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*, IN LIMINE TO EXCLUDE OUT-OF-SCOPE PORTIONS OF PLAINTIFFS' SUPPLEMENTAL EXPERT REPORTS

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] respectfully move *in limine* under Federal Rules of Evidence 702 and Federal Rules of Civil Procedure 26(a)(2)(D), 26(e), and 37(c)(1) for an order precluding Plaintiffs' four experts—Dr. Craig Haney, Dr. Michael Hendricks, Dan Pacholke, and Russell Molter—from offering at trial the out-of-scope opinions and materials contained in their June 18, 2026 supplemental reports. In support of this Motion, Defendants state as follows.

BACKGROUND

Plaintiffs, a certified class of inmates, allege that the conditions of confinement in VDOC's Step-Down Program (the "Program") at Red Onion State Prison and Wallens Ridge State Prison violate the Eighth Amendment and that the Program's reviews violate the Due Process Clause.

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

Fact discovery on the merits closed on or about March 1, 2023. In May and August 2023, Plaintiffs served opening and rebuttal merits reports from each of the four experts at issue here:

1. **Dr. Craig Haney** (opening May 26, 2023; rebuttal August 2, 2023), opining on whether the Program conditions constitute "solitary confinement" as that term is used in the scientific literature and whether that literature establishes that solitary confinement poses a significant risk of psychological harm.

2. **Dr. Michael Hendricks** (opening May 26, 2023; rebuttal August 2, 2023), opining on the adequacy of mental health care and the psychological effects of the Program on the named Plaintiffs.

3. **Dan Pacholke** (opening May 26, 2023; rebuttal August 2, 2023), opining on whether the Program conforms to accepted correctional practice.

4. **Russell Molter** (report May 26, 2023; supplemental June 23, 2023; rebuttal August 2, 2023), providing numerical analysis of certain VDOC CORIS data.

On March 4, 2026, the Court reopened discovery for a narrow and specific purpose. (ECF No. 524.) It permitted Plaintiffs to take supplemental discovery "limited to any material changes in the subject Step-Down Program and its policies, practices, and conditions of confinement." *Id.* at 2. The Court correspondingly authorized, "[i]f necessary," supplemental expert reports and rebuttal reports from each side. *Id.* The order thus defined a narrow universe: developments that postdate the 2023 record and that "material[ly] change[d]" the Program—not a second opportunity to re-litigate the experts' prior opinions.

Plaintiffs served four supplemental reports on June 18, 2026. Three experts framed their reports as determinations whether newly produced materials "affect" or "change" their prior opinions; each concludes that they do not. *See* Ex. 1 (Haney Supp. Rep.) at ¶ 20 ("The opinions I expressed in my earlier case-related reports remain unchanged."); Ex. 2 (Hendricks Supp. Rep. [relevant portions]) at p. 2 ("[N]one of this additional evidence changes my prior opinions in this case; rather, it provides additional support for certain of those opinions."); Ex. 3 (Pacholke Supp.

Rep.) at p. 2 ("[T]hese new materials have only strengthened my prior opinions."). Molter updated his prior analyses "using updated inmate security and status spreadsheets ('CORIS Data') produced by [VDOC] on April 21, 2026."). Ex. 4 (Molter 2d Supp. Rep. [relevant portions]) at p. 2.

Plaintiffs' supplemental reports largely disregard the boundary between supplementation and bolstering. By the experts' own descriptions, the reports were designed to confirm that their prior opinions "remain unchanged" and have only been "strengthened." Ex. 1 (Haney Supp. Rep.) at ¶ 20; Ex. 3 (Pacholke Supp. Rep.) at p. 2; Ex. 2 (Hendricks Supp. Rep.) at pp. 2, 16. To get there, those reports do two things the Court's order does not permit. *First*, they rehash—often verbatim—the facts, data, and opinions the experts expressed in their 2023 reports. *Second*, they introduce new opinions, literature, or analyses untethered to any material change to the Step-Down Program, most notably Dr. Haney's rolling update of scientific literature on the asserted general harmfulness of solitary confinement—a section in which he claims that "hundreds" of studies and "some 100" publications since 2018 corroborate his views, yet identifies only three by name—and Mr. Molter's new individualized day-count exhibits.

