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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

DOES 1-35; and UNKNOWN NAMED DOES 1-1000, Plaintiffs, v. ADAM PAUL LAXALT, Attorney General of the State of Nevada; et al; Defendants.	CASE NO.: 2:15-CV-01638-RFB-CWH **PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

Come now Plaintiffs, by and through the undersigned attorneys, and file this Response to Defendants' Motion to Dismiss, or in the Alternative, for Summary Judgment, based upon the

attached Memorandum of Points and Authorities, all papers and pleadings on file herein, and any oral argument at the hearing of this matter.

Dated this 7th day of May 2018

Respectfully submitted by:

/s/ Allen Lichtenstein
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POINTS AND AUTHORITIES

I. Introduction

Defendants filed a Motion to Dismiss, or in the Alternative for Summary Judgment. The filing of this Motion as one under Fed.R.Civ. P. 12(b)(6) is incorrect because it is untimely. As for a Rule 56, summary judgment motion, that too is untenable because, for that motion, all facts must be construed in the light most favorable to the nonmoving party. Here, the only facts that might be in contention would be the exact role and authority of each of the Defendants in the unconstitutional, retroactive application of residency restrictions on individuals who are on lifetime supervision, and whose convictions came prior to the 2007 amendments of N.R.S. 213.1243. Retroactive application of those amendments, which were contained in S.B. 471 (2007), were declared unconstitutional and permanently enjoined in *ACLU of Nev. v. Masto*, 719 F. Supp. 2d 1258 (D. Nev. 2008) and *ACLU of Nev. v. Masto*, No. 2:08-CV-822 JCM (PAL), 2012 U.S. Dist. LEXIS 88059, at *3 (D. Nev. June 26, 2012). Moreover, in *McNeill v. State of Nevada*, 375 P.3d 1022 (2016), the Nevada Supreme Court ruled that the Division of Parole and Probation cannot impose conditions of lifetime supervision not specified in N.R.S. 213.1243. Thus, the retroactive application of these restrictions violate the rights of Plaintiffs, and others who are similarly situated. This is a fact that Defendants' Motion does not even attempt to refute.

Defendants, instead, assert that they are not responsible for these unconstitutional provisions, even though they hold the authority to continue or cease employing them. They do not offer any law or evidence to support this lack of authority claim. Defendants also claim qualified immunity and also discretionary immunity pursuant to N.R.S. 41.032. As shown below, neither of these defenses are available to Defendants in these circumstances. Defendants Motion should be denied. Again one important salient point is that nowhere do Defendants ever argue that the

retroactive application of movement and residency restrictions, which has been, and still is occurring on their watch, is constitutionally permissible.

II. Standards for a Motion to Dismiss

A. This motion should be analyzed as a Motion on the Pleadings pursuant to Fed.R.Civ. P. 12(c)

1. A motion pursuant to Rule 12(b)(6) is untimely.

Defendants have moved to dismiss, pursuant to Fed.R.Civ. P. 12(b)(6), for failure to state a claim. This motion is untimely, because the Rule 12(b)(6) motion was made after the answer was filed by Defendants on October 25, 2016 (Docket No. 49). Rule 12(b) states that a "motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed."). *See, Elvig v. Calvin Presbyterian Church*, 375 F.3d 951, 954 (9th Cir. 2004) ("A Rule 12(b)(6) motion must be made before the responsive pleading."); *Augustine v. United States*, 704 F.2d 1074, 1075 n. 3 (9th Cir. 1983) (A Rule 12(b) motion filed after a responsive pleading is "technically untimely"). The Court will construe the motion as a motion for judgment on pleadings under Rule 12(c). *Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980) ("We believe the best approach is . . . treating the motion to dismiss as a motion for judgment on the pleadings."); *see also, In re 1982 Sanger*, 738 F.2d 1043, 1046 (9th Cir. 1984) ("The moving party's label for its motion is not controlling. Rather, the court will construe it, however styled, to be the type proper for relief requested.").

2. Defendants' motion rests solely upon arguments concerning allegations contained in Plaintiffs' Complaint.

In the instant case, Defendants requested both dismissal Pursuant to Rule 12(b)(6), and summary judgment pursuant to Rule 56. A similar situation arose in *Alvarez v. King Cty.*, No. C16-721-RAJ, 2017 U.S. Dist. LEXIS 97530, (W.D. Wash. June 23, 2017):

> Although Defendants call their motion a Motion for Summary Judgment, they contend that the Court should dismiss Alvarez's excessive force claim against Officer Bertaina because he does not allege facts in his complaint that state a claim against her. Alvarez contends that Defendants have been aware all along as to the scope of his allegations such that the deficit of facts in his complaint is immaterial.
>
> The Court will construe Defendants' motion as a motion on the pleadings under Rule 12(c) with respect to its argument concerning Officer Bertaina. "The moving party's label for its motion is not controlling. Rather, the court will construe it, however styled, to be the type proper for relief requested." *In re 1982 Sanger*, 738 F.2d 1043, 1046 (9th Cir. 1984). Because Defendants' argument rests wholly on the contents of Alvarez's complaint, the Court must conduct its analysis accordingly. *See Chocolates By Bernard, LLC v. Chocolaterie Bernard Callebaut Ltd.*, No. 2:10-CV-1298 JWS, 2013 U.S. Dist. LEXIS 96949, 2013 WL 3489805, at *1 (D. Ariz. July 11, 2013) (construing motion for summary judgment as a motion for judgment on the pleadings where movant's basis for relief relied exclusively on allegations in complaint).

