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

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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR JUDICIAL NOTICE UNDER FED. R. EVID. 201

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I. INTRODUCTION

Defendants' Motion for Judicial Notice ("Mot.") seeks to expand judicial notice beyond its permissible scope to introduce disputed evidence and argument, and should be denied.

Judicial notice under Federal Rule of Evidence 201 serves a narrow and specific function: it permits a court to accept as established certain facts that are "not subject to reasonable dispute" because they are either "generally known within the trial court's territorial jurisdiction" or "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). The doctrine exists to spare parties the burden of formally proving facts that no one could reasonably dispute. *See* Fed. R. Evid. 201 advisory committee's note.

But judicial notice is not a mechanism for resolving legal disputes or contested factual questions, nor is it a vehicle for introducing evidence disputed by the parties. *See, e.g.*, *United States v. Lowers*, 170 F.4th 134, 148–49, 153 (4th Cir. 2026) (courts may not use judicial notice to "borrow factual findings made by other courts to fill [an evidentiary] gap"). Where parties dispute factual or legal issues, or contest the accuracy, completeness, or implications of proffered materials, judicial notice is unavailable, and the proponent must argue its position and submit evidence through the ordinary adversarial process, subject to the safeguards of discovery, cross-examination, and the Rules of Evidence. *See* Fed. R. Evid. 201 advisory committee's note ("traditional methods of proof" apply except in "clear cases" in which facts are "so universally known that they cannot reasonably be the subject of dispute" or "capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy").

Defendants' motion violates these principles in two ways. *First*, Defendants seek to use judicial notice to resolve disputed legal and factual issues—including whether prior decisions establish collateral estoppel and whether Defendants were deliberately indifferent to the risks of prolonged solitary confinement. *Second*, Defendants seek to use judicial notice to introduce an

unreliable "50-state survey"—a purported survey whose author is not identified in Defendants' motion, which contains selective inclusion and characterization of complex regulatory schemes, and which appears to have been created last month solely for this case to advance Defendants' litigation interests.

As discussed more fully below, Defendants' motion for judicial notice should be denied. The disputed issues of collateral estoppel and deliberate indifference Defendants seek to resolve through this motion are not subjects that can be established through judicial notice, and Defendants' purported 50-state survey bears no resemblance to the authoritative, indisputable sources that Rule 201 contemplates for judicial notice. Moreover, the survey should be precluded in any event, because Defendants failed to disclose it during discovery.

II. THE PRIOR ADJUDICATIONS SHOULD NOT BE JUDICIALLY NOTICED.

Defendants seek judicial notice of ten federal court adjudications addressing the Step-Down Program to try to establish issue preclusion against two class members, and negate Defendants' deliberate indifference. *See* Mot. at 4–7, 10–13. The Court should reject these efforts.

A. Issue Preclusion Is Not a Matter for Judicial Notice and Is Unavailable in Any Event.

Defendants ask the Court to take judicial notice of the *Mukuria* and *Snodgrass* adjudications, arguing that these decisions are binding through the doctrine of issue preclusion. Mot. at 10–13. But issue preclusion is unavailable because (1) whether a prior adjudication results in issue preclusion is a disputed legal question that cannot be established through judicial notice; and (2) Defendants cannot satisfy the elements of issue preclusion in any event.

First, issue preclusion cannot be established through judicial notice given that judicial notice can only be used to establish *facts* that are not subject to reasonable dispute. Fed. R. Evid. 201(b) ("The court may judicially notice ***a fact*** that is ***not subject to reasonable dispute***.")

(emphasis added). Whether a prior judgment precludes litigation of an issue in a subsequent case is a *conclusion* that requires legal analysis and adjudication. *See, e.g.*, *Sedlack v. Braswell Servs. Gp. Inc.*, 134 F.3d 219, 224 (4th Cir. 1998) (applying elements of collateral estoppel and concluding doctrine did not apply). Because collateral estoppel is not a "fact," let alone an indisputable fact, it cannot be established through judicial notice. *See United States v. Daley*, 378 F. Supp. 3d 539, 546 (W.D. Va. 2019) ("Judicial notice of legal conclusions or legal reasoning ... would be inappropriate."). If Defendants wanted to try to resolve preclusion issues prior to trial, they could have raised these issues in a summary judgment motion. *See generally* ECF No. 381. Having failed to do so, and with the deadline for filing summary judgment motions now passed, (ECF No. 262; ECF No. 312), Defendants have forgone the opportunity to resolve collateral estoppel issues before trial.

