

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock Street Denver, Colorado 80202	DATE FILED: December 24, 2020 11:28 AM CASE NUMBER: 2020CV31823
Plaintiffs: GARY WINSTON; et al., v. Defendants: JARED POLIS, in his Official Capacity as Governor of Colorado; et al.	Case No. 20CV31823 Courtroom: 209
ORDER RE: THE GOVERNOR’S C.R.C.P. 12(b)(1) AND 12(b)(5) MOTION TO DISMISS	

This matter comes before the Court on Defendant Governor Jared Polis’ (“the Governor” or “Defendant Polis”) Motion to Dismiss (“Motion”) filed December 11, 2020; the response and reply.¹ The Court, having reviewed the pleadings and applicable law, and being advised in the premises, hereby finds and orders as follows:

I. BACKGROUND

Plaintiffs are five inmates in the Colorado Department of Corrections. Plaintiffs assert that they are medically vulnerable, and have filed a class action lawsuit on behalf of themselves and a proposed class of similarly situated inmates “who are at high risk of death or serious illness from COVID-19.” Am. Compl. ¶ 35.

The present action was commenced on May 28, 2020. The original Complaint named as defendants Governor Polis and Dean Williams, the Executive Director of the Colorado Department of Corrections (“CDOC”).²

¹ The Court expedited briefing on the Motion to Dismiss in an Order dated December 16, 2020, recognizing the pressing nature of this case.

² Since the filing of the suit, Plaintiffs and Defendant Williams, on behalf of the CDOC, have entered into an agreement, reflected in the proposed Consent Decree filed on November 13, 2020. In the Amended Complaint, Plaintiffs state that Defendant Williams will be dismissed if and when the Consent Decree is entered upon court review at a fairness hearing. Am. Compl. ¶ 38. The fairness hearing is set for January 13, 2021.

Plaintiffs filed an Amended Class Action Complaint on November 13, 2020. The Amended Complaint asserts a single claim for alleged cruel and unusual punishment under article II, section 20 of the Colorado Constitution, which provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Colo. Const. art. II, § 20. Plaintiffs request the following remedies: the issuance of a preliminary and/or permanent injunction requiring Defendant Polis to reduce the prison population across CDOC facilities, or “take other measures to cure the Constitutional violations”; the issuance of a declaration that Defendant Polis’ inaction violates the Colorado Constitution article II, section 20; the issuance of a writ of mandamus ordering Defendant Polis to exercise his powers under C.R.S. § 24-33.5-704 to “correct the constitutional violations and fulfill his emergency response duties.” Am. Compl. at Prayer for Relief, ¶¶ 3–5.³

In his Motion, Defendant Polis moves for dismissal of the Amended Complaint, based on lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1) and failure to state a claim upon which relief can be granted pursuant to C.R.C.P. 12(b)(5). Plaintiffs respond with a discussion of multiple cases, including cases from other jurisdictions (both federal and state) that have addressed similar COVID-19 lawsuits. Plaintiffs ask this Court to deny the Governor’s Motion, arguing that it is the Governor, alone, who must remedy the conditions faced by the proposed class.

II. STANDARD OF REVIEW

A. Motion to Dismiss Pursuant to C. R. C. P. 12(b)(1)

A motion to dismiss for lack of subject matter jurisdiction is governed by C.R.C.P. 12(b)(1). “Subject matter jurisdiction concerns the court’s authority to deal with the class of cases in which it renders judgment.” *In re Marriage of Stroud*, 631 P.2d 168, 170 (Colo. 1981). In determining whether a court has subject matter jurisdiction, reference must be made to the nature of the claim and the relief sought. *In re Water Rights of Columbine Associates*, 993 P.2d 483, 488 (Colo. 2000). The test is whether the court has the authority, under the constitution and statutes of the state, to hear the type of claim and grant the relief which is sought. *In re Estate of Ongaro*, 998 P.2d 1097, 1103 (Colo. 2000) (“the jurisdiction of Colorado’s courts is established either by the Colorado Constitution or by statute”).

“A court is said to have jurisdiction over the subject matter of an action if the case is one of the type of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority.” *Paine, Webber, Jackson & Curtis, Inc. v. Adams*, 718 P.2d 508, 513 (Colo. 1986). If the court does not possess such authority under the constitution and statutes, the parties may not confer jurisdiction upon the court. *Clinic Masters, Inc. v. District Court*, 556 P.2d 473, 475 (Colo. 1976). A judgment rendered without subject matter jurisdiction is void. *In re Marriage of Stroud*, 631 P.2d 168 (Colo. 1981); *In re Support of E.K.*, 410 P.3d 480, 482 (Colo. App. 2013); *Adams Cty. Dep’t of Soc. Servs. Child Support Enf’t Unit v. Huynh*, 883 P.2d 573, 574 (Colo. App. 1994).

³ The other prayers for relief are: to certify this action as a class action, enter Consent Decree as to all claims against Defendant Williams, and “any further relief this Court deems appropriate.” Am. Compl. at Prayer for Relief, ¶¶ 1, 2, 6.

