IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 03-56712

JAMES ALLEN HYDRICK, et al.,
Plaintiffs-Appellees,

vs.

PETER WILSON, et al.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Judge Terry J. Hatter, Jr., Case No. CV 98-7167 TJH (RNBx)

APPELLEES' ANSWERING BRIEF

Joel E. Krischer (Bar No. 066489)
Kathryn M. Davis (Bar No. 199494)
Matthew B. Hayes (Bar No. 220639)
LATHAM & WATKINS LLP
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
(213) 485-1234 (phone)
(213) 891-8763 (fax)

Attorneys for Appellees,
James Allen Hydrick, et al.

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Case No. 03-56712

JAMES ALLEN HYDRICK, et al.,
Plaintiffs-Appellees,

vs.

PETER WILSON, et al.,
Defendants-Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA,
Judge Terry J. Hatter, Jr., Case No. CV 98-7167 TJH (RNBx)

APPELLEES' ANSWERING BRIEF

Joel E. Krischer (Bar No. 066489)
Kathryn M. Davis (Bar No. 199494)
Matthew B. Hayes (Bar No. 220639)
LATHAM & WATKINS LLP
633 West Fifth Street, Suite 4000
Los Angeles, CA 90071-2007
(213) 485-1234 (phone)
(213) 891-8763 (fax)

Attorneys for Appellees,
James Allen Hydrick, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

Page

CASES

STATUTES

I.

INTRODUCTION

This appeal concerns Defendants' second unsuccessful attempt to dismiss Plaintiffs' complaint. The complaint at issue was filed by individuals civilly confined at Atascadero State Hospital pursuant to California's Sexually Violent Predator Act. It alleges multiple violations of 42 U.S.C. Section 1983 and the United States Constitution. On appeal, Defendants contend that the district court erred in its Order of August 26, 2003, by summarily denying their Motion to Dismiss Plaintiffs' Second Amended Complaint on all grounds. In February 2000, the district court previously denied Defendants' Motion to Dismiss the First Amended Complaint, which was substantively equivalent to the Second Amended Complaint. Defendants did not, however, appeal that ruling.

In challenging Plaintiffs' Second Amended Complaint, Defendants reassert the same arguments they advanced to challenge Plaintiffs' First Amended Complaint. Specifically, Defendants contend, *inter alia*, that Plaintiffs' claims for monetary damages should be dismissed because the Eleventh Amendment bars such claims against Defendants acting in their official capacities and that the Second Amended Complaint contravenes the Eleventh Amendment by seeking to enforce state law claims in federal court. Defendants further contend that they are entitled to qualified immunity on every claim raised in the Second Amended Complaint either because no constitutional violation has been pled or because reasonable officials in Defendants' positions would believe their alleged actions were constitutionally permissible. As Plaintiffs argued in their Oppositions to Defendants' two Motions to Dismiss, and as the district court twice found, Defendants' arguments are without merit.

Contrary to Defendants' assertions, the Second Amended Complaint and the course of proceedings in this case make clear that Plaintiffs seek damages from

Defendants in their individual capacities only. In addition, none of Plaintiffs' claims attempt to enforce state constitutional claims in federal court. Rather, the Second Amended Complaint seeks only to enforce Plaintiffs' federal statutory and constitutional rights. As such, none of Plaintiffs' claims are barred by the Eleventh Amendment.

Furthermore, Defendants are not entitled to qualified immunity as a matter of law on any of the claims raised in the Second Amended Complaint. Plaintiffs have fully and properly alleged facts sufficient to state a claim for every cause of action in the Complaint. Defendants' arguments are ineffective to show that their alleged conduct did not violate some of the most firmly established rights protected by the Constitution. Moreover, regardless of the merits of Defendants' purported qualified immunity defense, it is not properly raised at this stage in the proceedings upon a Motion to Dismiss. Defendants' request pursuant to Rule 12(b)(6) that a finding of qualified immunity be made merely upon the pleadings in this case is precluded because a determination of the reasonableness of the Defendants' conduct will necessarily involve the Court in an analysis of the facts underlying this case. Absent adequate development of record facts, a grant of qualified immunity is premature.

II.

STATEMENT OF JURISDICTION

A. District Court Jurisdiction

The United States District Court for the Central District of California has jurisdiction pursuant to 28 U.S.C. Section 1343.

B. Appellate Jurisdiction

This Court has appellate jurisdiction pursuant to 28 U.S.C. Section 1291 and the collateral order doctrine. See Mitchell v. Forsyth, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1998). On August 26, 2003, the district court

entered its Order summarily denying Defendants' Second Motion to Dismiss. ER 804-05. On September 22, 2003, Defendants timely filed a notice of appeal pursuant to Federal Rules of Appellate Procedure 4(a)(1)(A). ER 806-07.

III.

STANDARD OF REVIEW

This Court reviews the district court's decision to deny a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) *de novo*. Fireman's Fund Ins. Co. v. City of Lodi, 302 F.3d 928, 939 (9th Cir. 2002). It is fundamental that, for purposes of a Rule 12(b)(6) motion to dismiss, all factual allegations set forth in the complaint are taken as true and construed in the light most favorable to plaintiffs. Thompson v. Davis, 295 F.3d 890, 895 (9th Cir. 2002), cert. denied, 123 S. Ct. 1570 (2003). Furthermore, as a general rule, a district court may not consider any material beyond the pleadings. Lee v. City of Los Angeles, 250 F.3d 668, 688 (9th Cir. 2001). A claim may be dismissed with prejudice only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief." Thompson, 295 F.3d at 895.

Federal Rule of Civil Procedure 8(e) grants parties great flexibility in framing their pleadings: "No technical forms of pleadings or motions are required." Fed. R. Civ. P. (8)(e). Rather, Rule 8(e) simply mandates that "each averment of a pleading . . . be simple, concise, and direct." Id.

It is true that a heightened pleading standard is required if subjective intent is an element of a claim against a government official in his or her individual capacity. Mendocino Envtl. Ctr. v. Mendocino County, 14 F.3d 457, 460 (9th Cir. 1994). This standard, however, does not apply to every claim in the Second Amended Complaint and, where it does apply, it has been met.

IV.

ISSUES PRESENTED

1. Whether the district erred in concluding that none of Plaintiffs' claims are barred by the Eleventh Amendment, where the Second Amended Complaint and the course of proceedings in this case evidence that Plaintiffs seek money damages from Defendants in their individual capacities only, and where Plaintiffs seek to enforce only federal statutory and constitutional rights.

2. Whether the district court erred in concluding that Defendants are not entitled to qualified immunity on any of the claims raised in the Second Amended Complaint, where Plaintiffs have alleged violations of clearly established rights, and where a determination of the reasonableness of Defendants' conduct involves adequate development of record facts such that a grant of qualified immunity is premature.

V.

STATEMENT OF THE CASE

A. Case Background

This action, alleging violations of 42 U.S.C. Section 1983 and the United States Constitution, was originally filed *pro se* on September 2, 1998, by individuals confined at Atascadero State Hospital ("ASH") pursuant to the Sexually Violent Predator Act (the "SVP Act"), California Welfare and Institutions Code §§ 6600 et seq. (the "SVPs"). ER 1-93. In approximately March 1999, Latham & Watkins was appointed as pro bono counsel for Plaintiffs. Thereafter, on August 31, 1999, Plaintiffs filed the First Amended Complaint for Injunctive and Declaratory Relief and Monetary Damages, setting forth allegations and causes of action that are substantively identical to those of the Second Amended Complaint, and seeking class certification. ER 94-120. The district court certified a class including all individuals who are, or were, confined at ASH pursuant to

California Welfare and Institutions §§ 6600 et seq. on or after September 2, 1997 – a class which now includes over 400 individuals.

Plaintiffs challenge the conditions of their confinement and the adequacy of the therapy/treatment programs at ASH, alleging that the conditions imposed upon them by ASH policies, practices and procedures violate constitutionally afforded rights applicable to all citizens in general, and, specifically, to individuals civilly committed to a state institution for treatment. Plaintiffs allege that, in many respects, the conditions at ASH are similar to, or worse than, those within state prisons and that, notwithstanding any claims by Defendants to the contrary, the conditions of their confinement at ASH are not designed to further the goals of effective treatment, but rather are merely a ruse to keep Plaintiffs off the street and improperly extend the term of their confinement.

Following the replacement of Defendant Jon DeMorales by Defendant Melvin Hunter as Executive Director at ASH on July 7, 2001, Plaintiffs moved for leave to amend their complaint for the sole purpose of adding Mr. Hunter as a Defendant in his personal capacity. ER 363-399. As expressly stated in the Motion for Leave to Amend Complaint to Add Melvin E. Hunter as a Defendant filed with the Court on June 3, 2002, Plaintiffs' requested amendment effected no substantive changes to the complaint in this action other than adding Mr. Hunter as a Defendant. Compare ER 94-120 with ER 462-487.

B. Defendants' First Motion To Dismiss

On November 1, 1999, Defendants moved to dismiss Plaintiffs' First Amended Complaint, stating various grounds for dismissal, most of which are identical or similar to the grounds upon which Defendants make their current Motion to Dismiss. ER 121-154. After lengthy consideration of the merits of Defendants' claims, the district court summarily denied the Motion to Dismiss the First Amended Complaint upon all grounds by its Order of February 4, 2000. ER

344. Defendants did not appeal this Order. Nor did they seek reconsideration.

C. The Second Amended Complaint

Following the replacement of Defendant Jon DeMorales by Defendant Melvin Hunter as Executive Director at ASH on July 7, 2001, Plaintiffs filed a Second Amended Complaint for the sole purpose of adding Mr. Hunter as a Defendant in his personal capacity. ER 462-487. The Second Amended Complaint sets forth 10 claims for relief. In summary, it alleges that the officials who both set the policies that govern the conditions of Plaintiffs' confinement and treatment at ASH and are delegated the duty to supervise the enforcement of those and all other policies, practices and procedures at ASH, have expressly authorized or otherwise violated their duty to prevent the following improper conduct and/or conditions at ASH:

- a pattern and practice of force-medicating Plaintiffs in non-emergency situations and without following necessary protective procedures (ER 476, ¶48);
- a pattern and practice of reducing Plaintiffs' access levels and privileges as a form of punishment for refusal to participate in treatment sessions and for the initiation of this and other lawsuits (ER 476, ¶47);
- a pattern and practice of putting Plaintiffs in excessive restraints for nonthreatening and/or nondisruptive conduct, including the mere refusal to participate in treatment or therapy (ER 478, ¶¶56, 57);
- a pattern and practice of putting Plaintiffs in unnecessary four-point restraints and/or subjecting Plaintiffs to degrading public strip-searches (ER 479, ¶64);
- a pattern and practice of unreasonably denying Plaintiffs access

to the law library in retaliation for participation in this and other lawsuits (ER 480, ¶66);

- a pattern and practice of deliberately denying Plaintiffs protection from other patients at ASH despite the existence of cognizable threats to Plaintiffs' health and safety as a result of their forced intermingling with penal commitments (ER 78, ¶54, 55);
- a pattern and practice of imposing living conditions upon Plaintiffs which are, in many respects, worse than prison conditions and which thereby fail to satisfy constitutional standards applicable to civil commitments (ER 479-80, ¶¶59-68); and
- a pattern and practice of denying Plaintiffs a legitimate and constitutionally mandated system of treatment, whereby Plaintiffs' confinement at ASH becomes nothing more than a *de facto* extension of their prison sentence (ER 477, ¶51).

In various combinations, this misconduct by, and/or under the direct supervision of, Defendants constitutes violations of Plaintiffs' clear and well-established federal constitutional rights.

D. Defendants' Second Motion To Dismiss

On February 25, 2003, Defendants moved to dismiss the Second Amended Complaint, reasserting the same grounds for dismissal raised in their First Motion to Dismiss. ER 489-556. On August 26, 2003, the district court summarily denied Defendants' Second Motion to Dismiss on all grounds. ER 804-805.

VI.

SUMMARY OF ARGUMENT

This Court should not reconsider the merits of Defendants' arguments, which have been rejected by the district court twice. Rather, this Court should affirm the district court's denial of Defendants' Second Motion to Dismiss based on the law of the case doctrine. Three years prior to denying Defendants' Motion to Dismiss the Second Amended Complaint, the district court denied Defendants' Motion to Dismiss the First Amended Complaint. The Second Amended Complaint is an exact replica of the First Amended Complaint, except that it includes one additional Defendant. Defendants could have appealed the district court's denial of their First Motion to Dismiss, but they did not do so. Rather, Defendants merely repeated in their Second Motion to Dismiss arguments that had already been advanced in the First Motion to Dismiss and rejected by the district court. The law of the case bars reexamination of those issues now.

