To: Defendant City and County of San Francisco et al. and their attorneys: PLEASE TAKE NOTICE that on February 27, 2004 at 10:00 a.m., Plaintiffs will move this Court, located at 450 Golden Gate Avenue, San Francisco, California, Courtroom 8, the Hon. Charles R. Breyer presiding, for a Preliminary Injunction which:

1) Enjoins pre-arraignment strip searches at any of the San Francisco County Jails of arrestees charged with crimes not involving drugs, violence or weapons unless a) there is particularized reasonable suspicion that a search will be productive of contraband or a weapon, b) the basis for that reasonable suspicion is recorded in writing and c) the search is approved by a supervisor prior to the search being conducted;

2) Enjoins pre-arraignment placement into safety cells of arrestees unless there has been a prior determination by a licensed professional that the arrestee has demonstrated behavior which reveals an intent to cause physical harm to himself/herself or others;

3) Enjoins strip searches of persons placed in safety cells;

4) Enjoins removal of the clothing of persons placed in safety cells unless a licensed professional has determined that the arrestee is likely to use the clothing to harm himself.

Plaintiffs' motion will be based on the grounds that injunctive relief is necessary to prevent irreparable harm to plaintiffs pending trial and is supported by this Memorandum, the First Amended Complaint, and the declarations and exhibits filed herewith.

"You don't get safer jails without lawsuits."
San Francisco Sheriff Michael Hennessey
***New York Times*, 1/5/2004**

OVERVIEW OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

Plaintiffs seek a preliminary injunction against two unconstitutional policies and practices of the San Francisco County jail system: Plaintiffs seek to enjoin strip searches and body cavity searches of arrestees held prior to arraignment conducted by jail personnel absent

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reasonable suspicion that the individual possesses contraband or presents a security threat. For at least 15 years the Ninth Circuit has consistently held that strip search of pre-arraignment detainees violates the Fourth Amendment absent particularized reasonable suspicion that the search will produce a weapon or contraband. *See, e.g., Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-872 (9th Cir. 1992); *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 711 (9th Cir. 1989), *Giles v. Ackerman*, 746 F.2d 714, 617 (9th Cir. 1984). Such strip searches also violate California Penal Code § 4030 which only permits strip searches of those arrested for minor offenses supported by particularized reasonable suspicion that the search will disclose a weapon or contraband. Indeed violation of § 4030 is a misdemeanor. This Court may enjoin violations of § 4030 under its supplemental jurisdiction. Little doubt exists that the County employs an illegitimate blanket strip search policy violating the Fourth Amendment and § 4030.

Plaintiffs also seek to enjoin the County from continuing to implement its policy of placing pretrial detainees in "safety cells" as punishment in violation of the Due Process Clause of the Fourteenth Amendment. *Bell v. Wolfish* 441 U.S. 520 (1979); *Henry v. County of Shasta*, 132 F.3d 512 (9th Cir. 1997), *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir. 1995). The County places naked pretrial detainees in safety cells for, among other things, refusal to submit to a strip search or for a perceived lack of cooperation with the strip search. Arrestees placed in safety cells often are denied food and water, are observed by deputies of the opposite sex, and go for hours without interviews by mental health professionals.

STATEMENT OF FACTS

The Narratives Of Plaintiffs And Other Former Pre-Arraignment Detainees Describe The County's Blanket Strip Search Policy And The County's Use Of Safety Cells As Punishment.

Mary Bull: On November 18, 2002, Bull was arrested at a political demonstration and taken to the Bryant Street jail (County Jail 9). Declaration of Mary Bull, ¶¶ 2-3. At 6:00 p.m., deputies took her to be strip searched. *Id*., ¶ 4. (A strip search is part of the "dressing in" process.) Bull refused to sign a form consenting to the search and was returned to a holding cell. *Id*., ¶ 5. Three hours later, at 9:00 p.m., deputies advised her that if she refused to consent to the search, officers would forcibly strip search her and place her naked in a cold room for 24

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hours. *Id*., ¶¶ 6, 8. After Bull politely refused to submit, deputies forcibly stripped her; placed her naked in a squatting position, in view of male deputies; inspected her genital and anal areas and left her naked in the room. *Id*., ¶¶ 9-11. While Bull was in the room, a sheriff's deputy smashed a baton against the door on a regular basis, "creating an unbearably loud nerve-shattering noise," disrupting Bull's sleep and causing her extreme distress. *Id*., ¶ 12. The following morning Bull was given clothes and taken upstairs (to County Jail 1) where deputies informed her she was required to undergo another strip search. *Id.*, ¶ 13. After Bull politely refused, she was taken to another cold room and forcibly strip searched. *Id.*, ¶¶ 14-15. She was released that night on her own recognizance and never charged with a crime. *Id.,* ¶ 18.

Deborah Flick: Ms. Flick is plaintiff in a related case *Flick v. City and County of San Francisco,* No. C 03 04022 CRB. On March 28, 2003 Deborah Flick was arrested for public intoxication. Declaration of Deborah Flick., at ¶ 1-2. She was taken to County Jail 9 where she was held down by two deputies who forcibly removed her clothing and then placed her naked in a safety cell. *Id*., ¶ 6-7. While in the safety cell she began cramping and bleeding profusely and spent the night bleeding and in pain while Sheriff's Deputies verbally abused her. *Id.*, ¶ 8-9. She was never cited and no criminal charges were ever filed. *Id.*, ¶ 4.

Miki Mangosing: On December 12, 2002 Miki Mangosing was arrested and taken to County Jail 9 without ever being advised of the charges against her. Declaration of Miki S. Mangosing, at ¶ 1-2. When she attempted to call to a friend in the neighboring cell, a female deputy told her to "Shut Up," and several deputies removed her from the holding cell and took her to a safety cell. *Id.*, ¶ 4. Once in the safety cell, a deputy said, "Let's teach this bitch a lesson;" deputies then strip searched and beat her. *Id*., ¶ 5. She was left naked in the cell without food or water for twelve hours and was only given a safety cell garment after eight hours. *Id*., ¶ 7-8. While in the cell, she was woken regularly by deputies smashing their batons against the cell door and hurling verbal abuse. *Id*., ¶ 9. She was never booked and was released the next day with no charges ever filed against her. *Id*., ¶ 10.

Steve Noh: Steve Noh was arrested for battery on June 28, 2003. Declaration of Steve Noh, at ¶ 1. He was strip searched within 15 minutes of his arrival at County Jail 9 and then put

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in a safety cell for 15-18 hours after asking about his rights. *Id*., ¶¶ 2-3. He was kept in several holding cells over the next 17 hours and finally released. All charges were dropped. *Id*., ¶¶ 5-7.

Michael Marron: In June 2003, Michael Marron was arrested for alleged credit card fraud at the Hotel Nikka in San Francisco and taken to County Jail 9. Declaration of Michael Marron, at ¶ 1-2. He was booked, classified, and strip searched. *Id*., ¶ 3. When deputies noticed that Marron had removed a jail-assigned wrist band, they removed him from a holding cell, beat him, stripped him and placed him naked and handcuffed in a safety cell. *Id.*, ¶¶ 5-6. He was in the safety cell for over ten hours. *Id.*, ¶ 7. He was neither visited by medical or psychiatric staff while he was in the safety cell, nor was he given any food or water. *Id*., ¶¶ 8-9.

