IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Tre McPherson, Pattikate Williams-Void, John Doe, John Roe, and Thomas Caves, *on behalf of themselves and all others similarly situated*, *Plaintiffs-Petitioners*, v. Ned Lamont and Rollin Cook, *in their official capacities* *Defendants-Respondents*.	Civil Action No. 20-cv-534 May 3, 2020

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-PETITIONERS' OPPOSITION TO RESPONDENTS' MOTION TO DISMISS

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PRELIMINARY STATEMENT

In this dual § 2241 and § 1983 class action, people in the custody of the defendants seek relief from the COVID-19 pandemic occurring inside Connecticut's unified prison and jail system. Although the coronavirus outbreak has moved across the globe with a speed and ferocity that has rendered photographs of pre-pandemic life in Connecticut quaint in just six weeks, the defendants interpose jurisdictional objections seeming like relics of another era and suggestive of a shell game. They contend that the proposed plaintiff Classes may not break the glass and pull the fire alarms of either § 2241 or § 1983 without first spending months or years in the state courts or a minimum of ninety days writing grievances to their jailers, respectively. They also advance the theory that the Court should abstain from passing judgment, in deference to a state suit filed against them by some Class members in which they successfully convinced the state court that it lacked subject matter jurisdiction.

The buck stops here. The exhaustion that defendants argue is required of § 2241 petitions is a prudential consideration, not a jurisdictional one. The Court may find it inapplicable where-as here-the state judiciary's capacity has been squeezed to a trickle as a natural consequence of COVID restrictions shuttering twenty-eight seats of court, operating the remaining six only three days a week at reduced hours, and prioritizing all but a short list of matters excluding habeas petitions. Likewise, the administrative exhaustion that the defendants raise as an affirmative defense to the Classes' § 1983 claims fails in the face of the Classes' inability to complete the defendants' three-month grievance procedure, and the defendants' inability to provide anyone who has managed to grieve with the necessary remedies to prevent further COVID infection. And finally, the Younger abstention that defendants suggest has no applicability in a litigation like this one, where the Classes have not asked the Court to enjoin a pending state proceeding. The Court must accordingly deny the defendants' motion to dismiss in its entirety.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO CONSIDER THE MEDICALLY VULNERABLE SUBCLASSES' CLAIMS UNDER SECTION 2241.

A. Section 2241 is the Appropriate Mechanism for Relief.

Defendants believe this Court should treat the Medically Vulnerable Subclasses' request for release as "a Petition for a writ of habeas corpus by state inmates via § 2254." (Mot. at 4.) To be clear, Plaintiffs and the putative subclasses challenge the fact of their detention in these exceptional circumstances and ask for habeas relief under § 2241. No Plaintiff or putative class member challenges the lawfulness of a sentence through this petition. Section 2241 is a fail-safe habeas guarantee that applies when a prisoner "is in custody under or by color of the authority of the United States" or "is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(a), (c)(1), (c)(3). Therefore, § 2241 expressly grants this Court jurisdiction to entertain a federal habeas petition from incarcerated people who allege that the fact of continued custody violates federal law, and seek temporary release due to the significant health risks they face due to their continued detention in unlawfully unsafe conditions.

B. There is no Mandatory or Statutory Exhaustion Requirement for Claims Brought Under § 2241, and the Court May Exercise Jurisdiction without Requiring Plaintiffs and the Subclasses to Exhaust Administrative or State Remedies.

Defendants wrongly believe that § 2241 requires Plaintiffs to exhaust administrative and state court remedies before this Court may hear merits of the Petition. Defendants acknowledge, however, that § 2241 does not expressly require exhaustion of state court or administrative remedies before a court may consider a petition for relief. Defs.' Mot. At 6. This differentiates § 2241 from § 2254, which does have a mandatory exhaustion requirement.[1] To the extent courts

[1] Courts within the Second Circuit have repeatedly affirmed a futility exception even in the more standard § 2254 context. *See, e.g., Aparicio v. Artuz*, 269 F.3d 78, 90 (2d Cir. 2001) (exhaustion waived for futility

have required petitioners to exhaust before bringing a § 2241 habeas claim, this requirement is exclusively judge-made and not statutory. *See Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484, 490 (1973) (describing the exhaustion doctrine in § 2241 cases as a "judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a 'swift and imperative remedy in all cases of illegal restraint or confinement'") (citation omitted). The distinction is crucial: whereas § 2254's statutory exhaustion requirement is mandatory, the prudential exhaustion requirement for § 2241 petitions is discretionary and non-jurisdictional. *Beharry v. Ashcroft*, 329 F.3d 51, 56-57 (2d Cir. 2003); *see also Mihailovich v. Berkebile*, No. 3:06-CV-1603-N, 2007 WL 942091, at *6 (N.D. Tex. Mar. 28, 2007) ("Although prisoners generally must exhaust their administrative remedies prior to filing a § 2241 action, exhaustion of such remedies is not a jurisdictional requirement.").

The exhaustion bar Defendants ask this Court to impose is therefore prudential. Courts that have imposed prudential exhaustion rules on § 2241 petitioners have done so because petitioners sought modifications to confinement conditions rather than discharge. *Fan v. Williams*, 3:17-cv-630, 2017 WL 1652547 (D. Conn. Apr. 28, 2017); *Anderson v. Williams*, 3:15-cv-1364, 2017 WL 855795 (D. Conn Mar. 3, 2017); *Clark v. Zickefoose*, 3:08-cv-1555, 2009 WL 2195113 (D. Conn July, 23, 2009). The concerns that animate such prudential restrictions—the existence of parallel statutes with exhaustion requirements—do not apply to those seeking discharge. Here, by contrast, the Medically Vulnerable Subclasses seek COVID-19-based temporary ***release***, and the

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when unexhausted claim is procedurally barred); *Mercado v. Rockefeller*, 502 F.2d 666, 672 (2d Cir. 1974) ("We hold that appellants, in order to present to federal courts their claim . . . are not required to present this claim to the New York courts first, for it is evident that under the prevailing law of that state such a presentation would only be an exercise in futility"); *Pope v. Lord*, No. 00-CV-6530 (JBW), 2003 WL 21812455, at *6 (E.D.N.Y. July 23, 2003) ("Attempts to exhaust now would be futile because petitioner has already made the one request for leave to appeal to which she is entitled").

