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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

No. 22-20652
Filed December 5, 2023

John Doe 1, *on behalf of themselves and a Class of all other similarly situated John and or Jane Doe employees of Harris County;* John Doe 2, *on behalf of themselves and a Class of all other similarly situated John and or Jane Doe employees of Harris County,*

Plaintiffs-Appellants,

Versus

Harris County, Texas; Lina Hidalgo, *County Judge;* Rodney Ellis, *Precinct 1 Commissioner;* Adrian Garcia, *Precinct 2 Commissioner;* Jack Cagle, *Precinct 4, Commissioner;* Tom S. Ramsey, *Precinct 3, Commissioner;* Edward Gonzalez, *Harris County Sheriff,*

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Texas
USDC No. 4:21-CV-3036

NO. 22-20652

Before Jones, Barksdale, and Elrod, *Circuit Judges.*

PER CURIAM:*

The court has carefully considered this appeal in light of the briefs, the comprehensive district court opinion, and pertinent portions of the record. Having done so, we find no reversible error of law or fact. The district court's judgment is AFFIRMED for essentially the same reasons articulated by that court.

*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN DOE 1, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO.
	§	H-21-03036
	§	
HARRIS COUNTY, TEXAS; *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

On April 22, 2022, the Court conditionally granted the Defendants' first motion to dismiss and warned that this case would be dismissed within thirty days unless Plaintiffs submitted an Amended Complaint that, among other things, "fully cures the deficiencies in the Complaint that are explained in [the Court's April 2022 Memorandum and Order] for any claim asserted in the Amended Complaint, if such is possible." Doc. No. 20 at 29.

Plaintiffs subsequently submitted a First Amended Complaint. Doc. No. 25. Defendants have

filed a motion to dismiss that amended complaint (Doc. No. 27), and Plaintiffs have filed a response in opposition (Doc. No. 33). For the reasons explained in the Court's April 2022 Memorandum and Order and for the reasons that follow, the Court GRANTS the motion to dismiss, DISMISSES the federal claims with prejudice on the merits, and DISMISSES the state law claims without prejudice for lack of jurisdiction.

I. BACKGROUND

The background facts were set forth in the Court's April 2022 Memorandum and Order and need not be repeated at length here. *See* Doc. No. 20 at 1-16. Plaintiffs, who are current and former jailers, medical personnel, and/or correctional supervisors at the Harris County Jail, repeat some of their allegations about the "overly dangerous" working conditions in the Jail in their Amended Complaint and assert the following claims: (1) Fourteenth Amendment substantive due process claim based on a state-created danger theory (Claim 1); (2) Fourteenth Amendment substantive due process claim based on understaffing policies creating a hostile and abusive work environment (Claim 2); (3) *ultra vires* claims regarding a failure to provide funding and minimum staffing in violation of state law minimum jail standards (Claim 3); (4) Fourteenth Amendment due process claim regarding negative or defamatory employment reports or investigations regarding those employees who notify Defendants that they desire to retire, transfer, or leave the Sheriff's Office (Claim 4); (5) Fifth Amendment takings claim based on Defendants' failure to protect

Plaintiffs, which "negatively devalu[es]" Plaintiffs' property (Claim 5); (6) *ultra vires* claim regarding basic funding and noncompliance with the Texas Commission on Jail Standards (TCJS) (Claim 6).

Plaintiffs request declaratory and injunctive relief, seeking to force Defendants to increase funding and to stop understaffing the Jail. Among other things, Plaintiffs want an injunction ordering Defendants: to stop further defunding and be ordered to properly provide funding; to stop further violations of due process regarding plaintiffs' property interests; to provide a staffing and funding plan to be implemented in 60 days or less; to be prohibited from using jail funding for discretionary purposes that do not involve the jail; and to pay attorney fees and costs. *See* Doc. No. 25 at 40.

In their response to the motion to dismiss, Plaintiffs include a one-sentence request to amend, but do not state what facts they would plead to cure their pleadings or submit a proposed second amended complaint that addresses the deficiencies identified by the Defendants in their motion to dismiss or by the Court in its previous order. *See* Doc. No. 33 at 15.

II. LEGAL STANDARD

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the filing of a motion to dismiss a case for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). In considering a motion to dismiss under Rule 12(b)(6), the district court construes the allegations in the complaint

favorably to the pleader and accepts as true all well-pleaded facts in the complaint. *La Porte Construction Co. v. Bayshore Nat'l Bank of La Porte, Tex.,* 805 F.2d 1254, 1255 (5th Cir. 1986). To survive dismissal, a complaint must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007). A claim is facially plausible when a "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009) (citing *Twombly,* 550 U.S. at 556).

"[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed me accusation." *Iqbal,* 556 U.S. at 678 (citing *Twombly,* 550 U.S. at 555). "A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Twombly*, 550 U.S. at 555). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 555).

III. DISCUSSION

A. Federal Claims

Plaintiffs claim that Defendants have violated their rights under 42 U.S.C. § 1983 in connection with their working conditions and employment at the Harris County Jail. Section 1983 does not grant substantive rights, but provides a vehicle for a

plaintiff to vindicate rights protected by the United States Constitution and other federal laws. *Albright v. Oliver*, 510 U.S. 266, 271 (1994). It provides a cause of action for individuals who have been "depriv[ed] of [their] rights, privileges, or immunities secured by the Constitution and laws" of the United States by a "person" acting under color of state law. *Id.* at 315.

A plaintiff seeking relief under section 1983 must establish two elements: (1) that the conduct complained of was committed under color of law, and (2) that the conduct deprived the plaintiff of rights secured by the Constitution or laws of the United States. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49-50 (1999); *Hernandez v. Maxwell*, 905 F.2d 94, 95 (5th Cir. 1990) (citing *Daniel v. Ferguson*, 839 F.2d 1124, 1128 (5th Cir. 1998)).

Municipalities and other bodies of local government are "persons" within the meaning of section 1983. *Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978). A municipality may be liable under § 1983 if the execution of one of its customs or policies causes a violation of a plaintiff's constitutional rights. *Id.* at 690-91. To state a claim for municipal liability under § 1983, a plaintiff must identify (a) a policymaker, (b) an official policy [or custom or widespread practice], and (c) a violation of constitutional rights whose "moving force" is the policy or custom. *Piotrowski v. City of Houston,* 237 F.3d 567, 578 (5th Cir. 2001) (holding that a plaintiff must show that the unconstitutional conduct is attributable to the municipality through some official custom or policy that is the "moving force" behind the

constitutional violation) *(citing Monell,* 436 U.S. at 694).

Accordingly, to succeed on a section 1983 claim against either an individual state actor or a municipality, whether seeking monetary or injunctive relief, a plaintiff must show, among other things, a violation of federal constitutional or federal statutory law. As explained in the Court's April 2022 Memorandum and Order and in the discussion that follows, Plaintiffs do not state a viable section 1983 claim against the Defendants because they fail to allege facts to state a violation of federal statutory or constitutional law.

1. Fourteenth Amendment State-Created Danger

Plaintiffs allege that Defendants "created or exacerbated the danger of private violence by inmates against individual jail employees that would not exist other than Defendants' failure to perform their ministerial duties of providing required minimum funding for operation of the jail facilities under minimum standards required by TCJS." Doc. No. 25 at 24-25. They argue that they are being subjected to inevitable serious harm due to Defendants' conduct and that Defendants' acts or omissions were deliberately, purposely, and knowingly done in reckless disregard of Plaintiffs' constitutional rights to due process and equal protection. Id. at 25.[1] They contend that:

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[1] Plaintiffs cursorily allege that the state-created danger violates their equal protection rights in addition to their due process rights. Doc. No. 25 at 25. The Court previously explained that

> The Plaintiffs—jail personnel—are not random members of the public but instead, a[re] Detention Officers, Deputies, medical staff, and administrative staff of the jail and its facilities. It is foreseeable and known to the Defendants, independently and collectively, that Plaintiffs would be exposed to the serious and avoidable health and safety risks created by Defendants' policies of deliberately understaffing the Harris County jail facilities through intentional refusal to provide adequate finding thereby creating gaps in coverage by reducing manpower, increasing serious threats of harm without sufficient personnel to perform the basic functions required by law that is non-discretionary, thereby knowingly increasing the risks to Plaintiffs collectively through inadequate funding and refusal to hire [] sufficient staff to operate the jail facilities to protect the inmates.

