IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Tre McPherson, *et al.*,
Plaintiffs-Petitioners,

v.

Ned Lamont, *et al.*,
Defendants-Respondents.

No. 20-cv-534 (JBA)
July 17, 2020

MOTION TO APPROVE SETTLEMENT AGREEMENT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

The plaintiff class of all incarcerated people in Connecticut filed this dual 42 U.S.C. § 1983 and 28 U.S.C. § 2241 case in April, contending that the defendant state officials' acts and omissions in response to the COVID-19 pandemic contravened their Eighth and Fourteenth Amendment rights. After targeted discovery, depositions, and a denial of a motion to dismiss, the parties entered Court-supervised settlement negotiations on the eve of a hearing on the Plaintiffs' motion for a preliminary injunction. Plaintiffs now seek to have the fruits of that hard-fought negotiation approved in conformance with Fed. R. Civ. P. 23(e). Defendants consent to this motion.[1]

FACTUAL BACKGROUND

I. COVID-19 BACKGROUND

As this Court is aware, COVID-19 is a serious and potentially fatal respiratory disease caused by a novel coronavirus. It has infected millions and upended life in every corner of the globe, country, and state.

Moreover, all parties are aware of the devastating effects COVID-19 has had on the state of Connecticut since March. As of July 15, 2020, Connecticut has reported 47,750 cases of COVID-19, and 4,389 deaths.[2] While conditions have improved in the northeast, the virus continues to spread exponentially throughout the United States and a "second wave" could be imminent here.

[1] Defendants consent to the approval of the settlement agreement because they also believe the *Grinnell* factors heavily weigh in favor of acceptance of the agreement. However, the defendants do not agree with, and continue to dispute, many of the factual representations that form the basis of the plaintiffs' claims. Furthermore, the defendants, by consenting to the approval of the agreement, do not also consent to this motion serving as an interpretive document should there be a dispute in the future as to any of its terms or conditions.

[2] Connecticut Open Data, *COVID-19 Data Resources: Connecticut Summary, available at* https://cutt.ly/2yse8YA (last visited July 15, 2020).

While scientists worldwide are still analyzing how COVID-19 spreads, it is accepted that it spreads from person to person through respiratory droplets and close personal contact.[3] Symptomatic persons spread the disease, but so too can asymptomatic and pre-symptomatic persons.[4] For this reason, the CDC has recommended persons wear masks any time they leave their homes[5] and Governor Lamont issued an executive order requiring "any person in a public place in Connecticut who is unable to or does not maintain a safe social distance of approximately six feet from every other person [to] cover their mouth and nose with a mask or cloth face-covering."[6]

There is still no known cure, vaccine, or treatment for COVID-19. COVID-19 presents an even greater risk of serious symptoms and death for those who are over 50 or have certain preexisting medical conditions. The need for care, including intensive care, and the likelihood of death, is much higher from COVID-19 than from influenza. High-risk patients who survive can expect prolonged recovery, including the need for extensive rehabilitation for profound reconditioning, loss of digits, neurological damage, and loss of respiratory capacity.

The expert consensus is that the most effective strategy for limiting the spread of the disease is social distancing—deliberately keeping at least six feet of space between persons to avoid spreading the illness—combined with a vigilant hygiene regimen, including frequent hand-washing and routine disinfecting of surfaces, and covering one's mouth and nose when around others.[7] Following the recommendation of public health experts, government officials across the

[3] Centers for Disease Control and Prevention, *How COVID-19 Spreads*, *available at* https://cutt.ly/eaalOau (last visited July 17, 2020).
[4] *Id.*
[5] Centers for Disease Control & Prevention, Coronavirus Disease 2019 (COVID-19), *Considerations for Wearing Cloth Face Coviering*s, *available at* https://cutt.ly/rysekak (last visited July 17, 2020).
[6] Exec. Order No, 7BB (Apr. 17, 2020), *available at* https://cutt.ly/LaaxbLq.
[7] Centers for Disease Control and Prevention, *How COVID-19 Spreads*, *available at* https://cutt.ly/eaalOau (last visited July 17, 2020).

country have shut down schools, non-essential businesses, and courts in an effort to increase social distancing, and to minimize the spread of the disease.

II. THE SPREAD OF COVID-19 THROUGH CORRECTIONAL FACILITIES

Connecticut's Department of Correction (DOC), like other correctional facilities, has proven to be particularly vulnerable to outbreaks.

By mid-March, public health experts in Connecticut experienced in correctional health began to express "grave concern that, absent immediate action, COVID-19 will overrun Connecticut's jails and prisons."[8] This is because, like other congregate settings such as nursing homes, prisons and jails are conducive to the spread of such a contagious disease. People incarcerated in these facilities are forced into close contact with each other and prison staff, including corrections officers. Compl. (ECF No. 1) at ¶ 15–18. Many DOC facilities have dormitory-style housing in which up to 120 people live side-by-side in one room. Other DOC facilities hold incarcerated people two to a cell in close quarters. Social distancing in a cell is impossible: cellmates sleep in bunk beds and share a desk, a toilet, and a sink in each cell. And like their dormitory counterparts, DOC facilities with double cells hold upwards of 80 people in each unit. Any time people in double-celled units are out of their cells, they share each and every inch of physical space with their entire unit in common areas.

It is difficult for those incarcerated in DOC facilities to achieve the requisite social distancing needed to effectively prevent the spread of COVID-19. They share or touch objects such as objects or recreation equipment used often by others and cleaned infrequently. In addition to eating, sleeping, recreating, and living close to each other, they have to share bathroom facilities—showers, toilets, and sinks.

[8] Letter from Dr. Emily Wang et al. to Governor Lamont, Ex. A to Pls' Mot. for Prelim. Inj. (ECF No. 43-1).

Additionally, about 40 percent of incarcerated people nationally are estimated to have at least one chronic illness. *See id.* ¶¶ 10–12. Many of these illnesses, such as hypertension, asthma, diabetes, and chronic kidney disease, are associated with more severe cases of COVID-19 and poorer outcomes, including death.[9] But chronically ill incarcerated people face a far greater risk of severe illness and death from COVID-19 than those with similar preexisting conditions who are free to isolate in their homes or avoid groups of people.

Public health experts have issued guidance in light of the extraordinary risk COVID-19 poses to those in correctional facilities. The CDC's COVID-19 guidance documents for correctional facilities recommend, among other things, social distancing to increase space between incarcerated people to six feet.[10] Because regular, frequent handwashing is vital for limiting the spread of COVID-19, they also establish that prisons should "[p]rovide a no-cost supply of soap to incarcerated/detained persons, sufficient to allow frequent hand washing." They further provide that doorknobs, light switches, sink handles, countertops, toilets, toilet handles, recreation equipment, kiosks, and telephones be cleaned "several times a day."[11]

III. PROCEDURAL HISTORY

From the beginning of the litigation, Defendants have vigorously contested Plaintiffs' allegations, denied wrongdoing, and asserted that the DOC's efforts to protect incarcerated people have been exemplary in light of the challenges of the COVID-19 pandemic. After attempting to

[9] Centers for Disease Control and Prevention, *People Who are at a Higher Risk for Severe Illness*, Coronavirus Disease 2019 (Mar. 2020), *available at* https://cutt.ly/mysyIkT.

[10] *See Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (Mar. 23, 2020), *available at https://cutt.ly/iysyJ9e.* These have been updated in recent days, for the first time. *See also* Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (July 14, 2020), *available at* https://cutt.ly/NaabUKs.

[11] *See also* Centers for Disease Control and Prevention, *Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities* (July 14, 2020), *available at* https://cutt.ly/NaabUKs.

dismiss the action on jurisdictional grounds, Defendants contended that the class was not entitled to injunctive relief because the Plaintiffs were unlikely to succeed on the merits and the balance of equities tipped in Defendants' favor. After a hard-fought discovery period and significant briefing, the parties engaged in arms-length negotiations, assisted by Judge Garfinkel, who played a key role in bringing the parties together and facilitating productive discussions that resulted in a fair settlement.

This Court already is very familiar with the procedural history in this case, which is briefly summarized below.

a. Initiation of Lawsuit

Prior to the inception of this suit, certain of Plaintiffs' counsel and other co-counsel—representing a group of incarcerated people and the Connecticut Criminal Defense Lawyers Association ("CCDLA")—filed a mandamus action in Connecticut Superior Court against the same defendants as here on April 3, 2020. *See Conn. Crim. Def. Laws. Assoc. v. Lamont*, No. UWY-CV20-6054309-S (Conn. Super. Ct. 2020) (Dkt. 100.31). The defendants moved to dismiss[12] on April 7, 2020. The superior court heard argument on April 15, 2020, and dismissed the case on April 24, 2020. In its order, the court concluded that none of the plaintiffs possessed standing to prosecute the claims, quizzically finding that "plaintiffs do not allege that any of them are housed with or otherwise directly exposed to individuals with COVID-19." *CCDLA v. Lamont*, No. UWY-CV20-6054309-S, slip op. at 6 (Conn. Super. Ct. Apr. 24, 2020) (attached as Exhibit 1). The court also concluded that, even if any plaintiff had standing, their claims "involve nonjusticiable political questions." *Id.* at 8. The plaintiffs sought, and were granted, expedited

[12] In Connecticut practice, a motion to dismiss is solely for the purpose of asserting "(1) lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; and (4) insufficiency of service of process." Conn. R. Super. Ct. § 10-30(a).

direct review at the Connecticut Supreme Court. Notice to Counsel, *CCDLA v. Lamont*, No. 20470 (Conn. May 15, 2020) (attached as Exhibit 2). On June 6, 2020, following the parties' agreement in this litigation, the CCDLA plaintiffs dismissed their appeal.

