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

Anthony Murdock, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	20-cv-1440
-vs-	)	
	)	*(Judge Feinerman)*
City of Chicago,	)	
	)	
Defendant.	)	

PLAINTIFFS' SUPPLEMENTAL REPLY IN SUPPORT OF MOTION TO COMPEL

Plaintiffs accept defendant's waiver of any argument that plaintiffs must show deliberate indifference by defendant. (ECF No. 71 at 1-2.) Plaintiffs respond below to the two issues the Court raised at the status hearing on July 9, 2021 to show:

1. The "task files," which will show why the City abandoned its long-standing policy of permitting all persons arrested on warrants to post bond at the police station, are crucial to the Fourth Amendment reasonableness of the current policy, and

2. The Court should respect the finding of the Illinois Supreme Court in *Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48 (1998) that it is "nothing more than speculation" that officials of the City of Chicago "would withhold giving advice they believe is necessary and correct, based

merely upon the remote possibility that it could some day be produced in litigation." 184 Ill.2d at 532-33, 705 N.E.2d at 53.

Before addressing these questions, plaintiffs seek to correct two factual mistakes in their motion to compel.

I. The Factual Errors

A. The City Changed Its Policy in a 2012 Amendment to Special Order S06-12-02.

The policy plaintiffs challenge is set out in Chicago Police Department Special Order S06-12-02. Plaintiffs have now obtained all versions of the special order, attached as Exhibits 1-5, and recognize that they were mistaken in asserting that the City changed its policy of allowing any person arrested on a warrant to post bail at the police station when it first adopted Special Order S06-12-02. (ECF No. 67 at 1.)

The original version of Special Order S06-12-02 (dated January 1, 1998) permitted all persons held on a warrant on which a judge had set bond to post bail at the police station. Section IV(A)(5)(a) of the original version of the special order, attached as Exhibit 1, provides as follows:

> Persons arrested on local charges and when a warrant issued within the State of Illinois is discovered, the person will not be issued an Individual Recognizance Bond (I-Bond) for the local (misdemeanor or traffic Major room) charges or for the warrant. Such persons will instead be sent to the First Municipal District, Circuit Court of Cook County (Municipal Court of Chicago) having proper jurisdiction, for a bond hearing in accordance with the Department Notice entitled, "Court Call Schedule." An arrestee who is able to post a Cash Bond (C-Bond) or

> a Deposit Bond (D-Bond) on the local charges will be allowed to do so, however, the arrestee will be sent to the Central Detention Section for additional processing of the warrant. (Unless the bond amount is indicated on the warrant, in which case the person will be allowed to post the indicated bond and not transported to the Central Detention Section.)

Exhibit 1, Special Order S06-12-02 at 4 (January 1, 1998). Tthe last sentence of this provision permitted any arrestee with a bond amount stated on the warrant to post bond at the police station without going to court.

Exhibit 1 remained in effect until 2012, when a new version of the Special Order became effective on April 10, 2012. (Exhibit 2.) This version was promptly amended two weeks later, on April 24, 2012. (Exhibit 3.) The version adopted on April 24, 2012 is the first version to include the policy at issue in this case.

Section IV(B)(1)-(3) of the April 24, 2012 version of the Special Order provides in pertinent part as follows:

> B. The station supervisor will ensure that:
>
> 1. all persons arrested on a Cook County Sheriff's warrant returnable to the First Municipal District are transported from the district of arrest to the court of issuance the local Branch Court, Traffic Court, or 26th and California as appropriate).
> 2. all persons arrested on a warrant issued outside of the first Municipal District and who have local charges are transported from the district of arrest to the local branch court according to the Case Priority Listing Unit Matrix outlined in the Department Directive entitled "Court Call Schedule."
> 3. the following will be transported to Central Bond Court:

> a. all persons arrested on a warrant outside of the First Municipal District and no local charges,
>
> b. all persons arrested on a warrant issued from Criminal Trial Court and no local charges, and
>
> c. all persons arrested on all warrants on Saturday, Sunday, and Court Holidays.

(Exhibit 3, Special Order S06-12-02 (April 24, 2012) at 4.) The City continued these provisions when it amended the Special Order on June 13, 2013 (Exhibit 4) and most recently on August 26, 2019. (Exhibit 5.)

