UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

JOSEPH A. DENBOW and SEAN R. RAGSDALE, *on their own and on behalf of a class of similarly situated persons*, *Petitioners*, v. MAINE DEPARTMENT OF CORRECTIONS and RANDALL A. LIBERTY, Commissioner of Maine Department of Corrections *in his official capacity*, *Respondents*	Case No. 20-cv-00175-JAW

PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

Petitioners and putative Class Members in the custody of Respondents seek habeas relief from unconstitutional conditions of confinement during the COVID-19 pandemic that continues to ravage the United States. Petitioners sought relief in federal court because, at the time this petition was filed in May 2020, the state courts were operating at a greatly reduced capacity, with no apparent procedural avenue to adjudicate claims on behalf of the 900+ putative class members who are medically vulnerable to COVID-19. Respondents have sought to dismiss Petitioners' claims for failure to exhaust state court remedies under 28 U.S.C. § 2254. The motion should be denied.

As an initial matter, as set forth in Petitioners' July 10, 2020 "Memorandum Regarding the Applicability of the Rules Governing Section 2254 Cases," this Court should not convert the § 2241 Petition to a § 2254 petition. Under established law, moreover, this case presents the type of unusual and exceptional circumstances that justify excusing the prudential exhaustion requirement under 28 U.S.C. § 2241.

Even if § 2254 exhaustion requirements apply, the Motion fails because it appears that state court remedies would be unavailable or ineffective to provide the necessary relief in this case. The sole question under § 2254 is whether, at the time Petitioners filed the petition on May 15, 2020, "it appear[ed] that" pursuing state court remedies would be futile, because such remedies were unavailable or ineffective to protect the rights of Petitioners and putative class members. *See* 28 U.S.C. § 2254(b)(1). That is exactly the case here. At the time Petitioners filed this action, the Maine state courts were at a virtual standstill due to the virus. And although class-wide relief is absolutely necessary and critical in this action, the state courts do not appear to offer any class relief for the claims at issue in this case.

In their motion, Respondents make no showing that class relief is available under the any of the potential remedies on which they rely. Nor do they show that potential remedies such as the Maine Administrative Procedure Act and Maine Criminal Procedure Rule 35 are appropriate to raise the constitutional and federal statutory violations asserted here. Because the § 2254 exhaustion requirement does not apply to remedies that are merely conjectural, and Respondents *admit* that, at best, it is unknown whether Maine courts would permit class relief under any of the remedies they cite, exhaustion is not required here, and the Motion must be denied.

In addition, Respondents admit that they are trying to have it both ways, arguing in this Court that class relief is available in state proceedings, while acknowledging their intention to argue to the state court against class treatment of Petitioners' claims. In such circumstances, and given the speed with which the virus can cause irreparable harm to the putative Class, the Court may, and considerations of fundamental fairness and judicial economy mandate that it should, deem any state court remedies exhausted, and also deny the Motion on that basis.

Finally, in reliance on Respondents' representations to this Court that class remedies are available in state court, Petitioner Denbow filed a motion in his state court post-conviction review proceeding to amend his complaint to include class allegations. A ruling on the motion is pending. In the event the Court is not inclined to deny the Motion outright, Petitioners submit that the Court may defer a final ruling on this Motion and retain jurisdiction until the issue of whether class relief is available is resolved in the state courts.

ARGUMENT

I. The Court May Grant Habeas Relief to Petitioners Pursuant to 28 U.S.C. § 2241 Given the Extraordinary Circumstances Posed by the COVID-19 Pandemic

As set forth in Petitioners' "Memorandum Regarding the Applicability of the Rules Governing Section 2254 Cases" filed July 10, 2020 (the "July 10 Memorandum"), Petitioners

submit that 28 U.S.C. § 2241 remains the proper vehicle for relief in this action. *See* July 10 Memorandum at 2-6 & n.4, ECF No. 38 (July 10, 2020). The First Circuit has recognized that, where "unusual circumstances" exist, a federal court may grant habeas relief pursuant to Section 2241 without exhaustion of state remedies. *Benson v. Sup. Ct. Dept. of Tr. Ct.*, 663 F.2d 355, 358 (1st Cir. 1981) (explaining that "Section 2241, which empowers courts to issue writs and makes no mention of exhaustion, has been interpreted to allow a court to grant a writ before a defendant has exhausted his claim at trial, but only in unusual circumstances"); *see also Miller v. United States*, 564 F.2d 103, 105 (1st Cir. 1977) (explaining that Section 2241 provides a remedy for a challenging the conditions of confinement) (citing, *e.g.*, *Braden v. 30th Judicial Circuit Ct. of Ky.*, 410 U.S. 484 (1973)).[1] Accordingly, for the reasons set forth in Petitioners' July 10 Memorandum, and the extraordinary circumstances posed by the COVID-19 pandemic and its imminent threat to the health and lives of the Class, the Court should determine Section 2241 is applicable here, and that exhaustion is not required.

