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

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	**Civil No. C2-99-1097**
	)	
v.	)	**Judge Holschuh**
	)	
CITY OF COLUMBUS, OHIO, et al.,	)	**Magistrate Judge King**
	)	
Defendants.	)	
	)	

REPLY OF THE FRATERNAL ORDER OF POLICE, CAPITAL CITY LODGE NO. 9, TO 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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The words in §14141, legislative history and relevant case law at the time §14141 was enacted show that Congress did not, and did not intend to, single out municipalities and impose vicarious liability on them. If it had, that would have exceeded Congress' authority to enact legislation, and §14141 would be unconstitutional as applied. The Complaint must be dismissed.

REPLY MEMORANDUM OF FRATERNAL ORDER OF POLICE, CAPITAL CITY LODGE NO. 9

In its Motion for Judgment on the Pleadings, the Fraternal Order of Police, Capital City Lodge No. 9 (the "FOP") asserted that the Complaint should be dismissed, because the Complaint did not allege facts supporting either of two necessary elements of a cause of action:[1]

(1) the **municipality**, not simply some of its employees, **must be deliberately indifferent to the violation of constitutional rights**; and

(2) the **municipality**, not simply some of its employees, **must be the moving force behind the violation of constitutional rights**.

In its Response, the Department of Justice ("DOJ") argues that the City is subject to vicarious liability under §14141 for the acts of its police officers, and that the DOJ does not have to allege either of the above two elements.

This Reply shows that §14141 does not impose vicarious liability on governmental authorities. This Reply then shows that if §14141 could be interpreted to impose vicarious liability on the City, §14141 would be in excess of the authority granted to Congress and would be unconstitutional. The FOP therefore asks that this Court grant the FOP's Motion for Judgment on the Pleadings.

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[1] The FOP also agreed and still agrees with the additional points made in the City's Motion to Dismiss, and incorporated by reference the arguments of the City of Columbus (the "City") in its Motion to Dismiss. The FOP does not restate those arguments here.

I. 42 U.S.C. §14141 Does Not Impose Vicarious Liability.

A. The Words Show §14141(a) Prohibits Conduct By A Municipality And Does Not Impose Vicarious Liability

Disregarding "engage," "pattern or practice," legislative history and existing case law at the time §14141 was passed, the DOJ argues that §14141 imposes vicarious liability on municipalities throughout this country. The DOJ says "Section 14141(a) clearly states that a 'governmental authority' can be liable for 'engag[ing] in a pattern of practice of conduct by law enforcement officers'."[2] (Emphasis added.) But why did the DOJ add "can be liable for" if §14141(a) clearly said what the DOJ is arguing it says? The phrase "can be liable for" might suggest some sort of vicarious liability, but that phrase is not in §14141(a).

Instead, the words of §14141(a) **prohibit a municipality from engaging in 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 . . . that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(Emphasis added.)[3] The DOJ suggests it is significant that the word "cause"[4] is not included in §14141. Yet the DOJ disregards "engage" in §14141, which

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[2] Page 4 of 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 (hereafter "DOJ Memorandum").

[3] Exhibit C of the FOP's Motion for Judgment on the Pleadings.

[4] "or any word of equal import." Page 35 of DOJ Memorandum.

means "to employ or involve oneself; to take part in; to embark on."[5] **The use of "engage" shows that municipalities must take part in the conduct in question in order to be subject to liability.**

Overlooking contrary Supreme Court decisions, the DOJ also argues that since a government only acts through its agents, Congress must have meant to impose vicarious liability on municipalities.[6] However, in St. Louis v. Praprotnik, 485 U.S. 112, 122 (1988),[7] the Supreme Court said it was "[a]ware that governmental bodies can act only through natural persons." Nevertheless the Supreme Court added that in Monell it had "concluded that these **governments should be held responsible when, and only when, their official policies cause their employees to violate another person's constitutional rights.**" Id.

In addition to disregarding "engage," the DOJ also disregards the phrase "pattern or practice" and judicial interpretations of that phrase at the time §14141 was passed.[8] In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Supreme Court held "pattern or practice" meant the United States Government "had to establish by a preponderance of the evidence that racial discrimination was the **company's standard operating procedure** -- the regular rather than the unusual practice." Id. at 336 (emphasis added). In Board of Comm'rs of Bryan Cty. V. Brown, 520 U.S. 397, 407-408

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[5] Black's Law Dictionary, Seventh Edition (1991).

[6] Page 32 of DOJ Memorandum.

[7] Discussing Monell v. New York City Dept. of Social Services, 436 U.S. 658 (1978),

(1997), citing Canton v. Harris, 489 U.S. 378, 390-391 (1989), the Supreme Court indicated that a pattern of police misconduct "may tend to show that the lack of proper training...is the '**moving force**' behind the plaintiff's injury." (Emphasis added.) In Rizzo v. Goode, 423 U.S. 362, 371 (1976), the Supreme Court reversed an injunction against municipal officials resulting from police misconduct, because "there was no affirmative link between the occurrence of the various incidents of police misconduct and the adoption of any plan or policy by petitioners—express or otherwise—showing their authorization or approval of such misconduct." The Supreme Court contrasted the situation in Rizzo to other cases where there had been a **pattern of police violation of rights caused by the defendants.** Id. at 375. As in the above cases, "**pattern or practice**" in §14141 means a pattern or practice caused by the defendant.[9]

The DOJ argues that if Congress had "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...."[10] Of course, Congress did intend that municipalities would in certain situations be liable for the acts of their officers. However, the fact that a statute prohibits a municipality from engaging in specified conduct does not mean the statute imposes vicarious liability.

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[8] It is presumed that Congress was aware of the law, including judicial interpretations of statutes, when it passes legislation. See Cannon v. University of Chicago, 441 U.S. 677, 696-698 (1979).

[9] This is reinforced by the requirement in §14141 that the governmental authority "engage" in the pattern or practice.

[10] Page 32 of DOJ Memorandum.

In §14141(a), Congress prohibited "any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority" from engaging in certain activity by its law enforcement officers. If Congress had intended to subject municipalities to vicarious liability, it could have (1) only prohibited governmental authorities from engaging in a pattern or practice of violating the constitutional rights of citizens and (2) included within the definition of governmental authority "police officers."[11] Alternatively, Congress could have only prohibited police officers from engaging in a pattern or practice of violating constitutional rights and provided in §14141(b) that the Attorney General could sue the governmental authority which employed the police officers to obtain injunctive relief when police violated the constitutional rights of citizens. Third, Congress could have said "Municipalities are liable for a pattern or practice of police violations of the constitutional rights of individuals." This is essentially what the ~~DOJ~~ claims the statute says, but §14141 does not say that.

Congress took none of these alternatives, but **separately prohibited governmental authorities, agents and persons acting on behalf of governmental authorities** from **engaging in conduct.** Congress only wanted the persons/entities responsible for the violations of constitutional rights to be enjoined, and not others.

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[11] This is the method Congress used when it passed Title VII and imposed vicarious liability upon state and local governments in employment discrimination cases. See 42 U.S.C. §2000e(a),(b) and §20002-2(a).

The DOJ refers to statutes authorizing the Attorney General to bring pattern or practice suits,[12] but does not mention that these statutes authorize **injunctive relief against the person or persons responsible.** For instance, 42 U.S.C. §2000a-5(a) provides that when the Attorney General has reasonable cause to believe that the statute is being violated, "the Attorney General may bring a civil action...requesting...preventive relief...**against the person or persons responsible for such pattern or practice**..." (Emphasis added.) Similarly, 42 U.S.C. §3613(a) authorizes the Attorney General to request preventive relief "against the **person or persons responsible for such pattern or practice** or denial of rights..." (Emphasis added.) See United States v. City of Parma, Ohio, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 656 U.S. 1012 (1982); United States v. Bob Lawrence Realty, Inc., 474 F.2d 115 (5th Cir. 1973), *cert. denied*, 414 U.S. 826 (1973); and United States v. Hunter, 459 F.2d 205 (4th Cir. 1972), *cert. denied*, 409 U.S. 934(1972)—each involving 42 U.S.C. §3613. In other words, these statutes do not impose vicarious liability.

B. The Legislative History Shows Congress Did Not Intend To Impose Vicarious Liability

House Report 102-242 stated that the Omnibus Crime Control Act of 1991 "does not increase the responsibilities of police departments or impose any new standards of conduct on police officers."[13] Although the DOJ blithely

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[12] Page 2 of DOJ Memorandum.