Second, issue preclusion is unavailable as a substantive matter, because the prior decisions Defendants attempt to rely upon have been repudiated, and therefore "[do] not retain preclusive force." *Herrera v. Wyoming*, 587 U.S. 329, 344 (2019).

On the due process claim, the district courts in both *Mukuria* and *Snodgrass*—on undeveloped records and in cases litigated by *pro se* plaintiffs—held that the Step-Down Program did not create a protected liberty interest, with *Mukuria* concluding that the program "addresses and alleviates the isolating conditions and indefiniteness identified in *Wilkinson*." *Mukuria v. Clarke*, 2016 WL 5396712, at *8 (W.D. Va. Sept. 27, 2016); *see also Snodgrass v. Gilbert*, 2017 WL 1049582, at *14 (W.D. Va. Mar. 17, 2017) (concluding that "step-down procedures available to SLS inmates address and alleviate the isolating conditions and indefiniteness identified in *Wilkinson* and *Incumaa*"). But in *Smith v. Collins*, 964 F.3d 266, 277 (4th Cir. 2020), the Fourth Circuit rejected the point-by-point comparison of conditions from those decisions and held that

materially similar Step-Down Program conditions could support a protected liberty interest, considering factors like indefiniteness, collateral consequences on good-time credit, and whether the program provides a genuine path to release. *See id.* at 275, 280.

As for the Eighth Amendment claim, both *Mukuria* and *Snodgrass* found no violation based on the individual plaintiffs' thin evidentiary showings—*Mukuria* because the plaintiff "fail[ed] to allege that these restrictions have caused him any serious or significant harm," 2016 WL 5396712, at *11, and *Snodgrass* because the plaintiff "does not allege that the specific conditions or restrictions in SLS or SM-0 status have caused, or are likely to cause, him any serious or significant physical or mental injury," 2017 WL 1049582, at *14. Those holdings were made on the undeveloped factual records that often exist in conditions brought by *pro se* litigants and both pre-dated *Porter v. Clarke*, 923 F.3d 348, 357–58 (4th Cir. 2019), which held that conditions amounting to solitary confinement pose a substantial risk of serious psychological and emotional harm as an objective matter.

The Fourth Circuit's earlier decision in this case confirms that these prior adjudications rest on repudiated premises. In *Thorpe v. Clarke*, 37 F.4th 926 (4th Cir. 2022), the court allowed Plaintiffs' due process and Eighth Amendment claims to proceed—notwithstanding that *Mukuria* and *Snodgrass* rejected claims challenging the same Step-Down Program. On due process, the *Thorpe* court held that the program's conditions are "even more onerous than conditions the Supreme Court unanimously recognized gave rise to [a protected liberty] interest in 2005," *id.* at 942; rejected the argument that the program cured the indefiniteness problem, *id.* at 942–43; and found that the very review procedures *Mukuria* credited as protective "multi-level" mechanisms, *cf. Mukuria*, 2016 WL 5396712, at *9, may not provide sufficient due process. *Thorpe*, 37 F.4th at 944–45. On the Eighth Amendment, *Thorpe* denied qualified immunity—necessarily finding

that Plaintiffs had plausibly alleged Defendants knew of the harms solitary confinement causes and chose to disregard them. *Id*. at 934–37. *Thorpe* thus repudiates the premises underlying the prior adjudications, and, under *Herrera*, these repudiated decisions have no preclusive force. 587 U.S. at 344.

Even putting *Herrera* aside, the prior adjudications do not satisfy the elements of collateral estoppel, including, for example, the requirement that the party against whom preclusion is asserted had "a full and fair opportunity to litigate the issue in the previous forum." *Sedlack*, 134 F.3d at 224. Mr. Mukuria and Mr. Snodgrass litigated as *pro se* prisoners—without counsel, without experts, and without the class-wide discovery that has defined this case, and did not have the means to litigate adequately the complex fact-intensive claim that prolonged solitary confinement violates the Eighth Amendment and Due Process Clause given the prison program here. *See Restatement (Second) of Judgments* § 28(5)(c) (issue preclusion does not apply where, "as a result of the conduct of [an] adversary or other special circumstances," the party to be precluded "did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action"). The inadequacy of the prior proceedings defeats preclusion even as to Mr. Mukuria and Mr. Snodgrass, and indisputably to the entire class.[1]

