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. Bryan Collier, in his official capacity, Robert Herrera, in his official capacity, and Texas Department of Criminal Justice, Defendants.	)	Case No. 4:20-cv-01115 Hon. Keith P. Ellison

Plaintiffs' Response to Defendants' Rule 12(b) Motion to Dismiss

Table of Contents

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Nature and Stage of the Proceeding

Valentine and King—two elderly inmates confined to a Texas geriatric prison called the Wallace Pack Unit—filed suit, asking the Court to require Defendants to take certain measures to protect them from COVID-19. Valentine and King, for themselves and those similarly situated, assert two causes of action: one under 42 U.S.C. § 1983 for Collier and Herrera's violation of the Eighth Amendment based on the dangerous conditions of confinement at the Pack Unit, and a second for the Texas Department of Criminal Justice's violations of the Americans with Disabilities Act and the Rehabilitation Act of 1973 for failing to provide reasonable accommodations to Pack Unit inmates with disabilities during the pandemic. Plaintiffs and the class seek declaratory and injunctive relief, but not money damages.

On April 16, 2020, the Court heard Plaintiffs' application for a temporary restraining order and a preliminary injunction, and, after weighing the evidence and examining the law, issued an injunction the same day. Prelim. Inj. Order, ECF No. 40. The injunction ordered Defendants to take certain life-saving measures necessary to protect Plaintiffs, both of whom are medically vulnerable because of their disabilities. *Id.* at 2–5. On April 20, the Court issued a memorandum opinion and order supporting the injunction and including detailed findings of fact based on the record evidence. On that evidence—much of which Defendants did not rebut—the Court found that Plaintiffs had shown that a narrowly tailored preliminary injunction was warranted. Order 33, ECF No. 51. Two days later, Defendants moved to dismiss the suit under Rule 12(b). *See* Defs.' Mot., ECF No. 53. That same day, the Fifth Circuit stayed the preliminary injunction pending an appeal. *Valentine v. Collier*, No. 20-20207, 2020 WL 1934431, at *7 (5th Cir. Apr. 22, 2020). The appeal remains pending, and Plaintiffs have asked the Supreme Court to vacate the stay. Emergency Appl., *Valentine v. Collier*, No. 19A1034 (U.S. May 4, 2020). Plaintiffs now respond to the Rule 12(b) motion.

Statement of Issues to be Ruled on by the Court

1. Whether Plaintiffs have pleaded an injury-in-fact that satisfies constitutional standing, where they have alleged that Defendants' conduct has put them at an increased, extreme risk of serious illness and death from COVID-19 and where [redacted]

2. Whether Plaintiffs state an Eighth Amendment claim, where they have alleged that Herrera and Collier have acted with deliberate indifference by purposefully failing to take appropriate measures to protect Plaintiffs and the Pack Unit inmates, even though Defendants know that COVID-19 poses a particularly acute risk of inflicting severe illness and death on medically vulnerable inmates like Plaintiffs.

3. Whether the COVID-19 pandemic absolves the TDCJ of its statutory obligations under the ADA and the Rehabilitation Act to refrain from discriminating against Plaintiffs based on their status as individuals with disabilities.

4. Whether Plaintiffs, who are people with disabilities, have stated a claim for violating the ADA and the Rehabilitation Act, where they have pleaded facts to support that TDCJ denies them reasonable accommodations to protect them against the significant risk of harm that COVID-19 poses to the inmates with disabilities in TDCJ's charge.

5. Whether the Fifth Circuit motions panel's tentative *per curiam* decision to stay this Court's preliminary injunction pending an appeal constitutes a final decision on the merits that Plaintiffs' claims are barred from suit for failure to exhaust remedies.

Legal Standards

A. Rule 12(b)(1)

"Motions filed under Rule 12(b)(1) of the Federal Rules of Civil Procedure allow a party to challenge the subject matter jurisdiction of the district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). "The burden of proof … is on the party asserting jurisdiction." *Id.* A Rule 12(b)(1) motion "should be granted only if it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief." *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998). The court must accept as true the complaint's material allegations and must construe the complaint in the plaintiff's favor. *Williams v. Certain Underwriters at Lloyd's of London*, 398 F. App'x 44, 46

(5th Cir. 2010) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). Prisoners have standing to sue for unsafe prison conditions—including for potential exposure to infectious diseases—even if the likely harm would not occur immediately "and even though the possible infection might not affect all of those exposed." *Helling v. McKinney*, 509 U.S. 25, 33 (1993).

B. Rule 12(b)(6)

"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.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "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). Motions for failure to state a claim are not favored and rarely granted. *Calhoun v. Villa*, 761 F. App'x 297, 299 (5th Cir. 2019) (citation and quotation omitted); *accord Lormand v. US Unwired, Inc.*, 565 F.3d 228, 232 (5th Cir. 2009). "The complaint is to be 'liberally construed in favor of the plaintiff.'" *Calhoun*, 761 F. App'x at 299 (quoting *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982)). The court must accept all well-pleaded facts as true and must view them in the light most favorable to the plaintiff. *Richardson v. Axion Logistics, L.L.C.*, 780 F.3d 304, 306 (5th Cir. 2015).

Summary of the Argument

Plaintiffs have constitutional standing because they have alleged that Defendants' conduct subjects them to a significant, imminent risk of severe illness and death from COVID-19. They have also pleaded that the relief they seek will quell the imminent risk. They have easily met the requirements of Article III standing.

Plaintiffs have also pleaded facts that, when assumed to be true, show that Defendants are deliberately indifferent to the serious risk of severe illness and death that COVID-19 poses to Plaintiffs. Plaintiffs have pleaded facts supporting: (a) that an objectively serious health risk exists in the Pack Unit; (b) that Defendants are aware of that obvious risk; and yet (c) they intentionally or recklessly disregard it by failing to take appropriate action to protect Plaintiffs' health and safety—including by failing in practice to enforce Defendants' own written policies. Plaintiffs have thus alleged facts that, when accepted as true, show deliberate indifference.

Plaintiffs have similarly pleaded facts sufficient to state their ADA and Rehabilitation Act claims. The Fifth Circuit's narrow exception to ADA and Rehabilitation Act liability—which applies only to officers making in-the-field arrests in dangerous circumstances—does not absolve the TDCJ of its obligation to reasonably accommodate Plaintiffs' disabilities. And Plaintiffs have stated claims under both statutes because they have alleged facts that, accepted as true, show that TDCJ has not reasonably accommodated Plaintiffs' disabilities in the areas of hygiene and medical care, which constitutes actionable disability discrimination.

