

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KIM YOUNG, RONALD JOHNSON, and)
WILLIAM JONES, on behalf of themselves)
and a class of others similarly situated,)

Plaintiffs,)

v.)

No. 06 C 0552

COUNTY OF COOK, MICHAEL SHEAHAN,)
individually and in his official capacity as Sheriff of)
Cook County, CALLIE BAIRD, individually and in)
her official capacity as former Director of the Cook)
County Department of Corrections,)
SCOTT KURTOVICH, individually in his official)
capacity as Director of the Cook County)
Department of Corrections,)
SALVADOR GODINEZ, individually and in his)
official capacity as Director of the Cook County)
Department of Corrections, et al,)

Judge Matthew Kennelly

Defendants.)

JURY TRIAL DEMANDED

**PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR PARTIAL SUMMARY JUDGMENT**

Plaintiffs, KIM YOUNG, RONALD JOHNSON, and WILLIAM JONES, on behalf of themselves and two classes of others similarly situated, through their attorneys, LOEVY & LOEVY, submit this memorandum in support of their motion for summary judgment.

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INTRODUCTION

The old adage that “actions speak louder than words” aptly applies to the Defendants’ summary judgment position. Defendants say that the inhumane and unnecessary strip search procedures they used on Classes I and II are justified but their own conduct shows otherwise. In truth, they have been retreating from the challenged procedures ever since Plaintiffs filed this case, and several of the Defendants have already disavowed some of the procedures’ more brutal aspects.

For example, at the time this suit was filed, Defendants strip searched men at intake in groups of seventy-five or more at a time, such that they were forced to bump into each other’s naked (and often unsanitary) bodies, but after Plaintiffs filed their motion for class certification, the jail installed privacy dividers for each man and limited the number of searchees to fewer than 40. Similarly, after this Court certified the case as a class action, Defendants finally installed a body scan machine for the men. These changes, which were implemented almost a decade ago for the women in the Cook County Jail (“CCJ” or “Jail”) and longer ago than that in other jurisdictions, follow a history of unconscionable indifference by the policymakers which has included widespread violence, animus towards race and sexual orientation, use of dogs, and unhygienic conditions like vomiting, urination, and the release of diarrhea during the *en masse* search.

Perhaps worse than this history of cruelty and indifference is the fact that the Defendants have allowed the reforms to begin slipping away because they are only “voluntary” steps and the Jail has not formalized them. This, despite the Defendants’ admissions at their depositions in this case that the reforms worked when the Jail finally tried them.

Accordingly, judgment for the Plaintiffs is not only proper under the law, it is the only way to solidify the needed reforms. There is ample undisputed evidence to support such a judgment. The Defendants’ policies permitting the *en masse* strip searches are undisputed, as are the anecdotal accounts of the indignities and suffering those policies inflict. Moreover, with regard to each challenged aspect of the *en masse* searches, the undisputed evidence shows that the procedures were both cruel and vastly in excess of what was needed to address legitimate safety concerns. Similarly, regarding Defendants’ decision to use a blanket strip search, the case law has long prohibited such searches. Not just that, but Defendants have admitted that a

reasonable procedure allows persons charged with minor crimes to avoid a strip search by staying out of the general population while they wait to make bail. That is the procedure that the United States Bureau of Prisons (“BOP”) uses for persons charged with misdemeanors and it is, by Defendants’ own admission, the model of reasonableness.

Accordingly, for these and the other reasons explained below, it is appropriate that this Court hold the Defendants accountable, in both their individual and official capacities, and grant summary judgment in favor of the Plaintiff classes.

FACTS

The relevant facts are set out in Plaintiffs’ Local Rule 56.1(a)(1)(3) Statement of Undisputed Material Facts. They are further recounted in the context of Plaintiffs’ argument, below.

ARGUMENT

I. Applicable Standard

On this motion, Plaintiffs bear the burden of establishing that the undisputed facts are undisputed, and that the facts entitle Plaintiffs to a judgment in their favor under the applicable law. See Egan Marine Corp. v. Great American Ins. Co. Of New York, 531 F. Supp. 2d 949, 953 (N.D. Ill. 2007) (“Entry of summary judgment is appropriate only when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. The fact that both parties have filed cross-motions for summary judgment does not change the applicable standard. The Court must consider each motion independently and must deny both motions if there is a genuine issue of material fact.”) (Kennelly, J.).

II. Class I is Entitled to Summary Judgment Over the Methods Used to Search Them

Class I brings claims under the Fourth Amendment, the Equal Protection Clause, and the Due Process Clause. Each of these provides an independent legal basis for summary judgment because the Defendants' strip search methods for Class I violate all three.

A. The Manner in Which Defendants Strip Searched Class I Violates the Restrictions on Such Searches in Bell v. Wolfish

In Bell v. Wolfish, 441 U.S. 520 (1979), the Supreme Court warned that even when the use of a strip search is authorized to detect contraband, jail officials must be careful to make sure that the searches are conducted in a reasonable and respectful manner. Id. at 559. As applied in the jail context, a reasonable manner is one which properly balances the need for the search method chosen against its degree of intrusion into the searchee's personal privacy. Id. at 559 ("In each case [the Fourth Amendment] requires a balancing of the need for the particular search against the invasion of personal rights that the search entails."); see e.g. Campbell v. Miller, 499 F.3d 711, 718 (7th Cir. 2007) (Considering "whether an otherwise permissible [strip] search is conducted in a reasonable manner" under the standard announced in Bell and finding the manner unreasonable because: "the police inexplicably did not even afford Campbell the dignity of doing it in a private place."). Bell set out four factors that a court should consider, including: the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. Id.

This is the case that the Supreme Court was concerned about when it laid down the rule requiring a reasonable and respectful manner for authorized strip searches. The undisputed facts show numerous ways in which the Defendants have ignored the Court's command and allowed the Jail's strip search procedure to transgress all bounds of decency.

1. En Masse Strip Searches Without Privacy or Even Personal Space Are Unreasonable As a Matter of Law

Up until at least June of 2007, every member of Class I was searched *en masse* at the RCDC (as well as at the men's housing divisions) without any semblance of privacy or decency.

Plaintiffs' Statement of Facts ("PSF") ¶¶ 62-82.¹ At times, in excess of 70 men at once were crammed together in an inhumane and unsanitary *en masse* search. The brutal nature of the group strip search and its effects on those undergoing it are described in detail in PSF ¶¶ 62-114.

