UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

_____

UNITED STATES OF AMERICA,

Plaintiff

v. Civil Docket No. 09-CV-849

ERIE COUNTY, NEW YORK,
ET AL.

Defendants

_____

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

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I. SUMMARY OF THE ARGUMENT

The Complaint must be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6). See Fed. R. Civ. P. 12(b)(6). 42 U.S.C. § 1997-1997j, known as the Civil Rights of Institutionalized Persons Act of 1980 (hereafter "CRIPA"), is the statute under which the Plaintiff has brought the instant action against Erie County and various officials in Erie County. By its plain language, CRIPA only authorizes the United States Attorney General to bring an action to correct egregious, flagrant conditions which deprive inmates of their constitutional rights as repeatedly violated pursuant to a pattern or practice and which causes the inmates grievous harm. 42 U.S.C. § 1997a. CRIPA only authorizes the Attorney General to seek injunctive relief against municipalities and their officers, employees and agents, in the form of the minimum measures necessary to correct the alleged constitutional violations. Id.

CRIPA is a standing statute; it does not create legal rights for inmates or regulatory authority for the federal government. CRIPA is similar to 42 U.S.C. § 1983 in that it provides a mechanism by which the government can bring an action to correct only the most egregious and severe constitutional violations. CRIPA does not impose standards upon local municipalities or their officials. Accordingly, the basis upon which the government can sue is very narrow under CRIPA as is the relief that may be obtained in such a suit. In the present case, the Complaint fails to allege constitutional violations against inmates in Erie County facilities attributable to Erie County or any of the individually named defendants. Furthermore, the Complaint is made up of nothing more than vague conclusions of law couched as fact, and it is therefore insufficient to satisfy the heightened pleading standards established by the United States Supreme Court in

Ashcroft v. Iqbal, __ U.S.___, 129 S.Ct. 1937, 1949 (2009). As such, the Defendants respectfully submit that the case must be dismissed.

It is the courts, not statute, Congress or the United States Attorney General that defines what is constitutionally required with respect to the treatment of inmates. Under well established constitutional law, a supervisor who is not personally involved in a constitutional deprivation of an inmate is not vicariously liable for the constitutional violations of subordinate employees. In addition, federal case law sets forth a very high standard that must be met before Constitutional violations will be attributable to a municipality or supervisors.

In the present case, the Complaint fails to contain allegations sufficient to state a cause of action against any of the Defendants and must be dismissed. The Complaint is filled with conclusory allegations about purported "inadequacies" at the Facilities. The government does not even allege, however, that such purported "inadequacies" rise to the level of constitutional violations. Furthermore, the government fails to allege in any non-conclusory terms that the policies or customs of the Facilities are the cause of any purported unconstitutional conditions or practices at the Facilities. Similarly, the government has failed to allege in any non-conclusory terms that the Defendants were deliberately indifferent to a known risk of unconstitutional harm, which is required for a showing of municipal liability. See Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 691 (1977). Indeed, the Complaint is so vague that the Defendants cannot even reasonably determine whether the allegations relate to current policies or practices at the facilities, much less which specific policies or practices might be in issue.

Given the government's abject failure to plead its case with anything other than conclusory legal assertions couched as fact, under the heightened pleading standards articulated in Iqbal,129 S.Ct. at 1949, this case must be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

II. FACTUAL INTRODUCTION

This case involves the conditions of confinement at two detention facilities (collectively "Facilities") in Erie County, New York ("County"). The Facilities consist of the Erie County Holding Center, ("ECHC") located downtown in the City of Buffalo, and the Erie County Correctional Facility ("ECCF"), located in Alden, New York. Inmates awaiting arraignment, trial and sentence are housed at both facilities. Over the past five years, the Facilities have admitted approximately 132,704 inmates, averaging about 26,540 inmate admissions per year. In addition to inmates admitted by local police jurisdictions, the Facilities have housed prisoners from the United States Marshal Service and United States Immigration Service pursuant to contract. Indeed, the Facilities currently house a number of the federal government's own prisoners. Inmates are generally held for short periods of time before release or transfer to other correctional facilities.

Generally, the intake process at the facilities includes, but is not limited to, a search, property inventory, fingerprinting, photograph, distribution of inmate handbook, suicide and medical health history screening, phone call, and change out. The Facilities provide a wide range of services to inmates at taxpayer expense. The Facilities include basic inmate service components, including for example, a medical unit, commissary, recreation areas, law library, visitation areas, laundry and a kitchen. In addition, the

inmate units are equipped with televisions having conversion boxes that receive the major network television stations. Likewise, inmates also receive the Buffalo News newspaper on a daily basis free of charge.

Since 2004, Erie County taxpayers have paid approximately three hundred and forty nine million tax dollars ($368,000,000) to run the Facilities. The projected tax payer dollars anticipated to be spent for the facilities in 2009 are approximately sixty nine million dollars ($69,000,000) or almost five (5%) percent of the County's one billion dollar budget. The taxpayer cost of running the Facilities has steadily increased, while aid from both federal and state governments has sharply decreased in recent years.

III. BACKGROUND

On November 13, 2007, the Civil Rights Division ("Division") of the United States Department of Justice ("Department" or "DOJ") notified the County that it had instituted an investigation at the Facilities pursuant to CRIPA. Thereafter, the Division conducted an investigation of the Facilities which included review of some documents related to the Facilities as well as conducting a small number of interviews with inmates from the Facilities. On July 15, 2009, the Division issued a Letter ("Letter") which the government has attached, in part, to the Complaint as Exhibit B.

On September 10, 2009, the County submitted a substantive response to the Letter addressing the allegations on a point-by-point basis. The government never responded to that substantive submission, opted to forego any further good faith discussions and commenced the instant suit on September 30, 2009.

IV. STANDARD OF REVIEW

The federal government is bound by the same pleading standards as an ordinary civil plaintiff. This is particularly appropriate in the CRIPA context because Congress declined to provide the federal government with subpoena power, evincing a desire to require the government to satisfy at least the same standards as any other civil defendant. See generally 42 U.S.C. § 1997 *et. seq.*

The United States Supreme Court recently established a heightened pleading standard for all civil cases. Iqbal, 129 S. Ct. at 1949. Under FRCP 8(a)(2), "a pleading must contain a 'short and plain statement of the claim showing that the pleader is entitled to relief.'" Id. "The pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the –defendant-unlawfully-harmed-me accusation." Id., citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007); Papasan v. Allain, 478 U.S. 265, 286 (1986). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" Id., citing Twombly, 550 U.S. at 555. "Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" Id.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id., quoting Twombly, 550 U.S. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. "Where a complaint pleads facts that are 'merely consistent

with' a defendant's liability, it 'stops short of the line between possibility and the plausibility of 'entitlement to relief.'" Id.

Thus, "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. The Court is "not bound to accept as true a legal conclusion couched as a factual allegation." Id., quoting Twombly, 550 U.S. at 555. "Only a complaint that states a plausible claim for relief survives a motion to dismiss." Id., citing Twombly at 556. "Determining whether a complaint states a plausible claim for relief will, . . . be a context –specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. "But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged-but it has not 'shown'-'that the pleader is entitled to relief.'" Id., quoting Fed. Rule Civ. Proc. 8(a)(2). Rather, the complaint "must allege facts that are not merely consistent with the conclusion that the defendant violated the law, but which actively and plausibly suggest that conclusion." Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 121 (2d Cir. 2007), citing Twombly, 550 U.S. at 557-58. In determining whether the complaint adequately states a claim, the court must examine the elements of the constitutional violation alleged and determine whether those elements are pled with factual specificity in the complaint, as opposed to bald assertions or legal conclusions. Id.

In the Iqbal case, the Supreme Court examined whether the complaint stated a claim for supervisory liability under section 1983, as opposed to discrete acts against individuals. The Supreme Court noted:

> Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for the

> unconstitutional conduct of their subordinates under a theory of respondeat superior. (citations omitted). Because vicarious liability is inapplicable to Bivens and §1983 suits, a plaintiff must plead that each Government-official defendant, through the official's own individual actions has violated the Constitution.

Iqbal, 129 S.Ct. at 1947. The Supreme Court went on to note that the factors necessary to establish a Bivens violation will vary with the constitutional provision at issue. Id. As the claim in Iqbal alleged invidious discrimination in violation of the First and Fifth Amendments in the treatment of individuals suspected of terrorism, the Court noted that the plaintiff was required to plead "sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral investigative reason, but for the purpose of discriminating on the account of race, religion or national origin." Id. at 1948-49.

The Court explicitly rejected the argument that supervisors can be liable under a theory of "supervisory liability," which attempted to make the supervisors liable for the misdeeds of their agents. Id. "Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." Id. The court held it was insufficient to allege, without factual detail supporting such allegation, that the supervisors "'knew of, condoned, and willfully and maliciously agreed to subject [plaintiff]'" to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national original and for no legitimate penological interest.'" Id., quoting the Complaint. The Court noted that the allegations amounted to nothing more than conclusions that were not entitled to the presumption of truth. Id. The Court found that where the complaint "allege[d] discrete wrongs –for instance,

beatings- by lower level Government actors," it failed to allege sufficient supervisory liability against supervisors who had no personal involvement in the conduct at issue. Id.

Courts in the Second Circuit have recognized the general applicability of Iqbal's and Twombly's heightened pleading standards in civil litigation. See S. Cherry St., LLC v. Hennessee Group LLC, 573 F.3d 98, 103-04 (2d Cir. 2009) (citing the Iqbal standard); Marrero v. Kirkpatrick, ___ F.Supp.2d ___, 2009 WL 3172693 (W.D.N.Y. October 5, 2009).

V. ARGUMENT

A. CRIPA IS UNCONSTITUTIONAL AS APPLIED.

i. The Language of CRIPA and the Constitution Itself Establish Fundamental Limitations on Government Enforcement Authority Under CRIPA.

A covered "institution" under CRIPA includes "any facility or institution" "which is owned or operated, or managed" by any "political subdivision of a State" and which is "a jail prison or correctional facility." 42 U.S.C. 1997(1)(A)& (B)(ii)(West 2009). Section 1997a of CRIPA provides:

> (a) Discretionary authority of the Attorney General; preconditions
> Whenever the Attorney General has reasonable cause to believe that any. . . political subdivision of a State, official, employee or agent thereof, . . . **is subjecting persons residing or confined to an institution. . . to egregrious or flagrant conditions** which deprive such persons of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States **causing such persons to suffer grievous harm, and that such deprivation is pursuant to a pattern or practice or resistance to the full enjoyment of such rights, privileges or immunities**, the Attorney General or in the name of the United States, may institute a civil action. . . against such party for such equitable relief as may be appropriate to insure **the minimum corrective measures necessary** to insure the full enjoyment of such rights, privileges or immunities, except that such equitable relief shall be available under this subchapter to persons residing in or confined to . . . [a jail, prison or correctional facility], **only so far as such persons are subjected to**

conditions which deprive them of rights, privileges, or immunities secured or protected by the Constitution of the United States.

