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INTRODUCTION

The plaintiffs seek a declaratory judgment and injunctive relief against an ongoing program of the New York City Police Department under which police officers, acting without suspicion of unlawful activity, are searching the personal belongings of people seeking to use the New York City subway system. Complaint at 11-12, ¶¶ 2, 4 (Aug. 4, 2005). Pursuant to this program, the millions of people who use the subway system every day are subject to suspicionless police searches.

The NYPD subway search program is unprecedented in this country, and no court has ever endorsed anything like it. The Supreme Court and the Second Circuit, however, have issued many rulings establishing the legal standards governing the important constitutional issues raised by the NYPD's program. Those cases establish that the City bears the burden of justifying its search program and that that burden is a heavy one.

At this point in the proceedings -- with this memorandum being submitted at the same time the City will be submitting its evidence and arguments in support of the NYPD program -- the plaintiffs are not now in a position to respond to whatever factual and legal contentions the City may offer to justify its program. Rather, the plaintiffs' response will have to await completion of the trial and post-trial submissions.

In this pre-trial memorandum, however, the plaintiffs do address the elements of the initial burden they bear to demonstrate the NYPD subway search program implicates the Fourth Amendment. In addition, the plaintiffs spell out the basic legal standards that govern the burden the City bears in justifying its program under the Fourth Amendment.

STATEMENT OF FACTS

The plaintiffs believe that the facts underlying this controversy are largely undisputed. Though certain facts will be adduced at trial, the declarations being submitted in advance of the trial provide a relatively complete picture of the New York City subway system, of the implementation and operation of the NYPD search program, and of the plaintiffs.

The New York City Subway System

The New York City subway system is the largest, most heavily used subway system in the United States. On an average weekday, people enter the system approximately 4.7 million times and on a typical weekend day do so 2.6 million times, with ridership in 2004 totaling approximately 1.4 billion. Operated by the Metropolitan Transportation Authority (MTA), the system serves as the primary form of transportation for millions of New Yorkers getting to work, visiting friends, or simply moving about the City. See Plaintiffs' Proposed Findings of Fact (hereinafter "PPFF") 21-22.

The New York City subway system is a direct, physical extension of the sidewalks of New York City. Every station in the system connects directly to City sidewalks, and members of the public are free to enter subway stations without restriction 24 hours a day. PPF 23.

People entering subway stations and wishing to ride on a train must pass through a turnstile entrance. As has been the case since the subway system opened in 1904, the only restriction on entry into this area of the system is payment of the fare, which currently is \$2.00 for a single ride. Entry is accomplished by "swiping" a fare card -- known as a "Metrocard" -- through a turnstile. Metrocards can be purchased by anyone at automated vending machines at

every station, which are accessible without restriction and accept cash (as well as other forms of payment), and at many newsstands throughout the city. People can obtain Metrocards and pass through turnstiles without any scrutiny or interaction with MTA personnel whatsoever; indeed, as the MTA has started to close token booths at some stations and has increased the use of what are known as High-Entrance/Exit Turnstiles, people increasingly enter the system without ever even being seen by an MTA employee. PPF 24.

The New York City subway system is comprised of 26 lines, with 468 stations. Each of the 26 lines connects to another line in the system. As a result of these connections, a person can reach any point in the system by entering any single entrance to the system and riding that line or by transferring between lines. Once in the system through any entrance, a person need not leave the system to reach any other point in the system. PPF 26.

Many of the 468 stations in the New York City subway system have more than one entrance where someone can pass through a turnstile or set of turnstiles into the system. (Some of these entrances feature standard turnstiles and some feature so-called MetroCard High Entrance/Exit Turnstiles). To take just a few examples of major stations, the Times Square Station has 13 separate entrances; Grand Central has 7 separate entrances; Penn Station has 6 separate entrances; Broadway-Fulton Street has 11 separate entrances; Atlantic Avenue/Pacific Street has 5 separate entrances and Borough Hall has 5 separate entrances. (In most instances, entrances are not visible from other entrances to the same station.) The entire system has at least 1000 separate entrances where someone can pass through a turnstile or set of turnstiles into the system. PPF 27.

Many subway stations, particularly in Manhattan, are located very close to each other. In

many instances, an entrance to a particular subway station is within ten blocks or less of the entrance to another station, whether that station is on the same line or a different line. PPF 28.

The New York City subway system operates 24 hours a day, 365 days a year. All 468 stations of the system have at least one entrance that is open 24 hours a day. (Five lines – the 3, B, C, M and V -- do not run all night, but all their stations are served by other lines at all times.) Once a person enters the New York City subway system, he or she is permitted to remain in the system indefinitely. PPF 29-30.

