UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NAKISHA BOONE, both individually and on behalf of a class of others similarly situated,	:	
Plaintiff,	:	
v.	:	No. 05-cv-1851 (MAM)
THE CITY OF PHILADELPHIA, *et. al.,*	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Respectfully Submitted by:

Dated: February 16, 2007

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INTRODUCTION

The City of Philadelphia conducts blanket strip searches upon all pre-trial detainees remanded to the custody of the Philadelphia Prison System, regardless of criminal charge or reasonable suspicion. These searches could not be more degrading. All members of the proposed class are required to disrobe in front of a Corrections Officer, and are then required to bend or manipulate themselves to allow for a visual inspection of the genitals and body cavities. Under the City's written strip search policy, these searches are to be done with a Corrections Officer using a flashlight to illuminate body cavities. These searches are done on everyone entering the Prison System. Men, women, juveniles, the elderly, the sick, the mentally and physically handicapped, the obese ---- many of whom are charged with minor crimes like driving while intoxicated, shoplifting, and failing to pay fines. One court has fairly described these searches as being "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago,* 723 F.2d 1263, 1272 (7th Cir. 1983).

There is no factual dispute that these searches occurred in the past – in fact, the City is even boastful about the supposed need to do this to everybody. They have refused to change their policies in the face of this lawsuit, meaning as this motion, and a prospective motion for preliminary injunction, is pending, thousands of people will be illegally strip searched by the Philadelphia Prison System. Other federal courts, when faced with the same situation, have not hesitated to certify a class action to address illegal uniform strip search policies, and they also have not hesitated to enter injunctions to protect the constitutional rights of pre-trial detainees. *See, Marriott v. County of*

Montgomery, 227 F.R.D. 159 (N.D.N.Y.), *aff'd,* 2005 WL 3117194 (2d Cir. 2005) (class certification, preliminary injunction in strip search class action); *Marriott v. County of Montgomery,* 426 F. Supp.2d 1 (N.D.N.Y. 2006) (summary judgment and permanent injunction in favor of a certified class). The present case before the Court mandates treatment as a class action so that the City can be held accountable for its intentional violation of the constitutional rights of tens of thousands of individuals, many of whom, because of their circumstances, have no voice to individually seek change or recompense from a large government agency. The Plaintiffs respectfully seek class certification by the filing of this motion.

I. Procedural History

Nakisha Boone initiated this putative class action against the City of Philadelphia (the "City), the Philadelphia Prison Service ("PPS"), and various individual defendants on April 21, 2005 with the filing of a class action complaint. Motions for summary judgment were filed by Ms. Boone and the City on January 23, 2006 and February 23, 2006, respectively. After the motions were fully briefed, the parties entered into a stipulation dismissing PPS and the individual defendants from the lawsuit. The stipulation was approved by the Court on May 17, 2006, and the City remains the only named defendant in this case. On June 8, 2006, the Court entered an order denying both motions for summary judgment without prejudice. The Court advised the parties that it would consider renewed motions for summary judgment after the issue of class certification had been resolved. Contemporaneously with this motion the Plaintiffs have sought leave to intervene George Byrd as a class representative.

In accordance with orders issued throughout the course of this litigation, Plaintiff submits this motion seeking that the Court certify a class of individuals who, like Ms. Boone and Mr. Byrd, have had their civil rights unnecessarily violated by the uniform strip search practices of the City. In a separate motion proceeding that the Plaintiffs hope will be heard contemporaneously with this motion, proposed class counsel also seek a preliminary injunction barring the City from continuing to illegally strip search pretrial detainees admitted to the custody of PPS absent reasonable suspicion.

II. Factual Background

A. Nakisha Boone's Arrest and Strip Search

Nakisha Boone is a single mother who works as an aide in a nursing home. (Ex. A, Boone Aff., ¶3). On October 22, 2004, Ms. Boone was arrested for failing to appear to answer charges of reckless endangerment (Pa. C.S.A. Crimes and Offenses §2705 – misdemeanor in the second degree) and endangering the welfare of a child (Pa. C.S.A. Crimes and Offenses §4304 misdemeanor in the first degree), both misdemeanors under Pennsylvania's Criminal Code. (Boone Aff., ¶1; Ex. B, Boone Arrest and Booking Documents).

The underlying charges in question occurred in 2001, with Ms. Boone failing to appear to answer these charges until the time of her arrest several years later. A Philadelphia Police Officer pulled over Ms. Boone on October 22, 2004 for having an expired registration, and during the traffic stop the officer discovered that Plaintiff was the subject of an outstanding bench warrant. (Boone Aff. at ¶6; Ex. A, March 22, 2006 Stipulation, at ¶2; Ex. D, Boone Dep. at 76-77). The following day, after being ordered held on $5,000 bail, Ms. Boone was transported to Riverside, a component facility of PPS

that is responsible for the intake of new female detainees. (Boone Aff. at ¶7; Ex. C March 22, 2006 Stipulation, at ¶3; Boone Dep. at 80). Shortly after her arrival at the facility, Ms. Boone was moved into a shower room and ordered to remove all of her clothing, including her underpants and brassiere. (Boone Aff. at ¶8; Boone Dep. at 83, 86). While naked, Ms. Boone was instructed to "squat and cough," and then to bend at the waist and spread the lobes of her buttocks to allow for a visual inspection of her vaginal and anal cavities. (Boone Aff. at ¶8; Boone Dep. at 89). Ms. Boone was forced to "squat" so a Corrections Officer could see if any contraband dislodged from her vagina or anus.[1]

The strip search of Ms. Boone was conducted regardless of the fact that she was detained on a bench warrant for two misdemeanor charges, and without any reason to believe that she was concealing weapons or contraband in her private areas. There is no reason to believe that Ms. Boone, arrested while driving in Philadelphia after a traffic stop for a bench warrant on three year old misdemeanor charges, was in possession of any weapons or contraband. The strip and visual cavity search of Ms. Boone revealed no such items. (Boone Dep. at 90). Moreover, the reason why Ms. Boone was subjected to this humiliating procedure is simple: as illustrated below, the City of Philadelphia admits to doing this to everybody, regardless of criminal charges, reasonable suspicion, or personal characteristics, upon their admission to the PPS.

B. Proposed Intervenor George Byrd's Arrest and Strip Search

On March 31, 2005, proposed intervenor George Byrd was arrested at 3900 Wissahickon Avenue, Philadelphia, for operating a motor vehicle with a suspended

[1] Several weeks later, Ms. Boone's underlying criminal charges were dismissed by the Philadelphia Municipal Court, and she was released from custody. (Boone Aff. at ¶3).

operator's license while under the influence of alcohol. Since Mr. Byrd had failed to appear for a hearing relating to a prior arrest for driving under the influence, Mr. Byrd was taken to the police station under a bench warrant.

On April 2, 2005, Mr. Byrd was arraigned and bail was set at $2,500. He was unable to make bail at the time and was then transferred to the Philadelphia Prison System. During the intake procedures at the Philadelphia Prison System, Mr. Byrd was required to undergo a strip search, including a visual cavity search. This search did not reveal any contraband on Mr. Byrd's person. At no time in Mr. Byrd's criminal history had he been charged with a felony, drug offenses or weapons charges. This strip search was undertaken without any reasonable suspicion pursuant to defendant's uniform strip search policy. Mr. Byrd was discharged from Philadelphia Prison System after making bail on April 3, 2005. Mr. Byrd's charges were eventually dismissed. (See, Proposed Amended Complaint ¶¶ 35).