Doc. No. 25 at 27-28 ¶ 129. Plaintiffs allege that Defendants have violated their Fourteenth Amendment rights and have acted *ultra vires* of their

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they failed to plead facts to show a valid equal protection claim in their Original Complaint. *See* Doc. No. 20 at 25-27. Plaintiffs' Amended Complaint does not cure this defect; they plead no facts to show a violation of their equal protection rights. Therefore, their equal protection claim must be dismissed for failure to state a claim for which relief may be granted.

duties under state law by failing to fund and staff the Jail, posing a state-created danger to them.

As explained at length in the Court's April 2022 Memorandum and Order, the Fifth Circuit has consistently refused to recognize a "state-created danger" theory of liability. *See Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys,* 675 F.3d 849, 853 (5th Cir. 2012) *(en banc); Rios v. City of Del Rio, Tex.,* 444 F.3d 417, 422 (5th Cir. 2006); *Beltran v. City of El Paso,* 367 F.3d 299, 307 (5th Cir. 2004); *Rivera v. Houston lndep. Sch. Dist.,* 349 F.3d 244, 249 (5th Cir. 2003); *Piotrowski,* 237 F.3d at 584; *see also* Doc. No. 20 at 19-25 (explaining that the Plaintiffs fail to state a claim under the state-created danger theory).

Nonetheless, Plaintiffs argue that, since they are "only" seeking injunctive and declaratory relief, the Fifth Circuit cases that reject the state-created danger theory do not apply. *See* Doc. No. 33 at 11. Plaintiffs appear to contend that they need not meet the requirements for their Fourteenth Amendment claims because they only seek injunctive relief and not monetary relief. Contrary to their contentions, Plaintiffs must show a violation of federal law to obtain *any* relief—injunctive, declaratory, or monetary—under section 1983. *See Cantu Servs., Inc. v. Roberie*, 535 F. App'x 342, 345 (5th Cir. 2013) (holding that the plaintiff must show a constitutionally protected interest that is being infringed by the defendants in order to obtain injunctive relief under section 1983); *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1574 (5th Cir. 1989) (holding that "an underlying

constitutional or statutory violation is a predicate to liability under § 1983"); *see also Strickland v. Dallas Indep. Sch. Dist.*, Civ. A. No. 3:22-CV-0056-D, 2022 WL 3081577, at *4 n.9 (N.D. Tex. Aug. 3, 2022) (slip copy) ("[T]he question the court must decide is whether the plaintiffs have plausibly pleaded their due process claim, and Fifth Circuit case law analyzing the requirements of such a claim is controlling. **The precise relief that plaintiffs seek is not relevant to this inquiry.**") (emphasis added).

The Court fully considered Plaintiffs' due process and equal protection claims based on a state-created danger theory in its previous order and concluded that Plaintiffs cannot state a plausible claim under that theory. *See* Doc. No. 20 at 19-25. Plaintiffs also fail to state a viable federal claim predicated on a state-created danger theory in their First Amended Complaint. Therefore, Claim 1 must be dismissed for failure to state a claim for which relief may be granted.

2. Fourteenth Amendment Understaffing/ Abusive Work Environment

Likewise, as explained in the Court's previous Order, Plaintiffs do not have a protected liberty or property interest in a safe working environment and cannot maintain a due process claim on that basis. *See Collins* v. *City of Harker Heights,* 503 U.S. 115, 129 (1992)). "Neither the text nor the history of the Due Process Clause supports [plaintiffs'] claim that the governmental employer's duty to provide its employees with a safe working environment is a

substantive component of the Due Process Clause." *Id.* at 126; *see also Carty v. Rodriguez,* 470 F. App'x 234, 236 n.5 (5th Cir. 2012). In this circuit, "a government employer does not violate the Due Process Clause of the Fourteenth Amendment even if it provides a workplace that is unreasonably dangerous and fails to warn its employees of the danger." *Greene* v. *Plano Indep. Sch. Dist.,* 103 F. App'x 542, 544-45 (5th Cir. 2004) (explaining that even if it were to recognize the state-created danger theory, it would not apply in the government workplace context for dangerous working conditions).

Governmental employees, who work voluntarily, do not have the "special relationship" required to impose liability under section 1983. *See Broussard v. Basaldua,* 410 F. App'x 838, 839 (5th Cir. 2011) (per curiam) (rejecting a jailer's claims against the Sheriff and Warden for creating an unsafe work environment when an inmate assaulted her and holding that there is no substantive due process right to a safe work environment) (citing *Walton v. Alexander,* 44 F.3d 1297, 1300-01 (5th Cir. 1995) (*en banc*)). Therefore, Plaintiffs' Claim 2 fails as a matter of law and must be dismissed.

3. *Ultra Vires* Failure to Fund and Noncompliance with TCJS

Plaintiffs complain that the Defendants act *ultra vires* by not properly funding the Jail (Claim 3) and by failing to comply with the TCJS (Claim 6), in violation of Texas state law. To the extent that the Plaintiffs cast their *ultra vires* claims as federal

claims, "[a]llegations that [defendants] violated state law are 'alone insufficient to state a constitutional claim under the Fourteenth Amendment.'" *Bryan v. Cano,* No. 22-50035, 2022 WL 16756388, at *4 (5th Cir. Nov. 8, 2022) (citing *FM Props. Operating Co. v. City of Austin,* 93 F.3d 167, 174 (5th Cir. 1996)). The Fifth Circuit recently reiterated that "[t]o hold otherwise would 'improperly bootstrap state law into the Constitution.'" *Id.* (quoting *Stern v. Tarrant Cnty. Hosp. Dist.,* 778 F.2d 1052, 1056 (5th Cir. 1985) (*en banc*)). Therefore, the federal claims based on the alleged *ultra vires* actions of Defendants in violation of state law fail as a matter of law. Claims 3 and 6, to the extent they are pleaded as federal claims, must be dismissed.

4. Due Process Claim for Negative Employment Decisions

In Claim 4, Plaintiffs claim that they are being denied due process in connection with Defendant Edward Gonzalez's alleged "pattern and practice of intentionally negatively branding employees seeking to find new employment as not being eligible for rehire [and/or] providing a less [th]an honorable F-5." Doc. No. 25 at 36. They claim that these actions "are taken without any due process provided and or any opportunity to be heard by an employee prior to the taking of [and/or] destruction of an employee's good name." *Id.* They further allege that when they provide notice of their intent to retire, leave, or request a transfer, they are notified that they are under investigation for purported policy violations, and if the employee leaves, he will be branded as "not

eligible for rehire" or given a dishonorable F-5 discharge. *Id.* at 37. They also claim that Defendant Gonzalez imposed disciplinary measures against them without notice and an opportunity to be heard prior to the imposition of those measures. *Id.*

"A public employee, even an at-will employee, has a constitutional right to notice and an opportunity to be heard when the employee is 'discharged in a manner that creates a false and defamatory impression about him and thus stigmatizes him and forecloses him from other employment opportunities.'" *Bellard v. Gautreaux,* 675 F.3d 454, 461---02 (5th Cir. 2012) (quoting *Bledsoe v. City of Horn Lake,* 449 F.3d 650, 653 (5th Cir. 2006)). To state a claim for stigma-plus-infringement in the Fifth Circuit, a government employee must plead facts to show: "(1) [the employee] was discharged; (2) stigmatizing charges were made against [the employee] in connection with the discharge; (3) the charges were false; (4) [the employee] was not provided notice or an opportunity to be heard prior to the discharge; (5) the charges were made public; (6) [the employee] requested a hearing to clear his name; and (7) the employer denied the request." *Id.* (quoting *Bledsoe,* 449 F.3d at 653).

Plaintiffs do not plead specific facts to show that they were actually discharged (as opposed to being threatened with discharge) under stigmatizing charges or that such charges were false or made public. In addition, Plaintiffs plead no facts to show that those who were actually discharged under the allegedly stigmatizing charges requested a hearing to

clear their names and were denied such a hearing after those charges were imposed. Plaintiffs also do not specify the disciplinary measures to which they were subjected, and instead use vague, conclusory pleadings that lack specific facts that do not suffice to show a violation of their procedural due process rights or other federal claims regarding the procedures used in connection with their separation, retirement, or transfer from the Harris County Sheriff's Office. See *Iqbal,* 556 U.S. at 678 (holding that a complaint that "tenders 'naked assertion[s]' devoid of 'further factual enhancement'" does not suffice to state a plausible claim for relief) (quoting *Twombly,* 550 U.S. at 555). Therefore, Claim 4 must be dismissed.

