

No. 24-1325

IN THE
United States Court of Appeals for the Third Circuit

DION HORTON, ET AL.,
Plaintiffs-Appellants,

v.

ADMINISTRATIVE JUDGE JILL RANGOS, ET AL.
Defendants-Appellees.

On Appeal from the United States District Court
for the Western District of Pennsylvania
No. 2:22-CV-1391-NR
Hon. J. Nicholas Ranjan

**BRIEF OF *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

Allison Frankel
Counsel for Amicus Curiae
AMERICAN CIVIL LIBERTIES UNION
125 Broad Street, 18th Floor
New York, New York 10004
Tel: 617-650-7741
afrankel@aclu.org

July 3, 2024

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* American Civil Liberties Union discloses that it has no parent corporations and that no publicly held corporations hold 10% or more of its stock.

Dated: New York, New York
July 3, 2024

/s/ Allison Frankel
Allison Frankel

Counsel for Amicus Curiae

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES..... iii

STATEMENT OF IDENTIFICATION..... 1

SUMMARY OF ARGUMENT..... 3

ARGUMENT 5

 I. Probation Was Designed To Advance Rehabilitation And Spare People From
 Prison. 5

 II. *Morrissey* And *Gagnon* Were Grounded In The Understanding That
 Probation Is A Rehabilitative Alternative To Incarceration..... 7

 III. Probation Today is Not a Rehabilitative Alternative to Incarceration..... 11

 A. Probation’s focus shifted from rehabilitation to punitive enforcement. 11

 B. Probation largely does not divert people from prison..... 16

 IV. Probation’s Devolution into a Punitive Sanction Necessitates Assessing
 Whether Detention Pending Revocation Proceedings is Warranted. 18

CONCLUSION..... 21

COMBINED CERTIFICATIONS 22

CERTIFICATE OF SERVICE 23

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Black v. Romano</i> , 471 U.S. 606 (1985).....	8
<i>Faheem-El v. Klincar</i> , 841 F.2d 712 (7th Cir. 1988).....	24, 25, 26
<i>Gagnon v. Scarpelli</i> , 411 U.S. 778 (1973).....	passim
<i>Morrissey v. Brewer</i> , 408 U.S. 471 (1972).....	passim
 Statutes	
30 Pa. Cons. Stat. Ann. § 923(a)(1)-(7)	19
 Other Authorities	
ACLU, <i>Reducing Barriers: A Guide to Obtaining Reasonable Accommodations for People with Disabilities on Supervision</i> (2024)	13
Andrew Horowitz, <i>The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process</i> , 75 Brooklyn L. Rev. 753 (2010).....	5, 12, 14, 18
Cecelia Klingele, <i>Rethinking the Use of Community Supervision</i> , 103 J. Crim. L. & Criminology 1015 (2013)	5, 13, 15
Council of State Governments Justice Center, <i>Confined and Costly</i> (2019).....	16
County Probation and Parole Officers’ Firearm Education and Training Commission, <i>Annual Report Fiscal Year 2012-2013</i> , Pennsylvania Commission on Crime and Delinquency (2013)	14

Current Population Hold Types, Allegheny County Jail Population Management Dashboards.....16

Danielle Kaeble, U.S. Dep’t of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2022 (2024)*17

Dolly Prabhu & Dan Bernstein, Abolitionist Law Center Court Watch, *Probation in Allegheny County (2023)* 15, 19

Fifth Judicial District of Pennsylvania, County of Allegheny, *Rules of Probation and Parole*.....13

Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 Georgetown L. J. 291 (2016) 6, 14, 15, 18

Human Rights Watch & ACLU, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States (2020)* passim

Lauren Gill, *Operation ‘Safe’ Streets: How Delaware’s Most Secretive Police Force Plays Fast & Loose with Our Communities (2022)*.....14

Michelle Phelps, *The Paradox of Probation: Community Supervision in the Age of Mass Incarceration*, Law Policy (2013)..... 17, 18

Paula Ward, *Lawsuit calls Allegheny County probation detainer system unconstitutional*, TribLive (Oct. 4, 2022).....19

