Connecticut Superior Court
Judicial District of Waterbury

Connecticut Criminal Defense Lawyers Association,
Willie Breyette,
Daniel Rodriguez,
Anthony Johnson,
Marvin Jones, and
Kerri Dirgo,
Plaintiffs

No. UWY-CV20-6054309-S

April 9, 2020

v.

Ned Lamont and **Rollin Cook**,
Defendants.

Opposition to Motion to Dismiss

In this mandamus action, the plaintiffs seek emergency relief for the defendants' ongoing failures to protect them from the COVID-19 pandemic. The defendants have moved to dismiss [No. 112], raising a variety of arguments contending that the Court lacks the jurisdiction to force compliance with statutory and constitutional healthcare requirements for prisoners. Viewing the complaint as it must in its "most favorable light" and taking its allegations as true along with "those facts necessarily implied from the allegations," *Cuozzo v. Town of Orange,* 315 Conn. 606, 614 (2015), the Court should deny the motion.

1. The Connecticut Criminal Defense Lawyers Association is a Proper Plaintiff

The defendants devote a substantial portion of their argument to decrying the ability of the Connecticut Criminal Defense Lawyers Association (CCDLA) to seek mandamus. Because CCDLA is vindicating a public right, satisfies all the requirements for third party standing on behalf of the incarcerated, and can leverage associational standing to bring suit, the defendants' motion must be denied.

1.1. Connecticut Law Grants Members of the Public the Ability to Pursue Mandamus to Enforce a Public Right

In Connecticut, private entities are entitled to sue to enforce public officials to carry out their duties. Our supreme court has explained that "[w]hen the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the people are regarded as the real party in interest, and the relator at whose instigation the proceedings are instituted need not show that he has any legal or special interest in the result." *State ex rel. Eastern Color Printing Co. v. Jenks*, 150 Conn. 444, 448 (1963). The availability of mandamus under such circumstances is not unusual in state jurisprudence, given that many states' judiciaries—like ours—have no constitutional "case or controversy" predicate as does the federal one. *See, e.g., Save the Plastic Bag Coal. v. City of Manhattan Beach*, 254 P.3d 1005, 1011-12 (Cal. 2011) ("[W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the [petitioner] need not show that he has any legal or special interest in the result." (internal quotation marks omitted)); *State*

ex rel. Cittadine v. Dep't of Transp., 790 N.E.2d 978, 980 (Ind. 2003) ("[W]hen a case involves enforcement of a public rather than a private right the plaintiff need not have a special interest in the matter nor be a public official." (internal quotation marks omitted)); *Sears v. Treasurer & Receiver Gen.*, 98 N.E.2d 621, 626 (Mass. 1951) (holding that mandamus is available to members of the public where "the question was one of public right, and that the object of the petition was to procure the enforcement of a public duty, the people as a whole being regarded as the real party in interest") (internal quotations omitted); *Gregory v. Shurtleff*, 299 P.3d 1098, 1104 (Utah 2013) ("Utah law also allows parties to gain standing if they can show that they are an appropriate party raising issues of significant public importance." (internal quotation marks omitted)); *see also Marone v. Nassau County*, 967 N.Y.S.2d 583, 589 (N.Y. Sup. Ct. 2013). ("[T]he writ of mandamus may, in a proper case, and in the absence of an adequate remedy by action, issue on the relation of a private individual, to redress a wrong personal to himself, or on the relation of one, who, in common with all other citizens, is interested in having some act done, of a general public nature, devolving as a duty upon a public officer or body, who refuse to perform it." (internal quotation marks omitted)).

This Court's rules of practice reflect the availability of mandamus in such circumstances, providing that "[a]n 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." Practice Book § 23-45(a). Thus, CCDLA is a proper plaintiff. *See id.* § 9-23 ("An action may be brought in all cases in the name of the real party in interest, but any claim or defense may be set up which would have been available had the plaintiff sued in the

name of the nominal party in interest."); *accord State ex rel. Foote v. Bartholomew*, 103 Conn. 607, 618 (1925) (finding standing for mandamus where "matters relating to performance of public duty have been brought by the state's attorney at the relation of a private individual where there is a private right to have a public duty performed."). As permitted by decisional law and the Practice Book, CCDLA seeks in this case to enforce a mandatory public duty that both Governor Lamont and Commissioner Cook have to protect the life and health of those in DOC custody. It is thus entitled to obtain a ruling on their complaint.

1.2. The Close Relationship Between CCDLA Members and Their Clients, and Those Clients' Functional Inability to Litigate During the Pandemic Confer Third-Party Standing Upon the Association

Contrary to the Defendants' argument at pages 8-13 in their Memorandum, CCDLA also meets the prudential requirements for third-party standing on behalf of its existing clients. The federal supreme court has explained that third-party standing exists where a party is able to meet two conditions: first, that "the party asserting the right has a 'close' relationship with the person who possesses the right" and second, that "there is a 'hindrance' to the possessor's ability to protect [their] own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 129 (2004); *see also State v. Bradley*, 195 Conn. App. 36, 50-51 (2019) (quoting *Kowalski*). CCDLA satisfies both inquiries.

1.2.1. CCDLA has a sufficiently close relationship with its clients

A close relationship between a litigant and the third party ensures that "the former is fully, or very nearly, as effective a proponent of the right as the latter."

Singleton v. Wulff, 428 U.S. 106, 115 (1976). CCDLA clearly meets the close relationship prong, given its members' advocacy on behalf of their clients. Defendants rely on two cases in which attorneys were granted third-party standing on behalf of their clients and distinguish them by claiming that CCDLA's clients are hypothetical or prospective. Def's Memorandum of Law at 12 (citing *Caplin & Drysdale v. United States*, 491 U.S. 617 (1989) and *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715 (1990)). The argument that CCDLA's criminal defense attorney members only have hypothetical relationships with clients is patently false. The very nature of the direct harms alleged in this lawsuit stem from the fact that CCDLA members are exposing themselves to the risk of COVID-19 infection in order to visit their existing clients—not prospective clients that they may one day work with. There is no reason to believe that this case features different attorney–client relationships than the ones conferring third-party standing in *Caplin* or *Triplett*.

