DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80203 KANDACE RAVEN, JANE GALLENTINE, TALIYAH MURPHY, AMBER MILLER, MEGAN GULLEY, LAVINYA KAPIERZ 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.	▲ **COURT USE ONLY** ▲ Case No. 19CV34492 Ctrm./Div.: 203
Attorneys for Defendants CDOC, Williams, Trani, Maul, M.D., and Butler, M.D.: PHILIP J. WEISER Attorney General HEATHER K. KELLY* Assistant Attorney General JACK D. PATTEN, III* Senior Assistant Attorney General Civil Litigation and Employment Law Section Colorado Department of Law Ralph L. Carr Colorado Judicial Center 1300 Broadway, 10th Floor Denver, Colorado 80203 *Counsel of Record Telephone: (720) 508-6000 Email: heather.kelly@coag.gov; jack.patten@coag.gov	
DEFENDANTS' JOINT PARTIAL MOTION TO DISMISS	

Defendants[1], through their respective undersigned counsel, hereby move for partial dismissal of Plaintiffs' Amended Complaint pursuant to Colorado Rules of Civil Procedure 12(b)(1) and (5).

[1] This Motion is filed jointly by all Defendants, except for Defendant Jared Polis.

Certificate of Conferral pursuant to C.R.C.P. 121 § 1-15(8):

Defendants conferred with Plaintiffs about the specific grounds for this Motion. Plaintiffs oppose this Motion.

INTRODUCTION

This is a civil-rights class action relating to transgender women's rights. The rights and safety of transgender inmates is an important issue, and the Colorado Department of Corrections (CDOC) has recently made significant, progressive, policy changes for the benefit of transgender inmates. For example, CDOC has implemented agency-wide training regarding the use of pronouns and respectful interactions with transgender inmates. CDOC has implemented an intake process to address housing and placement options on a case-by-case basis. Colorado is one of only a handful of states that has transferred transgender women to a female correctional facility. Additionally, all of the named Plaintiffs, and the vast majority of members of the putative class, receive hormone replacement therapy along with other medical support. As a result, Colorado is on the cutting edge with respect to policies, protocols, and services concerning transgender inmates. The corrections environment presents unique challenges and issues that are not present in ordinary community settings. Balancing the desire to protect the dignity of all inmates with the need to ensure their safety and well-being in custody is not always easy, but CDOC consistently strikes that careful balance.

In this lawsuit, Plaintiffs urge the Court to override CDOC's judgment and provide transgender inmates greater choice than other inmates when it comes to housing and medical treatment. They seek a wide range of relief, including gender reaffirming surgery and housing in a women's correctional facility. Plaintiffs allege discrimination in a place of public accommodation on the basis of sex and disability under the Colorado Anti-Discrimination Act (CADA). Those claims must be dismissed for failure to state a claim because a prison is not a public accommodation. Rather, Plaintiffs' CADA claims must be amended and asserted under the public entity provisions, which limits the scope of Plaintiffs' claims to discrimination against those class members with a recognized disability. Moreover, Plaintiffs are not entitled to compensatory damages under CADA, and even if they could recover such damages, their claims would be barred by the Colorado Governmental Immunity Act (CGIA).

Plaintiffs also assert two claims under the Colorado Constitution: article II, § 29 (sex discrimination) and article II, § 20 (cruel and unusual punishment). Those claims should also be dismissed to the extent they seek monetary damages because there is no implied cause of action under the Colorado Constitution. Instead, Colorado courts have repeatedly held that such claims are properly raised under 42 U.S.C. § 1983. If they are brought under 42 U.S.C. § 1983, or if the Court creates a new § 1983-like cause of action under the Colorado Constitution, the doctrine of qualified immunity should apply to the constitutional torts, and Defendants in their

individual capacities should be dismissed. Pursuant to the doctrine of qualified immunity, monetary liability for prison officials sued in their individual capacities can only lie where there has been a violation of "clearly established" law, and courts have declined to hold individual officers personally liable in situations where the officers did not have clear notice that their actions were unlawful. Here, there is no clearly established law showing that the policies and actions of which Plaintiffs complain violate the constitution. As a result, Defendants in their individual capacities should be dismissed at the outset. Additionally, and even if the Court were to recognize Plaintiffs' claims for monetary relief under the Colorado Constitution, those monetary claims would be barred by the CGIA.

FACTS ALLEGED IN THE AMENDED COMPLAINT

This is a class action lawsuit brought on behalf of all transgender women[2] who are or will be incarcerated with CDOC. The following facts as alleged in the Amended Complaint are assumed as true for purposes of this Motion to Dismiss.

