UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
AT OWENSBORO

EDWARD LEE SUTTON, et al.,	)	
	)	
Plaintiffs	)	
	)	
vs.	)	**CIVIL ACTION NO. 4:03CV-3-M**
	)	
HOPKINS COUNTY, KENTUCKY, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND FOR A PRELIMINARY INJUNCTION

May it please the Court:

For more than two decades, the Sixth Circuit and courts across the country have consistently held that pretrial detainees arrested for non-violent, non-drug-related misdemeanor offenses may not be strip searched upon admission to a detention facility without individualized reasonable suspicion that the particular detainee is hiding weapons or contraband. In complete disregard for this firmly established constitutional standard, the Defendants admit that the Hopkins County Jail (the "Jail") employs a blanket policy of strip searching all arrestees – including all non-violent, non-drug-related misdemeanor offenders – who are transferred to the Jail from another facility, without making any individualized determination whether there is reasonable suspicion that any particular transferee is concealing contraband or weapons. This policy, on its face, plainly violates the Fourth Amendment. The Plaintiff Class, therefore, is entitled to a partial summary judgment finding that the Jail's policy is unconstitutional, and that

any class member searched pursuant to the Jail's policy has been subjected to an illegal search in violation of the class member's constitutional rights.

Moreover, preliminary injunctive relief is necessary to cease the pattern and practice of illegal strip searches that is currently ongoing at the Hopkins County Jail. Every day, individuals admitted to the Jail following an institutional transfer are subjected to unconstitutional strip searches that are not warranted by any individualized reasonable suspicion. The harm caused by these constitutional violations is irreparable. Preliminary injunctive relief is therefore necessary to cease these constitutional violations pending a full adjudication of the merits and entry of appropriate permanent injunctive relief.

PROCEDURAL HISTORY

This is a class action lawsuit pursuant to 28 U.S.C. § 1983, which was originally filed by Plaintiffs Edward Lee Sutton and Lester H. Turner "in their individual capacities and on behalf of all persons arrested for minor offenses who were required by Defendants in the Hopkins County Jail to remove their clothing for visual inspection despite the absence of any reasonable grounds for believing they were concealing weapons or contraband." [Complaint ¶ 1.] The Plaintiffs' class action complaint alleged that "such searches have been and continue to be regularly conducted by Defendants and there are potentially hundreds of members of the subject class." [*Id.*]

On March 16, 2005, the Court entered an Agreed Order granting Plaintiffs' motion for class certification. [3/16/05 Class Cert. Order.] The Court's Order certified two subclasses – the "Admissions Class" and the "Release Class" – defined as follows:

> a. All persons arrested for minor offenses who were required by Defendants in the Hopkins County Jail ("Jail"), after becoming entitled to release, to remove their clothing for a visual inspection. . . . [the "Release Class"]

> [b.] All persons arrested for non-violent, non-drug related misdemeanor offenses who were required by the Defendants in the Jail to remove their clothing for a visual inspection on admission to the Jail despite the absence of any reasonable suspicion that they were carrying or concealing weapons or contraband. [the "Admissions Class"]

[3/16/05 Class Cert. Order ¶¶ 2-3.] Each of these classes includes all persons who were so treated from January 9, 2002, to the present. [*Id.* ¶ 4.]

The Named Class Representatives of the Admissions Class are Plaintiffs Linda Joyce Ford, Timothy D. May, Ladonia W. Nelson, Robin Littlepage, Robert R. Teague, Tabitha Nance, Daniel Todd and Tony Ward. [Third Am. Compl. ¶ 3.] Each of these Plaintiffs was admitted to the Jail following an arrest on minor, non-weapons-related, non-drug-related offenses, including writing bad checks, failure to appear, and traffic violations. [Third Am. Compl. ¶¶ 17-24.] Each of the Class Representatives of the Admissions Class alleged that upon admission to the Jail, they were forced to remove their clothes and submit to a visual strip search inspection. [*Id.*] During these searches, Plaintiffs were, among other things, subjected to visual inspection of their genitals, instructed to bend over and spread their buttocks for visual inspection, and, in the case of female Plaintiffs, asked to lift their breasts for inspection. [*Id. See also, e.g.*, Ford Dep. at 21-24 (attached as Exh. A); May Dep. at 30-31 (attached as Exh. B); Nelson Dep. at 23-24, 31-32, 38-39 (attached as Exh. C); Teague Dep. at 33-36 (attached as Exh. D).]

UNDISPUTED FACTS

In his deposition, James Lantrip, who served as Hopkins County Jailer from 1987 until his retirement on July 31, 2005, explained the policies and procedures of the Hopkins County Jail (the "Jail") governing strip searching arrestees upon admission to the Jail. [1/17/06 Lantrip Dep. at 6 -21 (attached as Exh. E).] According to Jailer Lantrip, an arrestee brought to the Jail is met at the door by a Jail officer and asked to complete a medical questionnaire to determine

whether there is a need for immediate medical attention. [1/17/06 Lantrip Dep. at 11.] If no immediate medical attention is required, the arrestee is taken to the booking desk, where the booking officer collects information for the purposes of doing an "initial classification," which includes determining whether the arrestee is to be strip searched. [1/17/06 Lantrip Dep. at 15.]

If the booking officer determines that an arrestee "fall[s] under a strip searchable reason," they would be strip searched. [1/17/06 Lantrip Dep. at 6-7.] According to official Jail policy, "strip searchable reasons" include charges involving serious violent felonies, past history of violence, drug charges, suicide risk, and "people coming from other facilities not in your jurisdiction that you had no control over before they arrived":

> Q: Now, when you were the Jailer at the Hopkins County jail, what was the policy at the jail for strip search of persons on admission to the jail?
>
> A: Well, you question them, you look at their charges, why they're there. Determine if they fall under the strip searchable reasons.
>
> * * * *
>
> Q: That being whether they were a felon, had a past history of violence, were drug charges, suicide risk, people coming from other facilities, is that what you'd look at?
>
> A: At his initial arrest?
>
> Q: Yes.
>
> A: Yes.

[1/17/06 Lantrip Dep. at 6-7.]

Notably, the initial booking process does not include running a criminal history background check, or "NCIC" report, on the arrestee. [1/17/06 Lantrip Dep. at 15-18.] Further, a full criminal history check is not performed on an arrestee until the "full-blown classification" process, which is performed the day after the arrestee is booked into the Jail. [1/17/06 Lantrip

Dep. at 15-16.] Thus, the decision to strip search an arrestee is made before obtaining a criminal history report on the subject. [1/17/06 Lantrip Dep. at 17.]