2017 U.S. Dist. LEXIS 97530, at *4-5.

Such is the circumstance here. Although Defendants styled their motion as one to both dismiss under Rule 12(b)(6), and for summary judgment pursuant to Rule 56, their claimed basis for relief relies exclusively on their argument concerning allegations contained within Plaintiffs' Complaint. Because of this, added to the fact that Defendants have already filed their Answer, the Court should analyze this Motion is one for a Judgment on the Pleadings, pursuant to Fed.R.Civ. P. 12(c).

B. Standards for a Judgment on the Pleadings pursuant to Fed.R.Civ. P. 12(c).

Federal Rule of Civil Procedure 12(c) provides that, "[a]fter the pleadings are closed — but early enough not to delay trial — a party may move for judgment on the pleadings." Analysis under Rule 12(c) is "substantially identical" to analysis under Rule 12(b)(6). *Pit River Tribe v. BLM*, 793 F.3d 1147, 1155 (9th Cir. 2015), *citing Chavez v. United States*, 683 F.3d 1102, 1108 (9th Cir. 2012). *See also, Dworkin v. Hustler Magazine, Inc.*, 867 F.2d 1188, 1192 (9th Cir. 1989)

(" Because the motions are functionally identical, the same standard of review applicable to a Rule 12(b) motion applies to its Rule 12(c).")

Under both, a court must determine whether the facts alleged in the complaint, taken as true, entitle the plaintiff to a legal remedy. *Id.* The pleading standards set forth by *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), govern all claims for relief. *Straight Path IP Grp, Inc. v. Apple Inc*., No. C 16-03582 WHA, 2017 U.S. Dist. LEXIS 146751, at *4 (N.D. Cal. Sep. 9, 2017).

When deciding a Rule 12(b)(6) or Rule 12(c) motion to dismiss, the court is generally limited to the pleadings and must construe all factual allegations set forth in the complaint as true and in the light most favorable to the Plaintiff. *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). A complaint need only satisfy the minimal notice pleading requirements of Rule 8(a)(2), A short and plain statement, to survive a motion to dismiss for failure to state a claim under Rule 12(b)(6). *Porter v. Jones*, 319 F.3d 483, 494 (9th Cir. 2003); *Bell Atl. Corp. v. Twombly*, 550 U.S.at 548 ; Fed. R. Civ. P. 8(a)(2).

"To survive a motion to dismiss or judgment on the pleadings, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. (*quoting Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 556). A claim is plausible if the facts pleaded allow the court to make the reasonable inference that the defendant is liable. *Iqbal*, 556 U.S. at 678.

Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests. *Erickson v. Pardus*, 551 U.S. 89, 93-94 (2007), *citing Twombly*, 550, U.S. at 555; *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508, n. 1

(2002); *Neitzke v. Williams*, 490 U.S. 319, 327 (1989); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Conley v. Gibson*, 355 U.S. 41, 47 (1957). The plausibility standard is not akin to a 'probability requirement, however, as it requires more than merely a possibility that a defendant has acted unlawfully. *Great Divide Ins. Co. v. Bear Mt. Lodge, LLC, No*. 3:15 CV 00189 JWS, 2016 U.S. Dist. LEXIS 23363, at *6 (D. Alaska Feb. 24, 2016) *citing Twombly*, 550 U.S. at 556).

Nor does it require that a plaintiff set forth a prima facie case. *Swierkiewicz*, at 511. Rather than adduce a prima facie claim in the complaint itself before discovery, it is often necessary to uncover a trail of evidence regarding the defendants' intent in undertaking allegedly discriminatory action, has taken place. A plaintiff need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. *Edwards v. Marin Park, Inc*., 356 F.3d 1058, 1061-62 (9th Cir. 2004) *citing Swierkiewicz*, 534 U.S. at 512; *Conley*, 355 U.S. at 47). The prima facie case is "an evidentiary standard, not a pleading requirement." *Swierkiewicz*, 534 U.S. at 510. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. *Swierkiewicz*, 534 U.S. at 512, *citing Conley* 355 U.S. at 47 48; *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-169 (2003).

Thus, even after *Iqbal*, courts must continue to accept all factual allegations as true, and construe the complaint in the light most favorable to the plaintiff. *Argueta v. U.S. Immigration & Customs Enforcement*, 643 F.3d 60, 74 (3d Cir. 2011). In the context of a motion to dismiss, a court must accept plaintiffs factual allegations as true. *Brown v. Elec. Arts, Inc.*, 724 F.3d 1235, 1244 (9th Cir. 2013), and all inferences must be construed in the light most favorable to the plaintiff. *Stocke v. Shuffle Master, Inc*., 615 F. Supp. 2d 1180, 1186 (D. Nev. 2009). [F]actual allegations "must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Nev. ex rel.*

Hager v. Countrywide Home Loans Servicing, L.P., 812 F. Supp. 2d 1211, 1215 (D. Nev. 2011), *citing Twombly*, 550 U.S. at 555.

