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

PAGE PROOF OPENING BRIEF

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INTRODUCTION

In Allegheny County, probationers are jailed for months or years based on an initial determination of probable cause—at a cursory proceeding—that they violated a condition of probation. In the most glaring instances, any probationer under the supervision of two local judges is *automatically* detained, regardless of the underlying conviction, regardless of the facts or evidence concerning the alleged violation, and without any consideration of rehabilitative interests or public safety. This case asks whether probationers' fundamental interest in bodily liberty demands a substantive legal determination—beyond mere probable cause that a violation occurred—that pre-revocation detention serves a compelling government interest and justifies prolonged incarceration until a revocation hearing determines whether they have violated probation and what consequences should flow from any violation. This is a novel question under Supreme Court precedent that this circuit has never addressed. Separately, this case also asks whether Defendants' procedures for the initial probable-cause finding pass constitutional muster under well-settled Supreme Court precedent.

The reach of these issues is significant: over one third of the individuals confined to the Allegheny County Jail are in jail cells because of how Defendants treat alleged probation violations. JA_[ECF1_PDF6]. For a significant majority, after a prolonged period of pre-revocation jailing, the sentencing court ultimately finds that probation need not be revoked and releases the probationer back to their family and community. JA_[DefEx2_PDF40]. Too little, too late. By that time, individuals have already experienced the destabilizing impacts of incarceration—loss of housing and employment; strained family and community ties; and other irreparable harm. *See* JA_[ECF82-1_PDF100–01].

The district court erred in concluding that Defendants' practices do not violate probationers' liberty interests. The district court held that probationers are not entitled to a determination about whether the government's interests are served by detaining them until their revocation hearing. Instead, it held that a mere finding of probable cause that a violation occurred allows for long-term pre-revocation detention, even though, once the evidence is presented, most revocation hearings

ultimately result in a judicial determination that the person need not be jailed.

In reaching this holding, the district court incorrectly interpreted the two Supreme Court cases that address probation and parole revocation proceedings. *See Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole). Both cases hold that a preliminary finding of probable cause is required for detention before a revocation hearing. *Gagnon*, 411 U.S. at 781–82; *Morissey*, 408 U.S. at 487. That initial finding, however, establishes only the government's authority to effect pre-revocation detention—akin to requiring a neutral probable-cause finding after any warrantless arrest. Such a finding is legally distinct from the findings necessary to justify prolonged deprivation of physical liberty—akin to the determination of whether a person for whom probable cause has been found may be jailed pending trial. *Cf., e.g.*, *United States v. Salerno*, 481 U.S. 739, 747–49 (1987) (upholding federal statutory scheme for pretrial detention because it required rigorous determinations that the government's compelling interests were served by pretrial detention *distinct from* the requirement

of probable cause that an offense occurred). As the Seventh Circuit explained, there is a "substantial difference" between the determination that there is probable cause to believe a violation occurred and "a determination that an individual should be detained pending his or her final revocation hearing." *Faheem-El v. Klincar*, 841 F.2d 712, 725 (7th Cir. 1988) (en banc).

While an individual's status as a probationer justifies some liberty restrictions, *see Gagnon*, 411 U.S. at 781, it does not dissolve the "fundamental" right to bodily liberty, *Salerno*, 481 U.S. at 747–50; *accord Bearden v. Georgia*, 461 U.S. 660, 672–73 (1983) (requiring substantive findings and procedural safeguards before incarcerating a probationer for failing to pay fine).

As for Plaintiffs' challenge to the adequacy of the probable-cause proceedings—that Defendants do not give probationers adequate notice of the hearing or a chance to present or confront evidence—the district court jumped the gun. Over Plaintiffs' objection, the district court erroneously applied its preliminary-injunction factual findings (laden with credibility determinations) to dispose of Plaintiffs' claims even

though there were material disputes of fact, and Defendants had not even sought summary judgment. This is a textbook error of law. *See Country Floors, Inc. v. P'ship Composed of Gepner & Ford*, 930 F.2d 1056, 1061–62 (3d Cir. 1991). The district court also erroneously rejected Plaintiffs' request to proceed to discovery on the disputed issues of material fact. In its rush to dispose of the case, it abused its discretion. *See Shelton v. Bledsoe*, 775 F.3d 554, 568 (3d Cir. 2015).

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1291 over the final order of the District Court for the Western District of Pennsylvania entering summary judgment, *sua sponte*, on all claims against Plaintiffs-Appellants Dion Horton, *et al.* and dismissing their case against Defendants-Appellees Administrative Judge Jill Rangos, *et al.* on February 21, 2024. The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. Plaintiffs timely filed their notice of appeal on February 21, 2024.

STATEMENT OF THE ISSUES ON APPEAL

1. Whether due process requires a suitability-for-release determination before extended detention until a probation revocation hearing and whether Defendants' practices violate that right. JA_[ECF3_PDF19–28], JA_[ECF82], JA_[ECF116_121–39, 180–81], JA_[ECF121_PDF16–18], JA_[ECF139], JA_[ECF148].

2. Whether *sua sponte* summary judgment on Plaintiffs' procedural due process claim was improper, given genuine disputes of material fact and the need for more discovery. JA_[ECF140], JA_[ECF144], JA_[ECF148].

STATEMENT OF RELATED CASES

This case has not previously been before the Third Circuit. Plaintiffs are unaware of any related case or proceeding.

STATEMENT OF THE CASE

I. Factual Background

A. Probation Has Become a Major Driver of Incarceration.

Pennsylvania has the third-highest percentage of residents on probation and parole nationwide.[1] Nearly half of Pennsylvania's prison admissions stem from probation or parole violations.[2] And in Allegheny County, on any given day, more than one third of the jail population (upwards of 600 people) is jailed for an alleged probation violation. JA_[ECF1_PDF6].

The present-day reality of probation represents a marked departure from its original intent: avoiding incarceration. *See United States v. Murray*, 275 U.S. 347, 357–58 (1928) (explaining probation's goal was giving "young and new violators of law a chance to reform and to escape the contaminating influence of…imprisonment"). As the Supreme Court

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[1] Vincent Schiraldi, *The Pennsylvania Community Corrections Story*, COLUM. UNIV. JUST. LAB 1 (Apr. 25, 2018), https://bit.ly/4c2wuSB (one in 53 nationally vs. one in 34 in Pennsylvania).

[2] *Confined and Costly: How Supervision Violations are Filling Prisons and Burdening Budgets*, COUNCIL OF STATE GOVERNMENTS JUSTICE CENTER (June 18, 2019), https://bit.ly/3KpaAx1.

explained over 50 years ago, "the whole thrust of the probation-parole movement [was] to keep [individuals] in the community, working with adjustment problems there, and using revocation only as a last resort when treatment has failed or is about to fail." *Gagnon*, 411 U.S. at 785 (citation omitted). Probation's original rehabilitative design offered a serious alternative to incarceration, aimed at "keep[ing] less serious and/or first [time] offenders from undergoing the corrupting effects of jail terms."[3]

So how have so many probationers ended up incarcerated? Today's rampant incarceration of probationers reflects an increasing reality that "the state seeks to regulate many aspects of a probationer's behavior far beyond what is covered by the criminal law."[4] Probationers must keep in regular contact with probation officers, who function as "hidden and unaccountable lawmaker[s]" in enforcing the terms of probation.[5] This

[3] Cecelia Klingele, *Rethinking the Use of Community Supervision*, 103 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY no. 4 (2013) at 1024.

[4] Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 295 (2016), https://bit.ly/3VqsqWQ.

[5] *Id* at 346.

includes subjective requirements like not speaking with specific individuals (e.g., people the officer thinks disreputable) and making "every" effort to find employment, plus rampant incursions on daily life, like restrictions on interstate travel, random, invasive drug testing, home inspections, and curfews.[6] Even conditions that are seemingly straightforward may prove difficult to abide, particularly because Pennsylvania does not cap probation sentences—government supervision may last decades.[7]

The consequences of an alleged probation violation make this regime even more draconian. Every day, hundreds of people accused of violating probation conditions are incarcerated at the Allegheny County Jail (ACJ). JA_[ECF1_PDF6]. On a sample date in 2022, 616 people incarcerated at ACJ were awaiting a revocation hearing, or 42% of the entire jail population. JA_[ECF3-1_PDF10]. Thousands live with the

[6] Elizabeth Randol, *Probation in Pennsylvania Keeps People Trapped in the Cycle of Incarceration*, ACLU-PENNSYLVANIA (July 18, 2019), https://bit.ly/4bZe5WU; *see also Rules of Probation and Parole*, FIFTH JUDICIAL DISTRICT OF PENNSYLVANIA, https://bit.ly/3Ko7iKL (last visited June 28, 2024).

[7] Randol, *supra* note 6.

imminent risk of such incarceration. At one point in 2023, there were 10,696 people on probation in Allegheny County. JA_[DefEx1_PDF5].

The vast majority are under supervision for minor offenses. In 2022, 82.3% of probation sentences were for misdemeanor (69.5%) or summary (12.8%) offenses, JA_[ECF82-1_PDF99], for which only short periods of incarceration are authorized, s*ee* 30 Pa. Cons. Stat. § 923(a)(1)–(7).[8] Because Defendants incarcerate individuals for months or years while they await resolution of an alleged violation, probationers can end up spending more time in jail due to the alleged violation than would have been statutorily permitted as the maximum sentence for the underlying offense.

