SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 20470

CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION, ET AL.,
PLAINTIFFS-APPELLANTS

v.

NED LAMONT, ET AL.,
DEFENDANTS-APPELLEES

BRIEF OF PLAINTIFFS-APPELLANTS CONNECTICUT CRIMINAL DEFENSE LAWYERS ASSOCIATION, ET AL.

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INTRODUCTION

This is an extraordinary case in an extraordinary time. The COVID-19 pandemic poses a threat to the people of Connecticut and especially its most vulnerable populations. This appeal is about protecting the health and safety of one of those populations – people residing in the state's correctional facilities. As Justice Sotomayor observed just weeks ago:

> It has long been said that a society's worth can be judged by taking stock of its prisons. That is all the truer in this pandemic, where inmates everywhere have been rendered vulnerable and often powerless to protect themselves from harm. May we hope that our country's facilities serve as models rather than cautionary tales.

Valentine v. Collier, ___ S.Ct. ___, 2020 WL 2497541 (May 14, 2020), at 3 (*Sotomayor, J.*, concurring in denial of motion to vacate stay pending appeal).

Life under the pandemic is fundamentally altered. The Governor has issued numerous orders to slow the spread of COVID-19 and protect the people of Connecticut. The courts have scaled back operations in order to limit people's exposure to the virus. And across the state, people have made great sacrifices to care for themselves and each other.

But there has been no such protection given to the roughly 11,000 people incarcerated in Connecticut prisons, where social distancing and other mitigation efforts are impossible to observe. The plaintiffs, the Connecticut Criminal Defense Lawyers Association ("CCDLA"), Willie Breyette, Daniel Rodriguez, Marvin Jones, Kerri Dirgo, and Joshua Wilcox (collectively, the "individual plaintiffs"), brought this lawsuit, and now bring this expedited public interest appeal, seeking a judicial order, based on the federal and state constitutions, as well as this Court's supervisory authority, to protect the health, safety, and rights of Connecticut's incarcerated residents during this unprecedented pandemic.

NATURE OF THE PROCEEDINGS AND STATEMENT OF FACTS

I. FACTUAL BACKGROUND

Public health experts have cautioned that prisons and jails are extremely high-risk settings for the spread of COVID-19.[1] In Connecticut, as elsewhere, these warnings have proven tragically accurate. The Department of Correction ("DOC") reported its first staff member to test positive for COVID-19 on March 23, 2020,[2] and the first incarcerated person to test positive on March 30, 2020.[3] Since then, even according to the DOC's own publicly-available statistics,[4] there has been unrestrained growth in the number of infections: 378 DOC staff members and 853 incarcerated people have tested positive, and 7 incarcerated people have died.

Responding to the threat posed by COVID-19, Governor Lamont declared civil preparedness and public health emergencies on March 10. Since then, the Governor has issued 46 executive orders, many of which closed or substantially altered operations in

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[1] Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, https://tinyurl.com/y8pmv5p9 (last visited May 28, 2020).

[2] Press Release, Conn. Department of Correction, First Department of Correction Employee to Test Positive for COVID-19 Virus (March 23, 2020), https://tinyurl.com/y78punr8 (last visited May 28, 2020).

[3] Press Release, Conn. Department of Correction, First Department of Correction Offender Tests Positive for COVID-19 Virus (March 30, 2020), https://tinyurl.com/y9o2z9s6 (last visited May 28, 2020).

[4] These figures are based on the statistics published on the DOC website. See Conn. Department of Correction, Covid-19 Tracker, https://tinyurl.com/ycyfkoyk (last visited May 28, 2020). There are substantial questions about the accuracy of these statistics. For example, in its first and third most populous prisons (MacDougall and Cheshire), DOC has recorded only 4 and 18 positive test results, an infection rate of .27% and 1.6%, respectively. Id.; Conn. Department of Correction, Average Confined Inmate Population and Legal Status (May 1, 2020), https://portal.ct.gov/-/media/DOC/Pdf/MonthlyStat/Stat05012020.pdf?la=en. In comparison, in its second most populous facility, Osborn, DOC has recorded 255 infections, an infection rate of 21.4%—almost 80 times the recorded rate at MacDougall, and more than 13 times the rate at Cheshire. To put it mildly, it is extraordinarily unlikely that DOCs statistics accurately reflect the true scope of the health crisis that currently exists in Connecticut correctional facilities.

nearly all settings where people congregate in large numbers, including by: restricting entry into nursing homes; closing public schools and universities; prohibiting bars and restaurants from serving sit-in customers; postponing the presidential primary; limiting workplace operations of non-essential businesses; restricting gatherings to no more than five people; limiting the provision of short-term lodging; and suspending non-critical court operations. Recently, the Governor ordered that some businesses may resume operations, but only under modified conditions, including that they adhere to social distancing policies.[5] At the same time, the Governor extended many other restrictions at least another month.

Notwithstanding the outsized threat that COVID-19 poses in correctional settings, however, the Governor has refused to address the risk to the incarcerated population. As of today, no executive order addresses incarcerated residents. While DOC has adopted a COVID-19 response plan, in contrast to the regulations for other settings, that plan falls far short of the measures prescribed by public health experts. The plan contains no provision for social distancing among incarcerated people, no provision for regular cleaning of cells and dormitories, and no provision for reducing population density.[6] Moreover, the defendants' plan for quarantining those infected with COVID-19 is to transfer them to Northern CI, where they are locked in maximum-security cells for days and allowed to leave their cells (if at all) to make a short phone call.[7]

In addition, it now appears that COVID-19 has spread among Connecticut prisons

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[5] Exec. Order 7 No. 7PP (May 18, 2020).

[6] Conn. Department of Correction, COVID-19 Operational Response Plan 1 (Mar. 20, 2020), https://tinyurl.com/y9thulac (last visited May 28, 2020).

[7] Conn. Department of Correction, Orientation Notice, Northern Correctional Institution – COVID Units, https://tinyurl.com/y8mfrwea (last visited May 28, 2020). At the time this appeal was filed, DOC did not allow individuals in the COVID-19 units at Northern to shower while in quarantine. Kelan Lyons, "Department of Correction Suspends Showers for Inmates in Quarantine or Medical Isolation Units," Connecticut Mirror (May 12, 2020), https://tinyurl.com/y9nn3bo3. Recently, DOC revised its policy to state that showers would be allowed.

even faster than reflected in the initial statistics released by DOC. On May 13, DOC began an effort to test all staff and incarcerated residents, starting at Osborn CI. In the first two days of testing, 17% (105 of the 617) of the incarcerated people to whom the test was administered tested positive, resulting in Osborn CI being placed on lockdown.[8]

II. TRIAL COURT PROCEEDINGS

The plaintiffs brought this action to protect the health and safety of the people confined in Connecticut's correctional facilities. The plaintiffs claimed that the defendants' failure to take steps to mitigate the spread of the virus has exposed Connecticut's incarcerated population to a substantial risk of serious illness. The plaintiffs claimed that the defendants' failure to act violated (1) the Eighth Amendment (with respect to sentenced persons) and Fourteenth Amendment (with respect to pretrial detainees) of the U.S. constitution, (2) the corresponding provisions in article first, §§ 8 and 9 of the Connecticut constitution, (3) the Governor's obligation under General Statutes § 28-9(b)(5) to "protect[] the health and safety of inmates of state institutions" during public health and civil preparedness emergencies.;" and (4) the Commissioner's obligation under General Statutes § 18-7 to "provide for the relief of any sick or infirm prisoner …." The plaintiffs sought various forms of relief, including release of incarcerated people at heightened risk for serious illness or death from COVID-19, an order to reduce the population density at all DOC facilities, and an order to submit a plan to provide adequate sanitation, social distancing, and medical treatment. The defendants moved to dismiss, claiming that the plaintiffs lacked standing, and that the action is barred by the political question doctrine.[9]

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[8] Press Release, Conn. Department of Correction, Asymptomatic Positive Test Results for COVID-19 Virus Prompt Lockdown of the Osborn Correctional Institution (May 15, 2020), https://tinyurl.com/y9qlbvge (last visited May 28, 2020).

[9] The defendants also moved to dismiss the action on Eleventh Amendment grounds, an argument rejected by the trial court and not at issue in this appeal.