[1] Even accepting Defendants' argument, preclusion would accomplish virtually nothing. It would extend only through September 2016 (for Mr. Mukuria) and March 2017 (for Mr. Snodgrass)—a narrow sliver of the damages class period, which runs from August 2012 through trial. The injunction class is entirely forward-looking and would be untouched. And preclusion could apply only to Mr. Mukuria and Mr. Snodgrass themselves—two individuals out of an entire certified class, as the Court has already rejected Mr. Mukuria as a class representative. *See* ECF No. 467 (Mar. 29, 2024). Given issue preclusion's marginal importance, there is even less reason for the Court to accept Defendants' invitation to adjudicate the issue-preclusion defense through judicial notice.

B. Defendants' State of Mind Is Not a Matter for Judicial Notice.

Defendants also argue the prior adjudications negate their subjective awareness of a substantial risk of serious harm to the Plaintiffs—a required element of the Eighth Amendment deliberate indifference standard—"during the earlier years of the class period." Mot. at 13. Defendants effectively argue that because prior courts upheld the Step-Down Program, Defendants believed it was constitutional and therefore were not deliberately indifferent. *Id.* at 12–13. But this reflects an argument that rests on highly disputed facts. ECF No. 516. Whether a particular prison official read a particular court decision, how that official interpreted it, and whether other information overrode whatever comfort those rulings may have provided Defendants, are all fact questions for trial that Defendants cannot resolve here.

It does not help Defendants to contend that they are not relying on the prior decisions for their "truth." Mot. at 9. Defendants purport to be "mindful" of the "limits" on judicial notice, acknowledging that courts "may not take judicial notice of another court's findings of fact for the truth asserted therein because such facts are usually disputed." *Id*. But if Defendants are not offering the prior adjudications for their truth, they can only be offered for the inference that Defendants believed the program was constitutional—which is itself the disputed fact this Court has committed to the factfinder at trial. Indeed, this Court's January 20, 2026 summary judgment decision held that "[w]hether the evidence cited by the plaintiffs renders the Step-Down Program obviously harmful and demonstrates indifference presents a question of credibility." ECF No. 516 at 14. Defendants cannot now use Rule 201 as a backdoor to relitigate qualified immunity or to resolve deliberate indifference prior to trial. If Defendants merely want to argue that they were aware of prior favorable decisions, the proper mechanism is for the individual Defendants to testify to that effect at trial, subject to cross-examination about what else they knew.

C. The Prior Adjudications Are Not Relevant.

Not only are the purposes for which Defendants seek to use the prior adjudications improper, but the prior adjudications themselves are not relevant. Evidence is relevant only if it has "any tendency to make a fact more or less probable than it would be without the evidence" and is "of consequence in determining the action." Fed. R. Evid. 401. Irrelevant evidence is not admissible. Fed. R. Evid. 402. Here, Defendants have not established that the prior adjudications are relevant for any permissible purpose.

Of the ten adjudications identified, Defendants argue that issue preclusion applies to only two—the *Mukuria* (2016) and *Snodgrass* (2017) proceedings. *See* Mot. at 10–11. But as discussed in Section II.A above, issue preclusion is unavailable and cannot be adjudicated through a motion for judicial notice.

For the remaining adjudications, Defendants identify no preclusion theory. Nor have they established relevance for any other purpose, such as state of mind, as Defendants have submitted no affidavits, declarations, or other evidence that any individual Defendant read, was aware of, or relied upon any of these prior adjudications in forming beliefs about constitutional risk. *See generally* Mot. And the decisions are also not relevant to qualified immunity—a defense on which this Court has denied summary judgment for both the Eighth Amendment and Due Process claims. *See* ECF No. 516 at 13–15. Indeed, the Fourth Circuit has held that "district court opinions, like unpublished opinions from our Court, have no precedential value" and will not be considered when assessing clearly established law. *Thorpe*, 37 F.4th at 943 n.6 (quoting *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 545 (4th Cir. 2017)). The district court opinions relied upon by Defendants carry no precedential weight under *Thorpe*, and thus cannot support qualified immunity as a matter of law.

The prior adjudications therefore would not assist the Court in resolving any issue before the Court. Should Defendants later demonstrate that any of these decisions bear on an issue before the Court—and that the decision satisfies Rule 201's requirements and other applicable rules—the Court may take notice at that time. *See* Fed. R. Evid. 201(d) ("The court may take judicial notice at any stage of the proceeding.") But Defendants have not established relevance at this juncture, and the Court should not wade into ten prior opinions to determine whether relevance might eventually materialize.