[13] Exhibit A of DOJ Memorandum, also attached to this Reply as Exhibit A. See p. 138 of the House Report. Due to the difficulty in reading the page numbers on the copy of the House Report, counsel has hand printed the page numbers and put them in brackets, on pp. 136-139.

suggests that "all law enforcement agencies previously had the responsibility to eliminate unlawful conduct by their officers,"[14] the DOJ cites no authority for that proposition. Moreover, the sentence immediately following the quoted sentence shows the House Report was referring to no new federal standards: "The standards of conduct under the Act are the same as those under the Constitution, presently enforced in damage actions under section 1983."[15]

The prevailing standards under §1983, now and at the time of the passage of §14141, required a plaintiff to establish that a defendant had caused the police to violate the rights before the defendant could be liable and be subject to either injunctive relief or damages. For instance, in Rizzo v. Goode, 423 U.S. 362, 376-377 (1976), the Supreme Court rejected the argument of plaintiffs that the mayor and police officials could be enjoined to eliminate future police misconduct, since there had been no showing that they had caused the police misconduct. In Canton v. Harris, 489 U.S. 378 (1989), the Supreme Court held that a municipality could not be held liable under §1983 for violations of rights of citizens by police officers unless (1) the municipality had shown "deliberate indifference to the rights of persons with whom police come into contact," at 388, and (2) the actions by the municipality "actually caused" the police officers to violate the rights of the citizen. Id. at 391. These were the prevailing standards at the time the House Report said the "standards of

[14] Page 34 of DOJ Motion

[15] Exhibit A, p. 138.

conduct under the Act are the same as under the Constitution, presently enforced in damage actions under section 1983."[16]

The House Report stated that the Omnibus Crime Control Act of 1991 "provides another tool for a court to use, **after a police department is held responsible for a pattern or practice of misconduct** that violates the Constitution or laws of the United States."[17] (Emphasis added.) The House Report then gave two examples of the need for pattern and practice authority–rejecting through these examples liability based on the principle of *respondeat superior*. The first example was Davis v. Mason County, 927 F.2d 1473 (9th Cir. 1991), in which the Ninth Circuit said "a municipality cannot be held liable on a *respondeat superior* theory." Id. at 1480. Quoting City of Canton v. Harris, 489 U.S. 378, 389 (1989), the Ninth Circuit said in order for a municipality to be liable, "the failure to train must 'reflect[] a 'deliberate' or 'conscious' choice by a municipality—a 'policy.'..." Id. The Ninth Circuit also said that "the deprivation of plaintiffs' Fourth Amendment rights was a direct consequence of the inadequacy of the training the deputies received." Id. at 1483. The second example given in the House Report was a Goldsboro, North Carolina, incident where the testimony showed there was "an official policy of not investigating incidents (involving deadly

[16] Exhibit A, p. 138.

[17] Id. The next paragraph in the House Report also says "the Act imposes no new standard of conduct on law enforcement agencies." Id.

force)."[18] **Both of these examples in the House Report required at least deliberate indifference and causation, and rejected vicarious liability.**

The DOJ even resorts to making up misleading legislative history when it says the "Committee cited the following two examples of patterns of police misconduct that it believed required injunctive relief"[19] and then indenting and single spacing six sentences and citing "Report at 139"[20] for the apparent source. The following are the actual quotes of the first three sentences of the applicable paragraphs from the House Report:

> In Mason County, Washington, in the nine month period between June 1985 and March 1986, citizens in four separate incidents were beaten by police officers following traffic stops. A federal jury returned civil verdicts against all of the deputy sheriffs involved in the incidents and against the a county, awarding a total of $853,000 in damages and costs. The Ninth Circuit affirmed, tracing the incidents to the lack of training provided by the sheriffs department, which it described as 'woefully inadequate, if it can be said to have existed at all.'
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> Another federal case, against the Goldsboro, North Carolina police department, resulted in a $220,000 payment to the father of a young black man who was strangled to death by city police officers. The officers involved in the incident had been involved in several prior incidents involving use of excessive force, yet there had been [no?] disciplinary action taken against them. One expert witness, the former chief of police for Boston and St. Louis County, testified that the City of

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[18] Id. at 139.

[19] Page 9 of DOJ Memorandum.

[20] Page 10 of DOJ Memorandum.

> Goldsboro had an 'official policy of not investigating incidents (involving deadly force).'[21]

(Emphasis added.) The first two sentences in each of the DOJ indented paragraphs are similar to sentences in the House Report, except for omitting "tracing," which provides an element of causation, and "official," which also places responsibility directly with the police department.

These are particularly significant omissions when considered in conjunction with the third sentence in each of the indented paragraphs:

> Under the Police Accountability Act, the court could have awarded injunctive relief to stop future violations.
>
> ....
>
> Under the Police Accountability Act, the court could have awarded injunctive relief to require investigation of such incidents.

There are no such sentences in the House Report.

In short, the legislative history of §14141 is consistent with the words in §14141. This history shows that §14141 was simply meant to provide the DOJ with authority to ask for and obtain injunctive relief, not impose vicarious liability. The imposition of vicarious liability would have been a significant increase in the responsibilities of municipalities under federal law. Congress would not have reversed years of Supreme Court decisions on the question of municipal liability without at least an express statement to that effect and, in fact, while giving

[21] Exhibit A at pp. 138-139.

assurances to the contrary[22]: "standards of conduct under the Act are the same as...presently enforced in damage actions under section 1983."[23]

C. The DOJ Admits A Municipality Must Engage In A Pattern Or Practice Of Conduct

Vicarious liability is liability "because of the relationship between the two parties."[24] In other words, no action is required by the supervisory party under vicarious liability.

Yet the DOJ says there are "two separate and distinct actors" under §14141: "a governmental authority (or agent)" and "law enforcement officers."[25] When the DOJ identifies the governmental authority as an actor, it implicitly recognizes vicarious liability is not imposed by §14141(a), and that a municipality, not simply its employees, must have taken certain actions (unspecified by the DOJ).

The DOJ walks farther down the path away from vicarious liability when it refers to "a governmental authority (or agent), which engages in the pattern or practice," again referring to conduct. The DOJ, however, does not suggest the pattern or practice in which a municipality must engage. Under the DOJ's theory of vicarious liability, a municipality could even be found liable if it

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[22] The Supreme Court has held that "if Congress intends to alter the 'usual constitutional balance between the States and the Federal Government', it must make its intention to do so 'unmistakably clear in the language of the statute.'" Well v. Michigan Department of State Police, 491 U.S. 58, 65 (1989), quoting Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985). The House Report stated Congress did not intend to change the balance.

[23] Exhibit A, p. 138.

[24] See Black's Law Dictionary.

[25] Pages 31-32 of DOJ Memorandum.

engages in a pattern or practice of paying its employees on time. This obviously would be an absurd interpretation of §14141(a) – inconsistent with its words and the legislative history. **The text of the statute, legislative history and case law at the time of passage of §14141 show that there must be a causal link between the municipality and the police actions.**

II. If §14141 Were Applied To Impose Vicarious Liability On Municipalities, It Would Be Unconstitutional As Applied

A. Congress Does Not Have The Authority Under Section 5 Of The Fourteenth Amendment To Impose Vicarious Liability On, And Authorize Injunctive Relief Against, Municipalities For The Actions Of Individual Police Officers

If §14141 could be interpreted to impose vicarious liability on municipalities for the conduct of municipal employees, the section would exceed the authority of Congress for at least two related reasons. First, legislation enacted pursuant to §5 of the Fourteenth Amendment must be remedial, and vicarious liability would authorize relief against municipalities which had not violated the Constitution. The legislation would not be remedial. Second, the imposition of vicarious liability would be a disproportionate response, by requiring municipalities to take action when those municipalities had not violated the Constitution.

1. The governmental entity/official being sued must be at fault to be liable

The Supreme Court has held that in order "for Congress to invoke §5, it must identify conduct transgressing the Fourteenth Amendment's substantive

provisions, and must tailor its legislative scheme to remedying or preventing such conduct." Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank, 527 U.S. 627, 119 S. Ct. 2199, 2209 (1999). In declaring the Patent Remedy Act unconstitutional as in excess of Congress' authority under §5 of the Fourteenth Amendment, the Supreme Court in Florida Prepaid explained "the evidence before Congress suggested that most State infringement was innocent or at worst negligent." Id. at 2209. The Court then said that such negligent conduct did not violate the Due Process Clause of the Fourteenth Amendment. The Supreme Court also explained:

> Nor did it [Congress] make any attempt to confine the reach of the Act by limiting the remedy to certain types of infringement, such as non-negligent infringement or infringement authorized pursuant to state policy. . . .

