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

LOUIS HENDERSON, et al., Plaintiffs, v. **ROBERT BENTLEY, Governor of Alabama, et al.,** Defendants.	Civil Case No. 2:11cv224-MHT

MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Introduction

The Amended Complaint claims that "Defendants are violating Plaintiffs' rights under Title II of the ADA and Section 504 of the Rehabilitation Act, by subjecting them to discrimination solely on the basis of their testing HIV-positive, and by excluding them from participation in, or denying them the benefits of, ADOC services, programs, or activities for which Plaintiffs are qualified, because they have HIV." Am. Compl. ¶ 112. None of Defendants' arguments for dismissal of the Amended Complaint withstands scrutiny.

I. PLAINTIFFS' CLAIMS ARE NOT BARRED BY *RES JUDICATA*

Defendants argue that Plaintiffs' claims are barred by the doctrine of *res judicata*, asserting that Plaintiffs have already litigated the identical claims in *Onishea v. Hopper*, 171 F.3d 1289 (11th Cir. 1999) (en banc), and *Edwards v. Alabama Dep't of Corrections.*, 81 F. Supp. 2d 1242 (M.D. Ala. 2000). Def. Br. 9-22. *Res judicata* does not apply here: the claims are

materially different because of a significant change in circumstances since *Onishea* and *Edwards* were decided.

As this Court ruled in *Edwards*, "[i]n order for *res judicata* to apply, the following four elements must be satisfied: (1) there must have been a final judgment on the merits of the first action; (2) the first decision must have been rendered by a court of competent jurisdiction; (3) the parties to both actions, or those in privity with them, must be identical; and (4) the causes of action in both suits must be identical." *Edwards*, 81 F. Supp. 2d at 1247. The fourth element is the one at issue in this case. "The determinative factor in ascertaining whether two causes of action are identical for *res judicata* purposes is not only whether the same legal claim is asserted, but also whether the factual underpinnings of the causes of action are constant." *Id.* at 1249.

The Eleventh Circuit premised its 1999 decision in *Onishea* on the following core factual finding by the district court: "In the state of medical knowledge and art at the time of trial, *HIV infection inevitably progressed to AIDS. AIDS always led to death*, often after lengthy suffering." *Onishea*, 171 F.3d at 1293 (emphasis added). The Eleventh Circuit pointed to the district court's finding that HIV-transmission activity could occur in any prison program, and then summarized the district court's conclusion that prisoners with HIV were not "otherwise qualified" for any prison program, as follows:

> If these activities can spread HIV, and these activities can occur between HIV-positive and HIV-negative inmates, the [district] court reasoned, then HIV transmission is more than a theoretical possibility, even if we have no examples.
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> From these facts, the [district] court concluded that the transmission risk is significant in all programs. After all, each case of transmission, however rare, claims at least one life . . . . Given this degree of harm, even slim odds of transmission make the risk significant. As the [district] court put it in words echoed throughout its 476-page opinion, "elimination of high risk behavior is impossible . . . . Because the Defendant/Prison system has decided that such conduct is likely, and *because of the catastrophic severity of the consequences if such conduct does occur*, this Court holds that integrating the

> [program under discussion] would present a significant risk of transmitting the deadly HIV virus. Accordingly, the HIV+ inmates are not 'otherwise qualified.'"

Id. at 1295 (quoting district court opinion). In affirming, the Court of Appeals 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 (emphasis added).

This central factual premise of the *Onishea* decision—that HIV infection inevitably progresses to AIDS and then to death—is no longer true. Since the mid-1990s, "new classes of antiretroviral medications proved extremely effective at suppressing the virus. These medications have changed HIV from a fatal disease to a chronic condition that can be successfully treated. Nowadays, people with HIV who receive appropriate treatment can look forward to a normal lifespan." Am. Compl. ¶ 4.

Plaintiffs' allegations that HIV no longer "inevitably entails death" are a sufficient basis to deny defendants' motion to dismiss on *res judicata* grounds. These allegations are well-founded: highly active antiretroviral therapy (HAART) has been the accepted standard of care since 1997; this Court may take judicial notice of the fact that HIV can now be successfully managed even though it cannot be cured, and that with proper treatment it is a chronic rather than an invariably fatal disease.[1] Because the crucial factual underpinning of the *Onishea* decision

[1] According to the U.S. Department of Health and Human Services ("DHHS"), highly active antiretroviral therapy (HAART) became the new standard of HIV care in 1997; in that same year the U.S. Centers for Disease Control and Prevention (CDC) reported the first substantial decline in AIDS deaths in the United States, due largely to the use of HAART. *See* Dep't Health & Human Servs., *A Timeline of AIDS*, AIDS.gov, http://www.aids.gov/hiv-aids-basics/hiv-aids-101/overview/aids-timeline/index.html (follow "1997" hyperlink) (last visited June 24, 2011); Ex. 1 at 4.

DHHS explains that HIV "is a serious, infectious disease that can lead to death if it isn't treated," but that even though there is no cure "many scientific and technological advances have made HIV a *chronic* manageable disease. Many people with HIV lead healthy, happy, and productive lives and learn how to cope with the disease." DHHS, *HIV Positive*, Aids.gov, http://www.aids.gov/hiv-aids-basics/diagnosed-with-hiv-aids/overview/hiv-positive/ (last visited June 24, 2011). *See* Ex. 1 at 1. "With proper care, HIV is not a death sentence!" *Id*. DHHS further

has changed, *Onishea* cannot have *res judicata* effect.

Nor does *Edwards* bar this suit. The *Edwards* plaintiffs alleged that "advances in medicine have occurred since the district court rejected the first eighth-amendment claim in 1990, which have changed the standard of care for HIV-positive patients and thus altered what constitutes cruel and unusual punishment in this context." *Edwards*, 81 F. Supp. 2d at 1249. This Court concluded:

> The particular facts now alleged by the plaintiffs here do transform their claim into a different cause of action because they change an essential element of the eighth-amendment claim . . . . While a failure to provide certain treatments might not have risen to the level of deliberate indifference in 1990, that same level of care might now amount to an eighth-amendment violation."

Id. at 1250. Accordingly, this Court ruled, the *Edwards* plaintiffs' Eighth Amendment claims were not barred by *res judicata*:

> The threshold for deliberate indifference, defined by the "evolving standards of decency," might very well have changed in the nearly ten years since the district court rejected the *Onishea* plaintiffs' eight-amendment claims, and the plaintiffs' eight-amendment claims here therefore should not be precluded from relitigation [on *res judicata* grounds].

Id.

The *Edwards* plaintiffs did not, however, allege changed circumstances with respect to their ADA claim (presumably because, when the *Edwards* plaintiffs filed suit in 1997, the new HAART therapies had just become the standard of HIV care and it was not yet established that these therapies would effectively convert the disease from a "death sentence" to a manageable

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defines a "chronic" disease as one that "continues over a long period of time and does not go away, but "may improve with lifestyle changes and treatment," for example, "heart disease, diabetes, and asthma," as well as HIV. DHHS, Aids.gov, http://www.aids.gov/hiv-aids-basics/diagnosed-with-hiv-aids/overview/hiv-positive/ (follow "Chronic Disease" hyperlink) (last visited June 24, 2011). *See* Ex. 1 at 2. Under "Frequently Asked Question: Diagnosed with HIV/AIDS," DHHS explains that "current treatments and medications are giving people with HIV a positive prognosis and near-normal life-span." DHHS, *Frequently Asked Questions*, Aids.gov,; http://www.aids.gov/hiv-aids-basics/diagnosed-with-hiv-aids/overview/hiv-positive/ (follow the "Answer" hyperlink to "Am I going to Die of Aids?") (last visited June 24, 2011). *See* Ex. 1 at 3.

chronic condition). This Court accordingly ruled that the *Edwards* plaintiffs' ADA claim was essentially the same as those of the *Onishea* plaintiffs. The Court expressly noted, however, that nothing in its opinion would prevent the plaintiffs from showing changed circumstances in the future:

> [T]he argument of changed circumstances . . . could also be asserted as a basis to deny the application of *res judicata* to the plaintiffs' ADA claim. However, because the plaintiffs do not make this argument with regard to their ADA claim, the court does not reach the argument, and *nothing in this opinion should be taken to hold that the court has rejected the application of changed-circumstances argument to the plaintiffs' ADA claim.*

Id. at 1250 n.2 (emphasis added).

Thus, *Edwards* is no more a bar to Plaintiffs' claims than *Onishea*: The claims are not identical because of the change in factual circumstances. Furthermore, "[u]nder a generally accepted exception to the res judicata doctrine, a litigant's claims are not precluded if the court in an earlier action expressly reserves the litigant's right to bring those claims in a later action." *D&K Props. Crystal Lake v. Mut. Life Ins. Co.* 112 F.3d 257, 260 (7th Cir. 1997) (quoting *Apparel Art Int'l, Inc. v. Amertex Enter. Ltd.*, 48 F.3d 576, 585 (1st Cir. 1995); *see also* Restatement (Second) of Judgments § 26(1)(b) (1982). This Court expressly noted that its decision in *Edwards* was no bar to plaintiffs bringing a new case that alleged changed circumstances.

