IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION

WILLIAM THORPE, *et al*., *Plaintiffs*, v. VIRGINIA DEPARTMENT OF CORRECTIONS, *et al*., *Defendants*.	CASE NO. 2:20-cv-00007

CLASS PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS TO REPORT AND RECOMMENDATION

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INTRODUCTION

Class Plaintiffs' 97-page Complaint alleges six causes of action arising from the Virginia Department of Corrections' ("VDOC") Step-Down Program, a self-described "prison management system" used by VDOC to evaluate and provide privilege incentives to prisoners in long-term solitary confinement. *See* Compl. Ex. 9, at 1 (W.D. Va. May 6, 2019), ECF No. 1-12 (VDOC Operating Procedure ("O.P.") 830.A). The Complaint's constitutional claims do not challenge the practice of solitary confinement in all of its forms—only long-term solitary confinement as instituted by Virginia under the Step-Down Program. Class Plaintiffs allege that the Step-Down Program "is a 'system of vague standards, contradictory goals, and malleable jargon used to conceal what is nothing more than an indefinite or permanent solitary confinement regime'" used to fund Red Onion and Wallens Ridge. Report & Recommendation at 2, 28 (W.D. Va. Sept. 4, 2020), ECF No. 70 (hereinafter referred to as the "R&R") (quoting Compl. ¶ 16 (E.D. Va. May 6, 2019), ECF No.1). The Complaint's allegations are supported by 1,164 pages of exhibits, which confirm the factual allegations in the Complaint using VDOC policies, policy statements, reports, and the sworn testimony of VDOC's own employees.

In her 87-page R&R, the Magistrate Judge concludes that the Complaint states constitutional claims applicable to all Plaintiffs under the Eighth Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and to federal statutory claims brought by a sub-class under the Americans with Disabilities Act ("ADA") and Rehabilitation Act ("RA"). The R&R also recommends that, while Class Plaintiffs state a claim for breach of a prior settlement agreement involving Defendant VDOC, that claim is time-barred.[1]

[1] Class Plaintiffs timely objected to this aspect of the R&R. Pls.' Obj. R&R (W.D. Va. Sept. 18, 2020), ECF No. 71.

Defendants assert that the Magistrate Judge erred in nearly every aspect of the R&R, but only summarily "object to each proposed finding of fact and conclusion of law decided adversely to them . . . ." Defs' Obj. R&R 1 (W.D. Va. Sept. 18, 2020), ECF No. 73. Relying largely on arguments already made before the Magistrate Judge, Defendants assert error as to each claim for which the Magistrate Judge does not recommend dismissal. As described below, these arguments rely on affirmative defenses and mischaracterize the Complaint as merely challenging the fact of Class Plaintiffs' incarceration in administrative segregation, a claim which the Complaint does not make. *Cf.* Compl. ¶ 203 ("VDOC and each of the individual defendants impose and/or condone this harm by creating, administering, or implementing the Step-Down Program."); *see also* Pls.' Mem. Opp'n Def.'s Mot. Dismiss 1 (E.D. Va. June 14, 2019), ECF No. 23 ("VDOC raises the affirmative defenses of Eleventh Amendment immunity . . . , statute of limitations . . . , and failure of condition precedent."). The Magistrate Judge carefully considered and rejected these arguments, basing her findings and recommendations on the detailed factual allegations actually made in the Complaint—the correct standard—rather than as characterized by the Defendants. The Court should overrule the objections and adopt the Magistrate Judge's recommendations denying Defendants' motions to dismiss.

STANDARD OF REVIEW

This Court "must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3); *see also Brown v. Comm'r of Soc. Sec.*, 969 F. Supp. 2d 433, 437 (W.D. Va. 2013) ("The district court conducts a *de novo* review of those portions of a magistrate's report and recommendation to which specific objections were made."). Where there is no objection, "a district court need not conduct a de novo review, but instead must 'only satisfy itself that there is no clear error on the face of the record in order to accept the

recommendation.'" *Diamond v. Colonial Life & Accident Ins. Co.*, 416 F.3d 310, 315 (4th Cir. 2005) (citing Fed. R. Civ. P. 72).

"[G]eneral, nonspecific objections to a magistrate judge's report and recommendation, reiterating arguments previously presented, have the same effect as a failure to object." *Smith v. James C. Hormel Sch. of the Va. Inst. of Autism*, No. 3:08-cv-00030, 2010 U.S. Dist. LEXIS 29026, at *31 (W.D. Va. Mar. 26, 2010) (citing *Veney v. Astrue*, 539 F. Supp. 2d 841, 845 (W.D. Va. 2008)); *see also Farmer v. McBride*, 177 F. App'x 327, 331 (4th Cir. 2006) (citation omitted). Clear error review is also called for "if the objections are to strictly legal issues and no factual issues are challenged." *Hunt v. Rushton*, No. 01-7766, 2002 U.S. App. LEXIS 7450, at *2 (4th Cir. Apr. 23, 2002) (citing *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982)).

RESPONSE

I. THE SETTLEMENT AGREEMENT CLAIM SHOULD NOT BE DISMISSED

A. The Magistrate Judge Properly Concluded That The Parties' Intent As To The 1985 Settlement Agreement Should Be Decided By The Trier Of Fact.

VDOC's 1985 class-action Settlement Agreement (the "Agreement") was entered ten years before the Prison Litigation Reform Act ("PLRA") created a distinction between "agreements" and "consent decrees" for purposes of ongoing judicial enforcement. 18 U.S.C. § 3626. Moreover, the Agreement states only that the Court "*may* issue" a consent decree, which necessitates the finding that the Agreement on its face "does not clearly answer" the question as to "whether parties to the 1985 Settlement Agreement intended to enter into an enforceable private settlement agreement regardless of court approval." R&R 68. The R&R accordingly concludes that the motion to dismiss should be denied because this "issue is one for the trier of fact to decide upon the evidence of the parties' intentions." *Id.*

First, Defendants simply rehash their prior Rule 12(b)(6) arguments, asserting that, despite the equivocal language of the Agreement, "the parties manifested their intention that the Court retain enforcement jurisdiction over them" and therefore the agreements were "'consent decrees' . . . within the meaning of the PLRA." Defs.' Obj. R&R 8 (citing *Rowe v. Jones*, 483 F.3d 791, 796 (11th Cir. 2007)). As below, Defendants insist that the R&R should be set aside in favor of Defendants' interpretation of cherry-picked circumstantial parol evidence from *outside* of the Complaint (an earlier consent decree (Defs. Obj. R&R 8), court orders (Defs. Obj. R&R 7-8), and an earlier settlement agreement (*id.* (claiming that "the terms of these documents unambiguously provide for ongoing judicial enforcement")). The Magistrate Judge did not credit that material, however, precisely because as a matter of law the Court must "test the legal feasibility of the complaint *without* weighing the evidence that might be offered to support or contradict it." Pls.' Mem. Opp'n Defs.' Mot. Dismiss 2 (E.D. Va. July 9, 2019), ECF No. 26 (quoting *Clatterbuck v. City of Charlottesville*, 708 F.3d 549, 558 (4th Cir. 2013) (emphasis added)).

Second, Defendants argue for the *first time* that *any* judicial enforcement, at *any* point in time, permanently converts a private settlement agreement into a consent decree. *See* Defs.' Obj. R&R 6 ("private settlement agreements," unlike consent decrees, are "not subject to judicial enforcement"). But Defendants' authorities say no such thing. Instead, they recognize that the PLRA contemplates that an agreement may be enforced separately after it is no longer subject to court enforcement through a consent decree. *See* Pls.' Mem. Opp'n Defs.' Mot. Dismiss 7 ("The Second Circuit noted that plaintiffs may 'agree to a consent decree and also agree—either in the same document or in a separate document—to give up their claims unconditionally in exchange for undertakings by the defendants that would not be enforceable except through the

commencement of a new lawsuit for breach of contract." (quoting *Benjamin v. Jacobson*, 172 F.3d 144, 157 (2d Cir. 1999) (en banc))); *Doe v. Cook Cty.*, 798 F.3d 558, 563, 566 (7th Cir. 2015) (finding of PLRA's applicability to a court-appointed administrator did not "undermine the original settlement in 2002 or the follow-up settlements in 2006," and such agreements were consent decrees under the PLRA only because "a violation means [court enforcement beyond] restarting the litigation on the merits"). Thus, because the Agreement is no longer subject to a decree, it is a "private settlement agreement" under the PLRA, and may be enforced through a new lawsuit. Pls.' Mem. Opp'n Defs.' Mot. Dismiss 6-7 (quoting *Benjamin*, 172 F.3d at 157).