Id. at 2210. **The Patent Remedy Act did not even impose vicarious liability, but the Supreme Court nonetheless held that the Act was unconstitutional, because it was not tied to the affirmative fault of the government entity.**

The Supreme Court in Florida Prepaid did not announce a new principle. After all, in Rizzo v. Goode, the Supreme Court said "the District Court found that none of the petitioners had deprived the respondent classes of any rights secured under the Constitution." 423 U.S. at 377(emphasis added). As a result, even though police officers supervised by the defendants had deprived individuals of federal rights, the defendants could not be enjoined: "Under the well-established rule that federal 'judicial powers may be exercised only on the

basis of a constitutional violation,'...this case presented no occasion for the District Court to grant equitable relief against petitioners." Id. (emphasis added).

Florida Prepaid and Rizzo establish that a local government entity cannot be held liable and enjoined pursuant to legislation passed pursuant to §5 of the Fourteenth Amendment, unless that government entity–in contrast to its employees–has violated the constitutional rights of individuals. Congress does not have the authority under §5 of the Fourteenth Amendment to pass legislation imposing vicarious liability on municipalities.

2. Congress Is Not Authorized To Enact Legislation Where The Remedy Is Disproportionate To The Violation

In City of Boerne v. Flores, 529 U.S. 507 (1997), the Supreme Court concluded that the Religious Freedom Restoration Act of 1993 was unconstitutional. Noting that Congress' power under §5 of the Fourteenth Amendment was only remedial, the Supreme Court said "[t]he design of the Amendment and the text at §5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States." Id. at 519. The Supreme Court added that there had to be "a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." Id. at 520. In the present case, if §14141 imposed vicarious liability on municipalities, Congress would be authorizing the imposition of liability on municipalities which had not violated the Constitution.

In Kimel v. Florida Board of Regents, ___ U.S. ___, 120 S.Ct. 621, 629 (2000), the Supreme Court invalidated the application of the ADEA to the States, because "Congress never identified any pattern of age discrimination by the States...." Referring to a 1996 California report on age discrimination in California public agencies, the Supreme Court said that '[e]ven if the California report had uncovered a pattern of unconstitutional age discrimination in the State's public agencies at the time, it nevertheless would have been insufficient to support Congress' 1974 extension of the ADEA to every State of the Union." Id. at 649. The Supreme Court also said "isolated sentences clipped from floor debates and legislative reports" were not sufficient.

Similarly, in Florida Prepaid, the Supreme Court said "Congress appears to have enacted this legislation [the Patent Remedy Act] in response to the handful of instances of state patent infringement that do not necessarily violate the Constitution". 119 S.Ct. at 2210. The Supreme Court held the Patent Remedy Act was unconstitutional, stating "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." Id. at 2207.

As in Kimel and Florida Prepaid, the scattered incidents of police officer misconduct referred to in the House Report are not sufficient to impose vicarious liability on municipalities. The House Report, in a section titled "background," refers to the Los Angeles Police Department and says "the conduct of these officers was well known to police department management,

who condoned the behavior through a pattern of lax supervising and inadequate investigation of complaints." The House Report also says the "Los Angeles Police Department directed officers to use an illegal kung-fu device known as the nun-chuk to inflict pain on passive demonstrators in an effort to force them to comply with police orders." In other words, the House Report finds knowledge and causation by the Los Angeles Police Department and does not suggest vicarious liability should be imposed.

The House Report also cites United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980). In Philadelphia, the Third Circuit observed that the "United States alleges that the appellees have deliberately encouraged these illegal practices through the policies and procedures they have established for investigating complaints of illegal police activity." Id. at 190. The Third Circuit also said the United States had alleged "generally that some or all of the appellees have deliberately endeavored to encourage police violation of civil rights." Id. Again, there is no suggestion of vicarious liability.

There are a number of references in the House Report to individual police misconduct. However, those references do not indicate that the police department was deliberately indifferent to the violation of rights or caused the violation of rights.

At most, the House Report identified two anecdotal examples (Los Angeles and Philadelphia) of violation of constitutional rights by police departments. Even assuming the House Report reference to New York had

been a finding that the New York Police Department—rather than individual police officers—had been engaged in a pattern or practice of violation of constitutional rights, three examples of unconstitutional conduct by police departments would be insufficient under Kimel and Florida Prepaid , under §5 of the Fourteenth Amendment, to justify imposing vicarious liability on police departments nationwide.

The principles announced in Boerne, Kimel and Florida Prepaid show that Congress does not have the authority under §5 of the Fourteenth Amendment to impose vicarious liability on local governments for the actions of police officers. If the governmental entity is not at fault, any remedy against the governmental entity is disproportionate to the violation, since in fact the municipality has not violated anyone's rights.

B. The Cases Cited By The DOJ Do Not Support The Constitutionality Of The Imposition Of Vicarious Liability On Municipalities

1. The DOJ Cites No Cases Granting Injunctive Relief Against Municipalities Based On Respondent Superior

The DOJ argues that Congress has the authority to impose vicarious liability on municipalities, but does not cite a single case in which a federal court issued an injunction against a municipality based on *respondeat superior* liability.[26] The three cases cited by the DOJ as affirming injunctive relief in police

[26] The DOJ cites Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998), which involved a question of legislative intent, not whether Congress had the constitutional authority to pass the legislation. In Gebser the Supreme Court concluded the statue did not impose vicarious liability, and Gebser gives no support to an argument that the imposition of vicarious liability on municipalities in a different situation would be constitutional

cases[27] in fact did not approve injunctive relief against a municipality. Moreover, each of the three cases recognized Rizzo v. Goode, 423 U.S. 362 (1976), as controlling and also recognized that there had to be a causal link between the defendant and the violation of constitutional rights in order for an injunction to issue.

In Thomas v. County of Los Angeles, 978 F.2d 504 (9th Cir. 1993), for instance, the Ninth Circuit reversed the injunction issued by the District Court, because the record did "not yet contain a sufficient basis on which to evaluate the likelihood of the plaintiffs' succeeding on the merits and establishing, not merely misconduct, but a pervasive pattern of misconduct reflecting departmental policy." Id. at 509 (emphasis added). The Ninth Circuit in Thomas cited and fully supported the Supreme Court's decision in Rizzo, and also noted that the plaintiffs in Thomas had named as defendants 21 individual sheriff's deputies reportedly responsible for the misconduct, and supervisory personnel. Even in that situation, the Ninth Circuit reversed the order of the District Court granting the injunction.

The DOJ also cites LaDuke v. Nelson, 762 F.2d 1318 (9th Cir. 1985), modified, 796 F2d 309 9th Cir. 1986), but LaDuke did not involve relief against a state or municipal agency. Instead, LaDuke was a suit against the Immigration and Naturalization Service of the United States Government. Distinguishing Los Angeles v. Lyons, 461 U.S. 95 (1983), Rizzo, and O'Shea v. Littleton, 414 U.S.

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[27] Page 38 of DOJ Memorandum and n. 22.

488 (1974), the Ninth Circuit said Lyons, Rizzo and O'Shea "involved attempts by plaintiffs to entangle federal courts in the operations of state law enforcement and criminal justice institutions." Id. at 1324 (emphasis added). The Ninth Circuit concluded that the "comity considerations which influenced the Supreme Court's decision" in Lyons, Rizzo and O'Shea were inapplicable in LaDuke. Id. at 1325. However, the comity considerations absent in LaDuke are present here, since federal legislation is being used to entangle the District Court in local law enforcement.

The issue of federalism also was not present in Commonwealth of Pennsylvania v. Porter, 659 F.2d 306 (3rd Cir. 1981), *cert. denied*, 458 U.S. 1121 (1982), since the Commonwealth of Pennsylvania, not the federal government, sued various municipal officials.[28] Even without the issue of federalism being present, the Third Circuit rejected injunctive relief against the members of the Borough Council. The majority[29] held that Rizzo was controlling and that in order to enjoin "the members of the Borough Council,...[their] misconduct cannot be merely a failure to act. Such officials must have played an affirmative role in the deprivation of the plaintiffs' rights, *i.e.*, there must be a causal link between the actions of the responsible officials named and the challenged misconduct."[30]

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[28] the Borough itself was not even a defendant.

