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' RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, through undersigned counsel, hereby respond to Defendants' Motion for Summary Judgment. ECF 56.

INTRODUCTION

Defendants have refused and continue to refuse to provide outdoor exercise to all inmates housed in Restrictive Housing Maximum Security ("Max"), Close Custody Transition Unit (CCTU), and Management Control Unit ("MCU") statuses at Colorado State Penitentiary ("CSP"). The Colorado Department of Corrections ("CDOC") has deprived Mr. Decoteau, Mr. Gomez, and Mr. Duran, as well as all inmates who are now or in the future will be housed in Max, CCTU, or MCU statuses at CSP, of a basic human need: access to outdoor exercise.

Defendants have completely denied outdoor exercise to all inmates held in solitary confinement at CSP – including the named Plaintiffs – from CSP's construction in 1993 to the present. With the June 30, 2014, revision to AR 600-09, Defendants added two additional statuses to CSP: CCTU and MCU, which are now also denied outdoor exercise at CSP.

Defendants have recently implemented a new policy governing inmates housed in solitary confinement at CSP and have proposed a "Facility Program Plan" ("FPP") which, if funded by the legislature, purports to address the lack of outdoor exercise for some inmates at CSP in the future. Nevertheless, inmates housed at CSP continue to be denied access to outdoor exercise. Thus, Defendants have subjected the named Plaintiffs and the class they represent to a serious deprivation of their rights in violation of the Eighth Amendment.

Defendants know and have known for years that CSP is out of compliance with correctional standards and well-established case law. It has been the law in the Tenth Circuit for more than 25 years that "regular outdoor exercise is extremely important to the psychological and physical wellbeing of inmates." *Bailey v. Shillinger*, 828 F.2d 651, 653 (10th Cir. 1987). More than two years ago, another court in this district held that the CDOC violated the Eighth Amendment by denying an inmate it held at CSP access to outdoor exercise. *Anderson v. Colorado Dep't of Corr*., 887 F.Supp.2d 1133, 1142 (D. Colo. 2012). Despite this ruling, inmates at CSP have either suffered a long-term denial of a basic human need or are currently at substantial risk of serious harm because CDOC intends to continue depriving them of outdoor exercise. The Defendants knew of, disregarded, and continue to disregard that risk of harm. Defendants have, therefore, not met their burden of establishing that they are entitled to summary judgment.

At the same time Plaintiffs are filing this Response Brief, they are filing their Reply Brief in Support of Motion for Partial Summary Judgment, which is incorporated herein by reference.

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS ("RSUMF")

1-14. **Admit.**[1]

15. **Deny.** Under exigent circumstances, inmates can be housed in Max for periods longer than six or twelve months with the approval of the Director of Prisons and the Deputy Executive Director. Ex. 1, Hager Dep., 31:14-33:13, 73:6-9, 76:22-77:1; Robertson 2/27/15 Decl. Ex. 1 (AR 650-03 effective 1/15/2015) at 14. Inmates who commit COPD infractions can serve time in punitive segregation before beginning their Max sentences. Robertson 2/27/15 Decl. Ex. 1 (AR 650-03 effective 1/15/2015) at 3. Inmates can spend up to 60 days in punitive segregation before beginning their Max sentences. *Id*. Inmates who commit such infractions at CSP serve their punitive segregation time at CSP and are permitted to exercise only in the same type of indoor recreation cell available to Max inmates. Ex. 2, Decl. of Alberto Valles, ¶ 12; Ex. 3, Decl. of Derek Gallegos, ¶ 12; Ex. 4, Decl. of Donald Lowe, ¶ 8; Ex. 5, Decl. of John Martinez, ¶ 13; Ex. 6, Decl. of Francis Hernandez, ¶ 18. This time spent in punitive segregation at CSP before inmates' Max sentences begin is not counted towards the six or twelve month maximums, thereby extending time spent in Max by up to 60 days beyond the limits for Max sentences established in AR 650-03. Ex. 2, Decl. of Alberto Valles, ¶ 13; Ex. 3, Decl. of Derek Gallegos, ¶ 13; Ex. 4, Decl. of Donald Lowe, ¶ 10; Ex. 5, Decl. of John Martinez, ¶ 12; Ex. 6, Decl. of Francis Hernandez, ¶ 19.

16. **Admit.**

17. **Deny.** AR 650-03 permits placement in Max for those committed offenses listed on the Matrix. Robertson 2/27/15 Decl. Ex. 1 (AR 650-03 effective 1/15/2015) at 3-4. AR 650-03

[1] Any fact that Plaintiffs admit is admitted for the purposes of Defendants' Motion only.

states, "Other circumstances may warrant placement on [Max] status." *Id*.; *see also* RSUMF ¶ 15, *supra*.

18. Plaintiffs are without information sufficient to admit or deny the reasons that some inmates are held in Max for more than 12 months. In addition, many inmates at CSP are denied outdoor exercise for longer than 12 months. Robertson 2/27/15 Decl. Ex. 12.

19. **Deny.** *See* RSUMF ¶15, supra. Further, Mr. Lowe was placed in Max for a twelve-month sentence on complicity charges, an offense not identified as a very dangerous behavior on the Matrix in AR 650-03. *Compare* Decl. of Donald Lowe ¶ 9 *with* Robertson 2/27/15 Decl. Ex. 1 (AR 650-03 effective 1/15/2015) at 3-4.

20. **Deny.** *See* RSUMF ¶¶15, 17-19, *supra*.

21. **Admit.**

22. **Admit** that Mr. Martin reviewed Mr. Hager's deposition transcript. **Admit** that the June 30, 2014 regulations were in effect when Mr. Martin was deposed. However, the June 30, 2014 AR 650-03 was superseded on January 15, 2015, and Mr. Martin has not expressed an opinion regarding that version of the regulation.

23. **Admit** that Mr. Martin stated the quoted words, but urge the court to consider the full context of the testimony. The question was, "Would you agree that if staffing deficiencies and plant deficiencies at CSP prevent CSP from offering offenders in restrictive housing opportunities for what you would characterize as outdoor exercise, that the department of corrections has a legitimate penological interest in keeping them in restrictive housing so long as it's for a limited period of time?" Ex. 7, Martin Dep., 150:17-151:12. This question was objected to as to form by Plaintiffs' counsel Lauren Fontana. *Id*. Mr. Martin responded that there was not, "a per se

constitutional violation in the current approach you're taking now for the rec, as contemplated or addressed within this policy." *Id*. Note, too, that on its face, the policy anticipates the possibility of outdoor recreation, which is not, in fact, being provided. Further, in his deposition, Mr. Martin did not opine on the fact that MCU inmates are also being denied outdoor exercise. Ex. 8, Decl. of Steven Peoples, ¶ 10; Ex. 9, Decl. of Matthew Leach, ¶ 13; Ex. 10, Decl. of Kenny Castillo, ¶ 12; Ex. 11, Decl. of Joshua Fierek, ¶ 13; Ex. 12, Decl. of Eldon Thurston, ¶ 13; Ex. 2, Decl. of Alberto Valles, ¶ 20. Max inmates who then move to MCU status are being denied outdoor exercise for combined periods far in excess of the six or twelve month purported maximums.

