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

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

Plaintiffs,

v. CASE NO. 3:23cv127

VIRGINIA DEPARTMENT OF CORRECTIONS, *et al.*,

Defendants.

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

Defendants Barry Marano, Darrell Miller, Harold Clarke, Kevin Punturi, Lakeisha Shaw, Lane Talbott, Larry Edmonds, Officer D. Smith, Tammy Williams, and the Virginia Department of Corrections ("VDOC"), move this Honorable Court for entry of an order dismissing them from this case for failure to state a claim, lack of jurisdiction, and sovereign immunity.

Statement of Facts

1. Plaintiffs are six current VDOC inmates, one former VDOC inmate,[1] and one nonprofit organization. Compl. ¶¶ 1, 50.
2. Of the seven individual plaintiffs, two plaintiffs are currently incarcerated at Greensville Correctional Center ("Greensville"): William L. Hajacos ("Hajacos") and Wilbert G. Rogers ("Rogers"). Compl. ¶¶ 17, 28. Their allegations address instances at Greensville.

[1] The Complaint states that Plaintiff Nacarlo A. Courtney ("Courtney") is currently incarcerated at the Greensville Correctional Center. Compl. ¶¶ 1, 10–11. However, according to VDOC records, VDOC released Courtney from custody on March 16, 2023 because he had fully satisfied his sentences.

3. Of the seven individual plaintiffs, four plaintiffs are currently incarcerated at Deerfield Correctional Center ("Deerfield"): Michael McCann ("McCann"), Kevin M. Shabazz ("Shabazz"), Patrick Shaw ("Patrick Shaw"),[2] and William Stravitz ("Stravitz"). Compl. ¶¶ 23, 34, 39, 45. Their allegations address instances at Deerfield.

4. Plaintiffs not only reside at different VDOC facilities, they also experience different levels of "blindness."[3] *See* Compl. ¶ 1. Of the seven individual plaintiffs, only two plaintiffs are "fully blind": Rogers and Shaw. Compl. ¶¶ 32, 43. The remaining individual plaintiffs (Courtney, Hajacos, McCann, Shabazz, and Stravits) identify as "visually impaired" and can see. Compl. ¶¶ 13, 19, 24, 35, 47. Accordingly, their specific complaints vary based on their individual visual needs.

5. Plaintiff National Federation of the Blind of Virginia ("NFB-VA") is a nonprofit organization representing "blind" individuals currently within VDOC custody and "blind" individuals expected to enter VDOC custody. Compl. ¶¶ 50, 55.

6. Defendants (as relevant to this Memorandum) are the Virginia Department of Corrections ("VDOC") and nine individual defendants.

7. Defendant Barry Marano is VDOC's ADA Coordinator. Compl. ¶ 62. In the Complaint, he is mentioned four times and only in relation to Courtney. *See* Compl. ¶¶ 175–76, 275.

8. Defendant Kevin Punturi is the acting Warden at Greensville. Compl. ¶ 65.

9. Defendant Darrell Miller is the Warden at Deerfield. Compl. ¶ 66.

10. Defendant Tammy Williams is the former Warden of Deerfield. Compl. ¶¶ 64.

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[2] To reduce confusion, when referring to Plaintiff Patrick Shaw in this Memorandum, Defendants use his full name: Patrick Shaw. When referring to Defendant Lakeisha Shaw, Defendants also refer to her by her full name: Lakeisha Shaw.

[3] Plaintiffs use "blind" in a "broad sense" to include individuals capable of seeing. Compl. ¶ 1, n. 1.

11. Defendant Lane Talbott is the ADA Coordinator at Greensville. Compl. ¶ 67.

12. Defendant Lakeisha Shaw is the ADA Coordinator at Deerfield. In the Complaint, she is substantively mentioned only once and only by McCann. *See* Compl. ¶¶ 68, 185.

13. Defendant Larry Edmonds is the former Warden of Greensville. Compl. ¶¶ 63.

14. Defendant D. Smith is a Corrections Officer at Greensville. *See* Compl. ¶¶ 75. In the Complaint, only Courtney makes factual assertions concerning Defendant Smith specifically. *See* Compl. ¶¶ 253, 256, 258–59, 274–75.

15. Defendant Harold Clarke is the Director of VDOC. Compl. ¶ 61.

16. Plaintiffs' Complaint mainly consists of many general allegations that are neither plaintiff-specific, facility-specific, nor event-specific.

17. Plaintiffs generally allege that VDOC does not provide information and other written materials in an "accessible format."[4] Compl. ¶¶ 77, 82, 84, 86, 88, 91, 93. Those materials are: commissary lists and order forms, directives, facility handbooks, facility publications, informational postings, job descriptions, memoranda, menus, orientation materials, and operating procedures. Compl. ¶¶ 82, 84, 86, 88, 91, 93, 151.

18. Generally, Plaintiffs allege that the following devices are inaccessible: computers, JP6 tablets, and kiosks. Compl. ¶¶ 78, 128.

19. Generally, Plaintiffs allege that they sometimes require the assistance of another person to do the following: submit a grievance form and read VDOC's response, request medical appointments, submit visitor information, and read and write mail. Compl. ¶¶ 99, 100, 102, 104, and 115.

[4] Plaintiffs state that "large print, taped text, accessible electronic format, [and] Braille" are examples of accessible formats. Compl. ¶ 77. *But see* Compl. ¶ 130 (alleging that Deerfield has a SARA machine that can convert printed text into spoken language); Compl. ¶ 138 (alleging that Shabazz has access to a speech-to-text software to use in his computer course).

20. Generally, Plaintiffs allege that VDOC does not provide information about educational and vocational programs in an accessible format. Compl. ¶ 135. Plaintiffs also allege that materials used in educational and vocational programs are inaccessible. Compl. ¶ 136.

21. Plaintiffs, without providing any detail, generally conclude that "blind prisoners are unable to obtain Grade 3 work assignments and are often relegated to Grade 1 'unskilled' work assignments or receive no work assignment because they are blind." Compl. ¶ 152.

22. Courtney, Hajacos, and Rogers generally allege that, because the library at Greensville does not "provide a scanner, printer, or other assistive technology," they "struggle to get much done" while they are there. Compl. ¶ 129.

23. While the library at Deerfield does provide a SARA machine,[5] Plaintiffs generally allege that, due to their schedules, they "are not always able to get to the law library during the week to use the SARA scanner." Compl. ¶ 130. Plaintiffs also generally complain that the library computers at Deerfield do not have "assistive technology to allow blind prisoners to access documents on the library computers." Compl. ¶ 132.

Plaintiff Courtney (Greensville Correctional Center)

24. Courtney is visually impaired, and he permitted other inmates to read "almost all" of his incoming mail. Compl. ¶ 117. He also permitted other inmates to write documents for him. Compl. ¶ 119. He alleges that his actions "[gave] these prisoners access to private information about both [him] and [his] family members . . . as well as privileged discussions with [his] criminal and civil attorneys." Compl. ¶ 117.

25. While incarcerated, Courtney took a college course at Greensville. He complains that the course materials were not accessible to him and he needed a "qualified reader." Compl. ¶ 137.

[5] A SARA machine converts printed text into spoken text. Compl. ¶ 130.

26. Courtney alleges that, from January to May of 2019, he had a prison work assignment which included "read[ing] charges to prisoners," but states VDOC removed him from this position because of his vision loss and he has not had another work assignment since. Compl. ¶ 162.

27. When Courtney was incarcerated at Sussex II, the prison granted his requests for special accommodations such as a seven-inch tablet, a fifteen-inch television, dimmer light, and the ability to cover the window in his cell. Compl. ¶¶ 167–68. When Courtney was transferred to Greensville in November of 2021, he was not permitted to have these things. Compl. ¶ 169.

28. Courtney alleges that, while incarcerated at Greensville, he submitted requests for special accommodations. Compl. ¶¶ 174–75, 178. Defendants Marano and Talbott discussed these special accommodations with Courtney and sent his requests "to medical for approval." Compl. ¶¶ 175–77.

29. Even though Courtney was seen by doctors several times while incarcerated, he complains that he had "issues receiving regular appointments." Compl. ¶¶ 232, 234–35, 237. He also complains that he had issues with receiving special cleaning solution for his contact lenses. Compl. ¶ 237. This, he alleges, has affected the condition of his eyes and caused emotional distress. Compl. ¶ 238.

30. While incarcerated at Greensville, Courtney complained to Defendants Clarke and Talbott. Compl. ¶¶ 248, 273. Courtney believes that, because he complained, Defendants Punturi, Smith, and Talbott subjected him to a "routine drug test" and then Defendants VDOC, Clarke, Marano, Punturi, and Talbott falsified the positive test results. Compl. ¶¶ 253, 256, 258–59, 274–75. Even though Courtney was released on March 16, 2023, he complains that he could have been incarcerated longer because of the test results. Compl. ¶ 257.

31. Courtney generally alleges that Defendants VDOC, Edmonds, Marano, Punturi, and Talbott knew of his eye condition and were deliberately indifferent. Compl. ¶¶ 325, 330.

32. Courtney generally alleges that Defendants Edmonds, Miller, Punturi, and Williams failed to adequately ensure, supervise, and review his medical care and treatment. Compl. ¶ 357.

Plaintiff Hajacos (Greensville Correctional Center)

33. Because Hajacos is visually impaired, he permits other inmates to read "almost all" of his incoming mail. Compl. ¶ 117. Hajacos "pays" these inmates in commissary goods to read and write documents for him. Compl. ¶ 123. He alleges that his actions "give these prisoners access to private information about both [him] and [his] family members . . . as well as privileged discussions with [his] criminal and civil attorneys." Compl. ¶ 117.

34. Hajacos takes a computer course offered at Greensville. Because Hajacos is visually impaired, his classmates read the course textbook to him to accommodate him. However, Hajacos complains that these classmates are not "qualified readers" under the ADA. Compl. ¶ 140.

35. During the COVID-19 pandemic, Hajacos had a choice: (1) he could move to a different pod and maintain his prison job or (2) he could stay in the same pod and change jobs. Hajacos chose the latter option and now complains that he "has not been able to find work at his previous rate of pay." Compl. ¶ 163.

Plaintiff McCann (Deerfield Correctional Center)

36. Because McCann is visually impaired, he permits other inmates to read "almost all" of his incoming mail. Compl. ¶ 117. He also permits other inmates to write documents for him. Compl. ¶ 119. He alleges that his actions "give these prisoners access to private information about both [him] and [his] family members . . . as well as privileged discussions with [his] criminal and civil attorneys." Compl. ¶ 117.

37. McCann, without providing dates, alleges that he missed two deadlines for grievances because of an inmate he relied on for assistance. He also alleges that, one time, VDOC rejected a grievance that he improperly submitted.[6] Compl. ¶ 124.

38. McCann took a horticulture course at Deerfield, but opted to drop the class because, as he claims, the instructor would not accommodate him. Compl. ¶ 141.

39. Because McCann is visually impaired, he claims that he is ineligible for some work assignments. Compl. ¶ 154. For example, he was assigned to "fill the hot water pot for other prisoners in his pod." This assignment changed because it was deemed "too dangerous." Compl. ¶ 153. To accommodate McCann, VDOC reassigned him as an "Assistant to the ADA Coordinator" and then a "Counselor's Aide." Compl. ¶ 155. McCann is not satisfied with the accommodations made in consideration of his disability.

40. McCann states that he requested special accommodations for his Caregiver to be moved into the bed next to him. Even though Defendant Lakeisha Shaw provided a reason (i.e. "[i]t is 'not medically necessary' and that there must be verification that his vision ha[d] worsened"), McCann complains that Defendant Shaw denied his request. Compl. ¶ 185.

41. McCann states that he needs his Caregiver to navigate. *See* Compl. ¶ 189. Without his Caregiver, he is limited to the basketball court during recreation and has been hit by a basketball. Compl. ¶ 189. However, he also complains that his Caregiver is inadequate. *See* Compl. ¶ 186. He alleges that, due to his Caregiver, he has suffered physical injuries. Compl. ¶ 186.

42. McCann complains that, generally, other inmates have confronted him and taken his property. Compl. ¶¶ 186, 187, 188, 205.

[6] McCann states that he "tried to complete a grievance form using a Sharpie marker and writing in large print. Because the print was so large, he [attached] a separate sheet of paper to detail his grievance." Compl. ¶ 124.

43. McCann complains that VDOC has failed to adequately accommodate him as his vision worsens. He states that he needs a new magnifier and prescription glasses. Compl. ¶¶ 190, 193.

Plaintiff Rogers (Greensville Correctional Center)

44. Because Rogers is visually impaired, he permits other inmates to read "almost all" of his incoming mail. Compl. ¶ 117. He also permits other inmates to write documents for him. Compl. ¶ 119. He alleges that his actions "give these prisoners access to private information about both [him] and [his] family members . . . as well as privileged discussions with [his] criminal and civil attorneys." Compl. ¶ 117.

45. "Caregiver" is a title for inmates who assist visually impaired individuals. Compl. ¶ 106. Even though Rogers receives assistance from other inmates, he alleges he needs a "Caregiver." Compl. ¶ 122.

46. Rogers believes that Deerfield and Greensville erroneously denied his requests for a single cell. Compl. ¶ 213. Specifically, because his former cellmate at Greensville moved his property, Rogers requested a single cell. Even though Rogers now has a single cell, he complains that Defendant Talbott did not address his initial request. Compl. ¶¶ 214–215.

Plaintiff Shabazz (Deerfield Correctional Center)

47. Because Shabazz is visually impaired, he permits other inmates to read "almost all" of his incoming mail. Compl. ¶ 117. He also permits other inmates to write documents for him. Compl. ¶ 119. He alleges that his actions "give these prisoners access to private information about both [him] and [his] family members . . . as well as privileged discussions with [his] criminal and civil attorneys." Compl. ¶ 117.

48. Shabazz, without describing specific instances, generally alleges that he "has been unable to submit grievances." Compl. ¶ 125.

49. Even though Shabazz can access the SARA machine at Deerfield, he complains that he is allowed access for only two hours each week. While Shabazz admits that he can request an additional hour per week, he asserts the request form is in an inaccessible format. Compl. ¶ 131.

50. Shabazz is taking a computer course at Deerfield. Even though VDOC installed a speech-to-text software to accommodate Shabazz, he complains that there are "limits on the amount of time [he] can use the software." Compl. ¶ 138.

51. Shabazz is taking a GED course at Deerfield. Even though VDOC assigned an inmate to read the course materials to Plaintiff Shabazz to accommodate him, he complains that a graph and other images cannot be "read." Compl. ¶ 139.

52. Even though Shabazz is employed, he complains that he cannot get a Grade 3 work assignment due to safety concerns. Compl. ¶¶ 156–57.

