

**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.

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

**DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO
STRIKE THE DESIGNATION OF DR. TAMA CELI**

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The Court should deny Plaintiffs' motion to strike the expert disclosure of Tama Celi, Ph.D., because Plaintiffs have not identified any valid basis to exclude the testimony of the single person with the greatest knowledge of, and most experience with, the inmate data at the heart of this action. She is also the most qualified person to testify regarding the inmate data. In short, Dr. Celi's testimony will be incredibly helpful, and her exclusion would only hamstring the Court.

During discovery, Plaintiffs requested and received voluminous data regarding Virginia Department of Corrections ("VDOC") inmates assigned to Security Level S and Security Level 6, and more specifically assigned to the Step-Down Program. Plaintiffs intend to rely on that data to characterize, among other things, an inmate's typical length of stay in the Step-Down Program. The data produced to Plaintiffs was exported into an Excel spreadsheet from VDOC's CORIS database, which is specialized enterprise management software used by corrections departments.

Dr. Celi uses the raw data maintained in CORIS on a daily basis. She oversees the department responsible for statistically analyzing the data, assessing programs and policy changes, and ultimately reporting that information to the General Assembly and other stakeholders. Dr. Celi has a deep, unassailable knowledge of the inmate data maintained by VDOC, produced to Plaintiffs, and relied on by Plaintiffs' experts. That is knowledge she has acquired not for purposes of this litigation, but rather over the past two decades in her work for VDOC, analyzing the data on a routine basis. Dr. Celi's familiarity with the data supports her critique of the statistical analysis performed by two of Plaintiffs' experts—one used by Plaintiffs in class certification proceedings, and then a substitute who provided a report for Plaintiffs in the merits phase.

Dr. Celi's opinions are a known quantity to Plaintiffs. First, she provided a declaration in August 2022 rebutting the class certification opinions of Plaintiffs' original expert witness on analysis of VDOC's inmate data, Peter Graham. Second, she testified on behalf of VDOC as a

Rule 30(b)(6) fact witness in March 2023 about the inmate data at issue. Third, she provided an Expert Disclosure that enumerated her expert opinions rebutting those of Plaintiffs' replacement expert witness on analysis of VDOC's inmate data, Russell Molter. Fourth, she sat for an expert deposition in August 2023. Between her class-certification rebuttal declaration, her Expert Disclosure, her fact-witness deposition, and her expert-witness deposition, Dr. Celi has offered up her testimony for greater scrutiny than any other witness in this case.

Yet Plaintiffs ask the Court to ignore Dr. Celi's expert opinions. They argue that Defendants should have served an expert report for Dr. Celi under Rule 26(a)(2)(B) rather than an expert designation under Rule 26(a)(2)(C). That is incorrect, because Dr. Celi was not "retained or specially employed" to offer expert testimony in this case. Instead, she is a hybrid fact-expert witness. She is permitted to offer expert opinion testimony based on the knowledge she gained through involvement with the underlying facts.

Even if Plaintiffs are right that Defendants should have served an expert *report* rather than an expert *designation* for Dr. Celi, they are wrong that the Court should exclude her opinion testimony in its entirety. Defendants' compliance with Rule 26(a)(2)(C) rather than Rule 26(a)(2)(B) was "substantially justified or harmless" under the binding Fourth Circuit precedent that goes unmentioned in Plaintiffs' motion. Under that precedent, the Plaintiff's motion to exclude Dr. Celi's expert opinion testimony should be denied.

I. FACTS

A. Dr. Celi's Background and Qualifications

Plaintiffs do not dispute that Dr. Celi is qualified to offer the opinions detailed in her Expert Disclosure. She has a bachelor's degree in economics, a master's degree in public policy from William & Mary, and a Ph.D. in public policy from Virginia Commonwealth University. Defendants' Supplemental Expert Disclosure of Dr. Tama S. Celi ("Supplemental Expert

Disclosure”) at ¶¶ 1-3, attached as Exhibit A.¹ While at VCU, she was an Advanced Research Methods Scholar in the Center for Advancement of Research Methods and Analysis. *Id.* at ¶ 3.