Michele De Ranleau: is not a plaintiff. She should be treated as a percipient witness to County policies and practices and will be added to this action. She formerly was homeless on the streets of San Francisco from late 2000 to January 2003. Declaration of Michele De Ranleau, at ¶ 1. In that time, she was arrested approximately fifteen times for misdemeanor infractions such as loitering and sleeping on a sidewalk. Each time, all charges were dropped. *Id*., ¶ 2. Each time, she was taken to County Jail 9 where she was booked and strip searched and then taken upstairs to County Jail 1 where she was strip searched again. *Id.*, ¶¶ 4-5. She was never told about the possibility of making bail. *Id*., ¶ 7. In December 2002, she was arrested for blocking a sidewalk, taken to County Jail 9, booked, strip searched, and then taken upstairs and strip searched again; when she demanded a phone book in order to find an attorney, she was stripped, searched and placed in a safety cell where she remained for almost 12 hours. *Id*., ¶¶ 8-14. All charges were dismissed. *Id*., ¶ 17.

Lisa Giampaoli: Lisa Giampaoli was arrested on July 19, 2002 because her dog allegedly bit a man. She was taken to County Jail 9 where she was booked and instructed to disrobe in the presence of a male officer. When she refused, male and female deputies dragged her into a safety cell, forcibly removed her clothing and left her naked in the cell for approximately 12 hours. *First Amended Class Action Complaint*, at ¶ 20. She was awakened every 20 minutes by pounding on the door by a male officer who observed her naked. *Id*., ¶ 21

Alexis Bronson: On August 5, 2002 Alexis Bronson was arrested in San Francisco for

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allegedly being drunk in public and taken to San Francisco County Jail where he complied with an order to strip and submit to a cavity search. He was told that he was not coughing loudly enough and was dragged to a safety cell by five deputies where he was kept naked for 12 hours without food or water. Declaration of Alexis Bronson, at ¶¶ 6-8. While naked, he was repeatedly observed by a female deputy, who refused Bronson's requests for clothes and water. *Id*., ¶ 9. No charges were ever filed. *Id*., ¶ 14.

Charli Johnson: On August 30, 2001, Charli Johnson was arrested for alleged public intoxication and taken to San Francisco County Jail where she was strip searched by two male deputies who removed her tampon. *First Amended Class Action Complaint*, at ¶ 27.She was then placed in a safety cell naked for approximately 12 hours and regularly observed by male deputies. She was released the next day and no charges were ever filed against her.

Leigh Fleming: On April 11, 2003 Leigh Fleming was arrested in San Francisco for allegedly disturbing the peace. She was taken to San Francisco County Jail where she was subjected to a visual body cavity search and then confined in a safety cell for more than five hours during which time she was constantly harassed by loud banging on the door every twenty minutes. No charges were ever filed. *Id*., ¶ 28.

Laura Timbrook: On January 6, 2003 Laura Timbrook was arrested in San Francisco on an old warrant for writing bad checks and taken to San Francisco County Jail where she was strip searched twice. *Id*., ¶ 29

Deposition Testimony Of Sheriff's Department Personnel Confirmed That The County Has Long Implemented A Blanket Strip Search Policy.

San Francisco County enforces a blanket strip search policy by which deputies strip search virtually everyone arrested and brought to County Jail prior to arraignment, even absent evidence of the commission of a crime involving drugs, weapons or violence; a criminal history of convictions for such crimes, or reasonable suspicion that the arrestee may carry contraband. Thus jail personnel strip search (1) all arrestees detained on the basis of an outstanding warrant, regardless of the charge; (2) all arrestees who are to be housed at a jail facility prior to their arraignment, *i.e.,* arrestees who are to be introduced into the general jail population; (3) all

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arrestees who signed a form consenting to be strip-searched; (4) all arrestees who are processed through the own recognizance program; and (5) arrestees who do not post bail with sufficient promptness – although no defined period exists after sheriff's deputies are allowed to strip search an individual who is permitted to post bail but has failed to do so.

Booking Searches

Two categories of strip searches exist, "booking searches" and "custody searches." "Booking searches" include strip searches which deputies "automatically" perform on a "person [who] comes in with current charges of drugs, violence or weapons, or if they are on some type of probation or parole." Deposition of Kevin McConnell, Ex. 1 to Seaton Decl., at 29:14-24, 30:17-22.[1] *See also* Deposition of Suzette Humphrey, Ex. 6 to Seaton Declaration, at 48:18-

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[1] Kevin McConnell is a senior deputy, and serves as acting watch commander in the watch commander's absence. McConnell, 7:14-21. McConnell was assigned to the 3:00 p.m. to 11:00 p.m. shift at County Jail 9 from June or July 2002 to August 2003, when he was assigned to the midnight watch. *Id*., 9:3-20. He was on duty when Mary Bull was brought to County Jail 9. *Field Arrest Card of Mary Bull*, Bates No. Bull CCSF MB 00014, Ex. 2 to Seaton Decl., McConnell, 34:13-35:1.

Booking searches are set forth in Department Procedure E-03. Bates No. Bull CCSF 00022-00027, Ex. 3 to the Seaton Decl. Sheriff Hennessey personally approved the Procedure. *Id*., at 00022. On February 23, 2000, Captain Thomas Arata drafted a clarification of strip search policies for inclusion in the County Jail 9 Manual. Bates No. Bull CCSF 00003-00004, Ex. 4 to the Seaton Decl. These were the written procedures in effect when Mary Bull, other plaintiffs and the class members were detained. On February 10, 2003, Captain Dyer amended Arata's clarification to state that the policy referred to both "Felony and misdemeanor charges." Bates No. Bull CCSF 00143-00144, Ex. 5 to the Seaton Decl. As clarified by Arata's amendments and the Dyer Insert (both set off with italics below), the key elements of Procedure E-03 are:

> *To clarify an issue pertaining to CJ#9 strip searches and the departmental policy (E-03 entitled Booking Searches) the following procedure should be followed pertaining to the strip search of CJ#9 prisoners.*
>
> ***Felony and misdemeanor charges*** **[Captain R. Dyer 2/10/03]**
>
> **POLICY:**
> All arrestees entering the San Francisco County Jail System shall be processed through a booking search. The search shall either be a "pat search" performed in conjunction with a hand held metal detector, and/or a strip search. The type of search will be based on the elements of the current criminal charges, prior criminal history or on reasonable suspicion that the prisoner is in possession of contraband.
>
> **PURPOSE:**
> To protect inmates, staff and visitors by establishing policy and procedure for searching inmates to detect and recover weapons, drugs, and other contraband concealed upon their person.
>
> **DEFNITIONS:**
> **Visual Body Cavity Search** - means visual inspection of a body cavity
>
> **Strip Search** (same as Custodial Search) - means a search which requires a person to remove or arrange

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51:20.