The named Plaintiffs are seven transgender women who bring this suit on behalf of at least 160 transgender women against the CDOC, Governor Jared Polis,

[2] An individual is transgender if his or her gender identity differs from the sex he or she was assigned at birth. Plaintiffs identify as transgender women and will be referenced by their preferred name and pronoun.

The class action includes a subclass consisting of those class members diagnosed with gender dysphoria, which is the clinical diagnosis for the distress that many transgender people experience because of the incongruence between gender identity and sex assigned at birth. Am. Compl. ¶¶ 24, 34.

CDOC Executive Director Dean Williams, and five other current or former CDOC employees in their official and individual capacities.

In the Amended Complaint, Plaintiffs allege that CDOC has inadequate policies and procedures to accommodate gender dysphoria. Am. Compl. at ¶ 70. Plaintiffs assert that CDOC provides inadequate health care and counseling for treatment of gender dysphoria, for example, lack of facial hair removal treatments, hormone therapy or gender affirming surgery. *Id.* at ¶¶ 71, 72. Plaintiffs claim that CDOC staff disrespect transgender women, for example, staff refusal to use their preferred names and pronouns. *Id.* at ¶¶ 58, 72. Plaintiffs seek to be provided with private showering areas and to be searched by female staff. *Id.* at ¶ 61 and p. 26(D). Plaintiffs allege that CDOC staff place inmates in segregated custody after making complaints under the Prison Rape Elimination Act *Id.* at ¶¶ 44, 47. Plaintiffs seek transfer of all transgender women inmates to a facility for female inmates. *Id.* at ¶ 61.

Plaintiffs acknowledge that CDOC employs a "case-by-case" intake policy for inmates. Am. Compl. ¶ 61. Most members of the putative class receive hormone replacement therapy. *Id.* at ¶ 40. Although the majority of transgender women are housed in male prisons, CDOC recently transferred three transgender women to a CDOC female facility. *Id.* at ¶ 60. Defendants enacted new policies providing that transgender women shall be referred to by proper pronouns and given access to the female canteen items. *Id.* at ¶ 68.

STANDARD OF REVIEW

A. C.R.C.P. 12(b)(1) applies to Defendants' CGIA arguments.

The issue of sovereign immunity is jurisdictional, and therefore, should be determined by the trial court before trial under Rule 12(b)(1). *Gallagher v. Bd. of Trs. for Univ. of N. Colo.*, 54 P.3d 386, 394-95 (Colo. 2002). The court may consider any competent evidence pertaining to the jurisdictional issue, and factual allegations asserted in the complaint are not taken as true on a motion to dismiss for lack of subject matter jurisdiction. *Fogg v. Macaluso*, 892 P.2d 271, 276 (Colo. 1995); *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924-25 (Colo. 1993). Plaintiffs have the burden of establishing the court's subject matter jurisdiction. *Tidwell v. City & Cty. of Denver,* 83 P.3d 75, 85 (Colo. 2003).

B. C.R.C.P. 12(b)(5) standard applies to the remaining arguments.

On a C.R.C.P. 12(b)(5) motion, a district court accepts all factual allegations in the complaint as true, viewing them in the light most favorable to a plaintiff. The court is not, however, required to accept bare legal conclusions as true. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). The facts alleged must plausibly state a claim: "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim for relief that is plausible on its face.'" *Warne v. Hall*, 373 P.3d 588, 590 (Colo. 2016) (internal quotations omitted).

LEGAL ARGUMENT

I. Plaintiffs' claims under the Colorado Constitution should be dismissed to the extent Plaintiffs seek monetary damages.

A. There is no implied cause of action under the Colorado Constitution.

Plaintiffs' Third and Fourth Claims for Relief, which allege violations of article II, §§ 20 and 29 of the Colorado Constitution, must be dismissed because there is no statutory or implied cause of action under Colorado's Constitution. *See, e.g.*, *Bd. of Cty. Comm'rs of Douglas Cty. v. Sundheim*, 926 P.2d 545, 547 (Colo. 1996). Colorado courts have repeatedly held that an implied cause of action to enforce the provisions of the Colorado Constitution fails as a matter of law when a plaintiff has an existing and adequate remedy. *Id.*; *see also Rodgers v. Bd. of Cty. Comm'rs of Summit Cty.*, 363 P.3d 713, 716 (Colo. App. 2013), *rev'd on other grounds*, 355 P.3d 1253 (Colo. 2017) ("[A] direct claim for damages will lie under the Colorado Constitution only where no other adequate statutory remedy exists.")