24-25. **Admit.**

26. **Deny in part.** While a number of MCU inmates are held at Sterling Correctional Facility ("SCF"), as of January 31, 2014, there were approximately 153 inmates being housed in MCU at CSP. Robertson 2/27/15 Decl. ¶ 12 & Ex. 14.

27. **Admit** that Mr. Martin agreed to counsel's characterization of what AR 600-09 states.

28. **Admit.**

29. **Deny.** Mr. Falk's cited testimony referenced the outdoor recreation areas at SCF. The exercise areas attached to the day halls at SCF are not outdoor exercise areas. *See Anderson v. Colorado*, No. 10-cv-01005-RBJ-KMT (D. Colo.), ECF 166 (Reporter's Tr., Hearing on Pending Mots.) 20:24 - 21:13, 33:23-25. This paragraph makes no mention of the MCU inmates housed at CSP; Plaintiffs admit, however, that MCU inmates housed at CSP are permitted to exercise in the day hall at CSP, which is the open space outside of their cells. Robertson 2/27/15 Decl. Ex.21 (Diagram of day hall).

30. **Admit** for MCU inmates at SCF. This paragraph makes no mention of the MCU inmates

housed at CSP.

31. **Deny.** *See* RSUMF ¶ 26, *supra*. Inmates in MCU at CSP are being held in that status for periods in excess of the six-month purported maximum, including, for example, Mr. Castillo, who has been housed in MCU for eight months as of the date of his signed declaration. Ex. 10, Decl. of Kenny Castillo, ¶ 9. Further, Defendants suggest inmates will not be incarcerated at CSP for more than six months, yet inmates can be transitioned out of MCU to Max, punitive segregation, or CCTU, and remain incarcerated at CSP. Ex. 2, Decl. of Alberto Valles, ¶ 10; Ex. 3, Decl. of Derek Gallegos, ¶ 10; Ex. 4, Decl. of Donald Lowe, ¶¶ 5, 6; Ex. 12, Decl. of Eldon Thurston, ¶ 10; Ex. _13, Decl. of Jeremy Torres, ¶ 9; Ex. 5, Decl. of John Martinez, ¶¶ 6, 10; Ex. 11, Decl. of Joshua Fierek, ¶ 11; Ex. 10, Decl. of Kenny Castillo, ¶ 9; Ex. 9, Decl. of Matthew Leach, ¶¶ 11, 16; Ex. 8, Decl. of Steven Peoples, ¶ 11; Ex. 6 Decl. of Francis Hernandez, ¶ 4. Thus a number of inmates at CSP have gone far more than six months without outdoor exercise. *Id.; see also* Robertson 2/27/15 Decl. Ex. 12.

32. **Admit.**

33. *See* RSUMF ¶ 27 supra.

34. **Admit in part; deny in part.** Admit that CCTU inmates are able to exercise in the day hall areas, in indoor exercise areas adjacent to the day halls, in a gym, and in a room adjacent to the gym with a metal mesh and razor-wired ceiling. Deny that adjacent rooms, either attached to the day halls or to the gym, are outdoors. Judge Jackson held that the indoor recreation rooms adjacent to the day hall areas are not outdoors. RSUMF ¶ 29, *supra*. Mr. Martin's testimony concerning the area adjacent to the gym referred to its configuration before 240 of the 694 square feet were occupied by three separate steel mesh cages, each measuring 8x10 square feet, 8 feet

tall. *See* Robertson 2/27/15 Decl. ¶¶ 4-5 and Exs. 2 & 3; Ex. 14, Ridley Decl. ¶ 7; Ex. 15, Decl. of David Bueno, ¶ 18.

35. **Deny.** *See* RSUMF ¶ 34, *supra*. Further, inmates are restricted from using the once per week access to the room adjacent to the gym due to frequent lockdowns and other undisclosed reasons. Robertson 2/27/15 Decl. 24 (CSP Logs, CDOC/Decoteau 10003-10544); Ex. 15, Decl. of David Bueno, ¶¶ 17, 20.

36. *See* RSUMF ¶ 27, *supra*.

37. **Deny.** The cited portion of Mr. Martin's deposition discusses CCTU only, and does not discuss inmates in MCU, who are limited to the indoor recreation rooms adjacent to the day halls. Ex. 9, Decl. of Matthew Leach, ¶ 12; Ex. 10, Decl. of Kenny Castillo, ¶ 10; Ex. 11, Decl. of Joshua Fierek, ¶ 12; Ex. 13, Decl. of Eldon Thurston, ¶ 12. Mr. Martin testified that those areas are not outdoors. Ex. 7, Martin Dep., 93:9-11. *See* RSUMF ¶ 34, *supra*.

38-39. **Admit.**

STATEMENT OF ADDITIONAL MATERIAL FACTS ("SAMF")[2]

1. At the time this case was filed in December 2013, Max inmates, formerly known as Administrative Segregation ("Ad Seg") inmates, were only permitted to exercise in indoor recreation cells. Ex.1, Hager Dep., 58:15-59:6, 91:6-10.

2. Six months after this case was filed, on June 30, 2014, CDOC issued new regulations, including AR 650-03 and 600-09, but did not provide for outdoor exercise for Max inmates. ECF 60 at 5, ¶¶ 7, 10; *id.* at 12, ¶ 50.

[2] To the extent that the Court finds that any of these additional facts are undisputed, they weigh in Plaintiffs' favor.

3. In response to Plaintiffs' Motion for Partial Summary Judgment, Defendants asserted that they planned to revise AR 650-03 to include the following language: "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." ECF 60 at 21.

4. Defendants "anticipated that these revisions to Administrative Regulation 650-03 [would] go into effect January 1, 2015." *Id*. at 22.

5. The revisions to AR 650-03 took effect on January 15, 2015. Robertson 2/27/15 Decl. Ex. 1 (AR 650-03 effective 1/15/2015).