Hopkins County Jail Policy Concerning Strip Search of Institutional Transfers

Jailer Lantrip testified that in addition to strip searches that might be ordered based on factors such as history of contraband, drug charges, or suicide risk, the Jail's official policy also calls for automatically strip searching all arrestees who are transferred to the Hopkins County Jail from another jurisdiction, regardless of the charge:

> Q: Now you also mentioned strip searching people coming from other facilities. Now what do you mean by that?
>
> A: If we get – our sheriff goes somewhere and picks somebody up, bring[s] him back here from a jail in another county or state or a sheriff or somebody from another county or state brought one to us, we'll have occasions where the jail themselves may transfer someone to us from another facility.
>
> Q: Now would those persons be strip searched?
>
> A: Yes.
>
> Q: Regardless of their charge?
>
> A: Yes.

[1/17/06 Lantrip Dep. at 26. *See also* 12/5/05 Sabbatine Dep. (Defendants' Expert) at 64-65 (attached as Exh. F); August 30, 2005 Soyars Letter, Exhibit 7 to 12/5/05 Sabbatine Dep. (attached as Exh. G) ("The jail does have a policy of strip-searching inmates upon transfer from another facility.").] Thus, traffic offenders and minor misdemeanor offenders – as well as those arrested on more serious charges – are subject to automatic strip searches following an institutional transfer to the Jail. [1/17/06 Lantrip Dep. at 26.]

Jailer Lantrip testified that this is a "blanket policy." [1/17/06 Lantrip Dep. at 27.] All arrestees who are transferred from other jurisdictions or facilities are strip searched, without

regard to the circumstances surrounding the transfer or other factors indicating that there is reasonable suspicion to believe the arrestee is secreting contraband:

> Q: Now, have there been institutional transfers, arrestees brought to the Hopkins County jail from other facilities that you are familiar with in which a decision was made to forego a strip search of that individual?
>
> A: Shouldn't be.
>
> Q: So this is a blanket policy, anyone coming to Hopkins County jail from another facility is to be strip searched period?
>
> A: Period.
>
> * * * *
>
> A: . . . . **Policy is one of those things one shoe fits everybody** with rare, rare exceptions I would think, and off the top of my head I can't even think of one . . . . Okay, so, you know, that's just one of those things, so **it's a blanket thing**. If you come from another facility that we have not authority over, no control of, you're checked when you hit our door.

[1/17/06 Lantrip Dep. at 27, 52-53 (emphasis added).]

Jailer Lantrip stated that transferees are strip searched out of a concern that the arrestee might have obtained contraband either during their prior stay in the transferring facility or during their transportation to the Hopkins County Jail, and might smuggle this contraband into the Hopkins County Jail. [1/17/06 Lantrip Dep. at 26.] However, Jailer Lantrip admitted that the Jail's policy is not based on any particular facts known to the Jail staff about the circumstances under which arrestees are transferred, such as what kind of security precautions are taken by the Hopkins County Sheriff in conducting the transfer or whether the arrestees were ever unsupervised during the transfer. [1/17/06 Lantrip Dep. at 51-52.]

Jailer Lantrip testified, for example, that the Jail staff knew "very little" about the Sheriff Department's security practices in transferring arrestees:

Q: What do you know about the security procedures employed by the Hopkins County Sheriff in transporting prisoners that they'd picked up at another jail to the Hopkins County Jail?

A: **Very little. I couldn't tell you that it was any better or worse than anyone else's.** That would probably depend on which officer went.

[1/17/06 Lantrip Dep. at 51 (emphasis added).]

Jailer Lantrip also admitted that upon admission of a detainee transferred from another facility, Jail staff did not inquire about the circumstances of a particular detainee's transfer to determine if that detainee had an opportunity to obtain or conceal contraband:

Q: . . . . I'm just talking about whether [the arrestees] could have acquired contraband while in the custody of the Hopkins County sheriff.

A: Yes, they could. I mean, you never know if there's a bathroom stop or whatever.

Q: Can you determine that once they're admitted to the Hopkins County jail?

A: Could I determine that?

Q: Yeah. You could ask the sheriff whether there'd been a bathroom stop or any opportunity for –

A: **I guess you could. I don't think we ever did.**

[1/17/06 Lantrip Dep. at 52 (emphasis added).]

Thus, under the Jail's policy, the decision to strip search arrestees transferred from other facilities was not based on any actual information indicating a risk of contraband smuggling among institutional transferees as a class of offenders, or any individualized determination that a particular arrestee had an opportunity to hide contraband. Rather, Jailer Lantrip testified that arrestees transferred from other facilities were strip searched merely because the Jail did not know the circumstances of their custodial history: "I have **no idea** what kind of jail they came from, how tight it was run or how loose it was run, what they were allowed to have in that jail. I

have **no idea** where they stopped en route to our jail, who they've had contact with, those type things." [1/17/06 Lantrip Dep. at 26 (emphasis added).]

Expert testimony concerning justification for strip searches of institutional transfers

Notwithstanding the justification offered for the Jail's blanket strip search policy by Jailer Lantrip, Defendants' own purported expert witness, Ray Sabbatine, testified that the mere fact that an arrestee is transferred from another facility, in the absence of other factors, is **not** sufficient justification for a strip search:

> Q: . . . . [J]ust the mere fact that they're being institutionally transferred, that alone is not a justification for a strip search?
>
> A: That's correct in the absence of other factors that would justify the search.

[12/5/05 Sabbatine Dep. at 70-71 (attached as Exh. F).]

Sabbatine is a consultant in the field of criminal justice, who has served in a number of positions in the Kentucky criminal justice system, including jail administrator for Lexington, KY. He was retained by the Defendants to render an opinion "as to the propriety of both policy and practice of the Hopkins County Detention Center as they relate to the strip-searching of offenders housed in that facility." [7/17/03 Sabbatine Report at 1.] Sabbatine based his opinions upon an examination of "the policies of the [Hopkins County] facility and their consistency with State and Federal standards of care and whether practices are consistent with acceptable policy." [*Id.*]

Sabbatine's testimony was clear that, in his expert opinion, strip searching an arrestee solely because the arrestee was transferred from another jurisdiction is not justified:

> Q: . . . . [W]hen you've got an inmate coming from another facility for whatever reason, . . . under what circumstances would it be inappropriate to strip search them?

A: If a person were not otherwise strippable and the person did not spend – in other words, the person did not go beyond the booking area of the other facility and then were transferred to the second jail and they were not strippable, in other words, it would almost be similar to a person being arrested, taken to the police station for an interview, and then dropped off at jail, then **I don't believe that to give me reason to be concerned about the presence of a contraband for an otherwise nonstrippable offender**. Okay?

As the period of time extends in the sending facility and whether or not there was a hospital run of that person because they may have been a DUI that ended up going to the hospital and then coming back to the facility and then transferred to the second facility, in other words, in order to examine it **I need the full circumstance of the custodial happenings in the initial facility**. Time would be a factor, incident would be a factor; okay? If in the original facility they were undergoing a pat frisk and there were contraband uncovered, if they were undergoing a pat search and they refused the pat search and said, don't touch me, okay, if that other facility had an alert on them for suicide, if that other facility had an alert on them for prior introduction of contraband, okay, that and the transfer of that information to the second facility would give reason for examination at the second facility as to whether or not the person was searchable.