On April 24, 2020, the trial court, Bellis, J., granted the defendants' motion to dismiss, concluding that Connecticut courts have no jurisdiction over the plaintiffs' suit. First, the court held that none of the plaintiffs had standing because they did not sufficiently allege that they suffered a direct injury as a result of the defendants' actions. With respect to the individual plaintiffs, the trial court focused solely on the substance of the Eighth Amendment claim, rather than whether the plaintiffs alleged a colorable claim of injury. Order re Mot. to Dismiss, pp. 5-6. The court also did not mention the plaintiffs' separate allegations that the defendants violated the Fourteenth Amendment (given that the plaintiffs who are pretrial detainees do not come under the Eighth Amendment in the first place), the Connecticut Constitution, and General Statutes §§ 18-7 and 28-9(b). Instead, the court concluded – improperly – that the plaintiffs lacked standing solely because, in the court's view, the complaint failed to state a claim under the Eighth Amendment. Id.

Second, the trial court concluded that the plaintiffs' claims involved nonjusticiable political questions. Despite acknowledging that the plaintiffs' claims "depend … on a determination that the individual plaintiffs' constitutional rights are being violated," Order, p. 9, the court nevertheless held that it was powerless to adjudicate those claims because certain statutes unrelated to the plaintiffs' claims "provide discretion to the executive branch officials with regard to the transfer or release of inmates." Id., p. 8.

ARGUMENT

I. CONNECTICUT COURTS HAVE THE CONSTITUTIONAL POWER TO PROTECT THE HEALTH AND SAFETY OF CONNECTICUT'S INCARCERATED PEOPLE DURING THE COVID-19 PANDEMIC

This lawsuit was brought in order to obtain relief under the federal and state constitutions to protect the health, safety, and rights of Connecticut's incarcerated residents during this unprecedented pandemic. As demonstrated in Parts I-B and C below, the plaintiffs should have prevailed on the merits of these claims. However, the trial court

erroneously held that it had no power to hear the plaintiffs' claims because: (1) the CCDLA lacked standing to attempt to protect the health and rights of their clients; (2) the six individual plaintiffs, all of who are currently incarcerated, lacked standing to sue until they have actually contracted COVID-19; and (3) the political question doctrine barred consideration of the plaintiffs' claims. The current treatment of Connecticut's incarcerated people during this pandemic is cruel. The trial court was wrong to dismiss this case and a reversal is required.

A. The Trial Court Wrongly Decided an Issue Through A Motion to Dismiss That Should Have Been Made Through A Motion to Strike

1. Standard of review

Whether the court properly dismissed a case for lack of jurisdiction is a question of law. See Markley v. Department of Public Utility Control, 301 Conn. 56, 64-65 (2011). "[E]very presumption is to be indulged in favor of jurisdiction." State v. Carey, 222 Conn. 299, 306 (1992). The superior court is presumed to have jurisdiction over all matters that come before it and cannot lose that jurisdiction "by implication." In re Matthew F., 297 Conn. 673, 708-709 (2010) (*Rogers, C.J.*, concurring) ("[N]othing shall be intended to be out of the jurisdiction of a Superior Court but that which specially appears to be so."). A court should conclude that it has jurisdiction over a dispute "whenever possible and to secure the litigant his day in court." See In re Jose B., 303 Conn. 569, 579-580 (2012).

2. An attack on a specific remedy (such as mandamus relief) is not a basis for a jurisdictional dismissal

Preliminarily, it should be noted that the trial court dismissed this case based on its conclusion that the complaint did not allege facts sufficient to obtain mandamus relief. See Order re Mot. to Dismiss ("the plaintiffs have not alleged any injury to the CCDLA or its members"; "the plaintiffs have not alleged facts demonstrating that the defendants had or

have the requisite mental state with respect to the risks identified in the complaint"). This error is critical because "[t]here is a significant difference between asserting that a plaintiff *cannot* state a cause of action and asserting that a plaintiff *has not* stated a cause of action, and therein lies the distinction between the motion to dismiss and the motion to strike." Egri v. Foisie, 83 Conn. App. 243, 247–51, cert. denied, 271 Conn. 931 (2004) (emphasis in original); see also Izzo v. Quinn, 170 Conn. App. 631, 638 (2017) (motion to dismiss "essentially asserts that, as a matter of law and fact, a plaintiff cannot state a cause of action that is properly before the court" whereas "the motion to strike attacks the sufficiency of the pleadings"); see also Practice Book 10-39(a)(2).

A claim that the plaintiffs did not adequately allege a clear legal right as required to support mandamus relief is not properly decided on a motion to dismiss. "A prediction that the plaintiffs will not ultimately prevail on the merits of their mandamus action does not support a conclusion that the court is without jurisdiction to hear the matter." Allen v. Meacham, 1993 WL 78174, at *3 (Conn. Super. Mar. 3, 1993) (court had jurisdiction over prisoners' mandamus action seeking to remedy prison conditions that allegedly violated first amendment). See also Golden Hill Paugussett Tribe v. Weicker, 1992 WL 96732, at *3 (Conn. Super. May 5, 1992) (whether "the law imposes on the [defendant] 'a duty the performance of which is mandatory and not discretionary,' and that [plaintiff] 'has a clear legal right to have the duty performed' … are more properly raised in a motion to strike"). Here, the trial court concluded that the plaintiffs did not state a cause of action, but did not consider whether they *could* state a cause of action.

This mistake was prejudicial. Had the trial court granted a motion to strike, rather than a motion to dismiss, the plaintiffs would have had the opportunity to replead rather than having their case terminated.

> If a motion to dismiss is granted, the case is terminated, save for an appeal from that ruling … The granting of a motion to strike, however, ordinarily is not a final judgment because our rules of practice afford a party a right to amend deficient pleadings…. That critical distinction implicates a fundamental policy consideration in this state. Connecticut law repeatedly has expressed a policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his or her day in court…..

(Citation omitted.) Egri v. Foisie, 83 Conn. App. at 247–51. If the court believed that it could not issue mandamus relief to these particular plaintiffs, then it should have afforded the plaintiffs the opportunity to seek other forms of relief (declaratory, injunctive, habeas) to remedy the federal and state constitutional violations at issue in this case. The ability of the plaintiffs to obtain mandamus relief was not a jurisdictional bar to their constitutional claims.

3. The trial court wrongly analyzed "standing" by limiting its review to the availability of mandamus relief instead of its jurisdiction to decide the constitutional claims

The trial court opined that it had no authority to hear the plaintiffs' claims based on two theories: standing and the political question doctrine. With respect to standing, the court first determined that the CCDLA did not allege an adequate injury. This analysis was erroneous because: (1) CCDLA has associational standing to bring suit on behalf of its members; (2) its members have sufficient special relationships with prisoners whose constitutional rights would be protected by the case; and (3) absent relief through this case, CCDLA members are unable to obtain protection for their clients from prison conditions that put their clients' health, safety, and lives at risk, and are severely hampered in their ability to perform their jobs without exposing themselves to the risk of serious illness. The trial court also erroneously held that the six individual plaintiffs, all of whom are currently incarcerated, lack standing to sue until they have actually contracted COVID-19. Numerous courts across the country have rejected this argument. See Section I.A.4.b., *infra*.

