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.	)	Civil Action No. 2:20-CV-00007-JPJ-PMS

DEFENDANTS' MOTION *IN LIMINE*, AND MEMORANDUM IN SUPPORT OF MOTION *IN LIMINE*, TO EXCLUDE UNFOUNDED TESTIMONY REGARDING STATEMENTS AND CONDUCT OF NON-DEFENDANT VDOC PERSONNEL

Individual Defendants Harold Clarke, Randall Mathena, H. Scott Richeson, David Robinson, Henry Ponton, Marcus Elam, Denise Malone, Tori Raiford, Jeffrey Kiser, and Carl Manis (collectively, "Defendants")[1] pursuant to Federal Rules of Evidence 103, 401, 402, 403, 701, 801, 802, 803, and 807, and Federal Rules of Civil procedure 26 and 37, respectfully move *in limine* for an order precluding the named Plaintiffs and any other testifying class member from offering at trial (i) testimony about alleged statements and conduct of non-Defendant VDOC personnel offered to prove that a named Defendant violated Plaintiffs' constitutional rights, and (ii) out-of-court statements purportedly attributed to VDOC employees and other declarants that do not qualify as a statement of a party opponent under Federal Rule of Evidence 801(d)(2). The surviving constitutional claims lie against the named Defendants in their individual capacities (for damages) and in their official capacities (for injunctive relief), and the anticipated testimony—

[1] The Virginia Department of Corrections (VDOC) is not a party to Plaintiffs' Eighth Amendment and Due Process claims.

about what non-party staff supposedly said and did—is neither relevant to those claims nor admissible as evidence of them. In support of this Motion, Defendants state as follows.

BACKGROUND

Trial in this class action is set to begin October 5, 2026, and to continue through October 23, 2026, on the Plaintiff class's constitutional claims: that the conditions and duration of confinement in the Step-Down Program violate the Eighth Amendment, and that the Program's review procedures violate the Fourteenth Amendment's Due Process Clause. Two classes are certified: a Rule 23(b)(2) Constitutional Violation Injunction Class and a Rule 23(b)(3) Constitutional Violation Damages Class. *See* Op. & Order as to Cross Mots. for Summ. J., ECF No. 516 at 2–3. These classes seek distinct forms of relief, which run against the Defendants in two different capacities. First, the Injunction Class seeks prospective injunctive and declaratory relief requiring VDOC to change how the Step-Down Program is operated and reviewed. That relief would run, if at all, against the named officials in their ***official capacities*** under *Ex Parte Young*. Second, the Damages Class seeks compensatory and related damages against those same officials in their ***individual*** capacities under 42 U.S.C. § 1983.

Defendants anticipate that Plaintiffs will attempt to prove their claims, in substantial part, through inmate witnesses who will recount what unidentified or non-party prison staff supposedly said to them—including, for example, statements about the witness's progress through the Step-Down Program, statements containing alleged racist slurs, and statements purportedly denying medical treatment. Plaintiffs will offer those statements for their truth: to prove that the Program operates as alleged, that staff harbored animus, and that care was withheld. That is the classic definition of hearsay, and it is inadmissible. Fed. R. Evid. 801(c), 802; *see United States v. Gallagher*, 90 F.4th 182, 196 (4th Cir. 2024).

The depositions of the named Plaintiffs, taken in March and April 2023, confirm that this testimony is coming and show why it is inadmissible.[2] Across the transcripts, the named Plaintiffs recount what officers, counselors, committees, wardens, medical providers, and—in several instances—other inmates supposedly said. The anticipated proof falls into three related categories, each of which concerns statements attributed to non-party personnel:

1. **Alleged Statements About Step-Down Program Progress.** Plaintiffs recounted what officers, counselors, committees, and wardens allegedly told them about why they were, or were not, advancing through the Program.[3]

2. **Alleged Racist Slurs.** Plaintiffs recount epithets allegedly uttered by staff or other inmates.[4]

3. **Alleged Denials of Medical Treatment.** Plaintiffs recount what medical or mental-health staff allegedly said about their care.[5]

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[2] Excerpts from the relevant deposition transcripts are attached as follows: Exhibit 1 (Dep. of Derek Cornelison, Apr. 11, 2023); Exhibit 2 (Dep. of Gerald McNabb, Mar. 23, 2023); Exhibit 3 (Dep. of Gary Wall, Mar. 29, 2023); Exhibit 4 (Dep. of Steven Riddick, Mar. 24, 2023); Exhibit 5 (Dep. of Dmitry Khavkin, Mar. 30, 2023); Exhibit 6 (Dep. of Vernon Brooks, Mar. 28, 2023); Exhibit 7 (Dep. of Frederick Hammer, Mar. 22, 2023); Exhibit 8 (Dep. of William Thorpe, Apr. 10, 2023); Exhibit 9 (Dep. of Peter Mukuria, Mar. 27, 2023); Exhibit 10 (Dep. of Brian Cavitt, Mar. 21, 2023); Exhibit 11 (Dep. of Kevin Snodgrass, Apr. 12, 2023).

[3] *E.g.*, Ex. 1 (Cornelison) Tr. 214:20-215:3 (counselor allegedly threatened to send him to the D6 pod to die and said he would never see general population); Ex. 2 (McNabb) Tr. 221:4-7 (counselor allegedly said that if he did not participate, he would remain in solitary confinement for the rest of his life); Ex. 3 (Wall) Tr. 296:6-9; Ex. 4 (Riddick) Tr. 71:11-13; Ex. 5 (Khavkin) Tr. 214:11-19; Ex. 6 (Brooks) Tr. 177:5-9; Ex. 7 (Hammer) Tr. 198:5-8; Ex. 8 (Thorpe) Tr. 209:7-12; Ex. 9 (Mukuria) Tr. 55:17-19; Ex. 10 (Cavitt) Tr. 266:14-17.

