

WILLIAM THORPE, *et al.*,

Plaintiffs,

V.

VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,

Defendants.

Case No. 2:20-cv-00007-JPJ-PMS

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO
EXCLUDE THE TESTIMONY OF LENARD VARE**

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I. INTRODUCTION

Plaintiffs allege Defendant Virginia Department of Corrections (“VDOC” or “VADOC”) does not comply with Title II of the Americans with Disabilities Act (“ADA”) and the Rehabilitation Act (“RA”) by allegedly failing to grant reasonable accommodations to allow inmates with mental disabilities to participate in its Step-Down Program. To support that claim, Plaintiffs retained an alleged expert, Richard Wells, to opine on the issue. In turn, VDOC retained Lenard Vare, who has more than 26 years of experience in corrections facilities, to help the factfinder assess Wells’s opinions and determine how to apply ADA and RA standards in the specialized area of prison administration. Vare’s testimony is proper. Under Fed. R. Ev. 702, Plaintiffs’ effort to exclude Vare’s testimony is improper because (1) Vare qualifies as an expert, (2) Vare’s opinions have a reliable basis, and (3) Vare’s opinions are relevant and helpful to the factfinder.

Vare plainly has sufficient education, knowledge, experience, skills, and training to qualify as an expert in this case. Plaintiffs’ arguments otherwise are based on misrepresentations of his testimony. For example, while Plaintiffs contend Vare testified he “[n]ever consulted on ADA-related issues,” and “never developed or drafted any ADA-related policies while working as a corrections professional,” Plaintiffs’ Memorandum of Law in Support of Their Motion to Exclude the testimony of Lenard Vare (“Pls.’ Mem.”) (ECF 377) at 5, they also concede that he has at least “ancillary” experience with ADA-related issues (instead of zero consulting experience) and that he worked with attorneys and consultants in developing ADA-related policies as a corrections professional (instead of never developing such policies). *Id.* Not only are these statements internally inconsistent, but they are grounded in misstatements of Vare’s testimony—taken out-of-context and overdrawn. When read in full, Vare’s testimony shows his years of education, knowledge, experience, skills, and training—which includes drafting and auditing policies for

ADA compliance in the course of operating correctional facilities—support his qualifications as an expert.

Second, Vare’s methodology is reliable. No ADA regulation sets out exact specifications for how an institution’s mental health policies, classification system, tracking system, staff training, and grievance programs must be implemented. As a result, Vare’s methodology is based on his years of experience working as a corrections professional, assessing compliance with the American Correctional Association (“ACA”) accreditation standards (which Plaintiffs’ expert, Wells, admits set forth “national best practices”), visiting Red Onion State Prison (“ROSP”) to interview staff members (which Wells did not do), reviewing relevant policies and other documents, and comparing VDOC’s policies and practices to those at other institutions. Vare’s methodology applies his understanding of best practices based on his decades-long knowledge and experience, which renders his opinion sufficiently reliable. Vare’s purported failure to consider factors and variables that Plaintiffs deem important goes (to the extent even relevant) to the weight of his opinion, not its admissibility.

Third, Vare’s opinions relate to elements of Plaintiffs’ claims and VDOC’s defenses. Vare’s testimony will help the factfinder understand best practices in the correctional context, including the operation of a restrictive housing program and the provision of mental health services to inmates in that program. His opinions will help the factfinder make the ultimate determination on the legal issues in this case.

In sum, Vare is particularly well-qualified to testify and his opinions are reliable and relevant. Given Rule 702’s standard for admissibility and its presumption against exclusion, the Court should deny Plaintiffs’ motion in its entirety.

II. FACTUAL BACKGROUND

A. Vare's Expert Witness Qualifications.

Education. Vare holds a Bachelor's degree in criminal justice administration and a Master's degree in justice management. Vare Expert Report (ECF No. 377-1) at 3. He has served as an adjunct criminal justice professor for six years and has been involved in training various sheriff's departments "on topics related to corrections and inmate management." *Id.*

Knowledge, Experience, and Skills. Vare has "over 26 years of experience working in jails and prisons," including being a "senior warden" at three state prisons in Nevada and working "at all levels of inmate classifications." *Id.* at 2. He became the Jail Director and Corrections Administrator over the Napa County Department of Corrections in 2008, holding that position for 10 years. *Id.* As for his experience assessing administrative issues in the context of inmate mental health, he has "significant experience in the topic of deaths in-custody, suicidal deaths in-custody, conducting suicide/death investigations and homicide investigations in a correctional setting, and overseeing Critical Incident Teams following deaths in custody." *Id.* at 3.

As Vare explains in his Report, his positions at prison and jail facilities rendered him "responsible for creating and implementing policies, procedures, and administrative regulations in the care and custody of inmates." *Id.* This included "overs[eeing] classification teams and manag[ing] the implementation of policies and procedures related to the ADA[.]" *Id.* Moreover, as a warden, Vare was responsible "for the operation of a maximum custody sex-offender prison, a maximum custody high-risk gang and violent offender population, and inmates on death row." *Id.* at 3-4. Accordingly, he "ha[s] a keen understanding of the issues related to managing prison and jail security protocols while ensuring that inmates are provided with all allowable programs and access to services." *Id.* at 4.

Training. Vare has extensive training in ADA-related issues. As explained in his Report, he operated a jail facility in California when the California Department of Corrections and Rehabilitation (“CDCR”) “was subject to class action litigation related to inmate medical and mental health services” – litigation that began before his employment there. *Id.* at 4. As a result of that litigation, Vare “was involved in many meetings and training sessions related to ADA accommodations and was responsible for implementing that training in practice.” *Id.* As a jail administrator, Vare was responsible for enacting and implementing policies “that were consistent with the requirements of the ADA and the settlement of the CDCR class action litigation” and attended numerous “training and information sessions being offered by the State of California to its 58 county jail facilities.” *Id.* In addition, he attended training and information sessions through the California Sheriff’s Association that “provided guidance on ADA and ADA implementation before and after the settlement of the CDCR litigation.” *Id.*

B. Vare’s Principles and Methodology.

Review of Records. In preparing his Report, Vare reviewed “numerous documents and evidence including deposition testimony, program materials, and policies and procedures.” *Id.* at 6. Indeed, as identified in his Report, Vare reviewed (among other things) more than 30 depositions, 11 affidavits, more than 250 bates-numbered documents produced in the case, and five VDOC Operating Procedures. *Id.* at App. B. Those VDOC Operating Procedures include 730.2, which governs the “Screening, Assessment and Classification” of inmates as it relates to mental health; 730.1, which governs the “Administration” of mental health services at VDOC; 830.1 and 830.2, which govern inmate classification issues; and 866.1, which sets forth the procedure for offender grievances. *Id.* Vare also reviewed VDOC’s Mental Health Classification Coding system, which “provides a standard approach through which the mental health status and services needs of individual inmates may be examined.” *Id.* at 17.

Review of ACA Audits. Vare also considered the accreditation process used by the ACA, a national organization that sets standards for the administration of prison systems.¹ His Report includes an in-depth explanation of the ACA’s critical role “in providing guidance and setting forth best practices in corrections.” *Id.* at 46. As Vare explained:

The [ACA] guidelines govern all aspects of a facility or agency’s functioning. ACA accreditation is a rigorous process that includes a series of facility inspections, evaluations, audits, and hearings. A reevaluation is required every three years for continued accreditation with ACA standards. . . . The accreditation of a prison facility through the ACA is the highest standard achievable in professional certification and recognition for a correctional institution. The accreditation indicates that the facility operates through a clear adherence to standards relevant to all areas of operations of the facility including safety, security, order, inmate care, programs, justice, and administration.

Id. at 33-34. Given the extensive depth of the ACA’s “thoughtful and detailed prison audits,” an ACA audit would identify any prison facility “that is not following appropriate grievance procedures,” “appropriate guidelines regarding classification, housing, and medical and mental health care,” or “ appropriate procedures regarding the ADA and RA.” *Id.* at 36.