Since 1999, Dr. Celi has worked for the Commonwealth of Virginia in various capacities, all of which required her to analyze state data regarding criminal offenders and inmates, and to develop statistical methodologies and assessment tools to inform Virginia’s policy decisions. From 1999 to 2005, she served the Virginia Criminal Sentencing Commission, and since 2005 she has worked for the Virginia Department of Corrections. *Id.* at ¶¶ 4-5. Her first role at VDOC required her to develop VDOC’s research agenda and manage research projects and staff. *Id.* at ¶ 4. From 2010 to 2016, she was the Statistical Analysis and Forecast Manager, where she oversaw a team of statistical analysts using external VDOC data and data from CORIS. *Id.* at ¶ 5.

Today, Dr. Celi is the Research Director, Policy and Planning at VDOC. *Id.* at ¶ 7. Among other responsibilities, she is the Unit Head over Statistical Analysis and Forecast, Program Fidelity and Quality Assurance, and Special Projects and Evaluation Units. *Id.* In the ordinary course of business, she is tasked with analyzing the inmate data VDOC maintains in its CORIS database, reporting to the Commonwealth and the General Assembly on the same issues raised in this case. *E.g.*, Transcript of March 23, 2023 30(b)(6) Deposition of Tama Susan Celi, Ph.D. (“Celi Dep. I”), at 91:14-92:9, relevant portions attached as Exhibit B. Dr. Celi not only must analyze the inmate data but explain to stakeholders what that data means—including, for instance, the use of measures of central tendency (like mean and median) to describe the experience of inmates, and the effect of policy changes on different facets of VDOC’s system.

¹ Defendants served the Supplemental Expert Disclosure on July 21, 2023, after Plaintiffs’ counsel complained about the purported insufficiency of the original Expert Disclosure regarding Dr. Celi. Defendants believe the original Expert Disclosure was sufficient but served the Supplemental Expert Disclosure to alleviate any doubt.

B. The Inmate Data at Issue

In this case, Plaintiffs requested in discovery some of the data that Dr. Celi analyzes on a daily basis. Dr. Celi uses that information, for instance, to “forecast for state-responsible bed needs” in the prison system, *id.* at 22:11-13, determine legislative impacts on prison populations, *id.* at 22:4-8, and analyze other metrics, including length of inmate stays, *id.* at 91:14-92:9.

With Dr. Celi’s assistance, Defendants exported that information from CORIS, which is specialized software used by corrections departments, into an Excel spreadsheet, and produced it to Plaintiffs.² *Id.* at 24:7-16. VDOC could not produce the data to Plaintiffs in native format because CORIS comprises “about 1,900 relational data tables,” with each data table comparable to an Excel sheet. *Id.* at 28:6-21. To accommodate Plaintiffs’ request, Dr. Celi had “to flatten” the data, “transform[ing] a very complicated data system into a single spreadsheet for [Plaintiffs].” *Id.* at 45:17, 46:10-13. The spreadsheet Plaintiffs requested was “created solely for the purposes of this litigation,” *id.* at 24:17-19, but the data *in* the spreadsheet certainly was not.

C. Dr. Celi’s Declaration and Fact-Witness Deposition

In support of their motion for class certification, Plaintiffs relied on a declaration from Peter Graham, a “data analyst” for the State of Washington. Graham purported to calculate the “average” length of time inmates spent at various security levels in VDOC custody. But Graham’s calculations were rife with errors because he misunderstood much of the information in the Inmate Data Spreadsheet.

Dr. Celi prepared a declaration regarding the data and fields in the Inmate Data Spreadsheet, and Defendants attached the declaration to their opposition to the motion for class

² In their motion, Plaintiffs refer to this document as the “Inmate Data Spreadsheet.” To avoid confusion, Defendants adopt the same term.

certification.³ *See* Celi Declaration, attached as Exhibit C. Dr. Celi’s declaration did not mention Graham by name. Graham submitted a second declaration in the class certification briefing in which he attempted to address deficiencies in his original declaration, but after that briefing closed, Plaintiffs did not designate him as an expert in the merits phase of the case.

As fact discovery proceeded, Plaintiffs served a 30(b)(6) deposition notice on VDOC. Topic 18 for the deposition was “The origin, variables, and data elements of, and systems and sources used to produce, and any reports related to the data provided in VADOC-00037970 [the Inmate Data Spreadsheet], including but not limited to the information provided in the declaration of Tama S. Celi at ECF No. 194-2.” Celi Dep. I at 14:7-14 (quoting Deposition Notice). Unsurprisingly, Dr. Celi served as VDOC’s corporate representative on that topic.

