

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION**

**IN RE: RACE
DISCRIMINATION IN
CINCINNATI POLICING**

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Case No. C-1-99-317

Judge Dlott

**MOTION BY PLAINTIFFS FOR
PRELIMINARY INJUNCTION**

Pursuant to Fed. R. Civ. Pro. 65, plaintiffs hereby move for a preliminary injunction restraining the defendant City of Cincinnati from continuing to engage in racially discriminatory police practices as further described below. Due to the public importance of this matter, plaintiffs request expedited discovery and an expedited hearing. Plaintiffs request that bond be set at \$1.00.

MEMORANDUM OF LAW

I. INTRODUCTION AND SUMMARY UNDER LOCAL RULE 7

This is a civil rights class action challenging disparate treatment of African-American persons by the Cincinnati Police Division. This treatment includes stops, detentions and searches based on race. This treatment also includes discriminatory enforcement of the traffic and other laws resulting in a disproportionate number of African American people being charged with minor traffic violations and discretionary offenses such as jaywalking. This treatment also includes discriminatory uses of force against African-American persons and other practices that have the purpose and/or effect of discriminating against African-American persons because of their race. Plaintiffs seek declaratory and injunctive relief for the class under the First, Fourth, and Fourteenth

Tyehimba v. Cincinnati



PP-OH-001-004

Amendments to the United States Constitution, federal law, the Ohio Constitution, and state law.

This case addresses policing which is just one part of the criminal justice system. There is currently a great deal of attention paid locally, state-wide and nationally to the racially disparate impact of practices at all levels of the criminal justice system. Urgent action is needed to address these issues. For example, the Ohio Commission on Racial Fairness, convened at the request of Ohio Supreme Court Justice Thomas Moyer recently reported that in Ohio African Americans are arrested, convicted and sentenced to prison almost *10 times* as frequently as whites. “One in 523 whites in the state will spend some time in prison, while for blacks the number grows to one in 53.” Report at 37. The Commission noted that “Witnesses in nearly all of the sites told of being stopped by the police for no apparent reason, only because of their color.” *Id.* at 7. The Commission found that while “racial discrimination does not account for all of the differences in treatment of white people and minorities, it *concludes that a factual basis for this perception [of racial discrimination] clearly exists.*” *Id.* at 36 (emphasis added). Racial discrimination in the criminal justice system should be eradicated with all deliberate speed, starting now, here in Cincinnati, with this effort to reform discriminatory practices engaged in by the Cincinnati Police.

II. STATEMENT OF FACTS

A. History of Racial Discrimination By Cincinnati Police Division

Racial discrimination in policing has a long history in Cincinnati. Opposition by African American citizens to Cincinnati Police Division (CPD) discriminatory practices triggered race riots in Cincinnati in 1967.

At the time of the riots, African American persons were protesting the improper use of the loitering law by Cincinnati police officers, contending that the law was used to harass Black people. In 1968, the Kerner Commission, which studied the riots in eight major cities, including Cincinnati, found that police used their discretion to charge disproportionate numbers of Blacks with loitering compared to white persons. Moreover, the Commission found that on the first day of the riot that for similar conduct the Cincinnati Police charged white people with disorderly conduct but charged African Americans with more serious violations of the "Riot Act," further fueling racial hostility toward the police.

A common complaint by African Americans to the Kerner Commission was their subjection to verbal harassment and the abusive and degrading police practice of "*stopping of Negroes on foot or in cars without obvious basis.*" Harris, Kerner Report, p. 303 (1988 edition).

Police relations with the African American Community remained strained through the 1970's. Within an eighteen-month period in 1978 and 1979, white police officers killed four black civilians and black civilians killed four white police officers. In March, 1979, 600 angry police wives marched on City Hall. In May, 1979, hundreds of Cincinnati police officers participated in a protest that included surrounding City Hall

with 60 cruisers, turning on their emergency and head lights, locking their doors and marching to police headquarters, where they threw the cruiser keys into a pile. Meetings at City Hall to address tensions between African Americans and police were disrupted by fistfights in Council chambers and in the halls.

Police officer demands were appeased by the City in 1979 in part by the issuance of high powered .357 magnum weapons, expansion bullets, and bullet proof vests. These measures further heightened distrust and animosity toward the police among African American citizens.

