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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF ARIZONA et al.,

Defendants.

Civil Action No. 97-476-PHX-ROS

UNITED STATES' MEMORANDUM IN

OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

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UNITED STATES' MEMORANDUM IN

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PRELIMINARY STATEMENT

Female inmates in Arizona's prisons are incarcerated in a sexually charged environment of daily sexual harassment and needless invasions of privacy, and in which there is a continuous pattern of sexual contact between inmates and staff, including serious sexual assaults. This pervasive and destructive environment violates the Fourth and Eighth Amendments of the United States Constitution.

In the accompanying Statement of Facts (SOF), the United States presents evidence of forced sexual contact (including at least five rapes and 30 sexual assaults), unforced sexual contact (including at least 65 incidents of sexual intercourse, oral sex, or other sexual contact), numerous incidents of sexual harassment, and daily invasions of privacy that include both prurient viewing, and unwarranted, prolonged, close up, observation by male staff of female inmates showering, toileting, and dressing.[(1)] SOF ## 1-4.

Since 1992, at least 60 people (including ADOC and contract employees) who worked with Arizona female inmates have been fired, resigned, or have been disciplined as a result of sexual misconduct. SOF ## 9-14. In addition, many ADOC and contract employees have engaged in sexual misconduct and invasions of privacy without being disciplined. Many ADOC investigations of sexual misconduct are ongoing, including allegations of misconduct that arose during discovery. SOF # 9.

Sexual misconduct and invasions of privacy in Arizona women's prisons: (a) are systemic; (b) involve more than just a few problem employees, (c) occur at levels far beyond what would be expected in a prison system that made a serious, concerted effort to minimize sexual misconduct and invasions of privacy; and (d) result from ADOC's inadequate staff training, inadequate misconduct investigations, inadequate inmate education about sexual misconduct, failure to eliminate one-on-one staffing situations and to take other proactive measures to prevent sexual misconduct, failure to adopt a "knock and announce" policy to protect inmate privacy, failure to assist misconduct victims, and punishment of inmates for reporting misconduct. SOF ## 23-34.

Defendants' summary judgment motion ignores the overwhelming evidence of sexual misconduct and the serious physical and psychological harm it inflicts on female inmates. That evidence raises disputed issues of material fact that preclude a grant of summary judgment. Further, Defendants claim that the facts establishing a pattern of sexual contact, sexual harassment and needless invasions of privacy are irrelevant is unfounded. Defendants' legal arguments are fundamentally flawed, for several reasons:

First, forced sexual contact plainly violates inmates' constitutional rights.

Second, either on its own, or when considered as part of an overall pattern of sexual misconduct, sexual harassment violates inmates' constitutional rights.

Third, sexual contact occurring "without force" -- assuming the highly dubious proposition that inmates can legally or factually consent to sex with a jailer -- violates inmates' constitutional rights under the circumstances that exist in this case: Defendants know that such relationships can cause severe harm to some inmates, there is a pattern of sexual contact resulting in serious harm to some inmates, and Defendants have deliberately refused to take the necessary steps to minimize sexual contact occurring without force.

Fourth, Ninth Circuit cases directly on point -- including a case decided only a few months ago -- state explicitly that inmates have a limited constitutional right to privacy, including the right not to be subject to close-up, prolonged viewing by members of the opposite sex while toileting, showering, and dressing. Robino v. Iranon, 145 F.3d 1109 (9th Cir. 1998).

Defendants make several claims that various legal doctrines insulate them from liability even if there is a pattern of sexual misconduct at their prisons. Each of these legal claims fails:

a. Defendants devote much of their summary judgment motion to the argument that they cannot be held deliberately indifferent to sexual misconduct because they train their employees, have an adequate grievance system, and respond appropriately to substantiated misconduct. The United States, however, has offered contrary evidence on each of those issues, SOF ## 35-46, 67-69, 94-96, raising disputed issues of material fact that preclude summary judgment.

b. Defendants attempt to insulate themselves from the pattern of sexual misconduct extant in their women's prisons by claiming that they are not vicariously liable for the acts of their agents and employees. The law, however, says otherwise. The Civil Rights of Institutionalized Persons Act

(CRIPA) authorizes injunctive relief against any party necessary to ensure institutionalized persons' constitutional rights. In any event, even if the Court accepts Defendants' erroneous argument that Section 1983 case law governs CRIPA actions, two recent Ninth Circuit cases hold explicitly that in Section 1983 actions seeking only prospective injunctive relief, Defendants are vicariously liable for the unconstitutional acts of their employees and agents. In this case, the United States seeks only prospective injunctive relief. Complaint ¶ 21 and Prayer for Relief.

c. Finally, Defendants' "standing" claim regarding the standard of proof in CRIPA cases is misplaced. In its July 9, 1997, Order denying Arizona's motion to dismiss, this Court quoted with approval a case that commented that the United State's burden of proof in a CRIPA case is the same as any other litigant's burden raising the same issues. All courts to have addressed the issue have held similarly.

The substantial factual evidence of sexual misconduct and invasions of privacy presented by the United States, and the failure of Defendants' legal arguments, preclude summary judgment in this case.

ARGUMENT

I. A SEXUALIZED ENVIRONMENT, INCLUDING

SEXUAL CONTACT, SEXUAL HARASSMENT,

AND INVASIONS OF PRIVACY, PERVADES

ADOC FEMALE PRISONS AND

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Prison conditions are subject to Eighth Amendment scrutiny, Helling v. McKinney, 509 U.S. 25, 32 (1993). Those conditions must not violate "evolving standards of decency," Rhodes v. Chapman, 452 U.S. 337, 346 (1981), for "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." Helling, 509 U.S. at 31. The one federal court that applied these standards to a claim of systemic sexual misconduct throughout a female prison found that female inmates' Eighth Amendment rights were violated by systemic sexual misconduct and invasions of privacy. Women Prisoners of the District of Columbia Department of Corrections v. District of Columbia, 877 F. Supp. 634 (D.D.C. 1994), vacated in part on other grounds and remanded, 93 F.3d 910 (D.C. Cir. 1996), cert. denied, 117 U.S. 1552 (1997) (hereafter, "D.C. Women Prisoners>"). D.C. Women Prisoners was a class action in which female inmates in the District of Columbia alleged, among other things, that their Eighth

Amendment rights were violated by staff sexual misconduct.

In ruling in favor of the inmates, the district court considered relevant the following evidence of sexual misconduct:

forceful sexual activity, unsolicited sexual touching, exposure of body parts or genitals and sexual comments ... a general acceptance of sexual relationships between staff and inmates which creates a 'sexualized environment' where 'boundaries and expectations or behavior are not clear' ... a lack of privacy [where] some male officers fail to announce themselves when appearing in areas where women undress ...

Id. at 639-40. The court also considered evidence of the psychological harm caused women by the various forms of sexual misconduct evidenced at the prison:

The effect of sexual harassment on women prisoners is profound. The abuse has a significant impact on a woman's concentration, and it lowers confidence and self-esteem. It leads to anxiety ... nervousness ... [anger and fear] ... depression, nausea, frequent headaches, insomnia and ... fatigue ... For women who have a history of sexual abuse the harassment often brings back memories of the prior abuse. This can lead to severe depression.

Id. at 642-43. The United States believes that D.C. Women Prisoners' legal and factual treatment of the sexual misconduct claim should serve as a model for how this Court should analyze the identical claim made by the United States against Defendants here.

In this case, the United States will present evidence of at least 34 instances of forced sexual activity and unsolicited sexual touching (SOF # 1), frequent incidents of exposure of body parts and sexual comments (SOF # 3), at least 65 sexual relationships (SOF # 2), daily invasions of privacy (SOF # 4), and severe psychological harm resulting from such acts (SOF ## 165-190).

