IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

WILLIAM THORPE, *et al*., *Plaintiffs*, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al*., *Defendants*.	CASE NO. 3:19-cv-332-REP

CLASS PLAINTIFFS'
MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS

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INTRODUCTION

Plaintiffs' 98-page Complaint (the "**CAC**" or "**Complaint**") is far more factually detailed than modern pleading standards require. The Complaint also includes citations to VDOC's internal documents and sworn testimony by VDOC's designated corporate representatives and employees. Rather than dealing with these rigorous factual allegations, Defendants now offer a competing "Statement of Facts" based upon counsel's selective interpretation of the Step-Down policy and cherry-picked documents extrinsic to the Complaint. Defendants present *this* as the "essential allegations of the complaint" and argue that the Complaint should be dismissed because the Western District of Virginia has granted summary judgment to Defendants in pro se cases based on VDOC affidavits mirroring their Statement of Facts. *See* Mem. Supp. Mot. Dismiss 2, 19 n.10, 21-22, 24, 26 (June 14, 2019), ECF No. 22 ("**Mot.**" or "**Motion**").

On a Rule 12(b)(6) motion, this Court cannot consider Defendants' "Statement of Facts." Under Fourth Circuit law it is irrelevant that other courts granted summary judgment on pro se complaints that bear no relation to the detailed factual record yet to be developed here. Because Defendants ignore the well-pleaded allegations of Plaintiffs' Complaint, their Motion to Dismiss the constitutional claims (Counts II, III, and V) must fail. Defendants' arguments for dismissal of the remaining claims (Counts I and VI) rely on meritless technicalities and likewise ignore the Complaint.

ARGUMENT

I. Plaintiffs Have Adequately Pleaded Their Constitutional Claims.

A. Defendants Cannot Defeat The Constitutional Claims By Improperly Relying Upon Disputed Factual Propositions Based In Documents That Are Extrinsic And Not Integral To The Complaint.

While correctly admitting that "Plaintiffs submitted VDOC operating procedure 830.A [the Step-Down Program] as Exhibit 9 to the complaint and its contents are therefore properly before the Court" (Mot. 7 n.4), Defendants seek to support their Motion with four additional

VDOC operating procedures that are extrinsic to the Complaint: O.P. 830.2 (Mot. Ex. 1); O.P. 841.1 (Mot. Ex. 2); O.P. 830.1 (Mot. Ex. 3); and O.P. 730.3 (Mot. Ex. 4).[1] Defendants claim these operating procedures may be considered because they are "publicly-available official documents" subject to judicial notice. Mot. 8 n.5, 9 n.6, 10 n.8, 12 n.9. Defendants' counsel then characterizes these documents in trying to respond to the Complaint. *See, e.g.*, Mot. 10 ¶ 41 (claiming that prisoners who make "adequate progress at security level 6 . . . *will be* reclassified at security level 5" and "'stepped down' into the general population" (emphasis added)). Defendants' argument fails for several reasons.

First, Defendants are offering these documents, and their counsel's characterization of them, as *proof* that Plaintiffs' conditions of confinement do not implicate procedural due process or Eighth Amendment rights. *See, e.g.*, Mot. 12 ¶ 52 (quoting policy as proof that Level S inmates "were reviewed" by staff starting in 2017); *see also* Mot. 16-22, 25-29. Defendants also offer these "facts" in support of qualified immunity. Mot. 28-29.

Rule 12(b)(6) does not allow Defendants to base a motion to dismiss on a competing "Statement of Facts" or their counsel's disputed characterization of VDOC policies that are neither attached nor integral to the Complaint. Rule 12(b)(6) tests the legal sufficiency of the facts alleged in the Complaint, which must be taken as true, and all inferences from the allegations are drawn in Plaintiffs' favor. *Brown v. Mitchell*, 308 F. Supp. 2d 682, 690-91 (E.D. Va. 2004) (Payne, J.). A motion to dismiss does not "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). Hence, on this ground alone, the Motion must fail.

[1] Because these operating procedures were enacted only recently, and do not purport to apply from 2012 to the present, they have no bearing on Plaintiffs' damage claims for the entire period. CAC ¶ 22; *see* Mot. Ex. 1 (O.P. 830.2, effective April 1, 2018); Mot. Ex. 2 (O.P. 841.4, effective April 1, 2019); Mot. Ex. 3 (O.P. 730.3, effective March 1, 2018).

Second, Fourth Circuit law is clear that a "district court cannot go beyond" the Complaint. *E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 637 F.3d 435, 448 (4th Cir. 2011). "[I]f it does, it converts the motion into one for summary judgment" which "is not appropriate where"—as here—"the parties have not had an opportunity for reasonable discovery." *Id*. Thus, a court may only consider documents outside the complaint if they are "integral to and explicitly relied on in the complaint." *Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 234 (4th Cir. 2004); *see Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 165-68 (4th Cir. 2016) (rejecting motion to dismiss based upon defendant's interpretation of passages from Incident Report referenced in the complaint). "[S]tatements by counsel that raise new facts constitute matters beyond the pleadings and cannot be considered on a Rule 12(b)(6) motion." *du Pont*, 637 F.3d at 449, 454 (reversing dismissal where district court relied on defendant's assertions over the complaint's allegations).

Plaintiffs' claims do not rely upon the policies that Defendants attach to their Motion *or* upon defense counsel's characterization of those policies. Plaintiffs' claims rely instead upon specific factual allegations in the Complaint detailing their conditions of long-term solitary confinement pursuant to the Step-Down Program's key policies. These allegations are bolstered by sworn testimony of VDOC's chosen Rule 30(b)(6) corporate representative in a separate litigation, who bound VDOC when she explained that the Step-Down policies—not those introduced by Defendants—solely govern whether a prisoner in the Program may return to the general population.[2] *See Buffalo Wings Factory, Inc. v. Mohd*, 574 F. Supp. 2d 574, 579-

[2] *See* Dep. Tr. Amee Duncan at 65:25-66:6, *DePaola v. Clarke*, No. 7:16-cv-00485 (Oct. 3, 2018) ("Q: Are you aware, other than this policy [O.P. 830.A.], are you aware of any other policies that allow Level S inmates at Red Onion to earn their way back to a lower security level? A: No, no other policies. The only other thing, you know, that we use would be [Compl. Ex. 11], which is the restrictive housing reduction step-down [plan]."), *referring to* CAC Exs. 8, 9, 10, 11. The Complaint cites numerous excerpts from Duncan's testimony. *See* CAC ¶¶ 126 n.67, 174 n.94, 180 n.97.

80 (E.D. Va. 2008) (denying motion to dismiss where Rule 30(b)(6) deposition testimony further corroborated factual allegations). Defendants are silent regarding this testimony.

Finally, Defendants may not use the judicial notice doctrine as an end-run around the Complaint's well-pleaded allegations. The Fourth Circuit has made clear that "judicial notice must not be used as an expedient for courts to consider matters beyond the pleadings and thereby upset the procedural rights of litigants to present evidence on disputed matters." *Goldfarb v. Mayor of Balt.*, 791 F.3d 500, 511 (4th Cir. 2015) (internal quotation marks omitted). And, in any event, facts within the document for which notice is sought must be "construed in the light most favorable to the plaintiff along with the well-pleaded allegations of the complaint." *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 557, 560 (4th Cir. 2013) (district court erred by noticing facts contradicting the complaint).

At most, this Court could take note of the limited fact that the documents cited by Defendants *exist*—as written instructions to VDOC personnel on how to perform their jobs—but nothing more. *See Goines*, 822 F.3d at 168 (district court erred in considering the contents of a police report as proof of the events rather than as assertions made by the officers); *Clatterbuck*, 708 F.3d at 558 (district court erred in considering citizen statements in city council records as proof of necessity for city ordinance at issue); *du Pont*, 637 F.3d at 449 (district court erred by relying on the truth of counsel's representations regarding the operation of supply contracts); *Ohio Valley Envtl. Coal v. Aracoma Coal Co.*, 556 F.3d 177, 216 (4th Cir. 2009) (declining to take judicial notice of permit decision documents where party sought notice of its interpretation of documents, not of their mere existence).

