IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

MICHAEL BOUNDS, FOREST OLIVIER, WIA DAY, DANIEL BELL, and ZACHARY LORENZ,

Plaintiffs,

v.

THE STATE OF MINNESOTA, *et al.*,

Defendants.

Docket No. 0:13-cv-00266-JRT-FLN

JURY TRIAL DEMANDED

PLAINTIFFS MICHAEL BOUNDS, FOREST OLIVIER, WIA DAY, DANIEL BELL, AND ZACHARY LORENZ' OMNIBUS MEMORANDUM OF LAW IN OPPOSITION TO THE PENDING MOTIONS TO DISMISS

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INTRODUCTION

> To manipulate men, to propel them toward goals which we see but they may not, is to deny their human essence, to treat them as objects without wills of their own, and therefore to degrade them. This is why to lie to men, or to deceive them, that is, to use them as means for our not their own independently conceived ends, even if it is to their own benefit, is in effect to treat them as sub-human, to behave as if their ends are less ultimate and sacred than our own. … For if the essence of men is that they are autonomous beings – authors of values, of ends in themselves – then nothing is worse than to treat them as if they were not autonomous but natural objects whose choices can be manipulated.[1]

Plaintiffs Michael Bounds, Forest Olivier, Daniel Bell, Wia Day, and Zachary Lorenz, by and through their counsel, Alan C. Milstein and Michael Dube of Sherman, Silverstein, Kohl, Rose & Podolsky, P.A., and Nathan M. Hansen, respectfully submit this omnibus memorandum of law in response and opposition to the pending motions to dismiss (collectively, "Motions to Dismiss").

The first motion, filed on March 27, 2013 at Docket No. 26, was filed on behalf of the State of Minnesota ("State"), the Minnesota State Patrol ("State Patrol"), and Sergeant Riccardo Munoz (collectively, "State Defendants"). The second motion, filed on March 28, 2013 at Docket No. 32, was filed on behalf of Defendants Marc Suchy and Ramsey County (collectively, "Ramsey County Defendants"). The fourth motion, filed on April 3, 2013 at Docket No. 40, was filed on behalf of Defendants Chris McCall and Anoka County (collectively, "Anoka County Defendants"). The fifth motion, filed on April 9, 2013 at Docket No. 46, was filed on behalf of Defendants Bryce Schuenke and

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[1] See In re Cincinnati Radiation Litigation, 874 F. Supp. 796, 812 (D. Ohio 1995) (some punctuation omitted).

Dakota County (collectively, "Dakota County Defendants"). The third motion, filed on March 29, 2013 at Docket No. 37, was filed on behalf of all other Defendants except for Michelle Ness, Nicholas Jacobson, or Olmsted County (collectively, "City and County Defendants").[2] The Motions to Dismiss present common questions of fact and law and are treated together herein for the convenience of the Court and the parties. We refer to the Ramsey County Defendants, Anoka County Defendants, Dakota County Defendants, and City and County Defendants collectively as the "Local Defendants."

The State and State Patrol point out that the Eleventh Amendment precludes suit against them in federal court unless they consent, and they do not consent. As such, we withdraw all claims against them.[3] The Local Defendants argue that the Plaintiffs have failed to allege enough detail to support a 42 U.S.C. § 1983 claim for violations of the Fourth or Eighth Amendments, or claims against them under the Tort Claims Act. We concede this much as well, and withdraw those claims. Beyond this, however, the Local Defendants' arguments fail.

The Local Defendants first argue that the Plaintiffs cannot state a claim under 42 U.S.C. § 1983 because they have not plausibly alleged the violation of a right secured by the Constitution and laws of the United States. In reality, the Plaintiffs have alleged not only plausible but compelling violations of the Fourteenth Amendment's right to bodily

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[2] Defendants Michelle Ness, Nicholas Jacobson, or Olmsted County have not responded.

[3] The caption of the Complaint mentions Sergeant Riccardo Munoz of the State Patrol, who headed the program at issue, but the body of the Complaint does not include any specific allegations against him. The Plaintiffs reserve the right to seek leave to amend. At this juncture, any argument that Sgt. Munoz should be dismissed from this case is premature.

integrity, and the First Amendment's right to free speech and peaceable assembly. The police officers who have been sued conduced nothing less than an unethical clinical trial whereby armed officers targeted Occupy Minneapolis protesters exercising their right to free speech and peaceable assembly, and vulnerable members of the public, intimated they would be arrested if they did not participate, provided them with shocking quantities of marijuana apparently obtained from police evidence in other cases, encouraged them to get high, observed them so the officers could understand what someone that high looked like, and then abandoned them while they were still high.

The trial had no possible therapeutic value to the participants, and any consent given by individual members of the public (including but not limited to Plaintiff Michael Bounds, who suffers from epilepsy and schizophrenia, and Plaintiff Forest Olivier, who was provided eight pipe bowls worth of marijuana in one sitting) could not have truly been informed.

