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14 UNITED STATES DISTRICT COURT
15 NORTHERN DISTRICT OF CALIFORNIA
16

17 MARY BULL, JONAH ZERN, LISA
GIAMPAOLI, MARCY CORNEAU, ALEXIS
18 BRONSON, MIKI MANGOSING, CHARLI
JOHNSON, LEIGH FLEMING, LAURA
19 TIMBROOK, and all others similarly situated,

Case No. **C 03-1840 CRB**

20 Plaintiffs,

21 vs.

22 CITY AND COUNTY OF SAN FRANCISCO; et
23 al.,

24 Defendants.

25
26 **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'**
27 **MOTION FOR JUDGMENT ON THE PLEADINGS ON CROSS-**
28 **COMPLAINT FOR DECLARATORY RELIEF**

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS'
MOTION FOR JUDGMENT ON THE PLEADINGS ON CROSS-
COMPLAINT FOR DECLARATORY RELIEF**

TABLE OF CONTENTS

I.	SUMMARY OF PLAINTIFFS' ARGUMENT	1
II.	OVERVIEW OF PLAINTIFFS' OPPOSITION	2
III.	ARGUMENT: A PARTIAL JUDGMENT ON THE PLEADINGS ON DEFENDANTS' CROSS-COMPLAINT FOR DECLARATORY JUDGMENT IS INAPPROPRIATE BECAUSE ISSUES OF FACT MUST BE RESOLVED AND BECAUSE A PARTIAL DECLARATORY JUDGMENT WILL NOT TERMINATE THE CONTROVERSY	5
A.	A Judgment On the Pleadings Is Not Warranted If Factual Issues Remain To Be Adjusted	5
B.	Declaratory Judgment Must Be Denied When A Party Seeks Only An Advisory Opinion, When The Issues Are Not Ripe For Adjudication Because The Factual Record Is Incomplete If Declaratory Relief Will Not Terminate The Controversy	6
IV.	THE STATE OF THE RECORD ON DEFENDANTS' MOTION PRECLUDES THE GRANT OF DECLARATORY RELIEF	7
V.	AN ORDER BLESSING THE NEW REGULATIONS WILL NOT RESOLVE THE CONTROVERSY BETWEEN THE PARTIES NOR PRECLUDE FUTURE LITIGATION; MOREOVER SUBSTANTIAL UNRESOLVED FACTUAL ISSUES TIED TO THE VALIDITY OF THE NEW REGULATIONS FURTHER COUNSEL DENIAL OF THE MOTION	9
A.	Defendants' Motion Mischaracterizes Plaintiffs' Claims.	9
1.	Plaintiffs' First Amended Complaint	9
2.	Plaintiffs' Motion For A Preliminary Injunction	10
B.	A Declaratory Relief Judgment Will Not Resolve The Controversy Nor Preclude Future Litigation; Additional Facts Must Be Resolved Before The Court Can Confidently Decide Whether Declaratory Relief Is Appropriate	11

1
2
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23
24
25
26
27
28

VI.	DECLARATORY RELIEF ALSO IS INAPPROPRIATE BECAUSE MANY OF THE NEW WRITTEN POLICIES VIOLATE THE CONSTITUTION	12
A.	Visual Body Cavity Searches Are Impermissible Absent Individualized Reasonable Suspicion That An Arrestee Has Secreted Weapons Or Contraband In His Or Her Person	12
B.	With No Factual Basis, The Strip-Search Policies Contain Overbroad Classifications And Other Defects Which Preclude Declaratory Relief	14
C.	The Safety Cells Policy Is Also Flawed	15
VII.	CONCLUSION	16

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page(s)</u>
United States of America v. Braren 338 F.3d 971 (9 th Cir. 2003)	1, 2, 4, 6
United States v. State of Washington 759 F.2d 1353 (9 th Cir. 1985)	1, 4, 6, 8, 11
Orix Credit Alliance v. Wolfe 212 F.2d 891 (5 th Cir. 2000)	1, 6,
Robinson Band of Pomo Indians of Robinson Rancheria v. Babbitt (N.D. Cal. 1998)	1, 4, 6, 8
Kennedy v. Los Angeles Police Dept. 901 F.2d 702 (9 th Cir. 1989)	1, 3, 7, 12, 13
Fuller v. M.G. Jewelry 950 F.2d 1437, 1445 (9 th Cir. 1991)	4, 12
Enron Oil Trading & Transportation Co. v. Walbrook Ins. Co., Ltd. 132 F.3d 526 (9 th Cir. 1997)	5
Roberts v. Robert v. Rohrman Inc. 909 F.Supp. 545 (N.D. Ill. 1995)	5
United States v. Ritchie 342 F.3d 903 (9 th Cir. 2003)	5
United States v. Wilson 631 F.2d 118 (9 th Cir. 1980)	5
Cardiner v. Provident Life and Accident Insurance Company 158 F.Supp.2d 1088 (C.D. Cal. 2001)	5
Thomas v. Anchorage Equal Rights Commission 220 F.3d 1134 (9 th Cir. 2000)	6
Cha-Toine Hotel Apartments Building Corp. v. Shogren 204 F.2d 256 (7 th Cir. 1953)	6
Miramax Film Corp. v. Abraham 2003 WL 22832384 (S.D.N.Y. 2003)	6
Giles v. Ackerman 746 F.2d 714 (9 th Cir. 1984)	7, 11, 12, 13
Mary Beth G. v. City of Chicago 723 F.2d 1263 (7 th Cir. 1983)	7