II. The Court May Grant Habeas Relief To Petitioners Under Section 2254 Without Exhaustion Where, As Here, "It Appears That" State Court Remedies Are Unavailable And/Or Ineffective To Protect The Rights Of The Petitioners And Putative Class Members

Respondents contend that the Petitioners' claims should be dismissed "because Petitioners failed to exhaust administrative remedies as required by 28 U.S.C. § 2254(b) and (c)." (Motion, at p. 1.) Section 2254 provides that, in general, habeas relief shall not be granted to a person in custody pursuant to a judgment of a state court unless "the applicant has exhausted the

[1] Although the *Miller* decision applied to a federal prisoner challenging conditions of confinement in a § 2241 proceeding, the court cited to the Supreme Court's reasoning in *Braden v. 30th Judicial Circuit Court*, in which a prisoner serving a state court sentence filed a habeas petition under 28 U.S.C. §§ 2241 and 2254, challenging a speedy trial violation on separate charges. 410 U.S. 484, 485-86 (1973).

remedies available in the courts of the State." 28 U.S.C. § 2254(b)(1). There are at least two escape hatches from the general exhaustion requirements; exhaustion of available state court remedies is not required where "it appears that" (i) state court corrective processes are not available, or (ii) circumstances exist that render such process ineffective to protect the rights of the Petitioners and other putative Class Members. 28 U.S.C. 2254(b)(1)(B)(i) & (ii).[2] In this case, the Petitioners and putative Class Members are excused from the exhaustion of state court remedies under either or both of these exceptions.

On a motion for dismissal of a habeas petition without a hearing, the well-pleaded allegations of the petition must be assumed to be true. *United States v. Mosquera*, 845 F.2d 1122, 1124 & n.2 (1st Cir. 1988). To support dismissal, Respondents argue, without supporting authority, that (i) Petitioners might have been able to bring an action for habeas class relief on the claims at issue herein in state court Post-Conviction Review ("PCR") proceedings or common law habeas, (ii) Petitioners were potentially entitled to file a claim under the Maine Administrative Procedure Act for court review of the DOC's decisions, and (iii) Petitioners may have been entitled to file motions to correct an illegal sentence in their individual cases under Maine Criminal Procedure Rule 35. [3] (Motion, at pp. 10, 13-15.) As shown below, Respondents

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[2] Although Respondents also refer to § 2254(c), (Motion at 2, 10), this section only applies in determining whether a habeas petitioner has successfully exhausted state remedies, not whether an exception to the exhaustion requirement applies. *See* 28 U.S.C. § 2254(c). For the latter question, the sole question is whether it "appears that" exhaustion would be futile. *See id.* § 2254(b)(1).

[3] Respondents argue that federal courts have no jurisdiction to excuse exhaustion except as the statute expressly allows, relying on *Ross v. Blake*, 136 s. Ct. 1850, 1857 (2016). But here, the plain language of the statute supports Petitioners, by excusing the exhaustion requirement when "it appears that" state remedies are unavailable or ineffective to satisfy the rights at issue. 28 U.S.C. § 2254(b)(1).

have not rebutted Petitioners' showing that it appears that none of these potential remedies were available and effective at the time of filing of the Petition to protect the rights of the putative Class Members. Nor have Respondents shown that class relief—which is a crucial part of the requested relief during the COVID-19 pandemic—is available under any of the procedural vehicles on which Respondents rely. Accordingly, the Motion must be denied.

A. The § 2254 Exhaustions Requirements Apply Only to Remedies That Are Available At the Time of Filing of the Habeas Petition

As a threshold matter, the Section 2254 exhaustion provisions apply only to a petitioner's failure to exhaust state court remedies that are available "at the time he files his application in federal court." *Fay v. Noia*, 372 U.S. 391 (1963), overruled in part on other grounds by *Wainwright v. Sykes*, 433 U.S. 72 (1977)[4]; *Dana v. Tracy*, 360 F.2d 545, 548 (1st Cir. 1966) (availability of state court remedies is to be assessed "at the time the application was made for writ of habeas corpus"). This rule applies "even if at some earlier or later stage a remedy was or will become available." R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure*, Vol. 2, § 23.4[a][1].

