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

NICOLAS REYES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 3:18-cv-0611
	)	
HAROLD CLARKE, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN OPPOSITION TO DEFENDANTS'

RULE 12(b)(6) MOTION TO DISMISS

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INTRODUCTION

For over twelve years, Nicolas Reyes has been locked in a small concrete cell at Red Onion State Prison ("RO"), the Virginia Department of Corrections' ("VDOC") most restrictive facility. His isolation is extreme in duration and degree. And because Mr. Reyes is a monolingual Spanish speaker in a prison where virtually everyone speaks English to him and he cannot read or write in any language, it is virtually absolute.

Defendants' cruel treatment of Mr. Reyes is all the more shocking because it is pointless. He is not a threat to others: the claimed basis for continuing to hold him in long-term solitary confinement is his failure to complete a journaling program (the "Step-Down Program") that is administered only in English and requires a level of mental health and literacy that Mr. Reyes does not have.

Mr. Reyes pleads violations of his rights under the Constitution's Cruel and Unusual Punishment Clause, the Due Process Clause, the Equal Protection Clause, and federal anti-discrimination law. In moving to dismiss Mr. Reyes' claims, Defendants portray a version of the Step-Down Program that is entirely divorced from the Complaint's allegations. Rather than providing an avenue out of solitary confinement, this program Defendants tout as "nationally acclaimed" and "laudable" serves to obscure and sanitize Mr. Reyes' torture. Defendants' treatment of Mr. Reyes is cruel, inhumane, arbitrary, and discriminatory, and this Court should deny Defendants' motion to dismiss in its entirety.

STATEMENT OF FACTS

Red Onion is a geographically remote supermax facility whose design accentuates prisoners' isolation and officers' total control. (Compl. ¶¶ 1, 54–57.) Mr. Reyes is held in conditions Defendants know create a substantial risk of serious harm to his mental and physical

health. (*Id.*. ¶¶ 34, 49–50, 194.) They include: 22-24 hours a day in his cell;[1] non-congregate recreation in a small cage (similar to a dog run); a maximum of three showers a week; an invasive and humiliating body cavity search every time he leaves his cell; two fifteen-minute phone calls per month;[2] no contact visits, video visits, television,[3] out-of-cell programming,[4] law library access, or religious services; and a limited commissary list with no food for purchase. (*Id.* ¶¶ 63, 106-31.) Correctional officers routinely deny him even the minimal out-of-cell recreation and showers that VDOC policy allows—often refusing, for example, to take him to shower until his odor is overwhelming. (*Id.* ¶¶ 115, 120, 195.)

Mr. Reyes' solitary cell is just six paces in length with no furnishings but for a bed, a table with no chair, and a toilet with a sink. (*Id.* ¶ 107.) His cell is illuminated at all hours. (*Id.*) There is a window at the back of his cell that Defendants have made opaque. (*Id.* ¶ 119.) A solid, steel door at the front of his cell keeps out nearly all sound and makes meaningful communication nearly impossible. (*Id.* ¶¶ 56-57, 108.) Mr. Reyes eats, sleeps, defecates, and spends nearly every second of his life inside this cell. (*Id.* ¶¶ 130-31.)

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[1] For most of Mr. Reyes' term in solitary confinement, he could have no more than one hour of recreation in the recreation cage five days out of every seven. (*Id.* ¶ 114.) Recently VDOC amended its policy to permit two hours of recreation, five days a week. (*Id.*) In practice, Mr. Reyes receives far less time out of his cell. (*Id.* ¶ 115.)

[2] After six years under this restriction, Defendants moved Mr. Reyes from the most harsh form of solitary confinement, "SM 0," to the second-most harsh form of solitary confinement, "SM 1." (*Id.* ¶ 102.) Defendants' policy provides SM 1 prisoners with one additional fifteen-minute phone call per month. (*Id.* ¶ 123.)

[3] Defendants provided Mr. Reyes a television only 5 months ago when they moved him from SM 0 to SM 1. (*Id.* ¶ 126.)

[4] Mr. Reyes' move to SM 1 means that he now has periodic in-person instruction in the Step-Down Program. (*Id.* ¶¶ 66, 102.)

Such extreme conditions of confinement are uniquely isolating and damaging to Mr. Reyes, who cannot communicate in English and is illiterate and mentally ill. (Compl. ¶¶ 1, 6, 64, 83, 108, 111, 143.) He has lost 50 pounds since entering solitary. (*Id.* ¶ 112.) His mental health has decompensated and will continue to decline. (*Id.* ¶ 132.) He experiences auditory and visual hallucinations and other clear signs of psychosis. (*Id.* ¶¶ 132, 139, 193.) Mental health providers have documented Mr. Reyes' "severe cognitive deficits" (*id.* ¶ 145), "bizarre references to President Bush and the police," and "wide, arching military type salutes" (*id.* ¶ 137). His thought processes are "severely disordered, grandiose, and delusional" (*id.* ¶ 149), he "respond[s] to internal stimuli" (*id.* ¶ 140), and has at times been unable to recall basic information like the year or name of the prison (*id.* ¶ 145, 147). Defendants refuse to accommodate his mental illness by removing him from conditions that ravage his mind. (*Id.* ¶¶ 143, 213.)

Defendants rely on Mr. Reyes' purported refusal to engage in the Step-Down Program to justify his inexplicable retention in long-term solitary confinement. (Compl. ¶¶ 99–105.) Yet they did not include him in the program for years. (*Id.* ¶¶ 99, 103.) Even then, it was inaccessible to him, because it was offered only in English and required cognitive and literacy abilities that he lacked. (*Id.*) Without a true path out of solitary confinement, Mr. Reyes' ongoing isolation is rubberstamped at sham segregation reviews.[5] (*Id.* ¶¶ 5, 81, 98, 100.) Although he does not meet

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[5] Defendants' statement of "facts" brims with provisions from VDOC operating procedures that Mr. Reyes attached as exhibits to his complaint, which Defendants assert Mr. Reyes has thereby incorporated as factual allegations. (Def. Br. at 2 n.2.) But where, as here, an exhibit is attached to the complaint "for purposes other than the truthfulness of the document" in its entirety, "it is inappropriate to treat the contents . . . as true." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 167–68 (4th Cir. 2016). And where "the document is one prepared by or for the defendant [and] may . . . contain self-serving, exculpatory statements," *id.*, like the many self-serving characterizations of the Step-Down Program in Defendants' brief, those statements should not be considered. (*See, e.g.*, Def. Br. ¶ 5: "As described in the governing

(cont'd)

the criteria for long-term solitary confinement, and VDOC has repeatedly acknowledged he is no threat, he remains in solitary confinement today. (*Id.* ¶¶ 73–74, 89, 92, 94–97.)

RO correctional officers regularly castigate and use racist epithets against Mr. Reyes and other Latino prisoners. (*Id.* ¶ 110–11.) They demand he speak in English and use his inability to communicate with them as an excuse to deny him showers and recreation. (*Id.* ¶ 110–11, 128.) Defendants withhold interpretation services at critical junctures, including 90-day segregation reviews, mental health evaluations, and during the program he must complete to leave solitary confinement. (*Id.* ¶¶ 7, 8, 71, 83, 85, 142.) Without Court intervention, Mr. Reyes' needless isolation will continue, and the devastation to his health will compound. (*Id.* ¶ 11.)

STANDARD

In ruling on a motion to dismiss, the court must accept as true all of the factual allegations in the complaint and view those facts in the light most favorable to the plaintiff. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). "The purpose of a Rule 12(b)(6) motion is to test the sufficiency of a complaint." *Edwards v. City of Goldsboro*, 178 F.3d 231, 243 (4th Cir. 1999). Rule 12(b)(6) does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). 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).

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> document, OP 830.A, the program uses 'observable standards' to evaluate inmates and reward those who engage in positive behavior with incremental privileges.")

ARGUMENT

I. Mr. Reyes' Claims Are Timely.

Defendants insist that Mr. Reyes' Eighth Amendment claim is untimely as to Defendant Mathena and that his non-Section 1983 claims (under the Americans with Disabilities Act ("ADA"), Rehabilitation Act ("Rehab Act"), and Title VI) are untimely as to all Defendants. They are incorrect: the claims are timely, because they are continuing violations and involve ongoing, illegal acts plainly within the statute of limitations.

The Fourth Circuit has adopted the continuing violation doctrine in Section 1983 cases for "acts or omissions that demonstrate deliberate indifference to a serious, ongoing medical need." *DePaola v. Clarke*, 884 F.3d 481, 487 (4th Cir. 2018). In *Gonzalez v. Hasty*, the Second Circuit applied the continuing violation doctrine to Eighth Amendment claims based on wrongful retention in solitary confinement, reasoning that such claims "accrue[ ] only after an inmate has been confined in [solitary] for a prolonged period." 802 F.3d 212, 224 (2d Cir. 2015); *see also Turley v. Rednour*, 729 F.3d 645, 651 (7th Cir. 2013) (finding continuing violation claim where prisoner injuries increased in accordance with a series of prison lockdowns).

The continuing violation doctrine also applies to ADA statutory claims, Rehab Act, and Title VI where the "illegal act was a fixed and continuing practice" that was "repeated within the statute of limitations period." *A Soc'y Without a Name v. Virginia*, 655 F.3d 342, 348, 356 (4th Cir. 2011) (quoting *Nat'l Advetr. Co. v. City of Raleigh*, 947 F.2d 1158, 1166 (4th Cir. 1991)); *see also Bell v. Univ. of Maryland Coll. Park Campus Facilities Mgmt.*, No. CV PX-17-1655, 2018 WL 3008325, *6 (D. Md. June 14, 2018) (applicability to Title VI hostile environment claim) (citing *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 115 (2002)); *Moseke v. Miller & Smith, Inc.*, 202 F. Supp. 2d 492, 503–07 (E.D. Va. 2002) (applicability to disability discrimination claims). If the plaintiff can demonstrate that the illegal act did not happen once,

but rather "in a series of separate acts[,] and if the same alleged violation was committed at the time of each act, then the limitations period begins anew with each violation." *A Soc'y Without A Name*, 655 F.3d at 342 (quoting *Nat'l Advert. Co.*, 947 F.2d at 1167); *see also Vanvalkenburg v. Or. Dep't of Corr.*, No. 3:14-CV-00916-BR, 2014 WL 5494895, at *7 (D. Or. Oct. 30, 2014) (ADA claims reach back beyond two-year statute of limitations where prisoner alleged pattern or practice of discrimination and repeated failure to provide ASL interpreters).

