DOCKET NO. UWY CV-20-6054309-S

CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION, *et al*,	:	SUPERIOR COURT
Plaintiffs,	:	
	:	JUDICIAL DISTRICT OF WATERBURY
v.	:	AT WATERBURY
	:	
LAMONT, NED, *et al*,	:	APRIL 7, 2020
Defendants,	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants move to dismiss Plaintiffs' action for mandamus because this Court lacks subject matter jurisdiction. Specifically, the Connecticut Criminal Defense Lawyers Association (CCDLA) lacks standing because it fails the classical aggrievement test and it cannot assert third-party standing on behalf of inmates. The remaining inmate Plaintiffs also lack standing because they have no right to be released prior to the end of their lawful sentences and their constitutional claims are based on alleged injuries that are too speculative.

Further, Plaintiffs claims are non-justiciable political questions because granting the requested mandamus "would place the court in conflict with a coequal branch of government"—both the Legislature and the Executive—because the issue of releasing inmates early from prison is "[impossible to decide] without making an initial policy determination of a kind clearly for nonjudicial discretion" and it would "[express] lack of the respect due to coordinate branches of government."

Plaintiffs' request for this Court to order the Governor and Commissioner "to submit for the Court's review a plan" that includes and order for Defendants "to sufficiently fund transitional housing for the duration of the pandemic" is barred by sovereign immunity and the

Eleventh Amendment. Such a plan will require State funds and amount to an award of money damages from the State, which has not consented to be sued.

I. BACKGROUND

Plaintiffs are CCDLA, Mr. William Breyette, Mr. Anthony Johnson, Mr. Daniel Rodriguez, and Mr. Marvin Jones. (Doc. #100.31 at 2-3, ¶¶1-8.) Plaintiffs are bringing a mandamus action seeking the mass release of numerous inmates from lawful incarceration, as well as the immediate hospitalization of many other inmates. (Id. at 19-20, ¶85.) Plaintiffs also seek, *inter alia*, an order from this Court requiring the State of Connecticut to pay for the "transitional housing" of these prematurely released inmates, for the "duration of the pandemic." (Id. at 20, ¶85(c)(5).)

Plaintiffs acknowledge that Defendants have taken "commendable" steps to combat the COVID-19 epidemic, but they allege that these efforts are "insufficient" and "inadequate." (Doc. #100.31 at 14, 15, 16, 18, ¶¶65, 68, 70, 84.)

II. ARGUMENT

A. Standard of Review, Motion to Dismiss.

A motion to dismiss shall be used to assert lack of jurisdiction over the subject matter, the person, insufficiency of process, or insufficiency of service of process. Practice Book §10-30(a). It "properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court . . . ." *Bellman v. Town of W. Hartford*, 96 Conn. App. 387, 393 (2006) (internal citations omitted). "The burden rests with the party who seeks the exercise of jurisdiction in his favor . . . clearly to allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute." *Goodyear v. DiScala*, 269 Conn. 507, 511 (2004) (internal quotation marks omitted); *see also Fort Trumbull*

Conservancy, LLC v. New London, 265 Conn. 423, 430 n. 12 (2003) ("The plaintiff bears the burden of proving subject matter jurisdiction, whenever and however raised.").

"The subject matter jurisdiction requirement may not be waived by any party, and also may be raised by a party, or by the court *sua sponte*, at any state of the proceedings, including on appeal." *Peters v. Department of Social Services*, 273 Conn. 434, 441 (2005). Once brought to the attention of the court, the issue of subject matter jurisdiction must be immediately acted upon by the court, *Gurliacci v. Mayer*, 218 Conn. 531, 545 (1991), and "whenever a court discovers that it lacks jurisdiction, it is bound to dismiss the case." *Cahill v. Board of Education*, 198 Conn. 229, 238 (1985).

"[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine, that implicate a court's subject matter jurisdiction and its competency to adjudicate a particular matter ... A case that is nonjusticiable must be dismissed for lack of subject matter jurisdiction." *Janulawicz v. Commissioner of Correction*, 310 Conn. 265, 270 (2013) (internal citations and quotation marks omitted).

Additionally, "the doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss . . . ." *Envirotest Sys. Corp. v. Comm'r of Motor Vehicles*, 293 Conn. 382, 387 (2009) (citations omitted; quotation omitted).

"Mandamus is an extraordinary remedy, available in limited circumstances for limited purposes." *Greenfield v. Reynolds*, 122 Conn. App. 465, 469 *cert. denied*, 298 Conn. 922 (2010). "It is fundamental that the issuance of the writ rests in the discretion of the court, not an arbitrary discretion exercised as a result of caprice but a sound discretion exercised in accordance with recognized principles of law." *Id*. (quoting *Miles v. Foley*, 253 Conn. 381, 391 (2000)). "That discretion will be exercised in favor of issuing the writ only where the plaintiff has a clear

legal right to have done that which he seeks." *Id.* "The writ is proper only when (1) the law imposes on the party against whom the writ would run a duty the performance of which is mandatory and not discretionary; (2) the party applying for the writ has a clear legal right to have the duty performed; and (3) there is no other specific adequate remedy." *DelGobbo v. Town of Watertown*, 143 Conn. App. 628, 631–32 (2013) (internal quotation omitted).

"Even satisfaction of this demanding test does not, however, automatically compel issuance of the requested writ of mandamus.... In deciding the propriety of a writ of mandamus, the trial court exercises discretion rooted in the principles of equity." *Hennessey v. Bridgeport*, 213 Conn. 656, 659 (1990).

B. Plaintiffs lack standing which deprives the Court of subject-matter jurisdiction.

"[A] party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim." *Burton v. Freedom of Info. Comm'n*, 161 Conn. App. 654, 658 (2015); *Johnson v. Rell*, 119 Conn. App. 730, 735-36 (2010). "Standing is the legal right to set judicial machinery in motion." *Ferri v. Powell-Ferri*, 326 Conn. 438, 447 (2017). "One cannot rightfully invoke the jurisdiction of the court unless he [or she] has, in an individual or representative capacity, some real interest in the cause of action, or a legal or equitable right, title or interest in the subject matter of the controversy.... When standing is put in issue, the question is whether the person whose standing is challenged is a proper party to request an adjudication of the issue .... Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes ... standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests...." *Id.* at 448.

"Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved.... The fundamental test for determining aggrievement

encompasses a well-settled twofold determination: first, the party claiming aggrievement must successfully demonstrate a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole." *Id.* "Second, the party claiming aggrievement must successfully establish that this specific personal and legal interest has been specially and injuriously affected by the [challenged action].... Aggrievement is established if there is a possibility, as distinguished from a certainty, that some legally protected interest ... has been adversely affected." *Id.*

"An allegation of injury is both fundamental and essential to a demonstration of standing." *Johnson*, 119 Conn. App. at 737. "[O]nly those individuals who have suffered a *direct* injury would have [classical aggrievement-based] standing." *Broadnax v. City of New Haven*, 270 Conn. 133, 156 (2004) (emphasis in original); *see also Missionary Soc. of Connecticut v. Bd. of Pardons & Paroles*, 278 Conn. 197, 202 (2006) (applying classical aggrievement test in mandamus action).

