**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF VIRGINIA**
**ABINGDON DIVISION**

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

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE OUT-OF-SCOPE PORTIONS OF PLAINTIFFS' SUPPLEMENTAL EXPERT REPORTS**

This Court authorized supplemental expert reports because nearly three years had elapsed since expert discovery closed. ECF No. 524 (Mar. 4, 2026). Defendants now seek to exclude testimony consistent with those Court-authorized reports by relabeling necessary context as "bolstering," consideration of recent information in the expert's field as impermissible expansion, and analysis of newly produced VDOC data as improper supplemental analysis. But these mischaracterizations do not establish that Plaintiffs violated the Court's order, unfairly surprised Defendants, or intend to present opinions beyond those properly disclosed.

Defendants' objections fail for three related reasons. First, an expert summarizing an earlier opinion does not enlarge or bolster those opinions; it establishes the baseline needed to explain whether the opinion has changed. Second, Defendants do not come close to identifying any cognizable prejudice. They complain that the repeated opinions now bear "a 2026 date and the added force of a confirmatory re-endorsement." ECF No. 563 (Aug. 24, 2026) ("Mot.") at 15. But Defendants seek to exclude trial testimony, not to strike portions of reports. An expert does not present the same opinion twice at trial merely because it appears in two reports, and a new date

on a report does not make trial testimony more persuasive. If it did, courts would routinely exclude overlapping opinions reaffirmed in rebuttal reports. Plaintiffs' supplemental reports gave Defendants nothing new to confront with respect to the experts' original opinions and provides no basis for excluding the same opinions disclosed in 2023. Third, the challenged discussion of policy changes, newly produced VDOC data, and recent developments in the experts' fields address precisely the information that supplementation was intended to capture. The Court should deny Defendants' motion.

## I. Plaintiffs' Supplemental Expert Reports Are Proper Under the Court's March 4, 2026 Order.

Defendants frame their motion as seeking to enforce Rule 26(e)'s limits on supplementation, but that misapprehends the procedural posture. Plaintiffs did not unilaterally decide to supplement their expert reports to cure deficiencies in their 2023 submissions. The Court reopened expert discovery due to the passage of time and expressly authorized supplemental and rebuttal reports. ECF No. 524. The cases Defendants cite are therefore inapposite, involving parties who used Rule 26(e) as a vehicle to fix inadequate disclosures or to introduce "new and improved" opinions after the expert deadline had passed. *See Disney Enters., Inc. v. Kappos*, 923 F. Supp. 2d 788, 795 (E.D. Va. 2013). Here, by contrast, Plaintiffs served supplemental reports within the process and schedule the Court authorized.

Even if Rule 26(e) supplied the governing standard, it would not help Defendants. Rule 26(e) requires timely supplementation when "the party learns that in some material respect the disclosure or response is incomplete or incorrect." Fed. R. Civ. P. 26(e)(1)(A). Plaintiffs timely served their supplemental reports under the Court's scheduling order based on genuinely new information—updated VDOC policies and procedures, newly produced VDOC data, and recent scientific literature. That is supplementation in its most straightforward form, not the post-hoc

recasting of "initial opinions so as to comply with the requirements of Rule 26(a)" that the Fourth Circuit condemned in *Campbell v. United States*, 470 F. App'x 153, 157 (4th Cir. 2012).

Further, Defendants have wholly failed to demonstrate prejudice. They have been aware of the opinions each expert summarized since 2023, and although they contend that Plaintiffs' experts "bolster[ed]" those opinions by summarizing them, they identify no example of genuine bolstering. Defendants' prejudice argument therefore fails, and each of Plaintiffs' experts properly supplemented his opinions.

**A. Dr. Haney**

Dr. Haney's supplemental report addresses revisions to VDOC procedures and summarizes three studies published since the close of expert discovery in 2023 that are relevant to his expected testimony. This supplementation falls squarely within the Court's order authorizing supplemental expert reports. Defendants' complaint that Dr. Haney summarizes his previous opinions, anchoring his new opinions, is not improper. Defendants' "bolstering" label changes nothing. An expert cannot meaningfully explain that a prior opinion remains valid without first identifying the opinion being reaffirmed. Restating that opinion adds nothing substantive; it merely makes the report intelligible.