"Standing is the legal right to set judicial machinery in motion." Electrical Contractors, Inc. v. Dep't of Education, 303 Conn. 402, 411 (2012). "The question of standing does not involve an inquiry into the merits of the case. It merely requires the plaintiff to make allegations of a colorable claim of injury to an interest which is arguably protected or regulated by the statute or constitutional guarantee in question." Reitzer v. Bd. of Trustees of State Colleges, 2 Conn. App. 196, 200 (1984). Standing is established by showing aggrievement, which requires the plaintiff to demonstrate (1) "a specific, personal and legal interest in [the subject matter of the challenged action], as distinguished from a general interest, such as is the concern of all members of the community as a whole," and (2) "that this specific personal and legal interest has been specially and injuriously affected by the [challenged action]...." Electrical Contractors, 303 Conn. at 411-12. Consistent with this State's policy favoring granting litigants their day in court, "[a]ggrievement is established if there is a **possibility, as distinguished from a certainty**, that some legally protected interest ... has been adversely affected." Id. (emphasis added).

a. CCDLA standing

CCDLA meets all three criteria to bring suit on behalf of its members because "(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).

i. CCDLA members could sue in their own rights

CCDLA members have standing to assert the constitutional rights of their clients. The U.S. Supreme Court has recognized that third parties may have prudential standing where they have "a close relation" to a person whose rights are at stake and are otherwise unlikely to be vindicated. Powers v. Ohio, 499 U.S. 400 (1991) (criminal defendant had

standing to pursue constitutional claims on behalf of juror unlawfully excluded on racial grounds); United States Dept. of Labor v. Triplett, 494 U.S. 715, 719–21 (1990) (attorney had standing to assert due process claims to fee restrictions on behalf of clients he represented); Griswold v. Connecticut, 381 U.S. 479 (1965) (physician and Planned Parenthood official had standing to assert constitutional privacy rights of married couples); NAACP v. Alabama, 357 U.S. 449 (1958) (NAACP had standing to assert first amendment rights of members); Craig v. Boren, 429 U.S. 190 (1976) (liquor vendor could assert constitutional rights of potential customers). The third party must have a "'sufficiently concrete interest' in the outcome of the issue in dispute." (Citation omitted.) Powers, 499 U.S. at 411.

Here, the scale, rapid spread, and dire consequences of the pandemic, paired with the shutdown of the State's courts, weigh heavily in favor of third-party standing for CCDLA's members to vindicate the rights of their clients. This case concerns the fundamental rights of Connecticut's prisoners during an unprecedented pandemic. It is unrealistic to require each individual incarcerated person – especially those most vulnerable to the disease – to seek relief. It is also infeasible for this State's judiciary to adjudicate hundreds, if not thousands, of individual claims on behalf of CCDLA's individual members and their clients. Finally, 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 and, absent relief, are severely hampered in their ability to perform their jobs without exposing themselves to the risk of serious illness. For these reasons, CCDLA members have standing to pursue relief on behalf of their clients.

ii. This suit is germane to CCDLA's purpose

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 May 28, 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.").

iii. This case does not require the participation of CCDLA's members

"[S]o 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). The relief being sought in this case in the form of system-wide relief does not require the participation of individual CCDLA members. See Worrell, 199 Conn. at 617 (because relief sought would benefit all members of health care provider association, participation of each provider was not necessary). Indeed, adjudicating the global constitutional issues through this suit promotes "judicial economy and efficiency." Id. at 119. Finally, 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 individual members of the CCDLA. The third element for associational standing is met.

b. Incarcerated plaintiffs' standing

The trial court also refused to hear the plaintiffs' claims on the basis that the individual plaintiffs, all of whom are currently incarcerated, did not allege a sufficiently direct injury. However, the court's analysis focused solely on whether the individual plaintiffs alleged sufficient facts to state a claim under the Eighth Amendment. See Order re Mot. to Dismiss, p. 6 ("[T]he plaintiffs have not alleged facts showing that the defendants have

deprived the plaintiffs of the minimal civilized measure of life's necessities by failing to release a sufficient number of prisoners from confinement in order to mitigate the risk of the spread of infection."); Id. ("[T]he plaintiffs have not alleged facts … to show that the defendants have acted or will act with 'deliberate indifference' to the risks posed by the COVID-19 pandemic."). As noted previously, whether a plaintiff alleged sufficient facts to state a claim is properly addressed by way of a motion to strike, not a motion to dismiss. See Reitzer v. Bd. of Trustees of State Colleges, 2 Conn. App. 1996, 201 (1984) ("Whether the plaintiff will be successful on a motion to strike or on the merits is immaterial to the issue of standing.").

More fundamentally, the court's conclusion that prisoners must wait until they have contracted a potentially fatal disease before they are allowed to challenge conditions of confinement that expose them to that disease is deeply wrong and contrary to decades of precedent. As the U.S. Supreme Court has recognized, "a remedy for unsafe conditions need not await a tragic event." Helling v. McKinney, 509 U.S. 25, 33 (1993). Thus, courts routinely entertain prisoner claims that prison conditions expose them to a risk of future harm. See, e.g. id. (exposure to cigarette smoke); Toliver v. Comm'r Semple, 2016 WL 7115942, at *2 (D. Conn. Dec. 6, 2016) (exposure to, among other things, high PCB levels, asbestos, methane, and mold); Rahman v. Schriro, 22 F. Supp. 3d 305, 314 (S.D.N.Y. 2014) (exposure to radiation from x-ray screening machine). For that reason, in recent months, courts in other jurisdictions have had no patience for the argument that prisoners not yet infected by COVID-19 lack standing on the basis that the risk of harm is "too speculative." See Savino v. Souza, 2020 WL 1703844, at *4 (D. Mass. Apr. 8, 2020) (finding standing under Article III); Ortuno v. Jennings, 2020 WL 1701724, at *2 (N.D. Cal. Apr. 8, 2020) (same); Castillo v. Barr, 2020 WL 1502864, at *4 (C.D. Cal. Mar. 27, 2020)

(same); People ex rel. Stoughton v. Brann, 2020 WL 1679209, at *2 (N.Y. Sup. Ct. Apr. 6, 2020) (finding standing under New York law).

Finally, aside from improperly conflating the standing inquiry with the separate question whether the complaint adequately stated a claim, the court also simply ignored the plaintiffs' separate allegations that they are entitled to relief under the Connecticut Constitution. See Amended Complaint ("AC"), ¶ 90. Thus, even if the legal sufficiency of the complaint were relevant to the standing analysis (which it is not), the trial court erred by failing to address the plaintiffs' state constitutional claims.

4. The political question doctrine does not strip the Court of its obligation to protect constitutional rights

The trial court erroneously applied the political question doctrine to bar this lawsuit, despite the plaintiffs' assertion of federal and state constitutional rights. As the U. S. Supreme Court has consistently confirmed, the judiciary has the ability and obligation to protect constitutional rights – even in prisons. See, e.g., Brown v. Plata, 563 U.S. 493 (2011) (prison overcrowding violated Eighth Amendment); Farmer v. Brennan, 511 U.S. 825 (1994) (prison officials have duty under Eighth Amendment to provide humane conditions of confinement); Helling v. McKinney, 509 U.S. 25 (1993) (Eighth Amendment protects prisoners against exposure to future health risks); Bell v. Wolfish, 441 U.S. 520 (1979) (due process protects pre-trial detainees in prison). There is no basis to conclude that the political question doctrine strips courts of the power to adjudicate federal constitutional claims raised under the Eighth and Fourteenth Amendments.

The trial court's dismissal based on the political question doctrine is also problematic under the Connecticut constitution. In State v. Santiago, this Court made clear that determination of whether one's right to be treated in accord with "contemporary standards of decency" is, indeed, within the jurisdiction of Connecticut courts:

> In Ross, we also rejected the theory that "article first, § 9, confers the authority to determine what constitutes cruel and unusual punishment solely on the Connecticut legislature and not on the courts." [State v. Ross, 230 Conn. 183,] 248, 646 A.2d 1318. "Although we should exercise our authority with great restraint," we explained, "this court cannot abdicate its nondelegable responsibility for the adjudication of constitutional rights." Id., at 249, 646 A.2d 1318.

State v. Santiago, 318 Conn. at 1, 42 (2015). The Connecticut constitution entrusts Connecticut courts with ensuring that the treatment of prisoners comports with contemporary standards of decency. The trial court's application of the political question doctrine here was error.

B. The Trial Court Wrongly Rejected Plaintiffs' Federal Constitutional Claims

The coronavirus pandemic is unprecedented, but the plaintiffs' federal constitutional claims are not. The plaintiffs have stated a straightforward Eighth Amendment claim: they are at substantial risk of serious illness and possible death due to COVID-19, a disease with no vaccine, cure, or treatment; yet the defendants have failed to implement the principal measure known to prevent the spread of the disease: social distancing. But through a series of legal and factual missteps the trial court wrongly concluded that the plaintiffs had failed to state an Eighth Amendment claim and altogether overlooked plaintiffs' Fourteenth Amendment claim.

As elaborated above, because the court compounded its mistakes by reaching the merits in the context of a jurisdictional analysis, the result was a dismissal. The amended complaint sufficiently makes out both Eighth and Fourteenth Amendment claims, but at a minimum, the court should have treated the defendants' motion to dismiss as a motion to strike and permitted the plaintiffs to cure any defects in pleading so that the case could move forward to a full consideration of the merits.

