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<tr><td>KANDICE 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, THE COLORADO DEPARTMENT OF CORRECTIONS, DEAN WILLIAMS, Executive Director of the Colorado Department of Corrections, individually and in his official capacity, TRAVIS TRANI, Director of Prisons, individually and in his official capacity, RANDOLPH MAUL, M.D., CDOC Chief Medical Officer, individually and in his official capacity, SARAH BUTLER, M.D., Chief of the Gender Dysphoria Committee and Chief of Psychiatry, individually and in her official capacity, WILLIAM FROST, M.D., former CDOC Chief Medical Officer, individually and in his official capacity, DARREN LISH, M.D., former Chief of Psychiatry, individually and in his official capacity,

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***applications for pro hac vice admission forthcoming.*

RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT PARTIAL MOTION TO DISMISS

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, hereby submit their Response in Opposition to the Defendants' Joint Partial Motion to Dismiss ("Joint Partial Mot. to Dismiss") as follows:

INTRODUCTION

This case alleges serious violations of the Colorado State Constitution which implicate important state public policy considerations. The central focus of this case is whether the State of Colorado will recognize that its Constitution is a meaningful source of constitutional rights for the citizens of this State – or merely a doctrine with hollow guarantees. In making this determination, the Court is not bound by the precedent of federal or any other state's law. This Court also is not bound by antiquated principles which immunize the state government and government officials from being held accountable to its citizenry for constitutional violations. Rather, the Colorado courts have long been skeptical of such immunities, and this Court is bound by the law that makes it clear that the State its officials must be held accountable for their actions

when they run afoul of our State's Constitution. Defendants have conceded that this case will go forward. The only questions before this Court are whether money damages will be available and what statutory provisions Plaintiffs will proceed under.

At a time when our nation is divided on many fundamental principles of governance, it is critical that the States reaffirm the principles of its citizenry. Plaintiffs seek herein to affirm that the State of Colorado will not allow them to be discriminated against on the basis of their gender or subjected to cruel and unusual punishment, and that this Court will provide them with a meaningful remedies for any such violations under the Colorado Constitution and statutory law.

LEGAL ANALYSIS

I. This Court should recognize an implied cause of action for damages under the Colorado Constitution because Plaintiffs have no adequate remedy for their constitutional claims.

The Colorado Constitution mandates that citizens of this state are ensured equal treatment regardless of gender and that our citizens will not be subjected to cruel and unusual punishment. Colorado Constitution, Article II, Sections 20 and 29. Following the principles articulated in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971), the majority of states now recognize the power of the state judiciary to imply a private damage action under their state constitutions.[1] *Binette v. Sabo*, 710 A.2d 688, 693 (Conn. 1998).

[1] *See, e.g.*, *Cutter v. Brownbridge,* 183 Cal. App. 3d 836 (1986); *Walinski v. Morrison and Morrison*, 60 Ill. App. 3d 616, (1978); *Godfrey v. State*, 898 N.W.2d 844 (Iowa 2017); *Moresi v. State Through Dept. of Wildlife and Fisheries,* 567 So. 2d 1081 (La. 1990); *Widgeon,*479 A.2d 921 (Md. 1984) *Layne v. Superintendent, Massachusetts Correctional Inst., Cedar Junction*, 546 N.E.2d 166 (Mass. 1989); *Johnson v. Wayne Co.*, 540 N.W.2d 66 (Mich. App. 1995); *Dorwart v. Caraway*, 58 P.3d 128 (Mont. 2002); *Brown v. State*, 674 N.E.2d 1129 (N.Y. Ct. App. 1996);

Following these same principles, the Colorado Supreme Court has also acknowledged that it may "recognize an implied state constitutional cause of action when there is no other adequate remedy." *Board of County Com'rs of Douglas County v. Sundheim*, 926 P.2d 545, 553 (Colo. 1996). *See, e.g., Allstate Ins. Co. v. Parfrey,* 830 P.2d 905 (Colo. 1992) (concluding "that a private tort remedy against an insurer is implicit in the statutory scheme").

As there are no adequate remedies for the state constitutional violations alleged in this case, a private action for damages must be implied under the Colorado Constitution.

A. 42 U.S.C. § 1983 Does Not Provide An Adequate Remedy For Plaintiffs Claims.

As discussed below, the only federal remedy which Defendants argue would be applicable to this case do not provide equivalent protections to those provided under the Colorado Constitution. Even assuming *arguendo* that there were equivalent federal constitutional provisions, 42 U.S.C. § 1983 does not provided adequate, meaningful remedies here. Defendants concede that Plaintiffs' constitutional claims should go forward to the extent they seek injunctive relief.

1. Damages against the State for constitutional violations are unavailable under §1983 but are available under Colorado law.

The types of remedies sought in this case are not available under 42 U.S.C. § 1983. It is well-settled that federal law only allows for injunctive relief while prohibiting damages against the State and State officials in their official capacities for federal constitutional violations. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 n.10, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989).

Bott v. DeLand, 922 P.2d 732 (Utah 1996); *Woodruff v. Board of Trustees of Cabell Huntington Hosp.*, 319 S.E.2d 372 (W. Va. 1984); *Old Tuckaway Associates Ltd. Partnership v. City of Greenfield*, 509 N.W.2d 323 (Wis. Ct. App. 1993).

Colorado's courts, however, has long-since abrogated the common-law doctrine of sovereign immunity. *Evans v. Bd. of Cty. Comm'rs of El Paso Cty.*, 482 P.2d 968 (Colo. 1971). While the legislature later placed limitations on suits against the state in the form of the Colorado Governmental Immunities Act, those limitations are inapplicable here. *See* discussion *infra* Section I.B.

Instead, violations under 42 U.S.C. § 1983 *only* allows damages against state actors in their individual capacities. *Kentucky v. Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). Federal law then imposes an almost impossibly high barrier for an aggrieved party to obtain any such damages by imposing an archaic "qualified immunity" standard.[2]

In this case, Plaintiffs seek to hold the State of Colorado as well as State officials in their official capacities responsible for violating the Colorado Constitution. In *Zullo v. State*, 205 A.3d 466 (Vt. 2019), the Vermont Supreme Court explained that the limitations on federal remedies deprived a plaintiff of "meaningful redress." *Id*. at 485-486. In so doing, the Court pointed out that the *Bivens* Court created a constitutional damages remedy because of the ineffectiveness of injunctive relief as a remedy and held that "damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty." *Id*. at 486, quoting *Bivens*, 403 U.S. at 395.

Equally importantly is that this case involves state constitutional rights which should be interpreted and given the weight determined appropriate by the judiciary of this state. As explained by the *Zullo* Court, "the federal statutory remedy under 42 U.S.C. § 1983 generally 'creates no impediment to judicial recognition of a damages remedy' under the state constitution,

[2] The "qualified immunity" standard has become widely criticized as an unprincipled "get out of jail free" card by constitutional scholars and United States Supreme Court justices, as discussed infra at II.B.

as the civil rights statute is limited to violations of federal law, and the state constitution may protect broader interests than those under the federal constitution." *Zullo,* at 486, (citations omitted); *see also Widgeon v. E. Shore Hosp. Ctr.*, 479 A.2d 921, 929 (Md. 1984) (holding that existence of remedy under § 1983 "is not a persuasive basis" to defeat claim based on state constitution). Accordingly, § 1983 is not an adequate alternative remedy in this case.

