UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL BERGAMASCHI, *et al.*, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

ANDREW M. CUOMO, Governor of New York State, in his official capacity, *et al.*,

Defendants.

1:20-cv-2817 (CM)

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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Defendants Andrew M. Cuomo, Governor of New York State, and Tina M. Stanford, Chairperson of the New York State Board of Parole ("Parole Board"), sued here in their official capacities (collectively, "Defendants"), respectfully submit this memorandum of law, together with the Declaration of Tina M. Stanford, dated June 8, 2020 ("Stanford Decl."), and the Declaration of Andrew Amer, dated June 8, 2020 ("Amer Decl."), in opposition to Plaintiffs' Motion for Class Certification.

PRELIMINARY STATEMENT

Plaintiffs bring this action to challenge, on due process grounds, New York's laws and regulations mandating detention for alleged parole violators pending their final revocation hearings. Plaintiffs assert this claim on behalf of themselves and a purported class consisting "of all people on parole in New York City who are or will be detained pending their final hearing on a parole warrant pursuant to 9 N.Y.C.R.R. § 8005.7(5) and § 8004.3." Plaintiffs' Memorandum of Law in Support of Motion for Class Certification (ECF No. 6) ("Plaintiffs' Class Cert. MOL"), at 8. Along with seeking a declaration that New York's long-standing parole revocation procedures are unconstitutional, Plaintiffs seek a mandatory injunction to require the Parole Board to adopt a new bail assessment review by a neutral decision-maker on the suitability of releasing each parolee pending the final revocation hearing based on factors such as flight risk and danger to the community.

Plaintiffs' motion for class certification should be denied under the doctrine first announced by Judge Friendly in *Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973). Under *Galvan* and its progeny, a court should deny class certification where, as here, the prospective benefits of declaratory and injunctive relief will necessarily benefit all members of the proposed class, rendering certification unnecessary. Each of the four factors considered by courts in this circuit for determining whether

certification is unnecessary under *Galvan* weighs in favor of denying Plaintiffs' motion. First, in her accompanying declaration, Defendant Tina Stanford, Chairwoman of the Parole Board, confirms that, if Plaintiffs are successful on the merits, the Parole Board will apply any relief awarded to Plaintiffs across the board for the benefit of all alleged parolees. Second, if the Court grants Plaintiffs their requested relief in the absence of a class, the Court will invalidate the existing revocation procedures and enjoin the Parole Board's enforcement of those procedures. Third, the requested new procedural review, while burdensome and costly for the Parole Board to implement, will closely resemble the existing preliminary hearing already afforded to alleged parole violators, and therefore will not require any complex new regulations or rules. Finally, class certification is not necessary to prevent the case from becoming moot because, as the Court has already ruled, Plaintiffs' claim is capable of repetition, yet evading review.

Because any relief Plaintiffs may obtain on their claim will necessarily benefit all alleged parole violators in the state, there is no need to have this case proceed as a class action. Accordingly, the Court should deny Plaintiffs' certification motion under the *Galvan* doctrine.

STATEMENT OF FACTS

A. The Parole Revocation Procedures

New York Executive Law § 259-i(3) and 9 N.Y.C.R.R. §§ 8004 and 8005 set forth the procedures involved in parole revocation hearings. First, within three days of detention, pursuant to the parole warrant, the parolee must be given notice of the charges and of his rights. N.Y. Exec. Law § 259–i(3)(c)(iii); 9 N.Y.C.R.R. § 8005.7. Within 15 days of the execution of the parole warrant, a preliminary hearing must be held before a hearing officer who has not had "any prior supervisory involvement over the alleged violator." N.Y. Exec. Law § 259-i(3)(c)(i). At the preliminary hearing, a parole officer must establish probable cause that a violation of a parole condition in an important respect occurred. N.Y. Exec. Law § 259-i(3)(c)(i) & (iv). The parolee has the right to appear and to