Under C.R.C.P. 12(b)(1), the plaintiff has the burden to prove jurisdiction. *Development Recovery Company, LLC v. Public Service Company of Colorado*, 410 P.3d 1264, 1267–68 (Colo. App. 2017). In assessing subject matter jurisdiction, courts are not bound by the parties’ pleadings but instead must look to the underlying substance of the complaint with respect to the facts alleged and the relief sought. *West Colorado Motors, LLC v. General Motors, LLC*, 411 P.3d 1068, 1069 (Colo. App. 2016).

B. Motion to Dismiss Pursuant to C. R. C. P. 12(b)(5)

The Colorado Supreme Court has most recently clarified the standard of review to be employed by a trial court when considering a motion to dismiss under C.R.C.P. 12(b)(5) in *Warne v. Hall*, decided on June 27, 2016. *Warne v. Hall*, 373 P.3d 588 (Colo. 2016). In that case, the court held that motions to dismiss should be evaluated under the standards identified by the United States Supreme Court in *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). *Id.* at 595.

As a general matter, when considering a Rule 12(b)(5) motion, the court must accept all well-pleaded allegations of the complaint as true and must construe them in a light most favorable to the plaintiff. Under C.R.C.P. 8(a), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief,” in order to give the defendant fair notice of what the claim is and the grounds upon which it rests.

While a complaint need not contain detailed factual allegations, a plaintiff must identify the grounds on which he is entitled to relief, and cannot simply provide “labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555. A complaint is insufficient if it provides only bald assertions without further factual enhancement. *Id.* at 557. To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” *Id.* at 570. (emphasis added). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Iqbal*, 556 U.S. at 678. Facial plausibility requires that the plaintiff show “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* “Where a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* The Tenth Circuit has stated that “plausibility” in this context refers “to the scope of the allegations in the complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs ‘have not nudged their claims across the line from conceivable to plausible.’” *Robbins v. Okla.*, 519 F.3d 1242, 1247 (10th Cir. 2008) (quoting *Twombly*, 550 U.S. at 569).

Although a court must accept as true all of the allegations in a complaint, this requirement does not apply to legal conclusions. *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Stated differently, a court need not accept as true legal conclusions couched as factual allegations. *Id.* To determine whether a complaint states a plausible claim for relief, a court must engage in a “context-specific” analysis drawing on “judicial experience and common sense.” *Id.* at 679. “But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not

shown that the pleader is entitled to relief. *Palisades Nat'l Bank v. Williams*, 816 P.2d 961, 963 (Colo. App. 1991).

A motion to dismiss for failure to state a claim is viewed with disfavor, and should be granted only if it clearly appears that the plaintiff would not be entitled to any relief under the facts pleaded. *Nat'l Sur. Corp. v. Citizens State Bank*, 593 P.2d 362 (Colo. App. 1978), *aff'd*, 612 P.2d 70 (Colo. 1980). C.R.C.P. 12(b)(5) motions should only be granted when “the plaintiff’s factual allegations cannot support a claim as a matter of law.” *BRW, Inc. v. Dufficy & Sons, Inc.*, 99 P.3d 66, 71 (Colo. 2004).

III. LEGAL AUTHORITY & ANALYSIS

In the Motion, Defendant Polis advances the following three arguments: (1) the separation of powers provision in article III of the Colorado Constitution imposes a jurisdictional bar that precludes this Court from ordering the Governor to take discretionary executive action;⁴ (2) mandamus is not a proper mechanism to direct the Governor to undertake discretionary acts;⁵ and, (3) the Governor is not a proper party because CDOC and Director Williams are statutorily charged with prison administration and managing the day-to-day operations of CDOC facilities.⁶

A. Motion to Dismiss – C.R.C.P. 12(b)(1)

First, Defendant Polis argues that a court order compelling the Governor to exercise his discretionary powers in prescribed ways violates the separation of powers doctrine. Specifically, Defendant Polis argues that Plaintiffs’ request that the judiciary require the Governor to take executive action to “[r]educ[e] the prison population across CDOC facilities” or “[t]ake other measures to cure the Constitutional violations” must be dismissed under C.R.C.P. 12(b)(1) because it seeks a remedy that this Court lacks subject matter jurisdiction to provide.⁷ The Court will first address the doctrine and then its application to the proposed remedies for injunctive and declaratory relief.

1. Separation of Powers Doctrine

“Article III of the Colorado Constitution prevents one branch of government from exercising powers that the constitution makes the exclusive domain of another branch.” *Crowe v. Tull*, 126 P.3d 196, 205 (Colo. 2006) (citing *Dee Enters. v. Indus. Claim Appeals Office*, 89 P.3d 430, 433 (Colo. App. 2003)).⁸ The separation of powers doctrine does not require a complete division of authority among

⁴ Mot. at 5.

⁵ Mot. at 10.

⁶ Mot. at 13.

⁷ Am. Compl. at Prayer for Relief, ¶ 3.