Importantly, although the decisions in *Fay* and *Dana* predated the statutory amendments in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the futility exceptions to the exhaustion requirement have remained the same. As detailed in *Dana*, no exhaustion was required under the then-applicable version of § 2254 when "'there is either an absence of available State corrective process or the existence of circumstances rendering such process

[4] As described by the First Circuit, *Wainwright* stands for the limited proposition that "procedural default in the state court acts as an adequate and independent state ground for decision, precluding the granting of a federal habeas corpus petition." *Gagne v. Fair*, 835 F.2d 6, 9 (1st Cir. 1987) (citing *Wainwright*, 433 U.S. 72).

ineffective to protect the rights of the prisoner." *Dana*, 360 F.2d at 547 n.1 (quoting 28 U.S.C. § 2254 (1966)). Likewise today, § 2254 incorporates the same exception to the exhaustion requirement when "there is an absence of available State corrective process," or "circumstances exist that render such processes ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1) (2020); *see also Jones v. Jones*, 163 F.3d 285, 298 (5th Cir. 1998) (stating the post-AEDPA "futility exception appears to be derived from the language of pre-AEDPA § 2254(b)"). Accordingly, as in *Fay* and *Dana*, the inquiry under the modern-day § 2254(b)(1) must remain the same, and focus on the State court remedies available at the time of filing the Federal court petition.

Respondents devote much of their brief to arguing that since the time of filing of the Petition, Maine courts "are increasingly back to normal operations" (Motion, at p. 2), that the Maine state courts may return to normal processing of cases by September, and that subsequent to the filing of the Petition, "it has since become clear" that the Maine courts will proceed with Mr. Denbow's state action (Motion, p. 10). These and all of Respondents' other contentions regarding changes in state court operations occurring post-petition are irrelevant, and should be given no weight by the Court. FED. R. EVID. 402 ("Irrelevant evidence is not admissible").

B. Class Relief is Critical to Protect the Rights and Lives of the Over 900 Medically-Vulnerable Prisoners Held in DOC Facilities, But is Not Apparently Available In State Court Proceedings

A state remedy is not available, and hence exhaustion is not required, if the availability or effectiveness of a proposed remedy is merely conjectural at the time of filing of the petition. To invoke an exception to the exhaustion requirement, Petitioners must show only that "it appears that" State corrective processes are unavailable or ineffective. 28 U.S.C. § 2254(b)(1). Indeed, where a petitioner has not exhausted state remedies, "the court may still grant habeas relief when *it appears that* requiring the petitioner to exhaust his remedies is futile." *Banks v. Smith*,

377 F. Supp. 2d 92, 95 (D.D.C. 2005) (citing *Piercy v. Black*, 801 F.2d 1075 (8th Cir.1986); *Sarzen v. Gaughan*, 489 F.2d 1076 (1st Cir.1973); *Layton v. Carson*, 479 F.2d 1275 (5th Cir.1973)) (emphasis added).

Indeed, in evaluating section 2254's exhaustion requirement, the Supreme Court has previously found there was no "available" procedure when it was only "a matter of conjecture" whether "the State would have heard petitioner's claims in any of the suggested alternative proceedings." *Wilwording v. Swenson*, 404 U.S. 249 (1971) *superseded by statute on other grounds as stated in Woodford v. Ngo*, 548 U.S. 81 (2006). As another court explained, exhaustion of remedies was not required where it was not clear that claimed remedy was generally available and "State has not produced any precedent indicating [otherwise]." *Jones v. Washington*, 15 F.3d 671, 674 (7th Cir.), *cert. denied*, 512 U.S. 1241 (1994), *overruled in part on other grounds as stated in Wilkinson v. Cowan*, 231 F.3d 347 (7th Cir. 2000).

Here, although class relief is critical and necessary in this action to protect the rights, and potentially the lives, of the over 900 putative Class Members, Respondents not only fail to show class relief is clearly available, they *admit* that the "reality is no one know whether Maine courts will allow such class claims." (Motion, at p. 18.) Because Respondents have failed to show that any class remedy is clearly available, and admit that the availability of such relief is conjectural, exhaustion is not required, and the Motion must be denied.

1. Class Relief is Necessary and Critical in this Action

Petitioners propose to represent a class of all prisoners held in DOC facilities who are at high risk to COVID-19 due to their age and/or underlying health conditions. According to the DOC, there are over 900 such persons incarcerated in DOC facilities who are at high risk to COVID-19. *See* ECF 1-6, Sideris Decl. Att. B, (May 4, 2020 email from Benjamin Bean,

Director of Classification, DOC, stating that there were 924 prisoners with underlying conditions in DOC prisons in addition to Petitioner Denbow).