In analyzing the evidence of sexual misconduct and resulting harm, D.C. Women Prisoners noted that, "the combination of some conditions of confinement may constitute an Eighth Amendment violation though each would not do so alone," 877 F. Supp. at 663, citing Wilson v. Seiter, 501 U.S. 294, 304 (1991). The district court then found that the evidence showed "a level of sexual harassment which is so malicious that it violates contemporary standards of decency," that forced sexual contact violated the Eighth Amendment, and that, "in combination, vulgar sexual remarks ... the lack of privacy ... and the refusal of some male guards to announce their presence in the living areas of women prisoners constitute a violation of the Eighth Amendment since they mutually heighten the psychological injury of women prisoners." Id. at 664-65.

D.C. Women Prisoners rejected the defendants' claim that they were not deliberately indifferent to sexual misconduct because -- just as Defendants claim here -- they had policies and procedures prohibiting misconduct, trained their staff, and had an inmate grievance procedure. Id. at 640. The court rejected this defense, finding that training was deficient, investigations of misconduct were deficient, victims were placed in a punitive environment (protective custody), and that defendants' response to misconduct was inadequate. Id. at 665-66. Here, the United States has produced substantial evidence of deficient training (SOF ## 35-46), deficient investigations (SOF ## 54-66), placement of victims in a punitive environment (SOF ## 98-102, 104, 106-116), and inadequate responses to sexual misconduct (SOF ## 67-69).

Thus, under the factual and legal analysis ofD.C. Women Prisoners, the United States has raised

disputed issues of material fact concerning both sexual misconduct and Defendants' deliberate indifference to that misconduct, precluding a grant of summary judgment. Although D.C. Women Prisoners was vacated in part and remanded by the D.C. Circuit Court of Appeals, the only aspect of the district court's opinion relating to sexual misconduct that was vacated dealt with the relief awarded plaintiffs, not the district court's factual findings and legal analysis, which was left undisturbed. 93 F.3d at 929-31.

Of course, D.C. Women Prisoners is not the only federal decision addressing issues of sexual contact, sexual harassment or invasions of privacy. However, all other federal cases of which the United States is aware addressed sexual misconduct or invasions of privacy only in the context of individualized incidents of alleged misconduct. We discuss below other relevant cases, including cases cited by Defendants.

B. Forced Sexual Contact

Violates the Eighth Amendment

Forced sexual contact by staff against inmates violates the Eighth Amendment. See, e.g., Ware v. Jackson County, 150 F.3d 873 (8th Cir. 1998) (sexual assault violates Eighth Amendment); Barney v. Pulsipher, 143 F.3d 1299, 1310 (10th Cir. 1998) (in case of forced oral sex and sexual assault, "plaintiffs' deprivations from sexual assaults are sufficiently serious to constitute a violation under the Eighth Amendment"); Mathie v. Fries, 935 F. Supp. 1284, 1299-1300 (E.D.N.Y. 1996) (in case of sodomy and harassment, "sexual assault, coercion, and harassment ... violate contemporary standards of decency and can cause severe physical and psychological harm"), aff'd 121 F.3d 808 (2d Cir 1997); Thomas v. District of Columbia, 887 F. Supp. 1, 4 (D.D.C. 1995) (same, in case of two instances of forced touching of penis and sexual harassment).

The United States has presented the Court with specific facts evidencing a pattern of sexual assaults by staff against Arizona female inmates. SOF # 1 (describing more than 34 incidents of forced sexual contact by staff against female inmates, including five rapes, forced oral sex and forced touching of the genitals). Defendants repeatedly claim that any sexual misconduct that has occurred in their prisons consists of "isolated" incidents. Def. Br. at pages 3, 15, 17, 18, 19. The United States' evidence of a pattern of sexual assaults raises a disputed issue of material fact, precluding summary judgment.

C. In the Circumstances of This Case, Sexual Contact Without Force Violates the Eighth Amendment

The United States has presented the Court with specific facts evidencing a pattern of sexual contact without force between female inmates and ADOC employees. SOF # 2 (describing more than 65 incidents of sexual contact with staff including intercourse and oral sex). Defendants, citing Frietas v. Ault, 109 F.3d 1335, 1338-9 (8th Cir. 1997), claim that sexual contact between jailers and female inmates where no force is used does not violate inmates' Eighth Amendment rights. Def. Br. at pp. 26-27. As we explain below, Frietas is inapposite here.

The expert witnesses in this case, including Defendants' expert psychologist, as well as ADOC Director Terry Stewart and other ADOC employees, agree that there is no such thing as 'consensual' sexual activity between staff and inmates. SOF ## 194-200. An ADOC psychiatrist stated his reasons for that conclusion as follows:

First . . . the relationship can never be equal. That clearly an inmate by their role as inmate is vulnerable and not in a parity situation with the jailor . . . who has all kinds of authority and power and potential

means to exert influence and pressure . . . The jailkeeper . . . [is] mandated by law and by society to fulfill a certain function and that is not to fulfill their own personal sexual needs. . . . On an individual level, if in fact, as you point out that even up to 80% of the female inmates have a history of sexual or other kinds of abuse in the past, then very likely some and maybe many, of those inmates have sufficient degree of disturbance in their identity, their self esteem . . . in their own sexuality that would make them vulnerable and not as able to make proper decisions. (Shinkoda Deposition pp. 23-24).

There are several reasons why sexual contact between inmates and staff, even if no force was used to obtain that contact, cannot be considered 'consensual' either legally or factually.

First, there is a vast power differential between staff and inmates. Because inmates cannot legally or factually 'consent' to sexual contact with their jailers,[(2)] it is fair to equate the absence of consent with an implied use of force.[(3)] This legal theorem -- that inmates cannot legally or factually consent to sexual contact with staff -- based on the testimony of expert witnesses and ADOC employees, can be the predicate for a finding of an Eighth Amendment violation.

Second, an extremely high percentage of Arizona female inmates have histories of physical and/or sexual abuse, or are mentally ill. SOF ## 128-136, 161-164. Inmates with such histories are more vulnerable to sexual predators, are less likely to be able to ward off sexual predators, and are subject to an increased risk of harm from "unforced" sexual contact with staff occurring without force. SOF ## 137-160. The United States' evidence shows that Defendants are aware of all these facts, yet have failed to take the necessary steps to prevent the harm that can result from sexual contact without use of force. SOF ## 35-164. Because the Defendants are subjectively aware of inmates' past histories of abuse and mental illness, the inmates' vulnerability to sexual approaches, and the risk of serious harm from sexual contact without force, and because Defendants failed to take reasonable steps to prevent that harm, they are deliberately indifferent to inmate rights in violation of the Eighth Amendment.

The United States also has evidence that ADOC female inmates who have engaged in sexual contact with staff without force being used have had histories of physical or sexual abuse and mental illness, and that they have incurred serious psychological harm as a result of the sexual contact. SOF ## 172-175.

One example of harm resulting from sexual contact without force is summarized in SOF # 175 and described at length in the reports of the United States' expert psychiatrist Dr. Susan Fiester and Defendants' expert psychologist Dr. Judith Becker (Exhibits D and F of the United States' Exhibits in Opposition to Defendants' Motion for Summary Judgment, pages 19-22, 20-24, respectively). In their joint interview of inmate # 6, these experts learned that this inmate, currently housed in the Flamenco mental health unit for seriously mentally ill inmates, had a history of psychiatric hospitalization beginning at age 11. She was sexually abused once or twice a week by her stepfather at ages 9-11. He would pay her $20 for oral sex or to let him touch her breasts and genitals. She was violently raped at age 15. After age 11 she lived in seven or eight foster homes. She married at age 16, and her husband beat her regularly, sometimes to the point of her losing consciousness. On one occasion he hit her with a baseball bat, necessitating plastic surgery, and he once shot her in the leg. She reported up to 100 suicide attempts. This inmate engaged in touching, fondling, and oral sex, without force being used, with an ADOC officer in 1994. As a result of that sexual contact, Inmate 6 cut her wrists so badly that she required sutures, and she had another serious suicide attempt in 1997. She experienced decreased self-esteem, humiliation, and depression from her sexual contact with the ADOC officer. Under these circumstances, the officer with whom she had sexual contact violated her Eighth Amendment rights -- as did Defendants when they failed to take the necessary and reasonable steps to prevent that sexual contact from occurring.[(4)]

This is but one of many examples of harm resulting from sexual contact between inmates and staff without physical force. See expert reports of United States' and Defendants' expert psychiatrists and psychologist. Defendants are liable for the abuse of this woman by their officer. In addition, in these circumstances, where Defendants are aware of the risk of harm but fail to act to prevent such risk, Defendants are deliberately indifferent to the inmate's right to be free from sexual misconduct.

