

FILED UNDER SEAL
PURSUANT TO PROTECTIVE ORDER

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

WILLIAM THORPE, *et al.*,

Plaintiffs,

v.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

CASE NO. 2:20-cv-00007-JPJ-PMS

**PLAINTIFFS' REPLY MEMORANDUM OF LAW
IN SUPPORT OF MOTION FOR CLASS CERTIFICATION**

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INTRODUCTION

Plaintiffs’ Constitutional Violation Classes and Disabilities Classes each more than satisfy Rule 23’s requirements. Courts routinely certify similar classes in similar cases, in this Circuit and elsewhere. None of Defendants’ arguments justifies departing from that long line of authority. Rather, Defendants’ arguments in opposing certification ignore the record evidence, misread the case law, and/or improperly seek to inject merits issues unnecessary to address at the class certification stage, contrary to the Supreme Court’s direction. And as explained below, many of Defendants’ arguments actually underscore the commonality and cohesion of the proposed classes. The proposed classes should be certified.

Constitutional Violation Classes

Numerous common questions. Defendants fail to meaningfully address fourteen of the nineteen common questions Plaintiffs have identified. This alone should be dispositive on this factor. Indeed, while Defendants halfheartedly argue that these questions are too general, this ignores that they are almost identical to questions that numerous courts have found sufficient under Rule 23. *See, e.g., Scott v. Clarke*, 61 F. Supp. 3d 569, 585 (W.D. Va. 2014) (collecting cases). As for the three questions that Defendants claim cannot be answered by common evidence, Defendants misconstrue Plaintiffs’ basic case theories: that the Step-Down Program as written and as implemented is unconstitutional as to all members because, for example, individuals in the Program are required to spend a mandatory minimum amount of time at each stage of the Program; the periodic reviews listed in the Program policy do not afford due process; the criteria used to evaluate progression through the Program are arbitrary and not aimed at a valid penological purpose; and all individuals subjected to solitary confinement for any extended

length of time are at a substantial risk of serious psychological and physical harms. *See infra* at Section I.B.

Typical and adequate representatives. Defendants fail to raise a specific challenge as to the typicality or adequacy of nine of the eleven Plaintiffs. Defendants’ general contention that Plaintiffs failed to rely on evidence to illustrate adequacy is simply wrong. Plaintiffs have presented scores of evidence on this element, including affidavits outlining the progression of each Plaintiff through the Step-Down Program that applies to each class member. Defendants fail to show how cursorily asserted and meritless individual defenses as to only two Plaintiffs might “become the focus of the litigation,”¹ nor could they. *See infra* at Section I.C.

Commonly applicable injunctive relief for Rule 23(b)(2) class. Defendants’ arguments about the proposed relief are equally meritless. Civil-rights cases like this one are exactly the types of cases that Rule 23(b)(2) is meant to capture. *See, e.g., Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 361 (2011). Plaintiffs’ requested injunctive relief is more than sufficient at this stage; the precise contours are not yet required. *See infra* at Section II.A.

Predominant and common questions for Rule 23(b)(3) class. Defendants’ contentions regarding supposedly individualized issues also fail to acknowledge the crux of Plaintiffs’ arguments, including that the Step-Down Program is a singular “management system” to which each inmate is subject and in which each participant must progress through the most-restrictive levels for a mandatory minimum period of time, and that the current version of the Step-Down Program is unconstitutional, even if it has been modified over time. Defendants offer nothing to suggest that any affirmative defense, including the narrowly-contained statute of limitations,

¹ Defs’ Brief in Opp’n to Pls’ Mot. for Class Certification (“Opp.”) at 31.

would preclude certification. Indeed, qualified immunity as to *Defendants* actually presents a common issue for the class. *See infra* at Section II.B.

Disabilities Classes

Numerosity and ascertainability satisfied. Defendants cannot avoid the implication of their own interrogatory responses, which even on the most narrow read identify close to 75 individuals with disabilities that put them in the Disabilities Damages Class. And those (and other) Damages Class members are readily identifiable from VDOC mental health and intake records maintained in the ordinary course of business. The Disabilities Injunction Class seeks indivisible (not individualized) injunctive relief. It encompasses current and future individuals in the Step-Down Program, the type of fluid prison population commonly certified. *See infra* at Section III.A.

Common questions identified. Defendants' individualized inquiry argument, which does not specifically address four of the six common questions presented by Plaintiffs, once again misunderstands Plaintiffs' claim. Plaintiffs contend (and provide supporting evidence) that there are systemic policy and practice failures with the Step-Down Program in terms of addressing individuals with mental health disabilities. These failures affect *any* individual with a disability, no matter the disability. Courts have certified classes raising common questions regarding systemic government failures similar to those presented here. *See infra* at Section III.B.

Typical and adequate class representatives. Contrary to Defendants' assertions, Plaintiffs provide evidence that Plaintiffs Messrs. Cavitt, Khavkin, Riddick, and Wall each have ADA and RA-qualifying disabilities. *See infra* at Section III.C.

Appropriately described injunctive relief for Rule 23(b)(2) class. Defendants again seek to impose a heavier burden on Plaintiffs than is required at this stage. Plaintiffs have sufficiently

identified proposed injunctive relief to allow for class certification, and even provided some more specific resolutions in expert reports and interrogatories. *See infra* at Section IV.A.

Predominant and common questions for Rule 23(b)(3) class. Defendants make the same predominance arguments as to the Disabilities Classes that they do for the Constitutional Violation Classes. They fare no better the second time around. *See infra* at Section IV.B.

ARGUMENT

This case challenges the constitutionality of a single, common program (“Step-Down”) that by design and implementation was constructed to operate uniformly and that is administered by a single agency (VDOC) and is currently implemented at a single VDOC facility (Red Onion State Prison). This is precisely the sort of case that courts routinely certify for class-wide treatment. *See, e.g., Scott*, 61 F. Supp. 3d at 569 (certifying class alleging constitutionally inadequate medical care in the VDOC); *Davis v. Baldwin*, 2021 WL 2414640 (S.D. Ill. June 14, 2021) (certifying class challenging restrictive housing and administrative detention policies in Illinois Department of Corrections facilities); *Tellis v. LeBlanc*, No. CV 18-541, 2021 WL 4267513 (W.D. La. Sept. 20, 2021) (certifying class challenging the “extended lockdown” procedures at David Wade Correctional Center, with a subclass for individuals with ADA-qualified disabilities); *Wilburn v. Nelson*, 329 F.R.D. 190, 198-99 (S.D. Ind. 2018) (certifying class of plaintiffs with disabilities contesting solitary confinement in a juvenile justice center under Rules 23(b)(2) and 23(b)(3) because “questions of law or fact common to the proposed class members do predominate including whether the JJC has a policy, practice, or custom of keeping juvenile detainees in solitary confinement, and whether those practices are unconstitutional.”); *Ashker v. Gov. of Cal.*, No. C 09-5796 CW, 2014 WL 2465191 (C.D. Cal. June 2, 2014) (certifying class challenging solitary confinement practices at Pelican Bay State

Prison); *Indiana Protection & Advocacy Servs. Comm'n v. Comm'r, Indiana Dep't of Corrections*, 2012 WL 6738517 (S.D. Ind. Dec. 31, 2012) (certifying class challenging solitary confinement procedures in Indiana Department of Corrections facilities). None of Defendants' arguments supports a different result here.

I. PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS OF RULE 23(A) FOR THE CONSTITUTIONAL VIOLATION CLASSES

A. Defendants Do Not Contest Numerosity

Defendants do not challenge that the Constitutional Violation Classes are sufficiently numerous. Defendants' brief reports 63 individuals in the Step-Down Program (Opp. at 18), which is presumptively sufficient under Rule 23. *Scott*, 61 F. Supp. 3d at 584 ("[I]f a proposed class size exceeds 25 plaintiffs, joinder is usually presumed impracticable."). While sufficient, it is understated as to both Constitutional Violation Classes, because it relies on a report that only includes Level-S prisoners and excludes Level-6, and understated as to the Damages Class, because it excludes individuals no longer in the Program.² Additional evidence shows the class numbers are larger. ECF No. 199-1, Rebuttal Decl. of Peter Graham, Exs. A-B, D (approximately 135 incarcerated persons in the Program as of October 1, 2020 and 540 for the class period); *see also* ECF No. 195-5 (Defs.' Ex. 5) (Vera Report) (indicating that VDOC reported 511 Level-S prisoners when the Step-Down pilot began). Moreover, Defendants do not contest that the Injunction class is fluid, which further weighs in favor of a numerosity finding. Mem. at 27, 39. Both proposed classes are sufficiently numerous.

² The Step-Down Program includes prisoners with both Level-S and Level-6 classifications. [Defs.' Ex. 1]. In 2020, VDOC redefined SM-2 as Level-6, instead of Level-S, thereby instantly removing a large swathe of prisoners from the Level-S headcount. Opp. at 8 n.2.

B. Plaintiffs Have Established Commonality

Defendants’ “primary” argument is that Plaintiffs “cannot show even a single important common question that will have a common answer across all class members.” Opp. at 24. Defendants attempt to take a case about a systemic set of problems—*i.e.*, VDOC’s Step-Down Program—and argue that the Court will be required to look at the Program’s effect on each individual class member, which Defendants assert (at 25) defeats class treatment under *Wal-Mart v. Dukes*. Defendants’ argument fundamentally misapprehends *Wal-Mart*. Indeed, adopting the Defendants’ position would result in the absurd conclusion that after *Wal-Mart* Eighth and Fourteenth Amendment claims can *never* be brought in the form of a class action. To the contrary, the courts are unambiguous:

A clear line of precedent, stretching back long before *Wal-Mart* and unquestionably continuing past it, firmly establishes that when inmates provide sufficient evidence of systemic and centralized policies or practices in a prison system that allegedly expose all inmates in that system to a substantial risk of serious future harm, Rule 23(a)(2) is satisfied.

Parsons v. Ryan, 754 F.3d 657, 684 (9th Cir. 2014); *see also id.* at 681–82 (citing cases); Mem. at 28–29 (discussing cases). That is precisely the case here.

1. Plaintiffs Challenge the Step-Down Program’s Uniform Policies And Practices

Plaintiffs challenge as unconstitutional a common program that is designed and implemented to operate uniformly to each incarcerated person subject to it, first at two prisons, then only at one. The Program is implemented by a single state agency, VDOC. ECF No. 195-4 (Defs.’ Ex. 4) (Operating Procedure 830.A), at 1. There is a single Step-Down Program Manual in place at any one time that governs all prisoners within the Step-Down Program. *See* ECF No. 174-3 (Pls.’ Ex. 3) (2020 Step-Down Plan), at 2 (showing signatures of VDOC officials

approving the 2020 manual as the “Restrictive Housing Reduction Step-Down Program”); *id.* at 26–29 (describing the SM and IM pathways that “all” prisoners are assigned to). And there are a single set of Operating Procedures governing the implementation of the Step-Down Program at any given time. ECF No. 195-4 (Defs.’ Ex. 4), at 1 (noting that the updated Operating Procedures supersede the previous version). Class Plaintiffs have also produced evidence that VDOC’s unwritten policies are applied uniformly. Mem. at 15–16 (citing ECF No. 174-38 (Pls.’ Ex. 38) (Jessica King Dep., *Thorpe v. VDOC*, No. 20-0007 (June 1, 2022)), at 138:13). Indeed, Defendants’ Opposition spends much of its effort citing to these exact same common policies and practices. Opp. at 4, 6–8, 13–14 (citing O.P. 830.A), *id.* at 6–9, 11, 13–15 (citing 2020 Step-Down Plan).

Defendants argue (at 25, 28–30) that different aspects of the Step-Down Program present somewhat different conditions, depending on where an prisoner is within his progression through the Program. This is wrong on both the facts³ and the law. As a factual matter, the Step-Down Program, on its face, lays out a uniform system of progression for every prisoner, as well as uniform conditions of confinement that apply equally to all prisoners at the same level. *See* ECF No. 174-3 (Pls.’ Ex. 3) at 50, 55 (describing system of progression governing all prisoners in Level-S); *id.* at 49, 54 (describing “privileges” available to all Level-S prisoners). Moreover,

³ Many of Defendants’ so-called “facts” are self-serving and are from unreliable sources. For example, the Declaration of Randall Charles Mathena, ECF No. 195-3 (Defs.’ Ex. 3) (the “Mathena Declaration”), fails to cite to any policy statements supporting his personal description of the Step-Down Program, and his opinion that the Step-Down Program meets basic constitutional requirements and necessities is an improper legal conclusion that should be stricken. *See Chittick v. Freedom Mortg. Corp.*, No. 118CV00275AJTTCB, 2021 WL 5326407, at *6 (E.D. Va. May 7, 2021) (citing *Hurley v. U.S. Healthworks Med. Grp. of Washington, P.S.*, 2006 WL 1788994, at *1–2 (E.D. Wash. June 27, 2006) (“Because the following statements contained in [the witness’s] declaration . . . are not based on [the witness’s] personal knowledge and/or legal conclusions, the Court finds they are inadmissible[.]”)).

every single prisoner assigned to the Step-Down Program starts at and is required to endure a mandatory minimum time Level-S security (nine months on the SM pathway,⁴ and eighteen months on the IM pathway), with the burden of working himself through each step of the assigned pathway. *See, e.g.*, ECF No. 174-3 (Pls.' Ex. 3), at 16–17, 50, 55. Thus, all prisoners in the Step-Down Program are required to spend minimum lengths of time in the most restrictive levels of the program. Conditions in these most restrictive settings include spending at least 20-hours per day in an 8x10 foot cell; being subjected to an intrusive cavity search and restraints every time an individual is permitted to leave his cell; spending what small outdoor time is given in a block of individual cages; and severely lacking in any educational or work opportunities. *Id.* at 49–55; *see also* Mem. at 5–7. Only after an individual has progressed through these levels is he eligible for slightly increasing privileges. ECF No. 174-3 (Pls.' Ex. 3), at 50, 55.