Under Bell, these groups searches are unconstitutional unless the need for conducting the search in this manner outweighs the extremely high degree of intrusion. It does not, and summary judgment is appropriate because no reasonable jury could find otherwise. See e.g. Campbell, 499 F.3d at 718 ("The question here is thus whether the search performed on Campbell, involving as it did public nudity and exposure of intimate body parts, was reasonable. In our view, it was not, and no reasonable jury could have found otherwise.").

At the outset, the CCJ cannot possibly justify the searches because the requisite need to have conducted the strip searches in the manner that the Jail chose is non-existent. The Jail's policymakers claim that they need to conduct group strip searches in order to timely process the number of men who must go through intake each day. However, that justification avoids the issue at hand. Even allowing for the need to strip search in groups,² there is no need to have conducted the search without privacy dividers between the detainees, much less to strip search so many detainees at one time that they must bump into each other's naked bodies.

Indeed, when questioned at a deposition in this case why the CCJ could not provide privacy dividers, the Sheriff's Department's FRCP 30(b)(6) witness (and former acting Director of the Cook County Department of Corrections, Defendant Scott Kurtovich) could not think of a single serious reason why the jail could not give privacy dividers for the men going through the RCDC strip search. PSF ¶ 79. To the best of his knowledge, the Sheriff's Department never looked into it. Id. ¶ 78. This, even though the jail had been providing privacy dividers for its

¹ Although the CCJ installed dividers in the RCDC hallway in or about February of 2007, and in the divisions in or about June of 2007, the change was voluntary and not reduced to writing. PSF ¶¶ 130-139. As a result, the previous policy has not been effectively abolished and the guards at times still search class members without the dividers. Id.

² Plaintiffs concede the need for a group strip search for this class for purposes of their own motion for summary judgment, but the supposed need is suspect given that the CCJ waits for hours to even start strip searching the new detainees and the fact that the NYC department of corrections is able to conduct individual strip searches on a greater number of new detainees.

group strip searches of women for years. Id. ¶¶ 29-42. When Sheriff Sheahan made the decision to require the dividers for women, he did not include them for the men, although he had no specific objection to the men receiving privacy dividers. Id. ¶¶ 80-82.

Following that deposition, the CCJ installed privacy dividers in the RCDC hallway and limited to 37 the number of people who could be searched at one time. Id. ¶¶ 130-137. As a result, each detainee has privacy from the others as well as approximately four feet of personal space during the search, id., as compared to having to touch one another during the search. Id. ¶ 66 (jail guard's estimate of six inches or less between the detainees) and ¶ 67 (almost ninety-percent of the declarants reported being packed so tightly that they made physical contact with the other detainees in the search). The change in the procedure has been a success. The detainees are still processed through intake in a timely fashion, id., and, if anything, the group strip search is now more thorough. Id.

Thus, the undisputed evidence shows that the Defendants never had a justification for conducting the group strip searches in such dense groups without privacy dividers, and the success of the humanitarian changes to the procedure shows that there could not be a genuine need for such harsh procedures, regardless. The lack of sufficient justification alone is sufficient to require granting summary judgment. Campbell, 499 F.3d at 719 (finding that the lack of evidence to suggest “any conceivable exigency that could be met only by strip-searching Campbell in public” tipped the Bell balance in plaintiff's favor); Bullock v. Sheahan, 568 F. Supp. 2d 965, 974 (N.D. Ill. 2008) (awarding summary judgment to a different class of men strip searched without dividers at the CCJ divisions, finding: “Indeed, jail staff admits there is no deterrence reason for conducting the searches this particular way, nor do defendants contend that the searches are any less effective in detecting contraband when conducted in a location with privacy screens (as is presently done). For the same reasons, defendants have also failed to establish that searching the discharges in this manner is substantially related to achieving an important government objective. Plaintiffs' motion for summary judgment is granted.”).³

³ This holding is based on the evidence adduced by the Young Plaintiffs and so it is particularly relevant here, if it is not collateral estoppel. Following this Court's grant of class certification to the Young Plaintiffs, the Bullock plaintiffs moved for summary judgment using the evidence from the Young Plaintiffs' class certification motion to challenge the manner in

Regardless, there is plenty more besides the lack of a law enforcement need that supports summary judgment for Class I. In addition to the success of the Jail's previous addition of dividers for the women, and its later addition of the dividers for the men, the Defendants admit that the United States Bureau of Prisons ("BOP") procedures for strip searching pretrial detainees are reasonable, and the BOP has long required dividers. Id. ¶¶ 140-142.

In specific, when a BOP facility conducts a group strip search, it must limit the number of participants to the number of available strip stalls (*i.e.*, spaces with privacy dividers). Id. ¶¶ 143-145. Defendants' own expert confirms that the BOP has handled group strip searches in this fashion since before 1987. Id. Tellingly, even by the time the Bell case was filed in the 1970s, the Metropolitan Correctional Center at issue in that case required privacy dividers when more than one detainee was searched at a time. Id. ¶¶ 76-77. Defendants' expert is not aware of a single jail, aside from Cook County, that has conducted group strip searches without providing privacy dividers in the last 20 years. Id.

Balanced against the lack of any genuine need to conduct dense group strip searches is the extraordinary intrusion upon those who are subjected to these searches. Even without the group aspect, the case law already recognizes that strip searches (particularly those that include a visual cavity search) are inherently very intrusive. See e.g., Campbell, 499 F. 3d at 718 ("We have previously recognized that strip searches involving the visual inspection of the anal area are 'demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, [and] signify [] degradation and submission....'") citing Mary Beth G. v. City of

which the strip searches are performed at the divisions without dividers. See Bullock v. Sheahan, 519 F. Supp. 2d 763 (N.D. Ill. 2007). The Bullock defendants moved to strike those portions of the summary judgment, but the court denied the motion, holding that it did not matter that the Bullock parties had never conducted discovery on the manner of the strip search nor that the Bullock Plaintiffs had never disclosed the Young evidence in their case. Id. at 765 ("[D]efendants contend that these claims come as a surprise because they were never addressed by plaintiffs during fact or expert discovery. Defendants also move to strike certain exhibits attached to plaintiffs' motion for summary judgment, including deposition transcripts, affidavits, and other documents submitted by high ranking officials at CCDC, on the ground that they have not been previously disclosed"); see also Motion to Strike Unpled Theories of Liability and Evidence Not Previously Contained in the Record From Plaintiffs Motion for Summary Judgment, 04-1052, Dckt. 286, at 7, Exhibit A hereto.