During the corporate representative deposition, Plaintiffs’ counsel questioned Dr. Celi as a fact witness about the topic that would eventually become the subject of her expert testimony: the statistical analysis of VDOC’s inmate data, including how to calculate the mean or median length of stay at various levels of security. *E.g., id.* at 38:14-16; 39:7-15; 91:22-92:6; 92:19-93:15; 93:16-94:10; 95:3-22. Plaintiffs’ counsel also specifically questioned Dr. Celi about her “calculat[ion] [of] the median or average time an inmate stays at Level S or Level 6” in the ordinary course of her work for VDOC. *Id.* at 91:22-92:2. Dr. Celi explained that she believed that she had been responsible for that kind of analysis, in preparing reports for the General Assembly. *Id.* at 93:3-94:21. That analysis is based on the data in CORIS—the data produced to Plaintiffs’ counsel, and the data that Mr. Molter analyzed. *Id.* at 92:7-9. Dr. Celi also explained that to provide more precise answers regarding calculations of mean or median lengths of stay using CORIS data, she

³ Plaintiffs did not object to Dr. Celi’s class certification declaration.

would need to review the work done in preparing the General Assembly reports. *E.g., id.* at 92:3-6.

D. Dr. Celi’s Rebuttal Expert Disclosure and Expert-Witness Deposition

In the merits phase, Plaintiffs chose a new witness to analyze the inmate data from CORIS: Russell Molter. Like Graham, Mr. Molter purported to calculate the average—that is, mean—duration of inmates’ stays in various levels of security and steps within the Step-Down Program. Mr. Molter also calculated things like the aggregate number of days all Constitutional Violations class members had spent at various levels of confinement.

Defendants disclosed Dr. Celi to offer expert testimony rebutting Mr. Molter’s opinions about the inmate data housed in CORIS and the best methods for analyzing it. In compliance with Rule 26(a)(2)(C), Dr. Celi’s Expert Disclosure set out her qualifications and then enumerated the subjects of her anticipated testimony. Her anticipated opinions include:

- The different measures of central tendency—mean, median and mode—and the circumstances in which each is the best measure of central tendency;
- Mr. Molter’s reliance on mean as the measure of central tendency despite the fact that the data at issue is highly skewed, a circumstance in which median is generally accepted as the best measure of central tendency;⁴
- The effect of Mr. Molter’s reliance on mean rather than median—specifically, the fact that in every case, Mr. Molter’s use of mean rather than median inflates the “average” duration of an inmate’s stay at a particular level in the Step-Down Program;
- The absence of any statistical basis for reporting the aggregate number of days that all class members were in the Step-Down Program or various levels of the program; and

⁴ “[M]edian probability [is] the more appropriate informative measure of the central tendency in the data [where] the mean distribution results were non-normal and heavily skewed, as indicated by markedly different mean and median values,” because the “median is less influenced by statistical outliers.” *Alaska Wildlife Alliance v. U.S. Fish & Wildlife Serv.*, 2023 WL 2986365, at *14 (D. Alaska Feb. 6, 2023) (cleaned up).

- Inconsistencies in Mr. Molter’s reported methodology and the results in his report.

Supplemental Expert Disclosure at 3-4.

Dr. Celi’s disclosure detailed the basis for her opinion that median is a better measure than mean of the central tendency of skewed data—like duration of stay in the Step-Down Program. *Id.* at 3. The class’s length of stay does not follow a perfect bell curve. Instead, most inmates are clustered within a range, but a few outliers remain in the Step-Down Program for unusually long periods of time. The result is a skewed distribution. Dr. Celi included in her disclosure the formula and data tables showing calculated medians and skews of different inmate subpopulations addressed by Mr. Molter in his report. *Id.* at 4-6. Dr. Celi further explained the misleading effect of relying on mean rather than median to describe the length of stay of a “typical” inmate in the Step-Down Program. *Id.* at 6-7. Dr. Celi further identified specific inconsistencies in Mr. Molter’s analysis of the inmate data. *Id.* at 7-8.

In response to the Expert Disclosure, Mr. Molter authored a rebuttal report in which he reported median durations of inmate stays in various levels and in the Step-Down Program as a whole.