Defendants' reliance on Frietas v. Ault, 109 F.3d 1335 (8th Cir. 1997) is misplaced. With essentially no legal or factual analysis, Frietas held that voluntary sexual contact between a male inmate and female employee cannot constitute 'pain' under the Eighth Amendment. Id. at 1339. Frietas did not consider whether female inmates were legally or factually capable of 'consenting' to sexual contact with their jailers, nor did it consider inmates' past history of abuse and mental illness, their vulnerability to sexual approaches, the risk of harm from sexual contact, or Defendants' knowledge of those facts. This Court has before it considerably more information than did Frietas on the issue of the constitutionality of sexual contact occurring without force between female inmates and staff, evidence that allows this Court to reach a better reasoned, more firmly grounded opinion than was reached in that case.

Another critical distinction between Frietas and this case is that while the former addressed only a single claim of unforced sexual contact, United States v. Arizona concerns a pattern of systemic sexual contact both with and without force. The Eighth Amendment proscribes a pattern or practice in which, year after year after year, custodial staff have sexual contact with vulnerable female inmates that causes them significant harm, and prison officials know of inmates' vulnerability, but fail to act to protect them. Such a pattern violates "the evolving standards of decency that mark the progress of a maturing society." Rhodes v. Chapman, 452 U.S. 337, 346 (1981) (standard for Eighth Amendment violations).

Finally, even if this Court held that sexual contact occurring without force could never violate the Eighth Amendment, it should allow the United States to present evidence of incidents of sexual contact occurring without force as evidence of a sexualized environment that serves to foster incidents of sexual contact with force, sexual harassment, and invasions of privacy. See D.C. Women Prisoners ("a general acceptance of sexual relationships between staff and inmates ... creates a 'sexualized environment' where 'boundaries and expectations or behavior are not clear'") 877 F. Supp. at 639-40; Ware v. Jackson County, 150 F.3d 873, 876-79 (8th Cir. 1998) (reciting considerable evidence of sexual contact without force in describing environment in which sexual assault occurred).

D. Sexual Harassment Violates the Eighth Amendment

Several cases have recognized that sexual harassment of inmates alone, even without sexual contact, may violate the Eighth Amendment, if that harassment causes serious harm. See Frietas v. Ault, 109 F.3d 1335, 1338-9 (8th Cir. 1997) ("sexual harassment or abuse of an inmate ... can, in certain circumstances [violate the Eighth Amendment] ... To prevail on a constitutional claim of sexual harassment, an inmate must therefore prove, as an objective matter, that the alleged abuse or harassment caused 'pain'"); Chandler v. District of Columbia Department of Corrections, 145 F.3d 1355, 1360-61 (D.C. Cir. 1998) (citing with approval cases holding that verbal sexual harassment can violate the Eighth Amendment, if harm were sufficiently severe). Other courts have held that verbal sexual harassment, in combination with other sexual misconduct, may violate the Eighth Amendment. See Barney v. Pulsipher, 143 F.3d 1299, 1310 n.11 (10th Cir. 1998) ("Plaintiff's claims of verbal [sexual] harassment are only actionable '[i]n combination with' the [sexual] assaults"); Berry v. Oswalt, 143 F.3d 1127, 1133 (8th Cir. 1998) (Eighth Amendment claim stated when inmate "alleged that [officer] had attempted nonroutine pat downs and had verbally harassed her" and "presented evidence that these acts had caused her fear and frustration. The objective-pain component of the Eighth Amendment does not require significant injury."); D.C. Women Prisoners, supra, 877 F. Supp. at 664-5.

Regardless of whether verbal sexual harassment alone or in combination with sexual assaults can violate the constitution, the United States has presented substantial evidence raising a disputed issue of material fact regarding the existence and extent of sexual harassment of Arizona female inmates. SOF # 3. The United States also has presented substantial evidence that sexual harassment of Arizona female inmates has caused these inmates serious harm. In the opinion of the United States' and Defendants' psychiatrists and psychologist, many of the inmates they interviewed had been seriously harmed by verbal sexual harassment. See SOF ## 176-183, and the expert reports of Drs. Susan Fiester, Jeffery Metzner, and Judith Becker.

E. Female Inmates Have A Limited Right to Privacy That Defendants are Violating

Defendants claim that inmates have no right to bodily privacy whatsoever, and that no matter what the circumstances, male staff may look at a naked female inmate while she is showering, toileting, or dressing, without violating her constitutional rights. Ninth Circuit cases, however, explicitly recognize an inmate's limited right to bodily privacy, and every Circuit (except the Seventh) to have addressed the issue has held that this right to bodily privacy includes a limited right not to be seen naked by member of the opposite sex under certain circumstances.(5)

In 1963, the Ninth Circuit said:

> we cannot conceive of a more basic subject of privacy than the naked body. The desire to shield one's unclothed figure from view of strangers, and particularly strangers of the opposite sex, is impelled by elementary self-respect and personal dignity.

York v. Story, 324 F.2d 450, 455 (9th Cir. 1963) (invasion of privacy stated constitutional claim under section 1983). Citing York, Grummett v. Rushen, 779 F.2d 491 (9th Cir. 1985), the first Ninth Circuit case to address the issue of inmate privacy rights, held that male inmates' privacy rights were not violated because they were viewed by female guards by "infrequent and casual observation, or observation at a distance. Female guards ... do not stop for prolonged inspection [and] ... do not accompany male inmates to the ... showers." Grummett, 779 F.2d at 494-95 (emphasis added).

Subsequent circuit and district court cases in the Ninth Circuit have similarly recognized inmates' limited right to bodily privacy from opposite-sex staff. See, e.g., Michenfelder v. Sumner, 860 F.2d 328, 333-34 (9th Cir. 1988) ("We recognize that incarcerated prisoners retain a limited right to bodily privacy ... infrequent and casual observation, or observation at a distance ... are not so degrading as to warrant court interference."); Sepulveda v. Ramirez, 967 F.2d 1413, 1415-16 (9th Cir. 1992) ("The right to bodily privacy was established in this circuit in 1963 [citing York]. We extended this right to prison inmates in 1985 [citing Grummett]."); Huffman v. Fiola, 850 F. Supp. 833, 837 (N.D. Cal. 1994) ("The Ninth Circuit explicitly recognizes a prisoner's right to bodily privacy."); Galvan v. Carothers, 855 F. Supp. 285, 291 (D. Alaska 1994) (female inmate has right "to use the toilet without being observed by members of the opposite sex, and to shower without being viewed by members of the opposite sex") (citing Ninth Circuit cases), vacated on other grounds, 110 F.3d 68 (9th Cir. 1997 (table); Rodriguez v. Kincheloe, 763 F. Supp. 463, 470-71 (E.D. Wash. 1991) (inmates have limited right to bodily privacy, citing Ninth Circuit cases), aff'd 967 F.2d 540 (9th Cir. 1992) (table).

Defendants' claims that in Somers v. Thurman, 109 F.3d 614 (9th Cir. 1997), the Ninth Circuit failed to recognize inmate privacy rights, and that Somers is the latest Ninth Circuit case on point, are incorrect. Def. Br. at p. 21. Somers was followed by Robino v. Iranon, 145 F.3d 1109 (9th Cir. 1998). Robino held that a Hawaii female prison could assign certain posts in the prison to be staffed by females only without violating male staff Title VII employment rights. Citing Somers, the Robino court said:

> a person's interest in not being viewed unclothed by members of the opposite sex survives incarceration ... each designated female-only post is residential and requires [the staff] to observe the inmates in the showers and toilet areas ... these six female-only posts are a reasonable response to the concerns about inmate privacy and allegations of abuse by male [staff].

Robino, 145 F.3d at 1111.

