IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

WILLIAM THORPE, *et al*., *Plaintiffs*, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al*., *Defendants*.	CASE NO. 3:19-cv-332-REP

REPLY IN SUPPORT OF CLASS PLAINTIFFS' STATEMENT OF POSITION IN SUPPORT OF VENUE AND OPPOSING DISCRETIONARY TRANSFER

Defendants' Statement of Position, ECF No. 32 ("VDOC St.") underscores why Class Plaintiffs' choice of venue should control here. As demonstrated below, Defendants have attempted to shift their burden to the Class Plaintiffs to prove that transfer is not warranted. Defendants then, in arguing for transfer, simply ignore the well-pleaded facts in the Class Action Complaint—facts that at this stage are taken as true—showing that VDOC's creation, implementation, and administration of the Step-Down Program and its earlier solitary-confinement program were based on acts in the Eastern District of Virginia. Finally, Defendants have not met their burden showing that the remaining balance of convenience factors otherwise favor a transfer. Accordingly, the Class Plaintiffs' choice of venue must be respected.

1. Defendants disregard their burden of demonstrating that transfer is warranted.

In the Fourth Circuit, "defendant bears a heavy burden of showing that the balance of interests weighs strongly in his favor" for transfer. *Arabian v. Bowen*, No. 91-1720, 1992 U.S. App. LEXIS 15624, at *2-3 (4th Cir. July 7, 1992); *see also James v. Experian Info. Sols., Inc.*, No. 3:12-cv-902, 2014 U.S. Dist. LEXIS 242, at *4 (E.D. Va. Jan. 2, 2014) (Payne, J.) ("The party

requesting a change of venue has the burden of demonstrating that a transfer of venue is warranted."). Indeed, as this Court has recognized, "[t]he initial choice of forum, from among those possible under the law, is a privilege given to the plaintiff." *Koh*, 250 F. Supp. 2d at 633 (Payne, J.). "To overcome that privilege, a movant 'bears the burden of demonstrating that the balance of convenience among the parties and witnesses is ***strongly*** in favor of the forum to which transfer is sought.'" *Id*. (quoting *Medicenters of Am., Inc. v. T & V Realty & Equipment Corp.*, 371 F. Supp. 1180, 1184 (E.D. Va. 1974) (bold in original).

Defendants' argument, however, relies on placing that burden on *Class Plaintiffs*. *See* VDOC St. at 4 ("Plaintiffs fail to establish a direct connection . . . ."); *id.* at 7 ("Plaintiffs failed to identify . . . any non-party witness who would be inconvenienced . . . ."); *id.* at 11 ("Plaintiffs identify no countervailing inconvenience in litigating in their home district."). Rather than shouldering *their* burden to demonstrate the factors weighing strongly in favor of transfer, Defendants want it to be Class Plaintiffs' burden to show sufficient reasons weighing *against* transfer. That is not the Fourth Circuit standard and highlights that Defendants cannot shoulder their burden here.

2. Defendants ignore the gravamen of the Class Action Complaint: VDOC's creation, implementation, and administration of the Step-Down Program and its forerunner at MCC—took place in Richmond in the Eastern District.

Defendants argue that Class Plaintiffs' choice of forum is not entitled to substantial weight because Plaintiffs are incarcerated in the Western District and this is a class action. *See* VDOC St. at 4, 6. But that is not the law. Class Plaintiffs' choice of venue "is entitled to substantial weight" unless it "is *neither* the nucleus of operative facts *nor* the plaintiff's home forum." *Seaman*, 2019 U.S. Dist. LEXIS 58072, at *11 (emphasis added). This is a disjunctive test: Only one prong needs to be true for Class Plaintiffs' venue choice to merit substantial deference. Thus, Defendants

would lead this Court to error in claiming that "it is no answer" for Class Plaintiffs to argue that the nucleus of operative fact is in this District. VDOC St. at 13. In fact, it *is* the answer. Because the operative factual nucleus is in Richmond, this case should remain here.

