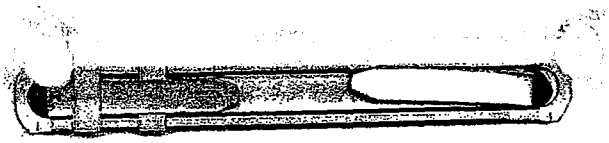

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

R.G., an individual; C.P., an individual by and through her next friend, A.W.; and J.D., an individual,

Plaintiffs,

vs.

LILLIAN KOLLER, Director of the State Department of Human Services, in her individual and official capacities; SHARON AGNEW, Director of the Office of Youth Services, in her individual and official capacities; KALEVE TUFONO-IOSEFA, Hawaii Youth Correctional Facility Administrator, in her individual and official capacities; *et al.*

Defendants.

CIVIL NO: 05-566 JMS/LEK

[CIVIL RIGHTS ACTION]

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION; CERTIFICATION OF WORD COUNT; DECLARATION OF PAUL ALSTON, EXS. 1- 6; SUPPLEMENTAL DECLARATION OF ROBERT J. BIDWELL, M.D., EX. 1; DECLARATION OF CAROLYN J. BROWN, EXS. 1-3; DECLARATION OF NELSON G. GRIFFIS, EX. 1; DECLARATION OF LINDA HADLEY, EX. 1; DECLARATION OF MELVEA HARDY, EX. 1; DECLARATION OF SHAUNA KAMAKA, EX. 1; DECLARATION OF LARRY D. MIESNER, EX. 1; SUPPLEMENTAL DECLARATION OF LOIS K. PERRIN, EXS. 1-3 ; DECLARATION OF DAVID ROUSH, EX. 1; CERTIFICATE OF SERVICE

JUDGE: Hon. J. Michael Seabright
HEARING: November 21, 2005
TIME: 1:30 p.m.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

R.G., an individual; C.P., an individual by and through her next friend, A.W.; and J.D., an individual,

Plaintiffs,

v.

LILLIAN KOLLER, Director of the State Department of Human Services, in her individual and official capacities; SHARON AGNEW, Director of the Office of Youth Services, in her individual and official capacities; KALEVE TUFONO-ISOSEFA, Hawaii Youth correctional Facility Administrator, in her individual and official capacities; *et al.*,

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CIVIL NO. 05-566 JMS/LEK

[CIVIL RIGHTS ACTION]

REPLY MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION AND SUMMARY OF ARGUMENT

As a preliminary matter, defendants' standing argument fails on the facts, *e.g.*, J.D. remains subject to return until July of 2005 (Brown Decl. ¶¶9-13) and plaintiffs' reasonable expectation of return has again been shown by R.G.'s current order of return to HYCF. (Kamaka Decl. ¶11.)

As to the merits, defendants' opposition is most notable for what it omits. Although defendants dispute selected details of incidents described by plaintiffs, they do not deny the key facts underlying plaintiffs' standing and legal claims. Defendants' concessions alone are sufficient to compel injunctive relief. Specifically, defendants do not contest that HYCF: (1) does not have policies with regard to the treatment and care of lesbian, gay, bisexual and transgender ("LGBT") youth; (2) regularly uses isolation to manage LGBT youth; (3) houses the most dangerous wards together with the most vulnerable; (4) lacks a functioning system to address alleged mistreatment; (5) has failed adequately to train its staff regarding the few policies it does have; and (6) operates with staffing levels insufficient to prevent unconstitutionally hazardous conditions.

Instead, the bulk of defendants' opposition rests on the premise that the Court should defer to their professional judgment in corrections. The facts, however, do not support any such deference. First, all of the above-mentioned practices violate professional norms. While the Constitution does not require adherence to all professional standards, it is well-established that deviation from

professional standards supports an inference that defendants' actions were not motivated by their exercise of professional judgment, and thus are entitled to no deference.

Second, plaintiffs have submitted powerful, and largely un-rebutted, evidence that defendants' mistreatment of LGBT wards was motivated by animus.

Third, and most damningly for defendants' case, the only expert evidence offered in support of defendants' professional judgment with respect to LGBT youth is fabricated. Defendant Tufono-Iosefa states under oath that HYCF's retained experts, Larry Miesner and Nelson Griffis, told her that it was appropriate to house male-to-female ("MTF") transgender youth with the boys, and that juvenile wards are housed based on their genitalia. (Tufono-Iosefa Decl. ¶¶ 10-11, 21.) ***This testimony is false***, and flatly denied by Miesner and Griffis. (Miesner Decl. ¶¶9-10 (placement "defies common logic"); Griffis Decl. ¶¶9-11, filed herewith.) Indeed, *defendants' experts state that their professional opinion is just the opposite: housing MTF transgender youth with male wards at HYCF is unsafe and inappropriate*. (Miesner Decl. ¶¶6-7, 10; Griffis Decl. ¶¶6-8, 11; Roush Decl. ¶ 11.) This fabrication goes to the heart of and eviscerates the asserted defenses on the merits of this motion. The Miesner and Griffis declarations reaffirm the conclusions reached by the ACLU Report and DOJ Report (10/3/05 Perrin Decl. Exs.A-B) – that HYCF operates an unsafe environment in violation of constitutional requirements.

