IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	Civil Case No. C2-99-1097
v.	:	JUDGE HOLSCHUH
CITY OF COLUMBUS, OHIO,	:	MAGISTRATE JUDGE KING
Defendant.	:	

DEFENDANT CITY'S MOTION TO DISMISS

The defendant City of Columbus hereby moves to dismiss the complaint filed by the United States in this litigation pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure. The United States has brought this lawsuit under 42 U.S.C. § 14141, which was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, and which has never before been upheld, construed, or applied by any court. Defendant contends that before this litigation can be permitted to proceed, this Court must first determine: (1) whether this statute was enacted within Congress's proper constitutional authority and whether it would unduly infringe upon the sovereign authority guaranteed to state and local officials by the Tenth Amendment; (2) whether the allegations made in this complaint are sufficient to satisfy the statutory requirement that the United States must demonstrate "a pattern or practice of conduct by law enforcement officers," with due regard to how the Court's construction of the statutory language bears on the foregoing constitutional inquiry; and (3) whether the allegations made in this complaint that are supposed to constitute the necessary "pattern or practice of conduct" must be circumscribed by the statute of limitations governing claims for deprivation of constitutional rights under 42 U.S.C. § 1983.

Defendant further asserts that when these determinations are made by the Court, they will provide grounds for dismissal of the complaint either because the Court lacks jurisdiction to adjudicate the United States' claims or because the United States has failed to state a proper claim upon which relief may be granted. For these reasons, as set forth more fully in the accompanying Memorandum, defendant respectfully requests that the Court grant the motion to dismiss this complaint.

Respectfully submitted:

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Dated: February 9, 2000

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DEFENDANT CITY'S MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS

INTRODUCTION

The United States brought this lawsuit under 42 U.S.C. § 14141, a statute that is brand-new and has never before been upheld, construed, or applied by any court. The statute, as enacted, is virtually devoid of any legislative history and consists merely of two paragraphs. They provide that the United States may bring a civil action to seek equitable and declaratory relief against any governmental authority whose law enforcement officers engage in a pattern or practice of conduct that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States. *See* 42 U.S.C. § 14141. The statute contains no definitions of any of these terms, and thus is silent about what must be proved to establish the requisite "pattern or practice of conduct" that is an essential element of the Government's single claim in this case.

The statute was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, Title XXI, § 210401, 108 Stat. 2071, ____ (1994). Another provision of the same legislation has been struck down on the grounds that Congress lacked the proper constitutional authority to enact it, and that issue is now awaiting decision before the United States

Supreme Court. *See Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 11 (1999) (U.S. Nos. 99-5 & 99-29). Yet another provision of the same legislation was challenged on Tenth Amendment grounds; it recently was upheld, but only after that case also made its way to the Supreme Court. *See Reno v. Condon*, 120 S. Ct. 666 (2000).

Defendant contends that before this litigation can be permitted to proceed, this Court must resolve the same kinds of jurisdictional issues by determining whether this statute was enacted within Congress's proper constitutional authority and whether application of the statute would unduly infringe upon the sovereign authority guaranteed to state and local officials by the Tenth Amendment. In light of these constitutional concerns, defendant further contends that the "pattern or practice" language of the statute must be construed to impose a strict threshold of proof upon the Government, and that the bare and generalized allegations made in this complaint are not sufficient to satisfy that strict threshold. Moreover, defendant notes that the allegations made in this complaint that are supposed to constitute the necessary "pattern or practice of conduct" must be circumscribed by the pertinent (2-year) statute of limitations that governs claims for deprivation of constitutional rights under 42 U.S.C. § 1983 that occur in Ohio. Because the complaint is devoid of details of any specific incidents, it nowhere addresses whether the supposed factual predicates for this lawsuit can meet that limitation. For each of these reasons, and in combination, defendant respectfully requests that the Court grant its motion to dismiss the complaint.