Put simply, in the decades since the Supreme Court last addressed the subject, "[m]ore and more people have become trapped in a cycle of reincarceration and release." *United States. v. Williams*, No. CR 07-010-1, 2023 WL 6299100, at *5 (E.D. Pa. Sept. 27, 2023). But there are no corresponding empirical benefits to public safety. Studies show that pre-

[8] A summary offense is a non-traffic citation. *See* 30 Pa. Cons. Stat. § 923(a)(1)–(4).

revocation detention makes communities *less safe*: just two or three days of post-arrest detention increases the risk of recidivism for low-risk persons. *See* JA_[ECF3_PDF13]. Conversely, decreasing reliance on detention makes communities safer by reducing recidivism. *See* JA_[ECF3_PDF13–14]. The evidence shows that reducing reliance on pre-revocation detention will enhance both public safety and rehabilitation—these interests are not at odds with probationers' liberty.

B. Preliminary Hearings in Allegheny County Are Perfunctory.

In November 2019, Defendants Judge Rangos and Former Director of Adult Probation Scherer approved a written "Detainer Policy" that governs initial detention decisions for those accused of violating probation. *See* JA_[ECF82-1_PDF27–32]. The Detainer Policy provides "criteria" for probation officers to apply when determining whether to arrest an individual for a violation. JA_[ECF3-1_PDF4]; *see also* JA_[DefEx7_PDF92–93]. Once detained for a violation, individuals wait a median of 8 and average of 15.7 days to have their constitutionally mandated preliminary hearing ("*Gagnon* I" proceeding). JA_[ECF82-1_PDF65].

At the preliminary hearing, hearing officers (managers in the probation department) are tasked with determining whether there is probable cause for the probation violation and whether the individual should remain detained until their revocation hearing ("*Gagnon* II" proceeding). JA_[DefEx7_PDF162–64]. Preliminary hearings are frequently short; for those in jail, 42% of hearings are under five minutes. JA_[ECF3-1_PDF14]. Everyone participates remotely by video. JA_[ECF116_12]; JA_[DefEx7_PDF66–67]. Jailed probationers are not notified of the hearing until immediately beforehand, leaving them unable to prepare. *See* JA_[ECF116_11, 87–88]; JA_[ECF3-1_PDF51]. Nor can public defenders meet with probationers before hearings, compelling them to represent individuals they have never spoken to. *See* JA_[ECF116_12, 31, 89].

Hearing officers rely on limited information to determine probable cause and detention. JA_[ECF82-1_PDF4–7]. A probation officer reads the violation report at the hearing. JA_[ECF3-1_PDF21–22]; *see also* JA_[ECF82-1_PDF4–7] (hearing officers get the report the day before but do not prepare in advance). When public defenders or probationers

attempt to advocate for release, hearing officers regularly cut them off. *See* JA_[ECF3-1_PDF23]; JA_[ECF116_44, 60]. Hearing officers rarely, if ever, allow presentation of evidence, aside from the probation officer's report. *See* JA_[ECF82-1_PDF34]; JA_[ECF3-1_PDF15, 21–22]. For instance, hearing officers consider only that a probationer has been accused of a new offense; they do not consider the alleged underlying facts or direct evidence of that offense. JA_[DefEx7_PDF157–58].

The already cursory proceedings are meaningless in "mandatory detention" cases, where hearing officers refuse to consider any individualized circumstances or argument.

Detainer Policy. The Detainer Policy requires mandatory detention when the individual is accused of 1) violating a "zero tolerance" condition imposed by the sentencing judge, or 2) "a new charge that represents a serious threat to public safety." JA_[ECF3-1_PDF4]. Hearing officers refuse to consider the facts of the new charge or the necessity of detention pending the final hearing given other available alternatives. JA_[ECF116_43–44, 49, 62]. Instead, detention automatically flows from the fact that a qualifying accusation has been made.

"No-Lift" Policy. Hearing officers also indiscriminately detain anyone supervised by Judges Bigley or Mariani.[9] These judges require that every individual they supervise who is arrested for a probation violation must be jailed—regardless of the circumstances of the alleged violation or the individual's risk of harm to the community. Defendant Hearing Officer O'Brien testified, "I was advised throughout my career...by different people, different Directors, during different meetings...not to recommend to lift Judge Mariani's detainers." JA_[DefEx7_PDF112–14]. "It was institutional knowledge." JA_[*Id.*_at_PDF112]. And he "received directives" from "superiors" "that if Judge Bigley issued a warrant for an individual on probation, they were to remain detained." JA_[*Id.*_at_PDF128].

So, during the preliminary hearing, based on the identity of the supervising judge, hearing officers refuse even to *consider* release, explaining, for example: "This is Judge Bigley—I'm not allowed to release you"; "It's Judge Mariani, I have no discretion in this case"; "There's

[9] Judge Mariani recently retired, mooting the claims against him, so Plaintiffs voluntarily dismissed him. Dkt. No. 20.

nothing we can do here, even if all three of us [hearing officer, public defender, and probation officer] want you out, Mariani won't let it happen." JA_[ECF3-1_PDF16]. The proof is in the numbers: between 2019 and 2022, individuals supervised by Judges Bigley and Mariani were detained at the preliminary hearing 96.3% and 94% of the time, respectively. JA_[ECF82-1_PDF63].

Because alleged probation violations are often first separately charged as substantive offenses, many probationers proceed through parallel processes: a bail hearing on the criminal charge, and a preliminary hearing on the violation. But even when a judge in the new criminal proceeding determines that the accused should be released on bail because pre-adjudication detention serves no government interest, Defendants' mandatory detention practices often *require* that they be detained on the violation.

Consider Plaintiff Damon Jones. A judge considering a criminal charge determined that pretrial detention was not necessary to serve the government's compelling interests and released him pending trial. JA_[ECF3-1_PDF36]. But after his release, he was re-arrested for a

probation violation based on that very charge, and because of Defendants' mandatory detention policies, a hearing officer refused to consider his release despite the judge's earlier determination. JA_[*Id.*_at_PDF36–37]; *see also* JA_[*Id.*_at_PDF30, 72, 75] (Plaintiffs Horton, Stanford, and Bronaugh had similar experiences).

Hearing officers do not function like independent judicial officers. Although judicial approval is not required if the hearing officer recommends that the person remained jailed, the supervising probation judge must approve any recommendation to release a probationer. JA_[ECF82-1_PDF47–50].

Overwhelmingly, hearing officers decline to recommend release: between 2019 and 2022, they did so for only 19.6% of people accused of probation violations. JA_[ECF82-1_PDF63].

C. Probationers Spend Months Detained Until the Revocation Hearing.

Once a hearing officer orders someone detained at the preliminary hearing, they are typically jailed until their revocation hearing, which generally does not occur until months, sometimes more than a year, later. JA_[ECF116_17–18, 93–95]. For people accused of violating probation by

committing a new offense, even once the new charge is resolved, it still takes approximately three more months (on average) for the revocation hearing because probation proceedings trail pretrial ones. *See* JA_[ECF85-2_PDF10]. As of the date of Plaintiffs' expert's declaration, the six Named Plaintiffs, four of whom were still detained, had spent an average of 230 days each in jail awaiting their final hearing. JA_[ECF82-1_PDF99–100]. Today, Plaintiff Jones remains in jail—more than two years after his arrest—only because of the probation violation; no judge has found that his incarceration serves any government interest.

During this interim period, Plaintiffs typically do not have access to a lawyer. As a matter of practice, between the conclusion of the preliminary hearing and the revocation hearing, the county public defender does not assign lawyers to represent individuals on the probation case. JA_[ECF1_PDF19–20]; *see also, e.g.*, JA_[ECF3-1_PDF30].

D. Indefinite Pre-Revocation Detention Causes Devastating Harm.

Plaintiffs suffer incalculable harm during the prolonged period of pre-revocation detention. People who are jailed pre-adjudication

experience worsening mental illness, since jail conditions cause extreme stress and make needed medications inaccessible; a high likelihood of assault, including sexual assault, especially in the first few days in jail; exposure to communicable diseases; inability to exercise; deprivation of sunlight and fresh air; and forcible separation from children and family. *See* JA_[ECF3_PDF12–13].

Other consequences of indefinite pre-revocation detention include loss of jobs and income; loss of housing and missed bill payments; and loss of physical or legal custody of children. JA_[*Id.*].

Plaintiffs experienced many of these consequences. Plaintiff Jones lost his home and faces diminished job prospects and pay upon release. JA_[ECF3-1_PDF38]. Plaintiff Brownlee was infected with COVID-19 twice while jailed and was unable to see his four-year-old son or care for his aging mother. JA_[*Id.*_at_PDF42–43]. Plaintiff Oden-Pritchett could not start college or a new job and lost the public housing he finally qualified for after a years-long wait. JA_[*Id.*_at_PDF47]; JA_[ECF116_97–99]. Dion Horton lost his job and missed the birth of his daughter; his family was then financially strained trying to meet basic

necessities for his children. JA_[ECF3-1_PDF31]; *see also* JA_[*Id.*_at_PDF43, 52, 56, 59–60, 64, 68–69] (probationers describing harms of detention).

Worse still, jailed probationers suffer inhumane conditions at ACJ. *See* JA_[ECF3_PDF14]. Plaintiffs Horton and Jones, for instance, experienced moldy food with bugs, filthy cells, delayed medical care, frequent isolation, and limited out-of-cell time. *See* JA_[ECF3-1_PDF32–33, 38]; *see also* JA_[*Id.*_at_PDF43, 47, 52, 59, 64, 68] (class members describing similar conditions). Six people incarcerated at ACJ died in 2022 alone, including two jailed only because of a probation allegation. JA_[ECF3_PDF15].

Finally, for most people released pretrial but jailed on a probation allegation for months or years, the detention undermines the trial court's decision that they should be able to fight their case outside of jail, subjecting them to higher rates of conviction and worse sentencing outcomes. JA_[*Id.*_at_PDF13].

