IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DWAYNE FURLOW et al.,

Plaintiffs,

v.

JON BELMAR et al.,

Defendants.

Case No.: 4:16-cv-00254-JAR
Oral Argument Requested

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

1285 Avenue of the Americas
New York, New York 10019-6064
Tel.: (212) 373-3000

CENTER FOR CONSTITUTIONAL RIGHTS

666 Broadway, 7th Floor
New York, New York 10012
Tel: (212) 614-6464

ARCHCITY DEFENDERS

1210 Locust Street, 2nd Floor
St. Louis, MO 63103
Tel: (855) 724-2489

Attorneys for Plaintiffs

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

The St. Louis County Police Department ("SLCPD") has a policy authorizing its officers to issue "Wanteds," teletype orders by which suspects are arrested and detained for purposes of custodial questioning, without any judicial determination of probable cause prior to or promptly after the arrest. In this action, Plaintiffs Dwayne Furlow, Ralph Torres, and Howard Liner—three of the thousands of St. Louis County residents who have been arrested on Wanteds issued by the SLCPD—allege that the Wanted system is unconstitutional. By this motion, they seek certification of two classes of others similarly situated, and to represent those classes in this lawsuit. For the reasons set forth below, the Court should grant their motion for class certification.

Whether St. Louis County's Wanted policy violates the Fourth Amendment is not unique to Mr. Furlow, Mr. Torres, and Mr. Liner (the "Named Plaintiffs"), but is instead common to all the members of the proposed classes. No one disputes that St. Louis County has a policy of issuing Wanteds, and no one disputes that if the Wanted policy is unconstitutional for anyone, it is unconstitutional for everyone. The Named Plaintiffs thus seek to certify classes pursuant to Fed. R. Civ. P. 23(b)(2) (Classes 1 and 2) and 23(b)(3) (Class 1), consisting of:

> Class 1: All persons who, since February 24, 2011 have been arrested pursuant to a Wanted issued by Defendants without a judicial determination of probable cause either prior to or promptly after their arrest, including those persons who were arrested without probable cause.
>
> Class 2: All persons who, since February 24, 2011 have been the subject of a Wanted issued by Defendant St. Louis County and have been denied procedural remedies to quash the Wanted.

Class certification is common in civil-rights cases like this one, because the issues common to the class overwhelm any individual issues, such as the amount of damages. Plaintiffs respectfully submit that they meet the class-certification requirements.

The Rule 23(a) prerequisites: The proposed classes comprise thousands of people whose identities can be ascertained through records and data in the Defendants' possession, thus satisfying Rule 23(a)(1). As set forth in the accompanying summary judgment motion, the parties dispute whether SLCPD officers issue Wanteds without probable cause, but—accepting as true the Defendants' contention that probable cause is always required and always present when a Wanted is issued—whether the SLCPD's Wanted policy is constitutional even on that assumption is a question of law common to each class, thus satisfying Rule 23(a)(2). The Named Plaintiffs are typical of each class, in that each Named Plaintiff was the subject of a Wanted, denied any means with which to quash the Wanted, arrested pursuant to the Wanted policy, and never afforded a judicial determination of probable cause either before or promptly after he was arrested—thus satisfying Rule 23(a)(3). And the Named Plaintiffs and their counsel, all experienced in civil-rights litigation like this, are adequate to represent the interests of each class, thus satisfying Rule 23(a)(4).

The Rule 23(b)(2) requirements: A "single injunction [and] declaratory judgment" declaring the Defendants' Wanted system unconstitutional and enjoining its further use will "provide relief to each member of the class," *Wal-Mart Stores*, *Inc.* v. *Dukes*, 131 S. Ct. 2541, 2557 (2011), satisfying Rule 23(b)(2) as to both classes.

The Rule 23(b)(3) requirements: The common issues of Plaintiffs' claims, including those going to liability, predominate over any individual issues, and a class action is the superior method to litigate the claims in this matter.

For all of these reasons and those set forth below, the Court should grant Plaintiffs' motion.

STATEMENT OF FACTS

Plaintiffs draw these facts from the accompanying declaration of Eric Alan Stone, to which Plaintiffs have attached testimony and exhibits from the depositions in the case, as well as additional record evidence supporting class certification, and from the declaration of Darius Charney. Where possible, Plaintiffs have taken this factual recitation verbatim from their accompanying motion for partial summary judgment, so that the Court does not need to parse fine distinctions in wording between the briefs.

The Parties

Plaintiffs Ralph Torres, Dwayne Furlow, and Howard Liner are all residents of St. Louis County, and each was the target of a Wanted, denied procedural remedies to quash the Wanted, and subjected to arrest and extended detention on a Wanted without a judicial determination of probable cause. Defendant Laura Clements is an SLCPD detective who issued a Wanted for and caused the arrest of Mr. Torres. Defendant Kevin Walsh is an SLCPD detective who issued a Wanted for and caused the arrest of Mr. Furlow. Defendant Christopher Partin is an SLCPD officer who issued a separate Wanted against Mr. Furlow. Officer Ed Schlueter is an SLCPD officer who issued a Wanted for and caused the arrest of Mr. Liner and who is named in the First Amended Complaint as John Doe. *See* Ex. 6, 13:11-14:4 (Schlueter) (acknowledging that he is the John Doe Defendant). Defendant Chief Jon Belmar has been the Chief of Police of St. Louis County since 2014. Defendant St. Louis County operates a police department that is the primary law enforcement agency serving St. Louis County.

The Wanted System in St. Louis County

In St. Louis County, a Wanted is issued by a police officer to authorize all other police officers in the state of Missouri with access to the two law-enforcement databases in which Wanteds are entered to arrest and detain the subject of the Wanted so that the issuing officer can

question him. A Wanted carries the same arrest authority in St. Louis County as a warrant, but a warrant is authorized by a neutral magistrate judge upon a sufficient showing of probable cause.