Court should not require these at-risk plaintiffs to exhaust remedies before seeking federal habeas relief under § 2241.

There are three additional reasons why the Court should accept jurisdiction, and not dismiss the § 2241 Petition for failure to exhaust. ***First***, the Medically Vulnerable Subclasses face irreparable harm if they do not get immediate relief. ***Second***, it would be futile for the Medically Vulnerable Subclasses to seek relief from Connecticut state courts that are not operating at full capacity during the pandemic, and therefore cannot provide expedient relief. ***Third***, it also would be futile to seek relief from Connecticut state courts that are not currently giving "prompt attention" to habeas requests.

1. The Court Should Accept Jurisdiction over This § 2241 Petition Without Requiring Exhaustion, Because the Medically Vulnerable Subclasses Are Likely to Suffer Irreparable Injury without Immediate Judicial Relief.

The Court may accept jurisdiction without requiring exhaustion of state and administrative remedies "when (1) available remedies provide no genuine opportunity for adequate relief; (2) irreparable injury may occur without immediate judicial relief; (3) administrative appeal would be futile; and (4) in certain circumstances a plaintiff has raised a substantial constitutional question." *Beharry*, 329 F.3d at 62; *see also Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (no exhaustion if state corrective process "is so clearly deficient as to render futile any effort to obtain relief"); *Gates v. Henderson*, 568 F.2d 830, 840 (2d Cir. 1977) ("It may further be that even where the state provides the process but in fact the defendant is precluded from utilizing it by reason of an unconscionable breakdown in that process, the federal intrusion may still be warranted.").

Defendants assume that that this Court will apply § 2254's exhaustion requirements, spending at least two and a half pages on Plaintiffs' purported failure to exhaust state court remedies before summarily waving off potential exceptions to the requirement. Defendants barely acknowledge, let alone appreciate, that *human lives are at stake* and, in fact, this case falls squarely

within at least two related exceptions: Plaintiffs likely will suffer an irreparable injury without immediate judicial relief, and it would be futile to seek state relief. *Beharry*, 329 F.3d at 62. Exhaustion is considered futile where the petitioner "must choose one of several intricate procedures with little guidance as to which is the appropriate remedy . . . or when there has been inordinate delay between petitioner's application for state relief and the final disposition thereof." Harvard Law Review Ass'n, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1098 (1970); *see also Turner v. Bagley*, 410 F.3d 718, 725 (6th Cir. 2005) ("A habeas petitioner . . . who makes 'frequent but unavailing requests to have his appeal processed' in state court is 'not required to take further futile steps in state court in order to be heard in federal court,' even if the state court subsequently decides his appeal." (quoting *Simmons v. Reynolds*, 898 F.2d 865, 867-68 (2d Cir. 1990)). Particularly in the case of a fast-moving pathogen, "delay may geld state procedures so as to render the exhaustion requirement meaningless." *Shelton v. Heard*, 696 F.2d 1127, 1128 (5th Cir. 1983).[2]

It is beyond dispute that irreparable injury will occur without immediate judicial relief. As Plaintiffs set forth in detail in their Complaint and Motion for Temporary Restraining Order, the COVID-19 pandemic is the biggest public health crisis of our time. The virus is so deadly and spreads so rapidly that each day matters, particularly for the Medically Vulnerable Subclasses. Without immediate relief, Plaintiffs could contract the virus and, within days, suffer severe physical injury, illness, or even death, harm that certainly would be irreparable. COVID-19 is exactly the kind of scenario for which this exception exists, and any exhaustion requirement should

[2] Courts reviewing § 2241 petitions have employed this logic when considering administrative remedies, as well. *See United States v. Basciano*, 369 F. Supp. 2d 344, 348 (E.D.N.Y. 2005) (excusing failure to exhaust for a § 2241 petition brought by a prisoner held in a special housing unit, and noting that "the court may excuse exhaustion if it appears that an administrative appeal would be futile, or because the appeals process is shown to be inadequate to prevent irreparable harm to the defendant").

be excused. *See e.g.*, *Granberry v. Greer*, 481 U.S. 129, 134 (1987) (acknowledging that courts may dispense with exhaustion in "rare cases where exceptional circumstances of peculiar urgency are shown to exist" (quoting *Ex Parte Hawk*, 321 U.S. 114, 117 (1944)); *Atkins v. Michigan*, 644 F.2d 543, 549 (6th Cir. 1981) (describing the right to pretrial release as one that, "if not asserted immediately at the time it is infringed, is irremediably lost"); 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 23.4[a][ii], 1322-26 (7th ed. 2015) (collecting cases in which federal courts have consistently found state corrective process to be ineffective when "requiring exhaustion would cause irreparable damage to the petitioner's federal rights," for reasons "including that undue delay in the state courts risks mooting the petitioner's federal rights before he reaches the federal courts"). The Southern District of New York recently applied a similar standard excusing failure to exhaust administrative remedies before granting compassionate release due to the emergency of COVID-19. *See* Order at 5, *United States v. Perez*, 17-cr-513-3 (S.D.N.Y. Apr. 1, 2020) [attached as Exhibit 1] (concluding in the case of a prisoner with serious chronic health conditions that "delaying release amounts to denying relief altogether").

2. Connecticut's State Courts are Not Operating at Full Capacity or on a Consistently Expedient Schedule and Cannot Provide Relief to Plaintiffs.

Here, the available state court processes would render the Medically Vulnerable Subclass' request for relief moot given the pace at which the virus is raging through DOC facilities and how slowly Connecticut courts are operating. That "the courts are open and are currently hearing and processing inmate requests for release via a variety of judicial mechanisms" (Mot. at 10) tells only half the story.