Defendants' argument on the nucleus of operative facts relies on characterizing the Class Action Complaint as limited to "the circumstances of [prisoners'] confinement at two prison facilities." VDOC St. at 4. As Class Plaintiffs have explained, however, "this class action is predominantly a *facial*, constitutional challenge to how the VDOC Defendants in Richmond devised, created, authorized, and administered the solitary-confinement policies imposed on the Class Plaintiffs." Class Pls.' Statement of Position at 8-9, ECF. No. 31 (emphasis added) ("Class Pls.' St."). Class Plaintiffs' allegations necessarily center on "VDOC's departmental leaders in Richmond" whose "motivations, policy decisions, knowledge, and detailed records make them the lead actors (and custodians) for assessing the class action claims." *Id.* at 9.

Similarly unavailing is Defendants' argument that pleading *subclasses* for ADA and RA claims somehow proves that this case is not predominantly a facial challenge to VDOC policies. VDOC St. at 5. This argument simply ignores that it is the same VDOC policies—made and administered in Richmond—that affected members of the class so as to create the need for subclasses. Defendants likewise gloss over in less than a sentence Class Plaintiffs' Settlement Agreement claim (Count I), which comprises 44 operative paragraphs of the Class Action Complaint (CAC ¶¶ 50-86, 222-30) and relates to VDOC *in Richmond* violating a settlement agreement that resolved a class action case venued in *this* District. *See* VDOC St. at 4 (briefly mentioning that Class Plaintiffs allege a violation of "the terms of a settlement agreement involving another, long-closed prison"). Defendants' desire to ignore the actual allegations in the Class Action Complaint is driven by their need to shoehorn this case into *Reyes*, which this Court

found "relies extensively upon the specific misconduct of Defendants and other individuals in the Western District of Virginia" (*Reyes*, at *29), and not upon VDOC's policies. Unlike Reyes, the only reason Class Plaintiffs have sought (and are now obtaining) discovery from Defendants regarding "how the Step-Down Program and policies have been applied" (VDOC St. at 5) is to show that "VDOC's vague, overbroad, and inadequate policies cause the expected or intended harms to the entire class." Class Pls.' St. at 5. Tellingly, Defendants attempt no rebuttal on this point.

Contrary to Defendants' claim that the Class Action Complaint only "seek[s] relief in the Western District" (VDOC St. at 1), the relief requested is Richmond-focused. First, Class Plaintiffs demand that VDOC abide by its prior promise—enshrined in the 1985 Settlement Agreement—"not to use any version of solitary confinement that is 'similar to'" what was in place at MCC. CAC ¶¶ 19, 74-79. Second, Class Plaintiffs "seek an end to VDOC's unconstitutional solitary confinement system unless and until VDOC can show that it is capable of administering and operating a constitutional solitary confinement system." *Id*. ¶ 19. The second demand for relief flows directly from the first: Class Plaintiffs seek an injunction preventing VDOC in Richmond from ever again instituting an unconstitutional solitary-confinement regime anywhere in Virginia, as they first did at MCC, then at Red Onion and Wallens Ridge, and just last year statewide. *See* Class Pls.' St. at 4 & n.1 (citing VDOC's statement that it had "expanded" the Step-Down Program "to all male facilities by November 2018").

Defendants offer the Court only *one* case, from outside this Circuit, to support their position. *See* VDOC St. at 5-6 (relying on *Mathis v. GEO Grp, Inc.*, 535 F. Supp. 2d 83 (D.D.C. 2008)). But *Mathis* only underscores the distinction between this case and *Reyes*. The *Mathis* plaintiffs alleged that officials at the federal Bureau of Prisons headquarters (in Washington, D.C.)