Chicago, 723 F.2d 1262, 1272 (7th Cir. 1983). Adding to it the lack of privacy (not to mention cruelty) makes the searches intolerable. As the Seventh Circuit recently noted in case where it held the defendants liable for a public strip search, strip searches conducted without affording individual privacy have been universally condemned:

Courts across the country are uniform in their condemnation of intrusive searches performed in public. See e.g., Iskander v. Village of Forest Park, 690 F.2d 126, 129 (7th Cir. 1982) (“Defendant naturally does not maintain that routine strip searches may be conducted in a room open to the prying eyes of passing strangers consistent with the reasonableness requirement imposed on all searches under the Fourth Amendment, nor would such a contention be entertained.”); Logan v. Shealy, 660 F.2d 1007, 1014 (4th Cir. 1981) (“We think that, as a matter of law, no police officer in this day and time could reasonably believe that conducting a strip search in an area exposed to the general view of persons known to be in the vicinity whether or not any actually viewed the search is a constitutionally valid governmental invasion of (the) personal rights that (such a) search entails.” (internal quotations omitted)); Amaechi v. West, 237 F.3d 356, 364 (4th Cir. 2001) (noting that “we have repeatedly emphasized the necessity of conducting a strip search in private” and concluding that “[t]he fact that, absent clear justification or exigent circumstances, an officer is not allowed to strip an arrestee on a public street pursuant to a search incident to an arrest necessarily means that an officer cannot go even further than simply disrobing the arrestee by actually touching and penetrating the arrestee's exposed genitalia on the public street.”); Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984) (finding unconstitutional “routine strip searches in a public area of persons detained for minor traffic offenses.”); United States v. Ford, 232 F. Supp. 2d 625, 630 (E.D.Va. 2002) (granting a motion to suppress, stating that “[t]aking the Bell factors into account, the Court concludes that the police officer engaged in a highly invasive search by exposing the defendant's buttocks on the side of a public highway in broad daylight, and that the search violated the defendant's Fourth Amendment protection”); People v. Mitchell, 2 A.D.3d 145, 768 N.Y.S.2d 204, 206-07 (1st Dep't 2003) (“[W]e have no difficulty in holding that a strip search, conducted in a *public* place, regardless of whether it includes a search of the arrested person's body cavities, is not justified or reasonable absent the most compelling circumstances, that is, circumstances that pose potentially serious risks to the arresting officer or others in the vicinity” (emphasis in original)).

Campbell, 499 F.3d at 719. See also Farmer v. Perrill, 288 F.3d 1254, 1260 (10th Cir. 2002) (“[P]laintiff has identified a well established right, the right not to be subjected to a humiliating strip search in full view of several (or perhaps many) others. . .”).

However intrusive the searches condemned in the above cases may have been, the intrusion on Class I was still many times worse. Using a 150 foot long hallway, the CCJ strip searched Class I in groups of 75 men at a time. PSF ¶¶ 62-75. They had no privacy from one another nor even personal space. Id. Aside from demeaning the men by forcing them to make physical contact with one another during the search, the procedure also put them through sickening conditions. At the outset, many persons coming into the jail are unbathed, and the stench from so many unclothed men disgusts even the guards. Id. Worse, the participants often become ill, with vomiting or diarrhea, soiling themselves and those nearby. Id. Additionally, most of the men's group searches lasted in excess of 30 minutes, id. ¶ 112, as compared to merely four minutes for the women. Id. ¶ 41.⁴

The second strip search, at the housing divisions, was also a group search without any privacy dividers. Id. ¶¶ 115-125; see also Bullock, 568 F. Supp. 2d at 974 (“There is no dispute that these searches are conducted in large group settings and that inmates are placed at approximately arm's length apart when searched.”). Following the success of the dividers at the RCDC, the jail eventually installed them at the divisions in about June of 2007, thereby also demonstrating that there was no need to have used a procedure in the divisions which excludes dividers. Id.; Bullock, 568 F. Supp. 2d at 974 (“[T]here is no deterrence reason for conducting the searches this particular way, nor do defendants contend that the searches are any less effective in detecting contraband when conducted in a location with privacy screens (as is presently done). . . . Plaintiffs' motion for summary judgment is granted.”).

Given all of the undisputed facts about the success of the dividers when finally installed for the men, that the dividers had been successfully used for women for years, and that the

⁴ While that is enough to demonstrate the unreasonableness, it is also true that the guards treat the men like animals, a fact which is not surprising in light of the dehumanizing procedures that the CCJ already expressly authorizes for use on the men. Yelling, threats of violence, and all manner of insults are commonplace. Indeed, almost eighty percent of the declarants witnessed or were victims of actual violence during the RCDC strip search. PSF ¶¶ 92-98. Although sickness is a normal occurrence given the CCJ's population, the guards used violence on men who became sick, even forcing them to clean up their vomit with their own clothes. Id. Similarly, some detainees' inability to understand English (a common occurrence in the jail) was also a catalyst for violence by the guards. Id.

admittedly reasonable BOP procedures have required dividers for decades, summary judgment for Class I regarding the lack of privacy in the RCDC and housing division intake strip searches should be granted.

2. The Visual Cavity Search Portion is Also Conducted in an Unreasonable Manner

In addition to the lack of privacy and personal space for the male detainees undergoing the two intake strip searches, Class I also challenges the use of a visual body cavity search in a group procedure. Specifically, during the group search at the RCDC and at the divisions, all of the men in the group submit to a visual anal cavity search which requires that they bend over at the waist, pull their buttocks apart, and cough repeatedly in unison. PSF ¶¶ 85-90, 109-111. This aspect of the procedure alone, which if done individually would take only seconds, lasts, on average, six minutes! *Id.* In addition, given the sickness and withdrawal symptoms often experienced by people entering the CCJ, conducting the visual cavity search in large groups is also unsanitary and inhumane.

