UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

LADDY CURTIS VALENTINE and	§	
RICHARD ELVIN KING, individually and	§	
on behalf of those similarly situated,	§	
Plaintiffs,	§	
	§	
v.	§	Civil Action No. 4:20-cv-01115
	§	
BRYAN COLLIER, in his official capacity,	§	
ROBERT HERRERA, in his official capacity,	§	
And TEXAS DEPARTMENT OF CRIMINAL	§	
JUSTICE,	§	
Defendants.	§	

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' 12(b) MOTION TO DISMISS

Defendants Bryan Collier ("Collier"), Robert Herrera ("Herrera"), and the Texas Department of Criminal Justice ("TDCJ") (collectively, "Defendants"), file this Reply to Plaintiffs' Response to Defendants' Motion to Dismiss Pursuant to Rule 12(b) [ECF 53] and Supplemental Motion to Dismiss Pursuant to Rule 12(b) [ECF 55] and in support respectfully show:

I. NATURE AND STAGE OF THE PROCEEDINGS

On March 30, 2020, Plaintiffs filed suit alleging that Defendants Collier and Herrera violated their rights under the Eighth Amendment and that Defendant TDCJ violated the Americans with Disabilities Act ("ADA") and the Rehabilitation Act ("RA") [ECF 1 at 1]. Plaintiffs seek injunctive and declaratory relief [ECF 1 at 31-34].

On April 16, 2020, the Court heard Plaintiffs' application for temporary restraining order and that same day entered a Preliminary Injunction Order. [ECF 40]. On April 17, 2020.

Defendants appealed the Court's order and were subsequently granted a stay of the preliminary injunction order pending resolution of the appeal. The appellate court determined that Defendants were likely to prevail on appeal in part because, after accounting for the protective measures taken by TDCJ, Plaintiffs had not shown a "substantial risk of serious harm" that amounts to cruel and unusual punishment and did not have evidence showing subjective indifference to that risk. *Valentine v. Collier,* 956 F.3d 797, 801–02 (5th Cir. 2020). The appeal is still pending.

II. SUMMARY OF ARGUMENT IN REPLY

Federal courts are prohibited from usurping a state's authority to grant the type of injunctive relief requested by Plaintiffs to craft measures responsive to a public health emergency. *In re Abbott ("Abbott II")*, 956 F.3d 696, 716 (5th Cir. 2020); *see Jacobson v. Mass.*, 197 U.S. 11, 35 (1905). Courts have no authority to ask whether a particular method is, perhaps or possibly, not the best. *Id.* During a pandemic emergency, public authorities must make numerous complex judgment calls. *Id.* "If the choice is between two reasonable responses to a public crisis, the judgment must be left to the governing state authorities." *Id.* (citing *Jacobson*, 197 U.S. at 30).

With that general guidance and without conceding the grounds stated in their pending Motion to Dismiss Pursuant to Rule 12(b), Defendants focus their arguments in reply upon the defects in the pleading of Plaintiffs' Eighth Amendment and ADA/RA claims, as well as Plaintiffs' failure to exhaust their administrative remedies before bringing this lawsuit. Plaintiffs fail to state an Eighth Amendment claim because they do not allege facts demonstrating Defendants Collier and Herrera have acted with deliberate indifference to Plaintiffs' health or safety. Further, Plaintiffs fail to state a claim under the ADA and RA because (1) the ADA does not apply in exigent circumstances and (2) Plaintiffs have not alleged discrimination by failing to provide them

with reasonable accommodations for their disabilities. Finally, Plaintiffs' failure to exhaust their available administrative remedies bars their claims.

III. ARGUMENT AND AUTHORITY

A. Plaintiffs fail to state an Eighth Amendment claim for deliberate indifference.

Contrary to Plaintiffs' assertion, Defendants do not attempt to raise their pleading standard or require Plaintiffs to meet their ultimate burden of proof at this stage of the litigation. While under a 12(b)(6) analysis the factual allegations in a plaintiff's complaint are to be taken as true, the court need not accept Plaintiffs' legal conclusions (*e.g.*, deliberate indifference) as true. *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal,* 556 U.S. at 678. A plausibility analysis requires reference to the applicable legal standard, which in the case of deliberate indifference is "extremely high."