"[T]he court has a duty to dismiss, even on its own initiative, any appeal that it lacks jurisdiction to hear . . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction . . . ." *Johnson*, 119 Conn. App. at 735-36 (affirming dismissal of action because of "the plaintiff's failure to allege injury in his complaint.").

"Standing is no mere procedural technicality. As the United States Supreme Court has explained, '[t]he power to declare the rights of individuals and to measure the authority of governments ... is legitimate only in the last resort, and as a necessity in the determination of real, earnest and vital controversy." *Johnson*, 119 Conn. App. at 736–37 (quoting *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471

(1982)). "As a result, '[t]he exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is therefore restricted to litigants who can show [an injury] resulting from the action which they seek to have the court adjudicate." *Id*. (quoting *Valley Forge Christian College*, 454 U.S. at 473).

"The standing requirement further evinces a proper regard for the judicial branch's relationship with coequal branches of government under our constitutional structure." *Johnson*, 119 Conn. App. at 737 "Thus, '[i]t is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, *but that of the political branches*, to shape the institutions of government in such fashion as to comply with the laws and the Constitution." *Id*. (quoting *Lewis v. Casey*, 518 U.S. 343, 349 (1996)) (emphasis added).

1. CCDLA fails the classical aggrievement test because a professional organization of lawyers does not suffer from a direct injury if numerous inmates are not prematurely released from lawful confinement.

"The fundamental aspect of standing ... [is that] it focuses on the party seeking to get his complaint before [the] court and not on the issues he wishes to have adjudicated." *Connecticut Ass'n of Health Care Facilities, Inc. v. Worrell*, 199 Conn. 609, 612 (1986) (quotations omitted).

"[A]s a general rule, a plaintiff lacks standing unless the harm alleged is direct rather than derivative or indirect." *Wiederman v. Halpert*, 178 Conn. App. 783, 795 (2017) (quoting *Connecticut State Medical Society v. Oxford Health Plans (CT), Inc.*, 272 Conn. 469, 481 (2005)). "[I]f the injuries claimed by the plaintiff are remote, indirect or derivative with respect to the defendant's conduct, the plaintiff is not the proper party to assert them and lacks standing to do so. Where, for example, the harms asserted to have been suffered directly by a plaintiff are in reality derivative of injuries to a third party, the injuries are not direct but are indirect, and the

plaintiff has no standing to assert them." *Id*. (quoting *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 347–48 (2001)).

Here, CCDLA is alleged to be a nonprofit organization comprised of lawyers who "represent clients held in each of the facilities controlled by [DOC]." (Doc. #100.31 at 2, ¶¶1-4.) There is no allegation of how any of the actions of either the Governor or the Commissioner injure CCDLA. There is not even an allegation of injury on behalf of CCDLA's members. Rather, it appears that CCDLA is attempting to bring an action for mandamus based on alleged potential injuries of some of the clients of some of the individual attorneys who comprise its membership. This does not pass the classical aggrievement test. *See Bell v. Planning & Zoning Comm'n of Town of Westport*, 174 Conn. 493, 499 (1978) ("Under long-established principles, a party is precluded from asserting the constitutional rights of another.").

CCDLA's position here is similar to the plaintiff in *Connecticut State Med. Soc. v. Oxford Health Plans (CT), Inc.*, 272 Conn. 469, 481–82 (2005). There, the plaintiff was a federation of medical associations comprised of individual physicians. *Id*. at 470. The plaintiff sued a "managed care organization" that provided medical insurance coverage and contracted with individual physicians to provide services to its subscribers. *Id*. The plaintiff brought an action for injunctive relief under CUTPA claiming the defendant had engaged in a scheme "to avoid making timely and complete payments to the plaintiff's member physicians." *Id*. at 471. The Supreme Court held the plaintiff lacked standing because the alleged injuries "derive[ed] solely and exclusively from the harm allegedly visited upon the plaintiff's members" and therefore, "none of the harm that the plaintiff allegedly suffered as a result of the defendant's conduct [was] direct." *Id*. at 479.

CCDLA's position is even more attenuated than the plaintiff in *Connecticut State Med. Soc.* Here, not even the members of CCDLA have any theoretical injury. Rather, Plaintiffs seem to allege that the clients of the members of CCDLA have a potential injury. This is simply too indirect to meet the classical aggrievement test and as a result, CCDLA lacks standing here. *See also Ganim*, 258 Conn. at 370 ("One might well say that the harms alleged by the plaintiffs to have been caused by the defendants' conduct are harms that injure the citizens of Bridgeport who may be so circumstanced as to come within the influence of that conduct. That is not enough, however, in our view, to answer the antecedent question of whether those harms are nonetheless too remote from that conduct to confer standing on the plaintiffs to complain of them."). Claims by associations of lawyers on behalf of clients are insufficient to satisfy standing and CCDLA's claims are no different. *See Juvenile Matters Trial Lawyers Ass'n v. Judicial Dep't*, 363 F. Supp. 2d 239, 247 (D. Conn. 2005) (Judge Droney held that organization of lawyers had no injury because "it is the clients that the Association claims are harmed . . .not the lawyers.").

2. CCDLA lacks third-party standing because there is no impediment to individual inmates seeking release from confinement, nor does any inmate have a right to be released prior to the expiration of his lawful sentence.

In general, Connecticut has rejected the concept of "third-party standing." *S. Connecticut Gas Co. v. Hous. Auth. of City of New Haven*, 191 Conn. 514, 522 (1983) ("We have uniformly resisted the efforts of litigants to assert constitutional claims of others not in a direct adversarial posture before the court."); *see also Superintendent of Police of City of Bridgeport v. Freedom of Info. Comm'n*, 222 Conn. 621, 630 (1992) (rejecting Bridgeport Police Department's attempt to assert Second Amendment rights of individual firearm permit holders in FOIC appeal); *Przekopski v. Zoning Bd. of Appeals of Town of Colchester*, 131 Conn. App. 178, 190 n. 7 (2011).

The undersigned is unable to locate any instance where the Supreme Court or Appellate Court has allowed a litigant to assert third-party standing in an action for mandamus or even in a civil matter generally. Even in criminal matters, the doctrine of third-party standing is rarely applied and done so in very limited circumstances based on alleged federal constitutional violations. *See State v. Bradley*, 195 Conn. App. 36, 50 (2019) (holding criminal defendant did not meet the "exacting requirements" to assert third-party standing on behalf of African American and Mexican defendants where mounting equal protection challenge to Connecticut's drug laws).

