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December 5, 2000

James Eichner
U.S. Department of Justice
Special Litigation Section
POB 66400
Washington, DC 20035-6400

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

Dear Mr. Eichner:

Enclosed please find a copy of the Defendant City's Response to the Brief Of Amici Curiae Members of Congress to be filed in the above captioned matter.

Sincerely,

Timothy J. Mangan
Assistant City Attorney

TJM:sw
Enclosure

c: James Phillips
C. David Henderson
Samuel Bagenstos

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 RESPONSE TO THE BRIEF OF AMICI CURIAE MEMBERS OF CONGRESS

A brief in support of the United States' objections to the Magistrate Judge's *Report and Recommendation* has been filed on behalf of fourteen current members of the United States House of Representatives as amici curiae (hereinafter "amici"). Defendant City now responds in opposition to that brief.

I. SUMMARY OF ARGUMENT

Amici's argument rests on the fallacious proposition that "pattern or practice" is an alternative standard of liability that Congress consciously chose over a "policy or custom" standard with the intention of imposing vicarious liability on municipalities. That proposition is not supported by the language of the statute itself, by the legislative history, or by the established law relating to the most closely related statutes; rather, it is ultimately nothing more than an *ipse dixit* argument. Their analysis suffers from the same fundamental defect as the plaintiff's in that both reflect a statutory interpretation biased against anything they perceive as an obstacle to the imposition of systemic remedies. Under such an ends-justifies-means analysis, fundamental concepts such as jurisdiction, standing, federalism, proof and causation are ignored or trivialized. But an objective analysis of § 14141, such as exhibited in the Magistrate Judge's *Report and Recommendation*, shows that it was enacted for the purpose of conferring limited standing on the

Attorney General rather than as a statute intended to effect a dramatic expansion of municipal liability.

II. "PATTERN OR PRACTICE" AND "POLICY OR CUSTOM" ARE NOT ALTERNATIVE STANDARDS OF LIABILITY

Amici's argument that "pattern or practice" is an alternative to "policy or custom" presupposes that the terms are separate and distinct and that they are always used in the same statutory contexts. Both presuppositions being invalid, however, their argument is fatally flawed and the terms are simply not comparable as alternative liability standards. First of all, rather than being used to describe a liability standard separate and distinct from the "policy or custom" test, "pattern" and "practice" are part and parcel of the "custom" component of that test. In fact, the terms "pattern" and "practice" are used repeatedly in describing what is necessary to show a "custom or usage" under *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978). *Monell* itself provides for the imposition of government liability not only when the challenged conduct executes or implements a formally adopted policy, but also when that conduct reflects "*practices* of state officials so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Id.* at 691 (emphasis added). And in the case law developing when these "practices" rise to the level of a "custom or usage" attributable to the governmental body, *Monell*'s progeny describe *practices* which reflect a *pattern* of conduct. *See, e.g., Alton v. Texas A&M Univ.*, 168 F.3d 196, 201 (5th Cir. 1999) (no liability under *Monell* since plaintiff failed to prove that "school officials learned of facts or a pattern of misbehavior that would lead a reasonable official to believe that plaintiff's constitutional rights were being violated"); *Mettler v. Whitledge*, 165 F.3d 1197, 1204 (8th Cir. 1999) (in order to show municipal liability based on 'custom,' plaintiff must show the "existence of a continuing, widespread, persistent pattern of unconstitutional misconduct by the governmental entity's employees"); *Ware v. Jackson County*, 150 F.3d 873, 886 (8th Cir. 1998) (evidence of employee's sexual misconduct was permissible