Ronald Corbett, Jr., *The Burdens of Leniency: The Changing Face of Probation*, 99 Minn. L. Rev. 1697 (2015)12

Shawn E. Small & Sam Torres, *Arming Probation Officers: Enhancing Public Confidence and Officer Safety*, 65 Federal Probation 26 (2001).....14

The Fifth Judicial District of Pennsylvania, Allegheny County, *2019/2020/2021 Triennial Report (2022)*18

Vincent Schiraldi, *Explainer: How ‘Technical Violations’ Drive Incarceration*, *The Appeal* (2021)14

Wendy Sawyer & Peter Wagner, Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2024* (2024)17

Wendy Sawyer, et al., Prison Policy Initiative, *Technical violations, immigration detainees, and other bad reasons to keep people in jail* (2020)15

STATEMENT OF IDENTIFICATION

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with nearly two million members and supporters dedicated to the principles of liberty and equality embodied in our nation’s Constitution and civil rights laws. The ACLU’s Criminal Law Reform Project (“CLRP”) advocates for the constitutional and civil rights of those impacted by criminal legal systems. We use litigation and advocacy to confront systemic government conduct that fuels the carceral state and oppresses people based on race, class, and other characteristics.

The ACLU has an interest in this matter because we regularly engage in litigation and advocacy to uphold the due process rights of people on probation and parole (“supervision”). The ACLU is counsel in *El v. 38th Judicial District*, 376 MD 2021 (Pa. Commw. Ct. 2021), a similar case challenging automatic and prolonged incarceration pending probation revocation proceedings, as well as *Mathis v. United States Parole Commission*, No. 24-cv-1312 (D.D.C. 2024), a challenge to failure to accommodate people on supervision with disabilities. Additionally, we have authored numerous reports regarding supervision, including *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* (2020), <https://www.aclu.org/publications/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states>, and *Reducing Barriers: A Guide to Obtaining Reasonable Accommodations for People with Disabilities on*

Supervision (2024), <https://www.aclu.org/publications/reducing-barriers-a-guide-to-obtaining-reasonable-accommodations-for-people-with-disabilities-on-supervision>. The parties have consented to the filing of this brief.¹

¹ Under Federal Rule of Appellate Procedure 29(a)(4)(e), the undersigned counsel certifies that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* made a monetary contribution intended to fund the preparation or submission of this brief.

SUMMARY OF ARGUMENT

People on probation enjoy “many of the core values of unqualified liberty” and revocation inflicts a “grievous loss” on them and their loved ones. *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). Plaintiffs are correct that due process prohibits the government from depriving them of that liberty without meaningfully assessing whether detention is warranted. This brief explains why Plaintiffs’ probation status does not limit their due process rights where, as here, probation no longer serves its original purposes of advancing rehabilitation and diverting people from prison.

Probation was designed in the 19th century to spare people from prison and help them rehabilitate in their community. The Supreme Court relied on this understanding in *Morrissey v. Brewer* and *Gagnon v. Scarpelli* when it articulated the “minimum” procedures required prior to revoking probation and parole (collectively, “supervision”). The Court’s opinions relied on two key premises: (1) supervision officers help people remain in the community and avoid revocation and (2) people on supervision would otherwise be incarcerated.

In the more than five decades since the Court decided *Morrissey* and *Gagnon*, probation fundamentally changed. Rather than prioritizing rehabilitation, today probation generally—and in Allegheny County, Pennsylvania, specifically—is characterized by close surveillance, stringent enforcement of onerous conditions, and harsh punishments for violations. Probation officers regularly pursue revocation

for minor slip-ups. Simply being accused of a violation often leads to months in jail pending revocation proceedings, even for technical violations or for low-level charges where the individual would otherwise be released pending trial. Meanwhile, instead of diverting people from prison, courts regularly impose probation in cases where individuals may otherwise have received *lesser* sanctions such as a fine. As a result, in Allegheny County today, scores of people are jailed for alleged violations despite posing no inherent risk to the community.