Given the characteristics of the virus, its rapid spread among persons who are close together in congregate settings, the Class Members' underlying medical conditions and the conditions of their confinement in DOC facilities, Petitioners and the other Class Members face the risk of contracting COVID-19 and, within days, suffering severe physical injury, illness, and possibly death. *See Medeiros v. Martin*, 2020 U.S. Dist. LEXIS 77118 at *1 (D. R.I. May 1, 2020) (explaining the mortality rate from COVID-19 for high risk persons is approximately 15%); Parish Decl., ECF 1-9, ¶¶ 2, 11-12 (COVID-19 spreads rapidly in congregate conditions, and infectious diseases are documented to spread quickly in prisons); Goldenson Decl., ECF No. 1-11, ¶ 14 (the lack of pre-existing or herd immunity "allows for very rapid chains of transmission" of the virus). Indeed, according to recent reports from the San Quentin prison, it "took only days" for recently transferred prisoners from another prison in Chino to spread the virus to "half the inmates tested" in the San Quentin facility.[5]

Although the State of Maine and its representatives admit that physical distancing is necessary to avoid spread of the virus,[6] in Maine DOC facilities this is all but impossible. Prisoners in DOC are housed together, sometimes in dorms with fifty or more other persons, with whom they unavoidably come into close contact each day. Sideris Decl. Att. A, ECF 1-6; Denbow Decl. ¶¶ 16-17, ECF 1-1; Ragsdale Decl. ¶¶ 13-14, ECF1-3. They generally sleep in

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[5] Timothy Williams and Rebecca Griesbach, *San Quentin Prison Was Free of the Virus. One Decision Fueled an Outbreak*, New York Times (June 30, 2020), available at https://www.nytimes.com/2020/06/30/us/san-quentin-prison-coronavirus.html.

[6] S*ee* Declaration of Dr. Nirav Shah ¶¶ 9, 11, 18-20, 31, Cavalry Chapel of Bangor v. Mills, Docket No. 20-cv-156-NT, ECF No. 20 (May 8, 2020) ("Shah Decl."),

close proximity, two to four in a cell, and share sinks, toilets, and showers with the dozens of other prisoners. Denbow Decl., ¶ 16, 17; Ragsdale Decl., ¶ 13, 14. Class members spend much of their days in small, crowded dayrooms where physical distancing is impossible. Denbow Decl., ¶¶ 22; Ragsdale Decl., ¶ 19. When traveling through the facilities for meals or otherwise, prisoners are bunched together and cannot physically distance because there is not enough space. *Id.* Such conditions are perfect for the spread of the virus. *See* Goldenson Decl. ¶¶ 15, 20, 25-28. In short, the class members face the "'substantial risk' of harm . . . from being confined in close quarters in defiance of the sound medical advice that all other segments of society now scrupulously observe." *Savino v. Souza*, No. 20-10617-WGY, 2020 U.S. Dist. LEXIS 61775 (D. Mass 2020), at *13.

In short, all of the Class Members face the same risks of serious illness or death due to COVID-19, and all are all bound by common questions of law and fact, including (i) whether the conditions of their confinement in light of the pandemic violate the Eighth Amendment, and (ii) whether Respondents' refusal to grant medical furloughs or home confinement to allow them to physically distance constitute deliberate indifference and a violation of the Americans with Disabilities Act. Given the urgent risks posed by the COVID-19 pandemic, and the systemic nature of the harm, proceeding as a class is critical to protecting the rights of Petitioners and putative Class Members.

2. As Respondents Admit, There is No Established Class Remedy Available In State Court

Despite the necessity of class relief, it does not appear that any class remedy is available to Petitioners and the putative Class Members under state law. To the contrary, state law provides that petitions for post-conviction review "may attack only a single proceeding." M.R. Crim. P. 67(b). The Maine rules provide that petitions for post-conviction review are governed

by the criminal rules, not by the rules of civil procedure, such as Rule 23 allowing class actions. *See* M.R. Crim. P. 65 Committee Advisory Notes (stating "the present approach does not contemplate that the Maine Rules of Civil Procedure govern any aspect of the proceeding"). Further, state law provides that the post-conviction review procedures are the "exclusive method" for "reviewing post-sentencing proceedings occurring during sentences." 15 M.R.S. § 2122. Under their plain terms, those procedures do not appear to provide for class relief. 15 M.R.S. §§ 2121 – 2132.

