IN THE 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.

CASE NO.: 2:20-CV-00007-JPJ

PLAINTIFFS' MEMORANDUM OF LAW IN
OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

After years of litigation and extensive discovery, Defendants continue to fall back on the same failed arguments, premised on the same flawed policies, as they did at the pleadings stage. Rather than meaningfully address the facts adduced in discovery, Defendants simply aver that the Step-Down Program "works," and that its "success" justifies many of the contemptible aspects of the program. Yet Defendants' arguments fail because (1) the policies, on their face, do not protect Plaintiffs' constitutional and statutory rights, and (2) in practice, the Step-Down Program diverges from official policy in material ways that further infringe upon those rights. Defendants' arguments to the contrary ignore binding Fourth Circuit precedent, the immense factual record developed during discovery, and a robust body of scientific literature denouncing conditions of confinement like those imposed by the Step-Down Program.

Defendants attempt to obscure the lack of factual support for their Motion for Summary Judgment through their focus on whether Plaintiffs bring "facial" or "as applied challenges." Starting from the mistaken premise that Plaintiffs' claims must be divided into "as-applied" and "facial" sub-claims, Defendants repeatedly misstate the applicable constitutional standards as requiring Plaintiffs to establish that the program satisfies each element of their claims in all circumstances. But this argument relies on a legal standard the Fourth Circuit has rejected, *see PETA v. N.C. Farm Bureau Fed'n, Inc*., 60 F.4th 815, 834 (4th Cir. 2023), and in any event is not relevant (if at all) until the remedies phase of the case, *Thorpe v. Clarke*, 37 F.4th 926, 947 (4th Cir. 2022). Thus, Defendants may not at this stage sidestep or reframe the constitutional inquiry by suggesting that there were some people who were able to make it through the program, or by suggesting that it is Plaintiffs' burden to demonstrate that each person in the program satisfies each element of the claims. But even if the Court were to incorrectly alter the legal standards for each claim at this stage in accordance with Defendants' Motion, the factual record demonstrates

constitutional deficiencies as to the manner in which the Step-Down Program policies have been interpreted and applied in practice as to all class members.

As a result of their misplaced emphasis, Defendants repeatedly mischaracterize the legal standards against which this Court should analyze Plaintiffs' constitutional claims. The undisputed evidence in the record shows that summary judgment is appropriate for Plaintiffs on their constitutional claims, and that material facts are in dispute that make summary judgment inappropriate on Plaintiffs' ADA/RA claims. Defendants' Motion for Summary Judgment therefore should be denied.

STANDARD OF REVIEW

Summary judgment is appropriate only where the record establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). In considering a motion for summary judgment, the court views the facts in the light most favorable to the nonmoving party. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). The court does not weigh evidence or determine credibility but instead only determines whether the record demonstrates a genuine dispute of material fact. *Id.*; *Anderson*, 477 U.S. at 255. The moving party bears the initial burden of showing the absence of a genuine dispute of material fact. *Celotex Corp.*, 477 U.S. at 323. Once this showing has been made, the burden shifts to the nonmoving party to establish the specific material facts that are in dispute. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986).

ARGUMENT

I. Defendants Misstate the Applicable Legal Standards.

Throughout their Motion, Defendants repeatedly argue that to succeed on their claims, Plaintiffs must establish "that there is 'no set of circumstances' in which the Step-Down Program's procedures could be constitutionally applied." *See, e.g.*, ECF No. 381, Defs. Memo. Supp. Mot. Summ. J. (hereinafter "ECF No. 381, Defs.' Br.") at 58, 56 (arguing that the program does not "in all circumstances . . . trap inmates permanently"), 59 ("Plaintiffs cannot prove . . . that the conditions of confinement in the Step-Down Program in all circumstances impose an atypical and significant hardship . . ."), 62, 66, 76, 77, 78. This argument is incorrect for several reasons.

First, Defendants' argument is grounded in the "no-set-of-circumstances" test described in dicta in *United States v. Salerno*, 481 U.S. 739, 745 (1987), under which facial invalidation is appropriate only when "no set of circumstances exists under which the [statute] would be valid." The Fourth Circuit has disavowed this test, however, even for facial challenges. *PETA*, 60 F.4th at 834. Indeed, the Fourth Circuit explained that courts have "allowed [facial] challenges to proceed under a diverse array of constitutional provisions, all applying the relevant constitutional standard, not *Salerno*'s no-set-of-circumstances test." *Id.* The court further underscored that "if courts have ever articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of the Court, including *Salerno* itself." *Id.* (collecting cases).

Second, as the Fourth Circuit clarified, to the extent any distinction between an as-applied or facial claim is relevant,[1] that relevance is at the remedy phase, *Thorpe*, 37 F.4th at 947, where

[1] In any event, Defendants cite no authority—and Plaintiffs can find none—to suggest that the distinction between an as-applied or a facial challenge is relevant to a challenge to the operation of a complex program brought by a class of everyone in that program, rather than a challenge (continued…)

the Court will in any event have to determine whether the program as a whole must be enjoined, or whether the relief ought to be narrower. *See also PETA*, 60 F.4th at 835 ("The debate regarding the availability of facial challenges is really a debate about statutory severability." (citations omitted)).

Thus, Defendants may not at this stage sidestep or reframe the constitutional inquiry by suggesting that there were some people who were able to make it through the program, or by suggesting that it is Plaintiffs' burden to demonstrate that each person in the program satisfies each element of the claims. Instead, the Court should apply the relevant constitutional standards for each of Plaintiffs' claims. And when those standards are applied, it is clear that Defendants are not entitled to summary judgment on any of Plaintiffs' claims.

II. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' Due Process Claim.

In denying Defendants' Motion to Dismiss, the Fourth Circuit explained that Plaintiffs alleged that the Step-Down Program "failed to meet even the most basic due process requirements like notice and a meaningful opportunity to be heard and that the criteria Defendants employ to assess solitary placements are entirely divorced from legitimate penological interests." *Thorpe*, 37 F.4th at 942. Instead of meaningfully grappling with the extensive factual record supporting this claim, Defendants regurgitate their pleadings stage arguments.[2] But the passage of time has

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seeking invalidation of a statute or regulation brought by one or more plaintiffs within a larger universe of people who might be subject to that statute or regulation.

[2] In particular, Defendants' Motion parrots the high-level written policies governing the Step-Down Program, *see* ECF No. 381, Defs.' Br. at 63–64, and leans heavily on the legally irrelevant position that, because some prisoners completed the Step-Down Program, the program somehow is constitutionally adequate, *see id.* at 3, 56, 59, 65, 67, 68, 69, 70. These policies were referenced in the Complaint and discussed in the Fourth Circuit's denial of Defendants' Motion to Dismiss. *See, e.g.*, *Thorpe*, 37 F.4th at 932; ECF No. 1 ¶¶ 174–78. As to the latter point, several of these individuals were moved out of the IM pathway and Step-Down Program *after* this suit was filed. *See infra* n.13.

not improved Defendants' legal arguments, and the mountain of evidence Plaintiffs adduced in the intervening three years underscores their infirmity. As Plaintiffs have argued throughout this case and as the undisputed evidence now shows, the Step-Down Program fails to meet basic due process requirements both as written and as applied.

A. The Undisputed Record Supports Plaintiffs' Due Process Claim.

To succeed in their respective due process arguments, the parties must show that no material facts remain in dispute on the question of whether Plaintiffs had a protected liberty interest and were deprived of that interest without adequate process. *See Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015). The factual record supports Plaintiffs' claim on both prongs. *Thorpe*, 37 F.4th at 941. The undisputed material facts show that the conditions in the Step-Down Program are "severe in comparison" to the general population and impose "a significant and atypical hardship" on Program participants, and Defendants present no undisputed evidence that would support a contrary finding. *Smith v. Collins*, 964 F.3d 266, 269 (4th Cir. 2020).[3] Nor have Defendants established undisputed evidence that the procedures offered to prisoners in the Program satisfy "basic' due process scrutiny." *Thorpe*, 37 F.4th at 944 (quoting *Incumaa v. Stirling*, 791 F.3d 517, 533 (4th Cir. 2015)).

[3] Defendants "assume without conceding" that the Step-Down Program creates an interest rooted in state regulations, as required in prong one of the due process analysis. ECF No. 381, Defs.' Br. at 59; *see Thorpe*, 37 F.4th at 942 ("Defendants sensibly do not dispute that Plaintiffs have adequately traced their interest to state regulations."). Because the Step-Down Program is based on VDOC policy, this Court should again find that the liberty interest claimed here "arise[s] from state policies or regulations." *Prieto*, 780 F.3d at 249; ECF No. 101 (Order on Motion to Dismiss); *see* ECF No. 383, Pls.' Am. Memo. Supp. Pls.' Am. Mot. Part. Summ. J. (hereinafter "ECF No. 383, Pls.' Br. Supp. Part. Summ. J.") at 23.

1. The Step-Down Program Caused Plaintiffs Atypical and Significant Hardship.

In evaluating whether the conditions of confinement in the Step-Down Program pose "an atypical and significant hardship in relation to th[e] general-population norm,"[4] the Court must consider "(1) the magnitude of confinement restrictions; (2) whether the administrative segregation is for an indefinite period; and (3) whether assignment to administrative segregation had any collateral consequences on the inmate's sentence." *Smith*, 964 F.3d at 275 (citation and internal quotation marks omitted). Defendants make no attempt to address the second or the third factors—prisoners' inability to earn good-time credit during the years- or decades-long confinement imposed by the Step-Down Program's design. *See* ECF No. 383, Pls.' Br. Supp. Part. Summ. J. at 26–28. And their arguments on the first factor rely on cherry-picked facts that are either disputed or untethered from the relevant general population baseline.

First, most of the material facts cited in Defendants' briefing are disputed as to the Step-Down Program conditions, the general population baseline, or both. While Defendants make much of the policy providing four hours out of cell per day—a policy enacted only after this litigation was filed—the record shows that (i) this out of cell time is spent alone in a barren cage the same size as the indoor cells, devoid of any meaningful human interaction or environmental stimulation and (ii) in practice, prisoners often do not receive this time due to weather, staffing constraints, quarterly shakedowns, and a host of other reasons. *See* Pls.' Opp. to Defs.' Stmt. Undis. Mat. Facts (hereinafter "Pls.' Opp. to Defs.' SUMF") ¶¶ 50, 76, 77. Further, Defendants introduce no evidence of the time out-of-cell afforded to general population prisoners, or the conditions and

[4] While Defendants purport to "reserve" an argument that the general population is not "the appropriate comparative baseline," they do not contest in substance this well-settled Fourth Circuit principle.

quality of that out-of-cell time. Unlike general population prisoners, Step-Down Program prisoners must stand on their sink and speak through piping to people they cannot see, or yell across the recreation yard to communicate, and even using these extraordinary means are able to communicate with no more than a small handful of fellow prisoners. *See id.* ¶ 50. General population prisoners can participate in programming unrestrained; most Step-Down Program prisoners must program alone in their cells or while restrained. *See id.* ¶ 47. And while general population prisoners are allowed contact visits with loved ones, Step-Down Program prisoners are not. *See id.* ¶ 56. Indeed, Step-Down Program prisoners are given fewer privileges across the board, including access to library books, *id.* ¶ 56, eligibility for jobs, *id.* ¶ 58, amount of commissary, ECF No. 383-33, Turner Dep. at 210:18-211:14, and ability to watch TV, *id.* Informal comforts are also less available; for example, Step-Down Program prisoners have no means to cover the bright lights that remain on 24/7 in order to sleep. *See* Pls.' Opp. to Defs.' SUMF ¶ 49.

Second, additional facts—beyond those cherry picked by Defendants—make clear that the Step-Down Program imposes a much greater hardship than the general population. Perhaps most notably, Step-Down Program prisoners—unlike those in the general population—are subject to intrusive and dehumanizing cavity searches whenever they leave their cells, whether to shower, program, or recreate. *See* ECF No. 383-33, Turner Dep. at 189:13-20; Ex. 49, Haney Rep. ¶ 135. In addition, Step-Down Program prisoners are restrained using handcuffs and leg irons while out-of-cell, while general population prisoners can come out of their cell unrestrained. *See* ECF No. 383-33, Turner Dep. at 188:12-14, 190:12-13, 210:18-19; ECF No. 381-12, VADOC-00053668 (2020 Step-Down Manual) at -680–81. And Defendants admit that Step-Down Program prisoners are isolated in individual cells without cell partners, unlike general population prisoners. *See* ECF

No. 381, Defs.' Stmt. Undis. Mat. Facts (hereinafter "ECF. No. 381, Defs.' SUMF") ¶ 48; ECF No. 383-33, Turner Dep. at 188:17-18, 189:3-5.

Third, the differences between the Step-Down Program and the general population create an atypical and significant hardship. At the motion to dismiss stage, the Fourth Circuit held that there was "no doubt" that the Step-Down Program's "harshness has been clearly established." *Thorpe*, 37 F.4th at 942. Discovery has confirmed Plaintiffs' core allegations, including that prisoners prior to 2017 were confined to their cells for [redacted] ECF No. 383-1, VADOC-00052689 (2012 Step-Down Manual) at -740, -746, and continue to be confined in excess of 20 hours per day, ECF No. 383-33, Turner Dep. at 272:9-276:11; Ex. 25, Collins Dep. at 110:8-9, 111:7-11; ECF No. 383-47, Younce Dep. at 236:17-237:2; Ex. 23, Duncan Dep. at 233:15-21; that placement [redacted] Ex. 45, Kiser Dep. at 279:19-280:4; and that prisoners [redacted] ECF No. 383-33, Turner Dep. at 189:13-20; Ex. 49, Haney Rep. ¶ 135. *See Thorpe*, 37 F.4th at 942 (referring to these factors). Defendants cite no law indicating that their hair splitting with respect to other conditions is material. *See* ECF No. 381, Defs.' Br. at 59-62. For example, Plaintiffs' isolation is no less severe because they can communicate with a small handful of other prisoners by standing on their sink or yelling across the yard. *See* Pls.' Opp. to Defs.' SUMF ¶ 50. While Plaintiffs maintain that they are entitled to summary judgment on this aspect of their claims, *see* ECF No. 383, Pls.' Br. Supp. Part. Summ. J. at 23-28, at the very least a reasonable jury could find that these conditions are a significant and atypical hardship compared to the general population.

2. Step-Down Program Procedures Neither Satisfy Basic Due Process Requirements Nor Evaluate Whether There Is a Valid and Subsisting Penological Purpose for Ongoing Segregation.

Defendants' application of the *Mathews v. Eldridge* test[5] is (once again) limited to repeating the same basic facts from VDOC's Step-Down Program policies as Defendants have recited from the start of this case, offering no facts about how those policies actually function. As explained below, record evidence shows that these policies, in both their design and implementation, (1) "transgress[] even the most foundational building blocks of due process: notice of the charges against them and an opportunity to be heard," *Thorpe*, 37 F.4th at 944, and (2) fail to provide meaningful periodic review of whether a prisoner's continued segregation is justified. *Id.* at 945 (describing the periodic review decision that must be made as determining "whether a prisoner remains a security risk").

As to the first factor, Defendants argue that Plaintiffs' private interest—*i.e.* the length of time spent in the Step-Down Program—is diminished because their "time in the Step-Down Program is a function of their own willingness to participate in programming and comply with stated behavioral expectations." ECF No. 381, Defs.' Br. at 63. But that position misstates the private interest inquiry, which focuses on the *fact* of the Plaintiffs' isolation and deprivations while in the Step-Down Program. *See Incumaa*, 791 F.3d at 534 ("Appellant's private interest stems not only from his prolonged isolation. Indeed, in the SMU, every aspect of Appellant's life is severely restricted, and his body is subjected to extraordinary intrusion on a regular basis."). It also misunderstands the issues in this case, which include the claim that the Step-Down Program assesses prisoners using arbitrary and subjective criteria without the opportunity for prisoners to

[5] In summary: the private interest at stake, the risk of erroneous deprivation of that interest, and the government's interest. ECF No. 381, Defs.' Br. at 62; *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

effectively challenge those assessments. *See, e.g.*, ECF No. 381, Defs.' Br. at 34–35. And it ignores undisputed evidence that prisoners face a lengthy minimum time in the Program regardless of their behavior and are routinely held back from progressing through the Program for reasons wholly unrelated to the safety issues that justified placement in the Step-Down Program. *See, e.g.*, ECF No. 383-1, VADOC-00052689 at –741 (outlining the level-by-level pathway behavioral goals); ECF No. 381-12, VADOC-00053668 at –717 (same); *id.* at -713, -717–19, -722–23 (outlining the BMC's behavioral goals evaluation criteria); Ex. 4, Mathena Dep. at 392:2–393:4, 396:17–397:2, 397:9–13 (describing the minimum time requirements for each pathway); Ex. 25, Collins Dep. at 149:6–13 (acknowledging an inability to accelerate the minimum time requirements); ECF No. 383-58, VADOC-00006446 (DOC-11G form does not indicate the evidence the ICA is considering or the decision VDOC contemplates based on that evidence); ECF No. 383, Pls.' Br. Supp. Part. Summ. J. at 35 n.10.

As to the second factor, Defendants assert that the written Step-Down Program procedures sufficiently reduce the risk of erroneous deprivation. They defend that claim by essentially copying the VDOC policy provisions detailing the "layers of review" behind the decision to keep an inmate in the Step-Down Program. ECF No. 381, Defs.' Br. at 63–64. Engaging in a point-by-point comparison with the procedures at issue in *Wilkinson v. Austin*, 545 U.S. 209 (2005), Defendants argue that the written Step-Down policy provides a trio of protections—multi-tiered review, a requirement that Institutional Classification Authority ("ICA") review give prisoners the reasons for its decisions, and an opportunity to contest classification decisions via the grievance process—that provide sufficient process.

But this argument fails for multiple reasons. First, these same policies have already been considered by this Court and the Fourth Circuit and found not, on their own, to satisfy minimal

due process requirements.[6] *See, e.g.*, ECF No. 1 ¶¶ 170, 175, 182; *Thorpe*, 37 F.4th at 944 ("Plaintiffs do not challenge Step Down as failing to live up to *Wilkinson*'s multi-tiered standard."). Second, the specific protections the Defendants point to are not undisputed, and therefore cannot be the basis on which to grant Defendants' Motion for Summary Judgment. *See, e.g.*, Ex. 11, Mathena 30(b)(6) Dep. at 250:11–15 (privilege levels not grievable); Ex. 43, Raiford Dep. at 118:22–122:3 (describing the frequent use of stock phrases such as a need for a "longer period of stable adjustment" in ICA paperwork). Third, a multi-tiered review provides no protection where none of the tiers offer a substantive review compliant with due process *by their very design*. *See* ECF No. 383, Pls.' Br. Supp. Part. Summ. J. at 36−37, 40−42. Such is the case here. The Building Management Committee ("BMC"), which decides whether to progress an inmate to the next level in the Step-Down Program—the key operative decision point in the Step-Down process—does not give prisoners notice of its "hearing," let alone an opportunity to hear or rebut the case against them. ECF No. 381-12, VADOC-00053668 at –679; Ex. 23, Duncan Dep. at 272:4–6, 272:15–273:11; Ex. 25, Collins Dep. at 197:21–198:1, 199:7–13. And once the BMC makes a decision, prisoners are not provided any formal notice of it, at least until they receive the results of their next ICA review—and even then, prisoners are not provided the *reasons* for any decision by the BMC not to progress them within the program. Ex. 23, Duncan Dep. at 273:3–22 (notice of BMC decision provided at ICA); ECF No. 383-59, VADOC-00010341 (Feb. 18, 2016 Mukuria DOC-11H Form); ECF No. 383-33, Turner Dep. at 131:7–15 (Turner testimony that at least one corrections officer repeatedly used the shorthand [redacted]

[6] Tellingly, the Motion's discussion of the procedures at issue includes minimal citations to the factual record developed since the motion to dismiss stage. The main exceptions are irrelevant mentions of the plaintiffs' behavioral records and eventual exit out of the Step-Down Program. *See* ECF No. 381, Defs.' Br. §§ I.A.2, I.B.2. Simply put, Defendants' arguments on this point have not progressed beyond the ones already rejected by this Court and the Fourth Circuit.

in completing ICA paperwork); Ex. 43, Raiford Dep. at 118:22–122:3 (Raiford testimony that this shorthand is used as a catch-all term); ECF No. 383-29, Gallihar (*Reyes*) Dep. at 192:22–195:6 (Gallihar testimony that the phrase "stable adjustment" was used "a lot" in ICA forms and was, to his knowledge, not defined anywhere in policies or guidance).