Only six courts across the state are currently operating. https://jud.ct.gov/HomePDFs/Reduced_Days_Courthouses.pdf. Their hours are severely reduced:

they are open only for several hours on Mondays, Wednesdays, and Fridays, and are closed on Tuesdays and Thursdays. https://jud.ct.gov/HomePDFs/Reduced_Days_Courthouses.pdf.

There are no longer any criminal hearings other than arraignments, Connecticut Judiciary, *COVID-19 Information from the Connecticut Judicial Branch* (Mar. 12, 2020) (explaining that the sole criminal business to be transacted by the courts will be "[c]riminal arraignments of defendants held in lieu of bond and all arraignments involving domestic violence cases"), and all hearing dates for criminal cases in which the defendant is incarcerated have been continued *en masse* from when the pandemic began in March to the end of May or beginning of June. Email from Ralph Dagostine to Chris Rapillo, Chief Public Defender (Apr. 23, 2020) [attached as Exhibit 2]. Under Connecticut law, modifications for sentences three years and over are heard only if a state's attorney agrees. Conn. Gen. Stat. § 53a-39(b). But sentence modification hearings simply are not happening during this pandemic. For example, Aaron Romano, a criminal defense attorney Courts have flatly refused to hear motions for sentence modification, even emergency ones. *See* Declaration of Aaron Romano at ¶¶ 5-6 (May 3, 2020) [attached as Exhibit 3] (including e-mail from court stating). Mr. Romano represents an immunocompromised inmate with asthma and reports that on April 28 he filed a motion for sentence modification due to the pandemic. The court responded that the motion would not be heard "until courts open up for regular business" because sentence modifications "are not priority 1 matters." Declaration of Aaron J. Romano, Esq., at ¶¶ 5-6. This is but one example of a court system that is largely shut down due to the pandemic. The state courts simply cannot give Plaintiffs and the Medically Vulnerable Subclasses the expeditious review needed right now, when time is of the essence.

3. Connecticut Courts Are Not Providing "Prompt Attention" to Habeas Petitions.

Defendants grossly overstate the ability or appetite of the Connecticut state courts to provide "exceedingly prompt attention to emergency motions, including but not limited to, habeas petitions and emergency motions seeking release or, in criminal matters, emergency reductions in bond, and requests for PTA's, due to COVID-19." (Mot. at 11.)

Even before the COVID-19 pandemic, Connecticut's habeas courts were an inefficient mechanism of relief for incarcerated people. To address this problem, and at the urging of the Attorney General's office, the Connecticut General Assembly established a task force to "Promote Efficiencies in the Filing of Habeas Corpus Matters" in June 2018.[3] In July 2019, there were 1,472 pending habeas cases in the state; 48% of those cases had been pending for over two years.[4] Conditions of confinement petitions take, on average, three years to get to trial.[5] Medical concerns comprise 68.7% of the pending habeas cases on conditions of confinement.[6] With a three-year wait for habeas petitions to be disposed of before the pandemic, there is no reason to believe that

[3] *See also* 2018 Conn. Acts. 18 (Spec. Sess.); see also Conn. Gen. Assembly: Habeas Corpus Matters Task Force, available at https://www.cga.ct.gov/jud/taskforce.asp?TF=20190729_Habeas%20Corpus%20Matters%20Task%20Force. Connecticut has no habeas statute. Petitions generally are placed in two groups: post-conviction relief, and conditions of confinement.

[4] *See* State of Conn. Judicial Branch, Habeas Case Analysis (July 29, 2019), available at https://www.cga.ct.gov/jud/tfs/20190729_Habeas%20Corpus%20Matters%20Task%20Force/20190717/Habeas%20Case%20Analysis-Judicial%20Branch%20Statistics%20&%20Performance%20Mgmt.pdf.

[5] Judiciary Committee Habeas Corpus Matters Task Force, Meeting Minutes from Thursday, Sept. 18, 2019, available at https://www.cga.ct.gov/jud/tfs/20190729_Habeas%20Corpus%20Matters%20Task%20Force/20190918/9-18-19%20Minutes%20of%20Habeas%20TF.pdf.

[6] State of Conn. Judicial Branch, Habeas Case Analysis (July 29, 2019), available at https://www.cga.ct.gov/jud/tfs/20190729_Habeas%20Corpus%20Matters%20Task%20Force/20190717/Habeas%20Case%20Analysis-Judicial%20Branch%20Statistics%20&%20Performance%20Mgmt..pdf; *see also id.* (detailing average times to disposition at trial, depending on type of case, ranging from 1,158 days to 1,299 days).

now, when the habeas court itself is closed and only six courts in the state are operating—at severely limited capacity—prisoners would see the relief they need with any urgency.

This is underscored, not refuted, by Defendants' pleadings. Defendants highlight three habeas petitions docketed on April 29, 2020 as supposed proof that the state courts are open and can provide swift relief. (Mot. at 11 n.12.) Defendants fail to mention, however, that ***these three petitions are the only habeas petitions opened in the entire state of Connecticut since March 12, 2020—i.e., since the pandemic began.*** *See* Declaration of Elizabeth Dolbeare (attached as Exhibit 4) (attesting, as of April 23, 2020, that no new habeas petitions had been docketed in the state of Connecticut).[7] This is notwithstanding the fact that, for the past ten years, the habeas court has opened an average of 50-60 new cases per month,[8] and there currently is a substantial "volume" of mail arriving at the Hartford courthouse, where habeas cases are now forwarded. *See* e-mail exchange with Habeas Clerk Kathryn Stackpole (attached as Exhibit 5).[9]

Moreover, the three petitions were filed weeks before they were docketed, and it will be more weeks until they are decided. Boyd filed his petition on April 15, Murphy filed his on April 13, and Nunn filed a petition April 9. *See* Dockets (Defs' Mot. Ex. I). In all three cases, Judge Bhatt has set a deadline of May 13 for respondents simply to file a responsive pleading—approximately one month after each petition was filed. This hardly qualifies as "exceedingly

[7] All three were also docketed on a single day, April 29, notably after Plaintiffs filed their Complaint (April 20) and Motion for Temporary Restraining Order (April 24).

