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DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80203	
KANDACE RAVEN, JANE GALLENTINE, TALIYAH MURPHY, AMBER MILLER, MEGAN GULLEY, LAVINYA KAPIERZ and CUPCAKE RIVERS, Plaintiffs, as representatives of themselves and all others similarly situated in this class action, v. JARED POLIS, Governor of Colorado, *et al.*, Defendants.	▲ **COURT USE ONLY** ▲
Attorneys for Defendant Jared Polis: 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*	Case No. 19CV34492 Ctrm./Div.: 203

THE GOVERNOR'S REPLY IN SUPPORT OF MOTION TO DISMISS

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 submits this reply in support of his motion to be dismissed as a party under C.R.C.P. ("Rule") 12(b)(5) and, alternatively, joins in the

arguments set forth in the reply in support of the other *Defendants' Joint Partial Motion to Dismiss* under Rules 12(b)(1) and (5).

INTRODUCTION

Plaintiffs' *Response* failed to refute that the *Amended Complaint* is devoid of even *one* factual allegation specifically detailing the Governor's direct personal participation in any of the claimed wrongdoing that has caused the alleged injuries they seek to redress. Despite this failure, Plaintiffs ask this Court to compel the Governor to remain a named defendant based on "custom" and "practice," and their legal conclusion that he "is responsible for the overall administration of the laws of the State." *Response*, at 2, 7 (citing *Compl.*, ¶ 14). The Court must reject their request for two reasons.

First, the "custom" and "practice" relied on by Plaintiffs is outdated and no longer blindly followed by Colorado courts based on the holdings in *Developmental Pathways v. Ritter,* 178 P.3d 524 (Colo. 2008), and *Lucchesi v. State,* 807 P.2d 1185 (Colo. App. 1990), *cert denied* April 8, 1991. And *second*, even if this Court accepts Plaintiffs' legal conclusion about the scope of the Governor's responsibility under Colorado law as a factual allegation, such an allegation is insufficient to "'state a claim for relief [against the Governor] that is plausible on its face.'" *Warne v. Hall*, 373 P.3d 588, 591 (Colo. 2016) (quoting *Bell Atlantic v. Twombly*, 550 U.S. 544, 555, 570 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). To hold otherwise is tantamount to the untenable conclusion that the Governor is a necessary and

indispensable party to *every* lawsuit in which a state agency or employee is alleged to have violated a plaintiff's state statutory or constitutional rights. The Court must instead reject that highly tangential basis and "weed[] out" Plaintiffs' claims against the Governor as "groundless." *Id.*, at 594.

Finally, Plaintiffs request to further amend their complaint to add facts in support of why the Governor is a proper party should be denied because they fail to identify any specific fact—as opposed to more legal conclusions—that would support their claims against him. And amendment would be futile because the *Amended Complaint* admits that only the CDOC Defendants are directly responsible for the "overall management, supervision and control of all [CDOC] facilities," and they—not the Governor—operate those facilities on a day-to-day basis "in accordance with the custom, policy, and practice of the CDOC[.]" *Compl.*, ¶¶ 16-21 (citing §§ 24-1-128.5, 17-1-101 & 103, C.R.S. (2019)).

ARGUMENT

I. The holdings in *Developmental Pathways* and *Luchessi* require this Court to dismiss the Governor because he is an improper party.

Plaintiffs' continued reliance on the Supreme Court's holding in *Ainscough v. Owens*, 90 P.3d 851 (Colo. 2004), to the exclusion of its holding in *Developmental Pathways* is misplaced for several reasons. *First, Developmental Pathways* was decided four years after *Ainscough*, and expressly discussed both *Ainscough* and other cases similarly holding that the Governor was a proper defendant "[f]or

litigation purposes" because he "is the embodiment of the state." 178 P.3d at 529 (quoting 90 P3d at 858)). As a result, *Developmental Pathways* announced the Supreme Court's departure from *Ainscough's* blind adherence to the "long recognized . . . practice of naming the governor" in cases challenging state action and adoption of a new test for determining whether he is a proper party. *Id.,* at 529-30 (citations omitted). Namely, that "[t]he evaluation of whether a person or entity is a proper party in a lawsuit *must be determined* in light of the relevant facts and circumstances." *Id.*, at 530 (emphasis added). And notably, the *Response* failed to cite to a single decision issued post-*Developmental Pathways* in which the Supreme Court or Court of Appeals has either cabined the applicability of this test or revived *Ainscough's* "long recognized . . . practice" standard as controlling. Instead, the *Response* cited to only a recent *federal* district court decision—which not only has zero precedential value, *see Kohn v. Burlington Northern and Santa Fe R.R.*, 77 P.3d 809, 811 (Colo. App. 2003) ("The decisions of lower federal courts may be persuasive, but they are not binding upon us."), but also has been appealed, *see* Tenth Circuit Case No. 20-1151—holding that the Governor is a proper party under the *Ainscough* standard. *See Response*, at 7 (citations omitted).