Defendants also argue that, because CCDLA is an association of lawyers as opposed to an individual lawyer, CCDLA would not be "very nearly" as effective of an advocate. *Singleton*, 428 U.S. at 115. On the contrary, in the context of COVID-19 there is good reason to believe that CCDLA would prove at least as effective as any one individual attorney in representing the interests of its members' clientele. Given the need to monitor conditions and interests of incarcerated clients statewide, members of a statewide organization of lawyers representing incarcerated people is best situated to do so. CCDLA's members, who routinely share information over listservs and by other organizationally sponsored means, are much better positioned than an individual attorney to survey the needs of clients throughout the state's prisons and jails and to represent their interests accordingly. *See* Conn. Criminal Def. Lawyers Ass'n, *Our*

Mission, http://www.ccdla.com ("Our active listserv encourages free communication between lawyers and the sharing of resources, pleadings and research amongst legal professionals, all within the confines of our strict adherence to client confidentiality issues.").

1.2.2. CCDLA clients face near-impossible obstacles to asserting their own rights.

Second, in this pandemic there is a substantial hindrance to "the third party's ability to protect his or her own interests." *Singleton*, 428 U.S. at 115-16. Though a litigant might be the third party's next-best advocate based on their relationship, the third party would still ideally represent themselves in court. To the extent that a plaintiff raises a third party's claims, a court inquires whether the third party's absence from court suggests that their right "is not truly at stake, or truly important to [them]." *Id.* at 116. Here, where CCDLA's members represent incarcerated clients who are hard-pressed to represent their own interests under the best of circumstances, let alone under the exigencies presented by COVID-19, there is no such obstacle.

CCDLA's clients face pervasive barriers to raising their own claims. These individuals are not only unable to pursue their own claims due to their incarceration, they are further prohibited due to restrictions on mobility and communication as a result of COVID-19. As Plaintiffs have already established, the COVID pandemic has closed all but seven courthouses to any but a short list of proceedings. *See* Connecticut Judicial Branch, *List of Courthouses where Priority 1 Level 1 Business Functions will Be*

Handled During the COVID-19 Pandemic (Apr. 1, 2020).[1] Courthouses that remain open are also operating on reduced hours. David Owens, *Connecticut Further Curtails Court Operations*, Hartford Courant, Apr. 3, 2020.[2]

The Defendants' argument that incarcerated individuals are free to seek their own relief through individual actions such as motions for bond reduction, sentencing modifications, and habeas corpus petitions verges on the absurd. See Defendant's Memorandum of Law at 14-15. It is patently unrealistic to expect the few courts and judicial personnel on duty during the pandemic to hear evidence on scores, or possibly hundreds, of applications for the sort of relief Defendants claim is available to CCDLA members' clients under the circumstances. This is why jurisdictions around the country are opting for exactly the type of categorical release that Plaintiffs seek here. *See, e.g.*, *Kentucky Plans to Release More than 900 Prisoners Because of the COVID-19 Outbreak*, WDRB, Apr. 2, 2020;[3] *US States Release 'Low-Risk' Inmates over Coronavirus Fears*, Al Jazeera, Mar. 23, 2020;[4] Paige St. John, *California to Release 3,500 Inmates Early As Coronavirus Spreads Inside Prisons*, Los Angeles Times, Mar. 31, 2020.[5]

It is especially ironic that Defendants assert this argument for individual actions while opposing relief that would make safer representation possible by the very criminal defense attorneys who would be deployed to represent their clients in such actions.

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[1] *Available at* https://jud.ct.gov/HomePDFs/CourthousesOpened.pdf?v4.
[2] https://www.courant.com/coronavirus/hc-news-coronavirus-court-hours-reduced-20200404-yuhmdrvhlnan3gcgruoczrqmxi-story.html.
[3] https://www.wdrb.com/news/kentucky-plans-to-release-more-than-900-prisoners-because-of-the-covid-19-outbreak/article_aef84282-7541-11ea-8a18-efe5a8cf107d.html.
[4] https://www.aljazeera.com/news/2020/03/states-release-risk-inmates-coronavirus-fears-200323175232427.html.
[5] https://www.latimes.com/california/story/2020-03-31/coronavirus-california-release-3500-inmates-prisons.

Certainly, Defendants cannot mean to suggest that they expect the judicial officers currently severely constrained by the COVID-19 safety measures to sort through and entertain countless *pro se* petitions in time to avert the looming disaster. CCDLA possesses standing to prosecute the cause in a single action for its clients.

1.3. CCDLA May Avail Itself of Associational Standing to Bring Suit on Its Members' Behalf

An association has standing to bring suit on behalf of its members when "(a) its members would otherwise have standing to sue in their own rights; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of members in the lawsuit." *Connecticut Ass'n of Health Care Facilities, Inc. v. Worrell*, 199 Conn. 609, 616 (1986). CCDLA meets all these criteria.

CCDLA's members, who are criminal defense attorneys with clients cycling in and out of DOC custody, suffer an injury-in-fact in that the attorneys face the threat of COVID-19 infection. They have standing to sue in their own rights, meeting the first element of associational standing. With regard to the second element, the rights that CCDLA seeks to protect are not only germane but essential to the organization's purpose, which is to support its members in their defense of people accused of violating the law. *See* Conn. Criminal Def. Lawyers Ass'n, *Our Mission*, http://www.ccdla.com (last visited Apr. 8, 2020) ("The Connecticut Criminal Defense Lawyers Association (CCDLA) is an organization of approximately three hundred lawyers who are dedicated to defending persons accused of criminal and motor vehicle offenses.").

Finally, regarding the third element, the United States Supreme Court has explained that "so long as the nature of the claim and of the relief sought does not make the individual participation of each injured party *indispensable* to proper resolution of the cause, the association may be an appropriate representative of its members, entitled to invoke the court's jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (emphasis added). In this case, the facts that Plaintiffs have asserted in their complaint and motion for injunctive relief, such as the risk and rate of COVID-19 infections in Connecticut's correctional institutions and the conditions within the state's prisons and jails that exacerbate and perpetuate that threat, are either well-established by publicly available information, or will require testimony by correctional officials rather than members of CCDLA. There is no reason to believe that CCDLA's members will need to individually participate in this proceeding.

