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' OPPOSITION TO DEFENDANTS' CROSS-MOTION TO REDEFINE THE CLASS AND REPLY IN SUPPORT OF MOTION TO MODIFY CLASS DEFINITION

Plaintiffs, through counsel, hereby submit their opposition to Defendants' Cross-Motion to Redefine the Class ("Cross-Motion"), ECF 51, and their reply in support of their Motion to Modify Class Definition ("Motion"), ECF 41.

Based on recent regulatory changes by the Colorado Department of Corrections ("CDOC"), on September 29, 2014, Plaintiffs filed their Motion, proposing to redefine the class to remove obsolete terminology and to focus on the common legal question of deprivation of outdoor exercise. Defendants filed their Cross-Motion, as well as a Response to Plaintiffs' Motion to Redefine the Class ("Response"), ECF 61, in which they propose to modify the class definition in a way that requires premature decisions on the merits, which is inappropriate at this stage.

Crucially, Plaintiffs' proposed definition does not preclude full consideration of the factual and legal issues raised by Defendants; it simply postpones that analysis until the appropriate, merits, stage.

1. Factual Background

a. 1993 to 2014

From the time the Colorado State Penitentiary ("CSP") was opened in 1993 until this summer, it largely housed inmates in solitary confinement, which Defendants referred to as "administrative segregation" ("ad. seg."). SUMF ¶¶ 1-3 (admitted).[1] Throughout those 21 years, the CDOC did not provide outdoor exercise to inmates in ad. seg. at CSP; rather those inmates were only permitted to exercise in an enclosed concrete cell that was part of their housing unit, which CDOC sometimes refers to as an "individual recreation area." SUMF ¶¶ 4, 11-15 (admitted); *see* Hager Dep. 99:6-20 (ECF 61-1) (referring to indoor exercise rooms as "individual recreation area").

In 2011, the CDOC commissioned a study -- known as the "Austin-Sparkman Report" -- that concluded (among other things) that "access to outdoor recreation is deficient" at CSP. SUMF ¶¶ 43-44 (admitted). Yet still the CDOC continued to deny outdoor exercise to inmates in ad. seg. at CSP. SUMF ¶ 4 (admitted).

In 2012, a district court in Colorado found that the lack of outdoor exercise in ad. seg. at CSP subjected inmate Troy Anderson to cruel and unusual punishment in violation of the Eighth Amendment and ordered that Mr. Anderson be provided outdoor exercise. *Anderson v. Colorado*, 887 F. Supp. 2d 1133, 1142 (D. Colo. 2012). Rather

[1] Plaintiffs' Motion for Partial Summary Judgment ("MPSJ") included a Statement of Undisputed Material Facts ("SUMF"), ECF 50 at 5-13. Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment ("Response to MPSJ") included a Response to Plaintiffs' Statement of Facts, ECF 60 at 5-13. In this brief, where possible, Plaintiffs cite to their SUMF and, in so doing, incorporate by reference the sources on which they relied in their MPSJ. Where Defendants admitted a fact without reservation, the citation is followed by the notation "(admitted)."

than provide Mr. Anderson with outdoor exercise at CSP, the CDOC moved him to a different facility. *Anderson*, 10-cv-01005-RBJ-KMT, ECF 118 (Oct. 23, 2012). And despite the court's holding that the individual recreation cells did not constitute outdoor exercise, *Anderson*, 887 F. Supp. 2d at 1142, the CDOC did not take steps to provide outdoor exercise to inmates in ad. seg. at CSP, SUMF ¶ 4 (admitted).

Also in 2012, ostensibly in response to the 2011 report, the CDOC amended its ad. seg. regulations to "radically chang[e] the way [they were] doing things in Colorado." Testimony of Susan Jones, former Warden of CSP, *Anderson* Trial Tr. (May 3, 2012) at 64:5-24 (Robertson Decl., ECF 41-2, Ex. 13). Even following this "dramatic" change, *id.* 67:12, inmates in ad. seg. at CSP still did not receive outdoor exercise, SUMF ¶ 4 (admitted).