Moreover, as detailed in the plaintiffs' affirmative brief, the criteria used by the BMC in these closed-door meetings are divorced from penological or safety purposes and include factors that are highly subjective and/or largely unrelated to a prisoner's security risk, such as the number of good/poor marks received by the prisoner as to their personal hygiene and rapport with staff, and whether they have spent a mandatory minimum period of time at their current status.[7] Indeed, discovery in this case has produced testimony about specific non-safety-related criteria used by the Defendants to justify prolonging inmates' time in the Step-Down Program, including lying, kicking doors, ripping up one's own pants, or demonstrating insufficient respect.[8]

As a result of these criteria, the BMC will not—and by design, cannot—progress an inmate who, despite presenting no ongoing safety risk, fails to show proper respect, complete workbooks,

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[7] *See* ECF No. 383, Pls.' Br. Supp. Part. Summ. J. at 52; ECF No. 383-44, Duncan (*DePaola*) Dep. at 103:17–108:7, 109:3–11, 113:7–23 (describing the rating process and its impact on BMC decisions); Ex. 11, Mathena 30(b)(6) Dep. at 296:10–297:4, 301:5–8; Ex. 25, Collins Dep. at 296:10–297:4, 301:5–8 (describing the subjective and inconsistent rating process), 171:20–172:14 (describing inconsistent reviewer methodology); ECF No. 383-47, Younce Dep. at 174:8–20 (describing the subjectivity of ratings evaluations); Ex. 45, Kiser Dep. at 213:3–15 (describing the subjective nature of the "rapport" rating); ECF No. 383-20, Gallihar Dep. at 72:12–22, 73:1–3 (describing the lack of written criteria to determine ratings); ECF No. 381-12, VADOC-00053668 at -717–19, -722–23 (outlining behavioral goals for each pathway level); ECF No. 383-3, Beard Dep. at 128:6–131:8 (acknowledging that many of the rating criteria do not relate to security risk). *See also Thorpe*, 37 F.4th at 943 (describing the Step-Down Program criteria, as alleged in the Complaint, as "entirely divorced from legitimate penological interests").

[8] Ex. 4, Mathena Dep. at 409:5–410:17 (noting that prisoners have been sent backwards within their pathway for "less than" lying, including for kicking on doors or being disrespectful), 402:9–415:3 (lying); ECF No. 383-55, VADOC-00090616 at -620 (lying); ECF No. 383-15, Wall Decl. ¶ 43 (blocking a vent); Pls.' Opp. to Defs.' SUMF ¶ 128 (ripping up one's own pants).

or maintain personal hygiene, or who hasn't spent the requisite number of months at his current status, in direct violation of the Fourth Circuit's command that "when a precarious situation ends, with it ends the State's authority to maintain prisoners in solitary confinement." *Thorpe*, 37 F.4th at 945. Indeed, VDOC routinely keeps prisoners in the Step-Down Program for failing one of these non-safety-related factors, even if the prisoner's record as a whole does not indicate a need for him to remain in the Step-Down Program.[9] For this reason, Defendants cannot—and do not—claim that BMC's criteria evaluate whether a prisoner poses an ongoing security risk—a fundamental principle of administrative segregation. *Thorpe*, 37 F.4th at 945 (describing the periodic review decision that must be made as determining "whether a prisoner remains a security risk"). A review system that employs such criteria—even against a prisoner who does not present a safety risk requiring continued solitary confinement—cannot provide the "meaningful review" required. *See Toevs v. Reid*, 685 F.3d 903, 913 (10th Cir. 2012).

Nor do the other "tiers" of review reduce the risk of erroneous decisions by the BMC, because they lack fundamental procedural protections, do not conduct a substantive review of the reasons for the BMC's decisions, and do not otherwise periodically review whether there is a valid and subsisting penological reason to retain prisoners in Level S. *Thorpe*, 37 F.4th at 945–46 (meaningful review under *Hewitt* "must reflect legitimate penological necessities" (discussing *Hewitt v. Helms*, 459 U.S. 460 (1983))); *see also Proctor v. LeClaire*, 846 F.3d 597, 610–11 (2d

[9] ECF No. 383-39, VDOC-014607 (documenting in a Level S prisoner's file that there are "no violent charges in his record to indicate a continued need to remain in Level S"); ECF No. 383-40, Collins (*Reyes*) Dep. at 155:4–156:7, 219:14–220:18, 233:9–236:8, 237:18–239:1, 272:4–18 303:20–304:4, 330:4–8 (describing a prisoner who was unable to understand the written Challenge Series workbooks and was able to progress out of the Step-Down Program only after he received individual oral assistance with completing the books).

Cir. 2017) (meaningful periodic reviews must evaluate whether continued administrative segregation remains justified in light of safety, security, or other valid justifications).

Because the ICA does not review a person's privilege status (*e.g.*, placement in IM-1 or IM-2) but only their housing status (*i.e.* their status as a Level S prisoner), its function is essentially ministerial; its decision is dictated by and dependent on the BMC's determination to progress someone through and eventually out of Level S—and thus it cannot make up for the BMC's faulty decision making procedures. ECF No. 383-44, Duncan (*DePaola*) Dep. at 190:2–4, 193:20–22; Ex. 25, Collins Dep. at 149:6–13. And far from the paragon of process that Defendants describe, *see* ECF No. 381, Defs.' Br. at 64, the ICA itself is riddled with due process flaws, including no advanced warning of the evidence against an inmate, a perfunctory cell door hearing, and after-the-fact "reports" that often consist of the conclusory line that the inmate needs a "longer period of stable adjustment."[10] As such, it is both remarkable and unsurprising that the counselor responsible for preparing and attending every 90-day ICA review for Level S prisoners (at least as of 2020) acknowledged that a prisoner's statement at their ICA has *no effect* on the outcome of the review. ECF No. 383-102, Kegley (*Reyes*) Dep. at 110:20–111:1.

Similarly, the External Review Team (ERT) reviews only the original decision to place a prisoner in Level S in addition to whether the prisoner should remain in the pathway to which the DTT assigned them. Ex. 4, Mathena Dep. at 478:20–479:9. But it does not have the ability to advance persons through the Step-Down Program or remove them from Level S, even if ERT members believed they posed no ongoing safety or security concern justifying continued segregation. Ex. 50, Mathena (*Reyes*) Dep. at 76:19–79:10; Ex. 51, Clarke (*Reyes*) Dep. at 76:19–

[10] *See* ECF No. 383-29, Gallihar (*Reyes*) Dep. at 192:22–195:6; ECF No. 383-58, VADOC-00006446; ECF No. 383-59, VADOC-00010341; ECF No. 383-33, Turner Dep. at 131:7–9; Ex. 95, Mukuria Dep. at 203:7–204:8; ECF No. 174-24, Mukuria Aff. ¶ 11.

78:21; ECF No. 383-33, Turner Dep. at 172:2–11, 177:17–22. And the ERT fails to offer minimally adequate process to prisoners in the program. Prisoners are not told what the ERT is considering before it meets—if they are told about its existence at all. Ex. 14, Mukuria Decl. ¶ 31; Ex. 13, Bowman Decl. ¶ 25. They are typically not brought before the ERT and are not informed of the ERT's decisions or their rationale, and, at the end of the process, are affected by decisions that are not grievable.[11] The other tier of the Step-Down Program review, the Dual Treatment Team ("DTT"), adds no meaningful process, either. DTT conducts an *ad hoc*, not periodic review, and can only review the BMC's decision to progress an inmate to Level 6, not a decision to keep him at the same level or send him backwards (in other words, it is at best a check against early *release* from segregation, rather than on erroneous continued segregation). Ex. 11, Mathena 30(b)(6) Dep. at 213:6–14, 257:14–15, 264:19–265:4; ECF No. 383-5, VADOC-00134589 at -593.

3. The Claimed State Interest in Prison Security Does Not Outweigh The Risk Of Erroneous Deprivation.

For the same reasons just discussed, Defendants' invocation of twin state interests of administrative efficiency and prison security make little sense. ECF No. 381, Defs.' Br. at 66. As the Fourth Circuit recognized, Plaintiffs do not ask for a novel or uniquely burdensome procedural regime, but rather one that includes "the most foundational building blocks of due process," as the constitution requires. *Thorpe*, 37 F.4th at 944. And regardless, "the prison's interest does not eclipse [the prisoner's] well-established rights to receive notice of the grounds of his ongoing

[11] Ex. 50, Mathena (*Reyes*) Dep. at 76:19–79:10; Ex. 51, Clarke (*Reyes*) Dep. at 76:19–78:21; Ex. 4, Mathena Dep. at 496:4–497:19, 497:20–498:6; ECF No. 383-44, Duncan (*DePaola*) Dep. at 124:2–19; ECF No. 174-24, Mukuria Aff. ¶ 18; Ex. 80, Wall Dep. at 203:9–14; ECF No. 383-50, Cavitt Decl. ¶ 51; Ex. 11, Mathena 30(b)(6) Dep. at 254:22–255:3; ECF No. 383-65, VADOC-00007200 at -202.

confinement and to present his rebuttal to those grounds." *Incumaa*, 791 F.3d. at 535; *see also Hewitt*, 459 U.S. at 476 (review must provide an opportunity for the prisoner to "present his views to the prison official charged with deciding" whether he remains in segregation). VDOC's claimed security interest here falls flat, especially given that the Step-Down Program's inmate review is not grounded in a prisoner's ongoing risk.[12]

4. That The Named Plaintiffs Are Now Out of the Program Does Not Establish the Adequacy of the Procedures.

Defendants make much of the fact that many VDOC prisoners, including the named Plaintiffs, have returned to general population after placement in the Step-Down Program. ECF No. 381, Defs.' Br. at 58, 65, 68. As an initial matter, much of the decrease occurred *prior* to the implementation of the Step-Down Program or as a result of decisions to reclassify entire units to Level 6, rather than due to the operation of the Step-Down Program's review procedures themselves. *See* Pls.' Opp. to Defs.' SUMF ¶ 1. In any event, it is well established that permanent placement in solitary confinement is not necessary to state a due process claim. *See Marion v. Columbia Corr. Inst.*, 559 F.3d 693, 699 (7th Cir. 2009) ("[C]ourts of appeals have held that periods of confinement that approach or exceed one year may trigger a cognizable liberty interest without any reference to conditions."). And the mere fact that a prisoner eventually left the Program says nothing about the adequacy of the prison's procedures. Tellingly, the Defendants do not mention the decisional process that led to the named Plaintiffs' return to general population. Indeed, the fact that certain Plaintiffs and other prisoners made it out of the Step-Down Program—

[12] In the introduction to their *Mathews v. Eldridge* analysis, the Defendants urge the Court to be "flexible" in evaluating their due process claim. ECF No. 381, Defs.' Br. at 62. But such "flexibility" is required when grounded in an actual safety concern. *See Thorpe*, 37 F.4th at 945 ("*Hewitt* afforded flexibility because the State has a [manifest interest in maintaining safe detention facilities.' (quoting *Proctor*, 846 F.3d at 611)). Here, by contrast, the program at issue barely evaluates safety.

many soon after the commencement of this case[13]—despite their alleged records of misbehavior argues for, not against, the arbitrariness of the Program. *See* ECF No. 381, Defs.' Br. at 69–70.[14]

B. The Court Should Again Reject Defendants' Failed Qualified Immunity Arguments.

Defendants are not entitled to qualified immunity from monetary damages for the reasons discussed above and by the Fourth Circuit at an earlier stage of this case: the facts in this case, now thoroughly developed in discovery, clearly establish that the Step-Down Program's conditions create a protected liberty interest, and that the Program's procedures "transgress[] even the most foundational building blocks of due process: notice of the charges against them and an opportunity to be heard." *Thorpe*, 37 F.4th at 944.

To support their argument that due process precedent is "unsettled," Defendants point to a variety of unpublished district court opinions looking at the procedures in the Step-Down Program—a strategy squarely rejected by the Fourth Circuit in this case. ECF No. 381, Defs.' Br. at 72 & n.37. Indeed, as the Fourth Circuit explained, "[t]o the extent Defendants seek qualified immunity because district courts and unpublished opinions from this Circuit have upheld solitary confinement conditions in Red Onion and Wallens Ridge, we cannot agree. As we have explained

[13] *See generally* Ex. 29, VADOC-00175822 (Cornelison moved from Level 6 IM closed pod to general population in August 2019, approximately three months after the filing of the Complaint; Brooks moved out of Level S to Level 6 IM closed pod in August 2019, approximately three months after the filing of the Complaint, and moved to general population in March 2020; Wall moved out of Level S in May 2019, days after the filing of the Complaint, and moved to general population in June 2020; Hammer moved from Level 6 IM closed pod to general population in March 2020, approximately 10 months after the filing of the Complaint).

[14] Defendants again attempt to raise the distinction between facial and as applied challenges with respect to Plaintiffs' Due Process and Eighth Amendment claims. But as the Fourth Circuit previously clarified in this case, such a distinction is relevant to the remedy stage, not pretrial litigation. *Thorpe*, 37 F.4th at 947. Accordingly, Plaintiffs do not address these arguments raised by Defendants or attempt to distinguish between facial and as-applied relief here.

over and again, published district court opinions, like unpublished opinions from our Court, have no precedential value, and we do not consider them when surveying clearly established law."[15] *Thorpe*, 37 F.4th at 943 n.6 (internal quotation marks omitted). Defendants attempt to get out from under this ruling by quoting the Fourth Circuit's acknowledgment that "neither the Supreme Court nor this Circuit's precedent has clearly established the *exact* process prisoners must receive while in long-term administrative segregation." ECF No. 381, Defs.' Br. at 72 (quoting *Thorpe*, 37 F.4th at 944) (emphasis added). But the Fourth Circuit already rejected this argument as nonresponsive to the broader due process issues in this case. *Thorpe*, 37 F.4th at 944. *See also Ashcroft v. al–Kidd*, 563 U.S. 731, 741 (2011) (stating that the qualified immunity doctrine "do[es] not require a case directly on point" in order for a constitutional or statutory principle to be clearly established).

Other courts agree with the qualified immunity analysis of this Court and the Fourth Circuit. *See, e.g.*, *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 571 (3d Cir. 2017) (recognizing the Fourth Circuit as part of the "growing chorus" of courts that recognize prisoners "have a clearly established due process right under the Fourteenth Amendment to avoid unnecessary and unexamined solitary confinement"); *Toevs*, 685 F.3d at 916 ("Since *Hewitt*, it has been clearly established that prisoners cannot be placed indefinitely in administrative segregation without receiving meaningful periodic reviews."); *Wilkerson v. Goodwin*, 774 F.3d 845, 858 (5th Cir. 2014) ("In 2010, a reasonable prison official would have been on notice that continuing [plaintiff's] solitary confinement would give rise to a liberty interest requiring procedural protections.").

[15] In addition to their nonapplicability to the qualified immunity analysis, these cases were largely decided at the motion to dismiss stage and did not have the benefit of the extensive factual discovery in this case.

Finally, while Defendants vaguely contend that "[t]he facts adduced in discovery . . . cast a different light on" the qualified immunity analysis, ECF No. 381, Defs.' Br. at 72, Defendants do not mention what those facts are, or how they affect the qualified immunity conclusions reached by this Court and the Fourth Circuit. Nor could they—as discussed in detail above, Defendants' substantive argument rests on written policies that were already considered at the motion to dismiss stage. The additional factual development since then has only strengthened Plaintiffs' case that the operation and implementation of the Step-Down Program, in addition to the written policy, violate the Plaintiffs' clearly established due process rights. That Defendants' brief rehashes citations to the Step-Down policies and an irrelevant discussion of the plaintiffs' behavioral records and eventual exit from the Step-Down Program rather than addressing the actual factual record in this case—indeed, the procedures sections of Defendants' due process argument include exactly two cites to the factual record—speaks volumes. *See* ECF No. 381, Defs.' Br. §§ I.A.2, I.B.2.

In sum, Defendants' qualified immunity argument is essentially unchanged from the one squarely rejected by this Court and the Fourth Circuit more than two years ago, and should be rejected once again.

III. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' Eighth Amendment Claim.

The Eighth Amendment imposes a duty on prison officials to "provide humane conditions of confinement[.]" *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Defendants violated Plaintiffs' Eighth Amendment rights by housing them in solitary confinement under inhumane conditions that have been widely recognized to pose a significant risk of harm to Plaintiffs, many of whom suffer from mental illnesses that were known to Defendants. Defendants housed Plaintiffs under these draconian conditions for extended periods of time—in some instances decades—with

knowledge of the obvious risk of harm that long-term isolation would have—and was having—on Plaintiffs. Defendants try to sidestep these realities by urging the Court to defer to Defendants' judgment on how best to manage prisoners within their custody. But even putting aside that Defendants have not advanced any legitimate penological justifications for the severe conditions at issue, security concerns cannot override constitutional commands. The undisputed facts in the record show that Defendants violated Plaintiffs' Eighth Amendment rights. *See* ECF No. 383, Pls.' Br. Supp. Part. Summ. J. at 3–21. Certainly, Defendants have not come close to adducing sufficient undisputed facts showing the opposite as a matter of law. Moreover, Defendants are not entitled qualified immunity, and Plaintiffs' claims are timely.[16] For these reasons, discussed in further detail below, Defendants' Motion for Summary Judgment on Plaintiffs' Eighth Amendment claim should be denied.

A. The Conditions of Confinement in the Step-Down Program Pose a Significant Risk of Injury.

On the first prong of the Eighth Amendment inquiry—*i.e.* that "the deprivation alleged [was], objectively, 'sufficiently serious,'" *Farmer*, 511 U.S. at 834 (quoting *Wilson v. Seiter*, 501 U.S. 294, 298 (1991))—Defendants argue that Plaintiffs cannot show that "that conditions in the Step-Down Program posed, in all circumstances, an objectively intolerable risk of harm that Defendants were aware of but nonetheless disregarded." ECF No. 381, Defs.' Br. at 76. In support of this argument, Defendants state "[n]either the Supreme Court nor the Fourth Circuit has ever held that 'solitary confinement' generally—much less the specific conditions in the Step-Down Program—violates the Constitution in all circumstances." As mentioned above, *supra* note 1,

[16] Plaintiffs do not challenge Defendants' request to dismiss as untimely the Eighth Amendment claims of class members who left the Step-Down Program on or before May 5, 2017. *See infra* note 28.

Defendants mischaracterize the legal standard against which this Court should analyze Plaintiffs' constitutional claims[17] and the evidence adduced at summary judgment. Like with Defendants' due process argument, Defendants' "all circumstance" assertion is of no consequence at summary judgment, because to the extent the distinction does have any relevance, that relevance is at the remedy phase. *See Thorpe*, 37 F.4th at 947.

Flowing from their mischaracterization of the applicable legal standard, Defendants suggest that Plaintiffs bear the extraordinary burden of adducing evidence that the conditions of confinement imposed by the Step-Down Program have harmed or risk harming every individual prisoner subject to those conditions. But that is not the law, and Defendants cite no authority actually supporting their argument.[18] In any case, the conditions of confinement in the Step-Down Program have affected "[all] persons who at any time from August 1, 2012, to the present that have been confined at Red Onion or Wallens Ridge," *see* ECF Nos. 299 (Order and Opinion Granting Class Cert.) and 358 (Order and Opinion Recertifying Disabilities Classes). Indeed, Plaintiffs' own expert testified that he [redacted] that someone who spends [redacted] and that some or all of these effects [redacted] Ex. 52, Morgan Dep. at 116:1–9. And here, the sheer number of prisoners affected renders the

[17] Defendants make the same mistake with respect to Plaintiffs' due process claims. *See* ECF No. 381, Defs.' Br. at 63–67.