Thus, under the cases cited above, Arizona female inmates have a limited right to bodily privacy under which they may not be viewed pruriently, or at a close distance on a regular and prolonged basis by male staff while they shower, toilet or dress, absent legitimate penological justification.[(6)] The United States has presented evidence of inmate privacy violations by male officers, SOF ## 4, 83-88, raising disputed issues of material fact that preclude a grant of summary judgment.[(7)]

Defendants cite Somers, Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993)(en banc), and an unpublished decision by Judge McNamee[(8)] to support their contention that female inmates have no right to bodily privacy whatsoever.[(9)] These cases simply do not support Defendants' contention.

Jordan held that random cross-gender pat-down searches of female inmates violated the Eighth Amendment, because the prison knew of the past histories of physical and sexual abuse of female inmates and the harm cross-gender pat downs could cause. This analysis is identical to the United States' argument, outlined above, that sexual contact without force is an Eighth Amendment violation under the facts presented in this case.

In explaining why it decided the constitutionality of cross-gender pat down searches under the Eighth Amendment and not the Fourth Amendment, Jordan stated, "prisoners' legitimate expectations of bodily privacy from persons of the opposite sex are extremely limited ... while the inmates here may have protected privacy interests ... we do not reach the Fourth Amendment claims." Id. at 1524-25. Thus, Jordan did not hold that inmates have no privacy rights. Similarly, Somers v. Thurman simply noted that in 1993 inmates' right to privacy was not clearly established; Somers nowhere suggests that female inmates have no right whatsoever not to be viewed naked by male staff.

Jordan's legal analysis of why cross-gender pat-down searches of female inmates violate the Eighth Amendment supports the United States' argument that under the facts presented in this case, opposite sex viewing of female inmates violates the Eighth Amendment. Jordan recognized that female inmates with histories of physical abuse react differently to cross-gender pat-down searches than male inmates, and that there is a great probability of harm from such searches. Id. at 1525.

In this case, Defendants' expert psychologist stated explicitly that being viewed naked by male staff can cause significant harm to female inmates:

Many women with histories of maltreatment are extremely sensitive to issues of privacy and violation of their privacy. Early on in their lives their sense of body integrity was invaded by the behaviors of their perpetrators. Being exposed to the invasion of privacy while dressing, showering, or using the toilet can cause flashbacks in some women of prior abuse experiences. In others it can cause embarrassment and a sense of shame, even if they have no history of prior maltreatment.

Report of Defendants' expert Dr. Judith Becker, pages 63-64. Dr. Becker concluded that some inmates she interviewed had in fact been harmed by invasions of privacy by male staff, and in the quotation cited

above, she opined that some inmates were at serious risk of harm from such conduct. A serious risk of harm violates the Eighth Amendment, even if no harm has yet occurred. Farmer v. Brennan, 511 U.S. 825 (1994); Helling v. McKinney, 509 U.S. 25 (1993).

Moreover, the United States' evidence shows that certain female inmates have in fact been harmed by invasions of privacy by male staff, and that inmates face a serious risk of harm. SOF ## 184-190. Thus, under Jordan, the United States has raised a material issue of disputed fact regarding whether invasions of privacy by male staff precludes a grant of summary judgment.

II. DEFENDANTS ARE LIABLE FOR THE SEXUAL MISCONDUCT AND INVASIONS OF PRIVACY OCCURRING IN THEIR PRISONS, BOTH VICARIOUSLY AND BECAUSE OF THEIR DELIBERATE INDIFFERENCE TO INMATES' CONSTITUTIONAL RIGHTS

A. Defendants Are Deliberately Indifferent To Sexual Misconduct And Invasions of Inmate Privacy

The United States has presented the Court with substantial evidence that Defendants are deliberately indifferent to sexual misconduct and invasions of privacy. Most obviously, Defendants have admitted that they treat inmates as if they have no right to bodily privacy whatsoever, SOF ## 83-86, and Defendants go so far as to assert that male staff can view naked female inmates excessively or unnecessarily without violating their constitutional rights. SOF # 87. Defendants admit that male officers are instructed to walk unannounced into areas in which female inmates are naked, SOF # 84, and they admit that male officers can view naked inmates for prolonged periods at close range. SOF # 83. As discussed extensively above, in the Ninth Circuit Defendants' explicit policies constitute deliberate indifference to inmate privacy rights.

The United States has also presented evidence that Defendants are deliberately indifferent to sexual misconduct because of the following systemic deficiencies in the way they address sexual misconduct issues: Defendants' staff training regarding sexual misconduct is deficient;[(10)] inmate education about sexual misconduct is deficient;[(11)] Defendants' investigations of sexual misconduct are deficient;[(12)] Defendants' responses to substantiated instances of sexual misconduct are deficient;[(13)] Defendants do not take proactive measures necessary to minimize occurrences of sexual misconduct;[(14)] Defendants' inmate grievance system is deficient;[(15)] Defendants discourage inmate reporting of sexual misconduct;[(16)] Defendants fail to offer mental health services to sexual misconduct victims;[(17)] and Defendants deliberately refuse to implement any of the experts' recommendations for reducing sexual misconduct and invasions of inmate privacy.[(18)]

Defendants cite to three cases in which inmates were sexually assaulted by staff, but prison or jail managers were held not deliberately indifferent. Def. Br. at pages 15-17. Each case, however, actually supports the United States' position that under the facts presented by the United States, there is a material issue of disputed fact that precludes a grant of summary judgment.[(19)]

Scott v. Moore, 114 F.3d 51, 54 (5th Cir. 1997), held managerial defendants not deliberately indifferent because:

no showing [had been made] that the city had actual knowledge that its staffing policy created a substantial risk of harm to female detainees. To the contrary the city had followed the same staffing procedures since the late 1970's without any incident and had received no prior complaint of sexual assault.

In the instant case, however, the United States has presented substantial evidence that Defendants actually admit that their policy of allowing male staff to be alone with inmates increases the risk of sexual misconduct, SOF ## 70-71, and have refused to take any steps to eliminate that policy and subsequent risk. SOF ## 72-74. Moreover, Defendants have had the same policy for years, which has caused repeated incidents of sexual assault, sexual contact, and sexual harassment of which Defendants are aware. SOF ## 1-3.

Berry v. Oswalt, 143 F.3d 1127, 1130-31 (8th Cir. 1998), held defendants not deliberately indifferent because the only evidence plaintiff presented of the defendants' custom or policy was that it was "possible that [the defendant] had heard of complaints ... [and had] only a general concern about men guarding women." Here the United States has presented specific facts evidencing a pattern of sexual misconduct of which Defendants have been aware for many years. SOF ## 1-4.

Barney v. Pulsipher, 143 F.3d 1299, 1306 (10th Cir. 1998), held defendants not deliberately indifferent because:

the [two] sexual assaults ... were the only incidents of sexual misconduct by ... jailors of which [the] Sheriff ... was aware during his more than thirty-year tenure ... The Commissioners likewise lacked knowledge of any alleged sexual misconduct ...

Consequently, no pattern of violations existed to put the County on notice that its training program was deficient.

Again, the United States has presented substantial evidence in this case that a pattern of sexual misconduct of which Defendants are aware has been extant for many years. SOF ## 1-4.

Because Defendants have been on notice for many years of a pattern of sexual misconduct in their female prisons(20), they can be deemed to be deliberately indifferent to that pattern. Federal Circuit courts have held that a pattern of unconstitutional conduct can serve as the predicate for a finding of deliberate indifference. See Ware v. Jackson County, 150 F.3d 873, 880 (8th Cir. 1998) ("'custom or usage' is demonstrated by ... [t]he existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees"); Barney v. Pulsipher, 143 F.3d 1299, 1307-8 (10th Cir. 1998) ("The deliberate indifference standard [to impose municipal liability] may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation ... In most instances, notice can be established by proving the existence of a pattern or tortious conduct.").