This lawsuit was filed in December, 2013, challenging the continued denial of outdoor exercise to inmates in ad. seg. at CSP. ECF 1.

b. Recent Regulatory Amendment Relating to Inmates in Solitary

On June 30, 2014, the CDOC once again made "significant and substantial policy changes" in the regulations that govern inmates in solitary confinement. Cross-Motion at 3. It amended Administrative Regulation ("AR") 650-03, which governs solitary confinement, to eliminate the use of the term "administrative segregation," and to establish a new status called "Restrictive Housing Maximum Security Status" ("RH/Max").[2] SUMF ¶ 7 (admitted). Like inmates in ad. seg., inmates in RH/Max in

[2] Plaintiffs used the abbreviation "Max" in their Motion. Motion at 3. Defendants used the term "Restrictive Housing" to refer to the same inmates. Cross-Motion at 6-7;

CSP are held in conditions that include being alone in a cell 23 hours a day and out of cell a maximum one hour a day for five days a week. *Id*. ¶ 9 (admitted).

Three years after the Austin-Sparkman report and two years after the *Anderson* decision, however, these new regulations still did not provide for outdoor exercise for inmates in RH/Max. SUMF ¶¶ 10-11 (admitted).

On July 25, 2014, CDOC released a Facility Program Plan ("FPP") that outlined plans to construct outdoor exercise space at CSP. SUMF ¶¶ 52-53 (admitted). The FPP states 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*. ¶ 54, 57 (admitted). The FPP, which requests funding for the new exercise space, has been submitted to the legislature. SUMF ¶ 56 and response, ECF 60 ¶ 56.

Yet the FPP still does not address outdoor exercise for inmates in RH/Max. SUMF ¶ 59 (admitted).

Defendants assert that the time inmates will spend in RH/Max will be limited by the new regulation to 12 months, and that it is "extremely unlikely" that an inmate would be there for longer than that, Response at 5, Cross-Motion at 7, but do not mention (in these briefs) that the time limit of 12 months may be waived for "exigent circumstances." AR 650-03, ¶ IV(K), ECF 61-2 at 08905. A training video produced in late September of this year suggests that these exigent circumstances may be very broad:

Response at 3-4. To avoid confusion, those inmates and their status will be referred to with the abbreviation "RH/Max" in this brief.

> if there is a continued propensity for behavior that would continue to pose a serious threat to life, property, self, staff, or other offenders, or to the security or orderly operation of the facility, the offender will be referred for continued placement in Restrictive Housing.

"Video (BATES 09091) Restrictive Housing Draft 04.wav" at 0:42 (Declaration of Amy F. Robertson in Opp'n. to Defs.' Cross-Mot. to Redefine the Class And Reply In Supp. of Pls.' Mot. to Modify Class Definition ("Robertson Decl.") ¶ 3 & Ex. 1, Notice of Conventionally Submitted Materials); *see also* Hager Dep. 40:16-25 (exigent circumstances include those in which placing the inmate in another institution "would jeopardize the safety and security of that institution, of the other offenders there or the staff, or if it would not benefit this offender and if the only way to benefit this offender would be to place them within this status"). In addition, training materials concerning progression from Restrictive Housing to other statuses suggest that this process may involve a "waitlist." Robertson Decl. Ex. 2 at 08959, 08963.

In their Motion, Plaintiffs demonstrated -- based on the most recent data produced by Defendants -- that there were at least 53 inmates in RH/Max who had been there for more than nine months cumulatively, and at least 17 who had been there for more than nine months consecutively. Motion at 5. A list of inmates with recent referrals to RH/Max showed 12 inmates who had been in ad. seg. at CSP for periods ranging from 11 to 75 months prior to the referral. *Id*. at 6.

Defendants respond that these data -- which they produced in April and Auguts, 2014 -- do not establish that these inmates had been in ad. seg. or RH/Max "*immediately prior* to their placement in Restrictive Housing" and cite to the testimony of CDOC's Director of Prison Operations, Steve Hager, concerning how CDOC was

planning to deal with inmates who had already been in ad. seg. for long periods of time. Response 14 (emphasis in original). There are several problems with this response.

First, Mr. Hager's testimony does not refute Plaintiffs' calculations. He does not address any individual inmate's situation, or provide numbers that rebut Plaintiffs' analysis.

Second, the data on which Plaintiffs' numerical analysis relied were requested from and produced by Defendants in discovery. Robertson Decl. (ECF 41-2) ¶¶ 6-11. If there are later responsive data or information relating to the period "immediately prior to . . . placement in Restrictive Housing," Defendants had the obligation, pursuant to Fed. R. Civ. P. 26(e), to supplement their responses and provide such data or information. Indeed, Plaintiffs have requested that they do so, to no avail. Robertson Decl. ¶ 7. Any argument that Plaintiffs' numerical analysis does not address recent information must be disregarded under Fed. R. Civ. P. 37(c) (prohibiting the use, to supply evidence on a motion, of information not disclosed as required by Rule 26(a) or (e)).

