IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF OHIO

EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF COLUMBUS, OHIO, et. al.,

Defendants.

Civil No. C2-99-1097

Judge Holschuh

Magistrate Judge King

THE UNITED STATES' MEMORANDUM IN OPPOSITION TO THE CITY OF COLUMBUS' MOTION TO DISMISS AND THE FRATERNAL ORDER OF POLICE'S MOTION FOR JUDGMENT ON THE PLEADINGS

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SUMMARY OF ARGUMENT

The United States opposes the City of Columbus' (the City) motion to dismiss and the Fraternal Order of Police's (FOP) motion for judgment on the pleadings. The United States' Complaint -- brought pursuant to 42 U.S.C. § 14141 (§ 14141) -- alleges that the City is liable for equitable relief for a pattern or practice of unconstitutional excessive force, false arrests, false reports, and illegal searches by Columbus Division of Police (CDP) officers. The Complaint need not plead that the City "caused" the unconstitutional pattern or practice, since

§ 14141 imposes vicarious liability on the City for the acts of its officers.

Section 14141 is constitutional because its enactment was a valid exercise of Congressional authority pursuant to § 5 of the 14th Amendment. Section 14141 does not run afoul of the Tenth Amendment because legislation enacted pursuant to § 5 is not subject to Tenth Amendment attack.

The United States' memorandum in opposition to Defendants' motions contains the following arguments:

Section I(B)(1) Congress has the power to enact appropriate legislation to enforce the Fourth Amendment, as applied to the States through the Fourteenth Amendment (pages 14-17). The United States alleges that CDP officers have violated citizens' Fourth Amendment rights by using excessive force, making false arrests, writing false reports, and conducting unlawful searches. Section 5 of the Fourteenth Amendment provides a grant of legislative power to Congress to remedy such conduct by appropriate means because the Fourth Amendment is applicable to States and local governments through the Due Process Clause of the Fourteenth Amendment. Wolf v. Colorado, 338 U.S. 25, 28 (1949); Mapp v. Ohio, 367 U.S. 643 (1961); cf. City of Boerne v. Flores, 521 U.S. 507, 519 (1997).

Section I(B)(2) Section 14141 is "appropriate legislation" to enforce the Fourth Amendment (pages 17-20). By granting the United States authority in federal court to obtain equitable relief to redress systemic police misconduct, § 14141 provides "appropriate legislation" to enable the United States to remedy Fourth Amendment violations. United States v. Raines, 362 U.S. 17 (1960). Congress has enacted several statutes authorizing the Attorney General to bring pattern or practice suits to remedy unconstitutional or unlawful conduct; all have been held to be constitutionally adequate. Santana v. Collazo, 89 F.R.D. 369, 372-73 (D.P.R. 1981); United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981).

Section I(B)(3) The City relies on inapposite § 5 cases (pages 20-22). The "proportional and congruent" test of the constitutionality of legislation enacted under Congress' § 5 power (set forth in City of Boerne v. Flores, 521 U.S. 507 (1997), and Kimel v. Florida Board of Regents, 120 S.Ct. 631, 644 (2000)), applies only when Congress has enacted legislation that goes beyond what the Constitution itself prohibits. Flores, 521 U.S. at 519. In this case, § 14141 by its terms simply provides a new remedy for existing violations of the Constitution and does not redefine the substantive prohibitions of the Fourth Amendment.

Section I(B)(4) Section 14141 is 'congruent and proportional' (pages 22-25). In any event, the harms prevented by § 14141 are congruent and proportional to the means provided by the statute to prevent them if that test were to be applied. All the injuries § 14141 seeks to prevent are, by definition, constitutional injuries. Section 14141 authorizes the Attorney General only to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice." (emphasis added)

Section I(B)(5) Section 14141 does not violate the Tenth Amendment (pages 25-28). When Congress enacts legislation pursuant to its powers to enforce § 5 of the Fourteenth Amendment, that legislation is not subject to the Tenth Amendment. City of Rome v. United States, 446 U.S. 156, 179 (1980); Ex parte

Virginia, 100 U.S. (10 Otto) 339, 345 (1880); Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976); Hunter v. Underwood, 471 U.S. 222, 233 (1985); EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983).

Section II(A)(1)-(4) The complaint states a valid claim for relief (pages 29-31). Complaint ¶¶ 6-8 allege that CDP officers have engaged in excessive force, false arrests and charges, unlawful searches, and falsifying official reports. These types of misconduct individually or collectively violate citizens' constitutional rights. Tennessee v. Garner, 471 U.S. 1 (1985); Graham v. Connor, 490 U.S. 386 (1989); Albright v. Oliver, 510 U.S. 266 (1994); Deitrich v. Burrows, 167 F.3d 1007, 1013 (6th Cir. 1999); Olson v. Tyler, 771 F.2d 277 (7th Cir. 1985); Knowles v. Iowa, 119 S.Ct. 484 (1998); Wyoming v. Houghton, 119 S.Ct. 1297 (1999); Kalina v. Fletcher, 118 S.Ct. 502 (1997); Hill v. McIntyre, 884 F.2d 271, 275 (6th Cir. 1989); Bruning v. Pixler, 949 F.2d 352, 357 (10th Cir. 1991).

Section II(B)(1) Section 14141 imposes vicarious liability on the City for the acts of its officers (pages 31-36). Section 14141(a) clearly states that a "governmental authority" can be liable for "engag[ing] in a pattern or practice of conduct by law enforcement officers." Had Congress intended that the City would not be liable for the acts of its officers under § 14141, the statute would have omitted the term "governmental authorities" from § 14141(a) and only made it unlawful for the "agents" or "person[s] acting on behalf of" a governmental authority to engage in a pattern of conduct by law enforcement officers. Instead, the text of the statute makes clear that Congress chose specifically to make governmental bodies liable for "conduct by law enforcement officers" (and the legislative history is not to the contrary).

Section II(B)(2) The Constitution does not bar the imposition of vicarious liability (pages 36-38). It is clearly within Congress' authority to impose vicarious liability on governmental agencies for patterns or practices of unconstitutional conduct. Burlington Industries, Inc. v. Ellerth, 118 S.Ct. 2257 (1998); Faragher v. Boca Raton, 118 S.Ct. 2275 (1998).

Section III(A) The Complaint satisfies Fed. R. Civ. P. 8. (pages 39-42). The United States was not required to allege in its Complaint each and every fact in support of its allegations, and its complaint alleging municipal liability is not subject to a heightened pleading standard. Crawford-El v. Britton, 523 U.S. 574, 595 (1998); Leatherman v. Tarrant County, 507 U.S. 163 (1993); Conley v. Gibson, 355 U.S. 41 (1957).

Section III(B) The Complaint alleges facts in support of each element of its claim (pages 42-44). The United States' cause of action is set forth in § 14141(a), and its Complaint alleges facts in support of each material element of that cause of action: that CDP officers engage in a pattern or practice of acts that deprive citizens of their constitutional rights to be free from excessive force, false arrests, false reports, and unlawful searches (Complaint ¶¶ 6-8), and that the City is liable for that pattern or practice, Complaint ¶¶ 9-10. Under § 14141, the City is vicariously liable for the illegal pattern or practice of its police officers, and hence the Complaint need not allege causation or deliberate indifference.

Section IV The United States is not subject to state statutes of limitation (pages 44-46). The Supreme Court and lower federal courts have held repeatedly that when, as here, the United States sues in its sovereign capacity, it is not subject to state statutes of limitation. Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977); United States v. John Hancock Mutual Life Ins. Co., 364 U.S. 301, 306 (1960).

LEGAL BACKGROUND: HISTORY OF § 14141 On March 3, 1991, members of the Los Angeles Police Department were captured on videotape as they assaulted Rodney King with repeated baton blows, kicks, and an electric stun device. That event shocked the national conscience, and led directly to consideration by the Judiciary Committee of the United States House of Representatives of "The Police Accountability Act of 1991." A copy of that proposed legislation and the accompanying committee report, Omnibus Crime Control Act of 1991, Report of the House Committee on the Judiciary on H.R. 3371 (Report), is attached as Exhibit A. Although the proposed Police Accountability Act was not enacted, its first two sections were enacted several years later as part of the Violent Crime Control and Law Enforcement Act of 1994. Section 210401 of that Act, codified as 42 U.S.C. § 14141, reads as follows:

CAUSE OF ACTION.

