

<p>DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80203</p> <hr/> <p>KANDACE RAVEN, JANE GALLENTINE, TALIIYAH MURPHY, AMBER MILLER, MEGAN GULLEY, LAVINYA KAPIERZ and CUPCAKE RIVERS,</p> <p>Plaintiffs, as representatives of themselves and all others similarly situated in this class action,</p> <p>v.</p> <p>JARED POLIS, Governor of Colorado, <i>et al.</i>, Defendants.</p>	<p>^ COURT USE ONLY ^</p> <hr/> <p>Case No. 19CV34492</p> <p>Ctrm./Div.: 203</p>
<p><i>Attorneys for Defendant Jared Polis:</i> PHILIP J. WEISER Attorney General LEEANN MORRILL* First Assistant Attorney General Public Officials Unit / State Services Section Colorado Attorney General's Office 1300 Broadway, 6th Floor Denver, Colorado 80203 *Counsel of Record Telephone: (720) 508-6159 Email: leeann.morrill@coag.gov *Counsel of Record</p>	
<p style="text-align: center;">THE GOVERNOR'S MOTION TO DISMISS</p>	

Defendant Jared Polis, in his official capacity as the Governor of Colorado (the "Governor"), by and through the Colorado Attorney General's Office and undersigned counsel, respectfully moves for dismissal as a party to this action under C.R.C.P. ("Rule") 12(b)(5) and, alternatively, joins in the arguments set forth in the other *Defendants' Joint Partial Motion to Dismiss* pursuant to Rules 12(b)(1)

and (5).

Rule 121 § 1-15(8) Certificate of Conferral: Undersigned counsel certifies that she conferred in good faith with Plaintiffs' counsel before filing this Motion, which is opposed by Plaintiffs.

INTRODUCTION

Plaintiffs, seven transgender women who are in the custody of the Colorado Department of Corrections (“CDOC”), filed the *First Amended Class Action Complaint* seeking redress for alleged violations of their state constitutional and statutory rights, as well as those of all others who are or will be similarly situated. *Compl.*, ¶¶ 5-12. Specifically, claims one and two allege discrimination in a place of public accommodation on the basis of sex and disability in violation of the Colorado Anti-Discrimination Act (“CADA”), claim three alleges discrimination on the basis of sex in violation of Colo. Const. Art. II, § 29, and claim four alleges cruel and unusual punishment in violation of Colo. Const. Art. II, § 20. *Compl.*, ¶¶ 93-117.

Besides the Governor, the *Amended Complaint* names as defendants CDOC, its Executive Director (Dean Williams), three other current CDOC employees (Travis Trani, Randolph Maul, M.D., and Sarah Butler, M.D.), and two former CDOC employees (William Frost, M.D. and Darren Lish, M.D.) (collectively, the “CDOC Defendants”). *Compl.*, ¶¶ 14-21. Plaintiffs ask the Court to enter declaratory and injunctive relief against CDOC and all defendants who are named

in their official capacities, and seek monetary relief from those CDOC Defendants who also are named in their individual capacities.

The Governor respectfully requests that he be dismissed from this action because the *Amended Complaint* fails to plausibly allege that he personally participated in any of the acts and omissions giving rise to the claimed constitutional and statutory violations, and therefore he is an improper party.

If the Court disagrees, then the Governor alternatively joins in the arguments set forth in the CDOC Defendants' *Joint Partial Motion to Dismiss*, which requests dismissal of all claims, except to the extent that claims three and four seek injunctive relief, for lack of jurisdiction and failure to state a claim as a matter of law.

FACTS ALLEGED IN THE AMENDED COMPLAINT

The *Amended Complaint* alleges only one fact about “Defendant Jared Polis,” which is that he “is Governor of the State of Colorado.” *Compl.*, ¶ 14. It also asserts two legal conclusions about the Governor’s responsibilities under Colorado law, which are that he “appoint[s] the Executive Director of [CDOC] according to C.R.S. § 17-1-101,” and “is responsible for the overall administration of the laws of the State.” *Id.* The other 116 paragraphs of the *Amended Complaint* do not even reference the Governor, much less allege any facts about his personal participation in the claimed constitutional and statutory violations.