III. DEFENDANTS' INCOMPLETE AND UNAUTHETICATED 50-STATE SURVEY LABELED "EXHIBIT A" ALSO SHOULD NOT BE JUDICIALLY NOTICED.

Defendants also ask this Court to take judicial notice of "Exhibit A"—a chart dated August 2026, which Plaintiffs have never seen before at any point in the 7+ year history of this litigation and which Defendants have not authenticated, but which they ostensibly prepared for this litigation purporting to catalog laws restricting solitary confinement across the United States. Defendants contend their survey is relevant under the Eighth Amendment's evolving-standards-of-decency framework and qualifies for judicial notice because it purportedly compiles enacted legislation drawn from state codes. *See* Mot. at 14–18.

But Exhibit A is not merely a collection of statutory text. It is a document that self-servingly summarizes state legislative schemes through a series of editorial choices, including (1) which sources of law constitute relevant "authority"; (2) how to summarize complex regulatory frameworks; and (3) which inmate populations and categories of restrictions to exclude.

As discussed below, Exhibit A should not be judicially noticed for at least three reasons. *First*, as a document of unidentified origin that ostensibly has been prepared by Defendants for purposes of advancing their litigation interests, it is not a source whose accuracy "cannot

reasonably be questioned." *Second*, it is independently inadmissible as hearsay. *Third*, it was not produced during fact or expert discovery, and its introduction at this late stage should be precluded.

A. Defendants' "Exhibit A" Does Not Qualify for Judicial Notice Because It Is Not a "Source Whose Accuracy Cannot Reasonably Be Questioned."

Exhibit A is a document of unidentified origin, but presumably created by Defendants, that selectively identifies relevant authority and paraphrases statutes to advance their litigation interest. A source with an unidentified author, whose content apparently reflects the editorial judgments of an adversary is, by definition, a source whose accuracy *can* "reasonably be questioned." It would therefore be inappropriate under Rule 201 for the Court to take judicial notice of this document.

Courts routinely decline to take judicial notice of documents created by parties with a litigation interest. For example, in *General Electric Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082–84 (7th Cir. 1997), the Seventh Circuit held that it was an abuse of discretion to take judicial notice of a private document drafted by the parties, reasoning that such a document "has none of the indicia of trustworthiness found in a public record" and that "it is not too Machiavellian to believe that a party to a settlement may intentionally insert (or accept) misleading or erroneous language into an agreement for its later benefit in tangentially related litigation." *Id.* at 1084. The court concluded that the district court "erred in relying on a private settlement document for the truth of facts asserted therein without previously establishing why it is a source 'whose accuracy cannot reasonably be questioned.'" *Id.* Similarly, in *United States v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003), the Ninth Circuit rejected the government's attempt to use judicial notice to introduce a declaration prepared by its own counsel, holding that the factual assertions therein "do not remotely fit the requirements of Rule 201" because the underlying questions they purported to resolve were inherently disputed. And in *United States v. Rosenschein*, 136 F.4th 1247, 1259–60 n.3 (10th Cir. 2025), the Tenth Circuit affirmed the denial of judicial notice of

documents created by private party to advance its independent interests because "their accuracy can be reasonably questioned." The principle recognized in all these cases is clear: documents created by a private party or litigant with incentives to shape the content favorably are not sources "whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)

Defendants argue that individual state statutes, and compilations of information drawn from them, are proper subjects for judicial notice. *See* Mot. at 15–16 (citing *Lamar v. Micou*, 114 U.S. 218, 223 (1885)). But the cases they cite do not support judicial notice here. Every one of those cases involves judicial notice of official sources—enacted statutes (*Lamar*, 114 U.S. at 223; *S. Ry. Co. v. O'Dell*, 252 F. 540, 543 (4th Cir. 1918)); government websites (*United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017)), official state redistricting data (*Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004)), the territorial jurisdiction of the United States (*United States v. Perez*, 150 F.4th 237, 248 (4th Cir. 2025)), or government-agency sentencing statistics (*United States v. White*, 620 F.3d 401, 415–16 (4th Cir. 2010)). Defendants do not cite a single case in which a court agreed to take judicial notice of a document created by an unidentified author, nor of a party-prepared survey that characterizes, summarizes, or interprets those official sources for purposes of litigation. The leap Defendants ask this Court to make—from "courts may notice statutes" to "courts must notice counsel's summary of statutes"—is not supported by their cited authorities or the purpose of judicial notice.