basis for jury to infer that a "pattern of unconstitutional conduct existed" in determining 'custom or usage' question); *Andrews v. Fowler*, 98 F.3d 1069, 1076 (8th Cir. 1996) (police chief's knowledge of officer's two prior instances of misconduct did not indicate a "'persistent and widespread' pattern of misconduct that amounts to a city custom or policy of overlooking police misconduct"); *Cornfield v. Consolidated High School Dist. No. 230*, 991 F.2d 1316, 1327 (7th Cir. 1993) (municipal liability for a failure to train may be established by policymakers' acquiescence in a "pattern or frequency of constitutional violations"); *Walker v. New York*, 974 F.2d 293, 300 (2d Cir. 1992) (allowing discovery "in order to determine whether there was a practice of condoning perjury...or a pattern of police misconduct sufficient to require the police department to train and supervise police officers to assure they tell the truth"); *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir. 1989) (evidence of municipal custom where police department had a "longstanding, wide-spread, and facially unconstitutional practice of breaking down doors without a warrant when arresting a felon"); *Watson v. Kansas City*, 857 F.2d 690, 696 (10th Cir. 1988) ("pattern of deliberate indifference" on the part of the police department constitutes some evidence of a custom or policy); *Spell v. McDaniel*, 824 F.2d 1380, 1387 (4th Cir. 1987) ('custom or usage' can be found when the "duration and frequency of the practices warrants a finding of either actual or constructive knowledge by the...governing body that the practices have become customary among its employees"); *Weaver v. Tipton County*, 41 F. Supp.2d 779, 789 (W.D. Tenn. 1999) ("In general, to state a municipal liability claim under an 'inaction' theory, [plaintiff] must establish the existence of a clear and persistent pattern of unconstitutional conduct by municipal employees and notice or constructive notice of that pattern on the part of the municipality..."); *Thomas v. District of Columbia*, 887 F. Supp. 1, 5 (D.D.C. 1995) ("While the regulations [prohibiting intimate relations between prison inmates and guards] may exist, violations of them, or a pattern of such violations, may themselves be a

practice or custom."); *Gomez v. Metro Dade County*, 801 F. Supp. 674, 679 (S.D. Fla. 1992) ("In order to impose liability under a 'custom or usage' theory of municipal liability, [plaintiff] must prove a longstanding and widespread practice that is deemed authorized by policymaking officials...").

If "pattern or practice" and "policy or custom" were both standards of municipal liability, the case law illustrated above would indicate that "pattern or practice" is only a more specific way of describing the "custom" component of the "policy or custom" standard. That would result in a standard of liability under § 14141 that is even *narrower* than "policy or custom"—a position that no party has argued. The only sensible explanation for the inclusion of "pattern or practice" in § 14141 is that it was not for the purpose of setting a new standard of liability, but rather to limit the authority of the Attorney General to bring a civil action under that statute to those instances in which there is systemic misconduct. In other words, while Congress intended to vest the Attorney General with standing to sue local governments, it limited that standing to situations in which the frequency and duration of the misconduct evidences a "pattern or practice" of unconstitutional conduct. It is only in the context of a limitation on the Attorney General's standing that the "pattern or practice" language fits. And a statute enacted for this purpose need not—and did not—change the established law setting forth how to determine whether a local government has engaged in unconstitutional conduct.

III. THE TEXT OF § 14141 DOES NOT REFLECT AN INTENT TO IMPOSE VICARIOUS LIABILITY

Amici's argument is not supported by reading the text of § 14141 "in the light of text of surrounding statutes," *Vermont Agency of Natural Resources v. United States*, 120 S.Ct. 1858, 1870 n.17, since § 14141 is devoid of explicit language evincing an intent to impose vicarious liability. Only when Congress has included such clear language, as in the ADA, ADEA and Title VII, has the imposition of vicarious liability been permitted. *See, e.g., Meritor Savings*

Bank v. Vinson, 477 U.S. 57, 72 (1986) (finding vicarious liability applicable under Title VII based on its expansive statutory definition of "employer"). These statutes show that at the time § 14141 was enacted in 1994, Congress had an established mechanism for evincing its intent to impose vicarious liability via an explicit statutory definition. The fact that Congress did not utilize that established statutory mechanism in enacting § 14141 shows that it had no such intent. *See Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 283 (1998) (finding no vicarious liability under Title IX which, in contrast to Title VII, contained no definitional aspect); *cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) (finding no implied private cause of action for damages for misstatements in financial reports because "when Congress wished to provide a private damages remedy, it knew how to do so and did so expressly") (citations omitted).

The additional factor present in the instant case that compels this conclusion *a fortiori* is the alteration of the federal-state balance of power resulting from the enactment of § 14141. As noted in the *Report and Recommendation*, at 14, it is an established rule of statutory construction that "if Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Vermont Agency of Natural Resources v. United States*, 120 S.Ct. at 1870. Section 14141 unquestionably involves a significant extension of federal power into a traditionally local function, regardless of what standard of liability is applicable. However, use of a vicarious liability standard would even more significantly alter this balance by authorizing the federal courts to hold a local government liable and impose remedies even when the local government has not caused the constitutional violations sought to be remedied. If Congress intended such a dramatic alteration of the balance between federal and state governments, surely the "unmistakably clear language" requirement would be applicable. But the awkward and vague

language of § 14141 is unmistakably *unclear* and thus cannot be read to effect the far-reaching alteration of the federal-state balance sought by amici.