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People v. Rocha (1971) 3 Cal.3d 893 92 Cal.Rptr. 172	14
People v. Longoria (1995) 34 Cal.App.4 th 12 Cal.Rptr. 2d 213	14
Corcoran v. Fletcher 160 F.2d 1085 (C.D. Cal 2001)	14
Watt v. City of Richardson Police Department 849 F.2d 195 (5 th Cir. 1988)	15

1 **I. SUMMARY OF PLAINTIFFS' ARGUMENT**

2 Defendants seek what is in effect an advisory opinion on the legality of their new
3 written strip search and safety cell policies. At least three reasons should prompt the Court to
4 deny Defendants' motion.

5 First, declaratory relief is inappropriate unless the matter is ripe for adjudication and
6 does not require a more factual development of the record. *United States of America v. Braren*,
7 338 F.3d 971, 975 (9th Cir. 2003); *United States v. State of Washington*, 759 F.2d 1353, 1357
8 (9th Cir. 1985) (*en banc*); *Orix Credit Alliance v. Wolfe*, 212 F.2d 891, 895-896 (5th Cir.2000);
9 *Robinson Band of Pomo Indians of Robinson Rancheria v. Babbitt* (N.D. Cal. 1998) 1998 WL
10 [Westlaw] 355580. . In determining the legality of jail policies infringing on arrestees' Fourth
11 Amendment and Due Process rights, courts must conduct a "*delicate balancing*" between
12 "institutional needs and objectives" and the "constitutional liberties" of persons suspected of
13 crime. *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 711 (9th Cir. 1989). That balancing
14 cannot be done within the confines of the Cross-Complaint in which Defendants seek a
15 declaratory judgment.

16 Second, declaratory relief should be denied when it will not terminate the proceedings
17 and afford relief from the uncertainty and controversy faced by the parties." *United States v.*
18 *State of Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (*en banc*). Plaintiffs' claims focus on
19 unconstitutional and illegal conduct which in some cases emanated from written policies, but in
20 many cases violated written policies but became the *de facto* policies of the Department.
21 Absent a record showing that the Department will enforce the valid new policies, no Order
22 should issue and, in any event, no Order will bind those not now before the Court and cannot
23 preclude suits by those harmed by unconstitutional practices post-January 2004.

24 Finally, many of the new policies are suspect and lack any support in the record.
25 Defendants reject the mandatory requirement of individualized reasonable suspicion and create
26 broad categories permitting visual body cavity searches of those arrested on weapons, drugs or
27 violence charges and with certain criminal histories absent any showings whatever that such
28 individuals are, in fact, are likely to secrete weapons or contraband in body orifices when
arrested.

II. OVERVIEW OF PLAINTIFFS' OPPOSITION

On January 22, 2004, seeking to moot Plaintiffs' claims for injunctive relief and Plaintiffs' Motion for a Preliminary Injunction, Defendants filed a Cross-Complaint for Declaratory Relief to which they appended new regulations. The Department promulgated these new policies in mid-January 2004, years after the Ninth Circuit had condemned blanket strip searches and nine months after Plaintiffs filed suit. The Cross-Complaint asks the Court to declare that the claim for injunctive relief is moot and that the new regulations comply with federal and state law.

Defendants' Motion for Judgment on the Pleadings seeks an Order blessing the Sheriff's Department's new written policies. Defendants' Cross-Complaint alleges no more than the existence of a dispute between the parties about the legality of the new written policies. It contains no allegations describing the institution's security needs which could support the new written policies, fails to allege that the Department has disciplined violators of the prior written policies, or even enforced the new ones.

The issues framed by the Cross-Complaint are simply not ripe for adjudication. Those issues need further factual development. *United States of America v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003). Moreover, many of the issues addressed by new written policies, dealing with both visual body searches and particularly safety cells are not encompassed in Plaintiffs' pleadings. Ruling on these matters would be a purely advisory opinion which this Court lacks jurisdiction under Article III to issue.

A review of the Plaintiffs' pleadings in this case reveals that from the start Plaintiffs have sought redress for defendants' conduct which violated the rights of Plaintiffs and class members protected by the Fourth and Fourteenth Amendments and by California statute. Some of that conduct arose from deputies' application of illegal written policies while other abuses resulted from systemic violations of written policies so that new *de facto* policies came into effect. For example, contrary to written policies, authorization forms were altered to create purported strip search consent forms. Deputies participated in cross-gender searches, violating another written policy. And, in contravention of an express safety cell written policy, deputies used safety cell placements to punish arrestees who had been deemed uncooperative.

1 Promulgation of new written policies, as an isolated act, provides no assurance that the abuses
 2 which prompted this litigation will not continue. Only an injunction has the potential to create
 3 that beneficial result.