In *Sundheim*, the Colorado Supreme Court addressed whether it has "the authority to recognize an implied damages action in cases where citizens allege that government entities have violated their state constitutional rights." 926 P.2d at 547 (Colo. 1996). The court refused to recognize an implied cause of action under the Colorado Constitution, reasoning that, "[w]hile it may be appropriate to recognize an implied state constitutional cause of action when there is no other adequate remedy . . . where other adequate remedies exist, no implied remedy is necessary."

Id. at 553. The court found plaintiffs had an adequate remedy under 42 U.S.C. § 1983, among other remedies, for their claims that their procedural due process and equal protection rights had been violated.

Repeatedly recognizing that "Colorado statutes do not include a counterpart to section 1983 with which to enforce the Colorado Constitution," *Rodgers*, 363 P.3d at 716, our courts have refused to recognize an implied cause of action when plaintiffs have available remedies to obtain monetary relief, including under 42 U.S.C. § 1983. *See, e.g., Arndt v. Koby*, 309 F.3d 1247, 1255 (10th Cir. 2002) *cert. denied*, 538 U.S. 1013 (2003); *Brammer-Hoelter v. Twin Peaks Charter Acad.*, 81 F. Supp. 2d 1090, 1098 (D. Colo. 2000); *Walker v. Bd. of Trustees*, 76 F. Supp. 2d 1105, 1112 (D. Colo. 1999)*; Vanderhurst v. Colorado Mt. College Dist.*, 16 F. Supp.2d 1297, 1304 (D. Colo. 1998); *Greeley Publ'g Co. v. Hergert*, Civil Action No. 05-cv-00980-EWN-CBS, 2006 1581754, at *15 (D. Colo. June 6, 2006).

Plaintiffs have an adequate remedy under 42 U.S.C. § 1983, which provides for recovery of money damages by any person deprived of a constitutional right by a state actor. Plaintiffs' Third and Fourth Claims seek monetary relief for prison conditions they claim to be cruel and unusual and for unequal treatment, federal law protects against those alleged conditions and treatment. The Colorado constitutional provisions under which Plaintiffs seek relief are identical to the

federal counterparts on which a § 1983 claim would be based.[3] Courts have dismissed similar claims under the Colorado Constitution seeking identical remedies. *Rodgers*, 363 P.3d at 716 (dismissing claims alleging discrimination based on their sexual orientation violated right to equal protection, among others, because plaintiffs had an adequate remedy under § 1983).

In light of Plaintiffs' available remedy under § 1983, this Court should not recognize the implied causes of action under the Colorado Constitution in the Third and Fourth Claims for Relief. Accordingly, dismissal of these claims, to the extent they seek monetary damages, is appropriate.

B. The CGIA also bars Plaintiffs' constitutional claims for money damages.

Independently, Plaintiffs' claims under the Colorado Constitution are barred by the CGIA. Under the CGIA, "the General Assembly has carefully defined the limits of a private citizen's right to redress for the actions of government entities and officials." *Sundheim*, 926 P.2d at 549. The CGIA shields public entities and employees from liability for all claims that sound in tort unless the claim falls

---

[3] The plain language of articles 20 and 29, when compared with their federal counterparts, make clear that the Colorado Constitution provides no greater protection. *Compare* Colo. Const. art. II, § 20 (". . .nor cruel and unusual punishments inflicted"), *with* U.S. Const. amend. VIII (". . . nor cruel and unusual punishments inflicted"); *compare* Colo. Const. art. II, § 29 ("Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex") *with* U.S. Const. amend XIV, §1 (No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws").

within one of the limited, express waivers of the State's sovereign immunity. C.R.S. §§ 24-10-106, 106.1 & 106.2; *see also Foster v. Bd. of Governors of the Colo. State Univ. Sys.*, 342 P.3d 497, 500 (Colo. App. 2014). "[N]either the form of the claim itself nor the relief requested determines whether the claim is one which lies in tort or could lie in tort." *Id.*

To determine whether a claim sounds in tort, courts look to the "….source and nature of the government's liability, or the nature of the duty from the breach of which liability arises." *CDOT v. Brown Grp. Retail, Inc.*, 182 P.3d 687, 689 (Colo. 2008). On this basis, courts have repeatedly declined to recognize claims under the Colorado Constitution because the CGIA does not include a waiver for them. *Sundheim,* 926 P.2d at 549; *Young v. Larimer Cty. Sheriff's Office*, 356 P.3d 939, 945 (Colo. App. 2014) ("the broad immunity created by the . . . CGIA offers a reason for the General Assembly's failure to provide such a remedy.) *Ybanez v. Milyard*, Civil Action No. 10-cv-02234, 2011 WL 4383123, at *4 (D. Colo. Sept. 10, 2011) (holding that "[b]ecause Defendants are entitled to sovereign immunity under the CGIA, I will dismiss Ybanez's clams for monetary damages to the extent they are brought for violations of the Colorado Constitution."); *Faircloth v. Schwartz*, Civil Action No. 12-cv-02764-WYD-CBS, 2014 WL 4466663, at *21 (D. Colo. Sept. 10, 2014) (". . . CGIA prescribes the limit of liability for public entities within the State of Colorado.").