Defendants' arguments fail on the merits as well. Contrary to Defendants' assertion, Plaintiffs do not seek monetary damages from Defendants in their official capacities. Rather, the Second Amended Complaint and the course of proceedings evidence that Plaintiffs seek damages from Defendants in their individual capacities only. So, too, Plaintiffs seek only to enforce their federal statutory and constitutional rights – not pendant state law claims. Accordingly, the Eleventh Amendment presents no bar.

Defendants' attempt to invoke qualified immunity must also fail. The Second Amended Complaint has sufficiently pled facts to state a claim for every cause of action in the complaint. Furthermore, the rights Plaintiffs seek to enforce have all been clearly established. Most importantly, Defendants' request for a finding of qualified immunity in this case is premature because a determination of the reasonableness of Defendants' conduct will necessarily involve the Court in an

analysis of the facts underlying this case. Such factual analysis is not appropriate when ruling on a Motion to Dismiss.

VII.

THE DISTRICT COURT'S DENIAL OF DEFENDANTS' SECOND MOTION TO DISMISS SHOULD BE AFFIRMED OUTRIGHT PURSUANT TO THE LAW OF THE CASE DOCTRINE

This Court may affirm the district court's denial of Defendants' Second Motion to Dismiss on any ground supported by the record. See, e.g., Jama Const. v. City of Los Angeles, 983 F.2d 1045, 1047 (9th Cir. 1991). Plaintiffs submit that this Court should affirm the district court's ruling on the basis that the law of the case doctrine bars reconsideration of the claims raised and rejected by the district court in connection with the denial of Defendants' First Motion to Dismiss.

Under the law of the case doctrine, "a court is generally precluded from reconsidering an issue previously decided by the same court, or a higher court in the identical case." United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997); see also Pit River Home & Agric. Coop. Ass'n. v. United States, 30 F.3d 1088, 1097 (9th Cir. 1994); Matthews v. NCAA, 179 F. Supp. 2d 1209, 1217 (E.D. Wash. 2001). This doctrine was "created to maintain consistency and avoid reconsideration, during the course of a single continuing lawsuit, of those decisions that are intended to put a matter to rest." Pit River Home, 30 F.3d at 1097; see also United States v. Lower Elwha Band of S'Klallams, 235 F.3d 443, 452 (9th Cir. 2000).

A court has discretion to depart from the law of the case only where: "1) the first decision was clearly erroneous; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) a manifest injustice would otherwise result." Alexander, 106 F.3d at 876. Absent one of the requisite justifications, failure to apply the

doctrine constitutes an abuse of discretion. Id.

Significantly, the law of the case doctrine can operate to bar the reconsideration of issues disposed of by a ruling on a motion to dismiss an original complaint where a party raises those same issues in defense of an amended or supplemental complaint. In Hershel Calif. Fruit Prod. Co. v. Hunt Foods, 16 F.R.D. 547 (N.D. Cal. 1954), for example, the trial court ruled that the plaintiff's original complaint stated a claim for violation of the Robinson-Patman Price Discrimination Act. Upon consideration of defendant's motion to dismiss plaintiff's supplemental complaint, the court found that the same ruling should apply. Hershel, 16 F.R.D. at 549 ("I believe that since this has been decided [by a prior judge] in ruling on the original complaint the same ruling should apply where we are dealing with the supplemental complaint."); see also Halpert v. Engine Air Serv., 131 F. Supp. 402, 403 (E.D.N.Y. 1954) ("If the amended complaint is substantially the same as the original, restricted however to the assertion of a claim for relief under Section 70 of the [Bankruptcy] Act, the law of the case has been established with reference thereto. . . . It results that the defendants' motion, in effect if not in form, is an attempt to reargue matters disposed of.").

Law of the case bars reconsideration of Defendants' claims here. In February 2000, the district court summarily denied, in its entirety, Defendants' Motion to Dismiss the First Amended Complaint. ER 344. Plaintiffs subsequently filed a Second Amended Complaint for the sole purpose of adding one additional defendant – the newly hired Executive Director of ASH, Melvin E. Hunter. The Second Amended Complaint reflects a single, nominal change to the extent it adds an additional named defendant. It effects no substantive change whatsoever to the complaint that survived Defendants' First Motion to Dismiss. Compare ER 462-487 with ER 94-120.

In bringing their Second Motion to Dismiss, Defendants failed to specify any justification for the district court to revisit its decision to uphold the First Amended Complaint. Defendants never sought reconsideration of the first Order denying their First Motion to Dismiss, nor did they appeal that Order or show that it was entered in clear error. Rather, Defendants merely repeated in their Second Motion to Dismiss the exact same arguments that were advanced and rejected by the district court in the First Motion to Dismiss. Most of the arguments the Defendants advanced in the Second Motion to Dismiss were previously adjudicated in Plaintiffs' favor and the law of the case bars reexamination of those issues. See, e.g., Lower Elwha Band of S'Klallams, 235 F.3d at 443. The balance of the Defendants' arguments, which involve variations on or expansions of previously advanced arguments, could have been raised in the First Motion to Dismiss. Defendants' failure to do so does not entitle them to a second bite at the apple three years after the district court's ruling denying the First Motion to Dismiss.

Defendants have attempted to use Plaintiffs' addition of a new defendant as an opportunity to seek an untimely and improper request for reconsideration of the district court's earlier ruling. Defendants' request that the district court reconsider its ruling was, thus, improper because it was an attempt to make an end-run around this district court's earlier ruling and because it disregards the law of the case. More significantly, reconsideration of the district court's February 2000 ruling would force a fundamentally unfair result on Plaintiffs, who, since the First Amended Complaint survived judicial scrutiny over three years ago, have expended enormous amounts of time and money conducting extensive merits-based and expert discovery, reviewing hundreds of thousands of pages of documents, and deposing dozens of witnesses, all in effort to prove each of the allegations in the First Amended Complaint.

With respect to Defendants' claims that were not previously raised and adjudicated in Plaintiffs' favor, Plaintiffs submit that Defendants are time-barred from raising such claims in a second successive Motion to Dismiss. Defendants were required to respond, in full, to Plaintiffs' First Amended Complaint within 20 days of its filing. All substantive challenges to that complaint that could have been brought then, should have been brought then. Defendants' failure to raise all challenges to the substance of Plaintiffs' allegations cannot be overcome by virtue of the fact that a single named defendant has been added. Fed. R. Civ. P. 12(g) ("If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any grounds there stated."); see also 2 James Wm. Moore et al., Moore's Federal Practice, ¶ 12.21 (3d ed. 2003) ("amending a complaint does not revive omitted defenses or objections that the defendant could have raised in response to the original complaint."). Moreover, even if Defendants' 12(b)(6) defenses are preserved by Rule 12(h)(2), they could not be asserted in the Second Motion to Dismiss. Id. at ¶12.23 ("If omitted from the initial motion, those matters [included in Rule 12(h)(2)] may not be raised in a successive Rule 12 motion.").

Accordingly, Plaintiffs submit that rather than waste judicial resources in considering the allegations of a complaint that the district court has already upheld on two separate occasions, this Court should uphold the district court's summary denial of the Second Motion to Dismiss based on the law of the case. Defendants' appeal of the district court's denial of Defendants' Second Motion to Dismiss should be rejected outright. See, e.g., Figueroa v. Gates, 120 F. Supp. 2d 917, 918-19 n.4 (C.D. Cal. 2000) ("Although Defendants may feel the need to bring identical arguments on behalf of new Defendants, the Court considers submission

of nearly the same brief to be a waste of time on those issues on which the Court has already rejected Defendants' arguments, as a matter of law.").

VIII.

PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE ELEVENTH AMENDMENT OR BY THE DOCTRINE OF ABSTENTION

A. The Second Amended Complaint And The Course Of Proceedings In This Case Establish That The Complaint Seeks Damages From Defendants In Their Individual Capacities Only.

Defendants first contend that the Second Amended Complaint's prayer for damages against Defendants in their official capacities fails in its entirety for lack of jurisdiction under the Eleventh Amendment. Defendants' sweeping contention is without merit. Plaintiffs do not dispute that the Eleventh Amendment bars Section 1983 suits for monetary damages against state officials in their official capacity. Will v. Michigan Dept. of State Police, 491 U.S. 58, 70-71, 109 S. Ct. 2304, 2312, 105 L. Ed. 2d 45, 57-58 (1989). Nor have Defendants disputed the fact that the Eleventh Amendment does *not* bar Section 1983 suits for monetary damages against state officials in their individual capacity. Hafer v. Melo, 502 U.S. 21, 31, 112 S. Ct. 358, 363, 116 L. Ed. 2d 301, 313 (1991). However, as Defendants have previously acknowledged, the parties long ago agreed that the Second Amended Complaint seeks monetary damages from Defendants in their individual capacities only: "[t]he parties . . . have resolved that damages are being sought against defendants in their individual capacity only." ER 134:24-26. Defendants' awareness that they are being sued for damages in their individual capacities is further evidenced by the fact that they have raised the defense of qualified immunity, a defense available for state officials only when they are sued for damages in their individual capacities. ER 521-525; Melo v. Hafer, 912 F.2d

628, 636 (3rd Cir. 1990). Thus, it is unnecessary to amend the complaint to clarify this issue.

Notwithstanding Defendants' contentions, the Second Amended Complaint provides adequate notice that Defendants are being sued for monetary relief in their individual capacities. Pursuant to Federal Rule of Civil Procedure 9(a), "[i]t is not necessary to aver the capacity of a party to sue or to be sued . . . except to the extent required to show the jurisdiction of the court." Fed. R. Civ. P. 9(a). Plaintiffs have adequately informed Defendants that damages are being sought from Defendants solely in their individual capacities. The first paragraph of the Second Amended Complaint expressly provides that Defendants are being sued "in their individual and official capacities." ER 462. Further, as stated above, Defendants have long recognized that they are being sued for damages in their individual capacities only. ER 134:24-26. This alone is sufficient "notice" under Rule 9(a). Defendants cannot now feign ignorance to that which they have already admitted and conceded.

B. Plaintiffs Do Not Seek To Enforce Pendant State Law Claims.

Relying on Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1994), Defendants argue that they are immune from suits in federal court to enforce pendent state law claims. Defendants' argument is without merit.[1]

First, and most importantly, Plaintiffs are not attempting to directly enforce California statutory or constitutional rights. Plaintiffs are attempting to enforce

[1] The Eleventh Amendment does not preclude suits against state officers for prospective injunctive relief, even when the remedy will enjoin implementation of an official state policy. Ex Parte Young, 209 U.S. 123, 161-62, 28 S. Ct. 441, 454-55, 52 L. Ed. 714 (1908).

their federal statutory and constitutional rights. Plaintiffs have asserted that, by continuing to treat the Plaintiffs as criminal rather than civil commitments, Defendants have violated those federal rights. Second, while it is true that the First, Second and Tenth claims for relief make reference to California Constitutional provisions that parallel the rights guaranteed by federal law, the rights being asserted through Section 1983 are federal, not state law, claims.

Likewise, Plaintiffs include references to state law claims because they give rise to either liberty or property interests protected by the Due Process Clause of the Fourteenth Amendment. See Erwin Chemerinsky Federal Jurisdiction (1999). Under due process analysis, for example, state law can create both liberty and property rights, either explicitly or by creating an expectation that gives rise to a vested right. See, e.g., Paul v. Davis, 424 U.S. 693, 710-11, 96 S. Ct. 1155, 47 L. Ed. 2d 405 (1976). Accordingly, the Eleventh Amendment constitutes no bar.

Furthermore, and for the reasons stated above, Defendants' reliance on 28 U.S.C. §§ 1367(a) and (c) is misplaced. Section 1367 deals with supplemental jurisdiction over pendant state law claims (which are not advanced in the Second Amended Complaint), rather than federal claims, and is, as such, irrelevant.

Finally, Defendants' abstention argument was not raised in, or ruled on by the district court and is therefore waived on appeal. See, e.g., Conn. Gen. Life Ins. Co. v. New Images of Beverly Hills, 321 F.3d 878, 882 (9th Cir. 2003). On the merits, it fails for the same reasons Defendants' other Eleventh Amendment claim fails.

IX.

