IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JOHN HICKS, MELINDA WASHINGTON, DAVID SMITH and JAMES DOUGLAS,	)	
Plaintiffs,	)	
v.	)	**Civil action no.: 2:11-CV-00224**
ROBERT BENTLEY, KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON,	)	
Defendants.	)	

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendants ROBERT BENTLEY ("Governor Bentley"), KIM THOMAS ("Mr. Thomas"), BILLY MITCHEM ("Mr. Mitchem"), FRANK ALBRIGHT ("Mr. Albright"), BETTINA CARTER ("Ms. Carter") and EDWARD ELLINGTON ("Mr. Ellington," or collectively with Governor Bentley, Mr. Thomas, Mr. Mitchem, Mr. Albright and Ms. Carter, the "State"), pursuant to Rules 8(a)(2), 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, submit this Memorandum of Law in Support of Motion to Dismiss in response to the First Amended Complaint (Doc. No. 31) filed by Plaintiffs LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JOHN HICKS, DAVID SMITH, JAMES DOUGLAS and MELINDA WASHINGTON (the "Named Plaintiffs").[1] Along with this Memorandum, the State submits the Affidavits of Tonitta Reese[2]

[1] **RESERVATION OF OBJECTIONS REGARDING CLASS CERTIFICATION:** The State hereby respectfully reserves any and all objections which it currently possesses with respect to the Named Plaintiffs' request for

("Reese Aff") and Debbie Hunt[3] ("Hunt Aff.") attached hereto as **Exhibits "1"** and **"2."**

INTRODUCTION

The long-standing correctional policy in this State regarding HIV-positive inmates is no stranger to litigation. It has been the subject of at least two (2) prior failed challenges. In this case, the Named Plaintiffs raise the same complaints based upon the same factual allegations and the same law in the same jurisdiction as the groups of HIV-positive inmates who preceded them. Yet, for some unknown reason, they have reconstituted these identical claims in this new filing and expect a different result. In short, this action is not a second bite at the proverbial apple - the apple was cleaned, eaten and the remnants disposed of more than a decade ago.

The State's historical policy regarding the housing of the HIV-positive inmate population is well-known. Indeed, the fundamental rationale and reasoning behind the State's policies related to HIV-positive inmates have been challenged in court, supported and justified through substantial evidence and upheld by courts, including the United States Court of Appeals for the

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permission to pursue the claims set forth in their First Amended Complaint on behalf of "approximately 250 prisoners in ADOC custody who have tested positive for HIV." (First Amended Complaint, Doc. No. 31 at ¶ 8). Moreover, in the event that the Court determines that this matter should proceed to discovery as to any of the claims and/or issues set forth in the First Amended Complaint, the State respectfully requests that the Court exercise its authority and discretion pursuant to Rule 23(d) of the Federal Rules of Civil Procedure and set forth certain deadlines and discovery guidelines and otherwise determine the appropriate course of proceedings with respect to the issue of class certification.

[2] Tonitta Reese is currently employed as the Health Services Administrator ("HSA") at Tutwiler Prison for Women ("Tutwiler") in Wetumpka, Alabama, Montgomery Women's Facility ("Montgomery WF") in Montgomery, Alabama and Birmingham Work Release ("Birmingham WR") in Birmingham, Alabama. (Reese Aff. at ¶ 2). As the HSA, she is generally responsible for the overall administration of the Health Care Unit at Tutwiler, Montgomery WF and Birmingham WR. This necessarily includes the administrative and clinical management of the medical staff at Tutwiler, Montgomery WF and Birmingham WR. She has served as the HSA for Tutwiler, Montgomery WF and Birmingham WR since March 28, 2011. Prior to her position as the HSA, she was employed as the Director of Nursing at Tutwiler for a period of approximately four (4) months. She is currently licensed as a registered nurse in the State of Alabama and has held this license since 2000.

[3] Debbie Hunt is currently employed as the HSA at Limestone Correctional Facility ("Limestone") in Harvest, Alabama and Decatur Work Release ("Decatur WR") in Decatur, Alabama. (Hunt Aff. at ¶ 2). As the HSA at Limestone / Decatur WR (she no longer practices nursing as part of her role at Limestone or Decatur WR), her duties and responsibilities are primarily administrative in nature, overseeing the general administration of the medical delivery system and medical staff at Limestone / Decatur WR. (Id.). She has been employed as the HSA at Limestone / Decatur WR since approximately November 1, 2007, though she worked as part of the medical staff at Limestone / Decatur WR prior to November of 2007. (Id.).

Eleventh Circuit. See Onishea v. Hopper, 171 F.3d at 1289 (11th Cir. 1999). Not surprisingly, the Named Plaintiffs' pleadings are devoid of any reference to these prior proceedings. Regardless of the technical faults with the Named Plaintiffs' claims, the State, including the Alabama Department of Corrections ("ADOC"), remains faithful to its belief that the long-standing policy of specialized housing units for special needs patients, like the HIV-positive population, best serves the interests of the State and its taxpayers, the individuals working within the correctional system on a day-to-day basis, the non-HIV inmate population in Alabama, the HIV-positive inmate population, *and* even the Named Plaintiffs.

Though the State firmly believes that the claims of the Named Plaintiffs are factually bankrupt, their claims also fail under the scrutiny of Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Named Plaintiffs' claims are barred as a matter of law for the following reasons:

(1) The Named Plaintiffs' claims are precluded by the doctrine of *res judicata*;

(2) The Named Plaintiffs fail to state a claim for relief under Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* and § 504 of the Rehabilitation Act, 29 U.S.C. § 794;

(3) The Named Plaintiffs fail to allege compliance with the mandatory provisions of the Prison Litigation Reform Act (PLRA); and

(4) The State is entitled to Eleventh Amendment immunity from the claims of the Named Plaintiffs.

For these reasons, which are discussed in greater detail below, the Named Plaintiffs' Complaint and First Amended Complaint are due to be dismissed.

PROCEDURAL BACKGROUND

The Named Plaintiffs consist of six (6) male inmates incarcerated at Limestone, one (1) male inmate incarcerated at Decatur WR and two (2) female inmates incarcerated at Tutwiler.

(First Amended Complaint at ¶¶ 17-34). The one common trait among all nine (9) of the Named Plaintiffs is they have all been diagnosed as HIV-positive. (Id. at ¶¶ 17, 20, 23, 24, 26, 28, 31, 33, 34). The Named Plaintiffs together with three (3) other inmates originally filed this action on March 28, 2011. (See Complaint, Doc. No. 1). The State requested additional time to file its response to the original Complaint on April 18, 2011, which was subsequently granted on April 19, 2011. (Doc. No. 30). On May 11, 2011, the Named Plaintiffs amended their Complaint, filing their First Amended Complaint which is substantially identical to the original Complaint other than removing three (3) of the inmates named as plaintiffs in the original Complaint. (Compare Complaint, Doc. No. 1, and First Amended Complaint, Doc. No. 31).

The allegations and claims of the Named Plaintiffs all center upon the oft-repeated, generic phrase that the Named Plaintiffs have been allegedly excluded from and/or denied the opportunity to participate in "ADOC services, programs, or activities." (See, e.g., First Amended Complaint). With respect to the Named Plaintiffs, the First Amended Complaint makes various references to some specific "services, programs, or activities." (Id.). For example, the seven (7) male Named Plaintiffs refer to their exclusion from the Faith-Based Honor Dorm, the senior dorm, the Substance Abuse Program Dorm, the pre-release dorm and food services positions at Limestone. (Id. at ¶¶ 19, 24, 25, 29).

These seven (7) Named Plaintiffs also assert allegations directed at their housing assignments and the State's classification practices. More specifically, the First Amended Complaint states as follows:

> Plaintiff Louis Henderson believes he qualifies for a "transfer to a facility providing vocational training in heating and air, small engine repair, and information systems . . . [or] to an ADOC facility closer to his home in Mobile." (Id. at ¶ 19);
>
> Plaintiff Darrell Robinson believes he qualifies for a "transfer to a facility offering ['furniture restoration and cabinet making

> programs'] or an ADOC facility closer to his home in Mobile." (Id. at ¶ 21);
>
> Plaintiff John Hicks "would like to transfer to a facility where he can apply [his] skills" as a "certified welder." (Id. at ¶ 23);
>
> Plaintiff Dwight Smith believes he qualifies for a "transfer to the Alabama Therapeutic Education Center; . . . a facility providing vocational training such as barbering; [or] . . . a facility closer to his home in Atlanta." (Id. at ¶ 27);
>
> Plaintiff James Douglas believes he qualifies for a "transfer to a facility providing vocational training such as heating and air or electrical technology . . . [or] to an ADOC facility closer to his home in Mobile." (Id. at ¶ 29); and
>
> Plaintiff David Smith believes he qualifies for a "transfer to a facility providing vocational such as plumbing or electrical technology . . . [or] to an ADOC facility closer to his home in Auburn." (Id. at ¶ 29).

Importantly, the First Amended Complaint does *not* allege that non-HIV inmates within the State's correctional system are permitted to request a transfer to any particular facility or that non-HIV inmates are housed in facilities with vocational programs of their choosing or closer in proximity to their hometowns. (See id.).

With respect to the two (2) female Named Plaintiffs, the specificity of allegations again varies greatly. Plaintiff Dana Harley complains about the segregated housing at Tutwiler, but then complains about a specific incident involving Warden Albright. (Id. at ¶ 33). Plaintiff Melinda Washington also voices complaints about the "segregated dormitory," but then alleges in cursory fashion "harsher punishment" and denied "access to programs." (Id. at ¶ 34). Neither female Named Plaintiff references any allegations related to any specific program or any specific instance of disparate punishment. (Id. at ¶¶ 33-34).