The simplified pleading standard set forth in Rule 8(a) of the Federal Rules of Civil Procedure applies to all civil actions, with limited exceptions. *Jackson v. Soc. Sec.*, No. 2:16 00978 GMN PAL, 2016 U.S. Dist. LEXIS 66075, at *1 (D. Nev. May 16, 2016), *citing Alvarez v. Hill*, 518 F.3d 1152, 1159 (9th Cir. 2008); *see also, Merritt v. Countrywide Fin. Corp.*, 759 F.3d 1023, 1032-33 (9th Cir. 2014).

Moreover, a complaint need not identify the statutory or constitutional source of the claim raised in order to survive a motion to dismiss. *Alvarez v. Hill*, 518 F.3d at 1157 58 (9th Cir. 2008), *citing Sagana v. Tenorio*, 384 F.3d 731, 736-37 (9th Cir. 2004); *Austin v. Terhune*, 367 F.3d 1167, 1171 (9th Cir. 2004); *Cabrera v. Martin*, 973 F.2d 735, 745 (9th Cir. 1992).

Generally, a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion. *Fort Vancouver Plywood Co. v. United States*, 747 F.2d 547, 552 (9th Cir. 1984). However, material which is properly submitted as part of the complaint may be considered. *Amfac Mtg. Corp. v. Arizona Mall of Tempe*, 583 F.2d 426 (9th Cir. 1978); *Hal Roach Studios, Inc. v. Richard Feiner & Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1989).

It is the burden of the party bringing a motion to dismiss for failure to state a claim to demonstrate that the requirements of Rule 8(a)(2) have not been met. *Gallardo v. Dicarlo*, 203 F. Supp. 2d 1160, 1165 (C.D. Cal. 2002); *see also Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991) ("Under Rule 12(b)(6) the defendant has the burden of showing no claim has been stated."); *Hedges v. United States*, 404 F.3d 744, 750 (3d Cir. 2005); *Bangura v. Hansen*, 434 F.3d 487, 498 (6th Cir. 2006); *Spinedex Physical Therapy USA, Inc. v. United Healthcare of Ariz., Inc.*, 661 F. Supp. 2d 1076, 1083 (D. Ariz. 2009); *Ortega v. Univ. of the Pac.*, 2013 U.S. Dist. LEXIS 163186, *9 (E.D. Cal. Nov. 14, 2013).

Here, as set forth below, Plaintiffs have met the foregoing pleading standard with their extensive Complaint, which includes more numerous, very specific and detailed factual allegations, that far exceed mere naked assertions or labels and conclusions. Thus, the salient question for Defendants Motion is whether Plaintiffs' Amended Complaint gave Defendants fair notice of what the Plaintiffs' claims are and the grounds upon which they rest. *Twombly,* 550 U.S. 544, 555; *Swierkiewicz*, 534 U.S. at 512. It is important to know that Defendants' Motion does not argue that they did not receive such requisite fair notice.

III. Standard for Motion for Summary Judgment pursuant to Fed.R.Civ. P. 56

Pursuant to Fed. R. Civ. P. 56, summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. See, *Olsen v. Idaho State Bd. of Med*., 363 F.3d 916, 922 (9th Cir. 2004); *Admiralty Fund v. Hugh Johnson & Co*., 677 F.2d 1301, 1305-06 (9th Cir. 1982); *Pegasus Fund, Inc. v. Laraneta*, 617 F.2d 1335, 1339 (9th Cir. 1980); *Margolis v. Ryan*, 140 F.3d 850, 852 (9th Cir. 1998). A material issue of fact is one that affects the outcome of the litigation and requires a trial to resolve the differing versions of the truth. *Tie Tech, Inc. v. Kinedyne Corp*., 296 F.3d 778, 784-785 (9th Cir.2002); *Admiralty Fund v. Jones*, 677 F.2d 1289, 1293 (9th Cir. 1982); *United States v. First National Bank*, 652 F.2d 882, 887 (9th Cir. 1981); *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301, 1306 (9th Cir. 1982).

Courts may grant summary judgment in a party's favor "upon all or any part" of a party's claim. Fed. R. Civ. P. 56(a). Because summary judgment should "isolate and dispose of factually unsupported claims or defenses, the court's ability to grant partial summary judgment is inherent in Rule 56. *Perkins v. Demeyo*, No. 2:12-cv-01242-JAD-VCF, 2014 U.S. Dist. LEXIS 157862, at *8 (D. Nev. Nov. 6, 2014), *citing Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986). The

standard and procedures for a motion for partial summary judgment are the same as for summary judgment of a claim. *United States v. Mohalla*, 545 F. Supp. 2d 1035, 1039 (C.D. Cal. 2008); *Brooks v. Caswell*, No. 3:14-cv-01232-AC, 2015 U.S. Dist. LEXIS 118187, at *9 (D. Or. Sep. 3, 2015). Fed. R. Civ. P. 56(d)(2) contemplates directing summary judgment on liability even if damages cannot be ascertained as a matter of law. *Findlay v. Alaska Air Grp., Inc.*, No. 2:10-cv-01461-ECR-RJJ, 2011 U.S. Dist. LEXIS 75384, at *4 (D. Nev. July 12, 2011)

Once the moving party presents evidence that would call for judgment as a matter of law at trial if left uncontroverted, the respondent must show by specific facts the existence of a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Summary judgment may be appropriate when the movant is entitled to a judgment as a matter of law, even if the court accepts as true all evidence favorable to the party against whom the motion for summary judgment is made. *American Civil Liberties Union of Nevada v. City of Las Vegas*, 466 F.3d 784, 790 (9th Cir. 2006).