Mr. Reyes pleads that Mr. Mathena—former Warden of RO and current chair of VDOC's highest-level authority for reviewing the long-term solitary confinement of prisoners—is engaged in an ongoing violation of his Eighth Amendment rights. He alleges that Mr. Mathena held him in long-term solitary confinement pursuant to the Step-Down Program and failed to remove him from the long-term segregation classification (Level-S) to a less restrictive security level. (Compl. ¶ 180–81.) This is precisely the type of claim to which the continuing violation doctrine applies. *See Montin v. Estate of Johnson*, 636 F.3d 409, 415–16 (8th Cir. 2011) (doctrine could apply if plaintiff suffered "daily" unconstitutional restrictions of liberty); *Siggers v. Campbell*, 652 F.3d 681, 693 (6th Cir. 2011) (suggesting prisoner may state claim if he shows "one, continuing harm and government indifference"). Indeed, given the Eighth Amendment's durational analysis, Mr. Reyes' claims might have been subject to dismissal had he filed before being in solitary confinement for a sufficiently lengthy period. *See Hutto v. Finney*, 437 U.S. 678, 686–87 (1978) (emphasizing duration in Eighth Amendment inquiry); *Gonzalez*, 802 F.3d at 224 (Eighth Amendment contemplates prisoner suffer "some threshold period of time" in the challenged conditions). Mr. Reyes thus alleges a continuing Eighth Amendment violation that extends back to when Defendant Mathena first exhibited deliberate indifference to a serious risk of harm. *DePaola*, 884 F.3d at 487; *Scott v. Clarke*, 64 F. Supp. 3d 813, 828 (W.D. Va. 2014).

The mere fact that Defendant Mathena changed hats from Warden to Director of Security and head of the External Review Team ("ERT") while engaged in a continuing violation of Mr. Reyes' rights does not change this conclusion.

The continuing violation doctrine applies equally to Mr. Reyes' statutory discrimination claims, because he challenges a repeated, ongoing discriminatory practice. In the ADA/Rehab Act context, he challenges Defendants' repeated refusal to allow him to leave solitary confinement without completing the Step-Down Program. (Compl. ¶ 213.) Defendants insist that Mr. Reyes participate in this program despite his plainly debilitating mental illness, and they have so insisted since the program's initiation; moreover, although his mental illness is aggravated by his isolation, Defendants refuse to accommodate his mental health disability by placing him in an alternate setting. (*Id.* ¶¶ 5, 64, 99, 154, 213.) This ongoing practice appears most clearly at 90-day reviews, when Defendants review his classification and progress through the Step-Down Program. (*Id.* ¶ 99.) Mr. Reyes is suffering discrimination in a series of acts, all part of a fixed and continuing practice, and so the continuing violation doctrine applies.

Like his ADA and Rehab Act claims, Mr. Reyes' Title VI claims allege a discriminatory policy or practice instituted over a series of acts, and so the continuing violations rule applies. Defendants enact a discriminatory policy by repeatedly denying him release from solitary confinement for failing to complete a program that he cannot—due to being a Central-American prisoner unable to communicate in English—comprehend. *See Nat'l Advert. Co.*, 947 F.2d at 1166–67. Defendants' contention that Mr. Reyes' Title VI claim is barred by the statute of limitations neglects the ongoing nature of the allegations and would leave Mr. Reyes with no remedy for unlawful discrimination. Indeed, under Defendants' logic, Mr. Reyes would never be able to bring an injunctive claim to stop the ongoing violation of his civil rights; nor may he stop

future violations poised to recur at upcoming solitary-confinement reviews. The statute of limitations is meant to shield against stale claims, not license ongoing civil rights violations.

Finally, the limitations period on Mr. Reyes' ADA and Rehab Act claims is four years, not one, as the Defendants suggest.[6] Neither Title II of the ADA nor the Rehab Act contains a statute of limitations; courts therefore apply either the federal four-year, catch-all limitations period if the claim is made possible by the ADA Amendments Act of 2008, or borrow the statute of limitations from the most analogous state law. *Latson v. Clarke*, 249 F. Supp. 3d 838, 853–54 (W.D. Va. 2017). The 2008 Amendments expand the definition of "disability" under the ADA and Rehab Act to (1) include episodic disabilities and (2) instruct courts to disregard mitigation measures such as medication in determining disability. *Id.* (citing 42 U.S.C. § 12101(4)(D), (E)). Mr. Reyes' disability allegations plausibly arise from both amendments: Defendant McDuffie diagnosed Mr. Reyes with an episodic mental illness (major depression, severe recurrent); and Defendants claim that with medication, Mr. Reyes is not functionally impaired. (Compl. ¶¶ 150–51.) Therefore, Mr. Reyes may rely on the 2008 Amendments for his ADA claim, and the four-year limitations period applies.

II. Mr. Reyes States a Claim that Defendants Violated the Eighth Amendment.

"Confinement in a prison or in an isolation cell is a form of punishment subject to scrutiny under Eighth Amendment standards." *Hutto*, 437 U.S. at 685. Prison conditions that "alone or in combination" deprive prisoners of "the minimal civilized measure of life's necessities," are incompatible with the Eighth Amendment. *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981). And because prisoners "must rely on prison authorities to treat [their] medical

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[6] Courts frequently apply the same statute of limitations period to claims under the ADA and Rehab Act. *Semenova v. Md. Transit Admin.*, 845 F.3d 564, 567 (4th Cir. 2017).

needs," deliberate indifference to a prisoner's "serious illness or injury" states a cause of action under the Eighth Amendment. *Estelle v. Gamble*, 429 U.S. 97, 103, 105 (1976).

The cruel and unusual punishment clause's two prongs require prisoners to allege (1) an objectively serious deprivation and (2) defendants' subjectively culpable state of mind. *Johnson v. Quinones*, 145 F.3d 164, 167 (4th Cir. 1998). Mr. Reyes adequately pleads both prongs.

A. Objective Prong: Sufficiently Serious Conditions and Medical Needs

To satisfy the "sufficiently serious" prong, Mr. Reyes must allege "a serious or significant physical or emotional injury resulting from the challenged conditions," or "a substantial risk of such serious harm resulting from . . . exposure to the challenged conditions." *Scinto v. Stansberry*, 841 F.3d 219, 225 (4th Cir. 2016) (citation omitted). Claims of inadequate mental health care must allege a "serious" medical need that has either "been diagnosed by a physician as mandating treatment or . . . is so obvious that even a lay person would easily recognize the necessity for a doctor's attention." *Id.* And "the length of confinement cannot be ignored in deciding whether the confinement meets constitutional standards." *Hutto*, 437 U.S. at 686.

Mr. Reyes has endured extremely restrictive and isolating conditions as described in his Complaint, *see supra* page 2, for 12+ years. *See Hutto*, 437 U.S. at 686–87 (recognizing "[a] filthy, overcrowded cell and a diet of 'grue' might be tolerable for a few days and intolerably cruel for weeks or months"). Citing substantial evidence that "[p]risoners in long-term solitary confinement exhibit a range of profoundly harmful psychological" and "physiological injuries," and are disproportionately likely to attempt suicide and self-mutilate (Compl. ¶ 35), Mr. Reyes alleges that these conditions pose an "unreasonable risk of lasting harm" (*id.* ¶ 194). *See Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 210 (4th Cir. 2017) (plaintiff's exposure to a "substantial *risk* of serious harm" sufficient). He pleads these conditions deprive him of basic human needs,

including "physical health, mental health and sanity, environmental stimulation, social interaction, exercise, and basic human dignity." (Compl. ¶ 198.) He also describes with particularity the ruinous effect of these conditions on his health and sanity, detailing his 50-pound weight loss, grandiose and disordered thinking, hallucinations, and depression. (*Id.* ¶¶ 2, 148, 149, 153–154, 193.) This more than satisfies the Eighth Amendment's objective prong.

The Eighth Amendment cases relied on by Defendant, *Mickle v. Moore*, 174 F.3d 464 (4th Cir. 1999) and *Sweet v. South Carolina Dep't of Corr.*, 529 F.2d 854 (4th Cir. 1975) (en banc) do not support dismissal of Mr. Reyes' Complaint. *First*, in *Mickle* and *Sweet*, plaintiffs failed to amass sufficient evidence of an Eighth Amendment violation to prevail (*Mickle* on summary judgment, *Sweet* at trial). In contrast, here, upon a motion to dismiss, Mr. Reyes' allegations are taken as true and, as such, state an Eighth Amendment claim.[7]

Second, the prisoners in *Mickle* and *Sweet* failed to demonstrate the risk of (or serious psychological and physiological harm from) the alleged conditions. *Mickle* pointed to this evidentiary deficiency in upholding the district court's summary judgment for defendants. 174 F.3d at 472. The only evidence of injury was "affidavits of a few inmates asserting . . . 'great stress' and 'great emotional and physical suffering.'" *Id.* Because this slim record of a generally "depressed mental state" was not so different from the type of depression experienced by any prisoner, it did not "rise to the level of the 'serious or significant physical or emotional injury,'"

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[7] *See Quintanilla v. Bryson*, 730 F. App'x 738, 747 (11th Cir. 2018) (reversing dismissal of Eighth Amendment claim that prisoner was denied adequate food, exercise, and human contact, and directing fact development); *Finley v. Huss*, 723 F. App'x 294, 295–96 (6th Cir. 2018) (reversing dismissal of mentally ill prisoner's claim that solitary confinement placement violated his Eighth Amendment rights); *Latson*, 249 F. Supp. 3d at 860 (denying motion to dismiss and finding "plausible that the alleged conditions combined to deprive [plaintiff] of the single, identifiable human need of mental health and sanity").

necessary to withstand summary judgment on an Eighth Amendment claim. *Id.* (quoting *Strickler v. Waters*, 989 F.2d 1375, 1381 (4th Cir. 1993)).

