

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

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

Plaintiffs,

Case No. 3:23-cv-127-HEH

v.

**VIRGINIA DEPARTMENT OF
CORRECTIONS, *et al.*,**

Defendants.

**PLAINTIFFS' COMBINED RESPONSE IN OPPOSITION TO DEFENDANT'S
MOTIONS *IN LIMINE* TO EXCLUDE THE EXPERT TESTIMONY OF RICHARD
WELLS, RICHARD SUBIA, CURTIS CHONG, JENNIFER KENNEDY, AND
MICHAEL BULLIS**

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INTRODUCTION

Plaintiffs—four blind¹ prisoners in the custody of Defendant Virginia Department of Corrections (“VDOC”), two former prisoners, and a non-profit organization that advocates for the rights of the blind—seek systemic change within VDOC due to its ongoing failure to provide blind prisoners with equal access to programs and services and equally effective communication. This case involves the intersection of two categories of specialized issues that are not within the common knowledge of the laypersons who will serve on the jury: (1) prisons and the policies, procedures, and trainings required to accommodate individuals with disabilities, including blind individuals, in the correctional setting, and (2) the accommodations, technology, skills, and supports blind individuals need in order to fully and independently participate in the services, benefits, and programs provided in prisons. Jurors must understand these specialized areas of knowledge to determine the ultimate inquiry in this case: whether VDOC violated the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12131 et seq., and Section 504 of the Rehabilitation Act (“Section 504”), 29 U.S.C. § 794, by failing to provide reasonable modifications of policies, procedures and practices and equally effective communication to blind prisoners.

Plaintiffs intend to educate the jury on these specialized areas of knowledge through the testimony of five expert witnesses: (1) Richard Wells, an expert on accommodating prisoners with disabilities in the corrections context in areas such as written guidelines and policies, staff training, and program monitoring, *see generally* Expert Report of Richard Wells (“Wells Report”), ECF No. 280-1; Supplemental Expert Report of Richard Wells, ECF No. 280-2; Deposition of Richard Wells (“Wells Dep.”), ECF No. 280-3; (2) Richard Subia, an expert on the security implications

¹ We use the terms “blind” and “blindness” in their broadest sense, to include people with low-vision and other vision impairments that substantially limit their ability to see, consistent with the definition in the Amended Complaint. *See* Am. Compl. ¶ 1 n.1.

of disability accommodations in prison, including processes and procedures for determining whether specific auxiliary aids and assistive technology pose threats to security in the correctional setting, *see generally* Expert Report of Richard Subia (“Subia Report”), ECF No. 282-1; Deposition of Richard Subia (“Subia Dep.”), ECF No. 282-2; (3) Curtis Chong, an expert on use of technology and alternative formats for the blind and the importance of such technologies for communication, information gathering, education, employment, and recreation, *see generally* Expert Report of Curtis Chong (“Chong Report”), ECF No. 284-1; (4) Jennifer Kennedy, MA, NOMC, an expert in Orientation and Mobility (“O&M”) skills, instruction, tools, and techniques for the blind, including O&M training for prisoners re-entering society, *see generally* Expert Report of Jennifer Kennedy (“Kennedy Report”), ECF No. 286-1; and (5) Michael Bullis, an expert in blindness vocational preparation, skills training, and job analysis, *see generally* Expert Report of Michael Bullis (“Bullis Report”), ECF No. 288-1.

In five nearly identical motions *in limine*,² VDOC moves to exclude Plaintiffs’ experts because their proffered expertise and testimony is: (1) duplicative; (2) not required for the jury to assess the evidence in this case; (3) irrelevant; (4) unreliable; and (5) a repetition of the Plaintiffs’ allegations. Defendant additionally moves to exclude Mr. Wells’s and Mr. Subia’s expert testimony because: (1) their opinions rely upon information learned from unidentified prisoners and (2) they offer inadmissible legal conclusions. Finally, Defendant argues that Mr. Wells’s testimony does not satisfy *Daubert*.

² On April 19, 2024, Defendant VDOC filed five separate motions *in limine* to exclude each expert in this case with separate memorandums in support of those motions. ECF Nos. 279-288. On April 22, 2024, Plaintiffs filed a Consent Motion for Leave to File a Combined Opposition to Defendant’s Motion *In Limine* and to Exceed Page Limit. ECF No. 289. On April 24, 2024, this Court granted Plaintiffs’ motion. ECF No. 291.

This Court should deny VDOC's motions *in limine* to exclude Plaintiffs' expert witnesses. Each expert's testimony relates to a distinct discipline, and thus is not duplicative and complies with this Court's scheduling order. Assessing the claims in this case requires specialized knowledge related to prison implementation of the ADA and accommodations for blind individuals, which Plaintiffs' experts will provide to the jurors. Plaintiffs' experts' testimony is relevant and reliable under the *Daubert* standard, and it does not regurgitate information learned from other witnesses and the Plaintiffs, but rather applies the witnesses' expertise to the evidence and explains the basis for their conclusions. Mr. Wells's and Mr. Subia's testimony does not rely on conversations with unidentified prisoners or contain impermissible legal conclusions. Finally, Mr. Wells's testimony satisfies the *Daubert* standard.

Defendant repeatedly attempts to narrow the allegations in this case to individual failures by VDOC to provide specific accommodations to each individual Plaintiff. Applying this framework, Defendant seeks to exclude Plaintiffs' experts' testimony where it does not address a discrete, individual incident. As emphasized at every stage in this case, Plaintiffs—including the organizational Plaintiff National Federation for the Blind of Virginia—allege widespread, ongoing, systemic violations of the ADA and Section 504 that require injunctive relief to remedy. Plaintiffs' experts' testimony assesses these systemic failures, and is, therefore, admissible. Additionally, evidence of VDOC's systemic failures is relevant evidence of VDOC's failures with respect to the individual Plaintiffs: a prison system which is not equipped on a systemic level to accommodate blind prisoners is equally unable to accommodate the individual Plaintiffs in this case.

Accordingly, this Court should deny VDOC's motions to exclude Plaintiffs' experts' testimony.

LEGAL STANDARD

Federal Rule of Evidence 702 and the *Daubert* standard govern the admissibility of expert testimony and opinions. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 588–95 (1993). An expert may be qualified to offer expert testimony by “knowledge, skill, experience, training, or education.” Fed. R. Evid. 702. If an expert is qualified, the court must decide whether the expert testimony is both relevant and reliable. *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 249–50 (4th Cir. 1999) (quoting *Daubert*, 509 U.S. at 589). Indeed, Rule 702 “‘imposes a special gatekeeping obligation on the trial judge’ to ‘ensur[e] that an expert’s testimony both rests on a *reliable* foundation and is *relevant* to the task at hand.’” *Sardis v. Overhead Door Corp.*, 10 F.4th 268, 281 (4th Cir. 2021) (alteration in original) (quoting *Nease v. Ford Motor Co.*, 848 F.3d 219, 229–30 (4th Cir. 2017)). For an expert’s opinion to be relevant, the expert must have “sufficient specialized knowledge to assist the jurors in deciding the particular issues in the case.” *Belk, Inc. v. Meyer Corp.* U.S., 679 F.3d 146, 162 (4th Cir. 2012) (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 156 (1999)), *as amended* (May 9, 2012); *see also* Fed. R. Evid. 702(a) (“[T]he expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact at issue.”). Expert evidence or testimony is relevant if it will “assist the trier of fact to understand the evidence or to determine a fact in issue.” *Daubert*, 509 U.S. at 591; *Nease v. Ford Motor Co.*, 848 F.3d 219, 229–30 (4th Cir. 2017). The “touchstone” of Rule 702 is helpfulness to the trier of fact. *Kopf v. Skyrms*, 993 F.2d 374, 377 (4th Cir. 1993) (citation omitted). “Doubt regarding whether an expert’s testimony will be useful should generally be resolved in favor of admissibility.” *Mack v. Amerisource Bergen Drug Corp.*, 671 F. Supp. 2d 706, 709 (D. Md. 2009) (citation omitted).

