IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA
Big Stone Gap Division

WILLIAM THORPE, *et al.*, Plaintiffs, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*, Defendants.	)	Case No. 2:20-cv-00007-JPJ-PMS

DEFENDANTS' REPLY IN SUPPORT OF MOTION, AND MEMORANDUM IN SUPPORT OF MOTION, TO EXCLUDE THE REPORT AND TESTIMONY OF PLAINTIFFS' PROPOSED EXPERT RICHARD WELLS

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VDOC's motion should be granted because Plaintiffs fail to disprove any of the multiple independent grounds for excluding Richard Wells's expert testimony.

Plaintiffs do not dispute that Wells is neither qualified to conduct statistical analysis nor to provide medical and psychological opinions. Instead, they argue that, to the extent Wells's Report discusses and engages with statistics and clinical issues, his foray into these areas is only meant to support and color Wells's perspective as an expert in the correctional space. But these arguments illustrate the exact reason Wells's statistical and psychological opinions—falling far afield of his area of expertise—must be disregarded. It is misleading for Plaintiffs to claim Wells's opinions do not engage critically with these highly-specialized areas, and it would be both inappropriate and confusing to admit them as expert evidence.

Wells's Report does not explain how the VDOC mental health care system adversely affected Named Plaintiffs Steven Riddick, Dmitry Khavkin, Brian Cavitt, and Gary Wall—the only named Plaintiffs identified in the Complaint as asserting ADA and RA claims, but who do not meet the Court's disability class definition. Wells instead focuses on alleged systemic issues with VDOC's mental health care system as a whole, failing to connect those purported issues to any named Plaintiff's experience. Indeed, Plaintiffs do not dispute that Wells never connects his opinions concerning alleged ADA and RA violations to the actual experiences of any named Plaintiffs. This fatal omission in Wells's methodology requires exclusion.

Relatedly, insofar as Wells advocates for policies and procedures that he deems are required under the ADA and RA but lacking at VDOC, no named Plaintiff alleges that his individual theory of liability turns on an alleged violation of any of those policies or procedures. At a bare minimum, for Wells's opinions about those policies or practices to be relevant, at least one named Plaintiff must claim that he was harmed due to VDOC's failure to adopt a specific

policy or practice Wells alleges to be noncompliant. Plaintiffs have undisputedly failed to identify any such named Plaintiff, thereby warranting exclusion of Wells's opinions.

Lastly, Wells inappropriately testifies on the ultimate legal question: whether VDOC violated the ADA and RA. There is an important distinction between testifying that VDOC deviated from alleged industry standards, on the one hand, and testifying as to the legal conclusion that VDOC failed to comply with the ADA and RA, on the other. Throughout his Report, Wells directly and repeatedly opines that VDOC violated the law. This is impermissible and merits exclusion.

ARGUMENT

I. The Opinions Wells Offers Outside His Field Of Expertise Should Be Disregarded.

A. Wells's opinions on the alleged incidence of VDOC inmates with mental illness should be excluded.

Wells opines that VDOC is under-identifying incarcerated persons with mental illness. Expert Report of Richard Wells ("Wells Rep.") [ECF No. 372-1] ¶ 77 ("VDOC is not adequately or appropriately identifying incarcerated persons with mental illness . . . upon intake or while housed at [Red Onion State Prison]"); ¶ 78 (VDOC "is under-identifying people with mental illness among its populations"). To support this conclusion, Wells cites a single 2014 study alleging "at least half of prisoners have some mental health concerns." *See id.* ¶ 78 n. 88 (citing Lorna Collier, *Incarceration Nation*, 45 MONITOR ON PSYCH. 56 (2014)). Based on this single, 10-year-old study, Wells draws the following comparison: "50 percent or more of incarcerated persons nationwide have mental illness[es]," but VDOC under-identifies only 25% of its prison population as having "a mild mental impairment or [serious mental illness]." *Id.* ¶ 78.

Wells's analysis amounts to nothing more than a recitation of third-party "data," followed by the *ipse dixit* conclusion that, because "25% is less than 50%," Plaintiffs' Opposition to

Defendants' Motion to Exclude the Report and Testimony of Richard Wells ("Pls' Opp.") [ECF No. 391] at 6, VDOC must be inaccurately identifying disabilities at ROSP. Wells Rep. ¶ 78. Relying on Wells, Plaintiffs contend VDOC's allegedly insufficient policies are the sole cause for its identification of "only" 25% instead of 50% of its prison population as experiencing a mental health issue. But Wells provides no analysis, no statistics, and no discussion of alternative explanations – because he is not qualified to expand on these issues. He does not assess whether the populations in the 10-year-old study mirrored that of ROSP. He does not explain how the 25% figure he attributes to VDOC was calculated, or how the study he quotes defines "some mental health concerns." He does not explain how the study's criteria—having "some mental health concerns"—overlaps with VDOC's classifications of "mild mental impairment" and "serious mental impairment." On its face, "some mental health concerns" is a broad category that would swallow any of VDOC's more defined criteria. But Wells does not address the obvious "apples to oranges" comparison. Nor does he specify the inputs, controls, or methods he employed to make a statistically meaningful comparison between these figures.