Dr. Celi sat for an expert deposition in this case on August 7, 2023. Plaintiffs’ counsel had the opportunity to question Dr. Celi on each of the opinions in her Supplemental Expert Disclosure. For instance, Dr. Celi further explained why median is a better measure of central tendency than mean for class members’ lengths of stay in the Step-Down Program. *See* Transcript of August 7, 2023 Expert Deposition of Tama Celi, Ph.D. (“Celi Dep. II”), relevant portions attached as Exhibit D, at 37:4-38:6. In a skewed distribution, the outlier values will pull the mean towards the skew, but the median will be less affected by the extreme values. *Id.* at 41:4-8. The degree of skew can be measured, and when the metric exceeds a certain value, the median tends to be the better

measure of central tendency for representing the data set.⁵ *Id.* at 49:9-50:1; 53:5-9 (“A SKEW with an absolute value greater than 1 indicates that the data is not normally distributed and that the median is a more appropriate measure of the central tendency for the population.”).

Plaintiffs’ counsel also deposed Dr. Celi about her critique of Mr. Molter’s work. To analyze the inmate data VDOC produced, Mr. Molter purported to “clean” the raw data, and then he wrote code in statistical software called R to analyze the data. *Id.* at 52:7-57:4. VDOC employees, at Dr. Celi’s direction, attempted to replicate Mr. Molter’s analysis using syntax—the equivalent of code—in SPSS, the statistical software used by VDOC. *Id.* at 57:13-17, 58:15-18. Dr. Celi was able to replicate most of Mr. Molter’s analysis, and identified some inconsistencies in Mr. Molter’s analysis. *Id.* at 81:1-85:17. Dr. Celi’s Expert Disclosure specifically identified those inconsistencies, and Plaintiffs’ counsel was able to question her about them.

Plaintiffs’ counsel requested that Defendants produce the SPSS syntax used to review Mr. Molter’s own analysis. *E.g., id.* at 69:20-70:11. Plaintiffs never explained their purported need for the syntax, and in fact Mr. Molter responded to Dr. Celi’s points without any apparent need for the information. (His response was, more or less, that he did the best he could and some errors are to be expected.)

II. LEGAL STANDARD

The Court has broad discretion to admit evidence, including expert testimony. *Timpson v. Anderson Cnty.*, 31 F.4th 238, 253 (4th Cir. 2022). That discretion extends to determining whether

⁵ The difference between median and mean could matter a great deal because this is a class action. The parties will dispute whether the typical class member is better represented by the median number of days in the Step-Down Program or the mean number of days. The median number of days will be closer to the experience of each class member—half of the class members will have been in the program for fewer days, and half will have been in the program for more days. In contrast, the mean number of days will overweight the experience of a handful of outlier inmates.

a party has complied with expert disclosure requirements under Rule 26(a)(2). If a party has not properly disclosed expert testimony under Rule 26(a), the Court may exclude the testimony, but should not if the non-disclosure was substantially justified or harmless. *See* Fed. R. Civ. P. 37(c)(1); *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 595–96 (4th Cir. 2003).

III. ARGUMENT

Plaintiffs ask the Court to strike Dr. Celi’s Expert Disclosure because, according to them, Defendants instead should have served an expert report under Rule 26(a)(2)(B). That is incorrect: as an employee who does not regularly provide expert testimony for VDOC, and who is both a percipient witness and an expert witness, Dr. Celi falls under Rule 26(a)(2)(C), and only the Expert Disclosure was required. Moreover, even if Plaintiffs are right about the rule, they are wrong about the remedy. Any violation by Defendants was substantially justified and harmless, so the Court should not strike the Expert Disclosure.