For an expert’s opinion to be deemed reliable, it must be “based on sufficient facts or data,” Fed. R. Evid. 702(b), and it must be “the product of reliable principles and methods,” *id.* 702(c).

For “experiential expert testimony,” which “does not rely on anything like a scientific method,” “an expert may be qualified on the basis of experience” or on the basis of “experience in conjunction with other knowledge, skill, training or education.” *Copeland v. Bieber*, 2016 WL 7079569, at *3 (E.D. Va. Sept. 8, 2016) (quoting *United States v. Wilson*, 484 F.3d 267, 274 (4th Cir. 2007)). An experiential expert must “explain how [his] experience leads to the conclusion reached, why [his] experience is a sufficient basis for the opinion, and how [his] experience is reliably applied to the facts.” *Id.* (quoting *Wilson*, 484 F.3d at 274). “Expert opinions that are ‘bare conclusion[s] without reliable support’ must be excluded.” *Metro Towers, LLC v. Duff*, No. 1:20CV206, 2022 WL 1693717, at *3 (N.D.W. Va. May 26, 2022) (alteration in original) (first quoting *Stolting v. Jolly Roger Amusement Park, Inc.*, 37 F. App’x 80, 83 (4th Cir. 2002); and then citing *McEwen v. Baltimore Washington Med. Ctr. Inc.*, 404 F. App’x 789, 791–92 (4th Cir. 2010)).

Under FRE 702(d), an expert’s opinions must also “reflect[] a reliable application of the principles and methods to the facts of the case.” Fed. R. Evid. 702(d). Expert opinions “wholly conclusory and unsupported [in] nature,” by definition, fail to satisfy FRE 702(d), because the court is unable to determine whether the expert “reliably applied [any] principles and methods.” *Riddick v. Norfolk S. Ry. Co.*, No. 2:21CV297, 2022 WL 1180018, at *4 (E.D. Va. Apr. 20, 2022), *objections overruled*, No. 2:21CV297 (RCY), 2022 WL 2614877 (E.D. Va. May 6, 2022).

ARGUMENT

I. Each of Plaintiffs’ experts’ proffered testimonies relates to a distinct discipline.

Defendant argues that Plaintiffs’ five experts’ proffered testimonies are duplicative and, therefore, violate the Court’s Scheduling Order. ECF No. 280 at 7-8; ECF No. 282 at 6-7; ECF No. 284 at 6-7; ECF No. 286 at 6-7; ECF No. 288 at 6-7. The Court’s Scheduling Order states that “[e]ach party may call only one expert per *discipline*.” ECF No. 74-1 at 4 (emphasis added).

Plaintiffs' proffered experts' testimonies do not substantially overlap. Rather, each expert offers distinctive expertise in a distinct field of study, and each expert will assist the jury to understand the evidence and determine the facts in issue, as required by Rule 702. As explained *infra*, the challenged portions of each experts' testimony are not duplicative.

Richard Wells is an expert on how prison *staff* should be trained, directed, and supported to accommodate and ensure effective communication with prisoners with disabilities in the corrections context, including appropriate written guidelines and policies, staff training, and program monitoring. *See generally* Wells Report. The specific proffered testimony challenged by Defendant is not duplicative of Ms. Kennedy's or Mr. Bullis's testimony, which each address the information and training *blind prisoners* need. ECF No. 280 at 7-8. Regarding the issue of housing, Mr. Wells opines that VDOC's housing placement process for blind prisoners is inadequate because VDOC classification procedures do not consider physical disabilities such as blindness when making housing decisions—which may lead to blind prisoners being housed in inappropriate environments. Wells Report 58–60. Conversely, Ms. Kennedy opines on precisely how VDOC should assess blind prisoners' vision and mobility (e.g., verbal inventory, functional assessment) before making housing placement decisions and further opines on how VDOC should make structural adjustments to living spaces if blind prisoners must live in dorm-style housing to promote independent navigation. Kennedy Report 10-11. Regarding emergencies, Mr. Wells opines that VDOC *staff* must be adequately trained to assist blind and low vision incarcerated persons, Wells Report 59-60, while Ms. Kennedy opines that *blind prisoners* must receive robust initial orientation and assessment to ensure that the individual blind prisoner can travel safely and independently in an emergency, Kennedy Report 18. Regarding the intake and orientation processes, Mr. Wells opines that VDOC's intake procedures fail to adequately notify prisoners of

their rights under the ADA. Wells Report 49-57. Conversely, Ms. Kennedy opines that the current intake process fails to adequately evaluate the current orientation and mobility skills and needs of blind prisoners. Kennedy Report 16-17.

Regarding training, Mr. Wells opines that the VDOC training system as reflected in VDOC's policies and procedures is insufficient to adequately train *employees* regarding their obligations under the ADA, which leads to a failure to adequately accommodate individuals with disabilities, and further opines based on his expertise what should be encompassed in an adequate ADA training system for VDOC staff. Wells Report 27-36. Conversely, Mr. Bullis opines that VDOC employees' lack of understanding of "how blind people engage with the world," "combined with the lack of blind skills training for inmates sets up an environment that results in staff not knowing how to provide assistance to blind inmates and blind inmates not having independence in their environment or equal access to employment opportunities." Bullis Report 14. Mr. Bullis also opines of the need to hire instructors in the Career and Technical Education Department to train staff and blind prisoners, and provide specific guidance on reasonable accommodations for employment. Bullis Report 15.

Finally, regarding VDOC's failure to provide blind prisoners with accessible documents and access to VDOC written materials, Mr. Wells opines that the processes and practices *staff* use to ensure that blind prisoners have equal access to written materials are inadequate under the ADA. Wells Report 61-62. Mr. Bullis explains how equal access to written materials is essential for *blind prisoners'* vocational training employment opportunities. Bullis Report 8-10. Ms. Kennedy opines that VDOC's procedures for *blind prisoners* to request accommodations related to orientation and mobility are complicated and time-consuming, and rely on hand-written responses that are

inaccessible for blind individuals, and that VDOC's procedures related to orientation and mobility need to be provided in accessible formats. Kennedy Report 14.

Mr. Wells's testimony is narrowly focused on the inadequacy of VDOC's policies and procedures to ensure that *staff* reasonably accommodate blind prisoners, and is distinct from Plaintiffs' other expert witnesses.