Given probation's transformation into a punitive enforcement mechanism, due process requires additional protections beyond those articulated in *Morrissey* and *Gagnon*. Those cases did not address whether people are entitled to a suitability-for-release assessment pending revocation proceedings. Where, as in Allegheny County, probation is neither rehabilitative nor a diversion from prison, suitability-for-release assessments are critical to protect against unwarranted incarceration. This Court should reverse the District Court decision and hold that Plaintiffs have a due process right to be free of lengthy incarceration absent a meaningful suitability-for-release determination.

ARGUMENT

I. Probation Was Designed To Advance Rehabilitation And Spare People From Prison.

Probation was designed to divert people away from incarceration and help them reintegrate into their communities. It was first used in the United States during the mid-1800s, when a cobbler named John Augustus intervened in a Massachusetts court to “sponsor” a man who ordinarily would have been incarcerated for his crimes. Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 J. Crim. L. & Criminology 1015, 1023 (2013). Augustus returned the man to court several weeks later, explaining that he had been rehabilitated. The Court agreed, imposed a nominal fine, and allowed the man to return to the community. *Id.* Massachusetts soon formalized a “probation” system and, by 1925, all 48 states and the federal government had enacted probation statutes. Andrew Horwitz, *The Costs of Abusing Probationary Sentences: Overincarceration and the Erosion of Due Process*, 75 Brooklyn L. Rev. 753, 757 (2010).²

The nation’s first probation systems were products of the Progressive Era. Progressive reformers described probation officers as “instructive ‘friends’ of the probationer” and “social workers.” Wayne Logan, *The Importance of Purpose in*

² Probation is distinct from parole, another form of supervision that developed around the same time in the U.S. While probation was designed to spare people from prison, parole was created to release people early from prison. *See* Klingele at 1026-27.

Probation Decision Making, 7 Buffalo Crim. L. Rev. 171, 179 (2003) (citation omitted). Officers were supposed to “understand human nature and be tactful, sympathetic, resourceful and industrious.” Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 Georgetown L. J. 291, 328 (2016) (citation omitted). They were tasked with “exerting a helpful influence” over people on probation “by gradually changing their habits, associations and manner of life[.]” *Id.* at 328-29 (citation omitted). To this end, probation officers provided services in areas including employment, education, medical care, and legal aid. Logan at 180.

Because probation officers were “friends” of their supervisees, “[p]rogressive reformers were comfortable delegating broad discretionary power” to impose myriad conditions regulating where probationers may go, who they can associate with, and what actions they must take to “rehabilitate” themselves. Doherty at 329. Progressive reformers “trusted that probation officers would use their powers compassionately for the good of the probationer.” *Id.* In other words, probation officers’ sweeping powers were justified precisely because they were acting as a support system to keep people out of prison.

II. *Morrissey* And *Gagnon* Were Grounded In The Understanding That Probation Is A Rehabilitative Alternative To Incarceration.

The Supreme Court relied on the understanding that probation and parole are rehabilitative diversions from incarceration when analyzing supervisees' due process rights. In 1972, the Court in *Morrissey v. Brewer* held that "the liberty of a parolee, although indeterminate, includes many of the core values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others." 408 U.S. at 482. Thus, parole cannot be revoked absent due process protections. *Id.*; *see also Black v. Romano*, 471 U.S. 606, 610 (1985) ("The Due Process Clause of the Fourteenth Amendment imposes procedural and substantive limits on the revocation of the conditional liberty created by probation").

In assessing the procedural protections due, the Court explained that both the supervisee and the government "have interests in the accurate finding of fact and the informed use of discretion" to ensure that individuals' "liberty is not unjustifiably taken away" and that the government "is neither unnecessarily interrupting a successful effort at rehabilitation nor imprudently prejudicing the safety of the community." *Gagnon v. Scarpelli*, 411 U.S. 778, 785 (1973) (summarizing *Morrissey*). Accordingly, the Court held, the government must provide "minimum due process requirements" including (a) a "prompt" preliminary hearing "to determine whether there is probable cause" for the alleged violation and (b) a final revocation hearing within a "reasonable time" where the accused has "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 485-89.³

The following year, in *Gagnon v. Scarpelli*, the Court held that the same procedural protections apply to revocation of probation. 411 U.S. at 782. The Court also held that people have a right to counsel during revocation proceedings under certain circumstances on a “case-by-case basis.” *Id.* at 788-90.