The Local Defendants then argue that the police officers are entitled to dismissal under the doctrine of qualified immunity. That doctrine provides that governmental defendants sued in their *individual* capacities are entitled to dismissal at the outset of a 42 U.S.C. § 1983 case unless they are alleged to have violated clearly established constitutional rights. Here, the officers have been sued in both their official and individual capacities, and thus the qualified immunity defense provides no shelter for them. In any event, qualified immunity is unavailable because the officers violated rights that the Eighth Circuit and the United States Supreme Court have repeatedly recognized are clearly established.

Finally, the Local Defendants argue that the counties and municipalities[4] enjoy immunity under Monell v. Department of Social Services, wherein the Supreme Court held that a municipal entity may be held liable under § 1983 only "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 … ."[5] This argument too fails. As set forth in the Complaint, the police officers were acting in accordance with their employers' negligent training or failure to train about (1) providing illegal drugs to members of the public; (2) experimenting upon the public; (3) targeting individuals exercising First Amendment rights; and (4) reporting misconduct by fellow police officers, which amounted to an official policy or custom.

One final word is in order. The Dakota County Defendants' motion focuses upon the complete investigative file of the Minnesota Bureau of Criminal Apprehension ("Bureau") in this matter, which is outside of the four corners of the Complaint. This Court should reject these attempts.[6] Excluding materials outside of the pleadings is especially appropriate here because numerous police officers, including Officer Schuenke of Dakota County, refused to cooperate with the investigation and provide a statement to the Bureau.[7] While Officer Schuenke may suffer no criminal penalty for invoking his

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[4] The Local Defendants argue that the Plaintiffs should have named counties and municipalities, rather than police departments. By naming the officers in their official capacity, the Plaintiffs in effect named the counties and municipal police departments that employ them. See, e.g., Kentucky v. Graham, 473 U.S. 159 (1985).

[5] See Monell v. Department of Social Services, 436 U.S. 658, 694 (1978).

[6] See Federal Rule of Civil Procedure 12(d) (allowing a District Court to exclude matters outside of the pleadings).

[7] See Complaint, a true and correct copy of which is attached as **Exhibit "A,"** ¶ 46 (emphasis added) ("Tellingly, six police officers (including but not limited to Officer

Fifth Amendment right against self-incrimination, in civil litigation, such a choice can give rise to an "adverse inference" against Officer Schuenke and Dakota County at the time of trial.[8] Certainly, those Defendants should not be dismissed on the ground that the Bureau's investigative file is devoid of admissions by Officer Schuenke.

In sum, the Motions to Dismiss should be denied in pertinent part.

STATEMENT OF THE FACTS

I.

Plaintiffs Michael Bounds, Forest Olivier, Daniel Bell, Wia Day, and Zachary Lorenz are individuals who are residents of the State of Minnesota.[9] Mr. Bounds, a member of the Occupy Minneapolis movement, suffers from epilepsy and schizophrenia.[10]

Defendants Mark Hanneman, Karl Willers, and Barb Mathwig of the Hutchinson Police Department, Bryce Schuenke of the Dakota County Sheriff's Office, Peter Zajac of the Farmington Police Department, Troy Luke of the Washington County Sheriff's Office, Chris McCall of the Anoka County Sheriff's Office, Marc Suchy of the Ramsey County Sheriff's Office, Troy Kemp and Paul Ireland of the Coon Rapids Police Department, Michael Hadland of the Fillmore County Sheriff's Office, Michelle Ness and Nicholas Jacobson of the Olmstead County Sheriff's Office, Chard Vanhorn of the Lakes Area Police Department, Daniel Lewis and Steve Schulz of the Kanabec County

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Karl Willers, Officer Hanneman, and Officer Schuenke) refused to provide statements to the Bureau.").

[8] See, e.g., Rosebud Sioux Tribe v. A&P Steel, Inc., 733 F.2d 509, 521-522 (8th Cir. 1984).

[9] See Exhibit A, ¶ 1.

[10] See Exhibit A, ¶ 27.

Sheriff's Office, Andrew Mahowald of the Chisago County Sheriff's Office, Joshua Lawrenz of the Chaska Police Department, Matt Olson of the Maple Grove Police Department, Adam Connor of the Lyon County Sheriff's Office, Dustin Roemeling, Kenneth Willers, Joshua McCewen, Chris Henrichs, and Lonnie Roloff of the Nobles County Sheriff's Office, and Dan Sherburne of the Big Lake Police Department were duly authorized police officers deputized to perform official functions and acting under color of state law.[11] These Defendants are being sued in their official and individual capacities.[12]

The Defendants individually and collectively designed, developed, and/or ran a program called the "Drug Recognition Evaluators" program ("DRE Program" or "Program").[13] The DRE Program was essentially an unethical clinical trial whereby armed police officers provided vulnerable members of the public with substantial quantities of marijuana (presumably obtained from police evidence in other cases), encouraged them to get high, observed them, and then abandoned them while they were still high.[14]

This Program purportedly existed for the purpose of allowing law enforcement to understand what individuals look and act like while high.[15] In actuality, the parties that designed and ran the Program wished to target members of Occupy Minneapolis,

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[11] See Exhibit A, ¶ 4. Contrary to the Local Defendants' arguments, the Plaintiffs have alleged each Defendant's direct involvement in the alleged unconstitutional actions.