II. THE AMENDED COMPLAINT STATES CLAIMS UNDER THE ADA AND THE REHABILITATION ACT

To state a claim under Title II of the ADA, a plaintiff must allege: "(1) that he is a 'qualified individual with a disability;' (2) that he was 'excluded from participation in or . . . denied the benefits of the services, programs, or activities of a public entity' or otherwise 'discriminated [against] by such entity;' (3) 'by reason of such disability.'" *Shotz v. Cates*, 256

F.3d 1077, 1079 (11th Cir. 2001) (citing 42 U.S.C. § 12132.) Similarly, "[t]o establish a prima facie case of discrimination under the [Rehabilitation] Act, an individual must show that (1) he has a disability; (2) he is otherwise qualified for the position; and (3) he was subjected to unlawful discrimination as the result of his disability." *Sutton v. Lader*, 185 F.3d 1203, 1207 (11th Cir. 1999). Defendants focus their arguments on whether HIV is a disability and whether Plaintiffs have adequately pled that they are otherwise qualified for the services, programs, and activities denied them. For the reasons explained below, Plaintiffs have adequately pled each of the elements challenged by Defendants.[2]

A. HIV is a Disability under the ADA and the Rehabilitation Act

Defendants question whether Plaintiffs' HIV status entitles them to the protections of the ADA and the Rehabilitation Act, arguing that HIV may not be a disability under these statutes. They rely, however, exclusively on cases that arose before the January 1, 2009, effective date of the ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified as amended at 42 U.S.C.A. § 12101. (West 2009)), which expanded and clarified the definition of disability in response to overly narrow judicial interpretations of the ADA. Both the statutory text and legislative history of these amendments put to rest any doubt about whether HIV is a disability.

The Act defines a disability as, *inter alia*, "a physical or mental impairment that substantially limits one or more major life activities" of an individual. 42 U.S.C. § 12102(1)(A). The 2009 amendments to the Act, however, further define "major life activities" to include "the

[2] In addition to arguing that Plaintiffs have failed to meet the elements identified above, Defendants assert, without support or further argument, that "there is no legal basis for . . . Plaintiffs' naming of Governor Bentley as a defendant in this action." Def. Br. at 22-23. This assertion is without merit. As the Complaint alleges, the Governor is vested with ultimate authority and responsibility over the corrections system, and has the authority to promulgate rules and regulations necessary to the management and security of all prisons and jails. First Amend. Compl. ¶ 11. *See also* Ala. Code 1975 § 14-1-15 (2010); Ala. Code 1975 § 14-1-8 (2010). He is therefore appropriately named as a defendant in this suit, which seeks declaratory and injunctive relief against Defendants regarding the ADOC rules and regulations adopted pursuant to that authority.

operation of a major bodily function," which in turn includes "functions of the immune system." 42 U.S.C. § 12102(2)(B). The amendments also provide that this definition "shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter." 42 U.S.C. § 12102(4)(A). The amendments further provide that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active," 42 U.S.C. § 12102(4)(D), and that the determination of whether the impairment "substantially limits" a major life activity is to be made "without regard to the ameliorative effects of mitigating measures," which includes "medication, medical supplies, [and] equipment." 42 U.S.C. § 12102(4)(E)(i)(I).

HIV attacks the body's CD4 cells, which play a critical role in the immune system's response to infections. If active and left untreated, HIV will eventually destroy so many CD4 cells that the patient's body becomes unable to fight infections and diseases, leading to AIDS. *See* U.S. Dep't Health & Human Servs., *What is HIV/AIDS?*, AIDS.gov, http://www.aids.gov/hiv-aids-basics/hiv-aids-101/overview/what-is-hiv-aids (last visited June 24, 2011). Such weakening of the immune system is necessarily a substantial limitation on the operation of the immune system. Based on the statutory text, then, HIV is plainly a disability.

The legislative history supports this construction. The supporters of the Act sought both to expand the scope of the disability definition and to end discrimination against people with HIV. *See, e.g.*, 154 Cong. Rec. H8279, 8297-98 (daily ed. Sept. 17, 2008) (statement of Rep. Baldwin) ("Although the ADA clearly intended to protect people living with HIV from being discriminated against based on having HIV, many have had their lawsuits derailed by disputes over whether they meet a narrowly interpreted definition of the term 'disability.' . . . By passing the ADA Amendments Act, we reaffirm the right for American workers—including any

American living with HIV—to be judged based upon their skills, talents, loyalty, character, integrity and work ethic."); 154 Cong. Rec. S8342, 8344 (daily ed. Sept. 11, 2008) (statement of Sen. Harkin) ("[T]he bill rejects the Supreme Court's holding in *Toyota v. Williams* that the terms 'substantially' and 'major' in the definition of disability must be 'be interpreted strictly to create a demanding standard for qualifying as disabled,' as well as the Court's interpretation that 'substantially limits' means 'prevents or severely restricts').

Based on the statutory text and the legislative history, then, HIV is a disability within the meaning of the ADA and Rehabilitation Act, as amended.

B. The Complaint Adequately Pleads that Plaintiffs Are "Otherwise Qualified Individuals" Subjected to Discrimination By Reason of their HIV Status

Title II of the ADA defines "qualified individual with a disability" as "an individual with a disability who . . . 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. § 12131(2**)**. Under the implementing regulations for the Rehabilitation Act, a handicapped person is otherwise qualified for services if she "meets the essential eligibility requirements for the receipt of such services." 34 C.F.R. § 104.3(l)(4) (1987). Based on an erroneous application of the *Onishea* holding, Defendants argue that Plaintiffs "have not and cannot allege that there is no 'significant risk' of transmission of HIV throughout ADOC facilities," and that Plaintiffs' allegations are insufficiently detailed to survive a motion to dismiss. Def. Br. at 27-28. Neither of these arguments provides any basis to dismiss Plaintiffs' complaint at this early stage, before any discovery on the factual assumptions that form the basis of Defendants' contentions that a "significant risk" would arise from housing prisoners with HIV according to the same classification principles that Defendants apply to all other prisoners.

1. Defendants' argument that Plaintiffs have not adequately alleged they are "otherwise qualified" is based on an erroneous application of *Onishea.*

For the same reasons that *Onishea* cannot bar Plaintiffs' claims under the *res judicata* doctrine, *Onishea* does not support Defendants' argument that Plaintiffs' allegations are insufficient to show that they are qualified. Def. Br. 26-27. *Onishea* concluded that, because HIV transmission "*inevitably entails death*," any risk of HIV transmission is a "significant risk" if the evidence shows that (1) a certain event can occur and (2) according to reliable medical opinion that event can transmit HIV. The Complaint contains well-pleaded, plausible allegations, based on sources entitled to judicial notice, that the core factual premise of *Onishea*—that HIV transmission "*inevitably entails death*"—is no longer true. HIV is no longer a death sentence, and Plaintiffs are not required to allege or prove that there is *no* risk of HIV transmission in ADOC facilities.

The *Onishea* court's holding was based on *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), in which the Supreme Court set forth the standard under Section 504 of the Rehabilitation Act for determining whether a person with a contagious disease may be "otherwise qualified" for a job. 480 U.S. at 287-89. *Arline* emphasized that "[a]llowing discrimination based on the contagious effects of a physical impairment would be inconsistent with the basic purpose of § 504, which is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others." *Id*. at 284. *Arline* held that courts must make "an individualized inquiry" that "protect[s] handicapped individuals from deprivations based on prejudice, stereotypes, or unfounded fear, while giving appropriate weight to such legitimate concerns . . . as avoiding exposing others to significant health and safety risks." *Id*. at 287. This inquiry involves consideration and weighing of such

factors as: "(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.* at 288. The inquiry must be "based on reasonable medical judgments given the state of medical knowledge" and "normally should defer to the reasonable medical judgments of public health officials." *Id*. at 288. If, based on these factors, a person "poses a significant risk of communicating an infectious disease to others" in the program and reasonable accommodation will not eliminate that risk, then the person is not "otherwise qualified." *See id*. at 287 n.16.

In *Onishea*, the Eleventh Circuit weighed the *Arline* factors and concluded that when transmission of a contagious 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." 171 F.3d at 1299 (emphasis added). Defendants argue that this Court must apply this "inevitably entails death" standard—but that standard is no longer applicable since, as shown in Part I above, HIV is now a manageable chronic disease and no longer "inevitably entails death."

Accordingly, the applicable standard in this case is the one set forth in *Arline* itself. Relying on "reasonable medical judgments given the state of medical knowledge" and deferring to "the reasonable medical judgments of public health officials," the court must weigh several factors, namely "(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." *Arline*, 480 U.S. at 288. In the case of a contagious disease such as HIV, which is serious and chronic but not necessarily fatal, analysis of the interplay of the four *Arline*

factors in a particular context will not necessarily result in finding a "significant risk" of transmission. *Cf. Roe v. Dist. of Columbia*, 842 F. Supp. 563, 566, 570 (D.D.C. 1993) (holding that it did not create a "significant risk" of Hepatitis B transmission for a firefighter with Hepatitis B to perform mouth-to-mouth resuscitation; the court emphasized that no other fire department in the United States imposed similar restrictions on persons with Hepatitis B carriers and noted that when "the nature of the risk and the probability that [the disease] will be transmitted are both so low as to be classified as theoretical, the importance of the second and third *Arline* factors, although meriting some discussion, fades"), *vacated as moot*, 25 F.3d 1115 (D.C. Cir. 1994)).