Plaintiffs and the class they seek to represent were detained pursuant to sections 3(a) and 3(c), as persons who

> (a) were detained by police officers of the City of Chicago on a warrant for which a judge had set an amount of cash bail,
>
> (b) were not permitted to post bail at the police station pursuant to the explicit policies set out in Section IV.B.3(a) or IV.B.3(c) of Chicago Police Department Special Order S06-12-02, and
>
> (c) were released by posting bail after an appearance before a judge of the Circuit Court of Cook County without being held at the Cook County Jail.

(ECF No. 52, Amended Motion for Class Certification at 1.)

B. The Challenged Policy Extends to All Persons Arrested on Warrants Issued Outside of Chicago, Rather than Outside of Cook County

Plaintiffs mistakenly read the Special Order as requiring that persons held on warrants issued outside of Cook County could not post bond at a Chicago police station. (ECF No. 67 at 2, 4.) This is incorrect: Special Order S06-12-02 requires disparate treatment for all persons held on warrants

issued by a judge "outside of the First Municipal District." Exhibit 3, Special Order S06-12-02 (April 24, 2012), Section IV(B)(1)-(3). The "First Municipal District" consists of courts in the City of Chicago. *See Municipal Department Overview*, available at http://www.cookcountycourt.org/ABOUT-THE-COURT/Municipal-Department. That is, an arrestee with a warrant issued from a suburban courthouse, such as Rolling Meadows or Skokie, may not post bond at a Chicago police station under the policy.

II. Relevancy of the "Task Files"

Plaintiffs expect the "task file" for the 2012 amendments to the Special Order to explain why the City abandoned its long-standing policy of permitting all persons arrested on warrants to post bond at the police station. The facts known to the City when it changed its policy should be analyzed with the same care as the facts known to the officers who make an arrest, *Brinegar v. United States*, 338 U.S. 160, 175–76 (1949), use force, *Graham v. Connor*, 490 U.S. 386, 396 (1989), or conclude that they have waited long enough before entering a dwelling to execute a warrant, *United States v. Banks*, 540 U.S. 31, 40 (2003).

The reasonableness of a municipality's explicit policy that impinges on constitutional rights "depend[s] on the balance between its benefits (usually nonpecuniary) and its costs (ditto)." *Edmond v. Goldsmith*, 183 F.3d 659, 661 (7th Cir. 1999). For example, this analytical framework applies to

the constitutionality of a strip search policy: "a balancing of the need for the particular search against the invasion of personal rights that the search entails." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). The determinative question is whether the procedures are "a reasonable balance between inmate privacy and the needs of the institutions." *Florence v. Board of Chosen Freeholders of County of Burlington*, 566 U.S. 318, 339 (2012). Plaintiffs expect that the task file will identify any "needs of the institutions" on which the relied when it adopted a rule limiting which persons arrested on warrants may post bond at the police station.

It is difficult to discern any benefit the City reaps by prohibiting all persons arrested on a warrant issued outside of Chicago from posting bond at the police station. The policy has nothing to do with a judicial determination of probable cause—the judge who issued the warrant has found probable cause. Nor is there any need for a court appearance to set bond on the warrant—the judge who signed the warrant was required to follow Illinois law requiring arrest warrants to "[s]pecify the amount of bail." 725 ILCS 5/107-9(d)(7).

The City has argued in other litigation that the policy it adopted in 2012 was compelled by a "General Administrative Order" of the Circuit Court of Cook County. *Alcorn v. City of Chicago*, 2018 WL 3614010, at *3

(N.D.Ill. 2018). This claim appears to be an after the fact rationalization—the "General Administrative Order," attached as Exhibit 6, was issued in 2015, three years after the City stopped permitting all persons arrested on warrants to post bond at the police station.[1]

The City asserts the following as an affirmative defense in its answer to the amended complaint:

> At all times relevant, Defendant City's policies regarding bonding out people arrested on warrants were mandated by Illinois state law, the Illinois Supreme Court Rules, and/or orders implemented by the Circuit Court of Cook County.

(ECF No. 63, Answer to Amended Complaint at 23.)

Information in the "task file" will shed light on these affirmative defenses and will likely be relevant to plaintiffs' response that reliance on Illinois state law, Illinois Supreme Court Rules, or orders of the Circuit Court of Cook County is not a defense but rather "is a *source* of liability under federal law." *Quinones v. City of Evanston*, 58 F.3d 275, 277 (7th Cir. 1995) (cleaned up).

