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

Defendants[1], through their respective undersigned counsel, hereby submit their Reply in support of their Partial Motion to Dismiss Plaintiffs' Amended Complaint pursuant to Colorado Rules of Civil Procedure 12(b)(1) and (5).

INTRODUCTION

Defendants ask this Court to apply well-settled law and dismiss Plaintiffs' claims on multiple independent grounds. Plaintiffs on the other hand, ask this Court to create new causes of action, circumvent statutory immunity and set aside precedent rejecting the very same types of claims Plaintiffs bring here.

Specifically, Plaintiffs bring claims under the Colorado Constitution: art. II, § 29 (sex discrimination) and art. II, § 20 (cruel and unusual punishment), but Colorado law does not recognize an implied cause of action for monetary damages under these constitutional provisions. In fact, Colorado courts have repeatedly held that such claims are properly raised under 42 U.S.C. § 1983, not state law. Additionally, and even if the Court were to recognize Plaintiffs' claims for monetary relief under the Colorado Constitution, those claims would be barred by the CGIA.

In fact, the legislature recently created a § 1983-like cause of action (which can be filed against certain peace officers, but does not apply to correctional officers). There, the legislature expressly exempted those statutory claims from the CGIA. This recent legislation demonstrates two things. First, no implied cause of action exists under common law. If it did, the legislature would have no need to

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

create that same cause of action. Second, the type of § 1983-like claims Plaintiffs seek to bring here are subject to the CGIA. If they were not, there would be no need for the legislature to create a statutory exemption.

Plaintiffs also advocate against an extension of the qualified immunity doctrine, in spite of the fact that every state to address the issue has decided to the contrary. They also urge this Court to define violations of their clearly established rights at a high-level of generality, despite Supreme Court authority expressly counseling against defining a right at a high-level of generality.

Plaintiffs also allege discrimination in a place of public accommodation on the basis of sex and disability under the Colorado Anti-Discrimination Act (CADA), but a prison is not a place of public accommodation, and even if it were, their claims would also be barred by the CGIA because Plaintiffs' CADA claims lie in tort or could lie in tort.

Beyond the legal arguments, Plaintiffs urge the court to view Defendants' Partial Motion to Dismiss as taking a position that transgender women are not entitled to the same rights or protections as other prisoners. Nothing in the Partial Motion to Dismiss supports this statement. The rights and safety of transgender inmates is an important issue, and the Colorado Department of Corrections (CDOC) has recently made significant, progressive, policy changes for the benefit of transgender inmates, including being one of only a handful of states that has transferred transgender women to a female correctional facility. The CDOC will

continue to review its policies and monitor their effect on transgender inmates to ensure that all inmates, no matter their sexual orientation, gender, or identity, are safe and treated fairly and with dignity. However, the plain language of the applicable statutes and constitutional provisions, and the weight of decisions construing these provisions, establish that Plaintiffs' claims for monetary damages fail as a matter of law.

LEGAL ARGUMENT

I. Plaintiffs' constitutional claims should be dismissed because there is no cognizable cause of action under the Colorado Constitution, and because they are tort claims dressed as constitutional claims for the improper purpose of circumventing the CGIA.

A. Plaintiffs do not have a viable claim under the Colorado Constitution.

Plaintiffs' Third and Fourth Claims for Relief, which allege violations of art. II, §§ 20 and 29 of the Colorado Constitution, must be dismissed because there is no statutory or implied cause of action under Colorado's Constitution. *See Bd. of Cty. Comm'rs of Douglas Cty. v. Sundheim*, 926 P.2d 545, 547 (Colo. 1996). Plaintiffs' argument to the contrary lacks legal support.

i. There is no implied cause of action under art. II, §§ 20 or 29, as neither provides greater protection than its federal counterpart.

Colorado courts have recognized an implied cause of action under the Colorado Constitution only in the limited circumstance where the Colorado Constitution provides greater protection than its federal counterpart. *Bock v.*

Westminster Mall Co., 819 P.2d 55, 56 (Colo. 1991) (rejecting restriction on free speech in privately owned mall under art. II, § 10 (free speech) concluding that the Colorado Constitution "guarantees greater protections of petitioners' rights of speech than is guaranteed by the First Amendment.").

When interpreting the Colorado Constitution and analyzing whether it deviates from the United States Constitution, courts look to the plain language of the provisions. *See Bock,* 819 P.2d at 58 (finding the Colorado Constitution affords greater protections, noting "the root of this is the differences between the language of the First Amendment to the United States Constitution and the language of the Colorado Constitution."); *Dami Hosp., LLC v. Indus. Claim Appeals Office*, 457 P.3d 621, 623 n. 1 (Colo. App. 2017) ("Because the wording of Colorado Constitution article II, section 20 is identical, we do not address it separately.") *reversed on alt. grounds* 442 P.3d 94 (Colo. 2019).[2]

Application of this standard demonstrates there is no implied cause of action under art. II, §§ 20 and 29. The language of art. II, § 20 is identical to the Eighth Amendment. *Compare* Colo. Const. art. II, § 20 ("nor cruel and unusual punishments inflicted"); with the U.S. Const. amend. VIII ("nor cruel and unusual punishments inflicted"); *see also Wells-Yates v. People*, 454 P.3d 191, 197 (Colo. 2019) (acknowledging that art. II, § 20 is identical to the Eighth Amendment).