Hence, as Respondents admit, the availability of a class remedy in state court is conjectural at best. Because a petitioner is not required to exhaust conjectural remedies, *Jones*, 15 F.3d at 674, the Motion must be denied.[7]

3. Filing of Individual PCR Actions By Each Class Member Would Not Provide an Effective or Available Remedy to Protect the Rights of the Petitioners and Putative Class Members

Respondents assert that a remedy is available to the individual Petitioners and Class Members because each could separately file individual PCR claims in state court to challenge the conditions of their confinement. Respondents contend such a remedy could be available because the state courts are "increasingly back to normal operations" and there is a plan for that to occur by September, and they assert that the "mere passage of time" in state court processing of claims

[7] Relying on *Roman v. DiGugielmo*, 675 F.3d 204 (3rd Cir. 2012), Respondents argue that Petitioners must show it is "certain" that the remedy is not available. (Motion, at 18). But that statement in *Roman* was nothing more than *dicta* because the court declined to "address the issue of exhaustion in [that] case." *Roman*, 675 F.3d at 209. More importantly, requiring Petitioners to prove "certainty" would contradict the controlling statutory standard merely requiring Petitioners to show that it "appears that" state remedies are unavailable or ineffective. *See* 28 U.S.C. § 2254(b)(1). *Roman* is not applicable here.

is not alone sufficient to render a remedy unavailable or ineffective under § 2254. (Motion, at p. 2, 7, 11.)

These contentions have no merit, for several reasons. First, as noted, whether a remedy is available is to be determined as of the time of filing of the petition, and therefore whether the Maine courts are getting back to more normal operations now, after their prior shutdown, is not relevant. *Dana,* 360 F.2d at 548. At the time the Petition was filed here, the Maine Judicial Branch was operating with reduced court hours,[8] and had cancelled or delayed all "criminal matters (except as related to the incarceration of a defendant)." *See* PMO-SJC-1 (Apr. 14, 2020). State courts were allowed to "schedule and hear only the following" criminal proceedings: "[a]rraignments and first appearances of defendants held in custody," and "[m]otions for review of bail of defendants held in custody." *Id.* Additionally, although Mr. Denbow filed a motion for bail on April 13, and another motion requesting an emergency hearing on bail on April 23, the State opposed allowing even a hearing on Mr. Denbow's emergency request for bail, and as of May 15 when the Petition was filed, Denbow had not received any order from the Court regarding his case. *See* ECF 1-1, Denbow Decl., ¶ 27; ECF 31-11, Ex. K, at p. 2 of 3 (May 20, 2020 email from clerk of the Maine court, transmitting to Denbow's counsel the Maine court's order assigning a judge to Mr. Denbow's PCR case, and explaining that the order was not previously transmitted "[d]ue to the current situation and limited staffing").[9] Respondents' contentions as to what has happened since that time are not relevant.

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[8] Public Information Office, Maine Supreme Judicial Court (Mar. 22, 2020), https://www.courts.maine.gov/covid19/reduction-court-hours-march23.pdf.

[9] A copy of the current docket for Mr. Denbow's state PCR case is submitted herewith as Exhibit B.

Second, Respondents' contentions that the "mere passage of time" and delay in processing of state remedies does not render a remedy ineffective misses the mark entirely. (Motion, at p. 11.) This is not an ordinary case where a habeas petitioner contends he or she is being detained unlawfully, but the only harm the petitioner may suffer while the state court process plays out is the harm of continuing to be unlawfully confined. In this instance, the Petitioners and putative Class Members are subject to a high risk of serious illness or even death in a matter of days if they contract the virus, and as such may suffer irreparable harm while waiting for the state courts to process a case. In such circumstances, state procedures are ineffective to protect Petitioners' rights, because "delay . . . geld[s] state procedures so as to render the exhaustion requirement meaningless." *Shelton v. Heard*, 696 F.2d 1127, 1128 (5th Cir. 1983).

Moreover, proceeding on an individual basis in state post-conviction reviews is not feasible when the risks of COVID-19 to medically vulnerable prisoners—and the State's refusal to adequately protect prisoners from those risks—are common to all claims. This is precisely what the Court recognized in *McPherson v. Lamont*, considering similar challenges by (among other petitioners) persons serving sentences for state court convictions. No. 3:20CV534 (JBA), 2020 WL 2198279, at *7 (D. Conn. May 6, 2020). In *McPherson*, the Court acknowledged that, to be effective, state court relief must be available not only in theory, but also in practice. *Id.* As such, the question was whether the state court system would be able to expeditiously process a "massive volume of emergency habeas petitions—a number potentially in the hundreds or thousands, given the size of the putative class[.]" *Id.* Because the answer was "no," the court allowed the plaintiffs to "seek habeas relief under § 2241 without exhausting state court

remedies." *Id.* at *8. The court reached this holding despite "the Connecticut judiciary's best efforts in the face of an unprecedented global pandemic." *Id.* at *7.[10]

