IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 13-cv-03399-WJM-KMT

RYAN DECOTEAU, *et al.*, on behalf of themselves and others similarly situated,

Plaintiffs,

v.

RICK RAEMISCH, in his official capacity, *et al.*,

Defendants.

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF
MOTION FOR PARTIAL SUMMARY JUDGMENT

Plaintiffs, by and through their attorneys, hereby submit this reply brief in support of their Motion for Partial Summary Judgment ("MPSJ"), ECF 50.

INTRODUCTION

Defendants admitted, in response to Plaintiffs' MPSJ, that the Colorado Department of Corrections ("CDOC") "does not permit inmates in Restrictive Housing Maximum Security ("Max") status at [the Colorado State Penitentiary ("CSP")] to exercise outside." ECF 60, Response to Plaintiffs' Statement of Facts ("RPSF") ¶ 10. They confirmed that CDOC's Facility Program Plan ("FPP") dated July 25, 2014, stated that "the existing spaces at CSP do not meet certain American Correctional Association (ACA) physical standards for outdoor recreation areas, and do not satisfy certain court-decreed minimum legal standards for an outdoor exercise area." *Id.* ¶ 57. Finally, Defendants admitted that the FPP, which requests funding for new outdoor exercise areas at CSP, "does not address outdoor exercise for inmates in Max." *Id.* ¶ 59.

Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment ("Response," ECF 60) is insufficient to avoid partial summary judgment in Plaintiffs' favor. Contrary to their two major arguments, the outdoor exercise now theoretically permitted certain Max inmates under a recent regulatory amendment is not, in fact, outdoors; and inmates in Max spend far longer than nine months or even a year without outdoor exercise at CSP.[1]

Additional Undisputed Facts Relating to Events on which Defendants Rely but which Post-Date Plaintiffs' Motion for Partial Summary Judgment ("Reply Facts")[2]

1. There are currently approximately 123 inmates with "Max" status at CSP. Decl. of Amy F. Robertson (Feb. 27, 2015) ("Robertson 2/27/15 Decl.") Ex. 15 at 2.

2. On January 15, 2015, Defendants amended Administrative Regulation ("AR") 650-03 to read, "For those offenders who have been housed within Restrictive Housing Maximum Security status for over 9-months, out of cell time shall include opportunities for three (3) hours of outdoor recreation per week." Robertson 2/27/15 Decl. Ex. 1, ¶ IV(F)(12).

3. The area where certain Max inmates are permitted to exercise pursuant to the language quoted above is one of three steel-mesh cages in a room attached to the gym at CSP. Robertson 2/27/15 Decl. ¶ 6. There will eventually be three such cages in that space. *Id*.

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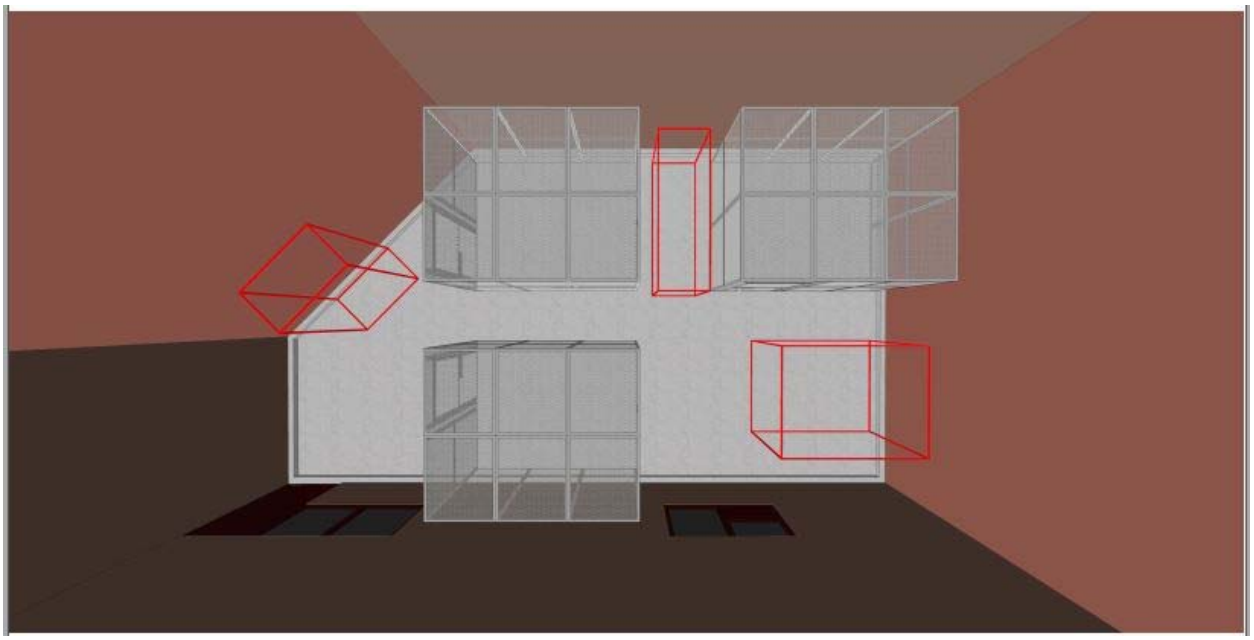
[1] At the same time Plaintiffs are filing this Reply Brief, they are filing their Response to Defendants' Motion for Summary Judgment, which is incorporated herein by reference.

