UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

TRE MCPHERSON, ET AL., *Petitioners,* v. NED LAMONT, ET AL., *Respondents.*	: : : : : : :	CIVIL NO. 3:20-CV-0534 (JBA) MAY 1, 2020

MEMORANDUM OF LAW IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS

Respondents move to dismiss Petitioners' action because this Court lacks jurisdiction. Petitioners bring this purported class action requesting habeas relief pursuant to 28 U.S.C. § 2241 as well as demanding declaratory and injunctive relief pursuant to 42 U.S.C. §1983. As shown below, the Petitioners' claims fail as they have failed to exhaust available state court remedies, and for §1983 and PLRA purposes, administrative remedies.

Alternatively, under the *Younger* abstention doctrine this Court should decline to exercise jurisdiction over these claims because they implicate various state judicial orders and mittimuses, impacting pending criminal pretrial matters, including detention and bond orders, as well as the state mandamus action brought by the same counsel.[1]

I. BACKGROUND

On April 20, 2020, Petitioners filed their Petition against Respondents Ned Lamont, the Governor of the State of Connecticut, and Rollin Cook, the Commissioner of the Connecticut Department of Correction. The individually named Petitioners are inmates held in various facilities

[1] As instructed by the Court during the April 29, 2020 status conference, Respondents herein address only their challenges to the Court's jurisdiction. Respondents reserve the right to challenge Petitioners' motion for a temporary restraining order, requests for preliminary and permanent injunctions and any efforts to certify a class if and when necessary.

of the Connecticut Department of Correction ("DOC") and they allegedly have pre-existing health conditions or are otherwise in an age group that allegedly place them at "significantly higher risk of severe disease and death if they contract [COVID-19]." (Doc. #1 at 2, ¶1.) Petitioners request to bring this action as a class action, alleging, *inter alia*, violations of the Eighth and Fourteenth Amendments. They seek the "immediate release" of numerous, indeed potentially thousands, of inmates who are "50 and older and those with medical conditions that place them at heightened risk of severe illness or death from COVID-19." *Id*. Petitioners contend that the immediate release of these "Medically Vulnerable Subclasses" will allow Respondents the ability to implement social distancing measures. *Id*. Critically, the Petition includes a complete lack of allegations or requests for relief that would suggest how they or any putative class members would be managed or cared for if released to the community.

Petitioners further seek injunctive relief as to two classes: the first comprised of Pre-Adjudication individuals, and the second comprised of Post-Adjudication individuals. *Id*. [2] Together the two classes comprise the entirety of the current inmate population. *Id.* As part of their proposed injunctive relief, Petitioners conflate the deliberate indifference standard of the Eighth and Fourteenth Amendments with administrative recommendations from the Centers for Disease Control and Prevention, requesting an order mandating that Respondents create a "plan" to ensure "[s]pecific mitigation efforts, consistent with CDC guidelines, to significantly reduce the risk of COVID-19 for" all inmates and "an evaluation" of whether "DOC must release additional" inmates in order to "be in compliance with CDC guideline[s]." (Doc. #1 at 34, ¶4.)

[2] There is no motion pending for class certification, and Respondents will oppose class certification as the individual public safety risk issues that pertain to each offender, and the unique health concerns would necessarily require that the individual issues would predominate over the common issues to the putative class. Further, it is impossible to determine who is medically "vulnerable" and thus it would be impossible to determine who would be in the class and who would be excluded.

On April 27, 2020, Petitioners filed their Motion for Temporary Restraining Order (Doc. #15) claiming, *inter alia*, essentially the same allegations regarding the conditions of confinement in the DOC facilities. (*Id*. at 1, ¶1.) Petitioners claim their requested preliminary relief is justified and further seek "emergency" preliminary relief. (*Id*. at 2, ¶2.) Clearly, the Petitioners' TRO is, in fact, a motion for a permanent, mandatory injunction seeking to compel the release of thousands of state inmates lawfully confined in the custody of the Commissioner of Correction. On April 29, 2020 the Court held a telephonic Status Conference (Doc. #27) in which counsel appeared to discuss the next steps. This Motion to Dismiss follows.

II. ARGUMENT

Petitioners attempt to classify their action as both a habeas matter and a civil rights suit under § 1983. As a preliminary matter, since Petitioners primarily seek a mass release of inmates, such a request is not cognizable in a § 1983 action and "cannot be granted in a civil rights action pursuant to section 1983" because it goes to "the fact or duration of a [Plaintiff's] confinement" and therefore "only habeas relief under 28 U.S.C. § 2254(b) with its exhaustion requirement may be employed." *Morgan v. Dzurenda*, No. 3:14-CV-966 SRU, 2014 WL 6673839, at *4 (D. Conn. Nov. 21, 2014) (quoting *Jenkins v. Haubert*, 179 F.3d 19, 23 (2d Cir.1999)); *see also Preiser v. Rodriguez*, 411 U.S. 475, 489–90 (1973) (habeas corpus was appropriate remedy for inmates seeking restoration of good-conduct-time credits which would shorten the length of their confinement in prison).

Petitioners are seeking, first and foremost, an order from this Court commanding Respondents "to identify all Medically Vulnerable Subclass Members in both the Pre-adjudication and Post-adjudication Classes within six (6) hours of the Court's order and *release*—within twenty-four (24) hours of submission of the list—all such persons…" (Doc. #1 at 34, ¶2) (emphasis

added). Only after this mass release is completed do Petitioners then seek a court-ordered "plan" to reduce the risk of COVID-19 to remaining inmates. (*Id*. at 34, ¶3.) Still, this proposed "plan" is merely a precursor to an "evaluation" of whether Respondents must "release additional members of the Classes" in order to comply with CDC guidelines. (*Id*. at 34, ¶3b.) Finally, Petitioners are seeking further release of all supposedly medically vulnerable inmates as time progresses in order to remain in compliance with CDC guidelines. (*Id*. at 34-35, ¶¶4a, 4d.) In other words, this action is about releasing inmates, not about changing the conditions of inmates' confinement. As such, Petitioners are seeking a writ of habeas corpus, plain and simple. To classify it as a § 1983 action is misleading and this Court should treat this as it really is: a Petition for a writ of habeas corpus by state inmates via § 2254, with its concomitant state court exhaustion requirements.

Noticeably absent from the Petition are necessary allegations regarding the Petitioners' efforts to exhaust state court or administrative remedies and their outcomes. There is no indication that Petitioners ever attempted to pursue any state court or administrative remedies as required under the applicable statutes and case law. Indeed, the Court can take judicial notice of the absence of any state court actions filed by any of the named Petitioners. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) ("docket sheets are public records of which the court could take judicial notice.").

