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.

REPLY TO PLAINTIFFS' RESPONSE IN OPPOSITION TO 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") (collectively, the "VDOC Defendants"), by counsel, submit the following reply to Plaintiffs' Response in Opposition to Defendants' Motion to Dismiss, ECF No. 73.

INTRODUCTION

Defendants have moved to dismiss the claims asserted against them in the Plaintiffs' Complaint. In support of their Motion, Defendants argued that (1) the Complaint violates the pleading requirements of Rule 8 and Rule 10; (2) Plaintiff National Federation of the Blind of Virginia ("NFB-VA") lacks standing to asserts its claims in this case; (3) Plaintiffs' claim under Title II of the Americans with Disabilities Act ("ADA") (Claim 1) fails to comply with pleading and joinder rules, improperly names individual Defendants, fails to state a claim for relief, and is barred by sovereign immunity; (4) Plaintiff Nacarlo Courtney's claim under Title II of the ADA for retaliation (Claim 2) fails to state a claim for relief; (5) Plaintiffs' claim under Section 504 of

the Rehabilitation Act (Claim 3) fails to state a claim for relief; (6) Plaintiffs' claim under the Virginians with Disabilities Act ("VDA") (Claim 4) is barred by sovereign immunity; and (7) Plaintiffs' claim for gross negligence (Claim 10) fails to comply with pleading standards and fails to state a claim for relief. Mem. Supp. Defs.' Mot. to Dismiss ("Defs. Br."), ECF No. 58.

Plaintiffs subsequently filed a Response in Opposition to the Motion to Dismiss. Pl.'s Resp. Opp. Defs.' Mot. to Dismiss ("Resp. Br."), ECF No. 73. In their Response, Plaintiffs noted that they agreed to dismiss Claims 5, 6, 7, and 9 against all the VDOC Defendants, and Claim 10 against Defendant Smith. Resp. Br. 5 n.5.[1] Defendants now submit their Reply to the Plaintiffs' Response. Defendants rest on the arguments advanced in their opening memorandum with respect to the merits of Plaintiffs' claims for violation of Title II and for gross negligence, *see* Defs. Br. 21–28, 62–65, and otherwise respond below to the arguments in Plaintiffs' response.

ARGUMENT

I. The Complaint does not comply with Federal Rules of Civil Procedure 8 and 10.

In their Response, Plaintiffs assert that their Complaint does not violate the pleading requirements of Rule 8 and Rule 10, instead arguing that Defendants rely on an overly pedantic reading of those Rules. Resp. Br. 6–11. However, Plaintiffs' pleading deficiencies are not simply a minor issue of form. Rather, the shotgun style and catch-all claims in the Complaint will cause Defendants significant difficulty in responding to those claims at this stage and as the litigation proceeds.

Plaintiffs contend that their allegations are appropriately consolidated into collective claims because they do not allege separate transactions or occurrences, but instead allege "ongoing and systemic conduct." Resp. Br. 10. Yet throughout the Complaint, Plaintiffs allege

[1] Citations to Plaintiffs' Response are to the page number at the bottom of each page.

specific events that would, seemingly, give rise to separate claims for relief. For instance, Plaintiffs allege that at various times they have dropped out of educational programs, Compl. ¶¶ 141–42; been removed from work assignments, *id.* ¶¶ 153, 162–63; been involved in physical altercations and had property stolen, *id.* ¶¶ 186–88; missed medical appointments, *id.* ¶ 198; and been sexually harassed by other prisoners, *id.* ¶ 205. All of these allegations pertain to discrete events and should be stated in separate claims, but are instead advanced in consolidated claims against all Defendants and on behalf of all Plaintiffs.

Plaintiffs' failure to identify which events give rise to which claims poses difficulties even at the pleading stage. This is particularly so with respect to Claim 1, brought under Title II of the ADA, and Claim 10, brought under state law for gross negligence. In their Response to the Motion to Dismiss, Plaintiffs highlight certain allegations they contend support those respective claims. Resp. Br. 21–26, 37–49. But it still remains unclear whether all of the allegations in their Complaint are intended to support these claims, and that the allegations highlighted in their briefing are only illustrative, or whether only specific allegations are meant to support these claims. If Plaintiffs contend that every allegation made in the Complaint resulted from a grossly negligent action by a Defendant, and that every act of alleged gross negligence led to an actionable injury, they should state so clearly, and do so in a manner that permits the Defendants to reasonably respond to those claims.