The Mayor's Community Relations Panel including Chair Lawrence Hawkins, V.P. of the University of Cincinnati, and member Archbishop Joseph L. Bernadin reported to City Council in 1979 that a problem existed in the CPD "beyond simply a few bad apples." The report further noted that citizens believed that

City Council, the City Administration, or the Police Administration neither really care nor are willing to do anything about reported incidents of misconduct. The existing complaint mechanisms have little credibility...The perceived lack of concern on the part of official Cincinnati for disciplining police misconduct has contributed to an atmosphere of fear and distrust. The public questions whether or not the Police Division can police itself, and more seriously, whether elected officials and appointed officials are willing to control the police.

Hawkins Report, III-2.

The Hawkins report also noted that members of the African American community perceived racism and class prejudice by the police. The major institutional problems the group discovered were lack of police accountability for misconduct; lack of adequate training in human relations and other areas; insufficient number of minority officers; lack of communication between minorities and police; and lack of racial equality in the delivery of policing services.

In 1981, The United States Commission on Civil Rights published another review of policing in Cincinnati. The findings of this group included misuse of force by the police, inadequate oversight of the police, and inequitable distribution of police services. One finding focused on the fact that police would frequently fail to explain or refuse to provide civilians with the reasons for their actions, creating resentment, fear and distrust in civilians. Another finding noted that the lack of African Americans and women on the force further hurt the credibility of the police force as a group available to protect all members of the community.

In 1981 the City finally entered into a consent decree that sought to address the discrimination against blacks and women in hiring and promotions in the CPD.

In 1981, the City finally made operational the Office of Municipal Investigation with limited responsibility and power to investigate citizen complaints against the police.

One study completed on the first five years of OMI's operation found that OMI made a finding of improper conduct against 94 officers but none of those officers received any discipline as a result of OMI's investigations and findings.

In 1983, a "Comprehensive Report" prepared by a group of City administrators that included attorney (and now Hamilton County Judge) Cheryl Grant, advised the City manager that 86% of the CPD personnel who were interviewed reported answered "YES" to the question, "Is there racial prejudice-racism in the Cincinnati Police Division?"

In 1987 a second consent decree was entered by the City to address racial and gender discrimination in the CPD at the rank of lieutenant and above.

In 1991 two African American citizens were killed by Cincinnati police officers. A team of City Administrators investigated the police action causing the two deaths. The

major recommendations involved increased training for officers dealing with minority and special needs populations.

In 1995, Pharon Crosby, an African American student, was subjected to excessive force by the Cincinnati Police in the central business district. Recommendations by a City panel to the City manager again called for increased training and again called for better measures to review police misconduct generally and track and supervise officers who use excessive force or engage in other inappropriate conduct.

In August, 1995, a panel headed by former Ohio Governor John J. Gilligan addressed allegations of racism lodged by the Sentinel Police Association against the City of Cincinnati. The panel reported to the city manager that a renewed commitment to community oriented policing was needed; that field training officers were critical to training and that their position should be upgraded; that more conflict training was needed and should be carried out on the job by matching veterans with new officers; that accountability be improved, and that CPD discipline needed to be carefully studied because African Americans made up 23% of the force but represented 44% of the discipline. There was a strong perception that for the same conduct white officers were counseled or tolerated and black officers were given formal discipline. The group also recommended civil service reforms.

On information and belief, between January, 1995 and December, 2000, Cincinnati police officers killed 13 persons while they were being apprehended. All thirteen individuals were African Americans.

In 1998, the City entered into an agreement with several community groups drawn largely from the African American community. The United States Department of

Justice mediated this agreement. In the agreement the City agreed to upgrade OMI and the system for holding police accountable; again agreed to upgrade training on cultural awareness and special needs; and again agreed to upgrade its system for tracking officers' performance.

In 1999, the Sentinel Police Association presented the City with a "Final Report for the New Millenium." The report included over 150 complaints from African American civilians who alleged racial targeting, racially discriminatory stops, excessive force, all echoing the types of complaints that had triggered commissions and studies for more than thirty years.