Vare’s review included relevant sections of the ACA manual relating to the following areas: disability discrimination, inmate classification, special management housing and restrictive housing, step down programs “establish[ing] criteria to prepare an inmate for transition to the general population or the community,” security measures that should be considered in the housing of inmates in various security level classifications, training and qualifications for staff, and the “identification of special needs inmates,” including inmates who are “inmates who are emotionally

¹ See, e.g., https://aca.org/ACA_Member/ACA/ACA-Member/AboutUs/AboutUs_Home.aspx?hkey=0c9cb058-e3d5-4bb0-ba7c-be29f9b34380.

disturbed or suspected of being mentally ill, intellectually disabled, and those who pose a high risk or require protective custody.”² *Id.* at 37-45, 91.

Vare’s review also included the ACA accreditation documentation for ROSP for 2012, 2015, 2018, and 2021, though he focused on the 2021 audit. *Id.* at 46. As he noted:

During the audit, the audit team members met with both staff and offenders to verify observations and/or to clarify questions concerning facility operations. The ACA audit team spoke with approximately 52 inmates. They received no complaints of a repetitive nature regarding the facility. Any complaints received were of normal concern and the auditors noted that the inmate/staff interaction was good. In general, the inmates interviewed all reported that they were being treated fairly by staff and their basic needs, including food and medical, were being met.³

Id. at 54.

Throughout his Report, Vare describes how his knowledge and experience regarding ACA accreditation leads to and informs his opinions. As he explains, “having a facility accredited through the ACA sends a strong message that its institutional procedures and practices have been thoroughly inspected, vetted, and deemed to be appropriate by an independent body with specific knowledge and expertise in correctional operations and management.” *Id.* at 46. In Vare’s experience, “many agencies strive for ACA accreditation but are unable to successfully achieve

² Plaintiffs argue the ACA standards are not relevant because they allegedly have “nothing to do with the ADA or disabled inmates” and do not invoke the ADA directly. Pls.’ Mem. at 13-14. They are wrong. ACA standards help assess what are adequate mental health policies, classification systems, staff training, grievance procedures, inmate management techniques, and health and safety standards. These issues bear on how to apply ADA and RA standards in the correctional context. This is particularly appropriate where the ADA and its regulations are silent on such issues. Even Wells conceded that ACA standards define “national best practices” for prisons. Deposition of Rick Wells (“Wells Dep.”) at 10-11 (relevant portions attached as Exhibit 1). Moreover, the significance of the ACA standards and accreditation process goes to the weight, not the admissibility, of Vare’s opinions.

³ Plaintiffs contend that “the report that an institution receives after an ACA audit provides no information explaining how an auditor arrived at his or her conclusion that a facility is ACA-compliant.” Pls.’ Mem. at 15. But Vare’s description of the ACA audit team’s extensive interview process belies this claim. Nevertheless, again, Plaintiffs’ argument goes to the weight, rather than the admissibility, of Vare’s opinions.

this goal.” *Id.* at 36. VDOC’s “achievement and continued accreditation from the ACA indicate that the agency follows the best practices and upholds the highest standards in managing its correctional facilities.” *Id.*

Site Visit of ROSP on June 20, 2023. In reaching his conclusions, Vare also relied on his inspection of the ROSP facility, interviews with various staff members, and observation of staff-inmate interactions.⁴ At ROSP, Vare met with Warden Rick White, Associate Warden Dwayne Turner, Chief of Housing and Programming Amee Duncan (who also was the former ROSP ADA Coordinator), Operations Manager Paula Sykes (the current ROSP ADA Coordinator), Institutional Program Manager Keith Sykes, and Supervising Mental Health Clinician Edward Creech. *Id.* at 54-55. Vare also assessed the programmatic options provided to inmates in Security Level S and Level 6. *Id.* at 69-71.

Despite reporting on his site visit, *see id.* at 54-69, and testifying extensively about it at his deposition, Plaintiffs contend that Vare’s decision to discard the minimal handwritten notes he took during the visit – after incorporating those notes into his Report – lead him to “remember[] very little about his trip to ROSP.” Pls.’ Mem. at 6. Plaintiffs assert that, at his deposition, Vare “could not identify the speaker of any unattributed statement in his Report, nor could he remember the details of any conversation he had with anyone at ROSP.” *Id.*

But Plaintiffs mischaracterize Vare’s testimony. Vare’s notes consisted of little else than “the names of the people [he] spoke with,” the “names of the units that [he] went to,” the name of an inmate he saw speaking to a staff member when he visited ROSP, “the names of programs,” and that he asked an attorney who accompanied him for “some photographs . . . of . . . the recreation

⁴ Plaintiffs’ expert, Wells, neither visited ROSP, interviewed staff members, nor observed staff-inmate interactions.

yard, . . . which are included in my report.” Deposition of Lenard Vare (“Vare Dep.”) at 237:21-239:6 (relevant portions attached as Exhibit 2). His notes did not “include what was discussed . . . with individuals during [his] visit” to ROSP; he “didn’t write down the substance of any discussions [he] might have had” at ROSP. *Id.* at 238:19-239:9.

In fact, all of the information from Vare’s notes is found in Vare’s Report. *Id.* at 259:22-260:2 (“Everything that was in my notes got copied into the body of this report. There was nothing left out[.]”); *see also id.* at 240:22-241:6 (“I copied the notes down into my narrative section [of the Report]”); 241:11-18 (“It’s in the report.”); 243:1-3 (“It’s my handwritten notes. I copied those handwritten notes into typed notes [in the Report]. There’s no difference, as far as I can tell.”); 243:6-14 (“I used the names and locations to put that into the narrative of the report, and then I filled it in with all the information that I had in my memory [from the site visit]. . . . I don’t see it any different than getting someone’s business card and having those business cards to identify them to put that into the report.”).

At his deposition, Plaintiffs repeatedly asked Vare to identify who from his ROSP visit informed him of particular facts noted in his Report. Each time, Vare responded that it was one of the six individuals identified in his Report. *See, e.g.,* Vare Dep. at 254:12-255:5; 256:13-257:6. For example:

- Plaintiffs asked Vare who informed him that “there are some individuals in Level S that have no desire to be placed into lower levels and willingly wish to remain in their current classification for safety reasons.” Vare testified that Amee Duncan did so, as that was who “I was speaking with the most.” Vare also noted that one of the other six individuals may have seconded Duncan’s statement. Vare Dep. at 251:9-255:1.
- Vare testified about visiting the housing units, the recreation area, and dental offices. He described an interaction in which Duncan spoke with an inmate named William Tanner. Vare Dep. at 264:7-268:6.
- Vare testified about seeing a metal box in the Level 6 or S housing unit in which inmates could submit grievance forms, *id.* at 273:20-274:16, and about seeing magnetic stickers stating “Mental Health” on certain cell doors. While Vare did not remember

the specific building in which he observed the box or the magnetic stickers, Vare Dep. at 270:8-19, Plaintiffs do not explain how they are prejudiced without that knowledge or how this is Vare's methodology. Moreover, when asked who explained to him the function of the magnetic stickers, Vare identified Aimee Duncan. Vare Dep. at 271:19-272:6.

- Vare examined "several classrooms," but did not know at deposition the name of the building housing the classrooms. He did describe, however, that the "library is in the same building" and there was a "catwalk on top" of the building. He also noted that "it's an area where they provide programs and classes." He further explained that if the name of the building were important (for example, if it were a housing unit), he would have noted it and included the name in the body of his Report. Vare Dep. 259:2-261:9. Again, Plaintiffs do not explain how the exact location of certain classrooms relates to their claims regarding restrictive housing or the administration of the Step Down Program.