Here, the claims that Defendants violated Plaintiffs' constitutional rights are based upon allegations that Defendants acted with alleged deliberate indifference. These allegations arise in tort. *See Foster*, 342 P.3d at 503. Colorado courts, therefore, routinely describe these claims as "constitutional torts." *See, e.g., Cty. of Adams v. Hibbard*, 918 P.2d 212, 218 (Colo. 1996); *see also Bannister v. Colorado Sup. Ct. Disciplinary Couns.*, 856 P.2d 79, 81 (Colo. App. 1993) (describing § 1983 claim as a constitutional tort"). Because Plaintiffs did not plead, much less prove, sufficient facts to establish a claim that survives the CGIA's jurisdictional bar, this Court does not have subject matter jurisdiction over Plaintiffs' Third and Fourth Claims for Relief, to the extent they seek monetary damages.

II. In the alternative, Colorado constitutional claims against Defendants in their individual capacities should be dismissed based on the qualified immunity doctrine.

As noted above, Plaintiffs' Colorado constitutional claims fail as a matter of law. However, if this Court were to make the unprecedented decision to allow Plaintiffs to bring monetary claims for relief under the Colorado Constitution, any claims against Defendants in their individual capacities, fail under the qualified immunity doctrine.

"The purpose of qualified immunity is to shield a government employee from the burdens associated with trial which include distraction from governmental responsibilities, inhibiting discretionary decision making, and the disruptive effects of discovery." *Moody v. Ungerer*, 885 P.2d 200, 202 (Colo. 1994) (*internal citations*

omitted). "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about open legal questions. When properly applied, it protects "all but the plainly incompetent or those who knowingly violate the law." *Ashcroft v. al-Kidd*, 563 U.S. 731, 743 (2011) (*internal citations and quotations omitted*).

"Qualified immunity 'is an entitlement not to stand trial or face the other burdens of litigation.' The privilege 'is an *immunity from suit* rather than a mere defense to liability….'" *Roska v. Peterson,* 328 F.3d 1230, 1239 (10th Cir. 2003) (*emphasis in original*) (*internal citations and quotations omitted*). To overcome the defense of qualified immunity, a plaintiff bears "a heavy two-part burden." *Albright v. Rodriguez,* 51 F.3d 1531, 1534 (10th Cir. 1995). A plaintiff must demonstrate that: (1) the facts alleged make out a violation of a constitutional or statutory right, and (2) that the right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Medina v. Cram,* 252 F.3d 1124, 1128 (10th Cir. 2001).

A. Qualified Immunity should apply to claims under the Colorado Constitution.

The reasons for qualified immunity under federal law apply with equal force to claims brought under state constitutions. As a result, the vast majority of states that permit claims under their state constitution apply either qualified immunity or a similar state-based immunity to express or implied causes of action for money damages. *See, e.g., Martin v. Hallum*, 374 S.W.3d 152, 158 (Ark. App. 2010);

Fleming v. City of Bridgeport, 935 A.2d 126, 147-48 (Conn. 2007) (affording individual defendants qualified immunity under Connecticut common law); *Baldwin v. City of Estherville*, 915 N.W.2d 259, 266 (Iowa 2018) ("[M]ost of these jurisdictions either recognize a federal-type immunity . . . or subject constitutional claims to the defenses otherwise available under the state's tort claims act"); *Cantrell v. Morris*, 849 N.E.2d 488, 496-98 (Ind. 2006) (same); *Moresi v. State Through Dep't of Wildlife & Fisheries*, 567 So.2d 1081, 1093 (La. 1990) ("The same factors that compelled the United States Supreme Court to recognize a qualified good faith immunity for state officers under § 1983 require us to recognize a similar immunity for them under any action arising from the state constitution."); *Jenness v. Nickerson*, 637 A.2d 1152, 1158 (Me. 1994); *Rodriques v. Furtado*, 575 N.E.2d 1124, 1127 (Mass. 1991); *City of Jackson v. Sutton*, 797 So. 2d 977, 980-81 (Miss. 2001); *Dorwart v. Caraway*, 58 P.3d 128, 139 (Mont. 2002); *Morillo v. Torres*, 117 A.3d 1206, 1213 (N.J. 2015) (qualified immunity defense is the same under state civil rights act as it is in federal § 1983 actions); *Brown v. State*, 165 A.3d 735, 743 (N.J. 2017); *Spackman ex rel. Spackman v. Board of Educ.*, 16 P.3d 533, 538 (Utah 2000)*; Routhier v. Goggins*, 229 F. Supp. 2d 299, 310 (D. Vt. 2017) (the Vermont Supreme Court has adopted the federal qualified immunity test to determine whether state actors are entitled to qualified immunity from state tort and constitutional claims). Indeed, Maryland appears to be the sole outlier that does not