From 2005-2014, law enforcement agencies issued more than two million Wanteds in Missouri, a state with a population of only six million people. *See* ECF No. 14 at 2. From 2011-2016, more than 15,000 Wanteds were issued by the SLCPD alone. Ex. 59 (SLCPD Wanteds Data 2011–2016). During this same period, more than 2,500 arrests were made pursuant to those SLCPD Wanteds. *Id.*

For decades, SLCPD police officers have issued Wanteds pursuant to SLCPD policy to satisfy a requirement of the County's Prosecuting Attorney's Office ("PAO") that the suspect be interrogated in person before a warrant application will be considered. The record is clear that the sole purpose of Wanteds in St. Louis County is to further a police officer's investigation through custodial interrogation, without which no warrant will be sought. *See, e.g.*, Ex. 15, 26:25-27:4, 28:2-14; 35:6-9, 35:24-36:3 (Burk); Ex. 2, 23:5-12 (Gomez); Ex. 13, 77:9-16 (Morrow); Ex. 3, 29:22-30:20 (Clements); Ex. 4, 42:2-5 (Partin); Ex. 5, 55:25-56:6 (Walsh); Ex. 6, 32:18-25 (Schlueter).

To issue a Wanted, an SLCPD officer calls a computer clerk (known as a "CARE operator") to enter the Wanted into REJIS or MULES, the two electronic databases used by SLCPD officers to issue, view, and store Wanteds and other information pertinent to their law enforcement duties.[1] The CARE operator inputs the information from the officer, including identifying information and the crime for which that person is Wanted, without any independent

[1] REJIS stands for Regional Justice Information Service. Ex. 1, 22:4-5 (Meschke). It is a government agency that operates in much of Missouri and in parts of Illinois. *Id.* at 22:5-6 (Meschke); Ex. 12, 23:23-24:7 (Jennings). MULES stands for Missouri Uniform Law Enforcement System. Ex. 11, 34:21-22 (Woods); Ex. 13, 39:5-17 (Morrow) (explaining that MULES is state-wide and REJIS is local).

assessment of whether or not there is probable cause to sustain the Wanted. Ex. 2, 213:12-17 (Gomez); Ex. 3, 102:2-103:13 (Clements). Once a Wanted has been entered into REJIS or MULES, it can be seen by any officer in any police department that has access to the database. Ex. 1, 101:6-19 (Meschke). Wanteds can remain active for up to three years. *See* Ex. 54, at 5 (Wanted Entry Guide 1-2017).

If an officer runs a person's name through REJIS or MULES, or simply searches those databases for outstanding Wanteds near his location, he will see the Wanted entry. Ex. 3, 208:17-209:2 (Clements). This can happen during a routine traffic stop, in the same way that an officer would run a person's name to determine whether that person has an outstanding warrant. Ex. 15, 28:15-29:1 (Burk). Where the querying officer sees that there is a Wanted for a specific person, he will see only the name (and address, when available) of the subject, the name of the officer who issued the Wanted, and the crime for which the person is wanted for questioning, but not any part of the evidentiary basis for the probable cause determination. *See Id.* at 31:20-33:9 (Burk); Ex. 2, 257:20-24 (Gomez). An officer is then obligated to detain the subject of the Wanted. Ex. 15, 22:23-23:9 (Burk); Ex. 1, 83:1-12 (Meschke).

Subjects of Wanteds often do not know that a Wanted has been issued for them until they are arrested. *See, e.g.*, Ex. 3, 53:8-11 (Clements). In many cases, an individual may suspect that a Wanted has been issued against him or her only because the police officer has threatened to issue the Wanted. *See, e.g.*, Ex. 7, 152:22-153:5 (Furlow). There is no database available to citizens to verify whether a Wanted has been issued, and if so, why. There is also no mechanism by which an individual can address or rectify a Wanted other than surrendering to the authorities. *See, e.g.*, Ex. 4, 65:2-19 (Partin).

Once a person is arrested on a Wanted, he is detained, without a judicial determination of probable cause, so that the officer who issued the Wanted can come to the jail where the person is being detained and question or attempt to question him, to obtain evidence to use in a warrant application to the County Prosecutor. Ex. 2, 39:17-40:1; 131:9-15 (Gomez).

The Wanted System Poses Significant Risks of Constitutional Abuses

As the Court knows, the Civil Rights Division of the U.S. Department of Justice ("DOJ") investigated the Ferguson Police Department after the August 2014 shooting of Michael Brown. Ferguson's own "Wanteds" system—essentially identical to that of the SLCPD—came up in some of the DOJ's witness interviews, and the DOJ's March 4, 2015 report discussed the Wanted system. Ex. 41, at 22–24 (DOJ Ferguson Report). The Report warned that Wanteds serve as an "end-run around the judicial system," and noted that even though the Ferguson Police Department nominally required probable cause and supervisory review before a Wanted could be issued, people were routinely arrested on Wanteds that were not supported by probable cause and that lacked meaningful supervisory review. *Id.* The DOJ concluded that the Wanted system "poses a significant risk of abuse." *Id.* at 22.

In the SLCPD, department policies and procedures are embodied in Departmental General Orders ("G.O.s"). *See* Ex. 2, 77:7-9 (Gomez). For many years, the governing policy on Wanteds did not mention "probable cause" as a requirement to issue a Wanted, although the County maintains (despite the lack of any documentary evidence) that probable cause has always been required to issue a Wanted. Ex. 21 (G.O. 11-26); Ex. 13, 64:8-14 (Morrow). On July 15, 2015, four months after the Ferguson Report found that Ferguson police officers were routinely issuing Wanteds without probable cause, the SLCPD added language to the Wanteds G.O. policy to indicate that probable cause is necessary to issue a Wanted. Ex. 22 (G.O. 15-26). The SLCPD's 30(b)(6) witness confirmed that this change was a direct result of the Ferguson Report,

as did the retired lieutenant who was involved in making the change. Ex. 13, 54:16-55:17 (Morrow); Ex. 15, 135:3-9 (Burk).

