

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

WILLIAM THORPE, <i>et al.</i> ,)	
)	
Plaintiff,)	
)	
v.)	Case No. 3:19cv332
)	
VIRGINIA DEPARTMENT OF)	
CORRECTIONS, <i>et al.</i> ,)	
)	
Defendants.)	

**DEFENDANTS’ OPPOSITION TO CLASS PLAINTIFFS’ MOTION FOR
LEAVE TO FILE NOTICE OF SUPPLEMENTAL AUTHORITY**

Pursuant to Local Civil Rule 7(F)(1), and in response to Class Plaintiffs’ Motion for Leave to File Notice of Supplemental Authority, ECF No. 36 (“Pls.’ Mot.”), Defendants submit that the Fourth Circuit’s decision in *Rivera v. Mathena*, No. 18-6615 (4th Cir. Nov. 19, 2019) (unpublished) (per curiam), ECF No. 36-1, is not applicable here.

I. *Rivera* is neither relevant nor binding.

First, Plaintiffs are wrong to construe *Rivera* as reducing or eliminating their own pleading obligations. *See* Pls.’ Mot. at 1. That *Rivera*’s evidence was sufficient, on the facts of his case, to withstand a motion for summary judgment under Rule 56(a) says nothing about whether, here, Plaintiffs’ bare allegations state a legal claim and are sufficient to avoid dismissal under Rule 12(b)(6). It is irrelevant that both cases involve “Eighth Amendment conditions-of-confinement claim[s] as to . . . solitary confinement in Red Onion and its twin, Wallens Ridge.” *Id.* Indeed, far from calling into doubt the constitutionality of VDOC’s administrative

segregation policy, which Plaintiffs challenge, *Rivera* concerned only alleged *departures* from the policy. *See Rivera*, slip op. at 11 (characterizing *Rivera*'s allegation as a denial of a meaningful opportunity to shower and exercise, "far fewer than the five hours of recreation and three showers each week that he 'should be permitted' while in segregation") (quoting OP 861.3).

Second, Plaintiffs incorrectly construe *Rivera*'s citation to *Porter v. Clarke*, 923 F.3d 348, 359 (4th Cir. 2019), as rejecting "Defendants' theory that *Porter* is limited to prisoners placed in solitary confinement by virtue of their sentence, as opposed to their conduct in prison." Pls.' Mot. at 2. Plaintiffs appear to believe that *Rivera* implicitly adopted a position that *Porter* itself rejected: a legal equivalence between inmates "placed in segregation based on their *in-prison conduct*" (as in *Mickle v. Moore*, 174 F.3d 464 (4th Cir. 1999)) and those "in solitary confinement based on their sentence alone." *Porter v. Clarke*, 923 F.3d 348, 359 (4th Cir. 2019). *Porter* squarely distinguished those two situations, noting that death-row inmates have no "avenue for removing themselves from segregation" and punctuating the point as follows: "Because *Mickle* involved a different set of facts than those adduced by Plaintiffs, our decision cannot—and does not—overrule *Mickle*." *Id.* Just as the Fourth Circuit expressly declined to overrule *Mickle* with its published opinion in *Porter*, it did not implicitly overrule *Porter* with its unpublished opinion in *Rivera*.

Because "unpublished decisions of the Fourth Circuit are not binding . . . , the Court is not constrained by [*Rivera*]. For the Court to adopt [its] reasoning, it must find that reasoning to be persuasive." *United States v. Edmonds*, 326 F. Supp. 3d 113, 122 (E.D. Va. 2018) (Payne, J.). For the reasons stated above, *Rivera* is not applicable, let alone persuasive.

II. *Rivera* does not undercut the many other grounds for dismissal.

Even if *Rivera* were relevant to Plaintiffs' Eighth Amendment claim (Count V), which it is not, it cannot overcome the arguments Defendants made in their motion-to-dismiss briefs. *See* ECF Nos. 19, 22. Nor does *Rivera* provide Plaintiffs any support in rebutting Defendants' multiple other arguments in favor of dismissal. All of Plaintiffs' other claims—whether sounding in contract (Count I), procedural due process (Count II), equal protection (Count III), the Americans with Disabilities Act (Count VI), or the Rehabilitation Act of 1973 (Count VII)¹—should also be dismissed for the reasons previously given, including on the basis of Eleventh Amendment immunity. *See generally id.*

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¹ Plaintiffs did not include a "Count IV" in the Complaint. *See* ECF No. 1 at 90-91.

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of December, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

/s/ Maya M. Eckstein _____

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