UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MICHAEL BERGAMASCHI; and FREDERICK ROBERSON; on behalf of themselves and all others similarly situated, Plaintiffs, v. ANDREW M. CUOMO, Governor of New York State, in his official capacity; and TINA M. STANFORD, Chairperson of the New York State Board of Parole, in her official capacity; Defendants.	1:20-CV-02817

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR CLASS CERTIFICATION

PHILIP DESGRANGES
GRACE Y. LI
DANIEL R. LAMBRIGHT
MOLLY K. BIKLEN
CHRISTOPHER T. DUNN
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300

COREY STOUGHTON
The Legal Aid Society
199 Water Street
New York, NY 10038
212-577-3367

Attorneys for Plaintiffs

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New York, N.Y.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The plaintiffs move for class certification in this action challenging New York State's jailing of thousands of people accused of violating their parole conditions without giving them any opportunity to be considered for release during the months it takes to adjudicate their charges. The plaintiffs seek declaratory relief and a mandatory injunction ending the State's scheme of detaining individuals alleged to have violated parole without an individualized hearing on their suitability for release pending the final revocation hearing. The defendants do not dispute that the plaintiffs' proposed class meets Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation. Instead, they invoke the Galvan doctrine to argue that this Court should exercise its discretion to deny certification under Rule 23(b)(2) because a class is unnecessary. But this reliance on Galvan is entirely misplaced. The Galvan doctrine does not apply because the plaintiffs seek affirmative relief and class certification will allow all class members immediately to obtain any relief that is entered in the plaintiffs' favor.

ARGUMENT

In opposing the plaintiffs' motion for class certification, the defendants do not contest that the plaintiffs' proposed class meets the requirements of Fed. R. Civ. P. 23(a). Instead, they urge this Court to deny class certification under Rule 23(b) solely on the basis that "the prospective benefits of declaratory and injunctive relief will necessarily benefit all members of the proposed class, rendering certification unnecessary." *See* Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion for Class Certification (ECF No. 44) ("Defs.' Opp. Mem."), at 1 (citing *Galvan v. Levine*, 490 F.2d 1255, 1261 (2d Cir. 1973)). However, the defendants' reliance on the *Galvan* doctrine is unavailing. The *Galvan* doctrine does not apply where, as here, the plaintiffs seek a mandatory injunction. Further, even if the defendants agree to apply any relief awarded to

all individuals who have allegedly violated parole, without class certification such wider relief could only occur after a significant gap in time caused by the process necessary to promulgate the appropriate regulations. This result would effectively deny relief to hundreds of putative class members. Class certification will ensure that all members of the class obtain immediate relief if a judgment is entered for plaintiffs and therefore class certification is not a mere formality and *Galvan* does not apply.

I. THE *GALVAN* DOCTRINE IS INAPPLICABLE TO THE PROPOSED CLASS.

A. The *Galvan* Doctrine Does Not Apply to Class Actions Seeking Mandatory Injunctions.

In *Galvan v. Levine*, 490 F.2d 1255 (2d Cir. 1973), the Second Circuit considered the denial of class certification where the defendants already had withdrawn the policy at issue. *Id.* at 1259. After the district court ruled in favor of the plaintiffs on their challenge to a state unemployment policy, they renewed their motion for class certification. *Id.* In response, the defendants represented that after the court's decision "it had abandoned" the challenged rule, had "no intention of reinstating it," and already had reopened the unemployment cases of those denied because of the challenged policy. *Id.* In affirming the district court's denial of class certification, Second Court stated, "insofar as the relief sought is *prohibitory, 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." *Id.* at 1261 (emphasis added). Subsequent courts have uniformly interpreted this language to mean that the *Galvan* doctrine does not apply when plaintiffs are seeking mandatory injunctions. *See, e.g.*, *Westchester Indep. Living Ctr., Inc. v. State Univ. of New York, Purchase Coll.*, 331 F.R.D. 279, 301 (S.D.N.Y. 2019) (holding that *Galvan* does not apply to mandatory relief); *Bishop v. New York City Dep't of Hous. Pres. & Dev.*, 141 F.R.D. 229, 240 (S.D.N.Y. 1992) (holding that "*Galvan* does not apply

to situations" in which "[p]laintiffs seek . . . affirmative relief"); *Cutler v. Perales*, 128 F.R.D. 39, 46 (S.D.N.Y. 1989) (same).

In fact, courts in this Circuit have regularly certified classes seeking precisely the type of affirmative relief that plaintiffs seek here. In *Monaco v. Stone*, for example, the court found that Rule 23(b)(2) was satisfied where the plaintiffs requested "an order directing local criminal courts to conduct hearings on whether probable cause exists to determine that a patient satisfies the civil commitment criteria at the same time that the court conducts hearings on competency to stand trial." 187 F.R.D. 50, 63 (E.D.N.Y. 1999). The court rejected the defendant's invocation of the *Galvan* doctrine because of the affirmative nature of the relief requested and because "plaintiff classes challenging the constitutionality of state statutes or administrative practices have frequently been certified in this Circuit." *Id.*

As this Court has recognized, the plaintiffs here are seeking a mandatory injunction. *See Bergamaschi v. Cuomo*, No. 20 Civ. 2817, 2020 WL 1910754, at *5 (S.D.N.Y. April 20, 2020). The plaintiffs seek to enjoin the detention regulations as unconstitutional and, as in *Monaco*, have asked the Court to "order the defendants to conduct hearings evaluating 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." *See* Amended Complaint (ECF No. 38), at 23. As plaintiffs have argued, these additional procedures are required under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), to protect against erroneous and unnecessary deprivations of liberty of the putative class. This is precisely the type of affirmative, potentially complex, remedy that supports class certification under Rule 23(b)(2) and weighs against the *Galvan* doctrine.

