IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
CENTRAL DIVISION

NICHOLAS FRAZIER, *et al.* **PLAINTIFFS**

v. **CASE NO. 4:20-CV-00434-KGB-JJV**

WENDY KELLEY, *et al.* **DEFENDANTS**

DEFENDANTS' MOTION TO DISMISS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), Defendants move to dismiss Plaintiffs' Complaint for the reasons stated in the accompanying brief. *See* E.D. Ark. R. 7.2(a), (e).

Respectfully submitted,

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BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

Plaintiffs are murderers, rapists, armed robbers, arsonists, and repeat violent offenders. Each has a history of assaulting fellow inmates and staff. Many have a history of absconding from supervised release. And all are security risks. Yet under the guise of challenging the Arkansas Division of Correction's response to the COVID-19 pandemic, they ask this Court to order their release or impose requirements that will put their fellow inmates, prison staff, and society at great risk.

Plaintiffs fail to state a claim for multiple reasons. Their request for declaratory relief is retrospective and barred by sovereign immunity. Their claims against Governor Hutchinson and Director Bradshaw are barred by sovereign immunity because Governor Hutchinson and Director Bradshaw have no connection to the policies Plaintiffs challenge. Their Eighth Amendment claim is merely a litany of disagreements with Defendants' COVID-19 policies that falls far short of a serious allegation of deliberate indifference. Their Americans with Disabilities Act claim, as this Court has already held, fails to seek any reasonable accommodation that Defendants do not already provide, and seeks accommodations that Plaintiffs never requested before bringing suit. And their request for temporary release to home

confinement is a condition-of-confinement claim that is not cognizable in habeas. This Court should dismiss Plaintiffs' suit.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs Nicholas Frazier, Alvin Hampton, Marvin Kent, Michael Kouri, Jonathan Neeley, Alfred Nickson, Harold "Scott" Otwell, Trinidad Serrato, Robert Stiggers, Victor Williams, and an unidentified John Doe are inmates housed at three of 20 units within ADC. DE 1 at 7-13 ¶¶ 15-35. Plaintiff Stiggers is a first-degree murderer who, for no apparent reason, shot a longtime friend and his passenger after asking them for a ride. *See Stiggers v. State*, 433 S.W.3d 252, 254-55 (Ark. 2014).

Plaintiff Neeley is a former youth minister who pled guilty to sexually assaulting a series of teenage girls in his congregation. *See Former youth minister guilty of sexual assault in Howard, Pope counties*, Nashville News Leader, Sept. 24, 2015, *available at* https://www.swarkansasnews.com/2015/09/former-youth-minister-pleads-guilty-to-sexual-assault-4-more-charges-pending-in-pope-county/.

Plaintiff Frazier is serving a 10-year prison sentence for commercial burglary, manufacture, delivery, and possession of controlled substances, criminal mischief, possession of drug paraphernalia, and theft of property, DE 36-21, and is housed in the Varner Super Maximum Security Unit, ADC's most secure housing facility for inmates who have shown they cannot be safely housed in other units. DE 1 at 8 ¶ 19.

Plaintiff Hampton is serving a five-year sentence for assaulting the director of a Salvation Army office and then assaulting and threatening to murder the police officer who arrested him. DE 36-25.

Plaintiff Kent, who is housed in the Varner Super Maximum Unit, DE 1 at 9 ¶ 20, is a habitual offender serving an 18-year sentence for first degree battery and endangering the welfare of a minor. DE 36-26.

Plaintiff Kouri, who is also known as Michael Mercouri, is serving a 10-year sentence for the armed robbery of his former supervisor at an Aaron's furniture store. *See Mercouri v. State*, 480 S.W.3d 864, 865 (Ark. 2016).

Plaintiff Otwell is serving a 15-year sentence for attempting to set an Arkansas Fish and Game Commission agent's car on fire, in apparent retaliation for the Commission's investigating him, and then tampering with the jury in his subsequent trial for arson. *See* DE 36-33; Caitlan Butler, *Man sentenced to prison for attempted truck arson, jury tampering*, El Dorado News, May 2, 2019, *available at* https://www.eldoradonews.com/news/2019/may/02/man-sentenced-prison-attempted-truck-arson-jury-ta/.

Plaintiff Serrato is currently in prison on a felon-in-possession-of-a-handgun conviction, after a lifetime of theft and controlled substances convictions. *See* DE 36-34.

Plaintiff Williams is in prison for manslaughter, a charge to which he pled guilty after being charged with murder in a double homicide that had gone unsolved for seven years. *See* DE 36 at 25.

Finally, Plaintiff Nickson is in prison for murdering his 73-year-old neighbor, 26 years after strangling his roommate to death and then setting their apartment on fire. *See* DE 36-31; *Hot Springs Man Admits to Neighbor's 2013 Murder*, KARK, Aug. 30, 2016, *available at* https://www.kark.com/news/local-news/hot-springs-man-admits-to-neighbors-2013-murder/541904923/; John Kass & Fred Marc Biddle, *Roommate Seized in School Adviser's*

Death, Chicago Tribune, May 22, 1987, *available at* https://www.chicagotribune.com/news/ct-xpm-1987-05-22-8702070942-story.html.

These plaintiffs filed this putative class action on April 21, 2020, naming 11 separate Defendants and alleging that ADC's response to the COVID-19 pandemic violates the Eighth Amendment to the United States Constitution and Title II of the Americans with Disabilities Act. DE 1 at 42-45 ¶¶ 127-148. More particularly, Plaintiffs allege that two sub-classes of inmates, including a "high-risk subclass" and a "disability subclass," are at a heightened risk of harm from the virus. They seek a myriad of injunctive and declaratory relief, including release from incarceration for inmates within those two subclasses, along with federal-court micromanagement of ADC's comprehensive response to the COVID-19 pandemic. DE 1 at 15-16 ¶ 41. Defendants accepted service on April 22, 2020, DE 4, 7, making their responsive pleading due June 22, 2020. *See* Fed. R. Civ. P. 12(a)(1)(ii).

On the same day that they filed their complaint, Plaintiffs filed an emergency motion for a temporary restraining order and preliminary injunction. DE 2. That motion requested the same relief sought in the complaint. On April 27, 2020, Plaintiffs filed a supplemental motion for a temporary restraining order. DE 22. In that motion, Plaintiffs sought a subset of the relief requested in their original motion, omitting their request for release and the appointment of a special master. This Court denied Plaintiffs' TRO motion on May 4, 2020, holding Plaintiffs had not yet shown a likelihood of success on any of their claims. DE 42. It held a hearing on Plaintiffs' PI motion on May 7, 2020. It denied that motion on May 19, 2020 in a comprehensive, 73-page order, again holding that Plaintiffs had failed to show a likelihood of success on any of their claims. DE 68.