Many courts have held that the visual cavity search procedure is inherently demeaning and requires special care to protect those who are undergoing the search. *See e.g., Bell*, 441 U.S. at 558-59 (visual inspection of inmates' body cavities "instinctively gives us the most pause."); *Campbell*, 499 F.3d at 718 ("[I]t is indisputable that visual body cavity searches are degrading, humiliating, and frightening"); *Mary Beth G.*, 723 F.2d at 1272 ("[W]e can think of few exercises of authority by the state that intrude on the citizen's privacy and dignity as severely as the visual and anal genital searches practiced here."); *Swain v. Spinney*, 117 F.3d 1, 7 (1st Cir. 1997) (visual cavity searches "impinge seriously" upon Fourth Amendment values); *Calvin v. Sheriff of Will County*, 405 F. Supp. 2d 933, 938 (N.D. Ill. 2005) ("Courts have repeatedly held that strip searches that include visual inspection of the anal and genital areas are inherently invasive."); *Thompson v. County of Cook*, 412 F. Supp. 2d 881, 885 n.2 (N.D. Ill. 2005) ("Courts, however, distinguish between visual cavity searches, which involve visually inspecting body cavities, and the more invasive procedure, sometimes referred to as a digital cavity search, that involves touching or physically searching an individual's body cavities."); *State v. Clark*, 654 P.2d 355, 362 (Haw. 1982) ("It is humiliating and degrading to be forced to totally expose one's self to a total and hostile stranger").

As with the dense groupings and lack of dividers, the Defendants have no justification for the group visual cavity search. The testimony of FRCP 30(b)(6) witness Brown shows that there was no need for the searches. The Jail had long ago replaced the visual cavity search for the women with a squat and cough procedure which was quick and effective. PSF ¶¶ 29-42. When the CCJ changed the bend and spread procedure for the men after this case was filed, *id.* ¶¶ 85-90, the squat and cough worked just as well and was more dignified. *Id.* The evidence from the detainee declarants shows that the change did not last, but its successful use for a period of time demonstrates that there is no need to use the group visual anal cavity search. *Id.* As the CCJ lacks a need to conduct the search in the group manner chosen, summary judgment for Plaintiffs is proper. Moreover, even if the jail could articulate a need, whatever justification the Defendants could offer for conducting visual anal cavity searches in dense groups would have to be so exigent and extraordinary that it would fail as a matter of law to justify using the procedure in routine blanket searches night after night. *See Campbell*, 499 F.3d at 719 (“[T]here was nothing before the jury that suggested any conceivable exigency that could be met only by strip-searching Campbell in public.”).

Accordingly, summary judgment should be granted to Class I on this aspect of the search as well.

B. Separately, the above Search Procedures Discriminate on the Basis of Sex Without Serving any Important Government Objective

Much of the foregoing discussion is dispositive of Class I’s additional equal protection claim because the challenged manner of the searches -- dense groups of men with no privacy dividers and a group visual cavity search -- were abolished for new detainees who are female long before the class period. To justify discriminating between these two sets of new detainees, the Defendants must demonstrate, at a minimum, that the disparities bear a “substantial relation[ship]” to an “important” state purpose. *See Mary Beth G.*, 723 F.2d at 1274; *Bullock*, 568 F. Supp. 2d at 974 (“With regard to [the Equal Protection] claim, defendants have first failed to establish there is an important government objective served by failing to afford male inmates privacy screens during strip searches prior to 2007. . . . For the same reasons, defendants have also failed to establish that searching the discharges in this manner is substantially related to

achieving an important government objective.”). Only an “exceedingly persuasive justification” will serve to uphold a strip search policy that expressly discriminates on the basis of gender. Mary Beth G., 723 F. 2d at 1274; see also Gary v. Sheahan, 1998 WL 547116, *10 (N.D. Ill. 1998) (granting summary judgment for class of women who were strip searched at the RCDC when men were not).

Defendants have no such justification to offer. Despite the differences in the number and/or qualities of men versus women at the CCJ, there was no “important” purpose to be served by depriving them of dividers that the women received, forcing them into groups so dense that they had no personal space during the strip search (even though it was perfectly feasible to give them each at least four feet of space), or putting them through a group visual cavity search (while women were permitted to briefly squat and cough). After those aspects were finally changed for the men in response to this suit, the strip search functioned just as timely, and just as well, if not better.

With no important purpose for the discrimination, and therefore no substantial relationship between the discriminatory procedure and the purpose to be served, the discrimination does not withstand scrutiny under the equal protection clause, and no reasonable jury could find otherwise. See, e.g., Mary Beth G., 723 F. 2d at 1274 (Upholding grant of summary judgment to plaintiffs based on disparities in the strip search policies for men and women), Bullock, 568 F. Supp. 2d at 974 (same, granting plaintiffs summary judgment for strip search disparities based on sex at the CCJ), Gary, 1998 WL 547116, at *10 (same).⁵ Class I is entitled to summary judgment for these two

⁵ Moreover, given that the changes to the male strip search procedures worked, Defendants cannot, in good conscience, argue that the men are not similarly situated to the women for purposes of the search procedures, and any such argument would be unavailing regardless. Men and women on the new are similarly situated because they all enter the CCJ from outside such that Defendants’ concerns that they could have planned to bring in contraband from outside the facility are the same. Moreover, the Seventh Circuit has held that even though women have an additional body cavity, they are similarly situated to men for purposes of an equal protection claim brought by women over strip searches for contraband. Mary Beth G., 723 F.2d at 1274 (“[W]e must agree with the district court in Jane Does that the City has not met its burden of demonstrating that the difference in gender alone justified the disparate search treatment accorded men and women.”). The same should be true when men are the ones bringing

discriminatory procedures.

Additionally, there is a third aspect of the intake strip search procedure that discriminated against men on the new for no sufficient reason. Specifically, men are strip searched twice during intake, once at the RCDC and once at the housing division, while women are body scanned at the RCDC and then only strip searched at the housing division. The one strip search/two strip search disparity dates back to the year 2000, or earlier, when CCJ banned strip searching women at the RCDC. PSF ¶¶ 29-32. Defendants installed the bodyscan machine for women several years later. Id.

When asked to explain why the Sheriff's Department strip searches men at the RCDC but not women, the Department's FRCP 30(b)(6) witness testified that the reason was because the Sheriff had provided a body scan machine for the women at the RCDC but not the men. Id. ¶¶ 117-119. The women received the body scan machine as a result of a class action lawsuit challenging strip searches at the RCDC, id. ¶¶ 31-32, and the reason why the Sheriff's Department did not provide a body scan machine for the men is that the Sheriff's Department never looked into it after getting one for the women. Id. ¶¶ 118-119.