Also notably absent from the allegations is notification to this Court that there is a mandamus action filed with the Connecticut Superior Court.[3] *See Connecticut Criminal Defense Lawyers Association, et al. v. Lamont, Ned, et al*, Superior Court, Judicial District of Waterbury, Docket No. CV20-6054309.[4] (*CCDLA v. Lamont*.) This state mandamus action was also filed against Governor

[3] As is noted more fully below the State Court (*Bellis, J*.) recently dismissed that action on April 24, 2020. As of April 30, 2020, the court has not entered a final judgment of dismissal, nor has that decision been appealed.
[4] Attached as Exhibit A, Also available at http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=UWYCV206054309S.

Ned Lamont and Commissioner of Correction Rollin Cook. Further, in the state court action, the plaintiffs sought an order of mandamus compelling the defendants to, *inter alia*, "immediately release all people having the CDC heightened risk factors for serious illness or death from COVID-19…immediately reduce the population density at each and every facility in which they confine people." *CCDLA v Lamont*, Amended Complaint (Doc. #114) at 22, ¶93. The very fact that the same attorneys were able to file such an action in state court completely refutes any claim that the state courts are "closed." In fact, this very same action that is now pending before this Court could have been filed in the state court, together with an emergency restraining order, and it would have been considered priority 1, and would have been dealt with appropriately.[5]

On April 8, 2020, the parties participated in a status conference call with Judge Bellis, who set a schedule for considering the motion to dismiss. The parties filed memoranda on April 9th and April 13th, the court heard argument on April 15th and issued a memorandum of decision on April 24, 2020.[6]

A. Petitioners' Habeas Claims Are Barred For Failure To Exhaust.

A prisoner must exhaust his or her administrative remedies prior to seeking a federal writ of habeas corpus pursuant to 28 U.S.C. § 2241 and must exhaust state court remedies prior to seeking a 28 U.S.C. § 2254 petition. *See Baldwin v. Reese*, 541 U.S. 27, 29 (2004) ("Before seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies [pursuant to] 28 U.S.C. § 2254(b)(1)"); *United States v. Smalling*, 644 Fed. App'x 3, 4-5 (2d Cir. 2016) (challenge to execution of sentence must be brought in a section 2241 proceeding, but only "after exhaustion of

[5] See email dated April 4, 2020 from Attorney Barrett to Judge Abrams, who is the statewide presiding judge for all civil matters. (Exhibit B)

[6] Petitioner Lowery's counsel, Attorney Taubes, also participated, albeit peripherally, in the *CCDLA* litigation. On April 14th, Attorney Taubes filed a request for leave to file an amicus brief, which Judge Bellis denied at the outset of oral argument. Lowery's counsel, Attorney Taubes, was on the phone during oral argument in the *CCDLA* case.

administrative remedies"); *see also Wilson v. Wells*, No. 3:17CV40(AWT), 2017 WL 6667515, at *2 (D. Conn. Sept. 6, 2017) ("a prisoner must exhaust his or her administrative remedies prior to filing a section 2241 petition or exhaust state court remedies prior to filing a section 2254 petition.").

Petitioners do not allege that they have made any efforts to exhaust their administrative or state court remedies as to the claims in the Petition. *See United States ex rel. Scranton v. New York*, 532 F.2d 292, 294 (2d Cir. 1976) ("While [§ 2241] does not by its own terms require the exhaustion of state remedies as a prerequisite to the grant of federal habeas relief, decisional law has superimposed such a requirement in order to accommodate principles of federalism" that includes that "the prisoner must fairly present his claim in *each* appropriate state court (including a state supreme court with powers of discretionary review)") (emphasis added); *see also Marte v. Berkman*, No. 11-cv-6082 (JFK), 2011 WL 4946708, at *6 (S.D.N.Y. October 18, 2011) ("Although exhaustion of state remedies is not statutorily required under § 2241, decisional law has superimposed such a requirement in order to accommodate principles of federalism…requiring pre-trial habeas detainee to satisfy § 2254's exhaustion requirement…In that respect, at least, § 2241 and § 2254 are indistinguishable.") (internal citations and quotation marks omitted).

For this reason alone, Petitioners' entire action must be dismissed for want of jurisdiction. *See Wilson*, 2017 WL 6667515, at *2 (dismissing for lack of jurisdiction because "[t]he plaintiff does not allege that he has made any efforts to exhaust his administrative or state court remedies as to the claims in the habeas petition."); *see also Miller v. Brown*, No. 3:18-CV-1823 (JAM), 2019 WL 79432, at *1 (D. Conn. Jan. 2, 2019) (holding the court lacked jurisdiction because "it is apparent that he has yet to exhaust his remedies as to Judge Brown's ruling through an appeal to the Connecticut Appellate Court and Connecticut Supreme Court.") (citing 28 U.S.C. § 2254(b)(1)(A));

Coleman v. Semple, No. 3:11CV512 (JBA), 2012 WL 2515541, at *6 (D. Conn. June 28, 2012) (granting motion to dismiss on the ground that the claims are unexhausted).

1. Sentenced Prisoners Must Exhaust Their State Remedies Prior To Seeking Federal Habeas Relief Under 28 U.S.C. § 2254.

"Before filing a petition for writ of habeas corpus in federal court, the petitioner must exhaust his state court remedies." *Fernandez v. Arnone*, No. 3:11-CV-1827 JBA, 2013 WL 870385, at *2 (D. Conn. Mar. 7, 2013) (citing *O'Sullivan v. Boerckel*, 526 U.S. 838, 842 (1999); 28 U.S.C. § 2254 (b)(1)(A)); *see also Green v. Wright*, No. 3:19-CV-52 (CSH), 2019 WL 7879730, at *4–5 (D. Conn. Sept. 10, 2019) ("A prerequisite to federal habeas corpus relief under 28 U.S.C. § 2254 is the exhaustion of available state court remedies.") (citation omitted). "The Second Circuit requires the district court to conduct a two-part inquiry: first, a petitioner must present the factual and legal bases of his federal claim to the highest state court capable of reviewing it; and second, he must have utilized all available means to secure appellate review of his claims." *Fernandez*, 2013 WL 870385, at *2 (citing *Galdamez v. Keane*, 394 F.3d 68, 73–74 (2d Cir.), *cert. denied*, 544 U.S. 1025 (2005)). "Even if claims are unexhausted, however, the court retains the ability to review and *deny* such claims on the merits." *Id*. (emphasis added) (citing 28 U.S.C. § 2254(b)(2); *Rhines v. Weber*, 544 U.S. 269, 271 (2005)).