STATEMENT OF THE CASE

. October 21, 1999, the plaintiff (hereafter "United States" or "the Government") filed a complaint alleging that defendant City of Columbus is subject to equitable and declaratory relief under 42 U.S.C. § 14141. *See* Complaint ¶¶ 10-11. The complaint generally alleges that defendant, through the Columbus Division of Police, has "engaged in a pattern or practice of subjecting individuals to excessive force, false arrests and charges, and improper searches and seizures." *Id.* ¶ 1. No facts to support these assertions are alleged anywhere in the complaint: no names are provided, no dates or locations are alleged, and no description, details, or facts of any specific incidents are presented. Instead, the Government has simply offered sweeping generalizations alleging, among other things, that defendant has "tolerated" this unspecified conduct by failing adequately to train, supervise, monitor, investigate, and discipline its police officers. *Id.*

After the complaint was filed, this litigation was initially stayed so that the parties could consider any grounds for possible settlement of the issues. The stay expired on December 20, 1999, and thereafter the parties agreed that defendant's answer date would be set for February 10, 2000. Other proceedings have been held on the motion of the Fraternal Order of Police, Capital City Lodge No. 9, to intervene as a defendant in this case, and that motion is currently under submission to the Court. Defendant now has moved to dismiss the complaint on grounds of subject-matter jurisdiction and for failure to state a claim upon which relief may be granted.

STANDARD OF REVIEW

For purposes of deciding a motion to dismiss, the Court must accept as true the allegations made in the complaint. Nonetheless, the motion will be granted if the complaint is without legal merit or there is an insurmountable legal bar to relief. *See Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697, 699-701 (6th Cir. 1978). A motion that challenges subject-matter jurisdiction may attack the allegations on their face or may attack the facts which underlie the allegations. *See Ohio Nat'l Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990). The plaintiff bears the burden at all times of demonstrating that the Court has jurisdiction over the subject matter. *See RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1134-35 (6th Cir. 1996).

In addition, the complaint must contain allegations with respect to every material element necessary to sustain the relief requested on some viable legal claim. *See Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir. 1997); *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436-37 (6th Cir. 1988). The Court is not required to accept as true the bare assertion of legal conclusions or unwarranted factual inferences. *See Lewis v. ACB Business Servs., Inc.*, 135 F.3d 389, 405 (6th Cir. 1997); *Scheid*, 859 F.2d at 436-37; *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir. 1987). Where the complaint fails to state a proper claim upon which relief may be granted, it should be dismissed without proceeding to a trial. *See, e.g., Lewis*, 135 F.3d at 406-07; *Scheid*, 859 F.2d at 436-37; *Morgan*, 829 F.2d at 12.

LAW AND ARGUMENT

Before this litigation can go forward, the Court must first decide: (1) whether this statute was enacted within Congress's proper constitutional authority and consistent with the Tenth Amendment; (2) whether the allegations in this complaint meet the threshold for demonstrating "a pattern or practice of conduct by law enforcement officers," with due regard to how this language must be construed to avoid any constitutional infirmities; and (3) whether the 2-year statute of limitations for section 1983 claims circumscribes the permissible allegations in this complaint. On the basis of these points, defendant respectfully urges that this complaint, which contains only vague and generalized allegations that are utterly devoid of any concrete factual content, should be dismissed.

I. Congress Lacked Proper Constitutional Authority to Enact This Statute

Beginning with *United States v. Lopez*, 514 U.S. 549 (1995), the Supreme Court has acted with increased frequency to invalidate a variety of federal statutes, either on their face or as applied, because Congress lacked proper constitutional authority to enact them. In reinvigorating the core doctrine of federalism that the Congress is vested only with the powers enumerated in Article I of the Constitution, the Court has indicated that it will not accept sweeping assertions of general federal authority either on commerce clause grounds or on the "catch-all" grounds that Congress is acting to enforce the terms of the Fourteenth Amendment. *See, e.g., Lopez, supra* (invalidating the Gun-Free School Zones Act as not properly authorized under the Commerce Clause); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (invalidating the Religious Freedom Restoration Act as not properly authorized under section 5 of the Fourteenth Amendment); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199 (1999) (invalidating the Patent Remedy Act's attempt to waive state sovereign immunity as not properly authorized under section 5 of the Fourteenth Amendment); *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631 (2000) (invalidating the Age Discrimination in Employment Act's attempt to waive state sovereign immunity as not properly authorized under section 5 of the Fourteenth Amendment). This basic constitutional infirmity has now been found in another important component of the same legislation that is the source of the statute under scrutiny here. *See Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 830-889 (4th Cir. 1999), *cert. granted*, 120 S. Ct. 11 (1999) (U.S. Nos. 99-5 & 99-29) (invalidating the civil action created in the Violence Against Women Act of 1994 as not properly authorized under the Commerce Clause or section 5 of the Fourteenth Amendment).