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(C). The burden of demonstrating the absence of a genuine issue of material fact lies with the moving party. *See, Zoslaw v. MCA Distr. Corp*., 693 F.2d 870, 883 (9th Cir. 1982).

For the purpose of summary judgment, the material lodged by the moving party must be viewed in the light most favorable to the nonmoving party. *See Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). In judging evidence at the summary judgment stage, the court does not make credibility determinations or weigh conflicting evidence. *T. W. Elec. Serv., Inc., v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). The court may only consider facts that could be presented in an admissible form at trial in deciding a motion for summary judgment.

Lee v. Williams, No. 2:14-cv-01426-JAD-CWH, 2016 U.S. Dist. LEXIS 171425 at *3 (D. Nev. Dec. 12, 2016). Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment. *Thornhill Publ'g Co., Inc. v. GTE Corp.*, 594 F.2d 730, 738 (9th Cir. 1979).

IV. Facts

The pertinent facts of this case have been laid out in detail in the April 23, 2018 Plaintiffs' Motion for Partial Summary Judgment (Docket No. 68), which Plaintiffs hereby incorporated by reference. Several pertinent facts should be mentioned here, however. The first is that the State has been and continues to pursue a policy and practice of retroactively applying movement and residency restrictions to sexual offenders whose convictions occurred prior to 2007. Prior to the enactment of S.B. 471, in 2007, no statutory authority existed for the application of these movement and residency restrictions. In *ACLU of Nev. v. Masto*, 719 F. Supp. 2d 1258 (D. Nev. 2008) and *ACLU of Nev. v. Masto*, No. 2:08-CV-822 JCM (PAL), 2012 U.S. Dist. LEXIS 88059, at *3 (D. Nev. June 26, 2012) the U.S. District Court permanently enjoined Nevada from applying the movement and residence restrictions that were added to N.R.S. 213.1243 by S.B. 471 in 2007, retroactively to offenders whose offenses occurred prior to the 2007 enactment of those restrictions. Defendants do not dispute this, nor can they.

Moreover, in *McNeill v. State of Nevada*, 375 P.3d 1022 (2016), the Nevada Supreme Court ruled that the Division of Parole and Probation cannot impose on those individuals under lifetime supervision, conditions that are not specified in N.R.S. 213.1243. Defendants, again, do not and cannot dispute this.

V. Argument

A. Named Defendants are proper parties.

Defendants argue that as the heads of various State agencies, they are not proper parties, based on two incorrect claims. The first is that the named Defendants, acting as head of these agencies, had absolutely nothing to do with the constitutional violations of retroactively applying movement and residency restriction. The second is that 42 U.S.C. 42 U.S.C. § 1983 does not apply to them. To state a claim under § 1983, plaintiffs must plead that (1) defendants acted under color of law, and (2) defendants deprived plaintiff of rights secured by the Constitution or federal statutes. *Gibson v. U.S.*, 781 F.2d 1334, 1338 (9th Cir. 1986). Both problems are present here.

As for Plaintiffs' latter argument, as noted above, Defendants are all being sued in their official capacities for prospective declaratory and injunctive relief. Only Defendant Wood is also being sued in her individual capacity for monetary damages. This is proper under *N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 107 Nev. 108, 807 P.2d 728 (1991).

> To the extent appellants seek to recover money damages under 42 U.S.C. §§ 1983 and 1985 from SIIS, the complaint fails to state an actionable claim. The United States Supreme Court has held that neither states nor their officials acting in their official capacities are persons under 42 U.S.C. § 1983 and therefore neither may be sued in state courts under the federal civil rights statutes. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 2311-12 (1989).

107 Nev. at, 114, 807 P.2d at 732.

However, in the instant case, Plaintiffs have not filed any claims for monetary damages against any of the Defendants in their official capacities. All claims against Defendants in their official capacities request only prospective declaratory and injunctive relief. These are proper.

> Appellants also sought injunctive relief. The *Will* court held that injunctive relief against state officials acting within their official capacities is available under 42 U.S.C. § 1983. Therefore, appellants did state a cause of action for injunctive relief under the federal civil rights statutes.

107 Nev. at 115-16, 807 P.2d at 733. *See also, Hafer v. Melo*, 502 U.S. 21, 27-28 (1991).

As noted above, only Defendant Wood is being sued for monetary damages in her individual capacity. This too is appropriate. *N. Nev. Ass'n of Injured*, 107 Nev. at 115, 807 P.2d at

732. ("We agree with those courts that have concluded that *Will* does not prohibit claims against officials acting in an individual capacity.") Thus there are no legal improprieties in Plaintiffs' claims against the individual Defendants.