So when you talk about a custodial time frame, **to have only one piece of it doesn't give me enough information to draw a conclusion that would satisfy me as to whether or not the person was likely to be strippable when they entered the second facility**.

[12/5/05 Sabbatine Dep. at 67-69 (emphasis added).] Thus, Defendants' own expert conceded that the mere fact that a detainee was transferred from another facility, by itself, does not indicate a security risk sufficient to justify a strip search. Only an examination of the individual circumstances surrounding the arrestee's custodial history would provide enough information to determine that a sufficient risk of contraband existed to warrant a search. [*Id.*]

Plaintiffs' expert witness, Gordon Kamka, echoed Mr. Sabbatine's testimony on this issue and opined that "[a] strip search due to transfer from another correctional facility cannot be justified for security reasons . . . ." [8/30/05 Pls. Tender of Supp. Expert Op.]

Records of searches conducted pursuant to County's blanket strip search policy

The records produced by the Defendants demonstrate the scope and regularity of the Jail's blanket strip search policy for arrestees transferred from other facilities. These records reveal that strip searches of institutional transferees have been, and continue to be, a routine and frequent occurrence at the Jail.

Beginning in July 2003, the Jail began using a "Jail Tracker" computer program, which records every instance in which a strip search was performed, the reason each search was conducted, and the results of the search. [1/17/06 Lantrip Dep. at 39.] In response to Plaintiffs' discovery requests, Defendants produced Jail Tracker records for all strip searches conducted by the Defendants between July 2003 and May 25, 2006. The Jail Tracker records show that during this period, 1159 arrestees were subjected to strip searches after being transferred to the Jail from another facility. [B. Thacker Aff. ¶¶ 4-5 & Exhibit A thereto (attached as Exh. H).] For each of these 1159 strip searches, the only grounds for the search identified in Defendants' records is "transfer from another facility." [B. Thacker Aff. ¶ 5.] No other factors supporting the decision to search, such as history of contraband, drug charges, etc., are identified in any of these records. [*Id.*]

Moreover, Plaintiffs' inspection of Defendants' records revealed that these strip searches generated some kind of positive result in only six (6) of the 1159 instances, which equates to approximately **five-tenths of one percent** (0.5%) of the persons searched. [*Id.* at ¶ 6.] In five of these instances, moreover, the only contraband reported found was identified as cigarettes, tobacco, or matches, while the sixth result was listed merely as "code 4." [*Id.* at ¶ 6.][1]

[1] Moreover, the Jail Tracker records do not indicate whether the contraband was found somewhere where only a strip search would detect it – such as in a body cavity – as opposed to the arrestee's clothing, where a simple pat down search could have located it.

Prior to the implementation of the Jail Tracker program in July 2003, the practice of the Jail was to only make a record of a strip search when the search was performed pursuant to an individualized reasonable suspicion and there was a positive finding of contraband. [1/17/06 Lantrip Dep. at 38-40; 12/5/05 Sabbatine Dep. at 38-39.] Thus, prior to July 2003, the Jail failed to make any record of strip searches conducted pursuant to an automatic or blanket strip search policy or where no contraband was found. This failure to document pre-July 2003 strip searches was contrary to the mandates of the applicable Kentucky Administrative Regulations, which provide that "[t]he Jailer shall require that a strip search or body cavity search shall be documented." 501 KAR 3:120, § 23(c)1.

Even in the absence of reliable Jail records prior to July 2003, however, the post July 2003 Jail Tracker records, combined with Jailer Lantrip's testimony, clearly reveal the scope and regularity of the Jail's policy of strip searching all arrestees transferred from other facilities. The undisputed facts plainly demonstrate that at all times relevant to this lawsuit, every detainee who came to the Jail from another facility was subjected to an automatic strip search upon arrival. This policy resulted in a large number of arrestees – including those arrested for nonviolent misdemeanor and traffic-related offenses – being strip searched, despite the absence of any other factors indicating that the particular arrestee was likely to pose a risk of smuggling weapons or contraband.

Strip searches of Named Plaintiff class representatives

Several of the Named Plaintiff class representatives are among those who were subjected to suspicionless strip searches pursuant to the Jail's blanket strip search policy. In his supplemental expert report, Mr. Sabbatine reviewed materials relating to Named Plaintiffs Linda H. Ford, Timothy P. May, Robert R. Teague, Robin G. Littlepage, Tabitha L. Joyce, and Ladonia

Davis Nelson. [11/22/05 Sabbatine Supp. Rep. at 1.] Sabbatine's review of the record showed that five of these six Plaintiffs had been strip searched following a transfer from another facility.[2] [*Id. See also, e.g.*, Ford Dep. at 18-22; May Dep. at 27-30; Nelson Dep. at 20-22; Teague Dep. at 33.]

For at least two of these Named Plaintiffs, Linda Ford and Timothy May, Mr. Sabbatine conceded that he could find no factors that would justify a strip search, other than the transfer from another facility. [11/22/05 Sabbatine Supp. Rep. at 2.] Sabbatine therefore opined that the available information was "not conclusive" of the need for a strip search. [*Id.*] Sabbatine testified that the mere fact that Ford and May were transferred from another facility would not warrant a strip search. [12/5/05 Sabbatine Dep. at 70.] Whether a strip search of these Plaintiffs was justified, Sabbatine explained, depended on whether officers at the Jail had made queries about the circumstances surrounding each detainee's transfer, and whether the particular information they learned demonstrated a risk that the individual detainee was concealing contraband:

> A: Both Ford and May were transferred. I don't know whether the information was transferred from the transferring facility to the second facility. I do not know **whether there were queries by the second facility, Hopkins, as to whether there were circumstances that would have justified a search**. . . .
>
> * * * *
>
> Q: Right. So the mere fact of an institutional transfer without more does not automatically necessitate or justify a strip search by the receiving facility; correct?
>
> A: The circumstances of the transfer may. **The transfer in itself without additional factors may not.**

[2] Notably, in the case of the one Named Plaintiff who had not been transferred from another facility, Robin G. Littlepage, Mr. Sabbatine did not find any information in her records that would support a decision to conduct a strip search. [11/22/05 Sabbatine Supp. Report at 2; 12/5/05 Sabbatine Dep. at 75.]