Even once an individual progresses to Level-6, he continues to experience severe restrictions vastly different than the general population. Out-of-cell time remains significantly restricted; educational and work opportunities continue to be limited as compared to the general population; and individuals in the Step-Down Program continue to experience a reduced ability to accrue good-time credit while in the Step-Down Program. *See* ECF No. 174-11 (Pls.' Ex. 11) (Operating Procedure 830.1 (2021)), at Appendix F; *see also* ECF No. 174-3 (Pls.' Ex. 3) at 30–31, 49, 54 (stating that prisoners at Level-6 are still restrained when they are out-of-cell and that additional privileges compared to IM-2 are not guaranteed). Thus, Defendants' attempt (at 7) to

⁴ VDOC's change of SM-2 from its designation as Level-S to its designation as Level-6, which occurred in 2020 after the filing of this lawsuit, does not alter these minimums. Prisoners must still spend three months at each of SM-0, SM-1, and SM-2 before being eligible for the Level-6 Pods. *See* ECF No. 174-3 (Pls.' Ex. 3), at 55.

categorize Level-6 as “general population” is a distinction in name only. Moreover, the effect of these continued restrictions—even if relaxed in some regards—may be compounded by the time that each individual has already spent in the most restrictive stages of the program. Ex. 1 (Craig Haney Dep., *Thorpe* (Aug. 17, 2022)), at 90:9-22. These conditions are by design and set forth in the Step-Down Program Manual, *i.e.*, the policies and practices to be applied to *all* prisoners in the program. ECF No. 174-3 (Pls.’ Ex. 3), at 49, 54.

Moreover, all individuals in the Step-Down Program—whether Level-S or Level-6—are subjected to vague and arbitrary standards for progressing through (or being bumped back in) the Step-Down Program, which are not tied to any valid penological purpose; and hearings and reviews which completely lack in due process. Mem. at 11–12. It is VDOC’s policy to deny progression to prisoners due to their ratings in hygiene, grooming, standing for count, or “respectfulness,” categories VDOC officials admit are not related to the prisoners’ security risk. *See* ECF No. 174-3 (Pls.’ Ex. 3), at 50, 55 (requiring “good” or “satisfactory” ratings to progress through Level-S); ECF No. 174-38 (Pls.’ Ex. 38) at 189:21-191:6; ECF No. 174-24 (Pls.’ Ex. 24) (Mukuria Affidavit), ¶ 14. Prisoners may even be reduced in level for violations in these non-security categories. *See* ECF No. 174-26 (Pls.’ Ex. 26) (Snodgrass Affidavit) ¶ 15; ECF No. 174-35 (Pls.’ Ex. 35) (Amea Duncan Dep., *DePaola v. Clarke*, No. 7:16-cv-00485 (Oct. 3, 2018)), at 191:24–192:20 (discussing reduction of Mr. Depaola from IM-2 to IM-0 for a grooming violation that was dismissed). Once an individual is within the Step-Down Program, he is subjected to its policies, including whatever circuitous progression it may send him on. Thus, there is no “may apply” in terms of the Step-Down Program policies and practices. Opp at 28.

Defendants’ commonality arguments also misstate the law. There is no requirement that Plaintiffs share identical histories or experiences. Rather, what matters is that the source of the harm stems from the same cause. *Scott*, 61 F. Supp. 3d at 586 (holding that commonality is met where the claims of the class members “arise from similar practices and [are] based on the same legal theory”). Putative class members “may have interacted with different individuals or had different experiences” without defeating commonality. *Wells v. Preferred Fin. Sols.*, No. 5:11-CV-422, 2013 WL 6632322, at *6 (M.D. Ga. Dec. 17, 2013); *see also Cent. Wesleyan Coll. v. W.R. Grace & Co.*, 143 F.R.D. 628, 636 (D.S.C. 1992), *aff’d*, 6 F.3d 177 (4th Cir. 1993) (detailing that commonality “does not require that all, or even most issues be common”); *Mebane v. GKN Driveline N. Am., Inc.*, No. 1:18-CV-892, 2022 WL 3043655, at *5 (M.D.N.C. Aug. 2, 2022) (concluding that “although differences in frequency and duration of mealtime work exist, these individual differences appear to go primarily to damages and are overshadowed by common issues of liability”).

2. Plaintiffs’ Eighth Amendment Claim Raises Common Questions

Plaintiffs identified (at Mem. 30) nine non-exhaustive common questions of law or fact based on the elements of their Eighth Amendment claim. *See Thorpe v. Va. Dep’t of Corr.*, No. 2:20CV00007, 2021 WL 2435868, at *8 (W.D. Va. June 15, 2021) (discussing elements of claim); *Thorpe v. Clarke*, 37 F.4th 926, 933, 940-41 (4th Cir. 2022) (same).

Yet, Defendants’ Opposition (at 27–29) only addresses two of these questions. First, Defendants contend (at 27-28) that the question “whether VDOC’s use of solitary confinement deprives prisoners of basic human needs” is too general to be certified. However, this very question has been deemed sufficient to certify a class in other cases. *See, e.g., Davis*, 2021 WL 2414640, at *23 (finding that “whether the conditions that exist as a result of the IDOC’s formal

policies and systematic practices deprive class members of their basic human needs” satisfied commonality); *Ashker*, 2014 WL 2465191, at *5 (holding that the question “whether long-term confinement inside the Pelican Bay SHU exposes inmates to a ‘sufficiently serious’ deprivation of basic human needs” satisfied the common question standard). And it can be proved by common evidence here, including but not limited to the Step-Down Program Manual and policies themselves. *See infra* at Section I.B.1. Defendants’ citation (at 28) to *Ebert v. General Mills, Inc.*, does not change the analysis. In *Ebert* the Eighth Circuit upheld the District Court’s determination that “issues of General Mills’ standardized conduct of alleged contamination and the remedies sought by the class are common to all plaintiffs for purposes of Rule 23(a)(2).” 823 F.3d 472, 478 (8th Cir. 2016). The court noted that it did not “quibble with the broad brush stroke used to define the ‘questions’ at issue for the purposes of 23(a)(2).” *Id.* The questions that Plaintiffs pose here are in fact similar in scope to the questions that the district court certified and the Eighth Circuit upheld in *Ebert*.

Second, Defendants argue (at 28) that the question “whether and to what extent individuals subjected to the Step-Down Program are kept in the Program as a result of mental disabilities, including traumas associated with long-term solitary confinement” will require prisoner-specific evidence to prove. Defendants are incorrect as a matter of fact and of law. The question can be answered by common evidence and expert analysis that individuals in the Step-Down Program suffer from the types of psychological harms that are associated with long-term solitary confinement;⁵ and that symptoms of the types of mental disabilities that solitary

⁵ ECF No. 174-18 (Pls.’ Ex. 18) (Expert Report of Craig Haney), at 14-15 (describing the methodology he and experts employ to regularly analyze class-wide issues relating to the harms of solitary confinement); *see generally Tellis*, 2021 WL 4267513, at *9 (relying on Dr. Haney’s

confinement is known to cause could prevent individuals in the Step-Down Program from complying with the criteria used to judge progression through the program, like apathy, lethargy, and attention deficits, poor grooming, failure to maintain an orderly cell, failure to complete the Challenge Series, refusal to engage in programming, lack of impulse control, problematic attitude, and disrespect towards staff—the very symptoms solitary confinement generates. Mem. at 16.

And courts have deemed this same type of question to be adequate to support class certification. *See Davis*, 2021 WL 2414640 at *22 (holding that the questions regarding “extreme social deprivation” and “profound levels of physical and mental idleness and inactivity” associated with solitary confinement are common to the class and support certification); *Tellis*, 2021 WL 4267513, at *6 (in a challenge to the restrictive housing policy in a Louisiana prison, holding that questions of whether “[the prison’s] policies of social isolation, enforced idleness, indefinite exposure [to extended lockdown], and inadequate mental health care substantially increased class members’ risks of serious harm” and “whether Defendants were deliberately indifferent to those risks” satisfied commonality); *Parsons*, 289 F.R.D. at 519 (holding that the question “whether Defendants’ practices are deliberately indifferent to inmates’ health and safety in violation of the Eighth Amendment and subjection to unconstitutional conditions of confinement in isolation units” satisfied commonality).

Neither *Lightfoot v. District of Columbia*, 273 F.R.D. 314 (D.D.C. 2011), nor *Sabata v. Nebraska Dep’t of Correctional Services*, 337 F.R.D. 215 (D. Neb. 2020), should lead this court to find otherwise. *See Opp.* at 28. First, on both the facts and procedural posture, there are no

opinion in certifying a prisoner class action in which he employs a similar methodology as described in his expert report here); *Briggs v. Dunn*, 317 F.R.D. 634 (M.D. Ala. 2016) (same).

similarities between *Lightfoot* and this case. *Lightfoot* addressed a motion to decertify a class alleging a Section 1983 claim on the eve of summary judgment. 273 F.R.D. at 318–19. The court ultimately decertified the class because even given the voluminous record in the case, plaintiffs failed to show that their common injury resulted from the same “policy or custom” as required by Section 1983 and instead identified a “wide ranging and poorly defined set of practice and policies” that resulted in “some deprivation of due process.” *Id.* at 329. And in *Sabata*, plaintiffs brought a challenge to *all* of the healthcare—including medical, dental, and mental health—provided in the Nebraska Department of Corrections. *Id.* at 224. Faced with such a broad statement and no evidence from the fact witnesses or the experts linking the individual experiences of the plaintiffs with a systemic or common deficiency in any particular healthcare program or policy, the *Sabata* court declined to certify the class because “[p]laintiffs have not shown a single policy or question whose resolution would apply across the class.” 337 F.R.D. at 261-664. In contrast to both of those cases, Plaintiffs here are at an earlier stage of the litigation than the plaintiffs in *Lightfoot* and unlike the plaintiffs in both cases, have identified a singular program—the Step-Down Program—that affects all class members and sets out rules and policies that apply to all participants in it.

Other common questions that Defendants do not directly challenge have been deemed sufficient to certify classes as well, satisfying Defendants’ obligation to identify at least a “single common question of law or fact.” *See Scott*, 61 F. Supp. 3d at 585 (“‘Even a single [common] question’ of law or fact will suffice to satisfy the requirements of Rule 23(a)(2).”) (quoting *Wal-Mart*, 564 U.S. at 369); *see, e.g., id.* (holding that the questions “whether the systematic deficiencies in care at [the prison] have placed its residents at unreasonable risk of suffering new or worsening physical injury, emotional distress, and the prospect of premature death” and

“whether the VDOC’s policies, procedures and practices reflect deliberate indifference to the serious medical needs of residence of [the prison] . . . have violated their right to be free from cruel and unusual punishment” satisfies commonality); *Ind. Prot. & Advocacy Servs. Comm’n*, 2012 WL 1737821, at *1 (holding that questions regarding “the effects that isolation or segregation status have on mental disorders” are sufficient to show commonality); *Jensen v. Shinn*, No. CV-12-00601-PHX-ROS, 2022 WL 2911496, at *2 (D. Ariz. June 30, 2022), *amended*, No. CV-12-00601-PHX-ROS, 2022 WL 2910835 (D. Ariz. July 18, 2022) (holding that commonality for an Eighth Amendment claim was met where harm was inflicted without penological justification); *A.T. v. Harder*, 298 F. Supp. 3d 391, 408 (N.D.N.Y. 2018) (finding that questions regarding “the education, special services, and other related procedural protections to which [class members] are entitled” were common to class members subjected to solitary confinement).

These questions can also be answered with common evidence, including examples set forth in Section I.B.1 above. For instance, the Fourth Circuit concluded—based on Plaintiffs’ extensively supported Complaint (including 1251 pages of exhibits)—it was plausible that Defendants were aware of the harm caused by the Step-Down Program’s conditions of confinement based on factors such as (1) observance of the symptoms Plaintiffs were suffering (*see* Opp. at 4–7), citing some of the physical and mental harms Plaintiffs suffered as a result of being in the Step-Down Program; (2) independent expert studies that documented the severe damage caused by prolonged solitary confinement; and (3) a long line of judicial precedent recognizing the “deleterious effects of complete sensory deprivation.” *See Thorpe*, 37 F. 4th at 933–37. Indeed, Dr. Craig Haney, detailed and analyzed numerous studies finding that solitary confinement has a negative impact on prisoners’ mental health. *See* ECF No. 174-18 (Pls.’ Ex.

18) (Expert Report of Craig Haney), at 44-46. He also set forth a clear methodology by which he can compare VDOC's policies and practices to the extensive literature and, thereby, determine if the conditions of confinement in the Step-Down Program create the risks of significant harm prohibited by the Eighth Amendment. *Id.* at 14–15.