[2] Plaintiffs moved for partial summary judgment based on the facts existing on October, 24, 2014. Defendants responded by asserting that they planned to further amend AR 650-03 to provide outdoor exercise for certain inmates in Max. In order to address those changes in Plaintiffs' reply, Plaintiffs sought and received extensions of time in which to file this Brief. During those extensions, Plaintiffs were able to review the new regulation and visit and photograph the area in which Defendants planned to start offering outdoor exercise. The facts recited in this section address Defendants' new facts and arguments.

4. Each steel-mesh cage is eight feet by ten feet in surface dimension, has eight-foot-high steel-mesh sides, and is covered by a steel-mesh top. The cages are located in an approximately 694-square-foot space next to the gym at CSP, which is surrounded by twenty-foot-high walls and is covered by steel mesh and razor wire. Robertson 2/27/15 Decl. Exs. 2-3.

5. On February 5, 2015, Plaintiffs' counsel visited CSP and measured and photographed the single steel-mesh cage that had, at that point, been constructed. The photographs attached as Exhibit 2 to the Robertson 2/27/15 Declaration show this cage, the location -- according to staff on site -- of the projected two additional cages (indicated by traffic cones), and the exercise equipment that also shares this area. For example:

6. After photographing and measuring this space, Plaintiffs' counsel engaged an architect to create three-dimensional renderings of the space with all three cages. *See generally* Decl. of Bryan Ridley & Ex. 1.[3] An example of one such rendering is this overhead view. The cuboid areas adjacent to the cages (outlined in red if this brief is being read in color) represent rectangular limits of the space occupied by exercise equipment. Ridley Decl. ¶ 7.



7. Prior to June 30, 2014, inmates in Administrative Segregation ("Ad Seg")[4] at Sterling exercised in a small rectangular space with concrete walls. The top of the walls and part of the ceiling of this area were made of steel mesh similar to that used in the Max cages now at

[3] The declaration of Bryan Ridley is filed as Exhibit 14 to Plaintiffs' Response to Defendants' Motion for Summary Judgment.

[4] The status CDOC now refers to as Max was, prior to June 30, 2014, referred to as Ad Seg. RPSF ¶¶ 3, 8.

CSP. Falk Dep. 62:13 - 63:15, Exs. 12, 13 (Robertson 2/27/15 Decl. Ex. 16); Weems Dep. 76:11 - 77:9, Ex. 33 (Robertson 2/27/15 Decl. Ex. 17).

8. At a September 4, 2013, hearing in the case of *Anderson v. Colorado*, No. 10-cv-01005-RBJ-KMT (D. Colo.), Judge Jackson held that the enclosed exercise areas at Sterling did not constitute outdoor exercise as required by his earlier order. *Anderson*, ECF 166 (Reporter's Tr., Hearing on Pending Mots.) 20:24 - 21:13, 33:23-25.

9. As of February 18, 2015, according to CDOC, only three inmates were eligible to exercise in the cages. Robertson 2/27/15 Decl ¶ 6(e) and Exs. 4 & 5.

10. According to data supplied by CDOC, however, far more than these three inmates have gone more than nine months at CSP without outdoor exercise. *See* Robertson 2/27/15 Decl. ¶¶ 8-10 & Ex. 12.