[12] See Exhibit A, ¶ 4.

[13] See Exhibit A, ¶ 9.

[14] See Exhibit A, ¶ 10.

[15] See Exhibit A, ¶ 11.

members of the homeless population, and other vulnerable members of the population and see what quantity of drugs their bodies could tolerate.[16]

Indeed, officers running the Program were instructed to specifically target Occupy Minneapolis protesters exercising their First Amendment right to free speech and peaceable assembly, and in fact targeted such individuals.[17] Officers running the Program were also instructed to target vulnerable members of the population, including homeless individuals and individuals addicted to illegal drugs such as cocaine, and in fact targeted such individuals.[18]

The targeted individuals were taken into police custody, provided with substantial quantities of drugs (principally marijuana) by the police, observed by the police while under the influence of the drugs, and then simply released onto the streets in a high and incoherent state.[19] Any officers who did not actually participate in this aspect of the Program knew about it, and failed to stop it, in reckless disregard of the Plaintiffs' rights.[20] Additionally, the parties that designed and ran the Program authorized providing, and actually provided, cash or other consideration (such as food, cigarettes, and even illegal drugs to take home) to members of the public in exchange for participation, and sometimes intimated to the "volunteers" that they would be arrested if they did not participate.[21] The Plaintiffs and other "participants" were not provided with

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[16] See Exhibit A, ¶ 12.
[17] See Exhibit A, ¶ 13.
[18] See Exhibit A, ¶ 14.
[19] See Exhibit A, ¶ 15.
[20] See Exhibit A, ¶ 16.
[21] See Exhibit A, ¶ 17.

an informed consent form, nor could any consent have ever been truly voluntary.[22] The Plaintiffs and other "participants" were not asked to supply any medical history.[23]

The Belmont Report, issued in 1979 by the National Commission for the Protection of Research Subjects in Biomedical and Behavioral Research, sets forth three principles to guide human subject research. It provides that, for human subject research to be ethical, the research must be designed in accordance with "the ethical principles of Respect for Persons, Beneficence and Justice."[24]

The DRE Program was contrary to the principle of Respect for Persons because it treated the human subjects as guinea pigs, if not worse.[25] The experiment was contrary to the principle of Beneficence because the risk of injury to human subjects who would be given large quantities of marijuana, observed, and then dropped off in the middle of a major metropolitan area while still in a highly altered state was more than minimal and was outweighed by any possible benefits.[26] The experiment was contrary to the principle of Justice because the experiment exclusively targeted those exercising their free speech rights, the economically disadvantaged, and other vulnerable members of the population.[27]

In 1991, federal regulations governing human subject research were integrated into the "Common Rule"; these federal regulations, among other things, detail the conditions required for obtaining informed consent and what information must be

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[22] See Exhibit A, ¶ 18.
[23] See Exhibit A, ¶ 19.
[24] See Exhibit A, ¶ 21.
[25] See Exhibit A, ¶ 22.
[26] See Exhibit A, ¶ 23.
[27] See Exhibit A, ¶ 24.

provided under those conditions, restrict experiments to those in which risks are minimized, require the equitable selection of research subjects, and establish the requirement of institutional review boards.[28] The experiment was contrary to the requirements of the Common Rule in virtually every respect.[29]

II.

Plaintiff Michael Bounds, a member of Occupy Minneapolis, suffers from epilepsy and schizophrenia.[30] On or around April 26, 2012, Mr. Bounds encountered a two armed officers participating in the DRE Program.[31] Mr. Bounds was asked whether he was high; he responded that he was not. One of the officers in turn responded, "That's alright, we'll get you high."[32] Officers then provided him with a substantial quantity of powerful marijuana.[33] Officers did not conduct any evaluation of him afterwards; rather, he was simply released in downtown Minneapolis while high.[34] Mr. Bounds was also given a quarter of a baggie filled with marijuana to take home in "exchange" for information on the Occupy Minneapolis movement.[35]

On three separate occasions on or around April 27, 2012, Plaintiff Forest Olivier, also an Occupy member, was approached by local law enforcement (including Nicholas Jacobson and either Karl Willers or Kenneth Willers) and offered substantial quantities of

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[28] See Exhibit A, ¶ 25.
[29] See Exhibit A, ¶ 26.
[30] See Exhibit A, ¶ 27.
[31] See Exhibit A, ¶ 28.
[32] See Exhibit A, ¶ 29.
[33] See Exhibit A, ¶ 30.
[34] See Exhibit A, ¶ 31.
[35] See Exhibit A, ¶ 32.

drugs.[36] On the first occasion, Mr. Olivier was given eight pipe bowls worth of marijuana, taken to a testing facility to be evaluated, evaluated there, and then returned to Peavey Plaza, where the Occupy protesters were gathered.[37] On the second occasion, Mr. Olivier was given ten or more pipe bowls worth of marijuana, taken to the facility to be evaluated, and then returned to Peavey Plaza.[38]