Defendants' expert, Dr. Morgan, offers nothing to change these conclusions. First, Dr. Morgan evaluates the wrong issue, contending that there may be some prisoners who are super resilient and may in some unspecified circumstances not suffer certain (but not all) harms from solitary confinement. *See generally* ECF No. 195-38 (Defs.' Ex. 38) (Expert Report of Robert Morgan). But this improperly shifts the inquiry to whether, *once subjected to the substantial risk of serious harm*, that harm may manifest itself in different ways as various symptoms within individuals. *See, e.g., id.* at 11–12. The relevant question here, however, is whether the Step-Down Program places these inmates at *substantial risk of serious harm*. *Scott*, 61 F. Supp. 3d at 587 (emphasis added) (“Whether these policies and practices place the Plaintiffs and other current and future [] prisoners at a *substantial risk of serious harm* to which the Defendants are deliberately indifferent implicates questions of fact and law common to the entire putative class.”); *Braggs v. Dunn*, 317 F.R.D. 634, 656 (M.D. Ala. 2016) (summarizing cases and finding commonality “because being subjected to a substantial risk of serious harm is an actionable constitutional injury, even when a prisoner’s physical or mental condition has not yet been detrimentally impacted”); *Farmer v. Brennan*, 511 U.S. 825, 828 (1994) (“A prison official’s ‘deliberate indifference’ to a substantial risk of serious harm to an inmate violates the Eighth Amendment.”). Dr. Haney showed that it does with his detailed analysis of numerous studies. *See* ECF No. 174-18 (Pls.’ Ex. 18), at 19–80. *See also Thorpe*, 37 F.4th at 936 (internal quotations and citations omitted) (summarizing cases) (explaining that the United States

Supreme Court and the Fourth Circuit have reiterated over a one-hundred year period the “severe risks of contemporary solitary-confinement regimes”).

Defendants, and Dr. Morgan’s report, miss this point entirely.⁶ In the Rebuttal Expert Report of Craig Haney, Ph.D, J.D., attached as Exhibit 2, (Haney Rebuttal Report), Dr. Haney explains that “the fact that individuals can experience that harm [of solitary confinement] differently does not change the fact that an individual’s placement within the system of solitary confinement is what puts the individual at significant risk of harm *Id.* at 8. “Because harms are not experienced in identical or universal ways,” he also states, “does not mean that the stressor or toxin does not create a significant risk of serious harm for everyone exposed to it, or that the stressor or toxin—whether cigarette smoking or solitary confinement—is not inherently harmful. Both clearly are.” *Id.* at 7; *see also id.* at 6–8. Defendants and Dr. Morgan’s report fail to address Dr. Haney’s opinion that all individuals placed into solitary confinement are at significant risk of harm and, furthermore, Dr. Morgan’s own data supports Dr. Haney’s opinion about the harmfulness of solitary confinement. *See id.* at 8, 11–13. Moreover, Defendants and Dr. Morgan mischaracterize Dr. Haney’s deposition testimony and expert report in an attempt to muddy this distinction. *Id.* at 7–8. Defendants fail to provide the Court with Dr. Haney’s testimony emphasizing that while specific experiences may vary— a consideration they wrongly accuse Dr. Haney of ignoring—they do not undermine the well-supported risk. *See id.* at 6–8;

⁶ This is not the first time that Dr. Haney has been called upon to respond to Dr. Morgan’s criticism of his conclusions and methodology. In fact, the courts in two previous prisoner class action cases contesting the constitutionality of solitary confinement have found Dr. Haney convincing and Dr. Morgan unpersuasive. *See Ashker*, 2014 WL 2465191, at *5; *Braggs*, 317 F.R.D. at 660. In *Ashker*, the court cites Dr. Haney for the proposition that commonality is met because “the mental health risks associated with long-term confinement [] are common to all putative class members.” 2014 WL 2465191, at *5. In *Braggs*, the court conclusively sided with Haney on the issue of commonality over Dr. Morgan. *Braggs*, 317 F.R.D. at 660.

see also Ex. 1, at 82:6-8; 83:14-15 (emphasizing that “variations [in specific conditions of confinement] can make the experience somewhat different, but they don’t undermine the risk of harm” and “the risk of harm is present for everybody”).

Second, Dr. Morgan incorrectly concludes that Dr. Haney has not taken into account “contextual” considerations and relevant studies—namely, Dr. Morgan’s own 2016 meta-analysis study (the “2016 Morgan Study”)—as part of Dr. Haney’s literature review. ECF No. 195-38 (Defs.’ Ex. 38) at 12. Dr. Haney did both. His Report provides a substantial literature review of relevant publications and authorities. He also discusses, distinguishes, and provides a substantive critique of the 2016 Morgan Study in his 2020 Northwestern Law Review article (which he attached as Appendix D to ECF No. 174-18 (Pls.’ Ex. 18) (Expert Report of Craig Haney)), and an earlier 2018 article (which he now attaches as Appendix A to the Haney Rebuttal Report). *See* ECF No. 174-18 (Pls.’ Ex. 18), App. D; Ex. 2 App. A; *id.* ¶¶ 3, 8-10. By contrast, Dr. Morgan’s report fails to address *any* of the important context or facts in this case. *See* Ex. 2 (Haney Rebuttal Report), at 3–4; ECF No. 174-18 (Pls.’ Ex. 18) at 93–100.

Third, Dr. Morgan’s unreliable opinions are inadmissible under Rule 702 of the Federal Rules of Evidence and *Daubert*. The methodology of the 2016 Morgan Study, which is the basis for Dr. Morgan’s Report, is fatally flawed. *See* Ex. 2 at 9–11, App. A. Dr. Haney has published a 10-page, detailed critique of the 2016 Morgan Study’s methodology in the past, explaining among other things that it excludes the vast majority of relevant literature, incorrectly reports and weights the number of participants in studies, reports effect sizes that did not exist, and relies on outdated, fundamentally flawed studies and data. *See id.* App. A, at 398-407; 9–11; *see also* ECF No. 174-18 (Pls.’ Ex. 18), at 24–25 n. 14. The four other publications that Dr. Morgan cites in his report are either inapplicable to the case at hand or have fatal methodological problems.

See Ex. 2 at 8–9. Moreover, Dr. Morgan mischaracterizes the conclusions from his own 2016 Morgan Study. His Report argues that “some inmates actually improve while placed in restrictive housing,” ECF No. 195-38 (Defs.’ Ex. 38), at 12, but his 2016 Morgan Study actually shows the contrary, that is, “the overwhelming majority of actual effects of solitary confinement are negative” Ex. 2 at 11; *see also id.* at 11–13. As Dr. Haney notes, Dr. Morgan fundamentally misinterprets his own data and figures, which “show[] clear elevations on many key and concerning dimensions of harm,” as well as failing to take into account that prisoners who may experience little to no effect on *one* dimension of harm can “nonetheless experience high negative elevations on some or many others.” *Id.* at 12; *see also id.* at 11–13. In sum, “each individual’s experience in solitary confinement is nowhere depicted” in the 2016 Morgan Study, nor in Dr. Morgan’s Report. *Id.* at 12–13. There is nothing relevant or reliable in Dr. Morgan’s Report and it should be excluded.

3. Plaintiffs’ Fourteenth Amendment Claim Raises Common Questions

Using the elements of the claim’s two-part inquiry (*see Thorpe*, 37 F.4th at 941–42, 944–45) as a guidepost, Plaintiffs identified (Mem. at 30–31) ten non-exhaustive common questions of law or fact relevant to their Fourteenth Amendment Due Process claims.

Once again, Defendants only specifically address three of these questions, contending generally that the rest are too high-level to be “common.” Opp. at 29–31.

First, Defendants concede (at 29–30) that VDOC’s Step-Down Program creates a liberty interest in avoiding long-term segregation, but argue that because of their concession, “[w]hether VDOC’s Step-Down program creates a liberty interest in avoiding long-term solitary confinement under the Step-Down Program” cannot serve as a common question for purposes of satisfying Rule 23(a). *Id.* This question is sufficiently common for class certification. *See*

Davis, 2021 WL 2414640, at *23 (recognizing common questions as to “whether segregation in the IDOC gives rise to a protected liberty interest”). The fact that Defendants now concede this point does not turn a clear common question into one that it not capable of class-wide resolution; Defendants have merely conceded that it has already been resolved. In any event, Plaintiffs have presented numerous other common questions as to the Due Process claim, and only one is required to satisfy Rule 23(a). *See Scott*, 61 F. Supp. 3d at 585 (quoting *Wal-Mart*, 564 U.S. at 369).

Second, VDOC contends that “whether the conditions of confinement impose an atypical and significant hardship” is not capable of classwide resolution because conditions of confinement vary for individuals at various stages of the Program. *Opp.* at 30. This is incorrect, as set forth in Section I.B.1 above. Common evidence includes, for example (1) statistics regarding average lengths of stay (like those provided by Peter Graham) in support of the indefinite nature of the time individuals spend in the Step-Down Program; (2) the cell conditions and out-of-cell restrictions imposed on individuals in the Step-Down Program; and (3) the policy regarding good time credits. In fact, the Fourth Circuit recognized that factual issues as to indefinite solitary confinement and good-time credits were appropriate considerations under the “atypical and significant hardship” analysis. *See Thorpe*, 37 F.4th at 942.

Third, Defendants contend (at 29) that the question “[w]hether the Step-Down Program affords constitutionally adequate review to protect Plaintiffs’ interest in avoiding long-term solitary confinement” is not a common question with a common answer because whether each prisoner received adequate due process requires an individualized inquiry, and because individuals have progressed out of the Step-Down Program to general population, so they must have had a constitutionally adequate review. Once again, courts have found that this is the type

of common question that is appropriate for class certification. *See Ashker*, 2014 WL 2465191, at *3 (holding that common questions exist where plaintiffs alleged class members were not “afforded . . . procedurally adequate review”); *Davis*, 2021 WL 2414640, at *24 (finding that “common questions exist . . . , including whether IDOC’s disciplinary hearing policies and procedures fail to afford inmates adequate process to address the allegations against them”); *see also id.* at *25. And Plaintiffs challenge a common, uniform set of criteria and review processes that apply to each person in the Step-Down Program. If it is unconstitutional as to one, it is unconstitutional as to all. *See supra* at Section I.B.1. That some have survived the constitutionally infirm Step-Down Program and progressed out of the Step-Down Program and into general population (Opp. at 18–19) hardly illustrates alone that individuals are afforded adequate process while in the Step-Down Program.

The questions Defendants do not challenge are equally common ones. For instance, “[w]hether and to what extent individuals subjected to the Step-Down Program are provided meaningful review of their assignments to or within Level-S or Level-6” is similar to questions courts have found to be common. *See, e.g., Davis*, 2021 WL 2414640, at *24 (holding that adequate common questions exist where “Plaintiffs allege that as a matter of systemic practice, the Adjustment Committee hearings used to impose a term of disciplinary segregation are perfunctory”). It is also capable of classwide evidence, including but not limited to the Step-Down Program Manual itself. *See supra* at Section I.B.1.

4. Whether Facial Or As-Applied, Plaintiffs’ Challenges To The Step-Down Program Are Appropriate For Class Certification

Defendants incorrectly contend (at 25-27) that Plaintiffs must specify at this time whether they are bringing a facial or an as-applied challenge to the Step-Down Program, and which common issues relate to facial versus as-applied arguments. The Fourth Circuit in this case

confirmed—based on the Complaint (which was supported with evidence)—that both the facial and as-applied challenges to the Step-Down Program should proceed. *See Thorpe*, 37 F.4th at 947 (dismissing Defendants’ argument that “Plaintiffs fail to plausibly allege either a facial or an as-applied due process challenge”).

In line with what this Court held in *Scott*, district courts regularly grant class certification in prison litigation class actions where plaintiffs plausibly allege that system-wide policies and practices, which apply to all of them deprive them of constitutional and statutory rights. *See e.g., Scott*, 61 F. Supp. 3d at 587–88, 588 n.11 (collecting cases where district courts granted class certification in prison litigations alleging a pattern and practice of unconstitutional conduct); *Holmes v. Godinez*, 311 F.R.D. 177, 219–20 (N.D. Ill. 2015) (certifying class of hearing-impaired inmates challenging discriminatory prison policies where plaintiffs “met their burden to show ‘significant proof’ of the system-wide policies and practices alleged” to have deprived plaintiffs of their rights under the ADA and the U.S. Constitution); *Parsons*, 289 F.R.D. at 524, 526 (certifying a class where the plaintiffs sought injunctive relief for systemically deficient medical care that violated their constitutional rights). Here, Plaintiffs have plausibly alleged and shown that the Step-Down Program is a system-wide policy that affects all of the class members and systematically deprives them of their constitutional and statutory rights, whether framed as a facial or as-applied challenge. *See Opp.* at 3 (referring to Step-Down as a “consistent, systematic approach”).

C. Plaintiffs Have Established Typicality and Adequacy

Plaintiffs’ claims are typical because proof of their claims regarding the Step-Down Program “would also prove the claims of absent class members.” *Scott*, 61 F. Supp. 3d at 589. Plaintiffs have shown this to be the case through evidence, not simply “identical allegations,” as

Defendants' contend. That evidence includes abundant material regarding the Step-Down Program and its failings, two expert reports, and affidavits from each Plaintiff illustrating systemic policies and practices at Red Onion (and formerly Wallens Ridge). Further, Plaintiffs are more than adequate representatives. They seek the same relief as, and do not have any interests in conflict, with the classes they seek to represent. Mem. at 33–34.

Defendants contend that typicality and adequacy are not satisfied because the claims of Plaintiff (Mr. Snodgrass) are barred by res judicata and collateral estoppel.⁷ But this says nothing about the typicality and adequacy of the other ten Plaintiffs.⁸ For this reason, *Shiring v. Tier Technologies, Inc.*, 244 F.R.D. 307 (E.D. Va. 2007), does not help Defendants, because that case involved a proposed fraud-on-the-market securities litigation class with a *single* putative class representative subject to the unique defense that he did not rely on publicly available market information in making his stock purchase.⁹ *Id.* at 313–14.