Plaintiffs' glib assertion that Wells should be allowed to testify about the statistical difference between the literature and VDOC's reporting is troubling. As one court explained, "[s]tatistical significance is a concept that it poorly understood in many contexts." *Torkie-Tork v. Wyeth*, 739 F. Supp. 2d 895, 903 n. 11 (E.D. Va. 2010). The court continued:

> For example, a political poll may show that one candidate leads another candidate in the polls 51% to 49%, but the fine print might note that the poll had a statistical error rate of plus-or-minus 2.5%. While some would assert that the poll shows one candidate to be leading the other by two percentage points, the only proper conclusion is that the candidates are in a statistical dead heat, because a 50–50 split is within the range of error. Arguments based on statistics must be evaluated carefully for such misleading statements.

Id. While the *Torkie-Tork* court's comment focused on the concept of statistical significance, its words of caution equally apply in the broader context of statistical analysis. But Wells offers *no* sound statistical analysis to support his opinion that VDOC is "under-identifying" individuals in its custody with mental illness. And Plaintiffs *do not dispute* that he is unqualified to do so. *See* Pls' Opp. at 5 (conceding Mr. Wells "is not a statistician" and "is not performing any statistical analyses for which he lacks the requisite expertise."). Given the unreliability of Wells's methodology and conclusions, Plaintiffs glib conclusion that "25% is less than 50%," Pls' Opp. at 6, underlines the need for exclusion here. Such an opinion—given with the gloss of an expert—is confusing at best, and misleading and prejudicial at worst.[1]

B. Wells's opinions on medical and psychological subjects should be excluded.

Plaintiffs argue that Wells does not opine on medical and psychological subjects, but instead "focuse[s] solely on the policies and procedures that underlie the Step-Down Program." Pls' Opp. at 6. Not so. Plaintiffs ignore the multiple clinical opinions Wells relays concerning the "mental health classification system that VDOC has developed." Wells Rep. ¶ 81. This includes his opinion that VDOC's system "does not allow for accurate identification of disabilities based on mental impairments." *Id.* The question of whether an inmate has been accurately diagnosed

[1] The cases Plaintiffs cite do not warrant a contrary conclusion. Unlike here, Plaintiffs' cases all involve a challenge to an expert's ability to interpret academic literature directly related to their fields of study. *See TFWS, Inc. v. Schaefer*, 325 F.3d 234, 240 (4th Cir. 2003) (professor of economics reviewed published economic studies on how a change in consumption results from change in price); *In re C.R. Bard, Inc.*, 948 F. Supp. 2d 589, 626 (S.D.W. Va. 2013) (doctors reviewing medical and scientific literature); *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 960 (4th Cir. 2020) (doctor with expertise in waste management was qualified to opine on odor traceability, waste management measures, and their testability; scientist specializing in understanding the human perception of odor qualified as odor expert). *McReynolds v. Sodexho Marriott Servs., Inc.*, 349 F. Supp. 2d 30, 38 (D.D.C. 2004), is also inapt as it addressed whether a statistician was required to independently verify the data produced by a party in the case. Here, Plaintiffs concedes Wells is not a statistician and, regardless, VDOC has not argued that he should be excluded for failing to independently verify VDOC's data.

with a mental health condition sits squarely within a clinician's field of expertise. And Wells's ultimate conclusion—that VDOC is not accurately making such diagnoses and, thus, not properly identifying inmates with disabilities—follows from an evaluation of the clinical reasoning process that Wells is unqualified to make.

For example, Wells opines that "there are several DSM diagnoses that rise to the level of disabilities, such as depression, generalized anxiety disorder, and post-traumatic stress disorder," and that "VDOC's language of 'mild impairment' would suggest that such impairments do not interfere with major life activities." Wells Rep. ¶ 85. In so opining, Wells provides a clinical assessment about whether inmates classified with "mild impairments" are being accurately diagnosed for mental illnesses and disabilities. Moreover, legal conclusions as to what constitute ADA-covered "disabilities" are inadmissible, and Wells's opinions should be stricken insofar as it attempts to define what constitutes a "disability" as a matter of law. Wells is engaging in clinical reasoning and reaching clinical conclusions, all of which exceeds the scope of Wells's purported expertise.