These difficulties will not resolve at the pleading stage. As this case progresses, it will become increasingly unclear which of the many allegations in the Complaint still support a viable claim for relief. For example, if the Court determines that some, but not all, of Plaintiffs' allegations do not state an independent constitutional violation, then sovereign immunity may remain intact for some, but not all, of Plaintiffs' Title II claims. Likewise, if it is determined that

some of Plaintiffs' allegations are subject to affirmative defenses, such as the provision of reasonable accommodations, the statute of limitations, or failure to exhaust administrative remedies, then those allegations would also no longer support a claim for relief. As the Complaint is currently structured, Plaintiffs' claims would move forward in piecemeal fashion, making it more difficult to identify those allegations that still support a viable claim for relief. The Complaint should therefore be dismissed for failure to comply with federal pleading standards.

II. Plaintiff National Federation of the Blind of Virginia lacks standing to bring its claims.

In their Motion to Dismiss, Defendants asserted that Plaintiff National Federation for the Blind of Virginia ("NFB-VA") lacks standing to assert claims on behalf of its members because the claims it asserts and the relief it seeks necessarily requires the participation of those members in this action. Defs. Br. 17–21. Plaintiffs dispute this assertion and contend that because NFB-VA seeks only prospective relief, it has standing to pursue the claims in this case. Resp. Br. 11–17.

In support of their argument, Plaintiffs cite to cases which distinguish between damages relief, which ordinarily requires the participation of an association's individual members in the litigation to assess the extent of their injuries, and prospective injunctive or declaratory relief, which can be determined without regard to the circumstances of individual members. Resp. Br. 13–14. While some types of prospective relief are less likely to require the involvement of individual members—for instance, relief pertaining to pure questions of law, or which would apply universally to the association's members—others still necessitate individual member participation in the litigation.

The cases cited by Plaintiffs in their Response are illustrative. For instance, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the Supreme Court determined that the nature of the litigation—a facial challenge made by a lessors' association against a local rent control ordinance—did not require participation of the association's members. 485 U.S. at 7 n.3. In *UAW v. Brock*, 477 U.S. 274 (1986), the case at issue involved a pure question of law, and the benefits due to individual members would be adjudicated in separate proceedings by state agencies, and thus could be litigated by the plaintiff union on behalf of its members without their participation. 477 U.S. at 287–88. And in *Retail Industry Leaders Association v. Fielder*, 475 F.3d 180 (4th Cir. 2007), the Fourth Circuit found that individual member participation was unnecessary where the plaintiff association sought an injunction against a state statute and a declaration that the statute was preempted, and where resolution of the case required only general findings regarding the statute. 475 F.3d at 183, 187. In each of these cases, the nature of the relief sought was such that no individualized factual inquiry was necessary for the court to determine the appropriate relief.

Here, by contrast, the individual Plaintiffs' factual circumstances are inherently connected to any relief that could be granted. Although the Plaintiffs have some characteristics in common (namely, that they have some level of visual impairment and have been at some point in VDOC custody), their level of sightedness, needs for accommodation, and other factors are varied. So too will be any relief that is appropriate. For instance, Plaintiffs request an injunction to ensure "equal opportunity to participate in and benefit from educational and work programs available to sighted prisoners," Compl. ¶ 379, but what such an accommodation would look like will depend significantly on the needs, abilities, and interests of the individual Plaintiffs. There is

no one-size-fits-all solution that can accommodate each of the individual Plaintiffs, and their participation in this litigation is therefore necessary to determine any appropriate relief.