"[T]he federal court must assess whether the petitioner 'properly exhausted those [state] remedies, i.e., whether [petitioner] has fairly presented his [or her] claims to the state courts,' such that the state court had a fair opportunity to act." *Green*, 2019 WL 7879730, at *4 (quoting *Galdamez*, 394 F.3d at 73). "This inquiry 'embodies the concept of procedural default.'" *Id*. (quoting *Galdamez*, 394 F.3d at 73). "The procedural default doctrine 'ensur[es] that state courts receive a legitimate opportunity to pass on a petitioner's federal claims and that federal courts respect the state courts' ability to correct their own mistakes." *Id*. (quoting *Galdamez*, 394 F.3d at

73). "Thus, to properly exhaust a federal habeas claim in state court, the petitioner 'must put state courts on notice that they are to decide *federal constitutional claims*.'" *Id*. (quoting *Petrucelli v. Serrano*, 735 F.2d 684, 687 (2d Cir. 1984) (emphasis in original). "The exhaustion requirement 'expresses respect for our dual judicial system and concern for harmonious relations between the two adjudicatory institutions'—state and federal." *Id*. (quoting *Petrucelli*, 735 F.2d at 687); *see also Coleman*, 2012 WL 2515541, at *1 ('The exhaustion requirement seeks to promote considerations of comity between the federal and state judicial systems.") (citation omitted).

"For purposes of exhaustion, adequate notice to the state court includes: (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation." *Green*, 2019 WL 7879730, at *5 (quoting *Daye v. Attorney Gen. of State of N.Y.*, 696 F.2d 186, 194 (2d Cir. 1982)). "Requiring such notice is not unreasonably burdensome on state prisoners." *Id*. (citing *Baldwin*, 541 U.S. at 32).

Here, this Court lacks jurisdiction because Petitioners have not alleged and cannot show that they have exhausted their remedies in state court.[7] Indeed, Petitioners do not even allege that they have attempted to do so or that they are somehow barred from doing so.[8] Other than the first named Petitioner Tre McPherson[9], there is nothing to indicate that any of the Petitioners have sought release

[7] *Pichard v. Connor*, 404 US 270, 275 (1971), ("It has been settled since *Ex parte Royall*, 117 U.S. 241 (1886), that a state prisoner must normally exhaust available state judicial remedies before a federal court will entertain his petition for habeas corpus."); *see also Pitchess v. Davis*, 421 US 482, 487 (1975) ("Under our decision in [*Picard*] exhaustion of state remedies is required as a prerequisite to consideration of each claim sought to be presented in federal habeas.").

[8] Petitioner Lowery does, in fact, make the false claim that state remedies are unavailable to him. As noted above, Lowery's counsel participated in a state court matter prior to his filing of Lowery's petition in this Court. *See supra* at p. 5 and n. 7.

[9] *Infra*, Petitioner McPherson has been released from custody pursuant to a Promise to Appear ("PTA."). *See* Declaration of Michelle DeVeau. (Exhibit C)

from confinement either via a bail reduction, sentence modification, or writ of habeas corpus pursuant to Conn. Gen. Stat. § 52-466 *et seq*. in state court. This failure alone robs this Court of jurisdiction. *See Saturno v. Mulligan*, No. 3:18CV504(AWT), 2019 WL 1789902, at *2 (D. Conn. Apr. 24, 2019) ("With respect to the other three grounds, the petitioner has not alleged that there is no opportunity for redress in state court or that the state court process is clearly deficient. Thus, he is not excused from exhausting his state remedies before proceeding in federal court.").

a. There is no excuse for failing to exhaust as the State Courts are open and hearing matters.

"Failure to exhaust may be excused only where 'there is no opportunity to obtain redress in state court or if the corrective process is so clearly deficient to render futile any effort to obtain relief.'" *Coleman*, 2012 WL 2515541, at *1 (quoting *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam)); *see also Ellman v. Davis*, 42 F.3d 144, 149 (2d Cir. 1994) (emphasizing the words "only," "no opportunity," "so clearly deficient," and "futile."). "A petitioner cannot, however, simply wait until appellate remedies no longer are available and argue that the claim is exhausted." *Id*. (citing *Galdamez*, 394 F.3d at 73–74).

"Futility is present when there is a 'complete absence of a mechanism for correction of the alleged unconstitutional violation' or the petitioner is 'precluded by an unconscionable breakdown from using the process that exists.'" *Jordan v. Bailey*, No. 13 Civ. 7651, 2013 WL 6233889 (S.D.N.Y. Dec. 1, 2013) (quoting *Francis S. v. Stone*, 995 F. Supp. 368, 380 (S.D.N.Y.1998), *aff'd*, 221 F.3d 100 (2d Cir.2000)). *See* Declarations of Kathryn Stackpole (Exhibit D) and Rob Cristiano (Exhibit E).

A petitioner's ignorance does not excuse the exhaustion requirement. *See Peterkin v. Bd. of Pardons & Paroles*, No. 3:19-CV-497 (KAD), 2019 WL 2602962, at *3 (D. Conn. June 25, 2019) ("Simply because he was unaware of his obligation to exhaust his state court remedies, does not

excuse him from having to do so."). Alleged delay cannot excuse the exhaustion requirement unless the court finds a violation when weighing the speedy trial factors of *Barker v. Wingo*, 407 U.S. 514 (1972). *See Roberites v. Colly*, 546 F. App'x 17, 19-20 (2d Cir. 2013) (affirming the district court's dismissal of § 2254 petition despite 32-month delay by state appellate courts between filing criminal appeal and filing habeas petition). Nor can alleged "procedural obstacles" excuse the exhaustion requirement when such obstacles are in fact, "reasonable procedural requirements." *See Saunders v. Comm'r, Dep't of Correction*, No. 10 CV 410 MRK, 2011 WL 572313, at *2 (D. Conn. Feb. 15, 2011) (quoting *Ellman*, 42 F.3d at 149).

Petitioners do not allege that they have even attempted to exhaust their state court remedies as required by the statute and precedent. To the extent they assume they are somehow relieved from this statutory prerequisite, they have seriously misapprehended the current situation in Connecticut State Courts.[10] The courts are open and are currently hearing and processing inmate requests for release via a variety of judicial mechanisms. Several inmates have already filed actions in state court for release based on similar claims related to COVID-19 and these claims are being acted upon. (Exhibit A.) Indeed, Mr. McPherson was actually recently released on a PTA after his criminal defense attorney requested this from the criminal court. See Declaration of Rob Cristiano, (Exhibit E), ¶17; see also Declaration of Michelle DeVeau. (Exhibit C), ¶4.