5. Fifth Amendment "Takings" Claim

In Claim 5, Plaintiffs claim that they "are in possession of certain skills, specialized knowledge, and specialized expertise regarding jail operations which constitute Plaintiffs' property." Doc. No. 25 at 38. They allege that they have earned certain property rights in their accumulated pay benefits and other benefits based on the fruits of their labors. *Id.* They acknowledge that they are at-will employees but contend that they have a statutory right in their continued employment that cannot be taken away without "just cause." *Id.*

Plaintiffs claim that they are "cloaked with protected working conditions that are part of their specialized rights to ensure protection from harm from inmates." *Id.* Plaintiffs assert that Defendants' "intentional acts of controlling and manipulation of

Plaintiffs earned benefits, notwithstanding the creation of such an abusive work atmosphere and demanding that Plaintiffs work in such conditions constitutes a taking of Plaintiffs' property where there is no 'just compensation' for that property." *Id.* at 39. They claim, without any elaboration, that Defendants "are essentially taking Plaintiffs earned benefits and accrued leave without just compensation and extending the time for employees' ability to use such time to become meaningless for the use of employees for the maintenance of the employee's mental health [and/or] ability to care for an employee's children or family." *Id.* at 22. Plaintiffs argue that Defendants' "conduct of failing to perform their ministerial duties of minimum funding for safe jail operations" takes away Plaintiffs' statutory protections. *Id.* at 39.

To the extent that Plaintiffs argue that they have a property interest in being protected at work, their takings claim in Claim 5 is an attempt to repackage their failed state-created danger due process claim in Claim 1 and their unsafe/abusive work environment claim in Claim 2. The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, guarantees that private property shall not "be taken for public use, without just compensation." U.S. CONST. amend. V; *see also Knick v. Township of Scott, Pa.*, 139 S. Ct. 2162, 2170 (2019). Axiomatically, a takings claim requires that the claimant have some private property taken by the government for public use. In that regard, "'if a government action is found to be impermissible . . .

that is the end of the inquiry.'" *Lafaye v. City of New Orleans*, 35 F.4th 940, 943 (5th Cir. 2022) (quoting *Lingle v. Chevron USA. Inc.*, 544 U.S. 528, 543 (2005)). In other words, the "plaintiff must challenge an action that would have been legal if only it had been compensated. " *Id.* (citing *Knick*, 139 S. Ct. at 2168).

Setting aside the fact that Plaintiffs' takings claim rests on a dubious claim of "property" in the right to be free from an abusive work atmosphere and free from the "manipulation" of their benefits through scheduling and other allegedly abusive practices,[2] Plaintiffs claim that Defendants, through their *ultra vires* actions by failing to perform their ministerial duties, have taken that property. Their pleadings belie a takings claim because they allege that Defendants' actions are not legal. This ends the inquiry regarding Plaintiffs' takings claim. *See Lafaye*, 35 F.4th at 943.

In addition, Plaintiffs' vague allegations that they are not allowed to use their leave time to care for

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[2] Plaintiffs acknowledge that they are at-will employees. Doc. No. 25 at 38. "The Fourteenth Amendment's Due Process Clause does not create a property interest in government employment." *Cabral v. Town of Youngsville*, 106 F.3d 101, 105 (5th Cir. 1997). As at-will employees, they do not have a protected property interest in their continued employment under the Fourteenth Amendment's Due Process Clause. *Rodriguez v. Escalon*, 90 F. App'x 776, 778 (5th Cir. 2004). Further, as explained in the discussion regarding Claim 2, Plaintiffs do not have a property interest in a safe work environment. *See supra* at 8-9 (citing *Collins*, 503 U.S. at 126). Thus, Plaintiffs also fail to plead a valid property interest that was subject to a government taking.

family members is conclusory and does not provide facts to state a claim for relief. They mention the FLSA and FMLA[3] in passing in their response to summary judgment, (Doc. No. 33 at 14), but wholly fail to provide any facts from which a plausible claim regarding either of those statutes may be discerned. Therefore, Claim 5 must be dismissed.

B. State Law Claims

As explained above, Plaintiffs have not stated a plausible federal claim in their First Amended Complaint.[4] In the absence of a viable federal claim or complete diversity of citizenship of the parties,[5] the Court declines to exercise supplemental jurisdiction

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[3] The *sole reference* in the First Amended Complaint to the FMLA is in the context of Chief Shannon Herklotz's blaming the inability to transition to 4 12-hour shifts on employees, like Plaintiffs, "who previously utilized their accrued legal benefits such as sick time or FMLA." Doc. No. 25 at 21. The only time FMLA is mentioned concerns the legal use of Plaintiffs' benefits. The FLSA is never mentioned in the First Amended Complaint. Plaintiffs do not plead facts in the First Amended Complaint to support a claim under either the FMLA or FLSA.

[4] The Federal Declaratory Judgment Act does not provide a federal court with an independent basis for exercising subject matter jurisdiction where there is no underlying federal claim indicating the existence of a judicially remediable right. *See In re B-727 Aircraft Serial No. 21010*, 272 F.3d 264, 270 (5th Cir. 2001) ("[T]he Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, does not provide a federal court with an independent basis for exercising subject-matter jurisdiction.")

[5] The Plaintiffs and Defendants are citizens of Texas; therefore, no diversity of citizenship exists in this case. *See* Doc. No. 25 at 2.

over any state *ultra vires* claims. *See Broussard*, 410 F. App'x at 840 (holding that the district court was correct to decline to exercise jurisdiction over the state law claims where, as here, there was no federal question because no federal claims remained); 28 U.S.C. § 1367(c)(3) (providing that a district court may decline to retain the state law claims where the federal claims have been dismissed). "District courts enjoy wide discretion in determining whether to retain supplemental jurisdiction over a state claim once all federal claims are dismissed." *Heggemeier v. Caldwell Cnty., Tex.*, 826 F.3d 861, 872 (5th Cir. 2016) (citation omitted). Further, the State of Texas has an interest in determining when its officials or officials in its subdivisions are acting *ultra vires* of its own laws, and Texas state courts are best equipped to navigate this complex state-law issue. *See* 28 U.S.C. § 1367(c)(1) (providing that a district court may decline to retain the state law claims where those claims "raise[] novel or complex issue[s] of State law"). For these reasons, the Court declines to exercise supplemental jurisdiction over the remaining state law claims.

IV. CONCLUSION AND ORDER

Based on the foregoing, the Court **ORDERS** as follows:

1. Defendants' Motion to Dismiss (Doc. No. 27) is **GRANTED.**

2. Plaintiffs' one-sentence request for leave to amend is **DENIED** because there is no

indication in their response or in any other pleadings that they could state a viable federal claim under 42 U.S.C. § 1983, and they do not propose any second amended complaint that cures the deficiencies identified in the Defendants' motion to dismiss or in the Court's previous order. The Court concludes that further amendments would be futile. See *Marucci Sports, L.L.C. v. Nat'l Collegiate Athletic Ass'n,* 751 F.3d 368, 378-79 (5th Cir. 2014) (holding that the district court did not abuse its discretion by denying leave to amend where the proposed amended complaint was futile because it again failed to state a viable claim after being given the opportunity to cure defects in the pleadings).

3. This case is **DISMISSED WITH PREJUDICE** regarding the federal claims, and **DISMISSED WITHOUT PREJUDICE** regarding any state law claims for lack of jurisdiction.

4. All other motions, if any, are **DENIED.**

The Clerk will provide a copy of this Order to all parties of record.

SIGNED at Houston, Texas this 17th day of November, 2022.

Andrew S. Hanen
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHN DOE 1, *et al.*,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	Civil Action No. H-21-03036
	§	
HARRIS COUNTY,	§	
TEXAS, *et al.*,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

Pending is Defendants Harris County, Lina Hidalgo, Rodney Ellis, Adrian Garcia, R. Jack Cagle, Tom S. Ramsey, and Edward Gonzalez's Amended Motion to Dismiss (Doc. No. 8).[1] The Court has carefully considered the pleadings, motion, response, and applicable law and concludes as follows.

I. BACKGROUND

[1] This Amended Motion to Dismiss supersedes the Defendants' Original Motion to Dismiss (Doc. No. 7), which is DENIED as MOOT with the filing of the amended motion.

Plaintiffs, John Does 1-35 and Jane Does 1-53,[2] are current and former jailers, medical personnel, and/or correctional supervisors at the Harris County Jail. Plaintiffs claim to be whistleblowers under Texas Government Code §§ 554.0035 and 554.007, and seek to remain anonymous in this litigation for fear of retaliation for reporting violations of state and federal law at the Harris County Jail.