According to Defendants, however, an opinion they have known since 2023 became prejudicial when it appeared under "a 2026 date" with purported "added force of a confirmatory re-endorsement." Mot. at 15. But Defendants wholly fail to explain how a 2026 date on a supplemental expert report impacts the expert's trial testimony in any way. Dr. Haney does not intend to cover the same material twice simply because he served a Court-authorized supplemental report. It is no wonder that Defendants acknowledge that the challenged material "does not present a surprise in the traditional sense." *Id.* That acknowledgement, however, does not stop Defendants

from requesting that the Court impose the draconian remedy of exclusion based on their novel theory of "prejudice." The Court should reject that effort, as exclusion under *Southern States* addresses real litigation prejudice—surprise, an inability to cure, or disruption at trial—not the imagined rhetorical power of a printed date. *See S. States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 597 (4th Cir. 2003). Defendants identify no authority recognizing their unprecedented theory, and its implications are untenable: any expert who reaffirmed an opening opinion in a later rebuttal or supplemental report would risk exclusion merely because the opinion had been stated twice. The Rules do not impose that penalty, and Defendants cannot manufacture grounds for exclusion by characterizing the complete absence of surprise as *nontraditional* prejudice. *See* Fed. R. Civ. P. 37(c)(1) (discussing remedies only for "fail[ure] to provide information").

Defendants further contend that Dr. Haney's discussion of three recent studies exceeds the permissible scope of supplementation. Mot. at 8. It does not. That argument treats Dr. Haney as a reviewer of VDOC documents rather than an expert applying decades of specialized knowledge. His opinions necessarily rest on the scientific literature and his expertise in the effects of solitary confinement, not merely on the materials produced by VDOC. When the Court authorized supplemental expert reports after expert discovery had been closed for nearly three years, nothing in its order required Dr. Haney to disregard intervening developments in his field.

Dr. Haney therefore identified three studies published in 2024 and 2025 and explained how those studies fit within the broader scientific literature underlying his previously disclosed opinions. ECF No. 563-1 ¶¶ 17–19. He did not rely on those studies to offer a new opinion; he considered them to determine whether intervening developments in the relevant science altered his existing opinion and concluded that they did not. Omitting that analysis would have left his

statement that his opinion remained unchanged since 2023 vulnerable as unsupported and disconnected from the scientific expertise on which the opinion rests. The Court's order did not require that artificial limitation, and Dr. Haney's discussion of recently published literature therefore falls within the proper scope of his supplemental report.

Defendants also claim that Dr. Haney failed to disclose the hundreds of scientific studies underlying his opinions. That misreads his report. Dr. Haney's reference to "some 100 scientific studies" plainly refers to the body of research discussed in his prior reports, as the challenged references comes three paragraphs after Dr. Haney expressly references the myriad studies summarized in his opening and rebuttal reports, *see* ECF No. 563-1 ¶ 16, a point Defendants conspicuously ignore. Their argument therefore depends on reading a single sentence in isolation while disregarding the surrounding discussion.

Defendants' position is also internally inconsistent: Defendants fault Dr. Haney for briefly summarizing his previously disclosed opinions yet argue those same opinions are unsupported because he did not repeat every study and citation from his original reports. They cannot have it both ways. And, in fact, neither of Defendants' complaints are correct, and no portion of Dr. Haney's supplemental expert report should be excluded from use at trial.

**B. Dr. Hendricks**

Defendants likewise contend that Dr. Hendricks improperly summarized his previous opinions in his supplemental expert report, which, according to Defendants, should be excluded because they "re-present or expand upon his broader 2023 opinions." Mot. at 9. As with Dr. Haney's report, Dr. Hendricks' brief "Summary of Prior Opinions" included at the start of his supplemental report serves as background and provides the context in which Dr. Hendricks offers his supplemental opinions. ECF No. 563-2 ¶¶ 4–6. And again, Defendants wholly fail to explain the prejudice of Dr. Hendricks' previous testimony summarized in a supplemental report or how

such a summary could possibly change his trial testimony. The opinions Dr. Hendricks provided in his opening expert report have been known to Defendants since 2023 and cannot possibly surprise Defendants, as even Defendants acknowledge. Mot. at 15 ("[T]he rehashed 2023 material does not present a surprise in the traditional sense."); *see also S. States*, 318 F.3d 597 (considering "surprise to the party against whom the evidence would be offered" when evaluating whether to exclude an expert opinion). The Court should therefore reject Defendants' attempts to exclude testimony from Dr. Hendricks.

**C. Dan Pacholke**

Defendants repeat their well-worn complaint against the portions of Mr. Pacholke's supplemental expert report that restate or affirm the opinions presented in his opening expert report. The objection fails for the same reasons discussed above. Mr. Pacholke is Plaintiffs' corrections expert and offers opinions regarding VDOC's policies, practices, and conditions of confinement. After the Court authorized supplemental discovery concerning "material changes in the subject Step-Down Program and its policies, practices, and conditions of confinement," ECF No. 524, Mr. Pacholke necessarily had to evaluate whether those developments affected his opinions about the program. In doing so, he appropriately identified the opinions he previously offered, considered the intervening information, and explained whether his conclusions had changed. Mr. Pacholke's reference to his prior opinions laid out in his opening report provide important context to the opinions he lays out in his supplemental report.