Some of the material allegations set forth in the First Amended Complaint are contradictory. For example, Plaintiff Louis Henderson claims he has been denied the

opportunity to participate in the ADOC's "work release [program] . . . solely because he has HIV." (Id. at ¶ 19). Plaintiffs Dwight Smith, James Douglas and David Smith make nearly identical statements, alleging their exclusion from work release "because [they have] HIV." (Id. at ¶¶ 26, 30, 32). However, the First Amended Complaint also states:

> [Plaintiff] John Hicks is a person with HIV . . . [and] is a prisoner housed at ***Decatur Work Release***.

(Id. at ¶ 23) (emphasis added). By virtue of this allegation, the First Amended Complaint establishes that HIV prisoners are *not* denied access to work release programs solely because they have HIV.

Based upon the allegations set forth in the First Amended Complaint, the Named Plaintiffs assert claims against the State for alleged violations of Title II of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA") and § 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Rehabilitation Act").

THE RELEVANT GRIEVANCE PROCESSES

The health care units within ADOC facilities generally rely upon the same procedures for obtaining emergency and non-emergency (i.e., sick call) medical treatment, conducting chronic care clinics, medication administration, segregation sick call and the like and permitting an inmate's invocation of and participation in a grievance process. (Reese Aff. at ¶ 4; Hunt Aff. at ¶ 4). More specifically, inmates at Limestone, Tutwiler, Birmingham WR, Decatur WR and Montgomery WF may voice concerns, complaints, grievances and/or criticisms related to their medical conditions, medical care or other matters which are medical in nature through the long-standing grievance processes maintained by the facilities' medical staffs. (See generally Hunt Aff. and Reese Aff.).

As part of inmate orientation at these facilities, inmates are provided forms entitled "ACCESS TO HEALTHCARE SERVICES" which also provide a detailed explanation of the grievance process. (Id.). At Limestone and Decatur WR, the medical staff provides inmates with these forms without requiring any form of signature of acknowledgement of any kind. (Hunt Aff. at ¶ 4; ADOC018-19). However, at Tutwiler, Plaintiffs Dana Harley and Melinda Washington signed and/or acknowledged in writing their receipt and review of the "ACCESS TO HEALTHCARE SERVICES" form. (Reese Aff. at ¶ 4; ADOC001-4). In signing these forms, Plaintiffs Dana Harley and Melinda Washington acknowledged their understanding of the grievance process offered by the medical staff at Tutwiler. (Id.).

The grievance processes at these facilities are generally supervised by the Health Services Administrators (collectively, "HSAs" or, individually, "HSA") or other medical personnel at these facilities. (Hunt Aff. at ¶ 5; Reese Aff. at ¶¶ 5-6). As indicated by the HSA at Tutwiler (in her attached affidavit), it is her experience that the patient population at these facilities understand and often utilize the grievance process to voice complaints regarding a variety of matters related to the medical staff and their medical conditions. (Reese Aff. at ¶ 5). The members of the medical staffs at Limestone, Tutwiler, Birmingham WR, Decatur WR and Montgomery WF receive grievances from inmates on a daily basis inmates. (Hunt Aff. at ¶ 5; Reese Aff. at ¶¶ 5-6).

The grievance process at Limestone, Tutwiler, Birmingham WR, Decatur WR and Montgomery WF is initiated when an inmate submits an informal "Medical Grievance" form to the healthcare unit through the institutional mail system. (Reese Aff. at ¶ 6; Hunt Aff. at ¶ 6). After reviewing the Medical Grievance, a written response is provided within approximately five (5) days of receipt of the Medical Grievance. (Id.). The written response to a Medical Grievance

is included on the bottom portion of the same form containing an inmate's Medical Grievance. (Id.). Below the portion of the form designated for the "RESPONSE," the following notation appears:

> IF YOU WISH TO APPEAL THIS REVIEW YOU MAY REQUEST A GRIEVANCE APPEAL FORM FROM THE HEALTH SERVICES ADMINISTRATOR. RETURN THE COMPLETED FORM TO THE ATTENTION OF THE HEALTH SERVICE ADMINISTRATOR. YOU MAY PLACE THE FORM IN THE SICK CALL REQUEST BOX OR GIVE IT TO THE SEGREGATION SICK CALL NURSE ON ROUNDS.

(Id.). As stated in the Medical Grievance forms, the second step of the grievance process involves the submission of a formal "Medical Grievance Appeal," at which time the inmate may be brought in for one-on-one communication with the medical staff. (Id.). A written response to a Medical Grievance Appeal is provided within approximately five (5) days of receipt. (Id.). Medical Grievance and Medical Grievance Appeal forms are available from the correctional shift commander office at Limestone, Tutwiler, Birmingham WR, Decatur WR and Montgomery WF and the health care unit. (Id.).

Inmates are instructed to place completed Medical Grievance and Medical Grievance Appeal forms in the sick call boxes located in the chow hall. (Id.). Grievances are reviewed daily, with a written response provided and returned with a copy of the completed forms to the inmate. (Id.).

Some, but not all, of the Named Plaintiffs have utilized the available grievance process during the course of their incarceration. Plaintiff David Smith filed thirty-seven (37) grievances during the course of his incarceration at Limestone, which are attached to the affidavit of Debbie Hunt as **Exhibit "B."** (Hunt Aff. at ¶ 5; ADOC020-58). Plaintiff Dana Harley, during the course of her incarceration at Tutwiler, filed four (4) grievances which are attached to the affidavit of Tonitta Reese as **Exhibit "B."** (Reese Aff. at ¶ 6; ADOC005-11). Plaintiff Melinda Washington,

during the course of her incarceration at Tutwiler, filed three (3) grievances which are attached to the affidavit of Tonitta Reese as **Exhibit "C."** (Id.; ADOC012-17). Despite the existence of more than forty (40) grievances from the Named Plaintiffs, none of these grievances mention any of the specific complaints or allegations raised in the First Amended Complaint, including any medical issues of any kind. (Hunt Aff. at ¶ 5; ADOC020-58; Reese Aff. at ¶ 6; ADOC005-17).

ARGUMENT

I. THE DOCTRINE OF *RES JUDICATA* BARS THIS MOST RECENT ATTEMPT AT RE-LITIGATION OF WELL-SETTLED ISSUES.

According to the Named Plaintiffs, the State's correctional system has maintained a "segregation policy" since "the mid-1980s," which allegedly mandates the segregation of "[p]risoners diagnosed with HIV . . . from all other prisoners." (First Amended Complaint at ¶¶ 2-3). In other words, the claims of the Named Plaintiffs center upon an alleged set of policies which have been in existence for at least twenty-five (25) years. (Id.). Since the inception of the State's policies regarding the HIV inmate population, there have been numerous challenges to the constitutionality and legality of those policies. See Onishea, 171 F.3d 1289. The First Amended Complaint is merely the latest filing in a long line of cases—all of which sought the alteration and/or complete dissolution of the State's policy regarding the housing of HIV inmates. Nothing in the Named Plaintiffs' First Amended Complaint distinguishes this case from prior actions filed before this Court and other courts. For these reasons (as discussed in greater detail below), the Named Plaintiffs' First Amended Complaint is barred by the doctrine of *res judicata*, and is due to be dismissed.

A. THE DOCTRINE OF *RES JUDICATA*.

The doctrine of *res judicata* arises out of the fundamental duty and "purpose" of the court system, which is the "conclusive resolution of disputes." Montana v. United States, 440 U.S.

147, 153-54 (1979); see also Curry v. Baker, 802 F.2d 1302, 1310 (11th Cir. 1986) (same). In the words of the Eleventh Circuit, this doctrine:

> adds certainty and stability to social institutions. This certainly in turn generates public respect for the courts. By preventing relitigation of issues, *res judicata* conserves judicial time and resources. It also supports several private interests, including avoidance of substantial litigation expenses, protection from harassment or coercion by lawsuit, and avoidance of conflicting rights and duties from inconsistent judgments.

Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1503 (11th Cir. 1984). In sum, this deep-seated doctrine acts as protection to parties, like the State in this instance, from the time, expense and sheer inconvenience and frustration of multiple lawsuits over previously settled issues. See, e.g., Allen v. McCurry, 449 U.S. 90, 94 (1980) (writing, "[f]inality 'relieve[s] parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, and, by preventing inconsistent decisions, encourage[s] reliance on adjudication.'"). In a very general sense, the doctrine of *res judicata* mandates that the entry of final judgment by a court of competent jurisdiction precludes a party from bringing the cause of action again in the absence of fraud or "other factors invalidating the judgment." Comm'r of Internal Revenue v. Sunnen, 333 U.S. 591, 597 (1948); see also In re Piper Aircraft Corp., 244 F.3d 1289, 1296 (11th Cir. 2001).

Although *res judicata* is labeled as an "affirmative defense" under Rule 8(c) of the Federal Rules of Civil Procedure, the Eleventh Circuit recently reaffirmed the principle that "dismissal by the court *sua sponte* on *res judicata* grounds . . . is permissible in the interest of judicial economy where both actions were brought before the same court." Shurick v. Boeing Co., 623 F.3d 1114, 1116 (11th Cir. 2010) (other citations omitted). Stated differently, a complaint is subject to dismissal under Fed. R. Civ. P. 12(b)(6) on the basis of *res judicata* "when its allegations—on their face—show that an affirmative defense bars recovery on the

claim." Marsh v. Butler County, Ala., 268 F.3d 1014, 1022 (11th Cir. 2001) (citing Larter & Sons v. Dinkler Hotels Co., 199 F.2d 854, 855 (5th Cir. 1952)). The doctrine of *res judicata* precludes this "subsequent" action if four (4) elements are present: (1) a final judgment is entered on the merits, (2) the judgment is rendered by a court of competent jurisdiction, (3) the parties, or those in privity with them, are identical in both suits, and (4) the same cause of action is involved in both cases. Hart v. Yamaha-Parts Distrib., Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); Piper Aircraft Corp., 244 F.3d at 1296.[4] Here, there is clear, unequivocal support for each element of *res judicata*.

