IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

THE NATIONAL FEDERATION OF THE BLIND OF VIRGINIA, *et al*.,

Plaintiffs,

Case No. 3:23-cv-127-HEH

v.

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,
Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

INTRODUCTION

Blind prisoners in the custody of the Virginia Department of Corrections ("VDOC") face numerous challenges and dangers every day because VDOC fails to provide them what they need to live safely and independently. Plaintiffs—six current and former blind[1] prisoners and one non-profit organization that advocates for blind people like them—initiated this lawsuit to rectify these ongoing, systemic denials because the efforts they have made inside their institutions to obtain the tools and services they need have failed time and time again.

Citing to immaterial or disputed facts (or no facts at all), Defendant VDOC and its Defendant employees (collectively, "Defendants") argue that Plaintiffs' claims are barred for a variety of reasons. Defendants' arguments fail because (1) the exhaustion requirement of the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, does not apply to Plaintiffs where VDOC's grievance procedure is not available to them; (2) VDOC's failures to accommodate the Plaintiffs are continuing violations of federal and state law and are not barred by the statute of limitations; and (3) Defendants cannot prevail on the merits of Plaintiffs' claims at the summary judgment stage because their argument relies on material facts that remain in dispute.

The record evidence in this case demonstrates that Defendants are far from entitled to summary judgment on Plaintiffs' claims under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12131 et seq., Section 504 of the Rehabilitation Act ("Section 504"), 29 U.S.C. § 794, and the Virginians with Disabilities Act ("VDA"), Va. Code Ann. § 51.5-40 Therefore, Defendants' Motion for Summary Judgment should be denied.

STANDARD OF REVIEW

Summary judgment is appropriate only where the record establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."

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[1] We use the terms "blind" and "blindness" in their broad sense, to include people with low-vision and other vision impairments that substantially limit their ability to see, consistent with the definition laid out in the Amended Complaint. See Am. Compl. ¶ 1 n.1.

Fed. R. Civ. P. 56; *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986). A genuine dispute exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986). In considering a motion for summary judgment, the court views the facts in the light most favorable to the nonmoving party. *Tolan v. Cotton*, 572 U.S. 650, 657 (2014). The court does not weigh evidence or determine credibility but instead only determines whether the record demonstrates a genuine dispute of material fact. *Id*.; *Anderson*, 477 U.S. at 255.

STATEMENT OF GENUINE DISPUTES OF MATERIAL FACTS

As a threshold matter, Plaintiffs dispute Defendants' inclusion of non-material facts throughout their Statement of Undisputed Facts ("SUF"). *See, e.g.*, SUF ¶¶ 14, 23, 46–48, 60, 77, 86, 122, 146, 150, 186. Non-material facts are not appropriate in a statement in support of summary judgment and should be disregarded or stricken. *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986) ("Factual disputes that are irrelevant or unnecessary will not be counted."); *accord*; *Knidel v. T.N.Z., Inc., et al.*, 189 F. Supp. 3d 283, 284–85 (D. Mass. 2016) ("giv[ing] little to no consideration to extraneous factual and legal assertions propounded"). Further, these non-material, irrelevant, impermissibly vague, or unsupported facts in Defendants' SUF—which take up about four fifths of their brief—do nothing to support their Motion. As such, it is an improper end run around the close of discovery that requires Plaintiffs to respond to Defendants' purported statements of fact on an accelerated time frame. Because Plaintiffs must respond to each of Defendants' factual contentions to ensure that they do not concede any disputed facts, and because they must provide a fulsome response to Defendants' arguments, this brief is lengthy by no fault of Plaintiffs.

Plaintiffs do not dispute the following paragraphs in Defendants' Statement of Undisputed Facts: 1–13 16, 24–25, 27, 31, 34, 37–39, 42–43, 53, 55–59, 61, 65–66, 68, 73–74, 78–79, 87, 92,

95–96, 99, 151, 153–54, 156–58, 160–62,[2] 164, 166–68, 172–73, 176–79, 181–82, 184–85, 187–88, 190, 192–93, 195–96, 204–05, and 209. Plaintiffs respond to the remainder of Defendants' paragraphs below.

Plaintiffs' response to Defendants' headings: Defendants' headings are not disputed material facts that require a response.

Plaintiffs' response to SUF ¶ 14: This is not a fact material to the adjudication of any claims or defenses in this action.

Plaintiffs' response to SUF ¶ 15: Plaintiffs dispute that only 801.3 governs the "management of inmates with disabilities" and the accommodations request process Ex. 1, NFBV 017182–87; *see generally* Ex. 2, VDOC OP 720.2, *Medical Screening, Classification, and Levels of Care*; Ex. 3, VDOC OP 810.1, *Inmate Reception and Classification*, § III(B)(2)(a).

Plaintiffs' response to SUF ¶ 17: Plaintiffs dispute that facility ADA Coordinators are responsible for approving or denying all requests for accommodations. The record reflects that VDOC staff are unclear (or have directly conflicting testimonies) as to exactly who has the final authority to approve or deny an accommodation request. Ex. 4, Miller Dep. 69:1–22 (testifying that the facility ADA coordinator cannot grant accommodations without the warden's approval); Ex. 5, Talbott Dep. 31:3–35:1 (testifying that the statewide ADA Coordinator provides some guidance, and that the warden can veto for security reasons, but the facility ADA Coordinator can grant some accommodations on her own); Ex. 6, Marano 30(b)(6) Dep. 154:8–156:1 (testifying that medical providers have to determine "medical accommodations"); Ex. 7, Gore Dep. 104:3–105:3 (testifying that the medical department does not approve accommodations; it provides information about the requester's medical issues); Ex. 8, L. Shaw Dep. 217:8–223:14 (testifying

[2] Defendants' brief contains two paragraphs numbered "160" and two paragraphs numbered "161." Plaintiffs do not dispute the paragraph labeled "160" that reads: "Ms. DeBerry, Deerfield's Grievance Coordinator, has reviewed Mr. Stravitz's Grievance File and Grievance Report related to his claims in this action. DeBerry Aff. ¶¶ 31-34 and Encl. D." Plaintiffs do not dispute the paragraph labeled "161" regarding Mr. Stravitz's experiences in his job as a tutor. Plaintiffs dispute the remaining paragraphs 160 and 161.

that some accommodation requests go straight to the medical department, not through her, and that she cannot determine whether certain accommodations are necessary without a medical professional). As ¶ 17 states, the ADA Coordinator sometimes needs approval from the statewide ADA Coordinator or the Facility Unit Head. In these cases, the facility ADA Coordinator does not have the authority to overrule their final decision. Ex. 5, Talbott Dep. 31:3–35:1; Ex. 8, L. Shaw Dep. 227:4–228:1. In addition, ¶ 17 neglects to include instances in which the ADA Coordinator must seek the approval of the "health care staff," ECF No. 191-16 (VDOC OP 801.3 § V(B)), or the fact that facility ADA Coordinators routinely route requests for accommodations to the Medical Department for approval, Ex. 5, Talbott Dep. 62:2–13; Ex. 9, NFBV 019733–34, Ex. 8, L. Shaw Dep. 217:8–223:14. Additionally, VDOC OP 801.3 contemplates instances in which a qualified health care practitioner—whether they work for the facility Medical Department or are a non-institutional practitioner—may make a decision about accommodations for a prisoner without the involvement of the facility ADA Coordinator. ECF No. 191-16 (VDOC OP 801.3 §§ IV(A)(4), IV(D)). Furthermore, 801.3 is vague and/or silent about when the facility ADA Coordinator is required to seek assistance from the statewide ADA Coordinator, the Facility Unit Head, or a health care practitioner. ECF No. 191-16, VDOC OP 801.3 §§ IV(A)(4) ("as needed"), IV(D)(2)(b) ("if there are unclear issues about an accommodation"), IV(D)(2)(d) ("as necessary"), V(C)(1–3) (when a "medical accommodation" is involved, or in the event of "safety and security" concerns), VIII(B) ("as appropriate").

Plaintiffs' response to SUF ¶ 18: Plaintiffs dispute that inmates may make requests through the grievance procedure or verbally. Ex. 8, L. Shaw Dep. 132:18–134:7 (testifying that a prisoner cannot use a grievance form in order to request an accommodation because "that is not the proper protocol" and that prisoners who do request an accommodation via grievance form will be instructed "to go back and . . . put it on an accommodation request form."); *e.g.* Ex. 10, NFBV 010179–80 (denying Mr. McCann's grievance and directing him to submit an accommodation request form); Ex. 11, McCann Supp. Decl. ¶ 16; Ex. 12, Shabazz Supp. Decl. ¶ 16; Ex. 13, Stravitz Supp. Decl. ¶ 14; Ex. 14, P. Shaw Supp. Decl. ¶ 12. Plaintiffs do not dispute that VDOC OP 801.3

§ V(B)(1) provides the stated deadline for a response from the facility ADA Coordinator. Plaintiffs dispute that the facility ADA Coordinators meet the deadline. *See, e.g.*, Ex. 15, NFBV 019764 (requesting accommodations for the use of a tablet in November 2022, to which Ms. Talbott responds that she forwarded the request to medical); *but see* Ex. 16, NFBV 019731 (following up in July 2023 on the November 2022 request); *see also* Ex. 9, NFBV 019733–34 (exhibiting an email exchange in which Ms. Talbott asks Dr. Gore and Mr. Marano for their input on the request from November 2022, but Dr. Gore does not give his approval until April 2023, and Mr. Marano does not give his approval until October 2023).

Plaintiffs' response to SUF ¶ 19: Undisputed that VDOC OP 801.3 § I(F)(3)(b)(ii) and § I(F)(3)(b)(iii) state that the responsibilities listed in ¶ 19 belong to the ADA Coordinator. Disputed that the ADA Coordinators at Deerfield and Greensville actually follow through with those responsibilities. ECF 191-20, Geist Dep. 38:4–20 (stating that Ms. Shaw only started circulating a list of ADA inmates and their accommodations after Plaintiffs filed this lawsuit). Additionally, the assistant ADA Coordinators may do ADA rounds in place of the facility ADA Coordinator. Ex. 12, Shabazz Supp. Decl. ¶ 16; Ex. 11, McCann Supp. Decl. ¶ 16; Ex. 5, Talbott Dep. 41:6–22.

Plaintiffs' response to SUF ¶ 20: Plaintiffs dispute that facility staff are "available" to assist blind inmates with reading and writing documents. Every Individual Plaintiff testified that staff have routinely refused to or are too busy to help them read and write documents. Ex. 17, Courtney Dep. 155:9–16; Ex. 18, Hajacos Dep. 10:8–17; Ex. #, Hajacos Supp. Decl. ¶¶ 11; Ex. 20, McCann Dep. 23:25–24:20; Ex. 11, McCann Supp. Decl. ¶ 15–16; Ex. 21, Shabazz Dep. 14:8–12; Ex. 12, Shabazz Supp. Decl. ¶ 15–16; Ex. 22, P. Shaw Dep. 26:11–27:1, 68:21–71:12; Ex. 14, P. Shaw Supp. Decl. ¶¶ 11–12; Ex. 13, Stravitz Supp. Decl. ¶¶ 15; *see also* Section I.B, *infra* (outlining documents showing that staff are unwilling to assist). In fact, Defendant Warden Miller had to send out a memorandum to all Deerfield staff in July 2023 reminding staff of their obligations to reasonably accommodate disabled prisoners, such as, "if an inmate has a visual impairment and needs assistance reading his mail." Ex. 1, NFBV 017182. Warden Miller testified that he sent out this memorandum to clarify his expectations of staff members because "we had some issues with

inmates not being able to get assistance with the reading of their mail." Ex. 4, Miller Dep. 126:17–127:2. Plaintiffs have requested assistance verbally from both medical and ADA staff, but have been told to write up their requests nonetheless. Ex. 12, Shabazz Supp. Decl. ¶ 15–16; Ex. 14, P. Shaw Supp. Decl. ¶¶ 11–12; Ex. 13, Stravitz Supp. Decl. ¶¶ 15; *see, e.g.,* Ex. 23 at NFBV 013157–59 (documenting Mr. McCann's verbal request for a magnifier with an appropriate prescription and both Ms. Shaw and Ms. Wynn telling him to write his request to medical and to submit an accommodation request form), Ex. 24 NFBV 013162 (showing Mr. McCann's request for a key lock and Ms. Shaw's response that he should submit paperwork to receive them).

Plaintiffs' response to SUF ¶ 21: The term "page magnifier" is vague and ambiguous. To the extent that Defendants are referencing sheet magnifiers (as pictured in Ex. 25, NFBV 020100), Plaintiffs dispute that these are available in each housing unit. Ex. 17, Courtney Dep. 90:6–7, 155:2–6; Ex. 13, Stravitz Supp. Decl. ¶ 5. Plaintiffs further dispute that these magnifiers effectively help blind prisoners read or write documents. *Id.*; Ex. 19, Hajacos Supp. Decl. ¶ 6. Critically, not all blind prisoners, including some of the Plaintiffs, are aware that these tools exist in their housing units because they are not informed that the magnifiers are there. Ex. 13, Stravitz Supp. Decl. ¶ 5 Also, these magnifiers have a fixed magnification level that cannot be adjusted to meet the individual user's needs. Ex. 19, Hajacos Supp. Decl. ¶ 6. Magnifiers without the appropriate prescription magnification are ineffective aids. Ex. 18, Hajacos Dep. 35:8–36:9, 80:10–18; Ex. 20, McCann Dep. 86:24–89:14; Ex. 23 at NFBV 013157–58 (showing Mr. McCann's request for a new magnifier with appropriate magnification). Fully blind people, like Mr. Shabazz and Mr. Shaw, cannot use them at all.

Plaintiffs' response to SUF ¶ 22: Disputed. VDOC's 30(b)(6) witness testified that 801.3 has not been made into an accessible format: neither large print, nor audio format, nor accessible electronic format. Ex. 6, Marano 30(b)(6) Dep. 62:3–65:13. Another 30(b)(6) witness testified that grievance documents are not available in large print, audio, or accessible electronic format. Ex. 26, Cosby 30(b)(6) Dep. 22:11–23:11. In addition, Plaintiffs have requested large print documents, but VDOC staff have either refused or failed to make that accommodation. Ex. 18, Hajacos Dep.

52:20–53:10. Even if VDOC staff do provide some documents in large print on occasion, they have not been trained how to do so. Ex. 27, Geist 47:22–49:12; Ex. 28, Phillips Dep. 15:6–16:6, 33:3–21, 41:5–44:14, 83:19–84:11, 109:19–111:10.

Plaintiffs' response to SUF ¶ 23: Disputed. Paragraph 23 is so vague that it is meaningless, and is therefore non-material. Plaintiffs direct the Court to their responses to ¶¶ 27-65 and fully incorporate them herein.

Plaintiffs' response to SUF ¶ 26: Plaintiffs dispute that they are permitted to use voice recorders to record disciplinary proceedings. Prisoners are not permitted to have such recorders. Ex. 29, NFBV 019999 (Deerfield rejecting Mr. Shabazz's request for a recorder); Ex. 6, Marano 30(b)(6) Dep. 113:9–18 (recorders are a security concern). Plaintiffs also dispute that any recordings make the disciplinary procedure accessible to blind prisoners because VDOC does not record those hearings for prisoner use; Mr. Hajacos requested such a recording of his disciplinary hearing and was denied. Ex. 19, Hajacos Supp. Decl. ¶ 11.