In any event, courts within this Circuit reject challenges, whether to adequacy and typicality or to predominance, on the basis of unique affirmative defenses when they are limited and individualized. *See Brooks v. GAF Materials Corp.*, 301 F.R.D. 229, 232 (D.S.C. 2014) (refusing to decertify the class because “[i]t is a more efficient use of court and litigant resources to allow class treatment of these common issues despite the need for limited individualized

⁷ Defendants' separate contention (at 40–44) that affirmative defenses sway the predominance analysis under Rule 23(b)(3) also fails. *See infra* Sections at II.B.3, II.B.4.

⁸ In a footnote, Defendants cite without explanation a case brought by Mr. Riddick, but it was dismissed without prejudice, and thus has no effect. *Riddick v. Dep't of Corr.*, No. 7:17CV00268, 2017 WL 6599007, at *1 (W.D. Va. Dec. 26, 2017).

⁹ Defendants' citation (at 31) to *Lienhart* is in error. The quoted language from *Shiring* is not in *Lienhart*, which in fact was decided prior to *Shiring*.

inquiries regarding affirmative defenses.”); *Krakauer v. Dish Network L.L.C.*, 311 F.R.D. 384, 397 (M.D.N.C. 2015) (concluding class certification appropriate when defendants could raise an unique affirmative defense to only a limited number of class members); *Fisher v. Va. Elec. & Power Co.*, 217 F.R.D. 201, 217 (E.D. Va. 2003) (holding that “the law in this circuit is that differences in the availability of certain defenses do not defeat class certification where, as here, all the class claims are based on the same legal and remedial theory”); *Hoffman v. First Student, Inc.*, No. CV AMD 06-1882, 2008 WL 11349801, at *4 (D. Md. Dec. 9, 2008) (“Admittedly, there may be affirmative defenses specific to particular plaintiffs. But this will almost always be true, and affirmative defenses do not destroy either commonality or typicality.”); *see also Chisolm v. TranSouth Fin. Corp.*, 194 F.R.D. 538, 552 (E.D. Va. 2000) (certifying the class and noting that individual-specific affirmative defenses, such as a statute of limitations defense, are “a factor for consideration”). The common issues similarly still predominate here. Defendants offer no comparison of the present claims to the ones adjudicated in Mr. Snodgrass’ prior cases to show what is supposedly precluded, and addressing any such issues hardly would distract the parties or the Court to the extent that he should not be appointed a class representative.¹⁰ As

¹⁰ In any event, the preclusive effect Defendants’ claim is lacking because there is legally insufficient overlap. As to res judicata, many of the claims were limited to instances of specific violations rather than the systemic constitutional problems raised here. *See e.g. Snodgrass v. Gilbert*, No. 7:16CV00091, 2017 WL 1049582, at *1, 9 (W.D. Va. Mar. 17, 2017), *vacated in part*, No. 7:16CV00091, 2018 WL 1972721 (W.D. Va. Apr. 26, 2018) (excessive force claim predicated on single “use of force” incident involving pepper spray), and a number more were resolved on issues that did not go to the merits). As to collateral estoppel, Defendants do not explain what would be estopped, but many of the findings were not necessary to the disposition of the cases. *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 326 (4th Cir. 2004) (explaining that *collateral estoppel* only applies when the identical issues are “actually determined and necessarily decided” where the party against whom *collateral estoppel* is asserted “had a full and fair opportunity to litigate”).

such, Defendants’ challenges to typicality and adequacy based on conclusory assertions of res judicata and collateral estoppel should fail.

Defendants’ separate point about the statute of limitations is equally unsupported. Defendants do not identify which Plaintiff is subject to a statute of limitations defense, but argue generally that Plaintiffs are subject to such a defense. Defendants are wrong because they do not account for this Court’s ruling that that continuing violation doctrine applies here. *Thorpe*, 2021 WL 2435868, at *9.¹¹ Defendants fail to show (nor could they show) how the statute of limitations makes any of the Plaintiffs’ claims any less typical or creates a conflict that renders him an inadequate class representative. To be sure, as explained in Section II.B.3, there may be a limited need to address the statute of limitations, but it creates no Rule 23(a) concerns.

Lastly, Defendants do not challenge—and Plaintiffs have submitted ample evidence of—the adequacy of class counsel, whether considered as part of the Rule 23(a) or Rule 23(g) analysis. *See, e.g.*, Opp. at 45.

II. PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS OF RULE 23(B)(2) AND 23(B)(3) FOR THE CONSTITUTIONAL VIOLATION CLASSES

A. The Proposed Injunction Satisfies Rule 23(b)(2)

Defendants’ contention (at 33–34) that Plaintiffs’ proposed injunctive relief is too general and would invite the Court to make individual remedial determinations misses the mark. As required, Plaintiffs have shown that (1) Defendants’ conduct applies generally to the class, and

¹¹ Defendants concede that the Court already has ruled that the continuing violation doctrine applies here: “the continuing violations doctrine applies to Plaintiffs’ claims because monthly internal reviews that apply criteria for pathway advancement constitute alleged unlawful acts, not alleged unlawful effects of an original violation.” Opp. at 41, 41 n.5 (stating that “although the Court reached its . . . conclusions in the context of Plaintiffs ADA and RA claims, Defendants understand them to apply to the § 1983 claims as well”).

(2) the proposed declaratory and injunctive relief “is appropriate respecting the class as whole.” Fed. R. Civ. P. 23(b)(2). Plaintiffs need not provide “every jot and tittle of injunctive relief . . . at the class certification stage.” *Yates v. Collier*, 868 F.3d 354, 368 (5th Cir. 2017); *Gray v. Cnty. of Riverside*, No. EDCV 13-00444-VAP, 2014 WL 5304915, at *37 (C.D. Cal. Sept. 2, 2014) (quoting *Ashker*, 2014 WL 2465191, at *7) (“Numerous courts have expressly held that plaintiffs are not required to satisfy Rule 65(d) in order to obtain class certification.”) (internal quotation and citation omitted).

Here, Defendants have engaged in common behavior that applies generally to the proposed Constitutional Violation Injunction Class. All class members are subject to the same policies and procedures—the Step-Down Program—that govern the “Level-S” and “Level-6” security levels at Red Onion and Wallens Ridge. ECF No. 195-4 (Defs.’ Ex. 4), at 3–4. All class members must participate in the earliest levels of the Step-Down Program for a minimum amount of time to progress within the Program. ECF No. 174-3 (Pls.’ Ex. 3), at 50, 55. If an individual chooses not to participate in the Program, he is assigned to either of the most restrictive levels (IM-0 or SM-0) to serve out his sentence. Mem. at 10. All class members are thus harmed in essentially the same way—*i.e.*, by exposure to a substantial risk of serious harm from prolonged time spent in solitary confinement, and to an atypical and significant hardship compared to the ordinary incidents of prison life without minimally adequate process. Defendants’ actions—subjecting all class members to the unlawful Step-Down Program—are the source of all injuries suffered by the Constitutional Violation Injunction Class. An injunction that enjoined Defendants from continuing to use the Step-Down Program in its present form would thus provide relief to all class members.

Moreover, Plaintiffs have provided far more than generalizations for the proposed indivisible (not individualized) injunctive and declarative relief. *See Parsons*, 754 F.3d at 687 (affirming district court’s finding that a proposed injunction that addressed the challenged healthcare policies and procedures and would raise “the level of [medical] care and resources . . . for all inmates” satisfied Rule 23(b)(2)). Specifically, Plaintiffs seek an injunction abolishing the Step-Down Program; ending long-term solitary confinement at Red Onion and Wallens Ridge; and appointing a special master to inspect long-term solitary confinement conditions at Red Onion and Wallens Ridge and determine how to bring the prisons into compliance with court orders. Plaintiffs’ request is substantiated by the expert reports of Craig Haney and Dan Pacholke, which identify the systemic unconstitutional policy and practice that affects class members across both Level-S and Level-6 security. Such an injunction would provide declaratory relief to each class member in Level-S and Level-6 Security, as they are all subjected to prolonged isolation in solitary confinement, per the terms of the Step-Down Program, with no guarantee of progression back to general population (and in the case of the IM pathway, no direct opportunity for such progression). No individual determinations would be required; a single classwide injunction would suffice. At this stage of the litigation, a more specific proposed injunction is not required. *Gray*, 2014 WL 5304915, at *37 (internal quotation and citation omitted) (finding “general contours of an injunction that would provide relief to the whole class . . . and that can be given greater substance and specificity at an appropriate stage in the litigation through fact-finding, negotiations, and expert testimony” sufficient under Rule 23(b)(2)).

Certification under Rule 23(b)(2) “does not require common issues, but rather requires common behavior by the defendant towards the class . . . such that class members [] have been harmed in essentially the same way. *Yates*, 868 F.3d at 367 (internal quotations and citation

omitted). All that is required at the class certification stage is a demonstration that the plaintiffs face common behavior by the defendant that could be remedied via injunctive relief. *See, e.g., Brown v. Lexington Cnty., S.C.*, No. CV 3:17-1426-MBS, 2021 WL 856878, at *10 (D.S.C. Mar. 5, 2021) (finding that description of defendant’s conduct that systemically violated plaintiffs’ civil rights and request for an injunction requiring defendants to remedy those violations was sufficient to meet the Rule 23(b)(2) certification requirement). For example, where plaintiffs demonstrate that defendants “have provided deficient medical care, or failed to provide medical care under circumstances in which it is plainly warranted and needed, on a systemic basis” class certification is appropriate under Rule 23(b)(2). *Scott*, 61 F. Supp. 3d at 590–91. In *Scott*, notwithstanding the fact that each class member had differing medical needs, each class member was substantially harmed by the prison’s failure to provide medical care and would benefit from declaratory and injunctive relief addressing the systemically deficient medical care. *Id.* at 585–87, 591–92. The court thus certified the class under 23(b)(2). *Id.* at 591–92.

Plaintiffs’ case is nothing like *Shook v. Board Of County Commissioners of County of El Paso* (Opp. at 33–34), where the Tenth Circuit affirmed the district court’s refusal to certify a class comprising of all current and future mentally ill prisoners at the El Paso County Jail because the injunction they requested did not comply with Rule 23(b)(2). 543 F.3d 597, 605 (10th Cir. 2008). The plaintiffs in *Shook* (1) proposed a very broad class, (2) contested a variety of policies and practices within the jail that did not affect all class members, and (3) requested relief that would require the court to distinguish “between how prison officials may treat class members, rather than prescribing a standard of conduct applicable to all class members.” *Id.* In contrast, Plaintiffs’ proposed class is narrower and focuses on enjoining Defendants from

continuing to use a set of systemic policies and practices—the Step-Down Program—that all class members must participate in to progress out of long-term solitary confinement.

Defendants’ reliance (at 35) on *Harvard v. Dixon* is similarly misplaced. In that outlier case, plaintiffs did not zero in on the specific policies and practices that allegedly created the substantial risk of harm. Instead Plaintiffs challenged many different practices in a large number of prisons across the entire Florida Department of Corrections system, slip op. at 4, as opposed to the singular policy, at only two prisons, challenged in this case. *Harvard v. Dixon*, No. 4:19-cv-212 (N.D. Fla. July 25, 2022). On top of that generality, plaintiffs stated broadly that they sought to “change the unconstitutional conditions in FDC restrictive housing” without further specifics and contended that it was defendant’s responsibility to “decide how to effect these changes.” *Id.* at 4–6. The court thus denied their motion for class certification. *Id.* at 6. Here, as explained above, Plaintiffs have identified the specific set of systematic policies and practices that are unconstitutional, shown that they apply to all members of the class, and requested sufficiently specific injunctive relief without leaving it up to Defendants to determine how to create a constitutionally compliant program. Plaintiffs have therefore demonstrated that injunctive relief is appropriate and the Court should certify the class under Rule 23(b)(2).

B. The Constitutional Violation Damages Class Is Certifiable Under Rule 23(b)(3)

1. Variations In The Length And Conditions Of Each Prisoner’s Conditions Of Confinement Do Not Preclude Certification Under Rule 23(B)(3)

Common questions of law and fact predominate over individual questions for the Constitutional Violation Damages Class because no unique claims exist—all class members challenge the same policies and raise the same legal claims relying on the same evidence.

Defendants’ assertion that “there are no material common questions” (Opp. at 35) falls flat in the face of the law and factual evidence. The only individualized factual issue is the specific amount of each class member’s injury, but the need for “individualized proof of damages will not defeat class certification.” *Case v. French Quarter III, LLC*, No. 2:12-cv-2518, 2015 WL 12851717, at *6 (D.S.C. July 27, 2015) (“In mass tort cases, common issues of law and fact have been held to predominate where the same evidence would resolve the question of liability for all class members.”) internal quotation and citation omitted); *Gunnells v. Healthplan Servs.*, 348 F.3d 417, 429 (4th Cir. 2003) (“Courts have routinely rejected this argument, concluding, as we have in previous cases, that the need for individualized proof of damages alone will *not* defeat class certification.”) (emphasis in original). Moreover, “by carving out subclasses, plaintiffs have further enhanced the comparative predominance of those common questions over individualized issues.” *Cancel v. City of Chicago*, 254 F.R.D. 501, 511 (N.D. Ill. 2008) (internal citation and quotation omitted).