[4] *E.g.*, Ex. 10 (Cavitt) Tr. 219:16-17 (officer allegedly whispered a racial slur at him, unprovoked); Ex. 2 (McNabb) Tr. 106:21-22 (officer allegedly directed a racial epithet at him during morning count); Ex. 9 (Mukuria) Tr. 226:14-16 (guards allegedly told him to go back to Africa); Ex. 4 (Riddick) Tr. 109:16-18 (other inmates allegedly heard a Defendant use a slur); Ex. 11 (Snodgrass) Tr. 328:11-15 (another inmate reported that a Defendant made a racially derogatory remark about him); Ex. 1 (Cornelison) Tr. 365:16-22 (another inmate's slur).

[5] *E.g.*, Ex. 1 (Cornelison) Tr. 139:20-22 (staff allegedly refused to take him to medical, telling him he would be all right, while he was vomiting and coughing up blood); Ex. 8 (Thorpe) Tr. 114:20-21 (mental-health worker allegedly said solitary confinement was not causing his

In each instance, the testimony consists of an out-of-court statement that Plaintiffs would offer to prove the truth of what the absent declarant supposedly said. These statements are hearsay, and most will not satisfy the foundation required to treat them as admissions of a party opponent. Indeed, one Plaintiff candidly described his own account of staff conduct as "hearsay" that he had heard from other inmates. Ex. 7 (Hammer) Tr. 260:17-18. Another, discussing a racial slur, acknowledged that he could not verify whether the allegation was true and that he had only heard the alleged use from ***other*** inmates. Ex. 4 (Riddick) Tr. 109:16-18. This is precisely the kind of out-of-court testimony Rule 802 bars.

The problem runs deeper than the hearsay bar. Much of the anticipated testimony describes not only what non-party staff allegedly ***said***, but what non-party staff allegedly ***did***—alleged failures to follow VDOC policy by employees who are not Defendants in this case. The declarations Plaintiffs have submitted to this Court—their own and those of other inmates—in support of various motions consist largely of allegations "concern[ing] individualized incidents of [alleged] misconduct or application of VDOC policies," including allegations from the *Reyes* case. Such allegations include, but are not limited to, non-Defendant VDOC staff allegedly telling inmates they will not progress out of the Step-Down Program,[6] failing to provide out-of-cell time

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eyesight or cardiac symptoms); Ex. 6 (Brooks) Tr. 234:15-18; Ex. 7 (Hammer) Tr. 40:18-19; Ex. 5 (Khavkin) Tr. 114:16-17; Ex. 9 (Mukuria) Tr. 93:13-19; Ex. 4 (Riddick) Tr. 275:19-22.

[6] ECF Nos. 174-20 at ¶ 7; 174-21 at ¶¶ 7, 15, 16, 18; 174-22 at ¶ 5; 174-24 at ¶¶ 10, 13; 174-60 at ¶ 20; 383-16 at ¶ 27; 400-15 at ¶ 7.

as required by policy,[7] violating policy as it applies to hearings,[8] fabricating charges,[9] withholding or manipulating food,[10] falsifying records,[11] violating policy by not performing their duties,[12] placing inmates in dirty cells or showers,[13] making improper comments to inmates,[14] or otherwise failing to implement policies as designed.[15] The employees said to have committed those acts are not parties to this case.[16]

That distinction is dispositive. Plaintiffs' surviving constitutional claims proceed against the named Defendants—Harold Clarke, Marcus Elam, Jeffrey Kiser, Denise Malone, Carl Manis, Randall Mathena, Henry Ponton, Tori Raiford, H. Scott Richeson, and A. David Robinson—in their ***individual*** capacities for damages and in their ***official*** capacities for injunctive relief. To prevail on their money-damages claims, Plaintiffs must prove that a named Defendant, through

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[7] ECF Nos. 174-19 at ¶ 4; 174-21 at ¶ 4; 174-22 at ¶ 25; 174-23 at ¶ 15; 174-24 at ¶ 4; 174-26 at ¶ 4; 174-27 at ¶ 12; 174-60 at ¶ 5; 383-15 at ¶ 19; 383-50 at ¶ 25; 400-15 at ¶¶ 5, 14, 23, 36.

[8] ECF Nos. 174-19 at ¶¶ 12, 35; 174-20 at ¶ 16; 174-21 at ¶ 8; 174-22 at ¶ 9; 174-25 at ¶¶ 3, 4; 174-60 at ¶¶ 21-25; 383-50 at ¶ 5.

[9] ECF Nos. 174-19 at ¶ 27; 174-23 at ¶ 12; 174-24 at ¶¶ 20-27; 174-25 at ¶¶ 6, 9, 10; 191-7 at ¶ 13; 383-15 at ¶¶ 14, 43, 44; 383-43 at ¶¶ 17, 18; 383-50 at ¶ 55; 400-15 at ¶¶ 34-35.

[10] ECF Nos. 174-60 at ¶ 18; 383-16 at ¶ 19; 383-50 at ¶ 40; 400-15 at ¶¶ 5, 33.

[11] ECF Nos. 174-24 ¶ 11; 174-60 at ¶ 26; 383-50 at ¶ 6; 383-43 at ¶¶ 31, 32, 35, 45.

[12] ECF Nos. 174-26 at ¶ 20; 383-15 at ¶ 15; 383-43 at ¶¶ 5, 10; 383-50 at ¶ 13; 400-15 at 43-44.

[13] ECF Nos. 383-43 at ¶ 9; 383-50 at ¶ 18.