In addition, the Supreme Court has become increasingly aggressive in invoking the Tenth Amendment to strike down federal statutes that intrude upon the functions and operations of state and local governments. *See, e.g., New York v. United States*, 505 U.S. 144 (1992) (invalidating portions of the Low-Level Radioactive Waste Policy Amendments Act of 1985 on Tenth Amendment grounds); *Printz v. United States*, 521 U.S. 898 (1997) (invalidating portions of the Brady Handgun Violence Prevention Act on Tenth Amendment grounds). In the wake of these decisions, it is clear that the long period of freewheeling congressional power to address any and all policy concerns, regardless of the effect on the constitutional balance between federal power and state and local authority, is now past.

At the time that 42 U.S.C. § 14141 was enacted, however, this seismic shift in the Supreme Court's jurisprudence was not yet apparent. As a result, this statute contains no clear identification of the source of constitutional authority that Congress relied upon to enact it. The legislative history is virtually barren, and contains no findings that would have justified Congress in invoking any particular source of constitutional authority. For these reasons, and because of the substantial extent to which any application of this statute would intrude upon state and local authorities, it cannot be upheld in the face of such a constitutional challenge.

A. This Statute Is Not Justified on Commerce Clause Grounds

In *Lopez*, the Supreme Court identified three proper categories of federal legislation under the Commerce Clause: laws regulating the channels of interstate commerce, laws regulating the instrumentalities of interstate commerce, and laws regulating activities which substantially affect interstate commerce. *See Lopez*, 514 U.S. at 558-59. Here, as in *Lopez*, the first two categories of congressional authority are "quickly disposed of," since it is clear that 42 U.S.C. § 14141 does not regulate either the "channels" or "instrumentalities" of interstate commerce. *Id.* at 559; *see also Brzonkala*, 169 F.3d at 831 n.4.

This statute also cannot be justified on the basis that it "substantially affects" interstate commerce. As in *Lopez*, which considered the constitutionality of the Gun-Free School Zones Act, the activity being regulated here is non-economic in nature and "is not an essential part of a larger regulation of economic activity." 514 U.S. at 561; *see also id.* at 559-67. And the statute at issue here, like the ban on guns in the vicinity of schools that was struck down in *Lopez*, cannot be sustained "under our cases upholding regulation of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 567. Indeed, even the fact that the guns at issue in *Lopez* were originally sold in interstate commerce did not save the constitutionality of that law. Because the connection to interstate commerce is even more tenuous here, this statute does not fall "within the fair ambit of the Court's practical definition of commercial regulation." *Id.* at 573-74 (Kennedy, J., concurring); *see also Brzonkala*, 169 F.3d at 834-36 (same).

Moreover, this statute shares the fundamental procedural defects that the Court identified with the law struck down in *Lopez*. As was true of the Gun-Free School Zones Act, this statute lacks a jurisdictional element. *See* 514 U.S. at 561; *see also Brzonkala*, 169 F.3d at 831-33, 836. Thus, Congress did not even attempt to assert that this statute was authorized under the Commerce Clause. Moreover, this statute shares the fundamental defect that the Court emphasized in *Lopez*, for here as there Congress made no findings to establish the necessary factual connection to justify this measure as "having a substantial relation to interstate commerce." *Id.* at 558-59. The *Lopez* Court noted that such legislative findings "would enable [the Court] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye," and stated that the lack of any such findings was crucial to its decision to invalidate the challenged measure. *Id.* at 563. Without this essential foundation, the courts are simply left "to pile inference upon inference" in order to sustain this statute on commerce clause grounds. This the Court refused to do in *Lopez* because the Constitution confers no "general police power" upon Congress. *Id.* at 567. For all of these reasons, this statute cannot be upheld as a valid exercise of congressional authority under the Commerce Clause.