Finally, Defendants' attempted rebuttal of Plaintiffs' demonstration that many inmates are still being denied outdoor exercise for periods longer than nine months or even a year assumes that any break from these conditions would restart the clock, making any previous period without outdoor exercise -- no matter how recent -- irrelevant to the constitutional analysis. They provide no support for this position. For example, Defendants data show that, on September 2, 2014, Inmate Luis Alvarado Cordova had been referred to RH/Max for twelve months for "assault on offender sbi." Robertson Dec (41-2) ¶ 18 & Ex. 6. Move sheets produced by Defendants show that

Mr. Alvarado Cordova had been in ad. seg. at CSP since July 11, 2008, and was still there on the last day of the last move sheet data Defendants have produced for him, March 18, 2014, for a total of over five and a half years in solitary confinement without outdoor exercise. Robertson Decl. Ex. 14 (ECF 41-6) at 04660. Even if -- and Defendants produce no data to show this -- Mr. Alvarado Cordova was in some other facility for some portion of the time between March and September, 2014, that still means he will have over six years without outdoor exercise with a break of at most a few months in the middle. *See infra* Section III(C).

Representing further regulatory changes, Defendants asserted -- in their November 17 Response to MPSJ, ECF 60, but not in their October 24 or November 21 briefs relating to the class definition, ECF 51, 61 -- that they would be amending AR 650-03 yet again to provide that inmates who have been in RH/Max for over nine months would be permitted three hours of outdoor recreation per week. ECF 60 at 21. The regulation has not yet been amended; rather, the CDOC stated that it anticipated the amendment would go into effect January 1, 2015. *Id*. at 22.

c. Recent Regulatory Amendment Creating MCU and CCTU.

On June 30, 2014, the CDOC also issued a revision to AR 600-09, which added the new statuses of "Close Custody Transition Unit" ("CCTU") and "Management Control Unit" ("MCU"). SUMF ¶ 50 (admitted). AR 600-09 states that inmates in MCU and CCTU will receive "indoor or outside" exercise. AR 600-09 (ECF 61-4) ¶¶ IV(G)(1)(b) (MCU); IV(G)(2)(b) (MCU/HR); VI(G)(3)(c) (MCU/PC); IV(G)(4)(c) (CCTU).

Although inmates in MCU are supposed to be housed at Sterling Correctional Facility, Response at 5-6, as of the most recent data produced by Defendants, there were 105 such inmates at CSP, 78 of whom had been in ad. seg. or RH/Max for more than nine months consecutively. Motion at 7-8. Indeed, there is no even theoretical cap to the amount of time an inmate can spend in MCU. *Compare* AR 600-09, ¶ III(F) (CCTU intended to be for six months) *with id*. ¶ III(E) (no stated time limit for MCU).

Mr. Hager testified that inmates in MCU may exercise outdoors at the Sterling Correctional Facility, Response at 6; however Defendants have given no indication where they permit MCU inmates to exercise at CSP, and a training presentation with the file name "CSP Power Point," produced by Defendants, states -- of such inmates -- that "[o]utdoor recreation will be completed in individual recreation areas." Robertson Decl. Ex. 3 at 5, 7, 9. That is, the over one hundred MCU inmates still at CSP are limited to the individual recreation areas on their pods that were held, in *Anderson*, not to be "outdoors" and there is no stated end to the time they spend in that status.

While Mr. Hager has testified that CCTU inmates may exercise in an internal courtyard at CSP, Response at 6-7, this is not memorialized in a policy document and the CSP training presentation referenced above says, of CCTU inmates, "[o]utdoor recreation will be completed in individual recreation areas." Robertson Decl. Ex. 3 at 11. Defendants assert that stays in CCTU are limited by policy to six months, AR 600-09, ¶ III(E); however, the most recent data produced by Defendants showed that 93 inmates with the status CCTU had been in ad. seg. for more than nine months consecutively prior to that time. Motion at 7.

2. Procedural Background

Plaintiffs, on behalf of a class of similarly situated inmates, filed this lawsuit against officials of the CDOC challenging the denial of outdoor exercise to inmates in solitary confinement at CSP. ECF 1. On July 10, 2014, this Court certified a class of such inmates, defined (as requested by Plaintiffs) using then-current terminology:

> All inmates who are now or will in the future be housed in administrative segregation at the Colorado State Penitentiary and who are now or will in the future be subjected to the policy and practice of refusing to provide such inmates access to outdoor exercise.