After this Court granted Plaintiffs' class certification, the Defendants did get a body scan machine for the men at the RCDC. Id. ¶¶ 120-123. The equipment costs approximately \$150,000 and it scans each man in a matter of seconds. Id. It works well enough that Defendant Kurtovich's recommendation is for the Jail to abandon all strip searches not based on individualized suspicion. Id.

Regardless of scanning machine's ultimate impact on the CCJ's continued use of a blanket strip search, its relatively reasonable cost and acceptable effectiveness show that there is no substantial justification for strip searching the men twice while the women are strip searched only once. The callous failure to have sooner provided a scanning machine for the men after purchasing one for the women clearly denied the men equal protection.

The impact of that discrimination is profound. RCDC strip searches are brutish to say the least, and if they can be replaced by a division-only strip search by using a \$150,000 scanning

the claim. See e.g. Bullock, 568 F. Supp. 2d at 972 (men were similarly situated to women with respect to the provision of dividers at the CCJ).

machine, the Defendants had an obligation to do so. At the RCDC, the men were forced one on top of each other while the strip searches at the divisions at least allow an arms-length of space on either side (and that was before the dividers were installed in the divisions). Bullock, 568 F. Supp. 2d at 975 (“There is no dispute that these searches are conducted in large group settings and that inmates are placed at approximately arm’s length apart when searched.”) The conditions in the RCDC are unsanitary and the guards resort to cruelty to manage such dense groups. Moreover, by requiring both an RCDC strip search and another search upon arrival to the housing division, the Defendants subject the men to two intrusive strip searches and two demeaning cavity searches.

Accordingly, Defendants need a quite substantial reason for failing to provide the same body scan accommodation for the men as they did for the women, and they have none. Moreover, there is no valid reason why the Defendants should not have alleviated this disparity on their own, without this Court first having to force their hands by certifying a class against them. Thus, summary judgment on this aspect of the discrimination claim is proper as well.

C. Certain Aspects of the RCDC Strip Search Procedures Are So Brutal and Needless as to Constitute Punishment

In addition to the restrictions of the Fourth Amendment and the Equal Protection clause, Defendants’ strip search procedures violate Plaintiffs’ right to due process if they rise to the level of “punishment.” Hart v. Sheahan, 396 F.3d 887, 892 (7th Cir. 2005) (“Punishment is not the only possible motive for brutal treatment. But whatever the motive is, if the brutal treatment is gratuitous, due process in its substantive sense has been violated.”). Punishment is present when an official acts out of an intent to punish, or when the official’s actions are not either “rationally related to a legitimate nonpunitive governmental purpose [or] appear excessive in relation to that purpose.” Bell, 441 U.S. at 561; Hart, 396 F.3d at 882 (“‘Punishment’ in such a case is really just a name for unreasonably harsh treatment meted out to inmates who have not yet been convicted of any crime.”); May v. Sheahan, 226 F.3d 876, 884 (7th Cir. 2000) (“[T]he use of bodily restraints constitutes punishment in the constitutional sense if their use is not rationally related to a legitimate non-punitive government purpose or they appear excessive in relation to the purpose they allegedly serve.”); Shelby County Jail Inmates v. Westlake, 798 F.2d 1085,

1094 (7th Cir. 1986) (punishment is present where jail officials act “intentionally or with ‘callous indifference.’”). See also Bell, 441 U.S. at 539 n.20 (“[L]oading a detainee with chains and shackles and throwing him in a dungeon may ensure his presence at trial and preserve the security of the institution. But it would be difficult to conceive of a situation where conditions so harsh, employed to achieve objectives that could be accomplished by so many alternative and less harsh methods, would not support a conclusion that the purpose for which they were imposed was to punish.”)

Here, the undisputed evidence proves that the RCDC strip searches are so brutal and so needless as to constitute punishment. As the foregoing discussion shows, the RCDC strip searches are inhumane, unsanitary, demeaning and violent. As Plaintiffs have pursued this suit through its various stages, the Department has been retreating from the harsher elements of the procedure without any deleterious effect on jail security: it has gone from little or no personal space to four feet of space, it has provided dividers which give privacy from the dozens of other searchees and also shield searchees from the bodily fluids that others commonly release, and it has replaced the demeaning and prolonged group visual cavity search procedure with an equally effective and much quicker squat and cough procedure. While the Jail staff appears to be reverting back to their old ways on occasions (due to the fact that the changes are as yet voluntary and not part of a general order), the Jail has, nevertheless, shown by its own conduct that the brutal elements of the group strip search are unnecessary. As with the Supreme Court’s example of the shackling in Bell, the legitimate objectives for the group strip search -- screening for contraband on a large number of detainees in a timely fashion -- can be achieved by significantly less harsh methods, and ones better suited to the Jail’s stated goal of ferreting out contraband.

While the foregoing undisputed facts are sufficient to entitle Plaintiffs to summary judgment under a punishment analysis, Plaintiffs, nevertheless, would be remiss if they did not also address the profound evidence of an actual intent to punish. Clearly, there is a widespread practice amongst the guards of hazing the detainees. Close to 80% of the declarants (more than 400 of them) reported that the guards resorted to actual violence during the RCDC strip searches, while even more reported that the guards used racial epithets, insults about anatomy and sexual orientation, and comments of a sexual nature during the searches. PSF ¶¶ 92-114. Thus, there is

a widespread practice of actual malice towards the detainees. Compare Antonelli v. Sheahan, 81 F.3d 1422, 1428 (7th Cir. 1996) (“Retribution and deterrence are not legitimate nonpunitive governmental objectives.”) citing Bell, 441 U.S. at 539 n.20. Defendants were the officials charged with preventing this widespread resort to prohibited punishment and the evidence shows, plainly, that they abandoned that charge. Id. ¶¶ 14, 43-61, 78-83, 92-114.

Moreover, at least as to Defendants Baird and Kurtovich, the evidence further shows that they contributed to the cruelty. Both of them ordered the use of dogs at the RCDC. Id. ¶¶ 99-108. Defendant Baird claims that she did so to “provide a sense of calm,” but that is just newspeak for intimidating the detainees, which is exactly how the dogs were actually used. Id. During the strip searches, guards threatened detainees repeatedly with the dogs, used them (unmuzzled) to sniff detainees’ naked bodies (a needless “search” once they are already disrobed), and told them that the dogs would “bite off” their genitals if they moved while the dogs were sniffing them. Id.