The Court’s decisions rely on two key premises: (1) probation officers prioritize helping people rehabilitate and remain in their community and (2) probation diverts people from prison. First, the Court emphasized that supervision’s “purpose is to help individuals reintegrate into society as constructive individuals[.]” *Morrissey*, 408 U.S. at 477. While supervision officers impose and enforce conditions, the Court stated, their “function is not so much to compel conformance to a strict code of behavior as to supervise a course of rehabilitation[.]” *Gagnon*, 411 U.S. at 784. Indeed, “by and large concern for the client dominates [their]

³ Minimum due process requirements at the preliminary hearing include notice of the alleged violations; the opportunity to appear in person and be heard before an independent decisionmaker and to present witnesses and documentary evidence; a conditional right to confront adverse witnesses; and a digest of the decision. *Morrissey*, 408 U.S. at 487. Minimum due process requirements at the final revocation hearing include these protections as well as disclosure of the government’s evidence and a written statement of reasons for the revocation decision. *Id.* at 489.

professional attitude.” *Id.* at 783; *see also Morrissey*, 408 U.S. at 478 (supervision officer tries to “guide the parolee into constructive development”). The Court pointed to Connecticut, where parole officers served as “social worker[s] rather than an adjunct of police, and exhibit a lack of punitive orientation.” *Morrissey*, 408 U.S. at 486 n.13.

The Court reasoned that “the rehabilitative rather than punitive focus of the probation/parole system” would limit revocations. *Gagnon*, 411 U.S. at 785. Since “the whole thrust of the probation-parole movement is to keep men in the community,” the Court noted, revocation is “commonly treated as a failure of supervision” and used “only as a last resort.” *Id.* (internal citation and quotation marks omitted). Accordingly, supervision officers generally do not pursue revocation “unless [they] think[] that the violations are serious and continuing so as to indicate that the parolee is not adjusting properly and cannot be counted on to avoid antisocial activity.” *Morrissey*, 408 U.S. at 479.

This reasoning led the Court to conclude that counsel is sometimes necessary during revocation. The Court determined that counsel is not *always* required because, in revocation hearings, “the State is represented, not by a prosecutor but by a [supervision] officer with” a “rehabilitative” “orientation” who is looking out for the accused’s best interests. *Gagnon*, 411 U.S. at 785, 789. The Court opined that having counsel present would make revocation proceedings “more akin” to “a trial,

and less attuned to the rehabilitative needs of the individual probationer,” and would increase “pressure to reincarcerate [rather] than to continue nonpunitive rehabilitation.” *Id.* at 787-88. Thus, probation’s rehabilitative focus was critical to the Court’s due process analysis.

Second, the Court operated under the impression that supervision is a benefit in exchange for avoiding incarceration. The *Morrissey* Court explained that “[t]he essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence.” *Morrissey*, 408 U.S. at 477. The *Gagnon* Court applied this same reasoning to probation, even though—unlike parole—probation does not release somebody from an ongoing prison term. Nevertheless, the Court stated that parole and probation revocation were “constitutionally indistinguishable” in cases where, as in *Gagnon*, the judge *already* imposed a prison term and suspended it upon successful completion of a probationary period. *Gagnon*, 411 U.S. at 782 n.3. The Court did not address situations where judges impose probation *without* a suspended prison term—i.e., where it is unknown if the probationer would otherwise be incarcerated.

The record in both cases revealed that supervision functioned as an off-ramp from incarceration. The two litigants in *Morrissey* were paroled after serving fractions of their total prison sentences—one year of a seven-year term, in one case; and approximately two years of a ten-year term, in the other. *Morrissey*, 408 U.S. at

472-73. In *Gagnon*, the litigant was convicted of felony armed robbery and the judge “sentenced him to 15 years’ imprisonment, but suspended the sentence and placed him on probation for seven years.” *Gagnon*, 411 U.S. at 779. Implicit in *Morrissey* and *Gagnon*, then, is the understanding that revocation, if ultimately imposed, would return to incarceration an individual who had already been sentenced to prison.