Ord. Granting Pls' Mot. for Class Certification and Denying Pls.' Mot. to Consolidate Cases ("Class Cert. Order"), ECF 37, at 15. After Plaintiffs filed their Motion for Class Certification, ECF 12, and just before the Court issued the Class Cert. Order, the CDOC amended AR 650-03 to eliminate the term "administrative segregation." Instead, three newly-defined categories of inmates would be housed at CSP: (1) RH/Max; (2) MCU and (3) CCTU. *See supra* at 3, 7-8.

Because the important common link among the class members was not the label used by the CDOC to indicate their conditions of solitary confinement, but rather the fact that they were "be[ing] subjected to the policy and practice of refusing to provide such inmates access to outdoor exercise," on September 29, 2014, Plaintiffs moved to modify the class definition to delete the now-obsolete term "administrative segregation" and to focus on the common element of denial of outdoor exercise. Plaintiffs proposed this definition:

> All inmates who are now or will in the future be housed at the Colorado State Penitentiary and who are now or will in the future be subjected to the policy and practice of refusing to provide such inmates access to outdoor exercise.

Motion, ECF 41, at 2.

Defendants filed both a Response and Cross-Motion rejecting Plaintiffs' proposed definition, and proposing the following instead; language that differs from Plaintiffs' proposal is underscored:

> All inmates who are now or will in the future be housed <u>in Restrictive Housing</u> at the Colorado State Penitentiary and who are now or will in the future be subjected to the policy and practice of refusing to provide such inmates access to outdoor exercise <u>for more than nine continuous months</u>.

Cross-Motion at 4 (underscoring added).

ARGUMENT

I. At the Very Least, the Parties Agree That Defendants' Proposed Class Satisfies Rule 23.

One crucial result of Defendants' Cross-Motion and Response is that Plaintiffs and Defendants agree that the class requested by Defendants satisfies Rule 23; Plaintiffs simply believe the class should be more broadly defined. But it is now undisputed that the class of inmates in RH/Max at CSP for more than nine months is sufficiently numerous, shares common questions, satisfies typicality, is adequately represented, and is a proper class under Rule 23(b)(2).

Indeed, Plaintiffs have moved for partial summary judgment as to the claims of inmates in Restrictive Housing Maximum Security Status. ECF 50. Their claims should be ripe for resolution.

II. Defendants' Proposed Definition is Too Narrow.

Defendants' proposed definition is too narrow, as it once again relies on a label ("Restrictive Housing") that CDOC is free to change in the next wave of regulatory amendments, and excludes inmates who are denied outdoor exercise for fewer than nine months. In so doing, as explained below, it improperly requires the Court to resolve merits issues at the class certification stage. As this Court held, in certifying the original class,

> [i]t may be that, if Plaintiffs succeed on the merits, the Court ultimately may order that there is a certain minimum time that an inmate must be at CSP before they have to be permitted outdoor exercise, or that only inmates at certain security levels must be allowed to exercise outdoors. However, the Court can draw whatever lines are necessary when fashioning the ultimate relief on the merits, and any injunction entered can still apply to the Class as a whole.

Class Cert. Order at 12. Should the Court ultimately decide that the only inmates to have suffered Eighth Amendment violations are those in RH/Max and/or those denied outdoor exercise for more than nine months, "the Court can draw whatever lines are necessary when fashioning the ultimate relief on the merits." *Id*. Plaintiffs' proposed definition properly postpones those decisions to the merits stage.

III. The Class As Plaintiffs Propose to Define it Shares Common Questions.

Defendants make a number of substantive arguments in support of their Cross-Motion and Response. Rather than providing reason to adopt Defendants' proposed definition, they constitute common questions of law that underscore the appropriateness of Plaintiffs' proposed definition. These common questions include but are not limited to the following.

A. Whether the New Regulations And Other Non-Regulatory Changes in Practice Satisfy Defendants' Heavy Burden to Show That Violations Will Not Recur is a Common Question.