The Magistrate Judge properly concluded that the Agreement "does not contain a clear, unambiguous statement that the parties' agreement either was or was not contingent on the court's approval." R&R 68. This finding not only is sound, but also unrebutted, as Defendants have identified no clear statement in the Agreement or even in any of their extrinsic evidence. The R&R's conclusion that the motion to dismiss should be denied on this basis is thus compelled by Virginia contract law, which requires that, where a contract is ambiguous, courts "look to parol evidence in order to determine the intent of the parties." R&R 67 (citing *Cascades N. Venture Ltd. P'ship v. PRC Inc.*, 457 S.E.2d 370, 373 (Va. 1995); *Dynamic Aviation Grp. Inc. v. Dynamic Int'l Airways, LLC*, No. 5:15-CV-00058, 2016 U.S. Dist. LEXIS 39248, at *20 (W.D. Va. Mar. 24, 2016)). Evaluation of such evidence is "for the trier of fact." R&R 67 (citations omitted). Indeed, as the Magistrate Judge properly recognized, an agreement that is "plain and unambiguous on its face" does not require the Court to "look for meaning beyond the instrument itself." R&R 67 (citations omitted). Defendants' reliance on sources outside the four corners of the Agreement confirms that the Agreement is ambiguous and that the R&R should be adopted.

B. The Magistrate Judge Concludes Correctly That Virginia Waived Its Sovereign Immunity In The Agreement.

The Magistrate Judge properly concluded that "[i]f the 1985 Settlement Agreement remains enforceable against the parties . . . it appears language set forth [in the Agreement] would be sufficient to waive the state's immunity." R&R 69. Conspicuously absent from Defendants' Objection is any discussion of the actual language that the Magistrate Judge analyzed. Instead, Defendants present two *new* arguments—not offered in their motion to dismiss—that they nonetheless claim the Magistrate Judge "failed to consider": (1) VDOC "was not a signatory" to the Agreement, and (2) the R&R's conclusions on the current *enforceability* of the 1985 Settlement Agreement somehow equate to a "concession that VDOC could not have waived immunity." Defs.' Obj. R&R 9-10. But the Magistrate Judge anticipated these arguments, and readily disposed of them.

First, the Magistrate Judge anticipated (and therefore considered) Defendants' argument that VDOC's failure to sign the Agreement means that there was no "express declaration that VDOC itself waived its immunity." Defs.' Obj. R&R 9. In fact, the Magistrate Judge concluded that "it appears the language set forth [in the Agreement] would be sufficient to waive the *state's* immunity." R&R 69 (emphasis added).[2] That *VDOC* did not itself sign the Agreement misses the point entirely, because Defendants *still* have not disputed Plaintiffs' argument that "the Agreement was signed . . . by two assistant attorneys general." Pls.' Mem. Opp'n Defs.' Mot. Dismiss 27 (citing *Lapides v. Bd. of Regents*, 535 U.S. 613, 622 (2002) and other case law for the proposition

[2] Defendants again argue that "the Court lacks supplemental jurisdiction over the claim." Defs.' Obj. R&R 9 n.3; *see also* R&R 68. As Class Plaintiffs argued, and the Magistrate found, however,Virginia waived its immunity, thus rendering any Eleventh Amendment limitations on jurisdiction over VDOC irrelevant. Even so, this Court has original jurisdiction over the matter. See Pls.' Mem. Opp'n Def.'s Mot. Dismiss 13 (showing why VDOC cannot avoid federal jurisdiction).

that "[c]ourts need not construe state statutes for waivers of immunity . . . in cases 'involv[ing] a State that *voluntarily* invoked the jurisdiction of the federal court' through its attorney general."). Accordingly, VDOC's status as a signatory is irrelevant because the Commonwealth *itself* signed the 1985 Settlement Agreement. *See* Pls.' Opp'n Defs.' Mot. Dismiss 27; *McCray v. Md. DOT*, 741 F.3d 480, 483 (4th Cir. 2014) (describing state abrogation of agency immunity by consent).[3] As the R&R properly concludes, this is more than sufficient to waive Virginia's sovereign immunity. *See* R&R 69 ("[I]t appears the language . . . [is] sufficient to waive the state's immunity."). While Defendants in a footnote observe that immunity may both be given and withdrawn, they necessarily can offer no authority for the proposition that consent can be withdrawn following the entry of a binding settlement agreement. *See* Defs.' Obj. R&R 11 n.5.

Second, Defendants argue that the R&R's "determination that the 1985 Settlement Agreement 'does not contain a clear, unambiguous statement'" as to whether the parties required judicial approval within the meaning of the PLRA somehow also means that "VDOC could not have [unambiguously] waived immunity." *Id.* at 10. But here, Defendants conflate the analysis of the language relating to *enforceability* of the Agreement with the analysis of whether Virginia expressly *waived* its immunity. These findings are entirely separate. And Defendants do not specifically object to the R&R's conclusion that Defendants consented to jurisdiction because the Agreement "explicitly state[s] that the federal court would retain jurisdiction to enforce the agreements." R&R 68 (citing *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375 (1994)); *see also* Pls.' Mem. Opp'n Defs.' Mot. Dismiss 15 ("VDOC expressly waived any immunity it might have had when it . . . asked a federal court . . . to retain jurisdiction to enforce compliance with the

[3] Because the Commonwealth itself waived its sovereign immunity through the Office of the Attorney General, it is of no moment that VDOC officials may lack authority to establish a waiver. *See* Defs.' Obj. R&R 9 n.4.

Agreement and any decree which may issue." (citing Compl. Ex.3 (E.D. Va. May 6, 2019), ECF No. 1-6 at 16, ¶ 37)).

II. THE MAGISTRATE JUDGE CORRECTLY CONCLUDED THAT CLASS PLAINTIFFS STATED A DUE PROCESS CLAIM

After a thorough analysis, the R&R properly concluded that Class Plaintiffs sufficiently alleged facts showing a protected liberty interest in leaving their conditions of indefinite solitary confinement and that Defendants failed to provide meaningful and adequate periodic review to protect this interest. R&R 74. Therefore, the Court should adopt the R&R's conclusion that Plaintiffs adequately stated both prongs of their due process claim. *Id.*; *see Incumaa v. Stirling*, 791 F.3d 517, 526 (4th Cir. 2015).