provide for a statutory or common law immunity defense to claims under its constitution. *See Ritchie v. Donnelly*, 597 A.2d 432, 444 (Md. 1991).

Although no Colorado court has squarely addressed this issue, Colorado courts have signaled that they would follow the majority of courts in recognizing the applicability of qualified immunity to constitutional torts. For example, in *Holliday v. Reg'l Transp. Dist.*, 43 P.3d 676, 681 (Colo. App. 2001), plaintiff brought claims pursuant to Colo. Const. art. II, § 10 and 42 U.S.C. § 1983. The court noted that although the Colorado Constitution provides greater protection for freedom of speech than the First Amendment, it nonetheless would analyze the claims under the federal framework, and apply qualified immunity. *Id.* at 688. The court did not analyze the Colorado constitutional claims separate from the federal claims under the qualified immunity doctrine, thus implying the same framework applies. *See also Freedom from Religion Found., Inc. v. Romer*, 921 P.2d 84, 89 (Colo. App. 1996) (dismissing individual defendants based on qualified immunity principles on claims pursuant to 42 U.S.C. § 1983 without any separate discussion of Colo. Const. art. II, § 4 (religious freedom) claim).

In similar contexts, Colorado courts have indicated a favorable view of the qualified immunity framework. For example, in *Health Grades, Inc. v. Boyer*, the Court of Appeals stated that "qualified immunity cases offer guidance on how a trial court should apply the [*Protect Our Mountain Environment, Inc.*] framework when a party asserts abuse of process based on a sham litigation theory." 369 P.3d 613, 618,

as modified on denial of reh'g (Colo. App. 2013), *rev'd on alt. grounds* 359 P.3d 25 (Colo. 2015) ("we conclude that the correct procedure for the trial court to follow when faced with a motion to dismiss a claim of abuse of process based on sham litigation is analogous to the procedure in cases where a defendant asserts a qualified immunity").

Additionally, application of qualified immunity principles is consistent with the broad protections afforded to the Colorado state government and its employees under the CGIA. It would be inconsistent with those sovereign immunity principles to permit an entirely new area of direct tort liability, with no defenses based on the reasonableness of the employee's conduct or whether the constitutional right is clearly established. In accordance with federal law interpreting the Eighth and Fourteenth Amendments over the past two centuries, and following the lead of Colorado courts and other state courts around the country that have adopted qualified immunity, this Court should apply the qualified immunity doctrine to Plaintiffs' claims against any and all individuals named in their individual capacity.[4]

[4] Qualified immunity should be applied at the earliest opportunity, and before individuals are subjected to the burdens of discovery and trial. *Jiron v. City of Lakewood*, 392 F.3d 410, 414 (10th Cir. 2004) ("even such pretrial matters as discovery are to be avoided if possible, as inquiries of this kind can be peculiarly disruptive of effective government.").

B. Applying qualified immunity, the individual capacity claims should be dismissed as the Amended Complaint does not allege violations of clearly established law.

Plaintiffs fail to meet the first prong of the qualified immunity test – that a constitutional violation exists. Plaintiffs likewise fail to establish the second prong of the qualified immunity doctrine – that the alleged conduct violated clearly established law. *Medina,* 252 F.3d at 1127. "A plaintiff may show clearly established law by pointing to either a Supreme Court or Tenth Circuit decision, or the weight of authority from other courts, existing at the time of the alleged violation." *T.D. v. Patton*, 868 F.3d 1209, 1220 (10th Cir. 2017).