Defendants argue that CCDLA lacks standing because Defendants' actions and inactions do not directly injure the CCDLA's members, Defs.' Memo [No. 113] at 8, but the cases they cite are inapposite. In support of their argument that CCDLA's members are not directly injured, Defendants cite *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 355 (2001), in which the court held that claims by plaintiffs—the city and mayor of Bridgeport—that handgun manufacturers and other defendants' actions had directly harmed the plaintiffs, were too remote to establish standing to sue. In this case, the harm to CCDLA is far more direct than the attenuated harm to the city and mayor of Bridgeport in *Ganim*. Whereas there the court held that the increased victimization of the city's residents as a result of defendant's advertising and manufacturing of handguns was too remote to establish standing, here there is no question that the CCDLA member attorneys' incarcerated clients are at direct and immediate risk of contracting COVID-

19. Defendants are holding CCDLA's incarcerated clients in a custodial setting in which the social distancing that public health officials recommend and that Defendant Lamont has ordered in other contexts impossible. *See* Pls.' Motion for Temporary Order of Mandamus at 6, 10-11. They are, by necessity, in direct physical contact with correctional personnel who are also exposing themselves to great risk of contracting COVID-19 in order to report to duty. Among the routine, daily in-person interactions that CCDLA's incarcerated clients have with DOC staff: they transport CCDLA's clients into, out of, and between DOC facilities; they escort CCDLA's clients within jails and prisons; they make deliveries; they arrange and supervise phone calls; and they deliver and collect meal trays. These activities pose a direct threat to CCDLA members' clients' health. They therefore also pose a threat to the health of CCDLA members, who are required, in order to carry out their professional obligations, to meet with incarcerated clients and with clients entering and departing DOC's jails and prisons, where the conditions fall far short of those required to protect health and safety during the COVID-19 pandemic. Therefore, *Ganim* is of no use here.

The same holds for the Defendants' misplaced reliance on *Juvenile Matters Trial Lawyers Ass'n v. Judicial Dep't*, in which lawyers who represented indigent children argued that lowering their compensation disrupted their clients' right to counsel. 363 F. Supp. 2d 239, 247 (D. Conn. 2005). In that case, the court held that the plaintiff organization lacked associational standing because its individual members also lacked standing. The court reasoned that the attorney members of the organization had voluntarily opted into the pay scale about which they were suing when they entered into contracts with the defendant, and therefore there was no injury-in-fact. *Id.* at 247. Here, neither CCDLA nor its members have agreed to be exposed to the pathogen, and have

not waived any claims against the defendants by virtue of practicing in the criminal division of this Court.

2. The Defendants' Knowledge of the Disease's Dangers, and Their Failure to Take the Medically Appropriate Measures to Prevent It, Amount to an Eighth and Fourteenth Amendment Violation

Next, the defendants claim that the individual plaintiffs currently in the virus's path phrase only a speculative question for the Court, and no avenue of redress because they do not meet any existing statutory schemes of early release from incarceration. They are wrong. Having extensive knowledge of the virus's dangers while leaving the plaintiffs in harm's way comprises a concrete injury, and, the Court is not so hobbled when fashioning equitable relief as to rely solely on statutory avenues of remediation.

2.1. Conditions of Confinement Likely to Cause Serious Illness Are Cognizable for Eighth and Fourteenth Amendment Purposes

Each individual plaintiff alleges that the Defendants have failed to take wide-scale, comprehensive, urgent action to de-densify the prison system and provide sanitation and hygiene measures adequate to protect their lives and health from a highly contagious, deadly disease. That is, Plaintiffs allege that they are being exposed to conditions posing "an unreasonable risk of serious damage to [their] future health." *Helling v. McKinney*, 509 U.S. 25, 35 (1993). As the U.S. Supreme Court determined in *Helling*, that claim is the *quintessential* Eighth Amendment violation.

The Supreme Court has given a clear mandate that an official may not "ignore a condition of confinement that is sure or very likely to cause serious illness and needless suffering the next week or month or year." *Id.* at 33. This is particularly acute in the infectious disease context. In *Hutto v. Finney*, the Court found that the Eighth

Amendment spoke directly to claims of prisoners crowded into cells in which infectious diseases were rampant. 437 U.S. 678, 682-83 (1978) (noting, among other Eighth Amendment infractions, that "[a]lthough some prisoners suffered from infectious diseases such as hepatitis and venereal disease, mattresses were removed and jumbled together each morning, then returned to the cells at random in the evening."). In *Rhodes v. Chapman*, similarly, the Court cited with approval a Fifth Circuit case finding an Eighth Amendment violation where people with communicable diseases were housed alongside others, with insufficient remedial measures taken and attempt at contagion prevention. 452 U.S. 337, 352, n.17 (1981).

The Court put a fine point on this in *Helling*, which involved claims regarding exposure to secondhand smoke by other prisoners and correctional officers. Flatly rejecting the defendants' motion to dismiss in that case, the Supreme Court found no question "that McKinney states a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health." 509 U.S. at 35. Construing *Hutto*, the Court explained that there was no question "the Eighth Amendment required a remedy, even though it was not alleged that the likely harm would occur immediately and even though the possible infection might not affect all of those exposed." *Id*. at 33.

Fully and completely repudiating Defendants' declaration here that "mere exposure to a disease is insufficient to satisfy either deliberate indifference or standing,"[6] Mot. at 21, the Supreme Court could not be clearer that exposure to

[6] Defendants' argument is couched as a standing argument, though it at times verges on an assertion of failure to state a claim. Both are incorrect. Standing is discussed at greater length *infra*.

conditions that "risk . . . serious damage to . . . future health" states an Eighth Amendment claim.

Defendants' confounding assertion flies in the fact of our current reality. As the Court reads this, the life of every person in Connecticut has been fundamentally upended by COVID-19. The fact that undersigned counsel is writing this from our homes, where we have been ordered to shelter in place for months lest we risk exposure to this virus, Am. Compl. ¶ 21; that every other possible congregate setting across the state has been de-densified by executive decree, *see id.* ¶¶ 22–27; that Governor Lamont has enacted two types of emergencies, *id.* ¶ 18, and further suspended or modified hundreds of state laws and regulations simply to keep people away from each other, *id.* ¶ 19—all of this speaks to the enormity of the harm Plaintiffs assert, and the imminence of the risk to them from the actions they allege Defendants (not) to have taken.