failed to oversee implementation of a prison contract and thereby caused injury to prisoners elsewhere. *Id*. at 85. In transferring the case, *Mathis* only stated a rule that this Court already explained in *Reyes*: When a plaintiff complains of misconduct or mistreatment at a prison, and sues a headquarters defendant for causing that harm by *omission*, the omission is "merely incidental" to the acts of misconduct that occurred at the prison. *Id.* at 88; *see Reyes*, at *30. This case is the opposite of *Reyes* and *Mathis* because it involves more than Defendants' failed oversight. Plaintiffs allege facts showing that Defendants—all but two of whom are VDOC officials—actively devised, created, authorized, and administered the Step-Down Program so as to allow imposition of solitary confinement in violation of Class Plaintiffs' constitutional and statutory rights. CAC ¶¶ 119-204. Those well-pleaded facts are taken as true and establish venue in this District. And indeed, unlike *Mathis*, the D.C. District Court last year denied a transfer motion for a case in which plaintiffs claimed "that Texas-based Defendants improperly denied parole requests 'in compliance with the official policies promulgated by the D.C. based Defendants.'" *Aracely R. v. Nielsen*, 319 F. Supp. 3d 110, 129 (D.D.C. 2018) (plaintiffs argued that "their 'cause of action therefore arises from this national policy, not the low-level decisions of individual officers who were bound by such policy'").

Finally, in *Harvard v. Inch*, the U.S. District Court for the Northern District of Florida just last month refused to transfer a solitary-confinement class action brought at the headquarters of the state department of corrections—where the challenged policies were devised, created, authorized, and administered—to the district in which the prison was located. The court respected the class plaintiffs' venue choice because the case centered on departmental policies and practices:

> This case is about statewide policies and practices related to isolation promulgated and enforced by Defendants in Tallahassee. Plaintiffs allege that Defendants promulgated a statewide policy and practice of isolating over 10,000 people for at least 22 hours a day

> in tiny, cramped cells. Plaintiffs further allege that this statewide policy and practice exposes all persons in isolation to a substantial risk of serious harm to their mental and physical health in violation of the Eighth Amendment and that policymakers in Tallahassee have exhibited deliberate indifference towards these risks. Finally, Plaintiffs allege that Defendants discriminate against people with disabilities through this same policy and practice.
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> The parties[] strongly dispute whether Plaintiffs' claims arose primarily in the Northern District of Florida or in the Middle District of Florida. That is to say, the parties strongly dispute the "site of the events from which the claim arises." Defendants argue that the site of the event from which the claims arise is the Middle District of Florida. Specifically, Defendants argue that the "individual acts" of isolation occurred in the Middle District of Florida and, therefore, the Middle District of Florida is the locus of operative facts. This Court disagrees.
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> Defendants misunderstand Plaintiffs' claims. The crux of Plaintiffs' complaint is that there are policies and practices related to isolation, promulgated and enforced by Defendants in Tallahassee, that violate Plaintiffs' Eighth and Fourteenth Amendment rights, along with their rights protected under the Americans with Disabilities Act and the Rehabilitation Act. The fact that Plaintiffs also allege facts showing implementation of these policies and practices at prisons in the Middle District of Florida does not convert their action into a complaint about "individual acts." Plaintiffs have alleged a statewide policy and practice of isolation which was promulgated and enforced by officials in Tallahassee. Therefore, the locus of operative facts underlying Plaintiffs' claims arose primarily in Tallahassee. For these reasons, this factor weighs against a transfer.

Harvard v. Inch, No. 4:19-cv-212, 2019 U.S. Dist. LEXIS 190417, at *2-3, 10-11 (N.D. Fla. Oct. 11, 2019) (internal citations omitted). The facts and reasoning in *Harvard* apply with equal force here.

3. Defendants fail to show that the remaining balance of convenience factors favor transfer to the Western District.

In asserting that the remaining factors weigh in favor of transfer, Defendants' arguments are lifted word-for-word from *Reyes* but are wholly inapposite to the factual context here.