B. This Statute Is Not Justified Under Section 5 of the Fourteenth Amendment

Although there is no jurisdictional element in 42 U.S.C. § 14141 to link it to congressional exercise of the enforcement power conferred under section 5 of the Fourteenth Amendment, the Government likely will assert this basis as the constitutional authority to justify this statute. In the past several years, the Supreme Court has developed a new test for determining whether Congress may permissibly invoke this authority to justify its legislative enactments, and has applied that test vigorously to invalidate the application of several statutory provisions. *See, e.g., City of Boerne*, 521 U.S. at 516-36; *Florida Prepaid*, 119 S. Ct. at 2205-11; *Kimel*, 120 S. Ct. at 644-50; *see also Brzonkala*, 169 F.3d at 861-889.

The test for applying section 5 has two parts. First, under the guise of enforcing the Constitution, Congress may not "define its own powers by altering the Fourteenth Amendment's meaning." *City of Boerne*, 521 U.S. at 529. This statute does not appear to suffer from that infirmity. Second, "[w]hile preventive measures are sometimes appropriate remedial measures, there must be a congruence between the means used and the ends to be achieved." *Id.* at 530. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one."

Id. Of particular concern are statutes whose "[s]weeping coverage ensures [their] intrusion" upon state and local governments, "pervasively prohibit[ing] constitutional state action in an effort to remedy or to prevent unconstitutional state action." *Id.* at 532-33. Such enactments are not valid under section 5 because they reflect "a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *Id.* at 533.

This requirement of "proportionality" and "congruence" between the "means-end fit" is the constitutional problem presented by 42 U.S.C. § 14141 as an exercise of Congress's authority under section 5. The stated purpose of the Court's new test is to preserve "vital principles necessary to maintain separation of powers and the federal balance." *Id.* at 536. This untested statute, as wielded by the Government in its complaint in this case, flunks that constitutional test of "proportionality" and "congruence."

One means of making this determination is "by examining the legislative record containing the reasons for Congress' action." *Kimel*, 120 S. Ct. at 648. Here, as in *Kimel*, this examination turns up little or nothing to indicate that this statute is more than an "unwarranted response to a perhaps inconsequential problem." *Id.* at 648-49. As noted earlier, there is no legislative history at all to support the rationale for this provision as contained in the 1994 legislation. A predecessor proposal that was not enacted had generated one brief committee report, which referred to a handful of examples of such alleged police misconduct around the country, including anecdotal and affidavit submissions, and referred to two cases adjudicated in Washington and North Carolina that had resulted in large damage awards against the offending departments and officers. *See* H.R. Rep. No. 242, 102d Cong., 1st Sess, at 402-03 (1991). As the Supreme Court found in *Kimel*, this sparse evidence "falls well short of the mark," relying largely on undocumented allegations and failing "to identify a widespread pattern" of unconstitutional conduct that had gone unredressed. *Kimel*, 120 S. Ct. at 649-50. "The appropriateness of remedial measures must be considered in light of the evil presented. Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Id.* (quoting *City of Boerne*, 521 U.S. at 530). Therefore, as in *Kimel*, a full review of this statute's legislative history "confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Id.* at 650; *see also Florida Prepaid*, 119 S. Ct. at 2210 ("The legislative history thus suggests that the Patent Remedy Act does not respond to a history of 'widespread and persisting deprivation of constitutional rights' of the sort Congress has faced in enacting proper prophylactic legislation.") (quoting *City of Boerne*, 521 U.S. at 526).

Another matter to consider in making this constitutional determination is the proposed application of this statute in this case. In its complaint, the Government asserts that the defendant, through the Columbus Division of Police, has engaged in a "pattern or practice of conduct" that has violated the constitutional rights of individual citizens. *See* Complaint ¶ 1. Yet the complaint provides absolutely no concrete facts to support these assertions. No numbers, description, details, or facts of any specific incidents are presented. Instead, the Government simply makes sweeping generalizations alleging, among other things, that defendant has "tolerated" this unspecified conduct. *Id.* On this conclusory basis, it is apparent that the Government seeks a broad structural injunction that would allow federal officials to assert pervasive control over the Columbus Division of Police. The federal control would extend to all aspects of the police officers' authority to exercise the police powers by training new and current officers, supervising their performance of their duties, monitoring their daily responsibilities, investigating all complaints filed by any individual, and by assuming control of the manner in which police officers are disciplined — thereby displacing the operation of city charter provisions, municipal ordinances, department policies, and existing labor agreements. The clear effect of the relief sought by the Government in this case would be precisely what the Court directly condemned in the *City of Boerne* case as unacceptably disproportionate: to "pervasively prohibit constitutional state action in an effort to remedy or to prevent unconstitutional state action." *Id.*, 521 U.S. at 532-33; *see also Florida Prepaid*, 119 S. Ct. at 2210; *Kimel*, 120 S. Ct. at 649-50.