STANDARD OF REVIEW

Rule 8 of the Federal Rules of Civil Procedure states that "[a] pleading that states a claim for relief must contain . . . a sort and plain statement of the claim showing that the pleader is entitled to relief[.]" Fed. R. Civ. P. 8(a)(2). Rule 12(b)(6) of the Federal Rules of Civil Procedure states that a defendant may raise, as a defense, a plaintiff's "failure to state a claim upon which relief can be granted" by motion.

When analyzing a Rule 12(b)(6) motion, the complaint's factual allegations are accepted as true and viewed in the light most favorable to the plaintiff. *Hanten v. Sch. Dist. of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir. 1999) (citing *Gordon v. Hansen*, 168 F.3d 1109, 1113 (8th Cir. 1999)). "At a minimum, however, a complaint must contain facts to state a claim as a matter of law and must not be merely conclusory in its allegations." *Id.* (quoting *Springdale Educ. Ass'n v. Springdale Sch. Dist.*, 133 F.3d 649, 651 (8th Cir. 1998)). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

An "important mechanism for weeding out meritless claims [is a] motion to dismiss for failure to state a claim." *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459, 2471 (2014). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 50). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555). "A pleading that offers 'labels

and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557); *see also Christiansen v. W. Branch Cmty. Sch. Dist.*, 674 F.3d 927, 934 (8th Cir. 2012) ("A gallimaufry of labels, [legal] conclusions, formulaic recitations, naked assertions and the like will not pass muster.") (citing *Twombly*, 550 U.S. at 555-57).

In evaluating a motion to dismiss, a district court should employ a two-pronged approach. First, the court should identify and set aside "pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Iqbal*, 556 U.S. at 679. Second, the court should assume the veracity of the plaintiff's "well-pleaded factual allegations . . . and then determine whether they plausibly give rise to an entitlement for relief." *Id.* "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." *Id.* (citing *Twombly*, 550 U.S. at 556). If the factual allegations "do not permit the court to infer more than the mere possibility of misconduct," then the complaint fails to show a plausible claim for relief." *Id.* (citing Fed. R. Civ. P. 8(a)(2)).

The court should dismiss a complaint if the plaintiff has failed to "nudge[] [his] claims" of unlawful conduct "across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. In other words, "if the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," then the complaint fails to "show[] that the pleader is entitled to relief" under Rule 8((a)(2) and must be dismissed. *Iqbal*, 556 U.S. at 679. Likewise, a court should dismiss when, based on the plaintiff's own allegations, he has no cognizable claims. "[D]ismissal under Rule 12(b)(6) serves to eliminate actions which are fatally flawed in their

legal premises and designed to fail, thereby sparing litigants the burden of unnecessary pretrial and trial activity." *Young v. City of St. Charles*, 244 F.3d 623, 627 (8th Cir. 2001).

ARGUMENT

I. Defendants are immune from Plaintiffs' claims for declaratory relief.

"The Eleventh Amendment establishes a general prohibition of suits in federal court by a citizen of a state against his state or an officer or agency of that state." *281 Care Comm. v. Aronson*, 638 F.3d 621, 632 (8th Cir. 2011). But under the limited exception to that rule identified in *Ex parte Young*, a citizen of a state may sue state officials where she "alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002). That exception, however, obviously "does not permit judgments against state officers declaring that they violated federal law in the past," *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993), or what the Eighth Circuit has recently termed "retrospective declaratory relief." *Justice Network, Inc. v. Craighead Cty.*, 931 F.3d 753, 764 (8th Cir. 2019). That means that in order to satisfy the *Ex parte Young* exception, a request for declaratory relief must seek to "define the legal rights and obligations of the parties in anticipation of *some future conduct*, not simply to proclaim liability for a past act." *Id.*

Plaintiffs' complaint seeks an order "declaring that Defendants/Respondents' policies and practices regarding COVID-19 violate the Eighth Amendment to the United States Constitution," and an order "declaring that Defendants/Respondents *have* violated the ADA by failing to reasonably accommodate incarcerated individuals with disabilities." DE1 at 45-46 (Prayer for Relief) (emphasis added). That is, Plaintiffs seek a declaration that Defendants' past policies and practices are unlawful.

The fact that those policies might continue—though as this Court has already found, Defendants' COVID-19 policies and practices have continuously evolved—is not enough to make Plaintiffs' request prospective. In *Justice Network*, for example, a probation services provider sought a declaration that two state court judges' probation-service debt-forgiveness program violated the Takings Clause. 931 F.3d at 757. That program was implemented before the provider sued, but it continued thereafter and was still in effect when the Eighth Circuit rendered its decision. *Id.* at 758. But because the program had been initially implemented in the past, the Eighth Circuit nevertheless held that the provider's request for a declaratory judgment was "retrospective" and sought to "invalidate the [judges' past] actions." *Id.* at 764. So too here; Plaintiffs do not seek a declaratory judgment "in anticipation of s*ome future* conduct," *id.*, but rather request a declaration that policies and practices Defendants adopted in the past are unlawful. Defendants' requests for declaratory relief should be dismissed on the ground of sovereign immunity.

II. Governor Hutchinson has sovereign immunity from all of Plaintiffs' claims.

Governor Hutchinson also enjoys immunity from all of Plaintiffs' requests for relief because he has no connection to the policies and practices that Plaintiffs challenge. Indeed, another judge of this Court has recently so held in a COVID-19-related prisoners' suit. *See Schuler v. Hutchinson*, No. 2:20-cv-97, 2020 WL 3104668, at *1 (E.D. Ark. June 11, 2020) ("The Governor and Attorney General are not proper defendants.") (citing *Dig. Recognition Network, Inc. v. Hutchinson*, 803 F.3d 952, 956-58 (8th Cir. 2015)).