Richard Subia is an expert on the security implications of disability accommodations in prisons, including processes and procedures for determining whether specific auxiliary aids and assistive technology pose threats to security in the correctional setting. *See generally* Subia Report. The specific proffered testimony challenged by Defendant is not duplicative. ECF No. 282 at 6-7. Regarding VDOC's failure to provide accommodations for blind prisoners, the portion of Mr. Subia's expert report cited by Defendant specifically discusses how "[a] generic statement that an auxiliary aid or assistive technology is considered a threat to safety and security of a facility" is insufficient and explains how items utilized by the blind as accommodations can be safely implemented in the prison context. Subia Report 4-7. The portion of Mr. Wells's report cited by Defendant as duplicative discusses Defendant's failure to adequately train staff to implement ADA requirements and explains what an appropriate ADA training regime would look like, Wells Report 27-36, and is, therefore, not duplicative at all. Regarding VDOC's failure to provide blind prisoners with adequate assistive technology, it is unclear what portion of Mr. Subia's report Defendant alleges is duplicative of Mr. Chong's report, as the pages Defendant cites of Mr. Subia's report do not exist. ECF No. 282 at 6 (citing Subia Report at 27-36). Mr. Subia's expert testimony focuses on VDOC's failure to provide blind prisoners with adequate assistive technology because of VDOC's failure to adequately identify auxiliary aids and assistive technology that can be safely deployed in the prison context and its failure to conduct detailed evaluations of why denied

accommodations pose a safety risk. *See generally* Subia Report. Additionally, Mr. Subia's report specifically addresses how VDOC fails to provide necessary assistive technologies in housing units and why such technologies do not undermine security. Subia Report 7-9. Conversely, Mr. Chong's testimony addresses the specific technological deficiencies of products currently deployed in VDOC, such as the JPay tablets and out-of-date SARA technology. Chong Report 6-9. In sum, Mr. Subia's testimony regarding how to address security concerns regarding assistive technology is distinct from Plaintiffs' other expert witnesses.

Curtis Chong is a blind person and an expert on assistive technology for blind persons. *See generally* Chong Report. The specific proffered testimony challenged by Defendant is not duplicative. ECF No. 284 at 6-7. Regarding VDOC's failure to provide accommodations for blind prisoners, it is unclear what portions of Mr. Chong's testimony Defendant alleges is duplicative of Mr. Wells's testimony, as Defendant cites to Mr. Subia's report in support of this argument. ECF No. 284 at 6 (citing Wells Report 27-36; Subia Report 4-7 as duplicative). Regarding testimony on blind prisoners requiring accommodations to access VDOC's paper-based processes, Mr. Wells opines on the procedural failures to train *staff* and information sharing that led to blind prisoners receiving inadequate accommodations to access paper-based processes, Wells Report 61-62, while Mr. Chong opines on the limitations of current assistive technologies, the necessity for VDOC to invest in adequate technical support for nonvisual access technology and to train and support *blind prisoners* in using assistive technologies. Chong Report 8-10. Regarding VDOC's failure to provide blind prisoners with adequate assistive technology, it is unclear what portions of Mr. Chong's testimony Defendant alleges is duplicative of Mr. Subia's testimony, as the pages Defendant cites of Mr. Subia's report do not exist. ECF No. 282 at 6 (citing Subia Report at 27-36). In sum, because no other expert opines on assistive technologies for blind persons such as

screen readers and OCR devices, Mr. Chong's testimony is distinct from Plaintiffs' other expert witnesses.

Jennifer Kennedy is a blind person, a certified blindness rehabilitation professional, and an expert in blindness rehabilitation and orientation and mobility. *See generally* Kennedy Report. The specific proffered testimony challenged by Defendant is not duplicative. ECF No. 286 at 6-7. For the reasons articulated *supra*, Ms. Kennedy's and Mr. Wells's testimony regarding housing and the intake/orientation processes are not duplicative. Regarding the adequacy of VDOC's policies and procedures for ADA accommodation requests, Mr. Wells's testimony is that the relevant written procedures do not provide for a dedicated grievance procedure for ADA complaints, Wells Report 65, while Ms. Kennedy's testimony relates to the complicated and time-consuming process blind prisoners face for receiving mobility-related tools, Kennedy Report 14. In sum, because no other expert opines on orientation and mobility skills training for blind persons, Ms. Kennedy's testimony is distinct from Plaintiffs' other expert witnesses.

Michael Bullis is blind and an expert in blindness vocational preparation, skills training, and job analysis. *See generally* Bullis Report. The specific proffered testimony challenged by Defendant is not duplicative. ECF No. 288 at 6-7. For the same reasons articulated *supra*, Mr. Bullis's testimony regarding VDOC's inadequate staff training and paper-based processes is not duplicative with Mr. Wells's testimony. Regarding assistive technologies needed to access VDOC's paper-based processes, Mr. Bullis's testimony specifically discusses trainings for blind prisoners in Braille, telephone use, and other assistive technologies to ensure access to employment opportunities. Bullis Report 5, 9-10. Mr. Subia's testimony emphasizes the need to identify auxiliary aids and assistive technology that is not a security risk and proposes a list of such devices, Subia Report 10-20, and Mr. Chong's testimony discusses the need for general access to assistive

technologies for blind inmates to independently and privately access information. Chong Report 6-10. Mr. Bullis’s testimony regarding necessary vocational skills training for blind prisoners is distinct from Plaintiffs’ other expert witnesses.

Reasonably accommodating blindness in the prison context is not monolithic; it requires coordinating across disciplines with stakeholders who are experts in distinct areas. Because the testimony of each proffered expert relates to a narrow discipline—prison procedure, prison security, assistive technologies, orientation and mobility, and vocational training—this Court should not find duplication among Plaintiffs’ experts.

II. Plaintiffs’ experts’ testimony will be helpful to the trier of fact.

Defendant next argues that Plaintiffs experts’ testimony should be excluded entirely “because this is simply not the type of case that requires [their] expertise at all.” ECF No. 280 at 8; ECF No. 282 at 7-8; ECF No. 284 at 7; ECF No. 286 at 7-8; ECF No. 288 at 7. Defendant essentially makes two arguments: *first*, that the issues in this case are comprehensible to a layperson, and *second*, that the experts’ testimony is not necessary for the jury to resolve the relevant inquiries. Both arguments take a myopic view of this case.

The issues in this case deal with two highly specialized areas of inquiry: prisons and the accommodations needed for blind individuals. These areas are not comprehensible to a layperson. A layperson would not understand:

- how prison policies, procedures, and trainings can achieve reasonable modifications and effective communication for blind prisoners, as explained by Mr. Wells;³

³ Defendant also advances what purports to be a more particularized argument with respect to Mr. Wells, and seeks to exclude testimony that is “simply about what certain VDOC documents say.” ECF No. 280 at 19-20. Defendant mischaracterizes Mr. Wells’s report. Mr. Wells explains why these various VDOC documents are deficient by identifying the missing information. Mr. Wells then explains why VDOC’s failure to include this information would undermine a prisoner’s rights

- the security considerations of prisons and how institutions like VDOC can provide reasonable accommodations while maintaining the safety and security of the institution, as explained by Mr. Subia;
- the types of assistive technologies used by blind persons and the training needed for blind individuals to use such technologies, as explained by Mr. Chong;
- the necessity for functional assessments and robust orientation and mobility training for blind persons as, explained by Ms. Kennedy; and
- the necessity for specific vocational and skills training for blind persons, as explained by Mr. Bullis.

Each subject explained by Plaintiffs' experts in this case is a unique area of knowledge outside of the layperson's common knowledge, thus requiring expert testimony. *Kopf*, 993 F.2d at 379 (recognizing that laymen can easily understand the damage a club can cause when it strikes a person's head, but expert testimony still permissible on prevailing standard of conduct for police use of such items); *Guerra v. W. Los Angeles College*, Case No. CV-16-6796 MWF (KSx), 2017 WL 10562680 at *5 (C.D. Cal. Sep. 28, 2017) (expert's testimony on transportation services available on college campuses is not a matter of common knowledge); *Yphantides v. Cnty. of San*

under the ADA, and why the fact that this information is missing explains why adequate policies are not implemented in practice. Wells Report 53 (Notice of rights fails to explain all protections under the ADA and therefore provides insufficient notice); Wells Report 54 (Greenville and Deerfield orientation manuals do not contain contact information for ADA coordinators, information on ADA-related grievances, information on how to seek accommodations, which fails to provide adequate notice of ADA processes and rights); Wells Report 65-66 (Grievance procedure fails to provide for a dedicated procedure for ADA complaints); Wells Report 69 (Informal complaint form fails to provide a way to indicate it is ADA-related). While the jurors can read the forms, it is not within the common knowledge of jurors that these documents should contain more ADA-related information. Mr. Wells's testimony explains why, with his expertise on creating and implementing written guidelines and policies related to the ADA, VDOC's documents are inadequate. Such testimony constitutes expertise and is admissible.