Moreover, when Vare's Report cited ROSP's specific initiatives related to inmate mental health, his substantive factual observations were more often than not attributed to a particular speaker. For example:

- Vare noted that, when he "asked about the housing units in Level 6 and Level S," Warden Rick White "switched the camera views to show me the dayroom areas in these units," allowing him to observe how the inmates were seated, including but not limited to how "[t]he inmates were sitting a few feet apart and could communicate with each other." Vare Expert Report at 55.
- Vare "spoke with Mr. Creech about how the facility addressed inmates with suicidal ideations who are assigned to Level S and Level 6." Vare Expert Report at 67. "Mr. Creech explained to me that these inmates are identified through multiple ways," including by inmates self-reporting or staff "observ[ing] someone experiencing a crisis." *Id.* He also includes Creech's description of mental-health related training that staff receive, as well as the procedure for monitoring suicidal inmates placed in the mental health cell. *Id.*
- Creech also informed Vare that "mental health staff communicates all safety concerns with custody staff" to inform them "when someone was placed in mental health cell under suicide watch or if an individual was experiencing a mental health crisis." *Id.* at 67. Creech explained that this was "intended to ensure the safety of the inmates who were experiencing mental health crisis." *Id.*
- Vare also reported that Creech informed him "that at ROSP, all inmate complaints related to mental health crisis were presumed to be valid and staff did not make any assumptions that individuals were attempting to manipulate their way into a different housing assignment." *Id.* at 68.

- “When an inmate was reclassified for any reason, including disciplinary classification decisions, notifications are sent to mental health staff and to medical staff.” *Id.* at 68. Duncan described to Vare the reasoning of this process, noting that “when someone is moved into a higher classification, there was a possibility that the inmate might experience stress and may need to speak with someone.” *Id.* at 68-69.

Vare’s opinions and testimony about his visit reflects an accurate and detailed description of events. Plaintiffs do not explain how his failure to recall granular details—like the exact location of any one room or building, or to identify which of six staff members was speaking at any one time—warrants exclusion or somehow affects Vare’s methodology, especially where Vare’s Expert Report names the sources for his (substantive) fact conclusions. Nor is there any basis for contending that any information in Vare’s preliminary notes was not disclosed, or would even be discoverable. *See* Fed. R. Civ. P. 26(b)(4)(B) (“Rules 26(b)(3)(A) and (B) protects drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded”).

C. Vare’s Expert Opinions.

Opinion 1. Plaintiffs mischaracterize Vare’s opinion as claiming that ACA accreditation and associated audits “ensure continued compliance with ADA requirements.” Pls.’ Mem. at 4. Contrary to Plaintiffs’ claims, Vare did not rely exclusively on ACA accreditation to form his opinions—though he does stress its significance to the issues in this case.⁵ Vare explains that the ACA sets forth best practices in corrections and describes how the ACA accreditation records address the core issues in this case. Vare Expert Report at 76-77. For example, he explained: “The auditors found that medical care and mental health services were provided in a timely manner, and any concerns related to mental illness was address[ed] appropriately. Inmates suffering severe

⁵ And again, Wells conceded that ACA standards define “national best practices” for prisons. Wells Dep. at 10-11.

mental illnesses were not housed in restrictive housing. Over the four audit cycles, not a single audit found issues related to conformance with ADA requirements.” *Id.* at 77.

Opinion 2. According to Plaintiffs, Vare opined that “[n]one of the named Plaintiffs have or had qualifying disabilities.” Pls.’ Mem. at 4. This misstates Vare’s testimony. Rather, Vare opined that Plaintiffs’ expert, Wells, “focuses on alleged violations of the ADA without consideration of the underlying question regarding which of the named plaintiffs, if any, were actually disabled – a necessary predicate for seeking a reasonable accommodation under the ADA.” Vare Expert Report at 77. Vare further opined that Wells “made several presumptions and suppositions in estimating the medical and mental health limitations of the named plaintiffs” even though Wells does not have “a medical or mental health background that would qualify him to do so.” *Id.* And Vare admitted that he, too, does not have such qualifications. *Id.*

Vare further noted that VDOC classified nine of the named Plaintiffs as MH-0 (“No Mental Health and Wellness Services Needs”), and two of them as MH-2 (“Minimal Impairment”). *Id.* at 78-81. Given that information, and Wells’s lack of credentials to diagnose a mental health disability, Vare opined that “*the records reflect* that no named plaintiff had any impairment that rose to the level of a disability, such that a reasonable accommodation was required to allow them to participate in programs or services that would have been provided to other individuals in a similar classification.” *Id.* at 81 (emphasis added).

Opinion 3. According to Plaintiffs, Vare opined that VDOC did not need to accommodate any of the named Plaintiffs because they posed a considerable direct safety and security threat. Pls.’ Mem. at 4. This mischaracterizes Vare’s opinion. He *did* opine about the “considerable direct safety and security threat[s]” posed by each of the named Plaintiffs “based upon their history of violent behavior and the severity of dangerous and aggressive actions while incarcerated which

justified their placements into high-security housing.” Vare Expert Report at 82. But Vare also noted that, “[d]espite these significant direct safety and security threat concerns, nine of the eleven named plaintiffs successfully worked their way down to the general population through the Step Down program.” *Id.* As a result, Vare questioned whether accommodations were needed at all, particularly considering the “extensive modifications to current safety and security protocols [that] would be required, and [the] potentially tremendous additional cost and risk, to allow the additional access to programs Mr. Wells appears to advocate.” *Id.* at 82. As a result, Vare concluded that, “stating the obvious, extrapolating similar concerns about direct safety and security threats, plus additional cost, and risk, to allow a class-wide group of ROSP inmates the additional access to programs Mr. Wells appears to advocate would make the threats, costs, and risks far greater.” *Id.* at 82. Accordingly, Vare’s opinion is that issues of threat and security must be considered when assessing “whether to allow the additional access [to programs] Mr. Wells appears to advocate,” notwithstanding that he questioned “whether the additional access Mr. Wells appears to advocate is even needed.” *Id.* at 82.

Opinion 4. Plaintiffs accurately summarize Vare’s opinion that “VDOC’s intake procedures are sufficient to identify people with disabilities,” Pls.’ Mem. at 4, but they do not disclose the entire opinion or the supporting methodology. In particular, Vare disagrees with Wells’s opinion that VDOC’s “intake procedures were insufficient to identify people with disabilities” because they “do[] not appear to be based in fact.” Vare Expert Report at 86. Vare further opines that Wells “makes assumptions that some or all the named plaintiffs were disabled at the time of their intake” into VDOC, but noted that he was “not aware of evidence that would support these assumptions,” as “their records reflect the lack of any mental health disability.” *Id.* Vare also noted that ACA audits from the past 12 years show that VDOC and ROSP “had been

following best practices in how they operated the facility, which included conducting intake, addressing orientation, classification, providing education, providing access to programs and services, access to mental health, medical services, and dental services,” and cited several examples of “ACA audit[s] and the statements made by the auditors after the 2021 audit [that] reflect the opposite of Mr. Wells’s claims regarding the insufficient nature of identifying persons with disabilities.” *Id.* at 86-87. Accordingly, Vare opined that “VADOC and ROSP had adequate intake procedures that were sufficient to identify persons with disabilities during the initial screening and classification process.” *Id.* at 89

Opinion 5. Plaintiffs accurately summarize Vare’s opinion that “[t]here is no tracking mandate in the ADA and VDOC has not violated the ADA’s non-discrimination mandate,” Pls.’ Mem. at 4, but they do not disclose the entire opinion or the supporting methodology. In particular, Vare disagrees with Wells’s opinion that VDOC “fail[s] to identify and track people with disabilities and provide adequate accommodation during their incarceration” and “that this led to a failure to comply with ADA’s non-discrimination mandate.” Vare Expert Report at 89.

As Vare explained, no mandate requires VDOC to “track the hundreds of interactions that staff has with incarcerated persons to provide adequate accommodations to accommodate disabilities under the ADA.” *Id.* at 89. Vare explained that he “do[es] not know of any agency that follows such a mandate unless they have been placed under a consent decree for having a pattern of failing to provide appropriate care,” and that VDOC “is not such an agency.” *Id.* Vare further notes that Wells “has not provided a single instance of how any one of the named plaintiffs was disabled or denied a reasonable accommodation due to a disability.” *Id.* at 90.

