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-PMS

DEFENDANTS' BRIEF IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

To be entitled to summary judgment, a movant must show "that there is no genuine issue as to any material facts" and that he is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56. Plaintiffs do not do so. Rather than show the absence of a dispute of material facts, Plaintiffs' Amended Motion for Partial Summary Judgment (ECF Nos. 380, 383) is based on disparate "facts" plucked from the record, misrepresentations of the record, and characterizations of record evidence provided by Plaintiffs' expert witnesses.[1] These cannot support an award of summary judgment in Plaintiffs' favor.

But even if Plaintiffs' motion did present undisputed facts (it does not), they still would not be entitled to summary judgment as to any particular Defendant(s). Nowhere in their brief do they identify which Defendant(s) against whom they seek summary judgment, nor do they even attempt to argue that any individual Defendant acted personally in violation of either the Eighth Amendment or Due Process Clause.

Plaintiffs' arguments regarding two of Defendants' affirmative defenses to Plaintiffs' claims under the Americans with Disabilities Act and Rehabilitation Act do not justify summary judgment either. Plaintiffs make the fatal error of challenging affirmative defenses without bringing forth facts sufficient to establish a *prima facie* case in support of their claims. Plaintiffs essentially put the proverbial cart before the horse.

Plaintiffs' motion should be denied.

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[1] Defendants' Response to Plaintiffs' Amended Statement of Undisputed Material Facts in Support of Plaintiffs' Amended Motion for Partial Summary Judgment [ECF No. 383-119] ("Resp. to Pls.' SUF") is attached as Exhibit 1.

ARGUMENT

I. Plaintiffs are not entitled to summary judgment on their Eighth Amendment claim.

Plaintiffs have not carried their heavy burden of showing that Defendants violated their Eighth Amendment rights. Contrary to the allegation in their complaint, the undisputed facts do not show that Defendants "subject[ed] them to indefinite and long-term solitary confinement that serves no legitimate penological purpose and that results in serious deprivations of basic human needs, significant mental and physical harms, and substantial risk of such harms," to which Defendants "have been deliberately indifferent." Compl. ¶ 247. Plaintiffs cannot cite any undisputed evidence that any Defendant acted unreasonably, and "prison officials who act reasonably cannot be found liable under the Cruel and Unusual Punishments Clause." *Farmer v. Brennan*, 511 U.S. 825, 845 (1994).

As has been their practice in this case, Plaintiffs seek broad but vague relief. Accordingly, at the outset, it is critical to note what Plaintiffs have failed even to attempt to establish. First, Plaintiffs do not identify which Defendant(s) they seek summary judgment against on this (or any) claim. Nor do they even attempt to establish that any particular individual Defendant acted personally in violation of their Eighth Amendment rights. Instead, they opt for generic statements that reference "VDOC" or "Defendants."[2] But, while Plaintiffs' broad, unsupported allegations were enough to survive dismissal at earlier stages of this case, they are not sufficient to warrant summary judgment in their favor here. Section 1983 liability "only lie[s] where it is affirmatively shown that the official charged acted personally in the deprivation of the plaintiffs' rights." *Wilcox*

[2] Indeed, Plaintiffs cite *no* evidence relating to Defendants Robinson, Richeson, Ponton, Elam, Raiford, or Herrick in their Eighth Amendment argument. Defendant Manis is referenced only once—for the proposition that he made rounds at Wallens Ridge State Prison ("Wallens Ridge" or "WRSP") *after* inmates in the Step-Down Program were moved to Red Onion State Prison ("Red Onion" or "ROSP").

v. Brown, 877 F.3d 161, 170 (4th Cir. 2017). Plaintiffs do not assert—much less demonstrate with undisputed facts—that *any* individual Defendant "personally took any particular action or made any relevant decision" that violated any Plaintiff's Eighth Amendment rights. *Taylor v. Manis*, No. 7:19-CV-00434, 2020 WL 354753, at *1 (W.D. Va. Jan. 21, 2020).

Second, Plaintiffs fail even to attempt to establish when or how the unidentified Defendant(s) violated the Eighth Amendment rights of any named Plaintiff or any other individual inmate. Instead, Plaintiffs string together testimony from various Plaintiffs with inadmissible hearsay statements made to Plaintiffs' expert and disputed expert opinions to argue that, as a general matter, the conditions of confinement in the Step-Down Program are unconstitutional. In doing so, Plaintiffs apparently seek to retain flexibility to mount a hybrid as-applied/facial challenge to the Step-Down Program.[3]

Regardless, while the nature and scope of Plaintiffs' Eighth Amendment claim remain unclear, the required outcome does not. On the record before this Court, Plaintiffs are not entitled to summary judgment against any Defendant on any as-applied theory as to any particular Plaintiff or class member. As set forth below, there is no undisputed evidence establishing either prong of a deliberate-indifference claim: that (1) the Step-Down Program objectively imposes a substantial risk of serious injury and (2) Defendants were subjectively aware of that risk but consciously disregarded it for no penological purpose.[4]

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[3] *Compare Thorpe v. Va. Dep't of Corr.*, No. 2:20CV00007, 2021 WL 2435868, at *4 (W.D. Va. June 15, 2021) (noting that "[P]laintiffs have not claimed to be mounting a facial challenge"), *aff'd sub nom. Thorpe v. Clarke*, 37 F.4th 926 (4th Cir. 2022) [ECF No. 101], *with Thorpe v. Clarke*, 37 F.4th 926, 947 (4th Cir. 2022) (noting that Plaintiffs' request to "abolish the Step-Down program" constitutes facial relief).

[4] Even if Plaintiffs had offered argument or evidence of an Eighth Amendment violation as applied to the named Plaintiffs, they still would not be entitled to summary judgment for the reasons discussed below.

A. There is no undisputed evidence that the conditions of the Step-Down Program objectively impose a substantial risk of serious injury.

To satisfy the objective prong of their claim, Plaintiffs need to show that the conditions of confinement in the Step-Down Program "inflict harm that is, 'objectively, sufficiently serious' to deprive prisoners of 'the minimal civilized measure of life's necessities.'" *Thorpe*, 37 F.4th at 933 (quoting *Farmer*, 511 U.S. at 834, 838). "To be 'sufficiently serious,' the deprivation must be 'extreme'—meaning that it poses a '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). Plaintiffs offer multiple arguments, but no undisputed evidence, that the conditions in the Step-Down Program qualify as "extreme."

In support of their claim of "cruel and unusual punishment," Plaintiffs predominantly focus on the fact that inmates in the Step-Down Program are limited in the amount of time they are permitted to spend outside of their cells in recreation, congregate programming, and other activity. Amended Mem. of Law in Supp. of Pls.' Amended Mot. for Partial Summ. J. [ECF No. 383] ("Pls.' Br.") at 6–8. The minimum out-of-cell time to which inmates have been entitled has risen from two hours per day (in outside recreation alone) for inmates designated IM-0 and SM-0 (with those at higher privilege levels receiving more out-of-cell time) in 2019, when the Complaint was filed, to *four* hours per day of out-of-cell time for all offenders (regardless of privilege level) beginning in January 2020. Resp. to Pls.' SUF at ¶ 147-148. Plaintiffs offer no undisputed evidence that four hours of out-of-cell time per day creates a level of isolation that violates the Eighth Amendment—or even qualifies as "solitary confinement."[5]

[5] In a report criticizing VDOC's confinement practices, the ACLU defined "solitary confinement" as the "isolation of a person in a cell for approximately 22 to 24 hours a day with little human contact or interaction . . ."—and expressly *advocated* that inmates be provided "a

Nor can Plaintiffs credibly argue that "these conditions are materially indistinguishable from those that the scientific literature has concluded cause serious harm or universal risk thereof." Pls.' Br. at 10. They fail to identify any such scientific literature in support of that statement.[6] Instead, they point to several cases, which are easily distinguishable. They first cite *Palakovic v. Wetzel*, a case involving confinement in a cell 23 to 24 hours each day, which cites to another Third Circuit case for its reference to a "robust body of legal and scientific authority." 854 F.3d 209, 225 (3d Cir. 2017) (citing *Williams v. Secretary of the Pa. Dep't of Corr.*, 848 F.3d 549 (3d Cir. 2017)). In *Williams*, a due-process case involving confinement in a cell 22 to 24 hours a day, the court did not cite to a single piece of scientific literature more recent than 2008. *Id*. at 568 n.130.[7] The court primarily relied on law review articles written by Stuart Grassian in 2006, *see id.* at 562 n.74, 566 n. 106, 567 nn.118–20, and Craig Haney & Mona Lynch in 1997, *see id.* at 566–67 nn.103–05 & 107–09. As an example of the court's reliance on the latter, it notes that "[s]pecifically, based on an examination of a representative sample of sensory deprivation studies, the researchers found that virtually *everyone* exposed to such conditions is affected in some way."

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minimum of four hours of out-of-cell time each day." ACLU, *Silent Injustice: Solitary Confinement in Virginia* at 14, 58 (2018), https://tinyurl.com/29f4tymy.

[6] In fact, the relevant literature shows only that isolation conditions *more restrictive* than those in this case *may* pose a substantial risk of harm to inmates' mental health in *some* circumstances. It does not show that any stay in restrictive housing, for any period of time, poses a risk of serious injury. *See* Resp. to Pls.' SUF ¶¶ 228–29; Part I.B.1 *infra*.

[7] *Williams* did not involve an Eighth Amendment challenge to conditions of confinement but, rather, whether former death-row inmates had a protected liberty interest in avoiding assignment to segregation after their death sentences had been vacated. Although concluding that the inmates possessed a protected liberty interest, *Williams* affirmed the grant of qualified immunity to the defendant prison officials. 848 F.3d at 571–72 ("[C]ase law in existence during Plaintiffs' continued confinement on death row did not adequately inform Defendants that the policy ran counter to Plaintiffs' protected liberty interests. Indeed, the limited precedent that existed on the topic suggested the contrary.").

Id. at 567. But Dr. Haney, an expert for Plaintiffs in this case, acknowledges that the sensory deprivation research cited by the court has "relatively little or no relevance to solitary confinement research. That was true in 2008, before 2008, and it's true now." Transcript of Craig Haney dated August 17, 2023 ("Haney Dep."), cited portions attached as Exhibit 43, at 374:14–375:8.

In *Johnston v. Wetzel*, 431 F. Supp. 3d 666 (W.D. Pa. 2019), a case involving confinement to a cell 23 hours a day for approximately 17 years, the court cites but does not discuss the 2006 Grassian article, along with two other articles and *The 2018 ASCA-Liman Nationwide Survey of Time-in-Cell*, Yale Law School 2018. *Id.* at 677. But it relies primarily on other cases, including *Williams* and *Palakovic*, for any discussion of the literature. *Id.*

In *Porter v. Clarke*, 923 F.3d 348 (4th Cir. 2019), as amended (May 6, 2019), a case involving confinement to a cell 23 to 24 hours a day, the court's discussion of the scientific literature similarly relied on articles written for legal journals in the early 2000s and on citation to other cases, including *Williams*, *Palakovic*, and various concurring or dissenting opinions. *Id.* at 355–57. Most important, the court noted that the defendants in that case "adduced no evidence refuting Plaintiffs' expert evidence establishing the risks and serious adverse psychological and emotional effects of prolonged solitary confinement, or the surveys of the scholarly literature supporting that evidence." *Id.* at 356.

In contrast to *Porter*, Defendants in *this* case have adduced such evidence. And that evidence includes not only a more balanced approach to reviewing the scientific literature that existed in the early 2000s, but also literature published since that time. That evidence includes more recent assessments of the existing literature by scholars who are not the parties' retained experts, including an extensive assessment of *Restrictive Housing in the U.S.* published by the National Institute of Justice in 2016. In the chapter of that assessment specifically addressing the

"Mental Effects of Restrictive Housing," Drs. Reena Kapoor of the Yale School of Medicine and Robert Trestman of the University of Connecticut School of Medicine describe the literature review they conducted. Based on that review, they concluded, among other things, that "[o]verall, the data are mixed, and there is currently no clear answer to the question of whether any particular duration of restrictive housing is safe or harmful from a psychological standpoint." Exhibit 47 at 207–08.[8]

Unable to show that a four-hour minimum for out-of-cell time per day constitutes "solitary confinement" or is somehow "cruel and unusual," Plaintiffs resort to other criticisms, relying primarily on *characterizations* of the evidence provided by their expert, Dr. Haney, rather than the evidence itself. *First*, they allege that this amount of out-of-cell time is not always provided. Pls.' Br. at 7. This allegation relies on inadmissible hearsay from inmates to Plaintiffs' expert that "there were times when their outdoor recreation was cancelled"[9] and a report of out-of-cell time for a single three-month period in 2021.[10] But neither there being "times" when outside recreation

[8] Scientific studies continue to be published. Just last month, research published in the journal *Social Science & Medicine* concluded, among other things, that the "results do not show a significant worsening of symptoms experienced in solitary confinement as compared to other security levels" and "results suggest that the incarceration experience, including conditions of confinement, is associated with mental well-being in different ways for different people." Exhibit 48 (Kevin A. Wright, et al., *Solitary Confinement and the well-being of people in prison*, 335 SOC. SCI. & MED. (Sept. 2023)).

[9] While an expert may rely on information that an "expert[] in the field would reasonably rely on . . . in forming an opinion on [a] subject," information that "would otherwise be inadmissible" may not be presented to jury unless "their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. The probative value of hearsay statements made to Plaintiffs' expert by unidentified inmates—whom Defendants cannot cross-examine—does not substantially outweigh their prejudicial effect. At the appropriate time, Defendants will move to exclude Dr. Haney from presenting such testimony.