On April 20, 2020, Plaintiffs filed the instant class action complaint for declaratory and injunctive relief and petition for writs of habeas corpus against Governor Ned Lamont and the Commissioner of the Department of Correction (then, Rollin Cook). Plaintiffs, sentenced and unsentenced people in DOC facilities, requested relief from both detention and conditions of confinement that violated the Eighth and Fourteenth Amendments. (ECF No. 1.) At the time of filing, a month into the COVID-19 pandemic, over 200 DOC staff members and almost 300 incarcerated people had tested for positive for COVID-19, already resulting in one death. Incarcerated people in DOC facilities had the highest infection rate in the state, at almost 2.3%. Plaintiffs alleged that DOC lacked necessary sanitation and hygiene procedures, social distancing, and quarantining of those who had tested positive or been exposed.

b. Motion for Preliminary Injunction

On April 27, 2020, Plaintiffs filed a motion for a temporary restraining order seeking expedited release of members of the medically vulnerable subclasses as well as specific mitigation efforts to halt the spread of COVID-19 within DOC facilities. (ECF No. 15.) Defendants immediately moved to dismiss Plaintiffs' claims on jurisdictional grounds, alleging that Plaintiffs were required, and failed, to exhaust available administrative and state court remedies, and were further barred from brining their claims by PLRA exhaustion. Following responsive briefing, oral argument was held on May 4. This Court denied the Motion to Dismiss on May 6. It held that, as Plaintiffs argued, the state court system's near-shutdown meant that state court avenues were unavailable, and that grievance procedures were similarly "unavailable." (ECF No. 37.)

On May 10, 2020, Plaintiffs converted their motion for a temporary restraining order into a motion for preliminary injunction, seeking identical relief. (ECF No. 43.) Defendants opposed the motion for preliminary injunction on May 18, 2020. (ECF No. 59.) In the course of preparing for the preliminary injunction hearing, Plaintiffs served multiple sets of discovery requests and received three productions of discovery from Defendants.

c. Negotiation

On the eve of the preliminary injunction hearing scheduled for May 22, 2020, the parties stipulated to, and the Court granted, a motion to continue the preliminary injunction hearing on May 21, 2020, to allow the parties to pursue settlement negotiations mediated by Magistrate Judge William I. Garfinkel. (ECF No. 86.) Intensive negotiations took place over the course of the next two weeks. With the assistance of Judge Garfinkel, the parties reached an agreement on June 6, 2020. (ECF No. 101.) In light of the settlement, the parties jointly moved to certify the class on June 11, 2020. (ECF No. 104.) The Court granted the joint motion for class certification on June 12, 2020. (ECF No. 105.)

IV. SETTLEMENT

The parties' proposed settlement agreement (hereinafter, "Agreement," docketed at ECF No. 160-1) is detailed and puts in place a variety of specific mitigation measures to improve COVID-19-related sanitation, hygiene, and medical monitoring at every Connecticut DOC facility. It also provides for a five-person monitoring panel to (1) oversee adherence to COVID-19-related correctional public health standards and to (2) make real-time recommendations to DOC regarding its COVID-19 mitigation efforts. The panel's output will be public. Finally, the Agreement provides for a dispute resolution procedure in front of Judge Garfinkel in the event of Defendants' non-compliance with the measures in the Agreement.

The major terms of the settlement are summarized below:

a. The Settlement Class

The parties have agreed that the Settlement Class will be defined identically to the certified class, as follows:

> All persons who were incarcerated in a DOC facility from March 1, 2020, or are incarcerated, or in the future will be so incarcerated, until the termination date of this Agreement, December 31, 2020.

b. Settlement Terms

Through the Agreement, Defendants have agreed to undertake a comprehensive set of mitigation measures aimed at preventing the transmission of COVID-19 within its facilities to the greatest extent possible. The substance of the Agreement is contained within five categories: A) CDC Guidelines; B) Monitoring; C) Testing; D) Sanitation; and E) Discretionary Release of Prisoners. Settlement Agreement ¶¶ 1-26.

CDC Guidance

First, Defendants agree to make best efforts to implement the public health guidance promulgated by the CDC has issued for correctional facilities during the COVID-19 crisis.

Monitoring Panel

Second, Defendants have agreed to the establishment of a five-person independent monitoring panel. Plaintiffs consider this independent monitoring panel to be the cornerstone of the Agreement, providing continued insight into and accountability for DOC's COVID-19 response. The monitoring panel also benefits Defendants by providing expert public health guidance as DOC navigates this challenging public health crisis.

The panel will include two people selected by DOC; two people selected by Plaintiffs; and a fifth person chosen by consensus, who cannot be currently employed by DOC. Plaintiffs' counsel does not intend for the panel members it selects to be currently employed by DOC. Accordingly, the panel will consist of—at most—two members out of five who are currently

employed by DOC, and thus the majority of the panel will be independent of DOC.

The panel's role is to serve as an ombudsman for the duration of the Agreement. The Agreement directs it to make recommendations to aid DOC's response to COVID-19, both in terms of complying with the CDC guidelines, and incorporating "evolving public health guidance that may require a change to DOC's COVID-19 response." Settlement Agreement ¶ 5. Within that broad mandate, the panel is to focus on DOC's strategy for mass testing; quarantining; and sanitation. *Id.*

To facilitate its independence, the panel will be able to devise its own procedures for monitoring the Agreement. Not only will it be given access to all materials and staff required to do its job, but it will also be given onsite access to DOC facilities. Panel members will be compensated for their time over the course of the Agreement with a flat $15,000 fee.

In the Amended Settlement Agreement signed on June 26, 2020, the parties agreed that the reports produced by the panel are to be public documents. Plaintiffs' counsel intends to facilitate their provision to class members, as requested.

Testing

Third, DOC has agreed to provide a COVID-19 viral test to every person in its custody. The only exceptions are if a person refuses testing, or has already been tested within 14 days. Defendants have agreed to report the numbers of those tested by facility, and the results of those tests, on an ongoing basis.[13]

The "Testing" provisions of the Agreement also contain mandates for quarantining. Defendants have agreed to quarantine those newly admitted to custody for 14 days, with

[13] Plaintiffs' counsel (and their outside medical experts) view mass testing as a vital component of the Agreement. At the outset of this lawsuit and well into May, DOC was doing no mass testing. DOC began conducting mass testing shortly before the parties began negotiations.

monitoring for symptoms throughout. Defendants have also agreed to medically isolate those who test positive for COVID-19. For those who are symptomatic, Defendants have further agreed to robust medical monitoring that includes twice daily checks for temperature, respiratory rate, heart rate, and blood oxygen saturation levels, as well as a daily blood pressure check.

These provisions are intended to respond to class members' concerns regarding comprehensive quarantining procedures, as well as medical monitoring for those who have symptomatic infections. The quarantining and medical monitoring provisions put into place also reflect the recommendations of Plaintiffs' outside medical and infectious disease experts.[14]

Finally, Defendants have agreed that "placement in medical monitoring, medical isolation and medical quarantine units shall not be considered punitive isolation." Settlement Agreement ¶ 14. In addition, DOC will make best efforts to return people who are medically isolated to their pre-isolation facilities, jobs, and programs. These provisions are intended to respond to common concerns from class members regarding the conditions of medical isolation employed by DOC, particularly in April and early May. There was significant concern (as reflected in many of the responses to the Agreement from class members) that medical isolation was indistinguishable from punitive isolation, and that people were being placed in segregation-like conditions, particularly in Northern Correctional Institution. As alleged in the motion for a preliminary injunction, fear of being placed in a "punitive" status, as well as fear of losing housing, job, or programming status, created a strong disincentive for reporting symptoms.

Sanitation

At the filing of this suit in late April, class members were highly concerned about sanitation

[14] While some class members have objected to the lack of a post-quarantine follow-up COVID-19 test before someone is returned to the general population, this was not the recommendation of Plaintiffs' outside experts—and is not recommended by the CDC.

in their facilities; access to soap; and their ability to sanitize their living areas. The seven "Sanitation" provisions reflect public health guidance on minimizing risk of transmission of COVID-19, and are intended to memorialize, standardize, and build upon the varying policies in effect across DOC facilities during the pendency of this lawsuit. They include:

- Free distribution of two bars of soap to every person in custody, each week;
- Cleaning of all common areas of all facilities twice per shift on first and second shift;
- Provision of both "sufficient disinfectant cleaning agents not diluted in excess of manufacturers' specifications" and equipment to clean cells, cubicles, or sleeping areas at least twice per week; and
- A mandate that all people in custody be allowed to shower in running water at least every other day, "regardless of COVID-19 symptoms, test results, or housing." Plaintiffs' counsel considered this important because during this lawsuit, many class members were not allowed to shower for weeks at a time while quarantined.

In addition, Defendants have agreed to provide two masks to each person in custody for the duration of the Agreement, with one mask able to be exchanged, weekly, for a new mask. This is contingent on DOC's production abilities. Finally, "[s]taff in correctional facilities will be required to wear masks when social distancing is not possible" and they "may be exempted from this only if medically necessary." Settlement Agreement ¶ 23. Notably, in response to the Agreement a number of incarcerated people voiced concerns about inconsistent mask-wearing by staff. The Agreement, if approved, will make mask wearing mandatory in many correctional settings when staff interact with class members.

Discretionary Release of Prisoners

The Defendants have agreed that—in the context of exercising statutory power to release class members on a discretionary basis—the Commissioner of Correction will prioritize for consideration those prisoners who are 65 or older, *or* if they have a medical score of 4 or 5.

Dispute Resolution Mechanism

Separate and apart from the oversight of the independent monitoring panel, Defendants have agreed to a specific dispute resolution mechanism to address any potential non-compliance with the Agreement. "If, while this Agreement is in effect, Plaintiffs' Counsel have reasonable grounds to believe that there is a systemic pattern or practice of non-compliance with this Agreement in one or more DOC Facilities, or if DOC proposes or enacts revisions or changes to its COVID-19 policies and procedures that are materially inconsistent with the Agreement and the CDC guidelines, and to the detriment of the class," Plaintiffs' counsel may initiate a dispute resolution procedure before Judge Garfinkel. Settlement Agreement ¶ 40-44. If mediation with Judge Garfinkel is unsuccessful, Plaintiffs' counsel may seek specific performance of the Agreement through the Court. *Id.* ¶ 44. Plaintiffs' counsel have agreed that they will not be able to seek any attorneys' fees for their efforts to ensure compliance with the Agreement.

Termination of Agreement

The Agreement will terminate on December 31, 2020, "provided that upon the mutual consent of the parties, it may be extended." Settlement Agreement ¶ 28.

Attorneys' Fees

The Agreement provides for $40,000 in attorneys' fees. This number represents a very small fraction of the costs and approximately $900,000 in District of Connecticut rates that Plaintiffs' counsel put into the case, and to which they would be entitled should they prevail on the class' claims.