This Motion is deliberately narrow. Defendants do ***not*** seek to exclude the portions of the supplemental reports that actually do what the Court authorized—those addressing actual post-2023 developments, such as VDOC's new "Safety Agreement," the implementation of Virginia Code § 53.1-39.2, new tablet and recreation access, and updates to Mr. Molter's previous analyses using the updated CORIS data produced in 2026. Defendants seek to exclude only the rehashed and untethered material that exceeds both the Court's order and the proper scope of Rule 26(e) supplementation.

Defendants therefore ask the Court to enter an order precluding Plaintiffs' experts from offering at trial (1) any opinions, facts, or data that merely restate or reiterate material already presented in their 2023 reports; (2) any new literature, studies, or opinions unrelated to a material post-2023 change in the Step-Down Program; and (3) any new analyses not previously disclosed and not necessary to account for new post-2023 data or program changes. Defendants further ask that Dr. Haney be precluded from invoking at trial any study not specifically identified in his reports.

ARGUMENT

I. Rule 26(e) does not permit experts to bolster, expand, or recast their prior opinions under the guise of supplementation.

Rule 26(a)(2)(D) governs the timing of expert disclosures, and Rule 26(e) imposes a duty to supplement those disclosures "when the party learns of new information." *S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596–97 (4th Cir. 2003). But supplementation is a vehicle for *new information only*—not for new, expanded, or improved opinions. The Fourth Circuit has squarely held that Rule 26(e) "envisions supplementation 'to add additional or corrective information,'" and that "[t]o construe [Rule 26(e)] supplementation to apply whenever a party wants to bolster or submit additional expert opinions would [wreak] havoc in docket control and amount to unlimited expert opinion preparation." *Campbell v. United States*, 470 F. App'x 153, 157 (4th Cir. 2012). A purported supplement that "[does] not simply add or correct information, but rather attempt[s] to recast [the expert's] initial opinions," falls outside Rule 26(e)(1) and is properly excluded. *Id.*; *see also Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306, 310 (M.D.N.C. 2002). ("Rule 26(e) envisions supplementation when a party's discovery disclosures happen to be defective in some way…. It does not cover failures of omission because the expert did an inadequate or incomplete preparation.").

Courts in this Circuit accordingly "distinguish true supplementation (*e.g.,* correcting inadvertent errors or omissions) from gamesmanship, and have therefore repeatedly rejected attempts to … supplement[] an expert report with a new and improved expert report." *Disney Enters., Inc. v. Kappos*, 923 F. Supp. 2d 788, 795 (E.D. Va. 2013) (quoting *Gallagher v. S. Source Packaging, LLC*, 568 F. Supp. 2d 624, 631 (E.D.N.C. 2008)). A party's "clear obligation to disclose and supplement expert witness information in a timely fashion . . . does not permit a party to make an end-run around the normal timetable for conducting discovery." *Id.* A "supplemental" report that "contains new information and expert opinion, intended both as an expansion of [the] earlier expert report as well as a means to impermissibly broaden the scope of the expert opinions," is not supplementation. *Id.* And a rebuttal report likewise "is not a means to skirt a party's *initial* disclosure obligations for issues on which it bears an affirmative burden." *Deque Sys. Inc. v. Browserstack, Inc.*, 177 F.4th 585, 595 (4th Cir. 2026).

When a party's expert disclosure exceeds the bounds of Rule 26, Rule 37(c)(1) supplies the remedy. Exclusion is the "automatic sanction"; the rule "requires exclusion unless the party establishes substantial justification or harmlessness." *S. States*, 318 F.3d at 596 n.2; *Campbell*, 470 F. App'x at 156. Exclusion is "proper—indeed, mandated—so long as [the] noncompliance with Rule 26(a) [is] neither substantially justified nor harmless." *Deque Sys.*, 177 F.4th at 595. No showing of bad faith is required, and the party facing exclusion—here, Plaintiffs—bears the burden of establishing that its "nondisclosure [was] substantially justified or harmless." *S. States*, 318 F.3d at 596-97.

In assessing substantial justification and harmlessness, the Court applies the five *Southern States* factors: "(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." *S. States*, 318 F.3d at 597. The importance of the evidence cuts both ways: "the more important the evidence, the more important it is for the proponent to disclose the evidence in a timely manner because it is more likely to prejudice the opposing party." *Deque* Sys., 177 F.4th at 596. Because untimely or improper disclosure "unfairly inhibits [the] opponent's ability to properly prepare," courts afford "particularly wide latitude" to the decision to exclude. *Id.* at 595; *see also Wilkins v. Montgomery*, 751 F.3d 214, 222 (4th Cir. 2014).