Opinion 6. Plaintiffs again accurately summarize Vare’s opinion that “VDOC staff are adequately trained in the requirements of the ADA and on VDOC’s own ADA-related policies,”

Pls.’ Mem. at 4, but they do not disclose the entire opinion or the supporting methodology. In particular, Vare disagreed with Wells’s assertion that VDOC’s staff “is not adequately trained in the requirements of the ADA” or in VDOC’s ADA-related policies.” Vare Expert Report at 90. As Vare noted, the ACA “fully vetted” VDOC’s training “and concluded that staff was fully complaint [sic] with relevant training requirements.” *Id.* at 90-91. He further explained that his own review of VDOC’s various ADA-related training materials “confirms as much.” *Id.*

Opinion 7. Plaintiffs again accurately summarize Vare’s opinion that “VDOC’s grievance procedure provides a meaningful complaint process that provides for a prompt and equitable resolution to ADA-related complaints and complies with the ADA’s requirements,” Pls.’ Mem. at 4, but they do not disclose the entire opinion or the supporting methodology. In particular, Vare opined that Wells failed to identify evidence that supports his opinion that VDOC’s “grievance procedure was inadequate to fulfill the ADA’s requirement[s]” and ignored that “ACA auditors had already performed multiple inspections and audits over the past 12 years and found that ROSP was fully compliant with ACA standards relating to inmate grievances, including in the context of the ADA.” Vare Expert Report at 92. Having reviewed ROSP’s grievance procedures, Vare opined that “ROSP had an adequate level of grievance management and accountability.” *Id.*

III. LEGAL STANDARDS

Rule 702 allows for a liberal introduction of relevant expert evidence. A witness may qualify as an expert through any one of the following ways: (i) knowledge, (ii) skill, (iii) experience, (iv) training, or (v) education. Fed. R. Evid. 702. And unless all five bases for expertise are lacking, the challenging party will not meet the “strict [test]” for exclusion. *Kopf v. Skyrn*, 993 F.2d 374, 377 (4th Cir. 1993).

A witness who qualifies as an expert may testify if (i) the expert’s scientific, technical, or other specialized knowledge (ii) will help the jury or other trier of fact to understand or resolve a

fact at issue. Fed. R. Evid. 702. The first prong of this inquiry examines whether the “principles and methodology” underlying the expert’s proffered opinion are reliable. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-95 (1993). Courts “may not evaluate the expert witness’ conclusion itself, but only the opinions underlying methodology.” *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 195 (4th Cir. 2017). Moreover, any “‘questions regarding the factual underpinnings of the [expert witness’] opinion affect the weight and credibility’ of the witness’ assessment, “‘not its admissibility.’” *Id.* (citations omitted). As the Rule 702 advisory committee’s notes emphasize:

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on “sufficient facts or data” is not intended to authorize a trial court to exclude an expert’s testimony on the ground that the court believes one version of the facts and not the other.

Fed. R. Evid. 702 advisory committee’s note to 2000 amendment.

The second prong of the inquiry requires an analysis of whether the opinion is relevant to the fact at issue. *See Daubert*, 509 U.S. at 591-92, 595. Again, Rule 702 is broadly interpreted, and helpfulness to the trier of fact is its “touchstone.” *Friendship Heights Assocs. v. Koubek*, 785 F.2d 1154, 1159 (4th Cir. 1986). Testimony from an expert is presumed to be helpful unless it concerns matters within the everyday knowledge and experience of a lay juror. *Persinger v. Norfolk & Western Ry. Co.*, 920 F.2d 1185, 1188 (4th Cir. 1990).

Rather than exclusion, “cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof” is preferred as “the traditional and appropriate means of attacking shaky but admissible evidence.” *Daubert*, 509 U.S. at 596. The Court’s role as a gatekeeper is “not intended to serve as a replacement for the adversary system, and consequently, the rejection of expert testimony is the exception rather than the rule.” *In re Lipitor (Atorvastatin Calcium) Mktg., Sales Pracs. & Prod. Liab. Litig. (No II) MDL 2502*, 892 F.3d 624, 631 (4th Cir.

2018). To that end, any “doubts about whether an expert’s testimony will be useful should generally be resolved in favor of admissibility.” *Gibbes, Inc. v. Law Eng’g, Inc.*, No. 91-1048, 1992 WL 78830, at *4 (4th Cir. April 20, 1992).

IV. ARGUMENT

A. Vare Is Well-Qualified to Render the Opinions in His Report.

Based on his knowledge, skill, experience, training, and education, Vare is qualified under Rule 702 to offer his expert opinion and testimony regarding Wells’s report, the conclusions both experts reach in their respective reports, and any related matters. Although Vare gained the majority of his ADA-related experience in the context of prison administration and consulting on issues related to inmate suicides and mental health (as opposed to directly testifying on ADA issues), he has extensive knowledge and experience in correctional operations, including the provision of mental health services and restrictive housing. This is more than sufficient to provide an expert perspective that is both reliable and relevant to this case. *Daubert*, 509 U.S. at 592; *Kopf*, 993 F.2d at 377.

Plaintiffs’ argument that Vare must have firsthand, paid consulting experience on ADA issues is unsupported by law. “The fit between an expert’s specialized knowledge and experience and the issues before the court need not be exact.” *Am. Strategic Ins. Corp. v. Scope Servs., Inc.*, Civil No. PX-15-2045, 2017 WL 4098722, at *3 (D. Md. Sept. 15, 2017). Indeed, Rule 702 does not create “a schematism that segregates expertise by type while mapping certain kinds of questions to certain kinds of experts. Life and the legal cases that it generates are too complex to warrant so definitive a match.” *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999).

An expert may properly opine on the actual steps or guidelines that professionals in his industry should follow to meet best practices. Such an opinion cannot be excluded simply because the expert’s testimony is framed in the context of professional standards of care, rather than exact

legal standards. *Friendship Heights Assoc.*, 785 F.2d at 1162 (failure to identify exact legal standard was insufficient grounds for excluding expert, where expert described steps or guidelines that professionals in his industry should follow); *Slaton v. Correct Care Sols., LLC*, No. CV 3:15-00627-JMC, 2016 WL 3257660, at *2 (D.S.C. June 14, 2016) (finding that expert witness who “referred to a number of regulatory texts including...the standards of the American Correctional Association and the National Commission on Correctional Healthcare...” was “seemingly qualified based on her experience and reliance on regulatory documents common within the nursing and corrections industries”); *Ortiz v. Ben Strong Trucking, Inc.*, 624 F. Supp. 3d 567, 590-91 (D. Md. 2022) (refusing to exclude experts whose experience was “close enough”, and holding: “With no single national vetting standard, [expert’s] testimony about the industry standard based on her experience will help the jury decide which expert to credit when assessing the standard of care.”); *Mann v. C. H. Robinson Worldwide, Inc.*, No. 7:16-CV-00102, 2017 WL 3191516, at **14-15 (W.D. Va. July 27, 2017) (permitting expert to testify as to a broker’s reasonable standard of care despite the expert having “never worked for a broker or otherwise been involved in the pragmatic decision-making of brokers”); *Crockett v. Crothers*, 285 A.2d 612, 614 (1972) (in negligence action against engineer, standard of care was established through expert testimony describing steps ordinarily taken by engineers preparing plans relevant to the case); *Claussen v. PowerSecure, Inc.*, No. 3:18-cv-00607, 2019 WL 4941109, at *9 (M.D. Ala. Oct. 7, 2019) (admitting an expert testimony on trucking industry standards and whether defendant violated those standards when the expert’s opinion was based on his experience in the industry, seminars, and discussions with industry professionals).

Given Vare’s decades-long tenure in corrections and his specialized focus on inmate mental health and related matters, he plainly has sufficient experience in the vetting process to

conclude that VDOC's ADA-related policies and procedures meet and exceed what he considers to be best practices in his field. *See Daubert*, 509 U.S. at 592 (noting an expert has "wide latitude to offer opinions" so long as their opinions have a "reliable basis in the knowledge and experience of his discipline").

B. Plaintiffs' Challenges to Vare's Qualifications Fail.

1. Vare Has Sufficient Experience with ADA-Related Issues.

Plaintiffs challenge Vare's qualifications because he "has never been retained to provide expert testimony on the ADA, nor has he ever consulted on ADA-related issues." Pls.' Mem. at 5. Plaintiffs' arguments have no basis in law or fact. Vare has more than 26 years of experience working in jails and prisons, Vare Expert Report at 2, and it is undisputed that several other courts have found him qualified to serve as an expert in the corrections context, *id.* at 5.