B. THE PRIOR CAUSES OF ACTION.

The history of litigation between actual and/or purported classes of HIV-positive inmates and the officials, agencies and representatives of the State of Alabama has been both circuitous and repetitive. Over the past twenty (20) years, there have been at least three (3) actions which, in some way, addressed the conditions of confinement of HIV-positive inmates in Alabama.[5] At

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[4] In this instance where the bar of *res judicata* exists with respect to a prior federal court action based upon alleged claims under federal law, the Eleventh Circuit mandates that "federal preclusion principles apply to [such] prior federal decisions, whether previously decided in diversity or federal question jurisdiction." EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1285 (11th Cir. 2004) (quoting CSX Transp., Inc. v. Bhd. of Maint. of Way Employees, 327 F.3d 1309, 1316 (11th Cir. 2003)). The reliance upon federal law is of no great consequence because of the substantial similarities between Alabama law and federal law in this regard. As the Alabama Supreme Court wrote:

> It has long been the policy in the courts of Alabama to provide a claimant a day in court, but he will not be allowed to continue to relitigate his claim. The underlying principle of *res judicata* or estoppel by judgment is based upon public policy and necessity, because it is to the interest of the state that there should be an end to litigation, and that the individual should not be vexed twice for the same cause. Savage v. Savage, 246 Ala. 389, 20 So.2d 784.

McGruder v. B & L Constr. Co., Inc., 331 So. 2d 257, 259 (Ala. 1976). Like the Eleventh Circuit, Alabama courts routinely recognize that "a subsequent attempt by the prior plaintiff to relitigate the same cause of action against the same defendant" after "prior litigation between a plaintiff and a defendant, which is decided on the merits by a court of competent jurisdiction" is expressly barred by the doctrine of *res judicata* – also known as claim preclusion. See, e.g., Whisman v. Ala. Power Co., 512 So.2d 78, 81 (Ala. 1987) (other citations omitted). Indeed, the four (4) elements for claim preclusion under Alabama law are substantially identical to those under Eleventh Circuit jurisprudence. See, e.g., Hughes v. Allenstein, 514 So. 2d 858 (Ala. 1987)

[5] For example, "a class of HIV-positive male inmates" instituted an action in the United States District Court for the Northern District of Alabama on April 2, 2003, challenging the conditions of their confinement under 42

least two (2) such actions arose out of claims which were virtually identical to the claims asserted by the Named Plaintiffs in this case. Simply put, there is no justifiable legal or factual basis for this latest attempt to challenge a set of policies that were previously challenged by the HIV-positive inmate population and evaluated and rejected by this Court (and rejected by the Eleventh Circuit Court of Appeals). Moreover, it is the doctrine of *res judicata* which exists to prevent this exact form of "*here we go again*" litigation.

1. ONISHEA V. HOPPER, 171 F.3d 1289 (11th Cir. 1999)(*en banc*).

On April 7, 1999, the Eleventh Circuit issued its opinion in Onishea v. Hopper, writing, "[t]he Rehabilitation Act does not require the Department [of Corrections] to do whatever it is legally capable of doing to accommodate" the HIV-positive inmate population in Alabama. 171 F.3d at 1306. By doing so, the Eleventh Circuit concluded "over a decade of litigation" regarding the conditions of confinement of HIV-positive inmates within Alabama. Id. at 1292. By issuing this opinion, the Eleventh Circuit also declared the rights of the HIV-positive inmate population within Alabama in terms of their housing circumstances and access to programs and activities available to other non-HIV inmates within Alabama.

The plaintiff class in Onishea v. Hopper[6] consisted of "prison inmates who have tested positive for the Human Immunodeficiency Virus (HIV)" who filed suit in the Middle District of

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U.S.C. § 1983. See Second Amended Complaint, Antonio Leatherwood, *et al*. v. Donal Campbell, *et al.*, In the United States District Court for the Northern District of Alabama, Western Division, No. CV02-BE-2812-W, attached hereto as **Exhibit "3."** While most of the claims asserted in the Leatherwood action related to the provision of medical care, the Leatherwood class specifically challenged the "living conditions" of the HIV-positive population at Limestone and, in fact, specifically complained that "[a]ll HIV-positive male inmates . . . have been segregated to Dorm 16 . . . and specific areas of the Health Care Unit at Limestone." While there are reasonable grounds to conclude that the Named Plaintiffs are collaterally estopped from bringing their claims by virtue of Leatherwood, the preclusive effect of the other actions is such that the Court need not even consider any collateral estoppel resulting from the Leatherwood matter.

[6] Onishea had a long and tortured procedural history before the Eleventh Circuit entered a final judgment in 1999. The case was first filed in the Middle District of Alabama as Harris v. Thigpen, 727 F. Supp. 1564 (M.D. Ala. 1990). It was appealed to the Eleventh Circuit still under the name of Harris v. Thigpen, 941 F.2d 1495 (11th Cir.

Alabama.[7] Id. at 1292. The named defendants in Onishea included various officials with the ADOC, including the then-Commissioner as well as the Limestone and Tutwiler wardens. Id. The Onishea plaintiffs sought to challenge the existing housing practices within the State's correctional system, which the Court summarized as follows:

> The [Alabama] Department of Corrections segregates inmates testing positive for the virus of the general inmate population in HIV-positive units, one for men at the Limestone Correctional Facility and one for women at the Julia Tutwiler Prison for Women.

Id. at 1292-1293. The Onishea plaintiffs also alleged that they were excluded from kitchen jobs, pre-release programs, runner jobs, jobs on the prison farm, and jobs maintaining the prison grounds, along with several other programs and activities that were available to non-HIV positive inmates. Id. at 1292-1293. The Onishea plaintiffs claimed that the State's housing practices and the alleged exclusion of the HIV-positive inmate population from these services, programs and activities violated their constitutional rights and specifically contravened § 504 of the Rehabilitation Act, and sought to force integration of all prison programs. Id. at 1292-1293.

This Court conducted an initial bench trial on the merits and, thereafter, rejected the Onishea plaintiffs' claims under the Rehabilitation Act. Id. at 1293. The Onishea plaintiffs appealed to the Eleventh Circuit, which affirmed all of this Court's rulings, except for the disposal of the plaintiffs' Rehabilitation Act claim. Id. At this stage, the Eleventh Circuit remanded the Rehabilitation Act claim with instructions that the district court evaluate this claim under a program-by-program analysis. Id. On remand, this Court conducted a lengthy bench

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1991), where it was remanded back to the Middle District of Alabama. It was then appealed again to the Eleventh Circuit under the name of Onishea v. Hopper, 126 F.3d 1323 (11th Cir. 1997), where only a panel of the court issued a decision. However, the Eleventh Circuit then granted a rehearing *en banc*, where it reversed the panel's decision and issued its final judgment as Onishea v. Hopper, 171 F.3d 1289 (11th Cir. 1999).

[7] Incidentally, some of the class counsel in Onishea are also counsel of record in this case.

trial which focused on the question of whether the plaintiffs were "otherwise qualified" under the Rehabilitation Act to participate in the programs that they sought to desegregate. Id.

During the course of the second bench trial, the parties presented extensive evidence with respect to the plaintiffs' Rehabilitation Act claim. Id. at 1293-96. The Onishea plaintiffs presented expert testimony that HIV transmission in many prison activities was rare and that there were few reports of anal sex and needle sharing in many of the prison programs that the plaintiffs wished to participate in. Id. at 1293-94. The State presented evidence that high risk activities such as anal sex, intravenous drug use, and bloody fights were common within the State prison system, that sexually transmitted diseases have a history of spreading quickly in Alabama prisons, and that prison systems that integrate HIV-positive inmates with the general prison population have dramatically higher rates of prisoners who contract HIV during the course of their incarceration. Id. at 1294.

In addressing the merits of the Onishea plaintiffs' claim, this Court issued a 467-page opinion that analyzed each individual program and reasoned that the risk of HIV transmission was a significant risk with respect to each condition. Id. at 1295. More importantly, the Court found that the HIV-positive inmate population was not "otherwise qualified" under the Rehabilitation Act. Id. at 1295, 1299 n.16. Additionally, the Court also found that any purported "reasonable accommodation" to the Onishea plaintiffs would result in an undue financial burden upon the State. Id. at 1295-1296. The Onishea plaintiffs, once again, appealed to the Eleventh Circuit. 171 F.3d 1289. The Eleventh Circuit affirmed the findings of fact and analysis employed by this Court. Id.

In its lengthy opinion, the Eleventh Circuit found that ADOC's segregation policy did not violate § 504 of the Rehabilitation Act because the HIV-positive inmates were not "otherwise

qualified" to live in integrated dorms or to participate in the general population programs. Id. at 1296. The Eleventh Circuit also held that the HIV-positive population was not "otherwise qualified" because they posed "a significant risk" of communicating their disease to others, and that reasonable accommodation on the part of ADOC would not eliminate the risk. Id. at 1296-1305. Specifically, the Eleventh Circuit observed that high-risk behavior that had been shown to communicate HIV—such as unprotected sex, intravenous drug use, and violence—was not only common in prisons, but happened "in the most unlikely and unexpected places and that it is impossible to know or watch much of what goes on." Id. at 1299. Further, the Eleventh Circuit agreed with this Court's determination that any accommodations that the State could make to prevent these high risk behaviors from occurring constituted an "undue hardship" on the State. Id. at 1304. The simple fact that there were possible measures that ADOC could take did not negate this finding because "[t]he Rehabilitation Act does not require the Department to do whatever it is legally capable of doing to accommodate the plaintiffs." Id. Therefore, the Eleventh Circuit affirmed the finding of the district court that the State's segregation policy did not violate § 504 of the Rehabilitation Act. Id. at 1305. The Onishea plaintiffs filed a petition for writ of certiorari with the United States Supreme Court, which was subsequently denied. Davis v. Hopper, 528 U.S. 1114 (2000).