⁸ Plaintiffs argue that the Governor has a generalized duty to defend and uphold the Colorado Constitution as set forth in article IV, section 2: “The supreme executive power of the state shall be vested in the governor, who shall take care that the laws be faithfully executed.” The governor is responsible for upholding and ensuring compliance with the state constitution and statutes prescribed by the legislature; however, this duty is not without limit and is circumscribed by article III of the Colorado Constitution.

the three branches, however, and the powers exercised by different branches of government necessarily overlap. *Id.* The fundamental purpose of the doctrine is not to create three mutually exclusive departments of government, but to prevent one department from exercising power that is essential to another department's exercise of its constitutionally defined functions. *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508 (Colo. 1985).

The Colorado Supreme Court expounded upon the separation of powers doctrine at length in *Colorado State Bd. of Med. Examiners v. Dist. Court In & For El Paso Cty.*, 331 P.2d 502 (Colo. 1958). In that case, a licensed doctor filed a complaint seeking relief from a notice of hearing to appear and answer to certain charges issued by the Colorado State Board of Medical Examiners ("State Board"). The trial court, in response, issued a desist order to the State Board and set the matter for a show cause hearing. The State Board sought intervention from the Colorado Supreme Court seeking to prohibit the trial court from interfering with the Board in the exercise of its statutory functions. The Colorado Supreme Court framed the issue for its determination as follows: "*Does the district court have jurisdiction to prohibit a branch of the executive department such as the State Board of Medical Examiners from carrying out its statutory functions?*" This question is answered in the negative." *Id.* at 504 (emphasis in original).

In discussing the separation of powers doctrine, the Colorado Supreme Court stated:

Can the judicial directly prohibit the executive department from executing laws governmental in their nature? When the question arises whether one department is encroaching upon the authority of another, the courts must become the final arbiters. When this question is between the judicial and either of the other departments, the judiciary must be just as careful in marking the line between their authority and either of the others as if the contest was one of power and authority between the other departments. By the constitution of the state our government is divided into three co-ordinate branches,—legislative, executive, and judicial. The constitution is the paramount law. Each department derives its authority from that source. The power of each is limited and defined. Each is clothed with specific powers. The result of this distribution of power is that each stands on an equal plane; neither is superior to the other, and each, acting within its proper sphere, is supreme. Hence, neither can directly call the other to account for actions within its province, nor can one directly interfere with the other in the performance of functions delegated by the constitution. Any other rule would be an assumption that the authority of one was superior to the other, or that the departments were not of equal dignity. To this doctrine each department must yield implicit obedience; otherwise, the constitutional authority of the respective branches of the government would be obliterated, and we would be confronted with the antagonisms and complications resulting from one department assuming to directly control the other with respect to acts within its province. It is only by a rigid adherence to these principles that the powers of each can be fully protected, or prevented from being assumed by, or concentrated in, one, and each limited to the legitimate functions which the people, by the constitution, have intrusted to the different departments of government. The duty of the executive department is to carry the laws into effect.

By virtue of the authority of the constitution, it is the duty of the state board to carry into effect the provisions of the revenue law which it is required to execute. They are of a governmental character. The sole object of the action commenced in the district court is to obtain an injunction to restrain the board from performing its duties. If this should be permitted in a direct proceeding, the result would be to directly subject executive officials to the jurisdiction of the courts when acting within their province, and strip them of their constitutional powers. This is an authority which the judicial department cannot exercise in this manner, for the obvious reason that to concede it would be an assumption that the judicial was of superior authority to the executive department.

[. . .]

The courts cannot investigate the question of [a law's] validity in a proceeding which can only be maintained upon the theory that the judicial is of higher rank than the executive department, or may directly control the functions of that branch of the government when acting within its sphere. **Jurisdiction is the power to hear and determine the particular questions in the case involved. If this power is absent, then the court is without jurisdiction. The case presented to the district court calls for an exercise of authority upon its part over another branch of the state government which it does not possess. It is, therefore, not within its power to hear and determine that case.** In a proper action the validity of the law may be raised, but not in one which would result in the courts assuming an authority which does not exist,—in fact, under our form of government, is impliedly prohibited by the constitution.

Id at 505-06, citing with approval *People ex rel. Alexander v. District Court*, 68 P. 242, 250 (Colo. 1904) (internal citations omitted).⁹

“[T]he doctrine of separation of powers requires that in most instances the Judicial Department should not impose restrictions on the Executive Department.” *McDonnell v. Juvenile Court in & for Second Judicial Dist.*, 864 P.2d 565, 567 (Colo. 1993). The doctrine “imposes upon the judiciary a proscription against interfering with the executive or legislative branches and operates to prohibit the judiciary from preempting an executive agency from exercising powers properly within its own sphere.” *Kort v. Hufnagel*, 729 P.2d 370, 373 (Colo. 1986); see *In re Legislative Reapportionment*, 374 P.2d 66, 67 (Colo. 1962) (“[U]nder the separation of powers doctrine we cannot and will not command the Governor to do anything, the doing of which lies within his sound discretion”).