Moreover, there is no factual basis for claiming Vare has "[n]ever consulted on ADA-related issues." Pls.' Mem. at 5. On the contrary, Vare testified that, as a corrections consultant, he had experience vetting ADA compliance, which emanated from his work with inmate suicides and mental health issues.

Q Okay. So in the context of your experience as a corrections consultant, prior to this case had you ever been asked to assess compliance with the Americans With Disabilities Act specifically?

A Specifically, no. But I've had a lot of cases with inmate suicides and mental health issues. But the way you've phrased it, I don't believe in that context.

Q Got it. So you haven't been asked to offer an opinion as to whether a particular practice or policy is compliant with the ADA?

A Not directly. *But if it doesn't meet ADA standards or there's some clear violations, those are -- those are things that I would look at.*

Q But you've never been asked to opine on whether a particular policy or practice is compliant with the ADA?

A Not specifically, no.

Vare Dep. at 38:16-39:18 (emphasis added; objections omitted).

Q The experiences you've gained as a corrections consultant, does that include the ADA-related experiences we discussed earlier in this deposition?

A In an ancillary fashion.

Vare Dep. at 82:10-14.

Q And I believe you testified that you have worked as an expert on numerous cases that involved inmate suicide and mental health issues? Is that right?

A Yes.

Q And as part of your work in those cases, did you often address ADA compliance issues?

A In an ancillary manner. *So if someone was dealing with a mental health issue and there were repeated incidents where staff failed to address those issues, those would be obviously ADA violations.* But also they were -- they were violating contract requirements if it was a medical provider, they were violating policies and procedures. They were violating ACA standards which requires recognition of someone who's experiencing, you know, a crisis, and then -- and then providing aid. *So I dealt with a lot of those cases with suicidal inmates in that arena.*

Vare Dep. at 303:2-21 (emphasis added).

Nevertheless, Plaintiffs frame Vare's use of the word "ancillary" in his testimony as an admission that his ADA-related experience was insubstantial. Pls.' Mem. at 5. Far from it. Vare uses "ancillary" to explain that the ADA issues he encountered in the context of inmate suicide and mental health were *in addition* to various other issues, including contract issues, violations of institutional policy, and violations of ACA standards, for example. Put into proper context, Vare's use of the word "ancillary" fairly describes the fact that the ADA-related issues Vare had experience with were related to his wider (non-ADA specific) consulting experience evaluating inmate suicides and institutional responses to other forms of inmate mental health issues.

2. That Vare Hired Staff and Consulted with Legal Counsel to Draft and Vet ADA-Related Policies Supports His Qualification as an Expert.

As the Director of Corrections in Napa County between 2008 and 2018, Vare managed the implementation of policies and procedures related to the ADA. Vare Dep. at 53:15-64:11. Vare testified:

Q And you say in your report that you managed the implementation of policies and procedures. Did you have any role in drafting the policies and procedures related to the ADA?

A Yes, I did. I actually had to hire a staff member to rewrite all the policies in Napa County from the first policy to the last policy. So it was several hundred pages that had to be brought up to -- because, I mean, when I took over the facility, the policies were 15, 20 years old and they were not current. So we had to bring it up to current standards. And so for a two-year period, that was one of the projects that I worked on. So every policy that was written by my staff or I wrote some of the policies, we would -- we would go through a committee that would sort of edit it. Then it would go to our legal counsel who would then edit it further. And then the board of county supervisors would approve it, and then it would become policy. So that was a process for two years that I worked on.

Q So you said you hired a staff member to write the policies. Is that right?

A Yes.

Q Did you, personally, draft any of the policies?

A Yes.

Q Were any of the policies that you personally drafted ADA policies?

A I could not recall. We had hundreds of policies to rewrite, so I don't know.

Q So this project that you are -- that you just described, isn't limited to ADA issues. This was sort of a broader project?

A It was every policy in the department. So it included ADA and everything else.

Q So you don't recall that you worked in particular on the ADA-specific policies?

A I'm sure I worked on the ADA-specific policies, because all the policies went through me. So, yeah, every policy had to go through me.

Vare Dep. at 56:8-58:8 (emphasis added; objection omitted).

Plaintiffs mischaracterize Vare's testimony as saying he "never developed or drafted any ADA-related policies while working as a corrections professional." Pls.' Mem. at 5. His testimony explicitly establishes otherwise, testifying that he was "sure" he "worked on the ADA-specific policies, because all the policies went through" him. Vare Dep. at 58:6-8. Moreover, that Vare consulted with legal counsel to confirm his understanding of relevant ADA requirements in the mental health space supports a finding that he is well-qualified to assess and evaluate such policies, having familiarized himself with these standards through the advice of attorneys on ADA-specific issues.

In addition, Vare testified he had experience applying these ADA-compliant policies by conducting annual audits of the facilities' mental health services. Vare Dep. at 58:15-20.

Q When it was internal, did you have a role in auditing compliance with the Americans With Disabilities Act?

Q You can answer.

A Yes.

Q And what was your role?

A I was the facility commander. So all of the facility audits had to go through me. There were times when I would go and look at specific sections of the facility and see whether or not there was compliance. For example, I have mental health individuals that were asking for help because they felt depressed or something happened. Based on that request, I wanted to see how fast the medical staff or mental health staff responded to those kinds of needs. *So that came within the scope of the ADA policy compliance and whether or not people were actually being given aid when they needed it. There were other times when we dealt with medical issues. Again because I had a state mental health hospital in the facility, a lot of my issues were to deal with mentally ill people that were in our custody and sort of how to – how to provide the treatment that they needed and maintain security.*

Vare Dep. at 60:18-62:1 (emphasis added; objection omitted).

In sum, Vare's qualifications meet the liberal standard for qualifying an expert. To the extent Plaintiffs argue Vare lacks substantial, firsthand experience assessing ADA compliance

(which VDOC denies), these issues go to the weight of Vare's testimony, not its admissibility. *Friendship Heights Assocs.*, 785 F.2d at 1159. Exclusion is improper when Plaintiffs can easily address any alleged gaps in Vare's knowledge or experience on cross-examination. *Kovari v. Brevard Extraditions, LLC*, 461 F. Supp. 3d 353, 373-74 (W.D. Va. 2020) (expert was qualified despite lack of familiarity with specific laws and regulations and any attempt to discredit him must be through cross-examination).

C. Vare's Opinions and Testimony Are Reliable.

In his expert report, Vare articulates the methodology behind his assessment of VDOC's policies and practices. Insofar as Vare's methodology involves applying his understanding of the best practices based on his knowledge and experience, his opinion is sufficiently reliable.

1. Plaintiffs' Challenges to Vare's Methodology Should Be Rejected.

a. Vare Never Conceded the "Substantial Irrelevance" of ACA Accreditation.

Plaintiffs contend "Mr. Vare conceded [the ACA's] substantial irrelevance to issues of ADA compliance." Pls.' Mem. at 7. This misstates Vare's testimony. Plaintiffs cite to the section of Vare's deposition in which he is directed to a presentation by the U.S. Attorney's Office, which includes a slide that states: "ACA and NCCHC Accreditation equals compliance with ADA. It does not." Vare Dep. at 214:19-21 Vare agreed with this statement, explaining that "just because you have an ACA accreditation doesn't mean that things cannot occur in that facility that might violate the ADA." Vare Dep. at 230:3-5. Vare also testified that "[i]t's possible that it -- that sometimes things could happen even with the compliance in place." *Id.* at 230:18-231:1.

But the fact that ACA accreditation is not dispositive does not mean it is "substantially irrelevant." Vare never uses these words. Instead, he testified that he looked to the ACA accreditation as one factor in his analysis:

Q And so did you find it to be significant that an Assistant U.S. Attorney, in training provided to the Virginia Department of Corrections, apparently instructed that ACA accreditation does not equal compliance with the ADA?

A Sure. I have no reason to argue that point with him.

Q I'm asking if you found it to be significant.