42 U.S.C.§ 1997a (West 2009)(emphasis added). Significantly, the last sentence of section 42 U.S.C. § 1997a limits relief sought by the government on behalf of inmates to that which is minimally necessary to correct systemic and pervasive Constitutional violations of inmates.

The Defendants do not contest the fact that CRIPA is a facially constitutional statute.[1] CRIPA was enacted pursuant to Section 5 of the Fourteenth Amendment, which permits Congress to enforce, by proper legislation, the provisions of the Fourteenth Amendment. U.S. Const. amend. XIV, § 5; see S. Rep. No. 96-416, at 24-25 (1979). Thus, the federal government's enforcement authority under CRIPA is limited to enforcement actions brought to protect those rights under the Bill of Rights that have been made applicable to the states through the incorporation doctrine. See, e.g., Robinson v. California, 370 U.S. 660 (1962) (incorporating the Eighth Amendment prohibition against cruel and unusual punishment to the states). Indeed, the legislative history of CRIPA confirms that CRIPA was so limited, noting that CRIPA "creates no new substantive rights. It simply gives the Attorney General legal standing to enforce existing constitutional . . . rights of institutionalized person." S. Rep. No. 96-416, at 3 (1979). Thus, the scope of government enforcement authority under CRIPA

[1] While CRIPA does not fall within Congress' authority to legislate under the Commerce Clause, see generally United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995), CRIPA is a properly authorized statute pursuant to Section 5 of the Fourteenth Amendment. Indeed, the legislative history of CRIPA confirms that Congress passed CRIPA with the understanding that it fell within the scope of Section 5. See S. Rep. No. 96-416, at 24-25 (1979).

is constitutionally limited to matters involving violations of the constitutional rights made applicable to the states through the Fourteenth Amendment.

In addition to these inherent constitutional limitations on the government's CRIPA enforcement authority, Congress further limited the scope of federal government enforcement action under CRIPA. Thus, CRIPA permits the federal government to bring enforcement actions only to obtain the "minimum corrective measures" necessary to correct a "pattern or practice" of "flagrant and egregious" constitutional violations by an institutional facility that causes an inmate grievous harm. 42 U.S.C. § 1997a. Congress also established a variety of threshold requirements that the Attorney General must satisfy before filing a CRIPA suit.[2] See generally 42 U.S.C. § 1997b. Based on these threshold requirements, Congress clearly intended to require the government to articulate with specificity which policies or practices of a facility are unconstitutional, the basis for any such determination, and the minimum corrective measures necessary to cure such policies. This further highlights Congress' intention that CRIPA enforcement actions be brought in only a very limited class of cases.

CRIPA thus clearly reflects a balancing of interests by Congress. On one hand, Congress recognized that it may be appropriate for the federal government to seek to protect the constitutional rights of inmates in the most extreme and disturbing cases of systemic violations of the constitutional rights of prisoners. On the other hand, Congress recognized that both the Constitution and the principles of federalism at the heart of our

[2] These threshold requirements include, for example, requirements that the government fully and adequately inform the operator of an institutional facility of the allegedly unconstitutional patterns or practices, of the factual information giving rise to the government's allegations, and of the minimum remedial measures necessary to correct such patterns or practices. See 42 U.S.C. § 1997b.

system of government require that such enforcement authority be used only sparingly to require institutional facilities to undertake the minimum remedial measures necessary to ensure that their policies satisfy minimum constitutional requirements. See H.R. Rep. No. 99-897, at 11 (1980) (Conf. Rep.) ("The adoption . . . of the language 'egregious or flagrant' establishes a standard for the Department of Justice's involvement that reflects a Congressional sensitivity to the fact that a high degree of care must be taken when one level of sovereign government sues another in our Federal system. This is a higher standard than that required of plaintiffs other than the United States."). Congress thus clearly never intended for the government to use its authority under CRIPA to force state and locally run institutional facilities to nationalize their policies and procedures in order to implement the government's perceived best practices.

Thus, the Constitution and the intent of Congress as expressed through CRIPA both require that states be given a free hand to impose whatever constitutionally adequate regulatory scheme the states deem fit to govern state and locally operated institutional facilities within their borders. This principle of allowing states the opportunity to operate as laboratories of democracy is a part of the very foundation of our system of government. See generally New State Ice Co. v. Liebmann, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

Indeed, the State of New York has seized upon that opportunity with vigor by enacting an extensive regulatory scheme under which all New York correctional facilities are required to operate. See N.Y. Correction Law § 40, *et. seq.*; 9 N.Y.C.R.R. part 7000

et seq.; see also Jeffes v. Barnes, 208 F.3d 49, 56-57 (2d Cir. 2000)(The Second Circuit on pages 58-61 examined in detail the regulatory authority of New York State Commission of Corrections over local correctional facilities). The standards for institutional facilities under this regulatory scheme far exceed the minimum requirements of the Constitution. Id. The extensive regulatory scheme governs the conditions of confinement of inmates in local correctional facilities. And, as evidenced by the current law suit being pursued by the state against the Facilities under state law, the State of New York takes its oversight responsibilities very seriously. See New York State Commission of Corrections v. Timothy Howard, Index No. 2009-011216 (Erie County Supreme Court), attached to the Declaration of Cheryl A. Green filed in support of the motion to dismiss at Exhibit "C."

It is also worthy to note that the complaint in the suit being pursued by the state against the County does not involve any of the purported "inadequacies" raised in the Complaint in this case. See id. This suggests that the State of New York believes that the policies and practices at the Facilities related to the matters addressed in the Complaint are in accordance with the state's regulatory requirements. Thus, to the extent that the government wishes to challenge any such policies and practices as unconstitutional, it should do so through a suit against the State of New York itself. If the government does not contend that the State of New York's regulatory requirements are constitutionally inadequate, then, likewise, the policies and practices of the Facilities that adhere to those policies cannot be constitutionally inadequate.

In addition to the importance of allowing states to regulate matters within their own borders without government interference, the constitutional limitations on federal

government enforcement authority under CRIPA also serve an important secondary goal. When, as in this case, the federal government seeks to reach beyond its constitutional authority and to impose what it views as best practices upon state and local government run correctional facilities, the federal government circumvents the democratic process and denies the citizens their proper voice in the decisions of government. Each modification of policies or each purported "improvement" that the federal government seeks to implement at the Facilities comes with a financial cost to the taxpayers of Erie County. In the absence of an established policy or practice that results in routine, flagrant, and egregious violations of the constitutional rights of inmates, such policy decisions must be left in the hands of state and local government officials who answer to the citizenry for how their decisions about how best to use the limited monetary resources available to them. For, as the United States Supreme Court has noted:

> under the Constitution, the first question to be answered is not whose plan is best, but in what branch of the Government is lodged the authority to initially devise the plan. This does not mean that constitutional rights are not to be scrupulously observed. It does mean, however, that the inquiry of federal courts into prison management must be limited to the issue of whether a particular system violates any prohibition of the Constitution or, in the case of a federal prison, a statute. The wide range of 'judgment calls' that meet constitutional and statutory requirements are confided to officials outside of the Judicial Branch of Government.

Bell v. Wolfish, 441 U.S. 520, 562 (1979).

Any attempt by the government to interject itself into decisions about the policies under which the Facilities operate, absent a clear showing that a policy is causing systemic violations of the constitutional rights of inmates, would be an affront to the State of New York's sovereign authority to regulate institutional facilities within its borders; it is an affront to the principles of federalism that form the foundation of our

system of government under the Constitution; and it is an affront to rights of the citizens of Erie County to have their voices heard in how their tax dollars are spent. Because the government has disregarded the fundamental constitutional limitations placed on its enforcement authority under CRIPA in filing its Complaint in this case, the Defendants respectfully submit that the case must be dismissed.

ii. **The Government Has Disregarded the Constitutional Limitations on Federal Government Enforcement Authority and CRIPA is Therefore Unconstitutional as Applied.**

In its CRIPA investigations, the government routinely fails to articulate with any specificity the ways in which the policies or customs of institutional facilities have caused unconstitutional conditions or practices at the facilities. See, e.g., Letter from Acting Assistant Attorney General Loretta King to the Honorable Ed Emmett (June 4, 2009);[3] Letter from Acting Assistant Attorney General Grace Chung Becker to Stephen Nodine and Sheriff Sam Cochran (January 15, 2009).[4] Instead, as in this case, the government simply discusses in general terms the generic constitutional standards applicable in the context of Section 1983 cases and then cites individual instances of conduct that purportedly occurred within a given correctional facility as evidence of "inadequacies" within the facility. See, e.g., Letter from Acting Assistant Attorney General Loretta King to the Honorable Ed Emmett (June 4, 2009);[5] Letter from Acting Assistant Attorney General Grace Chung Becker to Stephen Nodine and Sheriff Sam Cochran (January 15, 2009).[6] The government then demands that a facility implement sweeping remedial measures that far exceed constitutionally minimum corrective

[3] Available at http://www.usdoj.gov/crt/split/documents/harris_county_jail_findlet_060409.pdf.
[4] Available at http://www.usdoj.gov/crt/split/documents/MCMJ_findlet_01-15-09.pdf.
[5] Available at http://www.usdoj.gov/crt/split/documents/harris_county_jail_findlet_060409.pdf.
[6] Available at http://www.usdoj.gov/crt/split/documents/MCMJ_findlet_01-15-09.pdf.

measures, without regard to whether the policies of the facility in fact caused any purportedly unconstitutional conduct or whether the cited instances of purported misconduct were merely isolated incidences. See, e.g., Letter from Acting Assistant Attorney General Loretta King to the Honorable Ed Emmett (June 4, 2009);[7] Letter from Acting Assistant Attorney General Grace Chung Becker to Stephen Nodine and Sheriff Sam Cochran (January 15, 2009).[8]

The fact that this practice of blatantly unconstitutional overreaching by the government goes largely unchallenged in federal court is a testament to the might of the Department. As evidenced in this case, to the extent that a subject jurisdiction dares to inquire as to what the actual, minimal constitutional requirements are with respect to particular conditions of confinement, the government threatens to sue under CRIPA. Thus, as a general rule, jurisdictions acquiesce to the government's overreaching, presumably to avoid the cost of litigating against the virtually unlimited resources of the federal government.