If not for the utter lack of clarity in the language of the statute, amici would not have had to concoct their "alternative mechanism" theory. But even assuming *arguendo* that "pattern or practice" is an alternative to "policy or custom," that alone would not answer the question of whether liability under a "pattern or practice" standard was intended to be imposed *vicariously*. The statute must be stretched even further to complete its conversion from a statute imposing liability under established municipal liability standards into one imposing vicarious liability. In addition to the alternative of an interpretation under which an "intermediate" liability standard is imposed, plaintiff has advanced several different interpretations of the statute to achieve this conversion. Amici now argue yet another alternative interpretation. The fact that there are multiple interpretations coming from those seeking the same outcome best makes the point that there is no "unmistakably clear language" in § 14141 that establishes a vicarious liability standard. And no matter which one of plaintiff and amici's multiple interpretations is employed, the absence of the requisite clarity is fatal to their attempt to rewrite the statute to impose such a standard.

Amici contend that the Magistrate Judge improperly imported § 1983 law with respect to the proper liability standard for actions under § 14141. Yet, like the plaintiff, they mischaracterize her determination as a deviation from established law when in fact it is their position that would require a radical departure from established law. The parameters of a municipality's liability for the constitutional violations committed by its agents are the result of over twenty years of case law following the Supreme Court's decision in *Monell*. This is not some obscure or arcane area of law of which Congress can be said to be unaware; rather, the law developed under *Monell* is well known and has generated significant debate. Moreover, the

courts "assume that Congress is aware of existing law when it passes legislation." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998). Any departure from this established law would be highly controversial, but especially if taken to the extreme of imposing a vicarious liability standard on local governments and the possibility of federal oversight of a traditionally local function based on that standard. Under these circumstances, if Congress intended such a departure surely it would not rely on implication or negative inference, but on a direct, express rejection of existing law. *See Jones v. United States*, 526 U.S. 227, 234 (2000) ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so."). There being no such rejection of established law, the *Report and Recommendation* properly recognizes that adherence to that law is required here.

IV. THERE IS NO LEGISLATIVE HISTORY REFLECTING AN INTENT TO IMPOSE VICARIOUS LIABILITY

Amici acknowledge the fact that there is no direct legislative history relating to § 14141, as noted in the *Report and Recommendation* at 5. And as defendant City discussed in replying to plaintiff's objections to the *Report and Recommendation*, even the scant indirect history that is available supports a construction of the statute as one addressing the narrow issue of standing rather than as a far-reaching expansion of municipal liability. Finding no support for their expansive interpretation in this indirect history, amici reach back even further to selected testimonial excerpts from a 1991 House subcommittee report on the issue, generally, of police brutality. However, this testimony upon which they rely is not proper for consideration by this Court in its determination of the legislative intent behind § 14141. First, this subcommittee was not considering *any* proposed legislation, and thus, even if some legislative intent could be gleaned from its report, there is no legislation to which it could be ascribed. At least the indirect history that the parties have previously discussed dealt with proposed legislation that was substantially similar to that which was enacted. But even if amici's subcommittee had been

considering proposed legislation, any such legislation would be at least twice removed from the legislation that was ultimately enacted as § 14141. The generic connection between a 1991 subcommittee report that preceded any proposed legislation and legislation that was enacted in 1994 is so attenuated as to render that report irrelevant to any determination of the intent behind the 1994 legislation. "In surveying legislative history we have repeatedly stated that the authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which '[represent] the considered and collective understanding of the Congressmen involved in drafting and studying the proposed legislation.'" *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zyber v. Allen*, 396 U.S. 168, 186 (1969)). Accordingly, amici's subcommittee report is not a proper source for this Court to consider in determining the intent behind § 14141.