III. Probation Today is Not a Rehabilitative Alternative to Incarceration.

A. Probation’s focus shifted from rehabilitation to punitive enforcement.

Soon after the Supreme Court decided *Morrissey* and *Gagnon*, supervision fundamentally transformed. Beginning in the 1970s and 1980s, the “tough on crime” movement and the “war on drugs” ushered in an era of harsh sentencing laws. Human Rights Watch & ACLU, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States* 29 (2020), <https://www.aclu.org/publications/aclu-and-hrw-report-revoked-how-probation-and-parole-feed-mass-incarceration-united-states>. Politicians and practitioners began railing against supervision, which they perceived as too lenient, and pushed to send more people to prison. *Id.* Meanwhile, in 1974—one year after *Gagnon*—a widely publicized social science study asserted that “nothing works” to rehabilitate people. Ronald Corbett, Jr., *The Burdens of Leniency: The Changing Face of*

Probation, 99 Minn. L. Rev. 1697, 1706 (2015).⁴ Political consensus shifted away from rehabilitation and toward punishment and incarceration. Human Rights Watch & ACLU at 30.

The result was a seismic shift in probation practices. Rather than fade away as a product of a bygone rehabilitative era, probation “adapt[ed] to the unabashedly more punitive times in which it was obliged to operate.” Logan at 191. Probation’s original aim of rehabilitation “was replaced by punishment, deterrence, and public safety as the new priorities of the correctional system.” Corbett at 1706. As a former probation commissioner described, “no probation administrator could afford to ignore the shifting political winds” and, as a result, “probation departments around the country raced to take on the look and feel and accoutrements of a ‘get tough’ agency.” *Id.* at 1707.

In this climate, supervision requirements toughened. *Id.* at 1709. Today, people must comply with an average of 10 to 20 conditions a day. Human Rights Watch & ACLU at 41. These rules are wide-ranging and onerous, including attending frequent meetings, often far from home and during work hours; paying court costs that many cannot afford; abstaining from drugs and alcohol, even where individuals have a substance use disorder; and reporting every address change, even

⁴ The study’s author later tried to qualify his conclusion that “nothing works,” but by that point, his conclusions were already widely publicized. *See* Horwitz at 759.

while experiencing homelessness. *Id.* at 41-53; Fifth Judicial District of Pennsylvania, County of Allegheny, *Rules of Probation and Parole*, <https://www.alleghencourts.us/criminal/departments/adult-probation/rules-of-probation/> (last accessed July 3, 2024). While some supervision conditions may appear reasonable, “in the aggregate, the sheer number of requirements imposes a nearly impossible burden on many”—setting people up for failure. Klingele at 1035. Given systemic racial inequity, Black and Brown people are less likely to have the resources necessary to navigate supervision—such as stable jobs, secure housing, and reliable transportation—and are more likely to be surveilled by police, arrested, and incarcerated for violations. Human Rights Watch & ACLU at 38-40, 180-90. Additionally, people with disabilities, who are overrepresented among the probation population, face heightened barriers to understanding their supervision rules, physically getting to required meeting locations, and effectively communicating with supervision officers. *See generally* ACLU, *Reducing Barriers: A Guide to Obtaining Reasonable Accommodations for People with Disabilities on Supervision* (2024), <https://www.aclu.org/publications/reducing-barriers-a-guide-to-obtaining-reasonable-accommodations-for-people-with-disabilities-on-supervision>.