2. EDWARDS V. ALABAMA DEPT. OF CORRECTIONS, 81 F. Supp. 2d 1242 (M.D. Ala. 2000).

A year after the Eleventh Circuit's final decision in Onishea, a plaintiff class consisting of "all current and future HIV-positive inmates in Alabama's state-run prisons" filed suit in this Court challenging ADOC's segregation policy on the grounds that it violated Title II of the ADA. Edwards v. Ala. Dep't of Corr., 81 F. Supp. 2d 1242, 1245 (M.D. Ala. 2000). The

Edwards plaintiffs complained that, because of their HIV-positive status, they were required to sleep in separate living quarters and were "excluded from virtually all educational, work-related, and other programs in which the general prison population is entitled to participate." Id. at 1246. The Edwards plaintiffs alleged that these policies discriminated against them on the basis of a disability in violation of Title II of the ADA. Id. This Court dismissed this claim *with prejudice* finding that it had already been litigated and subject to a final judgment by a court of competent jurisdiction in Onishea and was, therefore, barred by *res judicata*. Id. at 1249.

This Court also found that the plaintiff class, defined as "all inmates who have tested positive for Human Immunodeficiency Virus (HIV) who are or will be confined in the jails and prisons throughout the state of Alabama," was completely included in the plaintiff class in Onishea. Id. at 1247. Further, this Court found that the Edwards plaintiffs' claim under Title II of the ADA was the same as the Onishea plaintiffs' claim under § 504 of the Rehabilitation Act. Id. at 1248. As written in Edwards, the two statutes "protect the same group of individuals and the same rights…[and] the only difference between them appears to be the kinds of defendants against whom these rights can be enforced." Id. at 1248-1249. This Court decided that "[t]hese similarities between Title II of the ADA and § 504 of the Rehabilitation Act demonstrate that the plaintiffs here and the plaintiffs in *Onishea* have sought to enforce essentially the same right, and the claims that they assert are identical for the purpose of the *res judicata* doctrine." Id. at 1249. Therefore, this Court dismissed the plaintiffs' ADA claim because it was barred from relitigation by *res judicata*.[8]

[8] Since the Edwards decision, the United States District Court for the Northern District of Alabama and the Eleventh Circuit have also addressed the State's policies regarding the confinement of HIV-positive inmates in the case of Reed v. Allen, 379 F. App'x 879 (11th Cir. 2010). Reed involved claims by an HIV-positive inmate at Limestone under 42 U.S.C. § 1983 in which the inmate claimed that the wearing of wristbands and other practices regarding the HIV-positive inmate population at Limestone violated his Fourteenth Amendment right to privacy. Id. at 880-881. Both the district court and Eleventh Circuit concluded that the named correctional defendants were entitled to qualified immunity from the inmate's claims. Id. at 881. In reaching this conclusion, the Eleventh Circuit

C. THE PRECLUSION OF THE NAMED PLAINTIFFS' CLAIMS.

Nothing material has changed since January 14, 2000, when this Court resolved the claims brought by the class of HIV-positive inmates on the basis of claim preclusion. The Named Plaintiffs practically acknowledge the static nature of the circumstances surrounding the confinement of HIV-inmates since January 14, 2000, in their First Amended Complaint. (See First Amended Complaint at ¶¶ 3-5). Despite the absence of any material change in the facts, circumstances or the law, the Named Plaintiffs now wish to pursue, yet again, a specific claim based upon nearly identical facts upon which this very Court previously ruled. Claim preclusion exists to prevent this sort of serial relitigation of the same claims.

1. A FINAL JUDGMENT BY A COURT OF COMPETENT JURISDICTION.

By far, the most straight-forward analysis of the elements of *res judicata* involves the first two elements, i.e., a final judgment rendered by a court of competent jurisdiction. Onishea, which was initiated by the same purported class of HIV-positive inmates, was initiated and determined in this Court. 171 F.3d at 1292. In this case (which is pending before the same Court which decided Onishea), the Named Plaintiffs readily admit the competent jurisdiction of the Court. (See First Amended Complaint at ¶ 9 (writing, "[t]his Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331")). By virtue of this admission in the Named Plaintiffs' First Amended Complaint, the Named Plaintiffs resolve one element of the *res judicata* defense.

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cited to the Harris v. Thigpen decision as authority for the proposition that "a 'blanket policy' of isolating HIV-positive inmates, with its resultant non-consensual disclosure of HIV-status, was a reasonable infringement on privacy rights of HIV-positive inmates when viewed in light of the prison interest generating such policy." Id. at 882.

The former Fifth Circuit[9] defined a final judgment for purposes of *res judicata* as "a final decision rendered after the parties have been given a reasonable opportunity to litigate a claim before a court of competent jurisdiction." Kaspar Wire Works, Inc. v. Leco Eng'g & Mach., Inc., 575 F.2d 530, 537-38 (5th Cir. 1978). Moreover, 28 U.S.C. § 1291 clearly vests jurisdiction in the Eleventh Circuit over appeals from the federal district courts and, therefore, the appeal of Onishea necessarily required a final adjudication of the Onishea plaintiffs' claims prior to such appeal to the Eleventh Circuit.

The issue related to the finality of the Onishea decision was also resolved in Edwards. As this Court wrote in Edwards, "the Eleventh Circuit clearly rendered a final judgment as to the ADA . . . claims in the Onishea case, and there is no question that it was a court of competent jurisdiction." Edwards, 81 F.Supp. 2d at 1247. It is equally clear that the Eleventh Circuit also rendered a final judgment as to the Rehabilitation Act claims in Onishea. 171 F.3d 1289. Thus, the first two (2) elements of *res judicata* are readily apparent here.

2. THE SUBSTANTIAL IDENTITY OF THE PARTIES.

The mere fact that this action was instituted with a different set of named plaintiffs is of no consequence in the application of the *res judicata* doctrine. As noted in Edwards, federal common law does not require strict identity of parties. According to Edwards, the third element of *res judicata* will be satisfied if the parties are either actually identical or if they are in privity with each other. 81 F.Supp. 2d at 1247. The Eleventh Circuit defines parties in "privity with each other" as a relationship "where the nonparty's interests were represented adequately by the party in the original suit," see, e.g. N.A.A.C.P. v. Hunt, 891 F.2d 1555, 1560 (11th Cir. 1990), or

[9] See Bonner v. City of Prichard, Ala., 661 F. 2d 1206, 1207 (11th Cir. 1981) (holding, "decisions of the United States Court of Appeals for the Fifth Circuit . . . as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.").

"where a party to the original suit is 'so closely aligned to a nonparty's interest as to be his virtual representative.' " See id. at 1560-61 (quoting United Merchs. & Mfrs. v. Sanders, 508 So. 2d 689, 692 (Ala. 1987)). In other words, privity is "a flexible legal term . . . generally applying when a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." EEOC v. Pemco Aeroplex, Inc., 383 F.3d 1280, 1286 (11th Cir. 2004) (internal citations omitted).

The notion of privity is further expanded in the context of class litigation. As a matter of common sense, the mere existence of a certified class presupposes some degree of privity between the named plaintiffs (or class representatives) and the unnamed members of the class. In Hansberry v. Lee, the United States Supreme Court held that "judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." 311 U.S. 32, 41 (1940). In other words, a member of a certified class cannot practically challenge his or her privity with named class representatives with respect to a judgment rendered in a prior action in which he or she was a class member.

The majority of the parties in this case are actually identical to the parties in Onishea. However, to the extent that there are new parties in this lawsuit, they are in privity with the Onishea parties because their interests were adequately represented in Onishea. The putative plaintiff class in this case is identical to the class in Onishea. The putative class in this case consists of "prisoners with HIV in the custody of ADOC, now and in the future." (First Amended Complaint at ¶ 106). The class in Onishea was described by the Eleventh Circuit both as "all inmates or future inmates of the DOC, except those inmates who had indicated an intention to intervene on behalf of the defendants," Harris, 941 F.2d at 1500, and "Alabama

inmates who are HIV-positive." Onishea, 126 F.3d at 1326. In Edwards, this Court found that a plaintiff class of "all inmates who have tested positive for Human Immunodeficiency Virus (HIV) who are or will be confined in the jails and prisons throughout the state of Alabama" was identical to the Onishea class. Edwards, 81 F. Supp. 2d at 1247. In sum, there can be no question that the Named Plaintiffs (regardless of whether they were incarcerated at the time of the Onishea decision or not) were in privity with the Onishea plaintiffs.

Likewise, many of the defendants in this case are identical to the defendants in Onishea as well. The commissioner of the Department of Corrections and the wardens of the Limestone and Tutwiler facilities were named in their official capacities in both lawsuits. (See First Amended Complaint at ¶¶ 12-14); Onishea, 126 F.3d 1323. The only new defendants in this lawsuit are the wardens of the Decatur WR and the Montgomery WF and Governor Robert Bentley. (See First Amended Complaint at ¶¶ 11, 15,16). However, it is clear that these new defendants are in privity with the defendants initially named in Onishea. As noted above, privity will exist "where [a] nonparty's interests were represented adequately by the party in the original suit." Hart v. Yamaha-Parts Distribs., Inc., 787 F.2d 1468, 1472 (11th Cir. 1986). Nothing in the First Amended Complaint suggests that these parties have any legal interests distinct from the others. Furthermore, it is clear from the facts underlying the First Amended Complaint that this is not the case. Considering that all of the Defendants are named in their official capacities, this action is essentially against the State and its corresponding administrative agencies (as opposed to the individuals identified by name). See, e.g., Oliver v. Bd. of Regents of the Univ. Sys. of Ga., No. 3:06-CV-110 (CDL), 2008 WL 2302686, at *4 (M.D. Ga. May 30, 2008) (quoting Will v. Mich. Dep't of State Police, 491 U.S. 58, 64 (1989)) (writing, "[i]t is equally well-established that 'a suit against a state official in his or her official capacity is not a suit against the official

but rather is a suit against the official's office."). Thus, there is no basis to dispute the substantial identity of the parties in this action and the Onishea action.