This historical pattern of unconstitutional overreaching by the government under CRIPA is exactly what has happened in this case. The government opened an investigation of the Facilities and ultimately issued the "Findings Letter," attached, in part, as Exhibit B to the Complaint. In the "Findings Letter," the government made broad and factually unsupported allegations about purported "inadequacies" at the Facilities. See, e.g., Letter at 13. Noticeably absent from the government's vague allegations regarding these purported "inadequacies," however, are any allegations that any particular policies or practices of the Facilities are unconstitutional. Instead, the Letter

[7] Available at http://www.usdoj.gov/crt/split/documents/harris_county_jail_findlet_060409.pdf.
[8] Available at http://www.usdoj.gov/crt/split/documents/MCMJ_findlet_01-15-09.pdf.

relies exclusively on allegations of a limited number of particular instances of purported misconduct as a basis for demanding remedial measures that far exceed the minimum requirements of the Constitution. And, when the County sought to clarify the applicable constitutional standards that the government was applying investigating the Facilities, the government refused to even engage in a conversation on the topic, opting instead to file this suit.[9]

As noted above, CRIPA involves a careful balancing by Congress of the constitutional and prudential elements of federalism against the importance of protecting prisoners from being subjected to flagrant and egregious conduct in violation of the Eighth Amendment. The Complaint ignores this balance and treats CRIPA as equivalent to a roving mandate to federalize conditions of confinement nationwide. The government apparently interprets CRIPA as sufficiently broad to permit the government to impose its preferred polices in place of the policies implemented by locally elected officials who deal with the realities of limited budgets and competing priorities. The Complaint draws no distinction between individual and municipal liability, and does not even attempt to allege that the *policies* at the Facilities caused any purported unconstitutional conditions

[9] The Defendants also wish to note that, despite the Attorney General's certification to the contrary, the government has not even attempted to satisfy several of the pre-requisites to suit under 42 U.S.C. Section 1997b. For example, despite several letters and conversations between the government and counsel for the County, the government never broached the topic of whether any federal funding might be available to assist the County in implementing the government's yet to be identified recommended remedial measures. While the few courts that have considered CRIPA cases have held that the facts underlying the Attorney General's certification are not judicially reviewable, the Defendants raise this issue to highlight the government's apparent total disregard of the limitations placed on CRIPA enforcement by Congress in enacting the statute. The abject failure by the government to even attempt to satisfy these requirements highlights the fact that the government believes it has virtually plenary authority to bring enforcement actions under CRIPA irrespective of the requirements of federal law and the Constitution.

or practices. See, e.g., Compl. ¶ 21 (alleging "inadequate" protect from staff abuse and "inadequate" protection from harm and serious risk of harm); id. at ¶ 22 (alleging "inadequate" protection from inmate-on-inmate abuse and "inadequate" protection from harm and serious risk of harm). Moreover, and most seriously, the government does not even attempt to link its Complaint to existing constitutional standards applicable to a jurisdiction, as opposed to standards that would apply to an individual defendant in a Section 1983 suit. See, e.g., Letter at 4-8.

Because the government has not limited its Complaint to allegations that the conditions or practices at the Facilities are *unconstitutional* and that the *policies* at the Facilities caused such unconstitutional conditions or practices, the government has interpreted CRIPA in a manner that exceeds the constitutionally permissible scope of federal infringement upon state and local government activities under Section 5 of the Fourteenth Amendment. See U.S. Const. amend. XIV § 5. Based on the government's unduly broad interpretation of CRIPA, the statute is unconstitutional as applied. This case should therefore be dismissed for failure to state a claim upon which relief can be granted under Rule 12(b)(6). Fed. R. Evid. 12(b)(6).

B. THE GOVERNMENT HAS FAILED TO PLEAD FACTS SUFFICIENT TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED AS TO ANY OF THE DEFENDANTS.

The Complaint, without any factual detail, alleges "inadequacies" in three main areas: (1) alleged failure of the defendants to prevent staff from inflicting harm on inmates and failure to protect inmates from harm (Complaint, ¶¶ 20-22); (2) alleged failure to provide adequate mental health and medical treatment (Complaint, ¶ 23); and

(3) alleged failure to maintain adequate sanitary conditions at the Facilities[10] (Complaint, ¶ 24). There are no specific factual allegations as to any of the defendants, nor do any of the allegations of sparse unrelated incidents support a finding of a custom or policy or practice adopted by any of the defendants. The government has failed to state a cause of action against any of the defendants named in this case and has failed to adequately plead constitutional violations in any of the above areas attributable to any of the defendants. Like the decision rendered in United States v. City of Columbus, 2000 WL 1133166 (S.D. Ohio August 3, 2000)(attached hereto as **Exhibit "A"**), this court should similarly conclude that the United States' pleading is woefully deficient.

i. The Complaint Fails to State a Case of Action for Failure to Protect from Harm against Any of the Defendants.

The Facilities house inmates awaiting arraignment and trial, as well as those who have been convicted and sentenced. The Second Circuit recently confirmed that no distinction is made between these types of inmates for purposes of determining the level of Constitutional protection afforded them. Caiozzo v. Koreman, ___F.3d___, 2009 WL 2998338 (2d Cir. September 22, 2009). In Caiozzo, the Second Circuit examined which line of cases it would follow in imposing constitutional liability for violating an inmate's right to be free from cruel and unusual punishment. The Second Circuit noted that its pre Farmer v. Brennan, 511 U.S. 825 (1994) decisions employed an "objective" test, in that constitutional violations could be found against defendants "without proof of the state of mind of the defendant" where "circumstances indicat[ed] an evil intent, or recklessness, or at least deliberate indifference to the consequences of his conduct for those under his

[10] There is barely any mention at all about the Erie County Correctional Facility in the Complaint and certainly no factual detail outlining any alleged unconstitutional conditions at the Erie County Correctional Facility.

control or dependent upon him." Caiozzo, at *1. The Second Circuit's post Farmer decisions however, directed that deliberate indifference claims brought by "pretrial detainees in state facilities" analyzed under the Due Process Clause of the Fourteenth Amendment "were to be analyzed under the same test as Eighth Amendment claims by inmates who stood convicted." Id. The Second Circuit explained the substantive standard as follows:

> In Farmer v. Brennan, [citation omitted] the Supreme Court addressed the question of whether to use a 'subjective' or an 'objective' standard in determining deliberate indifference in the context of a convicted prisoner's rights under the Eighth Amendment, *see id.* at 837-38, 114 S.Ct. 1970. The court noted '[w]ith deliberate indifference lying somewhere between the poles of negligence at one end and purpose or knowledge at the other, the Courts of Appeals have routinely equated deliberate indifference with recklessness.' *Id. at 836*, 114 S.Ct. 1970. But this does not resolve the question, because there are two legal tests for recklessness; the civil-law objective test, under which a defendant is liable if he 'fails to act in the face of an unjustifiably high risk of harm that is either known or so obvious that it should be known' and the criminal-law subjective test, under which a defendant is liable if he 'disregards a risk of harm of which he is aware.' *Id. at 836-37*. The Court concluded that the subjective [criminal] test should apply under the Eighth Amendment because it prohibits cruel and unusual punishment, and a prison official's action or inaction cannot properly be termed 'punishment' of the detainee if the official was not actually aware of the existence of an excessive risk to an inmate's health or safety. *See id.* at 837-38.

Caiozzo at *5. The Second Circuit then overruled its decision in Liscio v. Warren, 901 F.2d 274 (2d Cir. 1990) and held that, to the extent it was unclear, the objective standard has no place in cases in which pretrial detainees are making claims of deliberate indifference to their constitutional rights against officials. Id. at *5. The Second Circuit noted:

> We thus reaffirm the position that we expressed in Arroyo [v. Schaefer, 548 F.2d 47 (2d Cir. 1977)]: Claims for deliberate indifference to a serious medical condition or other serious threat

> to the health or safety or a person in custody should be analyzed under the same standard irrespective of whether they are brought under the Eighth or Fourteenth Amendment.

Caiozzo, at *7.

While the Eighth Amendment "requires prison officials to take reasonable measures to guarantee the safety of inmates in their custody," not all injuries suffered by one inmate at the hands of another rises to the level of a constitutional violation by those officials responsible for protecting the inmates from attack. Hayes v. New York City Dep't of Corrections, 84 F.3d 614, 620 (2d Cir. 1996); see also Farmer, 511 U.S. at 825. Mere negligence, however, on the part of a prison official does not give rise to a constitutional claim. Hayes, 84 F.3d at 620. "To state a cognizable failure to protect claim under § 1983, the inmate must demonstrate that two conditions are met." Warren v. Goord, 476 F.Supp.2d 407, 411 (S.D.N.Y. 2007). "First, for a claim 'based on the failure to prevent harm, the inmate just show that he is incarcerated under conditions posing a substantial risk of serious harm.'" Id., quoting Farmer, 511 U.S. at 834. "Second, the inmate must show that prison officials acted with 'deliberate indifference' to the safety of the inmate." Id. "The test for deliberate indifference is twofold: To act with deliberate indifference, 'the official must both be aware of the facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." Id., quoting Farmer, 511 U.S. at 837, see also Hayes, 84 F.3d at 620 ('[A] prison official has sufficient culpable intent if he has knowledge than an inmate faces a substantial risk of serious harm and he disregards that risk by failing to take reasonable measures to abate the harm.').

In order to impose supervisory liability for failure to protect, personal involvement of the supervisor must be shown, or that the complained of threat "was longstanding, pervasive, well-documented, or expressly noted by prison officials in the past, and the circumstances suggest that the defendant-official being sued had been exposed to the information concerning the risk" and deliberately disregarded the known and appreciated risk. Id., quoting Farmer. Absent some personal involvement by the supervisory official in the allegedly unlawful conduct of his subordinates, he cannot be liable under section 1983. Hernandez v. Keane, 341 F.3d 137, 144-45 (2d Cir. 2003). "The personal liability of a supervisor under § 1983 can be shown in one of more of the following ways: (1) actual direct participation in the constitutional violation, (2) failure to remedy a wrong after being informed through a report or appeal, (3) creation of policy or custom that sanctioned conduct amounting to a constitutional violation, or allowing such a policy or custom to continue, (4) grossly negligent supervision of subordinates who committed a violation, or (5) failure to act on information indicating that unconstitutional acts were occurring." Id., citing Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995)(other citations omitted).

a. There are No Facts Alleged to Support A Constitutional Violation for Excessive Force as Against Any of the Named Individual Defendants

The Complaint fails to allege that the individually named defendants were personally involved in the alleged use of excessive force. The Complaint names a whole host of individuals: Chris Collins, Erie County Executive, Anthony Billittier, IV, MD, Commissioner of Health, Timothy B. Howard, Erie County Sheriff, Richard T. Donovan, Erie County Undersheriff, Robert Koch, Superintendent, Barbara Leary, First Deputy

Superintendent for the Erie County Holding Center and Donald Livingston, First Deputy Superintendent for Erie County Correctional Facility. The only allegation with respect to Collins is that he is Erie County Executive and Chief Executive Officer for Erie County. There is no allegation that Collins has any involvement in the day to day management of the jail, nor is there any allegation that Collins has personally been involved in any incidences at the jail whatsoever. Given the lack of personal involvement in the jail, the Complaint clearly fails to state a cause of action against Collins.

Similarly, with respect to Dr. Billittier, the only allegation with respect to him is that he "is responsible for the daily oversight of health care employees at ECHC and ECCF." Although it is not clear from the Complaint that the allegations of failure to protect or use of force are not asserted against Dr. Billittier, there certainly is no allegation of personal involvement of Dr. Billittier in any respect.