Plaintiffs further argue that because NFB-VA's interests are aligned with that of its members, the participation of individual members in this action does not defeat associational standing. Resp. Br. 15–16. In support of their assertion, Plaintiffs cite to *Equal Rights Center v. Abercrombie & Fitch Co.*, in which an association representing the interests of disabled individuals brought suit under the ADA, alleging that the defendants inhibited the access of physically disabled persons to their stores. 767 F. Supp. 2d 510, 513 (D. Md. 2010). The Court found that even if individual members were needed during the litigation to provide evidence to establish the existence of access barriers in the defendants' stores, this did not defeat associational standing because the claims did not require the participation of all of the association's members. *Id.* at 525.

That case can be distinguished from the facts here. Whereas the facts and potential relief in *Equal Rights Center* were relatively straightforward—the existence and removal of access barriers in the defendants' stores—the facts at issue here are far broader. Plaintiffs assert that their visual impairments require accommodations in order to access or participate in multiple aspects of prison life, including written materials, educational programs, jobs, and appropriate housing. Their relative access and the accommodations they purport to require are necessarily intertwined with each Plaintiff's individual circumstances. Thus, the evidence the Plaintiffs would provide in discovery and at trial would not merely serve to illustrate a broader need for accommodation which, if granted, would benefit all of NFB-VA's members. Rather, that evidence is indispensable to adjudication of what accommodations, if any, are necessary to meet each Plaintiff's individual needs.

Finally, Plaintiffs dispute that any injunctive relief granted in this case will need to be tailored in accordance with the Prisoner Litigation Reform Act ("PLRA"), which limits prospective relief to that "no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." Resp. Br. 16–17. Plaintiffs contend that the "particular plaintiff" whose rights are at issue is NFB-VA, *id.* at 17, although the association does not purport to have sustained any injury that would confer standing in its own right. Plaintiffs also cite to cases involving broad injunctions sought by associations, notwithstanding the limitations of the PLRA. Those cases can also be distinguished, however. In *American Humanist Association v. Perry*, the court granted an injunction requiring the defendants to recognize Humanism as a faith group. 303 F. Supp. 3d 421, 432–33 (E.D.N.C. 2018). And in *Johnson v. Martin*, the court enjoined the defendants from banning a religious group's literature from its institutions. Nos. 2:00-cv-75, 1:01-cv-515, 2005 U.S. Dist. LEXIS 32278, at *26 (W.D. Mich. Dec. 7, 2005).

Defendants note again, however, that any relief that could be granted in this action will not be so clear cut. Much of the injunctive relief that Plaintiffs seek here, including requirements for VDOC to cease discriminating against blind prisoners, furnish auxiliary aids and services to allow blind prisoners to access written materials, ensure that blind prisoners have access to educational and work programs, provide the means for blind prisoners to read and write independently and privately, and replace inaccessible technology with accessible technology, Compl. ¶¶ 377–82, cannot simply be implemented as written in the Complaint. The form any such relief would take will, by necessity, account for the circumstances of individual Plaintiffs. The participation of those Plaintiffs in this litigation is therefore necessary, and as such NFB-VA lacks standing to assert its claims.

III. Plaintiffs' claims for damages under Title II of the ADA are barred by sovereign immunity.

Plaintiffs contend that Defendants are not entitled to sovereign immunity against Plaintiffs' claim for damages under Title II. They first assert that abrogation of immunity under Title II is a permissible exercise of Congress's power to pass prophylactic legislation under Section 5 of the Fourteenth Amendment. Plaintiffs argue that because the remedies under Title II are congruent and proportional to the constitutional rights implicated in prison litigation as a class, it is not necessary to consider whether the specific claims in this case rise to the level of an independent constitutional violation. Resp. Br. 49–55.

There is no binding precedent issued by the Supreme Court or the Fourth Circuit which has held that Title II is a valid abrogation of sovereign immunity with respect to prison litigation as a class.[2] This Court has previously considered whether Title II's purported abrogation of sovereign immunity was valid under Congress's prophylactic enforcement powers. *See generally Chase v. Baskerville*, 508 F. Supp. 2d 492 (E.D. Va. 2007). Applying the three-part test of *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court determined that Title II did not effect a valid waiver of sovereign immunity when applied to prison litigation as a class. *Chase*, 508 F. Supp. at 498–506.

