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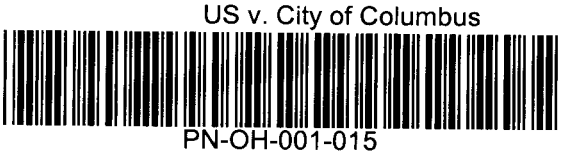

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RE: *United States of America v. City of Columbus, Ohio*
Case No. C2-99-1097

Dear Counsel:

Enclosed please find a copy of the Defendant City's Objections to the Report and Recommendation of the Magistrate Judge to be filed in the above captioned matter.

Sincerely,

Joshua Cox /sw

Joshua T. Cox
Assistant City Attorney

JTC:sw
Enclosure

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, *et al.*,	:	MAGISTRATE JUDGE KING
Defendants.	:	

DEFENDANT CITY'S OBJECTIONS TO THE REPORT AND RECOMMENDATION OF THE MAGISTRATE JUDGE

Pending before the Court is the Magistrate Judge's *Report and Recommendation* (doc. 57), in which it is recommended that defendant City of Columbus' [hereinafter "City"] motion to dismiss be denied. For the following reasons, defendant City objects to the *Report and Recommendation* insofar as it recommends denial of the motion to dismiss. Specifically, defendant City objects to that portion of Section IV. of the *Report and Recommendation* in which it is determined that 42 U.S.C. §14141 reflects a valid exercise of congressional power under §5 of the Fourteenth Amendment,[1] and to Section VI. of the *Report and Recommendation*, in which the Magistrate Judge concludes that the plaintiff is not bound by any statute of limitations in this action.

I. UNCONSTITUTIONALITY OF THE STATUTE

This lawsuit is based on 42 U.S.C. § 14141, a statute that the parties agree has never been upheld, construed, or applied by any court. After discussing the recent jurisprudence from the Supreme Court on the proper analysis for determining the constitutionality of legislation under §5 of the Fourteenth Amendment, *Report and Recommendation* at 9-11, the Court summarily

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[1] Primarily discussed in subsection B of Section IV, *Report and Recommendation* at 11-12.

dispenses with the City's arguments concerning the breadth of the remedies authorized under §14141 in relation to the congruence and proportionality test. *Report and Recommendation* at 11-12. The considerable intrusion of the federal government into the operation of local police departments authorized under this statute goes to the heart of the issue of federalism, warranting a higher degree of judicial scrutiny than that reflected in the *Report and Recommendation.* The City's arguments concerning the breadth of the remedies authorized under §14141 in relation to the congruence and proportionality test, as set forth in detail in its memoranda submitted in support of the motion to dismiss,[2] can be summarized as follows.

Under *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court set out a new constitutional test for when Congress may legitimately exercise its §5 power to enact legislation that imposes restrictions upon state and local governments. Under the first part of the two-part test, Congress may not "define its own powers by altering the Fourteenth Amendment's meaning" under the guise of enforcing the Constitution. *Id.* at 529. There is no dispute on this part of the test as applied to §14141. Under the second part, "[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 §5 because they reflect "a lack of proportionality or congruence between the means adopted and the legitimate end to be

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[2] *See* Def. City's Memo. in Support of the Motion to Dismiss (doc. 23), at 8-13; Def. City's Reply Memo. in Support of the Motion to Dismiss (doc. 35), at 2-8; Def. City's Reply Memo. to Plaintiff's Supp. Memo. (doc. 45), at 1-4.

achieved." *Id.* at 533. It is this second part of the test, in which the breadth of the remedies must be examined, where §14141 fails.

The *Report and Recommendation* relies too heavily on the "much deference" to which Congress is entitled in fashioning remedies under §5 of the Fourteenth Amendment, *id.* at 536, without giving due regard for the Court's admonition that "[t]he 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.* at 530; *see also Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 649-50 (2000) (same). Without consideration of the latter concern, Congress would be free to enact any category of broad remedies whatsoever "in an effort to remedy or to prevent unconstitutional state action," *City of Boerne*, 521 U.S. at 533, which would tend to destroy "vital principles necessary to maintain separation of powers and the federal balance," *id.* at 536.

