IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Consolidated Civil Action No. 16-cv-02733-STV

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

Plaintiffs,

v.

COLORADO DEPARTMENT OF CORRECTIONS,
RICK RAEMISCH, in his official capacity as Executive Director of the Colorado Department of Corrections,
RYAN LONG, in his official capacity as the Warden of the Denver Women's Correctional Facility, and
MIKE ROMERO, in his official capacity as Warden of the Colorado Territorial Correctional Facility,

Defendants.

Civil Action No. 1:18-cv-02926-MEH

LEONID RABINKOV,
CATHY BEGANO,
ANDREW ATKINS,
MARC TREVITHICK,
on behalf of themselves and others similarly situated,
Plaintiffs,
v.
COLORADO DEPARTMENT OF CORRECTIONS,
Defendant.

PARTIAL MOTION TO RECONSIDER COURT'S ORDER REGARDING DEFENDANTS' MOTION TO DISMISS AS MOOT AND PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT

Defendants, through the Colorado Attorney General, respectfully submit the following Partial Motion to Reconsider Court's Order regarding Defendants' Motion to Dismiss as Moot and Plaintiffs' Partial Motion for Summary Judgment (Doc. 158, issued 9/18/2019). In support thereof, Defendants state as follows:

CERTIFICATE OF CONSULTATION

Pursuant to D.C.COLO.LCivR 7.1(A), undersigned counsel has conferred with counsel for Plaintiffs regarding the relief sought herein and can represent that Plaintiffs oppose the relief sought herein.

INTRODUCTION

Plaintiffs are deaf individuals in the custody of the CDOC. Until December, 2018, Plaintiffs used TTY technology to communicate with their families and friends. Plaintiffs claim that they each requested, and were denied, the use of videophones when communicating with their families and friends. Plaintiffs allege that by failing to provide them with newer videophone technology, Defendants violated their rights under Title II of the American with Disabilities Act (ADA), 42 U.S.C. § 12131 *et seq.*, and Section 504 of the Rehabilitation Act (RA), 29 U.S.C. § 794, and their rights under the First Amendment.

However, on or about December 22, 2018, the CDOC installed videophones at the Denver Women's Correctional Facility (DWCF). Then, around late May, 2019, the CDOC installed videophones at Colorado Territorial Correctional Facility (CTCF). Thus, by June, 2019, all Plaintiffs had access to videophones and Plaintiffs' ADA and Rehab Act claims relating to any injunctive relief ceased to exist. However, the Court denied Defendants' motion to dismiss the matter as moot on grounds that the doctrine of voluntary cessation applied.

However, that doctrine does not apply here. The doctrine of voluntary cessation applies to limit a defendant's gamesmanship, and here the undisputed facts did not demonstrate that the CDOC was seeking to evade compliance and revert to TTY technology. Instead, the undisputed facts showed a clear commitment from the CDOC to maintain videophone service permanently. Moreover, the Court's order reached beyond the limits of the Prison Litigation Reform Act (PLRA) by applying beyond Plaintiffs in this case, and instead to all deaf and all hard of hearing offenders incarcerated within the CDOC. The mootness doctrine and the PLRA particularly serve to appropriately limit a court's reach where a governmental actor is invested in the appropriate changes. The Court's order should be confined by both frameworks. Defendants respectfully request that the Court reconsider its decision and grant Defendants' motion to dismiss the matter as moot.

STANDARD OF REVIEW

The Federal Rules of Civil Procedure do not explicitly authorize a motion for reconsideration for final judgments or interlocutory orders. *Van Skiver v. United States*, 952 F.2d 1241, 1243 (10th Cir. 1991); *Mantooth v. Bavaria Inn Rest., Inc.*, 360 F. Supp. 3d 1164, 1169 (D. Colo. 2019). However, regarding a final judgment, the Rules allow a litigant who was subject to an adverse judgment to file a motion to change the judgment pursuant to Rule 59(e) or a motion seeking relief from the judgment pursuant to Rule 60(b). *Van Skiver*, 952 F.2d at 1243. With respect to interlocutory orders, "district courts have broad discretion to reconsider their interlocutory rulings before the entry of judgment." *Mantooth*, 360 F. Supp. 3d at 1169 (considering order regarding motion to compel arbitration as an interlocutory order). Indeed, "every order short of a final decree is subject to reopening at the discretion of the district