Plaintiff Patrick Shaw (Deerfield Correctional Center)

53. Because Shaw is visually impaired, he permits other inmates to read "almost all" of his incoming mail. Compl. ¶ 117. He also permits other inmates to write documents for him. Compl. ¶ 119. He alleges that his actions "give these prisoners access to private information about both [him] and [his] family members . . . as well as privileged discussions with [his] criminal and civil attorneys." Compl. ¶ 117.

54. Shaw was taking a computer course at Deerfield. Because the specific accommodations that he requested were denied, Shaw elected to drop the course. Compl. ¶ 142.

55. Shaw alleges that he is not employed because VDOC will not provide him with occupational therapy. Compl. ¶ 158.

56. At Deerfield, the general population uses a "communal shower." When using this communal shower, Shaw needs a Caregiver or another inmate to take him to the shower area. *See* Compl. ¶¶ 207–08. Shaw complains that he does not have sufficient privacy in the shower. Compl. ¶ 209.

Plaintiff Stravitz (Deerfield Correctional Center)

57. Currently, Stravitz can read his incoming mail and write his outgoing mail. Compl. ¶¶ 118, 120. He alleges that, if his eyesight deteriorates though, he will permit other inmates to read his mail. If this happens, he alleges that his actions will "give those prisoners access to private information about both [him] and his family member . . . as well as privileged discussions with his criminal and civil attorneys." Compl. ¶ 118.

58. Currently, Stravitz is working in the law library at Deerfield. Compl. ¶ 159. He speculates that, in the future, he could be fired because of his diminished eyesight. Compl. ¶ 161.

59. In late 2021, Stravitz was informed that he has cataracts and needs cataract surgery. Compl. ¶ 239–40. Due to the COVID-19 pandemic and complications with obtaining a PCR test, Stravitz's cataract surgery was delayed. Compl. ¶ 242. He alleges that Defendant Lester is responsible for scheduling the surgery. Compl. ¶¶ 244–45. Stravitz is waiting for this surgery and, in the meantime, needs eyeglasses. Compl. ¶ 245–46.

60. Stravitz alleges that Defendants VDOC, Warden Miller, former Warden Williams, and Nurse Lester deprived him and continue to deprive him of the cataract surgery. Compl. ¶ 334. He also alleges that these defendants acted with deliberate indifference. Compl. ¶ 340.

61. Courtney generally alleges that Defendants Edmonds, Miller, Punturi, and Williams failed to adequately ensure, supervise, and review his medical care and treatment. Compl. ¶ 357.

Argument

A. Legal Standards

i. Rule 12(b)(6)

"[T]he purpose of Rule 12(b)(6) is to test the legal sufficiency of the complaint." *Randall v. U.S.*, 30 F.3d 518, 522 (4th Cir. 1994). To survive a Rule 12(b)(6) motion to dismiss, the non-moving party's complaint must therefore allege facts that "state a claim to relief that is plausible on its face." *Bell. Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007). A claim is plausible if the complaint contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged," and if there is "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 556). But "[w]here a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id*. (citing *Twombly*, 550 U.S. at 557). While a court should assume the veracity of well-pleaded factual allegations, conclusory statements are not sufficient. *Id.* at 663-64. Moreover, a plaintiff's proffer of bare legal conclusions – without any supporting facts – fails to satisfy this standard. *SD3, LLC v. Black & Decker*, 801 F.3d 412, 423 (4th Cir. 2015); *see also Iqbal*, 556 U.S. at 678.

ii. Rule 12(b)(1)

"The burden of establishing the existence of subject matter jurisdiction rests upon the party which seeks to invoke the court's authority." *Allen v. College of William & Mary*, 245 F. Supp. 2d 777, 782 (E.D. Va. 2003) (internal citations omitted). "For motions made pursuant to [Rule 12(b)(1)], the evidentiary standard depends upon whether the challenge is a facial attack on the sufficiency of the pleadings, or an attack on the factual allegations that support jurisdiction." *Id*. at 782-83 (internal quotation omitted). Specifically, "[i]f the defendant is attacking the sufficiency of the complaint, the court must accept all of the complaint's factual allegations as true." *Id*. at 783 (internal citations omitted). By contrast, "if the defendant claims that the jurisdictional facts

alleged in the complaint are untrue, the pleadings are regarded as mere evidence . . . The court then weighs the pleadings and all the other evidence to determine whether subject matter jurisdiction exists." *Id*. at 783 (internal citations omitted).

A. <u>The Complaint Should be Dismissed for Failure to Comply With the Federal Rules of Civil Procedure</u>

i. The Complaint Fails to Comply with Rule 8

As a general matter, the Complaint does not comply with the requirements of Rule 8 of the Federal Rules of Civil Procedure, which states that a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," and that the allegations in the pleading must be "simple, concise, and direct." Fed. R. Civ. P. 8(a)(2), (d)(1). The Complaint totals 388 numbered paragraphs and 58 pages. The six individual Plaintiffs who are housed at two different prison facilities allege a broad range of purportedly deficient accommodations and other conduct across various categories, including allegations regarding access to written materials, access to educational and vocational programs, access to work assignments, housing arrangements, medical care, retaliation, and other miscellaneous requested accommodations. Nothing about the Complaint is plain and it is certainly not short.[7]

The factual allegations include a mix of general claims regarding accommodations at two different prison facilities – Greensville and Deerfield – by six different individuals of varying levels of sightedness and other physical abilities. For instance, in the subsection of factual allegations regarding access to written materials, Plaintiffs allege generally that VDOC does not

[7] The shotgun nature of the Complaint pervades the entirety of the document. The problem compounds itself when the reader gets to the enumeration of the claims the plaintiffs purportedly seek to bring against each of the defendants. Because the facts are so scattered and far reaching, it makes it nearly impossible to ascertain which plaintiff is suing which defendant, particularly when all plaintiffs attempt to sue all defendants. This issue is addressed more fully in Sections C(i); H(ii)(a); and K.

provide electronic devices that are accessible to blind prisoners; that orientation materials, handbooks, policies, commissary order forms, food menus, grievance forms, and visitation request forms are not provided in an accessible format; that Greensville's "titler" system for displaying messages is not broadcast in an accessible format; and that blind prisoners are compelled to rely on the services of often unqualified prisoners assigned to them as caregivers. *See generally* Compl. ¶¶ 76–132. They also advance more specific allegations regarding individual Plaintiffs' attempts to utilize services at Greensville and Deerfield. Those allegations include claims that Plaintiffs Courtney, Hajacos, McCann, Rogers, Shabazz, and Shaw have other inmates read their mail; that Stravitz requires a booklight and marker to read and write mail; that Rogers's assigned caregiver was transferred away from Greensville; that McCann's attempts to file grievances were rejected; and that Courtney, Hajacos, and Rogers are limited in their use of the law library. *See generally* Compl. ¶¶ 117–132. The rest of Plaintiffs' allegations continue in a similar fashion, with general claims regarding accommodations or inconveniences interspersed with specific allegations made by individual Plaintiffs.

Despite the broad sweep of these allegations, the Plaintiffs' statement of their claims generally do not identify the particular facts offered in support of each claim. Claims 1, 3, and 4, asserted by all Plaintiffs against VDOC and all VDOC Defendants, allege violations of Title II of the ADA, the RA, and the VDA based upon purported denial of participation in VDOC's services, programs, and activities. Compl. ¶¶ 260–70, 276–87, 288–98. Although the Complaint cites to the controlling standards of these statutes and their implementing regulations, it does not identify which of the alleged facts give rise to each claim. *See generally id.* In a similar vein, Claim 10 alleges gross negligence on behalf of all Plaintiffs against the VDOC Defendants and Defendants

Edmonds, Williams, and Smith, yet offers no specific allegations of fact with respect to these parties.[8] Compl. ¶¶ 353–60.

Plaintiffs' shotgun style of pleading substantially increases the burden on Defendants and the Court to determine which of the many allegations of fact are offered in support of which claims. *See SunTrust Mortg., Inc. v. First Residential Mortg. Servs. Corp.*, No. 3:12cv162, 2012 U.S. Dist. LEXIS 185910, at 18–19 (E.D. Va. Sept. 11, 2012) ("Shotgun pleading occurs when a complaint fails to articulate claims with sufficient clarity to allow the defendant to frame a responsive pleading, or if it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief." (internal quotation marks and citations omitted)), *report and recommendation adopted*, 2013 U.S. Dist. LEXIS 17451 (E.D. Va. Feb. 8, 2013). "Because such pleadings require the Court to sift through each paragraph of a complaint as to any allegation that might pertain to subsequent counts, so called shotgun pleadings 'divert already stretched judicial resources into disputes that are not structurally prepared to use those resources efficiently.'" *Jackson v. Olsen*, No. 3:09cv43, 2010 U.S. Dist. LEXIS 17879, at *19 n.5 (E.D. Va. Mar. 1, 2010) (citing *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 179 (11th Cir. 2006)). The Complaint here "is both long and complex and fails to state its claims clearly enough for the defendants to know how to defend themselves." *North Carolina v. McGuirt*, 114 F. App'x 555, 558 (4th Cir. 2004). As such, it fails to comply with Rule 8 and should be dismissed. *See id.* at 560.

In the *McGuirt* opinion, the Fourth Circuit affirmed a district court's dismissal of a complaint with prejudice after repeated failed attempts to comport with the relevant Rules. In that

[8] The only specific allegations referenced in this claim pertain to Courtney's allegations regarding his drug test and Courtney and Stravitz's apparently joint allegations regarding their medical care for two different medical issues at two different facilities where medical care is offered by different facility-specific providers. Claim 10 is particularly illustrative of this pervasive issue.

case, the Fourth Circuit reviewed the district court's decision for abuse of discretion and reviewed various factors, such as "the length and complexity of the complaint" and "whether the complaint was clear enough to enable the defendant to know how to defend himself" and "whether the plaintiff was represented by counsel." *Id*. at 558. The court in that case noted that the factual background section of the complaint spanned twenty pages and was "filled with needless details." *Id.* The court further noted that it is "virtually impossible to separate the legally significant from the legally insignificant facts in this factual background and then to match them with claims purportedly made in the complaint." *Id*. Plaintiffs' Complaint in this case suffers from the same defects. The factual allegations contain a myriad of needless general statements that do not seem specifically applicable to any particular plaintiff or defendant and are therefore legally meaningless. *See, e.g.,* Compl. ¶ 82 ("VDOC does not make orientation materials, facility handbooks, operating procedures, and other information available in accessible formats"); Compl. ¶ 135 ("VDOC fails to provide information concerning educational and vocational programs in accessible formats"); Compl ¶ 205 (McCann "stopped taking showers for a period of time because a fellow prisoner would masturbate while Mr. McCann was taking a shower, thinking Mr. McCann could not see him.").

Again in the *McGuirt* case, the court noted that "simply to discover who is being charged in each count [of the complaint] becomes indeterminate" because the allegations and number of defendants named did not match up with the defendants who were and were not named as defendants in any given count. *Id*. at 559. The Plaintiffs' Complaint in this case has the same issues. "All Plaintiffs" attempt to assert claims – like Claim 4 – against the "VDOC Defendants" when there is no factual basis for such a claim because not all of the plaintiffs were housed at the same facilities with all of the individual employees of VDOC. The same problem arises in particular in

Claim 10, which is a gross negligence claim asserted by "All Plaintiffs" against the entire group of VDOC defendants. Overall, the Complaint is a morass and a jumble of relevant and irrelevant facts made by seven individuals at two different facilities with various complaints that are unrelated either to each other or the defendants they attempt to sue. The Complaint fails to comply with Rule 8 and should be dismissed.

ii. The Complaint Fails to Comply with Rule 10(b)

For similar reasons, the Complaint also runs afoul of Rule 10, which provides that "[i]f doing so would promote clarity, each claim founded on a separate transaction or occurrence . . . must be stated in a separate count or defense." Fed. R. Civ. P. 10(b). Here, Plaintiffs do not assert separate counts based upon separate transactions or occurrences. Rather, the Complaint consolidates all claims that could be asserted by any Plaintiff under a particular cause of action into combined counts, regardless of whether the facts giving rise to each claim are related. By lumping in unrelated facts into broad, omnibus counts, Plaintiffs render meaningful response to their claims more difficult, and accordingly the Complaint should be dismissed. *See Shonk v. Fountain Power Boats*, 338 F. App'x 282, 287 (4th Cir. 2009) (affirming the district court's dismissal of claims based in part upon plaintiff's failure to state claims in separate counts in accordance with Rule 10(b)).

In *Shonk*, the plaintiff bought a boat and later sued multiple defendant boat manufacturers for warranty claims when the boat's engine failed. The plaintiff alleged that defendant Fountain manufactured the boat, Yanmar manufactured the engines, and Mercury manufactured the stern drives. *Id.* at 287. Yet the plaintiff attempted to assert a single claim under the Magnuson-Moss Warranty Act ("MMWA") against all of the defendants. In affirming the district court's rejection of this attempt and dismissal of the claim, the Fourth Circuit held that "each claim under the

MMWA against Fountain, Yanmar, and Mercury should have been stated in a separate count." *Id*. Accordingly, the court held, "it cannot be doubted that the district court properly dismissed [the plaintiff's] claims against Yanmar and Mercury under the MMWA, as pleaded in the Initial Complaint." *Id.* Plaintiffs' Complaint in this case completely fails to comply with Rule 10(b) for the exact same reasons and the Complaint should be dismissed.[9]

B. ***Plaintiff National Federation for the Blind of Virginia ("NFB-VA") Should be Dismissed for Lack of Standing***

Article III of the United States Constitution limits the power of federal courts to deciding "cases" and "controversies." A component of this limitation is the requirement of standing, which "ensures that a plaintiff has a personal stake in the outcome of a dispute and that judicial resolution of the dispute is appropriate." *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 629 F.3d 387, 396 (4th Cir. 2011).

An association like NFB-VA can assert standing in one of two ways. "First, the association 'may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.'" Has *Md. Highways Contractors*

[9] The Complaint's pleading failures are exacerbated by the joinder of disparate claims by multiple Plaintiffs into this single action. *See* Fed. R. Civ. P. 20(a)(1) (permitting joinder of multiple plaintiffs in a single action if "(A) they assert any right to relief jointly, severally, or in the alternative with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences; and (B) any question of law or fact common to all plaintiffs will arise in the action"). Defendants do not at this stage formally request that this action be severed, and instead defer to the Court's judgment as to whether the claims of all the Plaintiffs can feasibly proceed in one action. *See* Fed. R. Civ. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party."); *see also Ofori v. Clarke*, No. 7:18cv587, 2019 U.S. Dist. LEXIS 155384, at *3–10 (W.D. Va. Sept. 12, 2019) (severing claims of multiple prisoner plaintiffs which, even if assumed not to have been misjoined under Rule 20, would not have been feasibly litigated in a single action). Defendants would not object to the Court's decision to *sua sponte* sever the claims outlined in this case, but decline to expressly move for severance at this time. Defendants intend to reserve and address the issue of severance prior to any potential trial.