Sweet did not involve any psychological harm from restrictive conditions of confinement. 529 F.2d 854. Its Eighth Amendment analysis highlights the need for some showing of "the effect of the deprivation to which the prisoner was subjected in terms of 'his physical or mental health.'" *Id.* at 866 n.30 (quoting *Sostre v. McGinnis*, 442 F.2d 178 (2d Cir. 1971)). *Sweet* remanded to the district court on two questions relevant here: the constitutionality of restrictions on recreation and showers. *Id.* at 866. *Sweet*'s discussion of the recreation restriction emphasizes both the duration of the restriction and the effect on the plaintiff's health as critical factors, holding that the evidence that the plaintiff was allowed outdoors to recreate just twice a week for an hour could violate the Eighth Amendment where extended beyond a "relatively short period." *Id.*

Mr. Reyes' allegations sharply differ from the evidence before the *Mickle* and *Sweet* courts. The particularly restrictive conditions of his solitary confinement have already caused him harm well above the normal depression that one would expect to accompany incarceration. (Compl. ¶¶ 2 (depression, disordered thinking, and routine hallucinations), 112–113 (substantial weight loss), 139 (psychosis), 141 (paranoia and anxiety), 145 (possible psychosis and severe cognitive deficits), 150 (diagnosed with major depression and prescribed an anti-depressant for depression and disordered thinking).) Moreover, Mr. Reyes' 12+ years in solitary confinement far exceeds the lengths of time at issue in *Mickle* (three years) and *Sweet* (five years).

Third, the Eighth Amendment's evolving standards of decency inquiry and the recent, compelling literature on the psychological damage of solitary confinement precludes reliance on nearly two-decades-old precedent. No static test exists for courts to determine whether

conditions of confinement are cruel and unusual "for the Eighth Amendment 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'" *Rhodes*, 452 U.S. at 346 (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)); *see also Sweet*, 529 F.3d at 860 ("[C]hanging concepts of civilized conduct and treatment" inform Eighth Amendment analysis). "The Eighth Amendment 'is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.'" *Hall v. Florida*, 572 U.S. 701, 708 (2014) (quoting *Weems v. United States*, 217 U.S. 349, 378 (1910)).

This Court made this very point in *Porter v. Clarke*, finding that the conditions for death-row prisoners in solitary confinement constituted cruel and unusual punishment, *Mickle* notwithstanding. 290 F. Supp. 3d 518, 529, 533 (E.D. Va. 2018).[8] "Given the rapidly evolving information available about the potential harmful effects of solitary confinement—and the explicit incorporation of contemporary standards of decency into the Eighth Amendment standard," the Court was "not bound by the decades-old determinations made by the Fourth Circuit . . . on which defendants rely." *Id.* at 529.

Due to the scientific consensus that solitary confinement imposes grave harm, numerous reforms are afoot. For example, following a 2013 GAO report on the Federal Bureau of Prisons' ("BOP") use of solitary, BOP reduced its solitary population and agreed to independent assessment of its practices.[9] This change is not isolated to federal policy; in the past decade at

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[8] Defendants have appealed the summary judgment grant for the plaintiffs in *Porter*; the case is currently pending before the Fourth Circuit.

[9] U.S. GAO, Improvements Needed in [BOP] Monitoring and Evaluation of Impact of Segregated Housing, at 61–65, May 2013, http://www.gao.gov/assets/660/654349.pdf.

least thirty states have reported measures to eliminate or improve conditions of solitary confinement.[10]

Leading correctional associations condemn the practice of holding mentally ill prisoners in solitary confinement. The American Corrections Association ("ACA") has concluded that seriously mentally ill prisoners should not be held in prolonged solitary confinement.[11] And the president-elect of the Association of State Correctional Administrators ("ASCA") "believe[s] that lengthy stays [in solitary confinement] manufacture or increase mental illness."[12]

Since 1999, three Supreme Court justices have expressed grave doubts as to the constitutionality of solitary confinement. Justice Kennedy has decried "[t]he human toll wrought by extended terms of isolation[.]" *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (concurring). Justice Breyer has observed that "it is well documented that . . . prolonged solitary confinement produces numerous deleterious harms" including hallucination, panic, paranoia, and self-mutilation. *Glossip v. Gross*, 135 S. Ct. 2726, 2765 (2015) (dissenting). And Justice Sotomayor recently emphasized the devastating harms inflicted by solitary confinement, cautioning that "[a] punishment need not leave physical scars to be cruel and unusual." *Apodaca v. Raemisch*, Nos. 17-1284 & 17-1289, 2018 WL 4866124, at *1 (U.S. Oct. 9, 2018) (denial of cert.).

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[10] Maurice Chammah, *Stepping Down from Solitary Confinement*, The Atlantic, Jan. 7, 2016, https://www.theatlantic.com/politics/archive/2016/01/solitary-confinementreform/422565.

[11] *See* ACA, *Performance Based Practices for Adult Local Detention Facilities* (4th ed. 2004); ACA, *Restrictive Housing Performance Based Standards* 41, 69 (2016). The ACA defines "Extended Restrictive Housing" as "more than 30 days" of "[h]ousing that separates the offender from contact with general population while restricting an offender/inmate to his/her cell for at least 22 hours per day." ACA, *Restrictive Housing*, at 3.

[12] Gary C. Mohr and Rick Raemisch, *Restrictive Housing: Taking the Lead*, Corrections Today (2015), http://www.asca.net/pdfdocs/6.pdf.

The Fourth Circuit has also observed that "[p]rolonged solitary confinement exacts a heavy psychological toll that often continues to plague an inmate's mind even after he is resocialized." *Incumaa v. Stirling*, 791 F.3d 517, 534 (4th Cir. 2015) *as amended* (July 7, 2015).[13] Mr. Reyes' allegations therefore satisfy the Eighth Amendment's objective prong.

B. Subjective Prong: Deliberate Indifference

The second prong of the Eighth Amendment requires that defendants act with "deliberate indifference to inmate health or safety." *King v. Rubenstein*, 825 F.3d 206, 219 (4th Cir. 2016) (quoting *Odom v. S.C. Dep't of Corr.*, 349 F.3d 765, 770 (4th Cir. 2003)). "[I]t is satisfied by something less than acts or omissions for the very purpose of causing harm or with knowledge that harm will result." *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 835 (1994)). The infliction of pain "without penological justification" satisfies the subjective prong, *Rhodes*, 452 U.S. at 346, as does a subjectively reckless disregard for serious mental or physical needs. *Farmer*, 511

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[13] The uniquely destructive effects of prolonged solitary confinement are increasingly recognized by the federal judiciary. *E.g.*, *Wallace v. Baldwin*, 895 F.3d 481, 484–85 (7th Cir. 2018) (noting the "'scientific consensus . . . that prisoners held in solitary confinement experience serious, often debilitating—even irreparable—mental and physical harms,' including an increased risk of suicide." (citation omitted)); *Palakovic v. Wetzel*, 854 F.3d 209, 225–26 (3d Cir. 2017) (describing the "robust body of legal and scientific authority recognizing the devastating mental health consequences caused by long-term isolation in solitary confinement"); *Shepard v. Quillen*, 840 F.3d 686, 691 (9th Cir. 2016) (recognizing significant harm suffered by prisoners in solitary confinement); *Scarver v. Litscher*, 434 F.3d 972, 977 (7th Cir. 2006) (solitary confinement "aggravated the symptoms of [a prisoner's] mental illness and by doing so inflicted severe physical and especially mental suffering"); *Porter*, 290 F.Supp.3d at 530–31 ("[P]rolonged isolation and lack of stimulation can have devastating psychological and emotional consequences."); *Latson*, No. 249 F. Supp. 3d at 847 ("[T]he impacts of solitary confinement can be similar to those of torture and can include a variety of negative physiological and psychological reactions," effects that "are amplified in individuals with mental illness."); *Braggs v. Dunn*, 257 F. Supp. 3d 1171, 1193 (M.D. Ala. 2017) (solitary confinement "subject[ed] mentally ill prisoners to actual harm and a substantial risk of serious harm—including worsening of symptoms . . . .self-harm and suicide").

U.S. at 839–40; *Johnson*, 145 F.3d at 168. "[P]laintiffs may be able to prove deliberate indifference with circumstantial evidence, such as a particularly obvious risk of harm or the lack of a penological objective for the conditions of confinement." *Porter*, 290 F. Supp. 3d at 532; *see Hope v. Pelzer*, 536 U.S. 730, 738 (2002) (courts "may infer the existence of this subjective state of mind [deliberate indifference] from the fact that the risk of harm is obvious").

Defendants, all of whom work in corrections and have experience with the use of solitary confinement, are all alleged to be aware of the serious negative effects of prolonged solitary confinement. (Compl. ¶¶ 34, 49–50, 194.) "Given defendants' status as corrections professionals, it would defy logic to suggest that they were unaware of the potential harm that the lack of human interaction . . . could cause." *Porter*, 290 F. Supp. 3d at 532.

Defendants' policies purportedly requiring solitary confinement prisoners to be "constantly checked by medical and mental-health personnel" (Def. Br. at 14), confirms their subjective awareness of the risks of solitary confinement. *Porter*, 290 F. Supp. 3d at 532 ("defendants' practice to have death row inmates 'constantly checked by medical and mental-health personnel' evinces their awareness that those conditions create a significant risk of harm for the death row inmates").[14] Defendants' reliance on these measures as proof they abate these risks merely raises questions of fact not amenable to resolution on a motion to dismiss.[15] Mr.

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[14] VDOC procedures limiting disciplinary segregation to less than thirty-one days was further evidence of their awareness of the risks of such confinement. *Porter*, 290 F. Supp. 3d at 532.