Similarly, the Complaint fails to allege any specific personal involvement or facts supporting deliberate indifference on the part of Howard, Koch, Leary, Donovan and Livingston. The government must plead facts which, if true, would be sufficient to establish that the Defendants acted with "deliberate indifference." See United States v. Terrell County, Georgia, 457 F.Supp.2d 1359, 1367 (M.D. Ga. 2006) (applying the deliberate indifference standard in a CRIPA case). In the present case, no such allegations are pled in the Complaint. The same sparse factual allegation is made with respect to Howard, Koch, Leary, Donovan and Livingston: that they "are responsible for the day-to-day operations of the ECHC and ECCF."

In addition to the failure to allege personal involvement, paragraphs 21 and 22 of the Complaint are insufficient. With respect to paragraph 21, the government has failed

to allege non-conclusory facts sufficient to support a finding of any unconstitutional conditions or practices. Instead, the government has stated vague legal conclusions couched as fact, such as the conclusions that the Defendants: "failed to take reasonable measures to prevent staff from inflicting harm on inmates;" provided "inadequate protection from staff abuse;" and provided "inadequate protection from harm and serious risk of harm caused by sexually abusive behavior." Compl. ¶ 21. Despite the government's apparent belief to the contrary, the government's mere statement that the conditions or practices at the Facilities are "inadequate" by whatever unarticulated standard the government has chosen to apply does not constitute an allegation of unconstitutionality as required under CRIPA. Thus, the Complaint fails to adequately allege unconstitutional conditions or practices in support of Paragraph 21.

Second, the government has failed to allege non-conclusory facts sufficient to support a finding that the policies or customs caused any purportedly unconstitutional conditions or practices at the Facilities. Instead, the government merely made vague, conclusory statements regarding two outdated versions of the Facilities' Policies and Procedures Manuals that in no way allege that the policies caused unconstitutional conditions or practices at the Facilities. Representative examples of these conclusory allegations include the claims: that "the organization of the Manuals is confusing" and that one of the Policies and Procedures Manuals "fails to provide inmates with sufficient protection from harm." Letter at 15-17. Moreover, while the government includes "illustrative examples" of excessive use of force in its Findings Letter, it does not even suggest that these examples are a result of the Facilities' policies or customs. Letter at 18-19. Instead, these examples, even taken in the light most favorable to the government,

do nothing more than evidence individual instances of purported use of excessive force. Given the fact that the Facilities admit more than 26,000 inmates on average per year, one would expect hundreds, if not thousands, of such claims if excessive force is a custom or policy or if it is so widespread and pervasive as suggested by the government. Under the Monell standard, however, it is clear that municipalities are only liable "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or act may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible." 436 U.S. at 694.

Third, the government does not plead any facts whatsoever to even suggest that the Defendants were deliberately indifferent to a known risk of serious harm. Despite alleging individual instances of excessive use of force, the government does not allege in either the Complaint or the underlying Findings Letter that these occurred as a result of the Facilities' policy or custom and it pleads no facts that would even tend to suggest that the Defendants were aware of any serious risk of harm to inmates at the Facilities. Thus, the Complaint fails to adequately plead that the Defendants were deliberately indifferent.

Similarly, paragraph 22 of the Complaint is insufficient to plead a constitutional claim for use of force. As with paragraph 21, the government has failed to allege non-conclusory facts sufficient to support a finding of any alleged unconstitutional conditions or practices at the Facilities. Instead, the government has pled vague legal conclusions couched as fact, such as the conclusions that the Defendants: "failed to take reasonable measures to protect inmates against the serious harm inflicted on them by other inmates;" provided "inadequate protection from inmate-on-inmate abuse;" provided "inadequate protection from harm and serious risk of harm caused by a failure to protect inmates

vulnerable to sexual abuse;" and "fail[ed] to implement an inmate classification system that adequately assesses risk factors for inmate-on-inmate violence." Compl. ¶ 22. Once again, the government's mere statement that the conditions or practices at the Facilities are "inadequate" does not constitute an allegation of unconstitutionality as required under CRIPA. Thus, the Complaint fails to adequately allege unconstitutional conditions or practices in support of Paragraph 22.

Second, the government has failed to plead any facts whatsoever regarding the policies or customs of the Facilities related to the allegations in Paragraph 22. Instead the government simply listed individual instances of inmate altercations (Letter at 20-22), all of which were documented, and followed-up on by Facilities' officials. See Letter at 20 (noting that these examples were pulled from a review of Facilities' incident reports). Indeed, in the examples of incidences allegedly arising when "ECSO deputies on duty were not present," Letter at 21, there is no suggestion that: (1) the deputies' absence was tied to an official or even unofficial policy or custom set forth by Facilities' officials or (2) that the deputies' absence was unconstitutional. Instead, these examples, even taken in the light most favorable to the government, do nothing more than evidence individual instances of inmate on inmate violence; which itself cannot be the basis of a claim of unconstitutional conditions or practices. As the Supreme Court has held:

> [i]t is not . . . every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety. Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious,' a prison official's act or omission must result in the denial of 'the minimal civilized measure of life's necessities.' . . . To violate the Cruel and Unusual Punishment Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety . . .

Farmer, 511 US at 834 (internal citations omitted). Likewise, under the Monell standard, it is clear that municipalities are only liable "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible." 436 U.S. at 694. The government has thus failed to plead that any alleged instances of inmate on inmate violence cited in the Letter resulted from the Facilities' policies or customs.

Third, the government did not plead adequate non-conclusory facts to support a finding of deliberate indifference.[11] At most, the underlying Findings Letter alleges that "inmates fought one another for inconsequential reasons" which lead to fights. Letter at 22. This however, is insufficient to rise to a showing of deliberate indifference on the parts of the Facilities' officials in that it does not amount to an allegation that any of the Defendants disregarded a known risk of serious harm to inmates as a result of inmate on inmate violence.

As the Complaint fails to set forth facts supporting a claim that any of the defendants participated, condoned or acted with deliberate indifference to known unconstitutional policies, it must be dismissed as to them. See Morales v. New York State Dep't of Corrections, 842 F.2d 27, 30-31 (2d Cir. 1988)(Excessive force claims

[11] The only factual allegation in this regard is the government's use of a cherry-picked quote from county Undersheriff Brian D. Doyle from August 4, 2007. Letter at 20. The fact that a single undersheriff made a public statement some two years ago is far from sufficient, even when viewed in the light most favorable to the government, to support a conclusion that the Defendants knowingly disregarded a serious risk of inmate-on-inmate violence.

dismissed as to the Superintendent where no allegations of personal involvement were alleged).

As discussed at length *supra*, the constitutional limits of the federal government's enforcement authority under CRIPA require that each of the government's claims be based on a purported constitutional deprivation. In the absence of such allegations, a CRIPA Complaint is insufficiently pled on its face given the limitations on federal government enforcement authority under the Fourteenth Amendment. See U.S. Const. amend. XIV, § 5. As the Complaint fails to plead an unconstitutional deprivation with regard to the excessive use of force against any of the individuals, it should be dismissed.

b. There are No Facts Alleged to Support A Constitutional Violation for Excessive Force as Against the County of Erie

It is well-settled that municipal liability for the unconstitutional conduct of employees can exist only when the policies or customs of the municipality caused the deprivation of an individual's constitutional rights. Thus, in the context of a Section 1983 suit, the Supreme Court has noted that "Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort." Monell, 436 U.S. at 691. "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." Id. at 694. "[A] municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." Id. at 691. A municipality can be held liable if the conduct that caused the unconstitutional deprivation was undertaken

pursuant to " a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers[,]. .. [or] pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." Jeffes, 208 F.3d at 56-57, quoting Monell, 436 U.S. at 690-91.

In the same way, when alleging violations under CRIPA, the government must show that any unconstitutional conditions were a result of government policy or custom, not simply actions by an individual tortfeasor. See United States v. Pennsylvania, 902 F.Supp. 565, 580, 589 (W.D. Pa. 1995) (noting in the context of a CRIPA suit that the government must establish that the governmental entity being sued was the "moving force behind the deprivation" and that the entity's "policy or custom must have played a part in the deprivation" and holding that certain isolated incidents of negligence were insufficient to establish entity liability (internal quotation marks omitted)); S. Rep. No. 96-416, at 29 (1979) ("Thus, the Attorney General does not have authority under [CRIPA] to redress isolated instances of abuse or repeated violations against an individual. Rather, the Attorney General's authority is limited to cases where unconstitutional . . . practices are widespread, pervasive, and systematic and adversely affect significant numbers of institutionalized individuals.").

"[D]eliberate indifference involves unnecessary and wanton infliction of pain, or other conduct that shocks the conscience." Kelsey v. City of New York, 2006 WL 3725543 at *5 (E.D.N.Y. December 18, 2006), aff'd 306 Fed.Appx. 700 (2d Cir. 2009), citing Hathaway v. Coughlin, 99 F.3d 550, 553 (2d Cir. 1996). In alleging that a municipality was deliberately indifferent based on the municipality's policies or customs,

the government must show that the municipality knew of alternatives for preventing harm and deliberately chose to not pursue such alternatives. Cruise v. Marino, 404 F. Supp. 2d 656, 672 (M.D. Pa. 2005). "This element . . . [of] proof of a conscious choice by the identified policy makers to implement a policy which affords prisoners insufficient protection in light of the information available to the policy makers concerning the risk of suicide and in light of feasible alternatives not implemented" must be present for a municipality to be held liable. Id. The Complaint in the instant case fails to contain any allegations relating to the use of force or unconstitutional custom or policy regarding the use of force sufficient to infer municipal liability.

Moreover, the Complaint only tangentially refers to training and it is difficult to discern whether the government is asserting a failure to train claim and if so, against which defendants. Here, however, the Complaint is factually deficient as well. "Municipal liability may also be premised on a failure to train employees when inadequate training 'reflects deliberate indifference to . . . constitutional rights.'" Okin v. Village of Cornwall –on-Hudson Police Dep't, 577 F.3d 415, 440 (2d Cir. 2009), quoting Canton v. Harris, 489U.S. 378, 392 (1989). "To prove deliberate indifference, [the Second Circuit] ha[s] required the plaintiff to show: (1) 'that a policymaker knows "to a moral certainty" that her employees will confront a given situation'; (2) 'that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation'; and (3) 'that the wrong choice by the . . . employee will frequently cause the deprivation of a citizen's constitutional rights.' Id., quoting Walker v. City of New York, 974 F.2d 293, 297-98 (2d Cir. 1992). The plaintiff must "'identify a specific

deficiency in the [county's] training program and establish that the deficiency is closely related to the ultimate injury, such that it actually caused the constitutional deprivation.'" Id., quoting Green v. City of New York, 465 F.3d 65, 81 (2d Cir. 2006). "A pattern of misconduct, while perhaps suggestive of inadequate training, is not enough to create a triable issue of fact on a failure-to-train theory." Id., citing Amnesty Am. v. Town of W. Hartford, 361 F.3d 113, 129 (2d Cir. 2004). "The plaintiff must offer evidence to support the conclusion that the training program was inadequate, not 'that a particular officer may be unsatisfactorily trained' or that 'an otherwise sound program has occasionally been negligently administered,' and that a 'hypothetically well-trained officer' would have avoided the constitutional violation." Id., quoting Canton, 489 U.S. at 390-391 (other citation omitted).