Ass'n v. Maryland, 933 F.2d 1246, 1250 (4th Cir. 1991) (citing *Warth v. Seldin*, 422 U.S. 490, 511 (1975)). "Second, the association may have standing as the representative of its members who have been harmed." *Id.* (citing *Warth*, 422 U.S. at 511; *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333 (1977)).

Here, NFB-VA alleges no organizational injury that would confer standing in its own right. Instead, it states that it brings suit "in a representative capacity on behalf of blind prisoners in the custody of VDOC and blind persons who may be placed in the custody of VDOC in the future." Compl. ¶ 55. "An organization has representational standing when (1) its own members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief sought requires the participation of individual members in the lawsuit." *Md. Highways Contractors Ass'n*, 933 F.2d at 1251 (citing *Hunt*, 432 U.S. at 343).

NFB-VA fails to satisfy the third prong of this test because the participation of individual members is necessary to this litigation. "[A] party satisfies the third prong if its 'claims can be proven by evidence from representative injured members, without a fact-intensive-individual inquiry.'" *Prison Justice League v. Bailey*, 697 F. App'x 362, 363 (4th Cir. 2017) (quoting *Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 552 (5th Cir. 2010)). Here, Plaintiffs' claims will necessarily entail individualized inquiries into their specific circumstances.

As noted elsewhere in this Memorandum, the individual Plaintiffs differ with respect to the nature of their disabilities and their need for accommodations. This holds true for the individuals identified in the Complaint as members of the NFB-VA: Plaintiffs McCann, Shabazz, Shaw, and Stravitz. Compl. ¶ 54. McCann complains, among other issues, that he has had difficulties with submitting grievances, Compl. ¶ 124; that he did not receive accommodations in a horticulture

class, *id.* ¶ 141; that he was reassigned from a job filling hot water pots because it was deemed too dangerous in light of his vision impairment, *id.* ¶ 153; that his request to have his Caregiver moved to an adjacent bed was denied, *id.* ¶ 185; that his Caregiver is inadequate to his needs, *id.* ¶ 186; and that he has been victimized by other inmates, *id.* ¶ 186–88, 205. Shabazz complains that he is limited in the amount of time he can use the SARA machine and speech-to-text software, Compl. ¶¶ 131, 138; that the inmate assigned to read materials for his GED class cannot read graphs and other images, *id.* ¶ 139; and that he cannot obtain a Grade 3 work assignment, *id.* ¶ 156–57. Shaw complains that he dropped out of a computer course after he did not receive requested accommodations, Compl. ¶ 142; that he is not employed because he has not been provided occupational therapy, *id.* ¶ 158; and that he has difficulty accessing, and lacks privacy in, the communal showers at Deerfield, *id.* ¶¶ 207–09. Finally, Stravitz complains that he may in the future be terminated from his job in the law library due to his diminished eyesight, Compl. ¶ 161, and that the surgery for his cataracts has been delayed, *id.* ¶¶ 239–47. Each of these Plaintiffs' claims will require specific factual inquiry as to the nature of the individual's impairment(s), the limitations caused by those impairments, the accommodations required for each Plaintiff, and the actions or omissions of VDOC staff and the specific reasonableness of accommodations to be made in a prison setting. The participation of those individual Plaintiffs in this litigation is necessary to develop these facts.

The nature of the relief NFB-VA seeks here also weighs against finding that it has standing to sue on behalf of its members. *See Warth*, 422 U.S. at 515 ("[W]hether an association has standing to invoke the court's remedial powers on behalf of its members depends in substantial measure on the nature of the relief sought."). Although NFB-VA expressly disclaims any demand for damages (Compl. ¶ 57) an association does not "automatically satisf[y] the third prong of the

Hunt test simply by requesting equitable relief rather than damages." *Bano v. Union Carbide Corp.*, 361 F.3d 696, 714 (2d Cir. 2004). "The organization lacks standing to assert claims of injunctive relief on behalf of its members where the fact and extent of the injury that gives rise to the claims for injunctive relief would require individualized proof, or where the relief requested would require the participation of individual members in the lawsuit." *Id.* (citing *Warth*, 422 U.S. at 515–16; *Hunt*, 432 U.S. at 343) (internal citations, quotation marks, and alterations omitted). "In contrast, where the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members, the *Hunt* test may be satisfied." *Id.*

Here, NFB-VA does not itself request any specific injunctive relief, and in general the injunctions requested by the Plaintiffs are stated collectively in broad, vague terms. *See* Compl. ¶ 377 (requesting injunction "ordering VDOC Defendants to cease violating the rights of blind prisoners, including the Individual Plaintiffs, and to cease discriminating against them on the basis of disability); *id.* ¶ 378 (requesting injunction ordering VDOC Defendants to modify VDOC policies and provide auxiliary aids necessary for blind prisoners to access written materials); *id.* ¶ 379 (requesting injunction ordering VDOC Defendants to provide blind prisoners equal access to work and education programs); *id.* ¶ 380 (requesting injunction against housing blind prisoners in dorm-style housing and instead requiring that they be housed in a double cell with their caregivers); *id.* ¶ 381 (requesting injunction against VDOC Defendants denying blind prisoners the ability to read, write, and access programs "without unnecessarily relying on Caregivers or other prisoners").[10] These vague requests, none of which are specifically asserted by NFB-VA, do not support a finding of associational standing. *See Jefferson v. Sch. Bd. of the City of Norfolk*, 452 F.

[10] Other requests for injunctive relief are stated in more specific terms, but these pertain to specific individual Plaintiffs and as such would necessarily require their participation in the case. *See, e.g.*, Compl. ¶ 385 (requesting injunction ordering that Stravitz be provided with cataract surgery).

App'x 356, 358 (4th Cir. 2011) (affirming district court's finding that association lacked standing where "the relief sought for the association's membership as a whole is so vague as to be meaningless").

Even if the vague nature of Plaintiffs' requests for injunctive relief is ignored, any injunction that would ultimately issue in this case would necessarily be tailored to the particular needs of the individual Plaintiffs. In *Parent/Professional Advocacy League v. City of Springfield*, 934 F.3d 13, 35 (1st Cir. 2019), the court found in a case brought under the ADA and the Individuals with Disabilities Education Act ("IDEA"), that the association did not have standing to seek injunctive relief on behalf of disabled students because "adjudication of the claims here would turn on facts specific to each student," and thus would require participation of the students in the litigation. This is particularly true here because the Prisoner Litigation Reform Act ("PLRA"), which governs in this case, provides that a federal court's power to order injunctive relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs," and an injunction cannot be granted "unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Any injunctive relief must therefore be targeted to the specific needs of the individual Plaintiffs in order to comply with the PLRA. Accordingly, participation of NFB-VA's individual members in this litigation is necessary to craft any appropriate relief, and NFB-VA therefore lacks standing to sue on behalf of its members. NFB-VA should be dismissed as a plaintiff from this case for lack of standing.

C. ***Claim 1 – Title II ADA Claim by All Plaintiffs Against Defendants VDOC, Clarke, Punturi, Miller, Talbott, and Shaw***

i. The Catchall Nature of Claim 1 Violates the Rules of Joinder and Attempts to Hold Defendants Liable Despite Alleging no Connection Whatsoever Between the Plaintiffs and the Defendants They Name. It Also Fails to State a Claim Upon Which Relief can be Granted

In this catchall ADA claim, each and every plaintiff (including, apparently, NFB-VA) is suing the above-named defendants for ADA violations, despite many of the incarcerated plaintiffs having no connection whatsoever to the individually named defendants. For example, Plaintiffs Courtney, Hajacos, and Rogers allege that they are currently incarcerated at Greensville.[11] Compl. ¶¶ 11, 17. They do not allege that they have ever been incarcerated at Deerfield. Compl. ¶¶ 12, 18. Nevertheless, they are suing the wardens and other staff at Deerfield.[12]

Similarly, Plaintiffs McCann, Shabazz, Patrick Shaw, and Stravitz all allege that they are currently incarcerated at Deerfield. Compl. ¶ 23, 34, 39, 45. Only Shaw and Stravitz allege a history of incarceration at Greensville (Compl. ¶¶ 40, 46), yet they attempt to bring a unified, single ADA claim against not only the staff at Deerfield, but also the staff at Greensville, including Defendants Punturi and Talbott.

This style of pleading makes no sense and is completely untethered to any factual support. There are no facts in the Complaint to support claims by inmates at Deerfield against staff members who are alleged to work at Greensville, and *vice versa*. This attempt to lump together defendants proliferates throughout the Complaint, creating confusion at best and actual deception at worst.

It is incredibly clear from the allegations in the Complaint that Plaintiffs Courney, Hajacos, and Rogers cannot sustain an ADA claim against Defendants Miller, Williams,and Lakeisha Shaw. Likewise, Plaintiffs McCann, Shabazz, Patrick Shaw, and Stravitz plainly cannot maintain an ADA

[11] Upon information and belief and after reasonable inquiry, Counsel for VDOC represents to this Court that Courtney was released from VDOC custody on or around March 16, 2023.
[12] Defendants Miller, Williams, and Lakeisha Shaw are all alleged to be affiliated only with Deerfield, not with Greensville.

claim against Defendants Punturi and Talbott. This is so because none of the allegations by any of these plaintiffs implicates activity, interactions, or unlawful behavior on the part of defendants who are not alleged to have worked at the prisons where the purported wrongdoing ever took place. This claim should, at an absolute minimum, be modified along these lines and only individual plaintiffs permitted to proceed against Defendant VDOC as addressed below.

ii. The Plaintiffs' ADA Claim Against the Individual Defendants Should be Dismissed Anyway, Because Plaintiffs Have Already Named VDOC as a Defendant

There is no individual liability for a violation of the ADA. *See, e.g., Jones v. Sternheimer*, 387 F. App'x 366, 368 (4th Cir. 2010); *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 472 (4th Cir. 1999) (both holding there is no individual liability for claims brought under the ADA). The plain language of Title II of the ADA only applies to "public entities," and not to individuals. *See* 42 U.S.C. § 12132. The term "public entity" as used in the ADA does not include individuals.[13] Clearly, Congress knew how to provide for individual liability in disability-related claims because it did so via Title III when it used the word "person" instead of the term "public entity." Instead, Congress chose not to opt for individual liability in Title II.

In *Young v. Barthlow*, the District Court in Maryland addressed this exact issue and concluded that the plaintiff's ADA suit against individuals failed because the plaintiff had not named a public entity as a defendant. *Young v. Barthlow*, No. RWT-07-662, 2007 WL 5253983, at *2 (D. Md. Nov. 7, 2007). In coming to this conclusion, the court considered the plain language of the ADA, which defines a "public entity" as "any State or local government" or "any department,

[13] *See, e.g.,* 42 U.S.C. § 12132 (which states "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities *of a public entity*, or be subjected to discrimination by any such entity.") (emphasis added); 42 U.S.C. § 12131(1), defining a "public entity" to include in relevant part any state or local government or any department, agency, or other instrumentality of a state.

agency, special purpose district, or other instrumentality of a State or States or local government." *Id*. (citing 42 U.S.C. § 12131(1)(A)-(B)). The court held that the "term 'public entity' does not include individuals." *Young*, 2007 WL 5253983, at *2 (citing *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1005 n. 8 (8th Cir.1999)); *see also Walker v. Snyder*, 213 F.3d 344, 346 (7th Cir. 2000) ("In suits under Title II of the ADA . . . the proper defendant usually is an organization rather than a natural person . . . [therefore] there is no personal liability under Title II."); *accord Miller v. King*, 384 F.3d 1248, 1276–77 (11th Cir. 2004). The *Young* court concluded that "[b]ecause individual liability is precluded under ADA Title II, Plaintiff's ADA claims against the individuals named in this suit must fail." *Young*, 2007 WL 5253983, at *2. Plaintiffs' Claim 1 fails for the same reasons.[14]

Virginia's federal courts have come to similar conclusions to those outlined in *Young*. In *Clement v. Satterfield*, the court noted that Title II of the ADA – which is the provision of the ADA under which the Plaintiffs have sued – "only covers discrimination by public entities." 927 F. Supp. 2d 297, 314 n. 12 (W.D. Va. 2013). In *Clement*, the Court compared Title II of the ADA with Title III. *See id.* ("*Compare* 42 U.S.C. § 12132 ('[N]o qualified individual . . . , shall be subjected to discrimination by any such *entity*') (emphasis added), *with* 42 U.S.C. § 12181 ('No individual shall be discriminated against . . . by any *person* who owns, leases (or leases to), or operates a place of public accommodation') (emphasis added)."). Indeed, this Court recently came to the same conclusion when faced with the same issue. This Court held that "because [the plaintiff] appropriately named the VDOC as a defendant in conjunction with [his ADA] claims, his official

[14] Plaintiffs assert "official capacity" claims against the individuals identified in Claim 1. But that does not matter. Naming individual state officials in their official capacities while at the same time naming VDOC – the appropriate public entity defendant – is redundant and unnecessarily clutters up an already cluttered Complaint.

capacity claims under the ADA and Rehabilitation Act" against individual defendants were "redundant and will be dismissed." *Richardson v. Clarke*, No. 3:18cv23, 2020 WL 4758361, at *5 (E.D. Va. Aug. 17, 2020) (citing *Latson v. Clarke*, 249 F. Supp. 3d 838, 856 (W.D. Va. 2017) (holding and ordering the same)).

In *Wilmer v. Whitlock*, the court also concluded that "only public entities are subject to the provisions of Title II of the ADA . . . The term 'public entity,' as it is defined within the statute, does not include individuals." *Wilmer v. Whitlock*, No. 3:19cv1, 2019 WL 257984, at *3 (W.D. Va. Jan. 17, 2019). In *Wilmer*, the court dismissed the *pro se* plaintiff's entire complaint for failure to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). *Id; see also Latson v. Clarke*, 249 F. Supp. at 855-56 (holding that in analyzing the proper defendants in an ADA claim for payment of money damages, the VDOC and the Commonwealth were "one and the same" and dismissing the Commonwealth and the individual defendants as redundant because VDOC was also named as a defendant).[15]

For the reasons outlined herein, Defendants Clarke, Punturi, Miller, Talbott, and Lakeisha Shaw respectfully ask this Court to dismiss the ADA claims against them. If the Court is inclined to permit the ADA claim to proceed at all – and Defendants do not concede that it should, for the reasons outlined in the next section – then it should proceed only against defendant VDOC.

iii. Claim 1 Fails to State a Claim Upon Which Relief can be Granted, Even When Limited to the Only Proper Defendant: VDOC

In order to state a claim under the ADA, a plaintiff must allege facts plausibly asserting that: (1) he has a disability, (2) he is otherwise qualified to receive the benefits of a public service, program, or activity, and (3) he was excluded from participation in or denied the benefits of such

[15] *See also Bane v. Virginia Dep't of Corrs.*, No. 7:12cv159, 2012 WL 6738274, at *10 (W.D. Va Dec. 28, 2012) (citing cases supporting the same).

service, program, or activity, or otherwise discriminated against, on the basis of his disability. *See, e.g., Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005) (citing *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 467–70 (4th Cir. 1999); *Doe v. University of Md. Med. Sys. Corp.*, 50 F.3d 1261, 1264–65 & n. 9 (4th Cir. 1995)).