First, Defendants concede that the convenience of witnesses does not weigh in favor of transfer, arguing only that this factor "does not weigh *against* transfer." VDOC St. at 7 (emphasis added). Defendants, however, offer no support even for this weaker position. In another example of improper burden shifting, Defendants fault Class Plaintiffs for not identifying "any non-party witness who would be inconvenienced if this case were transferred." *Id*. Yet, in the next breath, Defendants admit that they too "do not know the identities and scope of testimony of all non-party witnesses." *Id*. at 8. Again, it is Defendants' burden to identify such witnesses. *See Corry v. CFM Majestic, Inc.*, 16 F. Supp. 2d 660, 667 n.16 (E.D. Va. 1998) (party requesting transfer bears the burden "to identify the witnesses expected to testify at trial and the nature of their intended testimony so that a court may assess the materiality of the evidence and the nature of the inconvenience"). In failing to identify witnesses that would be inconvenienced, Defendants have conceded that witness convenience does not favor transfer of this case.[1]

Second, Defendants appear to have confused the convenience of parties in this case with the convenience of the parties in *Reyes*. Defendants argue that "[m]uch of the inconvenience in conducting a trial in Richmond has to do with the need to reallocate staffing resources at the prisons where Defendants work and Plaintiffs live." VDOC St. at 10-11. That might have made sense in *Reyes*, where ten of seventeen defendants work at ROSP and thirteen reside outside of the Eastern

[1] Defendants' assertion that "many of the non-party witnesses will be prison administrators, corrections officials, and other employees and staff located in the Western District" is nothing more than rank speculation because it is accompanied by no analysis. Furthermore, Class Plaintiffs already have stated that they "do not anticipate calling at trial any non-party witnesses employed at Red Onion or Wallens Ridge as most of the evidence regarding both prisons will be documentary in nature." Class Pls.' St. at 10. Class Plaintiffs also have made clear that, should such testimony become necessary, video depositions will be used. *Id*. at 12. Thus, there will be no reason for any "current employees of Red Onion and Wallens Ridge . . . . to testify in Richmond at a multi-day jury trial." VDOC St. at 9. Finally, Defendants' contention that video depositions or live video feeds evidence "little inconvenience to the Plaintiff witnesses" (*id*. at 7-8) also proves there will be little inconvenience to Defendants' witnesses by retaining venue in the Eastern District (*see* Class Pls.' St. at 10 (citing *Doka USA, Ltd.*, 2011 U.S. Dist. LEXIS 82380, at *35 (finding that the party asserting witness inconvenience failed to show "that alternatives to live testimony, such as video depositions, would be inadequate"))).

District. *See* Class Pls.' St. at 10; *Reyes*, ECF No. 40-2, ¶ 4. But, here, seven of the eleven Individual Defendants reside or work in Richmond, and they "will be the key witnesses on how VDOC devised, formulated, and implemented the Step-Down Program and its predecessor policies." Class Pls.' St. at 10; *see also Bd. of Trs.*, 702 F. Supp. at 1257 (holding that witnesses whose testimony is central to the claim or claims weighs more heavily in the convenience analysis). Only two Individual Defendants—the wardens of Red Onion and Wallens Ridge—actually work at the prisons, and Class Plaintiffs are willing to have them testify via live video feed (unless the Defendants choose to bring them to trial in this District). *See* Class Pls.' St. at 11; *see also id.* (eliminating Defendants' logistical concerns regarding convenience of testimony by the Class Plaintiffs' representatives (VDOC St. at 11) by noting Class Plaintiffs' willingness to present these representatives' testimony presented via video deposition or the same type of video link).

Third, Defendants do not contest Class Plaintiffs' showing that the evidence relevant to this case is located in Richmond. VDOC St. at 12-13. Instead, Defendants argue, without support, that "many" of the documents they expect Class Plaintiffs to seek in discovery "do not exist in electronic form and can only be found at" Red Onion and Wallens Ridge. *Id.* at 10. Discovery in this case has commenced, and the few categories of documents highlighted by Defendants capture only a small portion of the evidence Class Plaintiffs will seek, which includes documentary evidence of "the 'regulations, policies, directives, and operating procedures' relevant to this class action" and "VDOC's funding, planning, and construction of MCC, and later of Red Onion and Wallens Ridge." Class Pls.' St. at 12-13 (quoting CAC ¶ 37). That evidence is "most likely located at VDOC headquarters in Richmond—not at Red Onion and Wallens Ridge." *Id*. at 13. Indeed, Defendants do not dispute that VDOC has collected most of this information on VACORIS, its centralized digital information system in Richmond. *Id*. at 13. "[W]ithin