[14] ECF Nos. 174-23 at ¶¶ 11, 12b; 174-24 at ¶ 18; ¶ 174-25 at ¶ 11; ¶ 174-27 at ¶ 16; 191-7 at ¶¶ 32, 33; 383-15 at ¶¶ 38, 39; 383-43 at ¶40.

[15] ECF Nos. 174-24 at ¶¶ 3, 28, 30, 31; 174-25 at ¶¶ 8, 12, 13, 14, 16, 19; 174-60 at ¶¶ 12, 13, 15; 383-15 at ¶¶ 9, 25, 35,36; 383-43 at ¶¶22, 25, 41, 42, 54; 400-15 at ¶¶ 4, 8, 22, 27, 37.

[16] The declarations identify, among others, unnamed counselors and mental health professionals, *see, e.g.*, ECF Nos. 174-19 at ¶ 43; 174-22 at ¶ 30, and more than two dozen non-party unit managers or correctional officers, *see, e.g.*, ECF Nos. 174-20 at ¶ 7); 174-21 at ¶ 13; 174-23 at ¶ 11; 174-24 at ¶¶ 20–24; 174-25 at ¶¶ 11–13; 174-60 at ¶ 15.

his or her own individual conduct, violated Plaintiffs' constitutional rights; they cannot make the senior leadership of VDOC answer for every alleged misstep of subordinates several layers below.

Moreover, Plaintiffs' own assertions in this case undermine the need for such testimony. In opposing transfer to this Court, Plaintiffs told the District Court for the Eastern District of Virginia that their claims challenge how Defendants "devised, formulated, implemented, and oversaw" the Step-Down Program itself, that the case "does not concern individualized incidents of misconduct or application of VDOC policies," and that the Complaint "does not assert that VDOC reviews of a particular inmate failed to observe constitutional requirements or adhere to policy," but instead that the reviews "fail constitutional muster because [they] are procedurally inadequate ***as designed***." Pls.' Statement of Position Regarding Transfer, ECF No. 31, at 2, 3, 5 (emphasis added). Having framed this as a challenge to the Program's design, Plaintiffs may not now try their case as a catalog of individual misconduct by non-parties.

These categories of anticipated testimony present the same evidentiary problem—the use of statements and conduct attributed to non-party VDOC personnel to prove individual-capacity claims against the named Defendants—in several forms, and the Court should exclude it in each of its forms. This Motion addresses the categories in turn—Step-Down Program progress, alleged racist slurs, alleged denials of medical treatment, and alleged policy violations—identifying the applicable evidentiary grounds within each category. It then addresses why no hearsay exception under Rules 803, 804, or 807 cures these defects.

Defendants therefore ask the Court to enter an order precluding the named Plaintiffs and any other class member witness from offering testimony about the alleged statements and conduct of non-Defendant VDOC personnel to prove a named Defendant's liability, and from offering out-of-court statements of VDOC personnel or other declarants for their truth unless and until the

proponent establishes a proper foundation under Rule 801(d)(2) or a recognized hearsay exception. As explained below, this testimony is irrelevant to the claims that will be tried, it is inadmissible hearsay, and it should be excluded under Rule 403.

ARGUMENT

I. Testimony about statements and conduct of non-Defendant VDOC personnel is irrelevant under Rules 401 and 402 because the surviving claims challenge the Step-Down Program "as designed."

Evidence is relevant only if it has a tendency to make a fact of consequence "more or less probable than it would be without the evidence," Fed. R. Evid. 401, and irrelevant evidence "is not admissible," Fed. R. Evid. 402. Two questions of consequence will be tried: whether the Step-Down Program, as designed and administered on a system-wide basis, violates the Eighth Amendment and the Due Process Clause; and whether any named Defendant, through his or her own conduct, is personally liable in damages. Testimony that some non-party employee said or did something contrary to VDOC policy in a particular instance bears on neither. It does not tend to show the Program's design is unconstitutional, and it does not tend to show that a named Defendant personally violated Plaintiffs' rights.

This springs from Plaintiffs' own understanding of their case. In opposing transfer, Plaintiffs represented that their claims challenge how Defendants "devised, formulated, implemented, and oversaw" the Step-Down Program itself; that the case "does not concern individualized incidents of misconduct or application of VDOC policies"; and that the Complaint "does not assert that VDOC reviews of a particular inmate failed to observe constitutional requirements or adhere to policy," but instead that the reviews "fail constitutional muster because [they] are procedurally inadequate as designed." Pls.' Statement of Position Regarding Transfer, ECF No. 31, at 2, 3, 5. Having defined their case as a challenge to the Program's design—and having expressly disclaimed any theory resting on the individualized application of VDOC

policy—Plaintiffs cannot now prove their claims through a catalog of individual episodes in which non-party staff supposedly misapplied or departed from that policy. Such testimony is irrelevant to the design questions actually presented.

The class's request for prospective injunctive relief does not change the analysis. That relief turns on the same question—whether the Step-Down Program "as designed" comports with the Constitution—not on whether particular non-party employees deviated from policy in isolated instances. Evidence of individualized misapplication is therefore no more relevant to the injunctive claims than to the damages claims; it goes to the very conduct Plaintiffs told the Court the case "does not concern." ECF No. 31 at 3.