Likewise here, it would not be feasible for the Maine Superior Court to expeditiously process 900+ individual petitions, especially during the already difficult logistical challenges posed by the COVID-19 pandemic. Such an influx of petitions would be especially difficult to process, if not impossible, if the over 900 prisoners were to proceed in their individual cases without representation, as would be all but assured absent the option of class representation. Moreover, due to the COVID-19 pandemic and the dangers posed by congregating in enclosed spaces, prisoners in DOC facilities do not have normal access to law libraries, and instead are required to go through a complex process of requesting materials in writing or by email, and the DOC may subsequently make materials available by conducting rounds through the facilities. *See* ECF 32, Declaration of Dr. Ryan Thornell, Ph.D, In Support of Motion to Dismiss, ¶¶ 8-10. Such a process would make it all but impossible for any person seeking to research to bring a legal petition, but especially non-legally trained inmates, as one must normally review the library materials available to know which materials one needs.

Further, due to the prioritization of other matters, the Maine courts often put PCR proceedings at the bottom of the list. *See* Declaration of Devens Hamlen, Esq., ¶ 10. With the back-up of criminal cases that were not processed normally due to the COVID-19 shutdown, a wave of over 900 PCR cases would almost certainly overwhelm the courts. *Id.* Indeed, even under normal circumstances, obtaining PCR relief is a lengthy and time-consuming process,

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[10] Although the *McPherson* court was applying the exhaustion exception under § 2241, its focus on the realities imposed by the COVID-19 pandemic and the realities of hundreds of petitions being filed in state court, are just as relevant in considering whether it appears that state court remedies are "available" or "ineffective" under § 2254.

involving the period of time that it takes to assign a petition to a specific justice or judge, M.R. Crim. P. 69A(a); to promptly examine the petition under Rule 70, M.R. Crim. P. 70; to allow for the State to respond, M.R. Crim. P. 71; to provide the conference of all parties pursuant to M.R. 72A; to allow for assignment of counsel, M.R. Crim. P. 69; and to allow any proceedings on bail or an evidentiary hearing, M.R. Crim. P. 73, 74.

In sum, to rule in Petitioners' favor, the Court need not hold that remedies are never available in state court; rather, the Court need only conclude that, at the time Petitioners filed their petition in Federal court, it appeared that state court remedies were not "available," or would have been "ineffective," to handle an onslaught of hundreds of petitions challenging unlawful conditions under COVID-19. COVID-19 and its effects present a paradigm case for exceptional circumstances which render the state court individual remedy ineffective under § 2254. Given the extremely unusual circumstances created by COVID-19, the over 900 putative Class Members at risk of serious illness or death would almost certainly be unable to obtain a timely decision on their claims, and could suffer irreparable harm before the state courts were able to reach their cases. Accordingly, federal relief is necessary and proper. *See, e.g.*, *Granberry v. Greer*, 481 U.S. 129, 134 (1987) (acknowledging that courts may dispense with exhaustion in "rare cases where exceptional circumstances of peculiar urgency are shown to exist") (quoting *Rose v. Lundy*, 455 U.S. 509 (1982), *superseded in part by statute on other grounds as stated in Ralston v. Dir., Tx. Dept. of Crim. Just.*, 2011 U.S. Dist. LEXIS 68222 (E.D. Tex. 2011); 2 R. Hertz & J. Liebman, *Federal Habeas Corpus Practice and Procedure* § 23.4[a][ii], 1322-26 (7th ed. 2015) (explaining that federal courts have found state corrective process to be ineffective when "requiring exhaustion would cause irreparable damage to the petitioner's federal rights,"

for reasons "including that undue delay in the state courts risks mooting the petitioner's federal rights before he reaches the federal courts").

