08 CV 1034 (SAS)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID FLOYD, *et al.*,

Plaintiffs,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' REQUESTED INJUNCTIVE RELIEF

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PRELIMINARY STATEMENT

Defendants respectfully submit this memorandum of law in opposition to plaintiffs' request for injunctive relief.[1] NYPD is not apathetic to the constitutional rights of the people that it stops, but plaintiffs would have this Court believe that NYPD's stop and frisk practices are simply aimed at achieving numbers of UF250s for numbers-sake, and that race is the determinative factor of who is stopped, without regard to reasonable suspicion. Plaintiffs disregard the multi-layered and interconnected NYPD systems in place to govern stop activity and officer misconduct, including training, documentation, supervision, monitoring, investigations and audits.

Indeed, plaintiffs claim that stops have increased seven fold since 2002, disregarding the fact that stop documentation has increased, not in small part due to the City's continued stop and frisk policies and practices promised in the *Daniels* class action in 2003, and enhanced ever since. At the same time, plaintiffs paint a false, one-dimensional picture of a police department of 35,000 members that pressures officers to achieve unreachable quotas of UF250s. They simply ignore the complex forces in place to ensure that the vast organization of the NYPD can continue its trend of reducing crime, down 80% over the last twenty years, in compliance with the law and with respect to individual rights. They compare the NYPD to much smaller jurisdictions that have had virtually no systems in place and recommend that the outside-monitored consent decrees that have reformed those departments are needed to reform the NYPD. And, yet, for all of their advocacy for reform of NYPD stop practices, and eagerness to

[1] Defendants join in plaintiffs' request to supplement the remedy briefs after the close of trial to address remedy-related evidence. *See* Plaintiffs' Memorandum of Law in Support of Plaintiffs' Requested Injunctive Relief ("P Mem.") at 7 n. 2. Per Court order, defendants reserve their right to supplement this brief after receipt of the report of defendants' remedies expert, James Stewart, on April 15, 2013. *See* Trial Tr. at 3168: 1-3170: 19 (April 10, 2013).

impose an outside monitor of some sort to oversee NYPD, and reliance on experts, plaintiffs for the most part have not proposed any specific "remedies" to their perceived constitutional violations, and have effectively done no more than recommend a process to identify remedies. No injunction is warranted in this case, nor could the amorphous injunction of the nature proposed by plaintiffs be appropriate.

Plaintiffs' Proposal

Despite the verbiage and citation to many cases that do not involve remedies in a policing context and do involve unique equitable relief that cannot be achieved through money damages (*e.g.*, employment reinstatement, school desegregation), plaintiffs' proposal boils down to three basic points. First, in the only specific requests for relief, plaintiffs seek an order for NYPD to revise the UF250 immediately to include a narrative component and the eradication of Operation Order 52, promulgated in 2011, which requires that supervisors can and must set performance goals for their officers which are responsive to crime conditions. The evidence does and will show that plaintiffs' request for a narrative is unnecessary in light of NYPD's ever-increasing emphasis that officers include details of their stops in their memobooks, which recently evolved into a March 2013 order from the Chief of Patrol requiring all members of the Patrol Services Bureau to include in their memobooks a narrative for each stop describing, *inter alia*, the reasons that gave rise to reasonable suspicion for the stop including the specifics of any furtive movements. The evidence does and will show that the elimination of Operation Order 52 will irreparably divest NYPD, an employer safeguarding the public, of the means to ensure that its officers are doing their jobs, just like it is expected that any other employer can and should do.

The second component of plaintiffs' remedy is more vague and amorphous, although equally unnecessary and inappropriate: a process whereby a monitor will (1) hire experts to

study the NYPD, collecting information and data on its policies, practices and procedures, and (2) design a method for obtaining unspecified input from various "stakeholders," all for the apparent purpose of trying to figure out what the remedy for the alleged constitutional violations should be, including the development of reforms to bring NYPD's stop policies and practices in line with constitutional standards. *See* P Mem. at 3, 10-11, 20-22. Non-specific as it is, this is perhaps the most circular aspect of the relief sought, and most expensive, burdensome and duplicative of the very trial now pending. According to the proposal:

- The Monitor will appoint a Facilitator who will report to the Monitor.
- The Facilitator, an expert, will work with the parties to develop a timeline, ground rules and objectives for the Joint-Remedial Process ("The Process"), which the Court will order the parties to engage in. The goal of the Process is to develop a set of agreed-upon remedial measures.
- The Process will include a Plan.
- The Plan will be to conduct an independent analysis, performed by a panel of other experts retained by the Monitor, of the current policies, practices and procedures of the NYPD related to stop and frisk and will include findings and recommendations to inform the parties' negotiations during the Process. This Plan seems to be a replay of the very comprehensive, time-consuming and expensive trial now taking place before this Court.
- The Process will also include a Protocol, developed by the Facilitator in consultation with the parties. The Protocol will govern "obtaining input on appropriate remedial measures from a wide array of stakeholders on the stop-question-frisk issue in New York City," such as still other experts in police

practices, police officers, academics, religious, advocacy and grass roots organizations – of these "stakeholders," none are required to be class members.

- Finally, the Process will be transparent and findings will be presented to the public, the Court and the City Council.
- In the end, if the parties are unable to reach agreement of a set of proposed remedies through the Process, the Monitor will issue a report and recommendation for proposed additional remedies beyond the immediate remedies. The parties will have the opportunity to respond before the Court rules. Thus, the Court will have ordered the parties to engage in this very time-consuming and burdensome Process, which will have no effect if the parties do not agree. It seems like this is where the parties will be at the end of this trial – not at some unspecified time in the future after defendants have paid for multiple players to analyze what is already before this Court.

The proposal of the Process, the Plan, the Protocol, the Monitor, the Facilitator and all of the experts is tantamount to an unnecessary redo of the pending trial. It is unclear why Class Counsel and Class Representatives, as representatives of the class, are not in a position, either now or at the close of the evidence in the trial, to propose specific remedies to address the issues that they have identified. Indeed, if and when the Court identifies a specific *legal* or *constitutional* deficiency in the NYPD's policies, practices and procedures that a court would be empowered to remedy – as opposed to a *policy disagreement* with how the NYPD has determined, as a lawful exercise of its powers and discretion, to address the crime conditions it is tasked with addressing – the parties and the Court should be in a position to assess the record and propose a specific remedy for that specific alleged constitutional violation. Plaintiffs have gone

to great lengths to identify faults in the NYPD's policies, programs and procedures, but they offer precious little in terms of concrete solutions for the problems they perceive. They present no specifcs for improving upon the many systems already in place at the NYPD, a highly professional and skilled organization that does its utmost everyday to fulfill its mission – safeguarding every community in our vast, diverse, City within the legal limits of the law. The process plaintiffs have proposed instead is a way for plaintiffs to avoid putting forth now concrete recommendations for change based on the evidence adduced at trial – thereby exposing the dearth of any deficiencies in NYPD's systems.

POINT I

PLAINTIFFS WILL NOT MEET THEIR BURDEN FOR INJUNCTIVE RELIEF

Fed.R.Civ.P. 65(d)(1) requires that every order granting an injunction must: "(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail -- and not by referring to complaint or other document – the act or acts restrained or required." An injunction must be narrowly tailored to remedy the specific violation. *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144 (2d Cir. 2011) (quoting *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 50 (2d Cir. 1996)).

This Court itself has recognized that the judiciary is not well-suited to inject itself into the internal operations of NYPD. *See PBA of N.Y. v. City of N.Y.*, 97 Civ. 7895 (SAS), 98 Civ. 8202 (SAS), 2000 U.S. Dist. LEXIS 15179, *10-11 (S.D.N.Y. Oct. 13, 2000) (denying injunction where race-based transfers of NYPD officers alleged in violation of Title VII in part because it "represents an undue intrusion into a matter of state sovereignty, namely, the internal operation of . . . NYPD" and because the likelihood of repetition of the wrong was slim). As this Court wrote in *PBA*:

> an injunction represents an undue intrusion into a matter of state sovereignty, namely, the internal operation of the New York Police Department ("NYPD"). As the Supreme Court has counseled, "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." Rizzo v. Goode, 423 U.S. 362, 379, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976) (citation omitted). Accordingly, when a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the dispatch of its own internal affairs. Id. at 378-79 (internal quotation marks and citations omitted). *See also Portland Police Assoc. v. City of Portland*, 658 F.2d 1272, 1274 n.3 (9th Cir. 1981) (equitable relief not available where it would require "federal courts to disturb the inner workings and structure of a local police department").