Courts have repeatedly certified Rule 23(b)(3) classes to recover damages in conditions of confinement cases. In *Flood v. Dominguez*, for example, the plaintiffs challenged the conditions of confinement and alleged lack of bedding, cold temperatures, lack of hygiene, lack of exercise, and small meal portions. No. 2:08 CV 153, 2011 WL 238265, at *2 (N.D. Ind. Jan. 21, 2011). The court held those are not separate claims, but the common conditions under a uniform set of policies or practices by the jail. *Id.*; see *Rhodes v. Chapman*, 452 U.S. 337, 362–63 (1981) (“[A] challenge to conditions of confinement must examine the totality of the circumstances.”). The *Flood* court commented on the long history of such certifications:

Contrary to the Jail’s claim, courts routinely certify classes of plaintiffs seeking money damages for unconstitutional conditions of confinement in jails and prisons. See, e.g., *Parish v. Sheriff of Cook County*, 2008 WL 4812875 (N.D. Ill. Oct.24, 2008); *Vodak*

v. City of Chicago, 2006 WL 1037151 (N.D. Ill. Apr.17, 2006); *Dunn v. City of Chicago*, 231 F.R.D. 367 (N.D. Ill.2005); *Rahim v. Sheahan*, 2001 WL 1263493 (N.D. Ill. Oct. 19, 2001). This is especially true when the plaintiffs are challenging conditions of confinement that are the result of policies or practices uniformly applied to the entire class. See *Blihovde v. St. Croix County, Wis.*, 219 F.R.D. 607, 620 (W.D. Wis. 2003) (“[T]he case law suggests that when the class is challenging a uniform policy, the validity of that policy predominates over individual issues and class certification is appropriate.”); *Young v. County of Cook*, 2007 WL 1238920, at *7 (N.D. Ill. Apr. 25, 2007) (same); *Calvin v. Sheriff of Will County*, 2004 WL 1125922, at *4 (N.D. Ill. May 17, 2004) (same).

22011 WL 238265, at *3.

Ultimately, cases alleging a long-standing pattern of wrongful conduct are particularly well suited to Rule 23(b)(3) certification. *Powers v. Hamilton Cnty. Pub. Def. Comm’n*, 501 F.3d 592, 619 (6th Cir. 2007) (“Cases alleging a single course of wrongful conduct are particularly well-suited to class certification.”). In *Powers*, the Public Defender “had a well-settled custom or policy of not asking for an indigency hearing before a probationer is incarcerated for failure to pay a fine,” *id.* at 598, leading the Sixth Circuit to conclude that the Rule 23(b)(3) requirements were met because the plaintiff “alleged that the Public Defender engaged in an ongoing and regular practice . . . that violated clas members’ due process rights,” *id.* at 619. The crucial question, like here, was whether the defendant had a clear and persistent pattern of violating constitutional rights, and the focus was not on the individual violation but the systemic policies and programs that perpetuated the violations, thus establishing commonality. *Id.* at 619. Here, Plaintiffs’ common claims focus on the Step-Down Program as a singular management system that creates the conditions of confinement that violate the Eighth and Fourteenth Amendments.

Defendants concede (at 36) that the Step-Down Program is a singular “management system” to which each inmate is subject. Defendants nonetheless emphasize minor variances, noting for example that the “SAM Pod is different from SIP Pod, is different from the Step-Down Pod.” *Id.* at 37. From such variances, Defendants contend that “there is no unifying similar situation between all proposed class members.” *Id.* at 36. But “[t]he entire notion of predominance implies that the plaintiffs’ claims need not be identical.” *Krakauer*, 925 F.3d at 658 (4th Cir. 2019). The supposed “variances” here are inconsequential.

First, every single prisoner in the SAM Pod, SIP Pod, or the Step-Down Pod is still subject to the Step-Down Program and the uniform set of policies and practices that govern it, as these three different “pods” are merely different forms of the Security Level-6 at Red Onion. *See* ECF No. 174-3 (Pls.’ Ex. 3), at 17.

Second, every single prisoner currently at Level-6 (or who has departed Level-6) had to progress through Level-S in order to get to that point. *See* ECF No. 174-3 (Pls.’ Ex. 3), at 17; *see also* ECF No. 174-36 (Pls.’ Ex. 36) (Randall Mathena Dep., *Reyes v. Clarke*, No. 3:18-CV-611 (Sep. 22, 2020)), at 333:8–334:1 (explaining policy required prisoners to complete the Step-Down Program’s requirements in order to be eligible for the SAM Pod). Every prisoner in these Level-6 pods was therefore subject to lengthy minimum stays in Level-S. *See* ECF No. 174-3 (Pls.’ Ex. 3), at 50 (eighteen-month minimum for prisoners on IM pathway); *id.* at 55 (nine-month minimum for prisoners on SM pathway).

Third, prisoners in the later-stage Step-Down Program SIP or SAM pods have already “been housed for a period of months or years under severe solitary confinement” and have already been “highly isolated.” Ex. 2 at 90:9-19. Any minor housing differences within the Step-Down Program are therefore not independently correlated to the risk of harm of that

particular housing, as the Program must be analyzed *collectively* and *cumulatively* to understand the risk of harm SL-6 “conditions do or do not continue to pose[.]” *Id.* (emphases added). Further, “simply providing people with an opportunity to [access improved conditions in SL-6] doesn’t mean that by the time they’re given that opportunity they any longer have the capacity to even” exercise those improved conditions if they have already been severely harmed by prolonged exposure to more severe confinement. *Id.* at 91:8-12.

Fourth, Defendants’ own documents show that the differences between conditions at Level-S and Level-6 are not so great as to render them fundamentally dissimilar. Prisoners at Level-6 are still in restraints, and their recreation in featureless “dog cages” is still subject to suspension at the discretion of prison staff. *See* ECF No. 174-3 (Pls.’ Ex. 3), at 39; Mem. at 6–7. Even after reaching Level-6, prisoners are subject to the same evaluations for “personal hygiene,” “attitude,” “language,” “patience,” and programming participation, and may be returned to Level-S based on these metrics at the discretion of RO SP Staff. *See* ECF No. 174-3 (Pls.’ Ex. 3), at 55–56.

Defendants’ cases are not to the contrary. *Bass v. Perrin*, 170 F.3d 1312 (11th Cir. 1999) did not involve a class action and considered the merits of two inmates’ Eighth Amendment challenge to suspension of outdoor recreation time. Here, Plaintiffs challenge conditions of confinement that apply to all prisoners, the absence of penological justification for those conditions, and the system of decision-making used to evaluate all prisoners, not some particular denial of a certain benefit on a certain day.

Defendants’ over-reading (Opp. at 39) of *Wal-Mart* has been rejected in prison class certification decisions. *See supra* at Section I.B. For instance, the Fourth Circuit clarified, “*Wal-Mart* did not set out a per se rule against class certification where subjective decision-making or

discretion is alleged.” *Scott v. Family Dollar Stores, Inc.*, 733 F.3d 105, 113 (4th Cir. 2013). Indeed, even the Supreme Court contrasted *Wal-Mart*—which found an absence of commonality because 120 affidavits submitted by *Wal-Mart* employees in different jobs at different levels of the organization describing sex discrimination across 3400 stores nationwide did not constitute “significant proof that an employer operated under a general policy of discrimination,” *Wal-Mart*, 564 U.S. at 353—from situations where the plaintiffs were “in the same facility,” doing “similar work” and operating under “the same policy,” *Tyson Foods, Inc. v. Bouaphakeo*, 577 U.S. 442, 459 (2016); *see also Scott*, 733 F.3d at 114 (“*Wal-Mart* is limited to the exercise of discretion by lower-level employees, as opposed to upper-level, top-management personnel.”); *Amaya v. DGS Constr., LLC*, 326 F.R.D. 439, 449 (D. Md. 2018) (holding that “*Wal-Mart* is therefore not dispositive” where plaintiffs sought a “much narrower” finding regarding claims where a localized group supervised by “common management”). This distinction applies here, too, where Plaintiffs are subject to the same Step-Down Policy and confined in one or two localized facilities operated by the same state agency under a uniform set of operating procedures.

2. Minor Tweaks To The Step-Down Program Over Time Do Not Preclude Certification Under Rule 23(B)(3)

Defendants declare, without a single citation, that the changes over time in the Step-Down Program require a fact-intensive analysis for each inmate. Opp. at 39. But Plaintiffs have taken account of these tweaks and shown that the Step-Down Program remains constitutionally flawed to this day. *See, e.g.*, Mem. at 6–7; ECF No. 174-18 (Pls.’ Ex. 18), at 13. Regardless, Defendants neglect to explain to the Court how any “change” to its Step-Down Program creates individualized questions, let alone how it predominates. Nor could they, given the ongoing

constitutional problems. Instead, Defendants offer mere fragments of an argument and leave the Court to fill in the blanks.

Plaintiffs challenge the constitutionality of the Step-Down Program, *in its current state* as well as its prior state, which, Defendants concede, was even more restrictive in the past. *See* Opp. at 39 (“Inmates today have access to more out-of-cell programming, and longer out-of-cell recreation.”). A finding that the Step-Down Program is currently unconstitutional would therefore necessitate money damages for all previous prisoners subject to that Program as well. Regardless, a district court cannot “declin[e] certification based on the *possibility* that the plaintiffs would not prevail on the merits of their [] theory.” *Amaya*, 326 F.R.D. at 450 (quoting *United Steel, Paper & Forestry, Rubber, Mfg. Energy, Allied Indust. & Serv. Workers Int’l Union, AFL-CIO, CLC v. ConocoPhillips Co.*, 593 F.3d 802 (9th Cir. 2010)) (emphasis in original).

Defendants next proclaim “that the passage of time itself is of critical importance in adjudicating each putative class member’s claim.” Opp. at 40. Once again, Defendants leave their assertion bereft of any specific support. Lacking any articulable argument, Defendants’ discussion on “the passage of time” in the context of an unconstitutional program that imposes long-term solitary confinement with mandatory minimum periods requires no further inquiry.

3. Defendants’ Statute Of Limitations Affirmative Defense Does Not Preclude Certification Under Rule 23(B)(3)

Defendants argue (at 40-43) that individualized issues will predominate because some class members’ claims will be time-barred, but a statute of limitations defense is no bar to certification. *See* Recurring issues in the predominance analysis—Statute of limitations, 2 NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 4:57 (6th ed.) (“Statute of limitations defenses—like damage calculations, affirmative defenses, and counterclaims—rarely

defeat class certification.”); *In re U.S. Foodservice Inc. Pricing Litig.*, 729 F.3d 108, 128 (2d Cir. 2013) (affirming class certification when common issues predominated over an individualized statute of limitations tolling inquiry that applied when a plaintiff was “reasonably diligent in trying to discover his cause of action”) (quoting *Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 182, 117 (1997)); cf. *Krakauer*, 311 F.R.D. at 397, *aff’d*, 925 F.3d 643 (4th Cir. 2019) (“[T]he presence of affirmative defenses does not ‘automatically’ render class certification inappropriate.”). Courts within the Fourth Circuit permit class certification when there are limited, individualized defenses when common issues predominate. See *Brooks*, 301 F.R.D. at 232 (“It is a more efficient use of court and litigant resources to allow class treatment of these common issues despite the need for limited individualized inquiries regarding affirmative defenses.”); *Krakauer*, 311 F.R.D. at 397–98 (concluding that class certification of Rule 23(b)(3) class was appropriate when defendants could raise an unique affirmative defense to only a limited number of class members). Here, the issue is narrowly contained, addressed largely by common evidence, and will not predominate.

To begin, the issue is narrowly contained because it applies only to a subset of the two damages classes.¹² Defendants do not contend that the defense applies to class members who were subject to the Step-Down Program within the limitations periods, which is two years for the constitutional claims and one year for the disabilities claims. Opp. at 41–42 (limiting issue to

¹² This defense does not apply to the injunctive relief class. See, e.g., *Dunn v. Dunn*, 219 F. Supp. 3d 1100, 1119 (M.D. Ala. 2016) (explaining that the statute of limitations do not bar claims when prisoners “seek prospective injunctive relief to remedy a substantial risk of serious harm that they contend has existed for some time and continues to exist”); *Anderson v. Cornejo*, 199 F.R.D. 228, 245 (N.D. Ill. 2000) (citing *McCarthy v. Madigan*, 503 U.S. 140, 153 n.5 (1992)) (“[A]s to the class claims for injunctive relief, the most pertinent time period is prospective. A statute of limitations does not necessarily apply to a claim for prospective, injunctive relief.”).

class members “who ceased to be subjected to” the Step-Down Program before May 6, 2017 for the constitutional damages claims and May 6, 2018 for the disabilities damages claims). Defendants maintain the necessary data, so sorting out on which side of those lines class members fall would be a straightforward task to undertake at the appropriate time based on a common set of information, not an individualized inquiry that would predominate.¹³

Defendants seize on language from the motion to dismiss Report and Recommendation, but it addresses the accrual rule, *i.e.*, whether a plaintiff knew or should have known of the allegation violation of his rights. That issue, however, applies only to the subset of class members falling on the wrong side of the statute of limitations line described above, because they may be able to argue that their claim did not accrue for a period of time because they suffered from a serious mental health issue that “could have affected their ability to recognize their injuries.” *Thorpe*, 2020 WL 10354128, at *35, *aff’d*, 2021 WL 2435868 (discussing Plaintiffs’ allegation). Despite Defendants’ suggestion to the contrary, any inquiry into a class member’s state of mind would be limited to such “accrual-rule” plaintiffs and can be managed (if necessary) efficiently. Such inquiries would not predominate, given the common issues that abound and the potential for some accrual-rule plaintiffs (none have been identified), while addressing them in the context of this class action would be superior to the alternative of

¹³ In a similar context, for example, courts consistently hold that the need for individualized damages hearings does not weigh against class certification. *See, e.g., Kay Co., LLC v. EQT Prod. Co.*, No. 1:13-CV-151, 2017 WL 10436074, at *17 (N.D.W. Va. Sept. 6, 2017) (“Courts have routinely rejected this argument, concluding, as we have in previous cases, that the need for individualized proof of damages alone will not defeat class certification.”) (citing *Hill v. W. Elec. Co., Inc.*, 672 F.2d 381, 387 (4th Cir. 1982) (“Bifurcation of ... class action proceedings for hearings on ... damages is now commonplace.”)).

duplicative, individualized litigation.¹⁴ The Fourth Circuit’s *Thorn* decision (Opp. at 40) does not require a different result. That case addressed a vastly different situation—a proposed class of 1.4 million members and the need to “conduct individual hearings for *each* class member” to determine when class members’ claims accrued. *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 316 (4th Cir. 2006) (emphasis added).