4. Respondents Fails to Demonstrate that Any Class Remedy is Available or Effective for State Habeas Corpus Under 14 M.R.S. § 5501

Respondents contend that each Petitioner and putative Class Member could file a petition for habeas corpus under 14 M.R.S. § 5501. They make this argument even though, under state law, the writ is only available if a person has no other available means of redress, *Haynes v. Robbins*, 158 Me. 17, 24, 177 A.2d 352 (1962), and the state PCR procedures provide that they are the exclusive state remedy for post-conviction review. 15 M.R.S. § 2122. Even if this were not the case, the proposed remedy under 14 M.R.S. § 5501 is to subject to the same failings rendering it ineffective to protect the putative Class Members' rights as is the state PCR remedy. Filing of individual state habeas actions by each putative Class Member would not be an effective or available remedy for the same reasons set forth in Section B.3 immediately above, and there is a substantial danger of irreparable harm occurring before any state remedy could ever be processed. And although Respondents have previously argued that Petitioners may be able to file a class action under 14 M.R.S. § 5501,[11] (in reliance upon which Petitioners have sought to pursue this avenue in State court, *see infra* II.D), Respondents now concede that they will oppose class treatment in state court.

[11] *See Denbow v. Maine Dep't of Corr.*, No. 1:20-CV-00175-JAW, 2020 WL 3052220, at *17 & n.7 (D. Me. June 8, 2020) (stating that "Respondents argued . . . at oral argument, that class actions are available in Maine under a common law habeas corpus petition and referred to a common law habeas petition involving a juvenile detainee at Long Creek Youth Development Center, indicating that the Petitioners could have brought a state common law class habeas corpus action").

5. Respondents Fail to Demonstrate That Any Remedy Under the Maine Administrative Procedure Act is Available or Effective to Protect the Rights of the Putative Class Members

Respondents assert that Section 11001 of Title 5 of the Maine Administrative Procedure Act ("MAPA") may provide a potential remedy for the claims asserted herein. Under Section 11001, a party is permitted to bring a court action to challenge a final agency decision. Such a remedy would not be available or effective in the circumstances, given the long time frame for administrative actions, including the time required for preparation and submission of preparation of the administrative record (5 M.R.S. § 11005), and the status of processing of actions in the Maine courts at the time of filing of this Petition. Moreover, Respondents admit that it is unknown whether class procedures apply to any of the potential remedies on which they rely. (Motion, at pp. 17-18.) Because there is no MAPA remedy that is apparently available to provide Petitioners with the emergency class relief they seek, MAPA cannot serve as a basis for granting the Motion.

6. Respondents Fail to Demonstrate That Any Remedy Is Available To Petitioners Under Maine Criminal Procedure Rule 35

Respondents also refer to Maine Criminal Procedure Rule 35, which allows a person convicted of a crime to file a motion in the criminal case for correction of "an illegal sentence or a sentence that was imposed on an illegal manner." The Rule also allows reduction of a sentence after the sentence has commenced, on the ground of "mistake of fact that existed as the time of sentencing." Me. Crim. Proc. Rule 35(c)(2). Hence, by its terms, Rule 35 addresses defects in sentencing, not impermissible conditions in a prison facility which arise only after sentencing. Because the rule is intended to address defects in sentencing, a motion for relief under it "must be made within a year after a sentence is imposed." Me. Crim. Proc. Rule 35(a).

Accordingly, it does not appear there is any basis to conclude the remedy is applicable to the types of claims the Petitioners and Class Members assert in this case. Respondents' contentions as to Rule 35 also fails because, where a remedy is procedurally barred under state law, including where it is time-barred, the remedy is not available for purposes of Section 2254. *See, e.g., Carsetti v. Maine*, 932 F.2d 1007, 1011 (1st Cir. 1991) (claim exhausted for purposes of Section 2254 because petitioner failed to raise it in state court proceedings and was procedurally barred from doing so). Even if this vehicle were applicable to the type of claims asserted by Petitioners in this case (which it is not), given the one year time limit, it would almost certainly not be available or effective for a large portion of the putative Class. Finally, Rule 35 provides only for a motion to be filed in a convicted person's criminal case; it does not provide any basis for class relief.

C. The State Court Exhaustion Requirements Should Be Deemed Satisfied Based On Respondents' Admissions They Will Likely Oppose The Availability Of Class Remedies And Other Avenues Of Relief In State Court

Respondents concede that although they are arguing to this Court that there are unexhausted remedies available to Petitioners in state court, in state court they may take the position that such remedies are not available to Petitioners. *See* Motion, at p. 13, n. 10 (stating that Respondents do not concede that the State will not contend in state proceedings that Petitioners are foreclosed by state law from obtaining the claimed "other avenues of relief"); and p. 17, n. 12 (stating that Respondents will likely oppose class treatment of the claims at issue in state court).