3. THE SAME CAUSES OF ACTION.

According to the Eleventh Circuit, "[t]he principal test for determining whether the causes of action are the same is whether the primary right and duty are the same in each case. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form." Citibank, N.A. v. Data Lease Fin. Corp., 904 F.2d 1498, 1503 (11th Cir. 1990). Essentially, "if a case arises out of the same nucleus of operative fact, or is based on the same factual predicate, as a former action, […] the two cases are really the same 'claim' or 'cause of action' for purposes of *res judicata*." Id.; see also Burr & Forman v. Blair, 470 F.3d 1019, 1030 (11th Cir. 2006); Norfolk S. Corp. v. Chevron USA, Inc., 371 F.3d 1285, 1290 (11th Cir. 2004). Stated differently, "[r]es judicata applies not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same operative nucleus of fact." Manning v. City of Auburn, 953 F.2d 1355, 1358–59 (11th Cir. 1992) (quotation marks omitted); see also Piper Aircraft Corp., 244 F.3d at 1296-1297.

There can be no question that the causes of action in this case are identical to those in Onishea. Both the claims of the Named Plaintiffs and the claims in Onishea related to the State's housing practices with respect to HIV-positive inmates and the alleged denial of and/or exclusion from programs, activities and services because of their HIV condition. (See generally First Amended Complaint); Onishea, 171 F.3d 1289. The claims in this case and Onishea clearly "arise out of the same nucleus of operative fact," and deal with the same "primary right and duty."

In fact, the Named Plaintiffs' claim under § 504 of the Rehabilitation Act is identical to the Rehabilitation Act in claim in Onishea, both in form and in substance. (See First Amended Complaint at ¶ 112); Onishea, 171 F.3d at 1292-1293. Further, the Plaintiffs' claim under Title II of the ADA, while different in form, is identical in substance to the Rehabilitation Act claim. The First Amended Complaint makes no distinction between its Rehabilitation Act claim and its ADA claim—both are based on the same underlying facts and allege violations of the same right. (First Amended Complaint at ¶ 112). Therefore, like the ADA claim in Edwards, the Named Plaintiffs' ADA claim is identical to the Rehabilitation Act claim in Onishea. As this Court observed in Edwards, the "similarities between Title II of the ADA and § 504 of the Rehabilitation Act demonstrate that the plaintiffs here and the plaintiffs in Onishea have sought to enforce essentially the same right, and the claims that they assert are identical for the purposes of *res judicata* doctrine." Edwards, 81 F. Supp. 2d at 1249. For these reasons, *res judicata* bars the Named Plaintiffs' claims.

II. PLAINTIFFS' AMENDED COMPLAINT RELIES UPON FACTUAL ALLEGATIONS WHICH ARE NOT ACTIONABLE UNDER THE ADA OR REHABILITATION ACT.

Even if Plaintiffs' First Amended Complaint was not barred by the substantially identical cases preceding this case, the alleged factual bases for many of the Named Plaintiffs' claims are not actionable under the ADA or Rehabilitation Act. In a procedural sense, the First Amended Complaint fails to state a claim upon which relief can be granted. See Fed. R. Civ. P. 12(b)(6). Stated differently, the First Amended Complaint raises a number of complaints and/or grievances related to the conditions of confinement for which neither the ADA nor the Rehabilitation Act provide any relief of any kind. In summary, there is no legal basis for any of the following:

(1) Plaintiffs' cursory non-descript allegations of "discrimination";

(2) Plaintiffs' requests for incarceration at a correctional facility of their choosing;

(3) Plaintiffs' complaints related to the alleged confidentiality of their medical condition; and

(4) Plaintiffs' naming of Governor Bentley as a Defendant in this action.

To the extent that the Named Plaintiffs' ADA and Rehabilitation Act claims are based upon these non-actionable grounds, their First Amended Complaint necessarily fails.

A. THE PLEADING REQUIREMENTS UNDER RULE 12(B)(6).

A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the complaint as set forth in Rule 8. Citigroup Global Mkts. Realty Group v. City of Montgomery, No. 2:09-CV-784-WKW, 2009 WL 4021803, at *1 (M.D. Ala. Nov. 19, 2009). Prior to the United States Supreme Court's landmark ruling in Bell Atlantic v. Twombly, 550 U.S. 544 (2007) ("Twombly"), a court could only dismiss a complaint "if it is was clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." See Conley v. Gibson, 355 U.S. 41, 45-46 1957). However, in Twombly, the Supreme Court expressly rejected this language as it relates to the standard of Rule 12(b)(6) of the Federal Rules of Civil Procedure. Instead, the Supreme Court set forth the following standard regarding a court's determination of the sufficiency of pleading such as is in issue in the present case:

> Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." While a complaint attacked by a Rule 12(b) (6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the "grounds" of his "entitle[ment] to relief" requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

550 U.S. at 555 (internal citations omitted). In Twombly, the Supreme Court emphasized that a plaintiff must present "enough facts to state a claim to relief that is *plausible on its face*." 550 U.S. at 570 (emphasis added).

Following Twombly, the Supreme Court reinforced its new formulation of the pleading standard in Ashcroft v. Iqbal, 129 S.Ct. 1937, 1949-50 (2009). The Iqbal Court reiterated that a claim is insufficiently pled if it offers only "labels and conclusions" or "a formulaic recitation of the elements of a cause of action." Iqbal, 129 S.Ct. at 1949 (quoting Twombly, 550 U.S. at 557) (internal quotations omitted). In so doing, the Court noted that "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions." Id. That is, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. The Court also highlighted the "departure from the hyper-technical, code-pleading regime of [the] prior era . . . ." Therefore, to survive a motion to dismiss, the Court concluded, a complaint must state a plausible claim for relief. Id. The well-pleaded facts must allow the court to infer more than the mere possibility of misconduct. Id. at 1950.

With respect to this purported, uncertified class action, federal courts have consistently held that courts can rule on a motion to dismiss a class action complaint even before consideration of class certification. See, e.g., Zimmerman v. HBO Affiliate Group, 834 F.2d 1163, 1170 (3d Cir. 1987) (finding "no abuse of discretion in the district court's refusal to consider certification of a class before determining whether the named plaintiff, and *a fortiori* any putative class which the named plaintiff might properly seek to represent, had a federal cause of action."); Sheet Metal Workers Local 441 Health & Welfare Plan v. GlaxoSmithKline, PLC, 263 F.R.D. 205, 211 (E.D. Pa. 2009) ("[I]t is still appropriate to analyze whether a named

plaintiff has a cause of action under each claim before deciding whether to certify a class."). Moreover, courts generally consider *only* the claims of the named plaintiffs. See Speyer v. Avis Rent a Car Sys., Inc., 415 F. Supp. 2d 1090, 1094 (S.D. Cal. 2005) (citing Barth v. Firestone Tire and Rubber Co., 661 F. Supp. 193 (N.D.Cal.1987) aff'd, Speyer v. Avis Rent A Car Sys., Inc., 242 F. App'x 474 (9th Cir. 2007). Simply put, "at least one named Plaintiff must have a cause of action on a claim for that claim to survive a motion to dismiss." In re Flonase Antitrust Litig., 610 F. Supp. 2d 409, 414 (E.D. Pa. 2009). Therefore, if the Named Plaintiffs fail to state a claim, the allegation of any purported class must also fail.

B. REQUIREMENTS OF THE ADA AND REHABILITATION ACT.

Title II of the ADA and § 504 of the Rehabilitation Act both place restrictions on state and local governments with regard to providing disabled persons with an equal opportunity to participate and benefit from all government programs, services, and activities. "In order to establish a prima facie case of discrimination under [Title II of] the ADA, [a plaintiff] must demonstrate that he (1) is disabled, (2) is a qualified individual, and (3) was subjected to unlawful discrimination because of his disability." Waddell v. Valley Forge Dental Assocs., Inc., 276 F.3d 1275, 1279 (11th. Cir. 2001). Under § 504 of the Rehabilitation Act, a plaintiff must show he or she is an "otherwise qualified individual with a disability." 29 U.S.C. § 794(a). A claim under § 504 of the Rehabilitation Act is evaluated under the same standards, so the analysis of the two claims can be collapsed.[10] Sutton v. Lader, 185 F. 3d 1203, 1207-1208 n.5 (11th Cir. 1999) ("[t]he standard for determining liability under the Rehabilitation Act is the same as that under the ADA"); Everett v. Cobb County Sch. Dist., 138 F.3d 1407, 1409 (11th

[10] The only difference between the two causes of action is that a claim under § 504 can only be brought against a recipient of federal funding, while a claim brought under the ADA can be brought against both private and public parties. Edwards, 81 F. Supp. 2d at 1248-1249. As the defendants are recipients of federal funding, there is no distinction between the purported Plaintiff class's ADA claim and its § 504 claim.

Cir. 1998) ("causes of action brought under Title II of the ADA and the Rehabilitation Act are essentially identical"). Without question, the Named Plaintiffs must allege the essential elements of a claim under the ADA and Rehabilitation Act.

First, a "disability" under the ADA is defined as "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). The Eleventh Circuit has noted that the Supreme Court has specifically declined to address whether an HIV infection is a *per se* disability under the ADA, but has held that HIV could be considered a disability in some cases. Albra v. City of Fort Lauderdale, 232 F. App'x 885, 889 (11th Cir. 2007) (citing Bragdon v. Abbott, 524 U.S. 624, 641-42 (1998)). In the same way, the Rehabilitation Act defines "disability" as a "physical or mental impairment that constitutes or results in a substantial impediment to employment" or "a physical or mental impairment that substantially limits one or more major life activities." 29 U.S.C. § 705(9); 42 U.S.C. § 12102(1). Significantly, under the Rehabilitation Act, an "individual with a disability" does not include "an individual who has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals." Onishea, 171 F.3d at 1296-97 (quoting 29 U.S.C. § 705(20)(D)).