Here, “the common, aggregation-enabling, issues in the case are more prevalent or important” than the narrow statute of limitations issues. *Tyson Foods, Inc.*, 577 U.S. at 453 (emphasis added) (citation omitted). Plaintiffs do not believe it necessary, but to the extent the Court is concerned about determining which class members are on the wrong side of the statute of limitations line, or which of that subset may be an accrual rule plaintiff, the Court should exercise its discretion and modify the definitions of the damages classes to address the concern. *See Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 825 (7th Cir. 2012) (vacating and remanding district court’s denial of class certification when the class definition “can and often should be solved by refining the class definition rather than by flatly denying class certification on that basis”); *Boyle v. Progressive Specialty Ins. Co.*, 326 F.R.D. 69, 100 n.90 (E.D. Pa. 2018) (“It is within our discretion to alter or limit the class definition to remedy a defect in it.”) (citing *Finberg v. Sullivan*, 634 F.2d 50, 64 n.9 (3d Cir. 1980) (“The district court should not deny certification on account of such problems without considering the possibility of redefining the classes.”)); *Brooks v. GAF Materials Corp.*, No. 8:11-CV-00983-JMC, 2012 WL 5195982, at

¹⁴ *Brooks*, 2012 WL 5195982, at *6 (“If each prospective class member’s case was tried separately, each would have to present duplicative evidence and expert testimony . . . It is a more efficient use of court and litigant resources to allow class treatment of these common issues despite the need for limited individualized inquiries regarding affirmative defenses.”).

*4–5 (D.S.C. Oct. 19, 2012) (modifying class definition to “easily remed[y]” court’s concern “by excising the offending phrase from the definition”).

4. Potential Qualified Immunity Defenses Do Not Preclude Certification Under Rule 23(b)(3)

Defendants vaguely contend that the Fourth Circuit’s treatment of *Porter* in the qualified immunity appeal in this case will necessarily result in individualized determinations as to each *Defendants’* liability regarding Plaintiffs’ Eighth Amendment claims. Opp. at 43–44. Specifically, Defendants assert that an individual Defendant’s knowledge of the risk of substantial harm caused by the Step-Down Program and the actual conditions and harm being caused, as well the timing of that knowledge, would have to be litigated in order to determine liability. *Id.* As a preliminary matter, Defendants only raise this issue as to the Eighth Amendment claims in this case, so any concern would not reach the Fourteenth Amendment or ADA/RA claims brought by this class. *Id.* (referencing only the Fourth Circuit’s treatment of the Eighth Amendment and qualified immunity in *Thorpe*, 37 F.4th at 934). Further, qualified immunity only applies to damages cases, and thus does not extend to the injunctive relief sought in this case. *See Thorpe*, 37 F.4th at 937 n.4 (citing *Pearson v. Callahan*, 555 U.S. 223, 242 (2009)) (“Plaintiffs also seek declarative and injunctive relief, and qualified immunity, of course, cannot bar such actions.”); Opp. at 43 (arguing qualified immunity in the context of plaintiffs’ Eighth Amendment claims).

Setting those limitations aside and even supposing that Defendants are correct that the Court would have to investigate Defendants’ qualified immunity defenses individually, Defendants fail to present any support, whatsoever, for the idea that such determinations are relevant to class certification. While it is true that unique affirmative defenses that could be argued against different plaintiffs can be grounds to argue that class certification is inappropriate,

Defendants provide no authority supporting their argument that differences in the defenses named defendants might make has any bearing on the propriety of class certification. *Id.* In the context of challenges to adequacy and typicality, the “unique defense rule exists because “[t]he fear is that the named *plaintiff* will become distracted by the presence of a possible defense.” *Shiring*, 244 F.R.D. at 313 (emphasis added) (quoting *J. H. Cohn & Co. v. American Appraisal Associates, Inc.*, 628 F.2d 994, 998-99 (7th Cir. 1980)). Similarly, in the predominance or commonality context, “common issues do not predominate over individual issues” where individualized inquiries are needed for “each putative *class member*[.]” not as to defendants. *Lienhart v. Dryvit Sys., Inc.*, 255 F.3d 138, 149 (4th Cir. 2001). As an unsurprising result, all of Defendants’ cases on unique affirmative defenses address the issue in the context of affirmative defenses that would have to be litigated as to plaintiffs. *Id.* at 147 (evaluating contributory negligence claims that would “provide [Defendant] with a complete defense to liability to that plaintiff”); *Shiring*, 244 F.R.D. at 313 (“defendants contend that class certification is unwarranted because plaintiff is subject to a unique defense”). Defendants’ assertion is therefore conclusory and not based on any legal principle applied as they propose it be.

Further, the very language Defendants point to from the Fourth Circuit’s opinion in this case to suggest that individualized determinations as to qualified immunity should defeat class certification actually counsels in favor of class treatment. Whether “officers observed the injuries these Plaintiffs have pleaded and drew appropriate inferences as to what caused those injuries,” *Thorpe*, 37 F.4th at 939 (emphasis omitted), which Defendants argue will be the key question in the individualized qualified immunity analysis, is exactly the kind of question that is capable of “gener[ating] common answers apt to drive the resolution of the litigation.” *EQT Prod. Co. v. Adair*, 764 F.3d 347, 360 (4th Cir. 2014). Whether the Court will have to undergo

analysis as to each Defendant's knowledge, those findings will be applicable to the class writ large, rendering efficiencies as individual class members avoid having to make these arguments in duplicative trials.

5. Per Diem Damages That Do Not Require An Individualized Analysis Are Possible And Appropriate Here

Contrary to Defendant's argument (at 44–45), “class-wide rather than individual assessments of monetary relief may sometimes be appropriate in class discrimination cases.” *In re Nassau County Strip Search Cases*, No. 99-CV-2844 (DRH), 2008 WL 850268, at *6 (E.D.N.Y. Mar. 27, 2008). Proof of aggregate monetary relief for a class claiming constitutional violations is feasible and reasonable in various circumstances, including when the class does not rely on any special rules of evidence, or substantive principles, or increase defendants' monetary liability from what it would be if class members individually proved their claims. *Id.* (citing NEWBURG AND RUBENSTEIN ON CLASS ACTIONS § 10:2 (2008)). “Courts have approved various methods of discovery and determining damages in class actions on the basis of classwide, rather than individualized proof of damages and the use of statistics and representative samples are one such method.” *Id.*

Accordingly, district courts can and do certify classes under Rule 23(b)(3) where plaintiffs seek standardized damages for constitutional violations. *See, e.g., Betances v. Fischer*, No. 11-CV-3200 (RWL), 2022 WL 765963, at *12 (S.D.N.Y. Mar. 14, 2022) (holding that “general damages for Plaintiffs' loss of liberty can be determined on a class-wide basis” and maintaining the class for a damages trial); *Dellums v. Powell*, 566 F.2d 167, 211 (D.C. Cir. 1977) (upholding damages awarded on a sliding scale for a class of anti-war protestors for violations of the First and Eighth Amendment rights). For example, in *Cody v. City of St. Louis*, No. 4:17-CV-2707 AGF, 2022 WL 1658787 (E.D. Mo. May 25, 2022), plaintiffs filed a class action

seeking relief for unconstitutional conditions of confinement in the Medium Security Institution in St. Louis. Plaintiffs sought “general damages on a per-diem basis, at a rate set by the factfinder and not based on any individual characteristics of class members.” *Id.* at *5. Plaintiffs also did not seek damages for out-of-pocket losses. *Id.* For those reasons, the court found that “individual assessments of damages do not erode the predominance factor under Rule 23(b)(3)” and found that Plaintiffs satisfied the rule, as to both the general class and the subclass. *Id.* at *3, *5. Similarly, in *In re Nassau County Strip Search Cases*, where plaintiffs challenged the constitutionality of strip search procedures and sought general damages under Rule 23(b)(3), the district court held that the individual damages issues would not predominate because “class members were aggrieved by a single, admittedly unlawful policy and there is a strong commonality between the strip search violation and the harm.” 2008 WL 850268, at *6. The court continued, “[t]here is no reason that a jury in this case, hearing the procedures used by Defendants for strip searches together with the testimony of a number of class members as to the circumstances of actual searches, could not determine an amount of general damages awardable to each member of the class.” *Id.* The court granted the plaintiffs’ motion to extend class certification under Rule 23(b)(3) to include damages. *Id.* at *7.

Defendants point out that Plaintiffs cited two non-class action cases per-diem damages were awarded for constitutional violations in the Opening Brief. Opp. at 44. While they are not class certification cases, they support the principle that per-diem damages are available in constitutional violation cases.

Plaintiffs here seek standardized compensatory damages for the constitutional violations that can be distributed formulaically among the class without extensive or individualized proof, as determined by the trier of fact. For example, Plaintiffs may seek a per diem damages award of

for every day spent in solitary confinement above a certain threshold, such as the 15-day maximum that other jurisdictions have implemented. ECF No. 174-18 (Pls.' Ex. 18), at 91. Such an award would be easily calculable by viewing the class members' housing records and would not require individualized fact determinations, making it appropriate for class-wide resolution under Rule 23(b)(3). *See Betances*, 2022 WL 765963, at *12 (concluding that the jury could use a matrix or a grid system to determine how much each plaintiff was awarded based on how long they were detained).

If the Court determines that per diem damages are inappropriate in this case, Plaintiffs request that the Court bifurcate the liability and damages phases for the 23(b)(3) constitutional damages violation class. In Rule 23(b)(3) cases, courts regularly bifurcate liability and damages, proceeding with a liability class only and reserving damages questions for individual determination. *See, e.g., Hendricks v. Total Quality Logistics*, No. 1:10-CV-00649, 2014 WL 12888647, at *16 (S.D. Ohio July 17, 2014) (where individual damages calculations could overwhelm the common class questions, court certified the subclass at issue but bifurcated liability and damages, proceeding with the liability class and reserving damages questions for individual determination); *Fox v. Transam Leasing, Inc.*, No. 12-2706-CM, 2014 WL 2604035, at *6 (D. Kan. June 11, 2014) (certifying the class under Rule 23(b)(3) noting that "to the extent ascertaining damages is unmanageable, the court could bifurcate liability and damages, at least where injunctive relief is also sought"); *Villalpando v. Exel Direct Inc.*, 303 F.R.D. 588, 610 (N.D. Cal. Nov. 20, 2014) (certifying the class under Rule 23(b)(3) and noting that "[t]o the extent there are individual issues related to damages, the Court may bifurcate liability and damages" later on).

III. PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS OF RULE 23(A) FOR THE DISABILITY CLASSES

A. Plaintiffs Have Established Numerosity

Both the Disabilities Injunction Class and the Disabilities Damages Class are sufficiently numerous such that joinder is impracticable. Defendants' own interrogatory responses identify 74 members of the Damages Class, while Defendants' data and the continuing fluidity of the prison population subject to the Step-Down Program support numerosity of the Injunction Class. Defendants ignore the definition of the Disabilities Classes, seek to walk away from their own interrogatory response, ignore the fluidity of the prison population subject to the Step-Down Program, and otherwise muddle the numerosity and implicit ascertainability analysis. We address each of Defendants' arguments in turn below.

1. Defendants' Numerosity Arguments Are Flawed

Defendants cannot escape their own interrogatory responses showing that the Disabilities Damages Class is sufficiently numerous by ignoring the parameters of the proposed class.

The Disabilities Damages Class defines membership with reference to a "disability" under the ADA or the RA, that is to say, individuals who "suffer from mental health disabilities" and are "qualified as individual with disabilities under either the ADA or the RA." ECF No. 191-2 (Pls.' Am. Mot. for Class Certification). The ADA and RA in turn define "disability" broadly. Under both, a person has a disability if: (i) "a physical or mental impairment substantially limits one or more of life activities of such individual"; (ii) he or she has "a record of such an impairment"; or (iii) he or she is "regarded as having such an impairment." See 42 U.S.C. § 12102(1) (ADA definition of disability); 29 U.S.C. § 705(9)(B) (under the relevant provisions of the RA, disability has "the meaning given it in section 12102 of Title 42"). Implementing regulations explain that the "primary object of attention" in ADA cases should be

whether defendants “have complied with their obligations and whether discrimination has occurred”; whether the individual “meets the definition of ‘disability’ . . . should not demand extensive analysis.” 28 C.F.R. § 35.101; ¹⁵ *see also* 28 C.F.R. § 35.108(d)(1)(ii). Moreover, “[w]hether an individual has a record of an impairment that substantially limited a major life activity [also] shall be construed broadly to the maximum extent permitted by the ADA and should not demand extensive analysis.” 35 C.F.R. § 108(e)(2) (emphasis added).