Second, Plaintiffs' attempt to dismiss the "relevant facts and circumstances" test articulated in *Developmental Pathways* as "dicta" is wholly without merit. *Response*, at 5. Rather, "[a] holding and its necessary rationale . . . are not dicta." *Hardesty v. Pino*, 222 P.3d 336, 340 (Colo. App. 2009) (citing Michael Abramowicz &

Maxwell Stearns, *Defining Dicta*, 57 Stan. L.Rev. 953, 1048 (2005)). As part of the "relevant facts and circumstances" in *Developmental Pathways*, the Supreme Court expressly considered that "[a]t the time the current case was filed in February 2007, the members of the [Independent Ethics] Commission had not yet been appointed. Although the Commission existed on paper, it had not yet come into being, and it had taken no action. There was no alternative entity for Plaintiffs to sue in order to challenge Amendment 41." 178 P.3d at 530. Based on these specific facts, the Supreme Court concluded that "[t]he only appropriate state agent for litigation purposes was the Governor. As a personification of the state, the Governor was the proper party defendant *in this suit at the time of its filing*." *Id.* (emphasis added). But in its very next breath and as a necessary extension of its core rationale, the Supreme Court stated: "Had the Commission been in existence at the time this lawsuit was filed, we may have reached a different conclusion with regard to this issue." *Id.*; *see also id.*, at 530 n.3 (rejecting the Governor's reliance on an Illinois Supreme Court case dismissing the Illinois Governor as an improper party from a similar lawsuit as distinguishable because the "ethics commission in that case had already been established at the time the complaint was filed.").

And *third*, the test articulated in *Developmental Pathways* is strikingly similar to and totally aligned with the Court of Appeals' decision in *Lucchessi*, which held that where, as here, a different governmental entity or official is responsible for enforcing a particular law, the Governor is not the proper defendant.

807 P.2d at 1194 (upholding dismissal of Governor as defendant in lawsuit alleging statutory ad valorum 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). Plaintiffs' attempt to cast the Court of Appeals holding in *Luchessi* as in doubt because it was decided before *Ainscough* are unavailing for lack of citation to any Supreme Court authority that has actually disapproved its holding. *See Response*, at 6. To the contrary, the Supreme Court cited *Lucchesi* with approval in *Jackson v. State*, 966 P.2d 1046, 1053 (Colo. 1998), and *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002). And it must be noted that the Supreme Court was asked to expressly reverse *Lucchesi*, but denied the petition for a writ of certiorari. As a result, another division of this Court's reliance on both *Developmental Pathways and Lucchesi* was not misplaced or factually inapposite. *See Motion to Dismiss Exhibit A* (*Franzoy v. State of Colorado*, Denver District Court Case No. 18CV33600 (Gerdes, J., presiding) (January 11, 2019 Order); *see also Reply Exhibit A* (*In re the Lower North Fork Fire Litigation*, Jefferson County District Court Case No. 12CV2550 (Hall, J., presiding) (Feb. 18, 2014 Order) (granting the Governor and Attorney General's Rule 12(b)(5) motion to dismiss as improper parties based on *Developmental Pathways* holding)).

Finally, Plaintiffs' request for leave to further amend their complaint must be brought in a separate motion under C.R.C.P. 15 and cannot be made through their response to the Governor's motion to dismiss. *See* C.R.C.P. 121, § 1-15(1)(d). In

such event, Plaintiffs' counsel must first confer with undersigned counsel, who expressly hereby reserves the Governor's right to oppose such a motion on the basis that any amendment would be futile because Plaintiffs' cannot plead any plausible facts sufficient to tie the Governor to their claims. *See Giduck v. Niblett*, 408 P.3d 856, 869 (Colo. App. 2014); *see also Warne*, 373 P.3d at 591.

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 reply in support of 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 reply to 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: June 10, 2020.

PHILIP J. WEISER
Attorney General

s/ LeeAnn Morrill
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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2020, a true and correct copy of the foregoing **THE GOVERNOR'S REPLY IN SUPPORT OF 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