Separately, Rule 26(a)(2)(B)(ii) requires that expert reports contain "a complete statement of all opinions the witness will express and the basis and reasons for them" as well as "the facts or data considered by the witness in forming them." An expert who invokes studies or data as the foundation for his opinion but declines to identify them has not satisfied that obligation. *See Maltese v. Smith Transp., Inc.*, No. 3:19-cv-00060, 2021 WL 4394318, at *1, 2 (W.D. Va. Sept. 25, 2021) (Moon, J.) ("Litigants should be able to rely on an expert's report and deposition testimony for the basis for their opinions, and not the cumulative breadth of publicly available literature in the expert's field."); *Andrews v. Woody*, No. 3:17-cv-167, 2018 WL 2452177, at *5 (E.D. Va. May 31, 2018) ("An expert may not … simply state in a conclusory manner that his or her opinions are based on a review of relevant materials.").

Independently, expert testimony is admissible under Rule 702 only if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. The Court serves a "special gatekeeping obligation" to ensure that expert testimony "both rests on a *reliable* foundation and is *relevant* to the task at hand." *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021); *see also United States v. Hunt*, 99 F.4th 161, 168 (4th Cir. 2024). Relevance is "a *precondition* to

admissibility," and "if an opinion is not relevant to a fact at issue, *Daubert* requires that it be excluded." *Sardis*, 10 F.4th at 281-82. Expert opinion that does not "fit" the issue actually before the Court—here, whether the Program has materially changed since 2023—does not assist the factfinder and should be excluded. *See EEOC v. Freeman*, 778 F.3d 463, 467 (4th Cir. 2015) (explaining expert testimony must rest on a reliable foundation and be relevant to the task at hand); *United States v. Lester*, 254 F. Supp. 2d 602, 606 (E.D. Va. 2003) (excluding expert testimony that did not "fit" the factual dispute at trial).

II. The out-of-scope opinions exceed the permissible scope of supplementation and should be excluded under Rules 26(e) and 37(c)(1).

Plaintiffs' supplemental reports should have been confined to material changes in the Step-Down Program since 2023. Instead, each expert (i) re-presents opinions already disclosed in 2023, and (ii) in several instances injects new opinions and literature divorced from any program change. The problem is not supplementation with genuinely new information. It is Plaintiffs' use of the supplemental-report process to re-present, strengthen, and in some instances subtly expand opinions that were either already disclosed or could have been disclosed in 2023. The rehashed material is not "additional or corrective information" within Rule 26(e). *Campbell*, 470 F. App'x at 157. The new-but-untethered material exceeds the permissible scope of supplementation and should be excluded under Rule 37(c)(1). Defendants address each expert in turn, identifying the out-of-scope content they seek to exclude.

A. Dr. Haney

Dr. Haney may address whether newly produced VDOC materials—including asserted changes to programming, recreation, tablet access, phone access, and the Safety Agreement—materially alter his prior opinions about the Step-Down Program. But his supplemental report goes beyond that task in three respects.

First, it devotes its entire second section—"Summary of Prior Opinions," paragraphs 4 through 5(a)–(n) (at 2–7)—to a restatement of the opinions he disclosed in 2023. *See* Ex. 1 (Haney Supp. Rep.) at pp. 3, 8. This is not new information; it is a recapitulation of his earlier reports. Likewise, paragraphs 9 and 10 re-state his prior definition of "solitary confinement," expressly "as I have previously written," and quote at length from his 2020 publication attached to his Opening Report. *Id.* at pp. 8-10. Paragraph 15's first point similarly repeats, "as I noted in my Opening Expert Report," his opinion that virtual contact does not substitute for in-person interaction. *Id.* at p. 12. None of this is "additional or corrective information" tied to a post-2023 change; it is precisely the "bolster[ing]" of prior opinions that Rule 26(e) forbids. *Campbell*, 470 F. App'x at 157.