In reality, Plaintiffs attempt to lower their burden. Plaintiffs argue Rule 12(b)(6) dismissal is inappropriate because they have satisfied the minimum pleading requirements of FED. R. CIV. P. 8, suggesting that a complaint that satisfies Rule 8 necessarily satisfies the Rule 12(b)(6) plausibility standard. A complaint, however, may simultaneously satisfy Rule 8's technical requirements but fail to state a claim under Rule 12(b)(6). *Body by Cook, Inc. v. State Farm Mut. Auto. Ins.*, 869 F.3d 381, 385 (5th Cir. 2017). "[M]ere compliance with Rule 8 does not itself immunize the complaint against a motion to dismiss." *Id.* "Rule 8(a)(2) specifies the conditions of the *formal* adequacy of a pleading," but "[i]t does not specify the conditions of its *substantive* adequacy, that is, its legal merit." *Id.* at 386. Thus, though a complaint may satisfy Rule 8's formal requirements by pleading a short and plain statement of the claim, dismissal is

proper when the plaintiff "would not be entitled to relief under any set of facts or any possible theory that it could prove consistent with the complaint's allegations." *Id.*

To prove that prison conditions violate the Eighth Amendment, a plaintiff must show (1) "that he is incarcerated under conditions posing a substantial risk of serious harm," and (2) that the defendant prison official has acted with "'deliberate indifference' to inmate health or safety." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). To satisfy the second requirement, a plaintiff must show the defendant (1) was aware of facts from which the inference could be drawn that a substantial risk of serious harm exists; (2) subjectively drew the inference that the risk existed; and (3) disregarded the risk. *Valentine v. Collier*, 956 F.3d at 801. The incidence of diseases or infections, standing alone, do not imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks. *Id.* (citing *Shepherd v. Dallas Cty.*, 591 F.3d 445, 454 (5th Cir. 2009)). Instead, the plaintiff must show a denial of "basic human needs." *Id.* "Deliberate indifference is an extremely high standard to meet." *Id.* (quoting *Cadena v. El Paso Cty.*, 946 F.3d 717, 728 (5th Cir. 2020)). Assessing the legal feasibility of Plaintiffs' claim, Plaintiffs fail to state a deliberate indifference claim on facts alleged.

To warrant prospective relief, Plaintiffs must establish not only that Defendants' "attitudes and conduct" were subjectively wanton "at the time suit [wa]s brought," but also that Defendants Collier and Herrera currently are "knowingly and unreasonably disregarding an objectively intolerable risk of harm" and "will continue to do so ... into the future" absent relief. *Farmer*, 511 U.S. at 845-846 (quoting *Helling v. McKinney*, 509 U.S. 25 (1993)). To make that showing based on the actions of inmates and prison staff, which is all Plaintiffs point to, Plaintiffs would at the very least have to plead (and eventually prove) that Collier and Herrera (1) failed to supervise or train these violators, (2) knew persons were disregarding their orders, and (3) neglected to correct

this behavior knowing it posed a serious risk to Plaintiffs' health. *Brauner v. Coody*, 793 F.3d 493, 501 (5th Cir. 2015). Plaintiffs make no such allegation.

Failure to prevent or eliminate the risk of harm does not establish a claim of deliberate indifference. Failure to eliminate the risk of harm is not the measure of Eighth Amendment liability, nor is it proof of deliberate indifference. Actions and decisions that are merely inept, ineffective, or negligent do not constitute deliberate indifference. *Thompson v. Upshur Cty.*, 245 F.3d 447, 458-59 (5th Cir. 2001) ("[D]eliberate indifference cannot be inferred merely from a negligent or even a grossly negligent response to a substantial risk of serious harm."). Negligence, even if it results in harm to a prisoner, cannot be "characterized as wanton infliction of unnecessary pain" in violation of the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 105 (1976). And the "incidence of diseases or infections, standing alone," does not "imply unconstitutional confinement conditions, since any densely populated residence may be subject to outbreaks." *Shepherd*, 591 F.3d at 454; *see also Swain*, 2020 WL 2161317, at *4 (district court incorrectly "treated the increase in COVID-19 infections as proof that the defendants deliberately disregarded an intolerable risk"). Plaintiffs fail to engage the substance of this argument, effectively conceding it.