[15] Defendants wrongly insist that *Mickle* controls, because it considered evidence of protective measures for prisoners in solitary confinement in upholding the district court's summary judgment ruling. (Def. Br. at 14.) *Mickle* involved an entirely different prison system and different policies and procedures. It cannot stand for the proposition that *any* prison policy providing for "periodic visits by medical personnel" and "referral of inmates displaying mental health problems for treatment" conclusively precludes a finding of deliberate *(cont'd)*

Reyes alleges Defendants have caused and/or exacerbated his mental illness by imposing inhumane conditions of confinement; provision of mental health care to lessen the blow does not absolve them of responsibility. If it did, guards could break a prisoner's leg but avoid liability by providing a wheelchair and "escape a deliberate-indifference claim by fetching a band-aid" for "an inmate [who] is hemorrhaging." *Finley*, 723 F. App'x at 298.

Mr. Reyes' medical record from his time in solitary confinement is replete with textbook signs of mental decompensation. (Compl. ¶¶ 134 ("hollering, screaming, and dancing around his cell"), 137 ("crying 'profusely' and 'making bizarre references to President Bush, the police, and making wide, arching military type salutes'"); 140 ("responding to internal stimuli"); 141 ("paranoia"); 145 ("unaware of building, town, and year"); 149 ("severely disordered, grandiose and delusional thinking").) Had Defendants consistently used a Spanish-language interpreter with Mr. Reyes, they would likely have even greater knowledge of the severity of his suffering. Burying their heads in the sand does not make their indifference to his needs any less deliberate. *See United States v. Forbes*, 64 F.3d 928, 934 (4th Cir. 1995) ("[K]nowledge may be inferred from deliberate avoidance of learning the truth."). For these reasons, Mr. Reyes' allegations satisfy the Eighth Amendment's subjective prong.

C. The Eighth Amendment Allegations Are Sufficient Against Each Defendant.

Despite Defendants' claims to the contrary, Mr. Reyes' claims allege the direct involvement and subjective indifference of each Defendant named in his suit.

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indifference. (*Id.*) *See, e.g.*, *Scott*, 64 F. Supp. 3d at 834 (evidence of deliberate indifference to prisoners' medical needs shown despite VDOC hiring a private company to provide care to prisoners).

Defendant Mathena does not challenge the adequacy of the pleadings against him as the former RO Warden; he instead argues that Mr. Reyes fails to allege that he acted with subjective indifference in his current role as head of Security Operations for VDOC.

With respect to his position as Security Operations Manager, Mr. Mathena argues Mr. Reyes fails to allege he acted with subjective indifference. To the contrary, Mr. Mathena's duties require his personal involvement in decisions as to the ongoing solitary confinement of prisoners including Mr. Reyes. (Compl. ¶¶ 80, 182.) VDOC policy states that in this role Mr. Mathena is responsible for performing twice-yearly ERT reviews of the ongoing need for Mr. Reyes' solitary confinement and removing prisoners from long-term solitary confinement if warranted. (*Id.* ¶¶ 80, 182.) Although Mr. Reyes does not meet Level S criteria, Mr. Mathena has made no efforts to move him to lower security. (*Id.* ¶ 89.) As a corrections professional, it would "defy logic" to suggest that Mr. Mathena "was unaware of the potential harm" to Mr. Reyes from living in solitary confinement at RO for *over a decade*. *Porter*, 290 F. Supp. 3d at 532. That is subjective indifference to a serious risk of harm. The allegations against Mr. Mathena are therefore adequate as to both roles.

Defendant Gallihar contends that despite his role as Chief of Housing and Programs for RO and his concomitant key role on two administrative entities (the Dual Treatment Team ("DTT") and Building Management Committee) charged with ensuring that prisoners are not inappropriately held in long-term solitary confinement, his personal involvement is insufficiently pleaded. (*Cf.* Compl. ¶ 183–84 and Def. Br. at 15.) Not so.

The DTT is "responsible for reviewing solitary confinement classifications and making recommendations as to whether prisoners are properly classified," and "review[ing] mental health assessments to determine appropriate housing." (Compl. ¶ 80.) Mr. Gallihar and the DTT

continuously failed to provide "meaningful review or oversight of segregation decisions," including Mr. Reyes' ongoing solitary confinement. (*Id.* ¶ 91.) He has "abdicated his responsibility as a member of the DTT to advise the Regional Operations Chief and Warden that Mr. Reyes does not meet the criteria for segregation." (*Id.* ¶ 183.) In his position on the Building Management Committee, Mr. Gallihar "is responsible for assigning, or in the alternative, for recommending offenders to SM 0, SM 1, and SM 2 privilege levels." (*Id.* ¶ 184.) With Mr. Gallihar on the Building Management Committee and serving as Chief of Housing and Programs, Mr. Reyes remained at the lowest "privilege" level, SM 0, for six uninterrupted years. (*Id.* ¶¶ 102, 184.) And in light of his work "review[ing] mental health assessments to determine appropriate housing" (*id.* ¶ 80), Mr. Reyes plausibly alleges that Mr. Gallihar had actual notice of his decompensation during this time (*id.* ¶ 194).

Defendants Justin Kiser, Gilbert, Adams and **Lambert** claim Mr. Reyes does not allege sufficient facts to establish that they "knew of a substantial risk of harm . . . yet failed to act." (Def. Br. at 16.) To the contrary, the Complaint alleges their direct involvement in Defendants' refusal to move Mr. Reyes out of solitary. (Compl. ¶ 187.) Messrs. Justin Kiser, Gilbert, Adams and Lambert participate in Institutional Classification Authority ("ICA") reviews of Mr. Reyes' solitary confinement every 90 days. (*Id.*) At each ICA review, they recommend Mr. Reyes remain at the lowest "privilege" level, SM 0, due to his purported failure to participate in the Step-Down Program. Defendants are obviously aware that Mr. Reyes cannot participate in the English-language, reading and writing-intensive Step-Down Program. (*Id.* ¶¶ 7, 64, 103.) Yet they repeatedly cite his alleged non-participation as the sole basis for retaining Mr. Reyes in the most restrictive form of solitary confinement. Messrs. Justin Kiser, Gilbert, Adams and Lambert acted with the knowledge that extended solitary confinement put Mr. Reyes' well-being at risk.

See Porter, 290 F. Supp. 3d at 532; *Shoatz v. Wetzel*, No. 2:13-cv-0657, 2016 WL 595337, at *9 (W.D. Pa. Feb. 2, 2016) (noting that it should not strike anyone as "rocket science" that solitary substantially increases the likelihood of mental illness) (internal citations omitted).

Defendant Lee unconvincingly claims that the Complaint fails to adequately allege his deliberate indifference to Mr. Reyes' suffering. Mr. Lee is a senior psychological associate and member of a team of correctional officials who make final classification decisions regarding security levels and mental health unit referrals. (Compl. ¶ 29.) In 2017 one of Mr. Reyes' mental health providers designated Mr. Reyes as seriously mentally ill, a designation that should have resulted in his transfer out of RO and into a mental health unit. (*Id.* ¶ 145.) The provider found that Mr. Reyes was "suffering from possible psychosis, and unaware of 'the building, town, and year.'" (*Id.*) Notwithstanding this alarming mental illness designation, Mr. Lee personally denied Mr. Reyes' transfer to a mental health unit. (*Id.* ¶ 146.) Mr. Lee's contention that he acted to avoid a "misdiagnos[is]" is farcical. (Def. Br. at 16.) He did not need to halt Mr. Reyes' transfer out of long-term solitary confinement to provide him constitutionally adequate care, and a mental health unit would obviously be the superior setting for further evaluations. Mr. Reyes alleges that Mr. Lee is aware of the unreasonable risks of harm to prisoners in solitary confinement and to him in particular, yet retained him in these conditions. (Compl. ¶¶ 34, 49, 50, 194.) Mr. Lee's arguments anticipate insufficient evidence, not insufficient allegations, and do not warrant dismissal.

Defendants Huff, Trent and **McDuffie** are Mr. Reyes' treating mental health providers. They contend that Mr. Reyes' pleadings fail to allege their deliberate indifference to serious medical needs. However, they overlook the allegations of their direct involvement in Mr. Reyes' care and repeated indifference to his decompensation in solitary confinement. Mr. Reyes' mental

health record is replete with symptoms of serious mental illness—including hallucinations, grandiose thinking, disordered thinking, and depression—that the Eighth Amendment does not permit mental health providers to ignore. *See DePaola*, 884 F.3d at 488 (allegations of severe depression, hallucinations, acute anxiety, and feelings of hopeless and helplessness are sufficiently serious for Eighth Amendment failure to treat claim). Yet Messrs. Huff, Trent and Dr. McDuffie routinely did just that.