In any event, again, exclusion of any portion of an expert report is not appropriate where the report did not cause "surprise to the party against whom the evidence would be offered," and is therefore harmless. *S. States*, 318 F.3d at 597. Mr. Pacholke's restatement of opinions disclosed years ago could not possibly have surprised Defendants, as they effectively concede. The

supplemental report disclosed no new opinion, created no new trial advantage, and gave Defendants no reason to revisit issues they have been litigating since 2023. The challenged passages merely explain why Mr. Pacholke continues to hold opinions Defendants have known about for years, and they provide no basis for exclusion.

**D. Russell Molter**

Defendants note that their motion is much narrower with regard to Mr. Molter's second supplemental report.[1] Mr. Molter's recent report updates his prior analyses with new inmate data that VDOC produced on April 21, 2026. Mot. at 10. Since Mr. Molter analyzed new information from VDOC, Defendants seek to exclude only portions of his report that they claim are more than an update to his prior analyses. *Id.* at 11. Defendants are incorrect in their identification of any portion of Mr. Molter's second supplemental report as improper supplementation.

First, Defendants argue that Mr. Molter's updated analysis adds "51 class members who, by his own concession, fall outside his stated methodology." *Id.* Defendants mischaracterize Mr. Molter's analysis and, moreover, the issue is one of Defendants' own making. In Mr. Molter's initial analyses he identified potential class members by analyzing inmate data stored in CORIS, determining whether each inmate was ever "assigned to one of the Status Codes associated with the Program (i.e., a Status Code in the IM or SM Pathway, associated with the SIP/SAM Pods, or associated with Re-Entry Units)." Ex. 2 (Excerpt of Molter Rpt.) ¶ 10. On April 3, 2026, VDOC produced to Plaintiffs a list of class members—which included each inmate who Defendants had determined met the class definitions—who were "(i) currently in VDOC facilities, (ii) housed in non-VDOC facilities, and (iii) no longer in VDOC custody." Ex. 3 (Correspondence from

[1] Mr. Molter served a supplemental expert report on June 26, 2023 in response to Defendants' production of corrected data after they discovered errors in their data underlying his opening expert report. Ex. 1 (Excerpt of Molter Suppl. Rpt.) ¶ 3–5; ECF No. 563-4 ¶ 7.

Counsel). Based on this representation from VDOC, Mr. Molter added 51 individuals to his analysis who do not have a status code or security level notation associated with the Step-Down Program in the CORIS data but who counsel for VDOC represented are class members. This is not "impermissible new work" as Defendants contend, but rather an analysis of new information provided to Plaintiffs by Defendant VDOC in April 2026.

Defendants next contend that Exhibits 16g and 16h to Mr. Molter's report reflect a "new individualized analysis." Mot. at 12. That is not the case. Defendants do not dispute that in each of Mr. Molter's reports, he has calculated, *inter alia*, the average time inmates have spent at each stage of the Step-Down Program, the time inmates have spent in the program as a whole, and the total number of days that class members were in solitary confinement. In his second supplemental report, Mr. Molter reported how much time each class member spent in the Step-Down Program. While Defendants make much hay of this fact, these calculations were always part of Mr. Molter's analyses. In fact, these individual calculations are a necessary intermediate calculation to reach the aggregate calculations that Mr. Molter presented in his opening expert report, as one cannot calculate the average or total days without first determining—on an individual basis—how long inmates spent in stages of the program or in solitary confinement. In other words, Exhibits 16g and 16h present the data underlying the calculations that Mr. Molter's analysis has always been based on.

Defendants' motion also ignores that they requested the very type of individualized analysis included in Exhibits 16g and 16h that they now critique. Defendants previously complained to the Court that Mr. Molter "did not disclose a calculation of the number of days that any individual class member spent in the Step-Down Program or at any phase of the Step-Down Program." ECF No. 461 at 9 (Feb. 22, 2024). Defendants seemed intent on disregarding the fact that a class-

member-by-class-member analysis was already embedded in Mr. Molter's aggregate calculations (for which Defendants were provided Mr. Molter's source code files), just as it is embedded in the calculations performed by their own expert, Dr. Tama Celi. To eliminate any doubt, Mr. Molter provided the individualized data they requested. Exhibits 16g and 16h therefore present the individualized information about time spent in the Step-Down program that Defendants have argued is necessary for a damages calculation.[2]