Furthermore, the fabrication of expert evidence designed to place a veneer of professional respectability on defendants' decisions is itself convincing evidence

that defendants' *actual* motive was anti-LGBT animus. *Reeves v. Sanderson Plumbing, Inc.*, 530 U.S. 133, 147 (2000) ("[T]he trier of fact can reasonably infer from the falsity of the explanation that the [party] is dissembling to cover up a discriminatory purpose.").

Against this evidence, and more than two years after the ACLU Report, defendants offer nothing more than promises that they intend voluntarily to fix the problems at HYCF. To the extent defendants contend that adoption of a mere six new policies moots plaintiffs' claims, the law provides otherwise. Moreover, as set forth below, these six policies are insufficient to address and correct the unconstitutional conditions, policies, and practices at HYCF.

LEGAL STANDARD

Defendants' contention that they will suffer a hardship if forced to cease violating the constitutional rights of children defies logic. Requiring a state actor to adhere to constitutional norms is not a "hardship" for preliminary injunction purposes. *Cf. Quon v. Stans*, 309 F. Supp. 604, 608 (N.D. Cal. 1970) ("[B]alancing of hardships may have no role or at least a lesser role where constitutional rights are involved."). Defendants do not contest the plaintiffs' compelling interest in avoiding further physical and psychological harm, or the public interest in adherence to constitutional norms at HYCF.

Moreover, defendants' selective denial of parts of plaintiffs' factual evidence does not preclude an injunction, because triable issues of fact do not defeat a motion for preliminary injunction. *See Charlton v. Estate of Charlton*, 841 F.2d 988, 989 (9th Cir. 1988) (triable issue of fact merely entitles non-movant

to hearing on motion for permanent injunction). Rather, plaintiffs here need only show that their claims raise "serious questions," and that they have "a fair chance of success on the merits." *Republic of Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988).

> Serious questions are substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation. Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits.

Id. (citations omitted).

ARGUMENT

I. PLAINTIFFS HAVE STANDING TO SEEK INJUNCTIVE RELIEF

A. Standing Requires that Plaintiffs Have a Concrete Interest in the Outcome at the Time the Complaint Is Filed

To satisfy Article III standing, a plaintiff must show she has "personally ... suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant that can be fairly traced to the defendant's challenged conduct, and which is likely to be redressed by a favorable decision." *LaDuke v. Nelson*, 762 F.2d 1318, 1323 (9th Cir. 1985) (internal citations omitted). A plaintiff seeking injunctive relief must show that she "can reasonably expect to encounter the same injury in the future." 13 Wright & Miller, FEDERAL PRACTICE AND PROCEDURE, § 3531.2 (2d ed. 1984) (citing *Los Angeles v. Lyons*, 461 U.S. 95 (1983)); *LaDuke*, 762 F.2d at 1324 (plaintiff must show a "likelihood of similar injury in the future."); *Armstrong v. Davis*, 275 F.3d 849, 860-61 (9th Cir. 2001);

(Mem. at 10-11.) Standing is determined by facts at the time of filing. *Clark v. City of Lakewood*, 259 F.3d 996, 1006 (9th Cir. 2001).

B. Plaintiffs Have Shown A Likelihood Of Similar Injury In The Future

In this case, the showing of a threat of repetition has two components: that plaintiffs reasonably expect (1) to be returned to HYCF; and (2) that if returned, they will be subjected to similar unconstitutional conditions. Plaintiffs' showing is compelling on both counts.

1. Plaintiffs Have Shown A Reasonable Expectation That They Will Be Returned To HYCF

As defendants concede, plaintiffs C.P. and R.G. are on parole from HYCF, and subject to return at any time, for any number of reasons.[1] Plaintiffs may be returned to HYCF for mere suspicion of misconduct that falls well short of unlawful activity and even solely due to third-party conduct. (Kamaka Decl. ¶5-9, Ex.1; Hardy Decl. ¶8-9.) The reasonableness of plaintiffs' expectation that they will be returned to HYCF is underscored by the fact that, since the filing of the complaint, R.G. was returned to HYCF once already for no misconduct of her own, (R.G. Decl. ¶45), and is currently subject to an Order of return for leaving her residential program on November 8. (Kamaka Decl. ¶10-11.) When returned, R.G. will remain at HYCF until her 19th birthday unless another placement is located and approved. (Kamaka Decl. ¶11.) Indeed, there are many examples of

[1] Defendants' assertion that J.D. is not subject to HYCF's jurisdiction is factually wrong. Under an August 4, 2005 court order, J.D. remains subject to return to HYCF until his 19th birthday (July 2006) even for a technical probation violation. (*See* Brown Decl. ¶¶9-13, Exs.1-3.)

lawful conduct that can trigger a return to HYCF, including breaking curfew, not following program rules, not attending school on a regular basis, running away, or even quitting a job. (Kamaka Decl. ¶9, Ex.1).