[10] Plaintiffs also allege that the evidence shows that prison officials "changed the way they recorded out-of-cell hours" to "giv[e] the appearance that more time was being offered while not actually changing the offering." Pls.' Br. at 7 (citing Pls.' SUF ¶ 150). But the document Plaintiffs cite merely instructed corrections officers to record when inmates were provided "20 minutes for

is cancelled nor the out-of-cell times reported in a single three-month period can objectively impose a substantial risk of serious injury. Moreover, as of July 2023, Virginia law requires that the four hours of out-of-cell time be offered except in exceptional circumstances. *See* Va. Code § 53.1-39.2(D) ("An incarcerated person may be offered less than four hours of out-of-cell programmatic interventions or other congregate activities per day only in the circumstance that the facility administrator determines a lockdown is required to ensure the safety of the incarcerated persons in the facility.").

Second, Plaintiffs pivot from questioning the *amount* of recreation and programming to challenging its *quality*. For instance, they complain that the group programming provided does not allow "meaningful social contact" because inmates remain restrained. Pls.' Br. at 10. Similarly, they assert that "recreation time offers little benefit" because they are "alone" in their own cages. Pls.' Br. at 8. But Defendants are under no constitutional obligation to permit inmates to lay hands on one another, as Plaintiffs appear to demand—nor would such a duty make sense, given the violent history that placed Plaintiffs in the Step-Down Program in the first place. *See* Part I.B.2 *infra*. In any event, even inmates at the lowest privilege levels within the Step-Down Program (IM-0 or SM-0) are not overwhelmingly deprived of "direct intercourse with or sight of any human being." *In re Medley*, 134 U.S. 160, 168 (1890). Plaintiffs can interact with each other while in their cells and during their concurrent recreation, communicate with various VDOC staff, including corrections officers and mental health professionals, and are given non-contact visits on

showers, kiosk, work (C-1), haircuts, etc." Pls.' SUF ¶ 71. In other words, the corrections officers were instructed to record accurately *all* out-of-cell time, as contemplated by the policy, rather than just the recreation time that already was being recorded.

a weekly basis.[11] Br. in Supp. of Defs.' Mot. for Summ. J. [ECF No. 381] ("Defs.' Br.") at 21–22 ¶¶ 50, 56.

Third, Plaintiffs allege a series of other unrelated grievances: that their cells are "small and sparsely furnished," Pls.' Br. at 6; *see also* Compl. ¶¶ 96–97;[12] that the "recreation cages do not have exercise equipment or toilet facilities," *id.* at 8; that they purportedly must submit to "intrusive cavity searches" before leaving their cells, *id.* at 9;[13] and that they are handcuffed while being transported, *id.* at 10. But these various complaints have nothing to do with the *isolation* conditions they challenge in this case. And, in any event, the "Constitution does not mandate comfortable prisons." *Rhodes v. Chapman*, 452 U.S. 337, 349 (1981).

Just as Plaintiffs fail to present undisputed facts to prove that the Step-Down Program imposes a risk of serious injury to inmates generally, they fail to present undisputed facts that the named Plaintiffs in particular have experienced harm to mental health as a result of their confinement in the Step-Down Program. Most named Plaintiffs either had no mental health treatment needs at all or experienced a stable or improved mental health classification over their time in the Step-Down Program. Defs.' Br. at 90–91. To be sure, Plaintiffs assert that named Plaintiffs Brooks, Cornelison, and Mukuria experienced issues such as "anxiety," "depression,"

[11] On this last issue, Plaintiffs cannot keep their factual representations straight. In one place they allege that "at some levels [inmates] are limited to certain approved video visits," Pls.' Br. at 7, and in another that "[i]ndividuals on both the IM and SM pathways are permitted a single one-hour, non-contact visit per week," *id.* at 25.

[12] Plaintiffs fail to acknowledge the fact that, if the Step-Down Program were abolished as they demand, Compl. ¶ 271(1), and they were returned to general population, they would have a same-sized cell there—but instead would have to share it with another inmate, Defs.' Br. at 21 ¶ 48.

[13] Defendants dispute Plaintiffs' characterization of the required procedure—a strip search that is distinctly different from and less intrusive than a cavity search. Resp. to Pls.' SUF ¶ 166.

and "memory problems." Pls.' Br. at 12–13. Defendants dispute that those facts have been established. But it is undisputed that these inmates consistently had a mental health classification code of MH-0 throughout their time in the Step-Down Program, Defs.' Br. at 36–37, ¶¶ 99, 102, 105, 110, 113, 116, 123, 126, meaning that they had been assessed as not having mental-health needs. Plaintiffs assert that Wall's "mental health suffered while [he] was in solitary confinement," Pls.' Br. at 13, but his mental health classification has remained stable at MH-2 since 2014. Defs.' Br. at 47 ¶ 129. Riddick did experience "worsening symptoms" while in the Step-Down Program, Pls.' Br. at 13, and his mental-health classification changed accordingly from MH-0 to MH-2 in July 2018, Defs.' Br. at 44 ¶ 120, but an expert's review of Riddick's "extensive history does [not] support his claims of disability due to serious mental illness." Saathoff Rep. [ECF No. 381-68] at 104.

In sum, the conditions of confinement actually experienced by Plaintiffs, although restrictive, did not pose a significant and objectively intolerable risk of serious harm. And because there was no such risk, they are not entitled to summary judgment on their Eighth Amendment claims.

B. There is no undisputed evidence that Defendants were subjectively aware that the Step-Down Program posed an excessive risk to inmates' health or safety but consciously disregarded that risk for no penological purpose.

"To satisfy the subjective prong in an Eighth Amendment case, a plaintiff challenging his conditions of confinement must demonstrate that prison officials acted with deliberate indifference." *Porter*, 923 F.3d at 361. Plaintiffs cannot satisfy this "very high standard." *Grayson v. Peed*, 195 F.3d 692, 695 (4th Cir. 1999) (noting that "a showing of mere negligence" is insufficient); *see also Farmer*, 511 U.S. at 839–40 (adopting "subjective recklessness as used in the criminal law" as the appropriate standard for deliberate indifference under the Eighth Amendment). In particular, the evidence cited by Plaintiffs fails to establish either that Defendants

actually knew of a substantial risk that the Step-Down Program posed to inmates' health or safety—or that they then intentionally *disregarded* that risk.[14]

1. There is no undisputed evidence showing that Defendants were aware that the Step-Down Program poses an objectively intolerable risk of harm to inmates.

Plaintiffs attempt in several ways to show that Defendants were aware that the Step-Down Program poses an objectively intolerable risk of harm to inmates. All their arguments come up short.

Plaintiffs primarily assert that the "risk of harm in this case was obvious" from the "scientific literature." Pls.' Br. at 15. According to Plaintiffs, "numerous studies pre-dating the creation of the Step-Down Program . . . concluded that prolonged detention of prisoners" can cause "difficulty thinking," among other alleged effects. *Id.*

But the literature does not evaluate the specific conditions of the Step-Down Program, which for years have not fit commonly accepted definitions of "solitary confinement"[15]—or even Plaintiffs' counsel's own definition.[16] In any event, the conclusions of Plaintiffs' literature expert, Craig Haney, are heavily disputed. As discussed by Defendants' expert Dr. Robert Morgan, the literature shows only that some forms of "solitary confinement" *may* pose a risk of harm to

[14] *Porter*, 923 F.3d at 361; *see also Parrish ex rel. Lee v. Cleveland*, 372 F.3d 294, 303–04 (4th Cir. 2004) ("In making this assessment, it is important to remember that to cross the threshold from mere negligence to conscience-shocking deliberate indifference, the officers not only must recognize the facts giving rise to the risk, but they also must draw the additional causal inference.").

[15] Similarly, under the "Mandela Rules," the United Nations defines "solitary confinement" as "the confinement of prisoners for 22 hours or more a day." *United Nations Standard Minimum Rules for the Treatment of Prisoners*, Rule 44, https://tinyurl.com/ymrakpc2.

[16] *See* ACLU, *Silent Injustice: Solitary Confinement in Virginia* at 14 (defining "solitary confinement" as the "isolation of a person in a cell for approximately 22 to 24 hours a day with little human contact or interaction . . . ."); Part I.A at n.5 *supra*.

inmates' mental health in *some* circumstances. Resp. to Pls.' SUF ¶¶ 228–29. The literature does not show that any stay in restrictive housing, for any period of time, *necessarily* poses a risk of serious injury.

Nor has the Step-Down Program's alleged risk of harm been made "obvious" in any other way. Indeed, when viewed in the light of other available standards, the conditions of the Step-Down Program measure favorably:

- Legislative policy. Although Plaintiffs assert that the conditions violate "modern standards of decency," Pls.' Br. at 4, they ignore that neither Virginia's legislature nor the legislatures of countless other states have prohibited the conditions of the Step-Down Program. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (noting that, in assessing what constitutes cruel and unusual punishment against the "evolving standards of decency that mark the progress of a maturing society," "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures"). To the contrary: the Virginia General Assembly very recently approved of VDOC's existing practice by codifying its requirement that inmates receive 4 hours of out-of-cell time per day. Va. Code § 53.1-39.2. Defendants have not identified, nor have Plaintiffs cited, *any* federal or state legislation that categorically prohibits the conditions challenged here.

- Accrediting standards. VDOC's practices with respect to restorative housing at Red Onion have always been in compliance with the standards issued by the American Correctional Association ("ACA"), the accrediting body for the corrections industry, and often exceed those standards. Defs.' Br. at 20 ¶ 46. Under Virginia law, they will remain in compliance—in 2019, the General Assembly imposed a requirement that "restrictive housing shall, at a minimum, adhere to the standards adopted by the [ACA], the accrediting body for the corrections industry." Va. Code § 53.1-39.1.

- Correctional industry targets. The Step-Down Program repeatedly has been cited, including by reform groups, as a positive model for other correctional systems around the country.[17] Indeed, officials from other prison systems have looked to

[17] For instance, in July 2013, the Southern Legislative Conference awarded VDOC for its national leadership and "diligent work in reducing administrative segregation and for developing a program model replicable in other states." Defs.' Br. at 4 ¶ 2. Three years later, the U.S. Department of Justice, in a report containing recommendations on the use of restrictive housing, lauded Virginia as one of "five jurisdictions that have undertaken particularly significant reforms in recent years." *Id.* In 2018, the Vera Institute of Justice recognized the Step-Down Program as a model for others, calling it "a pioneering and significant program for reducing the number of people in long-term restrictive housing." Defs.' Br. at 5 ¶ 3.

the Step-Down Program as a model, visiting VDOC to study its success. Defs.' Br. at 31 ¶ 88.

- Judicial decisions. This Court and the Fourth Circuit repeatedly have rejected Eighth Amendment challenges to the Step-Down Program (including by some of the named Plaintiffs).[18] Plaintiffs cannot credibly argue that the risk of harm would have been "obvious" to prison officials, yet not to these courts.[19]

Thus, it cannot be said that the conditions of confinement associated with the Step-Down Program posed a risk of substantial harm that was "so obvious that it had to have been known" to Defendants. *Porter*, 923 F.3d at 361.

There also is no undisputed evidence, as Plaintiffs next claim, that "Defendants actually knew that the conditions of confinement in the Step-Down Program posed an excessive risk to the health and safety of prisoners." Pls.' Br. at 16. The individual Defendants unequivocally have stated that they were not aware of any such risk. *See, e.g.*, Defs.' Br. at 47–53 ¶¶ 130–40. The evidence cited by Plaintiffs is not to the contrary. Director Clarke's testimony that "people in Level S have raised issues about . . . [the] full gamut of issues," Pls.' Br. at 17 ("[e]verything from food, to noise, to their sentence structure, good time") (citation omitted), comes nowhere close to satisfying an actual-notice standard with respect to harms allegedly caused by the Step-Down Program in particular. The same goes for Dr. McDuffie's testimony that he "has been on 'group

[18] *See, e.g.*, *Mukuria v. Clarke*, No. 7:15CV00172, 2016 WL 5396712, at *4 (W.D. Va. Sept. 27, 2016) (Jones, J.), *aff'd*, 706 F. App'x 139 (4th Cir. 2017); *Snodgrass v. Gilbert*, No. 7:16CV00091, 2017 WL 1049582, at *14 (W.D. Va. March 17, 2017) (Conrad, J.); *Riddick v. Dep't of Corr.*, No. 7:17CV00268, 2017 WL 6599007, at *3–4 (W.D. Va. Dec. 26, 2017) (Conrad, J.).

[19] Plaintiffs' reliance on language in other cases where courts have cited the alleged harms of "prolonged solitary confinement" ignores that the Supreme Court has never declared its use unconstitutional. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 686 (1978) ("It is perfectly obvious that every decision to remove a particular inmate from the general prison population for an indeterminate period could not be characterized as cruel and unusual."); *Wilkinson v. Austin*, 545 U.S. 209, 229 (2005) (acknowledging that "[p]rolonged confinement in Supermax may be the State's only option for the control of some inmates");

phone calls' to discuss prisoner litigation, hunger strikes, and housing." Pls.' Br. at 17 (citations omitted). Likewise, the allegation that "VDOC officials personally viewed the conditions in the Step-Down Program," *id.*, or saw logs recording the amount of out-of-cell time received by inmates, *id.*, even if true, says nothing about Defendants' awareness that those conditions were unconstitutional (as to any inmate, much less to any named Plaintiff).[20] The fact is that two of the individuals whose depositions Plaintiffs cite for this allegation are or were unit managers, *not* "VDOC officials"; and the former warden mentioned by Plaintiffs testified to making rounds (of an unspecified frequency) at WRSP *after* inmates in the Step-Down Program were no longer housed at that facility. Resp. to Pls.' SUF ¶ 173. In any event, neither of the two unit managers nor the former warden is a Defendant in this case.