C. The City of Philadelphia's Unequivocal Admission to Conducting Blanket Strip Searches at PPS

Individuals sent to PPS are the subject of a detainer, and that detainer is reviewed for propriety on admission. (Ex. E, DiNubile Dep. at 59). Neither the detainer paperwork nor any other pertinent information about the detainee is forwarded to the search officer, the individual who administers the strip searches in question in a series of shower rooms. (DiNubile Dep., at 79, 90). Likewise, the process officer (who enters a detainee's information into a computer right before they are strip searched) does not attempt to ascertain the past criminal history of the detainee. (DiNubile Dep. at 107-08, 111-12, 114-17).

It is undisputed that the City of Philadelphia conducts blanket strip and visual cavity searches on *all* new detainees admitted to the PPS. As an initial matter, the written policies of the PPS require these blanket searches. Policy number 3.A.18 of PPS, entitled "Searches," details the standard procedure of PPS regarding strip searches, including searches performed when an individual initially enters a PPS facility. (Ex. E-1, City of Philadelphia Strip Search Policy). The written search policy clearly states that "Inmates are routinely strip searched on the following occasions: at intake…," (Search Policy, p. 6), and in its definitional section describes these searches as "the removal and searching of all clothing and visual inspection of the unclothed body" to be conducted "during routine searches as indicated in this policy." (Search Policy, p. 2). The Search Policy states:

> [m]ale and female inmates will be required to bend over and squat down, using his/her hands to expose the anus and genitalia. The following procedures will be performed in conducting a strip search:… [A Corrections Officer will] visually inspect the naked body for the presence of contraband from head to foot, including flashlight inspection of the mouth and ears and an external view of the anus and genitalia while the inmate uses his/her body and hands to expose those areas to view.

(Search Policy, p.6). The policy further provides, as an example for "specific situations," that "each inmate will be 'strip searched' by an intake officer of the same gender in a private area as part of the admission process and prior to housing on the intake housing unit." (Search Policy, p. 8). In short, the Search Policy, by its express terms, requires "routine," blanket strip searches to be conducted on every person admitted to the Philadelphia Prison System, regardless of criminal charge or individualized reasonable suspicion.

Major James DiNubile, Defendant's 30(b)(6) designee and a Deputy Warden of the Curran-Fromhold Correctional Facility ("CFCF") (the facility where male pretrial detainees such as George Byrd are processed into the PPS), freely admitted that all pretrial detainees including juveniles committed to the PPS are subjected to a strip and visual cavity search upon their admission to PPS facilities. (DiNubile Dep., pp. 65-66, 82-93).

Major DiNubile testified that the Philadelphia Prison System processes approximately 30,000 individuals per year for detention in PPS facilities, more than half of which are pretrial detainees who could not make bail after being arraigned. (DiNubile Dep., pp. 22, 29-31).[2] DiNubile also stated that the Philadelphia Prison System detains individuals charged with all manner of crimes, including misdemeanors, summary offenses, probation violations, parole violations, Family Court Act violations, failing to pay fines, as well as those held on bench warrants. (DiNubile, pp. 32-43). DiNubile affirmed that the actual strip search practices of the Philadelphia Prison System are reflected in the written Search Policy, that men and women are treated identically with the exception of the location in which they are strip searched (women are booked and strip searched at the Riverside Correctional Facility), and that women are forced to life their breasts and "squat and cough" during their search while men are required to lift their testicles. (DiNubile, pp. 20-21, 141-148). Men are also required to bend at the waist and physically spread the lobes of their buttocks. (DiNubile, pp. 145-46). These searches uniformly involve the visual inspection of body cavities (the vagina and anus) of each and every detainee admitted to the PPS, regardless of reasonable suspicion, criminal

[2] The City also provided booking information for all detainees admitted to PPS during much of the proposed class period. These records number into the tens of thousands.

charge, or individual circumstances. The searches of men occur in a 6' by 10' shower stall, with the Corrections Officer standing in close proximity to the detainee. (DiNubile Dep. pp. 80-81). The searches of female detainees occur under similar circumstances. (Boone Dep. pp. 88-90; Ex.F, Harold Dep., pp. 88-96, 98-104; Ex. G, Singleton Dep., 38, 68).

The following exchange best summarizes DiNubile's testimony about the City of Philadelphia's uniform strip search policies:

> Question [by Attorney Keach]: I just want to clarify for the record. Every individual who comes into the Philadelphia Prison System is subjected to a strip search as part of the reception procedure, correct?
>
> Answer [by Major DiNubile]: Part of the reception process, yes, that is correct.
>
> Question: And that strip search involves that individual completely disrobing, including removing his underpants, correct?
>
> Answer: That is correct.
>
> Question: That procedure also involves a visual examination of, for a male, their rectum, correct?
>
> Answer: That's correct.
>
> Question: For a female inmate that would involve a visual examination to see when they squat if anything falls from the vagina or the rectum, correct?
>
> Answer: That's correct.
>
> Question: Is reasonable suspicion considered at all when conducting those strip searches?
>
> Answer: The strip searches on intake?
>
> Question: On intake.
>
> Answer: No, it's a part of the process.

Question: Are criminal charges considered on intake?

Answer: No.

Question: Is an inmate's past criminal history considered when that individual is strip searched on intake?

Answer: No.

Question: Is an individual's status as either being a pretrial hold or a convicted inmate considered when being strip searched on intake?

Answer: No.

Question: Is it fair to say, sir, that the strip search on intake, that has been the subject of your testimony here today, is conducted on a uniform basis on all individuals admitted to the Philadelphia Prison System?

Answer: Yes.

(DiNubile Dep., pp. 178-80). In short, each and every individual admitted to the Philadelphia Prison System is forced to undergo a strip search, including a visual examination of their body cavities.

In their prior briefing before the Court, the City maintained that Ms. Boone's "history of violence" justified their strip search of her. Presumably, no matter who the Plaintiffs present to the Court, the Defendants will find some *post hoc* marginal basis to justify the strip search of that particular individual. The actual practices of the City and its Corrections Officers, of course, demonstrate that no effort is made to determine someone's history before searching them. As part of discovery in this action, the Defendants produced documents reflecting the Corrections Officers on duty during Ms. Boone's admission and search at the Riverside Correctional Facility. This "Admissions Report" reflects that Officers Harold, Singelton, and Bryant were working at the time of Ms. Boone's admission, (Ex Y., RCF Admissions Report), and each of these Corrections

Officers was deposed by the Plaintiffs. They all confirmed that everyone is subjected to a strip and visual cavity search upon admission to PPS regardless of reasonable suspicion or criminal charge, that the practice continues until today, and that no effort is made to determine the background of those being searched. (Singleton Dep., pp. 38-42, 57-58, 68-69; Harold Dep., pp. 99-102, 123-24, 109-111; Ex. H, Sareem Bryant Dep., pp. 17-19). All of these City Corrections Officers also confirmed that they had no knowledge or recollection of Nakisha Boone. (Singleton Dep., pp. 60-63; Harold Dep., pp. 123). To the extent that Ms. Boone's "history of violence" justifies her strip search on October 23, 2004, the officers that conducted the search apparently know nothing about it.