Focusing therefore on the second prong of the test for judging the validity of legislation enacted under §5, the issue is whether the remedies authorized under the statute and sought in this case are "proportional" and "congruent" to the alleged harms that have spawned this lawsuit. The Supreme Court has identified two avenues of inquiry in making this constitutional determination. First, the courts should "examin[e] the legislative record containing the reasons for Congress' action." *Kimel*, 120 S. Ct. at 648. As applied to §14141, the sparse, indirect history from a prior session of Congress addressing a prior version of the statute simply does not support the breadth of the remedy authorized under that statute, plaintiff's post-enactment efforts to supplement that history notwithstanding. The House Committee's unsupported and conclusory descriptions of a "serious" and "real" problem, as noted in the *Report and Recommendation* at 11, are based, at best, on evidence of isolated incidents, not on evidence of a

nationwide problem of a pattern or practice of police misconduct. Such 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. Indeed, the court cases referred to in the committee report had already resulted in large damage awards. 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 Postsecondary Educ. Expense Bd. v. College Savings Bank*, 119 S. Ct. 2199, 2210 (1999) ("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).

Under the second avenue of inquiry, the courts should consider the breadth of the remedies authorized by the statute and its proposed application in the circumstances presented. Here, as the plaintiff concedes, it does not seek simply a negative injunction that would bar the City, through the Columbus Division of Police, from violating constitutional rights in the manner identified. Instead, it seeks, *inter alia*, an "order requiring the City to adopt and implement policies, practices, and procedures to remedy the pattern or practice...." Complaint at ¶ 11. This is, in fact, the basis for broad structural relief that would allow federal officials to assert pervasive control over the Columbus Division of Police. That control would extend to all aspects of training officers, supervising their performance, monitoring their daily responsibilities, investigating complaints, and assuming control of their discipline. Such structural relief would have the effect of displacing the operation of city charter provisions, municipal ordinances, department policies, and existing labor agreements. The clear effect of the relief sought by the

plaintiff in this case would be precisely what the Supreme Court has directly condemned as unacceptably disproportionate: to "pervasively prohibit[] constitutional state action in an effort to remedy or to prevent unconstitutional state action." *City of Boerne*, 521 U.S. at 532-33; *see also Florida Prepaid*, 119 S. Ct. at 2210; *Kimel*, 120 S. Ct. at 649-50. The City's operation of its police department is a constitutional state action. The displacement of numerous core parts of that function authorized by §14141 is, for all intents and purposes, a "pervasive prohibit[ion]" of that constitutional action.

In its over-reliance on the factor of deferring to Congress, the *Report and Recommendation* fails to adequately take into account that in the Supreme Court's recent decisions reconsidering congressional authority to legislate broadly under §5, the *central* concern is to "maintain . . . the federal balance." *City of Boerne*, 521 U.S. at 536. The statute at issue here implicates this concern because rather than calibrating the remedy narrowly to the evil presented, such as prosecuting those officers who violate the law, *see* 18 U.S.C. §§ 241, 242, it would allow the federal government, in effect, to obtain a broad structural injunction that assumes federal control over the daily activities, policies, and decisions of an entity which embodies perhaps the most important and time-honored function of local governance—law enforcement. Such sweeping relief is disproportionate to any alleged wrong identified, particularly when redress for the alleged wrongs is already available. Whenever an officer engages in conduct that violates an individual's constitutional rights, the aggrieved party already can sue under 42 U.S.C. § 1983 for compensatory damages, appropriate injunctive relief, and full payment of attorney's fees.

In this context, the Supreme Court's decision in *Rizzo v. Goode*, 423 U.S. 362 (1976), becomes directly relevant to the constitutional inquiry here. In *Rizzo*, the Court made essentially

the same determination of whether a broad preventive injunction could be imposed upon the Philadelphia Police Department in a case alleging a pattern of unconstitutional police misconduct. The Supreme Court assumed that plaintiff had established sixteen incidents, over the course of a year, of police officers violating constitutional rights. *Id.* at 367-68. The Court overturned, as disproportionate, a lower court 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. *Id.* at 378. The Court also noted that "important considerations of federalism are additional factors weighing against" the imposition of 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 (quotation omitted).

In light of the fact that the Court in *Rizzo* overturned a broad, structural injunction because it sharply limited "the [police] department's latitude in the dispatch of its own internal affairs," 423 U.S. at 379 (quotation omitted), it is difficult to see why the same kind of judicial relief authorized under this statute, and explicitly requested in the Complaint, would be any more permissible here. *See also City of Los Angeles v. Lyons*, 461 U.S. 95, 112 (1983) ("principles of equity, comity, and federalism . . . should inform the judgment of federal courts when asked to oversee state law enforcement authorities"). In this case, just as in *Rizzo*, court-imposed restrictions would govern the training, supervision, and monitoring of officers' daily activities, the investigation and adjudication of all complaints, and the processes used to discipline officers — intrusive judicial relief that would contravene "important considerations of federalism." *Rizzo*, 423 U.S. at 378-80.