Another variation on this theme is Wells's opinion that "suicidal thoughts and behavior are symptoms of major depressive disorder, post-traumatic stress disorder, bipolar disorder, schizophrenia, and other mental disorders that are qualifying disabilities under the ADA," and that VDOC's policy "diminishes the seriousness of this symptom if it has not occurred within the two years preceding intake[, which] is both dangerous and insufficient to adequately identify disabilities under the ADA." Wells Rep. ¶ 84. Plaintiffs do not explain how Wells is qualified to analyze the diagnostic significance of suicidal thoughts and behavior in identifying various mental illnesses. Nor do Plaintiffs explain how Wells is possibly qualified to reach legal conclusions about what constitutes a disability as a matter of law. His assessment that VDOC's clinical practice is

"dangerous and insufficient" to diagnose mental illness wades too deeply into territory that exceeds his purported area of expertise.

Plaintiffs argue Wells does not "opine on whether the Step-Down Program exacerbates pre-existing mental illnesses," essentially admitting that doing so would be improper. Pls' Opp. at 6. Yet, Wells opines that "requiring incarcerated persons to actively participate in discussion of their feelings in a group setting may be particularly fraught for an incarcerated person suffering from depression, anxiety, or PTSD, to name just some mental impairments . . . ." *Id.* As Plaintiffs admit, Wells is not qualified to offer testimony as to what conditions may exacerbate pre-existing mental health conditions, as he admittedly is not a clinician and has no medical or psychiatric expertise to offer this sort of assessment.[2]

Ultimately, Wells's alleged expertise in prison administration does not permit him to engage in clinical reasoning or to reach conclusions of medical and psychological significance. *In re Zetia (Ezetimibe) Antitrust Litig.*, No. 2:18-MD-2836, 2021 WL 6690337, at *3 (E.D. Va. Aug. 16, 2021). Wells's opinions on these issues should not be given the imprimatur of an expert, as this would be confusing, misleading, and prejudicial. Fed. R. Civ. P. 403.

[2] Wells also posits that inmates may lack privacy should they hypothetically decide to seek assistance to complete the Challenge Series workbooks that are required to move through the Step-Down Program. Wells Rep. ¶ 175. According to Wells, this lack of privacy "can expose an incarcerated person's weakness in the context of prison, particularly maximum security prison, rendering this level of assistance an unreasonable accommodation." *Id.* This opinion should be stricken insofar as it constitutes a legal conclusion as to what constitutes a "reasonable accommodation." Moreover, again, as no named Plaintiff complained about a lack of privacy, seeking assistance to complete the Challenge Series workbooks, or being denied assistance, Wells's opinion is not only objectionable as an inappropriate legal conclusion, but is irrelevant.

II. Wells Did Not Apply A Reliable Methodology And Does Not Rely On Sufficient Facts Or Data In Forming Any Opinions Regarding The Disability Plaintiffs.

Wells does not connect his opinions concerning alleged ADA and RA violations to the actual experiences of the four named Plaintiffs who assert disability discrimination claims (Riddick, Cavitt, Khavkin and Wall). His omission is fatal and requires exclusion.

As explained in VDOC's opening motion, *Williams* is instructive. *Williams v. Illinois Dep't of Corr*., No. 3:19-CV-739-MAB, 2023 WL 1472246, at *14 (S.D. Ill. Feb. 2, 2023). There, the expert opined that the correctional institution suffered from systemic deficiencies that ultimately affected the care of the decedent, Dontrell Williams, on whose behalf plaintiff brought claims under the ADA and RA for failure to accommodate his mental illness before his suicide while incarcerated. *Id*. at *13-14. The court excluded the expert's opinion because his report "discusses problems with the IDOC generally but conspicuously does not connect those problems to Dontrell's personal experience in any way, shape, or form." *Id*. at *14. In his report, the expert "seemed to take the position"—which Plaintiffs take now—that the deficiencies in the correctional facility's "mental health services were so severe and pervasive that Dontrell must have been impacted." *Id*. at *15. But the court deemed this opinion regarding causation as "nothing more than an inferential leap, untethered from any explanation or facts regarding Dontrell's own personal experience." *Id*. Absent the crucial nexus of "personal experience," the court rejected the expert's opinion, as it was not based on any identifiable or reliable methodology. *Id*. at *14-16.

