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.	ORAL ARGUMENT REQUESTED[1]

UNITED STATES' OBJECTIONS TO THE MAGISTRATE'S REPORT AND RECOMMENDATION REGARDING DEFENDANTS' DISPOSITIVE MOTIONS

On August 3, 2000, Magistrate Judge King issued a Report and Recommendation (Report) in which she recommended that this Court find that (a) 42 U.S.C. § 14141 (§ 14141) is a valid exercise of Congressional authority under § 5 of the Fourteenth Amendment; (b) the United States' Complaint was pled in sufficient detail; (c) the United States' suit is not subject to Ohio statutes of limitation or to a defense of laches; and (d) governmental authority liability under § 14141 is based on standards applicable to cases brought under 42 U.S.C. § 1983 (§ 1983). Pursuant to Federal Rule of Civil Procedure 72(b), the United States objects to the Report's recommendation that the standard of governmental authority liability under § 14141 is the same as the standard of municipal liability under § 1983.

[1] Pursuant to S.D. Ohio Civ. R. 7.1(2) the United States requests oral argument regarding the issues raised in this objection to the Magistrate Judge's Report and Recommendation. The United States makes this request because of the importance and novelty of the issues involved.

I. SUMMARY OF ARGUMENT

The United States' Complaint alleges that the City of Columbus and the Columbus Division of Police (City) have violated 42 U.S.C. § 14141. The Complaint alleges that there is a pattern or practice of excessive force, false arrests and reports, and unlawful searches and seizures by Columbus police officers. The Complaint also alleges that the City has "engaged in" and "tolerated" the pattern or practice of misconduct, through its acts and omissions, by failing to have appropriate policies; failing to train, monitor, supervise, or discipline officers adequately; and failing to investigate uses of force and complaints of misconduct adequately. These two sets of allegations, taken as true for the purposes of defendants' dispositive motions,[2] state a cause of action under § 14141.

The Report erroneously found the Complaint deficient by grafting § 1983 municipal liability standards for damages, in cases brought by private persons, on § 14141 pattern or practice actions brought by the United States for equitable relief. In so doing, the Report ignores the significant differences between § 1983 and § 14141, in statutory language, structure and purpose. These differences clearly demonstrate that § 14141 imposes a different standard of governmental liability than § 1983.

Section 14141 imposes liability on any governmental

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[2] Defendant City of Columbus filed a motion to dismiss for failure to state a claim, pursuant to Federal Rule of Civil Procedure 12(b)(6). Defendant-intervenor Fraternal Order of Police, City Lodge No. 9, filed a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

authority when it engages in a pattern or practice of constitutional violations by the acts of its law enforcement officers. Section 14141 grants the United States Attorney General the sole authority to bring lawsuits to remedy such violations. In sharp contrast, § 1983 allows individuals to bring suit based on individual unconstitutional actions by a "person" who "cause[s]" constitutional violations. If Congress had actually intended, as the Report concludes, only to improve § 1983 by creating a right of action by the United States under the same standards developed in § 1983 case law, then Congress could simply have amended § 1983.

Congress recognized explicitly in § 14141's legislative history that the United States could bring suits to remedy "pattern or practice" violations under eight different civil rights statutes, and designed § 14141 to provide similar "pattern or practice" authority for patterns of civil rights violations by police. This clear intent of Congress, coupled with the fact that the language and liability standard of § 1983 is atypical among modern civil rights statutes, demonstrates that § 14141 should be interpreted by reference to other civil rights statutes, not § 1983. These other statutes, even those that -- unlike § 14141 -- do not specifically incorporate the language of agency law, do not require a finding of deliberate indifference to impose municipal liability.

The Report's error in finding that the legislative history supported grafting § 1983 standards onto § 14141, is clear from

an analysis of the legislative history upon which the Report relies. First, the legislative history's references to the inadequacies of § 1983 are directed toward the original bill's creation of a private right of action that was deleted from § 14141 before its enactment. Second, the legislative history's reference to the unchanged "standards of conduct" for police officers under § 14141 does not undermine the statute's primary purpose of changing when ("pattern or practice of conduct by law enforcement officers") and how ("appropriate equitable and declaratory relief") governmental authorities would be held accountable for officer misconduct. Third, the legislative history and subsequent evidence do not support the Report's contention that failing to impose § 1983 restrictions on municipal liability "would, contrary to congressional expectations, result in a dramatic expansion of liability and potential for litigation against local governments."

The standards of liability under § 14141 must be interpreted in light of other modern civil rights statutes. Based on comparisons of the language, structure, and purpose of § 14141 with these statutes, the best reading of § 14141 is that it makes municipalities vicariously liable for the constitutional violations of their law enforcement agents. Alternatively, an interpretation of the statute that focuses on the words "engaged in" provides support for a liability standard that requires more than a simple vicarious liability standard, but less than the deliberate indifference standard required by § 1983. Under this

intermediate standard, the United States would have to show that the governmental authority "tolerated," "contributed to" or "played a role in" the pattern or practice of constitutional violations committed by its law enforcement agents. Indeed, because the facts pled in the United States' complaint are sufficient to meet either a vicarious liability standard or an intermediate standard of liability, the Court need not decide between these standards to deny the pending motions to dismiss and for judgment on the pleadings.

Finally, the Report erred in justifying an interpretation of § 14141 as requiring the same liability standards as § 1983 based on a fear that a different standard would pose constitutional problems. Both the vicarious liability standard and a more stringent intermediate standard are well within Congress' ability to enact § 14141 under § 5 of the Fourteenth Amendment.

II. THE UNITED STATES' CLAIM[3]

The United States' Complaint (Complaint) in this case alleges generally that:

> Defendant City of Columbus has engaged in a pattern or practice of subjecting individuals to excessive force, false arrests and charges, and improper searches and seizures. The City has tolerated this conduct through its failure to adequately train, supervise, and monitor police officers, and its failure to adequately accept citizen complaints of misconduct, investigate alleged misconduct,

[3] On June 28, 2000, the United States moved to amend its complaint to add claims that the City is engaged in a pattern or practice of racially discriminatory conduct. That motion is pending. The dispositive motions at issue address the original complaint.

> and discipline officers who are guilty of misconduct.

Complaint ¶ 1. Defendants' dispositive motions contend and the Report agrees that the Complaint, as drafted, fails to state a claim under § 14141 because it fails to allege adequately that the City is responsible for the pattern of unconstitutional conduct that the United States will prove at trial.

The specific allegations of the Complaint contend that the pattern or practice of unconstitutional conduct encompasses repeated uses of excessive force, false arrests and reports, and illegal searches by Columbus police officers engaging in official activities. Complaint ¶¶ 6-8. However, the Complaint does not rest on these allegations, which would be sufficient to plead vicarious liability. Instead, the Complaint also specifically alleges that the City has "engaged in" and "tolerated" the pattern or practice of misconduct by failing to have appropriate policies; failing to train, monitor, supervise, and discipline officers adequately; and failing to investigate uses of force and complaints of misconduct adequately. Complaint ¶¶ 9-10.

III. ARGUMENT

A. Section 14141 Standards of Liability Should Not Be Governed by § 1983 Case Law

The Report erred when it found the Complaint deficient. The Report reached this incorrect result because it applied § 1983 standards to the United States' § 14141 Complaint, despite the significant differences between § 14141 and § 1983, in their language, structure and purpose. These factors clearly

demonstrate that § 14141 imposes a different standard of governmental liability than under § 1983.