The "proportionality" and "congruence" of such sweeping relief is thus highly questionable. In any instance where an officer engages in conduct that violates an individual's constitutional rights, the aggrieved party already can sue the officer in federal court under 42 U.S.C. § 1983 for compensatory damages, appropriate injunctive relief, and full payment of attorney's fees. Indeed, as explained further below, the same predicate showing what is necessary to prevail in such a lawsuit must be established in this case for each asserted violation that is alleged to form part of the "pattern or practice" of which the Government complains. *See* Section II, *infra*. In addition, the Federal government can respond to any egregious violations of individual rights by prosecuting the offending officers under the federal criminal laws that have long protected individual citizens against the abuse of their civil rights. *See* 18 U.S.C. §§ 241, 242. These existing provisions are carefully tailored to remedy the effects of specific violations of individual rights. They are strikingly different from the much broader institutional response embodied in 42 U.S.C. § 14141, which is frankly disproportionate to any perceived justification for this statute, and is being invoked by the Government in this case in an effort to obtain a structural injunction that would authorize it to control the daily activities, policies, and decisions of the Columbus Division of Police.

The Supreme Court has squarely stated its own disapproval of such broad institutional remedies imposed by the federal courts in the context of the state and local police power. In *Rizzo v. Goode*, 423 U.S. 362 (1976), the Court considered whether to uphold the terms of a broad preventive injunction that the lower courts had imposed upon the Philadelphia Police Department in a class action alleging a pervasive pattern of illegal and unconstitutional police mistreatment of minority citizens. The substance of the allegations related to 28 incidents over the course of a year, and the Supreme Court accepted for purposes of its decision that 16 of the incidents were established as instances where individual police officers committed violations of constitutional rights. *Id.* at 367-68. Based on these incidents, the lower courts entered an injunction mandating a "comprehensive program for dealing adequately with civilian complaints," which included revisions to the existing police manuals and procedures and revisions to the procedures for processing, investigating, and adjudicating complaints against officers.

The Supreme Court noted that injunctive relief was proper under 42 U.S.C. § 1983, but overturned this structural injunction, holding that the "scope of federal equity power" should not be extended "to the fashioning of prophylactic procedures for a state agency designed to minimize this kind of misconduct on the part of a handful of its employees." *Id.* at 378. The Court also noted that "important considerations of federalism are additional factors weighing against" the imposition of such relief, for when "the exercise of authority by state officials is attacked, federal courts must be constantly mindful of the special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law." *Id.* (quotation omitted). This is especially true, the Court emphasized, when the police power and the criminal justice process would be affected by such relief, for "a major continuing intrusion of the equitable power of the federal courts into the daily conduct of state criminal proceedings is in sharp conflict with the principles of equitable restraint which this Court has recognized." *Id.* at 379-80 (quoting *O'Shea v. Littleton,* 414 U.S. 488, 502 (1974)). The Court thus overturned the injunction, holding that it imposed an impermissibly "sharp limitation on the department's latitude in the dispatch of its own internal affairs." 423 U.S. at 379 (quotation omitted).

The same concerns are obviously just as pertinent in this case. In this case, the Government seeks to impose injunctive restrictions against the Columbus Division of Police that are even more sweeping than those struck down in *Rizzo* — restrictions that would dictate the training, supervision, and monitoring of officers' daily activities, the investigation and adjudication of all complaints, and the processes used to discipline officers. Here, as in *Rizzo*, such broad relief would impose an impermissibly "sharp limitation on the department's latitude in the dispatch of its own internal affairs" that would contravene "important considerations of federalism." *Id.* at 378-80. The mere fact that Congress has authorized equitable relief under 42 U.S.C. § 14141, just as it has done under 42 U.S.C. § 1983, does not justify an intrusive structural injunction of the type that the Government is seeking in this case. *See Rizzo*, 423 U.S. at 378-80.