Dismissal and Release of Claims

The Agreement contains a release of claims on behalf of the class that is as narrowly drawn as possible. It is the "parties' stated and undisputed intent to release only the class members' claims for injunctive relief against the defendants." *See McReynolds v. Richards-Cantave*, 588

F.3d 790, 803 (2d Cir. 2009) (upholding agreement for injunctive relief in class action on this basis). In other words, the release is limited to actions "for non-monetary relief arising from acts or omissions alleged in the Complaint, or from acts or omissions that could have been litigated by the class in this action." Settlement Agreement ¶ 30. The Agreement thus has no effect on any class member's claim for money damages on the basis of COVID-19 infection, exposure, or conditions. For the sake of clarity, the Agreement also contains explicit language stating that it has no effect on "criminal proceedings within the courts of the State of Connecticut" (such as sentence modifications or bond modifications); or on class members' ability to "seek and/or qualify for discretionary release." It also explicitly exempts any pending habeas case related to COVID-19, as counsel were aware of several pending habeas cases at the time of the Agreement's signing and in no way wanted to affect them.

Release or no release, the law of preclusion means the barring of similar actions for injunctive relief would be the likely product of any settlement in this case. The Agreement does this, and no more, for a very limited period of time.

LEGAL STANDARD

Federal Rule of Civil Procedure 23(e) provides that "the court may approve [a proposed settlement] only after a hearing and on finding that it is fair, reasonable, and adequate." Fed. R. Civ. P. 23(e)(2). If the parties negotiate a settlement before "class certification, as is the case here, it is subject to a higher degree of scrutiny in assessing its fairness." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85 (2d Cir. 2001). In these circumstances, the court examines "both the negotiation process and the settlement's substantive terms to determine its fairness." *Id.*

ARGUMENT

I. THE HARD-FOUGHT NEGOTIATION THAT RESULTED IN THE PROPOSED SETTLEMENT WAS PROCEDURALLY FAIR

"To determine procedural fairness, courts examine the negotiating process leading to the settlement." *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, No. 3:09CV1293 VLB, 2012 WL 3589610, at *3 (D. Conn. Aug. 20, 2012) (citation omitted). "A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" *Wal–Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005).

In this case, there is no question that "the litigation was hard-fought and the settlement negotiations . . . were extended and involved the Court." *Ingles v. Toro*, 438 F. Supp. 2d 203, 213 (S.D.N.Y. 2006) (approving injunctive class settlement in prisoner lawsuit). Intense negotiations between the parties in this action began on Friday, May 22, and continued near-daily for two weeks. During the extensive negotiation process, the parties exchanged multiple drafts of settlement proposals and "engaged in a vigorous exchange regarding their respective claims and defenses," *Johnson v. Brennan*, No. 10-CIV-4712, 2011 WL 4357376, at *9 (S.D.N.Y. Sept. 16, 2011) (approving class settlement), speaking to Judge Garfinkel's chambers and/or to each other multiple times per day. As Judge Garfinkel can attest, these exchanges were highly adversarial—underscoring the arm's-length nature of the process. *In re Austrian & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 174 (S.D.N.Y. 2000), *aff'd sub nom. D'Amato v. Deutsche Bank*, 236 F.3d 78 (2d Cir. 2001) (approving class settlement as the product of arms-length negotiations, where "at points the negotiations were extremely contentious").

Moreover, the settlement negotiations began on the eve of an evidentiary hearing on the plaintiffs' motion for a preliminary injunction. Between the filing of this case on April 20, 2020, and the commencement of negotiations on May 22, 2020, the parties condensed months' worth of litigation, pleadings, and trial preparation into a few weeks. Negotiations commenced hours before

an evidentiary hearing for which both sides had prepared extensively. *See Wal–Mart*, 396 F.3d at 117 (noting that district court held that "there could not be any better evidence of procedural integrity than the aggressive litigation . . . and the impassioned settlement negotiations that produced an agreement on the brink of trial"). At that juncture, counsel for Plaintiffs had reviewed three productions of documents from Defendants in response to multiple sets of discovery requests—comprising more than 100 policies, procedures, memoranda, and other materials—in addition to the hundreds of exhibits filed on the docket by both parties (much of which were first-hand testimony in the form of declarations). They also had conducted depositions of Defendant Cook and Dr. Byron Kennedy. Finally, they had worked extensively with seven lay witnesses in preparation for their testimony. Defendants, in turn, had deposed two medical experts retained by Plaintiffs and had provided declarations for a number of witnesses they intended to present at the hearing.

Against this backdrop, "[b]oth the Court and the parties had a substantial evidentiary basis for evaluating the strengths and weaknesses of plaintiffs' claims and defendants' defenses." *Ingles*, 438 F. Supp. 2d at 213. Given the record developed at the point of negotiation, and their investigation of the facts against a shifting legal and factual landscape, counsel were not drafting the Agreement on a blank canvas. To the contrary, they had a "clear view of the strengths and weaknesses of their cases and of the adequacy of the settlement." *In re Sturm, Ruger, & Co., Inc. Sec. Litig.*, 2012 WL 3589610, at *5 (internal citation omitted). "This factor therefore also supports approval of the settlement," as a strong indication that the negotiation was procedurally fair. *Id.*

II. THE PROPOSED SETTLEMENT AGREEMENT IS SUBSTANTIVELY FAIR, REASONABLE, AND ADEQUATE BASED ON ASSESSMENT OF THE *GRINNELL* FACTORS

The Agreement also is substantively fair, reasonable, and adequate. When determining whether a settlement agreement is substantively fair, reasonable, and adequate, courts consider the following factors, commonly referred to as the *Grinnell* factors:

1) the complexity, expense, and likely duration of the litigation;
2) the reaction of the class to the settlement;
3) the stage of the proceedings and the amount of discovery completed;
4) the risks of establishing liability;
5) the risks of establishing damages;
6) the risks of maintaining a class action through trial;
7) the ability of defendants to withstand greater judgment;
8) the range of reasonableness of the settlement fund in light of the best possible recovery;
9) the range of reasonableness of the settlement fund in light of the attendant risks of litigation.

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *see also O'Connor v. AR Res.*, 2012 WL 12743 at *2 (D. Conn. Jan. 4, 2012). Where, as here, the plaintiffs seek declaratory and injunctive relief rather than money damages, courts need not examine the last three factors. *E.g., Marisol A. v. Giuliani*, 185 F.R.D. 152, 162 (S.D.N.Y.1999) ("The court will not review the last three [*Grinnell*] criteria as they are applicable only in actions for damages, and will examine the fifth criteria in light of establishing remedies instead of damages."). "For a settlement to be substantively fair, not every factor must weigh in favor of settlement, rather, the court should consider the totality of these factors in light of the particular circumstances." *Kemp-DeLisser v.*

Saint Francis Hosp. & Med. Ctr., 2016 WL 6542707, at *7 (D. Conn. Nov. 3, 2016) (internal citations and quotation marks omitted).

Each of the six applicable *Grinnell* factors is analyzed below.

a. The Length, Complexity, and Duration of the Litigation Set Against the Backdrop of the Pandemic Weighs in Favor of Approving the Proposed Settlement

Plaintiffs allege that Defendants are contravening the Eighth and Fourteenth Amendments by failing to arrest the spread of the COVID-19 pathogen within Connecticut prisons. The legal questions posed by the three-count complaint reduce to whether the COVID-19 virus poses an objective threat to human health; whether Defendants' knowledge, actions, and inaction demonstrates a deliberate indifference to the plaintiffs' serious medical need, and, for the pre-trial detainee Plaintiffs, whether the conditions in Defendants' prisons bears no rational relationship to a legitimate governmental objective. Defendants deny that they violated the Constitution or that they acted with indifference, particularly in light of the unique challenges of managing the pandemic in a correctional setting.

The factual proof of Plaintiffs' claims—at the preliminary injunction stage alone, which is where the parties had reached at the time of their agreement—required significant evidence. Plaintiffs had designated two physician experts to testify at a preliminary injunction hearing, as well as seven people with firsthand knowledge of conditions within Defendants' prisons, Pls.' Final Ex. & Witness List (ECF No. 74) at 17, and planned to introduce more than one hundred documents showing Defendants' action or inaction. *Id.* 1-16. Defendants anticipated introducing fifty documents, Defs.' Ex. & Witness List (ECF No. 77) at 1-3 , as well as three experts and four lay witnesses who would defend DOC's conduct. *Id.* at 1.

Although the Court had allotted one day on which to hear evidence (ECF No. 81), and held an additional day in reserve, it seems likely that the presentation and arguments would exceed

those parameters. And if Plaintiffs were to prevail after a pre-trial evidentiary hearing, Defendants likely would file an immediate appeal of challenging any preliminary relief ordered by the Court.

As against a trial, the length and complexity of preliminary proceedings in this litigation do not seem onerous. However, Plaintiffs are working against the clock in a conditions case such as this one, in which each week that the litigation remained unresolved increased risk to inmates and staff alike. *Cf. Rodriquez v. It's Just Lunch Int'l*, 2020 WL 1030983, at *4 (S.D.N.Y. Mar. 2, 2020) (finding the *Grinnell* durational factor satisfied by the possibility of an ultimate liability decision being "years away"). So, for Plaintiffs, reaching an agreement in the near term that provides for much of the relief that they sought is greatly preferable to obtaining a court order, perhaps defending an appeal, and then facing the possibility of additional discovery, summary judgment, trial, and another appeal. The speed at which relief—in whatever form—was required in the face of the pandemic merits approval of the proposed settlement.

b. The Reaction of the Class Members Does Not Weigh Against Approval

The second *Grinnell* factor, the class's reaction to the settlement, "is perhaps the most significant factor to be weighed in considering its adequacy." *O'Connor*, 2012 WL 12743, at *4 (citing *In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 425 (S.D.N.Y. 2001)). Named class members were consulted about and consented to the Agreement before it was signed. Most of the more than 9,700 class members received notice of the settlement. The deadline for class members to respond and/or object to the Agreement was July 13, 2020. Since the posting of Notice within each DOC facility, approximately 450 class members have submitted responses to the Agreement.[15] Responses have been sent either directly to Plaintiffs' counsel and/or transmitted

[15] Some individuals have submitted multiple responses. Some class members have also signed onto other individuals' responses.

directly to the clerk's office to be placed on the case docket. For full transparency and fairness to class members, Plaintiffs' counsel has docketed all responses received to date. They have also reviewed every response, and have summarized them for the Court. (ECF No. 160.) Plaintiffs' counsel appreciates the many class members who took time to respond to the Agreement.