Plaintiffs bring this civil rights action under 42 U.S.C. § 1983 against Harris County and its officials, including County Judge Lina Hidalgo, County Commissioners Rodney Ellis, Adrian Garcia, Jack Cagle, Tom S. Ramsey, and County Sheriff Ed Gonzalez (collectively, "Defendants"), all in their official capacities. *See* Doc. Nos. 2 & 2-1 (Complaint). Plaintiffs allege that Defendants have violated their Fourteenth Amendment rights and have acted *ultra vires* of their duties under state law by failing to fund and staff the Jail, posing a state-created danger to them.

The following allegations are condensed from Plaintiffs' pleadings,[3] which are accepted as true for the purposes of deciding a motion to dismiss.

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[2] Plaintiffs style this case as a class action and name "John Doe l" and "John Doe 2" as the purported "class representatives." However, the Court has not certified a class, and there is no pending motion for certification. For purposes of this motion, the Court considers only whether the Plaintiffs have stated viable federal causes of action for the alleged harms they have suffered at the Harris County Jail.

[3] For sake of clarity, only a representative sample of the incidents alleged in the 200-page Complaint is presented here.

Plaintiffs outline Harris County Jail's alleged failings over the last 20 years, contending that the Jail regularly failed its Texas Commission on Jail Standards ("TCJS") inspections.[4] Plaintiffs claim that on February 9, 2021, Harris County Commissioners unanimously passed a $3.3 billion dollar county spending budget for the 2021-2022 fiscal year, which was a 2% increase over the previous year's budget. *Id.* at 23. Plaintiffs allege that the Commissioners did not factor in overtime costs into the Harris County Sheriff's Office budget, although they knew that the Jail was seriously understaffed and underfunded and would accrue significant overtime costs. They also claim that the Commissioners refused to address the allegedly deplorable conditions for staff and inmates at the Jail. *Id.*

Plaintiffs argue that, given the Jail's record of shortcomings, Harris County has actual or constructive knowledge that its jails are failing and not meeting minimum standards, yet Defendants "intentionally refuse to take mandatory steps to fix the issues that [are] part of their ministerial duties."

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[4] *See* Complaint at 12-24 (alleging, inter alia, that the Jail failed its TCJS inspections for various reasons in 2001, 2002, 2004-06, 2009, 2010, 2013, 2016-18, 2020 and 2021; failed to comply with a court order to fix communications devices in 2001; operated with TCJS-approved bed variances from 2006-2010; failed to provide detainees with adequate medical and mental health care and protection from serious physical harm in 2008-09, according to a Department of Justice investigation; was found to have inadequate staffing in 2010 based on a report Harris County contracted from MGT America, Inc.; and was cited in 2011 for not meeting the minimum 1:48 ratio and for overcrowding issues).

Id. at 24. Plaintiffs allege that chronic understaffing is "the chief reason for Harris County's constant and consistent failures of minimum jail standards." *Id.* Plaintiffs claim that Defendants purposefully underfund and understaff the Jail, causing a state-created danger in willful disregard for their substantive due process rights and resulting in the mismanagement of the facilities and in violation of several sections of the Texas Administrative Code and the Texas Local Government Code, as enumerated below. *See generally id.* at 9-11, 24-138.[5]

1. Insufficient staff to protect staff, inmates, and visitors

Plaintiffs claim that Defendants do not comply with Texas law governing jail standards, which provide, *inter alia*, that: "Facility security shall be planned to protect offenders from one another, protect staff and visitors from offenders, and deter and prevent escapes" and "[t]he level of security shall be commensurate with the degree of security sought to be achieved." 37 Tex. Admin. Code § 260.101. Complaint at 24. Plaintiffs point to the Offenders Management System ("OMS") statistics of reported jail incidents that show there were 918 assaults on staff members by inmates and 6,352 assaults between inmates in the first eight months of 2021. *Id.* at 24-25.

[5] Plaintiffs allege that Defendants are violating Tex. Local Gov't Code § 351.002, which provides that each county jail must comply with the minimum standards and procedures of the Commission on Jail Standards, and point to specific sections of Chapter 37 of the Texas Administrative Code to argue that Defendants fail to meet those state standards.

They allege that inmate assaults on other inmates have tripled in the last year and inmate assaults on staff have doubled. *Id.* at 25. John Doe 35 alleges that the Jail is so understaffed that there are not enough personnel to protect the staff from weekly attacks by the inmates during basic functions, such as passing out laundry. *Id.* at 25-26. Plaintiff nurses allege an increase in inmate attacks based on their experiences of treating inmates with assault injuries. Plaintiffs claim that Jail employees are leaving in large numbers due to the increasing safety issues, which exacerbates the problems. *Id.*

Plaintiffs provide numerous examples of being assaulted due, they claim, to being required to go into a pod of 48 inmates alone. *Id.* at 25-43. Although Harris County policy allegedly provides that two guards should conduct the rounds and/or CorreTrak[6] together, Plaintiffs claim that there are too few guards for this to occur on a regular basis. *Id.* For example, in June 2021, an inmate viciously attacked a lone guard in the corner of the pod, sending him to the hospital. *Id.* at 26. In August 2021, John Doe 21, a veteran, had to use his specialized military training to ward off an attack when an inmate rushed him as he entered the pod door to do rounds. *Id.* at 26-27. Jane Doe 17, a guard, had to enter a cell alone in mid-August 2021, and the inmate bit her finger. *Id.* at 42.

[6] According to Plaintiffs, CorreTrak "is an electronic device the size of a cell phone that is used in the Harris County Jail to scan barcodes in the inmate housing area to record and log rounds being conducted." Complaint at 25 n.14. Plaintiffs allege that they must do the CorreTrak on time because it is prioritized over staff and inmate safety and has tripled their workload. *See id.* at 79.

She says that only two rovers and a new trainee were on the floor that day. *Id.* at 43.

Plaintiffs allege that workloads have increased without any increase in staff. For example, Jane Doe 31 states that her workload increased because the Jail moved some male inmates to female floors, which requires more escorts and rovers, but there was no increase in staff to account for this need. *Id.* at 28. John Doe 5 alleges that bond reform changed the ever-increasing jail inmate population because the Jail retains only those inmates charged with violent crimes, who are more likely to fight and commit violence. *Id.* at 36-37

Plaintiffs further allege that there are not enough staff to escort civilians, and John Doe 10, a supervisor, claims that contractors are not escorted, causing an unsafe condition where tools get stolen and used as weapons. *Id.* at 30. John Doe 14 claims that the radio communication is unreliable while civilian contractors are in a cell with inmate and an escort. *Id.* at 29-30.

Plaintiff nurses allege that they are not provided adequate security escorts. For example, Jane Doe 35, a nurse, states that on July 27, 2021, she was escorting an inmate to medical without any guard when he attacked her. She was able to fend him off and other guards were able to come to help her. *Id.* at 30-31. Jane Doe 33, a registered nurse with 20 years' experience at the Jail, states that nurses must regularly do stretcher runs without security escorts, and that unescorted stretcher runs are more frequent

because of the rise of drug use. *Id.* at 31. For instance, Jane Doe 33 alleges that, during one stretcher run, an inmate who overdosed on K-2 rose up and attacked the nurse who carried the stretcher in the lead position, blindsiding her from behind. *Id.* at 32. Jane Doe 33 helped the other nurse, but there were no guards to help them. *Id.*

Jane Doe 47, a civilian working for federally funded grant programs, states that there are not enough security guards to escort her, which causes a delay in her job. *Id.* at 34-35. She claims that in the summer of 2021, she was locked in a cell with 10 inmates when the jail went into lockdown and she was forced to remain there without a guard. *Id.* at 35. Jane Doe 44, 47's supervisor, complained about the incident, but Harris County just blamed staffing shortages. *Id.* at 36.

Plaintiffs further complain that the Joint Processing Center ("JPC"), which is an open-concept center for processing the inmates when the first arrive at the jail, is not secure because of understaffing. *Id.* at 37-38. Plaintiffs allege that it takes at least 66 staff, in several different processing stations, to safely process the incoming inmates. *Id.* at 83. Plaintiffs claim that because of the systemic understaffing of the Jail, many of these staff members are reassigned to be counted as staff on other floors, leaving the JPC understaffed. *Id.* at 82-83.

Plaintiffs complain that unescorted inmates ride the elevators. Jane Doe nursing Plaintiffs allege that there is a lack of security for medical staff, and

that unescorted inmates appear at the elevator doors. Plaintiffs claim that they had to leave the elevator several times because they were outnumbered by unescorted inmates. *Id.* at 39-40. Further, Plaintiffs allege that inmates with mental health issues are placed together with the general population. Plaintiffs claim that there are increased risks to staff when these inmates are wandering unescorted in the hallways and elevators because many staff are not properly trained to handle mental health inmates. *Id.* at 41.