B. The Complaint Pleads Facts Showing That Defendants Have Violated Plaintiffs' Rights To Procedural Due Process.

Plaintiffs allege that their solitary confinement pursuant to the Step-Down Program lacks a penological purpose and serves Defendants' economic scheme to fill empty beds at Red Onion and Wallens Ridge with prisoners who do not pose a sufficient or ongoing danger. CAC

¶¶ 88-93, 132, 188-91. In response, Defendants essentially assert that they can hold prisoners in solitary confinement for as long as they like without accountability or meaningful review of whether these prisoners pose an ongoing risk. Mot. 16. However, the Supreme Court has held that prisoners in long-term administrative segregation have a liberty interest in avoiding ongoing solitary confinement and must be provided meaningful periodic review with adequate procedural protections. *Wilkinson v. Austin*, 545 U.S. 209, 223-24 (2005); *see also Incumaa v. Stirling*, 791 F.3d 517, 527, 530-32 (4th Cir. 2015). Defendants ignore the Complaint's well-pleaded allegations that place this case squarely within *Wilkinson*, and their Motion fails.

1. Plaintiffs' Lengthy And Indefinite Solitary Confinement Is Indistinguishable From *Wilkinson* And *Incumaa*.

Under *Wilkinson*, Plaintiffs must allege that (1) their interest in avoiding onerous conditions arises from state policies or regulations, such as a regulation mandating periodic review; and (2) their confinement "imposes atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Wilkinson*, 545 U.S. at 223.

Defendants do not dispute that VDOC policies create an expectation of avoiding futher solitary confinement. Rather, relying only on their own "Statement of Facts," Defendants argue that Plaintiffs have not sufficiently alleged an atypical and significant hardship under *Wilkinson*. Mot. 17-18. The Complaint, however, alleges facts establishing that Plaintiffs' long-term solitary confinement is strikingly similar to, and in fact worse than, conditions that *Wilkinson* held satisfy the "atypical and significant hardship" standard "under any plausible baseline"—even if compared to typical conditions of segregation. *Wilkinson*, 545 U.S. at 223. At minimum, Defendants do not dispute that Plaintiffs allege conditions of solitary confinement that are atypical and significant compared to conditions in the general population of Virginia prisons, which is all they need to do. *See Incumaa*, 791 F.3d at 527.

(a) Plaintiffs Allege Solitary Confinement Conditions That Are Materially Indistinguishable From *Wilkinson* And *Incumaa*.

In *Wilkinson*, the Supreme Court first looked to the magnitude of restrictions on prisoners in solitary confinement at Ohio State Penitentiary ("OSP"), a super-max prison. *Wilkinson* 545 U.S. at 223-24; *see Incumaa*, 791 F.3d at 529-30. The Court found it significant that "[i]ncarceration at OSP [was] synonymous with extreme isolation" and that "almost every aspect of an inmate's life [was] controlled and monitored." *Wilkinson*, 545 U.S. at 214. Plaintiffs allege the same. CAC ¶¶ 95-103:

- OSP inmates remained alone in a 7-by-14 foot cell for 23 hours per day. 545 U.S. at 214. Plaintiffs allege that they remain in their cells approximately 22 to 24 hours per day in *smaller* cells. CAC ¶ 96.

- The OSP solitary cells featured "solid metal doors with metal strips along their sides and bottoms which prevent conversation or communication with other inmates." 545 U.S. at 214. Plaintiffs allege that their cells have the same feature. CAC ¶ 102.

- OSP inmates had to eat all meals alone in their cells. 545 U.S. at 215. Plaintiffs allege the same. CAC ¶ 98.

- The light in OSP cells stayed on for 24 hours. 545 U.S. at 214. Plaintiffs allege the same. CAC ¶ 100.

- During the "one hour per day" that OSP inmates left their cells, they were permitted "recreation" time to exercise "only in a small indoor room." 545 U.S. at 214, 224. Plaintiffs allege that VDOC allowed them to leave their cells for only an hour so that they could exercise in a small outdoor "dog cage." CAC ¶¶ 109 & n.62, 110. In 2017, VDOC increased the limit to two hours. *Id.* ¶ 109 n.62. Plaintiffs also allege that, at all relevant times, VDOC has prohibited recreation on "off days"; Plaintiffs are not permitted to speak to other inmates; and guards often revoke recreation time. *Id.* ¶¶ 110, 112.

- At OSP, "opportunities for visitation [were] rare," and visits were "conducted through glass walls." 545 U.S. at 214. Plaintiffs allege they are likewise permitted only one hour of "non-contact" visitation per week, behind Plexiglas, and may only speak to one person at a time through a telephone. CAC ¶ 105.

As in *Wilkinson*, the Complaint pleads conditions of confinement imposing "especially severe limitations on all human contact."[3] 545 U.S. at 224.

[3] Indeed, the conditions at Red Onion and Wallens Ridge appear worse than conditions on death row in Virginia. *See Porter v. Clarke*, 923 F.3d 348, 364-65 (4th Cir. 2019) (death row inmates permitted contact visitation and group outdoor and in-pod recreation).

Defendants do not dispute that these detailed factual allegations are sufficient. Instead, relying on their own "Statement of Facts," Defendants submit that Plaintiffs receive "mail and correspondence," "the same laundry, barbering, and haircare services," and "the same number of meals and types of food," as general population prisoners. Mot. 18. Defendants cite no case recognizing that these "facts"—even if true—"undermine the material and substantial similarities that this case bears to *Wilkinson*." *Cf. Incumaa*, 791 F.3d at 532 (noting that plaintiff had not been denied parole) (internal quotation marks omitted). Nor can Defendants avoid *Wilkinson* by couching long-term solitary confinement as a denial of "privileges" or by relying on a self-serving statement in an extrinsic document stating conditions are meant to "approximate those of the general population." Mot. 17-19; CAC ¶ 195 (Defendants purposely mislabel solitary confinement units as "general population"); *see Goines*, 822 F.3d at 168 (treating "self-serving, exculpatory statements" in a document "prepared for or by the defendant," even if attached to the plaintiff's complaint, "would be contrary to the concept of notice pleading" (internal quotation marks omitted)); *Austin v. Wilkinson*, 189 F. Supp. 2d 719, 726 (N.D. Ohio 2002) (prisoners gained "privileges" by advancing in the OSP program).

Finally, the near-daily cavity searches imposed upon Plaintiffs each time they leave their cells make their solitary confinement even "worse in some respects" than that in *Wilkinson*. *Incumaa*, 791 F.3d at 531 ("extraordinary intrusion on a regular basis" further heightens a prisoner's liberty interest); *see* CAC ¶ 108. Unsupported testimony by Defendants' counsel that prisoners in VDOC's "general population" are "subject to strip searches" (Mot. 18) cannot defeat the allegation that "prisoners in VDOC's general population are not subject to this frequency of body cavity searches." CAC ¶ 108; *du Pont*, 637 F.3d at 449-50.

(b) Plaintiffs Allege That, As In *Incumaa*, They Are Subjected To Indefinite And Lengthy Solitary Confinement.

The *Wilkinson* Court found that a second factor—the indefinite nature and duration of a prisoner's placement—exacerbated the onerous conditions of solitary confinement and

further heightened the liberty interest in meaningful review. 545 U.S. at 224; *see also Incumaa*, 791 F.3d at 531. Again, the Complaint properly pleads the same here.