4 Defendants assert that their motion carves out an “autonomous” question, distinct from
 5 the rest of the litigation. Not so. Contrary to Defendants’ assertion, even a ruling in their favor
 6 will not preclude litigation by those harmed by unconstitutional conduct of Department
 7 personnel occurring after January 2004. Based on the written policies alone, the Court cannot
 8 accurately determine whether these written policies will actually dictate the practices of jail
 9 personnel. The Court should not assume that its approval of the new written policies will
 10 thwart future litigation. And, of course, the Court’s ruling will not bind future litigants (and of
 11 course not those within the instant class) allegedly harmed by post January 2004 Department
 12 practices and *de facto* policies. A partial judgment on the pleadings for declaratory relief is
 13 inappropriate here. Questions of fact about the effect of the new policies on actual practice and
 14 the factual basis for the new policies mandating blanket strip searches on certain classes of
 15 arrestees remain to be answered. Moreover, such an order will not foreclose future litigation
 16 based, as is the instant case, on illegal Departmental conduct.

17 Many of the policies themselves are also suspect. The Ninth Circuit has condemned
 18 blanket overbroad policies which consign entire categories to visual body cavity searches in the
 19 absence of individualized reasonable suspicion. No Ninth Circuit case has held that officials
 20 may search pre-arraignment arrestees based solely on the nature of the arrest **or** on an arrestee’s
 21 criminal history. Apart from citations to cases which Defendants often misread, Defendants
 22 offer no basis for consigning entire groups of arrestees to visual body cavity searches absent
 23 individualized reasonable suspicion.

24 While notice pleading rules permitted Defendants to file a barebones Cross-Complaint
 25 for Declaratory Relief, that pleading, even with the attached new regulations, gives the Court
 26 scant basis on which to enter partial judgment for Defendants. In determining the legality of
 27 jail policies infringing on arrestees’ Fourth Amendment and Due Process rights, courts must
 28 conduct a “*delicate* balancing” between “institutional needs and objectives” and the
 “constitutional liberties” of persons suspected of crime. *Kennedy v. Los Angeles Police Dept.*,

1 901 F.2d 702, 711 (9th Cir. 1989). That balancing cannot be done within the confines of the
 2 Cross-Complaint in which Defendants seek a declaratory judgment.

3 To judge the merit of the written policies the Court must go beyond the pleadings to
 4 determine the justification for the new policies, particularly those permitting strip searches for
 5 entire classes of individuals. This task is necessary given the Ninth Circuit's recognition that
 6 there are "few exercises of state authority that intrude on citizen's privacy and dignity as
 7 severely as visual anal and genital searches." *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1445 (9th
 8 Cir. 1991). Among the questions which require answers are: What was the jails' history of
 9 finding weapons and contraband during visual body cavity searches of those arrested under the
 10 prior policy? Have deputies ever discovered contraband during visual body cavity searches on
 11 those transferred from other institutions? What alternative procedures exist to detect weapons
 12 or contraband short of visual body strip searches? What information do Sheriff's Department
 13 personnel possess when deciding whether to subject an arrestee to a visual body cavity search?
 14 How have Sheriff's Department personnel actually complied with prior written policies which
 15 protected arrestees from improper strip searches or placements in safety cells? Will citizen
 16 arrests be deemed a valid basis for a strip search? How does the Sheriff's Department classify
 17 crimes of violence? Defendants' papers provide no answers to these questions. Without the
 18 answers to these questions, this Court cannot determine if the intrusion on pre-arraignment
 19 arrestees' rights is warranted given the institution's security needs against which the arrestees'
 20 rights must be weighed. Absent factual support for the dilution of Fourth Amendment rights
 21 occasioned by subjecting arrestees to visual body cavity searches, the Court has an insufficient
 22 basis on which to judge the constitutionality of the policies. Pending a more robust
 23 development of the record, the Court must deny Defendants' motion. *United States of America*
 24 *v. Braren*, 338 F.3d 971, 975 (9th Cir. 2003); *United States v. State of Washington*, 759 F.2d
 25 1353, 1357 (9th Cir. 1985) (*en banc*); *Robinson Band of Pomo Indians of Robinson Rancheria v.*
 26 *Babbitt* (N.D. Cal. 1998) 1998 WL [Westlaw] 355580.

1 **ARGUMENT**2 **III. A PARTIAL JUDGMENT ON THE PLEADINGS ON DEFENDANTS'**
3 **CROSS-COMPLAINT FOR DECLARATORY JUDGMENT IS**
4 **INAPPROPRIATE BECAUSE ISSUES OF FACT MUST BE RESOLVED**
5 **AND BECAUSE A PARTIAL DECLARATORY JUDGMENT WILL**
6 **NOT TERMINATE THE CONTROVERSY.**7 **A. A Judgment On The Pleadings Is Not Warranted If Factual Issues**
8 **Remain To Be Adjudicated.**

9 "A judgment on the pleadings is properly granted when, taking all allegations in the
10 pleading as true, the moving party is entitled to judgment as a matter of law." *Enron Oil*
11 *Trading & Transportation Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 528 (9th Cir. 1997). "A
12 motion for judgment on the pleadings pursuant to Fed.R.Civ.P. 12(c) is appropriate where the
13 material facts of a case are not in dispute, and a judgment on the merits may be achieved by
14 focusing on the legal issues and agreed facts in the case. If the pleadings do not resolve all of
15 the factual disputes, a trial is more appropriate than a judgment on the pleadings." *Roberts v.*
16 *Robert v. Rohrman, Inc.* 909 F.Supp. 545, 552 (N.D. Ill. 1995).

17 Defendants have alleged absolutely no facts in their Cross-Complaint that the
18 Department disciplined deputies who formerly violated arrestees' rights, or that deputies have
19 not and will not violate the rights of those arrested after January 2004. Plaintiffs would have
20 denied such allegations and judgment on the pleadings would have been denied *ab initio*. On
21 the other hand, the absence of such allegations provides the Court with no assurance that
22 adoption of the new written policies will result in protection of arrestees' rights.