Plaintiffs also claim that the public bonding lobby is unsafe with too few guards. Jane Doe 49 alleges that on Aug 21, 2021, a man covered in yellow caution tape came into the public bonding lobby waving a gun. *Id.* at 43. On the day the gunman came in, the magistrate staff elevator was down and the staff had to wait in the lobby for an hour. Plaintiffs claim that the lack of experienced staff for this public space creates a dangerous situation. Plaintiffs allege that many times during the night shift, there is no deputy in the lobby even after the incident with the gun-wielding assailant. *Id.* at 44.

Plaintiffs claim that there are not enough staff to do the hospital runs. John Doe 5 says that they have to pull guards off floors or even bailiffs out of court to make hospital runs because policy mandates that two guards accompany each transport. *Id.* He alleges that on August 13, 2021, 31 deputies were occupied with inmates at various hospitals, and central staffing scrambled to get coverage at the Jail. *Id.* John Doe 35 says they need about 40 staff just to

do hospital runs every day, and inmates must wait a long time—up to five hours—for transport to a hospital. *Id.* at 45. John Doe 12 claims that he has to do hospital duty 4 out of 5 days in a week despite not being trained for this activity. He alleges that he does not get bathroom breaks in his 16-hour shift and has used the bathroom in the prisoner's hospital room in an emergency. He also alleges that sometimes he gets only 2-3 hours of sleep between shifts because understaffing forces him to work beyond the 16-hour maximum. *Id.* at 45-46. Jane Doe 6, a certified peace officer, says that understaffing causes her to guard inmates at hospitals alone when there should be two officers guarding the inmates at the hospital. *Id.* at 46. On July 14, 2021, an inmate tried to disarm a lone guard escorting him to a hospital and shot him in the hand. Hospital staff had to help subdue the assailant because there was no other guard to help. *Id.* at 46-47.

2. Lack of bathroom breaks

Plaintiffs claim that accordingly to state law, Harris County must provide an adequate number of jailer stations and bathrooms for jailers on each floor, *see* 37 Tex. Admin. Code § 260.118. Plaintiffs allege that Harris County fails to meet this standard because staff guards are locked inside inmate observation pods for hours without a bathroom break due to lack of staff. *Id.* at 48. Jane Doe 15 alleges that on August 22, 2021, she called for a bathroom break, but because there was no one to relieve her, she urinated in a plastic garbage bag in the pod control area. *Id.* She believes that she has a bladder infection

now from doing this so many times, but cannot take time to go to a doctor because of her overworked schedule. *Id.* at 49-50. Jane Doe 3 also alleges multiple bladder infections, which she attributes to staff shortages and to not being able to go to the bathroom during her long shift. *Id.* at 50. Other detention officers have urinated on themselves for lack of bathroom break, and many of these officers later quit. Jane Doe 25, a former detention officer, returned to work with assurances that she could get bathroom breaks after treatment for her kidney cancer; she could not get a break. *Id.* at 51. On August 18, 2021, Jane Doe 17 called for a bathroom break three or four times, but it took 2 hours for someone to relieve her. *Id.* Jane Doe 54 had no bathroom break during her menstrual cycle and soiled herself with no way to clean up. *Id.*

Many more plaintiffs complain that they cannot get a bathroom break or must wait for hours before being able to use the restroom because there are not enough staff to cover the floors or provide even a 5-minute break. For example, Jane Doe 11 had surgery for a female issue, and on August 11, 2021, she was unable to get a bathroom break and bled through her clothes. She wanted to leave, but her supervisor requested that she stay so she cleaned herself up as best she could and finished her shift. *Id.* Jane Doe 31 has heavy menstrual cycles and must use a bathroom on those days but cannot get a bathroom break despite asking. Now she calls in sick on those days of the month. Jane Doe 32, the sole person guarding a pod, reports that she has to wait 3 hours to get a bathroom break. *Id.* at 57.

3. Lack of adequate medical facilities and staff

Medical staff Plaintiffs complain that understaffing places the inmate population at risk and is not in compliance with state law standards. *Id.* at 58 (citing 37 Tex. Admin. Code § 273.2) (providing that the Jail must provide and implement a written plan for adequate medical, dental, and mental health services). Jane Doe 33 claims that they have lost a lot of nurses to attrition because of inadequate staffing and lack of safety. Complaint at 58. Jane Does 37 and 39 claim that they are understaffed with more nurses needed to dispense pills to an inmate population increasingly in need of medications. They contend that there are not enough guards to escort the nurses who pass out medication, which causes delays. *Id.* at 58-59.

4. Lack of adequate vestibules and secure doors

Plaintiffs also complain that the Jail safety measures are inadequate and violate the Texas Administrative Code. Complaint at 59-60 (citing 37 Tex. Admin. Code §§ 260.136, 260.148, 260.150, 260.152).[7] Plaintiffs claim that the pod door system malfunctions sometimes and doors get unlocked or

[7] Providing, *inter alia*, that the Jail must provide adequate safety vestibules, §260.136; keys and locks should be sufficient to ensure proper security,§260.148; proper power-operated locks should be installed and be able to be opened with a key, § 260.150; and doors should be capable of being unlocked from remote or in an emergency, § 260.152.

cannot be opened as needed. Maintenance allegedly does not fix the problems or takes months to address the issues. John Doe 5 claims that the jail is not secure and lacks proper maintenance to address the electrical issues and mechanical wear and tear, so inmates can get out. *Id.* at 60-61.

Regarding the failures of the door security system, John Doe 14 alleges that when he was conducting rounds in November 2019, an inmate blindsided and severely beat him. Because the system was down and was rebooting, John Doe 2, who was in the pod control center, could not open the pod doors or make a page for help. *Id.* at 61. It took between 8-10 minutes to rescue John Doe 14, by which time the inmate became tired of beating him and went back to his cell. *Id.* at 64. The inmate bragged that he could have killed John Doe 14 if he wished and there was nothing anyone could do about it. *Id.* Plaintiffs state that Defendants did not fix the door issue until 2021. *Id.* John Doe 14 sought medical treatment but was informed that worker's compensation would not cover this injury or any mental health appointments to deal with the trauma of nearly being killed at work. *Id.* at 65. A month after this incident, another officer was attacked on this same floor. The pod officer left the pod control center to rescue him even though he was not supposed to leave the control center. *Id.* at 66. Jane Doe 4 reports that she witnessed an inmate-on-inmate fight in the pod, but the doors would not work so the inmate who was attacked endured 30 minutes of abuse without any help from the guards who could not reach him. *Id.*

5. Failure to maintain a reasonable temperature, provide two-way communication, provide adequate sanitation, and provide adequate firefighting equipment and training.

Plaintiffs further allege that the Jail fails to meet state standards under the Texas Administrative Code for maintaining a reasonable temperature at the Jail, a reliable public address system, two-way communication between staff and inmates, adequate sanitation, and fire safety equipment to deal with the increased arson in the Jail. *See id.* at 67-75.[8] Plaintiffs report that the Jail frequently exceeds 85 degrees and that the temperatures in some pods register in the 90s with little ventilation. *Id.* at 69. Plaintiffs further complain that Defendants knowingly create situations where the employees and inmates lose communication for several days. *Id.* at 71. Plaintiffs state that during the COVID pandemic, there was inadequate sanitation to keep inmates and staff safe. *Id.* at 114-116. They also claim that there are increased instances of arson with this increasingly dangerous inmate population setting fires and inadequate equipment and training to fight those fires. *Id.* at 73-75.

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[8] Citing 37 Tex. Admin. Code §§ 260.154-260.155 (the jail shall maintain temperature levels between 65 and 85 degrees Fahrenheit); § 260.161 (two-way communication shall be available at all times between offenders and jailers); §§ 263.53-263.56, 263.70 (the jail must provide fire safety equipment and the staff must be trained to combat fire emergencies).

6. Inadequate number of staff to conduct rounds

Plaintiffs allege that Defendants violate Texas Administrative Code § 275.1, which states that the Jail must provide adequate staffing to conduct rounds on inmates, and § 275.4, which mandates a 1:48 staff-to-inmate ratio for direct inmate supervision at the Jail at all times. *Id.* at 76. Plaintiffs claim that, while it may appear on paper that the Jail complies with the state standard, the Jail moves the staff around to meet the 1:48 ratio at the time that the Daily Watch Schedule ("DWS") sheet is signed and then move the staff to other areas of the Jail to be counted again, causing staff shortages in the JPC and elsewhere. *Id.* at 79-99. Plaintiffs claim that Harris County does not appropriately document staffing numbers to the Commission on Jail Standards and is fully aware of these staffing issues. *Id.* at 76. Plaintiffs claim that there is not enough staff to cover the CorreTrak rounds, escort nurses on the floor, take inmates to the clinic, and respond to emergencies, as outlined previously. *Id.* at 77.