The "task file" is also likely to contain admissible evidence because documents recently produced by the City show that many persons held on

[1] The General Administrative Order recognizes the right of a defendant who "is able to post the bail set on the warrant issued by the demanding authority" to be admitted to bail. (Exhibit 6.) The Order also does not make the distinction of the Special Order between warrants issued by judges in the City of Chicago and all other judges in Illinois, but between "an arrest warrant issued by an Illinois state court outside of Cook County." (*Id.*)

weekends on warrants issued by judges sitting in the City of Chicago are permitted to post bond at the police station without the overnight stay and appearance in Central Bond Court required by the Special Order.[2] Thus, plaintiffs expect to show that, as in *Fonder v. Sheriff of Kankakee County*, 823 F.3d 1144 (7th Cir. 2016), "the policy in practice may differ from the policy as written." *Id.* at 1146. It is likely that the information in the "task file" about the basis for requiring appearances in Central Bond Court of persons arrested on Chicago warrants on weekends and holidays will be relevant to the plaintiffs' challenge to the "policy in practice." Plaintiffs show below that the Court should not permit the City to hide this information by asserting a privilege that the Illinois Supreme Court held is based on "nothing more than speculation."

III. The City Is Unable to Justify the Need to Conceal the Reasons for Adopting the Putatively Unconstitutional Policy

The City does not dispute that in *Birkett v. City of Chicago*, 184 Ill.2d 521, 705 N.E.2d 48 (1998), the Illinois Supreme Court rejected the City's assertion "that governmental officials would withhold giving advice they believe is necessary and correct, based merely upon the remote possibility that

[2] Plaintiffs' counsel used information posted by the City on http://publicsearch1.chicagopolice.org/ to identify 1,148 persons arrested on a warrant on a Saturday or a Sunday and permitted to post bond. Counsel subsequently reviewed 28 of these reports obtained through a document request. Each report shows that a person held on a warrant issued in the City of Chicago was released from the police station on a Saturday or Sunday after posting cash bond.

it could some day be produced in litigation." 184 Ill.2d at 532-33, 705 N.E.2d at 53. The Illinois Supreme Court described the City's argument as "nothing more than speculation." 184 Ill.2d at 532, 705 N.E.2d at 53.

The Court should reject the City's invitation to ignore *Birkett*. "State courts are the final arbiters of state law … Federal courts do not reexamine state court determinations of state law questions." *Barger v. Indiana*, 991 F.2d 394, 396 (7th Cir. 1993) (cleaned up). As the court noted in *Valbruna Slater Steel Corp. v. Joslyn Mfg. Co.*, No. 1:15-MC-39-SEB-DKL, 2015 WL 6695510, at *5 (S.D. Ind. Nov. 3, 2015), "[t]here is no reason to extend to state agencies in federal court greater privileges than they enjoy in their own courts under their own law." *Id.* at *5; *see also Andersen v. City of Chicago*, No. 16 C 1963, 2019 WL 423144, at *3 (N.D. Ill. Feb. 4, 2019) (following *Valbruna*). The Court should therefore accept *Birkett* as controlling precedent for the proposition that, under Illinois law, a municipality may not withhold in litigation the factual basis for its adoption of a particular policy.

The City does not attempt to justify the need for any privilege in this case, but instead relies on cases that apply the FOIA statutory exemption (ECF No. 71 at 3) or cases that apply a deliberative process privilege without considering *Birkett* or Federal Rule of Evidence 501. (*Id.* at 4-6.) Defendant's contention that state law plays no role in the Rule 501 analysis (*id.*

at 5) is manifestly in error. The Supreme Court made plain in *Jaffee v. Redmond*, 518 U.S. 1 (1996) that "the policy decisions of the States bear on the question whether federal courts should recognize a new privilege or amend the coverage of an existing one." *Id.* at 12. The Seventh Circuit recognized this rule in a case cited by defendant, *Mem'l Hosp. for McHenry County. v. Shadur*, 664 F.2d 1058 (7th Cir. 1981), explaining that federal courts should "consider the law of the state in which the case arises in determining whether a privilege should be recognized as a matter of federal law." *Id.* at 1061.

Nothing in *Shadur* supports defendant's assertion that deference to state rules is appropriate when the state recognizes a privilege but is inappropriate when a state refuses to recognize a privilege. (ECF No. 71 at 6-7.) On the contrary, the same "policy of comity between state and federal sovereignties," *Shadur*, 664 F.2d at 1061, supports deference to a state rule when the state courts have rejected a privilege. The Court should reject the City's position and order production of the task files.

Respectfully submitted,

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