II. Procedural History

Plaintiffs filed this case on October 2, 2022, on behalf of themselves and a putative class of similarly situated persons.

Counts I focuses on Defendants' failure to provide the procedural safeguards that *Gagnon* and *Morrissey* require at the preliminary hearing, rendering any probable-cause determination constitutionally deficient. Count II focuses on the due-process right to a suitability-for-release determination (with certain substantive findings and procedural safeguards) as a prerequisite to prolonged pre-revocation detention. Plaintiffs sought declaratory relief against all Defendants, and injunctive relief and compensatory damages against County Defendants.[10]

Because of the irreparable harm they were suffering, Plaintiffs immediately moved for a preliminary injunction seeking to halt Defendants' mandatory detention practices and compel Defendants' to

[10] "County Defendants" are Administrative Judge Jill Rangos, (Former) Director of Adult Probation Frank Scherer, and (Former) ACJ Warden Orlando Harper. "Judicial Defendants" are Judge Bigley and now-retired (and dismissed) Judge Mariani. "Hearing Officer Defendants" are the hearing officers who preside over the preliminary hearings: Robert O'Brien, Charlene Christmas, Stephen Esswein, and Renawn Harris.

provide release-suitability determinations before subjecting Plaintiffs to prolonged pre-revocation incarceration.

At the preliminary-injunction stage, the parties engaged in limited discovery to develop facts relevant to that motion with the understanding that the case would proceed to full merits discovery after a ruling. Consistent with the rushed and informal nature of preliminary-injunction proceedings, the district court allowed only "ten requests for production" and "20 hours of depositions per side." JA_[ECF17_1–2]. Abiding by these limitations, and cognizant that the evidentiary burden for a preliminary injunction is relaxed, Plaintiffs served two requests for production on Warden Harper and seven on County Defendants. JA_[ECF144_5–6]. Plaintiffs deposed only a single Hearing Officer Defendant and Defendant Scherer to obtain targeted evidence relevant to the limited preliminary-injunction motion—a fraction of the witnesses to be deposed during normal discovery. JA_[*Id.*_at_6].

Plaintiffs had no reason to believe they should attempt to shoehorn full-blown merits discovery into limited preliminary-injunction discovery, nor would that have been possible under the court-imposed

constraints. At the time, the district court appeared to be operating on the same assumption: denying Defendants' motions to dismiss just days before the preliminary-injunction hearing, it found that Plaintiffs had "plausibly state[d] claims that their due-process rights were violated" and that "[f]urther details" of the challenged practices "should be fleshed out in discovery". JA_[ECF104_8].

The district court held a preliminary-injunction hearing on April 18, 2023. Plaintiffs called five witnesses; Defendants called none. Both sides submitted witness declarations, deposition transcripts, and documents. Plaintiffs also provided the sworn declaration of probation expert Vincent Schiraldi, who critiqued Defendants' perfunctory preliminary hearings and the resulting high detention rates, concluding that pre-revocation detention was highly disruptive and counter to the goals of probation. JA_[ECF82-1_PDF76–85].

The district court denied preliminary relief on December 22, 2023. JA_[ECF139]. On Count II, regarding the suitability-for-release determination, the court construed *Morrissey* and *Gagnon* as defining the full panoply of substantive and procedural rights that attach when

probationers are arrested, *see* JA_[*Id.*_at_16], and found that "there is no federal or state constitutional right that mandates the process that Plaintiffs now seek," JA_[*Id.*_at_22]. On Count I, concerning the procedures used to determine probable cause at the preliminary hearing, the district court noted factual gaps in the record, but made factual findings against Plaintiffs, ultimately concluding that there is "insufficient evidence to support [Plaintiffs'] claim" that the "current hearing procedures…fail[] to comply with the requirements of *Gagnon*." JA_[*Id.*_at_25–26]. The court simultaneously issued a *sua sponte* order to show cause as to why it should not convert its preliminary-injunction decision into a summary-judgment ruling. JA_[ECF140].

Plaintiffs objected. They argued that the record was limited by the proceedings' preliminary nature, and they were entitled to obtain additional proof before summary judgment. JA_[ECF144_5–8]. Plus, even on the limited record, there were genuine disputes of material fact. JA_[*Id.*_at_8–9]. Plaintiffs urged the district court to allow the case to proceed to discovery.

Even though each of Plaintiffs' arguments should independently have barred summary disposition against them, on February 21, 2024, the district court entered summary judgment in Defendants' favor. JA_[ECF148].[11]

SUMMARY OF THE ARGUMENT

I. The district court held that the probable-cause determination Defendants make at the preliminary hearing safeguards probationers' interest in bodily liberty, justifying their detention for months or years until their revocation hearing. Not so.

To reach its conclusion, the district court relied almost exclusively on *Gagnon* and *Morrissey*. But as the en banc Seventh Circuit held, these cases concern only the procedures necessary for the preliminary hearing (determining probable cause) and the final hearing (determining whether a violation occurred and whether to revoke probation). The question Plaintiffs raise—whether a release-suitability determination is required and what substantive findings are needed to justify prolonged pre-

[11] After dismissing Plaintiffs' federal constitutional claims (Counts I and II), the district court declined to exercise supplemental jurisdiction over Plaintiffs' state-law claims (Counts III and IV). These claims should be reinstated on remand.

revocation detention—"was not before the Court in *Morrissey*." *Faheem-El*, 841 F.2d at 724–25. While there is little precedent on this question, this Court is not writing on a blank slate. Consistent with decades of precedent on the importance of bodily liberty, *Faheem-El* held that due process *does* protect a parolee's liberty interest against pre-revocation detention. *Id.*

Indeed, probationers' interest in bodily liberty carries "many of the core values of unqualified liberty." *Morrissey*, 408 U.S. at 482. And Supreme Court precedent instructs that "[f]reedom from physical restraint [is] a fundamental right" that "has *always* been at the core of the liberty protected by the Due Process Clause." *Foucha v. Louisiana*, 504 U.S. 71, 80, 86 (1992) (emphasis added); *see also Zadvydas v. Davis*, 533 U.S. 678, 690 (2001) (same); *Salerno*, 481 U.S. at 747–50 (same).

These cases demonstrate that probable cause to believe a violation of law has occurred does not alone warrant indefinite detention for months or years. Importantly, whether a violation of law occurs is not the only, or even the most relevant, question in determining what the appropriate governmental response to that violation should be. As the

record here demonstrates, for example, judges in most cases ultimately conclude that incarceration after a violation does *not* serve the government's interests. JA_[DefEx2_PDF40].

In a variety of contexts, the Supreme Court has held that the government may not deprive individuals of bodily liberty unless that incarceration serves compelling government interests that less restrictive alternatives do not satisfy. No precedent holds that this fundamental requirement to justify infringing bodily liberty disappears merely because someone is on misdemeanor or felony probation. *See Bearden*, 461 U.S. at 672 (government cannot jail a probationer for not paying a fine without inquiring into reasons for non-payment and making a substantive finding that alternative sanctions do not serve the government's interests).

The district court erred by dismissing Count II as a matter of law and holding that prolonged pre-revocation detention—even indiscriminate mandatory detention—does not require any finding that such detention serves a government interest. And though more discovery is needed to define the contours of the procedures necessary to ensure

confidence in the release-suitability determination, existing precedent and the limited record demonstrate that the Detainer Policy does not protect probationers' important interest in bodily liberty.

II. Although probable cause that a violation occurred does not alone justify prolonged pre-revocation detention, Plaintiffs *are* entitled to a preliminary hearing determining probable cause with certain procedural safeguards. *See Morrissey*, 408 U.S. at 486–87 (defining procedural requirements for preliminary hearing for parolees); *Gagnon*, 411 U.S. at 781–82 (extending *Morrissey* to probationers). Defendants' failure to fulfill these minimum requirements during the probable-cause determination is the basis for Count I. The district court's error in dismissing this claim is twofold.

First, the court erred in entering summary judgment because there is a genuine factual dispute over whether Defendants meet *Gagnon*'s probable-cause requirements. This error was amplified by the fact that the court imported its factual findings from the preliminary-injunction record (regarding the opportunity to present evidence) and applied them at summary judgment. "[S]uch reliance cannot co-exist with the

requirement of Rule 56(c) that no genuine issues of material fact remain outstanding." *Country Floors, Inc.*, 930 F.2d at 1061.

Second, the court abused its discretion by denying Plaintiffs discovery on the disputed factual issues before entering judgment. The district court allowed only limited discovery before the preliminary-injunction hearing and even acknowledged several times that "the record is not fully developed." JA_[ECF139_22 n.9]. "If discovery is incomplete, a district court is rarely justified in granting summary judgment[.]" *Shelton*, 775 F.3d at 568.

STANDARD OF REVIEW

This Court must review a summary-judgment order de novo. *Huber v. Simon's Agency, Inc.*, 84 F.4th 132, 144 (3d Cir. 2023). "Summary judgment is appropriate only where 'there is no genuine dispute as to any material fact and the [prevailing party] is entitled to judgment as a matter of law[,]'" when the facts are viewed "in the light most favorable to the nonmoving party." *Baloga v. Pittston Area Sch. Dist.*, 927 F.3d 742, 751–52 (3d Cir. 2019) (quoting Fed. R. Civ. P. 56(a)). An abuse-of-discretion standard governs the district court's decision to disallow

additional discovery before entering judgment. *Murphy v. Millennium Radio Grp. LLC*, 650 F.3d 295, 310 (3d Cir. 2011).