judge." *Elephant Butte Irrigation Dist. v. U.S. Dep't of Interior*, 538 F.3d 1299, 1306 (10th Cir. 2008). Still, "[t]he Court may be guided by Rules 59 and 60 standards in deciding whether to alter or vacate an interlocutory order." *Mantooth*, 360 F. Supp. 3d at 1169 (citing *Perkins v. Fed. Fruit & Produce Co. Inc.*, 945 F. Supp. 2d 1225, 1232 (D. Colo. 2013)). Motions for reconsideration fall within a court's plenary power to revisit and amend interlocutory orders as justice requires. *See Paramount Pictures Corp. v. Thompson Theatres, Inc.*, 621 F.2d 1088, 1090 (10th Cir. 1980) (citing Fed. R. Civ. P. 54(b)); *see also Houston Fearless Corp. v. Teter*, 313 F.2d 91, 92 (10th Cir. 1962). Motions to reconsider are generally an inappropriate vehicle to advance "new arguments, or supporting facts which were available at the time of the original motion." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000).

ARGUMENT

I. Plaintiffs' claims are moot and the doctrine of voluntary cessation does not apply here.

"[A] case becomes moot when a plaintiff no longer suffers actual injury that can be redressed by a favorable judicial decision." *Brown v. Buhman*, 822 F.3d 1151, 1166 (10th Cir. 2016). Although the doctrine of voluntary cessation can be an exception to mootness, it is designed to prevent gamesmanship, *id.*, and should therefore be applied in limited circumstances. And this of course makes sense. When a court applies the doctrine of voluntary cessation, it is essentially saying it does not believe the defendant—here, the state government—will keep the promise that rendered the case moot. The voluntary cessation doctrine therefore should only come into play where the facts clearly show "reluctant submission by governmental actors and a desire to return to the old ways." *Id*. at 1167 (internal quotation omitted).

That is not the case here. Defendants are public servants who for some time—undisputedly, before this suit was filed—were considering ways to upgrade the technology available to deaf inmates. After CDOC installed videophone systems, Defendants (by and through Ms. Adrienne Jacobson) pledged to continue providing those systems to deaf inmates. *See* Doc. 143-1, Exhibit A-1, Affidavit of Adrienne Jacobson, ¶ 13. At no time did Defendants ever state or suggest that the installed videophones would be removed. Additionally, the nature and installation of the videophones makes removal, reversion, or recurrence, difficult, meaning there is little-to-no chance Defendants will "pick up where [they] left off, repeating this cycle until [they] achieve[ ] all [their] unlawful ends." *Brown*, 822 F.3d at 1166.

A. The doctrine of voluntary cessation does not apply here because the CDOC demonstrated a commitment to maintaining videophones for deaf inmates and because there is no evidence of gamesmanship on the part of the CDOC.

Ms. Adrienne Jacobson, Director of Legal Services, was unequivocal in her affidavit, stating that:

> It is CDOC's intention to maintain the videophone units permanently in place for use by deaf offenders. The CDOC has no intention of terminating or getting rid of the videophone units within the CDOC or discontinuing the accessibility of the videophone units for offender use.

Doc. 143-1, Exhibit A-1, Affidavit of Adrienne Jacobson, ¶ 13. "Courts are more apt to trust public officials than private defendants to desist from future violations." *Ghailani v. Sessions*, 859 F.3d 1295, 1302 (10th Cir. 2017) (*citing* 13C Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure, § 3533.7 at 333(3d ed. 2008) (citing cases). Moreover, the Tenth Circuit has indicated that "that government 'self-correction provides a secure foundation for mootness so long as it seems genuine.'" *Id*. (*citing Brown*, 822

F.3d at 1167-68 (quoting *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1118 (10th Cir. 2010)).

As demonstrated by the undisputed evidentiary record here, the CDOC's steps over the last several years and ultimate implementation of videophone services, while attempting to take into account the security and process interests, cannot be said to be anything but genuine. The record established that the CDOC manages a population of over 20,000 inmates across the State of Colorado. It seeks to balance the interests and needs of all inmates against its obligation to ensure the security of all facilities. It strikes this balance using limited resources and good judgment about where and how to focus those resources. That the CDOC was delayed in its implementation of a videophone system, or that the CDOC has not yet revised its policies to reflect new practices, should not be grounds for penalizing the CDOC under the doctrine of voluntary cessation. Before this litigation, the CDOC began moving to upgrade its technology to provide better service to deaf inmates. *See* Doc. 143-1, Exhibit A-1, Affidavit of Adrienne Jacobson, ¶¶ 5-13. It is undisputed that the videophone pilot program was commenced *before* this lawsuit was filed [*Id.*], and was only discontinued because of legitimate security concerns. Namely, at that time, the CDOC was not able to limit the use of videophones so as to prevent inmates using them from potentially contacting their victims, among other issues. *Id*. In light of those security concerns, the CDOC considered providing videophone services through alternative technologies that were more secure -- two different tablets. *Id*. The tablets were intended to provide inmates with a single device that could provide videophone services as well as the ability to listen to music and play certain games. *Id*. Unfortunately, once the tablets were distributed to inmates, the CDOC learned that the tablet screens were too small for effective sign