[29] A majority of five judges (Gibbons, Higginbotham, Sloviter, Seitz and Adams) approved injunctive relief against the mayor and certain police officers on the grounds that these officials had affirmatively approved the violation of constitutional rights,. However, a different majority (Garth, Aldisert, Hunter, Seitz and Adams) rejected injunctive relief against the members of the Borough Council for the reasons discussed above.

[30] Id. at 336.

(Emphasis added.) Porter supports the position of the FOP that vicarious liability is impermissible in the present situation.

2. The Commerce Clause Cases Cited By The DOJ Are Inapplicable

Faragher v. City of Boca Raton, 524 U.S. 775, 118 S.Ct. 2275 (1998), at least did involve municipal liability, but also is distinguishable from the present case, because, among other reasons, it involved Title VII. Congress has the authority under the Commerce Clause of the Constitution to regulate conditions of employment for both public and private employers.[31] In contrast, the DOJ argues that §14141 is within the power of Congress under §5 of the Fourteenth Amendment, not the Commerce Clause.[32]

There are differences in the authority granted to Congress by the different constitutional provisions. For instance, in Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985), the Supreme Court held that the application of the federal Fair Labor Standards Act to a local public mass-

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[31] U.S. v. Gregory, 818 F.2d 1114, 1119 (4th Cir. 1987), *cert. denied*, 484 U.S. 847 (1987). There is a separate question of whether the Eleventh Amendment bars actions against a state for employment discrimination. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). However, the Eleventh Amendment does not apply to actions against municipalities. Kentucky v. Graham, 473 U.S. 159, 167 n. 14 (1985).

[32] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998), and Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1013-1014 (6th Cir. 1987), cited by the DOJ at pp. 36-37, are also Title VII cases and distinguishable on the same grounds as Farragher. The DOJ also cites City of Chicago v. Matchmaker Real Estate Center, Inc., 982 F.2d 1086 (7th Cir. 1992); and Northside Realty Associates, Inc. v. United States, 605 F.2d 1348 (5th Cir. 1979) at p. 36. Yet these two cases involved the fair housing laws, private defendants and the Commerce Clause. The DOJ does not argue that the Commerce Clause gives Congress the authority to pass §14141, and the decision in United States v. Lopez, 514 U.S. 549, 115 S. Ct. 1624 (1995), in which the Supreme Court held interstate commerce was not involved in a federal law regulating guns in school districts, would prevent any argument that interstate commerce was involved in this case.

transit authority was a valid exercise by Congress of its power under the Commerce Clause. In EEOC v. Wyoming, 460 U.S. 226, 243 (1983), the Supreme Court held that the extension of the Age Discrimination in Employment Act ("ADEA") "to cover state and local governments...was a valid exercise of Congress' powers under the Commerce Clause." On the other hand, in Kimel v. Florida Board of Regents, ___ U.S.___, 120 S.Ct. 631, 650 (2000), the Supreme Court held that the ADEA was not a valid exercise of §5 of the Fourteenth Amendment, and therefore "ADEA's purported abrogation of the States' sovereign immunity is accordingly invalid."

In addition to the different parts of the Constitution involved, there are other reasons why Faragher is not applicable to the present case. First, although the Supreme Court in Faragher referred to vicarious liability, in fact that liability was subject to a condition: discriminatory action of a supervisor, who in the context of hiring and firing decisions could be deemed to be a policymaker. Second, Faragher did not involve a pattern or practice but a case filed by an individual asking for damages and, as the next section of this memorandum points out, injunctive relief against municipal actions can raise more federalism concerns than an individual damage action.

Finally, the anti-discrimination legislation involved in Faragher applied to both private and public employers and, unlike §14141, did not single out municipalities and control the actions of municipal employees toward private parties. As the following cases show, the Supreme Court has consistently

questioned the right of the federal government to single out municipalities and direct how the municipalities could act toward private citizens.

In Printz v. United States, 521 U.S. 898, 919-920 (1997), the Supreme Court held that the Brady Handgun Violence Prevention Act was unconstitutional, because it imposed duties on local governments in their contacts with private citizens. The Supreme Court noted that the Framers of the Constitution "rejected the concept of a central government that would act upon and through the States, and instead designed a system in which the State and federal governments would exercise concurrent authority over the people." The Supreme Court added that the Tenth Amendment was not "the exclusive textual source of protection for principles of federalism. Our system of dual sovereignty is reflected in numerous constitutional provisions . . . and not only those, like the Tenth Amendment, that speak to the point explicitly." Id. at 923 n. 13.

In New York v. United States, 505 U.S. 144, 156 (1992), the Supreme Court said that if a power was delegated to Congress by the Constitution, "the Tenth Amendment expressly disclaims any reservation of that power to the States; if a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution does not confer on Congress." The Court then held that if Congress had the authority to regulate private activity under the Commerce Clause, Congress could "offer States the choice of regulation that activity according to federal standards or having state

law pre-empted by federal regulation." Id. at 167. The Court held that the Low Level Radioactive Waste Policy Amendments Act of 1985 was inconsistent with the Tenth Amendment and unconstitutional, because "the Act commandeers the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program. Id. at 176, quoting Hodel v. Virginia Surface Mining & Reclamation Assn., Inc., 452 U.S. 264, 288 (1981).

In Jett v. Dallas Independent School District, 491 U.S. 701, 728 (1989), the Supreme Court cited Collector v. Day, 11 Wall. 113 (1871) and Kentucky v. Denison, 24 How. 66 (1861), and quoted Prigg v. Pennsylvania, 16 Pet. 539, 616 (1842), for the proposition that "Congress could not constitutionally 'insist that the states are bound to provide means to carry into effect the duties of the national government'". 42 U.S.C. §14141, as interpreted by the DOJ, would do just that--impose on local governments the DOJ's interpretation of appropriate police conduct.

3. Injunctive Relief Against Municipalities Based On Vicarious Liability Conflicts With Principles Of Federalism

The DOJ suggests that "the usual arguments against the imposition of such [vicarious] liability are inapplicable to §14141",[33] since injunctive relief and not damages is involved. The DOJ incorrectly cites Wood v. Strickland, 420 U.S. 308, 315 n. 6 (1975), which did not involve vicarious liability, for the proposition that "courts have historically drawn distinctions when discussing

[33] Page 37 of DOJ Memorandum

vicarious liability between actions for damages and actions for equitable relief."[34] However, Wood is irrelevant, since it was a case against the members of a local school board,[35] not an action against the local government entity,[36] and involved the qualified immunity of government officials, not vicarious liability.

The issue is not immunity. After all, "local government units can be sued directly for damages and injunctive or declaratory relief." Kentucky v. Graham, 473 U.S. 159 at 167, n. 14 (1985). The issue is that Congress does not have the authority to single out government entities and impose vicarious liability on them in order for the DOJ to control the conduct of police officers through some sort of "standards" decided by the DOJ instead of the Constitution.

Injunctive relief can in fact be far more intrusive than a damage action, and principles of federalism apply to injunctive relief against municipalities. As the Supreme Court said in City of Los Angeles v. Lyons, 461 U.S. 95, 112 (1983), "the need for a proper balance between state and federal authority counsels restraint in the issuance of injunctions against state officers engaged in the administration of the States' criminal laws in the absence of

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[34] Page 36 of DOJ Memorandum.

[35] The Court of Appeals affirmed directed verdicts for the principal and school district, and those rulings were not appealed. Id. at 309 n. 1.

[36] The qualified immunity of government officials in damage actions is a common law doctrine which the Supreme Court concluded Congress did not intend to eliminate by the passage of § 1983. Wood, Id. at 314-319. See also Pierson v. Ray, 386 U.S. 547 (1967). That common law

irreparable injury which is both grave and immediate." The Supreme Court added that "[i]n exercising their equitable powers federal courts must recognize '[t]he special delicacy of the adjustment to be preserved between federal equitable power and State administration of its own law.'" Id. In Lewis v. Casey, 518 U.S. 322, 342 (1996), the Supreme Court concluded that because the constitutional violation in question had "not been shown to be system-wide, and granting a remedy beyond what was necessary to provide relief to Harris and Bartholic was therefore improper." In Missouri v. Jenkins, 515 U.S. 70, 88 (1995), the Supreme Court quoted Milliken v. Bradley, 433 U.S. 267, 281-82 (1977), for the proposition that the "principle that the nature and scope of the remedy are to be determined by the violation means simply that federal-court decrees must directly address and relate to the constitutional violation itself." 515 U.S. at 88.