Thus, as a result of the connections between the lines of the subway system and as a result of the system's 24-hour operation, a person can easily get to any particular location inside the system at any particular time. Specifically, that person can enter any one of the system's hundreds of entrances and then can make his way to the intended spot. Similarly, the person can enter the system hours, even days before the appointed time, and then simply remain in the system until that time. Thus, with a minimal amount of planning, a person can reach any point in the subway system at any appointed time, even if some or many entrances to the system are not available to that person. PPF 31.

All of the basic features of the New York City subway system as described above are widely known and readily ascertainable from a review of MTA maps, the MTA website or many other websites, from publications (including travel guides) that include information about the subway system, or from simple observation of and use of the system. PPF 32.

By October 31, 2005, the date this case is scheduled to go to trial, approximately 400 million people will have entered the New York City subway system since the NYPD implemented its search program. PPF 33.

The NYPD Subway Search Program

On July 21, 2005, Mayor Michael Bloomberg announced that the NYPD, in response to an attempted attack on the London subway earlier that day, planned to start a program of “random” searches of the bags of people seeking to use the New York City subway system. In making the announcement, Mr. Bloomberg said of NYPD Commissioner Raymond Kelly:

He’s going to institute some random searches of bags that people are carrying over the next few days but I want to emphasize that there is still no threats to this city that have been explicitly made, or to our subway or bus system. People should go and feel comfortable in using it.

Stipulation 1 (attached as Exhibit D to Affirmation of Palyn Hung (Oct. 26, 2005)). One day later, he said of the search program:

You know, clearly we’ll do it for a little while. It is partially designed to make people comfortable. That’s part of the security thing. You want to make people comfortable. You also want to have substance and make sure that you keep the potential threats away. We still have not had any specific threats that the public should worry about.

Stipulation 2 (attached as Exhibit D to Affirmation of Palyn Hung (Oct. 26, 2005)).

According to NYPD Deputy Chief Owen Monaghan, the official produced by the City to provide deposition testimony about the operation of the program, the Department uses a standard procedure in operating its subway-search checkpoints. The basic operational features of the checkpoints, as explained by Chief Monaghan, are as follows:

- At subway entrances at which subway search checkpoints are set up, NYPD officers set up a table in close proximity to the turnstiles just before one would pass through the turnstile to enter the system. PPF 35.
- At subway entrances at which subway search checkpoints are set up, NYPD officers post a sign that is intended to alert persons to the possibility of a search before they might be selected for a search, and bullhorns are routinely used to announce that searches are taking place, giving people considerable advance warning that searches are taking place

and giving them warning before they would be in position to be selected for a search. Thus, the NYPD subway search program is designed and has been implemented to give people ample notice that searches are taking place before they might be selected for search. PPF 36-38.

- At subway entrances at which subway search checkpoints are set up, NYPD officers do not put in place any controls, such as ropes or barricades, to control the flow of passengers entering the turnstile area. PPF 39.
- Under the NYPD's subway search program, people are selected for search according to a mathematical formula (e.g. every 12th or every 15th person) and without regard to the behavior or activity of the person. PPF 41.
- The NYPD is searching the bags or containers of people without the bag or container having to be any minimum size. Thus, everything from women's purses to large backpacks are subject to search. PPF 43.
- Under the NYPD's subway search program, a person selected for search is directed to open any bags or containers or unzip openings so the officer can visually inspect their contents. Police officers manipulate items to assist in the visual inspections. PPF 44.
- Under the NYPD's subway search program, no action -- including following the person -- is taken against a person who is selected for search, objects to the search, and chooses to walk away from the checkpoint. The person therefore is free to enter the system through another entrance. Similarly, no action -- including following the person -- is taken against a person who sees a checkpoint and chooses to walk away from the checkpoint before being in a position to be selected for a search. The person therefore also is free to enter the system through another entrance. PPF 45-46.

Though the New York City subway system has been entered approximately 400 million times since the NYPD started its search program, the program has not detected any instances of terrorist activity. PPF 49. Indeed, there has not been one instance in which a search under the program has detected unlawful activity of any sort. PPF 50.