Plaintiffs' criticisms of the Correctional Managed Health Care (CMHC) policy implemented in response to COVID-19 include that inmates are not permitted to use alcohol-based hand sanitizer (ECF No. 1 at 16); that the CMHC policy requires facilities to "[m]inimize transfer of offenders between units," rather than "restrict" transfers (ECF No. 1 at 16); and that the policy is "vague" with regard to social distancing (ECF No. 1 at 17).

Plaintiffs' critiques of Defendants' response to COVID-19 include that Defendants at the Pack Unit did not (1) post COVID-19 signs and warnings throughout the prison; (2) reduce social

gatherings or take other precautions to reduce inmate contact; (3) educate inmates on how COVID-19 is transmitted, signs and symptoms and prevention of transmission; (4) reduce and restrict inmate movement; and/or (5) remind inmates of effective measures to prevent transmission, such as washing hands with soap for at least 20 seconds. ECF No. 1 at 21.

Plaintiffs do not allege that Defendants Collier or Herrera failed to supervise or train their staff, that they knew any staff was disregarding their orders, nor that they failed to correct the behavior knowing it posed a serious risk to Plaintiffs' health. For these reasons, Plaintiffs fail to state an Eighth Amendment deliberate indifference claim upon which relief may be granted.

B. Plaintiffs fail to state an ADA or RA claim.

During the April 16, 2020 preliminary injunction hearing, the Court commented, "I think ADA doesn't belong in the case. Let's leave that one out." Hearing on Plaintiffs' Motion for Temporary Restraining Order at 119:8-9 (April 16, 2020). Surprisingly, Plaintiffs continue to press this claim in their Response.

Plaintiffs have generally alleged TDCJ has intentionally discriminated against them by denying them reasonable accommodations recommended by the CDC in violation of the ADA and RA. [ECF 1 at 29-31, ¶¶ 80-89a]. Neither the ADA or the RA, however, apply in exigent circumstances. Moreover, Plaintiffs have not alleged any actual discrimination because of their respective disabilities. Accordingly, Plaintiffs have failed to state a claim against TDCJ under the ADA and/or RA, and these claims should be dismissed.

1. The ADA does not apply in exigent circumstances.

Plaintiffs do not dispute that TDCJ is facing exigent circumstances. Instead, they mistakenly argue that this Court's precedent declining to apply the ADA in exigent circumstances must be limited to its facts. It is the *reasoning* of precedent that governs future cases. *United States*

v. Williams, 679 F.2d 504, 509 (5th Cir. 1982). The *Hainze* rule is premised on a judgment that state officials facing "potentially life-threatening situations," *Hainze v. Richards*, 207 F.3d 795, 801 (5th Cir. 2000), "in a continuously evolving environment," *Roell v. Hamilton County*, 870 F.3d 471, 489 (6th Cir. 2017) (adopting *Hainze* rule), "do not first have to consider whether their actions will comply with the ADA," *Wilson v. City of Southlake*, 936 F.3d 326, 331 (5th Cir. 2019). That is this case. The COVID-19 pandemic presents a continuously evolving, life-threatening situation. Like other state agencies, TDCJ must shift resources and adapt policies rapidly to respond to and prevent outbreaks. It is *Hainze* on a state-wide scale. The ADA and RA are inapplicable in this context.

2. No discrimination is alleged.

Plaintiffs' ADA/RA claim also fails for lack of any allegation of actual discrimination based on disability. There remains no allegation that Plaintiffs have been treated worse or denied any benefit because of any alleged disability. Plaintiffs also make no effort to show how tying the hands of prison officials during an emergency is a reasonable accommodation. Plaintiffs argue only that Plaintiffs will somehow endure more "pain and punishment" than non-disabled inmates. [Resp. 20-21]. But that is an Eighth Amendment standard, not the ADA standard. *See Id.* (citing *Hinojosa v. Livingston*, 994 F. Supp. 2d 840, 843 (S.D. Tex. 2014); in turn citing *McCoy v. TDCJ*, 2006 WL 2331055, at *7 (S.D. Tex. Aug. 9, 2006); in turn citing *United States v. Georgia*, 546 U.S. 151, 157 (2006)). As shown above, Plaintiffs fail to state a claim against Defendants Collier and Herrera for an Eighth Amendment violation. *See supra* pp. 3-5.