QUALIFIED IMMUNITY DOES NOT BAR PLAINTIFFS' CHALLENGES TO THEIR CONDITIONS OF CONFINEMENT

A. Plaintiffs May Challenge Defendants' Implementation Of The SVP Act.

Defendants contend that the Double Jeopardy and Ex Post Facto Clauses, as well as the Eighth and Sixth Amendments, do not apply to civil commitments such as the Plaintiffs and, accordingly, Plaintiffs' claims are barred. Appellants' Br. at 11-12. To support this assertion, Defendants rely on the Supreme Court's holding in Seling v. Young, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 734 (2001), wherein the Court ruled that "[a]n Act found to be civil, cannot be deemed punitive 'as applied' to a single individual in violation of the Double Jeopardy and Ex Post Facto Clauses and provide cause for release." Seling, 531 U.S. at 267, 1215 S. Ct. at 737, 148 L. Ed. 2d at 749. But Defendants completely mischaracterize the nature of Plaintiffs' claims. As set out below, Seling is based on facts that are wholly distinguishable from the facts presented here.

Seling involved a habeas action brought by an individual patient seeking release and challenging the constitutionality of Washington State's sexually violent predator statute. The issue addressed was whether the patient could argue that the statute was punitive "as applied" to him specifically and thereby in violation of the Double Jeopardy and Ex Post Facto Clauses. Seling, 531 U.S. at 262, 121 S. Ct. at 734-35, 148 L. Ed. 2d at 746. The Court ruled that an individual patient could not challenge the statute on the basis that it was punitive "as applied" to him individually, reasoning that "[s]uch an analysis would never conclusively resolve whether a particular scheme is punitive and would thereby prevent a final determination of the scheme's validity under the Double Jeopardy and *Ex Post Facto* Clauses." Id. at 263, 121 S. Ct. at 735, 148 L. Ed. 2d at 746.

Defendants fail to recognize that, unlike the patient in Seling, the Plaintiffs in this case are not seeking to have the SVP Act declared unconstitutional, either on its face or "as applied" to them. Nor are they seeking release. Rather, Plaintiffs merely seek injunctive relief, pursuant to 42 U.S.C. § 1983, from the unconstitutional conditions of confinement that Defendants have imposed upon them. It is Defendants' conduct, not the SVP Act itself, that the Second Amended Complaint alleges violates the Double Jeopardy and Ex Post Facto Clauses, as well as the Eighth Amendment and Sixth Amendment. The holding in Seling applies only to actions challenging the constitutionality of sexually violent predator statutes; it does not apply to actions against state officials for unconstitutionally implementing such statutes.

In fact, the Court in Seling specifically clarified that its holding does not limit those committed as sexually violent predators from seeking injunctive relief from unconstitutional conditions of confinement pursuant to a Section 1983 action. In reaching its decision, the Court explained that its holding "does not mean that respondent and others committed as sexually violent predators have no remedy for the alleged conditions and treatment regime at the Center." Id. at 265, 121 S. Ct. at 736, 148 L. Ed. 2d at 748. The Court then proceeded to "note that a § 1983 action against the Center is pending" and that "[t]he Center operates under an injunction that requires it to adopt and implement a plan for training and hiring competent sex offender therapists; to improve relations between residents and treatment providers; to implement a treatment program for residents containing elements required by prevailing professional standards; to develop individual treatment programs, and to provide a psychologist or psychiatrist expert in the diagnosis and treatment of sex offenders to supervise the staff." Id. at 265-66, 121 S. Ct. at 736, 148 L. Ed. 2d at 748. Here, no such injunction is currently in place, and it is similar injunctive relief that this Section 1983 action seeks to accomplish. The

Seling holding does not purport to limit such an action.

Finally, it is important to point out that in Seling, the action was brought by an individual patient seeking release on a petition for writ of habeas corpus, whereas this action is brought pursuant to a class action by virtually all patients confined pursuant to the SVP Act. Release from ASH is not among the remedies Plaintiffs seek. In refusing to allow an "as applied" challenge to the statute at issue in Seling, the Court expressed concern that such an approach would "never conclusively resolve" the constitutionality of the statute since the result would vary depending on the "vagaries" of each individual case. Id. at 263, 121 S. Ct. at 735, 148 L. Ed. 2d at 746. But here, because the challenge to the conditions of confinement at ASH is brought by virtually every patient committed pursuant to the SVP Act, there is no similar risk that the outcome would change based upon particularities of individual cases. Rather, this case would allow the Court to conclusively resolve whether the Defendants have implemented the SVP Act in a constitutional manner.

Thus, contrary to Defendants' assertion, Seling does not preclude Plaintiffs from bringing Double Jeopardy, Ex Post Facto, Sixth Amendment and Eighth Amendment challenges to their conditions of confinement.

B. Plaintiffs May Challenge Their Conditions of Confinement Under The Double Jeopardy And Ex Post Facto Claims.

Defendants assert that claims for violations of the Ex Post Facto and Double Jeopardy Clauses should be dismissed in light of Kansas v. Hendricks and Seling v. Young. Appellants' Br. at 12-14. These cases both rejected facial, not as applied, Double Jeopardy and Ex Post Facto challenges to sexually violent predator statutes. In Hendricks, the Court rejected a facial challenge to Kansas's sexually violent predator law and in Seling, as discussed above, the Court rejected

an argument that Washington state's sexually violent predator statute was unconstitutional "as applied" to a particular patient. These cases, however, are inapposite to this action because Plaintiffs are not challenging the constitutionality of the SVP Act itself. Instead, Plaintiffs are seeking injunctive relief from the punitive conditions of confinement imposed upon them by Defendants. Neither Hendricks nor Seling addressed such a challenge. Accordingly, their holdings do not preclude Plaintiffs from challenging Defendants' conduct on Double Jeopardy and Ex Post Facto grounds.

C. Plaintiffs May Challenge Their Conditions of Confinement Under The Eighth Amendment.

Defendants argue that Plaintiffs may not challenge the punitive conditions of confinement under the Eighth Amendment because the Due Process Clause of the Fourteenth Amendment already protects civilly committed persons from being punished. Appellants' Br. at 14-16. Plaintiffs do not dispute that the punitive conditions of confinement violate the Due Process Clause, but Plaintiffs further assert that such punitive conditions are so egregious that they amount to cruel and unusual punishment and thereby also violate the Eighth Amendment.

Defendants first cite to Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979), wherein the Supreme Court noted that due process, as opposed to the Eighth Amendment, requires that a pretrial detainee not be punished, since "[t]he State does not acquire the power to punish with which the Eighth Amendment is concerned until after it has secured a formal adjudication of guilt. . . ." Id. at 535 n.16, 99 S. Ct. at 1873 n.16, 60 L. Ed. 2d at 467 n.16 (quotation and citation omitted). Plaintiffs concede that the Due Process Clause, not the Eighth Amendment, prohibits the state from punishing civil commitments. Thus, as set out below, Plaintiffs also bring claims under this clause. However,

since Plaintiffs contend that punishment has in fact occurred, the next logical question is whether such punishment is so severe that it amounts to cruel and unusual punishment in violation of the Eighth Amendment.

Defendants next cite to Youngberg v. Romeo, 457 U.S. 307, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982), for the proposition that the Eighth Amendment is not an appropriate source for determining the rights of the involuntarily committed. But in that case, whether the commitment at issue violated the Eighth Amendment was not before the Court. 457 U.S. at 314 n.16, 102 S. Ct. at 2457 n.16, 73 L. Ed. 2d at 36 n.16. Rather, in Youngberg the Court only addressed whether an involuntarily civilly committed patient's substantive due process rights under the Fourteenth Amendment had been violated. 457 U.S. at 314-15, 102 S. Ct. at 2457, 73 L. Ed. at 36. In contrast, here, Plaintiffs not only assert that the conditions of confinement violate substantive due process, Plaintiffs also assert that such conditions of confinement at ASH are so egregious that they constitute cruel and unusual punishment in violation of the Eighth Amendment. The Court in Youngberg did not consider, and therefore does not purport to limit, such a challenge.

Finally, if the conditions of confinement are found to be punitive or otherwise unconstitutional, then Defendants should not escape liability simply because they are not labeled as prison officials. For all of the above reasons, the Plaintiffs have stated a claim under the Eighth Amendment.

D. Plaintiffs May Challenge Their Conditions of Confinement Under The Sixth Amendment.

Defendants assert that Seling's holding precludes Plaintiffs from challenging Defendants' deprivation of their Sixth Amendment rights because the SVP Act is a civil, as opposed to a criminal, statute. Appellants' Br. at 16-17. But, as already

explained above, Plaintiffs are not challenging the SVP Act. They do not allege that the Act violates their Sixth Amendment rights. Rather, they argue that Defendants' conduct constitutes punishment, and it is the Defendants, not the SVP Act, that have deprived Plaintiffs of their Sixth Amendment rights. As set out above, Seling does not address such an action. Its holding is therefore inapplicable to this case.[2] Thus, Plaintiffs have stated a claim for violation of their Sixth Amendment rights.

X.

PLAINTIFFS DO NOT ALLEGE RESPONDEAT SUPERIOR LIABILITY, BUT BRING PERMISSIBLE § 1983 CLAIMS BASED ON, INTER ALIA, DELIBERATE INDIFFERENCE

Defendants argue that the Second Amended Complaint does not sufficiently specify how the Defendants affirmatively violated the constitutional rights of the Plaintiffs, but instead simply relies on a theory of respondeat superior, which is not permitted in a Section 1983 claim. Appellants' Br. at 17-21.

Defendants fail to recognize that a supervisor will be liable under Section 1983 for his or her deliberate indifference to the constitutional violations committed by subordinates. See City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L. Ed. 2d 412 (1989) (finding that inadequate training may be a basis for Section 1983 liability); Fayle v. Stapley, 607 F.2d 858, 862 (9th Cir. 1979) (finding question of fact regarding whether director of hospital was vested with duty to ensure that patient received noticed before his property was taken). The heart of Plaintiffs' case is their challenge to the "policies, customs, and practices"

---

[2] Defendants' reliance on United States v. Sahhar, 917 F.2d 1197 (9th Cir. 1990) is likewise misplaced, as that case, like Seling, concerned the constitutionality of a commitment statute, not the conduct of officials in implementing the statute.

promulgated by Defendants themselves, as the officials vested with the authority and in the positions to make such policies. As Defendants concede, "[a] supervisor making policy decisions that cause the alleged constitutional violations may be liable." Appellants' Br. at 18 (citing Ouzts v. Cummins, 825 F.2d 1276, 1277 (8th Cir. 1987)). Plaintiffs also allege that Defendants are aware of and tolerate the abuses of SVPs, thereby demonstrating Defendants' deliberate indifference to the constitutional violations committed by subordinates. ER 463, ¶2; 466, ¶¶14, 17; 477, ¶52; 479, ¶58; 480, ¶68. In this regard, Defendants' respondeat superior argument is wholly misplaced.

The Defendants also argue that Plaintiffs must set forth a variety of specific assertions, including a linkage between the individual Defendants and the unconstitutional policies and a linkage between the individual Defendants and Plaintiffs' injuries. Appellants' Br. at 18. To support their demands for specificity, Defendants point to a variety of cases that focus on the requirements applicable to summary judgment motions. See Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 759 (1987); Palmer v. Sanderson, 9 F.3d 1433 (9th Cir. 1993); Taylor v. List, 880 F.2d 1040 (9th Cir. 1989); Leer v. Murphy, 844 F.2d 628 (9th Cir. 1988); Padway v. Palches, 665 F.2d 965 (9th Cir. 1982); Fayle, 607 F.2d 858. Because the standard for summary judgment is completely different from the standard for a 12(b)(6) motion to dismiss, the specificity required in these cases does not apply at this time.

Nevertheless, the Second Amended Complaint does connect the four named Defendants to Plaintiffs' injuries by alleging that Defendants create and enforce policies, practices and procedures that tolerate and encourage the abuse and improper punishment of SVPs. ER 466, ¶17. Defendants' further suggestion that the Second Amended Complaint must allege which of the named Defendants created which policies, procedures and practices is misplaced at the pleading stage

because such information is currently within the exclusive control of the Defendants.

Indeed, Defendants appear to suggest, without citing to any supporting authority, that Plaintiffs should be required to present, within the complaint itself, a list of specific incidents involving constitutional violations by each Defendant. Appellants' Br. at 19-21. This is clearly not required under the Federal Rules of Civil Procedure. Plaintiffs, if required, could produce voluminous evidence of violations of their rights resulting from Defendants' policies, practices, or failure to intervene. This, however, involves questions of fact, which are properly raised only as early as a motion for summary judgment.

XI.

DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY IN THEIR INDIVIDUAL CAPACITIES BECAUSE PLAINTIFFS ALLEGE VIOLATIONS OF CLEARLY ESTABLISHED LAW

A. Defendants' Defense Of Qualified Immunity Is Premature.

Defendants advance the defense of qualified immunity against every one of Plaintiffs' claims. Regardless of the merits of Defendants' purported qualified immunity defense, it is not properly raised at this stage in the proceedings upon a motion to dismiss. As set out below, Plaintiffs have amply demonstrated that the rights which Defendants are alleged to have violated were clearly established. This is all that is required to overcome a qualified immunity defense at the motion to dismiss stage. See Jensen v. City of Oxnard, 145 F.3d 1078, 1085 (9th Cir. 1998) (rejecting motion to dismiss because law was clearly established and reasonableness of defendants conduct would turn on facts outside the pleadings).