It is undisputed -- and apparent to anyone using the subway system since the program went into effect -- that few subway entrances have search checkpoints. During his deposition NYPD Deputy Commissioner for Counter Terrorism Michael Sheehan confirmed that "at any

point in time most of the subway entrances have no checkpoints.” PPF 51. A survey of 5,500 subway turnstile entrances at 3,299 subway stations between August 25, 2005, and September 16, 2005, found a total of 34 searches, representing .62% of entrances checked. PPF 53. It is commonly known that multiple entrances and stations are not being subjected to a container search at any given time. PPF 52.

Given the unique features of the New York City subway system and the specific features of the NYPD subway search program, a person wishing to can easily evade the NYPD checkpoints and enter the system at entrances without checkpoints. Declaration of Gene Russianoff ¶ 20 (Oct. 25, 2005). As the NYPD program has been implemented, hundreds of subway entrances remain open at any time for entry into the system, and once in the system from any single entrance a person can reach any other point in the system at any appointed time. Id.

In light of the specific way it has been designed and implemented and in light of the unique features of the New York City subway system, the NYPD subway search program has no meaningful value in preventing the entry of explosive devices into the system by the terrorists the NYPD is attempting to thwart. See Declaration of Charles Pena ¶¶ 13-25 (Oct. 25, 2005).

The NYPD intends to continue the search program indefinitely. PPF 54.

The Plaintiffs

The plaintiffs are five residents of New York City, all of whom must use the subway to get to work, all of whom have been searched or threatened with search under the NYPD program, and all of whom object to the searches as unwarranted violations of their privacy.

Plaintiff Brendan MacWade was in One World Trade Center on September 11, 2001

when the terrorist attacks occurred. He is a ten-year resident of New York City and works in Jersey City, New Jersey at a financial services company. He commutes to New Jersey via the Port Authority Trans-Hudson station in lower Manhattan. The subway is his only means of getting to and from that station every workday, and to and from his girlfriend's apartment in Inwood, Manhattan several times a week. On July 22, 2005, Mr. MacWade was searched at the A/C/E Chambers Street station. He found the search intrusive and felt violated by it. He is against the search policy because it violates his right to privacy and his Fourth Amendment rights. He does not believe that the necessary act of riding the subway should be conditioned on submitting to a suspicionless search. PPF 1-4.

Plaintiff Andrew Schonebaum is a social worker who attends night classes for his Master's of Business Administration. He lives in Jackson Heights, Queens, and commutes to midtown Manhattan for work. The subway is his only means of transportation. He relies on it to commute to work, attend class, and see friends. On July 22, 2005, his bag was searched at the Roosevelt Avenue subway station in Jackson Heights. He indicated to the police officer who performed the search that he did not agree with it because it was a violation of the Fourth Amendment. Mr. Schonebaum objects to the search policy because it violates his right to privacy and his rights under the Fourth Amendment. He does not want to defy the police in order to protect these rights. He is also concerned that the police are selecting subway stations to search based on the ethnic composition of surrounding neighborhoods. PPF 5-8.

Plaintiff Joseph Gehring, Jr., is a life-long Republican, the son of a retired police captain, and a lawyer. He lives on the Upper West Side of Manhattan and works near Grand Central Terminal. He commutes to work every weekday on the subway and also depends on the subway

to travel frequently to court, client meetings, and social activities. Mr. Gehring has encountered security checkpoints in the subway system on two occasions. One time he changed his route before being asked to be searched. The second time he refused to be searched and left the subway station. He objects to the subway search policy because it conditions his use of the subway upon a waiver of his Fourth Amendment rights. He is also concerned that the search policy could cause him to violate his ethical obligations as an attorney to keep the confidences of his clients. PPF 9-12.

Plaintiff Partha Banerjee lives in Brooklyn and works in Newark, New Jersey. He holds advanced degrees in journalism and biology and works at an immigration policy organization not involved in this lawsuit. His weekday commute to Newark is solely via public transportation. Mr. Banerjee was searched under the subway search policy on October 7, 2005. He found the search intrusive and submitted to it only because he felt he had no choice but to. Mr. Banerjee objects to the subway search policy because under it, the decision to search someone is not founded on criminal suspicion. In addition, he fears that police officers could unlawfully interrogate and detain him because of written materials in his bag that they might find objectionable and is concerned that he may be targeted to be searched because of his dark eyes and skin and his beard. PPF 13-16.

Plaintiff Norman Murphy resides in Mahwah, New Jersey. He is a public servant and works in lower Manhattan. He rides the subway to commute to work from the Port Authority bus terminal. The subway is the only means he has of getting between Port Authority and lower Manhattan. On July 22, 2005, a police officer at the Chambers Street A/C/E subway station asked if he could look in Mr. Murphy's bag. He refused, left that subway station, and arrived at

Port Authority via another subway line. Mr. Murphy objects to the search policy because it is not based on reasonable belief or suspicion that individuals have engaged in criminal conduct and thus, it makes him feel like a criminal. He also objects to it because it is an unwarranted violation of his privacy. PPF 17-20.