7. No control over contraband and drugs

Plaintiffs allege that Defendants violate Texas Administrative Code § 275.6 by not assuring sufficient searches for contraband, including drugs. *See id.* at 100-114. They complain that drugs and toxic fumes from the unabated use of K-2 (synthetic marijuana) and other substances create a toxic environment for the staff (as well as the inmates), making the working conditions unbearable. *Id.* The

smell of the K-2 smoke allegedly permeates the building, making the staff sick with headaches and other ailments.

For example, Jane Doe 45, a civilian case worker who works to help with drug rehabilitation, says her job is nearly impossible with the smell of drugs everywhere making it so difficult for addicted inmates who want to stop using. *Id.* at 109. Plaintiffs claim that K-2 and other drugs are rampant, and so are shanks and porn. *Id.* at 110. They allege that there are not enough staff members to conduct searches or keep track of razors. Meanwhile, the drug abuse makes the inmates high, erratic, or out of control and in need of more medication or treatment when they get into fights or hurt themselves. *Id.* at 109. Plaintiffs allege that there is no discipline or consequence for the offenders, which means that the drug abuse continues. *Id.* at 116.

8. No adequate system for inmate discipline

Plaintiffs claim that Harris County Jail violates Texas Administrative Code §§ 283.1 and 283.3 by failing to discipline inmates when they break the rules or violate the law. *Id.* at 116-18. Plaintiffs allege that this lack of discipline and understaffing emboldens the inmates, creating an environment where inmates feel free to harass staff without any consequences. For example, John Doe 17 says an inmate threw urine and feces on him, but he had to keep working in his soiled clothes because there was no one to relieve him. *Id.* at 118.

Plaintiffs recount many instances where inmates are out of control due to a lack of discipline and understaffing. *Id.* at 118-138. Jane Doe 33, a nurse, responded to a call for a stretcher because a young inmate was reportedly having a seizure. *Id.* at 119-20. When she arrived in the pod to help the young inmate, a group of inmates encircled her and masturbated around her. She was in the pod with just one guard, and they were outnumbered and surrounded. *Id.* Jane Doe 42 says that an inmate reached out of the food slot and grabbed her buttocks when she was passing out medications. *Id.* at 121. Although these women complained, nothing was done to the offending inmates. *Id.*

Jane Doe 37, a nurse, says nurses are exposed to masturbation and other sexual assaults on a daily basis. *Id.* at 122. For example, while Jane Doe 20 was trying to conduct CorreTrak rounds, an inmate who was masturbating in front of her cornered her and tried to rape her—he grabbed her genitals and she tried to punch him but hit the concrete wall and broke her hand. *Id.* at 122-23. Another inmate got in between her and the would-be rapist; otherwise, she would have had no help. *Id.* at 123. She was told that if she wanted to report the attack she would have to do so before being transported to the hospital, so she typed the complaint with one hand and had to wait for treatment until her complaint was finished. *Id.*

The Jane Does claim that inmates suffer no consequences for their actions and that nothing is done when inmates expose themselves to female staff. *Id.* Jane Doe 26 complained about an inmate

masturbating in front of her, and her sergeant allegedly told her that "that is what you signed up for." *Id.* at 124. Jane Doe 7 has had many inmates masturbate in front of her, and when she complains, the sergeant just says, "You know we are not moving them for that." *Id.* at 126. She tried to write a complaint on each inmate, but each one already had so many other charges that the District Attorney did not want to add another charge, so nothing was done. *Id.* Jane Does 41 and 36, both nurse, deliver medications to the inmates and state that inmates routinely masturbate in front of them. *Id.* at 127. The more experienced nurses claim that this conduct was not permitted in the past.

Plaintiffs claim that unescorted inmates are also a menace to the civilian social workers and medical workers at the Jail, hiding behind large trashcans and generally not being where they are supposed to be. *Id.* at 129-33. Plaintiffs allege that because the Jail is understaffed, these workers are being placed in situations where they can be subjected to inmates exposing themselves or masturbating in front of them regularly without anyone doing anything to stop it. *Id.* Even after these civilian workers complain, the inmates are not moved despite engaging in sexually explicit behavior. *Id.* at 132. Jane Doe 44, a manager of the civilian case workers, asked for guards to escort inmates going to medical, but this request was refused because there is no staff to escort them. *Id.* at 132-33.

9. No oversight to ensure compliance with Jail Standards

Plaintiffs also complain that Harris County does not provide enough oversight or monitoring to make sure the Jail complies with the law. They claim that the training for detention officers is minimal and inadequate, with little to no training for how to deal with mentally ill individuals or the increasingly violent and lawless inmate population. New trainees allegedly are assigned to jobs right away that they do not know how to do or manage. *See id.* at 137-146.

10. Staff overworked and not allowed to take earned time off

Plaintiffs also allege that Harris County overworks the staff by requiring mandatory 60-hour work weeks and makes it very difficult for staff to take the time off they have accumulated. *Id.* at 146-156. Plaintiffs state that there is no reasonable approach to paid time off. The working conditions allegedly are so bad that the staff is quitting at an alarming rate, with Harris County reportedly having the worst attrition rate in the country. *Id.* at 157.

Plaintiffs allege that these working conditions, described summarily above, amount to a state-created danger and that Defendants are violating their substantive due process rights to bodily integrity by subjecting them to dangerous working conditions on a daily basis and failing to protect them from the harms described above. Plaintiffs further claim that Defendants are violating their rights under the Equal Protection Clause. *Id.* at 177. Throughout their Complaint, Plaintiffs assert that Defendants

have acted *ultra vires* of their authority by failing to perform their ministerial duties to fund and staff the Jail and by failing to follow state law to ensure that the jail standards are met as set forth in the Texas Administrative Code.

Plaintiffs seek declaratory and injunctive relief. Among other things, Plaintiffs want the Defendants to authorize county funds to be allocated to the Jail to bring the Jail to minimum standards under state law "to create a safe and humane working environment for its employees." *Id.* at 181. They claim that federal funding is available through the Federal American Rescue Plan Act of 2021 ("ARPA"), such that $915 million of funds available to the Defendants should be allocated to staffing the Jail and bringing the Jail into compliance with state jail standards. Plaintiffs also contend that they should be certified as a class action.

I. LEGAL STANDARDS

Rule 12(b)(6) of the Federal Rules of Civil Procedure authorizes the filing of a motion to dismiss a case for failure to state a claim upon which relief can be granted. FED. R. CIV. P. 12(b)(6). "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 entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action 's elements will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation omitted). A plaintiff must allege sufficient

facts to state a claim to relief that is "plausible" on its face. *Id.* at 569. A claim is facially plausible when a "plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556).

Conclusory allegations and unwarranted factual deductions will not suffice to avoid a motion to dismiss. *United States ex rel. Willard v. Humana Health Plan of Tex., Inc.*, 336 F.3d 375, 379 (5th Cir. 2003). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). In ruling on a Rule 12(b)(6) motion, "courts must limit their inquiry to the facts stated in the complaint and the documents either attached to or incorporated in the complaint." *Lovelace v. Software Spectrum Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996).

III. DISCUSSION

Defendants move to dismiss the Complaint, arguing that: (1) Plaintiffs' claims that occurred before September 20, 2019 are barred by the applicable two-year statute of limitations; (2) Plaintiffs' federal claims against the County Defendants fail as a matter of law; (3) Plaintiffs' state *ultra vires* claims against the County Defendants fail as a matter of law; and (4) Plaintiffs' class action fails as a matter of law.

Plaintiffs filed a response, arguing that (1) there are no claims barred by limitations because the alleged inadequate staffing continues to the present time, and the historical accounts are alleged to establish that Defendants had actual and constructive knowledge of the issues; (2) the official capacity claims are against Harris County, and the individuals are named for their *ultra vires* actions; (3) they assert a viable Equal Protection claim because they allege that Defendants knowingly encouraged policies and practices that treat female guards differently than male guards; and (4) they have stated a substantive due process claim based on the state-created danger doctrine due to Defendants' policy of underfunding the Jail. In addition, Plaintiffs request leave to amend their complaint in the event that the Court concludes that the pleadings are insufficient to state a claim upon which relief may be granted.