Plaintiffs' response to SUF ¶ 28: Plaintiffs dispute that clerks are there to assist prisoners with "anything" they "may need." The clerks are not responsible for performing legal research for blind prisoners. Ex. 6, Marano 30(b)(6) Dep. 92:2–93:4. They do not have access to resources to create alternative formats like large print. Ex. 30, Delbridge Dep. 25:14–26:5. The librarian (who is not stationed in the library), not clerks, receives written requests for legal cases, prints those cases, and provides them to (sighted) prisoners requesting them. *Id.* 38:3–15, 39:7–40:7; Ex. 12, Shabazz Supp. Decl. ¶¶ 2–4. Clerks have received no training on technologies like SARA. *See* Ex. 30, Delbridge Dep. 116:22–117:3.

Plaintiffs' response to SUF ¶ 29: Plaintiffs dispute that the screen magnifier allows visually impaired prisoners to read legal materials on computers because the law librarian has never used it and does not know if inmate clerks ever have, Ex. 30, Delbridge Dep. 73:8–75:6. Fully blind people, like Mr. Shaw and Mr. Shabazz, cannot use the screen magnifier.

Plaintiffs' response to SUF ¶ 30: Plaintiffs dispute that Ms. Delbridge is "available" to print legal materials and answer questions**,** because Ms. Delbridge works outside the library, has to go through

security to get to the library, and "most weeks" only goes to the library "once a day" to pick up paper requests for materials that (sighted) prisoners have left for her. Ex. 30, Delbridge Dep. 37:17–38:22. Plaintiffs also dispute this statement to the extent that "available" can be construed to mean that Ms. Delbridge is ready, willing, and able to assist blind inmates with conducting legal research and drafting documents, as she did not testify that she has ever provided such assistance or that she has received training on how to accommodate blind inmates. *Id.* 13:2–8; 47:15–52:14; 117:4–9.

Plaintiffs' response to SUF ¶ 32: Disputed that the SARA machine reads "case[s]" and "any other legal document." Legal materials such as court documents and cases from LexisNexis include a "watermark" on each printed page, which makes it impossible for the SARA machine to read the document. Deerfield only started addressing this issue six months ago and only with respect to Mr. Shabazz. Ex. 30, Delbridge Dep. 170:22–171:10, 176:5–178:14. There also is no evidence that a blind prisoner could privately and independently perform legal research to identify documents to be printed out without a screen reader on the computers.

Plaintiffs' response to SUF ¶ 33: Plaintiffs dispute this fact insofar as blind prisoners must request to use the SARA in the law library and they must be approved to do so by submitting (inaccessible) paper request forms. Ex. 30, Delbridge Dep. 115:6–116:4. For instance, Deerfield rejected Mr. Shabazz's 2022 request to use the SARA for more than one hour on Saturday and Sunday. *Id*. 137:6–139:15. Blind prisoners cannot use the SARA while the prison is in "lock down." Ex. 31, NFBV 010552; Ex. 32 NFBV 010459. And VDOC staff has denied Mr. Shabazz access to SARA even when he was authorized to use it. Ex. 33, NFBV 019933; Ex. 34, Pl. Kevin Shabazz Resp. to VDOC's First Set of Interrogs. ¶ 4.

Plaintiffs' response to SUF ¶ 35: Undisputed, except that the Greensville law libraries store copies of VDOC's OPs only in standard print. Ex. 28, Phillips Dep. 68:15–69:16.

Plaintiffs' response to SUF ¶ 36: Plaintiffs do not dispute that the computers in the Law Library at Greensville have a narrator and magnification function but dispute they allow blind prisoners to access material on Lexis Nexis. VDOC materials expressly state that Narrator is not comparable

to screen readers like JAWS and is not ready to "go big time" yet. ECF No. 191-34, NFBV 014659–79. Instead, the Narrator is "an inferior product that does not provide a full reading experience for blind users." ECF No. 191-22, Chong Report at 7. The Deerfield law librarian does not know whether or how a blind person could operate Narrator using keystrokes. Ex. 28, Phillips Dep. 55:5–57:3. Ms. Phillips has used Narrator while looking at the screen and using a mouse, does not know if a blind person would be able to use Narrator, has never observed a blind person using it, and has never arranged for Narrator to be tested for accessibility. *Id*. 56:21–60:13.

Plaintiffs' response to SUF ¶ 40: Plaintiffs dispute that forms and legal materials are "available" in large print. The law library does not have forms "available" in alternative formats like large print. Ex. 28, Phillips Dep. 102:21–103:21. The librarian does not know if she could obtain large-print versions of standard-print books kept in the law library. *Id*. 66:14–68:8. Operating Procedures and policies are available in standard print only and are not available in large print. *Id*. 68:15–13. Ms. Phillips testified she could try to create a large print version of a document but has received no training. *Id.* 82:20–83:22. Plaintiffs dispute that Ms. Phillips actually provides blind inmates with large print documents upon request or that Greensville informs blind inmates that this is an accommodation Ms. Phillips may provide.

Plaintiffs' response to SUF ¶ 41: Plaintiffs dispute that JAWS is installed on computers in those law libraries. Ex. 28, Phillips Dep. 53:5–7. At Greensville, JAWS is only available on laptops used by the education department and cannot be used outside of the classroom. Ex. 35, Butcher Dep. 130:4–132:6. Even if "IT" could provide a laptop with JAWS on it, that laptop is not one of the three computers with Lexis Nexis on them and thus could not be used for legal research. Moreover, a blind individual in the law library could not effectively use JAWS even if it were available because the law librarian has never been trained on using JAWS and has never seen it used. Ex. 28, Phillips Dep. 53:11–54:3. Blind individuals must receive training on screen reader software before they can use it effectively, Ex. 36, Bullis Expert Report at 5, and there is no evidence in the record that VDOC provides such training outside of the classroom setting.

Plaintiffs' response to SUF ¶ 44: Plaintiffs agree the library does not allow prisoners to type letters on computers but dispute that prisoners do not use keyboards; they do in order to, for instance, type information into the library's electronic catalog. Ex. 27, Geist Dep. 80:14–81:9.

Plaintiffs' response to SUF ¶ 45: Plaintiffs dispute the phrase "very user friendly" as vague and ambiguous, and to the extent it can be construed to mean the catalogue is accessible to the blind.

Plaintiffs' response to SUF ¶ 46: Disputed. As stated in ¶ 47, Ms. Geist has received requests from visually impaired inmates for large print books, which is a form of accessible standard print book. There is no evidence in the record that VDOC informs blind inmates that they may request accessible standard print books from Ms. Geist. Therefore, the number of times inmates have (or have not) requested accessible standard print books is not relevant as inmates are not even aware that they can do so.

Plaintiffs' response to SUF ¶ 47: Disputed for the same reasons stated in ¶ 46. Plaintiffs fully incorporate their response to ¶ 46 herein.

Plaintiffs' response to SUF ¶ 48: Plaintiffs do not dispute the facts cited in Ms. Geist's testimony. However, there is no evidence in the record that VDOC informs blind inmates that the Deerfield recreational library has large print books or that they may request a Braille version of a book from Ms. Geist. Therefore, the number of times inmates have (or have not) requested books in Braille is not relevant as inmates are not even aware that they can do so.

Plaintiffs' response to SUF ¶ 49: Plaintiffs do not dispute that Ms. Geist prints the documents listed in ¶ 49. However, Ms. Geist has received no training on how to properly create large print materials. Ex. 27, Geist Dep. 48:8–49:12. Moreover, there is no evidence in the record that VDOC informs blind inmates that Ms. Geist can create large print documents.

Plaintiffs' response to SUF ¶ 50: Plaintiffs dispute that the Deerfield SARA machine "rotates through the school classrooms and recreational library." When Plaintiffs' experts conducted their site visit of Deerfield, the SARA machine was not in the recreational library, and an employee in the education department stated that she did not know where the SARA machine was but she thought that it was "locked in a closet." Ex. 37, Basche Decl. ¶ 4. Since November 2022, Mr.

Stravitz has worked in the Deerfield recreational library. Ex. 13, Stravitz Supp. Decl. ¶ 8. He has never seen a SARA scanner there, just the Merlin. *Id*.

Plaintiffs' response to SUF ¶ 51: Plaintiffs dispute that blind inmates "need only" come to the library and request to use the Merlin. There is no record evidence supporting that VDOC and/or Deerfield informs visually impaired inmates that the Deerfield recreational library has a Merlin Machine for inmate use so that they may make such a request.

Plaintiffs' response to SUF ¶ 52: Plaintiffs dispute that there is a SARA Machine in the Deerfield recreational library. Ex. 13, Stravitz Supp. Decl. ¶ 8.

Plaintiffs' response to SUF ¶ 54: Plaintiffs dispute that these resources are "available" to the extent that no record evidence supports that VDOC informs blind inmates that the recreational library has audio books and a CD player they can check out. In addition, the CD player can only be used in the library—a blind inmate cannot take it to his housing unit. Ex. 13, Stravitz Supp. Decl. ¶ 8. Sighted prisoners, on the other hand, can check out print books and bring them back to their housing unit to read. Ex. 27, Geist Dep. 19:21–20:10; 82:21–84:1.

Plaintiffs' response to SUF ¶ 60: Plaintiffs dispute the term "features" as vague and ambiguous. Plaintiffs are unable to provide a substantive response to ¶ 60 because they do not understand what "features that are readily available for use by blind or visually impaired inmates" means, and therefore object that this paragraph is non-material.

Plaintiffs' response to SUF ¶ 62: Plaintiffs dispute that OPAC is "accessible" to blind inmates, because there is no evidence that library computers have screen readers on them or that prisoners who wish to use those computers receive screen-reader training.

Plaintiffs' response to SUF ¶ 63: Plaintiffs dispute that the Microsoft Windows program effectively magnifies the library computer screens for blind inmates, that VDOC informs blind and visually impaired inmates that this program is available, and that VDOC provides blind inmates with the training necessary to use the magnifier function.

Plaintiffs' response to SUF ¶ 64: Plaintiffs do not dispute that Mr. Shumate is present in one of the Greensville recreational libraries when it is open for use. However, Plaintiffs dispute that Mr.

Shumate is "available" to assist blind inmates with reading, writing, or using the computers in the library to the extent that his presence alone does not mean that he is willing to help—or actually does help—blind prisoners with these tasks. Further, Mr. Shumate attested that Greensville has three recreational libraries, so it is unclear how he could be "available" in all of those libraries at the same time to assist inmates. Finally, Plaintiffs dispute that audiobooks are "available" to the extent it may be construed to mean that inmates are informed that the collection exists.

Plaintiffs' response to SUF ¶ 67: Undisputed to the extent that the JPay tablets have the capabilities that are mentioned in ¶ 67. Plaintiffs dispute that ¶ 67 provides an exhaustive list of JPay tablets' capabilities. Ex. 11, McCann Supp. Decl. ¶ 13 (VDOC provides announcements via JPay messages); Ex. 12, Shabazz Supp. Decl. ¶ 13 (same); Ex. 19, Hajacos Supp. Decl. ¶ 10 (same); Ex. 38, Stravitz Dep. 185:25–186:6 (same).

Plaintiffs' response to SUF ¶ 69: Plaintiffs object to the use of ¶ 8 of the Welch Declaration to support ¶ 69, as Welch's declaration demonstrates that this declarant lacks personal knowledge regarding the JPay tablets. Welch states, "Based on my understanding and discussions with JPay representatives, all VDOC tablets are currently equipped with accessibility features for visually impaired inmates that can be individually activated on each tablet." ECF No. 210-33, Welch Decl. ¶ 8. Welch further states: "From my understanding and based on my conversations with JPay representatives, these features can be activated by the inmate on his individual JPay tablet by turning them on under 'Settings' and 'Accessibility.'" *Id.* n.1. Thus, Welch is not competent to testify to what, if any, "accessibility features" the tablets are currently equipped with. Plaintiffs dispute the term "accessibility features" as vague and ambiguous and on the grounds that it suggests those features make the tablets accessible to Plaintiffs. Ex. 8, L. Shaw Dep. 236:4–22, 240:9–15; Ex. 6, Marano 30(b)(6) Dep. 144:6–19; Ex. 21, Shabazz Dep. 67:23–68:1; Ex. 17, Courtney Dep. 204:17–205:6; ECF No. 191-36, NFBV 014328–29; ECF No. 191-47, NFBV 010451–52; ECF No. 191-40, NFBV 010396; ECF No. 191-36, NFBV 013164–65; ECF No. 191-42, NFBV 013997-98; ECF No. 191-38, NFBV 014993; ECF 191-45, MCCANN 000007; Ex. 19,

Hajacos Supp. Decl. ¶¶ 7–8; Ex. 14, P. Shaw Supp. Decl. ¶ 3–5; Ex. 11, McCann Supp. Decl. ¶¶ 5–10; Ex. 12, Shabazz Supp. Decl. ¶¶ 8–9, 11.

Plaintiffs' response to SUF ¶ 70: Plaintiffs dispute ¶ 70 for the same reasons they dispute ¶ 69 and incorporate their response to ¶ 69 herein.

Plaintiffs' response to SUF ¶ 71: Plaintiffs dispute ¶ 71 for the same reasons they dispute ¶¶ 69 and 70 and incorporate their responses to ¶¶ 69 and 70 herein. Plaintiffs further dispute the description of how the "talk back" feature functions. To the extent it functions in the manner described, this feature alone would not make the JPay tablet accessible to blind and visually impaired inmates. Ex. 39, Chong Decl. ¶¶ 2–5.

Plaintiffs' response to SUF ¶ 72: Plaintiffs dispute the first sentence because blind prisoners are not "able" to purchase external keyboards for their tablets if they do not know they exist. Ex. 11, McCann Supp. Decl. ¶ 12; Ex. 12, Shabazz Supp. Decl. ¶ 10; Ex. 13, Stravitz Supp. Decl. ¶ 5; Ex. 14, P. Shaw Supp. Decl. ¶ 6. Additionally, no record evidence supports that "numerous" Braille kiosks exist throughout VDOC facilities. Deerfield only has one Braille keyboard on a kiosk, which is located in the gym. ECF No. 191-279, Shabazz Decl. ¶ 20; Ex. 12, Shabazz Supp. Decl. ¶ 12; Ex. 13, Stravitz Supp. Decl. ¶ 2; Ex. 37, Basche Decl. ¶ 5. The record currently shows that Greensville has none. *See* Ex. 19, Hajacos Supp. Decl. ¶ 9.

Plaintiffs' response to SUF ¶ 75: Plaintiffs dispute that they are able to request that postings be provided in an alternative format or ask their counselors about open positions if they cannot see the postings in the first place since they are posted in regular print, hard copy documents. Ex. 18, Hajacos Dep. 148:23–151:7.

Plaintiffs' response to SUF ¶ 76: Plaintiffs dispute ¶ 76 for the same reasons they dispute ¶ 18 and incorporate their response to ¶ 18 herein.