2. The federal Prison Litigation Reform Act prohibits damages under §1983 for a wide range of the injuries Plaintiffs have suffered and also makes §1983 an inadequate remedy here

The federal Prison Litigation Reform Act ("PLRA"), which would apply to any claim under §1983, bars claims for damages "for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act." 42 U.S.C. § 1997e(e); *also see Searles v. Van Bebber*, 251 F.3d 869 (10th Cir. 2001) (PLRA bars claims for compensatory damages for mental and emotion injuries). A "sexual act" is defined by reference to 18 U.S.C. § 2246(2) and includes only contact between genitals, oral copulation, and digital penetration, thereby regressively excluding a wide range of sexual violence. While Colorado has adopted some of the limitations found in the PLRA, *see* 13 C.R.S. 17.5, this provision is not among them, and indeed, broader remedies are available under Colorado law. For example, damages for mental or emotional injuries may be available where a plaintiff "is subjected to an unreasonable ***risk*** of bodily harm due to the negligence of another," *Towns v. Anderson*, 195 Colo. 517, 520 (1978), or where "the emotional distress has thus manifested itself in some form of physical or mental illness[.]" *Valencia v. GEO Grp., Inc.*, No. 05 CV 00296 LTB PAC, 2005 WL 3416118, at *6 (D. Colo. Dec. 13, 2005) (internal quotations and citations removed). Recovery for the same sorts of injuries are not available under the PLRA. *See, e.g., Hughes v.*

Colorado Dept. of Corrections, 594 F.Supp.2d 1226 (D. Colo. 2009) ("While Hughes alleges that he suffered 'physical injuries,' he defines such injuries as the physical manifestations of depression and anxiety. I find these allegations insufficient to withstand the 'physical injury' requirement of Section 1997e(e)").

A wide range of Plaintiffs' injuries here would be barred in federal court by the PLRA yet are cognizable under Colorado law. For example, Plaintiffs' claims for damages include mental and emotional injuries resulting from Defendants refusal to treat them as women and their failure to adequately treat their gender dysphoria, resulting in severe depression, anxiety, self-harm, and suicidality. *See, e.g.* Am. Compl. at ¶ 37 ("Kandice Raven's insufficiently treated gender dysphoria causes serious depression and constant thoughts of attempting self-castration. Megan Gulley has attempted self-castration multiple times, and Amber Miller engages in self-harm 'cutting' regularly."); *Id.* at ¶ 81 ("As a result, Taliyah continues to suffer from severe depression caused by her gender dysphoria– and is often afraid to tell anyone about the level of her depression because she fears being placed into solitary confinement, which only deepens the pain."). The PLRA's prohibition on damage claims for "mental or emotional injury suffered while in custody without a prior showing of physical injury" renders §1983 an inadequate remedy for these harms. And some Plaintiffs who live in constant, well-founded fear of rape and other violent assault would be excluded from a damages remedy in federal court on the grounds that they had not yet suffered rape or other violent assault.

Further, the PLRA's severe limitations on recovery for sexual harms would preclude recovery for Plaintiffs who have suffered sexual violence other than rape. Plaintiffs would have no damages remedy under § 1983 for knowingly being subjected to living environments where

constant groping, vulgar sexual harassment and threats of sexual violence, and men exposing themselves in a non-consensual sexual manner are an everyday fact of life. *See, e.g.,* Am. Compl. at ¶ 7 ("Jane lives in a constant state of severe anxiety and depression due to lack of medical treatment, lack of mental health treatment, and a persistent fear of sexual assault and a violent death."); *Id.* at ¶ 12 ("Cupcake lives in fear of being raped in the male facilities and is often subjected to constant, severe and vulgar sexual harassment by incarcerated men, and she continues to suffer from depression and anxiety and loses sleep worrying for her safety."). So too for the trauma and constant re-traumatization Plaintiffs face resulting from being frequently subjected to strip-searches performed by male guards. *See, e.g.*, Am. Compl. at ¶ 44 (After Amber Miller reported a rape, "male CDOC staff stripped her naked, handcuffed her, searched her, and put her in solitary confinement."); *Id.* at ¶ 64 ("Many of these women have been subjected to sexual violence even before entering the prison system, and being subjected to strip searches by men exacerbates both their trauma and their symptoms of gender dysphoria.").

Because the PLRA precludes compensatory damages for a wide variety of Plaintiffs' injuries, § 1983 is not at adequate remedy. Thus, an implied cause of action for damages must be recognized under the Colorado Constitution to redress these harms.

3. The Equality of the Sexes provision of the Colorado Constitution, Article II, Section 29, provides for great protections than the Equal Protection Clause

Article II, Section 29 of the Colorado Constitution provides that "[e]quality 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." This state constitutional provision, known as the Colorado Equal Rights Amendment ("ERA"), assures equal protection on the basis of sex for which there

is no federal analogue. Indeed, the ERA requires that Colorado courts apply the "closest judicial scrutiny" to sex-based classifications. *Colorado Civil Rights Com'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1363 (Colo. 1988). While Defendants appear to suggest that the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution may provide analogous guarantees, it does not. *Free the Nipple v. City of Fort Collins*, 216 F.Supp.3d 1258, 1267 (D. Colo. 2016) (comparing Colorado's ERA which requires the "closest judicial scrutiny" to the Equal Protection Clause which affords only intermediate scrutiny).

Further, caselaw in the Tenth Circuit suggests that it is doubtful whether the federal constitution would respect or even recognize the gender of the Plaintiffs. "The Tenth Circuit, to date, has not recognized transgender individuals as a suspect class for purposes of a Fourteenth Amendment equal-protection claim." *Porter v. Crow*, 18-CV-0472-JED-FHM, 2020 WL 620284, *8 n. 13 (N.D. Okla. Feb. 10, 2020); *see also Etsitty v. Utah Transit Authority,* 502 F.3d 1215 (10th Cir. 2007) (holding that "transsexuals are not a protected class"). Thus, it is doubtful that any federal remedy would be available to Plaintiffs with respect to their sex-based discrimination claims. In contrast, Colorado's clear public policy on non-discrimination and gender identity dictates inclusion of Plaintiffs' sex discrimination claims under the ERA. *See* discussion *infra* Section II.B.

4. The Colorado Constitution's Cruel and Unusual Punishment Clause, Article II, Section 20, provides for greater protections than the Eighth Amendment.

The mere fact that Article II, Section 20 of the Colorado Constitution mirrors the language of the Eighth Amendment to the United States Constitution is not dispositive as to whether it provides an adequate remedy to the Plaintiffs To the contrary, the Colorado Supreme

Court has previously demonstrated that, despite textual similarities, the Colorado Constitution requires a more nuanced analysis than would be applied to an Eighth Amendment claim under 42 U.S.C. § 1983. *See Wells-Yates v. People,* 454 P.3d 191, 197 (Colo. 2019) (While "Article II, section 20 of the Colorado Constitution is identical to the Eighth Amendment… our analysis does not mirror the [United States] Supreme Court's.").

More importantly, how Colorado operates its prisons and treats some of its most vulnerable citizens is a significant question of state public policy that should be resolve by Colorado courts—not the federal judiciary under federal law. Many of the issues involved in whether conditions amount to "cruel and unusual" punishment are subjective in nature and involve decisions of policy and judgment which reflect the judicial philosophy of the citizens of the State. As explained by the Connecticut Supreme Court when interpreting its state's constitutional provision that is analogous to the Eighth Amendment:

> [U]nder the state constitution, the pertinent standards by which we judge the fairness, decency, and efficacy of a punishment are necessarily those of Connecticut. *Although regional, national, and international norms may inform our analysis . . . the ultimate question is whether capital punishment has come to be excessive and disproportionate* in Connecticut. Cf. *Fleming v. Zant,* 259 Ga. 687, 690, 386 S.E.2d 339 (1989) ("[t]he standard of decency that is relevant to the interpretation of the prohibition against cruel and unusual punishment found in the Georgia [c]onstitution is the standard of the people of Georgia, not the national standard" [internal quotation marks omitted]); *District Attorney v. Watson,* 381 Mass. 648, 661, 664–65, 411 N.E.2d 1274 (1980) (holding that death penalty violated state constitution on basis of contemporary standards of decency in Massachusetts); J. Acker & E. Walsh, Challenging the Death Penalty under State Constitutions, 42 Vand. L.Rev. 1299, 1325 (1989) ("[e]ven if state courts are guided by the doctrinal analysis now associated with the eighth amendment, their frame of reference for measuring evolving standards of decency must be within state borders" [internal quotation marks omitted]); cf. also *Kerrigan v. Commissioner of Public Health,* 289 Conn. 135, 188–213, 957

> A.2d 407 (2008) (in context of determining whether gay persons are entitled to heightened protection for equal protection purposes under state constitution, court assessed their political power or lack thereof in Connecticut).