2. The Complaint pleads sufficient facts from which this Court can infer that Plaintiffs are qualified to be housed according to ADOC's general classification rules and that there is no "significant risk of transmission."

Defendants contend that the Complaint pleads only "the conclusory statement" that Plaintiffs are "otherwise qualified" for the ADOC programs, services and activities identified in the Complaint. Def. Br. at 27-28. A review of the Complaint makes it plain, however, that Plaintiffs have met the requirements of Rule 12(b)(6), pleading enough factual content to allow the Court to draw the reasonable inference that Plaintiffs are otherwise qualified for the programs, services, and activities identified in the Complaint, and that Defendants are denying them access on the basis of their HIV status.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 562-63 (2007), the Supreme Court announced that Rule 12(b)(6)'s pleading standard "[does] not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* at 570. A complaint "does not need detailed factual allegations," but the allegations "must be enough to raise a right to relief above the speculative level." *Id.* at 555. Furthermore, "a well-pleaded

complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Id.* at 556 (quotation marks omitted). The rule "does not impose a probability requirement at the pleading stage,' but instead "simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the necessary element. *Id.* In *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), the Supreme Court clarified that "[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.* at 1949 ; *see also Speaker v. U.S. Dep't of Health and Human Servs.*, 623 F.3d 1371, 1384 (11th Cir. 2010) (*quoting Twombly*, 550 U.S. at 570 ("Speaker has pleaded enough factual content to 'nudge[ ] [his] claims across the line from conceivable to plausible'. . . Importantly, Speaker's allegations are not barren recitals of the statutory elements, shorn of factual specificity."); *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295-96 (11th Cir.2007) ("The Court has instructed us that the rule . . . 'simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of' the necessary element." (quoting *Twombly,* 550 U.S. at 556)).

Plaintiffs' claim that they are "otherwise qualified" for the programs, services and activities at issue here is supported by the following non-conclusory factual allegations,[3] among many others:

[3] Plaintiffs' allegations regarding specific eligibility requirements for the various programs at issue here would have been more detailed had not Defendant Kim Thomas and Defendants' counsel Anne Adams Hill repeatedly failed to provide a complete response to Plaintiffs' September 1, 2010, Open Records Act request for the eligibility requirements for ADOC programs. *See* Ex. 2 (written communications between Plaintiffs' counsel and Defendant Thomas regarding Plaintiffs' open records request). *See also* Ex. 3-A , at 1 (follow-up communications with ADOC counsel Anne Adams Hill). As discussed above, however, *Twombly* and *Iqbal* permit the use of inferential reasoning to fill gaps in plaintiffs' knowledge—in part to prevent defendants from using such information asymmetries to prematurely end potentially meritorious lawsuits. *See U.S. ex rel Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 854 (7th Cir. 2009) (plaintiff need not plead the contents of invoices that he "is unlikely to have . . . unless he works in the defendant's accounting department" so long as "the inference that [he] proposes is a plausible one").

All prisoners with HIV are categorically excluded from the general population dormitories and are housed together in a single HIV-living are on the A-side of Limestone, whatever their custody level. Am. Compl., ¶ 47. ADOC's segregation policy trumps all the usual considerations that prison officials take into account in making classification decisions, and results in prisoners at different custody levels being housed together for no reason other than that they have HIV. Am. Compl., ¶ 40.

Plaintiffs Henderson, Robinson, Dwight and David Smith, Knox and Douglas are housed at Limestone on A-side. Am. Compl., ¶¶ 17, 20, 24, 26, 28, 31, 46, 47.

Plaintiff Henderson as remained free of disciplinary violations for at least four years. His custody level is minimum-in. Minimum-in custody prisoners are eligible to work in jobs outside the perimeter of the prison, when supervised by a correctional officer. In August 2009 Limestone's classification recommended that Henderson's custody be lowered further to minimum-out, making him eligible for work assignments outside the prison and without the direct supervision of a correctional officer, and that he be moved to Decatur Work Release. In July 2010, Limestone's classification team recommended that Henderson's custody be lowered further, to minimum-community, and again recommended that he be moved to Decatur Work Release. He has been medically cleared for work release. Despite the classification team's recommendations, ADOC has not lowered his custody and he remains at Limestone. He is qualified for a number of ADOC programs, privileges, activities, and services, including, for example, residence in the Faith-Based Honor Dorm at Limestone; transfer to a lower security level facility; transfer to a facility providing vocational training in heating and air, small engine repair, and information systems; transfer to a ADOC facility closer to his home in Mobile; and work release. Defendants exclude him from all of these programs and services solely because he has HIV. Am. Compl., ¶ 17-19.

All general population prisoners on A-side and B-side at Limestone have their meals in the dining hall– except for prisoners with HIV, all of whom are categorically excluded from dining hall. Am. Compl., ¶ 64. Plaintiffs Henderson, Robinson, Dwight and David Smith, Knox and Douglas, who are housed on A-side, are thus otherwise qualified to eat their meals in the dining hall at Limestone, but are excluded solely because they have HIV.

General population prisoners at Limestone who are least forty years old and older are eligible for housing in a senior's dormitory. Am. Compl., ¶ 50. Plaintiffs Louis Henderson, Dwight Smith, Albert Knox, James Douglas, David Smith and Darrell Robinson are eligible to reside in the senior dorm but are excluded solely because they have HIV. Am. Compl., ¶ 50.

Plaintiff Albert Knox is eligible for the residential substance abuse program but is prohibited from living or taking meals with the other program participants solely because he has HIV. Am. Compl., ¶ 51-52.

General-population prisoners who are near the end of their sentence are housed in a pre-release unit for ninety days to learn life-skills prior to release. Plaintiff David Smith is due to be released August 28, 2011. Am. Compl., ¶ 31. He is therefore otherwise eligible to participate in residential pre-release programming but is excluded solely because he has HIV. Am. Compl., ¶ 55.

Qualified general population prisoners are eligible for jobs in the prison kitchen or dining room at Limestone. Am. Compl., ¶ 58. Plaintiffs—including Plaintiff Henderson, who has been recommended for minimum-community custody— are nevertheless categorically excluded from kitchen and dining hall jobs because they have HIV. Am. Compl., ¶ 58. The ADOC Commissioner conceded in 2010 that there is no medical rationale for the policy, and stated that the only reason ADOC excludes prisoners with HIV from food service jobs is that it believes other prisoners would dislike eating food prepared by them. Am. Compl., ¶ 61.

Prisoners with good disciplinary records are eligible for participation in the Faith-based Honor Dorm. Am. Compl., ¶ 56. Plaintiff Henderson has remained disciplinary-free for at least four years. Am. Compl., ¶17. Plaintiff Robinson has remained disciplinary free since arriving at Limestone in 2009. Plaintiff Dwight Smith, who has been at Limestone for five years, has a clear disciplinary record. Am. Compl., ¶ 26. All these prisoners are thus otherwise eligible for the Faith-based honor dorm, but prisoners with HIV are categorically excluded from the faith-based honor dorm. Am. Compl., ¶ 57.

Defendants discriminate against prisoners with HIV at Limestone by punishing them for appearing without the white armbands that identify them as living in the HIV Unit, while not punishing other prisoners for not wearing the armbands that identify the dorms they live in. Am. Compl., ¶ 66.

ADOC discriminates against prisoners with HIV at Limestone and at Tutwiler on the basis of their HIV status by locking prisoners with HIV in isolation cells whenever they have a personal conflict with another inmate, rather than simply housing them in separate dorms as is the policy with prisoners who do not have HIV. Am. Compl., ¶¶ 65, 72.

ADOC excludes female prisoners with HIV from all but two of the 15 dormitories at Tutwiler: an HIV dormitory housing all custody levels together, and the "healthcare unit" consisting of holding cells, isolation rooms used to house prisoners with HIV in disciplinary segregation, protective custody, or isolation, and infirmary beds. Am. Compl., ¶ 67.

Defendant Albright has designated Plaintiff Melinda Washington and "Sally Roe," another prisoner with HIV, as enemies. Rather than house them in separate dormitories, as he would if they were HIV-negative, and for which they are obviously otherwise qualified, he keeps one in solitary confinement and the other in the HIV dorm, rotating them once every ninety days. Similarly, Warden Albright has designated Plaintiff Dana Harley and fellow prisoner with HIV "Mary Jones" as enemies, and instead of assigning them to separate dormitories he keeps one prisoner in the HIV dorm and the other in

solitary confinement where conditions are extremely harsh and punitive, simply because they have HIV. Am. Compl., ¶¶ 73-74.