The number of responses (from approximately 450 of 10,000 class members) is not dispositive, as the "the amount of opposition to the proposed settlement does not compel its rejection." *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996) (upholding approval of settlement where 13% of the class of incarcerated people submitted written objections in response to the notice of settlement); *see also Stoetzner v. U.S. Steel Corp.*, 897 F.2d 115, 118–19 (3d Cir. 1990) ("only" 10% of the class had objected, which "strongly favors settlement"); *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 624 (N.D. Cal.1979) (16% of the class objecting was deemed "persuasive" of the adequacy of the settlement).

Nor does the substance of the responses weigh against approval. Many responses were not objections to the Agreement per se. Rather, these responses detailed class members' difficult and traumatic experiences in prison during the pandemic, including conditions prior to the filing of the lawsuit, or during the pendency of the lawsuit. Other responders described their health conditions and care by DOC, and argued that these weighed in favor of their being released from custody. While Plaintiffs' counsel acknowledge the seriousness of these allegations (echoed in their hundreds of conversations with class members over the course of the litigation), "an individual inmate's objections regarding his own care are not directly relevant to the Court's inquiry into the fairness of the Settlement Agreement," *Austin v. Pa. Dep't of Corr.*, 876 F. Supp. 1437, 1459 (E.D. Pa. 1995), particularly where the mitigation measures entailed by the Agreement are not yet in effect. Again, these experiences speak to the utility and necessity of this Agreement.

In addition, many objections involved confusion with the terms of the Agreement or its timing, based on incorrect information or a lack of understanding of the Agreement. These objections do not speak to the fundamental fairness of the Agreement. *See Gaddis v. Campbell*, 301 F. Supp. 2d 1310, 1315 (M.D. Ala. 2004) (approving settlement for injunctive relief in prison suit where "[m]any of the objections filed in this case are based on incorrect information or a lack of understanding of the settlement agreement," including that the Agreement "lack[ed] provisions that it actually contains").

First, many class members stated that DOC was not in current compliance with the terms of the Agreement, and provided details on that non-compliance. These objections are addressed by the fact that DOC is not required to comply with the Agreement unless and until the Agreement is approved by the Court (and they further, underscore the need for the Agreement to be so approved). Second, many class members were upset that they would not receive money damages from this lawsuit. These included class members who asked to "opt out" of the class on this basis. However, Plaintiffs never sought money damages in this action, and the Agreement expressly does not waive any individual damages claims that members of the Settlement Class may have with respect to harms incurred as a result of being subjected to COVID-19 while incarcerated. Settlement Agreement ¶ 30 (limiting the release of claims to those for "non-monetary relief arising from acts or omissions alleged in the Complaint"). Class members will not, by way of the Agreement, be barred from bringing their own lawsuits for money damages based on COVID-19-related allegations, their infection with COVID-19, or anything else. *See Stinson v. City of New York*, 256 F. Supp. 3d 283, 292–93 (S.D.N.Y. 2017) (approving a settlement involving improperly issued summonses where it did not release any class members' individual damage claims of excessive force arising from the same incident). Plaintiffs' counsel is in the process of

communicating this to objecting class members, and will continue to convey this widely to all members of the class.

Another subset of objections—brought by an attorney representing 50 objectors—involved a lengthy list of demands unrelated to and beyond the scope of this case. (ECF No. 135.) These include reducing the state's incarceration expenditures by 50 percent in 2020; establishing an independent body to review the sentence modification process; and creating an independent grievance process and investigative body for alleged misconduct by DOC and other state agencies. Many of these proposals are for relief that could not have been achieved through this case, whether by way of settlement or Court order—not least because of the stringent dictates of the PLRA's provisions on "narrowly drawn" injunctive relief. *See* 18 U.S.C. § 3626(1).

As to enforceability concerns, it is noteworthy that the "Settlement Agreement contains a dispute resolution mechanism that Class Counsel can invoke if serious complaints continue to arise regarding these matters." *Decoteau v. Raemisch*, 2016 WL 8416757, at *7 (D. Colo. July 6, 2016) (approving settlement for injunctive relief in prison suit). This is in addition to the outside monitoring provided by independent monitoring panel. Thus, while acknowledging that "[s]ome of the comments filed predict that the Corrections Department will not actually follow the terms of the settlement," the fact that "the agreement provides for monitoring by an independent contract monitor" provides significant reassurance. *Gaddis*, 301 F. Supp. 2d at 1315 (approving settlement).

The remaining objections involved specific suggestions on the substance of the Agreement and have been summarized for the Court. (*See* ECF No. 160 (detailing, among others, objections regarding duration of Agreement and categories of persons fast-tracked for discretionary release consideration).) Some, while considered, had to give way to competing concerns or practicality

considerations. For example, given the uncertainties around the COVID-19 pandemic and frequently changing conditions on the ground, Plaintiffs' counsel was cognizant of barring future individual or systemic litigation for non-monetary relief, and wanted to do so for the shortest possible period of time. *Cf. W. v. City of New York*, 2016 WL 4367969, at *10 (S.D.N.Y. Aug. 12, 2016) (finding injunctive consent decree unfair and unreasonable based, in part, on "the extraordinary length of time for which the parties propose to bar further systemic litigation"). To this end, the Agreement balances the need to get specific, expert-recommended mitigation measures in place in the near-future, with the desire not to stand in the way of class members' ability to pursue other remedial litigation. Similarly, DOC does not have a system-wide listing of each person's specific health conditions, and therefore no obvious way to systemically review everyone in custody for chronic health conditions posing COVID-19 risk. Using DOC medical risk scores as a stand-in for health conditions posing COVID-19 risk, while admittedly imperfect, is an efficient way to determine who might warrant priority consideration for discretionary relief on the basis of medical vulnerability.

Finally, while other specific suggestions contained in the objections were well-taken—in particular, prioritizing a greater range of people for discretionary release consideration, or mandating release of certain class members, particularly the medically vulnerable—they were simply not achievable through the hard-fought negotiation process. Given the substantial risks of moving forward with this case, as detailed below, these modifications do not outweigh the significant argument for approving the Agreement. *See, e.g.*, *Charron v. Wiener*, 731 F.3d 241, 254 (2d Cir. 2013) (upholding approval of settlement agreement notwithstanding that the scope of relief "leaves much to be desired from the standpoint of" certain class members" given the greater context and risks of pursuing the class' claims); *see also Riker v. Gibbons*, 2010 WL 4366012, at

*7 (D. Nev. Oct. 28, 2010) (approving settlement for injunctive relief in prison medical suit, over class member objections, because "[a]n adverse decision on the merits of plaintiffs' claims would result in not only denial of declaratory relief, but would deprive plaintiffs of the relief guaranteed by the settlement agreement, to wit, improvement in ESP's delivery of medical care").

c. The Amount of Discovery Completed Was Substantial and Allowed the Parties to Sufficiently Investigate the Claims in This Case

Given the extraordinary circumstances of this case, the third factor, the stage of the proceedings and amount of discovery completed, weighs heavily in favor of approval. When weighing this factor, the Court "need not find that the parties have engaged in extensive discovery. . . . Instead, it is enough for the parties to have engaged in sufficient investigation of the facts to enable the Court to intelligently make an appraisal of the Settlement." *In re Austrian & German Bank Holocaust Litig.*, 80 F.Supp.2d at 176 (internal quotations and citations omitted).

Between April 20 and June 6, 2020, the parties engaged in substantial discovery on an accelerated schedule. Among other things, the parties:

- Conducted the depositions of Defendant Commissioner Cook and Dr. Byron Kennedy, Defendants' proffered expert witness;
- Exchanged expert witness declarations;
- Conducted depositions of two plaintiff experts, Dr. Joe Goldenson (correctional health) and Dr. Robert Murphy (infectious diseases);
- Engaged in formal written discovery, including propounding and responding to dozens of interrogatories, requests for production, and requests for admission, as well as informal discovery;
- Exchanged hundreds of pages of documents over multiple productions; and
- Exchanged witness and exhibit lists ahead of a preliminary injunction hearing;

As this Court is aware, the parties worked around the clock for six weeks to discover as much information as they could and efficiently assess the claims and defenses to prepare for the

preliminary injunction hearing. Plaintiffs requested and reviewed information about policies in place to halt the spread of COVID-19 in DOC facilities, descriptions of those facilities and information about population density, and deposed Commissioner Cook in real time about evolving standards by which the DOC attempted to implement measures to contain the virus. The parties questioned expert witnesses on the central topics in this case, including the transmission of the virus, what should be done to prevent infection, and why correctional facilities are uniquely conducive to its spread. There is no question that this intensive discovery process was "sufficiently adversarial that [it is] not designed to justify a settlement . . . [,but] an aggressive effort to ferret out facts helpful to the prosecution of the suit." *Martens v. Smith Barney, Inc.*, 181 F.R.D. 243, 263 (S.D.N.Y. 1998). Thus, this factor weighs heavily in favor of approval.

d. The Risks of Establishing Liability Are High and Could Prevent a Sufficient Mitigation Response to COVID-19

The risks of establishing liability also weigh in favor of approval. The primary risk is that Plaintiffs do not establish liability on their allegations that conditions of Connecticut prisons during the COVID-19 pandemic violate their Eighth and Fourteenth Amendment rights. As discussed above in Section II.a., Plaintiffs bear the burden of proving that COVID-19 poses an objective threat to human health; that Defendants' knowledge, actions, and inaction demonstrates a deliberate indifference to the Plaintiffs' welfare; and, for the pre-trial detainee plaintiffs, whether the conditions in the DOC facilities bears no rational relationship to a legitimate governmental objective. Establishing liability on these issues typically is a very high bar. Here, Plaintiffs are aware that they would encounter difficulty establishing that Defendants showed a deliberate indifference to Plaintiffs' welfare and/or medical need in light of the piecemeal mitigation that DOC did implement (though those measures varied widely across facilities) and deposition

testimony from Commissioner Cook that he was taking the pandemic seriously and was making real efforts to take actions to the best of the DOC's capabilities.