2. There is no undisputed evidence that Defendants disregarded a substantial risk of injury to inmates without penological purpose.

Even if Plaintiffs could establish Defendants' awareness of a substantial risk of serious injury, which they cannot, there is no undisputed evidence that Defendants subjectively disregarded that risk and implemented the Step-Down Program for no legitimate penological purpose. Without such evidence, Plaintiffs cannot show that Defendants possessed the "culpable mental state" required for a finding of deliberate indifference. *Thorpe*, 37 F.4th at 941. Indeed, "prison officials who actually knew of a substantial risk to inmate health or safety may be found free from liability if they responded reasonably to the risk, even if the harm ultimately was not averted." *Farmer*, 511 U.S. at 844

[20] In any event, such testimony would be relevant only to those individual Defendants, and could not be used to impose liability on others. *See Trulock v. Freeh*, 275 F.3d 391, 402 (4th Cir. 2001) (liability under § 1983 is "personal, based upon each defendant's own constitutional violations").

First, there is no undisputed evidence that Defendants disregarded any risk of substantial harm to inmates (let alone to the named Plaintiffs in particular), such as by completely ignoring inmates' needs or taking no action when any needs were identified.[21] The evidence shows that, pursuant to VDOC policies, inmates in the Step-Down Program are provided comprehensive protections to guard against the mental-health effects of their detention. These protections include: individualized assessments of all inmates' mental health status, which is continually tracked, *see* O.P. 730.2 [ECF No. 381-49]; Defs.' Br. at 28 ¶ 78; consideration of inmates' mental health in decisions regarding inmates' placement and progress in the Step-Down Program, *see* Defs.' Br. at 16–19 ¶¶ 37, 38, 40, 44; and diversion of inmates with serious mental illness from restorative housing, *see* Defs.' Br. at 30 ¶ 85. Contrary to Plaintiffs' assertions, *see* Pls.' Br. at 18, an inmate's mental health status is "essential" to his security classification. Resp. to Pls.' SUF at ¶ 22. And the Secure Diversionary Treatment Program ensures that inmates with serious mental illness are not "placed in the Step-Down Program and remain there." Pls.' Br. at 19. These precautionary measures help satisfy Defendants' "duty under the Eighth Amendment . . . to ensure 'reasonable safety'" to those in its custody in the Step-Down Program. *Farmer*, 511 U.S. at 844 (cleaned up and internal citations omitted).

Moreover, Plaintiffs fail to show that Defendants subjectively disregarded a risk of substantial harm to any named Plaintiff, such as by choosing to ignore known mental health needs. Throughout their time in the Step-Down Program, most of the named Plaintiffs had a mental health classification code of MH-0—an assessment that they had no mental health treatment needs. Defs.' Br. at 36–46 ¶¶ 99, 102, 105, 110, 113, 116, 123, 126. There is no undisputed evidence that

[21] Thus, even if Plaintiffs were correct that Defendants were actually aware of a substantial risk of harm posed by the Step-Down Program to the mental health of inmates, *see* Pls.' Br. at 17–18, their deliberate-indifference claim still fails.

any named Plaintiff was denied regular evaluations by qualified mental health professionals, appropriate medications, or mental health services that were warranted. *See Mickle v. Moore*, 174 F.3d 464, 472 (4th Cir. 1999) (holding that the plaintiffs could not establish deliberate indifference where the prison's "procedures for administrative segregation provide for periodic visits by medical personnel and for the referral of inmates displaying mental health problems for treatment").

Second, Plaintiffs cannot persuasively argue that the Step-Down Program is "totally without penological justification." Pls.' Br. at 20 (quoting *Gregg v. Georgia*, 428 U.S. 153, 182–83 (1976) (opinion of Stewart, J.)); *see also* Compl. ¶ 247 (alleging that the Step-Down Program "serves no legitimate penological purpose"). The Fourth Circuit has recognized that "prison officials tasked with the difficult task of operating a detention center may reasonably determine that prolonged solitary detention of the inmate is necessary to protect the well-being of prison employees, inmates, and the public or to serve some other legitimate penological objective." *Porter*, 923 F.3d at 363 & n.2 (acknowledging that "a legitimate penological justification can support even prolonged solitary detention of a particular inmate"); *see also Overton v. Bazzetta*, 539 U.S. 126, 133 (2003) (finding "internal security [to be] perhaps the most legitimate of penological goals"). The evidence establishes that these valid penological interests are behind the Step-Down Program.[22]

[22] Plaintiffs appear to have abandoned the central premise of their case, offering no argument that they were "confined [in the Step-Down Program] for a pecuniary rather than penological purpose." *Thorpe*, 2021 WL 2435868, at *7. Discovery produced no evidence for this "economic gain" theory. Instead it established that the Step-Down Program was designed to *lower* the number of inmates in restrictive housing, *see, e.g.*, Transcript of Henry Ponton, Jr. dated March 1, 2023 ("Ponton Dep."), cited portions attached as Exhibit 49, at 143–44; Transcript of Harold Clarke dated April 12, 2023 ("Clarke Dep."), cited portions attached as Exhibit 50 at 151, and in fact was successful in dramatically reducing the number of inmates in the Step-Down

A mountain of evidence rebuts Plaintiffs' assertion that the Step-Down Program completely lacks penological justification. The documents describing the origins and purpose of the program belie that assertion. Defs.' Br. at 7–8 ¶¶ 8–10. So does the testimony of VDOC employees. *See, e.g.*, Transcript of James Gallihar dated April 7, 2023 ("Gallihar Dep."), cited portions attached as Exhibit 10 ("The programs are designed to enhance security."); Transcript of Jessica King dated June 1, 2022 ("King Dep."), cited portions attached as Exhibit 51, at 111–12 ("[T]he whole goal of the program is to change behavior to where we increase public safety."); Transcript of A. David Robinson dated February 16, 2023 ("Robinson Dep."), cited portions attached as Exhibit 23, at 304 (noting that inmates in Step-Down Program "have demonstrated [a] risk" to the facility, a security risk, or a risk of escape). Expert testimony also rebuts Plaintiffs' assertion. *See, e.g.*, Expert Report of Jeffery Beard, July 3, 2023 ("Beard Rep.") (ECF No. 381-67) at 5 (noting that restorative housing "units exist to provide for the safety of staff and inmates and for the security of the institution"); *id.* at 16 (opining that "VDOC works hard to ensure that inmates are not kept in the Step-Down Program any longer than is necessary from a penological and safety standpoint"). Even Plaintiffs' own proposed class representative admitted that, "absolutely," "segregation is necessary for some inmates." Transcript of Peter Mukuria dated March 28, 2023 ("Mukuria Dep."), cited portions attached as Exhibit 52, at 199–200.[23] Other named Plaintiffs made similar admissions. *See, e.g.*, Transcript of Kevin Snodgrass dated April 12, 2023 ("Snodgrass Dep."), cited portions attached as Exhibit 53, at 108–09 ("[T]he whole

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Program and returning inmates—including each of the named Plaintiffs still in VDOC custody—to general population.

[23] *See also id.* at 197–98 ("[Y]ou can't just have people committing whatever acts and just completely going without being held accountable despite the fact that this is prison. So I do believe that there is a need, you know, to have segregation units for those purposes.").

purpose of solitary confinement is to establish institutional order."); Transcript of Steven Riddick dated March 23, 2023 ("Riddick Dep."), cited portions attached as Exhibit 54, at 155 (acknowledging times he was "necessarily kept in segregation"). The Fourth Circuit has recognized it, too. *Greenhill v. Clarke*, 944 F.3d 243, 250 (4th Cir. 2019) (describing the Step-Down Program as "a sophisticated, well-conceived program to better inmates' behavior and their confinement, as well as to improve safety and the overall operation of the prison").

It is undisputed that no named Plaintiff remains in the Step-Down Program; every named Plaintiff still in a VDOC facility has reentered general population. The undisputed evidence also shows there were legitimate penological reasons for each named Plaintiff's placement in the Step-Down Program:

- Vernon Brooks was placed in the Step-Down Program for numerous institutional charges, some including violence, which culminated in an incident in which Brooks stabbed two offenders with a knife. Defs.' Br. at 36 ¶ 97. He prolonged his time in the Step-Down Program when he was found attempting to make a weapon in his cell. *Id.*

- Brian Cavitt, a convicted murderer, was placed in the Step-Down Program following a history of attempting violence and formulating escape plots, including plans that involved murdering corrections officers during a court visit. *Id.* at 37 ¶ 100.

- Derek Cornelison was placed in the Step-Down Program after an incident in which he tried to kill a fellow inmate at Sussex I State Prison, striking the inmate approximately 20 times with a weapon. *Id.* at 38 ¶ 104.

- Frederick Hammer, who had been convicted of killing three men, entered the Step-Down Program for safety reasons in April 2012. *Id.* at 39 ¶ 107.

- Dmitry Khavkin, a convicted murderer, was placed in the Step-Down Program because he was under investigation for the killing of his cellmate at Lawrenceville Correctional Center (a charge he later admitted). *Id.* at 40 ¶ 110.

- Gerald McNabb, McNabb, who is serving for variety of crimes including homicide, has an extensive history of committing violence within VDOC institutions, both against fellow inmates and officers. He was placed in the Step-Down Program after an incident in which he assaulted an officer at

Sussex I State Prison, stabbing her with a weapon. He proceeded through the Step-Down Program, but a month after returning to general population, he was back in the Step-Down Program after a knife was found inside his television. He thereafter failed to proceed all the way through the Step-Down Program, due to numerous charges and infractions.[24] *Id.* at 41 ¶ 112.

- Peter Mukuria, a convicted murderer, entered the Step-Down Program after stabbing a guard at Suffolk II State Prison, necessitating emergency surgery on the guard. *Id.* at 42 ¶¶ 114–15. After progressing through the Program, Mukuria regressed after receiving multiple disciplinary infractions, including attempting to incite a riot among other offenders.[25] *Id.* at 42 ¶ 115.

- Steven Riddick, a convicted murderer, was transferred to the Step-Down Program following months of racking up institutional charges, including threatening to kill an officer. *Id.* at 43, ¶ 118. Until his release to general population earlier this year, he remained in the Step-Down Program "by choice," to avoid having a cellmate. *Id.* at 43 ¶ 119.

- Kevin Snodgrass, a convicted murderer, was transferred into the Step-Down Program after being possessing a weapon in general population. *Id.* at 45 ¶ 122.

- William Thorpe, who is serving time for multiple crimes including malicious wounding, assault, and escape, participated in the August 1984 riot at Mecklenburg Correctional Center, in which he and other inmates took control of a cell block and held multiple corrections officers hostage. *Id.* at 45 ¶ 124. After being demoted within the IM pathway for publicly masturbating during visitation, Thorpe refused to participate in any Step-Down programming and remained at IM-0 until he was transferred out-of-state. *Id.* at 45 ¶ 125.

- Gary Wall, who is serving time for multiple crimes including unlawful wounding and injury to a corrections employee, received more than a dozen institutional charges related to fighting or assaults before being placed in the Step-Down Program. *Id.* at 46 ¶ 127. Although he was later released to general population, he returned to the Step-Down Program for "assaultive behavior"; a series of charges and infractions, including threatening behavior, delayed his release back to general population. *Id.* at 46 ¶ 128.

[24] In November 2020, McNabb requested to be transferred out of state, asserting that he would be "better adjusted if he was in another state" due to his history of poor performance within VDOC facilities, and in May 2021 that transfer request was granted. *Id.* at 41 ¶ 112.

[25] In March 2022, Mukuria was transferred to a correctional facility in Maryland. *Id.*

As this undisputed evidence shows, each named Plaintiff's placement in (and eventually out of) the Step-Down Program reflects a series of reasonable decisions by VDOC in service of its "obligation . . . to ensure the safety of guards and prison personnel, the public, and the prisoners themselves." *Wilkinson*, 545 U.S. at 227.

Unable to show that the Step-Down Program as a whole lacks a penological interest, Plaintiffs resort to isolating certain aspects of the Program, such as the availability of certain programming, and scrutinizing whether they "relate to security." Pls.' Br. at 21. But this suit is not about making the "Cognitive Stimulation Program" available to "Level S prisoners." Pls.' Br. at 21. Plaintiffs seek to "abolish the Step-Down Program" and "end long-term solitary confinement" altogether. Compl. ¶ 271(1). And, in any event, Plaintiffs' second-guessing of minor aspects of the Step-Down Program must be evaluated against the Supreme Court's instruction that prison officials "be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547–48 (1979).

II. Plaintiffs are not entitled to summary judgment on their due-process claim.

Plaintiffs also do not present undisputed facts that would entitle them to summary judgment on their due-process claim—that Defendants used arbitrary criteria to evaluate Plaintiffs' progression in the Step-Down Program and denied them meaningful and periodic reviews of that progression without any valid penological purpose. *Thorpe*, 2021 WL 2435868, at *4; *see generally* Compl. [ECF No. 1]. For their claim to succeed, Plaintiffs "must [first] identify a protected liberty . . . interest," *Prieto v. Clarke*, 780 F.3d 245, 248 (4th Cir. 2015), which requires that they demonstrate that the conditions of their confinement "are harsh and atypical in relation

to the ordinary incidents of prison life," *id.* at 252.[26] Then they must "demonstrate deprivation of that [protected liberty] interest without due process of law." *Id.* at 248. Plaintiffs do not and cannot make either showing on this evidentiary record.