1. Section 14141 and Section 1983 Use Different Statutory Language to Impose Liability on Governmental Authorities

The language of § 14141 is entirely different from that of § 1983. In pertinent part, § 14141(a) reads:

> 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.

By contrast, the pertinent part of § 1983 reads:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured.

Section 1983 provides a remedy against any "person" who through a "statute, ordinance, regulation, custom, or usage" "subjects or causes to be subjected" any person to a deprivation of constitutional rights. 42 U.S.C. § 1983. It requires that the suit must be brought against the "person" who "caused" the deprivation of rights. The Supreme Court relied primarily on this textual language in Monell v. Department of Social Services, 436 U.S. 658 (1978) (Monell), where the Court held that § 1983 applied to municipalities, but that municipal liability must be

based on some municipal "custom" or "policy."[4] Subsequently, in City of Canton v. Harris, 489 U.S. 378 (1989), the Supreme Court was faced with the question of when a municipality, in the absence of an actual policy that was unconstitutional, could be found liable under § 1983 for an unconstitutional act by one of its police officers. The Court found that a failure to provide adequate training could be a de facto policy that caused a deprivation of rights, if it evidenced deliberate indifference and led to a constitutional violation. Id. at 388-392. Thus, the deliberate indifference standard adopted by the Supreme Court in § 1983 damages cases was crafted to satisfy both the "custom or policy" requirement and the strict causation standard explicitly set forth in the unique language of § 1983. See Board

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[4] The Report refers to a comment in the Monell decision about "perceived constitutional difficulties" regarding the imposition of respondeat superior liability under § 1983. Monell did not say, however, that imposition of vicarious liability on local governments for the acts of their agents would have posed an actual constitutional question. Instead, Monell states that imposition of vicarious liability would have caused the 19th Century legislators who created § 1983 to perceive that there was a constitutional problem. As Monell notes, this perceived constitutional problem was laid to rest by the Supreme Court in Ex Parte Virginia, 100 U.S. 339 (1879).

Monell discusses constitutional federalism principles only as part of the Court's efforts to determine the intent of the 1871 Congress in enacting § 1983. There is no suggestion in Monell or any other case that Congress would raise any contemporary constitutional question by imposing respondeat superior liability on municipalities for the acts of their employees. For example, the Supreme Court has recently applied respondeat superior liability under Title VII (which applies to governmental entities). See Burlington Indust. v. Ellerth, 524 U.S. 742, 754-66 (1998); Kitchen v. Chippewa Valley Schools, 825 F.2d 1004, 1013-14 (6th Cir. 1987) (applying respondeat superior liability under Title VII to local school board).

of County Commissioners of Bryan County v. Brown, 520 U.S. 397, 409 (1997) (deliberate indifference standard needed to ensure that liability attaches only when municipality can be said to cause violation).

By contrast, § 14141 uses the phrase "engage in a pattern or practice of conduct" rather than the phrase "statute, ordinance, regulation, custom, or usage" or the causation language of § 1983. By its terms, § 14141 imposes liability on a government authority based upon an unconstitutional "pattern ... of conduct by law enforcement officers," (emphasis added) whether or not that conduct was pursuant to an explicit policy ("statute, ordinance, regulation") or implicit policy ("custom, or usage"). Furthermore, the plain language of § 14141 explicitly differentiates between the liable entity under the statute -- "a governmental authority, or any agent" -- and the law enforcement officers whose direct actions deprive persons of their constitutional rights. Because § 14141 uses language completely different from that in § 1983, and the holdings in Monell and City of Canton were based on the Court's analysis of the unique language of § 1983 and its legislative history, the deliberate indifference standard for governmental liability does not apply to § 14141. See Dorris v. Absher, 179 F.3d 420, 429 (6th Cir. 1999) (quoting Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1444 (D.C. Cir. 1988)) ("Where the words of a later statute differ from those of a previous one on the same . . . subject, the Congress must have intended them to have a different

meaning").

2. Section 14141 and Section 1983 Have Significantly Different Structures and Purposes

A different legal standard for determining governmental liability under § 14141 than under § 1983 is required by the significant differences in the structure and purposes of the two laws. Section 14141 provides a right of action only for the United States Attorney General based on "a pattern or practice of conduct by law enforcement officers." Section 1983 by contrast is primarily designed to provide a right of action for individual plaintiffs based on individual unconstitutional acts.

Neither § 14141 nor § 1983 impose blanket liability on governmental authorities for individual acts of wrongdoing by their law enforcement officers. The two statutes, however, use different mechanisms for limiting liability. Section 1983 limits municipal liability to those cases where private plaintiffs show that the governmental actor, through its policies or deliberate indifference, was the direct cause of an unconstitutional act. See Bryan County, supra. In contrast, § 14141 limits liability to those circumstances where the Attorney General can prove that there is a "pattern or practice" of conduct that violates the Constitution or federal statutes by the governmental defendant's law enforcement officers. Thus, § 14141 imposes a significantly different burden than does § 1983. Once the United States proves a "pattern or practice," the language, structure and purpose of § 14141 do not indicate that Congress intended to impose the additional burden of demonstrating deliberate indifference by the

governmental defendant to impose liability.

3. The Legislative History of § 14141 Does Not Support Application Of § 1983 Monell Standards

Congress' explicit intent in enacting § 14141 was to provide the United States with the authority to bring lawsuits against governmental authorities whose law enforcement agents were engaging in a pattern or practice of misconduct, and to obtain appropriate prospective injunctive relief "to eliminate the pattern or practice." 42 U.S.C. § 14141(b). Congress enacted § 14141 in 1994, well after the Supreme Court had established standards for municipal liability under § 1983 in the Monell (decided in 1978) and City of Canton (decided in 1989) decisions. Thus, Congress must be presumed to have been aware of the Supreme Court's interpretation of § 1983 in enacting § 14141. See South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 351 (1998) (Congress is assumed to be aware of existing law when it passes legislation).

If, as the Report concludes, Congress' intent in enacting § 14141 was to impose the same deliberate indifference standard for municipal liability that the Supreme Court had established for § 1983 in Monell and City of Canton, there was a simple and straightforward way to do so. Congress could have amended § 1983 to give the United States a cause of action for injunctive relief for a "pattern or practice" of conduct that violates § 1983. Yet, Congress chose not to do so. Instead, Congress chose to create an entirely new statute, with no textual reference to § 1983, and with completely different language to describe the

parties, prohibited conduct, and standard for liability.

The Report finds, nonetheless, that Congress intended to apply the § 1983 deliberate indifference standard of liability to § 14141 based largely on three references to the legislative history. As an initial matter, the text and structure of § 14141, not the legislative history, must be viewed as the primarily indicator of Congressional intent. See Holloway v. United States, 526 U.S. 1, 6 (1999) (language of the statute, and its structure, are the most reliable evidence of Congressional intent). Moreover, the legislative history excerpts cited by the Report do not, either individually or collectively, justify imposing the § 1983 standard on § 14141.

a. The legislative history's references to § 1983 do not require imposition of the deliberate indifference standard on § 14141

As correctly noted on page 5 of the Report, § 14141 is a direct successor to a section of the 1991 Police Accountability Act that was not enacted by Congress. The Report is incorrect, however, in concluding that the legislative history of the 1991 bill supports the imposition of § 1983 standards of municipal liability on the Attorney General's authority to sue under § 14141, as enacted. The legislative history's references to the inadequacies § 1983 are directed toward the private right of action that was deleted from § 14141 before its enactment. See H.Rep. No. 102-242 102nd Cong., 1st Sess. 137-38 (1991) ("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.")