A Not -- not -- not really. Because I also was looking at how they were running the facility and their operations, and looking at the ACA inspections of the facility. And sort of the overall operations of the facility will at times tell you a lot about how things are run. My physical tour of the facility, I'm looking at how people were being brought out of their cells, and they were getting, you know, access to programs, et cetera. Those are the things that I would -- I looked at also, which kind of provided me with a better picture of what was happening at the facility. So, yes, there is a -- there is that statement there. But I don't think I put too much weight on that statement, other than it's there. I acknowledge it's there.

Vare Dep. at 232:4-233:8.

Moreover, Plaintiffs' own expert refutes any claim that the ACA is "substantially irrelevant" to assessing ADA compliance. In his report and his CV (attached to his report), Wells extensively discusses his involvement in the ACA-accreditation process.⁶ Commenting on the

⁶ Wells Report at ¶ 8 ("During that time, I also provided internal auditing oversight over the American Correctional Association (ACA) accreditation statewide review process for over 500 performance-based standards from virtually all aspects of prison operations, including but not limited to programming, health care, conditions of confinement etc."); Wells CV (attached to Wells Report) at 141-42 ("As a CDCR Correctional Administrator (Associate Warden), developed and implemented compliance review/audit instruments and methodologies for the Americans with Disabilities Act (ADA), American Correctional Association (ACA), and CDCR Security Audits, as well as developed training curriculum for Federal class action litigation and ACA, . . . served as an ACA Consultant for the California Prison Industry Authority; . . . and conducted numerous internal ACA preparation reviews and combined peer audit reviews at numerous CDCR adult correctional facilities."); Wells CV (attached to Wells Report) at 144 ("I have also served as a consultant for the California Prison Industry Authority (CALPIA) with regard to ACA auditing and compliance monitoring."); Wells CV (attached to Wells Report) at 146 ("I served on various committees and task groups, e.g., ACA, CDCR employee discipline, security audits, and ADA: I possess a good understanding of Adult Correctional Institution (ACI) Standards Manual, Standards Supplement, and applicable parts/sections containing over 500 ACA Standards. I maintained positive working relationships with ACA national headquarters management. For internal CDCR ACA audits and related processes, and in preparation of ACA accreditation audits by Commission Visiting Committee, I managed the CDCR OACC ACA audit

relationship between the ACA and the ADA, Wells explains that ACA audits involved standards related to “prisoner access to programs, services, and activities [like] ADA/Disability program (including disability identification/verification, tracking system, prisoner request for accommodations/modifications process, effective communication, reasonable accommodations, auxiliary aids and services, health care appliances/assistive devices/durable medical equipment, medical supplies, assistance with daily living, etc.), [and] access to health care (medical/mental health/dental).”⁷ Wells CV (attached to Wells Report) at 153.

And at his deposition, Wells identified ACA standards as a source for what he deems “national best practices” and “national, state, county, and community standard levels” for determining a “constitutionally sound (including mental health) delivery system”:

Q In Paragraph 34 of your opening report, you wrote, quote, “Prisons and jail slash detention facility systems must have a constitutionally sound health care, open paren, including mental health, close paren, delivery system, one that is in keeping with national best practices and that delivers health care minimally at a community standard level,” end quote.

team, monitored all compliance activities including ACA Standard file folders (containing protocols, process indicator documentation), and monitored plans of action, requests for discretionary compliance, requests for waivers, and internal corrective action plans.”).

⁷ Wells’ own words in full: “Likewise, I provided managerial oversight over CDCR internal American Correctional Association (ACA) preparation audits. The ACA audits consisted of over 500 ACA standards covering most major aspects of prison operations, including custody and health care policies/procedures, use-of-force, staff training, staff post orders, staffing ratios, staff accountability, management operations (and numerous others), and prisoner access to programs, services, and activities, e.g., including but not limited to: Intake/Reception; classification, prisoner Orientation, housing, hygiene, ADA/Disability program (including disability identification/verification, tracking system, prisoner request for accommodations/modifications process, effective communication, reasonable accommodations, auxiliary aids and services, health care appliances/assistive devices/durable medical equipment, medical supplies, assistance with daily living, etc.), access to health care (medical/mental health/dental), restrictive housing, yard/dayroom/recreation (out-of-cell time), work assignments, education (academic and vocations), reentry services, self-help programs, prisoner message request process, religious services, searches, grievance process, prisoner disciplinary process, access to law and recreational libraries, Prison Rape Elimination Act (PREA)/Zero Tolerance Sexual Abuse, and overall conditions of confinement, etc.).” Wells CV (attached to Wells Report) at 153.

A Correct.

Q National best practices established by who?

A. I've done reviews, not from a clinical perspective, but from a non-clinical and access perspective where we rated, I guess, *ACA standards* against NCCHC standards. Of course, there are -- you know, an agency's own respective policies, procedures, et cetera. So just through my experiences and in understanding and in dealing in the past with NCCH standards *ACA standards* and other standards that - - you know, *it falls under, you know, best practice*, what I'm used to auditing based on those standards, if that makes sense.

Q. I think I understand. And so I guess a follow-up question is you just commented on the sources for national best practices. What about the sources for community standard levels, the community standard levels established by who, the same groups you just mentioned or different one?

A. The same. The same. It can be local. It could be state, county, national as well.

Wells Dep. at 10:17-11:19 (emphasis added).

Q. . . . In Paragraph 37 of your opening report, you mention several examples of what you again refer to as best practices. Now, on Paragraph 37, what is the source for these best practices?

A. This is --

Q. Is this the same sources we've been talking about, or is this something different?

A. I mean, try to answer this the right way. I have over 30 years working for a specific department and years -- numerous years, almost a decade or so, doing consulting work. So I've conducted audits, not just on ADA, it's primarily ADA, but conditions of confinement in multiple areas, *ACA audits*, combined peer review audits, touching most aspects of prison operations. So this is years of monitoring different states, different states' facilities, county facilitates or agencies, even private -- county, state, private. So it's -- it's accumulation of -- based on standards, based on policies at numerous jurisdictions, what I've seen, what I've audited, what is common, what you commonly expect or see -- or expect is probably a better way to put it, in this area.

Wells Dep. at 15:25-16:23 (emphasis added).

Indeed, Wells's own report asserted that "VDOC's ADA training does not meet standards for prison staff," specifically mentioning "ACA training standards," notwithstanding that the

ACA audited and certified the particular VDOC prison facility. Nonetheless, he confirmed that he was criticizing VDOC for purportedly failing to meet ACA standards:

Q. [Your report] says, “VDOC’s ADA training does not meet standards for prison staff.” And I was just wondering what standards did you mean?

A. I may have used -- probably could have used better terminology. Uhm, acceptable -- acceptable training curriculum practices. I mean, there are standards. There’s NCCHC training standards. *There’s ACA training standards.* There are standards, but trainings, it needs to be effective. So I don’t know if the standards is probably -- maybe that wasn’t the right -- the best terminology I used...

Wells Dep. at 66:19-67:5 (emphasis added).

Vare and Wells agree that ACA standards are a source for “best practices” and are relevant to assessing ADA compliance. Plaintiffs fail to square both experts’ shared reliance on the ACA with their claim that Vare’s methodology is unreliable because it draws from Vare’s review of the ACA accreditation process.

b. That Plaintiffs Purport to Identify Flawed Facts and Data in Vare’s Analysis Does Not Warrant Exclusion; These Issues Go to Weight, Not Admissibility.

Plaintiffs argue that Vare’s opinions are unreliable because he did not properly account for all the factors and variables that Plaintiffs contend are relevant. Plaintiffs identify the following to be considerations that Vare “should have” considered:

- VDOC did not have an ADA-specific training program until 2016. Pl’s. Mem. at 22.
- Two VDOC employees do not remember ever attending an ADA training program, before or after 2016. *Id.* at 23.
- One VDOC employee has not attended an ADA training program in several years. *Id.*
- Plaintiff’s (disputed) assertion that “VDOC employees have come away from the training program without an understanding of their obligations under the ADA.” *Id.*
- As to Vare’s opinion that Plaintiffs posed a considerable direct safety and security threat, Plaintiffs contend that Vare should have considered whether Plaintiffs posed “current and/or

recent security risks” and any “additional risks that Plaintiffs might pose were they to receive certain accommodations.” *Id.* at 18.