[8] *See* https://www.cga.ct.gov/jud/tfs/20190729_Habeas%20Corpus%20Matters%20Task%20Force/20190717/Habeas%20Case%20Analysis-Judicial%20Branch%20Statistics%20&%20Performance%20Mgmt.pdf (dividing average of new cases per year—679—by 12 months)

[9] It is unsurprising that only three habeas cases have been docketed in the past month and a half, given that the closure of the state court system means the process now involves: mailing a petition to the (closed) Rockvillle courthouse; having it forwarded from Rockville to Hartford, again via mail, at which point a clerk will review it on a Wednesday or Friday between 9 a.m. and 1 p.m. and then—assuming it has been marked on the envelope as an "emergency"—a judge may review it to determine whether a hearing should be held. *See* Defs.' Mot. Ex. C; E-mail exchanged with Kathryn Stackpole (Exhibit 5).

prompt attention" under any standard.

In addition to the three habeas cases docketed in nearly two months, Defendants identified one emergency motion for release (*Grimes*) that has been docketed on an existing habeas case.[10] Once again, the facts of this emergency motion undercut Defendants' argument. The petitioner, who had a habeas petition pending since January, filed a "motion for immediate release" on medical grounds on April 14. Defendants filed an objection to his motion on April 23; as of today, the court has taken no action on this emergency motion in spite of the fact that DOC has assigned him a medical acuity level of 4 (out of 5) and admitted that he has a condition that puts him at risk for serious complications should he contract COVID-19. *Id.* This, too, fails to establish that the state courts are acting quickly enough to spare the most vulnerable.

Defendants also offer the cases of Daniel Greer and Robert Day as proof that the state courts are actively providing relief in light of COVID-19. (Mot. at 11.) But these cases are the obvious—and only—exceptions, not the norm.[11] Mr. Day, who has multiple medical conditions that would put him at risk of severe illness from COVID-19, first filed a habeas petition in July 2017. *See* Declaration of Andrew O'Shea, Apr. 16, 2020, attached hereto as Exhibit 6. Beginning in early April 2020, Mr. Day's attorney made multiple attempts to obtain relief for his client in light of his health status and the fact that the chief physician at his DOC facility was himself adamant that Mr. Day be released. *See* Exhibit 7, Petition for Bond Pending Habeas. Yet his emergency motion for bond pending habeas, filed April 13, was denied for failure to demonstrate likelihood of prevailing on the underlying habeas claim. *See* Defs.' Mot. Ex. E. Mr. Greer's

[10] *See Grimes v. Commissioner*, Dkt. No. TSR-CV20-5000478-S http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=TSRCV205000478S. Plaintiffs' counsel have not identified any others, aside from Mr. Day's (technically a motion for bond pending habeas).

[11] Again, Plaintiffs' counsel have identified no other such cases.

counsel similarly had represented him zealously for months, making the first of three motions to secure bond pending appeal in December 2019. His case had reached the Appellate Court by the time the pandemic began, which ultimately remanded to the Superior Court. It is telling that these are the *only* examples of medically vulnerable sentenced prisoners obtaining a release-related hearing in state court since the COVID-19 crisis began. *See also* Declaration of Darcy McGraw, May 3, 2020 (Exhibit 14).

As with the above examples, the facts relating to the state court mandamus action in *CCDLA v. Lamont* only highlight the grave difficulty Plaintiffs and the Class Members face in any "emergency" proceeding in the state court system. Defendants stress that the court took only 21 days to make its initial—jurisdictional—ruling. Yet each day is a lifetime in COVID-19 terms: on April 3, the day the state action was filed, 8 people incarcerated in DOC facilities and 16 staff members had been confirmed positive for COVID-19. *See* State Court Complaint, Exhibit 8. By the time the state court reached its decision, those numbers had risen to 338 confirmed positive incarcerated people (one of whom had died) and 256 positive staff members.[12] As of May 1, those numbers are 443 incarcerated people, 335 staff, and 3 deaths.[13]

Far from painting a portrait of a robust, functioning court system willing and able to pay "prompt attention" to medically vulnerable prisoners' urgent pleas for release, the evidence Defendants offer demonstrates the opposite. It remains virtually impossible for incarcerated people—particularly those who do not have already engaged, active lawyers on their longstanding cases, and even those who do—to obtain relief in state court. With state court exhaustion futile

[12] *See* Connecticut State Department of Correction, *Health Information and Advisories: Coronavirus Information, available at* https://cutt.ly/xyr57np (as accessed Apr. 25, 2020).
[13] *See* Connecticut State Department of Correction, *Health Information and Advisories: Coronavirus Information, available at* https://cutt.ly/xyr57np (as accessed May 1, 2020).

and time of the essence, this Court can, and should, consider Plaintiffs' claims for relief under § 2241.[14]

C. This Court Has Jurisdiction Over the Pre-adjudication Medically Vulnerable Subclass' Claims Under § 2241 Because Exhaustion Is Not Required.

Similar to the Post-adjudication Class, this Court has jurisdiction over the Pre-adjudication Medically Vulnerable Subclass' claims because the prudential exhaustion requirement under § 2241 is discretionary and subject to the same exceptions. Defendants again simply say that the pretrial detainees have not initiated proceedings and therefore this Court should not hear these claims, but these arguments fail for the reasons discussed above. It is not possible for the Medically Vulnerable Pre-adjudication Subclass to get expedient state-court relief when those courts are for all intents and purposes shut down and not prioritizing bail reduction or habeas hearings.

Defendants' assertion that Plaintiffs ignored the bond reduction process—and should thus be precluded from bringing a habeas action—is misguided. First, a motion for bond reduction does not provide a litigant the opportunity to demand improved jail conditions or to seek release on behalf of those most likely to face serious illness under the COVID-19 threat.

