IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 16-cv-02733-STV

BIONCA CHARMAINE ROGERS,
CATHY BEGANO,
ANDREW ATKINS, and
MARC TREVITHICK,

Plaintiffs,

v.

COLORADO DEPARTMENT OF CORRECTIONS,
RICK RAEMISCH, in his official capacity,
RYAN LONG, in his official capacity, and
MIKE ROMERO, in his official capacity,

Defendants.

LEONID RABINKOV,
CATHY BEGANO,
ANDREW ATKINS, and
MARC TREVITHICK,

Plaintiffs,

v.

COLORADO DEPARTMENT OF CORRECTIONS,

Defendant.

PLAINTIFFS' POST-HEARING BRIEF

Plaintiffs respectfully submit this post-hearing brief, addressing the question raised by the Court during the July 26, 2019 hearing: whether the case of *Brown v. Buhman*, 822 F.3d 1151 (10th Cir. 2016), applies to Plaintiffs' Americans with Disabilities Act ("ADA")[1] and Rehabilitation Act[2] claims for injunctive relief ordering the Colorado Department of Corrections ("CDOC") to "cease discriminating against them by, among other things, providing videophone service to deaf prisoners and implementing policies to ensure access to such videophones." Amended Complaint, ECF 115, at 12. Plaintiffs also submit, for the Court's convenience, a copy of the timeline presented during the hearing, as well as citations supporting each entry in the timeline. *See* Exhibits 1 and 2 hereto.

In the *Brown* case, the plaintiffs, a "plural family" with one husband and multiple "sister wives," challenged the possibility they would be prosecuted by the county attorney for bigamy. These claims were held to be moot based on the following facts:

- the county closed its file on the Brown family, 822 F.3d at 1155;
- the county adopted a policy that would exclude the Browns from prosecution, *id.*at 1159;
- the county attorney signed a declaration stating that he did not intend to prosecute the Browns, *id.*;
- there was no history "in recent memory" of bigamy prosecutions, *id.* at 1157, 1158;
- the county attorney conceded that there were no legal grounds to prosecute the Browns, *id.* at 1159; and
- the plaintiffs had moved to Nevada and the statute of limitations had lapsed, making prosecution by a Utah county attorney impossible, *id.* at 1156, 1173.

[1] 42 U.S.C. § 12131 *et seq*.
[2] 29 U.S.C. § 794.

Unlike the present case, there was no evidence that the county attorney, on whose sworn statement the Tenth Circuit relied, had made other misrepresentations under oath.

***Brown* is distinguishable from the present case** on a number of grounds. Indeed, it would only be on point here if the county attorney in *Brown* had – counterfactually – taken the steps in the left-hand column, each of which is equivalent to a stage of CDOC's consideration, cancellation, and reconsideration of videophones:

***Brown* would (counterfactually) only be relevant if the county attorney . . .**	**When in fact CDOC . . .**
had previously promised not to prosecute the Browns;	worked on a videophone program from 2013-2016, promising Plaintiffs Rogers and Atkins that there would be videophones;
prosecuted the Browns anyway;	canceled the pilot program in 2016;
continued to prosecute the Browns for two more years after they filed suit;	installed no videophones and produced no evidence that videophones were being considered for the two years after Ms. Rogers filed suit (2016-2018);
promised that he would not prosecute the Browns in the future in a sworn affidavit that contained a material misrepresentation under oath;	submitted Adrienne Jacobson's affidavit stating that CDOC intends to keep videophones, which affidavit also includes a material misrepresentation;
while maintaining the county attorney's right to prosecute the Browns; and	consistent maintained the legal position that videophones are not required, ECF 37, 119, 120, 133, 141, 143, and 148;
while the Browns remained in Utah, plurally married within the statute of limitations	while Plaintiffs all remain in custody of the CDOC.

Each of the items in the left hand column is contrary to the facts in *Brown* but consistent – as shown in the right hand column – with the facts of this case. The only thing *Brown* has in common with this case is the presence of a sworn affidavit, which similarity is rendered irrelevant by Ms. Jacobson's other misrepresentations under oath. *See also Hill v. Williams*, Nos. 16–cv–02627–CMA, 16–cv–02649–CMA, 2016 WL 8667798, at *3, 6-7 (D. Colo. Nov. 4,

2016) (distinguishing *Brown* and holding case not moot despite declarations from two district attorneys, a deputy district attorney, a deputy attorney general, and a chief prosecutor; noting that "the Tenth Circuit in large part relied on the Browns' relocation to Nevada and their intent not to return to Utah to support a finding that they faced no credible threat of prosecution.").