Defendants do not dispute the Magistrate Judge's conclusion that Class Plaintiffs have a "protected liberty interest in avoiding long-term solitary confinement pursuant to the Step-Down Program." R&R 71-72; *see* Defs.' Obj. R&R 2; *id*. at 11-15. Instead, Defendants argue that the Magistrate Judge was wrong to conclude that they did "not challenge that the *Complaint* adequately alleged that the plaintiffs were not afforded adequate process to protect that interest." R&R 74 (emphasis added) (*cited in* Defs.' Obj. R&R 11). The Magistrate Judge was correct. Defendants never argued that the *Complaint's* allegations are legally insufficient to state a due process claim, and they do not do so here. Instead, Defendants' objections only rehash the erroneous argument that Defendants' *characterizations* of language cherry-picked from VDOC policies, some of which are not even referenced in the Complaint, should control the Court's analysis. Defs.' Obj. R&R 12 n.6; Defs.' Mem. Supp. Mot. Dismiss 20-21 (E.D. Va. June 14, 2019), ECF No. 22; *see also* Pls.' Opp'n to Defs.' Mot. Dismiss 1-4. This Court should reject Defendants' argument for the same reason the Magistrate Judge did: "A Rule 12(b)(6) motion . . . tests the sufficiency of a *complaint*." *Edwards v. City of Goldsboro*, 178 F.3d 231,

243-44 (4th Cir. 1999). The Complaint's well-pleaded factual allegations, "accepted as true and [after] drawing all reasonable factual inferences from those facts in the plaintiff's favor," are sufficient to plead that Defendants violated Class Plaintiffs' right to procedural due process. *Id.*

Attempting an impermissible end-run around the Complaint, Defendants once again offer competing assertions of fact tied to their own interpretation of their own policy, O.P. 830.A, claiming that their own bare interpretation of vague provisions "prevails" over conflicting "bare allegations in the complaint." Defs.' Obj. R&R 12 n.6 (quoting *Fayetteville Inv'rs v. Comm. Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991)). But, as the Magistrate Judge noted, the Complaint's allegations demonstrating that the Step-Down Program fails to provide meaningful and adequate review are not "bare." They are tied to reasonable inferences from O.P. 830.A's text and supported by *sworn statements* of VDOC's own employees, for example:

(1) "Formal ICA hearings." As the Magistrate Judge recognized, the Complaint alleges that the ICA does not review for whether a prisoner should advance through the Step-Down Program or poses an ongoing security threat. Instead, the ICA's "external status" review "determines the prisoner's assignment to a *maximum security prison or lower level facility*." R&R 25 (emphasis added). But the ICA's external review depends entirely on "whether the Unit Manager/BMC has decided that the prisoner has fulfilled all requirements of the Step-Down Program" and is thus eligible for transfer. Compl. ¶¶ 177-78 & nn.94-95 (quoting Duncan and Swiney Dep. Trs.); *see* R&R 25. And because the Step-Down Program requires prisoners to remain in solitary confinement for a mandatory minimum period, the ICA's written decisions "often repeat non-substantive 'rationales' for a prisoner's long-term solitary confinement, such as 'Remain Segregation' or 'needs a longer period of stable adjustment.'" R&R 25-26, 27; *see* Compl. ¶ 176.

(2) "Reviews by the External Review Team" ("ERT"). As the Magistrate Judge noted, the Complaint alleges that the ERT does not, in fact, consider whether a prisoner is correctly assigned to their internal pathway or "whether a pathway change would be appropriate." Defs.' Obj. R&R 13. ERT reviews examine only "whether the *original* decision to place the prisoner on the IM pathway was justified." R&R 26 (referencing Compl. ¶ 183). The ERT's review docket is controlled by the Unit Manager, whose DTT decisions the ERT is supposed to review. *Id*. at 26; Compl. ¶¶ 183-84. The ERT fails to provide prisoners with prior notice or explanations for their decisions, an opportunity to appeal, or even a right to attend the ERT hearing. R&R 27; Compl. ¶ 187.

(3) "Informal reviews by the Dual Treatment Team" ("DTT"). Though Defendants assert that the DTT reviews prisoners "being recommended to be considered for a status or pathway change," it is entirely unclear what powers Defendants claim that the DTT holds independent from other review units like the ICA. Defs.' Obj. R&R 13. Regardless, as the Magistrate Judge recognized, the Complaint alleges that the DTT "routinely sits as a committee of one decision-maker" (R&R 20 (quoting Compl. ¶ 136)), usually the Unit Manager, who also controls most other reviews that could affect a prisoner's progression. *See* Defs.' Obj. R&R 13. Additionally, the Complaint alleges that the DTT's review is driven by the Step-Down Program's "vague, subjective, and overlapping" criteria that bear no relevance to a prisoner's security risk. Compl. ¶¶ 142-45; R&R 20, 24, 53.

(4) "Formal reviews by the Multi-Disciplinary Team" ("MDT"). Defendants claim that a "multi-disciplinary team" review prisoners,[4] but imply that MDT reviews are duplicative of the ICA, and fail to explain how the MDT's "recommend[ations]" as to prisoners' progression through the Step-Down Program factor into any of the status review decisions. Defs.' Obj. R&R 13-14.

(5) "Informal reviews by the Building Management Committee" ("BMC"). Finally, Defendants assert that the BMC reviews prisoners "as needed, but at least monthly" and "may recommend changes to an inmate's privilege level." Defs.' Obj. R&R 13. But as the Magistrate Judge found, "[t]he Complaint alleges that these periodic reviews are conducted in secret," by the Unit Manager alone, "with no notice to the prisoner and no opportunity to be heard." R&R 25 (referencing Compl. ¶ 169). The BMC does not provide its decisions to prisoners, who have "no meaningful opportunity to understand why they remain in solitary confinement or how they can shape their behavior to return to general population." R&R 25 (referencing Compl. ¶ 173). "Also, there is no ability to grieve or appeal these status review decisions." *Id*. (referencing Compl. ¶ 174).

[4] Here and elsewhere, Defendants make untested factual claims based on their intrepretations of O.P. 830.1, O.P. 830.2, and O.P. 841.4, which similarly are not "integral to [or] explicitly relied on in the complaint." *Am. Chiropractic v. Trigon Healthcare*, 367 F.2d 212, 234 (4th Cir. 2004); Obj. Br. 12 n.8, 13 n.9, 13 n.10. But the Fourth Circuit has held that "[j]udicial 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) (quoting *Waugh Chapel S., LLC v. United Food & Com. Workers Union Local*, 728 F.3d 354, 360 (4th Cir. 2013)). And this Court cannot take judicial notice of Defendants' *interpretation* of facts within a document, which must be "construed in the light most favorable to the plaintiff along with the well-pleaded allegations of the complaint." *Clatterbuck*, 708 F.3d at 557, 560. Thus, Fourth Circuit precedent prevented the Magistrate (and prevents this Court) from considering Defendants' "extrinsic evidence" in its Rule 12(b)(6) analysis. *Am Chiropractic*, 376 F.2d at 234.

Defense counsel's unsworn *ipse dixit* that "inmates . . . receive multiple periodic reviews" is irrelevant, and, in any event, cannot hold up to Class Plaintiffs' factual allegations. Defs.' Obj. R&R 12.

The Magistrate Judge also correctly concluded that the Complaint adequately states a due process claim under the Fourth Circuit's recent decision in *Smith v. Collins*. R&R 72-74 (citing *Smith v. Collins*¸ 964 F.3d 266 (4th Cir. 2020)). Defendants contest the R&R's reliance on *Smith* claiming that (1) *Smith* does not control because Class Plaintiffs make a facial challenge to the Step-Down Program, while *Smith* challenged the Program as applied solely to Smith; and (2) Defendants' own assertions of fact detailed above are the facts to which *Smith* must be compared. These objections fail on both counts.

Defendants' first strike against *Smith* misses because "the distinction between facial and as-applied challenges goes to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. FEC*, 558 U.S. 310, 331 (2010); *see also White Coat Waste Proj. v. Greater Richmond Transit Co.*, No. 3:17-cv-719, 2020 U.S. Dist. LEXIS 94993, at *49-51 (E.D. Va. May 30, 2020) (applying the same substantive law to resolve facial and as-applied challenges). The elements of the due process claim here are the same as in *Smith*. In any event, Class Plaintiffs challenge the Step-Down Program as unconstitutional both on its face *and* as applied to Class Plaintiffs. Pls.' Statement of Position in Supp. of Venue and Opp'n. Discretionary Transfer 8-9 (E.D. Va. Nov. 4, 2019), ECF No. 31 (stating that Class Plaintiffs' claims are *predominantly* a facial challenge).