The reasonableness of plaintiffs' expectation of return is further confirmed by statistics regarding parole revocation. Nearly half of paroled wards are returned to HYCF for parole violations. (Supp. Perrin Decl. Ex.1 at 2, 13 (Attorney General of Hawaii Report to OYS Feb. 2001 ("AG Report")); Hardy Decl. ¶¶7-9.) With respect to wards who, like J.D., are on probation, the AG found that "[c]ommitments for probation revocation accounted for 27%" of first-time commitments to HYCF. (AG Report at 2,13; *see also* Brown Decl. ¶¶12-14.) This is neither remote nor speculative. Further, the fact that each plaintiff has been returned to HYCF multiple times alone is sufficient to establish a reasonable likelihood of return, (R.G. Decl. ¶¶6-7, 45-47; C.P. Decl. ¶¶25, 52; J.D. Decl. ¶50), because repeated incarceration may demonstrate the likelihood of future incarceration. *Demery v. Arpaio,* 378 F.3d 1020, 1025, 1027 (9th Cir. 2004) (affirming entry of a preliminary injunction on behalf of "former [pretrial] detainees" because plaintiffs were likely to be reincarcerated and subjected to the same unconstitutional conditions).[2]

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[2] Defendants assert that *Demery* does not apply because it concerned mootness. But the district court's entry of the injunction, and the Ninth Circuit's affirmance of it, necessarily presuppose that plaintiffs had standing to seek injunctive relief, as it is incumbent on a court to dismiss an appeal if there was no Article III standing. *See Wilbur v. Locke*, 423 F.3d 1101, 1106-07 (9th Cir. 2005). Moreover, where (as in *Demery* and here) *former* detainees challenge conditions of confinement, the mootness and standing inquiries merge, inasmuch as standing requires a "likelihood of similar injury," and plaintiffs must show a "reasonable

Contrary to defendants' assertions, plaintiffs' expectation of being returned to HYCF is neither speculative nor hypothetical as in *Los Angeles v. Lyons*. Indeed, *Lyons* has no bearing on the standing inquiry in this case, for at least two reasons. First, *Lyons* held that "standing is inappropriate where the future injury could be inflicted *only* in the event of future *illegal* conduct by plaintiff." *Armstrong,* 275 F.3d at 865 (citing *Lyons*) (emphasis added). The Ninth Circuit has expressly distinguished *Lyons* in cases like *Armstrong* and *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1041 (9th Cir. 1999), where the conduct that may trigger a future violation is not unlawful. *Armstrong*, 275 F.3d at 866. This is such a case, as plaintiffs need not engage in illegal conduct to be returned to HYCF. (AG Report at 13-15 (identifying legal behavior that can result in return to HYCF); Kamaka Decl. ¶¶5-9, Ex.1; Hardy Decl. ¶8-9; Brown Decl. ¶14, Ex.3.)[3]

Second, defendants are engaging in a pattern of officially-sanctioned conduct that violates plaintiffs' constitutional rights. Conversely, *Lyons* "pointed to the absence of 'any evidence showing a pattern of [unconstitutional] police behavior.'" *LaDuke*, 762 F.2d at 1324 (quoting *Lyons*).

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expectation that the same parties will be subjected to the same offending conduct" to avoid a finding of mootness. *Demery*, 378 F.3d at 1025.

[3] Defendants' reliance on *McAlpine v. Thompson*, a Tenth Circuit case, is similarly misplaced. Like *Lyons*, *McAlpine* rested on the assumption that "[plaintiffs] will conduct their activities within the law and so avoid prosecution and conviction" and risk of injury. *McAlpine v. Thompson*, 187 F.3d 1213, 1216-17 (10th Cir. 1999). In contrast, as shown above, plaintiffs here need not violate the law to be returned to HYCF.

2. The Unconstitutional Conditions At HYCF Have Not Been Remedied

Plaintiffs' expectation of being subjected to unconstitutional conditions if returned to HYCF is objectively reasonable in light of defendants' history of repeated and persistent unconstitutional conduct and resistance to reform. *Armstrong*, 275 F.3d at 861 ("where the defendants have repeatedly engaged in the injurious acts in the past, there is a sufficient possibility that they will engage in them in the near future to satisfy the 'realistic repetition' requirement"). It is also reasonable because defendants' pattern of discrimination continues unabated to date. Defendants continue to follow outdated policies intended for an adult institution, which are inappropriate for juveniles. (Mem. at 19; *see also* Roush Decl. ¶8; Miesner Decl. ¶5; Griffis Decl. ¶5.) Ms. Tufono-Iosefa and the HYCF medical staff testified before the Legislature just last week that HYCF has no policies governing the treatment of LGBT wards. (Supp. Perrin Decl. ¶¶7,18.) HYCF has recently adopted a "Youth Rights" policy that provides that youth should not be discriminated against on the basis of "sexual orientation." (Tufono-Iosefa Decl. Ex.D.) Other than these two words, the current policies at HYCF remain silent with respect to the treatment and care of LGBT youth. (*Id.*; Hardy Decl. ¶4; Hadley Decl. ¶8; Supp. Bidwell Decl. ¶8.)