(a) UNLAWFUL CONDUCT. -- It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) CIVIL ACTION BY ATTORNEY GENERAL. -- Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) [sic] has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

Congressional intent regarding § 14141's enactment is set forth in the Committee Report that discussed the Police Accountability Act of 1991.(1)

The Report described or referenced numerous, egregious instances of recent patterns or practices of unconstitutional police misconduct. The Report summarized the findings of the Committee's Sub-Committee on Civil and Constitutional Rights, which had held hearings on police misconduct and received evidence of systemic misconduct in law enforcement agencies, including:

* Testimony from various experts in policing concerning widespread police misconduct in American cities.

* Evidence that Boston police routinely conducted harassing stops and searches of minority individuals.

* Evidence that New York City police harassed witnesses to police misconduct.

* Evidence that a special unit in the Reynoldsburg, Ohio police department called itself the SNAT team, for "Special Nigger Arrest Team."

* Evidence that the Los Angeles police department had a policy of using "nun-chuks" on passive demonstrators.

Report at 135-36.

The Committee noted that United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980), held that absent explicit statutory authority, the United States lacked authority to address by civil remedy the unconstitutional exercise of police power. The Committee noted that the absence of such authority was anomalous, since the Attorney General has "pattern or practice" authority in eight civil rights statutes, including those concerning voting, housing, employment, education, public accommodations, access to public facilities, and conditions of confinement.(2) Report at 137.

The Committee was also concerned that private citizens were unable to obtain broad injunctive relief against police misconduct as a result of Los Angeles v. Lyons, 461 U.S. 95 (1983), which held that private citizens could not obtain injunctive relief against police misconduct absent a showing of likely future harm to the individual plaintiff. The Committee urged passage of the Police Accountability Act because the United States' lack of authority to remedy civilly police misconduct was inconsistent with other civil rights legislation, and because Lyons had limited the ability of individuals to obtain injunctive relief. Report at 136-38. According to the Committee, "The Act creates an enforceable right to be free of patterns of police brutality ... The Act does not increase responsibilities of police departments or impose any new standards of conduct on police officers ... [which] are the same as those under the Constitution, presently enforced in damage actions under section 1983." Report at 138.

The Committee stated that it believed that authorizing civil "pattern or practice" suits for police misconduct may lead to a decrease in police misconduct litigation, since reform could be achieved in a single suit, rather than piecemeal after each individual criminal or civil prosecution. The Committee noted also that Justice Department criminal prosecutions were inadequate to address the causes of patterns or practices of misconduct such as deficient training, an absence of monitoring, and inadequate discipline. Report at 138. The Committee cited the following two examples of patterns of police misconduct that it believed required injunctive relief:

* In a nine month period in a Washington State county, there were four separate incidents of police beatings of motorists after traffic stops. A jury awarded damages, which the Ninth Circuit upheld, citing the lack of officer training. Under the Police Accountability Act, the court could have awarded injunctive relief to stop future violations.

* A jury awarded damages to the family of a man who was strangled by officers of the Goldsboro, North Carolina police department. There was evidence presented at trial that the city had a policy of not investigating deadly force incidents. Under the Police Accountability Act, the court could have awarded injunctive relief to require investigation of such incidents.

Report at 139.

Section 14141 grants the United States authority to assert a cause of action against entities that engage in a pattern or practice by law enforcement officers of conduct that violates citizens' Constitutional rights. Section 14141 does not create any new standards of conduct for law enforcement agents or responsibilities for law enforcement agencies.(3) Section 14141 limits the cause of action to violations that involve a pattern or practice of unlawful acts. The statute is not novel. It merely expands the Attorney General's authority to seek equitable remedies for patterns or practices of violations of citizens' constitutional rights to a new area: law enforcement officer conduct. Congress has previously given the Attorney General authority to seek such relief for patterns or practices of unconstitutional conduct in areas including housing, employment, institutionalized persons, and voting. A decision declaring

§ 14141 unconstitutional would be at odds with decisions holding those statutes constitutional.

ARGUMENT

I. SECTION 14141 IS CONSTITUTIONAL

Congress has the authority to enact § 14141 under § 5 of the Fourteenth Amendment; legislation enacted pursuant to § 5 does not violate the Tenth Amendment.

A. The Fact That Congress Did Not Identify The

Source Of Its Power To Enact § 14141 Is Irrelevant

Under established Supreme Court precedent, § 14141's constitutionality is unaffected by the lack of direct legislative history, or by the fact that the Committee Report on the Police Accountability Act did not specify the constitutional basis for its enactment.

Congress does not need to explain why it enacted a particular piece of legislation or by what power it sought to enact it. The Supreme Court has "never require[d] a legislature to articulate its reasons for enacting a statute." FCC v. Beach Communications, Inc., 508 U.S. 307, 315 (1993); see also Turner Broadcasting Sys., Inc. v. FCC, 512 U.S. 622, 665 (1994) ("Congress is not obligated, when enacting its statutes, to make a record of the type that an administrative agency or court does to accommodate judicial review."); Katzenbach v. McClung, 379 U.S. 294, 299 (1964) (noting that "no formal findings were made, which of course are not necessary").

Under the Constitution, in order to enact a statute, a bill must be passed by a majority of both houses of Congress and be signed by the President. U.S. Const., Art. I, § 7. Nothing in the Constitution requires

Congress to identify the constitutional provision by which it legislates. Thus it has long been the law that "[t]he constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise." Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948); EEOC v. Wyoming, 460 U.S. 226, 244-245 n.18 (1983) (quoting Woods); Franks v. Kentucky School For The Deaf, 142 F.3d 360, 363 (6th Cir. 1998) ("The question is whether Congress actually had the authority to adopt the legislation pursuant to that provision, not whether Congress correctly guessed the source of its authority").

That proposition is consistent with the traditional cannon of judicial review that statutes are presumed constitutional and must be shown to be beyond Congress' power. See, e.g., Reno v. Condon, 120 S.Ct. 666, 670 (2000) ("We of course begin with the time-honored presumption that the [statute] is a constitutional exercise of legislative power"); Close v. Glenwood Cemetery, 107 U.S. 466, 475 (1883) ("Every legislative act is to be presumed to be a constitutional exercise of legislative power until the contrary is clearly established."); United States v. Harris, 106 U.S. (16 Otto) 629, 635 (1883) ("Proper respect for a co-ordinate branch of the government requires the courts of the United States to give effect to the presumption that Congress will pass no act not within its constitutional power. This presumption should prevail unless the lack of constitutional authority to pass an act in question is clearly demonstrated."); United States v. Stewart, 531 F.2d 326, 337 (6th Cir. 1976) ("It is, of course, accepted law that an act of Congress carries a presumption of constitutionality.").

When constitutional challenges are brought "question[ing] the power of Congress to pass the law ... [i]t is, therefore, necessary [for the court] to search the constitution to ascertain whether or not the power is conferred." Harris, 106 U.S. (16 Otto) at 636 (emphasis added). This central separation of powers principle has been adhered to in more recent cases. See, e.g., Fullilove v. Klutznick, 448 U.S. 448, 473-478 (1980) (opinion of Burger, C.J.); United States v. Butler, 297 U.S. 1, 61 (1936).

Thus, this Court should "search the Constitution" to see whether Congress had the authority to enact § 14141. As set forth in detail below, the Court may find § 5 of the Fourteenth Amendment was the source of Congress' authority to enact § 14141.

B. Section 14141 Is A Valid Exercise Of

Congress' Power Under § 5 Of The Fourteenth Amendment

Section 5 of the Fourteenth Amendment states, "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." Section 5 is "a positive grant of legislative power" to Congress. City of Boerne v. Flores, 521 U.S. 507, 517 (1997) (quoting Katzenbach v. Morgan, 384 U.S. 641, 651 (1966)). As Flores recently reaffirmed, "[i]t is for Congress in the first instance to 'determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment,' and its conclusions are entitled to much deference." Id. at 536 (quoting Morgan, 384 U.S. at 651).

1. Because The Strictures Of The Fourth

Amendment Are Applied To State And Local

Governments Through The Fourteenth Amendment,

Congress Has The Power To Enforce Them Through § 5

The United States alleges that CDP officers have violated citizens' Fourth Amendment rights by using excessive force, making false arrests, writing false reports, and conducting unlawful searches. See pages 29-31, below. Section 5 of the Fourteenth Amendment provides a "grant of legislative power" to Congress to remedy by appropriate means such conduct because the Fourth Amendment is applicable to States and local governments through the Fourteenth Amendment.

The Supreme Court first applied the Fourth Amendment's prohibitions to the States through the

Fourteenth Amendment in Wolf v. Colorado, 338 U.S. 25, 28 (1949), which held that:

The security of one's privacy against arbitrary intrusion by the police -- which is at the core of the Fourth Amendment -- is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause [of the Fourteenth Amendment].