1. The Trial Court's Eighth Amendment analysis was erroneous

The plaintiffs' allegations satisfy both the objective and subjective prongs of the Eighth Amendment. Helling v. McKinney, 509 U.S. 25, 26 (1993); Faraday v. Comm'r of Corr., 288 Conn. 326, 338 (2008). First, the plaintiffs have alleged that the defendants have subjected them to conditions of confinement that are "objectively, sufficiently serious" so as to deny "the minimal civilized measure of life's necessities." Id. (citations omitted). The cramped and communal nature of Connecticut's prisons places the plaintiffs at imminent risk of serious illness or death by COVID-19. Second, the plaintiffs have alleged that the defendants are deliberately indifferent to that risk. Farmer v. Brennan, 511 U.S. 825, 834 (1994). The defendants have refused to enact social distancing despite full knowledge that it is the principal measure to prevent the spread of the disease.

In reaching the opposite conclusion, the trial court misconstrued the law and ignored critical factual allegations. Courts have long recognized that "correctional officials have an affirmative obligation to protect inmates from infectious disease." Jolly v. Coughlin, 76 F.3d 468, 477 (2d Cir. 1996). The risk of contracting a "serious, communicable disease" constitutes an "unsafe, life-threatening condition" that threatens prisoners' "reasonable safety." Helling, 509 U.S. at 33. Numerous courts have held that COVID-19 poses precisely the sort of objectively serious risk contemplated by Helling. E.g. Ruderman v. Kolitwenzew, 2020 WL 2449758, at *13 (C.D. Ill. May 12, 2020); Frazier v. Kelley, 2020 WL 2110896, at *6 (E.D. Ark. May 4, 2020) ("[I]t cannot be disputed that COVID-19 poses an objectively serious health risk … given the nature of the disease and the congregate living environment of the [correctional] facilities."); Awshana v. Adducci, 2020 WL 1808906, at *7 (E.D. Mich. Apr. 9, 2020) ("Objectively, the health risks posed by COVID-19 are abundantly clear.").

Protecting someone from infectious disease necessarily means the prevention of *future* harm. In Helling, the U.S. Supreme Court held that the Eighth Amendment protected the plaintiff against exposure to future health risks "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. Flatly rejecting the defendants' motion to dismiss in that case, the Supreme Court found no question that the plaintiff "state[d] a cause of action under the Eighth Amendment by alleging that petitioners have, with deliberate indifference, exposed him to levels of [secondhand smoke] that pose an unreasonable risk of serious damage to his *future* health." 509 U.S. at 35 (emphasis added). See also Jabbar v. Fischer, 683 F.3d 54, 57 (2d Cir. 2012) (citation omitted) ("[P]risoners may not be deprived of their basic human needs . . . and they may not be exposed to conditions that pose an unreasonable risk of serious damage to [their] *future* health.") (emphasis added).

The trial court's reasoning distorts these precedents. The court acknowledged that Helling stands for the proposition that "exposure to future harm can present an eighth amendment violation." Order re Mot. to Dismiss at 6. Yet the court proceeded to the baffling conclusion that the plaintiffs failed to allege "analogous facts" because they were not "presently and directly exposed to the dangerous condition." Id. at 6. The court went on to explain that, to state a claim, the plaintiffs must "allege that [they] are housed with or otherwise directly exposed to individuals with COVID-19," presumably in the same manner that a person is exposed to second-hand smoke. Id. The court concluded that the plaintiffs had failed to state a claim by alleging "that the preventative steps that the defendants have taken have not been and will not be adequate to address the pandemic because the plaintiffs will be subjected to a heightened risk of exposure to the coronavirus in the future as a result of inadequate steps taken to mitigate the risks." Id. But protecting prisoners from "a heightened risk of exposure" to a deadly disease due to the defendants' "inadequate

steps" is *precisely* what the Eighth Amendment demands. Helling, 509 U.S. at 36 (holding that prisoner satisfied the objective prong by demonstrating that he was exposed to unreasonably high levels of environmental tobacco smoke *and* that the health risks associated with exposure were "so grave" as to "violate contemporary standards of decency to expose *anyone* unwillingly to such risk."). Under the court's reasoning, the plaintiffs' Eighth Amendment claim would be ripe for consideration only once the plaintiffs have already been exposed to the pathogen. But at that point, it will be too late.

As the Amended Complaint makes plain, COVID-19 poses risks that are distinct from and greater than secondhand smoke. The virus "'is both highly contagious and deadly,' spreading from person to person through 'respiratory droplets, close personal contact, and from contact with contaminated surfaces and objects.'" AC ¶ 14 (quoting Affidavit of Dr. Jonathan Giftos ¶ 5). The virus – unlike an environmental contaminant like secondhand smoke – spreads exponentially through its human hosts and poses a special threat because it is asymptomatic in roughly 60% of people yet deadly in others. AC ¶ 78. There exists no cure, treatment, or vaccine for COVID-19. AC ¶ 3.

Society's attempts to contain the virus have fundamentally reshaped virtually all aspects of life, and social distancing has become a national standard. During March alone, the Governor issued 23 executive orders to enforce social distancing policies and reduce the risk of spreading COVID-19. AC ¶ 19. He has closed public schools, limited the workplace operations of non-essential businesses and nonprofits, and even delayed the presidential primary. AC ¶ 26. The risk of contracting COVID-19 is so grave that it justifies requiring citizens to forego some of the most important aspects of their lives: attending school, joining in religious services, and earning a living at their workplace. AC ¶ 26. There can be little doubt that society "considers the risk [posed by COVID-19] … so grave that it

violates contemporary standards of decency to expose anyone unwillingly to such a risk." McKinney, 509 U.S. at 36.

Incarcerated people, unlike virtually every other Connecticut resident, do not have the liberty to practice social distancing. Connecticut's incarcerated residents "are held in a congregate living situation at least as dense as is found in nursing homes and hospitals." AC ¶ 43. The stakes are especially high in prison because "'there are high numbers of people, often with chronic and frequently untreated illnesses, housed in a setting with minimal levels of sanitation, limited access to personal hygiene, limited access to medical care, and no possibility of staying at a distance from others," AC ¶ 49 (quoting Giftos Aff. ¶ 8). The plaintiffs are living in dormitory settings with as many as 100 other people, AC ¶ 45, or forcibly confined in a small cell with another person, AC ¶ 46, as many as 24 hours per day; in either setting, they have limited ability to maintain their personal hygiene. AC ¶ 47. Under those circumstances, "[d]ecreasing the incarcerated population so that there is more ability to physically distance within the facility, fewer people who can contract the virus inside the facility, and more medical care for those who need it **is the only way to prevent the complications from surging**." AC ¶ 86 (quoting Giftos Aff. ¶ 18) (emphasis added).

Even DOC's own figures demonstrate the uncontrolled spread of the virus in the absence of meaningful social distancing.[10] On March 30, 2020, a single prisoner tested positive for the virus; by April 7, 41 DOC staff members and 44 incarcerated people had tested positive, with 53 prisoner test results still pending. AC ¶ 55. In the seven weeks since, updated data from the DOC report that those figures have grown to 378 staff members and 843 incarcerated people who have had the virus. Seven prisoners have

[10] As noted in footnote 4, there are substantial reasons to believe that the virus is much more widespread than what is reflected in DOC's statistics.

died.[11] Actual infection rates are undoubtedly higher, given that roughly 60% of COVID-19 cases are asymptomatic. AC ¶ 78.

Thus, the plaintiffs' concerns are far from abstract or speculative. The individual plaintiffs, like other people in Connecticut prisons, are forcibly confined under conditions that subject them to a significant risk of exposure to a potentially deadly virus that is growing at an unchecked rate.[12] Each individual plaintiff has an underlying condition that places him or her among the groups identified by the CDC to be at heightened risk of serious illness or death from COVID-19.[13] But incarcerated people are precluded from social distancing, the only proven prevention measure. DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 199–200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that *it renders him unable to care for himself, and at the same time fails to provide for his basic human needs*—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment...") (emphasis added).