- As to Vare’s opinion that the additional access advocated by Wells is associated with potentially tremendous additional cost and risk, Plaintiffs contend that Vare should have specifically identified the additional access programs he was evaluating, explained why this additional access posed a safety concern, considered a “budget for ROSP or VDOC,” facts about the “costs associated with any modification,” “information about how those costs compare to the costs of prison programs generally,” and how to quantify whether a cost is “tremendous.” *Id.* at 20-21.

However, VDOC disputes that these facts are relevant. That Vare weighed a different set of facts or used methodology different from what Plaintiffs would devise to reach his ultimate conclusions does not warrant exclusion. Here, Vare’s methodology relied on his experience in prison administration. He applied his experience evaluating inmate security risk to reach his conclusion that Plaintiffs posed a considerable direct safety and security threat. Vare also applied his knowledge of high-security, maximum custody prisons similar to ROSP to evaluate the costs that ROSP would face if it were to implement Wells’s proposed changes to the current Step-Down Program. Again, it is proper for an expert to apply his knowledge and experience to the facts of the case, to the extent doing so would be helpful to the factfinder.

Even assuming Vare failed to consider all facts that Plaintiffs deemed relevant, exclusion is not the proper remedy. Rather, arguments related to an expert’s failure to consider certain factors or variables go to weight rather than admissibility.⁸ *See Alaska Rent-A-Car, Inc. v. Avis Budget Grp., Inc.*, 738 F.3d 960, 969 (9th Cir. 2013) (An opinion is not excludable “merely because [it is]

⁸ Plaintiffs’ citations to the contrary involve medical and scientific standards. *See Perkins v. United States*, 626 F. Supp. 2d 587, 592 (E.D. Va. 2009) (medical diagnoses); *Sanchez v. Bos. Sci. Corp.*, No. 2:12-CV-05762, 2014 WL 4851989, at *4 (S.D.W. Va. Sept. 29, 2014) (defects of polypropylene mid-urethral slings). The experts in these cases offered opinions that were not tethered to black-letter medical standards and published testing protocols. In contrast, this case does not involve an express ADA regulation or other governing standard, so the bright-line standards at play in Plaintiffs’ cited cases are inapposite here.

impeachable.”). “After an expert establishes admissibility to the judge’s satisfaction, challenges that go to the weight of the evidence are within the province of a fact finder.” *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co.*, 752 F.3d. 807, 814 (9th Cir. 2014). While “unreliable nonsense opinions” are inadmissible, a judge should “not exclude opinions merely because they are impeachable,” as “[t]he district court is not tasked with deciding whether the expert is right or wrong, just whether his testimony has substance such that it would be helpful” to the factfinder. *Alaska Rent-A-Car, Inc.*, 738 F.3d at 969-70. “[T]he identification of flawed data or facts relied upon by an expert is precisely the role of cross-examination.” *McGarity v. FM Carriers Inc.*, No. CV410-130, 2012 WL 1028593, at *7 (S.D. Ga. Mar. 26, 2012) (citing *Daubert*, 509 U.S. at 596; *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd*, 326 F.3d at 1333, 1345-46 (11th Cir. 2003)); see also *Grant Thornton, LLP v. F.D.I.C.*, No. CIV.A. 1:00-0655, 2004 WL 6033093, at *1 (S.D.W. Va. May 6, 2004).

c. Plaintiffs’ Complaints About Vare’s Costs Opinions Lack Merit And Should Be Rejected.

Plaintiffs argue that “Mr. Vare claims that Defendants are not required to make *any changes* to the Step-Down Program because of the ‘potentially tremendous additional cost’ of implementing any such changes.” Pl’s. Mem. at 20 (emphasis added). But Vare did not make this claim. What Vare says is that adopting *certain recommendations* proposed by Plaintiffs’ expert, Wells, would be “extremely onerous,” would require “extensive modifications” and would involve “tremendous cost[s].”

In particular, Wells opined that because VDOC does not have a “comprehensive real-time network tracking system” to track ADA “disabilities, ADA accommodation needs, ADA accommodations provided (e.g., as related to effective communication, disciplinary and other due process events, health care, disability identification, intake, orientation, ADA coordinator contacts),” VDOC does not offer “an effective incarcerated person disability program.” See Wells

Report at ¶¶ 59, 109-112, 118-120, 201, 205, 207-208, 212, 223. Yet Wells admitted at deposition that the “comprehensive real-time network tracking system” he faults VDOC for not offering *is not legally required*. Wells Dep. at 58:1-10.

Vare disagreed with Wells, correctly noting “[t]here is no requirement in the ADA or related regulations to create [a system to] identify and track people with disabilities on a systemwide basis.” *See* Vare Expert Report at 89-90 (adding that requiring VDOC to purchase and implement such a system would be “extremely onerous”). That Wells’s “comprehensive real-time network tracking system” would be “extremely onerous” and would require additional costs are self-evident. Moreover, that Wells believes that such a system, while not legally required, is somehow needed for an “incarcerated person disability program” to be “effective,” and that Vare disagrees and believes procuring and installing such a system would be “extremely onerous” and “tremendously costly,” is not a valid reason to exclude Vare’s opinion.

The disagreements between Vare and Wells also arise from the fact that Wells opined repeatedly that certain unnamed inmates with alleged mental health impairments were not given unspecified accommodations they allegedly needed to progress through the VDOC Step-Down Program and return to the general population. *See* Wells Report at ¶¶ 15, 182, 189-190; *see also* Wells Dep. at 76 (discussing the possibility of relocating inmates to “safe locations” for instructional assistance in a “safe, relatively private, yet secure environment”). Vare responded to Wells by pointing out the undue burden and direct threat concerns associated with granting accommodations that would permit inmates who had committed violent crimes in prison with opportunities to harm others. Vare Expert Report at 82 (“[C]onsidering the direct safety and security threats that these individuals posed to other inmates and prison staff, extensive modifications to current safety and security protocols would be required, and potentially

tremendous additional cost and risk, to allow the additional access to programs Mr. Wells appears to advocate.”).⁹ That Wells believes that some unspecified accommodations may need to be provided to inmates, and that, contrastingly, Vare believes undue burden costs and direct threat risks must be assessed when considering whether to grant those unspecified accommodations, is no reason to exclude Vare’s testimony.¹⁰

Lastly, Plaintiffs also argue that Vare’s opinion should be excluded because he has not quantified the “cost” associated with modifications to the Step-Down Program about which he expresses concern. This argument should be rejected. Despite engaging with Vare over a full-day deposition, Plaintiffs’ counsel never asked Vare even one question about “modifications,” “costs,” “undue burden,” or “fundamental alteration.” Even more telling, Plaintiffs’ counsel failed to ask about these topics even after Vare voluntarily disclosed that he researched the cost of “ADA-related facility upgrades” at prisons Wells identified at his deposition, and he reviewed “budget documents” that “specifically provided actual funding information related to those projects.” *See* Vare Dep. at 46:14-22. Plaintiffs cannot fault Vare for their strategic decision to forego asking questions about modifications and costs.¹¹

⁹ Wells does not truly disagree with Vare on this point. He admitted at deposition that direct safety and security risks are “always of paramount concern” and “must be reasonably considered” when assessing accommodations requested by inmates. *See* Wells Dep. at 83, 85-86; *see also* Wells Dep at 90-91 (“Obviously it’s a case-by-case basis . . . and would depend on the accommodation and the person with respect to direct safety threat.”).

¹⁰ This issue is largely collateral. Regardless of Wells’s opinions that it may be possible to relocate inmates to “safe locations” for instructional assistance in a “safe, relatively private, yet secure environment,” there is no evidence that any Plaintiff actually requested this accommodation (or any other accommodation) to progress through the VDOC Step-Down Program.

¹¹ To the extent Plaintiffs assert that Vare cannot provide “an educated opinion about the costliness of certain changes to the Step-Down Program” because he did not review budgets for ROSP or VDOC, or compare ROSP or VDOC budgets to budgets for prisons Wells identified –such arguments go to the weight, not the admissibility, of Vare’s testimony.

d. Plaintiffs' Complaints About Vare's On-Site Visit To VDOC Lack Merit And Should Be Rejected.