Finally, defendants' continuing intransigence is demonstrated by recent events. On Tuesday, October 25, 2005, there was staff training on three new policies at HYCF, including Youth Rights. (Hardy Decl. ¶3; Hadley Decl. ¶9.) When one of the social workers asked the trainer, Ms. Emmert, what the new

policy meant with respect to transgender wards, Ms. Emmert replied, "it is what is between their legs that matters," and that that MTFs would "have their heads shaved and will be placed with the boys." (Hardy Decl. ¶5; Hadley Decl. ¶9-10.)

In summary, plaintiffs have demonstrated that they are likely to be returned to HYCF, and that the pattern of constitutional violations at HYCF continues unabated. (*See also* Mem. at 10-12.)

II. PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THEIR DUE PROCESS CLAIM

Although defendants do not dispute their duty to ensure reasonably-safe conditions of confinement at HYCF, and freedom from unreasonable bodily restraint, *Youngberg v. Romeo*, 457 U.S. 307, 315-16 (1982); *Bell v. Wolfish*, 441 U.S. 520 (1979), defendants have failed effectively to refute plaintiffs' evidence that HYCF does not comply with these constitutional standards.

Defendants rely heavily on the proposition that prison administrators should be accorded deference with respect to actions necessary to preserve internal order. *Bell,* 441 U.S. at 547. Defendants offer no facts, however, to support such deference here. In fact, the conditions, policies and practices (or the lack thereof) at HYCF depart substantially from professional standards. (10/3/05 Perrin Decl. Ex.A, DOJ Report at 3-4; Griffis Decl. ¶¶4-5; Meisner Decl. ¶¶4-5.) It is the duty of this Court "to make certain that minimal constitutional rights are preserved." *Gary H. v. Hegstrom*, 831 F.2d 1430, 1433 (9th Cir. 1987).

A. Defendants' Excessive Use of Isolation Amounts to Punishment in Violation of Plaintiffs' Due Process Rights

Defendants correctly assert that in assessing institutional restrictions, courts must balance individuals' liberty interests and legitimate institutional needs for order and security. *Milonas v. Williams*, 691 F.2d 931, 942 (10th Cir. 1982). A proper balancing of those interests, however, dictates the conclusion that "placing boys in isolation facilities for any reason other than to contain a boy who is physically violent" gives rise to a due process violation. *Id.* at 935; (*see also* Roush Decl. ¶12-13; Miesner Decl. ¶11; Griffis Decl. ¶12.)

Defendants admit that, as a matter of policy, they use isolation as a means of "protecting" certain LGBT wards, including C.P. and J.D., from violent conditions at HYCF. (Opp. at 27-28.) This admission necessarily concedes that HYCF is unsafe. Moreover, defendants' assertion that they did not intend the isolation as "punishment" misses the point: the only expert evidence on this topic uniformly concludes that long-term segregation or isolation of youth is *inherently* punitive and outside of generally accepted practices (Mem. at 21-25; *see also* Roush Decl. ¶12-13; Miesner Decl. ¶11; Griffis Decl. ¶12.)[4] Indeed, HYCF may be the only juvenile facility in the country that employs this practice. (Griffis Decl. ¶12.) It

[4] Defendants' suggestion that Dr. Bidwell is unqualified to opine regarding policies is belied by the contract with HYCF, which specifically calls for input regarding HYCF policies and procedures. (10/3/05 Bidwell Decl. ¶11.) Moreover, as an expert in adolescent psychology and medicine, he is qualified to opine on the psychological and physical effects of the challenged practices. (*Id.* at ¶¶1-9.)

thus cannot seriously be disputed that HYCF's isolation practice violates wards' due process rights.[5]

B. Conditions At HYCF Are Unreasonably Unsafe With Regard To Wards' Physical And Psychological Safety

Second, defendants have offered no evidence that conditions at HYCF are safe, or are consistent with professional standards. Plaintiffs are therefore likely to prevail on their due process claim.

1. Defendants are required to protect HYCF wards from both physical and psychological harm.

Defendants assert – contrary to the evidence – that plaintiffs did not suffer "any physical harm," and therefore cannot establish unreasonably unsafe conditions at HYCF. (Opp. at 21.) This is factually and legally incorrect. First, defendants' assertion that "J.D. did not suffer any physical harm as a result of the conditions at HYCF" ignores the many physical and sexual assaults described by J.D. and their effect, (J.D. Decl. ¶¶3-5, 8-9, 17, 19, 22), or downplays the seriousness of these assaults by referring to them as "physical touchings." (Opp. at 24.) J.D.'s un-rebutted testimony establishes a harrowing ordeal of physical, sexual and emotional abuse. Defendants also fail to rebut the physical manifestations of emotional and psychological abuse described by R.G. and C.P. (R.G. Decl. ¶¶5, 9, 15; C.P. Decl. ¶¶41, 47.)