6. What Defendants refer to as "outdoor" exercise in the new AR 650-03 language is, in fact, one hour spent inside a steel mesh cage measuring 8x10 square feet, 8 feet tall that is, itself, in an indoor room adjacent to the gym measuring approximately 694 square feet with a metal mesh and razor wire ceiling. The room is surrounded on all sides by concrete walls that are approximately 20 feet high. Robertson 2/27/15 Decl. ¶¶ 4-5; Exs. 2-3.

7. Once finalized, the indoor room attached to the gym will contain three steel mesh cages. Robertson 2/27/15 Decl. ¶ 6 & Ex. 4.

8. Given the security measures of transporting Max inmates, the cages can only provide exercise for 18 inmates, one hour each, three times per week. *Id*.

9. Since the most recent version of AR 650-03 went into effect, only three Max inmates have been determined as eligible to exercise in these cages. Robertson 2/27/15 Decl. ¶ 6(e) and Ex. 5.

10. With the exception of the three Max inmates referred to in SAMF ¶ 9, all other Max inmates are limited to exercise in the indoor recreation cells. Ex. 5, Decl. of John Martinez, ¶ 13; Ex. 4,

Decl. of Donald Lowe, ¶ 11; Ex. 9, Decl. of Matthew Leach, ¶ 6; Ex. 11, Decl. of Joshua Fierek, ¶ 6; Ex. 2, Decl. of Alberto Valles, ¶ 6; Ex. 3, Decl. of Derek Gallegos, ¶ 6; Ex. 10, Decl. of Kenny Castillo, ¶ 5; Ex. 8, Decl. of Steven Peoples, ¶ 5; Ex. 12, Decl. of Eldon Thurston, ¶ 6; Ex. 6, Decl. of Francis Hernandez, ¶ 6.

11. The MCU inmates are permitted to leave their cells for four hours per day, during which time they are permitted to exercise in the indoor recreation cell and the day hall. Ex. 10, Decl. of Kenny Castillo, ¶ 10-11; Ex. 9, Decl. of Matthew Leach, ¶ 12-13; Ex. 2, Decl. of Alberto Valles, ¶¶ 17-18; Ex. 11, Decl. of Joshua Fierek, ¶¶ 12-13; Ex. 12, Decl. of Eldon Thurston, ¶¶ 11-12. The day hall and indoor recreation cell are the only areas in which these inmates are permitted to exercise, and they are not permitted to exercise outside. Ex. 10, Decl. of Kenny Castillo, ¶ 10-11; Ex. 9, Decl. of Matthew Leach, ¶ 12-13; Ex. 8, Decl. of Steven Peoples, ¶ 10; Ex. 2, Decl. of Alberto Valles, ¶¶ 17-18; Ex. 11, Decl. of Joshua Fierek, ¶¶ 12-13; Ex. 12, Decl. of Eldon Thurston, ¶¶ 11-12. The indoor recreation cell is attached to the day hall. Robertson 2/27/15 Decl. Ex. 22 (Photo of day hall).

12. Inmates in CCTU at CSP are permitted to exercise, for one hour once a week, in an indoor gym or in the indoor room adjacent to the gym, unless it is closed due to weather or other reasons. Ex. 5, Decl. of John Martinez, ¶ 7; Ex. 12, Decl. of Eldon Thurston, ¶¶ 16-17; Ex. 13, Decl. of Jeremy Torres, ¶ 9; Ex. 15, Decl. of David Bueno, ¶ 20. Robertson 2/27/15 Decl. Exs. 5 & 24 (CSP Logs, CDOC/Decoteau 10003-10544). In addition, inmates in CCTU at CSP are permitted out of their cells for six hours per day in the day hall, during which time they are permitted to exercise in the indoor recreation cells adjacent to the day hall. Ex. 12, Decl. of Eldon Thurston, ¶ 1. Sixteen CCTU inmates are allowed to exercise together at one time. Ex. 16,

AR 600-09 at CDOC\Decoteau 8885-86.

13. Exercise in the indoor room adjacent to the gym occurs in the gerrymandered area remaining around the now two, eventually three, steel mesh cages in which Max inmates will be exercising. Ex. 14, Decl. of Bryan Ridley, Ex. 1 (3D Renderings at ORCA 000561-000572); Ex. 15, Decl. of David Bueno, ¶ 18.

14. Before the cages were installed, CCTU inmates had approximately a 694-square foot area for exercise in the area adjacent to the gym. *Id.*, ¶ 7.

15. Once all three of the cages are installed, the area remaining for CCTU inmates' exercise will measure approximately 454 square feet. *Id.*

16. Much of the Defendants' defense depends on their assertion that inmates will not spend more than definite periods of time in Max, MCU, and CCTU. *See, e.g.*, ECF 56 at 14-16, 18-20.

17. Inmates transition among Max, MCU, and CCTU regularly, resulting in lengthy combined periods of time without outdoor exercise. *See* Robertson 2/27/15 Decl. Ex. 12.

18. Maureen O'Keefe is CDOC's Research Manager. ECF 71 at 10. Ms. O'Keefe wrote a letter to Executive Director Rick Raemisch in which she stated, among other things, "With the partitioning of administrative segregation into multiple statuses, calculated lengths of stay only include time classified to administrative segregation or maximum security status. Excluding maximum [sic] control units and other restrictive statuses minimizes the true amount of time that offenders at CSP are without access to outdoor recreation." Robertson 2/27/15 Decl. Ex. 18 at ORCA000361.

19. Once a potential Max violation occurs, an inmate is placed in punitive segregation without outdoor exercise, and this time is not counted as part of the Max sentence. The regulations thus

contemplate deprivation of outdoor exercise for periods longer than twelve months. Robertson 2/27/15 Decl. Ex. 1 (AR 650-03 effective 1/15/2015) at 3; *see also* Ex. 2, Decl. of Alberto Valles, ¶¶ 12-13; Ex. 3, Decl. of Derek Gallegos, ¶¶ 12-13; Ex. 4, Decl. of Donald Lowe, ¶ 8; Ex. 5, Decl. of John Martinez, ¶¶ 11-12; Ex. 6, Decl. of Francis Hernandez, ¶¶ 18-19.

20. There are frequent security lockdowns at CSP; when those lockdowns occur, inmates are not permitted to leave their cells. Ex. 9, Decl. of Matthew Leach, ¶ 14; Ex. 6, Decl. of Francis Hernandez, ¶ 22; Ex. 2, Decl. of Alberto Valles, ¶ 19; Ex. 11, Decl. of Joshua Fierek, ¶ 14; Ex. 12, Decl. of Eldon Thurston, ¶ 20; Ex. 5, Decl. of John Martinez, ¶ 14; Ex. 4, Decl. of Donald Lowe, ¶ 15; Ex. 3, Decl. of Derek Gallegos, ¶ 16; Ex. 10, Decl. of Kenny Castillo, ¶ 13; Ex. 15, Decl. of David Bueno, ¶ 20; *see also* Robertson 2/27/15 Decl. Ex. 24 (logs).