[2] Additionally, Colorado courts have found state-specific conditions require a separate interpretation of the Colorado Constitution.

While the Colorado Supreme Court has recognized that Colorado's "analysis does not mirror the Supreme Court's," *Wells-Yates*, 454 P.3d at 197 (internal citation omitted), no Colorado court has held that art. II, § 20 affords greater rights than the Eighth Amendment, and no Colorado court has recognized an implied cause of action under art. II, § 20. To the contrary, Colorado courts apply art. II, § 20 and the Eighth Amendment as providing the same standard and protections. *See, e.g., People v. Cardenas*, 262 P.3d 913 (Colo. App. 2011) (analyzing the Eighth Amendment and art. II. § 20 as fully consonant in determining whether restitution post-judgment interest statute as applied to incarcerated defendant constituted an excessive fine); *People v. Stafford*, 93 P.3d 572 (Colo. App. 2004) (interpreting the Eighth Amendment under the same standard as art. II, § 20).

Similarly, there is no implied cause of action under art. II, § 29 even though the language of art. II, § 29 and the Fourteenth Amendment are not identical. *Compare* Colo. Const. art. II, § 29 ("Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex") *with* U.S. Const. amend XIV, §1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . nor deny to any person within its jurisdiction the equal protection of the laws"). Despite the slight differences in language, no Colorado court has recognized an implied cause of action under this section, and in fact, the Colorado Court of Appeals has expressly declined to recognize an implied cause of action based on

alleged discrimination on the basis of sexual orientation. *See Rodgers v. Bd. of Cty. Comm'rs of Summit Cty.*, 363 P.3d 713, 716 (Colo. App. 2013), *rev'd on other grounds*, 355 P.3d 1253 (Colo. 2017) (concluding trial court did not err in concluding plaintiffs had an adequate remedy under 42 U.S.C. § 1983 for claims alleging violation of equal protection under Colorado Constitution; while the Court referenced art. II, § 25, the plaintiffs did not expressly limit their equal protection claim to art. II, § 25 in their Second Amended Complaint).

Such an *implied* claim would be duplicative of an *express* claim under CADA, given the Colorado Supreme Court's guidance that § 29 is the basis for interpreting an express cause of action under CADA. *Colorado Civil Rights Comm'n v. Travelers Ins. Co.*, 759 P.2d 1358, 1363 (Colo. 1988) ("The Equal Rights Amendment necessarily guides us in interpreting the requirements of CADA"). Plaintiffs' argument attempts to graft the level of scrutiny applied to legislation concerning sex discrimination, to its cause of action analysis, but the law simply does not recognize the implied cause of action Plaintiffs seek to advance here.

ii. 42 U.S.C. § 1983 provides an adequate remedy.

Plaintiffs argue that because monetary damages are only available against Defendants in their individual capacities under 42 U.S.C. § 1983, the federal statute provides an inadequate remedy. That argument runs contrary to well settled Colorado law. *See, e.g. Sundheim*, 926 P.2d at 553 ("The availability of [42 U.S.C. § 1983] makes judicial creation of an implied damages remedy unnecessary in this

case."); *Arndt v. Koby*, 309 F.3d 1247, 1255 (10th Cir. 2002) (interpreting *Sundheim,* and holding that "[s]ection 1983 provides such an adequate remedy.") Colorado courts have expressly and unambiguously held that an implied right of action *will not be recognized* when the same concerns can be redressed under 42 U.S.C. § 1983.

Likewise, application of the Prison Litigation Reform Act (PLRA) in federal court does not render § 1983 an inadequate remedy. As discussed above, courts consider the plain language of the Colorado and United States Constitutions, when comparing federal rights to state rights. They do not, as Plaintiffs contend, focus on identity of plaintiff to determine whether a section of the Colorado Constitution provides greater protections then the federal counterpart. Plaintiffs do not cite, nor could Defendants find, authority for the proposition that the identity of a plaintiff is a factor. Indeed, such an interpretation would mean *any* prisoner could bring claims under the Colorado Constitution due to the operation of the PLRA. An implied cause of action would exist depending on who you are – not on the wording or meaning of the Constitution. This argument is contrary to Colorado law. *See Bock,* 819 P.2d at 58 (considering the differences in language).

Plaintiffs' citation to Vermont and Montana caselaw commenting that § 1983 is an inadequate remedy is unpersuasive as Colorado has considered and rejected this argument. *See, e.g. Sundheim*, 926 P.2d at 553 ("where other adequate remedies exist, no implied remedy is necessary"). In short, Colorado courts have already considered this issue and held that § 1983 is an adequate remedy.

iii. The legislature's recent rejection of the very causes of action Plaintiffs seek to advance here, further supports dismissal.

Should this Court recognize Plaintiffs' proposed implied causes of action under art. II, §§ 20 and 29, it would create a remedy that was recently rejected by the Colorado legislature. On June 13, 2020, the Colorado legislature passed SB 20-217, which, among other things, created a civil action against certain categories of peace officers for violation of rights secured by the Colorado Constitution. § 13-21-131, C.R.S. (2020). Notably, the definition of a peace officer in SB 20-217 does not include a correctional officer or other prison officials. § 24-31-901(3), C.R.S. (2020). Additionally, and particularly relevant here, the General Assembly would not have needed to create a private right of action if, as Plaintiffs claim, one already existed under the common law. Courts should "presume a newly-enacted provision had been framed and adopted in the light and understanding of prior and existing laws." *Bickel v. City of Boulder*, 885 P.2d 215, 229 (Colo. 1994) (internal quotations omitted).