[12/5/05 Sabbatine Dep. at 69-70 (emphasis added).][3]

ARGUMENT

Defendants' records indicate that since July 2003, 1159 strip searches have been conducted on the sole grounds that the detainee was transferred from another facility, without any other articulated basis for suspecting the detainee of harboring contraband. These strip searches plainly violate well established principles of constitutional law, which hold that a pretrial detainee charged with non-violent, non-drug-related offenses may not be subjected to the severe humiliation and invasion entailed by a strip search without at least an individualized reasonable suspicion that the detainee is harboring contraband. The mere fact that a detainee has been transferred from another facility does not excuse jail officials from satisfying the Fourth Amendment's individualized reasonable suspicion requirement. Nor does the fact of a transfer, without more, satisfy the individualized reasonable suspicion requirement. The Plaintiffs are therefore entitled to a partial summary judgment finding Defendants' policy unconstitutional and finding that any member of the Admissions Class searched pursuant to Defendant's policy has been subjected to an unconstitutional strip search.

I. Defendants' blanket policy to automatically strip search all detainees transferred from other facilities, without individualized reasonable suspicion, is unconstitutional.

"Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law." *Ireland v. Tunis,* 113

[3] With respect to Named Plaintiffs Teague and Nelson, Sabbatine indicated that a search could have been justified based on information that these individuals had drug-related charges in their criminal histories. However, Sabbatine could not verify whether the drug-related charges pre-dated or post-dated the strip search. [12/5/05 Sabbatine Dep. at 71-73.] Sabbatine also admitted that he "had no way of knowing" whether the Jail was in possession of this criminal history information at the time the strip searches were ordered. [12/5/05 Sabbatine Dep. at 108-09.] Mr. Sabbatine also suggested that the strip search of Plaintiff Nance may have been justified by an indication of a prior suicide attempt. However, Ms. Nance denied telling the Jail officers that she was suicidal at the time of her admission, or that she had attempted to kill herself within the past three months. [Nance Dep. at 15-16 (attached as Exh. I).]

F.3d 1435, 1440 (6th Cir. 1997). The material facts concerning the unconstitutionality of the Defendants' strip search policy are undisputed. The Defendants admit that the Jail has a blanket policy of subjecting all detainees transferred from other facilities to an automatic strip search upon admission to the Jail – regardless of the charge and regardless of the particular circumstances of the detainee. Indeed, the Defendants admit that they did not even inquire about the circumstances of any individual detainees' transportation to the Jail or prior custody in the transferring facility before determining whether to order a strip search. Defendants therefore have admitted that detainees transferred from other facilities – including persons charged with non-violent, non-drug-related misdemeanor offenses – are routinely strip searched without individualized suspicion that a particular detainee is concealing contraband. This practice violates detainees' clearly established constitutional rights.

A. Under clearly established constitutional law, pretrial detainees charged with non-violent, non-drug related misdemeanor offenses may not be strip searched absent individualized reasonable suspicion.

Courts have repeatedly recognized that "strip and visual body cavity searches impinge seriously upon the values that the Fourth Amendment was meant to protect." *Swain v. Spinney*, 117 F.3d 1, 6 (1st Cir. 1997). Strip searches of pretrial detainees have been described as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and humiliation." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). It is therefore well established that "a strip search is an invasion of personal rights of the first magnitude." *Chapman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993).

Accordingly, in 1979, the U.S. Supreme Court held that a pretrial detainee has the right not to be strip searched unless the reasonableness of the search is established by "balancing of

the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

Applying this balancing test to strip searches of arrestees charged with non-violent, non-drug-related misdemeanor offenses, which are not normally associated with a high risk of smuggling contraband or weapons, "[t]he decisions of all the federal courts of appeals that have considered the issue [have] reached the same conclusion: a strip search of a person arrested for a traffic violation or other minor offense not normally associated with violence and concerning whom there is no **individualized reasonable suspicion** that the arrestee is carrying or concealing a weapon or other contraband, is unreasonable." *Masters v. Crouch*, 872 F.2d 1248, 1255 (6th Cir. 1989) (emphasis added).[4]

In *Masters v. Crouch*, the Sixth Circuit held that Jefferson County, Kentucky's blanket policy of strip searching all pretrial detainees who were transferred into the general jail population violated the detainees' clearly established constitutional rights. *Id.* The court concluded that Fourth Amendment balancing test discussed in *Wolfish* "does not validate a

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[4]*See also, e.g., N.G. v. State of Connecticut*, 382 F.3d 225, 232 (2d Cir. 2004) ("[W]e have ruled that strip searches may not be performed upon adults confined after arrest for misdemeanors, in the absence of reasonable suspicion concerning possession of contraband. . . . **[A]ll the circuits to have considered the issue have reached the same conclusion** . . . .") (emphasis added); *Roberts v. Rhode Island,* 239 F.3d 107, 109-112 (1st Cir. 2001) (When an arrestee "has been charged with only a misdemeanor involving minor offenses or traffic violations, crimes not generally associated with weapons or contraband, courts have required that officers have a reasonable suspicion that the individual inmate is concealing contraband."); *Swain v. Spinney,* 117 F.3d 1 (1st Cir. 1997); *Chapman v. Nichols*, 989 F.2d 393, 397 (10th Cir. 1993) (citing "**unanimous circuit authority condemning blanket strip search policies applied to minor offense detainees**") (emphasis added); *Weber v. Dell*, 804 F.2d 796, 799 (2d Cir. 1986) ("[T]he Fourth Amendment precludes prison officials from performing strip/body cavity searches of arrestees charged with misdemeanors or other minor offenses unless the officials have a reasonable suspicion that the arrestee is concealing weapons or other contraband based on the crime charged, the particular characteristics of the arrestee, and/or the circumstances of the arrest."); *Walsh v. Franco*, 849 F.2d 66, 69 (2d Cir. 1988) (holding "blanket policy calling for strip searches of all misdemeanor arrestees" to be unconstitutional); *Jones v. Edwards*, 770 F.2d 739, 742 (8th Cir. 1985); *Giles v. Ackerman*, 746 F.2d 614, 617 (9th Cir. 1984); *Hill v. Bogans*, 735 F.2d 391, 394 (10th Cir. 1984); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983); *Logan v. Shealy*, 660 F.2d 1007, 113 (4th Cir. 1981); *Davis v. City of Camden*, 657 F. Supp. 396, 400-401 (D.N.J. 1987); *Thompson v. County of Cook*, 428 F. Supp. 2d 807 (N.D. Ill. 2006).

blanket policy of strip searching pretrial detainees." *Id.* at 1253. The court relied on the numerous decisions from other circuits, which found no basis for believing that, as a class, a minor offenders charged with non-violent, non-drug-related crimes presented a risk of smuggling contraband. In the absence of such evidence, "the only justification for [a blanket] policy was institutional convenience" – i.e., that a blanket policy is "easier to administer than one which requires a balancing of interests in each case and an individual determination of need." *Id.* at 1254 (citing *Mary Beth G.*, 723 F.2d at 1272-73). The Sixth Circuit agreed with the other circuits that "institutional convenience" was insufficient to justify the intrusion of a strip search in the case of minor offenders. Accordingly, the court held "[i]t was equally clearly established that a person charged only with a traffic violation or nonviolent minor offense may not be subjected to a strip search unless there are reasonable grounds for believing that the **particular person** might be carrying or concealing weapons or other contraband." *Id.* at 1257 (emphasis added).