Second, Section IV of Dr. Haney's report—"Additional Scientific Literature on the Harmful Effects of Solitary Confinement"—includes a previously undisclosed summary of his earlier reports and adds new material unrelated to the scope of supplementation permitted by the Court's order. Ex. 1 (Haney Supp. Rep.) at ¶¶ 16-19. There, Dr. Haney purports to summarize recent scientific studies, including a 2024 study by Silverthorn and Zgoba, *id.* at ¶ 18a; a 2025 meta-analysis by Giguere and colleagues, *id.* at ¶ 18b; and a 2025 publication by Dellazizzo and colleagues, *id.* at ¶ 18c. He then asserts that "there are now some 100 scientific studies, data-based book chapters, and other treatises published since 2018 that, with the exception of a very few outliers" corroborate his views. *Id.* at ¶ 19.

Third, even setting scope aside, Dr. Haney claims to have reviewed "hundreds" of studies corroborating his views but identifies only three by name; the remaining studies are neither listed, cited, nor described anywhere in his report. Rule 26(a)(2)(B)(ii) requires disclosure of "the facts or data considered by the witness in forming" his opinions, and an expert who invokes hundreds

of studies as the foundation for his opinion but declines to identify them has not satisfied that obligation. *See Akeva*, 212 F.R.D. at 310. An opinion whose claimed scientific foundation consists of hundreds of unidentified studies cannot be tested for reliability; it is nothing more than *ipse dixit*—the very thing Rule 702 and *Daubert* were designed to prevent. *Sardis*, 10 F.5th at 281; *Hunt*, 99 F.4th at 168. Dr. Haney should therefore be precluded from invoking at trial any study not specifically identified in his reports.

B. Dr. Hendricks

Dr. Hendricks's supplemental report principally addresses two categories of post-2023 information: recent incidents of self-harm in the Step-Down Program and VDOC's new use of a "Safety Agreement" in response to those incidents. Defendants do not seek to preclude Dr. Hendricks from addressing either category to the extent he ties his opinions to material post-2023 developments. But Rule 26(e) does not permit Dr. Hendricks to use those developments as a vehicle to re-present or expand his broader 2023 opinions about VDOC's mental-health screening, staffing, treatment, or response to self-harm, except to the extent those opinions are tied to the Safety Agreement itself, the 2024-2025 self-harm incidents, or another material post-2023 program change. His "Summary of Prior Opinions," for example, restates his 2023 opinions on mental-health screening, staffing, and care. Ex. 2, Hendricks Supp. Rept. at pp. 2-3. Likewise, any generalized clinical exposition on self-harm that is not tied to the post-2023 incidents or the Safety Agreement remains background expert opinion that could have been disclosed in 2023. Those portions should be excluded. *Campbell*, 470 F. App'x at 157.

C. Dan Pacholke

Mr. Pacholke may address the post-2023 materials that actually bear on whether the Step-Down Program materially changed, including the 2023 Step-Down Manual, weekly BMC review records, implementation of Va. Code § 53.1-39.2, the Safety Agreement, recent self-harm

incidents, updated grievance materials, and lockdown data. But he may not use those materials as a vehicle to re-present the full set of correctional-practice opinions he disclosed in 2023. Much of his supplemental report does exactly that. It repeatedly opens by reaffirming prior opinions and then concludes they remain unchanged: Section II.A, ¶¶ 7-15, on unnecessary deprivation; Section II.B, ¶¶ 16-19, on the Program's complexity; Section II.C, ¶¶ 20-26, on ACA standards, step-down practices, and evidence-based principles; Section II.D, ¶¶ 27-28, on staff understanding of evidence-based principles; Section II.E, ¶¶ 29-36, on the review "gauntlet"; Section II.H, ¶¶ 51-56, on discipline, retaliation, and abuse; Section II.I, ¶¶ 57-61, on supervisory failures; and Section II.K, ¶¶ 71-76, on named Plaintiffs and grievances. Ex. 3 (Pacholke Supp. Rep.) at pp. 2-32. Those sections largely restate his 2023 critiques using new examples. They should be limited to the specific post-2023 facts he identifies and not treated as a renewed disclosure of his full 2023 opinions. Likewise, his renewed discussion of physical cell design and the use of attack dogs, which simply cites his Opening Report, is not supplementation at all. *Id.* ¶¶ 68-69. And to the extent he relies on new, general literature—such as the 2025 Batastini article or the 2024 Stateline article—to add support for unchanged opinions untethered to a material VDOC program change, that material is improper bolstering under Rule 26(e). *Campbell*, 470 F. App'x at 157. These portions should be excluded.