For some years, deputies also based searches on arrestees' signatures on "consent" forms which deputes had prepared.[2] Deputies also strip search any arrestee whose conduct creates a reasonable suspicion that the arrestee may possess contraband. *Id.*, 40:3-7, 19-22; Strip Search Authorization Forms, Bates Nos. Bull CCSF 00008, Bull CCSF 00027, Exs. 10 and 11 to Seaton Decl. Deputies also strip search all individuals detained on the basis of San Francisco warrants, regardless of the crime underlying the warrant. Dyer, 50:1-9.

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some or all of his or her clothing so as to permit a visual inspection of the underclothing, breasts, buttocks or genitalia of such person. Includes a visual inspection of the mouth, ears, hair, hands, skin folds, armpits as well as a thorough search of all clothing items.

PROCEDURE:
II Strip Search Criteria
A. A strip search shall be conducted by an officer of the same sex, and may be conducted on a person received at the Intake and Release facility, without written authorization, when **any** of the following conditions apply:

1. An arrestee charged with a crime involving drugs, weapons or violence.
2. An arrestee with a criminal history involving drugs, weapons or violence.
10. A person assigned a custody level by Classification arid scheduled for custodial housing.

Prisoners should be strip searched before the conclusion of the watch. . . .

B. **Authorization to Perform a Strip Search of Arrestees Who Do Not Fall Within Criteria Listed In IIA**

If any arrestee or person accepted at intake does not fall within Section II above, permission to conduct a strip search may be requested by the arresting, transporting or booking officer when he/she has a reasonable suspicion based on articulable facts that the arrestee or person may possess contraband. Permission to conduct a strip search. may be requested by completing Part A, Request for Strip Search, of the San Francisco Sheriff's Department STRIP SEARCH AUTHORIZATION form.

Part III of Procedure E-O3 also details the manner in which deputies must conduct the search.

Booking Search, Procedure E-03, As Revised, August 20, 1999, at Bates No. BULL CCSF 00022-00025, and as supplemented by the Arata Clarification and Dyer Insert To The County Jail 9 Manual, at Bates No. BULL CCSF 00143-00144.

[2] For some years prior to February 2003, deputies altered the E-03 Procedure "Strip Search Authorization" form to add an improvised "consent to search" line for searches of arrestees whose charges did not involve weapons, violence or drugs. McConnell, 36:16-37:14, 38:1-16, 39:7-8; Deposition of Julio Palencia, Ex. 7 to Seaton Decl., at 41:10-11. These altered forms were "in common use." McConnell, 39:3-4; Dyer Memo, 2/11/203, Bates No. Bull CCSF 00145, Ex. 8 to Seaton Declaration; Deposition of Richard Dyer, Ex. 9 to Seaton Decl., at 54:9-12, 56:10-18, 62:24-63:1. Those arrestees who refused to sign the consent form were classified and then strip searched anyway! McConnell, 39:9-12. Palencia, 42:6-16. Captain Dyer confiscated the forms and prepared a memorandum chastising use of the form. Dyer Memo, *supra,* Dyer, 63:22-64:1.

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Custody Searches

"Custody searches" are strip searches which deputies perform on all arrestees who have been given a classification designating the particular jail facility where the Department will house them. McConnell, 29:3-13, 30:23-31:1. All arrestees who have been assigned to housing in a San Francisco County jail are strip searched, regardless of the charges against them and even if they have not met the criteria for a booking search. *Id.*, 29:9-13, 30:23-25; Dyer, 51:12-17. This policy was in effect in November 2002, when Bull was brought to County Jail 9. Deposition of Jan Dempsey, Ex. 12 to Seaton Decl., at 23:3-8.

Deputies Suzette Humphrey and Julio Palencia highlight the breadth of San Francisco's strip search policy. They testified that deputies strip search all arrestees except those who post bail or who are cited and released. Humphrey, 66:22-25, 67:1-11; Palencia, 32:9-12, 38:21-22, 38:24-39:1. Arrestees who qualify for own recognizance release are strip-searched prior to the determination of whether they qualify for inclusion in the "OR" program. Humphrey, 66:9-21.

Strip Searches Of All Arrestees On Their Arrival At New Facility From Jail 9

The Sheriff's Department's Procedure E-07, "Contraband Control, as revised in September, 1997, states, in part, that "When a prisoner enters the facility upon initial assignment . . . the appropriate search of their person or property will be conducted." Procedure E-07, "Contraband Control," Ex. 13 to Seaton Decl., Bates No. Bull CCSF 00030-00036, at 00032. That Procedure further states that a "Strip Search [2.] will be conducted on every prisoner processed into any facility. Does not include searches performed as part of the booking process." "Contraband Control," *supra*, at 00034.

Captain Butler, who ran County Jail 1 at the time of Bull's arrest, testified that deputies strip searched all arrestees processed into County Jail 1. Captain Butler understood the term "appropriate search" to mean a "strip search." Deposition of Sabrina Butler, Ex. 14 to Seaton Decl., at 24:10-15. Procedure E-07 is a blanket strip search policy; it does not differentiate among inmates based on the nature of their alleged crimes. *Id.*, 24:16-20, 26:23-25, 27:1-3. Deputies strip search each arrestee newly admitted to County Jail 1, regardless of whether that individual has been strip searched at County Jail 9. *Id.*, 43:24-44:7. On June 10, 2003 Captain

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Butler sent a memorandum to her subordinates in County Jail 1 stating that that: "ALL NEWLY ASSIGNED INMATES shall be strip-searched upon arrival at CJ #1." Butler June 10, 2003 Memorandum, Ex. 15 to Seaton Decl., Bates No. Bull CCSF 00038. Butler reprimanded deputies who failed to follow the policy. *Id.*, 19:12-15, 28:11-16, 27:21-13.[3]

Sheriff's Department Personnel Routinely Ignore Written Safety Cell Policy And Procedures In Effect Since 1994 Which Prohibit Placement Of Arrestees In A Safety Cell As Punishment For Uncooperative Behavior.

County Safety Cell Policies Are Tied To State Regulations Which Prohibit Use Of Safety Cells For Punishment And Set Forth Minimum Standards.

As revised in 1994, the Sheriff's Department's Safety Cell Policy is set forth in Procedure E-05. Bates No. Bull CCSF 00009-00017, Ex. 18 to Seaton Decl.[4] That Procedure

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[3] At the Facility Commanders' meeting of October 6, 2003, "Chief Dempsey reminded staff that prisoners arriving at housing jails directly from CJ#9 will no longer be strip searched upon arrival. All initial searches will be done at CJ#9" Minutes, Ex. 16 to Seaton Decl., Bates No. Bull CCSF 00286-287. The Department, however, has not changed its written policies requiring that deputies must strip search everyone newly admitted to a facility from County Jail 9. Captain Dyer testified that arrestees are strip searched upon their arrival at new facilities from County Jail 9. Dyer, 65:3-7. Deputy Valerie Carson testified on December 2, 2003, that "anyone entering County Jail 1 is to be strip searched." Deposition of Valerie Carson, Ex. 17 to Seaton Decl., at 24:18-19.