VACORIS, the DOC maintains an ongoing record for each offender which includes identification and demographic information, current offenses and sentences, and other information as appropriate." *VDOC Operating Procedure 050.1*, Operating Procedures, https://vadoc.virginia.gov/files/operating-procedures/050/vadoc-op-050-1.pdf (last visited Nov. 21, 2019). That VACORIS record "is originated upon the offender's first contact" with VDOC and "continues throughout the offender's lifetime." *Id*. "Any additional investigations and periods of supervision or incarceration are added to the VACORIS record" in Richmond. *Id*. Finally, "[t]he computerized offender record maintained in VACORIS is the *primary official* record on each offender." *Id*. (emphasis added). Thus, once again, the factual nucleus of this case lies in Richmond, and so does the evidence.

Fourth, Defendants' interest-of-justice analysis must fail because it relies on the same mischaracterization of the Class Action Complaint discussed above. *See* VDOC St. at 14 (misconstruing Class Plaintiffs' claims as challenging the "operat[ion]" and "implement[ation]" of the Step-Down Program "in the Western District"). As demonstrated above (at 3-6), the Eastern District possesses a strong interest in resolving this controversy because Class Plaintiffs' claims arise from affirmative actions taken by VDOC in Richmond to devise, create, authorize, and administer the Step-Down Program in violation of Class Plaintiffs' constitutional and statutory rights. The Class Action Complaint, like the *Harvard* solitary-confinement class action, "centers around policies and practices related to isolation that were promulgated and enforced in [the state capital], and not around specific instances of implementation of those policies in other parts of the state. As such, the relationship between this forum and the claims is strong." *Harvard*, 2019 U.S. Dist. LEXIS 190417, at *17 (finding that the interest of justice weighed against transfer).

Defendants' contention that the Western District "is in a better position to enforce and monitor" relief again misses the mark. VDOC St. at 13. Class Plaintiffs do not seek only to prohibit current practices at Red Onion and Wallens Ridge, but to permanently enjoin "Defendants and their successors, agents, and assigns from further violation of the Eighth and Fourteenth Amendments of the U.S. Constitution, the Americans with Disabilities Act, and the Rehabilitation Act." Class Pls.' St. at 14 (quoting CAC ¶ 272). That relief seeks "an end to VDOC's unconstitutional solitary confinement system unless and until VDOC can show that it is capable of administering and operating a constitutional solitary confinement system." CAC ¶ 19. Considering VDOC's expansion of the Step-Down Program from MCC, to Red Onion and Wallens Ridge, and then, just last year, statewide (Class Pls.' St. at 4 n.1), Class Plaintiffs' harms only can be redressed by relief directed at VDOC and its leadership in Richmond.

Finally, retaining this case in the Eastern District poses no danger of "inconsistent judgments." VDOC St. at 12. There have been no class actions in the Western District presenting the same facial constitutional and statutory challenges as those presented here; examining the origins, purposes, and widespread impact of the Step-Down Program; or concerning breach of a binding Settlement Agreement—that was entered in this District—governing VDOC's solitary-confinement regime. The Western District cases cited by Defendants do not change this calculus. *Id*. at 12 n.6. All of those cases were brought by *pro se* plaintiffs to challenge their individual conditions of confinement. Moreover, this Court already has shown that it can assess claims regarding Red Onion and apply controlling Fourth Circuit law to them. Class Pls.' St. at 15 (citing *Reyes*). Thus, Defendants have failed to meet their burden of showing that the interest of justice will be served by transferring this case.

CONCLUSION

For the foregoing reasons, Class Plaintiffs' choice of venue in the Eastern District of Virginia should be given substantial weight, and this class action should not be transferred to the United States District Court for the Western District of Virginia.

Dated: November 21, 2019

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2019, I electronically filed the foregoing Reply in Support of Class Plaintiffs' Statement of Position in Support of Venue and Opposing Discretionary Transfer with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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