Second, bond modifications are proceeding in a haphazard fashion. Although the CSSD is making efforts to identify those incarcerated on bond who might be appropriate for relief, the primarily paper system employed by state's attorneys, and the widespread closures of courthouses in which files are held, have meant that standard mechanisms for moving things through are simply

[14] Defendants include substantial argument about the compassionate release mechanism for federal prisoners pursuant to 18 U.S.C. § 3582 as amended by the First Step Act (Mot. at 12-13), which contains an exhaustion requirement. Because Plaintiffs do not seek relief under § 3582, cases Defendants cite do not apply here. Nonetheless, courts in this District have waived the exhaustion requirements under that statute. *U.S. v. Peters*, No. 3:18-CR-188, 2020 WL 2092617 (D. Conn. May 1, 2020) (noting that "[n]umerous courts within the Second Circuit, however, have waived the exhaustion requirement during the COVID-19 pandemic," doing so, and collecting cases).

inoperable. *See* E-mail from Chief State's Attorney Rich Colangelo (Apr. 24, 2020), attached as Exhibit 9 (laying out multi-step process to attempt to discuss criminal cases, including for those currently detained, necessitating requests to supervisor retrieve files from closed courthouses, assignment of state's attorney, and parking lot transfer of file to assigned attorney, all before conversations can occur between defense counsel and prosecutors; further explaining that "[p]lease understand that with closed courts it will take time to get the files.") For pretrial detainees, nearly *any* delay by the state systems to hear their constitutional claims renders those proceedings inadequate, because of the inherent transitory nature of pretrial detention, in so far as "the length of pretrial custody cannot be ascertained at the outset" and may end before the petitioner can vindicate the right to pretrial release in state court. *Gerstein v. Pugh*, 420 U.S. 103, 111 n.11 (1975). Delays in this context also cause irreparable harm, both to an individual's ability to defend against the charges and to the individual's safety.

Finally, members of the Pre-adjudication Class subject to parole or special parole holds are ineligible for release via a bond reduction under Connecticut law. *See Liistro v. Robinson*, 365 A.2d 109, 115 (Conn. 1976) (no right to bail while awaiting parole revocation hearing). Since the pandemic began, parole revocation hearings are not happening, at all. *See* Declaration of Elisa Villa, attached as Exhibit 10. Class members in this situation are in indefinite custody and have no means of obtaining relief.

II. THIS COURT HAS JURISDICTION OVER PLAINTIFFS' CLAIMS UNDER THE PLRA.

A. Exhaustion Is an Affirmative Defense.

The Supreme Court is clear that under the PLRA, courts must "regard exhaustion as an affirmative defense," not a jurisdictional pleading requirement. *Jones v. Bock*, 549 U.S. 199, 212 (2007) ("The PLRA itself is not a source of a prisoner's claim; claims covered by the PLRA are

typically brought under 42 U.S.C. § 1983, which does not require exhaustion at all . . . This is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense.") (citing *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 516 (1982)).[15] At least one court has issued a preliminary injunction in the COVID-19 prison context absent a decision on exhaustion because "there is both a factual dispute regarding whether and to what extent grievance forms were available to inmates to voice their concerns about COVID-19 at [the jail] and a legal dispute regarding whether this type of administrative exhaustion may be considered 'unavailable' because of exigent circumstances." *Swain v. Junior*, No. 1:20-CV-21457-KMW, 2020 WL 2078580, at *13 (S.D. Fla. Apr. 29, 2020). Such an order is doubly appropriate given that "the PLRA contains nothing expressly foreclosing courts from exercising their traditional equitable power to issue injunctions to prevent irreparable injury *pending* exhaustion of administrative remedies." *Jackson v. District of Columbia*, 254 F.3d 262, 267–68 (D.C. Cir. 2001) (emphasis added). In *Jackson*, the D.C. Circuit acknowledged that the PLRA does not contain a textual exemption to exhaustion—except, as confirmed by *Ross v. Blake*, when it is "unavailable," and thus does not apply—but explained that "the court had inherent power to protect the prisoners while they exhausted prison grievance procedures," *Jackson*, 254 F.3d at 268, and the district court whose actions it reviewed had properly done so.

B. Plaintiffs Have Attempted to File Grievances.[16]

[15] In expedited briefing in response to Plaintiffs' motion for a temporary restraining order, Defendants have asked that their opposition be styled as a motion to dismiss, though it is not clear that the Court granted them leave to do so, nor intended procedurally to decide such a motion prior to a decision on Plaintiffs' motion for a temporary restraining order. It is also unclear whether Defendants intend to seek to raise further Fed. R. Civ. P. 12(b) arguments.

[16] For purposes of a putative class action, a single plaintiff's allegation regarding exhaustion "satisfies the requirement as to all members." *Barfield v. Cook*, No. 3:18-CV-1198 (MPS), 2019 WL 3562021, at *8 (D. Conn. Aug. 6, 2019).

Plaintiff Roe attempted to file a grievance regarding the circumstances that led to his infection with COVID-19 and subsequent custody, but was told there were no forms available and "we don't do those" here. Declaration of Mr. Roe ¶ X (Exhibit 11). Courts in this Circuit have found these circumstances sufficient to support a claim that the grievance procedure was unavailable. *See Smith v. City of New York*, 2013 WL 5434144, *14-16 (S.D.N.Y., Sept. 26, 2013) (holding evidence prisoner was told by prison staff, "We are not able to deal with this," and to "Wait it out. See what comes. Calm down," supported claim that grievance process was unavailable); *see also Scott v. Westchester Cty.*, No. 18 CV 7203, 2020 WL 364251, at *5 (S.D.N.Y. Jan. 22, 2020) (allegations that plaintiff "repeatedly requested assistance writing a grievance but was either ignored or told someone would help him" "plausibly suggest prison administrators thwarted plaintiff from taking advantage of the grievance system").