The trial court's analysis of the Eighth Amendment's subjective prong is also wrong. The court thought that the plaintiffs' claims "sound in negligence rather than deliberate indifference." Order re Mot. to Dismiss at 7. It took the plaintiffs' acknowledgement that the efforts that the defendants have made were "commendable" AC ¶ 92 as dispositive of the question whether the failure to take other indispensable life-saving measures was

[11] See Connecticut Dep't of Correction, Covid-19 Tracker, https://tinyurl.com/ycyfkoyk (last visited May 28, 2020).

[12] The Amended Complaint provides a specific example of a likely extended exposure to someone with COVID-19: Plaintiff Dirgo's cellmate displayed telltale symptoms of COVID-19—including fever, malaise, and fatigue—but was not tested for the virus and was not treated for COVID-19. AC ¶ 83.

[13] Plaintiffs Willie Breyette and Keri Dirgo both have autoimmune diseases. AC ¶¶ 5, 9. Plaintiffs Breytte and Marvin Jones both have respiratory conditions. AC ¶ 5. Plaintiff Anthony Johnson is 61 years old. AC ¶ 41.

deliberately indifferent. But the deliberate indifference question is not whether the defendants have done anything; it is why they have left the plaintiffs exposed and vulnerable to a deadly virus.

The court simply failed to consider the plaintiffs' allegations that demonstrate the defendants' deliberate indifference. Farmer requires that "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Farmer v. Brennan, 511 U.S. 825, 837 (1994); see also Morgan v. Dzurenda, 2020 WL 1870144, at *3 (2d Cir. Apr. 15, 2020). That analysis is "a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence . . . and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." Farmer, 511 U.S. at 842.

Instead, the court treated the inadequacy of the defendants' response to the pandemic as irrelevant to the plaintiffs' Eighth Amendment's claims. Order re Mot. to Dismiss at 7.[14] But the defendants do not defeat a claim of deliberate indifference simply because they have taken some protective measures. Under Farmer, those actions in their totality must be "*reasonable*." Farmer, 511 U.S. at 847.[15] Because the essential facts

[14] In reaching that conclusion, the court did not consider any Eighth Amendment cases; instead it relied on Matthiessen v. Vanech, 266 Conn. 822, 832–33 (2003), a state tort case arising out of a motor vehicle accident. Order re Mot. to Dismiss at 7.

[15] Even in the context of the denial of medical treatment, a court must examine the constitutional adequacy of the care provided. See Chance v. Armstrong, 143 F.3d 698, 703 (2d Cir.1998) (defendant's "conscious choice of the 'easier and less efficacious treatment' for an objectively serious medical condition can still amount to deliberate indifference.") (quoting Estelle, 429 U.S. at 106 n.10); Berry v. Peterman, 604 F.3d 435, 441 (7th Cir.2010) (same); Waldrop v. Evans, 871 F.2d 1030, 1035 (11th Cir.1989) (same); Jones v. Westchester County Department of Corrections Medical Dept., 557 F.Supp.2d 408, 416 (S.D.N.Y. 2008) ("Whatever the ultimate merits of Plaintiff's claim, Defendants have jumped the gun by filing a pre-answer motion to dismiss. Many of the material questions in this case, such as, 'What care is reasonable in these circumstances,' and 'What was the

surrounding COVID-19 in prisons are well-known and indisputable, courts around the country have ruled that insufficient mitigation measures result in deliberate indifference.[16] See Martinez-Brooks v. Easter, 2020 WL 2405350, (D.Conn. May 12, 2020) ("[E]ven with the measures that the Warden has put in place, due to the impossibility of adequate social distancing, confinement at FCI Danbury—due to the very structure of the facility—continues to pose a grave risk to vulnerable inmates' health."); Wilson v. Williams, 2020 WL 1940882, at *9 (N.D. Ohio Apr. 22, 2020) (same, as to FCI Elkton).

There is little question that defendants are aware that COVID-19 poses "a substantial risk of serious harm" to incarcerated people. Farmer, 511 U.S. 837. DOC Defendant Cook has acknowledged the COVID-19 pandemic as an "unprecedented healthcare emergency."[17] The Governor has repeatedly acknowledged the substantial risk of rapid COVID-19 transmission in congregate settings, including long-term care facilities and homeless shelters, and he has publicly defended the state's responses to the pandemic in its correctional facilities. AC ¶ 80. As noted *supra*, according to statistics published on the DOC's own website, COVID-19 infections have increased rapidly over the

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Defendants' mental state when the surgery was refused,' are not ripe for adjudication on the basis of the complaint.").

[16] See Valentine v. Collier, 2020 WL 1916883, at *10 (S.D. Tex. Apr. 20, 2020) (finding that "the risk of COVID-19 is obvious" and the Defendant facilities were deliberately indifferent because the facilities were not complying with their implemented policies (e.g., placing prisoners on lockdown, taking temperatures twice per day, and providing them with new cloth masks daily and additional soap at no cost)); Swain v. Junior, 2020 WL 2078580, at *16 (S.D. Fla Apr. 29, 2020) (finding defendants' preventative measures demonstrated deliberate indifference due to the "exponential rate of infection since the case commenced."); see also Wilson, 2020 WL 1940882, at *8 (finding respondents acted with deliberate indifference because they lacked sufficient equipment to test prisoners properly and failed to separate prisoners at least six feet apart).

[17] 3/16/2020 Memorandum from R. Cook to DOC Staff, https://tinyurl.com/y9ev86vt (last visited May 28, 2020).

last 7 weeks, from one person on March 30, 2020 to 853 people as of May 29, 2020.[18] Farmer, 511 U.S. at 842 ("[A] fact finder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious.").

Despite their knowledge of the substantial risk posed to incarcerated people by COVID-19, the defendants have refused to take "reasonable measures to abate it." Farmer, 511 U.S. at 847. The defendants know that social distancing is the principal tool to fight the virus, which has no cure, treatment, or vaccine. Indeed, as detailed above, the Governor has enacted dozens of executive orders to enforce social distancing in virtually all areas of life. AC ¶ 80. Starting in mid-March, the defendants have received numerous communications from experts and community groups concerning the dire risks the virus poses to Connecticut's incarcerated residents. For example, Dr. Emily Wang, an expert on correctional health and director of a clinic for chronically ill people leaving prison, wrote to the Governor, the Commissioner, and other Connecticut officials to express her concerns. AC Ex. 19. Chief among Dr. Wang's recommendations was "to thin the incarcerated population—by the most expeditious means possible, including releasing the healthy—to allow for social distancing." Id. at p. 3.[19] Even so, the Governor has refused to consider releasing anyone in his custody, offering instead that "[w]e are going to do everything we can to make sure that anybody who may be at risk of being a carrier is segregated or quarantined in a separate area." AC ¶ 80. Given that as many as 60% of infected people

[18] The actual figure is likely far higher due to the fact that approximately 60% of people infected with the virus are asymptomatic.

[19] Dr. Wang's letter is just one of many examples of communications that Defendant Lamont has received since the outbreak of the pandemic, calling on him to reduce the prison population sufficient to permit social distancing. See, e.g., Letter from ACLU of Connecticut to Gov. Lamont et al. (March 12, 2020), https://tinyurl.com/y7urjo6f; Letter to Governor Lamont from 80 Connecticut Organizations and 1256 Individuals Concerning Urgent Action Needed to Protect Individuals in Connecticut's Prisons and Jails (March 16, 2020), https://tinyurl.com/y8j5dzej; Letter to Governor Lamont from 59 Yale University Medical and Public Health Faculty (Apr. 21, 2020), https://tinyurl.com/yc4pwobk.

are asymptomatic, however, a plan that relies solely on quarantining symptomatic people is patently inadequate. AC ¶ 79; Ex. 24, Affidavit of Josiah Rich, MD, ¶¶ 9, 15-16. Coleman v. Wilson, 912 F. Supp. 1282, 1319 (E.D. Cal. 1995) ("[P]atently ineffective gestures purportedly directed towards remedying objectively unconstitutional conditions do not prove a lack of deliberate indifference, *they demonstrate it*.") (emphasis added).

In sum, the defendants are fully aware of the risk posed by COVID-19 to incarcerated people; that social distancing is the principal tool to prevent the spread of the disease; and that social distancing in prison is impossible under current conditions. The defendants' failure to take "reasonable measures" – including by creating a plan to reduce the incarcerated population – is ample evidence of deliberate indifference.