Second, as the Magistrate Judge found, Class Plaintiffs' due process allegations are sufficient to state a procedural due process claim under *Smith*. As in *Smith*, Plaintiffs allege that the Step-Down Program does not provide many prisoners with "any real opportunity for release

from segregation," and ICA reviews do not provide a valid rationale for why they remain in solitary confinement. *Smith*, 964 F.3d at 278 ("The conclusory nature of the [ICA's] rationales could lead a reasonable jury to find that the ICA reviews did not offer Smith any real opportunity for release from segregation."); *see also* Compl. ¶¶ 177-87, 200-01. Class Plaintiffs likewise suffered the same injuries as alleged in *Smith* arising from the inadequate process afforded them by the Step-Down Program. *Compare Smith*, 964 F.3d at 272-73, 279, *with* Compl. ¶¶ 95-103, 105, 107-13, 196-203. Therefore, just as the allegations in *Smith* bound the Court to find that Class Plaintiffs sufficiently alleged a protected liberty interest, *Smith* makes evident that Class Plaintiffs likewise have sufficiently alleged inadequate process to establish a properly stated due process claim.

Defendants attempt to distinguish *Smith* only by contending that their own unsupported factual assertions regarding the Step-Down Program policies are the facts to which *Smith* must be compared. But as noted above, the Court may not adopt these assertions at this stage; it must analyze the *Complaint's* allegations about the Step-Down Program policies and how VDOC interprets and applies those policies. *See Darcangelo v. Verizon Communs., Inc.*, 292 F.3d 181, 188-89 (4th Cir. 2002) (reversing dismissal where district court "accepted the defendants' version of the facts" as to the characterization of plaintiffs' allegations of defendants' wrongful conduct); *cf. Ward v. Rock Against Racism*, 491 U.S. 781, 796-97 (1989) (administrative interpretation and implementation of a regulation is "highly relevant" to analysis of a facial challenge).

III. THE MAGISTRATE JUDGE CORRECTLY CONCLUDED THAT CLASS PLAINTIFFS STATED AN EQUAL PROTECTION CLAIM

To state a claim under the Equal Protection Clause of the Fourteenth Amendment, Class Plaintiffs "must allege that [they have] been treated differently from others with whom [they are] similarly situated and that the unequal treatment was the result of intentional or purposeful discrimination." R&R 74-75 (citing *Morrison v. Garraghty*, 239 F.3d 648, 654 (4th Cir. 2001));

see also Fauconier v. Clarke, 966 F.3d 265, 277 (4th Cir. 2020) (same). The R&R properly found that Class Plaintiffs state an Equal Protection claim related to (1) the Step-Down Program's criteria for evaluation and assignment of prisoners to the Intensive Management ("IM") and Special Management ("SM") Pathways, and (2) the Step-Down Program's punishment of behavior that is incident to mental illness. R&R 75-76. Defendants contend the Magistrate Judge erred because Class Plaintiffs fail "to allege specific facts showing that they were treated differently from similarly situated inmates" and "that [the] discrimination was intentional or purposeful." Defs.' Obj. R&R 16-17. Once again, Defendants are wrong on both counts.

A. The Magistrate Judge Properly Concluded That Class Plaintiffs Adequately Alleged That They Have Been Subjected To Discriminatory Treatment.

As recognized in the R&R, the Complaint alleges that Defendants have engaged in two varieties of discriminatory treatment.

First, "the Complaint alleges that the vague and overbroad criteria for placement into either the IM or SM Pathways has resulted in prisoners with similar criminal and prison disciplinary histories being treated differently." R&R 75. For example, the Complaint alleges facts showing that Defendants place prisoners on the IM Pathway (i) "based on an undefined and necessarily subjective finding of 'intent'"; (ii) because they conclude that some prisoners have been "routinely" rather than "repeatedly" disruptive; or (iii) based on crimes the prisoner committed outside of prison, even if the prisoner has displayed no violence while in prison. Compl. ¶¶ 142-45. Named Plaintiff Frederick Hammer has been subjected to this aspect of the Program. Despite having "not committed any disciplinary infraction from when he entered prison in 2009," he was placed in solitary confinement and was "repeatedly told" that "he will remain in solitary confinement for the rest of his life [on the IM Pathway] due to press attention concerning his crimes." R&R 3; *see* Compl. ¶ 25.

Second, Class Plaintiffs also allege that the Step-Down Program lacks any criteria to allow staff to consider a prisoner's mental disabilities in either placement decisions or periodic evaluations. R&R 21-23, 30, 75; Compl. ¶¶ 143, 153, 241. The Magistrate Judge found that the Complaint alleges facts showing that "the Step-Down Program severely disadvantages prisoners who suffer from mental illness or disability, in that it does not allow staff to meaningfully consider these conditions in setting programming requirements or in their periodic reviews, which results in these prisoners being held in solitary confinement longer than prisoners who do not suffer from these conditions." R&R 75; *see also id.* at 4-7, 30-31; Compl. ¶¶ 26, 28, 30, 34, 162, 251, 256 (alleging that Class Plaintiffs Khavkin, Wall, Cavitt, and Riddick suffer from mental illnesses and disabilities that, as with other prisoners, prevent or prevented them from participating in the Step-Down Program).

B. The Magistrate Judge Properly Concluded That Class Plaintiffs Adequately Alleged That Defendants' Discriminatory Conduct Is Intentional And Has No Rational Basis.

The Complaint alleges facts showing that both these outcomes are intentional, not related to a legitimate penological purpose, and primarily designed to achieve the economic goal of filling empty beds at Wallens Ridge and Red Onion. R&R 75-76; Compl. ¶¶ 54, 66, 80-83, 242-44.

At the outset, Defendants' policies are not entitled to a presumption of reasonableness. *See* Defs.' Obj. R&R 17. As the R&R correctly concludes, and Defendants' own authority provides, Class Plaintiffs need only "allege that the 'disparate treatment [was not] reasonably related to any legitimate penological interests.'" R&R 75-76; *Fauconier*, 966 F.3d at 277 (quoting *Veney v. Wyche*, 293 F.3d 726, 732 (4th Cir. 2002)); *see* also *Veney*, 293 F.3d at 732-33 (explaining that the question was "whether there is a valid, rational connection between safety and security" and the practice at issue) (citing *Turner v. Safley*, 482 U.S. 78, 89 (1987)). In any event, Class Plaintiffs' factual allegations are amply sufficient to overcome any sort of presumption. The

Complaint asserts, with factual support, that Defendants have engaged in a history of policies and practices designed to fill beds at its maximum-security prisons. R&R 14-17, 20; Compl. ¶¶ 15-16, 54, 66, 80-83, 122-33, 159, 166, 179, 242. Ignoring the facts in the Complaint, Defendants baldly claim that *any* "individualized assessment" of prisoners' supposed potential for violence prior to placing them on the IM Pathway "supports a finding that" Defendants' disparate treatment of these prisoners "is rational." Defs.' Obj. R&R 18-19. But the Complaint alleges facts showing that the *standards* for these assessments, and the purposes underlying them, violate the Equal Protection Clause. R&R 2, 21-22; Compl. ¶¶ 135-36, 139-45.

Defendants emphasize that the Complaint is deficient as to "intent," arguing for the first time that the Complaint must allege facts showing "(1) evidence of a consistent pattern of actions impacting members of a particular class; (2) the historical background of the decision; (3) the sequence of events leading up to the decision; and (4) contemporary statements by decisionmakers." Defs.' Obj. R&R 17 (citing *Cent. Radio Co. Inc. v. City of Norfolk, Va.*, 811 F.3d 625, 635 (4th Cir. 2016)). This heightened "clear and intentional discrimination" standard, however, applies to *selective enforcement* claims—*i.e.*, where a facially valid municipal law is enforced in a discriminatory manner. *See Cent. Radio*, 811 F.3d at 635. That is not this case. Here, the Complaint alleges that the text and purpose of the Step-Down Program policies are inherently discriminatory. As Defendants argued before the Magistrate Judge (Defs.' Mem. Supp. Mot. Dismiss 22), Class Plaintiffs need only plead that Defendants' disparate treatment "was not an error but deliberate." *Fauconier*, 966 F.3d at 278; *see also Veney*, 293 F.3d at 730-31 (prisoner alleged intentional discrimination when he alleged that as a homosexual male he received a different housing assignment than other males). The Complaint alleges facts showing that Defendants have created and maintained the Step-Down Program's discriminatory features with

the specific intent to retain prisoners in solitary confinement and thereby justify funding for Red Onion and Wallens Ridge. R&R 75-76; Compl. ¶¶ 54, 66, 80-83, 242-44.