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[5] Notably, the use of isolation for "protection" violates even HYCF's own policies. (Tufono-Iosefa Decl. ¶42, Ex.E. (wards have the right to "not be isolated or segregated unless [their] behavior is in violation of HYCF rules and regulations.").)

Second, it is well-established that defendants' obligation to provide a reasonably safe environment includes protection from both physical and psychological abuse. *See K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) ("*Youngberg v. Romeo* made clear . . . that the Constitution requires the responsible state officials to take steps to prevent children in state institutions from deteriorating physically or psychologically."). Again, defendants' arguments, and HYCF's practices, are inconsistent with even their own policies. (Tufono-Iosefa Decl. ¶42, Ex.E (stating that wards have the right "to be protected from *physical and emotional abuse.*").) The psychological and emotional abuse suffered by plaintiffs at HYCF is a cognizable injury.

While Defendants quibble with certain details of plaintiffs' accounts of abuse and discrimination, examination of the defendants' declarations (and the absence of declarations from several defendants), reveals no refutation of most of plaintiffs' testimony. Moreover, as noted above, defendants' selective denials of the abuse have no bearing on the appropriateness of injunctive relief. (*See supra* pp.3-4.)

2. The lack of a classification system creates unreasonably unsafe conditions at HYCF

Defendants admit that that they house the most violent wards together with the most vulnerable, and offer no expert evidence that this lack of classification is professionally acceptable. DOJ specifically found that the absence of classification contributed to the unreasonably unsafe conditions at HYCF. (DOJ Report at 16; *see also* Mem. at 20-21.) This conclusion is reinforced by the opinion of

defendants' own experts. (*See* Griffis Decl. ¶5.) Notably, defendants offer no professional opinion to the contrary.[6]

3. Inadequate grievance procedures create unreasonably unsafe conditions at HYCF

While defendants do not dispute that they are required to establish effective grievance procedures for HYCF wards, (Mem. at 21), they misapprehend plaintiffs' argument. While failure to resolve a grievance in favor of a ward is not, in itself, a violation of the ward's due process rights, plaintiffs have submitted evidence that fundamental inadequacies in HYCF's grievance procedures, by contributing to the unsafe environment, violate due process.[7] (*See* Mem. at 21.) And testimony by defendants Agnew and Tufono-Iosefa before the Legislature demonstrates that even the newly-minted grievance procedure is inadequate to handle complaints of alleged mistreatment. (Supp. Perrin Decl. ¶14-16.)

4. Inadequate staffing, supervision and training create unreasonably unsafe conditions at HYCF

Defendants do not dispute that staffing and supervision at HYCF is inadequate to provide a safe environment for wards. Indeed, by asserting that J.D. and C.P. were isolated for "protective purposes," (Opp. at 21, 24-25, 27-28),

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[6] Further, defendants' argument that there is no evidence that "J.D. was accosted by wards who were more 'aggressive' or 'dangerous'" is nonsensical because HYCF never completed a risk assessment of the wards. It also ignores J.D.'s testimony that certain wards were particularly aggressive. (J.D. Decl. ¶¶3-5, 10, 17, 19.)

[7] Defendants' assertion that "only J.D. and C.P. filed grievances with HYCF" is incorrect. (R.G. Decl. ¶¶ 15, 38 (February 2005 grievances).) Further, plaintiffs did exhaust although they were not required to do so under the PLRA.

defendants effectively concede that HYCF was unsafe and that staffing levels left them unable to ensure plaintiffs' safety by other means. Defendants then blithely ignore the un-rebutted evidence that isolation is psychologically damaging to youth, (DOJ Report at 17-19; *see also* Roush Decl. ¶¶12-13; Miesner Decl. ¶11 (characterizing HYCF's practice as "inexcusable"); Griffis Decl. ¶12; 10/3/05 Bidwell Decl. ¶26.), and simply assert that inadequate staffing levels did not harm Plaintiffs. (Opp. at 23-24.) Plaintiffs' un-rebutted evidence, however, establishes a prima facie case that the inadequate staffing, training, and supervision contribute to HYCF's unsafe environment. (Mem. at 19-20.)

C. HYCF's Eleventh-Hour Adoption Of Selected New Policies Does Not Moot Plaintiffs' Claims for Injunctive Relief

Defendants suggest that adoption of six new policies weeks after this motion was filed renders injunctive relief unnecessary. (Opp. at 22.) These policies do not moot plaintiffs' claims, for several reasons. First, the legality of two of the six new "policies" is dubious. Defendant Agnew has conceded that some of the new HYCF policies were adopted pursuant to administrative rules that may have no legal effect. (Supp. Perrin Decl. ¶13.)