Once a plaintiff establishes that the law is clearly established, the burden shifts to the defendant to show that a reasonable official could have believed, in light of the settled law, that he was not violating a constitutional right. See Alford

v. Haner, 333 F.3d 972, 977 (9th Cir. 2003). The question of whether Defendants, notwithstanding such clearly established law, could nevertheless have reasonably believed that their conduct was lawful is a question inextricably intertwined with a factual inquiry into the circumstances of the Defendants' actions and the extent to which a reasonable official in the Defendants' position would have been aware that the conduct at issue was unlawful. Though the two-part test for qualified immunity focuses upon the objective reasonableness of the Defendants' conduct, this does not remove the inquiry from the fact-specific context of the case (e.g., in the context of the Fourteenth Amendment, whether under the circumstances Defendants could have reasonably believed they were exercising proper "professional judgment").

Accordingly, Defendants' request pursuant to Rule 12(b)(6) that a finding of qualified immunity be made merely upon the pleadings in this case is precluded because a determination of the reasonableness of the Defendants' conduct would require this Court to look beyond the pleadings to analyze the facts underlying this case.[3] See Groten v. Cal., 251 F.3d 844, 851 (9th Cir. 2001) ("[A] Rule 12(b)(6) dismissal is not appropriate unless we can determine, based on the complaint itself, that qualified immunity applies.") At this stage in the pleadings, an analysis of the underlying facts would be impossible. Jacobs v. City of Chicago, 215 F.3d 758, 765 n.3 (7th Cir. 2000) ("[I]n many cases, the existence of qualified immunity will depend on the particular facts of a given case. In those cases, the plaintiff is not

[3] Indeed, the cases primarily relied upon by Defendants all involved review of a qualified immunity defense upon a motion for summary judgment, not a motion to dismiss. See, e.g., Saucier v. Katz, 533 U.S. 194, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001); Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998); Anderson v. Creighton, 483 U.S. 635, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); Neely v. Feinstein, 50 F.3d 1502, 1506 (9th Cir. 1995); Reed v. Philadelphia Hous. Auth., 372 F. Supp. 686 (E.D. Pa. 1974).

required initially to plead factual allegations that anticipate and overcome a defense of qualified immunity.") Therefore, this Court should refrain from making any qualified immunity determination before allowing for an adequate development of the record facts.

B. Plaintiffs Have Adequately Pled Violations Of Clearly Established Law.

Defendants assert that Plaintiffs have failed to allege violations of "clearly established" law. Appellants' Br. at 19-21, 21-24. While Crawford-El v. Britton, 523 U.S. 574, 118 S. Ct. 1584, 140 L. Ed. 2d 759 (1998), gives the district court authority to consider qualified immunity issues at the pleading stage, that case also specifically rejects the imposition of a heightened pleading standard that would require plaintiffs to adduce "clear and convincing evidence of improper motive." All the Court needs to do is assure itself that the rights allegedly violated were well-established. That burden is clearly met here as Plaintiffs have alleged violations of the most fundamental rights afforded by our Constitution.

Determining whether a constitutional right is clearly established does not require that there be a case on point or binding precedent in order to prevail over a qualified immunity defense. See Allen v. City & County of Honolulu, 39 F.3d 936, 939 (9th Cir. 1994); Mendoza v. Block, 27 F.3d 1357, 1362 (9th Cir. 1994). Thus, a finding of clearly established law is not precluded by the possibility that there is no case law addressing the exact scenarios that Plaintiffs describe. See Alexander v. Perrill, 916 F.2d 1392, 1397 (9th Cir. 1990) ("[T]he law simply does not require that we find a prior case with the exact factual situation in order to hold that the official breached a clearly established duty."). Further, where there is no decision by the Supreme Court or the particular circuit on the issue in question, the decisions of other circuit, district, and even state courts may provide the basis for clearly established law that precludes a qualified immunity defense. See Bilbrey

by Bilbrey v. Brown, 738 F.2d 1462 (9th Cir. 1984); Jacobs, 215 F.3d at 767 ("In the absence of controlling precedent, we broaden our survey to include all relevant caselaw in order to determine 'whether there was such a clear trend in the caselaw that we can say with fair assurance that the recognition of the right by a controlling precedent was merely a question of time.'") (citations omitted).

Defendants' proffered authority and their assertion that the law governing the commitment and treatment of SVPs is "unsettled" does nothing to upset the conclusion that Plaintiffs have alleged violations of some of the most well-established protections afforded by the Constitution. A number of the cases cited by Defendants arise within the context of challenges to commitment statutes, either facially or as applied, but do not concern challenges to public officials' implementation of such commitment statutes. See Kansas v. Crane, 534 U.S. 407, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002); Seling v. Young, 531 U.S. 250 (2001); Kansas v. Hendricks, 521 U.S. 346, 117 S. Ct. 2072, 138 L. Ed. 2d 501 (1997); Woodward v. Mayberg, 242 F. Supp. 2d 695 (N.D. Cal. 2003)); Hubbart v. Superior Court, 19 Cal. 4th 1138, 81 Cal. Rptr. 2d 492 (1999); People v. Hurtado, 28 Cal. 4th 1179, 124 Cal. Rptr. 2d 186 (2002); People v. Superior Court (Ghilotti), 27 Cal. 4th 888, 119 Cal. Rptr. 2d 1 (2002). Others arise within a prison context and are therefore ineffective to establish the outer limits of the rights to be afforded civilly committed patients within a state hospital. See Sharp v. Weston, 233 F.3d 1166, 1172 (9th Cir. 2000) ("[T]he state must . . . provide the civilly-committed with 'more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.'") (citing Youngberg v. Romeo, 457 U.S. 307, 322, 102 S. Ct. 2452, 2461, 73 L. Ed. 2d 28, 41 (1982)); compare, e.g., McKune v. Lile, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) (addressing inmate rights in prison context); Thielman v. Leean, 282 F.3d 478 (7th Cir. 2002) (same); Kulas v. Valdez, 159 F.3d 453 (9th Cir. 1998)

(addressing rights of prisoner awaiting trial); Munoz v. Kolender, 208 F. Supp. 2d 1125 (S.D. Cal. 2002) (addressing jail confinement). The remaining cases cited by Defendants are either not good law, see In re Calhoun, 112 Cal. App. 4th 1262, 6 Cal. Rptr. 3d 34 (2003) vacated by 85 P.3d 2, 10 Cal. Rptr. 3d 205 (Cal. 2004), or are simply ineffective to support their claimed qualified immunity defense.

The primary fault in Defendants' reasoning is that they misconstrue the baseline from which it is to be determined if the rights which Plaintiffs allege have been violated are "clearly established." Defendants suggest that they are to be held liable for violations of Plaintiffs' constitutional rights only if such rights have been clearly established within cases arising within the narrow context of sex offender commitment statutes. This is simply not the case. See Hope v. Pelzer, 536 U.S. 730, 741, 122 S. Ct. 2508, 2516, 153 L. Ed. 2d 666, 679 ("'[G]eneral statements of the law are not inherently incapable of giving fair and clear warning, and in other instances a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.' . . . [O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances.'") (citing United States v. Lanier, 520 U.S. 259, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997)). As the Supreme Court stated in the paragraph of the Supreme Court's decision in Anderson which Defendants cite (see Appellants' Br. at 19): "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, [citation]; but it is to say that in the light of pre-existing law the unlawfulness must be apparent." 483 U.S. at 640, 107 S. Ct. at 3039, 97 L. Ed. 2d at 531 (citations omitted); see also Ostlund v. Bobb, 825 F.2d 1371, 1374 (9th Cir. 1987) (stating that the "clearly established" standard "does not require specific binding precedent to show that a right is clearly established"). Given the firmly established law

applicable to the rights afforded confined individuals in general, and civilly committed mental health patients in particular, this standard is clearly satisfied in this case.[4]

While the constitutionality of sex offender civil commitment statutes and treatment programs is currently a matter of much debate, it is not subject to debate that Plaintiffs are to be protected from unreasonable use of involuntary restraints, seclusion and medication other than in those rare circumstances permitted by the law. See, e.g., Washington v. Harper, 494 U.S. 210, 221, 110 S. Ct. 1028, 1036, 108 L. Ed. 2d 178, 197-98 (1990) (prisoners have a liberty interest in avoiding the unwanted administration of anti-psychotic drugs); Youngberg v. Romeo, 457 U.S. 307, 316, 102 S. Ct. 2452, 2458, 73 L. Ed. 2d 28, 37 (1982) (observing that freedom from bodily restraint is "the core of the liberty protected by the Due Process Clause"); see also In re Qawi, 32 Cal. 4th 1, 7 Cal. Rptr. 3d 780 (2004) (California constitutional rights to both privacy and bodily integrity are implicated when civil commitments are forcibly medicated with anti-psychotic drugs). Nor is it subject to debate that Plaintiffs are not to be subjected to unreasonable limitations upon their First Amendment rights or retaliation for participation in lawsuits. See Turner v. Safley, 482 U.S. 78, 89-91, 107 S. Ct. 2254, 2261-63, 96 L. Ed. 2d 64, 79-80 (1987) (prison regulations restricting First Amendment rights must operate in a neutral fashion without regard to the content of the expression); Thomas v. Carpenter, 881 F.2d 828, 829 (9th Cir. 1989) (stating that deliberate

---

[4] Because the rights of civilly committed individuals are greater than those of penal commitments, see Sharp, 233 F.3d at 1172, cases establishing the constitutional rights of prisoners should be viewed as establishing a constitutional minimum of rights to be afforded in the context of civil commitment. Further, Plaintiffs also note that a substantial number of the Plaintiffs' Class have yet to be committed pursuant to the SVP Act; thus, those Plaintiffs have even greater rights than civilly committed individuals.

retaliation by a state actor against an individual's exercise of his First Amendment rights is actionable under Section 1983); see also Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977) (access to the courts); Freeman v. Arpaio, 125 F.3d 732 (9th Cir. 1997) (right to practice religion); Cornett v. Donovan, 51 F.3d 894 (9th Cir. 1995) (access to courts). Nor may Plaintiffs be subjected to unreasonable searches or improper seizures of personal belongings. See Michenfelder v. Sumner, 860 F.2d 328, 332 (9th Cir. 1997) (strip searches may not be excessive, vindictive or harassing). Most importantly, because Plaintiffs are civil commitments, they may not be subject to living conditions which are devoid of dignity and in many instances worse than the conditions under which penal commitments and prisoners are held.

In sum, the policies, practices and procedures implemented by Defendants and for which Defendants have primary responsibility have resulted in violations of all of the above constitutionally protected rights. As such, Defendants' reliance upon Crawford-El v. Britton is misplaced.

C. Whether Defendants' Conduct Was Nevertheless Reasonable Is A Question Of Fact Not Properly Adjudicated Upon A Motion To Dismiss.

Defendants further contend that they are entitled to qualified immunity because they reasonably could have believed that their conduct was lawful. Appellants' Br. at 21-26. The question of objective reasonableness is the second inquiry under the two-part qualified immunity analysis. The burden is on Defendants to show that a reasonable official could have believed, in light of the settled law, that he or she was not violating a constitutional law. See Alford v. Haner, 333 F.3d 972, 977 (9th Cir. 2003). As discussed above, however, this issue is a question of fact that cannot be adjudicated at the pleading stage.

Indeed, Defendants' main source of authority, Crawford-El v. Britton, was a summary judgment case and the Court was concerned solely with the issue of the amount of proof required of a plaintiff to overcome a qualified immunity defense raised in a motion for summary judgment. 523 U.S. at 577-78, 118 S. Ct. at 1587, 140 L. Ed. 2d at 767. In fact, the Court recognized that a determination of whether a defendant is entitled to qualified immunity may involve a significant factual inquiry. See id. at 598, 118 S. Ct. at 1597, 140 L. Ed. 2d at 779-80.

Plaintiffs have adequately alleged that Defendants have violated a number of Plaintiffs' most fundamental rights. That is all that is required. Whether Defendants' conduct was nevertheless reasonable involves a factual analysis of the circumstances surrounding Defendants' actions and a determination of whether a reasonable official similarly situated would have been aware that his/her actions violated the law. While Plaintiffs maintain that Defendants' actions were *not* reasonable, notwithstanding clearly established law, it is clear that any debate upon this issue will require the Court to delve into the facts underlying this case. Defendants cannot escape liability by summarily contending, without adequate factual development, that their actions were "objectively reasonable."