In the present case, there are absolutely no factual allegations to support a claim that training at the Facilities is "inadequate" much less unconstitutional or that such alleged lack of training caused unconstitutional deprivations either by the individual defendants or the County. As such, the cause of action alleging failure to train should be dismissed.

ii. The Complaint Fails to State A Cause of Action for Denial of Medical Treatment.

"The Cruel and Unusual Punishments Clause of the Eighth Amendment imposes a duty upon prison officials to ensure that inmates receive adequate medical care." Salahuddin v. Goord, 467 F.3d 263, 279-80 (2d Cir. 2006), citing Farmer, 511 U.S. at 825. "Yet not every lapse in medical care is a constitutional wrong." Id. "Only 'deprivations denying "the minimal civilized measures of life's necessities" are

sufficiently grave to form the basis of an Eighth Amendment violation." Id., quoting Wilson, 501 U.S. at 298, quoting Rhodes v. Chapman, 452 U.S. 337, 347 (1981).

In Salahuddin, the Second Circuit concisely articulated the standard to be applied in determining whether a denial of medical treatment rises to a constitutional violation:

> The first inquiry is whether the prisoner was actually deprived of adequate medical care. As the Supreme Court has noted, the prison official's duty is only to provide reasonable care. *See Farmer*, 511 U.S. at 844-47. Thus, 'prison officials who act reasonably [in response to an inmate-health risk] cannot be found liable under the Cruel and Unusual Punishments Clause,' (citation omitted) and, conversely, failing to take 'reasonable measures' in response to a medical condition can lead to liability, Id. at 847, 114 S.Ct. 1970.
>
> Second, the objective test asks whether the inadequacy in medical care is sufficiently serious. This inquiry requires the court to examine how the offending conduct is inadequate, and what harm, if any the inadequacy has caused or will likely cause the prisoner. *See Helling v. McKinney*, 509 U.S. 25, 32-33 (1993)(holding that prisoners may complain about both current harm and 'very likely' future harm). . . Factors relevant to the seriousness of a medical condition include whether 'a reasonable doctor or patient would find it important and worthy of comment,' whether the condition' significantly affects an individual's daily activities,' and whether it causes 'chronic and substantial pain.' *Chance v. Armstrong*, 143 F.3d 698 (2d Cir. 1998)(quotation marks omitted). In cases where the inadequacy is in the medical treatment given, the seriousness inquiry is narrower. For example, if the prisoner is receiving on-going treatment and the offending conduct is an unreasonable delay or interruption in that treatment, the seriousness inquiry 'focuses on the challenged delay or interruption in treatment rather than the prisoners' underlying medical condition alone.' *Smith*, 316 F.3d at 185. Thus, although we sometimes speak of a 'serious medical condition' as a basis for an Eighth Amendment claim, such a condition is only one factor in determining whether a deprivation of adequate medical care is sufficiently grave to establish constitutional liability.
>
> The second requirement for an Eighth Amendment violation is subjective: the charged official must act with a sufficiently culpable state of mind. *Wilson*, 501 U.S. at 300 (reasoning that 'some mental element must be attributed to the inflicting officer' before the harm inflicted can qualify as 'punishment'). In medical-treatment cases not arising from emergency situations, the official's state of mind need not reach the level of knowing and purposeful infliction of harm; it suffices if the plaintiff proves that the official acted with deliberate indifference to inmate health. Id. at 302. . . . This mental state requires that the charged official act or

> failed to act while actually aware of a substantial risk that serious inmate harm will result.

Salahuddin, 467 F.3d at 280-281.

In Caiozzo, the Second Circuit examined claims of denial of medical treatment in the context of an inmate who died as a result of seizure due to acute and chronic alcoholism. Based on the decedent's poorly self reported medical history, the nurse was led to believe he was under the influence of alcohol rather than in detox from it. Although the Second Circuit, noted the nurse *should have been aware* that the decedent was in immediate danger of alcohol withdrawal, it dismissed the case as against her because the nurse honestly thought (wrongly as it turned out) the decedent was intoxicated. Caiozzo, 2009 WL 2998338 at * 7. The subjective component of the deliberate indifference test was not met, as she was not aware of his actual condition and then deliberately disregarded it. Id.

In the present case, as with the excessive force claims, there are no allegations specific to any of the defendants with respect to denial of medical treatment or suicide prevention. The document attached to the Complaint does not set forth facts specific to any of the individuals demonstrating the subjective element of a denial of medical treatment claim against them. In that regard, paragraph 23 of the Complaint is deficient and contains only conclusory facts insufficient to support a finding of any unconstitutional conditions or practices at the Facilities. Paragraph 23 includes nothing more than legal conclusions couched as fact, which are insufficient to satisfy the pleading standards under Iqbal. For example, the government has alleged that the Defendants: "failed to provide adequate mental health and medical treatment and services to inmates;"

provided "inadequate suicide prevention;" provided "inadequate mental health care;" provided "inadequate management of medical services and treatment;" provided "inadequate administration of medication;" and provided "inadequate infection control." Compl. ¶ 23. The government's mere statement that the conditions or practices at the Facilities are "inadequate" by whatever unarticulated standard the government has chosen to apply does not constitute an allegation of unconstitutionality as required under CRIPA. Thus, the Complaint fails to adequately allege unconstitutional conditions or practices in Paragraph 24.

Second, the government has failed to allege non-conclusory facts sufficient to support a finding that the policies or customs caused any constitutional violations. Quite the contrary, the government explicitly stated in the Findings Letter that "the [suicide prevention] policies we reviewed appear sound." Letter at 9-10. Thus, the government does not even contend that the policies of the Defendants caused any purported unconstitutional conditions. With respect to the remaining allegations in Paragraph 24, the government does not plead any facts to even suggest that the policies caused any unconstitutional conditions or practices at the Facilities. And, as the Monell standard makes clear, the government's allegations of individual instances of conduct within the Facilities are not sufficient to establish municipal liability. See Monell, 436 U.S. at 691.

Third, the government does not plead any facts whatsoever to support a claim that the Defendants were deliberately indifferent to a known risk of serious harm. While the government cites the fact that the inmates have previously committed or attempted to commit suicide in the Facilities, this fact alone is insufficient to establish a finding of deliberate indifference. As one court noted, "[i]t is deceivingly inviting to take the

suicide, ipso facto, as conclusive proof of deliberate indifference. However, where suicidal tendencies are discovered and preventive measures taken, the question is only whether the measures taken were so inadequate as to be deliberately indifferent to the risk." Kelsey, 2006 WL 3725543 at *7, quoting Rellergert, 924 F.2d at 797; see also Caiozzo, 2009 WL 2998338 at *7. Given that the government does not dispute the adequacy of the Defendants' policies with respect to mental health services, the government's pleadings are insufficient as to the deliberate indifference as well and the claims should be dismissed as to the defendants. Shomo v. City of New York, 579 F.3d 176 (2d Cir. 2009).

ii. The Complaint Fails to State A Claim for Unconstitutional Sanitary Conditions

As previously noted, the Eighth Amendment does not mandate comfortable prisons, but they must be humane. Gaston v. Coughlin, 249 F.3d 156 (2d Cir. 2001). The Second Circuit has held that an Eighth Amendment claim may be established by proof that the inmate was subjected for a prolonged period to bitter cold. In Corselli v. Coughlin, 842 F.2d 23, 27 (2d Cir.1988), for example, the Second Circuit reversed the grant of summary judgment in favor of defendants where there was evidence that the prisoner plaintiff had been deliberately exposed to bitter cold in his cell block for three months. See also Wright v. McMann, 387 F.2d 519, 526 (2d Cir.1967) (vacating a dismissal on the pleadings where the complaint alleged that inmates were deliberately exposed to bitter cold and deprived of basic hygiene products while in solitary confinement). Accord Dixon v. Godinez, 114 F.3d 640, 643-45 (7th Cir.1997) (vacating summary judgment and remanding for determination of duration and severity of

prisoner's exposure to cold); Chandler v. Baird, 926 F.2d 1057, 1065-66 (11th Cir.1991) (vacating summary judgment where prisoner testified that he was denied basic sanitation items for two days and that his cell was frigid for 16 days during which he was denied bedding and all clothing except undershorts); Beck v. Lynaugh, 842 F.2d 759, 761 (5th Cir.1988) (vacating summary dismissal of claim that prisoners were exposed to winter cold due to broken windows).

In Gaston, plaintiff alleged his Eighth Amendment rights were violated principally by unsanitary conditions and exposure to prolonged cold. Gaston alleged that mice were constantly entering his cell, and that for several consecutive days and one noncontiguous day, the area directly in front of his cell was filled with human feces, urine, and sewage water. It also alleged that during the following winter, there were broken windows in Gaston's cell block, and that despite numerous complaints, the windows remained unrepaired for the entire winter, exposing inmates to freezing and sub-zero temperatures. Thus Gaston was subject to temperatures near or well below freezing for a five-month period.

In Gaston, the Second Circuit held that these allegations were sufficient to allege an Eighth Amendment sanitary condition claim. In the present case however, there are no facts supporting an Eighth Amendment conditions of confinement claim. Again, as with the other purported causes of actions, there are no allegations of personal involvement of any of the individuals named in the suit.

Paragraph 24 of the Complaint is deficient in that it contains only conclusory facts insufficient to support a finding of any unconstitutional conditions or practices at the Facilities. Indeed, the full extent of the government's pleadings with respect to the

claims in Paragraph 24 are contained in that paragraph itself. Compl. ¶ 24. That paragraph states the unsupported legal conclusion that "Defendants have pervasively maintained a physical environment at ECHC that poses an unreasonable risk of serious harm to inmates' health and safety by failing to correct facility maintenance problems." Compl. ¶ 24. Yet nowhere in the Complaint does the government cite any conditions or practices that are rise to the level of unconstitutional conduct.