Diego, No.: 21cv1575-GPC(BLM), 2023 WL 7555301, at *7 (S.D. Cal. Nov. 14, 2023) (expert's testimony on municipality's standards for reasonable accommodations, the interactive process and workplace investigations is not common knowledge).

The Defendant oversimplifies the inquiry in this case to “whether VDOC provided the individual Plaintiffs with reasonable accommodations for their vision impairments.” ECF No. 282 at 7; ECF No. 284 at 7; *see also* ECF No. 286 at 7; ECF No. 288 at 7 (“...with reasonable accommodations for their various levels of vision impairment in prison.”); ECF No. 280 at 8 (“simply whether the Plaintiffs received reasonable accommodations for their visual impairments.”). In each of its motions *in limine*, Defendant pointedly ignores that this case concerns whether VDOC has ensured effective communication with blind prisoners (as the ADA requires) and raises the systemic failures of VDOC as to all blind and vision impaired prisoners, and thus the inquiry is broader than whether VDOC provided the individual Plaintiffs with reasonable accommodations for their vision impairments. But even outside of the systemic injunctive relief requested in this case, Plaintiffs’ proffered experts’ testimony provides the jurors with the tools to understand what accommodations blind prisoners, including Plaintiffs, require, and whether there are reasonable ways to provide those accommodations in VDOC’s institutions. It is then for the jury to assess, with these tools in hand and as applied to the facts of this case, whether VDOC failed to ensure effective communication and failed to accommodate Plaintiffs’ disabilities. Moreover, VDOC repeatedly argues it is not liable under the ADA because its staff are capable and willing to assist blind prisoners—an argument for which Plaintiffs’ experts’ testimony is directly relevant.

Mr. Wells’s testimony regarding the deficiencies in VDOC’s policies, procedures, and trainings will help jurors assess whether VDOC has adequate procedures in place to ensure

effective communication and provide reasonable modifications to the individual Plaintiffs and blind prisoners in general. Mr. Subia's testimony regarding prison security and safety and the use of auxiliary aids in prisons will help jurors assess whether VDOC's failure to consider providing additional auxiliary aids under the guise of security constitutes a failure to comply with the ADA. Mr. Chong's, Ms. Kennedy's, and Mr. Bullis's testimony regarding skills, trainings, and technological aids blind individuals require to live independently and access programs and services will allow the jury to assess what accommodations are required and, in conjunction with Mr. Wells's and Mr. Subia's testimony, what accommodations would be reasonable in VDOC facilities. Thus, this case requires Plaintiffs' experts' specialized knowledge and testimony.⁴

III. Mr. Wells's testimony satisfies the non-scientific standards of *Daubert*.

Defendant argues specifically with respect to Mr. Wells that his testimony should be excluded because it is unreliable under the non-scientific *Daubert* standard because he: (1) fails to explain how his experience in prison administration supports his conclusions regarding the deficiencies in VDOC's policies, procedures, and training; and (2) his opinions are not supported by "any identifiable standards." ECF No. 280 at 9. At the outset of his report, Mr. Wells details his extensive experience with, and knowledge of, the ADA and its implementation within the correctional environment, including as a member of rank-and-file prison staff, a member of prison management, a statewide subject matter expert on the ADA, and a neutral corrections operations

⁴ Defendant makes a generic argument with respect to Mr. Wells and Mr. Subia that "to the extent that the Plaintiffs wish to introduce expert testimony as to whether VDOC failed to follow its own policies," such testimony does not require expertise and can be assessed by the jury. ECF No. 280 at 10, ECF No. 282 at 7-8. Defendant does not cite any portion of either report to support this argument. Mr. Wells and Mr. Subia appropriately comment on the insufficient and confusing nature of VDOC's policies, and the absence of relevant policies. Again, because a layperson is unable to assess what policies and procedures are required in the prison context, their expert testimony is appropriate.

expert/court-appointed monitor related to the ADA. Wells Report 2-4. As a court-appointed monitor, Mr. Wells specifically monitors disabled prisoners and their access to programs, services, and activities in Michigan, Monterey County, and Alameda County. Wells Report Ex. 1 at 4. Mr. Wells also conducts semi-annual reviews of Orange County Jail facilities pertaining to ADA and restrictive housing by agreement of the parties. *Id.* While employed with the California Department of Corrections and Rehabilitation (“CDCR”), Mr. Wells provided internal auditing oversight over the American Correctional Association (“ACA”) accreditation statewide review process for over 500 performance-based standards related to nearly all aspects of prison operations including disabilities. Wells Report 4.

As detailed *supra* and in Mr. Wells’s report, he has robust experience conducting ADA audits, evaluations, and monitoring both for compliance with the ADA and the ACA. In his report, Mr. Wells explains how that experience leads to the conclusions reached and how that experience is reliably applied to the facts, as required by *Daubert*. See *Thomas v. City of Chattanooga*, 398 F.3d 426, 432 (6th Cir. 2005). For example, with respect to training, Mr. Wells begins with the Department of Justice’s recommendation that public institutions, particularly law enforcement, evaluate their ADA training efforts because “lack of training leads to discriminatory practices, even when the policies in place are nondiscriminatory.” Wells Report 29. Mr. Wells then evaluates VDOC’s current training and how, in his experience as a curriculum designer, trainer, and ADA monitor, it fails to adequately train staff on the ADA, and thus is likely to lead to discrimination like that alleged in this case. Wells Report 31-32. Mr. Wells specifically explains how, in his experience as statewide ADA/disability trainer for the CDCR, holding regular and varied sensitivity training (including lectures, class discussions, etc.) to all CDCR staff led to staff better accommodating incarcerated individuals with disabilities, and compared this to VDOC’s lack of

analogous training which, in his opinion, led to the discrimination in this case. Wells Report 35-36.

As another example, Mr. Wells opines that VDOC does not provide blind prisoners with equal access to its programs and services through reasonable accommodations. Wells Report 62. To support this opinion, Mr. Wells relied upon his experience ensuring CDCR's compliance with the ADA and provision of required accommodations to individuals with disabilities (including vision loss) pursuant to the remedial plan in *Armstrong v. Newsom* [previously *Brown*]. Wells Report 63. Based upon this experience, Mr. Wells concluded that VDOC does not ensure effective communication with blind prisoners. Wells Report 63-64. Mr. Wells thus sufficiently connects his experience with the facts of this case, and meets the requirements of *Daubert*.

IV. Plaintiffs' experts' testimony is relevant.

Defendant next argues that Plaintiffs' experts' testimony should be excluded because it is irrelevant. As to all of Plaintiffs' experts, Defendant makes the same general argument that each expert does not sufficiently opine on how their area of expertise was applied to each individual Plaintiff, leading to each individual Plaintiff being denied a specific accommodation. ECF No. 280 at 11; ECF No. 282 at 8; ECF No. 284 at 8; ECF No. 286 at 8-9; ECF No. 288 at 8. Again, Defendant willfully ignores the systemic nature of the violations alleged in the Amended Complaint, and the necessity of injunctive relief to ensure that blind prisoners are reasonably accommodated in VDOC facilities. Defendant also ignores that Plaintiffs claim that VDOC has failed to affirmatively ensure effective communication with blind prisoners, as required under the ADA.