D. Defendants' Purported Compliance With AD 602 Does Not Bar Plaintiffs' Constitutional Challenges.

Defendants' sole basis for contending that they acted objectively reasonable is their argument concerning ASH Administrative Directive 602. Defendants appear to argue that, because Plaintiffs concede that this is a policy at ASH, and because this policy seeks to protect the very rights Plaintiffs say were violated, Defendants could not knowingly have violated these rights. Appellants' Br. at 24-26. In other words, Defendants posit that merely by instituting a policy that recognizes patient rights, Defendants are immunized from liability for violating the rights that policy ostensibly protects. The absurdity of this argument is self-

evident. The mere fact a policy exists does not mean it was implemented or that Defendants did not knowingly oversee, condone or ignore its violation.

Indeed, that Administrative Directive 602 may recite a laundry list of patient rights has no bearing on whether and to what extent that policy or any other is applied in accordance with the federal Constitution. Nor does it indicate compliance. Despite Defendants' claim that Plaintiffs "do not dispute Administrative Directive 602 and do not allege that it is not applied as a policy at ASH" (Appellants' Br. at 24), the Second Amended Complaint clearly alleges that this policy – and the numerous other policies, practices and procedures at ASH – are applied (or misapplied) in such a fashion as to result in numerous violations of Plaintiffs' constitutional rights. ER 476-480, ¶¶47-68. For example, paragraph 47 of the Second Amended Complaint clearly states: "In practice, all of the previously mentioned rights and privileges are restricted and denied as a means to punish SVPs who object to mandatory treatment, arbitrary rules and disciplinary procedures, as well as to punish SVPs for filing this and other lawsuits challenging conditions of their confinement." Paragraph 48 states: "In contrast to ASH's Administrative Directives previously discussed, Defendants' policies, practices and customs permit and encourage the involuntary medication of SVPs with psychotropic drugs in non-emergency situations for the convenience of staff and as a means of punishment." Paragraph 52 states: "Defendants' policies, practices and customs disregard the rights of SVPs by allowing and encouraging . . . punitive and improper conditions of confinement."

Because Plaintiffs clearly allege that the policies, practices and procedures at ASH – including Administrative Directive 602 – are applied in such a manner as to result in numerous violations of Plaintiffs' constitutional rights, Defendants' argument with regard to Administrative Directive 602 is without merit.

XII.

THE DOCTRINE OF QUALIFIED IMMUNITY DOES NOT BAR PLAINTIFFS' SPECIFIC CLAIMS

A. Plaintiffs Have Sufficiently Pled Claims for First Amendment Violations (First Alleged Claim).

1. Plaintiffs' Allegations Rise Above Mere "Conclusory" Allegations.

With regard to Plaintiffs' First Amendment claim, contrary to Defendants' contention, the Second Amended Complaint states more than mere "conclusory" allegations, and Plaintiffs' allegations meet the requirements of Fed. R. Civ. P. (8) to put Defendants on notice as to what is being alleged.[5]

Plaintiffs allege that Defendants have created and implemented policies, practices and procedures directed at silencing SVPs. For example, SVPs experience access-level reductions, administrative segregation and loss of library access in retaliation for this and other lawsuits. In addition, SVPs who participate in lawsuits are not protected from physical and sexual abuse by penal commitments held at ASH. ER 476, ¶47; 485, ¶98.

In arguing that Plaintiffs have failed to state a claim for retaliation under the First Amendment, Defendants rely on ACLU v. Wicomico County, 999 F.2d 780 (4th Cir. 1993) and Huang v. Board of Governors, 902 F.2d 1134 (4th Cir. 1990). That reliance is misplaced, as those cases involved disposition of plaintiffs' claims upon summary judgment – after full development of the factual record – and are, as such, distinguishable from the case at hand. At this point in the litigation, the

---

[5] To satisfy Rule 8, a pleading must give fair notice of the claim being asserted and the grounds upon which it rests. The rules of pleading require only that the allegations in the complaint "sufficiently establish a basis for judgment against the defendants." Yamaguchi v. United States Dept. of the Air Force, 109 F.3d 1475, 1481 (9th Cir. 1997).

Court must determine only whether the facts as alleged would entitle the plaintiff to a legal remedy. United States v. White, 893 F. Supp. 1423, 1428 (C.D. Cal. 1995). Moreover, the issue addressed in Huang is inapposite. That case involved the protected speech of public employees – an issue not remotely related to those now before the Court.[6]

Nevertheless, Plaintiffs have stated a claim for retaliation. Courts have held that retaliation claims state a valid cause of action under Section 1983.[7] To prevail on a claim for retaliation, a prisoner must "allege that he was retaliated against for exercising his constitutional rights and that the retaliatory action does not advance legitimate penological goals, such as preserving institutional order and discipline." Barnett v. Centoni, 31 F.3d 813, 816 (9th Cir. 1994), citing Rizzo v. Dawson, 778 F.2d 527, 532 (9th Cir. 1985).

It is well established that members of the SVP class are entitled to certain First Amendment rights. For instance, Plaintiffs have the right to assemble peaceably,[8] access the courts,[9] petition the government,[10] and refuse treatment.[11]

---

[6] Defendants also make passing reference to In re Calhoun, 112 Cal. App. 4th 1262, 6 Cal. Rptr. 3d 34 (2003) and McKune v. Lile, 536 U.S. 204, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002). Appellants' Br. at 26. However, neither of these cases concerns Plaintiffs' First Amendment rights. In re Calhoun concerns whether SVPs have a liberty interest in being free from forced medication and McKune, as discussed below, addresses Fifth Amendment rights, which are not at issue in this case. Moreover, the holding in In re Calhoun is no longer good law. It has been vacated in light of In Re Qawi, 32 Cal. 4th 1, 7 Cal. Rptr. 3d 780 (2004), wherein the California Supreme Court found that forced medication of civil commitments implicates the California Constitutional rights to both privacy and bodily integrity. See In re Calhoun, 85 P.3d 2, 10 Cal. Rptr. 3d 205 (Cal. 2004).

[7] "Because retaliation by prison officials may chill an inmate's exercise of his legitimate First Amendment rights, such conduct is actionable even if it would not otherwise rise to the level of a constitutional violation." Buckley v. Gomez, 36 F. Supp. 2d 1216, 1226 (S.D. Cal. 1997).

[8] Plaintiffs recognize that prisoners' First Amendment associational rights may be curtailed to protect and maintain order consistent with legitimate

Plaintiffs have alleged that these very rights and privileges are restricted and denied in order to punish SVPs who object to mandatory treatment, arbitrary rules and disciplinary procedures. ER 480, ¶¶67-73.

For example, members of the SVP class are subject to red-light alarms for verbally refusing to participate in group therapy sessions even when the class member does not use physical force. ER, ¶56. Additionally, members of the SVP class are subject to regular and public overreaction in the form of excessive red-light alarms, excessive restraints and forced medication as a means of threatening and intimidating members of the SVP class. ER 478, ¶57. This intimidation affects all members of the class, whether they have been subject to the behavior or not. Members of the class are also subject to excessive room searches and seizure of property regardless of their individual security risk because of their participation in this and other lawsuits. ER 481, ¶75. Finally, Plaintiffs allege that SVPs are punished for filing this and other lawsuits challenging the conditions of confinement at ASH. ER 476, ¶47.

These policies and practices do not advance legitimate security or therapeutic interests. They are enforced to retaliate against members of the SVP class for exercising their First Amendment rights. Accordingly, Plaintiffs have clearly stated a claim for violation of their First Amendment rights.

---

penological interests. Jones et al. v. North Carolina Prisoners' Labor Union, Inc., 433 U.S. 119, 132, 97 S. Ct. 2532, 2541, 53 L. Ed. 2d 629, 642-43 (1977).

[9] The right of access is guaranteed to people who are committed to a mental institution. Cornett, 51 F.3d at 897.

[10] See Bradley v. Hall, 64 F.3d 1276, 1279 (9th Cir. 1995). Prisoners have a right to petition the government for a redress of grievances under the First Amendment and prison officials cannot penalize a prisoner for exercising that right.

[11] Prisoners have a liberty interest in avoiding the unwanted administration of anti-psychotic drugs. Harper, 494 U.S. at 221, 110 S. Ct. at 1036, 108 L. Ed. 2d at 197-98; In re Qawi, 32 Cal. 4th 1, 7 Cal. Rptr. 3d 780 (2004).

2. Clearly Established Free Speech Rights Preclude Finding Of Qualified Immunity.

Defendants contend that "[t]he allegations are not such that a reasonable official in Defendants' position would have known that their actions, even if all allegations are accepted as true, violated constitutional standards for treatment of SVPs." Appellants' Br. at 26. But the Ninth Circuit has already found that certain First Amendment rights are so clearly established that they preclude qualified immunity. In Duran v. City of Douglas, 904 F.2d 1372, 1378 (9th Cir. 1990), the court stated the following:

> Whether or not the officer . . . was aware of the fine points of First Amendment law, to the extent he is found to have detained [plaintiff] as punishment for the latter's insults, we hold that he ought to have known he was exercising his authority in violation of well-established constitutional rights.

Like the plaintiff in Duran, Plaintiffs in this case enjoy the well-known benefits of free speech when they state their belief that they do not have an illness, need treatment or when they file lawsuits regarding the conditions at ASH. Moreover, it is untenable that Defendants could believe they may tolerate or encourage the punishment of those patients who exercise such rights.[12] Thus,

---

[12] In Allen v. Saki, 40 F.3d 1001 (9th Cir. 1994), the Ninth Circuit determined that defendants were not entitled to qualified immunity because it was clearly settled that prisoners had a right to access the courts and counsel. The court stated that although there was no case directly on point, "it does not require sophisticated 'legal scholarship' to know that a plaintiff's access to the courts could be hindered seriously by an inability to make multiple, accurate copies of legal documents." Id. at 1005. Similarly, it does not require such analysis to know that by prohibiting SVPs from accessing the law library, using the copy machine, and corresponding privately with counsel (without alternative accommodations), Plaintiffs would be hindered in their ability to prepare for their probable cause and commitment hearings. This inability to prepare for upcoming hearings would clearly hinder Plaintiffs' access to the courts and counsel. While Plaintiffs recognize that it might be acceptable to limit access to the courts where an individual acts violently or poses a danger to himself or others, it does not follow that it is reasonable for any official to believe that

Defendants should not be granted qualified immunity for such conduct. Moreover, any determination of the reasonableness of Defendants' actions requires resolution of factual questions and, as such, should be made only after full development of the factual record.

Finally, Defendants' reliance on McKune v. Lile, 536 U.S. 24, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002), for the proposition that SVPs are not entitled to privileges if they choose not to participate in treatment while confined is misplaced. Appellants' Br. at 26. As discussed further below, the McKune decision is clearly distinguishable from this case. McKune arose in the prison context. The plurality opinion turned on the fact that there was a valid conviction with ensuing restrictions on liberty that such a conviction entails. SVPs, however, are not penal commitments and are to be afforded greater protection of their rights and privileges than prisoners. Nothing within the SVP Act permits the State to treat Plaintiffs in the same fashion as prisoners. It is implausible that Defendants could believe that SVPs could be treated in the same manner as prisoners.

B. Defendants Are Not Entitled To Qualified Immunity On Plaintiffs' Second Alleged Claim (Fourth Amendment Violation).

In challenging Plaintiffs' Second Alleged Claim, Defendants incorrectly assume that involuntary civil commitments enjoy no greater rights under the Fourth Amendment than prisoners or pretrial criminal detainees. Proceeding on this assumption, Defendants then argue that, because the need for safety and security in prisons has been held to justify intrusions on prisoners' Fourth Amendment rights, it follows that the need for safety and security in hospitals automatically justifies intruding upon the Fourth Amendment rights of patients

---

access to the courts and counsel may be conditioned upon a patient's attendance at a treatment session which requires the acknowledgement of an illness or need for treatment.

housed at ASH. Appellants' Br. at 28-31.

1. Plaintiffs Have A Right To Be Free From Unreasonable Searches And Seizures.

The Fourth Amendment rights of involuntary civil commitments cannot be equated with the limited rights of prisoners or pretrial criminal detainees.[13] Unlike prisoners, civil commitments are not confined for the purpose of punishment, but rather they are confined for the purpose of receiving treatment. Also, unlike prisoners and pretrial criminal detainees, Plaintiffs are not housed in a criminal institution, but rather a hospital. There can be no doubt that patients in a mental institution have greater Fourth Amendment rights than incarcerated individuals. Furthermore, Defendants purposely ignore that not all Plaintiffs have actually been committed; many patients referred to by Defendants as SVPs are actually being confined on mere "probable cause" or less. Without having been legally committed, these Plaintiffs have even greater rights and higher interests to enjoy the freedoms granted by the Fourth and Fourteenth Amendments.