"[W]hen a state official issued in his or her official capacity, the suit is not truly brought against the official, but instead, is a suit against the official's office." *Hernandez v. Palmer*, 2013 Nev. Unpub. LEXIS 1358, *6 (2013), *citing Will at 71.* "Such a case therefore is effectively a suit against the state itself." *Id.* Here, the claims against Defendants in their official capacities for declaratory and injunctive relief are therefore to be thought of as having been lodged against their agencies and the State itself. Again, this is proper when equitable relief is sought, as is the case here.

On page 11 of their brief, Defendants argue that none of them had or have anything to do with the deprivation of Plaintiffs' rights created by the retroactive application of movement and residency restrictions.

> Here, State Defendants did not take any such actions against Plaintiffs to trigger § 1983 protections. Plaintiffs do not allege that State Defendants actually took any actions against them, much less any actions that deprived them of a constitutional right. The actions taken, if any, were the promulgation of lifetime supervision conditions beyond those enumerated in the statute—conditions that were set by the Parole Board, not State Defendants.

Defendants' Motion, at 11.

The assertion here is that the Parole Board acting on its own, without any statutory authority whatsoever, has been and continues to defy not only the ruling of the federal court in *Masto* and the Nevada Supreme Court in *McNeil*, and decided to impose unconstitutional retroactive and residency restrictions on people under lifetime supervision. Defendants' position is that neither Attorney General, the Director of the Nevada Department of Public Safety, the head of parole and Probation, nor any of the other Defendants have anything to do with these

unconstitutional practices. According to Defendants' argument, none of these individuals have the authority to end this policy and practice. Ultimately, for the purposes of Plaintiffs' claims for declaratory and injunctive relief, the State of Nevada is the ultimate Defendant, against whom this equitable relief is sought.

The situation is obviously somewhat different for Defendant Wood, who is being sued for damages in her individual capacity. She is considered a "person" under 42 U.S.C. § 1983. Moreover, it should be noted that Defendant Wood has produced absolutely no evidence to the effect that she did not devise and implement the practice and policy of retroactively applying movement and residency restrictions. There are no affidavits, statutes from the N.R.S., nor regulations authorized by statute listed in the N.A.C., or any other evidence provided by Defendants. Neither a judgment on the pleadings nor summary judgment can be supported by these mere assertions contained in Defendants' brief.

B. Qualified immunity does not apply.

"An official is entitled to summary judgment on the ground of qualified immunity where his or her conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, 533 U.S. 194, 201(2001), the Supreme Court mandated a two-prong procedure for analyzing government officials' qualified immunity claims. First, the court must decide whether the facts set forth in the complaint set forth a violation of a constitutional right. *Id.* The court must also decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. *Id.*

Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right. *Anderson*, *supra*, at 640. A right is clearly established for purposes of qualified immunity only where "[t]he contours of the right [are] sufficiently clear that a reasonable

official would understand [**24] that what he is doing violates that right." *Frudden v. Pilling*, 877 F.3d 821, 831 (9th Cir. 2017) , *quoting Dunn v. Castro*, 621 F.3d 1196, 1200 (9th Cir. 2010), and *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In *Pearson v. Callahan*, 555 U.S. 223 (2009), the Supreme Court ruled that the order of the two-part *Saucier v. Katz*, qualified immunity analysis was flexible, depending on the particular circumstances in each case.

> [W]hile the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

555 U.S. at 236.

Here, Defendants are not entitled to qualified immunity as they knowingly violated Plaintiffs' constitutional rights with impunity. Moreover, because Plaintiffs are asking for the declaratory and injunctive relief, qualified immunity is not available to Defendants.

1. Qualified immunity does not bar prospective injunctive relief.

Plaintiffs have brought claims against all Defendants for declaratory and injunctive relief. The affirmative defense of qualified immunity is unavailable to Defendants concerning these claims. *Henry A. v. Willden*, 678 F.3d 991, 999 (9th Cir. 2012); *American Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991). "[C]laims for injunctive and declaratory relief are unaffected by qualified immunity." *Hydrick v. Hunter*, 669 F.3d 937, 942 (9th Cir. 2012), *citing Malik v. Brown*, 16 F.3d 330, 335 n.4 (9th Cir. 1994); and *L.A. Police Protective League v. Gates*, 995 F.2d 1469, 1472 (9th Cir. 1993).

Qualified immunity is not available as a defense in § 1983 cases where injunctive relief is sought **instead of or in addition to damages.** *Henry A. v. Willden*, 678 F.3d at 999, *citing Pearson v. Callahan*, 555 U.S. at 242 (emphasis added), *See also. Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dept.*, 533 F.3d 780, 794-95 (9th Cir. 2008); *Meisler v.*

Chrzanowski, No. 3:12-cv-00487-MMD-WGC, 2013 U.S. Dist. LEXIS 136680, at *47 (D. Nev. May 8, 2013).