On another occasion, Mr. Olivier was approached by an Officer Willers and another officer.[39] Officer Willers asked Mr. Olivier whether he was in possession of any marijuana, to which Mr. Olivier responded no.[40] Thereafter, Mr. Olivier was placed in the back of a squad car, and his personal belongings were placed in the trunk of the vehicle.[41] Officer Willers then provided Mr. Olivier with a substantial quantity of marijuana, which Mr. Olivier smoked in the back of the squad car.[42] Thereafter, Mr. Olivier was taken to the testing facility, at which point other law enforcement officials refused to let Mr. Olivier in because they identified him as being associated with Occupy Minneapolis, and were wary of footage of the Program that Occupy Minneapolis had posted on YouTube.[43] Mr. Olivier was then taken back downtown and released onto the streets while incredibly high.[44] The remaining Plaintiffs had similar experiences.[45]

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[36] See Exhibit A, ¶ 33.
[37] See Exhibit A, ¶ 34.
[38] See Exhibit A, ¶ 35.
[39] See Exhibit A, ¶ 36.
[40] See Exhibit A, ¶ 37.
[41] See Exhibit A, ¶ 38.
[42] See Exhibit A, ¶ 39.
[43] See Exhibit A, ¶ 40.
[44] See Exhibit A, ¶ 41.
[45] See Exhibit A, ¶ 42.

The Defendants' unethical and illegal conduct was first brought to light by Occupy Minneapolis; in response, officers falsely denied the allegations and attempted to cast doubts upon the truthfulness of the Occupy members.[46] Thereafter, certain officers participating in the program (such as Deputy Andrew James Mahowald of the Chisago County Sheriff's Office) began making the same allegations, which triggered an investigation by the Minnesota Bureau of Criminal Apprehension.[47] Indeed, Officer Mahowald personally witnessed Mr. Olivier being provided drugs by an Officer Willers, and provided details to the Bureau during the investigation.[48] Tellingly, six police officers (including but not limited to Officer Karl Willers, Officer Hanneman, and Officer Schuenke) refused to provide statements to the Bureau.[49]

During the investigation, one officer testified as to his belief that instructors "skirted the line" in connection with the Program, while another testified that "morals are gone."[50] According to multiple individuals, Officer Kenneth Willers or Officer Karl Willers openly admitted to providing illegal drugs to individuals, and questioned what was wrong with that.[51] After these abuses came to light, the DRE Program was suspended.[52] As a result of the Defendants' individual and collective wrongdoing, the Plaintiffs have suffered physical and emotional damages and harm.[53]

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[46] See Exhibit A, ¶ 43.
[47] See Exhibit A, ¶ 44.
[48] See Exhibit A, ¶ 45.
[49] See Exhibit A, ¶ 46.
[50] See Exhibit A, ¶ 47.
[51] See Exhibit A, ¶ 48.
[52] See Exhibit A, ¶ 49.
[53] See Exhibit A, ¶ 50.

Finally, contrary to the Local Defendants' intimations, the police officers were acting in accordance with their employers' official policy and custom, including but not limited to their employers' negligent training or failure to train about (1) providing illegal drugs to members of the public; (2) experimenting upon the public; (3) targeting individuals exercising First Amendment rights; and (4) reporting misconduct by fellow police officers.[54]

LEGAL ARGUMENT

1. Introduction

Even following the issuance of Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, federal courts must continue to accept as true "all well-pleaded facts" (which include "either direct or inferential" factual allegations), analyze those facts "in the light most hospitable to the plaintiff's theory," and draw "all reasonable inferences for the plaintiff."[55] This is especially so where critical information may be in the sole possession of the defendants.[56]

The Local Defendants unconvincingly suggest in passing that the Plaintiffs have failed to meet the pleading standard set forth in Iqbal and Twombly. In reality, as is self-evident, the Plaintiffs' allegations are not mere formulaic recitations of the elements of causes of action. Indeed, the Local Defendants focus their efforts on three arguments: (1) the Plaintiffs have failed to state a claim under 42 U.S.C. § 1983; (2) the police officers are entitled to qualified immunity because they are not alleged to have violated any

[54] See Exhibit A, ¶ 55.

[55] See, e.g., U.S. ex rel. Hutcheson v. Blackstone Medical, Inc., 647 F.3d 377 (1st Cir. 2011).

[56] See, e.g., Bausch v. Stryker Corp., 630 F.3d 546, 552 (7th Cir. 2010).

clearly established constitutional rights; and (3) Monell precludes suit against the counties and municipalities. Each argument fails.