D. The Illegality of the City's Blanket Strip Search Policy

The legality of the City's strip search regimen was the subject of prior motion proceedings before the Court. While the Court declined to decide the Plaintiff's Motion for Partial Summary Judgment because of factual disputes, the Plaintiffs maintain that they have demonstrated to the Court the patent illegality of the City's strip search policy. *See, Newkirk v. Sheers,* 834 F. Supp. 772, 789-90 (E.D. Pa. 1993) ("we are compelled to find that ensuring the security needs of the Schuylkill County Prison by strip searching plaintiffs was unreasonable without a particularized suspicion by the authorities that either of the twin dangers of concealing weapons or contraband existed"). *See also, Delandro v. County of Allegheny,* No. 06-0927 (TFM/RCM) (W.D. Pa. December 7, 2006) (unreported), *aff'd by order,* No. 06-0927 (W.D. Pa. January 8, 2007) (considering the blanket strip search practice of the Allegheny County Jail) (Exhibit X). The Plaintiffs also maintain that they successfully defeated the justification provided by the City for these searches, including City's supposed "huge problem" with contraband (seven

incidents in approximately 70,000 admissions), the need to conduct such searches to keep contraband out the Philadelphia Prison System, and the claim that reasonable suspicion to strip search an individual can be manufactured after the fact. *See, Ford v. City of Boston,* 154 F. Supp.2d 131, 137 (D. Mass. 2001) (contraband discovered "five times," or 0.063 percent of the time, during admissions to Suffolk County Jail); *John Does No. 1-100 v. Boyd,* 613 F. Supp. 1514, 1523 (D. Minn. 1985) (discussing the "unplanned" nature of being arrest, and how uniform strip searches "can hardly be expected to deter smuggling"); *Gonzalez v. City of Schenectady,* 141 F. Supp.2d 304, 309 (N.D.N.Y. 2001) (calling the *post hoc* effort to provide reasonable suspicion to justify uniform strip searches "absurd"). These issues, of course, are the common legal questions that make this action suitable for class certification.

III. The Court Should Certify This Action, Either on a Full or Partial Basis, as a Class Action

Nakisha Boone and, with the Court's approval, proposed intervenor George Byrd, seek to represent a class of thousands of individuals, many of whom are poor and disenfranchised, who had, and who will have, their civil rights unnecessarily violated by the uniform strip search practices of the City of Philadelphia. The class that Plaintiffs seek to represent is defined as follows:

> All persons who have been or will be placed into the custody of the Philadelphia Prison System after being charged with misdemeanors, summary offenses, violations of probation or parole, traffic infractions, civil commitments, or other minor crimes, and who were or will be strip searched upon their entry into the Philadelphia Prison System pursuant to the policy, custom and practice of the Philadelphia Prison System and the City of Philadelphia. The class period commences on April 21, 2003 and extends to the present or until the defendant is enjoined from, or otherwise ceases, enforcing the

> unconstitutional policy, practice and custom of conducting strip searches absent reasonable suspicion. Specifically excluded from the class are any and all of the City of Philadelphia's affiliates, legal representatives, heirs, successors, or assignees. Also excluded from the class are any and all employees of the Philadelphia Prison System.

The Court may certify a case for class action treatment where a plaintiff can demonstrate that the threshold requirements of Fed. R. Civ. P. 23(a) (numerosity, commonality, typicality and adequacy of representation) are satisfied, and also demonstrate that the class satisfies one of the three criteria set forth in Fed. R. Civ. P. 23(b). *See Amechem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-14 (1997); *Baby Neal v. Casey*, 43 F.3d 46, 55-56 (3d Cir. 1994). Here, the proposed class satisfies these threshold requirements, and the Plaintiffs request that the Court certify this action as a money damages class under Fed. R. Civ. P 23(b)(3), or, in the alternative, as an injunctive relief class action under Rule 23(b)(2). Should the Court find that full certification is inappropriate, Plaintiffs request partial certification relative to the issues common to the class: the existence of a blanket strip search policy at Philadelphia Prison System facilities, and the liability of the City of Philadelphia for that policy.

The Court of Appeals for the Third Circuit has held that the "interests of justice require that in a doubtful case ... any error, if there is to be one, should be committed in favor of allowing a class action." *Eisenberg v. Gagnon*, 766 F.2d 770, 785 (3d Cir. 1985), *cert. denied*, 474 U.S. 946 (1985); *In re Bulk (Extruded) Graphite Prods. Antitrust Litig. Slip Copy*, 2006 WL 891362, *4 (D.N.J. 2006) ("interests of justice require that in a doubtful case… any error, if there is to be one, should be committed in favor of allowing

a class action.") (Ex. L). *See e.g. Hairston v. Hutzler*, 334 F. Supp. 251, 254(W .D. Pa. 1971) *aff'd* 468 F.2d 621 (3d Cir. 1972).

"The Court's focus in deciding a m otion under Rule 23 is on whether a class action is an appropriate vehicle for litigat[ing] the cla ims alleged, and not the m erits of the case." *Bart Dal Ponte v. American Mortgage Express Corp* ., 2006 WL 2403982, *2 (D.N.J. Aug. 17, 2006) (*citing Eisen v. Carlisle & Jacquelin* , 417 U.S. 156, 178 (1974); *In re Chian g*, 385 F.3d 256, 269-270(3d Cir. 2004)). As opposed to considering the merits of the underlying claim , the Court s hould consider "whether the requirem ents of Rule 23 are met." *In Re Visa Check/Master Money Antitrust Litig.,* 280 F.3d 124, 133 (2d Cir. 2001). "[T]he legal standard is whether the evidence presented by plaintiffs establishes a reasonab le basis for cr editing plaintiffs' assertions." *Bynum v. District of Columbia,* 214 F.R.D. 27, 31 (D.D.C. 2003) (q uotations omitted). "[P]laintiffs need not establish the merits of their case a t the class certification stage and the substan tive allegations of the com plaint must be take n as true, [though] the court must conduct a rigorous analysis to determ ine the suitability of resolving th e issues in a class action." *Blain v. Smithkline Beecham Corp* ., 2007 W L 178564, *3-4 (E.D. Pa. Jan. 25, 2007) (internal citations omitted) (Ex. N). While it is not necessary for a class representative to make an extensiv e evidentiary showing for evaluating w hether class certification is proper, *see In re Chiang*, 385 F.3d 256, 269-270 (3d Cir. 2004), as demonstrated herein, Plaintiff has done so in this case by provi ding the Court with written docum entation and deposition testimony confirming the allegations of the Amended Class Action Complaint.