Plaintiffs' response to SUF ¶ 77: Plaintiffs dispute the first statement because Defendants do not provide a supporting citation for it. Defendants cite only two examples to support their statement—Mr. Hajacos and Mr. Stravitz. Mr. Hajacos's job in the Wood Shop was not a Grade 3 job—it was a job with Virginia Correctional Enterprises, which has a separate hiring process from the one for

VDOC jobs. Ex. 19, Hajacos Supp. Decl. ¶ 5. Mr. Stravitz already had a Grade 3 position as a pod tutor when he lost his vision. When his supervisor, Ms. Finley, left Greensville, she assisted Mr. Stravitz with getting his job in the library. Ex. 13, Stravitz Supp. Decl. ¶ 7.

Plaintiffs' response to SUF ¶ 80: The second sentence mischaracterizes the testimony cited. Plaintiffs' counsel asked, "If the inmate has a disability, . . . does the availability of accommodations or auxiliary aids affect their eligibility for the program?" and Ms. Butcher responded, "No." Ex. 40, Butcher 30(b)(6) Dep. 19:19–22; 20:1. Further, Ms. Butcher only testified about educational program**s**, not vocational or re-entry programming. *See id*. at 19:4–8.

Plaintiffs' response to SUF ¶ 81: Plaintiffs dispute that any disabled inmate will be evaluated for accommodations needed to be successful in educational or vocational courses. The testimony cited states that a *blind* inmate *can* request accommodations and that Ms. Rashida Butcher *has had* individual interviews with blind inmates—Ms. Butcher did not state that it is her practice or policy to evaluate all inmates with disabilities. Ex. 40, Butcher 30(b)(6) Dep. 19:19-22:4.

Plaintiffs' response to SUF ¶ 82: Disputed for the same reasons provided in ¶ 81 and incorporate their response to ¶ 81 herein. Ms. Butcher testified that she has met with "probably two" blind inmates and "about five" visually impaired inmates about the accommodations they need for academic courses. Ex. 40, Butcher 30(b)(6) Dep. 19:4–8; 21:14–22:4.

Plaintiffs' response to SUF ¶ 83: Plaintiffs dispute ¶ 83 for the same reasons stated in response to ¶ 81. Plaintiffs also dispute that Ms. Butcher found the list of auxiliary aids "to be successful for certain individuals"; Ms. Butcher was listing accommodations that the Education Department has provided blind and visually impaired inmates—she did not offer an opinion on whether the accommodations provided were "successful." Ex. 40, Butcher 30(b)(6) Dep. 22:13–22; 23:1–4.

Plaintiffs' response to SUF ¶ 84: Disputed that this computer has ever been provided to a prisoner who required it.

Plaintiffs' response to SUF ¶ 85: Disputed. Ms. Butcher testified that she or Emily McKeough, who works for DARS and VATS, trains inmates on how to use screen reader software on the lone laptop Ms. Butcher has with the software installed that she can bring to any VDOC facility; Ms.

Butcher did not testify that she works with VATS to teach all inmates how to use "accessible technology" generally. Ex. 40, Butcher 30(b)(6) Dep. 23:5–21.

Plaintiffs' response to SUF ¶ 86: Disputed. The cited testimony does not support the statements in ¶ 86.

Plaintiffs' response to SUF ¶ 88: Disputed. Per OP 866.1, non-grievable issues also "include," but are not limited to, a host of other issues, including grievance intake decisions, limitation decisions, and "[i]ssues yet to occur." Ex. 41, VDOC OP 866.1 § III(B)(1)(b). In practice, VDOC also rejects many other prisoner submissions as "non-grievable," such as when VDOC decides a submission is actually a "request for services" rather than a "grievance." *E.g.*, Ex. 42, NFBV 010045–46.

Plaintiffs' response to SUF ¶ 89: Disputed in part. OP 866.1 provides that the first step in the grievance procedure is to discuss the issue with a staff member "for a quick resolution." *See* VDOC OP 866.1 § I(D)(1). And before filing an ADA-related complaint, the prisoner "must" attempt to address the issue by filling out an ADA Reasonable Accommodation Request form, which then "must" be appended to the complaint. *Id.* § III.B.6. VDOC has rejected grievances where a prisoner fails to attach an ADA Reasonable Accommodation form. Ex. 43, NFBV 009645; Ex. 44, NFBV 010172–76; Ex. 45, NFBV 018480-81; Ex. 46, NFBV 010201; Ex. 47, NFBV 010180; Ex. 48, NFBV 009631; Ex. 49, NFBV 010184. ADA coordinators offered conflicting testimony as to whether prisoners must first file an ADA Reasonable Accommodation Request before proceeding with the grievance process. Ex. 5, Talbott Dep. 173:14–174:16; Ex. 8, L. Shaw Dep. 132:18–134:7.

Plaintiffs' response to SUF ¶ 90: Plaintiffs incorporate their response to ¶ 89 and further state that this SUF misstates the text of OP 866.1.

Plaintiffs' response to SUF ¶ 91: Disputed in part. VDOC's rejections of prisoners' grievances often leave prisoners with no effective way to remedy the purported problem, such as when a grievance inappropriately is rejected as beyond the control of VDOC, Ex. 50, NFBV 010451–52; Ex. 51, NFBV 010479–81, or when prisoners are instructed to consult medical personnel or file a "Request for Services," not a grievance, *e.g.,* Ex. 42, NFBV 010045–46.

Plaintiffs' response to S UF ¶ 93: Disputed in part. The forms described in this paragraph are not "available" for blind prisoners to use, because they are in standard print and are not accessible. Ex. 26, Cosby 30(b)(6) Dep. 22:11–24:14; Ex. 5, Talbott Dep. 145:4–147:17, 173:17– 174:16; Ex. 8, L. Shaw Dep. 112:6–16, 171:5–174:14; ECF No. 191–3, Hajacos Decl. ¶¶ 5–6. The citation "Aff; ¶ 10" does not point to any evidence in the record and should be stricken.

Plaintiffs' response to SUF ¶ 94: Plaintiffs dispute that blind prisoners can request the assistance of another person who will read and/or write their grievance documents for them. Plaintiffs incorporate by reference their objections and response to SUF ¶ 20. The citation "Aff; ¶ 11" does not point to any evidence in the record and should be stricken.

Plaintiffs' response to SUF ¶ 97: Plaintiffs dispute that VDOC Grievance Reports "reflect" all complaints and accepted grievances and appeals. *See* Section I.A, *infra*. For example, Mr. McCann's Grievance Report does not include a complaint he submitted, which was denied because he attached a separate sheet of paper with his full description of his complaint. Ex. 52, MCCANN 000005; Ex. 53, MCCANN 000142; Ex. 54, NFBV 019511. Additionally, Grievance Reports do not reflect the verbatim language used in complaints, grievances, and appeals, or the exact language of the responses. *Compare, e.g.*, Ex. 55, NFBV 010611 (grieving that "[p]rison life is dangerous enough without the loss of sight."), *with* Ex. 56, NFBV 019561 (summarizing this complaint as: "You state that since you were diagnosed with cataracts in October 2021 you have been waiting for surgery."). Grievance Reports neglect to include other important information from those original documents, such as the date that the document was submitted, any attachments submitted with the document, and to whom the grievance or other document was directed. *Id.* Additionally, as Plaintiffs have testified, not all grievances, complaints, and appeals—and in some cases, none of them—are "filed by [the] inmate" whose name is on the document. Ex. 22, P. Shaw Dep. 87:18–22. Blind prisoners frequently rely on other people to submit documents on their behalf, including grievances. Ex. 21, Shabazz Dep. 13:2–18. Grievance Reports fail to capture significant hand-written markings, such as the initials of Mr. Shaw's caretaker who wrote grievance documents on his behalf. *See, e.g.*, Ex. 57, NFBV 010600 (exhibiting the initials "AS"

next to Mr. Shaw's name on the written complaint, which stands for "Anthony Sheppard," Mr. Shaw's former caregiver); Ex. 14, P. Shaw Supp. Decl. ¶ 2.

Plaintiffs response to SUF ¶ 98: Plaintiffs dispute that VDOC Grievance Reports "reflect" all the documents described in ¶ 98 for the reasons stated in Plaintiffs' response to ¶ 97, *supra*.

Plaintiffs response to SUF ¶ 100: Plaintiffs dispute that Mr. Courtney's "Grievance File" and "Grievance Report" are complete. For instance, Mr. Courtney testified that he filed a grievance regarding the lighting in his cell and "appeal[ed] that all the way up," Ex. 17, Courtney Dep. 159:3–161:16, yet that appeal is not noted in VDOC's Grievance File and Grievance Report. *See also* Section I-A, *infra* (explaining why VDOC records are not reliable). Further, Plaintiffs dispute ¶ 100 because it states a legal conclusion that Mr. Courtney failed to "exhaust" remedies. Moreover, Mr. Courtney (to whom the PLRA does not apply, Section I.E, *infra*) did "exhaust" all those remedies that were available to him, as detailed in Sections I.A-D, *infra*. Plaintiffs also object to the assertions in ¶ 100 as failing to cite to admissible evidence. Fed. R. Civ. P. 56(c)(2). Ms. Phillips' testimony about what the Grievance Reports say is not sufficient to satisfy the best evidence rule. FRE 1002. Nor does her testimony satisfy the exception thereto for testimony about an original document, FRE 1007, because she is not testifying to the content of the original grievance documents—she is testifying about the content of a VDOC-created list of abbreviated summaries of the original grievance documents. The Grievance Reports themselves are not sufficient to satisfy the best evidence rule because VDOC is required to cite to the original grievance documents. *Id.* The Grievance Reports are not adequate duplicates, copies, or summaries of the documents they purport to reflect sufficient to establish an exception to the best evidence rule, as described in Plaintiffs' objections and responses to SUF ¶ 97, *supra*. Additionally, neither Ms. Phillips' testimony, nor SUF ¶¶ 97–98 establish any foundation for the Grievance Reports' admissibility as business records or any other hearsay exception. Finally, Ms. Phillips' declaration and the Grievance Reports do not cite to specific grievance documents in the record that would be admissible at trial. As such, both Ms. Phillips' testimony on this issue and the Grievance Reports themselves are not admissible evidence under the Federal Rules to prove the fact presented in ¶

100. In addition, VDOC's conclusions about the Grievance Reports' determinative weight in establishing Plaintiffs' failure to exhaust their remedies overlook the fact that Grievance Reports do not include any information about rejected grievances (or facility requests and other commonly-used forms) and the reasons for their rejection. These grievances demonstrate the strawman system of VDOC's grievance process. *See* Section I.A, *infra*.

Plaintiffs' response to SUF ¶ 101: Disputed, including because Defendants' recordkeeping is unreliable. *See* Section I.A, *infra*. Further underscoring the point, many of Mr. Courtney's records as produced by Defendants are illegible, *e.g.*, Ex. 58, NFBV 008932, and Defendants produced a batch of grievance documents they had not previously found in the course of discovery after the discovery deadline had passed, Ex. 37, Basche Decl., Ex. A. Further, the documents Defendants cite do not reflect the breadth of documents Mr. Courtney filed in an attempt to secure reasonable accommodations, including Requests for Accommodation forms, Ex. 59, NFBV 014996–97, and facility requests, Ex. 60, NFBV 014999, which—according to Greensville's ADA Coordinator are appropriate ways to secure accommodations, Ex. 5, Talbott Dep. 173:14–174:16.

Plaintiffs' response to SUF ¶¶ 102–15: Because Plaintiff Nacarlo Courtney filed a motion to voluntarily dismiss his claim for retaliation, ECF No. 222, Plaintiffs do not address these paragraphs in Defendants' SUF or their related arguments at this time.

Plaintiffs' response to SUF ¶ 117: Plaintiffs dispute this statement. First, the evidence makes plain that VDOC's records are unreliable. *See* Section I.A, *infra*. For instance, with respect to Mr. Hajacos, this statement omits that, according to VDOC's own records, Mr. Hajacos filed a complaint, accepted grievance, and appeal in 2022 because he was being denied access to large print, Ex. 61, NFBV 009206, Ex. 62, NFBV 009216–21, and also filed complaints regarding Greensville's inaccessible message boards, Ex. 63, NFBV 019785–87, both of which directly concerned his allegations that VDOC does not ensure effective communication with blind prisoners. Defendants' statement also ignores the fact that Mr. Hajacos was unable to exhaust his remedies early in his time at Greensville because his blindness was not recorded in VDOC's electronic database. Ex. 64, NFBV 009176–77, Ex. 65, NFBV 009186–9201. This precluded him

from receiving accommodations for his blindness, which he filed grievances about in April 2022. *Id.* As such, his grievances were rejected for inappropriate reasons that stymied his ability to use the grievance process. *Id.* Further, Plaintiffs dispute the grievance process is "available" to Mr. Hajacos such that he needs "exhaust" it. Plaintiffs incorporate their responses to SUF ¶ 100–01. Plaintiffs also dispute Defendants' characterization that Mr. Hajacos did not file complaints about "most" allegations, because he repeatedly filed complaints regarding Defendants' failure to ensure effective communication.

Plaintiffs' response to SUF ¶ 118: Dispute that any failure to appeal the issues in SUF ¶ 118 constitutes a failure to exhaust his remedies, for the reasons stated in Plaintiffs' objections and response to SUF ¶ 100–01, *supra*, and in Sections I.A-E, *infra.*

Plaintiffs' response to SUF ¶ 119: Disputed for the same reasons provided in Plaintiffs objections and responses to SUF ¶¶ 100–01, Plaintiffs also dispute that this figure represents the closed universe of grievance documents submitted by Mr. Hajacos.

Plaintiffs' response to SUF ¶ 120: Plaintiffs dispute that Mr. Hajacos's Wood Shop job is a Grade 3 Skilled job. It is a job with Virginia Correctional Enterprises ("VCE"), which is a separate category of work assignment. Ex. 19, Hajacos Supp. Decl. ¶ 5. VDOC OP 520.1, *Virginia Correctional Enterprises Administration*, governs inmate employment with VCE,[3] whereas VDOC OP 841.2, *Inmate Work Programs*, Ex. 66, NFBV 017543-017553, governs employment with VDOC and sets out employment grades.

Plaintiffs' response to SUF ¶ 122: Plaintiffs dispute the fact stated in ¶ 122 on two grounds. First, any information pertaining to VDOC's concerns about COVID-19 at Deerfield is non-material and unrelated to Mr. Hajacos's claim related to his employment in the woodshop at Greensville and, therefore, should be stricken. Second, to the extent that Defendants inadvertently put "Deerfield" instead of "Greensville" in this fact, Plaintiffs dispute that Greensville is a facility that "houses

[3] *See* Va. Dep't of Corr., Operating Procedure 520.1, Virginia Correctional Enterprises Administration (2023), https://vadoc.virginia.gov/files/operating-procedures/500/vadoc-op-520-1.pdf.

many elderly and medically infirm inmates." Mr. Reed's affidavit—the sole evidence they cite for this fact—does not support that statement. Reed Aff. ¶ 7 ("At that time, Mr. Hajacos was housed in Housing Unit 4, which is a Housing Unit designed for deaf inmates."). Without any further support, ¶ 122 should be stricken as a naked assertion.