present witnesses and evidence on his own behalf, as well as the right to confront and cross-examine adverse witnesses. N.Y. Exec. Law §§ 259-i(3)(c)(iii) & (iv); 9 N.Y.C.R.R. § 8005.3(c). After the preliminary hearing, the hearing officer must issue a written decision stating the reasons for the determination and citing to the evidence upon which the determination was based. N.Y. Exec. Law §§ 259-i(3)(c)(iii). If a finding of probable cause is made at the preliminary hearing or the parolee waives his right to a preliminary hearing, a final revocation hearing must be scheduled within 90 days. N.Y. Exec. Law §§ 259-i(3)(f)(i). At the final revocation hearing, the parolee is entitled to a number of due process protections, including: (i) the right to compel witnesses to appear at the hearing and provide testimony; (ii) the right to subpoena and submit documentary evidence; (iii) the right of confrontation and cross examination; (iv) the right to submit mitigating evidence for the purpose of being restored to supervision; and (v) the right to representation of counsel. N.Y. Exec. Law § 259-i(3)(f)(iv) and (v). In the event the alleged violator is indigent and cannot afford counsel, an attorney will be assigned to afford representation. N.Y. Exec. Law § 259-i(3)(f)(v). If the hearing officer does not find that a violation of release in an important respect was committed, the charges are dismissed, and the parolee is released back to the parole. N.Y. Exec. Law §§ 259-i(3)(f)(ix); 9 N.Y.C.C.R. § 8005.20(a)*; see generally*, *Bergamaschi v. Cuomo*, No. 20 Civ. 2817, 2020 WL 1910754, at *1-3 (S.D.N.Y. April 20, 2020).

Since 1978, under N.Y. Exec. Law § 259-i(3), if the parole officer has probable cause to believe that the parolee has violated a condition of his parole, a warrant may be issued for his temporary detention, in accordance with the rules of the Parole Board. The statute expressly provides that the detention of any such person may be "further" regulated by rules and regulations of the Parole Board. N.Y. Exec. Law § 259-i(3)(a)(i). The Parole Board's regulations mandate the detention of the alleged violators once there is probable cause to find that the alleged violator has violated one or more of the conditions of parole *in an important respect*. 9 N.Y.C.R.R. § 8005.7(a)(5)

("If the preliminary hearing officer finds that there is probable cause to believe that the alleged violator has violated one or more of the conditions of parole *in an important respect*, he *shall* direct that the alleged violator be held for further action pursuant to section 8004.3 of this Title.") (emphasis added).

New York's mandatory detention policy is not unique or unusual. In a majority of states, alleged parole violators who are taken into custody by the police or corrections officers on a parole warrant are detained pending their final revocation proceedings. Cohen, *Law of Probation & Parole* § 1:1 (2d ed.) (available on Westlaw at LAWPROBPAR § 18:5); *see e.g.,* Mo. Rev. Stat, § 217.720 (West 2018); Ark. Code Ann. § 16-93-705 (West 2020); *see also* Amended Complaint (ECF No. 38) ("Amended Compl.") ¶ 47 (listing only 20 states that do not have mandatory detention for parole violators pending the final revocation hearing).

B. Current Status of the Putative Class Representatives

Plaintiff Bergamaschi has been on parole since late February 2020, after serving two years of a three-year sentence for burglary. Amended Compl. ¶ 49. On March 11, 2020, he was arrested and taken into custody on a parole warrant accusing him of violating five conditions of his parole. *Id.* ¶¶ 11, 50. His preliminary hearing took place on April 10, 2020. Declaration of Rhonda Tomlinson, dated April 10, 2020 (ECF. No. 25) ("Tomlinson Decl."), at ¶ 2. The Preliminary Hearing Officer ordered that his warrant be lifted. *Id.* Accordingly, Plaintiff Bergamaschi has been released. *Id.*

Plaintiff Roberson is serving a 5-year period of post release supervision following conditional release from a 6-year determinate sentence for burglary. *See* Amended Compl. ¶ 59. On March 12, 2020, he was arrested and taken into custody on a parole warrant accusing him of violating five conditions of parole. *Id.* ¶¶ 12, 58. He waived his right to a preliminary hearing. *Id.* ¶ 61. By order dated April 13, 2020, a justice of the New York State Supreme Court, Bronx County, granted his petition for a writ of habeas corpus and ordered that his parole warrant be "hereby lifted

without prejudice," and that Plaintiff Roberson be released from custody and "restored to parole supervision under the same conditions heretofore in effect," which resulted in the cancellation of his final revocation hearing. Amer Decl. at ¶ 2 and Exhibit A.