D. Russell Molter

Mr. Molter's Second Supplemental Report stands on a different footing, and Defendants' request as to him is correspondingly limited. Mr. Molter re-runs his prior statistical analyses on a genuinely new dataset—the CORIS Data that VDOC produced on April 21, 2026, which extends through February 17, 2026. Ex. 4 (Molter 2d Supp. Rep.) at pp. 5, 7. To the extent the report updates previous analyses using that newly produced data, that is proper Rule 26(e)

supplementation based on "new information," and Defendants do not seek to exclude it. *S. States*, 318 F.3d at 596.

Defendants instead seek to exclude those portions of Mr. Molter's Second Supplemental Report that go beyond updating his previously disclosed aggregate analysis with the 2026 data. There are three categories of this impermissible ***new*** work.

First, Mr. Molter adds a wholly new analysis of 51 class members who, by his own concession, fall outside his stated methodology. Reviewing the list of 990 class members, Molter concedes that 51 "do not have either a Status Code associated with the Program or a Security Level of SL-S or SL-6 during the Class Period in the CORIS Data." Ex. 4 (Molter 2d Supp. Rep.) ¶ 11. Rather than exclude those individuals, however, he created four entirely ***new*** exhibits analyzing them (in Exhibits 16c, 16d, 16e, and 16f), then combined them with the 939 individuals who met his original criteria (in Exhibits 16e and 16f).

Analyzing these 51 individuals requires new methodological decisions about how to quantify Program time for individuals whom the CORIS Data cannot place in the Program—decisions never disclosed or tested in discovery. This is not a response to a change in the Program's conditions; it is ***new*** expert analysis that Molter could have performed in 2023. The Court's supplementation order did not authorize it, and neither do the Rules. *See Akeva*, 212 F.R.D. at 310; *Campbell*, 470 F. App'x at 157.

The prejudice is concrete and visible on the face of Mr. Molter's exhibits. For these 51 individuals, his choice of counting methodology produces a 170% variation: Scenario 2 (pathway time) generates 893 total days, while Scenario 3 (which adds "Other Segregation" codes) generates 2,408 total days—a swing driven entirely by an untested methodological judgment about how to treat "Other Segregation" codes. When the 51 are combined with the 939 in Exhibit 16e, the result

is a combined aggregate of 1,048,407 class-member confinement days—the single largest figure in either Molter report—which Defendants have never had the opportunity to examine. Exhibits 16c, 16d, 16e, and 16f should be excluded.

Second, Exhibits 16g and 16h present a ***new*** individualized analysis. In 2023, Exhibit 16 was a six-number aggregate table (three Scenarios multiplied by two Calculations) for the class as a whole. In 2026, Exhibits 16g and 16h present row-by-row schedules—one row per class member, with six day-count figures per row, for all 990 individuals—that provide 5,490 individual data points never disclosed in any prior report. Ex. 4 (Molter 2d Supp. Rep.) at p. 10. Nothing about a change in Program conditions required shifting from aggregate-level reporting to inmate-by-inmate reporting. Indeed, the underlying methodology for calculating days rests on the same CORIS fields, status-code assumptions, and counting rules Mr. Molter disclosed in 2023. Exhibits 16g and 16h are ***new*** analyses dressed as a data update.

Defendants' necessarily limited review of the individual-level data has revealed internal inconsistencies that underscore the prejudice of admitting this kind of untested analysis. For example, Molter credits Frank C. King (Offender ID 1164665) in Exhibit 16g with only 89 days of SL-S/SL-6 time under Scenario 1 but 4,307 days of Pathway time under Scenario 2—a discrepancy of 4,218 days. VDOC's own CORIS release file confirms that King was administratively transferred from Wallens Ridge State Prison to an interstate compact facility on June 29, 2014, with no subsequent return to VDOC custody. Yet VDOC's CORIS internal status file shows that on June 30, 2014—the day after King's transfer—a new "Intensive Management 0" pathway status was entered in CORIS for King at Wallens Ridge, the prison he had just departed. Because that entry postdates his release, Molter's cap-at-release methodology cannot reach it, and the Pathway time has accrued without interruption ever since. The result is crediting

more than eleven years of additional Program time to an inmate whose actual time in the Step-Down Program lasted 89 days.