23 The Ninth Circuit has explained, "A court may, however, consider certain materials--
24 documents attached to the complaint, documents incorporated by reference in the complaint, or
25 matters of judicial notice--without converting the motion to dismiss into a motion for summary
26 judgment." *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). Plaintiffs are asking
27 the Court to take judicial notice of the exhibits filed in support of Plaintiffs' Motion for a
28 Preliminary Injunction. Rule 201, Federal Rules of Evidence, *United States v. Wilson*, 631 F.2d
118, 119 (9th Cir. 1980); *Cardiner v. Provident Life And Accident Insurance Company*, 158
F.Supp.2d 1088, 1099 (C.D. Cal. 2001). Plaintiffs do not ask the Court to accept the testimony
as true, but only to recognize that in papers already before the Court, Plaintiffs allege with

1 supporting documents that Sheriff's Department personnel consistently violated Department
 2 written policies, confirming that factual issues remain to be litigated and that judgment on the
 3 pleadings must be denied.

4 **B. Declaratory Judgment Must Be Denied When A Party Seeks Only**
 5 **An Advisory Opinion, When The Issues Are Not Ripe For**
 6 **Adjudication Because The Factual Record Is Incomplete If**
 7 **Declaratory Relief Will Not Terminate The Controversy.**

8 This Court may not exercise Article III jurisdiction when a party seeks only an advisory
 9 opinion. The Court's "role is neither to issue advisory opinions nor to declare rights in
 10 hypothetical cases." *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134, 1138 (9th Cir.
 11 2000) (*en banc*).

12 This Court has discretion to deny declaratory relief if prudential considerations dictate
 13 against it. Thus, "even if Article III jurisdiction does exist, a court must refrain from issuing
 14 declaratory relief if the matter is not ripe for decision. A case is not ripe if further factual
 15 development is required." *United States of America v. Braren*, 338 F.3d 971, 975 (9th Cir.
 16 2003); *Orix Credit Alliance v. Wolfe*, 212 F.2d 891, 895-896 (5th Cir.2000). The Ninth Circuit
 17 further instructs us that, "Declaratory relief should be denied when prudential considerations
 18 counsel against its use . . . Declaratory relief should be denied when it will neither serve a
 19 useful purpose in clarifying and settling the legal relations in issue nor terminate the
 20 proceedings and afford relief from the uncertainty and controversy faced by the parties."
 21 *United States v. State of Washington*, 759 F.2d 1353, 1357 (9th Cir. 1985) (*en banc*). *See, e.g.*,
 22 *Cha-Toine Hotel Apartments Bldg. Corp. v. Shogren*, 204 F.2d 256, 258 (7 Cir. 1953) (same);
 23 *Miramax Film Corp. v. Abraham* 2003 WL 22832384, at 15 (S.D.N.Y. 2003) (same).

24 "In fact, the court may, after a full consideration of the merits, exercise its discretion to
 25 refuse to grant declaratory relief because the state of the record is inadequate to support the
 26 extent of relief sought." *State of Washington, supra*, at 1356. This Court has refused to grant
 27 declaratory relief when final relief is dependent on resolution of factual disputes. In *Robinson*
 28 *Band of Pomo Indians of Robinson Rancheria v. Babbitt* (N.D. Cal. 1998) 1998 WL [Westlaw]
 355580, plaintiff sought a declaration that it could legally conduct gaming without government
 permits. Refusing to grant that relief, this Court explained, "It is unlikely that a declaratory

1 relief action would resolve the controversy as to what gambling, if any, the tribes may lawfully
 2 conduct. It would be impossible in the absence of a particular factual context for the parties
 3 and the Court to imagine all possible class III gambling scenarios and adjudicate which
 4 scenarios are lawful.” 1998 WL [Westlaw] 355580, at 3.

5 **IV. THE STATE OF THE RECORD ON DEFENDANTS’ MOTION**
 6 **PRECLUDES THE GRANT OF DECLARATORY RELIEF.**

7 The Court cannot gauge the constitutional or statutory validity of the current policies
 8 absent a balancing of the harsh intrusion into personal privacy effected by a visual body cavity
 9 search against *evidence* that such degradations are necessary to safe operation of the jails. In
 10 determining the legality of jail policies infringing on arrestees Fourth Amendment and Due
 11 Process, this Court must conduct a “*delicate* balancing” between “institutional needs and
 12 objectives” and the “constitutional liberties” of persons suspected of crime. *Kennedy, supra*,
 13 901 F.2d 702, 711 (9th Cir. 1989). “The permissibility of a particular law enforcement practice
 14 is judged by balancing its intrusion on the individual’s Fourth Amendment interests against its
 15 promotion of legitimate governmental interests.” *Giles v. Ackerman*, 746 F.2d 714, 617 (9th
 16 Cir. 1984) “The more intrusive the search, the closer governmental authorities must come to
 17 demonstrating probable cause will uncover the objects for which the search is being
 18 conducted.” *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1273 (7th Cir. 1983).