Meanwhile, the role of probation officers shifted from supporters to enforcers. Far from their social work origins, by the 1980s, a probation officer was “likely to come from a law enforcement background, to call himself or herself a ‘probation

officer,’ and to refer to probationers as ‘offenders.’” Horwitz at 763. Some probation officers still try to connect people with resources, but today, they largely fail to provide the supports people need to succeed on supervision. Human Rights Watch & ACLU at 54-56. Instead, probation officers prioritize close surveillance, frequent drug testing, and strict enforcement of supervision rules. *Id.* at 30, 56; Vincent Schiraldi, *Explainer: How ‘Technical Violations’ Drive Incarceration*, The Appeal (Mar. 23, 2021), <https://theappeal.org/the-lab/explainers/explainer-how-technical-violations-drive-incarceration/>. In many jurisdictions, including Allegheny County, probation officers carry guns.⁵ And probation officers regularly conduct joint operations with law enforcement to search people on probation without warrants. See Lauren Gill, *Operation ‘Safe’ Streets: How Delaware’s Most Secretive Police Force Plays Fast & Loose with Our Communities* (Oct. 12, 2022), <https://www.aclu-de.org/en/news/operation-safe-streets>; Doherty at 322.

⁵ Shawn E. Small & Sam Torres, *Arming Probation Officers: Enhancing Public Confidence and Officer Safety*, 65 *Federal Probation* 26 (2001), https://www.uscourts.gov/sites/default/files/65_3_5_0.pdf#:~:text=In%20the%20federal%20probation%20system,probation%20officers%20to%20carry%20firearms; County Probation and Parole Officers’ Firearm Education and Training Commission, *Annual Report Fiscal Year 2012-2013* at 1, Pennsylvania Commission on Crime and Delinquency (2013), <https://www.pccd.pa.gov/FET/FormsandPublications/AnnualReports/Documents/FY12-13%20Annual%20Report%20FINAL.pdf>.

Probation officers frequently punish people for violations. Beginning in the 1980s, many probation departments adopted “intensive supervision” programs that involve heightened monitoring and swift consequences for the slightest misstep. Klingele at 1024; Doherty at 326-27. Common sanctions include electronic monitoring, home confinement, boot camps, and “shock” incarceration—meaning days, weeks, or even months in jail. Logan at 192; Human Rights Watch & ACLU at 83, 109 n. 406.

Far from a “last resort,” *Gagnon*, 411 U.S. at 785, today, probation officers regularly resort to revocation. *See* Human Rights Watch & ACLU at 60, 132-41. In many places, including Allegheny County, just being accused of a violation often triggers incarceration on a “detainer”—absent any meaningful assessment of whether detention is necessary.⁶ This includes people facing revocation for technical violations, which do not inherently pose a safety concern, and new offenses for which they would otherwise be released pending trial. Human Rights Watch & ACLU at 94. People commonly spend months or years in jail awaiting a final revocation hearing. *Id.* at 95-102; Prabhu & Bernstein at 7. Even a few days in jail

⁶ Human Rights Watch & ACLU at 90-94; Dolly Prabhu & Dan Bernstein, Abolitionist Law Center Court Watch, *Probation in Allegheny County*, 7 (2023), <https://abolitionistlawcenter.org/wp-content/uploads/2023/07/ALC-COURT-WATCH-PROBATION-REPORT-230710.pdf>; Wendy Sawyer, et al., Prison Policy Initiative, *Technical violations, immigration detainees, and other bad reasons to keep people in jail* (Mar. 18, 2020), <https://www.prisonpolicy.org/blog/2020/03/18/detainers/>.

can mean lost jobs, housing instability, disrupted access to health care or public benefits, and exacerbated physical or mental health conditions. Human Rights Watch & ACLU at 103. Upon revocation, people face years or decades in prison and even more probation. Other times, courts reinstate the individual to probation, suggesting pre-revocation detention was not necessary. *Id.* at 113-28.

