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 MEMORANDUM OF THE FRATERNAL ORDER OF POLICE, CAPITAL CITY LODGE NO. 9 ("FOP") TO THE UNITED STATES' SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO FOP'S MOTION FOR JUDGMENT ON THE PLEADINGS

The Department of Justice (the "DOJ") is simply making things up as it goes along, without regard for accuracy. DOJ cites three cases, three articles and a book for the proposition that pervasive evidence of police misconduct was "available at the time of § 14141's enactment,"[1] but each of those "authorities" was actually issued or published more than a year after the passage of §14141. DOJ refers to a Supreme Court decision,[2] when in reality DOJ is referring to part of an opinion by Justice Kennedy with which only one other Justice agreed. DOJ also claims for the first time that the Complaint "refers to actions or inactions by Columbus that played a part in and

[1] P. 16 of Supplemental Memorandum (emphasis added).
[2] P. 9 of Supplemental Memorandum, citing Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 279 (1997). The cited part of Justice Kennedy's opinion was in part IID of his opinion, in which only Chief Justice Rehnquist concurred.

contributed to the constitutional deprivations suffered by citizens."[3] However, there is no allegation in the Complaint that actions or inactions by Columbus "played a part in" or "contributed to" constitutional deprivations. The remainder of DOJ's argument has no more merit.

A. The Use of the Disjunctive "Or" In Section 14141's Prohibition Against "Any Governmental Authority, Or Any Agent" Engaging In Certain Conduct Shows That §14141 Does Not Impose Vicarious Liability

DOJ also attempts to re-write the statute upon which it relies by eliminating the word "or." Yet, the use in §14141 of the disjunctive "or," which DOJ disregards, is significant. In Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979), the Supreme Court said, "[c]anons of construction ordinarily suggest that terms connected by a disjunctive be given separate meanings, unless the context dictates otherwise; here it does not." See also Brown v. Budget Rent-A-Car Systems, Inc., 119 F.3d 922, 924 (11th Cir. 1997) ("as 'a general rule, the use of a disjunctive in a statute indicates alternatives and requires that those alternatives be treated separately. Hence, language in a clause following a disjunctive is considered inapplicable to the subject matter of the preceding clause'."); and In re Espy, 80 F.3d 501, 505 (D.C. Cir. 1996) ("a statute written in the disjunctive is generally construed as 'setting out separate and distinct alternatives'"). In other words, §14141(a) makes it illegal for

[3] P. 8 of Supplemental Memorandum.

governmental authorities or agents to engage in specified activities; and it does not impose the sins of one on the other.

In Title VII, by contrast, Congress used the word "agent" not in the disjunctive, but instead included it within the definition of employer. Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998), cited by DOJ, recognized the significance of including "agent" within the definition of employer. The Supreme Court observed that "*Meritor's*[4] rationale for concluding that agency principles guide the liability inquiry under Title VII rests on an aspect of that statute not found in Title IX." Id. at 283. The Court then said that difference was "Title VII ...explicitly defines 'employer' to include 'any agent'." Id. Title IX did not define educational institution to include its agents,[5] and the Supreme Court concluded there was no vicarious liability.

In short, under Title VII there is vicarious liability because the statute defines "employer" to include agents. In contrast, the use of "or" in §14141 shows §14141 treats an agent separately from the governmental authority and does not impose vicarious liability.

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[4] Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986)

[5] 20 U.S.C. §1681(c) defines educational institution as "any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department."

