

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

JOSEPH A. DENBOW and SEAN R.
RAGSDALE, *on their own and on behalf of a
class of similarly situated persons,*

Petitioners,

v.

MAINE DEPARTMENT OF CORRECTIONS
and RANDALL A. LIBERTY, Commissioner of
Maine Department of Corrections *in his official
capacity,*

Respondents

Case No. 20-cv-00175-JAW

**PETITIONERS' SUR-REPLY IN
OPPOSITION TO MOTION TO DISMISS**

Pursuant to the Court's Minute Order, ECF No. 43 (July 15, 2020), Petitioners respectfully submit this sur-reply in opposition to the Respondents' motion to dismiss. In a letter regarding supplemental authority, which the Court construed as a reply, the Respondents updated the Court regarding proceedings in Mr. Denbow's state court case, and offered several additional cases regarding exhaustion. *See* Reply, ECF No. 42 (July 15, 2020). For the reasons discussed below, the developments in the state court action do not support the Respondents' arguments regarding dismissal, and all of the supplemental cases cited by Respondents are distinguishable from this case.

As an initial matter, the denial of post-conviction bail and ultimate dismissal of Mr. Denbow's state petition for post-conviction review do not support the Respondents' motion to dismiss. *See* Order of Dismissal, ECF No. 42-1 (issued by the state court on July 14, 2020, filed in this Court on July 15, 2020); Order Denying Bail, ECF No. 42-2 (issued by the state court on June 25, 2020, filed in this Court on July 15, 2020). The primary question presented in the Respondents' motion to dismiss is a narrow one: whether the general requirement to exhaust state remedies should be excused in this case because, at the time of filing the federal petition,

state court remedies were either unavailable or ineffective to provide the requested relief.¹ See Petitioners' Opp. at 6-7, ECF No. 40 (July 13, 2020). This inquiry is directed to the state court remedies available at the time the petition was filed, and is not altered by post-filing developments. See Petitioners' Opp. at 6-7, ECF No. 40 (July 13, 2020). Accordingly, the ultimate dismissal of Mr. Denbow's state court petition does not alter the inquiry regarding the futility of state court remedies as of May 15, 2020, the date of filing the federal petition.

Additionally, the 21-day period to appeal the state court dismissal has not yet elapsed. To the extent Mr. Denbow does not appeal, the state court dismissal would be fatal to the Respondents' arguments regarding *Younger* abstention, which prevents federal courts from enjoining ongoing state court proceedings. See Petitioners' Opp. at 19 (citing *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004)). *Younger* abstention is inapplicable for the reasons set forth in Petitioners' opposition, see *id.*, and also because, absent appeal of the state court's decision, there are no ongoing state proceedings to enjoin. Finally, to the extent Mr. Denbow does not appeal, there would be no need for the Court to address the Petitioners' alternative argument to defer a ruling pending the state court's adjudication of the amendment. See *id.* at 18-19.

Respondents also cite a number of recent decisions regarding exhaustion, many of which do not meaningfully address the futility of state court remedies at issue here. See Reply at 1-2 (citing *Sisco v. Stanislaus County Sheriff's Dep't*, No. 1-20-CV-00947, 2020 WL 3893396, at *2 (E.D. Cal. July 10, 2020) (dismissing without prejudice a single petition for habeas corpus

¹ Alternatively, consistent with the styling of Petitioners' petition as a 28 U.S.C. § 2241 petition, the question is whether there are unusual circumstances that support waiving the prudential exhaustion requirement. See Petitioners' Opp. at 5-6.

without considering futility); *Harrison v. Wolcott*, No. 20-CV-6270, 2020 WL 3871345, at *1 (W.D.N.Y. July 9, 2020) (dismissing without prejudice a single petition for habeas corpus when there was no claim “that a state process is unavailable or that circumstances render that process ineffective”); *Fahr v. Arizona*, No. CV-20-08114, 2020 WL 3791535, at *2 (D. Ariz. July 7, 2020) (noting that the petitioner “presented nothing to suggest that either of these conditions [regarding unavailable or ineffective state remedies] have been met or that the exhaustion requirement should be waived”); *Day v. Gonzalez*, No. CV 4:20-1301, 2020 WL 3504467, at *2 (S.D. Tex. June 29, 2020) (dismissing without prejudice a single habeas petition under § 2241 without addressing futility).

Additionally, each of the remaining cited cases is distinguishable because none addressed the specific circumstances here: namely, state courts that were unavailable or ineffective to handle the 900+ petitions of all putative class members, and did not offer a class remedy to adjudicate such claims. *See Valenzuela v. Keyser*, No. 19-CV-3696, 2020 WL 3839697, at *4 (S.D.N.Y. July 8, 2020) (noting that many habeas petitions have been granted by justices of the New York State Supreme Court” during the pandemic); *Sosby v. Brown*, No. 2:20-CV-80, 2020 WL 3786177, at *3 (W.D. Mich. July 7, 2020) (dismissing without prejudice a single habeas petition when Petitioner “failed to show the absence of State corrective process, or that the present circumstances have rendered state court remedies ineffective”); *Most v. Watson*, No. 20-CV-493-NJR, 2020 WL 3544985, at *2 (S.D. Ill. June 30, 2020) (dismissing without prejudice a single habeas petition when it “appears that Most still has procedures available to him under Illinois law to raise the question of his right to release due to these health concerns”); *Stewart v. Dep’t of Corr.*, No. 20-CV-2136, 2020 WL 3415768, at *3 (E.D.N.Y. June 22, 2020) (denying without prejudice an emergency motion to amend an existing habeas petition for failure to

exhaust). Unlike these cases, Petitioners have shown that, at the time of filing this petition, state court processes were unavailable or ineffective to provide the necessary widespread relief to protect Petitioners and members of the putative class from the COVID-19 pandemic. *See generally* Petitioners' Opp. at 5-18.

CONCLUSION

For these reasons, Petitioners respectfully request that the Court deny Respondents' Motion to Dismiss.

Dated: July 20, 2020

Respectfully Submitted,

/s/ Emma E. Bond

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CERTIFICATE OF SERVICE

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

Dated: July 20, 2020

/s/ Emma E. Bond