Finally, federal courts have rejected Defendants' argument that they are not deliberately indifferent because they have extensive policies against misconduct and train their employees when, as here, there is substantial evidence that policies and training are not followed. See Ware v. Jackson County, 150 F.3d 873, 882, 884 (8th Cir. 1998) ("The existence of written policies ... are of no moment in the face of evidence that such policies are neither followed nor enforced ... neither the County's written policies prohibiting unconstitutional misconduct nor evidence of its employee training can insulate it from § 1983 liability where there is evidence of a pattern of misconduct."); Thomas v. District of Columbia, 887 F. Supp. 1, 5 (D.D.C. 1995) ("Defendants argue that there is no practice or custom of permitting sexual harassment or assault because District of Columbia regulations expressly prohibit intimate relations between prison guards and inmates. This argument misses the point. While the regulations may exist, violations of them, or a pattern of such violations, may themselves be a practice or custom. The District of Columbia is not off the hook merely because regulations exist ... the failure of the District of Columbia to safeguard against known unconstitutional conduct may amount to a tacit approval of the

conduct.").

In sum, the United States has presented substantial evidence that Defendants are deliberately indifferent to sexual misconduct and invasions of privacy, precluding the grant of summary judgment.

B. Defendants Are Vicariously Liable For The Acts of Their Employees and Agents

Defendants attempt to insulate themselves from the pattern of sexual misconduct and privacy invasions occurring in their prisons by claiming that they are not vicariously liable for acts committed by their employees or agents, citing cases decided under 42 U.S.C. § 1983, in which plaintiffs sought monetary damages. This case, however, was brought under CRIPA, which explicitly authorizes the United States to seek equitable relief against any entity necessary to remedy a pattern or practice of constitutional violations against institutionalized persons. Moreover, even if the law developed under § 1983 applies to this case, the Ninth Circuit has held explicitly that vicarious liability applies in § 1983 cases in which only prospective injunctive relief is sought. See Chaloux v. Killeen, 886 F.2d 247, 250 (9th Cir. 1989); Los Angeles Police Protective League v. Gates, 995 F.2d 1469 (9th Cir. 1993).[(21)] Here, the United States seeks only prospective injunctive relief.

1. Vicarious Liability Applies In Section 1983 Cases Seeking Only Prospective, Injunctive Relief

In Monell v. Dep't of Social Services of the City of New York, 436 U.S. 658 (1978), the Supreme Court held that a municipality could be held liable under 42 U.S.C. § 1983.[(22)] In Monell, where plaintiffs sought only retrospective relief,[(23)] the Court held that municipal liability could attach only if a government's "policy or custom" had caused the constitutional violation. Monell, 436 U.S. at 694. Monell recognized that the contours of § 1983 liability would need to be more expressly defined in future decisions. Id. at 695.

Although the Supreme Court has yet to address whether the requirement of an "official policy or custom" to hold § 1983 defendants liable applies even where plaintiffs request only prospective injunctive relief, this issue has been decided in the Ninth Circuit. Chaloux v. Killeen, 886 F.2d 247, 250 (9th Cir. 1989), held that § 1983 plaintiffs seeking prospective relief were not required to show that constitutional violations resulted from an "official policy or custom." In Chaloux, the plaintiffs sought to enjoin county officials from garnishing their governmental benefits pursuant to state garnishment proceedings. The district court, relying on Monell, dismissed the action, ruling that the plaintiffs had failed to establish that the defendants had inflicted the alleged constitutional violations pursuant to an official county policy. The Ninth Circuit reversed, stating,

Monell does not apply here. Unlike Monell, this case presents solely a claim for prospective relief ... We find no persuasive reasons for applying the Court's 'official policy or custom' requirement to suits ... only for prospective relief.

Id. at 250-251.

Chaloux's rationale was based on its analysis of the policy justifications animating the decision in Monell. Chaloux reasoned that Monell set forth the "official policy or custom" requirement to "limit § 1983 damage awards against municipalities" in order to "alleviate the imposition of financial liability on local governments based solely on a respondeat superior theory." Id. (citing Monell at 691 and Pembaur v. City of Cincinnati, 475 U.S. 469 (1986)).

Cases decided after Chaloux show that it is the nature of the relief sought (i.e., prospective or

retrospective), and not the "financial liability" at issue that determines whether a plaintiff needs to prove that constitutional violations resulted from a "custom or policy" of defendants. Los Angeles Police Protective League v. Gates, 995 F.2d 1469 (9th Cir. 1993), decided subsequent to Chaloux, re-affirmed Chaloux and held that a police officer dismissed for his refusal to comply with an unconstitutional search of his home was entitled to prospective, but not retrospective, equitable relief. In Gates, the court had previously held in a related case that the unconstitutional search was not conducted pursuant to any "official policy or custom." Gates made clear that the officer was nevertheless entitled to prospective equitable relief from the County:

As a threshold matter, we note that equitable relief, such as reinstatement of [the officer's] job and pension rights, is not barred by the prior rulings of this court on immunity from liability for damages ... Further, the City can be subject to prospective injunctive relief even if the constitutional violation was not the result of an "official custom or policy."

Gates, 995 F.2d 1469, 1472, citing Chaloux. Gates thus explicitly distinguished between "retrospective" and "prospective" equitable relief in deciding what relief the plaintiff could seek. Gates refused to grant the officer back pay, because back pay was retrospective relief, Gates at 1472 n.1. But Gates permitted the officer to seek job reinstatement and reinstatement of pension rights, because those remedies were prospective -- even though job reinstatement and pension rights could potentially result in a greater financial burden on the County than an award of back pay.(24)

Even if CRIPA cases were governed by § 1983 case law, Chaloux and Gates make it clear that in cases such as this one, where the United States seeks solely prospective injunctive relief in order to prevent further violations of constitutional rights, Monell's "official policy or custom" requirement does not apply. Arizona may be held liable for violations of inmates' constitutional right to be free from sexual misconduct and invasions of privacy even if those violations were not caused by an Arizona custom or policy.

Chaloux clearly states that in cases in which plaintiffs seek only prospective injunctive relief, defendants can be held vicariously liable for the actions of their employees and other agents:

The 'official policy' requirement was intended to distinguish acts of the municipality from acts of employees of the municipality, and thereby make clear that municipal liability is limited to action for which the municipality is actually responsible.

Chaloux at 250. Other courts have also held that in § 1983 actions plaintiffs seeking injunctive relief may rely on a respondeat superior theory to hold an employer or governmental agency liable. See American Association of State Troopers, Inc. v. Preate, 825 F. Supp. 1228, 1229 (E.D. Pa. 1993) (rejecting defendant's claim that respondeat superior does not apply to Section 1983 claims, since defendant sued in official capacity for prospective relief, citing Chaloux); Malik v. Tanner, 697 F. Supp. 1294, 1304 (S.D.N.Y. 1988) (in prison case, "a claim for injunctive relief, as opposed to monetary relief, may be made on a theory of respondeat superior in a § 1983 action"); Ganguly v.New York State Department of Mental Hygiene, 511 F. Supp. 420, 424 (S.D.N.Y. 1981) ("state defendants may be liable for the acts of their subordinates under the doctrine of respondeat superior as long as injunctive and declarative relief is sought" citing cases).

Thus, if § 1983 precedents applied to this CRIPA case, Arizona would be liable for the acts of its employees and agents that violated inmates' constitutional rights, because the United States seeks only prospective injunctive relief.

2. Vicarious Liability

Applies in CRIPA Cases

Quite apart from the foregoing arguments, the language and structure of CRIPA make it clear that vicarious liability applies in CRIPA cases. CRIPA 42 U.S.C. § 1997a(a), provides that when the Attorney General

has reasonable cause to believe that any ... *official, employee or agent* [of a State], *or other person* acting on behalf of a State ... is subjecting persons residing in or confined to an institution [to unconstitutional conditions] ... the Attorney General ... may institute a civil action *against such party* for such equitable relief *as may be appropriate to* insure the minimum corrective measures necessary to insure the full enjoyment of such rights, privileges, or immunities ...