Furthermore, plaintiffs bringing an ADA claim "must propose a reasonable modification to the challenged public program that will allow [him] the meaningful access [he] seek[s]." *Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016) (citing *Halpern*, 669 F.3d at 464). The Plaintiffs fail to meet this burden. For example, the Greensville plaintiffs (Courtney, Hajacos, and Rogers) collectively complain that they are limited in the amount of time they can spend in the library, and because there is no assistive technology, "they struggle to get much done." Compl. ¶ 129. Shabazz (at Deerfield) complains that he is allowed to use the SARA machine (a machine that can read written materials out loud for a person with a vision impairment or limited literacy) on Saturdays and Sundays but complains that he has to submit an inaccessible form to do so. Shabazz is plainly being accommodated by being provided weekend access to the SARA machine. But to which program or service is Shabazz being denied access by virtue of the purported inconveniences of the SARA machine? Similarly, an unidentified plaintiff claims that "Deerfield does not provide assistive technology to allow blind prisoners to access documents on the library computers." Compl. ¶ 132. What "assistive technology" is lacking? Who asked for it? Was it denied? By whom? Why? None of the relevant and important details are alleged in the Complaint.[16] Shabazz goes on to complain that "VDOC installed a trial version of speech-to-text

[16] This Court is well-aware that the statement "Deerfield does not provide assistive technology to allow blind prisoners to access documents on the library computers" is inaccurate. *See, e.g.,*, *Richardson v. Clarke*, No. 3:28cv23, Dkt. No. 93, pp. 4-5 (outlining steps Deerfield staff had taken for the visually impaired plaintiff in that case to facilitate his access to the law library computers); Dkt. No. 94, pp. 8-9 (outlining further accommodations made in the law library to facilitate access

software for Mr. Shabazz to use [in a computer course] that places limits on the amount of time Mr. Shabazz can use the software." Compl. ¶ 138. What kind of limits? 30 seconds? Three hours? Has Mr. Shabazz asked for more time and been denied? From the allegations in the Complaint, it seems like someone installed software to attempt to accommodate Shabazz's vision impairment and he does not like the fact that it does not also come with unlimited use. This is simply not sufficient to sustain a claim for a violation of the ADA. Hajacos complains that the accommodations provided for him in his pod are inadequate. Compl. ¶¶ 194 – 198. But then he complains that he was faced with the choice of giving up these inadequate accommodations that did not work for him or quit his prison work assignment. Compl. ¶ 163. Hajacos also complains that he has "requested several accommodations, including a larger TV, a magnifier or magnifying glasses, an external keyboard for his JP6 tablet, and a reading light, none of which he has received." Compl. ¶ 199. But this is insufficient to show that Hajacos has been denied his rights under the ADA. To which program or service is he being denied access without these items? Did a VDOC employee actually tell him "no, you cannot have these" or is he waiting to receive them? When did he ask for them in relation to the statement that he currently still does not have them? There is no evidence of a failure to accommodate or any denial of access to a prison program or service, at least not in relation to those items Hajacos would like to have.

Plaintiffs further complain about things that have nothing to do with any individual defendant. For example, McCann alleges that he stopped taking showers for a period of time because a fellow prisoner would masturbate while he was showering, believing McCann could not see him. Compl. ¶ 205. What does this have to do with any accommodation for McCann's vision

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for an inmate plaintiff who stated he was visually impaired); p. 16 (concluding that the defendants had "gone to extraordinary lengths by providing a host of accommodations" to the plaintiff).

impairment? There are no facts alleged to show that some prison employee knew about this and did nothing, or that a prison employee excluded him from taking a shower because he has a vision impairment. Patrick Shaw asserts that he requires – and has received – assistance getting to the shower. Compl. ¶¶ 207, 208. This, too, fails to support a claim for a violation of the ADA[17]. Accordingly, both the ADA and Rehabilitation Act claims lack merit and should be dismissed.

iv. Claim 1 Cannot Support an Award for Money Damages Under the ADA and VDOC is Entitled to Sovereign Immunity

To the extent Plaintiffs intend to seek an award for money damages against VDOC based on the allegations they have collectively made in the Complaint in Claim 1, their attempt should fail and any claim for money damages should be dismissed. VDOC is entitled to sovereign immunity on this claim because Plaintiffs fail to allege conduct in violation of the ADA that also violated the Fourteenth Amendment to the United States Constitution.

Two basic principles apply to the issue of sovereign immunity in this scenario. First, that Title II of the ADA validly abrogates a state prison's sovereign immunity and creates a cause of action for money damages *only* for conduct that actually violates the Fourteenth Amendment. *Georgia*, 546 U.S. at 159. Second, for conduct that does *not* actually violate the Fourteenth Amendment, the money damages remedy created by Title II of the ADA must nevertheless satisfy all three factors laid out in *City of Boerne v. Flores*, 521 U.S. 507 (1997). The conduct complained of in this case does not actually violate the Fourteenth Amendment and the award of money damages based on Plaintiffs' allegations fail to satisfy the "congruence and proportionality" prong of the *City of Boerne* test. To determine whether abrogation of a state's sovereign immunity is a

[17] Notably, Deerfield has an assisted living unit with trained nursing staff who can assist inmates with more personal tasks related to bathing and / or dressing. If Patrick Shaw is asserting exclusion from this "program or service" his Complaint fails to adequately assert such an exclusion.

valid exercise of Congress's enforcement powers, the Supreme Court outlined a three-part test in *City of Boerne*: (1) identify the constitutional rights Congress sought to enforce when it enacted Title II; (2) determine whether Congress enacted Title II in response to a pattern of unconstitutional disability discrimination; *and* (3) determine whether the rights and remedies created by Title II are "congruent and proportional" to the rights Title II purports to enforce. Defendants focus their argument on the "congruence and proportionality" prong.

a. Plaintiffs do not Allege Conduct in Violation of the ADA that also Violates the Constitution

By its plain language, the ADA applies to (and thus imposes legal obligations on) public entities, including state prisons. *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 210 (1998). But states, of course, are generally immune from private suits for money damages, even when those suits allege violations of federal laws like the ADA. *See Board of Trustees of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 360 (2001). At the same time, the Supreme Court has held that "insofar as Title II [of the ADA] creates a private cause of action for damages against the States for conduct that *actually* violates the Fourteenth Amendment, Title II validly abrogates state sovereign immunity." *United States v. Georgia*, 546 U.S. 151, 159 (2006).

This Court has previously determined that "in the context of state prisons, Title II [of the ADA] validly abrogates state sovereign immunity and 'creates a private cause of action for damages against the states' only 'for conduct that *actually* violates the Fourteenth Amendment.'" *Chase v. Baskerville*, 508 F. Supp. 2d 492, 506 (E.D. Va. 2007), *aff'd*, 305 F. App'x 135 (4th Cir. 2008) (quoting *Georgia*, 546 U.S. at 159 (emphasis in original)); *see also Richardson v. Clarke*, No. 3:18cv23, 2020 WL 4758361, at *6 (E.D. Va. Aug. 17, 2020) (holding the same).

b. Plaintiffs' Allegations Fail to Satisfy the "Congruence and Proportionality" Test in City of Boern

Here, the underlying allegations that support Plaintiffs' joint ADA claim plainly do not rise to the level of a constitutional violation. Accordingly, VDOC's sovereign immunity is not disturbed and it is immune from suit for money damages in this case.

Absent a constitutional violation in a state prison, a state's sovereign immunity may nevertheless be abrogated when Congress unequivocally states its desire to do so and only when it is constitutionally appropriate. *See, e.g., Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 484 (4th Cir. 2005). This, too, has its limits. Pursuant to Section 5 of the Fourteenth Amendment, Congress may "enact prophylactic legislation prohibiting conduct that is 'not itself unconstitutional,' [however] it may not substantively redefine Fourteenth Amendment protections." *Constantine*, 411 F.3d at 484 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997)). Consistent with *Georgia* and absent a constitutional violation, courts should evaluate "whether Congress's purported abrogation of sovereign immunity as to [the class of conduct at issue] is nevertheless valid." *Georgia*, 546 U.S. at 159. In this case, it is not.

Plaintiffs' requests for money damages is not "congruent and proportional" to the rights Title II attempts to enforce. This is so because "[t]he appropriateness of remedial measures must be considered in the light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *City of Boerne*, 521 U.S. at 530. More importantly, Congress's enforcement powers are not unlimited. *Id*. at 519. Such power "extends only to 'enforc[ing]' the provisions of the Fourteenth Amendment", not redefining the "substance of the Fourteenth Amendment's restrictions on the States" altogether. *Id*. With that in mind, Congress's chosen remedies "may not work a 'substantive change in the governing law.'" *Lane*, 541 U.S. at 520. "'Regardless of the state of the legislative record,' legislation will be viewed as

an unauthorized substantive change in constitutional protections where the chosen remedy 'is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *City of Boerne*, 521 U.S. at 532. "Any suggestion that Congress has a substantive, non-remedial power under the Fourteenth Amendment is not supported" by Supreme Court precedent. *Id.*, 521 U.S. at 528.

While it is incredibly difficult – if not impossible – to parse out the individual allegations supporting each plaintiff's ADA claim because of the shotgun nature of the Complaint, it seems that the allegations attempt to state claims for money damages under the ADA based on some of the following allegations:[18]

- Plaintiffs collectively allege that they do not have "equally independent and effective access to orientation materials, facility handbooks, operating procedures, memoranda, directives, facility publications, menus, commissary lists, the titler system, or posted written information as sighted prisoners." Compl. ¶ 97.
- "There is no way for a blind prisoner to independently or privately fill in and submit a grievance form." Compl. ¶ 98.
- "Blind prisoners, including the Individual Plaintiffs, are unable to independently or privately write requests for medical visits." Compl. ¶ 99.
- Courtney wants and was purportedly approved to possess sunglasses, a "maximum-sized television, wireless headphones, and a Blu-Ray DVD player." Compl. ¶ 176.

Paragraphs 76 through 96 and Paragraphs 100 through 116 vaguely and generally assert things that "blind prisoners" (including the individual plaintiffs) cannot do in the same way that sighted

[18] This list is by no means exhaustive. The purported disability-related issues are sprinkled throughout the Complaint and are merely summarized here for illustration purposes.

inmates can do them. But this is not the standard for an ADA violation at all. The individual plaintiffs – each and every one of them – must allege that they have been *excluded from participation in or denied the benefits of such service, program, or activity*, or otherwise discriminated against, on the basis of his disability. *See, e.g., Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005). The fact that some inmates – including, apparently collectively, the individual plaintiffs – do not have as much privacy or the same independent access to written materials in prison that sighted prisoners do does not mean that these inmates with vision impairments have been denied the benefits of a prison program or service. While inmates with vision impairments may need assistance to fill out a request to see a medical provider, if they are provided that assistance and are ultimately able to consult with the medical provider, then they have not been excluded from a service or program on the basis of their disability. For example, Stravitz claims that to "read his incoming mail, [he] must be in dim light, wear prescription glasses, use a booklight, and hold the document approximately an inch from his face." Compl. ¶ 118. Similarly, he uses a booklight and marker to write his outgoing mail. Compl. ¶ 120. None of this indicates that Stravitz's constitutional right to communicate with other people outside the prison has been violated. While it might be more inconvenient for Stravitz to use a booklight and a marker to write his correspondence, his allegations indicate that he has been accommodated and the accompanying inconvenience of the accommodation does not also rise to the level of a constitutional violation. More importantly, Stravitz does not allege that he is unable to communicate with people outside the prison in another manner, such as in-person or video visitation, use of the telephone, or a secured messaging platform.

Allowing the plaintiffs' ADA claims to proceed and seek the imposition of money damages against the Commonwealth's prison system based on allegations of limited or inadequate access

to educational programs, email or secured messaging, Sharpies, headphones, privacy, DVD players, or televisions would be an "unauthorized substantive change in constitutional protections." *City of Boerne*, 521 U.S. at 532. This is so because inmates have no constitutional rights to protect their access to these things in the first place. If this case were to proceed against VDOC and impose money damages on VDOC for a purported lack of access to programs and services that are offered solely as a matter of grace by the Commonwealth of Virginia, such a holding could produce the perverse disincentive to stop offering such services altogether. Clearly, the imposition of money damages based on (at least most of) the allegations in the Complaint would be way out of proportion with any relief this Court could order in the context of a constitutional claim and it should not be permitted.[19]

Similarly, the Complaint makes allegations concerning the Plaintiffs' purported inability to access employment while in prison. *See, e.g.,* Compl. ¶¶ 143–63. But inmates have no constitutional right to employment while incarcerated. *See, e.g., Al-Haqq v. Willingham*, No. 2:20cv3233, 2022 WL 4001117, at *12 (D.S.C. July 1, 2022) (holding that "prison work assignments are matters within the discretion of prison officials, and thus implicate no constitutional concerns" and citing cases). In *Fauconier v. Clarke*, 966 F.3d 265, 277 (4th Cir. 2020) the Fourth Circuit did conclude that an inmate's allegations that he was prohibited from all prison work assignments because of a medical diagnosis had stated a claim for discrimination under Title II of the ADA. The Fourth Circuit also found that the inmate plaintiff was entitled to seek money damages because he had also brought a constitutional claim premised on an equal protection violation supported by the same underlying facts. For this reason, the Fourth Circuit

[19] While it is true that claims for injunctive relief based on ADA violations would not be affected by this argument, the Prison Litigation Reform Act ("PLRA") requires certain findings and limits the breadth of injunctive relief that can be issued to an incarcerated plaintiff.

concluded that the inmate plaintiff had "plausibly alleged violations of both Title II of the ADA and the Fourteenth Amendment" and that the defendants were not entitled to Eleventh Amendment or sovereign immunity "at this juncture." *Id*. at 280. That is not so here. Plaintiffs have made no analogous constitutional claims linking their purported lack of access to services, programs, or employment at their respective prisons. Indeed, making an equal protection claim at this juncture would be difficult, since the plaintiffs have effectively alleged that *all of them* (and other "[b]lind prisoners" not before the Court) were *all* denied access to various services, reading materials, jobs, etc.[20] But that point is putting a non-existent cart before the instant horse. The Plaintiffs' catchall ADA discrimination claims fail to contain analogous constitutional claims and they cannot proceed with their claims for money damages based on alleged denials of access to prison programming, reading materials, privacy, educational programs, and the like. Claim 1 should be dismissed insofar as it seeks money damages from VDOC or any defendant in his or her official capacity.