Much like Connecticut, "[u]nder federal law, a party 'generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id*. (quoting *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004)). "The 'prudential standing rule ... normally bars litigants from asserting the rights or legal interests of others in order to obtain relief from injury to themselves.'" *Laquer v. Priceline Grp., Inc.*, 722 F. App'x. 22, 24 (2d Cir. 2018) (quoting *Warth v. Seldin*, 422 U.S. 490, 509 (1975)). "[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id*. (quoting *Warth*, 422 U.S. at 499). As the Supreme Court has stated, and our Appellate Court has quoted:

> This rule assumes that the party with the right has the appropriate incentive to challenge (or not challenge) governmental action and to do so with the necessary zeal and appropriate presentation. It represents a healthy concern that **if the claim is brought by someone other than one at whom the constitutional protection is aimed, the courts might be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions** and even though judicial intervention may be unnecessary to protect individual rights.

Bradley, 195 Conn. App. At 50-51 (quoting *Kowalski*, 543 U.S. at 129) (emphasis added).

Though the rule against litigating the rights of third parties is not absolute, the Supreme Court has "not looked favorably upon third-party standing" and it has limited the doctrine to only those circumstances where a plaintiff can satisfy a certain test. *Kowalski*, 543 U.S. at 130.

"A plaintiff may assert the constitutional claims of a third party if the plaintiff can demonstrate: (1) injury to the plaintiff, (2) a close relationship between the plaintiff and the third party that would cause plaintiff to be an effective advocate for the third party's rights, and (3) 'some hindrance to the third party's ability to protect his or her own interests.'" *Camacho v. Brandon*, 317 F.3d 153, 159 (2d Cir. 2003) (quoting *Campbell v. Louisiana*, 523 U.S. 392, 397 (1998)). However, the Second Circuit has also held that a plaintiff seeking to invoke third-party standing must meet an additional requirement: that the third party has a claim as well. *Huth v. Haslun*, 598 F.3d 70, 75 (2d Cir. 2010) ("Implicit in *Camacho's* formulation is the requirement that the third party ... has a constitutional claim."); *see also Lewis v. City of New York*, 591 F. App'x. 21, 23 (2d Cir. 2015) (affirming dismissal of plaintiff's retaliation claim—that he was arrested or prosecuted based on his mother's speech to defendant police officers—because plaintiff did not allege that his "mother suffered an injury from her allegedly protected speech.").

Therefore, for CCDLA to even claim third-party standing here, it must demonstrate 1. that it has an independent injury in fact, 2. that it has a sufficiently close relationship with the allegedly aggrieved inmates—not their lawyers—that it can be an effective advocate for their rights, 3. that there is some hindrance to the allegedly aggrieved inmates' ability to protect their own rights, and 4. that the inmates have some constitutional claim in the first instance. This additional requirement means—as the Second Circuit held in *Huth* and *Lewis*—that CCDLA must at a minimum demonstrate that all the inmates they seek to represent suffered some injury

in fact in the context of federal constitutional rights. For various reasons, CCDLA fails this intentionally demanding test.

a. CCDLA has no injury in fact, independent of any inmates.

For all the reasons articulated *supra* at 6-8, CCDLA has no independent injury, non-derivative of any inmates. It does not even have an injury independent from that of its attorney membership. Moreover, none of its individual members has any injury, since there are no allegations of fact to establish that defense attorneys are unable to discharge their duties to their clients in criminal proceedings. For this reason alone, CCDLA cannot invoke third-party standing.

This is also why CCDLA does not have "associational" or "representative" standing.[1] *See Connecticut Associated Builders & Contractors v. City of Hartford*, 251 Conn. 169, 185 (1999) (holding association did not have standing to seek injunction because its members did not otherwise have standing).

b. CCDLA does not have a sufficiently close relationship with any identified client of any of its members.

The "closeness" standard of the third-party standing test is satisfied if "the relationship between the litigant and the third party may be such that the former is fully, or very nearly, as effective a proponent of the right as the latter." *Singleton v. Wulff*, 428 U.S. 106, 115 (1976). This prong of the test asks whether "the third party can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." *Sec'y of State of Md. v. Joseph*

[1] "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Connecticut State Med. Soc. v. Connecticare, Inc.*, No. X01CV010165649S, 2002 WL 725510, at *2 (Conn. Super. Ct. Apr. 1, 2002), *aff'd sub nom. Connecticut State Med. Soc'y v. Connecticare, Inc.*, 272 Conn. 482, 863 (2005).

H. Munson Co., 467 U.S. 947, 956 (1984); *see also In re Deepwater Horizon*, 857 F.3d 246, 252 (5th Cir. 2017) ("[T]he [plaintiff] must establish that it and the third party have 'a close relation,' such that 'their interests coincide.'").

The Supreme Court has previously allowed individual attorneys to invoke third-party standing on behalf of identified clients. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989) (Court granted third-party standing to narcotics defendant's counsel who challenged validity of forfeiture statute to extent that it prevented defendant from paying attorney fees); *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715 (1990) (attorney against whom disciplinary proceeding was brought for allegedly collecting illegal fees in black lung benefit cases had third-party standing to object to constitutionality of attorney fee provisions of Black Lung Benefits Act). But these cases involved actual retained attorneys taking actions on behalf of identified clients. Neither case involved a professional organization and the Supreme Court has declined to grant third-party standing based on an attorney-client theory where the clients were hypothetical or prospective. *See Kowalski*, 543 U.S. at 130. Merely having an attorney-client relationship is not enough to invoke third-party standing. *See Conn v. Gabbert*, 526 U.S. 286, 292–293 (1999) (rejecting an attorney's attempt to adjudicate the rights of a client).