The Colorado Supreme Court has made clear that “[c]ourts do not have jurisdiction to interfere with the executive branch of the government in the performance of its statutory duties.” *Hufnagel*, 729 P.2d at 373. Accordingly, a court lacks subject matter jurisdiction to issue an order that violates the separation of powers mandated by article III of the Colorado Constitution. *Id.* “Courts cannot, under the pretense of an actual case, assume powers vested in either the executive or the legislative branches of government.” *Wimberly v. Ettenberg*, 570 P.2d 535, 538 (Colo. 1977).

⁹ To assist the reader, the Court supplies paragraph breaks for Justice Gabbert’s concurring opinion in *Alexander*, quoted here.

Here, Plaintiffs assert that “Defendant Polis has done virtually nothing to reduce the population density in Colorado prisons.”¹⁰ Plaintiffs request that the Court “require Defendant Polis to perform his legal duties under the Colorado Constitution by using his constitutional, statutory, and emergency powers to prioritize the safety of Medically Vulnerable Prisoners housed in CDOC facilities by sufficiently reducing the prison population.”¹¹ Plaintiffs seek an injunction “requiring Defendant Polis to reduce the prison population across CDOC facilities” or “take other measures to cure the Constitutional violations.”¹²

1. Injunctive Relief

The Court will first address its ability to issue an injunction requiring the Governor to reduce the prison population across CDOC facilities. In requesting such relief, Plaintiffs reference the Governor’s constitutional powers found in article IV, section 7 of the Colorado Constitution, authorizing the Governor “to grant reprieves, commutations and pardons after conviction, for all offenses except treason.”¹³

Plaintiffs argue that this Court has the power to order Defendant Polis to reduce the prison population, citing to *Brown v. Plata*, 563 U.S. 493 (2011), which states in relevant part “[i]f government fails to fulfill this obligation, the courts have a responsibility to remedy the resulting Eighth Amendment violation.” *Id.* at 511. To support this position, Plaintiffs cite a number of cases in which courts have ordered members of the executive branch (e.g., prison officials, wardens, and occasionally a named governor) to remove or transfer prisoners due to the inabilities of facilities to adhere to COVID-19 guidelines and protocols. These cases rely upon existing statutory authority that permits executive action to be undertaken with respect to incarcerated individuals.¹⁴

For example, Plaintiffs cite to *In re Von Staich*, in which the California Supreme Court ordered the California Department of Corrections and Rehabilitation to immediately move the incarcerated petitioner from one facility to another. 270 Cal. Rptr. 3d 128 (Cal. App. 2020). The court determined that because the current prison facility lacked sufficient space necessary for COVID-19 physical distancing, the petitioner’s Eighth Amendment rights were violated.¹⁵ The court also “hoped” that

¹⁰ Am. Compl. ¶ 21.

¹¹ Am. Compl. ¶ 26.

¹² Am. Compl. at Prayer for Relief, ¶ 3.

¹³ Am. Compl. ¶ 161.

¹⁴ The Court notes that some cases cited to by the parties are from other jurisdictions and are thus persuasive, non-binding authority.

¹⁵ Importantly, the California Emergency Services Act permits correctional facilities to remove inmates from institutions in the event of an emergency that endangers the lives of inmates. Cal. Gov. Code § 8658. Section 8658 provides in relevant part: “In any case in which an emergency endangering the lives of inmates of a state, county, or city penal or correctional institution has occurred or is imminent, the person in charge of the institution may remove the inmates from the institution. He shall, if possible, remove them to a safe and convenient place and there confine them as long as may

the parole board and governor would expedite petitioner's parole hearing review in accordance with statute.¹⁶ *Id.* at 150. Similarly, Plaintiffs cite to *Martinez-Brooks v. Easter*, a federal action in which the court granted the petitioners' Temporary Restraining Order and ordered federal prison officials to implement a process making full use of home confinement authority under 18 U.S.C. § 3624(b), the CARES Act, and as directed by the Attorney General's April 3, 2020 Memorandum. 459 F. Supp. 3d 411 (D. Conn. 2020). Plaintiffs also direct the Court to consider how the federal courts have decided issues surrounding ICE facilities/detainees during COVID-19.¹⁷

In reply, Defendant Polis points the Court to *Committee for Public Counsel Services v. Chief Justice of Trial Court*, 142 N.E.3d 525 (Mass. 2020). In *Committee for Public Counsel Services*, the Massachusetts Supreme Court was asked to exercise its statutory superintendence authority to release to the community as many individuals as possible as expeditiously as possible, consistent with the CDC recommendations. The court determined that it was limited even under that statute, and because a constitutional violation was not established, the judiciary had no authority to revise or revoke defendants' custodial sentences, stay sentences, or order temporary release.¹⁸ *Id.* at 531. The court held that if the judiciary were to invoke such authority as requested, it would be tantamount to a usurping of the authority of the executive branch. *Id.* at 530.