A. Defendants Were Not Required to Produce an Expert Report for Dr. Celi.

Parties can proffer expert opinion testimony through one of two channels: Rule 26(a)(2)(B) or Rule 26(a)(2)(C). Rule 26(a)(2)(B) applies to an expert witness “retained or specially employed to provide expert testimony in the case or one whose duties as the party’s employee regularly involve giving expert testimony.” Fed. R. Civ. P. 26(a)(2)(B). These experts must provide reports covering specific information. *Id.*

In contrast, experts who are outside of Rule 26(a)(2)(B) fall by default into the lesser requirements of Rule 26(a)(2)(C). These are the hybrid fact-expert witness, for whom a party must disclose only “(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify.” Fed. R. Civ. P. 26(a)(2)(C). “Hybrid witnesses—fact witnesses

with expertise that will inform their testimony—do not fall under Rule 26(a)(2)(B)’s purview.” *Timpson*, 31 F.4th at 253. They may “testify from the personal knowledge they gained on the job,” within “the scope of facts they learned and opinions they formed during the course of their project duties.” *Id.* (quoting *Indianapolis Airport Auth. v. Travelers Prop. Cas. Co. of Am.*, 849 F.3d 355, 371 (7th Cir. 2017) (internal quotations omitted).

1. Dr. Celi Is a Hybrid Witness Outside the Scope of Rule 26(a)(2)(B).

Dr. Celi is a classic example of a hybrid fact-expert witness who can offer expert opinion testimony without providing an expert report: an “employee[] of a party who do[es] not regularly provide expert testimony.” Fed. R. Civ. P. 26, comment to 2010 amendment. Dr. Celi has more personal knowledge than anyone connected with this case—and possibly anyone, period—regarding the CORIS data on class members. After all, she was deposed as a *fact* witness, serving as a corporate representative for VDOC, and her qualifications as an *expert* witness are undisputed: ergo, she is a hybrid witness.

Dr. Celi is outside the plain language of Rule 26(a)(2)(B). There are “two categories of experts from whom reports are required; one comprising non-employees of a party especially retained or employed for the particular case and one comprising employees of a party who regularly testify for the employer party.” *Navajo Nation v. Norris*, 189 F.R.D. 610, 612 (E.D. Wash. 1999). Dr. Celi is in neither category. First, she does not regularly provide expert testimony for VDOC; indeed, before her fact-witness deposition in this case, she had never been deposed before. *See* Celi Dep. Tran. I at 8:11-12. Second, she was not “retained or specially employed” by VDOC to offer this testimony. She is a long-term employee of VDOC, not someone retained or specially employed for purposes of this case.

Dr. Celi’s case is similar to *Equal Employment Opportunity Commission v. Huntington Ingalls, Inc.*, Case No. 4:17-cv-113, 2018 WL 6272891 (E.D. Va. Nov. 29, 2018). There, the

EEOC sued Huntington-Ingalls, alleging the shipyard violated the Americans with Disabilities Act by denying an applicant employment based on his inability to perform job tasks without hearing aids. *Id.* at *1. In expert discovery, the shipyard served Rule 26(a)(2)(C) disclosures for two employees who would testify regarding the shipyard's hearing test requirements, the risk the applicant would have posed to himself and others, and the safety concerns regarding any possible accommodations. *Id.* at **1-2. The plaintiff objected to the disclosures on the ground that these witnesses fell under Rule 26(a)(2)(B), arguing that they were not "hybrid" witnesses under Rule 26(a)(2)(C) because they had no direct involvement in the facts of the case. *Id.* at *4.

The district court rejected the plaintiff's argument and permitted the employee witnesses to offer expert opinion testimony under Rule 26(a)(2)(C). According to the Court, it did not matter that neither witness had met the applicant, nor that one of the witnesses had not yet even begun working at the shipyard when the applicant was rejected—it was enough that the witness "became aware of the minimum hearing standard through her employment" at the shipyard later on. *Id.* Based on those facts, the witnesses "were [not] retained or specially employed by Defendant to testify regarding matters related to the litigation." *Id.* That is exactly the result the Court should reach here: Dr. Celi was not retained for purposes of this case, and she was not employed for the purpose of offering an opinion in this case. Dr. Celi is outside the scope of Rule 26(a)(2)(B), and within the scope of Rule 26(a)(2)(C). As a result, nothing more than an expert disclosure was required for her.

2. Dr. Celi Was Not "Retained or Specially Employed" to Testify as an Expert.

Plaintiffs do not contend that Dr. Celi regularly provides expert testimony, and they do not contend she was "retained" to provide expert testimony in this case. But they argue that she reviewed some material specifically for purposes of this litigation and, thus, the Court should deem

her “specially employed” within the ambit of Rule 26(a)(2)(B). Plaintiffs’ Memorandum in Support of Plaintiffs’ Motion to Strike Defendants’ Disclosure and Supplemental Disclosure of Expert Testimony of Dr. Tama S. Celi (“Pls.’ Mem.”) at 8.