As set out in §B-E below, the Cincinnati Police Division continues to use racially discriminatory practices that have been identified and discussed for thirty years .

B. Disparate Treatment of Class Members in Stops, Searches and Length of Detention Where no Charges are Filed

Defendant City has tolerated, acquiesced in, ratified and been deliberately indifferent to practices by members of the CPD, based on race, of stopping African American citizens without reasonable suspicion of criminal activity. This disparate treatment based on race has been perpetuated and implemented by various tactics including but not limited to the following:

Racial stops. Defendant City stops a disproportionate number of African Americans in their vehicles and on foot for interrogation when there is no reasonable suspicion that a crime has been committed.

For example, class member Klinton McGhee, an African-American male, was a Walnut Hills High School student in February, 2000. He was driving with two African American female passengers on Madison Road in the Hyde Park neighborhood of

Cincinnati. He did not violate any traffic laws. Nonetheless, he was stopped by a group of five police cruisers that night. He was ordered to produce his license and registration and numerous officers shined flashlights into the car looking at the contents of the car and the occupants very carefully. After awhile one officer returned and claimed that he was simply checking to see if they were wearing their seatbelts. McGhee and his passengers were all frightened by the experience.

Class member Larry Davant, an African-American male, reports on four instances within the year 2000 when he was stopped, often at gunpoint and detained and then released. One stop resulted in a misdemeanor charge of which he was later acquitted.

Class member Douglas McMillan was stopped in November, 1999 near Swifton Commons in Cincinnati. Two officers exited their cruisers yelling "get out of the car with your hands up." Mr. Mcmillan was in the car with his wife and child and frightened to have guns pointed at them all. Mr. McMillan exited the car and provided his identification. After reviewing the I.D., one officer said, "he's clean." In response to Mr. McMillan's questions one officer stated that he had been stopped because he was allegedly swerving. But no ticket was issued and Mr. McMillan was not swerving. The experience was frightening for Mr. McMillan and his family.

Class member Shepherd Allin Gaines, an African-American male, attempted to find a friend's apartment in English Woods. When he was not successful he left and started to drive away. The police stopped him and accused him of dealing drugs simply because he had been to English Woods and inquired of a person there as to the location of the apartment. Even though the police had no evidence that he was a drug user, they searched his car.

Class member Wendell Young, an African American male, former Cincinnati police officer and presently a Diversity manager for MSD, was singled out for a license plate check and detained while the officer threatened to file disorderly conduct charges against him when Mr. Young questioned him about his directives.

Class member George Webb is seventy-two years old. He is an African-American. On November 7, 2000, he was handcuffed and walked across the Kroger parking lot in Hyde Park allegedly as a suspect in a shoplifting. But the suspect was in his thirties and wore entirely different clothing. Mr. Webb states that the officer simply arrested the first Black man he saw. The experience was embarrassing and humiliating.

Class member Mustafaathfathee Alfred Ingram is an African American male who was stopped on March 11, 2001 on Vine Street downtown. He was asked about drugs, held at gunpoint and handcuffed and his car was searched. He had committed no crime.

Another class member, Roderick Glenn, was stopped by the police on March 1, 2001 as he was walking on Vine Street. Though he had committed no crime he was ordered to get up against the wall. He declined. He was eventually arrested and was subjected to excessive force. He was frightened and humiliated by his treatment by the police.

Class member Basil Warren Lewis was stopped on Ezzard Charles on February 20, 2001. He was ordered out of his car and handcuffed before he was permitted to produce proof of identification. After he did show his I.D., the officers released him without charges. He was humiliated and cannot understand why he was arrested and handcuffed without being offered a chance first to establish his identity.

Sometimes the disparate treatment of stopping African Americans and not Whites is evident in a single incident. For example, class member Shirelyn Beaman, an African-American female, was with approximately seven friends in the front of a residence on private property on September 26, 1999. They were talking in normal tones and not being boisterous. Across the street was a very loud college party involving a large number of white people who were screaming and drinking and being very disorderly. The police asked the white college students to quiet down and did not arrest or cite anyone. But then they came across the street and interrogated the African Americans about an alleged light that they thought had been directed toward them, cited one person for holding an open container on private property and cited Ms. Beaman for resisting arrest when she asked them for their names and badge numbers. The charges were eventually dismissed but the trauma of being viewed as a criminal while the white students were viewed with respect cannot be so easily dismissed.