Mapp v. Ohio, 367 U.S. 643 (1961), extended Wolf by holding that a central method of enforcing the Fourth Amendment, the exclusionary rule, was also applicable to the States through the Fourteenth Amendment.(4)

The proposition that Congress may enact legislation pursuant to its § 5 power to redress violations of constitutional amendments made applicable to the states through the Fourteenth Amendment is not novel. In Flores, 521 U.S. at 519, the Court said:

We agree ... of course, that Congress can enact legislation under § 5 enforcing the constitutional right to the free exercise of religion. The "provisions of this article," to which § 5 refers, include the Due Process Clause of the Fourteenth Amendment. Congress' power to enforce the Free Exercise Clause follows from our holding in Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) that the "fundamental concept of liberty embodied in the [Fourteenth Amendment's Due Process Clause] embraces the liberties granted by the First Amendment.

By the same logic Congress has the power under § 5 to enforce the Fourth Amendment, which has been made applicable to the States through that same constitutional mechanism, the Fourteenth Amendment's Due Process Clause. As such, § 5 grants Congress the power to enforce the Fourth Amendment's restrictions on the ban of excessive force, false arrests, false reports, and unlawful searches by police.(5)

18 U.S.C. § 242 makes certain conduct by persons acting "under color of law" that violates citizens' constitutional rights a federal criminal offense.(6)

The Supreme Court has twice upheld the constitutionality of 18 U.S.C. § 242 and its predecessors, first in Screws v. United States, 325 U.S. 91 (1944), and again in Williams v. United States, 341 U.S. 97 (1950). Both Screws and Williams concerned federal criminal prosecution of local, municipal law enforcement officers for use of excessive force. Since § 242 is constitutional, then surely

§ 14141 is as well, for § 242 authorizes the more severe remedy of federal prosecutions of criminal violations of the Constitution, including the Fourth Amendment, while § 14141 simply authorizes civil suits to enjoin patterns or practices of such conduct.

2. Section 14141 Is "Appropriate Legislation" To Enforce

Fourth Amendment Prohibitions Against Excessive Force, False Arrests, False Reports, and Unlawful Searches

The House Judiciary Committee's Report regarding the Police Accountability Act made clear that a primary purpose of the legislation that became § 14141 was to remedy the gap in the enforcement of citizens' Fourth Amendment rights created by the decisions of Los Angeles v. Lyons, 461 U.S. 95 (1983), and United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980).(7) Report at 137-38. By granting the United States authority in federal court to obtain equitable relief to redress systemic police misconduct, § 14141 provides "appropriate legislation" to enable the United States to remedy those constitutional violations.

United States v. Raines, 362 U.S. 17 (1960), makes clear that Congress has the power under § 5 to grant the United States authority to bring a suit for injunctive relief to enforce citizens' constitutional rights. Raines reversed a lower court decision finding unconstitutional a section of the Civil Rights Act of 1957, 42 U.S.C. § 1971(c), that gave the Attorney General authority to enjoin interference with citizens' voting rights. The Court rejected a contention that because the aggrieved citizens may have had a remedy under

state law, § 1971(c) was invalid, stating, "the conduct charged -- discrimination by state officials ... is subject to the ban of [the Fifteenth] Amendment, and ... legislation designed to deal with such discrimination is 'appropriate legislation' under it." Id. at 25.

Raines also rejected the argument that, "it is beyond the power of Congress to authorize the United States to bring this action in support of private constitutional rights," saying

But there is the highest public interest in the due observance of all the constitutional guarantees, including those that bear the most directly on private rights, and we think it perfectly competent for Congress to authorize the United States to be the guardian of that public interest in a suit for injunctive relief.

Id. at 27.

Congress has enacted several statutes authorizing the Attorney General to bring pattern or practice suits to remedy unconstitutional or unlawful conduct. All of those statutes have been held to be constitutionally adequate. Perhaps the statute most similar to § 14141 is the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et. seq., which grants the Attorney General authority to seek equitable relief to remedy unlawful patterns or practices that affect persons institutionalized in government prisons, jails, mental retardation and mental health facilities, and nursing homes. CRIPA was held constitutional in Santana v. Collazo, 89 F.R.D. 369, 372-73 (D.P.R. 1981) ("there appears to be ample authority under the Fourteenth Amendment for Congress to have enacted [CRIPA] and we find it to pass constitutional scrutiny."), and no court has subsequently questioned its constitutionality. Since CRIPA and § 14141 are substantively identical (both give the Attorney General authority to remedy equitably patterns or practices of institutional misconduct), because CRIPA is constitutional, so too is § 14141.(8)

Section 14141 gives the United States authority to seek equitable relief for violations of citizens' private rights under the Fourth Amendment, applied to State and local governments through the Fourteenth Amendment. As such, it is 'appropriate legislation' to allow the United States to be the guardian of those rights.(9)

3. The City Relies On Inapposite § 5 Cases That Have No Bearing On The Constitutionality Of § 14141

Citing several recent Supreme Court cases, the City alleges that § 14141 is unconstitutional because its scope is not proportional or congruent with the harms it seeks to redress. City Mem. at 8-12. The City has misread those cases, for the proportional and congruent test applies only when Congress has enacted legislation pursuant to § 5 of the Fourteenth Amendment that goes beyond what the Constitution itself prohibits. That test determines whether preventative or remedial measures going beyond the constitution cross the line between "measures that remedy or prevent unconstitutional actions and measures that change the governing law ...." Flores, 521 U.S. at 519. In this case, § 14141 by its terms simply provides a new remedy for existing violations of the Constitution or federal law.(10)

Flores concluded that the Religious Freedom Restoration Act (RFRA) could not properly be viewed as legislation to "enforce" any recognized constitutional right. Because § 5 gives Congress the power only to "enforce," not to define, constitutional rights, the Court held that RFRA was not a permissible exercise of the § 5 power. See id. at 519 ("Legislation which alters the meaning of the Free Exercise Clause cannot be said to be enforcing the Clause.").

Kimel v. Florida Board of Regents, 120 S.Ct. 631, 644 (2000), held that Congress did not have power under § 5 to enact the Age Discrimination in Employment Act because, "the ADEA prohibits very little conduct likely to be held unconstitutional," and was "an attempt to substantively redefine the States' legal obligations with respect to age discrimination." Id. at 648. Kimel reaffirmed that the 'congruence and proportionality' test is only applicable when Congress seeks to exercise its "authority both to remedy and to deter violation of the rights guaranteed thereunder by prohibiting a ... broader swath of conduct, including that which is not itself forbidden by the Amendment's text." quoting Flores, 521 U.S. at 518.

Kimel noted that, "Congress' § 5 power is not confined to the enactment of legislation that merely parrots the precise wording of the Fourteenth Amendment."

Kimel and Flores are inapposite because § 14141 prohibits only unconstitutional conduct, and as stated in the legislative history, "[the statute] does not increase responsibilities of police departments or impose any new standards of conduct on police officers ... [which] are the same as those under the Constitution." Report at p. 138. Section 14141 prohibits only a pattern or practice of police conduct that "deprive[s] persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," 42 U.S.C. § 14141(a). Section 14141 does not redefine the substantive prohibitions of the Fourth Amendment. To the contrary, § 14141 only provides an additional remedy for constitutional violations, granting the United States authority to bring suits to end systemic Fourth Amendment violations. Since § 14141 prohibits only unconstitutional conduct, and only parrots the prohibitions of the Fourth Amendment, it is constitutional and not subject to the 'congruence and proportionality' test of Flores and its progeny.(11)

4. Section 14141 is 'Congruent and Proportional'

If, notwithstanding the foregoing arguments, the Court determines that it must assess whether there is a congruence and proportionality between the harms sought to be addressed by

§ 14141 and the statutory remedies, then the United States asserts that § 14141 satisfies that test, because all the injuries § 14141 seeks to prevent are, by definition, constitutional injuries. Section 14141 authorizes the Attorney General to bring suit to redress patterns or practices that "deprive persons of rights, privileges or immunities, secured or protected by the Constitution or laws of the United States."

The remedy for violations of § 14141 is congruent and proportional to the harms meant to be redressed by the statute. Section 14141 authorizes the Attorney General only to "obtain appropriate equitable and declaratory relief to eliminate the pattern or practice." (emphasis added)

Throughout its motion to dismiss, the City complains about the intrusiveness and breadth of the injunctive relief sought by the United States, arguing for dismissal of the Complaint because the relief sought is not congruent or proportional to the harm sought to be remedied.(12) This argument is belied by the Complaint, which seeks only (a) a declaration that the City has engaged in the pattern or practice described in the Complaint, (b) an order enjoining that pattern or practice, and (c) an order requiring the City to adopt and implement policies, practices, and procedures to remedy the pattern or practice. Complaint

¶ 11.