(Emphasis added). The above-quoted language shows that the Attorney General has the authority to institute a CRIPA action based on deprivations of federal rights by *individual* officials, employees or other agents of a State. At the same time, Section 1997a(a) makes it equally clear that injunctive *relief* under CRIPA is to run against *such parties as are appropriate to insure that appropriate corrective measures are taken* -- i.e., those management-level officials, such as the Defendants in this case, who have control and authority over the subordinate officials, agents, and/or employees whose unconstitutional conduct caused the Attorney General to file suit. Thus, CRIPA Section 1997a(a) imposes vicarious liability for injunctive relief on management officials for the conduct of their subordinates.

Equitable relief only against day care workers who abuse persons in mental retardation facilities, nurses who chemically restrain patients in nursing homes, food service workers who serve inedible food in psychiatric hospitals, or line officers who sexually abuse female inmates, would not be equitable relief "against such party ... as may be appropriate to insure the full enjoyment" of constitutional rights. Effective remedies for systemic constitutional violations require that the institution's management be involved in solving the problems, even when the harm is being caused by non-management employees. Vicarious liability therefore is essential in CRIPA litigation.

The foregoing analysis is supported by two cases, decided this year, in which the Supreme Court held that employers were vicariously liable for the sexual misconduct of their supervisory employees under Title VII. Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998); Faragher v. Boca Raton, 118 S.Ct. 2275 (1998). These decisions were based in part on the fact that Title VII's definition of the term 'employer' included the term 'agents,' and the Supreme Court interpreted this to mean that Congress intended that Title VII be interpreted under agency principles. Like Title VII, CRIPA requires the application of vicarious liability agency principles to be as fully effective as Congress intended.[(25)]

In addition, CRIPA's statutory scheme differs significantly from § 1983, providing a "notice" structure that makes a showing of "official policy or custom" unnecessary. Under § 1983, a private litigant can file suit under § 1983 without any prior notice or opportunity for defendant to alleviate constitutional infirmities. CRIPA, however, mandates that before a state or local government can be sued, the potential defendant must be notified that the Department of Justice has determined that constitutional violations exist and what remedy is necessary to correct the constitutional violation. 42 U.S.C. § 1997b. The United States cannot resort to litigation until after the defendant has been given the opportunity, and refused, to voluntarily come into compliance with the United States' findings. Thus, CRIPA's prelitigation notice requirements provide the appropriate public decision makers with specific notice of constitutional problems that is absent from § 1983 litigation, and provide another reason why these

decision makers should be liable for the actions of their subordinates.

III. THE UNITED STATES HAS STANDING

TO BRING THIS SUIT, AND

THIS COURT HAS ALREADY INDICATED

ITS REJECTION OF DEFENDANTS'

STANDARD OF PROOF ARGUMENT

Defendants intermingle three distinct arguments in claiming that the United States lacks standing to bring this action. They appear to be claiming (1) that the United States lacks Article III standing under the Constitution, Def. Br. at pages 8-9, (2) that the United States lacks statutory standing under CRIPA, Def. Br. at pages 6-10, and (3) that CRIPA, at 42 U.S.C. § 1997a(a), establishes the standard of proof at trial, Def. Br. at page 8. All three claims are incorrect.

A. The United States Has Constitutional

Standing To Bring This Suit

Defendants' argument that the United States lacks constitutional standing is difficult to understand since this suit was brought under CRIPA, by which Congress explicitly granted the United States standing to litigate prison conditions in federal court. United States v. Pennsylvania (Ebensburg Center), 902 F. Supp. 565, 578 (W.D. Pa. 1996) ("'CRIPA is a standing statute.'"), aff'd, 96 F.3d 1436 (3d Cir. 1996), quoting United States v. Tennessee, 798 F. Supp. 483, 488 (W.D. Tenn. 1992). It is difficult to understand how Defendants can challenge the United States' standing to bring this case, when Congress enacted CRIPA for the express purpose of providing that standing.

Under a traditional constitutional standing analysis, the United States clearly has standing to bring this case. In Steel Company v. Citizens For A Better Environment, 118 S.Ct. 1003, 1016 (1998) the Supreme Court summarized the required elements to satisfy constitutional standing:

The irreducible constitutional minimum of standing contains three requirements ... First and foremost, there must be alleged (and ultimately proven) an injury in fact--a harm suffered by the plaintiff that is concrete and actual or imminent, not 'conjectural' or 'hypothetical.' ... Second, there must be causation--a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant ... And third, there must be redressability--a likelihood that the requested relief will redress the alleged injury ...[citations and quotations omitted]

Under this analysis the United States has constitutional standing to bring this case. First, the United States has presented evidence that sexual misconduct and unnecessary invasions of privacy have caused actual harm to inmates.[(26)] Second, that harm has been caused by defendants' and their employees' and agents' actions. Third, remedial measures exist that would reduce sexual misconduct and invasions of privacy. SOF ## 123-124. The United States therefore satisfies all three elements of Article III standing requirements.

Defendants suggest that the United States lacks constitutional standing because sexual misconduct and invasions of privacy are not ongoing and have occurred only in the past. Def. Br. at page 9. The United

States' Statement of Facts shows that sexual misconduct and invasions of privacy were occurring in defendants' prisons in 1992, 1993, 1994, 1995, 1996, 1997, and 1998. SOF ## 1-4. Thus, constitutional harm continues.

B. The United States Has Statutory

Standing To Bring This Suit

Defendants erroneously claim that the United States lacks statutory standing because it cannot prove a pattern or practice of flagrant or egregious conditions, a standard taken from CRIPA § 1997a(a). Def. Br. at pages 6-10.[(27)] This argument fails for three reasons. First, CRIPA's legislative history shows that Congress intended that courts should not review the Attorney General's "reasonable cause" determination under Section 1997a(a). Second, federal courts have refused to examine the Attorney General's "reasonable cause" determinations concerning other civil rights statutes. Third, judicial review of the exercise of the Attorney General's discretionary authority is extremely limited even where judicial review is allowed, and is not warranted here.

CRIPA § 1997a(a) reads in part:

(a) Discretionary authority of Attorney General; preconditions. Whenever the Attorney General has reasonable cause to believe that any State ... is subjecting persons ... to egregious or flagrant conditions ... pursuant to a pattern or practice ... the Attorney General ... may institute a civil action ...

The terms a "pattern or practice" of "egregious and flagrant" conditions are elements of the Attorney General's "reasonable cause" determination of whether to file a CRIPA suit.

This Court has already ruled, on July 9, 1997, that it cannot judicially review the Attorney General's compliance with CRIPA's presuit requirements in § 1997(b) because of the express prohibition on judicial review set forth in CRIPA's legislative history. CRIPA's legislative history contains a parallel prohibition on judicial review of the Attorney General's "reasonable cause" determination in § 1997a(a).

In the Senate Report on CRIPA, the Judiciary Committee stated:

[C]ourts have consistently held that the decision of the Attorney General to initiate such pattern or practice litigation is not a proper subject for judicial inquiry [citing cases]. The committee intends that under the grant of authority in [§ 1997a(a)], the decision of the Attorney General to file suit shall be similarly unreviewable.

S. Rep. No. 96-416 (1980) reprinted in 1980 U.S.C.C.A.N. 810-11.

Thus, Congress has directed that Defendants cannot challenge the Attorney General's "reasonable cause" determination that a pattern or practice or flagrant and egregious conditions merited the initiation of litigation in this case.

The phrase "reasonable cause" appears in other civil rights statutes authorizing suits by the Attorney General, and federal courts have held that they will not judicially review such "reasonable cause" determinations. For example, the Fair Housing Act, 42 U.S.C. § 3614(a) provides:

Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of rights granted by this subchapter ...

the Attorney General may commence a civil action in any appropriate United States district court.

Numerous courts have held that the Attorney General's "reasonable cause" determination under the Fair Housing Act is not subject to judicial review. See, e.g., United States v. City of Philadelphia, 838 F. Supp. 223, 227 (E.D. Pa. 1993), aff'd, 30 F.3d 1488 (3d Cir. 1994); United States v. Yonkers Board of Education, 624 F. Supp. 1276, 1291 n.9 (S.D.N.Y. 1985), aff'd, 837 F.2d 1181 (2d Cir. 1987), cert. denied, 486 U.S. 1055 (1988); United States v. Housing Authority of Chickasaw, 504 F. Supp. 716, 726 (S.D. Ala. 1980).