Another class member, Otha Smiley, an African American male, was part of a group of three African American boys and two white girls walking in Corryville on July 11, 1999. Cincinnati police officer Patrick Caton ordered the African American boys to stop and he detained them. Officer Caton advised the white girls to leave the area and he did not detain them. This stop and eventual use of force on Mr. Smiley is the subject of a civil rights lawsuit, *Smiley v. George*, et al., USDC S.D.OH. No. C-1-00-765 which remains pending.

Discriminatory Action After Stops. Defendant City detains a disproportionate number of African Americans for investigation for lengthy periods of time and harasses them or treats them in an abusive manner after a suspicion has clearly been disproven.

This practice includes but is not limited to drawing weapons on innocent African American civilians; placing innocent African American civilians in handcuffs and requiring them to lay down on the street or sit in the cruiser; and using abusive language in order to provoke a citizen into a reaction that can then be used to charge a crime.

For example, when the CPD officers stopped class member Charnell Warner, an African-American female, on January 19, 2001, they were looking for two males. She was driving in a car with her husband and two minor children. The incorrect identity of this class member was obviously and immediately apparent. The couple was eventually released without charges. Nonetheless, before their release Ms. Warner and her husband were ordered out of their vehicle at gunpoint *with the children also in firing range of the weapons*, each of the parents was handcuffed, each of them was locked in a cruiser for some period of time, all while the children were crying and frightened.

Class members Vinnie Clark and Terry Horton had a similar experience. Mr. Clark is a former pro football player for the Atlanta Falcons and the Green Bay Packers. On February 23, 2001, they were riding in a Yukon sport utility vehicle owned by Vinnie Clark. Several police cruisers surrounded them and officers quickly pointed shotguns and handguns at these men. The police were allegedly looking for a suspect by the name of Charles B. Identification was presented by the class members and none of their information matched the suspect. Nonetheless, these two men were forced to their knees, handcuffed, and locked in the rear of a police cruiser while the police searched the glove compartment, seats, interior and the trunk of the Yukon. The experience was frightening.

William D. Haybert IV is another African-American class member. On March 11, 1999, he was approached at gunpoint by a White police officer as he exited his

vehicle in his own driveway. Mr. Haybert was arrested for traffic violations and obstructing justice, all charges that had no basis. The White officer failed to show for court two times. Mr. Haybert was arrested again on the same charge by the same officer. The officer again failed to show for court and the charges were again dismissed. The White officer was clearly harassing the class member.

Another class member, Stephanie Keith, an African-American female, was stopped on June 22, 2000. She was riding in a car with her husband. The police stopped the car based on an anonymous tip that two black males in a similar car were pointing a gun. As soon as they were stopped, it was obvious to the police that they had the wrong persons. The couple was eventually released without charges. Nonetheless before release, the couple was ordered out of their car, handcuffed, searched and placed in the back of a cruiser. Moreover, the police also conducted a search of their car, including the trunk, without their consent.

One class member, John Harris, was engaged in shooting dice in June, 2000. When he first saw the police he started to run. Soon he stopped and put up his hands. The police, however, punched, maced, kicked and severely beat him. Witnesses begged the police to stop since Mr. Harris was not resisting. Those witnesses testified at Mr. Harris' criminal trial and Mr. Harris was acquitted of all charges. The officers were not charged or disciplined for the excessive force.

Police officers escalated another situation on October 4, 2000 when class member Kevin Frierson was subjected to excessive force after he was approached while sitting in his car. A similar escalation occurred on January 1, 2001 when excessive force was used on class member Vincent Lee Ward II.

In August, 1999 class member Alfred Olverson and his wife, both African-Americans, were stopped at gunpoint by a Cincinnati officer who was looking for a stolen motorcycle. Since he was driving an automobile and not a car he should not have been stopped. Even after the error was evident they were detained unnecessarily and totally embarrassed in front of their business associates.

Retaliation. Defendant City permits officers to retaliate against African American persons who exercise their First Amendment right to request an officer's name, badge number and identity.