Plaintiff Doe represented to undersigned counsel that he has filed an initial grievance,[17] but Defendants represent that they do not have a record of it. *See* Defs.' Motion at Ex. D. In this instance, too, courts have found grievance procedure unavailable. *See, e.g.*, *Carter v. Revine*, No. 3:14-CV-01553, 2017 WL 2111594, at *12 (D. Conn. May 15, 2017) ("The Court cannot render summary judgment for the Defendants on the basis of their contention that Carter did not file grievances when Carter claims that he did," and finding testimony "sufficient for the Court to conclude that it was practically impossible to pursue his grievance"); *Terry v. Hulse*, No. 16-CV-252 (KMK), 2018 WL 4682784, at *10 (S.D.N.Y. Sept. 28, 2018) (finding that where plaintiff submitted grievances but officials had no record, grievance procedure was "unavailable," and collecting cases); *see also A.T. by & through Tillman v. Harder*, 298 F. Supp. 3d 391, 410 (N.D.N.Y. 2018) (holding that where requests to grievance officer to initiate process went

[17] Given the expedited briefing schedule, Plaintiffs were unable to have Mr. Doe sign a declaration to this end in time for this filing, but will do so as soon as possible.

unanswered, exhaustion defense was insufficient to defeat class certification). "Because prisoners are not required to plead compliance with prison grievance procedures in their complaints, courts in this Circuit have denied motions to dismiss based on exhaustion where ambiguity exists as to whether a plaintiff exhausted his administrative remedies." *Huggins v. Schriro*, No. 14 CV 6468, 2015 WL 7345750, at *3 (S.D.N.Y. Nov. 19, 2015), *report and recommendation adopted*, No. 14 CV 06468, 2016 WL 680822 (S.D.N.Y. Feb. 18, 2016) ("Where a prisoner indicates that he has taken some steps toward exhaustion, district courts will normally not infer from his silence that he failed to take the remaining steps that full exhaustion would require.").

C. When No Remedy Is Available, There Is Nothing to Exhaust.

Most importantly for the present context, the Supreme Court has been clear that the PLRA does not demand exhaustion where no remedy can be achieved. *See Ross v. Blake*, 136 S. Ct. 1850, 1850 (2016) (A remedy is considered unavailable if administrative processes are not "'capable of use' to obtain 'some relief for the action complained of.'") (citing *Booth v. Churner*, 532 U.S. 731, 738 (2001)). This reasoning aligns with the Second Circuit's pre-*Ross* reasoning in *Abney v. McGinnis*, 380 F.3d 663 (2d Cir. 2004), in which it explained that the PLRA requires exhaustion of only those remedies that are "available" to a person, that is, that afford the possibility of some relief for the action of which the individual complains. *Abney*, 380 F.3d at 667.

In *Ross*, the Court held that the statutory text and history of the PLRA's exhaustion requirement foreclose "special circumstances" exceptions to the exhaustion requirement.[18] However, as the *Ross* court explained, "the PLRA contains its own, textual exception to mandatory exhaustion": an individual "must exhaust available remedies, but need not exhaust unavailable

[18] The particular "special circumstances" examined by the Supreme Court in *Ross* did not involve timing, but rather whether a person who "reasonably, even though mistakenly, believed he had sufficiently exhausted his remedies." 136 S. Ct. at 1853.

ones." *Ross*, 136 S. Ct. at 1859. The court then provided three examples of "circumstances in which an administrative remedy, although officially on the books, is not capable of use to obtain relief." *Id*. First, an administrative remedy may be unavailable when "it operates as a simple dead end—with officers unable or consistently unwilling to provide any relief to aggrieved inmates." *Id.* This is because "some redress for a wrong is presupposed by the statute's requirement of an available remedy; where the relevant administrative procedure lacks authority to provide any relief, the inmate has 'nothing to exhaust.'" *Id*. (internal citation omitted).[19] Second, "an administrative scheme might be so opaque that it becomes, practically speaking, incapable of use." *Id.* And third, an administrative remedy may be unavailable "when prison administrators thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Id.* at 1860. The Second Circuit has construed these examples as non-exhaustive. *Williams v. Correction Officer Priatno*, 829 F.3d 118, 123–24 (2d Cir. 2016) (finding that exhaustion was "unavailable").

Unlike some other correctional systems, Connecticut's DOC does not have an emergency grievance procedure.[20] *Cf. Thornton v. Snyder*, 428 F.3d 690, 694 (7th Cir. 2005) (explaining that someone in custody of Illinois Department of Corrections "can request that a grievance be handled on an emergency basis by submitting the grievance directly to the warden," and if it involves "substantial risk of imminent personal injury or other serious or irreparable harm, the grievance is to be handled on an emergency basis") (citing 20 Ill. Admin. Code § 504.840).

Unsurprisingly, Connecticut's grievance procedure also does not anticipate the full-out

[19] Defendants argue that "futility of the remedy is not an excuse for failing to exhaust." But this is distinct from when a remedy is unavailable—in that case, there is no need for an excuse; rather, there is nothing to exhaust.

[20] Previous iterations of the policy appear to have had one. *E.g.*, *Melendez v. Gomez*, No. 3:06CV964 (WWE), 2010 WL 3034292, at *2 (D. Conn. July 28, 2010) (discussing emergency exception in AD 9.6).

crisis scenario of a global pandemic, and its mandated timelines are thoroughly unsuited for this context. Exhausting the grievance process in Connecticut takes a minimum of 75 *business* days, and up to 105 *business* days for a grievance that "challenges Department level policy." Conn. Dep't of Correction Administrative Directive ("AD") 9.6(6)(L) (attached as Ex. 15). First, before even filing a grievance, a person must attempt informal resolution of the matter. AD 9.6(6)(A). This includes filing an Inmate Request Form and waiting 15 business days for a response. *Id.; see also* AD 9.6(6)(C) (a person must attach the response to the next step of the process, or explain why it is not attached). The next step is to file a Level 1 grievance on a designated form. *Id.* DOC staff have 30 business days to respond before a person may appeal by filing a Level 2 grievance. AD 9.6(6)(I). Once the person files a Level 2 grievance, DOC staff have another 30 business days to respond before a person may appeal. *Id.* And if a person does not receive a Level 2 response in 30 business days, or if the decision challenges a departmental policy,[21] another 30-business-day period will elapse before DOC must respond and the grievance procedure is completed. AD 9.6.(6)(L). Even if a person never receives a response from DOC, a person may not appeal to the next grievance "level" unless the requisite time period has elapsed.[22]