In the ins tant case the City's 30(b)(6) designee and four Philadelphia Prison System correctional officers each unequivocally testified that a blanket strip search policy

is in place at PPS facilities. Correctional Officer Harold testified that strip searches are performed on all detainees who enter the Philadelphia Prison System, regardless of criminal charge and regardless of whether or not any suspicion exists to believe that a detainee is carrying contraband. (Harold Dep., pp. 109-110). Correctional Officers Singleton and Bryant confirmed that, without exception, every single individual admitted to a PPS facility is subjected to a strip search. (Singleton Dep., p. 57; Bryant Dep., p. 17-18). According to Officer Singleton, strip searches are employed in a non-discriminatory manner: "No exception. No discrimination to race, weight, height, repeat offender, new admit, the first time come in, there's no discrimination." (Singleton Dep. p. 58). As set forth in greater below, other federal courts, in considering the situation where a municipality employs a blanket strip search policy, have not hesitated to certify those actions as class actions.[12]

A. The Proposed Class Satisfies the Numerosity Requirement of Rule 23(a)(1)

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1); *Stewart v. Abraham*, 275 F.3d 200, 226-227(3d

[12] **First Circuit:** *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004); *Nilsen v. York County*, 2005 WL 757859 (D. Me. 2005) (Ex. O); *Polk County*, 154 F. Supp. 2d 131 (D. Mass. 2001); *Mack v. Suffolk County*, 191 F.R.D. 16 (D. Mass. 2000); **Second Circuit:** *Dodge v. County of Orange*, 226 F.R.D. 177 (S.D.N.Y. 2005); *Marriott v. County of Montgomery*, 227 F.R.D. 159 (N.D.N.Y. 2005) (certification achieved by lead counsel in this action); *Maneely v. City of Newburgh*, 256 F. Supp. 2d. 204 (S.D.N.Y. 2003); *Spinner v. City of New York*, 2003 WL 23648356 (E.D.N.Y. 2003) (Ex. F); **Fourth Circuit:** *Smith v. Montgomery County,* 643 F. Supp. 435 (D.Md. 1986); **Sixth Circuit:** *Eddleman v. Jefferson County,* 1996 WL 495013, *5 (6th Cir. 1996) (unpublished) (Ex. Q); **Seventh Circuit:** *Blihovde v. St. Croix County,* 219 F.R.D. 607 (W.D. Wis. 2003); *Doan v. Watson,* 168 F. Supp. 2d 932 (S.D. Ind. 2001); *Doe v. Calumet City,* 754 F. Supp. 1211 (N. D. Ill. 1990); **Ninth Circuit:** *Bull v. City of San Francisco*, No. 03-01840 (N.D. Cal. June 10, 2004); **Eleventh Circuit:** *Haney v. Miami Dade County*, 2005 WL 1004931 (S.D. Fla. 2005). **D.C. Circuit:** *Bynum v. District of Columbia*, 384 F. Supp. 2d. 342 (D.D.C. 2005).

Cir. 2001). "The numerosity requirement is intended to limit the class action device to those cases in which the number of parties makes traditional joinder of parties unworkable. By modern, complex litigation standards the minimum number of parties is not large." *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 185 (D.N.J. 2003). "No definite standard exists concerning a magic number satisfying the numerosity requirement, nor must plaintiff allege the exact number or identity of class members… It is proper for the court to accept common sense assumptions in order to support a finding of numerosity." *Cumberland Farms, Inc. v. Browning-Ferris Indus.*, 120 F.R.D. 642, 645-646 (E.D. Pa. 1988) (internal quotation marks and citations omitted).

The element of numerosity is clearly met here. The Third Circuit has previously instructed that "[n]o minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiff demonstrates that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met." *Stewart v. Abraham*, 275 F.3d at 226-27. Here, where the booking records produced by the City confirm that tens of thousands of individuals were arrested and detained in PPS facilities during the class period, the numerosity requirement for certification is easily satisfied. *See e.g. Bowers v. City of Philadelphia*, 2006 WL 2818501, *2-3 (E.D. Pa. Sept. 28, 2006) (numerosity exists where over 300 individuals had allegedly been subjected to unconstitutional conditions at PPS facilities and where the proposed class, which includes future detainees, could include thousands of people) (Ex. R); *Marriott v. County of Montgomery*, 227 F.R.D. 159, 171 (N.D.N.Y.), *aff'd,* 2005 WL 3117194 (2d Cir. 2005) (finding numerosity in strip search class action where proposed class numbered over 2,000 individuals).

B. There are Numerous Questions of Law and Fact Common to the Class.

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). The commonality requirement is met if the plaintiff's grievances "share at least one question of fact or law with the grievances of the prospective class. Because the requirement may be satisfied by a single common issue, it is easily met…" *Baby Neal v. Casey*, 43 F.3d 48, 56 (3d Cir. 1994). A party is entitled to certification where the class claims arise "from a 'common nucleus of operative fact' regardless of whether the underlying facts fluctuate over the class period and vary as to individual claimants." *In re Asbestos Sch. Litig.*, 104 F.R.D. 422, 429 (E.D. Pa. 1983). A single common question is sufficient to satisfy the requirements of Rule 23(a)(2). *See H. Newberg & A. Conte*, 1 Newberg on Class Actions s3.10, at 3-50(1992); *accord Baby Neal*, 43 F.3d at 56.

"This low bar recognizes that, even where factual differences may exist between putative class members, the class action may be a useful method of resolving those issues that are common to them all." *In re Hydrogen Peroxide Antitrust Litig.*, 2007 WL 163767, *2 (E.D. Pa. Jan. 19, 2007) (Ex. S). In addressing the issues of commonality and predominance, the United States Court of Appeals for the Third Circuit in *Hassine v. Jeffes*, 846 F.2d 169, 177 (3d Cir. 1988) explained that "Rule 23 does not require that the representative plaintiff have endured precisely the same injuries that have been sustained by the class members, only that the harm complained of be common to the class." Thus, Plaintiffs are not required to show that all class members' claims are identical to one another. Differences between proposed class members, "while arguably relevant as defenses to liability, do not change the fact that this class action raises the same basic

claim and shares common questions of law." *Mack,* 191 F.R.D. at 23 (allowing certification of strip search class action despite "varying defenses to liability which may be raised regarding particular individuals").

The Plaintiffs have established commonality in this case. The heart of Ms. Boone and proposed intervenor George Byrd's claims against the City of Philadelphia is that both they and the members of the proposed class were illegally strip searched upon their entry into PPS facilities, pursuant to a uniform policy, custom and practice implemented by the City. The City of Philadelphia admits that all individuals admitted to PPS facilities were, and continue to be, subjected to the visual inspection of their naked bodies upon admission. The testimony of three Corrections Officers, all of whom were working at the time that Plaintiff Nakisha Boone was strip searched, have confirmed this uniform practice. Plaintiff Nakisha Boone testified that she was subjected to this procedure on her admission to the Riverside Correctional Facility. (Boone Dep. at 83-39). When George Byrd is deposed, he will confirm this as well relative to the Curran-Fromhold Correctional Facility. As such, this class action has three common issues that are of central importance to all class members: a) did the City of Philadelphia employ a blanket strip search policy and/or practice during the class period; b) does the City's blanket strip search policy violate the unreasonable search provisions of the United States Constitution; and c) is the City of Philadelphia directly responsible for these constitutional violations? Obviously, the Plaintiffs believe that, at the appropriate time, all of these issues will be resolved in their favor on summary judgment.