Today, supervision is feeding mass incarceration. In 2017, nearly half of all state prison admissions nationwide stemmed from probation or parole violations. Council of State Governments Justice Center, *Confined and Costly* (2019), <https://csgjusticecenter.org/publications/confined-costly/>. In Pennsylvania, it was 54 percent. *Id.* Nationwide, most people are incarcerated for technical violations, not new convictions. Human Rights Watch & ACLU at 144-46. In Allegheny County on one day in June 2024, nearly 40 percent of people in jail (690 individuals) had a probation detainer.⁷

B. Probation largely does not divert people from prison.

Instead of diverting people from prison, probation today widens the net of correctional control. If probation functioned as an alternative to incarceration, as the *Gagnon* Court contemplated, we would expect to see jail and prison populations declining as probation expanded. *See* Michelle Phelps, *The Paradox of Probation:*

⁷ *Current Population Hold Types*, Allegheny County Jail Population Management Dashboards, <https://bit.ly/3BCmzTc> (visited June 20, 2024).

Community Supervision in the Age of Mass Incarceration at 10-11, Law Policy (2013),

<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3780417/pdf/nihms-460270.pdf>.

But in the decades since *Morrissey* and *Gagnon*, prison, jail, and probation populations *all* skyrocketed in tandem. As incarceration grew nearly five-fold from 1980 to its peak in 2007, from about 500,000 to 2.3 million, the population under probation grew almost four-fold—from 1.1 million to 4.3 million. Human Rights Watch & ACLU at 32. While both incarceration and supervision populations have since declined slightly, today, over 1.9 million people are incarcerated⁸ and nearly 3 million people—or one in every 88—are on probation.⁹ In Pennsylvania, 66,000 people are in jail or state prison¹⁰ and more than 92,000 are on probation.¹¹

Probation is failing to replace incarceration, in large part, because courts no longer use probation solely as an off-ramp from otherwise-certain prison terms. Rather, courts regularly use probation to escalate non-carceral sentences. Recall the litigant in *Gagnon* was on probation for a felony armed robbery conviction, for

⁸ Wendy Sawyer & Peter Wagner, Prison Policy Initiative, *Mass Incarceration: The Whole Pie 2024* (Mar. 14, 2024),

<https://www.prisonpolicy.org/reports/pie2024.html>.

⁹ Danielle Kaebler, U.S. Dep't of Justice, Bureau of Justice Statistics, *Probation and Parole in the United States, 2022*, Tbl 6 (May 2024),

<https://bjs.ojp.gov/document/ppus22.pdf>.

¹⁰ Sawyer & Wagner, *Mass Incarceration: The Whole Pie 2024*.

¹¹ Kaebler, *Probation and Parole in the United States, 2022* at Tbl 6.

which he otherwise would have served 15 years in prison. *Gagnon*, 411 U.S. at 779. In sharp contrast, today, “[m]any of the smallest criminal cases end in probation.” Doherty at 340. Indeed, “[a]s many as eighty percent of misdemeanor convictions result in probationary sentences.” *Id.* In Allegheny County in 2021, 82 percent of people sentenced to county probation were sentenced for either misdemeanor (69.5 percent) or summary (12.8 percent) offenses. The Fifth Judicial District of Pennsylvania, Allegheny County, *2019/2020/2021 Triennial Report* at 19 (2022), <https://www.alleghenycourts.us/wp-content/uploads/2022/10/5JD-Triennial-2019-21-FINAL-web.pdf>. In these cases, individuals might otherwise have received a lesser sentence, such as a fine. *See Phelps* at 5. This means that “[t]he consequence of a probationer’s failure to meet what are often unrealistic expectations can frequently be a prison sentence far in excess of what anyone would ever have thought justified by the original criminal charge.” Horwitz at 765.

IV. Probation’s Devolution into a Punitive Sanction Necessitates Assessing Whether Detention Pending Revocation Proceedings is Warranted.

Given probation’s transformation into a punitive sanction, due process requires additional protections beyond those outlined in *Morrissey* and *Gagnon*. Neither case addressed whether people facing revocation are entitled to an assessment of their suitability to remain in the community pending revocation proceedings. *See Faheem-El v. Klinicar*, 841 F.2d 712, 724–25 (7th Cir. 1988) (en

banc). Where, as in Allegheny County, probation is not rehabilitative or a diversion from incarceration, due process mandates such assessments.