Allowing the Plaintiffs' ADA claim for money damages to proceed based on the current allegations concerning a purported inadequate access to programming and services to which the inmate plaintiffs have no constitutional right to access in the first place would drastically redefine the bounds of constitutional injuries warranting money damages. VDOC's sovereign immunity remains intact and this claim should be dismissed.[21]

D. Claim 2 – Title II ADA Retaliation Claim by Nacarlo Courtney Against Defendants VDOC, Clarke, Marano, Talbott, and Punturi in Their Official Capacities

[20] "To succeed on an equal protection claim, a plaintiff must first demonstrate that he has been treated differently from others with whom he is similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001).

[21] Even outside the context of state prison defendants, "[c]ompensatory damages are only available to a successful plaintiff in a suit under Title II of the ADA or § 504 of the Rehabilitation Act 'upon proof of intentional discrimination or disparate treatment, rather than mere disparate impact." *Smith v. North Carolina*, No. 1:18cv914, 2019 WL 3798457, at *3 (M.D.N.C. Aug. 13, 2019) (internal citations and quotations omitted)).

i. This Claim Fails to State a Claim for Relief Against Clarke, Marano, Talbott, or Punturi Because it Fails to Allege That These Defendants Were Personally Involved in the Alleged Retaliation

Courtney omits pertinent dates from his Complaint regarding the purported retaliation he faced. He also fails to link any knowledge of his complaints concerning his eye drops (Paragraphs 248, 273) – which occurred in or around October 27, 2022 – and the purported retaliatory drug test – which Defendant Smith administered on December 20, 2022. Compl. ¶ 253. Courtney essentially alleges that his Counsel complained about his access to eye drops via a "letter to Defendant Clarke" and Defendant Talbott, and then, two months later, a correctional officer (Defendant Smith) drug tested Courtney *and four other inmates* at Greensville. Compl. ¶ 253. Nothing in the Complaint links Courtney's complaints about his eye drops to Defendant Smith. Courtney does not even allege that Defendant Smith knew about Courtney's complaints, which Courtney himself states went to Defendants Clarke and Talbott, not Smith. Compl. ¶ 248. There is simply no causal link between Courtney's complaints and the administration of a drug test two months later.

> The ADA's retaliation provision provides, in relevant part, "[n]o person shall discriminate against any individual because such individual ... made a charge ... under this chapter." 42 U.S.C. § 12203(a). To establish a *prima facie* retaliation claim under the ADA, a plaintiff must prove (1) he engaged in protected conduct, (2) he suffered an adverse action, and (3) a causal link exists between the protected conduct and the adverse action.

Reynolds v. American Nat. Red Cross, 701 F.3d 143, 145 (4th Cir. 2012) (citing *A Soc'y Without a Name v. Commonwealth of Va*., 655 F.3d 342, 350 (4th Cir.2011)). Courtney's allegations plainly fail to allege a "causal link" between his protected conduct (a letter his counsel wrote to Defendant Clarke and Defendant Talbott) and a drug test administered two months later by Defendant Smith. Unless Courtney believes he can allege facts to support some sort of conspiracy between Defendant Clarke (VDOC's Director) and Defendant Smith (a correctional officer at

Greensville administering drug tests to inmates as a routine part of his job) and that he can do so in compliance with Rule 11, Claim 2 fails to state a claim and should be dismissed.[22]

E. Claim 3 – Rehabilitation Act ("RA") Claim by All Plaintiffs Against Defendants VDOC, Clarke, Punturi, Miller, Talbott, and Shaw

Defendants assert many of the same arguments in favor of dismissing Claim 3 as they do in favor of dismissing Claim 1. For the reasons outlined above in Section C(i), "all" of the plaintiffs cannot bring a claim against "all" of the defendants because not "all" of the plaintiffs allege that they were even housed in the same facilities with all of these defendants. Plaintiffs' sloppy pleading should not be allowed. If an individual plaintiff wants to bring an ADA or RA claim against VDOC, he should do so on an individual basis. Collective pleading is not allowed, for reasons outlined more fully above in Sections A(ii) and below in Section H(ii)(a). Similarly, the RA – like the ADA – does not provide for individual liability, so the individual defendants should be dismissed.

Additionally, while the ADA and the RA are similar, they are not exactly the same. *See, e.g., Spencer v. Earley*, 278 F. App'x 254, 261 (4th Cir. 2008) (holding that "'[t]he ADA and Rehabilitation Act generally are construed to impose the same requirements,' and '[b]ecause the language of the Acts is substantially the same, we apply the same analysis to both.'" (alterations in original) (quoting *Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999)). The difference, however, is as follows: "[t]o succeed on a claim under the Rehabilitation Act, the plaintiff must establish he was excluded 'solely by reason of' his disability; the ADA requires only that the disability was 'a motivating cause' of the exclusion." *Halpern v. Wake Forest Univ. Health Scis*., 669 F.3d 454, 461–62 (4th Cir. 2012) (quoting *Baird ex rel. Baird*, 192 F.3d at 468–69). "Despite the overall similarity of ... Title II of the ADA and § 504 of the Rehabilitation Act, the language of these two statutory

[22] Moreover, for the same reasons outlined in Section C(ii), Courtney cannot maintain an ADA retaliation claim against individuals. *See, e.g,. Baird*, 192 F. 3d at 471-72.

provisions regarding the causative link between discrimination and adverse action is significantly dissimilar." *Baird,* 192 F.3d at 469.

Exclusion "solely by reason of" one's disability may be established by direct evidence of intentional discrimination (such as comments, writings, or conduct directly indicating a discriminatory attitude) or under the "pretext" framework by which a plaintiff attacks a defendant's proffered permissible reason for a discriminatory action. *See e.g., Reyazuddin v. Montgomery County, Md.*, 7 F. Supp. 3d 526, 552 (D. Md. Mar. 20, 2014) aff'd in part, rev'd in part on other grounds by *Reyazuddin v. Montgomery County, Md.*, 789 F.3d 407 (4th Cir. 2015). While Plaintiffs' Complaint is such a myriad of disjointed allegations from multiple different people against many different defendants, what is conspicuously absent is any evidence of allegations tending to show a discriminatory animus or some type of pretext for purposes of establishing this third element of a claim under the RA. Claim 3 should be dismissed for failure to state a claim.

F. Claim 4 – Virginians With Disabilities Act ("VDA") Claim by All Plaintiffs Against Defendants VDOC, Clarke, Punturi, Miller, Talbott, and Shaw

Plaintiffs' Claim 4 should be – at least in part – dismissed for the same reasons the catchall ADA claims in Claim 1 should be dismissed. It is simply not possible – even taking the Plaintiffs' allegations at face value – that each individual plaintiff (including, apparently, NFB-VA) has asserted a disability discrimination claim against each of the above individual defendants because not every plaintiff was housed in a facility with each and every one of the above defendants. The lax pleading should be rejected and this claim dismissed.

Moreover, VDOC, Clarke, Punturi, Miller, Talbott, and Lakeisha Shaw all assert that this Court lacks jurisdiction over a claim made against them pursuant to the VDA. Plaintiffs assert their claim pursuant to Va. Code § 51.5-40.

The VDA states:

> No person with a disability who is otherwise qualified shall on the basis of his disability be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving state financial assistance or under any program or activity conducted by or on behalf of any state agency.

Va. Code § 51.5-40.

In Va. Code § 51.5-46, the VDA's remedies are outlined. This provision states:

> Any *circuit court having jurisdiction and venue pursuant to Title 8.01*, on the petition of any person with a disability, shall have the right to enjoin the abridgement of rights set forth in this chapter and to order such affirmative equitable relief as is appropriate and to award compensatory damages . . .

Because the claims Plaintiffs attempt to bring are asserted against VDOC (a state agency) and Defendants Clarke, Punturi, Miller, Talbott, and Lakeisha Shaw are employees of that state agency, they are entitled to the protections afforded them under the doctrine of sovereign immunity.

The Commonwealth and its agents cannot be sued, absent express consent. *Stuart v. Smith-Courtney Co.*, 96 S.E. 241 (1918). The Commonwealth extended its consent to be sued in a limited fashion through the VDA, which expressly applies to "any program or activity conducted by or on behalf of any state agency." Va. Code § 51.5-40. Because this provision is in derogation of the common law, the limited waiver of immunity must be strictly construed. *Melanson v. Commonwealth*, 539 S.E.2d 433 (2001); *Patten v. Commonwealth*, 553 S.E.2d 517 (2001).

The Supreme Court of Virginia has frequently asserted that "the doctrine of sovereign immunity is alive and well in Virginia." *Messina v. Burden*, 228 Va. 301, 307 (1984). Sovereign immunity is "a rule of social policy, which protects the state from burdensome interference with the performance of its governmental functions and preserves its control over state funds, property, and instrumentalities." *Id.* at 308. "A waiver of sovereign immunity may not be inferred from general statutory language, but must be expressly and explicitly stated. In the absence of such an

express waiver, the courts of the Commonwealth lack subject-matter jurisdiction to adjudicate tort claims against the Commonwealth." *Doud v. Commonwealth*, 282 Va. 317, 321 (2011). "[O]nly the legislature acting in its policy-making capacity can abrogate the Commonwealth's sovereign immunity and vest the circuit court with jurisdiction." *Daniels v. Mobley*, 285 Va. 402, 414 (2013). As far as individual employees of the Commonwealth like the named defendants, the General Assembly has not waived the sovereign immunity that protects these Commonwealth agents. The Commonwealth, its agencies, officers, or employees, may not be sued for actions taken by them within the scope of their official duties unless expressly permitted by statute. *Messina v. Burden*, 228 Va. 301. In other words, the Commonwealth cannot be sued, absent its express consent. *Stuart v. Smith-Courtney Co.*, 123 Va. 231, 234 (1918).

Under the VDA, the Commonwealth's limited consent to be sued comes with conditions. Specifically, the "Remedies" provision of the VDA permits suit to be filed only in a "circuit court having jurisdiction and venue pursuant to Title 8.01." Va. Code § 51.5-46.[23] The VDA does not permit suit against the Commonwealth or her agencies in federal court.

This Court has previously found Defendants' briefing on this argument to be lacking and denied the defendants' motion to dismiss without prejudice in a similar case. *See, e.g., Richardson v. Clarke*, No. 3:18cv23, 2020 WL 4758361, at *7 (E.D. Va. Aug. 17, 2020). In that opinion, the Court held that "there are numerous instances in which the federal courts have entertained claims under the VDA." *See id.* (citing cases). But in none of those cases did the defendants ever raise the argument that the Court lacked jurisdiction to hear the claims on the basis of sovereign immunity, most likely because that argument was not available to them.

[23] Title 8.01 of the Virginia Code addresses jurisdiction, venue, and other procedural matters applicable to Virginia's state courts.

For example, in *J.D. by Doherty v. Colonial Williamsburg Foundation*, 925 F.3d 663 (4th Cir. 2019), the Fourth Circuit's analysis focused exclusively on the ADA, noting only in a footnote that the "VDA *standards for liability* follow the standards established in the federal Rehabilitation Act of 1973 and adopted in the ADA." *Id.* at 669 n.6 (emphasis added). A review of the operative complaint in that case indicates that the plaintiff alleged only that the defendant Colonial Williamsburg Foundation was "a recipient of state financial assistance" *not* that it was a "program or activity conducted by or on behalf of any state agency." This is a distinction with a major difference. If Colonial Williamsburg Foundation simply received state funding, then it is not entitled to the defense of sovereign immunity. VDOC and VDOC employees – a state agency and state employees – plainly are. The case law and precedent concerning the consent of the Commonwealth to be sued must be strictly construed in favor of the Commonwealth. A recipient of state funding has no such protection.

Similarly, the other case this Court cited (*Tyndall v. National Educ. Centers, Inc. of California*, 31 F.3d 209 (4th Cir. 1994)) is similarly inapplicable to the facts alleged here. In that case, the plaintiff asserted claims under a different provision of the VDA: Va. Code § 51.5-41, which prohibits discrimination in *employment*. This is a different code provision than the one under which the Plaintiffs assert Claim 4 in this case and again was not asserted against a Virginia state agency. Importantly, this employment discrimination provision of the VDA states, "[t]his section shall not apply to employers covered by the federal Rehabilitation Act." Va. Code § 51.5-41(F). This provision is not the provision Plaintiffs have chosen to use in making their VDA claim in this case, and if it were, then their Rehabilitation Act claims would plainly be barred.

The Plaintiffs cannot sustain a VDA claim against VDOC and VDOC employees before this Court. The VDA expressly states that such claims are to be brought in "[a]ny circuit court

having jurisdiction and venue pursuant to Title 8.01." Va. Code § 51.5-46. Defendants VDOC, Clarke, Punturi, Miller, Talbott, and Lakeisha Shaw are entitled to the defense of sovereign immunity and respectfully ask this Court to dismiss this claim against them.

G. Claims 5 and 6 – Claims for Mandamus Relief Pursuant to Va. Code § 2.2-2012 (Claim 5) and the Information Technology Accessibility Act (Claim 6) – Fail to State a Claim Upon Which Relief can be Granted

In both Claims 5 and 6, all of the Plaintiffs seek mandamus relief for purported violations of ministerial duties that allegedly require VDOC to purchase information technology products that are accessible to Virginia inmates with disabilities. Claims 5 and 6 fail for the same reasons.

i. Claim5 and Claim 6 are Barred by the Doctrine of Eleventh Amendment Immunity

It is well-established that the Eleventh Amendment bars suit in federal court by a private citizen against any non-consenting state, as states are generally immune from suit in federal court. *See Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). The Eleventh Amendment provides that "[t]he judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. While the Eleventh Amendment by its terms makes no mention of suits against a state by its own citizens, it is well established that "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another State." *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (citations omitted). The Eleventh Amendment reinforces the common law doctrine of sovereign immunity, specifically ensuring "that the State cannot be sued in federal court at all, even where the claim has merit, and the importance of immunity as an attribute of the States' sovereignty is such that a court should address that issue promptly once the State asserts its immunity." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 482 n.4 (4th Cir. 2005).