Defendants also criticize Mr. Molter's analyses based on alleged inconsistencies in the CORIS data, a dataset that Defendant VDOC itself maintains. But those criticisms provide no basis for exclusion. First, any such issues were properly the subject of a rebuttal expert report, which Defendants elected not to serve.[3] Defendants were likewise free to depose Mr. Molter regarding his analysis but chose not to do so. Having declined both opportunities, Defendants

[2] This motion is also in tension with Defendants' separate effort to exclude Plaintiffs' damages theories based on Plaintiffs' purported failure to supplement their interrogatory responses to further detail those theories. *See* ECF No. 559 (Aug. 24, 2026). Here, by contrast, Defendants complain that Plaintiffs' expert did exactly that—provide additional information, already inherent in his original reports, to support those same damages theories.

[3] Defendants contend that they "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." Mot. at 14–15. That argument is meritless. Defendants produced the inmate data for the express purpose of allowing Mr. Molter to supplement his analysis. Defendants also knew the applicable deadlines. Indeed, Defendants only objected to supplemental expert discovery, not to the time allotted between opening reports and rebuttals. *See* ECF No. 520 at 3 (Feb. 23, 2026) ("The parties have discussed the schedule for pretrial deadlines and are largely in agreement regarding the matters that require deadlines *and the intervals of time proposed*. . . . Defendants object to including deadlines related to expert discovery in the proposed schedule.") (emphasis added). Moreover, Defendants apparently did not attempt to download the materials accompanying Mr. Molter's report until a full week after he served his second supplemental report. On June 25, 2026, seven days after Mr. Molter served his report, Defendants complained that Plaintiffs had not provided all relevant data in an accessible format, only for Plaintiffs to point out that the information was contained in the files already produced and accessible. Ex. 4. Defendants neither sought an extension of the rebuttal deadline nor, again, deposed Mr. Molter regarding his updated analysis. They cannot now use a motion to exclude as a substitute for diligence they chose not to exercise.

cannot now attempt to offer rebuttal expert testimony through attorney argument in a motion *in limine*. Moreover, even setting aside that Defendants' complaints are unsupported attorney argument and that their challenge to Mr. Molter's report is effectively a *Daubert* motion masquerading as a motion *in limine*, Defendants cannot benefit from their own mistakes. As one court has recently recognized, "any missing data would have been the product of the [Defendants'] own incomplete record-keeping and cannot be held against [the expert]." *See Orellana v. Cnty. of Suffolk*, No. 17-CV-4267 (WFK), 2026 WL 2031336, at *18 (E.D.N.Y. June 24, 2026); *see also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.").

Mr. Molter acknowledges that inconsistencies exist in the CORIS data and expressly accounts for these issues by conducting his analyses under multiple scenarios. For example, Defendants highlight the case of Frank C. King (Offender ID 1164665), whose status codes in the CORIS data show both that he was transferred on June 29, 2014, without stating whether he was permanently transferred out of VDOC custody, and that he was placed in IM 0 at Wallens Ridge on June 30, 2014, which Defendants now report, for the first time, is an error in the data. Defendants complain that Mr. Molter's calculation of the time Frank King spent in the Step-Down Program ranges from 89 days under Scenario 1 to 4,307 days under Scenario 2. Yet it is precisely because VDOC has errors in their data set that Mr. Molter's analysis offers multiple scenarios to account for these errors. This is not a basis for exclusion.

Finally, Defendants are likewise mistaken in asserting that Exhibits 9 and 15 of Mr. Molter's second supplemental report present new analyses. ECF No. 563 at 13. Defendants state

that "Exhibit 9 adds a new column presenting outcome percentages . . . not disclosed in 2023." Mot. at 13. But Mr. Molter's opening expert report presented the exact same column in Exhibit 9. *Compare* Ex. 1 (Excerpt of Molter Suppl. Rpt.), Exhibit 9 *with* Ex. 5 (Excerpt of Molter 2d Suppl. Rpt.), Exhibit 9. Defendants also state that Exhibit 15 "adds a new row reporting the median number of regressions." Mot. at 13. Again, this analysis is not new. Exhibit 11 of Mr. Molter's Rebuttal Report includes a presentation of the median number of regressions. Ex. 6 (Excerpt of Molter Rebuttal Rpt.), Exhibit 11. None of these updated analyses are a basis for exclusion.

Each of the analyses that Mr. Molter's provided in his second supplemental report merely updates analyses based on updated data from VDOC or presents the same data in a new table. As such, they should not be excluded from use at trial.

## II. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' motion *in limine* in its entirety.

Dated: September 8, 2026

Respectfully Submitted,

/s/ *Jared Frisch*

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 8th day of September 2026, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all CM/ECF participants.

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