Mr. Huff has known Mr. Reyes to be in mental distress since at least 2007, when he suggested Mr. Reyes for referral to a mental health facility. (Compl. ¶¶ 137–38.) Mr. Huff apparently took no steps to effect that recommendation, and Mr. Reyes remained in solitary confinement. (*Id.* ¶ 138.) In 2016, despite continuous, obvious signs that Mr. Reyes was suffering from mental illness, Mr. Huff designated Mr. Reyes not seriously mentally ill—allegedly without performing an in-person evaluation. (*Id.* ¶ 144.) Mr. Reyes was later designated seriously mentally ill by another provider. (*Id.* ¶ 145.) In January 2018, Mr. Huff found that Mr. Reyes could not recall basic information such as the prison where he was housed and that he showed signs of disordered thinking. (*Id.* ¶¶ 147–48.) Nonetheless, he reversed Mr. Reyes' designation as seriously mentally ill, knowing that as a result Mr. Reyes would not be moved to a mental health unit. (*Id.* ¶ 151.) Mr. Reyes alleges that Mr. Huff did so partly due to administrative resistance to transferring him out of solitary confinement. (*Id.* ¶ 152.) Mr. Huff is a member of the RO DTT and Building Management Committee; in this role, he has the ability—indeed, the responsibility—to press for the removal of mentally ill prisoners such as Mr. Reyes from solitary confinement. (*Id.* ¶ 189.) Yet he has not done so for Mr. Reyes. (*Id.*)

Mr. Trent has known Mr. Reyes since at least 2016. (Compl. ¶ 143.) He has observed Mr. Reyes to be disheveled and his personal hygiene lacking, and Mr. Reyes performed poorly on a

mini mental status examination that he administered. (*Id.*) Mr. Trent arbitrarily attributed the poor results to Mr. Reyes' language limitations without basis. (*Id.*) He at one point found Mr. Reyes to be so mentally ill and functionally impaired that he designated him seriously mentally ill. (*Id.* ¶ 145.) Like Mr. Huff, he is a member of the RO DTT and Building Management Committee and so is responsible for recommending the removal of mentally ill men like Mr. Reyes from solitary. (*Id.* ¶ 189.) Yet even after finding him to meet the criteria for having serious mental illness, he has not advocated for Mr. Reyes' release from solitary. (*Id.*)

Dr. McDuffie, the RO psychiatrist, did not even meet with Mr. Reyes until 2018. (Compl. ¶ 150.) He apparently ignored reports of Mr. Reyes' possible psychosis, even though his mental illness is a known consequence of prolonged solitary confinement. Although he found Mr. Reyes was mentally ill and very depressed, he failed to remove him from solitary confinement or advocate for less restrictive conditions. (*Id.* ¶ 153.) As Mr. Reyes' psychiatrist, Dr. McDuffie has an ethical responsibility to urge that he and other prisoners who are decompensating in solitary be transferred or the restrictive conditions otherwise relaxed. His prescription of anti-depressant medication to address Mr. Reyes' extreme decompensation is akin to mending "hemorrhaging" with a "band-aid." *Finley*, 723 F. App'x at 298.

All three mental health providers failed to perform a comprehensive mental health evaluation of Mr. Reyes to render a meaningful diagnosis and develop a treatment plan. (Compl. ¶ 189.) They have refused to designate him as seriously mentally ill. (*Id.*) And they have failed to ensure that Mr. Reyes has interpretation services for all mental health contacts. (*Id.*) Without interpretation services, there is an obvious, unacceptable risk that Mr. Reyes' mental illness will be ignored. "Even a lay person could easily recognize the need for a patient with a serious medical condition to be able to communicate with medical staff, so a proper diagnosis can be

made." *Heyer*, 849 F.3d at 210; *see also id.* at 211 (prison's failure to provide ASL interpreters for medical appointments could constitute deliberate indifference). All three providers acted with awareness of the risks to mentally ill prisoners in solitary confinement, and of Mr. Reyes' mental illness and the risk of harm to him. (Comp. ¶¶ 34, 49, 194.) The pleadings against them are adequate.

Defendant Herrick unpersuasively claims the Complaint fails to allege sufficient personal involvement or knowledge as to him. But Mr. Reyes alleges that Mr. Herrick is aware that solitary is harmful, and that an unacceptable risk exists that mental illness will go undetected if mental health staff do not use interpreters. (*Id.* ¶ 190.) Mr. Reyes also alleges that Defendant Herrick is responsible as VDOC Director of Health Services to ensure adequate access to health services for all prisoners, including Mr. Reyes. (*Id.*) Yet he instituted no policy nor took any steps to ensure that mental health staff use interpretation services when dealing with non-English-speaking prisoners like Mr. Reyes. (*Id.*) Mr. Reyes therefore lacks consistent interpretation services, and cell-door mental health "checks" are ineffective measures of his wellbeing. In such circumstances, it does not matter that he may be unaware of Mr. Reyes' particular situation.[16] The facts alleged state a claim for deliberate indifference against Defendant Herrick.

Finally, Mr. Reyes' official capacity claims for injunctive relief are fairly attributable to the state entity, VDOC. (*Contra* Def. Br. at 15.) Mr. Reyes challenges the Defendants' policy of

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[16] *See Farmer*, 511 U.S. at 843–44 ("If, for example, prison officials were aware that inmate 'rape was so common and uncontrolled that some potential victims dared not sleep [but] instead . . . would leave their beds and spend the night clinging to the bars nearest the guards' station,' it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom." (quoting *Hutto*, 437 U.S. at 681–82, n.3)).

long-term solitary confinement and inhumane conditions (Compl. ¶ 194), which includes requiring prisoners to complete an English-only, reading and writing intensive program to leave solitary confinement (*id.* ¶ 60), the lack of appropriate mental health care services for prisoners such as himself in solitary confinement (*id.* ¶¶ 188–90, 196), the lack of appropriate interpretation services for prisoners who cannot communicate in English (*id.* ¶¶ 83–84, 128–29, 132), and the failure to supervise correctional officers responsible for Mr. Reyes' direct care (*id.* ¶ 195.) And, the regular rubberstamping of Mr. Reyes' ongoing solitary confinement under the Step-Down Program was not isolated, but a course of conduct extending over a period of years. His official-capacity claims therefore are properly alleged, as well.

III. Mr. Reyes More than Plausibly Alleges that Defendants Violated His Rights to Procedural Due Process.

A. The Liberty Interest

Prisoners have a liberty interest in avoiding confinement conditions that impose "atypical and significant hardship . . . in relation to the ordinary incidents of prison life." *Sandin v. Conner*, 515 U.S. 472, 484 (1995); *accord Wilkinson v. Austin*, 545 U.S. 209 (2005). General population conditions are the "baseline for atypicality," as that is where the courts sentenced Mr. Reyes to serve his prison term. [17] *Incumaa*, 791 F.3d at 527. Defendants suggest solitary

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[17] In this Circuit, prisoners must make a preliminary showing that their interest in avoiding restrictive atypical conditions "'arise[s] from state policies or regulations' (e.g., a regulation mandating periodic review)." *Incumaa*, 791 F.3d at 527 (alteration in original) (quoting *Prieto v. Clarke*, 780 F.3d 245, 249 (4th Cir. 2015). Defendants "assume, without conceding" that Mr. Reyes' liberty interest arises from a VDOC policy or regulation. (Def. Br. at 18.) That is beyond dispute. (Compl. ¶ 201 (his "liberty interest arises from . . . VDOC regulations mandating periodic review of long-term segregation status, including the Segregation Reduction Step-Down Program and VDOC Operation Procedure 830.A")); *Incumaa*, 791 F.3d at 527 (holding that prisoner's "uncontroverted evidence that the *(cont'd)*

confinement itself is the baseline. (Def. Br. at 21.) That is legally incorrect.[18] *Incumaa*, 791 F.3d at 527. They also suggest that solitary confinement at RO cannot be distinguished from general population conditions. That is wrong as a matter of fact. (*See* Compl. ¶¶ 155–64.) In any event, such a factual dispute is not appropriate for resolution at the pleading stage.

Defendants contend that despite Mr. Reyes' 12+ years in solitary confinement, he fails to allege "atypical and significant" hardship as compared to the conditions in general population. (Def. Br. at 18.) Courts analyzing atypicality place primary importance on the severity of the conditions alleged and the duration spent in those conditions. *See Incumaa*, 791 F.3d at 530 (discussing *Wilkinson*). With regards to the second atypicality consideration, solitary confinement placements of lengthy and/or unlimited duration indicate a liberty interest is at stake. *Id.* at 531 (holding that prisoner's solitary confinement was "extraordinary in its duration and indefiniteness"). Courts also consider collateral effects on the prisoner's criminal sentence, though this factor need not be present for a liberty interest to exist. *Id.* at 532. Mr. Reyes' atypicality allegations suffice under clear Supreme Court and Fourth Circuit precedent.

First, Mr. Reyes alleges restrictive conditions of the kind held atypical and significant in *Incumaa* and *Wilkinson* and that are "significantly worse than in the general population." *Id.* at 531. (*Compare* Compl. ¶¶ 63, 106–31 *with* ¶¶ 155–64.) These conditions bear many hallmarks of restrictive confinement that *Incumaa* held atypical and significant: "near-daily cavity and strip

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Department policy here mandates review of Appellant's security detention every 30 days" satisfies the first prong).

[18] Defendants cite *Sandin* as support for this view, but as the Supreme Court noted in *Wilkinson*, *Sandin* does not identify the baseline from which to measure what is atypical and significant in any particular prison system. 545 U.S. at 223.

searches"; "confinement to a small cell for all sleeping and waking hours" aside from a short period set by policy; "inability to socialize with other inmates"; and "denial of educational, vocational, and therapy programs." 791 F.3d at 531. Other courts agree that such conditions impose atypical and significant hardship.[19] *See, e.g.*, *Williams v. Sec'y Pa. Dep't of Corr.*, 848 F.3d 549, 563 (3d Cir. 2017) (plaintiffs were "confined to their respective cells for twenty-two to twenty-four hours a day"; "ate all meals accompanied only by the emptiness within the walls of their cells"; were "placed inside a small locked cage during much of the limited time" out-of-cell; and "subjected to invasive strip searches each time" they left their cells). Moreover, mentally ill prisoners like Mr. Reyes suffer more acutely in conditions of solitary confinement. *See, e.g.*, *Wheeler v. Butler*, 209 F. App'x 14, 16 (2d Cir. 2006) (noting that "medical need may bear upon the atypicality of [plaintiff's] punishment"); *Serrano v. Francis*, 345 F.3d 1071, 1079 (9th Cir. 2003) ("[T]he conditions imposed on [plaintiff] in the SHU, by virtue of his disability, constituted an atypical and significant hardship on him."); *Latson*, 249 F. Supp. 3d at 847, 860–61 (denying motion to dismiss mentally ill prisoner's procedural due process claim based on a six-month solitary confinement stint).