2. The Plaintiffs Have Stated a Compelling 42 U.S.C. § 1983 Claim

42 U.S.C. § 1983 provides, in pertinent part, as follows:

> 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 … .[57]

"To state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law."[58] "[Section] 1983, unlike its criminal counterpart, 18 U.S.C. § 242, contains no state-of-mind requirement independent of that necessary to state a violation of the underlying constitutional right."[59]

In this matter, the Local Defendants do not contest that the police officers were acting "under color of state law," nor could they.[60] Rather, they focus exclusively on the first element, arguing that their conduct did not constitute the violation of a right secured by the United States Constitution or the laws of the United States. This is simply untrue,

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[57] See 42 U.S.C. § 1983.
[58] See, e.g., West v. Atkins, 487 U.S. 42, 47 (1988) (multiple citations omitted).
[59] See Daniels v. Williams, 474 U.S. 327, 330 (1986) (citing Parratt v. Taylor, 451 U.S. 527 (1981)).
[60] See Monroe v. Pape, 365 U.S. 167 (1967).

as the Defendants' conduct violated the Plaintiffs' clearly established rights under the Fourteenth and First Amendments.[61]

a. Fourteenth Amendment

The Due Process Clause of the Fourteenth Amendment provides as follows: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The Fourteenth Amendment's substantive due process provisions protect individuals from certain arbitrary, wrongful actions by state and local authorities "regardless of the fairness of the procedures used to implement them."[62]

"The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."[63] As far back as the nineteenth century, in Union Pacific Railroad Co. v. Botsford, the United States Supreme Court observed that "[n]o right is held more sacred … than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law."[64] Indeed, there can be no doubt that "[t]he right to bodily integrity is a fundamental right protected by the Constitution."[65]

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[61] As previously stated, the Plaintiffs are not pursuing their claims for violations of the Fourth and Eighth Amendments.

[62] See Daniels, 474 U.S. at 331.

[63] See Albright v. Oliver, 510 U.S. 266, 272 (1994).

[64] See Union Pacific Railroad Co. v. Botsford, 141 U.S. 250, 251 (1891); accord Schmerber v. California, 384 U.S. 757, 772 (1966) (observing that "[t]he integrity of an individual's person is a cherished value of our society").

[65] See, e.g., Ammend v. BioPort, Inc., 322 F. Supp. 2d 848, 870 (W.D. Mich. 2004); cf. Washington v. Harper, 494 U.S. 210, 257 (1990) (Stevens, J., concurring in part and dissenting in part) ("Every violation of a person's bodily integrity is an invasion of his or her liberty. The invasion is particularly intrusive if it creates a substantial risk of

Numerous courts have held that "[t]he right to be free of state-sponsored invasion of a person's bodily integrity is protected by the [constitutional] guarantee of due process."[66] Similarly, numerous courts "have ruled that the right to bodily integrity includes protection from government-sponsored radiation experiments that have no therapeutic value and are not disclosed as such."[67] As the U.S. District Court for the District of Massachusetts has observed,

> [t]hese well-reasoned opinions argue that the failure to disclose the alleged true nature of the experiments – that they were conducted with no expectation of therapeutic value to the patients but rather only to observe the effects of radiation on human subjects – vitiates any "consent" that may have been given, thereby rendering the experiments similar to the forced, involuntary invasions of bodily integrity that the Supreme Court has deemed unconstitutional.[68]

Indeed, "the [federal] judiciary has not hesitated to find that, where the human research subjects were not told that they were participating in an experiment <u>and/or the government conducted the experiments knowing they had no therapeutic value</u>, the subject's constitutionally protected right to life and/or liberty had been violated."[69]

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permanent injury … . The liberty of citizens to resist the administration of mind altering drugs arises from our Nation's most basic values.").

[66] <u>See, e.g.</u>, <u>Cincinnati Radiation Litigation</u>, 874 F. Supp. at 810-11; <u>Heinrich ex rel. Heinrich v. Sweet</u>, 62 F. Supp. 2d 282 (D. Mass. 1999).

[67] <u>See</u> <u>Heinrich</u>, 62 F. Supp. 2d at 313; <u>accord</u> <u>Stadt v. Univ. of Rochester</u>, 921 F. Supp. 1023, 1027-28 (W.D.N.Y. 1996); <u>Cincinnati Radiation Litigation</u>, 874 F. Supp. at 810-11.

[68] <u>See</u> <u>id.</u> (multiple citations omitted); <u>accord</u> <u>Cruzan v. Director, Missouri Department of Health</u>, 497 U.S. 261, 278 (1989) (observing that the Fourteenth Amendment has been held to include medical decision making).

[69] <u>See</u> <u>Wright v. Fred Hutchinson Cancer Research Center</u>, 269 F. Supp. 2d 1286, 1294 (D. Wash. 2002) (emphasis added).

Ultimately, where an experiment is 'deficient in procedural regularity, or … needlessly severe,' that is held to constitute an unreasonable invasion of bodily integrity."[70]

The Local Defendants make much of the fact that, in Wright v. Fred Hutchinson Cancer Research Center, the District Court held that the clinical trial at issue in that case did not give rise to claims under 42 U.S.C. § 1983. In Wright, however, the District Court's rationale was that "the true nature of the experiments in which plaintiffs' decedents took part was not hidden by defendants and the proposed treatment regimen, while unproven, was thought, or at least hoped, to be of benefit to the individual participants."[71] The District Court acknowledged that numerous federal cases held that "where the human research subjects were not told that they were participating in an experiment and/or the government conducted the experiments knowing they had no therapeutic value, the subject's constitutionally protected right to life and/or liberty had been violated."[72]