Under circumstances such as these, where all class members raise common questions of law and assert the same claims a result of an unlawful strip search policy, the

element of commonality has been established. *See Dodge v. County of Orange*, 226 F.R.D. 177, 180-181 (S.D.N.Y. 2005) (commonality exists where all members of the class contend that a blanket strip search policy exists, where all members contend that the policy is illegal, and where all members of the class claim they were searched pursuant to the policy which was uniformly applied to all detainees); *Marriott*, 227 F.R.D. at 172 (finding commonality where the representative parties and the members of the proposed class had the same legal claims based upon the same official procedure); *see also Sutton v. Hopkins County*, 2007 WL 119892, *4 (W.D. Ky. Jan. 11, 2007) ("Plaintiffs have alleged that the Defendants had a policy, custom, or practice of strip-searching persons on admission to and/or just prior to release from the Hopkins County Jail without regard to whether there existed the requisite individual, reasonable suspicion required by law. Given this allegation, the existence and constitutionality of the county's policy, custom or practice are common questions.") (Ex. T). This point was recently clarified by this Court in *Bowers v. City of Philadelphia*, 2006 WL 281850, *2-3 (E.D. Pa. Sept. 28, 2006). In *Bowers*, pretrial detainees in the custody of the Philadelphia Prison System brought a class action alleging severe overcrowding and dangerous, unhealthy and degrading conditions. Judge Surrick granted the plaintiffs' motion for class certification, noting that commonality had been established where "all class members are or will be subjected to the conditions alleged…, all of which result from the overall claim of unconstitutional overcrowding" and where "all members of the class raise common questions of law" involving the constitutionality of the PPS's practices and policies. *Id*.

In short, the proposed class satisfies the commonality requirement of Rule 23(a). The constitutionality of Defendants' policies is at the core of this litigation and would be the focus of any trial in this matter – whether for an individual or for a class.

C. The Claims of the Representative Plaintiff are Typical of the Claims of the Class at Large.

Rule 23(a)(3) requires that the representative plaintiff's claims be "typical" of those of the other class members. Fed.R.Civ.P. 23(a)(3). "The commonality and typicality requirements of Rule 23(a) tend to merge." *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 157, n. 13 (1982). "The typicality inquiry centers on whether the interests of the named plaintiffs align with the interests of the absent members." *Stewart v. Abraham*, 275 F.3d 220, 227 (3d Cir. 2001). "[F]actual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory." *Baby Neal*, 43 F.3d at 58; *see also Hayworth v. Blondery Robinson & Co.*, 980 F.2d 912, 923 (3d Cir. 1992)(same); *Weiss v. York Hosp.*, 745 F.2d 786, 809-910(3d Cir. 1984)("typicality is demonstrated where the plaintiff can "show that two issues of law or fact he or she shares in common with the class occupy the same degree of centrality to his or her claims as to those of unmade class members"); *Blihovde*, 219 F.R.D. at 617 (applying this principle to a strip search class action). A class representative should "have the incentive to prove all of the elements of the cause of action which would be presented by the individual members of the class were they initiating individual actions." *Dietrich v. Bauer*, 192 F.R.D. 119, 124 (S.D.N.Y. 2000).

Here, the claims of Nakisha Boone and George Byrd are typical of members of the proposed class. They arise from the same practices, policies, and course of events,

and Plaintiffs must make similar arguments to prosecute their claims as would be made by members of the proposed class. *See Bowers*, 2006 WL 2818501, *2-3 ("A plaintiff's claim is typical if it arises from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory."); *see also Weisfeld v Sun Chem. Corp.*, 210 F.R.D. 136, 140 (D. N.J. 2002) ("[I]n instances wherein it is alleged that the defendants engaged in a common scheme relative to all members of the class there is a strong assumption that the claims of the representative parties will be typical of the absent class members.")(citation omitted); *Marriott*, 227 F.R.D. at 172 (finding typicality even where the claims of the representative parties involved a more detailed search than other class members, because they were conducted pursuant to the same policy); *Sutton,* 2007 WL 117892, *4 ("Because each named Plaintiff alleges an unconstitutional strip search after arrest for a minor violation or before release from jail, the claims of the representatives are typical of the class as a whole.").

Thus, typicality is easily satisfied by this proposed class action.

D. Nakisha Boone, Proposed Intervenor George Byrd, and Their Counsel Will Fairly and Adequately Represent the Class.

Rule 23(a)(4) requires that the class representative "fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). Two separate elements must be established in order to satisfy the adequacy of representation test adopted by the Third Circuit: "(a) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the plaintiff must not have interests antagonistic to those of the class." *Wetzel v. Liberty Mut. Ins. Co*., 508 F.2d 239, 247 (3d Cir. 1975); *Weiss v. York Hosp*., 745 F.2d 786, 811 (3d Cir. 1984). Notwithstanding the fact that both prerequisites of adequacy of representation are met in this case, any doubts

concerning the adequacy of a class representative should be resolved in favor of certification. *See Weikel v. Tower Semiconductor Ltd.*, 183 F.R.D. 377, 394 (D.N.J. 1998).

Nakisha Boone and proposed intervenor George Byrd seek to bring an end to illegal strip searches in the Philadelphia Prison System and are further committed to obtaining appropriate compensation from Defendants for themselves and for the members of the proposed class. Nakisha Boone and George Byrd have come forward to represent the class under great personal pressure – as being subject to a situation as humiliating as a strip search and then being forced to relive it would be difficult for anyone. The City's efforts to vilify Ms. Boone in their prior moving papers and her deposition underscore the scrutiny faced by someone seeking to represent the claims of a class against a municipality. Plaintiffs' "interests in this case coincide with those of the potential class members in that [Plaintiffs seek] a declaration that the practices, policies, and conditions complained of in the [Amended Class Action] Complaint are unconstitutional and seek injunctive relief prohibiting the continuation of those" policies. *Bowers*, 2006 WL 2818501, *6-8. Ms. Boone and Mr. Byrd's claims are typical because they arise "from the same event or course of conduct that gives rise to the claims of other class members and is based on the same legal theory." *Zeffiro v. First Pa. Banking & Trust Co.*, 96 F.R.D. 567, 569 (E.D. Pa. 1983). In nearly identical circumstances and given the common legal and factual issues, courts have deemed plaintiffs in similar cases to be adequate class representatives. *See e.g.*; *Marriott,* 227 F.R.D. at 172.

The class is also represented by competent and experienced counsel who have invested considerable time and resources into the prosecution of this action. (Copies of

proposed class counsel resumes are attached as Ex. I). Additionally, counsel in this action has served as class counsel in thirteen strip search class actions, and have been held to be adequate counsel by the United States District Court for the Northern District of New York in three certified class actions. *Kahler v. County of Rensselaer*, No. 03-CV-1324 (N.D.N.Y. 2004) (preliminary approval order in strip search class action settlement, litigated by present class counsel; class settlement later granted final approval) (Ex. J); *Marriott*, 227 F.R.D. at 172, *Marriott v. County of Montgomery*, 426 F. Supp.2d 1 (N.D.N.Y. 2006) (class certification granted by U.S. District Court for the Northern District of New York, and, by subsequent decision, summary judgment granted in favor of the class, class settlement preliminarily approved); *McDaniel v. County of Schenectady,* No. 04-CV-0757 (preliminary approval and certification of settlement class in strip search class action, class settlement pending) (Ex. K).

In short, Nakisha Boone and Proposed Intervenor George Byrd are adequate representatives and have retained experienced class counsel that have aggressively litigated this action. Plaintiffs have, accordingly, satisfied this requirement for certification.

E. Plaintiffs Have Satisfied the Requirements for a Money Damages Class Under Rule 23(b)(3), as the Common Issues Shared by Class Members Predominate Over Individual Issues and A Class Action is the Superior Method by Which to Prosecute this Case.

