Connecticut Superior Court
Judicial District of Waterbury

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

No. UWY-CV20-6054309-S

April 7, 2020

v.

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

Supplemental Motion for Temporary Order of Mandamus[1]

Both within penal institutions and without, "Connecticut has a policy of preserving life." *Commissioner of Correction v. Coleman*, 303 Conn. 800, 819 (2012). As of today, there are 11,662 sentenced and unsentenced people in Connecticut prisons. To preserve lives in the face of the COVID-19 pandemic, Governor Ned Lamont and Commissioner of Correction Rollin Cook must fulfill their statutory and constitutional duties to protect those in their custody, and provide adequate sanitation and medical treatment for them. In part, the proper execution of their duties requires them to immediately and system reduce the number of people in their custody—the *only* mechanism infectious disease and correctional experts say will prevent a public health crisis of unimaginable proportion.

[1] This motion has been updated from the previous filing to reflect the fast-moving figures and to conform to the amended complaint.

Defendants are obligated to act by both state statute and the U.S. Constitution, but have thus far failed to uphold their legal duties. Accordingly, Plaintiffs have asked this Court to use its mandamus power to direct Defendants to fulfill their legal obligations, and to craft—with expert assistance—an urgent, medically sound, wide-scale "de-densification" strategy to prevent immediate and massive harm and loss of life to Connecticut's incarcerated population, and by extension, to the rest of the state. It is simply too much to ask DOC, an agency that is already tremendously overburdened and under-resourced, to contain a pandemic within its walls. And it is, by definition, impossible: Prison is the prototypical congregate setting, with ideal conditions for both transmission of contagious diseases and spread into surrounding communities.

We are watching this play out in real-time. DOC announced that the **first** person in state custody had tested positive on March 30, 2020. As of April 2, when the complaint in this action was filed, **16** DOC staff members and **8** incarcerated people had tested positive for COVID-19. By April 6, both those numbers have more than doubled, to **32** DOC staff members and **21** incarcerated people. By April 7, these numbers had grown exponentially: **41** DOC staff members and **44** incarcerated people have tested positive, with **53** prisoner test results still pending. [2]

In these extraordinary times, where individual health is communal health, "correctional health is public health." Affidavit of Brie M. Williams, M.D. (Ex. 25) ¶ 17 (explaining that "The Entire Community is at Risk if Prison Populations Are Not Reduced"). A wide-scale, coordinated, comprehensive release strategy is not *an* option to uphold Defendants' duties to safeguard health and life; it is the only option. "These

[2] *See* Connecticut Dep't of Correction, *Covid-19 Tracker*, https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories (last visited Apr. 7, 2020).

are preventable infections, and we must act to prevent them." Affidavit of Dr. Josiah Rich (Ex. 24) ¶ 16. Because there is no time to waste, Plaintiffs are filing this motion for a temporary writ.[3]

1. FACTS

1.1 The inescapable onslaught of COVID-19 poses unprecedented challenges to Connecticut, and particularly, its prisons.

COVID-19 poses a substantial risk of serious and life-threatening harm to every person in Connecticut. It is a highly infectious disease significantly more contagious and more lethal than seasonal influenza.[4] There is no vaccine or cure, and neither the United States nor the state of Connecticut possesses sufficient resources to screen or test individuals.[5]

Modeling based on the current pace of the virus estimates that millions of Americans could be infected with COVID-19, and 100,000 to 240,000 Americans could die from the disease.[6] Not only do 20% of COVID-19 patients require hospitalization,

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[3] Because the plaintiffs request emergency temporary relief, their motion comprises a Priority 1 Business Function for the Court. In addition, the Court should permit the plaintiffs to proceed without posting a bond in this dispute, as allowed by Practice Book § 23-48 (temporary order of mandamus) and Conn. Gen. Stat. § 52-472 (temporary injunction). In this action, the plaintiffs seek Court intervention in an emergency situation posing a serious risk to the well-being of the approximately 12,000 people in the defendants' custody. *See Pharmaceutical Soc'y of State of New York v. N.Y. State Dep't of Soc. Servs.*, 50 F.3d 1168, 1174 (2d Cir. 1995) (explaining that, under similar provision of Fed. R. Civ. P. 65, "an exception to the bond requirement has been crafted for, inter alia, cases involving the enforcement of 'public interests'"). It is not a commercial dispute in which an improvident order could cause a corporate loss to the enjoined party or allow a debtor to dissipate assets. The defendants here are government officials who will be compelled by the Court to execute their statutory and constitutional duties, from which benefit, rather than cost, will flow. *Cf. Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) (excusing bond where the party to be enjoined could not show that "they will likely suffer harm absent the posting of a bond").

[4] *Coronavirus Disease 2019 (COVID-19): Situation Report - 46*, World Health Organization (Mar. 6, 2020), https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200306-sitrep-46-covid-19.pdf?sfvrsn=96b04adf_2.

[5] *See, e.g.*, Gregory B. Hladky, *Medical and Testing Supplies Grow Short As COVID-19 Cases Jump by 42%*, Conn. Mirror, March 25, 2020, https://ctmirror.org/2020/03/25/connecticut-covid-19-cases-deaths-continue-to-rise-as-worries-over-medical-and-testing-supplies-increase.

[6] Bobby Allyn, *Fauci Estimates That 100,000 To 200,000 Americans Could Die From The Coronavirus*, NPR, Mar. 29, 2020, https://www.npr.org/sections/coronavirus-live-

but recovered patients may also experience a permanent 20-30% reduction in lung function.[7] Furthermore, rapid viral transmission,[8] combined with a healthcare system stretched beyond capacity, has led to tragic consequences.

In only a few months, **1,390,511** people worldwide have been diagnosed with COVID-19 and **80,759** of those people have died.[9] As of April 6, 2020, there were **6,906** confirmed cases of coronavirus within Connecticut, up **1,231** cases from the day before, and at least **206** COVID-associated deaths.[10] These numbers are growing exponentially every day.

Public health experts have cautioned that prisons and jails are extremely high risk settings for the spread of COVID-19.[11] A recent letter from Connecticut doctors experienced in correctional health to Governor Lamont, for example, relayed "grave concern that, absent immediate action, COVID-19 will overrun Connecticut's jails and prisons" and that "Connecticut has days, not weeks, to chart a different future." Letter from Dr. Emily Wang et al. to Governor Lamont (Ex. 20). Infectious disease doctors who

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updates/2020/03/29/823517467/fauci-estimates-that-100-000-to-200-000-americans-could-die-from-the-coronavirus.

[7] Elizabeth Cheung, *Coronavirus: Some Recovered Patients May Have Reduced Lung Function and Are Left Gasping for Air While Walking Briskly, Hong Kong Doctors Find*, South China Morning Post, Mar. 13, 2020, https://www.scmp.com/news/hong-kong/health-environment/article/3074988/coronavirus-some-recovered-patients-may-have.

[8] *See* Jenny Gross and Mariel Padilla, *From Flattening the Curve to Pandemic: A Coronavirus Glosssary*, N.Y. Times, Mar. 18, 2020, https://www.nytimes.com/2020/ 03/18/us/coronavirus-terms-glossary.html (explaining that each infected person infects between two and four others).

[9] Johns Hopkins University of Medicine, Coronavirus COVID-19 Cases (Apr. 7, 2020), https://coronavirus.jhu.edu/map.html.

[10] Connecticut COVID-19 Update April 6, 2020 (Apr. 6, 2020), https://portal.ct.gov/-/media/Coronavirus/CTDPHCOVID19summary4062020.pdf.