Defendants' argument also misses the point, as evidenced by the two cases they cite. Of course, Plaintiffs do not simply allege that they are being exposed to COVID-19; they allege that Defendants are deliberately indifferent to their exposure by failing to take adequate steps to guard against contagion, and further failing to do the one thing every public health expert states must be done to prevent mass outbreak: de-densify. The two cases cited by defendants—both of which involved a pro se complaint by a prisoner or detainee—are not to the contrary. In one, "the Court discern[ed] no allegation suggesting the defendants acted with deliberate indifference"; in fact, the pro se plaintiff in that case himself asserted that his facility was sanitized and officials "took care to ensure the plaintiff was not placed in a facility prior to its sanitization." *Ayala v. NYC Dep't of Corr.*, No. 10 CIV. 6295 JSR KNF, 2011 WL 2015499, at *2 (S.D.N.Y. May 9, 2011). Meanwhile, the court did not reach the question of whether "the plaintiff's

exposure to swine flu constitutes a sufficiently serious medical condition." *Id.* In the other, the court seemed similarly uncertain whether the plaintiff was asserting anything more than exposure to swine flu—and then cited, perhaps mistakenly, to *Ayala* to find "that exposure to swine flu, in and of itself" was not sufficiently serious. *Jackson v. Rikers Island Facility*, No. 11 CIV. 285 RMB, 2011 WL 3370205, at *2 (S.D.N.Y. Aug. 2, 2011). Neither of these cases is on point, and neither is dispositive here. *Cf. Jimenez v. City of New York*, No. 18 CIV. 7273 (LGS), 2020 WL 1467371, at *3 (S.D.N.Y. Mar. 26, 2020) (plaintiff's exposure to inmates with active tuberculosis "sufficient to show that he faced an objectively serious risk of harm"); *Narvaez v. City of New York*, No. 16 CIV. 1980 (GBD), 2017 WL 1535386, at *6 (S.D.N.Y. Apr. 17, 2017) (pre-trial detainee's allegation that "DOC housed him with inmates with active TB who were not taking medication suffices at the pleading stage to allege that he faced an objectively serious risk of harm, that is, of contracting TB," notwithstanding DOC's assertion of "a policy of 'separating inmates with tuberculosis from inmates without tuberculosis'").

Defendants' motion is, at base, an attempt to downplay the obvious: that COVID-19 is an unprecedented, and unprecedently dangerous, mix of contagious and fatal, and doubly so for those who are locked inside cells. *See* Rich Aff. (Exhibit 24) ¶¶ 6, 8–12; Giftos Aff. (Exhibit 19) ¶ 16. In today's brave new world, Plaintiffs' allegations of deliberate indifference sound in the heart of constitutional protections for those who are incarcerated.

2.2. Deliberate Indifference does not Require a Demonstration that the Defendants Intentionally Exposed the Plaintiffs to the Virus

Each individual Plaintiff has likewise alleged a concrete injury that this court can redress. Contrary to Defendants' argument, the allegations in the complaint

are well beyond sufficient to allege a proper violation of deliberate indifference under the federal and state constitutions.

A claim of deliberate indifference based on dangerous conditions of confinement requires the allegation of "conditions [that] pose an unreasonable risk of serious damage to [the plaintiffs'] health," *Darnell v. Pineiro*, 849 F.3d 17, 30 (2d. Cir. 2017), and that the government official acted with a sufficiently culpable state of mind, *Farmer v. Brennan*, 511 U.S. 825, 838 (1994). For individuals who are sentenced, a cognizable state of mind requires alleging that Defendants were "acting recklessly," which is to say that the prison "official . . . acted or failed to act despite his knowledge of a substantial risk of serious harm." *Id*. at 826, 842. For individuals who are unsentenced, the requisite statement of mind requires showing that the official knew or should have known of the excessive risk to health or safety. *Darnell*, 849 F.3d at 35.

Defendants seek to impose a higher pleading standard, unsupported by law, to establish a claim of deliberate indifference. They argue that, for Plaintiffs' claim to survive their motion to dismiss, Plaintiffs must "alleg[e] that they are being deliberately exposed to COVID-19 by Defendants or their subordinates," by alleging, for example, that they were in "cell[]s with someone with COVID-19." Motion to Dismiss at 20. That is simply not the law. A claim of deliberate indifference does not require a present substantial risk of being infected with COVID-19; it is established by an unreasonable risk of being seriously harmed by the virus. It similarly does not require that Defendants act deliberately or intentionally to expose prisoners to the harm, only that they are deliberately indifferent to the serious risk of it. *Farmer*, 511 U.S. at 838. Plaintiffs in this case who DOC keeps in conditions that are tantamount to a petri dish for the spread of COVID-19 have more than sufficiently pleaded such a claim.

2.2.1. Failing to Protect Prisoners from a Lethal, Easily Transmitted Airborne Disease Such as COVID-19 Constitutes a Substantial Risk of Harm

First, a claim of deliberate indifference does not require that Plaintiffs allege currently having COVID-19 or already have faced the risk of contracting the illness. In *Helling*, the Supreme Court rejected the argument that a condition of confinement that is very likely to cause serious illness in the future could not form the basis of a constitutional violation. 509 U.S at 33. Rather, officials cannot be "deliberately indifferent to the exposure of [prisoners] to a serious, communicable disease on the ground that the complaining [prisoner] shows no serious current symptoms." *Id.* "That the Eighth Amendment protects against future harm to inmates is not a novel proposition." *Id.*; *see also Bauer*, 352 F.2d at 633 ("threatened harm in the form of an increased risk of future injury may serve as injury-in-fact for Article III standing purposes."); *Benjamin v. Fraser*, 264 F.3d 175, 185 (2d Cir. 2001) ("Where the right at issue is provided directly by the Constitution or federal law, a prisoner has standing to assert that right even if the denial of that right has not produced an 'actual injury.'"). A plaintiff need not allege that the prospective harm "occur immediately" nor that "the possible infection . . . affect all those exposed." *Id.* (citing *Hutto v. Finney*, 437 U.S. 678, 682 (1978)). The Eighth Amendment "protects against future harms to inmates" even if the "complaining inmate shows no serious current symptoms." *Id.*

Furthermore, nothing in *Helling* or other caselaw requires that plaintiffs establish that they were held in "cell[]s with someone who has COVID-19."[7] Mot. at 20. Defendants cannot escape liability by claiming that because Plaintiffs have purportedly not yet been exposed to COVID-19 by their cellmates, they do not face substantial risk of harm. "[I]t does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk . . . for reasons personal to him or because all prisoners in his situation face such a risk." *Farmer*, 511 U.S. at 843 (emphasis added). As long as the allegations, taken as true, are "sufficiently serious," *Faraday*, 288 Conn. at 338, the motion to dismiss must be denied.