1. Indefiniteness. Defendants argue that "assignment to security level 'S' is not 'indefinite'" because the Step-Down Program is a "specified pathway to allow offenders to progress out of segregation." Mot. 18. This argument ignores *Wilkinson* and *Incumaa*. *Wilkinson* also involved a so-called pathway for inmates to "progress" out of segregation. *Wilkinson*, 545 U.S. at 214-15. The Court nonetheless held that the confinement was indefinite because, as here, the policy provided "no indication how long" prisoners could be held in solitary confinement "once assigned there." *Id.* Similarly, *Incumaa* reversed a district court's conclusion that the inmate's solitary confinement "was not indefinite" because the "procedure put[] the duration of his confinement into his own hands to a significant degree." 791 F.3d at 530-32. Plaintiffs allege that the Step-Down Program does not limit a prisoner's solitary confinement to a maximum number of days or otherwise indicate how long a prisoner may be so confined. *See* CAC ¶¶ 119, 156-61.

2. Duration. Defendants argue that Plaintiffs have not adequately pleaded a liberty interest because the Fourth Circuit in *Beverati v. Smith*, 120 F.3d 500 (4th Cir. 1997), which was decided before *Wilkinson*, found that conditions "more onerous than those described by Plaintiffs" did not impose an atypical and significant hardship. Mot. 19. But the Fourth Circuit expressly rejected this reading of *Beverati* in *Incumaa*, when it reversed a district court's grant of *summary judgment* because plaintiff had not shown his "living conditions [were] nearly as bad as those present in *Beverati*." *Incumaa*, 791 F.3d at 517 (internal quotation marks omitted). *Wilkinson*, not *Beverati*, sets the bar here. *Id.* at 529. And the *Beverati* prisoners simply failed to show that their *six months* of confinement was atypical. *Id.* (noting that *Beverati* "simply highlights a failure of proof"). *Beverati* has no bearing upon Plaintiffs' allegations that they have experienced, and will experience, years or decades of solitary confinement subject to

"near-daily cavity and strip searches." *Id.* at 531; *see* CAC ¶¶ 146, 155 (alleging the Step-Down Program requires prisoners to spend a minimum of 15 or 30 months in solitary confinement, often for much longer). Indeed, *Wilkinson* found a liberty interest because the prisoners spent a minimum of *one year* in solitary-confinement conditions, which is a lower minimum than that imposed on Plaintiffs. *See* 545 U.S. at 216-17, 224.

Moreover, the Complaint alleges that VDOC policy requires retaining IM inmates in solitary confinement *permanently* because they may only progress to the IM-SL-6 Closed Pod, which is simply another solitary-confinement unit where the vast majority of IM inmates can expect to serve the rest of their sentences—up to and including life. CAC ¶¶ 147-48, 179-87. Defendants' counsel improperly testifies that, "[a]lthough the IM pathway ends at security level 6, an inmate who has progressed to IM-SL-6 may be reclassified as a 'SM' offender and thereby transition into the general population" by decision of the External Review Team ("**ERT**"). Mot. 10 ¶ 43 & n.7. Plaintiffs allege that VDOC policy only permits the ERT to change an IM inmate's Pathway if the original decision applying the IM Pathway Criteria was erroneous.[4] CAC ¶ 183; *see also id.* ¶¶ 141, 144, 179 (alleging the IM Pathway Criteria applied by the ERT in reviews are backward looking, focused on a prisoner's conduct from years prior or even crimes committed outside of prison); *id.* ¶ 192 (VDOC policies assert that IM prisoners pose a permanent risk "whether or not they have been compliant and well behaved for even extensive

[4] VDOC argues that it has allowed some IM prisoners to return to the general population. Mot. 10 ¶ 43 & n.7. Plaintiffs allege that prisoners on the IM Pathway are disqualified from rejoining the general population and that VDOC policy only allows the ERT to change an IM prisoner's Pathway if the original placement decision was erroneous or officials subsequently cleared the prisoner of involvement in the acts justifying his original placement. *See* CAC ¶¶ 147, 183. Discovery may show that Defendants change prisoners' Pathways in an attempt to moot their claims or to manipulate VDOC's reported segregation statistics. *See Porter*, 923 F.3d at 364-65.

periods of time"). None of these differences may be resolved on a motion to dismiss. *See du Pont*, 637 F.3d at 449 (all factual inferences must be drawn in plaintiffs' favor).[5]

(c) Plaintiffs Allege That Their Solitary Confinement Effectively Denies Them Early Release Through Parole Or For Good Conduct.

Lastly, Defendants make much of the fact that *Wilkinson* found it significant that placement in OSP "disqualifie[d] an otherwise eligible inmate for parole consideration" (545 U.S. at 224), but they ignore that Plaintiffs can plead a liberty interest without alleging this factor (*Incumaa*, 791 F.3d at 530-31). Nonetheless, Plaintiffs allege that VDOC's decision to retain an inmate in solitary confinement through the Step-Down Program effectively bars prisoners from parole release (CAC ¶ 117)[6] and that placement in the Step-Down Program denies or greatly reduces the ability of *all prisoners* to earn "good time credit" towards a reduction in their overall sentence (*id.* ¶¶ 116-18; *see* Mot. 17 (conceding that Plaintiffs "do not earn good conduct credit at the same rate")).

2. The Complaint Sufficiently Alleges That Defendants Do Not Provide Plaintiffs Meaningful Or Adequate Review Of Whether They Require Ongoing Solitary Confinement.

Under *Wilkinson*, determining what process is due requires a consideration of: (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards"; and (3) the government's interest. *Wilkinson*, 545 U.S. at 224-25 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)). Defendants do not dispute Plaintiffs' weighty private interest in leaving or avoiding years of solitary

[5] In any event, Plaintiffs' allegation that IM prisoners spend a minimum of 30 months before reaching the final phase of the Closed Pod establishes that the mandatory duration of solitary confinement is egregious and excessive, even by *Wilkinson*'s standard. CAC ¶¶ 164, 171.

[6] Defendants claim that the Virginia Parole Board makes parole decisions, rather than VDOC (Mot. ¶ 58), but who ultimately *decides* parole is not relevant—only the collateral effect of solitary confinement matters.

confinement. *See Incumaa*, 791 F.3d at 533-34. Nor do they argue a countervailing governmental interest.

Defendants limit their argument to the second *Wilkinson* factor: Relying on counsel's interpretation of O.P. 830.A and documents extrinsic to the Complaint, they contend the Step-Down Program's "reviews" minimize the chance that Plaintiffs will remain in long-term solitary confinement even after they no longer present a sufficient security risk. Mot. 20 & n.12 ("See Statement of Facts," referencing, *inter alia*, O.P. 830.1, O.P. 830.2, and O.P. 841.4). This argument falters at its first step. The Court cannot dismiss the Complaint's well-pleaded claims based upon defense counsel's disputed interpretation of O.P. 830.A, or upon Defendants' "maze of cross-references . . . and interpretations of specific provisions within" VDOC policies that are neither integral to the Complaint nor have any clear relevance to the Step-Down Program. *See Goldfarb*, 791 F.3d at 510-11 (concluding that such a maneuver "alone inclines against deciding the case under Rule 12(b)(6)"); *du Pont*, 637 F.3d at 449; *Ohio Valley*, 556 F.3d at 217; *see also supra* at 3 & n.2.

In any event, as explained below, the Complaint otherwise alleges that the Step-Down Program's "reviews" do not attempt to determine whether a particular prisoner still poses a security risk, as required under *Hewitt v. Helms*, 459 U.S. 460 (1983), and are devoid of the procedural protections required under *Wilkinson*.

(a) Step-Down Reviews Are Based On Arbitrary Standards Unrelated To A Particular Institutional Risk.