[4] **POLICY:**
The San Francisco Sheriff's Department permits the use of a safety cell to house a prisoner in conformity with California Code of Regulations, Title 15, Sections 1052, 1055 and 1083. Confinement to a safety cell is only justified for a minimum period of time necessary, until the prisoner can be removed for medical or psychiatric attention. A safety cell shall not be used as disciplinary housing.

A. A prisoner may be placed in a safety cell when:
1. She/he displays bizarre behavior which results in the destruction of property.
2. She/he displays bizarre behavior which reveals an intent to cause self-inflicted harm.
3. She/he appears gravely disabled and less restrictive housing is unavailable.
4. She/he appears to be a danger to self or others.
5. She/he requests to use the safety cell..
6. For OBSERVATION ONLY, if it is determined by direct observation that the prisoner has ingested items that may cause injury.

B. A safety cell **SHALL NOT** be used under any circumstances for disciplinary or punitive purposes. A prisoner **SHALL NOT** be placed in a safety cell for merely being uncooperative with. staff or being verbally abusive to staff

II. Procedure for Use of the Safety Cell
C. 1. When a prisoner is placed in a safety cell for any reason, that prisoner shall be strip searched prior to placement.
a. In the event the prisoner is not cooperative during a strip search, she/he will remain in restraints while her/his clothing is cut off in a manner that prevents injury to the prisoner.
b. Unless placement is made because the prisoner has been determined to be suicidal, substitute clothing will be immediately provided.

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was in effect when plaintiffs were placed in safety cells. The Procedure states, in part, "The San Francisco Sheriff's Department permits the use of a safety cell to house a prisoner in conformity with California Code of Regulations, Title 15, Sections 1052, 1055 and 1083." *Id*., at 00009. Safety cells are padded cells housing a single individual. The dimensions are dictated by Cal. Code of Regs. Title 24, § 2-470A.2.5. *See,* Excerpt from Title 24, Ex. 19 to Seaton Decl.

California Code of Regulations, Title 15, §§ 1055 and 1083 limit the permissible uses of a safety cell. They describe who may be placed in a safety cell and reiterate that placement in the safety cells may not be for disciplinary reasons, but only to protect the arrestee from harming himself or others. Title 15, § 1055, in effect as of February 10, 2001, states, in part:

> The safety cell described in Title 24, Section 2-470A.2.5, shall be used to hold only those inmates who display behavior which results in the destruction of property or reveals an intent to cause physical harm to self or others. . . .
>
> In no case shall the safety cell be used for punishment or as a substitute for treatment.
>
> An inmate shall be placed in a safety cell only with the approval of the facility manager, the facility watch commander, or the designated physician. Continued retention in a safety cell shall be reviewed a minimum of every eight hours. A medical assessment shall be completed within a maximum of 12 hours of placement in the safety cell or at the next daily sick call, whichever is earliest. The inmate shall be medically cleared for continued retention every 24 hours thereafter. A

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2. When a prisoner is placed in a safety cell because of bizarre behavior resulting in destruction of property or revealing an intent to cause self inflicted harm, JMS will ensure that a medical assessment is completed within 12 hours or at the next daily sick call, whichever is earlier.

III. Standards for Treatment of Prisoners in Safety Cells

C. Prisoners shall be deprived 'of clothing, mattress or blankets ONLY when it has been demonstrated that:
1. The prisoner will use them to harm her/himself.
2. The prisoner will destroy them.
3. The prisoner will use them to clog the plumbing or block observation windows.

D. 3. SFSD staff will provide a prisoner who has been deprived of clothing a suitably designed "safety garment" or fire retardant blanket for, the prisoner's personal privacy, unless specific, identifiable risks to the prisoner's safety or to the security of the facility are documented.

Procedure E-05 at Bates No. BULL CCSF 0009-00013.

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> mental health opinion on placement and retention shall be secured within 24 hours of placement. Direct visual observation shall be conducted at least twice every thirty minutes. Such observation shall be documented.
>
> Procedures shall be established to assure administration of necessary nutrition and fluids. Inmates shall be allowed to retain sufficient clothing, or be provided with a suitably designed "safety garment," to provide for their personal privacy unless specific identifiable risks to the inmate's safety or to the security of the facility are documented.

Title 15, § 1083, in effect as of February 10, 2001, states, in part:

> The Penal Code and the State Constitution expressly prohibit all cruel or unusual punishment. Additionally, there shall be the following limitations:
>
> (d) In no case shall a safety cell, as specified in title 24, section 2- 470A.2.5, or any restraint device be used for disciplinary purposes.

Procedure E-05 authorizes placement in a safety cell of arrestees who exhibited "bizarre" behavior or were "gravely disabled," categories not included in the Regulation § 1055. Procedure E-05 also requires that detainees be strip searched prior to placement in a safety cell.

Notwithstanding Written Procedures Preventing Use Of Safety Cells For Disciplinary Purposes, Sheriff's Department Personnel Regularly Place Pre-Arraignment Detainees In Safety Cells As Punishment For Refusing To Submit To Strip Searches And For Other Perceived Uncooperative Behavior.

Procedure E-05 in effect since 1994 appears clear: "A safety cell **SHALL NOT** be used under any circumstances for disciplinary or punitive purposes [and] A prisoner **SHALL NOT** be placed in a safety cell for merely being uncooperative with staff or being verbally abusive to staff." Yet, notwithstanding this pellucid prohibition, safety cells have routinely been used to discipline uncooperative detainees, including detainees who refuse to assent to a strip search. Plaintiffs' narratives are not aberrations but accurately reflect County policies.

Confirming plaintiffs' accounts, Suzette Humphrey, a deputy at County Jail 9 who participated in Bull's placement in a safety cell, testified that at least since 1992, deputies have placed arrestees who refuse to be strip searched in a safety cell. Humphrey, 6:24-7:1, 82:14-20, 77:11-16. Senior Deputy McConnell completed a safety cell form for Bull which noted that she was placed in the safety cell for refusing to strip in. McConnell, 45:14-25.

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Karen Cotton is a Jail Psychiatric Services (JPS) therapist/counselor who had the responsibility of deciding whether an individual should be placed in or removed from a safety cell. Deposition of Karen Cotton, Ex. 20 to Seaton Decl., at 22:23-23:5. As recently as November 3rd of last year, Cotton understood that refusal to submit to a strip search subjects a pre-arraignment arrestee to safety cell placement. Cotton, at 56:22-57:10. Joseph Chow, also assigned to JPS, has seen detainees placed in a safety cell for refusing to submit to a strip search. Deposition of Joseph Chow, Ex. 21 to Seaton Decl., at 24:24-25:1. Cathleen Beltz, of Jail Legal Services, co-authored a report on use of safety cells. She also found that detainees were sometimes placed in safety cells for refusing to yield to a strip search. Deposition of Cathleen Beltz, Ex. 22 to Seaton Decl., at 26:5-14.

Valerie Carson, the Senior Deputy who placed plaintiff Mary Bull in a safety cell after Bull's transfer to County Jail 1, testified that "If they are being placed in a safety cell, obviously, something happened where they weren't going along with the strip search." Carson, 18:10-12. By December 2003, Carson had not learned of any policy changes. *Id.*, 30:18-20.