[11] *See, e.g.*, Lipi Roy, *Infections And Incarceration: Why Jails And Prisons Need To Prepare For COVID-19 Now*, Forbes, Mar. 11, 2020, https://www.forbes.com/sites/lipiroy/2020/03/11/infections-and-incarceration-why-jails-and-prisons-need-to-prepare-for-covid-19-stat/#70cdb52a49f3; Oluwadamilola T. Oladru, Adam Beckman, Gregg Gonsalves, *What COVID-19 Means For America's Incarcerated Population — And How To Ensure It's Not Left Behind*, Health Affairs, Mar. 10, 2020, https://www.healthaffairs.org/do/10.1377/hblog20200310.290180/full/

work in correctional health similarly warn that a virus like 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." Rich Aff. ¶¶ 6, 8-12.

These warnings have proven tragically accurate.[12] On March 22, **one** staff member at Chicago's Cook County Jail tested positive, followed by **two** COVID-19 diagnoses in those incarcerated there; a week later, **12** staff members and **101** incarcerated people had tested positive for the virus.[13] As of April 5, those numbers stood at **70** staffers and **221** incarcerated people.[14] In just two weeks, the New York City jail Rikers Island went from **one** confirmed case of COVID-19 to **231** cases.[15] The most recent figures show **273** confirmed cases among detainees, **321** among corrections officers, and **53** among jail health workers.[16] As of March 29, 2020, Rikers had a

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[12] Timothy Williams, Benjamin Weiser, and William K. Rashbaum,'*Jails Are Petri Dishes': Inmates Freed as the Virus Spreads Behind Bars*, N.Y. Times, Mar. 30, 2020, https://www.nytimes.com/2020/03/30/us/coronavirus-prisons-jails.html (reporting that, after the New York City corrections department's physician warned the mayor that "'a storm is coming,'" the city "released at least 650 people").

[13] *Compare* Andy Grimm, *Two Cook County Jail Detainees Test Postive for Coronavirus*, Chicago Sun-Times, Mar, 23, 2020, https://chicago.suntimes.com/2020/3/23/21191438/two-cook-county-jail-detainees-test-positive-covid-19-coronavirus *with* Sam Kelly, *101 inmates at Cook County Jail Confirmed Positive for COVID-19*, Chicago Sun-Times, Mar. 30, 2020, https://chicago.suntimes.com/coronavirus/2020/3/29/21199171/cook-county-jail-coronavirus-positive-101-cases-covid-19.

[14] Tyler Kendall, "*We're at war with no weapons": Coronavirus cases surge inside Chicago's Cook County Jail*, https://www.cbsnews.com/news/chicago-cook-county-jail-coronavirus-life-inside-covid-19-cases, Apr. X 2020.

[15] *Compare* Chelsia Rose Marcius, *Rikers Island Inmate Has Contracted Coronavirus: Officials*, N.Y. Daily News, Mar. 18, 2020, https://www.nydailynews.com/coronavirus/ny-coronavirus-rikers-island-inmate-tests-positive-20200318-gf3r7q4cefaxzlqmwrmuevzz3y-story.html *with* The Legal Aid Society, *Covid-19 Tracking in NYC Jails*, Apr. 2, 2020, https://www.legalaidnyc.org/covid-19-infection-tracking-in-nyc-jails.

[16] Reuven Blau and Rosa Goldensohn, *First Rikers Virus-Positive Fatality Was Jailed on a Technicality*, The City, Apr. 6, 2020, https://thecity.nyc/2020/04/first-rikers-covid-death-was-jailed-on-technicality.html.

COVID-19 infection rate surpassing every country in the world.[17] Its top doctor has not minced words, calling the jail a "public health disaster unfolding before our eyes."[18] The first Rikers detainee to die from COVID-19 infection died Sunday; he was awaiting hearing on a technical parole violation.[19]

Here in Connecticut, DOC announced that the **first** person in state custody had tested positive on March 30, 2020. As of April 2, right before the complaint in this action was filed, **16** DOC staff members and **eight** incarcerated people had tested positive for COVID-19. By April 6, both those numbers have more than doubled: **32** DOC staff members and **21** incarcerated people have tested positive.[20] By April 7, these numbers had grown exponentially: **41** DOC staff members and **44** incarcerated people have tested positive, with **53** prisoner test results still pending.[21]

The trajectory of other correctional systems make clears that Connecticut has extremely limited time—days, if not hours—to act to prevent the virus from entirely overrunning its correctional facilities, at dire cost to DOC employees, those incarcerated, and the rest of the state. This is because an outbreak in a prison is not limited to a prison: It is taken home to the community by staff; carried to overburdened hospitals by those infected; and passed on, to more and more of us.[22]

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[17] *Id.*

[18] Megan Flynn, *Top Doctor at Rikers Island Calls the Jail a 'Public Health Disaster Unfolding Before our Eyes*, Wash. Post, Mar. 31, 2020, https://www.washingtonpost.com/nation/2020/03/31/rikers-island-coronavirus-spread.

[19] *Id.*

[20] *See* Connecticut Dep't of Correction, *Covid-19 Tracker*, https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories (last visited Apr. 6, 2020).

[21] *See* Connecticut Dep't of Correction, *Covid-19 Tracker*, https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories (last visited Apr. 7, 2020).

[22] Connecticut's public health experts have already sounded this alarm. *See* Ex. 20, Emily Wang, M.D. et al., Letter to Governor Ned Lamont (Mar. 27, 2020) ("We write out of our grave concern that, absent immediate action, COVID-19 will overrun Connecticut's jails and prisons. That tragedy will have far-reaching effects not only for the thousands of Connecticut residents who live and work in correctional facilities, their families and communities, but also for the population of the state as a whole.").

1.2 The State has otherwise quickly responded to limit all congregate settings.

On March 10, 2020, in response to the spread of COVID-19, Governor Lamont declared civil preparedness and public health emergencies.[23] Since then, Governor Lamont has issued eighteen Executive Orders intended to protect public health during the growing pandemic.[24] Governor Lamont's Executive Orders have emphasized that COVID-19 "spreads easily from person to person and may result in serious illness or death," and that the "risk of severe illness and death . . . appears to be higher for individuals who are 60 years of age or older and for those who have chronic health conditions."[25] The Executive Orders have also implemented guidance regarding social distancing from the United States Centers for Disease Control and Prevention and the Connecticut Department of Public Health, including most recently, forbidding "social and recreational gatherings of . . . six (6) or more people."[26]

Governor Lamont has repeatedly highlighted the particular threat COVID-19 poses to institutional and congregant housing. On March 12, he issued Executive Order No. 7, which noted, "there is an increased risk of rapid spread of COVID-19 among persons who are living in congregate settings, such as long-term care facilities."[27] His March 15 Executive Order, No. 7C, reiterated the risk to congregate settings, adding that such settings include "inpatient or outpatient hospitals, clinics or other facilities for the

[23] Gov. Lamont, Letter to the Secretary of the State (Mar. 10, 2020), *available at* https://tinyurl.com/wptdlw6.
[24] *See* Lamont Exec. Order Nos. 7 - 7Q (Exs. 1-18).
[25] Lamont Exec. Order 7N at 4 (Mar. 28, 2020) (Ex. 15).
[26] *Id*.
[27] Lamont Exec. Order No. 7 at 1.