As the Courts have noted, "society does not expect or intend prison conditions to be comfortable," thus "only extreme deprivations are sufficient to sustain a 'conditions-of-confinement' claim." Blyden v. Mancusi, 186 F.3d 252, 263 (2d Cir. 1999). The government's allegations are simply random factual allegations regarding minor environmental inconveniences such as alleged "accumulation of Styrofoam food trays and other clutter in cells" and the allegation that inmates were required to wash their undergarments "in a cell sink or arrange for pick-up and washing of these items by family or friends." Such minor deprivations fall far short of the denials of a "single, identifiable human need such as food, warmth, or exercise" that the Constitution is intended to protect against. Cusamano v. Sobek, 604 F.Supp.2d 416, 487-88 (2d Cir. 2009) (internal citations omitted); see also Lunney v. Brureton, 2005 WL 121720 (S.D.N.Y. 2005)(No Eighth Amendment violation where inmates are provided the opportunity and supplies to wash their own clothes), citing Green v. Ferrell, 801 F.2d 765, 771 (5th Cir. 1986)(no constitutional violation where inmates were permitted to wash their clothes in sinks and were provided with laundry detergent); Benjamin v. Fraser, 161 F.Supp.2d 151, 178-179 (S.D.N.Y. 2001)(availability of sinks and laundry detergent or bar soap sufficient under the Eighth Amendment) *aff'd in part and vacated in part* 343 F.3d 35 (2d Cir. 2003).

Thus, the Complaint fails to adequately allege unconstitutional conditions or practices in Paragraph 24.

Second, the government has failed to allege facts sufficient to support a finding that the Defendants' policies or customs caused any unconstitutional conditions or practices. Indeed, the Complaint includes absolutely no factual allegations regarding the Defendants' policies or customs related to environmental conditions at the Facilities, much less that such policies or customs caused any unconstitutional environmental conditions. Similarly, there are insufficient allegations under the Monell standard. See Monell, 436 U.S. at 691.

Third, the government does not allege any facts to support a claim that the Defendants were deliberately indifferent to a known risk of serious harm related to the allegations in Paragraph 24. As noted *supra*, the risks of harm alleged by the government fall far short of being unconstitutional, and are thus not sufficiently serious as to support a finding of deliberate indifference. Furthermore, the government's pleading that "Defendants have continued to maintain such an environment notwithstanding" the "known or obvious risks" in Paragraph 24 is nothing more than a formulaic recitation of the elements required to establish deliberate indifference and is insufficient to satisfy the pleading requirements established in Iqbal. See Twombly, 550 U.S. at 545; Iqbal, 129 S.Ct. at 1949.

C. THE COMPLAINT FAILS TO COMPLY WITH FRCP 10.

Rule 10 of the Federal Rules of Civil Procedure establishes the form generally required for pleadings and motions. Although a party may attach exhibits to their pleading, a party must state its claims in numbered paragraphs, with each paragraph

limited to a single set of circumstances. See Fed. R. Civ. P. 10(b) & (c). "The complaint should, as much as possible, avoid multiple allegations per paragraph." Politico v. Promus Hotels, Inc., 184 F.R.D. 232 (E.D.N.Y., 1999). Separation of claims into separate counts is mandatory under Federal Rules of Civil Procedure to facilitate clear presentation. See Original Ballet Russe v. Ballet Theater, 133 F.2d 187 (2nd Cir. 1943). Further, a complaint shall include a "short" and "plain" statement of the claim demonstrating that the party is entitled to relief. See Fed. R. Civ. P. 8(a). "The statements should be short because '[u]nnecessary prolixity in a pleading places an un-justified burden on the court and the party who must respond to it because they are forced to select the relevant material from a mass of verbiage.'" Politico, 184 F.R.D. at 233. (citing 5 Wright & Miller, § 1281). To otherwise allow a party to comingle detailed factual allegations in the same paragraph is simply not fair to the court or to the defendant. Id at 234. A complaint should not be a preview of counsel's argument to the jury at the end of the case.

In the present case the Complaint repeatedly cites and incorporates the "investigative findings of conditions at ECHC and ECCF" as allegedly detailed in the Letter. The so-called "Findings Letter" consists of fifty pages of lengthy unnumbered paragraphs and is referenced and incorporated no fewer than eleven times in the Complaint. Although the government is permitted to attach exhibits to its complaint, lengthy letters containing extraneous or evidentiary material should not be attached to a pleading. See Shultz v. Manufacturers & Traders Trust Co., 1 F.R.D. 53 (W.D.N.Y. 1939). It would be unjust and unduly burdensome to require the defendants to respond to

the fifty pages of lengthy, unnumbered paragraphs thereby forcing the defendants to "select the relevant material from a mass of verbiage." Politico, 184 F.R.D. at 233.

If the defendants' motion to dismiss is denied, it will be difficult to admit or deny the contents of the Letter given its structure. The Letter is illustrative of the deficiencies in the complaint in general. Because the government has failed to file a complaint in compliance with FRCP 10, it should be dismissed.

VI. CONCLUSION.

The government is seeking to use CRIPA to unconstitutionally usurp the sovereign authority of state and local governments to make decisions about what policies are implemented at correctional facilities within their purview. These policy decisions are properly reserved to state and local governments except in instances in which the policies at issue are so obviously improper that they are unconstitutional. In this case, the government's allegations are divorced from any meaningful ties to the requirements of the Constitution, they fail to even allege a connection between the Defendants' policies or customs to any unconstitutional conditions or practices, and they fail to allege deliberate indifference by the Defendants in all but the most conclusory of terms. For the foregoing reasons, Defendants' motion to dismiss the Complaint should be granted in its entirety. The Defendants further request, pursuant to 42 U.S.C. Section 1997a(b), that the government be required to pay the cost of the Defendants attorney's fees.

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By:

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2009 I electronically filed the foregoing with the Clerk of the District Court using its CM/ECF system, which would then electronically notify the following CM/ECF participants on this case:

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Exhibit “A”

Not Reported in F.Supp.2d, 2000 WL 1133166 (S.D.Ohio)
(Cite as: 2000 WL 1133166 (S.D.Ohio))

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Only the Westlaw citation is currently available.

United States District Court, S.D. Ohio, Eastern Division.
UNITED STATES of America, Plaintiff,
v.
CITY OF COLUMBUS, Ohio, et al., Defendants.
No. CIV.A.2;99CV1097.

Aug. 3, 2000.

Deborah F Sanders, United States Attorney's Office-2, Columbus, Mark nmi Masling, Mark A Posner, U S Department of Justice, Civil Rights Division, Special Litigation Section, Washington, DC, for USA, plaintiffs.

Timothy Joseph Mangan, Joshua T Cox, Andrea C Peeples, Columbus City Attorney's Office-2, Columbus, for City of Columbus, OH, defendants.

REPORT AND RECOMMENDATION

KING, Magistrate J.

***1** This is an action for injunctive and declaratory relief, instituted under the provisions of 42 U.S.C. § 14141, in which the United States alleges that officers of the Columbus Division of Police have engaged in a pattern or practice of conduct violative of federal law and that the defendant city has tolerated the alleged misconduct by failing to implement adequate policies, training, supervision, monitoring and incident investigation procedures. This matter is now before the Court on the motion to dismiss filed by the defendant city and on the motion for judgment on the pleadings filed by the defendant-intervenor, the Fraternal Order of Police, City Lodge No. 9 [referred to jointly as "movants"].

In their motions, the movants argue, first, that the Court is without subject matter jurisdiction over the claims asserted in the action because Congress exceeded its constitutional authority in promulgating the statute upon which the complaint is based, 42 U.S.C. § 14141. Movants argue, in the alternative, that the original complaint fails to state a claim upon which relief can be granted because it purports to impose vicarious liability on the defendant city, because it fails to allege with specificity the claimed wrongdoing of the defendant city or its police officers, and because its allegations are, in whole or in part, untimely. Although plaintiff has filed a motion for leave to amend the complaint in order to assert an additional claim of racially discriminatory conduct, that motion remains pending. The Court will therefore consider the movants' motions solely by reference to the original complaint.

I. STANDARD

Where the Court's subject matter jurisdiction is challenged under Fed.R.Civ.P. 12(b)(1), the plaintiff bears the burden of proving jurisdiction. *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F .3d 1125, 1134 (6th Cir.1996). When considering a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the Court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations in the complaint as true. *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *Roth Steel Products v. Sharon Steel Corporation*, 705 F.2d 134, 155 (6th Cir.1983). "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also McClain v. Real Estate Bd. of New Orleans, Inc.*, 444 U.S. 232, (1980); *Windsor v. The Tennessean*, 719 F.2d 155, 158 (6th Cir.1983). Because a motion under Rule 12(b)(6) is directed solely to the complaint itself, *Roth Steel Products*, 705 F.2d at 155, the Court must focus on whether the plaintiff is entitled to offer evidence to support the claims, rather than

whether the plaintiff will ultimately prevail. *Scheuer v. Rhodes*, 416 U.S. at 236.

In resolving a motion for judgment on the pleadings under F.R. Civ. P. 12(c), the Court must likewise accept all well-pleaded material allegations as true. *Southern Ohio Bank v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 479 F.2d 478, 480 (6th Cir.1973). "The motion is granted when no material issue of fact exists and the party making the motion is entitled to judgment as a matter of law." *United States v. Moriarty*, 8 F.3d 329, 332 (6th Cir.1993); *Paskvan v. City of Cleveland Civil Serv. Comm'n.*, 946 F.2d 1233, 1235 (6th Cir.1991). The Court need not, however, accept as true legal conclusions or unwarranted factual inferences. *Lewis v. ACB Business Serv., Inc.*, 135 F.3d 389, 405 (6th Cir.1998); *Morgan v. Church's Fried Chicken*, 829 F.2d 10, 12 (6th Cir.1987). Where the motion for judgment on the pleadings raises the defense of failure to state a claim upon which relief can be granted, the standard of F.R. Civ. P. 12(b)(6) is applicable. *Nixon v. State of Ohio*, 193 F.3d 389, 399 (6th Cir.1999). *See also Romero v. Intl. Terminal Operating Co.*, 358 U.S. 354, 358 n. 4 (1959).

II. THE ORIGINAL COMPLAINT

***2** The original complaint alleges that Columbus police officers have engaged in, and continue to engage in, a pattern or practice of using excessive force, *Complaint*, ¶ 6, falsely arresting individuals, *Id.*, ¶ 7, and falsifying official reports and conducting searches either without lawful authority or in an improper manner. *Id.*, ¶ 8(a),(b). The complaint further alleges that the City of Columbus has "tolerated the misconduct of individual officers," *Id.*, ¶ 9, by failing "to implement a policy on use of force that appropriately guides the actions of individual officers," *Id.*, ¶ 9(a), by failing to adequately "train," "supervise," and "monitor" officers, *Id.*, ¶ 9(b)-(d), and by failing to "establish a procedure whereby citizen complaints are adequately investigated," *Id.*, ¶ 9(e), "investigate adequately incidents in which a police officer uses lethal or non-lethal force," *Id.*, ¶ 9(f), "fairly and adequately adjudicate or review citizen complaints, and incidents in which an officer uses lethal or non-lethal force," *Id.*, ¶ 9(g), and "discipline adequately ... officers who engage in misconduct." *Id.*, ¶ 9(h). The complaint seeks a declaration that the city "is engaged in a pattern or practice by ... officers of depriving persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States," and asks that the Court enjoin the city "from engaging in any of the predicate acts forming the basis of the pattern or practice of conduct as described ..." and order the city "to adopt and implement policies, practices, and procedures to remedy the pattern or practice of conduct described ... and to prevent officers from depriving persons of rights, privileges or immunities secured or protected by the Constitution or laws of the United States...." *Id.*, at pp. 4-5.