21. Many inmates have gone more than nine months at CSP without outdoor exercise. Ex. 9, Decl. of Matthew Leach, ¶ 17 (approximately 19 months without outdoor exercise); Ex. 11, Decl. of Joshua Fierek, ¶ 16 (approximately 18 months without outdoor exercise); Ex. 4, Decl. of Donald Lowe, ¶ 16 (more than two years without outdoor exercise); Ex. 5, Decl. of John Martinez, ¶ 16 (two years and six months without outdoor exercise); Ex. 12, Decl. of Eldon Thurston, ¶ 21 (19 months without outdoor exercise); Ex. 2, Decl. of Alberto Valles, ¶ 21 (20 months without outdoor exercise); Ex. 10, Decl. of Kenny Castillo, ¶ 14 (18 months without outdoor exercise); Ex. 3, Decl. of Derek Gallegos, ¶ 17 (25 months without outdoor exercise); Ex. 6, Decl. of Francis Hernandez (more than three years without outdoor exercise).

22. CDOC policies may change as often as once per year, or more frequently. Ex. 17, Jones Testimony, 132:8-22.

23. According to Director of Prisons Steve Hager, "changes could be made" to "continually

evolve and make [AR 650-03] fit our vision correctly." Ex. 1, Hager Dep., 77:11–78:6.

24. Since the filing of this lawsuit in December 2013, AR 650-03 has undergone two formal changes, one in June 2014 and one in January 2015. Ex. 18, AR 650-03 effective 6/30/2014 at CDOC\Decoteau 8892; Robertson 2/27/15 Decl. Ex. 1 (AR 650-03 effective 1/15/2015).

25. According to CDOC's policy review schedule, AR 650-03 is scheduled for review in March 2015. Robertson 2/27/15 Decl. Ex. 20 (CDOC 2014-2015 Regulatory Plan) at 11.

26. In that same period, CDOC has plans to implement a new policy "to provide guidelines for consistent privileges and conditions of confinement for all segregation areas within the department." *Id.* Ex. 19 (CDOC 2014-2015 Regulatory Agenda), at 4.

STANDARD OF REVIEW

Under Rule 56(a) of the Federal Rules of Civil Procedure, a court may grant summary judgment when the record shows "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). An issue is "genuine" only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Farthing v. City of Shawnee*, 39 F.3d 1131, 1134-35 (10th Cir. 1994). A fact is "material" if it might affect the outcome of the suit under the governing law. *Anderson*, 477 U.S. at 248. The moving party bears the initial responsibility of providing to the Court the factual basis for its motion and identifying "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any," which "reveal that there [are] no genuine issue[s] as to any material fact[s], … [and that] the party is entitled to summary judgment as a matter of law." *McCowan v. All Star Maint., Inc.*, 273 F.3d 917, 921 (10th Cir. 2001) (internal quotation marks omitted).

In considering a motion for summary judgment, "the court must review the record in the light most favorable" to the nonmoving party. *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1437 (10th Cir. 1987). In doing so, courts "must draw all inferences in favor of the party opposing summary judgment." *O'Shea v. Yellow Tech. Servs., Inc.*, 185 F.3d 1093, 1096 (10th Cir. 1999). The Tenth Circuit has emphasized that the nonmovant is given "wide berth to prove a factual controversy exists." *Ulissey v. Shvartsman*, 61 F.3d 805, 808 (10th Cir. 1995). "Where different ultimate inferences may be drawn from the evidence presented by the parties, the case is not one for summary judgment." *Brown v. Parker-Hannifin Corp.*, 746 F.2d 1407, 1411 (10th Cir. 1984). As discussed below, there are disputes of material fact that preclude granting Defendants' Motion for Summary Judgment, and where facts are not in dispute, they are in Plaintiffs' favor.

ARGUMENT

I. Defendants Continue To Violate The Eighth Amendment By Denying Inmates At CSP Outdoor Exercise.

In order to show an Eighth Amendment violation, Plaintiffs must satisfy a two-prong test. *Farmer v. Brennan*, 511 U.S. 825, 834 (1994).

The first prong of this test is objective, in that Plaintiffs must show that the treatment they experienced constitutes a sufficiently serious deprivation of the minimal civilized measure of life's necessities. *Wilson v. Seiter*, 501 U.S. 294, 298 (1991) (quoting *Rhodes v. Chapman*, 452 U.S. 337, 346 (1981)). An inmate is denied the "the minimal civilized measure of life's necessities" if the prison deprives him of a basic human need. *Rhodes*, 452 U.S. at 347. The objective prong is likewise satisfied if an inmate establishes that he is at substantial risk of serious harm in the future. *Helling v. McKinney*, 509 U.S. 25, 33-34 (1993) ("[T]he Eighth Amendment protects against future harm to inmates.").

The second prong is subjective: Plaintiffs must show that the Defendants had a "sufficiently culpable state of mind." *Farmer*, 511 U.S. at 834. In cases involving prison conditions, this culpable state of mind must be one of "deliberate indifference" to inmate health or safety. *Id*.

As explained below, Defendants continue to violate the Eighth Amendment by denying outdoor exercise to inmates at CSP, and their Motion for Summary Judgment should be denied.

A. Defendants' Continued Denial Of Outdoor Exercise To The Class Continues To Harm The Class Or Put Them At Substantial Risk Of Serious Harm.

1. Defendants Offer No Outdoor Exercise at CSP.

The options for inmate recreation at CSP can be split into two categories: those that are located on the residential pods and those that are in the gym area. RSUMF ¶ 34. There are three statuses of inmates at CSP: Restrictive Housing Maximum Security Status ("Max"), Management Control Unit ("MCU"), and Close Custody Control Unit ("CCTU").[3] RSUMF ¶¶ 9, 26, 32. Inmates in each of these statuses have access to some of these recreation areas, as described below. Because none of these areas permit outdoor exercise, Defendants continue to violate the Eighth Amendment.

a. Recreation Areas On The Residential Pods Do Not Permit Outdoor Exercise.