Ms. Jacobson is an unreliable affiant. The question addressed during the hearing was whether a single statement in an affidavit by Ms. Jacobson could satisfy Defendant's "heavy burden" to show that "subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc*., 528 U.S. 167, 189 (2000). This single mid-litigation statement, even if reliable, could not satisfy that burden. *See infra* at 5-6. In addition, Ms. Jacobson has demonstrated that her testimony is not reliable:

- Elsewhere in the same affidavit, she states – under oath – that "Executive CDOC staff were unaware of the pilot program." Jacobson Aff. ¶ 5 (ECF 133-6). This is false, as demonstrated by the declaration of the former Director of Legal Services. ECF 147-2.
- In her April 9, 2018, deposition, she stated – under oath – that the pilot program videophone kiosks had been removed. Jacobson Dep. 17:1-19 (ECF 140-7 at 5). This was also false. *See* Robertson Decl. ¶ 12 and Ex. 9 (ECF 140-2; 140-11); *see also* Bradley Dep. 96:5 – 97:10 (ECF 140-8 at 11-12).

There is significant evidence that CDOC has been working to divest the Court of jurisdiction, precisely the sort of "gamesmanship" *Brown* stated was the purpose of the voluntary cessation exception to mootness. 822 F.3d at 1166. First, CDOC only began to address videophones after a 15-month silence because "CTCF's deaf population [was] being contacted by Attorney Amy Robertson. (The same attorney representing the deaf women in the pending lawsuit regarding lack of videophones.)" ECF 141-1 at 30, ¶ 84.

Second, CDOC sought repeated extensions of the discovery process on essentially false pretenses and engaged in other discovery violations in attempted support of mootness. CDOC:

- asked for and received a six-week extension to disclose expert witnesses in the summer of 2018, ECF 75, 76, 82, but did not disclose an expert;
- requested two to three months of discovery following the addition of Leonid Rabinkov's claims to the case in early 2019, January 7, 2019 Status Conference, Tr. at 6:19-25, but did not take discovery – in any form – of Mr. Rabinkov or anyone else;
- based this latter request on a misrepresentation to this Court that the CDOC didn't "have knowledge as to whether [Mr. Rabinkov] is truly deaf." January 7, 2019 Status Conference, Tr. at 6:10-11. In fact, Mr. Rabinkov was on the list of prisoners "in CDOC custody that are known to be deaf" that was included in Defendants' verified responses to interrogatories dated January 4, 2018, ECF 140-6 at 7-8; and
- withheld the documents – responsive to November, 2017, discovery – that demonstrated that Ms. Jacobson's assertion concerning the pilot program was false. Plaintiffs ultimately obtained these documents, in June 2019, from a third party. ECF 147-1 at 2-3.

Tenth Circuit precedent suggests it would look to cases in sister circuits with similar facts. Given that *Brown* is distinguishable on its facts as described above – and that CDOC has cited no other cases involving facts similar to those of the present case – the Tenth Circuit would look to voluntary cessation cases with similar facts in other circuits. *See Jordan v. Sosa*, 654 F.3d 1012, 1037 (10th Cir. 2011) (finding no voluntary cessation cases on point, looks to Eleventh Circuit precedent). Here, the Tenth Circuit would most likely look to the case of *Heyer v. United States Bureau of Prisons*, 849 F.3d 202 (4th Cir. 2017), a case in which a deaf prisoner in federal custody sought videophones and other accommodations. In that case, the district court had relied on the declaration under oath of a prison chaplain that the requested accommodations would be provided.[3] The Fourth Circuit reversed, holding that "the chaplain's affidavit cannot be viewed

[3] *Heyer v. U.S. Bureau of Prisons*, No. 5:11-CT-3118-D, 2015 WL 1470877, at *14 (E.D.N.C. Mar. 31, 2015). CDOC relied on this district court case without informing this Court

as a statement of current policy, but must instead be understood as a mid-litigation change of course. Viewed through that lens, the chaplain's statement does not support the district court's decision to dismiss these claims as moot. . . . [T]he statement amounts to little more than a 'bald assertion[ ]' of future compliance, which is insufficient to meet BOP's burden." *Id.* at 220; *see also Sheely v. MRI Radiology Network, P.A.*, 505 F.3d 1173, 1181, 1183 (11th Cir. 2007) (holding that hospital that announced a new ADA policy just prior to moving for summary judgment did not moot claims).

The *McBride* court reached a conclusion similar to *Heyer*, applying voluntary cessation and rejecting mootness in another case involving claims for videophones and other accommodations for deaf prisoners. The court quoted *Heyer* for the proposition that mid-litigation statements could not meet the prison's burden on mootness, and added "in the context of prison litigation, courts are particularly suspicious of non-binding policy changes by correctional institutions party to the litigation." *McBride v. Michigan Dep't of Corr.*, 294 F. Supp. 3d 695, 720 (E.D. Mich. 2018).