Further, counsel from the ACLU and a Yale Law School clinic filed a mandamus action in state court seeking the mass release of thousands of inmates. *See CCDLA v.Lamont*, *supra*. The brief history of the *CCDLA* matter demonstrates the full availability of litigation remedies in our state's courts. ACLU counsel, Attorney Dan Barrett, who appears for Petitioners in this matter, filed the state court *CCDLA* matter on Friday April 3, 2020, and later that day sent an email to Superior

[10] *See* Declaration of Kathryn Stackpole, Assistant Clerk for Habeas Matters, (Exhibit D).

Court Judge James Abrams, who serves as the Chief Administrative Judge for Civil Matters, reporting that the case had been filed and sought emergency relief. The following morning, a Saturday, Judge Abrams responded to the email indicating that the court was aware of the case and would take "appropriate measures" and later that day the case was transferred from the Hartford Superior Court to the Complex Litigation docket in Waterbury. The next business day, Monday April 6, 2020, the clerk for the Complex Litigation docket emailed all counsel, provided his personal cellphone and other contact information, and scheduled a status conference call with the judge assigned to the case for two days following, Wednesday April 8, 2020. The next day, the defendants filed a motion to dismiss and an opposition to the request for mandamus. Within three weeks, the case was docketed, Respondents filed a motion to dismiss, this motion was argued, and the court (*Bellis, J.*) rendered a decision granting dismissal. (Exhibit A.) *See also Day, Robert #253376 v. Commissioner of Correction,* Superior Court, Judicial District of Rockville, Docket No. CV17-4008971-S[11] where within seven (7) days the petitioner's habeas motion was filed, objected to, and the presiding habeas judge (*Bhatt, J.*) rendered a decision. (Exhibit F.) And in New Haven, an inmate named Daniel Greer was recently temporarily released from custody pursuant to his request for bond while his conviction is being appealed. (Exhibit G.)

Inmates like the proposed class not only have access to the state courts to bring actions seeking their release, the courts have accommodated inmates by instituting particularly speedy litigation schedules.[12] Any allegation of futility is completely belied by the prompt and expeditious

[11] http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=TSRCV174008971S; a copy of Judge Bhatt's Ruling is attached hereto (Exhibit F), for the convenience of the Court.

[12] In addition, there have been numerous motions for immediate release due to COVID-19, as well as motions for bond or for compassionate release, and the state court has treated these motions expeditiously. See Declaration of Kathryn Stackpole, Exhibit D; *See also, e.g Grimes v Commissioner*, Dkt. No. TSR-CV20-5000478-S http://civilinquiry.jud.ct.gov/CaseDetail/PublicCaseDetail.aspx?DocketNo=TSRCV205000478S (motion for immediate release filed April 14, 2020). (Exhibit H). On April 29, 2020, Judge Bhatt docketed 3 emergency habeas petitions in Hartford. Judge Bhatt has not issued any orders yet. The cases are: *Solomon*

treatment these matters are currently receiving in state courts. And any representation to the contrary by Petitioners is bewildering, particularly in light of the active participation by Petitioners' Connecticut counsel in at least one of those matters: *CCDLA et. al. v. Lamont, et. al*.

Connecticut's state courts are providing exceedingly prompt attention to emergency motions, including but not limited to, habeas petitions and emergency motions seeking release or, in criminal matters, emergency reductions in bond, and requests for PTA's, due to COVID-19. *See Money v. Pritzker,* 2020 WL 1820660 at *22, (N.D. Ill., April 10, 2020) ("To be sure, exhaustion requirements can…be waived when relief is truly unavailable. But waiving them here—when state courts clearly were available …would turn the habeas system upside down.").

b. The current COVID-19 pandemic is no excuse for failing to exhaust.

Petitioners go into great length to describe the current COVID-19 pandemic and the extraordinary circumstances the state, the prisons, and, in particular, the Petitioners face. And while Respondents—who are responsible for the health and safety of *all* of Connecticut's citizens—certainly recognize the extraordinary challenges presented by COVID-19, these circumstances do not excuse statutory exhaustion requirements.

Nationwide, inmates are seeking release through several methods both in state and federal courts. One such method available to federal inmates comes via compassionate release pursuant to 18 U.S.C. § 3582(c)(1)(A). Like § 2254, § 3582 has an exhaustion requirement.[13] But despite the

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Boyd v. Commissioner of Correction (COC), HHD-CV20-5063875; *Douglas Murphy v. COC*, HHD-CV20-5063876; *Malik Nunn v. COC*, HHD-CV20-5066377. (Exhibit I). On March 26, 2020, the Judicial Branch announced, in part, that matters from Rockville will transfer to the Hartford GA #14 courthouse. See https://jud.ct.gov/COVID19.htm. Therefore, Petitioner Lowery's assertion that "habeas matters are not being processed in the state courts," (Case 3:20-cv-00528-JBA, Doc. #1 at 3, ¶10) is simply inaccurate.

[13] 18 U.S.C. § 3582(c)(1)(A): "(A) the court, upon motion of the Director of the Bureau of Prisons, or upon motion of the defendant *after the defendant has fully exhausted all administrative rights…*"

exigencies arising from the current crisis, courts are not excusing the statutory exhaustion requirement in these cases.

In *United States v. Raia*, 954 F.3d 594 (3rd Cir. 2020), the Third Circuit held the petitioner's lack of exhaustion to be fatal to his motion for release. The court held "the mere existence of COVID-19 in society and the possibility that it may spread to a particular prison alone cannot independently justify compassionate release, especially considering BOP's statutory role, and its extensive and professional efforts to curtail the virus's spread…Given BOP's shared desire for a safe and healthy prison environment, we conclude that strict compliance with § 3582(c)(1)(A)'s exhaustion requirement takes on added—and critical—importance." *Id*. at 597.

Similarly in this District, a petitioner's failure to exhaust amid COVID-19 concerns barred his compassionate release petition. *See United States v. Gamble*, 2020 WL 1955338, at *2-3, (D. Conn., April 23, 2020), *appeal filed*, No. 20-1379 (2d Cir. Apr. 27, 2020). "'While the [c]ommon law (or 'judicial') exhaustion doctrine ... recognizes judicial discretion to employ a broad array of exceptions that allow a plaintiff to bring his case in district court despite his abandonment of the administrative review process,' this array of exceptions—including futility—is simply not available when the exhaustion requirement is statutory." *Id*. (quoting *Theodoropoulos v. I.N.S.*, 358 F.3d 162, 172 (2d Cir. 2004) (quoting *Beharry v. Ashcroft*, 329 F.3d 51, 58 (2d Cir. 2003)).[14]

[14] *See also, United States v. Smith*, 3:16-cr-00048 (MPS) (D. Conn. April 17, 2020) (ECF Doc. No. 82 at 4-5). ("for substantially the reasons set forth in *United States v. Roberts*, [No. 18-CR-528(JMF), 2020 WL 1700032, at *2 (S.D.N.Y. Apr. 8, 2020)], I view the exhaustion requirement in § 3582(c) as mandatory and not subject to exceptions for futility or other judge-made exceptions."); *United States v. Gileno*, No. 3:19CR161 (VAB), 2020 WL 1307108, at *3 (D. Conn. Mar. 19, 2020) ("As a threshold matter, [defendant] has not satisfied the requirement under 18 U.S.C. § 3582(c)(1)(A) to first request that the Bureau of Prisons file a motion on his behalf and then show that thirty days have passed without any BOP action. As a result, the Court cannot consider his motion to modify his sentence.").