IV. THE MAGISTRATE JUDGE CORRECTLY CONCLUDED THAT CLASS PLAINTIFFS STATED AN EIGHTH AMENDMENT CLAIM

To state an Eighth Amendment claim alleging cruel and unusual punishment based on prison conditions, the Class Plaintiffs "must establish a 'serious deprivation of a basic human need' and that the [D]efendants acted with deliberate indifference toward the conditions." R&R 77 (citing *In re Long Term Admin. Segregation of Inmates Designated as Five Percenters*, 174 F.3d 464, 471 (4th Cir. 1999)). The R&R found that "[Class P]laintiffs have sufficiently alleged a claim under § 1983 for violation of their Eighth Amendment right to be free from cruel and unusual punishment." R&R 78. Defendants' objection largely reiterates their motion-to-dismiss arguments that Class Plaintiffs failed to allege sufficient facts to state a claim. *Compare* Defs.' Obj. R&R 19-21 *with* Defs.' Mem. Supp. Mot. Dismiss 25-29. Thus, this Court need only review the R&R's finding for clear error. *See Smith*, 2010 U.S. Dist. LEXIS 29026, at *30.

A. The Magistrate Judge Properly Concluded That Class Plaintiffs Adequately Alleged An Objectively, "Sufficiently Serious" Deprivation.

The Magistrate Judge concluded that Class Plaintiffs adequately alleged an objectively, sufficiently serious deprivation because the Fourth Circuit "in 2019 . . . recognized that solitary confinement conditions less onerous than those alleged by the plaintiffs, here, violated the Eighth Amendment" and in 2015, "recognized that '[p]rolonged solitary confinement exacts a heavy psychological toll.'" R&R 78 (citing *Porter v. Clarke*, 923 F.3d 348, 361 (4th Cir. 2019); *Incumaa*, 791 F.3d at 534 (4th Cir. 2015)). In objecting, Defendants fail to identify any error in the Magistrate Judge's analysis of the Complaint's allegations. Instead, Defendants mischaracterize the Complaint and object to the R&R based on facts outside of the Complaint.

First, Defendants incorrectly assert that the Complaint alleges that "segregated housing conditions, standing alone, violate the Eighth Amendment." *See* Defs.' Obj. R&R 19. Of course, the Complaint does not challenge solitary confinement in the abstract—it pleads facts showing that VDOC's Step-Down Program imposes long-term solitary confinement constituting cruel and unusual punishment. *See, e.g.*, Compl. ¶ 200 ("VDOC . . . relies on the Step-Down Program, which not only allows VDOC to hold prisoners in long-term solitary confinement for reasons that bear no rational relationship to valid penological goals . . . , but also punishes behavior that is recognized as symptomatic of the very harms solitary confinement causes."). Accordingly, the R&R's finding that Class Plaintiffs alleged an Eighth Amendment violation is rooted in numerous factual allegations in the Complaint, which pleads that "the conditions of the [P]laintiffs' indefinite and long-term solitary confinement ha[ve] violated their right to be free from cruel and unusual punishment under the Eighth Amendment." R&R 76; *see* Compl. ¶¶ 197-98 (describing the psychological and physiological harms caused by prolonged solitary confinement); *id.* ¶ 200 ("VDOC's Step-Down Program does not ameliorate these deprivations, harms, or risks; rather, it exacerbates them."); *id.* ¶ 203 ("VDOC's Step-Down Program deliberately inflicts unnecessary and wanton pain.").

In reaching her conclusion, the Magistrate Judge identified numerous factual allegations that prisoners in solitary confinement "spend 22 to 24 hours a day alone within their small cells," "receive all meals in their cells," "are exposed to constant noise, noxious smells and light," are prevented from having "any type of meaningful interpersonal contact or social interaction with staff or other prisoners," "must strip naked and be subject to 'dehumanizing' cavity searches," are often denied "access to recreation or showers," are "led in shackles by a leash to small outdoor recreation cages devoid of any recreational equipment," are "denied access to any 'productive

activities,'" "receive only one hour of noncontact visitation with family and friends per week," and "are required to perform prison jobs while shackled." R&R 76-77; *see also* Compl. ¶¶ 96-121 (describing the conditions of long-term solitary confinement at Red Onion State Prison and Wallens Ridge State Prison). Based on these facts, the Magistrate Judge found these conditions to be more "onerous" than those the Fourth Circuit has previously held to violate the Eighth Amendment. R&R 78 (citing *Porter*, 923 F.3d at 361).

Second, Defendants attempt to sidestep *Porter v. Clarke* by substituting Class Plaintiffs' well-pleaded allegations with unsupported assertions "regarding [VDOC's] legitimate penological interest in the Step-Down Program." Defs.' Obj. R&R 20. Defendants' argument, however, cannot be made at the pleading stage. *See* Pls.' Mem. Opp'n Mot. Dismiss 2 (citing *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992) (a motion to dismiss does not "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses")). In any event, Defendants ignore the Complaint's factual allegations that Defendants keep Class Plaintiffs in long-term solitary confinement only because of their failure to satisfy the Step-Down Program's requirements, which do not relate to any penological goals. *See* R&R 21-25; Compl. ¶¶ 138-67 ("To determine whether a prisoner should remain in solitary confinement, VDOC directs its staff to evaluate whether the prisoner has remained in his current Phase for the mandatory minimum period . . . . Whether a prisoner finishes filling in the blanks in a workbook [for the Step-Down Program] bears no significant relationship to whether that prisoner poses a substantial security risk to the general population."). Hence, none of these objections can overcome the R&R's findings.

B. The Magistrate Judge Properly Concluded That Class Plaintiffs Sufficiently Alleged That Defendants Subjectively Acted With Deliberate Indifference.

Defendants also lead the Court astray in arguing that the R&R did not make "any finding regarding deliberate indifference." Defs.' Obj. R&R 20. In fact, the R&R considered Class

Plaintiffs' factual allegations and found that the Complaint adequately alleged deliberate indifference. *See* R&R 76-78. Deliberate indifference can be established by allegations (1) of actual knowledge, (2) "that the risk was obvious," or (3) "circumstantial evidence such as the long duration of a cruel prison condition." *Id.* at 78 (citing *Farmer v. Brennan*, 511 U.S. 825, 837, 842 (1994); *Makdessi v. Fields*, 789 F.3d 126, 136 (4th Cir. 2015)). Class Plaintiffs alleged facts supporting all three.

First, the Complaint alleges that Defendants had actual knowledge that solitary confinement posed a risk of serious harm because "[b]y the time the VDOC instituted the Step-Down Program in 2012, medical and scientific literature had consistently documented the severe and often permanent damage caused by prolonged solitary confinement." R&R 28; Compl. ¶¶ 196-204 ("Subsequent studies have established that long-term solitary confinement not only leads to psychological trauma, but also demonstrable neurological and physiological damage.").

Second, these factual allegations show that the risk of serious harm was obvious, as Class Plaintiffs alleged that Defendants received multiple reports and warnings that such conditions were seriously harmful. R&R 28-29; Compl. ¶¶ 122-30, 196-204 (VDOC responded to a report in *The Washington Post* regarding its use of solitary confinement). The Complaint alleges the "long duration" of this "cruel prison condition" because "in 1999, Human Rights Watch ('HRW') released a report identifying major operational deficiencies and human rights violations" at Red Onion and Wallens Ridge which ultimately led to a Department of Justice ("DOJ") investigation, a class action suit filed by the ACLU of Connecticut, and the Connecticut Department of Corrections' withdrawing its prisoners from both prisons. Compl. ¶¶ 122-24; R&R 14-15. The Complaint alleges that VDOC then began its "Progressive Housing Phase Program," which was

"similar to the discredited Phase Program at Mecklenburg." Compl. ¶ 125. In 2011, "three legislators observed" conditions similar to the conditions currently imposed by the Step-Down program and requested that DOJ investigate Virginia's use of solitary confinement. *Id.* ¶¶ 127-28. In 2012, DOJ threatened an investigation into the use of isolation at Red Onion and VDOC promised to address the concerns. *Id.* ¶¶ 128-29. The Complaint alleges that in 2012, VDOC announced the "Segregation Reduction Step-Down Program," which is "little more than a rerun of VDOC's prior failed phase programs." R&R 20; Compl. ¶ 130. Thus, Class Plaintiffs allege facts showing that Defendants imposed these cruel conditions for at least the last twenty years, which is ample circumstantial evidence of Defendants' knowledge that these conditions posed a substantial risk of harm.