2. The Court failed to consider the fourteenth amendment claim

The trial court simply failed to consider Plaintiff Jones's claim. He is currently at New Haven Correctional Center on a $5,000 bond, and he alleges that the defendants' inaction in the face of the pandemic constitutes punishment to which he—as a pretrial detainee—may not be subjected.

The Substantive Due Process Clause guarantees that "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law." Bell v. Wolfish, 441 U.S. 520, 535 (1979); see id. at n.16 (pretrial detainees retain greater protections than convicted prisoners). When deciding whether challenged conditions of confinement amount to punishment, courts ask "whether the [restriction] is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." Almighty Supreme Born Allah v. Milling, 876 F.3d 48, 55 (2d Cir. 2017). If a restriction or condition is not reasonably related to a legitimate goal, the court "may infer that the purpose of the government action is punishment that may not constitutionally be inflicted upon detainees *qua* detainees." Id.; see also Darnell v. Pineiro,

849 F.3d 17, 29 (2d Cir. 2017) (Due Process clause of the Fourteenth Amendment demands protection of serious medical needs of people held in pre-trial confinement).[20]

Here, the conditions of confinement imposed on the plaintiffs and other pretrial detainees at DOC facilities amount to punishment because the conditions place those detainees at a significantly increased risk of COVID-19 and are not reasonably related to any legitimate government objective. See Cameron v. Bouchard, 2020 WL 2569868 (E.D. Mich. May 21, 2020) (ordering jail to release medically vulnerable detainees in face of COVID-19 pandemic); Thakker v. Doll, 2020 WL 1671563, at *8 (M.D. Pa. Mar. 31, 2020) (similar).[21] The trial court should have considered this Fourteenth Amendment claim.

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[20] Under the Fourteenth Amendment, officials are deliberately indifferent, and thus violate their constitutional obligations, when they (1) recklessly fail to act with reasonable care to mitigate the risk that the condition posed to the pretrial detainee even though (2) they knew, or should have known, that the condition posed an excessive risk to health or safety. Darnell, 849 F.3d at 35. Notably, because pretrial detainees have not been convicted and therefore cannot be lawfully punished, they do not have to prove the subjective element of deliberate indifference. Id.

[21] See also Basank, 2020 WL 1481503, at *1, 5 (S.D.N.Y. Mar. 26, 2020) (concluding that plaintiffs who suffer from chronic conditions "face[] an imminent risk of death or serious injury in immigration detention if exposed" to the pathogen); Order, United States v. Hector, No. 2004183 (4th Cir. Mar. 27, 2020) (reversing denial of release pending appeal and ordering the district court to "consider the severity of the risk that the COVID-19 virus poses to appellant given her existing medical conditions"), on remand, Order, No. 18-002, Dkt. 748 (W.D. Va. Mar. 27, 2020) (granting release pending sentencing; Order, Xochihua-Jaimes v. Barr, No. 18-71460 (9th Cir. Mar. 23, 2020) (ordering *sua sponte* release "[i]n light of the rapidly escalating public health crisis); Order, United States v. Bolston, No. 1800382, Dkt. No. 20 (N.D. Ga. Mar. 30, 2020) (releasing defendant in part because "the danger inherent in his continued incarceration. . . during the COVID-19 outbreak".); Order, United States v. Kennedy, No. 1820315, Dkt. No. 77 (E.D. Mich. Mar. 27, 2020) (same); Order, United States v. Michaels, No. 16-00076, Dkt. No. 1061 (C.D. Cal. Mar. 26, 2020) (granting temporary release because the pathogen constitutes a compelling reason not to detain people); Order, United States v. Harris, 2020 WL 1503444 (D.D.C. Mar. 26, 2020) ("The Court is convinced that incarcerating Defendant while the current COVID-19 crisis continues to expand poses a far greater risk to community safety than the risk posed by Defendant's release to home confinement on . . . strict conditions.").

C. The Defendants' Treatment of Incarcerated People During the Pandemic Fails to "Comport with Contemporary Standards of Decency"

1. Preservation and Reviewability

The trial court did not address the plaintiffs' state constitutional claim. The plaintiffs' claim under the Connecticut constitution is that the treatment of incarcerated people during the COVID-19 pandemic fails to "comport with contemporary standards of decency." State v. Santiago, 318 Conn. 1, 9 (2015). This claim was alleged in paragraph 90 of the Amended Complaint.[22] But if this allegation were insufficient to preserve this claim, review is requested under State v. Golding, 213 Conn. 233, 239-40 (1989). Because this claim seeks application of a constitutional right, review of this claim is plenary. See Cambodian Buddhist Society of Connecticut, Inc. v. Planning and Zoning Com'n of Town of Newtown, 285 Conn. 381, 398 n.11 (2008); State v. Peeler, 271 Conn. 338, 399 (2004).

In State v. Geisler, 222 Conn. 672, 684-85 (1992), this Court set forth six nonexclusive factors that may be considered in analyzing a claim of error under the Connecticut state constitution.[23] In State v. Santiago, 318 Conn. at 18 n.14, this Court explained that, with respect to a claim involving the state constitutional right to be treated in accordance with contemporary standards of decency, the Geisler factors are "interwoven into our application of the legal framework that properly governs such challenges."[24]

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[22] Paragraph 90 states: "During the COVID-19 pandemic, and at all other times, the defendants bear the duty to refrain from cruelly and unusually punishing sentenced prisoners of the State in contravention of the Connecticut and United States Constitutions by failing to provide adequate sanitation and medical care."

[23] Those factors are: "(1) the text of the relevant constitutional provisions; (2) related Connecticut precedents; (3) persuasive federal precedents; (4) persuasive precedents of other state courts; (5) historical insights into the intent of our constitutional forebears; and (6) contemporary understandings of applicable economic and sociological norms." State v. Geisler, 222 Conn. at 684-85.

[24] See also Griffin v. Commissioner of Correction, 333 Conn. 480, 488 n.6 (2019) ("[T]he Geisler factors are interwoven into the evolving standards of decency analysis.").

2. The state constitutional right to be treated in accord with contemporary standards of decency

This Court recognized in Santiago and Ross that Connecticut's prohibition against cruel and unusual punishment is found in the due process clauses of the state constitution:

> [I]n the area of fundamental civil liberties—which includes all protections of the declaration of rights contained in article first of the Connecticut constitution—we sit as a court of last resort. In such constitutional adjudication, our first referent is Connecticut law and the full panoply of rights Connecticut citizens have come to expect as their due.…
>
> It is by now well established that the constitution of Connecticut prohibits cruel and unusual punishments under the auspices of the dual due process provisions contained in article first, §§ 8 and 9.[ ] Those due process protections take as their hallmark principles of fundamental fairness rooted in our state's unique common law, statutory, and constitutional traditions.… Although neither provision of the state constitution expressly references cruel or unusual punishments, it is settled constitutional doctrine that both of our due process clauses prohibit governmental infliction of cruel and unusual punishments. …

State v. Santiago, 318 Conn. at 15–17.

The Court in Santiago went on to hold that the due process right to be free from cruel and unusual punishment must be analyzed from the perspective of whether the challenged treatment comports with "contemporary standards of decency." That analysis involves a two-part framework. "First, the court looks to 'objective factors' to determine whether the punishment at issue comports with contemporary standards of decency." Id. at 21. In this part of the analysis, the Court generally "look[s] to five objective indicia of society's evolving standards of decency: (1) the historical development of the punishment at issue; (2) legislative enactments; (3) the current practice of prosecutors and sentencing juries; (4) the laws and practices of other jurisdictions; and (5) the opinions and

recommendations of professional associations."[25] Id. at 52. Next, the Court "must conduct a second stage of analysis in which [it] bring[s] [its] own independent judgments to bear, giving careful consideration to the reasons why a civilized society may accept or reject a given penalty." Id. at 22.[26]

a. Historical developments

For two reasons, historical developments do not shed much, if any, light on the Defendants' state constitutional obligations to prisoners in the context of the COVID-19 pandemic. First, as the Court noted in Santiago, there is little Connecticut precedent on Connecticut's prohibition against cruel and unusual punishment. See Santiago, 318 Conn. at 41-42 ("Turning to the next Geisler factor, namely, relevant Connecticut precedents, we write on a relatively blank slate with respect to cruel and unusual punishment….").

