DISTRICT COURT, CITY AND COUNTY OF DENVER, COLORADO City and County Building 1437 Bannock St., Room 203 Denver, CO 80202	DATE FILED: July 7, 2020 6:11 PM CASE NUMBER: 2019CV34492
Plaintiffs: 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.** **Defendants:** JARED POLIS, Governor of Colorado, *et al*	**▲COURT USE ONLY▲** Case Number: 19CV34492 Division: **CV** Courtroom: **203**

ORDER RE: GOVERNOR'S MOTION TO DISMISS

THIS MATTER comes now before the Court on Defendant Jared Polis, Governor of Colorado's ("Defendant") Motion to Dismiss filed on March 30, 2020. Plaintiffs Kandace Raven, Jane Gallentine, Taliyah Murphy, Amber Miller, Megan Gulley, Lavenya Karpierz, and Cupcake Rivers, as representatives of themselves and all others similarly situated in this class action ("Plaintiffs") filed their Opposition to the Governor's Motion to Dismiss on May 20, 2020. Defendant filed his Reply on June 10, 2020. The Court has reviewed the Motion, Response, Reply, and applicable law. For the following reasons, Defendant Jared Polis's Motion to Dismiss is DENIED.

STANDARD OF REVIEW

Defendant moves for dismissal under C.R.C.P. Rule 12(b)(5), failure to state a claim upon which relief can be granted. Under C.R.C.P. 8(a), a pleading which sets forth a claim for a relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Actions for declaratory judgment in Colorado are governed by C.R.C.P. 57. "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration." C.R.S. § 13-51-115.

"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). 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). "A complaint should not be dismissed for failure to state a claim so long as the plaintiff is entitled to some relief upon any theory of the law." *Walker v. Van Laningham*, 148 P.3d 391, 394 (Colo. App. 2006). The district court accepts all of the factual allegations in the complaint as true and views those allegations in the light most favorable to the plaintiff. *Prospect Dev. Co., Inc. v. Holland & Knight, LLP,* 2018 COA 107, ¶ 10, 433 P.3d 146, 149, cert. denied, No. 18SC619, 2019 WL 284434 (Colo. Jan. 22, 2019).

BACKGROUND

This class action lawsuit concerns the treatment of transgender women in custody of the Colorado Department of Corrections ("CDOC"). Plaintiffs are transgender women who are, have been, or will be confined at CDOC. Plaintiffs claim to have been, to be, or will be discriminated against on the basis of their status as transgender women. Plaintiffs claim to be subjected to medical neglect and unreasonable risks of violence in CDOC's care. Plaintiffs sued CDOC and seven executive branch officials, including Defendant, seeking declaratory and injunctive relief as well as monetary damages. Plaintiffs' Amended Complaint alleges the following against the Governor:

> Defendant Jared Polis is Governor of the State of Colorado. As Governor, Mr. Polis is responsible for appointing the Executive Director of the State of Colorado Department of Corrections according to C.R.S. 17-1-101, and furthermore is responsible for the overall administration of the laws of the state. Mr. Polis is sued in his official capacities.

Pl.'s Am. Compl. at ¶14.

IMPROPER PARTY

Defendant argues he must be dismissed because he is an improper party. Defendant argues Plaintiffs' reliance on the Colorado Supreme Court holding in *Ainscough v. Owens* is misplaced. Instead, Defendant urges the Court to follow the relevant facts and circumstances language from *Developmental Pathways.* "Developmental Pathways announced the Supreme Court's departure from *Ainscough's* blind adherence to the 'long recognized . . . practice of naming the governor' in cases challenging state action and adoption of a new test for determining whether he is a proper party." Reply at 4.

I. *Ainscough v. Owens*

In *Ainscough v. Owens*, individual state employees and their labor organizations sued the Governor and the Executive Director of the Department of Personnel to challenge a 2001 Executive Order and ensuing Personal Policy that eliminated employee payroll deductions for union dues. *Ainscough v. Owens*, 90 P.3d 851, 852, 858. (Colo. 2004). The Supreme Court of Colorado denied the Governor's Motion to Dismiss under C.R.C.P. 12(b)(5), finding that, because he was sued in his official capacity, he was a proper party to the suit. Citing the Colorado Constitution, the court noted that it is the "[Governor's] responsibility to ensure that the laws are faithfully executed" and that it necessarily follows that "when a party sues to enjoin or mandate enforcement of a statute, regulation, ordinance, or policy, it is not only customary, but entirely appropriate for the plaintiff to name the body ultimately responsible for enforcing that law." *Id.* at 858. The Court reasoned that when that body is an

administrative agency or the executive branch of government, the Governor, in his official capacity, is a proper defendant because he is the state's chief executive. *Id.* Moreover, the court emphasized that "[t]his case and the many others like it clearly demonstrate that when challenging the constitutionality of a statute or the lawfulness of an administrative rule, the Governor is an appropriate defendant due to his constitutional responsibility to uphold the laws of the state and to oversee Colorado's executive agencies." *Id.*