The practical implications of the judiciary creating these type of claims are considerable. If this Court were to create these new claims: what are the elements of the claim? What is the applicable statute of limitations? Is there a requisite *mens rea*, such as deliberate indifference under the federal law? Is there a subjective or objective standard? How is a defendant to be on notice that his or her conduct violates the Colorado Constitution? What are the available damages? Are there

applicable defenses? This Court should reject Plaintiffs' request to recognize two entirely new causes of action under the Colorado Constitution, and allow the General Assembly to create additional claims as necessary.

B. The CGIA bars Plaintiffs' claims because they are tort claims dressed as constitutional claims.

The CGIA applies to Plaintiffs' alleged state constitutional claims because Plaintiffs are seeking money damages for personal injuries and their claims are premised on tort theories. Pursuant to the CGIA, public entities and officials are immune from liability for all claims for injury that lie in tort or could lie in tort, unless the claim falls within one of its express exceptions to immunity. § 24-10-102, C.R.S.

Plaintiffs wrongly assert that the CGIA only applies to "traditional torts," and does not grant immunity for "other types of actions." Resp., pp. 11, 14-15 (citing *City of Colo. Springs v. Conners,* 993 P.2d 1167, 1173 (Colo. 2000).[3] Plaintiffs' assertion ignores the settled authority interpreting the CGIA as applying to any claims that lie in tort or *could* lie in tort. *See, e.g., Robinson v. Colorado State*

[3] Plaintiffs also cite two Colorado Court of Appeals decisions as their support for the proposition that the CGIA does not apply to actions based on the Colorado Constitution. Resp., p. 12 (citing *Jorgenson v. Aurora,* 767 P.2d 756 (Colo. App. 1988); *SRB v. Bd. of Cty. Comm'rs,* 601 P.2d 1082 (Colo. App. 1979)). Plaintiffs' reliance on these cases is misplaced because both decisions address claims under the takings clause of the Colorado Constitution, and the courts simply assumed the claims were valid constitutional claims, rather than piercing beyond the pleadings to perform an analysis as to whether the claims lied in tort or could lie in tort.

Lottery Division, 179 P.3d 998, 1003-07 (Colo. 2008) (breach of contract and unjust enrichment arising out of defendant's alleged misrepresentations); *Lehman v. City of Louisville*, 857 P.2d 455, 357 (Colo. App. 1992) (equitable estoppel)

When determining whether a claim lies in tort, courts look to the nature of the liability to assess whether the claim is premised on tort-like duties of care. *See CDOT v. Brown Grp. Retail, Inc.*, 182 P.3d 687, 690 (Colo. 2008). A court "should determine whether an action is one for 'injury which lies in tort or could lie in tort' under the Act by assessing whether the plaintiff seeks compensation for personal harms." *Conners,* 993 P.2d at 1173. Injuries that can be compensated by tort damages include "emotional distress; pain and suffering; . . . fear and anxiety; and impairment of the quality of life." *Goodson v. Am. Standard Ins. Co.*, 89 P.3d 409, 415 (Colo. 2004).

Moreover, courts reject efforts to repackage tort claims as something other than torts to avoid the CGIA bar, *Robinson*, 179 P.3d at 1003-07, and in analogous circumstances, both federal and Colorado courts have determined that claims for damages based on violations of constitutional rights sound in tort. *See e.g., Wilson v. Garcia*, 471 U.S. 261, 277 (1985) (claims under the Civil Rights Act of 1871, including § 1983, "*plainly sounded in tort*.") (emphasis added); *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1255 (10th Cir. 1988) (claim of racially discriminatory discharge under 42 U.S.C. § 1981 sounds in tort rather than

contract); *Sundheim*, 926 P.2d at 548, n.5 (citing *Wilson* in support of conclusion that Colorado's personal injury statute of limitations applies to § 1983 claims).

Here, Plaintiffs' claims are premised on alleged wrongdoing by Defendants, an alleged failure to act with care, and alleged intentional infliction of harm. *See* Am. Compl. *e.g.,* ¶ 65 ("Defendants failed to take any appropriate action to abate the harms"); ¶ 68 (failed to train); ¶ 69 (failed to prevent harm). Regardless of how Plaintiffs dress the claims, the nature of the alleged liability sounds in tort. *Robinson*, 179 P.3d at 1003-07. Moreover, Plaintiffs seek compensatory damages for physical injury as well as emotional distress and pain and suffering. *See* Am. Compl. ¶¶ 111, 117 and Wherefore Clause (F). These are tort-like remedies premised on tort theories and further evince that the nature of the liability is tort-like.

Plaintiffs' claims for monetary damages under the Colorado Constitution should be dismissed as they are not cognizable under Colorado law, and even if they were, they would by barred by the CGIA.[4]

[4] Indeed, the recently enacted bill further supports the State's position. The legislature expressly excluded the newly created Colorado Constitution causes of action from the otherwise applicable immunity statutes (including the CGIA). SB 20-217, Section 2, added § 13-21-131(2)(a). The express exclusion would be unnecessary, if as Plaintiffs claim, those constitutional claims were already excluded from the CGIA's immunity bar.