Federal Courts in districts throughout the country have been denying various requests for release under § 3582 and § 2241 when the petitioner has failed to exhaust, notwithstanding the COVID-19 pandemic.[15]

2. State pretrial detainees must also exhaust state court remedies.

Prior to seeking § 2241 habeas corpus relief, a state pretrial detainee must also first exhaust his or her available state-court remedies. *See United States ex rel. Scranton*, 532 F.2d at 294. "The exhaustion doctrine is a judicially crafted instrument which reflects a careful balance between important interests of federalism and the need to preserve the writ of habeas corpus as a swift and imperative remedy in all cases of illegal restraint or confinement." *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 490 (1973) (internal marks and citation omitted). "This exhaustion requirement is also grounded in principles of comity; in a federal system, the States should have the

[15] *See, e.g., Furando v. Ortiz*, No. CV 20-3739(RMB), 2020 WL 1922357, at *4 (D.N.J. Apr. 21, 2020)("the Court will dismiss the petition without prejudice for failure to exhaust administrative remedies" when denying § 2241 petition); *United States v. Cox*, No. 418CR00017TWPVTW, 2020 WL 1923220, at *1 (S.D. Ind. Apr. 21, 2020)("Because Mr. Cox has not exhausted his administrative remedies and the Court cannot waive that requirement, his Motion is denied without prejudice."); *Simmons v. Warden, FCI-Ashland*, No. CV 0:20-040-WOB, 2020 WL 1905289, at *3 (E.D. Ky. Apr. 17, 2020)(" Nor may the Court consider a request for habeas relief where Simmons concedes that he failed to pursue any available administrative remedies, much less fully exhaust those remedies, prior to filing his petition."); *Newton v. Louisiana Dep't of Corr.*, No. CV 20-0447, 2020 WL 1869018, at *2 (W.D. La. Apr. 13, 2020)("[I]f Newton seeks to bring this as a habeas action seeking parole, he has not alleged that he exhausted his state court administrative remedies prior to bringing suit."); *United States v. Heath*, No. CR-13-102-SLP, 2020 WL 1957916, at *1 (W.D. Okla. Apr. 23, 2020)("Defendant's [f]ailure to comply with [the] mandatory exhaustion requirement [of § 3582(c)(1)(A)] prevents judicial review of the issue.") (collecting cases); *United States v. Bell*, No. 16-20008-02-DDC, 2020 WL 1923086, at *2 (D. Kan. Apr. 21, 2020) (court lacked jurisdiction over defendant's motion for compassionate release under § 3582(c)(1)(A) based on COVID-19 pandemic due to failure to exhaust administrative remedies where defendant filed motion just one week after he filed a request with the warden, had not yet received warden's response, and 30 days had not elapsed since he submitted the request to the warden); *United States v. Gonzalez*, No. 18-cr-00130-PAB, 2020 WL 1905071, at *2-3 (D. Colo. Apr. 17, 2020) (the judiciary lacks "power to craft an exception" to § 3582(c)(1)(A)'s exhaustion requirement and because defendant's motion failed to indicate warden had responded to administrative request or that 30 days had lapsed from the warden's receipt of such request, motion had to be dismissed for lack of jurisdiction); *United States v. Perry*, No. 18-cr-00480-PAB, 2020 WL 1676773 at *1 (D. Colo. Apr. 3, 2020)(finding court lacked jurisdiction over the defendant's request for compassionate release under § 3582(c)(1)(A) based on COVID-19 pandemic where he did not satisfy exhaustion requirement and defendant failed to identify any "Tenth Circuit case where [a futility or an irreparable harm] exception to an exhaustion requirement has been found in a factually analogous case").

first opportunity to address and correct alleged violations of state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722, 731 (1991). It exists, "in recognition of the fact that the public good requires that those relations [between the States and the Union] be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the constitution." *Ex parte Royall*, 117 U.S. 241, 251 (1886).

"The distinction between § 2241, pre-trial exhaustion, and § 2254, post-trial exhaustion, is recognized and discussed in Justice Rehnquist's dissent in [*Braden*]. For our purposes, it is sufficient to recognize that, although there is a distinction in the statutory language of §§ 2254 and 2241, there is no distinction insofar as the exhaustion requirement is concerned." *Moore v. DeYoung*, 515 F.2d 437, 442 (3d Cir. 1975); *see also Drayton v. Hayes*, 589 F.2d 117, 120 (2d Cir. 1979) ("Prior to seeking federal habeas corpus relief, a detainee must exhaust his state remedies by fairly presenting his federal constitutional claim in the state courts."); *Thomas v. Crosby*, 371 F.3d 782, 812 (11th Cir. 2004) ("Among the most fundamental common law requirements of § 2241 is that petitioners must first exhaust their state court remedies."); *United States ex rel.* Scranton, *532* F.2d at 294; *Marte*, 2011 WL 4946708, at *6.

As argued *supra* for post-adjudication inmates, there have been no factual allegations made which indicate that anyone in the proposed petitioner class has even initiated, let alone fully exhausted, their state court remedies. And just like their post-conviction counterparts, the pretrial Petitioners have not offered, nor could they offer, any viable excuse for their failure to exhaust. As such, the pretrial Petitioners are also barred from seeking federal habeas relief due to their failure to fully exhaust their state court remedies.

B. Petitioners' Claims Are Barred Under the *Younger* Abstention Doctrine.

"*Younger*[16] exemplifies one class of cases in which federal-court abstention is required: When there is a parallel, pending state criminal proceeding, federal courts must refrain from enjoining the state prosecution. This Court has extended *Younger* abstention to particular state civil proceedings that are akin to criminal prosecutions, see *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct. 1200, 43 L.Ed.2d 482 (1975), or that implicate a State's interest in enforcing the orders and judgments of its courts, see *Pennzoil Co. v. Texaco Inc.*, 481 U.S. 1, 107 S.Ct. 1519, 95 L.Ed.2d 1 (1987)." *Sprint Communication, Inc. v. Jacobs*, 571 U.S 69, 73 (2013).

1. This Court should abstain from exercising jurisdiction over this action as there is a pending state mandamus action purportedly brought on behalf of the same inmates against the same state officials.