Mitch Marquez, formerly with JPS, has seen detainees naked in a safety cell. Deposition of Mitch Marquez, Ex. 23 to Seaton Decl., at 31:19-21. Undersheriff Dempsey had been told that on a number of occasions detainees placed in safety cells had not been provided garments in a timely fashion. Dempsey, 74:8-12. Cotton had made determinations that the detainees in safety cells were not to receive any clothing. Cotton, 82:1-4.

Undersheriff Jan Dempsey confirmed that all detainees "are stripped when they are in the safety cell," a policy which has remained unchanged since 1994. Dempsey, 32:18-19, 37:5-7. Karen Cotton confirmed that detainees placed in a safety cell are strip searched. Cotton, 41:24-42:1, 85:2-11. If the arrestee does not remove his or her clothes voluntarily, deputies remove the arrestee's clothes in the safety cell and visually inspect the arrestee's body cavities, using force if necessary. Palencia, 45:15-46:4; Humphrey, 83:12-17, 84:13-25.

Safety Cell Reports Submitted To The Sheriff By Jail Legal Services In September State That Department Policies And Practices Violate State Regulations And Raise Eighth Amendment Concerns; The Report Recommends That The Department Change Its Policies To Comply With The Law.

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In September 2002, Teresa Nelson, Directing Attorney of Prisoner Legal Services and Cathleen Beltz, Legal Intern, submitted a report to the Sheriff's Department: "*San Francisco County Jail Safety Cell Review: A Report of Findings."* Ex. 24 to Seaton Declaration, Bates No. Bull CCSF 00098-00140. The report analyzed safety cells in Jails 1, 2, 3 and 8 during the month of September 2001 and on March 14, 2002. *Id.,* 00101. The report observed that:

- While Procedure E-05 included "gravely disabled" and "bizarre behavior" as bases for placing arrestees in a safety cell, the term "gravely disabled" is not included in CCR Title 15 § 1055 and the term "bizarre" was removed from the regulation in 1998. *Id*. 00107
- Jail personnel relied on "Bizarre behavior" as the basis for 25 percent of the placements. *Id.*, 00109-00110.
- "In all but one of 19 observed placements, deprivation of at least one item (jail clothing, garment, blanket, or mattress) occurred without approval." *Id.*, 00124. *Id.*, 00124-00125.
- Prisoners were observed without safety garment (1) overnight until the following day; (2) for two hours; (3) for 6 ½ hours and (4) for 28 hours. *Id.*, 00125.
- A "more universal concern is the failure to provide clothing to placed prisoners. . . SFSD policy of stripping and searching every prisoner prior to placement and depriving every prisoner of clothing while placed, without first determining if such action is justified, is out of compliance with recommended procedure." *Id.,* 00130.
- In practice deputies failed to provide safety cell placements with food and water as required by regulations and policy. *Id.*, 00127-00128.

The Report advised the Department that its practices not only failed to comply with State law, but also raised Eighth Amendment concerns. *Id.*, 00130-00131.

The Report recommended a series of changes in policy, procedures and training. *Id.*, 00134-00137. These included:

- Two of the criteria for placement in a safety cell, "gravely disturbed" and "bizarre

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behavior" be eliminated to conform to Regulation § 1055. *Id.*, 00134.

- A Watch Commander authorize all placements in a safety cell. *Id.*, 00134.
- Strip searches of those placed in safety cells be limited to those who pose a danger to themselves; that substitute clothing be immediately provided a prisoner placed in a safety cell unless that prisoner is deemed suicidal; and that blankets and a mattress be provided unless prisoner will use clothing to harm him/herself, or use them to block windows or clog plumbing. *Id.*, 00134.

On June 19, 2003, Teresa Nelson submitted a follow-up report entitled *Safety Cell Report II* to Sheriff Hennessey, based on Nelson's analysis of placements occurring between January 9 and January 24, 2003 in County Jails 1 and 2. *Safety Cell Report II*, Ex. 25 to Seaton Decl., Bates No. Bull CCSF 00091-00097, at 00092. The Report noted that the Department continued to use the terms "gravely disabled" and "bizarre behavior" among the criteria for safety cell placement. *Id.*, 00093. Failure to offer or provide food and water persisted. 26 of forty prisoners placed in safety cells had not been offered or provided with water. *Id.*, 00094.[5]

Fourteen Months After Receiving The Safety Cell Report And Eight Months After Plaintiffs File Their Lawsuit, The Department Learns That Plaintiffs' Injunction Motion Is Imminent And Makes Changes in Safety Cell Procedure, Finally Claiming To Adopt Recommendations Of The September 2002 Report.

On December 24, 2003, Undersheriff Dempsey sent a memorandum to custodial personnel outlining changes in the safety cell policy. Dempsey December Memo, Ex. 27 to Seaton Declaration. The changes included the following: (1) only Jail Medical Services or Jail Psychiatric Services can determine whether someone is "gravely disabled, reiterating Dempsey's June 2003 memorandum; (2) only an individual who is a danger to self, who

[5] On June 26, 2003, two months after plaintiffs filed suit challenging the safety cell practices, Chief Deputy Dempsey sent a memorandum to all Custody Division personnel revising the safety cell policy. Memorandum, Bates No. Bull CCSF 00039, Ex. 26 to Seaton Decl. The memorandum first noted that "The Use of the Safety Cell policy is currently being reviewed." The memorandum directed jail personnel that deputies will no longer make the determination of whether a prisoner is exhibiting behavior classified as "gravely disabled." Jail Psychiatric Services will make that determination. Whether the Department effectively communicated this "new" policy change is an open question. As of her November 2003 deposition, Cotton of JPS had seen nothing in writing about the "gravely disabled" designation. Cotton, 96:11-97:10.

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requests placement in a safety cell or is a danger to others will be placed in a safety cell, tracking Title 15, § 1055; (3) bizarre behavior will not longer be basis for placement in a safety cell; (4) prior to placement in a safety cell, deputies will only strip search those prisoners who are a danger to themselves, who request placement in a safety cell or whose conduct creates a reasonable suspicion warranting a strip search; and prisoners will not remain in safety cells longer than 24 hours. *Id.*[6]

LEGAL ARGUMENT

PLAINTIFFS ARE ENTITLED TO A PRELIMINARY INJUNCTION

A. The Test For Injunctive Relief.

Established Ninth Circuit precedent requires the applicant for a preliminary injunction to demonstrate: "(1) a likelihood of success on the merits; (2) a significant threat of irreparable injury; (3) that the balance of hardships favors the applicant; and (4) whether any public interest favors granting an injunction." *Raich v. Ashcroft,* 325 F.3d 1222, (9th Cir. 2003). The Ninth Circuit "also uses an alternative test that requires the applicant to demonstrate either: a combination of probable success on the merits and the possibility of irreparable injury; or serious questions going to the merits and that the balance of hardships tips sharply in the applicant's favor. These two tests are not inconsistent. Rather, they represent a continuum of equitable discretion, whereby 'the greater the relative hardship to the moving party, the less probability of success must be shown.' " Id. *(*citations omitted). Plaintiffs' will prevail on the merits, irreparable harm exists and the burden imposed on defendants by requiring them to comply with Constitutional norms and State law is minimal.