Finally, Plaintiffs are not required to exhaust grievance remedies under the Prison Litigation Reform Act, because no remedies are available. The Fifth Circuit motion panel's decision on the motion to stay the preliminary injunction is not law of the case on the exhaustion issue. The Court should deny Defendants' Rule 12(b) motion.

Argument and Authorities

A. Plaintiffs Have Standing

To establish Article III standing, the plaintiff's injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (citation omitted). "'An allegation of future injury may suffice if the threatened injury is certainly impending *or* there is a sub-

stantial risk that the harm will occur.'" *Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445, 454 (5th Cir. 2017) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)) (emphasis added). Contrary to Defendants' way of thinking, "a remedy for unsafe [prison] conditions need not await a tragic event." *Helling*, 509 U.S. at 33. "It would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them." *Id.*

Plaintiffs pleaded, and proved at the evidentiary hearing, that Defendants' conduct creates a certainly impending threatened injury and presents a substantial risk that Plaintiffs will be harmed. Plaintiffs have alleged, for example, that COVID-19 poses a dire public-health emergency that particularly threatens the health of the elderly and medically vulnerable. *E.g.*, Compl. ¶¶ 8–12, 29, ECF No. 1. They have pleaded that COVID-19 is easily transmissible and spreads rapidly in confined, congregative environments like nursing homes, cruise ships, and prisons. *Id.* ¶¶ 15–17. They have pleaded that COVID-19 is already in the community where the Pack Unit sits, *id.* ¶ 43, and they have asserted they are at an increased risk of contracting the virus because of Defendants' failure to take appropriate precautionary measures—including by failing in some cases to enforce their own written polices, *e.g.*, *id.* ¶¶ 47–48, 78–79. And at the evidentiary hearing on the preliminary injunction, the record evidence showed that COVID-19 tragically has already found its way into the Pack Unit, presenting a serious and imminent likelihood that others at the Unit will contract the virus—if they haven't already. Order ¶ 7–8, ECF No. 51; *see also* Young Decl. ¶¶ 8–9, 13–27, ECF No. 12.[1] Construing the complaint in the light most favorable to Plaintiffs, there is no serious question that they have standing: "The Constitution does not require that [Plaintiffs] be seriously ill from COVID-19, or that they await the

[1] *See* Defs.' Resp. to Court Directive, attached as Ex. 1 to Duke Decl. (May 11, 2020) (filed under seal with the Fifth Circuit Court of Appeals).

introduction and spread of COVID-19 in their detention facility before they may assert" violations of their constitutional rights. *Fofana v. Albence*, No. 20-10869, 2020 WL 1873307, at *8 (E.D. Mich. Apr. 15, 2020).

Other courts dealing with COVID-19's rapid spread inside detention facilities have found that similar plaintiffs have satisfied constitutional standing requirements. *See*, *e.g.*, *Martinez Franco v. Jennings*, No. 20-cv-02474, 2020 WL 1976423, at *2 (N.D. Cal. Apr. 24, 2020) (government's argument that detainees lacked standing because detention facility was taking steps to prevent COVID-19 outbreak "has been rejected by many, and perhaps all, courts that have considered it"); *Bent v. Barr*, No. 19-cv-06123, 2020 WL 1812850, at *3 (N.D. Cal. Apr. 9, 2020) ("Given the exponential spread of the virus, the ability of COVID-19 to spread through asymptomatic individuals, and the inevitable delays of court proceedings, effective relief for [plaintiff] and other detainees may not be possible if they are forced to wait until their particular facility records a confirmed case.").[2]

Grasping at straws, Defendants argue that Plaintiffs' allegations of harm are too generalized because they do not "plead and prove that *each* alleged inadequacy injures them." Mot. 7, ECF No. 53. Defendants over-read *In re Gee* and ask the Court to misapply its teachings.

---

[2] These are not one-off cases. *See*, *e.g.*, *Matos v. Lopez Vega*, No. 20-cv-60784, 2020 WL 2298775, at *7 (S.D. Fla. May 6, 2020) ("Although they may never contract COVID-19, [detainees'] alleged injury is concrete enough to survive challenges to standing given the rapid spread and highly contagious nature of the [COVID-19] virus."); *Fraihat v. U.S. Immigr. & Customs Enf't*, —— F. Supp. 3d —— 2020 WL 1932570, at *21 (C.D. Cal. Apr. 20, 2020) (rejecting argument that risk of COVID-19 infection was too speculative to confer standing); *Dawson v. Asher*, No. 2:2020-cv-0409, 2020 WL 1704324, at *8 (W.D. Wash. Apr. 8, 2020) (detainees alleging unsafe detention facilities from COVID-19 sufficiently alleged "concrete injury in the form of unsafe conditions" to confer Article III standing); *Coreas v. Bounds*, No. 20-cv-0780, 2020 WL 1663133, at *5 (D. Md. Apr. 3, 2020) (detainees faced with risk of contracting COVID-19 have standing); *United States v. Kennedy*, No. 18-20315, 2020 WL 1493481, at *5 (E.D. Mich. Mar. 27, 2020) (waiting for confirmed COVID-19 case or outbreak in detention facility could have "devastating consequences … and would create serious medical and security challenges to the existing prison population").

There, the plaintiffs sought an injunction "against virtually *all* of Louisiana's legal framework for regulating abortion," implicating more than twenty-six statutory provisions, including one non-substantive provision that merely identified the statute's title. 941 F.3d 153, 156, 158 n.4 & 162 (5th Cir. 2009). The Fifth Circuit held that, when it comes to challenging an array of more than twenty-six state law provisions, the plaintiffs must show standing for each challenged law, especially where certain of the challenged provisions did not apply to the plaintiffs *at all*. *Id.* at 162.

Here, Plaintiffs challenge Defendants' conduct under the Eighth Amendment (through Section 1983), the ADA, and the Rehabilitation Act. Plaintiffs identified the statutes and constitutional amendments under which they assert their rights, and they have pleaded and shown that Defendants' conduct, inaction, and inadequate policies subject Plaintiffs to a significant increased risk of serious harm from COVID-19—including possible death. *See*, *e.g.*, Compl. ¶¶ 2–3, 24–38, 75–79, 81–83, 89; Order 28–29, ECF No. 51 (finding that Plaintiffs had shown Defendants' conduct caused irreparable harm); Duke Decl. Ex. 1; *see also Banks v. Booth*, No. 20-cv-849, 2020 WL 1914896, at *4 (D.D.C. Apr. 19, 2020) (holding that inmates had constitutional standing to bring Eighth Amendment and other claims where they had pleaded "an increased risk of contracting COVID-19 due to Defendants' failure to take appropriate precautionary measures"). Plaintiffs have also pleaded and shown that providing each of the life-saving measures they seek will help quell the risk of serious harm from contracting COVID-19. *See* Young Decl. ¶¶ 27–31, ECF No. 12; Gathe Decl. ¶¶ 7–8, ECF No. 16; Cohen Decl. 15–19, ECF No. 13. Nothing in *In re Gee*, or in standing jurisprudence generally, requires that Plaintiffs do more. *See Helling*, 509 U.S. at 33 ("We would think that a prison inmate also could successfully

complain about demonstrably unsafe drinking water without waiting for an attack of dysentery.").