Under *Ex parte Young*, a "state official is amenable to suit to enjoin the enforcement of an unconstitutional state statute only if the officer has 'some connection with the enforcement of the act.'" *Dig. Recognition Network*, 803 F.3d at 960 (quoting *Ex parte Young*, 209 U.S. 123,

157 (1908)); *see also Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) (requiring "some connection to the enforcement of the challenged laws"). "Without that connection, the officer would be sued merely 'as a representative of the state' in an impermissible attempt 'to make the state a party.'" *Dig. Recognition Network*, 803 F.3d at 960 (quoting *Ex parte Young*, 209 U.S. at 157). But Plaintiffs do not allege that Governor Hutchinson has had *any* role in crafting the policies and practices they challenge. They allege instead that under Arkansas's Constitution he "has the ultimate authority for ensuring that all [state] agencies . . . function in compliance with state and federal law." Compl. at 15 ¶ 40. And they allege that he "has the power to release people incarcerated in ADC correctional facilities." *Id.* Neither allegation suffices to make out the requisite connection between Governor Hutchinson and the policies Plaintiffs challenge.

First, as to Governor Hutchinson's general-enforcement authority under the Arkansas Constitution, it is well-settled that "a governor's general-enforcement authority is 'some connection' [only] if that authority gives the governor *methods* of enforcement." *Church v. Missouri*, 913 F.3d 736, 749 (8th Cir. 2019). Plaintiffs cite no enforcement method; they only cite the Governor's enforcement authority itself. But neither "a broad duty to uphold state law," *id.* (quoting *Air Evac EMS, Inc. v. Tex., Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 517 (5th Cir. 2017)), nor "general supervisory power over the persons responsible for enforcing the challenged provision will . . . subject an official to suit." *Id.* (quoting *L.A. Cty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992)). Indeed, the Eighth Circuit has specifically held that "the executive authority of the [Arkansas] governor" under the Arkansas Constitution is not the sort of connection to challenged state law or policy that *Ex parte Young* requires. *Dig. Recognition Network*, 803 F.3d at 960 (citing Ark. Const. art VI, secs. 2, 7).

Second, as for the Governor's "power to release people incarcerated in ADC correctional facilities," Compl. at 15 ¶ 40, the Governor does have the power to grant "[e]xecutive clemency," Ark. Const. art. VI, sec. 18, but that power has no connection to the policies and practices Plaintiffs challenge or the relief Plaintiffs seek. As this Court has noted, "Plaintiffs represent that they 'do not seek unconditional release' but instead seek measures such as transferring vulnerable plaintiffs 'to their homes to self-isolate, while still in ADC custody . . . until the emergency abates.'" DE 68 at 42-43 (quoting DE 3 at 56). But the Governor's clemency power is a power to pardon inmates or commute their sentences. *See* Ark. Code Ann. 16-93-204, 16-93-207. It is not a power to micromanage the conditions of inmates' sentences; that power is reserved to the Department of Corrections officials Plaintiffs have sued. Indeed, even in habeas proceedings that do seek unconditional release, governors are never sued as respondents because an order compelling a governor to exercise his discretionary pardon or commutation power is not a permissible remedy in habeas proceedings. *See Pennington v. Norris*, 257 F.3d 857, 858 n.2 (8th Cir. 2001) (declining to address possible procedural defects in a prisoner's "statutory executive clemency and/or commutation of sentence claim, because that claim is not cognizable in federal habeas proceedings in any event"). The Governor's discretionary pardon and commutation power has no connection to Plaintiffs' requests for temporary transfer to home confinement or modifications of prison conditions. Plaintiffs' claims against Governor Hutchinson thus fail as a matter of law.

III. Director Bradshaw has sovereign immunity from all of Plaintiffs' claims.

Plaintiffs sue Jerry Bradshaw, Director of the Arkansas Division of Community Correction, a state agency that manages several minimum-security residential treatment facilities housing low-risk offenders. DE 1 at 15 ¶ 39. Plaintiffs do not allege that Director Bradshaw's

action or inaction has harmed them or even mention him outside of the paragraph of their complaint listing him as a party. Nor could they. Plaintiffs are all inmates of facilities managed by the Arkansas Division of Correction, the state agency that manages Arkansas's *prisons*. *See* DE 1 at 7-13 ¶¶ 15, 17, 19, 20, 22, 24, 26, 28, 31, 33, 35. Plaintiffs do not allege that Director Bradshaw has any supervisory authority over Arkansas's prisons, and as a matter of law, he does not. *See* Ark. Code Ann. 12-27-126 (detailing powers of the Director of the Division of Community Correction).

Because Director Bradshaw has nothing whatsoever to do with the conditions of Plaintiffs' prisons, Plaintiffs fail to state a claim against Director Bradshaw. And as was true of Governor Hutchinson, the lack of any connection between Director Bradshaw and the policies and practices that Plaintiffs challenge means that Director Bradshaw has sovereign immunity.

In response, Plaintiffs will surely aver that they seek to represent a class of inmates that includes Community Correction inmates. *See* DE 1 at 15 ¶ 41 (proposed class definition). But as a matter of law, Plaintiffs cannot represent a class insofar as that class asserts claims against Director Bradshaw, because Plaintiffs themselves have no claims against Director Bradshaw. Rule 23 provides that "One or more members of a class may sue . . . as representative parties on behalf of all members only if," inter alia, "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a), 23(a)(3). Plaintiffs have no claims against Director Bradshaw *at all*, so their claims against Director Bradshaw cannot be typical of the class's claims against Director Bradshaw. Therefore, they cannot assert class claims against Director Bradshaw. *See Golan v. Veritas Entm't, LLC*, 788 F.3d 814, 821 (8th Cir. 2015) ("It is well established that a plaintiff who lacks standing to assert his claims cannot be a proper class representative under Rule 23(a)."); *Hall v. Lhaco, Inc.*, 140 F.3d 1190, 1196

(8th Cir. 1998) ("Because Hall does not have standing to pursue his claim [under a particular statute], it is immaterial whether any member of the potential class would have standing to pursue this claim. Hall is not a proper representative of the class where he himself lacks standing to pursue the claim."). Since Plaintiffs fail to state a claim against Director Bradshaw in their own right, and cannot represent a class against Director Bradshaw, Director Bradshaw is immune from and must be dismissed from this action.

IV. Plaintiffs fail to state an Eighth Amendment claim.

Plaintiffs assert that Defendants' COVID-19 policies and practices amount to deliberate indifference to the risks posed by COVID-19, in violation of the Eighth Amendment. Yet Plaintiffs' own allegations belie that claim. Rather than allege reckless indifference to the risks of COVID-19, Plaintiffs merely allege that Defendants' responses aren't what Plaintiffs would do. Plaintiffs' disagreement with Defendants' measures, whether reasonable or not, is not enough to state a deliberate indifference claim.