The complaint adequately alleges that people incarcerated in DOC prisons are held in conditions posing a substantial risk of serious harm. COVID-19 is highly contagious and deadly, Amended Complaint ¶ 14, simply being a human is a risk factor for infection by it. There is no vaccine or cure, and thus combatting the virus requires preventing its spread: the bare minimum medical treatment for the pathogen *is* prevention. *Id.* at ¶¶ 15-16. Connecticut prisons do not permit the level of hygiene that the Centers for Disease Control and Prevention recommend people employ due to the risk of COVID-19. *Id.* at ¶¶ 47-48. As a result, the risk of contracting COVID-19 in prison is heightened. *Id.* ¶ 49. Governor Lamont has made repeated statements about the heightened dangers of close quarter living arrangements. *Id.* ¶¶ 20-25. The complaint similarly alleges conditions of confinement in DOC prisons that render those facilities a

[7] This contorted attempt to distinguish *Helling* is perplexing. Regardless, that is exactly what Ms. Dirgo alleges: that she is bunked with someone with COVID-19 symptoms, and furthermore, that that person was not quarantined. Am. Compl. ¶ 83.

"petri dish" for COVID-19. *Id.* ¶¶ 43-50 (describing dense congregate living situations, including dorm-style housing or two-person cells, poor hygiene, inability to practice social distancing, etc.).

Defendants' argument amounts to the incredible assertion that the risk of harm posed by incarcerating people in close quarters during a deadly viral pandemic the likes of which has never been seen in our lifetimes, while "serious in a theoretical sense," is still "too speculative." Mot. at 20. State and federal courts across the country have not had much patience for this argument. A New York state trial court, for example, disposed of it in four sentences:

> There can be no doubt that the presence of a communicable disease in a prison can constitute a serious, medically threatening condition. The point need not be belabored in this case. Covid-19 is at large at Rikers Island. The current epidemic poses a deadly threat to inmates, and its presence at the prison equates to an "unsafe, life-threatening condition" endangering "reasonable safety." *See Helling v. McKinney*, 509 US at 33, *supra*.

People of the State of New York ex rel. Stoughton v. Brann, No. 45107/82020, 2020 WL 1679209, at *2 (N.Y. Sup. Ct. Apr. 6, 2020) (finding standing under New York law).

A Massachusetts federal court was similarly quick to dismiss the government's cry that "claims of future injury are hypothetical" and "conjectural" because "crowding in and of itself does not cause COVID-19 infection if none in the group has contracted COVID-19." *Savino v. Souza*, No. CV 20-10617-WGY, 2020 WL 1703844, at *4 (D. Mass. Apr. 8, 2020). To put it mildly, the court "disagree[d]." *Id.* It held:

> The [U.S.] Supreme Court has held that "future injuries" may support standing "if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Department of Commerce v. New York*, 139 S. Ct. 2551, 2565 (2019) (quoting *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014)). In this

> moment of worldwide peril from a highly contagious pathogen, the government cannot credibly argue that the Detainees face no "substantial risk" of harm (if not "certainly impending") from being confined in close quarters in defiance of the sound medical advice that all other segments of society now scrupulously observe.

Id. (finding standing under Article III).[8] *See also Ortuno v.* Jennings, No. 20-CV-02064-MMC, 2020 WL 1701724, at *2 (N.D. Cal. Apr. 8, 2020) (finding no question of standing in light of the fact that COVID-19 is "rapidly increasing in the United States" and "has quickly spread in a number of jails and prisons"); *Castillo et al. v. Barr*, No. CV2000605TJHAFMX, 2020 WL 1502864, at *4 (C.D. Cal. Mar. 27, 2020) (similarly finding standing, and citing to *Helling*).

Defendants do not dispute that the risk of contracting a communicable disease, generally speaking, could constitute a sufficiently serious risk to health and safety for a deliberate indifference claim. Defs.' Memo at 20. And aside from the assertion that the harm here is "too speculative," they also make no attempt to argue that COVID-19 itself could fail to present a serious risk of health and safety to the incarcerated population in Connecticut prisons. This is unsurprising, as the seriousness of the risk presented by COVID-19 has been recognized by both federal and state courts. *See, e.g.*, *United States v. Garlock*, 18-cr-418, 2020 WL 1439980, at *1 (N.D. Cal. Mar. 25, 2020) ("By now it almost goes without saying that we should not be adding to the prison population

[8] "[T]he doctrine of standing under Connecticut law closely parallels its federal counterpart, and federal cases are often cited as persuasive authority." *Morascini v. Comm'n of Pub. Safety*, No. CV 91 039 26 93, 1991 WL 277313, at *2 (Conn. Super. Ct. Dec. 20, 1991) (citing *Connecticut Ass'n of Health Care Facilities,* 199 Conn. 609, 612, 508 A.2d 743 (1986)). In Connecticut, "[s]tanding requires no more than a colorable claim of injury," *AvalonBay Communities, Inc. v. Town of Orange*, 256 Conn. 557, 568 (2001), and the requirements of standing are ordinarily held to have been met "when a complainant makes a colorable claim of direct injury he has suffered or is likely to suffer." *Conn. Ass'n of Health Care Facilities,* 199 Conn. at 613.

during the COVID-19 pandemic if it can be avoided. Several recent court rulings have explained the health risks—to inmates, guards, and the community at large—created by large prison populations."); *In the Matter of the Request to Commute or Suspend County Jail Sentences*, No. 84230, Slip Op. at 2 (N.J. Mar. 22, 2020),[9] (ordering releases in light of the parties' agreement that the "reduction of county jail populations, under appropriate conditions, is in the public interest to mitigate risks imposed by COVID-19").

Instead, Defendants seek to group all communicable diseases together, likening the risk COVID-19 presents to other diseases, such as the flu, Hepatitis C, or HIV/AIDS. *Id.* at 20-21. COVID-19, however, is more lethal than the flu, thus presenting a more substantial risk of serious illness or death. Am. Compl. ¶¶ 14-15 (describing COVID-19 as highly contagious and deadly, and noting that there is no vaccine); *Darnell*, 849 F.3d at 31 (holding that the "severity" of a condition of confinement is part of the analysis for a deliberate indifference claim). Because it is transmitted through respiratory droplets, it can spread merely through "close personal contact," unlike HIV/AIDS or Hepatitis C. *Id.* For these reasons, the risk of being infected with COVID-19 cannot be likened to the "many" "complaints" of a variety of communicable diseases. *Id.* Furthermore, courts have held that a lack of adequate policies by correctional officers in response to communicable diseases can constitute deliberate indifference. *See DeGidio v. Pung*, 920 F.2d 525 (8th Cir. 1990) (prison officials' response to tuberculosis outbreak constituted deliberate indifference under the Eighth Amendment); *Lareau v. Manson*, 507 F. Supp. 1177, 1194 (D. Conn. 1980) (failure to adequately screen newly arrived inmates to

[9] *Available at* https://www.njcourts.gov/notices/2020/n200323a.pdf.

identify individuals carrying communicable diseases constituted an "obvious" threat), aff'd in part, modified in part and remanded, 651 F.2d 96 (2d Cir. 1981).