The Court identified the rights at issue in this class of litigation, including the Eighth Amendment protection against cruel and unusual punishment, the Fourteenth Amendment right to equal protection, as well as the "'constellation of rights applicable in the prison context'" that are implicated by Title II, including the Fourteenth Amendment right to due process and the First Amendment rights to free speech and free exercise of religion. *Chase*, 508 F. Supp. at 499–500

[2] As Plaintiffs note, the Fourth Circuit's decision in *Amos v. Maryland Department of Public Safety and Correctional Services*, 178 F.3d 212 (4th Cir. 1998), was vacated pending rehearing *en banc*, then settled and dismissed prior to rehearing.

(citing *United States v. Georgia*, 546 U.S. 151, 162 (2006) (Stevens, J., concurring)). The Court also acknowledged that Title II represents a response to a history of unconstitutional disability discrimination. *Id.* at 500 (citing *Constantine v. Rectors and Visitors of George Mason Univ.*, 411 F.3d 474, 487 (4th Cir. 2005)). The Court then found, however, that Title II was not proportional and congruent to the constitutional rights ordinarily at issue in prison litigation. *Id.* at 500–06.

With respect to the First Amendment right of free exercise, the Court noted that while the requirement of accessibility in religious facilities required under the ADA is "facially congruent and proportional" to an inmate's right to religious exercise, "the strict liability imposed by the ADA in this context is not entirely congruent with the jurisprudence that 'negligent acts by officials causing unintended denials of religious rights do not violate the Free Exercise Clause.'" *Chase*, 508 F. Supp. 2d at 502 (citing *Lovelace v. Lee*, 472 F.3d 174, 201 (4th Cir. 2006)). Likewise, as to the Fourteenth Amendment right to due process, the Court determined that "Title II's accommodation requirement is facially congruent with the underlying due process right" to the extent an inmate's disability otherwise precludes meaningful ability to be heard. *Id.* Nonetheless, the Court observed that "Title II's accommodation requirement applies to almost every interaction between inmates and prison officials and imposes monetary liability upon the States for a host of actions in operating its prisons that are far removed from . . . the infrequent hearings where the Due Process Clause applies." *Id.*

The Court next considered the intersection between Title II's requirements and the Eighth Amendment. It noted that, in contrast to other affirmative constitutional obligations found to be congruent with Title II's requirements (such as the right of access to the courts) the Eighth Amendment imposes a "'negative obligation to abstain from cruel and unusual punishment.'"

Chase, 508 F. Supp. 2d at 502 (citing *Miller v. King*, 384 F.3d 1248, 1274 (11th Cir. 2004)). The Court also found that the Eighth Amendment is not relevant to most prison services, programs, and activities. *Id.* And it observed that, as to issues concerning prisoners' conditions of confinement, Title II's requirement of accessibility is not congruent or proportional to the Eighth Amendment's more limited restriction against conditions that impose substantial risk of serious harm. *Id.* at 502–03.

The Court likewise determined that Title II is not congruent or proportional to the Equal Protection Clause. It noted that, while the Equal Protection Clause does not require accommodations for disability if the state acts with a rational basis, Title II imposes additional obligations to make reasonable modifications to existing programs, services, and activities. *Chase*, 508 F. Supp. 2d at 503. Further, in contrast to the Fourth Circuit's finding of congruence and proportionality between Title II and the Equal Protection Clause in the context of public education, the Court noted that a greater degree of judicial deference is extended to administrators in the prison setting. *Id.* at 504.

Finally, the Court made note of the many areas in which Title II imposes obligations on correctional facilities above and beyond any constitutional requirements. The Court observed that the ADA required affirmative steps to facilitate communication for disabled inmates, including the provision of auxiliary aids and services such as interpreters and telecommunication devices. *Chase*, 508 F. Supp. 2d at 505. The Court also noted the breadth of activities, programs, and services offered to state prisoners which are covered under Title II, such as vocational and educational programming, telephones, computers, television, and books, none of which are required to be made available under the Constitution. *Id.* at 505–06. It further found that even if the state's obligation to provide accommodations is limited by the "reasonable modification"

principle, this still did not tailor Title II's requirements to issues of constitutional magnitude. *Id.* at 506. The Court therefore found that Title II was not congruent or proportional to the issue of constitutional violations in state prisons, and accordingly only abrogated sovereign immunity where conduct actually violates the Fourteenth Amendment. *Id.*

The Court's analysis in *Chase* has not been overturned by any intervening precedent.[3] And that analysis holds just as true here. Title II's obligations on state correctional facilities go so far beyond what would be necessary to remedy constitutional violations that it redefines rather than enforces constitutional rights. As such, the Court should find that Title II does not abrogate sovereign immunity in the context of prison litigation as a class.