Molter's supplemental report nowhere acknowledges this discrepancy or discloses how many of the aggregate Scenario 2 days are attributable to similar anomalies. At a minimum, the new analysis in Exhibit 16g attributes 4,218 phantom days to an inmate who has not been in VDOC custody for more than twelve years, and those phantom days are embedded in the class-wide totals calculated by Molter. This single example illustrates that 5,940 individual data points require exactly the kind of inmate-by-inmate verification that is infeasible and impractical on the eve of trial, well after the close of discovery. Because Mr. Molter could have generated these inmate-by-inmate schedules in 2023 using the same CORIS fields, assumptions, and counting rules – and Defendants then would have had an opportunity to respond – the new schedules are not proper under the Court's supplementation order. Exhibits 16g and 16h should be excluded. *See Akeva*, 212 F.R.D. at 310; *Campbell*, 470 F. App'x at 157.

Third, Molter's supplemental report structurally expands other exhibits from the 2023 report in ways that introduce new analyses rather than update old ones. Exhibit 9 adds a new column presenting outcome percentages excluding released or transferred inmates—a new reference population not disclosed in 2023. Exhibit 15 likewise adds a new row reporting the median number of regressions. These additions are smaller than what has been noted above, but they reinforce the same pattern: Mr. Molter systematically added new analyses throughout the report rather than merely updating previously disclosed calculations.

Taken together, these additions confirm the narrow line Defendants ask the Court to enforce: Mr. Molter was permitted to update the aggregate analyses he previously disclosed using genuinely new CORIS data, but he may not add new populations, individualized schedules, or new

structural measures that were not necessary to account for any change in the Step-Down Program. Nor may Plaintiffs use the supplemental report to reopen methodological disputes already joined in 2023, including disputes over status-code assumptions and other methodological decisions about undocumented data fields, except insofar as those decisions are used to present the same previously disclosed analysis with updated data. The new analyses described above are not "additional or corrective information" triggered by new data; they are new opinion work that should have been include in the original report. *See Akeva*, 212 F.R.D. at 310 (explaining supplementation "does not cover failures of omission because the expert did an inadequate or incomplete preparation"). Because Plaintiffs did not disclose that work during the original expert period, Rule 37(c)(1) requires its exclusion.

III. The *Southern States* factors confirm that exclusion is warranted.

The *Southern States* factors confirm that exclusion is warranted, and Plaintiffs—who bear the burden—cannot show substantial justification or harmlessness. *Southern States*, 318 F.3d at 596-97; *Deque Sys.*, 177 F.4th at 596. This Court has previously applied these factors to exclude untimely new expert opinions disguised as supplementation. *See Doe by Watson v. Russell Cnty. Sch. Bd.*, No. 1:16-cv-00045, 2018 WL 1128388, at *2 (W.D. Va. Mar. 1, 2018) (Jones, J.) (excluding new expert opinions that were "not a true supplemental disclosure but contained new opinions, not previously disclosed" as untimely under Rule 37(c)(1)).

Surprise. The out-of-scope material identified above inflicts three distinct forms of prejudice, corresponding to the three categories of excludable content.

First, Mr. Molter's new individualized day-count exhibits present the most straightforward surprise. As shown above, no previously disclosed analysis by Molter (or any other expert) took that form. Defendants had only two weeks between receiving the exhibits and their rebuttal deadline—insufficient time to verify the underlying data, test the methodology against the CORIS

records, or prepare responsive analyses for calculations covering nearly 1,000 class members. No expert could address them because no response was possible on the timeline given.

Second, the new-but-untethered material—Dr. Haney's literature update and Mr. Pacholke's reliance on post-2023 articles—forced Defendants into a response the Court's order did not contemplate. Dr. Morgan did respond to Haney's three named studies, demonstrating that each actually undercuts Dr. Haney's claims. But the issue is not whether Defendants managed to respond; it is whether the Court's narrow supplemental discovery order authorized a rolling exchange of general scientific literature on solitary confinement unmoored from any change to the Step-Down Program. It did not. Requiring Defendants to engage that material—and to litigate it at trial—expands the proceedings beyond the question of program change and rewards Plaintiffs for using supplementation as a vehicle to bolster unchanged opinions.