As to the second element a plaintiff must prove, Title II defines a "qualified individual with a disability" as "an individual with a disability who, with or without reasonable modifications . . . or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity." 42 U.S.C. § 12131(2). In Onishea, the Eleventh Circuit adopted the Supreme Court's interpretation of § 504 in School Board of Nassau County, Florida v. Arline, 480 U.S.

273 (1987) ("Arline"), based on its evaluation of "basic factors" to determine whether an individual with a contagious disease (i.e. HIV) is otherwise qualified to participate in the activities, services, and programs offered by the ADOC. Onishea, 471 F.3d at 1297. Those factors include: "(a) the nature of the risk (how the disease is transmitted); (b) the duration of the risk (how long is the carrier infectious); (c) the severity of the risk (what is the potential harm to third parties); and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. Id. (quoting Arline, 480 U.S. at 288). Applying these factors, the Supreme Court in Arline concluded that "[a] person who poses a *significant risk* of communicating an infectious disease to others in the workplace *will not be otherwise qualified* for his or her job if reasonable accommodation will not eliminate that risk." Id. (quoting Arline, 480 U.S. 287 n.16) (emphasis added). Focusing its analysis on the meaning of "significant risk," the court in Onishea held that "when transmitting a disease inevitably entails death, the evidence supports a finding of "significant risk" if it shows both (1) that a certain event can occur and (2) that according to reliable medical opinion the event can transmit the disease." Id. at 1299. The Eleventh Circuit concluded that there is a significant risk of transmission of HIV in ADOC facilities because violence, intravenous drug use, and sex which cause blood-to-blood contact are prevalent throughout these prisons. See id.

This case law establishes that at a minimum, the Named Plaintiffs must show that they are each qualified individuals; that they each have a disability as defined by the statute; that they were each denied the benefit of services by the State; and that they were each denied this benefit by reason of their disability. To be a qualified individual, as defined in Onishea, the Named Plaintiffs must do more than merely state that they are eligible for various programs because of good behavior or medical clearance, (see First Amended Complaint at ¶¶ 17, 18, 20, 26, 30), or

make the conclusory statement that they are simply "qualified." (id. at ¶¶ 19, 21, 24, 27, 29, 32). In fact, Plaintiffs Dana Harley and Melinda Washington do not even allege they are entitled or "qualified" to participate in any programs, services, or activities at the Tutwiler Prison for Women. Nowhere in the First Amended Complaint have the Named Plaintiffs alleged sufficient facts showing that they are qualified individuals. They allege no facts regarding the likelihood of transmission between HIV inmates and those without HIV in light of events and activities within a prison that could result in blood-to-blood contact. In other words, the Named Plaintiffs have not and cannot allege that there is no "significant risk" of transmission of HIV throughout ADOC facilities. Absent a showing that the Named Plaintiffs can at some point prove they are otherwise qualified individuals, they have failed to state a claim under both the ADA and Rehabilitation Act.

In addition to their inability to prove that they are "qualified individuals," the Named Plaintiffs substantially rely upon cursory, non-descript allegations such as their repeated general references to "services, programs, or activities." The examples are too numerous to list here. However, three (3) glaring examples include the following:

> The Named Plaintiffs allege that the classification of HIV-positive inmates "negatively impacts prisoners' safety and security," but the First Amended Complaint does not identify any one single instance when any inmate was harmed or their safety was threatened because of the State's classification practices. (See First Amended Complaint at ¶ 40);
>
> The Named Plaintiffs speculate that "[i]solation of prisoners with HIV *may* harm the treatment outcomes . . . ," without any allegation that any HIV-positive inmate has experienced a negative treatment outcome because of the State's correctional policies. (Id. at ¶ 44); and
>
> The Named Plaintiffs also speculate that the alleged disclosure of the inmate's status as HIV-positive "*may* result in potential employers refusing them jobs" – an allegation which cannot and does not relate to any of the Named Plaintiffs. (Id. at ¶ 48);

Furthermore, as mentioned above, certain allegations in the First Amended Complaint are also contradictory. Four (4) of the Named Plaintiffs claim to have been denied the opportunity to participate in the ADOC's "work release [program] . . . solely because [they have] HIV." (Id. at ¶ 19, 26, 30, 32). However, the First Amended Complaint also states:

> [Plaintiff] John Hicks is a person with HIV . . . [and] is a prisoner housed at ***Decatur Work Release***.

(Id. at ¶ 23)(emphasis supplied). By virtue of this allegation alone, the Amended Complaint establishes that HIV prisoners are *not* denied access to work release programs solely because they have HIV. As indicated through these examples, the Named Plaintiffs fail in many respects in simply articulating a factual basis for any claim against the State under the ADA or Rehabilitation Act. In addition to these general shortcomings, there are several specific examples of non-existent legal claims which are also referenced in their First Amended Complaint.

1. THE NAMED PLAINTIFFS CANNOT UTILIZE THE ADA AND/OR REHABILITATION ACT TO OBTAIN AN ASSIGNMENT TO A CORRECTIONAL FACILITY OF THEIR CHOOSING.

Federal courts have clearly mandated that disabled inmates should not be afforded greater rights than those available to non-disabled inmates. For example, one district court wrote:

> Inmates who fall within the ambit of the ADA "have the same interest in access to the programs, services, and activities available to the other inmates of their prison as disabled people on the outside have to the counterpart programs, services, and activities available to free people." *They have no right to more services than the able-bodied inmates*, but they have a right, if the Act is given its natural meaning, not to be treated even worse than those more fortunate inmates.

Ross v. Knight, No. 103-CV-1700-SEB-VSS, 2006 WL 3626372, at *6 (S.D. Ind. Dec. 8, 2006) (citing Crawford v. Ind. Dept. of Corr., 115 F.3d 481, 486 (7th Cir. 1997)) (emphasis added). As

discussed below, the Named Plaintiffs attempt to use the Rehabilitation Act and the ADA to claim rights that are clearly not given under either statute.

In their First Amended Complaint, the Named Plaintiffs repeatedly complain that they are unable to obtain an assignment to the correctional facility of their choosing, and that the facility in which they are housed is not convenient for them. Plaintiffs Louis Henderson, Darrell Robinson, Dwight Smith, James Douglas and David Smith allege that they have been denied the right to transfer to a lower security facility and an ADOC facility closer to their homes in Mobile, Atlanta, and Auburn, respectively. (First Amended Complaint at ¶¶ 19, 21, 22, 27, 29, 32). Additionally, Named Plaintiffs Louis Henderson, Darrell Johnson, John Hicks, Dwight Smith, James Douglas and David Smith allege they have a right to transfer to a facility where they can apply various technical skills and/or receive vocational training. (Id. at ¶¶ 19, 21, 22, 23, 27, 29, 32). There is no language in either the ADA or the Rehabilitation Act that provides any rights of this kind. *No prisoner* with the State's correctional system, regardless of HIV status, enjoys the right to demand that they be placed in the prison of their choosing. To allow HIV inmates greater access or rights to the benefit of services and programs afforded to all inmates is against the underlying policy of the ADA. See Ross, 2006 WL 3626372, at *6. Moreover, the Supreme Court has firmly and repeatedly held that a prisoner does not have a right to confinement in a particular penal facility. Meachum v. Fano, 427 U.S. 215, 224 (1976); Montanye v. Haymes, 427 U.S. 236, 242 (1976); Sandin v. Conner, 515 U.S. 472, 478 (1995).

As the court in Meachum v. Fano explained, "[c]onfinement in *any* of the State's institutions is within the normal limits or range of custody which the conviction has authorized the State to impose." Meachum, 427 U.S. at 225 (emphasis added). It does not matter if "life in one prison is much more disagreeable than in another." Id. In fact, in just this past year, this

Court has already twice denied demands from prisoners asking to be put in a different facility. See Jackson v. Albright, No. 2:10-CV-936-TMH, 2011 WL 904574, at *2 (M.D. Ala. Jan. 21, 2011) ("a convicted prisoner has no constitutionally protected right to confinement in a particular penal facility…[a]lthough Plaintiff's confinement at a medium based facility may entail more burdensome conditions than that of a minimum-out facility, such confinement is within the normal limits or range of custody which the conviction has authorized the state to impose") (internal citations omitted); Doyon v. Houston County Jail, No. 1:10-CV-580-TMH, 2010 WL 3724901, at *1 (M.D. Ala. July 15, 2010) ("[a] convicted prisoner has no constitutionally protected right to confinement in a particular penal facility"). In short, the Named Plaintiffs clearly do not have a right to demand that they be housed in whatever facility or geographical location of their choosing.

2. THE NAMED PLAINTIFFS' ALLEGATIONS REGARDING THE CONFIDENTIALITY OF THEIR MEDICAL CONDITION ARE WITHOUT ANY LEGAL BASIS.

Throughout the First Amended Complaint, the Named Plaintiffs repeatedly complain of disclosure of their HIV status due to ADOC's segregation policy. The Named Plaintiffs allege that prisoners with HIV are required to wear white armbands at all times signifying their assignment to the HIV living area, which results in disclosure of their private medical information to general population prisoners. (First Amended Complaint at ¶ 48). Likewise, the Named Plaintiffs claim that free-world people who visit Limestone are notified as to which prisoners have HIV. (Id.).

