DISTRICT COURT, DENVER COUNTY, COLORADO 1437 Bannock Street, Room 256 Denver, Colorado 80202	
RICHARD LILGEROSE and HAROLD MORTIS, on their own behalf and on behalf of those similarly situated, Plaintiffs, v. JARED POLIS, in his official capacity as the Governor of Colorado; DEAN WILLIAMS, in his official capacity as the Executive Director of the Colorado Department of Corrections; and COLORADO DEPARTMENT OF CORRECTIONS, an agency of the State of Colorado; Defendants.	▲ **COURT USE ONLY** ▲
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DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT UNDER C.R.C.P. 12(B)(5)	

Defendants Jared Polis, Dean Williams, and the Colorado Department of Corrections, through the Colorado Attorney General, respectfully submit this motion to dismiss Plaintiffs' First Amended Complaint under Rule (12)(b)(5) of the Colorado Rules of Civil Procedure.

CERTIFICATE OF CONFERRAL

Undersigned counsel certify that they have conferred with counsel for Plaintiffs regarding the relief requested in this motion. Plaintiffs' counsel indicate that they oppose the motion.

INTRODUCTION

On November 6, 2018, Colorado voters approved a referendum amending article II, section 26 of the Colorado Constitution. That provision, which previously banned slavery or involuntary servitude in the state "except as a punishment for crime, whereof the party shall have been duly convicted," was modified to remove that exception. Plaintiffs attempt to use this modernization as a basis to declare the CDOC inmate work program and its authorizing statutes unconstitutional.

Plaintiffs' claims rest on two faulty assumptions: First, that the inmate work program was ever justified by the exception to article II, section 26 that was removed by the voters; and second, that any consequences for declining to work amount to punishment. CDOC's inmate work program is administered in support of CDOC's mission to rehabilitate offenders. And while inmates are generally required to work as part of the rehabilitative process, CDOC does not impermissibly punish inmates or threaten them with legal sanctions for refusal to work. The Amended Complaint fails to state any plausible entitlement to the requested relief and should be dismissed.

BACKGROUND

Colorado's inmate work program was created and is administered as part of CDOC's obligation to rehabilitate offenders. Under Colorado law, the Executive Director of the CDOC is required to "provide work and self-improvement opportunities" for inmates and to "establish an environment that promotes habilitation for successful reentry into society." § 17-1-103(1)(a), C.R.S. (2022). All inmates are required to participate in a rehabilitation and work program in some form under rules and regulations implemented by CDOC. §§ 17-20-115, -117, C.R.S. This may include assignment to and participation in an intensive labor work program for thirty days after initial placement at a correctional facility. § 17-29-103(2), C.R.S. The intensive labor work program operates "on an incentive basis"; an inmate assigned to this program becomes eligible for reassignment after demonstrating willingness to cooperate in rehabilitation, modify behavioral patterns, and learn a work ethic and a job skill. § 17-29-103(1), C.R.S.

Under this statutory framework, CDOC's Offender Personnel Policy establishes non-discriminatory procedures for referring, assigning, and terminating inmates from assignments, as well as opportunities for inmates to request reasonable accommodations. *See* CDOC Administrative Regulation (AR) 850-03, § II (attached hereto as Exhibit A).[1] Under AR 850-03, all eligible inmates are expected to work unless they are assigned to an approved education or training program or qualify for unassigned status due to disability or medical needs. *Id.* §§ IV.A.2; IV.D. Inmates "have the option of refusing to participate in any rehabilitation or

[1] The Complaint refers to and challenges the constitutionality of AR 850-03. *See* Am. Compl. ¶¶ 26-27, 147-57. The Court may consider a document referred to in the Complaint without converting a motion to dismiss into a motion for summary judgment, "notwithstanding that the document is not formally incorporated by reference or attached to the complaint." *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 297, 299 (Colo. App. 2007).

treatment program except adult basic education or GED classes and programs required by statute or ordered by the sentencing court or paroling authority." *Id*. § IV.A.2. All inmates are compensated for work performed *Id*. § IV.E. Inmates assigned to jobs are paid monthly at the designated daily rate for the days worked; inmates who are unassigned due to disability or medical issues are paid at the Grade 1 rate and do not lose access to any services or programs available to assigned inmates. *Id*. §§ IV.E.10, IV.E.11.