As this Court has already explained, "[d]eliberate indifference has both an objective and a subjective component." DE 68 at 53. As relevant here, the "subjective component of deliberate indifference requires proof that defendants actually knew of and recklessly disregarded [a] substantial risk of serious harm" to prisoners. *Id.* (alteration omitted) (internal quotation marks omitted) (quoting *Butler v. Fletcher*, 465 F.3d 340, 345 (8th Cir. 2006)). And "[i]n order to demonstrate that a defendant actually knew of, but deliberately disregarded, a serious medical need, the plaintiff must establish a mental state akin to criminal recklessness: disregarding a known risk to the inmate's health." *Id.* (internal quotation marks omitted) (quoting *Vaughn v. Gray*, 557 F.3d 904, 908 (8th Cir. 2009)). Plaintiffs' allegations—particularly in light of

judicially noticeable public records this Court discussed in denying Plaintiffs' preliminary-injunction motion—do not meet that standard.

Plaintiffs first allege that Defendants failed before the COVID-19 pandemic began to develop "contingency plans for reduced workforces due to staff absences." DE 1 at 36 ¶ 102. But an alleged failure to develop a contingency plan for staff shortages in the event of a pandemic that did not yet exist does not constitute deliberate indifference to the *known* risk of harm from that pandemic. Moreover, Plaintiffs themselves allege—and this Court has found on the basis of judicially noticeable public records—that Defendants *have* addressed staff shortages by allowing, in the event of a critical staffing shortage, staff who have tested positive to return to work on the condition that they only work with positive-tested inmates. DE 1 at 41 ¶ 121; DE 68 at 38 (citing DE 36-19 (Arkansas Department of Health guidance)).

Next, while affirmatively alleging that "many . . . masks" have been provided to ADC inmates, DE 1 at 37 ¶ 106, and that ADC itself is manufacturing those masks in response to the COVID-19 pandemic, *id.*, Plaintiffs allege that *some* "Named Plaintiffs" have not been provided masks, DE 1 at 36 ¶ 105, and that "several" others are housed with inmates who have not been provided masks. DE 1 at 36 ¶ 104.

As this Court has already held, *see* DE 68 at 57-59, the fact that some individual inmates may not have been provided masks in spite of Defendants' policy of manufacturing and providing masks to all inmates but those in restrictive housing does not show deliberate indifference—especially not on the part of the officials at the very top of the Department of Corrections and its Divisions that Plaintiffs have sued. In order to state a deliberate-indifference claim against those apex officials premised on the failure of unit-level correctional officers to provide masks to individual inmates, Plaintiffs would need to allege a deliberate failure to train

those correctional officers—one where "the need 'for more or different training is so obvious, and the inadequacy so likely to result in the deprivation of constitutional rights, that the policymakers can reasonably be said to have been deliberately indifferent to the need.'" *Id.* at 56 (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 (1989)). Yet Plaintiffs' complaint contains not a word about Defendants' failure to train correctional officers or others in their employ. Plaintiffs' bare allegations of individualized instances of failures to implement Defendants' mask policies do not state a deliberate-indifference claim against Defendants.

Plaintiffs further initially alleged that the only COVID-19-related signage Defendants ordered posted was directed to staff, DE 1 at 37 ¶ 108, and that inmates received no education or training on donning masks. DE 1 at 37 ¶ 107. When Defendants put an abundance of COVID-19-related, inmate-facing signage in the record, *see* DE36-12–17, Plaintiffs abandoned that allegation, DE 68 at 57 ("Plaintiffs do not deny that these measures have been taken"), and only quibbled with the lack of oral instruction on the matters addressed in the signs. Plaintiffs may protest that this signage cannot be considered at the motion-to-dismiss stage and that the Court must indulge the counterfactual fantasy that it does not exist, thereby keeping their claims on temporary life support until summary judgment. But a "district court may take judicial notice of public records and may thus consider them on a motion to dismiss." *Stahl v. USDA*, 327 F.3d 697, 700 (8th Cir. 2003).

Plaintiffs also vaguely allege that "Defendants have not implemented the heightened hygienic, cleaning, and disinfecting practices called for by the CDC Guidance," DE 1 at 38 ¶ 109, and have "not followed the CDC's recommendation that staff clean shared surfaces several times a day." DE 1 at 38 ¶ 112. The only facts Plaintiffs allege in support of these conclusory allegations are conditions observed by three inmates at two of ADC's twenty-odd

units. DE 1 at 38 ¶¶ 110-12. Absent an allegation of an actual policy on Defendants' part to disregard CDC guidance—which Plaintiffs do not make—these allegations of isolated unit-level implementation failures do not state a claim of deliberate indifference on Defendants' part. And as the Court is now aware, Defendants have given orders to ADC units to engage in heightened cleaning, *see* DE 68 at 29 (citing 17 documents in the record documenting those orders), and Plaintiffs "do not challenge [those] orders." DE 68 at 59. Plaintiffs themselves, for example, filed an ADC memo directing sanitizer to be "continuously used daily" to "disinfect frequently touched surface[s]." DE 57-7.

Plaintiffs cannot oppose dismissal by denying the existence of orders to increase cleaning that they admit have been issued, as evidenced by a slew of judicially noticeable public records, some of which *they themselves offered* as evidence in support of their claims. The only allegations on which they can rely where cleaning is concerned, then, are their scattered unit-level allegations of implementation failures. But those sorts of allegations, again, do not suffice to state a claim against Defendants absent allegations of deliberately indifferent failures to train or supervise. And Plaintiffs have made no such allegations.

Plaintiffs next allege that Defendants' social-distancing measures have been inadequate, particularly with respect to the space between inmates' beds. *See* DE 1 at 39 ¶¶ 114-16. This Court has already held that given the flexibility of CDC guidance on the subject, a mere failure to space inmates' beds six feet apart is not deliberately indifferent. *See* DE 68 at 61 (citing DE 36-9 at 11). Plaintiffs also allege inadequate spacing at meals. But as this Court has found on the basis of a large array of judicially noticeable public records, Defendants have ordered staggered meal times and required spaced seating at meals. *See* DE 68 at 30. What remains, like so many of Plaintiffs' allegations, is an allegation of unit-level shortcomings in implementation,

unaccompanied by any allegations that Defendants have failed to train or supervise the unit-level officials responsible for those shortcomings.