III. THE STATUTE

The original complaint asserts claims under 42 U.S.C. § 14141. That statute, enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, reads in full as follows:

Cause of action

(a) Unlawful Conduct

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

(b) Civil action by Attorney General

> Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) 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** The parties agree that § 14141, which has no direct legislative history and which has never been construed by any court, is a successor to an earlier, nearly identical, provision of the Omnibus Crime Control Act of 1991, which was never actually promulgated.[FN1] *Defendant City's Motion to Dismiss*, at 9; *Motion for Judgment on Pleadings by the Fraternal Order of Police, City Lodge No. 9*, at 6; *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 6 [hereinafter "*Memorandum contra* "]. All parties also refer to the legislative history of that provision in their discussion of 42 U.S.C. § 14141. H.R.Rep. No. 102-242, 102nd Cong., 1st Sess., at 402, 1991 WL 206794 *399 (Leg.Hist.).

> FN1. This provision, § 1202 of the Police Accountability Act of 1991, was incorporated into H.R. 3371, the Omnibus Crime Control Act of 1991. The bill passed the House of Representatives and was forwarded to the Senate, which "failed to achieve cloture on the Conference Report. In the second session, the Senate again failed to achieve cloture, and the Conference Report on H.R. 3371 was never approved by the Senate." H.R. No. 102-1085, 102nd Cong., 2nd Sess.1992, 1992 WL 396419 *154 (Leg.Hist.)

Like § 14141, the earlier statute was intended to confer standing on the United States Attorney General to obtain civil injunctive relief against governmental authorities for patterns or practices of unconstitutional police practices. In considering the need for such legislation, the House Subcommittee on Civil and Constitutional Rights held two days of hearings and, in its report, the Committee on the Judiciary specifically referred to the Rodney King incident in Los Angeles, and to alleged misconduct within the Boston, New York City and Reynoldsburg, Ohio, Police Departments. Although recognizing that police misconduct violates the United States Constitution and, under 18 U.S.C. §§ 241, 242, can give rise to federal criminal liability, the Committee also noted that, under *United States v. City of Philadelphia*, 644 F.2d 187 (3d Cir.1980), the United States had neither statutory nor constitutional authority to sue a police department itself "to correct the underlying policy." 1991 WL 206794 *404. The problem was compounded, the Committee concluded, by the Supreme Court's holding, in *Los Angeles v. Lyons*, 461 U.S. 95 (1983), that, although a private citizen victimized by police misconduct could recover monetary relief under 42 U.S.C. § 1983, future injunctive relief remained unavailable absent a showing of likely future harm to that particular plaintiff. The proposed statute, the committee stated in its report, "would close this gap in the law, authorizing the Attorney General ... to sue for injunctive relief against abusive police practices." *Id.*, at 406. Significantly, the Committee went on to explain:

> The Act does not increase the responsibilities of police departments or impose any new standards of conduct on police officers. The standards of conduct under the Act are the same as those under the Constitution, presently enforced in damage actions under section 1983. The Act merely provides another tool for a court to use, after a police department is held responsible for a pattern or practice of misconduct that violates the Constitution or laws of the United States.
>
> Because the Act imposes no new standard of conduct on law enforcement agencies, it should not increase the amount of litigation against police departments. Individuals aggrieved by the use of excessive force already can and do sue under 42 U.S.C. § 1983 for monetary damages. With adoption of this section, such persons will be able to

seek injunctive relief as well, if their injury is the product of a pattern or practice of misconduct.

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

Id., at *406-08.

The movants argue that 42 U.S.C. § 14141, either as drafted or as applied in the original complaint in this action, does not reflect a valid exercise of congressional authority. This Court, movants contend, therefore lacks jurisdiction to entertain the claims asserted under that statute.

IV. Congressional Authority to Promulgate § 14141

A

It has been long established that each act of Congress, which is a branch of a government of only enumerated powers, must find its ultimate authority in the United States Constitution. *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803). The parties only briefly address the broad congressional authority to regulate "Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8. The proper exercise of that authority permits Congress to regulate the channels of interstate commerce, *e.g.*, *Heart of Atlanta Motel, Inc. v. United States,* 379 U.S. 241, 256 (1964), the instrumentalities of interstate commerce or persons or things in interstate commerce, *e.g.*, *Shreveport Rate Cases,* 234 U.S. 342 (1914), and those activities that "substantially affect interstate commerce," *e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37(137). *See generally United States v. Lopez,* 514 U.S. 549 (1995). The United States takes the position that Congress "had ample authority under the Commerce Clause to enact § 14141 given the substantial effect on interstate commerce of the consequences of police misconduct, ..." *Memorandum contra*, at 16 n. 5. There is no indication, however, that, in enacting § 14141, Congress intended the statute to effect a regulation of interstate commerce. More important, the United States Supreme Court has recently held that Congress may not regulate "non-economic [mis]conduct ... based solely on that conduct's aggregate effect on interstate commerce." *United States v. Morrison,* 120 S.Ct. 1740, 1754 (2000). This Court concludes that § 14141 cannot be justified as a valid exercise of congressional authority under the Commerce Clause.

In their memoranda, all parties also discuss, in comprehensive fashion, whether § 14141 reflects a valid exercise of congressional power under § 5 of the Fourteenth Amendment. The Fourteenth Amendment provides, in relevant part:

***5** Section 1.... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. amend. XIV. Congressional power under § 5 to enforce the Fourteenth Amendment includes the authority both to remedy and to prevent the violation of rights guaranteed by the amendment. *North Carolina v. Katzenbach,* 383 U.S. 301,

326 (1966). However, it does not include the power "to decree the substance of the Fourteenth Amendment's restrictions on the states." *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997). "Congress does not enforce a constitutional right by changing what the right is." *Id* . The limitations on the power of Congress to act, as reflected in both the language and purpose of 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*, 120 S.Ct. at 1755.

The distinction between remedial measures properly taken by Congress pursuant to § 5 and substantive changes to the Fourteenth Amendment forbidden to Congress is, as the Supreme Court has recognized, "not easy to discern." *City of Boerne*, 521 U.S. at 519. Critical to the distinction is the existence of "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.*, at 520. Legislation purportedly promulgated pursuant to § 5 of the Fourteenth Amendment, but which lacks such "congruence and proportionality, may become substantive in operation and effect" and is prohibited. *Id.* Although lapses in the legislative history are not necessarily fatal, *Kimel v. Florida Bd. of Regents*, 120 S.Ct. 631, 649-50 (2000); *Florida Prepaid Postsecondary Education Expense Bd. v. College Savings Bank*, 119 S.Ct 2199, 2210 (1999); *City of Boerne*, 521 U.S. at 531, Congress must nevertheless "identify conduct transgressing the Fourteenth Amendment's substantive provisions, and must tailor its legislative scheme to remedying or preventing such conduct." *Florida Prepaid*, 119 S.Ct. at 2207. Moreover, where congressional action would prohibit conduct not otherwise unconstitutional, it cannot be said, in the absence of a significant pattern of unconstitutional misconduct by state officials, that the action is congruent and proportional to the authority conferred upon Congress by § 5 of the Fourteenth Amendment. *Kimel*, 120 S.Ct. at 650. Where legislation "is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior," the statute may be characterized as attempting to effect "a substantive change in Constitutional protections." *City of Boerne*, 521 U.S. at 532. "Strong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Florida Prepaid*, 119 S.Ct. at 2157 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).

***6** With these standards in mind, the Court will consider whether § 14141 reflects a valid exercise of congressional power under § 5 of the Fourteenth Amendment.

B

Without doubt, the Fourteenth Amendment offers substantive protection from various forms of misconduct on the part of state law enforcement officials. *See, e.g., Graham v. Connor*, 490 U.S. 386 (1989) [excessive force]; *Dietrich v. Burrows*, 167 F.3d 1007 (6th Cir.1999) [arrest without probable cause]; *cf. Malley v. Briggs*, 475 U.S. 335 (1986); *Pierson v. Ray*, 386 U.S. 547 (1967) [false arrest]; *Albright v. Oliver*, 510 U.S. 266, 271n.4 (1994); *Knowles v. Iowa*, 525 U.S. 113 (1998) [unlawful searches]; *cf. Klina v. Fletcher*, 522 U.S. 118 (1997) [false affidavits in support of application for arrest warrant]. Moreover, the legislative history referred to by all parties in this action makes clear that the House Committee perceived the problem of police misconduct in constitutional terms and described the problem in its report as "serious," "real," and "not limited to Los Angeles." This Court has no doubt that, in enacting § 14141, Congress intended to respond, by both remedial and preventative measures, to a widespread pattern of violations of the Fourteenth Amendment by police officials acting under color of state law. The first test of the "congruence and proportionality" test, addressed in *Florida Prepaid* and *Kimel*, has been met.

The movants argue that any remedy under § 14141, and particularly the far-reaching relief sought by plaintiff in this action, is disproportionate to any claimed Fourteenth Amendment violations in light of the availability of private civil actions under § 1983 and the possibility of criminal prosecutions under 18 U.S.C. §§ 241, 242. However, as the House Committee report noted, some forms of unconstitutional police misconduct will, by operation of current judicial law, fall beyond the reach of private litigants and the possibility of remedy. The fact that Congress has previously promulgated 42 U.S.C. § 1983 and 18 U.S.C. §§ 241,242 does not transform § 14141 into an incongruent and disproportionate method of enforcing Fourteenth Amendment violations.

Once a Fourteenth Amendment violation has been identified, Congress is entitled to "much deference" in determining "whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." *City of Boerne,* 521 U.S. at 536; *Katzenbach v. Morgan,* 384 U.S. 641, 651 (1966). That the method of enforcement selected by Congress in the lawful exercise of its authority under § 5 may be unprecedented and even severe does not necessarily militate a finding of incongruity and disproportionality. *City of Boerne,* 521 U.S. at 526. As the United States Supreme Court has cautioned, "Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation." *Kimel,* 120 S.Ct. at 648.

C

***7** In a jurisdictional argument that overlaps an argument made in support of the motion to dismiss for failure to state a claim for relief, the movants disagree with the plaintiff's interpretation of the language of the statute and the remedy actually created by it. The United States contends that the statute authorizes "appropriate equitable and declaratory relief," 42 U.S.C. § 14141, even where the defendant governmental authority has not itself caused the pattern or practice of constitutional violations. In other words, the plaintiff argues, the statute authorizes vicarious liability as a predicate for relief. The movants contend that to impose liability on the City of Columbus for-not its own misconduct-but the alleged misconduct of police officers, FN2 is neither congruent nor proportional to the claimed constitutional violations. They argue that, if § 14141 is construed to effect such a result, either on its face or as applied in this action, the statute is disproportional to the perceived harm and cannot be justified as a lawful exercise of authority under § 5 of the Fourteenth Amendment.