Nevertheless, even the selected testimony upon which amici rely does not reflect any intent to abrogate the holding of *Monell* and impose liability on municipalities vicariously. In fact, the testimony merely expressed concern that *Monell* was going to be increasingly restrictively interpreted by the courts, making it difficult for plaintiffs to establish municipal liability. *Police Brutality: Hearings Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary* (1991) ["*Police Brutality Hearings*"], Amici's Exhibit B, at 126. Yet even the hand-wringing by the plaintiffs' bar and sympathetic members of the subcommittee did not go beyond an expression of this concern, or at most, an expression of disagreement with a restrictive interpretation of *Monell*. Their statements do not go so far as to suggest or advocate legislative nullification of *Monell* or legislative imposition of any new standard of municipal liability. More importantly, there is no report from this subcommittee adopting such a radical position. Rather, the statements of both witnesses and subcommittee members reflect advocacy of the same limited goal as found in the subsequent Committee Report dealing with the Police Accountability Act of 1991. That is, they reflect an intent to address the Attorney General's lack

of authority to file civil actions and seek prospective equitable relief in cases of systemic police misconduct.

Notably, the suggested legislative remedy for this perceived statutory deficiency was to draft legislation modeled after the Civil Rights of Institutionalized Persons Act of 1980 ("CRIPA"), 42 U.S.C. § 1997 *et seq. Police Brutality Hearings* at 123, 175. As previously noted, CRIPA is nothing more than a standing statute. *See United States v. Tennessee*, 798 F.Supp. 483, 488 (W.D. Tenn. 1992) ("As agreed by all parties, CRIPA does not establish substantive rights, but only gives the Attorney General standing to file suit to enforce constitutional or statutory violations."). And as a standing statute, § 14141, like CRIPA, was enacted for the limited purpose of providing standing for the Attorney General—not to alter the contours of governmental liability for constitutional violations. *Cf. United States v. Pennsylvania*, 902 F.Supp. 565, 579 (W.D. Pa. 1995) (In CRIPA actions, the United States is required to prove the same essential elements of a constitutional violation as any individual civil rights plaintiff).

V. THE POLICY OBJECTIVES NOW ADVANCED BY THESE AMICI DO NOT REFLECT THE INTENT OF CONGRESS NOR DICTATE THE PROPER INTERPRETATION OF THE STATUTE

Amici's reference to what they characterize as "commonsense notions" in support of their interpretation of § 14141 reflects the ends-justifies-means bias that permeates their entire argument. They contend that local government entities can "almost invariably do *something* to stop" a pattern of constitutional violations even though the entity did not cause, or was not deliberately indifferent to, that pattern. Brief of Amici at p. 8. Besides, they argue, it is a waste of time to search for the policymaker responsible for a policy where a pattern exists. *Id.* With these "notions" as the principles guiding interpretation of § 14141, it is undoubtedly much easier to transform it into a vicarious liability statute. "But no legislation pursues its purposes at all

costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (emphasis in original). The balancing of these competing values takes on added significance when, as in the instant case, the legislation will significantly impact the federal-state balance of power. And while the values now advocated by amici may well have been factors in that balancing (although that is not reflected in any relevant legislative history), those values would have been only a *part* of the equation. Amici's analysis, however, erroneously presumes that the opinions regarding the proper liability standard now expressed by one small faction of current House members are representative of the intent of the entire Congress when § 14141 was enacted in 1994. These post-enactment opinions are not probative of the legislative intent behind § 14141, but rather merely reflect what these current members believe the standard *should* be. Had the majority of the Congress agreed that vicarious liability was the proper standard, not only would that intent be clearly reflected in the legislative history, but more importantly, the statute could have been written to impose that standard unequivocally. But neither the indirect legislative history nor the statute reflects any intent to change the established law regarding when a municipality may be held liable for the constitutional violations of its agents.

VI. CONCLUSION

Congress did not expressly reject the "custom or policy" standard, either in the language of § 14141 or in the indirect legislative history. It is only under amici's "alternative mechanism" theory that Congress' choice to use "pattern or practice" in the statute also amounts to an implicit rejection of the "custom or policy" standard. However, their theory is fatally flawed because these terms are not comparable alternatives, much less mutually exclusive. Even accepting

amici's theory for the sake of argument, the use of "pattern or practice" in a statute still does not, in and of itself, answer the question of whether Congress intended to impose liability for that "pattern or practice" vicariously. With the only legislative history indicating that § 14141 was only intended to fill a perceived gap in § 1983 law with respect to prospective injunctive relief, there is no basis to conclude that Congress intended to drastically expand the contours of municipal liability by imposing a vicarious liability standard to actions under § 14141.

Wherefore, for the foregoing reasons and those previously set forth, defendant City respectfully requests that the United States' objections to the *Report and Recommendation* be overruled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by facsimile and regular U.S. Mail, postage prepaid, to:

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