11. This occurs for a number of reasons, principally because when inmates held in Max are transferred to Management Control Unit ("MCU") or Close Custody Transition Unit ("CCTU") status, and then returned to Max, Defendants appear to restart the clock with the new Max designation. This is true even if they were in MCU or CCTU status for a short period of time, and even if they were denied outdoor exercise while in that status. *Id*.

12. Inmates in MCU do not get any even ostensible outdoor exercise. Castillo Decl. ¶ 10-11;[5] Leach Decl. ¶ 12-13; Peoples Decl. ¶ 10; Valles Decl. ¶¶ 17-18; Fierek Decl. ¶¶ 12-13; Thurston Decl. ¶¶ 11-12.

[5] The declarations of inmates Alberto Valles, Derek Gallegos, Donald Lowe, John Martinez, Steven Peoples, Matthew Leach, Kenny Castillo, Joshua Fierek, Eldon Thurston, Jeremy Torres, and David Bueno are filed as Exhibits 2-5, 8-13, and 15 to Plaintiffs' Response to Defendants' Motion for Summary Judgment.

13. Inmates in CCTU are permitted into the room attached to the gym where they can exercise in the space outside the three Max cages. Martinez Decl. ¶ 7; Thurston Decl. ¶¶ 16-17; Torres Decl. ¶ 9; Bueno Decl. ¶ 20.

14. Another reason for extended deprivation of outdoor exercise in Max is because Defendants do not count periods of punitive segregation -- spent in conditions identical to Ad Seg and Max with respect to lack of outdoor exercise -- toward the six- or twelve-month Max sentence. *See* Robertson 2/27/15 Decl Ex. 1, AR 650-03 ¶ IV(B)(1) ("[P]unitive segregation time shall be completed prior to placement in Restrictive Housing Maximum Security Status."). Punitive segregation can last up to 60 days, *id*., adding two months to the six- or twelve-month Max sentence.

15. Thus, for example, inmates Derek Gallegos, Donald Lowe, and Alberto Valles each progressed from Ad Seg to CCTU on or about June 30, 2014, were immediately implicated by Defendants in an altercation, and were sent to punitive segregation, having spent less than one day in CCTU. After spending two months in punitive segregation, each was then sentenced to Max starting on September 2, 2014. *See generally* Gallegos Decl. (no outdoor exercise from January 2013 to present); Lowe Decl. (no outdoor exercise from February 2013 to present); Valles Decl. (no outdoor exercise from May 2013 to present); *see also* Martinez Decl. ¶ 18 (no outdoor exercise for two years and six months); Peoples Decl. ¶ 14 (no outdoor exercise since May 5, 2013); Robertson 2/27/15 Decl. Ex. 12.

16. The data provided by Defendants do not note periods of punitive segregation. Robertson 2/27/15 Decl. Exs. 7-10. So, for example, those data show Derek Gallegos as having

a CCTU status from May 20, 2014 to September 3, 2014, *id*. Ex. 10 at 10670, when in fact he had that status for one day, Gallegos Decl. ¶ 10.

17. The data also show the dates on which an official status change was entered; not necessarily the date on which the inmate's conditions of confinement changed. For example, according to Defendants' data, Steven Peoples's status was CCTU from December 24, 2014 to January 26, 2015, when it changed to MCU. Robertson 2/27/15 Decl. Ex. 7 at 10566. In fact, he was not actually placed in CCTU until January 10, 2015, where was involved in an altercation within the first few days, and then sent to punitive segregation where he remained until February 20, 2015. Peoples Decl. ¶ 14.

18. These discrepancies suggest that the number of inmates going without outdoor exercise is far greater than Defendants' data show.

19. On January 15, 2015, Defendants amended AR 650-03 to read, "Pending the construction and completion of the new recreation yards at CSP, offenders progressing from [Max] to [MCU] designations will be transferred to Sterling Correctional Facility." Robertson 2/27/15 Decl. Ex. 1, ¶ IV(J)(5).

20. There are currently over 150 inmates in MCU at CSP, 119 of them with that status over one month, 87 over two months; and 60 over three months. Robertson 2/27/15 Decl. ¶ 12 & Ex. 14.

21. More than 30 inmates in MCU status at CSP were assigned that status directly from Ad Seg/Max, and thus have been without outdoor exercise for periods of more than nine months, and many of them for periods ranging from 18 months to several years. Robertson 2/27/15 Decl. Ex. 12; *see also, e.g.*, Leach Decl. ¶¶ 4-17 (no outdoor exercise for 19 months).