The United States seeks the types of remedies previously recognized by federal courts to redress unlawful police conduct:

officer training(13) and supervision,(14) adequate misconduct investigations,(15) adequate discipline for misconduct,(16) and implementation of policies that do not violate citizen rights. These remedies are appropriate and congruent to the constitutional violations alleged in the Complaint.

Finally, even if the remedies sought in the Complaint were not appropriate and congruent to the alleged violation, that alleged deficiency would not be grounds for the Complaint's dismissal. Ultimately, what matters is the relief the Court grants, and § 14141 specifically requires the Court to award "appropriate" relief. In determining the appropriateness of any relief, the equitable powers of the Court will be guided by the traditional doctrines of the law of equity. "Equitable remedies ... [are] to be determined by the nature and scope of the constitutional violation." Milliken v. Bradley, 433 U.S. 267, 280 (1977). This equitable doctrine will ensure that, if the United States prevails at trial, the Court will fashion appropriate and congruent equitable relief to remedy the patterns or practices proved at trial.(17)

5. The Tenth Amendment Does Not Limit

Congressional Action Under The Fourteenth Amendment

The Supreme Court has held repeatedly that when Congress enacts legislation pursuant to its powers to enforce § 5 of the Fourteenth Amendment, that legislation is not subject to the Tenth Amendment. Defendants' argument, therefore, that § 14141 violates the strictures of the Tenth Amendment is incorrect, for as shown above, § 14141 is 'appropriate legislation' under § 5.

In City of Rome v. United States, 446 U.S. 156, 179 (1980), the Court stated that, "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the [Fourteenth and Fifteenth] Amendments 'by appropriate legislation.'" That is because those Amendments "were intended to be, what they really are, limitations of the power of the States and enlargements of the power of Congress." Ex parte Virginia, 100 U.S. (10 Otto) 339, 345 (1880). Since Ex parte Virginia was decided, a long "line of cases has sanctioned intrusions by Congress, acting under the [Fourteenth and Fifteenth] Amendments, into the judicial, executive, and legislative spheres of autonomy previously reserved to the States." Fitzpatrick v. Bitzer, 427 U.S. 445, 455 (1976). See also Hunter v. Underwood, 471 U.S. 222, 233 (1985) ("the Tenth Amendment cannot save [state] legislation prohibited by the subsequently enacted Fourteenth Amendment"); EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983) ("when properly exercising its power under § 5 [of the Fourteenth Amendment], Congress is not limited by the same Tenth Amendment constraints that circumscribe the exercise of its Commerce Clause powers."); Marshall v. Owensboro-Daviess County Hospital, 581 F.2d 116, 119 (6th Cir. 1978) ("Congress' enforcement power under the Fourteenth Amendment is not limited by the Tenth Amendment").

Monell v. Department of Social Services, 436 U.S. 658 (1978) held that under certain circumstances, municipalities are liable for civil rights violations under § 1983, and rejected a Tenth Amendment challenge to that ruling: "There is certainly no constitutional impediment to municipal liability. 'The Tenth Amendment's reservation of nondelegated powers to the States is not implicated by a federal-court judgement enforcing the express prohibitions of unlawful state conduct enacted by the Fourteenth Amendment.'" Id. at 690-91, quoting Miliken v. Bradley, 433 U.S. 267, 291 (1977). Just as § 1983 allows individuals to sue municipalities for unconstitutional conduct without violating those municipalities' Tenth Amendment rights, so too does § 14141 allow the United States to bring "pattern or practice" misconduct suits against municipalities without violating the Tenth Amendment.

The City cites two cases in support of its argument that

§ 14141 violates the Tenth Amendment, New York v. United States, 505 U.S. 144 (1992) and Printz v. United States, 521 U.S. 898 (1997). Those cases, however, invalidated legislation passed pursuant to Congress' Commerce Clause power, not its § 5 power.

Moreover, those cases do not support the City's argument that § 14141 violates the Tenth Amendment because § 14141 does not present the constitutional flaw present in New York and Printz. Unlike the federal statute in New York, § 14141 does not commandeer the state legislative process, in fact, it does not require the passage of any legislation at all. And, unlike the federal statute in Printz, § 14141 does not conscript state officers to enforce the regulations established by Congress. Indeed, § 14141 simply authorizes the United States to file suit in federal court to vindicate pre-existing federal rights; any action required by state or local officials is the result of a Federal court finding liability and imposing equitable remedies.

The conclusion that § 14141 does not violate the federalism principles contained in the Tenth Amendment is bolstered by the Supreme Court's recent decision in Reno v. Condon, 120 S.Ct. 666 (2000), which upheld the constitutionality of the Driver's Privacy Protection Act (DPPA) against a Tenth Amendment challenge. In upholding the law, the Court stated

[DPPA] does not require [states] to enact laws or regulations, and it does not require state officials to assist in the enforcement of federal statutes regulating private individuals. We accordingly conclude that the DPPA is consistent with the constitutional principles enunciated in New York and Printz.

Id. at 672.

Section 14141 does not require states or municipalities to enact laws or regulations, and is enforced only by the Attorney General of the United States. State officials may become subject to its provisions, but only after a federal court has adjudicated them to be liable for a pattern or practice of unlawful police conduct. Section 14141, therefore, does not violate the Tenth Amendment.

II. THE COMPLAINT STATES A COGNIZABLE CLAIM OF SYSTEMIC

CONSTITUTIONAL VIOLATIONS BY CDP OFFICERS FOR

WHICH THE CITY MAY BE HELD LIABLE UNDER SECTION 14141

The City moves pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the United States' Complaint on the grounds that it fails to state a claim upon which relief may be granted. The motion should be denied because the Complaint states a cognizable claim for relief based on a pattern or practice of unconstitutional acts for which the City is liable.

A. The Complaint State A Valid Claim For Relief

Complaint ¶¶ 6-8 allege that CDP officers have engaged in a pattern or practice of (a) excessive force, (b) false arrests and charges, (c) unlawful searches, and (d) falsifying official reports. Federal courts have held that these types of misconduct individually or collectively violate citizens' constitutional rights.(18) Because § 14141 makes it unlawful for any governmental entity to engage in a pattern or practice of conduct by its law enforcement officers that violates citizens' constitutional rights, the Complaint states a cognizable claim for relief.

1. Excessive Force: Tennessee v. Garner, 471 U.S. 1 (1985), and Graham v. Connor, 490 U.S. 386 (1989), affirm that a citizen's Fourth Amendment rights are violated when police use more force than is "objectively reasonable in light of the facts and circumstances confronting them ...." Graham, 490 U.S. at 397.

2. False Arrests: The Fourth Amendment prohibits arrests made without probable cause. See e.g., Albright v. Oliver, 510 U.S. 266 (1994) (plurality opinion) (arrests made without probable cause were, in appropriate circumstances, Fourth Amendment violations); Deitrich v. Burrows, 167 F.3d 1007, 1013 (6th Cir. 1999) (it is "clearly established that warrantless arrests made without probable cause are repugnant to the precepts embodied in the Fourth Amendment"); Olson v. Tyler, 771 F.2d 277 (7th Cir. 1985) (Fourth Amendment violated when arrest based on false information).

3. Unlawful Searches: The Fourth Amendment prohibits "unreasonable searches." See, e.g., Knowles v. Iowa, 119 S.Ct. 484 (1998) (Fourth Amendment violation to conduct full search of car after speeding citation); Wyoming v. Houghton, 119 S.Ct. 1297 (1999) ("reasonableness" of search determined by whether degree of privacy intrusion is necessary to satisfy legitimate government interests).

4. False Reports: The Fourth Amendment is violated when police intentionally fabricate information contained in documents such as warrants or police reports. See Kalina v. Fletcher, 118 S.Ct. 502 (1997) (prosecutor may be liable under

§ 1983 for making false statements in application for arrest warrant); Hill v. McIntyre, 884 F.2d 271, 275 (6th Cir. 1989) ("An action under § 1983 does lie against an officer who obtains an invalid search warrant by making, in his affidavit, material false statements either knowingly or in reckless disregard for the truth."); Bruning v. Pixler, 949 F.2d 352, 357 (10th Cir. 1991) ("the law was clear that an officer would violate a plaintiff's Fourth and Fourteenth Amendment rights by knowingly or recklessly making a false statement in an affidavit in support of an arrest or search warrant"); Olson v. Tyler, 771 F.2d 277 (7th Cir. 1985) (Fourth Amendment violated when arrest based on false reports); Tribblet v. Sanchez, 1996 WL 496603 (N.D. Ill. 1996) (plaintiff states claim for, inter alia, conspiracy to file false arrest

report).