CCDLA is in a similar position to the plaintiff in *Juvenile Matters Trial Lawyers Ass'n v. Judicial Dep't*. 363 F. Supp. 2d at 249. There, the plaintiff was "an association of attorneys who provided legal services to juveniles and their families in the Connecticut state courts." *Id*. at 241. The Association sued the Judicial Department of the State of Connecticut seeking injunctive and declaratory relief, essentially arguing that the compensation rates for juvenile attorneys were lower than for Special Public Defenders. *Id*. at 242. Relying on *Kowalski*, Judge Droney found the plaintiff did not satisfy the "closeness" criterion, holding "the Association also has not

identified any existing clients on whose behalf this action is brought, but rather claims that it 'has standing to raise this claim as a necessary proxy for the interest of all indigent children, parents and other parties with cases pending before the [Superior Court for juvenile matters] and Appellate Courts of the State of Connecticut.'" *Id.* at 249. For this reason, amongst others, the court denied the plaintiff third-party standing and dismissed the complaint. *Id.*

CCDLA makes no allegations about any individual clients of its members. This Court is left with hypotheticals and therefore, CCDLA fails the closeness inquiry. *See New York Cty. Lawyers' Ass'n v. Bloomberg*, No. 10 CV. 5035 DAB, 2011 WL 4444185, at *6 (S.D.N.Y. Sept. 23, 2011) (no close relationship between attorneys and hypothetical future clients). Even if CCDLA had identified current clients, there is a difference between an association that represents lawyers, who in turn represent some inmates, and a direct attorney-client relationship. Therefore, it cannot be assumed that CCDLA would be "very nearly" as effective of an advocate for all inmates as an individual inmate would be. *See Singleton*, 428 U.S. at 115. Plaintiffs seek a broad order that would result in the release of a wide range of inmates. Releasing an inmate who already has access to healthcare—and who currently has no symptoms or signs of COVID-19 infection—from a facility with a low infection rate into a community with an increasing rate of infection could place said inmate's health at risk. Ironically, releasing certain inmates could increase their risk of contracting COVID-19 rather than mitigate it, especially if that inmate would have no healthcare once released. Such a scenario illustrates why courts are very reluctant to allow third-party standing in the first place. *See Singleton*, 428 U.S. at 113-14 ("[C]ourts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not."). The second criterion for third-party standing is not met.

c. Individual inmates are permitted to seek release, via habeas or sentence and bond modifications. There is no hindrance to the third parties' ability to protect their own rights.

Plaintiffs also fail to show that individual inmates are "hindered from protecting [their] own interests." *Mental Hygiene Legal Serv. v. Cuomo*, 13 F. Supp. 3d 289, 301 (S.D.N.Y. 2014), *aff'd*, 609 Fed. App'x 693 (2d Cir. 2015) (quoting *Fenstermaker v. Obama*, 354 Fed. App'x 452, 454 (2d Cir.2009)). In order to demonstrate hindrance, there would need to be "some barrier or practical obstacle (e.g., third party is unidentifiable, lacks sufficient interest, or will suffer some sanction) prevent[ing] or deter[ing] the third party from asserting his or her own interest." *Congregation Rabbinical Coll. of Tartikov, Inc. v. Vill. of Pomona*, 915 F. Supp. 2d 574, 594 (S.D.N.Y. 2013) (quoting *Benjamin v. Aroostook Med. Ctr., Inc.*, 57 F.3d 101, 106 (1st Cir.1995)). "A simple lack of motivation does not constitute a 'genuine obstacle' to asserting an interest." *In re Deepwater Horizon*, 857 F.3d at 253 (quoting *Viceroy Gold Corp. v. Aubry*, 75 F.3d 482, 489 (9th Cir. 1996)).

Plaintiffs assert, albeit not in their Complaint, that "[a]s of April 2, 2020, only seven courthouses remained open, and they are only hearing 'Priority Level 1 Business,' a list that does not include, among others, bail or sentence modifications." (Doc. #101.00 at 24, n. 77.) Plaintiffs also claim, "state courts are by and large closed [and] are not hearing habeas petitions." (Id. at 24.) Finally, they assert that "[b]ecause the plaintiffs request emergency temporary relief, their motion comprises a Priority 1 Business Function for the Court." (Id. at 2, n.1.) This illustrates the flaw of their logic.

Plaintiffs do not rely on the fact that this is a mandamus action to categorize their Motion as "Priority 1 Level Business." Indeed, mandamus actions are not listed as such. Instead, Plaintiffs rely on the fact that they seek "emergency temporary relief." But if Plaintiffs can

transform an otherwise non-emergent action into "Priority 1 Business" simply by filing a motion for "emergency temporary relief," there is nothing to prevent any inmate, pretrial or sentenced, from filing a similar motion in an individualized action for release. Indeed, "emergency" petitions for a writ of habeas corpus have been heard in Connecticut. *See State v. Anderson*, 319 Conn. 288, 325(2015) (inmate claiming inadequate medical or mental health treatment may pursue an expedited petition for a writ of habeas corpus challenging the conditions of his confinement); *Surowka v. Comm'r of Correction*, No. CV184009523, 2018 WL 3814993, at *1 (Conn. Super. Ct. July 19, 2018); *Joseph v. Warden*, No. CV164008076, 2017 WL 3927615, at *1 (Conn. Super. Ct. July 21, 2017). There is nothing preventing any inmate from seeking a bond reduction, a sentence modification, or a writ of habeas corpus. Plaintiffs' very Motion demonstrates this.

Further, there is no procedural[2] bar to any inmate filing a similar mandamus action that is individualized to his or her circumstances. Since there is nothing to prevent individual inmates from seeking early release, there exists no "hindrance to the third party's ability to protect his or her own interests." *Campbell*, 523 U.S. at 397. CCDLA therefore also fails the third criterion of third-party standing.

d. The allegedly aggrieved inmates have no claim, so CCDLA cannot invoke third-party standing.

For reasons explained *infra* at 16-22, no DOC inmates, including Messrs. Breyette, Johnson, Jones, and Rodriguez, have any right to be released prematurely from confinement, nor do they state deliberate indifference claims. Therefore, the inmates on whose behalf CCDLA

[2] Defendants emphasize there is no procedural bar because, as will be argued further *infra*, there substantive reasons an inmate cannot obtain early release via a writ of mandamus.

seeks to invoke third-party standing do not have a claim in their own right, and for this reason, CCDLA is not entitled to third-party standing. CCDLA must be dismissed from this case.

3. Inmate Plaintiffs lack standing.

a. Breyette, Johnson, Jones, and Rodriguez, do not have any injury, because they have no right to be released early.

As a preliminary matter, "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence.... A state may ... establish a parole system, but it has no duty to do so." *Baker v. Commissioner of Correction*, 281 Conn. 241, 253 (2007) (quoting *Greenholtz v. Inmates of the Nebraska Penal & Correctional Complex*, 442 U.S. 1, 7 (1979)).

And while there are various ways an inmate can be released early from confinement via statute, these are matters of discretion, vested in Executive Branch officials by the Legislature. There is no statutory right to early *release* from confinement. *See Vincenzo v. Warden*, 26 Conn. App. 132, 142-43 (1991) (§ 54-125 utilizes "broad discretionary language" and therefore no right to "parole release"); *Asherman v. Meachum*, 213 Conn. 38, 49 (1989) (petitioner had no constitutionally derived liberty interest in remaining on supervised home release); *State v. Simmat*, 184 Conn. 222, 224 (1981) ("furlough[s], granted by [§]18-101a, [are] a matter of legislative grace"); *State v. Smith*, 207 Conn. 152, 165 (1988) ("there is no right to be granted probation"); *Midgette v. Comm'r of Corr.*, No. CV 89-00719, 1991 WL 93586, at *2 (Conn. Super. Ct. May 24, 1991) ("[Conn. Gen. Stat. §§ 18-81, 18-100(a) and 18-100(e)] gave the Commissioner apparent total discretion about determining eligibility to transfer inmates to community release programs and facilities."); *see also* Conn. Gen. Stat. § 18-100h ("the commissioner *may*, after admission and a risk and needs assessment of such person, release such person to such person's residence . . .") (emphasis added).