B. Congress Used Language In House Report 102-242 Similar To Supreme Court Decisions, Showing That A Local Government Must Be Found Responsible For The Constitutional Violations Before There Could Be Municipal Liability

House Report 102-242 explained that the "Act merely provides another tool for a court to use, **after a police department is held responsible** for a pattern of practice of misconduct that violates the Constitution or laws of the United States."[6] This language is very similar to the language of the Supreme Court interpreting § 1983, "that these **governments should be held responsible when, and only when...**" St. Louis v. Praprotnik 485 U.S. 112, 122 (1988) (emphasis added), discussing Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978) ["it is when execution of a government's policy or custom...may fairly be said to represent official policy...that the **government as an entity is responsible** under §1983" (emphasis added)]. In other words, Congress intended § 14141 to require a finding that the municipality was in fact responsible for the violations of constitutional rights, before the municipality could legally be found to be liable.

C. Conclusory Allegations Are Insufficient To Salvage A Cause Of Action.

Contrary to its new claim in the Supplemental Memorandum,[7] DOJ makes no allegation in its Complaint that Columbus played a part in

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[6] P. 138 of House Report 102-242, Exhibit A of Reply Memorandum of FOP to Memorandum of DOJ in Opposition to Motion for Judgment on Pleadings.

[7] P. 8 of Supplemental Memorandum.

or contributed to constitutional violations. However, even if the Complaint had used the few words that DOJ inserts into its Supplemental Memorandum--and claimed that Columbus had "played a part in" or "contributed to" constitutional violations--the Complaint still would be legally insufficient.

Although the Sixth Circuit observed, "some appear to argue that one need only to place the opposing party on notice," the Sixth Circuit also held that "in reality the rule envisions 'a statement of circumstance, occurrences and events in support of the claim presented'." Veney v. Hogan 70 Fed. 3d 917, 921 (6th Circuit 1995). The Sixth Circuit has also held that a "complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some viable legal theory." Weiner v. Klais & Co., Inc., 108 F. 3d 86, 88 (6th Cir. 1997) (Emphasis added). In Kesterson v. Moritsugu, 1998 U.S. App. LEXIS 12182 (6th Cir. 1998) (attached as Exhibit A to FOP Motion For Judgment On Pleadings), the Sixth Circuit said that plaintiff "must allege that [defendant] took specific actions that constituted deliberate indifference rather than simply failure to treat or negligence. He has not done so." Id. at *12 (emphasis added). The Sixth Circuit affirmed the District Court dismissal of the complaint, since the complaint made "only vague and conclusory allegations" with regard to

defendants. Id. at ** 11-12. DOJ has simply disregarded Sixth Circuit pleading requirements.

D. The Imposition of Vicarious Liability by Section 14141 Would be Unconstitutional

1. Supreme Court Silence On An Issue Is Not Precedent

A Supreme Court decision that is silent on a particular constitutional issue is not dispositive of or even a precedent on that issue. For instance, in Illinois Elections Board v. Socialist Workers Party, 440 U.S. 173, 183 (1979), the Court said "the issue was by no means adequately presented to and necessarily decided by this Court. *Jackson* therefore has no effect on the constitutional claim advanced by appellees." (Emphasis added.) See also Brecht v. Abrahamson, 507 U.S. 619, 631 (1993) ("since we have never squarely addressed the issue..., we are free to address the issue on the merits"); Webster v. Fall, 266 U.S. 507, 511 (1925)("[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents"); and United States v. Russo, 708 F. 2d 209, 225 (6th Cir. 1983), (Holschuh, J., concurring) ("questions neither brought to the attention of the court nor ruled upon are not to be considered as having been so decided as to constitute precedents").

DOJ appears to place significance on the fact that in Faragher, the Supreme Court imposed vicarious liability under Title VII

"without even considering whether such liability raised a constitutional concern."[8] However, as the above cases show, the Supreme Court's silence in Faragher has no bearing on the constitutionality of a statute imposing vicarious liability on local governments under a different statute enacted pursuant to a different provision of the Constitution.