Plaintiffs' response to SUF ¶ 124: Plaintiffs dispute the assertion that Mr. Hajacos "refused to move to Housing Unit 5." Mr. Hajacos faced an impossible decision. He loved his job in the Wood Shop. Ex. 18, Hajacos Dep. 51:12. To keep it, he would be required to leave a housing unit that was "designed for deaf inmates," SUF ¶ 123, *supra*, and provided accommodations for his blindness, Ex. 18, Hajacos Dep. 60:22–61:11 (message boards, someone who he trusts to help him read and write documents), 62:1–18 (staff shaking his cell door, people who notify him about announcements). But if he chose to move and keep his job, he would have been forced to give up accommodations he had in Housing Unit 4. *Id.* at 60:5–66:21. When Mr. Hajacos met with his counselor at the time and Lt. Robinson to discuss the situation, they told him that he would not be able to move because of the accommodations he needed. *Id.* at 57:2–22. When he wrote to the ADA Coordinator and voiced his distress about the position he was in, she provided him with a complete non-answer. Ex. 63, NFBV 019785–86, Ex. 67, NFBV 019788–89. She stated that "[a]ccommodations are determined on an individual basis," and that security risk evaluations and housing assignments were not under her control. *Id.* at 019785. Mr. Hajacos took that to mean that he would not be guaranteed to be able to keep his accommodations in the new housing unit. Ex. 18, Hajacos Dep. 65:3–66:4. Without any assurances from his counselor, his building lieutenant, or the facility ADA Coordinator that he could maintain the accommodations he had for his blindness and deafness, Mr. Hajacos was forced to give up his job and stay in Housing Unit 4.

Plaintiffs' response to SUF ¶ 125: Plaintiffs dispute Defendants' limited view of the facts surrounding Mr. Hajacos's termination and the cause of his inability to join his co-workers in Housing Unit 5 as described in Plaintiffs' response to ¶ 124.

Plaintiffs' response to SUF ¶ 127: Plaintiffs dispute that videophones, ASL interpreters, and TTY phones are available in every pod or housing unit at Greensville, and that they are consistently

available to hearing impaired inmates. Ex. 18, Hajacos Dep. 60:16–21; Ex. 19, Hajacos Supp. Decl. ¶¶ 2–3. The sparse or conditional availability of accommodations like these is precisely the reason Mr. Hajacos could not move to Housing Unit 5 when Greensville required it of Wood Shop workers.

Plaintiffs' response to SUF ¶ 128: Plaintiffs object to this statement of fact as failing to cite admissible evidence, Fed. R. Civ. P. 56(c)(2), because Ms. Talbott's testimony on this topic is entirely speculative and supported by no other evidence in the record. This fact also fails to satisfy Fed. R. Civ. P. 56(c)(4) because Ms. Talbott's personal knowledge does not, and cannot, extend to hypothetical situations, including if Mr. Hajacos had moved to HU5. Paragraph 128 is also squarely contradicted by Ms. Talbott's own statement in which she informed Mr. Hajacos that any requests for his accommodations to be transferred with him to HU5 would be "determined on an individual basis." Ex. 63 at NFBV 019785. Additionally, Enclosure A to Ms. Talbott's declaration merely lists Mr. Hajacos's approved accommodations. This document in no way supports Defendants' assertion that he could have kept all of his accommodations if he moved to HU5.

Plaintiffs' response to SUF ¶ 129: Plaintiffs reiterate their disputes from ¶ 128 and fully incorporate them herein. Furthermore, Mr. Hajacos's testimony contradicts the first sentence. Ex. 18, Hajacos Dep. 60:17–21 **(**testifying that ASL interpreters are located in HU4 and would need to be sent over to HU5 if he moved and that he would not have access to the videophones or TTY phones in HU5**).**

Plaintiffs' response to SUF ¶ 131: Disputed that the magnifying glasses accommodated Mr. Hajacos's blindness. After Mr. Hajacos complained to the Principal that he was not receiving accommodations in the Computer Systems Technology Course, she held a meeting with him, the instructor, and VDOC Education Department staff. Ex. 19, Hajacos Supp. Decl. ¶ 15. At that meeting, Mr. Hajacos was not told what accommodations were available, but he requested and received magnifying eyeglasses. *Id.* However, the glasses were not effective with assisting him to see the computer hardware that he worked on in the course. *Id.* Additionally, Mr. Hajacos never received closed captioning or screen reader software in the course. *Id.*

Plaintiffs' response to SUF ¶ 132: Disputed. Whenever Mr. Hajacos asked Mr. Zormelo for assistance reading or writing a document, he refused to assist him and told him to ask the inmate aide for assistance. Ex. 19, Hajacos Supp. Decl. ¶ 16.

Plaintiffs' response to SUF ¶ 133: Disputed. Although the inmate aide is hearing impaired, he only knows a few words in sign language, so he cannot effectively communicate with Mr. Hajacos via sign language. Ex. 19, Hajacos Supp. Decl. ¶ 16.

Plaintiffs' response to SUF ¶ 135: Plaintiffs reiterate their disputes from ¶ 117 and fully incorporate them herein.

Plaintiffs' response to SUF ¶ 137: Disputed. First, Defendants' records are unreliable, *see* Section I.A, *infra*, including with respect to Mr. Shabazz. For instance, Defendants assert that Mr. Shabazz filed one complaint (from November 2022) concerning JPay tablets. ECF No. 210-24, DeBerry Aff. ¶ 22. Mr. Shabazz submitted a second complaint in December 2022, explaining his tablet did not "provide equal access" with respect to "navigating [the tablet's] system independently like sighted inmates." Ex. 68, NFBV 010396. Similarly, Defendants assert Mr. Shabazz filed four complaints regarding the SARA machine (January 2019, April 2020, and two in November 2022). ECF No. 210-24, DeBerry Aff., ¶ 24. That is false; he filed another in March 2023. Ex. 32, NFBV 010459. More broadly, Plaintiffs dispute that Mr. Shabazz did not file complaints about "most" allegations in this lawsuit, because Defendants have failed to support that statement with evidence, *see* Section I-A, *infra,* and because Defendants' statement depends on unduly narrow interpretations of grievances he did file. For example, Defendants argue that although Mr. Shabazz exhausted his claim with respect to being denied access to the SARA machine, he did not exhaust other allegations in the complaint also concerning access to SARA. ECF No. 210-24, DeBerry Aff. ¶ 25–26. Similarly, although Mr. Shabazz exhausted his claim that VDOC discriminates against him by denying him more favorable work assignments, ECF 210-24, DeBerry Aff., ¶ 23, and exhausted his claim that he specifically was denied the position of "pod tutor," *id.* ¶ 27, Defendants argue that Mr. Shabazz did not exhaust claims that he was denied other favorable positions that he desired ("pod clerk" and "main laundry"). Mr. Shabazz repeatedly filed complaints and grievances

concerning his allegations that Defendants do not ensure effective communication and otherwise discriminate against disabled prisoners. Furthermore, Plaintiffs dispute any notion that Mr. Shabazz did not "exhaust" remedies, because those remedies were not "available" to him, *see* Sections I.B-D, *infra*, and incorporate their responses to SUF ¶¶ 100–01.

Plaintiffs' response to SUF ¶ 140: Undisputed that these grievances were not accepted, but they should have been. For instance, Mr. Shabazz filed a grievance concerning his JPay tablet that was rejected as "non-grievable" and "Beyond the control of the Department of Corrections" Ex. 50 at NFBV 010452; Ex. 51,010479-81, even though VDOC can control with whom and for what they contract, and VDOC cannot delegate its duty to comply with the ADA, *see* 42 U.S.C. § 12182(b)(1)(D) ("An **. . .** entity shall not, directly or through contractual or other arrangements, utilize standards or criteria or methods of administration (i) that have the effect of discriminating on the basis of disability . . . .").

Plaintiffs' response to SUF ¶ 141: Plaintiffs dispute the fact in ¶ 141 for the same reasons stated in ¶¶ 97–98, 100–01, 137, and 140. Moreover, Plaintiffs dispute any legal conclusion that Mr. Shabazz did not exhaust administrative remedies, including because such remedies were not "available," as detailed in Section I.B-D, *infra*.

Plaintiffs' response to SUF ¶ 142: Disputed for the same reasons provided in Plaintiffs objections and responses to SUF ¶¶ 100–01. Plaintiffs dispute that the figure in SUF ¶ 142 represents the closed universe of grievance documents submitted by Mr. Shabazz, or that the documents included in this figure should determine whether Mr. Shabazz is deemed to have exhausted his remedies.

Plaintiffs' response to SUF ¶ 145: Disputed. Mr. Shabazz testified in his deposition that he did not receive tactile graphics and that he only had a laptop to take typing lessons when he was first enrolled in the course, and that it was only used to practice typing—that he "wasn't using [Microsoft] Word" or any "type of spreadsheets or none of that. It was just learning the keyboard, that's it." Ex. 21, Shabazz Dep. 26:11–27:19; 29:22–30:14. Mr. Shabazz further testified that the SARA machine, talking calculator, and talking dictionary were not available between 2017 and

2018 when he first started the GED course, and that he only received these items in the beginning of 2019. *Id.* 30:22–31:21.

Plaintiffs' response to SUF ¶ 146: Plaintiffs decline to provide a substantive response to ¶ 146 because it does not contain any material facts.

Plaintiffs' response to SUF ¶ 147: Disputed for the reasons stated in Plaintiffs' response to ¶ 137, which they fully incorporate herein.

Plaintiffs' response to SUF ¶ 148: Plaintiffs dispute Defendants' characterization that Mr. Shabazz "completed this course successfully from October 12, 2022 to June 8, 2023." Mr. Shabazz testified during his deposition that "there was a lot of glitches" with the screen reader's ability to read the textbook for the course and that he "couldn't do the tests because of what was... it was a lot of problems . . . on how they implemented the curriculum in the system. So it wasn't just no cake walk. I had to wait. I had to wait plenty of days to complete this course. There was a lot of glitches in the system." Ex. 21, Shabazz Dep. 36:12–37:13; *see also id.* at 41:4–17 (testifying that it took him six months to complete the four-month course).

Plaintiffs' response to SUF ¶ 149: Disputed for the reasons stated in Plaintiffs' response to ¶ 148, which they fully incorporate herein. Plaintiffs also dispute that Mr. Shabazz used the SARA reader for materials that were not digital. Mr. Shabazz testified during his deposition that he only used the SARA reader once to read the contract he had to sign to enroll in the computer course. Ex. 21, Shabazz Dep. 34:22–35:4.

Plaintiffs' response to SUF ¶ 150: Disputed. Mr. Shabazz testified during his deposition that he did not require anyone to assist him with reading and writing print documents in the computer course because "[A]s far as blind people, you're not doing no writing—everything you do is on the computer. So when you say reading and writing something for me, I would have to say no, because they are not helping you write nothing." Ex. 21, Shabazz Dep. 35:5–18. Further, Ms. Furtrell's hypothetical availability to read and write documents for Mr. Shabazz in his computer course is not material or relevant.

Plaintiffs' response to SUF ¶ 152: Disputed for the reasons stated in Plaintiffs' response to ¶ 137, which they fully incorporate herein.

Plaintiffs' response to SUF ¶ 155: Plaintiffs dispute that Deerfield does not categorically prohibit Mr. Shabazz from holding jobs at Deerfield because he is blind. Mr. Shabazz has produced evidence that he did not receive an interview for a job because he is blind and grievances regarding the fact that Deerfield staff have denied him Grade 3, *i.e.*, skilled jobs, because he is blind. *See* Ex. 69, SHABAZZ 000075 (pod tutor application); Ex. 70, SHABAZZ 000008, 000010. 000015-16, 000021-22. 000032.

Plaintiffs' response to SUF ¶ 159: Disputed. Mr. Shabazz used the term "pod clerk" in his deposition, but he has produced his job *application* for the *pod tutor* position. Ex. 69, SHABAZZ 000075.

Plaintiffs' response to SUF ¶ 160: Plaintiffs dispute ¶ 160 for the same reasons stated in ¶¶ 97–98, 100–01, 137, and 140-41. Moreover, Plaintiffs dispute any legal conclusion that Mr. Shabazz did not exhaust administrative remedies, including because such remedies were not "available," as detailed in Sections I.A-D, *infra*.

Plaintiffs' response to SUF ¶ 161: Plaintiffs dispute that Mr. Stravitz has not filed "any" grievance documents about his allegations in this lawsuit. First, Mr. Stravitz has filed at least two complaints about not receiving surgery for his cataracts and the dangers he faced due to his blindness. Ex. 71, NFBV 010605, Ex. 55, NFBV 010611. Plaintiffs further dispute ¶ 161 for the reasons set forth in ¶¶ 100–01 and fully incorporate their responses herein. Finally, Plaintiffs dispute Defendants' assertion that Plaintiffs were required to exhaust their remedies, as per Sections I.A-E, *infra.*

Plaintiffs' response to SUF ¶ 163: Plaintiffs dispute that the magnifier and paper filter were effective accommodations. Mr. Stravitz testified that the magnifier and piece of translucent paper were clipped to the computer screen and that he "still had trouble reading, but it was a little bit better but that...that lens really didn't do much." Ex. 38, Stravitz Dep. 86:10–22.

Plaintiffs' response to SUF ¶ 165: Plaintiffs dispute that the sunglasses, large print books, a book light, and reading glasses, were accommodations that VDOC provided him. Mr. Stravitz purchased the sunglasses, book light, and reading glasses out of necessity and he checked out the large print books on his own; none of these were not accommodations that VDOC granted him. Ex. 38, Stravitz Dep. 86:23–87:10.

Plaintiffs' response to SUF ¶ 169: Plaintiffs cannot respond in substance because this statement is impermissibly vague. As VDOC notes, Mr. Shaw has filed complaints regarding his JPay tablet, ECF No. 210-24, DeBerry Aff., ¶¶ 15–16, and he also has filed written requests asking for access to the SARA machine (which concern his allegations that Defendants do not ensure effective communication) and a white cane tip replacement (which concern his allegation that Defendants stymie his efforts to navigate prison). *See* Ex. 72, NFBV 014175, Ex. 73, NFBV 014177, Ex. 74, NFBV 013992.

Plaintiffs' response to SUF ¶ 170: Plaintiffs dispute that Mr. Shaw did not "exhaust" remedies, including because those remedies were not "available" to him, *see* Sections I.A-D, *infra*, and incorporate their responses to SUF ¶¶ 100–01, 169.

Plaintiffs' response to SUF ¶ 171: for the same reasons provided in Plaintiffs objections and responses to SUF ¶¶ 100–01, 169, Plaintiffs dispute that the figure in ¶ 171 represents the closed universe of grievance documents submitted by Mr. Shaw, or that the documents included in this figure should determine whether Mr. Shaw is deemed to have exhausted his remedies.

Plaintiffs' response to SUF ¶ 174: Disputed. Mr. Shaw testified: "[T]hey said at the bottom of [the letter] that the caregiver couldn't accompany me to the class, he couldn't even be outside the door to take me to the bathroom or anything." Ex. 22, P. Shaw Dep. 75:6–9.

Plaintiffs' response to SUF ¶ 175: Plaintiffs dispute the term "unsatisfactory" as vague, ambiguous, and a mischaracterization of Mr. Shaw's testimony. Plaintiffs additionally dispute Defendants' characterization of the facts wherein Mr. Shaw "did not" take the class. Mr. Shaw testified that the instructor told him, "Well, your tutor [sic] can't be here, so you're not going to take the class." Ex. 22, P. Shaw Dep. 76:8–10.