Women with serious medical needs requiring nursing care or in-patient care are eligible to be housed in the Medical Dorm—so long as they do not have HIV. Prisoners with HIV who have comparable medical needs and thus are otherwise qualified for the Medical Dorm are categorically excluded from the medical dorm: they are either left in the HIV dorm, or else housed in the "healthcare unit" which is used primarily to house prisoners with HIV in disciplinary segregation, protective custody, or isolation, in extremely harsh conditions. Am. Compl., ¶¶ 68, 69, 75.

The Faith-Based Honor Dorm at Tutwiler is a residential program designed to help prisoners develop life skills, personal growth, and accountability with outcomes of positive personal, family, institutional, and community relationships. Otherwise-qualified prisoners with HIV are categorically excluded from the Faith-Based Honor Dorm. Am. Compl. ¶ 76.

The substance abuse dorm at Tutwiler houses general population prisoners who are participating in the 8-week Substance Abuse Program ("SAP"), and also in the six-month Crime Bill Substance Abuse Program ("CB SAP"). Prisoners with HIV are categorically excluded from the residential component of these programs. They are allowed to participate for instruction but must return to the HIV dormitory to sleep—and even to use the bathroom. Am. Compl., ¶ 77. Plaintiff Melinda Washington is otherwise qualified for the 8-week substance abuse program. Am. Compl., ¶ 73. However, she is excluded from the residential component solely because of her HIV status, and thus she was removed from the program entirely when it was "her turn" to be moved from the HIV unit to solitary confinement, solely because she has HIV. Am. Compl., ¶ 72, 73.

Although there are eleven work release centers in Alabama, ADOC permits men with HIV to be assigned only to the center in Decatur and women with HIV to be assigned only to the work release center at the Montgomery Women's Facility. Am. Compl., ¶ 82. Plaintiff Louis Henderson has been medically cleared for work release and Limestone's classification team has twice recommended that he be moved to Decatur Work Release. Nevertheless, ADOC refuses to transfer him there because he has HIV. Am. Compl. ¶¶ 18-19. Limestone's classification team recommended that Plaintiff Darrell Robinson be moved to Decatur Work Release in 2009, but ADOC will not medically clear him for work release, even though he is healthy enough to do hard labor in the sun for an outdoor clean-up squad, because he does not meet ADOC's arbitrary medical criteria. Am. Compl. ¶ 22. Plaintiff Dwight Smith has been medically cleared for work release, and Limestone's classification team has recommended him for transfer to Decatur Work Release multiple times. Nevertheless, ADOC refuses to transfer him there because he has HIV. Am. Compl. ¶ 26. Plaintiff James Douglas has been medically cleared for work release, and was recommended for transfer to Decatur Work Release. Nevertheless, ADOC arbitrarily refuses to place him in work release because he has HIV. Am. Compl. ¶ 30. Plaintiff David Smith is also qualified for work release, and meets the medical

> clearance criteria. Nevertheless, ADOC arbitrarily refuses to place him in work release as well. Am. Compl. ¶ 32.
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> Meanwhile, Plaintiff John Hicks is housed at Decatur Work Release, but is prohibited from working in food services jobs and prohibited from transferring to another work-release facility solely because he has HIV. Am. Compl. ¶ 23.

In these allegations, among many others, Plaintiff have pleaded "factual content that allows the court to draw the reasonable inference" that they are otherwise qualified individuals, against whom Defendants are discriminating by excluding them from or denying them the benefits of programs, services and activities simply because they have HIV.[4] *See Iqbal*, 129 S. Ct. at 1949.

Defendants also argue that because John Hicks is housed at Decatur Work Release, HIV discrimination cannot possibly be the reason for ADOC's repeated refusals to transfer Louis Henderson, Darrell Robinson, Dwight Smith, James Douglas, and David Smith to Decatur Work Release. Def. Br. at 29. This is not so. As the Complaint alleges, ADOC has never admitted more than a handful of men with HIV to work release, and has gone for long periods without placing any men with HIV there, even though general population inmates continue to be transferred to Decatur Work Release. Am. Compl. ¶ 88. The Complaint further alleges: "Upon information and belief, HIV prejudice, not a lack of bed space, is the reason for this disparity; there is bed space for at least fifteen other prisoners in the dorm where Plaintiff John Hicks is housed, in addition to space in the other dormitories at Decatur Work Release Center." *Id.*

[4] Defendants hint that the female Plaintiffs do not make sufficiently specific allegations regarding their program eligibility. They do not press this suggestion as an issue, however: it appears in the "Procedural Background" section of their brief unsupported by any discussion in the Argument. This suggestion is so unarticulated that Plaintiffs cannot meaningfully respond to it, and is therefore not properly raised. *See Smith v. Sec'ty, Dep't of Corrs.*, 572 F.3d 1327, 1352 (11th Cir. 2009) (argument that was only raised in one sentence of a 123-page brief, without citing any authority in support, was not adequately presented to the court); *see also Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995) ("There is no burden upon the district court to distill every potential argument that could be made based upon the materials before it on summary judgment. Rather, the onus is on the parties to formulate arguments.") (internal citations omitted).

Additionally, the Complaint alleges that correctional officers explicitly told one prisoner eligible for work release that "because of her HIV status she would not be transferred" to work release. Am. Compl. ¶ 89. This is enough factual information to "raise a reasonable expectation that discovery will reveal evidence" that HIV, not other factors, explains ADOC's near-universal refusal to admit otherwise-eligible prisoners with HIV to work release. *See Twombly*, 550 U.S. at 556.

Further, and contrary to Defendants' suggestion, the Complaint is replete with well-founded allegations from which the Court can infer that ending the practice of segregating prisoners with HIV would not pose a significant risk of HIV transmission in ADOC facilities. Plaintiffs allege the following:

> ¶ 3: Alabama's policies originated in the mid-1980s, when a tidal wave of public fear over the HIV/AIDS epidemic led a majority of state correctional systems to adopt policies requiring the segregation of prisoners with HIV. These policies were the product of a time when widespread popular confusion existed over the methods of HIV transmission, treatment options were virtually nonexistent, and HIV was considered a death sentence.
>
> ¶ 4: By the mid-1990s, however, new classes of antiretroviral medications proved extremely effective at suppressing the virus. These medications have changed HIV from a fatal disease to a chronic condition that can be successfully treated. Nowadays, people with HIV who receive appropriate treatment can look forward to a normal lifespan.
>
> ¶ 5: Also by the mid-1990s, the methods of HIV transmission had been clearly established, and myths that HIV could be transmitted through casual contact (such as handshakes, hugs, sharing food, or using the same toilet seats) had been widely debunked. Prison systems throughout the nation decided that HIV segregation was neither sound correctional policy nor justified by legitimate public health considerations. By 1994, only six prison systems had segregation policies. By 2003, that number had dwindled to three states—Alabama, South Carolina, and Mississippi. In 2010, the Mississippi Department of Corrections terminated its segregation policy.
>
> ¶ 6: Today, Alabama is one of only two states in the nation—South Carolina is the other—that continues to segregate all prisoners with HIV in separate, specially designated housing units.

¶ 7: Alabama insists that segregation is justified by the need to provide medical care and to prevent HIV transmission in prison. Prison systems throughout the United States have shown, however, that the states can meet their obligations to incarcerate prisoners safely and to provide them with necessary medical care without requiring prisoners with HIV to forfeit their right to be free from disability -based discrimination.

¶ 36: Appropriate prisoner classification is the backbone of the security program of any prison or jail. Like virtually every other prison system in the nation, ADOC uses an objective classification system to assign prisoners to appropriate custody levels. These classifications are based on the level of security and supervision the prisoner requires and the prisoner's program needs, including consideration of which prisoners can be safely housed together; the degree of restrictiveness of confinement necessary to protect the safety of other prisoners, prison staff, and the public; and the extent to which a particular classification will interfere with a prisoner's access to medical, mental health, educational, and other programs. Prison classification experts use standardized risk instruments and evidence-based judgments to make these decisions.

¶ 40: ADOC's segregation policy trumps all the usual considerations that prison officials take into account in making classification decisions, and results in prisoners at different custody levels being housed together for no reason other than that they have HIV. This automatic override of standard classification principles negatively impacts prisoners' safety and security, and denies prisoners with HIV the same opportunity afforded other prisoners to earn greater liberty and privileges through good behavior.

¶ 43: There is a broad national consensus in the medical-correctional community that segregation of prisoners merely because they test positive for HIV is unnecessary and potentially harmful. The National Commission on Correctional Health Care ("NCCHC") counsels that medical management of prisoners with HIV should parallel that offered to persons in the community. NCCHC explains as follows:

> Decisions on housing HIV-positive inmates should be based on what is appropriate for their age, gender, and custody class. NCCHC opposes routine segregated housing for HIV-positive inmates. HIV-positive inmates, like any other inmate, may require a higher level of care that may not be available at all institutions. This is a clinical judgment, based upon the acuity of care required for the patient. Patients with HIV infection may require isolation if, for example, they have pulmonary tuberculosis. HIV patients should not be medically isolated solely because of their HIV status (citing Nat'l Com'n on Corr. Health Care, Position Statement: Administrative Management of HIV in Correctional Institutions, (rev. Oct. 8, 2005), *available at* http://www.ncchc.org/resources/statements/admin_hiv2005.html.)