diagnosis, observation or treatment of persons with psychiatric and intellectual disabilities."[28] On March 28, he issued Executive Order No. 7P, which acknowledged public health guidance regarding the necessity to reduce density in congregate settings. The order stated that the "Centers for Disease Control has recommended that states, especially those with higher rates of growth in the number of infected people, take measures to reduce density within homeless shelters and other congregant housing situations."[29] Governor Lamont has also spoken to the press about these dangers, in one instance referring to nursing homes as a "petri dish" for the spread of COVID-19.[30]

As a result of these orders, nearly all settings where people congregate in large numbers have closed or substantially altered operations. Since Executive Order No. 7 issued on March 12, Governor Lamont has restricted entry into nursing homes and similar facilities;[31] modified in-person open meetings requirements;[32] closed public schools;[33] prohibited bars and restaurants from serving sit-in customers and closed gyms, fitness centers, and movie theaters;[34] closed malls;[35] postponed the presidential primary;[36] limited the workplace operations of non-essential businesses and non-profits;[37] and restricted social and recreational gatherings to no more than five people.[38]

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[28] Lamont Exec. Order No. 7C at 2 (Exhibit 4).
[29] Lamont Exec. Order No. 7P at 2 (Mar. 28, 2020) (Exhibit 17).
[30] Patrick Skahill, *Connecticut Tracks COVID-19 Cases But Doesn't Keep Nursing Home Tally*, WNPR, March 27, 2020, https://www.wnpr.org/post/connecticut-tracks-covid-19-cases-doesnt-keep-nursing-home-tally.
[31] *See* Lamont Exec. Order No. 7A at 2 (Mar. 13, 2020) (granting the Commissioner of Public Health the ability to restrict nursing home visitors) (Exhibit 2).
[32] Lamont Exec. Order No. 7B at 3 (Mar. 14, 2020) (Exhibit 3).
[33] Lamont Exec. Order No. 7C at 2 (Mar. 15, 2020) (Exhibit 4).
[34] Lamont Exec. Order No. 7D at 2 (Mar. 16, 2020) (Exhibit 5).
[35] Lamont Exec. Order No. 7F at 3 (Mar. 18, 2020) (Exhibit 7).
[36] Lamont Exec. Order No. 7G at 3 (Mar. 19, 2020) (Exhibit 8).
[37] Lamont Exec. Order No. 7H at 2-3 (Mar. 20, 2020) (Exhibit 9).
[38] Lamont Exec. Order No. 7N at 4.

Governor Lamont has implemented similar measures targeted specifically at courts and the justice system, including suspending non-critical court operations[39] and non-critical operations of the Probate Court, as well as authorizing remote notarization.[40]

1.3 Connecticut's Department of Correction has nearly 12,000 people in its custody, with multiple facilities that house more than 1,000 people.

The Department of Correction ("DOC") is authorized by Conn. Gen. Stat. § 18-78 as the unified correctional department for the state. DOC administers all state correctional facilities, which house both pretrial detainees and sentenced prisoners. The Commissioner of Correction is appointed by the governor and serves as the DOC's administrative head. *Id.* § 18-80.

DOC oversees fourteen operational correctional facilities throughout the state. Of these, twelve facilities hold adult men, one facility holds women, and one facility holds young men and boys twenty-one years of age and younger. Each facility is intended to house incarcerated persons of particular risk levels, as classified by the DOC, ranging from level 2 (low risk) through level 5 (high risk).[41]

As of April 7, there are a total of 11,662 people in DOC custody, 3,173 unsentenced and 8,489 sentenced. The two most populous single-building facilities, Cheshire Correctional Institution and Robinson Correctional Institution, currently house 1,142 people and 1,165 people, respectively.[42] Corrigan-Radgowski Correctional

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[39] Lamont Exec. Order No. 7G at 4.

[40] Lamont Exec. Order No. 7K at 3-4 (Mar. 23, 2020) (Exhibit 12); *see also* Executive Order No. 7Q at 2-4 (Mar. 31, 2020) (setting forth detailed remote notarizing requirements) (Exhibit 18).

[41] DOC Administrative Directive 9.2, *available at* https://portal.ct.gov/-/media/DOC/Pdf/Ad/ad0902pdf.pdf?la=en.

[42] *See* Allard K. Lowenstein Int'l Human Rights Clinic, *Covid-19 Prison Response Population Data*, Apr. 7, 2020, https://law.yale.edu/schell/lowenstein-clinic/recent-projects/covid-19-prison-response-population-data (listing counts by facility and population demographic).

Center in Uncasville, where **19** incarcerated people and **7** correctional staff have tested positive, houses 1,083 people. Hartford Correctional Center, where **19** people and **seven** staff have tested positive, houses 853 people. Willard-Cybulski Correctional Institution, where **eight** incarcerated people have tested positive, houses 913 people.

Of the current sentenced DOC population, 1,416 are within six months of the end of their sentences.[43] Of these, 822 are within three months of end of sentence.[44] That means that, outbreak or no outbreak, within a few short months, they will be re-entering the community.

1.4 Governor Lamont has made no effort to respond to the unfolding public health crisis in prisons, while DOC's efforts are, by definition, insufficient.

Notwithstanding the outsized threat that COVID-19 poses in correctional settings, over the past few weeks, Governor Lamont steadfastly refused to make any special provision for the incarcerated population. As of today, no executive order addresses incarcerated residents. Rather, until this lawsuit was filed, Governor Lamont had repeatedly stated that he will not take any measure to reduce prison density on account of the pandemic.[45] At a press conference held on April 6, 2020, he reversed course somewhat and acknowledged releases that had taken place in March[46], without explaining that nearly half—333 out of 782—were people due to be released anyway because they were at the end of their sentences.[47]

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[43] *See id.*
[44] *See id.*
[45] Kelan Lyons, *Lamont Says No Prison Releases Because of COVID-19 Despite Pressure from Advocates*, Conn. Mirror, Mar. 24, 2020, https://ctmirror.org/2020/03/24/lamont-says-no-prison-releases-because-of-covid-19-despite-pressure-from-advocates.
[46] Kelan Lyons, *A Noisy Protest, Then Prison Chief Confirms He Has Been Releasing Inmate Population*, Conn. Mirror, Apr. 6, 2020, https://ctmirror.org/2020/04/06/a-noisy-protest-then-prison-chief-confirms-he-has-been-reducing-inmate-population/.
[47] *See* Conn. Data, *Sentenced Inmates in Correctional Facilities* (Apr. 7, 2020), https://data.ct.gov/Public-Safety/Sentenced-Inmates-in-Correctional-Facilities/um73-fxm4 (reflecting

Meanwhile, the COVID-19 response implemented by DOC falls far short of the measures adopted to protect individuals in other Connecticut settings. As of March 11, 2020, DOC's plan to address COVID-19 was a policy from 2007 aimed at flu outbreaks,[48] despite the fact that COVID-19 is understood to be transmitted much more easily and in different ways than influenza viruses.[49] On March 11, 2020, DOC spokesperson Karen Martucci doubled down on the outdated plan in a press interview. "This isn't new for us. We quarantine for the flu every year," Martucci stated. "We didn't have to create a pandemic plan. This was already created."[50]

Though the 2007 plan has now been replaced with one specific to the COVID-19 pandemic[51], the preventative measures contained therein are not sufficient to stop transmission—nor could they be. The measures taken by DOC thus far include suspending social visits and volunteer-led programs, holding meals in-unit, and limiting facility transfers to essential-only.[52] However, recreation and programming still take place in groups of up to 50 incarcerated people,[53] ten times the number of people now permitted by executive order.[54] Many prisons have dorm-style housing; in most others,

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that, of 782 releases in March, 333 were at end of sentence; and reflecting 342 people added to state custody during the month).