As to the damages claim, the point is even clearer, because those claims proceed against the named Defendants solely in their individual capacities. "Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*"; rather, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct," and "a plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution." *Ashcroft v. Iqbal*, 556 U.S. 662, 676–77 (2009). The Fourth Circuit applies that rule directly: liability for constitutional violations is determined "person by person." *King v. Riley*, 76 F.4th 259, 269 (4th Cir. 2023) (quoting *Iqbal*, 556 U.S. at 677). "Only persons who cause or participate in the violations are responsible." *George v. Smith*, 507 F.3d 605, 609 (7th Cir. 2007); *see Carter v. Williams*, No. 7:22-CV-00502, 2024 WL 1337199, at *5 (W.D. Va. Mar. 28, 2024) (dismissing supervisory claims against prison officials where the plaintiff sought to hold them liable for line officers' alleged misconduct). Testimony about what a non-party counselor, officer, or nurse said or did proves nothing about whether the named Defendants personally violated the Constitution.

To the extent Plaintiffs suggest the testimony shows a pattern of which the named Defendants were aware, it fails on its own terms. Supervisory liability requires proof of "widespread" conduct posing "a pervasive and unreasonable risk," not "a single incident or isolated incidents." *Slakan v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984). Scattered anecdotes about what unnamed staff said to individual inmates are the latter, not the former. They cannot establish a widespread practice known to and tacitly authorized by these Defendants, and a supervisory-liability theory built on individualized misapplication is, again, the very theory Plaintiffs disclaimed. ECF No. 31 at 3, 5. Such testimony invites exactly the vicarious-liability inference the law forbids without tending to prove any fact of consequence.

Because testimony about the statements and conduct of non-Defendant VDOC personnel has no tendency to prove the Step-Down Program is unconstitutional as designed, or that a named Defendant personally violated Plaintiffs' rights, it fails Rule 401 and must be excluded under Rule 402.

II. Even if relevant, the anticipated testimony is inadmissible hearsay under Rules 801 and 802.

Hearsay is an out-of-court statement that a party offers in evidence "to prove the truth of the matter asserted in the statement." *United States v. Gallagher*, 90 F.4th 182, 195 (4th Cir. 2024). Hearsay is not admissible unless a federal statute, the Rules of Evidence, or other rules prescribed by the Supreme Court provide otherwise. Fed. R. Evid. 802; *see Gallagher*, 90 F.4th at 196.

Each category of anticipated testimony fits the definition. Testimony that a counselor told an inmate he would never see general population, *e.g.*, Ex. 1 (Cornelison) Tr. 214:20-215:3, is offered to prove that the program operates as Plaintiffs allege. Testimony recounting a staff member's racial epithet, *e.g.*, Ex. 10 (Cavitt) Tr. 219:16-17, is offered to prove that the epithet was uttered and reflects animus. And testimony that staff told an inmate who was demanding medical

attention "you'll be all right," *e.g.*, Ex. 1 (Cornelison) Tr. 139:20-22, is offered to prove that care was denied. Because the relevance of each statement depends on whether the declarant spoke the truth, each is hearsay. Fed. R. Evid. 802; *Gallagher*, 90 F.4th at 196.

To be sure, an out-of-court statement offered for a purpose other than its truth—such as its effect on the listener—is not hearsay and may not be excluded on that basis. *Gallagher*, 90 F.4th at 196. But that principle does not rescue the anticipated testimony. Plaintiffs do not seek to prove what a particular inmate subjectively believed or how he reacted; they seek to prove that the underlying events occurred as the absent declarants described. Offered for that purpose, the statements are hearsay and inadmissible unless Plaintiffs carry their "formidable burden" of establishing that the statements fall within a recognized exception. *United States v. Bumpass*, 60 F.3d 1099, 1102 (4th Cir. 1995).

III. The challenged statements do not qualify as party admissions under Rule 801(d)(2)(D).

Plaintiffs will likely contend that statements by VDOC personnel are admissions of a party opponent under Rule 801(d)(2)(D). Whether any given statement qualifies depends on the claim against which it is offered, because the "party" differs across the two sets of claims that will be tried. On the damages claim, the parties are the named Defendants sued in their individual capacities; on the class's claims for prospective injunctive relief, the parties are the named Defendants sued in their official capacities. Rule 801(d)(2) requires a different agency showing in each posture, and for the categories of testimony challenged here, Plaintiffs cannot make either showing.

A. Rule 801(d)(2)(D) requires the proponent to prove agency and scope, and the agency must run to the party against whom the statement is offered.

Rule 801(d)(2)(D) excludes from hearsay a statement "offered against a party" that "is … a statement by the party's agent … concerning a matter within the scope of the agency …, made

during the existence of the relationship." *E.E.O.C. v. Watergate at Landmark Condo.*, 24 F.3d 635, 638 (4th Cir. 1994). The proponent bears the burden of establishing both agency and scope for each declarant and must adduce independent evidence of the agency relationship; a statement made outside the scope of the declarant's scope of employment or authority is inadmissible as hearsay. *Precision Piping & Instruments, Inc. v. E.I. du Pont de Nemours & Co.*, 951 F.2d 613, 619 (4th Cir. 1991). When a declarant-employee's statement is sought to be introduced against a different defendant-employee, "admission under Rule 801(d)(2)(D) depends on the relationship between the declarant and the defendant." *Zaken v. Boerer*, 964 F.2d 1319, 1322 (2d Cir. 1992). The proponent of the statement must establish the agency relationship through independent evidence; the putative agent's own out-of-court statements "are not alone sufficient to establish the declarant's authority." *Gomez v. Rivera Rodriguez*, 694 F.2d 312, 321 (4th Cir. 1982) (quoting Fed. R. Evid. 801(d)(2).

Because the surviving claims are tried against different parties, that inquiry proceeds separately for the damages claims and the injunctive claims.

B. On the individual-capacity claims, Plaintiffs must prove that the declarant was an agent of the individual Defendant against whom the statement is offered—not merely a VDOC employee.