Plaintiffs also make allegations about several isolated incidents where symptomatic inmates were not given masks, tested for COVID-19, or treated. DE 1 at 40 ¶ 119. As this Court has already held when Plaintiffs put on further evidence of the sorts of incidents alleged in their complaint, such isolated failures do not show that Defendants have been deliberately indifferent. DE 68 at 63-64. Rather, Plaintiffs must allege Defendants have a policy of indifference to symptomatic inmates' needs or that Defendants have been deliberately indifferent in their supervision of ADC's contracted medical provider. They make no allegations of that kind.

Plaintiffs further allege that Defendants have not adequately isolated COVID-19-positive staff. DE 1 at 40-41 ¶ 121. This Court has addressed Defendants' practice of permitting positive staff to work with positive inmates, and concluded it does not constitute subjective deliberate indifference given that it was adopted on the advice of judicially noticeable expert guidance from the Arkansas Department of Health. DE 68 at 65. Obviously, Defendants cannot exhibit a mental state akin to criminal recklessness by following the advice of medical experts.

Finally, Plaintiffs claim that Defendants have shown deliberate indifference to COVID-19 by failing to "close off the areas used by [any] person who has contracted COVID-19," contrary to CDC guidance. DE 1 at 41 ¶ 122. The CDC's guidance does make that recommendation, but it also acknowledges that all of its recommendations "**may need to be adapted based on individual facilities' physical space**," DE 36-9 at 1 (emphasis in original), and closing off all the areas used by any positive inmate is not practicable in open-barracks facilities. As the Court has found, Defendants have separated positive inmates from negative ones, DE 68 at 61, under the Department of Health's judicially noticeable public-record

guidance. DE 36-10 at 2. No infected inmate can be infected again by living in the same barracks as other positive inmates. Defendants' inability to take the further step of moving positive inmates to other quarters—which is not only impossible under the circumstances, but would do little to reduce the risk of infection that separating positive from negative inmates does not do already—does not amount to deliberate indifference.

V. Plaintiffs fail to state an ADA claim.

Plaintiffs also assert a claim against all Defendants under Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132. Plaintiffs allege that Defendants have intentionally discriminated against them "by denying them reasonable accommodations that have been recommended by the CDC and are necessary to protect them from COVID-19." DE 1 at 44 ¶ 140. The "reasonable accommodations" they seek include: (1) access to alcohol-based hand sanitizer; (2) provision of cleaning supplies including products containing bleach, adequate to clean individuals' housing areas; (3) provision of PPE; (4) access to antibacterial hand soap and towels for hand washing; (5) implementation of social distancing measures "in all locations where incarcerated people are required to congregate"; and (6) release from prison or transfer to home confinement "if social distancing is not practicable." DE 1 at 44 ¶ 141. The ADA does not require these accommodations, especially where Plaintiffs did not request them before suing.

Title II provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. 12132. Title II regulations require public entities, including prisons, to "make reasonable modifications in policies . . . when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would

fundamentally alter the nature of the service, program, or activity" at issue. 28 C.F.R. 35.130(b)(7)(i); *see also Pa. Dep't. of Corr. v. Yeskey*, 524 U.S. 206 (1998) (holding that prisons are entities subject to Title II). The Supreme Court has explained that states may generally rely on the "reasonable assessments" of their own professionals in determining whether an individual is qualified for services and programs and whether "reasonable modifications" are available to prevent discrimination. *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 602 (1999) (citing 28 C.F.R. 35.130(b)(7) and (d)).

To succeed on their claim, Plaintiffs must show that Defendants refused to provide accommodations they requested "because of [their] disability." *DeBord v. Bd. of Educ.*, 126 F.3d 1102, 1105 (8th Cir. 1997). The Eighth Circuit has explained that plaintiffs may prove unlawful "discrimination" under Title II by offering evidence of disparate treatment based on disability or by showing that a facially-neutral policy has the "effect of discriminating against the disabled or the severely disabled." *Id.* And as noted above, states need not make modifications that "would fundamentally alter the nature of the service, program, or activity" at issue. 28 C.F.R. 35.130(b)(7)(i). Nor must states make modifications that would impose an undue burden on the entity, service, or program. *Randolph v. Rodgers*, 170 F.3d 850, 858 (8th Cir. 1999). Finally, and particularly important in the context of the state prison system, "[a] public entity may impose legitimate safety requirements necessary for the safe operation of its services, programs, or activities." 28 C.F.R. 35.130(h).

Plaintiffs are not entitled to the accommodations they seek for three reasons. First, Plaintiffs do not allege that they requested these accommodations. That is fatal to their claims as a matter of law because a person "seeking a reasonable accommodation must request such an accommodation." *Hatchett v. Philander Smith Coll.*, 251 F.3d 670, 675 (8th Cir. 2001); *see also*

Wallin v. Minn. Dept. of Corr., 153 F.3d 681, 689 (8th Cir. 1998) (holding in ADA suit against employer that "it is the responsibility of the individual with the disability to inform the employer that an accommodation is needed").

Second, as this Court has already held, none of the accommodations Plaintiffs seek are "reasonable accommodations [that] have been denied for plaintiffs." DE 68 at 70. Alcohol-based sanitizer is, under the CDC's guidance, merely a secondary option to handwashing and one that prisons may opt to deny for security reasons. *See id.* at 60 (citing CDC guidance). Under *Olmstead* and the federal regulations interpreting the ADA, the Court owes deference to ADC's judgment that providing alcohol-based sanitizer would be unsafe. The same is true of bleach, which the CDC's guidance does not even conditionally recommend providing to inmates. On the other hand, the Court has already found, based on judicially noticeable public records, that inmates are being provided soap. *See* DE 68 at 30 (citing DE 50-14). And Plaintiffs do not even allege that they have been denied soap. The complaint's only mentions of soap are: (1) an allegation that one of the Plaintiffs hand-washes his face mask with soap, DE 1 at 8 ¶ 16, and (2) requests for soap that Plaintiffs don't allege they've been denied. DE 1 at 44 ¶ 141(d), 46 (Prayer for Relief(f)(ii)).