A second risk of establishing liability lies in the formidable obstacles any prisoner, or class of incarcerated people, faces in attempting to assert constitutional rights through litigation. It is a sad reality that "prisoners have not fared well at trial," *Ingles*, 438 F. Supp. 2d at 213, whether in this Circuit or elsewhere. As with most prison cases, Plaintiffs' case rests on testimony from class members—i.e, incarcerated people who, in this case, would have to testify remotely from various facilities. While Plaintiffs' counsel is confident that class members would be testifying truthfully and accurately about the conditions in their respective facilities, as the parties prepared for a preliminary injunction hearing, the challenges of not being able to present live, in-person testimony from class members became apparent. Coupled with the credibility issues incarcerated people are faced with any time they testify, and the contradictory testimony Defendants submitted (and intended to present), the hill to establishing liability becomes that much steeper.

A final risk of establishing liability is the shifting factual and legal landscape. The state of the pandemic, along with the state of DOC facilities, changed day-to-day and even hour-to-hour over the course of this litigation. Changes within DOC, in particular, often appeared to be in response to allegations made or declarations filed in this litigation (and Defendant Cook testified to that effect). Each time Plaintiffs built their case, the facts on the ground would change (e.g., Defendants were sending people who had tested positive to Northern, then they were not; testing was not widely available in Connecticut, then it was; class members did not have access to masks, then they did, then they did not). The rapid shifts in the facts, in the national case law, and even in the science (for example, whether there is aerosolized transmission of COVID-19) create a moving target for proving liability that significantly increases Plaintiffs' burden and risk.

Given these considerations, there is a real risk that Plaintiffs will not prevail on liability before a jury. That result would foreclose the possibility of implementing the kind of mitigation measures across all facilities provided for in the Agreement. This, again, is a huge risk of establishing liability that weighs in favor of approval. Finally, as we have all painfully learned over the last several months, a delayed response to COVID-19 greatly increases the risk of transmission and puts people at risk. Protracted and uncertain litigation would not have served the best interests and the health of the class members.

e. The Risks of Establishing Damages and Obtaining Relief Also Are High and Weigh in Favor of Approval

Likewise, there is a substantial risk of establishing damages and obtaining relief at trial. As this Court has seen, the proposed Agreement provides very specific requirements for mitigating the spread of COVID-19 within the facilities, which is crucial to saving lives both in DOC and the wider Connecticut community. The parties drafted the proposal with input from public health experts on both sides. Based on this input, the Agreement contains precise requirements for measures such as testing, quarantining, and distribution of masks and soap. The Agreement also takes into account the fact that guidelines for prevention and treatment of COVID-19 are rapidly changing. In the absence of an independent monitoring panel, there would be no way to assess whether, for example, hygienic practices continually conformed to current CDC guidelines. Given the scope of the proposed settlement agreement and the important public health considerations guiding it, it is apparent that the risks of obtaining relief at trial, which would not allow the parties to negotiate these important issues on a granular level, would be high.

Moreover, given the rapidly evolving public health crisis and the grave risk of death to those who contract COVID-19, it is critical that "implementation of these measures will begin immediately." *Ingles*, 438 F. Supp. 2d at 214. So "[e]ven if plaintiffs were to prevail on liability

at trial, the process of litigating the scope of relief and the details thereof surely would have taken months." *Id.* But months of "litigating the scope of relief" would be too late: without immediate mitigation measures, the virus surely will spread throughout DOC facilities not only to inmates, but to employees, and those in the broader Connecticut community with whom employees come in contact. This is a significant risk none of the parties would like to take.

Finally, the Medically Vulnerable Subclasses would have a particular challenge in obtaining relief. Because many of these class members' status as Medically Vulnerable necessitates that they establish a certain preexisting health condition, it would be expected that Defendants would comb through those class members' medical records to dispute their Medically Vulnerable status, as they did in the CCDLA suit. This type of review can devolve into a battle of experts and likely preclude relief for some Medically Vulnerable subclass members who actually need it depending on how a jury credits expert testimony about whether records establish a preexisting condition. *See, e.g.*, *In re Am. Bank Note Holographics, Inc.*, 127 F.Supp.2d 418, 426–27 (S.D.N.Y. 2001) (discussing the risk of establishing damages where this aspect of trial would involve a "battle of the experts" and uncertainty about how a jury may be swayed by one expert or another). This is on top of the need to show that these conditions mandate release, whether through a habeas theory or a 42 U.S.C. § 1983 theory (which could, potentially, entail additional PLRA bars). Thus, because the risks of establishing damages and obtaining relief is high, this factor also weighs in favor of approving the settlement.

f. As Approval Would Remove the Need for Plaintiffs to Continually Defend the Class Form, the Final Applicable *Grinnell* Factor Counsels Granting It

Plaintiffs also face sufficient risks in maintaining their class certification through a final judgment in this litigation, such that a resolution is preferable. Plaintiffs remain confident that the class did and does satisfy the Fed. R. Civ. P. 23(a) prerequisites, yet Defendants could conceivably

contest the class on the basis of their being spread across fourteen different prisons with their own architecture, capacity, and infection rates. Additionally, as with so many facets of their lives while imprisoned, Plaintiffs are not in control of facts that could tend to cause the Defendants to eventually claim a lack of standing if the infection numbers and declining prison population nearly converged. Or, Defendants could continue to attempt to pick off named Plaintiffs by arranging for release through one of the discretionary programs they control. Whatever the ultimate outcome of such arguments, approval of a resolution at this stage removes the effort and duration of the Plaintiffs' having to overcome challenges to their class form. *See deMunecas v. Bold Food, LLC*, 2010 WL 3322580, at *6 (S.D.N.Y. Aug. 23, 2010) (holding that the *Grinnell* class risk factor points towards approval where granting it would "eliminate[] the risk, expense, and delay inherent in" a either contested certification or a later motion for decertification). The Court should accordingly conclude that the sixth *Grinnell* factor points towards approval.

CONCLUSION

For the forgoing reasons, this Court should grant this motion and approve the parties' proposed Settlement Agreement.

Respectfully submitted,

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EXHIBIT 1

ORDER 421277

DOCKET NO: UWYCV206054309S

SUPERIOR COURT

CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION Et Al
V.
LAMONT, NED Et Al

JUDICIAL DISTRICT OF WATERBURY
AT WATERBURY

4/24/2020

ORDER

ORDER REGARDING:
04/07/2020 112.00 MOTION TO DISMISS PB 10-30

The foregoing, having been considered by the Court, is hereby:

ORDER:

On April 3, 2020, the plaintiffs, the Connecticut Criminal Defense Lawyers Association (CCDLA), Willie Breyette, Daniel Rodriguez, Anthony Johnson, and Marvin Jones (individual plaintiffs), FN1 filed the writ of summons, complaint, and motion for temporary order of mandamus FN2 in this action against the defendants, Governor Ned Lamont and Rollin Cook, Commissioner of the Department of Correction. On April 7, 2020, the defendants filed a motion to dismiss, along with a memorandum of law in support. FN3Thereafter, on April 8, 2020, the plaintiffs filed an amended complaint, which adds Kerri Dirgo and Joshua Wilcox as additional plaintiffs, and which includes additional allegations and changes to some previous allegations. FN4
In the amended complaint, the plaintiffs ask the court to issue a writ of mandamus compelling the defendants to (a) "immediately release all people having the CDC heightened risk factors for serious illness or death from COVID-19, to an appropriate medical facility where necessary"; (b) "immediately and meaningfully reduce the population density at each and every facility in which they confine people"; (c) "submit for the court's review and ongoing monitoring a plan: (1) to provide adequate sanitation and social distancing in prisons so as
to prevent the spread of COVID-19, including by taking all measures for screening, cleaning, hygiene and social distancing that the CDC recommends for correctional facilities; (2) to diagnose and treat people showing symptoms of COVID-19 in accordance with contemporary standards of care, (3) to approve, within seven days, community or private residences to those qualified for release to such via [General Statutes] § 18-100, (4) to approve, within seven days, residences for any prisoner or detainee who is now eligible for release but for the defendant's approval of a residence, and (5) to sufficiently fund transitional housing for the duration of the pandemic; and (d) undertake any other task necessary to discharge their duties to those in their custody during the pandemic, including by working with other arms of state government to expedite their handling of requests for release, and ensuring consideration of relief for all incarcerated people who can safely return to their communities."
The defendants assert in their motion to dismiss that the court lacks subject matter jurisdiction over this action on the basis that the defendant CCDLA lacks standing because it fails the classical aggrievement test and because it cannot assert third party standing on behalf of the individual plaintiffs. They also assert that the individual plaintiffs lack standing because they do not have any right to be released prior to the end of their lawful sentences and because their constitutional claims are based on alleged injuries that are too speculative. The defendants also assert that the plaintiffs' claims are nonjusticiable political questions. Finally, the defendants contend that the plaintiffs' request for the court to order the defendants to submit a plan for the court's review is barred by sovereign immunity to the extent that such a plan calls for the defendants to sufficiently fund transitional housing for the duration of the pandemic because such a plan would amount to an award of damages from the state, which has not consented to be sued.
On April 13, 2020, the plaintiffs filed a memorandum in opposition to the motion and the defendants filed a reply, along with a declaration of Cary Freston. Arguments on this motion were heard before this court on the record on April 15, 2020. Counsel for all parties participated by telephone.

DISCUSSION

"[A] motion to dismiss . . . 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." (Internal quotation marks omitted.) Santorso v. Bristol Hospital, 308 Conn. 338, 350, 63 A.3d 940 (2013). "A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction." (Internal quotation marks omitted.) MacDermid, Inc. v. Leonetti, 310 Conn. 616, 626, 79 A.3d 60 (2013). "A court deciding a motion to dismiss must determine not the merits of the claim or even its legal sufficiency, but rather, whether the claim is one that the court has jurisdiction to hear and decide." (Internal quotation marks omitted.) Hinde v. Specialized Education of Connecticut, Inc., 147 Conn. App. 730, 740-41, 84 A.3d 895 (2014).

A

Standing

"[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." (Internal quotation marks omitted.) Janulawicz v. Commissioner of Correction, 310 Conn. 265, 270, 77 A.3d 113 (2013).