The class's § 1983 damages claims proceed against the named Defendants in their individual capacities. Such a suit seeks to impose individual liability and is not a suit against the employing entity. *See Kentucky v. Graham*, 473 U.S. 159, 166–67 (1985). When a statement is offered against an individual rather than the entity, the proponent must establish an agency relationship between the declarant and that individual defendant; shared employment by a common institution does not make one employee's statement the admission of the other. Even assuming a declarant was the entity's agent, "there remains the question of whether [the declarant] was [the] defendant's agent," and an agency relationship "is not created solely by the fact that the purported

principal is a corporate officer." *United States v. Wiedyk*, 71 F.3d 602, 605–606 (6th Cir. 1995) (internal quotation marks omitted); *see, e.g.*, *Ascent Aviation, LLC v. Smith*, No. 3:23-CV-101, 2024 WL 5454571, at *3 n.4 (S.D. Tex. Nov. 8, 2024) (explaining that a nonparty's assertive conduct otherwise "admissible as a party-opponent statement under the agency theory" for a claim against an entity was "inadmissible hearsay" because the plaintiff "only sued [the corporate officer] in his individual capacity").

The Third Circuit reached the same conclusion in *Lippay v. Christos*, 996 F.2d 1490, 1497 (3d Cir. 1993), holding that "the federal courts will not impute the statements of a declarant to a party-opponent who is merely the declarant's co-employee." There, the court required the proponent to show that the party-opponent personally "directed [the declarant's] work on a continuing basis." *Id.* (quoting *Boren v. Sable*, 887 F.2d 1032, 1041 (10th Cir. 1989)). That decision built on a Tenth Circuit decision explaining that a declarant's "mere occupation of a subordinate position in the corporate chain of command" was insufficient to show agency under Rule 801(d)(2)(D). *Boren*, 887 F.2d at 1040. Instead, the proponent needed to show that the party-opponent "controlled the daily performance of [the declarant] at the time he made the alleged 'admissions.'" *Id.* In that vein, the Second Circuit has permitted subordinate statements against an individual defendant only where the declarants "(1) were hand-picked by [the defendant]; (2) served at his pleasure; *and* (3) received their instructions through [the defendant] himself." *United States v. Rioux*, 97 F.3d 648, 653 (2d Cir. 1996).

No such showing can be made here. The named Defendants are (or were) senior leadership of VDOC. The declarants Plaintiffs intend to quote—line officers, counselors, unit staff, and medical personnel, many of them unidentified and most of them several supervisory layers removed—were not the agents or employees of the individual named Defendants in any sense the

rule recognized. Because Plaintiffs cannot make the required declarant-to-Defendant showing, the statements are not admissions on the damages claim.

C. On the claims for prospective injunctive relief, the challenged statements still fail Rule 801(d)(2)(D)'s foundation requirements.

The analysis differs for the class's claims for prospective injunctive relief, but the result is the same. Those claims proceed against the named officials in their official capacities, and an official-capacity suit is "in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham*, 473 U.S. 159, 166 (1985). The question thus becomes whether the out-of-court declarant is considered an agent of the entity. *United States v. Barile*, 286 F.3d 749, 758 (4th Cir. 2002). But that does not mean the anticipated testimony is admissible. Rule 801(d)(2)(D) still requires the proponent to identify the declarant, prove that the declarant was in fact a VDOC employee through independent evidence, demonstrate that the statement concerned a matter within the declarant's scope of employment, and—for any statement relayed through others—establish a qualifying foundation at each level.

1. Statements By Unidentified Staff. Where Plaintiffs cannot identify the declarant, they cannot establish that the declarant was a VDOC employee at all, much less one acting within the scope of employment when the statement was made. The Fourth Circuit has held that statements whose makers "had literally no involvement in the [relevant] process," or whose agency cannot be shown, are inadmissible hearsay rather than party admissions under Rule 801(d)(2)(D). *Watergate*, 24 F.3d at 640. The transcripts are replete with such statements attributed to anonymous staff. *E.g.*, Ex. 8 (Thorpe) Tr. 112:1-3 (unnamed mental-health staff who, the majority of the time, would say they never received his requests); Ex. 1 (Cornelison) Tr. 209:13-18 (recounting what unidentified staff told him about the D6 pod being the end of the line); Ex. 3 (Wall) Tr. 299:19-21 (unidentified staff telling him he was not programmed); Ex. 4 (Riddick) Tr. 84:17-21 (recounting what he was

later told by unidentified staff). An inmate's testimony that an unspecified individual made a statement cannot satisfy the foundational requirement and must be excluded. *See Tabor v. Thomas Built Buses, Inc.*, No. 2010 WL 148431, at *5 (M.D.N.C. Jan. 12, 2010) (rejecting on summary judgment party's assertion of what "an unidentified declarant" said because "without identification of the declarant, it cannot be considered as an admission of a party opponent").

