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District Court, City & County of Denver, State of Colorado
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KANDACE RAVEN, JANE GALLENTINE, TALIYAH MURPHY, AMBER MILLER, MEGAN GULLEY, LAVENYA KARPIERZ and CUPCAKE RIVERS,
Plaintiffs, as representatives of themselves and all others similarly situated in this class action,
v.
JARED POLIS, Governor of Colorado, *et al.*,
Defendants.

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Case No. 19CV34492

Ctrm./Div.: 203

PLAINTIFFS' OPPOSITION TO GOVERNOR'S MOTION TO DISMISS COMPLAINT

The Plaintiffs, Kandice Raven, Jane Gallentine, Taliyah Murphy, Amber Miller, Megan Gulley, Lavenya Karpierz, and Cupcake Rivers, as representatives of themselves and all others similarly situated, by and through their attorneys, Paula Greisen, Jessica Freeman, Lynly S. Egyes, Shawn Thomas Meerkamper, and Dale Melchert, respectfully submit this response in opposition to Defendant Governor Jared Polis's Motion to Dismiss (the "Governor's Motion") pursuant to Rule 12(b)(5) of the Colorado Rules of Civil Procedure.[1]

INTRODUCTION

This Court should deny the Governor's Motion for two reasons. ***First***, it is not only customary, but proper to name the Governor, the state's supreme executive, as a defendant in lawsuits, such as this one, seeking to enjoin executive branch agencies for unconstitutional and unlawful activities. *Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004) (en banc). This practice, which is grounded in the Governor's constitutional responsibility to take care that the laws be faithfully executed, is wide-spread and well established. *Id.*; Colo. Const. art IV, § 2. ***Second***, by invoking the Governor's responsibility with respect to the "overall administration of the laws of the State," Plaintiffs have pleaded sufficient facts to tie Governor Polis to their claims asserted in the First Amended Complaint. First Am. Compl. ¶ 14.

[1] Governor Polis incorporates Defendants' Joint Partial Motion to Dismiss pursuant to Rules 12(b)(1) and 12(b)(5) as an alternative basis for dismissal. In this response, Plaintiffs respond only to Governor Polis's arguments for dismissal under Rule 12(b)(5). Plaintiffs respond to Defendants' Joint Partial Motion to Dismiss in a separate opposition paper. The fact that Plaintiffs' do not address the Defendants' 12(b)(1) arguments here should not be construed as waiver of their defenses and objections.

SUMMARY OF COMPLAINT

This class action lawsuit concerns the unconstitutional and unlawful treatment of transgender women held in custody within the Colorado Department of Corrections ("CDOC"). Plaintiffs are all transgender women who are, have been, or will be confined at the CDOC, who have been, are, or will be discriminated against solely on the basis of their status as women who are transgender, and who are subjected to medical neglect and unreasonable risks of violence in CDOC's care. Plaintiffs sued the CDOC and seven executive branch officials, including Governor Jared Polis and Executive Director Dean Williams, seeking declaratory and injunctive relief as well as monetary damages.

STANDARD OF REVIEW

"Motions to dismiss for failure to state a claim are disfavored and should not be granted if relief is available under any theory of law." *Colorado Ethics Watch v. Senate Majority Fund, LLC*, 269 P.3d 1248, 1253 (Colo. 2012) (en banc). Indeed, a motion to dismiss under Rule 12(b)(5) serves merely to "test the formal sufficiency of the complaint." *Dorman v. Petrol Aspen, Inc.*, 914 P.2d 909, 911 (Colo. 1996). Dismissal is appropriate only where the factual allegations in the complaint, taken as true and viewed in the light most favorable to the plaintiff, do not present a right to relief above the speculative level or provide plausible grounds for relief. *See Warne v. Hall*, 373 P.3d 588 (Colo. 2016) (adopting the *Twombly/Iqbal* plausibility standard).

ARGUMENT

I. Governor Polis is a Proper Defendant in the Instant Case

Plaintiffs correctly named Governor Polis as a defendant in their First Amended Complaint because they seek redress for unconstitutional and unlawful practices perpetrated by agencies

under his control. The Supreme Court of Colorado has unambiguously recognized that when a plaintiff sues "an administrative agency, or the executive branch of government . . . the Governor, in his official capacity [as chief executive,] is a proper defendant." *Ainscough*, 90 P.3d at 858. The CDOC is an executive branch agency whose Executive Director is appointed by and serves at the pleasure of the Governor. *State for Use of Dept. of Corrections v. Pena*, 911 P.2d 48, 55 (Colo. 1996); C.R.S. § 17-1-101. Accordingly, Governor Polis, as the head of the executive branch, is a proper defendant in this case.