Each residential area at CSP has access to an indoor recreation cell. RSUMF ¶ 34; SAMF ¶¶ 10, 11. This cell is completely indoors and is enclosed by a floor, ceiling, and walls. *Id.* ¶ 12. The indoor cell measures approximately 90 square feet. *Id.* ¶ 13. It contains only two narrow

[3] There is one pod of Medium Security inmates at CSP; these inmates are not members of the Class that this Court has certified, nor are they members of either of the modified Class definitions proposed by the parties. Therefore, Plaintiffs are not addressing their access to recreation.

windows covered by metal grates. *Id.* ¶ 14. The only access to outside elements occurs through the holes in the metal grating covering these narrow windows. *Id.* ¶ 15. In 2012, a court in this district ruled that this exercise area is not outdoors. *Anderson,* 877 F. Supp. 2d at 1142. The Defendants recognize this, and have admitted that the recreation cell does not permit outdoor exercise. ECF 60 at 5, ¶ 10.[4]

The inmates who have access to the indoor recreation cells are: inmates who have been in Max for less than nine consecutive months,[5] inmates in MCU, and inmates in CCTU. SAMF ¶¶ 3, 10, 11; RSUMF ¶ 34. Max inmates are permitted to use the indoor recreation cell five days per week, for one hour per day. ECF 60 at 5, ¶ 9. MCU inmates are permitted to leave their cells for four hours per day, during which time they are permitted to exercise in the indoor recreation cell. SAMF, ¶ 11. CCTU inmates are permitted to leave their cells six hours per day, during which time they are permitted to exercise in the indoor recreation cell. *Id.* ¶ 12.

The second recreation area inside the pod is the day hall. RSUMF, ¶ 29. The day hall consists of a common area outside of the cells but within the pod. *Id.* The recreation cell described above is attached to the day hall. SAMF, ¶ 11. The day hall does not permit outdoor exercise. *Id.*

Inmates in MCU and CCTU have access to the day hall. SAMF, ¶¶ 11-12. The four hours per day that MCU inmates spend out of their cells occur in the day hall (with access to the indoor recreation cell). *Id.* ¶ 11. The six hours per day that CCTU inmates spend out of their cells

[4] To the extent that the facts about the indoor recreation cell are undisputed, they weigh in favor of the Plaintiffs.

[5] It is unclear whether inmates in Max for more than 9 months will continue to have access to these rooms, or will be limited to the cages described below.

occur in the day hall (with access to the indoor recreation cell). *Id.* ¶ 12. MCU and CCTU inmates are permitted to engage in exercise while they are in the day hall. *Id.* ¶¶ 11-12.

Thus no recreation areas attached to the residential pods provide outdoor exercise.

b. Recreation Areas In The Gym Space Do Not Provide Outdoor Exercise.

CSP also has an indoor gym with an attached room. RSUMF ¶ 34. The room is approximately 694 square feet in total and is surrounded on all sides by concrete walls that are approximately 20 feet high. SAMF ¶ 6. The ceiling, which would otherwise be open to the sky, is covered in a metal fence across the top and razor wire around the perimeter. *Id.* Defendants assert that this room provides outdoor exercise; the only evidence they provide to support that assertion is the deposition testimony of Steve Martin. ECF 56 at 11, ¶ 34. As described below, the Defendants have made substantial changes to this room since the time of that deposition. RSUMF ¶ 34; SAMF ¶¶ 6, 7, 13-15. Those changes have resulted in a reduction in the amount of exercise space available to inmates with access to this area. SAMF, ¶ 14, 15. As a result, Mr. Martin's testimony evaluating the exercise space provided in August 2014 is not applicable to the current configuration of this room. RSUMF ¶ 34. Thus, Defendants have provided no evidence that this room provides outdoor exercise, and therefore have not met their burden to establish that they are entitled to summary judgment.

As a result of recent and ongoing construction, much of the square footage in this room is consumed by cages. SAMF ¶ 15. As described below, the cages are intended for use by some Max inmates. *Id.* ¶ 9. The remaining space is available to inmates in CCTU. *Id.* ¶ 13. Inmates in

CCTU are permitted to use the gym and its attached room once per week for one hour. *Id.* ¶ 12.[6] When the ongoing construction is complete, 240 square feet of the room's 694 total square feet will be taken up by three cages. RSUMF ¶ 34. This will leave only 454 square feet of space for the inmates in CCTU to share. SAMF ¶ 15. Sixteen CCTU inmates are permitted to use this room and the gym at the same time. *Id.* ¶ 12. This does not leave enough space for inmates to exercise.[7]

As of January 15, 2014, Defendants revised AR 650-03 to allow for what the AR describes as outdoor exercise for inmates who have been held in Max for 9 months continuously. SAMF ¶¶ 3, 5. Currently, inmates held in Max at CSP for 9 continuous months are permitted to exercise in 80 square foot steel-mesh cages in the room attached to the indoor gym described above. *Id.* ¶ 6. These Max inmates are permitted to exercise in the cages for one hour a day, three days per week. *Id.* ¶ 8. When in the cages, inmates have at least two layers of metal between them and the sky. *Id.* ¶ 6. Furthermore, the 80 square foot cages are smaller than the indoor recreation cell described above, SAMF ¶ 6; ECF 60 at 5, ¶ 13, a cell that Judge Jackson in *Anderson* characterized as "a tiny indoor room," that could not be said to provide "lots of opportunity for exercise." *Anderson*, 887 F. Supp. 2d at 1142. Contrary to Defendants' characterization of the room and the cages, the cages do not provide inmates with outdoor exercise.

[6] Lockdowns are frequent at CSP. SAMF ¶ 20. When these lockdowns occur, all inmates in every status are not permitted to leave their cells. *Id.*

[7] As described in Section II, Voluntary Cessation, Defendants have asserted future possible changes to CCTU's outdoor exercise. Those changes are discussed further below.

2. Defendants Deprive Inmates At CSP Outdoor Exercise for Constitutionally Impermissible Periods Of Time.

a. The Tenth Circuit Has Established That Deprivations Of Outdoor Exercise Shorter Than One Year Are Impermissible.

Multiple circuits considering the denial of outdoor exercise, including the Tenth Circuit, have held that a denial of outdoor exercise for periods less than and similar to those experienced by the Class in this case is a serious deprivation of an inmate's constitutional rights. In *Perkins v. Kansas*, 165 F.3d. 803, 810 (10th Cir. 1999), the Tenth Circuit held that a prisoner who was denied outdoor exercise for nine months satisfied the objective prong of the Eighth Amendment analysis. *See also Kettering v. Chaves*, No. 07-cv-1575, 2008 WL 4877005, at *12 (D. Colo. Nov. 12, 2008) (holding that a three-month denial of outdoor exercise satisfied the objective prong of the Eighth Amendment analysis). 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; 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).