Rule 23(b)(3) permits certification when "the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed.R.Civ.P. 23(b)(3).

The party proposing a class action under Rule 23 must establish that issues common to the class predominate over the individual issues of particular class members. *See Amchem*, 521 U.S. at 623. "The predominance prong is met when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position." *Zeno v. Ford Motor Co*., 238 F.R.D. 173, 190 (W.D. Pa. 2006). Although Rule 23(b)(3) requires that common issues of law and fact predominate, it does not require that there be an absence of any individual issues. *In re Sugar Industry Antitrust Litig*., 73 F.R.D. 322, 344 (D.C. Pa. 1976). Neither does satisfaction of the predominance prong of the class certification standard require plaintiffs to provide evidence establishing each element of their cause of action at the class certification stage. Rather, it only requires plaintiffs to make a threshold showing that each element of their claim may be proven through common, class-wide evidence, rather than through evidence particular to each member of the class. *See Stewart v. Abraham*, 275 F.3d at 227-228. The most pragmatic way for the Court to make this determination is to evaluate whether "common proof will predominate at trial." *In Re NASDAQ Market Makers*, 169 F.R.D. 473, 517 (S.D.N.Y. 1996); *see also Jenkins v. Raymark Indus.*, 782 F.2d 468, 472 (5th Cir. 1986) (the "significant aspect" requirement is met if "jury findings on the class question ... will ... significantly advance the resolution of the underlying ... cases"); *Dietrich*, 192 F.R.D. at 127 (in determining whether common issues of fact predominate, "a court's inquiry is directed primarily toward whether the issue of liability is common to members of the class"). This is especially true "when the class is challenging a uniform policy," as "the validity of that policy predominates over individual issues." *Blihovde*, 219 F.R.D. at 620.

Here, all of the proposed class members' claims revolve around one central legal issue: was the policy of strip searching every pretrial detainee admitted to PPS facilities, without regard to the crime charged or the circumstances of arrest, constitutional? The proposed class members' claims also share common factual issues – did such a practice exist during the class period, and is the City of Philadelphia responsible for this practice. Significantly, and as set forth in detail above, Defendants do not dispute that the PPS implemented a uniform policy of strip searching every pretrial detainee admitted to its facilities without regard to the existence of reasonable suspicion. Clearly, legal and factual issues in this litigation predominate over any potential individual issues. *See e.g. Marriott*, 227 F.R.D. at 173 (predominance found despite differing facts regarding personal involvement of some individual defendants and slight differences between class members).

1. An Inquiry Into the Existence of Individualized Reasonable Suspicion Need Not Enter Into the Court's Analysis, and Even if it Does, it is Defendants' Burden to Establish a Justification for the Strip Searches in Question.

Defendants may claim that the need to analyze the existence of reasonable suspicion for each class member is an issue that predominates over any other common issues. This argument fails for two reasons. First, the metaphysical possibility that some of the class members may, at the time of their arrests, have had characteristics that might add up to reasonable suspicion to conduct a strip search is irrelevant to the events that routinely occurred at PPS facilities: the Class Action Complaint alleges, the City of Philadelphia admits, and testimony confirms that the City's practice did not (and does not) consider the presence or absence of reasonable suspicion when conducting strip searches at admission. The deposition testimony cited herein confirms that corrections

officers did not (and do not) make any inquiry whatsoever as to reasonable suspicion before strip searching an arrestee – *all detainees are strip searched*. Despite the City's prior arguments to the Court about Nakisha Boone's "history of violence" justifying her strip search, all Corrections Officers on duty during her admission to the Riverside Correctional Facility testified that they had no recollection of her, and that they did not consider a person's background prior to strip searching them. The City cannot claim the possibility of facts supporting reasonable suspicion to conduct a strip search if they did not make an inquiry on this point. *See Davis v. City of Camden* , 657 F. Supp. 396, 401 (D. N.J. 1987) ("[W]hen an arrestee charged with a felony or a misdemeanor involving weapons or contraband is strip searched pursuant to a policy encompassing *all* arrestees, regardless of the nature of their offenses, and where it is conceded that no suspicion regarding the particular arrestee existed, the requisite justification for the search is lacking; neither the general policy nor its particular application is supportable.") (emphasis in original); *Dodge v. County of Orange*, 226 F.R.D. 177, 182 (S.D.N.Y. 2005) ("If individualized assessments were in fact not made, then all the searches were illegal, because each new arrival was constitutionally entitled to an individualized assessment of his or her circumstances… [T]he fact that a particular class member could have been lawfully strip searched if [the correctional facility] had made the constitutionally required assessment is a defense to a particular class member's claim for damages, not a defense to the class-wide claim that the County searched everyone without making any assessment at all."); *Calvin v. Sheriff of Will County*, 2004 WL 1125922, *4 (N.D. Ill. May 17, 2004) (common questions predominate over individual issues where, as here, "the ultimate legal question is not whether jail personnel made erroneous reasonable

suspicion determinations regarding each individual, but whether the Sheriff's policy avoided all such inquiry, thus depriving those individuals of their Fourth and Fourteenth Amendment rights.") (Ex. U); *Lee v. Perez*, 175 F. Supp.2d 673, 679 (S.D.N.Y. 2001).

Further, reasonable suspicion is an affirmative defense that the City will need to prove at trial by a preponderance of the evidence, *see Curry v. City of Syracuse*, 316 F.3d 324, 330 (2d Cir. 2003), and one that the City cannot prove in the absence "of any evidence that its employees had any particular knowledge at the time of the searches that would give them any basis for such a belief." *Doe v. Calumet City*, 754 F. Supp. 1211, 1220 (N.D. Ill. 1990); *see also Sutton v. Hopkins County*, 2007 WL 119892, *8. "To require Plaintiff to prove that each individual search was unsupportable, as well as indiscriminate, would be unnecessary and unfair." *Mack*, 191 F.R.D. at 24. In short, "the burden rests on [the City of Philadelphia] to demonstrate that particular searches were reasonable." *Id.* In light of the proof taken in this action and the City's admissions regarding the uniform nature of the strip search policy, it is unlikely that the City can detail even one prospective class member that was subject to an evaluation for reasonable suspicion.

Second, even if issues of reasonable suspicion exist, they do not predominate over the common issues of law and fact. As noted by the U.S. Court of Appeals for the Sixth Circuit:

> Defendants argue that because the reasonableness of any search must be examined on a case by case basis, the constitutionality of strip searches cannot be properly evaluated in a class action. *The basis for the complaint, however, arises precisely because the Defendants did not conduct an individualized assessment of the need for each search*. Plaintiffs allege ... their constitutional rights were violated by a policy or custom, written or unwritten, to

> search every arrestee who entered the jail, regardless of the individual circumstances. Due to the single legal theory and the similar facts for each Plaintiff, a class action would be superior to individual actions.

Eddleman, 1996 WL 495013, *5; s*ee also Langley v. Coughlin*, 715 F. Supp. 522, 557-58 (S.D.N.Y. 1989); *Tyson v. City of New York*, 97 Civ. 3762 (March 18, 1998) (Bench Decision) (Ex. V); *Sutton v. Hopkins County*, 2007 WL 119892, *7 (W.D. Ky. Jan. 11, 1007). Thus, common issues predominate over any individual issues.