Plaintiffs sued Governor Polis because, as chief executive of Colorado, he is responsible for enforcing the laws of the state. The Governor's power to enforce the law is vested in him by the Colorado Constitution, which requires that he "take care that the laws be faithfully executed." Colo. Const. art. IV, § 2. When a plaintiff sues to enjoin or mandate enforcement of a law, it is "entirely appropriate for the plaintiff to name the body ultimately responsible for enforcing that law." *Ainscough*, 90 P.3d at 858. And his presence as a party is proper when compelling an executive branch official to act in accordance with the law. *Sportsmen's Wildlife Defense Fund v. U.S. Dept. of the Interior*, 949 F. Supp. 1510, 1515 (D. Colo 1996).[2] Therefore, Colorado's chief executive, Governor Polis, is properly named as a defendant when executive branch officials unlawfully fail to protect individuals in their custody.

The Governor's authority with respect to the CDOC is not only constitutionally enshrined, but also statutorily prescribed. In addition to appointing the Executive Director of the CDOC, the Governor is also responsible for "annually evaluat[ing] the plans, policies, and programs of all

[2] *See also People v. Kenehan*, 55 Colo. 589, 604 (Colo. 1913) ("who is more directly interested in seeing that the officers of the executive department, of which he is the supreme head, shall execute the duties imposed upon them by law . . . ?").

departments of the state government" for purposes of administering the executive budget. C.R.S. § 17-1-101; § 24-37-301 *et seq.* What is more, the Governor is able to exert influence over CDOC policy and personnel via executive orders, which he issues routinely. *See e.g.,* Exec. Or. D 2020 016 (Mar. 25, 2020) (temporarily suspending certain duties and provisions of the CDOC in response to the COVID-19 pandemic); Exec. Or. B 2019 012 (Oct. 17, 2019) (directing the CDOC staff to assist the Governor's Executive Clemency Advisory Board); Exec. Or. B 2018 001 (Feb. 16, 2018) ("directing the Department of Public Safety and Department of Corrections to convene a working group to undertake a study of prison population projections and capacity needs").

What little case law Governor Polis cites in support of his Motion is clearly inapposite here. For instance, *Development Pathways v. Ritter* is not only inconclusive, but fundamentally distinguishable insofar as it does not deal with an executive branch agency. 178 P.3d 524 (Colo. 2008). In *Development Pathways,* plaintiffs filed suit against the Governor to challenge the constitutionality of Amendment 41's "gift ban" provision. *Id*. Amendment 41 created the Independent Ethics Commission, which is tasked with administering the ban. *Id.* The Court concluded that the Governor was a proper defendant, but also noted, in dicta, that a different conclusion ***may*** have been reached had the Commission been in existence at the time the suit was filed. *Id.* at 529. Aside from being indeterminate, *Development Pathways*' dicta is inapplicable because, in terms of the separation of powers, the Independent Ethics Commission is a special creature. Amendment 41 makes clear that the Commission is "an entity separate and distinct from the executive and legislative branches, vested with the authority to adopt its own rules for the purpose of administering and enforcing the Amendment's provisions." *Id.* at 530; Colo. Const. art.

XXIX, § 5(1). Conversely, the CDOC is a law enforcement agency and, as such, falls squarely within domain of the executive branch.

Governor Polis's reliance on *Luchessi v. State* is similarly infirm for three reasons. 807 P.2d 1185 (Colo. App. 1990). ***First***, *Luchessi's* holding is narrow. In *Luchessi*, a *pro se* taxpayer sued numerous local, county, and state officials to challenge the constitutionality of a tax statute. The Court found that, under the statute governing declaratory judgment actions, joinder of a party is not compelled unless that party is "affected" by the litigation. *Id.* at 1193. Consequently, the Court affirmed the district court's decision to dismiss the Governor—on grounds entirely irrelevant to this case—because the statute did not ***require*** the Governor's appearance. *Id.* at 1189. Whether or not the Governor's presence is required under the declaratory judgment statute does nothing to diminish the clear propriety of his being named as a defendant in this case. ***Second***, *Ainscough* casts doubt on the validity of *Luchessi* as applied to the instant case. *Compare Luchessi* 807 P.2d at 1194 (acknowledging that "a determination that a state statute is unconstitutional . . . would 'affect' the ***state*** [of Colorado]," and concluding "its joinder as a party defendant in such an action is not improper") *with Ainscough*, 90 P.3d at 858 (finding that "[f]or litigation purposes, the Governor is the embodiment of the ***state***" and thus is a proper defendant in cases affecting the state). ***Third***, unlike the entity at issue in *Luchessi*, Governor Polis's "specific duties" are germane to the CDOC. A Governor cannot unilaterally change the rate at which property is taxed—but he can and does exert control over the policies and practices at issue in the CDOC, as outlined above.[3]