Thus, under *Masters*, it is clearly unconstitutional to strip search non-violent, non-drug-related offenders upon initial admission to a detention center pursuant to a blanket strip search policy that does not require an individualized finding of reasonable suspicion. But under the Jail's blanket policy of strip searching all arrestees transferred from other facilities, that is exactly what happens. Jailer Lantrip's unequivocal testimony was that all such transferees are searched automatically, regardless of their charges. [1/17/06 Lantrip Dep. at 26.] Moreover, Jailer Lantrip readily acknowledged that Jail officers do not make any individualized assessment of whether there is a reasonable suspicion that any particular arrestee transferred from another facility is carrying or concealing contraband based on the arrestee's charges, the circumstances surrounding the arrestee's transfer, or the conditions of the arrestee's confinement in the

transferring facility. [1/17/06 Lantrip Dep. at 26-27, 51-53.] Rather, once it is determined that an arrestee has been transferred from another facility, he or she is automatically strip searched without respect to the circumstances. [*Id.*] This is precisely the kind of blanket strip search policy held unconstitutional in *Masters*.

B. The mere fact that a detainee has been transferred from another facility is insufficient as a matter of law to justify a strip search in the absence of individualized reasonable suspicion.

Defendants have not, and cannot, identify any valid basis for concluding that the individualized reasonable suspicion requirement of *Masters* may be abandoned merely because an arrestee has been transferred from another facility. No case law supports such a radical conclusion. Nor is there any other basis in the record for concluding that the well-established rule set forth in *Masters* would not apply in this circumstance. To the contrary, Defendants' own expert witness flatly conceded that the mere fact that an arrestee has been transferred from another facility, by itself, is insufficient to justify a strip search.

1. The case law confirms that arrestees transferred from other facilities may not be strip searched in the absence of individualized reasonable suspicion.

No court that has ever found that the mere fact that an arrestee has been transferred from another facility, without more, is sufficient to warrant a strip search at the receiving facility. To the contrary, courts have consistently held that strip searches of nonviolent, non-drug-related minor offenders are unconstitutional in the absence of individualized reasonable suspicion, **even in circumstances where the searches were conducted following a transfer from another facility**. *See, e.g., N.G. v. State of Connecticut*, 382 F.3d 225, 232 (2d Cir. 2004); *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001); *Dodge v. County of Orange*, 282 F. Supp. 2d 41 (S.D.N.Y. 2003); *Lee v. Perez*, 175 F. Supp. 2d 673 (S.D.N.Y. 2001) (unconstitutional to strip search

arrestee following transport to regional detention center to post bail); *Ford v. Suffolk County*, 154 F. Supp. 2d 131 (D. Mass. 2001). *Accord Jones v. Edwards*, 770 F.2d 739, 741 (8th Cir. 1985) (noting that circumstances of custody did not establish reasonable suspicion where "[o]fficers were with [plaintiff] every moment after they read him the warrant; they watched him dress and go to the bathroom, thereby eliminating any chance that he might have secreted a weapon on his person").

In *N.G. v. State of Connecticut*, for example, the court squarely held that strip searches cannot be not justified "**simply because of transfers to other facilities.**" 382 F.3d 225, 233 (2d Cir. 2004) (emphasis added). The court rejected the defendants' contention – which mirrors the justification offered by Jailer Lantrip in this case – that strip searches following transfers are necessary "because it would be 'foolish' to rely on the searching at [the prior facility] and because contraband might have been picked up during transport." *Id.* at 234 n.12. According to the court, the mere possibility that contraband could be acquired during a transfer did not justify a blanket policy of searching all transferees. Rather, the court concluded that a strip search can only be justified upon examination of the individualized circumstances surrounding the transfer of a particular detainee to determine if a reasonable suspicion exists:

> Arguably, it was more convenient for the personnel at GDC to strip search S.C. upon her admission there, rather than determine whether she had been strip searched upon her prior admission to NHJDC and had remained in custody throughout the transfer process. Mere convenience, however, cannot be a sufficient interest to justify such a serious impairment of privacy. We recognize that unavoidable circumstances might arise, even during a period of continuous custody, that create opportunities for an inmate to acquire contraband, in which event a strip search might well be reasonable. No such circumstances were shown in this case.

Id. at 234.[5]

[5] *N.G.* involved strip searches of juveniles upon admission to juvenile detention facility. The court in *N.G.* held that blanket policies mandating strip searches upon initial admission to custody could be

Ford v. Suffolk County also is squarely on point. 154 F. Supp. 2d 131 (D. Mass. 2001). In *Ford*, the court granted partial summary judgment on § 1983 liability to a plaintiff class comprised of women who were subjected to routine strip searches upon their transfer from City of Boston facilities to the Suffolk County jail. Until May of 1999, the Suffolk Jail had a blanket policy of subjecting all of these female admittees to a routine strip search upon admission to the jail. *Id.* at 135. *See also id.* at 133-34. The court concluded that the policy was unconstitutional because "Jail officials made **no individualized findings** of reasonable suspicion prior to conducting strip searches of BPD [Boston Police Department] arrestees." *Id.* at 142 (emphasis added). Although the class members in *Ford*, by definition, had all been transferred from another facility, the court concluded that "the County **cannot reasonably have suspected the women, as a class, of harboring weapons or contraband at the time of admission**." *Id.* at 142 (emphasis added). The court noted that the factual record did not indicate that the BPD's practices in transferring detainees to the Suffolk county facility were not secure. *Id.* The court concluded that the defendants could not constitutionally adopt a blanket strip search policy simply to avoid making an individualized assessment of the particular circumstances of each transferee: "[a]n indiscriminate strip-search policy routinely applied . . . can not be justified simply on the basis of administrative ease in attending to security considerations." *Id.* at 142 (quotation omitted).

Similarly, in *Dodge v. County of Orange*, the court granted a permanent injunction to plaintiffs in a strip search class action, holding that it was unconstitutional for a county correctional facility to automatically strip search nonviolent and non-drug related offenders

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justified in the case of juveniles, even though such policies would not be justified for adult offenders, based on the state's special interest in detecting physical or sexual abuse. 382 F.3d at 237. It is significant that even though the *N.G.* court recognized a much broader scope of state authority to strip search juvenile offenders than adult offenders, the court still found an insufficient justification for subjecting juveniles to a blanket strip search policy following transfers from other facilities. *Id.* at 234.

following their remand to county facility from other law enforcement agencies or correctional facilities. 282 F. Supp. 2d 41 (S.D.N.Y. 2003). The plaintiffs in *Dodge* were all remanded to the county facility from other facilities while awaiting trial or the posting of bail. *Id.* The Defendants in *Dodge* defended their policy with the same institutional security arguments offered by Jailer Lantrip – i.e., that "no prudent correctional administrator could safely rely on security precautions taken by other law enforcement agencies, or even correctional facilities that may have had custody of the inmate before he or she arrived at OCCF." *Id.* at 47. The *Dodge* court nonetheless found that a blanket policy of strip searching all arrestees admitted to the facility plainly violated the established law that "persons charged with a misdemeanor and remanded to a local correctional facility have a right to be free of a strip search absent reasonable suspicion that they are carrying contraband." *Id.* at 82.