> FN2. Neither movant concedes that any constitutional violations have in fact occurred.

In determining whether or not § 14141, either on its face or as applied in this action, is congruent and proportional to the authority conferred upon Congress under § 5 of the Fourteenth Amendment, it becomes necessary to construe the actual language of the statute. The United States contends that § 14141 is unambiguous in its authorization of liability based upon vicarious liability. This Court does not agree. Rather, the awkwardness of the language and grammatical structure of the statute renders it difficult to construe and interpret. Thus, in construing § 14141, the Court will be guided by the time-honored tenet of statutory interpretation which requires that a Court "interpret the text of one statute in the light of text of surrounding statutes ...," *Vermont Agency of Natural Resources v. United States,* 120 S.Ct. 1858, 1860 n. 17 (2000), as well as by the corollary that, "if Congress intends to alter the usual constitutional balance between States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 1860. Finally, the Court is mindful that statutes should be construed so as to avoid difficult constitutional questions.

As the House Committee report makes clear, and as all parties to this action appear to concede, the grant of authority to the Attorney General reflected

in both the Police Accountability Act of 1991 and in § 14141 was drafted in light of and was intended to remedy the inadequacies of 42 U.S.C. § 1983. That statute provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia 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 in an action at law, suit in equity, or other proper proceeding for redress.

***8** Section 1983 does not impose vicarious liability solely on the basis of an employment relationship between a governmental agency and a tortfeasor. *Rizzo v. Goode*, 423 U.S. 362 (1976). Before a city can be held liable under § 1983, some "action pursuant to official municipal policy of some nature [must have] caused a constitutional tort." *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 691 (1978). Simply put, cities are not subject to liability under § 1983 on a theory of *respondeat superior*. *Id.*

That having been said, cities can nevertheless be held liable under § 1983 for more than just the most direct and egregious violations of an individual's Fourteenth Amendment rights. For example, if the constitutional violation is the result of inadequate police training, the city may be held liable under § 1983 if "the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." *City of Canton, Ohio v. Harris*, 489 U.S. 378, 388 (1989). Liability under § 1983 can be imposed on a municipality where " 'a deliberate choice to follow a course of action is made from among various alternatives' by city policy makers." *Id.*, at 389 (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1986)).

> [I]t may happen that in light of the duties assigned to specific officers or employees, the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of Constitutional rights, that the policy makers of the city can reasonably be said to have been deliberately indifferent to the need. In that event, the failure to provide proper training may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable if it actually causes injury.

Id., at 390 (footnotes omitted).[FN3]

> FN3. Indeed, the Supreme Court anticipated municipal liability under § 1983 where "the police, in exercising their discretion, so often violate constitutional rights that the need for further training must have been plainly obvious to the city policy makers who, nevertheless, are 'deliberately indifferent' to the need." *Id.*, at 390 n. 10.

The Supreme Court based its relatively narrow construction of § 1983 on the express language of the statute, its legislative history, *Monell*, 436 U.S. at 691, and "perceived constitutional difficulties" on the part of the drafters of the statute. *Id.* at 694. Moreover, the Supreme Court noted in *Rizzo v. Goode* that important principles of federalism "militate against the proposition ... that federal equity power should fashion prophylactic procedures designed to minimize misconduct by a handful of state employees...." *Rizzo v. Goode*, 423 U.S. at 362. In *City of Canton, Ohio v. Harris*, the Supreme Court reaffirmed its rejection of liability under § 1983 based on a theory of vicarious liability because federal courts "are ill-suited to undertake" the resultant wholesale supervision of municipal employment practices; to do so, moreover, "would implicate serious questions of federalism." *Id.*, at 392.

This Court concludes that § 14141 is properly construed to similar effect. Its language does not unambiguously contemplate the possibility of vicarious liability and such legislative history as exists manifests a congressional intent to conform its substant-

ive provisions to the standards of § 1983. For example, the House Committee report contemplates civil actions by the Justice Department "to change the *policy* of a police department that tolerates officers beating citizens on the street," 1991 WL 206794 *404(emphasis added), and commented that the standards of conduct under the act "are the same as those under the constitution, presently enforced in damage actions under Section 1983." *Id.*, at *406. Moreover, to eliminate the restriction placed on municipal liability under § 1983 by *Rizzo*, *Monell* and *City of Canton, Ohio*, would, contrary to congressional expectations, result in a dramatic expansion of liability and potential for litigation against local governments. Under these circumstances, the Court cannot conclude that Congress, which is presumed to alter the usual constitutional balance between states and the federal government only in unmistakable terms, intended to do so here. The Court therefore construes § 14141 to require the same level of proof as is required against municipalities and local governments in actions under § 1983.

***9** As so construed, the Court concludes that § 14141 is a valid and proper exercise of congressional authority under § 5 of the Fourteenth Amendment.[FN4] As the House Committee report makes clear, the authority conferred on the Attorney General by § 14141 was intended to "close [the] gap in the law" as it had developed in litigation under § 1983 by providing the remedy of broad injunctive relief where "appropriate." The remedy authorized by § 14141 is clearly responsive to the constitutional harm identified in the House Committee report and is no more expansive than is necessary to address that harm. The statute therefore reflects a valid exercise of Congress' constitutional mandate to identify, remedy and even prevent substantive violations of the Fourteenth Amendment. As so construed, § 14141 is neither incongruent nor disproportionate to Congress' constitutional prerogative and responsibility.

FN4. In reaching this conclusion, the Court expresses no opinion on whether or not Congress could, consistent with its authority under § 5 of the Fourteenth Amendment, choose to expressly base liability under 42 U.S.C. § 14141 on a theory of *respondeat superior*. The Court merely concludes that Congress has not done so.

To the extent that the complaint seeks to posit liability against the City of Columbus on a theory of *respondeat superior*, the original complaint is deficient. However, the United States asks that, in such event, "the Court grant the United States sufficient time to amend the complaint to remedy any identified deficiency." *Memorandum contra*, at 35. The Court will grant that request. Plaintiff may file its amended complaint within ten (10) days of the later of the resolution of its motion for leave to amend the complaint to assert an additional claim, and Judge Holschuh's final disposition of the movants' motions.[FN5]

FN5. The movants also contend that, to impose liability on the defendant city under § 14141 would violate the Tenth Amendment, which reserves to the states all powers not delegated by the constitution to the federal government. However, the Tenth Amendment is not implicated by the proper enforcement of the provisions of the Fourteenth Amendment. *See Monell v. Department of Social Services*, 436 U.S. at 691 n. 54. *See also City of Rome v. United States*, 446 U.S. 156, 179 (1980) [the Thirteenth, Fourteenth and Fifteenth Amendments "were specifically designed as an expansion of federal power and an intrusion on state sovereignty."] The motions are without merit in this regard.

V. SUFFICIENCY OF THE ORIGINAL COMPLAINT

The movants also take the position that, wholly apart from the contentions addressed *supra*, the al-

legations contained in the original complaint are not sufficiently detailed to state a claim upon which relief can be granted. Ordinarily, a complaint is sufficient if it contains "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." F.R. Civ. P. 8(a). The original complaint meets this standard. The city argues that, in order to avoid the constitutional issues addressed *supra*, the Court should impose heightened pleading requirements on the United States in this action. For its part, the defendant intervener contends that *Veney v. Hogan*, 70 F.3d 917, 921 (6th Cir.1995), requires heightened pleading in this case. Neither position has merit. The United States Supreme Court has expressly rejected a requirement of heightened pleading standards in § 1983 actions against municipalities. *Leatherman v. Tarrant Cy. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). Moreover, the heightened pleading required by *Veney* applies only in response to a defense of qualified immunity. The defendant city in this action cannot, of course, invoke that defense. *See Owens v. City of Independence*, 445 U.S. 622 (1980). Setting aside the deficiency in the complaint identified *supra*, the complaint is not inadequate for its failure to include factual or evidentiary detail best left to the discovery process.

VI. STATUTE OF LIMITATIONS

***10** Claims under 42 U.S.C. § 1983 must be brought within the time period established by the relevant state statute of limitations governing personal injury actions. *Owens v. Okure*, 488 U.S. 235, 249-50 (1989). In Ohio, that period is two years. *Browning v. Pendleton*, 869 F.2d 989, 992 (6th Cir.1989). Both movants contend that the two-year statute of limitations applicable to claims under § 1983 is likewise applicable to this action under § 14141. It follows, they argue, that plaintiff cannot base any aspect of its claims on allegations of police misconduct that occurred more than two years prior to the filing of the complaint on October 21, 1999.

Section 14141 does not include an express limitation on the period of time during which the Attorney General must act. Congress may create a cause of action without restricting the period of time within which the claim may be asserted. *Occidental Life Ins. Co. v. Equal Employment Opportunity Comm'n.*, 432 U.S. 355 (1977). Moreover, in actions brought in its sovereign capacity on behalf of the public interest, the United States is not bound by any limitations period, nor is it subject to the defense of laches, unless Congress explicitly provides otherwise. *United States v. Summerlin*, 310 U.S. 414 (1940); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938). *See also United States v. Peoples Household Furnishings, Inc.*, 75 F.3d 252, 254 (6th Cir.), *cert. denied*, 519 U.S. 964 (1996). Even assuming, without deciding, that principles of equity are available to protect the movants from demonstrated prejudice caused by any delay in instituting this action, *see Equal Employment Opportunity Comm'n. v. AT & T*, 36 F .Supp.2d 994, 997 (S.D.Ohio 1998), the motions to dismiss and for judgment on the pleadings, which call into question only the allegations contained in the original complaint, do not provide the proper vehicle for invoking such principles. The motions are without merit in this regard.

To summarize, the Court concludes that, when construed to impose liability on a municipality only upon a showing that the municipality itself has engaged in a constitutional violation, as municipal liability under 42 U.S.C. § 1983 has been authoritatively defined by the United States Supreme Court in *Monell* and its progeny, 42 U.S.C. § 14141 represents a proper exercise of congressional authority under § 5 of the Fourteenth Amendment. Because the allegations of the original complaint do not conform to this construction, the United States may amend the complaint to do so. That amendment must be filed within ten (10) days of the later of the resolution of its pending motion for leave to amend

the complaint to assert an additional claim, and Judge Holschuh's final disposition of the motions to dismiss and for judgment on the pleadings.

IT IS THEREFORE RECOMMENDED that the motions to dismiss and for judgment on the pleadings be DENIED on the condition that the United States amend the complaint accordingly.

***11** If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within ten (10) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part thereof in question, as well as the basis for objection thereto. 28 U.S.C. § 636(b)(1).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Federation of Teaches, Local 231 etc.*, 829 F.2d 1370 (6th Cir.1987); *United States v. Walters*, 638 F.2d 947 (6th Cir.1981).

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