[18] The only case Defendants cite for this proposition is *Thorpe*, 37 F.4th at 933 (quoting *Farmer*, 511 U.S. at 834, 838). ECF No. 381, Defs.' Br. at 79. As discussed in *supra* note 1, Defendants mischaracterize *Thorpe*. Nowhere in the opinion does the Fourth Circuit state that, as a matter of law, prisoners bringing claims under the Eighth Amendment "would need to show that, in all circumstances," the conditions of confinement . . . are "objectively, sufficiently serious" or otherwise satisfy the first prong of the *Farmer* test.

individualized risk assessment that Defendants seem to call for wildly impracticable in this certified class action.

For a deprivation "[t]o be 'sufficiently serious,' [it] must be 'extreme'—meaning that it poses 'serious or significant physical or emotional injury resulting from the challenged conditions,' or 'a substantial risk of serious harm resulting from . . . exposure to the challenged conditions.'" *Porter v. Clarke*, 923 F.3d 348, 355 (4th Cir. 2019) (citations omitted). Defendants argue that Plaintiffs "cannot make this showing" because the literature on which Plaintiffs' expert witness, Dr. Craig Haney, relies to offer opinions about the harms of solitary confinement "is both inconclusive and of questionable validity." Not so. The scientific literature discussing the emotional and psychological harms of solitary confinement is robust, conclusive (as close to unanimous as scientific consensus gets), and has been recognized by several courts, including the Fourth Circuit, as establishing that solitary confinement poses a substantial risk of serious harm sufficient to establish an Eighth Amendment claim. *See Porter*, 923 F.3d at 356 (explaining that "[n]umerous studies reveal that prolonged detention of inmates" in solitary conditions on death row has damaging results); *Grissom v. Roberts*, 902 F.3d 1162, 1175–78 (10th Cir. 2018) (Lucero, J., concurring) (citing research on solitary confinement including the work of Terry Kupers, Craig Haney, and Stuart Grassian); *Williams*, 848 F.3d at 566 (citing "[t]he robust body of scientific research on the effects of solitary confinement" as support for the conclusion that "the deprivations of protracted solitary confinement so exceed the typical deprivations of imprisonment" as to create a liberty interest in avoiding solitary confinement); *Palakovic v. Wetzel*, 854 F.3d 209, 217 (3d Cir. 2017) (acknowledging "the robust body of legal and scientific authority recognizing the

devastating mental health consequences caused by long-term isolation").[19] Even if this Court could depart from Circuit precedent on this score, there is no basis to do so in this case, particularly in light of the number of prisoners in this case diagnosed with mental illness. *See infra* note 34.[20]

Nor can Defendants avoid Circuit precedent by trying to distinguish the conditions at issue in this case on factual grounds. For example, Defendants aver that "each of the Operations Strategies specifies that prisoners in the Step-Down Program are provided with their basic requirements that meet constitutional standards such as, but not limited to, medical care, access to a law library, hygiene items, access to phone, in-cell education and religious programs, recreation, showers, and meals." *See* ECF No. 381, Defs.' SUMF ¶ 47 (internal quotations omitted). But once again, Defendants recite only what the policy says rather than addressing the factual record, which shows that in practice, the Program does not provide prisoners in the Step-Down Program with the same basic requirements offered to people in the general population.

Indeed, the record is replete with testimony from Plaintiffs and VDOC employees that class members have endured lengthy stays in small cells with minimal human contact and opportunities for social and educational programming. *See, e.g.*, ECF No. 383-33, Turner Dep. at 210:10–16; ECF No. 383-16, Cornelison Decl. ¶ 8; ECF No. 383-17, Arrington Decl. ¶ 9; Ex. 25, Collins Dep. at 46:22–47:22; *see also* Ex. 29, VADOC-00175822 at lines 19906–19913 (Mr. Cornelison spent

[19] Defendants' argument that the literature not only again applies an incorrect legal standard but also fails to appreciate that when applying the *Farmer* test, this court must measure the conditions of confinement against "the evolving standards of decency that mark the progress of a maturing society." *Porter*, 923 F.3d at 355 (internal quotations and citation omitted) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958)).

[20] Defendants cite no contrary authority on this point. Instead, Defendants criticize the literature for at most showing "that solitary confinement may pose a substantial risk of harm to inmates' mental health in some circumstances." ECF No. 381, Defs.' Br. at 79. The Court should reject this argument for the reasons stated above.

more than three years in the Step-Down Program), lines 20264–20291 (Mr. Mukuria spent more than seven years in the Step-Down Program) (Internal Status Spreadsheet). And in fact, Defendants' own expert, Dr. Morgan, agreed that [redacted]; agreed that instances of self-harm, including death by suicide, is higher for individuals in segregation; agreed that the research supports a finding of [redacted]; acknowledged that [redacted] as well as numerous courts, have [redacted]; and was [redacted] or any courts that have concluded that segregation causes [redacted] Ex. 52, Morgan Dep. at 110:21–22, 111:1–2, 146:4–13, 255:18–22, 256:1–20.

B. Defendants Were Aware of and Disregarded Excessive Risk To Prisoners' Health Posed by the Step-Down Program.

The record is replete with evidence that Defendants were deliberately indifferent to the harm Plaintiffs suffered in the Step-Down Program.

Defendants act with deliberate indifference when they "know of and disregard an excessive risk to inmate health or safety." *Porter*, 923 F.3d at 361 (quoting *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016) (quoting *Farmer*, 511 U.S. at 837)). Defendants' knowledge of an excessive risk to Plaintiffs' health or safety can be "prov[en] by circumstantial evidence that a risk was so obvious that it had to have been known." *Porter*, 923 F.3d at 361 (quoting *Makdessi v. Fields*, 789 F.3d 126, 136 (4th Cir. 2015)). An "obvious risk of harm justifies an inference that a prison official subjectively disregarded a substantial risk of serious harm to the inmate." *Porter*, 923 F.3d at 361 (quoting *Schaub v. VonWald*, 638 F.3d 905, 915 (8th Cir. 2011)). Defendants

have disregarded, and continue to disregard, the substantial risk of serious harm to Plaintiffs' health by failing to make any modifications to the Step-Down Program that would mitigate this risk.

As explained below and in Plaintiffs' cross-motion for summary judgment, ECF No. 383, Pls.' Br. Supp. Part. Summ. J. at 14–22, the evidence in the record shows that Defendants were apprised of the excessive risks posed to class members in the Step-Down Program through a variety of means, including the robust body of scientific knowledge about the harmful effects of solitary confinement, and their direct observation—or notification by other officials or prisoners—of the conditions of confinement in the program and the obvious risks posed by lengthy minimum time periods in such conditions.

First, a jury is likely to conclude that Defendants—experienced corrections officials who designed and implemented a program of administrative segregation—were in fact aware of the scientific consensus about the harms of solitary confinement described *supra* in Part III.A, which Dr. Haney described as a substantial, continuously growing body of published studies that have been easily accessible for decades, Ex. 49, Haney Rep. ¶ 108; Ex. 53, Haney Rebuttal Rep. ¶ 64, and which Dr. Hendricks described as widely known worldwide, Ex. 54, Hendricks Rep. ¶ 150. Mainstream media outlets have been reporting on these studies since at least the 1990s.[21] In 2011, the United Nations Special Rapporteur on Torture called for a ban on the use of solitary confinement.[22] Numerous federal court decisions predating the creation of the Step-Down

[21] *See, e.g.*, CNN, *Trend Towards Solitary Confinement Worries Experts* (Jan. 9, 1998), *available at:* http://www.cnn.com/US/9801/09/solitary.confinement/index.html. This Court may take judicial notice of articles to show that a fact was widely known at a particular time. *See, e.g.*, *Barnett v. United States*, 2023 WL 142441, at *16 (D.S.C. Jan. 10, 2023).

[22] *Solitary confinement should be banned in most cases, UN expert says*, UN NEWS (Oct. 18, 2011), *available at:* https://news.un.org/en/story/2011/10/392012.

Program expressly recognized that the risks associated with long-term solitary confinement are obvious. *See, e.g.*, *Davenport v. DeRobertis*, 844 F.2d 1310, 1313 (7th Cir. 1988) (it "seems pretty obvious . . . that isolating a human being from other human beings year after year or even month after month can cause substantial psychological damage, even if the isolation is not total"); *Wilkerson v. Stadler*, 639 F. Supp. 2d 654, 680 (M.D. La. 2007) ("Any person in the United States who reads or watches television should be aware that lack of adequate exercise, sleep, social isolation, and lack of environmental stimulation are seriously detrimental to a human being's physical and mental health."); *McClary v. Kelly*, 4 F. Supp. 2d 195, 208 (W.D.N.Y. 1998) (it is not "rocket science" "that prolonged isolation from social and environmental stimulation increases the risk of developing mental illness.").[23] *Cf. Porter*, 929 F.3d at 361 (noting that the "extensive scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement" provides circumstantial evidence that the risk of harm was obvious); *Clark v. Coupe*, 55 F.4th 167, 184 (3d Cir. 2022) ("Here the risk was obvious because the harm inherent in conditions of solitary confinement has long been recognized. Indeed, the Supreme Court recognized the threat to prisoners' mental health over a century ago"); *Porter v. Pa. Dep't of Corr.*, 974 F.3d 431, 445–46 (3d Cir. 2020) ("[T]he substantial risks of prolonged solitary confinement are 'obvious,' 'longstanding, pervasive, well-documented, [and] expressly noted by prison officials in the past.' . . . As we have emphasized, a wide range of researchers and courts have repeatedly described the serious risks associated with solitary confinement. Moreover, correctional officers have publicly acknowledged these harms.") (citations omitted); *Jensen v.*

[23] The Fourth Circuit in *Porter* cited both *Wilkerson* and *McClary* as support for its finding that "several courts have found—based on the empirical evidence set forth above—that solitary confinement poses an objective risk of serious psychological and emotional harm to inmates, and therefore can violate the Eighth Amendment . . . . We agree." *Porter*, 923 F.3d at 357.

Shinn, 609 F. Supp. 3d 789, 909–10 (D. Ariz. 2022), *as amended*, 2022 WL 2910835 (D. Ariz. July 18, 2022) ("[I]t has been established for decades that profound levels of social isolation are harmful.").

Even Defendants' Expert, Dr. Morgan, agreed that multiple authoritative bodies including the National Academies of Science and the American Psychological Association have accepted the conclusion that solitary confinement causes psychological and physical harm, and that no professional organization or standard-setting body, or even court, has concluded the opposite. Ex. 52, Morgan Dep. at 255:18–256:20. As the Fourth Circuit explained in *Porter*, given Defendants' "status as corrections professionals, it would defy logic to suggest that they were unaware of the potential harm that the lack of human interaction [in solitary confinement] could cause." 923 F.3d at 361 (quoting *Porter v. Clarke*, 290 F. Supp. 3d 518, 532 (E.D. Va. 2018)). That conclusion applies with equal force here. And it is sufficient to demonstrate deliberate indifference. *Porter*, 923 F.3d at 361; *Makdessi*, 789 F.3d at 129 ("Prison officials may not simply bury their heads in the sand and thereby skirt liability. Rather, they may be held accountable when a risk is so obvious that it had to have been known.").

Second, testimony by various VDOC officials confirmed that it was common knowledge within the Department that restrictive housing creates particular risk at least for prisoners with mental illness.[24] A jury also could view the creation of the Secure Diversionary Treatment

[24] *See* Ex. 36, Clarke Dep. at 116:6–8, 265:8–266:1 ("And in our estimation, individuals with mental health diagnoses are individuals who, when placed in [restrictive housing] conditions . . . may respond in a manner that is not appropriate. It . . . may be injurious to them, ultimately."); Ex. 59, Lee Dep. at 112:13–17 (testifying that among prisoners who [redacted]); Ex. 60, McDuffie Dep. at 140:14–18 (testifying that he has observed prisoners who [redacted]).

Program, purportedly for diverting people with severe mental illness from Level S (but which Dr. Haney describes as having substantially similar conditions to those in Level S), as a tacit acknowledgment by VDOC officials that Level S may cause or exacerbate the psychological harms caused by solitary confinement. *See* Ex. 49, Haney Rep. ¶ 29.

Third, evidence in the record shows that Defendants either would have directly observed the conditions of confinement that Plaintiffs endured and the obvious risk of harm from such conditions, or were notified about such conditions and subsequent harm. *See, e.g.*, Ex. 36, Clarke Dep. at 116:3–8; Ex. 4, Mathena Dep. at 379:2–380:9; Ex. 50, Mathena (*Reyes*) Dep. at 85:15–87:1 (noting that as Warden of Red Onion he was a hands-on supervisor who made rounds and spoke to staff and prisoners "continuously, as much as possible"); Ex. 47, Manis Dep. at 65:1–11, 66:13–16, 67:6–10. Internal emails show that several Defendants acknowledged the harms Plaintiffs were suffering during their lengthy stays in solitary, *see, e.g.*, Ex. 55, VADOC-00163440 (email noting numerous conversations among Defendant officials [redacted]), and evidence shows that Plaintiffs and class members sought repeatedly to alert Defendants to the harm they were suffering. *See, e.g.*, Ex. 56, Cavitt Dep. at 41:1–11, 42:18–22, 44:15–45:7, 149:11–14; ECF No. 383-17, Arrington Decl. ¶ 26; Ex. 57, Riddick Dep. at 28:13–29:19. For example, grievance data produced by VDOC contains numerous examples of grievances submitted by prisoners in the Step-Down Program complaining of mental health symptoms, including depression, anxiety, hallucinations, and suicidal ideation, *see, e.g.*, Ex. 58, VADOC-00174671 at lines 7774, 10642, 10652, 13957–58, 15267, 19640, 21985, 22210 (Grievance Spreadsheet), which would have put Defendants on notice of the obvious harms

associated with the Step-Down Program, *see Rivera v. Mathena*, 795 F. App'x 169, 176 (4th Cir. 2019) (prisoner's use of the grievance system and other written correspondence can provide notice to prison officials of the risk of harm from conditions of confinement).

Moreover, the evidence indicates it was common knowledge that many prisoners subject to the Step-Down Program had suffered from mental illness after entry into the program, and had experienced symptoms of serious mental illness, including hallucinations, hearing voices, talking to themselves, etc. *See, e.g.*, *infra* note 34 (discussing, *inter alia*, VDOC data indicating that fifty-eight percent of people in the Step-Down Program have had a mental health code of MH-2 or higher at some point (or consistently) during their incarceration.).

Given the wealth of evidence that the Step-Down Program imposed obvious and well-known harms, a jury is unlikely to believe Defendants' boilerplate interrogatory responses that "none of [their] training or experience led [them] to believe that placement in VDOC's Restrictive or Restorative housing posed an unreasonable risk of a negative effect or impact on the physical or mental health of prisoners, particularly as it relates to their long-term functioning." ECF No. 381, Defs.' SUMF ¶ 131; *see also id.* ¶¶ 130–40. On the contrary, a jury may find that these experienced correctional officials' disavowals of even rudimentary knowledge of mental health concerns are not only incredible but are themselves indicative of a deliberate attempt to hide their head in the sand from such concerns. *See* Ex. 51, Clarke (*Reyes*) Dep. at 261:4–267:19 (claiming not only that he had no information to suggest that people with serious mental illness cannot be kept in solitary confinement, but that he does not even know whether depression, bipolar disorder, or schizophrenia are mental illnesses at all, and has never bothered to inquire into such matters).

Defendants' attempt to disclaim any awareness of the obvious risks posed by the conditions in Level S by asserting they could find no legislation categorically prohibiting solitary confinement

is unavailing. Article III courts exist to enforce constitutional rights regardless of whether Congress or another legislative body has separately codified such protections. And the Supreme Court has said that "[r]elying on this metric" alone (*i.e.* legislative consensus) is "incomplete and unavailing." *Graham v. Florida*, 560 U.S. 48, 62 (2010). That is especially so where, as here, "[t]here are measures of consensus other than legislation." *Id.* (citing *Kennedy v. Louisiana*, 554 U.S. 407, 433 (2008)). For example, in *Porter*, the Fourth Circuit looked to the "extensive scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement that has emerged in recent years [which] provides circumstantial evidence that the risk of such harm 'was so obvious that it had to have been known.'" *Porter*, 923 F.3d at 361 (quoting *Makdessi*, 789 F.3d at 136). Likewise, Defendants' claim that the Step-Down Program complies with one particular set of industry standards is not only disputed, *see* Pls.' Opp. to Defs.' SUMF ¶ 46, but ignores that those standards are not a substitute for the constitutional and statutory requirements that Defendants are obligated to adhere to.[25] *See* ECF No. 383-54, Pacholke Rebuttal Rep. ¶¶ 8–11, 44 (detailing numerous problems with the ACA and its accreditation process); Ex. 63 Wells Reply Rep. ¶¶ 10–37 (detailing limitations of ACA audits generally, and VDOC's ACA audits specifically, for assessing ADA compliances).

In addition, the record evidence shows little if any connection between the Step-Down Program and any valid penological justifications, lending further support to Plaintiffs' argument

[25] In any event, numerous aspects of Level S were actually found not to comply with industry standards. For example, an October 2018 compliance reaccreditation audit of ROSP found that the outdoor recreation cages were too small according to ACA standards. ECF No. 381-36, VADOC-00132162 at -191. The individual outdoor recreation cages measured 96 square feet, nearly half the required size of 180 square feet. *Id.* The audit also found that ROSP fails to provide prisoners with requisite access to natural light in their cell, which the auditors deemed permissible simply because the building is not a new construction. *Id.* at -196. These failures to adhere to certain ACA standards may themselves suggest that the risk of harm to prisoners was obvious.

that Defendants "acted with culpable mental state." *Thorpe*, 37 F.4th at 941 n.5 (noting that lack of penological justification is relevant to the subjective prong in that it helps establish corrections officers acted with culpable mental state). Defendants predictably assert that the penological purpose of the Step-Down Program is to enhance security. ECF No. 381, Defs.' Br. at 85. However, as Plaintiffs detail above, the Step-Down Program's rubber-stamp review mechanisms fail to meaningfully review whether prisoners in the program pose any ongoing risk justifying their *continued* segregation in severely restrictive conditions, and are based on criteria that have little if anything to do with security. *See supra* Part II.A.2; *see also* Ex. 21, King Dep. at 190:20–191:6 (acknowledgment by former Red Onion Operations Manager and ADA Coordinator that criteria used to evaluate a prisoner's progress through the Program—such as personal hygiene, whether he stands when required, and "respect"—have nothing to do with security); Ex. 11, Mathena 30(b)(6) Dep. at 56:9–20 (noting [redacted] for exclusion of Level S prisoners from programming available to people at lower security levels).

Moreover, VDOC's assertion that the Step-Down Program is "based on evidence," is belied by its testimony that it does not know whether the principles underlying the Step-Down Program are in fact based on any evidence. Ex. 11, Mathena 30(b)(6) Dep. at 168:4–8. Even though VDOC claims that the Program is used to enhance security, VDOC (and its Rule 30(b)(6) designee, former Red Onion Warden Mathena who oversaw the creation and implementation of the Step-Down Program) is not [redacted] of the Program to advance this goal or any other penological purpose. *Id.* at 164:15–21. A jury could thus find that the Step-Down Program represents an "exaggerated response," at best, to VDOC's stated penological interests. *See, e.g.*, *Hardoby v. Sw. Reg'l Jail Auth.*, 2017 WL 1067811, at *6 (W.D. Va. Mar. 21, 2017).