For example, on December 31, 2000, class member Timothy Black was one of a group of African Americans approached as they were leaving a pool hall that had just closed. In response to questioning by the police officer, Mr. Black asked for the officer's badge number. The officer cited that request as one of the reasons for charging him with disorderly conduct.

Class member Shirelyn Beauman, as described above, experienced retaliation when she started recording police names and badge numbers.

Searches. The City permits officers to search the person and autos of a disproportionate number of African American persons who are innocent of any criminal activity.

For example, class member Stephanie Keith, as described above, experienced a search of her auto even though it was clear that she was not the person the police were seeking.

Similarly, class member Gary Fields was stopped, ordered out of his car, frisked and searched. He was innocent of any criminal activity but nonetheless was subjected to a

full search of his car without his consent. He was released without charges and is now more distrustful of the police.

Class member Summer Rose Bonner was waiting at her Aunt's door in July, 2000. Officers working for the landlord accused her of trespassing. They took her purse and searched it without consent and also patted her down. She complained to the district and was told only that the officer's "were doing their job." She is offended and upset that the officers searched her without consent.

Class member Shepherd Allin Gaines, as described above, also experienced a search without any reasonable basis to suspect drug activity. Although Mr. Gaines advised the officers that he had possessed a weapon which he kept in the car, the officers arrested him anyway. The charges were later dismissed

Photos. The defendant City permits officers to take Polaroid photos of innocent citizens at stops not followed by arrests and then keeping these photos in the cruisers for use in the ongoing monitoring of innocent African American persons.

**C. Disparate Treatment of Class Members In Discretionary Charges
Discretionary Charges.**

Defendant City has cited or arrested African American persons in disproportionate numbers for crimes that are within the discretion of a police officer to charge. For example, on information and belief, for the period 3/99-12/00, African Americans were charged with:

81% of all citations issued by the CPD for driving without proof of insurance;

72% of all citations issued by the CPD for driving under suspension or without a license;

70% of all citations issued by the CPD for driving without a seat belt; and

79% of all jaywalking citations issued by the CPD.

The proof of insurance, driving under suspension and seat belt charges are normally identified secondary to a stop for another reason. On information and belief African American drivers in Cincinnati have a dramatically higher incidence of being charged with secondary offenses than do white drivers.

African Americans make up 38% of the population of the city according to the 1990 census but receive 47% of all traffic citations, even though only 74% of African Americans of driving age hold licenses compared to 92% of white persons.

These statistics have support in the experience of individual class members. For example, one class member, Kareem Abdul Hadrick, was only cited with three discretionary minor traffic offenses after being detained for nearly an hour in November, 2000 while the police interrogated him about drugs and guns, searched his car without his consent and ordered him out of his vehicle. The three minor charges were later dismissed by the prosecutor.

Class member Israel Evans, an African-American male, was stopped by a Cincinnati officer who had no suspicion of a crime on December 5, 2001. After one hour of interrogation, gunpoint directives, and rude conduct, the officer released Mr. Evans with a citation for a faulty license plate light, a discretionary traffic offense and sped off. Mr. Evans called for a police supervisor who did come to the scene and witness that the light was operable. Mr. Evans was shocked and upset by the experience.

Class member Robbie Gary Fuqua, Jr. was cited on February 16, 2001 for a defective headlight and failure to wear a restraint. The charges, however, were pretext for an hour long search and interrogation of the class member and his three passengers.

These individuals were forced to sit for at least thirty minutes in their car with their hands out front of them and the windows down. They were also required to exit the car and submit to pat searches. The police also used a dog to search the car interior, all without permission. The experience was humiliating and has made Mr. Fuqua fearful.

Drug laws. African Americans have been disproportionately targeted for stops, arrests and property forfeitures under the drug laws including the Cincinnati Exclusion Zone Ordinance and forfeiture laws and regulations.

D. Disparate Treatment of Class Members Who Reside in Metropolitan Housing and Who are Subject to Discriminatory Searches

Cincinnati Police Officers are often hired on “special detail” through the CPD to work as security guards for the Cincinnati Metropolitan Housing Authority (CMHA). On information and belief, these officers are routinely permitted to use the master keys to units owned by African American persons and conduct searches of their living units without consent, without a warrant and without any exigent circumstance or other justifiable reason.