Plaintiffs also have not alleged an actual violation of the Fourteenth Amendment that would abrogate the Defendants' sovereign immunity against their Title II claim. First, Defendants note that following the withdrawal of some of their claims, Plaintiffs no longer state any claim against the VDOC Defendants under § 1983 for constitutional violations. Even looking to the facts of the Complaint, Plaintiffs' allegations cannot reasonably be construed as stating a violation of their constitutional rights by any of the Defendants.

In their Response, Plaintiffs point to several allegations which they contend amount to independent constitutional violations. Specifically, Plaintiffs allege that their allegations relating to lack of access to the grievance process or the law library constitute a violation of the right of access to the courts; their allegations related to their inability to read and write independently or reside in single cells constitute violations of the Eighth Amendment; and that they have alleged

[3] In their Response, Plaintiffs cite to a more recent opinion issued by this Court which found that Title II validly abrogated sovereign immunity in the context of local jails. Resp. Br. 53 (citing *Zemedagegehu v. Arthur*, No. 1:15cv57, 2015 U.S. Dist. LEXIS 55603 (E.D. Va. Apr. 28, 2015)). That case distinguished its facts from *Chase*, however, and it did not question the Court's analysis in *Chase* as applied to the context of state correctional facilities. *See* 2015 U.S. Dist. LEXIS 55603, at *35–40.

violations of the Equal Protection Clause because they do not receive or are removed from job assignments. Resp. Br. 56.

None of these arguments are availing. As to Plaintiffs' claims regarding grievances and the law library, there is no freestanding constitutional right of access to a prison grievance procedure, *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 541 (4th Cir. 2017), or to a prison law library, *Lewis v. Casey*, 518 U.S. 343, 351 (1996). To the extent Plaintiffs contend that Defendants have impeded their right of access to the courts, they do not allege that their lack of grievance or law library access has caused "actual injury" to an "arguable" or "nonfrivolous" claim. *Lewis*, 518 U.S. at 351, 353 & n.3.

Plaintiffs also have not alleged violations of the Eighth Amendment, as they have not alleged to have suffered a "serious or significant mental or emotional injury" sufficient to state an Eighth Amendment claim for unconstitutional conditions of confinement. *De'Lonta v. Angelone*, 330 F.3d 630, 634 (4th Cir. 2003). Finally, Plaintiffs fail to state a claim for violation of their right to equal protection. Although Plaintiffs allege that they are ineligible for or have been removed from prison jobs due to their disabilities, they do not allege a similarly situated comparator inmate who has been treated differently. *See See United States v. Olvis*, 97 F.3d 739, 744 (4th Cir. 1996) ("Generally, in determining whether persons are similarly situated for equal protection purposes, a court must examine all relevant factors."); *cf. Bowles v. Jackson*, No. 7:17cv117, 2018 U.S. Dist. LEXIS 111377, at *5 (W.D. Va. July 3, 2018) (dismissing inmate's equal protection claim because, among other reasons, he did not "identify another disabled or wheelchair bound inmate who has been denied access to the chow hall and or otherwise denied benefits by" the defendant). Likewise, they do not set forth "specific, non-conclusory factual

allegations that establish improper motive." *Williams v. Hansen*, 326 F.3d 569, 584 (4th Cir. 2003) (internal quotation marks omitted).

Plaintiffs' allegations do not state an independent claim for violation of their constitutional rights. Because they do not allege a coextensive constitutional claim, Defendants are protected by sovereign immunity against their Title II claims.