A number of previous decisions in this district provide not only legal precedent but factual support for the proposition that Plaintiffs' claims against CDOC are not moot. The plaintiffs in *Ybanez v. Raemisch* challenged a CDOC policy relating to explicit content. No. 14-CV-02704-PAB-MLC, 2018 WL 2994416 (D. Colo. June 14, 2018). The policy had originally complied with a pending settlement agreement but "following the expiration of the settlement agreement," CDOC amended the regulation to expand the range of materials it could censor. *Id.*

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that it had been reversed by the Fourth Circuit for the proposition for which CDOC cited it. ECF 133 at 11.

at *1. (That is, lacking legal compulsion, the CDOC "return[ed] to [its] old ways" as warned of in *Friends of the Earth*, *see* 528 U.S. at 189.) After the plaintiffs sued, CDOC changed the policy again and argued that the claims were moot. As here, the CDOC relied on the sworn testimony of Ms. Jacobson. *Id.*, Defs.' Reply in Supp. of Summ. J. (ECF 167 at 40). Magistrate Judge Carman, sitting by designation, rejected this argument based on the voluntary cessation doctrine, noting that the CDOC had not conceded that the challenged policies violated the law and holding that CDOC had "not pointed to any legal or practical barrier to their reinstatement of the previous versions of the policy . . .." *Ybanez*, 2018 WL 2994416 at *3. That is on point with the present case: CDOC has not conceded that videophones are required and – as demonstrated by the cancellation of the 2013-2016 videophone pilot program – there is no "legal or practical barrier" to cancelling the current program.

Similarly, in *Young v. Raemisch*, after the plaintiffs filed suit challenging a CDOC policy, CDOC changed the policy and moved for summary judgment based on mootness. No. 13-CV-01744-RPM, 2015 WL 4607679, at *1 (D. Colo. Aug. 3, 2015). This motion was based on the sworn testimony of Ms. Jacobson and a number of other CDOC officials. *Id.*, Mot. for Summ. J. Pursuant to Fed. R. Civ. P. 56 (ECF 45 at 2-4, 14-15). Judge Matsch rejected this argument based in part on the fact that CDOC would not concede that the earlier regulation violated the First Amendment. *Young*, 2015 WL 4607679, at *1; *see also Vigil v. Colorado Dep't of Corr.*, No. 09-CV-01676-PAB-KLM, 2012 WL 2919660, at *2 (D. Colo. July 17, 2012) (applying voluntary cessation; denying mootness after CDOC policy change); *Gibson v. Campbell*, No. 09-CV-00983-WYD-KLM, 2014 WL 482190, at *3 (D. Colo. Feb. 6, 2014) (same).

The elephant in the room. The Civil Rights Education and Enforcement Center, www.creeclaw.org, a small nonprofit (five lawyers; three paralegals), took on this originally-*pro se* case after inquiring of Ms. Jacobson – in an open records request – whether CDOC had any plans to provide videophones. She told us, in May 2017, that there were no such plans. ECF 150-10 at 60. We entered an appearance and litigated assiduously for two years. We retained experts to rebut CDOC's consistent position – espoused to this day – that TTYs are sufficient to comply with the ADA. ECF 140-3, 140-4. We litigated through discovery delays and violations, *see supra*. We made repeated trips to prisons in Cañon City and Denver because we could not talk to our clients by phone. We have invested over 1,000 hours in this case.

These are the sorts of "efforts" the Supreme Court referred to when it said, "[i]t is no small matter to deprive a litigant of the rewards of its efforts ... . Such action on grounds of mootness would be justified only if it were absolutely clear that the litigant no longer had any need of the judicial protection that is sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000). As *Ybanez*, *Young*, *Vigil*, *Gibson*, and CDOC's history of cancelled projects show, Plaintiffs need the judicial protection they seek.

Without this judicial protection, there is nothing to prevent CDOC from again stopping the videophone program and depriving Plaintiffs of the effective communication to which they are entitled under the ADA and Rehabilitation Act. Plaintiffs would be back at square one and be required to exhaust the administrative process to even bring their claims back before the court. In addition, Plaintiffs' requested relief goes beyond mere installation of videophones to include maintenance, equivalent access, and – as this Court pointed out during oral argument – damages. Even if Plaintiffs were no longer being harmed by unequal treatment in CDOC's phone program

and voluntary cessation did not apply – neither of which Plaintiffs concede – Plaintiffs' damages claims are inextricably intertwined with their claims for injunctive relief. Ultimately, mooting the injunctive claims would have no impact on the proof Plaintiffs will put on at trial.

While the discussion of the effect of mootness – after years of grievances and litigation, based on one mid-litigation statement – on the larger question of the ability of CREEC or any other civil rights nonprofit to bring impact litigation has not been part of this briefing, Plaintiffs respectfully urge the Court to read the *amicus* brief of the Uptown People's Law Center in the case of *Prison Legal News v. Federal Bureau of Prisons*, No. 18-1486 (10th Cir.), attached as Exhibit 3 hereto, which eloquently shows the devastating effect of allowing "strategic capitulation" such as CDOC's here. *Id.* at 11-13; *see also Vigil*, 2012 WL 2919660, at *1 (denying mootness in part because it would allow "CDOC to avoid responsibility for" litigation costs); *Gibson*, 2014 WL 482190, at *3 (same).

CONCLUSION

For the reasons set forth above and in Plaintiffs' previous briefing, Plaintiffs respectfully request that this Court hold that Plaintiffs' claims are not moot.

Respectfully submitted,

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Dated: July 31, 2019

CERTIFICATE OF SERVICE

I hereby certify that on July 31, 2019 I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system, which will provide electronic service to the following:

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