On September 14, 2016, the SLCPD issued a new G.O. related to Wanteds, requiring that a supervisor review a Wanted before it is issued. Ex. 23 (G.O. 16-26). The SLCPD admits that mandatory supervisory review prior to issuance of a Wanted was a new policy. Ex. 13, 71:19-23 (Morrow). While a police supervisor must now review a Wanted before issuance, however, there is still no judicial review. Wanteds still operate as an "end-run around the judicial system." *See* Ex. 41, at 22 (DOJ Ferguson Report). And the value of this supervisory review is unclear. Officers Schlueter and Partin each testified that under this new policy they have never had a supervisor reject a proposed Wanted for lack of probable cause. Ex. 6, 67:22-68:1 (Schlueter); Ex. 4, 104:1-6 (Partin). Similarly, the DOJ found that in Ferguson, where supervisory review has been required since at least December 2012, the supervisors stated "that they had never declined to authorize a wanted." Ex. 41, at 24 (DOJ Ferguson Report).

The SLCPD did not conduct a systematic review of its officers or policies in the aftermath of the Ferguson Report. But a senior SLCPD officer, Lt. Morrow, candidly testified: "I recall wondering where we stood as a police department with 20 times the amount of people that Ferguson had, officers—sworn officers, you know, their 30 or 40 to our 800, 850. I'm wondering where we might stand on a review like this, especially regarding wanted." Ex. 13, 75:3-8 (Morrow).

The Experiences of the Named Plaintiffs with the Wanted System

Ralph Torres, Dwayne Furlow and Howard Liner have each been the subject of a Wanted, denied any means with which to rectify their Wanted status, arrested pursuant to a Wanted, and thereafter detained for the purpose of furthering the issuing officer's investigation. In each case, the Named Plaintiff was arrested by an officer other than the officer who issued the

Wanted. In each case, neither the arresting officer nor the issuing officer sought a warrant or a judicial determination of probable cause before or promptly after the arrest.

The experiences of the Named Plaintiffs, detailed more fully below, are representative of the thousands of other individuals in and around St. Louis County who have been the subject of a Wanted.

Plaintiff Ralph Torres's Arrest Pursuant to a Wanted

Mr. Torres's arrest stems from allegations made by his ex-wife during a December 16, 2014 phone call with Detective Clements, and a November 26, 2014 forensic interview of his daughter conducted by the Missouri Department of Social Services ("MDSS") at the Child Center in Wentzville, Missouri. Ex. 31, at 3 (Torres SLCPD IR, 2-15).

Two months after those allegations were first made, on January 27, 2015, Defendant Clements contacted Mr. Torres by phone, reaching his voicemail. *Id*. at 3. Mr. Torres returned her call, stated that he "referred any matters pertaining to his ex-wife to his attorney," and provided Defendant Clements his attorney's contact information. *Id.* Defendant Clements was unable to reach the attorney, so on February 23, 2015, she issued a Wanted for Mr. Torres's arrest. *Id.*

On March 30, 2015, the MDSS closed its case against Mr. Torres for lack of evidence, noting inconsistencies in the accusations, and noting that Mr. Torres's daughter, during the interview, "admitted that her mom told her what to say." Ex. 36, at 1 (MDSS Letter). Defendant Clements did not learn of this until she prepared for her deposition in this case. Ex. 3, 174:22-25 (Clements). Mr. Torres's ex-wife later admitted she made these allegations up. Ex. 8, 44:14-45:1 (Torres).

Two days after the MDSS investigation against him was closed, at approximately 11 a.m. on April 1, 2015, Mr. Torres was in his garage with his eight-year-old son, fixing a bicycle, when

he was approached by SLCPD Officer Scott Leible. Ex. 31, at 6–7 (Torres SLCPD IR, 2-15). Officer Leible had, by coincidence, been in the neighborhood, and, from his car, conducted a computer search for outstanding warrants and Wanteds nearby. *Id.* Seeing Detective Clements's outstanding Wanted for the nearby (but otherwise unknown to him) Mr. Torres, Officer Leible went to Mr. Torres's house, informed him of the Wanted, and arrested him pursuant to that Wanted. Mr. Torres did not struggle or resist. *Id.* At approximately 11:30 a.m., Officer Leible told Detective Clements that he had arrested Mr. Torres. Ex. 28, at 3 (Just. CTR, Torres, 4-1-15). Mr. Torres was eventually booked and processed at the St. Louis County Justice Center at about 5 p.m. *Id.*

Defendant Clements was not on duty at the time. Ex. 3, 235:1-8 (Clements). According to her testimony and to Justice Center records, Clements arrived at the Justice Center at 8:45 p.m. that evening to interview Mr. Torres. Ex. 28, at 4 (Just. Ctr., Torres, 4-1-15); Ex. 3, 215:11-18 (Clements). All agree that Mr. Torres told Defendant Clements that he did not wish to speak with her, and that he invoked his right to an attorney. Ex. 3, 216:14-18 (Clements); Ex. 8, 99:8-11 (Torres).

Defendant Clements then instructed the Justice Center to continue holding Mr. Torres for a full 24 hours. Ex. 8, 102:1-8 (Torres); Ex. 3, 229:24-230:12 (Clements). She explained that her investigation was "complete" at that point, but that holding suspects for a full 24 hours is "just an option we have," and she chose to "utilize it." Ex. 3, 233:2-7 (Clements). The Justice Center records say "H24 for Clements"—*i.e.*, hold for 24 hours, for Detective Clements. Ex. 28, at 4 (Just. Ctr., Torres, 4-1-15).