It precludes a federal court from exercising subject matter jurisdiction over suits against a State and expressly includes suits seeking only equitable remedies. *Id.* at 480-81 (discussing that Eleventh Amendment immunity deprives a federal court from exercising subject matter jurisdiction); U.S. Const. amend. XI (expressly stating it includes suits in equity); *Missouri v. Fiske*, 290 U.S. 18, 27 (1933) (applying the Eleventh Amendment language to bar requests for equitable relief as well as monetary damages). Moreover, a state's waiver of sovereign immunity in its state courts, even if there were one in this case, "'does not waive the state's eleventh amendment immunity' in federal courts." *Holloman v. Virginia Dep't of Corr.*, No. &:23cv117, 2023 WL 2898454, at *2 (W.D Va. Apr. 11, 2023) (quoting *McConnell v. Adams*, 829 F.2d 1319, 1329 (4th Cir. 1987)).[24]

ii. Claim5 and Claim 6 are Barred by the Doctrine of Sovereign Immunity

Even if the Eleventh Amendment does not bar the Plaintiffs' claims against VDOC and VDOC employees in their official capacities from federal court, sovereign immunity nevertheless bars their claims. The Plaintiffs' claims seeking declaratory and injunctive relief against VDOC and its employees are being brought under Virginia law, specifically Va. Code § 2.2-20123 and Virginia's Information Technology Access Act (Va. Code § 2.2-3500 et seq.). Under the doctrine of sovereign immunity, the Commonwealth is generally immune from liability for damages and from suits to restrain governmental action or to compel such action. *Gray v. Virginia Sec'y of*

[24] "Federal district courts have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or one of its agencies to perform a duty owed to a petitioner. However, [a] federal district court has no mandamus jurisdiction over state employees and cannot compel the state court." *Davis v. Devore*, No. CIV.A. JFM-04-3566, 2004 WL 3704195, at *1 (D. Md. Nov. 17, 2004), aff'd, 124 F. App'x 200 (4th Cir. 2005) (emphasis added) (citing *Gurley v. Superior Court of Mecklenburg County*, 411 F.2d 586–87 (4th Cir. 1969)); *see also Jiggetts v. Maryland Gen. Assembly*, No. CV ELH-20-246, 2020 WL 512205, at *2 (D. Md. Jan. 30, 2020) ("federal courts may not issue an order in the nature of mandamus against a State agency or branch of government.").

Transp., 276 Va. 93, 102, 662 S.E.2d 66, 70 (2008); *Afzall v. Commonwealth*, 273 Va. 226, 231, 639 S.E.2d 279,282 (2007). "[O]nly the legislature acting in its policy-making capacity can abrogate the Commonwealth's sovereign immunity." *Commonwealth v. Luzik*, 259 Va. 198, 206, 524 S.E.2d 871, 876 (2000). A "'waiver of immunity cannot be implied from general statutory language'" but must be "'explicitly and expressly announced'" in the statute. *Afzall v. Commonwealth*, 273 Va. 226, 230, 639 S.E.2d 279, 281 (2007). Commonwealth agencies are not bound by statutes of general application no matter how comprehensive the language, unless named expressly or included by necessary implication. *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 427-28, 722 S.E.2d 626, 630-31 (2012). The declaratory judgment statute, VA Code § 8.01-184, is one such statute of general application. The Virginia Supreme Court, in analyzing whether a statute "evinces an intention on the part of the General Assembly to waive sovereign immunity so as to permit a party to seek judicial review by way of a motion for declaratory judgment of action taken pursuant to that Code section," stated that it is "clear that when the General Assembly intends to waive sovereign immunity and provide a particular procedure for an injured person to follow in seeking judicial review, it knows how to demonstrate that intention." *Afzall* 233-234, 639 S.E.2d at 283 (2007). Moreover, the Virginia Supreme Court has held that "the declaratory judgment statutes may not be used to attempt a third-party challenge to a governmental action when such a challenge is not otherwise authorized by statute." *Miller v. Highland Cnty*., 274 Va. 355, 371-72, 650 S.E.2d 532, 540 (2007).

The Plaintiffs assert that VDOC, Clarke, Miller, and Punturi are violating Va, Code § 2.2-2012(B)(1) and the Information Technology Access Act. They ask this Court to impose declaratory relief and to enjoin the defendants from purchasing or requiring them to purchase certain goods and services. Compl. ¶¶ 299 – 323, 376, 382. Nothing in any of these code provisions allows the

plaintiffs to sue VDOC and VDOC employees, who remain protected by the doctrine of sovereign immunity. Sovereign immunity plainly bars all claims and requested relief outlined in Claim 5 and Claim 6. Accordingly, this Court lacks jurisdiction to hear these claims and they should be dismissed.

iii. Claim 5 and Claim 6 Fail to State a Claim Upon Which Relief can be Granted

Even if VDOC and Defendants Clarke, Miller, and Punturi in their official capacities were not immune and were responsible for procuring IT goods and services for VDOC, Plaintiffs' state law claims for mandamus, declaratory judgment, and an injunction nevertheless fail. Citing to Va. Code § 2.2-2012 and the Virginia Information Technology Access Act, Plaintiffs ostensibly seek Mandamus relief, declaratory judgment, and an injunction against VDOC and Clarke, Miller, and Punturi "to replace existing inaccessible technology with accessible technology." Complaint, ¶¶ 299-323, 376, 382.

"Mandamus is an extraordinary remedy that may be used to compel a public official to perform a duty that is purely ministerial and is imposed upon the official by law." *In re Commonwealth's Attorney for City of Roanoke*, 265 Va. 313, 317 (2003). "A ministerial act is one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority without regard to, or the exercise of, his own judgment upon the propriety of the act being done." *Richlands Med. Ass'n. v. Commonwealth*, 230 Va. 384, 386 (1985) (internal quotation marks and citation omitted). "When a public official is vested with discretion or judgment, his actions are not subject to review by mandamus." *Id*.

Specifically, the Virginia Supreme Court has ruled:

> [I]t is well settled that mandamus will not lie to compel the performance of any act or duty necessarily calling for the exercise of judgment and discretion on the part of the official charged with its performance. . . . [W]here the official duty in question involves the necessity on the part of the officer of making some

> investigation, and of examining evidence and forming his judgment thereon mandamus will not lie.

Id., citing *Thurston v. Hudgins*, 93 Va. 780 (1895).

Plaintiffs attempt to plead this threshold mandamus requirement by asserting that procuring accessible technology is "ministerial" and that VDOC's adherence to the ITAA and Section 508 is non-discretionary. Plaintiffs' Complaint, ¶¶ 302, 313. But this legal conclusion directly contradicts Virginia law, specifically the Virginia Public Procurement Act ("VPPA"), Va. Code §§ 2.2-4300 *et seq.*

The VPPA expressly provides Virginia agencies and their employees broad discretion when procuring goods and services:

> [T]hat public bodies in the Commonwealth obtain high quality goods and services at reasonable cost, that all procurement procedures be conducted in a fair and impartial manner . . . it is the intent of the General Assembly that competition be sought to the maximum feasible degree . . . *that individual public bodies enjoy broad flexibility in fashioning details of such competition. Public bodies may consider best value concepts when procuring goods and nonprofessional services . . . the criteria, factors, and basis for consideration of best value and the process for the consideration of best value shall be as stated in the procurement solicitation.*

Va. Code § 2.2-4300 (emphasis added).

As demonstrated above, procurement by nature is a discretionary act requiring a procurement officer to use her best judgement in drafting procurement solicitations, negotiating terms with top vendors, and selecting to whom to award a public contract. Virginia law expressly recognizes the discretion involved in procurement, granting public bodies "broad flexibility" and requiring decisions about value-laden terms such as "best value." *Id.*

Mandamus applies to a duty that is purely ministerial in nature. *In re Commonwealth's Attorney for City of Roanoke*, 265 Va. 313, 317 (2003). As the VPPA states in its first section, agencies are legislatively instructed to use their discretion and judgement in procuring high quality

goods and services, which include IT-related goods and services. Since procurement is a discretionary process rather than ministerial, mandamus cannot be used to compel VDOC and its leadership to buy specific goods or services. On its face, the Plaintiffs' claim for mandamus relief against VDOC and VDOC employees in their official capacities is inappropriate.[25]

H. Claims 7 Fails to State a Claim Upon Which Relief can be Granted

In Claim 7, Courtney attempts to sue Defendants VDOC, Edmonds, Punturi, Marano, and Talbott for a purported violation of his Eighth Amendment right to be free from cruel and unusual punishment. Specifically, Courtney faults these defendants with having been deliberately indifferent to his serious medical needs.

i. It is Well Established that Courtney Cannot Bring a Constitutional Claim Against VDOC

To the extent Courtney intends to bring a civil rights claims pursuant to 42 U.S.C. § 1983 against VDOC, such a claim is improper because VDOC (a state agency) is not a "person" for purposes of § 1983 claims. This has been plainly and clearly established for years. *See, e.g., Will v. Michigan Dep't of State Police*, 491 U.S. 58 (1989); *Yost v. Young*, 892 F.2d 75, 1989 WL 152515, at *1 (4th Cir. Dec. 7, 1989); *Rhea v. Va. Dep't of Corr.*, 2002 WL 31398734, at *1 (W.D. Va. Oct. 23, 2002).

Moreover, the Eleventh Amendment of the Constitution bars claims by private citizens against a state in federal court. "The Eleventh Amendment largely shield States from suit in federal

[25] The fact that Plaintiffs attempt to sue both VDOC and VDOC employees in their official capacities makes no difference. The allegations fail to state a claim no matter the defendant. Moreover, since the plaintiffs (except for Courtney) are currently incarcerated, the Prison Litigation Reform Act ("PLRA") places explicit limits on this Court's authority to grant any type of prospective relief. Specifically, the PLRA limits the Court to order prospective relief only after finding that there is a "violation of [a] *Federal* right." 18 U.S.C. § 3626 (emphasis added). The PLRA implicitly prohibits this Court from enjoining a state official based on a purported violation of a *state-created* right.

court without their consent, leaving parties with claims against a State to present them, if the State permits, in the State's own tribunals." *Hess v. Port Authority Trans-Hudson Corp*., 513 U.S. 30, 39 (1994). Accordingly, VDOC respectfully asks that it be dismissed for failure to state a claim and on the basis of Eleventh Amendment immunity.

ii. Courtney Fails to Allege Sufficient Facts to Sustain an Eighth Amendment Deliberate Indifference Claim Against Defendants Edmonds, Punturi, Marano, and Talbott

Within the context of alleged medical indifference, a prison official's deliberate indifference to an inmate's serious medical need violates the Eighth Amendment. *See Estelle v. Gamble*, 429 U.S. 97, 102 (1976). A constitutional violation in this context involves both an objective and a subjective component. The objective component is met if the deprivation is "sufficiently serious." *Farmer v. Brennan*, 511 U.S. 825, 834 (1994). A medical need is sufficiently serious "if it is one that has been diagnosed by a physician as mandating treatment or one that is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Hunt v. Uphoff*, 199 F.3d 1220, 1224 (10th Cir. 1999); *Sheldon v. C/O Pezley*, 49 F.3d 1312, 1316 (8th Cir. 1995).

The subjective component is met if a prison official is "deliberately indifferent," that is, if he "knows of and disregards an excessive risk to inmate health or safety." *Farmer*, 511 U.S. at 837. Overall, to prove deliberate indifference, the plaintiff bears a heavy burden. *Slakan v. Porter*, 737 F.2d 368, 373 (4th Cir. 1984). To establish a sufficiently culpable state of mind, there must be evidence that the official knew of an excessive risk of harm to the inmate's health and that he disregarded that risk. *Wilson v. Seiter*, 501 U.S. 294, 302-03 (1991). "[T]he test is whether the [officers] know the plaintiff inmate faces a serious danger to his safety and they could avert the danger easily yet they fail to do so." *Brown v. N.C. Dep't of Corr.*, 612 F.3d 720, 723 (4th Cir. 2010)(internal quotations and citations omitted).

Additionally, to bring a medical treatment claim against non-medical supervisory prison officials such as Edmonds, Punturi, Marano, and Talbott, a plaintiff must show that the defendant was personally involved with a denial of treatment, deliberately interfered with a prison doctor's treatment, or tacitly authorized or was indifferent to a prison physician's misconduct. *Miltier v. Beorn*, 896 F.2d 848, 854 (4th Cir. 1990).[26] Non-medical prison personnel are entitled to rely on the opinion of the medical staff as to the proper course of treatment. *Miltier*, 896 F.2d at 854. "'If a prisoner is under the care of medical experts . . . , a nonmedical prison official will generally be justified in believing that the prisoner is in capable hands.'" *Iko v. Shreve*, 535 F.3d 225, 242 (omission in original) (quoting *Spruill v. Gillis*, 372 F.3d 218, 236 (3d Cir. 2004); *Miltier*, 896 F.2d 848; *see also Spruill*, 372 F.3d at 236 ("[A]bsent a reason to believe (or actual knowledge) that prison doctors or their assistants are mistreating (or not treating) a prisoner, a non-medical prison official . . . will not be chargeable with the Eighth Amendment scienter requirement of deliberate indifference."). For the reasons outlined more fully below, Courtney's factual allegations fail to allege facts sufficient to sustain an Eighth Amendment deliberate indifference claim as to Defendants Edmonds, Punturi, Marano, and Talbott and Claim 7 should be dismissed.

a. Collective Pleading and Vague Allegations Against "Defendants" are Insufficient on their Face

First and foremost, Plaintiffs' collective pleading concerning the non-medical defendants named in Claim 7 is unacceptable and for this reason alone, Claim 7 should be dismissed as to defendants Edmonds, Punturi, Marano, and Talbott, each of whom is a prison administrator and not a medical provider.

[26] *See also Cannon v. Armor Correctional Health Services*, No. 1:18cv202, 2019 WL 1646391, at *7, (E.D. Va. Apr. 15, 2019); *James v. Va. Dep't of Corr.*, No. 7:16cv442, 2018 WL 1528217, at *7 (W.D. Va. Mar. 28, 2018); *Cameron v. Sarraf*, 128 F. Supp. 2d 906, 911 (E.D. Va. 2000).