In contrast, the *Amended Complaint* alleges that CDOC “operates, maintains, and controls the operations of all correctional facilities in the state of Colorado,” and that Executive Director Williams is “responsible for the overall management, supervision, and control of all [CDOC] facilities according to C.R.S. §§ 17-1-101 and 17-1-103.” *Compl.*, ¶¶ 15-16. It further alleges that Defendant Trani, as the current Deputy Executive Director of Prison Operations and former Director of Prisons from 2016 to 2019, is “responsible for total prison operations, including the overall management, supervision and control of all [CDOC] operations and facilities according to C.R.S. §§ 17-1-101 and 17-1-103.” *Compl.*, ¶ 17. And it also alleges that Defendants Lish, Butler, Maul, and Frost, as current or former employees, either are or were “responsible for the overall management, supervision and control of all [CDOC] facilities according to C.R.S. §§ 17-1-101 and 17-1-103.” *Compl.*, ¶¶ 17-21.

And while the vast majority of allegations in the *Amended Complaint* are directed against “Defendants” amorphously, several are directed specifically at individually named CDOC Defendants and describe their alleged acts and omissions in detail. *See, e.g.*, ¶¶ 64-65, 87 (Trani, Lish, Butler, Maul, and Frost), 69 (Trani and Lish), 73-75 (Lish), 88-89 (Butler and Lish).¹ Indeed, it is clear that

¹ While the CDOC Defendants may dispute these specific factual allegations if part or all of the *Amended Complaint* survives the dispositive motion phase, all well-pled facts must be accepted as true for purposes of this motion to dismiss. *See* Rule 12(b)(5) Standard of Review *infra*.

Plaintiffs' claims arise from alleged conduct undertaken solely by the individual CDOC Defendants in their capacities as high-level CDOC employees "and in accordance with the custom, policy, and practice of the CDOC and the State of Colorado with respect to class members." *Compl.*, ¶¶ 16-21. Again, there are no specific factual allegations detailing the Governor's personal participation in any of the claimed wrongdoing.

RULE 12(b)(5) STANDARD OF REVIEW

To survive a Rule 12(b)(5) motion to dismiss, a complaint must state a plausible claim for relief. *See Warne v. Hall*, 373 P.3d 588 (Colo. 2016) (adopting the analysis employed by federal courts to evaluate motions to dismiss). When addressing such a motion, the court must accept properly pled factual allegations in the complaint as true and view them in the light most favorable to the plaintiff. *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). However, the court is "not required to accept as true legal conclusions that are couched as factual allegations." *Id.* Under Rule 12(b)(5), a "complaint may be dismissed if the substantive law does not support the claims asserted." *Western Innovations v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008).

In *Warne*, the Colorado Supreme Court explicitly adopted the plausibility standard articulated by the United States Supreme Court in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Warne*, 373 P.3d at 588. Under the *Twombly/Iqbal* standard, a complaint must contain

factual allegations sufficient to raise a right to relief “above the speculative level” and “state a claim for relief that is plausible on its face.” *Id.* at 591 (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). “The tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678.

As the Supreme Court explained in *Warne* that “there can be little question that the difference between a rule of pleading that effectively permits reliance on the compulsory process available in civil actions to discover whether grounds for the action exist in the first place and another that effectively bars such reliance without being able to first allege plausible grounds for relief can be extremely outcome-determinative.” 373 P.3d at 594 (noting that it may result in “weeding out groundless complaints at the pleading stage.”).

ARGUMENT

I. The Governor must be dismissed because he is an improper party.

When a plaintiff sues to enjoin or mandate the enforcement of a statute, regulation, ordinance, or policy, it is appropriate to name the body ultimately responsible for enforcing that law. *See Ainscough v. Owens*, 90 P.3d 851, 858 (Colo. 2004) (action challenging the state personnel director’s policy and the Governor’s executive order). The Governor has a general duty to “take care that the laws be

faithfully executed,” Colo. Const. Art. IV, ¶ 2, and may be a proper defendant in a variety of cases. *See id.* (Collecting cases, but noting that in one the “propriety of naming the Governor as a defendant was not challenged even though there was neither an executive order involved nor any other specific action on the part of the Governor.”).