Defendants make little effort to address this mountain of evidence, offering no more than conclusory and disputed evidence that they were unaware of the obvious risks associated with the Step-Down Program. Given Defendants' first-hand observation of the conditions of confinement in the Step-Down program, grievance data regarding the harms suffered by individuals in the Step-Down Program, the extensive and longstanding body of scientific literature on the adverse effects of prolonged solitary confinement, and the lack of legitimate penological justification for the Program, Defendants cannot credibly claim that they were unaware of the obvious risks of harm to the health of prisoners housed in the Step-Down Program. The Court should deny Defendants' motion.

C. The Court Should Again Find That Defendants Are Not Entitled to Qualified Immunity.

As described above and in Plaintiffs' summary judgment motion, the evidence shows that Defendants were aware of, and disregarded, the substantial risk of harm the conditions in the Step-Down program imposed on Plaintiffs and class members. *Supra* Parts III.A–B; ECF No. 383, Pls.' Br. Supp. Part. Summ. J. at 14–22. In addition to satisfying the Eighth Amendment's subjective prong, this evidence also demonstrates that Defendants are not entitled to qualified immunity. In affirming this Court's denial of qualified immunity at the motion to dismiss stage, the Fourth Circuit observed that "when plaintiffs have made a showing sufficient to" demonstrate an intentional violation of the Eighth Amendment, "they have also made a showing sufficient to overcome any claim to qualified immunity." *Thorpe*, 37 F.4th at 934 (citing *Beers-Capitol v. Whetzel*, 256 F.3d 120, 142 n.15 (3d Cir. 2001) and *Delgado-Brunet v. Clark*, 93 F.3d 339, 345 (7th Cir. 1996)); *see also Pfaller v. Amonette*, 55 F.4th 436, 448 & n.2 (4th Cir. 2022) (noting that "in cases like *Thorpe*, the court need not separately determine whether the constitutional right was clearly established if there remains a genuine issue of material fact as to an official's deliberate

indifference, because that potential deliberate indifference would, if established, necessarily include an awareness of the illegality of the defendant's actions," and rejecting the argument that *Thorpe* hinges on its procedural posture). Defendants try to avoid this conclusion in two ways; neither is availing.

First, Defendants rehash their argument from the motion to dismiss stage that even if they violated Plaintiffs' constitutional rights, the relevant right was not clearly established until *Porter*, and thus was not clearly established when Defendants created the Step-Down Program. But the *Porter* decision did not create a new Eighth Amendment right out of whole cloth. Rather, it was clearly established for decades before *Porter* that conditions far less onerous than those in restrictive housing—including "inadequate ventilation" and "limited exercise opportunities"—could satisfy the objective prong of a conditions of confinement claim, but that they only do so if the plaintiff is able to demonstrate "serious or significant physical or emotional injury resulting from the challenged conditions." *See Strickler v. Waters*, 989 F.2d 1375, 1380–81, 1380 n.3 (4th Cir. 1993) (granting defendants summary judgment because plaintiff had provided "no evidence" that overcrowding and excessive temperatures caused him any serious injury). Indeed, the Fourth Circuit's determination in *Porter* that Defendants had violated the plaintiffs' Eighth Amendment rights in that case rested heavily on findings that the scientific consensus showed that the risk was "obvious" and that because of Defendants' "status as corrections professionals, it would defy logic to suggest that they were unaware of the potential harm that the lack of human interaction [in solitary confinement] could cause." 923 F.3d at 361 (citation omitted). And it relied on numerous

federal court decisions long pre-dating the creation of the Step-Down Program to reach that conclusion. *See supra* Part III.B.[26]

None of Defendants' cited cases suggests a different result. For example, although the court in *Sweet v. S.C. Dep't of Corr.*, 529 F.2d 854 (4th Cir. 1975) (en banc) held that isolation alone does not render segregated confinement unconstitutional, that decision "significantly predated *all* the Supreme Court's conditions of confinement decisions—including *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981), which first set forth the standard for satisfying the objective component of a conditions of confinement claim—and lacked the benefit of the recent academic literature surveyed by Plaintiffs' experts concerning the harmful psychological and emotional effects of prolonged solitary confinement." *Porter*, 923 F.3d at 358 (distinguishing *Sweet* on the basis that it was "decided under a different legal standard", rather than overruling it and creating a new fundamental right). In *Mickle*, the factual record was exceedingly thin. In stark contrast to this case, "the *Mickle* plaintiffs did not introduce any expert reports or analyses concerning the risks of serious psychological and emotional harms attributable to long-term solitary confinement." *Porter*, 923 F.3d at 358–59. The evidence was limited to affidavits from a handful of the more than 40 plaintiffs vaguely alleging, without any independent corroboration, stress and

[26] Defendants cite to language in *Latson v. Clarke*, 794 F. App'x 266, 270 (4th Cir. 2019), an unpublished case that predated *Thorpe*, to the effect that *Porter* changed "the state of the law" in this Circuit. ECF No. 381, Defs.' Br. at 100. But as the *Porter* court explained, the difference between the outcomes in *Porter* and *Mickle v. Moore*, 174 F.3d 464 (4th Cir. 1999), was largely the evidentiary record in the two cases. 923 F.3d at 358–59 (noting that the *Mickle* plaintiffs failed to introduce any reports or analyses concerning the risks of psychological and emotional harms attributable to their conditions and that, "[p]ut simply . . . the *Mickle* plaintiffs failed to establish an evidentiary record that would have allowed this Court to find that prolonged solitary confinement poses a serious risk of psychological and emotional harm"). And in fact *Thorpe* explained that while a reasonable officer may not have known, before *Porter*, that isolation *per se* tends to cause severe injuries, that does not bear on a case like this one, where Plaintiffs raise a genuine dispute that Defendants were in fact aware of and disregarded risks of serious harm imposed by their program on Plaintiffs. *Thorpe*, 37 F.4th at 938.

emotional and physical suffering. *Id.* As the *Porter* court noted, "the *Mickle* plaintiffs failed to establish an evidentiary record that would have allowed this Court to find that prolonged solitary confinement poses a serious risk of psychological and emotional harm." *Id.*

The same is true of *Strickler*, where the court pointed out that a single affidavit claiming "mental stress" from inadequate ventilation was insufficient to create a genuine issue as to whether plaintiffs had suffered sufficiently serious "medical and emotional deterioration," and evidence of "simple anxiety" based upon fear of assault from other prisoners was insufficient to show that the condition "result[ed] in significant mental pain," as was required to satisfy the objective prong. 989 F.2d at 1381 (citing *Lopez v. Robinson*, 914 F.2d 486, 491–92 (4th Cir. 1990); *Schrader v. White*, 761 F.2d 975, 979 (4th Cir. 1985)).

Second, Defendants urge the Court to conduct a "traditional, full qualified immunity analysis," rather than borrowing the deliberate indifference analysis for the qualified immunity inquiry. Defs.' Br. § II.C. But this rests on a fundamental misunderstanding of the Fourth Circuit's prior denial of qualified immunity in this case. In acknowledging that the deliberate indifference prong of the Eighth Amendment and the clearly established prong of the qualified immunity analysis collapse, the *Thorpe* decision did not announce some new, lesser qualified immunity standard. Rather, the Fourth Circuit was merely acknowledging that "qualified immunity's two-pronged inquiry" collapses in a certain subset of Eighth Amendment cases because in these cases "each prong merely duplicates the other's work; these Eighth Amendment violations inherently include knowing disregard for the law." *Pfaller*, 55 F.4th at 446. That is because "Eighth Amendment cases exist on a spectrum of intent and harm," such that where the risk is obvious in a particular situation and the actor "doesn't need case law to tell him that [the plaintiff] deserves fair treatment," there is no need to conduct a separate qualified immunity analysis. *Id.* Defendants'

argument is, therefore, a red herring. There is no need to conduct a "traditional, full qualified immunity analysis" here because that analysis necessarily maps onto the deliberate indifference analysis in light of the circumstances of this case. In other words, applying *Thorpe*'s qualified immunity analysis does not suggest or require skipping a step in the qualified immunity analysis—it simply makes the analysis more efficient.

In any event, regardless of how the Court conducts the analysis, the end-result is the same. The Fourth Circuit previously considered Plaintiffs' allegations, *inter alia*, "that prison officials knew the harm that long-term solitary confinement caused, yet disregarded it," were actually aware of "a serious risk of harm," "had daily contact with [the p]laintiffs," and "had been pressured to abandon similar solitary-confinement systems several times before" to deny qualified immunity. *Thorpe*, 37 F.4th at 933–35. Plaintiffs now have adduced significant evidence supporting these allegations. *See supra* § II; Parts III.A–B*; see also, e.g.*, Ex. 55, VADOC-0163440 (email from Tori Raiford circulated among most Defendants in 2016 showing that they have had numerous conversations [redacted]); ECF No. 195-5, VADOC-00003442 at -456 (VDOC was placed on notice by the Vera Report, which recommended that VDOC expand strategies to further increase out-of-cell time for prisoners in restrictive housing).

Defendants try to avoid this finding by arguing that "the evidence now shows that conditions of confinement in the Step-Down Program are far less restrictive than Plaintiffs alleged." ECF No. 381, Defs.' Br. at 97; *see* ECF. No. 1 ("The prisoners are alone within their cell for the vast majority of the day, approximately 22 to 24 hours a day."). That is not so. Defendants point to evidence in the record that: (1) since 2017, all prisoners have been entitled to

two out-of-cell hours per day; (2) between 2018 and 2020, prisoners at some Step-Down Program levels were permitted up to four out-of-cell hours per day; and (3) beginning in 2020, all prisoners became entitled to at least four out-of-cell hours per day. *See* ECF No. 381, Defs.' Br. at 97 (citing ECF No. 381, Defs.' SUMF ¶¶ 60, 76, 77). But this evidence is disputed, *see* Pls.' Opp. to Defs.' SUMF ¶¶ 60, 76, 77 (noting, among other things, that even a recent ACA audit cited by Defendants found that Level S prisoners were allowed only 1 hour of exercise in outdoor cages), and even if it were not, Defendants cite no authority supporting an assumption that there can be no violation where prisoners are allowed between two and four hours per day of out-of-cell time. Further, even if offering four hours of out-of-cell time (accessed only after a body cavity search and spent alone in a filthy, barren outdoor cage the same size as the indoor cells) somehow automatically passed constitutional muster, the factual record shows that in practice, prisoners in the Step-Down Program routinely are not afforded this amount of time out of cell. *See* ECF No. 383-33, Turner Dep. at 272:9–276:11 (snow and ice and quarterly shakedowns prevent prisoners from getting four hours out-of-cell per day); Ex. 25, Collins Dep. at 110:8–9, 111:7–11 (quarterly shakedowns last seven to ten days); ECF No. 383-47, Younce Dep. at 236:17-237:2 (prisoners who need to use the bathroom have their rec cut short); Ex. 49, Haney Rep. ¶¶ 26–27, 136–137, 209, 215, 220, 247 (describing reports by many prisoners that out-of-cell time was often in practice far less than four hours); ECF No. 383-16, Cornelison Decl. ¶¶ 26, 32 (recreation denied in retaliation and only 1 hour per day out-of-cell for IM Closed Phase 1 and Phase 2 in 2019); Ex. 15, McClintock Decl. ¶ 21 (denying rec arbitrarily and because cages were full). Not to mention, Defendants fail to address in their motion the plethora of other well-documented conditions that violate Plaintiffs' rights.[27]

[27] Even if this Court were to find that *Porter* clearly established the relevant right for the first time, Defendants should not be granted qualified immunity where the rights at issue were clearly (continued…)

IV. Plaintiffs' Constitutional Claims Are Not Time Barred.

Defendants wrongly argue that the Court should dismiss all the individual constitutional claims for damages for any named Plaintiffs or class members who left the Step-Down Program on or before May 5, 2017. ECF No. 381, Defs.' Br. at 112.

Defendants' statute of limitations argument fails as to the due process claim because a genuine dispute exists as to whether class members could reasonably have discovered their due process injury prior to May 5, 2017. The two-year statute of limitations begins to run when "the cause of action accrues," Va. Code Ann. § 8.01-243, which is only "when the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action," *Nasim v. Warden*, 64 F.3d 951, 955 (4th Cir. 1995). Here, a genuine dispute exists as to whether class members who left the program prior to May 5, 2017, would have possessed facts such that reasonable inquiry would have revealed their due process injury. Prior to May 2017, the only review occurring in the presence of the prisoner that even purported to review their ongoing segregation was the 90-day ICA review, but nothing in the operating procedure or in the manner in which the review was conducted would have informed class members that the ICA merely rubber-stamped the BMC's review—which occurred outside of prisoners' presence. *See* ECF No. 383-7, VADOC-00051172 at -183 (Feb. 15, 2018 O.P. 830.A). Even if this Court finds that the claim *accrued* for class members no later than their last day in the Step-Down Program, equitable tolling is appropriate where, as here, there is genuine dispute as to whether "the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action."

established during the continuation of the alleged violations—meaning between May 2019 and the present. *See Williamson v. Stirling*, 912 F.3d 154, 189 (4th Cir. 2018); *Skinner v. Liller*, 2021 U.S. Dist. LEXIS 52261, at *27 (D. Md. Mar. 19, 2021). Defendants' use of the Step-Down Program to subject Plaintiffs to conditions that place them at serious risk of harm continues until the present.

Mezu v. Dolan, 75 F. App'x 910, 912 (4th Cir. 2003) (citing *English v. Pabst Brewing Co.*, 828 F.2d 1047, 1049 (4th Cir. 1987)).

Moreover, the constitutional claims of Plaintiffs and class members who remained in the Step-Down Program after May 5, 2017 are not time barred,[28] as "claims premised upon allegations concerning a continuing pattern of unlawful conduct that remains in effect when a lawsuit is filed are not barred by the statute of limitations, even if the alleged pattern commenced prior to an otherwise pertinent limitations period." *Scott v. Clarke*, 64 F. Supp. 3d 813, 826 (W.D. Va. 2014) (citing *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 348 (4th Cir. 2011); *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 189 (4th Cir. 1999); *Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989); *Jenkins v. Home Ins. Co.*, 635 F.2d 310, 312 (4th Cir. 1980); *Eldridge v. Bouchard*, 620 F. Supp. 678, 682–83 (W.D. Va. 1985)). This "continuing violations" or an analogous principle applies equally to the Eighth Amendment and Due Process claims in this case.

Because Plaintiffs' Eighth Amendment claims are based in part upon the duration of their confinement, they accrued only after Plaintiffs had been held in solitary confinement for a prolonged period of time. *See Gonzalez v. Hasty*, 802 F.3d 212, 224 (2d Cir. 2015) (Eighth Amendment claim predicated on harm suffered by individuals held in long-term solitary confinement "typically accrues only after an inmate has been confined in [solitary] for a prolonged period of time"); *see also DePaola v. Clarke*, 884 F.3d 481, 488 (4th Cir. 2018) (holding that Plaintiff sufficiently "alleged a claim of deliberate indifference to his serious mental health needs that is ongoing" and therefore, "not time-barred").

[28] Plaintiffs do not contest that the statute of limitations has expired on the Eighth Amendment damages claims for the subset of class members who left the Step-Down Program on or before May 5, 2017 and who have not re-entered the program since that date.

Similarly, the Due Process claim is not barred because Plaintiffs allege "a discrete act or series of discrete acts, each of which violates the law"—the repeated use of evaluation processes that denied and continue to deny fundamental due process—and, as a result, Plaintiffs have "a separate claim for each act, and each act carries its own limitations period." *Gonzalez*, 802 F.3d at 223. Moreover, Plaintiffs have alleged that they continue to suffer unconstitutional procedures and conditions of confinement today. *See, e.g.*, Ex. 25, Collins Dep. at 46:22–47:2; Ex. 21, King Dep. at 302:22–303:4; Ex. 11, Mathena 30(b)(6) Dep. at 85:12–17. Thus, Plaintiffs' and class members' constitutional claims are not time-barred as to Plaintiffs and class members who have been in the Step-Down Program after May 5, 2017—a group that includes each named Plaintiff. *See* ECF Nos. 174-19 ¶ 2 (Mr. Brooks); 174-20 ¶ 2 (Mr. Cavitt); 174-21 ¶ 2 (Mr. Cornelison); 174-22 ¶¶ 20–23 (Mr. Hammer); 174-23 ¶¶ 7–10 (Mr. Khavkin); 174-24 ¶ 2 (Mr. Mukuria); 174-25 ¶ 2 (Mr. Riddick); 174-26 ¶ 2 (Mr. Snodgrass); 174-27 ¶¶ 3, 9 (Mr. Thorpe); 174-28 ¶¶ 2, 18 (Mr. Wall); 174-60 ¶ 2 (Mr. McNabb).[29]

V. Defendants Are Not Entitled to Summary Judgment on Plaintiffs' ADA and RA Claims and Said Claims Are Not Barred by the Statute of Limitations.

The ADA and the RA prohibit disability-based discrimination.[30] Based on the evidence in this case, a reasonable jury could find that Defendants employed policies and practices that failed

[29] Defendants also move for dismissal of the constitutional claims against Dr. Steve Herrick (VDOC's Health Services Director) on the ground that Dr. Herrick had "no involvement" in the conduct Plaintiffs challenge. ECF No. 381, Defs.' Br. at 106–07. Plaintiffs disagree that Dr. Herrick, who oversaw the provision of mental health services to prisoners in the Step-Down Program from at least 2016 to 2018, *see* ECF No. 381, Defs.' SUMF ¶ 137, had no involvement in the constitutional violations Plaintiffs allege. However, in the interest of streamlining the issues for trial, Plaintiffs voluntarily dismiss their constitutional claims against Dr. Herrick.

[30] The Fourth Circuit "has repeatedly held that the ADA and Rehabilitation Act generally are construed to impose the same requirements," and thus courts should "apply the same analysis to both." *Spencer v. Earley*, 278 F. App'x 254, 261 (4th Cir. 2008). Plaintiffs' ADA and RA claims can therefore "be combined for analytical purposes." *Seremeth v. Bd. of Cnty. Comm'rs*, 673 F.3d 333, 336 n.1 (4th Cir. 2012).

to meet their obligations under those laws, discriminated against prisoners with mental health disabilities, and violated the ADA and RA rights of members of the Disabilities Classes.[31] Defendants' policies regarding identification and accommodation of mental health disabilities are inadequate on their face to protect Disabilities Class members' rights under the ADA and RA. Further, the record supports that there are meaningful differences between Defendants' operating procedures and policies, on the one hand, and Defendants' actual management of the Step-Down Program, on the other, such that Defendants cannot simply rely on the contents of their (facially deficient) policies to evade a finding of discrimination. Sufficient evidence also exists to support that Defendants continue to discriminate against the Disabilities Class members, as they have since the inception of the Step-Down Program.

A. A Jury Could Find That Defendants Discriminated Against Plaintiffs Based on Their Mental Health Disabilities.

"Title II of the ADA provides that no qualified individual shall, by reason of a disability, be denied the benefits of public services, programs, or activities or be subject to discrimination by a public entity." *Fauconier v. Clarke*, 966 F.3d 265, 276 (4th Cir. 2020) (cleaned up); *see also* 29 U.S.C. § 794(a) (similar under RA).[32] To establish an ADA or RA violation, a plaintiff must establish "(1) that he has a disability or has been regarded as having a disability; (2) that he is otherwise qualified to receive the benefits provided by a public entity; and (3) that he was denied

[31] The Disabilities Class members include former, current, and future incarcerated persons confined at the Level S or Level 6 security levels and enrolled in the Step-Down Program who have been assigned a mental health classification code of MH-2S or higher, as defined by the Court's August 8 order. ECF No. 358 at 8. Prior to that order, the Court certified a Disabilities Class that included such incarcerated persons at Level S or Level 6 enrolled in the Step-Down Program who suffer from mental health disabilities and are qualified as individuals with disabilities under either the ADA or RA. ECF No. 299 at 41–42. Plaintiffs moved for reconsideration of the Court's August 8 order, ECF No. 359; that motion is currently pending before the Court.