A. FEDERAL CLAIMS

1. Statute of Limitations

Defendants contend that claims stemming from incidents occurring more than two years prior to the filing of this case are barred by limitations. *See Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001) (explaining that a two-year statute of limitations applies for § 1983 cases in Texas); *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(a). Plaintiffs counter that they include Harris County Jail's history of noncompliance not to recover for those past wrongs, but instead to establish a pattern or knowledge for the County regarding deliberate

indifference to what Plaintiffs allege to be continuing violations of state and federal law. In fact, Plaintiffs state that they make no claims that pre-date September 20, 2019, and they seek only prospective injunctive relief for ongoing violations of federal and state law. Therefore, Defendants' statute of limitations argument is unavailing under these circumstances.

2. Due Process

Plaintiffs principally base their Fourteenth Amendment due process claims on a state-created danger theory. *See* Complaint at 164-165. The United States Supreme Court has held that "nothing in the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors," explaining that "the Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189, 195 (1989). However, *DeShaney* recognized that "in certain limited circumstances the Constitution imposes upon the State affirmative duties of care and protection with respect to particular individuals," explaining that the State acquires a duty to protect where there is a "special relationship" in situations where the individual is institutionalized, like when they are incarcerated or involuntarily committed. *Id.* at 198-200. *DeShaney* further noted in *dicta* that, " [w]hile the State may have been aware of the dangers that [the victim] faced in the real world, it played no part in their creation, nor did it do anything to render him

any more vulnerable to them." *Id.* at 201. Some other circuits have interpreted this to allow a "state-created danger" exception to the rule in *DeShaney*. While other circuits have recognized this theory of recovery in some limited circumstances, the Fifth Circuit has stated:

> As we noted in *McClendon v. City of Columbia*, 305 F.3d 314, 327, 330-32 (5th Cir. 2002) (*en banc*), this court has frequently spoken of the "state-created danger" theory, and has discussed its various permutations and requirements as applied in other circuits, but **neither the Supreme Court nor this court has ever either adopted the state-created danger theory or sustained a recovery on the basis thereof**. We have, however, many times refused to allow recovery sought to be predicated thereunder. *See, e.g., Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004) ("This court has consistently refused to recognize a 'state-created danger' theory of § 1983 liability"); *Rivera v. Houston Independent School District*, 349 F.3d 244, 249 (5th Cir. 2003) ("We have never recognized state-created danger as a trigger of State affirmative duties under the Due Process clause"); *Piotrowski v. City of Houston*, 237 F.3d 567, 584 (5th Cir. 2001) ("Although this court has discussed the contours of the 'state-created danger' theory on several occasions, we have never adopted that theory"); *Randolph v.*

> *Cervantes*, 130 F.3d 727, 731 (5th Cir. 1997) ("The state-created danger theory has not been adopted in this Circuit"); *Johnson v. Dallas I.S.D.*, 38 F.3d 198, 201 (5th Cir. 1994) ("no Fifth Circuit case has yet predicated relief on a state created danger theory"); *Leffall v. Dallas I.S.D.*, 28 F.3d 521, 530 (5th Cir. 1994) ("We have found no cases in our circuit permitting § 1983 recovery for a substantive due process violation predicated on a state-created danger theory").

Rios v. City of Del Rio, Tex., 444 F.3d 417, 422 (5th Cir. 2006) (emphasis added).

Plaintiffs state that they "fully acknowledge that the Fifth Circuit has steadfastly declined to recognize a state-created danger doctrine of § 1983 liability." Complaint at 167. Nonetheless, they argue that when the issue is raised, the Fifth Circuit discusses the state-created danger theory and considers whether it applies. Plaintiffs contend that the Fifth Circuit "has failed to adopt a state-created danger theory of liability when the ultimate outcome would still result in the claim being rejected" and argue that "the Fifth Circuit is waiting for a case where the state-created danger theory of liability should apply before determining if the Fifth Circuit will adopt an official state-created danger test." *Id.* at 168.

The Fifth Circuit has had numerous opportunities to adopt a state-created danger

doctrine, but declined to do so where, for example: (1) elementary school staff allowed an unauthorized person to sign out a 9-year-old female student on several occasions and the unauthorized person repeatedly sexually abused the student, see *Doe ex rel. Magee v. Covington Cty. Sch. Dist. ex rel. Keys*, 675 F.3d 849, 853 (5th Cir. 2012) (*en banc*); (2) a police officer left a prisoner unattended in the back seat of his police vehicle, which allowed the prisoner to escape using the vehicle and strike the plaintiff, *see Rios*, 444 F.3d at 419- 20; (3) a 911 call operator allegedly mishandled an emergency call by giving the mother and daughter erroneous information, and they were then murdered by the husband/father assailant, *see Beltran v. City of El Paso*, 367 F.3d 299, 307 (5th Cir. 2004); (4) a school board allegedly knew about and tolerated gang activity at a middle school, and a student was stabbed to death by another student in a gang-related fight on school grounds, *see Rivera v. Houston Indep. Sch. Dist.*, 349 F.3d 244, 249 (5th Cir. 2003); and (5) a woman was shot and rendered a paraplegic in an attempted murder plot involving her wealthy ex-boyfriend, his "unsavory" private investigator, and several cooperating Houston Police Department ("HPD") officers who harassed and threatened her, and she had previously complained numerous times to HPD about police misconduct and her dangerous situation, but to no avail, *see Piotrowski*, 237 F.3d at 584.

The Fifth Circuit has noted that "the state-created danger theory requires 'a plaintiff [to] show [1] the defendants used their authority to create a dangerous environment for the plaintiff and [2] that

the defendants acted with deliberate indifference to the plight of the plaintiff." *Doe*, 675 F.3d at 865. The *Doe* court further explained that "'the state-created danger theory is inapposite without a known victim,'" in that "'liability exists only if the state actor is aware of an immediate danger facing a known victim.'" *Id.* (citing *Rios*, 444 F.3d at 424; *Lester v. City of Coll. Station*, 103 Fed. App'x 814, 815-16 (5th Cir. 2004) (emphasis in *Doe*)).

Even if the Fifth Circuit did recognize the state-created danger theory, it would not apply in this case. First, the alleged state-created danger at the Jail hinges on possible actions of unknown third parties, and the complained-of risks or dangers are speculative and common to the general staff population, not an immediate danger facing a particular known plaintiff. Plaintiffs' allegations are insufficient to show deliberate indifference to a known victim. *Id.*

Second, Plaintiffs' allegations that the Defendants failed to fund and staff the Jail—an allegation of inaction by the Defendants—is insufficient to create an affirmative duty to protect. *See id.* at 862-63 (discussing the Tenth Circuit's opinion in *Graham v. Indep. Sch. Dist. No. 1-99*, 22 F.3d 991 (10th Cir. 1994), which stated that "'foreseeability cannot create an affirmative duty to protect when the plaintiff remains unable to allege a custodial relationship'" and "'[i]naction by the state in the face of a known danger is not enough to trigger the obligation; according to *DeShaney* the state must have limited in some way the liberty of a citizen to act

on his own behalf'"). Plaintiffs' allegations that Defendants' inaction and knowledge of the possibility of a dangerous condition fails to state a claim for which relief may be granted under a state-created danger theory where Plaintiffs are at-will employees, each with the liberty to act on their own behalf.

In addition, the Fourth Circuit recently rejected a similar claim from a prison guard who alleged that underfunding and understaffing caused a state-created danger at the prison and resulted in an attack by an inmate known to be dangerous. In *Callahan v. North Carolina Dep't of Public Safety*, 18 F.4th 142 (4th Cir. 2021), the court explained:

> The critical questions are: What is the pertinent danger, and did the state create it? Callahan's allegations make clear that the danger was [the inmate], and none of the defendants created that danger. The staffing and training decisions may reflect a failure to adequately respond to the danger posed by [the inmate]. But under our precedent, such failures do not support a state- created danger claim. They are neither the "immediate interactions" with the plaintiff called for in *Doe* [*v. Rosa*, 795 F.3d 429 (4th Cir. 2015)] nor the "direct cause" of the injuries required by *Graves* [*v. Lioi*, 930 F.3d 307 (4th Cir. 2019)]. These choices are simply too far down the causal chain of events to result in liability under the Due Process Clause. And without allegations that, if accepted as true, meet

> these legal requirements, the complaint does not plausibly state a§ 1983 substantive due process claim under the state-created danger theory.

Id. at 148. The Fourth Circuit further noted that the "special relationship" exception to the *DeShaney* rule did not apply either because it "arises only in a custodial context and not in an employment context." *Id* at n.4 (citing *Collins v. City of Harker Heights*, 503 U.S. 115, 129 (1992)). Likewise, Defendants' choices regarding funding and staffing of the Harris County Jail are "simply too far down the causal chain of events" for liability under the Due Process Clause in this case. *See id* at 148.