See also Miller v. Silbermann, 951 F. Supp. 485, 492 (S.D.N.Y. 1997) ("where the equitable relief sought would inappropriately require the federal court to supervise institutions central to the state's sovereignty, it should not be entertained") (citations omitted). Accordingly, the Court should proceed with caution in fashioning any proposed remedy in this case, taking care not to usurp the executive function of carrying out the law.

It is inappropriate for a court to order the NYPD simply or in effect to comply with the law of the Fourth Amendment. *S.C. Johnson, Inc. v. Clorox Co.*, 241 F.3d 232 (3d Cir. 2001) (command that the defendant obey the law is not legally cognizable). Here, moreover, improper stops can be remedied in the court system, as with improper arrests:

> Improper arrests are best handled by individual suits for damages (and potentially through the exclusionary rule), not by a structural injunction designed to make every error by the police an occasion for a petition to hold the officer (and perhaps the police department as a whole) in contempt of court.

Rahman v. Chertoff, 530 F.3d 622, 626-627 (7th Cir. Ill. 2008).[2] Injunctive relief where an effort is made "to take control of how police investigate crime and make arrests" is not appropriate.

[2]The injunctive cases relied upon by plaintiffs in their brief notably involve mostly employment and disability discrimination and school and housing desegregation cases. The remedies there were truly equitable in nature, adequate remedies at law did not exist; here, however, adequate

Id.[3] That is especially the case where such a complex and nuanced area of the law – under what circumstances a *Terry* stop may occur – is at issue. As the Court itself has recognized, Fourth Amendment jurisprudence is difficult to apply, and each application of the law turns on the specific facts at issue:

> This law and the policing practices associated with it have raised a host of difficult questions, including: (1) what is reasonable suspicion; (2) what constitutes a stop; (3) what is a public place; (4) when is a stopped person free to walk away from the police; and (5) when does an officer have grounds to reasonably suspect that he is danger of physical injury. None of these questions are easily answered.

Ligon v. City of New York, 12 Civ. 2274 (SAS), 2013 U.S. Dist. LEXIS 22383, *3-4 (S.D.N.Y. Feb. 14, 2013). Broad, sweeping injunctive relief that attempts to set forth the parameters for addressing the circumstances under which a stop may and may not occur would similarly be difficult to carry out, and worse it would carry with it the spectre of contempt proceedings for every disagreement over the application of the law.

Plaintiffs' Expert Report Is Not Based on Evidence That Supports an Injunction and is Not Helpful to the Court.[4]

Determining that the NYPD systems in place regarding stop and frisk are superficial and insufficient, in some cases to the point of nonexistence, plaintiffs' expert Samuel Walker opines

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remedies at law do exist for individual claims of violations of the Fourth Amendment, which, due to their inherently fact-specific nature, ultimately must be assessed individually.

[3] As Justice Scalia wrote in dissent in *Brown v. Plata*, __ U.S. __, 131 S. Ct. 1910, *1955, 2011 U.S. LEXIS 4012 (2011) (upholding order to release prisoners in California because of unacceptable prison conditions): "But structural injunctions do not simply invite judges to indulge policy preferences. They invite judges to indulge incompetent policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions."

[4] An expert witness may testify when his "scientific, technical, or other specialized knowledge *will help the trier of fact* to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a) (emphasis added).

that NYPD needs a twelve (12) component "comprehensive" approach for stop and frisk to ensure compliance with the Constitution. Walker at ¶¶ 17, 20.[5] He then generally cites to "about twenty consent decrees and memoranda of agreement between the U.S. DOJ and state and local law enforcement agencies entered into since 1994" which "all include the appointment of an independent court-appointed monitor to oversee implementation of the required reforms and report on the state of implementation to the court and to the public." *Id.* at ¶19.

Walker's "comprehensive" approach is full of non-specific suggestions that run the gamut from: formal written policies to performance assessment system to training at all levels; to daily supervision by immediate supervisors; to hierarchical review of activity up the chain of command; to systematic review of encounters to identify patterns of activity that may violate constitutional standards and need corrective action, to internal investigation and disciplinary processes; and to a citizen complaint process, allowing for "an opportunity for community expression of dissatisfaction or satisfaction." Walker at ¶17. These are all of the components at issue at trial. And Walker's suggestions for how to implement these components either mirror what the evidence will show are and have been in place at NYPD or his suggestions are devoid of specificity.