The *Dodge* court followed the Second Circuit's decision in *Shain v. Ellison*, 273 F.3d 56 (2d Cir. 2001), which reached the same conclusion on similar facts. In *Shain*, as in the *Dodge* case, the plaintiff was strip searched pursuant to a blanket policy requiring strip searches of all arrestees remanded to the custody of a county correctional facility by a court. The court concluded that "it was clearly established in 1995 [the time of the searches] that persons charged with a misdemeanor and remanded to a local correctional facility like NCCC have a right to be free of a strip search absent reasonable suspicion that they are carrying contraband or weapons." *Id.* at 66. *Shain* acknowledged that particular circumstances in an individual detainee's custodial history might create reasonable suspicion – "for example, a person who is allowed to visit the bathroom unescorted" – but concluded that "the remand [to the county correctional facility] could not provide reasonable and individualized suspicion." *Id.* at 64, 66.

The teaching of these cases is clear. The fact of an institutional transfer, without more, does not warrant abandoning minor offenders' rights not to be strip searched in the absence of individualized reasonable suspicion. In this case, Jailer Lantrip admits that no such individualized assessment was made before ordering a strip search of institutional transferees. Instead, arrestees transferred from other facilities were subject to an "automatic" strip search, regardless of the circumstances surrounding their prior custody or transfer. This blanket policy is plainly unconstitutional.

2. The Jail's blanket strip search policy is not based on any specific factual basis for suspecting institutional transferees, as a class, of harboring contraband.

In invalidating blanket strip search policies for detainees transferred from other facilities, courts have emphasized the absence any factual basis for suspecting institutional transferees, as a class, of harboring contraband. *See, e.g.*, *Ford*, 154 F. Supp. 2d at 142. *Accord Mary Beth G.*, 723 F.2d at 1272 (citing absence of any factual basis for finding that minor offenders, as a class, were likely to harbor contraband in invalidating blanket strip search policy for all incoming arrestees). The record in this case provides no reason to doubt these decisions. To the contrary, Defendants concede that the Jail's blanket strip search policy was not based on any particular facts known to the Defendants about the security practices involved in transferring detainees to the Hopkins County Jail. And the Defendants' own records fail to show a heightened risk of harboring contraband among detainees transferred from other facilities. Indeed, Defendants' own expert concedes that a detainee may not be strip searched merely because he was transferred from another facility. The only justification offered by the Defendants for searching all transferees, regardless of their individual circumstances, is the fact that the Defendants **lacked**

information to evaluate the security risk presented by any particular transferee. This justification is insufficient as a matter of law.

Initially, it is uncontested that the Jail's blanket strip search policy was not based on any facts known to the Defendants about the security practices involved in transporting arrestees to the Hopkins County Jail. To the contrary, Jailer Lantrip candidly admitted that he knew "very little" about these practices. [1/17/06 Lantrip Dep. at 51.] Jailer Lantrip further conceded "I don't think we ever did" ask about the circumstances surrounding transfers to the Hopkins County Jail to determine if a detainee had the opportunity to conceal contraband. [1/17/06 Lantrip Dep. at 52.] [6]

Additionally, the Defendants' own records belie any suggestion that institutional transferees as a class are more likely to be concealing contraband. Of the 1159 recorded strip searches that were ordered over the past three years on the basis of "transfer from another facility," all but six produced negative results. [Thacker Aff. ¶ 6 (attached as Exh. H).] Thus, an

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[6] The deposition testimony of the Named Plaintiffs also refutes any suggestion that transferees, as a class, were uniformly transferred under circumstances that would create security concerns. Ms. Ford, for example, testified that she had already been strip searched at the transferring facility, and was taken into custody and transferred to the Hopkins County Jail immediately upon her release. [Ford Dep. at 18-22.] *See generally Ford*, 154 F. Supp. 2d at 142 (fact that some plaintiffs had already been strip searched at transferring facility defeated claim that transferees, as a class, presented heightened security risk). Likewise, Ms. Nelson testified that on the three occasions she was transferred from the Caldwell County Jail to the Hopkins County Jail, she was never "booked in" to the general population at the Caldwell Jail, and merely waited 2-3 hours at the Caldwell facility until she could be transported to Hopkins County. [Nelson Dep. at 20-22.] According to Defendants' expert, Mr. Sabbatine, this kind of circumstance – i.e., where "the person did not go beyond the booking area of the [transferring] facility and then [was] transferred to the second jail" – would not "give me reason to be concerned about the presence of a contraband for an otherwise nonstrippable offender." [12/5/05 Sabbatine Dep. at 67-68.] Sabbatine explained that under these circumstances, there is no basis for differentiating a transferee from "a person being arrested, taken to the police station for interview, and then dropped off at the jail." [*Id.* at 67-68.] Plaintiff May similarly testified that he was arrested in Webster County and placed immediately into a holding cell, where he remained until his transfer. May testified that he was taken "directly from the hole, the holding cell to the Hopkins County Jail. . . . And they ran about a hundred miles an hour all the way to the [Hopkins County] jail." [May Dep. at 27-28.] May further testified that the Webster County officers searched his clothes and performed a pat down immediately before his transfer to the Hopkins County Jail. [May Dep. at 29-30.]

infinitesimal 0.51768 % of strip searches of arrestees transferred from other facilities generated any kind of positive result. And in five of these cases, the only contraband found was cigarettes or tobacco-related items.[7] [*Id.* at ¶ 6.] *See, e.g.*, *Mary Beth G.*, 723 F.2d at 1272 (affirming summary judgment and rejecting proffered jail security justification where "only a few items have been recovered from the body cavities of women arrested on minor charges over the years"); *Ford*, 154 F. Supp. 2d at 142 (granting summary judgment, finding no reasonable basis for concluding that transferees, as a class, were likely to be concealing contraband where contraband was found in less than one percent of searches).