[48] Conn. Dep't of Corr., *Pandemic Influenza Response Plan* (Feb. 14, 2007), *available at* https://portal.ct.gov/-/media/DOC/Pdf/Coronavirus-3-20/A-7-02a-Pandemic-Influenza-response-plan.pdf.

[49] Johns Hopkins Hosp., *Coronavirus Disease 2019 vs. the Flu*, https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu (accessed Mar. 30, 2020) (reporting that, unlike influenza, COVID-19 may "spread through the airborne route, meaning that tiny droplets remaining in the air could cause disease in others even after the ill person is no longer near").

[50] Kelan Lyons, *Elderly Prisoners in Connecticut Vulnerable to Potential Coronavirus Outbreak*, Hartford Courant, Mar. 11, 2020, https://www.courant.com/coronavirus/hc-pol-coronavirus-connecticut-prisons-20200311-ote3jd6orje77ipl44qgi3bb6i-story.html.

[51] Connecticut Dep't of Corr., *COVID-19 Operational Response Plan* 1 (Mar. 20, 2020), *available at* https://portal.ct.gov/-/media/DOC/Pdf/Coronavirus-3-20/Covid-19-Operational-Response-Plan.pdf.

[52] *Id.*

[53] *Id.*

[54] Lamont Exec. Order No. 7N at 4.

incarcerated people remain two to a cell.[55] Hygiene is also next to impossible: Facilities do not allow access to hand sanitizer; access to soap and showers is limited; and incarcerated people have little ability or control over disinfecting surfaces.

Most importantly, no matter what measures DOC takes, the nature of a correctional facility means that incarcerated people must eat, bathe, sleep, and recreate in shared space, mere inches away from others.

At the same time, DOC facilities—like every correctional facility—are not and cannot be closed systems. Staff, contractors, vendors cycle constantly throughout and among facilities, and they all link the facilities with surrounding communities. This was demonstrated in recent days: One of the **41** DOC staff who have now tested positive for COVID-19, assigned to the Hartford Correctional Center, had also worked a recent shift at Manchester Memorial Hospital.[56] Meanwhile, DOC facilities continue to take in new people—342 in March alone. While everyone entering a Connecticut correctional facility must now have a wellness screening, including a temperature check,[57] recent data suggests that more than half of COVID-19 cases are asymptomatic.[58] As a result, fevers may not be a reliable indicator of whether someone is a carrier of the virus, and those entering DOC facilities may easily introduce the virus into the facility—or, conversely,

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[55] *See Second Connecticut Prison Inmate Tests Positive for the COVID-19 Virus*, NBC Conn., Mar. 31, 2020, https://www.nbcconnecticut.com/news/coronavirus/second-connecticut-prison-inmate-tests-positive-for-the-covid-19-virus/2247971/ (noting that second person to test positive at Corrigan-Radgowski "was in a two-person cell").

[56] *See* Fawcett, *supra* n.16.

[57] Conn. Dep't of Corr., *First Department of Correction Employee to Test Positive for COVID-19 Virus* (Mar. 23, 2020), https://portal.ct.gov/-/media/DOC/Pdf/Coronavirus-3-20/PRESS-RELEASE--First-DoC-Staff-Tests-Positive-for-COVID19-B032320.pdf.

[58] Apoorva Mandavilli, *Infected but Feeling Fine: The Unwitting Coronavirus Spreaders*, N.Y. Times, Mar. 31, 2020, https://www.nytimes.com/2020/03/31/health/coronavirus-asymptomatic-transmission.html (reporting the director of the Centers for Disease Control and Prevention stating that "as many as 25 percent of people infected with the new coronavirus may not show symptoms").

may contract it themselves and transmit it to others in the community. *See* Williams Aff. ¶ 4; Rich Aff. ¶ 9. Given the extreme dearth of testing resources nationwide and in Connecticut[59], it is inconceivable that DOC has significant testing capacity; as of April 2, 111 people in DOC custody had been tested for the virus.[60]

1.5 DOC's healthcare system is already under-resourced, and is no match for a pandemic.

Nor will DOC's healthcare staff be able to manage an outbreak.

First, chronic health conditions are extremely common in correctional settings. About forty percent of incarcerated people are estimated to have at least one chronic illness, and almost all chronic illnesses are more common among incarcerated populations than the general population.[61] Many of these illnesses, such as hypertension (30.2% compared to 18.1% in the general population, other heart problems (9.8% compared to 2.9%), asthma (14.0% compared to 10.2% in the general population), and diabetes (9.0% compared to 6.5% in the general population),[62] are associated with more severe cases of COVID-19, and poorer outcomes.[63] As elsewhere, incarcerated people in Connecticut suffer from disproportionately high rates of chronic illness. DOC healthcare

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[59] *See, e.g.*, Gregory B. Hladky, *Medical and Testing Supplies Grow Short as COVID-19 Cases Jump by 42%*, Conn. Mirror, March 25, 2020, https://ctmirror.org/2020/03/25/connecticut-covid-19-cases-deaths-continue-to-rise-as-worries-over-medical-and-testing-supplies-increase.
[60] Conn. Dep't of Corr. *Health Information and Advisories: Coronavirus Information* (Apr. 2, 2020), https://portal.ct.gov/DOC/Common-Elements/Common-Elements/Health-Information-and-Advisories.
[61] *See, e.g.*, The Center for Prisoner Health and Human Rights, *Chronic and Infectious Diseases in Justice-Involved Populations* (2020), https://www.prisonerhealth.org/educational-resources/factsheets-2/chronic-and-infectious-diseases-in-justice-involved-populations/; Vera Institute of Justice, *On Life Support: Public Health in the Age of Mass Incarceration* (2014), *available at* https://www.vera.org/downloads/Publications/on-life-support-public-health-in-the-age-of-mass-incarceration/legacy_downloads/on-life-support-public-health-mass-incarceration-report.pdf.
[62] Laura M. Maruschak & Marchus Berzofsky, *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-2012*, Dep't. of Justice: Bureau of Justice Statistics (Feb. 2015), https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf.
[63] Centers for Disease Control and Prevention, *People Who are at a Higher Risk for Severe Illness*, Coronavirus Disease 2019 (Mar. 2020), *available at* https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-at-higher-risk.html.

staff have reported to press that the housed population suffers high infection rates, including of chronic illnesses such as Hepatitis C.[64] In addition, in 2012, the most recent year for which data on HIV in Connecticut prisons is publicly available, the HIV rate was more than 3.5 times higher in incarcerated populations[65] than the HIV rate in the state as a whole.[66]

Second, even in the best of times, the DOC healthcare system is tremendously overburdened. In July 2019, the Connecticut Mirror reported that the DOC had 309 nurses on staff to serve 13,320 prisoners, or one nurse for every 43 prisoners. For medical providers, including doctors and physician assistants, the DOC employs only one provider for every 579 prisoners.[67] Data provided by the DOC on March 12, 2020, in response to a request under the Freedom of Information Act, suggests that little has changed since that report: Cheshire Correctional Institution and Corrigan-Radgowski Correctional Center reported employing 29 and 27 nurses, respectively. According to the facility population counts for March 28,[68] that is 39 prisoners per nurse at Cheshire and 40 per nurse at Corrigan-Radgowski. Accessing medical doctors appears practically impossible: At Cheshire, one psychiatrist and one principal physician are the only

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[64] Josh Kovner, *Prison Doctors, Nurses Say Health Care Behind Bars Has Ruptured*, Hartford Courant, Sep. 18, 2020, https://www.courant.com/news/connecticut/hc-news-prison-medical-crisis-20180917-story.html.