In sum, the *Report and Recommendation* fails to acknowledge the serious federalism implications of §14141 and lacks the level of analysis that the recent Supreme Court cases in this area require. Such analysis shows that Congress has again overreached and allowed excessive federal intrusion into local governance. 42 U.S.C. §14141 is an extension of federal power that disturbs the balance of power established under the United States Constitution.

II. APPLICABILITY OF A TWO-YEAR STATUTE OF LIMITATIONS

In addressing the issue of what level of proof is required under §14141, the Magistrate Judge concludes that it is "the same level of proof as is required against municipalities and local governments in actions under §1983." *Report and Recommendation* at 17. This conclusion is based in part on the Court's determination that "such legislative history as exists manifests a congressional intent to conform its substantive provisions to the standards of §1983." *Id.* at 16. That same history also reflects that the stated purpose of the statute was to address the perceived gap in the availability of future injunctive relief in police misconduct cases under §1983 law. H.R. Rep. No. 102-242, 102nd Cong., 1st Sess., at 402, 1991 WL 206794 *406. Despite the fact that §14141 apparently was intended only as a gap-filling extension of §1983 law, and the fact that it was clearly established as a matter of federal law when §14141 was enacted that actions under §1983 are subject to the most appropriate state statutes of limitation, the *Report and Recommendation* nevertheless summarily concludes that this action is subject to no statute of limitations. *Report and Recommendation* at 20.

The position taken in the *Report and Recommendation* that there is no statute of limitations applicable to actions under §14141 disregards the substantive law of §1983, which earlier in the *Report and Recommendation* the Court had concluded applies to actions under §14141. At the time §14141 was enacted, it was clearly established as part of the substantive

law applicable to §1983 actions that claims of constitutional violations in Ohio were not cognizable more than two years after the conduct at issue.[3] The abandonment of this established statute of limitations in favor of no temporal restriction whatsoever would be inconsistent not only with the established substantive law under §1983, but also with the intent of Congress, as construed by the Court, relative to the purportedly limited scope of §14141. Local governments, including the City, would be subject to suit by the federal government in federal court for conduct that would otherwise no longer be actionable, regardless of how long ago the constitutional violation allegedly occurred. Rather than the mere filling of a perceived gap in §1983 law, this would dramatically expand the scope of local government liability in federal court when no intent to do so was expressed or implied by Congress. Such a departure from established law warrants more than the mechanical application of an anachronistic rule, particularly given the federalism implications here that are not normally involved in application of that rule.

As in the *Report and Recommendation,* the rule that the federal government, when bringing actions in its sovereign capacity, is not bound by any statute of limitations is typically applied without critical analysis as to its continued viability or legitimacy. That this "vestigal survival of the prerogative of the Crown," *Guaranty Trust v. U.S.*, 304 U.S. 126, 132 (1938), should be relied upon to directly and adversely impact the balance of power protected by the United States Constitution is ironic, to say the least. However, even assuming *arguendo* the general validity of the rule, a less doctrinaire application of it under a contemporary public policy analysis compels the conclusion that it simply does not apply here.

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[3] *See Owens v. Okure*, 488 U.S. 235 (1989); *Wilson v. Garcia*, 471 U.S. 261, 268-69 (1985); *Browning v. Pendleton*, 869 F.2d 989, 990-992 (6th Cir. 1989).

In the main case relied upon by the plaintiff, and cited in the *Report and Recommendation*, *Occidental Life Ins. Co. of California v. EEOC*, 432 U.S. 355 (1977), the Supreme Court did not apply the sovereignty-based rule perfunctorily, but first considered the legislative history and administrative enforcement structure of Title VII before concluding that the EEOC was not bound by a statute of limitations. In the instant case, as discussed *supra*, the indirect legislative history on §14141 reflects no intent by Congress to depart from the existing substantive law of §1983, which law includes statutes of limitation.

In addition to consideration of the legislative history, the Court in *Occidental Life* also based its decision on the conclusion that reference to state statutes of limitation would be inconsistent with the administrative structure created by Congress as to claims handled by the EEOC. *Id.*, 432 U.S. at 367. No such inconsistency exists in the case of §14141, however, since there is no administrative enforcement mechanism or other structure that could conceivably be adversely impacted by application of the established two-year statute of limitations. Nor would the application of the established two-year statute of limitations "frustrate or interfere with the implementation of national policies." *Id.* The propriety of borrowing state statutes of limitations and applying them, as a matter of federal law, to federal claims of constitutional violations was clearly established when §14141 was enacted. *See Owens v. Okure*, *supra*; *Wilson v. Garcia*, *supra*. It cannot now be reasonably argued that such statutes suddenly become abhorrent to national policy simply because the federal government, rather than a private litigant, is the plaintiff.