Response to Defendants' Additional Disputed Facts

1-13, 15, 22, 23, 26, 30, 36-40. Admit.[6]

14, 17-21, 24, 25, 27-29, 31-35. Plaintiffs' incorporate by reference their responses to Defendants Statement of Undisputed Material Facts from their Response to Defendants' Motion for Summary Judgment.

41. Plaintiffs are without sufficient information to admit or deny CDOC's assessment of the advisability of amending AR 650-03, but deny that the "area located off the existing gym area" provides "outdoor exercise." *See* Robertson 2/27/15 Decl. Ex. 2.

42-43. Admit that AR 650-03 was amended to add the quoted/referenced language.

44. Admit that the revisions to AR 650-03 were ultimately effective January 15, 2015.

ARGUMENT

Plaintiffs have moved for partial summary judgment as to inmates in solitary confinement at CSP -- a status previously referred to as Administrative Segregation, and now referred to as Restrictive Housing Maximum Security Status -- on the grounds that they are denied outdoor exercise in violation of the Eighth Amendment.[7]

It is undisputed that, at the time this litigation was filed and at all times up to January 15, 2015, no inmate in Ad Seg/Max was permitted to exercise outdoors. Plaintiffs are entitled to summary judgment because (1) the new cages for inmates with more than nine months in Max do not constitute outdoor exercise; (2) many inmates go far more than nine months without being

[6] Any fact that Plaintiffs admit is admitted for the purposes of the pending motion only.

[7] This Court certified a class of inmates in administrative segregation at CSP. ECF 37. After Defendants changed their terminology to eliminate the label "administrative segregation," both parties moved to redefine the class. ECF 41, 51. Although the parties disagree on the proposed new class definition, both parties' definitions include inmates in Max at CSP.

permitted access even to the cages; and (3) even if the cages and the regulations comply with the Constitution, in light of Defendants' long-standing practice and frequent regulatory changes, the case is not moot and an injunction is required.

I. CDOC'S Current Regulations and Facilities Do Not Provide Constitutionally Required Outdoor Exercise for Inmates in Max.

Following two recent amendments, the language of AR 650-03 provides for three hours of outdoor exercise per week for inmates who have spent over nine months in Max. Reply Facts ¶ 2. It is undisputed, however, that this exercise takes place in a steel-mesh cage that is eight by ten feet in area and eight feet high and that is, in turn, located within an interior area surrounded on sides by approximately twenty-foot-high walls and covered with a steel-mesh and razor-wire ceiling. *Id*. ¶ 3-4.

A. The Steel-Mesh Cages Do Not Provide Outdoor Exercise.

In the *Anderson* case, Judge Jackson held that the indoor recreation cells at CSP did not provide outdoor exercise. *Anderson v. Colorado*, 887 F.Supp.2d 1133, 1142 (D. Colo. 2012). In response to that court's order to provide outdoor exercise to Plaintiff Troy Anderson, *id.* at 1157, CDOC transferred him to Ad Seg at Sterling. *Anderson*, ECF 118 (Defs.' Notice of Compliance with Final Ord. & J.). Inmates in Ad Seg at Sterling exercised in a small rectangular space with concrete walls. The top of the walls and part of the ceiling of this area were made of steel mesh similar to that used in the Max cages now at CSP. Reply Facts ¶ 7. Judge Jackson held that the enclosed exercise areas at Sterling did not constitute outdoor exercise as required by his earlier order. *Id*. ¶ 8.

This Court has sufficient information to rule as a matter of law (based on Judge Jackson's rulings in *Anderson*) and undisputed facts (based on the photographs and measurements of the cages) that the steel-mesh cages do not provide outdoor exercise. If the Court so holds, then inmates in Max at CSP are getting no outdoor exercise, and partial summary judgment is appropriate in Plaintiffs' favor.

B. Even if the Steel-Mesh Cages Constitute Outdoor Exercise, Defendants Are Violating the Eighth Amendment Rights of Inmates in Max.