The Court is correct that the ADA/RA claim against TDCJ doesn't belong in the case and should be left out.

C. Plaintiffs' failure to exhaust their administrative remedies is fatal to their claims.

Finally, Plaintiffs' claims are barred for failure to exhaust administrative remedies before bringing this lawsuit. The Supreme Court has made clear that the exhaustion requirement applies to all suits regarding prison life, *Porter v. Nussle*, 534 U.S. 516, 532 (2002), and that "unexhausted claims cannot be brought in court," *Jones v. Bock*, 549 U.S. 199, 211 (2007). The exhaustion requirement is statutory, and the statute provides no exception for "special circumstances." *See Ross v. Blake*, 136 S. Ct. 1850, 1856-57 (2016); *see also See Farmer*, 511 U.S. at 847 (in a case seeking injunctive relief to address "current" prison conditions, inmates are not "free to bypass adequate internal prison procedures and bring their health and safety concerns directly to court"); *Valentine v. Collier*, 956 F.3d at 805. There is no futility or other exception. *Id.*

Plaintiffs do not dispute that they failed to exhaust the TDCJ grievance process. Instead, without pleading any facts to support their contention, Plaintiffs attempt to assert an exception to the exhaustion requirement, contending that there was no administrative remedy available to them. Plaintiffs' unavailability argument is belied by the fact that both Plaintiffs sought available remedies *via* the TDCJ grievance process–although after they filed their complaint. When an administrative procedure grants authority to take some action in response to a complaint, that procedure is considered available, even if it cannot provide the remedial action an inmate demands. *Valentine*, 956 F.3d at 804. "[T]he onus falls on the inmate to show that such remedies were unavailable to him." *Rinaldi v. United States*, 904 F.3d 257, 268 (3d Cir. 2018). Plaintiffs, however, fail to plead any facts to support the "dead end," "thwarted," and/or "opaqueness" elements of the "unavailability" exception. *See Ross*, 136 S. Ct. at 1859–60.

Regardless, on the *Ross* unavailability elements, the Fifth Circuit has found that the TDCJ administrative process is open for Plaintiffs' use. *Valentine*, 956 F.3d at 804. Plaintiffs do not allege

that TDCJ is incapable of providing *some* relief; they argue that available relief is inadequate. *Id.* Nor do they contend that TDCJ always "decline[s] to exercise" its authority, that the scheme is unworkably opaque, or that administrators thwart use of the system. *See Ross*, 136 S. Ct. at 1859–60. Therefore, TDCJ's grievance procedure is "available," and Plaintiffs were required to exhaust.

The Fifth Circuit has *never* allowed a prisoner to bypass the PLRA by bringing a federal lawsuit without exhausting administrative remedies. Neither have any of its sister Circuits. Plaintiffs have not cited a single case to support that result. There is a reason no such precedent exists: it is obviously contrary to the text and spirit of the PLRA. Because Plaintiffs failed to exhaust their administrative before bringing this suit, they have failed to state a claim upon which relief may be granted, and this lawsuit must be dismissed.

IV. CONCLUSION

Plaintiffs fail to state an Eighth Amendment claim because they do not allege facts demonstrating facial plausibility of alleged deliberate indifference by Defendants Collier and Herrera. Further, Plaintiffs fail to state a claim against TDCJ under the ADA and RA because the ADA does not apply in exigent circumstances and Plaintiffs fail to allege they were treated worse or denied some benefit because of any disability. Finally, Plaintiffs have failed to exhaust their available administrative remedies. For these reasons, Plaintiffs are not entitled to the relief they seek and the claims asserted against Defendants must be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHRISTIN COBE VASQUEZ, Assistant Attorney General of Texas, certify that a true and correct copy of the above and foregoing ***Defendants' Reply to Plaintiffs' Response to Motion to Dismiss Pursuant to Rule 12(b)*** has been served electronically upon all counsel of record *via* the electronic filing system of the Southern District of Texas, on May 26, 2020.

/ s/ Christin Cobe Vasquez
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