Second, the duration of Mr. Reyes' solitary confinement is indefinite and of sufficient length to constitute atypical and significant hardship. Mr. Reyes alleges that Defendants initially consigned him to solitary confinement in 2006; that under the Step-Down Program, he stalled at the most restrictive form of solitary confinement, SM 0, for six years; and that Defendants' 90-day and upper-level reviews do not provide a meaningful opportunity for him to leave these

[19] Defendants argue that general population prisoners also endure strip searches. (Def. Br. at 20.) But strip searches of prisoners in solitary confinement are more frequent and invasive than those of general population prisoners, and Mr. Reyes must submit to a cavity search every time he leaves his cell. (Compl. ¶ 117.)

restrictive conditions. (Compl. ¶¶ 81, 99–102.) This review scheme is strikingly similar to that in *Wilkinson*, which the Court held supported a liberty interest as it imposed solitary confinement of "indefinite" duration. 545 U.S. at 224 ("Unlike the 30-day placement in . . . *Sandin*, placement at OSP is indefinite and, after an initial 30-day review, is reviewed just annually.").

Mr. Reyes' ongoing solitary confinement, which has now lasted 12+ years in total, including nearly seven years under the Step-Down Program, has lasted so long that significant hardship cannot be denied. Indeed, courts have held that similar and far shorter periods require due process protection.[20] Defendants' reliance on *Beverati v. Smith*, 120 F.3d 500, 504 (4th Cir. 1997), which involved administrative segregation of just six months, is therefore misplaced. (Def. Br. at 21.)

Defendants insist that RO's Step-Down Program precludes a finding of atypical and significant hardship, but they cite no binding precedent or even published decisions in support of this dubious proposition. (*Id.* at 21 & n.8.) At any rate, none of the cases Defendants cite with regards to the due process implications of the Step-Down Program involved a prisoner held at the most restricted level, SM 0, for the length of time Mr. Reyes alleges. (*Id.* at n.8.) Of the cases Defendants cite, the longest period any prisoner spent at the lowest "privilege" level is three years. *See Delk v. Younce*, No. 7:14cv00643, 2017 U.S. Dist. LEXIS 36581, at *8–9 (W.D. Va.

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[20] *See, e.g.*, *Isby v. Brown*, 856 F.3d 508, 515, 524 (7th Cir. 2017) (ten years); *Williams*, 848 F.3d at 561 (six and eight years); *Aref v. Lynch*, 833 F.3d 242, 257 (D.C. Cir. 2016) (five years); *Brown v. Or. Dep't of Corr.*, 751 F.3d 983, 988 (9th Cir. 2014) (two years); *Fogle v. Pierson*, 435 F.3d 1252, 1259 (10th Cir. 2006) (three years); *Magluta v. Samples*, 375 F.3d 1269, 1282 (11th Cir. 2004) (500 days); *Colon v. Howard*, 215 F.3d 227, 231–32 (2d Cir. 2000) (305 days); *Kelly v. Brewer*, 525 F.2d 394, 397 (8th Cir. 1975) (three years); *see also Wilkerson v. Goodwin*, 774 F.3d 845, 855 (5th Cir. 2014) ("[T]he duration in segregated confinement that courts have found does not give rise to a liberty interest ranges up to two and one-half years.").

Mar. 14, 2017), *aff'd*, 709 F. App'x 184 (4th Cir. 2018). There, the Court found that the prisoner's own inaction held him back from progressing out of solitary confinement. *Id.* at *23.

The rulings in the cases Defendants have collected are premised upon an assumption that prisoners' movement between "privilege" levels would assuage the otherwise restrictive nature of the confinement regimen.[21] Whatever the validity of that assumption generally, it is inapplicable here. Mr. Reyes did not move "privilege" levels for six years. (Compl. ¶ 102.) He cannot meaningfully participate in the Step-Down Program due to the language barrier. (*Id.* ¶ 103.) The Step-Down Program does not help him avoid the indefiniteness of solitary confinement, even if it helps others. It is instead impeding his transfer to less restrictive conditions, as he has not had a disciplinary infraction in over three years. (*Id.* ¶ 104.)

Lastly, courts post-*Wilkinson* have identified liberty interests in avoiding restrictive conditions even where the conditions did not impact the length of the prisoner's overall confinement (the third *Wilkinson* factor). *See, e.g.*, *Incumaa*, 791 F.3d at 532. As a Level S prisoner, VDOC policy bars Mr. Reyes from earning the maximum amount of good conduct credits available. (Compl. ¶ 127.) While not required, he therefore alleges all three *Wilkinson* factors and more than adequately pleads a liberty interest in avoiding solitary confinement.[22]

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[21] *See, e.g.*, *Cooper v. Gilbert*, No. 7:17cv00509, 2018 U.S. Dist. LEXIS 65096, at *9 (W.D. Va. Apr. 17. 2018) (step-down program "address[es] and alleviate[s] the isolating conditions and indefiniteness" of segregation); *Obataiye-Allah v. Va. Dep't of Corr.*, No. 7:15cv00230, 2016 WL 5415906, at *10 (W.D. Va. Sept. 28, 2016) ("Conditions in IM-0 status, while restrictive, can improve in defined stages based on [prisoner]'s own efforts toward cognitive and behavioral changes."), *aff'd sub nom. per curiam*, *Obataiye-Allah v. Clarke*, 688 F. App'x 211 (4th Cir. 2017).

[22] Defendants' own policies acknowledge that ICA reviews of ongoing solitary confinement call for, what they term, "formal due process." (Compl. ¶ 84 & Attachment E, O.P. *(cont'd)*

B. Insufficient Process

Where a prisoner is subjected to atypical and significant hardship, he is entitled to meaningful periodic reviews of his segregation status so that "administrative segregation [is not] used as a pretext for indefinite confinement of an inmate." *Hewitt v. Helms*, 459 U.S. 460, 477 n.9 (1983); *see also Proctor v. LeClaire*, 846 F.3d 597, 609 (2d Cir. 2017) (periodic segregation reviews must be meaningful so justification has not grown "stale"); *Williams*, 848 F.3d at 576 (prisoners have a right to a "*regular and meaningful*" review of their solitary confinement) (emphasis in original); *Isby*, 856 F.3d at 527 (requiring "meaningful and non-pretextual" segregation review); *Incumaa*, 791 F.3d at 534 (faulting review process that encourages "arbitrary decisionmaking"); *Selby v. Caruso*, 734 F.3d 554, 559 (6th Cir. 2013) (requiring meaningful periodic reviews and "some evidence" of ongoing need for segregation). Such reviews cannot be "hollow formalities." *Proctor*, 846 F.3d at 612 (process nominally afforded to inmates over a significant period of time with no hint of success may raise questions in a reasonable jury's mind about whether that process has been meaningful).

In *Incumaa*, the Fourth Circuit identified a triable dispute of fact as to the constitutionality of the procedures at Mr. Incumaa's 30-day solitary confinement reviews. 791 F.3d at 534. Applying the *Mathews v. Eldridge* three-factor test, the Court found (1) that Mr. Incumaa had a significant interest in leaving the restrictive conditions of solitary confinement, and (2) that the "risk of erroneous deprivation" of Mr. Incumaa's liberty pursuant to the Defendant's process was high. *Id.* That process "apparently only require[d] the [reviewing body]

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> 830.1.IV.A.2.b.iii.) Their arguments that long-term solitary confinement at Red Onion does *not* require due process protection are oddly out of step with this official policy stance.

to give a perfunctory explanation supporting its decision to continue to hold" him in solitary confinement, leading prison officials to "list[ ] in 'rote repetition' the same justification every 30 days." *Id.* Such a policy encourages "arbitrary" decisions and risks holding prisoners in solitary confinement "for an insufficient reason." *Id.* (quoting *Wilkinson*, 545 U.S. at 226). As to the third *Mathews* factor, (3) the prison's interest in "order and security" "d[id] not eclipse [the prisoner's] well-established right to receive notice of the grounds for his ongoing confinement and to present his rebuttal." *Id.* at 535.

Rather than engaging in a meaningful process, Defendants arbitrarily retain Mr. Reyes in solitary confinement for failure to complete a program that, for all practical purposes, is unavailable to him. (Compl. ¶ 204.) Similar to *Incumaa*, Defendants have rubberstamped decisions to retain Mr. Reyes in solitary confinement . . . without providing a reasoned decision based on Mr. Reyes' current level of risk or assessment of his mental health. (*Id.* ¶ 203.) Mr. Reyes alleges that the review process is a sham and the Step-Down Program is a pretext for his retention in solitary confinement. (*Id.* ¶¶ 75, 101.)

The Constitution additionally requires that the process for reviewing Mr. Reyes' ongoing solitary confinement entail "some notice of the charges against [him] and an opportunity to present his views to the prison official charged with deciding whether to transfer him [out of] administrative segregation." *Incumaa*, 791 F.3d at 533 (quoting *Hewitt*, 459 U.S. at 476). However, no part of the ICA review process is interpreted in Spanish for Mr. Reyes. (Compl. ¶¶ 82–83.) As a result, he does not understand what recommendations staff have made as to his retention in solitary confinement; he cannot communicate his readiness to transition out of

solitary confinement; and he does not even know when ICA reviews are occurring. (*Id.* ¶ 83.) This system is a sham and does not comport with due process.[23]

IV. Mr. Reyes' ADA and Rehab Act Claims Are Amply Pled.

Defendants next argue that Mr. Reyes does not allege a claim for relief under the ADA and the Rehab Act because he does not adequately plead the factual elements. A plaintiff alleging discrimination must allege that (1) he has a disability; (2) that he was excluded from participation in or denied the benefits of the public entity's services, programs, or activities for which he was otherwise qualified; and (3) the exclusion, denial of benefits, or discrimination was by reason of his disability. *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 498 (4th Cir. 2005). Because the language of the ADA and the Rehab Act are substantially similar, they are generally "construed to impose the same requirements." *Baird ex rel. Baird v. Rose*, 192 F.3d 462, 468 (4th Cir. 1999). Both statutes require public entities to "make reasonable modifications" to accommodate covered individuals. 28 C.F.R. § 35.130(b)(7)(i).