In its very recent opinion affirming dismissal of an Eighth Amendment claim related to prison medical care asserted against non-medical defendants in a counsel-filed complaint, the Fourth Circuit concluded that the plaintiff's "'generalized, conclusory, and collective allegations' fail to plausibly allege deliberate indifference on the part of each defendant." *Langford v. Joyner*, 62 F.4th 122, 124-24 (4th Cir. 2023) (internal citations omitted). The problem, the court wrote, "arises from the manner of the pleading." *Id*. at 125. In *Langford* (as well as in this case) the complaint "makes only collective allegations against all 'Defendants,' without identifying how each individual defendant personally interacted with [the plaintiff] or was responsible for the denial of his Eighth Amendment rights. Courts have been critical of complaints that 'fail[] to isolate the allegedly unconstitutional acts of each defendant.'" *Id*. (internal citations omitted). The court also noted that the plaintiff "did not identify who the Defendants are beyond being employees at [the prison] in what capacity each Defendant interacted with [the plaintiff], or how (or even if) each Defendant was responsible for [the plaintiff's] medical treatment." *Id*. "This is especially the case with the nonmedical Defendants (the warden, case manager, and unit manager), where [the plaintiff's] 'global manner of pleading' makes his claim against those Defendants 'less plausible because some of the individual defendants had no reason to have known or interacted with [the plaintiff] at the time of the alleged violations.'" *Id*. at 126. That is precisely the case in Claim 7.[27]

In Claim 7, Courtney (who was formerly incarcerated at Greensville) attempts to sue Defendants Edmonds (former Greensville Warden), Punturi (current Greensville warden), Marano (VDOC's statewide ADA coordinator), and Talbott (Greensville's facility ADA coordinator).[28] But the Complaint is woefully lacking in factual allegations to show that these defendants – particularly

[27] This same argument applies to Claim 8 as well. *See* Sec. I.
[28] Courtney also names Armor Correctional Healthcare, Inc., VitalCore, and Dr. Gore as defendats in Claim 7.

a former employee – knew that Courtney had a serious medical issue, knew it was not being addressed to the point that it placed Courtney at a risk of serious harm, and failed to take appropriate action. The factual support for Claim 7 echoes the problems the Fourth Circuit addressed in *Langford*. For example, Courtney baldly alleges that "Defendants knew that failing to schedule eye exams at least every six months to monitor Mr. Courtney's keratoconus" caused him harm. Compl. ¶ 326. "Defendants knew that Mr. Courtney required eye exams and evaluations . . ." Compl. ¶ 327. "Defendants knew that denying Mr. Courtney eye exams . . . placed him at substantial risk of serious harm." Compl. ¶ 329. "The actions of Defendants described herein showed deliberate indifference . . ." Compl. ¶ 330. As the Fourth Circuit recently concluded in *Langford*, this is nothing more than the "'unadorned, the-defendant-unlawfully-harmed-me accusation[s]' and 'legal conclusions' that are insufficient to survive a Rule 12(b)(6) motion to dismiss." *Id.* at 125 (quoting *Iqbal*, 556 U.S. at 678). Rule 8, *Twombly*, and *Iqbal* require "sufficient facts to allow the court to infer liability as to *each* defendant." *Langford*, at 126 (emphasis in original). "This is baked into Rule 8's requirement that the complaint 'show' the plaintiff is entitled to relief." *Id*. This Complaint – just as the complaint in *Langford* – has alleged "but it has not 'shown' – 'that the pleader is entitled to relief.'" *Id.* (internal citations omitted). Claim 7 should be dismissed because of its collective pleading and its failure to comply with Rule 8 and the standards set out in *Iqbal* and *Twombly*.[29]

b. The Complaint Fails to Allege Adequate Personal Involvement on Behalf of Defendant Edmonds

Defendant Larry Edmonds is mentioned a total of ten times in the Complaint:

[29] In addition to the collective pleading issues outlined in this subsection, the Complaint fails to sufficiently allege personal involvement on behalf of the individual defendants it names. These arguments are addressed more fully in Sections H(ii)(b) through H(ii)(d).

(1) once in the caption on Page 1;

(2) once in the list of defendants at Page 2;

(3) three times in Paragraph 63, which simply identifies him as the "former Warden of Greensville;"

(4) once in Paragraph 238, which alleges that Courtney's eyesight has "worsened during this period of time in which . . . Edmonds . . . [has] failed to ensure that he has regular appointments and medical treatment for his eyes . . .;"

(5) once in the "Seventh Claim for Relief" asserting this claim against him;

(6) once in the "Tenth Claim for Relief" asserting a gross negligence claim against him; once in Paragraph 356 summarily stating that Edmonds and others "failed to adequately supervise, review, and ensure meaningful access to programs and services, and failed to ensure compliance with appropriate standards and procedures that would have prevented the harm experienced by the Individual Plaintiffs;"

(7) and again in Paragraph 357, alleging that Edmonds and others "failed to adequately supervise, review, and ensure the provision of adequate medical care and treatment to Mr. Stravitz and Mr. Courtney by medical staff."

None of these Paragraphs alleges facts tending to show that Edmonds was deliberately indifferent to Courtney's serious medical needs. The allegations do not even come close. Tellingly, Courtney fails to even identify *when* Edmonds was the warden at Greensville; only alleging that he is the "former" warden of that facility. None of the factual allegations about Edmonds even come close to "showing" that he knew Courtney had a serious medical issue that was not being appropriately treated or managed by medical personnel. Indeed, Paragraphs 356 and 357 are simply legal

conclusions, not entitled to any deference when evaluating a defendant's motion to dismiss. The Complaint plainly fails to state a claim against Edmonds and Claim 7 should be dismissed.

c. The Complaint Fails to Allege Adequate Personal Involvement on Behalf of Defendant Punturi

Defendant Punturi's arguments are similar to those of Defendant Edmonds. While Punturi is mentioned a total of twenty times in the Complaint, the allegations remain insufficient. The Complaint mentions Punturi:

(1) Once in the Caption on Page 1;

(2) Once in the list of Defendants at Page 2;

(3) Three times in Paragraph 65, which simply identifies him as the Acting Warden at Greensville;

(4) Once in Paragraph 238, which alleges that Courtney's eyesight has "worsened during this period of time in which . . . Edmonds . . . [has] failed to ensure that he has regular appointments and medical treatment for his eyes . . .;"

(5) Once in Paragraph 258 in relation to a retaliation claim also brought by Courtney, but alleging simply that Punturi and others "had no reason to suspect Mr. Courtney of taking drugs" and asserting in a conclusory fashion that the "urinalysis testing was out of the normal course of business at Greensville . . .;"

(6) Once in the "Second Claim for Relief" asserting an ADA claim against him;

(7) Once in Paragraph 274, which alleges that Punturi and others "subjected [Courtney] to a drug test that did not follow required testing procedures" in support of Courtney's Claim 2;

(8) Once in Paragraph 275, which baselessly alleges that Punturi and others "falsified the results of Mr. Courtney's drug test so that he would receive a [disciplinary] charge.";

(9) Once in the "Fifth Claim for Relief;"

(10) Once in Paragraph 306, asserting that Punturi failed to comply with his purported obligation to produce IT products and services accessible to blind prisoners;

(11) Once in Paragraph 308, concluding that Punturi's purported failures to obtain accessible IT equipment injured all of the individual plaintiffs;

(12) Once in the "Sixth Claim for Relief;"

(13) Once in Paragraph 313, asserting that Punturi and others "have a clear legal duty to provide accessible technology to blind program participants;"

(14) Once in the "Seventh Claim for Relief" asserting this claim against him;

(15) Once in the "Ninth Claim for Relief;

(16) Once in Paragraph 356, alleging that Punturi and others "failed to adequately supervise, review, and ensure meaningful access to programs and services . . .;"

(17) Once in Paragraph 357, alleging that Punturi and others "failed to adequately supervise, review, and ensure the provision of adequate medical care and treatment to Mr. Stravitz and Mr. Courtney by medical staff;" and

(18) Once in Paragraph 382, asking this Court to enjoin Punturi and others and force them to "replace existing inaccessible technology with accessible technology."

None of these allegations shows sufficient factual support for the Eighth Amendment deliberate indifference claim Courtney asserts against Punturi in Claim 7.[30] Nothing in the Complaint

[30] *See Langford*, 62 F.4th at 125 (holding that the plaintiff "needed to plead sufficient facts to plausibly allege that each Defendant actually knew about his serious medical condition and the risks of failing to treat him."). These types of claims brought against non-medical defendants – like Edmonds – are even "less plausible because some of the defendants had no reason to have known or interacted" with the plaintiff. *Id*. at 126. The same is true for Edmonds, Punturi, Marano, and Talbott. Absent some factual allegations indicating that these defendants were aware of Courtney's medical issues and nevertheless failed to appropriately address them, Claim 7 should be dismissed for failure to state a claim.

indicates any factual basis upon which this Court could even infer that Punturi *knew* about Courtney's medical needs and, after receiving that knowledge, acted in a deliberately indifferent manner. Courtney asserts nothing but legal conclusions – and scant legal conclusions, at that – to support any sort of claim against Punturi for something as serious as asserting that Punturi ignored Courtney's serious medical needs. Claim 7 should be dismissed against Punturi.

d. The Complaint Fails to Allege Adequate Personal Involvement on Behalf of Defendants Marano and Talbott

Similar arguments apply to Defendant Marano and Defendant Talbott. In the interest of brevity, Defendants do not recount every time Marano and Talbott are mentioned, but again asserts that the Complaint is woefully inadequate to show any facts whatsoever that indicate Marano and Talbott knew about Courtney's serious medical issues and then acted in any deliberately indifferent fashion.

Indeed, Paragraph 175 alleges that on July 21, 2022, Marano and Talbott met with Courtney to discuss "the lack of medical treatment for his keratoconus and his requests for reasonable accommodations." Compl. ¶ 175. Courtney then alleges that Marano "informed Mr. Courtney that accommodations would be approved for him, and he formally requested sunglasses, a maximum-sized television, wireless headphones, and a Blu-Ray DVD player."[31] Compl. ¶ 176. While Courtney then alleges that he never received these items (Compl. ¶179), he fails to assert that Marano and Talbott *knew* Courtney had failed to receive these items. Even if he had, nothing about a failure to provide sunglasses, a television, headphones, or a DVD player has any relation to Courtney's claim that Marano and Talbott violated his Eighth Amendment right to be free from

[31] How a Blu-Ray DVD player and wireless headphones were supposed to assist Courtney with his vision impairment is not explained in the Complaint. These allegations also have nothing to do with inadequate medical treatment.

cruel and unusual punishment based on a purported lack of *medical* treatment. Marano and Talbott are not alleged to be medical providers. They are not alleged to have interfered in Courtney's access to medical treatment. Despite Courtney's vague assertion that he spoke with Marano and Talbott about "the lack of medical treatment," (Compl. ¶ 175), the Complaint fails to allege that Marano and Talbott ignored those requests or interfered with any attempt for Courtney to access necessary treatment. If anything, Courtney seems to allege that Marano "informed Mr. Courtney that accommodations would be approved for him" (Compl. ¶ 176) and that Courtney's requests had been "sent to medical for approval" apparently in an attempt to assist Courtney. Compl. ¶ 177. Talbott is alleged to have responded to a letter from Courtney and informed him that his requests were received and sent to medical for approval. Compl. ¶177. These factual allegations are woefully inadequate to support a claim for deliberate indifference to a serious medical need by a prison official who is not a medical provider. The only thing Courtney comes close to establishing is that Talbott and Marano failed to make sure he received sunglasses, a television, headphones, and a DVD player. This is insufficient to sustain an Eighth Amendment claim and Claim 7 should be dismissed.

I. Claims 8 Fails to State a Claim Upon Which Relief can be Granted

In Claim 8, Plaintiff Stravitz attempts to assert an Eighth Amendment deliberate indifference to a serious medical need claim against Defendants VDOC, Miller, and Williams. Claim 8 against VDOC should be dismissed for the same reason Claim 7 should be. *See* Section H. The standards for asserting such a claim are laid out in Section H(ii) and are not repeated here.

Defendants Miller and Williams, assert similar arguments as the defendants asserted in response to Claim 7.[32]

First, Defendant Williams should be dismissed because the Complaint completely fails to assert any facts to show that she was aware of and deliberately indifferent to Stravitz's serious medical needs. The Complaint alleged that Williams is the "former Warden of Deerfield" but does not allege when she stopped working at Deerfield. Compl. ¶ 64. The Complaint then summarily and conclusively asserts that Williams and others "failed to adequately supervise, review, and ensure meaningful access to programs and services, and failed to ensure compliance with appropriate standards and procedures that would have prevented the harm experienced by the Individual Plaintiffs." Compl. ¶ 356. It further concludes that Williams and others "failed to adequately supervise, review, and ensure the provision of adequate medical care and treatment to Mr. Stravitz and Mr. Courtney by medical staff." Compl. ¶ 357. This is not a supervisory liability claim.[33] This is a direct liability claim against Defendant Williams that must assert facts to show that she personally violated Courtney's constitutional rights. This pleading is woefully inadequate to accomplish that. Nothing in the Complaint indicates that Williams knew about Stravitz's medical needs, knew that they were serious, knew that he was at risk of serious harm, and failed to act appropriately. Claim 8 should be dismissed against Williams.

The arguments in favor of dismissal of Defendant Miller are similar. Stravitz baldly concludes that the "VDOC Defendants" and others "denied and unreasonably delayed providing Mr. Stravitz necessary medical treatment for the condition that causes his blindness." Compl. ¶ 4.

[32] The collective pleading argument in Section H(ii)(a) above applies equally to the Eighth Amendment claim that Stravtiz attempts to assert.

[33] Even if it were, it is nearing non-sense to assert that a prison warden failed to adequately "supervise" or "review" the medical judgment and medical decisions of trained medical providers.

This is a legal conclusion if there ever was one. Stravitz asserts that on September 28, 2022, he filed a "Facility Request" inquiring about the status of his upcoming appointment with Dr. Gupta. Compl. ¶ 244. Defendant Lester[34] is alleged to have responded to that request and stated, "It is coming up." *Id*. Stravitz then asserts that Lester has not scheduled him for cataracts surgery. Compl. ¶ 245. But the factual allegations concerning Miller and Williams are completely absent. Indeed, there are no facts to actually show that Miller or Williams was ever involved in the scheduling surgery or that they were responsible for failing to schedule that surgery. There is nothing in the Complaint to indicate that Miller or Williams knew or should have known that a delay in scheduling Stravitz for surgery was going to expose him to a serious risk of harm. There is nothing to even support an inference that Miller or Williams even knew Stravitz had a vision impairment or was in need of medical attention at all. [35]

Stravitz claims that Miller and others "have not scheduled Mr. Stravitz's follow-up appointment with Dr. Gupta or otherwise taken any action to get him medically necessary surgery for his cataracts." Compl. ¶ 245. But the Complaint fails to assert facts tending to show that Miller and Williams even know Stravitz *had* cataracts, much less that they were aware that Stravitz

[34] Defendant Lester is not included in this Motion to Dismiss.

[35] Stravtiz does allege that "Defendants" knew he had cataracts. Compl. ¶ 335. But this collective pleading is impermissible when making a civil rights claim pursuant to 42 U.S.C. § 1983. Defendants address this inadequacy in more depth in Section H(ii)(a). Moreover, this statement is entirely conclusory and semi-nonsensical. "Defendants" includes, for example, VDOC, a state agency. So Stravitz is alleging that an agency "knew" that he had cataracts. "Defendants" also encompasses prison officials at Greensville, including Correctional Officer Smith who was unfortunately involved in administering a drug test to Mr. Courtney and has now been sued for that while at the same time is also alleged to have known that another inmate at another facility had cataracts and did not timely get surgery. This issue highlights the recurring problem in the Complaint and its blunderbuss approach to pleading. It also fails to comply with Rule 8 because these allegations fail to "show[] that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2).

needed surgery for this condition, had not gotten that surgery, and knew that a failure to receive that surgery subjected him to a serious risk of harm.