The next day, Defendant Clements asked the PAO to apply for a warrant for Mr. Torres. They refused, which Detective Clements believes they did for lack of evidence. Ex. 3, 233:10-

17 (Clements); Ex. 31, at 10 (Torres SLCPD IR, 2-15). Mr. Torres was released after nearly 25 hours in police custody, according to Defendants' own records. Ex. 28, at 1–2 (Just. Ctr., Torres, 4-1-15). Mr. Torres's mugshot, which was taken in conjunction with these accusations, remains publicly accessible online. Ex. 57 (Torres Mugshot).

Defendant Clements testified to a pattern and practice consistent with these events: she issues Wanteds to "investigate allegations" and to "either interview [a suspect] or have them invoke and not make a statement" so that she can present a complete investigation to the PAO. Ex. 3, 28:8-25 (Clements).

Plaintiff Dwayne Furlow's Two Wanteds and His Arrest

1. On the morning of November 11, 2015, Mr. Furlow was taking his daughter to preschool when his son called to tell him that their neighbor, Janet Virgin, had been hitting him in the face, and that there was a police officer on the scene. Ex. 7, 150:24-151:10, 152:2-5 (Furlow). The driver of the taxi the son usually takes to school observed the incident. Ex. 4, 212:13-25 (Partin); Ex. 7, 151:6-152:1 (Furlow). Defendant Partin was the officer on the scene. Ex. 7, 125:7-16 (Partin). Mr. Furlow's son handed Defendant Partin his cell phone so he could speak with Mr. Furlow. *Id.* at 125:18-21. Defendant Partin did not take a statement from the taxi driver. *Id.* at 212:13-25.

Over the phone, Mr. Furlow informed Defendant Partin that Ms. Virgin had assaulted his children. *Id.* at 125:22-126:4. Defendant Partin informed Mr. Furlow that Ms. Virgin had accused Mr. Furlow of stealing her phone, and asked Mr. Furlow to return home to be questioned. *Id.* at 186:9-20 (Partin); Ex. 7, 152:15-21 (Furlow); Ex. 32, at 4 (Furlow SLCPD IR, 11-15). Mr. Furlow declined to return to his home to be questioned by Defendant Partin, at which time Defendant Partin said he would enter a Wanted into the system for Mr. Furlow if he

didn't return; Defendant Partin entered a Wanted against Mr. Furlow. Ex. 32, at 4 (Furlow SLCPD IR, 11-15); Ex. 7, 152:22-153:23 (Furlow); Ex. 4, 134:24-135:1 (Partin).

That same day, Mr. Furlow's attorney, Blake Strode, made several attempts to contact Defendant Partin and others at the SLCPD to explain that Mr. Furlow was invoking his Fifth Amendment right to remain silent. Ex. 4, 141:4-17, 142:13-15, 144:20-24; Ex. 7, 195:24-198:10 (Furlow); Ex. 61 (Means Letter).

Despite these diligent efforts, the Wanted remained active for more than a month. Ex. 4, 144:25-145:10 (Partin). Ultimately, Mr. Strode arranged for Mr. Furlow to go to the police station on December 12, 2015 in order to invoke his right to remain silent in person, which he did, so that the Wanted would be canceled and Mr. Furlow would be free of the risk of sudden arrest. Ex.__ 154:20-22 (Partin). The PAO dropped the charges against Mr. . Furlow, noting that this was a "neighbor dispute and the neighbor is not mentally well." Ex. 35 (Furlow Prosecutor's Notes).

2. A little over a month later, on January 25, 2016, Mr. Furlow spoke over the telephone to a different police officer, Defendant Walsh, about unrelated allegations. Ex. 5, 121:14-122:4 (Walsh). Defendant Walsh asked Mr. Furlow to return to his home to be questioned, and Mr. Furlow said he did not want to speak to Defendant Walsh. *Id.* at 122:1-21. Defendant Walsh told Mr. Furlow that if he did not return home and speak with him in person, Defendant Walsh would issue a Wanted. *Id.* at 122:9-15. When Mr. Furlow did not return, Defendant Walsh issued a Wanted against him. *Id.* at 122:22-25. On January 28, 2016, Mr. Furlow was stopped for an unrelated traffic violation, and arrested on Defendant Walsh's Wanted. Ex. 7, 260:19-262:15 (Furlow); Ex. 33, at 5-6 (Furlow SLCPD IR, 1-16). At the time Defendant Walsh was informed that Mr. Furlow was in custody on his Wanted, Mr. Furlow had

already invoked his right to remain silent, so Defendant Walsh did not attempt to interrogate Mr. Furlow. *Id.* at 6; Ex. 5, 136:5-24 (Walsh). Mr. Furlow was held for just over 24 hours and released. Ex. 27, at 1-2 (Just. Ctr. Furlow, 1-29-16). No charges were brought against Mr. Furlow.

Plaintiff Howard Liner's Two Wanteds and His Arrest

1. An SLCPD officer issued a Wanted against Mr. Liner on March 23, 2015 after his girlfriend reported that he had stolen her car. Ex. 29, at 3 (Liner, SLCPD IR, 3-15). After the Wanted was live in the computer system, the officer determined that the vehicle had actually been repossessed by Mr. Liner's girlfriend's loan company, and that the accusation against Mr. Liner was baseless; at this point, the Wanted was cancelled. *Id.* From the time the Wanted was issued until it was cancelled, Mr. Liner was subject to arrest at any moment.

2. The second Wanted against Mr. Liner arose out of an incident in the summer of 2015 in which Mr. Liner was accused by his acquaintance Jaylen Davis and Mr. Davis's mother of stealing car tires and rims from their front lawn. Ex. 30, at 5 (Liner, SLCPD IR, 8-15); Ex. 6, 104:9-106:11 (Schlueter). Neither Mr. Davis nor his mother said they had seen Mr. Liner take these items. *Id.* Nevertheless, on these statements alone, Officer Ed Schlueter issued a Wanted against Mr. Liner on August 25, 2015. He then made no further attempts to investigate these allegations. *Id.* at 122:1-4.