Plaintiffs assert that Defendants have violated their constitutional rights by denying them: housing in a women's correctional facility, searches conducted by female correctional officers and medical treatment of their choice.[5] These claims fail

[5] Defendants recognize that viewing the facts as true and in the light most favorable to Plaintiffs, certain specific claims regarding the safety of and specific assaults against some individual Plaintiffs could be sufficient to withstand a motion to dismiss on qualified immunity grounds to the extent they allege specific facts related to a failure to protect a particular individual. *See Saunders-Velez v. Colorado Dep't of Corr.*, Civil Action No. 17-cv-01654-MSK-MJW, 2018 WL 1887979, at *3 (D. Colo. Apr. 20, 2018) (commenting on potential viability of claims of transgender inmate related to her safety if pled under an Eighth Amendment failure to protect). However, to maintain a § 1983 claim, a plaintiff must also allege that a defendant personally participated in a constitutional violation. *Henry v. Storey,* 658 F.3d 1235, 1241 (10th Cir. 2011). While personal participation is a requirement for a § 1983 claim, it is also a component of qualified immunity with respect to whether a clearly established right has been violated. *Pahls v. Thomas,* 718 F.3d 1210, 1227 (10th Cir. 2013). Plaintiffs do not allege that Defendants personally participated in the alleged assaults on these inmates or retaliated against them for reporting alleged assaults. Furthermore, Plaintiffs' failure to protect allegations against these Defendants are based purely on Plaintiffs' status

because they do not allege a violation of a clearly established right. To the contrary, courts have found that the claims Plaintiffs assert are not constitutional violations at all. For example, in *Lamb v. Norwood*, 899 F.3d 1159, 1161 (10th Cir. 2018), *cert. denied*, 140 S.Ct. 252, 205 L. Ed. 2d 163 (2019), the Tenth Circuit affirmed summary judgment on a transgender women's Eighth Amendment medical indifference claim, where the Kansas Department of Corrections was providing plaintiff hormone treatment, testosterone-blocking medication and weekly counseling sessions, but declined to provide other forms of treatment, including greater doses of hormones and authorization for gender affirming surgery.

Similarly, in *Druley v. Patton*, 601 F. App'x 632 (10th Cir. 2015) on an appeal from denial of a preliminary injunction, the Tenth Circuit concluded that the plaintiff failed to establish a likelihood of success on the merits of her Eighth Amendment medical indifference claim where she alleged that the Oklahoma Department of Corrections had started and stopped her hormone treatment numerous times and currently prescribed a hormone dosage below the lowest dosage recommended by World Professional Association for Transgender Health. The Tenth Circuit also found that equal protection claims concerning plaintiff's housing did not have likelihood of success on the merits. *Id.* at 636.

---

as transgender women, which fails to allege a violation of clearly established law. On this basis, dismissal is appropriate.

Likewise, communal showers or searches by opposite-sex correctional officers are not violations of clearly established rights. To the contrary, courts have denied that such conditions constitute constitutional violations. *Saunders-Velez,* Civil Action No. 17-CV-01654-MSK-MJW, 2018 WL 1887979, at *3 (denying preliminary injunction sought by transgender women inmate and opining with respect to privacy while using the restroom "[t]he Court does not intend to belittle these concerns by characterizing them as mere embarrassments, but some degree of loss of physical privacy is a harm that is endemic to the incarceration context."); *see also Williams v. Fletcher*, Civil Action No. CV 18-122-DLB, 2018 WL 3489240, at *2 (E.D. Ky. July 19, 2018) ("The Constitution thus does not categorically entitle an inmate of a particular sex to be pat-down searched solely by guards of the same sex or, in this case, gender identity.").

The United States Supreme Court has held that "[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-1 (1958). That core principle holds true in this emerging area of law. The law and treatment of transgender women, especially in correctional facilities, has been evolving since 1986, when the Tenth has recognized that prison officials have a duty to make informed judgments regarding the treatment of inmates diagnosed with gender dysphoria. *Supre v. Ricketts*, 792 F.2d 958, 962-63 (10th Cir. 1986). But neither the Tenth Circuit nor Colorado courts to date have recognized transgender individuals

as a suspect class for purposes of a Fourteenth Amendment equal-protection claim. *Druley*, 601 F. App'x at 635-36 (*citing Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1227-28 (10th Cir. 2007)). Nor have the Tenth Circuit or Colorado courts recognized other rights Plaintiffs assert.

CDOC's policies and practices are reflective of society's evolving standards, and in many instances, far more progressive than current norms. Plaintiffs acknowledge, for instance, that CDOC recently changed its policies providing that transgender women shall be referred to by proper pronouns and given access to the female canteen items. Am Compl. at ¶ 68. They also acknowledge that when transgender inmates meet established criteria, CDOC will house transgendered women in their preferred facility. *Id.* at ¶ 60. All of the named Plaintiffs and the vast majority of the putative class receive hormone replacement therapy. *Id.* at ¶ 40.