These cases show that the United State's Complaint alleges a pattern or practice by the CDP of officer acts that individually and collectively violate the Constitution.

B. The City Is Vicariously Liable

Under § 14141 For CDP Officer Misconduct

1. Section 14141 Imposes Vicarious Liability

The FOP's motion for judgment on the pleadings argues that the Complaint should be dismissed because it allegedly fails to plead, as required by case law under 42 U.S.C. § 1983, that the City caused, or was deliberately indifferent to, the pattern or practice of CDP officer misconduct alleged in the Complaint. FOP Mem. at 6-12. The FOP's argument fails because § 14141 imposes vicarious liability on the City for the acts of its officers.

The FOP's argument that under § 14141 the City is liable only if it "caused" the illegal pattern or practice of CDP officers, consists solely of analogizing § 14141 to § 1983. But the FOP's argument ignores the differences between the specific language of § 14141, which clearly imposes vicarious liability on the City, and the quite different language of § 1983, which explicitly requires causation to impose liability on municipalities.

Section 14141(a)[19] refers to two separate and distinct actors: a governmental authority (or agent), which engages in the pattern or practice, and law enforcement officers, whose conduct deprives persons of federal rights. The statute's structure marks Congress's intent that the identities of the party liable for the pattern or practice, and the identity of the persons whose direct actions violate the Constitution may be different under § 14141.

Moreover, § 14141(a) clearly states that a "governmental authority" can be liable for "engag[ing] in a pattern or practice of conduct by law enforcement officers." Had Congress intended that the City would not be liable for the acts of its officers under § 14141, the statute would have omitted the term "governmental authorities" from the first part of the sentence and only made it unlawful for the "agents" or "person[s] acting on behalf of" a governmental authority to engage in a pattern of conduct by law enforcement officers. Instead, Congress chose specifically to make governmental bodies liable for "conduct by law enforcement officers." How can a "governmental authority" engage in "conduct by law enforcement officers"? Clearly, the only way is through the acts of its agents, i.e., the officers. Thus, Congress has indicated in § 14141(a) that vicarious liability applies to governmental authorities under § 14141.

The conclusion that the statute is designed to impose vicarious liability on governmental authorities is buttressed by the language of § 14141(b). That paragraph states that the Attorney General is to sue "to eliminate the pattern or practice." Though the statute does not name the appropriate party defendant, it implicitly directs the Attorney General to sue the actor -- the "governmental authority," or its agent -- that "engage[s] in a pattern or practice." The defendant, that is, should ordinarily be the governmental authority in which the pattern occurred, or whose policies, procedures or practices enabled the constitutional violation.

The statutory language and structure thus indicate that Congress in § 14141 has intended that government authorities be vicariously liable in equity for a pattern or practice of wrongs committed by their law enforcement officers. The legislative history confirms this reading, stating that the statute was intended to reverse the Justice Department's lack of "authority to sue [a] police department **itself** to correct . . . underlying polic[ies]" such as "lack of training or the routine use of deadly techniques like chokeholds, or the absence of a monitoring and disciplinary system." Report at 137, 138. (emphasis added)

The FOP's entire argument for imposing § 1983 standards of municipal liability on § 14141 cases is

based on two sentences in the 1991 Police Accountability Act's legislative history, FOP Mem. at 7: "The Act does not increase responsibilities of police departments or impose any new standards of conduct on police officers. The standards of conduct under the Act are the same as those under the Constitution, presently enforced in damage actions under section 1983." Report at 138.

The FOP's argument fails for several reasons. First, "[r]esort to legislative history is only justified where the face of the Act is inescapably ambiguous," Garcia v. United States, 469 U.S. 70, 76, fn. 3 (1984), quoting Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 395-396 (1951) (concurrence). Since § 14141(a) is not "inescapably ambiguous," the two sentences in the statute's legislative history upon which the FOP relies should not be used to guide statutory interpretation.

Second, the two sentences upon which the FOP relies refer only to "responsibilities" and "standards of conduct," not standards of liability. It is quite correct to note that § 14141 does not render any conduct of police officers illegal which had not been deemed illegal before its enactment. But that is an entirely different issue from the question of who should be liable for such illegal conduct. And the fact that § 14141 imposes vicarious liability on governmental authorities does not mean that those agencies have increased "responsibilities," because all law enforcement agencies previously had the "responsibility" to eliminate unlawful conduct by their officers. Section 14141 simply provides an enforcement mechanism for the United States when such agencies and governmental authorities fail in their responsibility for prevent a pattern or practice of unlawful conduct.

The Supreme Court's decision in Monell v. Department of Social Services, 436 U.S. 658 (1978), does not support the FOP's claim that the United States must plead that the City caused the pattern or practice alleged in the Complaint. Monell held that 42 U.S.C. § 1983 applied to municipalities, but that municipalities are not subject to vicarious liability under that statute. 42 U.S.C. § 1983 reads in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ... (emphasis added)

Monell's conclusion that § 1983 did not impose vicarious liability on municipalities was derived in large part from

§ 1983's explicit use of the word "cause," bolstered by § 1983's legislative history: municipalities are liable only if they "cause" constitutional violations. Id. at 690-95. But Congress did not include the word "cause" -- or any word of equal

import -- when drafting § 14141. Instead, as discussed above, Congress subjected "governmental authorities" to liability for "patterns or practices of [unlawful] conduct by law enforcement officers," and did not require that the municipality "cause" the pattern or practice.(20)

In sum, both a textual analysis of § 14141 and the relevant precedent show that United States did not have to allege that the City caused, or was deliberately indifferent to, the pattern or practice at issue, because § 14141 imposes vicarious liability on the City.

2. There Is No Constitutional Bar To Imposing Vicarious Liability On The City

It is clearly within Congress' authority to impose vicarious liability on governmental agencies for patterns or practices of unconstitutional police conduct. There are numerous examples of decisions upholding federal statutes that impose vicarious liability on governments and employers.

Just recently the Supreme Court held that employers were vicariously liable for the sexual misconduct of their supervisory employees under Title VII (the Court did not exempt municipal employers from that holding). Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998). Other courts have held that corporate or other entities are responsible vicariously for Fair Housing Act violations of their employees. See City of Chicago v. Matchmaker Real Estate Center, Inc.,

982 F.2d 1086, 1096 (7th Cir. 1992); Northside Realty Assoc. Inc. v. United States, 605 F.2d 1348, 1353-54 (5th Cir. 1979).

Moreover, courts have historically drawn distinctions when discussing vicarious liability between actions for damages and actions for equitable relief. See Wood v. Strickland, 420 U.S. 308, 315 n. 6 (1975) (recognizing that "immunity from damages does not ordinarily bar equitable relief as well"). Section 14141 imposes vicarious liability on governmental entities only for prospective injunctive relief, not for awards of monetary damages. Accordingly, the usual arguments against the imposition of such liability are inapplicable to § 14141.

Finally, the fact that Monell refused to allow vicarious liability under § 1983 does not mean that it would be unconstitutional to impose vicarious liability on municipalities under § 14141. As discussed above, Monell was based on statutory language and legislative history, and not on an analysis of the constitutionality of imposing vicarious liability on governmental bodies for acts of their agents.(21)

C. Rizzo v. Goode Does Not

Mandate The Complaint's Dismissal

The City suggests that Rizzo v. Goode, 423 U.S. 362 (1976), is a basis to dismiss the United States' Complaint, because Rizzo disapproved of the breadth of an injunction imposed on the Philadelphia police department to remedy 19 constitutional violations by a small number of officers. Def. Mem. at 12-13. The City's argument is misplaced.

Rizzo did not purport to forbid all injunctions for systemic relief in police cases, as seen in the subsequent cases affirming such relief.(22) Instead, Rizzo simply required that private plaintiffs have appropriate standing to bring such a case, that the plaintiffs in a § 1983 case prove liability of the municipality and its administrators, and that the scope of relief be tailored to the proven violations.(23)

Here, § 14141 grants the United States authority, the statute imposes vicarious liability on governmental agencies whose officers engage in a pattern or practice of unlawful conduct, and §14141(b) requires the scope of relief to be "appropriate."(24)

Thus, Rizzo is not grounds to dismiss the United States' Complaint.