2.2.2. Defendants Have Ample Knowledge of COVID-19's Dangers, and Have Therefore Shown Deliberate Indifference by Failing to Protect Prisoners From It

The complaint likewise adequately alleges that Defendants are acting recklessly in their insufficient response to the instant public health crisis. Contrary to the Defendants' suggestion in their motion, Plaintiffs need not allege that Defendants are exposing Plaintiffs to COVID-19 deliberately. "An Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842. An official's awareness of the risk of harm may be shown from the "very fact that the risk was obvious." *Id.* at 842. Moreover, if Plaintiffs can show that the "defendant-official being sued had been exposed to *information concerning the risk* and thus 'must have known' about it," such evidence may be sufficient for a finding of actual knowledge. *Id.* at 842-43 (emphasis added). Plaintiffs have properly alleged that Defendants were aware of the grave risk that COVID-19 presents to the health and safety of those in their custody and that they failed to reasonably mitigate that risk.

The defendants here are well aware of the grave risk presented by COVID-19. *See* Am. Compl. ¶¶ 18-25 (collecting Governor Lamont's declaration of public health emergency and repeated public statements about the significant risks COVID-19 presents to congregated living spaces). In addition to the unequivocal statements made by Governor Lamont regarding the grave risk of COVID-19, Defendants were made

aware in many other ways of the drastic consequences that would flow absent systemic de-densification of Connecticut prisons. Connecticut doctors experienced in correctional health wrote a letter to Governor Lamont expressing grave concern about the prisons being overrun with COVID-19. *Id.* ¶ 51. The complaint also contains allegations of news reports that would render Defendants aware that a crisis was coming to their prisons absent significant swift action. *Id.* at ¶ 52-53.

Plaintiffs have properly alleged that Defendants have failed to reasonably abate these substantial risks of harm. The complaint alleges that COVID-19 is already present in Connecticut prisons and quickly growing. Am. Compl. ¶ 55 (as of April 7, 2020, 44 incarcerated people and 41 prison staff across Connecticut's prisons and jails have tested positive for COVID-19). Plaintiffs also allege that the interventions made to date by Defendants fail to reasonably mitigate the risk presented by COVID-19. *Id.* ¶¶ 70-86. It is not a matter of the "actions Plaintiffs prefer," as suggested by Defendants. Defs.' Memo at 22. Rather, it is the widespread held opinion of public health experts across the country that reasonable mitigation of the risk presented by COVID-19 requires more than what the complaint alleges Defendants have done. *See* Am. Compl. ¶¶ 56-57, 84-86; Exhibits 19 (opining that screening, social distancing, and quarantining measures cannot be sufficiently employed within correctional setting to combat COVID-19), 24 (noting that COVID-19 "requires urgent, scaled-up decarceration"), 25 (describing the risk to not just incarcerated people, but also corrections officers and the community). Based on these allegations, Plaintiffs have properly alleged the requisite reckless culpable statement of mind for both sentenced and unsentenced detainees. Defendants' non-zero action of quarantining symptomatic people, without doing more to

significantly de-densify Connecticut's prisons and jails, does not reasonably abate the substantial risk of harm to incarcerated people and is, therefore, reckless.

Lastly, Defendants claim that Plaintiffs have failed to satisfy the subjective component because "[a]llegations of inadequate treatment sound in negligence and are therefore insufficient to state a deliberate indifference claim." Defs.' Memo at 22.[10] Selecting a course of medical treatment is, to some extent, left to the judgment of medical care providers; however, medical discretion is not limitless. "[C]ertain instances of medical malpractice may rise to the level of deliberate indifference; namely . . . an act or a failure to act by the prison doctor that evinces a conscious disregard of a substantial risk of serious harm." *Faraday*, 288 Conn. at 340. Such a "conscious disregard" may arise when a physician "consciously chooses an 'easier and less efficacious' treatment plan." *Chance v. Armstong*, 143 F.3d 698, 703 (2d Cir. 1998). As Plaintiffs' complaint makes patently clear, DOC's current response to the COVID-19 pandemic is, effectively, an "easier and less efficacious" plan that fails to substantially mitigate spread of the virus and halt preventable fatalities. De-densification of correctional facilities is the only

[10] Defendants' discussion in this regard conflates deliberate indifference in the context of medical treatment claims with deliberate indifference in the context of prison conditions claims, and brings in unrelated discussion of negligence and preferred course of treatment. Courts must analyze challenged conditions of confinement on a case-by-case basis. *Willey v. Kirkpatrick*, 801 F.3d 51, 68 (2d Cir. 2015) (holding that there is no "bright-line durational requirement" or "minimum level of grotesquerie required" for a conditions-of-confinement claim). Notably, this requires evaluation of the full context: some conditions may rise to the level of a constitutional violation "in combination when each would not do so alone, but only when they have a mutually enforcing effect that produces the deprivation of a single, identifiable human need." *Wilson v. Seller*, 501 U.S. 294, 304 (1994).

At the same time, this conflation is part of a broader conflation of law and mischaracterization of Plaintiffs' claims. For example, Plaintiffs' claim sounds in unconstitutional conditions of confinement under both the Eighth Amendment (for those who are sentenced) and the "more lenient standards of the Fourteenth Amendment" (for those who are unsentenced), *see Jimenez*, 2020 WL 1467371, at *3. Yet Defendants appear to conflate the two prongs of a deliberate indifference claim under the Eighth Amendment—which have both an objective and subjective component, *see Faraday v. Comm'r of Correction*, 288 Conn. 326, 338 (2008)—with those under the Fourteenth Amendment, *Darnell*, 849 F.3d at 35, which are solely objective.

"treatment plan" that can reasonably abate the risks, and so the defendants' motion must be denied.

2.3. The Individual Plaintiffs' Standing is not Constrained by Their Eligibility for Release Mechanisms Controlled by the Defendants Themselves

Finally, with respect to the individual plaintiffs' standing, the defendants make much of the argument that the individual plaintiffs may not qualify for pre-existing statutory or administrative forms of relief. That entirely misses the point: The plaintiffs' injuries are imminent, and redressable by this Court, without regard to whether a particular statute or administrative scheme establishes the mechanism by which the Court saves them from the pandemic. And, even if the Court were limited *only* to the remedies already provided by the executive and legislative branches, the defendants currently possess the authority to alter every existing textual form of relief such that their feigned helplessness divests them of a defense.