Plaintiffs categorize the rights at issue as stemming from the Fourteenth Amendment, the Eighth Amendment, and Conn. Gen. Stat. § 28-9(b)[3]. (Doc. #100.31 at 18, ¶¶79-83.) But the rights Plaintiffs invoke relate to alleged deliberate indifference to health and safety and the provision of medical care. Such rights do not allow for the premature release of inmates from prison because no such rights exist. Therefore, the inmate Plaintiffs cannot claim an injury in not being released early, otherwise any inmate could get past the standing test simply by virtue of his incarceration. This is insufficient.

b. Inmate Plaintiffs' alleged 14th and 8th Amendment injuries fail to satisfy standing because the "risk of harm" in "mere exposure" to a virus is too speculative. Plaintiffs also fail to allege Defendants had sufficient mental culpability for purposes of deliberate indifference.

"A mere speculative injury" is not sufficient to establish a "specific, personal and legal interest that has been specially injured" by challenged action to establish aggrievement for

[3] Plaintiffs make a passing reference to "Conn. Const. art. 1, § 20," seemingly suggesting that Defendants are "depriving" certain inmates of medical care based on "race, color, ancestry, or national origin." (Doc. #100.31 at 18, §§81.) Our Supreme Court "has interpreted the state constitution's equal protection clause to have a like meaning and [to] impose similar constitutional limitations as the federal equal protection clause." *Markley v. Dept. of Public Utility Control*, 301 Conn. 56, 68 (2011). "An equal protection challenge must be established by a showing of intentional or purposeful discrimination." *Wendt v. Wendt*, 59 Conn. App. 656, 681 (2000) (quotation omitted). "[T]he requirement imposed upon [p]laintiffs claiming an equal protection violation [is that they] identify and relate specific instances where persons situated similarly in all relevant aspects were treated differently ..." *Gawlik v. Malloy*, No. CV185043126, 2019 WL 3021829, at *10 (Conn. Super. Ct. May 31, 2019) (quoting *Tuchman v. State*, 89 Conn. App. 745, 759, *cert. denied*, 275 Conn. 920 (2005)).
To the extent Plaintiffs allege that inmates are being discriminated against, they are not a suspect class, nor are they similarly situated to civilians. *Perez v. Comm'r of Correction*, 326 Conn. 357, 384 (2017); *Francis v. Lantz*, No. CV094034844, 2009 WL 2783721, at *5 (Conn. Super. Ct. July 31, 2009), *aff'd*, 126 Conn. App. 903 (2011). To the extent Plaintiffs base this claim on the race of certain inmates, they have made no allegation—nor could one be made—that Defendants' actions in combatting COVID-19 are in any way motivated by "purposeful discrimination" against "Black and Latinx prisoners." (Doc. #100.31 at 6, ¶29.) Such a claim is both borderline frivolous and factually unsupported, and therefore not worthy of further comment.

standing purposes. *AFSCME, Council 4, Local 681, AFL-CIO v. City of W. Haven*, 43 Conn. Supp. 470, 481 (Ct. Super. 1994), *aff'd*, 234 Conn. 217 (1995); *see also Fort Trumbull Conservancy, LLC v. City of New London*, 265 Conn. 423, 436 (2003) ("[A]n allegation of a mere fear of 'specific damages,' without more, is too vague and speculative a claim of injury for the purpose of establishing classical aggrievement.")[4]. Therefore, in order to have standing, the inmate Plaintiffs must allege actual deliberate indifference as opposed to merely hypothesizing.

"To state a claim for deliberate indifference to safety or failure to protect him from harm, [an inmate] must show that the conditions of his confinement posed a substantial risk of serious harm and that the defendants were deliberately indifferent to his safety." *Llewellyn v. Aldi*, No. 3:19-CV-1030 (KAD), 2019 WL 4139484, at *7 (D. Conn. Aug. 30, 2019) (citing *Farmer v. Brennan*, 511 U.S. 825, 834 (1994)). "Deliberate indifference exists when the defendant knows of and disregards an excessive risk to an inmate's safety." *Id.*; *see also Bridgewater v. Taylor*, 698 F. Supp. 2d 351, 357 (S.D.N.Y. 2010) (explaining that defendants must be aware of facts supporting an inference that the harm would occur and must actually draw that inference). There are both objective and subjective components to the deliberate indifference standard. *Deegan v. Doe #1*, No. 3:19CV1356(MPS), 2019 WL 5964816, at *3–4 (D. Conn. Nov. 13, 2019).

Subjectively, the defendants must have been actually aware of a substantial risk that the inmate would suffer serious harm as a result of their actions or inaction. *See Salahuddin v. Goord*, 467 F.3d 263, 279-80 (2d Cir. 2006). "To satisfy the subjective prong of the deliberate indifference standard, 'the official must have acted with the requisite state of mind, the equivalent of criminal recklessness.'" *James v. Suffolk Cty. Corr. Facility*, No.

[4] *See also Elec. Contractors, Inc. v. Dep't of Educ.*, 303 Conn. 402, 442 (2012) (plaintiffs lacked standing to bring their state constitutional claims because the claims were too remote and speculative); *W. Farms Mall, LLC v. Town of W. Hartford*, 279 Conn. 1, 16 (2006) (no standing where the plaintiff's injury was predicated on the probability of a tax increase).

13CV2344JFBSIL, 2018 WL 3966688, at *12 (E.D.N.Y. June 26, 2018), *report and recommendation adopted*, No. 13CV2344JFBSIL, 2018 WL 3966241 (E.D.N.Y. Aug. 17, 2018) (quoting *Collazo v. Pagano*, 656 F.3d 131, 135 (2d Cir. 2011)). Thus, an allegation of "mere negligen[t]" conduct is insufficient. *See Farmer*, 511 U.S. at 835.

"In the case of pretrial detainees, 'the subjective prong (or *mens rea* prong) ... is defined objectively.'" *Harris v. Viau*, No. 17-CV-9746 (KMK), 2019 WL 1331632, at *4 (S.D.N.Y. Mar. 25, 2019) (quoting *Darnell v. Pineiro*, 849 F.3d 17, 35 (2d Cir. 2017)). "After *Darnell*, pretrial detainees asserting conditions of confinement claims under the Fourteenth Amendment must allege 'that the defendant-official acted intentionally to impose the alleged condition, or recklessly failed to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though the defendant-official knew, or should have known, that the condition posed an excessive risk to health or safety.'" *Id.* (quoting *Darnell*, 849 F.3d at 35). Despite the application of an objective standard, deliberate indifference still requires more than mere negligence. *See Charles v. Orange Cty.*, 925 F.3d 73, 87 (2d Cir. 2019) (holding that "something more than mere negligence" and "mere medical malpractice" is necessary to establish deliberate indifference in the Fourteenth Amendment context).