"Although the *Younger* abstention doctrine was born in the context of state criminal proceedings, it now applies with equal force to state administrative proceedings…This doctrine of federal abstention rests foursquare on the notion that, in the ordinary course, a state proceeding provides an adequate forum for the vindication of federal constitutional rights. Therefore, giving the respect to our co-equal sovereigns that principles of 'Our Federalism' demand, we generally prohibit federal courts from intervening in such matters." *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198 (2d Cir. 2002) (quoting *Younger*, 401 U.S. at 44).

"*Younger* abstention is required when three conditions are met: (1) there is an ongoing state proceeding; (2) an important state interest is implicated in that proceeding; and (3) the state proceeding affords the federal plaintiff an adequate opportunity for judicial review of the federal constitutional claims." *Id*.

[16] *Younger v. Harris*, 401 U.S. 37 (1971).

a. There is an active state proceeding.

The first condition is met. As noted earlier, Petitioners' counsel brought a mandamus action in state court, essentially raising the same federal constitutional issues alleged in this case. In *CCDLA v. Lamont*, *supra*, the plaintiffs asked the court to issue a writ of mandamus to, *inter alia*, order Governor Lamont and Commissioner Cook, both Respondents here, to release inmates with medical conditions considered to be high risk factors by the CDC when contracting COVID-19. The action was filed on April 3, 2020. Defendants appeared and filed a motion to dismiss, which was recently argued. Although the court granted the motion to dismiss on April 24, 2020, judgment has not entered and the appeal period remains open. Thus, the Petitioners' federal constitutional claims have not been presented to the state's highest court and they have failed to fully exhaust in state court.

Petitioners are obviously aware of this *CCDLA* case but seem to raise the argument that since Respondents sought dismissal of the action in state court on jurisdictional grounds, they are somehow barred from also seeking dismissal here. By raising this bizarre and ultimately unavailing argument[17], Petitioners are essentially conceding that the federal issues within *CCDLA v. Lamont* are

[17] Respondents sought dismissal in *CCDLA v. Lamont* because those plaintiffs had no standing, both because CCDLA could not invoke third party standing and because the individual plaintiffs had not actually alleged injury in that they did not claim that the Respondents had the requisite mental state of recklessness necessary to state a deliberate indifference claim. The Respondents also sought dismissal because the plaintiffs sought a mandamus ordering Executive branch officials to exercise their discretion, granted to them by the Legislature, to release thousands of inmates. This presented a non-justiciable political question. Respondents did not argue that the federal courts had jurisdiction, as such an argument would make no sense given the exhaustion requirements of both §2241 and §2254 and the fact that inmates cannot secure release via §1983. *See Gulley v. Ogando*, No. 3:18-CV-858 (SRU), 2020 WL 1863276, at *1 (D. Conn. Apr. 13, 2020); *see also Preiser*, 411 U.S. at 487–90 (holding that a state prisoner challenging the length of confinement and requesting immediate release must do so by a habeas petition, not by a section 1983 suit). To the extent Petitioners attempt to advance an argument that Respondents are estopped from seeking dismissal here because of *CCDLA v. Lamont*, this fails because it fallaciously assumes that 1. there must be some judicial forum with jurisdiction, whether federal or state, for any claims presented and 2. that the proper forum for their claims were either a state mandamus action or a federal habeas action. Naturally, they are wrong and as argued *supra*, the proper forum for their complaints would be found via habeas, bond reduction, or sentence modification in the state courts, which are open for business.

the same as the issues contained within their Petition. No appeal has been sought in *CCDLA v. Lamont*, but this does not obviate the necessity to "present the factual and legal bases of his federal claim to the highest state court capable of reviewing it" or to utilize "all available means to secure appellate review of [the] claims." *Fernandez*, 2013 WL 870385, at *2. Regardless, the first prong of *Younger* is met here.[18]

b. There is an important state interest in that proceeding.

The second condition is met. "A state interest is important for purposes of the second *Younger* abstention factor where 'exercise of the federal judicial power would disregard the comity between the States and the National Government.'" *Grieve v. Tamerin*, 269 F.3d 149, 152 (2d Cir. 2001) (quoting *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987)). "In this Circuit, resolution of this question turns on whether the state action concerns the central sovereign functions of state government." *Id*. (quotation omitted).

The State plainly has an interest in the supervision of its prisons and the judicial adjudication of the wide discretion the state legislature has given its executive branch officers in exercising that supervision. *Meachum v. Fano*, 427 U.S. 215, 229 (1976) ("[T]he administration of [prisons] is of acute interest to the States."). Both the federal and state courts give significant deference to the Commissioner in how to adequately provide for the safety and security of the inmates under his charge. *See Pierce v. Lantz*, 113 Conn. App. 98, 106 (2009) ("The courts ... give wide ranging deference to the decisions of the commissioner in establishing guidelines for the order and discipline of the facilities that she governs"); *Overton v. Bazzetta*, 539 U.S. 126, 132 (2003) (Courts owe

[18] This prong is also satisfied by the ongoing criminal matters in state court best represented by the named Petitioner, Mr. McPherson. Since this action was filed, Mr. McPherson sought and received relief, while his underlying charges remain pending. This is representative of the potentially thousands of inmates the Petitioners seek to include within a class, who are now seeking relief in the state courts via similar bond reductions, habeas petitions, and sentence modifications.

"substantial deference to the professional judgment of prison administrators, who bear a significant responsibility for defining the legitimate goals of a corrections system and for determining the most appropriate means to accomplish them"); *Washington v. Meachum*, 238 Conn. 692, 733-34 (1996) (Courts are "ill equipped" to manage the "Herculean obstacles" presented when administering the state's prisons).

c. There is adequate opportunity for judicial review of federal constitutional claims.

The third condition is also met. As part of the state mandamus action, the plaintiffs claimed violations of the Eighth and Fourteenth Amendments as they apply to convicted prisoners and pretrial detainees, respectively. *CCDLA v. Lamont*, Amended Comp. at 21, ¶¶90-92. The constitutional claims were also extensively briefed in plaintiffs' objection to the motion to dismiss. The court in *CCDLA v. Lamont* addressed the constitutional claims and the attendant lack of injury of the inmate plaintiffs in its decision on the motion to dismiss. "[U]nder Art. VI of the Constitution, state courts share with federal courts an equivalent responsibility for the enforcement of federal rights, a responsibility one must expect they will fulfill." *Schlesinger v. Councilman*, 420 U.S. 738, 755-56 (1975).

As all three of the conditions are met, the *Younger* abstention clearly applies. As such, even if Petitioners had properly exhausted or if their obligations could be somehow excused, Respondents respectfully submit that this Court not exercise jurisdiction.