On October 5, 2015, officers from the St. Louis Metropolitan Police Department ("SLMPD") happened upon Mr. Liner in an argument outside of a restaurant. Ex. 38 (SLMPD Liner). From their computer, they learned about Defendant Schlueter's outstanding Wanted, and arrested Mr. Liner. *Id.* Because he was arrested by a separate law enforcement agency than the one that issued the Wanted, Mr. Liner was booked, processed and held by the SLMPD, and then

conveyed to SLCPD, where he was again booked, processed, and held, all as a result of Defendant Schlueter's Wanted. *Id.*; Ex. 26 (Just. Ctr. Liner, 10-5-15); Ex. 38 (SLMPD Liner). Defendant Schlueter did not even question Mr. Liner until he had been in custody for some 29 hours. Ex. 26 (Just. Ctr. Liner, 10-5-15) In that interrogation, Defendant Schlueter quickly determined that the stolen tires and rims could not possibly have fit in the trunk of Mr. Liner's car, given its make and model. Ex. 6, 143:6-9 (Schlueter). Defendant Schlueter was quite clear that Mr. Liner's vehicle negated probable cause: "I asked about the type of vehicle he was driving, and pretty quickly I determined that I don't have probable cause and he should be released." *Id.* "[S]o I told them, I've got nothing, you know, let him go . . . ." *Id.* at 144:24-145:1. Defendant Schlueter was also quite clear that prior to that point, he had not tried to determine what kind of car Mr. Liner drove. *Id.* at 116:1-117:1.

Mr. Liner was held for approximately 30 hours and was never charged with a crime. Ex. 26 (Just Ctr. Liner, 10-5-15); Ex. 38 (SLMPD Liner). His mugshot, which was taken in conjunction with these accusations, remains publicly accessible online. Ex. 56 (Liner Mugshot).

ARGUMENT

Plaintiffs seeking class certification bear the burden of showing that the class should be certified and that the requirements of Rule 23 are met. *See Mangold* v. *Lincoln Cty.*, No. 4:10-CV-1991, 2011 WL 3880561, at *2 (E.D. Mo. Aug. 31, 2011) (citing *Coleman* v. *Watt*, 40 F.3d 255, 258 (8th Cir. 1994)); Fed. R. Civ. P. 23. Here, the Named Plaintiffs seek certification of two classes, and to represent each of them:

> Class 1: All persons who, since February 24, 2011 have been arrested pursuant to a Wanted issued by Defendants without a judicial determination of probable cause either prior to or promptly after their arrest, including those persons who were arrested without probable cause.

Class 2: All persons who, since February 24, 2011 have been the subject of a Wanted issued by Defendant St. Louis County and have been denied procedural remedies to quash the Wanted.

I. The Proposed Classes Satisfy the Prerequisites of Rule 23(a)

A. Rule 23(a)(1): Numerosity, Impracticality, and Ascertainability

Rule 23(a)(1) requires that the class be so numerous that joinder of all members would be impracticable. "To be impracticable does not mean that joinder must be impossible, but it does require a showing that it would be extremely difficult or inconvenient to join all members of the class." *Boswell* v. *Panera Bread Co.*, 311 F.R.D. 515, 527 (E.D. Mo. 2015) (citation omitted). Courts in this Circuit have routinely certified classes of several hundred individuals, and, on occasion, as few as twenty individuals. *See Id.* (61 individuals spread across several states); *see also Ark. Educ. Ass'n* v. *Bd. of Edu. of Portland, Ark. Sch. Dist.*, 446 F.2d 763, 765-766 (8th Cir. 1971) (class of 17–20 members); *Tinsley* v. *Covenant Care Servs., LLC*, No. 1:14-CV-00026, 2016 WL 393577, at *7 (E.D. Mo. Feb. 2, 2016) ("It has been consistently held that joinder is impracticable where the class is composed of more than 40 persons."). In addition to the size of the class, the Court may also consider the nature of the action, the size of the individual claims, the inconvenience of trying individual suits, and any other factor relevant to the practicability of joining all the putative class members. *Tinsley*, 2016 WL 393577, at *7.

Here, Defendants' data reflect that 15,712 Wanteds were issued by SLCPD during the class period, and 2,677 arrests were made pursuant to those Wanteds during that same period. Ex. 59 (SLCPD Wanteds Data 2011–2016). Many if not all of these arrests occurred prior to, and without a prompt, subsequent, judicial determination of probable cause, given SLCPD's policy of issuing a Wanted and effecting a corresponding arrest solely for the purpose of conducting a custodial interrogation to obtain evidence to support a potential judicial determination of probable cause. And the lack of a procedural means to quash a Wanted—the

additional requirement of Class 2—is true for everyone for whom a Wanted was issued, as it is undisputed that no such procedural means exist.

The law also requires that the members of a proposed class be readily identifiable "with reference to objective criteria." *Sandusky Wellness Center, LLC* v. *Medtox Scientific, Inc.*, 821 F.3d 992, 995 (8th Cir. 2016). In this regard, the Eighth Circuit has rejected the "more stringent requirement for ascertainability" that some other circuits use, *Golan* v. *Veritas Entm't, LLC*, No. 4:14-CV-00069, 2017 WL 193560, at *2 (E.D. Mo. Jan. 18, 2017), requiring only that the Court be able to determine objectively who is in the class without "lengthy, individualized inquiries." *Glen* v. *Fairway Indep. Mortg. Corp.*, 265 F.R.D. 474, 477 (E.D. Mo. 2010) (citation omitted).

Here, there is no concern that the class is defined in terms of subjective criteria that require extensive inquiry or fact-finding. The identities of the persons arrested on Wanteds and the dispositions of their arrests are all contained within data in the possession of the County, which the County does not dispute. Should the court certify the putative classes, Plaintiffs will seek the identity of the class members in the course of the Phase II discovery contemplated by the Parties' scheduling order. *See Betances* v. *Fischer*, 304 F.R.D. 416, 431-432 (S.D.N.Y. 2015) ("Defendants are in possession of databases that identify each restriction that was placed on each class member.").