Defendants’ interrogatory responses identified 74 individuals who unquestionably fit this statutory definition of disability. Specifically, Defendants’ responses to interrogatory numbers 1 and 5 identified individuals with mental health codes of 2S (MH-2S) or greater between August 1, 2012 and July 31, 2021. ECF No. 174-56 (Pls.’ Ex. 56) (Response to Plaintiffs’ Interrogatories). In VDOC’s definitional scheme, mental health codes of MH-2S or greater only cover individuals with a Serious Mental Illness (“SMI”)—which requires both a particular diagnosis and current symptoms. *See* ECF No. 174-61 (Pls.’ Ex. 59) (Operating Procedure 730.2), at 3-4 (“An individual diagnosed with a Psychotic Disorder, Bipolar Disorder, Major Depressive Disorder, Posttraumatic Stress Disorder (PTSD) or Anxiety Disorder, or any diagnosed mental disorder (excluding substance use disorders) currently associated with serious impairment in psychological, cognitive, or behavioral functioning that substantially interferes with the person’s ability to meet the ordinary demands of living.”); Ex. 3 (Donald Trent Dep.), *Thorpe* (June 17, 2022) at 253:9-19; Ex. 4 (Riddick Mental Health Form). These listed diagnoses are the types of diagnoses that are ADA-covered disabilities in “virtually all cases,”

¹⁵ The Fourth Circuit has explained that “the views expressed by the Department of Justice in the implementing regulations ‘warrant respect.’” *A Helping Hand, LLC v. Baltimore Cnty., MD*, 515 F.3d 356, 362 (4th Cir. 2008) (quoting *Olmstead v. L.C.*, 527 U.S. 581, 597–98, 119 S.Ct. 2176, 144 L.Ed.2d 540 (1999)).

whether or not an individual is experiencing acute symptoms. 28 C.F.R. § 35.108(d)(2)(ii)-(iii) (listing “[m]ajor depressive disorder, bipolar disorder, post-traumatic stress disorder, traumatic brain injury, obsessive compulsive disorder, and schizophrenia each substantially limits brain function”); *see also id.* at (d)(iv) (these disabilities “should be easily found to impose a substantial limitation on a major life activity, and . . . the individualized assessment should be particularly simple and straightforward”).

Even though nothing more is needed for numerosity as to the Disability Damages Class, it is actually much larger, given the broad definition of “disability” employed by the ADA and RA. For instance, individuals who were “assigned to a designated DOC Mental Health Residential Treatment Unit” are coded as MH-3, indicating severe impairment and an SMI determination. *See* ECF No. 174-61 (Pls.’ Ex. 59), at 1–2. Thus, individuals who have spent time in such units at any point are also likely to be individuals with disabilities whether or not they are acutely experiencing symptoms. Moreover, individuals with a mental health code of MH-2 “must have a documented significant DSM¹⁶ diagnosis or diagnosis of a personality disorder with symptoms that are usually mild to moderate.” *Id.* at 14. Individuals with a mental health code of MH-1 “ha[ve] a history of self-directed violence, suicidal gestures or attempts, or mental health treatment within the past two years,” but VDOC has determined they do not “currently require mental health treatment.” *Id.* An individual with a significant DSM diagnosis, a history of self-directed violence, suicidal gestures or attempts would have had a “disability,” that is to say, an impairment that substantially limits a major life activity.

¹⁶ American Psychiatric Association, *The Diagnostic and Statistical Manual of Mental Disorders* (5th ed. 2013).

The Disabilities Injunction Class is likewise sufficiently numerous, primarily because that Class addresses an ongoing violation best addressed through the class action mechanism. Plaintiffs' expert (Peter Graham) used VDOC's data and recent disclosures to update his analysis and show that at least eight individuals listed in Defendants' interrogatory responses 1, 2, and 6 are still in the Step-Down Program. ECF No. 199-1, Rebuttal Decl. of Peter Graham, Ex. C. One of those eight individuals had a mental health code of MH-2S or higher during his time in Level-S or Level-6 according to Defendants' response to interrogatory number 1; 3 spent time in a residential treatment unit before entering or while in the Step-Down Program, according to the response to interrogatory number 6; and 3 spent time in a residential treatment unit after time spent in the Step-Down Program. Ex. 5 (ROSP – Mental Health Code and Treatment Unit Data). Therefore, at least 4 individuals had clear ADA-qualifying disabilities during the time in the Step-Down Program.¹⁷ See *infra* at Section III.C. Once again, these numbers only capture the most severe types of disabilities that always qualify as such under the ADA and RA, despite the fact, for instance, individuals with lower mental health codes are likely to have documented disabilities as well. See *infra* at 47; cf. *Thorpe*, 37 F.4th at 935–36 (identifying evidence of the

¹⁷ Even though individuals assigned to a mental health residential treatment unit should theoretically be designated as MH-3, see ECF No. 174-61 (Pls.' Ex. 59) at 13, the names listed in VDOC's response to interrogatory numbers 1 and 2 (those with MH-2S or above during they time they were in the Step-Down Program) do not perfectly align with the individuals listed in interrogatory number 6 who spent time in a residential treatment unit. This may be because the response to interrogatory numbers 1 and 2 were tied to an individuals' time in the Step-Down Program, while interrogatory number 6 only listed time spent in mental health units at any point from August 1, 2012 and July 31, 2021. See, e.g., Ex. 5 (as illustrated by prisoner [REDACTED]). Or perhaps the individual's mental health status was not appropriately adjusted. See, e.g., *id.* (as illustrated by prisoner [REDACTED]).

risks of harm of solitary confinement, including those set forth in the Plaintiffs' affidavits, independent studies, and long-running judicial precedent).¹⁸

In fact, most individuals in the Step-Down Program are likely to suffer negative psychological consequences that qualify as ADA or RA disabilities at some point during their confinement in the Program. As Dr. Haney explained, "being housed in solitary confinement is known to produce a number of negative psychological effects and to place incarcerated persons at a significant risk of serious psychological harm," ECF No. 174-18 (Pls.' Ex. 18), at 8, and to place *all* prisoners in solitary confinement at a serious risk of "serious psychological harm." *See, e.g., id.*; Ex. 2 at 6. These negative psychological effects include "appetite and sleep disturbances, anxiety, panic, a sense of impending emotional breakdown, lethargy, hypersensitivity to stimuli, irritability, aggression, rage, loss of control, ruminations, paranoia, perceptual distortions, cognitive dysfunction, hallucinations, depression, self-mutilation, suicidal ideation and behavior, and social withdrawal." ECF No. 174-18 (Pls.' Ex. 18), at 99. The evidence in this case clearly matches the literature, as all of the Plaintiffs have described just such negative psychological effects during their time in solitary confinement. *See, generally*, ECF Nos. 174-19 to 174-28 and 174-60 (Pls.' Ex. 19–28 and 58) (all Plaintiffs' affidavits). Many of them have described severe mental suffering, such as suicidal thoughts and incidents of self-harm, including repeated acts of self-mutilation. *Id.* This is confirmed by data that there are higher proportions of self-harm incidents and suicide attempts and completions in restrictive

¹⁸ The DOJ has also reported that "nearly 2 in 5 (38%) state and federal prisoners had at least one disability in 2016," including 23% with cognitive disabilities. Notably, this number is for *all* prisoners, not only those in segregation, where everyone is at risk of having a disability. U.S. DOJ, SURVEY OF PRISON INMATES, 2016, *DISABILITIES REPORTED BY PRISONERS* (2021), *available at* <https://bjs.ojp.gov/content/pub/pdf/drpspi16st.pdf>.

housing than in the general population. *See* Ex. 6 (Annual Review of Relevant Mental Health Statistics in VA DOC (2015)), at 16 (showing that VDOC determined 56% of suicide attempts for the prior year occurred in Restricted Housing); *see also* ECF No. 174-18 (Pls.’ Ex. 18), at 99. Given the extremely broad definition of disability under the ADA and RA, any number of these symptoms would qualify an individual in the Step-Down as having a disability.¹⁹

Moreover, as with the Constitutional Violation Injunction Class (Section I.A. above), the fluidity of classes in the prison context supports a finding of numerosity for the Disabilities Injunction Class—a point which Defendants do not contest. *Braggs*, 317 F.R.D. at 653 (stating that “the class action device is particularly well-suited in actions brought by prisoners due to the fluid composition of the prison population.”) (quoting *Clarkson v. Coughlin*, 145 F.R.D. 339, 346 (S.D.N.Y. 1993)). Future class members are impossible to join by nature, and their inclusion in a class “weighs in favor of certification” even where the presently identified class members are lower in number, as well. *Id.* (quoting *Reid v. Donelan*, 297 F.R.D. 185, 189 (D. Mass. 2014)).

2. Defendants’ Implicit Ascertainability Arguments Are Flawed And Misplaced

Defendants also argue (at 47) that the Disabilities Classes fail the implicit ascertainability requirement because each proposed class member’s mental health records would need to be examined to determine whether they fit within the class definition. Defendants’ contention is no bar to certification.

¹⁹ For example, “major life activities” is also defined broadly under the ADA as including, but not limited to, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.” 42 U.S.C. § 12102(2)(A); *see also* 28 C.F.R. § 35.108(c)(1)(i).

First, the Rule 23(b)(2) Disabilities Injunction Class is a mandatory class. As such, the key consideration is “the ‘indivisible nature of the injunctive or declaratory remedy warranted’ such that ‘each individual class member would [not] be entitled to a different injunction or declaratory judgment against the defendant,” *Wal-Mart*, 564 U.S. at 360, whether or not that individual is specifically identified, *see id.* at 362.²⁰ That is the case here. Each member of the Disabilities Injunction Class would benefit from abolishment of the Step-Down Program, which fails to identify or accommodate their disabilities, and an end to long-term solitary confinement at Red Onion and Wallens Ridge, which exacerbates the symptoms of individuals with disabilities. ECF No. 174-18 (Pls.’ Ex. 18) at 83–92, 98–100. Courts in this Circuit and elsewhere have certified Rule 23(b)(2) classes similar to the ones here. *Buffkin v. Hooks*, No.

²⁰ While the Fourth Circuit has not addressed explicitly whether ascertainability applies in the 23(b)(2) context, the weight of authorities in other Circuits hold that ascertainability does not apply to Rule 23(b)(2) classes. *See, e.g.*, 1 Newberg and Rubenstein on Class Actions § 3:7 (6th ed.) (“Definiteness is not required for class actions certified under 23(b)(2)”) (collecting and describing cases); *Yaffe v. Powers*, 454 F.2d 1362, 1366 (1st Cir. 1972), *abrogated on other grounds by*, *Gardner v. Westinghouse Broad. Co.*, 437 U.S. 478 (1978) (“Although notice to and therefore precise definition of the members of the suggested class are important to certification of a subdivision (b) (3) class, notice to the members of a (b) (2) class is not required and the actual membership of the class need not therefore be precisely delimited.”); *Shelton v. Bledsoe*, 775 F.3d 554, 563 (3d Cir. 2015) (“The nature of Rule 23(b)(2) actions, the Advisory Committee’s note on (b)(2) actions, and the practice of many of other federal courts all lead us to conclude that ascertainability is not a requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief, such as the putative class here.”); *In re Google Inc. Cookie Placement Consumer Privacy Litig.*, 934 F.3d 316, 328 (3d Cir. 2019) (“A (b)(2) class therefore does not . . . even require that individual class members be ascertainable.”); *Cole v. City of Memphis*, 839 F.3d 530, 542 (6th Cir. 2016) (“The decisions of other federal courts and the purpose of Rule 23(b)(2) persuade us that ascertainability is not an additional requirement for certification of a (b)(2) class seeking only injunctive and declaratory relief.”); *Shook v. El Paso Cnty*, 386 F.3d 963, 972 (10th Cir. 2004) (“However, while the lack of identifiability is a factor that may defeat Rule 23(b)(3) class certification, such is not the case with respect to class certification under Rule 23(b)(2).”).

1:18CV502, 2018 WL 6271855, at *14 (M.D.N.C. Nov. 30, 2018) (“[A]ll current and future prisoners in DPS custody who have or will have chronic hepatitis C virus and have not been treated with direct-acting antiviral drugs.”); *see also*; *Clarke v. Lane*, 267 F.R.D. 180, 194 (E.D. Pa. 2010) (certifying a class of “[a]ll current and future residents of Coleman Hall [a community corrections facility] to pursue claims associated with the inadequate access to and provision of medical and mental healthcare,” including seeking injunctive and declaratory relief under the ADA, without an analysis as to whether class members actually have disabilities); *Hernandez v. Cty. of Monterey*, 305 F.R.D. 132, 164 (N.D. Cal. 2015) (certifying two subclasses, including “all qualified individuals with a disability, as that term is defined in 42 U.S.C. § 12102, 29 U.S.C. § 705(9)(B), and California Government Code § 12926(j) and (m), and who are now, or will be in the future, incarcerated in Monterey County Jail”).