Because Plaintiffs, as civil commitments, clearly enjoy greater Fourth Amendment rights than prisoners, the fact that the State's interest in maintaining safety and security in prisons may justify limiting the Fourth Amendment rights of prisoners does not mean that ASH's asserted interest in safety and security automatically justifies infringing on the Fourth Amendment rights of Plaintiffs. Not surprisingly, Defendants have failed to cite, and Plaintiffs cannot find, any

---

[13] Defendants cite Bounds v. Smith, 430 U.S. 817, 97 S. Ct. 1491, 52 L. Ed. 2d 72 (1977), for the proposition that "a mental patient's rights are sometimes analogous to those of prisoners." Appellants' Br. at 29. But Bounds does not even address the issue of unreasonable searches of mental patients. Rather, the case addresses the right of prison inmates to access the courts and prison law libraries. Bounds makes no mention of either mental patients nor the Fourth Amendment right to be protected from unreasonable searches and seizures.

case law which supports Defendants' claim that a hospital's interest in safety and security automatically supersedes all of its civilly committed patients' Fourth Amendment rights.

Moreover, the test for whether particular searches or seizures are "reasonable," as guaranteed by the Fourth and Fourteenth Amendment, involves a factual inquiry that is not properly resolved in a motion to dismiss. As Defendants concede:

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Appellants' Br. at 30 (quoting Bell v. Wolfish, 441 U.S. at 559).

Here, Plaintiffs allege that Defendants' policies, practices and customs subject SVPs to unreasonable searches and seizures, and the unreasonable use of force. For example, SVPs are subjected to degrading public strip searches and the use of four-point restraints when they arrive at ASH. Also, SVPs arbitrarily have their personal belongings seized. ER 476-477, ¶¶64 & 65. The "reasonableness" of such retaliatory seizures and public strip searches should not be decided without further discovery; thus, the Fourth Amendment Claim should not be dismissed.

2. Clearly Established Search And Seizure Law Precludes Finding Of Qualified Immunity.

As Defendants concede, it is clearly established that prisoners have a Fourth Amendment right to be free from unreasonable searches. Appellants' Br. at 30 (quoting Michenfelder v. Summer, 860 F.2d 328, 332 (9th Cir. 1988)). It is also clearly established that Plaintiffs as "[p]ersons who have been involuntarily

committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish." Youngberg v. Romeo, 457 U.S. 307, 321-22, 102 S. Ct. 2452, 73 L. Ed. 2d 28 (1982). Accordingly, a reasonable official would know that Plaintiffs have a greater expectation of privacy than prisoners.

Furthermore, it is also clearly established that searches and seizures cannot be based on mere distaste for an individual. For example, the Ninth Circuit has held that, "no matter how peculiar, abrasive, unruly or distasteful a person's conduct may be, it cannot justify a police stop unless it suggests that some specific crime has been, or is about to be, committed, or that there is an imminent danger to persons or property." Duran, 904 F.2d at 1378. Duran establishes the principle that distasteful conduct, in and of itself, does not justify searches and seizures. A reasonable official would know that such a principle applies regardless of the setting (e.g., police stop or psychiatric hospital). Accordingly, the fact that SVPs refuse therapy that requires them to admit a need for treatment and/or participate in lawsuits does not, in and of itself, justify excessive room searches, increased seizures of legal documents and/or mandatory public strip searches while in four-point restraints. Plaintiffs have alleged violations of clearly established law.

C. Plaintiffs' Claims Are Not Barred By McKune v. Lile.

Defendants argue that, following the Supreme Court's recent decision in McKune v. Lile, Plaintiffs are barred from raising First and Fifth Amendment causes of action to the extent that such claims rely upon the fact that Plaintiffs, as a part of the phase therapy program at ASH, are required to sign a contract by which they agree that they have a "problem" or "illness" requiring treatment. Appellants' Br. at 31-33. Defendants' argument fails for a number of reasons.

First, and most importantly, the holding in McKune is inapplicable to this case. In McKune, the Court addressed a plaintiff's claim that the threat of lost privileges for refusal to admit past criminal acts as part of a sex offender treatment program within the Kansas state prison system violated his Fifth Amendment privilege against self-incrimination. McKune, 536 U.S. at 29, 122 S. Ct. at 2022, 153 L. Ed. 2d at 54. But, as explained to Defendants during the meet and confer process, Plaintiffs in this case have not raised a cause of action based upon this Fifth Amendment privilege and, therefore, the judgment of the Court in McKune is irrelevant to this litigation.

Furthermore, to the extent that Defendants argue that the Court's reasoning in McKune is nevertheless relevant despite the absence of such a claim, this argument disregards the clear emphasis which the plurality opinion placed upon the prison context from which the case arose.[14] As stated by Justice Kennedy in the plurality opinion, "[t]he fact that these consequences are imposed on prisoners, rather than ordinary citizens, . . . is important in weighing respondent's constitutional claim. . . . [T]he fact of a valid conviction and the ensuing restrictions on liberty are essential to the Fifth Amendment analysis." Id. at 36, 122 S. Ct. at 2026, 153 L. Ed. 2d at 58-59. While Defendants blindly argue to the contrary, the prison context from which McKune arose clearly distinguishes that case from this litigation. Plaintiffs in this case are not penal commitments. Rather, they have been civilly committed for the express purpose of treatment.[15] See Cal.

---

[14] There was no majority opinion in McKune, as the Justices failed to come to a majority agreement upon the applicable Fifth Amendment standard. The judgment of the Court was agreed upon by five Justices, and only four Justices joined in the plurality opinion to which Defendants cite.

[15] Plaintiffs again note that a significant number of the Plaintiffs' class have yet to even be committed and, as such, they are at best more closely aligned with pretrial detainees than with prisoners.

Welf. & Inst. Code §§ 6604, 6606. Nothing within the SVP Act nor the Constitution permits the State to treat Plaintiffs in the same fashion as prisoners. As opposed to the pervasive restrictions upon personal liberty inherent in penal commitment, the Supreme Court has expressly held that civilly committed patients held within State custody must be afforded greater protection of their rights and privileges than that afforded prisoners. Therefore, the balance the McKune plurality struck between a plaintiff's personal liberties and the State's interest in confinement and rehabilitation of prisoners does not apply here.

Also, the plurality in McKune did not interpret Kansas's past-acts-admission requirement and the resulting loss of privileges for failure to participate in treatment as a constitutionally viable system of *rewards and punishment*. To the contrary, and as expressly stated by Justice Kennedy:

> [n]o one contends . . . that the transfer [to a maximum security facility for failure to participate in treatment] is intended to punish prisoners for exercising their Fifth Amendment rights. Rather, the limitation on these rights is incidental to Kansas' legitimate penological reason for the transfer: Due to limited space, inmates who do not participate in their respective programs will be moved out of the facility where the programs are held to make room for other inmates [who wish to participate].

Id. at 38, 122 S. Ct. at 2027, 153 L. Ed. 2d at 60.

Despite the McKune plurality's emphasis upon the fact that the plaintiff's loss of privileges in that case was not a matter of punishment but rather merely a result of prison housing limitations, Defendants argue that McKune justifies ASH's punishment of those Plaintiffs who refuse to participate in the phase therapy program at ASH. This argument goes well beyond what the Court upheld in McKune, and attempts to justify a system which clearly amounts to coerced treatment. ASH's reduction of Plaintiffs' privileges for refusal to sign the contract and to participate in phase therapy cannot be justified as a mere consequence of

administrative concerns or housing limitations at ASH. Defendants have not, and cannot, make any showing that the punishments levied against Plaintiffs for refusal to participate in the phase therapy program are anything other than that – a punishment. Rather, as admitted by Defendants, privileges at ASH are awarded or denied to individual Plaintiffs in many instances based solely upon whether the individual signs the contract at issue and consents to treatment. Appellants' Br. at 32-33. Thus, Plaintiffs are faced with the choice: admit illness, waive confidentiality, and risk incrimination in order to proceed in the therapy program at ASH, or refuse to agree to such terms and thus be excluded from the therapy program and face a loss of privileges. Regardless of the Supreme Court's construction of the Fifth Amendment privilege against self-incrimination in McKune, this system of rewards and punishment goes astray of the Constitution's protections against compelled treatment of civil commitments and undermines the stated goal of effective treatment of the Section 6600 population.

Finally, it should be noted that in McKune the plurality emphasized that "respondent's decision not to participate in [treatment] did not extend his term of incarceration." McKune, 536 U.S. at 38, 122 S. Ct. at 2027, 153 L. Ed. 2d at 60. Moreover, in her concurrence, which provided the decisional majority, Justice O'Conner expressly concluded that penalties which create longer incarceration for exercise of the Fifth Amendment privilege went over the constitutional line, stating:

> The penalties potentially faced in these [penalty] cases – longer incarceration and execution – are far greater than those we have already held to constitute unconstitutional compulsion in the penalty cases. Indeed, the imposition of such outcomes as a penalty for refusing to incriminate oneself would surely implicate a 'liberty interest.'

Id. at 52, 122 S. Ct. at 2034-35, 153 L. Ed. 2d at 69. Thus, according to at least six members of the Court, the exaction of a penalty of longer incarceration for

remaining silent about prior sexual history violates the Fifth Amendment privilege against self incrimination.

Unlike the treatment program at issue in McKune, the treatment program currently being implemented by Defendants at ASH does extend incarceration for those SVPs who refuse to participate in treatment on Fifth Amendment grounds. As set out in the Second Amended Complaint, in order to progress through the various phases of treatment, SVPs are required to sign a statement acknowledging that they have a "problem" or "illness" and need "help" or "treatment" at ASH. ER 475, ¶43; 477, ¶51. Understandably, many SVPs refuse to sign such a statement because, if they do, the signed statement is used against the individual SVP in his probable-cause hearing. But, the consequence for such a refusal is an indefinitely extended incarceration, since in order to attain release under Defendants' policies, an SVP must advance through all the phases of treatment. Accordingly, even if McKune were applicable to this litigation, which it is not, its holding would not support the treatment program currently in effect at ASH.

D. Defendants Are Not Entitled To Qualified Immunity On Plaintiffs' Sixth Alleged Claim (Procedural Due Process Violations).

1. Plaintiffs' Protected Liberty And Property Interests.

Defendants challenge Plaintiffs' Procedural Due Process claims on the ground that Plaintiffs have not adequately pled the loss of established liberty or property interests in the access-level reductions, restrictions on movement, forced medication and confiscation of their belongings. Defendants attempt to justify whatever actions they take on the ground that Plaintiffs are "felons" who are, "by statutory definition," unsafe. Appellants' Br. at 35. As this argument itself evidences, the policies, practices and procedures implemented and administered by Defendants at ASH operate in complete disregard of the Plaintiffs' Due Process

rights and contribute to an environment wherein the desire to punish Plaintiffs overrules Defendants' duty not to violate the rights and protections afforded to Plaintiffs by the Constitution.[16] Contrary to Defendants' claims otherwise, Defendants' policies, practices and procedures violate Plaintiffs' clearly established liberty and property interests.

a. Right To Refuse Medication

In Washington v. Harper, the Supreme Court held that prisoners possess "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment." 494 U.S. at 221-22, 110 S. Ct. at 1036, 108 L. Ed. 2d at 198. The Court further held that procedures which provide for an independent decision maker, notice, right to be present at a fair hearing, and a right to present and cross-examine witnesses comported with due process.[17] In Sell v. United States, 539 U.S. 166, 123 S. Ct. 2174, 2184, 156 L. Ed. 2d 197 (2003), the Supreme Court held that the government may only involuntarily administer antipsychotic drugs to a mentally ill pretrial detainee in order to render that pretrial detainee competent to stand trial if the treatment is medically appropriate, substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, significantly necessary to further important governmental trial related

---

[16] Defendants' reliance on Lewis v. Casey, 518 U.S. 343, 116 S. Ct. 2174, 135 L. Ed. 2d 606 (1996) (Appellants' Br. at 33) is misplaced. Lewis did not involve a 12(b)(6) motion to dismiss or consider the relevant pleading standard. Moreover, that case addressed the rights of prison inmates, not civil commitments confined pursuant to a civil statute and held in a state hospital. Id. at 355, 116 S. Ct. at 2183, 135 L. Ed. 2d at 620 (stating that impairment of "litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration.").