Defendants argue that determination of an Eighth Amendment violation in this case turns on the length of time that CDOC denies outdoor exercise to inmates in Max at CSP. In their Motion, Defendants cite to *Ajaj v. United States*, 293 Fed. App'x. 575, 584 (10th Cir. 2008), as

the controlling authority on this issue. *See, e.g.*, ECF 56 at 15. This Court has already determined in its Class Certification Order that *Perkins* controls. ECF 37 at 8. Nevertheless, Defendants still argue that *Ajaj* is the law, but *Ajaj* is distinguishable from this case in many respects.

Ajaj and its progeny are distinguishable from this case in significant ways. Foremost is that the challenged facility in *Ajaj* offered outdoor exercise and the plaintiff (a pro se inmate) refused it on several occasions. *Ajaj*, 293 F. App'x at 584. Moreover, the plaintiff in *Ajaj* did not challenge the complete denial of outdoor exercise; rather, he argued that outdoor exercise was inconsistently offered. *Id.*

The other cases cited by Defendants all follow the decision in *Ajaj*, almost all concern *pro se* inmates who did not adequately prove both prongs of the Eighth Amendment test, and all are factually distinguishable. Defendants cite *Stout v. Okla. Dep't of Corr.*, 2012 U.S. Dist. LEXIS 139329 (W.D. Okla. Aug. 24, 2012), another case involving a pro se inmate as plaintiff where the court bases its decision solely on a broad interpretation of the decision in *Ajaj* and gives very little discussion to the outdoor exercise issue. In *Chappell v. Jones*, 2012 U.S. Dist. LEXIS 68929 (W.D. Okla. Apr. 2, 2012), another case cited by Defendants for support, the issue was the lack of an indoor recreation space. The court in *Chappell* did not meaningfully analyze the outdoor exercise issue; the extent of its discussion of outdoor exercise was a brief quote in a footnote. *Id.* at *7, n. 1. Last, the case cited by Defendants with the most tenuous connection to the present issue is *Evans v. Sauter*, 2011 U.S. Dist. LEXIS 75027, at *2-3, *7-9 (D. Colo. July 12, 2011). In *Evans*, the pro se inmate plaintiff alleged that one hour per day of recreation violated the Eighth Amendment. *Id.* at *5. Because the court in *Evans* did not discuss either

outdoor exercise or the duration of deprivation sufficient to establish an Eighth Amendment claim, *Evans* provides no useful authority to the case at hand.

Controlling law in this jurisdiction establishes that deprivations of outdoor exercise lasting less than one year satisfy the objective prong of the Eighth Amendment test.

b. Defendants Deprive Inmates At CSP Outdoor Exercise For Unconstitutional Periods Of Time.

Defendants have deprived many inmates currently at CSP of outdoor exercise for periods exceeding – sometimes far exceeding – nine months. SAMF ¶ 21. Defendants argue that because inmates can only be held in Max, MCU, and CCTU for specified time periods, all of which they claim are less than a year, inmates in those statuses are not deprived of outdoor exercise for constitutionally impermissible periods of time. This argument fails for two reasons: (1) Inmates are frequently moved from status to status within CSP, resulting in lengthy periods of time without outdoor exercise; and (2) as demonstrated above, even shorter periods may be unconstitutional.

Genuine issues of material fact remain regarding the amount of time that inmates in CCTU and MCU statuses are denied outdoor exercise. Defendants say that inmates in CCTU and MCU may be assigned to these statuses for up to six months. However, it is possible for inmates to spend more than six months in those statuses. RSUMF ¶ 31.

Defendants contend that the presumptive length of time inmates may spend in Max at CSP is up to six months for some violations and up to twelve months for a number of other violations. However, inmates may be housed in Max for even longer than twelve months for "exigent circumstances." RSUMF ¶ 15.

In addition, transfers from status to status within the CSP facility are common. RSUMF

¶ 31. Due to the frequent transfer of inmates between statuses at CSP, the length of the denial of outdoor exercise is much longer than the time spent in any individual status and can mean that many inmates are denied outdoor exercise for constitutionally impermissible periods of time. *Id.* For example, an inmate who spends six months in Max status and then is transferred to MCU status for an additional six months will exercise only in the indoor recreation room and the day hall for the entirety of his twelve-month stay at CSP. Inmates who spend longer time in each status, or cycle through numerous statuses at CSP, will incur even longer denials of outdoor exercise. SAMF ¶ 21.

Further exacerbating the deprivation of outdoor exercise at CSP is the time inmates spend in punitive segregation within the facility. When an inmate is cited for an infraction at CSP that results in a Max sentence, the inmate must spend a period of time in punitive segregation before the Max sentence begins. SAMF ¶ 19; RSUMF ¶ 15. During this time, inmates are permitted to exercise only in the same type of indoor recreation room available to Max inmates. *Id.* The period of time spent in punitive segregation before an inmate beings his Max sentence varies, but can take up to 60 days. *Id.* When this period of time is added to the inmate's Max sentence, the amount of time that inmates are denied outdoor exercise is extended beyond what the Max sentence seems to indicate. *Id.*

Based on the foregoing, CDOC is denying inmates at CSP access to outdoor exercise for periods prohibited by the Constitution.

B. Defendants Remain Deliberately Indifferent To The Harm And The Substantial Risk Of Serious Harm To Inmates At CSP.

In order to establish an Eighth Amendment claim, a second prong—a subjective prong—must be satisfied. Plaintiffs must prove that Defendants acted with a "sufficiently culpable state

of mind." *Farmer*, 511 U.S. at 834. In cases involving prison conditions, this means that the Defendants acted with "deliberate indifference" to inmate health or safety. *Id*. Defendants do not contend that the undisputed facts in this case establish deliberate indifference. In fact, their Motion does not analyze the subjective prong at all. The record in this case establishes that Defendants have been and continue to be deliberately indifferent, or, at a minimum, that disputed material facts preclude a finding that they have not been.

1. Defendants Have Been On Notice And Have Acknowledged That CSP Does Not Permit Outdoor Exercise.

In *Anderson*, Defendants were made directly aware that the lack of outdoor exercise at CSP was causing harm to inmates. *See generally Anderson*, 887 F.Supp.2d at 1138-39. As to deliberate indifference, the court stated:

> CDOC officials know that the CSP is out of step with the rest of the nation. They have been told by the experts whom they hired that access to outdoor recreation at the CSP is deficient. However, so far as the evidence in this case shows, nothing has been done to provide any form of outdoor exercise to Mr. Anderson or to other inmates who have been held in administrative segregation at the CSP for long periods. The Court concludes that defendants have been deliberately indifferent to Mr. Anderson's mental and his physical health.