Plaintiffs' complaints that Vare's opinions should be excluded because he "remembers very little about his trip to ROSP" (Pls.' Mem. at 6) lack merit and should be rejected. As detailed above, Plaintiffs mischaracterize Vare's testimony.

At his deposition, Vare repeatedly was asked about who from his ROSP visit informed him about particular facts noted in his Report; each time, Vare responded that it was one of the individuals he identified in his Report as having met at ROSP. *See, e.g.*, Vare Dep. at 254:12-255:5; 256:13-257:6; *see also* Section II(B) (detailing Plaintiffs' overstated complaints about Vare's recall of details about the site visit, and identifying Vare's conversations with VDOC staff members).

Vare's opinion and testimony on his visit reflects an accurate and detailed description of events that is more than sufficient. Plaintiffs' arguments to the contrary lack merit, go to the weight, not the admissibility, of Vare's testimony, and should be rejected. *See id.*

Similarly, Plaintiffs' complaints that Vare's testimony should be excluded because Vare discarded his brief preliminary notes lack merit and should be rejected. As discussed above, the substance of Vare's notes was captured in his Report. Vare Dep. at 259:22-260:2 ("Everything that was in my notes got copied into the body of this report. There was nothing left out[.]"); *see also id.* at 240:22-241:6 ("I copied the notes down into my narrative section [of the Report]"); 241:11-18 ("It's in the report."); 243:1-3 ("It's my handwritten notes. I copies those handwritten notes into typed notes [in the Report]. There's no difference, as far as I can tell."); 243:6-14 ("I used the names and locations to put that into the narrative of the report, and then I filled it in with all the information that I had in my memory [from the site visit].").

2. Vare's Opinions and Testimony Are Relevant and Would Help the Jury.

Among other opinions summarized in Vare's expert disclosures and accompanying reports, VDOC will offer Vare to testify on the following issues to help the factfinder assess this case:

Opinion 1. Vare will explain the particulars of ACA accreditation, "the importance of ACA accreditation as it applied to VADOC's operations," and the significance behind the fact that "Red Onion State Prison is ACA-accredited and has been fully inspected and provided with the accreditation for over 12 years." Vare Expert Report at 76. Vare testified that ACA accreditation is the "gold standard that agencies can achieve." Vare Dep. at 75:3-9. His opinion will help assess VDOC's policies and the reasonableness of any proposed accommodation, whether VDOC's "intake procedures were insufficient to identify people with disabilities," whether VDOC staff was "adequately trained in the requirements of the ADA or VADOC's own ADA-related policies," and whether VDOC's grievance procedure "was inadequate to fulfill the ADA's requirement that public entities provide a meaningful complaint process that provides for a prompt and equitable resolution to ADA-related complaints." Vare Expert Report at 86, 90, 92

Opinion 2. "The [mental health] classification system used by VADOC is similar to that used in many other corrections or jail institutions that [Vare has] visited and/or worked in and uses an objective classification process that is common in most jails and prisons in the United States." *Id.* at 16. Vare can explain VDOC's classification system and provide context as to how that system compares to other comparable institutions. Moreover, insofar as Wells's report assumes all of the named Plaintiffs had qualifying disabilities, Vare's expert report presents the counterfactual: it is possible that *none* of the named Plaintiffs had qualifying disabilities, which is the conclusion he draws from the Plaintiffs' insitutional records. This factual dispute is not grounds for exclusion,

and on the contrary, presenting competing factual scenarios for the jury to weigh will be helpful in deciding whose expert testimony to credit.

Opinion 3. To the extent the idea behind “high-security prisons was to hold the most violent and disruptive inmates in single-cell confinement separate from the general population to enhance safety and security,” Vare will opine on whether Plaintiffs “posed a considerable direct safety and security threat based upon their history of violent behavior and the severity of dangerous and aggressive actions while incarcerated which justified their placements into high-security housing.” *Id.* at 72, 82. Vare’s years-long experience in corrections will be helpful to assess whether Plaintiffs were denied meaningful access to the Step-Down Program, in view of their (largely successful) progress through the program.

Vare also opined that “allow[ing] the additional access to programs Mr. Wells appears to advocate” would require “extensive modifications to current safety and security protocols” and “potentially tremendous additional cost and risk.” *Id.* at 82. As he explained, “stating the obvious, extrapolating similar concerns about direct safety and security threats, plus additional cost, and risk, to allow a class-wide group of ROSP inmates the additional access to programs Mr. Wells appears to advocate would make the threats, costs, and risks far greater.” *Id.* Vare’s testimony will help to assess whether any reasonable accommodations exist, or whether the proposed accommodations are so fundamental or substantial that accommodation would not be reasonable.

Opinion 4. With an eye to best practices and his years-long experience in corrections, Vare will put into context VDOC’s policies, including VDOC’s intake process for identifying and classifying individuals with disabilities. Vare opined: “I find that the VADOC and ROSP had adequate intake procedures that were sufficient to identify persons with disabilities during the initial screening and classification process. Individuals being placed in Restorative Housing were

provided with orientation, and interacted with staff who provided them with their expectations and goals. Individuals who had any form of disability would have been screened and identified during the intake process.” *Id.* at 89. His opinion and testimony on his review of the ACA audits, relevant VDOC policies, and his site visit and interviews with VDOC staff will be helpful to assess whether VDOC’s intake process adversely affected individuals with disabilities.

Opinion 5. With an eye to best practices and his years-long experience in corrections, Vare will put into context VDOC’s policies, including VDOC’s procedures for identifying and tracking individuals with disabilities. Vare opined: “There is no mandate that I am aware of which requires that VADOC track the hundreds of interactions that staff has with incarcerated persons to provide adequate accommodations to accommodate disabilities under the ADA. I do not know of any agency that follows such a mandate unless they have been placed under a consent decree for having a pattern of failing to provide appropriate care. VADOC is not such an agency.” *Id.* at 89. His opinion and testimony on his review of the ACA audits, relevant VDOC policies, and his site visit and interviews with VDOC staff will be helpful to assess whether VDOC’s intake process and process for classifying individuals with mental health disabilities.

Opinion 6. With an eye to best practices and his years-long experience in corrections, Vare will put into context VDOC’s policies, including how VDOC staff is trained. Vare reviewed the ACA audits, and “[from] my tour of the ROSP facility and interviews with staff, I learned that every single employee working at ROSP, including uniform and non-uniformed staff, was trained in ADA requirements.” *Id.* at 91-92. He therefore opined: “Mr. Wells’ assertion that VADOC’s staff is not adequately trained in the requirements of the ADA or VADOC’s own ADA-related policies is incorrect.” *Id.* at 90. Vare’s opinion and testimony on his review of the ACA audits,

relevant VDOC policies, and his site visit and interviews with VDOC staff will be helpful to assess whether training of VDOC staff on ADA issues was adequate.

Opinion 7. With an eye to best practices and his years-long experience in corrections, Vare will put into context VDOC's policies, including VDOC's grievance procedure. He opined: "I found that the ROSP had an adequate level of grievance management and accountability. Inmates were able to submit emergency grievances at any time and such grievances were handled daily. Emergency grievances related to a medical issue would be routed to the medical department for an emergency response. Inmates in Level S were able to file grievances by being escorted by officers down to the grievance box where they could drop their grievance forms. ROSP had a facility grievance coordinator who worked Monday through Friday and personally went into each of the units five days a week to collect inmate grievances." *Id.* at 92. Vare's opinion and testimony on his review of the ACA audits, relevant VDOC policies, and his site visit and interviews with VDOC staff will be helpful to assess whether VDOC's grievance procedure was adequate.

Bottom line: VDOC will offer Vare to opine on best practices in a highly specialized industry. This will help the jury assess the sufficiency of VDOC's policies and procedures under the ADA and the Rehabilitation Act. Vare's expert testimony meets the liberal standard of Rule 702. Admissibility is presumptively proper, and exclusion—the exception to this rule—does not apply here.

V. CONCLUSION

For the foregoing reasons, Plaintiffs' Motion should be denied.

October 5, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2023 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

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