Defendant primarily relies on *Faulkner v. Lucile Packard Salter Children's Hospital*, Case no. 21-cv-00780-SI, 2023 WL 375686 at *4 (N.D. Cal. Jan. 24, 2023) and *Naeem v. McKesson*

Drug Co., 444 F.3d 593, 608 (7th Cir. 2006), for the proposition that Plaintiffs’ experts’ testimony “fails to draw any connection between [the defendant’s] policies/practices and defendant’s conduct in this case,” and thus is irrelevant and should be excluded. ECF No. 280 at 12; ECF No. 282 at 9; ECF No. 286 at 9, ECF No. 288 at 8. But in *Faulkner*, the proffered expert testimony merely summarized relevant human resources law and did not mention any of the policies or practices of the defendant or offer an opinion related to the case. 2023 WL 375686 at *4. And in *Naeem*, the expert’s testimony in court was not tied to specific portions of the relevant policy manual, but was merely based on general observations. 444 F.3d at 608. In contrast, each experts’ testimony here draws the requisite connections to be relevant under the *Daubert* standard.

Defendant argues that Mr. Wells’s opinions regarding the inadequacies of VDOC’s policies and procedures under the ADA are irrelevant because “Wells does not explain how each of the OPs, policies, and procedures that he cites are inadequate as applied to each of the individual Plaintiffs in this case and has led each individual Plaintiff being denied any specific accommodation.” ECF No. 280 at 11. Defendant ignores that this case raises issues of widespread, ongoing, and systemic failures by VDOC to accommodate blind prisoners and ensure effective communication, and Mr. Wells’s opinions on the systemwide deficiencies are, therefore, relevant. Additionally, Mr. Wells makes clear at the outset of his report how the inadequacies of VDOC’s procedures and policies led to the deprivation of rights alleged in this case: “VDOC’s written guidelines governing staff ADA/disability-related responsibilities are inadequate, and therefore staff are not aware that VDOC expects them to accommodate individuals with disabilities and ultimately fail to provide effective reasonable accommodations to incarcerated persons with disabilities, including blind/vision-impaired people.” Wells Report 8. It is VDOC’s overarching failure to craft adequate policies that govern accommodations in its facilities that is the genesis of

the discrimination in this case. Mr. Wells's testimony explains where those deficiencies lie, effectively explaining to the jury why the widespread deprivation of rights is occurring in this case.

Mr. Wells also explains in detail the inadequacies of VDOC's operating procedures. For example, OP 801.3 I.E. states that information pertaining to the prisoner's disability and any reasonable accommodations information is considered protected health information, which Mr. Wells explains does not clearly articulate that "staff should have access to this information on a need-to-know basis" because "staff from most disciplines in the prison...work with incarcerated persons with disabilities on a regular basis and provide (or may provide) reasonable accommodations. They should have quick access to this information...in a comprehensive real-time networked electronic tracking system." Wells Report 14. Mr. Wells later explains that, without a real-time networked tracking system, "there is no feasible way to identify whether required or needed disability related accommodations are being provided." Wells Report 46. In other words, VDOC's blanket policy that treats accommodation information as confidential inhibits prison staff from adequately accommodating disabled prisoners because they do not have access to the requisite information to provide an accommodation. The real-time tracking system is a solution which, in Mr. Wells's experience, would remedy the deficiency posed by this policy.

Defendant argues that, when Mr. Wells relates specific VDOC policies to the Plaintiffs, he does so not to suggest that they are inadequate, "but rather to suggest that those policies have not been followed." ECF No. 280 at 12. This argument is somewhat tautological: "Wells does not explain which accommodations had been denied to which Plaintiffs" because when "[he] interviewed the six individual plaintiffs...virtually all of them stated that staff do not assist them or provide accommodations for the disabilities." *Id.* Mr. Wells could not be clearer: from his interviews with Plaintiffs, they have not been provided adequate accommodations. Similarly,

Defendant argues that Mr. Wells does not explain what jobs or services Plaintiffs were not made aware of by being unable to read the bulletin board, but if Plaintiffs do not have an accommodation to view the bulletin board, they cannot know what jobs they are missing. *Id.*

Defendant argues that Mr. Wells was unable to explain at his deposition proposed changes to OP 801.3⁵ regarding prisoner disability accommodation requests, and that Mr. Wells was “unable to articulate the point he was trying to make” regarding the procedure’s current policy, which requires the ADA Coordinator to forward all disability-related reasonable accommodation requests to the medical department. ECF No. 280 at 13. Based on this alleged failure, Defendant argues that Mr. Wells’s “prescriptions for the accommodations process is not applied to the facts of this case,” and therefore irrelevant. *Id.* However, Mr. Wells explains in detail in his report that the written policy provision that “the facility ADA Coordinator will consult with the facility Medical Practitioner or designee prior to taking action regarding disabled inmates,” Wells Report 12, is inappropriate because medical necessity is not the standard for granting an accommodation, and needlessly forwarding accommodation requests to the medical department prolongs the accommodation process. Wells Report 50-51. Mr. Wells’s report, like any expert’s report, must be read as a whole instead of in the piecemeal fashion taken by Defendant. When read in full, Mr. Wells clearly explains the deficiency with this procedure and proscribes how it should be remedied to effectuate the requirements of the ADA. Mr. Wells’s opinions regarding VDOC’s policies and procedures are, therefore, relevant and admissible.

Defendant argues that Mr. Wells’s testimony regarding VDOC’s failure to adequately train staff regarding the ADA is irrelevant because there is no failure-to-train claim and it is irrelevant

⁵ Though Defendant cites OP 803.1 in its motion, the pages it cites in the deposition and Mr. Wells’s report clearly reference OP 801.3. ECF No. 280 at 13.

to the inquiry of whether the individual Plaintiffs were denied accommodations. ECF No. 280 at 14, 15. But it is beyond cavil that, to provide reasonable accommodations to disabled prisoners and comply with the ADA, prison staff need to be adequately trained on what the ADA requires. *See, e.g., Armstrong v. Newsom*, 58 F.4th 1283, 1297 n.12, 1298 (9th Cir. 2023) (affirming district court's order that California prison provide further training tailored to achieving staff compliance with the ADA in enforcement action for class action settlement for failure to provide reasonable accommodations to disabled prisoners). Mr. Wells's opinion that VDOC's training regarding the ADA is inadequate is relevant evidence of its violations of the ADA systemically and with respect to the individual Plaintiffs, because an untrained prison workforce cannot comply with the ADA: it simply does not know how to do so without proper training. Put differently, an untrained prison workforce is evidence that a prison is not ensuring effective communication with blind prisoners. Such evidence is clearly relevant here.

Defendant argues that Mr. Subia's opinions regarding devices that VDOC could provide safely to blind prisoners are irrelevant and unreliable because he does not identify any prisoner who requires or requested these devices or explain that VDOC has considered or rejected these devices. ECF No. 282 at 9. But whether any individual Plaintiff requested any particular device is not the standard. Defendant has an affirmative obligation to provide auxiliary aids and services to ensure equally effective communication with blind prisoners. The issue of what devices are appropriate for provision to blind prisoners is clearly relevant. Mr. Subia's list of potential auxiliary aids that could be safely deployed in VDOC facilities to accommodate blind prisoners demonstrates the inadequacies of the severely limited number of preapproved items and rebuts Warden Punturi's blanket denial of all Bluetooth devices based on perceived security risks. Subia Report 9-10, 12. Moreover, Mr. Subia's analysis also shows that VDOC's refusal to allow blind

prisoners to have assistive reading devices in their living areas has no basis in security concerns—even if VDOC had security concerns about devices requested by blind prisoners, VDOC failed to explore these other options.