B. Plaintiffs Will Succeed On The Merits

1. Ninth Circuit Precedent Unequivocally Forbids Blanket Strip Searching Pre-Arraignment Detainees Who Do Not Appear To Possess Contraband Or To Pose A Threat Of Harm To

[6] Dempsey testified at her deposition that the Department removed "bizarre behavior" as a basis for safety cell placement due to changes in Title 15 in 2001. Dempsey, 43:11-16, 64:14-16. In responding to interrogatories, however, Dempsey confirmed that the removal of the "bizarre behavior" language did not occur until December 2003. Interrogatory Answers, Ex. 28 to Seaton Declaration, at 18:5-8.

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Themselves Or To Others.

The Ninth Circuit has observed that "The intrusiveness of a body-cavity search cannot be overstated. Strip searches involving the visual exploration of body cavities is dehumanizing and humiliating." *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 711 (9th Cir. 1989). *See, e.g., Giles v. Ackerman*, 746 F.2d 714, 617 (9th Cir. 1984) (strip search caused the "detainee's privacy [to be] invaded in a frightening and humiliating manner.").

The Ninth Circuit has enunciated clear guidelines governing strip searches of pretrial detainees. In *Giles v. Ackerman*, 746 F.2d 614 (9th Cir. 1984), plaintiff had been strip searched at a local Idaho jail following her arrest for a traffic violation. Holding that strip searches must be predicated on reasonable suspicion that the arrestee is carrying contraband, the Court stated:

> [W]e hold that arrestees charged with minor offenses may be subjected to a strip search only if jail officials possess a reasonable suspicion that the individual arrestee is carrying or concealing contraband. Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee's appearance and conduct, and the prior arrest record.

746 F.2d at 617. Rejecting the argument that those arrested for minor offenses likely would be carrying contraband, the court noted, "[A]rrest and confinement in the Bonneville County Jail are unplanned events, so the policy could not possibly deter arrestees from carrying contraband." 746 F.2d at 617. *Giles* further held that the placing of temporary detainees in the general population did not justify the County's policy, explaining " '[d]efendants' heavy reliance on the intermingling of its temporary detainees with the general [jail] population is misplaced ...' because such intermingling is both limited and avoidable." 746 F.2d at 619.

The Ninth Circuit revisited the issue in *Ward v. San Diego County*, 791 F.2d 1329 (9th Cir. 1986). Following plaintiff's 1981 arrest for the misdemeanor offense of "failing to appear" she was stripped and searched. Rejecting qualified immunity, the court concluded that "that the law was sufficiently clear in early 1981 so as to expose a public official who unreasonably authorized blanket strip searches of minor offense arrestees to civil liability under 42 U.S.C. § 1983." 791 F.2d at 1332-1333.

Thompson v. City of Los Angeles, 885 F.2d 1439 (9th Cir. 1989) held that strip searches

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may be constitutional where the crime for which the detainee has been arrested -- in *Thompson*, grand theft auto -- provides the reasonable suspicion necessary to justify the search. The court, however, reiterated that: "[T]his court and several other courts have invalidated blanket visual strip search policies as applied to arrestees detained for minor traffic offenses and other misdemeanors not normally associated with weapons or other contraband." 885 F.2d at 1446.

Thompson also reiterated that the placing of a newly arrested detainee "into contact with the general jail population . . . by itself cannot justify a strip search," 885 F.2d at 1447, citing *Giles* (746 F.2d at 618) and *Masters v. Crouch*, 872 F.2d 1248, 1253, 1254-1255 (6th Cir. 1990) ("the fact of intermingling alone has never been found to justify [a strip search] without consideration of the nature of the offense and the question of whether there is any reasonable basis for concern that the particular detainee will attempt to introduce weapons or other contraband into the institution"). 885 F.2d at 1147.

A month after *Thompson*, the Ninth Circuit decided *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702 (9th Cir. 1989), this circuit's leading opinion on the constitutional limits placed on strip searches. Following plaintiff's arrest for felony grand theft (her roommates television set) she was a forced to submit to a body cavity search. 901 F.2d at 704. The LAPD subjected all felony arrestees to a body-cavity search as a matter of course, whereas only those misdemeanor arrestees charged with offenses relating to narcotics or suspected of concealing contraband or weapons are forced to undergo such a search. 901 F.2d at 713. The court held the classification of particular conduct as a felony rather than a misdemeanor did not, standing alone, justify a strip search. 901 F.2d 716.[7] *See, e.g. Arpin v. Santa Clara Valley Transportation Agency,* 261 F.3d 912, 922 (9th Cir. 2001) ("[S]trip searches of persons arrested

[7] In *Act Up!/Portland v. Bagley*, 988 F.2d 868, 871-872 (9th Cir. 1992), the Ninth Circuit held that by 1989 "it was clearly established in this circuit that it is unlawful to strip search an arrestee brought to a jail facility on charges of committing a minor offense, unless the officer directing the search possesses 'a reasonable suspicion that the individual arrestee is carrying or concealing contraband.' " *See, Wong v. Beebe,* 2002 WL 31548486 (D. Or. 2002) ("[W]ell before Wong's strip and cavity search [in 1999], it was clear that blanket strip search policies are unconstitutional if justified by nothing more than an arrest on suspicion of the commission of a felony or a planned confinement in the general jail population")

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for minor offenses are prohibited by the Fourth Amendment, unless reasonable suspicion exists that the arrestee is carrying or concealing contraband or suffering from a communicable disease."); *Silvia v. Clackamas County* 2001 WL 34039482, (D. Or. 2001) ("Well before Silvia's strip and cavity search, it was clear that blanket strip search policies justified by nothing more than arrest on suspicion of the commission of a felony or a planned confinement in the general jail population are unconstitutional.")

2. The County's Strip Search Policies And Practices Must Conform To State Law Which Places Strict Limits on Strip Searchers Of Misdemeanants.

Defendants' conduct also is governed by California Penal Code § 4030 which forbids strip searches of arrestees prior to placement in the general population absent "reasonable suspicion based on specific and articulable facts to believe such person is concealing a weapon or contraband, and a strip search will result in the discovery of the weapon or contraband." § 4030(f). Such searches must be authorized in writing by a supervisor who has documented the basis for the search. Section 4030 forbids placing those arrested for minor offenses in the general jail population unless the arrestee is not cited or released, or released on his or her own recognizance or unable to post bail. The arrestee must have at least three hours to post bail. Exceptions to such placement may only occur in a documented emergency. § 4030(g).

3. The County's Practice And Policy Of Subjecting Pretrial Detainees To Strip Searches Absent Reasonable Suspicion That The Detainees Possesses Contraband Or Poses A Security Threat To The Jail Violates The Fourth Amendment And Penal Code § 4030 .

The record leaves no doubt of plaintiffs' success on the merits. Deputies strip search all arrestees held prior to arraignment who are classified for housing, regardless of the charges against them or whether deputies possess a reasonable suspicion that they may possess a weapon or contraband. Bull was arrested during participation in a political demonstration; Flick for public intoxication; Marron for credit card fraud; De Ranleau for homeless related infractions, Giampaoli for owning a vicious dog, Fleming for disturbing the peace and Timbrook for writing bad checks. Arrestees who fail to promptly post bail also are strip searched, well before three hours elapse after their detention. Arata's directive requires strip

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searching all those in holding cells near the end of a shift. *See,* Arata Insert, Ex. 4 to Seaton Decl., supra.