IV. Plaintiff Nacarlo Courtney does not establish a prima facie case for retaliation.

In their Motion to Dismiss, Defendants argued that Plaintiff Courtney, did not establish that Defendant Smith *knew* about the letter to Defendants Clarke and Talbott, and therefore he did not satisfy the third requirement of a prima facie retaliation claim. Defs. Br. 35. In their Response, Plaintiffs still fail to establish that Defendant Smith *knew* about the letter to Defendants Clarke and Talbott. *See* Resp. Br. 17–20. Rather, they simply reiterate that Defendant Smith conducted a drug test after Courtney's letter was submitted, and they apparently argue that, based *only* on temporal proximity, this Court can reasonably infer that Defendants Clarke, Marano, Talbott, and VDOC conspired to falsify Courtney's drug test results. Resp. Br. 19.

While the pleading requirements to establish the causation element of a retaliation claim are not onerous, courts have nonetheless found that plaintiffs have failed to plead sufficient facts to satisfy this requirement. *See Reynolds v. Am. Nat'l Red Cross*, 701 F. 3d 143, 145, 154 (4th Cir. 2012) (stating that "[e]ven assuming that [the plaintiff] met the first two prongs to establish a prima facie claim of retaliation . . . [he] failed to cite to any evidence on the causation element of the ADA retaliation claim. Therefore, the retaliation claim . . . fails."). Plaintiffs, citing to *Foster v. University of Maryland-Eastern Shore*, *King v. Rumsfeld*, and *Silva v. Bowie State University*, apparently argue that temporal proximity alone is sufficient evidence of a causal link. However, *Foster* and *King* are cases where, in addition to temporal proximity, the person acting

adversely towards the plaintiff *knew* of the plaintiff's protected conduct. *Silva*, an unpublished opinion, can also be distinguished from this case.

Plaintiffs cite *Foster* for the proposition that only "one month" between the protected conduct and adverse action is sufficient evidence of a causal link. However, in *Foster*, the plaintiff complained about discrimination (i.e. the protected conduct) to the person that fired her (i.e. the adverse action). *See Foster v. Univ. of Md.-Eastern Shore*, 787 F.3d 243, 244 (4th Cir. 2015) (stating that "[the plaintiff] then told the University's Director of Human Resources, Marie Billie, that Jones had sexually harassed her"); *Foster* at 253 (stating that "Billie's statement . . . suggests that Billie and Holden fired [the plaintiff] because she complained about retaliation"). Plaintiffs cite *King* in support of the assertion that only "two months and two weeks" between the protected conduct and adverse action is sufficient evidence of a causal link. However, like *Foster*, the person that acted adversely towards the plaintiff *knew* of the plaintiff's protected conduct. *See King v. Rumsfeld*, 328 F.3d 145, 151 n.5 (4th Cir. 2003) (stating that Carlson did "reviews of [the plaintiff's] performance" and "[the plaintiff's] firing came two months and two weeks following Carlson's receipt of notice that [the plaintiff] had filed an EEO complaint with DOD's Office of Complaint Investigation."). In both *Foster* and *King*, the plaintiffs satisfied the third requirement of a prima facie retaliation claim by showing knowledge *and* temporal proximity, not just temporal proximity.

Plaintiffs also cite to *Silva* as holding that only "ten weeks" between the protected conduct and adverse action is sufficient evidence of a causal link. As an initial matter, it appears that the person who acted adversely towards the plaintiff in that case may have known of the plaintiff's protected conduct. *See Silva v. Bowie State Univ.*, 172 F. App'x 476, 477 (4th Cir. 2006) (stating that, after "the filing of his complaint with [his employer's] Equal Employment

Opportunity ("EEO") officer," the plaintiff was fired). However, even if this unpublished case did support the argument that temporal proximity alone is sufficient, this case can be distinguished from *Silva*. In *Silva*, the plaintiff filed a discrimination complaint with his employer's EEO officer. *Id.* at 477. Shortly thereafter, the plaintiff's employer fired him. *Id.* at 478. In *Silva*, both the protected activity and adverse action were clearly employment related. Thus, the court could reasonably infer a causal connection. In this case, Plaintiff Courtney complained to Defendants Clarke and Talbott about access to eye drops. Compl. ¶ 253. Approximately two months after, Defendant Smith conducts a drug test, which Courtney failed. Unlike *Silva*, the alleged protected activity and adverse action in this case are not clearly related.