State v. Santiago, 318 Conn. 1, 122 A.3d 1, 44 (2015) (emphasis added).

To determine what is protected under the Colorado constitution's cruel and unusual clause, Colorado courts should not look at the federal standards, but rather the standards of decency of their own state which may provide broader protections. It is well established that state courts have the power to interpret their state constitutional provisions as more protective of individual rights than the parallel provisions of the United States Constitution. *See People ex rel. Tooley v. Seven Thirty-Five E. Colfax, Inc.*, 697 P.2d 348, 353 (Colo. 1985) (Colorado free speech constitutional provision offers more protection than federal constitution). Indeed, Colorado is nationally known for its strong stance on protection of the LGBTQ community, as exemplified by its laws and case law. *See, e.g., Mullins v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015), *rev'd on other grounds*. As the state judiciary is the sole interpreter of this State's Constitution, these issues, and any available remedies, should be decided in accordance with the Constitution of the State of Colorado.

B. The CGIA Does not Bar Plaintiff's Constitutional Claims for Money Damages.

In this case, Plaintiffs have alleged that the Defendants knowingly created policies, practices, and customs that violate State constitutional protections and seek declaratory and injunctive relief as well as monetary damages. As the CGIA only applies to "traditional torts," this statute is no bar to Plaintiffs' claims.

1. The CGIA Does not Apply to Constitutional Torts

Colorado courts have recognized that the limitations in the CGIA do not apply to actions based on the Colorado Constitution. For instance, in *Jorgenson v. Aurora,* 767 P.2d 756 (Colo. App. 1988) the Court held that an action based on the "takings" clause, Article II, section 15 of the Colorado Constitution, was not subject to the limitations of the CGIA. *Id*. at 758. In so doing, the *Jorgenson* court reaffirmed *Srb v. Board of County Comm'rs,* 601 P.2d 1082 (Colo. App. 1979) which held that the CGIA did not apply to a constitutional "tort" under Article II, finding that such a claim "creates an exception to the doctrine of governmental immunity." *Id*. at 1085. Implicit in these cases is recognition of a principle deeply embedded in our constitutional form of government—that the Constitution is the law of the land and the state legislature cannot eviscerate the constitutional rights belonging to its citizens.[3] Indeed this principle applies with equal force here.

The sovereign immunity established by the CGIA is not a constitutional right, but rather is governed by statute. When there is a clash between constitutional rights and sovereign immunity, constitutional rights prevail. *Id.* As aptly stated by the Court in *Corum v. University of North Carolina*:

> "It would indeed be a fanciful gesture to say on the one hand that citizens have constitutional individual civil rights that are protected from encroachment by the State, while on the other hand saying that individuals whose constitutional rights

[3] *See, e.g., People v. Canister*, 110 P.3d 380 (Colo. 2005) (death penalty statute that violates state constitutional rights is unconstitutional); *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003) (law that enacts redistricting more than once per decade contravenes Colorado Constitution); *Board, Cty. Commrs. v. Vail Assoc*, 19 P.3d 1263, 1272-1273, (Colo. 2001) (law that exempt certain property from taxation contravenes Colorado Constitution and is this invalid): *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1378-1379 (Colo. 1985) (Governor cannot exercise veto power in manner that violates Colorado Constitution.);

> have been violated by the State cannot sue because of the doctrine of sovereign immunity."

413 S.E.2d 276, 291 (N.C. 1992).

Many states have also held that state sovereign immunity laws cannot be used to bar claims for violations of their state constitutions. See *Zullo,* 205 A.3d at 482("Invoking absolute sovereign immunity to prevent a remedy for significant breaches of constitutional rights would undermine the fundamental protections provided by our state constitution, which exists 'to dictate certain boundaries to the government.' J. Friesen, *supra*, § 8.08[1], at 51 (citing 'strong policy argument' that invoking sovereign immunity for breaches of bill of rights aimed at curtailing government power 'would make a mockery of constitutional democracy')"); *Smith v. State*, 410 N.W.2d 749, 751 (Mich. 1987) ("Where it is alleged that the state, by virtue of custom or policy, has violated a right conferred by the [state] Constitution, governmental immunity is not available."); *Corum,* 413 S.E.2d at 289-90 (Sovereign immunity could not bar individuals from bringing constitutional tort claims, "in keeping with the "fundamental purpose" of the Declaration of Rights to "ensure that the violation of [constitutional] rights is *never* permitted by anyone who might be invested under the Constitution with the powers of the State."). S*ee also Colman v. Utah State Land Bd.*, 795 P.2d 622, 634-635 (Utah 1990) (The state constitution serves to limit governmental authority, and statutory or legislative doctrines of sovereign immunity cannot prevail over this constitutional mandate).

2. "Constitutional Torts" are not Torts Under the CGIA.

Moreover, the CGIA is no barrier to Plaintiff's claims because "constitutional torts" are not torts within the meaning of the CGIA. The CGIA provides governmental immunity for those claims that "lie in tort or could lie in tort." C.R.S. § 24-10-106. Grants of immunity are to be

strictly construed. *Camas Colorado, Inc. v. Bd. of County Comm'rs*, 36 P.3d 135, 138 (Colo. App. 2001). It is well-settled that the CGIA does not grant immunity to claims that lie in contract or "from other types of actions… even if such actions require the government to expend funds redressing various harms to plaintiffs." *City of Colorado Springs v. Conners*, 993 P.2d 1167, 1173 (Colo. 2000). Plaintiff's constitutional tort claims constitute the "other types of actions" that lie beyond the CGIA's reach.

Traditional common-law torts are those based in negligence. Indeed, a plain reading of the CGIA shows that the statute is aimed at protecting the government and governmental actors against claims of negligence, except in very limited circumstances such as the operation of vehicles, public facilities or "dangerous conditions." C.R.S. 24-10-106(1). The statute specifically mentions that liability will not be found in certain circumstances unless negligence is shown. *See* C.R.S. 24-10-106(4) ("No liability shall be imposed… unless negligence is proven."). Nowhere does the CGIA, or its legislative history, mention that it applies to "constitutional torts."

Conversely, constitutional torts are premised on a policy or custom of governmental officials to violate the rights guaranteed in the constitution—as opposed to claims of negligence.[4]

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[4] In analogous situation, the Colorado Supreme Court declined to apply the CGIA to a state civil rights statute prohibiting sex discrimination in employment. *Conners*, *supra*. In that case, the Court found that the Colorado Anti-Discrimination Act was "without origins in common law" and was "intended by the legislature to address constitutionally based concerns of equality rather than mere compensation for personal injuries." *Id*. at 1173-75. The Court went on to note that any benefits to individual claimants was "merely incidental" to the Act's greater purpose of eliminating workplace discrimination. *Id.* at 1174. Although *Conners* did focus on the type of relief available under that statute in determining that it was not subject to the CGIA, the Colorado Supreme Court later clarified that the "form of relief alone, whether damages or

In this respect, the Colorado State Constitution is more akin to a contract with the citizens of this state—defining the duties owed by the State to its people. As stated in *Godfrey v. State,* "[t]he focus in a constitutional tort is not compensation as much as ensuring effective enforcement of constitutional rights." 898 N.W.2d 844, 876-877 (Iowa 2017) (citations omitted). The *Godfrey* Court explained that constitutional tort claims are designed to "vindicate social policies which, by virtue of their inclusion in the Constitution, are aimed predominantly at restraining the Government as an instrument of popular will." *Id*. at 877 (citations omitted). "When a constitutional violation is involved, more than mere allocation of risks and compensation is implicated. The emphasis is not simply on compensating an individual who may have been harmed by illegal conduct, but also upon deterring unconstitutional conduct in the future.… Vindication of the social interest is distinct from adequate compensation goals of tort law." *Id*.; *see also Robinson,* 179 P.3d at 1005-1006.

This case involves claims relating to policies and customs instituted by the state of Colorado that deny citizens their constitutional rights. Accordingly, Plaintiffs claims sound in constitutional tort—not the traditional tort. Important societal goals that far outweigh traditional common-law theories of negligence are implicated. As such, Plaintiff's claims are not subject to the limited immunity granted by the CGIA.