To begin, the argument falters because the Court's ability to structure relief for the plaintiffs is broad. When passing on requests for mandamus and other writs, this Court "exercises discretion rooted in the principles of equity." *Morris v. Congdon*, 277 Conn. 565, 569 (2006) (internal quotation omitted). And when considering equities, this Court "adapt[s] equitable remedies to the particular circumstances of each particular case." *Wall Systems, Inc. v. Pompa*, 324 Conn. 718, 736 (2017). Simply because there is no statute setting out the precise avenue of relief identified by the Court as the best remedy does not mean that the Court is without power to act. For example, there is no freestanding statute saying that an unlawfully-held prisoner must be

released, or that a particular medical treatment is required for a prisoner wrongfully denied it, yet this Court routinely orders those remedies.

Moreover, the defendants cannot simultaneously be omnipotent and impotent. Even if the Court were paradoxically restricted to fashioning relief from particular statutes, regulations, and sub-regulatory schemes, the defendants are the ones who control them. Because he has declared the pandemic a civil preparedness and public health emergency, Defendant Lamont may now "modify or suspend in whole or in part . . . any statute, regulation or requirement or part thereof" that he finds to be "in conflict with the efficient and expeditious execution of civil preparedness functions or the protection of the public health." Conn. Gen. Stat. § 28-9(b)(1). He has used that power since March 1st to suspend all or part of approximately 300 Connecticut statutes and regulations via his Executive Orders Nos. 7-7V, touching almost every aspect of daily life from the start of fishing season to the spacing of grocery shoppers in checkout lines. Defendant Cook, meanwhile, has always had the authority to alter any of the relief forms constricted by the sub-regulatory Administrative Directives that his agency issues. Given that the defendants now wield most of the power of the executive and legislative branches combined, they cannot play possum when told to protect their prisoners from the global pandemic.

3. The Vindication of State and Federal Constitutional Rights does not Comprise a Political Question

Defendants assert that the political question doctrine bars this suit, contending that, in light of the "broad discretion [of] Executive Branch officials" to determine when and how to release inmates, a court order requiring the release of inmates would "would

place the court in conflict with a coequal branch of government." Defs.' Memo at 22, 27 (internal quotations omitted). But the defendants elide not only how heavily Connecticut law disfavors the political question doctrine, but also the regularity and expertise with which Connecticut courts supervise penal matters, and the legal duties which make that role proper.

The Connecticut Supreme Court has rarely approved of lower court findings that the political question doctrine bars a particular suit. In case after case—including those cited by Defendants in their motion—the Connecticut Supreme Court has rejected the application of the political question doctrine. *See, e.g., Office of Governor v. Select Committee of Inquiry*, 271 Conn. 540 (2004) (Governor's motion to quash impeachment subpoena not barred as political question); *Nielsen v. Kezer*, 232 Conn. 65 (1995) (suit seeking mandamus to require Secretary of State to place contested candidate on ballot not barred as political question). In fact, the Connecticut Supreme Court has made clear more than once that "a case should not be dismissed for nonjusticiability as a political question unless [it presents] an unusual need for unquestioned adherence . . . courts should view such cases with a heavy thumb on the side of justiciability." *Connecticut Coalition for Justice in Higher Educ. Funding v. Rell*, 295 Conn. 240, 256 (internal quotation omitted). The rare cases in which the court has applied the doctrine make clear its extraordinary nature. *See, e.g., Nielsen v. State*, 236 Conn. 1 (1996) (barring suit seeking court order requiring legislature to enact certain statutes).

The reasons for which the Court disfavors the political question doctrine are simple. As observed in *Select Committee of Inquiry*, "there are no special impediments to [judicial] ascertainment and application of the standards by which to resolve . . .

questions of constitutional interpretation that, for more than two centuries, regularly have been reserved for the judiciary." 271 Conn. at 574. The doctrine must be applied sparingly because when it does obtain, it undercuts the principles that it is the duty of the judiciary to "say what the law is," and that "where there is a legal right, there is also a legal remedy." *Marbury v. Madison*, 5 U.S. 137, 163, 177 (1803). As a result, "every presumption is to be indulged in favor of subject matter jurisdiction." *Sheff v. O'Neill*, 238 Conn. 1, 16 (1996).

But this is not a close case; it requires no judicial indulgence. The core concern of the political question doctrine as it exists in Connecticut is "the principle of separation of powers." *Connecticut Coalition for Justice*, 295 Conn. at 255. Where an issue has been entirely reserved to either the executive or legislature, the courts may not intervene. Defendants claim such a reservation has occurred with respect to the release of inmates and the conditions of Connecticut's prisons. That claim ignores the basic argument raised by the plaintiffs: that manifest legal authorities, including the Eighth and Fourteenth Amendments to the United States Constitution, place the reckless exposure of inmates to illness or death as a result of COVID 19 beyond the power or discretion of the state. It is because of the mandatory nature of these constitutional protections that plaintiffs are entitled to mandamus.

Nevertheless, no Connecticut case has raised the question presented here squarely, because there has never been a situation quite like the one now facing Connecticut's prisoners. Even so, where defendants have tried to invoke the political question doctrine with claims of unfettered discretion in police administration, Connecticut courts have rejected those claims. In 2012, this Court rejected claims that the political question doctrine barred a judicial order requiring the Commissioner of

Emergency Services and Public Protection to hire scores of state troopers. *Connecticut State Police Union v. Dep't of Emergency Servs. and Public Protection*, 2012 WL 386679, **13-14 (Conn. Super. Ct. Jan. 13, 2012). Similarly, Superior Courts have rejected political question challenges to suits regarding officer pay and fire-funding. *See Nappe v. East Haven Bd. of Police Comm'rs*, 2014 WL 6476599, at *4 (Conn. Super. Ct. Oct. 23, 2014); *Belltown Fire Dep't v. City of Stamford*, 2008 WL 2797013, at *7 (Conn. Super. Ct. June 25, 2008). The United States Supreme Court has spoken to the issue more directly. In 2011, the Court upheld a federal court's order, pursuant to the Eighth Amendment, that California reduce prison population by 45,000 inmates. *Brown v. Plata*, 563 U.S. 493, 534 (2011). Plaintiffs' request here is both more modest and more urgent.