2. Statements Outside the Declarant's Scope or Area of Authority. Even where a declarant is identified, a statement is an admission only if it concerns "a matter within the scope of [the declarant's] agency." *Watergate*, 24 F.3d at 638. Rule 801(d)(2)(D) does not convert every utterance by every VDOC employee into an admission of the agency. The rule does not require proof that the employee had authority to ***make*** the statement; rather, the proponent must show that "the subject of the statement" related to the employee's area of authority. *See United States v. Bros. Const. Co. of Ohio*, 219 F.3d 300, 310-11 (4th Cir. 2000); *see also Quesenberry v. Volvo Grp. N. Am., Inc.*, 267 F.R.D. 475, 483 (W.D. Va. 2010) (rejecting attempted use of Rule 801(d)(2)(D) where proponent could not show the speaker was acting "within the scope of the agency" relationship with the defendant). Plaintiffs' own examples illustrate the defect: a floor officer's aside about the Step-Down Program, Ex. 2 (McNabb) Tr. 220:9-12; treatment officers allegedly offering their personal views about how the Challenge Series books were administered, Ex. 4 (Riddick) Tr. 239:7-11; a program officer's alleged opinion that the program did not make much sense, Ex. 10 (Cavitt) Tr. 170:1-2; a guard's alleged use of an epithet in a casual conversation, Ex. 9 (Mukuria) Tr. 226:14-16. These alleged comments, if they were made at all, are outside the scope of each officer's duties and therefore do not constitute admissions attributable to any named Defendant in his or her official capacity. And Plaintiffs bear the burden of establishing scope for each individual declarant. Where the challenged statements amount to casual

asides, personal opinions, or gratuitous remarks unrelated to the declarant's ***actual*** duties, that burden is not met.

3. Statements By Other Inmates. Statements attributed to fellow prisoners are not admissions at all. Inmates are not VDOC's agents or employees, and their out-of-court statements are ordinary hearsay. *E.g.*, Ex. 1 (Cornelison) Tr. 365:16–22.

4. Layered (Double) Hearsay. Much of the anticipated testimony relays what one person said another person said. The depositions are full of such chains.[17] That some of these remarks are attributed to a named Defendant does not change the result, because Plaintiffs would offer them through a second inmate's out-of-court report that the remark was made. That intervening layer—one inmate repeating what another purportedly heard—is hearsay from a non-party declarant who is neither a party-opponent nor an agent, and no exclusion or exception reaches it. *See* Fed. R. Evid. 805. Each layer must independently satisfy an exclusion or exception; where the proponent cannot show that the original declarant was an agent speaking within scope, the chain necessarily fails, but a subsequent declarant's out-of-court statement about what the original declarant said must also meet an exception. *Precision Piping*, 951 F.2d at 619. Unless each link in such a chain independently qualifies as an exception, the testimony is inadmissible. *Id.*

[17] For example, Riddick testified that other inmates told him they had heard a Defendant use a racial slur, while acknowledging that he could not verify whether it was true. Ex. 4 (Riddick) Tr. 109:16-18. Snodgrass attributed a Defendant's alleged statement to a third party, testifying that another inmate was the source of the report that Defendant Raiford had made a racially derogatory remark about him. Ex. 11 (Snodgrass) Tr. 328:11-15. Hammer recounted accounts from inmates he did not know, conceding that his testimony was hearsay. Ex. 7 (Hammer) Tr. 260:17-18. And Riddick recounted what a psychologist allegedly told him that the warden and other staff purportedly had said. Ex. 4 (Riddick) Tr. 275:19-22.

D. The Court should require that foundation be established before any such statement is admitted.

Accordingly, the Court should preclude Plaintiffs from offering the challenged statements as party admissions unless and until the proponent establishes the foundation Rule 801(d)(2)(D) demands. For the damages claims, the proponent must establish an agency relationship running to the individual Defendant against whom the statement is offered—not merely VDOC employment. *Wiedyk*, 71 F.3d at 605–606; *Lippay*, 996 F.2d at 1497; *Boren*, 887 F.2d at 1040. For the injunctive claims, the proponent must identify the declarant, establish through independent evidence that the declarant was a VDOC employee, and demonstrate that statement concerned a matter within the declarant's scope of employment. *Watergate*, 24 F.3d at 639–40. For any statement relayed through others, each layer must independently qualify for admission. *Precision Piping*, 951 F.2d at 619. Regardless of the defendants' capacity, a testifying inmate's bare assertion that an unspecified staff member made a statement cannot satisfy these requirements.

IV. No hearsay exception under Rules 803, 804, or 807 cures the inadmissibility of this testimony.

Once a statement is identified as hearsay that is not a party admission, the proponent bears the burden of establishing that a recognized exception applies. None fits here.

Rule 803. The Rule 803 exceptions apply "regardless of whether the declarant is available as a witness" but require that the statement fall within a defined category—such as a present sense impression, an excited utterance, or a statement of the declarant's then-existing state of mind. Fed. R. Evid. 803. The anticipated testimony does not fit. A counselor's alleged narrative explanation of why an inmate is not progressing through the Step-Down Program, *e.g.*, Ex. 10 (Cavitt) Tr. 266:14-17, is not a contemporaneous description of an event perceived as it occurred, is not a spontaneous reaction to a startling event, and is offered to prove the truth of the matter asserted rather than merely the declarant's then-existing condition. *See* Fed. R. Evid. 803(1)–(3). Nor does

the then-existing-state-of-mind exception apply: it reaches the declarant's own contemporaneous mental or physical condition, not statements offered to prove that past events occurred or that the program operates as alleged. Fed. R. Evid. 803(3). To the extent Plaintiffs invoke Rule 803(4) for the medical examples, that exception covers statements made ***by a patient to a provider*** for purposes of diagnosis or treatment—not a provider's alleged statements ***to the inmate***, which is the form all of Plaintiffs' medical testimony takes. *E.g.*, Ex. 8 (Thorpe) Tr. 114:20-21; Ex. 1 (Cornelison) Tr. 235:10-15. Rule 803 therefore does not apply.

Rule 804. The Rule 804 exceptions apply only "if the declarant is unavailable as a witness," as defined by the five criteria in Rule 804(a). Fed. R. Evid. 804(b). Plaintiffs cannot satisfy that threshold. To the extent the declarants Plaintiffs will invoke are current or former VDOC employees who work(ed) at Red Onion State Prison, they likely are amenable to subpoena. And Plaintiffs bear the burden of showing death, infirmity, privilege, a refusal to testify despite court order, lack of memory, or an inability to procure attendance by reasonable means. *Id.* A proponent invoking a Rule 804 exception must satisfy each of its elements, "beginning with" unavailability. *United States v. Huskey*, 90 F.4th 651, 669 (4th Cir. 2024).