Another judge in this Court has held, in the *Anderson* case, and Defendants have conceded, SUMF ¶¶ 44, 45, 57 (admitted), that the lack of outdoor exercise at CSP prior to June 30, 2014, violated the Eighth Amendment. Defendants assert that new conditions of confinement set forth in the third or fourth major overhaul of solitary confinement in the last three years -- and, as their Response to MPSJ demonstrates -- still in flux, *see supra* at 7, should restrict the class only to a small subset of the inmates CSP. Yet all of the inmates in the class as Plaintiffs proposed to define it share the common question whether Defendants' recent and ongoing changes to policies and practices satisfy the "heavy burden" to "make it absolutely clear that the allegedly wrongful behavior could not be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000); *cf. Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("[P]ostcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye. The voluntary cessation of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.").

If, as Plaintiffs will demonstrate, Defendants cannot satisfy that heavy burden, a class-wide injunction ensuring adequate outdoor exercise will be appropriate, even if it duplicates existing -- though new and still fluctuating -- policies and practices.

B. The Duration of Deprivation of Outdoor Exercise Sufficient to Violate the Eight Amendment is a Common Question.

Defendants argue that Plaintiffs' proposed definition would include inmates who are not deprived of outdoor exercise for long enough to constitute an Eighth Amendment violation. Cross-Motion at 12-13; Response at 8-9. The question of how long an inmate must go without access to outdoor exercise before it constitutes an Eighth Amendment violation is one that is both unresolved and common to the class. *See, e.g., Perkins v. Kansas*, 165 F.3d. 803, 810 (10th Cir. 1999) (holding that prisoner denied outdoor exercise for nine months satisfied the objective prong of the Eighth Amendment analysis); *Lopez v. Smith*, 203 F.3d 1122, 1133 n.15 (9th Cir. 2000) (holding six-week deprivation sufficient to state a claim under the Eighth Amendment); *Allen v. Sakai*, 43 F.3d 1082, 1087 (9th Cir. 1994) (holding that limiting inmate to 45 minutes of outdoor exercise once a week for six weeks met the objective element of an Eighth Amendment claim).[3]

[3] Defendants generally rely on *Ajaj v. United States*, 293 F. App'x 575 (10th Cir. 2008) to assert that the Tenth Circuit has held that deprivation of outdoor exercise up to 12 months is acceptable. *See, e.g.*, Cross-Motion at 12-13; Response at 9. However, the evidence in that unpublished case showed that, during the year in question, the inmate had been offered and refused outdoor exercise, *Ajaj*, 293 F. App'x at 587. Judge Henry, in his concurrence, noted that fact and observed that *Perkins* was still good law. *Id.* at 590.

C. Whether Periods During which Class Members Were Denied Outdoor Exercise in in Ad. Seg. under Prior Regulations Is Relevant to the Period of Denial under Current Regulations is a Common Question.

In their Motion, Plaintiffs presented data showing that many inmates currently in CSP had already incurred lengthy deprivations of outdoor exercise. Motion at 5-8. Defendants attempted to rebut these figures by asserting that Mr. Hager had explained the way the system should work: that inmates who had been in ad. seg. for more than 12 months were to be transferred out of ad. seg./RH/Max. Response at 14-15. Given that Defendants have not supplemented their discovery responses as required by Rule 26(e), this argument should be disregarded under Rule 37(c). *See supra* at 6.

Even if this Court were to credit Mr. Hager's conclusory testimony, it simply raises another common question: does a gap of a few months in a long period of deprivation of outdoor exercise make the earlier period irrelevant? For example, the plaintiff in *Turley v. Rednour*, 729 F.3d 645 (7th Cir. 2013), alleged that frequent lockdowns deprived him of exercise. "In all, 25 lockdowns were imposed, with 81 days being the longest continuous period of lockdown, and totaling 534 lockdown days. Thus, prisoners were confined in lockdown status for more than 50% of the period in question." *Id*. at 648. The defendant argued that the plaintiff "failed to allege a constitutionally sufficient injury, especially since no individual lockdown exceeded 90 days." *Id*. at 652. The Seventh Circuit rejected that argument as grounds to dismiss the claim on the pleadings, holding that the defendant was "free to produce evidence or studies, if any exist, that the intervals between weeks-long (or even months-long) lock-downs are sufficiently restorative." *Id*.

Like the question of duration, above, the question whether such intervals between periods of deprivation of outdoor exercise are legally significant is common to the class and can be addressed by the Court when formulating injunctive relief. *See* Class Cert. Order at 12.

IV. Defendants' Proposed Definition Improperly Requires the Court to Resolve A Number of Questions on the Merits.

Defendants' proposed class definition would exclude inmates at CSP (1) who have been there for less than nine consecutive months and/or (2) who have the status MCU or CCTU. Excluding these inmates from the class has the effect of dismissing their claims, that is, deciding on the merits -- under the rubric of defining the class -- the common claims discussed above.