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equitable relief, does not govern the categorization of a claim as a tort or other type of action." *Robinson v. Colo. State Lottery Div*., 179 P.3d 998, 1006 (Colo. 2008).

II. The Qualified Immunity Doctrine Does Not Bar Plaintiffs' Constitutional Claims for Money Damages.

Defendants next argue that the Court should apply the doctrine of qualified immunity to dismiss all claims against the individual Defendants sued in their individual capacities. Again, Defendants' argument fails.

A. This Court should refuse to apply qualified immunity to Plaintiffs' state Constitutional claims

The doctrine of qualified immunity is a controversial doctrine that has been roundly criticized by courts and commentators as unsound and unjust. For instance, the Montana Supreme Court refused to apply the qualified immunity doctrine to constitutional violations:

> qualified immunity is not a defense to the merits of a claim but frees a wrongdoer from liability whether or not he or she acted wrongly… [T]he adoption of qualified immunity in Montana would also be inconsistent with the constitutional requirement that courts of justice afford a speedy remedy for those claims recognized by law for injury of person, property or character.

Dorwart v. Caraway, 58 P.3d 128, 140 (Mont. 2002).[5]

Similarly, in *Clea v. City of Baltimore*, 541 A.2d 1303, 1314, (Md. 1988) the Court rejected any theory of immunity as a defense to violations of the Maryland Constitution, holding that "the presence or absence of malice is pertinent only to the question of punitive damages." *Id*. In so doing, the *Clea* Court explained, "(t)o accord immunity to the responsible government officials, and leave an individual remediless when his constitutional rights are violated, would be

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[5] Notably, the Montana Supreme Court based its decision on the Equality of Justice Provision in its constitution (Article II, Section 16) – an almost mirror image to our own (Article II, Section 6): "Courts of justice shall be open to every person, and a speedy remedy afforded for every injury to person, property or character; and right and justice should be administered without sale, denial or delay." (Colo. Const. Art II, Sec. 6)

inconsistent with the purpose of the constitutional provisions… [and] would also… largely render nugatory the cause of action for violation of [its state's] constitutional rights. *Id.*

Other courts that have applied qualified immunity principles to shield government actors involved in constitutional torts have developed standards that are different than those under federal qualified immunity law. For instance, in *Baldwin v. City of Estherville*, 915 N.W.2d 259 (Iowa 2018), the Iowa Supreme Court rejected the second prong of the federal analysis which requires that the conduct violate clearly established law. *Id*. at 279-280. The *Baldwin* Court reasoned that this requirement gives "undue weight to one factor: how clear the underlying constitutional law was" but rather should be looking at whether the actor exercised due care. *Id*. at 279. The Court went on to follow tort standards, holding qualified immunity should be available in cases involving constitutional torts to only to those defendants who plead and prove an affirmative defense that they exercised all due care to conform to the requirements of the law. *Id*.; *See also, e.g., Martin v. Brady*, 802 A.2d 814, 819 (Conn. 2002) (finding the defendants would be liable if their conduct was "wanton, reckless or malicious"); *Newell v. City of Elgin*, 340 N.E.2d 344, 348 ("[A] public employee is not liable for his act in the execution or enforcement of any law unless his act 'constitutes willful and wanton negligence.'") The Colorado Supreme Court has also recognized the injustice inherent in granting immunity to state actors.

In 1971, the Colorado Supreme Court abolished the common law doctrine of sovereign immunity in the context of tort claims. *Evans, supra*. The *Evans* Court described "the injustice and inequity—even absurdity—" of the doctrine, decrying it as "too great a degree of injustice." *Id.* at 969-970. The Court questioned whether the doctrine had any basis in common law and

ultimately concluded that immunity was a matter best left to the state legislature. *Id.* at 972. Years later, in *Trimble v. City and County of Denver*, 697 P.2d 716 (Colo. 1985), the Colorado Supreme Court addressed immunity for officials of the state, again in the context of tort claims. The Court traced the varying degrees of immunity afforded state officials by Colorado courts over the years for tort claims, from no immunity to the complete immunity enjoyed in 1985. *Id.* at 727-729. Noting that neither party requested that the Court completely abolish official immunity (as it did with the state in *Evans*), the Court instead adopted a form of qualified immunity for state officials sued for tort claims. *Id.* at 729.

Plaintiffs have not uncovered any Colorado cases adopting the doctrine of qualified immunity to claims against state officials for violation of the Colorado Constitution. In their Motion, Defendants rely on case law applying qualified immunity to claims brought pursuant to Section 1983. However, this is not a Section 1983 case and Plaintiffs have not alleged a violation of a *federal* constitutional or statutory right. *Cf.* Def. Mtn at p. 12 and cases cited therein.[6] Notably, qualified immunity under Section 1983 is itself a controversial doctrine that has increasingly come under fire by both sides of the ideological spectrum on the U.S. Supreme

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[6] Contrary to Defendants' assertion in its Motion at pages 14-15, Colorado courts have not "signaled" that Colorado courts would take a "favorable view" of qualified immunity for claims brough under Colorado's constitution. *Freedom from Religion Foundation v. Romer,* was a Section 1983 case and the court did not address the immunity standard. 921 P.2d 84 (Colo. App. 1996). In *Holliday v. Regional Transp. Dist.,* also a Section 1983 case, the court expressly declined to decide whether to apply qualified immunity to this state's right to freedom of speech, calling it a "weighty issue." 43 P.3d 676, 681 (Colo. App. 2001). Finally, in *Health Grades, Inc. v. Boyer,* the court merely applied the procedure used to determine a motion to dismiss brought on the basis of qualified immunity to a motion to dismiss an abuse of process claim. 369 P.3d 613, 618, 2012 Colo. App. LEXIS 2148, 2012 COA 196M (Nov. 8, 2012). These cases in no way espouse what Defendants ask this Court to do here.

Court.[7] Justice Sotomayor has observed the doctrine encourages police officers to "shoot first and think later." *Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (dissenting). Indeed, there are over a dozen cases pending review for certiorari for the Supreme Court's next term, some of them unpublished, suggesting the controversial and dysfunctional doctrine is poised to be overturned or narrowed. *See, e.g., Baxter v. Bracey*, 751 Fed. Appx. 869 (6th Cir. 2018) *cert. pending* (when a police officer unleashes a dog on a suspect who has surrendered and is sitting on the ground with his hands up, does "the judge-made doctrine of qualified immunity, which cannot be justified by reference to the text of 42 U.S.C. § 1983 or the relevant common law background, and which has been shown not to serve its intended policy goals, should be narrowed or abolished."); *West v. City of Caldwell*, 931 F.3d 978 (9th Cir. 2019) *cert. pending* (deciding the issue of "Whether an officer who has consent to "get inside" a house but instead destroys it from the outside is entitled to qualified immunity in the absence of precisely factually on-point case law."); *Zadeh v. Robinson*, 928 F.3d 457 (5th Cir. 2019) *cert. pending* (deciding the issue of "Whether the Supreme Court should recalibrate or reverse the doctrine of qualified immunity.") *Brennan v. Dawson,* 752 F. App'x 276 (6th Cir. 2018) *cert pending* (deciding the

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[7]*See e.g.,* William Baude, *Is Qualified Immunity Unlawful?,* 106 Cal. L. Rev. 45, 59 (2018) (arguing that purported justifications for qualified immunity fail "for a mix of historical, conceptual, and doctrinal reasons"). Indeed, several Justices have criticized the doctrine and expressed a desire to abolish or at least reconsider it. *E.g., Kisela v. Hughes*, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, S., dissenting) (describing qualified immunity as a flawed doctrine that "sends an alarming signal to law enforcement officers and the public"); *Ziglar v. Abbasi,* 137 S. Ct. 1843 (2017) (Thomas, C., concurring) (characterizing qualified immunity as of the "freewheeling policy choice[s]" that we have previously disclaimed the power to make"): *Wyatt v. Cole,* 504 U.S. 158, 170-172 (Kennedy, J. concurring) (the doctrine "diverged to a substantial degree from historical standards" and "it is something of a misnomer to describe the common law as creating a good-faith defense...").

issue of "Whether a police officer may reasonably rely on a narrow exception to a specific and clearly established right to shield him from civil liability when his conduct far exceeds the limits of that exception.").