These allegations are sufficient to support the inference that there would be no "significant risk" of HIV transmission if ADOC houses Plaintiffs according to the same

classification criteria it applies to all other prisoners, rather than categorically segregating them solely because they have HIV.

Indeed, the determination whether an individual is "otherwise qualified" for a particular position generally requires the court "to conduct an individualized inquiry and make appropriate findings of fact." *Sch. Bd. of Nassau County. v. Arline*, 480 U.S. 273, 287 (1987); *accord Fiedler v. American Multi-Cinema, Inc.*, 871 F. Supp. 35, 39 (D.D.C. 1994) ("[T]he right to treat a disabled person disparately, and less favorably, on the ground that to do otherwise would endanger others must be preceded by an individualized assessment of the nature and extent of danger in relation to the specific disability of the person to be disfavored."). Accordingly, it is simply premature to address on a motion to dismiss whether ending the segregation policy would cause any or all of the Plaintiffs to present any kind of significant risk. *See Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."); *Doe v. City of Chicago*, 883 F. Supp. 1126, 1135-36 (N.D. Ill. 1994) (denying motion to dismiss in case involving HIV-positive police officer candidates); *Gibbs v. Martin*, No. 01-74480, 2003 WL 21909780, *1 (E.D. Mich. July 28, 2003) (noting the denial of motion to dismiss case involving question whether HIV positive prisoners posed a direct threat).

Plaintiffs have pleaded facts from which the Court could infer that they are "otherwise qualified" for DOC programs, services and activities under the same classification criteria that ADOC applies to prisoners who do not have HIV, and that they have been discriminated against

on the basis of their HIV status. They have pleaded enough facts to state a claim to relief that is plausible on its face. Hence, there is no basis under Rule 12(b)(6) for dismissing the Complaint.

C. Plaintiffs Do Not Claim a Right to a Housing Assignment of their Choosing, But Rather a Right not to be Excluded Categorically from all but HIV-segregated Facilities

Defendants mischaracterize Plaintiffs' claims as a "demand that they be housed in whatever facility or geographical location of their choosing," Def. Br. at 31, and then assert there is no such right under federal disability discrimination law. *Id.* But Plaintiffs do not demand placement in any particular facilities or locations. Rather, they contest their categorical exclusion, based on their HIV status, from everywhere except for the segregated dorms in Limestone and Tutwiler and two work-release facilities (one for men with HIV, and one for women with HIV) in the entire state. *See* Am. Compl., ¶ 82 (prisoners with HIV excluded from all but two work-release facilities—one for women, and one for men); *Id.* ¶ 90 ("[A]ll male prisoners with HIV . . . are categorically excluded from transferring to [other ADOC] facilities and participating in the programs, services, and activities offered there.").

Defendants primarily rely on three cases holding that prisoners do not have a constitutional right to confinement in the prison of their choice. *See* Def. Br. at 30 (citing *Sandin v. Conner*, 515 U.S. 472, 478 (1995); *Meachum v. Fano*, 427 U.S. 215, 224 (1976); *Montanye v. Haymes*, 427 U.S. 236, 242 (1976)).[5] But these cases are inapposite because they address the liberty interests of prisoners in general under the Due Process Clause—not whether a prison

[5] The two recent decisions from the Middle District of Alabama cited by Defendants are similarly inapposite, as these cases do not involve claims of discrimination against any class protected by a statute or the Constitution. *See Jackson v. Albright*, No. 2:10-CV-936-TMH, 2011 WL 904574 (M.D. Ala. Jan. 21, 2011) (prisoner challenging assignment to medium custody facility); *Doyon v. Houston County Jail*, No. 1:10-CV-580-TMH, 2010 WL 3724901 (M.D. Ala. July 15, 2010) (prisoner challenging failure to transfer from county jail to state prison system).

may, consistent with the ADA and the Rehabilitation Act, categorically bar disabled prisoners from having the same transfer opportunities as non-disabled prisoners. The issue in this case is not the rights of prisoners in general; it is whether Plaintiffs may be treated worse than other prisoners because of their disability.[6]

The ADA was enacted against the backdrop of existing civil rights law, particularly the Civil Rights Act of 1964. It sought to extend to disabled individuals the same kinds of protections against invidious discrimination that existing civil rights laws already guaranteed to women and other minorities. *See McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995) (recognizing that the ADA is part of a "wider statutory scheme" aimed at the eradication of discrimination and invidious bias); *Helen L. v. DiDario*, 46 F.3d 325, 331 (3d Cir. 1995) (finding that the ADA was Congress' response to the need for "civil rights" legislation for the disabled). These civil rights laws protect "equality of opportunity" by removing "artificial, arbitrary, and unnecessary barriers . . . [that] operate invidiously to discriminate on the basis of racial or other impermissible classification." *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971). In this broader universe of case law, the fact that a job or some other benefit is not constitutionally guaranteed does not mean that it can be denied for improper reasons, such as invidious discrimination against a protected class. *See Curl v. Reavis*, 740 F.2d 1323, 1327-28 (4th Cir. 1984) (where deputy sheriff alleged she was denied equal promotional opportunities

[6] This point is actually reinforced by the lone case Defendants cite involving alleged violations of the ADA and the Rehabilitation Act. *See Ross v. Knight*, No. 103-CV-1700-SEB-VSS, 2006 WL 3626372, at *6 (S.D. Ind. Dec. 8, 2006) (granting summary judgment for defendants because plaintiff failed to establish he was disabled and failed to establish he had been prohibited from any particular program or activity based on his alleged disability). As the *Ross* court stated, "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.*'" *Id*. (emphasis added) (quoting *Crawford v. Indiana Dep't. of Corr.*, 115 F.3d 481, 486 (7th Cir.1997)).

and then fired based on sex, "we need not consider whether a North Carolina deputy sheriff has any property interest in his employment, since it is not necessary to have such a constitutionally protected interest to bring an employment discrimination claim under Title VII."). *See also Hishon v. King & Spalding*, 467 U.S. 69, 75 (1984) ("A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all.").

In this case, ADOC's discriminatory policies—which restrict Plaintiffs to segregated dorms in Limestone and Tutwiler, categorically bar them from all but two work-release facilities in the state, and discriminate against them in work-release placement at those two facilities—violate the ADA and the Rehabilitation Act by denying Plaintiffs the benefit of many ADOC-provided services, programs, and activities.[7] The ADA does not require ADOC to afford special treatment to prisoners with HIV, but it does forbid them from discriminating against such prisoners on the basis of their disability by denying them an equal opportunity to access prison programs, services, and activities. Plaintiffs do not request to pick and choose what housing assignments and facilities they most prefer—they ask only to be treated no worse than other prisoners because they have HIV.

Plaintiffs' segregation is based solely on their HIV status. *See* Am. Compl. ¶ 35 ("The law does not require segregation . . . [but] ADOC immediately segregates all prisoners who test positive for HIV and houses them separate and apart from all other prisoners for the duration of

[7] The categorical nature of Defendants' policies regarding prisoners with HIV make them close cousins to sex-based discriminatory eligibility requirements that operate as a categorical bar to employment. Such categorical bars have long been held to violate federal law banning sex discrimination. *See, e.g., Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385 (5th Cir. 1971) (holding that airline policy of restricting its hiring for flight attendant positions to females violates Title VII), *cert. denied*, 404 U.S. 950 (1971); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 293 (N.D. Tex. 1981) (holding that airline's "open refusal" to hire males for positions of flight attendant and ticket agent was a violation of Title VII); *Sprogis v. United Air Lines, Inc.*, 308 F. Supp. 959 (N.D. Ill. 1970) (holding that policy requiring female stewardesses to be unmarried as a condition of employment violated the Act) *aff'd and remanded*, 444 F.2d 1194 (7th Cir. 1971).

their prison confinement."). Further, this segregation results in Plaintiffs' *de facto* exclusion from programs, services, and activities offered to prisoners without HIV housed elsewhere in Limestone and Tutwiler, as well as those in other ADOC facilities. *See* Am. Compl. ¶ 40 ("[ADOC's segregation policy] denies prisoners with HIV the same opportunity afforded other prisoners to earn greater liberty and privileges through good behavior.") Thus, Defendant's discriminatory segregation housing policies—which deny Plaintiffs access to prison services, activities, and programs—violate the ADA and the Rehabilitation Act.