Third, the Magistrate Judge also noted that the Fourth Circuit has at least twice held that solitary confinement conditions lead to the very harms alleged in the Complaint. R&R 78 ("The court held that keeping prisoners in a cell at least 23 hours a day, alone, with 'no access to congregate religious, educational, or social programming' posed 'a substantial risk of serious psychological and emotional harm.'" (quoting *Porter*, 923 F.3d at 357)); *id.* ("[T]he court recognized that '[p]rolonged solitary confinement exacts a heavy psychological toll . . . .'") (quoting *Incumaa*, 791 F.3d at 534)).

Thus, the Magistrate Judge did not err in finding that Class Plaintiffs adequately alleged facts showing that Defendants imposed a sufficiently serious deprivation of a basic human need with deliberate indifference to the risk of harm caused by Class Plaintiffs' conditions of confinement. Defendants' objections cannot overcome those well-pleaded factual allegations.[5]

[5] As in their motion to dismiss, Defendants fail to address Class Plaintiffs' separate Eighth Amendment claim that "the Step-Down Program also violates the Eighth Amendment because it lacks a legitimate justification and that the deprivations it imposes therefore inflict unnecessary

V. THE MAGISTRATE JUDGE CORRECTLY CONCLUDED THAT DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The Magistrate Judge correctly recommended that the Individual Defendants are not entitled to qualified immunity, which would immunize them from Class Plaintiffs' damages claims under § 1983. R&R 81.[6] Of course, Class Plaintiffs also bring claims against the Individual Defendants under the Constitution itself for "declaratory and injunctive relief" (R&R 31), from which qualified immunity provides no protection. *See, e.g.*, Compl. ¶¶ 266-68, 272. Nonetheless, to overcome the affirmative defense of qualified immunity, "'a plaintiff must demonstrate that: (1) the defendant violated the plaintiff's constitutional rights, and (2) the right in question was clearly established at the time of the alleged violation.'" R&R 79 (quoting *Adams v. Ferguson*, 884 F.3d 219, 226 (4th Cir. 2018)); *see also* Pls' Mem. Opp'n Defs.' Mot. Dismiss 15. Defendants object that the Magistrate Judge erred by (1) defining the rights at issue too broadly and (2) relying "on decisions that did not 'clearly establish' the rights until long after the conduct challenged in the Complaint.'" Defs.' Obj. R&R 22. Neither argument holds water.

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and wanton pain on Plaintiffs." Pls.' Mem. Opp'n Defs.' Mot. Dismiss20-21 (internal quotations and citations omitted). The Magistrate Judge concluded that the Complaint stated this claim. *See* R&R 29, 77 (discussing Step-Down Program's infliction of "uncessary and wanton pain"); *id*. at 80 (discussing Class Plaintiffs' clearly established right "to avoid deprivations that were not motivated by any legitimate penological jusitifications"). Defendants' failure to specifically object counsels adoption of this conclusion. *See Diamond*, 416 F.3d at 315.

[6] *See also Ex parte Young*, 209 U.S. 123, 155-56 (1908) (permitting federal courts to enjoin state officials from enforcing unconstitutional state laws). Defendants' reliance on *Forsyth* and *Saucier* does not answer Class Plaintiffs' claims for equitable relief (Defs.' Obj. R&R 22), as the immunity from suit described in those cases involves only the "entitlement not to have to answer for [] conduct in a civil damages action." *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) (evaluating qualified immunity defense in § 1983 action for damages) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)); *see also Saucier v. Katz*, 533 U.S. 194, 199 (2001) (evaluating qualified immunity defense in *Bivens* action for damages).

A. The Magistrate Judge Articulated Class Plaintiffs' Clearly Established Constitutional Rights In A Sufficiently Particularized Manner.

As in their motion, Defendants' argument that the Magistrate Judge framed Class Plaintiffs rights at "too high a level of generality" boils down to an objection that no case had produced a liability determination that the *Step-Down Program* violated the Eighth Amendment, Due Process Clause, or Equal Protection Clause. Defs.' Obj. R&R 2, 23, 25 n.15, 26 n.17. But that is not the standard, as the Magistrate Judge correctly concluded. R&R 81 ("defendants' argument rests on too narrow a view of the issue before the court"). A right may be clearly established in a "particularized" manner, when "controlling authority . . . specifically articulates the right" or where a "'general constitutional rule already identified in the decisional law . . . appl[ies] with obvious clarity to the specific conduct in question." R&R 79-80 (quoting *United States v. Lanier*, 520 U.S. 259, 271 (1997)). Officials "'can still be on notice that their conduct violates established law even in novel factual circumstances.'" Pls' Mem. Opp'n Defs.' Mot. Dismiss 15 (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)).

The qualified immunity inquiry here was whether Class Plaintiffs' rights were clearly established, not whether a prior case already has ruled the Step-Down Program in particular violates those rights.[7] *See, e.g.*, *Latson v. Clarke*, 249 F. Supp. 3d 838, 866 (W.D. Va. 2017). Likewise, *Mullenix* and *Anderson* did not require the Magistrate Judge to define Class Plaintiffs' Eighth Amendment rights more narrowly, as Defendants argue. Defs. Obj. R&R 23-25, 25 n. 14.

[7] Thus, the cases Defendants cite in which *pro* se prisoners failed to offer sufficient evidence to save § 1983 claims against the Step-Down Program from summary judgment are inapposite. *See, e.g.*, Obj. Br. 25-27 & nn.15, 17. In any event, the Magistrate Judge did not need to consider these cases because, as Class Plaintiffs explained below, "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.'" Pls' Mem. Opp'n Defs.' Mot. Dismiss 17 (quoting *Booker v. S.C. Dep't of Corr.*, 855 F.3d 533, 538 n.1, 543 (4th Cir. 2017)).

"A court does not require a case directly on point," (*Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015)), only that the "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," (*Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). Any reasonable prison official can understand that placing prisoners in indefinite and long-term solitary confinement "not motivated by any legitimate penological purpose" violates the Eighth Amendment. R&R 80. The R&R's articulation of Class Plaintiffs' other constitutional rights also closely tracked that of the Fourth Circuit, including in *Sweet*, *Hewitt*, *Incumaa*, *King*, *Latson*, *Williams*, *Porter*, and *Smith*.[8]

B. The Magistrate Judge Correctly Concluded That Class Plaintiffs' Constitutional Rights Were Clearly Established During The Time Period Covered By The Complaint.

The Magistrate Judge also correctly concluded that Class Plaintiffs' rights under the Eighth Amendment, Due Process Clause, and Equal Protection Clause were clearly established during the time period covered by the Complaint's § 1983 claims:

[8] *See Sweet v. S.C. Dep't of Corrs.*, 529 F.2d 854, 861-62 (4th Cir. 1975) (Equal Protection Clause bars officials from treating similarly situated inmates differently, and solitary confinement must bear "some reasonable relation to the purpose for which the individual is committed"); *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983) (prisoners have the right to "periodic review" of their confinement and "administrative segregation may not be used as a pretext for indefinite confinement of an inmate"); *Incumaa*, 791 F.3d at 534 (prisoners are "entitled to periodic review" of their administrative segregation); *King v. Rubenstein*, 825 F.3d 206, 220 (4th Cir. 2016) (Equal Protection Clause forbids prison officials from treating a prisoner "differently from others with whom he is similarly situated [as] a result of intentional or purposeful discrimination"); *Latson*, 249 F. Supp. 3d at 866-67 (right to "humane conditions of confinement" was clearly established); *Williams v. Sterling*, 912 F.3d 154, 188 (4th Cir. 2018) (expanding *Hewitt* to apply in jails and denying qualified immunity); *Porter*, 923 F.3d at 357 (right to be free of "serious psychological and emotional harm" caused by solitary confinement without a valid penological purpose); *Smith*, 964 F.3d at 275 (right to be free of "confinement conditions [that] are atypical and substantially harsh in relation to the ordinary incidents of prison life").