As indemnification policies apply to most government officials, qualified immunity is redundant in so far as it intends to protect officials from having to pay out of pocket for their own civil rights violations. *See* C.R.S. § 24-10-110(1)(b) (providing that public entities are responsible for the cost of judgements and settlements against employees acting within the scope of their employment); Joanna C. Schwartz, *Police Indemnification,* 89 N.Y.U.L. Rev. 885, 887 (explaining that police officers are virtually always indemnified, with governments paying approximately 99.98% of liability).

Moreover, the doctrine of qualified immunity only serves to disincentivize public officials from respecting the constitutional rights of those they are charged to protect. *See* Devon W. Carbado*, Blue-on-Black Violence: A Provisional Model of Some of the Causes*, 104 Geo. L.J. 1479, 1519-24 (2016) (arguing that qualified immunity contributes to police violence); *also see* Sheldon H. Nahmod, *Civil Rights & Civil Liberties Litigation: The Law of Section 1983 § 8:5* (4th ed. 2016).

In short, this Court should not extend the doctrine of qualified immunity to state constitutional claims. The purported merits of qualified immunity simply do not outweigh the resulting injustice and inequity. However, should the Court choose to apply federal qualified immunity standards here, Plaintiffs' First Amended Complaint has met that high standard.

B. The Amended Complaint Alleges Violations of Clearly Established Law

As argued previously, this Court should decline the State's invitation to adopt the qualified immunity doctrine from other jurisdictions. If the Court determines that some level of immunity should be granted for state constitutional violations, Plaintiffs urge the Court to adopt the "due care" guidelines articulated in *Baldwin*. Even assuming arguendo, however, that this Court applies current federal qualified immunity standards to the constitutional claims for money damages against Defendants in their individual capacities, those claims should survive Rule 12(b)(5) motion to dismiss because Plaintiffs have alleged repeated violations of clearly established law.

While clearly established law may be shown by looking to "either a Supreme Court or Tenth Circuit decision, or the weight of authority from other courts," "there need not be a case directly on point[.]" *T.D. v. Patton*, 868 F.3d 1209, 1220 (10th Cir. 2017) (internal quotations and citations omitted). Rather, government defendants in their individual capacities may be held liable in their individual capacities even where some inferences about the law's application to particular circumstances are required. *See, e.g.*, *Blackmon v. Sutton*, 734 F.3d 1237, 1240 (10th Cir. 2013) (Gorsuch, J.) (rejecting qualified immunity in pretrial detention case even where "The jurisprudential terrain between arrest and conviction remains today only partially charted," and the Supreme Court had "done comparatively little to clarify the standards of care due to those who find themselves" in pretrial detention). And, state laws created in recognition of a constitutional right may aid in showing that a right is clearly established. *Walters v. W. State Hosp.*, 864 F.2d 695, 699 (10th Cir. 1988) (though no controlling case law "directly on point," Oklahoma statute helped clarify particulars of rights of those detained in state hospitals).

Here, Defendants intentionally confuse the rights Plaintiffs assert with the remedies they seek. Joint Partial Mot. to Dismiss at p. 16 ("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."). Rather, Plaintiffs have clearly established and long-standing rights to be protected from substantial risks of serious harms, including violence and sexual assault; to be free from discrimination; and to receive adequate treatment for serious medical needs.

1. Plaintiffs have alleged a system-wide failure to protect transgender women from known and substantial risks of serious harms, in violation of their clearly established right to be free of cruel and unusual punishment.

In a footnote, Defendants concede the merit of Plaintiffs' failure to protect claims, then argue that those claims should still be dismissed because defendants did not personally participate, then assert that because Plaintiffs are transgender the law on failure protect is somehow not clearly established as to them. Joint Partial Mot. to Dismiss at p. 16, n. 5. As explained above, Colorado's cruel and unusual punishment clause provides greater protections than the Eighth Amendment. Yet, even under federal law, the very case that established the failure to protect standard (1) involved a transgender plaintiff, and (2) made clear that prison officials have a duty to protect vulnerable groups:

> *Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault.* The question under the Eighth Amendment is whether prison officials, acting with deliberate indifference, exposed a prisoner to a sufficiently substantial risk of serious damage to his future health, and *it does not matter whether the risk comes from a single source or multiple sources, any more than it matters whether a prisoner faces an excessive risk of attack for reasons personal to him or because all prisoners in his situation*

> *face such a risk...* If, for example, prison officials were aware that inmate rape was so common and uncontrolled that some potential victims dared not sleep but instead would leave their beds and spend the night clinging to the bars nearest the guards' station, *it would obviously be irrelevant to liability that the officials could not guess beforehand precisely who would attack whom*.

Farmer v. Brennan, 511 U.S. 825, 842–44 (1994) (emphasis supplied) (internal quotations and citations omitted). It is precisely because *Farmer* describes Plaintiffs' exact situations that the above so closely mirrors the Amended Complaint. *See, e.g.* Am. Compl. at ¶ 12 (Plaintiff Cupcake Rivers lives in fear of rape and loses sleep because of it); ¶ 45 (Plaintiff Amber Miller has violated prison rules because it was her only option to obtain transfer to a safer unit). Further, it is the very existence of a substantial risk to their safety that violates Plaintiffs' rights, regardless of whether a certain harm eventually befalls them. *See, e.g. Helling v. McKinney*, 509 U.S. 25, 33 (1993) ("it would be odd to deny an injunction to inmates who plainly proved an unsafe, life-threatening condition in their prison on the ground that nothing yet had happened to them.").

The federal Prison Rape Elimination Act and its implementing standards, passed in recognition of the widespread failure to uphold the Eighth Amendment, further clarified both the law and the particular vulnerabilities of incarcerated transgender women, and gave Defendants a guidebook for preventing, detection, and responding to prison rape. Am. Compl. at ¶¶ 56-57.

At all times relevant to the Amended Complaint, Defendants knew that the transgender women in their care faced substantial risks of violence and sexual assault, and Defendants personally participated in the failure to adopt policies and procedures to mitigate that risk. Am. Compl. at ¶ 64-69. Defendants, especially Director Trani, implemented and enforced a policy that punishes and deters reporting rape by assigning men to strip search female survivors before

putting them in solitary confinement. *Id.* at ¶¶ 64-65. Director Trani and his co-defendants also failed to correct their system of investigating and documenting reported rapes, which led to zero out of thirty-three rapes reported by class members being substantiated during Defendant Trani's time as Director of Prisons. *Id*. at ¶¶ 66-67, 69. And, Director Trani and defendant members of the Gender Dysphoria Committee personally participated in denying Plaintiffs' requests for safer housing in women's prisons and personally participated in the policymaking that made those denials *pro forma*. *Id.* at 69.

The law in this area has been clearly established since at least 1994, and the Amended Complaint properly alleges that Defendants personally participated in the failures to protect the Plaintiff class from violence and sexual assault.

2. *Plaintiffs have a clearly established right to be free from discrimination based on their sex*

The Colorado Constitution provides "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." Art. II, Sec. 29. In Colorado, "classifications based solely on sexual status must receive the closest judicial scrutiny," *People v. Green*, 183 Colo. 25, 28 (1973), and can survive only where they serve "an important government objective and be substantially related to that objective." *Matter of Estate of Musso*, 932 P.2d 853, 855 (Colo. App. 1997).

Defendants' reliance on an unreported case and an outlier from the Tenth Circuit is not persuasive. As this Court recognizes, federal cases are not controlling authority on the interpretation of the Colorado Constitution. Moreover, the State of Colorado recognizes a clear public policy prohibiting forms of sex discrimination that include transgender status as clearly established law. Colorado law prohibits discrimination against transgender people in

employment, housing, public accommodation, advertising, and public entities. C.R.S. §§ 24-34-301 to -805. Colorado law further recognizes the importance of identifying transgender people in accord with their gender identities on official records, 5 C.C.R. 1006-1, of referring to all people by their gender-appropriate names, pronouns, and honorifics, 3 C.C.R. 708-1-81.6(A)(4), and of allowing transgender people access to sex-separate facilities that match their gender identities, 3 C.C.R. 708-1-81.9(B). In sum, the State of Colorado has enacted legislation and regulations prohibiting the full range of sex discrimination faced by Plaintiffs.