C. Plaintiffs' Class Action Allegations

Plaintiffs bring their claim on behalf of a purported class comprising "all people on parole in New York City who are or will be detained pending final hearing on a parole warrant pursuant to" New York's parole revocation procedures. Amended Compl. ¶ 65. Plaintiffs allege that "[j]oinder of all class members is impracticable because of the size of the class"; that "[t]here are question of law and fact common to all members of the class"; that "[t]he claims of the named plaintiffs are typical of those of the class"; and that "[t]he named plaintiffs and class counsel will fairly and adequately represent the interests of the class." *Id.* ¶ 65(a)-(d). Plaintiffs further allege that class-wide declaratory and injunctive relief are appropriate "because the Defendant has acted or refused to act on grounds applicable to the class as a whole." *Id.* ¶ 66. Plaintiffs do not seek any monetary relief other than attorney's fees and costs pursuant to 42 U.S.C. § 1988. *Id.* at 23.

ARGUMENT

THE COURT SHOULD DENY CLASS CERTIFICATION UNDER THE *GALVAN* DOCTRINE BECAUSE ALL MEMBERS OF THE PURPORTED CLASS WILL NECESSARILY BENEFIT FROM ANY RELIEF GRANTED TO THE NAMED PLAINTIFFS

A court may not grant class certification unless it is satisfied, after "'rigorous analysis,'" that the plaintiff has met the criteria set forth in Rule 23 of the Federal Rules of Civil Procedure. *See Dodge v. County of Orange*, 208 F.R.D. 79, 87 (S.D.N.Y.2002) (quoting *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982)). Plaintiffs bear the burden of establishing each requirement for class certification by a preponderance of the evidence. *See Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, 546 F.3d 196, 202 (2d Cir. 2008); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41

(2d Cir. 2006); *In re Methyl Tertiary Butyl Ether ("MTBE") Prod. Liab. Litig.*, 209 F.R.D. 323, 336 (S.D.N.Y. 2002); *Pecere v. Empire Blue Cross and Blue Shield*, 194 F.R.D. 66, 69 (E.D.N.Y.2000).

Pursuant to Federal Rule of Civil Procedure 23(a), class certification is appropriate only where: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. *See* Fed. R. Civ. Pro. 23(a); *Westchester Independent Living Ctr., Inc. v. State Univ. of New York, Purchase Coll.*, 331 F.R.D. 279, 287 (S.D.N.Y. 2019). But even where the requirements of Rule 23(a) are met, a plaintiff must still establish that the class is "maintainable," as defined by Rule 23(b). *Jeffries v. Pension Tr. Fund of Pension, Hospitalization & Benefit Plan of Elec. Indus.*, No. 99 Civ. 4174, 2007 WL 2454111, at *15 (S.D.N.Y. Aug. 20, 2007); *see* Fed. R. Civ. P. 23(b). Defendants oppose class certification on the basis that Plaintiffs have failed to satisfy Rule 23(b).

Plaintiffs seek certification based only on Rule 23(b)(2). *See* Plaintiffs' MOL at 13-15. Therefore, they must show that "the party opposing the class has acted or refused to act on grounds that generally apply to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2); *see Westchester Independent Living Ctr.*, 331 F.R.D. at 287. The Court should deny certification under Rule 23(b)(2) based on the *Galvan* doctrine because all persons similarly situated to Plaintiffs will necessarily benefit from any relief afforded to the Plaintiffs in this case, and therefore certification is unnecessary.