Id. at 1142. In addition, in CDOC's Facility Program Plan ("FPP"), Defendants acknowledge that the project's conception was due to the *Anderson* decision. ECF 60 at 12, ¶¶ 52-54.

Further, in Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment, they admitted that the indoor recreation cell provided to inmates in Max did not provide outdoor exercise. ECF 60 at 5, ¶ 10. At this time, inmates in MCU have access to the same indoor recreation cells. RSUMF ¶ 37. In 2013, Defendants filed a Budget Report to the Colorado State Legislature that, in pertinent part, stated: "Colorado State Penitentiary, constructed in 1993, *does not have an outdoor exercise area*." ECF 60 at 11, ¶ 45 (emphasis added).

In 2014, CDOC released its FPP which states, "Regarding the minimum standards for outdoor exercise, 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…" ECF 60 at 12, ¶ 57.

2. Despite Promises Of Future Change, CDOC Still Does Not Provide Outdoor Exercise For Inmates At CSP.

Defendants have changed their administrative regulations, and have created a plan (the FPP) that outlines the requirements for design and construction to provide group outdoor exercise space for inmates in CCTU and MCU at CSP. ECF 60 at 12, ¶ 53. As explained in Section I(A)(1), *supra*, however, CSP currently does not provide outdoor exercise, and this Court cannot rely on the possibility of future change to rule in favor of Defendants.[8]

The FPP does not contemplate providing outdoor exercise to inmates in Max. ECF 60 at 12, ¶ 59. On January 15, 2015, however, Defendants revised AR 650-03 to state that inmates held in Max at CSP for more than nine continuous months will receive "opportunities for three hours of outdoor recreation per week." SAMF ¶¶ 3, 5. Defendants failed to follow through on the promises of the revision to AR 650-03. Inmates who have been held in Max for more than nine months do not go outdoors to exercise; instead, they go to the steel-mesh cages described above. *Id.* ¶ 6.

Despite the recent changes made by the CDOC, the Class continues to be denied outdoor exercise. Defendants are aware that they are legally obligated to provide outdoor exercise, but

[8] *See* Section II, *infra.*

have remained deliberately indifferent to the Eighth Amendment violation suffered by the Class at CSP.

II. Even If The Current Conditions At CSP Do Not Violate The Eighth Amendment, The Doctrine Of Voluntary Cessation Precludes A Finding That Plaintiffs' Claim Is Moot.

Defendants argue that any Eighth Amendment violations that previously may have existed have been eradicated due to CDOC's recent policy changes or projected and contingent capital construction plans. As established in earlier sections of Plaintiffs' argument, such assertions lack merit. CDOC continues to deny inmates within Max, MCU, and CCTU at CSP outdoor exercise. However, even if the Court agrees such violations have indeed ceased -- or will cease -- to exist, Defendants cannot satisfy their heavy burden to show that the violations will not recur. The doctrine of voluntary cessation therefore precludes granting Defendants' Motion.

A. CDOC Continues To Deny Inmates Within Max, MCU, And CCTU At CSP Outdoor Exercise.

Defendants argue that any violation concerning Max and MCU inmates ceased to exist once the June 30, 2014 version of AR 650-03 shortened the time frames inmates are held in these respective statuses. As discussed in section I(A)(2), *supra*, the lengths of time that Plaintiffs are being denied outdoor exercise are long enough to satisfy the objective prong of the Eighth Amendment test. Further, CDOC Research Manager Maureen O'Keefe has pointed out that Defendants are improperly refusing to acknowledge time spent in "[MCU] and other restrictive statuses" when talking about "calculated lengths of stay." SAMF ¶ 18.

Defendants also assert that any violation concerning Max inmates ceased to exist once the January 15, 2015, version of AR 650-03 permitted inmates who have been in Max status for

more than nine continuous months to have outdoor exercise in the newly constructed cages located within the room attached to the gym. As explained in Section I(A)(1), *supra*, those cages do not provide an opportunity for outdoor exercise.

Finally, Defendants argue that any potential remaining violation concerning MCU and CCTU inmates will cease to exist once their submitted budget request is approved and construction resulting from their proposed FPP is complete. ECF 56 at 14, 17-20. As discussed in section II(B)(2), *infra*, this Court cannot rely on the possibility that Defendants will be granted a budget request in order to cure a violation.

B. The Doctrine Of Voluntary Cessation Precludes A Finding That Plaintiffs' Claim Is Moot.

It is well-settled that the "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). "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). "A controversy still smoulders when the defendant has voluntarily, but not necessarily permanently, ceased to engage in the allegedly wrongful conduct." *Hooker Chem. Co. v. U.S. EPA Region* II, 642 F.2d 48, 52 (3d Cir. 1981). "Otherwise, 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." *Already, LLC v. Nike, Inc.*, 133 S.Ct. 721, 727 (2013); *see also Knox v. Serv. Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("Such postcertiorari maneuvers designed to insulate a decision from review by this Court must be viewed with a critical eye.").

Under the voluntary cessation doctrine, defendants bear the "heavy burden" of proving two conditions: (1) there is no reasonable expectation that the alleged violation will recur; and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation. *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1115 (10th Cir. 2010). Defendants must demonstrate that it is "absolutely clear" that there is no reasonable expectation that the activity will recur. *Friends of the Earth v. Laidlaw Envtl. Serv.'s (TOC), Inc.*, 528 U.S. 167, 190 (2000). "[T]he reasonable expectation standard is not mathematically precise and requires only a reasonable likelihood of repetition." *Ind. v. Colorado Dep't of Corr.*, No. 09-CV-00537-WJM-KLM, 2012 WL 4033826, at *4 (D. Colo. Sept. 13, 2012). Because Defendants' policies change frequently and because Defendants' cannot rely on future plans to assert that the violation has been cured, Plaintiffs' claim is not moot.

1. CDOC Policies Are Impermanent And Change Regularly.

Defendants rely heavily on recent internal policy changes to assert that inmates at CSP will no longer be deprived of outdoor exercise for unconstitutional periods of time. As former CSP Warden Susan Jones testified in *Anderson*, CDOC policies may change as often as once per year, or more frequently. SAMF ¶ 22. According to Director of Prisons Steve Hager, "changes could be made" to "continually evolve and make [AR 650-03] fit our vision correctly." *Id.* ¶ 23. Since the filing of this lawsuit in December 2013, AR 650-03 has undergone two formal changes, one in June 2014 and one in January 2015. *Id.* ¶ 24. According to CDOC's policy review schedule, AR 650-03 is scheduled for review in March 2015. *Id.* ¶ 25. In that same period, CDOC has plans to implement a new policy "to provide guidelines for consistent privileges and conditions of confinement for all segregation areas within the department." *Id.*

¶ 26. The new regulation will have an impact on Max, yet it is impossible at this point to know how. CDOC's "policy has varied considerably," therefore it cannot be "shown to be absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Longstreth v. Maynard*, 961 F.2d 895, 900 (10th Cir. 1992).