[17] Courts have also prescribed a procedure for patients who do not wish to take antipsychotic medication that involves consultation with the patient, review by other professional staff and the institution, and submission of the case to the medical director. See, e.g., Rennie v. Klein, 720 F.2d 266 (3rd Cir. 1983).

interests. Finally, in United States v. Williams, 356 F.3d 1045, 1055-56 (9th Cir. 2004), the Ninth Circuit held that due process prohibits a court from requiring a parolee to take antipsychotic medication as a condition of supervised release without first making findings on a medically informed record supporting the need for medication.

Thus, at a minimum, it has been established that in non-emergency situations, a patient has a right to procedural due process before being forced to take certain types of medication. The Second Amended Complaint alleges forced medication without due process of law, and describes what is factually lacking from Defendants' procedures. ER 476, ¶48; 483, ¶87. Defendants' request for more facts, including the "whys" and "hows" of these due process violations, is a request to prove a negative; the point is, Defendants have not provided the necessary constitutional safeguards when depriving Plaintiffs of their property and liberty.

b. State-Created Interest In Patient Access Levels

A state statute or regulation can also create protected due process interests. For example, a California statute providing that a prisoner's sentence may be reduced for good behavior creates a constitutionally protected liberty interest. Toussaint v. McCarthy, 801 F.2d 1080, 1097-98 (9th Cir. 1986). Similarly, the Supreme Court has held that the transfer of a prisoner from the general population to administrative segregation deprived the prisoner of a state-created liberty interest. Hewitt v. Helms, 459 U.S. 460, 470-71, 103 S. Ct. 864, 871, 74 L. Ed. 2d 675, 687-88 (1983), modified by Sandin v. Connor, 515 U.S. 472, 115 S. Ct. 2293, 132 L. Ed. 2d 418 (1995). The liberty interest at issue in Hewitt was created by state law regulating the discretion of prison officials when ordering such transfers. The state statute authorized such transfers only when it was determined that the presence of the inmate in the general population posed a serious threat of harm to

the inmate or others. Id. The Court concluded that a liberty interest is created whenever a state statute uses explicitly mandatory language – such as "shall" – "in connection with requiring specific substantive predicates" for action. Id. at 472.

The SVPs at ASH have a similar state-created liberty interest. The reduction of an SVP's access level is, in effect, a transfer from the general population at ASH to an administrative-segregation unit where privileges, law library access and the ability to exercise are reduced or prohibited. California Code of Regulations, Title 22, § 71001 et seq. ("§ 71001 et seq."), regulates the licensing and certification of acute psychiatric hospitals, and forms the basis of state-created protected interests. Like the state statute described in Hewitt limiting the discretion of prison officials, § 71001 et seq. also uses explicitly mandatory language, such as "shall," in limiting the discretion of hospital administrators when reducing or altering patients' rights and conditions.[18] Insofar as the SVP Act requires Defendants to

[18] More specifically, § 71507 creates a variety of protected interests by stating that patients shall have rights which include, but are not limited to, the following: 1) to wear his own clothes, to keep and use his own personal possessions including toilet articles and to keep and be allowed to spend a reasonable sum of his own money for canteen expenses and small purchases; 2) to have access to individual storage space for his private use; 3) to see visitors each day; 4) to have reasonable access to telephones, both to make and receive confidential calls; 5) to have ready access to letter writing materials, including stamps, and to mail and receive unopened correspondence; 6) to refuse shock treatment; 7) to refuse psychosurgery; 8) to be informed of the provisions of law regarding complaints and of procedures for registering complaints confidentially, including, but not limited to, the address and telephone number of the complaint receiving unit of the Department; 9) all other rights as provided by law or regulation. 22 CCR § 71507. Furthermore, under § 71507, only a physician may for good cause deny a person these rights. Section 71545 also creates a protected liberty interest in being free from unreasonable restraints by stating that: a) restraints shall be used only when alternative methods are not sufficient to protect the patient or others from injury; b) patients shall be placed in restraint only on the written order of the physician. That order shall include the reason for restraint and the type of restraint to be used. In a clear case of emergency, a patient may be placed in restraint at the discretion of a registered nurse and a verbal or written order obtained thereafter. If a verbal order is obtained it shall be recorded in the patient's medical record and signed by the physician on his next visit; c) patients in

comply with "current institutional standards," as Defendants admit, this set of state regulations, as well as others, is instructive (and extremely fact-intensive). Likewise, these regulations endow ASH patients with certain protected liberty interests. The SVPs at ASH have a protected interest in the rights and privileges regulated by the patient access system ("PAS"), for example, and an access-level reduction requires certain due process procedures. Having thus created these rights, the Defendants may not take away these rights without due process.

c. Atypical And Significant Hardship

In Sandin v. Connor, 515 U.S. 472, 483-84, 115 S. Ct. 2293, 2300, 132 L. Ed. 2d 418, 429-30 (1995), the Supreme Court held that prison inmates have a state-created liberty interest where a restriction "imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life." Similarly, in this case, reduction to access "level one" means that an SVP cannot leave his unit for any reason without an individual escort. ER 474, ¶38. This restriction imposes an atypical and significant hardship in relation to the more ordinary incidents of life at ASH, which allow individuals to access the law library, exercise facilities, and canteen without any type of escort. Because these restrictions impose atypical and significant hardships in relation to the ordinary incidents of *hospital* life, the PAS system constitutes a state-created liberty interest.[19]

---

restraint by seclusion or mechanical means shall be observed at intervals not greater than 15 minutes; d) restraints shall be easily removable in the event of fire or other emergency. Section 71619 states that "a method of assuring privacy for each patient shall be maintained in patient rooms and in tub, shower and toilet rooms." Id.

[19] Defendants improperly rely on the finding in Sandin that the assignment to segregated housing did not impose "atypical and significant hardships on the inmate in relation to the ordinary incidents of prison life." Although this holding may clarify what constitutes such hardships in comparison to ordinary *prison* life, it does not address the factual issues regarding what constitutes

d. Reclassification

In Barnett v. Centoni, 31 F.3d 813, 815-16 (9th Cir. 1994), the Ninth Circuit held that a prison inmate was deprived of liberty and property because he was reclassified to a "Grade B," thereby losing certain privileges. Just as the inmate in that case had liberty and property interest in his classification level, the SVPs have liberty and property interest in their access levels. Due process requires that prison officials provide inmates with notice of the charges against them and an opportunity to present their views to the prison official charged with deciding whether inmates should be reclassified or transferred to administrative segregation. Id. Just as due process requires that inmates be given notice and an opportunity to present their views before being reclassified, SVPs should also be given these same opportunities before an access level is reduced. However, Defendants' policies, practices and procedures tolerate and encourage access-level reductions, without supplying these procedural safeguards. ER 483, ¶87. Thus, Plaintiffs' due process claims should not be dismissed.

2. Clearly Established Right To Refuse Medication Precludes Finding Of Qualified Immunity.

Defendants rely on McKune v. Lile in arguing that Plaintiffs' right to refuse forced medication is not clearly established. This reliance is entirely misplaced, as McKune in no way addresses issues of whether civil commitments have a protected liberty interest in avoiding forced medication. Rather, as already discussed above, McKune concerns solely the issue of the Fifth Amendment as a limitation on compelled confessions to past criminal acts as part of a treatment program in prison. What is at issue in Plaintiffs' Sixth Alleged Claim is forced

---

hardship in comparison to ordinary *hospital* life. Defendants' Motion to Dismiss is not the proper time to address these questions.

medication, not compelled confessions. The Second Amended Complaint alleges that Defendants unconstitutionally fail to provide the minimal procedural requirements before an SVP is injected with or otherwise forced to take a variety of drugs. ER 483, ¶87. As set out above, it is well settled that convicted prisoners, pretrial detainees, and parolees all possess a significant liberty interest in avoiding the unwanted administrations of antipsychotic drugs under the Due Process Clause of the Fourteenth Amendment.[20]

Moreover, California state courts have maintained even higher standards when addressing the rights of involuntary mental health patients, as opposed to prisoners, to refuse medication. For example, the California Supreme Court has held that individuals involuntarily committed pursuant to the Mentally Disordered Offender Act (Cal. Penal Code § 2960, et seq.) have a state constitutional right to be free from mandatory antipsychotic medication in non-emergency situations absent (1) a judicial determination of incapacity to make treatment decisions or (2) a judicial finding that the patient is dangerous within the meaning of California Welfare and Institutions Code section 5300. See In re Qawi, 32 Cal. 4th at 9-10; 7 Cal. Rptr. 3.d at 784; see also Riese v. St. Mary's Hosp. & Med. Ctr., 209 Cal. App. 3d 1303, 271 Cal. Rptr. 199 (1987) (ruling that involuntary commitments held pursuant to the Lanterman-Petris-Short Act, § 5000 et seq., have the right to exercise informed consent to the use of antipsychotic drugs in non-emergency situations absent a judicial determination of their incapacity to make treatment decisions).

---

[20] The Eighth Circuit held that a psychiatrist should have known of the decision in Washington v. Harper three weeks after it was handed down, and thus was not entitled to qualified immunity for administrations that occurred thereafter. Doby v. Hickerson, 120 F.3d 111 (8th Cir. 1997).

Accordingly, a reasonable official would realize that Plaintiffs have a protected liberty interest in avoiding the unwanted administration of antipsychotic drugs and, as such, procedural safeguards must be employed before forcibly administering such drugs at ASH.

3. Clearly Established Right To Notice For Sanctionable Conduct Precludes Finding Of Qualified Immunity.

According to the Ninth Circuit, it is clearly established that an inmate has a procedural due process right to notice that his conduct is sanctionable; that is, that there are negative repercussions – or even punishments – which will follow from his actions or failure to act a certain way. Newell v. Sauser, 79 F.3d 115 (9th Cir. 1996), superseding 64 F.3d 1416 (9th Cir. 1995); see also Browning v. Vernon, 44 F.3d 818 (9th Cir. 1995) (denying qualified immunity for prison officials from procedural due process violations where prisoners were informed of hearings only 24 hours in advance, were not given copies of the report and recommendation, and were immediately placed in solitary confinement). In Browning, the Ninth Circuit held that despite the absence of case law on point, a reasonable prison official would have known that the challenged procedures denied the inmates a right to a reliable rehabilitation report. Id. Given the clearly established rights of prison inmates to receive notice that their conduct is sanctionable, it follows that a reasonable official would realize that patients have the same, if not greater, rights to notice. Nonetheless, Defendants have and continue to reduce Plaintiffs' PAS levels without prior notice or justification. ER 475, ¶¶42, 43; 477, ¶51; 480, ¶70; 483, ¶87.

E. Defendants Are Not Entitled To Qualified Immunity On Plaintiffs' Seventh Claim (Violations Of Substantive Due Process).

Defendants' arguments concerning substantive due process are aimed primarily at an issue of fact not properly addressed within the context of a motion

to dismiss – i.e., whether Defendants have exercised "professional judgment." Appellants' Br. at 37-38. The propriety of an official's exercise of professional judgment can only be determined upon adjudication of the facts, which has not yet occurred in this case. As such, Defendants' premature claims should be rejected. Moreover, Defendants' arguments are nevertheless ineffective to dispose of Plaintiffs' Substantive Due Process claim.

1. The Applicable Standard.

As stated by the Ninth Circuit in Sharp v. Weston, "[a]lthough the state enjoys wide latitude in developing treatment regimens, the courts may take action when there is a substantial departure from accepted professional judgment or when there has been no exercise of professional judgment at all." 233 F.3d at 1171. Furthermore, "the state must . . . provide the civilly-committed with 'more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.'" Id. at 1172 (citing Youngberg, 457 U.S. at 322, 102 S. Ct. at 2461, 73 L. Ed. 2d at 41). As held by the Court in Youngberg, involuntary civil commitments have constitutionally protected rights under the Due Process Clause to reasonably safe conditions of confinement, freedom from unreasonable bodily restraints, and such minimally adequate training as reasonably may be required to protect these interests. See Youngberg, 457 U.S. at 319-22, 102 S. Ct. at 2459-61, 73 L. Ed. 2d at 39-42; see also DeShaney v. Winnebago County Dept. of Social Servs., 489 U.S. 189, 199-200, 109 S. Ct. 998, 1005, 103 L. Ed. 2d 249, 262 (1989) ("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."); County of Sacramento v. Lewis, 523 U.S. 833, 852 n.12, 118 S. Ct. 1708, 1719, 140 L. Ed. 2d 1043, 1061 (1998) ("The combination of a patient's involuntary commitment and his total dependence on his custodians obliges the

government to take thought and make reasonable provision for the patient's welfare."). Finally, "lack of funds, staff or facilities cannot justify the State's failure to provide [those confined] with that treatment necessary for rehabilitation." Ohlinger v. Watson, 652 F.2d 775, 778 (9th Cir. 1980).