Our Supreme Court has made clear that the Governor has the exclusive power and authority to grant reprieves, commutations, and pardons after conviction. *People ex rel. Dunbar v. District Court of Twentieth Judicial Dist.*, 502 P.2d 420, 421 (Colo. 1972). Once a conviction becomes final, the judiciary lacks further jurisdiction to modify a sentence validly imposed, "as to do so would encroach upon the executive power of the Governor." *McClure v. Dist. Court of Fourth Judicial Dist.*, 532 P.2d 340, 341 (Colo. 1975); *People v. Herrera*, 516 P.2d 626, 628–29 (Colo. 1973) (noting that after a final conviction, only the Governor has the power to reduce a sentence and that any effort by a court to exercise that power would violate the separation of powers doctrine).

Accordingly, this Court cannot force Defendant Polis to reduce the prison population across CDOC facilities. The power to reduce the prison population by commuting sentences or granting reprieves or pardons lies exclusively with the Governor.¹⁹ The judicial department cannot interfere with the executive department, except where constitutionally permissible. *Dunbar*, 502 P.2d at 422. Our

be necessary to avoid the danger, or, if that is not possible, may release them. Such person shall not be held liable, civilly or criminally, for acts performed pursuant to this section."

¹⁶ The California Emergency Services Act includes an option to release inmates should removal and confinement to a separate location prove insufficient.

¹⁷ *Fraihat v. U.S. Immigration and Customs Enf't*, 445 F. Supp. 3d 709 (C.D. Cal. 2020); *Savino v. Souza*, 453 F. Supp. 3d 441 (D. Mass. 2020); *Gayle v. Meade*, 2020WL2086482 (S.D. Fla. Apr. 30, 2020), *order clarified*, 2020WL2203576 (S.D. Fla. May 2, 2020); *Zepeda Rivas v. Jennings*, 445 F. Supp. 3d 36 (N.D. Cal. 2020).

¹⁸ The petitioners advised the Massachusetts' court during briefing and oral argument that the Eighth Amendment argument was not being pursued. *Committee for Public Counsel Services v. Chief Justice of Trial Court*, 142 N.E.3d. at 543.

¹⁹ Lest it be argued that this is a delegable duty, the Colorado Supreme Court has ruled that should the Governor wish to delegate his authority, he may do so but without the judiciary weighing in. *Steinman v. Caldwell*, 628 P.2d 110, 111 (Colo 1981) (citing to *Whittington v. Bray*, 612 P.2d 7 (Colo. 1980)).

tripartite system of government is premised on an independent and separate legislative, executive, and judicial division of government. When power is placed in one department, it cannot be exercised by another. *Colo. Const. art. III; People v. Davis*, 526 P.2d 312, 313 (Colo. 1974).

Here, Plaintiffs request that this Court “act beyond its constitutional capabilities.” *Id.* The Court does not have the power to grant the injunctive relief requested by Plaintiffs, as it “invades the Governor’s exclusive power to grant a commutation after conviction as provided in Article IV, Section 7, of the Colorado Constitution, and therefore violates the doctrine of separation of powers embodied in Article III of the Colorado Constitution.” *Herrera*, 516 P.2d at 627–28.

The Court will next address its ability to issue an injunction requiring the Governor to “take other measures to cure the Constitutional violations.”²⁰ In requesting such relief, Plaintiffs make reference to the Governor’s emergency powers granted to him by the legislature in the Colorado Disaster Emergency Act, found at C.R.S. § 24-33.5-701, *et seq.*²¹ Plaintiffs also reference the Governor’s statutory authority to grant parole to certain inmates under C.R.S. § 17-22.5-403(4) if, “in the governor’s opinion, extraordinary mitigating circumstances exist and such inmate’s release from institutional custody is compatible with the safety and welfare of society.”²²

In enacting the Colorado Disaster Emergency Act, the legislature delegated to the Governor the responsibility for emergency and disaster response, stating that “[t]he governor is responsible for meeting the dangers to the state and people presented by disasters.” C.R.S. § 24-33.5-704(1). Under Colorado law, only the Governor is authorized to declare a state of disaster emergency, which triggers a host of emergency-related powers. C.R.S. § 24-33.5-704(4). These powers include, among others, the ability to issue, amend, and rescind “executive orders, proclamations, and regulations” that have the force and effect of law in response to the conditions presented by the disaster emergency. C.R.S. § 24-33.5-704(2). The Governor also is authorized to suspend or modify regulatory statutes such as those governing eligibility for parole:

In addition to any other powers conferred upon the governor by law, the governor **may** . . . [s]uspend the provisions of any regulatory statute prescribing the procedures for conduct of state business or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency[.]

C.R.S. § 24-33.5-704(7)(a) (emphasis added); *see* Mot. Ex. A. (Executive Order D 2020 016, temporarily suspending certain regulatory statutes concerning criminal justice, including statutes governing inmates).

Here, Plaintiffs request that this Court order the Governor to reduce prison population density through his statutory powers granted by the legislature, either through the issuance of executive

²⁰ Am. Compl. at Prayer for Relief, ¶ 3.b.