B. Plaintiffs Have Stated Their Claims

1. Plaintiffs Have Stated a Claim for an Eighth Amendment Violation

Defendants conflate what is required at the pleading stage with what is ultimately required later, to prevail on the merits. They take pains to point out what "an inmate must show" to *establish*, or worse yet "*conclusively establish*," an Eighth Amendment violation—and specifically, deliberate indifference. Mot. 8, 19 (emphasis added). The Court needn't be distracted by Defendants' red-herring effort to raise the federal pleading standard. Plaintiffs embrace their ultimate burden to prove deliberate indifference after discovery. But regardless of the evidentiary burden they will face later, at *this* stage, they need only provide a short plain statement showing they are entitled to relief, supplemented with factual allegations that, assumed as true, "raise a right to relief above the speculative level." *Wampler v. Sw. Bell Tel. Co.*, 597 F.3d 741, 744 (5th Cir. 2010) (internal quotations marks and citation omitted). At this point, on a Rule 12(b)(6) motion, Plaintiffs are not required to establish, let alone conclusively establish, deliberate indifference. They are required only to plead facts that, when assumed true, would make out a plausible claim. *Id.* And they have done so.

a. Plaintiffs' Facts, When Assumed True, Show Deliberate Indifference

The Eighth Amendment requires prison officials to "'take reasonable measures to *guarantee*'" inmates' safety. *Farmer v. Brennan*, 511 U.S. 825, 832 (1994) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526–527 (1984)) (emphasis added). The "treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." *Helling*, 509 U.S. at 31. "To plead an Eighth Amendment violation based on the conditions of an inmate's confinement, a plaintiff must allege conditions that 'pose a substantial risk of

serious harm.'" *Hinojosa v. Livingston*, 807 F.3d 657, 665 (5th Cir. 2015) (quoting *Farmer*, 511 U.S. at 834) (cleaned up). "The plaintiff must also allege that the defendant prison officials were deliberately indifferent to the inmate's health or safety," which requires "more than an allegation of mere negligence, but less than an allegation of purpose or knowledge." *Id.* (citing *Farmer*, 511 U.S. at 834–36). A "prison official acts with deliberate indifference when he 'knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference.'" *Id.* (quoting *Farmer*, 511 U.S. at 837). An "Eighth Amendment claimant need not show that a prison official acted or failed to act believing that harm actually would befall an inmate; it is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious harm." *Farmer*, 511 U.S. at 842. "[A] prison official's knowledge of a substantial risk of harm may be inferred if the risk was obvious." *Thomas v. City of Galveston, Tex.*, 800 F. Supp. 2d 826, 839 (S.D. Tex. 2011) (Ellison, J.) (internal quotation marks and citation omitted).

"Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence …, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." *Farmer*, 511 U.S. at 842 (citations omitted). Deliberate indifference is determined by evaluating prison officials' "attitudes and conduct at the time suit is brought and persisting thereafter." *Id.* at 845. The Fifth Circuit has noted deliberate indifference is manifest where prison officials "refused to treat [a prisoner], ignored his complaints, intentionally treated him incorrectly, or engaged in any similar conduct that would clearly evince a wanton disregard for any serious medical needs." *Domino v. Tex. Dep't of Crim. Justice*, 239 F.3d

752, 756 (5th Cir. 2001) (quoting *Johnson v. Treen*, 759 F.2d 1236, 1238 (5th Cir. 1985)); *Mendez v. Chang*, No. 2:18-cv-396, 2020 WL 564271, at *2–3 (S.D. Tex. Feb. 4, 2020) (prisoner adequately alleged deliberate indifference).

Plaintiffs have pleaded facts showing that Herrera and Collier have failed to guarantee the safety of the Pack Unit inmates and have manifested deliberate indifference by engaging in conduct that clearly evinces a wanton disregard for Plaintiffs' serious medical needs.[3] For example, Plaintiffs allege Defendants violate their rights by failing to implement appropriate measures to protect them and the other Pack Unit inmates from the risks of severe illness and death from COVID-19 exposure. Compl. ¶ 1. They allege that Collier and Herrera are subjectively aware of the obvious risk COVID-19 poses, but aren't doing what they must to protect Plaintiffs—who are uniquely medically vulnerable—from the obvious threat COVID-19 poses. *Id.* ¶¶ 75–79. They have alleged that Defendants knowingly fail to implement effective hygienic, sanitizing, disinfecting, educational, and other measures that will protect Plaintiffs and other vulnerable inmates from contracting an easily transmissible, potentially lethal disease—in some cases, even declining to enforce necessary policies already on the books. *See*, *e.g.*, *id.* ¶¶ 31–37, 47–48, 51–60, 75–79; *see also Banks*, 2020 WL 1914896, at *8, 14–15 (granting injunctive relief, noting there was some evidence that defendant prison officials' written COVID-19 policies were not being enforced inside the prison); *accord Johnson v. Epps*, 479 F. App'x 583, 590 (5th Cir. 2012) (prisoner stated facts supporting deliberate indifference where he claimed that prison's sanitation pol-

[3] Defendants do not contend that Plaintiffs haven't pleaded confinement under conditions posing a substantial risk of serious harm or that Defendants were unaware of that risk. Nor could they, because they have acknowledged to this Court that they "are well aware of the threat COVID-19 poses to inmates—especially those of advanced age and those who suffer from underlying health conditions." Defs.' Resp. to Appl. for TRO 29, ECF No. 36. The thrust of Defendants' Rule 12(b)(6) motion for the Eighth Amendment claim is whether Plaintiffs have alleged facts showing that Herrera and Collier "have *disregarded* a substantial risk to Plaintiffs' health and safety." Mot. 10 (emphasis added). In any event, the serious risks wrought by COVID-19 are undeniably obvious. *See* Order 20, ECF No. 51; *see also* Duke Decl., Ex. 1.

icies, which it implemented "possibly in response to" prisoner's lawsuit, were "not being enforced"). Plaintiffs have met their burden by alleging that Defendants' inaction and half-hearted measures suggest a wanton disregard for Plaintiffs' serious medical needs.