2. The Authority Granted To Congress By The Commerce Clause Is Not The Same As The Authority Granted To Congress By §5 Of The Fourteenth Amendment

Contrary to the DOJ suggestion, a statute may pass muster under the Commerce Clause yet be beyond the authority that Section 5 of the Fourteenth Amendment confers upon Congress. For instance, in EEOC v. Wyoming, 460 U.S. 226, 243 (1983) the Supreme Court expressly held the extension of the Age Discrimination In Employment Act (**ADEA**) to cover state and local governments was a **valid exercise of the Commerce Clause**. However, 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 Section 5 of the 14th Amendment**, and that the "purported abrogation of the States' sovereign immunity is accordingly invalid." The Commerce Clause and Section 5 of the Fourteenth Amendment have different purposes and scopes.

The Commerce Clause of Article I of the United States Constitution provides broad authorization to Congress to regulate articles

[8] P. 10 of Supplemental Memorandum.

of interstate commerce, instrumentalities of interstate commerce and those activities that have a substantial relation to interstate commerce. United States v. Lopez, 514 U.S. 549 (1995) (invalidating the Gun-Free School Zones Act under the Commerce Clause). Under the Commerce Clause, "Congress has undoubted power to redefine the distribution of power over interstate commerce." Southern Pacific Co. v. Arizona, 325 U.S. 761, 769 (1945). See also Mourning v. Family Publications Service, Inc., 411 U.S. 356, 377 (1973) ("That the approach taken [in the Truth In Lending Act] may reflect what respondent views as an undue paternalistic concern for the consumer is beside the point. The statutory scheme is within the power granted to Congress under the Commerce Clause."). The Commerce Clause power includes the authority to regulate the activities of state and local governments in interstate commerce. Reno v. Condon, ___U.S.___, 120 S.Ct. 666 (2000) (upholding constitutionality of Driver's Privacy Protection Act of 1994, since drivers' information was sold in interstate commerce); and Garcia v. San Antonio Metropolitan Transit Authority, 469 US 528 (1985) (upholding constitutionality of application of Fair Labor Standards Act overtime provisions to public mass-transit authorities].

Section 5 of the Fourteenth Amendment, by contrast, gives Congress the "power to enforce, by appropriate legislation, the provisions of this article." Section 5 is not plenary, but remedial in nature, and there

has to "be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." City of Boerne v. Flores, 521 U.S. 507, 520, 522 (1997). In College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board, ___U.S.___, 119 S.Ct. 2219, 2224 (1999), the Supreme Court emphasized that "the object of valid §5 legislation must be the carefully delimited remediation or prevention of constitutional violations." College Savings and Boerne make clear that considerations of federalism are not eliminated when legislation is enacted pursuant to §5 of the Fourteenth Amendment.[9]

Indeed, just this week, on May 15, 2000, the Supreme Court said the limitations imposed on the power granted to Congress by the Fourteenth Amendment "are necessary to prevent the Fourteenth Amendment from obliterating the Framers' carefully crafted balance of power between the States and the National Government." United States v. Morrison, ___ U.S. ___, 2000 U.S. LEXIS 3422, *38 (2000). The Court also said "the principle that 'the Constitution created a Federal Government of limited powers,' while reserving a generalized police power to the States is deeply ingrained in our constitutional history." Id. at *33 n. 8.[10]

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[9] In Printz v. United States, 521 U.S. 898, 923 n. 13 (1997), the Court referred to an argument that "falsely presumes that the Tenth Amendment is 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."

[10] DOJ cites Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) for the proposition that the application of Title VII to government entities is based on Congress' power under Section 5. However, Bitzer only held that Section 5 of the Fourteenth Amendment abrogated the Eleventh Amendment's prohibitions on suits against states, not all principles of federalism. In fact, the Supreme Court

3. Under the DOJ Interpretation, §14141 Would Be Unconstitutional, Since It Could Impose Liability On Municipalities Even Though The Municipality Had Acted Constitutionally

DOJ indicates that Section 14141 must be constitutional, because it does not provide "a remedy against purely constitutional conduct."[11] In fact, that is exactly what §14141 would do as interpreted by DOJ: **DOJ is claiming that the City of Columbus can be held liable even though the City of Columbus has acted constitutionally.**