19 Thus, addressing the LAPD’s policy of subjecting all felony arrestees to visual body
 20 cavity searches, *Kennedy* explained that the “critical inquiry is whether the LAPD has a
 21 *sufficient justification* for imposing its blanket policy.” The Ninth Circuit invalidated the policy
 22 on the ground that the LAPD had failed to produce, in support of its justification, “any
 23 documentation (or even assertion) that felony arrestees have attempted to smuggle contraband
 24 into the jail in greater frequency than misdemeanor arrestees.” 901 F.2d at 713.

25 Plaintiffs remind the Court that those arrestees whose body cavities Defendants wish to
 26 search have only been arrested, not even arraigned, much less convicted. In the instant case,
 27 virtually none of them was charged. Yet they were subject to what the Ninth Circuit has
 28 described as “dehumanizing and humiliating” and “one of the most grievous offenses against
 personal dignity and common decency” the “intrusiveness [of which] cannot be overstated.”

1 901 F.2d at 711. This dehumanizing experience, then, in effect is the punishment many
 2 arrestees receive solely because they are suspected of committing a crime. These descriptions
 3 must be given effect or they lose any meaning. If balanced equally against an amorphous claim
 4 of jail security, the descriptions of visual body cavity searches as “grievous offenses” or
 5 “dehumanizing” might as well be morphed into “unpleasant” or “uncomfortable.”

6 The only way in which the Court can give effect to the accurate harsh descriptions
 7 affixed to such searches is by requiring Defendants to sustain their heavy burden of factually
 8 justifying the necessity for these blanket policies. Defendants have not offered such
 9 justification and must go outside the confines of their Cross-Complaint to do so. Based solely
 10 on the allegations in Defendants’ Cross-Complaint and the new policies appended to that
 11 pleading, the Court cannot confidently balance the dilution of Fourth Amendment rights
 12 wrought by a visible body cavity search against the jails’ security interests. Therefore, “The
 13 state of the record is inadequate to support the extent of relief sought.” *State of Washington,*
 14 *supra*, at 1356. *See, also, Robinson Band of Pomo Indians of Robinson Rancheria v. Babbitt,*
 15 *supra*. 1998 WL 355580, at 3. The Court therefore must deny Defendants’ motion.

16 **V. AN ORDER BLESSING THE NEW REGULATIONS WILL NOT**
 17 **RESOLVE THE CONTROVERSY BETWEEN THE PARTIES NOR**
 18 **PRECLUDE FUTURE LITIGATION; MOREOVER SUBSTANTIAL**
 19 **UNRESOLVED FACTUAL ISSUES TIED TO THE VALIDITY OF THE**
 20 **NEW REGULATIONS FURTHER COUNSEL DENIAL OF THE**
 21 **MOTION.**

22 **A. Defendants’ Motion Mischaracterizes Plaintiffs’ Claims.**

23 Defendants support the need for declaratory relief with the following statements:

24 In their motion for a preliminary injunction, plaintiffs seek to enjoin
 25 the *current* policies and allege an ongoing threat of irreparable harm to
 26 plaintiffs pending trial, despite the fact that they base their complaint in
 27 this action entirely on now-superseded policies. Plaintiffs’ actual quarrel,
 28 therefore, is with *stale* policies that were at one time applied to individuals
 who are no longer in the custody of the Sheriff. A declaration from this
 Court that the current policies fully comply with applicable law will cabin
 the current litigation, which Plaintiffs should not be allowed to expand to
 encompass policies that were not yet in force at the time that their claims
 arose.

1 Defendants' Memorandum at 6:20-27. Defendants' characterization of the litigation is just
 2 plain wrong. Plaintiffs do not base their entire complaint on the "superseded policies." The
 3 First Amended Cross Complaint does not cite a "written policy" as the sole basis for the
 4 Complaint. While the Motion for Preliminary Injunction addresses some of the old policies, it
 5 asks that the illegal *practices* of the Sheriff's Department be enjoined. Examining these
 6 pleadings we find:

7 **1. Plaintiffs' First Amended Complaint**

8 On January 12, 2004, Plaintiffs filed a First Amended Class Action Complaint, adding
 9 seven additional named Plaintiffs to Ms. Bull and Mr. Zern. The First Amended Complaint
 10 does not refer to any particular written policies by number. It does describe the strip searches
 11 and, where applicable, the cold room placements of the named Plaintiffs. The First Amended
 12 Complaint seeks "declaratory and injunctive relief declaring illegal and enjoining, preliminarily
 13 and permanently, defendants' *policies, practices, and customs* of subjecting pre-arraignment
 14 detainees to strip and visual body cavity searches without having a reasonable suspicion that
 15 such searches would be productive of contraband or weapons and of using the "cold rooms" to
 16 compel compliance or to punish detainees." (emphasis added.)

17 Though several abuses alleged in the pleadings arose from application of policies as
 18 written, the pleadings allege many practices and customs in variance with and in violation of
 19 the written Department policies then in effect such as those forbidding cross-gender searches,
 20 forbidding use of safety cells to discipline recalcitrant arrestees, and requiring that those in
 21 safety cells receive safety cell garments. Again, the allegations did not focus on the "written
 22 policies," but on the abusive unconstitutional practices which permeated the jail system. The
 23 new policies appended to Defendants' Cross-Complaint restate many of the same directives
 24 which the Department habitually violated, precipitating this litigation.