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

Because Plaintiffs' Colorado constitutional claims fail as a matter of law, the Court need not reach the question of whether the individual defendants have qualified immunity on the claims. However, if this Court were to make the unprecedented decision to allow implied causes of action under these sections of the Colorado Constitution, Defendants would be entitled to qualified immunity, resulting in dismissal of the claims.

A. This Court should apply qualified immunity to claims under the Colorado Constitution.

i. The Supreme Court continues to robustly recognize the doctrine of qualified immunity.

The application of qualified immunity, particularly in rapidly evolving areas of the law, continues to be recognized by courts across the country, including the United States Supreme Court. While Plaintiffs are correct that some commentators and two current justices of the U.S. Supreme Court have criticized the doctrine of qualified immunity, that criticism does not warrant abrogating the doctrine altogether. Resp., 19.[5]

[5] Plaintiffs do not cite any Colorado appellate court case suggesting that qualified immunity will or should be overturned or narrowed, and Defendants are not aware of any. Plaintiffs contend that the Colorado Court of Appeals "expressly declined to decide whether to apply qualified immunity to this state's right to freedom of speech, calling it a 'weighty issue.'" Resp., p. 18, n.6 (citing *Holliday v. RTD*, 43 P.3d 676, 681 (Colo. App. 2001), *cert. denied* (2002)). But there is no discussion of

Commentators who have advocated for overturning qualified immunity have themselves noted that the Supreme Court has continued to expand it. *See, e.g.,* Katherine Crocker, *Qualified Immunity and Constitutional Structure*, 17 Mich. L. Rev. 1405, 1405 (2019) (recognizing scholarly criticism of qualified immunity and that the Court nonetheless "continues to apply the doctrine in ever more aggressive ways"). Moreover, while two[6] of the nine justices of the United States Supreme Court (Justices Sotomayor and Thomas) have criticized the doctrine, *see* Resp., p. 19, the Supreme Court has nevertheless refused to re-evaluate it. The Supreme Court turned down nine pending petitions asking it to weigh in on issues relating to qualified immunity. *See* Amy Howe, *Court grants two new cases*, SCOTUSblog (June 15, 2020), https://www.scotusblog.com/2020/06/court-grants-two-new-cases/#more-294380 (last accessed July 13, 2020). Among that group, the Court denied *certiorari* in all four cases cited by Plaintiffs. *See id.* Only one justice dissented from the denial of review in any of those cases. *See Baxter v. Bracey*, 751 F. App'x 869 (6th Cir. 2018), *cert. denied*, No. 18-1287, 2020 WL 3146701 (June 15, 2020) (Thomas, J. dissenting). The qualified immunity doctrine, therefore, is not in retreat.

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qualified immunity on page 681 of the *Holliday* opinion and the term "weighty issue" does not appear *anywhere* in it. There is a discussion of qualified immunity later in that decision, where the court applies that doctrine to plaintiff's § 1983 claim there and *overturns* the district court's grant of summary judgment to plaintiffs. *Id*. at 688. *Holliday* provides no support for Plaintiffs' argument here.

[6] Justice Kennedy retired two years ago.

ii. Every state that has confronted the question of whether qualified immunity applies to state constitutional torts has recognized some form of qualified or statutory immunity.

No state has taken the approach advocated by Plaintiffs here, that *no* form of statutory or common law governmental immunity should apply. Indeed, seven of the eleven states listed by Plaintiffs, Resp., pp. 3-4, n.1 & 5, either recognize qualified immunity as a defense or apply that state's tort claims/sovereign immunity act.[7]

1. Illinois - *Commerce Bank, N.A. v. Widger*, No. 3-10-0647, 2011 WL 10468212, at *2-3 (Ill. Ct. App. Nov. 7, 2011) (claim under Illinois Constitution's search and seizure clause subject to State Lawsuit Immunity Act).

2. Louisiana - *Moresi v. Dept. of Wildlife and Fisheries,* 567 So.2d 1081, 1093 (La. 1990) ("qualified immunity is justified in an action against state officers" for damages caused by violation of Louisiana Constitution).

3. Maryland - *Lee v. Cline*, 863 A.2d 297, 304-05 (Md. 2007) ("constitutional torts are covered by the Maryland Tort Claims Act, thereby granting state personnel qualified immunity for such torts").

[7] Plaintiffs do not fully or accurately discuss current law on the existence of an implied cause of action for damages in four other states they list. *See Giraldo v. Dep't of Corr.*, 85 Cal. Rptr. 3d 371, 388-91 (Cal. App. 2008) (transgender inmates could not bring claim for damages under cruel or unusual punishment clause of state constitution where § 1983 claim available); *Jones v. Powell*, 612 N.W.2d 423, 426-27 (Mich. 2000) (no damages remedy for violations of state constitution where adequate alternative remedy available, including in a § 1983 claim); *Sunburst v. School Dist. No. 2 v. Texaco, Inc.*, 165 P.3d 1079, 1093 (Mont. 2007) (same); *Blake v. New York*, 69 N.Y.S. 3d 142, 143 (N.Y. App. 2018) (same).

4. Massachusetts - *Rodriques v. Furtado*, 575 N.E.2d 1124, 1127 (Mass. 1991) (in enacting state civil rights act, legislature intended to adopt standard of qualified immunity developed under § 1983).