Defendant argues that Mr. Chong’s testimony is irrelevant because he does not explain that Plaintiffs require technology in addition to the SARA scanner, and argues that Mr. Chong does not explain how technologies offered at Greenville and Deerfield are not available to Plaintiffs. ECF No. 284 at 8. This is incorrect, and conflates availability with accessibility. Mr. Chong specifically opines that the JPay tablets, kiosks to purchase music and other services, and general libraries are inaccessible because they do not have screen reading software. Chong Report 7. Mr. Chong specifically notes that the SARA technology used to convert printed materials to speech is no longer sold, supported, or updated by its vendor. Chong Report 7. Mr. Chong also notes that technologies such as the JAWS software and SARA are not available to prisoners outside of the classroom and/or library, inhibiting their ability to study or practice independently. Chong Report 8-9. Mr. Chong’s testimony thus is relevant to explain how all blind prisoners, including Plaintiffs, do not have adequate access to assistive technology.

Defendant argues that Ms. Kennedy’s testimony is irrelevant because she does not opine about the mobility and orientation training that is offered at VDOC through DBVI. ECF No. 286 at 8. Ms. Kennedy details at the outset of her report the materials she reviewed to form her opinion, including DBVI’s subpoena response outlining the orientation and mobility services DBVI provides in VDOC facilities, a DBVI training video on guided assistance for blind individuals, and correspondence between DBVI and VDOC concerning DBVI services provided to Plaintiffs. Kennedy Report 2-3 (citing “Subpoena response Letter from Rick L. Mitchell (Commissioner, DBVI) to Samantha Westrum (ACLU of Virginia) (December 11, 2023)”; NFB017087 (training

video); DBVI 000049-50, DBVI 000114, NFBV 013978-79 (correspondence regarding DBVI services)). More fundamentally, her opinion reflects the fact that DBVI is not providing orientation and mobility training to all blind prisoners in a systematic way, something Ms. Kennedy opines is insufficient: Mr. Shaw, for instance, never received any orientation and mobility training even though he experienced most of his vision loss while incarcerated. Kennedy Report 6. Her ultimate opinion is that “Deerfield and Greensville are not devoting *adequate* resources to orientation and mobility or otherwise to assisting blind prisoners.” Kennedy Report 17 (emphasis added). Specifically, Ms. Kennedy relies upon Greensville’s ADA coordinator’s failure to devote enough time to disability-related issues, lack of understanding of the needs of blind individuals in Greensville (specifically for caregiver assistance) and making improper assumptions, and her inability to “recall whether any orientation and mobility specialist had ever provided services to Greensville despite there being inmates who had experienced vision loss at Greensville.” Kennedy Report 17-18. Ms. Kennedy thus does adequately consider the training provided by DBVI in VDOC facilities, and opines that what exists at Deerfield and Greensville is inadequate. That VDOC disagrees with Ms. Kennedy’s opinion on its facilities’ inadequacies does not make her opinion irrelevant.

Next, Defendant argues that Ms. Kennedy’s opinions about VDOC’s intake and orientation processes for new prisoners are irrelevant because the Plaintiffs are not new prisoners. ECF No. 286 at 9. Again, because this case involves requests for systemic relief on behalf of all blind prisoners, the sufficiency of VDOC’s intake procedures is relevant to determine whether VDOC’s current intake and orientation process fails all blind prisoners. Additionally, Ms. Kennedy’s opinion is about the first and foundational way VDOC fails blind prisoners: “VDOC’s failure to provide robust evaluation and assessment and training for new prisoners *is making it harder* for

blind prisoners to safely and independently navigate prisons.” Kennedy Report 16. In other words, VDOC’s failure at the outset to adequately evaluate the needs of blind prisoners and orient them to the particulars of the facility makes it hard for blind prisoners to safely and independently navigate the prison throughout their incarceration. That Plaintiffs are not new prisoners is not the point; the failure in the first instance to provide adequate intake and orientation is a compounding harm, and thus relevant to their individual cases.

Finally, Defendant argues that Ms. Kennedy’s testimony regarding types of mobility training available to non-incarcerated individuals is irrelevant because VDOC does not permit some types of training, such as personal canines. ECF No. 286 at 9-10. This argument misconstrues Ms. Kennedy’s testimony, which does not conclude VDOC should allow blind prisoners to use personal canines and, instead, merely notes, in a “Background” section, that “[t]he long white cane and dog guide are the most common mobility tools used by blind people to gather information about their environment,” and that, while her report concerns orientation and mobility, dog trainers “receive additional instruction that falls outside the traditional skillset of O&M professionals.” Kennedy Report 4–5.

Defendant argues that Mr. Bullis’s testimony is irrelevant because he does not opine that any of the Plaintiffs require specific blindness skills or that VDOC has denied them these skills. ECF No. 288 at 8. Again, because this case raises allegations of widespread, ongoing, and systemic discrimination and failures to accommodate, Mr. Bullis’s opinions on the vocational skills blind individuals require and VDOC’s failure to provide appropriate blind skills vocational training, including its failure to assess the needs of its blind population and ensure that staff can afford blind prisoners equal access to their environment and employment opportunities are relevant to this case. Further, Mr. Bullis opines on specific skills that would make positions in kitchens, woodshops,

and computer-based roles accessible to blind prisoners. Bullis Report 12-13. This is relevant because Plaintiffs have alleged that they have been denied access to these jobs based on their blindness. Based on his review of materials, VDOC fails to provide the necessary and appropriate skills training for blind individuals to gain these skills, and that opinion is relevant. Bullis Report 7, 9.

Defendant also misconstrues Mr. Bullis's discussion of Mr. McCann's blindness skills training. Mr. Bullis opines that VDOC staff are ignorant of how blind people engage in the world and workplace, and this ignorance, combined with the lack of blindness skills training for prisoners, results in blind prisoners being denied equal access to employment opportunities. Bullis Report 14. Evidence of this ignorance includes Barry Marano's, ADA Coordinator of VDOC, lack of understanding of the capabilities of blind people related to kitchens and the lieutenant in Mr. McCann's pod assuming that Mr. McCann could not pour hot water because he is blind. Bullis Report 8, 12, 14. Mr. Bullis's opinion here is not that Mr. McCann requires additional training, but that, because "VDOC does not provide its staff with necessary training on accommodations for blindness and blindness skills training," Mr. McCann was denied employment opportunities that he can perform. Bullis Report 14. That opinion is clearly relevant to the issues in this case: whether blind individuals including Mr. McCann are discriminatorily denied access to programming, services, employment, and opportunities within VDOC.

V. Plaintiffs' experts' testimony is reliable.

Defendant next argues that all Plaintiffs' experts' testimony should be excluded because it is unreliable. For the reasons articulated *infra*, this Court should reject Defendant's arguments and conclude that Plaintiffs' proffered expert testimony is reliable and admissible.