Moreover, such an anomaly would be contrary to the equitable rule that "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." *Cope v. Anderson*, 331 U.S. 461, 464 (1947). Both before and after

the enactment of §14141, the only legal remedy available for alleged constitutional violations has belonged to the private litigant, whose claims are time-barred after two years. Since the legal remedy of any private litigant would be barred if he brought his case more than two years after the alleged violation, equitable relief should not be available for the same conduct simply because Congress has now decided to confer standing to seek such relief on the Attorney General. Particularly given the limited purpose of §14141 intended by Congress, as noted in the *Report and Recommendation* at 7, application of the expansive, sovereignty-based rule exempting the federal government from any statute of limitations would not only be inconsistent with that intended purpose, but contrary to the concurrent remedy rule and the equitable principles upon which it is based.

Finally, this Court has recognized that the principles of prejudice and fundamental fairness still allow a court to exercise its discretionary power to achieve a just result even when the sovereignty-based exemption rule does otherwise apply. *See EEOC v. AT&T*, 36 F.Supp. 2d 994, 997 (S.D. Ohio 1998) (Sargus, J.). The *Report and Recommendation*, at 20, acknowledges this case and the possibility that equitable principles may be available to the defendants, but concludes that the motions to dismiss and for judgment on the pleadings "do not provide the proper vehicle for invoking such principles." It is at the inception of this case, however, where such principles must be applied. Section 14141 authorizes the federal government to bring its vast resources to bear against local governments. If a local government decides to oppose the suit, it must expend significant amounts of its comparatively limited resources, regardless of how far back the federal government chooses to go in alleging a pattern or practice. Allowing such suits to be prosecuted without any temporal restriction which limits their scope and the concurrent costs of defending them would further tilt the playing field in favor of the federal

government while imposing an unreasonable burden on the resources of local governments. Adherence to a two-year statute of limitations imposes no hardship whatsoever on the federal government while at least limiting the burden imposed on local governments. Conversely, exemption of the federal government from any statute of limitations would severely prejudice the City's ability to defend itself. As noted by the Supreme Court in *Wilson v. Garcia*, 471 U.S. at 271, "[j]ust determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." Whereas "[a] federal cause of action 'brought at any distance of time' would be 'utterly repugnant to the genius of our laws,'" *id.*, quoting *Adams* v. *Woods*, 2 Cranch 336, 342 (1805), application of the two-year statute of limitations serves the policies of repose while still permitting timely-brought claims to be justly adjudicated. If the plaintiff in this case is unable to prove that a pattern and practice of constitutional violations existed within the last two years and continues to exist, then obviously there can be no ongoing pattern and practice of constitutional violations for which prospective injunctive relief is necessary. Equity requires that the issue of the how far back the City must go in defending itself be addressed now, before the resources are needlessly spent.

In sum, whether as a matter of law or equity, the federal government should not be permitted to prosecute this action without any temporal restrictions whatsoever.

III. CONCLUSION

For the foregoing reasons, the City requests that the *Report and Recommendation* not be adopted insofar as it concludes that §14141 is a valid exercise of congressional power under §5 of the Fourteenth Amendment, and that the plaintiff is not bound by any statute of limitations in this action. Wherefore, the City respectfully requests that its motion to dismiss be granted for the foregoing reasons and those set forth in the memoranda in support of that motion.

Respectfully submitted,

CITY OF COLUMBUS, DEPARTMENT OF LAW
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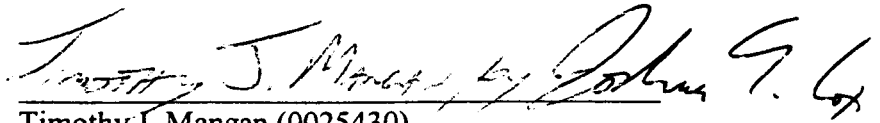

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CERTIFICATE OF SERVICE

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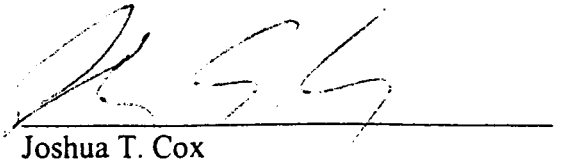

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