III. THE COMPLAINT IS A SHORT AND PLAIN STATEMENT

THAT IS NOT SUBJECT TO A HEIGHTENED PLEADING STANDARD

The City contends that the United States' Complaint lacks sufficient factual detail,(25) City Mem. at 2, 3, 4, 10, 14, 17, 18, 19, 20, and argues that the Complaint should be dismissed for this alleged deficiency. The FOP contends that the Complaint should be dismissed because it fails to allege facts supporting all material elements of the United States' claim. FOP Mem. at 4-6. These arguments fail because they ignore the relevant Federal Rules of Civil Procedure, and Supreme Court and lower federal court decisions interpreting those rules.

A. The Complaint Satisfies Fed. R. Civ. P. 8.

The Federal Rules do not require a plaintiff to set out in detail each and every fact upon which a claim is based. Rule 8 requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. R. Civ. P. 8(a)(2). The United States' Complaint meets that requirement.

The Supreme Court endorsed simplified notice pleading 40 years ago. Conley v. Gibson, 355 U.S. 41 (1957), reversed a dismissal of a civil rights complaint, even though the defendant -- like the City here -- argued that "the complaint failed to set forth specific facts to support its general allegations of discrimination." Id. at 47. The Court reasoned as follows:

[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests .... Such simplified 'notice pleading' is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

Id. at 47-48. See also Westlake v. Lucas, 537 F.2d 857, 858 (6th Cir. 1976) ("A complaint need not set down in detail all the particularities of a plaintiff's claim against a defendant."); Summit Technology, Inc. v. High-Line Medical Instruments, Co., 933 F. Supp. 918, 937 (E.D. Cal. 1996) ("Clearly, Rule 8(a) does not require plaintiff to set forth specific allegations or evidentiary facts. All that is required is a 'short and plain statement' of plaintiff's claim for relief.").

The United States' Complaint satisfies Rule 8(a). The Complaint sets forth clearly and unambiguously the United States' claim that the City is violating the constitutional rights of citizens to be free from excessive force, false arrests, false reports and illegal searches by the CDP. The United States was not required to allege in its Complaint each and every fact in support of its allegations.

The City appears to argue that the United States' Complaint should be subject to a heightened pleading standard because to prevail at trial the United States must prove a pattern or practice of unlawful conduct by CDP officers. The City, however, cites no case specifically endorsing this proposition. City Mem. at 14-19. Indeed, in 1993, the Supreme Court again spoke to the issue of the specificity of pleading required by civil rights complaints. In Leatherman v. Tarrant County, 507 U.S. 163 (1993), the Court unanimously rejected a "heightened pleading standard" for civil rights complaints against municipalities filed under 42 U.S.C. § 1983. In rejecting the requirement of pleading detailed facts in civil rights complaints, the Court specifically found that "it is impossible to square the 'heightened pleading standard' applied ... in this case with the liberal system of 'notice pleading' set up by the Federal Rules." Id. at 168. See also Crawford-El v. Britton, 523 U.S. 574, 595 (1998) ("We refused to change the Federal Rules governing pleading by requiring ... pleadings of heightened specificity in cases alleging municipal liability."); Vaugh v. Small Business Administration, 82 F.3d 684, 685 (6th Cir. 1996) (acknowledging that several Sixth Circuit cases requiring a heightened pleading standard have been superceded by Leatherman); Vector Research, Inc. v. Howard & Howard, 76 F.3d 692, 697 (6th Cir. 1996) (citing Leatherman with approval); LRL Properties v. Portage Metro Housing Authority, 55 F.3d 1097, 1104 (6th Cir. 1995) (same).(26)

B. The Complaint Alleges Facts In

Support Of Each Element Of Its Claim

The FOP's central argument is that the United States' complaint should be dismissed because it fails to allege facts in support of each element of its claim. The FOP's argument misstates the law, and is wrong about the facts alleged in the Complaint.

The FOP relies heavily on Veney v. Hogan, 70 F.3d 917 (6th Cir. 1995), to support its claim that all civil complaints must set forth specific factual detail. That reliance is misplaced. Even a cursory reading of Veney reveals that it requires heightened pleading only in complaints raising issues of qualified immunity (an issue specifically left open in Leatherman), not in complaints alleging municipal liability, the issue in Leatherman and this case.

The other cases cited by the FOP are equally inapposite.(27) Those cases stand for the proposition that civil complaints must allege facts in support of each material element of all claims set forth in the complaint.

Here, the United States' cause of action or claim is set forth in § 14141(a): "It shall be unlawful for any governmental authority ... to engage in a pattern or practice of conduct by law enforcement officers ... that deprives persons of rights ... secured or protected by the Constitution ... of the United States." The

United States' complaint alleges facts in support of each material element of that cause of action: that CDP officers engage in a pattern or practice of acts that deprive citizens of their constitutional rights to be free from excessive force, false arrests, false reports, and unlawful searches (Complaint ¶¶ 6-8), and that the City is liable for that pattern or practice, Complaint ¶¶ 9-10.

Thus, the Complaint alleges facts in support of each material element of § 14141's cause of action.

Of course, the real crux of the FOP's argument that the Complaint is factually deficient is that the Complaint fails to allege that the City "caused" or is "deliberately indifferent" to the CDP's pattern or practice of violating citizen rights. Even assuming that the FOP's description of the Complaint is accurate, the FOP's argument fails because, as set forth at length above, under § 14141 the City is vicariously liable for the illegal pattern or practice of its police officers, and hence the Complaint need not allege causation or deliberate indifference.(28)

C. Federal Courts Have Consistently Held That

Civil Rights 'Pattern Or Practice' Complaints

Are Not Required To Contain Detailed Facts

The sufficiency of the United States' Complaint is supported by numerous federal court decisions rejecting challenges to the sufficiency of complaints filed by the United States in other civil rights "pattern or practice" areas, including institutionalized persons, Title VII, and housing. Because those "notice pleading" complaints were similar to the one at issue here, decisions rejecting challenges to their factual specificity are relevant.

The Civil Rights Of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997 et. seq., is similar to § 14141 in that it provides the Department of Justice with authority to obtain equitable and injunctive relief for patterns or practices of unlawful conduct in state and local institutions such as jails and prisons. Complaints filed pursuant to CRIPA are identical in structure and format to that filed in this case. Federal courts have frequently upheld CRIPA complaints against challenges to their lack of specificity. For example, in United States v. Pennsylvania, 832 F. Supp. 122 (E.D. Pa. 1993), the United States brought a CRIPA action alleging unconstitutional conditions at the Embreeville Center, a state facility for persons with mental retardation. The complaint in that case, attached as Exhibit B, is almost identical in form to the Complaint filed in this case, in both the structure and style of its factual allegations. In United States v. Pennsylvania, defendants argued, just as the City does here, "that plaintiff's complaint lacks the factual specificity required by the Third Circuit to state a claim for civil rights violations." Id. at 125. Citing Leatherman, the court soundly rejected defendants' claim that the complaint was factually deficient. "The complaint here provides sufficient facts giving rise to the cause of action .... plaintiff's complaint contains a short and plain statement of the claim, giving the defendants fair and adequate notice to respond." Id.

Similarly, court have rejected challenges to "notice pleading" complaints filed by the Attorney General alleging employment and housing discrimination. See, e.g., United States v. Gustin-Bacon Division, 426 F.2d 539, 542-43 (10th Cir. 1970) (holding that employment discrimination complaint did not need to contain specific detail); United States v. Metro Development Corp., 61 F.R.D. 83, 87 (N.D. Ga. 1973) (holding that housing discrimination complaint that simply repeated the statutory language was sufficient); United States v. Bob Laurence Realty, Inc., 313 F. Supp. 870, 873 (N.D. Ga. 1970) (holding that housing discrimination complaint that simply repeated the statutory language was sufficient); United States v. Georgia Power Co., 301 F. Supp. 538, 544 (N.D. Ga. 1969) (holding that employement discrimination complaint did not need to contain specific detail).