Defendants suggest that judicial notice is appropriate because Exhibit A's content is "verifiable" by "any party or the Court at any time." Mot. at 16. But verifiability is not the standard—the standard is whether the facts come from "sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). These are not the same thing. If mere verifiability were sufficient, virtually any factual assertion backed by publicly available data could be introduced

through judicial notice: for example, an expert report could be judicially noticed because the underlying studies are "verifiable," or a party's damages calculation could be noticed because the financial records are publicly accessible. That is not how Rule 201 works. The rule requires that the *source itself*—not the underlying data it purports to compile—be one whose accuracy cannot reasonably be questioned. A chart prepared by a litigant to advance its position in the very case in which it is offered is not such a source. *See GE Capital*, 128 F.3d at 1082.

Moreover, Defendants cannot reconcile their "verifiability" argument with the text of Rule 201(f), which provides that "[i]n a civil case, the court must instruct the jury to accept the noticed fact as conclusive." Fed. R. Evid. 201(f). A standard of verifiability—that "any party" can verify the content of a noticed document at "any time"—cannot coexist with a rule that renders noticed facts conclusive, because the noticed facts would be beyond dispute regardless of what "verification" might later reveal. Mot. at 16.

In any event, even a cursory review of Exhibit A confirms that its accuracy *can* "reasonably be questioned" because it contains omissions and errors. For example, for Louisiana, the survey omits entirely the 2025 amendments adding protections for pregnant and postpartum prisoners and new violence-based exceptions to the general prohibition on solitary confinement. La. Stat. Ann. § 15:865(B)–(C). And Defendants themselves concede that the survey is incomplete: that it "does not purport to catalog every state provision that references restrictive housing, nor provisions limited to juveniles, pregnant prisoners, persons with serious mental illness, or other special populations unless the statute also imposes generally applicable restrictions on adult prisoners." Mot. at 15. That concession is fatal to judicial notice. A document that admittedly excludes entire categories of legislative protections—including protections for persons with serious mental illness,

a population directly at issue in this case—is a source whose accuracy can "reasonably be questioned."

Finally, Defendants argue that Exhibit A is "relevant to Plaintiffs' Eighth Amendment" claim. Mot. at 14. But even assuming that Exhibit A is relevant, it must still satisfy Rule 201(b)'s independent requirement that its contents come from a source whose accuracy cannot reasonably be questioned. Because Exhibit A fails that requirement, its supposed relevance is beside the point.

B. Defendants' "Exhibit A" Is Inadmissible Hearsay.

The Court should also decline to notice Exhibit A because it is inadmissible hearsay. Exhibit A is an out-of-court written statement from an unidentified author, but ostensibly prepared by Defendants, offered for the truth of the matters asserted therein—namely, that the characterizations in the chart accurately describe what each state's laws do and do not provide regarding solitary confinement. *See* Fed. R. Evid. 801(c) (defining hearsay as an out-of-court statement offered "to prove the truth of the matter asserted").

The critical distinction is between enacted statutes and Defendants' characterization of those statutes. Statutes themselves are not hearsay—they are law, which the Court can consider and construe. *See* Fed. R. Evid. 201(b)(2); *Lamar* 114 U.S. at 223. But when Defendants summarize a multi-faceted legislative scheme in a chart, those summaries are factual assertions by Defendants about what the law provides. Offered for their truth, they are hearsay. Notably, the opposing-party-statement exclusion of Rule 801(d)(2) might render these assertions admissible against Defendants—but that exclusion does not apply when, as here, the statements are offered by the party who made them. *See* Fed. R. Evid. 801(d)(2).

No hearsay exception saves the survey from exclusion. The survey is not a public record under Rule 803(8), because it was not prepared by a public office or agency—its author has not even been identified, but appears to be litigation counsel for Defendants. It is not a business record

under Rule 803(6), because it was not made in the regular course of any business activity—it was prepared for purposes of this litigation. *See Palmer v. Hoffman*, 318 U.S. 109, 114 (1943) (documents prepared "for use . . . in the court" do not satisfy the business records exception). It is not a learned treatise under Rule 803(18), because it is not a published treatise, periodical, or pamphlet recognized as a reliable authority by expert testimony or judicial notice. And it cannot satisfy the residual exception under Rule 807, because a document prepared for purposes of the very litigation in which it is offered is self-serving and therefore lacks the "equivalent circumstantial guarantees of trustworthiness" that exception demands. *See* Fed. R. Evid. 807. Defendants also have made no showing that their chart "is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts." Fed. R. Evid. 807(a)(2).