Performance Reviews/Command Review of Officer Performance Activity/Early Intervention System

For example, Walker opines that NYPD should redo its officer performance system and review officer performance data in an Early Intervention System (EIS) to identify not only evident patterns of problematic officer performance (a high rate of citizen complaints) but patterns of *potential* problematic performance. Without any recommendations of how to identify potential problematic performance, Walker offers the utterly unhelpful example that sergeants

[5] Expert Report of Samuel Walker, dated March 5, 2013 (hereinafter "Walker").

should "identify a slightly higher than average pattern of problematic officer performance across several indicators." Walker at ¶22. More to the point, Walker ignores that systems are already in place to do exactly that.

Walker claims that NYPD's performance review system, which includes evaluation based in part on officer activity – a check on whether officers are working – should be revamped with "robust evaluative indicators." Walker ¶¶38-44. However, NYPD already does exactly what Walker wants by utilizing both quantitative and qualitative metrics and performance goals. Using standards to hold individuals accountable and rigorous metrics to determine trends are both sound principles of organizational management.[6] Thus, it is not surprising that, as Walker says, "the entire document [Operations Order 52], however, consistently refers to 'activities' that can and will be counted." Walker at ¶42. This is even less surprising since an officer's job is to engage in activities – myriad activities, all of which are captured. What is surprising is Walker's conclusion that since activities are counted, a stop and frisk will be counted as a positive activity, even if made without reasonable suspicion. Walker at ¶42. This assertion simply conflicts with common sense since any activity ever adjudged illegal would count very negatively in the officer's evaluation. The response to Walker's glib commentary on how officers engage with repetitive, rote quality and stock phrases (Walker at ¶41) is that it is simply unreasonable to expect supervisors to issue caveats and reminders to follow the Constitution and address crime and quality of life conditions at every roll call that the vast majority of officers take as given due to their training and experience. The paucity of expertise that Mr. Walker brings to bear in his analysis, and absolute lack of assistance to the Court, is evident when he supports his opinion

[6] Plaintiffs' other police practices expert, Lou Reiter, acknowledges that productivity goals for officers can be within generally accepted practices. Transcript of Deposition of Lou Reiter, dated Feb. 17, 2011, at 106:13-108:4.

that NYPD should include a comprehensive list of specific factors when designing a revised performance review methodology by referring the court to an "expert in the field of police officer performance evaluations" who "should audit the current structure and make recommendations for improvements." Walker at ¶44. If Mr. Walker needs to refer to an expert for recommendations for improvements, how is he able to offer an expert opinion that the NYPD performance evaluation system is in need of improvement in the first place?

As for Walker's views on Commander Review of Officer Performance Activity (Walker at ¶¶45-51), he opines -- based on a single redacted 48 page document -- that NYPD "does not meet professional standards in the law enforcement field with regard to early intervention systems and their use as part of supervisory controls," and proceeds to outline sixteen (16) performance indicators that he says NYPD must monitor for each officer. But, as defendants' expert and the evidence will show, Mr. Walker has completely ignored the multi-faceted and holistic system in place for gathering, analyzing and monitoring performance of the NYPD's over 30,000 officers, which includes every one of the indicators that Walker requires.

Per officer, the NYPD comprehensive assessments include, *inter alia*, the maintenance and review of data related to all reported uses of force, complaints filed with the Civilian Complaint Review Board, investigations of misconduct, all stops made by the officer, and training history. General performance monitoring can be done by a supervisor through the Central Personnel Index ("CPI") database and CCRB database. Apart from the command, the NYPD Personnel Office, in conjunction with the Office of the First Deputy Commissioner, reviews the CPI and CCRB databases regularly to identify officers in need of performance monitoring, which can include oversight, training or adjustments to assignments, or for review by the CCRB Profile and Assessment Committee, which reviews any officer who meets certain

metrics, one of which is three CCRB complaints of any kind in one year regardless of whether they are substantiated, to determine if additional training, supervision or other intervention is appropriate. The Internal Affairs Bureau ("IAB") also conducts integrity checks in which they create stop situations to test an officer's performance.