First, Plaintiffs are wrong that the conditions in the Step-Down Program are "substantially harsher than those experienced by the general prison population," Pls.' Br. at 22—assuming general population is even the proper comparative baseline.[27] In comparing Step-Down conditions to those of general population, Plaintiffs focus on the most restrictive levels within the Step-Down Program, which inmates may experience only temporarily before progressing through the program. Given the variability in restrictions and privileges across Step-Down levels, there is no single set of "conditions" that support the conclusion that the Step-Down Program violates due process—let alone that support Plaintiffs' demands that this Court "abolish the Step-Down Program" and "end long-term solitary confinement." Compl. ¶ 271(1). In any event, the three analytical factors Plaintiffs identify—magnitude, indefiniteness, and collateral consequences—do not weigh in favor of finding an atypical and significant hardship.

Second, Plaintiffs are wrong to assert that the Step-Down Program fails to provide inmates with meaningful review. Pls.' Br. at 29–43. The undisputed record establishes, both as a matter

[26] As on their motion to dismiss, Defendants assume without conceding that VDOC policy creates an expectation of avoiding the conditions of confinement that accompany the Step-Down Program. *See Thorpe*, 37 F.4th at 942 (citing *Incumaa v. Stirling*, 791 F.3d 517, 527 (4th Cir. 2015)).

[27] "The Supreme Court has yet to identify the baseline for determining whether a state regulation imposes . . . an atypical and significant hardship." *Prieto*, 780 F.3d at 252; *see also Wilkinson*, 545 U.S. at 223 (recognizing that "the Courts of Appeals have not reached consistent conclusions for identifying the baseline" but declining to "resolve the issue"). The Fourth Circuit, however, has used general population as the comparative baseline. *See Incumaa*, 791 F.3d at 527. Defendants expressly reserve the argument that—as most other Courts of Appeals have found—the appropriate baseline is "administrative segregation or something more restrictive than general population." *Aref v. Lynch*, 833 F.3d 242, 253–56 (D.C. Cir. 2016) (collecting cases),

of stated policy and actual practice, that VDOC provides inmates (including the individual named Plaintiffs) with regular reviews of their status, which include adequate notice, a hearing, and due consideration of their individual circumstances. As this Court has repeatedly found when rejecting previous due-process challenges to the Step-Down Program—including when previously brought by Plaintiffs' proposed class representative Peter Mukuria—"under OP 830.A, an inmate's confinement in segregation at Red Onion is . . . only as lengthy and restrictive as dictated by his own effort and behavior." *Mukuria*, 2016 WL 5396712, at *8. Indeed, contrary to Plaintiffs' characterization of the Step-Down Program as a no-win, no-way-out dead end, *see* Compl. ¶¶ 16, 179, 192, 233, it is undisputed that the vast majority of inmates who have ever been in the Step-Down Program have successfully transitioned back to general population—including *every single named Plaintiff* who is still in a VDOC facility. Defs.' Br. at 5 ¶ 4. That record of success shows that VDOC has more than satisfied the requirement to "provide 'minimally adequate process to protect [any] liberty interest' in avoiding security-detention." *Thorpe*, 2021 WL 2435868, at *4.

A. The conditions of confinement under the Step-Down Program do not impose an atypical and significant hardship in relation to the ordinary incidents of prison life.

The undisputed evidence fails to support Plaintiffs' assertion that the conditions of their confinement are "harsh and atypical in relation to the ordinary incidents of prison life." *Prieto*, 780 F.3d at 252. True, this Court previously found that Plaintiffs had "plausibly *alleged* harsh and atypical" conditions. *Thorpe*, 2021 WL 2435868, at *4 (emphasis added). But at summary judgment, Plaintiffs must present more than their recycled allegations—and, in any event, the facts adduced in discovery do not back up their allegations. None of the three factors identified by Plaintiffs, *see* Pls.' Br. at 24 (citing *Smith*, 964 F.3d at 275), supports the existence of a protected liberty interest.

1. Severity of the conditions

Plaintiffs first assert that the supposed "magnitude" of the conditions of confinement in the Step-Down Program create an atypical and significant hardship. *Id.* at 24–26. But the evidence adduced in discovery does not back up their assertion that the key conditions experienced by Plaintiffs approach those found significant in *Wilkinson* or are drastically different from those in general population.

At the outset, it is worth reiterating that the privileges available to inmates in the Step-Down Program vary widely, depending on what level of the Step-Down Program a particular inmate has reached. This is by design and is an important component of this incentive-based behavioral modification program. Thus, even if Plaintiffs could establish that Step-Down conditions are, in some circumstances, atypical in comparison to general-population conditions, that is not sufficient to demonstrate the same is true for *all* inmates or class members.

The evidentiary record shows that the Step-Down Program does not impose the severe conditions found atypical and harsh in *Wilkinson*. In that case, Plaintiffs had to "'remain in their cells' for about '23 hours per day.'" *Thorpe*, 37 F.4th at 942 (quoting *Wilkinson*, 545 U.S. at 214). Not so here. By Plaintiffs' own admission, inmates in the Step-Down Program have had greater out-of-cell time since at least 2017. Pls.' SUF ¶¶ 144–49. Now "the amount of out-of-cell time allotted by VDOC policy for incarcerated persons at Level S and Level 6 depends on security and privilege level, and ranges from four to six hours per day." Pls.' SUF ¶ 149. Indeed, four hours is a *minimum*. Resp. to Pls.' SUF ¶ 148 (every day, each inmate in the Step-Down Program is "provided the opportunity to participate in a minimum of four hours out of cell activity" consisting of showers, outdoor exercise, visitation, interactive journaling, programming, and other group elective options) (quoting ECF No. 383-70 at VADOC-00118556). Moreover, unlike in *Wilkinson*, where the plaintiffs' cell conditions "'prevent[ed] conversation or communication with

other inmates,'" *Thorpe*, 37 F.4th at 942 (quoting *Wilkinson*, 545 U.S. at 214), Plaintiffs have presented no facts that Plaintiffs cannot communicate with other inmates while in their cells (let alone during recreation or congregate activity).[28] The plaintiffs in *Wilkinson* also were entitled to only "rare" visitations. *Thorpe*, 37 F.4th at 942 (quoting *Wilkinson*, 545 U.S. at 214). Here, by contrast, inmates at even the most restrictive levels have the opportunity for at least one one-hour in-person visit per week, as well as video visits. Resp. to Pls.' SUF ¶ 121. Visitation opportunities increase with privilege level; inmates in IM Closed Pod Phase I get a weekly total of 2 hours of non-contact visitation, while inmates in IM Closed Pod Phase II can also get a weekly 2-hour contact visitation. Resp. to Pls.' SUF ¶ 126 (citing ECF No. 383-2 at VADOC-00053537).

Just as the conditions of confinement experienced by inmates in the Step-Down Program are not nearly as restrictive as in *Wilkinson*, the conditions do not, as Plaintiffs claim, "differ[] starkly from the conditions experienced by the general prison population." Pls.' Br. at 24. Plaintiffs attempt to draw a contrast by arguing that, "even in maximum-security prison, prisoners assigned to the general population can socialize with other prisoners outside of their cells for several hours each day." Pls.' Br. at 24. But Plaintiffs do not cite anything to suggest that Step-Down inmates cannot socialize with each other during the multiple hours per day during which—it is undisputed—they have opportunities for recreation and congregate activity. Pls.' SUF ¶ 148; Resp. to Pls.' SUF ¶ 148. Likewise, Plaintiffs cite nothing for their passing assertion that Step-Down inmates have "no opportunity to participate in group activities." Pls.' Br. at 1. In fact, that

[28] In fact, the evidence is that inmates, and the named Plaintiffs in particular, *can* and *do* communicate with other inmates including while in their cells. *See* Defs.' Br. at 21 ¶ 50 (citing Brooks Tr. at 12:7–13:5, 244:20–245:17; Cavitt Tr. at 222:5–224:4; Cornelison Tr. at 37:11–38:5, 42:6–20, 64:20–67:14, 221:11–222:9; Hammer Tr. at 14:1–18:1; Mukuria Tr. at 17:10–18:17, 33:10–34:22, 237:19–239:9).

allegation is impliedly rebutted by their own SUF, which concedes out-of-cell programming occurs and states only that inmates "in IM-0 conduct programming alone in their cells." Pls.' SUF ¶ 165.

Unable to establish harsh-and-atypical conditions based on *isolation*—the alleged harm this case targets—Plaintiffs attempt to draw a contrast between the conditions in the Step-Down Program and those in general population based on *other* factors. Those arguments don't wash, either. For instance, Plaintiffs allege that inmates "in the Step-Down Program are confined to cells measuring approximately 7-by-10 feet." Pls.' Br. at 24. But (whatever their size) VDOC houses inmates in the Step-Down Program in cells of the same size and configuration in which it houses inmates in general population. Resp. to Pls.' SUF ¶ 133. Plaintiffs also complain that Step-Down inmates are usually (though not always) restrained during group programming; that they are "typically restrained in handcuffs and shackles while outside of their cell"; and that they are subject to searches when they leave their cell.[29] Pls.' Br. at 25. Plaintiffs cite no caselaw suggesting that the use of such restraints in a prison setting is atypical or harsh. Indeed, this court has previously found that "ambulatory restraints, which cause no physical injury and allow freedom of movement," are not "so atypical as to 'impose a significant hardship in relation to the ordinary incidents of life.'" *Smith v. Davis*, No. 7:10-CV-00263, 2011 WL 3880944, at *6 (W.D. Va. Sept. 1, 2011). Other courts have reached the same conclusion.[30] Plaintiffs' brief also repeatedly

[29] The parties do dispute the nature of these searches: although Plaintiffs characterize them as "intrusive cavity searches," Pls.' Br. at 9, in fact they are visual strip searches, Resp. to Pls.' SUF ¶ 166.

[30] *See, e.g.*, *Ruggiero v. Fischer*, 807 F. App'x 70, 72 (2d Cir. 2020) (finding no protected liberty interest implicated by a policy requiring inmates "to wear mechanical restraints, including handcuffs and a waist chain, during their allotted exercise period"); *Rodgers v. Johnson*, 56 F. App'x 633, 636 (6th Cir. 2002) (finding no liberty interest implicated where, among other things, inmate had "no participation in group activities, no eligibility for work assignments, and ha[d] to wear handcuffs and belly chains when out of his cell").

asserts that the activities, programming, and work available to inmates make Step-Down conditions harsh and atypical compared to general population. *See* Pls.' Br. at 1 (alleging "few opportunities to participate in educational or therapeutic programming"); *id.* at 5 (alleging "minimal access to educational, recreational, and therapeutic programming"). But those assertions do not rest on any undisputed facts—indeed, Plaintiffs do not bother to cite *any*. And, in any event, "the denial of access to educational programs generally does not deprive an inmate of a protected liberty interest." *Carter v. White*, No. 7:21-CV-00484, 2022 WL 3129101, at *4 (W.D. Va. Aug. 4, 2022).

While it is true that some Step-Down inmates do not have all the same privileges enjoyed by those in general population, the conditions in the Step-Down Program are not so different from general population that Plaintiffs suffered an atypical and significant hardship. But even if they were, "the severity of the conditions alone are insufficient to create a liberty interest." *Smith v. Collins*, 964 F.3d 266, 277 (4th Cir. 2020) (citing *Wilkinson*, 545 U.S. at 224). As set forth below, the other considerations addressed by Plaintiffs also do not weigh in favor of recognizing a protected liberty interest.

2. Duration of confinement

Plaintiffs also are wrong to conclude that the length of their time in the Step-Down Program—and its supposed "indefiniteness"—weighs in favor of finding a protected liberty interest. Pls.' Br. at 26.

Plaintiffs first attempt to frame their experience in the Step-Down Program as "extraordinary in its duration." *Id.* But they state as fact, and Defendants do not dispute, that inmates assigned to the Step-Down program can progress out of SL-S in nine months if assigned to the SM pathway and 18 months if assigned to the IM pathway. Pls.' SUF ¶ 49; Resp. to Pls.' SUF ¶ 49; *see also* Pls.' Br. at 32 (emphasizing that these "figures represent the *fastest* a prisoner

could theoretically advance through Level S after their pathway assignment"). Plaintiffs cite no Fourth Circuit case law finding those periods sufficiently lengthy as to implicate a liberty interest. Pls.' Br. at 26–27.[31] Nor do Plaintiffs cite any undisputed facts supporting their contention that those nine- and eighteen-month periods are "unrealistically short." *Id.* at 27. For instance, the assertion in their SUF that an IM inmate "may return to the general population only if he progresses through the Step-Down Program to Security Level 6 IM Closed Pod and is subsequently reclassified to the SM pathway," Pls.' SUF ¶ 48, is disputed. Inmates do *not* have to progress to the Level 6 IM Closed Pod before being reclassified to the SM pathway. Resp. to Pls.' SUF ¶ 48.