B. Rule 23(a)(2): Commonality

Rule 23(a)(2) requires a plaintiff to show that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2); *Tinsley*, 2016 WL 393577, at *8. The Rule requires only "a single common question" that unites the proposed class. *Wal-Mart Stores*, *Inc.* v. *Dukes*, 131 S. Ct. 2541, 2556 (2011). Factual differences among the plaintiffs do not negate commonality. Rather, commonality exists "where the question of law linking the class members is substantially related to the resolution of the litigation even though the individuals are not identically situated."

Paxton v. *Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982) (citations omitted); *see also Boswell*, 311 F.R.D. at 527.

As set forth in the accompanying motion for partial summary judgment, the Named Plaintiffs contend that the Wanted policy violates the Fourth Amendment. In that motion, they present a facial challenge to a governmental policy. A uniform policy is a paradigmatic example of a common question of law satisfying Rule 23(a)(2). *See Tinsley*, 2016 WL 393577, at *8 ("[t]hese questions are capable of common resolution because in each case, Defendants applied a uniform policy"); *Van Orden* v. *Meyers*, No. 4:09-CV-00971, 2011 WL 4600688, at *7-8 (E.D. Mo. Sept. 30, 2011); *Morgan* v. *UPS of Am.*, 169 F.R.D. 349, 356 (E.D. Mo. 1996) ("The alleged presence of a discriminatory practice or policy is sufficient to satisfy the commonality requirement") (*citing Paxton*, 688 F.2d at 561); *Rentschler* v. *Carnahan*, 160 F.R.D. 114, 116 (E.D. Mo. 1995) ("Whether the conditions, practices and policies of defendants, as they relate to PCC's conditions of confinement, are unconstitutional is a common issue for all present and future [class members].").

And although that one question is sufficient, there are other common questions as well, including whether the training that the SLCPD and its leadership provide to its officers is sufficient to satisfy the requirements of *Monell* v. *Dep't of Soc. Servs.*, 436 U.S. 658 (1978), whether the SLCPD actually enforces its newly imposed requirement that a supervisor review a Wanted prior to issuance, and whether officers actually issue Wanteds without probable cause on a regular basis.

Moreover, Plaintiffs' contentions "are of such a nature that [they are] capable of classwide resolution," such that "determination of [their] truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart*, 131 S. Ct. at 2551.

Indeed, the questions common to Plaintiffs are those that drive the present litigation, and present the possibility for class-wide resolution of Plaintiffs's claims.

That each Wanted reflects, on some level, its own, distinct facts does not bar a finding of commonality, because the Wanteds result from a uniform policy. *See Bouaphakeo* v. *Tyson Foods Inc.*, 765 F.3d 791, 797 (8th Cir. 2014), *aff'd*, 136 S. Ct. 1036 (2016); *DeBoer* v. *Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995). The inquiry is not whether "every class member need be affected by a statute, administrative practice, or institutional condition in an identical manner," but whether "the harm complained of be common to the members of the class." *Van Orden*, 2011 WL 4600688, at *6-7.

C. Rule 23(a)(3): Typicality

Rule 23(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. *See Rikard* v. *U.S. Auto Protection, LLC*, 287 F.R.D. 486, 490 (E.D. Mo. 2012); *see also* Newberg on Class Actions § 3:28 (5th Ed.). "The inherent logic of the typicality requirement is that a class representative will adequately pursue her own claims, and if those claims are typical of those of the rest of the class, then her pursuit of her own interest will necessarily benefit the class as well." Newberg § 3:28. Courts in this Circuit have recognized the tendency to merge the typicality with the commonality analysis. *See Paxton*, 688 F.2d at 562. To give the typicality prong independent meaning, the Eighth Circuit requires a demonstration that there are other members of the class who have the same or similar grievances as the plaintiffs. *Rikard*, 287 F.R.D. at 490. Still, the typicality burden is "not an onerous one." *Id.* (citing *Donaldson* v. *Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir. 1977)).

Named Plaintiffs' claims, defenses, and injuries are typical of those of the putative class members. Each of them is a member of each of Classes 1 and 2. Like many others in and around St. Louis County, each Named Plaintiff was arrested pursuant to a Wanted and detained

for purposes of interrogation, rather than to allow for a prompt judicial determination of probable cause. Like the thousands of others who have been the subject of Wanteds during the class period, each Named Plaintiff was denied any procedural remedies to quash the Wanted prior to arrest or self-surrender. While the individual crimes for which the Named Plaintiffs were arrested are, of course, unique to them, there is nothing atypical about any of their experiences.

D. Rule 23(a)(4): Adequacy

Rule 23(a)(4)'s adequacy requirement focuses on "whether: (1) the class representatives have common interests with the members of the class, and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Tinsley*, 2016 WL 393577, at *9 (quoting *Paxton*, 688 F.2d at 562-63).

The Named Plaintiffs themselves have actively pursued their own claims, and claims on behalf of the class. Each has responded to document requests and interrogatories, and each has been deposed. Each is prepared to continue to do whatever is required of him as a class representative. And there is no evidence to suggest that any of them has interests or strategies that diverge from those of the class as a whole. *See Rentschler* v. *Carnahan*, 160 F.R.D. 114, 117 (E.D. Mo. 1995).

Class counsel, too, meet the adequacy requirement. ArchCity Defenders, as its name implies, is a local organization with experience litigating both criminal cases and complex civil-rights matters in St. Louis. Its lawyers have extensive knowledge of the Wanted system from their representation of individuals arrested pursuant to Wanteds. *See* Declaration of Darius Charney, at ¶¶ 4–5. The Center for Constitutional Rights is a non-profit civil rights organization that has represented plaintiffs in civil rights litigation, including large federal class actions, since 1966. *Id.* at ¶¶ 6–7. And the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP has decades of experience in complex litigation, advocacy in the public interest, civil-rights cases,

and class actions, and has the resources to represent a class of the size proposed here. *Id.* at ¶¶ 8–10.