"The objective prong requires that the plaintiff 'demonstrate that he is incarcerated under conditions posing a substantial risk of serious harm.'" *Id.* (quoting *Hayes v. N.Y. City Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996)). In determining whether the plaintiff faced a substantial risk of serious harm, courts "look at the 'facts and circumstances of which the official was aware at the time he acted or failed to act.'" *Hartry v. Cty. of Suffolk*, 755 F.Supp.2d 422, 436 (E.D.N.Y. 2010) (quoting *Heisler v. Kralik*, 981 F. Supp. 830, 836 (S.D.N.Y. 1997)).

Here, Plaintiffs fail both prongs. They fail to satisfy the objective prong because the risk of harm, although serious in a theoretical sense—much as it is for all citizens without regard to their incarceration—is too speculative. Plaintiffs also fail the classical aggrievement test, because they depend entirely on a theory of "probability" and likelihood of injury. Plaintiffs rely on *Helling v. McKinney*, 509 U.S. 25, 32 (1993) for the proposition that a "serious, communicable disease constitutes an unsafe, life-threatening condition that threatens prisoners' reasonable safety." (Doc. #101.00 at 19.) However, the facts of *Helling* are distinguishable and though the risk of contracting a communicable disease can in some circumstances satisfy the objective prong, mere exposure to a disease is insufficient to satisfy either deliberate indifference or standing.

In *Helling*, the inmate plaintiff's cellmate "smoked five packs of cigarettes a day." *Helling*, 509 U.S. at 28. His claim was based on the potential harm he could suffer as the result of exposure to second-hand smoke. *Id*. Here, Plaintiffs are not alleging that they are being deliberately exposed to COVID-19 by Defendants or their subordinates and therefore this case is significantly different from *Helling*. Plaintiffs do not allege that any particular inmate is cellmates with someone who has COVID-19. Indeed, if DOC knew of such a situation, it would quarantine said inmate in accordance with the measures Plaintiffs acknowledge DOC have implemented. (Doc. #100.31 at 15, ¶¶66-69.) This is not *Helling*.

This case is more akin to one of the many inmate complaints based on alleged exposure to a communicable disease. Courts have routinely held that mere exposure to a virus, even a deadly or infectious one, is not enough to state a claim for deliberate indifference. *See Jackson v. Rikers Island Facility*, No. 11 CIV. 285 RMB, 2011 WL 3370205, at *2 (S.D.N.Y. Aug. 2, 2011) ("Exposure to swine flu, in and of itself," does not involve an 'unreasonable risk of serious

damage to future health," and does not constitute "a deprivation of basic human needs that was objectively sufficiently serious.").[5] Indeed, courts within the Second Circuit have found that even where an inmate has actually contracted the virus, the exposure is not enough to constitute deliberate indifference. *See Ayala v. NYC Dep't of Corr.*, No. 10 CIV. 6295 JSR KNF, 2011 WL 2015499, at *2 (S.D.N.Y. May 9, 2011) ("Absent any indication that the defendants ignored wilfully the swine flu outbreak in their facilities, the plaintiff's infection, though unfortunate, is insufficient to support an Eighth Amendment claim."); *See Jackson*, 2011 WL 3370205, at *2. Here, Plaintiffs' assumption that they may contract COVID-19 is too speculative to constitute a "substantial risk of serious harm" or to establish a direct injury for purposes of standing.

Plaintiffs' claims also fail the subjective prong of the deliberate indifference standard[6]. Plaintiffs acknowledge that Defendants have taken steps to combat the COVID-19 epidemic, but simply characterize these efforts as "insufficient" and "inadequate," while at the same time

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[5] *See also Jacob v. Clarke*, 129 Fed. App'x. 326, 330 (8th Cir. 2005) ("fears of possible infection from the prison food service because of the [HIV and Hepatitis C positive food service workers] remain speculative at best"); *Lacy v. Collins*, 66 F.32 321 (5th Cir. 1995) ("alleging exposure to the HIV virus is not a magic incantation that relieves a litigant from the established constructs of Eighth Amendment law"); *Clarke v. Collins*, 5 F.3d 1494, *2 (5th Cir. 1993) (unpublished) (rejecting claim of exposure to AIDS virus and other diseases in common showers); *Glick v. Henderson*, 855 F.2d 536, 539 (8th Cir. 1988) (rejecting claim of possible exposure to AIDS and other diseases through casual contact in common areas and in preparation of food.); *Woodard v. United States*, No. 1:17CV174, 2018 WL 4517624, at *6 (E.D. Tex. Aug. 31, 2018), *report and recommendation adopted*, No. 1:17-CV-174, 2018 WL 4517495 (E.D. Tex. Sept. 19, 2018) ("[C]laims of exposure to the AIDS virus in shared or common areas such as sinks, toilets, and showers have been rejected as too speculative to state a constitutional violation."); *Ortiz v. Schubert*, No. CV H-17-744, 2018 WL 671275, at *2 (S.D. Tex. Jan. 30, 2018) ("Courts addressing similar claims of risk from exposure to infected inmates have found that mere contact with infected inmates, even when the infected inmates released bodily fluids in the presence of others, did not state an Eighth Amendment claim."); *Glaspie v. New York City Dep't of Corr.*, No. 10 CV 00188 GBD JCF, 2010 WL 4967844, at *1 (S.D.N.Y. Nov. 30, 2010) ("mere exposure to swine flu does not involve an 'unreasonable risk of serious damage to ... future health'"); *Johnson v. United States*, 816 F. Supp 1519 (N.D. Ala. 1993) (rejecting plaintiff's claim of cell mate's blood on their sink, toilet, and towels finding BOP practices and policies governing handling of prisoners with AIDS do not violate Eighth Amendment).

[6] Whether Plaintiffs have adequately pled the mental element of a deliberate indifference claim is relevant to whether CCDLA has third-party standing because the third-party inmates they seek to represent must have claims in their own right.

describing Defendants' actions as "commendable." (Doc. #100.31 at 14, 15, 16, 18, ¶¶65, 68, 70, 84.) Allegations of inadequate treatment sound in negligence and are therefore insufficient to state a deliberate indifference claim, whether under the Fourteenth or Eighth Amendments. *See Pettus v. Lemmott-Taylor*, 219 F. App'x 81, 82 (2d Cir. 2007) (State prisoner's allegations that medical personnel rendered inadequate medical care, at most, claimed mere negligence, which was insufficient to state a claim of deliberate indifference); *cf. Petro v. Town of W. Warwick ex rel. Moore*, 889 F. Supp. 2d 292, 332 (D.R.I. 2012) (court held fact that officers took admittedly insufficient affirmative steps amounting to "gross negligence" still was not enough to find they "possessed a sufficiently culpable state of mind, namely one of 'deliberate indifference.'").