"[B]ecause the issue of standing implicates subject matter jurisdiction, it may be a proper basis for granting a motion to dismiss." Electrical Contractors, Inc. v. Dept. of Education, 303 Conn. 402, 413, 35 A.3d 188 (2012). "The proper procedural vehicle for disputing a party's standing is a motion to dismiss." (Internal quotation marks omitted.) D'Eramo v. Smith, 273 Conn. 610, 615 n.6, 872 A.2d 408 (2005). "If . . . the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed." (Footnote omitted; internal quotation marks omitted.) Burton v. Dominion Nuclear Connecticut, Inc., 300 Conn. 542, 550, 23 A.3d 1176 (2011).

"It is well established that [a] party must have standing to assert a claim in order for the court to have subject matter jurisdiction over the claim. . . . Standing is the legal right to set judicial machinery in motion. One cannot rightfully invoke the jurisdiction of the court unless he 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. . . . [Our Supreme Court] has often stated that the question of subject matter jurisdiction, because it addresses the basic competency of the court, can be raised by any of the parties, or by the court sua sponte, at any time. . . . Where a party is found to lack standing, the court is consequently without subject matter jurisdiction to determine the cause. . . .

"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.' . . . Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471, 102 S. Ct. 752, 70 L. Ed. 2d 700 (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., 473. The standing requirement further evinces a proper regard for the judicial branch's relationship with coequal branches of government under our constitutional structure. 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.' Lewis v. Casey, 518 U.S. 343, 349, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996)." (Citations omitted; footnotes omitted; internal quotation marks omitted.) Johnson v. Rell, 119 Conn. App. 730, 735–37, 990 A.2d 354 (2010).

The defendants argue that the court lacks subject matter jurisdiction because the plaintiffs lack standing to pursue their claims in this mandamus action. In support of their position, they argue that none of the plaintiffs are classically aggrieved because they have not alleged any direct injury. They also maintain that the plaintiffs have failed to allege facts to meet the other standing requirements applicable to each of the plaintiffs.

1. Associational Standing as to the CCDLA

With regard to the CCDLA, the defendants first argue that the CCDLA lacks standing because the complaint sets forth no allegations of any injury to the CCDLA or its members; the plaintiffs allege only potential injury to some clients of its members. They further maintain that the CCDLA cannot successfully assert associational standing because such standing requires the plaintiffs to allege that the

CCDLA has suffered or will suffer some direct injury in its own right. They note that no such allegations are included in the complaint. In opposition, the plaintiffs argue that the CCDLA may avail itself of associational standing to bring this action on behalf of its members because they meet the requirements for such standing. Specifically, they maintain that its members suffer an injury in fact and therefore would otherwise have standing to maintain this action in their own right because they face the threat of coronavirus infection when visiting their clients who are "cycling in and out of DOC custody." They further assert that the interests they seek to protect are germane to the CCDLA's purpose, which is to support its members in their defense of people accused of violating the law. Finally, they assert that participation of the individual members would not be required. In their reply, the defendants assert that the plaintiffs' assertions of injury in their memorandum in opposition are not a substitute for allegations in their operative complaint, which do not allege any such injuries, and argue that the CCDLA members have no rights under the eighth or fourteenth amendments to the United States constitution and are not required to enter prisons to represent their clients. They also argue that because the plaintiffs do not allege that CCDLA members represent inmates in any actions asserting conditions of confinement claims, they fail to satisfy the "germaneness" prong of the associational standing test.

The court agrees with the defendants that the plaintiffs have not alleged facts demonstrating that the CCDLA meets the requirements for such standing. Specifically, the plaintiffs have not alleged that the CCDLA or any of its members have suffered any injury. In the amended complaint, the plaintiffs allege that the CCDLA "is a nonprofit Connecticut organization comprising lawyers who represent people accused of crimes in the state," it "has approximately 300 members statewide," "[i]ts members represent clients held in each of the facilities controlled by the Connecticut Department of Correction," and it "engages in education and advocacy for the fair treatment of those accused of crimes, and for positive changes in Connecticut's criminal and motor vehicle code," and "also serves as an amicus curiae to Connecticut's appellate courts." (Amended complaint, entry #114, ¶¶ 1-4.) The CCDLA is not mentioned in anywhere else in the complaint, and these allegations fail to assert that it has suffered or will suffer any direct injury.

"An organization may file suit on its own behalf 'to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the organization itself may enjoy.' Warth v. Seldin, 422 U.S. 490, 511, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975). In order to do so, however, an organization must satisfy the constitutional minimum of standing by demonstrating an 'injury in fact'; a causal connection between the injury and the conduct of which the party complains; and that it is 'likely' a favorable decision will provide redress." Juvenile Matters Trial Lawyers Assn. v. Judicial Dept., 363 F. Supp. 2d 239, 244 (D. Conn. 2005). Without any allegation of an injury in fact to the CCDLA, it fails to meet the requirements of associational standing. In Juvenile Matters Trial Lawyers Assn. v. Judicial Dept., supra, 363 F. Supp. 2d 245, an organization of attorneys who provided legal services to juveniles and their families brought an action seeking injunctive and declaratory relief against the Judicial Department and several individual defendants. In opposing a motion to dismiss asserting lack of standing, the plaintiff argued that it had standing to bring this action in its own right, on behalf of its members, and on behalf of the clients represented by the member attorneys. As in the present case, the complaint in that case did not include any allegation of injury to the association itself. Accordingly, the District Court determined that the plaintiff lacked standing to bring the action on its own behalf in that action. That same reason applies here. As the plaintiffs have not alleged any injury to the CCDLA, it lacks standing to assert any claim on its own behalf.

Moreover, any injury on behalf of the CCDLA that might be inferred from the complaint would be too indirect to demonstrate the CCDLA's standing because any such injury would be suffered by individual clients of individual members of the CCDLA. In Connecticut State Medical Society v. Oxford Health Plans (CT), Inc., 272 Conn. 469, 481–82, 863 A.2d 645 (2005), the plaintiff had argued that it had sufficiently alleged an injury suffered by the plaintiff in that it alleged that its members had suffered injury by the defendant's failure to make timely and complete payments to those members, which, in turn, resulted in the plaintiff suffering injury because the defendants' actions caused the plaintiff to expend resources and to suffer a reduction in revenue from its members. The court upheld the trial court's decision dismissing the action for lack of standing because the plaintiff's injuries "derive solely and exclusively from the harm allegedly visited upon the plaintiff's members by the defendant. In other words, none of the harm that the plaintiff allegedly suffered as a result of the defendant's conduct is direct." (Emphasis in original.) Id., 479. As the defendants in the present case correctly note, the injuries asserted in this case are one step further removed; any injuries would affect the inmates, not the CCDLA or its members. For this reason as well, the CCDLA does not have associational standing.

2. Third Party Standing of the CCDLA

The court must next address whether the plaintiffs' allegations support the plaintiffs' argument that the CCDLA has third party standing to assert claims on behalf of third party inmates. The defendants assert that the CCDLA cannot assert third party standing on behalf of inmates because the three requirements for such standing are not satisfied in the present case. Specifically, they argue that the complaint sets forth no allegation of an injury suffered by the CCDLA or its members, that the CCDLA's relationship with the third party inmates is not sufficiently close, and that there is no hindrance to the third parties' ability to protect their own interests.

The plaintiffs counter that the CCDLA satisfies the requirements for third party standing, specifically that the CCDLA's relationship with third party inmates is sufficiently close and that there is a hindrance to the third party inmates' ability to protect their own interests. The plaintiffs do not directly address the defendants' argument that the CCDLA fails to allege an injury to itself for purposes of third party standing, but contend that members of the public may bring mandamus actions to enforce a public right pursuant to Practice Book § 23-45 (a) FN5 without the need to demonstrate any interest in the outcome of the matter. Moreover, they maintain, the CCDLA is in a better position to represent the interests of its members' clients than the individual inmates themselves because of the limited resources available to the courts to review the petitions of numerous individual inmates seeking to obtain release due to the COVID-19 pandemic.

The United States Supreme Court has "recognized the right of litigants to bring actions on behalf of third parties, provided three important criteria are satisfied: The litigant must have suffered an 'injury in fact,' thus giving him or her a 'sufficiently concrete interest' in the outcome of the issue in dispute . . . the litigant must have a close relation to the third party . . . and there must exist some hindrance to the third party's ability to protect his or her own interests." (Citations omitted.) Powers v. Ohio, 499 U.S. 400, 410–11, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); see also State v. Bradley, 195 Conn. App. 36, 51, 223 A.3d 62 (2019) (listing "injury" as one of three requirements that must be satisfied in order to bring actions on behalf of third parties), cert. granted on other grounds, 334 Conn. 925, 223 A.3d 379 (2020).

As discussed elsewhere in this decision with regard to associational standing, the plaintiffs have not alleged any injury to the CCDLA or its members. As such an injury is required in order to bring a claim on behalf of third parties, the plaintiffs' claim of third party standing as to the CCDLA fails. Moreover, the plaintiffs' contention that such an injury or direct interest is not required where a plaintiff brings a mandamus action to enforce a public right is unpersuasive. Practice Book § 23-45 (a) provides: "An action of mandamus may be brought in an individual right by any person who claims entitlement to that remedy to enforce a private duty owed to that person, or by any state's attorney to enforce a public duty." (Emphasis added.) The CCDLA is alleged to be an association of criminal defense attorneys, not state's attorneys. The one Connecticut case cited by the plaintiffs in support of their position, State ex rel. E. Color Printing Co. v. Jenks, 150 Conn. 444, 190 A.2d 591 (1963), was brought by a state's attorney and is therefore inapposite. Although it is therefore not necessary to address the other requirements of third party standing, the court further notes that the plaintiffs' contention that it meets the third requirement, that the third parties must be hindered in protecting their own rights, is belied by the fact that the individual plaintiffs in this action are members of the group whose interests the CCDLA seeks to protect. For all of these reasons, the CCDLA lacks standing to assert claims on behalf of third parties in this action. Accordingly, the motion is granted and the action is dismissed with regard to the CCDLA.