Inmates who refuse to work may lose privileges, including being placed on Restricted Privileges (RP) status. *See id*. § IV.A.2; *see also* Restriction of Offenders' Privileges in Correctional Facilities, AR 600-05 (attached hereto as Exhibit B).[2] Privileges that may be removed include televisions, other electronics, and access to snacks. *See* § 17-20-114.5(1), C.R.S.; Ex. B at 1. Inmates on RP status have some limitations imposed on their access to canteen purchases, certain personal property items, recreation time and equipment, and visiting privileges. *Id.* at 2-3.

Inmates who refuse to work may also face disciplinary proceedings under the Code of Penal Discipline (COPD). *See* AR 150-01 (attached hereto as Exhibit C).[3] The sanctions available under the COPD for failure to work amount to loss of privileges. *See id.* Failure to

[2] AR 600-05 establishes RP status procedures, which are discussed at length in the Complaint. *See* Am. Compl. ¶¶ 51-74. Accordingly, the Court may consider this AR without converting this motion into a motion for summary judgment. *See Walsenburg Sand & Gravel Co., Inc.*, 160 P.3d at 299.

[3] The Complaint refers to the COPD and challenges its consequences for failure to work as unconstitutionally compelling involuntary servitude. *See* Am. Compl. ¶¶ 31, 32, 45, 48. Accordingly, the Court may consider it without converting this motion into a motion for summary judgment. *See Walsenburg Sand & Gravel Co., Inc.*, 160 P.3d at 299.

work is a class II offense for which the available sanctions are: (1) up to 30 days' loss of good time; (2) up to 30 days' loss of privileges; or (3) up to 15 days' Housing Restriction Sanction. *Id.* at 29 (Class II Offenses & Authorized Sanction Matrix). Good time does not constitute service of a sentence, nor does it shorten a sentence; it is used to determine parole eligibility dates. *See Rather v. Suthers*, 973 P.2d 1264, 1266 (Colo. 1999), *cert denied*, 528 U.S. 834 (1999). Housing Restriction Sanction is a limitation on day hall or pod privileges that applies only during an inmate's time off work or program assignments. Exhibit C, at 3, 21. It is distinct from Restrictive Housing, which requires an inmate "to be confined to a cell for at least 22 hours per day." Exhibit C, at 3. Restrictive Housing is *not* an available sanction for failure to work. *See id.* at 29. Inmates who refuse to work are not subject to punitive measures such as administrative segregation, nor can they face additional criminal punishment or receive lengthier sentences as a consequence for refusal to work.

Plaintiffs Mortis and Lilgerose are inmates housed in the Fremont Correctional Facility of the Colorado Department of Corrections. They allege that they were required to work in the prison's kitchen in late 2020. Am. Compl. ¶¶ 88-89, 106-107. Prison officials allegedly informed Mr. Mortis that if he declined to work in the kitchen, he could face removal from the incentive living program, restricted privileges, loss of his previous job assignment in the furniture shop, and loss of earned time. *Id.* ¶¶ 88-95. Mr. Mortis declined to work and Plaintiffs allege that CDOC withheld two days of earned time from him. *Id.* ¶ 97. When Mr. Lilgerose stopped working in around December 2020, Plaintiffs allege that CDOC withheld four days of earned time from him and he lost his spot in an incentive living unit. *Id.* ¶¶ 109-110. Mr. Lilgerose's case manager also allegedly informed him that ordinarily he would be placed on RP status as a

consequence for declining to work; however, RP procedures had been temporarily suspended because of the facility's COVID-19 protocols, so this consequence was not imposed. *Id.* ¶ 112.

Plaintiffs assert that the work requirements, and the consequences they faced and may face for declining to work, amount to involuntary servitude in violation of the Colorado Constitution. They seek an injunction prohibiting Defendants from requiring inmates to work and restraining them from enforcing sections 17-20-115, 17-20-117, and 17-29-103, C.R.S., and AR 850-03.