language communication. *Id*. The CDOC thereafter resumed its efforts to provide deaf inmates with secure videophones, which it was ultimately able to do. *Id*. These facts show that the CDOC made consistent and repeated efforts to provide effective, secure videophone services for its deaf inmate population even before this lawsuit was filed, despite legitimate security and technological obstacles--this is hardly gamesmanship. *Id*. Once the videophones were installed, the case or controversy here relating to the claims for injunctive relief ceased to exist and the Court no longer had jurisdiction over these claims. Defendants respectfully request that the Court reconsider its decision, and grant Defendants' motion to dismiss these claims as moot.

In finding this case was not rendered moot, the Court relied upon the fact that Defendants, in particular Ms. Jacobson, continued to take the position that the provision of videophone services is not mandated under the ADA and Rehab Act. The Tenth Circuit in *Brown* faced a similar argument and determined that such an argument provided little probative value in determining whether the case was rendered moot. *See Brown*, 822 F.3d at 1176-77 ("A prosecutor's belief a statute is constitutional does not provide much help in determining the risk of future prosecution. Nor does it render unreliable his or her statements to the court—signed under penalty of perjury—that he will not enforce it.") (*citing Rio Grande Silvery Minnow,* 601 F.3d at 1118 n. 17 ("Although the failure of a governmental agency to acknowledge the impropriety of its former, challenged course of conduct certainly is not an irrelevant factor in the voluntary-cessation analysis, it is not dispositive.")).

Here too, the Court should give little weight to Ms. Jacobson's view of the law. *See Brown*, 822 F.3d at 1176-77 (*citing Am. Civil Liberties Union of Mass.,* 705 F.3d at 55 n. 9 ("It is not a purpose of the [voluntary cessation] doctrine to require an admission from the defendant

that the now ceased conduct was illegal. Mootness turns on future threats, not upon penance." (quotation omitted)). Regardless of whether Ms. Jacobson believes videophone services were or were not mandated under the ADA, the CDOC's history in attempting to provide these services to inmates, along with Ms. Jacobson's affidavit pledging to do so going forward, demonstrates there is no reasonable likelihood of CDOC eliminating videophone services after this case is closed.

B. The doctrine of voluntary cessation does not apply here because the nature of videophone installation makes removal difficult and unlikely, even in the absence of a policy requiring it.

This case is not like other cases where, absent a court order, defendant could easily revert to old habits. For example, in Plaintiff's leading case, *Friends of the Earth, Inc. v. Laidlaw Envtl. Serv's (TOC), Inc.*, 528 U.S. 167 (2000), Friends of the Earth (FOE) and several other environmental groups brought suit against Laidlaw Environmental Services (a private entity) alleged that Laidlaw was violating the Clean Water Act and its National Pollutant Discharge Elimination System permit. *Id*. at 176. A previous suit had been filed against Laidlaw by the South Carolina Department of Health and Environmental Control (DHEC). *Id*. DHEC and Laidlaw subsequently reached a settlement requiring, in part, Laidlaw to make "every effort" to comply with the permit obligations. *Id*. at 176-77. Despite this settlement, it was not until Friends of the Earth brought suit against Laidlaw that Laidlaw eventually became substantially compliant with the permit. *Id*. at 189. In *Friends*, the ease with which repeated violations could occur weighed heavily in favor of applying the voluntary cessation doctrine. Indeed, Plaintiffs' own response to Defendants' motion for summary judgment concedes that the ease with which Defendants could undo their promise is an important factor. *See* Doc. 140 at pp. 18-19.

Here, the 'ease' factor weighs in favor of Defendants. It is not easy for Defendants to 'undo' their implementation of videophones. The video equipment has been physically installed into the walls of the CDOC facilities, the CDOC physically wired and connected a large TV or video monitor and connect the system to the facility's network. The videophones installed within the CDOC require a hardwire internet connection and required substantial coordination between the Denver Women's Correctional Facility and the State's IT department to ensure that the videophones were compatible with the CDOC computer system. *See* Doc. 143-1, Exhibit A-1, Affidavit of Adrienne Jacobson, ¶ 9. As a result, it is not likely that the videophones would be removed on a whim. It is not the case that Defendants could, as the defendants could in *Friends*, easily 'cross the line' from being in compliance to being out of compliance. The nature of the videophones and their installation are factors that should weigh heavily in favor of mootness, and against the application of voluntary cessation.