2. Standing: Individual Plaintiffs

The court next turns to the issue of whether the individual plaintiffs have standing to maintain this action. The defendants argue that the individual plaintiffs lack standing because they have not alleged any injury as they do not have any right to be released before the end of their sentences. They maintain that the individual plaintiffs have no statutory right to early release and that the statutes providing for early release provide discretion to the executive officials charged with carrying out their provisions. In support, they further argue that the eighth and fourteenth amendments to the United States constitution do not provide a remedy for the individual plaintiffs because they do not provide for early release; rather, they relate to deliberate indifference to health and safety and the provision of medical care. They further maintain that the risk of harm posed by the individual plaintiffs remaining incarcerated is too speculative to support the plaintiffs' claims. Finally, the defendants argue that the plaintiffs' failure to allege that the defendants have the requisite level of mental culpability for purposes of a deliberate indifference claim deprives them of standing.

In opposition, the plaintiffs counter that the defendants' knowledge of the dangers of COVID-19, and the defendants' failure to take appropriate measures to prevent its spread in their facilities, amount to an eighth and fourteenth amendment violation because the individual plaintiffs' conditions of confinement are likely to cause serious illness and needless suffering. They argue that they have alleged the defendants' deliberate indifference to the plaintiffs' exposure to COVID-19 by their failure to take adequate steps to prevent exposure to the virus. Moreover, the plaintiffs maintain, their allegations pertaining to the defendants' mental state are adequate because they need only to have alleged that the defendants acted "recklessly" with regard to the safety of the individual plaintiffs who have been sentenced and that the defendants knew or should have known of the excessive risk to health or safety with regard to the individual plaintiffs who have not yet been sentenced. The plaintiffs further argue that claims of deliberate indifference do not require the plaintiffs already to have been exposed to the risk of infection. They maintain that the complaint adequately alleges that people incarcerated in DOC facilities are held in conditions posing a substantial risk of serious harm. Finally, the plaintiffs argue that their injuries are redressible by this court without regard to whether a particular statute or administrative scheme establishes a remedy to address the risks posed by the COVID-19 crisis and that, even if the court were limited only to the remedies already provided by the executive and legislative branches, the defendants already have the authority "to alter every existing textual form of relief such that their feigned helplessness divests them of a defense." Essentially, the plaintiffs argue that the court has broad discretion to structure appropriate relief in this mandamus action such that the plaintiffs have injuries that are redressible in this action.

As a threshold matter, the court rejects the defendants' argument that the issue of whether the individual plaintiffs have a right to be released from custody is dispositive of the issue of whether they have standing to maintain this action. Although the defendants have cited federal case law stating that "if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue"; Claybrook v. Slater, 111 F.3d 904, 907 (D.C. Cir. 1997); research reveals no appellate authority in Connecticut applying the concept of standing that broadly. To the contrary, our Supreme Court has consistently retained a distinction between standing and the plaintiff's "legal interests." "The fundamental aspect of [statutory] 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. . . . 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 and not whether the controversy is otherwise justiciable, or whether, on the merits, the plaintiff has a legally protected interest that the defendant's action has invaded. . . . The concepts of standing and legal interest are to be distinguished. The legal interest test goes to the merits, whereas standing concerns the question whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." (Internal quotation marks omitted.) Lazar v. Ganim, 334 Conn. 73, 85–86, 220 A.3d 18 (2019), quoting Mystic Marinelife Aquarium, Inc. v. Gill, 175 Conn. 483, 491–92, 400 A.2d 726 (1978). Accordingly, the court will not grant the defendants' motion on ground that the plaintiffs have no injury simply because they have no right to be released from custody. Nevertheless, the court must consider whether the plaintiffs otherwise have failed to allege an injury as a result of the defendants' handling of the COVID-19 pandemic.

"An allegation of injury is both fundamental and essential to a demonstration of standing. Under Connecticut law, standing requires no more than a colorable claim of injury; a plaintiff ordinarily establishes his standing by allegations of injury. . . . As long as there is some direct injury for which the plaintiff seeks redress, the injury that is alleged need not be great. . . . Furthermore, an allegation of injury is a prerequisite under federal law to the maintenance of an action under § 1983. See, e.g., Colombo v. O'Connell, 310 F.3d 115, 117 (2d Cir. 2002) ('[t]o state a claim under [§] 1983, a plaintiff must allege facts indicating that some official action has caused the plaintiff to be deprived of his or her constitutional rights—in other words, there is an injury requirement to state the claim'), cert. denied, 538 U.S. 961, 123 S. Ct. 1750, 155 L. Ed.2d 512 (2003); Ciambriello v. County of Nassau, 292 F.3d 307, 323 (2d Cir. 2002) ('[i]n order to state a claim under § 1983, a plaintiff must allege that he was injured by either a state actor or a private party acting under color of state law')." (Emphasis in original; footnotes omitted.) Johnson v. Rell, supra, 119 Conn. App. 735–38.

"The eighth amendment, which applies to the states through the due process clause of the fourteenth amendment to the United States constitution . . . prohibits detention in a manner that constitutes cruel and unusual punishment. . . . Cruel and unusual punishment refers to punishment that involves the unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the crime. . . .

Under the eighth amendment, prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of the inmates . . . .” (Citations omitted; internal quotation marks omitted.) Fuller v. Commissioner of Correction, 75 Conn. App. 133, 136, 815 A.2d 208 (2003).

“In challenging the conditions of confinement, the prisoner must meet two requirements. First, the alleged deprivation of adequate conditions must be objectively, sufficiently serious . . . such that the petitioner was denied ‘the minimal civilized measure of life’s necessities . . . .’ . . . Wilson v. Seiter, 501 U.S. 294, 298, 111 S. Ct. 2321, 115 L. Ed. 2d 271 (1991). Second, the official involved must have had a sufficiently culpable state of mind described as ‘deliberate indifference’ to inmate health or safety. Farmer v. Brennan, [511 U.S. 825, 834, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994)]. In that context, subjective deliberate indifference means that ‘a prison official cannot be found liable under the [e]ighth [a]mendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety . . . .’ Id., 837. (Citations omitted; internal quotation marks omitted.) Fuller v. Commissioner of Correction, supra, 75 Conn. App. 136–37.

In the present case, the plaintiffs have not alleged facts satisfying these two requirements. First, the plaintiffs have not alleged facts showing that the defendants have deprived the plaintiffs of the minimal civilized measure of life’s necessities by failing to release a sufficient number of prisoners from confinement in order to mitigate the risk of the spread of infection. Although Helling v. McKinney, 509 U.S. 25, 113 S. Ct. 2475, 125 L. Ed. 2d 22 (1993), supports the plaintiffs’ position that exposure to future harm can present an eighth amendment violation, the facts of that case are distinguishable from those alleged in the present case. In Helling, the United States Supreme Court held that the plaintiff in that case stated a cause of action under the eighth amendment by alleging that prison officials “have, with deliberate indifference, exposed [the plaintiff inmate] to levels of [environmental tobacco smoke] that pose an unreasonable risk of serious damage to his future health.” Id., 35. Although the court held that the fact that the plaintiff had not yet suffered any adverse health consequences from his exposure to smoke was not fatal to his claim, the plaintiff had asserted that he was presently and directly exposed to the dangerous condition, in that he was presently being exposed to smoke by being forced to share a cell with another prisoner who was smoking five packs of cigarettes per day. Id., 28. In the present case, the plaintiffs have not alleged analogous facts. For example, the plaintiffs do not allege that any of them are housed with or otherwise directly exposed to individuals with COVID-19. Rather, they allege that the preventative steps that the defendants have taken have not been and will not be adequate to address the pandemic because the plaintiffs will be subjected to a heightened risk of exposure to the coronavirus in the future as a result of inadequate steps taken to mitigate the risks.

Even assuming, arguendo, that the conditions to which the plaintiffs are being or will be exposed do rise to the level of a “serious risk to health or safety,” the plaintiffs have not alleged facts to satisfy the second requirement, that is, to show that the defendants have acted or will act with “deliberate indifference” to the risks posed by the COVID-19 pandemic. To the contrary, the plaintiffs describe the defendants’ conduct in the amended complaint as “commendable, but unfortunately insufficient to comply with their constitutional and statutory obligation to ensure the safety of those in their custody.” (Amended complaint, entry #114, ¶ 92.) Allegations that the defendants’ actions have been or will be “insufficient” do not rise to the level of a conscious disregard of an excessive risk to inmate health or safety.

“The second requirement follows from the principle that only the unnecessary and wanton infliction of pain implicates the Eighth Amendment. . . . To violate the Cruel and Unusual Punishments Clause, a prison official must have a sufficiently culpable state of mind. . . . In prison-conditions cases that state of mind is one of ‘deliberate indifference’ to inmate health or safety . . . .” (Citations omitted; internal quotation marks omitted.) Farmer v. Brennan, supra, 511 U.S. 834. The United States Supreme Court has explained that “deliberate indifference describes a state of mind more blameworthy than negligence.” Id., 835. It further explained that this standard “requires more than ordinary lack of due care for the prisoner’s interests or safety.” (Internal quotation marks omitted.) Id. “It is, indeed, fair to say that acting or failing to act with deliberate indifference to a substantial risk of serious harm to a prisoner is the equivalent of recklessly disregarding that risk.” Id., 836. In further clarifying what is meant by “recklessly” in this context, the court in Farmer explained that “a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.” (Emphasis added.) Id., 837. “The Eighth Amendment does

not outlaw cruel and unusual 'conditions'; it outlaws cruel and unusual 'punishments.' An act or omission unaccompanied by knowledge of a significant risk of harm might well be something society wishes to discourage, and if harm does result society might well wish to assure compensation. The common law reflects such concerns when it imposes tort liability on a purely objective basis. . . . But an official's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, cannot under our cases be condemned as the infliction of punishment." (Citations omitted.) Id., 837–38.