Plaintiffs' issue with Defendants is not that they have taken no actions in response to this pandemic. It is that Defendants have not taken the actions Plaintiffs prefer. But allegations that Defendants have not done enough to combat COVID-19 is insufficient to satisfy the subjective prong of the deliberate indifference test.

C. These claims are non-justiciable political questions because whether, when, how, and under what circumstances to release inmates from confinement is a function delegated to Executive officials by the Legislature.

"It is well settled that certain political questions cannot be resolved by judicial authority without violating the constitutional principle of separation of powers." *Nielsen v. Kezer*, 232 Conn. 65, 74 (1995). "The fundamental characteristic of a political question ... is that its adjudication would place the court in conflict with a coequal branch of government in violation of the primary authority of that coordinate branch." *Id.*

"In deciding whether an action is nonjusticiable under the political question doctrine, we are to be guided by several formulations which vary slightly according to the settings in which the [question] arise[s] ... Prominent on the surface of any case held to involve a political question

is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Id.* at 75.

"The political question doctrine ... is based on the principle of separation of powers ... as well as the notion that the judiciary should not involve itself in matters that have been committed to the executive and legislative branches of government. To conclude that an issue is within the political question doctrine is not an abdication of judicial responsibility; rather, it is a recognition that the tools with which a court can work, the data which it can fairly appraise, the conclusions which it can reach as a basis for entering judgments, have limits.... Whether a controversy so directly implicates the primary authority of the legislative or executive branch, such that a court is not the proper forum for its resolution, is a determination that must be made on a case-by-case inquiry…." *Connecticut Coal. for Justice in Educ. Funding, Inc. v. Rell*, 295 Conn. 240, 255 (2010).

Here, Plaintiffs seek the early release of thousands of inmates via a writ of mandamus. But "mandamus neither gives nor defines rights which one does not already have." *Stewart v. Town of Watertown*, 303 Conn. 699, 711 (2012). Rather, "[i]t enforces, it commands, performance of a duty. It acts at the instance of one having a complete and immediate legal right; it cannot and it does not act upon a doubtful or a contested right." *Id.* "Mandamus is an

extraordinary remedy, available in limited circumstances for limited purposes.... It is fundamental that the issuance of the writ rests in the discretion of the court, not an arbitrary discretion exercised as a result of caprice but a sound discretion exercised in accordance with recognized principles of law." *Greenfield v. Reynolds*, 122 Conn. App. 465, 469 (2010).

"The essential conditions without which the writ will not be issued to enforce the performance of a ministerial duty are: (1) that the party against whom the writ is sought must be under an obligation, imposed by law, to perform some such duty, that is, a duty in respect to the performance of which *he may not exercise any discretion*; (2) that the party applying for the writ has a clear, legal right to have the duty performed; and (3) that there is no other sufficient remedy." *Milford Ed. Ass'n v. Bd. of Ed. of Town of Milford*, 167 Conn. 513, 518 (1975) (emphasis added).

Therefore, Plaintiffs must rely on a clear, pre-existing, non-discretionary right of inmates to be released early from confinement. Here is where Plaintiffs' claims must fail as a matter of law. Every possible mechanism for early release is defined by the Legislature via statute[7] and in every applicable statute upon which Plaintiffs could rest their claim, the Legislature has conferred broad discretion on Executive Branch officials, such as the Commissioner of Correction or the Board of Pardons and Paroles[8]. *See State v. McCoy*, 331 Conn. 561, 586–87

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[7] Again, inmates have no constitutional right to be released early from confinement. *See Baker*, 281 Conn. at 253 (quoting *Greenholtz*, 442 U.S. at 7).

[8] *See* Conn. Gen. Stat. § 18-100(e) ("the commissioner *may* transfer any person from one correctional institution to another or to any public or private nonprofit halfway house, group home or mental health facility or, after satisfactory participation in a residential program, to any approved community or private residence") (emphasis added); Conn. Gen. Stat. §18-100c (inmate with sentence of 2 years or less "may be released pursuant to subsection (e) of section 18-100 or to any other community correction program approved by the Commissioner of Correction"); Conn. Gen. Stat. § 18-100f ("the commissioner *may release* [certain pretrial detainees] to a residence approved by the Department of Correction subject to such conditions as *the commissioner may impose*. . .") (emphasis added); Conn. Gen. Stat. §18-100i ("at the Commissioner's *discretion*, *may release* an inmate from the commissioner's custody . . . for

(2019) (clarifying and reiterating that "a trial court loses jurisdiction once the defendant's sentence is executed, unless there is a constitutional or legislative grant of authority"); *Perez*, 326 Conn. at 371 (noting that "the decision to grant parole is entirely within the discretion of the board").

Due to this statutory scheme—and the wide discretion granted to Executive Branch officials by the Legislature—the questions of whether, when, how, and under what circumstances an inmate should be released prior to his end of sentence or pretrial are answered by the political branches, not the judiciary. Whether to release inmates from prison early is "[impossible to decide] without making an initial policy determination of a kind clearly for nonjudicial discretion" and it would "[express] lack of the respect due to coordinate branches of government" for the judiciary to usurp those policy determinations by issuing a mandamus in a context otherwise saturated with discretion. *Nielsen*, 232 Conn. at 74.

The system in place is also in keeping with the deference generally owed to prison officials by the courts. *See Pierce v. Lantz*, 113 Conn. App. 98, 106 (2009) ("The courts . . . give wide ranging deference to the decisions of the commissioner in establishing guidelines for the order and discipline of the facilities that she governs."); *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (Courts owe "substantial deference to the professional judgment of prison administrators,

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placement in a licensed community-based nursing home. . .") (emphasis added); Conn. Gen. Stat. §18-101a ("at the *commissioner's discretion, may* extend the limits of the place of confinement of an inmate as to whom there is reasonable belief he or she will honor his or her trust, by authorizing the inmate under prescribed conditions to visit a specifically designated place or places…") (emphasis added); Conn. Gen. Stat. §18-110h ("the *commissioner may*, after admission and a risk and needs assessment release such person to such person's residence…") (emphasis added); Conn. Gen. Stat. §54-125a ("…may be allowed to go at large on parole…"); Conn. Gen. Stat. §54-125e (b)(2)("subject to such rules and conditions as may be established by the Board of Pardons and Paroles…"); Conn. Gen. Stat. §54-131k ("The Board of Pardons and Paroles may grant a compassionate parole release…").

who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them.").