²¹ Am. Compl. ¶ 162.

²² Am. Compl. ¶ 163.

orders stemming from his emergency powers under the Colorado Disaster Emergency Act, or through his powers granted under the parole eligibility statute.

As discussed above, “[c]ourts do not have jurisdiction to interfere with the executive branch of the government in the performance of its statutory duties.” *Hufnagel*, 729 P.2d at 373. The Governor has exclusive responsibility for emergency and disaster response, including the ability under the Colorado Disaster Emergency Act to issue, amend, and rescind executive orders, proclamations, and regulations. C.R.S. § 24-33.5-704(2). The Governor also has exclusive power under C.R.S. § 17-22.5-403(4) to grant parole to certain inmates if, in his opinion, “extraordinary mitigating circumstances exist and such inmate’s release from institutional custody is compatible with the safety and welfare of society.”

The decision whether or not to issue executive orders in response to a public health emergency or to grant parole to certain inmates are statutory duties granted to the Governor by the legislature. These decisions lie within the Governor’s sound discretion and exclusive authority, and this Court cannot force the Governor to make such decisions. Accordingly, the Court does not have the power to grant the injunctive relief requested by Plaintiffs.

2. Declaratory Judgment

The Court next addresses Plaintiffs’ request for a “declaration that Defendant Polis’ inaction violates the Colorado Constitution Article II, Section 20.”²³ Plaintiffs argue that “[t]his Court plainly may declare that governmental conduct violates the constitution, and order such violations corrected...as part of the Court’s inherent power.”²⁴ To support this proposition, Plaintiffs cite to C.R.C.P. 57 and to C.R.S. § 13-51-105, which states that “Courts of record within their respective jurisdiction have power to declare rights.” See Colorado Declaratory Judgment Act, C.R.S. § 13-51-101, *et seq.*

In the briefing on the Motion both parties cite to *Foster v. Commissioner of Correction*, 146 N.E.3d 408 (Mass. 2020), a recent case from the Supreme Court of Massachusetts in which inmates brought suit against the Governor and the parole board challenging conditions of their confinement during the COVID-19 pandemic on both Eighth Amendment and substantive due process grounds. Due to the close factual similarities to the present case, the Court finds the analysis in *Foster* to be instructive.

The court in *Foster* dismissed the Governor from the case, stating:

Although the complaint broadly alleges that the defendants have violated the plaintiffs’ State and Federal constitutional rights, the specific allegations against the Governor are notably few. The complaint alleges that the “Governor has refused to act on his near plenary emergency powers when it comes to the health and safety of prisoners.” The plaintiffs seek to compel the Governor to use his authority to order a reduction in the prison population, because, absent his exercise of authority, “[t]here have been no commutations, no furloughs, no increase in earned good times, no

²³ Am. Compl. at Prayer for Relief, ¶ 4.

²⁴ Resp. at 8-9.

releases by the [Department of Correction] to home confinement, little if any increase in the use of medical parole, and no effort by the parole board to streamline the parole process or modify the criteria for release in light of COVID-19.”

[. . .]

Nor is [plaintiffs’] position enhanced by invoking, as they do, the inherent power of this court “to say what the Constitution requires, when the question is properly presented.” Had they alleged that the Governor affirmatively took action that was unconstitutional, or that anything he has done actually caused harm to the plaintiffs from alleged constitutional violations, the situation may well be different. But they do not challenge anything the Governor has in fact done; they only complain of what they allege he could have done but did not. And they certainly do not contend that the Governor had any direct, affirmative involvement in causing the challenged prison conditions.

[. . .]

In short, the complaint claims that the Governor is liable for things he has not done. First, it alleges that he is responsible for failing to reduce the prison population by failing to exercise his executive authority to pardon and grant clemency. Second, it alleges that he has failed to exercise his emergency powers to mitigate the situation. These are not actionable claims. With respect to the first alleged failure to act, it is well settled that the Governor's authority to grant pardons and other clemency is exclusively an executive authority. This court cannot compel him to exercise it.

With respect to the second alleged failure to act, viz., the Governor's failure to utilize his emergency powers to mitigate the situation, this court should tread lightly in telling any Governor when or how to exercise his or her powers. It is one thing for a court to order a Governor to cease engaging in action the court has found to be unconstitutional; it is quite another for a court affirmatively to direct a Governor how to act. For that reason, among others, this court historically has been unwilling to order a Governor to act where the relief sought, if deserved, can be provided by means of a court order against some defendant other than the Governor. If the plaintiffs in this case are indeed entitled to a remedy at the conclusion of the case, it can be provided by an appropriate order or orders directed to the other executive branch officials in the case. As stated, there is no claim that the Governor himself, by any affirmative act he has taken, has “overstepp[ed] constitutional bounds.”

[. . .]

The Governor's presence is simply not necessary to provide any relief that a court may order in this case.

Foster, 146 N.E.3d at 411–412 (internal citations omitted).