Third, as this Court has already held, it cannot grant release under Plaintiffs' ADA claim. *See* DE 68 at 51 (holding that "the PLRA prevents this Court from granting temporary release or transferring to home confinement members of the proposed disability subclass who bring Title II ADA claims seeking such relief"). That is because the PLRA, which governs ADA suits, provides that only a three-judge court may enter a prisoner release order outside a habeas proceeding, and that even a three-judge court may only do so after the entry of a prior order granting less intrusive relief on the same claim that has failed to remedy the deprivation of a

federal right. *See id.* (citing 18 U.S.C. 3626(a)(3)(A)(i), (a)(3)(B), (g)(4)). No three-judge court has been empaneled, and as this Court previously held, it "has entered no such previous order." *Id.* So "regardless of the merits of plaintiffs' claims" for release under the ADA, this Court must dismiss their ADA claim insofar as it seeks release. *Id.*

VI. Plaintiffs' condition-of-confinement claims are not cognizable in habeas.

Plaintiffs' habeas claim challenges their conditions of confinement. They argue that, due to temporary conditions that they allege exist in ADC prisons on account of COVID-19, a putative subclass of medically vulnerable plaintiffs have an Eighth Amendment right to be transferred from prisons to home confinement. *See* DE 1 at 43 ¶ 138. That claim encounters an insurmountable obstacle at the starting gate: In the Eighth Circuit, "a habeas petition is not a proper remedy for a condition-of-confinement claim." *Holt v. Kelley*, No. 5:18-cv-00264, 2019 WL 3928633, at *1 (E.D. Ark. Aug. 18, 2019) (Baker, J.) (citing *Spencer v. Haynes*, 774 F.3d 467, 469 (8th Cir. 2014)).

In *Spencer v. Haynes*, the Eighth Circuit held that if a prisoner's "constitutional claim relates to the conditions of his confinement . . . a habeas petition is not the proper claim to remedy his alleged injury." 774 F.3d at 470. And that is how this Court understood *Spencer* in *Holt*. *See Holt*, 2019 WL 3928633, at *1-2 (reading *Spencer* as "holding that a habeas petition is not a proper remedy for a condition-of-confinement claim," and "declin[ing] Mr. Holt's invitation to distinguish or decline to follow . . . *Spencer*"). Plaintiffs' claim "relates to the conditions of their confinement," "as distinct from the fact or length of the confinement." *Spencer*, 774 F.3d at 470 (quoting *Bell v. Wolfish*, 441 U.S. 520, 526 n.6 (1979)). Plaintiffs do not challenge the validity of their sentences, nor their length; their claim has nothing to do with the legality of their sentence as imposed. It only attacks living conditions in one venue of

confinement, ADC prisons as currently affected by COVID-19. As such, they cannot bring that claim in a habeas proceeding.

Moreover, the relief that Plaintiffs seek is not cognizable in habeas. In *Kruger v. Erickson*, 77 F.3d 1071 (8th Cir. 1996), the Eighth Circuit held that "[i]f the prisoner is not challenging the validity of his conviction or the length of his detention, then a writ of habeas corpus is not the proper remedy . . . [and] the district court lacks the power or subject matter jurisdiction to issue the writ." *Id.* at 1073. The Eighth Circuit reaffirmed that rule in *Spencer* and held that habeas relief was unavailable in that case because Spencer did "not challenge his conviction, nor . . . seek a remedy that would result in an earlier release." *Spencer*, 774 F.3d at 469. Plaintiffs do not "challenge [their] conviction[s]." *Id.* Nor do they seek a writ that would reduce "the length of their state custody." *Kruger*, 77 F.3d at 1073. Rather, under Plaintiffs' proposed remedy they would "still [be] in ADC custody," DE 3 at 56, just in a different location: their homes. During that "temporary medical furlough" to "home confinement," *id.* at 36, 45, they would continue to serve their sentences, whose length Plaintiffs do not attack.

At the preliminary-injunction stage, Plaintiffs maintained that their claim is *not* a condition-of-confinement claim. Instead, they argued their request is tantamount to a request for early release because a temporary transfer to home confinement would amount to "a quantum change in the level of custody." DE 44 at 66 n.17. But even if an order granting home confinement were permissible relief in habeas, Plaintiffs still could not bring that claim because they do not assert that their sentences are unlawful; they only claim that the present health-and-safety *conditions* of their confinement have made their imprisonment temporarily unlawful.

Moreover, courts have overwhelmingly rejected Plaintiffs' construction of their claim. Plaintiffs have identified over twenty cases which they say hold COVID-19-based requests for

release from prison to less restrictive confinement are cognizable in habeas. *See* DE 44 at 67 n.18 and accompanying text. Of these, Plaintiffs focus on just two that say a COVID-19-based request for release from prison is not a condition-of-confinement claim. *See* DE 44 at 65-66 (citing *Wilson v. Williams*, — F. Supp. 3d —, 2020 WL 1940882 (N.D. Ohio Apr. 22, 2020), *vacated on other grounds*, — F.3d —, 2020 WL 3056217 (6th Cir. June 9, 2020); *Malam v. Adduci*, — F. Supp. 3d —, 2020 WL 1672662 (E.D. Mich. Apr. 5, 2020)); *see also* DE 54 at 2 (citing *Wilson v. Williams*, No. 20-3447 (6th Cir. May 4, 2020) (denying stay of *Wilson*)). The focus on these cases is not accidental. Virtually every other case granting habeas relief on such claims has said they *are* condition-of-confinement claims and can be heard in habeas because local circuit precedent has condoned condition-of-confinement habeas petitions. The following are examples, culled from cases Plaintiffs themselves cite in supposed support of their argument that their claims are *not* condition-of-confinement claims and can be heard in habeas:

- "Respondents submit that Petitioners cannot challenge their conditions of confinement through a habeas petition. Taking the latter challenge first, we note that federal courts, including the Third Circuit, have condoned conditions of confinement challenges through habeas. Accordingly, we find that Petitioners have appropriately invoked this court's jurisdiction through a 28 U.S.C. § 2241 petition for writ of habeas corpus." *Thakker v. Doll*, No. 1:20-CV-480, 2020 WL 1671563, at *2 (M.D. Pa. Mar. 31, 2020) (citations omitted).

- Federal courts . . . have seemingly condoned challenges to conditions of confinement raised through a habeas petition. Accordingly, I find the caselaw indicates that an immigration detainee may raise a conditions of confinement claim in his § 2241." *Leandro R. P. v. Decker*, No. CV 20-3853, 2020 WL 1899791, at *4 (D.N.J. Apr. 17, 2020) (alterations omitted) (citations omitted) (internal quotation marks omitted).