[65] *Compare* Laura M. Maruschak & Marchus Berzofsky, *Medical Problems of State and Federal Prisoners and Jail Inmates, 2011-2012*, Dept. of Justice: Bureau of Justice Statistics (Feb. 2015), at 16, *available at* https://www.bjs.gov/content/pub/pdf/mpsfpji1112.pdf, U.S. Department of Justice, Prisoners in 2012, *Advance Counts* (Jul. 2013), at 3, *available at* https://www.bjs.gov/content/pub/pdf/p12ac.pdf.

[66] *Compare* Centers for Disease Control and Prevention, *Prevalence of Diagnosed and Undiagnosed HIV Infection — United States, 2008–2012* (June 26, 2015), *available at* https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6424a2.htm#Tab1, Connecticut Department of Public Health, *Estimated Populations in Connecticut as of July 1, 2012*, *available at* https://portal.ct.gov/-/media/Departments-and-Agencies/DPH/Population/Town-Pop/poptowns2012pdf.pdf?la=en.

[67] Jenna Carlesso and Kelan Lyons, *One Year After DOC Took Over Inmate Healthcare, Troubles Persist*, Conn. Mirror, July 2, 2019, https://ctmirror.org/2019/07/02/one-year-after-doc-took-over-inmate-health-care-troubles-persist.

[68] Lowenstein Int'l Human Rights Clinic, *supra* n.37.

doctors serving a population of 1,131. Corrigan-Radgowski, with a population of 1,083, does not employ a single physician beyond their one staff psychiatrist.

While DOC has represented that facilities can manage staff shortages by scheduling medical employees for 12 hours at a time in an emergency,[69] low staffing levels mean healthcare staff already log significant overtime, sometimes staying on shift for 16 to 24 hours a day even in normal times.[70] As of February 2020, head nurses, nurses, and licensed nurse practitioners were among the 20 top wage earners in the DOC based on their overtime pay, and at least three nursing staff were making twice their annual pay in overtime.[71] The problem has been exacerbated by DOC's difficulties hiring new healthcare providers and retaining existing staff,[72] a problem that has persisted into 2020. In February 2020, Commissioner Cook told members of the Black and Puerto Rican Legislative Caucus that there were 139 positions vacant out of 843 budgeted.[73]

In the face of these dire shortages, DOC staff have been blunt. Dr. Gerald Valletta, the primary physician at Garner and Manson Youth Institution in Cheshire, told the Courant that "[t]he more people get sick and call out, the more burdened staff will be. We were already facing a huge shortage." [74] Debra Cruz, head nurse at Cheshire, expressed similar alarm, suggesting that even mandating 16-hour shifts, as permitted in the workers' contract, would not guarantee adequate healthcare. "We're all just holding

[69] Lyons, *supra* n.41.
[70] Carlesso and Lyons, *supra* n.51.
[71] Lisa Backus, *Staffing Shortage Creates 'Dangerous' Situation in CT Prisons*, Conn. Post, Feb. 3, 2020, https://www.ctpost.com/local/article/Staffing-shortage-creates-dangerous-15027264.php.
[72] Carlesso and Lyons, *supra* n.51.
[73] Backus, *supra* n.56.
[74] Fawcett, *supra* n.16.

our breaths and hoping this passes us by," the Hartford Courant quotes Cruz as saying on March 11.[75]

Finally, the defendants' unpreparedness for a global pandemic is set against their track record of medical care in less exigent times. A drumbeat of litigation and findings over the past five years have sounded the alarm about the DOC's inadequate medical care.[76] DOC health care has generated so much litigation that in 2018, a healthcare consultant it hired projected that litigation costs stemming from inadequate medical care "'may soon rival California,'" which has ten times Connecticut's population.[77] Unsurprisingly, Defendant Cook admitted that upon taking office, he had "he had never seen 'an organization that had as many lawsuits coming out of one unit,'" referring to the Department's medical operation.[78] Against this backdrop, the DOC's inability to combat a pandemic that is stretching properly prepared hospitals to their breaking points is almost a foregone conclusion.

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[75] Lyons, *supra* n.41.

[76] *See, e.g.*, Josh Kovner, *Concerns Growing Over Inmates' Medical Care; 25 Cases Flagged, Including Eight Deaths*, Hartford Courant, June 15, 2017, https://www.courant.com/news/connecticut/hc-inmate-deaths-medical-care-20170615-story.html (reporting that a consultant hired by the Department had identified policy violations and care lapses in more than twenty instances, including deaths in custody); Mackenzie Rigg, *DOC Commissioner Sued Twice in a Week Over Prisoners' Health Care, Conn. Mirror*, July 27, 2018, https://ctmirror.org/2018/07/27/doc-commissioner-sued-twice-week-prisoners-health-care (reporting that the family of a nineteen year-old who died of a treatable fungal infection, and a class of prisoners suffering from Hepatitis-C both filed suit on the basis of inadequate medical care); Mackenzie Rigg, *CT to Pay Former Inmate $1.3M After Claims of Improper Medical Treatment*, Conn. Mirror, Aug. 22, 2018, https://ctmirror.org/2018/08/22/ct-pay-former-inmate-1-3m-claims-improper-medical-treatment; Josh Kovner, *Second Lawsuit Alleging Medical Malfeasance in State Prisons Clears Early Legal hurdle, Carrying Potential of Hefty Public Price Tag*, Hartford Courant, Aug. 8, 2019, https://www.courant.com/news/connecticut/hc-news-prison-medical-malpractice-rulings-20190808-p4umgt3f65d63mesxy3b5pawti-story.html (reporting former prisoner Patrick Camera's suit for refusing to treat a facial tumor).

[77] Jacqueline Rabe Thomas and Jake Kara, *Report: Overhaul Needed to Avoid 'Untimely' Health Care for Inmates*, Conn. Mirror, Mar. 23, 2018, https://ctmirror.org/2018/03/13/report-overhaul-needed-avoid-untimely-health-care-inmates. Nonetheless, the DOC has blocked the State Auditor's access to a report detailing some of the failings. Jake Kara, *Frustrated Auditors Appeal to AG on Prison Officials' Refusal to Turn Over Report*, Conn. Mirror, https://ctmirror.org/2018/04/06/frustrated-auditors-appeal-ag-prison-officials-refusal-turn-report.

[78] Backus, *supra* n.56.