Plaintiffs' response to SUF ¶ 180: Disputed as to whether jobs are "available," especially for people like Mr. Shaw who have an obvious need for accommodations to obtain and keep a prison job but have not received them. Plaintiffs also dispute that the first step to obtaining a job is to submit an application; the first step is knowing that a position is open and that staff are taking applications. Blind prisoners, including Mr. Shaw, are routinely unaware of job postings because they are advertised through standard-print, typed announcements on the pod bulletin board, *e.g.*, Ex. 75 at NFBV 011643–81 (Deerfield Orientation Manual (2020–2022) at 26) ("Job Vacancy postings are placed on the bulletin boards in the housing units and the DCE Area."); Ex. 76 at NFBV 011708–72 (Greensville Orientation Manual (2015) at 47) ("Job vacancy postings are placed on the bulletin boards in the Housing Units."), which blind prisoners cannot read and are not alerted when new postings are put up by staff, Ex. 18, Hajacos Dep. 148:23–149:18 (Mr. Hajacos cannot read job postings on the boards and does not know when they are posted).

Plaintiffs' response to SUF ¶ 183: Undisputed, except to the extent that the universe of grievance documents submitted by Plaintiffs is not closed as described in Plaintiffs' response to SUF ¶ 101, *supra*.

Plaintiffs' response to SUF ¶ 186: Disputed to the extent that the paragraph is unclear as to the administration to which Mr. Shaw is referring. The Warden, ADA Coordinator, and other Deerfield administrators from when the single cells at Deerfield were closed down were all held by different people at the time than they are now. Ex. 14, P. Shaw Supp. Decl. ¶ 13.

Plaintiffs' response to SUF ¶ 189: Undisputed, except to the extent that the universe of grievance documents submitted by Plaintiffs is not closed as described in Plaintiffs' response to SUF ¶ 101, *supra*.

Plaintiffs' response to SUF ¶ 191: Plaintiffs dispute that Mr. Shaw's cited testimony refers to Deerfield staff ensuring that Mr. Shaw does not have obstacles in his way in order to shower. When asked if any of the assistance he described came from staff, Mr. Shaw replied: "Just my caregiver. That's it." Ex. 22, P. Shaw Dep. 107:5–109:16.

Plaintiffs' response to SUF ¶ 194: Plaintiffs dispute Defendants' vague assertion that Mr. McCann did not file complaints concerning "most" of his allegations, especially because he filed complaints regarding his caregiver being located close to him, orientation and mobility in the dorm-style pod and outside, inaccessible devices (microwave), inaccessible kiosks, inaccessible documents, and more—all of which reflect and concern his core allegations that Defendants discriminate against prisoners with disabilities. *See* Ex. 77, NFBV 018444–45; Ex. 78, NFBV010169, Ex. 44, NFBV 010172–76, Ex. 79, NFBV 010075–76, Ex. 80, NFBV 010080–84, Ex. 81, NFBV 009983–86, Ex. 82, NFBV 018388–89. Plaintiffs also incorporate their responses to ¶¶ 97, 100–101 and note that Mr. McCann was not required to "exhaust" remedies that were not available to him, *see* Sections I.B-D, *infra*.

Plaintiffs' response to SUF ¶ 197: Disputed for the same reasons provided in Plaintiffs objections and responses to SUF ¶¶ 100–01, Plaintiffs dispute that the figure in ¶ 197 represents the closed universe of grievance documents submitted by Mr. McCann, or that the documents included in this figure should determine whether Mr. McCann is deemed to have exhausted his remedies.

Plaintiffs' response to SUF ¶ 198: Disputed. Mr. McCann asks staff only rarely for assistance is because "he does not trust them." Ex. 11, McCann Supp. Decl. ¶¶ 15–16. Plaintiffs additionally dispute that non-medical staff "have not refused to assist with reading or writing at all." Mr. McCann has been told by staff members—both medical and non-medical staff—in his years in VDOC custody either that they could not help him or that he should put his request in writing. *Id.* ¶¶ 15–16.

Plaintiffs' response to SUF ¶ 199: Disputed as to the suggestion that Mr. McCann's testimony is determinative regarding the existence of this rejected grievance. Ex. 52, MCCANN 000005, Ex. 53, MCCANN 000142.

Plaintiffs' response to SUF ¶ 200: Plaintiffs dispute that VDOC staff follow this policy because one of Mr. McCann's grievances was rejected for this reason. Ex. 52, MCCANN 000005, Ex. 53, MCCANN 000142.

Plaintiffs' response to SUF ¶ 201: Undisputed, except that when his assigned caregiver is not available, Mr. McCann has to rely on other prisoners who are not his trusted caregiver to help him read and write, Ex. 20, McCann Dep. 32:5–33:1, or he has to wait for his caregiver to become available, Ex. 11, McCann Supp. Decl. ¶ 17.

Plaintiffs' response to SUF ¶ 202: Disputed as to the reason for which Mr. McCann's caregiver was switched. Mr. McCann testified, "They didn't do it as an accommodation. They did it because the guy beside me wanted to get away from the front of the building into the back . . . . It wasn't an accommodation to me, it was an accommodation for somebody else." Ex. 20, McCann Dep. 38:14–22.

Plaintiffs' response to SUF ¶ 203: Disputed that the universe of documents available to establish exhaustion is not closed, per ¶ 101. Additionally, at least one of Mr. McCann's informal complaints, Ex. 52, MCCANN 000005; Ex. 53, MCCANN 000142, is not included in the rejected grievance documents in Enclosure E to Ms. DeBerry's Declaration, nor is it included in his Grievance Report, as described in Plaintiffs' objections and response to SUF ¶ 199. Additionally, Mr. McCann has testified that sometimes he asks his caregiver or someone else to write up an event on his behalf and that he is not sure if it gets filed as a grievance or other form, or if those requested documents are filed at all. Ex. 20, McCann Dep. 62:20–63:14.

Plaintiffs' response to SUF ¶ 206: Disputed. For the reasons stated in response to ¶ 203, Mr. McCann may have submitted a complaint on the topic (or asked a caregiver submit a complaint on the topic on his behalf) that was not produced in discovery.

Plaintiffs' response to SUF ¶ 207: Disputed. For the reasons stated in response to ¶ 203, Mr. McCann may have submitted a complaint on the topic (or asked a caregiver submit a complaint on the topic on his behalf) that was not produced in discovery. Furthermore, Mr. McCann testified that he verbally reported the attack to VDOC staff, Ex. 20, McCann Dep. 54:23–56:2, who did not investigate the incident, much less help him write a report or grievance.

Plaintiffs' response to SUF ¶ 208: Disputed. For the reasons stated in response to ¶ 203, Mr. McCann may have submitted a complaint on the topic (or asked a caregiver submit a complaint on the topic on his behalf) that was not produced in discovery.

Plaintiffs' response to SUF ¶ 210: Plaintiffs dispute that the tape is maintained on the floor such that Mr. McCann is able to use it on a daily basis. During his deposition, Mr. McCann testified that several things have caused the tape to be removed from the floor: "Through lack of policies and regulations of the tape it has been destroyed by chairs, buffers, staff and inmates kicking at it, scraping—you know, rubbing their feet across it. You name it. The waxing on it, bumping on it, mopping, putting water all over it. Yeah. I couldn't name every way that it's been taken up, but that what I'm alleging as being damaged." Ex. 20, McCann Dep. 61:6–9; 61:12–19. Although Mr. McCann testified that the tape is "eventually" replaced, he further testified that this means that "It's taken weeks sometimes." *Id.* at 62:1-4. With regard to exhaustion, Mr. McCann testified that his Caregiver completes and submits written complaints and grievances for him, and he does not know whether his Caregiver follows through with his request to submit a grievance on a particular issue. *Id.* at 63:3–14. Plaintiffs reiterate their disputes from ¶ 203 and fully incorporate them herein.

Plaintiffs' response to SUF ¶ 211: Plaintiffs reiterate their disputes from ¶ 203 and fully incorporate them herein.

Plaintiffs' response to SUF ¶ 212: Plaintiffs dispute ¶ 212 to the extent that Mr. McCann not reporting the incidents of masturbation means that they did not occur. Mr. McCann testified that he did not report assaults because of fear of retaliation and because, when he did report the first assault on him, he was told that because he could not identify the person because he is blind that there was not anything Deerfield staff would do about it, so it would be pointless to report other assaults. Ex. 20, McCann Dep. 92:1–14. Plaintiffs reiterate their disputes from ¶ 203 and fully incorporate them herein.

Plaintiffs' response to SUF ¶ 213: Plaintiffs reiterate their disputes from ¶ 203 and fully incorporate them herein.

Plaintiffs' response to SUF ¶ 214: Plaintiffs dispute ¶ 214 to the extent it means that Mr. McCann was not discriminated against on the basis of his blindness when the lieutenant in his pod told him that he could not do the continue filling the hot water pot because it was too dangerous. Plaintiffs reiterate their disputes from ¶ 203 and fully incorporate them herein.

Plaintiffs' response to SUF ¶ 215: Plaintiffs reiterate disputes from ¶ 203 and fully incorporate them herein.

Plaintiffs' response to SUF ¶ 216: Plaintiffs dispute ¶ 216 to the extent it means that Mr. McCann is not being discriminated against on the basis of his blindness because he has been given a job and is being paid for it, but he does little to no work in his position. Plaintiffs also reiterate their disputes from ¶ 203 and fully incorporate them herein.

Plaintiffs' response to SUF ¶ 217: Disputed the extent means that Deerfield and/or VDOC has provided Mr. McCann necessary and appropriate accommodations for his blindness. On November 21, 2023, Mr. McCann had his low vision exam, and the ophthalmologist who saw him recommended he be provided a magnifier as an accommodation. Ex. 83, NFBV 020012; Ex. 20, McCann Dep. 87:8–88:5 Mr. McCann submitted a request to Ms. Shaw and a request to the Medical Department for the magnifier. Ex. 20, McCann Dep. 88:6–89:14. To date, Deerfield has not approved a replacement magnifier for him, even though VDOC policy requires Deerfield to approve, deny, or modify a request for accommodations within 10 days. Ex. 83, NFBV 020012; Ex. 20, McCann Dep. 22:4–9; 88:4–5. Additionally, Plaintiffs reiterate their disputes from ¶ 203 and fully incorporate them herein.

Plaintiffs' response to SUF ¶ 218 & 219: Plaintiffs reiterate their disputes from ¶ 203 and fully incorporate them herein.

ARGUMENT

I. Defendants are not entitled to summary judgment for failure to exhaust administrative remedies.

Defendants argue throughout their SUF that the incarcerated Plaintiffs have failed to exhaust administrative remedies.[4] These arguments fail on several grounds.

The primary reason that Defendants are not entitled to summary judgment on the issue of non-exhaustion is that Plaintiffs exhausted grievances concerning VDOC's failure to ensure effective communication and accommodate their blindness. Defendants concede that Plaintiffs properly and completely exhausted claims concerning: (1) denial of work due to disability, Phillips Decl. ¶ 25, ECF No. 210-24; DeBerry Aff.. ¶¶ 20, 27; (2) that blind prisoners are forced to rely on other prisoners in order to read and write documents, DeBerry Aff. ¶¶ 20, 35; (3) "issues related to the use of the SARA Machine," DeBerry Aff. ¶¶ 25, 26; and (4) the fact that blind prisoners could not independently navigate the dorm-style "pod" at Deerfield, DeBerry Aff. ¶ 35. Defendants omit, but the record also shows, that Mr. McCann exhausted his grievance concerning the inability of blind prisoners to independently navigate outside walkways. Ex. 84, NFBV 009979; Ex. 85, NFBV 010013–23.

Accordingly, Defendants at best argue for partial summary judgment on exhaustion—yet even that would be inappropriate, because Defendants' non-exhaustion argument with respect to other claims is riddled with errors. First, Defendants have failed to meet their *prima facie* burden of putting Plaintiffs' non-exhaustion at issue. Second, VDOC's grievance process was "unavailable" to Plaintiffs because it is inaccessible to the blind, and because Defendants thwarted Plaintiffs' efforts to fully exhaust their grievances. Finally, the exhaustion requirement does not apply to Mr. Courtney, because he was not a prisoner when the Amended Complaint was filed.

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[4] Defendants also do not argue (and have therefore waived the argument) that plaintiff NFB-VA is bound to exhaust administrative remedies—nor could they, because the PLRA applies only to "prisoners." *See* 42 U.S.C. § 1997e.

A. Defendants have not met their *prima facie* burden to show that Plaintiffs have failed to exhaust administrative remedies.

Because failure to exhaust is an affirmative defense, *Jones v. Bock*, 127 S. Ct. 910, 921 (2007), Defendants first must present sufficient evidence of failure to exhaust before Plaintiffs are required to show a genuine dispute on exhaustion exists, *Lordmaster v. Augusta Corr. Ctr. Pers.*, 2014 WL 3359389, at *1, n.2 (W.D. Va. July 9, 2014) (citing *Tuckel v. Grover*, 660 F.3d 1249, 1254 (10th Cir. 2011)). Defendants fail to meet their burden for several reasons.

First, Defendants fail to proffer sufficient evidence. With respect to Mr. Shabazz, Defendants' largely fail to support their exhaustion defense with sufficient evidence. By Defendants' count (which Plaintiffs contest), Mr. Shabazz raised 20 distinct issues regarding ADA discrimination. DeBerry Aff. ¶ 19. VDOC concedes Mr. Shabazz exhausted three of these allegations but submits a declaration arguing that Mr. Shabazz failed to exhaust the remaining seventeen. *Id.* ¶ 20. Yet with respect to 12 of those purportedly remaining 17 issues, VDOC's declaration is silent and offers *no evidence* one way or the other. *Id.* ¶¶ 13–30. Accordingly, the exhaustion defense fails as to issues such whether Mr. Shabazz was unable to partake in educational programming or denied blindness skills training. *See id.*

With respect to all Plaintiffs, Defendants' exhaustion defense also fails because it depends entirely on the declarations of staff members K. DeBerry (ECF No. 210-24) and K. Phillips (ECF No. 210-22). These declarants claim no personal knowledge of whether or not Plaintiffs grieved their issues; rather, they testify only to the contents of a grievance file they *reviewed* in their respective prisons. DeBerry Aff. ¶¶ 14, 20, 32, 35, ECF No. 210-24; Phillips Decl. ¶¶ 14, 21, ECF No. 210-22. Such records do not suffice to meet Defendants' burden of proof if evidence exists that they are "incomplete, or inaccurate, or both." *See Scott v. Clarke*, 64 F. Supp. 3d 813, 830 (W.D. Va. 2014); Order, *Hudson v. Ek*, No. 21-cv-2056 at *30 (C.D. Ill. Feb. 14, 2024), ECF No. 166 (defendants did not meet their burden to prove non-exhaustion "by negative inference" because the grievance log "is not reliable enough" and "is verifiably missing certain entries"). Here, ample evidence shows VDOC's records are unreliable.