II. The Proposed Classes Satisfy the Additional Requirements of Rule 23(b)(2)

The Named Plaintiffs seek certification of both Class 1 and Class 2 under Rule 23(b)(2), which encompasses claims that defendants have "acted or refused to act on grounds that apply generally to the class, so that final injunctive relief of corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Rule 23(b)(2) applies "when a single injunction or declaratory judgment would provide relief to each member of the class." *Dukes*, 131 S. Ct. at 2557. The Eighth Circuit has expressed a preference for a liberal reading of Rule 23(b)(2) in the context of civil rights suits. *See Coley* v. *Clinton*, 635 F.2d 1364, 1378 (8th Cir. 1980). Indeed, "civil rights cases against parties charged with unlawful [ ] discrimination are prime examples of what (b)(2) is meant to capture." *Dukes*, 131 S. Ct at 2557 (quoting *Amchem Prods*, *Inc.* v. *Windsor*, 521 U.S. 591, 614 (1997)); *accord* Adv. Comm. Note to 1966 Amendment, Fed. R. Civ. P. 23 (denoting as examples "various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class," for which 23(b)(2) was proper).

By arresting and detaining all members of Class 1, without recourse, pursuant to the Wanted system, and having issued Wanteds against all members of Class 2, without providing means with which to quash the Wanted, Defendants have acted as to each class on grounds generally applicable to that class such that equitable relief as to each class is appropriate. Although Plaintiffs also seek monetary damages, first and foremost they seek an injunction ending the issuance of Wanteds. Their request for that relief satisfies Rule 23(b)(2).

III. Proposed Class 1 Satisfies the Additional Requirements of Rule 23(b)(3)

In addition to certifying Classes 1 and 2 under Rule 23(b)(2), Plaintiffs move separately to certify Class 1 under Rule 23(b)(3) so that Plaintiffs may seek damages. Federal Rule of Civil Procedure 23(b)(3) requires that this Court find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." It is common for civil rights cases to be certified simultaneously under Rules 23(b)(2) and (b)(3). *See Betances*, 304 F.R.D. at 416; *Stinson* v. *City of N.Y.*, 282 F.R.D. 360, 373 (S.D.N.Y. 2012); *Jermyn* v. *Best Buy Stores, L.P.*, 276 F.R.D. 167 (S.D.N.Y. 2011); *Casale* v. *Kelly*, 257 F.R.D. 396, 412 (S.D.N.Y. 2009). As in *Stinson*, in civil rights cases seeking both 23(b)(2) and (b)(3), "without class certification, it is likely that the constitutional violations Plaintiffs allege would go unadjudicated, as many of the potential class members do not possess the knowledge or resources to prosecute a lawsuit, and the relatively small amount of damages suffered by each individual plaintiff decreases the possibility of individual lawsuits being filed." 282 F.R.D. at 383. Certifying both classes at the same time increases the efficiency of this litigation. The Eighth Circuit has acknowledged that the use of such "hybrid" certification—in which the court simultaneously litigates classwide issues of liability and individualized damages—is "an available approach that is gaining ground in class action suits." *See Ebert* v. *Gen. Mills, Inc*., 823 F.3d 472, 480 (8th Cir. 2016) (citing Newberg on Class Actions § 4:38 (5th Ed.)).[2]

[2] Alternatively, if the Court believes that Plaintiffs cannot meet the requirements of Rule 23(b)(3) at this stage, it can also bifurcate the litigation into a liability phase and a damages phase and address the certification of a Rule 23(b)(3) damages class if it rules in favor of plaintiffs on liability. *See, e.g.*, *Marshall* v. *Kirkland*, 602 F.2d 1282, 1296 (8th Cir. 1979); *Morgan* v. *UPS of Am.*, 169 F.R.D. 349, 358 (E.D. Mo. 1996); *Wakefield* v. *Monsanto Co.*, 120 F.R.D. 112, 117 (E.D. Mo. 1988); *Bond* v. *Liberty Ins. Corp.*, No. 2:15-cv-04236, 2017 WL

A. Common Liability Issues Predominate Over Any Individual Issues

"The predominance inquiry requires an analysis of whether a prima facie showing of liability can be proved by common evidence or whether this showing varies from member to member." *Halvorson* v. *Auto-Owners Ins. Co.*, 718 F.3d 773, 778 (8th Cir. 2013) (citation omitted); *see also Tyson Foods, Inc.* v. *Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016) ("a common question is one where 'the same evidence will suffice for each member to make a prima facie showing [or] the issue is susceptible to generalized, class-wide proof.'").

As described above, and in their accompanying motion for partial summary judgment, the Named Plaintiffs have brought a common, class-wide challenge to the constitutionality of the SLCPD's Wanted system. Where "a proposed class challenges a uniform policy, the validity of the policy tends to be the predominant issue in the litigation." *Fonder* v. *Sheriff of Kankakee Cty.*, No. 12-CV-2115, 2013 WL 5644754, at *3 (C.D. Ill. Oct. 15, 2013) (citation omitted); *accord Perez* v. *Alta-Dena Certified Dairy, Ltd. Liab. Co.*, No. CV 13-7741-R, 2016 WL 9047150, at *2 (C.D. Cal. Oct. 24, 2016). That is true here: the predominant issues at trial will involve the nature of the Wanted policy, the reasons for its existence, the alternatives available, and the manner in which it is implemented. While there will necessarily be evidence about the facts of individual Wanteds, those facts will be relevant to prove the existence of overall, class-wide patterns of behavior by the Defendants.