Here, the officers failed to disclose to the Plaintiffs that what was occurring was an experiment. There was no informed consent form, nor was there even any use of the word "experiment." The officers also hid the true nature of the experiment from the

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[70] See id. (quoting Cincinnati Radiation Litigation, 874 F. Supp. at 813); accord Schmerber, 384 U.S. at 757 ("It bears repeating … that we reach this judgment only on the facts of the present record. The integrity of the individual's person is a cherished value of our society. That we hold today that the Constitution does not forbid the state's minor intrusions into an individual's body under strictly limited conditions in no way indicates that it permits more substantial intrusions or intrusions under other conditions. … [I]n order to maintain an action under the Fifth Amendment, it is sufficient that a plaintiff demonstrate that an invasion of bodily integrity was deficient in procedural regularity, or that it was needlessly severe.").

[71] See Wright, 269 F. Supp. 2d at 1294-95.

[72] See id. at 1294-95.

Plaintiffs; the Plaintiffs were not told that the officers planned on giving them substantial quantities of marijuana, and the purpose of the experiment was to see how much marijuana the participants' bodies could take. Furthermore, there was no possible therapeutic value to any of those who participated. This is not a case in which researchers, however misguidedly, believed that large quantities of the drug would benefit the participants. Rather, the researchers conducted the trial (at best for them) solely for the purpose of increasing their knowledge of what a suspect looks like while extremely high, or (at worst for them) solely to harass members of Occupy Minneapolis and vulnerable members of Minneapolis' population, such as the homeless. Either way, the Local Defendants violated the Plaintiffs' Fourteenth Amendment right to bodily integrity.

The Local Defendants further argue that the subjects consented to the experiment because they knew marijuana was involved. This is simply untrue. As discussed immediately above, the subjects did not understand the true nature and objects of the experiment.

Moreover, "consent" to smoking marijuana under police observation was not voluntary. The officers intimated to the participants that they would be arrested if they did not participate, provided them with shocking quantities of marijuana, encouraged them to get high, observed them so the officers could understand what someone that high looked like, and then abandoned them while still high. Against this backdrop, Mr. Olivier for example was given eight pipe bowls worth of marijuana, taken to a testing facility to be evaluated, evaluated there, and then brought back downtown. At the

motion-to-dismiss stage, the fair and reasonable inference that must be made is that Mr. Oliver did not consent to the first bowl because of the officers' conduct, and did not consent to the second through eighth bowls due to an altered state of consciousness.

In sum, the Fourteenth Amendment provides ample support for the Plaintiffs' claims under 42 U.S.C. § 1983. "[T]he human research subjects were not told that they were participating in an experiment," and "the government conducted the experiments knowing they had no therapeutic value"; as such, the Plaintiffs' constitutionally protected right to liberty and bodily integrity has been violated.[73] Furthermore, the facts in the Complaint make clear that the experiment is 'deficient in procedural regularity, or … needlessly severe,' [which] is held to constitute an unreasonable invasion of bodily integrity."[74] Contrary to the Local Defendants' suggestion, dismissal of this compelling claim would be utterly inappropriate.

b. First Amendment

It is "clearly established" that a citizen has the right to exercise First Amendment freedoms "without facing retaliation from government officials."[75] Among other things, "the First Amendment prohibits government officials from subjecting an individual to retaliatory actions … on the basis of his constitutionally protected speech."[76] In Santiago v. Blair, the Eighth Circuit's most recent pronouncement on the issue, the Eighth Circuit reiterated that, in order to prevail on a § 1983 claim for retaliation in violation of the First

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[73] See Wright, 269 F. Supp. 2d at 1294.
[74] See id. (quoting Cincinnati Radiation Litigation, 874 F. Supp. at 813).
[75] See, e.g., Kilpatrick v. King, 499 F.3d 759, 767 (8th Cir. 2007).
[76] See Osborne v. Grussing, 477 F.3d 1002, 1004 (8th Cir. 2007) (quoting Hartman v. Moore, 547 U.S. 250 (2006)).

Amendment, a plaintiff must show "(1) that he engaged in a protected activity; (2) that the government official took adverse action against him that would chill a person of ordinary firmness from continuing in the activity; and (3) that the adverse action was motivated at least in part by the exercise of the protected activity."[77] In their moving papers, the Defendants focus their efforts on the second prong, i.e., the ordinary-firmness test. Their reliance, however, is woefully misplaced.

It is true that, in the words of the Eighth Circuit, "[t]he ordinary-firmness test is well established in the case law, and is designed to weed out trivial matters from those deserving the time of the courts as real and substantial violations of the First Amendment."[78] Yet, in applying the test, the Eighth Circuit has recognized that "[t]he effect on freedom of speech may be small, but since there is no justification for harassing people for exercising their constitutional rights it need not be great in order to be actionable."[79]

Furthermore, "[t]he chilling effect of an adverse action must be determined on an objective basis."[80] As the ordinary-firmness test "is an objective one, not subjective," "[t]he question is not whether the plaintiff herself was deterred … ."[81] As this Court has previously observed, "It is … not dispositive that [the plaintiff] was not deterred from

[77] See Santiago v. Blair, 707 F.3d 984, 991 (8th Cir. 2013) (citing Revels v. Vincenz, 382 F.3d 870, 876 (8th Cir. 2004)); see also Baribeau v. City of Minneapolis, 596 F.3d 465, 481 (8th Cir. 2010); Lawrence v. City of St. Paul, 740 F. Supp. 2d 1026, 1043 (D. Minn. 2010) (citing Zutz v. Nelson, 601 F.3d 842, 848-49 (8th Cir. 2010)).