ARGUMENT

I. The District Court Erred in Concluding That Probationers Are Not Entitled to a Release-Suitability Determination.

An individual accused of violating the terms of probation has two important and distinct rights upon arrest. First, the constitutional right to a probable-cause determination that a violation has occurred (just like any individual accused of a crime is entitled to a probable-cause determination within 48 hours of arrest). Without probable cause that a violation has occurred, the government cannot proceed with the revocation process. For a probationer, this right and the procedures that protect it are defined in *Gagnon*. *Infra* § I.A.

Second, the separate and "fundamental" constitutional right to bodily liberty, *Salerno*, 481 U.S. at 747–50, which can only be infringed if the government proves that other alternatives are not sufficient to protect its compelling interests (here, public safety or rehabilitation). *See, e.g.*, *id.* at 749–50; *infra* § I.B.

The court below elided these independent constitutional rights, concluding erroneously that so long as probable cause is found, probationers are not entitled to a suitability-for-release determination before months or years of pre-adjudication detention. But the liberty interest Plaintiffs seek to vindicate was not at issue in *Gagnon* or *Morrissey*, and the district court erred in relying on those decisions, with no other meaningful analysis, to dispose of a claim those cases did not address.

Indeed, the en banc Seventh Circuit has considered and rejected the exact conclusion reached by the district court here—that *Morrissey* held that a probable cause finding alone was sufficient for detention pending a final revocation hearing.[12] In *Faheem-El v. Klincar*, the only circuit court decision to address the issue at the heart of Plaintiffs' claim, a class of parolees challenged Illinois's policy of mandatory detention for

[12] *Roberson v. Cuomo*, a now-vacated decision upon which the district court relied for another proposition, reached the same conclusion. *See* 524 F.Supp.3d 196, 211 (S.D.N.Y. 2022) (concluding that *Morrissey* did not decide what due-process protections attach to pre-revocation detention), *vacated as moot, Roberson v. Hochul*, No. 21-877, 2022 WL 19224518 (2d Cir. Sept. 27, 2022).

individuals arrested on new charges while on parole, arguing that they were entitled to an opportunity for release on bail under the Eighth and Fourteenth Amendments. 841 F.2d at 713–14. The court held that the question of what process is required to protect a parolee's liberty interest during the time between the preliminary and final revocation hearing "was not before the Court" in *Morrissey*. *Id.* at 724. *Morrissey* and *Gagnon* considered *only* the protections specific to the revocation of probation or parole, which includes a probable-cause determination at a preliminary hearing. *See Morrissey*, 408 U.S. at 485 (requiring a preliminary probable-cause and revocation hearing); *Gagnon*, 411 U.S. at 781-82 (extending *Morrissey* to probationers). In fact, the *Faheem-El* court reasoned that

> [t]here can be a substantial difference between the determination that there is probable cause to believe a condition of parole has been violated (the issue at the preliminary revocation hearing) and a determination that an individual should be detained pending his or her final revocation hearing.

841 F.2d at 725. Having implicitly found that parolees have a substantive liberty interest pending their revocation hearings, the court remanded

the case to determine the contours of the procedures required to protect that right. *See id.* at 727.

Just as a finding of probable cause to support a criminal charge is not enough to detain an individual until trial, a probable-cause finding under *Gagnon* does not dispose of a probationer's "fundamental" liberty interest before adjudication. *See infra* § I.A.1.a.

A. Due Process Requires a Suitability-for-Release Determination

Probationers' liberty interest "includes many of the core values of unqualified liberty and its termination" is an "immediate disaster" that "inflicts a 'grievous loss' on the [probationer] and often on others." *Morrissey*, 408 U.S. at 482; *Faheem-El*, 841 F.2d at 725. This is particularly true where, as here, probationers endure extended periods of incarceration: "such confinements clearly violate the Due Process Clause of the Fourteenth Amendment." *Faheem-El*, 841 F.2d at 729 (Cummings, J., concurring) ("[F]requently many weeks and even many months of detention separate the preliminary and final parole revocation." (cleaned up)).

The district court nonetheless concluded that Defendants' procedures (perfunctory, untested probable-cause determinations, no release-suitability determination, and mandatory detention in many cases) were constitutional, reasoning that neither *Morrissey* nor *Gagnon* "requires that a probation officer or judge also make a bail or release decision as part of the [preliminary] hearings." JA_[ECF139_17]. That may be true, but it is also irrelevant. These cases do not address, let alone foreclose, that requirement; they vindicate a right distinct from the one at issue here.

1. The District Court Erred in Concluding That a Probable-Cause Finding Alone Suffices to Justify Pre-Revocation Detention.

The district court's conclusion that *Gagnon*'s requirement for a probable-cause determination at the preliminary hearing satisfies all of probationers' detention-related rights, JA_[ECF139_17], cannot be reconciled with long-standing due-process principles or any conceivable balancing of the individual and government interests at stake. It is additionally dubious because the probable-cause determination is more traditionally conceived as protecting Fourth Amendment rights, distinct from fundamental due-process liberty interests.

a. The Probable-Cause Finding Traditionally Protects a Fourth-Amendment Interest, Not Due Process.

In *Gagnon*, the Supreme Court held that probationers are entitled to a probable-cause determination at the preliminary hearing. 411 U.S. at 781–82. But this probable-cause determination cannot usurp a suitability-for-release determination because the two findings protect different rights and interests. There are two prerequisites to detention: 1) probable cause, which satisfies the kinds of interests protected by Fourth Amendment; and 2) a finding that the deprivation of bodily liberty is warranted for any given person accused of a violation (to ensure public safety, ensure court appearance, or promote rehabilitation), which satisfies substantive due process. *Gerstein v. Pugh* and *United States v. Salerno* illustrate the distinction.

In *Gerstein*, the Supreme Court struck down a Florida law allowing "a person arrested without a warrant" to "be jailed…pending trial without any opportunity for a probable cause determination." *Gerstein v. Pugh*, 420 U.S. 103, 116 (1975). It found that the Fourth Amendment required a finding of "probable cause for detaining the arrested person pending further proceedings." *Id.* at 120. Twelve years later, in *Salerno*, the Court

considered a substantive-due-process challenge to the Bail Reform Act. *Salerno*, 481 U.S. at 739. It found that the Act passed constitutional muster because it limits "detention prior to trial" to only those who, "after an adversary hearing," are found "to pose a threat to the safety of individuals or to the community which no condition of release can dispel." *Id.* at 755.

In short, the Fourth Amendment and substantive due process protect related-but-different interests, and a finding that satisfies one does not satisfy the other. The former protects against certain searches and seizures, limiting government action in this sphere to only those situations in which there is good reason to believe that a law has been violated. The latter protects one of the most fundamental rights in the American legal tradition and, throughout a variety of contexts—regulatory detention, mental illness, immigration—always asks if the government's prolonged deprivation of physical bodily liberty serves a compelling interest. If mere probable cause sufficed to safeguard an individual's substantive due-process right to pretrial liberty, for example, the Supreme Court would not have needed to decide *Salerno*—*Gerstein*

would have been dispositive. So too here. The dicta from *Morrissey* that a probable-cause finding "would be sufficient to warrant the parolee's continued detention," 408 U.S. at 487, must be read, in light of that precedent, to refer to the interests safeguarded by the Fourth Amendment's analogous probable-cause determination. Indeed, as in the pretrial context, a finding of probable cause *is* sufficient, as far as the Fourth Amendment is concerned, to justify continued seizure of the person. On the other hand, as *Salerno* explained substantive due process, prolonged government detention before adjudication *also* requires a determination that alternative less-intrusive means will not serve the government's interests.

2. The District Court Ignored the Fundamental Interest in Bodily Liberty.

a. Probationers' Right to Bodily Liberty Is Fundamental.

The right to bodily liberty is "fundamental." *Salerno*, 481 U.S. at 747–49. In fact, "[f]reedom from bodily restraint has *always* been at the core of the liberty protected by the Due Process Clause." *Foucha*, 504 U.S. at 80 (emphasis added); *accord Zadvydas*, 533 U.S. at 690. *Salerno* therefore recognized a "'general rule' of substantive due process that the

government may not detain a person prior to a judgment of guilt in a criminal trial." 481 U.S. at 749.

In *Faheem-El*, the en banc Seventh Circuit held that this general rule applies to prolonged pre-revocation detention. 841 F.2d at 724-26. While the court rejected the parolees' argument that they were constitutionally entitled to a *judicial* bail hearing, it concluded that due process likely requires the parole board to provide an "individualized evaluation" (or a "release-suitability hearing") that considers the burden detention imposes on their liberty interest during the "time between the preliminary revocation hearing and the final revocation hearing" in light of any particularized government interest. *Id.* at 724–26.[13]

Even though *Faheem-El* remanded for factual development concerning the sufficiency of Illinois' parole-revocation procedures under

[13] Conflating these distinct holdings, the court below relied on *Faheem-El* for the irrelevant proposition that "there is no due-process right to a judge making an individualized release decision at the *Gagnon* I hearing." JA_[ECF139_18]. *Ross v. Young*, on which the court below also relied, JA_[ECF139_19], similarly conflates *Faheem-El*'s two holdings. 736 F. Supp. 1525, 1527 (E.D. Mo. 1990). Doing so, it failed to consider whether due process required some other form of protection, as Plaintiffs urge here.

Mathews, the issue before this Court "has both substantive and procedural aspects." *Washington v. Harper*, 494 U.S. 210, 220 (1990). In *Harper,* the Supreme Court explained that substantive constitutional law is concerned with setting forth what legal standard the government must meet to infringe any particular right. *Id.* Procedural due process, by contrast, concerns what "minimum procedures" are required to ensure the accuracy of that substantive determination. *Id.* "It is axiomatic that procedural protections must be examined in terms of the substantive rights at stake." *Id.* Only once a substantive right is infringed does "[p]rocedural due process impose[] constraints on governmental decisions." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

Thus, as in *Faheem-El*, if probationers retain a "fundamental" interest in bodily liberty, then the first step is determining what showing the government must make to deprive it (the substantive constitutional question), followed by a balancing of what procedural safeguards must attend such a finding given the importance of the interests at stake and the risk of error (the procedural due process question), as expanded upon below (*infra* § I.B.).

b. Abridging This Right Requires an Individualized Finding That Prolonged Pre-Revocation Detention Advances a Compelling Government Interest.