Not only are male prisoners with HIV automatically placed in Limestone—which, as a matter of course, denies them the benefits of all activities, programs, and services offered at any other ADOC facility—they are also categorically excluded from the general population dormitories and housed together in a single HIV living area. Am. Compl. ¶ 47. As a result, Plaintiffs are barred from senior housing, the Residential Substance Abuse Treatment Program, the Residential Pre-release Unit, and the Faith-Based Honor Dormitory—as well as all of the attendant privileges and benefits. *See* Am. Compl. ¶ ¶ 50-51, 55, 56-57. Female prisoners with HIV are similarly segregated in HIV housing and barred from the Medical Dormitory, the Faith-Based Honor Dorm, and the residential component of the Substance Abuse Dormitory. *See* First Am. Comp. ¶¶ 67, 75-77. The denial of privileges or the opportunity to participate in beneficial programming on the basis of disability is actionable under the ADA. *See, e.g., Raines v. Florida* 983 F. Supp. 1362, 1372-74 (N.D. Fla. 1997) (denying motion for summary judgment where disabled prisoners were denied full opportunity to participate in "program" to earn the maximum amount of incentive gain time in violation of the ADA); *Dean v. Knowles*, 912 F. Supp. 519 (S.D. Fla. 1996) (holding that issue of fact as to why HIV-positive prisoner's request to be granted trustee status was denied precluded summary judgment for the correctional facility).

Therefore, Plaintiffs have stated a claim that by categorically excluding Plaintiffs from the particular dormitories (and any attendant benefits and privileges) Defendants' discriminatory policies violate the ADA and the Rehabilitation Act.

Similarly, prisoners with HIV at Limestone are also excluded from the Limestone Dining Hall; and because there are too few dining tables in the HIV dorm to accommodate all prisoners who reside there, some must eat inside their cells or outside the dorm, with no access to a sanitary eating area. Am. Compl. ¶ 64. Prisoners with HIV are also restricted to one side of the recreation yard. Am. Compl. ¶ 49. For the purposes of making a claim under the ADA or the Rehabilitation Act, recreational facilities and dining services are considered applicable programs, activities, or services. *See, e.g.*, *Simmons v. Navajo County*, 609 F.3d 1011, 1021 (9th Cir. 2010) (outdoor recreation); *Montez v. Romer*, 32 F. Supp. 2d 1235, 1237-40 (D. Colo. 1999) (yard areas, recreational facilities, and dining halls); *Schmidt v. Odell*, 64 F. Supp. 2d 1014, 1032 (D. Kan. 1999) (use of recreational areas and obtaining meals). As such, Plaintiffs' exclusion from these facilities is actionable.

More generally, claims of discrimination involving access to educational, vocational, or medical programming solely on the basis of prisoners' disabled status have repeatedly been found cognizable under the ADA and the Rehabilitation Act. *See, e.g.*, *Lee v. Los Angeles*, 250 F.3d 668, 691 (9th Cir. 2001) (mental health services); *Crawford v. Indiana Dept. of Corrs.*, 115 F.3d 481, 483 (7th Cir. 1997), *abrogated on other grounds by Erickson v. Bd. of Governors*, 207 F.3d 945 (7th Cir. 2000) (educational programs); *Castle v. Eurofresh, Inc.*, 734 F. Supp. 2d 938, 942-44 (D. Ariz. 2010) (work program); *Clark v. California*, 739 F. Supp. 2d 1168, 1177 (N.D. Cal. 2010) ("The ADA encompasses all services, programs, and activities provided by a prison to its prisoners."); *Hughes v. Colorado Dept. of Corrs.*, 594 F. Supp. 2d 1226, 1241 (D. Colo.

2009) (medical and mental health care); *Kogut v. Ashe*, 592 F. Supp. 2d 204 (D. Mass. 2008) (prison good-time work program); *Chase v. Baskerville*, 508 F. Supp. 2d 492, 505 (E.D. Va. 2007) (finding that access to educational, rehabilitative, and vocational programs are protected under ADA); *Hallett v. New York State Dept. of Corr. Servs.*, 109 F. Supp. 2d 190, 198-99 (S.D.N.Y. 2000) (shock incarceration and work release programs); *Montez v. Romer*, 32 F. Supp. 2d 1235, 1237-40 (D. Colo. 1999) (vocational training); *Roop v. Squadrito*, 70 F. Supp. 2d 868 (N.D. Ind. 1999) (finding that claim under the ADA of disability-based segregation resulting in unequal access to prison programs, activities and services precludes summary judgment). Here, Plaintiffs allege that being restricted to just one prison and one work-release facility in the state (Limestone and Decatur for men, and Tutwiler and Montgomery for women) denies them access to a wide range of prison programs, services, and activities that are only available at other ADOC facilities. *See*, Am. Compl. ¶¶ 91-102 (listing a number of facilities from which prisoners with HIV are categorically excluded and the programs, services, and activities denied these individuals as a result—including academic programming, vocational educational programming, and substance abuse programming).

In sum, ADOC's discriminatory segregation policies effectively deny Plaintiffs access to a myriad of unique programs, privileges, services, and activities that are unavailable to them solely because of their HIV status. These allegations adequately state claims under both the ADA and the Rehabilitation Act.

D. Involuntary Disclosures of HIV Status That Cause Plaintiffs to Suffer Discrimination in Work-Release Placements Are Independently Actionable Under the ADA

Defendants argue that the various forms of humiliating involuntary disclosure of Plaintiffs' HIV status to others (including general-population prisoners, free-world visitors, and

work-release employers) described in the Complaint do not independently violate the ADA or the Rehabilitation Act.

Insofar as these disclosures only affect the prisoners' family relationships and personal well-being, Plaintiffs agree that these are not independent bases for the claims. The Complaint's allegations regarding these disclosures simply illustrate the far-reaching harms caused by ADOC's segregation policies (such as anxiety, humiliation, distress, strained family relationships, depressive symptoms, and stigmatization) and how these harms follow prisoners into the free world. *See* Am. Compl. ¶ 33, 44, 48-49, 70.

To the extent Defendants' disclosures affect placement in work-release jobs, however, they are independently actionable because they result in discrimination by those employers or discriminatory pre-screening by ADOC on behalf of the employers. *See* Am. Compl. ¶ 83 ("ADOC either discriminatorily refuses to place prisoners with HIV with the paper company, or else acquiesces in the discriminatory refusal of the paper company to accept women workers with HIV."), *id.* at ¶ 84 (inmate denied work-release job because warden feared that other prisoners would talk about her HIV status on the job, which he believed would adversely affect ADOC—a situation that arose only because ADOC had previously disclosed the inmate's HIV status to others).

The implementing regulations for Title II of the ADA make clear that facilitating disability discrimination by contractors who implement a public entity's programs is just as impermissible as directly discriminating in the entity's own programs. *See* 28 C.F.R. § 35.130(b)(1)(v) ("[A] public entity, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of disability . . . [a]id or perpetuate discrimination against a qualified individual with a disability by providing

significant assistance to an agency, organization, or person that discriminates on the basis of disability in providing any aid, benefit, or service to beneficiaries of the public entity's program."); 28 C.F.R. § 35.130(b)(3)(i) ("A public entity may not directly or through contractual or other arrangements, utilize criteria or methods of administration . . . [t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability."). Accordingly, HIV status disclosures that cause the affected prisoners to suffer discrimination in work-release placements are independently actionable.

III. DEFENDANTS HAVE NOT ESTABLISHED THE AFFIRMATIVE DEFENSE OF FAILURE TO EXHAUST

Defendants argue that this case should be dismissed for failure to exhaust administrative remedies. Under the PLRA, a prisoner-plaintiff's failure to exhaust administrative remedies is an affirmative defense, and "inmates are not required to specially plead or demonstrate exhaustion in their complaints." *Jones v. Bock*, 549 U.S. 199, 216 (2007).

Although affirmative defenses normally cannot support a motion to dismiss under Rule 12(b)(6), *Fortner v. Thomas*, 983 F.2d 1024, 1028 (11th Cir. 1993), the Eleventh Circuit treats exhaustion under the PLRA as "a matter in abatement and not generally an adjudication on the merits," which allows the court to engage in exhaustion-related fact-finding within the context of a 12(b)(6) motion. *Bryant v. Rich*, 530 F.3d 1368, 1374-75 (11th Cir. 2008).[8] Under this

[8] Defendants request a dismissal with prejudice for failure to exhaust, Def. Br. at 37. Even if the PLRA required dismissal of Plaintiffs' claims for failure to exhaust (which it does not) that dismissal would be without prejudice. *See Bryant*, 530 F.3d at 1375 n.11 (explicitly reserving the question of whether unusual circumstances, such as a prisoner's deliberate evasion of the exhaustion requirement to gain access to a federal forum, could ever justify a dismissal with prejudice). All but one of the cases Defendants cite to support dismissal with prejudice actually involve dismissals *without* prejudice. See *Hoops v. Corr. Med. Servs.*, 2011 WL 1576955, No. 2:10–CV–1023–ID (M.D. Ala. 2011) (granting motion to dismiss without prejudice for failure to exhaust); *Brinson v. Darbouze*, No. 2:09-CV-400-TFM (M.D. Ala. 2009) (same); *Edwards*, 81 F. Supp. 2d at 1257 (same). The lone exception is in the context of a motion for summary judgment, not a motion to dismiss. *See Dean v. Giles*, 2009 WL 4894799, No. 2:07-CV-342-WKW (M.D. Ala. 2009) (granting motion for summary judgment and dismissing pro se case with prejudice for failure to exhaust).

procedure, the court first "looks to the factual allegations in the defendant's motion to dismiss and those in the plaintiff's response, and if they conflict, takes the plaintiff's version of the facts as true." *Turner v. Burnside*, 541 F.3d 1077, 1082 (11th Cir. 2008). If dismissal at that first step is not appropriate, then the court "proceeds to make specific findings in order to resolve the disputed factual issues related to exhaustion." *Id*. In resolving these factual disputes, however, the court should avoid deciding the merits and should give the parties a sufficient opportunity to develop a record. *Bryant*, 530 F.3d at 1376.