[32] *See also supra* note 31.

those benefits or was otherwise discriminated against on the basis of his disability." *Fauconier*, 966 F.3d at 276. Discrimination under the ADA and RA can take several forms, including (a) intentional discrimination or disparate treatment; (b) disparate impact; or (c) failure to make reasonable accommodations. *See Thorpe v. Va. Dep't of Corr.*, 2021 WL 2435868, at *10 (W.D. Va. June 15, 2021), *aff'd sub nom. Thorpe v. Clarke*, 37 F.4th 926 (4th Cir. 2022).

Defendants' motion for summary judgment does not challenge (1) that the Disability Plaintiffs (Gary Wall, Dmitry Khavkin, Brian Cavitt, and Steven Riddick) have qualifying mental health disabilities,[33] or (2) that the Disability Plaintiffs were otherwise qualified to receive the benefits provided by the Step-Down Program. Instead, Defendants move for summary judgment on the ground that the Disability Plaintiffs were not "discriminated against because of a mental disability while participating in the Step-Down Program," and did not seek "a reasonable accommodation to participate in the Step-Down Program that VDOC knew of or denied." ECF No. 381, Defs.' Br. at 107. Defendants' motion is unavailing. In particular, Defendants ignore

[33] Both the ADA and the RA define "disability" as: (1) a physical or mental impairment that substantially limits one or more major life activities; (2) a record of the impairment; or (3) being regarded as having such an impairment. 42 U.S.C. § 12102(1); 29 U.S.C. § 705(20)(B). The ADA Amendments Act of 2008 ("ADAAA") broadened the definition of "disability" to expand the ADA's coverage. *See* 42 U.S.C. § 12102 (instructing that the definition of "disability" must be "construed in favor of broad coverage . . . to the maximum extent permitted" under the statute); ADA Amendments Act of 2008, Pub. L. No. 110-325 Sec. 4, 122 Stat. 3553. Under the ADAAA, an impairment constitutes a disability even if it (1) only substantially limits one major life activity; or (2) is episodic or in remission, if it would substantially limit at least one major life activity if active. ADAAA, Pub. L. No. 110-325 Sec. 3, 122 Stat. 3553, 3556. Congress passed the ADAAA in response to a series of Supreme Court decisions applying a narrow interpretation of "disability" that limited the ADA's coverage. *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 329 (4th Cir. 2014). The ADAAA "clarifies that the primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, not whether the individual meets the definition of disability." *Jacobs v. N.C. Admin. Off. of the Cts.*, 780 F.3d 562, 572 (4th Cir. 2015) (internal quotation marks, alterations, and citation omitted). Indeed, "[t]he question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Id.* (quoting ADAAA, Pub. L. No. 110-325, Sec. 2, 122 Stat. 3553).

abundant evidence from which a jury could reasonably conclude that (a) the Step-Down Program, by design and in practice, discriminates against Disability Plaintiffs and Disabilities Class members based on their mental disabilities by denying them meaningful access to the purported benefits of the Program; and (b) Defendants were on notice of Disability Plaintiffs' mental disabilities and resulting need for accommodations to participate in the Step-Down Program. The Court should therefore deny Defendants' motion.

1. Sufficient Evidence Exists That the Step-Down Program's Requirements Discriminate Against Prisoners with Mental Disabilities.

Defendants argue that there is "no evidence that VDOC took any adverse action against [the Disability Plaintiffs] in relation to the Step-Down Program" due to their mental disabilities because "[e]very named Disability Plaintiff completed the Step-Down Program." ECF No. 381, Defs.' Br. at 108–09. The Fourth Circuit, however, has explicitly rejected that argument. As explained in *Koon v. North Carolina*, the ADA prohibits "not just 'outright intentional exclusion' but also lesser injustices" such as a denial of "meaningful access." 50 F.4th 398, 405–06 (4th Cir. 2022). "[B]ecause 'meaningful access' is the standard, it is not a complete defense to say that some disabled prisoners overcame the hurdle." *Id.* at 406 (rejecting argument that because disabled prisoner "physically got himself to the general-population library, he was not denied meaningful access to the benefit," and observing that "[i]f a prisoner without the use of his legs left his wheelchair at the bottom of the stairwell and crawled up to the library, no one would doubt it was a denial of meaningful access"); *see also Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 479, 499 (4th Cir. 2005) (law student could bring ADA claim alleging lack of "meaningful participation" arising from inability to complete exam even where student ultimately completed exam).

Analyzed under the proper standard, Plaintiffs' ADA and RA claims are supported by ample evidence from which a jury could find that the Disability Plaintiffs faced discrimination on the basis of their disability, including because the Step-Down Program has a disparate impact on people with mental illness and because VDOC utterly fails to accommodate people with mental health disabilities.

The clearest evidence of the discriminatory impact of the Step-Down Program is reflected in data provided by VDOC and analyzed by Plaintiffs' expert Russell Molter. VDOC's data shows that prisoners with mental health issues spend far more time in the Step-Down Program than prisoners without mental health issues. For example, the average length of stay that class members as a whole remained in Level S (*i.e.* the housing level associated with the Step-Down Program) was 574.1 days. Ex. 8, Molter Supp. Rep. Ex. 6. Prisoners with mental health codes of MH-1 or higher at any time during their incarceration, however, have an average length of stay at Level S of 621 days—about a month and a half longer than the class as a whole. *Id.* Ex. 17a. The statistics are even more striking for prisoners with more severe mental illnesses. As Mr. Molter explains in his report, the average length of stay in Level S for prisoners with a mental health code of MH-2S or higher at any time during their incarceration is 845 days—almost 50% longer than the average stay of the class as a whole. *Id.* The experience of the Disability Plaintiffs fits this pattern: During the class period, Mr. Wall at one point spent 1,364 consecutive days in Level S; Mr. Riddick spent, on two occasions, 1,106 consecutive days and 1,487 consecutive days, respectively, in Level S; Mr. Cavitt spent 630 days in Level S; and Mr. Khavkin at one point spent 683 days in Level S. Ex. 29, VADOC-00175822.[34]

[34] VDOC's data also indicates that prisoners with mental illnesses are disproportionately assigned to or kept in the Step-Down Program. Of the 749 identified class members, only 38.9% have (continued…)

The causes of these disparities are apparent in the policies governing the Step-Down Program and the practices used to implement it. As a threshold matter, the evidence adduced in discovery shows that VDOC fails to adequately consider a prisoner's mental health history when deciding whether to place them in the Step-Down Program in the first place. *See* Ex. 4, Mathena Dep. at 537:6–21 (testifying that a prisoner's mental health status is no more important than "understanding what their eye color is" when assigning a security classification). There is no formal mental health screening prior to classifying a prisoner as Level S and placing them in the Step-Down Program, Ex. 21, King Dep. at 170:10–14, nor do mental health staff participate in the decision-making when assigning someone to Level S, Ex. 11, Mathena 30(b)(6) Dep. at 237:3–9, 238:4–8; Ex. 41, Malone 30(b)(6) Dep. at 118:13–19 ([redacted]). Any screening that does occur does not account for a prisoner's mental health history, which the evidence shows is highly important in assessing how a prisoner will fare in the Step-Down Program. Ex. 54, Hendricks Rep. ¶ 123 (observing that [redacted]); *see also, e.g.*, Ex.

consistently maintained a mental health code of MH-0 during their incarceration. Ex. 8, Molter Supp. Rep. Ex. 20. Fifty-eight percent of people in the Step-Down Program have had a mental health code of MH-2 or higher during their incarceration. *Id.* This is consistent with data reported by VDOC to Virginia's General Assembly, as required by statute. As of June 30, 2021, VDOC reported that only 30% of prisoners in the Step-Down Program had a mental health code of MH-0, 52% had a mental health code of MH-2, and 17% had a mental health code of MH-1. Ex. 99, VDOC, *Adoption of Restorative Housing in the Va. Dep't of Corr.*, FY2021 Rep., at 10 (Oct. 1, 2021), https://rga.lis.virginia.gov/Published/2021/RD447/PDF. The same report the following year reflected that 64% of prisoners in the Step-Down Program had a mental health code of MH-2. Ex. 20, VDOC, *Adoption of Restorative Housing in the Va. Dep't of Corr.*, FY2022 Rep., at 10 (Oct. 1, 2022), https://rga.lis.virginia.gov/Published/2022/RD472/PDF [hereinafter "*Adoption of Restorative Housing* Rep. (FY2022)"]. In contrast, among the overall VDOC population, around 68% of prisoners have a mental health code of MH-0, and only around 23% have a mental health code of MH-2. Ex. 100 at 3 (VDOC, Q. Rep. to the Governor and Gen. Assembly – CY2021).

59, Lee Dep. at 20:8–15, 49:12–20 (mental health screening omitted factors necessary to identify mental health conditions); Ex. 60, McDuffie Dep. at 256:16–257:13 (identifying omission of medical history from mental health screening); Ex. 15, McClintock Decl. ¶ 11 ("The last psychiatric evaluation I had was from when I was received by VDOC. To my memory, I never received a mental health evaluation at Red Onion.").

Plaintiffs have also adduced evidence of discrimination once class members are in the Step-Down Program. For example, as participants in the Step-Down Program, Disabilities Class members are subjected to performance criteria that disproportionately prevent prisoners with mental health disabilities from progressing through the Program and returning to general population. VDOC officials are well aware that a prisoner's mental health issues may impact their ability to satisfy several of these performance criteria, including cell compliance, personal hygiene, and respect. *See, e.g.*, Ex. 41, Malone 30(b)(6) Dep. at 208:7–14 (cell cleanliness), 209:5–14 (respect), 210:11–18 (personal hygiene); Ex. 60, McDuffie Dep. at 314:11–315:8; *see also id.* at 319:6–10 ([redacted]). As a result, VDOC officials have affirmed that certain prisoners [redacted] Ex. 59, Lee Dep. at 137:20–138:5, 140:14–141:4, or were "slower to progress" as a result, Ex. 4, Mathena Dep. at 583:21–584:3; *see also* Ex. 61, VADOC-00044002 (recognizing that [redacted] and are [redacted]); Ex. 25, Collins Dep. at 248:5–11, 249:5–19 (agreeing "that it is more difficult for prisoners with mental health issues to progress through the Step-Down program"); Ex. 21, King Dep. at 229:16–19

(acknowledging that prisoners were "unable to access privileges or complete certain tasks in the Step-Down Program because of an SMI" (serious mental illness)); Ex. 47, Manis Dep. at 154:5–16 (recognizing that prisoners, "especially" those with mental health issues, may refuse to shower). Each of the Disabilities Plaintiffs also testified that they were hindered in their progression in the Step-Down Program as a result of their mental illnesses. *See* Ex. 57, Riddick Dep. at 110:19–22 (testifying that his "mental health diagnosis" made it "difficult for [him] to get through the program and complete it"), 234:1–242:8, 249:2–251:12; ECF No. 383-15, Wall Decl. ¶¶ 19, 29; ECF No. 383-50, Cavitt Decl. ¶¶ 8–9, 37; ECF No. 174-23, Khavkin Aff. ¶¶ 18–20.

Despite its awareness of the challenges Disabilities Class members face in navigating the Step-Down Program, VDOC does not make any exceptions to the Program's requirements, even when prisoners' failure to meet the Program's requirements are clearly linked to their mental health disabilities. This is evident in grievance data provided by VDOC, which reflects how VDOC fails to consider the impact of a prisoner's mental health conditions on his ability to progress through the Step-Down Program, including where disciplinary infractions are a direct result of a prisoner's underlying mental health conditions. *See, e.g.*, Ex. 58, VADOC-00174671 at line 5550 (June 6, 2014 Informal Complaint that [redacted] and response from QMHP that [redacted]); at line 17183 (Mar. 26, 2014 Informal Complaint that Dr. McDuffie [redacted] and response by QMHP that [redacted] and [redacted]); at line 27087 (Sept. 30,

2022 Informal Complaint by Javon Arrington stating that VDOC is [redacted] and that he lost phone privileges as a result of actions caused by his mental illness, and response that he has [redacted]) (Grievance Spreadsheet); *see also* ECF No. 383-1, VADOC-00052689 at -736, -741–42 (describing disciplinary behavior requirements for progression through Program) (2012 Step-Down Manual); ECF No. 381-12, VADOC-00053668 at -717–18, -722 (same) (2020 Step-Down Manual).

As a result, the BMC—the committee that actually decides whether to progress an inmate to the next level in the Step-Down Program based on his completion of the Program's performance goals—applies these discriminatory criteria to routinely hold prisoners in the Step-Down Program without regard to whether a prisoner's mental health condition might be an impediment to his ability to progress through the Program. In fact, the BMC did not include a qualified mental health professional on the committee until September 2017. *Compare* ECF No. 381-10, VADOC-00056788 at -799–80 (Sept. 2016 Step-Down Program Manual) *with* ECF No. 381-11, VADOC-00053104 at -116 (Sept. 2017 Step-Down Program Manual). Even then, mental health professionals did not always attend BMC meetings, *see* Ex. 12, Trent Dep. at 283:6–285:4 (testifying that, as a psychology associate, he participated "maybe about half the time" because "sometimes they would forget to tell me that they had it"), and if they did attend, they had virtually no input, *see id.* at 286:10–287:1 (agreeing that psychology associate's "input would not affect the outcome of that meeting with respect to any given offender").[35]

[35] The same is true of the DTT, which is responsible for determining pathway placement in the Step-Down Program. *See* Ex. 12, Trent Dep. at 277:2–13 (psychology associate role on DTT was to answer questions about mental health, but they "typically [do] not speak during a dual treatment team meeting unless called upon," and "in many of the dual treatment team meetings [they] weren't called upon"), 278:22–279:17 ("Mental health didn't really have a say in what form of the step-down program [prisoners] were in," and their input "didn't affect the ultimate outcome one way or another typically.").

These discriminatory practices and effects of the Step-Down Program are the result of VDOC's systemic failure to maintain an adequate ADA program. As Plaintiffs' ADA expert has explained, and as the evidence described herein demonstrates, there are a number of critical gaps that, both individually and in combination, result in discrimination, including: (1) VDOC's intake and other procedures are inadequate to identify prisoners with disabilities (including mental disabilities), (2) VDOC fails to fully inform prisoners of their ADA rights at orientation and fails to track prisoners with disabilities, (3) VDOC staff are not adequately trained in ADA compliance, and (4) VDOC's grievance procedure does not offer prisoners a meaningful process to resolve ADA- or disability-related issues. *E.g.*, Ex. 62, Wells Rep. ¶ 15; Ex. 63, Wells Reply Rep. ¶ 87. These systemic failures "contributed to a widespread denial of access to the" benefits of the Step-Down Program for prisoners with mental health disabilities and are evidence of discrimination on the basis of disability sufficient to defeat summary judgment. *See Holmes v. Godinez*, 311 F.R.D. 177, 226 (N.D. Ill. 2015) (denying motion for summary judgment where plaintiffs challenged systemic issues, such as failure to properly train employees or centrally track hearing impaired offenders, that resulted in denial of hearing accommodations); *see also Dunn v. Dunn*, 318 F.R.D. 652, 664–65 (M.D. Ala. 2016), *modified sub nom. Braggs v. Dunn*, 2020 WL 2395987 (M.D. Ala. May 12, 2020) (explaining plaintiffs could have proven at trial that failure to "(1) appoint and train ADA coordinators, (2) adopt ADA grievance procedures, and (3) develop an ADA transition plan," as required by regulations, "had the effect of discriminating"); *Brown v. Dep't of Pub. Safety & Corr. Servs.*, 383 F. Supp. 3d 519, 556 (D. Md. 2019) ("[T]he undisputed failure of Defendants to implement policies and procedures designed to inform prisoners of their legal rights may be used as evidence that Defendants violated the ADA or the Rehabilitation Act in other ways, such as by failing to provide reasonable modifications.").

Defendants' only other argument for dismissal of Disability Plaintiffs' ADA claims at this stage is that Defendants could not have discriminated against two Disability Plaintiffs, Mr. Riddick and Mr. Wall, because each allegedly "voluntarily refused to participate" in the Step-Down Program. ECF No. 381, Defs.' Br. at 109. As a preliminary matter, this argument ignores the fact that the cause of these Plaintiffs' refusal to participate is far from undisputed, and there is sufficient evidence in the record to conclude that their mental health disabilities could have caused or contributed to any unwillingness or inability to participate. Evidence in the record demonstrates that VDOC fails to consider whether so-called "voluntary" behavior is in fact indicative of or the result of an underlying mental health issues. *Supra* at 47–48; *see also* Ex. 41, Malone 30(b)(6) Dep. at 163:17–164:2. Specifically with regard to Mr. Riddick, an independent psychological evaluation requested by VDOC in 2020 *disagreed* with VDOC's assessment that Mr. Riddick's behavior was [redacted] concluding instead that Mr. Riddick's behavior [redacted] of PTSD, as well as anxiety and depressive episodes. Ex. 64, VADOC-00163102 at -111.

In any event, Defendants mischaracterize the record, which reflects that both Mr. Riddick and Mr. Wall participated or attempted to participate in the Step-Down Program multiple times. For example, while Defendants claim that Mr. Wall "refused to program," ECF No. 381, Defs.' SUMF ¶ 128, the record reflects that he had *already* "completed the Challenge Series" at the time of such refusal, ECF No. 381-46 at 5 (CP-20-cv-7 00003263); *see also id.* at 11–18 (VADOC-00001681–1688) (Officer's Log Sheet reflecting numerous instances from September 2015 through 2018 in which Plaintiff Wall participated in the Challenge Series); ECF No. 383-15, Wall Decl. ¶¶ 31, 44. Plaintiff Riddick's testimony also reflects that, to the extent he "refused" to participate in the Step-Down Program at one point in time, he did so only after having attempted

to complete the Program multiple times. *See* Ex. 57, Riddick Dep. at 260:4–10 (discussing being sent back to SM-0 despite having completed the "books" and "classes"); *see also* ECF No. 381-59 at 77 (VADOC-00136074) (Mar. 14, 2016 informal grievance filed by Mr. Riddick regarding lack of progress from SM0 despite having completed books 1 and 2), at 79 (VADOC-00136076) (June 18, 2015 informal grievance filed by Mr. Riddick regarding being [redacted]).

2. The Record Supports a Finding That Defendants Were on Notice of Disability Plaintiffs' Disabilities and Need for Accommodations.

Under the ADA, public entities must "make reasonable modifications in policies, practices, or procedures . . . when necessary to avoid discrimination on the basis on disability[.]" 28 C.F.R. § 35.130(b)(7)(i). This affirmative duty is at its "apex" in the prison environment "in light of the uneven power dynamic between prison officials and inmates" and "the fact that departments of corrections have complete control over whether prison inmates (disabled or not) receive any programs or services at all." *Pierce v. D.C.*, 128 F. Supp. 3d 250, 269 (D.D.C. 2015) (Jackson, J.). VDOC wholly disregarded this duty by failing to provide reasonable accommodations to Disability Plaintiffs and Disabilities Class members which would allow them to complete the criteria necessary for progression in the Step-Down Program, thereby denying them the primary benefit of the Program—returning to general population.