The Court need not examine whether Step-Down reviews provide adequate procedural protections under *Wilkinson* at this stage. Defendants entirely ignore the Complaint's allegations that Step-Down reviews merely create a "pretext for indefinite confinement" of prisoners based upon factors that are irrelevant to whether they actually "remain[] a security risk," in order to serve Defendants' economic motives. *Hewitt*, 459 U.S. at 477 n.9; CAC ¶¶ 54, 88-90, 154-67, 192-95, 242. Plaintiffs, therefore, adequately plead that the Step-Down

Program violates *Hewitt*. *Id.*; *see Incumaa*, 791 F.3d at 534-35; *Quintanilla v. Bryson*, 730 F. App'x 738, 745 (11th Cir. 2018) (concluding that prisoner stated a due process claim that his solitary-confinement reviews were "unconnected to the legitimate administrative interests of the institution").[7] The only reviews that could decide whether an IM inmate returns to general population (ERT reviews) simply rehash information about the events that led to their placement in solitary confinement originally, or about their crimes outside of prison. CAC ¶ 183; *see Proctor v. LeClaire*, 846 F.3d 597, 611 (2d Cir. 2017) (segregation reviews that "forever rehash[] information addressed at the inmate's initial Ad Seg determination" violate *Hewitt*). For this reason alone, Defendants' Motion to dismiss the procedural due process claim fails.

(b) Step-Down Reviews Are Conducted In Secret Without Notice, Provide No Written Decision, No Opportunity For Rebuttal, And No Ability To Appeal.

Under *Wilkinson*, the most important procedural mechanisms for avoiding erroneous deprivations are prior notice, factual bases for the decision, and opportunity for rebuttal. *Wilkinson*, 545 U.S. at 225-26. Plaintiffs allege that Step-Down reviews provide none of these basic protections. CAC ¶¶ 168-87.

1. Ignoring the Complaint, Defendants argue that VDOC regularly reviews prisoners' confinement through ICA reviews every 90 days. *See* Mot. ¶ 45. But the Complaint, citing sworn VDOC testimony, alleges that the ICA's "external status" reviews are a sham and entirely dependent upon Step-Down reviews by the Building Management Committee ("**BMC**"). *See* CAC ¶¶ 173, 176-78. Plaintiffs allege that the BMC is often composed of a

[7] Several other circuits concur with this interpretation of *Hewitt*. *See, e.g.*, *Proctor v. LeClaire*, 846 F.3d 597, 610-12 (2d Cir. 2017) (concurring with a consensus of circuits that *Hewitt* requires prisons to determine a "*valid* administrative justification" for an inmate's solitary confinement (emphasis added)); *Isby v. Brown*, 856 F.3d 508, 530 (7th Cir. 2017) (noting that under *Hewitt* "periodic reviews of administrative segregation are constitutionally required, and it is self-evident that they cannot be a sham").

single Unit Manager and conducts its reviews ad hoc, in secret, and without notice. *Id.* ¶¶ 169, 173. Prisoners are prohibited from obtaining copies of their Status Rating Charts, which the BMC/Unit Manager uses in these reviews. *Compare id.* ¶ 158, *with Incumaa*, 791 F.3d at 534-35 (concluding that under *Wilkinson* prisoners have a right to be present for segregation reviews and "to contest the factual bases" for their solitary confinement "before the [staff] makes its decision"). Plaintiffs also allege that the BMC does not provide a written basis for its decisions, which are not subject to appeal or grievance. *Compare* CAC ¶¶ 173-74, *with Wilkinson*, 545 U.S. at 225-26 (prisoner must receive "notice of the factual basis leading" to the segregation decision, which will "guide . . . future behavior"), *and Incumaa*, 791 F.3d at 534 (review process fell below *Wilkinson* because it did not provide for a second layer of review "unless the inmate files a grievance"). Plaintiffs allege that the ICA exists simply to document whether the BMC/Unit Manager decided that a prisoner may advance through the Step-Down Program, even though the BMC's decision was made months earlier without a written record. CAC ¶¶ 172, 178. As a result, the ICA often repeats non-substantive "rationales" for a prisoner's long-term solitary confinement, such as "Remain Segregation," or "needs a longer period of stable adjustment." *Compare* CAC ¶ 178, *with Incumaa*, 791 F.3d at 534 ("rote repetition" of "a perfunctory explanation supporting [a] decision to continue to hold [a prisoner] in solitary confinement" contravenes *Wilkinson*), *and Quintanilla*, 730 F. App'x at 745 (finding bare recommendation that plaintiff "remain in Tier II" of solitary confinement phase violated due process).

Plaintiffs also allege that ERT reviews, which purport to consider inmates assigned to the IM Pathway, offer no procedural protections. Prisoners are provided no prior notice of ERT reviews and are not entitled to attend or present evidence. CAC ¶ 187. The ERT does not provide inmates with written explanations or notice of its decisions, which are not subject

to appeal or grievance. *Id.* And a Unit Manager—the same individual who chairs and conducts BMC reviews—has ultimate discretion to bar an inmate from ERT reviews. *Id.* ¶ 184.[8]

Put simply, the Complaint alleges that Defendants have denied Plaintiffs each of the basic protections that *Wilkinson* deemed "among the most important procedural mechanisms for purposes of avoiding erroneous deprivations." 545 U.S. at 225-26. Because Defendants entirely ignore these allegations, they cannot assert that Step-Down reviews "largely mirror the procedural protections that the Supreme Court has previously upheld." Mot. 20.

2. For their meaningful review and liberty interest arguments, Defendants in a footnote rely on ten unpublished cases in which the Western District of Virginia considered pro se prisoner suits. Mot. 19 n.10. But these cases were decided under a truncated Western District process limited to pro se prisoner lawsuits, which directs VDOC defendants to file for summary judgment before discovery is taken, and then weighs affidavits submitted by the pro se prisoner against VDOC affidavits.[9] Standing Order No. 2018-9 on Procedures for Prisoner Cases and Provisions for Custody of Prisoners (W.D. Va. Nov. 9, 2018). VDOC often moves for a protective order barring discovery pending a motion for summary judgment, which the court routinely grants. *See, e.g.*, Order, *Hubbert v. Washington*, No. 7:14-cv-00530 (W.D. Va. June 30, 2015), ECF No. 27; Order, *Obataiye-Allah v. Va. Dep't of Corr.*, No. 7:15-cv-00230 (W.D. Va. Aug. 24, 2016), ECF No. 61. These special procedures do *not* apply to represented prisoner cases (*see* Standing Order 2018-9(a)), and unpublished, pro se summary judgment decisions reciting largely untested VDOC assertions cannot as a matter of law overcome a well-pleaded Complaint in a non-pro se case.

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[8] Defendants claim that a Multi-Disciplinary Team also reviews Plaintiffs' status. *See* Mot. ¶ 48. This argument improperly relies on Defendants' own construction of O.P. 841.4, which is not integral to the Complaint and, at best, only raises a fact question.

[9] *See, e.g.*, *Jordan v. Va. Dep't of Corr.*, No. 7:16-cv-00228, 2017 U.S. Dist. LEXIS 150501, at *3-14 (W.D. Va. Sept. 18, 2017); *Muhammad v. Smith*, No. 7:16-cv-00223, 2017 U.S. Dist. LEXIS 125335, at *4-5, 8, 15, 19, 21 (W.D. Va. Aug. 8, 2017).

3. Defendants Fail to Establish Qualified Immunity For Violating Plaintiffs' Due Process Rights.

Qualified immunity does not shield Defendants from monetary liability if a well-pleaded Complaint substantiates a violation of a constitutional right that was "clearly established" at the time of their misconduct. *See Goines*, 822 F.3d at 170 (reversing district court's grant of qualified immunity where detainee's allegations pleaded violation of a clearly established right). Because Plaintiffs have adequately pleaded that Defendants violated their procedural due process rights, it is *Defendants'* burden to show that in 2011 it was constitutional to place inmates in indefinite and lengthy, or even permanent, administrative segregation without meaningful or periodic review. *See Henry v. Purnell*, 501 F.3d 374, 378 (4th Cir. 2007) ("[D]efendant bears the burden of proof on the second question—i.e., entitlement to qualified immunity."). Defendants submit they are entitled to qualified immunity because, as they frame the issue, "[n]o federal court has ever suggested" that the Step-Down Program's reviews are unconstitutional. Mot. 21. Defendants fail to meet their burden.