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4. Using Safety Cells To Impose Discipline On Uncooperative Arrestees Violates The Fourteenth Amendment.

Bell v. Wolfish 441 U.S. 520 (1979) held that the Due Process Clause governed condition of confinement claims raised by pretrial detainees. *Bell* explained that "the proper inquiry is whether those conditions amount to punishment of the detainee. . . . ¶ If a restriction or condition is not reasonably related to a legitimate goal--if it is arbitrary or purposeless--a court permissibly may infer that the purpose of the governmental action is punishment that may not constitutionally be inflicted upon detainees qua detainees. 441 U.S. at 535, 538-539.

Even absent proof of an "intent to punish", the conditions of confinement may raise an inference that the condition of confinement deprived a detainee of due process where the jailer's action was excessive in relation to the alternative [non-disciplinary] purpose assigned (to it), in light of available less harsh alternatives. 441 U.S. at 538, 539, n.20. *See, Hallstrom v. City of Garden City*, 991 F.2d 1473, 1485 (9th Cir. 1993) (Court held detaining plaintiff for refusing to comply with procedures following her arrest for a broken taillight was punishment for failing to cooperate and excessive.) 991 F.2d at 1485.

In 1995, the Ninth Circuit considered the permissible use of safety cells in *Anderson v. County of Kern*, 45 F.3d 1310 (9th Cir. 1995). The court affirmed the district court decision declining to enjoin use of a safety cells for placement of mentally disturbed and suicidal prisoners. The court noted that a safety cell "is employed in response to very severe safety concerns." 45 F.3d at 1314. The cells were used for "temporary placement . . .to deprive the prisoners of all means of harming themselves." Jail officials could properly use safety cells "for short periods of time" to "control violent inmates." *Id.*

In *Henry v. County of Shasta*, 132 F.3d 512 (9th Cir. 1997), plaintiff was arrested after

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refusing to sign a promise to appear form following a traffic stop. After Henry refused to cooperate with the jail nurse, he was placed naked in a padded safety cell, later given a blanket and released after nine hours in the cell. 132 F.3d at 515-516. The court described defendants' conduct "a blatantly unconstitutional course of treatment -- stripping persons who have committed minor traffic infractions, throwing them naked into a "rubber room" and holding them there for ten hours or more for failing to sign a traffic ticket or asserting their legal right to be brought before a magistrate." 132 F.3d at 520.

5. The County's Practice And Policy Of Using A "Safety Cell" To Confine An Unclothed Or Partially Clothed Arrestee (1) Who Has Done No More Than Refuse To Submit To A Strip Search And/Or (2) An Unclothed Or Partially Clothed Arrestee Who Pose No Threat To Themselves, To Others Or To The Security Of The Jails Violates Pretrial Detainees' Right To Due Process Guaranteed By The Fourteenth Amendment.

The record describes the Department's regular practice of placing into safety cells recalcitrant arrestees who refuse to submit to strip searches. It is as if San Francisco's jailers and their wards were governed by policies foreign to us. Under these policies, Bull and Noh were placed in safety cells after asserting their constitutional rights. Giampaoli was placed in a safety cell after refusing to disrobe before a male officer and de Ranleau was placed there for asking to use a phone book. Bronson was punished for not coughing properly during a strip search and Mangosing was placed in a safety cell to teach her a lesson. Flick, Fleming and Johnson were placed in safety cells for no apparent reason. Several were observed by deputies of the opposite sex. None posed a danger to themselves or others. Most were left unclothed for hours, some without water. These practices also ran afoul of State regulations, prohibiting use of safety cells for disciplinary purposes. They also violated Procedure E-05, violations which were apparently of no concern to anyone in the Department.

This use of safety cells goes well beyond the rationale for safety cells condoned in *Anderson* – to remedy "very severe safety concerns" by "depri[ving] the prisoners of all means of harming themselves. 45 F.3d at 1314. Placing non-violent pre-arraignment detainees in

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padded cells for refusing to comply with jail procedures is "blatantly unconstitutional." *Henry,* 132 F.3d at 520.

C. The Proposed Injunction Furthers The Public Interest While Placing Only A Minimal Burden On Defendants.

No cognizable burden, much less an intolerable one, will be placed on the County by requiring it to enforce a strip search policy requiring particularized suspicion of violence or contraband before conducting a strip search. Similarly, enjoining the County from violating the Due Process Clause and regulations in its safety cell policy will cause no untoward burden. At the same time, the public interest will be greatly enhanced by enforcement of policies and practices which adhere to the Constitution, the California Penal Code and state regulations.

D. Unless Restrained By This Court, Defendants' Unconstitutional Conduct Will Irreparably Harm Plaintiffs.

The Ninth Circuit, in K*ennedy* and *Giles,* underscored the dehumanizing, humiliating effect of strip searches. "'[A]n alleged constitutional infringement will often alone constitute irreparable harm.'" *Associated General Contractors of California, Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 (9th Cir. 1991). Longstanding precedent, preexisting California law and regulations, and the County's own procedures have failed to alter these debasing practices, including blanket strip searches and placing detainees naked in safety cells to punish refusal to cooperate, with, among other things, unconstitutional strip searches. Absent injunctive relief, no guarantee exists that defendants will abandon their illegal practices.

E. Plaintiffs Have Standing To Seek Injunctive Relief.

Whether a plaintiff has standing is determined by the situation which exists at the commencement of the suit. *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 571; *Bernhardt v. County of Los Angeles* 279 F.3d 862, 868 (9th Cir. 2001) ("We examine whether Bernhardt had standing at the time the lawsuit was filed.") *See, e.g., Paradise Creations, Inc. v. UV Sales, Inc.*, 315 F.3d 1304, 1309 (11th Cir. 2003). The County cannot dispute that when plaintiffs' filed their action, they had allegedly suffered from having been strip searched and, in some cases, placed in safety cells. No dispute exists that plaintiffs sufficiently alleged that when they sustained this harm, the County had a blanket strip search policy in force and was using safety

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cells as placement for uncooperative arrestees.

Plaintiffs have standing under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Lyons alleged he had been injured by the LAPD when its officers had illegally placed him in a chokehold following a traffic stop. Lyons could not show that all police officers always apply chokeholds or that the city authorized its officers to always apply chokeholds and that Lyons therefore would face harm from officers acting *within* "the strictures of the City's policy." 461 U.S. at 106. The majority faulted the dissent for failing to point to "any written or oral pronouncement by the LAPD or any evidence showing a pattern of police behavior" that would indicate that the official policy" authorizing the challenged conduct. 461 U.S. at 110, n.9.

Armstrong v. Davis, 275 F.3d 849 (9th Cir. 2001) held that where, as here, the constitutional violation arose from official policy or practices sanctioned by the government, plaintiffs have standing to seek an injunction. *See, LaDuke v. Nelson* 762 F.2d 1318, 1324 (9th Cir. 1985) ("[D]efendants engaged in a standard pattern of officially sanctioned officer behavior."). The harm which plaintiffs sustained was directly traceable to a written blanket strip search policy and to strip search and safety cell practices which the County officially sanctioned.