III. CONCLUSION

In United States v. City of Steubenville, C2-97-966 (S.D. Ohio, E.D.), the DOJ argued that the legislative history of §14141 showed "its very purpose was to address systematically police misconduct resulting from inadequate supervision, training, internal investigations, and other practices." (Emphasis added.) (See attached Exhibit B, which counsel for the FOP has highlighted) Now, however, the DOJ argues §14141 imposes vicarious liability. Apparently the DOJ has concluded the legislative history of §14141 changed between 1997,

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immunity has nothing to do with the power of Congress to authorize injunctive relief based on vicarious liability.

when the Steubenville case was filed, and the present date. The DOJ was closer to being accurate in the Steubenville case.

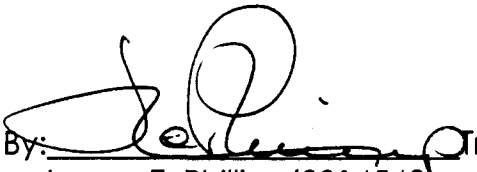
The words in §14141, legislative history and relevant case law at the time §14141 was enacted show that Congress did not single out municipalities and impose vicarious liability on them. If it had, that would have exceeded Congress' authority to enact legislation, and §14141 would be unconstitutional as applied.

The DOJ admits it has not pled two elements: deliberate indifference and causation by Columbus. Since the Complaint does not allege these two elements, and since these two elements are necessary for municipal liability, the Complaint must be dismissed. If, on the other hand, the Court concludes the statute imposes vicarious liability, this Court should declare § 14141 to be unconstitutional as applied by the DOJ. Either way, the FOP

respectfully requests that this Court grant the FOP's Motion for Judgment on the Pleadings.

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP



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CERTIFICATE OF SERVICE

I served a copy of this Reply Memorandum upon Mark Masling, Steven H. Rosenbaum and Mark A. Posner, Special Litigation Section, Civil Rights Division, United States Department of Justice, P.O. Box 66400, Washington, D.C. 20035-6400; Sharon J. Zealey, United States Attorney, Two Nationwide Plaza, 280 North High Street, Columbus, Ohio 43215; Glenn B. Redick, Chief Litigation Attorney, Timothy J. Mangan, Senior Litigation Attorney, and Andrea Peeples, Assistant City Attorney, Office of the Columbus City Attorney, 90 West Broad Street, Columbus, Ohio 43215; by first-class U.S. mail on April 14th, 2000.

James E. Phillips (0014542)

102D CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
Rept. 102-242
Part 1

OMNIBUS CRIME CONTROL ACT OF 1991

REPORT

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ON

H.R. 3371

together with

ADDITIONAL, DISSENTING, AND
ADDITIONAL DISSENTING VIEWS

[Including cost estimate of the Congressional Budget Office]

OCTOBER 7, 1991.—Ordered to be printed

EXHIBIT
A

102D CONGRESS
1st Session | HOUSE OF REPRESENTATIVES | REPT. 102-242
Part 1

OMNIBUS CRIME CONTROL ACT OF 1991

OCTOBER 7, 1991.—Ordered to be printed

Mr. BROOKS, from the Committee on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL, DISSENTING, AND ADDITIONAL DISSENTING VIEWS

[To accompany H.R. 3371]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the (H.R. 3371) to control and prevent crime, having considered same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu the the following:

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This Act may be cited as the "Omnibus Crime Control 1991".

(b) TABLE OF CONTENTS.—The following is the table of contents for this Act:

TITLE I—COMMUNITY POLICING; COP ON THE BEAT

SEC. 101. SHORT TITLE.

This title may be cited as "The Community Policing; Cop on the Beat Act of 1991".

SEC. 102. COMMUNITY POLICING; COP ON THE BEAT.

(a) IN GENERAL.—Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.) is amended—

(1) by redesignating part P as part Q;

(2) by redesignating section 1601 as section 1701; and

(3) by inserting after part O the following:

"PART P—COMMUNITY POLICING; COP ON THE BEAT GRANTS

"SEC. 1601. GRANT AUTHORIZATION.

"(a) GRANT PROJECTS.—The Director of the Bureau of Justice Assistance may make grants to units of general local government and to community groups to establish or expand cooperative efforts between police and a community for the purposes of increasing police presence in the community, including—

"(1) developing innovative neighborhood-oriented policing programs;

"(2) providing new technologies to reduce the amount of time officers spend processing cases instead of patrolling the community;

"(3) purchasing equipment to improve communications between officers and the community and to improve the collection, analysis, and use of information about crime-related community problems;

"(4) developing policies that reorient police emphasis from reacting to crime to preventing crime;

"(5) creating decentralized police substations throughout the community to encourage interaction and cooperation between the public and law enforcement personnel on a local level;

"(6) providing training and problem solving for community crime problems;

"(7) providing training in cultural differences for law enforcement officials;

"(8) developing community-based crime prevention programs, such as safety programs for senior citizens, community anticrime groups, and other anticrime awareness programs;

"(9) developing crime prevention programs in communities which have experienced a recent increase in gang-related violence; and

"(10) developing projects following the model under subsection (b).

"(b) MODEL PROJECT.—The Director shall develop a written model that informs community members regarding—

"(1) how to identify the existence of a drug or gang house;

"(2) what civil remedies, such as public nuisance violations and civil suits in small claims court, are available; and

"(3) what mediation techniques are available between community members and individuals who have established a drug or gang house in such community.

"SEC. 1602. APPLICATION.

"(a) IN GENERAL.—(1) To be eligible to receive a grant under this part, a chief executive of a unit of local government, a duly authorized representative of a combination of local governments within a geographic region, or a community group shall submit an application to the Director in such form and containing such information as the Director may reasonably require.

"(2) In such application, one office, or agency (public, private, or nonprofit) shall be designated as responsible for the coordination, implementation, administration, accounting, and evaluation of services described in the application.

"(b) GENERAL CONTENTS.—Each application under subsection (a) shall include—

"(1) a request for funds available under this part for the purposes described in section 160);

"(2) a description of the areas and populations to be served by the grant; and

"(3) assurances that Federal funds received under this part shall be used to supplement, not supplant, non-Federal funds that would otherwise be available for activities funded under this part.

"(c) COMPREHENSIVE PLAN.—Each application shall include a comprehensive plan which contains—

SEC. 1107. CERTIFICATES OF PROBABLE CAUSE.

The third paragraph of section 2253, title 28, United States Code, is amended to read as follows:

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause. However, an applicant under sentence of death shall have a right of appeal without a certification of probable cause, except after denial of a second or successive application.".

TITLE XII—PROVISIONS RELATING TO POLICE OFFICERS

Subtitle A—Police Accountability

SEC. 1201. SHORT TITLE.

This subtitle may be cited as the "Police Accountability Act of 1991".

SEC. 1202. PATTERN OR PRACTICE CASES.

(a) CAUSE OF ACTION.—

(1) 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 that deprives persons of rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States.

(2) CIVIL ACTION BY ATTORNEY GENERAL.—Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) 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.

(3) CIVIL ACTION BY INJURED PERSON.—Any person injured by a violation of paragraph (1) may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice. In any civil action under this paragraph, the court may allow the prevailing plaintiff reasonable attorneys' fees and other litigation fees and costs (including expert's fees). A governmental body shall be liable for such fees and costs to the same extent as a private individual.

(b) DEFINITION.—As used in this section, the term "law enforcement officer" means an official empowered by law to conduct investigations of, to make arrests for, or to detain individuals suspected or convicted of, criminal offenses.

SEC. 1203. DATA ON USE OF EXCESSIVE FORCE.

(a) ATTORNEY GENERAL TO COLLECT.—The Attorney General shall, through the victimization surveys conducted by the Bureau of Justice Statistics, acquire data about the use of excessive force by law enforcement officers.

(b) LIMITATION ON USE OF DATA.—Data acquired under this section shall be used only for research or statistical purposes and may not contain any information that may reveal the identity of the victim or any law enforcement officer.

(c) ANNUAL SUMMARY.—The Attorney General shall publish an annual summary of the data acquired under this section.

Subtitle B—Retired Public Safety Officer Death Benefit

SEC. 1211. RETIRED PUBLIC SAFETY OFFICER DEATH BENEFIT.