The defendants also mischaracterize the *Galvan* doctrine in attempting to apply it to the affirmative relief plaintiffs seek here. Although they recognize that the plaintiffs seek a mandatory

injunction, they claim that the relief sought here "will not require any complex new rules" and therefore *Galvan* could apply. Defs.' Opp. Mem. at 9. But this is not the test. Where plaintiffs seek injunctive relief to compel processes in accordance with the law, courts have declined "to create a threshold of specificity of affirmative relief that plaintiff must cross to qualify for class certification." *Cutler*, 128 F.R.D. at 46; *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 391 (S.D.N.Y. 2000) ("Because the relief requested by plaintiffs is not purely prohibitory, the *Galvan* rule is not a barrier to this Court's granting of class certification.").

In sum, the *Galvan* doctrine does not apply to class certifications where, as here, plaintiffs seek the type of affirmative relief sought in this case. The defendants' remaining arguments related to the relief sought are unavailing.

B. Without Class Certification, Many Putative Class Members Would Still Receive Inadequate Hearings.

Further, the defendants claim that the *Galvan* doctrine should be applied because the Chair of the Board of Parole has agreed "to provide any additional hearings . . . and implement such regulations for the benefit of all alleged parole violators . . . ." Declaration of Tina M. Stanford ("Stanford Decl.") ¶ 5; Defs.' Opp. Mem. at 8. This guarantee is insufficient to alleviate the need for a class because it does not actually ensure that all putative class members will receive relief.

In *Loper v. New York City Police Dep't*, the district court found that *Galvan* was not applicable where the defendant New York City Police Department declared that it would apply a holding to all putative class members after the exhaustion of its appeals. 135 F.R.D. 81, 83 (S.D.N.Y. 1991). The court held that "[g]iven the inevitable gap in time between this court's decision on the merits and a final disposition of the matter on appeal, many potential class members could in the absence of class certification be subject to arrest or prosecution. Thus, class

certification in this matter is not strictly a formality." [1] *Id*.

Here, the same problems make class certification necessary. While the defendants commit to promulgate the necessary regulations, they have agreed to do so "in accordance with the State Administrative Procedure Act." Stanford Decl. ¶ 5. New York Administrative Procedure Act § 202 establishes procedures that require *at least* 75 days before the adoption of any rule. At the very least, this would create a months-long gap in time between a judgment from this Court and the new procedures being implemented for the putative class members. As this Court has noted, preliminary hearings are supposed to happen within 15 days of execution of the parole warrant and final revocation hearings within 90 days, many class members would continue to be subjected to unconstitutional detention and not get the same relief as the named plaintiffs. *Bergamaschi*, 2020 WL 1910754, at *1-2. If the named plaintiffs obtain relief, putative class members cannot wait for the Board of Parole to promulgate new regulations; absent class certification, there is no guarantee that individual relief will be immediately available to the putative class members following this Court's judgment. Class certification is therefore not a mere formality.

CONCLUSION

For the foregoing reasons, as the proposed class plainly satisfies the requirements of Rules 23(a) and (b)(2), the plaintiffs respectfully request that this Court grant their motion for class

[1] Defendants misapply one of the factors they cite in support of the *Galvan* doctrine. As the defendants note, courts consider the "withdrawal of the challenged action or non-enforcement of the challenged statute" to determine whether class certification is a formality. Def. Opp. Mem. at 8 (citing *Casale v. Kelly*, 257 F.R.D. 396, 406–07 (S.D.N.Y. 2009)). When such a withdrawal occurs, there is less of a need for class certification. *Id*. In this case, the defendants have not withdrawn their mandatory detention regulations. They are still detaining all alleged parole violators with no chance of release before their final hearing. *Cf. Blecher v. Dep't of Hous. Pres. & Dev. of City of New York*, No. 92 CIV. 8760 (CSH), 1994 WL 144376, at *5 (S.D.N.Y. Apr. 19, 1994) (denying class certification where the defendants indicated that they had introduced a computerized system to address the backlog at the center of the litigation). Given that the mandatory detention scheme is still in place, class certification is necessary. The defendants' argument that if the court rules for the plaintiffs the mandatory detention regulations at issue would be enjoined, Def. Opp. Mem. at 9, is simply beside the point.

certification, certify the plaintiff class, appoint Michael Bergamaschi and Frederick Roberson representatives of the class, and appoint the undersigned counsel as class counsel.

Dated: June 22, 2020
New York, N.Y.

Respectfully submitted,

s/ Philip Desgranges
Philip Desgranges
Grace Y. Li*
Daniel R. Lambright*
Molly Biklen
Christopher T. Dunn
NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, New York 10004
(212) 607-3300
pdesgranges@nyclu.org
gli@nyclu.org
mbiklen@nyclu.org
dlambright@nyclu.org
cdunn@nyclu.org

Corey Stoughton
THE LEGAL AID SOCIETY
199 Water Street
New York, NY 10038
212-577-3367
cstoughton@legal-aid.org

Attorneys for Plaintiffs

* Application for admission forthcoming