Accordingly, the Court can find punishment, not only because the brutal strip search procedures which Defendants chose to use are vastly excessive and unnecessary for their stated purpose, but also because there is uncontradicted evidence of a widespread practice of actual antipathy and cruelty towards the detainees.

III. The Suspicionless Blanket Strip Searches of Class II are Unconstitutional

A. Case Law Forbids Using Blanket Strip Searches on the Members of Class II

Class II consists of people who were confined in the Jail to await posting bond on minor offenses which have nothing to do with drugs or weapons. The fact that the CCJ has strip searched and visual cavity searched all such persons at intake is undisputed. Thus, it is a pure legal question whether such searches are constitutional. The question is not even a close call. Almost every circuit, including the Seventh Circuit, as well as the First, Second, Fourth, Fifth, Sixth, Eighth, Ninth, and Tenth has found that blanket strip searches are unreasonable for the members of Class II (the Third Circuit does not appear to have had occasion to address the issue).

Only the Eleventh Circuit, which recently reversed its prior decisions prohibiting blanket

strip searches of misdemeanor detainees, now approves of such strip searches. As is explained below, that decision was based on a clear mistake of fact: the court assumed that the BOP permits intake strip searches of misdemeanor detainees without reasonable suspicion when, clearly, it does not (and Defendants' own expert here, a former Director of the BOP, admits as much). The Eleventh Circuit's decision also ignores much case law authority and is otherwise wrongly decided. Indeed, the court's reasoning actually relies upon an individualized suspicion analysis, although the majority, nevertheless, reached the opposite outcome.

Putting the Eleventh Circuit to the side, every circuit to have taken up the issue has concluded that a policy of strip searching all persons charged with minor crimes is not sufficiently related to the jail's legitimate interests in preventing contraband to justify the substantial intrusion on such persons that the search entails.⁶ See, e.g., Mary Beth G., 723 F.2d at 1273 ("While the need to assure jail security is a legitimate and substantial concern, we believe that, on the facts here, the strip searches bore an insubstantial relationship to security needs so that, when balanced against plaintiffs-appellees' privacy interests, the searches cannot be considered 'reasonable.'"); Tinetti v. Wittke, 620 F.2d 160 (7th Cir. 1980) (per curiam) (blanket policy of strip searching non-misdemeanor traffic violators unable to post cash bond was unconstitutional); Bull v. City and County of San Francisco, 539 F.3d 1193, 1196 (9th Cir. 2008); Savard v. Rhode Island, 320 F.3d 34 (1st Cir. 2003); Shain v. Ellison, 273 F.3d 56, 64-66 (2d Cir. 2001); Roberts v. Rhode Island, 239 F.3d 107, 111 (1st Cir. 2001); Chapman v. Nichols, 989 F.2d 393, 395 (10th Cir. 1993); Masters v. Crouch, 872 F.2d 1248, 1255 (6th Cir. 1989); Jones v. Edwards, 770 F.2d 739, 741 (8th Cir. 1985); Stewart v. Lubbock County, 767 F.2d 153, 156-57 (5th Cir.1985); Logan v. Shealy, 660 F.2d 1007, 1013 (4th Cir.1981). See also Thompson v. County of Cook, 428 F. Supp. 2d 807, 814 (N.D. Ill. 2006) (Kennelly, J.); Calvin v.

⁶ Indeed, Plaintiffs have defined the class in the most conservative possible fashion. While some courts draw the line at misdemeanor detainees, without even examining the nature of the charges, or at any detainee without proof of violence or drugs in the charges, e.g. Kennedy v. Los Angeles Police Dept., 901 F.2d 702, 714 (9th Cir. 1990) (blanket strip search policy that subjected all felony arrestees to a visual body cavity search without regard to nature of the charge was unconstitutional), Plaintiffs here used the most permissive rule for blanket strip searches by including in the class only those charged with misdemeanor or lesser offenses that do not involve drugs or weapons.

Sheriff of Will County, 405 F. Supp. 2d 933, 942 (N.D. Ill. 2005) (granting summary judgment to class of plaintiffs who claimed that jail's blanket policy of strip searching people arrested on traffic or misdemeanor charges violated Fourth Amendment). Thus, only searches based on individualized, reasonable suspicions, not blanket strip searches, may be used.

The Eleventh Circuit also prohibited blanket intake strip searches of persons charged with minor crimes, but it recently overturned its precedent. See Powell v. Barrett, 541 F.3d 1298 (11th Cir. 2008), overturning Wilson v. Jones, 251 F.3d 1340 (11th Cir. 2001), and Skurstenis v. Jones, 236 F.3d 678 (11th Cir. 2000). Powell has now created a circuit split by being the one case to approve blanket strip searching of detainees such as members of Class II. Of course, this Court should apply the Seventh Circuit case law which prohibits blanket strip searches of persons charged with minor crimes, rather than a contradictory Eleventh Circuit case. See Mary Beth G., 723 F.2d at 1273, Thompson, 428 F. Supp. 2d at 412. In any event, the Powell decision is based on several mistakes by that court, and should not be followed.

First, Powell incorrectly characterized the basis of the other circuits' decisions that it chose to reject. The Powell court stated that those decisions misread Bell to contain a requirement of reasonable suspicion. Powell, 531 F.3d at 1307. That was an easy "strawman" for the Powell court to defeat because Bell dispensed with a reasonable suspicion requirement for the searches at issue there. However, that was not the basis of the other circuits' holdings. Rather, the cases forbidding blanket intake strip searches of persons charged with minor crimes focus on Bell's setting, which involved a federal detention facility where persons charged with minor crimes are not held, and further involved post-contact strip searches, where there is a greater strategic likelihood of smuggling. See e.g., Mary Beth G., 723 F.2d at 1272-1273; Thompson, 428 F. Supp. 2d at 812 ("These courts have recognized the particularly invasive nature of a strip search and have distinguished Bell by noting that Bell involved detainees charged with serious federal crimes and not individuals charged with misdemeanor or traffic offenses and that Bell involved strip searches after contact visits and not at intake.").