[3] *Franzoy v. State of Colorado* is inapt for the same reasons (attached as Exhibit A to the Governor's Motion). The Court in *Franzoy* dismissed the Governor because he does not have the power or authority to instigate criminal proceedings against a particular criminal defendant. Indeed, it is deeply improper for a chief executive to direct law enforcement officials to target a

Finally, courts have "long recognized" Colorado's practice of naming the Governor as a defendant in cases such as this. *Wildgrass Oil and Gas Committee v. Colorado*, No. 19-cv-00190-RBJ, 2020 WL 1289559, at *5 (D. Colo. Mar. 18, 2020) (citing *Cooke v. Hickenlooper*, No. 13-cv-01300-MSK-MJW, 2013 WL 6384218, at *8 (D. Colo. Nov. 27, 2013)). In fact, the Court in *Wildgrass Oil and Gas* considered *Development Pathways*, but nevertheless found that Governor Polis was a proper defendant. *Id.* What is more, the Colorado Supreme Court surveyed a variety of cases and found that the practice of naming the Governor as a defendant in cases such as this was "widespread and well-established." *Ainscough*, 90 P.3d at 858 (citing, inter alia, *Ramos v. Lamm*, 639 F.2d 559 (10th Cir. 1980), a suit brought by incarcerated Coloradans challenging the constitutionality of prison conditions). Nothing about the instant case warrants departure from Colorado's long-standing practice of naming the Governor, in his official capacity, as a defendant.

II. Plaintiffs Have Pleaded Sufficient Facts to Name Governor Polis as a Defendant

Governor Polis misconstrues the First Amended Complaint, and omits an integral aspect of Plaintiff's pleading. Def.'s Mot. at 10. Governor Polis incorrectly argues that "the Amended Complaint asserts that the Governor is ***only*** 'responsible for appointing the [CDOC] Executive Director' under Colorado law." *Id.* (emphasis added). Indeed, the First Amended Complaint does assert that the Governor is responsible for appointing the CDOC Executive Director. But, crucially, the First Amended Complaint also asserts that Governor Polis "is responsible for the overall administration of the laws of the State." First Am. Compl. ¶ 14. This fact is central to the propriety of naming the Governor as a defendant because it is the Governor's unique role as

particular individual. But it is manifestly proper—standard, even—for Governor Polis to exert control over CDOC practices.

"'supreme executive,' and [] his responsibility to ensure that the laws are faithfully executed" which make him an appropriate defendant in this lawsuit. *Ainscough*, 90 P.3d at 858. Governor Polis's responsibility to take care that the laws be faithfully executed is precisely what ties him as a defendant to Plaintiffs' claims in the First Amended Complaint. *Giduck v. Niblett*, 408 P.3d 856, 869 (Colo. App. 2014).

III. In the Alternative, Plaintiffs Request Leave to Amend their Complaint

If this Court is inclined to grant the Governor's Motion to Dismiss, Plaintiffs request leave to amend their Complaint. *See* C.R.C.P. 15(a) ("a party may amend [their] pleading only by leave of court . . . and leave shall be freely given when justice so requires"). Rule 15 reflects "a liberal policy toward timely amendments to pleadings" and "encourages trial courts to look favorably upon motions to amend." *Benton v. Adams*, 56 P.3d 81, 85, 86 (Colo. 2002). If necessary, Plaintiffs' request should be granted because the limited grounds for denial of leave are not present here. *Id.* (listing "undue delay, bad faith, dilatory motive, repeated failure to cure deficiencies in the pleadings via prior amendments, undue prejudice to the opposing party, and futility of amendment" as the bases for denial of leave).

CONCLUSION

For the foregoing reasons and based on the above authorities, Plaintiffs respectfully request that this Court deny Governor Polis's Motion to Dismiss, or, in the alternative, grant Plaintiff's request for leave to amend their First Amended Complaint.

DATED: May 20, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of May 2020, a true and correct copy of the foregoing **PLAINTIFFS' PLAINTIFFS' OPPOSITION TO GOVERNOR'S MOTION TO DISMISS COMPLAINT** was duly filed and served on the following parties through Colorado Courts E-Filing/ICCES, addressed as follows:

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