Claims against all but one of the Defendants consist solely of requests for declaratory and injunctive relief, but not monetary damages. The one exception is Defendant Wood, who is being sued in her official and in her individual capacity, for declaratory and injunctive relief and for damages as well. Pursuant to *Henry A. v. Willden*, and *Pearson*, because Plaintiffs are seeking declaratory and injunctive relief in addition to damages (in her individual capacity) from her, qualified immunity is not available to Defendant Wood, either.

2. Unconstitutional retroactive application of movement and residency requirements violate clearly established legal precedent pursuant to *Masto* and *McNeil*.

a. *Masto*

Defendants cannot seriously claim that they were unaware that the retroactively applied movement and residency restrictions at issue here were already declared unconstitutional within the context of S.B. 471 (2007) in *ACLU of Nev. v. Masto*, 719 F. Supp. 2d 1258 (D. Nev. 2008).

> A.B. 579 and S.B. 471 do not provide any procedural due process protections, leaving even people who believe that they have been miscategorized as sex offenders with no means to challenge the application of A.B. 579 and S.B. 471.
>
> The application of these laws retroactively is the equivalent of a new punishment tacked on to the original sentence -- sometimes years after the fact -- in violation of the Ex Post Facto and Double Jeopardy Clauses of the U.S. Constitution, as well as the Contracts clauses of the U.S. and Nevada Constitutions. Moreover, because they do not provide any procedural protections from their retroactive application, A.B. 579 and S.B. 471 violate the Due Process Clause of the U.S. Constitution.
>
> For these reasons, the Court hereby grants Plaintiffs' Motion for Summary Judgment, making the June 30, 2008 Preliminary Injunction enjoining the enforcement of A.B. 579 and S.B. 471 a Permanent Injunction.

719 F. Supp. 2d 1260.

Nor can they credibly claim lack of knowledge that on appeal in *Masto*, the State acknowledged to the Ninth Circuit panel, that it was aware of the unconstitutionality of applying movement and residency restrictions retroactively. *ACLU v. Masto*, 670 F.3d 1046 (9th Cir. 2012).

> We do note that the State limited its concession to the residency and movement restrictions of SB 471, saying that "Nevada, in interpreting its own laws, concluded that movement and residency restrictions contained SB 571 [sic] cannot be applied retroactively." We will hold the State to its categorical representation.

670 F.3d at 1065.

Thus, despite the ever-shifting positions and responses of the State, the District Court in 2008 found the retroactive application of the movement and residency restrictions unconstitutional and permanently enjoined them. 719 F. Supp. 2d at 1260. After the admission made by the State, in the Court of Appeals, that it could not retroactively apply the movement and residency restrictions, the District Court, on remand, ruled that the permanent injunction on those restrictions would remain in full effect. *ACLU of Nev. v. Masto*, No. 2:08-CV-822 JCM (PAL), 2012 U.S. Dist. LEXIS 88059, at *3 (D. Nev. June 26, 2012) .

Defendants' brief does not argue lack of knowledge or applicability of the injunction or admissions in *Masto*. In fact, it does not mention *Masto* at all.

b. *McNeil*

On pages 10-11 of their brief Defendants argue that the Nevada Supreme Court decision in *McNeill v. State of Nevada*, 375 P.3d 1022 (2016) has no pertinence to their qualified immunity claim.

> State Defendants are entitled to qualified immunity on all federal claims. Assuming, for the purposes of this argument only, that Plaintiffs' constitutional rights were violated, State Defendants are entitled to qualified immunity as they were not "plainly incompetent," *Stanton v. Sims*, 571 U.S. 3 (2013), in believing that the additional terms and conditions of lifetime supervision were constitutional. NRS 213.1243 was originally enacted in 1997, and had been amended six times, prior to the *McNeill* decision. No prior decision had questioned the statute's constitutionality, or the Board's issuance of non-statutory conditions. To hold State

> Defendants liable now would have a chilling effect on persons implementing the law.

Defendant' Motion, at 10-11.

Of course, in making this claim, Defendants are necessarily making the argument that the 2008 District Court ruling in *Masto* that the retroactive application of movement and residency restrictions violated various constitutional provisions, including: the "Ex Post Facto and Double Jeopardy Clauses of the U.S. Constitution, as well as the Contracts clauses of the U.S. and Nevada Constitutions," and the "Due Process Clause of the U.S. Constitution." 719 F. Supp. 2d at 1260, only applied in the context of S.B. 471, but that somehow these unconstitutional statutory restrictions are now permissible because they are not authorized by statute. This is clearly not the representation the State made to the Ninth Circuit.

Any ambiguity concerning the scope of the powers afforded the Division of Parole and Probation under N.R.S. 213.1243 was clarified by the Nevada Supreme Court in *McNeill v. State*, 375 P.3d 1022 (Nev. 2016).

> We conclude that the plain language of NRS 213.1243 does not delegate authority to the Board to impose additional conditions not enumerated. NRS 213.1243(1) provides that "[t]he Board shall establish by regulation a program of lifetime supervision of sex offenders" and that the program must provide for supervision by officers in the Division of Parole and Probation. The conditions of lifetime supervision are explicitly set forth in the statute.