(a) PAYMENTS.—Section 1201 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 is amended—

(1) in subsection (a) by inserting after "line of duty" the following "or a retired public safety officer has died as the direct and proximate result of a personal injury sustained while responding to a fire, rescue, or police emergency";

(2) in subsection (b) by inserting after "line of duty" the following "or a retired public safety officer has become permanently and totally disabled as the direct result of a catastrophic injury sustained while responding to a fire, rescue, or police emergency"; and

(3) in subsections (c), (i), and (j) by inserting after "public safety officer" every place it occurs the following "or a retired public safety officer".

(b) LIMITATIONS.—Section 1202 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 is amended—

(1) in paragraph (1) by striking "the public safety officer or by such officer's intention" and inserting "the public safety officer or the retired public safety officer who had the intention";

(2) in paragraph (2) by striking "the public safety officer" and inserting "the public safety officer or the retired public safety officer"; and

(3) in paragraph (3) by striking "the public safety officer" and inserting "the public safety officer or the retired public safety officer".

(c) NATIONAL PROGRAM.—Section 1203 of title I of the Omnibus Crime Control and Safe Streets Act of 1968 is amended by inserting before the period "or retired public safety officers who have died while responding to a fire, rescue, or police emergency".

(d) DEFINITIONS.—Section 1204 of the Omnibus Crime Control and Safe Streets Act of 1968 is amended—

(1) by striking "and" after paragraph (6);

(2) by inserting "; and" at the end of paragraph (7); and

(3) by adding at the end the following:

"(8) 'retired public safety officer' means a former public safety officer, as defined in paragraph (7), who has served a sufficient period of time in such capacity to become vested in the retirement system of a public agency with which the officer was employed and who retired from such agency in good standing.".

(e) EFFECTIVE DATE.—The amendments made by this section shall apply with respect to death or injuries occurring after the date of the enactment of this section.

Subtitle C—Study on Police Officers' Rights

SEC. 1221. STUDY ON POLICE OFFICERS' RIGHTS.

The Attorney General, through the National Institute of Justice, shall conduct a study of the procedures followed in internal, noncriminal investigations of State and local law enforcement officers to determine if such investigations are conducted fairly and effectively. The study shall examine the adequacy of the rights available to law enforcement officers and members of the public in cases involving the performance of a law enforcement officer, including—

(1) notice;

(2) conduct of questioning;

(3) counsel;

(4) hearings;

(5) appeal; and

(6) sanctions.

Not later than one year after the date of enactment of this Act, the Attorney General shall submit to the Congress a report on the results of the study, along with findings and recommendations on strategies to guarantee fair and effective internal affairs investigations.

Subtitle D—Law Enforcement Scholarships

SECTION 1231. SHORT TITLE.

This subtitle may be cited as the "Law Enforcement Scholarship Act of 1991".

SEC. 1232. STATEMENT OF PURPOSE.

(a) IN GENERAL.—Title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3711 et seq.), as amended by section 791 of this Act, is amended—

(1) by redesignating part U as part V;

(2) by redesignating section 2101 as 2201; and

(3) by inserting after part T the following:

"(6) Whoever knowingly violates section 922(u) shall be fined under this title or imprisoned not more than 25 years, or both, and if death results from conduct prohibited by that section, shall be punished by death or imprisonment for life or any term of years.".

SEC. 2432. INAPPLICABILITY TO UNIFORM CODE OF MILITARY JUSTICE.

The provisions of chapter 228 of title 18, United States Code, as added by this Act, shall not apply to prosecutions under the Uniform Code of Military Justice (10 U.S.C. 801 et seq.).

EXPLANATION OF AMENDMENT

Inasmuch as H.R. 3371 was ordered reported with a single amendment in the nature of a substitute, the contents of this report constitute an explanation of that amendment.

SUMMARY AND PURPOSE

H.R. 3371, the "Omnibus Crime Control Act of 1991," is a comprehensive legislative response to the many facets of criminal activity in our society. The Committee has moved forward with this legislative initiative in order to fulfill a responsibility that has its roots in the Preamble to the Constitution and its call to "establish justice * * * insure domestic tranquility * * * [and] promote the general welfare." No force is more damaging to our Nation's system of justice, more disruptive of the domestic tranquility that the Founders sought, more harmful to the "general welfare" they wished to promote, than acts of criminal violence. People who live in fear of physical harm, of drugs corrupting their neighborhoods and schools, of a criminal justice system that does not operate efficiently and evenhandedly, cannot truly be said to be free.

Crime's corrosive effects are not confined exclusively to the physical violence that places life and limb in jeopardy. Our Nation's entire financial structure is predicted on trust and confidence in the soundness and integrity of the transactions and participants that make up the system. White collar crime erodes those pillars of trust and impedes our Nation's ability to operate efficiently at home and compete vigorously abroad.

In assembling the legislative components of H.R. 3371, the Committee was mindful of its dual responsibility: first, to fulfill its duty at the Federal level to counter criminal activity, and second, to respect and promote the fundamental role of the states and local governments in the functioning of our criminal justice system. In practical terms, it is impossible for the Federal government to assume the law enforcement role in every community across the Nation. Historically, day-to-day responsibility for operation of the Nation's criminal justice system has rested with those units of government that are closest to the people. H.R. 3371 reflects that historical relationship while giving impetus to certain initiatives and policy decisions that must start at the Federal level is the fight against crime is to be waged efficiently and vigorously.

As ordered reported by the Committee on the Judiciary, H.R. 3371 represents a Federal response to criminal activity in our Nation in the following areas:

Title I—Community Policing; Cop on the Beat
Title II—Drug Treatment in Federal Prisons
Title III—Substance Abuse Treatment in State Prisons
Title IV—Safe Schools
Title V—Victims of Crime
  Subtitle A—Crime Victims Fund
  Subtitle B—Restitution
  Subtitle C—HIV Testing
Title VI—Certainty of punishment for Young Offenders
Title VII—Drug Testing of Arrested Individuals
Title VIII—Drug Emergency Areas act of 1991
Title IX—Coerced Confessions
Title X—DNA Identification
Title XI—Habeas Corpus
Title XII—Provisions Relating To Police Officers
  Subtitle A—Police Accountability
  Subtitle B—Retired Public Safety Officer Death Benefit
  Subtitle C—Study on Police Officers' Rights
  Subtitle D—Law Enforcement Scholarships
  Subtitle E—Law Enforcement Family Support
Title XIII—Fraud
Title XIV—Protection of Youth
  Subtitle A—Crimes Against Children
  Subtitle B—Parental Kidnapping
  Subtitle C—Sexual Abuse Amendments
  Subtitle D—Reporting of Crimes Against Children
Title XV—Miscellaneous Drug Control
Title XVI—Fairness in Death Sentencing Act of 1991
Title XVII—Miscellaneous Crime Control
  Subtitle A—General
  Subtitle B—Motor Vehicle Theft Prevention
  Subtitle C—Terrorism: Civil Remedy
  Subtitle D—Commission on Crime and Violence
Title XVIII—Miscellaneous Funding Provisions
  Subtitle A—General
  Subtitle B—Midnight Basketball
Title XIX—Miscellaneous Criminal Procedure and Correction
  Subtitle A—Revocation of Probation and Supervised Release
  Subtitle B—List of Veniremen
  Subtitle C—Immunity
  Subtitle D—Juvenile Record
  Subtitle E—Petty Offenses
  Subtitle F—Optional Venue for Espionage and Related Offenses
  Subtitle G—General
Title XX—Firearms and Related Amendments
  Subtitle A—Firearms and Related Amendments
  Subtitle B—Assault Weapons
  Subtitle C—Large Capacity Ammunition Feeding Devices
Title XXI—Sports Gambling
Title XXII—Technical Corrections
Title XXIII—Death Penalty Procedures
Title XXIV—Death Penalty

Justice Anthony Kennedy's opinion for the Supreme Court in *McCleskey* v. *Zant* [61] has already narrowed the law governing successive petitions by incorporating the rules previously developed for cases on procedural default in State court. Under *McCleskey*, a prisoner cannot file a second Federal petition without showing 1) "cause" for failing to raise his or her claim in a prior application and "prejudice" flowing from the violation that went uncorrected because the claim was not raised the first time, *or* 2) that a "miscarriage of justice" would result from the Federal court's failure to entertain the claim in a successive petition. According to Justice Kennedy, a miscarriage of justice would occur if the violation "caused the conviction of an innocent person." [62]

This section is more stringent than *McCleskey*. Subparagraph (A) codifies some, but not all, of the ways the Court has held that "cause" can be established. Further, under subsection (B), the prisoner must assert a claim going to guilt or to the validity of his or her death sentence and, *in addition*, must show what amounts to "cause."