Plaintiffs attempt to distinguish *Williams* because the expert did not focus on the particular facility where the decedent was incarcerated, instead opining on systemic issues with the entire correctional institution and its mental health care system as a whole. Pls' Opp. at 13-14. They argue that Wells's Report is different, because it identified issues related to the specific facility that housed Plaintiffs (ROSP). *Id.* But *Williams* does not suggest that a facility-specific focus

would have rendered the expert report admissible. On the contrary, the *Williams* court excluded the expert's opinion because it did not assess specific data pertaining to the inmate's own "personal experience." *Williams*, 2023 WL 1472246 at *15. The court reasoned:

- The expert "said nothing about the treatment Dontrell received on crisis watch, such as the number of contacts, who he saw, etc." *Id.* at *15.
- The expert "stated in a conclusory fashion that Dontrell was not given 'proper evaluations,' but he did not identify any specific issues or problems with the evaluations (*e.g.*, the timing of the evaluations, who conducted them, what they contained, *etc*.) to support that opinion." *Id*.
- The expert "did not point out any deficiencies in Dontrell's treatment plans…" *Id*.
- The expert "likewise made no mention of medication management…" *Id*.

These are specific facts pertaining to the decedent, which the court recognized must be addressed in order to "connect the dots between the systemic deficiencies that existed in the IDOC as a whole and the personal experience of Dontrell and his ultimate death." *Id*.

Like *Williams*, there are no facts here connecting the generalized policy "failures" theorized by Wells and the specific experiences of the named Plaintiffs. Wells does not even attempt to "connect these dots," and certainly does not do so. As the Fourth Circuit held in *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194 (4th Cir. 2001), such connective tissue allows an expert like Wells to assess whether the allegedly deficient policies were actually applied in a discriminatory manner, or if the alternative were instead true: the policies were truly adequate and enforced as to the named Plaintiffs in a manner that complied with the ADA and RA. According to *Cooper*, "if an expert utterly fails to consider alternative causes or fails to offer an explanation for why the proffered alternative cause was not the sole cause, a district court is justified in excluding the expert's testimony." *Id.* at 202. Put another way, expert evidence is simply unreliable

when the expert has "draw[n] broad conclusions from incomplete data," and in such cases the opinion must be excluded. *E.E.O.C. v. Freeman*, 778 F.3d 463, 468 (4th Cir. 2015).[3]

Nevertheless, Plaintiffs argue that, because VDOC's policies and procedures are institution-wide, they would *de facto* apply to the named Plaintiffs, and that Plaintiffs "can—and will—prove the application of these policies to them and their fellow class members through other witnesses and evidence." Pls' Opp. at 13. But ***none*** of the named Plaintiffs has alleged that the procedural failures posited by Wells affected them; nor have they alleged that the purported failure to implement these procedures amounted to any failure to accommodate. At a bare minimum, a named Plaintiff must assert harm due to the specific procedural failures theorized by Wells for his opinion on this point to even arguably be relevant.

But even assuming for purposes of argument that Plaintiffs had made these allegations, the relevance of Wells's incomplete opinions still would be outweighed by the prejudicial effect of allowing as-of-yet undisclosed lay evidence to act as a stand-in for missing expert analysis. Where Plaintiffs intend to offer an opinion regarding the systemic deficiencies of VDOC's mental health system—with the imprimatur of an expert—the expert should evaluate the extent to which the named Plaintiffs actually were harmed by that supposed systemic deficiency, and whether these

[3] VDOC cited *Freeman* in its opening brief for the "common-sense idea" that "expert work should not be considered '[w]hen the assumptions made by [the] expert are not based on fact.'" *Id*. To distinguish *Freeman*, Plaintiffs argue that the expert report in that case was flawed, while "Defendants fail to identify a single 'error[]' or 'fallac[y]' in Mr. Wells's report." Pls' Opp. at 14 n, 2. Plaintiffs are wrong. VDOC openly contends that Wells's report is unreliable due to numerous errors and fallacies. In addition to the errors of methodology noted above, VDOC also has argued that there is no cognizable claim under the ADA for the alleged policy and practice shortcomings about which Wells opines (an assertion with which Wells agrees). As VDOC has repeatedly noted, the statutory language in ADA Title II contains no requirements governing training, tracking, grievance procedures, notice posting, and ADA coordinator responsibilities for public entities. *See* Def.'s Br. (ECF No. 372) at 13-14; Part III *supra*. Nor is there any requirement that VDOC provide accommodations notwithstanding any inmates failure to request one. *See id.* at 14.

particularized harms were out-of-step with correctional standards. *C.f. Williams*, 2023 WL 1472246, at *14-16. Otherwise, the factfinder is invited to accord expert weight to any lay opinion that the named Plaintiffs suffered harm from allegedly inadequate policies and procedures. All this amounts to is an end-run around Rule 702's rule that plaintiff should not be allowed to "dress up common-sense conclusions in the cloth of expert opinion," thereby encouraging the factfinder "to give greater weight to such statements." *Zankow v. Sears Holding Corp*., No. 1:10CV484, 2010 WL 11723679, at *2 (E.D. Va. Oct. 29, 2010) (excluding expert opinion that was well-within the common experience of jurors, as doing so violated Rule 702). Preventing the jury from giving a lay opinion expert weight is an analogous and appropriate exercise of the district court's "gatekeeping role" under Rule 702.[4] Exclusion is therefore proper.