375 P.3d at 1025.

On page 10 of their brief, Defendants cite *Stanton v. Sims*, 571 U.S. at 5, in claiming that they are entitled to qualified immunity because they are not "plainly incompetent." What Defendants neglect to mention is that under *Stanton*, not only the plainly incompetent but also those who knowingly violate the law are deprived of the defense of qualified immunity.

> "Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments," and "protects 'all but the plainly incompetent **or those who knowingly violate the law**.'" *Ashcroft* v. *al-Kidd*, 563 U.S. 731, 743,

> 131 S. Ct. 2074, 2083, 179 L. Ed. 2d 1149 (2011) (quoting *Malley* v. *Briggs*, 475 U.S. 335, 341, 106 S. Ct. 1092, 89 L. Ed. 2d 271 (1986)).

571 U.S. at 6 (emphasis added). Such is the case here.

Although Defendants argue that qualified immunity should get rid of all claims against all Defendants, as noted above, the claims against each Defendant involves requests for declaratory and injunctive relief. These are not subject to qualified immunity analysis.

There is only one claim for monetary damages against a single Defendant. While she can claim that it was not until *McNeill* in 2016 that the Nevada Supreme Court definitively ruled that the Division of Parole and Probation could not make up their own rules in the absence of any statutory authority, the fact that the Division that she runs still engages in the same prohibited behavior clearly constitutes a knowing violation of the law, in her individual capacity. This too defeats any argument concerning qualified immunity, particularly in light of the fact that Defendants provided no evidence.

C. Discretionary immunity is not an available defense for Defendants.

1. Because Defendants' actions were not undertaken in any attempt to execute any authorizing statute or regulation discretionary immunity does not apply.

On page 8 of their brief, Defendants note that "[I]n *Martinez v. Maruszczak*, 123 Nev. 433, 445, 168 P.3d 720 (2007), the Supreme Court of Nevada adopted the approach to the discretionary-function exception or discretionary-act immunity established by the Supreme Court of the United States in *United States v. Gaubert*, 499 U.S. 315 (1991) and *Berkovitz v. United States*, 486 U.S. 531 (1988)." Defendants claim their decision to retroactively apply movement and residency restrictions that were not set forth in N.R.S. 213.1243 prior to the 2007 S.B. 471 amendments, to offenders whose convictions predated the effective date of those amendments, is somehow protected by discretionary immunity pursuant to N.R.S 41.032. That statute sets forth exceptions to Nevada's general waiver of sovereign immunity. Pursuant to Section 41.032:

> Except as provided in NRS 278.0233, no action may be brought under NRS 41.031 or against an immune contractor or an officer or employee of the State or any of its agencies or political subdivisions which is:
>
> > **1.** Based upon an act or omission of an officer, employee or immune contractor, exercising due care, **in the execution of a statute or regulation,** whether or not such statute or regulation is valid, if the statute or regulation has not been declared invalid by a court of competent jurisdiction; or
> >
> > **2.** Based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State or any of its agencies or political subdivisions or of any officer, employee or immune contractor of any of these, whether or not the discretion involved is abused.

The plain language of Section 1 of the statute makes clear that discretionary immunity pursuant to N.R.S 41.032 can only apply to individuals whose actions are "in the execution of a statute or regulation." Defendants can cite no statute or administrative regulation, either in the N.R.S. or even the N.A.C., authorizing them to retroactively impose movement and residency restrictions on those whose offenses occurred prior to the 2007 amendments to N.R.S. 213.1243 "[A]dministrative regulations cannot contradict the statute they are designed to implement." *Jerry's Nugget v. Keith*, 111 Nev. 49, 54, 888 P.2d 921, 924 (1995), *citing Clark Co. Social Service Dep't v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990). *McNeil, supra*, is clear on this.

> We conclude that the plain language of NRS § 213.1243 does not grant the Board authority to impose additional conditions. We further conclude that this omission was intentional because the Legislature may not delegate its power to legislate.

375 P.3d at 1023.

Defendants never attempt to justify their practice of retroactively applying movement and residency restrictions by citing any statute found in the N.R.S. or even any regulation implementing a statute, found in the N.A.C. instead, Defendants, on page 9 of their brief simply states that "how lifetime supervision conditions are set and applied involve considerations of

social, economic, and political analysis and are an integral part of State Defendants' responsibility."

This attempt at justification is, of course, incorrect in the absence of any statutory authority. Because Defendants are unable to cite any statute in the Nevada Revised Statutes, or regulation implementing a statute found in the Nevada Code of Administrative Regulations, they cannot claim discretionary immunity pursuant to N.R.S. 41.032.

2. Discretionary immunity does not protect Defendants' constitutional violations.

On pages 1-2 of their brief, Defendants list the various claims for relief set forth in Plaintiffs' Amended Complaint.