1. Class Plaintiffs' Eighth Amendment right to be free from inhumane conditions of confinement without a sufficient penological purpose was clearly established by 1975. The Fourth Circuit's 1975 decision in *Sweet* held that "[w]hether prolonged or indefinite duration may offend constitutional standards will depend on whether the above standards of confinement are observed, and whether the confinement 'bear[s] some reasonable relation to the purpose for which the individual is committed.'" *Sweet*, 529 F.2d at 861 (quoting *Jackson v. Indiana*, 406 U.S. 715, 738 (1972)). Eight years later, in *Hewitt*, the Supreme Court stressed that officials must periodically review "whether a prisoner remains a security risk." *Hewitt*, 459 U.S. at 477 n.9. Thus, as the R&R concluded, Class Plaintiffs had a clearly established right to be free from inhumane conditions of confinement and "to avoid deprivations that were not motivated by any legitimate penological justification" decades before *Latson* found that VDOC violated these clearly established rights in 2014. R&R 80 (citing *Latson*, 249 F. Supp. 3d at 867 (holding that "these rights were clearly established at the time of the events described in the Amended Complaint," which occurred in early 2014)).

Contrary to Defendants' assertion (Defs.' Obj. R&R 25-26), the Magistrate Judge did not state that Class Plaintiffs' Eighth Amendment rights were not clearly established until *Porter* in 2019. Rather, the R&R only cites to *Porter*'s recognition that the right to freedom from onerous solitary confinement conditions was established *earlier*, by the Fourth Circuit's 2015 decision in *Incumaa*. R&R 80 (citing *Porter*, 923 F.3d at 357 ("this Court stated that '[p]rolonged solitary confinement exacts a heavy psychological toll that often continues to plague an inmate's mind even after he is resocialized'" (quoting *Incumaa*, 791 F.3d at 534))). *Porter* itself also illustrates that the Eighth Amendment law was clearly established years before 2019 because Porter's suit was filed in November 2014. *Porter*, 923 F.3d at 371.

2. Class Plaintiffs' due process right to meaningful and periodic administrative segregation reviews was clearly established by 1983. As the Magistrate Judge explained, the right to meaningful and periodic review of solitary confinement was extant in 1983, under the Supreme Court's decision in *Hewitt*. R&R 81 (quoting *Hewitt*, 459 U.S. at 477 n.9). The Supreme Court reiterated this right two decades later. *See Wilkinson v. Austin*, 545 U.S. 209, 224 (2005). As the Magistrate Judge also noted, the Fourth Circuit itself likewise reaffirmed the right to meaningful review of solitary confinement in this Circuit in *Incumaa*. R&R 81 (citing 791 F.3d at 531-32); *see also Williamson v. Stirling*, 912 F.3d 154, 189 (4th Cir. 2018).

Defendants' suggestion that this history should be met with "skepticism" misrepresents a footnote in *Smith*. Defs.' Obj. R&R 26. Specifically, the *Smith* Court was skeptical of *Defendants'* qualified-immunity arguments because (1) unpublished and published district court decisions cited by *Defendants* lacked precedential value, and (2) Smith's right to due process *was* clearly established under *Incumaa*. *See Smith*, 964 F.3d at 282 n.11 (quoting *Booker*, 855 F.3d at 545; *Williamson*, 912 F.3d at 189).

3. Class Plaintiffs' Equal Protection right not to be treated differently from other prisoners with whom they are similarly situated was clearly established by 1975. The Magistrate Judge also properly concluded that Class Plaintiffs' equal protection rights were clearly established at all relevant times. The Fourth Circuit found, as early as 1975, that the Equal Protection Clause requires that similarly situated prisoners not be treated differently and that their solitary confinement bear "some reasonable relation to the purpose for which the individual is committed." *Sweet*, 529 F.2d at 861, 868. In 2001, the Fourth Circuit again acknowledged that a prisoner has a right not to be "treated differently from others with whom he is similarly situated" without "justifi[cation] under the requisite level of scrutiny." *Morrison*, 239 F.3d at 654. The

Fourth Circuit reaffirmed its recognition of that right in 2016, evaluating a 2014 suit under rational-basis review. *King*, 825 F.3d at 220.

Defendants' objection offers no case to support the bare assertion that this right was not clearly established at the time of Defendants' misconduct. Instead, Defendants' rebuttal once again rests entirely on two *unpublished* district court opinions that addressed only the sufficiency of *pro se* plaintiffs' evidence that the Step-Down Program violated the Equal Protection Clause, rather than whether the Equal Protection *right* was clearly established. Defs.' Obj. R&R 25 n.15; Defs.' Mem. Supp. Mot. Dismiss 25. As explained below (Pls.' Mem. Opp'n Defs.' Mot. Dismiss. 24-25), unpublished and district court decisions "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 v. Carter*, 85 F.3d 1113, 1118 (4th Cir. 1996))). As such, Defendants' objections cannot disturb the R&R's conclusion that the Equal Protection right was clearly established before 2019.

VI. THE MAGISTRATE JUDGE CORRECTLY CONCLUDED THAT CLASS PLAINTIFFS STATED ADA AND RA CLAIMS

Defendants misleadingly suggest that, having recommended dismissal of the individual-capacity claims under the ADA and RA, the Magistrate Judge "neglected to recommend dismissal of the corresponding official-capacity claims." Defs.' Obj. R&R 28. First, the Magistrate Judge was presented with the opportunity to dismiss the individual Defendants from the ADA and RA claims, yet did not because including the individual Defendants is neither improper nor duplicative. Second, Class Plaintiffs sufficiently pleaded discrete violations occurring during the limitations period, and the R&R correctly concluded that the Complaint was not clear as to when class members realized that they were being discriminated against. Third, the Magistrate Judge correctly considered Class Plaintiffs' allegations that their disabilities prevented them from

meaningfully interacting with the Step-Down Program, which is the benefit through which prisoners may progress out of segregation. Lastly, the Magistrate Judge correctly concluded that Class Plaintiffs adequately pleaded ADA and RA claims by considering the plethora of factual allegations that support an inference that class members suffered from mental disabilities that were obvious to Defendants.

A. Class Plaintiffs' ADA Claims Against The Individual Defendants Are Not Duplicative Of Their Claims Against VDOC.

Defendants argue that the Magistrate Judge should have dismissed the ADA and RA claims against the individual Defendants as "duplicative" of these claims against VDOC, citing case law noting that such claims *can* be dismissed as duplicative, but which do not *compel* that result. Defs.' Obj. R&R 28 (citing *Latson*, 259 F. Supp. 3d at 856 ("Where a plaintiff has named the entity as well, an official-capacity claim *can* be dismissed as duplicative.") (emphasis added)). However, "it is established that individual officers can be named in their official capacities even if the entity is also a party." *Cole v. Buchanan County Sch. Bd.*, 504 F. Supp. 2d 81, 85 n.4 (W.D. Va. 2007) (citing *Chase v. City of Portsmouth*, 428 F. Supp. 2d 487, 489-90 (E.D. Va. 2006)). This takes on greater importance where, as here, "the alleged violations of [Class Plaintiffs'] rights occurred because of specific individuals" sued here as Defendants. *See Chase*, 428 F. Supp. 2d at 489.