III. Wells Offers Opinions That Are Not Relevant To The Claims At Issue In This Case.

Wells's testimony on matters irrelevant to any existing claim must be excluded. Plaintiffs fail to demonstrate otherwise. *See Kristensen ex rel. Kristensen v. Spotnitz*, No. 3:09–cv–00084, 2011 WL 4380893, at *3 (W.D. Va. Sept. 21, 2011) (explaining that testimony must "fit" the issue

[4] Plaintiffs' citation to *Knight v. Boehringer Ingelheim Pharms., Inc*., 323 F. Supp. 3d 837, (S.D.W. Va. 2018), is inapt. There, the expert's opinion was held admissible because it could be read in concert with the plaintiffs' ***other expert opinions*** "to assemble the logical links needed to demonstrate both the insufficiency of Pradaxa's warnings and what that insufficiency caused in Ms. Knight's case." *Id.* Plaintiffs' citation to *In re Ethicon Inc. Pelvic Repair Sys. Prod. Liab. Litig*., No. MDL 2327, 2017 WL 6346633, at *3 (S.D.W. Va. Dec. 12, 2017), is similarly flawed. There, a biochemistry expert opined that he observed degradation of the polypropylene sutures manufactured by the defendant. The expert did not opine on when such degradation would become clinically significant. The court explained that "[a] single expert need not provide all the pieces of the puzzle for their testimony to be useful to the jury in determining the ultimate issues in the case." *Id.* at *3 (citation omitted). But this missing piece—clinical significance—clearly was something that only expert evidence could prove. Here, though, Plaintiffs apparently seek to offer ***lay*** evidence to fill the gaps left by Wells's report.

to which the expert is testifying). Here, Plaintiffs base their ADA and RA claims on three discrete assertions:

- Defendants' alleged failure to provide proper services to inmates with mental health disabilities;
- Defendants' alleged selection of criteria that disproportionately prevent inmates with mental health disabilities from progressing through the Step-Down Program; and
- Defendants' alleged failure to reasonably accommodate disabled inmates.

See Pls' Opp'n to Defs.' Mot. for Leave to Amend Their Answer (ECF No. 340) at 2.

Wells elides these relevant subjects, opining on procedural "failures" far afield of any issues alleged by Plaintiffs—allegations about failure to implement compliant ADA training (*see* Wells Rep. ¶¶ 141–162), inadequate tracking of disabled individuals (*id*. ¶¶ 109–120), inadequate notice of ADA processes and rights (*id*. ¶¶ 61–70), inadequate ADA grievance procedures (*id*. ¶¶ 15, 131–140), failure to post the ADA Coordinator's contact information (*id*. ¶ 216), and failure to maintain a policy on the ADA Coordinator's responsibilities (*id*. ¶ 52).

No named Plaintiff has asserted any claim based on the supposed procedural failures identified by Wells—either institution-wide or individually. In fact, class-wide claims are altogether unavailable, since no named Plaintiff meets the Court's current class definition for the disability class and Plaintiffs have not identified a new named Plaintiff who does.[5] On an individual

[5] For these reasons, the Court must reject Plaintiffs' argument that Wells' opinions are somehow relevant to the class-wide injunctive relief they seek. Pls' Opp. at 14. Without a viable class, viable class claims, and a viable way to secure class-wide injunctive relief, Wells's opinions are irrelevant. Plaintiffs' further argument that VDOC's related discovery requests regarding these claims permits Wells's expert testimony on the same subject is specious. "Relevant information" for discovery purposes "need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26. As this is an issue of admissibility of an expert opinion, the scope of discovery is irrelevant. It is also circular to argue that it should be appropriate for Wells to provide expert testimony merely because VDOC retained Vare to respond to Wells' expert testimony. Pl.'s Opp. at 10. VDOC was not be required to leave Wells's opinion unquestioned while at the same time argue for its exclusion.

level, Wells even ***conceded*** he had no evidence that any of these perceived "violations" affected any named Plaintiff in any way. *See* Deposition of Richard Wells dated August 11, 2023 ("Wells Dep.") (ECF No. 372-2) at 36:13–37:15, 38:23–39:16.