Because being on probation does not extinguish the fundamental interest in bodily liberty, the preliminary hearing must interrogate whether the government has public-safety or rehabilitation reasons to infringe it.

When it comes to the deprivation of bodily liberty, the Supreme Court has consistently held that the government must demonstrate that detention serves its interests because other alternatives are insufficient. For example, in *Salerno*, the Court upheld a law governing pretrial detention on the basis that the government had a compelling interest in preventing crime and because the statute was narrowly focused and "carefully limit[ed] the circumstances under which detention [could] be sought to [those involving] the most serious of crimes." 481 U.S. at 747–49. Detention was permitted under the statute only if "no condition or combination of conditions" alternative to detention were available. *Id.* at 742 (internal quotation marks omitted). Likewise, the Court sustained a Kansas statute permitting civil detention of people with mental illnesses

convicted of sexually violent crimes because it "limited confinement to a small segment of particularly dangerous individuals," "provided strict procedural safeguards," and, notably, "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). In all these cases, the hallmark of substantive due process is the need for some showing that the deprivation of bodily liberty is necessary to serve the government's interests.

The Court has adopted the same approach even for those who do not have a "complete liberty interest." JA_[ECF139_19]. In *Schall v. Martin*, the Supreme Court considered the substantive due-process rights of juveniles, emphasizing that juveniles have a "qualified" liberty interest because they "are always in some form of custody." 467 U.S. 253, 265–66 (1984). Still, it upheld a New York law allowing juveniles to be detained under a scheme that required repeated judicial risk findings and detention evaluations. *Id.* at 278. Put differently, the Court upheld the requirement for substantive finding to justify a juvenile's pretrial detention, the qualified liberty interest notwithstanding.

On the other hand, the Supreme Court has consistently rejected incarceration schemes that did not require the government to prove, and a neutral arbiter to find, that the individual poses a public safety risk. In *Zadvydas*, for instance, the Court rejected an interpretation of federal law that allowed non-citizens to be detained pending deportation even when deportation was no longer reasonably foreseeable. 533 U.S. at 699. The detention scheme applied "broadly to [individuals] ordered removed for many and various reasons," the only common denominator being their removable status, "which bears no relation to a detainee's dangerousness." *Id.* at 691–92. Making matters worse, "the sole procedural protections available" were administrative proceedings where the detained individual bore "the burden of proving he is not dangerous." *Id.* at 692. Similarly, the Court struck down a law requiring detention of people found to be permanently incompetent to stand trial absent a particularized dangerousness finding, *Jackson v. Indiana*, 406 U.S. 715, 736–38 (1972), as well as a detention regime that required people found not guilty by reason of insanity to prove that they were not dangerous to obtain release, *Foucha*, 504 U.S. at 81–82.

These cases demonstrate that Defendants' policies—which result in months or years of detention before a revocation hearing without any determination that any government interest is served—are unlike any scheme the Supreme Court has upheld in its due process jurisprudence. Defendants, consistent with state law, have identified public safety as an "overwhelming factor" in the detention decision. JA_[ECF128_10]; *see also* JA_[DefEx1_PDF8]; 42 Pa. Cons. Stat. § 9771(c)(1)(ii) (authorizing revocation of probation and resulting incarceration on a finding that the probationer poses "an identifiable threat to public safety"). Promoting rehabilitation is another compelling interest. *See Gagnon*, 411 U.S. at 783–85. Due process demands, at minimum, that the government determine whether prolonged detention serves those interests.

Although it arose in a slightly different context, *Bearden* (like *Schall*) illustrates, that an individual's status as a probationer does not diminish the need for an individualized necessity finding before physical incapacitation—contrary to the district court's conclusion here, JA_[ECF139_19–21]. In *Bearden*, the Court considered "whether a sentencing court can revoke a defendant's probation for failure to pay the

imposed fine and restitution, absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." 461 U.S. at 665. Because the loss of physical liberty was at stake, *Bearden* held that when non-payment is not willful, a court must consider whether measures other than imprisonment would serve its interests. *Id.* at 672. "Only if alternate measures are not adequate to meet the State's interests in punishment and deterrence may the court imprison a probationer who has made sufficient bona fide efforts to pay." *Id.*

As they are currently constituted, preliminary hearings in Allegheny County do not even consider—let alone make a determination about—the public-safety and rehabilitation factors relevant to suitability for release pending the revocation hearing. *See, e.g.*, JA_[ECF116_13–14, 43-44 90–91]. To comport with due process, Defendants may not order detention at the preliminary hearing absent finding that the detention serves the government's compelling interests.

c. Suitability-for-Release Determinations Are Essential to the Probation-Revocation Process.

Gagnon and *Morrissey* contemplate two findings at the revocation hearing to justify incarcerating an alleged probation violator. First, a factual finding that the probationer actually violated one or more terms of probation. *See Morrissey*, 408 U.S. at 479, 488. Second, a determination about whether the individual should be committed to prison, or whether other sanctions (such as more probation, modified conditions, or court-ordered treatment) would better protect society and promote rehabilitation. *Id.* at 479–80, 488. Because not every accusation is substantiated and because not every supervision violation inexorably leads to revocation, let alone incarceration, each individual facing such an accusation must have an opportunity to show that they did not violate probation or that, if they did, "circumstances in mitigation suggest that the violation does not warrant revocation." *Id.* at 488.

The probable-cause finding at the preliminary hearing forecasts the first of these determinations required at the revocation hearing. The release-suitability determination forecasts the second. Without it, Defendants short-circuit the revocation hearing by detaining individuals

for prolonged periods only for a judicial officer often to ultimately determine that probation need not be revoked or that the individual need not be jailed.

By Defendants' own count, this happens in 61% of cases: in the last five years, only 39% of individuals jailed for a probation violation had probation revoked at the revocation hearing. JA_[DefEx2_PDF40]. For 50%, probation was terminated or continued at the final hearing, while 11% had the violation resolved before the hearing (for example, if their new criminal charges were dismissed and that was the sole basis for the alleged probation violation). JA_[*Id.*]. And because most probationers are convicted of low-level offenses, they may end up spending more time in jail awaiting the final hearing than the sentence a judge could or would impose in the event of a revocation. *Supra* at 10. Plainly, the government has no interest in detaining individuals longer than authorized by law or in situations in which the sentencing judge determines that it is not necessary. Making some initial determination concerning suitability-for-release at the preliminary hearing guards against these perverse

outcomes that are contrary to both probationers' and the government's interests.

This is particularly true where, as here, the detention is significantly longer than the two months the *Morrissey* court thought "not...unreasonable." 408 U.S. at 488. Plaintiff Jones, for instance, has now been jailed for more than two years only because of a probation violation: although a judge ordered him released in his underlying case, Defendants' mandatory detention policy means he is detained, and hampered from preparing his own defense, solely because of the probation violation based on the same allegations. Plaintiffs Stanford and Oden-Pritchett spent at least seven months in jail awaiting a revocation hearing, JA_[ECF116_17–18, 93–95], which reflects the lower end of the duration of pre-revocation detention in Allegheny County, *see* JA_[ECF85-2_PDF10] (demonstrating that an average of 84 days elapse between the resolution of an individual's new charges and their revocation hearing (in addition to the many months it takes for the new charges to resolve)). This period of detention "can have a devastating

effect on the life of a [probationer] and his or her family." *Faheem-El*, 841 F.2d at 725.

The release-suitability finding contemplated in *Faheem-El* is common in American law and similar to the requirements in other preliminary-hearing contexts, particularly where there is a risk of irreparable harm. For instance, civil litigants can obtain a preliminary injunction, which looks to the ultimate likelihood of success on the questions to be resolved at trial to prevent irreparable harm. *See Reilly v. City of Harrisburg*, 858 F.3d 173, 176–179 (3d Cir. 2017). Just like a party seeking a preliminary injunction must show that they are likely to succeed at the end of the case to obtain such drastic relief, the government, if it seeks pre-adjudication detention, must prove probable cause for a probation violation *and* that re-incarceration would serve its interests under the individualized circumstances to obtain the drastic relief of pre-revocation detention.

d. The "Conditional" Nature of Probationers' Liberty Interests Does Not Negate the Release-Suitability Requirement.

The district court's reasons for permitting prolonged pre-revocation detention without a release-suitability determination lack merit. First, the district court disregarded due-process precedent requiring similar findings because none arose in the probation context.[14] JA_[ECF139_19–21]. But *Bearden* and *Schall* both disprove the notion that having a "conditional" or "qualified" liberty interest absolves the government of demonstrating that the complete deprivation of bodily liberty requires an individualized showing that a government interest is served. *Supra* at 40, 42–43.

More fundamentally, though, the district court misunderstood what it means for probationers to have a "conditional" liberty interest. It

[14] The district court also said that "none of the decisions went so far as to mandate, in a vacuum, that detainees have a standalone right to receive a release determination predicated on risk of flight and danger to the community." JA_[ECF139_20]. It reasoned that "just because the Supreme Court in *Salerno*…held that the procedures under the Bail Reform Act satisfied due process, it does not mean that the absence of those procedures here offends due process." JA_[*Id.*_at_20–21]. True. But

presumed this meant that physical liberty could be infringed without a finding that detention serves a government interest. But all that legal concept means is that, in addition to the regular laws that all people must follow, probationers are subject to additional conditions that restrict them from doing things that would not otherwise be criminalized—like missing curfew, failing a drug test, or losing contact with a probation officer—and that these violations may lead to incarceration with a lower evidentiary burden than required for a criminal conviction. *See Morrissey*, 408 U.S. at 480, 484.