In this case, it is abundantly clear that there has been no failure to exhaust administrative remedies because no administrative remedy was available to the Plaintiffs.

A. ADOC Does Not Have an Administrative Remedy Program

ADOC does not maintain any administrative remedy program system-wide, at Limestone, or at Tutwiler. ADOC's counsel of record in this suit advised Plaintiffs' counsel that ADOC has no formal system-wide administrative remedy program for non-medical issues. *See* Declaration of Allison Neal, Ex. 3 ¶¶ 2, 5-8, and Ex. A. Nor does ADOC have any facility-specific administrative remedy program at either Limestone or Tutwiler. *See* Declaration of Ronald Hatcher, Ex. 4 ¶¶ 4-6, 9; Declaration of Dana Harley, Ex. 5 ¶¶ 6-9. [9]

B. The Medical Grievance Process is Not Available for Non-Medical Complaints Such as Housing Assignments and Work-Release Eligibility

Defendants contend that Plaintiffs should have used the "Medical Grievance" process provided by ADOC's private medical services contractor, Correctional Medical Services, Inc.

[9] Nothing in the ADOC Administrative Regulations available to prisoners and the public contains any information about an administrative remedy program or grievance process. *See generally* ADOC, *ADOC Administrative Regulations*, http://www.doc.state.al.us/adminregs.asp (last visited June 17, 2011).

("CMS"),[10] to challenge ADOC's policy of arbitrarily barring prisoners with HIV from the medical unit at Tutwiler. Def. Br. at 35-36. Defendants also argue that Plaintiffs should have used the CMS Medical Grievance process to exhaust administrative remedies on their claim that ADOC imposes unnecessarily restrictive medical clearance criteria for work release, which prevent otherwise qualified prisoners with HIV from participating in work-release, create unnecessary delays in approval for work release,[11] and force some prisoners to choose between being eligible for work release and starting a course of medication that Defendants' own HIV specialist has found medically unnecessary.[12] Def. Br. at 36-37. It is Defendants' burden, however, to show that the CMS Medical Grievance process is "available," within the meaning of the PLRA, to redress Plaintiffs' grievances against ADOC for its discriminatory HIV policies. *Jones*, 549 U.S. at 216. Defendants provide no evidence that CMS has any authority to rescind or modify ADOC's housing segregation policy at Tutwiler or ADOC's work-release eligibility criteria.[13]

Under the PLRA, an administrative remedy process is "available" for a particular complaint only if the process can offer relief of some kind in response to that complaint. "Without the possibility of some relief, the administrative officers would presumably have no

[10] *See* CMS, *Correctional Medical Services, Inc. Locations in Alabama,* http://www.cmsstl.com/alabama.aspx (last visited June 19, 2011). *See also generally* Hunt Aff.; Reese Aff.

[11] Defendants mischaracterize the nature of Plaintiffs' objection to the delays caused by ADOC's policies. Plaintiffs do not allege, as Defendants seem to imply, that the standard three-month interval that CMS has set for taking viral load readings fails to meet constitutional standards for medical care. *Compare* Def. Br. at 36 *with* Am. Compl. ¶ 85. Rather, Plaintiffs object to ADOC's requirement that four consecutive readings be below ADOC's arbitrary thresholds, which will—assuming that a patient remains on the standard chronic care schedule—unnecessarily delay a prisoner's being deemed eligible for work release by at least a year. Am. Compl. ¶ 85.

[12] Am. Compl. ¶¶ 85-87.

[13] For ease of reference, Plaintiffs have divided the exhibits Defendants submitted as Doc. No. 35-1 and Doc. No. 35-2 into multiple exhibits, which are attached to this brief as exhibits 6 through 11. These exhibits consist of affidavits from the Health Services Administrators at Limestone and Tutwiler, *see* Affidavit of Debbie Hunt (Ex. 6), Affidavit of Tonitta Reese (Ex. 7); access to care instruction forms printed by CMS, *see* "Correctional Medical Services, Limestone Correctional Facility, Access to Health Care Services" (Ex. 8) (hereinafter "Limestone Instr."), "Access to Health Care Services, Correctional Medical Services" (Ex. 9) (hereinafter "Tutwiler Instr."); and filled-out CMS Medical Grievance forms (Ex. 10 & 11).

authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust." *Booth v. Churner*, 532 U.S. 731, 736 n.4 (2001). In this case, it is plain that the CMS Medical Grievance process cannot be used to remedy ADOC's discriminatory HIV policies.

There is no evidence that the individuals who process CMS Medical Grievances have any authority whatsoever to resolve grievances regarding housing, work-release eligibility, or any other matters beyond the medical services provided by CMS. The Medical Grievance forms are sent to and processed by CMS medical staff, not ADOC staff. Reese Aff. ¶¶ 5-6; Hunt Aff. ¶ 5-6. Similarly, appeals of those grievances are sent to and processed by the Health Services Administrators and other members of the CMS medical staff, not the ADOC wardens. Reese Aff. ¶¶ 5-6; Hunt Aff. ¶ 5-6.

The affidavit of Debbie Hunt, the Health Services Administrator for Limestone, states that her "duties and responsibilities are primarily administrative in nature, overseeing the general administration of *the medical delivery system and medical staff* at LCF/DWR." Hunt Aff. ¶ 2 (emphasis added). She further states that the final resolution of a Medical Grievance Appeal consists of "one-on-one communication with me and/or the Director of Nursing." Hunt Aff. ¶ 6. She does not state that either she or the Director of Nursing has any authority to modify ADOC housing policies or work-release eligibility requirements and implies that such actions would be outside the scope of her authority: "I have not at any time ignored any of their requests for *medical treatment*. I did not deliberately ignore any of the inmates' *medical complaints* or interfere in any way with the *provision of medical care* to them at any time." Hunt Aff. ¶ 7 (emphasis added). The affidavit of Tonitta Reese, the Health Services Administrator for Tutwiler, is essentially identical. Reese Aff. ¶¶ 2, 6, 7.

Moreover, CMS's written guidance instructs inmates that the "Medical Grievance" process is for resolving "Complaints against health care." Limestone Instr. at ADOC018; Tutwiler Instr. at ADOC003.[14] They instruct inmates to obtain Medical Grievance forms from the same place that they obtain sick call request slips, and to turn in the completed forms in the same place where they return sick call slips. Limestone Instr. at ADOC018; Tutwiler Instr. at ADOC003. The checkboxes on the bottom of the forms list categories such as quality of care, access to care, timeliness of care, problems with medication, problems with treatment and testing, and conduct by health care staff—not housing assignments or work-release eligibility. *See generally* Ex. 10 & 11.

Prisoners sensibly interpret these instructions to mean that the Medical Grievance process cannot be used to submit grievances to prison officials about classification, housing, work release, access to prison programs, discrimination, the denial of rights under the ADA, or any other issue except for grievances about access to health care services. Hatcher Decl. ¶ 7; Harley Decl. ¶ 3. The prisoners' reasonable interpretation is supported by what prison officials, medical providers, prison law library workers, and other staff tell the prisoners: they instruct them to use the Medical Grievance form only for grievances about access to health care services, not for issues concerning segregation or discrimination. Hatcher Decl. ¶ 8; Harley Decl. ¶¶ 4, 5.

The CMS Medical Grievance process is therefore unavailable for the particular complaints raised in this case. *See, e.g.*, *Nooner v. Norris*, No. 5:06-CV-00110-SWW, 2006 WL 4958988, at *3 (E.D. Ark., June 19, 2006) (holding that prisoner challenging lethal injection protocol need not exhaust the prison grievance process because the grievance panel had no

[14] These instructions are intermingled with information about access to medical care, such as nursing hours, times for pill distribution, and medical co-pay fees.

authority to change the protocol); *Farnworth v. Craven*, No. CV05-493-S-MHW, 2007 WL 793397, at *5 (D. Idaho Mar. 14, 2007) (holding that prisoner seeking a new parole hearing need not exhaust the prison grievance system because it had no authority over the Parole Commission); *Stevens v. Goord*, No. 99 Civ. 11669(LMM), 2003 WL 21396665, at *5 (S.D.N.Y. June 16, 2003) (holding that where private medical contractor failed to show that it was subject to the general inmate grievance process, prisoner need not exhaust the general process to sue the contractor); *Handberry v. Thompson*, 92 F. Supp. 2d 244, 248 (S.D.N.Y 2000) (holding that prisoners challenging Board of Education's failure to deliver educational services did not need to grieve this failure to the Department of Corrections, because these services were "outside the jurisdiction of DOC").