25 **2. Plaintiffs' Motion For A Preliminary Injunction**

26 On January 21, 2004, Plaintiffs filed their Motion for Preliminary Injunction to be heard
 27 at the same time as the Motion for Judgment on the Pleadings. While challenging some of the
 28 Department's written policies (such as strip searching all arrestees who are to be "classified"
 and strip searching all arrestees placed in safety cells), the Motion seeks to enjoin the

1 unconstitutional **conduct** of Department personnel and supervisory officials. The testimony
 2 supporting Plaintiffs' motion describes a pattern and practice of Department personnel violating
 3 written policies governing visual body cavity searches and the placement of detainees in safety
 4 cells.¹

**B. A Declaratory Relief Judgment Will Not Resolve The
 Controversy Nor Preclude Future Litigation; Additional Facts
 Must Be Resolved Before The Court Can Confidently Decide
 Whether Declaratory Relief Is Appropriate.**

7 The premise of Defendants' motion fails. Plaintiffs' First Amended Class Complaint
 8 and Motion for Preliminary Injunction seeks to stop Defendants' illegal practices, both those
 9 which conform to illegal written policies and those which violate them. To the extent that

11 ¹ Plaintiffs have asked the Court to take judicial notice of the First Amended Class Complaint
 12 and the evidence Plaintiffs have submitted in support of the request for preliminary injunctive relief to
 13 emphasize the point that Plaintiffs' allegations (supported by Defendants' testimony) of systemic
 14 violations of prior written policies create at a minimum the factual question of whether Defendants'
 15 personnel will adhere to the new policies and whether Defendants' supervisory personnel will enforce
 16 the policies. The Court need not accept the truth of this testimony, simply the fact that it exists,
 17 creating at a minimum substantial factual issues which the Defendants' prayed-for Order cannot
 18 resolve.

16 For example, although the written regulations in effect prior to January 2004 required that
 17 booking strip searches of those falling outside the Strip Search Criteria of Section II of Procedure E-03
 18 be predicated on the reasonable suspicion that the arrestee possesses contraband and that that
 19 reasonable suspicion be documented on a written authorization form, Department personnel altered the
 20 form so that arrestees could "consent" to visual body cavity searches absent meeting the criteria for a
 21 booking strip search laid out in the Defendants' own policy. Deposition of Richard Dyer, at 54:9-12,
 22 62:24-64:1; April 11, 2003 Memo to CJ9 Personnel from Captain Richard Dyer, Bull CCSF 00028.
 23 Mary Bull was asked to sign such a consent form but refused. Declaration of Mary Bull ¶¶ 5-7. The
 24 altered forms were "in common use." Deposition of Kevin McConnell, 38:22-39:3.

20 Although Procedure E-03 required same sex searches, Mary Bull has stated that male deputies
 21 witnessed her strip search. Declaration of Mary Bull, ¶ 10.

22 Procedure E-05 "Safety Cell Use" clearly stated that safety cells were not to be used for
 23 disciplinary or punitive purposes. Deputy Humphrey stated that it was the practice at CJ9 to place
 24 prisoners who refuse to consent to a strip search in a safety cell. Deposition of Suzette Humphrey, at
 25 82:14-25, 83:1. Mary Bull testified that her refusal to consent to a strip search landed her in a safety
 26 cell twice. Bull Declaration, ¶¶ 8-11, 13-15. Alexis Bronson has stated that he was placed in a safety
 27 cell for not coughing loudly enough during a strip search, Miki Mangosing for attempting to talk to her
 28 friend in an adjacent cell, and Michael Marron for removing a prison-issued wristband. Declaration of
 Alexis Bronson, ¶¶ 6-7, Declaration of Miki Mangosing, ¶¶ 3-5, Declaration of Michael Marron, ¶¶ 4-5.

26 While the criteria in the old and new policies mandated strip searches of those charged with
 27 drugs, weapons or violence, Sheriff's Department employees testified that there was no list of eligible
 28 charges. McConnell Deposition, 34:2-6. No evidence exists that actual practices will be different under
 the new written policies.

1 Defendants have in the past and continue to violate constitutional and statutory rights possessed
 2 by arrestees, Defendants will be liable, regardless of the text of the written policies. Thus, a
 3 declaratory judgment will not resolve claims of arrestees whose rights were or will be violated
 4 after January 2004. In any event, even should the Court enter a declaratory judgment, Plaintiffs
 5 would still be free at trial to prove that deputies consistently violated the Department's written
 6 policies, both those in effect prior and subsequent to January 2004.

7 Shakespeare's observation that "what's past is prologue," (*The Tempest*, Act II, scene
 8 1), is truly apt here. The record before the Court is replete with allegations and evidence of
 9 violations of prior Department policies which appeared to offer at least some protection to
 10 arrestees. Defendants ask the Court to accept on faith that deputies applying the current
 11 regulations are protecting and will continue to protect arrestees' constitutional and statutory
 12 rights. Absent an evidentiary inquiry the Court cannot declare that the new written policies will
 13 offer any more coverage of arrestees' rights than the "safety garments" sometimes given
 14 arrestees placed in safety cells. Even those parts of the new regulations which appear to pass
 15 constitutional muster may well be honored solely in the breach. Only a full factual record -- not
 16 Defendants' arguments -- will enable the Court to judge whether even those new policies which
 17 appear facially valid will stand the test of time or unfortunately resemble the Emperor's New
 18 Clothes.