J. Claims 9 Fails to State a Claim Upon Which Relief can be Granted

Plaintiff Courtney next attempts to assert what should be a First Amendment retaliation claim against Defendants Punturi, Talbott, and Smith. Courtney has for some reason asserted this as a Fourteenth Amendment claim. Because that approach is plainly incorrect, Defendants will proceed to analyze the retaliation claim under the applicable First Amendment framework.

First and foremost, inmate retaliation claims are subject to rigorous scrutiny, for "'every act of discipline by prison officials is by definition 'retaliatory' in the sense that it responds directly to prisoner misconduct.'" *Cochran v. Morris*, 73 F.3d 1310, 1317 (4th Cir. 1996) (quoting *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994)). "Claims of retaliation must [] be regarded with skepticism, lest federal courts embroil themselves in every disciplinary act that occurs in state penal institutions." *Adams v. Rice*, 40 F.3d 72, 74 (4th Cir. 1994). In order to state an actionable claim of retaliation, therefore, an inmate must present more than "naked allegations of reprisal . . . ." *Id*. Generally, mere "temporal proximity" between the inmate's protected activity and the official's allegedly retaliatory action "is simply too slender a reed on which to rest a Section 1983" retaliation claim. *Thompson v. Clarke*, No. 7:17cv111, 2018 WL 4855457, at *2 (W.D. Va. Oct. 5, 2018) (quoting *Wagner v. Wheeler*, 13 F.3d 86, 91 (4th Cir. 1993) and citing *Clark Cty. Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (finding an inference of causality only if "the temporal proximity [is] very close")). Indeed, in a recent opinion the Western District of Virginia held that an inmate plaintiff attempting to make a claim for First Amendment retaliation had failed to state a claim when he "relie[d] exclusively on the temporal proximity between Defendants' alleged adverse actions and his own steady stream of ongoing litigation." *Thompson v. Clarke*, No.

7:17cv10, 2020 WL 1124361, at *4 (W.D. Va. Mar. 6, 2020). Inmates cannot simply produce a steady stream of litigation or internal complaints and then attempt to sue for retaliation every time something happens to them that they do not like.

Nevertheless, the "First Amendment protects not only the affirmative right to speak, but also the 'right to be free from retaliation by a public official for the exercise of that right.'" *Bhattacharya v. Murray*, 515 F. Supp. 3d 436, 452 (W.D. Va. 2021). In this Circuit, an inmate's "right to file a prison grievance free from retaliation [is] clearly established under the First Amendment." *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 545 (4th Cir. 2017); *see also Gregg-El v. Doe*, 746 Fed. App'x 274, 275 (4th Cir. 2019) ("[S]ince 2010, the law has been clearly established that an inmate's First Amendment right to petition the government is violated when he is retaliated against for filing a grievance."). The Fourth Circuit has also "long held that prison officials may not retaliate against prisoners for exercising their right to access the courts." *Booker*, 855 F.3d at 544. Courtney's retaliation claim is based on his allegation that, after sending a letter to Director Clarke – the Director of the Virginia Department of Corrections – on an unstated date, Defendant Smith selected Courtney for a routine drug screen on December 20, 2022. Ergo, Courtney concludes, there was retaliation. This is a plainly inadequate string of events to support even the inference of retaliation.[36]

There are three elements to a First Amendment retaliation claim: (1) the plaintiff engaged in protected First Amendment activity; (2) the defendants took some action that adversely affected

[36] It is also borderline ridiculous to baselessly accuse the Director of the Department of Corrections of intentionally retaliating against an inmate who complains about his treatment while incarcerated. This in itself is asinine. But to directly accuse the Director of *falsifying the results of an inmate's drug test* is beyond the pale. *See* Compl. ¶ 275. This is an outrageous accusation with zero basis in fact whatsoever. Courtney tested positive for meth and marijuana. Compl. ¶ 274. There is nothing in the Complaint whatsoever to support a conclusion that the results were intentionally falsified, much less that Director Clarke himself falsified those records.

the plaintiff's First Amendment rights; and (3) a causal relationship between the plaintiff's protected activity and the defendants' conduct. *Martin v. Duffy*, 977 F.3d 294, 299 (4th Cir. 2020) ("*Martin*"). Defendants do not dispute that Courtney's complaints concerning his conditions of confinement were protected conduct sufficient to satisfy the first element. Defendants do, however, take issue with Courtney's failure to satisfy the second and third elements.

As to the second element, "a plaintiff suffers adverse action if the defendant's allegedly retaliatory conduct would likely deter 'a person of ordinary firmness' from the exercise of First Amendment rights." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 500 (4th Cir. 2005). Notably, a plaintiff must demonstrate that the adverse action caused "something more than a '*de minimis* inconvenience' to h[is] exercise of First Amendment rights." *Id.* (citation omitted). "To determine whether a plaintiff has suffered an adverse action, the Court must make an objective inquiry that examines the specific facts of each case, taking into account the actors involved and their relationship." *Thompson v. Clarke*, Case No. 7:17-cv-10, 2020 WL 1124361, at *3 (W.D. Va. Mar. 6, 2020) (citing *Balt. Sun. Co. v. Ehrlich*, 437 F.3d 410, 416 (4th Cir. 2006)). "Because 'conduct that tends to chill the exercise of constitutional rights might not itself deprive such rights, . . . a plaintiff need not actually be deprived of [his] First Amendment rights in order to establish . . . retaliation.'" *Id.* (quoting *Constantine*, 411 F.3d at 500) (alterations in original). "Nonetheless, 'the plaintiff's actual response to the retaliatory conduct provides some evidence of the tendency of that conduct to chill such activity.'" *Id.* (quoting *Constantine*, 411 F.3d at 500).

As for the second element, Courtney has utterly failed to allege facts tending to show that the defendants he accuses of retaliation took some action that adversely affected his First Amendment rights. Courtney has not alleged that the purportedly falsified drug test deterred him from exercising his First Amendment rights, or even that it gave him pause in doing so. Indeed,

Courtney filed this lawsuit *after* the alleged retaliatory action. And for all of his handwringing about his release date being extended from March 16, 2023 until November of 2023 (an inaccurate calculation of the impact of a prison disciplinary conviction anyway), Courtney was released from custody on or about March 16, 2023.

Courtney has also failed to satisfy the pleading requirements of the third element of a retaliation claim. In *Martin*, the Fourth Circuit concluded that *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), "provides the appropriate framework for reviewing inmates' First Amendment retaliation claims." 977 F.3d at 297. *Mt. Healthy*'s framework for causation involves a shifting burden between the parties. *Id.* at 299. The inmate must first establish a *prima facie* case of retaliation. *Id.* Only once the inmate meets that threshold does the burden shift to a defendant. *See id.* That *prima facie* case, in regard to causation, requires "an inmate [to] show[] that protected conduct was a substantial or motivating factor in a prison guard's decision to take adverse action" and, if successful, "it is appropriate that the burden of proving a permissible basis for taking that action then shifts to the person who took it." *See id.* at 300; *see also Edwards v. Debord*, Case No. 7:18-cv-00423, 2021 U.S. Dist. LEXIS 235007, at *10-11, 16-17 (W.D. Va. Dec. 8, 2021) ("[O]nce the prisoner-plaintiff shows that his 'protected conduct was a substantial or motivating factor in a prison guard's decision to take adverse action,' then the burden shifts to the defendant to prove a permissible basis for taking that action," but, if a plaintiff does not show that his protected conduct constituted a substantial or motivating factor, then no *prima facie* case has been made.).

Here, Courtney has not even alleged temporal proximity between the time he sent a letter complaining about his incarceration[37] and the December 20, 2022 drug test. Not only that, he has

[37] Counsel for VDOC represents to this Court that the letter at issue was dated October 27, 2022.

failed to allege any facts whatsoever connecting a letter sent to Defendants Clarke and Talbott (Compl. ¶ 248) to Defendant Smith, who ultimately drug tested Courtney *and four other inmates*. Compl. ¶ 253. There is absolutely nothing in the Complaint to show that Smith even knew about the letter, much less that he cared enough to commit a crime and falsify a drug test result for Courtney and only Courtney, none of the other Greensville plaintiffs.[38]

Courtney's First Amendment retaliation claim fails to state a claim upon which relief can be granted and should be dismissed.

K. Claim 10 Fails to State a Claim Upon Which Relief can be Granted

In Claim 10, all of the plaintiffs attempt to assert a claim of gross negligence against Defendants VDOC, Clarke, Miller, Punturi, Talbott, Lakeisha Shaw, Edmonds, Williams, and Smith. Again. Punturi, Talbott, Edmonds, and Smith are only alleged to have worked at Greensville, not Deerfield, so it is impossible for the Deerfield Plaintiffs (McCann, Shabazz, Patrick Shaw, and Stravitz) to sustain a claim against Punturi, Talbott, Edmonds, and Smith.[39] This claim is plainly insufficient on its face and ought to be dismissed due to the lackadaisical pleading that persists throughout the Complaint. Even still, it fails to state a claim upon which relief can be granted.

Gross negligence is the "utter disregard of prudence amounting to a complete neglect of the safety of another. It is a heedless and palpable violation of legal duty respecting the rights of

[38] The allegation that Smith was required to "conduct the tests and to seal the test materials on camera" is beyond belief. Compl. ¶ 252. Nothing requires any VDOC employee to make a video record of an inmate while he urinates. Indeed, federal law would likely prohibit such a practice. To the extent Plaintiffs are suggesting that all inmate urinalysis sample collections should be or should have been recorded, the suggestion is inappropriate, at best.

[39] Defendant Clarke is the Director of VDOC and is not alleged to have had any personal involvement with any of the individual plaintiffs at any time ever and plainly cannot be liable for a claim of gross negligence as it is pled in this Complaint.

others which amounts to the absence of slight diligence, or the want of even scant care." *Burns v. Gagnon*, 283 Va. 657, 678, (2012) (internal citations and quotations omitted). The degree of negligence to support a gross negligence claim must "shock fair minded men although [be] something less than willful recklessness." *Evans v. Evans*, 280 Va. 76, 87 n.1 (2010). "A claim for gross negligence must fail as a matter of law when the evidence shows that the defendants exercised some degree of care." *Elliott v. Carter*, 292 Va. 618, 622 (2016) (citing *Kuykendall v. Young Life*, 261 Fed. App'x 480, 491 (4th Cir. 2008)).

Here, apparently (though it is entirely unclear and this scenario is not an exhaustive example of why Claim 10 fails), at least Plaintiffs Stravitz (at Deerfield) and Courtney (at Greensville) attempt to sue Edmonds (former warden at Greensville), Williams (former warden at Deerfield), and Smith (the guy whose only involvement in all of this was to drug test Courtney) for gross negligence based on the allegation that these defendants "fail[ed] to provide Mr. Stravitz and Mr. Courtney with timely and necessary medical treatment; falsif[ied] Mr. Courtney's positive drug test; fail[ed] to provide reasonable accommodations and appropriate auxiliary aids to all Plaintiffs, and den[ied] all Plaintiffs access to programs and services at Deerfield and Greensville, respectively." Compl. ¶ 355. This allegation is so convoluted and badly written that it is difficult for defendants to even respond. First, again, it is not possible for all of the plaintiffs to maintain claims against all of the defendants named in Claim 10. Second, a denial of access to prison services and programming (like a lack of access to DVD players and wireless headphones, *see* Compl. ¶ 176), or a lack of access to a horticultural class (*see* Compl. ¶ 141), or a four-month delay in providing a replacement Sharpie (*see* Compl. ¶ 192) are most certainly not things that would qualify as an "utter disregard of prudence amounting to the complete neglect of the safety of another" or a "heedless and palpable violation of legal duty." *Burns v. Gagnon*, 283 Va. 657, 678,

(2012) (internal citations and quotations omitted).[40] Nothing about these allegations could or would "shock fair minded" people.

Further, a claim for gross negligence requires that the defendant's purported negligence proximately caused harm or damage to a plaintiff. Plaintiffs collectively fail to identify any physical harm that the defendants proximately caused due to their purported failures to provide Sharpies, DVD players, headphones, computer access, and better mail services.[41] Virginia does not recognize a claim for negligent infliction of emotional distress. Instead, to bring a claim for intentional emotional distress – if that is what these plaintiffs actually intend to do – a plaintiff must allege facts tending to show the following elements: "1) the wrongdoer's conduct was intentional or reckless; 2) the conduct was outrageous or intolerable; 3) there was a causal connection between the wrongdoer's conduct and the resulting emotional distress; and 4) the resulting emotional distress was severe." *Almy v. Grisham*, 273 Va. 68, 78 (2007) (citing *Womack v. Eldridge*, 215 Va. 338 (1974)). These allegations come nowhere close to stating a claim for intentional infliction of emotional distress.

In summary, Claim 10 is so badly pled and so poorly drafted that it should be dismissed for failure to state a claim. It plainly seeks to assert liability where not even the plaintiffs can seriously contend they can sustain a claim against some of the defendants and the claim fails to allege sufficient injuries to sustain a claim for damages. Further analysis of the claim is made impossible

[40] Plaintiffs are reminded that gross negligence claims brought by inmates are subject to a one-year statute of limitations. *See* Va. Code § 8.01-243.2.

[41] The conclusion *might* be a little different for Plaintiffs Stravitz and Courtney, who apparently allege that these defendants – none of whom is a medical provider – somehow caused physical harm via the alleged grossly negligent acts concerning the plaintiffs' medical care. But again. That is entirely unclear, particularly when the individuals named as defendants in Claim 10 played no role in prescribing, distributing, or performing any medical procedure for Courtney and Stravitz. Moreover, and for the reasons stated in *Washington v. Brooks*, No. 3:20cv88, 2021 WL 4975268, at *3-5 (E.D. Va. Oct. 26, 2021), this is not the proper way to bring a medical malpractice claim.

by the lack of clarity in pleading facts to support each plaintiff's claim(s) against each of the defendants. Claim 10 should be dismissed in its entirety.

Conclusion

Plaintiffs' Complaint in this case is a disjointed assemblage of inconveniences, general allegations, conclusory statements and contains limited factual support for any claims it attempts to make. For the reasons outlined herein, Defendants respectfully ask this Court to dismiss the Complaint in its entirety.

Respectfully submitted,

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CERFIFICATE OF SERVICE

I hereby certify that on the 1st day of May, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing ("NEF") to the following:

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