Second, the Powell court was mistaken about another of its central premises, *to wit*, that the BOP allows suspicionless intake strip searches of misdemeanor detainees. It certainly does not. Rather, the BOP categorically *forbids* strip searches of persons charged with misdemeanors

unless there is reasonable suspicion that the person is harboring contraband or the person consents. PSF ¶¶ 140-149. Even Defendants' expert, a former Director of the BOP, admits that this is the policy. Id. By way of comparison, Powell predicated its holding as follows:

The decisions that conclude to the contrary not only disregard the existence of the dissenting opinions, but they also ignore one momentous fact of Franciscan simplicity: The Bureau of Prisons' policy has not changed in any material respect. Under that policy body cavity strip searches without reasonable suspicion are conducted today just as they were when the Bell lawsuit was brought. Indeed, the year after the Bell decision the Bureau enshrined the policy in a regulation, where it remains to this day. The policy still subjects inmates to strip searches involving "a visual inspection of all body surfaces and body cavities" whenever there is either a "reasonable belief" or "a good opportunity for concealment has occurred."

Powell, 541 F.3d at 1308. The policy cited in Powell did not concern intake strip searches at all (not to mention intake searches of persons charged only with misdemeanors) but, rather, searches of persons who after entering the general population have had outside contact. The Powell court assumed that the BOP's policy was the same regarding intake strip searches of persons charged with misdemeanors, but that is plain wrong. Given the Powell court's strong reliance on this "momentous" but incorrect fact, there is every reason to believe that it would have come out differently had the court not drawn this mistaken conclusion about the BOP's actual policies.

Third, in reaching its conclusion, Powell engages in a logical flaw by using facts that show individualized suspicion to justify indiscriminate strip searches of all persons. In the main, Powell relied on snippets from some lower court cases which recite jail administrators' concerns that gang members will get themselves arrested on minor crimes in order to serve as a "mule" to bring in contraband. Id. at 1311. Of course, gang membership is similar to a prior criminal record, in that it might reasonably be used as a basis to support individualized suspicion. However, it is hard to see how concerns about gangs could ever justify strip searching Mr. Jones, a 52-year-old suburbanite who missed paying a traffic fine, and Ms. Young, a 47-year-old grandmother who forgot a traffic court date. The only other example the Powell court could muster of people who get intentionally arrested are protesters practicing civil disobedience. Id. at 1313-1314. While the court believed (inexplicably) that such people are comparable to gang members for purposes of strip searches, by and large protesters are not smuggling contraband

into jails. To the contrary, most, if not all, never even enter the general population of a jail.

At any rate, the point is that a jail reasonably may rely on factors like gang membership or a prior criminal record to find individualized suspicion, however, these *particulars* do not justify *generalized* blanket strip searches. Strip searching grandmothers because of concerns about gang members is the exact type of overreaction to otherwise legitimate concerns that courts routinely warn jail administrators to avoid. See e.g. Mary Beth G., 723 F.2d at 1273 (“While the need to assure jail security is a legitimate and substantial concern, we believe that, on the facts here, the strip searches bore an insubstantial relationship to security needs so that, when balanced against plaintiffs-appellees’ privacy interests, the searches cannot be considered ‘reasonable.’”)

B. Separately, Defendants Admit that a Procedure Which Allows Persons Awaiting Bond on a Misdemeanor the Choice to Avoid a Strip Search by Staying out of General Population is Reasonable

One final point about the specific evidence in this case bears mention. Defendants here have admitted to the reasonableness of a BOP procedure which addresses the concerns about the introduction of contraband into the general population without using blanket intake strip searches of persons charged with misdemeanors (which is the same policy that Powell overlooked). The admission is dispositive. And even without it, the evidence would still demonstrate the substantive reasonableness of this procedure that avoids blanket strip searches of persons charged with misdemeanors.

The policy gives persons charged with misdemeanors an option to avoid a strip search by remaining separated from the general population. PSF ¶¶ 146-149. This procedure accords with the case law and with common sense. Anyone who is intent on smuggling items of contraband into the jail must enter the general population and thus submit to the strip search, while those with no intention to smuggle do not get caught up in the too-wide net of a blanket strip search.

The BOP’s policy also comports with numerous cases holding that a jail’s decision to intermingle persons like those in Class II with persons who are held on serious crimes does not justify a blanket strip search. See, e.g., Bull, 539 F.3d at 1196 (“We turn first to the question of whether a policy of strip searching arrestees solely because they are classified for housing in the general population, in the absence of any reasonable suspicion, violates the arrestees’

constitutional rights. Following a long history of precedent, we conclude that it clearly does.”); Roberts, 239 F.3d at 110 (same); Chapman, 989 F.2d at 396 (same); Masters, 872 F.2d at 1254 (same); Hill v. Bogans, 735 F.2d 391, 394 (10th Cir. 1984) (finding no reasonable suspicion where detainee charged with traffic offenses was intermingled with general population).

* * *

Accordingly, under the reasoning of almost every appellate court and, importantly, of the Seventh Circuit, as well as under Defendants’ own admission about the BOP policies, the members of Class II had a right not to be indiscriminately strip searched. Summary judgment for Class II should be granted.

IV. Defendants Are Also Liable in Their Individual Capacities

As the foregoing discussion demonstrates, the CCJ’s express strip search procedures dictated that Class I would be searched in dense groups without dividers (while prohibiting such mistreatment for the women) as well as that Class II should be blanket strip searched. These procedures constitute official policies which subject the Cook County Sheriff to liability on Plaintiffs’ official policy claims. See Sanders v. Sheahan, 198 F.3d 626, 629-30 (7th Cir. 1999) (explaining Department’s liability for its express procedures). Also, the Sheriff has official capacity liability for the widespread cruelty of the guards which, although not an express policy like the strip search procedures, is nevertheless so widespread and accepted as to constitute a policy. See Klebanowski v. Sheahan, 540 F.3d 633, 637-38 (7th Cir. 2008) (explaining official capacity liability for a widespread practice).

In addition to the Monell-based⁷ liability of the Sheriff’s Department, its policymakers (the Defendants here) can be liable as individuals for their hand in causing the constitutional violations. Here, the undisputed facts demonstrate that each of Defendants Sheahan, Baird, Kurtovich, and Godinez are sufficiently culpable to justify individual liability judgments.

⁷ Monell v. Dep’t of Soc. Servs. of City of New York, 436 U.S. 658 (1978).