II. *Developmental Pathways v. Ritter*

In *Developmental Pathways v. Ritter,* the Supreme Court of Colorado found that the Governor was a proper party to a constitutional challenge of gift ban provisions in Amendment 41 of the Colorado Constitution, entitled "Ethics in Government." *Developmental Pathways v. Ritter,* 178 P.3d 524, 526 (Colo. 2008). However, the Court acknowledged that "Had the Commission been in existence at the time this lawsuit was filed, we may have reached a different conclusion with regards to this issue." *Id.* at 530. Section 5 of Amendment 41 created an independent ethics commission "for the purposes of 'hearing complaints, issuing findings, and assessing penalties' as well as 'issuing advisory opinions . . ." *Id.* at 527 (citing Colo. Const. art. XXIX, § 5(1)). The Court pointed out that "The Commission is central to Amendment 41" and "The Amendment makes clear that the Commission is to be 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.*

Defendant argues the Court in *Developmental Pathways v. Ritter* departed from the "widespread and well-established practice" of naming the Governor in cases challenging state action. However, nowhere in the opinion does the Court in *Developmental Pathways* signal an explicit departure from the analysis of *Ainscough*. An announcement, or at least an acknowledgement of such a departure, is certainly expected when the Court breaks tradition. In fact, the Court cites *Ainscough* with favor, and restates *Ainscough's* holding that "As a personification of the state, the Governor was the proper party defendant in this suit at the time of filing." *Id.*

Considering the Supreme Court of Colorado in *Developmental Pathways* never offers any sort of language indicating its intent to stray from tradition, the Court appears to have offered the "relevant facts and circumstances" language to address the unique position of the Commission, a distinct body independent from the political branches and solely responsible for administrating and enforcing the Amendment. Without explicit language indicating such, this Court cannot find that the court in *Developmental Pathways* intended to substitute the "relevant facts and circumstances" language for the tradition of naming the Governor as a party because he is the embodiment of the state. Instead, the *Developmental Pathways* most likely discussed "relevant facts and circumstances" to address the unique position of the Commission. Defendant interprets the analysis of *Developmental Pathways* too narrowly and ignores the Court citing *Ainscough* with favor.

III. *Lucchesi v. State*

Defendant argues the Court should dismiss him from the current lawsuit using the "duties" analysis adopted by the Court of Appeals in *Lucchesi v. State.* The dispute in *Lucchesi* involved a pro se taxpayer challenging the constitutionality of a real property assessment statute. The plaintiff sued the Governor in his official capacity, the General Assembly, and other state officials. The Court of Appeals adopted the "duties" analysis argued by the Attorney General, finding that "Plaintiff has not demonstrated how the specific duties of either of the governor, of the state property tax administrator, or of the county attorney would be affected by any judicial declaration respecting the 1987 statute." *Lucchesi v. State*, 807 P.2d 1185, 1194 (Colo. App. 1990). The Colorado Court of Appeals narrowly held that the declaratory judgment statute did not require the Governor's presence in a lawsuit challenging the constitutionality of a real estate assessment statute.

The Court finds the facts of *Lucchesi* distinguishable from the present case and declines to apply the duties analysis from *Lucchessi* to the current matter. In the current matter, the policies of an agency within Colorado's executive branch are being directly challenged. This fact is important to distinguish the two cases because the Governor cannot unilaterally change property tax rates, but he can exert control over the policies and practices of the CDOC, an executive agency well within his direct purview. Moreover, *Ainscough* was decided after *Lucchesi* and held specifically on the propriety of the Governor's presence to a lawsuit when an agency in the executive branch is responsible for enforcing the relevant law.

IV. District Court Cases

Defendant attaches two Colorado District Court cases to his pleadings in support of his argument that where a different governmental entity or official is responsible for enforcing a particular law, the Governor is not the proper defendant. Mot. at 8; *See* Mot. Ex. A, Reply Ex. A. The Court finds both cases include widely variable fact patterns and therefore are inapplicable to the current case.