If courts may not review the Attorney General's "reasonable cause" determination of whether to file suit under the Fair Housing Act, there is no reason why they should be able to review that same discretionary decision in CRIPA cases, especially in light of CRIPA's legislative history forbidding such review. See also Salvador v. Bennett, 800 F.2d 97, 99 (7th Cir. 1986) (no judicial review of EEOC's "no reasonable cause" determinations); Georator Corp. v. EEOC, 592 F.2d 765, 767 (4th Cir. 1979) (same).

Finally, it is axiomatic that federal courts "will not interfere with the Attorney General's prosecutorial discretion unless it is abused to such an extent as to be arbitrary and capricious and violative of due process." United States v. Welsh, 572 F.2d 1359, 1360 (9th Cir. 1978). CRIPA § 1997a(a) begins with the phrase "discretionary authority of Attorney General." Even if this Court can review the Attorney General's "reasonable cause" determination, Defendants have not and cannot offer any evidence that the Attorney General's decision to file suit in this case was abusive or arbitrary and capricious. In fact, as the factual record reflected in the parties' pleadings on Defendants' 1997 motion to dismiss proves, the decision to file suit was taken only after years of discussion, negotiation, and Defendants' recalcitrance.

As this Court succinctly noted in its July 25, 1997, denial of Defendants' motion for reconsideration of the Court's denial of their motion to dismiss, Defendants cannot deny the United States access to state facilities to investigate allegations of unconstitutional conditions and then complain that the United States abused the process by filing suit. The Court should not interfere with the Attorney General's prosecutorial discretion to file CRIPA suits, especially when Defendants refused to cooperate with the pre-suit investigation.

C. This Court Has Already Indicated

Its Rejection of Defendants'

Standard of Proof Argument

Defendants' "standing" argument, as they themselves say, is really an argument about the standard of proof necessary for the United States to prevail at trial. Def. Br. at page 8 ("The 'egregious and flagrant' requirement [reflects] ... Congressional intent to impose this higher burden of proof on the United States at trial ...").

Defendants in previous CRIPA cases also have argued that Section 1997a(a) sets forth the standard of proof at trial. All courts to have considered this argument have rejected it. Both United States v. Pennsylvania (Ebensburg Center), 902 F. Supp. 565, 578-80 (W.D. Pa. 1996), aff'd 96 F.3d 1436 (3d Cir. 1996), and United States v. Pennsylvania (Embreeville Center), 863 F. Supp. 217 (E.D. Pa. 1994), subjected arguments identical to Defendants' to a rigorous legal analysis and rejected them completely. Both courts held that the language in § 1997a(a) relates solely to the Attorney General's determination of whether she has reasonable cause to initiate a civil action under CRIPA, and not to the definition of the standard of proof at trial. See also Messier v. Southbury Training School, 916 F. Supp. 133, 137 (D.

Conn. 1996).

Moreover, this Court already has indicated its disagreement with Defendants' argument that § 1997a(a) establishes the standard of proof in CRIPA actions. In its July 9, 1997, Order denying Defendants' motion to dismiss, this Court cited with approval Messier v. Southbury Training School, 916 F. Supp. 133, 137 (D. Conn. 1996), and included the following quote from Messier in the text of its opinion at pages 8 and 9:

Once the Attorney General has brought suit, having determined that CRIPA's prerequisites are satisfied, [t]he United States is treated no differently than any other litigant, and has neither a greater nor lessor burden of proof than that faced by an individual institutional resident bringing suit on his or her behalf.

Thus, this Court has previously indicated its agreement with the United States' position that once the Attorney General authorizes the filing of a CRIPA lawsuit, the United States must demonstrate at trial that Defendants exhibit a pattern or practice of violations of the constitutional rights of institutionalized persons[(28)] -- and not the factors taken into consideration by the Attorney General in deciding to file suit.

If Defendants' interpretation of § 1997a(a) were correct, the United States would have to meet a far higher standard of proof than any private litigant who brings an action to remedy unconstitutional conditions at a state prison. If a female inmate sued Arizona raising sexual misconduct claims, Arizona obviously would not be able to argue that the "reasonable cause" criteria of § 1997a(a) constituted the standard of proof that the inmate would have to meet to prevail at her trial. To establish that the United States had a greater burden than other plaintiffs, Defendants would have to demonstrate that Congress intended Arizona female inmates to have less protection of their constitutional rights in suits brought pursuant to CRIPA than that afforded them under 42 U.S.C. § 1983. But whether sexual misconduct violates the constitution should not depend on the identity of the plaintiff. See United States v. Pennsylvania (Embreeville Center), 863 F. Supp. at 219 ("[CRIPA's language]

does not . . . indicate that the United States must prove at

trial that a case is more serious than one that may have been

brought by any other plaintiff.").

IV. THE GOVERNOR IS A PROPER PARTY

Defendants argue that the Governor should be granted summary judgement because she "has no further involvement in the ADOC" other than appointing its Director, and because "the authority to manage the prison system is vested solely with the Director." Def. Br. at pages 28-29. Arizona statutes and cases, however, directly contradict Defendants' characterizations of the Governor's relationship with ADOC.

First, not only does the Governor have the power to appoint ADOC's director (subject to consent of the State Senate), she has the power to remove him as well, for any reason at all. See Ariz. Statute 41-1603 ("The director of the department [of corrections] shall be appointed by the Governor ... and shall serve at the pleasure of the governor."); Ahern v. Bailey, 451 P.2d 30, 33 (Ariz. 1969) (Governor has "the power to select subordinates and to remove them if they are unfaithful ... the power to remove is an executive function").

Second, the Governor has statutory "charge and control" over Arizona prisons. See Ariz. Statute 41-901

("The governor shall have charge and control of the .. state prison and other state institutions the management of which is not otherwise provided by law."); Litchfield Elementary School v. Babbit, 608 P.2d 792, 798 (Ct. App. Ariz. 1980) (noting Governor has "charge," "control," and "management" authority over Arizona prisons).

The Governor can, and presumably would, fire an ADOC director who refuses to feed inmates. The Governor has the ultimate authority over state institutions. Either inmates are treated the way she wants, or she can remove the director, and succeeding directors, until conditions are to her satisfaction.

Thus, the Governor has the ultimate authority over Arizona prisons for women, through the power to appoint and remove the Director, and the power to take "charge" and "control" of state prisons. As discussed above, CRIPA authorizes suit against any person necessary for the United States to obtain appropriate equitable relief to remedy systemic unconstitutional conditions of confinement. As the elected official with the ultimate authority and control over Arizona's prisons, the Governor wields the greatest power to effect institutional change within Defendants' prisons. The Governor, therefore, is a necessary and proper party for injunctive relief.

CONCLUSION

For the foregoing reasons, the United States requests that the Court deny Defendants' summary judgment motion in its entirety.

Respectfully submitted,

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1. Moreover, the incidents of sexual misconduct and invasions of privacy revealed in discovery reflect only a portion of the sexual misconduct and privacy invasions occurring in Arizona women's prisons. SOF ## 20-21.

2. Indeed, Arizona inmates' legal inability to consent to sexual contact with ADOC employees was recently made explicit by a state law, enacted at ADOC's request, which makes sexual contact between inmates and employees a felony offense. See A.R.S. § 13-1419.

3. This is not a novel doctrine. Most, if not all, states have statutes that criminalize sexual contact with persons who are incapable consenting to such contact because of physical or mental conditions. See, e.g., Martin v. Kassulke, 970 F.2d 1539 (6th Cir. 1992).