STANDARD OF REVIEW

Rule 12(b)(5) of the Colorado Rules of Civil Procedure provides that a court may dismiss one or more claims asserted in a complaint for "failure to state a claim upon which relief can be granted." Colo. R. Civ. P. 12(b)(5). "A complaint may be dismissed if the substantive law does not support the claims asserted, or if the plaintiff's factual allegations do not, as a matter of law, support a claim for relief…." *Pena v. Am. Family Mut. Ins. Co*., 463 P.3d 879, 881 (Colo. App. 2018) (citations omitted). Like the federal courts, the Colorado Supreme Court has adopted a "plausibility" pleading standard when considering a Rule 12(b)(5) dismissal motion. *See Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016).

Under Rule 12(b)(5), courts "accept all factual allegations in the complaint as true and view them in the light most favorable to the plaintiff." *Denver Post Corp. v. Ritter*, 255 P.3d 1083, 1088 (Colo. 2011). However, they are not required to accept as true legal conclusions that purport to be factual allegations. *Id.*; *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008). In resolving a motion to dismiss for failure to state a claim, a court should consider only the facts alleged in the complaint, documents attached as exhibits or referenced in

the complaint, and matters of which the court may take judicial notice, such as public records. *See Walker v. Van Laningham*, 148 P.3d 391, 397 (Colo. App. 2006) (discussing judicial notice); *Yadon v. Lowry*, 126 P.3d 332, 336 (Colo. App. 2005) (discussing documents attached or referenced in the complaint).

ARGUMENT

Colorado courts presume that a statute enacted by the General Assembly is constitutional. *People v. Vasquez*, 84 P.3d 1019, 1021-22 (Colo. 2004). A party challenging a statute's validity bears the burden of proving its unconstitutionality beyond a reasonable doubt. "A statute is facially unconstitutional only if 'no conceivable set of circumstances exists under which it may be applied in a constitutionally permissible manner.'" *People v. M.B.*, 90 P.3d 880, 881 (Colo. 2004) (quoting *Vasquez*, 84 P.3d at 1021). "To prevail on an as-applied constitutional challenge, the challenging party must 'establish that the statute is unconstitutional under the circumstances in which the plaintiff has acted or proposes to act.'" *People v. Maxwell*, 401 P.3d 523, 524 (Colo. 2017) (quoting *Qwest Servs. Corp. v. Blood*, 252 P.3d 1071, 1085 (Colo. 2011)).

Plaintiffs assert that the 2018 amendment to article II, section 26 of the Colorado Constitution invalidated the statutory and administrative requirements that inmates work in some form. This argument, however, rests on a fundamental misunderstanding of the work requirements and the intent of Colorado voters in amending the ban on involuntary servitude. Because Plaintiffs fail to allege sufficient facts to state a claim that the inmate work requirements are unconstitutional, their claims must be dismissed.

A. Loss of privileges as a consequence for declining to work does not amount to involuntary servitude.

Because the 2018 constitutional amendment removed the "penal exception" language, federal cases examining claims for Thirteenth Amendment violations made by individuals not convicted of a crime (including pretrial or immigration detainees) are instructive in determining whether conditions impose involuntary servitude. In *United States v. Kozminski*, 487 U.S. 931 (1988), the United States Supreme Court addressed and defined the conduct that constitutes "involuntary servitude" under federal statutes enacted to enforce the Thirteenth Amendment. As the Court explained,

> The primary purpose of the [Thirteenth] Amendment was to abolish the institution of African slavery as it had existed in the United States at the time of the Civil War, but the Amendment was not limited to that purpose; the phrase "involuntary servitude" was intended to extend "to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results."

Kozminski, 487 U.S. at 942. Under *Kozminski*, individuals claiming to have been forced into involuntary servitude must show that they were physically compelled to do the work in question or that they faced legal sanction for refusing. Other types of coercion will not be enough: "[t]he guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion." *Id.* at 944; *A.M. ex rel. Youngers v. New Mexico Dep't of Health*, 108 F. Supp. 3d 963, 995 (D.N.M. 2015).