In *Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973) (Friendly, J.), the Second Circuit denied the plaintiff's motion for class certification, finding that "an action seeking declaratory or injunctive relief against state officials on the ground of unconstitutionality of a statute or administrative practice is the archetype of one where class action designation is largely a formality." 490 F.2d at

1261; *see also Davis v. Smith*, 607 F.2d 535, 540 (2d Cir. 1978) ("Where retroactive monetary relief is not at issue and the prospective benefits of declaratory and injunctive relief will benefit all members of a proposed class to such an extent that the certification of a class would not further the implementation of the judgment, a district court may decline certification."); *Denenberg v. Blum*, 93 F.R.D. 131, 132 (S.D.N.Y. 1982) (finding class certification unnecessary where the "benefits sought for the putative class by this suit would self-evidently inure to all members of the class similarly situated.").

In analogous cases where the government is a party, the Second Circuit has consistently held that class certification was unnecessary under the *Galvan* doctrine. *See, e.g., Berger v. Heckler*, 771 F.2d 1556, 1566-67 (2d Cir. 1985) (holding class certification unnecessary in action for injunctive relief against Department of Health and Human Services based upon finding that "relief will benefit all members of a proposed class to such an extent that the certification of a class would not further the implementation of the judgment"); *Forts v. Ward*, 621 F.2d 1210, 1217-18 (2d Cir. 1980) (holding class certification unnecessary in action for injunctive and declaratory relief against correctional facility).

And district courts in the Second Circuit have repeatedly declined to certify a class under Rule 23(b)(2) under *Galvan* on the ground that the declaratory judgment or injunction, if in the named plaintiffs' favor, will run to the benefit not only of the named plaintiffs, but also to the benefit of all others similarly situated – often referred to as the lack of "need" concept. Wright & Miller, 7AA *Federal Practice & Procedure* § 1785.2 (3d ed. & 2020 Update); *Sudler v. Goord*, No. 08 Civ. 11389, 2010 WL 4273277, at *18 (S.D.N.Y. Oct. 6, 2010), *report and recommendation adopted*, 2011 WL 691239 (S.D.N.Y. Feb. 23, 2011), *aff'd sub nom.*, *Sudler v. City of New York*, 689 F.3d 159 (2d Cir. 2012) (denying class certification in case against state agency based upon *Galvan*); *Ruffino v. Lantz*, No. 08 Civ. 1521, 2009 WL 700653 at *1 (D.Conn. Mar. 13, 2009) (the "Second Circuit has held that class

certification is not necessary in an action seeking declaratory and injunctive relief against state officials on the ground that a statute or administrative practice is unconstitutional."); *Tremblay v. Riley*, 917 F. Supp. 196, 202 (W.D.N.Y. 1996) ("[t]he 'archetype' for application of this so-called 'non-necessity' doctrine is an action seeking declaratory or injunctive relief against state officials on the ground that a statute or administrative practice is unconstitutional"); *see also Augustin v. Jablonsky*, No. 99 Civ. 3126, 2001 WL 770839, at *7 (E.D.N.Y. Mar. 8, 2001) (discussing "lack of need" concept under *Galvan*).

In determining whether class certification is necessary under *Galvan*, courts have focused on the following four factors:

> *First*, notwithstanding the presumption that government officials will abide by a court's decision as to similarly situated individuals, an affirmative statement from the government defendant that it will apply any relief across the board militates against the need for class certification. *Second*, withdrawal of the challenged action or non-enforcement of the challenged statute militates against the need for class certification. *Third*, the type of relief sought can affect whether class certification is necessary. Courts have found that where the relief sought is merely a declaration that a statute or policy is unconstitutional, denial of class certification is more appropriate than where plaintiffs seek complex, affirmative relief. *Fourth*, courts also consider whether the claims raised by plaintiffs are likely to become moot, making class certification necessary to prevent the action from becoming moot.