C. Application of This Statute in This Case Would Violate the Tenth Amendment

Finally, the imposition of a broad structural injunction in this case to control the everyday affairs of the Columbus Division of Police would run afoul of the Tenth Amendment. In *Printz*, the Court struck down portions of the Brady Handgun Violence Prevention Act on the grounds that it improperly altered the constitutional federal-state balance by effectively commandeering state and local officials into the service of federal policy objectives. *See id.*, 521 U.S. at 904-33. While an individualized injunctive remedy that was carefully tailored to prevent a specific harm would not necessarily run afoul of this provision, a broad structural injunction that would place federal officials effectively in charge of the routine details of the activities, decisions, and policies of the local police in the exercise of their duties cannot be upheld under the Tenth Amendment. *See id.* at 921 ("municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere") (quotation omitted); *id.* at 922 (the Federal Government's power "would be augmented immeasurably if it were able to impress into its service — and at no cost to itself —the police officers of the 50 States."); *see also Rizzo,* 423 U.S. at 378-80 (such broad equitable relief imposed to control the practices and procedures of local police departments would contravene "important considerations of federalism").

II. In Any Event, the Allegations in This Complaint Do Not Suffice to Establish a "Pattern or Practice of Conduct," as This Language Must Be Construed

Even if the Court were to uphold 42 U.S.C. § 14141 on its face as having been enacted within Congress's proper legislative authority, there are grave difficulties in construing this statute so as to avoid constitutional infirmities in its application. Most importantly, the requisite "pattern or practice of conduct" must be strictly construed in order to prevent this statute from running afoul of the proportional "means-end" fit that the Supreme Court has now formulated and applied as the basic test for determining whether Congress had the necessary authority to legislate under section 5 of the Fourteenth Amendment. When that strict standard of proof is correctly applied in this case, it is apparent that the vague and generalized allegations presented in the Government's complaint do not meet its threshold burden for surviving a motion to dismiss.

A. The Supreme Court Has Strictly Defined a Statutory "Pattern or Practice"

The language of 42 U.S.C. § 14141 has never before been construed or applied by any court. Nonetheless, the Supreme Court has definitively interpreted the same critical phrase — "pattern or practice" of unlawful conduct — in addressing the elements of proof necessary to establish a valid claim under section 703(a) of Title VII. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). In that decision, the Court held that to bear its burden of showing a "pattern or practice" of violations under Title VII, "the Government ultimately had to prove more than the mere occurrence of isolated or 'accidental' or sporadic discriminatory acts." *Id.* at 336. Instead, the Government had to establish that such unlawful conduct "was the [defendant's] standard operating procedure — the regular, rather than the unusual, practice." *Id.*; *see also Cooper v. Federal Reserve Bank of Richmond*, 467 U.S. 867, 876 (1984) (same). In the *Teamsters* case, the Court concluded that the Government had carried its burden by presenting detailed statistical evidence of illegal discrimination, along with individual testimony that established more than forty specific instances of unlawful conduct. *See* 431 U.S. at 337-43.

The Seventh Circuit applied this holding more recently in *King v. General Elec. Co.*, 960 F.2d 617 (7th Cir. 1992). In *King*, several former employees brought a class lawsuit against their employer alleging that they had been targets of age discrimination. Although they marshaled a limited amount of statistical evidence to bolster their claims, the court applied the *Teamsters* decision and held that seventeen instances over three years were insufficient to constitute the requisite "pattern or practice" of age discrimination to support the class lawsuit. *See id.* at 619-27. The case thus reinforces the point that a small number of alleged incidents cannot, by themselves, satisfy the more rigorous statutory requirement of a "pattern or practice" of unlawful conduct.