While there is no law case that specifically addresses a confidentiality requirement under the ADA or Rehabilitation Act, the Eleventh Circuit has repeatedly held that the disclosure of prisoners' HIV status does not violate any constitutional right of privacy. See Reed v. Allen, 379

F. App'x 879, 882-83 (11th Cir. 2007) (finding the requirement that plaintiff a wear white wristband which resulted in the non-consensual disclosure of his HIV status was not unconstitutional because inmates had no right of privacy in their HIV status); Thigpen, 941 F.2d at 1514-15 (concluding that an inmate's privacy right in his HIV-positive status may lawfully be "subject to substantial restrictions and limitations" when balanced against legitimate penological interests). These holdings are consistent with case law amongst the other circuit courts. For example, in Seaton v. Mayberg, 610 F.3d 530 (9th Cir. 2010) cert. denied, 131 S. Ct. 1534 (2011), the Ninth Circuit noted that the loss of privacy is "an inherent incident of confinement. Id. at 534. In recognizing that HIV-positive inmates have no right of privacy in their HIV status, the court reasoned that a "prison may owe a duty, possibly a constitutional duty, to other prisoners to isolate him or otherwise protect them" from an inmate with HIV or AIDS, which results in disclosure of their HIV status. Id. at 535. Further, in Tokar v. Armontrout, 97 F.3d 1078 (8th Cir. 1996), the Eighth Circuit noted that neither the Supreme Court or any appellate courts have held that prisoners have a constitutional right to confidentiality of their medical records. Id. at 1084. Finally, the Sixth Circuit in Bell v. Beeler, 145 F.3d 1329 (6th Cir. 1998) (unpublished) found that an HIV-positive inmate had no constitutional right to privacy regarding his medical condition. Id. at *1; see also Doe v. Wigginton, 21 F.3d 733, 740 (6th Cir. 1994) (rejecting the notion that the Constitution encompasses a right to nondisclosure of private information in the context of release of information regarding prisoner's HIV status to corrections officer); Baez v. Rapping, 680 F. Supp. 112, 115 (S.D.N.Y. 1988) (rejecting privacy right challenge when hospital issued precaution notice to correctional facility to avoid petitioner's bodily fluids).

The attempts of the Named Plaintiffs to mask a constitutional right of privacy claim as a violation of the ADA or Rehabilitation Act has not gone unnoticed. However, nothing within the text of either the ADA or Rehabilitation Act, or the federal regulations promulgated thereunder, provide any form of relief for disclosure of a prisoner's HIV status. Under the standard provided in Twombley and Iqbal, the Named Plaintiffs have not stated any plausible claims for relief; therefore, their claims are due to be dismissed.

III. THE NAMED PLAINTIFFS FAIL TO ALLEGE COMPLIANCE WITH THE PRISON LITIGATION REFORM ACT.

The Prison Litigation Reform Act of 1995 ("PLRA"), which was actually passed in 1996, was enacted for the purpose of curtailing abusive prisoner tort, civil rights and conditions of confinement litigation. Anderson v. Singletary, 111 F.3d 801, 805 (11th Cir. 1997). Indeed, Congress intended to "taper prisoner litigation" so as to prevent frivolous lawsuits from overcrowding the judicial system. See Hubbard v. Haley, 262 F.3d 1194, 1196 (11th Cir. 2001). While the Named Plaintiffs must ultimately bring forth enough evidence to meet their prima facie case under the ADA and Rehabilitation Act, they are also required to adhere to certain requirements set forth in the PLRA.

A. THE NAMED PLAINTIFFS FAIL TO ALLEGE THEIR EXHAUSTION OF THE MEDICAL GRIEVANCE PROCEDURE PRIOR TO THE INSTITUTION OF THIS ACTION.

The Eleventh Circuit has noted that, as a prudential matter, a district court should first consider whether the PLRA bars a prisoner's case before rendering a decision on the merits. Boxer X v. Harris, 437 F.3d 1107, 1110 n.2 (11th Cir. 2006). The PLRA compels exhaustion of available administrative remedies before a prisoner can seek relief in federal court on an ADA or Rehabilitation Act complaint. Pursuant to § 1997e(a) of the PLRA, "[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a

prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a) (2011). In Goebert v. Lee County, 510 F.3d 1312 (11th Cir. 2007), the Eleventh Circuit emphasized that this "'invigorated' exhaustion requirement is the 'centerpiece' of the PLRA." Id. at 1322 (quoting Woodford v. Ngo, 548 U.S. 81, 84 (2006)). The Court further explained that "[i]n addition to 'reduc[ing] the quantity and improv[ing] the quality of prisoner suits,' the exhaustion requirement also 'attempts to eliminate unwarranted federal-court interference with the administration of prisons, and thus seeks to affor[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.'" Id. (quoting Woodford, 548 U.S. at 94).

This exhaustion requirement "applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." Hoops v. Corr. Med. Servs., No. 2:10-CV-1023-ID, 2011 WL 1576955, at *1 (M.D. Ala. Apr. 5, 2011), report and recommendation adopted, No. 2:10-CV-1023-ID, 2011 WL 1584600 (M.D. Ala. Apr. 26, 2011) (quoting Porter v. Nussle, 534 U.S. 516, 532 (2002)). Federal courts cannot waive this requirement and proper exhaustion (i.e., compliance with an agency's deadlines and other critical procedural rules) of all available remedies is a prerequisite to any litigation regarding prison conditions. Id. Eleventh Circuit precedent allows this Court to "look beyond the pleadings to relevant evidentiary materials in deciding the issue of proper exhaustion." Brinson v. Darbouze, No. CIV A 2:09-CV-400TFM, 2009 WL 1956389, at *1 (M.D. Ala. July 8, 2009) (citing Bryant v. Rich, 530 F.3d 1368, 1374, 1375 (11th Cir. 2008)).

Without question, the Named Plaintiffs were aware of the opportunity to file grievances regarding their medical conditions, medical care or other matters which are medical in nature through the long-standing grievance processes maintained by the facilities' medical staffs. (See

generally Hunt Aff. and Reese Aff.). This necessarily included any grievances regarding any medical issues raised in their First Amended Complaint. (Id.). In fact, Plaintiffs David Smith, Dana Harley and Melinda Washington had actually utilized this process on numerous occasions prior to the filing of this action. (Hunt Aff. at ¶ 5; ADOC020-58; Reese Aff. at ¶ 6; ADOC005-17).

As explained above, the grievance process at Limestone, Tutwiler, Birmingham WR, Decatur WR and Montgomery WF is initiated when an inmate submits an informal "Medical Grievance" form to the healthcare unit through the institutional mail system. (Reese Aff. at ¶ 6; Hunt Aff. at ¶ 6). After reviewing the Medical Grievance, a written response is provided within approximately five (5) days of receipt of the Medical Grievance. (Id.). The written response to a Medical Grievance is included on the bottom portion of the same form containing an inmate's Medical Grievance. (Id.). Below the portion of the form designated for the "RESPONSE," the following notation appears:

> IF YOU WISH TO APPEAL THIS REVIEW YOU MAY REQUEST A GRIEVANCE APPEAL FORM FROM THE HEALTH SERVICES ADMINISTRATOR. RETURN THE COMPLETED FORM TO THE ATTENTION OF THE HEALTH SERVICE ADMINISTRATOR. YOU MAY PLACE THE FORM IN THE SICK CALL REQUEST BOX OR GIVE IT TO THE SEGREGATION SICK CALL NURSE ON ROUNDS.

(Id.). As stated in the Medical Grievance forms, the second step of the grievance process involves the submission of a formal "Medical Grievance Appeal," at which time the inmate may be brought in for one-on-one communication with the medical staff. (Id.). A written response to a Medical Grievance Appeal is provided within approximately five (5) days of receipt. (Id.).

In their First Amended Complaint, the Named Plaintiffs allege that they have comparable medical needs to prisoners without HIV, yet they are "categorically excluded" from the Medical Dorm at Tutwiler. (First Amended Complaint at ¶ 75). The Named Plaintiffs disapprove of the

type and quality of medical treatment they receive in the HIV dorm or "healthcare unit" at Tutwiler. (See id.). Further, the Named Plaintiffs criticize the medical clearance criteria imposed on prisoners with HIV who have a desire to participate in the work release program. (Id. at ¶ 85). The Named Plaintiffs take issue with the duration of the six-month "Keep On Person" medication program which must be completed by HIV inmates prior to participating in work-release; the viral load threshold requirements for HIV inmates; and the duration in between consecutive viral load readings conducted by the HIV Specialist for Limestone and Tutwiler. (Id.) According to Plaintiff Darrell Robinson, he is forced to take HIV medications for six (6) consecutive months, although his viral load is below the threshold required. (Id. at ¶¶ 22, 86). As the Named Plaintiffs put it, "ADOC's arbitrary medical eligibility criteria for work release require Mr. Robinson to start taking HIV medications, with all their potential risks and side effects, despite lack of medical need." (Id. at ¶ 86). Likewise, Plaintiff Albert Knox alleges that he will be required to take HIV medication to participate in work release even though he does not need HIV medication. (Id.)

These issues are grievances specifically regarding the procedures and processes that are clearly medical in nature. It is undisputed that the health care provider for ADOC has a grievance procedure for inmate complaints related to the provision of medical treatment. Brinson, 2009 WL 1956389, at *2. However, the Named Plaintiffs have failed to file the requisite grievances at their respective facilities prior to commencing this lawsuit. (Hunt Aff. at ¶ 5; ADOC020-58; Reese Aff. at ¶ 6; ADOC005-17). The Named Plaintiffs' medical records contain no inmate grievance forms submitted by the Named Plaintiffs regarding their claims nor any notation of the requisite formal grievance in the inmate grievance log. (Reese Aff. at ¶ 6; Hunt Aff. at ¶ 5). As the Named Plaintiffs have not pursued any formal or informal

administrative remedies to address their grievances, under the PLRA, the Named Plaintiffs' claims are due to be dismissed *with prejudice*. See, e.g., Hoops, 2011 WL 1576955, at *2; Brinson, 2009 WL 1956389, at *2; Dean v. Giles, No. 2:07-CV-342-WKW, 2009 WL 4894799, at *11 (M.D. Ala. Dec. 11, 2009); Edwards, 81 F. Supp. 2d at 1255-57.