Not only have Plaintiffs pleaded facts that, taken as true, show deliberate indifference, but they have also buttressed those allegations with proof at the injunction hearing.[4] For example, Plaintiffs "presented unrebutted evidence … that Pack Unit's post-pandemic procedures for cleaning common areas resemble their pre-pandemic procedures." Order 21, ECF No. 51. Plaintiffs showed that Defendants deny them suitable sanitizing and disinfecting methods to protect them from COVID-19. *Id.* at 22.[5] And they provided unrefuted testimony that Defendants are not following their own written sanitizing and cleaning policies and must do more to protect the Pack inmates. *Id.* at 23, 25. Given what Plaintiffs have already been able to establish—even before discovery—Defendants' argument that Plaintiffs have stated no Eighth Amendment claim falls flat.

And while Defendants contend that "Plaintiffs cannot meet the 'extremely high' standard necessary to state" deliberate indifference, that argument confuses the burden of proof at the merits stage with what is required of Plaintiffs now. Mot. 8. Defendants cite no authority for the proposition that *any* heightened pleading standard, let alone one that is "extremely high," applies to Eighth Amendment claims brought through Section 1983—because there is none. *See generally Hoefling v. City of Miami*, 811 F.3d 1271, 1276 (11th Cir. 2016) (noting that since *Twombly*

[4] This case is in a unique procedural posture because Defendants have moved to dismiss under Rule 12(b)(6) even though some evidence has already been taken and weighed by the Court. Plaintiffs point to that evidence here merely to underscore the futility of Defendants' Rule 12(b)(6) arguments.

[5] Events that have occurred since Plaintiffs filed their complaint further bolster Defendants' deliberate indifference, and those events "suggests a conscious disregard of substantial risk" to the Pack Unit inmates. Order 22, ECF No. 51; *see also* Duke Decl. Ex. 1; *Farmer*, 511 U.S. at 845 (courts evaluate deliberate indifference by examining "attitudes and conduct at the time suit is brought and persisting thereafter").

and *Iqbal*, there is no heightened pleading standard in Section 1983 cases); *Zink v. Lombardi*, 783 F.3d 1089, 1104 (8th Cir. 2015) (noting that plaintiffs who plead Eighth Amendment claims are not subject to any pleading standard "that exceeds the requirements of Rule 8 as explained in *Iqbal* and *Twombly*"); *Educadores Puertorriquenos en Accion v. Hernandez*, 367 F.3d 61, 67 (1st Cir. 2004) (noting that the rule that all "civil rights actions are subject to Rule 8(a)'s notice pleading regime" was "not contingent on the type of civil rights case, the capacity in which a particular defendant is sued, the availability *vel non* of a qualified immunity defense, or the need (or lack of need) for proof of illegal motive").

Defendants' cases are not to the contrary. Of all those they cite to support their deliberate-indifference arguments, only four directly involve whether the plaintiffs sufficiently stated claims—and most of those dealt with dismissals of *pro se* complaints as frivolous under 28 U.S.C. § 1915(e)(2) after the court held an evidentiary hearing and weighed record evidence. They are therefore distinguishable from this case. *See*, *e.g.*, *McCormick v. Stalder*, 105 F.3d 1059, 1060–61 (5th Cir. 1997) (*pro se* prisoner's claim appropriately dismissed as frivolous under 28 U.S.C. § 1915(e) *after a hearing*, where prisoner was made to undergo prophylactic treatment for tuberculosis, was monitored during treatment, and where prisoner testified that prison medical staff did not intend to harm him); *Varnado v. Lynaugh*, 920 F.2d 320, 320–21 (5th Cir. 1991) (per curiam) (prisoner's claim appropriately dismissed as frivolous under 28 U.S.C. § 1915 *after hearing*, where his allegations and evidence amounted only to disagreement with his medical treatment for hip injury; unsuccessful medical treatment and medical malpractice do not give rise to a Section 1983 claim); *Norton v. Dimazana*, 122 F.3d 286, 291–92 (5th Cir. 1997) (prisoner's claim of deliberate indifference appropriately dismissed as frivolous under 28 U.S.C. § 1915(e) *after hearing*, where there was "extensive evidence in the record that

prison officials afforded [prisoner] a great deal of care and attention" and treatment "at least once a month for several years"); *see also Estelle v. Gamble*, 429 U.S. 97, 107–08, (1976) (prisoner did not state Eighth Amendment claim against prison medical staff where he was seen on 17 occasions spanning a three-month period, was treated for his medical conditions, and prescribed medications; prisoner's allegations amounted at most to medical malpractice claim, not an Eighth Amendment violation; case remanded for appellate court to consider whether prisoner stated claim against non-medical prison officials); *cf. Epps*, 479 F. App'x at 590–91 (holding district court erred in dismissing prisoner's Eighth Amendment claim under Rule 12(b)(6) analysis; although prisoner alleged "only limited facts," his allegations that prison's sanitation policy exposed inmates to risk of contracting diseases nevertheless permitted court to draw "a reasonable inference that [prison official] acted with deliberate indifference"). Defendants' other cases generally deal, not with the pleading standard, but with what Plaintiffs must prove at a later stage, including at summary judgment. Those cases lend nothing to Defendants' arguments about what Plaintiffs must plead to state a claim.

b. Defendants' Factual Disputes Are Inappropriate at the Pleading Stage

Defendants devote nearly eight pages—much of it single-spaced—to fact-based arguments that TDCJ has adopted system-wide COVID-19 policies, which they contend should end the deliberate-indifference inquiry. Mot. 10–18. Regardless of whatever belated steps Defendants might now be taking—some of which they adopted the *day before* the injunction hearing[6]—those fact-intensive defenses are not appropriately resolved on a Rule 12(b)(6) motion. *See Sandy Smith v. Bank of Am., N.A.*, No. 2:14-cv-479, 2016 WL 1162201, at *1 (S.D. Tex. Mar. 24, 2016); *United States v. Americus Mortg. Corp.*, No. 4:12-cv-02676, 2013 WL 4829271, at

[6] *See* Order 21, ECF No. 51.