2. Pre-adjudication detainees also fall under the first class of cases under *Younger* doctrine.

Although the pretrial Petitioners are presumably not challenging the constitutionality of their criminal prosecutions, this action still attempts to circumvent state court criminal procedures by seeking to essentially invalidate state court mittimuses and orders regarding the setting of bail. *See*

Declaration of Rob Cristiano, (Exhibit E). Orders such as these have been individually considered by judges and include the weighing of such factors as risk of danger to the community and risk of flight. See Conn. Gen. Stat. §§ 54-63b, 54-63d, 54-64a; *see also* Cristiano Decl. To allow Petitioners to sweepingly invalidate these orders would jeopardize the integrity of on-going state court criminal proceedings, by increasing danger to the community and the risk that detainees would flee. This would naturally thwart the state's ability to seek criminal convictions and potentially jeopardize the safety of its residents.

In *State v. Anderson*, the Connecticut Supreme Court in affirming the criminal trial court's imposition of a bond of $100,000, concluded that risk of danger to others was a permissible factor in setting a bond amount, stating:

> The very focus of the court's inquiry, therefore, was on whether the defendant safely could be released to the hospital again on a promise to appear, or whether permitting him to remain there, without further conditions, would create an unacceptable risk of danger to others. In making this determination, the court, pursuant to the statutory directive, was required to consider a broad array of factors, including the defendant's mental health, the charges pending against him, the strength of the evidence supporting those charges, the defendant's history of violence and previous convictions, and the likelihood that he would commit another crime if released.

State v. Anderson, 319 Conn. 288, 321 (2015) (citing Conn. Gen. Stat. § 54–64a (b)(2)).

Petitioners here seek an order from this federal court essentially negating the careful consideration of a broad array of factors that was made by each state court judge when setting bail, and potentially releasing hundreds if not thousands of "pre-adjudication" inmates without any notice to the states' attorneys, criminal defense counsel, and—perhaps most importantly—to the alleged victims. This would also essentially ambush scores of state court judges who are statutorily charged with reviewing individual bail decisions, and completely ignore and circumvent the process whereby individual pretrial detainees can seek review of their bonds. *See* Conn. Prac. Bk. §§38-13 *et.seq*.

As was noted by the Supreme Court: "What they seek is an injunction aimed at controlling or preventing the occurrence of specific events that might take place in the course of future state criminal trials… This seems to us nothing less than an ongoing federal audit of state criminal proceedings which would indirectly accomplish the kind of interference that *Younger v. Harris*, … and related cases sought to prevent." *O'Shea v. Littleton*, 414 U.S. 488, 500 (1974). "In a recent explication of *Younger* in *Huffman v. Pursue, Ltd*., 420 U.S. 592, (1975), Mr. Justice Rehnquist, writing the majority opinion, reiterated that federal injunctions against the state criminal law enforcement process could be issued only under extraordinary circumstances where the danger of irreparable loss is both great and immediate." *Wallace v. Kern*, 520 F.2d 400, 404 (2d Cir. 1975) (internal citations and quotation marks omitted). Such an action would be inappropriate here, where Petitioners have not yet sought any relief from the courts that set bail in their individual cases, nor have they even attempted to seek a writ of habeas corpus in state court.

C. Petitioners Also Failed To Exhaust Administrative Remedies.

1. Inmates must exhaust administrative remedies prior to filing §1983 claims.

The Prison Litigation Reform Act of 1996, 42 U.S.C. § 1997e(a), requires inmates to exhaust administrative remedies before seeking relief in federal court. *Porter v. Nussle*, 534 U.S. 516, 532 (2002). The exhaustion provision of the PLRA provides in relevant part that "*[n]o action shall be brought* with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (emphasis added). By enacting the PLRA, Congress sought to afford prison officials time and opportunity to address complaints internally and reduce the quantity, and improve the quality, of prisoner suits. *Porter*, 534 U.S. at 524-25.

Petitioners' attempt to characterize this action as a §1983 case is undercut by their request for release from confinement which is not cognizable and "cannot be granted in a civil rights action pursuant to section 1983" because it goes to "the fact or duration of a [Petitioners'] confinement" and therefore "only habeas relief under 28 U.S.C. § 2254(b) with its exhaustion requirement may be employed." *Morgan v. Dzurenda*, No. 3:14-CV-966 SRU, 2014 WL 6673839, at *4 (D. Conn. Nov. 21, 2014) (quoting *Jenkins v. Haubert*, 179 F.3d 19, 23 (2d Cir.1999)); *see also Preiser*, 411 U.S. at 489–90 ("when a state prisoner is challenging the very fact or duration of his physical imprisonment, and the relief he seeks is a determination that he is entitled to immediate release or a speedier release from that imprisonment, his *sole* federal remedy is a writ of habeas corpus.") (emphasis added). Since Petitioners primarily seek "release" rather than additional hand soap, and other disinfectants or distancing measures which as a practical matter would require releasing prisoners, this action should be treated for what it really is, a federal habeas petition which fails because Petitioners failed to exhaust available state court habeas remedies. *See* Declaration of Kathryn Stackpole, Exhibit D; see also various state court petitions, docket sheets, and motions, attached hereto as Exhibits F through J.

Construing this action, *arguendo*, as a §1983 action, it is nevertheless barred by the plain text of the PLRA exhaustion requirement. The Supreme Court has consistently found the language of the PLRA exhaustion provision to be mandatory. *Ross v. Blake*, 136 S. Ct. 1850, 1856 (2016); *see also Jones v. Bock*, 539 U.S. 199, 211 (2007) ("There is no question that exhaustion is mandatory under the PLRA."). The Supreme Court has held that inmates must exhaust administrative remedies before filing any type of action "about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Porter*, 534 U.S. at 532. The PLRA exhaustion requirement applies regardless of whether the inmate may obtain the specific relief he desires through the administrative process. *Booth v. Churner*, 532 U.S. 731, 741 (2001).

An inmate who fails to file administrative grievances and exhaust his remedies may not bring the claim in federal court. *Adekoya v. Federal Bureau of Prisons*, 375 Fed. App'x. 119, 121 (2d Cir. April 29, 2010) (barring inmate federal lawsuit where inmate failed to exhaust administrative remedies). Further, "[p]roper exhaustion demands compliance with an agency's deadlines and other critical procedural rules." *Woodford v. Ngo*, 548 U.S. 81, 90-91 (2006); *see also Ruggiero v. County of Orange*, 467 F.3d 170, 176 (2d Cir. 2006). "An 'untimely or otherwise procedurally defective administrative grievance' . . . does not constitute proper exhaustion." *Snyder v. Whittier*, 428 Fed. App'x. 89, 91 (2d Cir. 2011) (quoting *Woodford*, 548 U.S. at 83-84). To properly exhaust a claim, a prisoner must comply with the prison grievance procedures, including utilizing each step of the administrative appeal process. *Snyder*, 428 Fed. App'x at 91 (citing *Jones v. Bock*, 549 U.S. 199, 218 (2007)); *see also Ruggiero*, 467 F.3d at 176 ("PLRA requires 'proper exhaustion,' which 'means using all steps that the agency holds out and doing so properly.'") (quoting *Woodford*, 548 U.S. at 89).