- "An application for habeas corpus under 28 U.S.C. § 2241 is the appropriate vehicle for an inmate in federal custody to challenge conditions or actions that pose a threat to his medical wellbeing. *See Roba v. United States*, 604

F.2d 215, 218–19 (2d Cir. 1979) (allowing a § 2241 application to challenge an inmate's 'transfer while seriously ill' where that transfer posed a risk of fatal heart failure)." *Basank v. Decker*, No. 20 CIV. 2518, 2020 WL 1481503, at *4 (S.D.N.Y. Mar. 26, 2020).

- "Courts are divided on whether section 2241 provides a vehicle for challenging (and a remedy for addressing) allegedly unconstitutional conditions of confinement. This Court need not resolve these difficult questions at this junction because the Second Circuit 'has long interpreted section 2241 as applying to challenges to ... prison conditions,' *Thompson v. Choinski*, 525 F.3d 205, 209 (2d Cir. 2008)[.]" *Jones v. Wolf*, No. 20-CV-361, 2020 WL 1643857, at *14 (W.D.N.Y. Apr. 2, 2020) (footnote omitted) (alteration omitted).

On the other hand, courts in Circuits like the Eighth that bar condition-of-confinement claims from being heard in habeas overwhelmingly conclude that claims like Plaintiffs are condition-of-confinement claims and therefore cannot be heard in habeas. For example:

- "Although Plaintiffs are requesting immediate release, they are not challenging the legality or duration of their detention. At the core of their argument, they contend that the conditions of their detention at Otero are inadequate to protect them from exposure to COVID-19 . . . Accordingly, the Court finds that Plaintiffs are challenging the conditions of their detention, as opposed to its fact or duration, which is not appropriate under 28 U.S.C. § 2241." *Barco v. Price*, —F. Supp. 3d —, 2020 WL 2099890, at *6 (D.N.M. May 1, 2020).

- "[Petitioner] seeks release on the basis of his 'Living Conditions' at Terminal Island. Petitioner's allegations sound in civil rights, not in habeas. Although Petitioner requests relief in the form of release from prison, which is within the ambit of a writ of habeas corpus, Petitioner's claims challenge the conditions of his confinement and are properly the subject of a civil rights complaint, despite the relief he seeks." *Bolden v. Ponce*, No. 220CV03870JFWMAA, 2020 WL 2097751, at *2 (C.D. Cal. May 1, 2020) (alteration omitted) (citations omitted) (internal quotation marks omitted).

- "Drakos does not challenge the fact or duration of his confinement. While he requests injunctive relief ordering his release, his attack is on the conditions of his confinement, not on the fact that he was ordered detained before trial. Therefore, the relief Drakos seeks is not available in habeas corpus." *Drakos v. Gonzalez*, No. H-20-1505, 2020 WL 2110409, at *1 (S.D. Tex. May 1, 2020) (citations omitted).

Despite the abundance of authority holding that claims like Plaintiffs' are condition-of-confinement claims, only cognizable in habeas if condition-of-confinement claims are, Plaintiffs insist all these courts are wrong. They rest that argument almost entirely on an Ohio district court decision in *Wilson v. Williams*, which Justice Sotomayor subsequently stayed and the Sixth Circuit subsequently vacated. That decision is singularly unpersuasive and rests on an approach to condition-of-confinement claims that the Eighth Circuit explicitly rejected in *Spencer*.

In that case, the district court ordered that the Bureau of Prisons grant inmates in a federal prison with a severe COVID-19 outbreak one of either compassionate release, release to home confinement, or transfer to another BOP facility. *Wilson*, 2020 WL 1940882, at *10-11. According to the district court, all of these remedies, including transfer to a different prison, were available in habeas because in the Sixth Circuit, habeas petitioners could not only challenge "the fact or duration of confinement," but "also . . . the execution or manner in which the sentence is served." *Id.* at *5 (internal quotation marks omitted) (quoting *United States v. Peterman*, 249 F.3d 458, 461 (6th Cir. 2002)).

On appeal, the Sixth Circuit took a somewhat different view.[1] It held the prisoners' request for transfer to safer prisons merely sought "an improvement of prison conditions" and

[1] Prior to the Sixth Circuit vacating the district court's injunction, the government twice sought a stay in the Supreme Court. On the first occasion, the district court modified its order while the government's stay application regarding the original order was pending. *See Williams v. Wilson*, — S. Ct. —, 2020 WL 2644305, at *1 (U.S. May 26, 2020). "Particularly in light of that procedural posture, the Court decline[d] to stay the [original] preliminary injunction without prejudice to the Government seeking a new stay." *Id.* Justices Thomas, Alito and Gorsuch, however, would have granted a stay, the intervening order notwithstanding. *Id.* The government then sought a new stay. This time Justice Sotomayor, the Sixth Circuit's Circuit Justice, granted a stay on her own. *Williams v. Wilson*, — S. Ct. —, 2020 WL 2988458 (U.S. June 4, 2020). Notably, both of the government's stay applications relied heavily on the argument that the relief the district court granted was non-cognizable in habeas.

"could not be brought under § 2241." *Wilson*, 2020 WL 3056217, at *5, *6. It concluded, however, that a claim seeking release to home confinement on the basis of conditions of confinement should be "construed" as though it were not a conditions claim. *Id.* at *5. As it put it, "[o]ur precedent supports the conclusion that where a petitioner claims that no set of conditions would be constitutionally sufficient"—thus challenging *conditions*—"the claim should be construed as challenging the fact or extent, rather than the conditions, of the confinement." *Id.* (citing *Adams v. Bradshaw*, 644 F.3d 481, 483 (6th Cir. 2011)). For reasons left unexplained, it understood the prisoners' request for release to home confinement to make such a claim—only to vacate the district court's grant of that relief on the merits for reasons closely paralleling this Court's denial of injunctive relief. *See id.* at *8-11.

Besides the Supreme Court's strong hint that it would stay *Wilson* in an appropriate procedural posture, and Justice Sotomayor's stay, *Wilson* is unpersuasive for two reasons. First, it is inconsistent with the Sixth Circuit's own stated approach to habeas and condition-of-confinement claims; second, the Eighth Circuit has, in any event, rejected that approach.

The Sixth Circuit reasoned that the prisoners' claims in *Wilson* were attacks on their sentences themselves because they asserted that all possible conditions of those sentences were unconstitutional—relying on a lethal-injection case holding that where a prisoner claimed there was *no* "acceptable . . . procedure" for lethal injection, the claim was cognizable in habeas because it would "render his death sentence effectively invalid." *Adams*, 644 F.3d at 483. That, however, was not what the prisoners in *Wilson* were claiming.