"Neither the text nor the history of the Due Process Clause supports [plaintiffs'] claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the Due Process Clause." *Collins*, 503 U.S. at 126; *see also Carty v. Rodriguez*, 470 F. App'x 234, 236 n.5 (5th Cir. 2012). In this circuit, "a government employer does not violate the Due Process Clause of the Fourteenth Amendment even if it provides a workplace that is unreasonably dangerous and fails to warn its employees of the danger." *Greene v. Plano Indep. Sch. Dist.*, 103 F. App'x 542, 544-45 (5th Cir. 2004) (explaining that even if it were to recognize the state-created danger theory, it would not apply in the government workplace context for dangerous working conditions). Based on the Fifth Circuit precedent discussed above, Plaintiffs cannot recover on a state-created danger

theory against the County and its officials for the actions of third parties for exposure to a dangerous work environment or for being harmed by those third parties while at work.

In addition, to the extent that Plaintiffs assert that the Defendants' actions "shock the conscience," that doctrine does not provide an independent basis to hold a governmental entity liable under section 1983 for harm inflicted by a third party absent a showing of a special relationship. *See Doe*, 675 F.3d at 868-69. Governmental employees, who work voluntarily, do not have the "special relationship" required to impose liability under section 1983. *See Broussard v. Basaldua*, 410 F. App'x 838, 839 (5th Cir. 2011) (per curiam) (rejecting a jailer's claims against the Sheriff and Warden for creating an unsafe work environment when an inmate assaulted her and holding that there is no substantive due process right to a safe work environment) (citing *Walton v. Alexander*, 44 F.3d 1297, 1300-01 (5th Cir. 1995) (*en banc*)). Therefore, Plaintiffs' claims under the Due Process Clause are subject to dismissal for failure to state a claim for which relief may be granted.

3. Equal Protection

Plaintiffs allege that the Defendants violated their right to equal protection, stating:

> Due to the fact that said conspiracy and the overt actions in furtherance thereof were done and continue to be done with the knowledge and purpose of depriving

> Plaintiffs and employees of the equal protection of the laws and or of equal privilege and immunity under the law, the Defendants also deprived the Plaintiffs and the class of their right to equal protection of the laws under the Fourteenth Amendment and 42 U.S.C. § 1983.

Complaint at 177. As the Defendants point out, this allegation is vague and conclusory and fails to state a plausible claim for relief. *See Iqbal*, 556 U.S. at 678 ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

The Equal Protection Clause requires the State to treat all similarly situated people equally. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). To succeed on an equal protection challenge, a plaintiff must prove purposeful discrimination resulting in a discriminatory effect among similarly situated persons. *McCleskey v. Kemp*, 481 U.S. 279, 292 (1987); *Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir. 2001). A "discriminatory purpose" implies that a particular course of action was selected "at least in part because of, and not simply in spite of, the adverse impact it would have on an identifiable group." *Woods v. Edwards*, 51 F.3d 577, 580 (5th Cir. 1995). Plaintiffs must show specific acts that support a claim of discrimination; their personal belief that they were subject to such discrimination is insufficient to prove an equal protection violation. *Id.*

In their Complaint, Plaintiffs do not allege that female guards are being treated differently than male guards; at most, Plaintiffs appear to allege that all of the Plaintiffs, as Jail staff, are being denied equal protection generally because of the working conditions. *See* Complaint at 177. In their response to the motion to dismiss, however, Plaintiffs appear to recast this claim as one regarding unequal treatment of the female guards in connection with the alleged exposure to inmates' sexually offensive behavior and/or the lack of bathroom breaks for female issues.

As currently alleged in the Complaint, the equal protection claim does not point to facts to show that individuals in one class were treated differently than similarly situated individuals in another class. Indeed, even as recast as a "female-only" claim in response to the motion to dismiss, this claim is problematic. For example, neither of the two purported "class representatives"—"John Doe 1" nor "John Doe 2"—is even in the proposed new class of female guards; John Doe 1 and John Doe 2 would be the "similarly situated male guards" not exposed to such conditions, and, therefore, are not proper plaintiffs for this claim. In addition, Plaintiffs plead no facts to show a discriminatory purpose and that Defendants purposely acted to subject the females, and not the males, to the complained-of conditions. Plaintiffs' equal protection claim is subject to dismissal for failure to state a claim for which relief may be granted.

4. Conspiracy under Federal Law

To state a conspiracy claim under § 1983, plaintiffs must allege facts to support "(1) the existence of a conspiracy involving state action" and "(2) a deprivation of civil rights in furtherance of the conspiracy by a party to the conspiracy." *Shaw v. Villanueva*, 918 F.3d 414, 419 (5th Cir. 2019) (citation and internal quotation marks omitted). Similarly, to state a conspiracy under 42 U.S.C. § 1985, plaintiffs must allege facts to show that (1) two or more people conspired (2) for the purpose of depriving, either directly or indirectly, of the equal protection of the laws or of equal privileges and immunities under the laws, (3) acted in furtherance of the conspiracy, and (4) injured the plaintiffs or deprived them of their rights and privileges as United States citizens. *Id.*

A conspiracy requires two or more persons or entities. *Hilliard v. Ferguson*, 30 F.3d 649, 653 (5th Cir. 1994). "Where all of the defendants are members of the same collective entity, the conspiracy does not involve two or more people." *Reynosa v. Wood*, 134 F.3d 369 (5th Cir. 1997) (per curiam). In other words, a collective entity like Harris County and its employees in their official capacities "cannot conspire with itself." *Id.*

Plaintiffs' claims against Harris County and County officials in their official capacity are, in all respects except name, claims against Harris County. *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) ("As long as the government entity receives notice and an opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity," and not as a suit against the

official personally, "for the real party in interest is the entity."). Defendants correctly contend that the County cannot conspire with itself.

Further, "a conspiracy claim is not actionable without an actual violation of section 1983." *See Hale v. Townley*, 45 F.3d 914, 920 (5th Cir. 1995). As explained above, Plaintiffs do not plead facts to show a violation of section 1983 or otherwise show a violation of their civil rights as required by section 1985; therefore, their federal conspiracy claims also fail. *Id.*

B. STATE LAW CLAIMS

As explained above, Plaintiffs have not stated a plausible federal claim in their Complaint. In the absence of a viable federal claim or complete diversity of citizenship of the parties,[9] the Court declines to exercise supplemental jurisdiction over the state *ultra vires* claims. *See Broussard*, 410 F. App'x at 840 (holding that the district court was correct to decline to exercise jurisdiction over the state law claims where, as here, there was no federal question because no federal claims remained); *see also* 28 U.S.C. § 1367(c). The Court declines to decide what appears substantially to be a question of state law.

IV. CONCLUSION AND ORDER

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[9] The Plaintiffs and Defendants are citizens of Texas; therefore, no diversity of citizenship exists in this case. *See* Complaint at 26.

Based on the foregoing, the Court **ORDERS** as follows:

1. Defendants' Amended Motion to Dismiss (Doc. No. 8) is **conditionally GRANTED**, insofar as this case will be **DISMISSED** in thirty (30) days unless the Plaintiffs submit an Amended Complaint that : (a) complies with Federal Rule of Civil Procedure 8(a)(2) as "a short and plain statement of the claim showing that the pleader is entitled to relief," in that any Amended Complaint must be **no longer than 40 pages in length**, and double spaced; (b) complies with Federal Rule of Civil Procedure 11(b); and (c) fully cures the deficiencies in the Complaint that are explained above for any claim asserted in the Amended Complaint, if such is possible.

2. If the Plaintiffs do not file an Amended Complaint that meets the criteria stated above within thirty days, their federal claims will be dismissed with prejudice for failure to state a claim for which relief may be granted, and their state law claims will be dismissed without prejudice for lack of jurisdiction so that they may seek relief in state court, if appropriate.

3. Plaintiffs are advised that the period of limitations to file any state claims in state court is "tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d); *see also Artis v.*

District of Columbia, 138 S. Ct. 594, 605 (2018) (holding that Congress provided in section 1367(d) "for tolling not only while the claim is pending in federal court, but also for 30 days thereafter").

4. All scheduling deadlines are suspended pending further of the Court.

The Clerk will provide a copy of this Order to all parties of record.

SIGNED at Houston, Texas, this 22nd day of April 2022.

ANDREW S. HANEN
UNITED STATES DISTRICT JUDGE