That Defendants' policies and practices may have injured different class members to different degrees does not undermine the conclusion that common issues of law and fact predominate. To establish predominance under *Comcast Corp.* v. *Behrend*, 133 S. Ct. 1426, 1432 (2013), Plaintiffs need show only that damages of all class members are attributable to a

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1628956, at *3-4 (W.D. Mo. May 1, 2017); *Huyer* v. *Wells Fargo & Co.*, 295 F.R.D. 332, 344-45 (S.D. Iowa 2013); *Carlson* v. *C.H. Robinson Worldwide*, Inc., No. 02-CV-3780, 2005 WL 758602, at *16-17 (D. Minn. Mar. 31, 2005).

uniform theory of liability. *See also, e.g.*, *Cromeans* v. *Morgan Keegan & Co.*, 303 F.R.D. 543, 559 (W.D. Mo. 2014); *Barfield* v. *Sho-Me Power Elec. Coop.*, No. 11-cv-04321, 2013 WL 12145824, at *3 (W.D. Mo. July 8, 2013).

In civil-rights cases in which plaintiffs allege a loss of liberty, courts have recognized that there are classwide models available to calculate damages. For example, in *Betances*—which involved a challenge to a uniform post-supervised-release policy—the court noted that "the jury could determine a particular amount of damages for each day of incarceration. This amount could then be multiplied by the number of days each class member was incarcerated." 304 F.R.D. at 432. And courts recognize a monetary award to compensate for improper detention. *See, e.g.*, *Snider* v. *City of Cape Girardeau*, No. 1:10-CV-100, 2012 WL 6553710, at *2-3 (E.D. Mo. Dec. 14, 2012) ("Taking into account the length of plaintiff's detention—approximately seven hours—the Court believes that an award of $7,000 is reasonable and appropriate."); *Pierce* v. *Pemiscot Mem'l Health Sys.*, 25 F. Supp. 3d 1198, 1208-09 (E.D. Mo. 2014) (opining that "even absent such other injuries, an award of several thousand dollars may be appropriate simply for several hours' loss of liberty") (citation omitted). Likewise, in *Augustin* v. *Jablonsky*, later known as *In re Nassau Cty. Strip Search Cases*, "general damages in the amount of $500 per strip search were awarded," with the court noting that "special [individualized] damages sustained by class members is a subject for another day." 819 F. Supp. 2d 153, 158 (E.D.N.Y. 2011).

The parties' scheduling order calls for additional discovery in Phase II if a class is certified. ECF No. 11 at 3. As a part of Phase II discovery, the Named Plaintiffs will offer expert testimony regarding the damages suffered by the class, and a calculation of those damages, based on the information produced by the Defendants in that discovery. While the

amounts are not yet known, the law is clear that differences in damages in civil-rights cases like this one are not an impediment to class certification under Rule 23(b)(3) where there is a predominant, common question of liability.

B. A Class Action Is a Superior Method of Adjudicating These Claims

Rule 23(b)(3) also requires that a class action be "superior to other available methods for fairly and efficiently adjudicating the controversy." Fed. R. Civ. P. 23(b)(3). Relevant factors include: (A) the class members' interests in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already begun by or against class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. Fed. R. Civ. P. 23(b)(3)(A)-(D); *Arnold* v. *DirecTV, LLC*, No. 4:10-CV-352-JAR, 2017 WL 1251033, at *12 (E.D. Mo. Mar. 31, 2017).

To the Named Plaintiffs' knowledge, there are no other pending lawsuits challenging the constitutionality of the Wanted system or seeking damages arising out of the issuance of a Wanted. The class includes hundreds or thousands of St. Louis residents who lack the financial wherewithal to prosecute claims against the Defendants individually. Even if there were widespread litigation challenging Wanteds (and, to be clear, this is the only such case), it would make sense to concentrate those claims in this one forum. A class action is the ideal means of adjudicating these civil-rights cases.

CONCLUSION

For the foregoing reasons, the Named Plaintiffs respectfully request that the Court certify Class 1 pursuant to Rules 23(b)(2) and (b)(3), and Class 2 pursuant to Rule (23)(b)(2), and appoint the Named Plaintiffs and their counsel at ArchCity Defenders, the Center for

Constitutional Rights, and Paul, Weiss, Rifkind, Wharton & Garrison LLP as counsel to the class.

Dated: August 25, 2017

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON AND GARRISON LLP

By: /s/ Eric A. Stone
Eric A. Stone (*pro hac vice)*
Timothy J. Holland (*pro hac vice*)
Charles J. Hamilton III (*pro hac vice*)
Elizabeth J. Grossman (*pro hac vice*)
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: 212-373-3000
Fax: 212-757-3990
tholland@paulweiss.com
estone@paulweiss.com
chamilton@paulweiss.com
egrossman@paulweiss.com

and

ARCHCITY DEFENDERS, INC.

Thomas B. Harvey #61734MO
Michael-John Voss #61742MO
Blake A. Strode #68422MO
Nathaniel R. Carroll #67988MO
1210 Locust Street, 2nd Floor
St. Louis, MO 63103
Tel: 855-724-2489
Fax: 314-925-1307
tharvey@archicitydefenders.org
mjvoss@archcitydefenders.org
bstrode@archcitydefenders.org
ncarroll@archcitydefenders.org

and

CENTER FOR CONSTITUTIONAL RIGHTS

Baher Azmy (*pro hac vice*)
Darius Charney (*pro hac vice*)
Omar Farah (*pro hac vice*)
Angelo Guisado (*pro hac vice*)
666 Broadway, 7th Floor
New York, New York 10012
Tel: 212-614-6464
Fax: 212-614-6499
bazmy@ccrjustice.org
dcharney@ccrjustice.org
ofarah@ccrjustice.org

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the *Plaintiffs' Memorandum of Law in Support of Plaintiffs' Motion for Class Certification* was served upon all parties of record by this Court's CM/ECF electronic notification system on this 25th day of August, 2017:

/s/ *Eric A. Stone*
Eric A. Stone