Rule 807. The residual exception permits admission of a hearsay statement not covered by Rule 803 or 804 only where the statement "is supported by sufficient guarantees of trustworthiness" considering the totality of the circumstances and any corroborating evidence, and "is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts," upon reasonable written notice to the adverse party. Fed. R. Evid. 807(a). The Fourth Circuit has made clear that Rule 807 is "used very rarely, and only in exceptional circumstances." *United States v. Huskey*, 90 F.4th 651, 670 (4th Cir. 2024) (quoting *United States v. Heyward*, 729 F.2d 297, 299–300 (4th Cir. 1984)). It is a "narrow exception" to

the rule against hearsay that should not be construed broadly. *United States v. Covington*, No. 3:23CR68 (RCY), 2023 WL 8481004, at *5 (E.D. Va. Dec. 7, 2023) (quoting *United States v. Dunford*, 148 F.3d 385, 393-94 (4th Cir. 1998)). In *Covington*, a prosecution arising from an inmate's death in which the government moved *in limine* to exclude out-of-court statements, the Eastern District of Virginia applied that narrow standard and excluded the challenged statements for lack of trustworthiness. *Id.* at *5–6. The anticipated inmate testimony here presents none of the exceptional guarantees Rule 807 demands; to the contrary, Plaintiffs' own words underscore the unreliability—one acknowledging that he could not verify whether the statement was true, Ex. 4 (Riddick) Tr. 109:16-18, and another acknowledging that his account was hearsay, Ex. 7 (Hammer) Tr. 260:17-18. *Huskey*, 90 F.4th at 670; *Covington*, 2023 WL 8481004, at *5–6.

V. Independent of relevance and hearsay, the challenged testimony should be excluded under Rule 403.

Independent of its irrelevance and its inadmissibility as hearsay, the challenged testimony should be excluded under Rule 403. The Court may exclude relevant evidence if its probative value is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the factfinder, undue delay, or wasting time. Fed. R. Evid. 403. "Unfair prejudice" means "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Fed. R. Evid. 403 advisory committee's note to 1972 proposed rules; *see also Old Chief v. United States*, 519 U.S. 172, 180 (1997) ("[U]nfair prejudice… speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring [a conclusion] on a ground different from [that] specific to [the claims at issue].").

The probative value of out-of-court statements by non-Defendant personnel is marginal in light of the claims actually being tried. The surviving claims concern whether the conditions and duration of the Step-Down Program impose cruel and unusual punishment and whether its review

processes afford constitutionally adequate process. Racial animus is not an element of either claim, and isolated slurs attributed to individual staff—*e.g.*, Ex. 10 (Cavitt) Tr. 219:16-17; Ex. 2 (McNabb) Tr. 106:21-22; Ex. 9 (Mukuria) Tr. 226:14-16—have little tendency to prove the objective conditions of confinement, the adequacy of the program's reviews, or the individual Defendants' states of mind. The danger of distraction is heightened where, as with several of these accounts, the slur is recounted secondhand through another inmate. *E.g.*, Ex. 4 (Riddick) Tr. 109:16-18; Ex. 11 (Snodgrass) Tr. 328:11-15. Testimony about discrete denials of care by non-party staff, *e.g.*, Ex. 1 (Cornelison) Tr. 139:20-22; Ex. 8 (Thorpe) Tr. 114:20-21, similarly bears little relevance to the class-wide conditions and review processes at issue. Admitting a parade of such anecdotes—each requiring a mini-trial into who said what, when, in what context, and with what authority—would confuse the issues and waste trial time without materially advancing the factfinder's resolution of the claims.

The same balance requires exclusion of the broader testimony about alleged policy violations and other alleged bad acts by non-Defendant VDOC personnel. Even if such testimony had marginal relevance—and for the reasons above it does not—its slight probative value would be substantially outweighed by the dangers Rule 403 guards against. Each alleged violation by a non-party would spawn its own collateral inquiry: whether the policy applied, whether it was in fact breached, by whom, in what circumstances, and whether any named Defendant knew of or authorized the conduct. Litigating a succession of individualized incidents involving non-parties would divert the trial from the class-wide questions of Program design and process that Plaintiffs have said this case presents, confuse those issues with vicarious-liability theories the law forecloses, and consume trial time to no legitimate end. Fed. R. Evid. 403.

Because this case will be tried to the Court rather than a jury, Defendants recognize that the unfair-prejudice prong of Rule 403 carries diminished force; the Fourth Circuit has indicated that "in the context of a bench trial, evidence should not be excluded under [Rule] 403 on the ground that it is unfairly prejudicial," because a judge is presumed able to disregard improper inferences. *In re Sanctuary Belize Litig.*, No. CV PJM 18-3309, 2020 WL 2467280, at *1 (D. Md. May 13, 2020) (citing *United States v. Hassanzadeh*, 271 F.3d 574, 578 (4th Cir. 2001)). But the remaining Rule 403 dangers retain full force in a bench trial. As courts have recognized, Rule 403 balancing still serves important purposes, particularly with respect to avoiding undue delay and efficiently using limited judicial resources, and even "[j]udges are … not innately or wholly immune from needless issue confusion." *Lund-Ross Constructors, Inc. v. Vecino Nat. Bridge, LLC*, No. 8:19CV550, 2023 WL 5607563, at *4 (D. Neb. Aug. 30, 2023). Exclusion of cumulative, marginally probative, and issue-confusing anecdotal testimony "is clearly a proper exercise of the judge's power" even at a bench trial. *Id.* (quoting *Gulf States Utils. Co. v. Ecodyne Corp.*, 635 F.2d 517, 519 (5th Cir. 1981)). Defendants accordingly ask the Court to exclude this testimony on confusion-of-the-issues and waste-of-time grounds, and—to the extent any portion is offered to a jury in any later phase—as unfairly prejudicial as well.