The legislative history demonstrates that the original Police Accountability Act of 1991[5] was intended to remedy what Congress viewed as two distinct gaps in the federal statutory scheme to protect persons against police misconduct: (1) the gap created by United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980), which held that absent explicit statutory authorization, the Department of Justice lacked authority to

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[5] The proposed Police Accountability Act of 1991 read as follows:

(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.

bring suit to remedy a pattern or practice of unconstitutional police misconduct, and (2) the gap created by Los Angeles v. Lyons, 461 U.S. 95 (1983), which significantly limited the ability of private plaintiffs to file suits for injunctive relief to remedy police misconduct under § 1983.[6] The 1991 Police Accountability Act would have cured those two distinct "inadequacies" in two distinct ways. First, it would have given the Department of Justice authority to bring pattern or practice suits, closing the gap created by City of Philadelphia and the

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[6] This dichotomy is apparent from the following excerpts from the legislative history of the Police Accountability Act:

> The Justice Department currently lacks the authority to address systemic patterns or practices of police misconduct. The Justice Department can only [criminally] prosecute individual police officers ... United States v. City of Philadelphia, 644 F.2d 187 (3d Cir. 1980) [held] that the United States does not have 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.
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> * * *
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> [A] private citizen injured by police misconduct ... cannot sue for injunctive relief [due to] Los Angeles v. Lyons, 461 U.S. 95 (1983) ...
>
> The Police Accountability Act would close this gap in the law, authorizing the Attorney General and private parties to sue for injunctive relief ...

H.Rep. No. 102-242 at 137-38.

absence in federal law of explicit authority for the United States to file suit to remedy systemic police misconduct. Second, it sought to give private individuals injured by police misconduct the standing to obtain injunctive relief for a pattern or practice of misconduct, without the limitations on standing under § 1983 imposed by Lyons.

As noted above, the Police Accountability Act was not enacted in its entirety. When Congress enacted § 14141 in 1994, it intentionally deleted the section of the Police Accountability Act that gave private individuals standing to sue governmental authorities for injunctive relief for the misconduct of their law enforcement officers. Thus, § 14141 as enacted was not intended to remedy deficiencies in § 1983 case law created by Lyons. Rather, the statute was intended solely to remedy the Department of Justice's lack of statutory authority to bring pattern or practice police misconduct suits. Section 14141 does not allow the United States to bring pattern or practice suits under § 1983, but instead creates a new statutory vehicle for the United States to remedy police misconduct.

b. The legislative history's reference to unchanged "standards of conduct" does not support imposition of the deliberate indifference standard on § 14141

The Report also relies on the comment in the legislative history of the 1991 Police Accountability Act that the "standards of conduct under the Act are the same as those under the Constitution, presently enforced in damage actions under Section 1983." Report at 16. This sentence does not, however, support

the conclusion that the standards of municipal liability developed under § 1983 should be imposed on § 14141.

The "standards of conduct" language in that sentence of the legislative history is intended to explain the previous sentence, which notes that the Police Accountability Act would not "impose any new standards of conduct on police officers." H.Rep. No. 102-242 at 138. This portion of the legislative history simply makes clear that § 14141 is not like other federal civil rights statutes, such as Title VII, which prohibit conduct that is not already unlawful or unconstitutional. Section 14141 did not seek to change the parameters of the constitutional protections against, e.g., excessive force, false arrest, or improper searches or seizures. Rather, the 1991 Police Accountability Act (and § 14141 as enacted) were designed simply to create new enforcement and remedial mechanisms for eliminating patterns or practices of conduct by law enforcement officers that is already prohibited by federal law. Thus, the "standards of conduct" language does not address the question of under what circumstances a governmental authority can be held liable for such illegal conduct.

More generally, Congress, in the legislative history, made several different statements regarding the "standards of conduct" and "responsibilities" of police officers and law enforcement agencies. None of these should be read as evidencing congressional intent regarding the standard of liability for governmental authorities to be imposed under § 14141. Cf.

Walters v. Metropolitan Educational Enterprises, Inc., 519 U.S. 202, 207 (1997) ("In the absence of indication to the contrary, words in a statute are assumed to bear their ordinary, contemporary, common meaning") (internal quotations omitted). If these statements were intended to clarify the liability standard Congress would have used the word "liability" or explicitly referred to Monell. Even if these statements regarding "standards of conduct" and "responsibility" could be fairly read as referring to liability, they cannot outweigh the considerable arguments against applying § 1983 municipal liability standards to § 14141 discussed in this memorandum. The Report erred in giving its reading of ambiguous legislative history primacy over the text of the statute. See Holloway v. United States, 526 U.S. 1, 6 (1999) (language of the statute, and its structure, are the most reliable evidence of Congressional intent).

c. The imposition of municipal liability under a standard different than deliberate indifference will not result in a flood of litigation.

The Report's recommendation to apply § 1983 governmental liability standards to lawsuits under §14141 also was influenced by its conclusion that failure to follow the Monell line of cases "would, contrary to congressional expectations, result in a dramatic expansion of liability and potential for litigation against local governments." Report, at 16. This conclusion does not require application of § 1983 governmental liability standards to § 14141.

Congress did examine the concern about the possibility of a

potential increase in litigation against local governments, particularly in connection with providing a private right of action for injunctive relief under the 1991 Police Accountability Act. The legislative history's discussion, however, reflects Congress' ultimate expectation that under § 14141, the amount of litigation against police departments would not increase but might in fact decrease, because "pattern or practice" suits for injunctive relief would provide a more efficient impetus for change than had "the cumulative weight" of "successive criminal cases or damages actions." H.Rep. No. 102-242 at 138. Congress concluded that § 14141 either would encourage governmental authorities to address police misconduct through their management practices without awaiting litigation, or would provide a vehicle for resolving in one lawsuit whether and to what extent management practices needed to be changed to eliminate systemic consitutional violations. In either event, the consequence would be a decrease in police misconduct, resulting in fewer police misconduct cases in the long run.

In the six years since the enactment of § 14141 -- without the private right of action that initially prompted the congressional concern about increased litigation -- the United States has brought only one contested, litigated case (this one) and three other filed and settled cases against police departments. Under the United States' view of the § 14141 standard of liability, there has been no dramatic and inappropriate expansion of litigation against local governments.