In their motion for summary judgment, Defendants claim that "[t]o advance a disability discrimination claim under the ADA or RA for failing to provide a reasonable accommodation, a plaintiff must establish . . . that he proposed a reasonable modification to the challenged public program," ECF No. 381, Defs.' Br. at 109, but that is not the law. Indeed, Defendants made this same argument at the motion to dismiss stage and the Court properly rejected it, because "[t]he Fourth Circuit has not so required" a formal request for a reasonable accommodation. *Thorpe*,

2021 WL 2435868, at *10. Instead, a defendant need only have "notice" of the plaintiff's disability, *Reyazuddin v. Montgomery Cnty., Md.*, 789 F.3d 407, 414 (4th Cir. 2015), which is established when the plaintiff requests an accommodation or when the need for an accommodation is obvious, *Thorpe*, 2021 WL 2435868, at *10; *Paulone v. City of Frederick*, 787 F. Supp. 2d 360, 403–04 (D. Md. 2011) ("[T]he 'request requirement,' which 'usually' applies, is a function of the fact that 'a person's disability and concomitant need for accommodation are not always known until the [person] requests an accommodation.' In some cases, however, a person's 'need for an accommodation will be obvious; and in such cases, different rules may apply.'" (cleaned up) (quoting *Kiman v. N.H. Dep't of Corr.*, 451 F.3d 274, 283 (1st Cir. 2006))); *accord Robertson v. Las Animas Cnty. Sherriff's Dep't*, 500 F.3d 1185, 1197–98 (10th Cir. 2007) ("[A] public entity is on notice that an individual needs an accommodation when it knows that an individual requires one, either because that need is obvious or because the individual requests an accommodation."); *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124, 1139 (9th Cir. 2001) ("When the plaintiff has alerted the public entity to his need for accommodation (or where the need for accommodation is obvious, or required by statute or regulation), the public entity is on notice that an accommodation is required, and the plaintiff has satisfied the first element of the deliberate indifference test.").

Defendants suggest there is no evidence "that VDOC knew or should have known that [the Disability Plaintiffs] each needed a reasonable accommodation to participate in the Step-Down Program" due to their mental disability, Defs.' Br. at 111, but that argument is contradicted by VDOC's own records. Disability Plaintiffs Wall, Riddick, and Cavitt had documented mental

health conditions for which VDOC recognized they required treatment, and Disability Plaintiff Khavkin repeatedly reported mental health symptoms to VDOC.[36] Specifically:

- Plaintiff Gary Wall was diagnosed with an anxiety disorder by Dr. McDuffie in 2014 while in the Step-Down Program and was prescribed Prozac to treat his symptoms. ECF No. 381-46 at 6 (VADOC-00001598); Ex. 65, CP-20-cv-7-00002473; ECF No. 383-15, Wall Decl. ¶ 16. At that time, his mental health code was changed to MH-2. ECF No. 381-46 at 6 (VADOC-00001598); *see also* Ex. 33, VADOC-00165197 at line 4440. Later during his time in the Step-Down Program, he began to experience suicidal thoughts and depression. ECF No. 383-15, Wall Decl. ¶ 29; ECF No. 383-95, VADOC-00001279 at -329; ECF No. 383-97, VADOC-00149015. He also expressed concern that he was becoming unable to control his reactions to others. Ex. 66, VADOC-00148978 [redacted]).

- Mr. Riddick began seeing a ROSP psychiatrist in July 2018, after multiple complaints of mental health symptoms. *See, e.g.*, Ex. 67, VADOC-00012179 (MH progress notes); Ex. 58, VADOC-00174671 at line 21968 (May 29, 2018 informal complaint stating that [redacted]), at line 21985 (June 11, 2018 informal complaint that [redacted]) (Grievance Spreadsheet); ECF No. 383-43, Riddick Decl. ¶¶ 35–36. Once he saw Dr. McDuffie, Mr. Riddick was diagnosed with depressive disorder and prescribed Prozac and Zyprexa. *See* ECF No. 381-59 at 10 (CP-20-cv-7_00003350); Ex. 68, VADOC-00011517. On July 16, 2018, Mr. Riddick's mental health code was changed to MH-2 and remains such to the present. *See* Ex. 33, VADOC-00165197 at lines 7040–42; Ex. 69, VADOC-00011491 (Mental Health Screening dated July 16, 2018); Ex. 70, VADOC-00011492 (Mental Health Coding Classification Review/Update dated July 16, 2018). Over the course of several

[36] Defendants do not contest that Disability Plaintiffs Wall, Riddick, Cavitt, and Khavkin have qualifying disabilities under the ADA—or at least that there are genuine factual disputes as to this issue. That is for good reason. As this Court previously determined, the Disability Plaintiffs each "have a history of mental impairments that certainly would qualify as disabilities under the ADA and RA given those statutes' broad definition of disability." ECF No. 299 at 26; *see also Williams v. Kincaid*, 45 F.4th 759, 770 (4th Cir. 2022), *cert. denied*, 143 S. Ct. 2414 (2023) ("[W]e are once again guided by Congress' mandate that we must construe the definition of "disability" as broadly as the text of the ADA permits."); *supra* at 42 n.33. And, as described below, the Disability Plaintiffs' mental health conditions are those which the ADA regulations recognize "will, in virtually all cases," qualify as an impairment that substantially limits one or more major life activity. 28 C.F.R. § 35.108(d)(2)(ii); *see also id.* § 35.108(d)(iii)(K) ("[I]t should easily be concluded that . . . [m]ajor depressive disorder, bipolar disorder, post-traumatic stress disorder, . . . and schizophrenia each substantially limits brain function.").

months, Dr. McDuffie considered multiple possible diagnoses for Mr. Riddick, but ultimately concluded that a diagnosis of PTSD with depressive features was appropriate. Ex. 71, VADOC-00011367; *see also* Ex. 72, VADOC-00011476; Ex. 73, VADOC-00011519; Ex. 74, VADOC-00011477.

- Disability Plaintiff Cavitt had a documented mental health history when he arrived in VDOC custody from Massachusetts as an interstate transfer, including a history of depression, anxiety, and suicide attempts. Ex. 75, VADOC-00003639, at -640 (Aug. 23, 2016 Mental Health – Comprehensive Evaluation); ECF No. 383-50, Cavitt Decl. ¶ 6. Mr. Cavitt's mental health symptoms included anxiety, anger, difficulty getting out of bed and complying with instructions from prison staff, and feelings of hopelessness and despair. ECF No. 383-50, Cavitt Decl. ¶¶ 7–9, 54.

- Disability Plaintiff Khavkin testified that he repeatedly requested mental health services from VDOC related to his experiencing "[d]epression, anxiety, hallucination, hearing voices, . . . mood swings and schizophrenia," but that those concerns were not addressed by Defendants, Ex. 24, Khavkin Dep. at 108:18–111:8; *see also* ECF No. 174-23, Khavkin Aff. ¶ 18 ("I was eventually diagnosed by a doctor with a number of mental-health disabilities, including psychosis, Post-Traumatic Stress Disorder, schizophrenia, paranoia, depression, and anxiety. I asked to be seen by a psychiatrist at ROSP, but wasn't.").

Based on these symptoms and reports, VDOC was plainly on notice of Plaintiffs' need for accommodations. Indeed, VDOC's own training materials recognize that the conditions that Plaintiffs experienced—and *reported* to VDOC—are disabilities that implicate the need for accommodations. *E.g.*, Ex. 76, VADOC-00166474 at -475 (VDOC training document listing PTSD, bipolar disorder, TBI, and schizophrenia as [redacted]).

Regardless, Plaintiffs did in fact request accommodations related to their disabilities. Mr. Riddick, for example, requested *numerous* times to be transferred out of the Step-Down Program to the SIP/SAM pod or other mental health unit where he could obtain treatment for his mental illness. *See*, *e.g.*, ECF No. 383-43, Riddick Decl. ¶¶ 27, 29, 36, 37, 46, 47, 59; ECF No. 381-59 at 7 (CP-20-cv-7_00002175), 39 (VADOC-00135938), 46 (VADOC-00135945). VDOC staff even indicated at one point, in response to such a request, that Mr. Riddick would be placed in one of those units. Ex. 58, VADOC-00174671 at line 21998 (Aug. 27, 2018 informal complaint

requesting placement in mental health pod and response that Mr. Riddick was [redacted]) (Grievance Spreadsheet). Dr. McDuffie supported Mr. Riddick's request to be moved to the SIP/SAM pod. Ex. 72, VADOC-00011476 (Sept. 27, 2018 Psychiatry Progress Note noting that Mr. Riddick [redacted]). By September 2019, Dr. McDuffie believed there was no psychiatric reason to house Mr. Riddick in restrictive housing, and that [redacted] Ex. 71, VADOC-00011367 (Sept. 19, 2019 Psychiatry Progress Note). Mr. Riddick also expressed to ROSP Warden Kiser that his mental illness was "making it impossible for [him] to get through the Program" and he requested to be placed in SIP/SAM, but the Warden simply told him he had to finish the Step-Down Program before he could be moved. ECF No. 383-43, Riddick Decl. ¶ 47; *see also* Ex. 58, VADOC-00174671 at line 21998 (Grievance Spreadsheet). VDOC was put on notice of Mr. Riddick's need for accommodations yet again in 2020, when Mr. Riddick was evaluated by an independent licensed clinical psychologist, who opined that [redacted] Ex. 64, VADOC-00163102 at -112.

Despite this repeated notice over the course of several years, Mr. Riddick was not moved out of the Step-Down Program until March 2023. Instead of providing Mr. Riddick with any accommodation, ROSP staff consistently told Mr. Riddick that he would be required, without exception, to progress through the Step-Down Program in order to be housed in another unit. Ex. 58, VADOC-00174671 at line 22000 (Sept. 13, 2018 informal complaint that [redacted]

[redacted] and response that [redacted]); *id.* at line 22014 (Oct. 23, 2018 informal complaint regarding having to re-do the Challenge Series and response that [redacted]); *id.* at line 22304 (May 19, 2022 Regular Grievance stating that he wants to be in a mental health unit and response upholding the determination without analysis); *id.* at line 22308 (May 31, 2022 informal grievance that he is [redacted] and response that he was [redacted]) (Grievance Spreadsheet).

Contrary to Defendants' assertion, a formal request for an accommodation was not required in order to put Defendants on notice of Disability Plaintiffs' disabilities and resulting impairments.[37] Instead, courts have held that facilities, like VDOC, have "an *affirmative duty* to assess the potential accommodation needs of prisoners" and "to provide the accommodations that are necessary for those prisoners to access the prison's programs and services, without regard to whether or not the disabled individual has made a specific request for accommodation and without relying solely on the assumptions of prison officials regarding that individual's needs." *Pierce*, 128 F. Supp. 3d at 272 (emphasis added); *see also* Ex. 76, VADOC-00166474 at -480 (VDOC training document recognizing the same). That makes this case distinguishable from *Patrick v.*

[37] This is especially true for prisoners, such as those in the Disabilities Class, who were classified with a mental health code of MH-2S or higher. VDOC's own policy recognizes that prisoners with a mental health code of MH-2S or higher suffer from mental disorders [redacted] ECF No. 383-51 at 3–4, 13–14 (O.P. 730.2 effective June 1, 2021); ECF No. 381-50, VADOC-00002925 at -926, -933–34.

Martin, 2020 WL 4040969 (N.D. Tex. July 16, 2020).[38] Unlike in *Patrick*, a reasonable jury could conclude based on the evidence described above that Defendants were on notice of Disability Plaintiffs' need for accommodations, making summary judgment inappropriate. *See Baxley v. Jividen*, 508 F. Supp. 3d 28, 64 (S.D.W. Va. 2020) (denying motion for summary judgment where plaintiffs' grievances and deposition testimony supported that plaintiff sought reasonable accommodations from the Defendant); *Sydnor v. Fairfax Cnty., Va.*, 2011 WL 836948, at *7 (E.D. Va. Mar. 3, 2011) ("[C]rystal-clear information regarding Plaintiff's exact prognosis" is not required to meet ADA's notice requirement.).

Separate and apart from the evidence that Defendants were (or should have been) on notice of Disability Plaintiffs' need for reasonable accommodations, a reasonable jury could also infer from the record that any lack of formal accommodation requests by Disability Plaintiffs (and Disabilities Class members) was the result of VDOC's own policies and practices, which make it virtually impossible for prisoners to request or otherwise receive accommodations for mental health disabilities. Before July 1, 2016, VDOC did not have *any* operating procedure that addressed managing prisoners with disabilities or VDOC's obligations under the ADA. *See* ECF No. 383-36, VDOC Objs. & Ans. to Pls.' Reqs. For Admis. at 14–15, Nos. 29, 31. Nor was there any method for prisoners to request reasonable accommodations. *See* Ex. 77, King 30(b)(6) Dep. at 164:20–165:3 (no knowledge of accommodation request procedure prior to July 1, 2016). Even

[38] The other cases cited by Defendants are equally inapposite. *Wells v. Bureau County* focused primarily on plaintiff's failure to offer any evidence that plaintiff "had been diagnosed with or treated for mental illness at any time" to support that he had a disability. 723 F. Supp. 2d 1061, 1087 (C.D. Ill. 2010). Similarly, in *Gonzalez v. Bexar County, Texas* it was "undisputed that [decedent] did not ask for any mental health treatment" in the two days he was in defendants' custody. 2014 WL 12513177, at *5 (W.D. Tex. Mar. 20, 2014). As explained above, *supra* at 53–54, Disability Plaintiffs routinely sought mental health treatment and in fact were diagnosed with serious mental health disorders while in VDOC custody.

after 2016, VDOC's ADA policies suffered from serious deficiencies. The first version of the ADA Operating Procedure, O.P 801.3, "did not explain how Prisoners with disabilities should request accommodations, or what types of records should be kept to track accommodation requests and responses." ECF No. 383-36, VDOC Objs. & Ans. to Pls.' Reqs. For Admis. at 14, No. 30; *see also* ECF No. 383-108, VADOC-00040782 (O.P. 801.3 effective July 1, 2016). When O.P. 801.3 was amended on August 1, 2019, months after the filing of this lawsuit, it included for the first time a policy to inform incarcerated persons of their right to nondiscrimination under the ADA and a one-page 'Notice of Rights for Offenders with Disabilities.'" ECF No. 383-109, VADOC-00040788 at -790 (O.P. 801.3 effective Aug. 1, 2019). The Notice, however, did not contain guidance on disabilities based on a mental impairment, *see* Ex. 78, VADOC-00040801, and it was not included in the Offender Orientation Handbook. *See, e.g.*, Ex. 48, VADOC-00040809 (revised June 2021); Ex. 27, VADOC-00041095 (Revised Nov. 2020); Ex. 79, VADOC-00041041 (Revised Apr. 2020); Ex. 26, VADOC-00041077 (revised Feb. 2017). Instead, VDOC's 30(b)(6) witness testified that medical and mental health staff were expected to explain qualifying mental disabilities at intake, but that it was "absolutely not" her understanding that it is always done. Ex. 77, King 30(b)(6) Dep. at 204:22–206:10. As a result, Plaintiffs and class members were unaware that there was an ADA coordinator at ROSP, who that person was, or that it was possible to request accommodations for mental health disabilities. ECF No. 383-15, Wall Decl. ¶ 50; Ex. 80, Wall Dep. at 258:12–19; *see also* ECF No. 383-17, Arrington Decl. ¶ 29; Ex. 13, Bowman Decl. ¶ 39.

In fact, there is considerable confusion within VDOC as to who is responsible for determining whether a prisoner should receive an accommodation due to a mental health disability. VDOC's and ROSP's ADA coordinators claim that it is the job of mental health staff to assess whether a prisoner has a qualifying mental impairment and to provide necessary accommodations.

See, e.g., Ex. 23, Duncan Dep. at 62:13–20, 63:18–65:8; Ex. 21, King Dep. at 233:9–234:2; Ex. 81, Marano (*Reyes*) Dep. at 94:10–97:3. But those responsible for mental health treatment at ROSP repeatedly disclaimed any responsibility for assessing whether a prisoner has a mental disability or needed an accommodation. *See* Ex. 59, Lee Dep. at 52:13–54:1 (testifying that [redacted] and that it was not psychology associates' role to recommend ADA accommodations); Ex. 12, Trent Dep. at 302:13–22 (no role as a psychology associate in providing accommodations to prisoners who have a mental disability); Ex. 60 McDuffie Dep. at 379:16–380:17 (testifying that, as the ROSP facility psychiatrist, McDuffie does not [redacted] and is [redacted] for mental disabilities); Ex. 41, Malone 30(b)(6) Dep. at 105:19–106:6 (VDOC's Chief of Mental Health Services unfamiliar with [redacted]).

To the extent incarcerated persons have been able to find a way to request reasonable accommodations, VDOC has failed to adequately track such requests, including whether such requests were granted or denied, and if granted, what reasonable accommodations were provided. Although VDOC's statewide ADA coordinator recognizes it is a "requirement[] of the ADA" to track accommodations, Ex. 82, Marano Dep. at 174:3–13, VDOC did not begin tracking incarcerated persons with disabilities until June 2019.[39] Nor does VDOC maintain a list of accommodations provided to offenders, *id.* at 235:19–21, which violates the department's own written policies, *see* ECF No. 383-109, VADOC-00040788 at -791 (O.P. 801.3 effective Aug. 1, 2019). All of these issues were exacerbated by the fact that VDOC employees were not

[39] The earliest tracking spreadsheet VDOC produced was dated June 2019.

appropriately trained on the ADA's requirements. "[C]orrectional staff working with Prisoners in the Step-Down Program received *no* ADA-specific training prior to 2016." ECF No. 383-36, VDOC Objs. & Ans. to Pls.' Reqs. For Admis. at 15, No. 32 (emphasis added).

Other VDOC policies and practices have inhibited prisoners' ability to request accommodations as well. For example, based on VDOC policy, if a prisoner requests an accommodation but does not use the VDOC-designated ADA request form, the request is sent back to the inmate as undeliverable. Ex. 77, King 30(b)(6) Dep. at 212:11–213:11. When returning the request, however, VDOC employees do not explain to the prisoner that the request needs to be on a different form or otherwise addressed to the ADA coordinator. *Id.* at 213:12–214:14. Even where prisoners file grievances explicitly related to violations of their ADA rights, those grievances are not passed on to the ADA coordinator. *See* Ex. 58, VADOC-00174671 at line 27082 (Sept. 23, 2022 Informal Complaint by Javon Arrington [redacted] and stating he was [redacted] and response only that [redacted]); at line 29627 (Dec. 20, 2020 Regular Grievance claiming to [redacted] and response from Health Services Director that grievance was unfounded without addressing request for accommodations) (Grievance Spreadsheet). In sum, Defendants cannot fault Disability Plaintiffs for failing to identify a specific request made for an accommodation when (a) VDOC did not inform prisoners of their ADA rights or the accommodation request process; and (b) VDOC did not properly consider, document, or track those requests.

Finally, Defendants claim that Plaintiffs' ADA and RA claims fail because the Disability Plaintiffs have not "identified any reasonable accommodation for their alleged mental disability that allegedly was needed to *participate* in the Step-Down Program." ECF No. 381, Defs.' Br. at 111. But Defendants mischaracterize Disability Plaintiffs' ADA claims. The Disability Plaintiffs do not allege that they have been prohibited from participating *at all* in the Step-Down Program. Instead, the Disability Plaintiffs contend that they have been denied the opportunity to *meaningfully* participate in the Step-Down Program, such that the promise of a return to general population is equally accessible to Disabilities Class members as it is to other prisoners. The Disability Plaintiffs have identified several accommodations that they contend would provide them and other class members with the meaningful access required by the ADA. *See* ECF No. 383-106, Class Plaintiff Wall's Resps. and Objs. to Defs.' First Set of Interrogs., at Interrogatory Nos. 4 & 9 at 8–9, 14–15; ECF No. 383-107, Class Plaintiff Wall's Supp. Resps. and Objs. to Defs.' First Set of Interrogs., at Interrogatory Nos. 4 & 9 at 8–9, 14–15; Ex. 62, Wells Rep. ¶ 196. Plaintiffs are entitled to their day in court to determine whether these accommodations are appropriate. *See Seremeth*, 673 F.3d at 340 ("[W]hat constitutes reasonable accommodations . . . is a question of fact."); *Wilson v. North Carolina*, 981 F. Supp. 397, 400 (E.D.N.C. 1997) ("[T]he question of whether an accommodation is reasonable under the circumstances is a factual one not to be resolved by the court on summary judgment.").[40]

[40] Even if this Court disagreed that Defendants were sufficiently on notice of Disability Plaintiffs' need for accommodations, that still would not warrant dismissal of the ADA claims at the summary judgment stage. A failure to accommodate is only one of several theories that could support an ADA violation, and as explained above, *e.g.*, *supra* Part V.A.1, plenty of other evidence of discrimination exists.