Take Mr. Courtney. According to Defendants' records, Mr. Courtney filed one complaint (and no grievances or appeals) in August 2022 regarding his need for dimmer lights in his cell and window tinting. Phillips Decl. ¶ 16. In fact, as Mr. Courtney testified at his deposition, he requested these accommodations starting in November 2021—almost a year before the date indicated in VDOC records—and then he "submit[ted] a grievance and appeal[ed] that all the way up." Ex. 17, Courtney Dep. 159:3–161:16. Similarly, although VDOC asserts there is no evidence that "Greensville took away all the accommodations that Sussex II State Prison had previously provided," Phillips Decl. ¶ 14, VDOC's own records make plain that Mr. Courtney received dim lighting as an accommodation in 2019 at his prior facility, *see* Ex. 86, COURTNEY000019 (VDOC record stating he received a letter stating he should receive "dimmer indirect lighting" as an accommodation and that "Different light bulbs have been ordered"), which was taken away when he transferred to Greensville—resulting in the August 2022 complaint. Worse, Defendants did not produce relevant grievance records for Mr. Courtney until mere weeks ago, after the close of discovery. Ex. 37, Basche Decl., Ex. B

Indeed, Defendants' proffered evidence concerning which steps Plaintiffs have taken in the grievance process is consistently incorrect, underscoring why summary judgment is inappropriate. For example, with respect to his JPay tablet, VDOC asserts that Mr. Hajacos only asked for a cable to connect the tablet to his television (so he could see his tablet's display on a bigger screen). ECF No. 210-22, Phillips Decl. ¶ 23 . That is incorrect. In November 2022, and again in January 2023, Mr. Hajacos also objected that he was unable to see the "display/keyboard" on his JP6 player and needed a "keyboard accessory that has the Large printed keys." Ex. 15, NFBV 019764, Ex. 87, NFBV 019756. Similarly, Defendants assert that Mr. Shabazz filed one complaint (from November 2022) concerning JPay tablets. ECF No. 210-24, DeBerry Aff. ¶ 22. That is incorrect. Mr. Shabaz submitted a second in December 2022, stating his tablet did not "provide equal access" with respect to "navigating [the tablet's] system independently like sighted inmates." Ex. 68, NFBV 010396. Defendants assert Mr. Shabazz filed four complaints regarding SARA (January 2019, April 2020, and two in November 2022). ECF No. 210-24, DeBerry Aff. ¶ 24. That is

incorrect; he filed another in March 2023 Ex. 32, NFBV 010549. Defendants assert Mr. McCann filed complaints on September 27, 2022 and November 9, 2022 regarding the need to have his (sighted) caregiver close to him in the housing unit. ECF No. 210-24, DeBerry Aff. ¶ 38. That analysis omits at least two other complaints that Mr. McCann filed on this same issue. Ex. 10 NFBV 010179, Ex. 88, NFBV 010085.

The unreliability of VDOC's records is further underscored by the fact that Defendants themselves were unable to locate grievance documents in response to Plaintiffs' discovery request for over a year and a half. Plaintiffs served a request for production of documents on defendant VDOC on July 3, 2023, the responses to which were due within 30 days. Ex. 37, Basche Decl. ¶ 6. Yet on February 29, 2024—after the close of discovery—counsel for Defendants alerted Plaintiffs that they had located additional responsive records that included grievances. *Id.* ¶ 7 & Ex. A. When asked why these grievance documents were not produced in Defendants' initial responses, defense counsel stated that "those documents were discovered during the course of our declarant's review of her declaration and the plaintiffs' grievance reports." *Id.* ¶ 8 & Ex. B.

Finally, a genuine dispute exists as to the reliability of Defendants' records because the "summaries" of VDOC records that Defendants' declarants reviewed are written by prison officials (not prisoners). DeBerry Aff. ¶¶ 14, 20, 32, 35; Phillips Decl. ¶¶ 14, 21. These "summaries" are often inaccurate or incomplete accounts of complaints and grievances that Plaintiffs filed. See Pls.' Resp. to SUF ¶ 97, *supra*.

For all these reasons, Defendants have failed to meet their burden of showing Plaintiffs' non-exhaustion. Accordingly, summary judgment is inappropriate.

B. Defendants' failure to effectively communicate with blind prisoners regarding the grievance process rendered it unavailable.

Prisoners are only required to exhaust "available" remedies. 42 U.S.C. 1997e(a). Here, there is at least a dispute of fact as to whether the grievance processes at Deerfield and Greensville are "available" to blind prisoners. "[A]n administrative remedy is not considered to have been

available if a prisoner, through no fault of his own, was prevented from availing himself of it." *Moore v. Bennette*, 517 F.3d 717, 725 (4th Cir. 2008). The availability of administrative remedies is an individualized question that turns on the specifics of the plaintiff's situation. As the Seventh Circuit has held:

> [I]f a prison had a procedure whereby written grievance forms were provided to all inmates and they were required to fill them out without any assistance from others, that procedure might render the grievance remedy available for the majority of inmates, but **the same procedure could render it unavailable for a subset of inmates such as those who are illiterate or blind, for whom either assistance or a form in braille would be necessary to allow them to file a grievance**.

Lanaghan v. Koch, 902 F.3d 683, 688 (7th Cir. 2018) (emphasis added).

Here, the grievance process is unavailable to Plaintiffs for the exact reason the Seventh Circuit identified in *Lanaghan*—the grievance process is not accessible to them. *See also Brown v. Dep't of Pub. Safety & Corr. Servs.*, 383 F. Supp. 3d 519, 543–44 (D. Md. 2019) (blind prisoners have no obligation to exhaust because if they are "unable to read the print-only grievance materials"). The paper forms prisoners must use to file complaints, grievances, and appeals are all offered in standard print only. Ex. 26, Cosby 30(b)(6) Dep. 22:11–23:11; Ex. 5, Talbott Dep. 173:22–174:2. VDOC responses to those filings also are on standard print forms, Ex. 26, Cosby 30(b)(6) Dep. 22:11–23:11, and the responses themselves are handwritten, meaning they cannot be "read aloud" by assistive technology available at Deerfield (but not Greensville), such as a SARA machine. ECF No. 191-22, Chong Expert Report at 8; *see* Ex. 30, Delbridge Dep. 175:17–176:1. Plaintiffs depend on other (sighted) individuals in order to file complaints, grievances, and appeals, and to read all responses thereto. Because the grievance process is not available to them, Plaintiffs need not exhaust these remedies. *See Lanaghan*, 902 F.3d at 688.

The mere fact that Plaintiffs were able to fully exhaust a handful of grievances does not demonstrate that the grievance process was "available." *See Hill v. O'Brien*, 387 F. App'x 396, 401 (4th Cir. 2010) (denying summary judgment because defendants' "reliance on [plaintiff's]

high-volume filings is specious" and "irrelevant to whether his efforts to file grievances were obstructed" with regard to the claims in the case).

Although VDOC focuses on the "high volume of filings" from Plaintiffs, *see Hill*, 387 F. App'x at 401, to argue the grievance process was "available," VDOC ignores that VDOC rejected the bulk of Plaintiffs' filings for inappropriate reasons. *See* Section I.C, *infra*. Plaintiffs' repeatedly appealed these rejections to the highest possible level and repeatedly expressed frustration to VDOC officials that VDOC was not accepting and considering their grievances. That was all they believed they could do, both in light of VDOC's rejections and because VDOC never provided accessible information regarding grievance procedures (and, in particular, exhaustion) to blind prisoners, such that they did not understand the details of VDOC's exhaustion requirements as outlined in OP 866.1. Ex. 14, Suppl. P. Shaw Decl. ¶ 8; Ex. 19, Suppl. Hajacos Decl. ¶¶ 13–14; Ex. 13, Suppl. Stravitz Decl. ¶¶ 11–12.

For example, upon arriving at Deerfield or Greensville, sighted prisoners receive "orientation manuals" describing the grievance process and notifying prisoners VDOC Operating Procedure 866.1 governs this process. *See* Ex. 76, NFBV 011709–011772 (Greensville orientation manual); Ex. 75, NFBV 015405–30 (Deerfield orientation manual). These manuals are not accessible to blind prisoners, because, at least in past years (when Plaintiffs went through orientation), VDOC provided manuals in standard print only. *See* Ex. 8, L. Shaw Dep. 88:22–89:12 (stating in late 2023 that Deerfield is starting to create large-print materials); Ex. 13, Suppl. Stravitz Decl. ¶ 10. Thus, blind prisoners would not know which policy governs grievances.

Prisoners are not provided copies of OP 866.1 at orientation. Although OP 866.1 and other VDOC policies may be reviewed in the Deerfield or Greensville law library, prisoners must fill out an inaccessible paper request form in order to reserve a visitation time. Ex. 28, Phillips Dep. 76:7−77:5. In the law libraries, the prisons only have inaccessible, standard-print copies of OP 866.1; they do not have the policy in accessible, alternate formats (*e.g.*, Braille, large print). *Id.* at 68:15–69:16 & Ex. 2 § IV.B.3; Ex. 6, Marano 30(b)(6) Dep. 30:18–31:16; Ex. 30, Delbridge Dep. 64:5–20, 84:17–86:5; Ex. 5, Talbott Dep. 114:4–9, 173:14–21.

Both at orientation and in the library, then, blind prisoners are denied information they need regarding how to exhaust claims. Courts in similar situations readily conclude that summary judgment on exhaustion is inappropriate. *See, e.g.*, *Snyder v. Riverside Cnty.*, 819 F. App'x 514, 516 (9th Cir. 2020) (plaintiff's "statement that he never received the prison inmate orientation manual containing the official grievance policy" supported argument that . . . the grievance process was unavailable); *Denton v. Pastor*, No. C17-5075 BHS-TLF, 2021 WL 6622137, at *4–5 (W.D. Wash. Dec. 16, 2021) (denying summary judgment because "[t]he parties provided conflicting testimony regarding whether plaintiff received information about the grievance process"), *report and recommendation adopted*, 2022 WL 203489 (W.D. Wash. Jan. 24, 2022); *see Reid v. Marzano,* 9:15-CV-0761 (MAD/CFH), 2017 WL 1040420, at *3 (N.D.N.Y. Mar. 17, 2017) (holding that the plaintiff's testimony that he did not know how to proceed when he did not receive a response to his grievance is sufficient to withstand summary judgment on the issue of exhaustion). At the least, a genuine dispute exists.

Worse, VDOC did not inform blind prisoners when it amended its grievance procedures in 2022—it simply began rejecting Plaintiffs' grievances pursuant to those new procedures. In a change effective June 1, 2022, VDOC clarified that "[s]upporting documents" that "must" be filed with a grievance for that grievance to be accepted and reviewed on the merits include (where applicable) a filled-out, standard-print "Request for Reasonable Accommodation" (which blind prisoners also cannot privately and independently access) (NFBV 012096). This 2022 amendment was not effectively communicated to blind prisoners. Indeed, when VDOC amends a policy, it typically updates the standard-print policies in the law libraries without informing prisoners; at most, if it is "something of great significance," VDOC will post a standard-print (inaccessible) "memo" on an announcements board. Ex. 5, Talbott Dep. 134:8–135:7.

Although VDOC downplays this amendment, *see* Defs.' Mot. at 17 n.3,[5] Plaintiffs' post-

[5] Defendants state: "Although minor edits to OP 866.1 were made over the course of time, the overall process for filing Informal/Written Complaints, Regular Grievances, and appeals has remained the same." Defs.' Mot. at 17 n.3

June 2022 grievances routinely were rejected for failing to attach a written Request for Reasonable Accommodation. Mr. Shabazz's experience is illustrative. From November 2022 to January 2023, Mr. Shabazz (through sighted prisoners who assisted him) filed written grievances that JPay tablets were not accessible to the blind. Those grievances were rejected, and when Mr. Shabazz appealed, the rejections were affirmed because he had not submitted an Accommodation Request to the ADA Coordinator. Ex. 50 NFBV 010451–52. Of course, the reason for the rejection was handwritten and not accessible to Mr. Shabazz either. *Id.*

Similarly, in fall 2022, Mr. McCann filed grievances asking for his (sighted) caregiver to be moved closer to him in Deerfield's dorm-style housing because he could not independently navigate the dorm to get to the bathroom, kitchen, phones, and the JPay kiosk. VDOC rejected all those grievances as improperly filed, because Mr. McCann did not attach a Reasonable Accommodation form—something VDOC had only started requiring in June 2022, when it amended OP 866.1 without informing blind prisoners. Mr. McCann pursued all potential appeals, but the regional ombudsman upheld the rejections. *See* Ex. 44, NFBV 010172–76; Ex. 45, NFBV 018480–81; Ex. 51, NFBV 010183–84.[6]

Although VDOC argues the grievance process is accessible because staff are available to assist blind prisoners, Defs.' SUF ¶¶ 93–94, the evidence suggests otherwise, creating at least a genuine dispute on exhaustion. *See Hill*, 387 F. App'x at 400 (remedies are not "available" if any "defects in exhaustion were . . . procured from the action or inaction of prison officials"); *Harris v. Pittman*, 927 F. 3d 266, 276 (4th Cir. 2019) (on summary judgment, the nonmoving party's version of the facts must be adopted even if the non-moving party's account is unlikely). The

[6] To this day, VDOC ADA coordinators offer conflicting testimony as to whether ADA forms must accompany grievances for grievances to be accepted at intake and reviewed on the merits. The Greensville ADA coordinator testified that prisoners could choose to request accommodations either through the grievance process or by filing an ADA Request for Accommodations. Ex. 5, Talbott Dep. 173:14–174:16. The Deerfield ADA Coordinator, by contrast, said a prison cannot use a grievance form in order to request an accommodation because "that is not the proper protocol," and prisoners that do request an accommodation via a grievance form will be instructed "to go back and . . . put it on an accommodation request form." Ex. 8, L. Shaw Dep. 132:18–134:7.

record is replete with testimony from blind prisoners that staff are not, in fact, available or willing to help. Pls. Resp. to SUF ¶ 21, *supra*. Plaintiffs also repeatedly objected that staff were unavailable in written filings to VDOC. *See, e.g.*, Ex. 89, NFBV 011286 (Mr. Courtney objecting that staff do not help him); Ex. 90, NFBV 010360 (Mr. Shabazz objecting that staff were unavailable to help fill out forms); Ex. 91, NFBV 018308-09 (Mr. McCann objecting that staff "refused to offer assistance").

C. Defendants Thwarted Plaintiffs' Ability to Use the Grievance Process.

Moreover, even if VDOC had provided accessible information regarding its grievance policies to blind prisoners—it did not—summary judgment on exhaustion nonetheless would be inappropriate because a genuine dispute exists as to whether VDOC officials otherwise "thwart[e]d" blind Plaintiffs "from taking advantage of [the] grievance process." *See Ross v. Blake*, 578 U.S. 632, 644 (2016). VDOC officials repeatedly misled Plaintiffs as to which ADA-related issues could be grieved, urged Plaintiffs to refrain from timely exercising their grievance rights, and otherwise stymied their efforts to secure relief. These actions effectively "render[ed] the administrative process unavailable" such that exhaustion is not required. *See id.*; *see also Zander v. Lappin*, 415 F. App'x 491, 492 (4th Cir. 2011) ("the district court is 'obligated to ensure that any defects in exhaustion were not procured from the action or inaction of prison officials." (quoting *Aquilar-Avellaveda v. Terrell*, 478 F.3d 1223, 1225 (10th Cir. 2007)).