The PLRA exhaustion requirement may only be excused where administrative remedies were not available to the inmate. *Ross*, 136 S. Ct. at 1862. The Supreme Court has identified three circumstances in which an administrative remedy is not available for an inmate to obtain relief: (1) "the administrative remedy may operate as a 'dead end,' such as where the office to which inmates are directed to submit all grievances disclaims the ability to consider them . . . [(2)] the procedures may be so confusing that no ordinary prisoner could be expected to 'discern or navigate' the requirements . . . [a]nd [(3)] prison officials may 'thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation.'" *Shehan v. Erfe*, No. 3:15-CV-1315 (MPS), 2017 WL 53691, * 6 (D. Conn. Jan. 4, 2017) (quoting *Ross*, 136 S. Ct. at 1859-60).

The PLRA defines a "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h). There is no dispute that all Petitioners,[19] both "pre-adjudication" and "post-adjudication," fall within the PLRA's definition of "prisoner." Accordingly, the exhaustion requirement of the PLRA applies to the instant action.

2. Petitioners did not exhaust available administrative remedies.

For the petitioners to properly exhaust their administrative remedies, DOC requires the prisoner to file grievances and follow the procedures imposed by Administrative Directive (AD) 9.6. (Exhibit K, DOC Administrative Directive 9.6); *see also Riles v. Buchanan*, 656 Fed. App'x. 577, 579 (2d Cir. 2016) (Summary Order) ("The Connecticut Department of Correction requires inmates to submit grievances in accordance with Administrative Directive 9.6); *Shehan v. Erfe*, No. 3:15-CV-1315 (MPS), 2017 WL 53691, at *6 (D. Conn. Jan. 4, 2017). In *Sheehan*, Judge Shea noted that, "the inmate must exhaust his administrative remedies for each claim he asserts in federal court." *Id*. (citing *Baldwin v. Arnone*, No. 3:12cv243(JCH), 2013 WL 628660, at *5 (D. Conn. Feb. 18, 2013)).

Oftentimes, exhaustion is raised as an affirmative defense by way of a motion for summary judgment. "However, if it is apparent from the pleadings themselves, and the documents attached thereto or incorporated therein, that the plaintiff has failed to exhaust his administrative remedies, then the complaint may be dismissed pursuant to Rule 12(b)(6)." *Paschal-Barros v. Kenny*, No. 3:18-CV-1870 (VLB), 2019 WL 2720739, at *3 (D. Conn. June 28, 2019) (citing *Nelson v. Deming*,

[19] Except for McPherson who was released by the state court after his bond was reduced to a PTA.

140 F. Supp. 3d 248, 264 (W.D.N.Y. 2015)).[20] "'[C]ourts routinely consider extrinsic material on a motion to dismiss for nonexhaustion,' even without conversion pursuant to Rule 12(d)." *Id*. (quoting *McCoy v. Goord*, 255 F. Supp. 2d 233, 250 (S.D.N.Y. 2003)). This Court may consider the Petitioners' failure to exhaust, as well as the extrinsic evidence set forth in the Declarations of Michelle King (Exhibit L), Marc Hambrecht (Exhibit M), Jessica Bennett (Exhibit N), Ronald Cotta and D'Andra Basley-Motley (Exhibit O), and Donald Acus (Exhibit P) in connection with the Respondents' Motion to Dismiss.

Indeed, Petitioners do not allege that they have exhausted their administrative remedies, nor do they claim an exception to the exhaustion requirement pursuant to *Ross*. However, to the extent Petitioners respond that exhaustion would be futile due to the length of time it takes to properly exhaust all steps of the grievance procedure, the Supreme Court has rejected such arguments.

"[The] PLRA's text suggests no limits on an inmate's obligation to exhaust—irrespective of any 'special circumstances.'" *Ross* at 1856. The amendments to the PLRA exhaustion requirements eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be "plain, speedy, and effective" before exhaustion could be required. *Booth v. Churner*, 532 U.S. 731, 739 (2001). Indeed, as discussed above, if Petitioners sought a "plain, speedy and effective" remedy, they could have, should have, and still can file a state court habeas petition, which does not require administrative exhaustion. Congress has mandated exhaustion regardless of

[20] *See also Jones v. Bock*, 549 U.S. 199, 214–15 (2007) (complaint may be dismissed sua sponte for failure "when an affirmative defense ... appears on its face"); *Stimpson v. Comm'r of Correction*, No. 3:16-CV-00520 (SRU), 2017 WL 3841646, at *4 (D. Conn. Sept. 1, 2017) (holding "[i]t would be futile to permit [plaintiff] to proceed with regard to the unexhausted claims against [DOC officials]."); *Thomas v. Metro. Correction Ctr.*, No. 09 CIV. 1769 (PGG), 2010 WL 2507041, at *7 (S.D.N.Y. June 21, 2010) ("Where it appears from the face of the complaint that a plaintiff concedes lack of exhaustion [under the PLRA], or non-exhaustion is otherwise apparent, a court may decide the exhaustion issue on a [motion to dismiss].").

the relief offered through administrative procedures, and futility of the remedy is not an excuse for failing to exhaust. *Booth* at 741.

As was the case with their potential remedies in state court, Petitioners have simply not exhausted their administrative remedies. Petitioners are not permitted to "leapfrog" both the administrative exhaustion requirement of the PLRA and the state court exhaustion requirements of §§ 2241 and 2254. *cf. Tota v. United States*, No. 99-CV-0445E(SC), 2000 WL 1160477, at *1 (W.D.N.Y. July 31, 2000) (finding no subject matter jurisdiction where plaintiff failed to exhaust administrative remedies and stating, "[plaintiff] may not circumvent the administrative procedures and leapfrog to this Court on the theory that the agency failed to respond to the later requests."). Petitioners cannot mandate that a federal court usurp the role of the state courts by bringing an exhausted claim before it and simply claiming exigency. This Court should therefore dismiss this action.

III. CONCLUSION

For all the foregoing reasons, Respondents respectfully request that this Motion be granted and this Court dismiss the proposed class action habeas/§1983 action in its entirety.

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CERTIFICATION

I hereby certify that on May 1, 2020 a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ James W. Donohue
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