Third, the rehashed 2023 material does not present a surprise in the traditional sense; Defendants are well aware of these opinions from the 2023 reports. The prejudice is different. If permitted to stand in the supplemental reports, this material transforms a narrow supplemental exchange about program changes into a re-presentation of the experts' entire 2023 merits opinions, now carrying a 2026 date and the added force of a confirmatory re-endorsement. The Court's order authorized the experts to identify what has changed—not to confirm at length what has not. Defendants' rebuttal experts—Dr. Beard and Dr. Morgan—scoped their supplemental reports to address post-2023 developments, as the order required. They did not re-engage the full range of 2023 opinions because the order gave no occasion to do so. Permitting Plaintiffs' experts to re-present that material at trial would require Defendants to expand their trial preparation to encompass a second iteration of the entire 2023 expert presentation, blur the distinction between the narrow supplemental question (has the Program materially changed?) and the underlying

merits (were the 2023 conditions unconstitutional?), and effectively grant Plaintiffs the more powerful trial narrative that their experts have now "reviewed everything and confirmed nothing has changed"—a framing the March 4 order did not authorize.

The "rules of expert disclosure are designed to allow an opponent to examine an expert opinion for flaws and to develop counter-testimony through that party's own experts." *Southern States*, 318 F.3d at 598. None of these categories of prejudice can be cured through cross-examination. Cross-examination cannot substitute for the expert investigation needed to test Mr. Molter's 990 individualized calculations, cannot undo the expansion of the supplemental exchange to encompass untethered literature, and cannot prevent the rehashed material from lending a 2026 imprimatur to opinions that were due in 2023. "[T]he ability to simply cross-examine an expert concerning a new opinion at trial is not the ability to cure." *Id.*; *see also Doe by Watson*, 2018 WL 1128388, at *3 (finding that "the ability to cure at this stage of litigation seems limited to a continuance, which would be greatly disruptive"). Nor would reopening the supplemental expert exchange be an appropriate remedy; it would require Defendants to redirect their rebuttal experts to re-address 2023 opinions, effectively restarting the process the Court's narrow order was designed to confine. *Doe by Watson*, 2018 WL 1128388, at *3.

Disruption and Importance. Permitting Plaintiffs to relaunch their full 2023 expert presentation under the banner of "supplementation"—and to fortify it with new studies and new analyses—would expand the issues for trial well beyond the narrow question of program change and require Defendants to re-engage opinions already addressed in 2023. The evidence may be important to Plaintiffs, but that cuts against them, not for them: "the more important the evidence, the more important it is for the proponent to disclose the evidence in a timely manner." *Deque Sys.*, 177 F.4th at 596. The time to disclose these opinions was 2023.

No Justification. Plaintiffs have no adequate explanation for repackaging old opinions or for offering literature untethered to any program change. Rule 26(e) does not allow supplementation "whenever a party wants to bolster or submit additional expert opinions." *Campbell*, 470 F. App'x at 157. And a supplemental report may not be used "to make an end-run around the normal timetable for conducting discovery." *Disney Enters.*, 923 F. Supp. 2d at 795. The fact that these experts could have—and did—offer these very opinions in 2023 defeats any claim of justification. Allowing the out-of-scope material would circumvent the Court's March 4, 2026 limitation and reward Plaintiffs for using the supplemental-report process as a mechanism to expand their original expert opinions beyond what the Court authorized. Because the noncompliance is neither substantially justified nor harmless, exclusion is "proper—indeed, mandated." *Deque Sys.*, 177 F.4th at 595. Moreover, the out-of-scope opinions are inadmissible under Rule 702 because they do not "fit" the only issue the supplemental record was opened to address. *See Sardis*, 10 F.4th at 281; *Lester*, 254 F. Supp. 2d at 606.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court enter an order precluding Plaintiffs' expert witnesses Dr. Haney, Dr. Hendricks, Mr. Pacholke, and Mr. Molter from offering the out-of-scope opinions offered here, specifically: all rehashed 2023 material; all new literature, studies, or opinions untethered to any material post-2023 program change; and all new analyses not previously disclosed and not necessary to account for genuinely new post-2023 data or program changes. Defendants further request that Dr. Haney be precluded from invoking at trial any study not specifically identified in his reports. Defendants further request such other and further relief as this Court deems just and proper.

Dated: August 24, 2026

Respectfully submitted,

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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.

By: /s/ *Maya M. Eckstein*
Maya M. Eckstein