As other circuits have held, this principle includes situations in which an individual is given a choice to work, but a refusal to do so will entail negative – even serious – consequences. *See, e.g., Immediato v. Rye Neck Sch. Dist*., 73 F.3d 454, 459 (2d Cir. 1996) ("The Thirteenth Amendment does not bar labor that an individual may, at least in some sense, choose not to perform, even where the consequences of that choice are 'exceedingly bad.'"); *Graves v.*

Watson, 909 F.2d 1549, 1552 (5th Cir. 1990) (holding that "[w]hen the employee has a choice, even though it is a painful one, there is no involuntary servitude"). Courts reviewing challenges to work requirements imposed on pretrial and immigration detainees have reached similar conclusions. *See Channer v. Hall*, 112 F.3d 214, 219 (5th Cir. 1997) (holding that "the federal government is entitled to require a communal contribution by an INS detainee in the form of housekeeping tasks, and that [plaintiff's] kitchen service, for which he was paid, did not violate the Thirteenth Amendment's prohibition of involuntary servitude"); *Hause v. Vaught*, 993 F.2d 1079, 1085 (4th Cir. 1993) (required cleaning assignments were not inherently punitive and were related to the legitimate, non-punitive governmental objective of prison cleanliness); *Jobson v. Henne*, 355 F.2d 129, 131-32 (2d Cir. 1966) (inmates in mental hospitals can be required to perform housekeeping chores); *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992) (requiring a pretrial detainee to perform housekeeping chores is not punishment).

Here, Plaintiffs complain that they are required to perform kitchen or other maintenance-related work – precisely the kind of housekeeping work that courts have repeatedly found not to be punitive. And Plaintiffs make no plausible, non-conclusory allegations that they were physically compelled to work at a prison job, or that they will face legal sanction or lose access to basic rights, such as food, shelter, or medical care, if they refuse to work. Rather, their allegations make clear that inmates' basic human rights are guaranteed regardless of whether they work. Inmates on RP status receive meals, for example, if allegedly with less time in the dining hall. *See id.* ¶ 61. They are given shelter, albeit in units that do not provide extra privileges as an incentive for program participation and good behavior. *See id.* ¶ 64. They are

permitted telephone calls and visits with family and loved ones, even if they have fewer opportunities for these social interactions than they would otherwise have. *See id.* ¶¶ 59, 63.

In short, Plaintiffs allege that the consequences for refusal to work amount to a loss of privileges, including removal from incentive units, being placed on RP status, and not being awarded earned time. *See* Am. Compl. ¶ 52. However, prison privileges are just that – privileges. Because inmates have no entitlement to these privileges, withholding them as a consequence of not working is not so coercive as to constitute slavery or involuntary servitude. *See* § 17-20-114.5(1), C.R.S.; *see also Estate of Buzzelle v. Colorado State Hosp.*, 491 P.2d 1369, 1371 (Colo. 1971).

B. Loss of earned time as a consequence for declining to work does not amount to involuntary servitude.

Messrs. Mortis and Lilgerose's allegations that they lost two and four days of earned time, respectively, for refusing to work do not make the inmate work requirements a form of involuntary servitude. Despite Plaintiffs' unsupported allegations to the contrary, the decision to withhold earned time does not lengthen an inmate's sentence or impose an additional criminal punishment. Pursuant to § 17-22.5-405(1), C.R.S., earned time credits are awarded for substantial progress in rehabilitation or work programs. *Rather*, 973 P.2d at 1266. Earned time "may be deducted from the inmate's sentence" upon a demonstration of consistent progress in programs such as work, education, and counseling programs. § 17-22.5-405(1), C.R.S.; *see also Meyers v. Price*, 842 P.2d 229, 232 (Colo. 1992) ("[T]he department of corrections retains the authority to grant or deny the award of earned time credits."). The award or withdrawal of earned time is not subject to judicial review because an award of earned time is discretionary, and there

is no right to it under either federal or state law. *See Templeman v. Gunter*, 16 F.3d 367, 369 (10th Cir. 1994); *Rather*, 973 P.2d at 1266.