The 'ease' factor also counterbalances the lack of policy. When the Court found that the CDOC's lack of a videophone policy weighed in favor of Plaintiffs' voluntary cessation argument, it relied on the Tenth Circuit's decision in *Brown*, 822 F.3d at 1159. But *Brown* does not support Plaintiffs' arguments. In *Brown*, the implementation of a new policy regarding who would prospectively be prosecuted for bigamy was the sole change that rendered the case moot. *Id*. at 1170. The action here that has rendered Plaintiffs' claims moot was the actual installation of physical equipment that provides Plaintiffs with the videophone services that they seek. However, no such tangible, real world change could have provided the plaintiffs in *Brown* with the relief that they sought – which was freedom from the potential for future prosecution. In other words, the existence of a non-prosecution policy in *Brown* mattered because it, and it

alone, was the change that provided them with the relief that they sought. In contrast, here, Plaintiffs' accommodation for their disabilities is not contingent on the presence or absence of a policy, it is contingent on the presence or absence of access to actual functioning videophone equipment in the prisons in which they are housed. They now have it. A policy regarding the use of videophones is collateral to the actual accommodation for their disabilities, and at worst, the lack of a policy is merely evidence of an agency slow to conform policy to practice.

Brown stands for another important principle—when a case or controversy is extinguished before relief is awarded, a court should dismiss the case as moot. *Id*. at 1170-72. Here, like in *Brown*, Plaintiffs no longer suffer the harm they claimed at the onset of the lawsuit. Although there may be a possibility that a violation could one day resume [*Id*. at 1171], that is not enough to overcome mootness. This case dictates the same result as in *Brown*—dismissal for mootness.

II. The Court's Order reaches beyond the limits set forth under the Prisoner Litigation Reform Act (PLRA).

In its order entering summary judgment in favor of Plaintiffs on the ADA and Rehab Act claims, the Court ordered that the "CDOC SHALL: (1) Make videophones available to all deaf and hard of hearing inmates; (2) Make videophones available to all inmates communicating with deaf and hard of hearing friends, family members, or other individuals[;] and (3) Adopt effective and comprehensive policies and procedures regarding the use and implementation of videophones, including for appropriate compliance monitoring and videophone maintenance and repair." Doc. 158, p. 48. Respectfully, this order runs counter to the PLRA.

The PLRA circumscribes the scope of a district court's authority to enter an injunction in the corrections context. The first and most basic requirement of the PLRA is that any prospective relief, 18 U.S.C. § 3626(g)(7), "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 18 U.S.C. § 3626(a)(1)(A). Whenever a court orders prospective relief pursuant to the PLRA, it must find "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." *Id.*

Thus, the starting point when considering prospective relief must always be a "particular" violation of a "federal right." When a corrections department is already currently providing the relief that is ultimately sought through the course of the litigation, as the CDOC is doing here, the case becomes moot, as discussed above. However, where an order issuing prospective relief is issued, the PLRA limits the scope of the remedy and requires that it must be proportional to the *scope of the violation*, and the order must extend no further than necessary to remedy the violation. *Brown v. Plata*, 563 U.S. 493, 531 (2011). A remedy shall extend no further than necessary to remedy the *violation of the rights* of a "particular plaintiff or plaintiffs." *Id*. (*citing* 18 U.S.C. § 3626(a)(1)(A)). This is particularly important here where the CDOC has a vested interest in the creation and implementation of its own policies, especially when needing to take into accounts its unique security and safety interests. Additionally, the CDOC also has a vested interest in how its limited resources are allocated throughout the entire Department, which includes 23 state prison facilities and 3 private prisons. The Court ordered the CDOC to make videophones available, not just to the named Plaintiffs, but also to all deaf and all hard of hearing inmates. In fashioning the relief in this manner, the CDOC will be required to indiscriminately

allocate resources across the CDOC, without regard to which facilities have a greater need and without concern for the complexities that arise in a correctional environment. For example, pursuant to the Court's order, if one facility has one inmate who communicates with one friend who is hard of hearing, that facility's priority for videophones is the same as the facility that has multiple deaf inmates. Or, if a facility has greater security and videophones present a greater risk at that facility, the CDOC does not have discretion to make alternate arrangements. It is important for the CDOC to maintain discretion so that it can properly take into account security, cost, and need, as appropriate. Thus, Defendants respectfully request that the Court reconsider the injunctive relief provided in the Court's order.

Respectfully submitted this 16th day of October, 2019.

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/s/ Chris W. Alber

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within Motion to Reconsider upon all parties herein by e-filing pursuant to CM/ECF, or by depositing copies of same in the United States mail, first-class postage prepaid, at Denver, Colorado, this 16th day of October, 2019 addressed as follows:

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