As in *Foster*, Plaintiffs in the present case seek to compel the Governor to use his emergency powers and statutory authority to reduce the prison population in response to the COVID-19 pandemic, thereby asking the Court to declare that Defendant Polis’ inaction equates to a constitutional violation. Plaintiffs argue that the judiciary has the “basic right” to review executive power, including alleged inaction by Defendant Polis in violation of his constitutional and statutory powers. “Governor Polis has a clear constitutional duty to ensure that incarcerated people are not subjected to cruel and unusual punishment and a statutory duty to reduce vulnerability to injury and loss of life due to the COVID-19 pandemic under the [Colorado Disaster Emergency Act].”²⁵

In support of this argument Plaintiffs cite to *Ritchie v. Polis*, 467 P.3d 339 (Colo. 2020), in which the Colorado Supreme Court recently held that an emergency executive order modifying signature gathering requirements for state constitutional ballot initiatives violated the Colorado Constitution. *Id.* at 342. However, *Ritchie* is distinguishable from the present case, in that the plaintiffs there challenged specific affirmative action by the Governor—Executive Order D 2020 065.

Plaintiffs’ argument belies the fact that the relief sought in *Ritchie* and similar cases pertains to affirmative actions taken by the executive, such that the judiciary is able to rule on the constitutionality of those actions. In this case, and much like in *Foster*, Plaintiffs are not challenging the constitutionality of an existing statute or the issuance of an executive order; rather, Plaintiffs are requesting that the Court compel the Governor to act.

While the judiciary does have a right to review a governor’s affirmative actions, it is not axiomatic that the judiciary has the right to review a governor’s *inaction* on discretionary matters. The Court does not have the power to declare the Governor’s alleged failure to act unconstitutional, as the decision to exercise or refrain from exercising his constitutional or statutory powers is within his discretion as head of the executive branch. Accordingly, the Court is without power to grant the requested declaratory relief and “issue a declaration that Defendant Polis’ inaction violates the Colorado Constitution article II, section 20.”

C. Mandamus

In the Amended Class Action Complaint, Plaintiffs also request that the Court issue a writ of mandamus “ordering Defendant Polis to exercise his powers under Colo. Rev. Stat. § 24-33.5-704 to correct the unconstitutional conditions and fulfill his emergency response duties.”²⁶ In response, Defendant Polis argues that mandamus is not a proper mechanism to direct the Governor to undertake discretionary acts.²⁷

C.R.C.P. 106(a)(2) provides that relief may be obtained “[w]here the relief sought is to compel a lower judicial body, governmental body, corporation, board, officer or person to perform an act which the law specially enjoins as a duty resulting from an office, trust, or station.”

²⁵ Resp. at 15.

²⁶ Am. Compl. at Prayer for Relief, ¶ 5.

²⁷ Mot. at 10.

Mandamus is “an extraordinary remedy which may be used to compel performance by public officials of a plain legal duty devolving upon them by virtue of their office or which the law enjoins as a duty resulting from the office.” *Sherman v. City of Colorado Springs Planning Comm’n*, 763 P.2d 292, 295 (Colo. 1988) (citing to *Potter v. Anderson*, 392 P.2d 650 (Colo. 1964)). Although mandamus is classed as a legal remedy, it is an extraordinary remedial process which is awarded not as a matter of legal right, but in the exercise of sound judicial discretion. *People v. Buckland*, 269 P. 15 (Colo. 1928).

Relief in the nature of mandamus to compel a public official to perform an act is narrowly interpreted. Such relief will be granted only in cases where the act is administrative in nature and a clear legal duty exists under a statute to perform this act. *People ex rel. Albright v. Board of Trustees of Firemen's Pension Fund*, 82 P.2d 765 (Colo. 1938). If the act sought to be compelled is one involving the exercise of discretion on the part of the official, or requiring a choice between alternative courses of action, then such relief will be denied. *State ex rel. Holmes v. Peck*, 19 P.2d 217, 229 (Colo. 1933).

In *Gramiger v. Crowley*, 660 P.2d 1279 (Colo. 1983), the Colorado Supreme Court established a three-prong test for mandamus relief: (1) the plaintiff must have a clear right to the relief sought; (2) the defendant must have a clear legal duty to perform the act requested; and (3) there must be no other adequate remedy available. *Id.* at 1281.

The Court finds that the analysis in this case should begin with the second prong of the test: “Mandamus lies to compel the performance of a purely ministerial duty involving no discretionary right and not requiring the exercise of judgment. It does not lie where performance of a trust is sought which is discretionary or involves the exercise of judgment.” *Bd. of County Comm'rs v. County Road Users Ass'n*, 11 P.3d 432, 437 (Colo. 2000).

Here, Plaintiffs fail to articulate any clear legal or ministerial duty owed by the Governor. Rather, Plaintiffs request that the court order Defendant Polis “to exercise his powers” under the Colorado Disaster Emergency Act to “correct the unconstitutional conditions and fulfill his emergency response duties.”²⁸ Plaintiffs cannot point to a specific legal duty that the Governor has failed to carry out, instead asking the Court to fashion a broad remedy to constitutional violations. Because the second prong of the test is not satisfied, the Court goes no further in its analysis, as the test is in the conjunctive. Accordingly, mandamus will not lie, as the Court cannot compel the Governor to undertake purely discretionary acts that require the exercise of judgment.