Second, the policies are woefully deficient to address the panoply of problems at HYCF. For example, with the exception of two words, the policies are silent as to LGBT matters, and despite being told to adopt such policies with due speed, defendants have failed to do so. (Supp. Bidwell Decl. ¶4, 8, Ex.1 at 13; Hadley Decl. ¶6, 8, 12; Hardy Decl. ¶4; Supp. Perrin Decl. ¶17-18.)

Third, defendants' voluntary steps toward reform do not moot a request for injunctive relief. *United States v. Odessa Union Warehouse Co-Op*, 833 F.2d 172, 176 (9th Cir. 1987). Defendants were aware of the unconstitutional and unsafe conditions at HYCF for over two years, yet implemented no corrective measures at all until faced with litigation.

III. PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR EQUAL PROTECTION CLAIM

Defendants' equal protection arguments boil down to three tactics. First, downplay the harassment plaintiffs faced as "mere name-calling" or the unavoidable product of a "tough" atmosphere. Second, recast defendants' actions as simply enforcing neutral rules. Third, claim that "order and safety" required plaintiffs to be treated as they were. These arguments all fail resoundingly as a matter of fact and law.

A. Defendants Intentionally Discriminated Against Plaintiffs Based on their LGBT Status

1. Discriminatory name-calling in a correctional setting is "strong evidence" of a constitutional violation

Defendants argue that "mere name calling" does not rise to the level of a constitutional violation. (Opp. at 30.) Plaintiffs' evidence does not show "mere name calling," however, but a pervasive atmosphere of anti-LGBT discrimination in which verbal harassment was part of a larger pattern of psychological abuse, assaults, threats, and enforced isolation. In *DeWalt v. Carter*, cited by defendants,

the Seventh Circuit noted that "a series of sexually suggestive and racially derogatory comments" made by a prison guard were

> strong evidence of racial animus, an essential element of any equal protection claim. Thus, although the use of racially derogatory language, by itself, does not violate the Constitution, it can be quite important evidence of a constitutional violation.

224 F.3d 607, 610, 612 n.3 (7th Cir. 2000) (citations omitted). Similarly here, defendants' use of anti-LGBT names was just one aspect of their systemic discrimination. This case, like *DeWalt*, is quite unlike *Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987), which concerned a supervisor's use of nondiscriminatory "vulgar language" to an adult inmate.

2. Defendants harassed, threatened and punished C.P. based on her LGBT identity

Defendants misconstrue the allegations regarding C.P., claiming it was not unconstitutional to "treat[] C.P. as a male." (Opp. at 31.) This formulation ignores that defendants' discriminatory conduct had nothing to do with treating C.P as biologically male: calling her anti-LGBT names, failing to discipline staff and wards who harassed her, and saying she could stop the harassment by not being transgender. (C.P. Decl. ¶42.) Moreover, defendants' threats to cut C.P.'s hair and place her on the boys' side of the facility (where her "life would be much worse") were intended to harass and intimidate her, not simply to treat her as male. (C.P. Decl. ¶16-21; 30-33; 40-47.)

Neither of defendants' claimed reasons for moving C.P. to the boys' side is valid. First, defendants claim that their retained experts Griffis and Miesner

advised them that juvenile ward placement is based on "biological identity" or "genitalia" (Tufono-Iosefa Decl. ¶¶10, 11.) This is false, (Griffis Decl. ¶¶10-11; Miesner Decl. ¶¶9-10), and raises an inference of discriminatory motive. *Reeves*, 530 U.S. at 147.

Second, defendants claim, without factual support, that C.P. "made advances to several of the female wards," prompting her removal to the boys' side. (Tufono-Iosefa Decl. ¶19.) This assertion – which would undoubtedly have been documented if true – is unsupported by evidence. [8]

The case defendants cite in support of housing C.P. with the boys is plainly distinguishable. *Long v. Nix*, 877 F. Supp. 1358, 1360 n.2 (S.D. Iowa 1995) concerned a transgender inmate who murdered and raped a female victim – a fact the court deemed "relevant to his request to be housed in a women's prison" – and who "[did] not fear sexual attack by inmates as he is 61 years old." *Id.* at 1361. *Nix* has no relevance here.

Nor did defendants' decision to isolate C.P., rather than discipline her harassers, bear any relation to treating her as male. The only reasonable interpretation of defendants' conduct is that it was motivated by animus based on sex, sexual orientation and gender stereotypes. This conclusion is supported by the opinion of defendants' own experts, that defendants' conduct deviates from accepted professional standards. (Griffis Decl. ¶12; Miesner Decl. ¶11; Roush

[8] Plaintiffs move to strike defendants' fabricated and scandalous statement that C.P. "expos[ed] himself" to the female wards. This claim lacks any factual support. (*Compare* Opp. at 6 *with* Tufono-Iosefa Decl. ¶ 19).