Plaintiffs misconstrue the term “specially employed.” Cases interpreting the phrase “retained or specially employed” in the context of Rule 26(b)(4) are instructive. In that context, Judge Warriner of the Eastern District of Virginia explained that a general employee who also provides expert assistance in a case is not “retained or specially employed” as an expert:

The Court believes that “specially employed” refers only to the manner by which the services of the expert are obtained; that is to say, that ***the expert is put on the payroll for the specific purpose of deriving facts and opinions for use in trial preparation or anticipated litigation.*** The distinction between “retained” and “specially employed” is the difference between hiring the expert as an independent contractor and hiring him as an employee *pro hac vice*.

Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 407 (E.D. Va. 1975) (emphasis added).⁶ In other words, a general employee does not become “specially employed” merely by providing expert advice or even serving as an expert witness for his or her employer.

That interpretation of the phrase “retained or specially employed” is also more consistent with the structure of Rule 26(a)(2)(B). If “specially employed” included a general employee who also provides expert testimony, it would subsume the term “one whose duties as the party’s employee regularly involve giving expert testimony.” The second half of the sentence would become redundant. The Court should construe the provision “so that effect is given to all its

⁶ In cases interpreting the phrase “retained or specially employed” in the context of Rule 26(b)(4), the interests of the parties are flipped: the employer more often argues that an employee-expert is “specially employed” for purposes of litigation, and thus shielded from discovery, while the opposing party argues that general employees are not “specially employed,” even when they assist their employer in litigation. But the Court should assume that the phrase has the same meaning under both subsection (a) and subsection (b) of Rule 26.

provisions, so that no part will be inoperative or superfluous, void or insignificant.” *Corley v. U.S.*, 556 U.S. 303, 314 (2009).

Plaintiffs ask the Court to adopt a crabbed view of hybrid witnesses, arguing that “where employees have no connection to the specific events underlying the case, or have reviewed information solely in preparation for litigation, they must produce expert reports.” Pls.’ Mem. at 8 (quoting *Nat’l R.R. Passenger Corp. v. Ry. Express, LLC*, 268 F.R.D. 211, 214 (D. Md. 2010)). But what Plaintiffs call the “majority view” has been rejected by multiple courts in favor of an approach that instead gives effect to the “plain language” of Rule 26(a)(2)(B). Employees may offer expert testimony without “prepar[ing] written expert reports” if “their duties [do] not involve their regularly giving expert testimony in court.” *Allstate Ins. Co. v. Nassiri*, 2011 WL 2975461, at *8 (D. Nev. July 21, 2011) (citing *Navajo Nation*, 189 F.R.D. at 612). The “majority view” that Plaintiffs advocate “simply rewrite[es] the rule.” *Id.* at *8. As the *Navajo Nation* court reasoned, “[t]hose who drafted FRCP 26(a)(2)(B) could simply have required reports for all employee-experts if that is what they had intended,” yet the cases Plaintiffs cite never “attempt to explain why they did not.” 189 F.R.D. at 612. The bottom line is that the Court “must apply the rule as it is written, not as it could have been or should have been written,” regardless of what Plaintiffs claim the “majority view is.” *Greenhaw v. City of Cedar Rapids*, 255 F.R.D. 484, 487 (N.D. Iowa 2009).

Additionally, the case on which Plaintiffs principally rely, *National Railroad Passenger Corp. v. Railway Express, LLC*, predates the amendment to Rule 26 in which the Rules Committee expressly clarified that Rule 26(a)(2)(C), not Rule 26(a)(2)(B), covers “employees of a party who do not regularly provide expert testimony.” Fed. R. Civ. P. 26, comment to 2010 amendment. Plaintiffs attempt to head off this point by stating that the amendment and comment are irrelevant

because “*National Railroad* interpreted the language of Rule 26(a)(2)(B)—not Rule 26(a)(2)(C).” Pls.’ Mem. at 8 n.1. But Plaintiffs cannot cabin interpretation of one provision of Rule 26(a)(2) away from another interlocking provision. It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.” *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). That principle is never more true than here, where Rule 26(a)(2)(B) and Rule 26(a)(2)(C) are two halves of a whole: the scope of one determines the scope of the other. It is simply not possible to determine the scope of Rule 26(a)(2)(B) without considering the scope of Rule 26(a)(2)(C), but that is the argument to which Plaintiffs are reduced.