A local governmental entity cannot be held liable and enjoined as a result of legislation passed pursuant to Section 5 of the Fourteenth Amendment unless that governmental entity, in contrast to its employees, has violated the constitutional rights of individuals. In Rizzo v. Goode, 423 U.S. 362 (1976), for instance, the Supreme Court said that "the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights," even though individual police officers had violated the constitutional rights of citizens. Id. at 377. The Court held that "[u]nder the well-established rule

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noted the state officials had not contended the substantive provisions of Title VII exceeded the authority of Congress under §5 of the Fourteenth Amendment. Id. at 456 n. 11. In other words, in Bitzer the Court simply did not consider whether Section 5 gave Congress the authority to impose through Title VII vicarious liability on state and local governments. That failure to consider the issue is of no precedential value. See §D1 of this Reply Memorandum

[11] P. 12 of Supplemental Memorandum. Of course, a statute which was enacted pursuant to Section 5 of the Fourteenth Amendment and provided a remedy against unconstitutional conduct would not necessarily be constitutional. The statute would have to be a "congruent and proportional" remedy. However, DOJ appears to admit that a statute which was enacted pursuant to Section 5 and provided a "remedy" against constitutional conduct would exceed the authority of Congress.

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."[12] In Florida Prepaid Post Secondary Education Expense Board v. College Savings Bank, ___ U.S. ___, 119 S.Ct. 2199, 2207 (1999), the Court declared the Patent Remedy Act unconstitutional and said that "[i]t is...**conduct...patent infringement by the States—that must give rise to the Fourteenth Amendment violation** that Congress sought to redress in the Patent Remedy Act." (Emphasis added.) *Imposing vicarious liability on Columbus in the present case* would violate the principle announced in Rizzo and Florida Prepaid—Section 5 of the Fourteenth Amendment cannot be used to regulate government entities that have not violated the Constitution.

CONCLUSION

When there are serious issues about the constitutionality of a statute, that statute should be interpreted to avoid the constitutional issue. For instance, in Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 841(1986) the Supreme Court concluded that the DC Circuit "was correct in its understanding that '**[f]ederal statutes are to be so construed as to avoid serious doubt of their constitutionality**'," quoting Machinists v. Street, 367 U.S. 740, 749 (1961)(emphasis added). Similarly, in Morrison v. Olson, 487 U.S. 654, 682 (1988), the Court said

[12] Id. quoting Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971).

that "[i]t is the duty of federal courts to construe a statute in order to save it from constitutional infirmities."

The Supreme Court has recognized that the imposition of vicarious liability on municipalities would create serious constitutional issues. In Monell v. New York City Dept. of Social Services, 436 U.S. 658, 693 (1978), the Supreme Court said "creation of a federal law of *respondeat superior* would have raised all the constitutional problems associated with the obligation to keep the peace, an obligation Congress chose not to impose because it thought imposition of such an obligation unconstitutional."

Consistent with the wording of §14141, applicable legislative history and Supreme Court precedent on liability of municipalities in cases alleging police misconduct, this Court should interpret §14141 to avoid the necessity of deciding this serious constitutional issue. This Court should conclude that §14141 requires (a) that there be at least deliberate indifference on the part of the municipality, and (b) that such deliberate indifference be the moving force behind a pattern or practice of violations of constitutional rights, before a municipality can be held liable. Since the Complaint does not allege either of these two elements, this Court should grant the FOP Motion For Judgment On The Pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I served a copy of this 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; Timothy J. Mangan, Senior Litigation Attorney, and Andrea Peeples, Assistant City Attorney, Office of the Columbus City Attorney, 50 West Broad Street, Suite 1425, Columbus, Ohio 43215; by first-class U.S. mail on May ___, 2000.

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FOP Reply Memorandum

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