2. The Second Amended Complaint Alleges That Defendants Have Failed To Provide For Plaintiffs' Safety And That The Conditions At ASH Are Similar To Or Worse Than Those In Prison.

The Second Amended Complaint clearly alleges that Plaintiffs are subjected to living conditions which in many respects are similar to or worse than those in prison and which are designed to punish, rather than promote the treatment of, Plaintiffs. ER 475, ¶40; 476, ¶¶47-49; 477-480, ¶¶51-67; 483-484, ¶ 90. The Second Amended Complaint similarly alleges that Defendants have personal knowledge of physical and sexual abuse of Plaintiffs by ASH staff and other patients and yet have failed to take affirmative steps to provide for Plaintiffs' safety. See id. The Second Amended Complaint also sets forth various policies, practices and procedures at ASH – including public strip searches, red-light alarms, PAS level reductions – all of which are used in a punitive fashion to intimidate Plaintiffs, thus denying Plaintiffs their constitutional right to safe conditions and freedom from unreasonable restraint. ER 478, ¶¶56-57; 479, ¶64; 481, ¶75; 482, ¶84. Thus, upon these allegations alone, Plaintiffs have clearly alleged facts establishing violations of their substantive due process rights.

3. Whether Defendants Have Exercised Proper Professional Judgment Is A Question Of Fact Not Properly Addressed By A Motion To Dismiss.

In accordance with the standard set forth in Youngberg, Plaintiffs allege that the treatment and therapy programs at ASH are not designed to provide effective treatment nor to facilitate the eventual release of Plaintiffs, but rather are merely a

ruse to justify the indefinite civil "incarceration" of Plaintiffs under the guise of treatment. ER 475-476, ¶¶41-46; 477, ¶¶51-52. The Second Amended Complaint also alleges that the policies, practices and procedures at ASH substantially depart from and often contradict both the written statements contained in ASH administrative directives as well as the rights and regulations contained in the relevant statutes. ER 473-475, ¶¶33-40. Proof of such inadequate treatment policies and practices, in addition to proof of the unconstitutional physical conditions of confinement discussed above, would clearly establish that Defendants have demonstrated "a substantial departure from accepted professional judgment" or have failed to "exercise professional judgment at all." Sharp, 233 F.3d at 1171.

Regardless, the issue of whether Defendants have exercised proper professional judgment in designing, implementing and managing the policies, practices and procedures applicable to Plaintiffs' confinement and treatment at ASH – and the related issue of whether state interests outweigh Plaintiffs' liberty interests in this case – is a question of fact not properly resolved within the context of a motion to dismiss. Youngberg requires demonstration of a substantial departure, at the earliest, upon a motion for summary judgment. Therefore, Plaintiffs' Seventh Alleged Claim should not be dismissed at this stage.

4. Plaintiffs' Clearly Established Right To Safe Conditions Precludes A Finding Of Qualified Immunity.

As set forth above, it has been clearly established that civil commitment have a constitutional right to safe conditions of confinement, freedom from unreasonable bodily restraints and adequate training to ensure that these interests are protected. See Youngberg, 457 U.S. at 319-22; see also Neely v. Feinstein, 50 F.3d 1502, 1508 (9th Cir. 1995) (noting that it is "clearly established" within Ninth Circuit that "patients have a constitutional right to be safe in the state institution to

which they are committed"). The Second Amended Complaint alleges facts sufficient to demonstrate that Defendants have violated Plaintiffs' clearly established right to be safe and have breached their clearly established duty to prevent harm. ER 475, ¶40; 476, ¶¶47-49; 477-480, ¶¶51-67; 481, ¶75; 482, ¶84; 483-484, ¶ 90. Further, Defendants have failed to take affirmative steps to remedy those conditions at ASH which undermine the therapeutic goal of the institution and which subject Plaintiffs to living conditions similar to or worse than those within a prison. For these reasons, Defendants are not entitled to qualified immunity.

F. Defendants Are Not Entitled To Qualified Immunity On Plaintiffs' Eighth Alleged Claim (Violation Of Equal Protection).

In challenging Plaintiffs' Eighth Alleged Claim, Defendants claim that no equal protection violation has been alleged because, even if SVPs are treated differently than other civil commitments, SVPs do not constitute a protected class and, therefore, only rational basis review is justified. Appellants' Br. at 38-40. But Plaintiffs allege facts demonstrating arbitrary and unjustified discrimination against SVPs. For example, the Second Amended Complaint points out that Defendants purposely give priority to non-SVPs when hiring patients for remunerative work. ER 479, ¶63. Similarly, the Second Amended Complaint describes tolerance and encouragement of abuse of SVPs merely because they are SVPs. ER 476, ¶49; 478, ¶¶54, 55; 480, ¶72.

Furthermore, where fundamental interests are at issue, heightened scrutiny may be required even if there is no suspect class. Plyer v. Doe, 457 U.S. 202, 102 S. Ct. 2382, 72 L. Ed. 2d 786 (1982); Reno v. Flores, 507 U.S. 292, 302, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993) (holding that government cannot infringe on fundamental liberty interests unless the infringement is narrowly tailored to serve a compelling state interest); Washington v. Glucksberg, 521 U.S. 702, 720, 117

S. Ct. 2258, 138 L. Ed. 2d 722 (1997) (holding that the due process clause "provides heightened protection against government interference with certain fundamental rights and liberty interests"). In Young v. Weston, 176 F.3d 1196, 1201 (9th Cir. 1999), rev'd on other grounds by Seling v. Young, 531 U.S. 250, 121 S. Ct. 727, 148 L. Ed. 2d 28 (2001), the Ninth Circuit upheld the lower court's application of "a heightened scrutiny standard" when evaluating whether Washington State's Sexually Violent Predator Statute violated equal protection. Under this standard, the court considers whether the classification is substantially related to an important government interest. Because this case involves fundamental interests, such as the fundamental liberty interest in freedom from bodily restraint,[21] "a heightened scrutiny" standard and not rational basis review is applicable. Defendants' arguments are therefore unpersuasive.

Finally, even if rational basis review is applied, it is difficult to imagine how a reasonable official could believe that tolerating and encouraging the abuse, improper punishment and forced medication of SVPs, in contrast to other patients housed at ASH, could bear a rational relationship to a legitimate state purpose.[22] Plaintiffs have described facts showing purposeful and knowing discrimination that is not justified by legislative distinctions. Thus, Defendants' arguments do not justify dismissal of the equal protection claims.

---

[21] In Youngberg, 457 U.S. at 316, 102 S. Ct. at 2458, 73 L. Ed. 2d at 37, the United States Supreme Court held that persons have a fundamental liberty interest in freedom from bodily restraint.

[22] Defendants rely on Baxtrom v. Herold, 383 U.S. 107, 86 S. Ct. 760, 15 L. Ed. 2d 620 (1966), to argue that classifications based on degree of dangerousness are reasonable. Appellants' Br. at 39. But the Court in Baxtrom actually found that the State's different treatment of the criminally insane and civilly insane was not justified based on a degree of dangerousness. 383 U.S. 111-112. Similarly, here, a degree of dangerousness does not justify subjecting SVPs to more abusive conditions than those imposed on the other types of patients housed at ASH, such as penal commitments.

G. Defendants Are Not Entitled To Qualified Immunity On Plaintiffs' Tenth Alleged Claim (Violation Of The Right To Privacy).

Defendants seem to conclude that Plaintiffs, as confined individuals, either do not have any privacy rights or that Defendants' summary and unsupported reliance on ASH's alleged security and treatment interests automatically supersede Plaintiffs' privacy interests. Appellants' Br. at 40-41. However, Plaintiffs allege a variety of privacy violations that bear no relation to any State interest. Rather, these allegations are based on arbitrary, unreasonable, unconstitutional conduct. For example, public strip searches and retaliatory room searches violate Plaintiffs' privacy without furthering security or treatment interests. Rather than automatically justifying a motion to dismiss, this assertion demonstrates the need for discovery regarding the frequency and scope of these privacy violations. Absent supporting evidence, Defendants' bald assertion of compelling state interest cannot summarily and preemptively defeat Plaintiffs' properly pled claims.

Furthermore, the Ninth Circuit established a Fourteenth Amendment Due Process right to bodily privacy in York v. Story, 324 F.2d 450 (9th Cir. 1963). Defendants argue that "it is clear that in the Ninth Circuit a person confined in a secure institution does not have the right to be free from observation while showering, in their room, or otherwise in the institution." Appellants' Br. at 41. This argument is based on Grummet v. Rushen, 779 F.2d 491 (9th Cir. 1985), a case that dealt with observation in the prison context, not a civil hospital. To reiterate, Plaintiffs are civil, not penal, commitments and, as such, have greater rights than prisoners. See Youngberg, 457 U.S. at 321-322 ("Persons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish."). The Ninth Circuit has never found that civil commitments do not have the right to be free from observation. Accordingly, at this stage of the

case, Plaintiffs' privacy claim should not be dismissed on qualified immunity grounds.

Finally, Defendants' contention that the Second Amended Complaint fails to state a privacy claim under the California Constitution is similarly without merit. As stated above, Plaintiffs bring challenges under federal, not state, law.[23]

[23] Thus, Defendants' contention that Plaintiffs have failed to state a claim under Hill v. National Collegiate Athletic Ass'n, 7 Cal. 4th 1, 26 Cal. Rptr. 2d 834 (Cal. 1994) is inapposite. Nevertheless, a violation of state law is relevant to whether there has been a violation of the federal Constitution and the Hill elements have been met in the instant case. Analogizing from the prison context, class members, at a minimum, retain the right to privacy except to the extent restrictions are necessary to guarantee the security of the hospital and the protection of the public. People v. Lloyd, 27 Cal. 4th 997, 1007-1008, 119 Cal. Rptr. 2d 360 (Cal. 2002). Notwithstanding Grummet v. Rushen, 779 F.2d 491 (9th Cir. 1985), Plaintiffs have a right to expect bodily privacy. York, 324 F.2d at 455. Moreover, Section 71619 of Title 22 of the California Code of Regulations creates an expectation of privacy by stating that "a method of assuring privacy for each patient shall be maintained in patient rooms and in tub, shower and toilet rooms." Aside from asserting that there is a compelling State interest in viewing patients' psychological records, People v. Martinez, 88 Cal. App. 4th 465, 105 Cal. Rptr. 2d 841 (2001), which does not equate with a compelling interest for any of the privacy violations alleged by Plaintiffs, Defendants have not even attempted to articulate a compelling state interest which they contend could summarily defeat Plaintiffs' privacy claims at the pleading stage. Their challenge is premature.

XIII.

CONCLUSION

Defendants have attempted twice to dismiss Plaintiffs' claims on the basis that they are barred, in their entirety, by the doctrine of qualified immunity. Their attempts were wholly rejected by the district court both times. Plaintiffs respectfully submit that this Court, too, should deny Defendants' claims and affirm the district court's Order denying the Second Motion to Dismiss.

Dated: May 21, 2004

LATHAM & WATKINS
Joel E. Krischer
Kathryn M. Davis
Matthew B. Hayes

By _____
Kathryn M. Davis
Attorneys for Appellees,
James Allen Hydrick, et al.

STATEMENT OF RELATED CASES

(Circuit Rule 28-2.6)

Appellees are not aware of any pending related cases.

Dated: May 21, 2004

LATHAM & WATKINS LLP
Joel E. Krischer (Bar No. 066489)
Kathryn M. Davis (Bar No. 199494)
Matthew B. Hayes (Bar No. 220639)

By _____
Kathryn M. Davis
Attorneys for Appellees

CERTIFICATION PURSUANT TO CIRCUIT RULE 32

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, I certify that Appellees' brief is proportionally spaced, has a typeface of 14 points or more and contains 17, 340 words, exclusive of tables, captions and headings.

Dated: May 21, 2004

Kathryn M. Davis

PROOF OF SERVICE

STATE OF CALIFORNIA)
) SS:
COUNTY OF LOS ANGELES)

I am employed in the county of Los Angeles, state of California. I am over the age of eighteen years and not a party to the within action. My business address is Latham & Watkins, 633 West Fifth Street, Suite 4000, Los Angeles, California (90071-2007).

On May 21, 2004, I served the foregoing document described as *Appellees' Answering Brief* on interested parties in this action by mail by placing a true copy thereof in a sealed envelope addressed as follows:

RANDALL MURPHY, DEPY ATTY GNRL
300 SOUTH SPRING STREET, SUITE 1700
LOS ANGELES, CA 90013

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U. S. Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in the affidavit.

EXECUTED on May 21, 2004 at Los Angeles, California.

I DECLARE under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Linda Marks

Linda Marks