The federal courts, however, have rejected the notion that a state may escape federal court habeas review by arguing to the federal court that remedies are available to the petitioner in state court, but then turning around and taking the position in state court that the petitioner is not entitled to such relief under state law. In such circumstances, the courts deem that the exhaustion

requirements have been satisfied. *Russell v. Rolfs*, 893 F.2d 1033 (9th Cir. 1990) (holding that exhaustion requirements were satisfied where state argued to District Court than remedies were available to plaintiff under state law, then argued to state court that procedural default barred plaintiff from pursuing those remedies). Similarly here, this Court should not countenance Respondents' attempts to have it both ways, when that position would leave Petitioners without an available and effective avenue to assert their weighty constitutional and statutory claims. Accordingly, any state court remedies should be deemed exhausted, and the Motion should be denied

D. In The Alternative, The Court Should Defer A Ruling Until The State Court Determines If A Class Remedy Is Available Under Maine Law

As mentioned in the Motion, in reliance on Respondents' representations to this Court that class remedies are available in state court, Petitioner Denbow filed a motion to amend his state court petition to include class allegations. A copy of the motion to amend is attached hereto as Exhibit A. Given the gravity of the potential harm to the putative Class, and the rapid spread of the virus once it takes hold, Petitioners could suffer irreparable prejudice if they are forced to bounce back and forth from court to court while the State argues one position to this Court, and another to the state court. In the event the Court is not inclined to deny the Motion outright, based on both fundamental fairness and considerations of judicial economy, Petitioners submit that the Court may defer a ruling on the Motion or stay proceedings and retain jurisdiction until the state court rules on whether Denbow's state petition will include class relief or remedies are exhausted. Indeed, even if a federal court believes state remedies have not been exhausted, it may stay the federal proceeding pending state exhaustion. *See Rhines v. Weber*, 34 U.S. 269, 278 (2005). At least the same solicitude is required here, given the serious issues at play.

III. The Younger Abstention Doctrine Does Not Bar Petitioner Denbow's Claims

Finally, Respondents cite *Younger v. Harris*, 401 U.S. 37 (1971), and ask this Court to bar Petitioner Denbow's claims based on Denbow's state court action, which is being pursued not by them, but against them. This contention lacks merit because the fundamental requirement of *Younger* abstention: a federal plaintiff seeking to enjoin a state proceeding, is absent here.

"The doctrine established by *Younger v. Harris* and its successors forbids federal courts from *enjoining ongoing state proceedings*," *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (emphasis added). *Younger* is "inapplicable" to a parallel litigation in which the federal plaintiff "has not asked that any state proceeding be enjoined." *Williams v. Lambert*, 46 F.3d 1275, 1282 (2d Cir. 1995) (vacating *Younger* stay). "Abstention is not in order simply because a pending state-court proceeding involves the same subject matter." *Sprint Comms. v. Jacobs*, 571 U.S. 69, 72 (2013); *see also Lambert*, 46 F.3d at 1282 (explaining that the possibility of preclusion arising during parallel litigation "does not present the issues of state and federal comity with which *Younger* is concerned"); *Omar v. 1 Front St. Grimaldi, Inc.*, No. 16-cv-5824, 2019 WL 1322614, at *6 (E.D.N.Y. Jan. 8, 2019) (declining to apply *Younger* "because no one is trying to enjoin" the state labor investigation that the federal defendants alleged to be in progress).

Mr. Denbow has not asked this Court to enjoin any ongoing state proceeding or interfere with an action being prosecuted by Respondents. Instead, he has asked only that the Court rule that Respondents' acts violate the Eighth Amendment, the ADA, and the Rehabilitation Act, and that the Court order Respondents to remedy these unconstitutional and unlawful conditions—including the impossibility of physically distancing—and allow transfer to the community for him to safely avoid contracting the virus. Accordingly, *Younger* is not applicable.

Respondents also argue that an order from this Court releasing Mr. Denbow would interfere with his pending state court action by effectively terminating it. But to the extent that granting relief in the Federal case would render Mr. Denbow's state case moot, terminating a case because of mootness is not at all the same as seeking to enjoin it. Mr. Denbow is seeking only to require Respondents to exercise their authority to grant medical furlough or home confinement, under which Respondents and the state courts would continue to have jurisdiction over him.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request that Respondents' Motion be denied in its entirety. In the event the Court is not inclined to deny the Motion, Petitioners respectfully submit that the Court should defer a ruling on the Motion and retain jurisdiction at least until the state court issues a ruling on whether Petitioner Denbow's petition may be amended to include class allegations.

Dated: July 13, 2020

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that she has electronically filed this date the foregoing Opposition to Respondents' Motion to Dismiss with the Clerk of the Court using the CM/ECF system. This filing is available for viewing and downloading from the ECF system.

Dated: July 13, 2020 /s/ Emma E. Bond