A. *Franzoy v. State*

In *Franzoy v. State,* plaintiff brought claims challenging the constitutionality of C.R.S. §§ 6-1-802; 18-10-101, 102; and 18-10.5-102, 103. Plaintiff named several state defendants in the action, including former Governor Hickenlooper. The District Court granted the state defendants' motion to dismiss because the state defendants, including former Governor Hickenlooper, did not have the power to enforce Title 18 because of its location within the criminal code. *Franzoy v. State of Colorado,* Denver District Court Case No. 18CV33600 (Gerdes, J., presiding) (January 11, 2019 Order).

First, the Court notes that district court opinions are not precedent and should not be cited as authority. Moreover, district court opinions are rarely helpful to legal analysis unless the facts are nearly identical. The Court finds the facts in *Franzoy* vary greatly from the facts of the current case. In *Franzoy,* plaintiff challenged the constitutionality of statutes under the criminal code. In the current case, Plaintiffs are challenging the actions of the CDOC, a department of the state government that the Governor exercises control over through

appointment of the Executive Director and issuance of Executive Orders regarding CDOC policy and personnel.

B. *In re Lower North Fork Fire Litigation*

Second, the Court finds the facts of *In re the Lower Fork Fire Litigation* to be far-removed from the facts of the current case. Reply Ex. A. In *In re the Lower Fork Fire Litigation,* Plaintiffs challenged the constitutionality of the CGIA tort cap, sec. 24-10-114(1), C.R.S. The District Court found that "the governmental agencies which are seeking to use the cap to limit the homeowners' recovery" are the proper parties to defend the constitutionality of the tort cap. *In re Lower North Fork Fire Litigation,* No. 12 CV 2550, 2014 WL 642534, at *2 (Colo.Dist.Ct. Feb. 18, 2014). However, the District Court ultimately found that the "policy issues concerning sovereign immunity (which is the conceptual basis for the cap) are matters for the legislature," not the court. *Id.* Again, in the current case, Defendant exercises control over CDOC actions. The two cases are incomparable, as the Governor does not exercise control over legislative decisions, but the Governor *does* enforce policy over CDOC through executive orders and through his duties as the executive embodiment of the state.

PLAUSIBLE CLAIM FOR RELIEF

Defendant secondarily argues he should be dismissed because Plaintiffs cannot plead any plausible facts sufficient to tie the Governor to their claims. Defendant argues that, "if Plaintiffs have a cause of action, it is against the CDOC Defendants" because "Colorado law simply does not vest the Governor with any responsibility for the daily management, supervision, control, and operation of CDOC facilities." Reply at 11. However, as established in the analysis above, daily management, supervision, control, and operation of CDOC facilities is not the test required for whether Plaintiffs have a valid claim against Defendant.

Colorado law states "[t]he governor, with the consent of the senate, shall appoint an executive director of the department of corrections, who shall serve at the pleasure of the governor." Furthermore, the Colorado Constitution states "[t]he supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed. The Governor is statutorily obliged to annually obliged to "annually evaluate the plans, policies, an programs of all departments of the state government." Additionally, the Governor has exerted control over CDOC policy and personnel through executive orders. For example, in Executive Order D 2020 016 (Mar. 25, 2020), the Governor suspended CDOC's duty to receive prisoners pursuant to certain regulatory statutes and directed CDOC to identify criteria justifying acceptance of prisoners. In Executive Order B 2019 012 (Oct. 17, 2019), the Governor directed the CDOC staff to assist the Governor's Executive Clemency Advisory Board. In Executive Order B 2018 001 (Feb. 16, 2018), the Governor directed 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.

CONCLUSION

Defendant's Motion to Dismiss is hereby DENIED. The Court is not convinced that the Court in *Developmental Pathways* or *Lucchessi* intended to substitute the longstanding Colorado tradition that the "Governor is an appropriate defendant due to his constitutional responsibility to uphold the laws of the state and to oversee Colorado's executive agencies." *Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004). Moreover, the facts of both *Franzoy* and *In re Lower North Fork Fire Litigation* are too divergent to offer any insight to the present dispute. The Court will address Defendant's alternative arguments set forth in the CDOC Defendants' Joint Partial Motion to Dismiss in a separate order.

SO ORDERED this 7th day of July, 2020.

BY THE COURT:

Brian R. Whitney
District Court Judge