5. Utah - *Spackman v. Bd. of Educ.*, 16 P.3d 533, 538 (Utah 2000) (to be liable for damages, "defendant must have violated 'clearly established' constitutional rights 'of which a reasonable person would have known'") (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)).

6. Vermont - *Zullo v. State of Vermont*, 205 A.3d 466, 490 (Vt. 2019) ("imposing restrictions akin to qualified immunity is appropriate" for public officials' alleged violations of state constitution).

7. West Virginia - *Robinson v. Pack*, 679 S.E.2d 660, 665-66 (applying *Harlow* qualified immunity to unlawful detention and excessive force claims brought pursuant to various provisions of the state constitution).

Two other states, Connecticut and Iowa, have adopted common law qualified immunity but modified the test traditionally applied by courts to federal causes of action. *See Binette v. Sabo,* 710 A.2d 688, 700-01 (Conn. 1998); *Baldwin v. City of Estherville*, 915 N.W.2d 259, 281 (Iowa 2018). Wisconsin has not decided whether common law or statutory immunities apply to constitutional tort claims. *See Old Tuckaway Assocs. v. City of Greenfield*, 509 N.W.2d 323, 329-30, n.4 & 5 (Wis. Ct. App. 1993) (recognizing claim for intentional denial of procedural due process but not addressing whether any immunities applied because plaintiffs had not met their burden of proof).

Colorado should follow the weight of this authority and recognize qualified immunity as a defense to constitutional tort claims where such claims are not barred entirely under the CGIA.

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

i. A clearly established right cannot be defined at a high-level of generality, which Plaintiffs have done for both constitutional claims.

Plaintiffs ask this Court to define clearly established law at too high a level of generality.[8] In support of their § 20/Eighth Amendment claim, Plaintiffs cite *Mata v. Saiz*, 427 F.3d 745, 749 (10th Cir. 2005) for the proposition that "deliberate indifference to an inmate's serious medical need is a clearly established constitutional right." But since *Mata*, the U.S. Supreme Court has instructed lower courts not to define clearly established law at this level of generality. *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011). *See, e.g., Estate of Lockett v. Fallin*, 841 F.3d 1098, 1107 (10th Cir. 2016) (refusing to define clearly established law at a high level of generality in a medical indifference case).[9]

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[8] Plaintiffs also argue that if the court applies an immunity doctrine to claims under the Colorado Constitution, it should adopt the "due care" standard articulated in *Baldwin,* 915 N.W.2d at 281, instead of the qualified immunity standard. However, Iowa adopted the "due care" standard based on "historical Iowa common law" and the Iowa Tort Claims Act. *Id.* at 280. As detailed above, the contours of art. II, § 20 mirror those of the Eighth Amendment. *See Cardenas*, 262 P.3d at 913. Colorado has also rejected similar claims based on sexual orientation; *Rodgers,* 363 P. 3d at 716. Accordingly, there is no support for the argument that Colorado courts should deviate from the federal standard.

[9] Plaintiffs also incorrectly criticize Defendants for allegedly confusing the remedy sought (for example, gender confirming surgery) with the right allegedly violated. Resp., pp. 21-22. The criticism is misplaced, as courts routinely look to the particular medical treatment at issue when determining whether a prison official

Plaintiffs make the same error regarding their § 29/equal protection claim, defining it as "a clearly established right to be free from discrimination based on their sex." Resp., p. 24. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the Supreme Court admonished against looking at such a general right as the right to be free of sex discrimination for purposes of the "clearly established" test. *See also Woodward v. City of Worland*, 977 F.2d 1392, 1397 (10th Cir. 1992).

Plaintiffs' articulation of clearly established rights is far too general for the qualified immunity analysis. Were such a broad, generalized articulation of the right sufficient to meet the clearly established law prong of the qualified immunity analysis, essentially qualified immunity would never be applicable. On the contrary, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful *in the situation he confronted*." *Holland v. Harrington*, 268 F.3d 1179, 1186 (10th Cir. 2001) (emphasis added). Courts must consider both the specific information Defendants possessed and the state of the law in similar cases. A right is clearly established only if existing precedent places "the statutory or constitutional question beyond debate." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152

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violated a clearly established right in denying that medical treatment. *See, e.g.*, *Estelle v. Gamble*, 429 U.S. 97, 107 (1976) ("A medical decision not to order an X-ray, or like measures, does not represent cruel and unusual punishment."); *Al – Turki v. Robinson*, 762 F.3d 1188, 1194 (10th Cir. 2014) (assessing whether prison officials violated clearly established law by denying care to an inmate presenting with recognizable symptoms such as severe abdominal pain).

(2018). As discussed below, drilling down on each type of conduct alleged demonstrates that the conduct is not a violation of a clearly established right.

ii. Plaintiffs have not articulated a violation of clearly established law on either claim.

A plaintiff must demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's conduct was clearly prohibited. *Hannula v. City of Lakewood*, 907 F.2d 129 (10th Cir. 1990). "Once the defendant raises a qualified immunity defense, *the plaintiff assumes the burden* of identifying both the clearly established law that the government official is alleged to have violated and the conduct that violated that law." *Conde v. Colorado State Dep't of Pers.*, 872 P.2d 1381, 1388 (Colo. App. 1994). Plaintiffs have not met their burden.