Setting aside that no named Plaintiff alleges any deficiency identified by Wells, Plaintiffs proffer no competent factual or legal support for any such claim. Taking Plaintiffs' arguments in turn:

Training. Plaintiffs argue they have "adduced evidence that class members' ADA and RA rights are routinely violated because VDOC employees do not understand their obligations under the ADA and RA." Pls' Opp. at 8. In support, they point to Donnie Trent, "a former VDOC psychology associate [who] testified that, because he did not have any training on what constitutes a reasonable accommodation, it was not his goal to provide accommodations to individuals with a mental health disability." *Id*. But Plaintiffs misstate Mr. Trent's testimony, as he testified about other employees who did provide accommodations to inmates. Specifically, Mr. Trent observed "treatment officers who would work with the inmates when they were doing the Challenge Series program" by "meet[ing] one-on-one with those inmates and work with them one-on-one outside of the group setting to help them get through [the program]." Deposition of Donnie Trent dated June 17, 2022 ("Trent Dep.") at 301:1-302:2 (attached as Exh. 1).

In any event, the testimony Plaintiffs cite is not evidence "that ADA and RA rights are routinely violated" and certainly is not evidence that any named Plaintiff's ADA and RA rights were ever violated. In fact, Wells conceded at deposition that he was not aware of any ADA requirement that VDOC must assign or train employees other than facility ADA coordinators to identify disabilities or request reasonable accommodations for them. Wells Dep., attached as Exh. 2, at 18:14–19:8.

Tracking. Paraphrasing Wells, Plaintiffs contend that "[w]ithout a [comprehensive real-time networked tracking system" program], VDOC does not provide proper services to inmates with mental health disabilities and fails to provide reasonable accommodations to disabled inmates." Pls' Opp. at 9-10. But Wells admitted at deposition that there is no legal requirement for VDOC to have a "comprehensive real-time networked tracking system" program, or any tracking program. Wells Dep. at 58:1-10. Admitting Wells's opinion would simply confuse the issues, which begin and end at the applicable legal requirement—or in this case absence of any legal requirement pertaining to tracking.

Notice. Plaintiffs' argument that "Defendants fail to provide class members with notice of their rights under the ADA and RA and neglect to inform class members of the existence of an ADA coordinator" is unsupported by evidence and demonstrably incorrect. Jessica King testified that, while she was the Facility ADA Coordinator at Red Onion, her "name was also posted by all the showers and on all the notification boards in the housing units" with a notice that "if they needed assistance, they could contact me." Deposition of Jessica King dated March 23, 2023 ("King Dep.") at171:13-17 (attached as Exh. 3). Wells contends that the notices posted by the showers are insufficient because some unidentified Level S inmates allegedly were denied showers or were subject to restrictions that limit their ability to read the notices. Wells Report at 45. While Plaintiffs allege that their out-of-cell time was limited, including with regard to showers, there is no indication that this alleged deprivation kept them from ever reading the notices. And even assuming they had not read the notices posted at the showers, neither Plaintiffs nor Wells explain how the notices in the housing units were insufficient to put them on notice.

Grievance. Plaintiffs cite Wells to argue "Defendants' grievance procedures are insufficient for class members to raise—and for VDOC to address—ADA concerns." Pls' Opp. at

9. However, as Wells admits, "the ADA does not specify what form the grievance procedure must take." Wells Report at 83. At ROSP, grievance forms are provided to incarcerated persons in Level S, and there is a grievance coordinator who relays ADA-related complaints to the ADA Coordinator. Deposition of Amee Duncan dated March 14, 2023 ("Duncan Dep.) at 8:15–18, 31:22–32:3 (attached as Exh. 4); Deposition of Barry Marano dated March 31, 2023 ("Marano Dep.") at 114:10-18, 115:8-11 (attached as Exh. 5). Wells' advocacy for additional measures has no basis in the law, and such unsupported opinions, if admitted, would likely mislead the factfinder, cause confusion, and unfairly prejudice VDOC's defense of this case.