Perhaps the best illustration of the need to defer to the political branches in these situations is Plaintiffs' first request for relief. Plaintiffs ask this Court to "immediately release all people having the CDC heightened risk factors for serious illness or death from COVID-19, directly to a hospital or appropriate medical facility where necessary." (Doc. #100.31 at 19, ¶85a.) This request would potentially see thousands[9] of inmates released to hospitals in a state that is facing a serious pandemic. In these circumstances, having an adequate number of beds, ventilators, and personal protective equipment becomes increasingly crucial for the health and safety of Connecticut's citizens. Many of the inmates with "heightened risk factors" may not even have any symptoms of COVID-19, let alone the virus itself. To engage is this kind of mass movement of inmates who may or may not be infected would constitute a critical and dangerous misuse of resources at a time where preservation of equipment is essential. This is to say nothing of the need for DOC officers to accompany these "high risk" inmates. Rather than stem the tide, this action would potentially swamp the boat.

Plaintiffs may argue that the phrase "where necessary" would prevent this potential catastrophe. But this simply demonstrates the need for someone to make judgment calls and begs the question, "who decides what's necessary?" Plaintiffs no doubt posit that they are best positioned to make these determinations, as enforced by this Court. However, the Legislature has decided that the Commissioner of Correction and the Board of Pardons and Parole should exercise this discretion. And courts generally decide that when it comes to managing the health

[9] Currently, there are over two thousand inmates that suffer from diabetes, HIV/AIDS, Hepatitis C, and coronary artery disease. There are over 500 inmates over the age of 60. There are no doubt many more with other "risk factors," including obesity and asthma.

and safety of inmates deference is owed to correctional officials. *See Washington v. Meachum*, 238 Conn. 692, 733–34(1996) (Courts are ill-equipped to manage the "Herculean obstacles" presented when administering the state's prisons).

Plaintiffs cannot utilize the courts to circumvent this legislatively delegated discretion and they certainly cannot do so in the context of a mandamus, where a *total absence* of discretion is a *sine qua non* of the writ. *Gaeta v. Town of Ridgefield*, No. CV106002367S, 2011 WL 3211247, at *5 (Conn. Super. Ct. June 15, 2011). Whether and how to release inmates, especially during this crisis, is a task best left to the political branches. These decisions can only be wisely made on a case by case basis, which is what has already been occurring up until this point. To attempt to attack this problem with a judicial broadsword rather than an executive scalpel, although perhaps well-intentioned, is both imprudent and evinces a "lack of the respect due coordinate branches of government." *Nielsen*, 232 Conn. at 74. This Court therefore lacks subject matter jurisdiction because Plaintiffs' claims run afoul of the political question doctrine, rendering them not justiciable.

D. Plaintiffs' request for this Court to order the Governor and Commissioner "to submit for the Court's review a plan" that includes a requirement "to sufficiently fund transitional housing for the duration of the pandemic" is barred by sovereign immunity and the Eleventh Amendment because it will require the expenditure of State funds.

"The principle that the state cannot be sued without its consent, or sovereign immunity, is well established under our case law. . .It has deep roots in this state and our legal system in general, finding its origin in ancient common law." *Columbia Air Servs., Inc. v. Dep't of Transp.*, 293 Conn. 342, 349 (2009). "[T]he doctrine protects the state from unconsented to litigation, as well as unconsented to liability." *Nelson v. Dettmer*, 305 Conn. 654, 661 (2012)

(quotations omitted). "Exceptions to this doctrine are few and narrowly construed under our jurisprudence." *Columbia Air Servs., Inc.*, 293 Conn. at 349 (emphasis added).

"When the state has not expressly waived sovereign immunity by statute, 'a plaintiff who seeks to bring an action for monetary damages against the state must first obtain authorization from the [commissioner].... [T]he ... commissioner is authorized by statute to hear monetary claims against the state and determine whether the claimant has a cognizable claim." *Nelson*, 305 Conn. at 661 (quoting *Miller*, 265 Conn. at 317).

"Chapter 53 of the General Statutes, which governs claims against the state, 'expressly bars suits upon claims cognizable by the ... commissioner ... except as he may authorize, an indication of the legislative determination to preserve sovereign immunity as a defense to monetary claims against the state not sanctioned by the commissioner or other statutory provisions." *Nelson*, 305 Conn. at 661 (quoting *Miller*, 265 Conn. at 317-18).

There are three exceptions to sovereign immunity: "(1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity ... (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights ... and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." *Columbia Air Services*, 293 Conn. at 349.

Though Plaintiffs filed for a writ of mandamus, many of their requests seek the functional equivalent of money damages from Defendants, who are undisputedly state officials acting within the scope of their duties. Plaintiffs seek, inter alia, a court order, requiring Defendants to submit "a plan . . . to sufficiently fund transitional housing for the duration of the pandemic."

(Doc. #100.31 at 20, ¶85(c)(5).) In essence, Plaintiffs are seeking funds from the State in the form of a "mandamus" that would provide the functional equivalent of money damages. But the State has not consented to be sued. Asking for an order that is merely the functional equivalent of securing money damages from the State violates sovereign immunity. *See Alter & Assocs., LLC v. Lantz*, 90 Conn. App. 15, 22 (2005) (Contract bidder's action against the Department of Corrections, which sought mandamus to compel Department to go forward with contract for sexual harassment training, was precluded by Department's sovereign immunity); *see also McDonough Assocs., Inc. v. Grunloh*, 722 F.3d 1043, 1052 (7th Cir. 2013) (holding a requested injunction to "process paperwork," was tantamount to signing a check made out to plaintiff, which therefore violated the Eleventh Amendment).

Plaintiffs cannot utilize the exception within *Columbia Air Services* to circumvent sovereign immunity. But even if Plaintiffs could, this would not overcome the State's Eleventh Amendment immunity from suit. As argued *supra*, Plaintiffs seek this mandamus based on their claims that Defendants have violated the Constitution. Plaintiffs cannot bring an action seeking to "impose a liability, however articulated, that must be paid from the state treasury." *Sullins v. Rodriguez*, 281 Conn. 128, 143 n. 15 (2007) (citing *Edelman v. Jordan*, 415 U.S. 651, 663–65 (1974)). "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Id*.

Here, Plaintiffs' requested "plan" would require the expenditure of State funds. This runs afoul of both sovereign immunity and the Eleventh Amendment. Therefore, this Court lacks subject matter jurisdiction and must dismiss.

III. CONCLUSION

The Court should grant this motion and dismiss the entire action because this Court lacks subject matter jurisdiction.

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CERTIFICATION

I hereby certify that on April 7, 2020, a copy of the foregoing was filed electronically on the judicial branch website and emailed to the following:

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