First, addressing the § 20 medical indifference claims, declining to provide either the specific hormone treatment sought by an inmate or gender affirming surgery does not establish a violation of a clearly established right. *Lamb v. Norwood*, 899 F.3d 1159, 1161 (10th Cir. 2018), *cert. denied*, 140 S. Ct. 252 (2019) (affirming summary judgment on a transgender women's Eighth Amendment medical indifference claim, where the Kansas Department of Corrections was providing plaintiff hormone treatment, testosterone-blocking medication and weekly counseling sessions, but declined to provide other forms of treatment, including greater doses of hormones and authorization for gender affirming surgery); *Druley*, 601 F. App'x 632 (concluding that the plaintiff failed to establish a

likelihood of success on the merits of her Eighth Amendment medical indifference claim where she alleged that the Oklahoma Department of Corrections had started and stopped her hormone treatment numerous times and currently prescribed a hormone dosage below the lowest dosage recommended by World Professional Association for Transgender Health); *but see Edmo v. Corizon, Inc.*, 935 F.3d 757 (9th Cir. 2019), *stay denied* __ S. Ct. __, No. 191A1038, 2020 WL 2569747 (Mem) (one sentence order declining to stay injunction ordering Idaho to provide inmate with gender affirming surgery).

Likewise, communal showers and searches by opposite-sex correctional officers are not violations of clearly established rights. *Williams v. Fletcher*, Civil Action No. CV 18-122-DLB, 2018 WL 3489240, at *2 (E.D. Ky. July 19, 2018) ("The Constitution thus does not categorically entitle an inmate of a particular sex to be pat-down searched solely by guards of the same sex or, in this case, gender identity.").

Plaintiffs also make several § 20/Eighth Amendment claims about their safety ranging from harassment to assault. Plaintiffs make the unsupported statement that Defendants "assert that because Plaintiffs are transgender the law on failure to protect is somehow not clearly established as to them." Resp., p. 22. The statement is erroneous and not reflective of Defendants' position. Defendants have continually affirmed that the rights and safety of transgender inmates is an

important issue and CDOC continues to make significant, progressive, policy changes for the benefit of transgender inmates.

The allegations against each of the individual defendants are not sufficient to establish that each engaged in a violation of clearly established law. For the most part, Plaintiffs do not allege each Defendant was personally aware of a substantial risk or that the risk to transgender inmates' safety "was so common and uncontrolled" that such a risk to their safety was obvious. *See Hutto v. Finney*, 437 U.S. 678, 681–682, n. 3, (1978); *Farmer v. Brennan*, 511 U.S. 825, 844 (1994) ("prison officials who lacked knowledge of a risk cannot be said to have inflicted punishment, it remains open to the officials to prove that they were unaware even of an obvious risk to inmate health or safety"). Plaintiffs fail to explain how any particular Defendant was aware of an obvious, substantial risk to inmate safety.

Plaintiffs do allege that Defendants, especially Defendant Travis Trani, instituted a policy which resulted in punitive measures to deter reporting of rape and assault. Resp., pp. 23-24; Am. Compl. ¶¶ 64-67, 69. While Defendants deny this claim, they acknowledge the allegation taken as true and viewed in the light most favorable to Plaintiffs equates to a facial challenge to the constitutionality of CDOC's prison rape policy and procedures, which may require more factual development then available at this stage of the pleadings.

Turning to Plaintiffs' equal protection claim, neither the Fourteenth Amendment nor art. II, § 29 confer a right to be housed based on one's gender

identity instead of gender at birth. Although courts may have found that other federal laws such as Title IX separately provide rights in an educational setting, this does not establish the contours of the constitutional provisions at issue. *See* Resp., p. 25. The cases Plaintiffs cite cannot create a clearly established right since they would not put any defendant on notice their conduct violated a prisoner's rights.

Plaintiffs correctly note, and Defendants do not dispute, that "[l]egislative classifications based solely on sexual status must receive the closest judicial scrutiny." *People v. Green*, 183 Colo. 25, 514 P.2d 769 (1973). A prison policy is not a legislative classification. *See generally Dean v. People*, 366 P.3d 593, 598 (Colo. 2016) (in equal protection analysis, describing legislative classification occurring where "legislature defines" an offense of penalty). But, even if it were, Plaintiffs' claims do not establish a violation of art. II, § 29 – if that were the case then every transgender female inmate would be entitled to housing in a women's correctional facility.

With the isolated exception related to alleged prison policy to deter reporting of assault, Plaintiffs' claims against the individual Defendants are deficient for failing to assert that each named defendant violated clearly established rights. Therefore, claims against Defendants in their individual capacities should be dismissed based on the qualified immunity doctrine.

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

Plaintiffs fail to address and, thus concede, that they cannot assert claims against Defendants Lish and Frost for injunctive or declaratory relief because, as former employees, neither has an official capacity. *See* Joint Partial Motion to Dismiss at II C. Any claims against Defendants Lish and Frost in their official capacity must be dismissed with prejudice. *See Bonte v. U.S. Bank, N.A.*, 624 F.3d 461, 466 (7th Cir. 2010) ("Failure to respond to an argument … results in waiver," and "silence leaves us to conclude" a concession).

III. Plaintiffs' CADA claims fail as a matter of law and must be dismissed for failure to tender the requisite CGIA notice.