19 Hence, declaratory relief in this case "will neither serve a useful purpose in clarifying
 20 and settling the legal relations in issue nor terminate the proceedings and afford relief from the
 21 uncertainty and controversy faced by the parties." *State of Washington, supra*, 759 F.2d 1353 at
 22 1357. The Court must deny Defendants' motion.

23 **VI. DECLARATORY RELIEF ALSO IS INAPPROPRIATE BECAUSE**
 24 **MANY OF THE NEW WRITTEN POLICIES VIOLATE THE**
 25 **CONSTITUTION.**

26 **A. Visual Body Cavity Searches Are Impermissible Absent**
 27 **Individualized Reasonable Suspicion That An Arrestee Has**
 28 **Secreted Weapons Or Contraband In His Or Her Person.**

The Ninth Circuit has repeatedly used the harshest adjectives in describing the harm
 wrought by body cavity searches carried out by uniformed government officials on naked
 detainees. *Giles v. Ackerman*, 746 F.2d 714, 617 (9th Cir. 1984) observed that strip searches

1 caused the “detainee’s privacy [to be] invaded in a frightening and humiliating manner.”
 2 *Kennedy v. Los Angeles Police Dept.*, 901 F.2d 702, 711 (9th Cir. 1989) concluded that “[t]he
 3 intrusiveness of a body-cavity search cannot be overstated. Strip searches involving the visual
 4 exploration of body cavities is dehumanizing and humiliating.” *Kennedy* also noted that “‘body
 5 cavity searches . . . [of] inmates represent one of the most grievous offenses against personal
 6 dignity and common decency.’” *Id.* (quoting from Justice Marshall’s dissent in *Bell v. Wolfish*,
 7 441 U.S. 558, 576-577 (1979)). *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1445 (9th Cir. 1991)
 8 remarked that “few exercises of state authority intrude on citizen’s privacy and dignity as
 9 severely as visual anal and genital searches.” These descriptions are more than words cited
 10 from West’s Federal Reporter. They accurately describe the grave intrusion on Fourth
 11 Amendment protected privacy rights caused by visual body cavity searches.

12 Recognizing the grievous character of these intrusions, the Ninth Circuit has condemned
 13 overbroad blanket strip search policies because such policies do not require the individualized
 14 reasonable suspicion that the arrestee possesses weapons or other contraband. Reviewing prior
 15 decisions, the Ninth Circuit stated in *Fuller, supra*, that “[t]hese decisions suggest that strip and
 16 body cavity searches of detainees may be conducted based on reasonable suspicion only where
 17 such searches are necessary to protect the overriding security needs of the institution--that is,
 18 where officials have a reasonable suspicion that a *particular detainee* harbors weapons or
 19 dangerous contraband.” 950 F.2d at 1447. (emphasis added.) “[T]he permissibility of a
 20 particular law enforcement practice is judged by balancing its intrusion on the individual’s
 21 Fourth Amendment interests against its promotion of legitimate governmental interests.” *Giles*
 22 *v. Ackerman, supra*, 746 F.2d at 617.

23 In explaining application of the reasonable suspicion standard, *Kennedy* noted that “
 24 ‘Reasonable suspicion may be based on such factors as the nature of the offense, the arrestee’s
 25 appearance and conduct, and the prior arrest record.’ ” 901 F.2d at 716, citing *Giles v.*
 26 *Ackerman, supra*, 746 F.2d at 617. *Kennedy*, however, did **not** state that any one of these
 27 factors, standing alone, *necessarily* would give rise to the reasonable suspicion necessary to
 28 justify the strip search. Hence, “the classification of the offense in some cases might inform the

1 presence of suspicion, but it does not inform the level of suspicion required.” *Kennedy*, supra,
 2 901 F.2d at 716.

3 The danger inherent in blanket policies covering an entire classification of individuals is
 4 that it runs the substantial danger of overbreadth, casting many within its net who, if not strip-
 5 searched, will pose no threat to jail security. Because visual body cavity searches are
 6 considered “one of the most grievous offenses against personal dignity and common decency
 7 harm which befalls those subject to such searches” (*Kennedy*, 901 F.2d at 711), blanket
 8 classification should be avoided except when it is narrowly focused. As *Kennedy* noted, “a
 9 ham-handed approach to policy making runs the serious risk of infringing on detainees’
 10 constitutional rights.” 901 F.2d at 713.

11 **B. With No Factual Basis, The Strip-Search Policies Contain**
 12 **Overbroad Classifications And Other Defects Which Preclude**
Declaratory Relief.

13 Plaintiffs agree that “[r]easonable suspicion may be based on such factors as the nature
 14 of the offense, the arrestee's appearance and conduct, and the prior arrest record” *Kennedy*,
 15 *supra*, 901 F.2d at 716. *Kennedy*, however, does not hold that any one of the factors, standing
 16 alone, necessarily provides the individualized reasonable suspicion necessary to support the
 17 intrusion.

18 Blanket policies, proffered with no justification, are suspect. Thus, *Kennedy* invalidated
 19 the blanket strip search of all felons on the grounds that the LAPD had failed to produce, in
 20 support of its justification, “any documentation (or even assertion) that felony arrestees have
 21 attempted to smuggle contraband into the jail in greater frequency than misdemeanor arrestees.”
 22 901 F.2d at 713.