Moreover, the evidence now available tends to confirm congressional expectations, as reflected in the legislative history, that the remedial measures resulting from § 14141 cases significantly decrease the number of suits against the local governments involved.[7]

4. Section 14141 Should Be Interpreted In Light of Civil Rights Statutes That Are More Similar To It Than § 1983

The standard of governmental liability under § 14141 should be understood in light of the other modern civil rights statutes that have similar language, structure or purposes. Although the Report purports to interpret § 14141 "in the light of surrounding statutes," Report at 13-14 (quoting Vermont Agency of Natural Resources v. United States, 120 S.Ct. 1858, 1860, n. 17 (2000)), the Report turns to only one statute for guidance, § 1983. As discussed above, reliance on § 1983 to interpret § 14141 is fundamentally flawed. The legislative history makes clear that other modern civil rights statutes should provide the guidance for interpreting Congress' actions in designing the Department of

[7] For example, in 1997, the United States brought a § 14141 suit against, and simultaneously entered into a Consent Decree with, the City of Steubenville, Ohio. Prior to the United States' action, Steubenville had been the subject of numerous civil rights suits concerning misconduct by its police officers. Subsequent to the filing of the suit and entry of the Consent Decree, there has been a remarkable decrease in the number of suits filed, to the point that in 1999, for the first time in 23 years, there were no pending suits against Steubenville for the conduct of its police officers. See The Steubenville/Weirton Intelligencer, February 3, 1999; the Columbus Dispatch, April 23, 2000, attached as Exhibit A.

Justice's authority to sue under § 14141.[8]

In the legislative history concerning the Department of Justice's authority, Congress declared its intention to fill the "serious and outdated gap in the federal scheme for protecting constitutional rights" created by the absence of federal government "authority to sue a local government or its officials to enjoin violations of citizens' constitutional rights by police officers." Congress explicitly recognized that the Attorney General had "pattern or practice" authority under eight other civil rights statutes, including those governing housing and employment discrimination. Congress noted the parallel between the authority in § 14141 for the Department of Justice to bring a "pattern or practice" lawsuit for injunctive relief against "a police department that tolerates officers beating citizens on the street" and the then-existing authority for such "pattern or practice" lawsuits against state and local governmental authorities in order to reform voter registration practices, educational policies, employment practices by public employers (including police departments), and treatment of institutionalized persons.

The civil rights statutes referenced in the legislative history do not use the § 1983 deliberate indifference standard.

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[8] As noted above, in Part III(A)(3)(a), supra, the 1991 Police Accountability Act was designed to remedy two perceived gaps in federal civil rights laws. Section 14141, as enacted, remedies only one of those two gaps -- giving the Department of Justice authority it did not previously have to bring suits to obtain injunctive relief for patterns or practices of police misconduct.

Rather, Title VII of the 1964 Civil Rights Act (Title VII), the Americans With Disabilities Act (ADA), the Age Discrimination in Employment Act (ADEA), the Fair Housing Act, and Section 504 of the Rehabilitation Act, all impose vicarious liability on employers for the acts of their agents. As will be discussed in Section III(B)(1) below, courts have held that three of these statutes impose vicarious liability because of their text, and that two impose vicarious liability for policy reasons. These same textual and policy bases are applicable to § 14141.

The clear intent of Congress, coupled with the fact that the language and liability standard of § 1983 is atypical among modern civil rights statutes, demonstrates that Congress drafted § 14141 against the backdrop of civil rights statutes other than § 1983. These other statutes simply do not require a finding of deliberate indifference to impose municipal liability. Thus, the Report erred in grafting § 1983's deliberate indifference standard onto § 14141, and the Court should reject the conclusion that the United States' Complaint is insufficient.

B. Section 14141 Imposes a Different Standard of Governmental Liability than § 1983

The best interpretation of the language, structure, and purpose of § 14141, when read in light of other modern civil rights statutes, is that it makes governmental authorities vicariously liable for the systemic constitutional violations of their law enforcement agents. In the alternative, an interpretation of § 14141 that focuses on the statute's use of the words "engage in" would support an intermediate liability

standard that requires the municipality to have "tolerated," "contributed to" or "played a role in" the pattern or practice of constitutional violations committed by its law enforcement agents. The facts pled in the United States' complaint are sufficient to meet either a vicarious liability standard or an intermediate standard of liability. Therefore, the motions to dismiss and for judgment on the pleadings should be denied.

1. The Best Reading of § 14141 Is That it Imposes Vicarious Liability

The starting point for interpreting any statute is the text. The text of § 14141(a) recognizes two distinct actors or sets of actors. The first actor is the "governmental authority" which is being held liable. The second actors are the law enforcement officers that deprive persons of their constitutional rights. Section 14141, by its plain terms, provides a remedy in cases in which a governmental authority did not itself cause its agents to deprive anyone of their constitutional rights. Rather, because a municipality can only act through its agents, the governmental authority is held responsible for the unconstitutional acts of its law enforcement employees committed under color of law. Thus, under § 14141, governmental authorities should be liable not only for their own failures, as is the case under § 1983, but also for a pattern of illegal acts by their agents.

a. Civil rights statutes that include the phrase "any agent" in defining the liable entity consistently have been held to impose vicarious liability

The first clause of § 14141(a) defines the liable governmental authority to include both the governmental authority

and "any agent thereof." The fact that the text of § 14141 uses the phrase "any agent" in this way is particularly significant to understanding Congress' intent regarding the standard of liability to be imposed in § 14141 cases. Federal courts have held that Title VII of the 1964 Civil Rights Act (Title VII), the Americans With Disabilities Act (ADA), and the Age Discrimination In Employment Act (ADEA),[9] all impose vicarious liability on governmental authorities or employers, in large part because each of those statutes defines the scope of liability to include "any agent" of those entities or persons. Because § 14141 also includes that same phrase -- "It shall be unlawful for any governmental authority, or any agent thereof ..." -- § 14141 should be interpreted in the same way as Title VII, the ADA, and the ADEA. See Evans v. United States, 504 U.S. 225, 259 (1992) (stating that when Congress borrows a term of art "it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed").

Three Supreme Court cases have held that Title VII imposes vicarious liability on employers when such imposition of liability is consistent with agency principles. See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57 (1986); Faragher v. City of Boca Raton, 524 U.S. 775, 791-92 (1998); Burlington

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[9] 42 U.S.C. § 2000e et. seq.; 42 U.S.C. § 12101 et. seq.; 29 U.S.C. § 621 et seq., respectively.

Industries, Inc., v. Ellerth, 524 U.S. 742 (1998). Those decisions rested in large part on the fact that Title VII defines those who are liable to include "any agent." Meritor Savings Bank was decided well before § 14141 was enacted in 1994 (or proposed in 1991). Therefore, Congress must be presumed to have been aware of this decision interpreting "any agent" to impose vicarious liability under Title VII when it enacted § 14141. See South Dakota, 522 U.S. at 351. Indeed, the Supreme Court recently found that by use of the term "any agent," "Congress has directed federal courts to interpret Title VII based on agency principles." Burlington Industries, 524 U.S. at 754.

Similarly, courts have imposed vicarious liability under the ADA and the ADEA because those statutes define those who are liable to include "any agent." See, e.g., Silk v. City of Chicago, 194 F.3d 788 (7th Cir. 1999) (employers vicariously liable under ADA for hostile work environment created by supervisor); EEOC v. Walmart, 187 F.3d 1241 (10th Cir. 1999) (employer vicariously liable under ADA for punitive damages); Mason v. Stallings, 82 F.3d 1007, 1008-9 (11th Cir. 1996) (use of word "agent" in ADA and ADEA "was included to ensure respondeat superior liability of the employer for the acts of its agents", noting that such liability, by contrast, is not available for § 1983 claims); Anonymous v. Legal Services Corporation of Puerto Rico, 935 F. Supp. 49, 50-51 (D.P.R. 1996) (use of words "any agent" in Title VII, ADEA, and ADA meant "to ensure that courts would impose respondeat superior liability upon employers for the

acts of their agents"). In each case, the Court found the use of "any agent" to evidence Congress' desire to impose vicarious liability.