A. Prisons are public entities, not places of public accommodation.

A "place of public accommodation" under Part 6 of CADA is defined to include any place of business, a sporting or recreational area and facility, public transportation facility, museum, library, and parks, as examples. § 24-34-601(1), C.R.S. As Plaintiffs correctly note, there are no federal or state cases interpreting whether a prison is a place of public accommodation under Part 6 of CADA. Instead, a place of public accommodation under Part 6 of CADA is defined to have "the same meaning as set forth in Title III of the federal Americans with Disabilities Act (ADA) of 1990, 42 U.S.C. sec. 12181(7) and its related amendments and implementing regulations." § 24-34-301(5.3), C.R.S; *see also e.g.,* § 24-34-703, C.R.S. ("A place of public accommodation has the same meaning as set forth in section 24-

34-301"). Title III of the ADA does not include a state prison. Plaintiffs' Response overlooks, and indeed makes no mention, of CADA's clear, unambiguous definitions that distinguish between places of public accommodation under Title III of the ADA versus public entities under Title II of the ADA.

A "public entity" under Part 8 of CADA, however, is defined to have "the same meaning as set forth in Title II of the federal Americans with Disabilities Act of 1990, 42 U.S.C. § 12131, and its related amendments and implementing regulations." § 24-34-301(5.4), C.R.S. A state prison is defined as a public entity under Title II of the ADA. And there is good reason, because a prison is different in form and function from a place that is open to the general public such as a public park, theatre, sporting area, or public school. As such, a prison is not a place of public accommodation; rather, it is a public entity subject to Part 8 of CADA, not Part 6.

Second, even if there were ambiguity as to whether a state prison is a place of public accommodation or public entity, the specific exclusion of state prisons from the definition of what constitutes a place of public accommodation in Part 6 of CADA should be presumed to be intentional by the Colorado legislature. Part 6 of CADA contains a list of entities that are considered "places of public accommodation." § 24-34-601(1), C.R.S. This list, however, does not identify state prisons or any type of correctional entity. When examining the statute's framework, the statutory construction maxim of "*expressio unius est exclusio alterius*" is

applicable. "*Expressio unius est exclusio alterius*" means when one or more things of a class are expressly mentioned, others of the same class are excluded. *See Merriam Webster's Dictionary of Law*, at p. 181 (1st ed. 1996); *see e.g., Reale v. Bd. of Real Estate Appraisers*, 880 P.2d 1205, 1207 (Colo. 1994) ("Expressio unius est exclusio alterius"—the expression of one thing is the exclusion of another."). When the Colorado legislature enacted Part 6 of CADA it was aware of the types of entities that could be considered a place of public accommodation. The legislature could have included state prisons – or any type of correctional entity – but did not. As such, the exclusion of state prisons from the class of entities identified as places of public accommodation, should be presumed to be intentional.

Third, Plaintiffs misread the holding in *Pennsylvania Dep't of Corr. v. Yeskey*, 524 U.S. 206 (1998), and they omit any discussion of the Tenth Circuit case law cited in Defendants' Partial Motion to Dismiss that equate prisons to public entities, using the framework of Title II of the ADA. *Yeskey*, held that prisons are "public entities," using the framework of Title II of the ADA. *Id*. at 210 ("State prisons fall squarely within the statutory definition of public entity…"). Nowhere in *Yeskey* is a prison identified as a place of public accommodation. And, the Supreme Court in *Yeskey* unequivocally held that even though prisons may offer benefits, services, privileges, and advantages – notably the same types of benefits, services, privileges, and advantages that Plaintiffs claim they are entitled to in this matter – a prison is a public entity. *Id*.

The distinction between public entities and places of public accommodation does not leave Plaintiffs without a remedy. However, Plaintiffs must pursue a remedy under the correct statutory framework as opposed to creating a new one by piecemealing together bits and pieces of CADA. For example, in this case, Plaintiffs have remedies available under the Equal Protection and Due Process clauses of the Fourteenth Amendment of the federal constitution via a § 1983 claim. *See e.g. Doe v. Massachusetts Dep't of Corr.,* CIVIL ACTION NO. 17-12255-RGS, 2018 WL 2994403 (D. Mass. June 14, 2018) (transgender offender bringing discrimination claims based on sex, gender identity, and disability).[10]

B. Parts 6 and 8 of CADA are not exempt from the CGIA.

Plaintiffs are not entitled to money damages under CADA because these claims are foreclosed by the CGIA. In 2013, Colorado's legislature enacted the Job Protection and Civil Rights Enforcement Act of 2013. *See* § 24-34-405, C.R.S. By the clear, unambiguous text of the statute, the 2013 amendments only amended Part 4 of CADA – the employment practices section – to except from the CGIA claims for compensatory damages where there has been a finding of employment discrimination. § 24-34-405(8)(g), C.R.S. The CGIA continues to apply to all other claims for money damages that assert discrimination.

[10] Plaintiffs recognize their Second Claim (disability and gender dysphoria) could have been pled appropriately under Part 8 of CADA. Resp., p. 33.

In an effort to side-step the 2013 legislative amendments that apply to, and only except Part 4 of CADA from the CGIA, Plaintiffs argue that the Colorado Supreme Court's decision in *Conners*, 993 P.2d 1167, issued 13 years before the 2013 amendments, continues to apply, and should apply to *all* CADA claims. Resp., pp. 34-36. Plaintiffs' argument is incorrect.

