir.

[2] The "substantial period of detention" involved detention that "may last more than 60 days." *Id.* at *11. Here, the plaintiffs are detained on average for technical parole violations for 57 days, for new misdemeanor arrests for 100 days, and for new felony arrests for 169 days. *See* Pls.' Mem. p. 5, 21. Contrary to the defendants' assertions, Defs.' Mem. at 20, the civil commitment statute at issue in *Mental Hygiene* applied to those who were either incarcerated or on parole when the state sought to extend their confinement because of their sex offense convictions and related safety concerns. *Id.* at *13.

1977). Defendants are wrong. In fact, *Faheem-El* relies on *Galante* in support of its decision that there is no constitutional right to bail in parole revocation proceedings. *Faheem-El*, 841 F.2d at 722 n.13 (citing *Galante* and other cases for the holding that the Eighth Amendment's excessive bail clause does not grant a right to bail in parole revocation proceedings). As the *Faheem-El* court similarly held, due process does not "require that parolees receive a bail hearing conducted by a judicial officer prior to the conclusion of the revocation hearings." *Id.* at 724. The court explained that the state can "vest authority" for parolees in the parole board, removing their entitlement to court-ordered bail, and therefore turned to the *Matthews* analysis to determine what protection is required to protect the liberty interest between the preliminary and final hearings. *See id.* Plaintiffs do not seek bail from a court; instead, the plaintiffs seek an evaluation of their release suitability that can be folded into the existing preliminary probable cause hearing, conducted by hearing officer, a Parole Board employee.

Because the plaintiffs do not seek bail, the defendants' argument that *Galante* controls here is misplaced. In a *per curiam* opinion initially written as a summary disposition, the Second Circuit in *Galante* summarily states a parolee "no longer enjoys the benefit of a presumption of innocence and has no constitutional right to bail."[3] *Id.* at 708. *Galante*'s reasoning on judicial bail is consistent with *Faheem-El*.[4]

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[3] As for the presumption of innocence, *Galante* cites to *Argro v. United States* for support. 505 F.2d 1374, at 1376, 1378 (2d Cir. 1974) (holding that because the parolee was convicted of a new crime, he no longer enjoyed the presumption of innocence). For class members convicted of the misdemeanors, the fact that they do not share the presumption of innocence enjoyed by those charged in criminal court does not mean they are owed *no* due process protections in their revocation process.

[4] Because *Galante* does not conflict with *Faheem-El*, the defendants' lone remaining attack of *Faheem-El* is to rely on the concurrence of Judge Easterbrook disagreeing with the majority's reasoning. Defs.' Mem. at 19 (discussing *Faheem-El*). Writing for himself and two other judges, Judge Easterbrook writes, without citing any cases or legal support, that "it follows" that, because parolees do not have the same liberty interests as ordinary citizens, the state can detain them pending their final hearings simply based on probable cause. *Id.* at 732. But this is contradicted by *Morrissey*, which found: "the liberty of a parolee, although indeterminate,

Finally, contrary to the defendants' assertion, *Lora v. Shanahan*, 804 F.3d 601 (2d Cir. 2015) does not suggest that mandatory detention pending a final revocation hearing presents no due process concerns. Defs.' Mem. at 20. In *Lora*, the court relied on *Demore v. Kim*, 538 U.S. 510 (2013), in upholding a scheme of mandatory detention of up to six months for non-citizens awaiting deportation proceedings. *See Lora,* 804 F.3d at 606, 612-15. But *Demore* turned on a rare and particular exception to due process rights in the immigration context, and indicated that such exceptions could not be applied to U.S. citizens: "In the exercise of its broad power over naturalization and immigration, Congress regularly makes *rules that would be unacceptable if applied to citizens*." *Demore,* 538 U.S. at 521 (emphasis added); *see also Hamdi v. Rumsfeld*, 542 U.S. 507, 532 (2004) (comparing heightened due process rights of U.S. citizens to the rights due to captured non-citizen enemy combatants).