But the Eighth and Fourteenth Amendments do not require states to provide treatment that is on the cutting edge of societal norms. With respect to the individual liability of the named Defendants, because "qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law,'" the Supreme Court has "repeatedly told courts ... not to define clearly established law at a high level of generality." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). No Tenth Circuit, United States Supreme Court or Colorado case supports a determination that the individual Defendants violated clearly established constitutional rights of

which a reasonable official would have known. Accordingly, Defendants are entitled to qualified immunity on the claims against them in their individual capacities for money damages.

C. Official Capacity claims fail against Defendants Lish and Frost.

Plaintiffs' Amended Complaint asserts in ¶¶ 20 and 21 that Defendants Frost and Lish are former employees of CDOC. Therefore, Drs. Lish and Frost have no official capacity and cannot be sued as State officials. *See* C.R.C.P. 25(d)(1) ("When a public officer is a party to an action and during its pendency dies, resigns or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party."). By operation of law, the official capacity claims against Drs. Frost and Lish should be dismissed with prejudice

III. Plaintiffs' CADA Claims must be dismissed because a prison is not a public accommodation.

Colorado's Anti-Discrimination Act was enacted to prohibit discriminatory or unfair practices against individuals or groups in areas of employment, housing, public accommodation, advertising, and public entities. C.R.S. §§ 24-34-301 to -805. CADA is broken into several parts, each covering a specific area. Employment practices are covered under Part 4, §§ 24-34-401 to -406; housing practices under Part 5, §§ 24-34-501 to -509; places of public accommodation under Part 6, §§ 24-34-601 to -605; advertising under Part 7, §§ 24-34-701 to -707; and public entities are covered under Part 8, §§ 24-34-801 to -805.

A. A prison is a "public entity" under Part Eight of CADA, not a "place of public accommodation" under Part Six of CADA.

Plaintiffs allege that they have been discriminated against on the basis of their sex (transgender status, gender identity, or sexual orientation) and disability (gender dysphoria) in their enjoyment of a public accommodation under Part 6 of CADA. Am Compl. ¶¶ 93-105, citing § 24-34-601, *et seq*. In their First Claim, Plaintiffs allege the entire class has been discriminated against on the basis of their sex, while the second claim alleges that only those members who have gender dysphoria have been discriminated against on the basis of their disability. *Id*.

Under Part 6 of CADA, it is a discriminatory practice and unlawful to refuse or deny to an individual or group ". . . full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation. . .". § 24-34-601(2)(a). A "place of public accommodation" is defined by example to include any place of business, a sporting or recreational area and facility, public transportation facility, museum, library, and parks. § 24-34-601(1). But prisons are not included in that definition, nor are they like in kind to the places identified in the definition. Prisons greatly differ in form and function, as they are not places open to the general public for enjoyment.

"Whenever possible, the CADA should be interpreted consistently with the Americans with Disabilities Act (ADA)." *Tesmer v. Colorado High Sch. Activities Ass'n*, 140 P.3d 249, 253 (Colo. App. 2006). *See* Colo. Div. Civil Rights Rule 60.1(B) (the CADA is "substantially equivalent" to the ADA); Rule 60.1(C) (whenever

possible, the CADA should be interpreted consistently with the ADA). And it is well-settled that under the ADA, a prison is a "public entity," not a "place of public accommodation." *Pa. Dep't of Corr. v. Yeskey,* 524 U.S. 206, 209 (1998) ("[s]tate prisons fall squarely within the statutory definition of 'public entity,' which includes 'any department, agency, special purpose district, or other instrumentality of a State or States or local government'" (*quoting* 42 U.S.C. § 12131(1)(B))); *Villa v. D.O.C. Dep't of Corr.*, 664 F. App'x 731, 734 (10th Cir. 2016) (citing to *Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1193 (10th Cir. 2007) (holding that "[p]risons are 'public entities' covered by Title II of the ADA."). As a result, Plaintiffs fail to state a claim under CADA Part 6, and, therefore, their First and Second Claims must be dismissed.

B. Plaintiffs' claims against a "public entity" must be partially dismissed to the extent they are not on behalf of class members who have a disability.