Dr. Celi is a general employee of VDOC—she was not retained or specially employed for this case. Plaintiffs’ interpretation of the phrase “retained or specially employed” is wrong, and the Court should reject it.

3. Even Under Plaintiffs’ Interpretation of Rule 26(a)(2)(B), Dr. Celi Was Not Required to Provide a Report.

Even if the Court accepts Plaintiffs’ reading of the rule, Dr. Celi clearly falls outside of that interpretation: she has a *direct* connection to the facts underlying this case, and her review of the facts was not solely to provide expert testimony. After all, Plaintiffs deposed her as a fact witness—a corporate representative, no less—months before expert discovery.

Plaintiffs argue that Dr. Celi “has all the characteristics of a typical retained expert who has no familiarity with the underlying facts of this litigation.” Pls.’ Mem. at 11. They elaborate that “Dr. Celi’s opinions relate to and rely solely on the Inmate Data Spreadsheet, which she does not use in her day-to-day job.” *Id.* That mischaracterizes Dr. Celi’s opinions in this case.

Dr. Celi’s opinions relate to the data *in* the Inmate Data Spreadsheet, not the spreadsheet itself. Plaintiffs claim that Dr. Celi “consulted the data provided in the Inmate Data Spreadsheet

solely for purposes of this litigation,” *id.* at 12, but that is directly at odds with Dr. Celi’s extensive testimony regarding her use and analysis of the inmate data stored in CORIS. *See supra.* Dr. Celi has been immersed in this data for years. Similarly, Dr. Celi’s use of the inmate data has for years involved, among other things, determination of the best measures of central tendency, and the best ways to communicate to stakeholders the meaning of the data and what it represents. Plaintiffs’ contention that she has developed these opinions solely for the purpose of this case is contradicted by all of the testimony they elicited at her fact and expert depositions.

Dr. Celi “was not retained or specially employed for the purpose of offering expert testimony. Rather, [she] was ‘an actor with regard to the occurrences from which the tapestry of this lawsuit was woven.’” *Downey v. Bob’s Discount Furniture Holdings, Inc.*, 633 F.3d 1, 4 (1st Cir. 2011) (contractor exterminator outside the scope of Rule 26(a)(2)(B) (quoting *Gomez v. Rivera Rodriguez*, 344 F.3d 103, 112 (1st Cir. 2003))).

B. Even if Plaintiffs Were Correct a Report Was Required, the Court Should Permit Dr. Celi to Offer Her Opinion Testimony Alongside Her Anticipated Fact Testimony.

Rule 37(c) only mandates exclusion of evidence if the violation is not “substantially justified or . . . harmless.” Fed. R. Civ. P. 37(c). Plaintiffs never *mention*, let alone address, the Fourth Circuit’s test for determining whether a Rule 37(c) violation requires exclusion of evidence, or instead should be excused because it was justified or harmless. Application of that controlling Fourth Circuit precedent establishes that even if Defendants should have served a report rather than a disclosure, the purported violation does not warrant exclusion of Dr. Celi’s opinions.

The Fourth Circuit has identified five factors that are “helpful in determining whether a party’s nondisclosure of evidence was substantially justified or harmless.” *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d at 596–97. The factors are:

(1) the surprise to the party against whom the evidence would be offered; (2) the ability of that party to cure the surprise; (3) the extent to which allowing the evidence would disrupt the trial; (4) the importance of the evidence; and (5) the nondisclosing party's explanation for its failure to disclose the evidence.

Id. at 597. The Court is “not required to tick through each of the *Southern States* factors,” but instead should address each factor relevant to the case at hand. *Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014). Here, every *Southern States* factor weighs in Defendants' favor.