> Plaintiffs' 42 U.S.C. § 1983 Amended Complaint for Declaratory and Injunctive Relief and Damages ("Amended Complaint") consists of 11 causes of action, alleging: violation of the Fourteenth Amendment of the United States Constitution and Article 1, §8(5) of the Nevada Constitution ("Procedural Due Process"); violation of the Fourteenth Amendment of the United States Constitution and Article 1, §8(5) of the Nevada Constitution ("Substantive Due Process"); violation of the Fourteenth Amendment of the United States Constitution and Article I, §4 of the Nevada Constitution ("First Amendment"); violation of the Fourteenth Amendment of the United States Constitution ("Equal Protection"); violation of the Fourteenth Amendment of the United States Constitution and Article 1, § 6 of the Nevada Constitution ("Cruel and Unusual Punishment"); violation of the Fourteenth Amendment of the United States Constitution and Art. 1, § 18(1) of the Nevada Constitution ("Double Jeopardy"); violation of Article 1, Section 9 of the United States Constitution and Article 1, §1 (15) of the Nevada Constitution ("Ex Post Facto"); violation of Article 1, Section 10, Clause 1 of the United States Constitution and Article 1, § 15 of the Nevada Constitution ("Contract Clause"); violation of Fourteenth Amendment of the United States Constitution and Article 3, §1(15) of the Nevada Constitution ("Separation of Powers"); violation of Article 1, Section 9 of the United States Constitution and Article 1, § 15 of the Nevada Constitution("Bill of Attainder"); and intentional or fraudulent misrepresentation.

Defendants' Motion, at 1-2.

Clearly, all of these allegations involve claims by Plaintiffs of constitutional violations by Defendants. Because of the constitutional nature of these claims, discretionary immunity is unavailable as a defense by Defendants.

"[A]cts that violate the Constitution are not discretionary. *Correa v. Las Vegas Metro. Police Dep't*, 2018 U.S. Dist. LEXIS 50501 at *5 (D. Nev. March 27, 2018), *citing Jarvis v. City of Mesquite Police Dep't*, 2012 U.S. Dist. LEXIS 22800, at *15 (D. Nev. Feb. 23, 2012) and *Nurse v. United States*, 226 F.3d 996, 1002 (9th Cir. 2000) ("In general, governmental conduct cannot be discretionary if it violates a legal mandate.")..

Nevada looks to federal decisional law on the Federal Tort Claims Act for guidance on what type of conduct discretionary immunity protects. *Martinez*, 168 P.3d at 727-28. Acts that violate the Constitution cannot be viewed as discretionary. *Cloes v. City of Mesquite*, 582 F. App'x 721, 727 (9th Cir. 2014), B*ruins v. Osborn*, No. 2:15-cv-00324-APG-VCF, 2016 U.S. Dist. LEXIS 20364, at *29 (D. Nev. Feb. 19, 2016). (" Because the defendants have not shown that the nature and amount of force used was reasonable under the Constitution as a matter of law, they have not shown they are entitled to discretionary immunity.") As in *Bruins, supra*, "the party asserting immunity as a defense, has the burden of demonstrating facts that show its entitlement to immunity. *Kie Vang v. Forsman*, No. A16-0782, 2016 Minn. App. Unpub. LEXIS 1077, at *3 (Dec. 5, 2016) , *citing Rehn v. Fischley*, 557 N.W.2d 328, 333 (Minn. 1997); *Caldwell v. Roseville Joint Union High Sch. Dist.*, 2005 U.S. Dist. LEXIS 24923, (E.D. Cal. Oct. 25, 2005).

> Defendants argue that they are immune based upon state law absolute or discretionary immunity. State statutory immunity provisions do not apply to federal civil rights actions. *Guillory v. Orange County*, 731 F.2d 1379, 1382 (9th Cir. 1984).

2005 U.S. Dist. LEXIS 24923, at *19 (E.D. Cal. Oct. 25, 2005).

Here, Defendants assert no facts to show their continuing retroactive application of movement and residency restrictions -- which are done in the absence of any statutory authority -- are reasonable, much less constitutional. The rather flaccid assertion in their brief about how these retroactively applied restrictions, that were already declared unconstitutional in *Masto, supra*, "involve considerations of social, economic, and political analysis and are an integral part of State

Defendants' responsibility," provides neither factual or legal justification. Defendants are not protected by discretionary immunity under N.R.S. 41.032.

3. Discretionary immunity does not bar prospective equitable relief.

As noted above, all but one of Plaintiffs' claims involve a request for declaratory and injunctive relief. Discretionary immunity is inapplicable as a defense against such claims for relief. *Mark v. State Dep't of Fish & Wildlife*, 158 Or. App. 355, 368 n.7, 974 P.2d 716, 724 (1999)(The Oregon "Supreme Court held that discretionary immunity does not apply to actions for equitable rather than monetary relief. Because of that conclusion, it did not need to consider the grounds on which we held that the defendant's actions were immune."); *Bradley v. Ohio Dep't of Rehab. & Corr.*, 878 N.E.2d 683 (Ohio Ct. App. 2007) (Discretionary immunity does not apply to claims seeking declaratory relief.).

VI. Conclusion

For all these reasons, Defendants' Motion should be denied.

Dated this 23rd day of April 2018

Respectfully submitted by:

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CERTIFICATE OF SERVICE

I hereby certify that on May 7, 2018, I served Plaintiffs' Response to Defendants' Motion to Dismiss or in the Alternative, for Summary Judgment on all parties via the Court's CM/ECF electronic filing and service system.

/s/ Allen Lichtenstein