1.6 Courts across the country have ordered "de-densification."

Courts across the country have responded to analogous circumstances by ordering release of those in state custody and acting to prevent new admissions to penal institutions. *See generally* Updated Appendix, Court Actions to Reduce Incarceration in Light of COVID-19 (cataloging orders releasing prisoners and unlocking release mechanisms, by 17 courts across 15 state courts, as well as numerous release orders by federal courts with respect to federal and immigration detention) (Exhibit 22). These include the New Jersey Supreme Court, which ordered presumptive release of every person in county jail in the state; a New York trial court, which ordered the release of 106 people held at Rikers Island on technical parole violations; and the South Carolina Supreme Court, which released every person charged with a non-capital crime, without bond. *See id*. And these court actions are in addition to the many actions by governors, parole boards, and departments of correction in other states to quickly enact comprehensive plans for thinning unsentenced populations, granting early release, expediting the transition to parole, and generally ensuring that an incarcerated person's sentence is not a death sentence because of this pandemic. *See generally* Second Appendix, Gubernatorial and State Agency Actions to Reduce Incarceration in Light of COVID-19 (collecting examples, including Kentucky governor's announcement of plan to commute the sentences of nearly 1,000 state prisoners, such as those more susceptible to COVID-19 and those within six months of end of sentence, within a matter of days) (Exhibit 23).[79]

[79] *See also* Prison Policy Initiative, *Responses to the COVID-19 Pandemic* (Apr. 1, 2020), https://www.prisonpolicy.org/virus/virusresponse.html (detailing, among other actions, the Rhode Island Department of Corrections' efforts to evaluate people with less than four years left of their sentences for release; the Iowa Department of Corrections' planned expedited release of 700 incarcerated

2. ARGUMENT

The facts are sobering. And as medical and correctional experts attest, the *only* solution is what is called de-densification: thinning the incarcerated population—by the quickest means possible—to allow for social distancing and to give DOC's staff a fighting chance of being able to tend to those in their custody. *See* Affidavit of Jonathan Giftos, M.D. (Exhibit 19) ¶17; Williams Aff. ¶ 18; Rich Aff. ¶ 15. [80] In the face of this crisis,

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people eligible for parole; and the governor of Colorado's executive order granting broad authority to the state's Department of Correction to release people within 180 days of their parole eligibility dates).

[80] *See also* Statement of *Amicus Curiae* Rick Raemisch at 4, *Coleman v. Newsom*, No. 90-cv-00520 (E.D. Cal. Mar. 27, 2020) ("Only by immediately releasing non-violent inmates can governors and state legislators prevent the devastating consequences to corrections staff, inmates, and the communities where prisons are located that will result when—not if—infections enter these facilities."); Brief of *Amici Curiae* Public Health & Human Rights Experts at 13, *Thakker v. Doll*, No. 20-cv-00480 (M.D. Pa. Mar. 27, 2020) ("The novel coronavirus outbreak is already straining hospital capacity across the country. That problem will be dangerously exacerbated if detention facilities do not act immediately to release those detainees who are at the greatest risk of serious infection."); Decl. of Dr. Craig W. Haney, PhD at 6, *Coleman v. Newsom*, No. 90-cv-00520 (E.D. Cal. Mar. 25, 2020) ("[I]t is my professional opinion that adult prisons must reduce their populations *urgently* in order to allow the necessary social distancing in response to the COVID-19 Pandemic."); Aff. of Jonathan Giftos, M.D. at 11, *United States v. Chandler*, No. 19-cr-00867 (S.D.N.Y. Mar. 23, 2020) ("[I]t is an urgent priority to reduce the number of people in detention facilities during this national public health emergency."); Decl. of Dr. Marc Stern at ¶ 9, *Dawson v. Asher*, No. 20-cv-00409 (W.D. Wash. Mar. 16, 2020) ("For detainees who are at high risk of serious illness or death should they contract the COVID-19 virus, release from detention is . . . critically important . . . . Additionally, the release of detainees who present a low risk of harm to the community is also an important mitigation strategy as it reduces the total number of detainees in a facility."); Aff. of Jaimie Meyer, M.D., at ¶ 40, *Velesaca v. Wolf*, 20-cv-1803 (S.D.N.Y. Feb. 28,. 2020) ("I am also strongly of the opinion that individuals who are already in [prison] facilities should be evaluated for release . . . These steps are both necessary and urgent."); *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, No. SJC-12926 (Mass. Mar. 30, 2020) ("Decreasing the incarcerated population so that there is more ability to physically distance within the facility and fewer people who can contract the virus inside the facility is the only way to prevent the complications from surging."); Aff. of Danielle C. Ompad, PhD, Regarding SARS-CoV-2 Infection (Otherwise Known as COVID-19) in Correctional Settings at ¶ 10(b), *Comm. for Pub. Counsel Servs. v. Chief Justice of the Trial Court*, No. SJ-2020- (Mass. Mar. 24, 2020) ("By acting now and releasing a significant number of people who are currently detained you will save lives."); Letter from *Amici Curiae* Public Health Experts to Maura S. Doyle, Clerk, Supreme Judicial Court for the County of Suffolk at 4, *Comm. for Public Counsel Servs. v. Chief Justice of the Trial Court*, No. SJ-2020- (Mass. Mar. 24, 2020) ("The surest way to contain the spread of an infectious disease in a jail or prison is to reduce its population."); Letter from a Grp. of Concerned Scientists, Physicians & Pub. Health Experts to the Honorable Judges of the Md. Dist. & Circuit Courts, State & Local Corr. Dep'ts at 4 (Mar. 19, 2020), https://www.aclu-md.org/sites/default/files/field_documents/200319_-_public_health_experts_maryland_covid_jails_sign_on_letter.pdf ("We strongly recommend that the courts implement community-based alternatives to detention to alleviate potential exposure in jails. Incarcerating as few people as possible will help mitigate the harm from a COVID-19 outbreak.").

Plaintiffs—incarcerated people, both sentenced and unsentenced, as well as the affinity organization for criminal defense lawyers in Connecticut—amply meet the standard for a temporary order of mandamus.

2.1 The standard for a writ of mandamus.

"Mandamus is an ancient common law writ with deep roots in the American legal tradition." *Wozniak v. Town of Colchester*, 193 Conn. App. 842, 855 (2019). A party seeking a writ of mandamus must establish: that the defendant's duty is non-discretionary, that the plaintiff has no adequate remedy at law, and that the plaintiff has a right to the performance of the duty. *E.g.*, *Stewart* v. *Watertown*, 303 Conn. 699, 711-12 (2012). A party seeking a temporary order of mandamus, much like one seeking a temporary injunction, must also make a showing of irreparable harm. *See, e.g.*, *Meyers v. Town of Westport*, 41 Conn. Supp. 295, 297 (Super. Ct. 1989) (ordering temporary writ of mandamus).

In these exceptional times, exceptional relief is warranted. Plaintiffs have a clear legal right—grounded in both Connecticut statute and federal law—to the performance of duties by Defendants. These duties are non-discretionary. And there is no other adequate remedy at law. Finally, absent relief, Plaintiffs' lives are at stake.

2.2 Defendants' duty is non-discretionary.

2.2.1 Defendants are obligated under the Fourteenth Amendment (for unsentenced people) and Eighth Amendment (for sentenced prisoners) of the U.S. Constitution to safeguard the life and health of those in DOC custody.

Defendants' duty to protect the lives of the nearly 12,000 people in their custody from COVID-19 stems directly from the U.S. and Connecticut Constitutions. The prohibitions against cruel and unusual punishment existing "under the auspices of the

dual due process provisions contained in article first, §§ 8 and 9" of the Connecticut Constitution, *State v. Santiago*, 318 Conn. 1, 16 (2015), and the United States Constitution's Eighth Amendment, demand that the state provide for the "basic human needs" of prisoners in its custody. *See Helling v. McKinney*, 509 U.S. 25, 32 (1993). "[W]hen the State . . . fails to provide for [prisoners'] basic human needs . . . it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause." *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 199-200 (1989); *see also Youngberg v. Romeo*, 457 U.S. 307, 324 (1982) (finding the State has a duty to provide certain services and care to institutionalized persons in its custody). Similar standards hold for pretrial detainees under the Fourteenth Amendment's due process clause. *State v. Anderson*, 319 Conn. 288, 317 (2015); *see also Darnell v. Pineiro*, 849 F.3d 17, 29 (2d Cir. 2017) (explaining that the Due Process clause of the Fourteenth Amendment demands protection of serious medical needs of people held in pre-trial confinement).