As pled, Plaintiffs Second Claim can only be revived if Plaintiffs amend their complaint to allege claims against a public entity under Part 8 of CADA. Those claims still fail in part and must be limited to include only those class members with a disability. Because Plaintiffs' CADA claims may be brought against a public entity, Part 8 of CADA, not Part 6, determines the rights, remedies, and scope of coverage. Part 8 of CADA only allows a plaintiff with disabilities to bring claims against a public entity. *See, e.g.,* § 24-34-801(1)(d) ("…individuals with a disability must not be excluded, by reason of his or her disability, from participation in or be

denied the benefits of the services, programs, or activities of any public entity . . .”). Part 8 makes no mention of discrimination on the basis of sex.

“When construing a statute, we give effect to the intent of the General Assembly by first looking to the plain language of the statute.” *In re Marriage of Boettcher and Boettcher*, 449 P.3d 382, 385 (Colo. 2019); *Carrera v. People*, 449 P.3d 725, 729 (“The first step in the process of construing a statute is to look to the language of the statute, giving its words and phrases their plain and ordinary meanings.”). If the statute is clear and unambiguous, the court’s inquiry ends, and it must apply the statute as written. *Boettcher*, 449 P.3d at 385.

Here, CADA explicitly differentiates between who may fall within, and be subject to, the rights and remedies contained in Part 6 (“places of public accommodation”), and Part 8 (covers “public entities”). As a result, Plaintiffs’ first claim for relief – discrimination on the basis of sex for all class members must be dismissed because it fails to state a claim for relief. Assuming that Plaintiffs’ second claim for relief – discrimination on the basis of disability – is reasserted in an amended complaint under Part 8, it is an appropriate claim only for those class members who have gender dysphoria. Defendants, therefore, move to dismiss Plaintiffs’ CADA claim to the extent that it includes class members who do not have an identified disability.

C. This Court lacks subject-matter jurisdiction over Plaintiffs' CADA claims because they failed to file a notice of claim as required by the CGIA.

The CGIA requires Plaintiff to file a Notice of Claim addressed to the Office of the Attorney General "within one hundred eighty-two days after the date of the discovery of the injury, regardless of whether [Plaintiff] then knew all of the elements of a claim or of a cause of action for such injury." C.R.S. § 24-10-109(1). The General Assembly has included express language in the CADA statute, exempting certain claims from the CGIA. For example, when a claimant brings a claim of unfair employment practices, the general assembly expressly provided that "A claim . . . against the state for compensatory damages for an intentional unfair or discriminatory employment practice is not subject to the 'Colorado Governmental Immunity Act.'" C.R.S. §24-34-405(8)(g).

If the legislature meant to exclude public accommodation claims or claims against public entities from the CGIA, then it would have mirrored the language used with respect to employment claims under CADA. However, neither Part 6 nor Part 8 of CADA include any similar exemption under the CGIA. Therefore, the CGIA applies. Plaintiffs do not plead compliance with the CGIA. Accordingly, Plaintiffs' CADA claims are barred generally under the CGIA, as well as barred for lack of notice.

CONCLUSION

For the reasons stated herein, Defendants respectfully seek dismissal of Claims One and Two in their entirety; Claims Three and Four to the extent they seek monetary damages; and Claims Three and Four in their entirety against Defendants in their individual capacity.

Respectfully submitted this 30th day of March 2020.

PHILIP J. WEISER
Attorney General

s/ Heather K. Kelly
HEATHER K. KELLY, #36052*
Assistant Attorney General
JACK D. PATTEN, III, #36882*
Senior Assistant Attorney General
Attorneys for Defendants Colorado Department of Corrections, Dean Williams, Travis Trani, Randolph Maul, M.D. and Sarah Butler, M.D

s/ William A. Rogers
William A. Rogers, III
Dietze and Davis, P.C.
Attorney for Defendant William Frost, M.D.

s/ Cathy Havener Greer
Cathy Havener Greer
Wells, Anderson & Race, LLC
Attorney for Defendant Darren Lish, M.D.

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2020, a true and correct copy of the foregoing DEFENDANTS' JOINT PARTIAL MOTION TO DISMISS was duly filed and served upon the following parties through Colorado Courts E-Filing/CCES, addressed as follows:

Paula Greisen
Jessica Freeman
King & Greisen, LLP
1670 York Street
Denver, CO 800267
greisen@kinggreisen.com
freeman@kinggreisen.com
Attorneys for Plaintiffs

Lynly S. Egyes
Shawn Thomas Meerkamper
Dale Melchert
Transgender Law Center
P.O. Box 70976
Oakland, CA 94612
lynly@transgenderlawcenter.org
shawn@transgenderlawcenter.org
dale@transgenderlawcenter.org
Attorneys for Plaintiffs

s/ Laurie A. Merrick
Laurie A. Merrick, Senior Paralegal