Defendants' arguments that the complaint should be dismissed because it fails to plead sufficient facts upon which to base its pattern or practice allegations is contrary to Conley, Leatherman, relevant Sixth Circuit cases, and decisions opining on the sufficient of "notice pleading" pattern or practice civil rights complaints, and should be rejected.(29)

IV. THE UNITED STATES' COMPLAINT IS NOT LIMITED BY OHIO'S TWO YEAR STATUTE OF LIMITATIONS FOR PERSONAL INJURY CLAIMS

The City erroneously argues, Def. Mem. at 19-20, that the United States' complaint is limited by Ohio's two-year statute of limitations for personal injury claims, because (a) private suits brought under 42 U.S.C. § 1983 -- under which individuals may sue for damages for unconstitutional police acts -- are governed by state personal injury statutes of limitation, and (b) § 14141 violations must be based on conduct that would be actionable under § 1983. This argument for dismissal fails because the Supreme Court and lower federal courts have held repeatedly that when, as here, the United States sues in its sovereign capacity, it is not subject to state statutes of limitation unless a federal statute contains or references such a statute. Section 14141, of course, does not mention, discuss, or otherwise provide for a statute of limitations period. See Occidental Life Insurance Co. v. EEOC, 432 U.S. 355 (1977) (holding that EEOC actions for backpay are suits in its sovereign capacity, and are not subject to state statutes of limitation); United States v. John Hancock Mutual Life Ins. Co., 364 U.S. 301, 306 (1960) (citing "the rule that the United States is not subject to local statutes of limitations"); Board of County Commissioners v. United States, 308 U.S. 343, 351 (1939) ("state statutes of limitations have no applicability to suits by the Government ... This is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments."); E.I. Dupont De Nemours & Co. v. Davis, 264 U.S. 456, 462 (1924) ("an action on behalf of the United States in its governmental capacity ... is subject to no time limitation, in the absence of congressional enactment clearly imposing it.").(30)

This rule has been applied to "pattern or practice" suits brought by the Attorney General on behalf of the United States for alleged housing and employment civil rights violations. See United States v. City of Parma, 494 F. Supp. 1049, 1094, n.63 (N.D. Ohio) (United States is not subject to state statutes of limitation when it brings a pattern or practice claim under the Fair Housing Act), aff'd 661 F.2d 562, 573 (6th Cir. 1981) ("a pattern or practice suit necessarily involves a number of discriminatory acts, not a particular one for which the time for bringing suit may be measured"); United States v. Marsten Apartments, Inc. 175 F.R.D. 257, 262 (E.D. Mich. 1997) (same); United States v. City of Yonkers, 592 F. Supp. 570, 586-89 (S.D.N.Y. 1984) (United States was not subject to a state statute of limitations when it sued the City of Yonkers under Title VII for an alleged pattern or practice of employment discrimination in its police department); United States v. McHenry County, 1994 WL 447419 (N.D. Ill. 1994) (same).

The United States brings § 14141 suits in its sovereign capacity, and there is no reason to distinguish "pattern or practice"employment and housing discrimination suits brought by the Attorney General from suits brought under § 14141. Therefore, Ohio's two year statute of limitations on personal injury claims does not limit this suit to remedy a pattern or practice of excessive force, false arrests, false reports, and unlawful searches by CDP.

CONCLUSION

For the foregoing reasons, the City's motion to dismiss and the FOP's motion for judgment on the pleadings should be denied in their entirety.

	Respectfully submitted,
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1. The differences between the 1991 Police Accountability Act and § 14141 are the deletion from the latter of provisions that authorized "pattern or practice" suits by private individuals and the definition section, and the expansion of the former to cover organizations and juvenile institutions that deal with juvenile justice. Except for the 'juvenile justice' clause, § 14141's two paragraphs are identical to the first two paragraphs of the Police Accountability Act (which accounts for the typographical error in § 14141(b): the first paragraph in

§ 14141 is labeled "(a)" while in the Police Accountability Act it is labeled "(1)"). The FOP recognizes that the legislative history to the Police Accountability Act informs issues concerning § 14141. FOP Mem. at 6-7.

2. That anomaly is reflected in the fact before § 14141, the United States could bring civil pattern or practice suits against police departments for employment discrimination (under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et. seq.) and could sue jails or prisons regarding officers' excessive force (under the Civil Rights of Institutionalized Persons Act, 42 U.S.C. § 1997 et. seq.) but could not sue police departments for officers' excessive force.

3. As discussed at length below, pp. 31-36, § 14141 does impose vicarious liability on governmental

bodies for the acts of their law enforcement officers. Section 14141(a) creates a "cause of action" in which "any governmental authority" violates the law when it "engage[s] in a pattern or practice of conduct by law enforcement officers" that violates citizens' constitutional rights. Section 14141(a) thus makes "governmental authorit[ies]" liable for a pattern or practice of unlawful acts by law enforcement agents. The fact that § 14141 imposes vicarious liability on governmental authorities does not mean that those agencies have increased responsibilities, because all law enforcement agencies previously had the "responsibility" to eliminate unlawful conduct by their officers. Section 14141 simply provides an enforcement mechanism for the United States when such agencies and governmental authorities fail in their responsibility to prevent a pattern or practice of unlawful conduct.

4. The Supreme Court has time and again affirmed the rule laid down in Wolf and Mapp that states are subject to the Fourth Amendment's requirements through the Fourteenth Amendment. See O'Connor v. Ortega, 480 U.S. 709, 714 (1987) ("The strictures of the Fourth Amendment [have been] applied to the States through the Fourteenth Amendment ..."); New Jersey v. T.L.O., 469 U.S. 325, 334 (1985) ("It is now beyond dispute that 'the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers.'") quoting Elkins v. United States, 364 U.S. 206, 213 (1961); Robbins v. California, 453 U.S. 420, 423 (1981) ("The Fourth Amendment to the Constitution ... is made applicable to the States through the Fourteenth Amendment"); Colorado v. Bannister, 449 U.S. 1, 2 (1980) ("The provisions of the Fourth Amendment are enforceable against the States through the Fourteenth"); Ker v. California, 374 U.S. 23, 30 (1963) (same).

5. Of course, Congress has the power under the Necessary and Proper Clause to authorize the United States to bring actions to enforce statutory rights validly created pursuant to an enumerated Article I power. Thus, § 14141 is a valid exercise of the Commerce Clause and Spending Clause to the extent it is used to enforce "laws" enacted pursuant to those sources of authority (which would be true, for example, if the United States brings a racial discrimination claim, which could also be authorized under the Fourteenth Amendment's equal protection clause). Moreover, Congress had amply authority under the Commerce Clause to enact

§ 14141 given the substantial effect on interstate commerce of the consequences of police misconduct, such as the riots that resulted from the Rodney King state court verdict, or the financial impact on Los Angeles of the "Ramparts" scandal.

6. Section 242 reads in part: "Whoever, under color of any law ... willfully subjects any person in any State ... to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States ... shall be fined under this title or imprisoned not more than ...."

7. As discussed above, City of Philadelphia prevented the United States from obtaining injunctive relief for systemic police misconduct absent a specific statutory grant of authority, and Lyons limited the circumstances under which individual plaintiffs could obtain injunctive relief against police misconduct.

8. See also United States v. City of Parma, 661 F.2d 562 (6th Cir. 1981) (pattern or practice suit brought by Attorney General under Fair Housing Act constitutional because it is 'appropriate legislation' under § 2 of the Thirteenth Amendment); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973) (upholding grant of authority to Attorney General under 42 U.S.C. § 3613 relating to housing); United States v. Hunter, 459 F.2d 205 (4th Cir. 1972) (same);

9. Prior to the enactment of § 14141, several courts had held that it is for Congress, not the executive (or the courts) to enforce the Fourteenth Amendment through appropriate legislation in this area. See, e.g., United States v. Philadelphia, 644 F.2d at 200 (§ 5 of the fourteenth amendment confers on Congress, not the Executive or the Judiciary, the "power to enforce, by appropriate legislation, the provisions of this article"); United States v. Mattson, 600 F.2d 1295, 1297 (9th Cir. 1979) (showing of authority "can be easily made with specific statutory authority"); United States v. Solomon, 563 F.2d 1121, 1129 (4th Cir. 1977) (permitting non-statutory authority "would authorize the executive to do what Congress has repeatedly declined to authorize him to do."). Cf. United States v. California, 332 U.S. 19 (1947) (Congress can grant and limit power of Attorney General to prosecute claims for the government under

Art. IV, § 3, cl. 2). By enacting § 14141, Congress has exercised its power, which it had not in these cases, to enforce the Fourteenth Amendment by providing statutory authority for the Attorney General to sue.

10. Because the United States' Complaint in this case alleges only constitutional violations, § 14141's grant of authority to the United States to remedy patterns or practices of conduct that violates federal statutes is not at issue here.

11. Defendants' reliance on Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 119 S.Ct. 2199 (1999), which held the Patent Remedy Act not to be permissible

§ 5 legislation, also is misplaced. Section 14141 does not suffer from the defects that the Court found in the Patent Remedy Act. In Florida Prepaid, the Court emphasized that "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." Id. at 2207. In contrast, Congress did identify a pattern of constitutional violations in enacting Section 14141. Moreover, in Florida Prepaid, the Court noted the Patent Remedy Act's "indiscriminate scope," which would expose a State to liability for "[a]n unlimited range of state conduct." Id. at 2210. Section 14141 subjects governmental authorities to liability only for the unconstitutional acts of their officers.