1. Aside from failing to treat Plaintiffs' well-pleaded allegations as true, Defendants misapprehend the applicable standard. The "very action in question" need not have "previously been held unlawful" for Defendants to shed their qualified immunity. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002); *see also Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015) (per curiam) (stating that qualified immunity "do[es] not require a case directly on point"). Previous case law need not encompass facts that are "materially similar" or even "fundamentally similar" to the conduct at issue, and officials "can still be on notice that their conduct violates established law even in novel factual circumstances." *Pelzer*, 536 U.S. at 741. Defendants' argument that no court has previously held that the Step-Down Program violates due process rights thus "overlooks the broader right at issue." *Wall v. Wade*, 741 F.3d 492, 502 (4th Cir. 2014) (rejecting Red Onion officials' narrow argument in favor of qualified immunity "that there is

a lack of case law elucidating exactly how prisons may utilize sincerity tests in determining eligibility for religious accommodations").

Since *Hewitt*, there has been little doubt that state officials may not keep a prisoner in administrative segregation indefinitely for "pretext[ual]" reasons that are not sufficiently related to whether he "remains a security risk," and that prisoners must be individually reviewed to determine their current risk. *Hewitt*, 459 U.S. at 477 n.9.[10] Plaintiffs allege that Defendants purposely designed the Step-Down Program (like the Mecklenburg Phase Program before it) to retain inmates in segregation for reasons decidedly unrelated to their current institutional risk. CAC ¶¶ 54, 80-93, 193. Plaintiffs also allege that the Step-Down Program requires permanently segregating IM inmates based solely on their past conduct, even if they exhibit perfect behavior in segregation for years. CAC ¶ 179. Taking these allegations as true, no state officer could possibly believe that the Step-Down Program is constitutional under *Hewitt*. *See Goines*, 822 F.3d at 170 (denying qualified immunity and "[a]ccepting the allegations of the complaint as true"). Defendants do not argue to the contrary.

Moreover, *Wilkinson* requires at minimum affording prisoners prior notice of the factual basis before a decision is made, a written decision with a statement of substantive reasons and factual support, and an opportunity for rebuttal or appeal. *See Incumaa*, 791 F.3d at 533-35. Defendants do not argue that this principle is anything but clear. *See Williams v. Stirling*, 912 F.3d 154, 188 (4th Cir. 2018) (expanding *Hewitt* to the jail context and denying qualified immunity). And Plaintiffs allege facts showing that Step-Down reviews provide none of these protections. *See supra* at 12-14.

2. Citing the same unpublished decisions from the Western District, Defendants argue they are entitled to qualified immunity because none of these decisions entertained a pro se

[10] *See also supra* at 12 n.7 (citing Circuit consensus interpreting *Hewitt*). The Court may consider this consensus. *Owens v. Lott*, 372 F.3d 267, 280 (2004).

prisoner's due process claims about the Step-Down Program. Mot. at 19 n.10, 21-22. But, unpublished appellate decisions and "[d]istrict court opinions . . . are not decisions of 'controlling authority'" and "cannot be considered in deciding whether particular conduct violated clearly established law." *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 n.1, 543 (4th Cir. 2017) (quoting *Hogan v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996)).[11]

C. The Complaint Alleges Facts Showing That Defendants Have Violated Plaintiffs' Rights To Be Free From Cruel And Unusual Punishment.

The Complaint pleads two distinct Eighth Amendment claims. First, that Defendants have held Plaintiffs in long-term solitary confinement at Red Onion and Wallens Ridge despite knowing these conditions have or will inflict serious mental and physical harms upon Plaintiffs. Second, that Defendants purposely maintain the Step-Down Program despite knowing that it ensures Plaintiffs are placed in such conditions and remain there without any valid penological reason. Defendants move to dismiss neither of these claims. Instead, without referencing the Complaint even once, Defendants imagine a generic conditions-of-confinement claim that Plaintiffs have not pleaded (Mot. 25-29) and ask the Court to dismiss this claim on the basis of Defendants' "Statement of Facts." Again, there is no basis for dismissal of the Complaint.

1. Plaintiffs State A Conditions-Of-Confinement Claim Under The Eighth Amendment.

(a) The Complaint Alleges That Long-Term Solitary Confinement Has, Or Will, Inflict Sufficiently Serious Physical And Emotional Harms.

Defendants argue that the Fourth Circuit's decision in *Mickle v. Moore* forecloses Plaintiffs from satisfying the Eighth Amendment's objective prong. Mot. 25-26. Defendants are wrong. *Mickle* was decided on summary judgment, after the prisoner plaintiffs had a chance

[11] Even if this Court considers the district court and unpublished decisions cited by Defendants, these cases rely on assertions in VDOC affidavits not before the Court that are disputed by the Complaint's well-pleaded allegations. *See supra* at 14 & n.9. Given this dispute of fact, the Court "cannot conclude that the defendants are entitled to qualified immunity" at this stage. *Covey v. Assessor of Ohio Cty.*, 777 F.3d 186, 195-96 (4th Cir. 2015).

to gather evidence showing that their conditions of confinement violated the Eighth Amendment. *Mickle v. Moore*, 174 F.3d 464, 471-72 (4th Cir. 1999). But, this evidence consisted only of a few affidavits regarding plaintiffs' general feelings of anxiety and depression. *See id*. The court concluded that these feelings did not "rise to the level of the 'serious or significant physical or emotional injury' that must be shown to withstand summary judgment on an Eighth Amendment charge." *Id.* at 472. Plaintiffs, by contrast, allege that long-term solitary confinement has caused (or will cause) them severe physiological and psychological symptoms such as neurological damage, psychosis, hallucinations, and suicidal acts or ideation, which "far exceed the discomforts and depression or anxiety associated with ordinary life in prison." CAC ¶ 197. Plaintiffs also allege that they are deprived of basic human needs including meaningful social contact, adequate sleep and exercise, and adequate mental and physical health. CAC ¶ 199. Because Defendants do not dispute that the harms alleged by Plaintiffs would constitute serious injuries if proven, their reliance on *Mickle* fails.

Moreover, the Fourth Circuit recently held that plaintiffs alleging similar but arguably less comprehensive harms caused by long-term solitary confinement amply satisfied the objective prong of the Eighth Amendment. *See Porter v. Clarke*, 923 F.3d 348, 356-561 (4th Cir. 2019) (alleging, *inter alia*, severe psychological symptoms including psychosis, hallucinations, and suicidal acts or ideation, but not neurological damage, increased blood pressure, stroke, and digestive diseases, as Plaintiffs do (CAC ¶ 198)). The objective prong adjusts to "the evolving standards of decency that mark the progress of a maturing society," which are informed by advances in scientific understanding. *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981) (internal quotation marks omitted); *accord Porter*, 923 F.2d at 358-59 (explaining that *Sweet* and *Mickle* could not control because they predated probative research on the severe harms of solitary confinement); *Oldham v. Beck*, 75 F. App'x 122, 125 (4th Cir. 2003) (courts must inquire into the "scientific and statistical" degree of potential harm, in

addition to "whether society considers the risk that the prisoner complains of to be so grave that it violates contemporary standards of decency"). As the *Porter* court recognized, the scientific consensus regarding such harms has developed significantly since *Mickle*. *See* 923 F.3d at 358-59 (much of the research on the "serious" risks posed by solitary confinement "post-dates *Mickle*"). Defendants ask this Court to err by blinding itself to these evolving standards and Plaintiffs' allegations regarding this scientific consensus.

(b) Defendants Were Deliberately Indifferent To These Harms.

Plaintiffs allege that Defendants knew or should have known when they instituted the Step-Down Program in 2012 that medical science had consistently documented the harms caused by long-term solitary confinement, and yet they maintained this regime anyway. CAC ¶ 196. Thus, Plaintiffs sufficiently allege that Defendants are deliberately indifferent to the harms inflicted upon Plaintiffs or to a substantial risk of future harm. *See Porter*, 923 F.3d at 361 ("[T]he extensive scholarly literature describing and quantifying the adverse mental health effects of prolonged solitary confinement that has emerged in recent years provides circumstantial evidence that the risk of such harm 'was so obvious that it had to have been known.'" (quoting *Makdessi v. Fields*, 789 F.3d 126, 136 (4th Cir. 2015))).