B. THE NAMED PLAINTIFFS' REQUESTED RELIEF FAILS TO COMPLY WITH THE PARAMETERS FOR INJUNCTIVE RELIEF ESTABLISHED UNDER THE PLRA.

Even if the Named Plaintiffs' First Amended Complaint was not barred by the litany of cases preceding this case or the other fatal flaws mentioned above, the relief requested does not meet the requisite standards for prospective relief under the PLRA. The prospective relief sections of the PLRA apply to "any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prisons." See 18 U.S.C. § 3626(g)(2). "Prospective relief" is "all relief other than compensatory money damages." Id. § 3626(g)(7). Under § 3626(a), prospective relief in prison conditions litigation, whether contested or entered by consent, is required to be narrowly drawn, to extend no further than necessary to correct of violation of federal rights, and to be the least intrusive means of doing so. 18 U.S.C. § 3626(a); Cason v. Seckinger, 231 F.3d 777, 780 (11th Cir. 2000). In Clement v. California Department. of Corrections, 364 F.3d 1148 (9th Cir. 2004), the Ninth Circuit provided a more detailed explanation of this so-called "need-narrowness-intrusiveness" test. The Court in Clement noted:

> An injunction employs the "least intrusive means necessary" when it " 'heel[s] close to the identified violation,' and is not overly 'intrusive and unworkable' . . . [and] would [not] require for its enforcement the continuous supervision by the federal court over the conduct of [state officers]." *Id.* at 872 (quoting Gilmore v. California, 220 F.3d 987, 1005 (9th Cir. 2000) and O'Shea v. Littleton, 414 U.S. 488, 500-01, 94 S. Ct. 669, 38 L.Ed.2d 674 (1974)).

Id. at 1153. Keeping in line with these principles, the Eleventh Circuit declined to rule that an injunction was overly intrusive under the PLRA's "need-narrowness-intrusive" test where the injunction left to the complete discretion of the State how to implement the injunction's requirements and the injunction did not "excessively impede" upon the State's internal administration. See Thomas v. Bryant, 614 F.3d 1288, 1325 (11th Cir. 2010).

The Named Plaintiffs in the present matter have asked this Court to "[en]join Defendants, their officers, agents, employees and all other persons in active concert and participation with Defendants from engaging in discriminatory policies and practices against Plaintiffs on the basis of their HIV status . . . ." (First Amended Complaint at p. 37). However, this prayer for relief does not pass muster under the "need-narrowness-intrusive" test. A prohibition on *all* discriminatory policies and practices for HIV inmates is entirely too broad and will ultimately hinder ADOC administrators from ensuring the safety of every inmate within its custody and supervision. The Named Plaintiffs have not and cannot formulate the prospective relief they seek in a manner that is narrowly drawn and minimally intrusive. Therefore, the Named Plaintiffs' claims should be dismissed.

IV. THE STATE IS IMMUNE UNDER THE ELEVENTH AMENDMENT FROM THE NAMED PLAINTIFFS' CLAIMS.

The Eleventh Amendment to the United States Constitution provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. Amend. XI. The Supreme Court has construed the Eleventh Amendment to apply equally to suits against a state commenced by that state's own citizens. Sandoval v. Hagan, 197 F.3d 484, 492 (11th Cir. 1999), rev'd on other grounds, Alexander v. Sandoval, 532 U.S. 275 (2001) (citing Edelman v. Jordan, 415 U.S. 651,

663 (1974); Hans v. Louisiana, 134 U.S. 1, 13-15 (1890)). Moreover, "the Amendment bans suits against state officials where the state, in fact, is the real party in interest." Id. (citing Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101, 104 (1984)). Generally, "these bans prohibit federal courts from exercising subject matter jurisdiction over private party suits filed against a state or state officials." Id. The Supreme Court has recognized three exceptions to this constitutional ban:

> First, individual suits may proceed directly against a state if a state waives its sovereign immunity. *See Atascadero State Hosp. v. Scanlon*,473 U.S. 234, 238, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985). Second, individual suits against a state also may be adjudicated if Congress, pursuant to a valid exercise of congressional power, abrogates a state's immunity through a clear statement of its intent to abrogate. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996). Finally, individual suits that seek *prospective* relief for *ongoing* violations of federal law also may be levied against state officials. *See Ex Parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

Id. Because Alabama has not waived its Eleventh Amendment immunity in this regard, only the second exception of abrogation and third exceptions under Young warrant further discussion.

In determining whether Congress abrogated a state's Eleventh Amendment immunity, courts apply a "simple but stringent" two-part test. Seminole Tribe of Fla. v. Florida, 11 F.3d 1016, 1024 (11th Cir. 1994). First, courts must determine whether Congress unequivocally expressed its intent to abrogate. Id. Second, courts consider whether Congress acted according to a valid exercise of power in abrogating state immunity. Id.

Both the ADA and Rehabilitation Act contain unequivocal statements of Congressional intent to abrogate the States' Eleventh Amendment immunity. Section 12202 of the ADA states, "A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of [the

ADA]." 42 U.S.C.A. § 12202. Similarly, under the Rehabilitation Act, § 2000d-7 provides: "A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C.A. § 794] . . . ." 42 U.S.C. § 2000d-7.

Although Congress has clearly expressed its intent to abrogate State immunity as evidenced by the language in both the ADA and Rehabilitation Act, federal courts have held that this abrogation exceeded Congress' constitutional authority. In Simmang v. Tex. Bd. of Law Exam'r, 346 F. Supp. 2d 874 (W.D. Tex. 2004), the court held that the accommodations obligation imposed by Title II of the ADA is not a valid exercise of Congress' power under § 5 of the Fourteenth Amendment and thus do not abrogate the States' Eleventh Amendment Immunity. Id. at 983. Section 5 of the Fourteenth Amendment "grants Congress the authority to enforce the provisions of the amendment by enacting legislation which deters or remedies conduct transgressing the Fourteenth Amendment's substantive provisions." Jamison v. Delaware, 340 F. Supp. 2d 514, 517 (D. Del. 2004). Discussing immunity under Title II of the ADA, the court in Jamison held:

> The legislative record does not reveal a widespread pattern of disability discrimination on which Section Five legislation must be based. Even if Congress had identified a pattern of discrimination by the states, the ADA is not congruent and proportional to the targeted violation. Title II of the ADA prohibits public entities from excluding or denying public services to people with disabilities. 42 U.S.C. § 12132 (2004). The ADA is sufficiently out of proportion to a supposed remedial or preventive object that it cannot be understood to prevent unconstitutional behavior. In addition, through its broad restriction on the use of disability as a discriminating factor, the ADA prohibits substantially more state practices and decisions than would likely be held unconstitutional under the applicable rational basis standard. *Kimel*, 528 U.S. at 84, 120 S.Ct. 631.

Id. at 518. This case law makes it clear that Eleventh Amendment immunity remains as a valid affirmative defense to a claim under either the ADA or Rehabilitation Act.

The Ex parte Young exception to Eleventh Amendment immunity was recognized in the context of the ADA by the Supreme Court in Board of Trust of University of Alabama v. Garrett, 531 U.S. 356, 374 n.9 (2001). Miller v. King, 384 F.3d 1248, 1264 (11th Cir. 2004) opinion vacated and superseded, 449 F.3d 1149 (11th Cir. 2006). "In determining whether the doctrine of Ex Parte Young avoids an Eleventh Amendment bar to suit, a court need only conduct a straightforward inquiry into whether the complaint 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) (internal quotation marks omitted). The Young doctrine will not go so far as to allow federal jurisdiction over a suit that seeks to redress past wrongs—only ongoing violations are covered. See Papasan v. Allain, 478 U.S. 265, 277-78 (1986) ("*Young* has been focused on cases in which a violation of federal law by a state official is ongoing as opposed to cases in which federal law has been violated at one time or over a period of time in the past . . . ."). Although the Named Plaintiffs seek prospective relief against the State in the form of declaratory and injunctive relief, they have failed to allege an "ongoing and continuous violation." The very fact that the Named Plaintiffs have previously litigated these claims in Onishea, Edwards, and Reed, shows that not only is there is no violation of federal law, but there is certainly not any ongoing and continuous violation.

In sum, the Named Plaintiffs have sued Governor Bentley; Kim Thomas, Commissioner of the Alabama Department of Corrections; Billy Mitchem, warden at Limestone; Frank Albright, warden at Tutwiler; Bettina Carter, warden at Decatur WR; and Edward Ellington, warden at the Montgomery WF, all in their official capacities. (First Amended Complaint at ¶¶

11-16.) Although the State of Alabama is not specifically named in the First Amended Complaint, it is clear that Eleventh Amendment immunity extends to any state official acting in their official capacity. As state officials, Defendants are entitled to sovereign immunity and may not be sued for any alleged violations of the ADA and Rehabilitation Act. Accordingly, this Court does not have subject matter jurisdiction over this lawsuit and this case must be dismissed.

CONCLUSION

Based upon the foregoing, Defendants ROBERT BENTLEY, KIM THOMAS, BILLY MITCHEM, FRANK ALBRIGHT, BETTINA CARTER and EDWARD ELLINGTON respectfully request that this Court dismiss *with prejudice* the claims asserted by the Named Plaintiffs LOUIS HENDERSON, DANA HARLEY, DARRELL ROBINSON, DWIGHT SMITH, ALBERT KNOX, JOHN HICKS, JAMES DOUGLAS, DAVID SMITH and MELINDA WASHINGTON pursuant to Rules 8(a)(2), 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and whatever additional relief to which they may be entitled.

Respectfully submitted on this 25th day of May, 2011,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and service will be perfected by email to the CM/ECF participants or by postage prepaid first class mail to the following this the 25th day of May, 2011:

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