Plaintiffs' attempt to salvage Wells by pointing to one out-of-circuit case, *Dunn v. Dunn*, 318 F.R.D. 652, 663 (M.D. Ala. 2016), but they misstate its import. *Dunn* does not address whether expert testimony is admissible on topics not addressed by any fact or legal theory alleged in the case. Rather, *Dunn* arose in the context of a final class action settlement approval hearing in which all parties agreed that class certification was appropriate. In the course of approving the agreed-upon settlement, the plaintiffs specifically alleged that certain systemic failures—in particular, failure to appoint and train ADA coordinators, adopt ADA grievance procedures, and develop an ADA transition plan—constituted violations of regulations enforcing the ADA.[6] In approving a class-action settlement, the district court dismissed the fact that the regulations are not privately enforceable. *Dunn*, 318 F.R.D. at 664. While violating these regulations would not constitute a *per se* violation of the ADA, the district court found that any failure to do the things required by the regulations could have the effect of discriminating. *Id.* So, as applied to that case, the lack of a

[6] The *Dunn* court's analysis ultimately turned on the so-called methods-of-administration regulation (28 C.F.R. § 35.130(b)(3)), which Plaintiffs have not pleaded or otherwise invoked in this case. *Dunn*, 318 F.R.D. at 564-566.

private right of action was irrelevant to whether there were common questions of law or fact for class settlement purposes. *Dunn*, 318 F.R.D. at 663-65.

Procedurally and substantively, the present case is completely different from *Dunn*. Unlike *Dunn*, there is no viable class. Even assuming the *Dunn* court's finding as to commonality in the class settlement context could somehow be instructive in the context of expert discovery, Plaintiffs fail to make a basic showing of relevance. Specifically, the *Dunn* plaintiffs "alleged in their Complaint that the lack of these policies and practices resulted in discrimination," *id*. at 665-666, while the named Plaintiffs here do no such thing. Again, ***no named Plaintiff asserts any claims based on the alleged policy failures identified by Wells***—let alone claims that seek to prove a failure to accommodate by not doing the things advocated by Wells.

This case aligns more readily with *Sanchez v. Bos. Sci. Corp*., No. 2:12-CV-05762, 2014 WL 4851989 (S.D.W. Va. Sept. 29, 2014). There, the court held that expert testimony on standards that were not raised and "not at issue in this case" could "lead to more confusion . . . than enlightenment." *Id*. at *35. The same holds here—particularly because the statutory language in ADA Title II contains no requirements governing training, tracking, grievance procedures, notice posting, and ADA coordinator responsibilities for public entities. *See Waller v. City of Danville, Virginia*, 515 F. Supp. 2d 659, 665 (W.D. Va. 2007) (court found "no basis in the Act's text supporting a failure to train claim under [Title II of] the ADA"). Wells's analysis is fatally flawed insofar as it relies on an unsupported application of ADA standards. Admitting such an opinion invites the factfinder to helm to standards that are unrooted in any statutory or regulatory requirement. And Wells's testimony—based on an *incorrect* legal standard—may confuse the factfinder, and must therefore be proscribed as irrelevant and unduly prejudicial. Fed. R. Civ. P. 403; 702.

IV. Wells Improperly Makes Legal Conclusions.

An expert witness cannot give an opinion as to his legal conclusion, *i.e.*, an opinion on an ultimate issue of law. *Hangarter v. Provident Life and Acc. Ins. Co*., 373 F.3d 998, 1016 (9th Cir. 2004) ; *see also* Fed. R. Evid. 702 (requiring that expert opinion evidence "assist the trier of fact to understand the evidence or to determine a fact in issue"). Similarly, it is the distinct and exclusive province of the Court to determine the applicable law that applies to Plaintiffs' claims. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc*., 523 F.3d 1051, 1058 (9th Cir. 2008) ("Resolving doubtful questions of law is the distinct and exclusive province of the trial judge.").

Plaintiffs try to cloak Wells's legal opinions on the ADA, its regulations, and their applicability to Plaintiffs' action as specialized knowledge about correctional policies that they assert will be valuable to the factfinder's decision whether VDOC complies with the ADA. The "ultimate issue in the case" is whether VDOC is non-compliant (Pls' Opp. at 16); according to Plaintiffs, Wells's Report simply explains his basis for concluding that "Defendants' policies and procedures are ill-suited to ensure ADA compliance." Pls' Opp. at 15.