B. Defendants' Discretionary Review Process Does Not Lessen the Need for Immediate Relief.

Since the plaintiffs filed this suit, the defendants have completed their discretionary review of people accused of non-criminal rule violations and absconder charges. Defs.' Mem. at 9. By their own account, hundreds of people who are detained on parole warrants for misdemeanor arrests and other crimes were never reviewed. Desgranges Decl. ¶ 3. Of those, around 300 are in jail for alleged parole violations based on misdemeanors and non-violent felonies. Shames Decl. ¶ 7. Many would be automatically released by a criminal court for the underlying arrests if not for their parole warrants. *See* McEvilley Decl. ¶¶ 1-3. None of those class members received *any* process evaluating them for release pending their final hearings.

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includes many of the core values of unqualified liberty . . . the liberty is valuable and must be seen as within the protection of the Fourteenth Amendment. *Its termination calls for some orderly process, however informal*." *Morrissey*, 408 U.S. at 482.

Moreover, none of the hundreds of people detained on technical parole violations who remain in City jails received constitutionally adequate process evaluating them for release because they never received notice of the review, an opportunity to be heard during the review, or the reason for their denial. Desgranges Decl. ¶ 3. These safeguards are essential to protect against mistakes. For example, as the defendants acknowledge, plaintiff Michael Bergamaschi was denied release under this review process, but when he and his lawyer had the opportunity to be heard at his probable cause hearing, the hearing officer dismissed the warrant after finding no probable cause. Defs.' Mem. at 9. Plaintiff Frederick Roberson could have explained, for example, why his COMPAS score shouldn't preclude his release because he is in the highest risk group for COVID-19 and his life is in peril at Rikers. Late last night, a New York State Supreme Court judge ordered the state to release Mr. Roberson. Desgranges Decl. ¶ 4.

If people had the opportunity to be heard during the Governor's review process, more would likely have been released because they would have the chance to correct the mistakes of the defendants. For example, the plaintiffs note that the state's criteria preclude people with serious mental illnesses from being released, in violation of federal, state, and city laws prohibiting discrimination against individuals with disabilities.[5] The lack of minimum due process protections in the Governor's review process leaves these individuals with no opportunity to be heard and thus no way to contest this discrimination.

II. PLAINTIFFS ARE SUFFERING IRREPERABLE HARM.

Since April 3, 2020, the day the plaintiffs filed this suit, two putative class members,

[5] *See, e.g.* 42 U.S.C.A. § 12132 ("...[N]o qualified individual with a disability shall...be subjected to discrimination by any [public] entity"); N.Y. Exec § 290; New York City Administrative Code § 8-107.

Raymond Rivera and Michael Tyson, died after testing positive for COVID-19.[6] In the wake of these deaths, the defendants argue that the plaintiffs cannot demonstrate irreparable harm because (i) the plaintiffs can achieve relief by filing state habeas petitions; and because (ii) the plaintiffs delayed in bringing this suit by not initiating it over 40 years ago. Defs.' Mem. at 22. Defendants' arguments have no merit.

First, habeas writs do not provide the same remedy that the plaintiffs seek here and cannot substitute for adequate due process. State habeas is not available to everyone, and courts can only grant release after finding that a person has been illegally detained. *See* N.Y. CPLR § 7010(a). Thus far, these findings have typically been due to jail authorities' deliberate indifference to the serious harm posed by COVID-19 to a person's health. McEvilley Decl. ¶ 4.

Further, the government cannot infringe on liberty interests without affording adequate process simply because the remedy of state habeas is available. *See Duchesne v. Sugarman*, 566 F.2d 817, 826-29 (2d Cir. 1977). As the *Duchesne* Court explained, the state "cannot . . . (adopt) for itself an attitude of 'if you don't like it, sue.'" *Id.* at 828 (internal citations omitted). Here too, the defendants cannot assert that over one thousand people subject to its mandatory detention scheme face no harm because some of them may have success via habeas.