Decl. ¶¶10-12.) *See Garrett v. Hewlett-Packard Co.*, 305 F.3d 1210, 1220 (10th Cir. 2002) (deviation from procedure supports inference of improper motive).

3. Defendants harassed and punished R.G. based on her LGBT identity while encouraging a dating relationship between heterosexual wards

Defendants also seek to whitewash their discrimination against R.G., claiming they merely "enforc[ed] the rules prohibiting physical relationships between wards." (Opp. at 31.) This disingenuous explanation, however, fails to account for the – largely undisputed – facts that defendants repeatedly called R.G. anti-LGBT names, made humiliating sexual comments about her, and disciplined her for saying "I love you" to her girlfriend. (R.G. Decl. ¶¶10, 12, 16.) For the last, ***R.G. received twelve days' lockdown***, purportedly for talking after lights-out. (Opp. at 4.) Yet there is no evidence that any non-LGBT ward was ever punished so severely for a minor behavioral infraction, suggesting a discriminatory motive.[9]

Defendants' discriminatory motive is further evidenced by the extreme disparity in treatment of non-LGBT wards. Guards forbade R.G. and her girlfriend even to speak with one another, while heterosexual wards were permitted to speak freely — even graphically — about their sexual relationships, (R.G. Decl. ¶¶11, 20, 36), and guards facilitated a dating relationship between R.G.'s girlfriend and a male ward. (R.G. Decl. ¶¶18, 23-26.) This double standard has troubling First Amendment implications and is plainly unconstitutional under *Flores v. Morgan Hills Unified School District*, 324 F.3d 1130 (2003).

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[9] Moreover, as discussed above, the use of isolation in these circumstances violates due process.

Moreover, defendants' claim that they were only concerned about "physical relationships," is belied by the un-rebutted facts that they prevented R.G. and her girlfriend from ordinary socializing: talking to each other, sitting near each other, playing sports on the same team, or playing board games together. (R.G. Decl. ¶20.)

Finally, defendants' explanation of the meeting when Ms. Tufono-Iosefa assembled all the female wards to instruct them that R.G.'s relationship with her girlfriend was "disgusting" and "wrong" does not withstand scrutiny. (10/3/05 Bidwell Decl. Ex.F; R.G. Decl. Ex.A.) Ms. Tufono-Iosefa now maintains this meeting concerned the general topic of "the importance of all wards following the institution's rules." (Tufono-Iosefa Decl. ¶37.) Yet, HYCF's own internal report, authored by Ms. Tufono-Iosefa, shows the meeting was to set goals *concerning R.G. and her girlfriend* (R.G. Decl. Ex.A), and several girls who were present confirmed the meeting focused on their relationship. (Hadley Decl. ¶3.) This humiliating meeting about R.G.'s sexuality is strong evidence of the anti-LGBT atmosphere defendants fostered at HYCF. The facts make clear that defendants went far beyond enforcing a neutral rule and singled out R.G. for wildly disparate treatment.

4. Cases prohibiting "deliberate indifference" and "sex stereotyping" are particularly apposite in the juvenile detention setting

Defendants argue, without authority, that because a juvenile detention facility is a "tougher" environment than a school, conduct that would constitute

"deliberate indifference" in a school setting is permissible at HYCF. (Opp. at 33.) The idea that a "tough" environment excuses defendants from preventing anti-LGBT harassment of wards, as required by *Flores,* is untenable. 324 F.3d 1130. If anything, a more stringent standard for "deliberate indifference" should apply where the most vulnerable of the State's children are confined to its custody 24-hours a day. It is defendants' responsibility to ensure that HYCF's environment is not so "tough" as to fall short of constitutional standards. (Roush Decl. ¶13.)

Similarly, defendants cite no cases in support of their claim that cases prohibiting sex-stereotyping in the employment context do not apply at HYCF. (Opp. at 33-34.) Such stereotypes are even more pernicious in the juvenile detention setting, where psychologically-vulnerable minors have no escape from peer and staff abuse based on their failure to conform to sexual stereotypes and perceive such treatment to be rejection by their family. (Mem. at 30-31; 10/3/05 Bidwell Decl. ¶17.)

B. Defendants' Discriminatory Conduct Had No Rational Basis in Maintaining Order and Safety

Finally, defendants argue that their discriminatory treatment of plaintiffs contributed to order and safety at HYCF. (Opp. at 34.) The opposite is true. By modeling and permitting anti-LGBT discrimination, defendants fostered a dangerous climate for LGBT wards. (10/3/05 Bidwell Decl. ¶¶16-18.) As noted above, defendants' conduct went far beyond treating C.P. as male and preventing a physical relationship between R.G. and her girlfriend, and is disproportionate to any legitimate interest. Similarly, defendants' isolation of J.D. and C.P. in lieu of

providing a safe environment or disciplining their harassers is without rational basis and outside of accepted professional practices. (Mem. at 24.)