Not only did the district court erroneously dispose of Plaintiffs' claim on the basis that their liberty interest is "conditional," it overlooked the legal reasons and specific evidentiary facts establishing that

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Salerno held that the liberty interest is "fundamental" and that any intrusion on this interest must be "narrowly focuse[d] on a particularly acute problem," 481 U.S. at 740, emphasizing the substantive finding of dangerousness and lack of less-intrusive alternatives. Courts have subsequently relied on *Salerno* to determine what substantive findings and procedural protections *are* necessary. *See, e.g.*, *Black v. Decker*, 103 F.4th 133, 156–58 (2d Cir. 2024); *In re Humphrey*, 482 P.3d 1008, 1021–22 (Cal. 2021); *Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 460 P.3d 976, 984–85 (Nev. 2020); *Simpson v. Miller*, 387 P.3d 1270, 1275–78 (Ariz. 2017).

probationers retain an even greater interest in their liberty than parolees—such that *Faheem-El* provides the floor, not the ceiling, for the protections required here. Unlike with parolees, the government has never established a penological interest in incarcerating a probationer. Parolees, for their part, are serving carceral sentences under supervision rather than behind bars. *See Morrissey*, 408 U.S. at 477 ("The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules...."). Probation, though, is "a court-ordered period of correctional supervision to be served in the community, generally in lieu of incarceration."[15] And "[a]s a general proposition, parolees have been convicted of more serious crimes than individuals who receive probation." *Faheem-El*, 841 F.2d at 728 (finding that the law need not treat probationers and parolees equally). Indeed, in 2022, more than 80% of the people sentenced to probation in Allegheny County were convicted of low-level offenses. JA_[ECF82-1_PDF99].

[15] *Probation and Parole*, ACLU-PENNSYLVANIA, https://bit.ly/4e8h2Xa (last visited June 27, 2024).

Importantly, unlike with parole, Pennsylvania law also presumes that probationers do *not* pose a significant public safety risk and are less likely to require incarceration when they violate conditions. Pennsylvania's guidance on probation revocation gives the sentencing court a menu of options in the event of probation revocation, including doing nothing. 42 Pa. Cons. Stat. § 9771(b). Conversely, state law *requires* courts to recommit individuals to prison if parole is revoked for a new conviction. 61 Pa. Cons. Stat. § 6138(a)(2). Also, there are limits on a court's ability to sentence a probation violator to incarceration, especially for technical violations, *see* 42 Pa. Cons. Stat. § 9771(c), while a technical violation of parole requires some period of re-incarceration, *see* 61 Pa. Cons. Stat. § 6138(c)(1.2)–(1.3). Finally, while no statutes govern pre-revocation detention for probationers, Pennsylvania law requires that parolees be automatically detained when charged with new offenses. *Id.* § [16]

[16] As in *Faheem-El*, this type of mandatory detention likely violates the right to a release-suitability determination at issue in this case. But regardless, the difference in how Pennsylvania law treats parolees and

Stated simply, unlike parole, probation does not carry a presumption of the need for incarceration under Pennsylvania's articulation of its own interests, and in a large majority of revocation proceedings, state judges eventually agree. *Supra* at 25–26, *infra* at 58–59. This further underscores why Defendants need to make an individualized determination that pre-revocation detention will promote government interests in public safety or rehabilitation.[17]

B. The Procedural "Protections" Afforded at the Preliminary Hearing Are Insufficient.

The district court predicated its summary-judgment determination on its erroneous conclusion that Plaintiffs' claim fails as a matter of law, but when it denied Plaintiffs' preliminary-injunction motion, it held in the alternative (in a short footnote) that Defendants' procedures

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probationers speaks to the government's assessment of the public-safety risk it attributes to each group and will be relevant to a proper balancing of the competing government and individual interests on remand.

[17] Several states require that both preliminary and final revocation hearings be conducted within weeks of arrest, otherwise the probationer or parolee must be released from incarceration. *See* JA_[ECF82-1_PDF92–94]. These laws acknowledge the importance of the liberty interest at stake and demonstrate that individuals accused of supervision violations are not presumptively dangerous.

sufficiently safeguard whatever liberty interest Plaintiffs may have in avoiding pre-revocation incarceration. JA_[ECF139_22 n.9]. This conclusion cannot sustain summary judgment, either.

As explained below (*infra* § II), genuine disputes of material fact and an insufficiently developed record bar summary judgment on Plaintiffs' claim that the current procedures do not protect probationers' right to the probable-cause determination under *Gagnon*. Those same issues preclude summary judgment as to the procedural protections attending the release-suitability determination.

Defendants' failure to make any determination at all that no alternatives to pre-revocation detention are sufficient to serve their compelling interests is fatal to the sufficiency of their procedures because, by definition, they provide no procedural protections at all relating to the determination they do not make. It is thus unnecessary for this Court to do a full weighing of the *Mathews* factors as *Faheem-El* contemplated—such a weighing can be undertaken on remand with a proper factual record.

If this Court does reach the district court's *Mathews* analysis, however, it is clear that Plaintiffs' right to a release-suitability finding requires more safeguards than those Defendants provide at preliminary hearings. "[P]rocedural due process rules are shaped by the risk of error inherent in the truthfinding process[,]" *Mathews*, 424 U.S. at 344, and Defendants' preliminary hearing procedures are replete with deficiencies that exacerbate the likelihood of pre-revocation detention in cases where it is not necessary to satisfy the government's interests in public safety and rehabilitation.[18] The district court's factual findings on the *Mathews* factors, JA_[ECF139_22 n.9], ignore critical facts.

[18] Though the district court rejected a right to a release-suitability determination, it observed in dicta that "Defendants have gone beyond the constitutional minimum in adopting the Detainer Policy," that "detention is rare for probation violations, and that non-detention alternatives are often sought." JA_[ECF139_21]. It is irrelevant that Defendants use "a more flexible process to account for the ups and downs of supervision and rehabilitation" such that not everyone accused of a violation is arrested. JA_[*Id.*_at_22]. The only facts relevant to Plaintiffs' claim are those pertaining to the subset of individuals who *are* arrested for a probation violation and undergo a preliminary hearing.

To start, preliminary hearings in Allegheny County are very brief; 44% are under five minutes, and most are under ten. JA_[ECF3-1_PDF14]. More importantly, hearing officers systematically silence public defenders and probationers when they advocate for release. *See* JA_[ECF116_14, 60]; JA_[DefEx7_PDF87–89]; JA_[ECF3-1_PDF23]. Probationers do not have a meaningful opportunity to confront the evidence against them—hearing officers rely on the allegations in the violation report without question and refuse to consider the alleged facts underlying any new charges. JA_[DefEx7_PDF157–58].

These deficiencies are even worse in "mandatory detention" cases. Hearing officers refuse to hear any facts related to the alleged violation, rendering unreliable any detention decision based on the nature of the charge. JA_[ECF116_12–14, 43, 61–62, 77–78, 90–91]; JA_[DefEx7_PDF157–60]. Across the board, hearing officers do not determine whether incarceration serves the government's interests. JA_[ECF116_13–14, 43–44, 90–91]. These procedures are insufficient to produce accurate decisions about whether prolonged detention will serve the government's interests in any individual case.

Plaintiffs seek straightforward enhancements to these procedures, including timely notice; the opportunity to be heard, present evidence, and challenge evidence against them; and an on-the-record explanation for any detention decision. JA_[ECF121-1].

To test the sufficiency of Defendants' procedures, the Court must consider (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement[s] would entail." *Mathews*, 424 U.S. at 335.

1. Probationers Have an Important Liberty Interest.

As established above, the right at issue here "is the most significant liberty interest there is—the interest in being free from imprisonment." *Black*, 103 F.4th at 151. The first *Mathews* factor weighs decidedly in Plaintiffs' favor. *Faheem-El*, 841 F.2d at 725.

2. The Risk of Erroneous Deprivation Is Great.

Defendants' preliminary hearings put Plaintiffs at significant risk of erroneous deprivation. Probationers have a weighty interest "in avoiding inappropriate detention…pending their…revocation hearing." *Faheem-El*, 841 F.2d at 725. This is doubly true given the prolonged nature of pre-revocation detention in Allegheny County.

First, by failing to make any findings regarding the necessity of pre-revocation detention, preliminary hearings run afoul of the Supreme Court's repeated guidance that a hearing is only adequate if it tests the government's application of its rationale for the specific right at issue. For example, in *Bell v. Burson*, the Court held that where a statutory scheme made "[driver] liability an important factor in the State's determination to deprive [an uninsured driver involved in a car accident] of his licenses," the State could "not, consistently with due process, eliminate consideration of that factor in its [pre-suspension] hearing." 402 U.S. 535, 541–43 (1971). In *Stanley v. Illinois*, the Court called the statutory scheme in *Bell* "repugnant to the Due Process Clause" because it enacted a deprivation "without reference to the very factor...that the

State itself deemed fundamental to its statutory scheme." 405 U.S. 645, 653 (1972); *see also Schall*, 467 U.S. at 255–57, 275–77 (1984) (finding juvenile-detention proceedings sufficient where they provided an opportunity to contest the government's public-safety arguments).