Section 14141, like Title VII, the ADEA and the ADA, uses the phrase "any agent" to broaden the scope of liability of "governmental authorities" to include acts of their agents. Accordingly, this Court should acknowledge, as did the Supreme Court in Burlington Industries, Inc., v. Ellerth, 524 U.S. at 754 (1998), that Congress directed federal courts to interpret § 14141 based on agency principles.[10]

b. The policy justifications for imposing vicarious

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[10] Under such agency principles, in order to impose vicarious liability on governmental authorities under § 14141, their law enforcement officers must be deemed to be their "agents," and their acts must be imputed to their employer. These issues are ones of federal, not state law. See City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086, 1096-1097 (7th Cir. 1992); Marr v. Rife, 503 F.2d 735, 740-741 (6th Cir. 1974) (federal, not state, law must determine who is liable under federal civil rights statutes).

When deciding whether principles of agency law require an employer to be held liable for the acts of its employees, the Supreme Court has relied heavily on common law of agency as articulated in the Restatement (second) of Agency. See, e.g., Faragher, 524 U.S. at 793 (citing Restatement (Second) of Agency § 2191 (1957 Main Vol.)). Applying these common law agency principles, improper acts of police officers clearly fall within the scope of their employment, thus making a municipality liable for the constitutional violations of its police officers. For this reason, state and federal courts deciding this issue under state agency law, including Ohio law, have found municipalities vicariously liable for the on-duty misconduct of their officers. See, e.g., Stallworth v. City of Cleveland, 893 F.2d 830, 833-835 (6th Cir. 1990) (under Ohio law, Cleveland was vicariously liable for a use of excessive force by one of its police officers); Red Elk v. United States, 62 F.3d 1102 (8th Cir. 1995) (governmental entity liable for sexual assaults committed by officers on persons within their custody); Mary M. v. City of Los Angeles, 814 P.2d 1341 (1991) (same).

liability under other civil rights statutes are equally applicable to § 14141

The Fair Housing Act and Section 504 of the Rehabilitation Act, have also been interpreted to impose vicarious liability because of policy considerations, although these statutes do not contain the "any agent" language. Those considerations are equally applicable to § 14141.

i. Fair Housing Act

The Fair Housing Act imposes vicarious liability for damages and injunctive relief against persons or entities that discriminate in housing decisions based on race, color, religion, sex, familiar status, or national origin. 42 U.S.C. 3604. Federal courts have consistently held that owners of realty companies, rental agencies, and other entities involved in the rent or sale of real estate are vicariously liable for the actions of their employees or agents, regardless of whether the owner actually knew of the employees' conduct and/or took steps to correct it. The rationale for these decisions has rested on both general agency principles and public policy arguments, and not on the language of the Fair Housing Act. The same agency principles and public policy arguments apply to § 14141.

For example, City of Chicago v. Matchmaker Real Estate Sales Center, Inc., 982 F.2d 1086, 1096-1099 (7th Cir. 1992), held a realty company vicariously liable for the acts of its agents noting "[a] principal cannot free itself of liability by delegating to an agent the duty not to discriminate." (citing Green v. Century 21, 740 F.2d 460, 465 (6th Cir. 1984)). The

Court then framed the vicarious liability issue:

> which innocent party, the owner whose agent acted contrary to instruction, or the potential renter who felt the direct harm of the agent's discriminatory failure to offer the residence for rent, will ultimately bear the burden of the harm caused

Id. at 1097. (quoting Walker v. Crigler, 976 F.2d 900, 901 (4th Cir. 1992)). City of Chicago agreed with Walker that the Fair Housing Act's "overriding societal priority" mandated that, under these circumstances, an owner must act to compensate the injured party, because the party with the "power to control the acts of the agent ... must compensate the injured party for the harm, and to ensure that similar harm will not occur in the future." Id.

Similarly, Marr v. Rife, 503 F.2d 735, 740-741 (6th Cir. 1974) held the owner of a real estate agency vicariously liable for damages for acts of his employees in violation of the Fair Housing Act, because of the statute's "broad legislative plan to eliminate all traces of discrimination within the housing field." The Court found vicarious liability applies "under the doctrine of respondeat superior and because the duty to obey the law is non-delegable." See also Sanders v. Dorris, 873 F.2d 938, 944 (6th Cir. 1989) (owner cannot escape liability by instructing agents not to discriminate); Northside Realty Associates, Inc. v. United States, 605 F.2d 1348, 1353-54 (5th Cir. 1979) (vicarious liability because corporation maintains authority to hire, fire, discipline, and direct activities of sales agents); United States v. Lorantffy Care Center, 999 F. Supp. 1037, 1045 (N.D. Ohio 1998) (imposing vicarious liability in the Fair Housing Act

"pattern or practice" suit brought by United States); United States v. Gorman Towers Apartments, 857 F. Supp. 1335, 1340 (W.D. Ark. 1994) (imposing vicarious liability, while dismissing § 1983 cases cited by defendants).

ii. Section 504 Of The Rehabilitation Act

Federal courts have also refused to graft Monell liability standards onto cases brought under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits discrimination against persons with disabilities in federally funded programs. Patton v. Dumpson, 498 F. Supp. 933 (S.D.N.Y. 1980), imposed vicarious liability against a governmental authority under § 504, finding that "[w]ith respect to other civil rights statutes, it appears that the general rule is that respondeat superior does apply." Id. at 942. Patton refused to impose § 1983 standards onto § 504 cases: "The Supreme Court's decision in Monell ... that respondeat superior was not applicable to § 1983 suits is confined to the peculiar characteristics of that statute ... In addition the wording of the two statutes is entirely different." Id. Patton noted (and cited) the numerous federal decisions applying vicarious liability in the Fair Housing Act, Title VII, and 42 U.S.C. § 1981 cases and found that imposing vicarious liability under § 504 would be "entirely consistent" with the statute's policy of eliminating discrimination against the handicapped. Id. at 943. See also Bonner v. Lewis, 857 F.2d 559 (9th Cir. 1988) (expressly adopting Patton for § 504 cases).

iii. Applicability to § 14141

The same agency principles and policy considerations that have led federal courts to impose vicarious liability in Fair Housing Act and § 504 cases apply equally to § 14141. The reasoning of Monell is no more applicable to § 14141 than it is to the Fair Housing Act or § 504. Section 1983's "peculiar characteristics" are not shared with § 14141. When governmental authorities delegate to officers the right to deprive persons of their liberty and to use force to do so, they cannot escape liability by simply telling officers to use only lawful force or to execute only lawful searches and seizures. Governmental authorities exercise control over hiring, supervising, disciplining, and directing the acts of their law enforcement officers. If courts are forced to choose between an arguably "innocent" governmental authority (that is, in the language of Monell, one whose "custom or policy" cannot be shown to have caused the constitutional harm) and the citizens whose rights would be violated if the pattern or practice is unabated, the choice is simple: those with authority over the wrong-doers should be liable for appropriate equitable relief.[11] The "overriding societal priority" in § 14141 suits in which the United States proves a pattern or practice of illegal conduct by law enforcement officers must be the elimination of the

[11] Of course, if the governmental authority adequately trains, supervises, monitors, and disciplines its agents, the "appropriate equitable and declaratory relief" available under § 14141(b) may be of limited scope and duration.

misconduct, a priority that would be hindered by imposition of Monell standards.