Mr. Reyes adequately alleges that Defendants violated their ADA and Rehab Act obligations by refusing to accommodate his inability to participate in the Step-Down Program

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[23] *See Wolff v. McDonnell*, 418 U.S. 539, 570 (1974) (additional procedural protections and safeguards would be required to assist an illiterate prisoner at a disciplinary hearing); *Sandoval v. Holinka*, No. 09-CV-033-BBC, 2009 WL 499110, at *3 (W.D. Wis. Feb. 27, 2009) (if prisoner at disciplinary hearing did not "comprehend the proceedings or process he was subject to, then he was denied a meaningful opportunity to defend himself"); *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1049–50 (S.D.N.Y. 1995) (failure to offer interpretive services or assistive devices in disciplinary, grievance and parole hearings constituted denial of due process); *Bonner v. Ariz. Dep't of Corr.*, 714 F. Supp. 420, 425 (D. Ariz. 1989) (requiring deaf, mute and vision inmates to navigate through legal proceedings without interpreter services violates due process); *Powell v. Ward*, 487 F .Supp. 917, 932 (S.D.N.Y. 1980) ("Unless Spanish speaking inmates understand and can communicate with the hearing board, they are being denied . . . due process protections.").

due to his mental health disability and further by refusing to accommodate his mental health disability by moving him out of solitary confinement, a setting that Defendants know exacerbates his mental illness. (Compl. ¶¶ 213, 222.)

Defendants half-heartedly challenge Mr. Reyes' allegation that he has a disability. (Def. Br. at 25.) The ADA defines disability as "a physical or mental impairment that substantially limits one or more major life activities." 42 U.S.C. § 12102(1). Major life activities include "caring for oneself, . . . sleeping, . . . learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2). Mr. Reyes alleges multiple symptoms of serious mental illness that interfere with his ability to care for himself, sleep, concentrate, think, and communicate. (Compl. ¶¶ 8, 132–154, 189, 196, 209, 218.) Mental health staff diagnosed Mr. Reyes with severe cognitive deficits and deemed him severely functionally impaired (*id.* ¶ 145); he has also been diagnosed with major depression, severe, recurrent, an illness that is an "extreme impairment" to his functioning (*id.* ¶ 150). These factual allegations establish that Mr. Reyes is disabled within the meaning of the ADA and Rehab Act.

Mr. Reyes also alleges exclusion from services, programs and activities for which he is otherwise qualified. Recreational activities, medical services, and educational and vocational programs offered by prisons fit unambiguously into the definition of "the services, programs, or activities of a public entity." *Pa. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998). To demonstrate his qualification, Mr. Reyes need only allege that he "meets the essential eligibility requirements" for these services or programs. 42 U.S.C. § 12131(2). As a non-death row prisoner who has not had a disciplinary infraction in three years, Mr. Reyes is eligible to leave solitary confinement and to access the services and programs afforded prisoners in general population,

including congregate meals and recreation, unlimited phone calls, congregate programming, religious services, and employment opportunities. (Compl. ¶¶ 156–64.)[24]

Finally, Defendants claim that Mr. Reyes has not plausibly alleged discriminatory intent. (Def. Br. at 25–26.) The Fourth Circuit recognizes "three distinct grounds" for relief under the ADA: "(1) intentional discrimination or disparate treatment; (2) disparate impact; and (3) failure to make reasonable accommodations." *A Helping Hand, LLC v. Baltimore Cty*, 515 F.3d 356, 362 (4th Cir. 2008). While intentional discrimination or disparate treatment is needed to recover compensatory damages under the ADA, *see Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 533–34 (1999), discriminatory animus is not, *Proctor v. Prince George's Hosp. Ctr.*, 32 F. Supp. 2d 820, 828–29 (D. Md. 1998) (quoting *Bartlett v. New York State Board of Law Examiners*, 970 F. Supp. 1094, 1151 (S.D.N.Y. 1997)). Nearly all federal courts of appeal recognize that deliberate indifference, a form of intentional discrimination, is the "proper standard for obtaining compensatory damages" under Title II of the ADA and the Rehabilitation Act. *Lacy v. Cook Cty., Ill.*, 897 F.3d 847, 862 (7th Cir. 2018); *see id.* at n.33 (collecting cases). Such a standard is best suited to root out disability discrimination, which is "most often the product, not of

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[24] Defendants severely misconstrue the purpose of the ADA and Rehab Act when they argue that Mr. Reyes cannot show exclusion from a service, program or activity unless he had a "vested right" under *Sandin*, 515 U.S. at 486–87, to the service, program or activity at issue. (Def. Br. at 25.) "There is no textual limitation requiring that a plaintiff must demonstrate some other source of legal entitlement to participation in the program or activity at issue in order to proceed under either statute. . . . [I]t is enough that the plaintiff is excluded from participation in or denied the benefits of the program on the basis of disability." *Jarboe v. Md. Dep't of Pub. Safety & Corr. Servs. (DPSCS)*, 2013 WL 1010357, *17–18 (D. Md. Mar. 13, 2013). To the extent Defendants make programs, activities, and services available to prisoners generally—including religious services, employment opportunities, congregate programming, and a pathway out of solitary confinement—Defendants cannot exclude prisoners with disabilities from participating and must make reasonable accommodations to facilitate access. *See id.* at *18.

invidious animus, but rather of thoughtlessness and indifference—of benign neglect." *Id.* at 863 (quoting *Alexander v. Choate*, 469 U.S. 287, 295 (1985)). To show deliberate indifference in this context, plaintiffs must allege "(1) 'knowledge that a harm to a federally protected right is substantially likely,' and (2) 'a failure to act upon that likelihood.'" *Id.* (quoting *S.H. ex re. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 263 (3d Cir. 2013)).

Here, Mr. Reyes adequately pleads that Defendants knew violations of disabled prisoners' rights under the ADA and Rehabilitation Act were substantially likely and yet failed to act. For example, he alleges that "[d]espite his awareness that prisoners with . . . cognitive impairments[] and serious mental health complications populate VDOC prisons and long-term solitary confinement units, Defendant Clarke has failed to accommodate such prisoners in VDOC's long-term solitary confinement policy." (Compl. ¶ 168.) Mr. Reyes contends that Defendants were well aware of the psychological effects of prolonged solitary confinement and of his own poor mental health, yet failed to provide him a meaningful pathway out of solitary confinement. (*Id.* ¶¶ 132–54, 165–69, 173–77, 209–15, 218–24.)

Defendants also insist that Mr. Reyes has no recourse under the Rehab Act because he is not still in solitary confinement "solely" because of his disability. (Def. Br. at 26.) But Mr. Reyes plausibly alleges that in light of his exceedingly minor disciplinary record, Defendants should have released him from solitary confinement long ago, and there is no penological purpose to keeping him there. (Compl. ¶ 104.) Thus, Mr. Reyes has sufficiently made his prima facia case for disability discrimination.

Finally, Defendants' suggestion that Mr. Reyes' ADA claims be dismissed for state sovereign immunity is incorrect and premature. (Def. Br. at 26–27.) Mr. Reyes intends to prove that Defendants' wrongful retention of Mr. Reyes in solitary confinement with no meaningful

pathway out is "conduct that *actually* violates the Fourteenth Amendment." *Chase v. Baskerville*, 508 F. Supp. 2d 492, 506 (E.D. Va. 2008) (quoting *United States v. Georgia*, 546 U.S. 151, 159 (2006)); *see supra* Sections II & III. To the extent he succeeds, he may recover damages, as Title II of the ADA abrogates state sovereign immunity to reach unconstitutional conduct. *Id.* Furthermore, state sovereign immunity is no bar to Mr. Reyes' claims for injunctive relief.

V. Mr. Reyes' Title VI Claims Are Well Supported.

Defendants make two arguments regarding the merits of Mr. Reyes' Title VI claim. First, they assert that the thrust of the claim is discrimination on the basis of language, not national origin, and that discrimination against a Spanish-speaking person does not state a claim for national origin discrimination under Title VI. (Def. Br. at 30.) But courts have repeatedly treated discrimination against people with limited English proficiency either as encompassed within Title VI's prohibition on national origin discrimination because it is a close proxy for such discrimination, or as raising a strong inference national origin discrimination.[25]

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[25] *See, e.g., T.R. v. Sch. Dist. of Phila.*, 223 F. Supp. 3d 321, 335 (E.D. Pa. 2016) (language based discrimination can constitute a form of national origin discrimination under Title VI; motion to dismiss action against school district for inadequate translation services denied); *United States v. Cty. Of Maricopa*, 915 F. Supp. 2d 1073, 1079–81 (D. Ariz. 2012) (rejecting argument that "Title VI's prohibition against intentional discrimination 'on the ground of race, color, or national origin' does not cover language proficiency" and declining to dismiss claims based on discrimination against Latino prisoners with limited English proficiency); *J.D.H. v. Las Vegas Metro. Police Dep't*, No. 2:13-cv-01300-APG-NJK, 2014 WL 3809131, at *4–5 (D. Nev. Aug. 1, 2014) (allegations that officers intentionally denied meaningful access to police services by failing to use a translator stated a plausible claim because "[l]anguage-based discrimination can constitute a form of national-origin discrimination under Title VI"); *Jones v. Gusman*, 296 F.R.D. 416, 453–55 (E.D. La. 2013) (approving consent judgment to remedy Title VI violations for lack of access for prisoners with limited English proficiency). This is consistent with longstanding policy guidance from the Department of Justice directed at recipients of federal financial aid, such as VDOC, regarding compliance with Title VI and its implementing regulations, *see, e.g.*, Guidance to *(cont'd)*

The only case cited by Defendants, *Mumid v. Abraham Lincoln High Sch.*, 618 F.3d 789 (8th Cir. 2010), is not to the contrary. There, a high school for students with limited English proficiency allegedly discriminated on the basis of national origin by offering substandard curriculum and failing to offer timely special education testing and services as compared with other area schools. *Id.* at 793. The Eighth Circuit—on a motion for summary judgment—agreed with the district court's conclusion that evidence of intentional discrimination was exceedingly weak, in part because there was no comparator—someone outside of the allegedly protected class who was treated more favorably—given that the school's entire student body was foreign born, and because there was no real evidence of animus as opposed to mere incompetence and deficient programming. *Id.* at 794–95. With respect to its claims against the school district, the plaintiffs could not create a genuine issue as to whether the legitimate, non-discriminatory reason offered for the delayed testing—that students' special education needs could not be reliably assessed until they had been in the country long enough to learn English—was mere pretext for discrimination based on national origin. *Id.* at 794. Rather than preclude a Title VI national-origin discrimination claim premised on language discrimination as a matter of law, the court noted that the two were not "interchangeable" and that "a policy that treats students with limited English proficiency differently than other students . . . does not *facially* discriminate based on national origin." *Id.* at 795 (emphasis added). Here, Defendants did not articulate how denying a

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> Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons; Policy Guidance, 67 Fed. Reg. 41455 (June 18, 2002). *See also Colwell v. HHS*, 558 F.3d 1112, 1116–18 (9th Cir. 2009) (summarizing regulatory history of interpretation of Title VI's prohibition on national-origin discrimination as including discrimination against people with limited English proficiency).

pathway out of solitary confinement to someone with limited English proficiency serves a legitimate interest, or evinces incompetence rather than intentional discrimination, and Mr. Reyes should not be precluded from amassing evidence indicating a contrary conclusion.