Defendants' argument for their definition also requires the Court to resolve a number of fact questions in their favor. For example, they assert that offenders are now given "a definitive end date by which they will be released from Restrictive Housing" and that their time is capped at either six or twelve months. Cross-Motion at 7. Yet, the regulation on which they rely provides a broad exception for exigent circumstances. *See supra* at 5. Defendants assert that "it is extremely unlikely" that an inmate would be RH/Max for more than twelve months. Cross-Motion at 7. Yet the most recent documents produced by Defendants show that many inmates have been in RH/Max and/or ad. seg. for more than nine months consecutively or cumulatively, including 12

who have been in that status for periods ranging from 11 to 75 months. Decl. of Amy F. Robertson, ECF 41-2, ¶¶ 13, 19 & Ex. 7.[4]

Indeed, Defendants ask the Court to ignore the *current* facts, asserting that the Court "must consider" the inmates' conditions at some unknown future point "once [the new] policies are fully implemented." Response at 7-8. That is, Defendants ask the Court to exclude inmates from the class -- to dismiss their claims -- based on a set of facts that Defendants hope will exist sometime in the future.

"Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage. Merits questions may be considered to the extent -- but only to the extent -- that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied." *Amgen Inc. v. Connecticut Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194-95 (2013); *see also Helmer v. Goodyear Tire & Rubber Co.*, No. 12-CV-00685-RBJ-MEH, 2014 WL 1133299, at *3 (D. Colo. Mar. 21, 2014) ("[A] peek at the merits is not an invitation to 'turn the class certification proceedings into a dress

[4] The fact that Defendants are making improper merits arguments is underscored by their reliance on selective quotation from Plaintiffs' expert, Steve Martin, to attempt to demonstrate that their current policy is constitutional. For example, Mr. Martin stated that there was no *per se* constitutional violation in the current policy if the majority of inmates are coming out in six months. "If almost all of them are staying there a year and more than a year, then it's a different ball game." Martin Dep. 151:9-25; *compare* Cross-Motion at 8 (partial quote). Defendants assert that Mr. Martin believed there was no constitutional violation with respect to MCU and CCTU outdoor exercise, Cross-Motion at 10, but do not note that this was in response to a question that was limited to durations of six months, Martin Dep. 187:12-18. Indeed, most of Defendants' cites to Mr. Martin's deposition refer to passages in which he was asked to agree with the accuracy of the wording while opposing counsel read the regulation into the record. *See, e.g.*, Martin Dep. 185:15 - 186:7 (*cited in* Cross-Motion at 9); 186:8 - 187:2, 187:3-11 (*cited in* Cross-Motion at 10, 14-15).

rehearsal for the trial on the merits.'" (quoting *Messner v. Northshore Univ. HealthSys*., 669 F.3d 802, 811 (7th Cir. 2012)). Here, consideration of the merits reveals several common questions; that is the extent of a proper merits inquiry at this stage. It would be improper to go beyond that and dismiss the claims of many CSP inmates on the merits.

V. In an Injunctive Class, It is Not Necessary that All Class Members' Claims Be Identical or that All Class Members Have a Claim.

Defendants argue for restricting the class to inmates in Restrictive Housing on the grounds that Plaintiffs' proposed definition will (in their view) include inmates who do not have a claim under the Eighth Amendment. Cross-Motion at 12; Response at 8-9, 14. As noted above, this requires a premature decision on the merits. In addition, the Tenth Circuit has explicitly rejected the argument that the named plaintiffs must show that all class members have been injured. *Colorado Cross-Disability Coalition v. Abercrombie & Fitch Co.*, 765 F.3d 1205, 1214 (10th Cir. 2014) ("Rule 23's certification requirements neither require all class members to suffer harm or threat of immediate harm nor Named Plaintiffs to prove class members have suffered such harm," citing *DG ex rel. Stricklin v. Devaughn*, 594 F.3d 1188, 1198 (10th Cir. 2010)).

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion, deny Defendants' Cross-Motion, and modify the class definition to: "All inmates who are now or will in the future be housed at the Colorado State Penitentiary and who are now or will in the future be subjected to the policy and practice of refusing to provide such inmates access to outdoor exercise."

Respectfully Submitted,

s/ Amy F. Robertson
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DATED: November 24, 2014

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2014, 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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