The Tenth Circuit has held that an inmate who was denied all outdoor exercise for more than nine months stated a claim under the Eighth Amendment. *Perkins v. Kan. Dep't of Corr.*, 165 F.3d 803, 810 (10th Cir. 1999). The undisputed evidence -- information from CDOC concerning the lengths of stay in various statuses -- shows that inmates at CSP go for periods much longer than nine months without outdoor exercise, even following implementation of the twice-amended AR. Reply Facts ¶¶ 9-18. Given this established pattern, even those inmates currently in Max for less than nine months are at substantial risk of future harm. *See, e.g.*, *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993) ("[T]he Eighth Amendment protects against future harm to inmates.").

Furthermore, it is undisputed that inmates who are held in Max for periods of less than nine months do not get outdoor exercise, even under the new regulatory amendments. Such a period without outdoor exercise may also violate the Eighth Amendment. As the *Perkins* court noted, the Tenth Circuit had earlier held "that an inmate who alleged he had received only thirty minutes of out-of-cell exercise in three months stated an Eighth Amendment claim." *Id*. (citing *Housley v. Dodson*, 41 F.3d 597, 599 (10th Cir.1994), *overruled on other grounds, Tucker v. Graves*, 107 F.3d 881, at *1 n.2 (10th Cir. 1997)). This is relevant because, prior to the nine-

month mark, inmates in Max are only permitted to exercise in an indoor recreation cell, measuring 90 square feet -- the same size their living cell. That is, they were simply given a choice of similarly-sized cells in which to exercise. RPSF ¶¶ 9-15; *see also Anderson*, 887 F. Supp. 2d at 1137 (Ad Seg cells and indoor recreation cells are both approximately 90 square feet).

Cases from this district and other courts also support the claim that periods of less than a year without outdoor exercise constitute violations of the Eighth Amendment. *See, e.g.*, *Kettering v. Chaves*, 2008 WL 4877005, at *12 (D. Colo. Nov. 12, 2008) (holding that denial of outdoor exercise for 90 days satisfied the objective component of an Eight Amendment violation); *Hebbe v. Pliler*, 627 F.3d 338, 343-44 (9th Cir. 2010) (holding that plaintiff who alleged that prison officials forced him to choose between accessing the law library and accessing outdoor exercise for a period of eight months stated a claim for an Eighth Amendment violation); *Delaney v. DeTella*, 256 F.3d 679, 684 (7th Cir. 2001) (holding that inmate denied yard access for six months suffered sufficient constitutional deprivation); *Pearson v. Ramos*, 237 F.3d 881, 884–85 (7th Cir. 2001) (holding that denial of yard privileges for more than 90 days may be cognizable under Eighth Amendment); *Keenan v. Hall*, 83 F.3d 1083, 1089-90 (9th Cir. 1996) (reversing grant of summary judgment to defendants on plaintiff's claim that six-month deprivation of outdoor exercise violated the Eighth Amendment). Even if the Court should conclude that the cages are outdoors, it would be reasonable for this Court to hold that the total deprivation of outdoor exercise before the nine-month mark violated the Eighth Amendment.

Defendants rely on an unpublished case that they assert stands for the proposition that denial of outdoor exercise for one year does not violate the Eighth Amendment. *See* Resp. at 23-

24 (citing *Ajaj v. United States*, 293 F. App'x 575, 584 (10th Cir. 2008)). However, the evidence in that case showed that, during that year, the inmate had been offered and refused outdoor exercise, *Ajaj*, 293 F. App'x at 587.[8] Judge Henry, in his concurrence, noted that fact and observed that *Perkins* was still good law. *Id.* at 590. *Ajaj* is thus irrelevant to the present case where -- prior to nine months and often even after that time -- inmates in Max are not offered outdoor exercise, even as defined by Defendants.

Thus, as a matter of law and undisputed fact, Defendants continue to violate the Eighth Amendment rights of inmates in Max, and an order requiring CDOC to provide outdoor exercise is appropriate.

II. Even if CDOC's Current or Projected Regulations and Policies Theoretically Provided Constitutionally-Required Outdoor Exercise, The Case is Not Moot and an Injunction Remains Necessary to Ensure Compliance.

Although Defendants may now claim to provide a constitutional level of outdoor exercise to inmates in Max at CSP, it is undisputed that -- prior to January 15, 2015 -- it provided no outdoor exercise whatsoever to such inmates. RPSF ¶ 59. Furthermore, Defendants refused to provide outdoor exercise to inmates in Ad Seg/Max at CSP despite the recommendations of its own consultants, *id*. ¶¶ 43-44, and a court order holding that the lack of such outdoor exercise violated one inmate's Eighth Amendment rights, *id* ¶ 5. That was the state of play when this lawsuit was filed in December, 2013.