Still, to the extent federal caselaw may be of assistance with the interpretation of sex discrimination in Colorado, many courts to consider the issue have concluded that sex-based discrimination provisions prohibit discrimination on the basis of gender identity, including access to sex-separate facilities that match one's gender identity. *See, e.g., Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017) (Title IX and the Equal Protection Clause each prohibited public school from barring transgender boy from boy's restrooms); *Dodds v. United States Dep't of Educ.*, 845 F.3d 217, 222 (6th Cir. 2016) (public school engaged in sex discrimination under Title IX by barring transgender girl from girl's restroom; citing *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004)); *Glenn v. Brumby,* 663 F.3d 1312, 1317 (11th Cir. 2011) ("discrimination against a transgender individual because of her gender-nonconformity is sex discrimination" under the Equal Protection Clause); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000) (sex discrimination under Equal Credit Opportunity Act included discrimination against transgender plaintiff); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (sex discrimination under Gender Motivated Violence Act included gender-identity-motivated violence against incarcerated transgender woman).

There is also no doubt that constitutional discrimination provisions apply with full force in prison environments. *Johnson v. California*, 543 U.S. 499, 510 (2005) (applying strict scrutiny to race discrimination in prison: "The right not to be discriminated against… is not a right that need necessarily be compromised for the sake of proper prison administration.").

Taken together, Defendants had clear and ample notice that they were engaged in unconstitutional sex discrimination by barring transgender women from women's prisons, treating transgender women as men for search purposes, allowing their staff to ignore transgender women's gender-appropriate names, pronouns, and honorifics, denying transgender women access to canteen items allowed to cisgender women, denying this community necessary medical and mental health treatment, and otherwise treating transgender women differently than cisgender women.

3. Plaintiffs have a clearly established right to adequate treatment for their serious medical needs, including gender dysphoria.

Again, Colorado's constitution provides greater protections than the Eighth Amendment to the U.S. Constitution. Even under the federal standard, thought, Plaintiffs have adequately plead violations of clearly established law. "A prison official's deliberate indifference to an inmate's serious medical needs is a violation of the Eighth Amendment's prohibition against cruel and unusual punishment." *Mata v. Saiz*, 427 F.3d 745, 751 (10th Cir. 2005) (*citing Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). Plaintiffs must show that their medical need or denial or inadequacy of care was, objectively, "sufficiently serious," and that defendants were subjectively deliberately indifferent. *Burke v. Regalado*, 935 F.3d 960, 992 (10th Cir. 2019). "Each step of this inquiry is fact-intensive." *Rachel v. Troutt*, 820 F.3d 390, 394 (10th Cir. 2016) (*quoting Hartsfield v. Colburn*, 491 F.3d 394, 397 (8th Cir. 2007).

As an initial matter, the Tenth Circuit cases Defendants cite concerning healthcare for incarcerated transgender people were each decided after some measure of fact development. Joint Partial Mot. to Dismiss at p. 17 (*citing Lamb v. Norwood*, 899 F.3d 1159 (10th Cir. 2018) (appeal of summary judgement) and *Druley v. Patton*, 601 F. App'x 632 (10th Cir. 2015) (unreported appeal of denial of preliminary injunction)). Here, while considering a motion to dismiss under C.R.C.P. 12(b)(5), the facts in the Amended Complaint must be taken as true. The question before the Court, therefore, is not what treatment gender dysphoria requires as a matter of law, but rather, given the facts in the Amended Complaint, have Plaintiffs pled a deliberate indifference to their serious medical needs.

An outright prohibition on any medical treatment evidences deliberate indifference by refusing to consider the seriousness of a patient's condition. *See, e.g., Colwell v. Bannister*, 763 F.3d 1060, 1069 (9th Cir. 2014) (holding that prison overriding medical recommendations because of administrative policy may constitute deliberate indifference); *Roe v. Elyea*, 631 F.3d 843, 862-63 (7th Cir. 2011) (holding that categorical denial of treatment for hepatitis C to inmates with less than two years left of sentence indicated Eighth Amendment violation); *Fields v. Smith*, 653 F.3d 550, 556 (7th Cir. 2011) ("It is well established that the Constitution's ban on cruel and unusual punishment does not permit a state to deny effective treatment for the serious medical needs of prisoners.") (citing *Estelle*, 429 U.S. 97).

Similarly, prison officials show deliberate indifference when they fail to seek medical and mental health providers qualified to assess and treat an incarcerated person's serious medical needs. *See, e.g., Mata, at* 758 (Colorado prison nurse not due qualified immunity on summary judgement where she failed to "contact qualified medical personnel that could properly assess

and assist" plaintiff); *Oxendine v. Kaplan*, 241 F.3d 1272, 1274 (10th Cir. 2001) (deliberate indifference found where prison doctor at FCI-Florence performed procedure he was not qualified to perform and "refused to obtain outside specialized medical assistance[.]").

Defendants would like to obscure this question by focusing on Plaintiffs' transgender status,[8] because the fact remains that Plaintiffs have properly pled that Defendants violate clearly established law by making certain treatments off-limits and by eschewing qualified medical judgement. Plaintiffs have alleged that CDOC policy is to deny ***all*** requests for transition-related surgery, regardless of medical necessity. Am. Compl. at ¶¶ 73, 80. Plaintiffs' class representatives have been told this is so repeatedly, including Ms. Taliyah Murphy whose treating provider recommended her for medically necessary surgical treatment for gender dysphoria. *Id.* at ¶¶ 81-82. Plaintiffs have further alleged that CDOC refuses to engage medical providers who even have the necessary qualifications to properly evaluate transgender patients for surgical treatment and that CDOC's own Chief of Psychiatry and Chair of the Gender Dysphoria Committee admitted as much in prior testimony. *Id.* at ¶¶ 73, 89. Despite that knowledge and testimony, Dr. Lish, and Dr. Butler after him, sent letters from the Gender

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[8] Though not necessary to decide the question before the court at this stage, it bears noting that the State of Colorado considers surgical treatment for gender dysphoria medically necessary for people who are not incarcerated. *See* 10 C.C.R. 2505-10-8.735 (detailing coverage for transition-related surgical procedures under Colorado's Medicaid program, Health First Colorado); 3 C.C.R. 702-4:4-2-62(5)(E)(3) (prohibiting exclusions of gender dysphoria treatment in private health insurance plans. And, in addition to the World Professional Association for Transgender Health, treatment for gender dysphoria, including surgical treatment, is recognized as medically necessary by at least twenty other healthcare-related professional associations, including the National Commission on Correctional Health Care, the American Medical Association, the American Academy of Nursing, the American College of Physicians, the American Psychiatric Association, the American Psychological Association, American Public Health Association, the Endocrine Society, and the World Medical Association.

Dysphoria Committee to class members denying requests for treatment and deferring to those same unqualified providers. *Id.* at ¶ 89. All of this despite Defendants' knowledge that failure to adequately treat gender dysphoria can lead to severe depression, self-mutilation, and suicide. *Id.* at ¶¶ 9, 36, 37, 74. However other cases involving gender dysphoria have come out, Defendants here have violated clearly established law by showing deliberate indifference to Plaintiffs' serious medical needs.

As argued above, this Court should not apply qualified immunity to individual capacity claims for money damages under the Colorado Constitution. However, should the Court decide to adopt the qualified immunity doctrine, it should find that Plaintiffs have properly pled violations of their clear rights to protection from substantial risks of serious harms, to be free from sex discrimination, and to receive adequate treatment for serious medical needs.

III. Plaintiffs Have Properly Pled Claims For Relief Under Part 6 Of CADA.

Plaintiffs' First Claim (discrimination on the basis of sex and transgender status) and Second Claim (discrimination on the basis of disability and gender dysphoria) are properly brought under Part 6 of CADA, which protects individuals from discrimination on the basis of sex, transgender status, and disability (among other characteristics) in places of public accommodation. Defendants' contention – that prisons are not places of public accommodation and that, as public entities, they need not comply with Part 6 – conflicts with both the express language of CADA and its goal of eradicating discrimination.