To support their "extraordinary . . . duration" claim, Pls.' Br. at 26, Plaintiffs use an artificially long yardstick. They do not identify the "*many* class members [who allegedly] have spent *decades* in Level S," *id.* (emphasis added)[32]—a formulation that sidesteps the undisputed fact that the Step-Down Program they challenge has only existed since 2012, Resp. to Pls.' SUF ¶ 2; *see also id.* ¶ 52, and ignores that at least some inmates (such as Thorpe and Reyes) have spent time in the Step-Down Program voluntarily. They provide no evidence that the few named Plaintiffs with more than seven years in the Step-Down Program are representative of other class members with respect to the amount of time spent in the program. Nor would such evidence be determinative in evaluating the existence of a liberty interest, which is an individualized inquiry

[31] There is less to the out-of-circuit cases cited by Plaintiffs than their brief lets on. *See* Pls.' Br. at 26–27. In *Marion v. Columbia Correction Inst.*, 559 F.3d 693 (7th Cir. 2009), the court concluded that "confinement in segregation for 240 days *may* implicate a liberty interest," but that it would depend on the severity of the conditions, "and therefore, further fact-finding is necessary." *Id.* at 699 (emphasis added). And in *Williams v. Fountain*, 77 F.3d 372 (11th Cir. 1996), the court, in a footnote, merely "assumed" the inmate in question suffered the deprivation of a liberty interest. *Id.* at 374 n.3.

[32] Plaintiffs cite to their SUF ¶ 53 for the similar proposition that some inmates "have spent over 18 years in Level S." Pls.' Br. at 11. That paragraph contains no supporting information.

that is not susceptible to class-wide resolution. As the Fifth Circuit has recently explained in this context, "[d]istrict courts should apply a nuanced analysis looking at the length and conditions of confinement on a case-by-case basis to determine whether they give rise to a liberty interest—not the application of a [particular time] threshold." *Carmouche v. Hooper*, 77 F.4th 362, 367 (5th Cir. 2023).

Plaintiffs next assert that "[s]ome class members have been subjected to [Step-Down] conditions indefinitely . . . ." Pls.' Br. at 5 (emphasis added). They do not identify those class members, however; nor do they explain whether those inmates can be representative of a larger class.[33] Moreover, Plaintiffs' definition of "indefiniteness" is faulty. Plaintiffs consider their confinement in the Step-Down Program to be indefinite "because there is no maximum amount of time that a prisoner may be required to spend in the program." Pls.' Br. at 26.[34] But that formulation is not what the Supreme Court used in *Wilkinson*. There the inmate's placement in severely restrictive conditions was for an "indefinite period of time" because "there [was] *no* indication how long he may be incarcerated" in those conditions "once confined there." 545 U.S. at 215 (emphasis added). But that's not Plaintiffs' situation here.[35] The undisputed facts show that the Step-Down Program has defined processes and review opportunities, with some associated

[33] Indeed, Plaintiffs' acknowledgment that only "some" inmates have a protected liberty interest because of the alleged "indefinite" nature of their confinement again highlights that class-wide resolution of this issue remains inappropriate and impossible.

[34] For this proposition, Plaintiffs point to the deposition testimony of Jeffrey Kiser. *See id.* (citing Pls.' Br. Ex. 23, Kiser Dep. at 279–80). Reviewing a chart "outlin[ing] what the SM privilege levels would have been in 2012," Kiser merely testified that the chart prescribed a minimum but not a maximum number of days "for an offender to move from SM-0 to SM-1 at the time." Pls.' Br. Ex. 23, Kiser Dep. at 276–80.

[35] The Supreme Court also based its finding of indefiniteness in *Wilkinson* on the fact that an inmate's maximum-security confinement was "reviewed just annually." 545 U.S. at 224. Here, by contrast, inmates are reviewed much more regularly. *See* Part II.B.2 *infra*.

time periods, through which inmates can progress from more restrictive to less restrictive levels and out of the program altogether. *See, e.g.*, Pls.' SUF ¶¶ 49–50. Indeed, every named Plaintiff still in a VDOC facility has made the transition back to general population. Defs.' Br. at 36–46, ¶¶ 97, 101, 104, 107, 110, 119, 122, 128. That the length of each inmate's time in the Step-Down Program depended on his individual behavioral choices, and was not pre-determined or fixed, does not render his confinement "indefinite." *See, e.g.*, *Canada v. Clarke*, No. 7:15CV00065, 2016 WL 5416630, at *8 (W.D. Va. Sept. 27, 2016) (Jones, J.) (concluding that the "step-down procedure addresses and alleviates the . . . indefiniteness identified in *Wilkinson* and *Incumaa* as distinguishing factors of "atypical and significant" hardships presented by a prison's long-term segregation scheme"; noting that an inmate's "status need not be permanent or indefinite if the inmate chooses to participate in the step-down procedures"), *aff'd*, 717 F. App'x 361 (4th Cir. 2018).[36]

For this same reason, Plaintiffs' heavy reliance on the Third Circuit's decision in *Williams v. Secretary of the Pennsylvania Department of Corrections*, 848 F.3d 549 (3d Cir. 2017), *see, e.g.*, Pls.' Br. at 28, is misplaced. As noted above, *see* Part I.A *supra*, that case involved the continued confinement of inmates in solitary confinement on death row, without any opportunity for review, after their death sentences were vacated and until they were resentenced. The Third Circuit stressed that the plaintiffs there "could have been the most compliant inmates in a given facility, and exhibited no signs they would endanger themselves or others[, but] . . . would still

[36] Courts in other jurisdictions have held similarly. *See, e.g.*, *Williams v. Lindamood*, 526 F. App'x 559, 563 (6th Cir. 2013) (conditions not indefinite where inmates' "confinement is geared toward a return to the general prison population"); *Traylor v. Danforth*, No. 6:19-CV-68, 2022 WL 604184, at *5 (S.D. Ga. Feb. 1, 2022) ("Plaintiff was regularly being moved through the Tier II program into less restrictive phases, so he was not being kept in segregation indefinitely unlike the disputed placement in the Supermax prison in *Wilkinson* . . . ."), *report and recommendation adopted*, 2022 WL 599310 (S.D. Ga. Feb. 28, 2022).

have been relegated to death row indefinitely." *Id.* at 562. Indeed, the plaintiffs' continued confinement on death row "would follow even if the professionals who are part of the prison [review committee] reviewed their placements and concluded that that level of confinement was not otherwise warranted." *Id.* The same is not true here, where Plaintiffs' progress through and out of the Step-Down Program depends on their own behavioral choices. *See, e.g.*, *Mukuria*, 2016 WL 5396712, at *8 ("[U]nder OP 830.A, an inmate's confinement in segregation at Red Onion is . . . only as lengthy and restrictive as dictated by his own effort and behavior[.]"). Indeed, the Third Circuit expressly noted that the "indefiniteness" in *Williams* "contrasts sharply with other common forms of solitary confinement, such as the punitive segregation . . . in *Sandin*," where the "duration of the deprivations" need not be "predetermined and fixed" if "the inmate's behavior is thought to require an additional period of segregation." *Williams*, 848 F.3d at 562.

3. Collateral consequences

The third and final factor analyzed by Plaintiffs—the "collateral consequences on the prisoner's sentence," Pls.' Br. at 28—is not supported by undisputed facts either. Plaintiffs first assert that Level-S inmates "cannot earn good-time credit unless they participate in the Step-Down Program." Pls.' Br. at 28.[37] They cite nothing in support of that proposition. Indeed, the relevant testimony in the record is that *all* inmates—including those in the Step-Down Program—are eligible to earn good-time credit. Resp. to Pls.' SUF ¶ 122 (citing ECF No. 383-11 at 93:15–94:4).

[37] Plaintiffs' arguments have narrowed dramatically from the allegations in their Complaint. Plaintiffs have abandoned their assertion that "VDOC denies parole to otherwise parole-eligible prisoners while they are in solitary confinement." Compl. ¶ 117. Plaintiffs' brief also does not press their allegation, made "[u]pon information and belief," that inmates in the Step-Down Program "earn [good-time] credit at a significantly reduced rate." *Id.* In any event, inmates do not have a "liberty interest in . . . earning any particular number of credits." *Ewell v. Murray*, 813 F. Supp. 1180, 1183 (W.D. Va. 1993); *see also Gaskins v. Johnson*, 443 F. Supp. 2d 800, 805 (E.D. Va. 2006) (distinguishing the loss of good-time credits an inmate "might earn *in the future*" from the loss of "already-earned credits").

Plaintiffs then assert that "*no* good-time credit is available to individuals at SM-0 or IM-0 at all." Pls.' Br. at 28 (citing Pls.' SUF ¶ 122 and Pls.' Br. Ex. 11, Transcript of Amee Duncan dated March 14, 2023 ("Duncan Dep."), cited portions attached as Exhibit 9, at 94:9–16). But Plaintiffs' SUF ¶ 122 refers only to whether IM-0 inmates can receive good-time credit; it makes no mention of whether SM-0 inmates can receive good-time credit. In any event, whether inmates at IM-0 can receive good-time credit is directly disputed by the parties, and Plaintiffs' assertion is directly contradicted by the express language of VDOC's policy. Exhibit 28 [OP 830.3]

B. The procedures of the Step-Down Program afford inmates minimally adequate process to protect their liberty interest.

Even if Plaintiffs had a protected liberty interest in avoiding continued placement in the Step-Down Program, Plaintiffs are not entitled to summary judgment on their due-process claim because they fail to show they have been deprived of "minimally adequate process" to protect that interest. *Thorpe*, 2021 WL 2435868, at *4. Plaintiffs claim a deprivation of two different due-process rights: "meaningful periodic review of whether the reasons for their ongoing confinement are valid and subsisting" and "review procedures that satisfy the elementary requirements of due process, namely, notice or explanation of the case against the prisoner and an opportunity to rebut it." Pls.' Br. at 29. As shown in corresponding sections below, the undisputed facts do not support summary judgment for Plaintiffs on either theory.

It also should also be noted at the outset that Plaintiffs are not entitled to summary judgment against any individual Defendant on either theory. Section 1983 liability "only lie[s] where it is affirmatively shown that the official charged acted personally in the deprivation of the plaintiffs' rights." *Wilcox v. Brown*, 877 F.3d 161, 170 (4th Cir. 2017); *see also Trulock*, 275 F.3d at 402 (Section 1983 liability is "personal, based upon each defendant's own constitutional violations"). Plaintiffs do not even attempt to show that any individual Defendant "personally took any

particular action or made any relevant decision" with respect to their due-process claims. *Taylor*, 2020 WL 354753, at *1. Plaintiffs offer no undisputed facts and no basis for holding any individual Defendant liable for their alleged role in creating and maintaining the Step-Down Program as a whole. Indeed, as the Fourth Circuit noted, Plaintiffs' claim is not about the adequacy of the review the Step-Down Program provides "on paper" but the meaningfulness of the review that inmates receive "in practice." *Thorpe*, 37 F.4th at 944. But Plaintiffs fail to identify any specific segregation review, conducted by any specific Defendant, that violated any inmate's rights (let alone any named Plaintiff's). Having cited no factual basis for liability against the individual Defendants, Plaintiffs are not entitled to summary judgment against them.

1. There is no undisputed evidence that the periodic reviews of inmates' placement in the Step-Down Program are not meaningful.

The record evidence solidly refutes Plaintiffs' claim that the Step-Down reviews are not "meaningful." Compl. ¶ 16. They are not entitled to summary judgment for several reasons.

First, the Step-Down Program's success in transitioning inmates out of the program puts the lie to Plaintiffs' claim that its mechanisms for reviewing inmates are not meaningful. *See* Compl. ¶ 16 (characterizing the Step-Down Program as a "permanent solitary confinement regime"). Indeed, far from "do[ing] nothing for Plaintiffs in practice," *Thorpe*, 37 F.4th at 944, the undisputed evidence shows that the vast majority of inmates that were ever in the Step-Down Program—numbering in the hundreds—have returned to general population as a consequence of its review scheme, *see* Defs.' Br. at 5 ¶ 4. On these facts, it is difficult to credit Plaintiffs' charge that Step-Down reviews are somehow not "meaningful" given the undeniably "meaningful" results they have produced.

Plaintiffs fail to provide any evidence (undisputed or not) that would support their view. For instance, their brief is quick to assert that the Step-Down Program's review procedures "make

it effectively impossible for many people to ever exit the Program." Pls.' Br. at 2. But they do not identify any such "people," much less do they show how those individuals have been denied meaningful review of their status.[38] The specific examples of the named Plaintiffs certainly do not validate their claim. As noted above, the evidence shows that every named Plaintiff who is still in a VDOC facility has successfully progressed back from the Step-Down Program to general population. *See* Part II.A.2 *supra*.

Moreover, each named Plaintiff's classification history demonstrates what this Court has repeatedly found on previous occasions—that, "under OP 830.A, an inmate's confinement in segregation at Red Onion is . . . only as lengthy and restrictive as dictated by his own effort and behavior." *Mukuria*, 2016 WL 5396712, at *8. Nor do Plaintiffs offer any evidence of arbitrary treatment of the named Plaintiffs. Indeed, contrary to the named Plaintiffs' allegations of arbitrary treatment, their movement within the Step-Down Program corresponded to their own behavioral choices. They progressed through the program when, over time, they established a track record of positive choices and rule-compliant behavior, and they ultimately returned to general population after "fulfill[ing] all requirements of the Step-Down Program." Compl. ¶ 177. They regressed when they committed further disciplinary infractions or refused to take the stated steps to progress.[39] In sum, Plaintiffs present no undisputed evidence that Step-Down review

[38] Plaintiffs' reference to "many" unnamed inmates whose rights allegedly have been violated suggests they may be pursuing their due-process claim on a facial basis. Plaintiffs cannot possibly succeed on a facial challenge, which is "the most difficult" kind "to mount successfully." *City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015) (internal citation omitted). Plaintiffs would have to "establish that *no set of circumstances exists* under which the [Step-Down Program's review scheme] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987) (emphasis added). This they cannot do—including in light of the undisputed evidence that so many inmates, including named Plaintiffs, have successfully transitioned out of the Step-Down Program.