2. Alternatively, Section 14141 Can Be Read to Require That The Governmental Authority Tolerate, Play a Role in or Contribute to the Constitutional Violation

The United States believes the best reading of § 14141 is that it imposes vicarious liability. However, the statute's use of the term "engaged in" as part of the definition of a liable governmental entity also provides support for an intermediate standard of governmental liability, between vicarious liability and the § 1983 deliberate indifference standard. Such an intermediate standard would require that the municipality "tolerate," "contribute to" or "play a role in" the pattern or practice of constitutional violations committed by its law enforcement agents.

Section 14141 states that entities are liable if they "engage" in a pattern or practice of misconduct, but does not define "engage." Black's Law Dictionary defines "engage" as "to employ or involve one's self; to take part in; to embark on." Of these definitions, "to involve one's self" or "take part in" are most apt when inserted into the text of § 14141. Thus, § 14141 could be read to make it unlawful for any governmental authority to "involve itself" or "take part in" a pattern or practice of conduct by law enforcement officers that deprives citizens of their rights.

The allegations of the United States' Complaint plead facts sufficient to satisfy this intermediate standard as well as a

vicarious liability standard. The Complaint states that the "City of Columbus has tolerated the misconduct of individual officers . . . through its acts or omissions."[12] Complaint at ¶ 9. It then lists a number of acts or omissions by the City that contributed to and played a role in the pattern of deprivation of rights. These include the failure to implement policies, to train, to supervise and to monitor Columbus police officers. Id. Thus, the Complaint refers to actions or inactions by the City that played a part in or contributed to the alleged pattern or practice.

The actions and inactions alleged in the Complaint satisfy this alternative reading of § 14141 because they are sufficient to show that the City is "engage[d] in" the alleged pattern or practice of unconstitutional conduct. The use of the term "engage" does not mean that a governmental authority must undertake the kind of "deliberate" or "intentional" policy-making required by Monell and its progeny. In other statutes containing the word "engage," Congress has repeatedly used the phrase "intent to engage," evidencing a belief that the use of the word "engage," by itself, is not sufficient to establish an intent requirement. For example, 18 U.S.C. § 831, which prohibits certain transactions involving nuclear materials, provides that a party is guilty of a conspiracy in violation of the statute when that

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[12] As noted above, Section 14141's legislative history also uses the word "tolerate" to describe governmental authority acts that would be reached by the statute. "[DOJ] cannot sue to change the policy of a police department that tolerates officers beating citizens on the street." H.Rep. No. 102-242 at 137.

party "intentionally engage[s]" in conduct in furtherance of the conspiracy. 18 U.S.C. § 831(a)(8). Similarly, the statute that criminalizes transportation of a person for illegal sexual activity requires that a party must transport the person "with intent that such individual engage in prostitution." 18 U.S.C. § 2421. Thus, the word "engage," without more, does not impose an intent or deliberate indifference requirement, and the analogy to the § 1983 liability standards is inapposite.

3. The Court Need Not Decide the Precise Standard for Municipal Liability to Deny the Defendants' Motions to Dismiss and for Judgment on the Pleadings

The discussion above sets forth the arguments that the best reading of § 14141 is one that leads to the imposition of vicarious liability on a governmental authority for a pattern or practice of unconstitutional conduct by its law enforcement officers, as well as the alternative reading of § 14141 which would impose an intermediate standard of municipal liability. However, this Court also could decide that its resolution of the most appropriate municipal liability standard under § 14141 would be best made at a later stage of the litigation, with the benefit of a fully-developed factual record and presentation of the evidence at trial. Because the United States' Complaint adequately pleads both of these potential standards, the Court need only decide now that § 14141 does not require the United States to meet the deliberate indifference liability standard of § 1983. This finding alone would be sufficient for this Court to reject the Report's conclusion that § 1983 applies, and to deny

the defendants' pending dispositive motions.

C. Section 14141's Imposition of Municipal Liability with a Standard Different than Deliberate Indifference Does Not Raise Any Serious Constitutional Questions

The Report recommends adopting the § 1983 liability standard, in part, to avoid what it views as constitutional concerns raised by applying some lower standards of liability. This concern is misplaced. Section 14141 clearly falls within Congressional powers granted by § 5 of the Fourteenth Amendment.[13]

1. Section 14141 Is Proportional and Congruent

As discussed in the United States' Supplemental Memorandum in Opposition to The Fraternal Order of Police's Motion For Judgment on The Pleadings brief filed before the Magistrate Judge, an argument we incorporate by reference but do not repeat here, § 14141's vicarious liability standard is proportional and congruent to the constitutional harm identified.[14] The

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[13] The United States also objects to the Report's recommendation that the Court rule that Congress lacked power under the Commerce Clause to enact § 14141, for the reasons set forth in our first brief in opposition to defendants' dispositive motions. We believe that Congress had authority under the Commerce Clause to enact § 14141 given the substantial effect on interstate commerce of the consequences of police misconduct, such as the riots that resulted from the Rodney King state court verdict, or the financial impact on Los Angeles of the "Rampart" scandal. See 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, at 16 n.5 (March 11, 2000). In any event, the Commerce Clause analysis is unnecessary to finding that § 14141 is constitutional because it is sufficient to hold that it was properly enacted pursuant to Congress' power under Section 5 of the Fourteenth Amendment.

[14] It appears that the City raises this issue again in its Objections to the Magistrate's Report and Recommendation,

alternative intermediate liability standard is even less susceptible to constitutional challenge than a reading of § 14141 that applied the vicarious liability standard. Under the intermediate standard, § 14141 would sanction a governmental authority only when it "contributed to," or "played some role in," the constitutional violation. Finally, because the court would be required by equitable principles to fashion a remedy that addresses precisely the areas in which the municipality's deficiency occurred, there could be no lack of proportionality between the violation and the remedy.

2. Section 14141 Does Not Raise Federalism Concerns

The Report's conclusion also appears to be based in part on a concern that imposing vicarious liability will unduly expand the federal role in the operations of local law enforcement. In this case, the remedies that are imposed after trial will be determined by this Court based on the nature and scope of the violations proven by the United States at trial. In enacting § 14141, Congress intended the courts to address any federalism concerns at the remedy stage by applying traditional equitable standards, rather than limiting liability in the first place by adopting § 1983 liability standards.

Moreover, in assessing federalism concerns, the Supreme Court has recognized the important difference between suits

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filed August 14, 2000. Therefore, the United States' response to the City of Columbus' Objections to the Magistrate Judge's Report, will again elaborate on the reasons why § 14141's imposition of vicarious liability is constitutional.

brought by the United States against state governmental authorities, and suits brought by private plaintiffs. In Alden v. Maine, 527 U.S. 706 (1999), the Court identified constitutionally significant differences between damage suits by private persons against States -- which "may threaten the financial integrity of the States" -- and suits

> commenced and prosecuted against a State in the name of the United States by those who are entrusted with the Constitutional duty to 'take Care that the Laws be faithfully executed' U.S. Const. Art. II § 3 ... Suits brought by the United States itself require the exercise of political responsibility for each suit prosecuted against a State, a control which is absent from a broad delegation to private persons to sue nonconsenting States.