B. The Magistrate Judge Correctly Found that Class Plaintiffs' ADA and RA Claims Are Not Barred By The Statute Of Limitations.

Defendants argue that the Class Plaintiffs' ADA and RA claims are time-barred because Class Plaintiffs have not identified "at least one act of alleged discrimination within the limitations period for the continuing violation doctrine to apply" and "do not challenge a recent, discrete act of discrimination but, instead, ongoing effects from an allegedly discriminatory act in the distant past." Defs.' Obj. R&R 29. But, Class Plaintiffs *do* allege such acts, when they allege that the Building Management committee "holds internal status review sessions on a monthly basis" and

"reviews whether a prisoner's progress in the three Step-Down Categories merits progression to the next phase." Compl. ¶ 169. Because the Complaint alleges facts showing that Defendants discriminate against Class Plaintiffs each time they apply these criteria to retain a disabled prisoner in solitary confinement, each review decision constitutes "a series of separate acts" that restarts the limitations period. *See* Defs.' Obj. R&R 29 (citation omitted). Put simply, the Complaint adequately alleges that "[D]efendants' violations . . . are continuing" (R&R 82-83), in the form of a "discrete act[] of discrimination" (Defs.' Obj. R&R 29 (citing *Jersey Heights Neighborhood Ass'n v. Glendening*, 174 F.3d 180, 189 (4th Cir. 1999))).

In any event, Defendants do not challenge the Magistrate Judge's conclusion "that each of the [Class Plaintiffs] suffered from serious mental health issues, which could have affected their ability to recognize their injuries." R&R 84. Indeed, the Magistrate Judge was correct in concluding that the Complaint "does not clearly state when each [Class Plaintiff] first experienced the alleged discrimination based on their mental disabilities." *Id.*; *accord Nasim v. Warden, Md. House of Corr.*, 64 F.3d 951, 955 (4th Cir. 1995) (concluding that a cause of action does not accrue until "the plaintiff possesses sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action"). Because Defendants assert an affirmative statute-of-limitations defense, and such facts do not "'clearly appear[] *on the face of the complaint*,'" (*Goodman v. PraxAir, Inc.*, 494 F.3d 458, 464 (4th Cir. 2007) (quoting *Richmond, Fredericksburg & Potomac R.R. v. Forst*, 4 F.3d 244, 250 (4th Cir. 1993))), Defendants' objections to the R&R must fail.

C. The Magistrate Judge Correctly Found that Class Plaintiffs Adequately Stated ADA And RA Claims.

First, Defendants mischaracterize Class Plaintiffs' Complaint. Defendants argue that Class Plaintiffs' claims are "fundamentally about segregation" and that "Plaintiffs simply have not alleged any benefit of the Step-Down Program other than the ability to return to the general

population." Defs.' Obj. R&R 32. Yet, Class Plaintiffs allege facts showing that "[t]he Step-Down Program . . . is the only avenue through which prisoners in long-term solitary confinement . . . gain eligibility for assignment to a lower security level classification" (Compl. ¶ 177), and that disabled prisoners' inability to interact meaningfully with the program is because "they receive no accommodations for their mental health disabilities" (*id.* ¶ 215). The Magistrate Judge similarly recognized this. *See* R&R 86 ("[The Complaint] also alleges that, due to . . . mental health problems, [Class Plaintiffs] continue to be housed in solitary confinement, and denied many of the benefits and programs available to other prisoners."). Accordingly, Class Plaintiffs sufficiently allege that prisoners with mental disabilities are unable to access the benefit through which they *progress* out of segregation, not the segregation itself. Therefore, Defendants' arguments must fail, as the Magistrate Judge concluded.

Second, Defendants improperly ignore the well-pleaded Complaint when they assert that the R&R nevertheless erred because Plaintiffs did not allege any request for accommodation or "obvious" need for accommodation as to the policy. *See* Defs.' Obj. R&R 33. This argument is belied by the Complaint, which is replete with factual allegations that Named Plaintiffs and class members are victims of mental illnesses. *See* Compl. ¶ 216 ("Individuals with mental health disabilities are disproportionately represented in prison populations generally and within solitary confinement populations specifically."); *id.* ¶ 216 n.119 ("[A]pproximately 40 percent of inmates have mental illness."); *see also* R&R 4 ("Khavkin suffers from . . . schizoaffective disorder, psychosis, hallucinations . . . ."); Compl. ¶ 26 ("Mr. Khavkin suffers from physical and mental harms . . . including . . . Post-Traumatic Stress Disorder, schizoaffective disorder, psychosis, [and] hallucinations."); R&R 4 ("Wall suffers from . . . post-traumatic stress disorder"); Compl. ¶ 28 ("Mr. Wall suffers from physical and mental harms . . . including . . . Post-Traumatic

Stress Disorder."); R&R 5 ("Cavitt suffers from . . . bouts of disorientation."); Compl. ¶ 30 ("Mr. Cavitt suffers from physical and mental harms . . . including . . . bouts of disorientation."); R&R 7 ("Riddick suffers from schizophrenia . . . [and] bouts of disorientation."); Compl. ¶ 34 ("Mr. Riddick suffers from physical and mental harms . . . including schizophrenia.").

Based on these factual allegations, the R&R correctly found that the need for accommodation was obvious to a reasonable prison official and amounts to discrimination "on account of" Named Plaintiffs' disabilities.[9] *See* R&R 86-87 ("Here, the Plaintiffs have alleged that they suffer from serious mental health conditions, which have caused them to either act out or fail to comply with the requirements of the Step Down Program.") (citing *Kiman v. N.H. Dep't of Corrs.*, 451 F.3d 274, 283 (1st Cir. 2006)); *see also Sydnor v. Fairfax Cty.*, No. 1:10-cv-934, 2011 U.S. Dist. LEXIS 22287, at *28 (E.D. Va. Mar. 3, 2011) ("'It is well settled that a request for accommodation is not required where the disabled individual's need for accommodation is obvious.'") (quoting *Brown v. Cty. of Nassau*, 736 F. Supp. 2d 602, 618-19 (E.D.N.Y. 2011)).

[9] Defendants cite a footnote from *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 n.17 (4th Cir. 2005) to argue that the required intent for an ADA violation is one where a disability "'played a motivating role' in the adverse action." Defs.' Obj. R&R 32. However, in this footnote, the Fourth Circuit merely sought to distinguish the intent requirements of the ADA and RA. *See Constantine*, 411 F.3d at 498 n.17. Numerous courts have interpreted *Constantine* and its progeny to require only discrimination "on the basis of" a disability. *See Reyes v. Clarke*, No. 3:18-cv-611, 2019 U.S. Dist. LEXIS 146237, at *64 (E.D. Va. Aug. 27, 2019) ("[B]ecause of his disability, [Plaintiff] has not been allowed to complete the Step-Down Program and move to general population.") (citing *Constantine*, 411 F.3d at 498). This is akin to but-for causation. *See Baird v. Rose*, 192 F.3d 462, 470 (4th Cir. 1999) (adopting the legal standard that "the prohibited motivation" under the ADA Title II is one that is a "'but-for' cause" of the discrimination (quoting *McNely v. Ocala Star Banner Corp.*, 99 F.3d 1068, 1076 (11th Cir. 1996)). The R&R concluded that Plaintiffs sufficiently alleged such facts. *See* R&R 86; Compl. ¶ 202.

CONCLUSION

The Magistrate Judge carefully considered Defendants' motions to dismiss in light of the detailed factual allegations in Class Plaintiffs' Complaint and prevailing case law, particularly from the Fourth Circuit. With the exception of one reccomendation, to which Class Plaintiffs have timely and properly objected (ECF No. 71), the Magistrate Judge denied Defendants' motions. For the foregoing reasons, Class Plaintiffs respectfully request that this Court adopt the R&R as to the denial of Defendants' motions to dismiss. After considering Class Plaintiffs' single objection, this Court should deny Defendants' motions to dismiss in their entirety.

Dated: October 2, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2020, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF system.

Dated: October 2, 2020

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