"[P]risoners may not be deprived of their basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—and they may not be exposed to conditions that pose an unreasonable risk of serious damage to [their] future health." *Jabbar v. Fischer*, 683 F.3d 54, 57 (2d Cir. 2012) (citation omitted). The U.S. Supreme Court has recognized that the risk of contracting a "serious, communicable disease" constitutes an "unsafe, life-threatening condition" that threatens prisoners' "reasonable safety." *McKinney*, 509 U.S. at 33. Therefore, there is no question that "correctional officials have an affirmative obligation to protect [forcibly confined] inmates from infectious disease." *Jolly v. Coughlin*, 76 F.3d 468, 477 (2d Cir. 1996).

Officials flout their Eighth Amendment obligations when they are aware that prisoners in their custody face "a substantial risk of serious harm and disregard[] that risk by failing to take reasonable measures to abate it." *Farmer v. Brennan*, 511 U.S. 825, 826 (1994); *see also Estelle v. Gamble*, 429 U.S. 97, 104 (1976) ("[D]eliberate indifference . . . constitutes the 'unnecessary and wanton infliction of pain' proscribed by the Eighth Amendment."). Under the Fourteenth Amendment, similarly, 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.

It does not matter if the harm is prospective, rather than retrospective: Officials 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." *McKinney*, 509 U.S. at 33 (emphasis added). Nor does it matter whether "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" such that even if the "complaining inmate shows no serious current symptoms," prison officials can be found to act with deliberate indifference to their rights. *Id.*

The deliberate indifference standard that animates Eighth and Fourteenth Amendment violations involves both an objective and a subjective component. *McKinney*, 509 U.S. at 26; *Faraday v. Comm'r of Corr.*, 288 Conn. 326, 338 (2008). To satisfy the objective component, the alleged harm must be "sufficiently serious." *Faraday*, 288 Conn. at 338. Defendants' failure to adequately respond to COVID-19 will inevitably result in serious injury to prisoners' health at best and numerous fatalities at

worst. The unprecedented, sweeping steps that federal and state governments have taken to limit exposure to the virus demonstrate that society does, in fact, "consider[] the risk . . . so grave that it violates contemporary standards of decency to expose anyone unwillingly to such a risk." *McKinney*, 509 U.S. at 36.

On the subjective component, prison officials show deliberate indifference when they "know[] of and disregard[] 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." *Faraday*, 288 Conn. at 338-9; *see also McKinney*, 509 U.S. at 36 ("[T]he subjective factor . . . should be determined in light of the prison authorities' current attitudes and conduct . . . ."). Here, again, Defendants are well aware of the extraordinary risk that COVID-19 poses to people in Connecticut's prisons and jails. DOC Commissioner Rollin Cook has acknowledged the COVID-19 pandemic as an "unprecedented healthcare emergency."[81] Governor Lamont has repeatedly acknowledged the substantial risk of rapid COVID-19 transmission in congregate settings, including long-term care facilities and homeless shelters, yet he has refused to take action to protect incarcerated people under the State's own custody.

Meanwhile, 44 incarcerated people and 41 DOC employees at many Connecticut correctional facilities have already tested positive for COVID-19. The disease's exponential epidemic curve both in the general population and at other correctional facilities, including Chicago's Cook County Jail and New York's Rikers Island, makes clear that Connecticut's prisons and jails will inevitably follow—in fact, are already

[81] Cook, *Coronavirus Memo #4* at 1.

following—the same trajectory. Such exponential growth threatens to wreak havoc on DOC's ill-equipped and strained healthcare system. Defendants' failure to act while remaining aware of these substantial risks plainly constitutes a violation of their Constitutional obligations.

2.2.2 Defendants are obligated by statute to protect the life and health of those in DOC custody.

Governor Lamont proclaimed that public health and civil preparedness emergencies exist in the State of Connecticut on March 10, 2020. Upon such proclamation, certain provisions of Connecticut law "shall immediately become effective and shall continue in effect until the Governor proclaims the end of the civil preparedness emergency[.]" Conn. Gen. Stat. § 28-9(b). While certain of these are discretionary, others are not. In particular, during emergencies such as this, "[t]he Governor *shall take appropriate measures for protecting the health and safety of inmates of state institutions* and children in schools." *Id.* § 28-9(b)(5) (emphasis added).

This duty is mandatory. *Eastern Color Printing v. Jenks*, 150 Conn. 444, 450-51 (1963) (ordering mandamus where "[t]he statute uses the words 'shall . . . view' and 'shall revalue.' So far as these two operations are concerned, the statute is mandatory, and the defendant is obliged to conform to it"). Accordingly, the Governor "is called upon to perform [these] acts in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment on the propriety of the acts being done." *Id.*

The Commissioner of Correction, similarly, "has not only a compelling interest in preserving the life and health of the inmates in the custody of the department, but also a

statutorily mandated duty to do so." *Coleman*, 303 Conn. at 819 (citing Conn. Gen. Stat § 18-7's directive that the department "provide for the relief of any sick or infirm prisoner").

2.3 Plaintiffs have no adequate remedy at law.

A writ of mandamus requires a showing of no adequate remedy at law. A remedy is adequate only if it is one "to which [the complainant] may at all times resort, at his own option, fully and freely, *without let or hinderance*." *Wheeler v. Bedford*, 54 Conn. 244, 249 (1886) (emphasis added); *see also State ex rel. Heimov v. Thomson*, 131 Conn. 8, 13 (1944). It must provide "a means of effectively, conveniently and directly enforcing the performance" of the duty owed to the plaintiff. *Brainard v. Town of West Hartford*, 140 Conn. 631, 635 (1954). Likewise, the fact that equitable relief would "avoid circuity, delay and expense" is, in some cases, sufficient for a finding that no adequate remedy at law exists. *See id.* at 635; *Heimov*, 131 Conn. at 14; *Town of Darien v. Webb*, 115 Conn. 581, 588 (1932).

Applying this standard, the Court has found an adequate remedy absent when no clear legal mechanism will provide the requested relief. *AvalonBay Communities, Inc. v. Town of Orange*, 256 Conn. 557, 582 (2001) (holding that there was no adequate remedy at law because there was "no statutory right to appeal" the action); *Brainard*, 140 Conn. at 636 (concluding that alternative relief under a zoning ordinance did not provide an adequate remedy at law). Finally, even potential future damages awards do not necessarily mean the plaintiff has an adequate remedy at law, because "[a] remedy at law, to exclude equity jurisdiction, must be as complete and beneficial as the relief in equity." *Beach v. Beach Hotel Corp.*, 117 Conn. 445, 449 (1933). *See also Berin v. Olson*,

183 Conn. 337, 341 (1981) (citing the continuing nature of the injury as one reasons why damages may not provide a complete remedy).

Here, no adequate remedy at law exists to redress Defendants' inaction in the face of the COVID-19 crisis in Connecticut's prisons. There are no other adequate mechanisms for relief to quickly head off the dramatic pace at which the crisis is unfolding and the increased exposure that detainees and prisoners face with each passing day. It is simply not possible to avoid the danger posed by COVID-19 by having each person's lawyer, if they have one, attempt to file a different kind of petition, or make a different kind of phone call, one-by-one, for each client—and then attempt to see the process through. Not to mention, state courts are by and large closed,[82] are not hearing habeas petitions, and many state agencies are operating with a skeleton crew, if at all, for the length of the pandemic. Therefore, Plaintiffs' only "means of effectively, conveniently and directly enforcing the performance" at issue is through this writ.