The policy changes Defendants have made do not have "every appearance of being permanent." *United States v. Or. State Med. Soc'y*, 343 U.S. 326, 334 (1952). As Plaintiffs already established in Section I(B), *supra*, Defendants only just recently began attempting to cure Eighth Amendment violations despite years of consultant recommendations, federal court orders, and policy changes. In fact, up until the January 15, 2015, version of AR 650-03 was implemented, Defendants agreed there were no outdoor exercise opportunities for Max inmates. ECF 60 at 5, ¶ 10. It is only after the latest promulgation of AR 650-03 that Defendants have initiated construction on three cages for Max inmates. SAMF ¶ 5-6.[9]

2. Defendants Cannot Rely On Future Plans To Cure A Violation.

Defendants further rely on the potential for future legislative funding to assert that any prior unconstitutional deprivation will no longer exist. The FPP that CDOC released in July 2014 and submitted in a budget request to the Colorado legislature outlines the design and construction plans to provide outdoor exercise space for inmates in CCTU and MCU at CSP. ECF 60 at 12, ¶ 53. The FPP did not address outdoor exercise for inmates in Max. *Id.* ¶ 59. Just months after

[9] The 10th Circuit has recently held an amendment to a challenged regulation sufficiently mooted a case. *Citizen Ctr. v. Gessler*, 770 F.3d 900, 908 (10th Cir. 2014). However, in *Gessler*, the plaintiffs challenged a regulation on its face, not as applied. *Id*. 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.

releasing the FPP, CDOC initiated a different plan altogether regarding outdoor exercise for some Max inmates at CSP. SAMF, ¶¶ 3, 5. "Even assuming that" what Defendants have done or plan to do "meets constitutional standards on its face," given the fluctuating nature of CDOC's actions and plans that have not themselves existed long enough to take root, "it cannot be said 'with assurance' that there is no 'reasonable expectation' that the alleged violations will recur." *See Gluth v. Kangas*, 951 F.2d 1504, 1507 (9th Cir. 1991) (internal citations omitted).

Even if the Court determines that Defendants are currently providing some form of outdoor exercise at CSP, additional changes in an AR could easily redefine, limit, or altogether eliminate that outdoor exercise. Further, a denial of recently requested legislative funding would significantly impact any future plant modification plans for outdoor exercise. "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. Kan State Fair Bd.*, 348 F.3d 850, 865 (10th Cir. 2003). "When defendants are shown to have settled into a continuing practice . . . , courts will not assume that it has been abandoned without clear proof." *Id*. CDOC therefore cannot meet its heavy burden to establish that the challenged conduct cannot "reasonably be expected to recur." *Friends of the Earth*, 528 U.S. at 190.

III. Plaintiffs Are Entitled To Prospective Injunctive Relief Because Granting Outdoor Exercise To The Class Is The Least Intrusive Means To Correct The Violation of Plaintiffs' Eighth Amendment Rights.

Plaintiffs are entitled to prospective injunctive relief because the requested relief is the least intrusive means to correct the Eighth Amendment violation and the Defendants were previously given the opportunity to correct the constitutional violation. Defendants correctly cite

to the language of 18 U.S.C. § 3626(a)(2), which provides, "The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." In accordance with § 3626(a)(2), Plaintiffs seek no more nor no less than what is necessary to correct the violation of Plaintiffs' Eighth Amendment rights; therefore, Plaintiffs only seek prospective relief that "extends no further than necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(2). The only way to correct the violation of the Federal right, in this case, is to provide outdoor exercise for inmates at CSP. Defendants make no assertion to the contrary.

Defendants further argue that, for prospective relief, the Court must consider what the conditions of confinement will be when the new policies are fully implemented rather than what the conditions of confinement are during the transition period before full implementation. Defendants offer no authority to support such an assertion, however.

Defendants cite to *Taylor v. Freeman*, 34 F.3d 266, 269-70 n.2 (4th Cir. 1994), in order to support their assertion that intervention by the federal courts should only occur when absolutely necessary. In the same case, however, the court held that, "intrusive and far-reaching federal judicial intervention in the details of prison management is justifiable only where state officials have been afforded the opportunity to correct constitutional infirmities and have abdicated their responsibility to do so." What the court describes is precisely what has occurred in this case after the decision in *Anderson*, 887 F.Supp.2d at 1142.

Over two years ago, a Colorado district court determined that CSP's recreation cell was inadequate to provide outdoor exercise in compliance with the Eighth Amendment, and issued an

injunction requiring CDOC to provide outdoor exercise to the plaintiff in that case. *Id.* Instead of correcting the constitutional infirmity at CSP, CDOC transferred Mr. Anderson to Sterling Correctional Facility. *Anderson*, ECF 118 "Defendants' Notice of Compliance with Final Order and Judgment," 10/23/12. As explained in Section I(A)(1), *supra*, to this day, the CDOC does not provide outdoor exercise for inmates in Max, CCTU, and MCU statuses at CSP. Because CDOC officials were "afforded the opportunity to correct" the lack of outdoor exercise at CSP, and failed to do so, the prospective relief sought by Plaintiffs is both necessary and appropriate. *Taylor*, 34 F.3d at 269-70, n. 2.

CONCLUSION

Inmates at CSP have been and continue to be denied outdoor exercise in violation of their Eighth Amendment right to be free from cruel and unusual punishment. Because Defendants have not met their burden of establishing that they are entitled to summary judgment, their Motion should be denied.

DATED: February 27, 2015

Respectfully submitted,

STUDENT LAW OFFICE

s/ Kevin Benninger

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s/ Lauren Fontana

_____

Kevin Benninger, Student Attorney
Jenny Vultaggio, Student Attorney
Lindsey Webb
Lauren Fontana
University of Denver Sturm College of Law
Civil Rights Clinic

2255 E. Evans Ave., Suite 335
Denver, CO 80208
P: (303) 871-6140
Fax: (303) 871-6847
lfontana@law.du.edu

Amy F. Robertson
Civil Rights Education and Enforcement Center
104 Broadway, Suite 400
Denver, CO 80203
P: (303) 757-7901
arobertson@creeclaw.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on this 27th day of February, 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:

Chris W. Alber
chris.alber@state.co.us

Nicole Gellar
nicole.gellar@state.co.us

Counsel for Defendants

s/ Jenny Vultaggio
_____
Jenny Vultaggio