“But when a state law explicitly empowers one set of officials to enforce its terms, a plaintiff cannot sue a different official absent some evidence that the defendant is connected to the enforcement of the challenged law.” *Peterson v. Martinez*, 707 F.3d 1197, 1207 (10th Cir. 2013); *see also Chamber of Commerce of the U.S. v. Edmondson*, 594 F.3d 742, 760 (10th Cir. 2010) (rejecting the argument that the Oklahoma Attorney General’s non-specific duty to represent the state made him a proper defendant). Instead, “[t]he evaluation of whether [the Governor] is a proper party in a lawsuit must be determined in light of the relevant facts and circumstances.” *Developmental Pathways v. Ritter*, 178 P.3d 524, 530 (Colo. 2008). For example, the Governor may be properly named as a defendant where no other governmental body is charged with enforcing a particular statute. *See id.* (holding that because entity responsible for enforcing state law had not yet been formed, the Governor was the appropriate state agent for litigation purposes). In other cases, the Governor may consent to defend laws of significant importance when their constitutionality is attacked and there is no other state official tasked with their enforcement. *See, e.g., Rocky Mountain Gun Owners v. Hickenlooper*, --P.3d--, 2018

WL5074555, *1-2 (Colo. App. Oct. 18, 2018) (facial challenge to legislation limiting large capacity magazines for firearms and expanding mandatory background checks for firearm sales and transfers).

Where a different governmental entity or official is responsible for enforcing a particular law, the Governor is not the proper defendant. *See Developmental Pathways*, 178 P.3d at 530 (recognizing that if the entity responsible for enforcing the challenged laws had been formed at the time the lawsuit was filed, the Governor may not have been proper defendant); *Lucchesi v. State*, 807 P.2d 1185, 1194 (Colo. App. 1990) (upholding dismissal of Governor as defendant in lawsuit alleging statutory ad valorem property tax violated constitutional tax scheme where plaintiff failed to demonstrate how the Governor’s specific duties would be affected by a judicial declaration respecting the challenged statute); *Franzoy v. State of Colorado*, Denver District Court Case No. 18CV33600 (Gerdes, J., presiding) (January 11, 2019 Order granting the State Defendants’ motion for dismissal as improper parties to action challenging the constitutionality of a criminal prosecution threatened by the El Paso County District Attorney, attached as *Exhibit A*); *see also Greenwood Cemetery Land Co. v. Routt*, 28 P. 1125 (Colo. 1892) (holding that a mandamus action may be brought against the Governor when “the law specially enjoins upon the governor, as a duty, the performance of some particular act, under circumstances in which he has no discretion, and he refuses to perform the act”).

Additionally, to survive a Rule 12(b)(5) motion to dismiss, a complaint must tie a particular defendant to the plaintiff's claims. *Giduck v. Niblett*, 408 P.3d 856, 869 (Colo. App. 2014). Dismissal for failure to state a claim is appropriate where “[i]t is impossible to tell from the face of the complaint which defendants were accused of which violations, what specific acts constituted violations, or when alleged violations occurred.” *Monroe v. Owens*, 38 Fed.Appx. 510, 515 (10th Cir. 2002) (unpublished) (cited by *Giduck, supra*). It also is appropriate where a “complaint fails to specifically mention these defendants or allege any wrongful acts on their behalf[.]” *Carter v. Champion International*, 911 F.2d 737, 1990 WL 121888, *2 (9th Cir. 1990) (unpublished table decision) (cited by *Giduck, supra*).