In *Conners*, the Colorado Supreme Court held that the CGIA did not apply to equitable remedies relating to employment discrimination claims brought under CADA, as it then existed. *Conners*, 993 P.2d at 1177. *Conners* did not except claims brought under Part 6 (places of public accommodation) or Part 8 (public entities) from the CGIA. Moreover, the 2013 legislative amendments did not expressly identify these parts nor did it mention remedies under these parts. As such, any exemption to the CGIA, if any, after the 2013 legislative amendments, is only applicable to Part 4 of CADA, not Parts 6 and 8.

In addition, as noted above in Section II, the "CGIA is less concerned with what the plaintiff is arguing and more concerned with what the plaintiff could argue." *Robinson*, 179 P.3d at 1005 (finding that a review of the factual allegations supporting plaintiff's claims for contractual violations revealed that the underlying injury lies in tort). A review of Plaintiffs' Amended Complaint makes clear they are arguing they have been subjected to physical and psychological harm, emotional distress, and physical pain because of their sex, sexual orientation, or disability.

Am. Compl. ¶¶ 98, 105, and 117. Plaintiffs' claims thus lie in tort or could lie in tort, and as such, the CGIA bars Plaintiffs' claims.

C. Plaintiffs did not comply with the CGIA's notice requirements.

The CGIA also requires that written notice of a claim be filed within 182 days after the date of discovery of the injury, and it provides:

> (2) The notice shall contain the following:
> (a) The name and address of the claimant and the name and address of his attorney, if any;
> (b) A concise statement of the factual basis of the claim, including the date, time, place, and circumstances of the act, omission, or event complained of;
> (c) The name and address of any public employee involved, if known;
> (d) A concise statement of the nature and the extent of the injury claimed to have been suffered;
> (e) A statement of the amount of monetary damages that is being requested.

§24-10-109(2), C.R.S. "Actual knowledge by the governmental entity of the incidents giving rise to a claim, or knowledge of the claim itself, does not constitute substantial compliance with the notice of claim requirement and does not relieve a plaintiff of his duty to provide formal notice." *Stone Envtl. Eng'g Servs., Inc. v. Colorado Dep't of Health*, 762 P.2d 737, 740 (Colo. App. 1988) (citing *Lloyd v. State Pers. Bd.*, 710 P.2d 1177 (Colo. App. 1985) *rev'd on other grounds*, 752 P.2d 559 (Colo.1988)). "[T]he request for payment of monetary damages is what shows that a document is a notice of a claim under 24-10-109(1);" accordingly, the "standard of strict compliance required by section 24-10-109(1)" must apply to the statement of monetary damages even if a lesser standard of substantial compliance applies to

other factual information. *See Mesa Cty. Valley School Dist. No. 51 v. Kelsey*, 8 P.3d 1200, 1205 (Colo. 2000).

Relying on the Colorado Supreme Court decision in *Woodsmall v. Reg'l Transp. Dist.*, 800 P.2d 63 (Colo. 1990), Plaintiffs argue that they substantially complied with CGIA's notice requirements under § 24-10-109(2)(a)-(e) because their threats to bring a class action during settlement negotiations in a separate lawsuit, filed in federal court, provided enough information under § 24-10-109(2)(a)-(e), C.R.S. to place Defendants on notice of their claims. Resp., pp 37-78. Plaintiffs' arguments are not correct for a couple of reasons.

First, a specific amount for payment of monetary damages should be identified in order to satisfy the standard of strict compliance required by § 24-10-109(1), C.R.S. *Kelsey*, 8 P.3d at 1205 ("the request for payment of monetary damages is what shows that a document is a notice of a claim under section 24–10–109(1)"); *Dicke v. Mabin*, 101 P.3d 1126, 1129 (Colo. App. 2004) (strict standard of compliance was satisfied because an actual number of damages being sought in the amount of $150,000 *and* a general statement of compensatory damages were identified). Here, as demonstrated in exhibits to the Response, while there are general statements about damages, there is no specific mention of the amount of damages with sufficient level of detail to satisfy requisite notice under § 24-10-109(1), C.R.S.

Second, none of the individuals Plaintiffs sent settlement correspondence to were authorized to personally accept service of a notice of claim pursuant to § 24-10-109(3), C.R.S. *Stone Envtl. Eng'g Servs., Inc.*, 762 P.2d at 740 (defendant's actual knowledge of the incidents or claim itself does not does not relieve a plaintiff of the duty to provide formal notice); *see e.g. Armstead v. Memorial Hosp.*, 892 P.2d 450, 453-54 (Colo. App. 1995) (the purpose of sending the notice by registered mail or by personally serving it on the appropriate person it is to conclusively establish an effective date of service for purposes of the notice deadline). The settlement correspondence, which Plaintiffs now claim for the first time is sufficient notice, only shows that Plaintiffs could have brought claims, not that they were in fact making a claim.

Based on the foregoing, Plaintiffs have not complied with CGIA notice requirements.

CONCLUSION

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

Respectfully submitted this 15th day of July, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2020, a true and correct copy of the foregoing DEFENDANTS' REPLY TO THEIR JOINT PARTIAL MOTION TO DISMISS was duly filed and served upon the following parties through Colorado Courts E-Filing/CCES, addressed as follows:

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