Coupled with VDOC's failure to make the process accessible (paper forms) and failure to provide accessible materials explaining the process (paper policies), VDOC's actions and inactions effectively precluded Plaintiffs from successfully using the grievance process—an issue Plaintiffs repeatedly raised and VDOC failed to address. *E.g.*, Ex. 92, NFBV 009013 (Mr. Hajacos objecting that he is being "arbitrarily denied" accommodations); Ex. 93, NFBV 009967–68 (Mr. McCann objecting that institutional ombudsman finds all grievances "unfounded"); Ex. 94, NFBV 018352–54 (Mr. McCann objecting that VDOC is not investigating grievances); Ex. 95, NFBV 008933–37 (Mr. Courtney appealing denial of grievance caused by VDOC inactions and arguing he is "effectively being denied access to the grievance process"). *See also* Order, *Hudson v. Ek*, No. 21-

cv-2056 at *31 (C.D. Ill. Feb. 14, 2024), ECF No. 166 (finding remedies were unavailable because the prison appeals process "does not question or substantively review" the decision of the lower-level administrative decision and thus was not substantive in practice).

First, VDOC repeatedly and falsely informed Plaintiffs they could not grieve effective-communication issues if those issues concerned the actions of contractors. That information was wrong. Because the ADA bars public entities from discriminating "through contractual, licensing, or other arrangements," 28 C.F.R. § 35.130(b)(1), VDOC has a responsibility to ensure its contractors comply with the ADA's requirements. By misleading Plaintiffs, VDOC ensured Plaintiffs could not exhaust administrative remedies as to these issues. Thus, the grievance procedure was "unavailable." *See Ross*, 578 U.S. at 644 n.3 ("Grievance procedures are unavailable . . . if the correctional facility's staff misled the inmate as to the existence or rules of the grievance process so as to cause the inmate to fail to exhaust such process").

For instance, in November 2023, Mr. McCann filed a complaint and grievance concerning JPay kiosks. VDOC rejected his grievance, informing Mr. McCann that his issue is "nongrievable" because the kiosks are provided by JPay, an outside contractor; Mr. McCann appealed, but the regional ombudsman affirmed. Ex. 96 NFBV 018644; Ex. 97 NFBV 018642; Ex. 98 NFBV 018643, Ex. 99, NFBV 018667–68. Similarly, in December 2022, Mr. Shabazz filed a grievance because JPay tablets are not accessible. VDOC rejected that grievance as "Beyond the control of the Department of Corrections"; Mr. Shabazz appealed, and the regional ombudsman affirmed. Ex. 50, NFBV 010451–52; Ex. 51, NFBV 010479–81. Again in 2022, when Mr. McCann filed a grievance noting that the Deerfield commissary (run by an outside contractor) did not ensure effective communication with blind prisoners, Deerfield rejected that grievance as an issue beyond VDOC's control (and VDOC upheld that decision on appeal. Ex. 100, NFBV 009683–84; Ex. 101, NFBV 010293; Ex. 102, NFBV 010289; Ex. 103, NFBV 010295.

If a plaintiff is told by correctional staff that grieving an issue is futile or outside the scope of the grievance process, he is not required to proceed with the futile step of continuing to grieve the issue. *See Ebmeyer v. Brock*, 11 F.4th 537, 542–43 (7th Cir. 2021) (remedies are considered

unavailable when a correctional officer tells the prisoner that he cannot file a grievance when, in fact, he can.); *Wright v. Ferguson*, No. 7:22-CV-00395, 2023 WL 6304687, at *3 (W.D. Va. Sept. 26, 2023) (administrative remedies were not available where defendants told inmate his issues were "not grievable"); *Hartsell v. Dietz*, No. 3:20-CV-588-MGG, 2023 WL 6382578, at *4 (N.D. Ind. Sept. 30, 2023) (same).

Second, VDOC has frustrated Plaintiffs' efforts to exhaust administrative remedies by telling Plaintiffs that they should do nothing and "be patient" because VDOC was working on a solution—leading Plaintiffs to forfeit their right to fully exhaust their claims (because a grievance must be filed within 30 days of the date of the "incident" when the issue arose).

For instance, in 2018, Mr. Shabazz requested that VDOC install a screen reader in the Deerfield law library. VDOC responded that, although the "equipment is here," Mr. Shabazz could not use it, because VDOC "ha[s] to train staff so it can be accessible for you" as well as "others." Ex. 104, NFBV 014108. When Mr. Shabazz followed up a year later, VDOC urged him to be patient, explaining "[t]he order has been sent to appropriate staff for processing" and instructing him that VDOC "[w]ill advise" him "once the [screen reader] software is here." Ex. 105, NFBV 014116. That day never arrived; there still are no screen readers on Deerfield law library computers. Ex. 30, Delbridge Dep. 118:10–120:19.

Similarly, in August 2022, Mr. Courtney filed a complaint that VDOC had not tinted his cell window as was needed for his disability. VDOC said it would be fixed, both in writing, Ex. # NFBV 011281; Ex. 106, NFBV 015002, and in person, Ex. 17, Courtney Dep. 173:8–174:10. There was no apparent reason to continue the grievance process--yet by March 2023, when he was released from prison, Mr. Courtney still had not received this accommodation. *Id.* at 13:7–10, 159:3–9. Similarly, when Mr. Shabazz in December 2022 grieved the fact that he could not use the SARA machine in his living space, Deerfield rejected his grievance and instructed him to "Wait to see" whether his grievance was necessary; that decision was affirmed on appeal. Ex. 107, NFBV 010527–28. In November 2022, when Mr. Hajacos filed a complaint concerning his needs for an accessible JPay tablet, VDOC told him to "Be patient, please." Ex. 15, NFBV 019764. Mr. Hajacos

repeatedly followed up, Ex. 87, NFBV 019756, but it was not until ten months later—in October 2023—that VDOC denied his request, Ex. 108, NFBV 019732. When VDOC dithers and Plaintiffs ask about how long VDOC will take in an effort to preserve grievance rights, VDOC declines to provide such information. *See* Ex. 109, NFBV 013987.[7]

Third, rather than engaging with the issues blind prisoners raise, VDOC routinely rejects attempted grievances and asks Plaintiffs to provide superfluous and burdensome information, rendering the grievance process in reality unavailable. For instance, when Mr. Shabazz filed a written request for the JAWS screen reader in the law library, VDOC asked him to explain "why it is important to have the JAWS program in the law library." Ex. 110, NFBV 011457. When Mr. Hajacos in 2022 filed a grievance because his status as a blind prisoner had not been recorded in the prison's electronic database—an error that kept him from receiving accommodations—VDOC rejected the grievance for "insufficient information" and asked him to explain "when and How did [he] learned that [his] vision status [was] not in CORIS"; that rejection was affirmed on appeal. Ex. 111 at NFBV 009186–91. When Mr. McCann in 2022 grieved that the commissary is not accessible, VDOC rejected it because Mr. Mcann did not "provide . . . the ADA guidelines for this accommodation." *Id.* at NFBV 009981–82.[8]

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[7] Plaintiffs repeatedly lost their right to pursue a grievance because they did not file it within the 30-day window. *See* Ex. 113, NFBV 010315–010316 (on appeal in February 2023, regional ombudsman affirming rejection of Mr. McCann's grievance regarding non-responses to his accommodation requests because he waited more than 30 days from when he asked for the accommodations to grieve their non-fulfillment); Ex. 62 at NFBV 009218–19 (upholding rejection of Mr. Hajacos's complaint that he was not receiving large print because it was filed outside the 30-day window).

[8] Relatedly, VDOC routinely rejects blind prisoners' grievances for technical reasons in a byzantine system that is "so confusing that . . . no reasonable prisoner" can use this process. *See Ross*, 578 U.S. at 644. For instance, when Mr. McCann requested his caregiver be moved beside him in September 2022, VDOC concluded that was an inappropriate "Request for Services" that must be directed to medical personnel. Ex. 42, NFBV 010045-46. When Mr. Hajacos in 2022 grieved the lack of large print at Greensville, that too was rejected as a "Request for Services" that should be directed to his counselor Ex. 62, NFBV 009216–21. When Mr. Shabazz filed grievance regarding the unsuitability of the dorm-style pod and his request for a single cell, VDOC again

D. This Court Should Reject Defendants' Attempts to Unduly Narrow the Scope of Plaintiffs' Exhausted Claims.

Even if this Court finds administrative remedies were "available" to Plaintiffs, this Court should reject Defendant's misguided effort to narrow the scope of those grievances Plaintiffs indisputably did exhaust. Although Defendants suggest Plaintiffs must exhaust each precise legal allegation, that is not how exhaustion works. "[T]o satisfy the exhaustion requirement, grievances generally need only be sufficient to 'alert the prison to the nature of the wrong for which redress is sought.'" *Wilcox*, 877 F.3d at 167 n.4 (quoting *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)). That is, an exhausted grievance suffices if it provides "fair notice of the alleged systemic problems" *Scott*, 64 F. Supp. 3d at 814.

Even limiting the record to Plaintiffs' grievances that Defendants concede were exhausted, Defendants were on notice many times over, for years, that they were failing to meet their obligations under the ADA to ensure effective communication with blind prisoners and accommodate their needs. This Court should reject Defendants' attempts—unmoored from the case law—to demand exhaustion of each precise legal allegation.

Defendants argue, for instance, that Mr. Hajacos did not exhaust the issue of being forced to rely on other prisoners for reading and writing, Phillips Decl. ¶ 21, even though Mr. Hajacos filed a complaint, accepted grievance, and appeal in 2022 because he was being denied access to large print, Ex. 112 at NFBV 009206, NFBV 009216–21, and filed complaints regarding inaccessible message boards, Ex. 63, NFBV 019785–87. Defendants' attempts to minimize Mr. Shabazz's exhausted grievances are even more egregious. Defendants argue that although Mr. Shabazz exhausted his claim regarding access to the SARA machine, DeBerry Aff. ¶ 25, he did not exhaust other allegations in the complaint also concerning access to SARA, *id.* ¶ 26. Similarly, Defendants argue that, although Mr. Shabazz exhausted his grievance that VDOC discriminates against him by denying him favorable work assignments, DeBerry Aff. ¶ 23, and exhausted his

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rejected it as an inappropriate "request for services," and on appeal the regional ombudsman upheld that decision. Ex. 114, NFBV 010471-72. Rather than addressing the concerns, VDOC deflects.

grievance that he specifically was denied the position of "pod tutor," *id.* ¶ 27, he did not exhaust grievances that he was denied other favorable positions ("main laundry").

These arguments ignore the fact that Plaintiffs need only provide "fair notice" of the problems. Defendants' argument is especially unconvincing in the ADA context, because under the ADA prisons are not just barred from discriminating but also have an affirmative obligation to take proactive steps to ensure "effective communication" and otherwise comply with ADA standards. *See Pierce v. District of Columbia*, 128 F. Supp. 3d 250, 266 (D.D.C. 2015) (prisons have "an affirmative obligation to make benefits, services, and programs accessible to disabled people"); 28 C.F.R. § 35.160(a)(1) (2022) (prisons shall "take appropriate steps to ensure that communications" with disabled persons "are as effective as communications with others."). Here, Defendants had more than "fair notice" that they were, *inter alia*, failing to ensure communications with the blind, failing to accommodate blind prisoners' mobility needs, and failing to ensure the blind were not discriminated against in employment.

Moreover, even if this Court concludes administrative remedies were "available" to blind prisoners (it should not, *see* Sections I.A-C, *supra*), this Court should reject Defendants' suggestion that Mr. Stravitz and Mr. Shaw should not benefit from that exhaustion. Under the vicarious-exhaustion doctrine, exhaustion by one plaintiff in a lawsuit suffices for other plaintiffs alleging they were similarly affected by Defendants actions or inactions. *See, e.g.*, *Jarboe v. Md. Dep't of Pub. Safety & Corr. Servs.*, 2013 WL 1010357, at *15 (D. Md. Mar. 13, 2013) (the vicarious exhaustion doctrine applies in non-class actions if plaintiffs' disabilities are similar and plaintiffs "complain about substantially similar alleged failures to accommodate their disability in common aspects of prison life," even if their "requested accommodations may vary").

Because Defendants received "fair notice" of the "nature of the wrong" that Plaintiffs experienced with their blindness—and that is all the PLRA requires—this Court should find that Plaintiffs exhausted the administrative process with regard to all their claims.

E. The PLRA's Exhaustion Requirement Does Not Apply to Mr. Courtney

At the time Plaintiffs filed their Amended Complaint in November 2023 (ECF No. 136), Mr. Courtney was no longer incarcerated and thus no longer a "prisoner" under the PLRA subject to the PLRA's exhaustion requirement. *See* Ex. 17, Courtney Dep. 13:7–10 (stating his release date was March 2023). Accordingly, this Court must consider the merits of Mr. Courtney's claims regardless of whether he exhausted administrative remedies. *See, e.g.*, *Garrett v. Wexford Health*, 938 F.3d 69, 84, 88 (3d Cir. 2019); *Jackson v. Fong*, 870 F.3d 928, 934 (9th Cir. 2017).

II. Defendants are not entitled to summary judgment on the statute of limitations.

Next, VDOC erroneously argues that Plaintiffs' claims are barred by a one-year statute of limitations. VDOC's arguments notwithstanding, a four-year statute of limitations—not a one-year statute of limitations—applies to Plaintiffs' ADA and Section 504 claims. 28 U.S.C. § 1658 provides a four-year limitations period for federal laws enacted or amended after December 1, 1990. Here, Plaintiffs' claims are "made possible" in part by a 2008 amendment to the ADA that broadened the statute's definition of "disability." *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 380 n.14 (2004); *Malpica v. Kincaid*, No. 1:21-cv-417, 2022 WL 503966, at *5 (E.D. Va. Feb. 18, 2022). The ADA Amendments Act of 2008 "revised the definition of 'disability' for both the ADA and the Rehabilitation Act," *Dickinson v. Univ. of N.C.*, 91 F. Supp. 3d 755, 763–64 (M.D.N.C. 2015), ensuring that disability determinations would be made "without regard to the ameliorative effects of mitigating measures, such as . . . low-vision devices . . . or auxiliary aids or services." Pub. L. No. 110-325, 122 Stat. at 3555–56 (codified at 42 U.S.C. § 12102(4)(E)). For instance, "severe myopia" was not a "disability" before 2008, but it was a "disability" after 2008 even if correctable by glasses. *Malpica*, 2022 WL 503966 at *5 & n.4. Here, Plaintiffs use "low-vision devices" and "auxiliary aids or services" to access information. Mr. Hajacos uses magnifiers. Ex. 18, Hajacos Dep. 89:1–7. Mr. McCann and Mr. Stravitz use prescription glasses. Ex. 20, McCann Dep. 84:22–24; Ex. 21, Stravitz Dep. 33:18–34:13. Mr. Shabazz and Mr. Shaw use a "low-vision device"—the SARA machine. Because, for all Plaintiffs, the 2008 amendment helped ensure their claims are viable, the four-year window applies. Even if the one-year

limitations period applied, VDOC's statute-of-limitations argument still fails because the continuing violation doctrine applies to Plaintiffs' ADA and Section 504 claims. The continuing violation doctrine applies if "the illegal act did not occur just once, but rather in a series of separate acts, and if the same alleged violation was committed at the time of each act." *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 348 (4th Cir. 2011); *see DePaula v. Clarke*, 884 F.3d 481, 487 (4th Cir. 2018) (doctrine applies if plaintiffs "(1) identify a series of acts or omissions that demonstrate [the violation]; and (2) place one or more of these acts or omissions within the applicable statute of limitations"). Such "continual unlawful acts are distinguishable from the continuing ill effects of an original violation," which "do not constitute a continuing violation." *A Soc'y Without a Name*, 655 F.3d at 348. Here, for years, Plaintiffs repeatedly have asked VDOC to live up to its ADA obligation to ensure effective communication by providing assistive technology, such as SARA machines for reading print documents, large-print copies of information, screen readers on computers, and accessible tablets for emails and music. Plaintiffs experienced the same violation (denial of effective communication) by the same actor (VDOC) in a series of acts (VDOC's refusals to provide technology to ensure effective communication despite Plaintiffs' repeated requests). *See, e.g.*, *DePaula*, 884 F.3d at 487 (doctrine applies where plaintiff "repeatedly sought help from officials and medical staff" but did not receive it); *McCarter v. Univ. of N.C. at Chapel Hill*, No. 1:20-CV-1050, 2021 WL 4482983 at *8–9 (M.D.N.C. Sept. 30, 2021) (doctrine applies where defendant "repeatedly" violated the law by "allowing" discriminatory acts to occur, "[e]ach action . . . constituted [] discrimination in violation of the same laws," and "the same actors engaged in a series of actions that each violated the same laws"). Defendants provide no evidence that they actually provided the assistive technology requested by Plaintiffs and, therefore, cannot assert that this deprivation was anything other than a "fixed and continuing practice."