Assuming even a 60-business-day turnaround, in order to have exhausted this procedure as of today, Plaintiffs would have had to file their initial grievance on February 24—two weeks before the first case of coronavirus was reported in Connecticut.[23] Assuming a 90-business-day

[21] This phrase is neither elaborated upon nor defined in the Administrative Directives.
[22] This is notable given that at least one litigant in this Court has alleged that DOC was "flooded with requests and grievances concerning COVID-19" and was thus told by his warden that "it might be a while" for an answer to his grievance. *Rogers v. Lamont*, 3:20-cv-00474-JCH, Complaint, ECF No. 1 (April 8, 2020).
[23] Office of Gov. Ned Lamont, *Press Release: Governor Lamont Announces First Positive Case of Novel Coronavirus Involving a Connecticut Resident*, Mar. 8, 2020, https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2020/03-2020/Governor-Lamont-Announces-First-Positive-Case-of-Novel-Coronavirus-Involving-a-Connecticut-Resident.

turnaround, Plaintiffs would have had to file their initial grievance on January 13, before the first case was reported in the United States.[24] And waiting the full 105 days would require an initial grievance filed in December, before the first cases of coronavirus were confirmed in Wuhan, China. The absurdity of these dates underlines the unavailability of the grievance procedure in the context of a pandemic, and the fact that taking the time to exhaust administrative procedures renders any remedy moot. Not only are administrative procedures unable to offer the only effective relief, but attempting to navigate them would take months in a pandemic where people can die within days of exposure to the virus. Therefore, the administrative procedures in place are dead ends and not "available" to Plaintiffs within the meaning of the PLRA. *See Ross*, 136 S. Ct at 1858.

Availability can encompass the present context. "If a prisoner has been placed in imminent danger of serious physical injury by an act that violates his constitutional rights, administrative remedies that offer no possible relief in time to prevent the imminent danger from becoming an actual harm can't be thought available." *Fletcher v. Menard Correctional Center*, 623 F.3d 1171, 1173 (7th Cir. 2010). Put another way: "If it takes two weeks to exhaust a complaint that the complainant is in danger of being killed tomorrow, there is no 'possibility of some relief' and so nothing for the prisoner to exhaust." *Id. See also Laboy v. Semple*, 3:19-cv-307-JCH, Ruling on Motion for Summary Judgment, ECF. No. 55 (Dec. 5, 2019) [attached as Exhibit 12] (holding that, after the plaintiff gave birth, there was "no remedy within the power of the jail to grant" regarding the conditions of her prenatal care, and thus, section 1997e's exhaustion requirement did not apply).

[24] Centers for Disease Control and Prevention, *Press Release: First Travel-related Case of 2019 Novel Coronavirus Detected in United States*, Jan. 21, 2020, https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html.

Finally, and in the alternative, if Plaintiffs' complaint is construed—as it appears to be by Defendants—to primarily seek release, it is outside the purview of the grievance system altogether. The grievance system can receive requests directed "to any aspect of an inmate's *confinement*," AD 9.6(1) (emphasis added), but does not purport to address the very fact thereof. If the grievance process has no authority to release people from prison, and if there is no meaningful relief that can be granted to the medically vulnerable subclasses in the present crisis short of release, *cf. Booth*, 532 U.S. at 731, then there is no "available" remedy. *See also Handberry v. Thompson*, 92 F.Supp.2d 244, 247 (S.D.N.Y. 2000) (holding that prisoners need not grieve failure to deliver educational services because the issues were out of Department of Correction's control), *aff'd in part, vacated in part, and remanded on other grounds*, 446 F.3d 335 (2d Cir. 2006).

III. *YOUNGER* ABSTENTION IS IRRELEVANT BECAUSE THE CLASSES DO NOT SEEK TO ENJOIN ANY STATE PROCEEDING.

Lastly, the Defendants cite *Younger v. Harris*, 401 U.S. 37 (1971), and ask this Court to stay its hand in favor of a state litigation being pursued *against them*, even though they successfully convinced the state court that it lacked jurisdiction over that case;[25] they also intimate that this action would intrude on pending criminal proceedings. However, Cook and Lamont make their gambit without the *sine qua non* of *Younger* abstention: a federal plaintiff seeking to enjoin a state proceeding. Their motion must be denied.

"The doctrine established by *Younger v. Harris* and its successors forbids federal courts from *enjoining ongoing state proceedings*," *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (emphasis added). *Accord Kirschner v. Klemons*, 225 F.3d 227, 238 (2d Cir. 2000) (describing "unacceptable interference with the ongoing state proceeding" as "the evil against

[25] *See* Order on Defendants' Motion to Dismiss, *Connecticut Criminal Defense Lawyers' Ass'n v. Lamont*, No. UWY-CV-20-6054309-S (Conn. Super. Ct. Apr. 24, 2020) [attached as Exhibit 13].

which *Younger* seeks to guard"). *Younger* is "inapplicable" to a parallel litigation in which the federal plaintiff "has not asked that any state proceeding be enjoined." *Williams v. Lambert*, 46 F.3d 1275, 1282 (2d Cir. 1995) (vacating *Younger* stay). As a matter of practicality, a ruling from this Court may preempt a pending state court action by having preclusive effect upon it. But "[a]bstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint Communications v. Jacobs*, 571 U.S. 69, 72 (2013). *Accord Lambert*, 46 F.3d at 1282 (explaining that the possibility of preclusion arising during parallel litigation "does not present the issues of state and federal comity with which *Younger* is concerned").

Plaintiffs have not asked this Court to enjoin any ongoing state proceeding. *See* Complaint ¶ 91. They have asked only that the Court enjoin certain acts of the Defendants, as well as to declare that Defendants' acts violate the Constitution. *Id.* That ends the *Younger* analysis.[26]

Defendants do not address the absence of a request by the Classes for an injunction against a state proceeding, but cite outdated precedent to suggest a broader reach of *Younger* than now exists. In 2013, the Supreme Court pared the doctrine back to "three exceptional categories . . . defin[ing] *Younger*'s scope": those in which the requested federal injunction would intrude on either (1) "ongoing state criminal prosecutions," (2) "certain civil enforcement proceedings . . .