3. Defendants May Not Redefine the CMS Medical Grievance Process as a General-Purpose Administrative Remedy Process.

Defendants' claim that the CMS Medical Grievance process is available to prisoners to redress ADOC's housing segregation and work-release policies (and not just purely medical issues such as quality of care, access to care, and timeliness of care) contradicts all of the instructions they give to inmates and is inconsistent with the earlier representations they made to Plaintiffs' counsel. In the Eleventh Circuit, "an administrative remedy that was not discovered, and which could not have been discovered through reasonable effort, until it was too late for it to be used is not an 'available' remedy." *Goebert v. Lee Cty.*, 510 F.3d 1312, 1324 (11th Cir. 2007). The reason is that "[i]f we allowed jails and prisons to play hide-and-seek with administrative remedies, they could keep all remedies under wraps until after a lawsuit is filed and then uncover them and proclaim that the remedies were available all along." *Id.* at 1323. In

other words, prisons would do exactly what Defendants are wrongly attempting to do in this lawsuit.

Nothing in ADOC counsel's pre-filing communications with Plaintiffs' counsel, the written instructions for Medical Grievances, the Medical Grievance forms themselves, or the other instructions communicated to inmates put Plaintiffs on notice that they needed to use the CMS Medical Grievance process for anything other than purely medical issues such as quality of care, access to care, and timeliness of care. "That which is unknown and unknowable is unavailable; it is not 'capable for use for the accomplishment of a purpose.'" *Goebert*, 510 F.3d at 1323 (quoting *Booth*, 532 U.S. at 738).

Defendants' post-filing claim that Plaintiffs' suit should be dismissed because they did not use the CMS Medical Grievance process is truly "inspired by the Queen of Hearts' Croquet game, since there is nothing on this side of the rabbit hole to support it." *See Goebert*, 510 F.3d at 1322. Defendants must not benefit from their decision to "keep all remedies under wraps until after a lawsuit is filed and then uncover them and proclaim that the remedies were available all along." *See id*. at 1323. This Court should therefore find that the CMS Medical Grievance process is not available to resolve Plaintiffs' particular complaints.

IV. THE SCOPE OF PLAINTIFFS' REQUESTED RELIEF IS NOT A BASIS FOR DISMISSAL OF THEIR CLAIMS UNDER RULE 12(b)(6)

Defendants argue that this case should be dismissed under Rule 12(b)(6) because plaintiffs' prayer for relief is allegedly too broad to meet the PLRA's "need-narrowness-intrusive" test, defined at 18 U.S.C. § 3626(a)(1). But Defendants do not and cannot show that this alleged defect in the prayer for relief is a valid basis for their motion to dismiss.

The relevant inquiry on a motion to dismiss is whether the claim as stated plausibly gives the plaintiff the right to *some* relief, not necessarily the particular relief requested. *See* 5 Charles Alan Wright et al., *Federal Practice and Procedure* § 1357 (3d ed. 2011) ("[I]t need not appear that the plaintiff can obtain the particular relief prayed for in the complaint, as long as the district judge can ascertain from what has been alleged that some relief may be granted by the court."); *see also Cassidy v. Millers Cas. Ins. Co.*, 1 F. Supp. 2d 1200, 1214 (D. Colo. 1998) ("[T]he test of a complaint pursuant to a motion to dismiss lies in the claim, not in the demand."). Thus, a plaintiff's request for overbroad or improper relief is generally not a proper basis for dismissing the complaint. *See, e.g.*, *Lada v. Wilkie*, 250 F.2d 211, 215 (8th Cir. 1957) (finding that although part of the relief demanded by the plaintiffs could not possibly be granted, the complaint should not have been dismissed, since the question was not whether all of the relief asked for could be granted, but whether the plaintiffs could be accorded any relief); *Kerr v. Wanderer & Wanderer*, 211 F.R.D. 625, 629 (D. Nev. 2002) ("[A] claim is sufficient if it shows that the plaintiff is entitled to any relief which the court can grant, even if the complaint . . . asks for improper relief."); *McHugh v. Reserve Mining. Co.*, 27 F.R.D. 505, 506 (N.D. Ohio 1961) ("The court will not dismiss an entire action because the plaintiff has asked for more than that to which he may be entitled.").

There is nothing special about § 3626(a)(1) that changes this general rule and Defendants cite no authority for their claim that it does. None of the cases they cite in their argument—all of which deal with either the termination of consent decrees or the evaluation of injunctions already entered by district courts—have the slightest bearing on the situation before this Court. Relevant case law makes clear that § 3626(a)(1) merely limits the scope of relief *after* the court has found liability. For example, in *Shook v. El Paso County*, 386 F.3d 963, 969-71 (10th Cir. 2004), *cert.*

denied, 544 U.S. 978 (2005), the U.S. Court of Appeals for the Tenth Circuit found that, in denying a motion for class certification, the district court erred by prematurely focusing on whether the court could ultimately fashion a remedy that satisfied the requirements under the PLRA. *See also Anderson v. Garner*, 22 F.Supp.2d 1379, 1383 (N.D. Ga. 1997) (holding that § 3626(a)(1) of the PLRA did not bear on the court's class certification analysis). Similarly, in *Williams v. Edwards*, 87 F.3d 126 (5th Cir. 1996), the Fifth Circuit held that § 3626(a)(1) is not implicated until the court actually fashions prospective relief. 87 F.3d 126, 133 (5th Cir. 1996) ("The district court has fashioned no prospective relief and [therefore] the provisions of [§ 3626(a)(1)] have yet to be triggered in this case."). *Id.* at 133. Under Defendants' view of § 3626(a)(1), courts would have to determine the appropriate scope of relief before the parties have conducted discovery, before the court has determined liability, and before the parties have briefed the court on proposed relief. The plain language of the statute shows that it is a restriction on the relief the Court may ultimately grant, not a heightened pleading requirement.

V. ELEVENTH AMENDMENT IMMUNITY IS NOT A BASIS FOR DISMISSAL OF PLAINTIFFS' CLAIMS

Defendants argue that they are immune from suit under the ADA and the Rehabilitation Act under the Eleventh Amendment because (1) neither Title II of the ADA nor section 504 of the Rehabilitation Act validly abrogates the state's sovereign immunity; and (2) the *Ex Parte Young* exception to sovereign immunity does not apply to this case. Defendants properly conceded this point a dozen years ago during oral argument before the en banc court in *Onishea*, acknowledging that "the relief the plaintiffs seek plants this case within the fiction of *Ex parte Young* and that the Eleventh Amendment is therefore not an issue in this case." *Onishea*, 171

F.3d at1296 n.11 (internal citation removed). Their re-argument of the issue today has no more merit than it did in 1998.

Defendants rely exclusively on ADA cases, without addressing any cases under section 504 of the Rehabilitation Act. The Eleventh Circuit has unambiguously held that section 504 of the Rehabilitation Act *does* validly abrogate the state's sovereign immunity. *Garrett v. Univ. of Ala. at Birmingham Bd. of Trustees*, 344 F.3d 1288, 1293 (11th Cir. 2003) ("Section 2000d-7 unambiguously conditions the receipt of federal funds on a waiver of Eleventh Amendment immunity to claims under section 504 of the Rehabilitation Act. By continuing to accept federal funds, the state agencies have waived their immunity."). Defendants concede that they are recipients of federal funding. Def. Br. at 25 n.10. They therefore have no basis for asserting immunity against Plaintiffs' Rehabilitation Act claims.

Defendants argue further that sovereign immunity should bar an ADA suit for damages. But this suit seeks exclusively declaratory and injunctive relief. Private parties seeking such relief under Title I and Title II of the ADA may proceed under the *Ex parte Young* doctrine. *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 n.9 (2001) (noting that although Title I of the ADA does not validly abrogate sovereign immunity, it may still "be enforced . . . by private individuals in actions for injunctive relief under *Ex parte Young*"); *Miller v. King*, 384 F.3d 1248, 1264 (11th Cir. 2004) ("[W]e join our sister circuits in holding that the Eleventh Amendment does not bar ADA suits under Title II for prospective injunctive relief against state officials in their official capacities."), *opinion vacated and superseded on other grounds*, 449 F.3d 1149 (11th Cir. 2006).

Finally, defendants argue that plaintiffs' ADA claims do not fall within the *Ex parte Young* doctrine. Even if defendants had not already conceded this issue before the Eleventh

Circuit in *Onishea*, however, their argument would still be meritless. The *Ex parte Young* doctrine applies if 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). Nobody disputes that this is a suit for prospective relief against the State in the form of declaratory and injunctive relief, or that the policies challenged in this suit are still being enforced. Def. Br. at 3, 41. Instead, Defendants argue that the Complaint does not allege a violation of federal law because their ongoing policies do not actually violate the ADA or the Rehabilitation Act. *Id*. at 41. This is an attempt to backdoor an argument on the merits into an *Ex parte Young* argument—something that the U.S. Supreme Court has explicitly forbidden: "[T]he inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim." *Verizon Md.*, 535 U.S. at 646.

CONCLUSION

Defendants' Motion to Dismiss should be denied.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of June 2011, I filed a true copy of the foregoing with the Court using the CM/ECF electronic filing system, which will automatically forward a copy to counsel for the Defendants at the following addresses:

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