A. Prisons Are Places of Public Accommodation.

There are no federal or state cases interpreting whether a prison is a "place of public accommodation" under Part 6 of CADA. As a civil rights statute enacted to eliminate the blight

of discrimination, CADA must be afforded a "liberal construction" to carry out its beneficent purpose. *Creek Red Nation v. Jeffco Midget Football Ass'n*, 175 F. Supp. 3d 1290, 1298 (D. Colo. 2016); *see also Colo. & S. Ry. Co. v. State R.R. Comm'n of Colo.*, 129 P. 506, 512 (Colo. 1912) (where an act is remedial, it will be liberally construed to accomplish its objective); *Colo. Civil Rights Comm'n v. Adolph Coors Corp*., 486 P.2d 43, 45 (Colo. App. 1971) ("the Colorado Antidiscrimination Act of 1957 was enacted for a beneficent purpose and should be liberally construed in favor of the legal remedies which it provides"). This Court need not construe Part 6 broadly, however, as the plain text makes clear that state prisons are not exempted from its prohibitions against unlawful discrimination.

Part 6 of CADA renders it unlawful for "a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation[.]". C.R.S. § 24-34-601(2)(a). "Person" is broadly defined in Part 3 of CADA as "one or more individuals, limited liability companies, partnerships, associations, corporations, legal representatives, trustees, receivers, ***or the state of Colorado and all of its political subdivisions and agencies**.*" C.R.S § 24-34-301(5)(a) (emphasis added). It is indisputable that Defendants are "persons" precluded from discriminating against individuals in places of public accommodation under Part 6.

"Public accommodation," in turn, is defined expansively to include "*any place* offering services, facilities, privileges, advantages, or accommodations to the public," including places to eat and drink, sleep, recreate, obtain medical care, live, and learn. C.R.S. § 24-34-601(1)

(emphasis added)[9]; *see also Masterpiece Cakeshop v. Colo. Civil Rights,* 138 S. Ct. 1719, 1725 (2018) ("[t]he Act defines 'public accommodation' broadly"). To reinforce its breadth, the definition concludes with a catch-all: it applies to a "public facility *of any kind* whether indoor or outdoor." C.R.S. § 24-34-601(1) (emphasis added). Notably, Part 6 contains one–*and only one*– exception: places of worship. Thus, with this one exception, Part 6 encompasses all places of life, prisons included. *Cf. Showpiece Homes Corp. v. Assurance*, 38 P.3d 47, 54 (Colo. 2001) (fact that statute expressly excluded certain persons and entities from its provisions supported interpretation that those not listed were within its purview).

Defendants mischaracterize the holding in *Pennsylvania Dept. of Corrections v Yeskey*. 524 U.S. 206 (1998). In that case, the U.S. Supreme Court did *not* hold that a prison is not "a place of public accommodation." Joint Partial Mot. to Dismiss at p. 22. At issue in *Yeskey* was whether Title II of the Americans with Disabilities Act of 1990 (ADA) – which provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public

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[9] The statute provides in full:

> "As used in this part 6, 'place of public accommodation' means any place of business engaged in any sales to the public and any place offering services, facilities, privileges, advantages, or accommodations to the public, including but not limited to any business offering wholesale or retail sales to the public; any place to eat, drink, sleep, or rest, or any combination thereof; any sporting or recreational area and facility; any public transportation facility; a barber shop, bathhouse, swimming pool, bath, steam or massage parlor, gymnasium, or other establishment conducted to serve the health, appearance, or physical condition of a person; a campsite or trailer camp; a dispensary, clinic, hospital, convalescent home, or other institution for the sick, ailing, aged, or infirm; a mortuary, undertaking parlor, or cemetery; an educational institution; or any public building, park, arena, theater, hall, auditorium, museum, library, exhibit, or public facility of any kind whether indoor or outdoor."

entity"–is applicable to state prisons. *Id.* at 208. The Supreme Court unanimously concluded that public entities must comply with the ADA in state prisons. *Id.* at 2011-12. Notably, the Court *rejected* the argument–suggested by Defendants here–that state prisons are exempted from the ADA because they do not provide inmates with the "benefits" of "programs, services, or activities," as those terms are ordinarily understood. Rather, as the Supreme Court explained, "[m]odern prisons provide inmates with many recreational 'activities,' medical 'services,' and educational and vocational 'programs,' all of which at least theoretically 'benefit' the prisoners (and any of which disabled prisoners could be 'excluded from participation in')." *Id.* at 210.

Under the rationale of *Yeskey,* state prisons are "places of public accommodation" within the meaning of Part 6 of CADA, as they are places where "persons" (i.e., "the state of Colorado and all of its political subdivisions and agencies") offer "goods, services, facilities, privileges, advantages, or accommodations." Like the examples listed in *Yeskey,* the CDOC offers various types of services and programs in its prisons, from GED and vocational training programs to physical and mental health services.

To be sure, prisons are not completely open to the public, and incarcerated people cannot come and go freely. But that is true of public schools and public hospitals, as well, which are places of public accommodation. Each of these places have restrictions on who may access these facilities, but, nonetheless, they are designed and intended to provide services to the public. And it would lead to anomalous results if places run by private entities–like bakeries and nail salons–are deemed "public accommodations," while places run by public entities–like state prisons, state parks, and the local DMV–are not deemed "public accommodations."

B. Public Entities Are Not Exempt from Part 6.

Finally, Defendants make the circular argument that Part 8 of CADA applies to "public entities" and, thus, it is the only Part of CADA with which they must comply. (Joint Partial Mot. to Dismiss at p. 20.) However, Part 8 is focused on a type of discrimination (disability), not on a type of discriminator. Like Part 6, Part 8 applies to "persons." C.R.S. § 24-34-802 ("[i]t is a discriminatory practice and unlawful *for any person* to discriminate against any individual or group …") (emphasis added).

If this Court were to construe Defendants as being exempt from Part 6's prohibitions, DOC's employees and agents would be free to discriminate against an incarcerated person because she is Latina, or African American, or Catholic, or transgender (subject to constitutional limitations). It should go without saying that incarcerated people, although confined to prison, remain members of the public who deserve to be treated fairly, without discrimination on the basis of protected characteristics. Of course, the fact that Plaintiffs *could have* pled their Second Claim (disability and gender dysphoria) under Part 8, but chose Part 6, instead is irrelevant.[10]

In short, Plaintiffs' First and Second Claims are both properly brought under Part 6 of CADA, and the Court should deny Defendants' motion to dismiss on this ground.

C. Plaintiffs' CADA Claims Are Not Barred by the CGIA.

Defendants contend that because Part 6 of CADA does not contain an express exemption from the CGIA (as Part 4 does), claims brought under Part 6 are subject to the CGIA. Defendants misconstrue the legislative history and case law construing CADA. CADA is a complex body of

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[10] The two Parts are connected, as a claim for unlawful discrimination on the basis of disability may be brought under one or both Parts, but the remedies for both are provided under Part 8. *See* C.R.S. §§ 24-34-602(1)(b) and 24-34-802(2).

statutes created to eradicate discrimination across a broad swath of society and for the public good. The remedies provided under the various parts of CADA are meant to do much more than simply compensate individuals. They are akin to constitutional claims, which, as previously mentioned, "vindicate social policies" *See Godfrey* at 877. As such, CADA claims–including claims under Part 6–are not claims which "lie in tort or could lie in tort" and are thus not subject to the CGIA. And, in any event, Plaintiffs substantially complied with the CGIA notice requirements, which is all that is required.

1. The Colorado Courts and Legislature Have Long Recognized that CADA Claims Do Not Lie in Tort.

The Colorado Legislature amended Part 4 of CADA in 2013 to exempt claims brought under that section from the CGIA, as Defendants note. In no way, however, was that an indication that other Parts of CADA were now subject to the CGIA. A brief history is illustrative.