[26] *See Omar v. 1 Front St. Grimaldi, Inc.*, No. 16-cv-5824, 2019 WL 1322614, at *6 (E.D.N.Y. Jan. 8, 2019) (declining to apply *Younger* "because no one is trying to enjoin" the state labor investigation that the federal defendants alleged to be in progress); *Helms Realty Corp. v. City of New York*, 320 F. Supp. 3d 526, 538 (S.D.N.Y. 2018) (declining to apply *Younger* to action between parties with pending state litigation "[s]ince Plaintiff does not in the federal action seek to enjoin or otherwise supervise the state courts"); *Wilmington Trust v. Estate of McClendon*, 287 F. Supp. 3d 353, 363 (S.D.N.Y. 2018) (same where "[n]othing Plaintiff seeks" would "result in enjoining state proceedings or invalidating a state court order") (internal quotations omitted); *Dubin v. Nassau County*, 277 F. Supp. 3d 366, 380-81 (E.D.N.Y. 2017) (same where plaintiffs with pending municipal traffic cases "d[id] not seek to enjoin cases" but asked to bar the municipality from tacking an additional fee on to dismissed tickets); *Lamont v. Farucci*, No. 16-cv-7746, 2017 WL 6502239, at *8 (S.D.N.Y. Dec. 18, 2017) (same where "Plaintiff is not seeking to enjoin the ongoing Family Court proceedings" about which he complained); *Torres v. DeMatteo Salvage Co.*, 34 F. Supp. 3d 286, 287 (E.D.N.Y. 2014) (same where plaintiff brought federal claims but did not seek to enjoin pending state court action, in which he himself was the plaintiff).

akin to a criminal prosecution" that have been "initiated to sanction the federal plaintiff," or (3) "pending civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Communications*, 571 U.S. at 78-79 (internal quotations omitted).[27]

None of the three types is at issue in this action. The Classes do not ask this Court to alter the state courts' civil rules. And, of course, Defendants Cook and Lamont are the defendants in the state action, which seeks to regulate *their* behavior, not that of any Class members. *See id.* at 80 (explaining that state civil action initiated by "[a] private corporation" against a state agency did not fall into second *Younger* category).[28]

Nor do the Classes challenge a rule or procedure of the state superior court that led to their current predicament such that their request for relief poses the specter of "interruption of state proceedings to adjudicate assertions of noncompliance by petitioners" comprising "an ongoing federal audit of state criminal proceedings." *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974). But *O'Shea* stands for the proposition that "[o]ngoing, case-by-case oversight of state courts" is to be

[27] The court also expressly overruled use of the factors relied upon by the defendants on page 16 of their memo. "Divorced from their quasi-criminal context," the court explained, the very considerations put forth by the defendants "would extend *Younger* to virtually all parallel state and federal proceedings, at least where a party could identify a plausibly important state interest," which is "irreconcilable with our dominant instruction that . . . abstention from the exercise of federal jurisdiction is the exception, not the rule." *Sprint*, 571 U.S. at 81-82 (internal quotation omitted).

[28] Beyond the state case not falling into any of the three *Younger* categories, Cook and Lamont have further problems. They forfeited their ability to claim that the state action is necessary for them to vindicate "an important state interest" in that venue, Mot. at 18, because they argued the opposite there. *See* Mot. at 1, *Connecticut Criminal Defense Lawyers' Ass'n v. Lamont* [attached as Exhibit 13] (contending that the superior court "lacks subject matter jurisdiction," and that the claims "are non-justiciable political questions"). If the state action were vital to their vindicating quasi-criminal state interests, they should not have had it dismissed. If, on the other hand, the interest they lay claim to is a state court's lack of jurisdiction over their federal constitutional violations, that is not a consideration bearing any significance here. U.S. Const. art. 6, cl. 2; *see also Ex parte Young*, 209 U.S. 123, 159-60 (1908) (denying habeas petition of state official who filed state enforcement action in defiance of federal injunction, and explaining that "[t]he state has no power to impart to him any immunity from responsibility to the supreme authority of the United States."). Their arguments in favor of deference to their decision-making go to the merits of the Classes' claims rather than this Court's remit to ensure compliance with the national constitution.

avoided, not that executive branch officials' actions should not be ordered to conform to the constitution. *Disability Rights New York v. New York*, 916 F.3d 129, 136 (2d Cir. 2019) (abstaining from entertaining federal challenges to the New York courts' guardianship proceedings). The Classes' challenge to their conditions of confinement does not implicate *O'Shea* because it does not invite wholesale federal supervision of the state superior court or its orders, and does not propose to supplant their judgments of conviction. Defendants' protests that sentenced Class members are subject to a state court order—a "mittimus"—committing them to prison only expresses a truism of Connecticut law: there is only one way to get into a Connecticut prison, "by commitment to the custody of the Commissioner of Correction." Conn. Gen. Stat. § 54-92a. If the Court orders enlargement of their confinement to bail or other alternative measure designed to physically space Class members from one another it will not negate the fact of their having been convicted and committed to the defendants' custody

The Classes' dispute is with the conditions in which the Defendants are subjecting them to the coronavirus pathogen during the pandemic. A ruling here in the Classes' favor would not alter the way that Superior Court judges set bail or try cases in any now-pending or future criminal cases. Instead, it would command the Defendants—none of whom are state judicial officers—to allay the unconstitutional conditions in which people incarcerated in their custody currently find themselves. Worse for the defendants, much of the relief that the Classes seek is not, and was never, within the purview of the superior court's criminal division. That forum has no control over COVID-19 prevention efforts in prisons, proper sanitation, or sufficient medical care. *See* Compl. ¶ 91. The Defendants' motion must be denied.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendants' Motion to Dismiss in its entirety.

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