Prolonged pre-revocation detention is erroneous if (1) the probationer did not violate any conditions, (2) the probationer posed no public safety risk and could be better rehabilitated in the community, or (3) the sentencing court does not revoke probation at the final hearing. Based on the preliminary factual record, Defendants' preliminary-hearing procedures virtually guarantee erroneous deprivation, and the safeguards Plaintiffs seek would mitigate this risk.

Turning to the specifics of Defendants' procedures, by failing to give probationers advance notice of the hearing and the issues to be decided, precluding probationers from meaningfully challenging detention (by cross examining witnesses and presenting evidence), and declining to receive evidence about public safety and rehabilitation, hearing officers are likely to reach the wrong result. Defendants' own data proves this is the case. Probation is ultimately revoked in only 39% of cases, after

people have the opportunity to present such information at the revocation hearing, meaning that 61% of the time judges conclude the probationer will continue to be better rehabilitated in the community. *See* JA_[DefEx2_PDF40]. For example, at his revocation hearing, Plaintiff Oden-Pritchett was released from his probationary sentence. JA_[ECF116_94–95]. Plaintiff Stanford's new charges were dismissed. JA_[*Id.*_at_18].

Advance notice—at least a day—would give probationers an opportunity to prepare, consult with counsel, and line up their witnesses. Allowing probationers to present evidence related to their public-safety risk and rehabilitative needs would likely alter the outcome of the proceedings. Most people who are detained (including all Plaintiffs) have been determined, in a separate proceeding, to be eligible for release on the new charge that forms the basis of the alleged probation violation—or have been accused of only a technical violation and not a new crime. *See, e.g.*, JA_[ECF116_16–17, 92–93]; JA_[ECF3-1_PDF30, 36, 42, 46, 55, 59, 63, 67, 72, 75]. And probation is ultimately revoked in only 39% of cases, after Finally, a statement of the reasons will ensure that hearing

officers base their decisions on constitutionally sufficient criteria and give probationers an understanding of the basis for the decision.

In its perfunctory *Mathews* analysis, the court below did not address the risk of erroneous deprivation and noted only that Plaintiffs' "proposed procedural safeguards would not add value to the procedures already in place, which already appear to result in low detention rates," JA_[ECF139_22 n.9], appearing to conflate the detention rate for all individuals on probation with the detention rate for the *subset of probationers arrested for alleged probation violations who undergo a preliminary hearing*. But the latter is the relevant consideration under *Mathews* to evaluate Plaintiffs' claim, which only concerns those arrested for alleged violations. And because hearing officers recommend release in less than 20% of cases, JA_[ECF82-1_PDF63], the proposed procedural safeguards *would* curb the risk of erroneous detention.

3. *The Government's Interest Does Not Outweigh That of the Probationers.*

The third *Mathews* factor also favors Plaintiffs, though the preliminary record needs further development. The Court must consider Defendants' interests, to include "the function involved and the fiscal and

administrative burdens that the additional or substitute procedural requirement would entail," as well as "other societal costs." *Mathews*, 424 U.S. at 335, 347.

Defendants' interests converge with the requested relief: requiring them to "justify [prolonged] detention promotes the government's interest ... in minimizing the enormous impact of incarceration in cases where it serves no purpose." *Black*, 103 F.4th at 154 (cleaned up). Indeed, all the government accomplishes by requiring detention when it serves no compelling interest is to "separate families and remove from the community breadwinners, caregivers, parents, siblings, and employees." *Id.* (cleaned up).

As Plaintiffs' expert explained, pretrial incarceration "contribute[s] to the loss of employment, it is disruptive to treatment and family relationships, and contributes to, rather than inhibits, recidivism." JA_[ECF82-1_PDF82]. It also has long-term effects like increased likelihood of re-arrest, lost earnings, and decreases in employment and eligibility for public benefits. JA_[*Id.*_at_PDF84–85].

Plaintiffs recounted the toll incarceration inflicted on them and their families. Plaintiff Stanford became ineligible for food stamps and was unable to pay bills, jeopardizing his credit. JA_[ECF116_19]. Being in jail exacerbated his PTSD symptoms. JA_[*Id.*_at_21–22]. After spending several years waiting, Plaintiff Oden-Pritchett lost the apartment he had finally qualified for through the Pittsburgh Housing Authority, and he got kicked out of a college program he was about to begin. JA_[*Id.*_at_97–99]. Defendants themselves recognize "the disruptions that detention can cause," JA_[ECF85_2], and their infliction of such harms is particularly egregious given that most of the time, Defendants ultimately conclude that incarceration was not necessary to serve their interests, JA_[DefEx2_PDF40].

Still, the district court found against Plaintiffs, concluding that "in light of the number of probationers in the Allegheny County system and the limited number of judges, it would seem that Plaintiffs' requested injunction (which includes an individualized judicial determination...) would create significant administrative and fiscal problems." JA_[ECF139_22 n.9] (acknowledging that the record was not developed

on this point). This statement mischaracterizes Plaintiffs' proposed relief—as they twice clarified, JA_[ECF90_PDF14]; JA_[ECF116_143], they did not seek that judges substitute for hearing officers at the preliminary hearing.

More importantly, the administrative and fiscal burden of Plaintiffs' request is negligible. Defendants already conduct preliminary hearings. Plaintiffs simply ask that, in addition to complying with *Gagnon*'s baseline requirements, hearing officers make a fact-based detention determination after allowing probationers an opportunity to be heard and confront evidence regarding public safety and rehabilitation. The "additional resources that the government will need to expend" to enhance the hearings "will be minimal—and will likely be outweighed by costs saved by reducing unnecessary detention." *Black*, 103 F.4th at 1555.

Other large jurisdictions already require protections like those Plaintiffs seek here, demonstrating administrative feasibility. *See, e.g.*, Fed. R. Crim. P. 32.1(a)(6) (requiring individualized determination regarding necessity of detention for federal probationers); Cal. Penal Code § 1203.25(a) (requiring individualized determination regarding

danger to the public and reasonable assurance of court appearance for probationers).

II. The District Court Was Wrong to Dismiss Count I Despite Several Genuine Disputes of Material Fact and a Need for More Discovery.

In addition to the important legal question about whether prolonged pre-adjudication detention requires an individualized determination that it serves the government's interests, Plaintiffs also raised flagrant violations of well-established procedural protections. Count I challenges procedural due-process violations in how Defendants make the probable-cause determination. Plaintiffs alleged that Defendants conduct cursory hearings, frequently with predetermined outcomes, that fail to afford three components of the process due under black-letter law: (1) "notice of the alleged violations of probation," (2) "an opportunity to appear and to present evidence in his own behalf," and (3) "a conditional right to confront adverse witnesses." *Gagnon*, 411 U.S. at 786.

The record demonstrates at least a genuine dispute on the facts underlying Plaintiffs' claim. The district court in part overlooked and in part improperly resolved those factual disputes and, in so doing,

erroneously entered summary judgment against Plaintiffs on its own motion before discovery was complete. *Infra* § II.A. And even if there were no genuine disputes of material fact, more discovery would have substantiated the disputes, rendering summary judgment erroneously premature. *Infra* § II.B.

A. The District Court Ignored Disputes of Material Fact and Improperly Relied on Credibility Determinations.

Even given the district court's premature *sua sponte* consideration of summary judgment, Plaintiffs presented evidence of material factual disputes to defeat summary judgment—an issue this Court reviews de novo, construing the facts "in the light most favorable to" Plaintiffs. *Baloga*, 927 F.3d at 751–52. Here, each of the procedural due-process violations is genuinely disputed and warrants reversal.

1. Advance Notice.

Defendants do not give constitutionally sufficient notice of the alleged probation violations. It is undisputed that Defendants typically provide probationers *zero* advance notice of their preliminary hearing. The district court found this fact based on Plaintiffs Stanford's and Oden-

Pritchett's preliminary-injunction testimony, JA_[ECF139_7–8], and others offered declarations to the same effect, JA_[ECF3-1_PDF37, 51].

The district court concluded that the notice requirement was nonetheless satisfied by a reading of the allegations "at the hearing itself, which comports with *Morrissey* and *Gagnon*." JA_[ECF139_23]. But that conclusion conflicts with *Morrissey*, which requires that "the [probationer] should be given *notice that the hearing will take place*…." 408 U.S. at 486–87 (emphasis added). The relevant inquiry—which the district court incorrectly disregarded—is whether the required notice is provided with enough time to permit reasonable preparation. *See, e.g.*, *In re Gault*, 387 U.S. 1, 33 (1967) ("Notice, to comply with due process requirements [for juvenile detention], must be given sufficiently in advance of [the] scheduled court proceedings so that reasonable opportunity to prepare will be afforded…. Notice [at the hearing] is not timely…."), *abrogated on other grounds by Allen v. Illinois*, 478 U.S. 364 (1986). And the undisputed facts, as found by the district court, are that it is not. That alone requires reversal.

How far in advance Defendants must provide the notice is a question to resolve on remand (based on a developed factual record and balancing of the *Mathews* factors), but it should be sufficient time for the probationer to prepare and marshal relevant evidence.

2. Appearance and Presentation of Evidence.

Although probationers do appear (virtually) at their preliminary hearings, whether they are genuinely afforded the opportunity to "speak" and "to present evidence in [their] own behalf" is in dispute. *Morrissey*, 408 U.S. at 487; *Gagnon*, 411 U.S. at 786. The district court concluded that, as is "evident from the court watchers' testimony, the probationer and counsel are present at the hearing [and] are able to put on evidence[.]" JA_[ECF139_24]; *see also* JA_[ECF148_6 n.3] (repeating that disputed finding at summary judgment).