[39] Brooks regressed in the program when he was found attempting to make a weapon in his cell, Defs.' Br. at 36 ¶ 97; Mukuria, when he attempted to incite a riot among other inmates, *id.* at

procedures—let alone any particular review of any particular Plaintiff by any particular Defendant—are necessarily so arbitrary and meaningless as to constitute a due-process violation. *See Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) (noting that "[p]rison officials must engage in some sort of periodic review of the confinement of such inmates" but emphasizing that the "decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner").

Second, Plaintiffs posit that Step-Down reviews cannot be constitutionally valid because of the types of information considered during the various reviews of inmates' status within the Step-Down Program.[40] Plaintiffs' conclusion relies on a series of mistaken assumptions, disputed facts, and overly narrow focus on the Building Management Committee ("BMC").

They allege that "BMC reviews, and the criteria that the BMC applies in them, do not meaningfully evaluate the risk an individual prisoner would pose to the general population environment . . . ." Pls.' Br. at 42. To the extent Plaintiffs are now contesting the propriety of their initial assignment to Level S, they failed to make or press such an allegation. *See* Compl. ¶ 233 (asserting a due-process violation based on the allegation that "Named Plaintiffs and class members are (or were) entitled to meaningful periodic review of whether there is (or was) a

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42 ¶ 115. Riddick was resolved "not [to] have a cell partner" and intentionally refused to participate in programming to avoid progressing back to general population. *Id.* at 43 ¶ 119. Thorpe regressed after publicly masturbating during an IM-Closed contact visitation, and he thereafter refused to participate in programming. *Id.* at 46 ¶ 125.

[40] Plaintiffs make much of the Fourth Circuit's comments that Step-Down reviews "rest on reasons 'having nothing to do with' prisoners' security risk and [that] there is a dissonance between legitimate penological goals and the processes Step Down institutes." Pls.' Br. at 30–31 (cleaned up; quoting *Thorpe*, 37 F.4th at 946 (in turn quoting the Complaint)). But that's merely what the Fourth Circuit noted "at the pleading stage," *id.* at 30, when it had to accept Plaintiffs' generalized allegations as if they were true. Those allegations, which remain unsupported by any undisputed facts, and in fact are directly contrary to the established record evidence, are insufficient to obtain summary judgment.

sustaining and valid reason for *continuing to hold them* in long-term solitary confinement.") (emphasis added).[41] Moreover, a myopic focus on the BMC does not account for the multiple other layers of review afforded inmates.

In any event, Plaintiffs' challenge to the criteria the BMC uses in determining "whether prisoners can advance within the Step-Down Program," Pls.' Br. at 30, comes up short. The factors considered by the BMC in evaluating an inmate's privilege level—an inmate's time at each level, completion of required programming, adherence to behavioral expectations, and avoidance of disciplinary charges, *see* Pls.' Br. at 32–36—are perfectly legitimate. Plaintiffs' assertion that those considerations are irrelevant to evaluating a prisoner's "security risk" amounts to a denial that the Step-Down Program and its practices are based on evidence-based principles. *See, e.g.*, Resp. to Pls.' SUF ¶¶ 7–11. As Defendants have explained, these considerations are directly relevant to assessing the institutional risks associated with an inmate's behavior. Defs.' Br. at 11 ¶ 21.

> The disciplinary violation goals are designed to improve respect for authority, improved decision making, and replace impulsivity with forward thinking. The responsible behavior goals are designed to develop a routine pattern of responsible and mature behavior. The program participation goals are to involve offenders in evidence-based programs that are proven to have a positive impact on offender thinking, beliefs, and attitudes which, in turn, support and reinforce responsible and mature behavior.

Defs.' Br. Ex. 12 [ECF 381-12] at VADOC-00053687. Plaintiffs offer no evidence that the use of these factors continually traps in the Step-Down Program inmates who "demonstrate no continuing

[41] As previously noted, *see* Mem. in Supp. of Defs.' Mot. to Dismiss [ECF No. 22] at 20 n.11, any such challenge would be barred by the applicable statute of limitations, given that each named Plaintiff allegedly had been assigned to Level S more than two years before the filing of the Complaint.

risk of harm." Pls.' Br. at 31.[42] Nor are they correct that the Step-Down reviews do not assess "whether there is a valid and sustaining penological reason" for an inmate's continued placement in the Step-Down Program. Plaintiffs cannot isolate a single phase of the Step-Down review process, assert that it is insufficient (particularly in the face of conflicting record evidence), and thereby claim entitlement to summary judgment.[43]

Third, Plaintiffs' allegation that inmates are denied "meaningful" review of their placement in the Step-Down Program, Compl. ¶ 233, also rests on the incorrect assumption that Defendants use "non-substantive 'rationales' for a prisoner's long-term solitary confinement," *see id.* ¶ 178. For instance, they assume that the conclusion that an inmate "needs a longer period of stable adjustment," *see id.*, calls into question that "any meaningful evaluation was done," Pls.' Br. at 41. To the extent Plaintiffs find that phrasing devoid of meaning, and therefore violative of due process, that is disputed. The record testimony is that "longer period of stable adjustment" means that the time that an inmate has been at SL-S is insufficiently long to ensure that he is no longer a threat to the orderly operation of the institution. Resp. to Pls.' SUF ¶ 103 (quoting Transcript of Dwayne Turner dated March 17, 2023 ("Turner Dep."), cited portions attached as Exhibit 24, at 124:17–125:17).

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[42] Plaintiffs' arguments repeatedly invoke the experience of Nicolas Reyes, an inmate formerly in the Step-Down Program. *See, e.g.*, Pls.' Br. at 31, 33–34. The example of Reyes is irrelevant because he is not a member of the class. *See* Resp. to Pls.' SUF ¶¶ 70–73.

[43] Moreover, Plaintiffs' denunciation of the factors considered in Step-Down decisions improperly second-guesses the judgment of the officials who created the program. As the Supreme Court has frequently stated, prison officials must "be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell*, 441 U.S. at 547–48. Indeed, the "difficulties of operating a detention center must not be underestimated by the courts . . . [and] correctional officials . . . must have substantial discretion to devise reasonable solutions to the problems they face." *Prieto*, 780 F.3d at 255 (cleaned up; quoting *Florence v. Bd. of Chosen Freeholders*, 566 U.S. 318, 326 (2012)).

In any event, Plaintiffs offer no evidence that a "longer period of stable adjustment" cannot be the outcome of a "meaningful" review process. The "decision whether a prisoner remains a security risk will be based on facts relating to a particular prisoner," *Hewitt*, 459 U.S. at 477 n.9, and Plaintiffs provide no specific examples where the outcome of a review should have been different. Indeed, there is no due-process guarantee that the outcome of a successive review be different from a previous one. *See Tri Cnty. Paving, Inc. v. Ashe Cnty.*, 281 F.3d 430, 436 (4th Cir. 2002) (due process "does not require certain results"). A successive review need not even take new information into account. In *Hewitt*, the Supreme Court explained that the required "periodic review" does "not necessarily require that prison officials permit the submission of any additional evidence or statements"; rather, the Court anticipated that review decisions "will be based on facts . . . which will have been ascertained when determining to confine the inmate to administrative segregation" as well as "the officials' general knowledge of prison conditions and tensions, which are singularly unsuited for 'proof' in any highly structured manner." 459 U.S. at 477 n.9.

For all these reasons, Plaintiffs are not entitled to summary judgment on their due-process claim that Defendants failed to provide a "meaningful" review of their placement in the Step-Down Program.

2. There is no undisputed evidence that the periodic reviews of inmates' placement in the Step-Down Program are not procedurally adequate.

Next, Plaintiffs assert that the reviews provided in the Step-Down Program "offer no assurance that the Plaintiffs have not been erroneously confined in [it]." Pls.' Br. at 39.[44] They

[44] In questioning the adequacy of the reviews provided to Step-Down inmates, Plaintiffs appear not to be challenging the frequency of reviews. *See* Pls.' Br. at 30 (noting that "VDOC policy instructs teams to review prisoners once a month, once every three months, and twice a year"); *but see* Pls.' SUF ¶ 94 (Level S inmates given an ICA hearing "at least" every 90 days); Pls.' SUF ¶ 57 (pointing out that the BMC convenes *at least* monthly); Va. Code Ann. § 53.1-

are wrong.

As explained above, Plaintiffs waste much ink explaining why the periodic reviews conducted by the BMC and ERT "fail to offer minimally adequate process under *Wilkinson*." Pls.' Br. at 41; *see also id.* at 40–43 (cataloguing a variety of ways that BMC and ERT reviews are deficient). These arguments are mere strawmen. Defendants have never claimed that inmates are entitled, for instance, to participate in BMC and ERT proceedings or to contest the outcomes through the grievance process. Rather, the process to which Plaintiffs are due is provided by the Institutional Classification Authority ("ICA"). As Plaintiffs state, the circumstances in which inmates receive "formal process" in connection with "ICA hearings" include when they "relate to increasing an incarcerated person's security level [or] removing an incarcerated person from general population." Pls.' SUF ¶ 93. Each Level S inmate receives an ICA hearing at least every 90 days as part of the Step-Down Program. Pls.' SUF ¶ 94 (citing Step-Down Manual). Plaintiffs do not assert that any inmates, in general or in particular, have been deprived of these regular reviews.

The Fourth Circuit understood Plaintiffs not to be "request[ing] any discrete procedures like advance notice, an opportunity to offer witnesses, or a possibility of appeal." *Thorpe*, 37 F.4th at 944. Yet they appear to be demanding such procedures now. Contrary to Plaintiffs' brief, however, the ICA already "does . . . provide basic procedural protections" like these. Pls.' Br. at 41; *see also* Defs.' Br. at 15 ¶ 34. A formal due process hearing—requiring formal notification to the inmate indicating the reason for, purpose of, and possible results of the classification hearing 48 hours in advance of the scheduled hearing, the inmate's right to be present at the hearing, and

39.2(C) (as of July 1, 2023, requiring weekly reviews). Even as Plaintiffs have stated the facts, the frequency of ICA reviews compares very favorably with the once-a-year review upheld in *Wilkinson*. *See* 545 U.S. at 224.

notice of the results of the hearing and the reason for the decision—is required before assignment to SL-S. *See* Defs.' Br. Ex. 24 [ECF No. 381-24] (O.P. 830.1, effective Feb. 1, 2021) at 3, 8.[45] Inmates may appeal any classification decision through the offender grievance procedure. *Id.* at 13.

Plaintiffs offer no undisputed facts to support their contention that the ICA review is procedurally deficient. *See, e.g.*, Resp. to Pls.' SUF ¶¶ 96–97. Because they cannot dispute that inmates have the opportunity to attend and participate in the ICA hearing, they resort to criticizing the fact that the hearing typically occurs at an inmate's cell door. Pls.' Br. at 41 (citing Pls.' SUF ¶ 101). But they fail to explain why the mere location of the hearing implicates due process. *See, e.g.*, *Avina v. Adams*, No. 1:10-CV-00790-AWI, 2012 WL 2995473, at *9 (E.D. Cal. July 23, 2012) ("Petitioner's claim that his hearing was held at his cell door is not cognizable. There is no requirement that disciplinary hearings be held at a specific [location]." (citing *Wolff v. McDonnell*, 418 U.S. 539 (1974)). Nor does a decision issued following an ICA hearing—*e.g.*, that an inmate requires a "longer period of stable adjustment" before his classification changes, *see* Pls.' Br. at 41 (criticizing the "conclusory nature" of that rationale)—become suspect merely because of how it's phrased. *See* Part II.B.1 *supra* (refuting Plaintiffs' assertion that Step-Down reviews are not "meaningful").

Contrary to Plaintiffs' assertion, Pls.' Br. at 39, the ICA review easily passes muster under the *Mathews* three-factor analysis. *See Wilkinson*, 545 U.S. at 224–25 (discussing *Mathews v. Eldridge*, 424 U.S. 319 (1976)). First, the "private interest that will be affected" is the length of

[45] To the extent Plaintiffs assert that they are entitled to summary judgment on the basis that some named Plaintiffs were not provided due process in connection with their security level increase to Level S, that assertion relies on numerous disputed facts. *See, e.g.*, Resp. to Pls.' SUF ¶¶ 18–20.

time inmates spend in the Step-Down Program—but that is a function of their own willingness to participate in programming and comply with stated behavioral expectations. And, as the Supreme Court has counseled, "[p]risoners held in lawful confinement have their liberty curtailed by definition, so the procedural protections to which they are entitled are more limited than in cases where the right at stake is the right to be free from confinement at all." *Wilkinson*, 545 U.S. at 225.