Id. at 755-756.

The difference between § 1983 suits for damages[15] by private

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[15] The Report's rejection of a vicarious liability standard under § 14141 appears to be based on an understanding that Monell and its progeny bar vicarious liability in all § 1983 suits. But Monell held only that under § 1983 municipalities are not vicariously liable for damages. Moreover, when Congress enacted § 14141 a substantial number of courts had ruled that Monell does not bar vicarious liability for § 1983 claims seeking prospective injunctive relief. See Chaloux v. Killeen, 886 F.2d 247 (9th Cir. 1989); Los Angeles Police Protective League v. Gates, 995 F.2d 1469 (9th Cir. 1993); Nobby Lobby Inc, v. City of Dallas, 767 F. Supp. 801, 810 (N.D. Tex. 1991), aff'd 970 F.2d 82 (5th Cir. 1992); Santiago v. Miles, 774 F. Supp. 775, 792 (W.D.N.Y. 1991); Joyce v. City and County of San Francisco, 846 F. Supp. 843, 861 (N.D. Cal. 1994); American Association of State Troopers, Inc. v. Preate, 825 F. Supp. 1228, 1229 (E.D. Pa. 1993); Malik v. Tanner, 697 F. Supp. 1294, 1304 (S.D.N.Y. 1988); Ganguly v. New York State Department of Mental Hygiene, 511 F. Supp. 420, 424 (S.D.N.Y. 1981). We recognize that before § 14141 was enacted, the Sixth Circuit, in an unpublished decision, had come to a different conclusion about § 1983. Kennard v. Wray, 19 F.3d 19 (Table) (6th Cir. 1994) (holding without discussion that Monell bars vicarious liability in § 1983 cases for injunctive relief). Nonetheless, against this backdrop, there is nothing in

persons and § 14141 is precisely the difference Alden identifies as one of constitutional significance. The fact that § 14141 suits brought by the United States are an exercise of political responsibility further undermines the rationale for tying § 1983 to § 14141. While Alden found Congress could not subject States to suit by private citizens over federal laws in their own courts, it expressly distinguished suits by the Department of Justice to enforce those same laws. Thus, the Report's assertion that "federalism" issues would be raised if § 14141 was not limited by Monell standards of liability, Report at 16, is rebutted by Alden. While Monell interpreted § 1983 as limiting private suits for damages against municipalities to those in which a municipal policy or custom caused the harm, Congress did not intend to subject § 14141 suits to that same limitation.

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the legislative history to suggest that Congress understood § 1983 to bar vicarious liability claims for injunctive relief.

IV. CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court reject that portion of the Magistrate Judge King's Report that recommends that § 1983 standards of municipal liability apply to this case, deny defendants' motions to dismiss and for judgment on the pleadings, and rule that the Complaint states a claim under 42 U.S.C. § 14141.[16]

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[16] If, however, the Court accepts the Report's challenged recommendation, the United States respectfully requests that it be given an opportunity to amend its Complaint within a reasonable time after the Court's decision.

CERTIFICATE OF SERVICE

I certify that a copy of the United States' Objections To The Magistrate's Report And Recommendation Regarding Defendants' Dispositive Motions was served by facsimile and regular mail on August 21, 2000, on the following:

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EXHIBIT A

Repella: No Litigation Against Police for First Time in 23 Years

By ERIC AYRES
The Intelligencer Staff

Steubenville Law Director Gary Repella announced Tuesday that for the first time in 23 years, there is no litigation pending against the city's police department.

Repella cited action by city council, the city administration and the police department for helping to bring significant and permanent improvements to the force, which had been troubled with civil litigation for years.

"For the first time since 1976, there are no lawsuits pending against the city's police department," Repella told members of city council Tuesday. "The city's handled close to 60 lawsuits against the department since then, and there's been about $870,000 in claims paid out in those cases."

In 1997, the city entered into a consent decree with the U.S. Department of Justice following a year-long federal investigation into allegations of police misconduct. Since then, the city has spent nearly $500,000 on new equipment and training in order to come into compliance with the consent decree and is continuing to work towards improving the operations at the police department.

According to Repella, a pending lawsuit that stemmed from a raid by city, county and state officials at the Safari Lounge is being dismissed, and another suit that was pending in Jefferson County Common Pleas Court was recently resolved with a summary judgment in favor of the city.

"We're now down to zero cases with none on the horizon," said Repella. "I think it's pretty impressive and it's my belief that we're really beginning to see the benefits of the consent decree."

Repella said attorneys who brought lawsuits against the Steubenville Police Department would often argue in court about a lack of training and discipline among the officers. Now that the city is under the watchful eye of the justice department, the police department is basically under mandate to become one of the most efficiently operated law enforcement agencies with some of the most professional and most highly-trained officers in the nation.

Officials also credited the city's purchase and installation of video cameras in police cruisers for the dramatic decline in lawsuits against the department. Through the use of the video equipment, officers have solid proof of exactly what occurs during arrests.

The number of settlements and claims awarded from past lawsuits against the department had caused the city's insurance premiums to skyrocket, according to Repella, who said the Ohio Municipal League "kicked the city out" of their insurance pool at one time because of the claims.

Officials noted that the city has not been forced to pay a settlement for one of the cases for a few years. The city's insurance rates had risen to about $360,000 a year at the height of the lawsuit frenzy, but according to City Manager Gary DuFour, the city recently received a low bid of about $130,000 for a new insurance policy.

Steubenville was the second city in the nation behind Pittsburgh to enter into a consent decree with the U.S. Department of Justice and other cities, such as Columbus, have followed. Repella said unlike the other cities that are resisting the implementation of the consent decree, Steubenville is working hard to come into compliance and is benefitting from it.

"We're in very good shape," said Repella. "Our police department is doing a very fine job, and Chief Jerry McCartney and all of the officers should be commended. We're turning around what used to be a major problem for the police department and the city."

In other action Tuesday:

■ council approved an agreement with the Ohio Department of Transportation that will give the city the duties of handling bidding and selection of contractors for the construction phase of the Sunset Boulevard (Ohio 43) widening project.

The new agreement is expected to save the project from going through about four months of state bureaucracy and red tape.

■ a majority of council members officially ratified an agreement with Jefferson County which will allow a new sewer system to be built in Pottery Addition. The pact will bring economic development and improved environmental conditions to the area and is expected to bring a new cooperative relationship between the city and county.

Councilwoman-at-Large LaDonna Delatore, who has been opposed to the legislation, cast the sole dissenting vote on the agreement. Delatore noted that she has never believed that the city would benefit from the agreement and that she is still in support of annexation when surrounding communities desire the use of Steubenville's utilities.

■ long awaited legislation amending the city ordinances to address parking of commercial vehicles in a residential district received a first reading. The safety committee of council, city leaders and officers from the traffic division of the police department have been working on the legislation for months due to an apparent problem with large vehicles, such as tractor trailers being parked in residential neighborhoods.