E. Disparate Impact of Rewarding Officers Who Accomplish More Arrests

On information and belief, Cincinnati Police Officers are expected to make more arrests in predominately African-American neighborhoods than in predominately white neighborhoods. Officers are evaluated in part based on their achievement of these arrest goals or quotas.

On information and belief officers are commended for making arrests but not commended in similar fashion for accomplishments that prevent crime or promote good

police-community relations. This continued pressure to make arrests causes officers to arrest more low income and minority persons who are least likely to fight the charges in court. This practice of rewarding for arrests rather than framing rewards consistent with the COP philosophy has a disparate impact on African Americans.

F. Deliberate Failure of City to Reform Discriminatory Practices

The City has been deliberately indifferent to members of the plaintiff class by failing to supervise its police officers in a manner that would expose and correct the practices that are the subject of this lawsuit.

The need for effective supervision and discipline has been evident for thirty years and the failure to establish an effective system for supervision and discipline has been a major reason that discriminatory practices have continued.

Upon information and belief, the City has lost each of the last ten cases of police discipline presented to arbitrators under the labor agreement with the Fraternal Order of Police. This dismal record of success in arbitration has had a chilling effect on all discipline, causing police supervision to fail to charge or to undercharge officers guilty of misconduct, including racially discriminatory policing.

The City deliberately hobbles the Office of Municipal Investigation and the Civilian Police Review Panel by failing to heed their recommendations, failing to adequately staff and provide resources necessary for their work, and by failing to cooperate with their investigations.

Every review of the CPD in the last thirty years has called for more cultural diversity training, including ways for police to rely on interpersonal de-escalation skills rather than force when interacting with citizens. The City has deliberately failed to

provide such training in a meaningful and effective manner. Typically, a session may be devoted to discussion of such issues in the training academy but little is done after the formal classroom sessions to help officers effectively police when they are in an unfamiliar cultural environment. This cultural awareness training can only be accomplished through supervised field training. But with deliberate indifference to this critical task, the City will assign as field training officers, individuals with three or fewer years of experience. In a 1999 field training officer class, 80% of those selected as field training officers had three or fewer years of experience.

The City has a practice of tolerating, acquiescing in and failing to discipline those officers that engage in discourteous conduct toward citizens. The Kerner Commission in 1968 warned about the importance of professionalism and respect in all police-citizen relations. Numerous commissions and reports since that time have continued to recommend that the city insist on courtesy by its officers and punish those who fail to act consistent with professional guidelines. A disproportionate amount of discourteous and harassing actions by Cincinnati police officers is directed at African American persons. The City has deliberately failed to address this issue and routinely permits complaints of discourtesy to go unaddressed and undisciplined, thereby perpetuating this racially discriminatory practice.

As recently as 1998, the City Council approved an agreement mediated by the United States Justice Department between the City and various community groups that required the city to enhance its existing personnel database by requiring entry of performance related information about each officer, including civilian and other complaint histories and discipline. Now, three years later, that comprehensive database

has not been established. As a result of its breach of this commitment the City is consciously failing to effectively supervise its officers.

In September 1999, the Sentinel Police Association renewed its call for the establishment of a comprehensive personnel tracking database. Even though the City has previously agreed that such a system would provide objective facts necessary to tracking racial discrimination, the City has deliberately failed to act on this request.

The need to determine if police action on the scene is consistent with written policies and professional standards is a basic element of any system of accountability. Police action that is described over radio transmissions and through use of the mobile computer terminals is traceable. In recent months, however, on information and belief, the City has allowed critical police action to be taken "off the record" by permitting private cell phone use by officers at the scene of civilian arrests and interrogations. This "off the record" communication further erodes the ability to hold the officers accountable. By permitting the practice the City is consciously failing to effectively supervise and control its officers.

Eighteen months ago, in September 1999, the City was requested by the Sentinel Police Association to collect data with respect to traffic stops that do not result in arrests. The Sentinel study of police misconduct had clearly indicated that a disproportionate number of African American citizens were subjected to stops due to their race and color without any reasonable suspicion of a crime. The Sentinels requested that such data be included in the performance database. The City has deliberately failed to establish a record keeping system for stops not accompanied by arrests.