12. The City apparently bases its argument concerning the intrusiveness of the remedies sought by the United States not on the Complaint, but on the provisions of a Consent Decree tentatively agreed to by the City and the United States in pre-suit negotiations. That Decree, of course, was never finalized or signed. The specific relief sought by the United States in this case will be directed toward curing the violations found by the Court.

13. City of Canton v. Harris, 489 U.S. 378, 390 (1989) (city may be liable for failure to train); Zuchel v. City of Denver, 997 F.2d 730 (10th Cir. 1993) (failure to train in use of deadly force, five recent police shooting deaths); Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991) (failure to train can be deliberate indifference); Parker v. District of Columbia, 850 F.2d 708, 712 (D.C. Cir. 1988) (municipality may be liable for failing to train).

14. Leach v. Shelby County Sheriff, 891 F.2d 1241, 1247-48 (6th Cir. 1989) (failure to investigate and supervise sufficient to support municipal liability); Parker v. District of Columbia, 850 F.2d 708, 712 (D.C. Cir. 1988) (municipality may be liable for failing to supervise); Cox v. District of Columbia, 821 F. Supp. 1, 11-14 (failure to investigate citizen complaints).

15. Fiacco v. City of Rensselaer, 783 F.2d 319, 326 (2d Cir. 1986) (failure to investigate claims of police brutality sufficient to support municipal liability); Green v. Francis, 705 F.2d 846 (6th Cir. 1983) (failure to investigate racial crimes); Czajkowski v. City of Chicago, 810 F. Supp. 1428 (N.D. Ill. 1992) (denial of summary judgment for defendants; evidence could show systemic failure to investigate complaints of excessive force and violence against officers' wives).

16. Bielevicz v. Dubinon, 915 F.2d 845, 852-53 (3d Cir. 1990) (acquiescence to custom of arresting individuals without probable cause sufficient to support municipal liability); Parker v. District of Columbia, 850 F.2d 708, 712 (D.C. Cir. 1988) (municipality may be liable for failing to discipline); Harris v. City of Pagedale, 821 F.2d 499, 504-06 (8th Cir. 1987) (failure to take remedial action against known pattern of sexual misconduct by police officers sufficient to support municipal liability); Czajkowski v. City of Chicago, 810 F. Supp. 1428 (N.D. Ill. 1992) (denial of summary judgment for defendants; evidence could show inadequate discipline for excessive force and domestic violence against officers' wives, officers knew unlawful conduct unlikely to result in discipline).

17. Although the award of equitable relief must be tailored to the harm found, the Court's power to fashion appropriate remedies is wide. See Swann v. Charlotte-Mecklenburg Bd. of Ed., 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."); United States v. Paradise, 480 U.S. 149, 183 (1987) ("A district court has 'not merely the power but the duty to render a decree which will so far as possible eliminate the [unlawful] effects of the past as well as bar

like [illegality] in the future.'").

18. Most of the cases cited in this section concern a single incident of unlawful police conduct. As discussed above, § 14141 creates a cause of action to allow the United States to remedy a pattern or practice of such acts.

19. "It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers . . . that deprives persons of [federal] rights . . . "

20. If the Court decides that § 14141 does not impose vicarious liability on the City, and that the United States' Complaint is therefore not well pled, the United States requests that the Court not dismiss the Complaint, but instead allow the United States sufficient time to re-plead its allegations.

21. Although the discussion in Monell includes the historical issue that "creation of a federal law of respondeat superior would have raised all the constitutional problems associated with the obligation to keep the peace ... Congress ... thought ... such an obligation unconstitutional," that sentence should not affect this Court's analysis of whether there is a constitutional bar to imposing vicarious liability under § 14141, because it refers to perceived Civil War era constitutional problems that have been mooted by subsequent Supreme Court decisions. There is no suggestion in Monell or any other case that Congress would raise any contemporary constitutional question by imposing respondeat superior liability on municipalities for the acts of their employees. For example, the Supreme Court has recently applied respondeat superior liability under Title VII (which applies to municipal organizations). See Burlington Indust. v. Ellerth, 524 U.S. 742, 754-66 (1998); Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1013-14 (6th Cir. 1987) (applying respondeat superior liability under Title VII to local school board). In modern cases deciding when and whether to apply vicarious liability, the Court has consistently looked to the intent of Congress and has not felt limited by any constitutional restrictions. See, e.g., Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998) (refusing to apply Title VII respondeat superior rule in Title IX cases because of differences in statutory language and congressional intent).

22. See Thomas v. County of Los Angeles, 978 F.2d 504, 508-509 (9th Cir. 1993) ("A state law enforcement agency may be enjoined from committing constitutional violations where there is proof that officers within the agency have engaged in a persistent pattern of misconduct."); LaDuke v. Nelson, 762 F.2d 1318, 1324 (9th Cir. 1985) ("the Supreme Court has repeatedly upheld the appropriateness of federal injunctive relief to combat a 'pattern' of illicit law enforcement behavior."); Pennsylvania v. Porter, 659 F.2d 306 (3rd Cir. 1981) (upholding injunction in action Commonwealth brought under its parens patriae power to enjoin pattern or practice of local police department's excessive force, false arrests, illegal searches, and other misconduct).

23. To the extent that Rizzo could be read to indicate disapproval of imposing municipal liability for unlawful police conduct under § 1983, later decisions in Monell and City of Canton v. Harris, 489 U.S. 378 (1989), clarified any such interpretation: municipalities can be liable for unlawful conduct under § 1983.

24. Althought the City complains about the scope of relief they believe will be sought by the United States, "[q]uestions as to the relief sought by the United States are posed, but remedial issues are hardly properly presented at this stage in the litigation," Raines, 362 U.S. at 27-28.

25. The City's allegation that the Complaint fails to specify particular incidents, officers, and victims, rings hollow given the fact that the majority of the allegations of misconduct that animated the Complaint were referenced in documents provided to the United States by the City during the course of the United States' pre-suit § 14141 investigation. The City has in its possession the records needed to answer much of the question it raises so insistently in its motion to dismiss.

26. The cases upon which the City relies to argue that the complaint is not sufficiently pled are either inapposite or have been overruled by Leatherman. Carrol v. Bristol Township, 827 F. Supp. 332 (1993), required a heightened pleading standard for civil rights complaints, a holding explicitly overruled by

Leatherman. East v. City of Chicago, 719 F. Supp. 683 (1989) relied explicitly on Strauss v. City of Chicago, 760 F.2d 765 (7th Cir. 1985), which was later abrogated by Leatherman. See Carney v. White, 843 F. Supp. 462 (E.D. Wisc. 1994) ("the district courts within the Seventh Circuit consistently have read Leatherman to nullify the pleading requirement set forth in Strauss."). Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434 (6th Cir. 1988), is inapposite because it dismissed a complaint for failing to allege, directly or inferentially, any facts to support one of the material elements of an age discrimination claim. In this case, the United States's claim is that the City is liable for patterns or practices of excessive force, false arrests, false reports and unlawful searches. The complaint alleges facts sufficient to support its claim: the CDP has engaged in a pattern or practice of unconstitutional police conduct for which the City is liable.

27. The FOP cites a number of unpublished Sixth Circuit opinions deemed by the Court not suitable for publication.

28. If the Court rules that the Complaint is deficient, the United States requests that the Court give the United States sufficient time to amend the Complaint to cure whatever deficiencies are identified by the Court.

29. If the Court decides that the Complaint is not well pled, either because it fails to allege that the City caused, or was deliberately indifferent to, the pattern or practice alleged in the Complaint, or because it lacks sufficient factual specificity, the United States requests that the Court grant the United States sufficient time to amend the Complaint to remedy any identified deficiency.

30. See also EEOC v. Frank's Nursery and Crafts, Inc., 177 F.3d 448 (6th Cir. 1999) (noting Occidental's rejection of applicability of state statutes of limitation to the EEOC); United States v. Telluride Co., 146 F.3d 1241 (10th Cir. 1998) (held that five year statute of limitation contained in Clean Water Act for the United States' recovery of a "civil penalty" did not apply to injunctive relief, because injunctive relief is not a penalty); United States v. Alvarado, 5 F.3d 1425, 1427-8 (11th Cir. 1993) (citing cases); United States v. Gera, 409 F.2d 117, (3d Cir. 1969) (United States' complaint under Medical Care Recovery Act not subject to state statute of limitations. "It has long been settled that the United States is not bound by state statutes of limitation ..."); United States v. Johnson, 946 F. Supp. 915, 918-19, (D. Utah 1996) ("The United States Supreme Court and the lower courts of appeals have consistently held that the United States and its agencies are not bound by state statutes of limitations" citing to 14 Supreme Court and other federal cases).