Defendants argue that VDOC policies purporting to address these risks somehow establish that Defendants are not deliberately indifferent. Mot. 27-28. None of these policies are integral to the Complaint and, furthermore, establish the opposite. Defendants' counsel testifies that, "[b]y policy, if an inmate were to exhibit mental health symptoms, he would be immediately assessed and appropriate treatment provided, up to and including transfer to Marion Correctional Center, the VDOC psychiatric facility." Mot. 28. Thus, fatal to the Motion, Defendants *know* that their long-term solitary confinement regime results in mental-health injuries—and watch as prisoners' mental health collapses and only then offer treatment. *Id.*; *see also* CAC ¶ 104 (VDOC staff place suicidal prisoners naked in bare strip cells, strap

them to a gurney, feed them a liquid diet until they say that they no longer intend to harm themselves, and then return them to solitary confinement). Similarly, while Defendants' counsel testifies to periodic mental health checks (Mot. 28), Plaintiffs allege that these checks are inadequate to detect or treat possible mental illness and that Plaintiffs are at risk of harms that do not necessarily manifest as "mental health symptoms" (CAC ¶¶ 103, 197-99).

2. Defendants Do Not Seek Dismissal Of Plaintiffs' Separate Eighth Amendment Claim That The Step-Down Program Imposes Long-Term Solitary Confinement Without A Valid Penological Purpose.

Plaintiffs allege that solitary confinement pursuant to the Step-Down Program also violates the Eighth Amendment because it lacks "a legitimate justification" and that the deprivations it imposes therefore inflict "unnecessary and wanton" pain on Plaintiffs. *King v. Rubenstein*, 825 F.3d 206, 219 (4th Cir. 2016) (internal quotation marks omitted); *see also Quintanilla*, 730 F. App'x at 746-47 (reversing dismissal of prisoner's Eighth Amendment claim that his solitary confinment was "arbitrary and 'without penological justification'"). Plaintiffs submit that the Step-Down Program is purposely designed so that Defendants may hold prisoners in "solitary confinement for reasons having nothing to do with a prisoner's actual prison behavior or legitimate penological purposes," and based instead upon economic considerations untethered from the risk posed by a particular prisoner. CAC ¶¶ 139, 193; *see also id.* ¶¶ 87-93, 242.

Specifically, Plaintiffs allege that the Step-Down Program imposes a mandatory minimum number of months that a prisoner must spend in each of the many phases of solitary confinement—regardless of that prisoner's behavior. CAC ¶ 154. Plaintiffs allege that even when prisoners complete the Step-Down Program, Defendants allow staff broad authority to force prisoners to restart the program for failing to meet irrelevant "responsible behavioral goals" or for committing trivial infractions—even when those issues arise from a prisoner's intellectual disabilities, language barriers, or trauma resulting from solitary confinement. *Id.*

¶¶ 160-65, 201-02. Finally, while Defendants utilize objective criteria to assess the risk posed by most of VDOC's prisoners, they refuse to use that criteria to determine whether prisoners in solitary confinement at Red Onion or Wallens Ridge pose a security risk. *Id.* ¶¶ 188-94, 200. Instead, Defendants ask staff not adequately trained in behavioral or penological science to rely on their "professional judgment" to determine these prisoners' risks, usually on the basis of past behavior. *Id.* ¶¶ 179, 191-94.

"Infliction of pain and suffering without penological justification violates the Eighth Amendment in an array of contexts." *Thompson v. Commonwealth*, 878 F.3d 89, 103 (4th Cir. 2017). Subjecting Plaintiffs to "serious psychological and emotional risks posed by" solitary confinement for reasons unrelated to institutional risk that are instead pretexts for justifying the cost of the prisons is plainly one such context. *Porter*, 923 F.3d at 358; *see also Quintanilla*, 730 F. App'x at 746-47 (reversing dismissal of Eighth Amendment claim where complaint's "allegations call[ed] into question whether prison officials believe they have legitimate reasons for confining [plaintiff] in administrative segregation"). Moreover, becauseprison staff may ignore objective scientific criteria to determine which inmates require solitary confinement, Plaintiffs allege that Defendants knowingly allow staff to harass and humiliate prisoners for innocent or even fabricated behavior. CAC ¶¶ 161-66; *see King*, 825 F.3d at 219 ("A prisoner states a claim under the Eighth Amendment when he plausibly alleges that the conduct in question was motivated by a desire to harass or humiliate rather than by a legitimate justification, such as the need for order and security." (internal quotation marks omitted)). Again, Defendants do not argue that Plaintiffs' allegations are insufficient.

3. Defendants Cannot Assert Qualified Immunity For Violating Plaintiffs' Eighth Amendment Rights.

Defendants rightly do not assert qualified immunity from Plaintiffs' right to be free from wanton infliction of pain without penological purpose. Mot. 28-29. No reasonable prison official could have believed in 2012 that it was constitutional to place prisoners in indefinite

and long-term solitary confinement absent a legitimate penological purpose. Defendants argue only that Plaintiffs' right not to be placed in conditions of confinement that deprive them of a basic human need—freedom from mental and physiological harm—was not clear until the Fourth Circuit's 2019 decision in *Porter*. *Id.* ¶ 247.

First, like their due process argument, Defendants improperly rely on unpublished summary judgment decisions to show that Plaintiffs' Eighth Amendment rights, as alleged, were not clearly established. Mot. 28; *see supra* at 16-17.

Second, Defendants' argument that *Mickle* and *Sweet* were "controlling" from 2012 until 2019 is unavailing. Mot. 28. *Mickle*'s holding rested upon the plaintiff's failure to show that their conditions of confinement exacted a sufficiently serious deprivation. 174 F.3d at 471-72. That *Porter* restated *Mickle*'s holding does not mean *Mickle* was in some way unclear and, in any event, Plaintiffs allege Defendants *knew* in 2012 that solitary confinement almost invariably causes mental and physical trauma.[12] CAC ¶¶ 196-204, 246-49. Nor could Defendants believe that *Sweet*, decided in 1975, controlled in 2012. *Sweet* predated the Supreme Court's adoption of an objective prong for conditions-of-confinement claims. *Porter*, 923 F.3d at 358. Defendants are charged with knowledge of law at the time of the alleged wrong, the effect of which, in the Eighth Amendment context, depends on prevailing scientific knowledge. *See Odom v. S.C. Dep't of Corr.*, 349 F.3d 765, 772-74 (4th Cir. 2003); *see Oldham*, 75 F. App'x at 125.

Third, the Court cannot rule on Defendants' qualified immunity defense because their Motion defines Plaintiffs' rights narrowly so as to "improperly import[] the specific facts of this case into the definition of the rights allegedly violated." *Latson v. Clarke*, 249 F. Supp. 3d

[12] Defendants note that the mandate in *Porter v. Clarke* has been stayed because appellees filed a petition for rehearing *en banc*, which remains pending. Mot. 26 n.15. However, appellees did not seek rehearing of *Porter*'s Eighth Amendment rulings. Pet. Reh'g & Reh'g En Banc 12 n.2, No. 18-6257 (4th Cir. May 17, 2019), ECF No. 62.

838, 866-67 (W.D. Va. 2017) (denying defendants' qualified immunity claim in its motion to dismiss because the right to "humane conditions of confinement" was clearly established). Moreover, the Court cannot rule on Defendants' qualified immunity defense without making factual findings about what Defendants knew when, or at what point the scientific consensus was sufficiently clear. *See Covey*, 777 F.3d at 195-96.

D. The Complaint Adequately Pleads That Defendants Have Violated Plaintiffs' Rights To Equal Protection. Defendants Are Not Entitled To Qualified Immunity.