The Kerner Commission also warned in 1968 that aggressive policing which focuses on arrests and involves officers policing neighborhoods who are unfamiliar with the residents will have a disparate impact on African American citizens. The City has long been aware that community oriented policing (COP) improves police relations- community, prevents crime, and results in a more equitable enforcement of the law among citizens of all races. While initiating some programs, the City has nonetheless been deliberately indifferent to the disparate impact of continued rewards to those officers who engage in aggressive police practices. These practices include but are not limited to (1) rewarding officers for high volumes of arrests without scrutinizing the quality of those arrests and (2) disciplining officers who fail to achieve an “expected” number of arrests where such arrest expectations are higher in majority African American neighborhoods.

The Cincinnati Chief of Police, during the year 2000, publicly admitted that racial profiling takes place within the Cincinnati Police Division. An Assistant Chief of Police, also during the year 2000, admitted that racial profiling continues because of inadequate training.

The City has knowingly, intentionally, deliberately and consciously continued police practices that have a disparate impact on African American citizens.

III. ARGUMENT

A. Standard for Granting Preliminary Relief

The standard for evaluating a request for preliminary injunctive relief under Rule 65 is well established in this Circuit. Though, there is no “rigid and comprehensive test for determining the appropriateness of preliminary injunctive relief, *Tate v. Frey*, 735

F.2d 986, 990 (6th Cir. 1984) (citations omitted), the court should consider the following four factors:

1. Whether the party seeking the injunction has shown a substantial likelihood of success on the merits;
2. Whether the party seeking the injunction will suffer irreparable harm absent the injunction;
3. Whether the injunction will cause others to suffer substantial harm;
4. Whether the public interest would be served by the preliminary injunction.

Memphis Planned Parenthood, Inc. v. Sunquist, 175 F.3d 456, 460 (6th Cir. 1999); *Southern Milk Sales, Inc. v. Martin*, 924 F.2d 98, 103 n.3 (6th Cir. 1991). *See also Jane Doe v. Barron*, 92 F.Supp.2d 694, 695 (S.D. Ohio 1999); *Women's Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051 (S.D. Ohio 1995), *aff'd*, 130 F.3d 187 (6th Cir. 1997), *cert. denied*, 523 U.S. 1036 (1998).

These factors are “to be balanced and [are] not prerequisites that must be satisfied . . . they are not meant to be rigid and unbending requirements.” *McPherson v. Michigan High School Athletic Association*, 119 F.3d 453, 459 (6th Cir. 1997) (en banc). A finding of irreparable injury “is the single most important prerequisite that the Court must examine when ruling upon a motion for preliminary injunction.” *Metrobank v. Federal Home Loan Bank Bd.*, 666 F. Supp. 981, 984 (E.D. Mich. 1987). “The probability of success that must be shown is inversely proportional to the degree of irreparable injury the plaintiffs will suffer absent an injunction.” *State of Ohio Ex Rel Celebrezze v. N.R.C.*, 812 F.2d 288, 290 (6th Cir. 1987); *accord Shell v. R.W. Sturge Ltd.*, 850 F. Supp. 620, 632 (S.D. Ohio 1993).

Even if the Court is not certain that a plaintiff is likely to succeed on the merits, a preliminary injunction is still appropriate where the plaintiff shows “‘serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant,’” *DeLorean*, 755 F.2d at 1229 (quoting *Friendship Materials, Inc. v. Michigan Brick, Inc.*, 679 F.2d 100, 105 (6th Cir. 1982)), or if “the merits present a sufficiently serious question to justify further investigation,” *DeLorean*, 755 F.2d at 1230.

In this case, as thoroughly set out below and in the accompanying declarations, the plaintiffs meet the test for preliminary relief. Their likelihood of success on the merits, their irreparable harm, the balance of hardships and the public interest all strongly favor the issuance of an injunction.

B. Plaintiffs Have A Likelihood of Success on the Merits of Showing that the City Engages in Racial Discrimination in its Police Practices.