Section 1107 (Certificates of Probable Cause)

This section adopts the recommendation of the Powell Committee that prisoners under sentence of death should not be required to obtain a certificate of probable cause in order to appeal from the denial of relief at the district court level, except in successive petition cases. Since certificates are issued routinely in death penalty cases, the certification process now wastes valuable judicial resources.

CONCLUSION

As ABA President John Curtin testified:

> A system that would take life must first give justice. The paramount requirement of a civilized system of justice is that a sentence of death not be carried out until it has been subjected to full, fair, and deliberate scrutiny. Unique among all legal decisions, the decision to execute the defendant cannot be corrected after it has been carried out.[63]

In a manner consistent with justice, the Act will expedite death penalty proceedings and ensure that every petitioner will have one, and only one, fair opportunity to present his or her claims to a Federal court. The Act thus return the focus of capital litigation to the States courts, where it belongs.

[61] 111 S. Ct. 1454 (1991).
[62] *Id.* at 1475.
[63] Curtin and Liebman statement at 52, *Subcommittee Hearings*, July 17, 1991.

TITLE XII—PROVISIONS RELATING TO POLICE OFFICERS

SUBTITLE A—POLICE ACCOUNTABILITY

PURPOSE

Subtitle A is the Police Accountability Act of 1991. It grants standing to the United States Attorney General and, in certain circumstances, to private parties to obtain civil injunctive relief against governmental authorities that engage in patterns or practices of unconstitutional or unlawful conduct by law enforcement officers. It also requires the Attorney General, through the surveys of the Bureau of Justice Statistics, to collect data about the incidence of police use of excessive force.

BACKGROUND

On March 3, 1991 motorist Rodney King was apprehended by members of the Los Angeles Police Department (LAPD) after a high speed chase. While twenty-one other officers stood by, three LAPD officers and a sergeant administered 56 baton blows, six kicks to the head and body, and two shocks from a Taser electric stun gun. The incident was captured on videotape by a citizen. President Bush rightly called the beating "sickening."

Unfortunately, the Rodney King incident is not an aberration. The Independent Commission on the Los Angeles Police Department, created to examine the incident and headed by former Deputy Attorney General and Deputy Secretary of State Warren Christopher, concluded in its July 1991 report that "there is a significant number of officers in the LAPD who repetitively use excessive force against the public." Moreover, as the Commission found, the conduct of these officers was well known to police department management, who condoned the behavior through a pattern of lax supervision and inadequate investigation of complaints.

As Professor James Fyfe, a 16-year veteran of the New York City Police Department and one of the nation's leading experts on police use of force, testified before the Subcommittee on Civil and Constitutional Rights, the King incident "was no aberration. . . . [T]here exists in LAPD a culture in which officers who choose to be brutal and abusive are left to do so without fear of interference."

It is apparent, moreover, that the problem is not limited to Los Angeles. Police chiefs from 10 major cities convened soon after the King incident and emphasized that "the problem of excessive force in American policing is real." The same point was stressed by Hubert Williams, President of the Police Foundation and former Chief of Police for Newark, New Jersey: "Police use of excessive force is a significant problem in this country, particularly in our inner cities" District of Columbia police officer Ronald Hampton, director of national affairs for the National Black Police Association, testified before the Subcommittee that his organization has complained for years that minority residents "were disrespected, disregarded, [and] physically and verbally abused" by police. The Flint, Michigan ombudsman, who reported that citizen complaints about police conduct to his office were up 10 percent in 1990, after

a 25 percent increase in 1989, wrote to the Subcommittee that the experience of his office led him to believe that the Los Angeles beating "was not an isolated incident."

The Subcommittee on Civil and Constitutional Rights held two days of hearings on police brutality after the King incident and received written submissions regarding alleged police misconduct from across the country. Many of the complaints involved individual incidents. Many, however, also presented systemic issues—particular policies or practices that were reflected in a pattern of misconduct. Among the matters brought to the Subcommittee's attention:

> The Civil Rights Division of the Massachusetts Attorney General's office found that in 1989-90 Boston police officers routinely conducted unconstitutional, harassing stops and searches of minority individuals, including requiring youths to submit to strip searches in public.
>
> In New York City, bystanders who complain about police actions are arrested and "run through the system," according to affidavits compiled by the New York Civil Liberties Union. The Police Department admitted that a 1977 order prohibiting such arrests was "mistakenly" revoked in 1980.
>
> A lawsuit against the town of Reynoldsburg, Ohio discovered that a special unit within the police department called itself the S.N.A.T. squad, for "Special Nigger Arrest Team."
>
> The Los Angeles Police Department directed officers to use an illegal king-fu device known as the nun-chuk to inflict pain on passive demonstrators in an effort to force them to comply with police orders.

Policing is difficult, dangerous work. Most police officers do not abuse the authority granted them. To the contrary, the majority of police officers in America are dedicated men and women who strive to uphold the ideals of the Constitution. Under growing stresses, they make an enormous contribution to public safety and deserve the nation's gratitude. Incidents of restraint in the face of provocation certainly outnumber incidents of brutality. Faced, however, with evidence that the problem of excessive force is a serious one, police departments, local authorities and the Federal Government have a responsibility to strengthen their responses.

Current Federal legal authority and Justice Department policy

Police brutality is a violation of the U.S. Constitution, and under sections 241 and 242 of title 18 it is a federal crime. However, the Federal response to police misconduct has been limited. The Assistant Attorney General in charge of the Civil Rights Division testified that the U.S. Justice Department follows a "back-stop" policy, deferring to local authorities. Statistics provided to the Subcommittee on Civil and Constitutional Rights by the Justice Department show that the Justice Department prosecutes on average 50 police officers a year. This represents a fraction of the 3,000 criminal civil rights cases, most of them involving law enforcement officers, that the Justice Department investigates yearly.

Moreover, the cases investigated by the Department represent only a fraction of the allegations of police misconduct reported to local authorities, most of which are never reported to Federal officials. The Justice Department provided to the Subcommittee statistics showing that the FBI had investigated 720 criminal civil rights matters in the Central District of California, which encompasses Los Angeles, between 1982 and March 1991. Of those 720 cases investigated in a nine year period, 72 involved the Los Angeles Police Department and 186 involved the Los Angeles County Sheriff's Office. Yet, the Los Angeles Police Misconduct Referral Service received 652 complaints against the LAPD in 1988 alone and 616 in 1990. Of the 720 Federal investigations, only four resulted in indictments against police officers. Yet, during just a 3 year period, 1987-1990, the LA County Sheriff's Office lost or settled 56 civil lawsuits involving the use of excessive force, paying out $8.5 million in damages, and the LAPD paid out $18.8 million in damages for police brutality cases.

Pattern or practice authority

The Justice Department currently lacks the authority to address systemic patterns or practices of police misconduct. The Justice Department can only prosecute individual police officers, whom juries are often reluctant to convict. If an officer was poorly trained, or was acting pursuant to an official policy, it is difficult to obtain a conviction, and Justice has no authority to sue the police department itself to correct the underlying policy.

In 1980, the Third Circuit Court of Appeals held in *United States* v. *City of Philadelphia*, 644 F. 2d 187 (3d Cir. 1980), that the United States does not have implied statutory or constitutional authority to sue a local government or its officials to enjoin violations of citizens' constitutional rights by police officers.

This represents a serious and outdated gap in the federal scheme for protecting constitutional rights. The Attorney General has pattern or practice authority under eight civil rights statutes, including those governing voting, housing, employment, education, public accommodations and access to public facilities. The Justice Department can sue a city or county over its voter registration practices or its educational policies. It can sue private and public employers, including police departments, over patterns of employment discrimination. The Justice Department can seek injunctive relief under the Civil Rights of Institutionalized Persons Act against a jail or prison that tolerates guards beating inmates. But it cannot sue to change the policy of a police department that tolerates officers beating citizens on the street.

While a private citizen injured by police misconduct can sue for money damages, he or she cannot sue for injunctive relief, absent a showing of likely future harm, under the Supreme Court decision in *Los Angeles* v. *Lyons*, 461 U.S. 95 (1983). The case involved a resident of Los Angeles who had been choked unconscious by a police officer following a routine traffic stop. Unlike other cities, Los Angeles did not limit the use of chokeholds to situations where the officer's life was in danger. From 1975 to 1982, 15 people died as a result of LAPD chokeholds. The Supreme Court ruled that the plaintiff had no standing to seek an injunction restricting the use of chokeholds because he could not demonstrate that he himself was likely to be choked again. If choked again, the Court allowed, he could sue for damages again. But neither he nor anyone else could sue to bring the LAPD's policy on use of the chokehold in line with practices accepted in most other cities.