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 *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556–57 (2007)). In this case, Courtney only argues that the "two months" between his letter about eyedrops and his failed drug test is sufficient evidence of a causal link. However, there is no evidence that Defendant Smith *knew* of the letter to Defendants Clarke and Talbott. There is no evidence that Defendants Clarke, Marano, Talbott, and VDOC conspired with Defendant Smith to falsify his drug test results. Furthermore, a letter regarding access to eyedrops and a drug test conducted two months later are not clearly related. In short, Courtney's "causal connection" is too attenuated for this Court to reasonably infer that Defendants retaliated against him.

V. Plaintiffs do not adequately allege a Section 504 claim.

In their Motion to Dismiss, Defendants argued that Plaintiffs did not satisfy the third requirement of a Rehabilitation Act claim because they never established that they were

excluded "solely by reason of" their disability. Defs. Br. 36. In their Response, Plaintiffs argue that they may simply allege and need not establish discrimination. *See* Resp. Br. 57. Citing to Paragraphs 278 and 284 of their Complaint, Plaintiffs conclude "[their] allegations are sufficient."

Both Paragraphs 278 and 284 are conclusory statements. Paragraph 278 states "Defendants excluded the Individual Plaintiffs and other blind prisoners from participation in, denied them the benefits of, and subjected them to discrimination in VDOC services programs, and activities solely by reason of disability in violation of Section 504 and its implementing regulations as more fully described in this Complaint." Compl. ¶ 278. Paragraph 284 states "The actions of Defendants discriminated against the Individual Plaintiffs and other blind prisoners solely by reason of their disabilities." Compl. ¶ 284.

While Plaintiffs are not required to prove their claims now, they cannot rest on conclusory statements to survive a Motion to Dismiss either. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, [will] not suffice." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555). Furthermore, the Court should not accept "'unwarranted deductions,' 'footless conclusions of law,' or 'sweeping legal conclusions cast in the form of factual allegations.'" *Custer v. Sweeney*, 89 F.3d 1156, 1163 (4th Cir. 1996). Plaintiffs attempt to bolster their conclusory allegations by citing to Paragraphs 99 through 132, but none of these paragraphs show discriminatory animus or some type of pretext. They therefore fail to state a claim for violation of Section 504 of the Rehabilitation Act.

VI. Plaintiffs' claims under the VDA are barred by sovereign immunity.

Plaintiffs dispute the Defendants' assertion that they are entitled to sovereign immunity on Plaintiff's claims under the Virginians with Disabilities Act ("VDA"). They contend that the

VDA's waiver of sovereign immunity is not limited to actions brought in state court, arguing that the statute's remedies provision authorizing suit in "[a]ny circuit court having jurisdiction and venue pursuant to Title 8.01 [of the Code of Virginia]" does not "strip VDA plaintiffs of the opportunity to file the same claim in federal court, provided she could meet the requirements for federal jurisdiction." Resp. Br. 29. But this argument fails to show that the VDA waives the Commonwealth's immunity against suit in federal court.

First, Plaintiffs conflate the distinct issues of whether federal courts may exercise pendent subject matter jurisdiction over claims brought under the VDA, and whether the Commonwealth, its agencies, or its employees may be sued in federal court. Although claims against non-state defendants have been brought under the VDA in federal court, those exercises of jurisdiction do not speak to the separate question of whether state actors are immune from suit. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121 (1984) ("[N]either pendent jurisdiction nor any other basis of jurisdiction may override the Eleventh Amendment."). Even to the extent claims under the VDA have previously been brought against state entities in federal court,[4] no cases have directly spoken to the issue of sovereign immunity against any those claims, and thus those cases would not be binding on this Court. *See Hagans v. Levine*, 415 U.S. 528, 533 n.5 (1974) ("[W]hen questions of jurisdiction have been passed on in prior decisions *sub silencio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue directly before us.").