Defendants next argue that Mr. Reyes does not plausibly allege that the official-capacity Defendants were actually aware of Mr. Reyes' "national origin" and intentionally discriminated against him on that basis.[26] (Def. Br. at 30.) But Mr. Reyes' official capacity claims against Messrs. Clarke and Kiser are equivalent to claims against VDOC and RO, the entities receiving federal financial assistance. *See, e.g.*, *Bollman v. Ciesla*, No. 2:14-CV-02001, 2014 WL 1765003, at *2–3 (W.D. Ark. May 2, 2014) (dismissing Title VI individual capacity claims and treating official capacity claims against individual defendants as equivalent to claims against the entity for which official is an agent); *Windsor v. Bd. of Educ.*, No. TDC-14-2287, 2016 WL 4939294, at *9 (D. Md. Sept. 13, 2016) (same). And although private suits under Title VI require a showing of intentional discrimination, courts that have examined the issue have concluded (1) that an institution is directly liable for its own official policies that violate Title VI and similar

[26] This section responds broadly to the argument that Mr. Reyes has not adequately alleged intentional discrimination, but to the extent Defendants' argument is that Title VI requires them to be aware of Mr. Reyes' specific country of origin—El Salvador (Compl. ¶ 16)—Defendants offer no authority for this proposition and courts have rejected such a cramped reading of the statute. *See Almendares v. Palmer*, No. 3:00-CV-7524, 2002 WL 31730963, at *9–10 (N.D. Ohio Dec. 3, 2002) (rejecting argument that plaintiffs must allege their specific nation of origin in order to state a claim for national origin discrimination under Title VI); *cf. Kanaji v. Children's Hosp. of Phila.*, 276 F.Supp. 2d 399, 404 (E.D. Pa. 2003) (Title VII national origin claim of discrimination against person of "African descent" allowed to proceed despite failure to specify a nation or country of origin).

statutes,[27] and (2) that intentional discrimination can also be established by a showing of deliberate indifference.[28]

Thus, Mr. Reyes can allege a plausible Title VI claim by asserting that his inability to progress through the Step-Down Program was the direct result of VDOC policy that discriminates on the basis of national origin, or alternatively that VDOC officials authorized to take corrective measures for the entity defendants, *see Gebser*, 524 U.S. at 290; *Maricopa*, 889 F.3d at 652, were deliberately indifferent towards whether Mr. Reyes was subjected to discrimination on the basis of his national origin in VDOC's implementation of solitary confinement and the Step-Down Program. Mr. Reyes' pleadings clear that hurdle. He alleges that VDOC operates the Step-Down Program as the only way out of solitary and that the program is as a matter of policy unavailable in Spanish (Compl. ¶¶ 61, 103); that VDOC was aware that Mr. Reyes could not communicate in English, and as a result could not progress out of solitary confinement (*id.* ¶¶ 64, 71); that VDOC and RO officials made no accommodations for Mr. Reyes and did not offer Mr. Reyes the Step-Down Program for seven years in part out of

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[27] *See United States v. Maricopa*, 889 F.3d 648, 652 (9th Cir. 2018) (citing *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 285 (1998)); *Cf. Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1178 (10th Cir. 2007) (Title IX funding recipient can be said to have "intentionally" acted when the violation is caused by official policy).

[28] *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 272–73 (3d Cir. 2014) (adopting deliberate indifference standard for Title VI intentional discrimination claims because, as in the Rehabilitation Act and ADA context, such a standard is better suited to the remedial goals of Title VI); *Preusser ex rel. E.P. v. Taconic Hills Cent. Sch. Dist.*, 548 F. App'x 739, 740 (2d Cir. 2013) (concluding that Title VI intentional race discrimination claims can be based on deliberate indifference of school boards, teachers, administrators to harassment); *Bryant v. Indep. Sch. Dist. No. I-38*, 334 F.3d 928, 934 (10th Cir. 2003) (stating "deliberate indifference to known instances of student-on-student racial harassment is a viable theory in a Title VI intentional discrimination suit").

hostility for Spanish speakers and persons of Central-American descent (*id.* ¶¶ 5, 64, 103, 168, 204); that RO correctional officers regularly use racist epithets like "wetback" to refer to Latino prisoners including Mr. Reyes, and use his inability to speak English as an excuse to deny him basic rights like showers and recreation (*id.* ¶ 110–11); that because of hostility towards Spanish speakers and people of Central-American ancestry like Mr. Reyes, staff continue to deny him the translation services he needs to leave solitary confinement (*id.* ¶ 7); that officials authorized to take corrective measures for the entity defendants were well aware that RO correctional officers engage in discriminatory treatment towards Latino prisoners and prisoners from Central America (*id.* ¶ 239); and that VDOC knowingly failed to promulgate a language-access policy under Title VI and closely-related Executive Order 13166. (*Id.*) In addition to demonstrating a policy to deny prisoners with limited English proficiency access to the Step-Down Program, these allegations amount to purposeful discrimination or, at minimum, deliberate indifference to purposeful discrimination, and satisfy the intent requirement.

VI. Mr. Reyes Sufficiently Alleges Defendants Violated His Equal Protection Rights.

Mr. Reyes also plausibly alleges an equal protection claim of intentional discrimination based on his national origin—a suspect classification—and on his limited English proficiency, a proxy for his national origin and an illegitimate basis for disparate treatment. Specifically, Mr. Reyes alleges that Defendants intentionally and unnecessarily prolonged his stay in solitary confinement by withholding language accommodations despite knowing that his inability to speak English kept him from leaving solitary confinement, and that such denial of language access was also a proxy for and evidence of intentional discrimination on grounds of his national origin, *i.e.* his Central American origin. (*See* Compl. ¶¶ 5, 61, 64, 71, 103, 204, 226–31.) Mr. Reyes also alleges that other Level S prisoners are provided with the journals and programming needed to step down from solitary at RO. (*Id.* ¶ 204.)

Defendants claim that Mr. Reyes does not plausibly allege that he has been treated differently from others who are similarly situated, because doing so would require him to "establish that he has been treated differently than other inmates who are not proficient at speaking English," for example by alleging that the Step-Down Program is also provided in other foreign languages. (Def. Br. at 28.) This argument misconstrues Mr. Reyes' claim, the crux of which is not that he is treated worse than RO prisoners who speak other foreign languages—like French or Italian—but that he is intentionally discriminated against because of his national origin and limited English proficiency, characteristics that are closely related. The similarly-situated inquiry seeks comparators who are similarly situated but *outside* the group subject to the alleged discrimination, to determine whether they are treated more favorably. *See Myers v. Hose*, 50 F.3d 278, 284 (4th Cir. 1995) (the point of the similarly-situated inquiry is to compare classes that are similarly situated except for protected status). Mr. Reyes alleges that he is discriminated against because of his national origin and limited English proficiency, and that those who are similarly-situated to Mr. Reyes in all respects relevant to his claim—i.e., other S-Level prisoners at RO—can access the Step-Down Program and leave solitary confinement. (Compl. ¶ 204.) The Court must accept these allegations as true at this stage. *See, e.g.*, *Veney v. Wyche*, 293 F.3d 726, 731 & n.2 (4th Cir. 2002) (assuming on motion to dismiss that gay prisoner who alleged disparate treatment based on his sexuality and gender was similarly situated to others in same prison).[29]

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[29] Defendants' citation of *Kolbe v. Hogan*, 813 F.3d 160 (4th Cir. 2016), *aff'd on reh'g*, 849 F.3d 114 (4th Cir. 2017) (en banc), is inapposite. There, various individual and associational plaintiffs brought an entirely different type of equal protection challenge seeking to enjoin a state ban on assault weapons because it exempted retired law enforcement officers. The court rejected the challenge—on summary judgment—because such officers could not be said to

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Mr. Reyes' allegations also raise an inference that the differential treatment accorded to him amounted to intentional discrimination based on an improper motive. In assessing discriminatory purpose, courts undertake "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," including the impact of the action, *Village of Arlington Heights v. Metro Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977), and an "invidious discriminatory purpose may often be inferred from the totality of the relevant facts," *Hernandez v. New York*, 500 U.S. 352, 363 (1991) (citation omitted); *see also Pronin v. Johnson*, 628 F. App'x 160, 164–65 (4th Cir. 2015). Here, for all of the reasons discussed with respect to Mr. Reyes' Title VI intentional discrimination claim, *see supra* pages 38–39. Mr. Reyes plausibly alleges his differential treatment was intentional, and the Defendants' involvement in decisions that prolonged his solitary confinement. *See supra* pages 17–19, 38–39. (Compl. ¶¶ 165–87.)

CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Rule 12(b)(6) Motion to Dismiss. If the Court grants any part of Defendants' Motion, it should do so with leave to amend.

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be similarly situated to the general public in light of the greater experience and training in public safety and firearms that law enforcement officers have relative to the average person.

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CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of November, 2018, I electronically filed the foregoing Memorandum in Opposition to Defendants' Rule 12(B)(6) 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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