The Police Accountability Act would close this gap in the law, authorizing the Attorney General and private parties to sue for injunctive relief against abusive police practices. The Committee expects that the Department of Justice will be diligent in exercising its new authority. But the Committee believes that private standing is necessary, especially in situations where the Department of Justice does not act. To ensure that the issues being litigated are not hypothetical, and to provide a court with the benefit of a factual context, the Act requires that a private citizen seeking injunctive relief have been injured by the challenged practice.

The Act creates an enforceable right to be free of patterns of police brutality. In adopting the provision granting individuals the standing to sue, Congress is exercising its authority to create legal rights, the invasion of which creates standing even where the plaintiff would not have had standing in the absence of the statute. *Warth* v. *Seldin*, 422 U.S. 490 (1975).

The Act does not increase the 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. The Act merely provides another tool for a court to use, after a police department is held responsible for a pattern or practice of misconduct that violates the Constitution or laws of the United States.

Because the Act imposes no new standard of conduct on law enforcement agencies, it should not increase the amount of litigation against police departments. Individuals aggrieved by the use of excessive force already can and do sue under 42 U.S.C. 1983 for monetary damages. With adoption of this section, such persons will be able to seek injunctive relief as well, if their injury is the product of a pattern or practice of misconduct.

This provision may in fact decrease the number of lawsuits against police departments. Currently, changes in a police department's policy are prompted by successive criminal cases or damage actions; the cumulative weight of convictions or adverse monetary judgments may lead the police leadership to conclude that change is necessary. This is an inefficient way to enforce the Constitution and is not always effective. Some police departments have shown they are willing to absorb millions of dollars of damage payments per year without changing their policies. If there is a pattern of abuse, this section can bring it to an end with a single legal action.

Pattern or practice authority is needed because the Federal Government's criminal authority to prosecute police brutality is not adequate to address patterns or practices such as the lack of training or the routine use of deadly techniques like chokeholds, or the absence of a monitoring and disciplinary system. Two cases illustrate both the need for this authority and how it will work.

In Mason County, Washington, in the nine month period between June 1985 and March 1986, citizens in four separate incidents were beaten by police officers following traffic stops. A federal jury returned civil verdicts against all of the deputy sheriffs involved in the incidents and against the county, awarding a total of $853,000 in damages and costs. The Ninth Circuit affirmed, tracing the incidents to the lack of training provided by the sheriff's department, which it described as "woefully inadequate, if it can be said to have existed at all." *Davis* v. *Mason County*, 927 F.2d 1473, 1482 (9th Cir. 1991). Yet while the lack of training was established and was found to rise to the level of a constitutional violation, the courts were powerless to correct it. In formulating a remedy, the courts would have had to look no further than the Washington State statute on police training standards, which Mason County has ignored.

Another federal case, against the Goldsboro, North Carolina police department, resulted in a $220,000 payment to the father of a young black man who was strangled to death by city police officers. The officers involved in the incident had been involved in several prior incidents involving use of excessive force, yet there had been disciplinary action taken against them. One expert witness, the former chief of police for Boston and St. Louis County, testified that the City of Goldsboro had an "official policy of not investigating incidents [involving deadly force]." Again, the court had no authority to order remedies for the glaring deficiencies the case has highlighted. *Swann* v. *Goldsboro*, No. 90-59-CIV-5-D (E.D.N.C.).

The Police Accountability Act as originally introduced and reported out of the Subcommittee on Civil and Constitutional Rights contained a section on criminal liability against police officers. That section was stricken by an amendment during full Committee consideration.

Section-by-Section Analysis

Section 1201 is the short title: Police Accountability Act of 1991.

Section 1202 creates a cause of action and standing for pattern or practice cases.

Subsection 1202(a)(1) provides that 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 rights, privileges or immunities secured or protected by the Constitution or laws of the United States.

Subsection 1202(a)(2) provides that the Attorney General may in a civil action obtain appropriate equitable and declaratory relief to eliminate a pattern or practice that violates subsection 1202(a)(1).

Subsection 1202(a)(3) provides that a person injured by a pattern or practice that violates subseciton 1202(a)(1) may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

Section 1202(b) defines law enforcement officers. The term includes state, local and Federal officials.

Section 1203 requires the Attorney General to collect data about the use of excessive force by law enforcement officers. The data will not identify individuals. It will be published annually in statistical form.

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

UNITED STATES OF AMERICA, Plaintiff, v. CITY OF STEUBENVILLE, STEUBENVILLE POLICE DEPARTMENT, STEUBENVILLE CITY MANAGER, in his capacity as Director of Public Safety, and STEUBENVILLE CIVIL SERVICE COMMISSION, Defendants.	)	CIVIL NO. _____

MEMORANDUM OF LAW IN SUPPORT OF
JOINT MOTION FOR ENTRY OF CONSENT DECREE

SUMMARY

The parties have moved jointly for this Court to enter the proposed Consent Decree. Entry is appropriate under the law, and accordingly should be granted. A declaration in support of entry is attached to the Motion.

ARGUMENT

A consent decrees has "attributes of both a contract and of a judicial act." Williams v. Vukovich, 720 F.2d 909, 919 (6th Cir. 1983). "[O]nce approved, the prospective provisions of the consent decree operate as an injunction." Id. at 920. Because of the consent decree's status as a judicial order, the district court should review the decree's provisions prior to entry. That review, however, is deferential in circumstances such as these, where the plaintiff is the United States government, and where voluntary agreement serves the interests of the statute underlying the cause of action.

EXHIBIT
B

Under applicable precedent, the review should simply ensure that the consent decree:

> spring[s] from and serve[s] to resolve a dispute within the court's subject-matter jurisdiction. Furthermore, consistent with this requirement, the consent decree must 'com[e] within the general scope of the case made by the pleadings,' Pacific R. Co. v. Ketchum, 101 U.S. 289, 297 (1880), and must further the objectives of the law upon which the complaint was based. . . . However, in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree. . . . Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial.

Local 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501 (1986). "[T]he trial court need only determine that the proposed settlement is not unconstitutional, unlawful, . . . or unreasonable before approval is granted. Moreover, . . . the decree proposed in these circumstances is entitled to a presumption of validity." United States v. City of Miami, 614 F.2d 1322, 1333(5th Cir. 1980).[1]

This decree meets these requirements because it fairly, adequately, and reasonably resolves the allegations in the Complaint; it furthers the purposes of Section 210401 of the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141; its terms do not violate the law; and it serves the public interest.

The proposed Consent Decree was carefully drafted to help the Steubenville Police Department satisfy constitutional

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[1] Rule 23, Fed. R. Civ. P., does not apply to this "action . . . brought by a Government agency to enforce the federal law with whose enforcement the agency is charged." General Telephone Co. of the Northwest, Inc. v. EEOC, 446 U.S. 318, 323 n.5 (1980).

requirements by implementing a comprehensive system that enhances accountability and supervision of officers and managers of the Steubenville Police Department, and meets current standards in the law enforcement profession. By agreeing to the terms of this Consent Decree, the United States and the defendants avoid expensive, protracted litigation, and accelerate reforms in the Steubenville Police Department.

The provisions of the decree are entirely within the scope of the statute underlying the Complaint, 42 U.S.C. § 14141. That statute imposes municipal liability for patterns or practices of illegal or unconstitutional conduct by law enforcement officers. As the relevant House Committee Report explains, its very purpose was to address systemically police misconduct resulting from inadequate supervision, training, internal investigations, and other practices: "Pattern or practice authority is needed . . . to address patterns or practices such as the lack of training . . . or the absence of a monitoring and disciplinary system." H.R. Rep. No. 102-242, at 138 (1991) (Omnibus Crime Control Act of 1991, Title XII, Police Accountability Act).[2/]

The proposed Consent Decree requires systemic reforms to the Steubenville Police Department of precisely the type Congress

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[2] This committee report accompanied the enacted statute's predecessor bill. There is no separate legislative history for the bill that was enacted and codified at 42 U.S.C. § 14141, but the legislative history of the predecessor bill is relevant because the language of that bill was identical, in pertinent part, to that of Section 14141. Compare id. at 24 ("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, privileges, or immunities, secured or protected by the Constitution or laws of the United States.") with 42 U.S.C. § 14141 (same language).