Rather, the prisoners in *Wilson* sought to temporarily serve the balances of their sentences at home; by definition, then, they claimed that there *were* conditions under which their sentences could be administered constitutionally. The same is true of Plaintiffs' claims, which both

acknowledge that they can be constitutionally confined at home, and that they can be confined in prison once "the emergency abates." DE 68 at 43 (quoting DE 3 at 56). Far from resembling a challenge to the very sentence of death by lethal injection, Plaintiffs' claim is more like a claim that due to a temporary health condition, lethal injection must be postponed or administered by a different procedure until the condition subsides. No court would entertain that sort of claim in habeas. *C.f. Bucklew v. Precythe*, 139 S. Ct. 1112 (2019) (entertaining a lethal-injection claim based on a *more* permanent medical condition under Section 1983).

Second, the Eighth Circuit rejected the Sixth Circuit's approach to conditions claims in *Spencer*. In *Adams*, the Sixth Circuit said that Eighth Amendment challenges to the conditions of a sentence transform into challenges to the "fact" of sentence if they assert that a sentence would be unconstitutional under any set of conditions. Likewise, Plaintiffs reason that their claim is not a conditions claim because it claims no set of prison conditions could be safe enough for certain inmates. In *Spencer*, however, the Eighth Circuit specifically addressed *Adams* and rejected it. There, it acknowledged "a split ha[d] arisen amongst our sister circuits" in permitting condition-of-confinement claims in habeas. *Spencer*, 774 F.3d at 470. "Notwithstanding" that split, it wrote it was "bound" by *Kruger* to reject the view of those circuits that allowed condition-of-confinement habeas petitions. In cataloguing the split, the *Spencer* court wrote that "the Sixth Circuit firmly stand[s] in the camp of *allowing* conditions-of-confinement claims to be brought in the habeas corpus context." *Id.* at 470 n.6 (emphasis added). *Spencer*'s only authority for that statement was *Adams*—which on the Sixth Circuit's and Plaintiffs' theory, only permitted a challenge to the fact of sentence. *Id.* Thus, the Eighth Circuit necessarily rejected *Adams*' distinction of condition claims that effectively attack a sentence itself, deeming those claims condition-of-confinement claims too. As *Wilson* is based entirely (albeit unpersuasively)

on the Sixth Circuit's hybrid approach to conditions claims in *Adams* that the Eighth Circuit rejected in *Spencer*, the Eighth Circuit would necessarily reject *Wilson*.

VII. Plaintiffs' habeas claims are barred for non-exhaustion.

Even if Plaintiffs had brought their habeas claim in a circuit where condition-of-confinement claims were cognizable in habeas, their claim would be barred for failure to exhaust. Plaintiffs style their habeas claim as one under 28 U.S.C. 2241. DE 1 at 43 ¶ 137. But in the Eighth Circuit, "[28 U.S.C.] § 2254 is the only means by which 'a person in custody pursuant to the judgment of a State court' may raise challenges to the validity of his conviction or sentence *or to the execution of his sentence*." *Singleton v. Norris*, 319 F.3d 1018, 1023 (8th Cir. 2003) (en banc) (emphasis added) (citing *Crouch v. Norris*, 251 F.3d 720, 722-23 (8th Cir. 2001)). Indeed, *Singleton* specifically rejected a state prisoner's argument that his habeas "claim [wa]s properly before the court under authority of § 2241," *id.* at 1022, as did *Crouch*. *See* 251 F.3d at 722 ("According to Crouch, his proposed petition is properly classified as a habeas action under 28 U.S.C. § 2241 . . . We disagree.").

Because in the Eighth Circuit, prisoners in custody pursuant to state-court judgments can only seek habeas relief under Section 2254, "[t]he petition at bar must . . . be construed as one pursuant to 28 U.S.C. 2254." *Jones v. Norris*, No. 5:09CV00353, 2010 WL 346440, at *5 (E.D. Ark. Jan. 25, 2010) (Moody, J.); *see also Murphy v. Bradly*, No. 1:19cv00091, 2019 WL 5777712, at *1 n.1 (E.D. Ark. Sept. 20, 2019) (Volpe, J.), *report and recommendation adopted*, 2019 WL 5755886 (E.D. Ark. Nov. 5, 2019) (Miller, J.) ("constru[ing]" habeas petition that "purport[ed] to be pursuant to 28 U.S.C. § 2241 . . . as being pursuant to § 2254" because "where a habeas petitioner is in custody pursuant to a state court judgment, she 'can only obtain habeas

relief through § 2254, no matter how [her] pleadings are styled.'" (quoting *Crouch*, 251 F.3d at 723).

As a Section 2254 petition, however, Plaintiffs' would-be habeas petition hits an insurmountable roadblock: Section 2254's prohibition against granting relief "unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State"—which the "applicant shall not be deemed to have [done], within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. 2254(b)(1)(A), 2254(c). Plaintiffs do not allege that they have pursued any state-court remedy. To the contrary, their briefing concedes they did not. *See* DE 44 at 64-65.

Plaintiffs may raise their deliberate-indifference claims in state court under Section 1983 and the Arkansas Civil Rights Act (ACRA), Ark. Code Ann. 16-123-105, which this Court has interpreted as providing identical protections to Section 1983. *See Hess v. Ables*, No. 5:11-cv-00249, 2012 WL 3882184, at *14 (E.D. Ark. Sept. 6, 2012) (Baker, J.), *aff'd*, 714 F.3d 1048, 1054 (8th Cir. 2013) (upholding this Court's analysis). Indeed, the Arkansas Supreme Court has decided deliberate-indifference claims under both Section 1983 and the ACRA. *See, e.g.*, *Early v. Crockett*, 436 S.W.3d 141 (Ark. 2014).

Plaintiffs may contend that their claim for release is only cognizable in habeas, not Section 1983. But as discussed above, many courts disagree, and so might the Arkansas courts. Therefore, whatever conclusion this Court reaches on that question, it must dismiss for non-exhaustion. For "[i]f a federal court is unsure whether a claim would be rejected by the state courts, the habeas proceeding should be dismissed without prejudice or stayed until the claim is fairly presented to them." *Sloan v. Delo*, 54 F.3d 1371, 1381 (8th Cir. 1995) (emphasis added).

Here the Court can be, at best, unsure whether Arkansas courts would reject Plaintiffs' potential 1983 and ACRA claims out of hand.

CONCLUSION

The Court should grant Defendants' motion to dismiss.

Respectfully submitted,

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