[78] See Garcia v. City of Trenton, 348 F.3d 726, 728-29 (8th Cir. 2003); accord Santiago, 707 F.3d at 992.

[79] See id. at 729 (quoting Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982)).

[80] See Lawrence, 740 F. Supp. 2d at 1043-44.

[81] See id.

[engaging in the protected activity]. Where 'the punitive machinery of government' is employed – even in a minor way – in retaliation for protected First Amendment activity, the question of an adverse act's chilling effect is best left to a jury."[82]

This Court has made clear that targeting can equal retaliation. In Garcia v. City of Trenton, a municipality targeted a business owner exercising her First Amendment right to complain about a municipal policy by lawfully issuing her $35 in parking tickets. On appeal, the Eighth Circuit reinstated the jury's verdict in favor of the business owner, observing as follows:

> What would a person of "ordinary firmness" have done in reaction to the tickets? Would he or she have simply ignored them, or would he or she have been slowed down, at least to some degree? The issue is a close one, in our view. The total amount of the tickets was not large, $35.00. However, they came during a period of less than two months, and the threat of further harassment could reasonably be inferred. Ultimately, this sort of question is usually best left to the judgment of a jury, twelve ordinary people, than to that of a judge … .[83]

Here, the Plaintiffs engaged in protected speech and assembly, and the police officers took adverse action against them (targeted them to participate in an unconstitutional experiment) based upon the exercise of those rights. As the Eighth Circuit has made clear, it is the jury's province to decide whether a "person of ordinary firmness" would be chilled from continuing to participate in Occupy Minneapolis based upon what occurred.

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[82] See id. at 1044.

[83] See Garcia, 348 F.3d at 726.

3. The Officers' Qualified Immunity Defense Fails

The police officers argue, in many ways and still more guises, that they are entitled to qualified immunity. This argument is based upon a false premise. "Notably, qualified immunity is only available to government employees sued in their individual capacity. … Therefore, this defense does not apply to [a plaintiff's] federal claims against … individual Defendants sued in their official capacities."[84] Indeed, only "government officials sued in their individual capacities are entitled to qualified immunity from suit [where] their actions do not violate 'clearly established constitutional or statutory rights of which a reasonable person would have known.'"[85] Here, the police officers have been sued in both their individual and official capacities.[86] As such, qualified immunity provides them with no shelter.

In any event, the officers are unentitled to qualified immunity. As the Eighth Circuit has made clear, determining the question of qualified immunity involves the following two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right; and (2) whether that right was clearly established at the time of the defendant's alleged misconduct."[87] "[O]fficials can still be on notice that their conduct violates established law even in novel factual

[84] Strinni v. Mehlville Fire Protection Dist., 681 F. Supp. 2d 1052, 1081-82 (D. Missouri 2010); accord Bankhead v. Knickrehm, 360 F.3d 839, 844 (8th Cir. 2004) (observing that "[q]ualified immunity is a defense only against a claim in one's individual capacity"); Johnson v. Outboard Marine Corp., 172 F.3d 531, 535 (8th Cir. 1999) (same principle).

[85] See Stadt, 921 F. Supp. at 1027 (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

[86] See Exhibit A, ¶ 4.

[87] See Garcia, 707 F.3d at 989.

circumstances."[88] Indeed, "[t]o defeat a qualified immunity defense, the officials need only have fair warning that their alleged conduct was unconstitutional."[89]

Ultimately, "[c]ourts are charged with the responsibility of ensuring that the defense of qualified immunity gives no more protection than is necessary for the official in question to effectively fulfill his duties. Each additional measure of protection afforded government officials inevitably divests individual citizens of some remedies for violations of their constitutional rights."[90]

As discussed in detail above, "the facts shown by the [Plaintiffs] make out a violation of a constitutional … right … ."[91] Additionally, "that right was clearly established at the time of the [Defendants'] alleged misconduct."[92] First, "the right to be free from nonconsensual experimentation on one's body – the right to bodily integrity – [is] a right which has been recognized throughout this nation's history," and was recognized by the United States Supreme Court as far back as 1891.[93] As one District Court observed over ten years ago, "the [federal] judiciary has not hesitated to find that, where the human research subjects were not told that they were participating in an experiment and/or the government conducted the experiments knowing they had no

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[88] See Hope v. Pelzer, 536 U.S. 730, 741 (2002).

[89] See Lawrence, 740 F. Supp. 2d at 1045 (quoting Brown v. Fortner, 518 F.3d 552, 561 (8th Cir. 2008)) (internal quotation marks deleted).