Assuming, *arguendo,* that the Court allows the City to attempt to establish reasonable suspicion for some detainees despite their uniform written policy, possible individualized determinations regarding the existence of reasonable suspicion for a limited number of class members do not outweigh the benefits that certification can offer in this case. In the context of a class action defining the proposed class as encompassing persons searched pursuant to a blanket policy requiring all arrestees to be strip searched upon admission, any "reasonable suspicion inquiries" related to individual arrestees "will be *de minimis,*" in part because "reasonable suspicion must be possessed by some law enforcement officer at the time of the search and may not be retroactively imputed." *In re Nassau County Strip Search Cases*, 461 F.3d 219, 224, 230 (2nd Cir. 2006). "The existence of this defense does 'not… foreclose class certification.'" *Id*. (*quoting Visa Check*, 280 F.3d at 138)).

The Court of Appeals for the First Circuit addressed this issue in *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004), a strip search class action prosecuted against a County Jail in Maine. There, having emphasized that "threats of undue complications as to liability [were] limited[,]" the Court rejected the notion that individualized determinations proscribed a finding that certification was appropriate. *Id*., 365 F.3d at 6.

Moreover, the Court explained that "[i]f there was in fact a rule, custom or policy of strip searching every arrestee or a substantially overlarge category, then it is a fair guess that most arrestees so classed were strip searched on that basis." *Id*. Concluding that the class could be narrowed or de-certified at a later date if necessary, the Court held that certification was warranted.

In yet another case granting certification of a class of individuals challenging the propriety of a jail policy providing for blanket strip searches, the Court in *Marriott v. County of Montgomery*, 227 F.R.D. 159 (N.D.N.Y. 2005), initially observed that the common question among all members of the class was whether the search procedure, which was applied to all admittees, was constitutional. Notwithstanding uncertainties regarding the extent of the searches and the corresponding amount of compensatory damages, certification under Rule 23(b)(3) was, in the Court's judgment, appropriate. Despite several "minor" issues, efficiency of the judicial process would be promoted by the certification process. *Id*. at 173.

> While there are as many as 2,000 class members, there is one central issue of law – whether the change out strip search violates the Fourth Amendment. Piecemeal litigation by multiple plaintiffs in multiple law suits would not promoted efficiency and would be inferior to litigation of the issue in one suit.

Id.

Similarly, in *Smith v. Montgomery County*, 643 F.Supp. 435 (D.M.D. 1986), the United States District Court for the District of Maryland certified a class of temporary detainees at a local county detention center who were strip searched absent reasonable suspicion that they possessed either weapons or contraband. *Id*. at 437. In an effort to facilitate the class action mechanism, the Court adopted the bright line rule that

reasonable suspicion exists to strip search felony arrestees, temporary detainees arrested for misdemeanors that involved weapons or contraband, as well as temporary detainees with prior records for felony offenses or misdemeanors involving weapons or contraband. *Id*. at 439. In light of the potential for factual disputes regarding the existence of individualized reasonable suspicion, the Court adopted the following case management structure:

> [T]he Court will leave it to the parties to determine which members of the class of temporary detainees were strip searched in violation of their Fourth Amendment rights under the terms of the Court's ruling. If defendants believe that they had individualized grounds for a reasonable belief that a detainee arrested for a minor offense was concealing weapons or contraband, the defendants shall submit a written statement of those individualized reasons to the Court. If any of the statements of reasonable suspicion create issues of fact, brief evidentiary hearings may be necessary.

Id. at 443.

While the Defendants will vociferously claim to the contrary, other courts addressing blanket strip search policies have not hesitated to grant class certification despite *post hoc* claims of reasonable suspicion. In fact, prior case precedent has largely disregarded *post hoc* attempts to justify blanket strip searches on the basis of reasonable suspicion because the attempt to do so is "absurd" and "unfair." *See Gonzalez v. City of Schenectady*, 141 F. Supp. 2d 304 (N.D.N.Y. 2001); *Mack*, 191 F.R.D. at 24.

2. Certification Should Be Granted Even If Damages Vary Among Class Members

In order to defeat Rule 23(b)(3) certification, Defendants may argue that this case requires individual determination of damages for each class member and that these damages calculations which will predominate over other common issues. It is well

established that distinctions in damages will not defeat class certification when there are common liability issues to be determined. *Seawell v. Universal Fidelity Corp.*, 235 F.R.D. 64 (E.D. Pa. 2006) ("That damages may have to be calculated individually… does not preclude class certification."); *see also In re Cigna Corp. Securities Litig.*, 2006 WL 2433779, *6 (E.D. Pa. 2006) ("The mere fact that individual members of the class may be entitled to different amounts of money damages does not mean that individual questions predominate.") (Ex. W). Indeed, it was noted nearly twenty years ago that "overwhelming weight of authority holds that the need for individual damages calculations does not diminish the appropriateness of class certification where common questions as to liability predominate." *In re Asbestos School Litig.*, 104 F.R.D. 422, 432 (E.D. Pa. 1984) (*quoting Wolgin v. Magic Marker Corp.*, 82 F.R.D. 168, 176 (E.D. Pa. 1979) (*quoting* 5 H. Newberg, *Newberg on Class Actions* §8824(b), at 879 (1977)).

Civil rights cases involving allegations of an unconstitutional strip search policy applicable on a routine and generalized basis are particularly well-suited for class treatment regardless of variations in the amount of damages to which individual members of the class may be entitled. For example, in *Marriott v. County of Montgomery* , 227 F.R.D. 159, 173 (N.D.N.Y. 2005), the court held that certification was appropriate notwithstanding "questions of fact differing among the members of the class relate[d] to the extent of the search to which each individual was subjected, which would affect the amount of compensatory damages." The "common question [of] whether the change-out, strip search procedure applicable to all admittees, regardless of whether reasonable suspicion exists that contraband or weapons are possessed, violates the Fourth

Amendment," predominates over the other "minor differences between class members…" *Id*.

In *Tardiff v. Knox County*, 365 F.3d 1 (1st Cir. 2004), the First Circuit affirmed the lower court's decision to certify the class notwithstanding the potential need for individualized damages determinations. In so doing, the court observed the multitude of tools at its disposal, including formula damages, an agreement on uniform damages for all but the most serious claims and the use of special masters to determine the remaining claims, to address these concerns. *Id*. at 6-7. Likewise, in *Calvin v. Sheriff of Will County*, the court rejected the notion that individualized damages concerns outweighed the benefits of class treatment:

> The fact that damages may vary based on each plaintiff's mental state is not, however, a sufficient reason to deny certification, because the court may bifurcate the lawsuit so that liability is determined first. If defendants are found liable, the court may then revisit the damages issue, including whether to certify another class or subclasses, or hold individual hearings, for the purpose of resolving damages.

Calvin, 2004 WL 1125922 at *5; *see also Sutton v. Hopkins County*, 2007 WL 119892, *8 (notwithstanding "some variation in the class members' amount of damages, numerous cases exist in which courts have rejected arguments that differences in damages among the class members should preclude class certification.")(internal quotation marks and citations omitted).