Defendant argues that Mr. Wells's opinion that VDOC staff training is inadequate is unreliable because it is not supported by sufficient evidence and is not sufficiently connected to

each Plaintiff being denied any accommodation. ECF No. 280 at 14-15. This is incorrect. Mr. Wells articulates that, upon his review of VDOC's records, there is no documentation that confirms which VDOC staff completed ADA training, and thus no evidence that staff personnel completed such training. Wells Report 31. The training itself is not specific to facilities, and, because of the online format, it does not provide for meaningful question-and-answer. *Id.* Mr. Wells relies upon his experience as a curriculum designer, trainer, and ADA monitor to opine that "the minimally acceptable practice is for ADA training to be formalized classroom training, with a corresponding PowerPoint presentation, facilitated by at least one qualified/knowledgeable ADA instructor." *Id.* at 31-32. Mr. Wells proceeds to detail the minimum substantive requirements for ADA trainings based on his experience developing and training multiple jurisdictions regarding ADA compliance. *Id.* at 33. Mr. Wells's opinion that VDOC staff training is inadequate is thus with solid foundation in Mr. Wells's wealth of experience and his assessment of VDOC's training procedures.

Defendant argues that Mr. Wells's opinion that VDOC's intake and orientation processes are inadequate for blind prisoners is unreliable because the documents Mr. Wells reviewed regarding Greenville and Deerfield's orientation and intake procedures post-date when Plaintiffs McCann, Shabazz, Shaw, and Courtney arrived at their respective facilities. ECF No. 280 at 16. The materials Mr. Wells reviewed are relevant regardless, particularly where Defendant points to no evidence that VDOC's intake and orientation procedures were different than or superior to the more recent policies. And, again, this case is not focused merely on the individual plaintiffs but advocates for systemic change on behalf of all current and future blind prisoners, as advocated for by the organizational Plaintiff.

Defendant's argument that Mr. Subia's opinion that "VDOC has failed to accommodate blind and low vision inmates" is unreliable inaccurately flattens Mr. Subia's testimony. ECF No.

282 at 8. In Mr. Subia's opinion, VDOC has failed to provide appropriate accommodations for blind and vision impaired prisoners in accordance with the ADA because it has instituted policies of blanket denials of certain items without evaluating the ways to securely deploy such auxiliary aids, and the approved items VDOC does deploy are not varied enough or available in enough spaces in the prison to ensure that blind prisoners have access to VDOC's programs, activities, and services, and can operate independently. *See generally* Subia Report. Mr. Subia explains that he toured both Deerfield and Greensville Correctional Center housing units and interviewed prisoners, including Plaintiffs. Subia Report 7. He explains how the only assistive devices in housing units were handheld magnifiers, which are insufficient for totally blind prisoners, and the additional assistive devices at Deerfield—the SARA Reader and Merlin machine—are only available in the library and, therefore, only available for limited amounts of time. Subia Report 8. By explaining in detail the deficiencies with the accommodations in VDOC which are purportedly for safety reasons, Mr. Subia sufficiently connects his testimony and his conclusions, and his testimony is, therefore, reliable.

Defendant argues that Mr. Chong's testimony regarding JPay devices is unreliable and speculative because Mr. Chong provides no basis to conclude that VDOC's specific JPay tablets are Android devices. ECF No. 284 at 8. Mr. Chong relied on the press release from Securus Technologies (which owns JPay) announcing the debut of JP6S for incarcerated individuals, which explicitly states that the device relies upon Android's operating system. Chong Rep. 4 (citing Press Release, Securus Technologies Debuts the JP6S, the Most Evolved Tablet Constructed to Improve the Wellbeing of Incarcerated Individuals, PR Newswire (July 22, 2020, 09:00 EST), <https://www.prnewswire.com/news-releases/securus-technologies-debuts-the-jp6s-the-most-evolved-tablet-constructed-to-improve-the-wellbeing-of-incarcerated-individuals->

301097467.html). Mr. Chong also relied upon documents and depositions that referenced VDOC prisoners having access to the JP6S version of JPay. Chong Report 3-4 (citing in relevant part NFBV 010396; Geist Deposition; Marano Deposition; Shaw Deposition; Washington Deposition). Mr. Chong also details his experience and expertise with nonvisual access to the Android operating system. Chong Report 2. Mr. Chong clearly has the requisite expertise and factual basis to render reliable conclusions regarding the JPay tablets used by VDOC prisoners.

Defendant argues that Ms. Kennedy's and Mr. Bullis's opinions are unreliable because they do not have experience in prison administration, making their opinions regarding what is appropriate for blind prisoners unreliable and speculative. ECF No. 286 at 10-11; ECF No. 288 9-10. Ms. Kennedy is an expert on orientation and mobility training for blind individuals, and Mr. Bullis is an expert on vocational and skills training for blind individuals. Their opinions are appropriately limited to the deficiencies in those trainings in VDOC facilities, and the necessity to supply those trainings for all blind people, including those who are in prisons. The ultimate questions for the jury to determine are whether VDOC fails on a systemic level to accommodate blind prisoners and specifically failed to accommodate the Plaintiffs in this case, and whether accommodations like those proposed by Ms. Kennedy and Mr. Bullis are reasonable in the prison context. Defendant's objections go to the weight of Ms. Kennedy's and Mr. Bullis's expert testimony—a determination left squarely in the province of the jury—rather than admissibility. *See Samuel v. Ford Motor Co.*, 112 F. Supp. 2d 460, 469 (D. Md. 2000) (“The jury evaluates the expert’s credibility and decides what weight to give to his or her testimony, in the light of the court’s instructions on the law.”).

VI. Mr. Wells's and Mr. Subia's testimony does not rely on conversations with unidentified VDOC prisoners, and thus is admissible.

Defendant argues that Mr. Wells's and Mr. Subia's testimony based upon any conversation or interview with an unidentified VDOC prisoner must be excluded. ECF No. 280 at 17-18; ECF No. 282 at 9-10.

With respect to Mr. Wells, Defendant cites the following exchange:

Q: Do you recall the names of any nonparty DOC inmates who you spoke?

A: Names? No. again, with those folks I didn't have any formal, you know, Q&As. I do recall, again, I don't remember a name, but I recall on the yard, on the yard there, the recreation yard, having some informal conversations, but again, nothing. I don't remember any names or anything like that. It was very quick and brief. It wasn't anything formal.

Wells Dep. 11:6-15. Defendant points to no portion of Mr. Wells's report where he relies solely upon information from unidentified prisoners to reach his conclusions. As Mr. Wells states in this exchange, he did not have any substantive, information-seeking conversations with nonparty prisoners, but rather had brief, informal exchanges. Compared to Mr. Wells's robust reliance on VDOC's own deficient policies, procedures, and trainings, review of depositions in this case, and his formal conversations with Plaintiffs, any information gleaned from unidentified prisoners was *de minimis* and had no impact on his ultimate conclusions.

With respect to Mr. Subia, Defendant cites the following two exchanges:

Q: All right. Did you speak to any non-party DOC inmates to help prepare your report?

A: Not in any details. You know, there were some – some of the aides that were there that were – that I, you know, just spoke to about access and things of that nature. I couldn't tell you their names, other than they did tell me that they were aides. And they were just basic questions about, you know, how they got their job, what they did, and things of that nature.

Subia Dep. 11:5-14.

Q: So based on your review of the evidence from the tours, from speaking with inmates, and from reviewing the documents in this case, are there visually impaired inmates at these facilities for whom the magnifiers would be sufficient to allow them to access written materials?

[...]

A: ...I know that for the individuals that I talked to and asked about, I asked them and I looked around, and that's what they had available. And I asked them if that was adequate for them, and they told me know. And I would have them explain to me why. And those are the answers I would get, you know, at times I can't utilize this to appropriately write a document, or a document is not available, or where would I go to get this document. It was things like that. So it was specifically talking to the inmates, looking around the facility itself, and identifying if there's any other alternative to the hand-held magnifiers, which limits their ability to do a number of things.