B. The Statute of Limitations Does Not Preclude Plaintiffs from Relief for Their ADA and RA Claims.

Defendants contend that Plaintiffs' ADA and RA claims similarly fail because they are time-barred. This is not true. Contrary to Defendants' assertion, a reasonable jury could find that the discrimination suffered by the Disability Plaintiffs,[41] and the Disabilities Classes generally, occurred within the year prior to filing this lawsuit on May 6, 2019.[42] *See* ECF No. 299 at 32 ("[T]hose policies and practices related to each of the plaintiffs' substantive claims are not made up of a single occurrence, but rather were, and in some cases still are, a continuing series of acts, meaning the limitations period is not triggered until the unlawful conduct has ended.").

1. VDOC Systemically Discriminates Against Individuals with Mental Impairments Such That the Continuing Violations Doctrine Applies.

Defendants' statute of limitations argument fails as to Plaintiffs' ADA and RA claims because the Disabilities Classes could not have reasonably discovered their injuries prior to May

[41] Defendants devote their argument for summary judgment on the statute of limitations to claims brought by the four Named Disability Plaintiffs. Defs.' Br. at 117–21. By the current class definitions in this case, those individuals are not members of the Disabilities Class. Defendants adduce no evidence supporting the application of the statute of limitations to the members of the Disabilities Damages Class who were Disabilities Damages Class members as of May 6, 2018. ECF No. 358 at 8. The Court accordingly should treat that omission as a concession that no statute of limitations bars those claims. Fed. R. Civ. P. 56(e)(2).

[42] The Disabilities Injunction Class is not barred by the statute of limitations because it seeks prospective relief for the harms suffered and includes persons who will in the future be subject to the Step-Down Program and classifications at issue here. *See, e.g.*, *Dunn v. Dunn*, 219 F. Supp. 3d 1100, 1119 (M.D. Ala. 2016); *Anderson v. Cornejo*, 199 F.R.D. 228, 245 (N.D. Ill. 2000) ("[A]s to the class claims for injunctive relief, the most pertinent time period is prospective. A statute of limitations does not necessarily apply to a claim for prospective, injunctive relief." (citing *McCarthy v. Madigan*, 503 U.S. 140, 153 n.5 (1992))). All class members within the Court's definition of the Disabilities Injunction Class have valid claims not barred by the statute of limitations or the date on which they exited the Step-Down Program. *See* ECF No. 358 at 8. Plaintiffs concede that those class members otherwise within the class definition who were not in the Step-Down Program at any time in the year preceding the filing of this lawsuit, *i.e.* May 6, 2018 to May 6, 2019, based on an objective inquiry, are time-barred from bringing ADA or RA claims for damages. *See* Defs.' Br. at 122.

6, 2018. VDOC's systemic disability discrimination against incarcerated persons in the Step-Down Program occurs not through discrete acts but rather through the implementation of operating procedures and policies at Red Onion and at Wallens Ridge. Much like a hostile workplace claim, this continuum of unequal access to activities, programs, and services has unfolded over time and "may not be actionable on its own." *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002). The Court should apply the continuing violations doctrine to the Disabilities Classes' claims in recognition of the violations that formed and fueled the Step-Down Program, and not solely because *Morgan*'s holding does not reach Title II, as discussed *infra*.

The continuing violations doctrine applies where repeated conduct "over a series of days, or perhaps years and, in direct contrast to discrete acts, a single act . . . may not be actionable on its own." *Id.*; *see also DePaola*, 884 F.3d at 486 ("[W]hen a harm has occurred more than once in a continuing series of acts or omissions, a plaintiff under certain circumstances may allege a 'continuing violation' for which the statute of limitations runs anew with each violation."). Prisoners in the Step-Down Program lack a viable pathway out of segregation: on average, all class members spend 574 days at Level S, but the Disabilities Class members spend 845 days there. Ex. 8, Molter Supp. Rep. Updated Exs. 6, 17a. As this Court has already held, the doctrine applies to Plaintiffs' claims. ECF No. 70 at 83 (Report & Recommendation recognizing continuing violations doctrine in civil rights cases), *adopted in part by* 2021 WL 2435868, at *9–10 (adopting ADA-related holding of R&R) (recognizing that monthly BMC reviews constitute repeating instances of discrimination). And courts in this Circuit regularly apply the continuing violations doctrine to ADA and RA claims where, as here, a public entity repeatedly and continually violates ADA rights. *See, e.g.*, *id.*; *Reyes v. Clarke*, 2019 WL 4044316, at *26 (E.D.

Va. Aug. 27, 2019); *cf. Depaola*, 884 F.3d at 487 (applying continuing violations doctrine in § 1983 suit related to mental health needs).

2. VDOC's Systemic Discrimination Does Not Consist of Discrete Acts.

Defendants contend that the continuing violation doctrine does not apply to Plaintiffs' ADA and RA claims because the Disabilities Plaintiffs and members of the Disabilities Classes experienced injury through discrete acts as opposed to continuing violations. Invoking the Fourth Circuit's decision in *Morgan*, Defendants contend that the continuing violations doctrine does not apply to disability discrimination claims, even if Defendants' acts of discrimination were repeated over the years and decades that class members spent in the Step-Down Program. ECF No. 381, Defs.' Br. at 113–14. This argument fails for two reasons. First, *Morgan*'s analysis focuses on Title VII claims involving employment decisions related to promotion or demotion, whereas this case focuses on Title II disability discrimination claims, which are governed by different statutory text and principles. Second, even if a *Morgan*-like analysis applied to Plaintiffs' claims, the discrete acts that Defendants identify—ICA reviews—are insufficient to put Plaintiffs on notice of their claims. *See* ECF No. 299 at 32.

a) *Morgan* is Distinguishable and Does Not Apply to Title II Claims.

The *Morgan* decision is inapposite because it involves employment discrimination under Title VII of the Civil Rights Act of 1964, not disability discrimination claims under Title II of the ADA. The provisions are not analogous. The text of Title VII "specifies with precision" when an employee must file a charge of employment discrimination, mandating that an employee file her charge "within one hundred and eight days after the alleged unlawful employment practice occurred." *Morgan*, 536 U.S. at 109 (internal citations omitted). Title II, by contrast, contains no such statutory text. *See Soc'y Without a Name*, 655 F.3d at 347; 42 U.S.C. §§ 12131 *et seq.*

Defendants cite no authority supporting application of *Morgan*'s "discrete acts" approach to Title II claims like those brought here, where Plaintiffs contest not individual workplace decisions but rather the existence of a viable pathway out of segregation. *See* Defs.' Br. at 115–17 (citing *Hill v. Hampstead Lester Morton Ct. Partners, LP*, 581 F. App'x 178, 179–80 (4th Cir. 2014) (unpublished) (declining to apply continuing violation doctrine where tenant's individual, express requests for physical accommodation were explicitly rejected); *Holland v. Wash. Homes, Inc.*, 487 F.3d 208 (4th Cir. 2007) (decline to apply doctrine to Title VII claims § 2000e-2(a) enumerates as discrete acts); *Szedlock v. Tenet*, 61 F. App'x 88, 94 (4th Cir. 2003) (unpublished) (dismissing Title VII claim for fatal error in pleadings)).

Indeed, courts routinely apply the continuing violations doctrine in civil rights cases, especially where, as here, plaintiffs' claims are premised on "Defendants 'alleged pattern and practice of relying on inadequate guidelines and procedures that fail to ensure the requisite access to Plaintiffs.'" *Californians for Disability Rts., Inc. v. Cal. Dep't of Transp.*, 2009 WL 2982840, at *2 (N.D. Cal. Sept. 14, 2009); *Geness v. Pennsylvania*, 364 F. Supp. 3d 448, 454–55 (W.D. Pa. 2019); *DePaola*, 884 F.3d at 486; *Peralta v. Dillard*, 744 F.3d 1076, 1083 (9th Cir. 2014); *Shomo v. City of New York*, 579 F.3d 176, 182 (2d Cir. 2009).

b) ICA Reviews Are Not "Discrete Acts" Which Trigger the ADA or RA Statute of Limitations.

Even if Defendants' conduct could be construed as "discrete acts" of discrimination, the specific acts that Defendants identify in their motion—namely, ICA reviews—are not sufficient to put the Disability Plaintiffs on notice of their claims. In particular, ICA reviews—which Defendants claim provide "written notice of any failures to promote or demotions within the Step-Down program," Defs.' Br. at 117—are insufficient to Plaintiffs on notice of their claims because (a) the ICA simply rubber-stamps the decisions the BMC makes through application of

discriminatory criteria, (b) VDOC does not consistently provide written notice of ICA determinations, and (c) when prisoners do receive ICA determinations, they are insufficient to provide notice that prisoners' failure to advance through the Step-Down Program is related to their mental health disabilities. More specifically:

- ICA reviews do nothing more than rubber-stamp decisions made by VDOC's BMC. Ex. 25, Collins Dep. at 203:4–9, 205:15–20; ECF No. 383-44, Duncan (*DePaola*) Dep. at 190:2–6, 191:11–16, 193:20–22. The Court has already held that BMC reviews are insufficient to put Disabilities Class members on notice of their claims. ECF No. 299 at 32.

- VDOC does not provide notice of the ICA determinations sufficient to constitute notice of class members' disability discrimination claims. While VDOC operating procedures purport to require that VDOC provide notice of ICA determinations, copious record evidence reflects that these procedures are not followed in practice. *Compare* ECF No. 381, Defs.' SUMF ¶ 34 (citing O.P. 830.1) *with* ECF No. 383-15, Wall Decl. ¶ 14 (identifying ICA failure to follow its own procedures); ECF No. 383-17, Arrington Decl. ¶ 17 (same); ECF No. 383-98, Hammer Decl. ¶ 26 (ICA review form did not explain reason for continued solitary confinement); Ex. 13, Bowman Decl. ¶ 10 (received ICA determinations only after requests, and they do not provide a basis for decisions).

- ICA review determinations use boilerplate language and give no individualized reason or rationale for the outcomes, making it impossible to discern whether discrimination based on mental disability is occurring. For example, a common refrain for refusing to advance a prisoner through the Step-Down Program is that the prisoner needs a "longer period of stable adjustment." *See, e.g.*, ECF No. 383-59, VADOC-00010341 at -341 (advising of need for a "longer period of stable adjustment") (Feb. 18, 2016 Mukuria DOC-11H Form); ECF No. 383-15, Wall Decl. ¶ 17 (same); Ex. 83, VADOC-00004081 (same) (Dec. 21, 2018 Cavitt DOC-11H). The Fourth Circuit has referred to this well-worn but largely meaningless phrase as a "conclusory" rationale for keeping a prisoner in the Step-Down Program. *Smith*, 964 F.3d at 278 ("The conclusory nature of the [] rationales could lead a reasonable jury to find that the ICA reviews did not offer Smith any real opportunity for release from segregation."). Indeed, VDOC employee testimony establishes the futility of any attempt to render the phrase relevant to mental stability or meaningful at all, VDOC does not define "longer period of stable adjustment" in its policies or guidance, and employees use it as a catch-all. ECF No. 383-33, Turner Dep. at 131:7–9; ECF No. 383-29, Gallihar (*Reyes*) Dep. at 192:22–195:6; Ex. 43, Raiford Dep. at 118:22–122:3 (testifying that this phrase is a catch-all, meaning that an inmate is "not in compliance with an element of the step-down process" or "acquired a certain charge"). It surely does not put a prisoner on notice that he is being held in the Step-Down Program as a result of a mental health disability.

- The BMC's decisions do not take into account the opinions of a mental health professional, whom the committee has included since 2017. Ex. 12, Trent Dep. at 286:10–287:1; ECF No. 381-11, VADOC-00053104 at -116 (2017 Step-Down Manual). Privilege level may not be challenged. Ex. 11, Mathena 30(b)(6) Dep. at 250:11–15; ECF No. 383-30, VADOC-00004369 at -370 (Dec. 25, 2016 Cornelison Grievance); ECF No. 383-31, Elam Dep. at 259:13–260:6. When prisoners do grieve ICA reviews, the only aspect of the process actually reviewed is whether the ICA review was conducted according to policy, not whether the outcome of the ICA review was appropriate under the circumstances. *See, e.g.*, Ex. 58, VADOC-00174671 at lines 30058, 30060, 30086, 30087, 30090 (Grievance Spreadsheet); *see also* ECF No. 383-31, Elam Dep. at 258:10–19; *see also* ECF No. 383-15, Wall Decl. ¶¶ 17–18; ECF No. 383-16, Cornelison Decl. ¶ 8.

The Disabilities Class Plaintiffs' individual experiences confirm the opacity of ICA reviews. Mr. Riddick's ICA review record, for example, is so vague as to be anonymous. The ICA recommended Mr. Riddick, in pre-hearing detention as of July 30, 2014, stay in segregation without offering any basis. Ex. 84, VADOC-00011205; Ex. 85, VADOC-00011208. The ICA regularly recommended Mr. Riddick remain in segregation without more than a line of explanation for the next three years without a single reference to mental health or his incredible lack of progress. The ICA recommended a status increase to SM-1 in May 2017, reflecting more than three years spent in segregation without any progression. Ex. 86, VADOC-00011227. At no point during those three years at SM-0 did the ICA record why Mr. Riddick (once) received poor status ratings, *see* Ex. 87, VADOC-00011218, needed 17 months to complete the first two books of the Challenge Series, *see* Ex. 88, VADOC-00011221, or had remained at SM-0 without progressing for a period multiple times longer than the pathway was intended to take.

Mr. Cavitt's ICA determinations are equally meaningless. His ICA determinations did not identify any reason other than failure to meet all of the requirements of the Step-Down Program for keeping him in segregation, without specifying which ones. *See, e.g.*, Ex. 89, VADOC-00004043 ("Remain in segregation, offender has not met all the requirements of the step down program") (Cavitt Feb. 3, 2017 DOC-11H); Ex. 90, VADOC-00004074 (same) (Cavitt Oct. 4,

2017 DOC-11H); Ex. 91, VADOC-00004075 ("primary goals will be to participate and complete the requirements of the step-down program") (Cavitt Dec. 29, 2017 DOC-11H); Ex. 92, VADOC-00004076 ("has not completed all the requirements of the Step-Down Program") (Cavitt Dec. 29, 2017 DOC-11H); Ex. 93, VADOC-00004077 (same) (Cavitt June 4, 2018 DOC-11H). There is no discussion of why Mr. Cavitt's mental health, despite Mr. Cavitt's long history of mental-health challenges. ECF No. 174-20, Cavitt Aff. ¶¶ 3, 5, 14; Ex. 54, Hendricks Rep. ¶ 45 (diagnosing Mr. Cavitt with Major Depressive Disorder and PTSD). Like Mr. Riddick's ICA review determinations, Mr. Cavitt's provide no indication he progressed contrary to VDOC's Program plan or that Mr. Cavitt should have any understanding of an injury.

In sum, ICA review determinations cannot serve as discrete acts that trigger the statute of limitations, because they do not provide adequate notice that a plaintiff has been discriminated against in order for a claim to accrue. *See Brooks v. City of Winston-Salem, N.C.*, 85 F.3d 178, 181 (4th Cir. 1996) ("cause of action accrues when plaintiff possesses sufficient facts about harm done that reasonable inquiry will reveal cause of action").

3. Equitable Tolling Should Apply to Plaintiffs' Disability Claims.

In the event the Court does not apply the continuing violations doctrine, equitable tolling should apply to the Disabilities Classes' claims related to ADA and RA violations occurring prior to May 6, 02018 in light of the extraordinary circumstances here. Courts may apply the doctrine of equitable tolling where "due to circumstances external to the party's own conduct—it would be unconscionable to enforce the limitation period against the party and gross injustice would result." *Harris v. Hutchinson*, 209 F.3d 325, 330 (4th Cir. 2000). Reasonable grounds exist for equitable tolling of the filing period where a defendant wrongfully prevents a plaintiff from asserting the claims or where extraordinary circumstances beyond the plaintiff's control prevent filing on time.

Crabill v. Charlotte–Mecklenburg Bd. of Educ., 423 F. App'x 314, 321 (4th Cir. 2010) (unpublished) (citing *Harris*, 209 F.3d at 330).

VDOC's complete power over every aspect of the lives of the incarcerated persons enrolled in the Step-Down Program favors application of equitable tolling because VDOC's extraordinary control over the Disabilities Classes prevented its members from asserting and pursuing those claims. VDOC holds class members at Red Onion and Wallens Ridge and classifies them as exceeding the traditional "maximum security" designation. ECF No. 383-116 at 4–5, 10–11 (2021 O.P. 830.2). They have strictly limited time outside of their cells, and the record reflects VDOC does not even provide the mandatory out-of-cell time pursuant to VDOC's own policies. Ex. 11, Mathena 30(b)(6) Dep. at 47:5–8, 85:12–17; Ex. 25, Collins Dep. at 94:20–95:15; ECF No. 383-71, VADOC-00158348. VDOC also limits Plaintiffs' access to forms, including complaint and grievance forms, in addition to restrictions on their movement. Ex. 94, Cornelison Dep. at 313:10–14; Ex. 95, Mukuria Dep. at 216:13–217:22; Ex. 96, Brooks Dep. at 183:5–10; Ex. 13, Bowman Decl. ¶ 37. In the event a prisoner is able to request accommodation or file a grievance regarding treatment within the Step-Down Program with VDOC, he can expect little progress because VDOC considers Level S classification and privileges "non-grievable." *See, e.g.*, Ex. 4, Mathena Dep. at 419:21–420:3 (describing pathway progression determinations as "final"); Ex. 11, Mathena 30(b)(6) Dep. at 250:11–15 (BMC reviews), 254:22–266:3 (ERT reviews); Ex. 14, Mukuria Decl. ¶ 18; Ex. 13, Bowman Decl. ¶¶ 37–38. VDOC did not create or provide accommodations request forms prior to 2016 or, in its 2019 or 2022 versions of the disability policy, identify the accommodation request procedure. Ex. 82, Marano Dep. at 55:3–5; Ex. 77, King 30(b)(6) Dep. at 186:19–188:19; ECF No. 383-109, VADOC-00040788 (2019 O.P. 801.3). Prisoner complaints requesting accommodations filed on incorrect forms or misidentified are

neither delivered to facility ADA coordinators nor returned to the sender with an explanation for failure to deliver. Ex. 77, King 30(b)(6) Dep. at 212:11–214:14.

VDOC's inadequate ICA procedures likewise support the application of equitable tolling. Prisoners enrolled in the Step-Down Program have access to only a single review in their presence: ICA reviews. But the evidence adduced in discovery shows that the ICA review results are predetermined by the BMC, a panel before which prisoners do not have the opportunity to appear. Even if this Court finds that the claim accrued for class members prior to May 6, 2018, equitable tolling is appropriate where, as here, there is genuine dispute as to whether "the defendant has wrongfully deceived or misled the plaintiff in order to conceal the existence of a cause of action." *Mezu*, 75 F. App'x at 912 (citing *English*, 828 F.2d at 1049). Defendants' characterization of the ICA reviews as "discrete acts" sufficient to notify Plaintiffs of disability discrimination, despite the utter lack of prisoner access to the decision-making process or determination as made by the BMC should not be entertained.

The Disabilities Class members are in an extraordinary situation. Omissions in VDOC's policies and how VDOC trains employees to implement them prevents independent pursuit of claims and even awareness of how to pursue those claims. Any purported delays in filing the types of disability discrimination claims brought here, *see supra* Part IV.A, may be laid squarely at VDOC's feet. VDOC's application of its own operating procedures and committee sleight-of-hand stonewalled Plaintiffs from proceeding even where they exercised reasonable diligence in challenging pathway determinations and mental health treatment. *See Holland v. Florida*, 560 U.S. 631, 653 (2010) (setting "reasonable diligence" equitable tolling standard). Equitable tolling is warranted where Defendants' conduct prevented filing within the statute of limitations. *See Crabill*, 423 F. App'x at 321; *Mezu*, 75 F. App'x at 912. The record demands a further, fact-

intensive inquiry regarding that conduct to determine whether the extraordinary circumstances here merit equitable tolling. *Holland*, 560 U.S. at 655; *Harris*, 209 F.3d at 330.