*11 (S.D. Tex. Sept. 10, 2013). But even setting that reality aside, that Defendants might now be taking *some* action does not immunize them from well-pleaded allegations of deliberate indifference. For example, "[m]ere proof that an inmate has obtained some medical care … does not mean that the course of treatment of an inmate's medical problems cannot manifest deliberate indifference." *Starbeck v. Linn Cnty. Jail*, 871 F. Supp. 1129, 1146–47 (N.D. Iowa 1994) (citation omitted); *Smith v. Jenkins*, 919 F.2d 90, 93 (8th Cir. 1990) (inmate who received some medical care is still "entitled to prove" deliberate indifference by establishing that care was "[g]rossly incompetent or inadequate"); *Ortiz v. City of Imperial*, 884 F.2d 1312, 1314 (9th Cir. 1989) (prisoner "need not prove complete failure to treat" to establish a constitutional violation); *Mann v. Ohio Dep't of Rehab. & Corr.*, No. 2:18-cv-01565, 2019 WL 2617471, at *13 (S.D. Ohio June 26, 2019) (inmate stated Eighth Amendment claim by alleging medical care fell below standard).[7]

Here, Defendants' fact-intensive arguments about their system-wide policies cannot overcome—at the pleading stage—Plaintiffs' well-pleaded allegations of deliberate indifference. Defendants will have their chance to show that their supposed efforts counteract Plaintiffs' allegations and proof, but the mechanism for hashing out those fact-intensive disputes is not a Rule 12(b)(6) motion. *See Garrett v. Thaler*, 560 F. App'x 375, 379 n.3 (5th Cir. 2014) (evaluating deliberate indifference is a "fact-intensive inquir[y] not easily determined without discovery"). In any event, the policies Defendants argue they now have implemented say nothing of whether Defendants are actually adhering to those policies in practice *at the Pack Unit* or whether their ad-

[7] Indeed, an inmate can establish deliberate indifference by showing that a prison official decided to pursue an "easier but less efficacious course of treatment." *George v. Sonoma Cnty. Sheriff's Dep't*, 732 F. Supp. 2d 922, 937 (N.D. Cal. 2010) (quoting *McElligot v. Foley*, 182 F.3d 1248, 1255 (11th Cir. 1999)); *see also Greeno v. Daley*, 414 F.3d 645, 655 (7th Cir. 2005).

herence is adequate given the reality of COVID-19.[8] Plaintiffs have alleged that Defendants aren't following their own policies or CDC guidance, Compl. ¶¶ 47–48, which is enough to support a plausible claim that Defendants are deliberately indifferent. "Having informed [Defendants] of the factual basis for their complaint, [Plaintiffs are] required to do *no more* to stave off threshold dismissal for want of an adequate statement of their claim." *Johnson v. City of Shelby*, 574 U.S. 10, 12 (2014) (per curiam) (emphasis added).

c. Plaintiffs Have Articulated Facts Supporting Risk of Harm

In a final half-hearted attempt to stave off the Eighth Amendment claim, Defendants argue that their own failure to follow their own policies does not demonstrate a constitutional violation because, they say, Plaintiffs do not articulate how that failure has harmed them. Mot. 20. Not so. Plaintiffs have alleged that Defendants' lack of adherence to their own policies increases the already significant risk that Plaintiffs will be exposed to COVID-19. Compl. ¶ 48. Plaintiffs have alleged that, as medically vulnerable inmates suffering from preexisting comorbidities like diabetes, diabetic neuropathy, hypertension, and serious heart conditions, they stand to endure serious harm and possible death if they contract COVID-19. *Id.* ¶¶ 51–60. [redacted] Duke Decl. Ex. 1. Not only does that "cast doubt" on the policies Defendants claim they have enacted as purportedly ade-

[8] Defendants say that Plaintiffs are disingenuous in claiming that Defendants' policies don't track many of the CDC's recommendations. *See* Mot. 15. Plaintiffs take exception to that characterization. Plaintiffs filed their complaint on March 30, 2020. At least some of the policies Defendants point to as supposedly evidencing their compliance with CDC guidance are dated April 15, 2020—after the complaint was filed and just one day before the evidentiary hearing on the preliminary injunction. *See* CMHC Infection Control Manual Policy No. B-14.52, attached as Ex. A. to Defs.' Mot., ECF No. 53-1. But setting that aside, Plaintiffs have alleged (and already proffered evidence to support the allegation) that Defendants are not complying with their own policies. *See* Order 22–23, ECF No. 51. What is more, although CDC guidelines may provide a baseline for what is reasonable in some prisons, the guideline itself notes that it might need adjusting to account for specific circumstances and populations. Given the known spread of the virus in the Pack Unit and the Unit's vulnerable population, CDC recommendations are insufficient here.

quate protections from COVID-19 (*see* Order 23, ECF No. 51), but it also portends the ultimate serious risk of harm that Defendants' inaction risks visiting upon Plaintiffs, *see* Compl. ¶ 48.

Defendants' two cases do not stand for the proposition they cite them for, and do not show that Plaintiffs' Eighth Amendment allegations fail the pleading standard. Those cases center on whether a prison official violates due process guarantees when he confiscates a prisoner's property in violation of the prison's own policies. *Stanley v. Foster*, 464 F.3d 565, 569 (5th Cir. 2006) (affirming dismissal of prisoner's frivolous claim that official confiscated prisoner's medical pass in violation of prison policy; confiscation did not violate due process, especially where medical pass was reissued "on the same day that it was initially confiscated"); *Myers v. Klevenhagen*, 97 F.3d 91, 94 (5th Cir. 1996) (depriving inmates of property in violation of prison policy "does not constitute a violation of due process, if constitutional minima," including access to adequate post-deprivation remedies, "are nevertheless met"). Neither of these cases holds that a prison official escapes the Eighth Amendment's command against cruel and unusual punishment when he deliberately ignores prison policy.

2. Plaintiffs Have Stated Claims Under the ADA and Rehabilitation Act

a. The ADA and Rehabilitation Act Apply During the Pandemic

Relying on *Hainze v. Richards*, 207 F.3d 795 (5th Cir. 2000), TDCJ urges the Court to substantially widen a narrow, limited exception to the ADA and Rehabilitation Act's commands against discrimination. In *Hainze*, police responded to a 911 call about a mentally ill, intoxicated man who was threatening "suicide by cop." *Id.* at 797. Upon arriving at the scene, the officers found the man holding a knife. *Id.* The plaintiff began yelling profanities and then advanced toward the officers. *Id.* The officers twice ordered the plaintiff to stop, but he continued, and once he was within "four to six feet," one of the officers fired, injuring the plaintiff. *Id.* Only twenty seconds had elapsed between the time the officers first arrived on the scene until the officer

pulled the trigger. *Id.* The plaintiff sued for violations of the ADA and the Rehabilitation Act, based on, among other things, accusations that defendants discriminated against him based on his disability (mental illness) by refusing to offer him accommodations before firing the weapon. *Id.* at 795, 798.[9]

Out of these specific facts, a narrow exception to the ADA and Rehabilitation Act was born: Neither statute applies "to an officer's *on-the-street responses* to reported disturbances or other similar incidents, whether or not those calls involve subjects with mental disabilities, prior to the officer's *securing the scene* and ensuring that there is no threat to human life." *Id.* at 801 (emphasis added). The court explained its rationale for the narrowly drawn exception, which affords officers in the field time to assess and secure a volatile scene when making an arrest:

> Law enforcement personnel conducting in-the-field investigations already face the onerous task of frequently having to instantaneously identify, assess, and react to potentially life-threatening situations. To require the officers to factor in whether their actions are going to comply with the ADA, in the presence of exigent circumstances and prior to securing the safety of themselves, other officers, and any nearby civilians, would pose an unnecessary risk to innocents.