In 2000, the Colorado Supreme Court held that claims brought under the Colorado Civil Rights Act (the previous version of CADA) are not claims that "lie or could lie in tort" and therefore are not subject to the CGIA. *Conners*, 993 P.2d at 1176-1177. In reaching that conclusion, the *Conners* Court specifically addressed the state statutory prohibitions on employment discrimination, and stated:

> [T]he legislature adopted these anti-discrimination provisions to fulfill the "basic responsibility of government to redress discriminatory employment practices on the basis of race, creed, color, sex, age, national origin, or ancestry." (citations omitted). The CRA was not designed primarily to compensate individual claimants but rather to eliminate discriminatory practices as defined by the Act.

(citation omitted).

The Court went on to explain that "any benefits to an individual claimant… are 'merely incidental' to the Act's greater purpose of eliminating workplace discrimination." *Conners*, 993 P.2d at 1174 (citing *Brooke v. Restaurant Servs., Inc.*, 906 P.2d 66, 71 (Colo. 1995)). The *Connors* Court also noted that the statutory remedies that existed at the time (such as injunctive and declaratory relief, reinstatement and backpay) were equitable in nature, further distinguishing CADA claims from tort claims. In conclusion, the Court held that the statutory scheme was aimed at *eradicating discriminatory practices*, rather than providing compensatory relief to individuals, and thus was not subject to the CGIA. *Id*. at 1176.

Subsequently, in *Robinson*, the Colorado Supreme Court clarified that the "form of relief alone, whether damages or equitable relief, does not govern the categorization of a claim as a tort or other type of action." 179 P.3d at 1003. Rather, it is the nature of the injury that governs. *Id.*at 1005. Thus, CADA, as "a statutory scheme without origins in common law… intended by the legislature to address constitutionally based concerns of equality rather than mere compensation for personal injuries," is not subject to the CGIA. *Id.* at 1006.

In 2013, the Colorado Legislature amended Part 4 of CADA to add compensatory damages as available remedies. At the same time, in recognition that the nature of the claim (rather than the available remedies) was the key factor in determining whether the CGIA applied, the Legislature also added a provision to Part 4 codifying *Conners/Robinson* and retaining CADA's exemption from the CGIA. *See* C.R.S. § 24-34-405(8)(g). Part 6 and Part 8 were not amended at that time. Thus, contrary to Defendants' argument, the fact that the Legislature did not also expressly exempt those Parts from the CGIA is unremarkable.

2. Plaintiffs' Claims Under Part 6 of CADA Based on Sex and Transgender Status Are Not Subject to the CGIA.

Like Part 4 of CADA, Part 6 is concerned with "constitutionally based concerns of equality." It prohibits discrimination in public accommodations and provides that "any person" (i.e., "the state of Colorado and all of its political subdivisions and agencies") who violates Part 6 shall be fined not less than fifty dollars nor more than five hundred dollars for each violation. C.R.S. § 24-34-602(1). No other remedies are provided (unless the discrimination is based on disability, as discussed immediately below). Clearly, Part 6 is directed foremost at eradicating discrimination in places of public accommodation, rather than compensating individuals. As both the nature of the injury and the relief sought do not lie in tort, *Conners/Robinson* mandate that Plaintiffs' First Claim brought under Part 6 of CADA for discrimination on the basis of sex and transgender status are not subject to the CGIA.

3. Plaintiffs' Claims Under Section 6 of CADA Based on Disability Are Not Subject to the CGIA.

The same analysis dictates that Plaintiffs' Second Claim for discrimination on the basis of disability and gender dysphoria, brought under Part 6 of CADA (which also incorporates Part 8 remedies) is also not subject to the CGIA. The nature of the injury–discrimination on the basis of disability–is no different than discrimination on the basis of sex, national origin, etc. and is abhorrent whether it occurs in places of public accommodation (Part 6) or in employment (Part 4). And again, the remedies that are allowed for disability discrimination under Part 6 are limited. An individual discriminated against based on disability is entitled to recover either actual monetary damages or a fine not to exceed $3,500. C.R.S. § 24-34-802(2)(III). The mere fact that the Colorado Legislature added the availability of actual monetary damages to disability-related

claims under Part 6 does not transform claims of disability discrimination into claims that could "lie in tort."

It is noted that on February 3, 2020, the Colorado Supreme Court granted certiorari to review *Denver Health & Hosp. Auth. v. Houchin*, No. 19SC354, 2020 Colo. LEXIS 86 (Feb. 3, 2020). In that case, the Colorado Court of Appeals addressed whether, by expanding the remedies under Part 4 of CADA in 2013, the Colorado Legislature intended that Part subject to the CGIA. However, as expressed above, there is no reasoned basis to hold that either Part 6 or Part 8 is subject to the CGIA.

4. Defendants Had Sufficient Notice of Plaintiffs' Claims under the CGIA

Even assuming a scenario where the CGIA is applicable to Parts 6 and 8 of CADA, Plaintiffs more than substantially complied with the notice requirements of the CGIA.

In *Woodsmall v. Regional Transp. Dist.,* 800 P.2d 63 (Colo. 2000), the Colorado Supreme Court held that the CGIA only requires "substantial compliance" with its notification requirements. It is sufficient if the claimant notifies the public entity and, to the extent possible, makes a good faith effort to include information about the name of the claimants, information about the factual basis of the claim, the name of the public entity or employees involved, the nature of the injury and the amount of damages being required. *Id.* at 68; C.R.S. § 24-10-109(2) (a-e). "In determining whether a claimant has substantially complied with the notice requirement, a court may consider whether and to what extent the public entity has been adversely affected in its ability to defend against the claim by reason of any omission or error in the notice." *Id.* at 68-69.

Defendants and the Office of the Attorney General have been fully aware of all the claims and allegations in this case for over one year. Substantive discussions about the systemic problems faced by the over 170 transgender women in the CDOC began during the precursor case of *Saunders-Velez v. CDOC, et al*., Case No. 17-cv-01654-MSK-NRN (D. Colo.), which involved a young transgender women in CDOC. As detailed in the settlement in that case, the same issues Plaintiffs bring in this case were raised by Ms. Saunders-Velez in her case.[11] Ex. 1. In January 2019, undersigned counsel provided the Attorney General's office with an outline of the systemic changes that needed to be made. Ex. 2. Indeed, in May 2019, undersigned counsel, attorneys at the Office of the Attorney General, and several of the named individual Defendants in this case met in a full day training organized by undersigned counsel in which a variety of medical, mental health, and correctional experts spoke about the systemic changes that needed to be made at CDOC. At that time, undersigned counsel, the Attorney General's office and CDOC management agreed to retain a third-party medical expert to assist the parties in reaching a resolution and had a series of settlement talks with the mediator, former Judge Christina Habas. After substantive discussions, in August 2019, undersigned counsel provided attorneys at the Office of the Attorney General a detailed statement of the facts for each of the named class representatives in this case, along with two large binders full of grievances, medical information,

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[11] WHEREAS, throughout the Litigation Plaintiff has made several allegations concerning: (a) her placement and housing in a male facility, (b) pat and strip searches by male correctional officers, (c) pronoun usage in connection with transgender inmates, (d) access to certain canteen items, (e) medical and surgical treatments for transgender inmates, including but not limited to, hormone therapy, and gender confirming surgery; (f) privacy for transgender inmates; (g) programming for and concerning transgender inmates; (h) administrative segregation; and (i) training of correctional officers, medical providers, mental health providers, and other staff, employees, agents, representatives, insurers related to the above transgender issues, all of which shall be known as the "Policy Issues";

and other facts establishing the unsafe conditions at CDOC with respect to the women, and the denial of necessary treatment for their disabilities. Ex. 3. This submission included a detailed draft complaint, essentially identical to the one that was subsequently filed in this case, and additionally included an assessment of the kinds of damages required.

In short, Plaintiffs have provided Defendants more than "substantial" notice of their claims under the CGIA. Despite significant efforts, the parties were unable to achieve a resolution, and Plaintiffs filed this lawsuit. The CGIA is thus satisfied.

CONCLUSION

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

Dated this 3rd day of June 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of June 2020, a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO DEFENDANTS' JOINT PARTIAL MOTION TO DISMISS** was duly filed and served on the following parties through Colorado Courts E-Filing/ICCES, addressed as follows:

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