VI. The Relief Plaintiffs Seek Is Not Barred.

A. The PLRA Does Not Preclude Injunctive Relief.

Plaintiffs' requested relief is well within the bounds of the Prison Litigation Reform Act ("PLRA") and this Court's equitable discretion. In arguing otherwise, VDOC mischaracterizes the law and Plaintiffs' requested relief. Even setting this aside, it is premature at the summary judgment stage to determine the scope of relief: considerations regarding the scope of relief are not a basis for granting summary judgment. *See* Fed. R. Civ. P. 56(a) (summary judgment is appropriate where "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law[]"); *cf. Thorpe*, 37 F.4th at 947 ("The Complaint makes clear Plaintiffs request both facial (abolish the Step-Down program) and as-applied (award[] *Plaintiffs* compensatory damages) relief. But the propriety of either goes to the breadth of the remedy[.]") (internal quotations and citations omitted). To the extent this Court finds that there remain genuine issues of material fact on Plaintiff's injunctive claims, these are issues for trial and the Court should not tie its hands as to the remedy before resolution of those claims. *See Califano v. Yamasaki*, 442 U.S. 682, 702 (1979) (stating "the scope of injunctive relief is dictated by the extent of the violation established").

VDOC offers two arguments here: that Plaintiffs' requested relief is precluded by the PLRA (the appropriateness argument), and that VDOC's voluntary changes to the Step-Down

Program and developments in Virginia law moot the need for an injunction (the necessity argument).[43] Defs.' Br. at 123–25. Both arguments fail.

1. Injunctive Relief Is Appropriate.

Injunctive relief is appropriate under the PLRA and this Court's equitable discretion. Plaintiffs' requested relief meets the need-narrowness-intrusiveness requirements of the PLRA, 18 U.S.C. § 3626(a), and post-filing actions have not altered the appropriateness of injunctive relief. Under the PLRA, an injunction must be "narrowly drawn, extend[] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Here, Plaintiffs request injunctive relief to bring the Step-Down Program into compliance with court orders, including via the appointment of a special master to undertake the necessary fact finding. ECF No. 1 ¶¶ 271–273. That Defendants already agreed in a prior settlement to Plaintiffs' "bold demands" belies

[43] Defendants also make a throw-away argument—namely that Plaintiffs are asking for an impermissible injunction to obey the law. ECF No. 381, Defs.' Br. at 123 n.76. It is well settled that courts are empowered to award injunctive relief in the face of constitutional violations like those at issue here. *See Porter*, 923 F.3d at 353 (upholding district court's award of injunctive relief); *cf. Ross v. Meese*, 818 F.2d 1132, 1134–35 (4th Cir. 1987) (holding district court had jurisdiction to issue declaratory and injunctive relief in Fourth Amendment violation case; collecting cases holding the same). In arguing otherwise, Defendants misconstrue this Court's prior opinion. *See Miller v. Pilgrim's Pride Corp.*, 2007 WL 2570219, at *4 (W.D. Va. Aug. 31, 2007). Speaking in the context of employment discrimination cases, this Court in *Miller* observed that "[t]ypically, an injunction that simply orders the defendant to obey the law and not discriminate is impermissible." *Id.* The employment discrimination context is inapposite to Plaintiffs' case. In *Miller*, the Court granted plaintiff's request for a declaration to be added to his personnel file indicating he was terminated in violation of the ADA. *Id*. at *5. It declined, however, to issue further injunctive relief expunging negative performance reviews and mandating defendant disseminate information on the case and the ADA to current employees. *Id*. The Court noted both of these requested forms of relief were not warranted based on the evidence presented at trial and that plaintiff and the employer had no ongoing relationship. *Id*. The only other case cited by Defendants is again in the statutory discrimination context and the entire opinion is barely more than one page. *See Matarese v. Archstone Cmtys., LLC*, 468 F. App'x 283, 284–85 (4th Cir. 2012).

Defendants' admonition to consider the "adverse impact on" VDOC's operation. *See* ECF No. 381, Defs.' Br. at 138. Viewed as a whole, rather than through Defendants' cherry-picked arguments, Plaintiffs' requested relief is narrow, non-intrusive and within this Court's equitable discretion. *See Richmond Tenants Org., Inc. v. Kemp*, 956 F.2d 1300, 1308 (4th Cir. 1992) ("It is well established, however, that a federal district court has wide discretion to fashion appropriate injunctive relief in a particular case.").

2. Injunctive Relief Is Necessary.

Plaintiffs' requested relief also is necessary to prevent further constitutional violations. Although Defendants vaguely assert that post-filing actions have mooted the need for an injunction, ECF No. 381, Defs.' Br. at 138, this contravenes settled law that "courts require clear proof that an unlawful practice has been abandoned, and must guard against attempts to avoid injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption." *Porter*, 923 F.3d at 365 (internal quotations omitted).

As Plaintiffs' summary judgment brief, ECF No. 383, and this Response have shown, an injunction is needed to prevent irreparable harm to Class Plaintiffs. Post-filing action does not change this. *First*, the record shows, contrary to Defendants' assertions, that the Step-Down Program today is not meaningfully different from the program that existed at the outset of Plaintiffs' complaint. Irrespective of any changes, VDOC has not complied with its own written policies. *Second*, any relevant changes made to VDOC's written policy—to the extent actually followed—constitute voluntary cessation that coincided (not coincidentally) with the start of this litigation. *Third*, the recently enacted Virginia law does not codify the Step-Down Program, and even if it did, the record overwhelmingly shows that Defendants do not abide by written policies and procedures governing the Program.

a) The Step-Down Program Today Is, in Practice, No Different than the Step-Down Program at the Time of the Complaint.

Conditions of confinement remain materially identical to those asserted in Plaintiffs' Complaint. VDOC makes much of the fact that, on paper, it now offers four hours of out-of-cell time. Not only is this not followed in practice, but it is not the constitutional cure Defendants deem it to be. The hallmark of restrictive housing is social isolation. *See, e.g.*, Ex. 49, Haney Rep. ¶¶ 36–37 [redacted]). That Defendants purport to offer four hours out-of-cell time does not materially change the character of the Step-Down Program because these four out-of-cell hours—if they indeed happen—are still solitary hours. Ex. 11, Mathena 30(b)(6) Dep. at 85:11–17, 85:21–86:2 (admitting that in February 2021 none of the units in Level S or Level 6 were getting out-of-cell time for the allotted amount of time under current policy and acknowledging that each of the units in Level S were getting maximum 2.8 hours out-of-cell time per day); Ex. 13, Bowman Decl. ¶¶ 19, 20. And the programming touted by Defendants' is no different. *See, e.g.*, Ex. 11, Mathena 30(b)(6) Dep. at 55:15–57:18, 199:22–200:7 (describing limited programming available to Level S prisoners and that SM-0 and IM-0 prisoners complete the Challenge Series books in their cells); Ex. 13, Bowman Decl. ¶ 23; ECF No. 381-12, VADOC-00053668 (2020 Step-Down Manual) at -689, -698 (showing that if out-of-cell programming is offered to persons at Level S in the SM pathway, it is provided while they are in restraints); Ex. 14, Mukuria Decl. ¶¶ 26, 27.

To emphasize the illusory differences in the pre- and post-filing Step-Down Program, Defendants misattribute an apparent decline in Program enrollment to the Program itself. ECF

No. 381, Defs.' Br. at 139. This is a red herring and eschews the facts. In reality, [redacted] Ex. 2, Pacholke Rep. ¶ 92. And the rate of decrease in Level S classifications slowed after the Step-Down Program began. *Id.* [redacted][44] *Id.*

b) Any Changes in the Step-Down Program Constitute Voluntary Cessation and Do Not Bar Injunctive Relief.

Notwithstanding the similarities between the Step-Down Program today and at the time of filing, any changes made to the Program were spurred by the present suit and constitute voluntary cessation. Plaintiffs filed suit in May 2019. ECF No. 1 at 97. By August of that year, former VDOC Director Clarke issued a directive to begin offering incarcerated persons in restrictive housing three hours of out-of-cell time seven days per week. Ex. 36, Clarke Dep. at 245:9–20. By

[44] Institutional records show that six of eight named Plaintiffs classified as IM were moved to SM by the ERT soon after Plaintiffs filed suit. Ex. 29, VADOC-00175822 at rows 3173–3175 (showing Brooks moved from IM Closed Pod 1 to Step Down Phase 1 as of August 30, 2019), 7685–7686 (showing McNabb moved from IM 2 to SM2 on Nov. 19, 2019), 12310–12311 (showing Wall moved from IM 2 to SM 2 on May 29, 2019), 19911–19913 (showing Cornelison moved from IM Closed Pod 1 to Step Down Phase 1 on May 29, 2019), 20286–20291 (showing Mukuria moved from IM Closed Pod 2 to Step Down Phase 1 on May 29, 2019), 24859–24864 (showing Hammer moved from IM Closed Pod 2 to step Down Phase 1 on Nov. 21, 2019) (Internal Status Spreadsheet). The pathway change forms responsible for this move provide no rationale. *See* Ex. 6, VADOC-00111448 at -453, -455, -460 (ERT recommended change forms for Cornelison, Mukuria, and Wall) and Ex. 7, VADOC-00050514 at -516, -525, -526 (ERT recommended change forms for McNabb, Hammer, and Brooks). This lack of documented rationale gives rise to the inference that these Plaintiffs (and others in similar circumstances) were moved not because of a change in their risk profile, but because of the pressures of this lawsuit or arbitrary, subjective reasons. *See* Ex. 14, Mukuria Decl. ¶ 32.

September, a memo was issued that purported to give everyone in Level S four hours of out-of-cell time. Ex. 11, Mathena 30(b)(6) Dep. at 47:5–8. There are no out-of-cell time policy changes post-September 2019. *Id*. at 47:17–20. However, the record indicates staff were consistently not meeting this policy and, instead of conforming, merely changed the way they reported out-of-cell time. Ex. 25, Collins Dep. at 122:22–123:5; Ex. 49, Haney Rep. ¶ 136.

It is well settled that voluntary cessation does not moot the need for an injunction. "[A]n injunction should not be refused upon the mere *ipse dixit* of a defendant that, notwithstanding his past misconduct, he is now repentant and will hereafter abide by the law." *Porter*, 923 F.3d at 366 (quoting *United States v. Hunter*, 459 F.2d 205, 220 (4th Cir. 1972)). The Defendants erroneously rely on the Ninth Circuit decision in *Hallet*—a decision that the Fourth Circuit has explicitly declined to follow. ECF No. 381, Defs.' Br. at 139 (citing *Hallet v. Morgan*, 296 F.3d 732, 743 (9th Cir. 2002)). In *Porter*, the Fourth Circuit stated "we are not persuaded to follow [the Ninth Circuit's opinion in *Hallet*]" and "[c]onstruing the phrase 'necessary to correct' as demanding a 'current and ongoing' violation would render redundant the phrase 'current and ongoing' violation in Section 3626(b)(3)[.]" *Porter*, 923 F.3d at 366–67. Without *Hallet*, Defendants' argument to legitimize its voluntary cessation has no legs.

c) VDOC Assumes Its Current Unconstitutional Practices Meet the New Virginia Law and Has Therefore Made No Attempts to Comply with It.

Defendants' final straw to grasp is that a recently enacted Virginia law prevents them from maintaining an unconstitutional iteration of the Step-Down Program. ECF No. 381, Defs.' Br. at 139; Va. Code Ann. § 53.1-39.2. But their argument that the law moots Plaintiffs' request for injunctive relief is belied by their claim, made in the same breath, that the law codifies the existing Step-Down Program. ECF No. 381, Defs.' Br. at 1–2 (claiming that the law "endorsed and codified the limitations VDOC already had imposed on itself."), at 125 (claiming that the law

provides "the relief Plaintiffs might have sought"). Neither is true. The new law contains many requirements that the Defendants do not currently meet, either in policy or actual practice. For example, the Virginia law requires that persons in restorative housing have four hours out-of-cell time for programmatic interventions or *congregate* activities. Va. Code Ann. § 53.1-39.2(B)(5). It further requires corrections staff to: review placement in restorative housing once a week and document why a less restrictive setting cannot be utilized, create an action plan to transfer the person out of restrictive housing as soon as safely possible, and provide medical and mental health evaluations within a day of placement. Va. Code Ann. § 53.1-39.2(C) and (E). Additionally, the law requires corrections administrators to publicly publish policies and procedures for transitioning someone in restorative housing back into the general population. Va. Code Ann. § 53.1-39.2(F).

Despite these requirements, VDOC does not provide *any* hours of "out-of-cell programmatic interventions or other *congregate* activities aimed at promoting personal development or addressing underlying causes of problematic behavior," to people in the Step-Down Program—let alone four. Va. Code Ann. § 53.1-39.2; Ex. 15, McClintock Decl. ¶¶ 19, 21, 37 (noting that all recreation is solitary in an outdoor cage and that all Challenge Series books in his cell and that "Step Down Phase 1 was the first time where I was able to participate in group meetings"); Ex. 13, Bowman Decl. ¶¶ 20, 23 ("I have never had group meetings or other group programming related to the Challenge Series, even as I progressed to IM-1 and IM-2. In fact, I have not been pulled out of my cell for any group programming of any kind, despite requesting mental health programming and group programming for the Challenge Series."). And it does not provide: a meaningful review of placement (let alone providing such review once a week), an action plan that prioritizes removal from restrictive housing as soon as safely possible, or mental

health evaluations within a business day of placement in restrictive housing. *See* ECF No. 383, Pls.' Br. Supp. Part. Summ. J. § II(B)(1); ECF No. 383-17, Arrington Decl. ¶¶ 5–7.

Further, VDOC has apparently deemed it unnecessary to update the sole procedure specifically governing the Step-Down Program. *See* ECF No. 381, Defs.' SUMF ¶ 15 ("The current version of O.P. 830.A[has] an effective date of October 1, 2021[.]"). Nor has it re-issued the Step-Down Manual. *See* ECF No. 381-12, VADOC-00053668 (2020 Step-Down Manual); *see also* Ex. 4, Mathena Dep. at 615:7–11. And neither Operating Procedure 830.A nor the Step-Down Manual have been published on VDOC's website or otherwise made available to the public, as apparently required by the law. *Operating Procedures*, VIRGINIA DEPARTMENT OF CORRECTIONS, https://www.vadoc.virginia.gov/general-public/operating-procedures/ (last visited Sep. 30, 2023); ECF No. 382 at 1 (Defendants motion to file exhibits under seal, including exhibits 12 and 23); ECF No. 381-12, VADOC-00053668 (2020 Step-Down Manual) at -668; ECF No. 381-23, VADOC-00069651 (O.P. 830.A effective Oct. 1, 2020) at -651.

Thus, as shown by Defendants' words and inaction, the new Virginia law has had no practical effect on the Step-Down Program.[45] And Defendants' claim that the law codifies the Step-Down Program suggests that they do not anticipate making many—if any—changes to the program as it currently exists. Because Plaintiffs have shown that the current operation of the Step-Down Program violates their constitutional and federal statutory rights, injunctive relief is warranted, and the new Virginia law does not change the analysis.

[45] Importantly, the new Virginia law also does not include an enforcement mechanism. Va. Code Ann. § 53.1-39.2; *see also* Luca Powell, *Virginia Solitary Confinement Reform Bill Passes But Without Key Piece Sought By Advocates*, RICHMOND TIMES-DISPATCH (Feb. 28, 2023), available at: https://richmond.com/news/local/crime-and-courts/virginia-solitary-confinement-reform-bill-passes-but-without-key-piece-sought-by-advocates/article_e09202d6-b6e5-11ed-9416-8fb9c7836a98.html.

B. Compensatory Damages Related to Physical Injuries Are Recoverable for the Disability Plaintiffs' ADA and RA Claims.

Defendants contend that *Cummings v. Premier Rehab Keller, P.L.L.C.* precludes recovery for emotional damages under the ADA and the RA. 142 S. Ct. 1562 (2022). However, district courts broadly agree that *Cummings* cannot be read to bar other types of damages for injuries not related to emotional distress. *See, e.g.*, *Williams v. Colo. Dep't. of Corr.*, 2003 WL 3585210, at *6–7 (D. Colo. May 22, 2023) (dismissing plaintiff's request for emotional relief but noting that "requests for economic loss or physical pain and suffering remain"); *A.T. v. Oley Valley Sch. Dist.*, 2023 WL 1453143, at *4 (E.D. Pa. Feb. 1, 2023) (plaintiff's claims for relief other than emotional damages survive a motion for summary judgement); *Chaitram v. Penn Med.-Princeton Med. Ctr.*, 2022 WL 16821692, at *1–2 (D.N.J. Nov. 8, 2022) ("*Cummings* does not foreclose compensatory damages"); *Montgomery v. Dist. of Columbia*, 2022 WL 1618741, at *25 (D.D.C. May 23, 2022) ("[W]hile [the plaintiff] cannot recover either emotional distress or reputation damages in light of *Cummings*, he may be able to recover some small amount of damages to compensate him for the opportunity he lost when he was denied the ability to meaningfully access and participate in his [police] interrogations.").

While *Cummings*, a decision the Supreme Court handed down after this suit began, precludes plaintiffs from collecting damages related to emotional distress, it does not follow that Defendants are entitled to summary judgement. In addition to damages related to emotional distress, Plaintiffs also request damages due to both physical and psychological injuries. Specifically, Plaintiffs "suffered injuries including pain and suffering, emotional distress, and an exacerbation of their mental illness." ECF No. 1 ¶ 258. Emotional distress is a single example of Plaintiffs' injuries while in solitary confinement. Defendants overlook Plaintiffs' request for relief due to *physical* injuries like shortness of breath, headaches, body aches, migraines, and blood in

vomit. Ex. 54, Hendricks Rep. ¶ 27; Ex. 94, Cornelison Dep. at 139:10–142:15. Incarceration at Defendants' facilities have also exacerbated previous diagnoses, including partial blindness, pulmonary hypertension, glaucoma, high blood pressure, and kidney disease. Ex. 96, Brooks Dep. at 145:7–21; Ex. 94, Cornelison Dep. at 139:10 –142:15; Ex. 97, Thorpe Dep. at 67:21–78:2–5. Damages resulting from these ailments are not precluded by *Cummings*.

The standard for deliberate indifference requires a "deliberate or conscious choice to ignore something" *Koon*, 50 F.4th at 406 (quoting *City of Canton v. Harris*, 489 U.S. 378, 389 (1994)). Liability exists when "a defendant (1) *knew* that harm to a federally protected right was substantially likely and (2) *failed to act* on that likelihood." *Basta v. Novant Health Inc.*, 56 F.4th 307, 317 (4th Cir. 2022).

Plaintiffs have provided evidence that Defendants were aware of the risk to prisoners' constitutional rights in multiple situations. In October 2020, for example, one Named Disability Plaintiff, Mr. Riddick, received an independent psychological evaluation. Ex. 98, VADOC-00163104 at -104. That evaluation found that [redacted] *Id.* Dr. Lee confirmed that the independent clinical psychologist had [redacted] about whether Riddick's behavior was [redacted] Ex. 59, Lee Dep. at 226:13–21. Despite this difference of opinion, Dr. Lee was made aware of the substantial likelihood of violating Riddick's constitutional rights. Dr. Lee testified that in the eight months between when he received the report and when he retired, he [redacted] *Id.* at 230:21–231:10. VDOC mental health staff complained that mental health offenders were

[redacted] ECF No. 383-103, VADOC-00161495 at -495.

CONCLUSION

Accordingly, for the foregoing reasons, Plaintiffs respectfully request that the Court Defendants' motion for summary judgment.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all CM/ECF participants.

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