And with respect to suits against state agencies and officials, the Colorado Supreme Court long ago held that dismissal for failure to state a claim is necessary when a plaintiff fails to name the correct state agency that is statutorily vested with “[w]ide discretion . . . as to the manner in which it accomplishes and performs its duty[.]” *Vessa v. Johnson*, 310 P.2d, 564, 566-67 (Colo. 1957) (dismissing complaint against the Civil Service Commission and stating that “plaintiffs, if they have a cause of action, have instituted same against the wrong party” because “[i]t is obvious that the department of health makes the determination as to what is needed” in performing its statutory duties.); see accord *Cruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1080 (Colo. App. 2005) (considering a motion to dismiss under Rule 19(a) for failure to join the Director of the Division of Workers’

Compensation and holding that “[t]he director must be named as an indispensable party only when the appeal involves a statutory duty of the director that concerns a mandatory exercise of discretion.” (citations omitted)).

Here, the *Amended Complaint* alleges that only the individual CDOC Defendants are directly responsible for the “overall management, supervision and control of all [CDOC] facilities,” and operate those facilities on a day-to-day basis “in accordance with the custom, policy, and practice of the CDOC[.]” *Compl.*, ¶¶ 16-21. *See* §§ 16-5-202(1)(a), 20-1-102(1) C.R.S. And Colorado law specifically vests the individual CDOC Defendants with these and other powers and duties. *See* §§ 17-1-101 and 103, C.R.S. (2019). In contrast, the *Amended Complaint* asserts that the Governor is only “responsible for appointing the [CDOC] Executive Director” under Colorado law. *Compl.*, ¶ 14 (citing § 17-1-101(1), C.R.S. (2019) (“[t]he governor, with the consent of the senate, shall appoint an executive director”). But Plaintiffs’ claims do not stem from any alleged wrongdoing in the exercise of this appointment power, such as that the Governor either failed to make an appointment, or made an appointment but failed to obtain the senate’s consent. *See Compl.*, ¶¶ 93-117. Thus, the allegation that he appointed Defendant Williams, by itself, fails to state an actionable claim against the Governor for Defendant Williams’ alleged acts and omissions because “substantive law does not support the claims asserted.” *Western Innovations*, 187 P.3d at 1158.

And Colorado law simply does not vest the Governor with any responsibility for the daily management, supervision, control, and operation of CDOC facilities. *See* §§ 17-1-101 and 103, C.R.S. (2019). As a result, none of his “specific duties would be affected by a judicial declaration respecting the challenged” wrongdoing. *Lucchesi*, 807 P.2d at 1194. Put another way, if Plaintiffs have a cause of action, it is against the CDOC Defendants, *see Vessa*, 310 P.2d at 566-67, and is one that is fully capable of resolution by this Court without the Governor’s participation as a defendant. *See* C.R.C.P. 19(a) (the Governor is not an indispensable party because: (1) in his absence complete relief may still be accorded among those already parties; and (2) he does not claim a direct interest relating to the subject of this action such that his lack of participation would be problematic); *Cruz-Cesario*, 122 P.3d at 1080.

For these reasons and based on these authorities, the Governor is not a proper party to this case and Plaintiffs’ claims against him must be dismissed.

II. Alternatively, the majority of Plaintiffs’ claims must be dismissed for the reasons set forth in the CDOC Defendants’ *Joint Partial Motion to Dismiss*.

If the Court disagrees that the Governor must be dismissed because he is an improper party, then the Governor alternatively joins in the arguments set forth in the CDOC Defendants’ *Joint Partial Motion to Dismiss*, which requests dismissal of all claims, except to the extent that claims three and four seek injunctive relief, for lack of jurisdiction and failure to state a claim as a matter of law.

CONCLUSION

For the above reasons and based on the above authorities, the Governor respectfully requests that either he be dismissed as a party to this action, or all of Plaintiffs' claims, except to the extent that claims three and four seek injunctive relief, be dismissed for lack of jurisdiction and failure to state a claim as a matter of law.

DATED: March 30, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2020, a true and correct copy of the foregoing **THE GOVERNOR'S MOTION TO DISMISS** was duly filed and electronically served upon all counsel of record for the parties to Case No. 19CV34492 through Colorado Courts E-Filing/CCES.

s/ LeeAnn Morrill _____

LeeAnn Morrill