Second, members of the Rule 23(b)(3) Disabilities Damages Class are “readily identifiable” in VDOC’s own medical, mental health, and intake records, and it would not require a “mini-trial” to do so. *Peters v. Aetna Inc.*, 2 F.4th 199, 241-42 (4th Cir. 2021) (quoting *EQT Prod. Co. v. Adair*, 764 F.3d at 358) (remanding for reconsideration of ascertainability because lower court analyzed issue “too rigidly”); *see also id.* at 242 (Plaintiff “need not be able to identify every class member at the time of certification” in order to satisfy the ascertainability requirement.); *Holmes*, 311 F.R.D. at 215-216 (certifying Rule 23(b)(2) class; “[e]ven if ascertainment w[ould] require the parties to cull through inmate records . . . the cost and time involved in identifying class members does not preclude certification”). As set forth above, individuals who have spent some time assigned a mental health code of MH-2S or above in VDOC mental health records would necessarily meet the definition of disability under the ADA and RA. Mental health forms for those in the Step-Down Program could also include indications

of disability-qualifying impairments as set forth in the ADA and RA. Such mental health forms include, for example, DOC MH 18 – Intake and review form; DOC MH 14 – MH Screening and Special Housing; Change of Medical Classification – C&R 7a, 720.2 att. 2. Similar use can be made of VDOC’s medical records and intake forms. For example, Operating Procedure 720.2 (attached as Exhibit 7, at 11) requires VDOC to perform a mental health screening upon an inmates arrival to one of its facilities. VDOC records these findings on the *Preliminary Medical Screening* (C&R 7b) form and on the Intrasystem Transfer Medical Review (DOC 726-B). *Id.* at 8, 11. Likewise, prisoners transferred to VDOC undergo a mental health appraisal by a Psychology Associate. Because VDOC is required to file all mental health documentation, including information received from outside agencies in Section IV of the prisoner’s Health Record, VDOC possesses sufficient data required to identify the members of the Disabilities Classes. Therefore, mental health forms can be quickly and efficiently reviewed to determine if an individual has an ADA-qualifying disability. *See e.g.*, Ex. 8 (Wall’s Mental Health Services Progress Notes); Ex. 9 (Riddick’s Mental Health Screening); Ex. 10 (Cavitt’s Mental Health Evaluation); Ex. 11 (Khavkin’s Mental Health Monitoring Report).²¹

²¹ Defendants’ cases are not to the contrary. The court in *Holmes v. Godinez* actually certified a class of individuals with disabilities. It simply limited the class definition to those “who IDOC classified as deaf or hard of hearing or who notified IDOC in writing during the Class Period, either personally or through a family member, that he or she was deaf or hard of hearing.” *Steimel v. Minott* is vastly different because the Court was asked to engage in a complex analysis of whether it could readily identify individuals who “require[d] more services” under multiple Medicaid waiver programs, not to identify individuals with disabilities under the ADA. No. 1:13-cv-957-JMS-MJD, 2014 WL 1213390 (S.D. Ind. Mar. 24, 2014), at *5-*7.

Finally, to the extent VDOC's records fail to appropriately track other individuals with disabilities, VDOC's own failure cannot be the cause for denying class certification.²² See *Gaston v. LexisNexis Risk Sols., Inc.*, 483 F.Supp.3d 318, 334 (W.D.N.C. 2020) (where defendant agencies argued a class was not ascertainable because their records could not identify class members with "absolute certainty," the Court stated: "To the extent this is true, it is because the North Carolina DMV, CMPD and Defendants employ a system that makes it so, thereby entirely frustrating the public safety goals of the DPPA. Indeed, if Defendants' arguments prevailed no class of clearly wronged individuals could ever be certified."). VDOC should not be allowed to benefit from its own record-keeping failures.²³

B. Plaintiffs Have Established Commonality

Defendants' commonality argument (at 49-50)—that Plaintiffs' proposed common questions would depend on individual-specific mental disabilities to evaluate whether reasonable

²² Defendants admit VDOC does not separately track potential or actual ADA-qualifying disabilities apart from its Mental Health Classification Coding System (see Opp. at 16) and also "does not categorize inmates as having a 'mental health disability'" (*id.* at 47). Defendants also misunderstand the scope of disabilities under the ADA. For instance, Defendants assert that "mental health conditions may be managed or successfully treated through the use of medication or other interventions such that it does not qualify as a disability," and that the "impact [of a disability] on the inmate can wax or wane." *Id.* at 47. But that is wrong under the ADA and its implementing regulations—supplying further support to the conclusion that mental health codes used by VDOC fail to accurately capture or track individuals with disabilities. See, e.g., 42 U.S.C. § 12102(4)(C), (D) ("An impairment constitutes a disability even if it . . . is episodic or in remission, if it would substantially limit at least one major life activity if active."); 42 U.S.C. § 12102(4)(E)(i) ("substantially limits" is to determined "without regard to the ameliorative effects of mitigating measures such as . . . medication, or . . . learned behavioral or adaptive neurological modifications").

²³ The Court could also look to other readily-available records, such as pre-sentencing reports, sentencing transcripts, or mitigation evidence from criminal trials. The Court could even allow an expert to evaluate potential class members still in VDOC's custody for ADA-qualifying disabilities, particularly where, for example, the potential class numbers in the hundreds rather than the thousands.

accommodations were available—ignores the nature and scope of ADA/RA claims generally, the challenge to a common system that will yield common answers to common questions that is brought here, and prior cases certifying similar common questions arising from failed institutional approaches to ADA/RA compliance. As explained above, *supra* at Section II.B, courts reject efforts by defendants to focus improperly on individual class members in cases challenging a systemic set of problems.

A violation of the ADA is proven by showing individuals (1) have a disability; (2) are otherwise qualified to receive the benefits of a public service, program or activity; and (3) were denied the benefits of such service, program, or activity, or otherwise discriminated against, on the basis of their disability.” *Nat’l Fed’n of the Blind v. Lamone*, 813 F.3d 494, 503 (4th Cir. 2016). Individuals with disabilities can pursue their ADA claims under one of three theories: “(1) intentional discrimination or disparate treatment; (2) disparate impact; and (3) failure to make reasonable accommodations.” *A Helping Hand, LLC*, 515 F.3d at 362. Moreover, as detailed previously (Mem. at 41), VDOC is obligated under Title II of the ADA to take affirmative steps to avoid the proscribed discrimination.

Plaintiffs’ case focuses on the systemic problems of Defendants’ flawed institutional approach to ADA and RA compliance. For instance, VDOC has emphasized that the self-stated purpose of the Step-Down Program is to progress individuals out of solitary confinement and into the general population. Opp. at 4, 8. Therefore, those who are placed in the Step-Down Program should receive the benefits of the program: *i.e.*, an opportunity to progress from solitary confinement back to the general population. However, the Step-Down Program is incapable of ensuring equal participation for individuals with disabilities because, for instance,

(1) the Program fails to identify or trace individuals with ADA-qualifying disabilities²⁴ (*see infra* at Section III.A.2); (2) the Program includes no provisions allowing for modifications of the program to account for disabilities, ECF No. 174-3 (Pls' Ex. 3), at 50, 55 (describing system of evaluating prisoners for progression that does not account for disabilities); and (3) the only "accommodation" Defendants supposedly provide (from 2018 onwards) is to divert individuals to the Secure Diversionary Treatment Program (Opp. at 17–18), [REDACTED]

[REDACTED]²⁵ To the extent Defendants would argue that the mental health care services they provide qualify as an accommodation, those services are equally inadequate to address the mental health concerns of individuals with disabilities in the Step-Down Program. People in Level-S generally receive only one visit by a Psychology Associate per week (and prior to approximately 2019, the visits were between once every 30 or 90 days depending on the person's mental health code), and those visits generally take place at the cell door, Ex. 3 at 54:12-56:4, which is extremely difficult to speak through. ECF No. 174-18 (Pls' Ex. 18) at 13, 94. Until 2020, there was just one Psychology Associate assigned to all of Red Onion's C-Building (the primary housing for people in Level-S), and today there are just two. Ex. 3 at 45:10-46-4, 47:2-20. Psychology Associates at Red Onion are

²⁴ Without a system for properly tracking individuals with ADA-qualifying mental health disabilities—whether mental illnesses or intellectual disabilities (*see infra* at III.A.2)—there is no feasible way that VDOC can comply with its obligations under the ADA.

²⁵ [REDACTED] ECF No. 195-6 (Defs.' Ex. 19) (SDTP Manual) at [REDACTED].

not licensed to practice mental health, but instead work under the supervision of a licensed clinical psychologist who supervises all of VDOC's mental health staff across the western region of Virginia. Ex. 11 (William Lee Dep.), *Reyes* (Jan. 14, 2020) at 12:15-13:3; Ex. 12 (William Lee Dep.), *Reyes* (Sep. 18, 2020) at 58:22-59:5, 62:20-63:13.

No matter the merits resolution of Plaintiffs' ADA and RA claims, Plaintiffs' common questions focus on common issues and will provide common answers for the class. *See, e.g., Dockery*, 253 F. Supp. 3d at 848 (holding that plaintiffs need not "establish that the harm actually occurred, i.e., they do not need to prove that the policies they identified did, in fact, cause the harm they are alleging"); *see also Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 568 U.S. 455, 466 (2013). Defendants' erroneous contention that each individual's circumstances would need to be evaluated misses the point of Plaintiffs' case entirely. If Defendants' policies and practices are flawed—and they are—then they are flawed as to everyone, individuals' particular disabilities or circumstances notwithstanding. *See, e.g., Bumgarner v. NCDOC*, 276 F.R.D. 452, 456 (D.N.C. 2011) ("In a lawsuit wherein individuals with varying disabilities challenge policies and practices that affect all of the putative class members, factual differences regarding their disabilities does not defeat commonality.").²⁶

C. Plaintiffs Have Established Typicality And Adequacy

Four Class Representatives—Messrs. Cavitt, Khavkin, Riddick, and Wall—have disability claims typical of the Disabilities Classes and will adequately represent those classes. Mem. at 42. Defendants' sole argument (Opp. at 50) is that they have not established that they

²⁶ Defendants' citation to *Parent/Prof'l Advocacy League v. City of Springfield*, 934 F.3d 13, 30 (1st Cir. 2019) is also distinguishable in that the plaintiffs had failed to identify "a uniform policy or practice that affect[ed] all class members" in the Springfield Public School system

have a disability, which Defendants contend means they are not typical or adequate. This is not correct. As set forth above (*see supra* at Section III.A) and in Plaintiffs’ initial memorandum (Mem. at 42–43), they all have ADA and RA-qualifying disabilities.

Further, Defendants do not challenge—and Plaintiffs have submitted ample evidence of—the adequacy of class counsel, whether considered as part of the Rule 23(a) or Rule 23(g) analysis. *See, e.g.*, Mem. at 45.

IV. PLAINTIFFS HAVE SATISFIED THE REQUIREMENTS OF RULE 23(B)(2) AND 23(B)(3) FOR THE DISABILITIES CLASSES

A. The Disabilities Injunction Class Is Certifiable Under Rule 23(b)(2)

Without additional explanation, Defendants assert that the Disabilities Injunction Relief Class “suffers from the same lack of cohesion as the Constitutional violations class” and that no one is in the class. Opp. At 50. Plaintiffs have already shown why each argument fails. *See supra* at Section II.A.

Defendants also say (again without any additional explanation) that the requested injunctive relief does not pass muster. But as explained in Section II.A above, providing the general contours of the requested injunctive relief is sufficient under Rule 23(b)(2). And Plaintiffs have done more than that here. For instance, in addition to enjoining operation of the Program and appointing a Special Master, Dr. Haney’s expert report identified solutions that other prison systems have implemented to address the serious risks of harm imposed by solitary confinement—including 15-day maximum stays and the diversion of individuals with severe mental illnesses out of long-term solitary confinement altogether. ECF No. 174-18 (Pls’ Ex. 18), at 90. Moreover, Plaintiffs identified a number of potential improvements to the Step-Down Program in their interrogatory responses. *See* Ex. 14 (Thorpe Supplemental R&O to ROGs 4 &

9). Plaintiffs have gone beyond the requirements of Rule 23(b)(2) in terms of details regarding injunctive relief that would benefit the class. *See supra* at Section II.A (citing cases).

B. Common Issues Predominate for the Rule 23(b)(3) Class

Plaintiffs have shown (Mem. at 40–42) that the Disabilities Damages Class presents an array of common questions of law and fact that are subject to common proof and will predominate over any individualized issue. The class action device is the preferred method for addressing challenges to the validity of prison policies and practices (*id.* at 45), and Defendants do not contend otherwise.

Defendants’ cursory reference (at 52) in little more than a page to a few arguments raised in other sections of their Opposition fail to identify individualized issues that will predominate, as Plaintiffs have addressed above: (1) Differences among individuals’ particular disabilities have no bearing on Plaintiffs’ challenge to Defendants’ Step-Down Program’s complete failure to account for disabilities (*see supra* at Section III.B); (2) Any variation in the effect of the Step Down Program on prisoners similarly is of no moment, because the Program overall fails to account for disabilities (*see supra* at Section III.B), and in any event, Plaintiffs with disabilities are at heightened risk of harm (*see supra* at Section III.A); and (3) Per diem damages, like those sought here, are appropriate and would not require a disqualifying individualized inquiry (*see supra* at Section II.B.5). Even if such inquiry were required, courts routinely hold that the need for individualized proof of damages alone will *not* defeat class certification. *Id.*

Once again, Defendants cases are distinguishable. The plaintiff in *Sawyer v. Noble*, sought certification under Rule 23(b)(2) only, not Rule 23(b)(3). 708 F. Supp. 2d 591, 595-96 (W.D. Va. 2010). In *August v. Michigan Department of Corrections*, plaintiffs brought claims under the Eighth Amendment only, rather than seeking a class of individuals with disabilities

under the ADA, so the court did not consider evidence that individuals with disabilities were being treated differently from the remainder of the class. No. 2:16-cv-11224, 2018 WL 4679597, at *5 (E.D. Mich. Sept. 29, 2018). Here, in contrast, Plaintiffs have identified class members with disabilities, provided a methodology for ascertaining the rest of the class members who have disabilities, and identified ways in which they are treated different from the non-disabled class members. In *Sabata v. Nebraska Department of Correctional Services*, the court declined to find commonality for a proposed subclass because it included everyone in the entire Nebraska Department of Corrections system who suffered from any type of disability, intellectual, mental illness, or physical and asserted claims against various policies including restrictive housing and parole, among others. 337 F.R.D. at 264. Plaintiffs here challenge a single system of policies and practice applying to a subset of individuals at a single VDOC institution.

CONCLUSION

For the foregoing reasons, as well as for those set forth in Plaintiffs' Opening Brief and Opposition to Defendants' Motion to Strike, Plaintiffs respectfully request that the Court certify the four classes as set forth in Plaintiffs' Motion for Class Certification.

Dated: September 23, 2022

Respectfully submitted,

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