23 Here, Defendants have failed to allege any factual basis demonstrating that the blanket
 24 classifications are necessary to protect jail security. No allegation exists in the Cross-
 25 Complaint, for example, that those arrested for drugs, weapons or violence have a propensity to
 26 secret weapons or contraband in their person. Mere arrest for an alleged crime involving drugs,
 27 weapons or violence cannot, without more, give rise to a reasonable suspicion that the arrestee
 28 intends to smuggle contraband into the facility. As the court noted in *Giles v. Ackerman*, *supra*,
 “arrest and confinement in the Bonneville County Jail are unplanned events, so the [strip

1 search] policy could not possibly deter arrestees from carrying contraband.” 746 F.2d at 617.
 2 The question is not whether those arrested for weapons or violence, for example, may pose
 3 sufficient security threats to require particular housing, but whether such individuals, by their
 4 membership in a particular class of arrestees, and regardless of the circumstances surrounding
 5 the actual arrest, evidence a likelihood that they possess contraband or weapons which can *only*
 6 be detected via a visual body cavity search.

7 Moreover, the policy mandating visual body cavity searches of those charged with
 8 crimes of “violence” is terribly overbroad. The new policies contain no definition of violent
 9 crimes. Thus certain crimes, which may appear to be crimes of violence are not necessarily in
 10 that category. For example, battery does not necessarily involve violence, since even the
 11 slightest touching is sufficient to support a conviction for the offense. *See, e.g., People v.*
 12 *Rocha* (1971) 3 Cal.3d 893, 899 ft. 12, 92 Cal.Rptr. 172 (“The least unprivileged touching may
 13 constitute a criminal battery. ‘In other words, force against the person is enough, *it need not be*
 14 *violent or severe.*’”); *People v. Longoria* (1995) 34 Cal.App.4th 12, 40 Cal.Rptr.2d 213, (“[t]he
 15 word ‘violence’ has no real significance . . .’ it has long been established . . . that ‘the least
 16 touching’ may constitute battery.’ ”).

17 The absurdity of such blanket classification is evident in the case of Lisa Giampaoli.
 18 Even assuming the charges were true, how can an arrest for allegedly unleashing a dog on
 19 another person give rise to a reasonable suspicion that the arrestee has placed weapons (*i.e.*
 20 another animal) in her body cavity?

21 Moreover, the policy makes no distinction between those arrested with probable cause
 22 and those arrested based on a citizen’s arrest. Hence, those brought into the jails due to
 23 malicious citizens’ complaints by enemies, ex-lovers, etc. and usually released without being
 24 charged, still must face the harm wrought by a visual body cavity search. In *Corcoran v.*
 25 *Fletcher*, 160 F.2d 1085 (C.D. Cal. 2001), the court held that a city’s policy of substituting
 26 citizen’s arrests for probable cause violated the Fourth Amendment. Of course, those arrested
 27 in error for crimes of drugs, weapons or violence also must suffer visual body cavity searches.
 28 The new policies afford no protection for such individuals.

1 Similarly no allegations in the Cross-Complaint support the policy that all those arrested
 2 or convicted in the prior five years for crimes involving drugs, weapons or violence must be
 3 subject to a visual body cavity search. No documentation exists, nor may it exist on a motion
 4 for judgment on the pleadings, that such arrestees, by virtue of prior arrests or even convictions,
 5 have a propensity to secret contraband in their orifices. The same overbreadth taints the policy
 6 mandating visual body cavity searches of those arrested for probation and parole violations.
 7 *Watt v. City of Richardson Police Department* 849 F2d 195,198 (5th Cir, 1988)

8 The current written policies are also defective because they make no provision
 9 excluding those awaiting bail from the visual body cavity search. Given the recognized
 10 humiliation of such searches, no reason exists why arrestees should not be given 23 hours to
 11 post bail and access to a telephone to arrange such release. Otherwise, a visual body cavity
 12 search remains punishment for those unable to promptly post bail. In the same vein, no one
 13 eligible for OR release should be strip searched before release on OR has been denied.

14 **C. The Safety Cells Policy Is Also Flawed.**

15 The safety cell policy is defective, too. No one should be placed in a safety cell unless a
 16 qualified professional determines that such placement is necessary because the person is a
 17 danger to himself. If an arrestee is a danger to others, the arrestee can be single celled in a
 18 normal cell. Moreover, detention in a safety cell must be premised on an individual's particular
 19 circumstances. Nonetheless, the perceived danger an individual poses to others provides an
 20 insufficient basis to strip search an individual laced in a safety cell – once alone, that arrestee
 21 poses no threat to others. In any event, no individual should be subjected to a visual body
 22 search absent an individualized reasonable suspicion that the search is necessary to protect the
 23 individual.

24 Whatever defects may exist in the strip search policy, the main point is this: the Court
 25 has an insufficient factual record on which to declare the constitutionality of the current
 26 policies. For that reason, without more, the Court must refuse to enter judgment approving any
 27 of the current strip policies.
 28

1 **VII. CONCLUSION**

2 Defendants' Motion For Declaratory Relief is not ripe for adjudication. Assessment of
3 the new written policies requires a far more factual development than that presented in
4 Defendants' papers. Moreover, the judgment Defendants seek will not terminate the
5 controversy. Defendants offer no assurance that these new policies will be enforced. More
6 significantly, issuance of the Order will not preclude individuals who have been harmed by
7 unconstitutional practices from seeking relief. The Court must deny Defendants' motion for
8 judgment on the pleadings.

9
10
11 Dated: March 19, 2004



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