As to the second *Mathews* factor, the risk is low of an "erroneous deprivation" of inmates' interest in avoiding prolonged placement in the Step-Down Program, as is "the probable value, if any, of additional or substitute procedural safeguards." *Id.* Plaintiffs do not dispute that inmates are assessed regularly by multidisciplinary teams of staff, with these reviews affecting the pace of their progression through the Step-Down Program and eventually back to general population. These regular reviews largely mirror the procedural protections that the Supreme Court has previously upheld. *See id.* at 225, 229 (if a policy "provides informal, nonadversary procedures comparable to those [previously] upheld, . . . no further procedural modifications are necessary in order to satisfy due process under the *Mathews* test").[46] The Step-Down Program more than satisfies the requirement that prison officials minimally engage in "some sort of periodic review" of the confinement of such inmates. *Hewitt*, 459 U.S. at 477 n.9. No "additional or substitute procedural safeguards" are required, *Wilkinson*, 545 U.S. at 225; *see also Austin v. Wilkinson*, 372 F.3d 346, 351–52 (6th Cir. 2004), *aff'd in relevant part*, 545 U.S. 209 (2005) (describing procedural protections similar to those afforded here); certainly no additional safeguards are

[46] Review-process features that might risk erroneous deprivation include a single layer of review, the lack of a requirement to provide the basis for a decision, and the lack of an opportunity to contest the decision, *see Wilkinson*, 545 U.S. at 209–10—all features absent from the Step-Down Program.

necessary to actuate the process here.[47]

The third *Mathews* factor—"the Government's interest, including . . . the fiscal and administrative burdens" entailed by additional procedures, *Wilkinson*, 545 U.S. at 225—also weighs against Plaintiffs. The Supreme Court has instructed that "courts must give substantial deference to prison management decisions before mandating additional expenditures for elaborate procedural safeguards when correctional officials conclude that a prisoner has engaged in disruptive behavior." *Id.* at 228. But Plaintiffs' claims implicate a more fundamental interest on VDOC's part—internal security, which "[i]n the context of prison management . . . is a dominant consideration." *Id.* at 227; *see also Pell v. Procunier*, 417 U.S. 817, 823 (1974) ("[C]entral to all other corrections goals is the institutional consideration of internal security within the corrections facilities themselves."). If the additional (or more "meaningful") "process" that Plaintiffs seek is, in effect, a different outcome—reclassification out of the Step-Down Program—that would seriously imperil "the Government's interest" in keeping out of general population those inmates who "need[] a longer period of stable adjustment." Compl. ¶ 178. Any process must reflect that the "State's first obligation must be to ensure the safety of guards and prison personnel, the public, and the prisoners themselves." *Wilkinson*, 545 U.S. at 227.

[47] As noted above, there is no dispute that, pursuant to the Step-Down Program's review protocol, hundreds of inmates have transitioned out of segregated confinement and returned to general population—including each of the named Plaintiffs still in VDOC custody. *See* Part II.B.1 *supra*.

III. Plaintiffs are not entitled to summary judgment on VDOC's affirmative defenses of undue burden and fundamental alteration.

Plaintiffs' motion for partial summary judgment on VDOC's affirmative defenses of undue burden and fundamental alteration[48] are predicated on arguments that are untethered to the Court's rulings and should be denied for multiple independent reasons.

A. Plaintiffs cannot obtain summary judgment on a class-wide basis.

To obtain any sort of class-wide relief, a class must be certified and at least one of the named Plaintiffs must belong to the proposed class. *See Bennett v. Westfall*, 640 F. Supp. 169, 170 (S.D.W. Va. 1986), *aff'd*, 836 F.2d 1342 (4th Cir. 1988); *Abron v. Black & Decker (U.S.) Inc*., 654 F.2d 951, 955 (4th Cir. 1981).

Here, no named Plaintiff belongs to the disability classes certified by the Court. The Court's amended definition for the disabilities classes includes only those inmates classified by VDOC at the MH-2S "Substantial Impairment" mental health code or higher at the time they were classified in Security Level S or 6. August 8, 2023 Opinion and Order (ECF No. 358) at 6–8, 14. Named Plaintiffs Steven Riddick, Dmitry Khavkin, Brian Cavitt, and Gary Wall—the only four named Plaintiffs identified in the Complaint as being "disabled"—indisputably do not meet the Court's amended class definition. And Plaintiffs have yet to identify a new named Plaintiff who meets the definition and, thus, could serve as a class representative. Without a class representative, Plaintiffs cannot seek class-wide relief.

Bennett illustrates this principle. There, the plaintiff was a prisoner who challenged conditions at a county jail on behalf of a class of other inmates. *Bennett*, 640 F. Supp. at 170. The plaintiff, though, had been transferred out of the county jail into another facility. *Id.* The court

[48] VDOC also asserted the affirmative defense of direct threat, but Plaintiffs do not seek summary judgment on this affirmative defense.

held that the plaintiff's "removal from the situation at the jail certainly affects his ability to adequately represent the interests of any purported class," as "a named class representative must be a member of the class at the time the class is certified." *Id.* (citing *E. Tex. Motor Freight Sys. v. Rodriguez*, 431 U.S. 395, 97 (1977); *Sosna v. Iowa*, 419 U.S. 393 (1975); *Clay v. Miller,* 626 F.2d 345 (4th Cir.1980)). Thus, the plaintiff could proceed with his claims only in "a singular nature." *Id*.

So too here. Absent a class representative (and, thus, a properly certified class), named Plaintiffs Riddick, Khavkin, Cavitt, and Wall may seek relief only on their individual claims, not class-wide summary judgment. *See, e.g.*, *Messer v. Bristol Compressors Int'l, LLC*, No. 1:18cv00040, 2020 WL 1472217, at *1 n.2 (W.D. Va. Mar. 26, 2020) (noting that "[b]ecause notice to the [certified] class has not been provided" the court's rulings "bind only the named plaintiffs and not the non-plaintiff class members" (citing *Faber v. Ciox Health, LLC*, 944 F.3d 593, 602–04 (6th Cir. 2019)); *see also Abron*, 654 F.2d at 955.

Any class-wide motion for summary judgment as to VDOC's affirmative defenses of undue burden and fundamental alteration is premature and should be denied.

B. Plaintiffs cannot obtain summary judgment on behalf of any individual named plaintiff.

To 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 that would have allowed him the meaningful access he seeks, and that the defendant denied the reasonable accommodation that was proposed. *See Halpern v. Wake Forest Univ. Health Scis.*, 669 F.3d 454, 465 (4th Cir. 2012) (defendant was not "obligated to accommodate [the student's] disability until he 'provided a proper diagnosis . . . and requested specific accommodation'") (quoting *Kaltenberger v. Ohio Coll. of Podiatric Med.*, 162 F.3d 432,

437 (6th Cir. 1998)); *see also Reyazuddin v. Montgomery Cnty.*, Md., 789 F.3d 407, 414 (4th Cir. 2015) (plaintiff must allege defendant "had notice" of her disability and then deliberately "refused to make any reasonable accommodation"); *Dee v. Md. Nat. Capitol Park & Plan. Comm'n*, No. CBD-09-491, 2010 WL 3245332, at *6 (D. Md. Aug. 16, 2010) (to bring a Title II claim for failure to provide "a reasonable accommodation a plaintiff must 'have, at minimum, communicated to [the entity] a wish for accommodation of his disability'"); *Gardner v. Mabus*, No. 2:14CV352, 2014 WL 11512862, at *2 (E.D. Va. Dec. 23, 2014) (Rehabilitation Act claim failed because plaintiff "never requested an accommodation").

Thus, to establish their ADA and RA claims, named Plaintiffs Riddick, Khavkin, Cavitt, and Wall must show that they requested an accommodation and that the request was rejected. Only after that showing would VDOC's affirmative defenses of undue burden and fundamental alteration be relevant to these named Plaintiffs' individual claims.

But there is no evidence that Riddick, Khavkin, Cavitt or Wall made any request for a reasonable accommodation to participate in VDOC's Step-Down Program. *See* Defs.' Br. at 109–12.[49] Nor is there evidence that any of them actually required a reasonable accommodation to participate in VDOC's Step-Down Program, as it is undisputed that each of them participated in and completed the program. *See id.* at 108–09, 111. And, thus, there is no evidence that VDOC rejected the never-requested accommodations.

[49] *See also* Pls.' Br.at 43 (stating that "VDOC conceded that it has not identified any request for accommodation to the Step-Down Program made by any potential Class Member on the basis of a mental health disability between August 1, 2012 and the present" (citing Pls.' Ex. 36 (VDOC Responses and Objections to Plaintiffs' First Set of Requests for Admission) at No. 36)); *id.* at 45 (citing Pls.' Ex. 14 (Clarke Dep.) at 222:2–5 ("I have not been involved in any conversations about anyone needing accommodations to be able to complete the program."); *id.* at 47 (citing Pls.' Ex. 51 (Marano Dep. at 142:20–22 ("I do not recall being asked to look into accommodations specifically for [the Step-Down] Program.")).

Plaintiffs argue "*[t]hrough Mr. Wells*," their purported expert witness on ADA/RA-related issues, that they "provided possible modifications and accommodations to the Step-Down Program and to the practices, policies, and procedures at ROSP." Pls.' Br. at 43–44 & n.14 (citing "Ex. 85, Wells Rep. ¶¶ 3, 63–64, 66–66, 72"). But Wells did not make requests for *accommodations* on behalf of the named Plaintiffs. Wells is not a party to the lawsuit and his report cannot be construed as a request for accommodation for any named Plaintiff to participate in VDOC's Step-Down Program because that report was issued *after* the named Plaintiffs completed VDOC's Step-Down Program. *See* Defs.' Br. at 108–09.[50]

Plaintiffs alternatively argue "*[t]hrough Named Plaintiffs' Interrogatory Responses*," they "provided possible modifications and accommodations to the Step-Down Program and to the practices, policies, and procedures at ROSP." Pls.' Br. at 43–44 and 49 (citing Ex. 106 [Class Plaintiff Wall's Answers and Objs. to Defs.' 1st Set of Interrogs.] at Nos. 4, 9; Ex. 107 [Class Plaintiff Wall's Supp. Answers and Objs. to Defs.' 1st Set of Interrogs.] at Nos. 4, 9). But Wall's interrogatory responses also cannot be construed as a request to accommodate his participation in VDOC's Step-Down Program, as they were served in November 2021 and June 2023, respectively,

[50] Even setting aside the fact that Wells's report cannot satisfy Plaintiffs' duty to request an accommodation, the paragraphs of the Wells report that Plaintiffs cite (Paragraphs 3, 63–64, 66–66, and 72) are not requests for accommodations to allow these individuals (or anyone else) to participate in the Step-Down Program. Rather, they are vague observations for which no assessment of undue burden or fundamental alteration is even possible. *Pahlavan v. Drexel University College Of Medicine*, 438 F.Supp.3d 404, 424 (E.D.Pa. 2020). For example, Wells opines "it may require extra effort to ensure that this population is aware of their rights and understands what processes are available to them to assert their rights," but Plaintiffs do not explain what types of "extra effort" would be a sufficient accommodation to inform the inmate population about their rights and the processes available to assert them. *See* Wells Rep. [ECF No. 383-85] ¶ 72.

after he completed VDOC's Step-Down Program.[51] *See* Pls.' Exs. 106 and 107; Defs.' Br. at 108–09.[52]

As there is no evidence that a request for reasonable accommodation was made by the named Plaintiffs, and because neither Wells's report nor Wall's interrogatory responses are requests for accommodation to participate in VDOC's Step-Down Program, VDOC had no duty to assess the undue burden or fundamental alteration consequences of granting such requests. If and when a named Plaintiff makes an individual request for reasonable accommodation regarding his participation in the Step-Down Program, VDOC will assess whether granting the requested accommodation would present undue burden or fundamental alteration concerns. At present, however, no duty to assess undue burden or fundamental alteration has been triggered. Thus, any motion to dismiss VDOC's affirmative defenses of undue burden and fundamental alteration on an individual basis is premature and should be denied.

C. Conflicting expert opinions create genuine issues of material fact that preclude summary judgment.

Plaintiffs argue VDOC has not adduced factual evidence to support its undue burden and fundamental alteration defenses. Again, the Court need not reach this issue, because none of the named Plaintiffs identified in the Complaint as being part of the "disabilities class" made a request

[51] Moreover, to the extent Wall states in his interrogatory responses that reforms at VDOC should include "not requiring prisoners . . . such as Class Plaintiff Wall to complete the Challenge Series and the Step- Down Program in order to leave solitary confinement," or "the elimination of long-term solitary confinement for all prisoners at Red Onion and Wallens Ridge State Prison," he is not requesting a reasonable accommodation to *participate* in the Step-Down Program. *See id.*

[52] Nor can Wall's interrogatory responses serve as the basis for requesting a class-wide accommodation. As explained above, named Plaintiff Wall does not meet the Court's amended definition for the disabilities classes, so he is not (and cannot be) a class representative for the disabilities class, and cannot request class-wide relief. *See* August 8, 2023 Order [ECF No. 358] at 6–8, 14.

for a reasonable accommodation relating to the Step-Down Program. But even on its own terms, the argument fails. Plaintiffs frame the competing factual assertions by Wells and VDOC's consultant, Lenard Vare, as an absence of evidence from VDOC's side. Not so. These are genuine issues of disputed fact that preclude summary judgment as to VDOC's undue burden and fundamental alteration defenses.

Wells repeatedly opined that VDOC does not offer "an effective incarcerated person disability program" because it does not have a "comprehensive real-time networked tracking system" to track "ADA disabilities, ADA accommodation needs, ADA accommodations provided (*e.g.*, as related to effective communication, disciplinary and other due process events, health care, disability identification, intake, orientation, and ADA coordinator contacts)." *See* Wells Rep. [ECF No. 383-85] ¶¶ 59, 109–12, 118–20, 201, 205, 207–08, 212. VDOC's expert, Vare, disagreed with Wells, noting that neither the ADA nor its related regulations require the creation of such a tracking system. Vare Rep. at 89–90 (adding that requiring VDOC to purchase and implement such a system would be "extremely onerous"). *Id.* Wells admitted as much at his deposition, conceding that "the "comprehensive real time networked tracking system" he faults VDOC for not having is not legally required. Wells Dep., Exhibit 42 at 58:1–10. That Wells nonetheless believes that such a system, while not legally required, is somehow needed for an "incarcerated person disability program" to be "effective," and that Vare disagrees and believes procuring and installing such a system would be "extremely onerous," is not a basis on which to grant summary judgment. Plaintiffs essentially ask the Court to credit Wells's conclusions over Vare's—but that is not a determination appropriate for summary judgment. If anything, the disagreement between Wells and Vare necessarily precludes summary judgment. *See Biedermann*

Techs. GmbH & Co. KG v. K2M, Inc., 528 F. Supp. 3d 407, 442 (E.D. Va. 2021) ("the Court finds that the conflicting expert opinions in this case create genuine disputes as to material facts").