Rule 201 does not operate as a hearsay exception. Judicial notice permits the Court to accept adjudicative facts not reasonably subject to dispute; it does not render otherwise inadmissible evidence admissible. *See* Fed. R. Evid. 201 advisory committee's note. Thus, even if the survey could somehow satisfy Rule 201's requirements (and it cannot), it would remain barred by the hearsay prohibition of Federal Rule of Evidence 802.

C. Defendants' Attempt to Introduce Their 50-State Survey Is Also Untimely and Procedurally Improper.

Defendants' attempt to use Rule 201 to introduce Exhibit A is also procedurally improper. The survey should have been produced in discovery but never was, and Defendants cannot now circumvent their disclosure obligations by repackaging undisclosed research as a request for judicial notice.

Exhibit A is an August 2026 compilation that required methodological judgment: identification of relevant authorities across fifty jurisdictions, determination of which inmate

populations and types of restrictions to include or exclude, and summary of complex multi-provision regulatory schemes. This work could have been performed by an expert and disclosed pursuant to Rule 26(a)(2), but Defendants did not disclose Exhibit A as an exhibit to an expert report, did not produce a Rule 26(a)(2)(B) report describing the survey's methodology, and did not make the survey's author available for deposition. Nor did Defendants identify the survey as a trial exhibit under Rule 26(a)(3).

Defendants also failed to produce the survey in response to Plaintiffs' document requests, notwithstanding requests that squarely encompass this material. *See* Ex. 1 (Class Plaintiffs' First Set, RFP No. 26 (requesting all documents "concerning research, articles, or studies relating to prisoners in restrictive housing, segregation, solitary confinement, and the Step-Down Program and similar programs")); *id.*, RFP No. 19 (requesting "reports, research, diagnostic tools, analyses" relating to solitary confinement and restrictive housing)); Ex. 2 (Fifth Set, RFP No. 5 (requesting third-party documents relevant to this litigation)). Each of these requests carries a continuing production obligation under Rule 26(e), and Defendants should previously have produced it.

The consequences of this failure are clear. Federal Rule of Civil Procedure 37(c)(1) provides that "[i]f a party fails to provide information ... as required by Rule 26(a) or (e), the party is not allowed to use that information ... to supply evidence on a motion ... unless the failure was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1); *see also Southern States Rack & Fixture, Inc. v. Sherwin-Williams Co.*, 318 F.3d 592, 596 (4th Cir. 2003). Defendants have offered no justification, substantial or otherwise, for their failure to produce this material during the years of discovery that preceded their motion. Indeed, the survey is dated "August 2026"—the same month Defendants filed their motion, and just weeks before trial. If Defendants believed a

legislative survey was relevant to the Eighth Amendment's evolving-standards inquiry, they had years of discovery in which to prepare it, disclose it, and subject it to the scrutiny the Rules require.

Defendants' failure to disclose is not harmless. Plaintiffs have been deprived of the opportunity to: (1) depose the survey's preparer regarding methodology, scoping decisions, and accuracy; (2) retain an expert to prepare a rebuttal survey under rigorous methodology; (3) challenge individual entries through targeted discovery; and (4) move to exclude the survey under *Daubert* or Rule 702. These are not theoretical prejudices—they go to the heart of the Eighth Amendment's evolving-standards inquiry, which this Court has already identified as a central trial issue. *See* ECF No. 516 at 9–12. The prejudice to Plaintiffs is concrete, substantial, and irremediable at this stage of the litigation.

The Court should not permit Defendants to circumvent the Scheduling Order's expert deadlines and discovery cutoffs by attaching undisclosed analytical work product to a pretrial motion and requesting judicial notice. If parties could bypass discovery obligations in this manner, the expert disclosure requirements governing contested empirical questions—including the Eighth Amendment's evolving-standards inquiry—would be meaningless. This Court should accordingly exclude the survey.

IV. CONCLUSION

For the reasons stated above, the Court should deny Defendants' Motion for Judicial Notice.

Respectfully Submitted,

Dated: September 8, 2026

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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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