VI. Plaintiffs may not use lay inmate witnesses to offer undisclosed expert opinion.

Finally, to the extent Plaintiffs attempt to introduce the challenged statements—particularly those concerning medical treatment and psychological harm—through inmate witnesses offering opinion-style testimony, that testimony is independently inadmissible. A lay witness may offer opinion testimony only where it is "rationally based on the witness's perception," helpful, and not based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See* Fed. R. Evid. 701. Rule 701 "generally does not permit a lay witness to express an opinion as to matters which are beyond the realm of common experience and which

require the special skill and knowledge of an expert witness." *Certain Underwriters at Lloyd's, London v. Sinkovich*, 232 F.3d 200, 203 (4th Cir. 2000) (internal quotation marks omitted). Rule 701(c) was adopted precisely "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing," and to ensure that a party does not evade Rule 26's expert witness disclosure requirements. Fed. R. Evid. 701 advisory committee's note to 2000 amendment. Thus, at bottom Rule 701 forbids the admission of expert testimony dressed in lay witness clothing, and lay opinion must rest on the witness's own firsthand perception, not on post-hoc interpretation. *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010).

An inmate may testify to what he personally observed and experienced. But he may not opine that particular conditions caused a diagnosable psychological injury, or that a denial of treatment was medically improper; those are matters that "result[ ] from a process of reasoning which can be mastered only by specialists in the field," requiring qualification as an expert. Fed. R. Evid. 701 advisory committee's note to 2000 amendment. A witness may testify that a substance "appeared to be blood," but must qualify as an expert to testify that an injury "is indicative of" a particular medical condition. *Id.* The deposition testimony shows Plaintiffs poised to cross that line—for example, recounting a psychologist's musings about whether a Plaintiff had schizophrenia, Ex. 4 (Riddick) Tr. 294:9-10, a mental-health classification and its significance, Ex. 6 (Brooks) Tr. 234:15-18, or a cardiac diagnosis and its treatment, Ex. 1 (Cornelison) Tr. 235:10-15. Offered to prove medical causation, necessity, or harm, such testimony is expert opinion regardless of the lay packaging.

Opinion testimony that crosses into Rule 702 territory must also satisfy the disclosure requirements of Rule 26(a)(2). Absent a stipulation or court order, expert disclosures must be made

"at least 90 days before the date set for trial." Fed. R. Civ. P. 26(a)(2)(D). A party must supplement an expert disclosure that it learns is incomplete or incorrect, generally "at least thirty days before trial." *Bresler v. Wilmington Tr. Co.*, 855 F.3d 178, 190 (4th Cir. 2017); Fed. R. Civ. P. 26(e)(2). A party that fails to make a required disclosure "is not allowed to use that information or witness to supply evidence … at a trial, unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). That exclusion is an "automatic sanction," and the nondisclosing party bears the burden of showing substantial justification or harmlessness under the five-factor test the Fourth Circuit applies. *Hall v. Gestamp W. Va., LLC*, No. 2:20-CV-00146, 2021 WL 1240635, at *3 (S.D.W. Va. Apr. 2, 2021). Nor may Plaintiffs circumvent the rule by recasting belated opinions as "supplements"; Rule 26(e) permits supplementation only "to add additional or corrective information," not "to bolster or submit additional expert opinions." *Campbell v. United States*, 470 F. App'x 153, 157 (4th Cir. 2012). To the extent Plaintiffs have not properly and timely disclosed inmate witnesses as experts on causation, medical necessity, or psychological harm, those witnesses may not offer such opinions at trial. *Id.*

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter an order precluding the named Plaintiffs and any other class member witness from offering at trial:

(i) testimony about alleged violations of VDOC policies or procedures, or other conduct, by non-Defendant VDOC personnel, offered to prove that a named Defendant violated Plaintiffs' constitutional rights, such testimony being irrelevant under Federal Rules of Evidence 401 and 402;

(ii) out-of-court statements attributed to VDOC personnel or other declarants for the truth of the matter asserted, where such statements do not qualify as a statement of a party opponent against a named Defendant under Federal Rule of Evidence 801(d)(2) and are not admissible under any exception in Rules 803, 804, or 807;

(iii) the testimony addressed above—including the alleged racist slurs, the alleged denials of medical treatment, and the alleged policy violations and

bad acts of non-Defendant personnel—that should be excluded under Rule 403; and

(iv) expert opinion testimony that has not been disclosed in compliance with Federal Rule of Civil Procedure 26(a)(2) and (e).

Defendants further request that the Court direct Plaintiffs to establish the requisite foundation before eliciting any such testimony, and grant such other and further relief as the Court deems just and proper.

Dated: August 24, 2026

Respectfully submitted,

/s/ *Maya M. Eckstein*

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CERTIFICATE OF SERVICE

I hereby certify that on August 24, 2026, I caused a copy of the foregoing to be electronically filed using the CM/ECF system, which will send notification to counsel of record of such filing by operation of the Court's electronic system. Parties may access this filing via the Court's electronic system. Additionally, the sealed documents have been delivered to all counsel of record via electronic mail.

By: /s/ *Maya M. Eckstein*
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