Defendants also contend that Mr. Shabazz's and Mr. Shaw's claims for denial of educational and job opportunities are barred because they last applied for such a Grade 3 job four or five years ago. Def.' Mot. at 53, 54. However, as discussed below, these Plaintiffs challenge not

the denial of a specific job, but their ongoing ineligibility for those jobs, which is based on Defendant's restrictions on which prisoners can hold what jobs.

III. Defendants are not entitled to summary judgment on the merits of Plaintiffs' claims.

As a threshold matter, Plaintiffs dispute Defendants' attempt to parse out each individual failure on Defendants' part to provide accommodations to Plaintiffs. Plaintiffs allege widespread, ongoing, systemic violations of the ADA, Section 504, and VDA that require injuctive relief to remedy. Plaintiffs allegations in the Amended Complaint provide examples of these ongoing, systemic violations.[9]

A. Plaintiffs' ADA, Section 504, and VDA claims have merit.[10]

1. William Hajacos

Defendants' argument regarding Mr. Hajacos's Wood Shop claim misses the mark. Mr. Hajacos refused to move to the Wood Shop-only housing unit because Ms. Talbott refused to ensure that he would receive the accommodations provided in his existing housing unit. Ex. 18, Hajacos Dep. 57:2–22, 60:5–66:21; Ex. 63, NFBV 019785-86; Ex. 67, NFBV 019788–89. Thus, Mr. Hajacos was forced to choose between continuing to receive his accommodations or giving up those accommodations and keeping his job in the Wood Shop. *Id.* He chose the former. Defendants cite a declaration from Lane Talbott, the former ADA Coordinator at Greensville, to support the proposition that Mr. Hajacos could hypothetically have kept his accommodations and would have had access to videophones, ASL interpreters, and TTY phones had he moved to the Wood Shop housing unit. Defs.' Mot. at 51 (citing Talbott Decl. ¶¶ 7–9). But the evidence in the

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[9] Because Defendants only argue that they are entitled to summary judgment on Mr. Shaw's claims on the basis of exhaustion and statute of limitations, Plaintiffs do not address the merits of his ADA, Section 504, and VDA claims.

[10] Mr. Courtney has moved to voluntarily dismiss his retaliation claim, ECF No. XX, and therefore does not address Defendants' arguments regarding this claim. If, however, the Court denies his Motion, Mr. Courtney reserves the right to provide argument with respect to his retaliation claim. Similarly, Mr. Courtney has moved to dismiss his claims for prospective injunctive relief. ECF No. XX. Accordingly, Mr. Courtney does not address Defendants' argument that his claims for prospective injunctive relief are moot. However, Defendants do not move for summary judgment on Mr. Courtney's damages claims. Therefore, those claims are still in dispute.

record demonstrates that this is not the case. Ex. 18, Hajacos Dep. 57:2–22, 60:5–66:21; Ex. 63, NFBV 019785–86, Ex. 67, NFBV 019788–89.

Defendants misconstrue Mr. Hajacos's Wood Shop claim and apply the wrong standard. Mr. Hajacos alleges that Defendants failed to accommodate him. The causation standard for failure to accommodate claims is that, but for Mr. Hajacos's disability, he would not have needed these accommodations and but for the lack of auxiliary aids and services, Mr. Hajacos would have been able to continue his Wood Shop job. S*ee Gentry v. E. W. Partners Club Mgmt. Co. Inc.*, 816 F.3d 228, 235–36 (4th Cir. 2016); *Bennett-Nelson v. La. Bd. of Regents*, 431 F.3d 448, 454–55 (5th Cir. 2005); *Wis. Cmty. Servs., Inc. v. City of Milwaukee*, 465 F.3d 737, 751–52 (7th Cir. 2006). Defendants do not dispute that Mr. Hajacos needed the accommodations he had in his existing housing unit—and there are genuine disputes of material fact regarding whether his existing accommodations would have been provided in the Wood Shop housing unit. Ex. 18, Hajacos Dep. 57:2–22, 60:5–66:21; Ex. 63, NFBV 019785–86, Ex. 67, NFBV 019788–89. Accordingly, the Court should deny Defendants' Motion as to Mr. Hajacos's Wood Shop claim.

As to Mr. Hajacos's failure to accommodate claim for his computer class, Defendants overlook factual disputes and apply the incorrect standard. The ADA, Section 504, and VDA require Defendants to provide equal access to programs, services, and activities and ensure equally effective communication with individuals with disabilities. 28 C.F.R. § 35.130; 28 C.F.R. § 35.160. Even if Defendants provided Mr. Hajacos with all the items Mr. Zormelo listed in his declaration, *see* ECF No. 210-27, Zormelo Decl. ¶ 8, it is of no moment, because the relevant inquiry is whether these items were effective in providing Mr. Hajacos with equal access to and equally effective communication in his computer course. Evidence in the record demonstrates that this is not the case. *See* Pls.' Resp. to SUF ¶¶ 131–33. Accordingly, the Court should deny Defendants' Motion as to Mr. Hajacos's computer class claim.

2. Kevin Shabazz

Defendants do not provide a substantive, factual dispute regarding Mr. Shabazz's claims that having other inmates read and write for him violates the ADA, Section 504 and the VDA. Nor

do Defendants dispute that Mr. Shabazz is forced to have other inmates read and write for him—because there is ample evidence in the record that this is true. Ex. 21, Shabazz Dep. 13:2–18. The question is whether this violates the ADA's mandate of equally effective communication, and the evidence set forth in Plaintiffs' Statement of Undisputed Facts in support of their Motion for Partial Summary Judgment demonstrates that there are no genuine disputes of material fact that forcing blind inmates such as Mr. Shabazz to rely on other inmates to read and write for them violates the ADA. 28 C.F.R. § 35.160(b)(2) ("In order to be effective, auxiliary aids and services must be provided in accessible formats, in a timely manner, and in such a way as to protect the privacy and independence of the individual with a disability.").

Defendants attempt to frame Mr. Shabazz's allegations regarding employment to apply to all prison jobs at Deerfield. Defs.' Mot. at 53 ("Deerfield does not categorically prohibit Mr. Shabazz from holding jobs at Deerfield due to his vision."). But Mr. Shabazz's claim is that he is being denied Grade 3, or skilled, work assignments because he is blind. Defendants contend that Mr. Shabazz applied for the "pod clerk" position, and that position does not exist, but the position of "pod tutor" does. Defs.' Mot. at 53; Defs.' SUF ¶ 159. This is a distinction without a difference. Mr. Shabazz used the term "pod clerk" in his deposition, but he has produced his job application for the *pod tutor* position. Ex. 69, SHABAZZ 000075. His application establishes that he applied to a pod tutor position in August 2023, and his counselor approved him for an interview, but the interviewer declined to interview him. *Id.* Thus, Defendants' quibbles with the exact job title do not amount to a basis for summary judgment on Mr. Shabazz's claim. Further, Mr. Shabazz has also produced grievances regarding the fact that Deerfield staff have denied him Grade 3 jobs because he is blind. Pls.' Resp. to SUF ¶ 155. Thus, there are genuine disputes of material fact that preclude summary judgment on this claim.

3. William Stravitz

Defendants contend that they are entitled to summary judgment on the merits of Mr. Stravitz's claims because he received accommodations for his blindness. Defs.' Mot. at 55. Defendants misunderstand the standard under the ADA and distort the facts. The receipt of some

purported accommodations is not necessarily sufficient to satisfy the ADA's standard of equal access and equally effective communication. 28 C.F.R. 35.130(b)(ii) (covered entities may not "afford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not *equal* to that afforded others") (emphasis added); 28 C.F.R. 35.130(b)(iii) (covered entities may not "provide a qualified individual with a disability with an aid, benefit, or service that is not *as effective in affording equal opportunity* to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others") (emphasis added). The evidence in the record reflects that Mr. Stravitz's supervisor in the library provided him one or two accommodations -- a magnifying sheet and a translucent sheet of paper to help reduce glare,—so that he could read text on the computer Ex. 38, Stravitz Dep. 86:10–22. But Mr. Stravitz testified that these accommodations did not really help. Further, other items Defendants claim are "accommodations" —sunglasses, reading glasses, and a reading light—were all items that he purchased for himself, not accommodations provided by VDOC. *Id.* 87:6–10; 192:9–10. Thus, there are genuine disputes of material fact regarding whether Defendants failed to accommodate Mr. Stravitz because of his blindness. Accordingly, Defendants are not entitled to summary judgment on Mr. Stravitz's claims.[11]

4. Michael McCann

Defendants contend that they are entitled to summary judgment on the merits of Mr. McCann's claims because he received accommodations. Defs.' Mot. at 57. Defendants, again, misunderstand the standard under the ADA and distort the facts. First, Defendants take Mr. McCann to task for not asking staff to assist him with reading and writing instead of other inmates. *See id.* Defendants omit several relevant, material facts. Mr. McCann testified that he does not ask Deerfield staff for assistance because "I don't trust them," and that, when he has asked them for assistance with reading and writing documents, he has been told to wait and that medical staff has

[11] Plaintiffs have moved to voluntarily dismiss Mr. Stravitz's claims for injunctive relief. ECF No. 223. Accordingly, Plaintiffs do not address Defendants' argument regarding his claims for injunctive relief.

refused to assist him. Ex. 20, McCann Dep. 23:3–24:2; 24:5–20. Thus, he is forced to rely on other inmates to complete these tasks. Neither staff assistance nor forced reliance on other inmates meets the requirements of the ADA, which requires that Defendants provide auxiliary aids that would allow Mr. McCann to read and write privately and independently, 28 C.F.R. § 35.160(b)(2), requires Defendants to provide primary consideration to the auxiliary aid chosen by the person with a disability, *id*., and requires readers and scribes to be qualified, 28 C.F.R. § 35.104. Thus, there are genuine disputes of material fact regarding whether such assistance violates the ADA's mandate of equally effective communication.

Defendants contend that Mr. McCann is not being discriminated against with regard to job opportunities because he currently has a Grade 3 job and he is being paid for it. But the evidence in the record reflects that he is not being permitted to perform the job duties, despite the fact that there is a list of them. Ex. 20, McCann Dep. 80:12–23. A job provides more than a paycheck. It provides a way to contribute, a source of pride, and a way of building skills. Mr. McCann can achieve none of those benefits because he is not allowed to perform his job. Mr. McCann testified that his then-Unit Manager, Cheala Washington, told him that counselor's aide position "was just a title they gave me so I would shut up and leave them alone." *Id.* at 80:2–11. Thus, there are genuine disputes of material fact regarding whether Defendants are discriminating against Mr. McCann on the basis of his disability with regard to job opportunities.

Mr. McCann's claims regarding housing are also subject to genuine disputes of material fact. Mr. McCann's caregiver was only recently moved next to him in his housing unit despite numerous requests for this move as a reasonable accommodation. But Deerfield staff did not move Mr. McCann's Caregiver in response to his requests—they moved him because the inmate who was next to him wanted to be in the back of the housing unit, so he asked to switch beds with Mr. McCann's Caregiver. *Id.* at 38:14–24. As to the tactile tape on the floor, the evidence reflects that the tape is not maintained such that Mr. McCann is able to use it effectively. During his deposition, Mr. McCann testified that several things have caused the tape to be removed from the floor. *Id.* at 61:6–9; 12-19. Mr. McCann further testified that "It's taken weeks sometimes" for the tape to be

replaced. *Id.* at. 62:3–4. Thus, there are genuine disputes of material fact regarding Mr. McCann's claim about equal access to housing.

Defendants contend that Mr. McCann's allegations regarding assaults and thefts by other inmates are "at best tenuously connected to his blindness" and point to his inability to identify the offenders or report these incidents as evidence that they did not occur. But Defendants overlook that Mr. McCann testified that he did not report assaults because of fear of retaliation and because, when he did report the first assault on him, he was told that because he could not identify the person because he is blind that there was not anything Deerfield staff would do about it, so it would be pointless to report other assaults. *Id.* at 92:1–14. This is discrimination based on Mr. McCann's blindness. There is also evidence that the assaults are related to his blindness, as Mr. McCann testified that he gets into altercations with other inmates when he bumps into them because he cannot see them. *Id.* at 40:2–42:12. Specifically, with regard to Mr. McCann's allegation that another inmate was masturbating next to him in the shower, other inmates told him that the inmate was doing so *because* Mr. McCann is blind. *Id.* at 53:14–54:18. Thus, there are genuine disputes of material fact regarding Mr. McCann's allegations that he was assaulted and had his property stolen because he is blind.

Finally, Defendants make a sweeping statement that Mr. McCann has received sufficient accommodations to participate in Deerfield's programs. Defendants contend that he has recently been provided accommodations he requested, such as 6X magnifier and a light for his cane. However, Ms. Shaw attests that she has approved the maginifier, but she is still waiting for the Warden to sign off on it. ECF No. 210-25, L. Shaw Decl., ¶ 4. Thus, Mr. McCann does not actually have a new magnifier, despite having seen the specialist who recommended it in November 2023. Pls.' Resp. to SUF ¶ 217. Moreover, the fact that Defendants have only recently provided Mr. McCann with accommodations demonstrates that injunctive relief is needed to ensure that Defendants comply with the ADA, Section 504, and the VDA, as they did not accommodate Mr. McCann until after Plaintiffs filed suit. Thus, there are genuine disputes of material fact regarding

whether Defendants failed to accommodate Mr. McCann because of his blindness and Defendants are not entitled to summary judgment on Mr. McCann's claims.

IV. Defendants are not entitled to summary judgment against plaintiff NFB-VA unless they are entitled to summary judgment against all other Plaintiffs on all claims for injunctive relief.

Defendants make only a derivative argument for summary judgment against plaintiff NFB-VA: that NFB-VA must be dismissed because no other plaintiff has any injunctive claims in the case. Therefore, if the Court fails to grant summary judgment in Defendants' favor on any one of the NFB-VA member's—Mr. McCann's, Mr. Shabazz's, Mr. Shaw's, or Mr. Stravitz's—claims single incarcerated plaintiff's, NFB-VA will remain in the case.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' Motion for Summary Judgment.

Dated: March 15, 2024

Respectfully submitted,

/s/ Eve L. Hill

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing ("NEF") to the following:

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