[90] See Cincinnati Radiation Litigation, 874 F. Supp. at 807-08.

[91] See Garcia, 707 F.3d at 989.

[92] See id.

[93] See Stadt, 927 F. Supp. at 1027 (citing Botsford, 141 U.S. at 251) (additional citations omitted); accord Ammend, 322 F. Supp. 2d at 870 ("The right to bodily integrity has long been recognized."); cf. Schmerber, 384 U.S. at 772 ("The integrity of an individual's person is a cherished value of our society.").

therapeutic value, the subject's constitutionally protected right to life and/or liberty had been violated."[94]

Similarly, in the words of the Eighth Circuit, it is "clearly established" that a citizen has the right to exercise First Amendment freedoms "without facing retaliation from government officials."[95]

Finally, even if this matter presents "novel factual circumstances,"[96] this is simply not enough to give rise to a defense of qualified immunity. The officers' qualified immunity argument utterly fails.

4. The Counties and Municipalities' Monell Argument Fails

Finally, it is argued that the counties and municipalities should be dismissed because the Plaintiffs have failed to allege the violation of an official policy. This argument fails.

In Monell v. Department of Social Services, the United States Supreme Court held that a municipality is a "person" that can be held liable under 42 U.S.C. § 1983. At the same time, the Court concluded that municipalities cannot be held liable under § 1983 on a theory of *respondeat superior*. Rather, a municipal entity is liable under § 1983 only "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 … ."[97]

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[94] See Wright, 269 F. Supp. 2d at 1294.
[95] See, e.g., Kilpatrick, 499 F.3d at 767.
[96] See Hope, 536 U.S. at 741.
[97] Monell, 436 U.S. at 690-94.

In City of Canton, Ohio v. Harris, the United States Supreme Court expanded Monell in holding, as a matter of first impression, that there are "circumstances in which an allegation of a 'failure to train' can be the basis for liability under § 1983."[98] It further held as follows:

> [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 policymakers 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.[99]

This Court need not labor long on the Local Defendants' Monell argument. Contrary to their position, the Plaintiffs are not attempting to hold the counties and municipalities liable based upon a theory of *respondeat superior*. Rather, the Plaintiffs have alleged, and intend to prove, that the police officers were acting in accordance with their employers' official policy and custom, including but not limited to their employers' negligent training or failure to train about (1) providing illegal drugs to members of the public; (2) experimenting upon the public; (3) targeting individuals exercising First Amendment rights; and (4) reporting misconduct by fellow police officers.[100] The Plaintiffs have further alleged, and intend to prove, that the Defendants, including the

[98] See City of Canton, Ohio v. Harris, 489 U.S. 378, 387 (1989); accord Kuha v. City of Minnetonka, 365 F.3d 590, 603-07 (8th Cir. 2004); Pietrafeso v. Lawrence County, 452 F.3d 978, 982 (8th Cir. 2006) ("A county is liable if an action or policy itself violated federal law, or if the action or policy was lawful on its face but led an employee to violate a plaintiff's rights [and] was taken with 'deliberate indifference' as to its known or obvious consequences.").

[99] See id. at 390.

[100] See Exhibit A, ¶ 55.

counties, "acted with deliberate indifference towards the Plaintiffs' medical needs, recklessly disregarded their rights, and acted with an improper motivation."[101] The widespread and repeated nature of the constitutional violations at issue here, which occurred across departments, make manifest the need for training, and the lack of it caused or contributed to numerous officers violating the Fourteenth and First Amendments with impunity.

CONCLUSION

For the foregoing reasons, the Motions to Dismiss should be denied in material part. Specifically,

1. As the State and the State Patrol refuse to consent to federal jurisdiction, the Plaintiffs withdraw all claims against them. The Plaintiffs reserve the right to move for leave to amend to assert an individual-capacity claim against Sergeant Munoz of the State Patrol, who headed the DRE Program (Sgt. Munoz is mentioned in the caption, but no further allegations appear).

2. The Plaintiffs withdraw all claims against the Local Defendants to the extent those claims rely upon the Fourth or Eighth Amendments, or the Tort Claims Act.

3. This Court should reject the Ramsey County Defendants' attempts to convert their Rule 12(b)(6) motion to dismiss into a Rule 56 summary judgment motion, especially considering that Officer Schuenke of Ramsey County refused to speak with the Bureau, and no other Defendant felt it necessary to go outside of the four corners of the Complaint.

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[101] See Exhibit A, ¶ 60.

4. The Plaintiffs have stated a compelling claim under 42 U.S.C. § 1983 for violations of the Fourteenth Amendment, and the First Amendment.

5. The police officers who have been sued are not entitled to qualified immunity, because they have been sued in their official and individual capacities, and their conduct violated the Plaintiffs' clearly established constitutional rights.

6. The counties and local governmental agencies that have been sued are not entitled to dismissal under Monell, because their failure to train amounted to municipal policy and custom, constituted deliberate indifference, and caused harm to the Plaintiffs.

Dated: Wednesday, April 17, 2013

Respectfully submitted,

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