In addition, under this statute it is clear that the Government must show that each incident alleged to form part of the supposed "pattern or practice of conduct" must itself satisfy the statutory requirements for making out a proper claim under 42 U.S.C. § 1983. That is, it does not suffice for the officers merely to have acted "improperly" or "unreasonably" in specific instances. In each case, their conduct must rise to the level of an actual violation of an individual citizen's constitutional rights, and the Government will bear the burden of proof in demonstrating that this did indeed occur. In this regard, at least, this statute is very specific. *See* 42 U.S.C. § 14141 (referring to "a pattern or practice of conduct by law enforcement officers . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States"). This legal prerequisite further limits the Government's ability to allege and prove a proper case here.

B. This Statute Must Be Construed Strictly to Avoid Constitutional Concerns

In addition, the Court must construe 42 U.S.C. § 14141 strictly to avoid the constitutional questions raised and discussed in Section I, *supra*. It is axiomatic that the federal courts are obliged to give federal statutes a reasonable construction so as to avoid difficult constitutional problems "unless such construction is plainly contrary to the intent of Congress." *See, e.g., United States v. Winstar Corp.*, 518 U.S. 839, 875 (1996) (quoting *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1987)); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (same).

If this Court were to construe the statutory "pattern or practice" requirement so that it could be met by a few isolated incidents of improper conduct by individual officers, then this statute would run up against the very constitutional concerns that the Supreme Court discussed in detail in the *Rizzo* case. *See* 423 U.S. at 378-80. At a minimum, the Court must construe this language more strictly than the Supreme Court construed Title VII's similar "pattern or practice" language in the *Teamsters* case and than the Seventh Circuit applied it in the *King* case. In the latter case, in particular, the court's holding (with no pressure from any constitutional backdrop) that seventeen instances of improper conduct over three years was insufficient to constitute a "pattern or practice" of illegal age discrimination provides useful guidance in applying in this case what must be the even more rigorous requirements of 42 U.S.C. § 14141. *See King*, 960 F.2d at 619-27; *see also Rizzo*, 423 U.S. at 368, 373-80 (sixteen alleged incidents where officers were presumed to have violated constitutional rights over the course of a year did not suffice to justify a broad preventive injunction reconstituting police policies and procedures). Any lesser threshold of proof would negate any possible view that this legislation's "means-end" fit under section 5 of the Fourteenth Amendment is proportionate and constitutionally permissible under the Supreme Court's recent decisions in *City of Boerne*, *Florida Prepaid*, and *Kimel*.

C. The Allegations in This Complaint Do Not Meet This Strict Standard

By contrast to these strict standards that must be adopted in applying 42 U.S.C. § 14141, the extremely generalized complaint in this case falls far short of making out a proper claim for relief. The Government has alleged no facts to allow the Court to test the sufficiency of its claims as a legal matter, and has not alleged the necessary facts for properly pleading a "pattern or practice" claim. The Supreme Court has rejected a "heightened pleading standard" for cases brought under 42 U.S.C. §1983. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993). However, lower courts have held that when a "pattern or practice" of abuse has been alleged under 42 U.S.C. §1983 specific facts supporting the allegation must be plead in order for the complaint to survive a motion to dismiss. *See, e.g. Carroll v. Bristol Township*, 827

F. Supp. 332,335 (E.D. Pa. 1993)(granting a motion to dismiss because the plaintiff did not allege specific conduct supporting a broad allegation that the municipality maintained a policy or custom of failing to train its officers); *East v. City of Chicago*, 719 F. Supp. 683, 692-93 (N.D. Ill.1989)(granting a motion to dismiss because plaintiff merely asserted the existence of a policy or custom without alleging specific facts evidencing its existence); *Atchinson v. District of Columbia*, 73 F.3d, 422-23 (D.C. Cir. 1996)(holding that a pleading alleging a single specific instance of improper training in the use of force could withstand a motion to dismiss, but only if that instance was so unusually serious as to raise doubts about a municipality's training policies).