First, Dr. Celi's opinions are not a surprise to Plaintiffs. This is not a case in which an expert disclosed an opinion for the first time at trial, as in *Southern States*. 318 F.3d at 594. Defendants provided an expert disclosure in sufficient time not only for Plaintiffs to depose Dr. Celi about her opinions, but for Plaintiffs' own expert to draft a rebuttal report about Dr. Celi's opinions. In that regard, this case is more akin to *Stinnie v. Holcomb*, 3:16-cv-44, 2019 WL 12317721 (W.D. Va. May 23, 2019). In *Stinnie*, the plaintiffs' experts had testified about their opinions at a preliminary injunction hearing, but the plaintiffs subsequently failed to serve expert reports during expert discovery. *Id.* at *1. Judge Moon held that the witnesses' hearing testimony did not satisfy Rule 26(a)(2)(B)'s expert report requirement. *Id.* But Judge Moon declined to exclude their opinions because there was “little, if any surprise” to the defendants, given that the witnesses were “providing the same testimony they offered at the preliminary injunction hearing.” *Id.* at *2. The same is true here: Plaintiffs have deposed Dr. Celi about her opinions and about the facts of this case, on two separate occasions.

Second, to the extent any potential for surprise remains, it is easily cured. Any “surprise” here would be the difference between the information in Dr. Celi's expert disclosure, compared to the information in an expert report. Dr. Celi's opinions here are targeted on a handful of issues, and her Expert Disclosure and expert deposition covered them sufficiently.

Plaintiffs might argue that there is still a potential for surprise because Dr. Celi did not produce the syntax VDOC used when trying to replicate Mr. Molter's analysis. In fact, they ask the Court to order that Defendants be required to "[a]t a minimum . . . produce source code" underlying Dr. Celi's criticism of Mr. Molter. Pls.' Mem. at 13. Plaintiffs' argument about source code is a red herring. Dr. Celi and her VDOC team were attempting to replicate *Mr. Molter's* analysis. Plaintiffs already know (presumably) how Mr. Molter conducted his analysis, and they have Mr. Molter's source code. A request for source code replicating source code threatens the parties and the Court with a recursive spiral of requests about requests, and it misses the point of Dr. Celi's testimony.

Third, admitting Dr. Celi's testimony would not disrupt the trial. Dr. Celi has already been deposed twice. Trial is set for six months from now. That compares favorably to *Scott v. Holz-Her, U.S., Inc.*, Case No. 6:04-cv-68, 2007 WL 3171937 (W.D. Va. Oct. 26, 2007), in which the Court declined to exclude a late-disclosed expert opinion because "the trial date was almost four months away." *Id.* at *2. Even if the Court were to order Defendants to produce an expert report for Dr. Celi, any supplemental discovery could easily be completed before trial. Dr. Celi's opinions are narrow and do not affect the pending summary judgment motions. Moreover, Plaintiffs themselves have asked to pick new named plaintiffs, which would potentially require reopening *fact* discovery.

Fourth, the evidence is important to Defendants' rebuttal of Mr. Molter's opinions. The inmate data is complicated, as evidenced by Plaintiffs' need to employ two different experts and to depose Dr. Celi twice. Dr. Celi's testimony will aid the Court in understanding how the data is maintained and what the data means. As importantly, the Court should not allow Mr. Molter's opinions regarding VDOC's data to go rebutted.

Fifth, Defendants had a good-faith basis for serving an Expert Disclosure. Defendants relied on the plain language of Rule 26 and a significant body of case law to support their position that Dr. Celi need not provide an expert report. While good faith alone does not excuse a violation of Rule 26(a)'s disclosure obligations, *Southern States* recognizes its relevance in analyzing whether non-disclosure was "substantially justified." In *Southern States*, the non-disclosing party missed multiple opportunities to disclose the opinion at issue, or at least to take reasonable steps to avoid surprise to the other party at trial. *S. States Rack & Fixture*, 318 F.3d at 598.

In contrast, Defendants have been open with Plaintiffs regarding Dr. Celi's opinions and Defendants' basis for not serving an expert report. Had Defendants waited until trial to spring Dr. Celi's opinions during her fact-witness testimony about the inmate data, perhaps Plaintiffs would have a viable argument that the Court should exclude Dr. Celi's opinions. But those are not the facts before the Court. Defendants' position is substantially justified by the law and the facts. If the Court finds that there was nevertheless a violation, it was effectively harmless or easily cured. The Court should deny Plaintiffs' motion.

IV. CONCLUSION

For the reasons stated, this Court should deny Plaintiffs' Motion in its entirety.

October 5, 2023

Respectfully submitted,

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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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