Defendants' claims are also wrong as a matter of judicial capacity. Enforcing the United States Constitution's guarantee that no person shall be subject to cruel and unusual punishment—including being made to suffer a significant risk of death or serious illness—is hardly outside the competence of state courts. In the context of habeas corpus, Connecticut courts routinely entertain challenges to the conditions of state prisons, *see Faraday*, 288 Conn. at 328 ("prison officials will be found to have violated the eighth amendment . . . [if] they refuse to provide care or treatment to that inmate"), as well as challenges to convictions resulting in release, *see Jobe v. Comm'r of Correction*, 334 Conn. 636, 650 (2020)("[I]n our own state courts . . . habeas corpus provides a special and extraordinary legal remedy for illegal detention . . . .") (internal quotation omitted), even well after sentencing.

As a backstop, Defendants argue that their duty to safeguard the wellbeing of Connecticut's inmates is discretionary, and so their performance may not be compelled

by mandamus. This is wrong. Neither the Eighth and Fourteenth Amendments to the United States Constitution, nor the General Assembly's command that the "Governor shall take appropriate measures for protecting the health and safety of inmates of state institutions," is discretionary. Conn. Gen. Stat. § 28-9(b)(5). And, as Plaintiffs' complaint and Motion for Mandamus alleges in detail, a chorus of medical experts has made clear that the only plausible and humane way to mitigate the spread of COVID-19 among the state's inmates is de-densification—that is, at least partial release. The mandatory vindication of these state and federal rights does not constitute a political question and is not a matter of executive discretion, and so the defendants' motion must be denied.

4. Neither Eleventh Amendment nor State Law Sovereign Immunity Shields Official Capacity Defendants Like Lamont and Cook from Being Ordered to Stop Violating the Constitution

Lastly, the defendants invoke state law, and Eleventh Amendment, sovereign immunity as a reason why the Court cannot hold them to account. The defenses are irrelevant in a suit like this one, in which plaintiffs seek equitable relief to stop ongoing constitutional violations.

The general rule of the Eleventh Amendment is that courts "may hear claims for prospective injunctive relief" against state employees in their official capacities, but not "retroactive claims seeking monetary damages from the state treasury." *Tsirelman v. Daines*, 794 F.3d 310, 314 (2d Cir. 2015). *See Martinez v. Empire Fire & Marine Ins.*, 322 Conn. 47, 62 (2016) ("When addressing questions of federal law, we give special consideration to the decisions of the Second Circuit."). Relief is retroactive—and hence, barred—only where it asks a court to pronounce the "past liability of" such employees, or

impose upon them "a monetary loss resulting from a past breach of a legal duty." *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 646 (2002) (internal quotation omitted). *See also New York City Health & Hosps. Corp. v. Perales*, 50 F.3d 129, 135 (2d Cir. 1995) ("What the Amendment forecloses is an award of money . . . from state funds that *compensates a claimant* for the state's *past violations* of federal law.") (emphasis added).

The defendants sidestep the applicable authority by suggesting that an injunction against future bad acts which costs money to comply with "[i]n essence" asks for damages. Defs.' Memo at 29. That is wrong. "[S]overeign immunity is not invoked simply because prospective injunctive relief ultimately results in a diminution of state funds." *In re Dairy Mart Convenience Stores*, 411 F.3d 367, 375 (2d Cir. 2005). Were that so, virtually no defendant would ever have to adhere to the mandates of the national constitution.

The lone two cases mustered by the defendants for their novel interpretation of the law turn out to have no bearing on this dispute, because both involved plaintiffs demanding money for past wrongs. One of the cases, *Sullins v. Rodriguez*, is a non-sequitur because it solely concerned a damages claim against a Department of Correction employee in his individual capacity, and not an injunction against ongoing wrongs. 281 Conn. 128, 130, 141 (2007) (turning aside employee's claim to Eleventh Amendment immunity against such damages). The other is similarly inapt because the plaintiff's claim was a backwards-looking contract breach for which he sought an injunction compelling issuance of a check for the money he believed owed under the contract. *McDonough Assocs. v. Grunloh*, 722 F.3d 1043, 1052 (7th Cir. 2013)

(describing the claim as seeking "relief based on state law for an alleged monetary loss resulting from a past breach of a legal duty.") (internal quotation omitted).

Nothing of the sort is at issue in this litigation. Rather than filing suit "to extract money for an accrued liability," *Perales*, 50 F.3d at 135, the plaintiffs have brought the Court an ongoing violation of the Eighth and Fourteenth Amendments. If stopping that violation of federal law costs the defendants some money, such will be "the necessary result of compliance with decrees which by their terms were prospective in nature," a permissible and "inevitable consequence" of adhering to the national constitution. *Edelman v. Jordan*, 415 U.S. 651, 667-68 (1974).

The defendants' state law arguments are identically doomed, because—just like the federal version—Connecticut's sovereign immunity doctrine excepts actions to stop ongoing and future constitutional violations. *Doe v. Heintz*, 204 Conn. 17, 31-32 (1987) (holding that "sovereign immunity is unavailable as a defense" to "suits seeking only to enjoin state officers from illegal or unconstitutional acts"); *Sentner v. Bd. of Trustees of Regional Community Colleges*, 184 Conn. 339, 344-45 (1981) (overruling earlier cases permitting declaratory judgments only for such violations). The exception is equally applicable to equitable relief that may end up costing money. *E.g.*, *Sheff*, 238 Conn. at 43 (declaring that state's school districting statutes violated Connecticut Constitution by working de facto racial segregation); *Doe v. Maher*, 40 Conn. Supp. 394, 450-51 (1986) ("The court . . . orders that the defendants pay for the costs of all medically necessary abortions on the same basis, to the same extent and with the same limitations as the defendants pay for all other medical expenses under the Medicaid program.") (internal citation omitted).

As with their federal argument, the defendants rely on a case, *Alter and Assocs. v. Lantz*, in which the plaintiff sought an injunction to right a past monetary wrong rather than to stop an ongoing rights violation. 90 Conn. App. 15 (2005). There, the plaintiff alleged that it had entered into a binding contract with the Department of Correction that the Department had breached, and that the appropriate remedy to fix that past breach was an injunction mandating the defendants "go forward with the plaintiff's proposal to provide staff training on sexual harassment issues," *id.* at 17, having the unspoken effect of obligating payment.

The plaintiffs in this litigation do not come to court pointing backwards over their shoulders at a state decision that cost them money. They bring the Court facts of an unfolding medical disaster which can be stopped by issuance of an order mandating that the defendants provide those in their care the proper avoidance and treatment measures. The defendants' motion must be denied.

5. Conclusion

Because CCDLA and the individual plaintiffs have standing, and because neither the political question doctrine nor sovereign immunity shields the defendants from account, the Court possesses subject matter jurisdiction over the dispute and must deny the defendants' motion.

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