In the current case, the complaint merely repeats the conclusory assertion that defendant has engaged in a "pattern or practice of conduct" with no particulars to support this assertion. Additionally, as discussed in the following section, the Government's burden of alleging specific incidents in support of their "pattern or practice" claim is likely governed by a 2-year statute of limitations period. This factor serves to severely limit the scope of alleged violations that the government may examine. No specific incidents of any actual constitutional violations are described in the complaint. The principles of "notice pleading" have been stripped so bare as to be nonexistent in this case, the critical omissions that have resulted simply will not suffice to allow the Government's claim to proceed to trial. *See, e.g., Scheid*, 859 F.2d at 436 ("more than bare assertions of legal conclusions is ordinarily required to satisfy federal notice pleading requirements").

If the Court is to apply the strict threshold of proof that must be adopted in view of the serious concerns about the constitutionality of 42 U.S.C. § 14141, then it must be applied in a meaningful way and the Government must provide much more than it has done here to state a proper claim upon which relief may be granted. *See, e.g., Scheid*, 859 F.2d at 437 ("when a complaint omits facts that, if they existed, would clearly dominate the case, it seems fair to assume that those facts do not exist") (quoting *O'Brien v. DiGrazia*, 544 F.2d 543, 546 n.3 (1st Cir. 1976), *cert. denied*, 431 U.S. 914 (1977)). Even when viewed under the liberal pleading standards of Federal Rule of Civil Procedure 8, the Government's complaint falls short of alleging even the barest of facts necessary to survive a Motion to Dismiss.

III. The Allegations in This Complaint Do Not Satisfy the Statute of Limitations

A. These Allegations Must Be Governed by a 2-Year Limitations Period

The statute invoked in this case contains no prescribed limitations period for the cause of action that it purports to create. *See* 42 U.S.C. § 14141. In this posture, the Supreme Court has indicated that the federal courts are to borrow the most appropriate state statute of limitations to govern the federal claim. *See Wilson v. Garcia*, 471 U.S. 261, 268-69 (1985). Here, where the federal claim depends upon establishing a "pattern or practice" of conduct, each instance of which must be found independently to violate 42 U.S.C. § 1983, the proper limitations period is the same one that governs federal claims brought under that provision.

In *Owens v. Okure*, 488 U.S. 235 (1989), the Supreme Court held that all section 1983 claims should be governed by the state statute of limitations for personal injury claims. *Id.* at 240-41. The Sixth Circuit has applied *Owens* to hold that section 1983 claims arising in Ohio are governed by the 2-year period applicable to state actions for bodily injury. *See Browning v. Pendleton*, 869 F.2d 989, 990-992 (6th Cir. 1989). The same 2-year limitations period must govern the Government's claim in this case, particularly when this statute is construed in light of the serious underlying concerns about its constitutional validity.

B. This Complaint Is Too Vague to Survive Application of the 2-Year Period

The complaint filed in this case, as noted earlier, contains no facts to support the generalized allegation that defendant, through the Columbus Division of Police, has "engaged in a pattern or practice of subjecting individuals to excessive force, false arrests and charges, and improper searches and seizures." *Id.* ¶ 1. No names are provided, no dates or locations are alleged, and no description, details, or facts of any specific incidents are presented. Instead, the Government has simply offered conclusory assertions that do not permit either the defendant or this Court to test the legal sufficiency of the Government's claims on the face of the complaint.

In particular, with a complaint that provides no specifics of any alleged incidents and no dates when they occurred, it is not possible to determine whether the Government's claim survives application of the proper limitations period. Not only is it unclear from the face of the complaint whether any alleged incidents occurred within the governing 2-year period, but the Government fails to establish that the strict threshold for establishing a "pattern or practice" of improper conduct can be met by occurrences that fall within the 2-year period. These serious pleading deficiencies do not permit the Court to sustain the relief requested or to accept as true any of the necessary legal conclusions or factual inferences that are not supported by the lack of substance provided in this complaint. *See, e.g., Scheid*, 859 F.2d at 436-37; *Lewis*, 135 F.3d at 406-07; *Morgan*, 829 F.2d at 12. On these grounds, therefore, the pervasive omissions in these pleadings warrant dismissal of the Government's complaint.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that the Court address the critical issues involved in interpreting and applying this new statute to the allegations raised in this case, and upon doing so to grant the defendant's motion to dismiss this complaint.

Respectfully submitted:

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Dated: February 9, 2000

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Defendant City's Motion to Dismiss was sent by regular U.S. Mail, postage prepaid, to:

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