The Equal Protection Clause forbids prison officials from treating a prisoner "differently from others with whom he is similarly situated [as] the result of intentional or purposeful discrimination." *King*, 825 F.3d at 220 (internal quotation marks omitted). Likewise, the Equal Protection Clause bars officials from placing nondangerous inmates, who should be housed like other general-population inmates, in administrative segregation reserved for inmates who pose an institutional risk. *See Sweet*, 529 F.2d at 868 (Butzner, J., concurring); *Proctor*, 846 F.3d at 609 (explaining that administrative segregation is only appropriate "when necessary to incapacitate an inmate who 'represents a security threat'" or to finish "an investigation into misconduct charges"); *Williams v. Lane*, 851 F.2d 867, 881-82 (7th Cir. 1988) (holding prison officials violated prisoners' rights because disparate segregation restrictions imposed upon protective custody prisoners were irrational).

Plaintiffs allege that Defendants have denied them equal protection by intentionally selecting criteria that assigns prisoners to solitary confinement and holds them there despite not posing an institutional risk, such as prisoners who belong in a protective custody unit and have not committed any serious infractions in prison (like Named Plaintiff Hammer), or whose behavior is attributable to illness (like Named Plaintiff Riddick). *See, e.g.*, CAC ¶¶ 25, 34, 139-45, 236-45. The Plaintiffs allege that the Step-Down Program provides no basis for placing some prisoners on the IM Pathway because they are "*routinely* disruptive," while

placing others on the SM Pathway because they are "*repeatedly* disruptive," and that some prisoners are arbitrarily placed in permanent solitary confinement on the IM Pathway despite posing no risk of extreme and deadly violence. *Id.* ¶¶ 140-41, 143. Plaintiffs also allege that Defendants have maintained this scheme for economic reasons that bear no rational relationship to the valid purposes of administrative segregation. CAC ¶¶ 139-45; *c.f. Doe v. Plyler*, 458 F. Supp. 569, 586 (E.D. Tex. 1978) ("It is not sufficient justification that a law saves money."). Defendants do not argue that these allegations are insufficient.

Instead, once again ignoring the Complaint, Defendants submit that "Plaintiffs allege that some inmates are accidentally assigned to the IM pathway rather than the SM pathway." Mot. 23. This allegation appears nowhere in the Complaint, which alleges that improper use of solitary confinement is not a bug, but an intended *feature*, of the Step-Down Program—just like the Mecklenburg Phase Program. CAC ¶¶ 87-93, 142-145, 192-93, 237-39. Defendants' argument that placement of prisoners in solitary confinement boils down to "exercise of the Defendants' professional judgment" (Mot. 23) only confirms that the Court cannot dismiss Plaintiffs' claim. *See Pendleton v. W. Va. Div. of Corr.*, No. 2:15-01903, 2016 U.S. Dist. LEXIS 43425, at *10-11 (S.D. W. Va. Mar. 31, 2016) (rejecting officials' argument that prisoner could not plead Equal Protection claim "due to the discretionary and granular nature of administrative segregation decisions").

Neither are Defendants entitled to qualified immunity. Defendants have offered no case showing that Plaintiffs' equal protection rights were not clearly established at the time of Defendants' misconduct. As with their other assertions of qualified immunity, Defendants merely cite to district court cases and unpublished opinions (Mot. 24), which "cannot be considered in deciding whether particular conduct violated clearly established law for purposes of adjudging entitlement to qualified immunity." *Booker*, 855 F.3d at 538 n.1, 543 (quoting

Hogan, 85 F.3d at 1118)). Defendants have therefore failed to establish qualified immunity from monetary liability for Plaintiffs' equal protection claim.

II. Plaintiffs State A Claim Under The ADA And RA.

Plaintiffs allege that Defendants bear official responsibilities for the Step-Down Program that apply to the disabilities sub-class. *See* CAC ¶¶ 38-48. Defendants do not dispute these allegations. Instead, Defendants argue that Plaintiffs' ADA and RA claims should be dismissed because Defendants cannot be sued in their individual capacities and because any claim brought against any of them in their official capacities is "redundant" of the claim against VDOC. Mot. 29.

Plaintiffs concede that no claim under the ADA and RA lies against Defendants in their individual capacities. But Plaintiffs' official-capacity claims against Defendants are not redundant as a matter of law. "A significant amount of case law shows government officials named in their official capacities alongside the entities [with] which they are associated, especially where the alleged violations of a plaintiffs' rights occurred because of specific individuals." *Chase v. City of Portsmouth*, 428 F. Supp. 2d 487, 489 (E.D. Va. 2006). And "[s]imply because a claim is redundant does not necessarily mean that the complaint is invalid" or fails to state an official-capacity claim. *Id.* Defendants do not argue that they would be subject to any "substantial burden" if the claims against them in their official capacities proceed. *Id.* at 490. Indeed, Defendants will not be personally liable for an ADA monetary judgment. *Id.* But, maintaining the official-capacity claims against the Defendants will facilitate necessary fact-finding and even benefits VDOC "to the extent that they will be able to participate fully in the defense of this action as named parties to the litigation." *Id.*

III. Plaintiffs State A Claim For Breach Of The Settlement Agreement.

Defendants join VDOC's motion to dismiss Plaintiffs' Settlement Agreement claim and assert mostly the same arguments that Plaintiffs have already shown lack merit, but likewise

do not contest this Court's supplemental jurisdiction or Plaintiffs' standing.[13] Mot. 15-16; Pls' Opp'n 3-18 (June 14, 2019), ECF No. 23 ("**Opp'n**"). In their prior Opposition, Plaintiffs explained that Defendants' PLRA arguments rely on a misapplication of the law. Defendants' counsel "selectively" chose not to address any of Plaintiffs' responsive arguments on the PLRA issues in VDOC's reply. VDOC Reply 2-3 nn.1 & 2 (June 20, 2019), ECF No. 25 ("**VDOC Reply**"). The Court should not now allow VDOC to benefit from arguments it chose not to raise when it had the chance, knowing that Plaintiffs would have no opportunity to respond. *See du Pont*, 847 F. Supp. 2d at 851 n.9. In any event, Defendants' new qualified immunity and individual statute of limitations arguments do not require dismissal.

A. Plaintiffs State A Claim Against The Individual Defendants In Their Official Capacities.

Defendants assert that "even if some aspect of the settlement agreement[] survived" termination of the decree, they are individually immune under the Eleventh Amendment "in their official capacities" from Plaintiffs' Settlement Agreement claim. Mot. 15. The Settlement Agreement's plain text expressly and voluntarily waives Eleventh Amendment immunity by settling federal constitutional claims and submitting to this Court's jurisdiction for the purpose of enforcing compliance with the Agreement. Opp'n 15-16. Tellingly, VDOC did not dispute this point and instead claimed it was "not an express party to the settlement agreement." VDOC Reply 3. Defendants likewise cite no case holding that states enjoy Eleventh Amendment immunity from actions to enforce their own agreements settling

[13] VDOC did not move to dismiss the Settlement Agreement claim on the basis that this Court lacks supplemental jurisdiction. Opp'n 17; Def. VDOC's Mot. Dismiss 16 (May 31, 2019), ECF No. 19 ("**VDOC Mot.**"). For the first time on reply, VDOC lodged an untimely argument that this Court lacks supplemental jurisdiction because Plaintiffs did not plead it. VDOC Reply 7-8. This argument is to no avail. *See E.I. du Pont de Nemours & Co. v. Kolon Indus.*, 847 F. Supp. 2d 843, 851 n.9 (E.D. Va. 2012); *Eriline Co. S.A. v. Johnson*, 440 F.3d 648, 652 n.6 (4th Cir. 2006) (the court must examine the "entire complaint" to detemine "a proper basis for assuming jurisdiction," even if the complaint does not affirmatively plead a jurisdictional basis (internal quotation marks omitted)).

violations of federal constitutional rights. *See Watson v. Texas*, 261 F.3d 436, 441-42 (5th Cir. 2001) (finding that settlement agreement waived immunity where "the state consented to the vesting of jurisdiction 'for the purposes of implementing and enforcing' the Agreement"); *Dagnall v. Dep't of Highways*, 466 F Supp. 245, 246-47 (E.D. La. 1979).