But the two paragraphs leading up to that conclusion lay out the conflicting evidence on this issue. As the district court summarized, court-watcher testimony demonstrated that "sometimes a probationer would be expressly told [by the hearing officer] *not to try to explain themselves*," and even when they did, "[o]ften…those facts would not be heard." JA_[ECF139_24] (emphasis added; alteration in original).

Plainly, the evidence was mixed, and the facts were disputed. Defendants' own testimony—unmentioned by the district court—confirmed this dispute. For example, Director Scherer testified that aside from "the testimony of the Probation Officer," there is typically no "other evidence presented[.]" JA_[DefEx6_PDF78].

The district court's error here was understandable given the procedural posture: It reviewed the evidence at the preliminary-injunction stage, when it was proper for it to resolve—preliminarily—a factual dispute like this one. But at summary judgment, in disposing of Plaintiffs' claims, it lacked that authority. *See Country Floors, Inc.*, 930 F.2d at 1061–62. This Court has repeatedly warned district courts of the analytic pothole that tripped up the analysis here: A court's "findings and conclusions at the preliminary injunction stage are by nature *preliminary*. They are typically based on an incomplete record, using a different standard (likelihood of success on the merits), and therefore are not binding at summary judgment." *Bordelon v. Chi. Sch. Reform Bd. of Trs.*, 233 F.3d 524, 528 n.4 (7th Cir. 2000), *quoted in Parkell v. Senato*, 639 F. App'x 115, 117 (3d Cir. 2016) (per curiam); *see also Council of*

Alternative Pol. Parties v. Hooks, 179 F.3d 64, 69–70 (3d Cir. 1999) (collecting analogous cases); *Clark v. K-Mart Corp.*, 979 F.2d 965, 969 (3d Cir. 1992) (en banc) ("findings of fact and conclusions of law made at the preliminary stage are of no binding effect whatsoever").

Faced with conflicting evidence at the preliminary stage (albeit without the developed factual context that would enable it to understand when, why, and under what systemic circumstances hearing officers prohibit people from speaking), the court below was entitled to preliminarily resolve the factual conflict. Faced with that same conflict (which it created *sua sponte*) at summary judgment, it was obligated not to. This Court should reverse that error.

3. Witness Confrontation.

For detained probationers who are accused of new offenses (the vast majority, JA_[DefEx1_PDF5, 7]), the government presents no witness with firsthand knowledge of the allegations. *See* JA_[kvpx81DefEx6_PDF77–78]. Yet the district court ignored the important constitutional questions of whether and under what circumstances probationers have a right to confront such witnesses, even though due process limits reliance on certain types of unreliable hearsay.

See, e.g., *United States v. Lloyd*, 566 F.3d 341, 343 (3d Cir. 2009); *Crawford v. Jackson*, 323 F.3d 123, 129 (D.C. Cir. 2003).

The district court did not even mention this constitutional claim or the facts and case law governing it, and it had no basis to reject it as a matter of law at summary judgment, as it implicitly did without analysis. Indeed, in the court's description of the preliminary-hearing procedures, it does not mention the government presenting *any* evidence in support of the charges. *See* JA_[ECF139_3–4]. There is, therefore, *at least* a genuine dispute whether Defendants facilitate probationers' "conditional right to confront adverse witnesses." *Gagnon*, 411 U.S. at 786. This Court should reverse the district court's apparent conclusion that this protection was afforded to Plaintiffs.

B. The District Court Improperly Barred Plaintiffs from Completing Discovery on Disputed Issues of Material Fact.

Mindful of the narrow scope of the pre-hearing discovery, Plaintiffs urged the district court to defer considering summary judgment until the record could be further developed. *See* JA_[ECF144]. Although this Court reviews the denial of additional discovery for abuse of discretion, it has explained that "[i]f discovery is incomplete, a district court is rarely

justified in granting summary judgment," unless the requested discovery is immaterial as a matter of law. *Shelton*, 775 F.3d at 568; *accord In re Avandia Mktg., Sales & Prods. Liab. Litig.*, 945 F.3d 749, 761 (3d Cir. 2019); *see also Smith v. OSF HealthCare Sys.*, 933 F.3d 859, 865 (7th Cir. 2019) (collecting cases finding that disallowing discovery and prematurely entering summary judgment is an abuse of discretion).

Plaintiffs' request for more discovery cited this Court's expectation that district courts ensure a "fully developed record" exists before entering summary judgment *sua sponte*. JA_[ECF144_1] (quoting *Anderson v. Wachovia Mortg. Corp.*, 621 F.3d 261, 280 (3d Cir. 2010)). Although the *Anderson* line of cases applies that principle in situations where a district court does not provide advance notice of its intent to enter judgment, Federal Rule of Civil Procedure 56(d) embodies the same principle, guiding trial courts to allow more discovery where the record is insufficiently developed. Plaintiffs adequately raised this principle and "alerted the court…that discovery was still underway" such that summary judgment was premature. *Sames v. Gable*, 732 F.2d 49, 52 (3d Cir. 1984); *accord Radich v. Goode*, 886 F.2d 1391, 1399–1404 (3d Cir.

1989) (Hutchinson, J., concurring in the judgment). And the district court appeared to recognize this, framing the question before it as whether Plaintiffs had offered sufficient "explanation as to how [they] would benefit from further evidence or briefing[.]" JA_[ECF148_3].

The additional discovery Plaintiffs sought would have underscored genuine factual disputes. *Supra* at 65–70. For instance, as Plaintiffs explained below, "Defendants actively bar the presentation of argument, let alone evidence," at the preliminary hearings. JA_[ECF144_7–8]; *accord supra* at 67–69. If the district court thought there was insufficient evidence that Defendants obstructed Plaintiffs' efforts to argue and present evidence, the "additional discovery (such as hearing officer or public defender deposition testimony)" requested by Plaintiffs would have borne that fact out. JA_[ECF144_7–8] Similarly, deposition testimony (like additional hearing officer testimony or a deposition of Adult Probation under Rule 30(b)(6)) would shed light on why Defendants do not produce any witnesses to safeguard Plaintiffs' right of confrontation.

More discovery is also needed on an issue Plaintiffs did not get to litigate before the district court entered judgment: A *Mathews* balancing analysis will ultimately be necessary to refine the application of constitutional principles to local practices. Take advance notice. Though additional discovery is not needed to prove that Defendants fail to provide this, *supra* at 65–66, the district court will need to understand the impact of the delay on probationers, the administrative burden, and the government's interests to determine how far in advance the notice must be given.

And Plaintiffs would have sought class-wide discovery on these issues—discovery would have further illuminated the genuine disputes about the relevant government interests and the costs and benefits of additional protections. Plaintiffs should have been "entitled to pursue their discovery procedures, which summary judgment prevented, to more thoroughly canvas the due process violations which were alleged and decried." *Kirby v. Blackledge*, 530 F.2d 583, 588 (4th Cir. 1976).

* * *

The district court had two grounds for entering summary judgment even though discovery had barely begun. Neither holds water, and the court abused its discretion by forging ahead to judgment prematurely.

First, the district court observed that Plaintiffs "did not utilize all of the authorized discovery" before the preliminary-injunction hearing. JA_[ECF148_6]. True, but irrelevant. The hearing was, after all, preliminary, and Plaintiffs reasonably expected that they would be able to develop the record when the case entered the merits phase. JA_[ECF144_4] ("[T]he parties engaged in only limited discovery, specific to the facts at issue at the preliminary injunction stage and in light of the lower evidentiary burden that applies."). Plus, the district court authorized discovery only for a limited window before the hearing, and discovery was not open between the hearing and the court's disposition of the case—Plaintiffs could not have "come forward with [additional] facts in response to" the show-cause order. JA_[ECF148_7]. This fact alone should be dispositive.

There is no rule that a plaintiff must have rushed to complete all discovery by the end of the preliminary-injunction phase of a case (in fact,

pre-hearing discovery is only permitted to whatever limited extent a court permits). It was an abuse of discretion for the district court to conclude circularly that Plaintiffs could not take more discovery because they had not already taken it under conditions that did not permit it.

Second, the district court reasoned that "the relevant discovery here is largely within Plaintiffs' control." JA_[ECF148_6]. Not true: Plaintiffs explained what evidence was out of reach. JA_[ECF144_7–8]. But again, that has nothing to do with whether such discovery should have been allowed before proceeding to summary judgment. Even if Plaintiffs could have sought third-party discovery from, for example, the county public defenders, the point remains that such discovery had not yet been taken—and was necessary to a proper summary-judgment disposition.

Put simply, as the district court's preliminary-injunction decision acknowledged, this case was not ripe for summary judgment. *See, e.g.*, JA_[ECF139_3] ("for reasons that are unclear from the record"); JA_[ECF139_22 n.9] ("the record is not fully developed"); JA_[ECF139_23] ("there is no evidence before the Court"); JA_[ECF139_25] ("The Court cannot tell on this record…."). And the

district court's summary-judgment reasoning—that the discovery Plaintiffs requested had not yet occurred—just confirmed that the record *remained* insufficiently developed at the time of judgment.

CONCLUSION

This Court should reverse. A need for additional discovery and genuine disputes of material fact preclude summary judgment on Count I, and Plaintiffs' fundamental due process liberty interest in a suitability-for-release determination precludes summary judgment on Count II.

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Respectfully submitted,

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(b). According to the word-count feature of the word-processing program with which it was prepared (Microsoft Word) the brief contains 13,000 words. This brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: June 28, 2024

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CERTIFICATE OF BAR MEMBERSHIP

The undersigned certifies pursuant to Third Circuit Local Appellate Rules 28.3 and 46.1(e) that the attorney whose name appears on the foregoing brief, Sumayya Saleh, is a member of the bar of this Court, admitted in February 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system, which will send a copy of the foregoing to all registered counsel of record.

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