Similarly, Plaintiffs argue that the Court should deny the Defendants' claim of sovereign immunity for purposes of judicial economy and litigation convenience, contending that the

[4] The only such case identified in Plaintiffs' Response is *Gary v. Virginia Department of Elections*, No. 1:20cv860, 2020 U.S. Dist. LEXIS 214886 (E.D. Va. Aug. 28, 2020), in which this Court entered a partial consent judgment and decree which expressly declined to bind the parties with respect to the viability of the plaintiffs' claims under a different section of the VDA. In any event, that case did not address the question of sovereign immunity.

similarity between claims brought under the VDA and claims brought under the ADA and Section 504 counsel in favor of litigating those claims in a single federal action. Resp. Br. 30–31. But these considerations are insufficient to overcome the Defendants' assertion of sovereign immunity. The Supreme Court has acknowledged the potential inconvenience raised by claims of Eleventh Amendment immunity, noting that the application of immunity to pendent state-law claims may "result[] in federal claims being brought in state court, or in bifurcation of claims." *Pennhurst*, 465 U.S. at 122. Yet the Court nonetheless held that "such considerations of policy cannot override the constitutional limitation on the authority of the federal judiciary to adjudicate suits against a State." *Id.* at 123.

Here, Plaintiffs have not shown that the VDA waives the Commonwealth's immunity against suit brought in federal court. Such a waiver may be found "only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'" *Edelman v. Jordan*, 415 U.S. 651, 673 (1974) (quoting *Murray v. Wilson Distilling Co.*, 213 U.S. 151, 171 (1909)) (alteration in original). Even if the VDA is construed as waiving the Commonwealth's sovereign immunity against claims brought in state court, this does not by itself effect a waiver of immunity from suit brought in federal court. "A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." *Pennhurst*, 465 U.S. at 99. Thus, "it is settled that a statute waiving a state's sovereign immunity in its own courts is insufficient to waive its Eleventh Amendment immunity; the statute must specify the state's intention to be sued in federal court." *Huang v. Bd. of Governors of Univ. of N.C.*, 902 F.2d 1134, 1138–39 (4th Cir. 1990) (citing *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)). "The test for determining whether a State has waived its immunity from federal-court jurisdiction is a

stringent one." *Atascadero*, 473 U.S. at 241. Accordingly, "a state does not waive its Eleventh Amendment immunity 'by consenting to suit in the courts of its own creation,' 'by stating its intention to sue and be sued, or even by authorizing suits against it in any court of competent jurisdiction.'" *Lee-Thomas v. Prince George's Cnty. Pub. Sch.*, 666 F.3d 244, 251 (4th Cir. 2012) (quoting *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 676 (1999)).

Plaintiffs can point to no waiver of Eleventh Amendment immunity in the VDA, either express or implicit, that satisfies this "stringent" test. The remedies provision of that statute authorizes claims to be brought in Virginia's circuit courts but is silent as to federal courts. Va. Code § 51.5-46(A).[5] Plaintiffs cite to *Lee-Thomas v. Prince George's County Public Schools* for the assertion that the Fourth Circuit "is 'reluctant to infer that the only way a state statute' can waive sovereign immunity in federal court is 'to include the words "federal court" or "United States" in the statutory text.'" Resp. Br. 28 n.17 (citing 666 F.3d at 254). But this omits important context from that case. There, the Fourth Circuit considered whether a Maryland statute waived the state's Eleventh Amendment immunity. Rather than undertake an independent analysis of the statutory text, the court primarily deferred to a decision of the Court of Appeals of Maryland, which had held that the statute included a "broad and unambiguous" waiver of immunity, including immunity under the Eleventh Amendment. 666 F.3d at 251–55.

Here, there is no state court decision interpreting the VDA in a similar way, nor do Plaintiffs point to any language in the statute that evinces a clear intent by the Commonwealth to waive its immunity from suit in federal court. In light of the requirement that any waiver of immunity must be strictly construed, Plaintiffs fail to show that Eleventh Amendment immunity

[5] The provision also limits the available relief for violations of the VDA to those remedies set forth therein. Va. Code § 51.5-46(C).

is waived under the VDA, and their claims brought under that statute must therefore be dismissed.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Memorandum of Support of their Motion to Dismiss, Defendants respectfully request that this Court grant their Motion to Dismiss and dismiss all claims asserted against them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of July, 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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