Moreover, Defendants' own expert witness conceded that the mere fact that a detainee was transferred from another facility is not sufficient to warrant a strip search "in the absence of other factors that would justify the search." [12/5/05 Sabbatine Dep. at 70-71 (attached as Exh. F).] Mr. Sabbatine, who offered an expert opinion concerning the "State and Federal standards of care" regarding strip search policies and practices, testified that a decision to strip search an arrestee upon transfer to the second facility could only be made after examination of the "full circumstance of the custodial happenings in the initial facility." [12/5/05 Sabbatine Dep. at 68.] The mere fact that an arrestee had been transferred from another facility, according to Sabbatine, "**doesn't give me enough information to draw a conclusion that would satisfy me as to whether or not the person was likely to be strippable when they entered the second facility.**" [12/5/05 Sabbatine Dep. at 69 (emphasis added).]

Plaintiffs' expert, Gordon Kamka, was of the same view: "**[a] strip search due to transfer form another correctional facility cannot be justified for security reasons . . . .**" [8/30/05 Pls. Tender of Supp. Expert Op. (emphasis added).]

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[7] The only information shown in the sixth case were the words "code 4." There is no explanation in Defendants' records of what "code 4" stands for.

The only justification offered for the Jail's policy was Jailer Lantrip's testimony that he cannot have confidence in the security of any transfer because he has "no idea" about the security conditions in the transferring jail or "where they stopped en route to our jail, who they've had contact with, those type things." [1/17/06 Lantrip Dep. at 26.]

But Jailer Lantrip's unspecified and unsubstantiated concerns about security practices involved in institutional transfers is insufficient, as a matter of law, to justify a blanket policy of strip searching all arrestees transferred from other facilities. Indeed, the Second Circuit in *N.G.* rejected an identical justification offered by the defendants in that case, who claimed in would be "foolish" to rely on the security practices at other facilities or the transferring officers who previously had custody of a detainee. 382 F.3d at 234 n.12. Similarly, the *Dodge* the court held a blanket strip search policy for institutional transferees unconstitutional despite defendants' claim that "no prudent correction administrator could safely rely on security precautions taken by other law enforcement agencies . . .that may have had custody of the inmate before he or she arrived." 282 F. Supp. 2d at 47.

Reasonable suspicion to justify a strip search must be based on information "known to the officer *at the time* of the search." *Thompson v. County of Cook*, 408 F. Supp. 2d 807, 2006 U.S. Dist LEXIS 26155, at *18-19 (N.D. Ill. 2006) (citing *Kaniff v. United States*, 351 F.3d 780, 785 (7th Cir. 2003)) (emphasis in original).[8] Here, the decision to search was not based on any facts known to Jail staff at the time of the searches that indicated a risk of contraband. Rather, the blanket strip search policy was put in place because the Jail staff simply did not know the facts necessary to determine whether a security risk existed. But "Defendants have not explained nor cited cases for the somewhat remarkable proposition that the **lack of information** can create

[8] *See also generally Maryland v . Garrison*, 480 U.S. 79, 85 (1987) (constitutionality of search must be judged "in light of the information available to [the officers] at the time they acted").

a reasonable suspicion." *Id.* at *20 (emphasis added). Indeed, a rule holding that the mere absence of information is sufficient to justify a strip search would "encourage officers and jailers to deliberately refrain" from obtaining the information necessary to make reliable individualized risk assessments. *Id.*

The fact that the Jail's blanket strip search policy is not based on any actual knowledge about the specific security practices involved in transferring arrestees, or particular facts about the circumstances of any individual transfers, "demonstrate[s] that the only justification for the policy [is] institutional convenience" – i.e., that a policy of strip searching all detainees transferred from another facility "is easier to administer than one which requires a balancing of interests in each case and an individual determination of need." *Masters*, 872 F.2d at 1254 (citing *Mary Beth G.*, 723 F.2d at 1272-73)). The Sixth Circuit, along with all other courts to have considered the issue, has clearly held that institutional convenience is not a sufficient interest to justify a blanket strip search policy. *Id.* Put simply, "[a]n indiscriminate strip search policy routinely applied . . . cannot be constitutionally justified simply on the basis of administrative ease." *Logan*, 660 F.2d at 1013.

In sum, the Defendants' blanket policy of individually strip searching all detainees transferred from other facilities plainly violates pretrial detainees' clearly established constitutional rights. Every court that has considered the issue has agreed that the fact of an institutional transfer, by itself, does not justify a strip search in the absence of individualized reasonable suspicion. Even Defendants' own expert witness concedes this point. And Defendants have conceded that in the case of institutional transfers, they did not make the inquiries necessary to make an individualized determination of whether reasonable suspicion existed. Thus, any class members strip searched pursuant to the Defendants' policy have been

subjected to an unconstitutional search, and are entitled to partial summary judgment establishing Defendants' liability for their § 1983 claims.

II. Hopkins County is liable, as a matter of law, for unconstitutional strip searches conducted pursuant to the Jail's official policy of automatically strip searching all detainees transferred from another facility without individualized reasonable suspicion.

Plaintiffs are also entitled to a partial summary judgment finding that Hopkins County is liable for unconstitutional strip searches conducted pursuant to the Jail's blanket strip search policy for institutional transferees.

In *Monell v. Department of Social Services*, the Supreme Court squarely held that a municipal entity will be liable under 28 U.S.C. § 1983 when the defendant's "official policy is responsible for a deprivation of rights protected by the Constitution." 436 U.S. 658, 691 (1978). A municipal defendant's official policy may be evinced through formal enactments, such as "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or by an established practice that "[a]lthough not authorized by written law, . . . is so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Cash v. Hamilton County Dept. of Adult Probation*, 388 F.3d 539, 542-43 (6th Cir. 2004) (quotations omitted). *See also City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988); *Monell*, 436 U.S. at 691.

Here, there is no dispute it was the official policy at the Jail to require strip searches of all detainees transferred from other facilities. *See, e.g.,* 1/17/06 Lantrip Dep. at 6-7 (attached as Exh. E); 1/17/06 Lantrip Dep. at 26-27 (Jail had "blanket policy" to strip search all institutional transfers); 1/17/06 Lantrip Dep. at 52-53 ("Policy is one of those things one shoe fits everybody . . . . so it's a blanket thing. If you come from another facility . . . that we have no authority over, no control of, you're checked when you hit our door."); 12/5/05 Sabbatine Dep. at 64-65

(attached as Exh. F); 12/5/05 Sabbatine Dep., Exhibit 7, August 30, 2005, Soyer Letter (attached as Exh. G) ("The jail does have a policy of strip-searching inmates upon transfer from another facility."). Under *Monell*, therefore, Hopkins County is liable for the unconstitutional strip searches caused by this policy.

Courts have routinely held municipal defendants liable for unconstitutional strip searches under comparable circumstances.[9] In *Weber v. Dell*, for example, the Second Circuit found that the county defendant was liable under *Monell* for an unconstitutional strip search where "the County and the Sheriff conceded[d] that pursuant to jail policy a jail employee undertook a strip/body cavity search of Mrs. Weber after her arrest on misdemeanor charges in the absence of any ground other than her status as an arrested person for concluding that she was likely to be concealing contraband." 804 F.2d 796, 798, 802 (2d Cir. 1986).