Second, the state's treatment of prisoners during the COVID-19 pandemic is a purely contemporary issue. The current pandemic is largely unprecedented. The closest parallel cited by public health officials is the 1918 "Spanish" Flu pandemic. But over the past century, the population density among both the general population and the prison population have increased dramatically, significantly increasing the risk of transmission unless social distancing measures are implemented. Connecticut's population has increased nearly three-fold, from about 1.3 million to 3.6 million.[27] Over the same period,

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[25] Because this case involves whether the conditions of confinement comport with contemporary standards of decency, the practice of prosecutors and sentencing juries is not applicable.

[26] While Santiago considered contemporary standards of decency in the context of the death penalty, this Court subsequently applied this analysis in other contexts. See Griffin v. Commissioner of Correction, 333 Conn. 480 (2019); State v. McCleese, 333 Conn. 378 (2019). There is no reason why the same analysis would not apply to how prisoners are treated during a pandemic.

[27] U.S. Census Bureau, Statistical Abstract of the United States 1918, Pt. 2 Tbl. 23, https://tinyurl.com/ybko6rdr; U.S. Census Bureau, QuickFacts: Connecticut, https://www.census.gov/quickfacts/CT (last visited May 28, 2020).

the number of incarcerated individuals has increased more than five-fold, from about 2,000 to more than 11,000 today.[28] It was not until 65 years after the "Spanish" Flu pandemic that the General Assembly passed General Statutes § 28-9 (discussed below), which requires the Governor to protect the health and safety of incarcerated residents during a public health emergency. Public Acts 1975, No. 75-643, § 2.

b. Legislative enactments

As this Court recognized in Santiago, "both this court and the United States Supreme Court have stated that 'the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" State v. Santiago, 318 Conn. at 59, quoting Atkins v. Virginia, 536 U.S. 304, 312 (2002). In Santiago, this Court concluded that, after years of unsuccessful efforts to abolish the death penalty in Connecticut, the passing of a prospective repeal on April 25, 2012 "evinces a steady, inexorable devolution in the popularity and legitimacy of the death penalty." State v. Santiago, 318 Conn. at 59. Justice Palmer, the author of Santiago, subsequently clarified that the use of legislative enactments does not result in a statutory construction analysis, but rather is used as evidence by the Court of "contemporary standards of decency":

> [T]o the extent that it was not transparent from our decision in Santiago, I take this opportunity to clarify that a claim that a penal sanction impermissibly offends contemporary standards of decency is not a question of statutory interpretation subject to § 1–2z and the attendant rules of construction.[ ] When a reviewing court considers whether a challenged punishment is excessive and disproportionate according to current social standards, legislative enactments are just one—albeit the most important—factor to be considered. Moreover, our goal in evaluating those enactments is not merely to determine what the legislature intended to accomplish through the enabling legislation (the touchstone of statutory interpretation), but also to understand

[28] See Margaret Werner Calahan, Historical Corrections Statistics in the United States, 1850-1984, Tables 3-2, 4-3, & 5-1 (1986) (Connecticut prisons, jails, and juvenile correctional centers held 2,218 in 1910 and 1,671 1923); Conn. Department of Correction, Average Confined Inmate Population and Legal Status (May 1, 2020), https://tinyurl.com/yayythu8 (last visited May 28, 2020).

> what the legislation says and signifies about our society's evolving perspectives on crime and punishment. In that respect, we look not only to the words of the statute, but also to its legislative history, the aspirations and concerns that were before the legislature as it deliberated, and, to the extent we can perceive them, the political motivations and calculations that affected or effected the outcome of those deliberations. The latter, as much as anything else, offer a portal into what the final legislative product indicates about our contemporary standards of decency.

State v. Peeler, 321 Conn. 375, 405–06 (2016) (*Palmer, J.*, with whom *Eveleigh* and *McDonald*, *J*s., join, concurring).

It is in this context that this Court should consider General Statutes §§ 28-9(b)(5) and 18-7 to be strong evidence that the failure to protect the health and safety of Connecticut's prisoners violates contemporary standards of decency. While the current pandemic is unprecedented, legislative enactments show that contemporary society expects prisoners to be protected during a pandemic.

General Statutes § 28-9(b)(5) provides:

> Following the Governor's proclamation of … a public health emergency …. The Governor shall take appropriate measures for protecting the health and safety of inmates of state institutions and children in schools.

General Statutes § 18-7 also provides that

> The commissioner … shall provide for the prisoners suitable food and clothing and suitable implements and materials for their work, and shall provide for the relief of any sick or infirm prisoner ….

These two statutes demonstrate that contemporary society wants the health and safety of Connecticut's prisoners to be protected, particularly during a pandemic. The General Statutes reflect a consensus from the people of this State that prisoners must be protected during a public health emergency and must have adequate medical care. Yet, since the declaration of the public health emergency on March 10, the Governor has issued no fewer than 46 executive orders, not one of which has been directed at Connecticut's incarcerated residents. The current treatment of incarcerated people during the COVID-19 pandemic is

cruel and violates contemporary standards of decency as reflected in the societal values underlying General Statutes §§ 28-9(b)(5) and 18-7.

c. Laws and practices of other jurisdictions

"Although trends within Connecticut are the most direct and relevant indicators of contemporary standards of decency with respect to the state constitution, we also look to developments in our sister states, and even the international community, for additional input." State v. Santiago, 318 Conn. at 77-78. Part I.C above discusses the many federal court decisions ordering relief under the U.S. Constitution. Those decisions are strong evidence that conditions in Connecticut prisons do not conform with contemporary standard of decency. This section focuses on the actions taken by courts and executive branch officials in our sister states.

"When we interpret the protections afforded under the state constitution, trends and norms in our neighboring New England states, with which Connecticut shares a cultural and historical affinity, can be especially pertinent." State v. Santiago, 318 Conn. at 80. Our neighboring states have taken swift and decisive action to protect their incarcerated populations from COVID-19. In Massachusetts, the Supreme Judicial Court issued an order on April 3 that included a number of measures, including a presumption of release for all pretrial detainees being held for non-violent offenses and technical parole violations, and appointment of a special master to facilitate hearings for pretrial detainees. Committee for Public Counsel Services v. Chief Justice of Trial Court, 484 Mass. 431, 435, aff'd as modified, 484 Mass. 1029 (2020). While the court did not order release for individuals serving a sentence of incarceration, the court recognized that "if the virus becomes widespread within correctional facilities in the Commonwealth"—as it now has in Connecticut's correctional facilities—"there could be questions of violations of the Eighth and Fourteenth Amendments to the United States Constitution and art. 26 of the

Massachusetts Declaration of Rights ...." Id. at 436. As of May 18, over 1,200 people had been released pursuant to the procedures established by the court's order.[29]

Other states in the region have taken similar action. In New York, a state trial court ordered the release of pretrial detainees held at Rikers Island who have a high risk of serious illness or death from COVID-19, People ex rel. Stoughton v. Brann, 2020 WL 1679209, at *5 (N.Y. Sup. Ct. Apr. 6, 2020), and other state and local officials have ordered the release of additional prisoners and pretrial detainees from jails and prisons.[30] In New Jersey, the Chief Justice ordered the temporary release of individuals serving county jail sentences, Matter of the Request to Commute or Suspend County Jail Sentences, Supreme Court of New Jersey (March 22, 2020), and the Governor ordered special release procedures for individuals who are eligible for parole or have an increased risk of death or serious illness from COVID-19. Exec. Order No. 124 (N.J. April 10, 2020), https://tinyurl.com/ycqobfzm. In Rhode Island, the Supreme Court ordered the release of 52 people, and ordered trial courts to hold expedited hearings on motions for sentence reduction. In re Request for Prison Census Control in Response to COVID-19, No. 2020-103-M.P. (R.I. April 3, 2020).

And the northeast is not unique in this regard. A website maintained by the Prison Policy Initiative shows that state courts, governors, and prison administrators across the country have taken action well beyond what Connecticut has done to protect incarcerated

[29] See Committee for Public Counsel Services v. Chief Justice of the Trial Court, Special Master's Weekly Report (May 18, 2020), https://tinyurl.com/yb33evnb (last visited May 28, 2020).