Defendants' reliance on *Weinberger v. Romer-Barcelo*, 456 U.S. 305 (1982) is similarly misplaced. Addressing the Federal Water Pollution Control Act, the Supreme Court agreed with the district court's conclusion that there was "no appreciable harm" to the environment and held that it did not explicitly foreclose federal courts from issuing remedies other than enjoining the unlawful activity. *Id.* at 320. Unlike *Weinberger*, the plaintiffs here cannot be said to suffer no

[6] *See* Desgranges Decl. in support of Pls.' Mem. ¶ 11 and "Jailed on a Minor Parole Violation, He Caught the Virus and Died," THE NEW YORK TIMES (Apr. 9, 2020) https://www.nytimes.com/2020/04/09/nyregion/rikers-coronavirus-deaths-parolees.html.

"appreciable harm" when they are unconstitutionally incarcerated and two putative class members have died after becoming infected with COVID-19 at Rikers.

Second, the defendants cite three trademark cases for the proposition that the injunctive relief sought in this case was unduly delayed and thus no irreparable injury can be shown. *See* Defs.' Mem. at 23. These cases focus on the plaintiffs' delay in seeking injunctive relief *after* commencing their initial actions.[7] Here, the plaintiffs sought preliminary injunctive relief within 72 hours of commencing the initial action. Plaintiffs' irreparable harm should not be minimized because of what previous parolees and their lawyers failed to do.

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

Plaintiffs satisfy the remaining elements for a preliminary injunction. See Pls.' Mem. at 23-24. Defendants do not (and could not) argue that the public interest would be served by a mandatory-detention scheme that is unconstitutional, as is the one before this Court. Rather, they point to draft legislation that might address the unconstitutional scheme the plaintiffs challenge, *see* Defs.' Mem. at 24, this bill is not law,[8] and courts retain their essential obligation to provide a remedy for violation of a fundamental constitutional right. *See Correctional Services v. Malesko*, 534 U.S. 61, 73 (2001) ("[I]njunctive relief has long been recognized as the proper means for preventing entities from acting unconstitutionally"); *cf. Hurrell-Harring v. State of New York,* 15 N.Y.3d 8, 26 (2010).

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[7] *See Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985); *Gidatex, S.r.L. v. Campeniello Imports, Ltd*., 13 F. Supp. 2d 417, 419 (S.D.N.Y. 1998); *Tough Traveler, Ltd. v. Outbound Prods*., 60 F.3d 964, 968 (2d Cir. 1995) (noting a four-month delay in seeking preliminary injunction after commencing action and an initial delay in filing suit after infringement was discovered).

[8] *See* "The Purgatory of Parole Incarcerations During the Coronavirus Crisis," THE NEW YORKER (Apr. 11, 2020) https://www.newyorker.com/news/news-desk/the-purgatory-of-parole-incarcerations-during-the-coronavirus-crisis.

Nor is this court required to rewrite New York's regulations in granting the plaintiffs' motion. When a provision of a law is unconstitutional on its face, an injunction prohibiting its enforcement is "proper," *Whole Women's Health v. Hellerstedt*, 136 S.Ct. 2292, 2307 (2016), and even obligatory. *See Brown v. Guiliani*, 158 F.R.D. 251, 268 (E.D.N.Y. 1994) ("Where the standards for a preliminary injunction are met, it is this Court's obligation to enjoin actions of a governmental body which are in violation of the law"). The Supreme Court's decision in *Morrissey* is instructive here. When addressing the requirements for a parole revocation hearing, the Court stated that "[w]e cannot write a code of procedure; that is the responsibility of each State. . . . Our task is limited to deciding the minimum requirements of due process." *Morrissey*, 408 U.S. at 488-89. Plaintiffs simply ask this Court to order the defendants to afford the plaintiffs the minimum requirements of due process to prevent their inappropriate detention.

CONCLUSION

For the foregoing reasons, the plaintiffs respectfully request that the Court grant their motion, enjoin the defendants' mandatory detention scheme, and order the defendants to provide the following: (1) for all individuals currently detained, immediate review of their case, notice, and an opportunity to be heard on their suitability for release; and (2) for all future individuals arrested for a parole violation, a prompt hearing on whether they may be suitable for release with notice, a neutral decision-maker, and, if detention is required, an explanation as to why and the evidence relied on, either on the record or in writing.

Dated: April 13, 2020
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Respectfully submitted,

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