Id. The Fifth Circuit made clear that its holding in *Hainze* was limited to the specific circumstances in that case. *Id.* (exception limited to circumstances "such as presented herein"). Under the exception, arresting officers need not employ reasonable accommodations for their disabled attackers when they are making split-second safety decisions at the scene of an arrest:

> We are not persuaded that requiring [the responding officer] and other similarly situated officers to use less than reasonable force in defending themselves and others, or to hesitate to consider other possible actions in the course of making such split-second decisions, is the type of "reasonable accommodation" contemplated by Title II [of the ADA].

[9] The plaintiff later was convicted of aggravated assault with a deadly weapon based on the incident. *Id.*

Id. at 801–02.

A recent Fifth Circuit decision recognizes just how limited the *Hainze* exception is. *See Wilson v. City of Southlake*, 936 F.3d 326, 331 (5th Cir. 2019). In *Wilson*, an officer subdued and handcuffed a combative, autistic eight-year-old child who was behaving erratically and threatening school officials with a jump rope. *Id.* at 328. The parents brought ADA and Rehabilitation Act claims against the officer. Relying on *Hainze*, the district court granted summary judgment for the officer, finding that he was exempt from ADA and Rehabilitation Act liability because *Hainze* did not require him to "inquire as to the disability status of a child before attempting to secure the disruption …." *Id.* at 330. But the Fifth Circuit vacated the grant of summary judgment, noting that the *Hainze* exception applied to "an officer's on-the-street responses to reported disturbances or other similar incidents," and concluding that the disruption by the eight-year old did not fit that bill. *Id.* at 331 (internal quotation omitted); *see also Windham v. Harris Cnty., Tex.*, 875 F.3d 229, 235 n. 4 (5th Cir. 2017) (declining to apply exception during even "non-exigent" arrest). Indeed, *Hainze* has never been applied outside the context of an in-the-field arrest, and Defendants do not argue that it has been. *See generally*, *e.g.*, *Salinas v. City of New Braunfels, Tex.*, 557 F. Supp. 2d 771, 776 (W.D. Tex. 2006) (declining to extend exception to 911 services).

Hainze does not excuse TDCJ's disability discrimination and failure to accommodate Plaintiffs. To be sure, the COVID-19 pandemic presents serious risk of severe illness and death to those who, like Plaintiffs, are people with disabilities. But this is not a situation in which officers are in the field making arrests, with only seconds to decide whether the arrestee poses a serious threat to the officers themselves or to others on the scene. *Hainze*, by its own terms, teaches only that the ADA and Rehabilitation Act's mandates are relaxed when an arrestee *himself* poses

a serious threat; it does not permit the government to evade liability for disability discrimination in any other circumstance.[10] Indeed, the Pack Unit's present situation equates more to what happened in *Hainze* after the arrestee had been subdued and the scene was secure, which even the *Hainze* court recognized would then retrigger the officers' "duty to reasonably accommodate Hainze's disability in handling and transporting him to a mental health facility." *Hainze*, 207 F.3d at 802; *see Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 213 (1998). The Court should decline to distort the narrow *Hainze* exception beyond its carefully circumscribed contours.

b. Plaintiffs Have Stated an ADA and Rehabilitation Act Claim

The ADA and the Rehabilitation Act provide that a public entity cannot deny people with disabilities the benefits or services the entity provides and cannot otherwise discriminate against the disabled based on their disabilities. *Garrett v. Thaler*, 560 F. App'x 375, 382 (5th Cir. 2014) (quoting *Frame v. City of Arlington*, 657 F.3d 215, 223 (5th Cir. 2011)).[11] Both the Rehabilitation Act and the ADA "impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals," including prison inmates. *Smith v. Harris Cnty., Tex.*, 956 F.3d 311, 317 (5th Cir. 2020) (quoting *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454 (5th Cir. 2005)); *Cadena v. El Paso Cnty.*, 946 F.3d 717, 723 (5th Cir. 2020); *Garrett*, 560 F. App'x at 382.[12]

---

[10] Indeed, Judge Ho noted that even the narrow exception set out in *Hainze* "appears nowhere in the text" of either the ADA or the Rehabilitation Act, which likewise weighs against expanding the exception beyond the specific circumstances in *Hainze*. *Wilson*, 936 F.3d at 333 (Ho, J., concurring) (collecting cases, noting that other circuits have rejected even the narrow exception discussed in *Hainze*).

[11] Section 504 of the Rehabilitation Act provides that no "otherwise qualified individual with a disability … shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance …." 29 U.S.C. § 794.

[12] "The close relationship between Section 504 of the Rehabilitation Act and Title II of the ADA means that precedents interpreting either law generally apply to both." *Smith*, 956 F.3d at 317.