Plaintiffs appear to misunderstand the significance and discretionary nature of earned time credits. Earned time is awarded at the discretion of the CDOC as an incentive and reward for inmates who affirmatively engage in positive behaviors identified in C.R.S. § 17-22.5-405. If the CDOC awards these credits to an inmate who engages in such positive affirmative behaviors, the credits operate to accelerate their parole eligibility and mandatory release dates. Nonetheless, because inmates have no right to earned time credit under Colorado law, the denial of earned time credit cannot be said to increase their punishment. *See Reeves v. Colo. Dep't of Corr.*, 155 P.3d 648, 654 (Colo. App. 2007) ("Because Reeves had no vested right in earned time, the DOC did not increase his punishment by reclassifying Reeves . . . and withholding earned time."); *Chambers v. Colo. Dep't of Corr.*, 205 F.3d 1237, 1242 (10th Cir. 2000) (withholding of earned time credits for a CDOC offender who did not comply with requirements for sex offender did not violate ex post facto laws). And because earned time does not affect the length of a sentence and inmates have no right to earned time, withholding earned time for failure to comply with programming (including work requirements) does not amount to a legal sanction that would support a claim of involuntary servitude.

C. Colorado voters did not intend to abolish CDOC's work requirements.

Plaintiffs claim that CDOC has "ignored the will of Colorado's voters" by continuing to require inmates to work or participate in programming in some form. *See* Am. Compl. ¶ 8. To the extent Plaintiffs argue that Colorado voters intended to eliminate CDOC's work requirements

when they amended article II, section 26, the ballot measure's language contradicts that assertion:

> WHEREAS, The state recognizes that allowing individuals convicted of a crime to perform work incident to such convictions, including labor at penal institutions or pursuant to work-release programs, assists in such individuals' rehabilitations, teaches practical and interpersonal skills that may be useful upon their reintegration with society, and contributes to healthier and safer penal environments; and
>
> WHEREAS, Because work provides myriad individual and collective benefits, the purpose of this proposed constitutional amendment is not to withdraw legitimate opportunities to work for individuals who have been convicted of a crime, but instead to merely prohibit compulsory labor from such individuals ….

2018 State Ballot Information Booklet (Blue Book), Amendment A – Prohibit Slavery and Involuntary Servitude in All Circumstances, Title and Text.[4] In addition, the fiscal impact statement for the amendment noted only that the measure "may minimally impact state and local government revenue, costs, and workload if court filings increase due to offenders filing additional lawsuits." *Id*. Thus, to the extent the plain language of the constitutional amendment is ambiguous, the ballot measure's language makes clear that the amendment was never intended to disrupt prison work programs.

As Plaintiffs recognize, Colorado voters did not bar the State from providing incentives for inmates to work. *See* Am. Compl. ¶ 6. CDOC has done precisely that. By awarding privileges

[4] Available at https://leg.colorado.gov/sites/default/files/2018_english_final_for_internet_updated_language_73_0.pdf. "When interpreting a constitutional amendment, [courts] may look to the explanatory publication of the Legislative Council of the Colorado General Assembly, otherwise known as the Blue Book." *Grossman v. Dean*, 80 P.3d 952, 962 (Colo. App. 2003).

to inmates who comply with programming (including work requirements), and denying privileges to inmates who refuse to work, CDOC incentivizes work and programming compliance consistent with the voters' will. Plaintiffs simply disagree with the incentives CDOC has put into place. But that disagreement does not support a plausible claim that they are subjected to slavery or involuntary servitude. Because Plaintiffs state no cognizable claim that the statutes requiring inmates to work or AR 850-03 violate article II, section 26 of the Colorado Constitution, their claims should therefore be dismissed.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss this action.

Respectfully submitted May 27, 2022.

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CERTIFICATE OF SERVICE

This is to certify that the within **DEFENDANTS' MOTION TO DISMISS FIRST AMENDED COMPLAINT UNDER C.R.C.P. 12(B)(5)** was served upon all parties herein electronically and/or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, on May 27, 2022, addressed as follows:

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