In the present case, the plaintiffs have not alleged facts demonstrating that the defendants had or have the requisite mental state with respect to the risks identified in the complaint. Although the allegations in the amended complaint do demonstrate that the defendants are aware of the seriousness of the risks posed by COVID-19 generally, the complaint does not allege facts demonstrating that the defendants are acting with deliberate indifference with regard to those risks. Rather, the plaintiffs assert in their amended complaint that the defendants, in failing to release prisoners from confinement to reduce prison population density, have not done enough to protect inmates from the risk of infection. As the defendants correctly assert, these allegations sound in negligence, not recklessness. Our Supreme Court has "described recklessness as a state of consciousness with reference to the consequences of one's acts. . . . It is more than negligence, more than gross negligence. . . . The state of mind amounting to recklessness may be inferred from conduct. But, in order to infer it, there must be something more than a failure to exercise a reasonable degree of watchfulness to avoid danger to others or to take reasonable precautions to avoid injury to them. . . . Wanton misconduct is reckless misconduct. . . . It is such conduct as indicates a reckless disregard of the just rights or safety of others or of the consequences of the action." (Internal quotation marks omitted.) Matthiessen v. Vanech, 266 Conn. 822, 832–33, 836 A.2d 394 (2003). As the allegations in the amended complaint do not sound in recklessness, the plaintiffs have failed to allege an eighth amendment injury and, accordingly, the individual plaintiffs lack standing to maintain this action.

B

Political Question Doctrine

Although it is not necessary to reach the other grounds asserted in the defendants' motion, as the court has already determined that none of the plaintiffs have standing to maintain this action and it must, therefore, be dismissed, the court will address the political question doctrine as an alternative basis for its decision. The defendants argue that the plaintiffs' action presents nonjusticiable political questions and must be dismissed because the plaintiffs' requests for relief in this mandamus action seek to impose the judgment of the court in place of the discretion vested in coordinate branches of government. In essence, they contend that by seeking mandamus relief that would limit or override the discretion otherwise vested in the legislative and executive branches of government, the plaintiffs' action presents nonjusticiable political questions. The plaintiffs counter that the plaintiffs' claims do not involve political questions because the court has the power to provide mandamus relief from reckless exposure to illness or death as a result of the spread of COVID-19 in their facilities. They maintain that enforcing the protections of the United States constitution against cruel and unusual punishment is within this court's authority. They argue that the defendants' duty to safeguard the health and wellbeing of the inmates in custody are not discretionary. In response, the defendants further argue that the question of how any violations of the plaintiffs' constitutional rights would be rectified should be left to the discretion of the legislative and executive branches. They maintain that because the plaintiffs seek relief that calls for the exercise of discretion by executive branch officials, and seeks no alternative relief such as a declaratory judgment that the plaintiffs' constitutional rights are being violated, this case presents nonjusticiable political questions and must be dismissed.

"The political question doctrine itself 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. . . . [I]n considering whether a particular subject matter presents a nonjusticiable political question, we have articulated [six] relevant factors, including: 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. Unless one of these formulations is inextricable from the case at bar, there should be no

dismissal for nonjusticiability on the ground of a political question's presence." (Citations omitted; internal quotation marks omitted.) Connecticut Coalition for Justice in Education Funding, Inc. v. Rell, 295 Conn. 240, 255-56, 990 A.2d 206 (2010).

Applying these factors to the present case, the plaintiffs' claims involve nonjusticiable political questions and should be dismissed for that reason as well. The plaintiffs seek mandamus relief compelling the defendants to release inmates with heightened risk factors for COVID-19 to "to an appropriate medical facility where necessary"; "immediately and meaningfully reduce the population density at each and every facility in which they confine people" by taking specific steps specified by the plaintiffs in their complaint; and to "submit for the Court's review and ongoing monitoring a plan" regarding certain aspects of the defendants' efforts to mitigate the spread of the coronavirus, providing medical care to inmates, approval of residences for qualified inmates, and to sufficiently fund transitional housing for the duration of the pandemic; and to undertake other necessary tasks. If the court were to compel the defendants to take these actions, such an order would necessarily be made without "judicially discoverable and manageable standards"; would not be possible "without an initial policy determination of a kind clearly for nonjudicial discretion"; would not be possible "without expressing lack of the respect due coordinate branches of government . . . ." See Id.

As the defendants correctly note, the statutes governing release and transfer of inmates in DOC custody provide discretion to the executive branch officials with regard to the transfer or release of inmates. For example, General Statutes § 18-100 (e) provides in relevant part that "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.) Similarly, General Statutes § 18-100c provides that an inmates with a sentence of two 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." (Emphasis added.) General Statutes § 18-52a (a) provides in relevant part: "Any person committed to the custody of the Commissioner of Correction who is confined in a correctional facility and requires hospitalization for medical care may be transferred by the department to any hospital having facilities for such care. . . ." (Emphasis added.) These statutes necessarily entail the use of discretion and judgment by the department of correction in determining whether to release or transfer an inmate. Accordingly, application of the above factors indicates that the action should be dismissed based on the political question doctrine.

By contrast, in Connecticut Coalition for Justice in Education Funding, Inc., the court determined that the plaintiffs' claims in that case did not present a nonjusticiable political question. In reaching its conclusion, the court summarized the reasoning set forth in an earlier decision, Seymour v. Region One Board of Education, 261 Conn. 475, 482–84, 803 A.2d 318 (2002). In both cases, the court relied, in part, on the forms of relief sought by the plaintiffs in determining that the case did not present a nonjusticiable political question. Specifically, it noted: "If we were to construe the complaint as requesting only that a court, having determined that the plaintiffs' constitutional claims are meritorious, order the [school] district to establish itself as a taxing district, and set the taxing powers and standards suggested by the plaintiffs, we would have grave doubts about the justiciability of the claim, as the defendant suggests. In that case, it is very likely that the claim would fall within one or more of the categories of nonjusticiability." Connecticut Coalition for Justice in Education Funding, Inc. v. Rell, supra, 295 Conn. 261. The court further explained: "Although the plaintiffs do seek, in part, such an order from the court, and although the text of the complaint presents such a remedy as the only way to vindicate the plaintiffs' rights, a separate prayer for relief is simply '[t]hat judgment be entered declaring that . . . [General Statutes] § 10–51 (b) is unconstitutional on its face and as applied by [the board].'" Id. It further explained: "This latter prayer for relief is susceptible of an interpretation that would leave the formulation of the appropriate remedy to the legislative branch, rather than requiring the judicial branch to entangle itself in what probably would be the nonjudicial function of establishing a taxing district. Furthermore, there is precedent for this court, having determined that a particular legislative scheme is unconstitutional, to leave the remedy to the legislative branch, at least initially. . . . We, therefore, consider the question of justiciability on the premise that the plaintiffs seek a declaration of the unconstitutionality of § 10–51 (b), with the remedy that they propose to be considered by the legislative branch." Id., 261-62.

Applying this reasoning to the present action yields a different result. In the present case, the plaintiffs' prayers for relief leave no room for an interpretation that the plaintiffs seek a mere declaration as to the constitutionality of the defendants' actions with respect to the COVID-19 crisis. Although the plaintiffs'

claims would depend, in part, on a determination that the individual plaintiffs' constitutional rights are being violated, the plaintiffs do not seek declaratory relief. They ask that the court order mandamus relief, specifically the release and relocation of inmates and the reduction in prison populations. Moreover, the nature of the action itself, mandamus, demonstrates that the nature of relief sought in this action is to compel specific actions on the part of the defendants, actions that are governed by statutes granting the defendants discretion with regard to how to carry out their responsibilities. Accordingly, this action presents nonjusticiable political questions and must be dismissed.

C

Sovereign Immunity

With regard to the defendants' sovereign immunity argument, the motion will not be granted on that basis. "The Supreme Court . . . has taught that sovereign immunity is not invoked simply because prospective injunctive relief ultimately results in a diminution of state funds." In re Dairy Mart Convenience Stores, Inc., 411 F.3d 367, 375 (2d Cir. 2005), citing Edelman v. Jordan, 415 U.S. 651, 668, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974) (although state officials, "in order to shape their official conduct to the mandate of the Court's decrees, would more likely have to spend money from the state treasury than if they had been left free to pursue their previous course of conduct" such "an ancillary effect on the state treasury is a permissible and often an inevitable consequence of the principle" that prospective injunctive relief is not barred by the eleventh amendment to the United States constitution). As the plaintiffs correctly assert, therefore, sovereign immunity does not bar the present action. Accordingly, the motion is not granted on sovereign immunity grounds. Nevertheless, for the reasons discussed elsewhere in this decision, the court nevertheless lacks subject matter jurisdiction, which requires that the motion be granted.

CONCLUSION

For the foregoing reasons, the defendants' motion to dismiss is hereby granted.

Footnotes

1 As noted elsewhere in this decision, Kerri Dirgo and Joshua Wilcox were added as plaintiffs on April 8, 2020. Accordingly, references to the "individual defendants" refer to them as well.

2 On April 8, 2020, the plaintiffs also filed a supplemental motion for temporary order of mandamus to conform to the amended complaint that was filed on that date.

3 On April 7, 2020, the defendants also filed an objection to the motion for temporary order of mandamus, with several exhibits.

4 On April 8, 2020, this court, Bellis, J., issued an order stating in relevant part: "By agreement of the parties, and with the court's permission, Kerri Dirgo and Joshua Wilcox are added as party plaintiffs, Amended Complaint entry #114 filed on today's date is the operative complaint, and Motion to Dismiss entry #112 is directed to said Amended Complaint."

5 Practice Book § 23-45 (a) provides: "An action of mandamus may be brought in an individual right by any person who claims entitlement to that remedy to enforce a private duty owed to that person, or by any state's attorney to enforce a public duty." (Emphasis added).

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Judge: BARBARA N BELLIS

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EXHIBIT 2

STATE OF CONNECTICUT

SUPREME COURT
APPELLATE COURT

CAROLYN C. ZIOGAS
CHIEF CLERK

SUSAN C. REEVE
DEPUTY CHIEF CLERK

231 CAPITOL AVENUE
HARTFORD, CT 06106

TEL. (860) 757-2200
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May 15, 2020

Re: UWY-CV20-6054309-S *Connecticut Criminal Defense Lawyers Association et al*. v. *Ned Lamont et al.*

Dear Counsel of Record:

Today, Chief Justice Richard A. Robinson granted your Application for Certification to Appeal pursuant to Connecticut General Statute § 52-265a, which was filed on May 8, 2020. *

*A scheduling order for briefing will issue on Monday, May 18, 2020.

Very truly yours,

/S/
L. Jeanne Dullea
Assistant Clerk-Appellate

Notice sent: May 15, 2020
Hon. Barbara N. Bellis
Counsel of Record
Clerk, Superior Court, UWY-CV20-6054309-S

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