"A plaintiff states a claim for relief under Title II [and under the Rehabilitation Act] if he alleges: (1) that he has a qualifying disability; (2) that he is being denied the benefits of services, programs, or activities for which the public entity is responsible, or is otherwise discriminated against by the public entity; and (3) that such discrimination is by reason of his disability." *Hale v. King*, 642 F.3d 492, 499 (5th Cir. 2011). A prison's failure to make reasonable accommodations for disabled inmates can "constitute denial of services and discrimination sufficient to satisfy the second two prongs" of an ADA claim. *Garrett*, 560 F. App'x at 382 (citing *Tennessee v. Lane*, 541 U.S. 509, 531 (2004)). Indeed, a failure to reasonably accommodate the disabled "will often have the same practical effect as outright exclusion" from the benefits of services and programs a public entity provides. *Lane*, 541 U.S. at 531. Thus, "[d]iscrimination under the ADA and Rehabilitation Act may include a defendant's failure to make reasonable accommodations to the needs of a disabled person." *Wright v. Tex. Dep't of Crim. Justice*, No. 7:13-cv-116, 2013 WL 6578994, at *3 (N.D. Tex. Dec. 16, 2013); (citation omitted); *see also McCoy v. Tex. Dep't of Crim. Justice*, No. 2:05-cv-370, 2006 WL 2331055, at *7 and n. 6 (S.D. Tex. Aug. 9, 2006) ("[L]ack of an accommodation may cause the disabled prisoner to suffer more pain and punishment than non-disabled prisoners."). "In fact, it is quite plausible that the alleged deliberate refusal of prison officials to accommodate [a prisoner's] disability-related needs in such fundamentals as mobility, *hygiene*, *medical care*, and virtually all other prison programs constituted exclusion from participation in or … denial of the benefits of the prison's services, programs, or activities." *United States v. Georgia*, 546 U.S. 151, 157 (2006) (cleaned up) (emphasis added) (quoting 42 U.S.C. § 12132); *see also Yeskey*, 524 U.S. at 210 (the phrase "services, programs, or activities" in Title II of the ADA includes medical, educational, and other prison programs).

To succeed on a failure-to-accommodate claim, a plaintiff ultimately must prove: "(1) he is a qualified individual with a disability; (2) the disability and its consequential limitations were known by the covered entity; and (3) the entity failed to make reasonable accommodations." *Smith*, 956 F.3d at 317 (internal quotation marks and citation omitted).

Here, Defendants do not contest that Plaintiffs are people with disabilities. Instead, they claim that Plaintiffs haven't pleaded that they were denied access to benefits or services based on their disabilities. Mot. 22. But Plaintiffs have pleaded that TDCJ has failed to accommodate their disabilities in the face of COVID-19, and that the lack of reasonable accommodation—which leads to a heightened and substantial risk of exposure to the virus—will cause Plaintiffs "to suffer more pain and punishment than non-disabled prisoners." *McCoy*, 2006 WL 2331055, at *7; *Wright*, 2013 WL 6578994, at *3; *see* Compl. ¶¶ 51–60, 81–89. They have pleaded that, because of disabilities that make them particularly susceptible to COVID-19's dangerous effects, they "are in especially acute need of access to accommodations," including for example, alcohol-based hand sanitizer, adequate cleaning supplies, access to antibacterial hand soap, and increased social-distancing measures. Compl. ¶¶ 82, 89. When TDCJ fails to provide appropriate hygienic, sanitizing, disinfecting, and other life-saving accommodations to disabled inmates—even though it knows they need those measures—it illegally discriminates against them in administering state-provided medical services and hygiene care. *See id.* ¶¶ 83–87; *see also Smith*, 956 F.3d at 317. In other words, Plaintiffs have adequately pleaded disability discrimination because they have alleged facts to support that TDCJ failed to accommodate their disabilities, even though TDCJ knows Plaintiffs are disabled and knows of the serious risk of harm COVID-19 presents to disabled inmates. *See* Compl. ¶¶ 22–29, 81–89. Plaintiffs therefore have adequately alleged facts that, assumed as true, state claims for ADA and Rehabilitation Act violations. *See Hinojosa v.*

Livingston, 994 F. Supp. 2d 840, 843 (S.D. Tex. 2014) (finding that plaintiff alleged enough facts to state ADA claim where she claimed TDCJ knew of risks but still "failed to make reasonable accommodations, resulting in the decedent suffering more pain and punishment than non-disabled prisoners").

Defendants also incorrectly argue that Plaintiffs' ADA and Rehabilitation Act claims amount to a request for special treatment. Mot. 23. In the face of a pernicious disease that strikes more virulently at the disabled because of their comorbidities, Defendants' argument is as offensive as it is erroneous. The nature of Plaintiffs' disabilities makes them more susceptible to the risk of serious illness or death from COVID-19 versus those who are not disabled, and TDCJ must therefore provide reasonable accommodations. *See Hinojosa*, 994 F. Supp. 2d at 843 ("It is not enough for Defendant to claim that all prisoners in the [facility]—whether suffering from a disability or not—endured the same housing and living conditions that the decedent did because even though the condition complained of was suffered by all of the inmates, Plaintiff has alleged sufficient facts to state that those conditions were more onerous on the decedent due to his particular disabilities.").

Indeed, Defendants' argument that disabled inmates should be treated the same as non-disabled inmates all but acknowledges Defendants' unlawful discrimination: They implicitly concede that they are not accommodating disabled inmates vis-à-vis non-disabled inmates, despite the allegation that disabled inmates are at greater risk of serious illness or death from COVID-19. While Defendants claim they have established a "state-wide protocol" for COVID-19 that applies generally to "all 104" TDCJ facilities, Mot. 23, ECF No. 53, that argument ignores the unique characteristics of the disabled inmates housed at Pack. Under Defendants' flawed reasoning, wheelchair access ramps, shower grab-bars, and heart medications are all

unnecessary for the disabled because able-bodied prisoners don't need them. That, of course, is not the law. *Riel v. Elec. Data Sys. Corp.*, 99 F.3d 678, 681 (5th Cir. 1996) ("[T]he ADA shifts away from similar treatment to different treatment of the disabled by accommodating their disabilities."). Providing increased protections for the disabled against the deadliness of COVID-19 constitutes no more special treatment than a wheelchair ramp does for an inmate who has lost the use of his legs.[13] Defendants' failure to make reasonable accommodations for the disabled inmates in its charge constitutes disability discrimination.

C. The PLRA's Exhaustion Requirement Does Not Bar Plaintiffs' Claims

The PLRA requires prisoners to exhaust "such administrative remedies as are available" before filing a federal suit challenging prison conditions. 42 U.S.C. § 1997e(a). But there is a "built-in exception to the exhaustion requirement: A prisoner need not exhaust remedies if they are not 'available.'" *Ross v. Blake*, 136 S. Ct. 1850, 1855 (2016). A remedy is "available" only if it is "capable of use" by an inmate to "obtain some relief for the action complained of." *Id.* at 1858–59 (quotation marks and citation omitted). Defendants will bear the burden to prove "beyond peradventure" that a remedy was available because failure to exhaust is an affirmative defense. *Dillon v. Rogers*, 596 F.3d 260, 266 (5th Cir. 2010).