ARGUMENT

New York City has on ongoing and indefinite program of conducting suspicionless searches of the personal possessions of people seeking to use the New York City subway system. As a result of that program, the millions of people who rely on the subway system, including the plaintiffs, are subject every day to the possibility of a police search as a condition of riding the subway to work, to visit friends, or simply to move about the city.

The NYPD program implicates core constitutional protections under the Fourth Amendment. Under well-established law, the defendants bear the burden of justifying their unprecedented program of suspicionless searches. Once they have reviewed the defendants' simultaneous submission, the plaintiffs will be in a position to respond to the justifications proffered by the City. In the meantime, in this brief memorandum they address their burden and set out the legal standards governing the City's burden.

I. THE NYPD PROGRAM OF SEARCHING THE POSSESSIONS OF PEOPLE USING THE NEW YORK CITY SUBWAY SYSTEM FALLS SQUARELY WITHIN THE FOURTH AMENDMENT.

Under the NYPD's undisputed program, police officers are requiring people seeking to use the New York City subway system to open their personal belongings -- ranging from large

backpacks to small purses -- for search. As part of the visual inspections of the interiors of subway riders' belongings, police officers also are manipulating interior spaces of bags.

Searches of the closed containers carried by people traveling on public transportation plainly implicate the Fourth Amendment. As the Supreme Court explained in a recent decision in which it held unconstitutional the search of the closed bag of a person riding on a bus, "A traveler's personal luggage is clearly an 'effect' protected by the [Fourth] Amendment." Bond v. United States, 529 U.S. 334, 336 (2000).

As the Court explained in Bond, by using a closed container, the contents of which cannot be seen, the traveler has exhibited an "actual expectation of privacy"; that is, "he has shown that he [sought] to preserve [something] as private." Bond, 529 U.S. at 338 (citation omitted). Moreover, the Court held, an expectation of privacy "is one that society is prepared to recognize as reasonable." Id. (citation omitted).

The core Fourth Amendment protection accorded to personal bags of those using public transportation is highlighted by the Court's decision in Bond. There police officers had not even opened the bag of the defendant but instead had only squeezed the outside of it; moreover, the bag was not in the bus rider's possession but instead on an overhead rack. In an opinion by the late Chief Justice Rehnquist, the Court did not hesitate to find that the inspection of the defendants' bag constituted the type of search that lay at the heart of the Fourth Amendment. See id. at 337-39.

Here, it is undisputed that under the NYPD subway search program police officers are requiring subway riders to open their personal bags for police inspection. Beyond that, they are manipulating the contents of bags as part of the inspections. These inspections plainly are

searches squarely within the Fourth Amendment.

II. THE CLEARLY ESTABLISHED LEGAL STANDARDS GOVERNING SUSPICIONLESS SEARCHES PLACE A HEAVY BURDEN ON THE CITY TO JUSTIFY ITS SUBWAY SEARCH PROGRAM.

Though the NYPD's program of subjecting the millions of subway riders to suspicionless searches is unprecedented, considerable case law exists about the Fourth Amendment analysis that applies to police programs of suspicionless searches. That case law governs this dispute.

The Fourth Amendment generally prohibits searches in the absence of individualized suspicion. Ferguson v. City of Charleston, 532 U.S. 67, 86 (2001); City of Indianapolis v. Edmond, 531 U.S. 32, 37 (2000) (noting that “[a] search or seizure is ordinarily unreasonable in the absence of individualized suspicion”). Since it is undisputed that police officers are searching subway riders without suspicion of wrongdoing, the City must establish that its program falls into one of the narrow exceptions to that rule.

The City seeks to avoid the historical requirement of individualized suspicion by invoking concerns about terrorism to invoke the “special needs” exception. The Supreme Court has yet to rule on the circumstances in which such concerns can qualify a suspicionless search regime for this narrow Fourth Amendment exception, and the ultimate resolution of this threshold question will turn on the final factual record in this matter. See, e.g., Edmond, 531 U.S. at 40-41 (in assessing purpose of roadblock program to determine whether it qualified for exception to individualized-suspicion requirement, reviewing record, including stipulated facts and testimony from defendants, to determine purpose of program).