[30] See, e.g. J. Marsh, "NYC Jail Population Lowest Since World War II After Coronavirus Releases," NY Post, March 26, 2020, available at https://tinyurl.com/ybgzadaz (last visited May 28, 2020); S. Taddeo, "NY to Release Up to 1,100 Low-level Parole Violators From Jails to Stop Coronavirus Spread," Democrat & Chronicle, March 28, 2020, https://tinyurl.com/y959az85 (last visited May 28, 2020).

individuals from COVID-19.[31] See also AC Exs. 22 & 23 (listing actions taken by state courts, governors, and prison officials to reduce incarceration in light of COVID-19). These actions by themselves demonstrate that contemporary standards of decency require the defendants to take immediate action to protect Connecticut's prison population.

Internationally, there is also an emerging consensus that COVID-19 presents a special risk to prisons and that early release is an appropriate tool to lower the threat to incarcerated populations and guards. The World Health Organization and the United Nations Office of the High Commissioner on Human Rights ("OHCHR") have called on political leaders to reduce the size of prison populations in order to control the spread of COVID-19, including by expanding the use of release mechanisms for incarcerated people at higher risk for the virus.[32] The OHCHR Subcommittee on the Prevention of Torture has also issued advice urging all States Parties to the Convention Against Torture, including the United States, to reduce their prison populations "wherever possible."[33] The judiciaries of the Philippines, Iran, Tunisia, and Afghanistan have released thousands of prisoners to reduce the spread of COVID-19,[34] and the United Kingdom and Australia have announced plans to do so.[35]

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[31] "Responses to the COVID-19 Pandemic," Prison Policy Initiative, https://www.prisonpolicy.org/virus/virusresponse.html (last visited May 28, 2020).

[32] "UNODC, WHO, UNAIDS and OHCHR Joint Statement on COVID-19 in prisons and other closed settings," World Health Organization, May 13, 2020, https://tinyurl.com/y9vdd8vn (last visited May 28, 2020).

[33] "Advice of the Subcommittee on Prevention of Torture to States Parties and National Preventive Mechanisms Relating to the Coronavirus Pandemic," March 25, 2020, Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, https://tinyurl.com/wszobyc (last visited May 28, 2020) .

[34] See "As COVID-19 Fears Grow, 10,000 Prisoners are Freed from Overcrowded Philippine Jails," NPR, May 5, 2020, https://tinyurl.com/ycu6mjta (last visited May 28, 2020); "Iran Temporarily Releases 70,000 Prisoners as Coronavirus Cases Surge," Reuters, March 9, 2020, https://tinyurl.com/uk6dfy9 (last visited May 28, 2020); "Coronavirus: Tunisia releases 1,420 Inmates to Reduce Prison Population," Middle East Eye, March 31, 2020, https://tinyurl.com/y9f3cblp (last visited May 28, 2020); "Afghanistan

d. Opinions and recommendations of professional associations

Public health experts unanimously agree that prisons and jails are extremely high risk settings for the spread of COVID-19, and that swift and drastic action is necessary to mitigate that risk. As one expert stated in an affidavit submitted by the Plaintiffs, COVID-19 "create[s] a perfect storm for correctional settings" because of ease of transmission, lack of prevention opportunities, concentration of people with chronic health issues, and the fact that "despite being physically secure, jails and prison are not isolated from the community."[36] These experts agree that, consistent with social distancing guidelines that have been implemented in virtually every aspect of public life except in correctional settings, the best solution is de-densification of the incarcerated population, to allow for social distancing and to give correctional staff a fighting chance of being able to tend to those in their custody.[37]

But even apart from de-densification, public health experts universally affirm that the government has an obligation to protect those in its custody from the risks of COVID-19. Recognizing that jails and prisons "present[] unique challenges for control of COVID-19 transmission," the Centers for Disease Control issued detailed guidelines for correctional facilities to "help reduce the risk of transmission and severe disease."[38] The plaintiffs submitted to the trial court numerous first-hand affidavits detailing how, despite a few policies that pay lip service to some of the CDC guidelines, conditions in Connecticut's

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to Release 10,000 Prisoners to Slow Spread of Coronavirus," Reuters, March 26, 2020, https://tinyurl.com/y7v587t9 (last visited May 28, 2020).

[35] "Covid-19 Prisoner Releases Too Few, Too Slow," Human Rights Watch, May 27, 2020, available at https://tinyurl.com/yb6duwdn (last visited May 28, 2020).

[36] AC Ex. 24, Aff. of Dr. Josiah Rich ("Rich Aff."), ¶¶ 6, 8-12.

[37] See AC Ex. 19, Giftos Aff. ¶17; AC Ex. 25, Williams Aff. ¶ 18; AC Ex. 24, Rich Aff. ¶ 15.

[38] Centers for Disease Control and Prevention, Interim Guidance on Management of Coronavirus Disease 2019 (COVID-19) in Correctional and Detention Facilities, https://tinyurl.com/y8pmv5p9 (last visited May 28, 2020).

correctional facilities do not come close to what experts recommend to protect the incarcerated population. In short, the defendants' response to the pandemic is neither uniform nor comprehensive, but instead a grab-bag of aspirational half-measures that is insufficient to provide constitutionally adequate conditions of confinement.

D. This Court May Invoke Its Supervisory Authority To Provide Immediate Relief For Connecticut's Prisoners

This Court is a constitutional court and the state's highest court of appellate jurisdiction. See State v. DeJesus, 277 Conn. 418, 457-58 (2008). As such, it retains an "inherent authority over the administration of justice." State v. Melendez, 291 Conn. 693, 719 (2009). The broad scope of this Court's supervisory authority vests it with, for example, the ability to create a Jury Selection Task Force to address the effects of implicit bias and disparate impact on our justice system; State v. Holmes, 334 Conn. 202, 205–06 (2019); the ability to reverse criminal convictions to deter future prosecutorial misconduct; State v. Payne, 260 Conn. 446, 450-53 (2002); and the power (prior to the abolition of the death penalty) to stay the execution of a death sentences. In re Ross, 272 Conn. 674, 675 (*Norcott*, *Lavery*, and *Dranginis*, J's, dissenting).

"The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole…" In re Yasiel R., 317 Conn. 773, 789 (2015). This is an extraordinary time that requires extraordinary action. This Court should invoke its power of supervisory authority and consider issuing orders such as the following:

(1) create an expedited judicial procedure requiring courts to hear requests and balance public health and public safety issues in determining which individuals having the CDC heightened risk factors for serious illness or death should be released;

(2) immediately release all pre-trial detainees facing misdemeanor charges, or detained subject to a bond of $50,000 or less, except for charges comprising a crime of family violence;

(3) immediately release to transitional supervision all those eligible for such;

(4) immediately release to home confinement those eligible for such pursuant to Conn. Gen. Stat. § 18-100h;

(5) immediately release those currently incarcerated only for a technical violation of their parole or probation; and

(6) immediately release on furlough all prisoners who are within six months of their end of sentence.

Additionally, this Court should reverse and remand this case so that the trial court can consider, after a substantive hearing with expert testimony, whether the defendants should be ordered to submit for the court's review and ongoing monitoring a plan to address mitigation efforts including, but not limited to, adequate sanitation and social distancing, taking all measures for screening, cleaning, hygiene and social distancing that the CDC recommends for correctional facilities and diagnosis and treatment people showing symptoms of COVID-19 in accordance with contemporary standards of care.

CONCLUSION

For all of the reasons set forth herein, the trial court's decision should be reversed.

Respectfully submitted,

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CERTIFICATION

The undersigned attorney hereby certifies, pursuant to Connecticut Rule of Appellate Procedure § 67-2, that on May 29, 2020:

(1) the electronically submitted brief and appendix has been delivered electronically to the last known e-mail address of each counsel of record for whom an e-mail address has been provided; and

(2) the electronically submitted brief and appendix have been redacted or do not contain any names or other personal identifying information that is prohibited from disclosure by rule, statute, court order or case law; and

(3) a copy of the brief and appendix has been sent to each counsel of record, in compliance with Section 62-7; and

(4) paper copies of the brief are not required to be filed with the appellate clerk pursuant to this Court's March 20, 2020 order; and

(5) the brief complies with all provisions of this rule.

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CERTIFICATION OF FORMAT AND SERVICE

I hereby certify that a copy of the Plaintiffs' Appellant Brief and Appendix were sent via electronic mail, this 29th day of May, 2020 to:

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