This Court can utilize various "management tools ... to address any individualized damages issues that might arise in a class action, including (1) bifurcating liability and damages trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class

after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." *Visa Check*, 280 F.3d at 141. The United States District Court for the Southern District of New York used these management tools when providing full certification of a strip search class action involving 53,000 pretrial detainees. *See Tyson*, 97 Civ. 3762, pp. 4-5 (March 18, 1998). The Southern District of New York held that:

> On the damages question, I note that I need not decide at this point whether damages can be awarded on a class-wide basis or whether there needs to be individualized determinations of damages for each plaintiff. I simply note that the most efficient way to resolve all of the issues in this case is in one forum, and if I should determine that individualized determinations need to be made with respect to each plaintiff, there are numerous options available. If my time is too short to preside over the damage determinations, we do have Magistrate Judges, visiting judges, and the possibility of a Special Master's involvement.

Id. The *Tyson* case was later resolved, with a settlement utilizing a point system to provide compensation to individual class members.

In the event that the Court is convinced that the potential for individualized damages determination is so substantial as to preclude certification as to all issues, the proposed class should, at a minimum, be partially certified as to liability. S*ee Maneely*, 208 F.R.D. at 78 ("[I]t would be improper to let manageability concerns overwhelm the predominance decision. There is a common issue at the core of this case – whether defendants maintained an unconstitutional blanket strip search policy during the class ... I find these common issues represent a sufficient constellation of common issues binding the class member together.") (internal quotation marks omitted); *Sutton v. Hopkins County*, 2007 WL 119892, *8 ("[T]he potential for varying claims of damages does not

mandate class decertification. Instead, the Court will bifurcate the lawsuit permitting the Defendants' liability to be determined initially. In the event a jury determines that the Hopkins County Jail maintained an unconstitutional blanket strip search policy, the Court will then determine the best approach for the second phase of the litigation."). *In re Nassau County Strip Search Cases*, 461 F.3d 219, 224 (2d Cir. 2006).

3. The Superiority of the Class Action Mechanism is Clear

Given the nature of this action and the fact that a substantial proportion of the class membership is comprised of economically disenfranchised individuals, a class action is also the superior method by which to adjudicate claims of individual class members. Poor and marginalized class members are unlikely to be able to litigate their cases individually. *See Mack,* 191 F.R.D. at 25; *D'Alauro* v. *GC Services Ltd.,* 168 F.R.D. 451, 458 (E.D.N.Y. 1996); *In re Nassau County* , 461 F.3d 219 at 230; *Tardiff,* 365 F.3d at 7 ("class status here is not only the superior means, but probably the only feasible one ... to establish liability and perhaps damages"). The class action device is designed for the situation where an individual seeks to vindicate "the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prod.,* 521 U.S. at 617. "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mack,* 191 F.R.D. at 25 (internal citations omitted); *Yang v. Odum* , 392 F.3d 97, 106 (3d Cir. 2004); *Marriott*, 227 F.R.D. at 173; *Sutton*, 2007 WL 119892, *9 ("litigating the existence of a uniform

policy for the class as a whole would both reduce the range of issues and promote judicial economy.")(internal quotation marks and citations omitted).

The prosecution of this case as a class action is superior to thousands of individual cases being filed in this Court, each of which would be repetitious and possibly yield inconsistent adjudications. *See Califano v. Yamaski,* 42 U.S. 682, 700-701 (1979); *Dodge*, 226 F.R.D. at 183 ("Where a single issue (such as the existence of a uniform policy) is guaranteed to come up time and time again, issues of judicial economy strongly militate in favor of resolving that issue via a techniques that will bind as many persons as possible."); *Sutton v. Hopkins County*, 2007 WL 119892, *9 (holding that "a class action provides the most feasible and efficient method of determining liability" where suit alleges existence if a uniform unconstitutional strip search policy). Assuming, *arguendo,* that summary judgment is not eventually granted against the City of Philadelphia on behalf of the entire proposed class, the trial in this action will last for weeks, with scores of jail employees being examined about the practices of the City of Philadelphia in an effort to establish municipal liability. Even having a small proportion of class members have duplicative trials on this issue would be an enormous waste of judicial resources, and would not be the superior and appropriate way to resolve this controversy.

For these reasons, Plaintiffs respectfully suggest that the Motion for Class Certification be granted.

F. Plaintiffs Have Also Satisfied the Requirements of Rule 23(b)(2)

Rule 23(b)(2) permits certification when "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a

whole." Fed.R.Civ.P. 23(b)(2). Rule 23(b)(2) is "almost automatically satisfied in actions primarily seeking injunctive relief." *Baby Neal*, 43 F.3d at 58. This Court has previously held that:

> Courts have noted that Rule 23(b)(2) is "an especially appropriate vehicle for civil rights actions seeking... declaratory relief 'for prison and hospital reform.'" *Coley v. Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980) (*quoting* 3B J. Moore & J. Kennedy, Moore's Federal Practice P 23.40(1) (1980)); *see also Santiago v. City of Phila.*, 72 F.R.D. 619, 625-26 (E.D. Pa. 1976) ("This subsection has been liberally applied in the area of civil rights, including suits challenging conditions and practices at various detention facilities." (*citing Martinez Rodriguez v. Jimenez*, 409 F. Supp. 582 (D. P.R. 1976); *Woe v. Mathews*, 408 F. Supp. 419 (E.D.N.Y. 1976); *Pugh v. Locke*, 406 F. Supp. 318 (M.D. Ala. 1976); *King v. Carey*, 405 F. Supp. 41 (W.D.N.Y. 1975))). "The essential consideration is whether the complaint alleges that the plaintiffs have been injured by defendants' conduct which is based on policies and practices applicable to the entire class." *Santiago*, 72 F.R.D. at 626.

Bowers, 2006 WL 281850, *3-4. Here, where Plaintiffs have alleged that the City of Philadelphia employs a blanket strip search policy that is unconstitutional as applied to detainees charged with minor offenses, and where Plaintiffs seek relief that will terminate this practice and benefit the entire class, the requirements of Rule 23(b)(2) are satisfied. *Seawell v. Universal Fidelity Corp.*, 235 F.R.D. 64, 67 (E.D. Pa. 2006) (certification under Rule 23(b)(2) was warranted for that portion of the case for which the plaintiff sought exclusively injunctive/declaratory relief, where such relief "would obviously benefit the entire class"); *Marriott*, 227 F.R.D. at 173 (holding that requirements of Rule 23(b)(2) are met where "the centerpiece of the litigation is elimination of the… procedure which is applicable to all admittees without a requirement for reasonable suspicion.").

G. The City of Philadelphia Should Be Required to Assist Class Counsel in Providing Notice to Absent Class Members.

"[I]f a defendant can undertake the tasks associated [with class notice] with less expenses and difficulty than could a plaintiff, the defendant may be ordered to provide notice." *LaFlamme,* 212 F.R.D. at 459. Class counsel is fully prepared and able to provide notice to all class members. The City of Philadelphia, however, has all of the information regarding the addresses and social security numbers of all prospective class members in electronic format, which can presumably be accessed to form a database and provide a mass mailing. Plaintiff respectfully suggests that the City be required to "provide the notice or ... cooperate with plaintiff by giving him the information necessary to provide the notice." *Id.,* at 460.

IV. Conclusion

For these reasons, Plaintiffs respectfully request that their Motion for Class Certification be granted, and the Court provide any other relief it finds to be just, proper and equitable.

Respectfully submitted by:

/s
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