Suitability-for-release assessments are critical to prevent unwarranted incarceration. The probation officers contemplated in *Gagnon* prioritized rehabilitation and made all efforts to keep people in their community. *See Gagnon*, 411 U.S. at 783-85. Yet here, Allegheny County officials regularly jail people for conduct that poses no inherent risk to society. *See supra* Section III(A). In many cases, detention is mandatory, regardless of whether mitigating circumstances counsel against incarceration. Paula Ward, *Lawsuit calls Allegheny County probation detainer system unconstitutional*, TribLive (Oct. 4, 2022), <https://triblive.com/local/lawsuit-calls-allegheny-county-probation-detainer-system-unconstitutional/>. And pre-revocation detention is often lengthy. People may ultimately spend longer in jail pending revocation hearings than the maximum sentence authorized for their crime of conviction. Prabhu & Bernstein at 7; *see* 30 Pa. Cons. Stat. Ann. § 923(a)(1)-(7). Given probation’s punitive devolution, there is a serious risk that Allegheny County’s detention practices “result in needless errors”—months and years in jail absent any demonstrable safety concern. *See Faheem-El*, 841 F.2d at 725–26; *see also id.* at 729 (Cummings, J., concurring).

Release assessments are also vital because, contrary to the Court’s assumption in *Gagnon*, people on probation today would not necessarily have otherwise been

incarcerated. *See supra* Section III(B). Indeed, incarceration was an unlikely outcome for the 82 percent of people on probation in Allegheny County for misdemeanor and summary offenses. *See id.* Nevertheless, the County reflexively jails such individuals pending revocation proceedings. Thus, there is a significant risk that Allegheny County is erroneously incarcerating people for whom jail would never have been a reasonable outcome at the outset.

The probable cause hearing required by *Morrissey* and *Gagnon* is insufficient to guard against this risk of needless incarceration. That is because “[t]here can be a substantial difference between the determination that there is probable cause to believe a condition of parole has been violated . . . and a determination that an individual should be detained pending his or her final revocation hearing.” *Faheem-El*, 841 F.2d at 725. Meanwhile, assessing whether detention is inappropriate—for example, because the charges do not warrant incarceration upon revocation, the accused does not pose a demonstrable safety or flight risk, or the accused has health conditions that would be aggravated by incarceration—would curb the risk of erroneous detention. *See* Human Rights Watch & ACLU at 101. Last, the government has no interest in incarcerating people who pose no demonstrable risk to the community. *See Morrissey*, 408 U.S. at 483-84; *Gagnon*, 411 U.S. at 785.

CONCLUSION

For these reasons, this Court should reverse the District Court decision and hold that people on probation in Allegheny County have a due process right to be free from lengthy detention absent a meaningful suitability-for-release assessment.

Respectfully submitted,

/s/ Allison Frankel

Allison Frankel

AMERICAN CIVIL LIBERTIES UNION

125 Broad Street, 18th Floor

New York, New York 10004

Tel: 617-650-7741

afrankel@aclu.org

Counsel for Amicus Curiae

Dated: New York, New York
July 3, 2024

COMBINED CERTIFICATIONS

In accordance with applicable Federal and Local Rules, I certify as follows:

1. I am a member in good standing of the Bar of this Court.
2. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because this brief contains 3910 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). In making this certification, I have relied on the word count of the word-processing system used to prepare the brief.
3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point Times New Roman, a proportionally spaced typeface, using Microsoft Word word-processing software.
4. The text of the electronic brief is identical to the text in the paper copies.
5. The electronic file containing the brief was scanned for viruses using Carbon Black Cloud, Version 4.0.0.1292, and no virus was detected.

Dated: New York, New York
July 3, 2024

/s/ Allison Frankel

Allison Frankel

Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

On this date, I caused a true and correct copy of the foregoing Brief of *Amicus Curiae* in Support of Plaintiffs-Appellants to be served upon all counsel of record via the Court's ECF system, in accordance with 3d Cir. L.A.R. Misc. 113.4.

Dated: New York, New York
July 3, 2024

/s/ Allison Frankel
Allison Frankel

Counsel for Amicus Curiae