Additionally, the disagreement between Vare and Wells arises from the fact that Wells opined repeatedly that certain unnamed inmates with alleged mental health impairments were not given unspecified accommodations to progress through the Step-Down Program. *See* Wells Rep. ¶¶ 15, 182, 189–90, 196 (suggesting reasonable accommodations for inmates with mental health disabilities "could include" "a change in housing assignment," "a change in housing conditions," "staff assistance with activities as necessary," "additional monitoring," and "additional assistance to navigate programs and procedures"); *see also* Wells Dep., Exhibit 42 at 76 (discussing the possibility of relocating inmates to "safe locations" for instructional assistance in a "safe, relatively private, yet secure environment"). Vare responded to Wells by noting the undue burden and direct threat concerns associated with granting accommodations that might permit inmates who had committed violent crimes with opportunities to harm others. Vare Rep. [ECF No. 383-81] at 82 ("[C]onsidering the direct safety and security threats that these individuals posed to other inmates and prison staff, extensive modifications to current safety and security protocols would be required, and potentially tremendous additional cost and risk, to allow the additional access to programs Mr. Wells appears to advocate.").[53] That Wells believes one or more accommodations may need to be provided, and that Vare believes undue burden and direct threat concerns may need to be assessed when considering whether to grant those accommodations, is no reason to grant summary judgment.

[53] Wells does not disagree with Vare on this point. He admitted at deposition that direct safety and security risks are "always of paramount concern" and "must be reasonably considered" when assessing accommodations requested by inmates. *See* Wells Dep., Exhibit 42 at 83, 85–86; *see also* Wells Dep. at 90–91 ("Obviously it's a case-by-case basis . . . and would depend on the accommodation and the person with respect to direct safety threat").

D. Plaintiffs' remaining arguments lack merit.

1. No duty to assess affirmative defenses under 28 C.F.R. § 35.164 has been triggered and, in any event, the cited regulation has no application to this case.

To the extent Plaintiffs argue that summary judgment on VDOC's affirmative defenses of undue burden and fundamental alteration is warranted due to an alleged failure by VDOC to "undertake a specific assessment of the accommodations at issue to determine the impact of the accommodation on the covered entity" under 28 C.F.R. § 35.164, they are wrong. As discussed above, since there is no mechanism for Plaintiffs to request class-wide relief, and since no named Plaintiff made an individual request for reasonable accommodation, no duty to undertake a specific assessment of the undue burden or fundamental alteration has been triggered.

Moreover, 28 C.F.R. § 35.164 arises from the "Communications" portion of the DOJ regulations, applies to the provision of auxiliary aids, and concerns assessing whether the failure to provide auxiliary aids would cause a fundamental alteration or be an undue burden. Here, Plaintiffs have not requested auxiliary aids as an accommodation VDOC must provide to permit inmates to participate in the Step-Down Program, or for any other reason. The cited regulation has no application to the present case.

Plaintiffs claim that *American Council of Blind of New York, Inc. v. City of New York*, 495 F. Supp. 3d 211 (S.D.N.Y. 2020), supports their argument, but that case is inapposite because the different regulation relied on in that case also is inapplicable here. There, the plaintiffs alleged the defendant violated ADA Title II and the RA by not providing Accessible Pedestrian Signals at crosswalks. *Id.* at 219. The court held that the defendant could not raise an undue burden defense because, under 28 C.F.R. § 35.150(a)(3), the head of a public entity or a designee did not analyze the action sought by plaintiff and provide a written statement supporting its conclusion of undue burden. *Id.* at 239–40. But 28 C.F.R. § 35.150(a)(3) governs the removal of architectural barriers

(such as crosswalks that do not provide access to blind pedestrians). Plaintiffs here do not complain about architectural barriers for inmates with mental disabilities.[54]

2. Plaintiffs repeatedly mischaracterize the evidence they claim supports their arguments.

Contrary to Plaintiffs' arguments, Dr. Denise Malone, VDOC's Chief of Mental Health and Wellness, did not "concede that VDOC has not made *any* modifications to the Step-Down Program to accommodate prisoners with mental health disabilities." Pls.' Br. at 47. To the contrary, she testified at length about VDOC's process for identifying impairments and granting reasonable accommodations:

> First and foremost, we need to look at the functioning of that inmate and figure out what the issue is. So do they need more individual work, do they need a different group, do they need medication fine-tuning or tweaking. So, again, it can't be a one size fits all. I have known of mental health staff [and] treatment officers [] to individually work with an inmate and maybe they could make sessions shorter because the inmate has an issue with attention span right then or they could change how the resources [], whether it's a handout or a worksheet or whatever, maybe do the writing for them. Encouraging is probably our strongest tool in the toolbox, is to just keep assessing what's going on with the person by clinical interview and by asking the other disciplines what they're seeing and a lot of motivational interviewing skills.

Transcript of Denise Malone dated April 12, 2023 ("Malone Dep."), cited portions attached as Exhibit 41, at 206–07; *see also id.* at 207 (confirming that "treatment officers will work with

[54] Fundamental alteration or undue burden defenses may be raised in different ways and pursuant to different regulations. For example, the defenses may be raised pursuant to 28 C.F.R. § 35.130(b)(7)(i) (a "public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity"). This regulation imposes no requirement that "the head of the public entity or his or her designee" assess whether a proposed modification would result in a fundamental alteration or undue burden. *See also Halpern,* 669 F.3d at 464 (proposed modification is not reasonable if defendant simply shows "that the proposed modification will cause 'undue hardship in the particular circumstances'").

prisoners to help them complete the challenge series"); *id*. at 209 ("the modification is on the part of the staff addressing these underlying issues, and, again, it could be as rudimentary as using motivational interviewing and encouragement skills in addition to what is underlying this"); *id*. at 213 ("intervention by staff"). Dr. Malone's testimony does not support Plaintiffs' arguments.

Nor did Barry Marano, VDOC's ADA Services Coordinator, "concede that VDOC has not made *any* modifications to the Step-Down Program to accommodate prisoners with mental health disabilities." Pls.' Br. at 47. To the contrary, he testified that he "do[es] not recall being asked to look into accommodations specifically for [the Step-Down] Program."[55] *See* Transcript of Barry Marano dated March 31, 2023 ("Marano Dep."), cited portions attached as Exhibit 55, at 142. Marano's testimony does not support Plaintiffs' arguments.

And Harold Clarke, VDOC's former Director, did not testify that he never analyzed the accommodations proposed in this lawsuit, the potential cost of such accommodations, or the accommodations' impact on the Step-Down Program or VDOC's operations. He testified he was "not aware of whether accommodations are provided to people who might have difficulty completing the programming in the Step-Down program" because "I have not been involved in any conversations about anyone needing accommodations to be able to complete the program; he added, "I can tell you that throughout our Department, we make accommodations for individuals in programs, so I'd be surprised if they would not seek to do the same for those in the Step-Down program," and emphasized that he thinks it is important that people who have disabilities are

[55] Mr. Marino's testimony is consistent with VDOC's position that there is no evidence that named Plaintiffs Riddick, Khavkin, Cavitt, and Wall sought a reasonable accommodation to participate in VDOC's Step-Down Program. *See* Defs.' Br. at 109–12.

accommodated in any way they reasonably need. *See* Clarke Dep., Exhibit 50, at 222. Director Clarke's testimony does not support Plaintiffs' arguments.[56]

Lastly, Dr. William Lee, VDOC's former Mental Health Clinical Supervisor for the Western Region, did testify that "there was a set of offenders . . . who were stuck at security level S or 6" because "they could not complete the step–down programming due to their mental health issues." Pls.' Br. at 47 (quoting Pls.' Ex. 73 (Lee Dep.) at 137:20–138:5). But Plaintiffs fail to put Dr. Lee's testimony into context. The exhibit Dr. Lee testified about was an email identifying a discussion of "alternative 'pathways' to help offenders to progress and move forward" in the Step-Down Program, *see* Ex. 56 (VADOC-00044006) at 2. His testimony did not address any need to make accommodations to comply with the ADA or RA. Further, Plaintiffs' counsel elected to present and question Dr. Lee about only the initial seven-year-old email in Exhibit 56—not the response indicating that "[t]here is already a process in place" for the issue identified by Dr. Lee. *Id.* at 1. It also indicates that "[t]he number of SL-'S' type of offenders at MCTC has dropped dramatically over the years." *Id.*[57] Contrary to Plaintiffs' arguments, a review of the underlying documentation shows that VDOC accommodated inmates with mental health impairments. Further, VDOC has implemented additional safeguards since 2016, including the Secure Diversionary Treatment Program and the prohibition against keeping any inmate with a Mental

[56] Mr. Clarke's testimony is consistent with VDOC's position that there is no evidence that named Plaintiffs Riddick, Khavkin, Cavitt, and Wall sought a reasonable accommodation to participate in VDOC's Step-Down Program. *See* Defs.' Br. at 109–12.

[57] Jeffrey Kiser, former Warden of ROSP, agreed. *See* Transcript of Jeffrey Kiser dated February 10, 2023 ("Kiser Dep."), cited portions attached as Exhibit 57, at 248:3–18 ("[W]e did have offenders who could not complete it due to -- and, again, the psychologists, psychiatrists would determine that, that they had mental illnesses. And they would be removed from the program [and] would typically go to Marion Correctional Unit[.]").

Health Classification Code of MH-2S or higher in restorative housing for more than 28 days. ECF No. 381 at 30–31 ¶¶ 85–87.

CONCLUSION

The Court should deny Plaintiffs' motion for summary judgment.

October 5, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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INDEX OF EXHIBITS

No.	Description
1	Defendants' Response to Plaintiffs' Statement of Undisputed Material Facts in Support of Plaintiffs' Amended Motion for Partial Summary Judgment
2	Email from Maya Eckstein to Vishal Agraharkar and others dated April 28, 2023
3	VADOC-00000892, 896, 900
4	VADOC-00004586-88
5	ICA Forms-Arrington (under seal)
6	O.P. 830.5
7	Email from Dennis Fairbanks to Jared Frisch and others dated February 7, 2023
8	Mental Health Progress Notes signed by Terence Huff (VADOC-00012179)
9	Duncan Deposition Transcript (relevant pages)
10	Gallihar Deposition Transcript (relevant pages)
11	Gibson Deposition Transcript (relevant pages)
12	Declaration of Aimee Duncan
13	VADOC-00001721–30
14	Mathena Deposition Transcript, April 5, 2023 (relevant pages)
15	External Review Team Recommend Change Form (VADOC-000024217, 221, 225) (under seal)
16	Collins Deposition Transcript (relevant pages)
17	Raiford Deposition Transcript (relevant pages)
18	Declaration of Randall Mathena
19	Offender Internal Status Report (VADOC-00099046-50) (under seal)
20	Younce Deposition Transcript (relevant pages)
21	O.P. 864.1
22	Mefford Deposition Transcript (relevant pages)
23	Robinson Deposition Transcript (relevant pages)
24	Turner Deposition Transcript (relevant pages) (under seal)
25	2013 External Review Team (VADOC-00019676-729) (under seal)
26	Annual External Review Recommend Change Form (VADOC-00088065-71) (under seal)
27	O.P. 851.1
28	O.P. 830.3
29	Committee on Accreditation for Corrections Standards Compliance Reaccreditation Unit Audit of Red Onion State Prison (VADOC-00132162-2212) (under seal)
30	Mathena Deposition Transcript, April 4, 2023 (relevant pages)
31	Incident Report (VADOC-000147996) (under seal)
32	Manis Deposition Transcript (relevant pages)
33	Lee Deposition Exhibit 27 (VADOC-00049087)
34	O.P. 730.2
35	O.P. 730.5
36	O.P. 720.2
37	O.P. 720.9
38	Malone Deposition Transcript, *Reyes v. Clarke* (relevant pages)
39	Regulations Governing the Registration of [QMHPs]
40	PowerPoint Presentation (VADOC-00108342 (under seal)

No.	Description
41	Malone Deposition Transcript, April 12, 2023 (relevant pages)
42	Wells Deposition Transcript (relevant pages)
43	Haney Deposition Transcript, August 17, 2023 (relevant pages)
44	VADOC-00160533 (under seal) VADOC-00160571 (under seal) VADOC-00160570 (under seal)
45	Cavitt Deposition Transcript (relevant pages)
46	Cabeldue Deposition Transcript (relevant pages) (under seal)
47	*Restrictive Housing in the U.S.* published by the National Institute of Justice in 2016
48	Kevin A. Wright, et al., *Solitary Confinement and the well-being of people in prison*, 335 Soc. Sci. & Med. (Oct. 2023)
49	Ponton Deposition Transcript (relevant pages)
50	Clarke Deposition Transcript (relevant pages)
51	King Deposition Transcript (relevant pages)
52	Mukuria Deposition Transcript (relevant pages)
53	Snodgrass Deposition Transcript (relevant pages)
54	O.P. 830.3
55	Marano Deposition Transcript (relevant pages)
56	VADOC-00044006 (under seal)
57	Kiser Deposition Transcript (relevant pages)