Instead, as relevant to the Individual Defendants' motion, VDOC argues that, "because state correctional officials did not have the authority [provided by state statute] to waive VDOC's Eleventh Amendment immunity, the execution of the settlement agreement[] could not validly abrogate VDOC's immunity from suit." VDOC Reply 6 (relying on *Am. Fed'n of State, Cty. & Mun. Empls. v. Virginia*, 949 F. Supp. 438, 443 n.4 (W.D. Va. 1996)). Defendants ignore that the Agreement was signed, not only by one of Defendant Clarke's predecessors, but also by two assistant attorneys general.[14] CAC Ex. 3, at 17. Courts need not construe state statutes for waivers of immunity (or waiver authority) in cases "involv[ing] a State that *voluntarily* invoked the jurisdiction of the federal court" through its attorney general. *Lapides v. Bd. of Regents*, 535 U.S. 613, 621-22 (2002) (rejecting Georgia's argument that its attorney general lacked statutory authority to waive immunity where Georgia voluntarily subjected itself to federal jurisdiction); *see also Watson*, 261 F.3d at 441 & n.11 (finding waiver where settlement agreement was signed by state attorney general); *Pettigrew v. Okla. ex rel. Okla. Dep't of Pub. Safety*, 722 F.3d 1209, 1213 (10th Cir. 2013) (executing a "contract that waives its Eleventh Amendment immunity to suits related to the contract" is a voluntary waiver) (citing

[14] Defendants do not argue that their own Office of Attorney General lacks authority to waive Eleventh Amendment immunity in settlement agreements that Virginia may enter (or has already entered) to conclude or prevent federal litigation. If Defendants ever do so, Plaintiffs will be entitled to jurisdictional discovery of memoranda, procedures, opinions, and similar documents authored or maintained by the Office of Attorney General concerning the authority to waive Eleventh Amendment immunity. *See Oracle Am., Inc. v. Or. Health Ins. Exch. Corp.*, 145 F. Supp. 3d 1018, 1036-37 (D. Ore. 2015) (such documents are relevant to whether an assistant attorney general possessed Eleventh Amendment waiver authority).

Lapides, 535 U.S. at 619-24)); *Hans v. Louisiana*, 134 U.S. 1, 17-18 (1890) (distinguishing voluntary waivers through "a contract" from an "ordinary act of legislation").

As Plaintiffs have shown already, adopting Defendants' position would allow "States to achieve unfair tactical advantages, if not in this case, in others." *Lapides*, 535 U.S. at 621 (internal quotation and alteration omitted). Defendants voluntarily chose to settle § 1983 claims and to submit to federal jurisdiction over the enforcement of the Settlement Agreement. Opp'n 15-16. States cannot lure federal plaintiffs into a settlement subject to federal jurisdiction, breach the settlement agreement, and thereby force the plaintiffs to litigate their claims in state court against their choice of forum. *See Lapides*, 535 U.S. at 623 (concluding that a "rule of federal law that . . . denies waiver despite the state attorney general's state-authorized litigating decision" promotes "inconsistency and unfairness").[15]

Defendants ultimately argue that they "effectively withdrew" their express waiver of immunity upon successfully requesting that the Court terminate its consent decree. VDOC Reply 7. The Agreement's waiver provision, however, is not conditioned on the existence of a decree; nor does it expire after a single use, or after a particular time. Defendants instead waived their immunity to the extent this Court finds it "necessary" to enforce their compliance with the Agreement. CAC Ex. 2, at 3. Because there can be no such "necessity" if there is no breach, Defendants' immunity defense is inextricably bound up in the merits and cannot be resolved at this stage. Moreoever, Defendants could not unilaterally withdraw their waiver, and "[t]he PLRA's termination provision affects only 'prospective relief,'" not a state's waiver of immunity *from* prospective relief. *Benjamin v. Jacobson*, 172 F.3d 144, 156 (2d Cir. 1999); *see Gilmore v. California*, 220 F.3d 987, 1001 (9th Cir. 2000); *Inmates of Suffolk Cty. Jail v.*

[15] *American Federation*, upon which VDOC (and assumingly Defendants) rely, did not involve a voluntary waiver, or express waiver in a settlement agreement, or whether the Attorney General of Virginia has authority to waive Virginia's immunity. VDOC Reply 6; *Am. Fed'n*, 949 F. Supp. at 442; *see Abril v. Virginia*, 145 F.3d 182, 184 (4th Cir. 1998) (affirming).

Rouse, 129 F.3d 649, 662 (1st Cir. 1997); *see also Lynch v. United States*, 292 U.S. 571, 581-82 (1934) ("The consent may be withdrawn, although given after much deliberation and for a pecuniary consideration."), *cited in* VDOC Reply 7.

B. Plaintiffs State A Claim Against The Individual Defendants In Their Individual Capacities.

Aside from the issue of immunity, Defendants argue "that no individually-named defendant was a party to the settlement agreement[] that [was] allegedly breached." Mot. 16. Defendants' argument fails because the Settlement Agreement expressly binds "all of the defendants, their agents, employees and successors in office" and does not specify that liability for breach is limited to Defendants' official capacities. CAC ¶ 74 & Ex. 2, at 2; *see, e.g.*, *Fransmart, LLC v. Freshii Dev., LLC*, 768 F. Supp. 2d 851, 859-64 (E.D. Va. 2011) (rejecting argument that successor plaintiff lacked standing to sue under contract that contained successors-and-assigns clause). At minimum, if the question of whether Plaintiffs are a party to the Settlement Agreement "involves questions of fact that are not apparent on the face of the complaint," so does the question of whether the Defendants are a party. VDOC Reply 8.

C. The Individual Defendants Fail To Establish An Affirmative Statute-Of-Limitations Defense.

Finally, like VDOC, Defendants argue that the statute of limitations has run on Plaintiffs' Settlement Agreement claim. Mot. 18; VDOC Reply 8-9. It is axiomatic that a cause of action for breach of contract does not arise until the defendant owes a legal obligation to the plaintiff and breaches that obligation. *See* Opp'n 21 (citing *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660, 666 (Va. 1994)); *see also Hamlet v. Hayes*, 641 S.E.2d 115, 117 (Va. 2007); *Payman v. St. Mary's Hosp., Inc.*, 72 Va. Cir. 582, 583-84 (Va. Cir. Ct. 2004) ("there can be no breach in the absence of a duty"). Defendants do not dispute, for the purposes of their Motion, that some Plaintiffs accrued rights in the Agreement five or fewer years before this action was filed. *See, e.g.*, CAC ¶¶ 22-36; *compare* Opp'n 18, *with* VDOC Reply 8-9.

Thus, Defendants' statute-of-limitations defense must fail at this early pleading stage, and the Court need go no further.

In any event, Defendants may have re-breached the Agreement when they issued new versions of the Step-Down Program. Opp'n 18. VDOC (and assumingly Defendants) rely on *Fluor Federal Solutions, LLC v. PAE Applied Technologies, LLC*, 728 F. App'x 200 (4th Cir. 2018), which found a continuous breach of contractual duties because the defendant "initially breached and continued to breach the contract in exactly the same manner" for twelve years. VDOC Reply 9-10 (citing *Fluor*, 728 F. App'x at 203). Each version of the Step-Down Program articulated different goals or justifications, may have altered the Program's Pathways and standards, and modified prisoners' confinement restrictions. *E.g.*, CAC Exs. 8, 10, 11. Whether these changes materially altered the Step-Down Program in a way that constituted a new breach can only be determined after discovery.

CONCLUSION

For the foregoing reasons, the Court should deny the Defendants' Motion to Dismiss.

Dated: July 9, 2019

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of July, 2019, I electronically filed the foregoing Class Plaintiffs' Memorandum in Opposition to Defendants' Motion to Dismiss 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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