B. Motion to Dismiss – C.R.C.P. 12(b)(5)

Although it is not necessary to reach the alternative ground of dismissal under C.R.C.P. 12(b)(5), the Court finds it proper for purposes of completeness to address the issue as an alternative basis for its decision. In his Motion, Defendant Polis argues that to the extent that he is alleged to have violated Colo. Const. article II, section 20, he is not the proper party to this lawsuit because he does not direct the day-to-day operations, management, and administration of CDOC facilities.

²⁸ Am. Compl. at Prayer for Relief, ¶ 5.

Both parties discuss *Raven v. Polis*, an ongoing class action suit concerning the treatment of transgender women in custody of the CDOC. Denver Dist. Court Case No. 2019CV34492 (July 7, 2020).²⁹ Plaintiffs sued the CDOC and Governor Polis, alleging Colorado Anti-Discrimination Act and constitutional violations. Defendant Polis sought dismissal on grounds that the Governor was an improper party because at the time the lawsuit was filed, there existed other government agencies or officials specifically charged with administering, enforcing, or complying with the particular state law at issue.

In *Raven*, the trial court analyzed prior Colorado decisions in determining that the Governor was a proper party. This Court also analyzed the same cases in reaching its decision in *Franzoy v. State of Colorado*, Denver Distr. Court Case No. 18CV33600 (Jan. 11, 2019). Although the two trial courts reached opposite results as to whether the Governor was a proper party to the lawsuit, the legal authority remains the same.

In *Ainscough v. Owens*, 90 P.3d 851 (Colo. 2004), the Supreme Court held that the Governor was a properly named defendant in a suit challenging the constitutionality of an executive order and personnel policy. The Court found that “when a party sues to enjoin or mandate enforcement of a statute, regulation, ordinance, or policy, it is...entirely appropriate for the plaintiff to name the body ultimately responsible for enforcing that law.” *Id.* at 858. If that body is an administrative agency or the executive branch, the Court reasoned, it is proper to name the Governor as he is the chief executive of the state.

Later, in *Developmental Pathways v. Ritter*, 178 P.3d 524 (Colo. 2008), the Colorado Supreme Court dealt with a challenge to a constitutional amendment which had created an ethics commission to hear certain types of disputes. At the time the lawsuit was filed, the ethics commission had not come into being. Because the commission did not exist yet, the Governor was the “only appropriate state agent for litigation purposes...” *Id.* at 530. For this reason, it was appropriate to name the Governor as a defendant. The Court noted in the next paragraph that had the commission been in existence at the time of the suit, it may have reached a different decision with regards to the propriety of naming the Governor as a defendant.

Lastly, the Court of Appeals’ decision in *Luchessi v. State* is illustrative. 807 P.2d 1185 (Colo. App. 1990). The plaintiff brought a declaratory judgment action attempting to invalidate a tax statute. The court found that under the declaratory judgment statute, any party “affected” by a potential declaration should be joined. Being “affected” by a declaration, the court explained, meant an alteration to the “specific duties” of that state actor. *Id.* at 1193-94. The court found that the county treasurer, county assessor and county commissioners who dealt directly with the plaintiff were proper defendants under the statute, contrasted with other state and county officials (i.e., the Governor, the state property tax administrator and the county attorney), who were not proper defendants.

In *Ainscough*, the Court held that it is appropriate to name the body responsible for enforcing a law when challenging that law’s constitutionality. Here, there is no challenge to the constitutionality of a law. To the extent that enforcement of the law is sought, the body responsible for the operations, management, and administration of those incarcerated is CDOC, a named defendant. In

²⁹ This case is currently pending before the Colorado Supreme Court. 20SA321.

Developmental Pathways, the Supreme Court held that because the responsible body was not in existence at the time of the lawsuit, it was proper to name the Governor as a defendant because he was the only proper agent of the state. Here, it is well known that CDOC is the proper agent of the state relative to the operations regarding incarcerated persons. Further, CDOC is named as a defendant in this action.

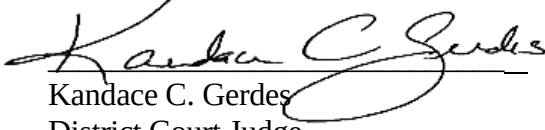
Accordingly, where the proper party responsible for the day-to-day operations of CDOC is Executive Director Dean Williams, a named party, Colorado case law does not support the Governor as a proper party to the lawsuit.

IV. CONCLUSION

The Governor's C.R.C.P. 12(b)(1) and 12(b)(5) Motion To Dismiss is hereby GRANTED. Defendant Polis is hereby dismissed from Plaintiffs' suit with prejudice.

SO ORDERED this 24th day of December, 2020.

BY THE COURT:


Kandace C. Gerdes
District Court Judge