In the context of "the alarming speed with which COVID-19 continues to spread throughout the states and their prison systems," this Court has already found that TDCJ's administrative grievance procedures are not 'capable of use' to obtain the swift and particularized relief

[13] Defendants' authority is unpersuasive. In *Tuft v. Texas*, the *pro se* inmate "did not provide any summary-judgment evidence" showing TDCJ discriminated against him: There was no evidence "the overcrowding [in prison showers] had a greater effect in impairing his access to showers than it did for non-disabled prisoners." 410 F. App'x 770, 775 (5th. Cir. 2011). Here, Plaintiffs have pleaded (and in the preliminary injunction hearing, demonstrated with record evidence) that people with certain disabilities are at serious risk of complications of COVID-19 compared to able-bodied inmates and thus require additional protection. *See*, *e.g.*, Compl. ¶ 89; Young Decl. ¶¶ 5, 19, ECF No. 12; Cohen Decl. 5, ECF No. 13

needed by vulnerable, high-risk prisoners. *Sowell v. Tex. Dep't of Crim. Justice*, No. 4:20-cv-1492, 2020 WL 2113603, at *3 (S.D. Tex. May 4, 2020) (Ellison, J.); *see also* Order 15–17, ECF No. 51 (finding TDCJ's grievance procedures do not provide an available remedy to Plaintiffs given the current global pandemic). Here, Plaintiffs have pleaded that, as disabled inmates suffering from serious medical conditions, they have heightened medical needs because they are at substantial risk of severe illness and death from COVID-19. Compl. ¶¶ 2, 22–29, 44, 51–60, 81–89. TDCJ's lumbering grievance system cannot address that significant risk, which means there is no "available" remedy to exhaust.[14]

D. The Fifth Circuit's Stay Is Not the Law of the Case on Exhaustion

Asking the Court to stretch the law-of-the-case doctrine beyond its bounds, Defendants argue that the Fifth Circuit has already found that Plaintiffs failed to exhaust remedies, which they say merits dismissal of Plaintiffs' suit. Supp. Mot. 3, ECF No. 55. Defendants are wrong. True, the law-of-the-case doctrine teaches that "an issue of law or fact decided on appeal may not be reexamined either by the district court on remand or by the appellate court on a subsequent appeal." *In re Deepwater Horizon*, 723 F. App'x 247, 249 (5th Cir. 2018) (internal quotation marks and citation omitted). But a "motion panel's ruling does not create binding precedent" or law of the case. *Id.* (citing *Northshore Dev., Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988)); *accord E. Bay Sanctuary Covenant v. Trump*, 950 F.3d 1242, 1263 (9th Cir. 2020) (noting that "good policy and practical reasons" exist for declining to allow a motions panel's decision to become law of the case, because those decisions "are generally issued without oral argument, on limited timelines, and in reliance on limited briefing"); *Council Tree Commc'ns, Inc. v. F.C.C.*, 503 F.3d 284, 292 (3d Cir. 2007) (motions panel decisions are not binding as law of the case);

[14] Because failure to exhaust is an affirmative defense, Defendants must shoulder the burden to show their grievance system is "available" to address the emergency presented by the pandemic.

Kennedy v. Lubar, 273 F.3d 1293, 1299 (10th Cir. 2001) (noting that "law of the case principles apply only to decisions on the actual merits"). This is particularly true here because the motions panel considered only whether to stay a preliminary injunction, which is at best a "probabilistic endeavor," not a final decision on the merits where all parties have been fully heard on the exhaustion issue. *See E. Bay Sanctuary Covenant*, 950 F.3d at 1264. The Fifth Circuit's motions panel reached its *per curiam* decision on the stay without an oral argument, on a hastened timeline, based on only limited briefing. *See Valentine v. Collier*, No. 20-20207, 2020 WL 1934431, at *7 (5th Cir. Apr. 22, 2020).[15] Plaintiffs have not had their "day in court" on the exhaustion question, and the Fifth Circuit's treatment of that issue on the stay motion is not the law of the case. *See Conway v. Chem. Leaman Tank Lines, Inc.*, 644 F.2d 1059, 1062 (5th Cir. 1981).

Conclusion

Plaintiffs have shown constitutional standing because they have alleged and shown that COVID-19 poses a serious risk of imminent harm to them, given Defendants' conduct. The remedies they ask the Court to impose will provide redress. Plaintiffs have stated an Eighth Amendment claim because they have pleaded facts that, accepted as true, show Defendants are aware of a significant threat to Plaintiffs' health and safety, but still intentionally or recklessly disregard that serious threat. Plaintiffs have also stated claims for ADA and Rehabilitation Act violations because they have alleged TDCJ has failed to reasonably accommodate their disabilities. No exception to the commands of those statutes applies here. Finally, the law-of-the-case doctrine does not warrant dismissal. The Court should deny Defendants' motion to dismiss.

[15] Plaintiffs have also asked the U.S. Supreme Court to vacate the stay. *Valentine v. Collier*, No. 19A1034 (U.S. May 4, 2020)

Dated: May 13, 2020

WINSTON & STRAWN LLP

By: */s/ John R. Keville*

John R. Keville
Attorney-in-Charge
Texas State Bar No. 00794085
S.D. Tex. ID No. 20922
jkeville@winston.com
Denise Scofield
Texas Bar No. 00784934
S.D. Tex. ID No. 1529 dsco-field@winston.com
Michael T. Murphy
Texas Bar No. 24051098
S.D. Tex. ID No. 621098
MTMurphy@winston.com
Brandon W. Duke
Texas Bar No. 240994476
S.D. Tex. ID No. 2857734
bduke@winston.com
Benjamin D. Williams
Texas Bar No. 24072517
S.D. Tex. ID No. 1447500
bwilliams@winston.com
Robert L. Green
Texas Bar No. 24087625
S.D. Tex. ID No. 2535614
RLGreen@winston.com
Corinne Stone Hockman
Texas Bar No. 24102541
S.D. Tex. ID No. 3019917
CHockman@winston.com
WINSTON & STRAWN LLP
800 Capital Street, Suite 2400
Houston, Texas 77002
Tel. (713) 651-2600
Fax (713) 651-2700

Jeff Edwards
State Bar No. 24014406
Scott Medlock
State Bar No. 24044783
Michael Singley
State Bar No. 00794642
David James
State Bar No. 24092572
Federal ID No. 2496580
THE EDWARDS LAW FIRM
The Haehnel Building
1101 East 11th Street
Austin, TX 78702
Tel. (512) 623-7727
Fax. (512) 623-7729

CERTIFICATE OF SERVICE

I certify that on May 13, 2020, a copy of this Response to Defendants' Motion to Dismiss, along with the accompanying declaration of Brandon Duke and the exhibit to that declaration, were served upon all counsel of record through the Court's CM/ECF filing system.

/s/ Benjamin D. Williams
Benjamin D. Williams