A. Baird, Kurtovich, and Godinez

Regarding the blanket strip search of Class II and the express procedures used for Class I -- the group strip searches without dividers, the density of 75 or more men at a time, and the group visual cavity searches -- each of Baird, Kurtovich and Godinez admit ample facts to subject them to liability. First, each admits that, during their respective tenures, they were the official at the CC DOC who was charged with ensuring that the strip searches were conducted in a constitutional manner. PSF ¶¶ 9-15. The blanket strip search and the express procedures for strip searching Class I are not constitutional, yet each of the three Defendants nevertheless allowed them to continue and to injure the members of these Classes (although Godinez eventually implemented partial reforms) . That is sufficient to subject them to personal liability for allowing the unconstitutional policies to be enforced. See, e.g., Doyle v. Camelot Care Centers, Inc., 305 F.3d 603, 614 -615 (7th Cir. 2002) (“[T]he supervisory officials . . . must have had some personal involvement in the constitutional deprivation, essentially directing or consenting to the challenged conduct . . . Ms. Doyle and Mr. Konold allege that the DCFS Director and his deputy personally were responsible for creating the policies, practices and customs that caused the constitutional deprivations. Under the notice pleading regime, these allegations, charitably read, suffice at this stage in the litigation to demonstrate Mr. McDonald's and Mr. Cotton's personal involvement in this purported unconstitutional conduct.”); see also Gentry v. Duckworth, 65 F.3d 555, 561 (7th Cir. 1995) (Upholding complaint against prison superintendent in his individual capacity where plaintiff claimed that superintendent “ordered that prisoners such as Gentry were to be denied scribe materials, even though he did not order that Gentry specifically be denied materials” construing that as “a policy of Duckworth’s.”).

Accordingly, because the challenged procedures were unreasonable (in violation of the Fourth Amendment), needlessly discriminatory (in violation of Equal Protection), and punishing (in violation of the Fourteenth Amendment), the policymakers who implemented and continued them are liable for causing the ensuing unconstitutional strip searches. Summary judgment against Baird, Kurtovich, and Godinez in their individual capacities is appropriate.

B. Defendant Sheahan

Mr. Sheahan repeatedly invoked the “see no evil” defense at his deposition, claiming that all issues regarding strip searches were handled by the Director of the CC DOC (*i.e.*, Baird, Kurtovich, and Godinez) and not by him. Nevertheless, the undisputed facts demonstrate that this claim is overly general and does not carry the day for him. Rather, after the class actions were brought on behalf of the women, challenging their group RCDC strip searches, Sheahan did make the specific decision to move the strip searches to the divisions and to provide privacy dividers for the women. PSF ¶¶ 29-32, 43-54, 79-82. Nevertheless, he did not implement those same procedures for the men. *Id.* That was a policy decision that Mr. Sheahan made, and it was unconstitutional. It was both discriminatory, in that it differentiated between the men and the women without just grounds, and unreasonable in that the withholding of dividers for the men continued a manner of strip searching them that violated the Fourth Amendment.

As the policymaker for the Sheriff’s Department, and thus the Jail, PSF ¶ 10, Defendant Sheahan’s decision to cause the Jail to violate the constitution subjects him to personal liability. *Doyle*, 305 F.3d at 614 -615; *Gentry*, 65 F.3d at 561. See also *Frake v. City of Chicago*, 210 F.3d 779, 781 (7th Cir. 2000) (“A plaintiff must show that municipal policymakers made a deliberate choice among various alternatives and that the injury was caused by the policy.”) (quotation omitted).

Independently, as to the widespread cruelty by the jail guards during the searches, Sheahan had ample notice of the problems to have required him to take action to stop it, and his failure to do so is an additional basis for personal liability. See *Farmer v. Brennan*, 511 U.S. 825, 842-43 (1994) (“[I]t is enough that the official acted or failed to act despite his knowledge of a substantial risk of serious. . . . Nor may a prison official escape liability for deliberate indifference by showing that, while he was aware of an obvious, substantial risk to inmate safety, he did not know that the complainant was especially likely to be assaulted by the specific prisoner who eventually committed the assault.”).

The undisputed facts show that Mr. Sheahan understood from the *Chicago Tribune* editorial that the women were challenging the “demeaning way” in which the jail guards were performing the strip searches. PSF ¶ 46. Moreover the editorial listed details about those

demeaning procedures which are indistinguishable from the cruel practices being used on the men, including: needless repetition of the search procedures; use of derogatory and sexually-charged epithets; sickness during the searches (a fact Mr. Sheahan separately knew from his own experience, id. ¶ 93); use of dogs in the searches; presence of blood, urine, excrement and vomit; and, the needless density of the groups due to the fact that the jail waits until the bullpens fill up to start the search (even though New York City is able to search a greater quantity of detainees individually). Id. ¶¶ 43-54. Moreover, Mr. Sheahan was sued by men both before and after he made the changes for the women, in which the men complained of the conditions for the male strip searches and the use of violence and cruelty by the guards. Id. ¶¶ 55-61. See also Pryor v. Sheahan, 1996 WL 221198, at *4 (N.D. Ill. 1996) (“It is also clear that strip-searching prisoners is permissible but strip-searching prisoners in extremely cold surroundings could amount to deliberate infliction of pain, particularly if prisoners are searched as a group and must remain undressed until the last prisoner has been searched”).

Under the case law and good conscience, Mr. Sheahan could not turn a blind eye to the brutal practices that were being used on the men, and he is responsible for the ensuing violations of the detainees’ constitutional rights. Class I is entitled to summary judgment against him on these grounds.⁸

⁸ Class II also intends to seek a personal judgment against Mr. Sheahan at trial. However, because he denies knowledge of the blanket strip search procedures (claiming that he left it all up to his CC DOC Director) it is not appropriate for summary judgment.

CONCLUSION

For the foregoing reasons, the Court should grant summary judgment in favor of Class I against Defendants Sheahan, Baird, Kurtovich, and Godinez in their official and individual capacities. The Court should also grant summary judgment in favor of Class II against Defendant Sheahan in his official capacity and against Defendants Baird, Kurtovich, and Godinez in their official and individual capacities.

RESPECTFULLY SUBMITTED,

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NOTICE OF FILING AND CERTIFICATE OF SERVICE

I, Samantha Liskow, an attorney, certify that on November 10, 2008, I filed the attached Memorandum in Support and served this document by ECF electronic filing as to counsel for all parties.

/s/ Samantha Liskow