Casale v. Kelly, 257 F.R.D. 396, 406–07 (S.D.N.Y. 2009); *see also Finch v. New York State Office of Children & Family Servs.*, 252 F.R.D. 192, 199 (S.D.N.Y. 2008); *Daniels v. City of New York*, 198 F.R.D. 409, 421 (S.D.N.Y. 2001) (citing *Blecher v. Dep't of Hous. Pres. and Dev.*, No. 92 Civ. 8760, 1994 WL 144376, at *4 (S.D.N.Y. April 19, 1994)).

Here, each of these factors weighs in favor of denying certification.

On the first factor, Defendant Tina Stanford, Chairwoman of the Parole Board, attests in her accompanying declaration that the Parole Board will apply any relief awarded to Plaintiffs in a final judgment in this case for the benefit of all alleged parole violators, absent any stay of any such judgment pending appeal. Stanford Decl. at ¶ 5.

The second factor similarly weighs against certification based on the nature of the relief Plaintiffs are requesting: Even in the absence of a class, Plaintiffs' requested relief, if granted, would (a) declare that the existing revocation procedures requiring mandatory detention pending the final revocation hearing violate due process, and (b) enjoin the Parole Board's enforcement of those procedures.

With respect to the third factor, Plaintiffs do seek more than a declaration that the existing revocation procedures are unconstitutional because they are asking the Court for a mandatory injunction requiring the Parole Board to adopt a new suitability release hearing. However, while the requested new procedural review will be burdensome and costly to the State if imposed by the Court, it will not be complex. Plaintiffs seek to add to the existing procedures a new hearing to evaluate "each person's suitability for release pending their final revocation hearings where each person on parole has the opportunity to be heard and present evidence." Plaintiffs' Memorandum of Law in Support of Motion for Preliminary Injunction (ECF No. 19), at 23. Plaintiffs ask that this new hearing be conducted by a "neutral decision-maker," who must (i) consider factors such as whether the parolee is a flight risk or presents a public safety risk, and (ii) support any denial of release by a reasoned decision in writing or on the record. *Id.* at 20, 24-25. In short, the new hearing, which will closely resemble the existing preliminary hearing already afforded to alleged parole violators, will not require any complex new regulations or rules. Accordingly, the third factor weighs in favor of denying certification.

Finally, the fourth factor also supports denying certification because a class is not necessary to prevent the case from becoming moot based on the applicability of the "capable of repetition, yet evading review" exception to the mootness doctrine. A dispute, including one that is not a class action, qualifies for this exception "'if (1) the challenged action is in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there is a reasonable expectation that the same

complaining party will be subjected to the same action again.'" *United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) (quoting *Turner v. Rogers*, 564 U.S. 431, 439-40 (2011)). This Court has already ruled that this exception to the mootness doctrine applies here, where both Plaintiffs have had their parole warrants lifted and have already been released, because "Plaintiffs' claims belong to the class of cases which is capable of repetition, yet evading review." *Bergamaschi v. Cuomo*, No. 20 Civ. 2817, 2020 WL 1910754 at *5 (S.D.N.Y. April 20, 2020) (citing *Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975)). The Court's ruling is law of the case. *In re PCH Assocs.,* 949 F.2d 585, 592 (2d Cir.1991) (holding that "a decision on an issue of law made at one stage of a case becomes binding precedent to be followed in subsequent stages of the same litigation.").

For these reasons, class certification in this case is not necessary, and Plaintiffs' request for certification should be denied under the *Galvan* doctrine. Just as in *Galvan* and *Davis*, Plaintiffs are seeking only declaratory and injunctive relief against government officials - Governor Cuomo and Chairwoman Stanford – on the ground that the challenged laws and regulations are unconstitutional. Any judgment on the case would "run to the benefit not only of the named plaintiffs but of all others similarly situated," making class certification unnecessary. *Galvan*, 490 F.2d at 1261.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that the Court deny Plaintiffs' motion for class certification in its entirety, and grant such other and further relief as the Court deems just and proper.

Dated: New York, New York
June 8, 2020

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