Six months later, on June 30, 2014, Defendants issued a major revision to the regulation governing inmates in Ad Seg/Max, yet still did not provide for outdoor exercise for such

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[8] *See also id.* at 591 (Henry, J, concurring) ("the record generated before the district court … demonstrates that Mr. Ajaj was offered, but refused, outdoor exercise on several occasions during his first year at ADX.").

inmates. *See* RPSF ¶ 10; AR 650-03 (June 30, 2014). In late July, 2014, Defendants drafted a plan to seek funding to construct outdoor exercise areas at CSP, but even then did not provide for outdoor exercise for inmates in Max in the projected exercise yards. RPSF ¶¶ 52, 53, 59.

It was not until Plaintiffs moved for partial summary judgment on the lack of outdoor exercise for inmates in Max that Defendants took steps to provide what they deem to be outdoor exercise for these inmates. Indeed, Defendants' Response and the accompanying declaration were the first Plaintiffs had heard of a plan to provide outdoor exercise to Max inmates, and when filed, the brief and declaration could only promise future regulatory language. Response at 21; Hager Decl. ¶¶ 48-49.

As the Supreme Court has repeatedly held,

> It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice." …"[I]f it did, the courts would be compelled to leave '[t]he defendant ... free to return to his old ways.'" . . . The "heavy burden of persua[ding]" the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness.

Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 U.S. 167, 189 (2000); *see also Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 727 (2013) (If voluntary cessation led to mootness, "a defendant could engage in unlawful conduct, stop when sued to have the case declared moot, then pick up where he left off, repeating this cycle until he achieves all his unlawful ends."); *cf. Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S.Ct. 2277, 2287 (2013) ("Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.").

The fact that Defendants have denied outdoor exercise at CSP over a long period of time, despite ample motivation to remedy this violation, militates strongly against mootness and underscores the need for an injunction. As the Tenth Circuit has held:

> "When defendants are shown to have settled into a continuing practice ..., courts will not assume that it has been abandoned without clear proof. It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption."

Chaffin v. Kansas State Fair Bd., 348 F.3d 850, 865 (10th Cir. 2003) (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 n. 5 (1953)); *see also Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991) (holding, with respect to ostensibly new prison policy, "[e]ven assuming that the policy meets constitutional standards on its face, given the Department's history of [alleged violations] and the vagueness of the new policy, it cannot be said 'with assurance' that there is no 'reasonable expectation' that the alleged violations will recur.")

Similarly, the fact that CDOC policies concerning the conditions of confinement for inmates in Ad Seg/Max have been repeatedly amended means that the new regulatory language does not "afford … an assurance that the threatened harm may not recur." *Longstreth v. Maynard*, 961 F.2d 895, 900 (10th Cir. 1992). In *Longstreth*, as here, the defendant prison relied on an amended regulation to attempt to avoid adjudication of the plaintiff's claims. The Tenth Circuit held that because "the Department's policy ha[d] varied considerably, . . . we cannot agree that we should dismiss [the] instant appeals as moot because we do not feel it shown to be

absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*[9]

Ultimately, "[i]t is no small matter to deprive a litigant of the rewards of its efforts ... . Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000).

[9] The Tenth Circuit's recent holding in *Citizen Center v. Gessler*, 770 F.3d 900, 908 (10th Cir. 2014), that an amendment to a challenged regulation mooted the challenge, does not apply here. In this case, Plaintiffs do not challenge a specific regulation, but rather the practice of denying outdoor exercise to inmates at CSP. This practice has continued unchanged through (1) consultant recommendations; (2) federal court orders; and (3) numerous regulatory amendments. As such, *Chaffin* and *Longstreth* dictate that this case is not moot.

CONCLUSION

For the reasons set forth above and in Plaintiffs' Motion for Partial Summary Judgment, Plaintiffs respectfully request that this Court grant summary judgment in their favor, holding that Defendants' denial of outdoor exercise to inmates in Restrictive Housing Maximum Security Status violates the Eighth Amendment.

Respectfully Submitted,

s/ Amy F. Robertson

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DATED: February 27, 2015

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2015, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following email addresses:

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s/ Sophie Breene
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