The proposed legislation amends language to state that trucks of one ton capacity or less may park in a private driveway, but trucks of more than 3/4 ton capacity or more may not park on any street, in any private parking space or lot in the residential districts between one hour after sunset and one hour before sunrise.

However, 1st Ward Councilman Bill Sullivan, chairman of the safety committee, noted that the new language may create a problem since school buses will not be permitted to park in residential areas at night, even during games and special events.

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THE COLUMBUS DISPATCH

Sunday, April 23, 2000

NEWS

AUDITOR WATCHES OVER POLICE STEUBENVILLE CHANGES ITS WAYS TO MEET CONSENT-DECREE CRITERIA

Bruce Cadwallader
Dispatch Staff Reporter

STEUBENVILLE, Ohio -- The police officer shifted nervously in the witness chair when he saw the spectator in the back of the Jefferson County courtroom.

Then he continued his testimony. He had struggled with the motorist, he told the judge, used a chemical irritant on him and finally tackled the man after a foot chase.

The defendant dropped a loaded pistol, and other officers found another gun and cocaine in the man's car, the officer said.

"I guess I'll have to pull that file," the spectator said at the preliminary hearing as he listened to the officer describe how he helped apprehend the defendant.

The spectator was Charles D. Reynolds, the federal auditor assigned to monitor the "patterns and practices" of police in this town of 22,000 on the West Virginia border. Reynolds provides the same type of oversight the federal government is suing to put in place over the Columbus Division of Police.

Reynolds is the federal sledgehammer that Steubenville Police Chief Jerry McCartney feared in September 1997 when city officials signed a negotiated settlement -- called a consent decree -- with the U.S. Department of Justice.

Instead, Reynolds, a retired police chief from Dover, N.H., is the tool that's straightened out the kinks in McCartney's chain of command. Though he objects to the decree, McCartney acknowledges it is one of the best things that's happened to his department.

Reynolds visits Steubenville only once every three months, conducting most of his business via e-mail. The city pays him $500, plus expenses, for the days he visits and $400 a day when he works on the consent decree, expected to be in force about five years, from his New Hampshire office. Since 1997, the city has paid him $70,000.

Having a monitor like Reynolds looking over their shoulders is what Columbus police officials and the officers' union worry will result from a civil-rights lawsuit against the city.

The U.S. Justice Department suit contends Columbus police have engaged in a pattern of abusing civil rights by filing false charges, using excessive force and conducting illegal searches. City officials are accused of tolerating such abuses.

The Justice Department sued Columbus in October after city officials failed to accept a consent decree with the federal government.

The decree outlines training standards, procedures for citizens to complain about police, and measures for investigating and disciplining officers.

A consent decree would resolve all pending civil-rights complaints and require the city to improve police training and policies. A monitor like Reynolds would make sure the provisions are carried out.

"You shouldn't be afraid of me," Reynolds said, as if he were speaking to cities facing a decree. "I don't see or feel from Justice a desire to have the police department do anything more than what is generally accepted of a police department."

Steubenville Law Director S. Gary Repella said the consent decree forced his city into 21st-century policing. Taxpayers, he said, saved more than $1 million avoiding the estimated four years of litigation fighting the Justice Department.

For 20 years before that, though, Steubenville fought a reputation as rough and tumble. Six city police officers were once federally prosecuted for beating prisoners, and black steelworkers twice won settlements for false arrest.

In Steubenville today, police officer candidates must have a two- year associate's degree to even apply. Before, applicants needed only a high-school diploma.

"We hope it's a success story. We hope Steubenville wants it to become a success story," Reynolds said. "Success is simply this: We had some issues and worked hard to correct those issues and worked hard to regain the trust of the public and made a lot of progress."

Rank-and-file Steubenville officers address him warmly as "chief." However, the officers decline to comment about Reynolds or the consent decree, as does Jim Marquis, president of the Steubenville chapter of the Fraternal Order of Police.

Reynold's spartan office in the police department's internal-affairs

division has a desk, telephone, computer and one chair.

"I understand the inner workings of a police department and understand their management systems. From my perspective, everybody started off with a clean slate here," Reynolds said.

He calls the consent decree "the bible" as he holds up the 41-page document, which is similar to the one under which Pittsburgh police are operating.

"This is pretty fundamental stuff," Reynolds said. "It's hard for me to understand why a professional police officer would disagree with the contents of this decree."

Former Columbus Mayor Greg Lashutka and City Attorney Janet Jackson worked last year to sign a similar agreement with the Justice Department. Jackson shuttled back and forth to Washington, D.C., to pursue the agreement.

However, Police Chief James G. Jackson, who is not related to the city attorney, and the Columbus chapter of the Fraternal Order of Police union objected. Attorneys for the city and the FOP Capital City Lodge No. 9, which has joined the city as a defendant, have asked that the lawsuit be dismissed.

Repella, Steubenville's law director, said officials there decided to avoid that costly fight. He expects Steubenville will pay a total of $500,000 to implement the decree.

"Columbus is going to spend something like $4 million on this. I think for half the price they could implement these programs and in three or four years they could be out," he said. "We'll be out of our consent decree before Columbus ever goes to court."

Repella said Justice Department officials requested hundreds of documents concerning 100 civil-rights complaints. He gave them enough to fill a pickup truck, and in six months the federal lawyers had found the city's worst cases.

From 1976 to 1997, the city of Steubenville and its officers were sued 45 times and paid out about $850,000 in settlements and judgments. Since the signing of the consent decree, the city and its officers have not been named in a major lawsuit. In addition, the city's insurance carrier has lowered its premiums by two-thirds because of the increased police training.

"We've come a long way since the decree was signed," Repella said.

Chief McCartney publicly has spoken out against the consent decree from the start. He acknowledges, however, that because of it his department has become computerized, his officers have undergone intensive training and the public has benefited from a complaint policy.

"There's things in that consent decree I really appreciate and like, such as the monetary value of the computers," the chief said. "The things I appreciate the most is the schooling and education. In the past it was always a problem getting the money. Now, since the consent decree, it's a must."

The money comes from a city council that had been reluctant in the past to approve such funds for training, he said.

McCartney said he has made a new friend in Columbus' Chief Jackson, who has visited Steubenville to discuss the consent decree.

"I can't give the Columbus police and the FOP any more credit just for doing what they're doing -- just for the simple reason I don't think there's any pattern of abuse here in Steubenville," McCartney said, applauding Columbus for opposing the Justice Department lawsuit.

Still, the Steubenville chief said his department will continue to comply with the consent decree.

"We have nothing to hide."

TABULAR OR GRAPHIC MATERIAL SET FORTH IN THIS DOCUMENT IS NOT DISPLAYABLE

(1) Neal C. Lauron / Dispatch photos; As part of the federal consent decree, the Steubenville Police Department has boosted training efforts. Officer Eric Hart takes aim during a simulation at the municipal building. Sgt. Robert Gotshall, left, trainer Tony Piergallini, center, and officer Jim Marquis observe.; (2) Charles D. Reynolds, a retired police chief, makes sure Steubenville police meet their end of a consent decree signed to resolve civil-rights complaints. Reynolds visits Steubenville once every three months and also works by e-mail.; (3) Map; (4) Jerry McCartney; Photo, Map

---- INDEX REFERENCES ----

NEWS SUBJECT: Lawsuits; General News; Law Enforcement (LWS GEN LEN)

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