Mary Bull has sufficiently established the likelihood that she will again be subject to the County's unconstitutional conduct. Mary Bull plans to participate lawfully and nonviolently in future protests in San Francisco. Bull Declaration, ¶¶ 19-20. She anticipates that even though she plans to commit no crime, she will be arrested and transported to County Jail 9 where she will again refuse to be strip searched and will again be placed in a safety cell. *Id.*, ¶ 22.

In *Maneely v. City of Newburgh*, 208 F.R.D. 69, 73 (S.D.N.Y. 2002), standing was found where plaintiff alleged "that at the time that the department was given notice of this suit, there was an official policy of strip searching all arrestees who were detained in a cell. Maneely thus ha[d] standing to seek injunctive relief." *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000), recognized that plaintiffs, who had been arrested on prior occasions, were more likely to be arrested than those with no criminal history. 191 F.R.D. at 20. "Under the circumstances," said the court, "it is not unreasonable to conclude that future arrests are likely." *Id.* The court

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distinguished *Lyons* by noting that the police conduct there was episodic and not the "routine procedure" practiced by County personnel. *Id.*, at 21. As here, the blanket strip searches challenged in *Mack* were not simply the result of officially condoned "practice[s];" they resulted from an "iron clad policy" in place at the time plaintiffs "were arrested and at the time Mack filed her complaint." *Id.* In San Francisco those iron clad policies required deputies to strip search all classified pre-arraignment detainees; to strip search detainees prior to placement in safety cells; and strip search pre-arraignment detainees be strip searched again upon transfer to another facility, such as County Jail 1. *Mack* applies equally well to plaintiffs here: "As [plaintiffs] have demonstrated that, at the time the complaint was filed, a real and immediate threat of future injury existed, they have standing to seek injunctive relief." *Id.*

F. The Recent Change In Procedures Does Not Moot Plaintiffs' Motion: The County Has Not Materially Altered Its Blanket Strip Search Policy And Cannot Meet Its Heavy Burden Of Showing That Its Personnel Will Now Adhere To Constitutional Norms.

Plaintiffs' motion is not moot because the County has not altered its blanket strip search policy requiring deputies to strip search all arrestees at County Jail 9 who are being classified for housing, a policy exacerbated by requiring deputies to strip search those remaining in holding cells near the end of a shift. Arata Insert, Ex. 4,to Seaton Declaration, *supra*.

Moreover, even though defendants have modified their written safety cell policies, such modification, in the midst of litigation, offers no guarantee that safety cell practices will adhere to he constitution. Indeed, the County has taken no steps whatsoever to ensure that safety cell placements will not be used as punishment for those unwilling to comply with jailers' directives, such as submitting to a strip search.

In *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000) the Court noted, "It is well settled that "a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice" . The Court set forth this "stringent" test: "A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." The " 'heavy burden of persua[ding]' the court that the challenged conduct

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cannot reasonably be expected to start up again lies with the party asserting mootness." 528 U.S. at 189 (citations omitted).

The County cannot meet this burden. Since *Giles* in 1984 and certainly after *Thompson* and *Kennedy* in 1989, the Ninth Circuit made clear that the blanket strip search policies which plaintiffs seek to enjoin here violated the Fourth Amendment. County policy requires that once arrestees are classified, all are strip searched. Moreover, deputies' actual practices deviate even further from constitutional standards. Arrestees are often strip searched, regardless of reasonable suspicion, almost immediately after entering the facility. And, notwithstanding contrary written procedures, male deputies participated in the strip searching of several plaintiffs, including Mary Bull, Lisa Giampaoli, and Charli Johnson.

The Ninth Circuit also set clear limits on the use of safety cells in *Anderson* in 1995 and in *Henry*, decided two years later. Since at least 2001, the State of California's regulations have prohibited use of safety cells for discipline and limited the criteria for safety cell placement. Yet nothing was done. Even after the 2002 *Safety Cell Report*, the County waited over a year after the *Safety Cell Report*, -- until the eve of the filing of this motion -- to change part of its written policy. In any event, deputies have regularly violated written procedures governing safety cell placements. For years, Procedure E-05, the written policy, has prohibited use of the safety cells for disciplinary purposes to punish uncooperative arrestees. Yet, on two occasions, deputies placed Mary Bull in a safety cell for refusing to submit to a strip search. Several deputies pulled Miki Mangosing from the holding cell for attempting to talk to her friend in the next cell, placed her in a safety cell, forcibly strip searched her, and left her naked in the cell without food or water for 12 hours. Lisa Giampaoli was booked and instructed to disrobe in the presence of a male officer. When she refused, male and female deputies dragged her into a safety cell, forcibly removed her clothing and left her naked in the cell for approximately 12 hours. Alexis Bronson was told that he was not coughing loudly enough and was dragged to a safety cell by five deputies where he was kept naked for 12 hours without food or water. The existence of written policies availed these plaintiffs nothing.

Delays between clearly established court-authored constitutional guidelines and the

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change in written procedures have led courts to reject defendants' claims of mootness in strip search litigation. In *Maneely v. City of Newburgh*, 208 F.R.D. 69 (S.D.N.Y.2002), plaintiff "sought: a declaratory judgment declaring that a strip search of a pre-arraignment arrestee undertaken absent reasonable suspicion that the arrestee is concealing weapons or other contraband is unconstitutional; [and] an order enjoining defendants from implementing or enforcing such a policy." *Id.,* at 71. Following submission of plaintiff's claim, but seven months prior to filing suit, the City changed its policy to conform to the constitution. Rejecting defendants' mootness claim, the court pointed to the five years which had elapsed since the unconstitutionality of defendants' strip search policies had become clear: "Given that it took the defendants well over five years to conform Newburgh's strip search policy with the law, it is not "absolutely clear" that defendants will not "return to their old ways." *Id.*, at 73-74.

Plaintiff in *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000) also sought injunctive relief to enjoin defendant's unlawful strip search policies. The County unsuccessfully argued mootness, noting the change in its policy. Defendant's change, however, did not "eliminate the possibility" that plaintiffs would be unlawfully stripped searched in the future since, "Absent the imperative imposed by an injunction, these Defendants are free to reinstate the objectionable practice at any time." *Id.*, at 21. The court emphasized that the County had maintained its procedures years after the Circuit Court of Appeals had deemed such practices unconstitutional. The court concluded that "Defendant changed its policy to avoid liability in this case at bar rather than to comport with constitutional standards." *Id.*, at 22.

The County cannot meet its "heavy burden" of convincing this Court that it is "absolutely clear" that its personnel will adhere to constitutional norms. The County cannot lift this weighty burden. The County may not take solace in the preparation of some new procedures in the midst of litigation occurring years after controlling Ninth Circuit precedent. The County's dismal track record in enforcing its own written policies further defeats its mootness claim. The County's mootness claim fails.

CONCLUSION

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For the foregoing reasons, the Court must grant the preliminary injunction.

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