Even in those highly unusual circumstances in which the government can establish

“special needs,” it still bears a substantial burden in demonstrating that suspicionless searches comply with the Fourth Amendment. As a general matter, the court is to look at the privacy interest involved, the character and degree of the intrusion, and finally to the nature and immediacy of the government’s concerns and the efficacy of the search program in meeting them.

In several recent decisions, the Second has reviewed and applied the special needs doctrine to suspicionless searches. As the court explained in one of its decisions last year:

First, the government must allege a ‘special need,’ the importance of which derives both from the particular context in which it seeks to implement searches . . . and what the searches are designed to discover Secondly, those subject to the search must enjoy a diminished expectation of privacy, partly occasioned by the special nature of their situation, and partly derived from the fact that they are notified in advance of the search policy. Third, the search program at issue must seek a minimum of intrusiveness coupled with maximal effectiveness so that the searches ‘bear a close and substantial relationship’ to the government’s special needs.’

United States v. Lifshitz, 369 F.3d 173, 186 (2d Cir. 2004) (citations and internal quotations omitted). Accord United States v. Palmieri, 392 F.3d 73, 81 (2d Cir. 2004) (“[W]e must weigh the governmental conduct – in light of the purported special need and against the privacy interest advanced -- by analyzing three principal factors: (1) the nature of the privacy interest allegedly compromised by the challenged governmental conduct; (2) the character of the intrusion imposed by the challenged conduct; and (3) the nature and immediacy of the state’s concerns and the efficacy of the governmental conduct in meeting them.”) (citations and quotations omitted).

Application of the special-needs doctrine in a particular controversy is not an abstract exercise. Rather, as the Second Circuit has explained, what is required is a ‘fact-specific balancing of the intrusion . . . against the promotion of legitimate governmental interests.’” N.G.

v. Connecticut, 382 F.3d 225, 231 (2d Cir. 2004) (citing and quoting Board of Education v. Earls, 536 U.S. 822, 830 (2002)).

Given the fact-intensive nature of the application of the special-needs doctrine and the fact that this memorandum is being submitted prior to the introduction of any evidence from the City (which of course bears the burden of justifying its search program), the plaintiffs in this pretrial memorandum cannot and do not respond to the City's claims. However, a few preliminary observations can be made.

First, the millions of subway riders who every day are subject to police searches under the NYPD program do not have a diminished expectation of privacy. The New York City subway system is an integral part of the City; is used as part of the daily life of its residents, workers and visitors; is a direct physical extension of city sidewalks; and is accessible to members of the public without restriction (other than payment of the fare). Just as the Supreme Court in Bond rejected the notion that a person riding a bus had a diminished expectation of privacy in his bag, subway riders in New York city have an undiminished expectation of privacy in their bags.

Second, searches of personal belongings are not minimally intrusive. As already noted, a traveler's bag "is clearly an 'effect' protected by the [Fourth] Amendment." Bond, 529 U.S. at 336. Searches of closed items of a personal nature are significant intrusions on protected privacy interests, for "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." United States v. Ross, 456 U.S. 798, 822-23 (1982).

Finally, the undisputed aspects of the NYPD search program pose serious questions about its effectiveness in deterring terrorist activity. By the time this matter goes to trial, 400 million people will have entered the subway system since the program went into effect, yet the program

has not detected any instance of terrorist activity. As for deterring terrorist activity, the fact that checkpoints are not set up at most subway entrances and the fact that people can freely evade checkpoints and enter the system elsewhere raise obvious questions about value of the program as a deterrent to sophisticated terrorists, as discussed in detail in the declaration from plaintiffs' expert Charles Pena. See Declaration of Charles Pena ¶¶ 12-25 (Oct. 25, 2005). Yet, as the plaintiffs recognize, no final analysis of the effectiveness of the program is possible until all the evidence is adduced in this matter.

CONCLUSION

It is undisputed that the NYPD has implemented a program under which millions of New Yorkers are subject to suspicionless searches. Under well-established law from the Supreme Court and Second Circuit, the defendants therefore bear a substantial burden in seeking to justify their program under the Fourth Amendment. Once the plaintiffs have had an opportunity to review the evidence adduced and arguments advanced by the defendants in support of the program, they will respond fully in their post-trial submissions to the defendants' claims.

Respectfully submitted,

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Dated: October 26, 2005
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CERTIFICATE OF SERVICE

I hereby certify that on October 26, 2005, I caused to be served by United States First Class Mail and by facsimile the attached Plaintiffs' Memorandum of Law in Support of Request for Declaratory and Injunctive Relief on the following counsel of record:

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