The Fourteenth Amendment to the United States Constitution provides that no state shall “deny to any person within its jurisdiction the equal protection of the laws.” When police stops, detention practices, handcuff use, force, and charging practices are based on race the Equal Protection Clause is violated. No compelling government interest could support such racial classifications. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989)(even benign purpose of increasing minority contracts not satisfy strict scrutiny test); *White v. Morris*, 863 F.Supp 607 (S.D. Ohio 1994)(prohibit routine cell assignments in prison by race).

The Sixth Circuit has held that residents in a community denied equal access to public services due to race discrimination have standing to sue to redress that discrimination. *Neighborhood Action Coalition v. Canton, Ohio*, 882 F. 2d 1012 (6th Cir.

1989). In that same decision, the Sixth Circuit held that a claim of racial discrimination in the provision of services (police protection) stated a claim by the plaintiffs under the Fourteenth Amendment equal protection clause which is actionable under 42 U.S.C. §1983. *Id* at 1017.

The discriminatory charging of discretionary offenses supports a claim of selective prosecution which is an equal protection violation under both the federal and state constitutions. *See Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) and *Cleveland v. Trxebuckowski*, 85 Ohio St.3d 524 (1999). *See also U.S. v. Armstrong*, 517 U.S. 456 (1996).

Also present in this case is a strong claim under Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d. That statute states that, “No person in the United States shall on the ground of race, color, or national origin...be subjected to discrimination under any program or activity receiving federal financial assistance.” The City of Cincinnati receives millions of dollars in federal law enforcement assistance. Facially neutral practices that have a disparate impact on African-Americans are prohibited under the Title VI regulations. *See* 28 C.F.R. §42.104(b); 42.104(6)(2). *See Alexander v. Choate*, 469 U.S. 287, 292-94 (1985). The practices of the City with respect to discretionary charges as well as other practices are particularly susceptible under this theory.

The disparate impact of criminal justice intervention on African-Americans is finally a current issue of national, state as well as local import. The Chief Justice of Ohio recently chaired the Commission on Racial Fairness cited above. The Commission included an appendix which contained recommendations on juvenile issues. One recommendation noted that “minority youth are overrepresented upon referral to juvenile

court.” The report continued that “it is clear that police enforcement practices and referral patterns have a lot to do with overrepresentation.” It may well be that the pattern of charging African Americans with a disproportionate number of discretionary charges starts when they are very young. These are the type of practices that this case is designed to expose and stop. Title VI will be easily satisfied by the proof on these issues.

C. Plaintiffs Are Experiencing Irreparable Harm

The Ohio Commission on Racial Fairness described the harm of racial discrimination in policing:

The Commission also heard repeated testimony of racial prejudice in arrests. Many witnesses alleged that the percentage of black males under 25 arrested is inappropriately disproportionate to their percentage of the population....a black witness [said] “I’m judged before I even go to court. I’m judged before you even pull me over and frisk me. I’m judged because of what you see; not because of what I did.”

Racial Fairness Report, 7. No damage action or other remedy at law can return to a person his dignity and self-esteem. The systemic discrimination against a group of citizens because of race causes irreparable harm to individuals, organizations including the plaintiff organizations and to society at large.

D. The Balance of Hardships and the Public Interest Favor Issuance of an Injunction

Race discrimination is pernicious. Especially when practiced by government. Race Discrimination reflects our national legacy of slavery – our worst legacy as a nation. It undermines our democratic principles and reinforces stereotypes that we must overcome if we are to establish a free society with equal opportunity for all. No hardship could flow to the government from an order requiring the Police Division to eradicate discrimination. The record in this case will demonstrate that the executive and legislative

branches of the Cincinnati government have had more than thirty years to address discrimination in policing. They have made promises but have failed to honor those promises. The public interest will be served by issuance of an injunction.

IV. CONCLUSION

This Court should issue a preliminary injunction restraining the Defendant City, its agents, employees and those acting in concert with them, from discriminating against the members of the class based on race, and include in such order a specific plan for gathering data to measure the racial impact of various police practices, gathering data on the performance of the officers consistent with the 1998 mediation report, regularly reporting to the court and the public on the data to be gathered, and additional measures to supervise, discipline and control officers with respect to standards of conduct adopted to end race discrimination.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The foregoing Motion for Preliminary Injunction was served on the following counsel of record this day of March, 2001 by United States Mail:

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