4. Defendants are also vicariously liable for that Eighth Amendment violation, as discussed infra.

5. See, e.g., See Hayes v. Marriott, 70 F.3d 1144, 1146 (10th Cir. 1995) ("Prisoners do retain a limited constitutional right to bodily privacy, particularly as to searches viewed or conducted by members of the opposite sex [citing cases]."); Fortner v. Thomas, 983 F.2d 1024, 1030 (11th Cir. 1993) ("We are persuaded to join other circuits in recognizing a prisoner's constitutional right to bodily privacy because most people have 'a special sense of privacy in their genitals, and involuntary exposure of them in the presence of people of the other sex may be demeaning and humiliating.'") quoting Lee v. Downs, 641 F.2d 1117, 1119 (4th Cir. 1981); Cornwell v. Dahlberg, 963 F.2d 912, 916 (6th Cir. 1992) ("convicted prisoner maintains some reasonable expectations of privacy ... related to forced exposure to strangers of the opposite sex."); Covino v. Patrissi, 967 F.2d 73, 78 (2d Cir. 1992) ("We have little doubt that society is prepared to recognize as reasonable the retention of a limited right of bodily privacy even in the prison context."); Cookish v. Powell, 945 F.2d 441, 446 (1st Cir. 1991) ("inmate's constitutional right to privacy is violated when guards of the opposite sex regularly observe him/her engaged in personal activities, such as undressing, showering, and using the toilet."); Kent v. Johnson, 821 F.2d 1220, 1226-27 (6th Cir. 1987) ("[T]here must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding, reason, for the obverse would be repugnant to notions of human decency and personal

integrity.").

6. Defendants mistakenly assert that the United States believes that inmates have a right to bodily privacy from same gender staff. Def. Br. page 20, n. 8. This assertion is baseless. Similarly, there is no basis for Defendants' assertion that the United States believes that prison officials can never legally view inmates while they are dressing, showering or using toilet facilities. Def. Br. page 21. There are situations in which a male officer would have a legitimate penological interest in being in toilet or shower areas while they are in use.

7. Defendants have admitted that female inmates may be closely observed on a routine basis by male officers as they shower, toilet, and dress, and that male officers are instructed not to announce their presence as they enter these areas. SOF ## 83-86. ADOC Director Stewart testified that even unnecessary or excessive viewing of female inmates by male staff does not violate inmates' constitutional rights. SOF # 87.

8. Defendants have violated this Court's oral order at a hearing in 1997 not to cite to unpublished decisions. This order was issued at Defendants' request, as they objected to the United States citing unpublished decisions.

9. Defendants also cite Johnson v. Phelan, 69 F.3d 144 (7th Cir. 1995). Defendants' interpretation of Johnson was, however, explicitly called into question by a subsequent Seventh Circuit case, Peckham v. Wisconsin Department of Corrections, 141 F.3d 694 (7th Cir. 1998).

10. ADOC staff training is deficient because employees (including ADOC officers, and maintenance and contract workers) do not receive adequate training concerning sexual misconduct and invasions of privacy. SOF ## 35-46.

11. ADOC fails to give inmates either written or verbal information about sexual misconduct or how to report it when they enter ADOC, and ADOC has not even provided inmates with specific information regarding the recently-enacted Arizona statute that makes it a felony for an inmate and an ADOC employee to be involved in sexual conduct. SOF ## 47-53.

12. ADOC fails to provide its investigators with special training on prison investigations, fails to seek out and interview all appropriate witnesses, fails to ensure that its investigators determine whether the alleged perpetrators have been the subject of previous allegations of sexual misconduct, fails to maintain a central file of incident reports, lacks the ability to track the number or type of sexual misconduct complaints, and fails to continue investigations after employee resignations. SOF ## 54-66.

13. ADOC allows guilty employees to resign instead of firing them, fails to continue investigations after employees resign, fails to talk to staff about substantiated incidents, and fails to encourage prosecution of sexual misconduct that may violate criminal statutes. SOF ## 67-69.

14. ADOC fails to search proactively for allegations of sexual misconduct and invasions of privacy, and fails to end practices that facilitate sexual misconduct and invasions of privacy, most notably its failure to change its practice of allowing female inmates and ADOC staff to be alone together. SOF ## 70-82.

15. ADOC's grievance system is deficient in addressing inmate complaints, and the manner in which inmate complaints are retained and organized by ADOC renders the complaint system useless in any effort to identify and resolve systemic problems related to sexual misconduct and invasions of privacy. SOF ## 94-96.

16. Many Arizona female inmates do not report sexual misconduct regarding themselves or others because they fear going to detention or other punishment -- a fear that is warranted, since ADOC admits that its policies and practices permit sending a female inmates to detention for participating in, witnessing, or reporting sexual misconduct. SOF ## 97-116.

17. ADOC fails to offer mental health services to inmates who have been involved in sexual misconduct despite the fact that mental health experts retained by *both* parties believe that such services are appropriate, and despite the substantial evidence regarding the very high percentage of Arizona female inmates with histories of pre-incarceration physical or sexual abuse or mental illness and the increased vulnerability of these inmates to sexual misconduct and to harm resulting from that misconduct. SOF ## 117-122.

18. SOF ## 125-127.

19. The United States disputes Defendants' Statement of Facts in support of their summary judgment motion. Many of Defendants' facts relate to employee training. Defendants' Facts 7-8, 10-20. But as ADOC's expert penological witness and its Director testified, training cannot be assessed by a paper review alone -- it must be assessed by its results. SOF ## 36-37. The United States' Statement of Facts shows clearly the results of ADOC employee training: hundreds of incidents of sexual misconduct, from rape to invasions of privacy. SOF ## 1-4. Many of Defendants' other facts are wrong or are in dispute. For example, the United States disputes that ADOC managment utilizes a comprehensive strategy to deal with sexual misconduct, SOF ## 35-122, that inmates routinely report misconduct, SOF ## 97-116, and that ADOC promptly and aggressively investigates allegations of misconduct, SOF ## 54-66.

20. See Admissions ## 120-235 in Defendants' Third Amended Answers to United States Requests To Admit, containing admissions about instances of sexual misconduct occurring in Arizona women prisons from 1992 to 1998.

21. Each case cited by Defendants' in support of their argument that they cannot be held vicariously liable was decided prior to these cases.

22. Defendants cite Felder v. Casey, 487 U.S. 131, 148 (1988), as support of their statement that CRIPA cases brought by the United States are a type of § 1983 case. Felder merely notes that one section of CRIPA (1997e) establishes that adult prisoners must exhaust administrative remedies prior to bringing suit under § 1983. Felder does not address whether CRIPA suits brought by the United States are a type of Section 1983 action.

23. The Monell plaintiffs, a class of female employees of the city of New York challenging city policy that compelled pregnant employees to take unpaid leaves of absence regardless of medical need, originally sought injunctive and declaratory relief as well as backpay. However, the district court held the injunctive claims moot after defendants changed their policies relating to maternity leaves. Monell 436 U.S. at 661. These claims were thus not before the Supreme Court.

24. Federal district courts in the Ninth and other circuits have followed Chaloux and Gates. See,e.g., Joyce v. City and County of San Francisco, 846 F. Supp. 843, 861 (N.D. Cal. 1994) ("Where prospective relief only is sought the Ninth Circuit has provided that the 'official policy or custom requirement' does not apply."); Santiago v. Miles, 774 F. Supp. 775, 792 (W.D.N.Y. 1991) (In prison case, "The [Chaloux] court held that the Monell doctrine did not limit plaintiff's ability to sue to enjoin state officials from the *continued violation of constitutional rights*.") (emphasis added).

25. CRIPA contains similarly expansive language, authorizing the Attorney General to bring suit against a state or locality when she has reasonable cause to believe that constitutional rights are being violated by "any State . . . official, employee, or agent thereof, or person acting on behalf of a State . . . ." § 1997a(a).

26. Under CRIPA, the United States stands in place of the inmates whose rights the United States seeks to vindicate. In addition, remedying ongoing constitutional violations serves the interests of all citizens, not only the persons institutionalized.

27. The evidence presented to the Court in the accompanying Statement of Facts and supporting exhibits raises a disputed issue of material fact concerning whether there is a pattern or practice of flagrant and egregious conditions, precluding summary judgment.

28. The United States must prove at trial that defendants are guilty of a "pattern or practice" of constitutional violations. The United States must prove a "pattern or practice" because it seeks institution-wide reform, and systemic relief would not be warranted if the United States could prove only sporadic and isolated constitutional violations.