Also illustrative is *Blihovde v. St. Croix County*, 219 F.R.D. 607 (W.D. Wis. 2003), which involved a class action alleging illegal strip search policies at a county jail. Based upon defendants' testimony concerning the practices at the jail, the court found that the jail custom was to search all incoming inmates without regard to reasonable suspicion. The court found this testimony established the county's liability under *Monell*, noting that "even when there is no express policy, a municipality may be liable when there is a custom of unconstitutional conduct." *Id.* at 618.

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[9] *See, e.g., Wachtler v. County of Herkimer*, 35 F.3d 77, 82 (2d Cir. 1994) (holding that liability of county would be established if "standard procedures for admitting a person to the jail . . . included routine strip searches of misdemeanor arrestees, absent reasonable suspicion of weapons or contraband"); *O'Brien v. Borough of Woodbury Heights*, 679 F. Supp. 429, 434-35 (D.N.J. 1988) (county held liable for unconstitutional strip search where "Defendants . . . concede that it is the policy of the Gloucester County Jail to strip search all inmates regardless of the charge."); *Davis v. City of Camden*, 657 F. Supp. 396, 402 (D.N.J. 1987) (requirements for municipal liability satisfied where county "admitted that the Camden County Sheriff's Office maintained a policy of having an officer of the same sex strip search any person unable to post bail").

III. Plaintiffs are entitled to preliminary injunctive relief.

This Court should also preliminarily enjoin the Defendants from continuing to enforce their blanket policy of strip searching all arrestees transferred from other facilities without reasonable suspicion that a particular detainee is concealing contraband or weapons. There are absolutely no factual disputes – the existence and nature of the Jail's blanket strip search policy is undisputed. This policy is unconstitutional as a matter of law. An oral hearing is therefore unnecessary, and the Court should enter the requested preliminary injunction without delay. *United States v. McGhee*, 714 F.2d 607, 612 (6th Cir. 1983) (evidentiary hearing is not required when motion for preliminary injunction presents "no triable issues of fact").

"A district court must consider four factors when determining whether to grant or deny a preliminary injunction: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest." *Déjà vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 400 (6th Cir. 2001).

In cases based on government violations of individuals' constitutional rights, a sufficient showing of likelihood of success will often be decisive. As the Sixth Circuit has noted, "when reviewing a motion for a preliminary injunction, if it is found that a constitutional right is being threatened or impaired, a finding of irreparable injury is mandated." *ACLU v. McCreary County*, 354 F.3d 438, 445 (6th Cir. 2003). "In other words, the first factor of the four-factor preliminary injunction inquiry--whether the plaintiff shows a substantial likelihood of succeeding on the merits--should be addressed first insofar as a successful showing on the first factor mandates a successful showing on the second factor--whether the plaintiff will suffer irreparable harm." *Id.*

Likewise, "it is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994). And "if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment." *Déjà vu of Nashville, Inc.*, 274 F.3d at 400.

As explained fully in Part I, *supra*, Defendants' blanket policy of strip searching all pretrial detainees transferred from other facilities without individualized suspicion is patently unconstitutional on its face and has caused, and continues to cause, repeated violations of arrestees' constitutional rights. The unconstitutionality of this policy is indisputable. Plaintiffs have therefore demonstrated both a strong likelihood of success on the merits and irreparable harm. *See Dodge v. County of Orange*, 282 F. Supp. 2d 41, 72 (S.D.N.Y. 2003) (holding that court's determination that blanket strip search policy was unconstitutional was sufficient to demonstrate requisite irreparable harm for preliminary injunction).

Moreover, the undisputed factual record in this case confirms that a preliminary injunction will promote the public interest, and not cause undue harm to the Defendants' interest in jail security. Indeed, Defendants' own expert conceded that the mere fact that an arrestee has been transferred from another facility does not present a heightened security risk, in the absence of other factors suggesting the transferee had an opportunity to conceal contraband. [12/5/05 Sabbatine Dep. at 67-68.] Thus, Defendants have no demonstrated need to search every single detainee transferred from another facility, regardless of the specific circumstances surrounding a particular detainee.

Additionally, the fact that the strip searches of only six of the 1159 detainees transferred from other facilities generated any kind of positive results – and in five of these instances the

only results reported were a finding of cigarettes or related items, such as matches[10] – clearly demonstrates that ceasing blanket strip searches of these arrestees will not result in a substantial increase in the amount of contraband brought into the Jail. [B. Thacker Aff. ¶ 6 (attached as Exh. H).] Indeed, it is not clear from the Jail's records whether a strip search was necessary to detect the contraband, even in those six instances. The Jail's records do not show whether contraband was concealed in a place that would only be located during a strip search, such as a bodily orifice, or whether it was located in a place, such as an arrestee's clothing, where it could have been discovered during a simple pat down search or through a search of the detainee's clothing after the detainee donned a jail uniform.

Moreover, the Jail can protect its institutional security interests by taking the necessary steps to identify and search those particular offenders who, because of their individual circumstances, may pose a security risk. See, e.g., *Giles v. Ackerman*, 746 F.2d 614, 618 (9th Cir. 1984); *Dodge*, 282 F. Supp. 2d at 88 (rejecting claim that it is "impossible" for booking officers to make individualized assessment of reasonable suspicion upon each detainee's transfer to county correctional facility). And "[o]f course, the County remains free to enhance its security by implementation of procedures that are less intrusive than strip searches, including the use of pat down searches and metal detectors . . . ." *Giles*, 746 F.2d at 618 (affirming injunction against blanket strip search policy).

Finally, in assessing the possible hardship to the Defendants, the Court must consider that if the Defendants continue to follow their blanket strip search policy, they will continue to expose themselves to additional § 1983 claims for punitive and compensatory damages from

[10] In the sixth instance, the only result reported was "code 4." Defendants' records do not explain what "code 4" means.

detainees subjected to unconstitutional strip searches. The *Dodge* court cited a similar concern in granting injunctive relief in that case:

> I note that defendants would suffer similar hardship even if I did not enter an injunction. . . . OCCF would expose itself to punitive damages in individual Section 1983 actions if it reverted to its past policy of strip searching all arrestees. Of course, one of the functions of punitive damages is to force a party to comply with the law. Thus, there exists a distinct possibility that OFFC would suffer the same hardship regardless of whether I issue an injunction.

See Dodge, 282 F. Supp. 2d at 139.

In sum, all factors weigh in favor of granting preliminary injunctive relief. Plaintiffs' motion for a preliminary injunction should therefore be granted.

CONCLUSION

For the foregoing reasons, Plaintiffs' motions for partial summary judgment and for preliminary injunctive relief should be **GRANTED**.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on this 11th day of July, 2006, a copy of the foregoing was served via United States Mail, sufficient postage prepaid, upon:

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