Defendants' protestations that their treatment of plaintiffs served institutional goals of order and safety are unconvincing. Defendants turned a blind eye to pervasive peer and staff harassment and threatened and punished plaintiffs for expressing their LGBT identity. None of these actions had the aim or effect of making HYCF safe and orderly. The only reasonable inference is that the actual basis for such actions was impermissible. Because there was no rational basis for defendants' discriminatory conduct, plaintiffs are likely to prevail on their equal protection claims.[10]

IV. PLAINTIFFS HAVE DEMONSTRATED A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR ESTABLISHMENT CLAUSE CLAIM

According to the defendants' argument, any corrections officer in a youth correctional facility can preach to wards, condemn their sexual orientation on religious grounds, and censor all their reading material other than the Bible, so long as the officer's conduct is not "the official policy or custom of the facility." (Opp. at 36.) Defendants' argument cannot be squared with *Canell v. Lightner*, 143 F.3d 1210, 1214 (9th Cir. 1998), which found that "for the purpose of an Establishment Clause violation, *a state policy need not be formal, written or approved by an official body* to qualify as state sponsorship of religion." The test

[10] The Court need not resolve appropriate level of scrutiny in this case (an open question) because defendants' actions fail rational basis review. Plaintiffs will provide supplemental briefing on the issue if necessary.

is whether the offending party had the authority to make policy, or the state ratified or endorsed the offending party's actions by approving of or ignoring the situation. Even absent an "official" policy at HYCF sanctioning Christian preaching, plaintiffs have shown under the standard articulated in *Canell,* that defendants' endorsement of anti-LGBT religious views and the bibles-only practice (Supp. Perrin Decl. ¶¶30-31) violates the Establishment Clause. (Mem. at 33-36.) Thus, a preliminary injunction should issue.

V. HYCF'S PRACTICE CONCERNING ACCESS TO COUNSEL FAILS TO AFFORD JUVENILE WARDS MEANINGFUL ACCESS TO THE COURTS

Strikingly absent from defendants' opposition is any argument to refute the well-settled principle that meaningful access to the courts includes access to counsel to allow children to challenge conditions of their confinement. *John L. v. Adams*, 969 F.2d 228 (6th Cir. 1992) (holding that the state was required to contract with private attorneys to provide part-time legal assistance to children in the state institutions in order to ensure meaningful access to counsel). Defendants do not dispute that they have no paralegal, law library or system to ensure that wards have access to the courts. (Mem. at 36-38.) Instead, defendants argue, based on three faulty factual premises: (1) that plaintiffs are not being denied access to counsel because they were able to file this lawsuit; and (2) that there is an "agreement" whereby HYCF requires parental consent prior to allowing a visit with the ACLU; and (3) that this purported "agreement" (and newly developed, but

not yet implemented (Hardy Decl. ¶10, Ex.1), practice of allowing wards to request a visit with the ACLU) satisfies minimum constitutional guarantees.

HYCF's current practice (and lack of policies) is barring other potential plaintiffs for this suit from contacting the ACLU or another civil lawyer. (Supp. Perrin Decl. ¶¶19-23.) Further, defendants have not disputed that plaintiffs were told that they could not contact the ACLU, (R.G. Decl. ¶43), and that defendant Tufono-Iosefa denied the ACLU's requests to visit C.P. in August of 2004 (10/3/05 Perrin Decl. ¶13.) Finally, contrary to defendants' representations, there has never been an "agreement" between HYCF and the ACLU or Alston, Hunt with respect to access to counsel. (Alston Decl. ¶¶3-9, Exs.1-6; Supp. Perrin Decl. ¶¶27-29, Ex.3.) HYCF's practice violates the wards' right to access to counsel and the courts. *John L.,* 969 F.2d at 230.

CONCLUSION

For all these reasons, a preliminary injunction should issue.

DATED: Honolulu, Hawaii, November 14, 2005.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

R.G., an individual; C.P., an individual by and through her next friend, A.W.; and J.D., an individual, Plaintiffs, vs. LILLIAN KOLLER, Director of the State Department of Human Services, in her individual and official capacities; SHARON AGNEW, Director of the Office of Youth Services, in her individual and official capacities; KALEVE TUFONO-IOSEFA, Hawaii Youth Correctional Facility Administrator, in her individual and official capacities; *et al.* Defendants.	CIVIL NO: 05-566 JMS/LEK [CIVIL RIGHTS ACTION] CERTIFICATION OF WORD COUNT

CERTIFICATION OF WORD COUNT

I, LOIS K. PERRIN, attorney for Plaintiffs, hereby certify that the foregoing Reply Memorandum in Support of Motion for Preliminary Injunction ("Memorandum") falls within the word allotment requested by Plaintiffs' Motion to Exceed Word Limit for Reply Memorandum, which is being filed concurrently herewith. According to the word count function of the Microsoft Word processing system that was used to produce this document, the Memorandum (excluding the caption and including headings, footnotes and quotations) contains 5732 words.

DATED: Honolulu, Hawaii, November 14, 2005.

Respectfully submitted,

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