Q: And the inmates that you're referring to here that you spoke to about – in this context about whether the magnifiers were sufficient, was that just the plaintiffs or other inmates as well?

A: It was both. It was some just inmates that identified in the units, and it was some that I spoke to that were plaintiffs in this case, and it was also inmates that I spoke to who were assigned as aides to some of these inmates who had these specific problems, or were identified as blind or visually impaired. So it was across the board.

Q: And those non-party inmates who you spoke to, are you able to recall who any of them were?

A: No. I mean, I know where they were, but I don't know their names or anything like that.

Subia Dep. 51:8-52:23.

Defendant points to no portion of Mr. Subia's report where Mr. Subia relies solely upon information from unidentified prisoners to reach his conclusions. Mr. Subia does not offer any opinions on the roles of prisoner aides, so it cannot be said that conversations with any aides impacted his opinions. Mr. Subia's opinion that blind prisoners do not have access to auxiliary aids or assistive technology that allows them to engage in programs, activities, or tasks that require reading and writing is supported by Mr. Subia's observations of the facilities and interviews with

Plaintiffs. Subia Report 7-8. Compared to Mr. Subia's robust reliance on VDOC's own deficient policies, procedures, and trainings, review of depositions in this case, and his formal conversations with Plaintiffs, any information gleaned from unidentified prisoners was *de minimis* and had no impact on his ultimate conclusions.

VII. Plaintiffs' experts' testimony about Plaintiffs' allegations are admissible.

Defendant argues that Plaintiffs' experts' testimony which merely repeats any facts or allegations learned from the individual Plaintiffs or other witnesses should be excluded. ECF No. 280 at 18-19; ECF No. 282 at 10-11; ECF No. 284 at 9; ECF No. 286 at 11; ECF No. 288 at 10. While it is impermissible for an expert to "merely regurgitate factual information" learned from other witnesses, the purpose of expert testimony is to educate the jury, and "it is permissible to allow the expert to summarize or characterize the evidence in order to educate the jury on the import of the evidence, in light of the expert's field of expertise." *SAS Inst., Inc. v. World Programming Ltd.*, 125 F. Supp. 3d 579, 587-88 (E.D.N.C. 2015), *aff'd*, 874 F.3d 370 (4th Cir. 2017); *United States v. Johnson*, 54 F.3d 1150, 1157 (4th Cir.1995) (allowing expert to summarize prior lay testimony through a demonstrative exhibit in light of expertise); *cf. Kibert v. Peyton*, 383 F.2d 566, 570 (4th Cir.1967) ("It is elementary that an expert witness is permitted to take into account the testimony of others as to what they observed, and upon his interpretation to offer an informed professional opinion.").

It is necessary for Plaintiffs' experts to reference information learned from Plaintiffs and other witnesses to educate the jury about the import of the evidence and explain how Plaintiffs' experts reached their conclusions. Mr. Chong, Ms. Kennedy, and Mr. Bullis will educate the jury on the assistive technologies and skills trainings blind individuals need in order to safely and fully access services, programs, and facilities during their incarceration; this requires explaining what technologies and trainings are currently available to blind prisoners in Plaintiffs' experiences, and

opining on their deficiencies. Mr. Wells will educate the jury on the policies, procedures, and trainings required to effectively implement the ADA in the correctional setting; this requires explaining the current policies, procedures, and trainings in VDOC and their implementation as experienced by Plaintiffs, and opining on their deficiencies. Mr. Subia will educate the jury on the security implications of disability accommodations in prisons; this requires explaining VDOC's current process for evaluating the security risks for disability accommodations and proffered explanations by VDOC for not providing certain accommodations, and opining on the deficiencies of this process.

Plaintiffs' experts do not seek to regurgitate testimony from other witnesses to the jury, but rather to educate the jury on their expertise, apply that expertise to the evidence, and explain the basis for their conclusions; such testimony is permissible.

VIII. Mr. Wells's and Mr. Subia's expert testimony does not contain impermissible legal conclusions.

Defendant moves to exclude Mr. Wells's opinions that various VDOC operating procedures, policies, procedures, and staff training are inadequate under the ADA, ECF No. 280 at 20, and Mr. Subia's opinion that VDOC "has failed to provide appropriate accommodations for blind and vision impaired [prisoners] in accordance with the ADA," ECF No. 282 at 11, by arguing that such opinions constitute legal conclusions and are, therefore, inadmissible.

Defendant overstates the rules. "An opinion is not objectionable just because it embraces an ultimate issue." Fed. R. Evid. 704(a). Indeed, "[t]he line between a permissible opinion on an ultimate issue and an impermissible legal conclusion is not always easy to discern. We identify improper legal conclusions by determining whether the terms used by the witness have a separate, distinct, and specialized meaning in the law different from that present in the vernacular." *United States v. McIver*, 470 F.3d 550, 562 (4th Cir. 2006) (cleaned up). As an initial matter, the question

that the jury must answer in this case is whether VDOC has failed systemically and violated Plaintiffs' rights under the ADA and Section 504 by failing to provide reasonable accommodations and equally effective communication to blind prisoners. Mr. Wells's opinions on the inadequacies of VDOC's policies, procedures, and trainings serves as evidence of VDOC's systemic failures and likelihood that it violated the Plaintiffs' individual rights, but still does not answer the ultimate legal question. Similarly, Mr. Subia's opinions that certain auxiliary aids can be deployed safely in prisons and that VDOC failed to provide appropriate accommodations to blind prisoners in accordance with the ADA does not answer the ultimate question of whether such accommodations would be reasonable.

To the extent that Mr. Wells's or Mr. Subia's testimony states a legal conclusion regarding VDOC's violations of the ADA and Section 504, such opinion testimony is still admissible because it relates to a specialized area and thus is helpful for the jury. *See United States v. Barile*, 286 F.3d 749, 760 n.7 (4th Cir. 2002) ("in some circumstances, opinion testimony that arguably states a legal conclusion is helpful to the jury, and thus, admissible.") (citation omitted); *Kopf*, 993 F.2d at 378-79 (district court abused its discretion in excluding testimony on the excessive force standard because (1) "objective reasonableness" was not generic, but applied to specific of "a reasonable officer," and (2) answering juror questions on the use of specialized tools such as handcuffs, guns, mace, and dogs, may require specialized knowledge and therefore assisted by expert testimony). As Defendant repeatedly emphasizes, prisons are a specialized context with particular considerations regarding reasonableness of providing accommodations. Mr. Wells's and Mr. Subia's specialized knowledge on the application of accommodations for blind prisoners will help the jury assess the reasonableness of accommodations and VDOC's failure to accommodate and ensure effective communication in this case.

CONCLUSION

Plaintiffs' proffered expert witnesses have specialized knowledge in five distinct disciplines. Their testimony is helpful to educate the jury on the specialized issues of necessary skills training and accommodations for blind individuals and how prisons like VDOC can create policies, procedures, and trainings to reasonably accommodate blind individuals while maintaining the safety and security of their facilities. Their opinions are relevant and reliable, and easily satisfy the requirements of FRE 702, 704, and *Daubert*. Accordingly, Plaintiffs request that this Court deny Defendant's Motions in *Limine* to Exclude the Testimony of Plaintiffs' Experts Richard Wells, Richard Subia, Curtis Chong, Jennifer Kennedy, and Michael Bullis.

Dated: April 24, 2024

Respectfully submitted,

/s/ Eve L. Hill

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of April, 2024, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (“NEF”) to the following:

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I hereby certify that I will mail the foregoing document by U.S. Mail to the following non-filing user:

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