2.4 Plaintiffs will suffer irreparable harm.

The irreparable harm calculus in this case is straightforward. There is not just a "substantial probability," *Aqleh*, 299 Conn. at 98, but an inevitability, without action, of loss of life to Plaintiffs and many of those with whom they come into contact.

The numbers are striking: In a matter of days, **41** incarcerated people have been confirmed positive. **Forty-one** DOC staff have also tested positive, in nearly every facility.

[82] As of April 2, 2020, only seven courthouses remained open, and they are only hearing "Priority Level 1 Business," a list that does not include, among others, bail or sentence modifications. Conn. Judicial Branch, *List of Courthouses where Priority Level 1 Level I Business Functions will Be Handled During the COVID-19 Pandemic* (Apr. 1, 2020), https://jud.ct.gov/HomePDFs/CourthousesOpened.pdf?v4.

Yet despite the directives from the CDC; the extraordinary measures taken by the governor in other aspects of his COVID-19 response; and the fact that conditions of confinement are the sites of disproportionate infection rates,[83] Defendants' efforts to uphold their legal obligations to safeguard the life and health of the state's prison population have fallen massively short. Governor Lamont refused to take any action until this suit was filed, and still has made no indication of a systemic, wide-scale, urgent plan to address this crisis. DOC Commissioner Rollin Cook, for his part, has acknowledged the COVID-19 pandemic as an "unprecedented healthcare emergency" and has put out a plan to social distance by quarantining potential carriers of the disease. But social distancing simply by isolating prisoners who are "potential carriers" of the disease is wholly inadequate: pre-symptomatic transmission of COVID-19 is rampant, and DOC has not taken steps, aside from increased overtime, to bolster the capacity of its extremely understaffed prison healthcare system, presenting serious concerns about DOC's ability to handle an inevitable COVID-19 outbreak in its prisons and jails.

The prevalence of asymptomatic and presymptomatic COVID-19 carriers, coupled with COVID-19's extremely high transmission rate, also belie the claim, made by both the DOC and Governor Lamont, that quarantine procedures within DOC facilities are sufficient to contain the virus. DOC has suggested that "Overcrowding is not a concern for our agency. We have space to use."[84] Similarly, on March 24, Governor Lamont said, "We do have extra capacity [at] our correctional facilities right now" when

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[83] *See, e.g.*, Leonard S. Rubenstein, et al., *HIV, Prisoners, and Human Rights*, 388 The Lancet 1202 (July 14, 2016), *available at* https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(16)30663-8/fulltext; Joseph A. Bick, *Infection Control in Jails and Prisons*, 45 Clinical Infectious Diseases 1047-1055 (Oct. 15, 2007), *available at* https://academic.oup.com/cid/article/45/8/1047/344842.
[84] Lyons, *supra* n.41.

explaining why he had no plan to release people from correctional facilities. He added, "We 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."[85] Yet COVID-19 cannot be outrun. Waiting for someone to become symptomatic is simply not enough to prevent exposure to COVID-19.[86] If and when someone is symptomatic, it may be too late.[87]

Finally, even if carriers could be successfully identified and quarantined, additional physical space within a facility does not translate to sufficient staff capacity to implement quarantine or social distancing. DOC has neither the staff nor the infrastructure to give each incarcerated person his own cell, his own shower, his own eating facility, and his own recreational space, six feet apart from any other person; DOC facilities are physically set up to house multiple people in close proximity, and staffing levels are structured accordingly.

Simply put, the DOC of today cannot be expected to contain a pandemic within its walls. It does not have the staffing, it does not have the equipment, and it does not have the resources. But more than that, by definition, correctional facilities *are* congregate environments, and thus create the ideal environment for transmission of contagious diseases.[88] Social distancing has become the linchpin of COVID-19 containment measures worldwide: Public health experts, along with federal and state

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[85] Lyons, *supra* n.38.

[86] Jane Qiu, *Covert Coronavirus Infections Could be Seeding New Outbreaks*, Nature, Mar. 20, 2020, https://www.nature.com/articles/d41586-020-00822-x; *see also* Mandavilli, supra n.49.

[87] This is particularly true given the glacial pace of DOC medical response, even in normal times. *See* Rigg, *supra* n.61 (reporting how the mother of a prisoner with cancer called DOC twenty times over eighteen months before it provided a long-delayed specialist examination).

[88] *See, e.g.*, Chris Francescani and Luke Barr, *Fearing Outbreaks and Riots, Nation's Prison and Jail Wardens Scramble to Respond to Coronavirus Threat*, ABC News, Mar. 19, 2020, https://abcnews.go.com/Health/fearing-outbreaks-riots-nations-prison-jail-wardens-scramble/story?id=69676840 (quoting former New York City corrections commissioner Marty Horn as saying that "nobody has invented a more effective vector for transmitting disease than a city jail").

government officials, have repeatedly extended social distancing guidelines in an effort to contain the outbreak. *But social distancing is not possible in prison*.

Instead, the only remedy is what infectious disease and correctional experts label de-densification: dramatically thinning the population inside prison walls to allow for some measure of social distancing. Releasing a few hundred people over the course of a month will not do it. And without this, people will be irreparably harmed: They will die.

3. RELIEF

The dire irony of COVID-19 is that once a case has been confirmed, it is likely too late to prevent rapid contagion. With positive cases already in multiple facilities[89], this Court cannot stand by and wait for Plaintiffs to uphold their statutory and Constitutional responsibilities. Nor can it stand by and wait for people to become infected. *Helling*, 509 U.S. at 33 ("It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them."). Defendants' failure to take protective actions targeted at places of confinement must be remedied now before it is too late. "These are preventable infections, and we should act to prevent them." Rich Aff. ¶ 16.

To "preserv[e] life," *Coleman*, 303 Conn. at 819, and reduce the density within DOC facilities as quickly as possible, the defendants must be ordered to take systemic, coordinated, wide-scale action (1) to immediately release all people having the CDC heightened risk factors for serious illness or death; (2) to 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) to immediately release

[89] *See* Krasselt, *supra* n.17 (noting that second prisoner to test positive in DOC custody, given no contact with first prisoner, "could indicate a wider community spread" within DOC).

to transitional supervision all those eligible for such; (4) to immediately release to home confinement those eligible for such pursuant to Conn. Gen. Stat. § 18-100h; (4) to immediately release those currently incarcerated only for a technical violation of their parole or probation; and (5) immediately release on furlough all prisoners who are within six months of their end of sentence.

Additionally, to provide for the people who would remain in a less-dense prison system, the defendants must be ordered to submit for the Court's review and ongoing monitoring a plan to provide adequate sanitation and social distancing, including by taking all measures for screening, cleaning, hygiene and social distancing that the CDC recommends for correctional facilities; to diagnose and treat people showing symptoms of COVID-19 in accordance with contemporary standards of care; to approve, within seven days, community or private residences to those qualified for release to such via Conn. Gen. Stat. § 18-100; to approve, within seven days, residences for any prisoner or detainee who is now eligible for release but for the defendant's approval of a residence, and to sufficiently fund transitional housing for the duration of the pandemic.

Finally, the Court should order Defendants to undertake any other task necessary to discharge their duties to those in their custody during the pandemic, including by working with other arms of state government to expedite their handling of requests for release and ensuring immediate consideration of relief for all incarcerated people who can safely return to their communities.

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Certificate of Service

I certify that a copy of the above, and any exhibits, was emailed on April 7, 2020 to all counsel of record, all of whom have filed written consent for electronic delivery:

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