This is incorrect. And it is telling that Plaintiffs *do not contend* with any of the examples VDOC cited where Wells reached numerous legal conclusions, stating that the policies he advocates are required under the ADA and that, absent these policies, VDOC violated the ADA or RA:

- VDOC is not "fulfilling its obligations under the ADA" because "*'accommodation needs' are not met* during intake screening," Wells Rep. ¶ 75 (emphasis added);
- VDOC's "tracker does not lend itself to staff proactively providing accommodations," which "*must inevitably result in people with disabilities going without necessary accommodations*," *id.* ¶ 130 (emphasis added);
- "It is my opinion that by failing to train staff on these issues, *it is virtually impossible for staff to comply with the ADA and provide equal access*," *id.* ¶ 162 (emphasis added);

- "VDOC policy thereby *refuses mentally impaired incarcerated persons equal access* to the benefits of the Step-Down program," *id.* ¶ 180 (emphasis added);

- mentally impaired inmates are "*discriminated against in the status ratings* in a perfect world," *id.* ¶ 183 (emphasis added);

- "Despite *the clear discriminatory impact of the Status Rating Chart* on mentally impaired incarcerated persons, accommodations are limited," *id.* ¶ 185 (emphasis added);

- "Without meaningful mental health participation or mental health staff involvement in program decision-making such as for progression within a pathway, *in my opinion this violated [the] ADA in that equal access was not afforded to mentally ill participants*," *id.* ¶ 189 (emphasis added)

- "Ultimately, *this is paramount to discrimination* under the ADA, as progression opportunities are not equal for mentally ill incarcerated persons," *id.* ¶ 190 (emphasis added);

- "With regard to deficiencies in the Step-Down program specifically, VDOC policies and procedures and practices at ROSP *do not comply with the ADA or RA*," *id.* ¶ 219 (emphasis added).

With these assertions, Wells repeatedly opines that VDOC did not comply with the ADA or RA.[7] Wells's legal conclusions not only invade the province of the trial judge, but constitute erroneous statements of law. In such a case, expert testimony would be "not only superfluous but mischievous." *Nationwide*, 523 F.3d at 1059.

In opposition, Plaintiffs cite a number of cases in which courts held that experts could refer to terminology from applicable law in expressing their opinions. *See Focal Point Films, LLC v. Sandhu*, No. 19-CV-02898-JCS, 2020 WL 5760355, at *6 (N.D. Cal. Sept. 28, 2020); *Pelican Int'l, Inc. v. Hobie Cat Co*., No. 3:20-cv-02390-RSH-MSB, 2023 WL 2130379, at *12 (S.D. Cal.

[7] Plaintiffs' reliance on *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998 (9th Cir. 2004) is misplace. Unlike Wells, the expert in *Hangarter* did not reach a definitive legal conclusion that the defendant "did not comply" with the law, but instead opined that his analysis suggested that one element of the pertinent legal standard may have been met. *Id*. at 1016 ("While Caliri's testimony that Defendants deviated from industry standards supported a finding that they acted in bad faith, Caliri never testified that he had reached a legal conclusion that Defendants actually acted in bad faith (i.e., an ultimate issue of law).").

Feb. 10, 2023). Wells's Report, though, goes far beyond the mere use of legal terminology that tracks the law, or the use of terms that have a specialized legal meaning. Rather, the Report contains a lengthy section discussing the ADA and its enacting regulations, and Wells opines on the parties' supposed legal rights, duties, and obligations under the law, applying his interpretation of the ADA to the facts he assumes. Then—and fatally—Wells draws his legal conclusions that VDOC violated the ADA and RA. As stated in, *Focal Point Films,* 2020 WL 5760355 at *6, on which Plaintiffs rely:

> Here, the Court will not permit Rubin to testify on the ultimate legal question, namely, whether Sandhu is a joint author. As this is a legal question that the Court must decide, testimony on this question will not be helpful to the jury. Rather, it is more likely that it will confuse the jury.

The same analysis applies here.

Nonetheless, Plaintiffs argue that, even assuming Wells reached legal conclusions, the Court should disregard them and permit his opinion. The cases they cite are inapt. Unlike Wells, none of the experts in the cases cited by Plaintiffs directly testified that the defendant violated the law. *See United States v. Perkins*, 470 F.3d 150, 160 (4th Cir. 2006) ("Rule 704 justifies differentiating between the officers' testimony that they saw no 'law enforcement' or 'legitimate' reason for Perkins's kicks and testimony that Perkins's actions were 'objectively unreasonable.'"); *United States v. Dazey*, 403 F.3d 1147, 1171–72 (10th Cir. 2005) ("Although he also opined that any investment program using the word 'prime bank' was a fraud and that the Wealth-Mart trading program did not exist, he did not directly testify that any particular defendant actually violated the law. Even if his testimony arguably embraced the ultimate issue, such testimony is permissible as long as the expert's testimony assists, rather than supplants, the jury's judgment."). An exception

to Rule 702 is unsupported, and its prohibition on experts providing legal conclusions should be enforced here.

CONCLUSION

The opinions Wells offers in the Report are neither reliable nor relevant. Accordingly, the Court should exclude the Wells Report and any related testimony.

October 24, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 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.

By: */s/ Maya M. Eckstein*

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