As for Walker's suggestion that peer group analysis be done to compare performance of officers working at similar times in similar conditions, this is exactly what Operations Order 52 (performance goals) requires, despite that Walker wants it rescinded. Walker at ¶49. Without any helpful expertise, Walker also concludes that NYPD, in consultation with experts in the field (apparently not Mr. Walker), should develop new standards for determining when performance indicators exceed the peer group average to the point were officers should be subject to a formal intervention; Walker suggests, without support, that looking at a certain number of citizen complaints in a certain number of months is generally not accepted as a best practice, but does no more than recommend that NYPD, with expert assistance (which he does not provide) should examine practices in other large police departments and develop standards best suited to its own needs. Walker at ¶50. Walker does not acknowledge in any way that NYPD is the largest police force in the country by far, operating in a city with a unique diversity in population and crime condition distribution. Walker also does not take into account that NYPD purchased internal benchmarking software from Rand that was intended to determine aberrational stop patterns among peer officers, but when it ran the software for 2008, it identified only officers who understopped minorities rather than overstopped in comparison to their peer officers.

Supervisory Review

Walker opines that NYPD needs multiple layers of review, which should include material on the circumstances of the incident and the rationale for the stop, and the review of UF250s and

aggregate UF250s up the chain of command. Walker at ¶¶23-29. He bases his opinion on evidence that he understands plaintiffs will present that sergeants do not inquire into why a stop was made or ask for a substantive reason for why a box was checked. *Id.* at ¶24-25. Walker's conclusion assumes facts not yet found (relying heavily on this Court's summary judgment and class certification decisions) and fails to cite to specific testimony or documents. It ignores the undisputed NYPD requirement that officers document stops in memobooks with pertinent facts, which is reinforced with the spectre of a serious command discipline for failure to make an appropriate memobook entry about a stop.

Walker, who has never worked as a police officer, discounts as a factor in assessing whether an officer made a legal stop the knowledge and information that a supervisor has of the officers under his command, both in terms of their strengths and weaknesses exhibited over time and at the time of enforcement activity that the supervisor observes. The evidence will show that an average officer on patrol makes between 2-3 stops per month and an officer in a specialty unit, with an even smaller sergeant to officer ratio to enable tighter supervision and increased opportunity for the sergeant to be on the scene, makes 5-8 stops per month. The average number of stops made by an officer in a month is not so high that a supervisor would not be likely to be on the scene often.

One of Walker's only concrete proposals is that the UF250 form contain a narrative section where an officer can describe the reasons for the stop including a description of any furtive movements. The evidence will show that in addition to NYPD training, supervision and disciplinary efforts to encourage more detail in memobooks, dating back to at least early 2008, in March 2013, any ambiguity about the level of detail required was addressed in an order from the Chief of Patrol directing members of the Patrol Services Bureau to include in activity logs a

description about the reasons for the stop and any furtive movements. The evidence will further show that UF250s are often reviewed by immediate supervisors as are activity logs. Once again, Walker's suggestion for "meaningful engagement between officers and their supervisors" as a remedy (Walker at ¶28) disregards that this is exactly the foundation upon which NYPD supervision is based.

Walker's recommendation that a "neutral third-party agent" conduct an audit or evaluation of the NYPD supervisory structure (Walker at ¶29) is unnecessary. The class has had ample opportunity before this Court to develop and present the best evidence in support of their views – the record needs no supplementation by a third-party unconstrained by the Federal Rules of Evidence and Civil Procedure.

Court-Appointed Monitor

NYPD is monitored internally by its IAB and Chief of Department Investigations, and externally at least by federal prosecutors, the NY State Attorney General, five local District Attorneys, the NYC City Council, the Civilian Complaint Review Board and the public electorate. Disregarding all of this oversight, Walker opines that NYPD needs an outside monitor to ensure compliance with any court order, as has been the monitor role in other police practices consent decree cases. However, he relies on jurisdictions in which a monitor was appointed on consent, and where the nature of the reforms involved restructuring of the police department and introduction of entirely new systems/procedures that did not formerly exist. This is in stark contrast to the kind of reform of a single, long-established Fourth Amendment police power employed by the NYPD that the Class does not seek to eradicate. This is not a situation where the mode of policing was changing conceptually to one of community policing and thereby changing the very nature of how citizens chose to police themselves (*e.g.*, Cincinnati and

New Orleans). Nor does it involve the introduction of completely new procedures and investigatory boards that NYPD already has (*e.g.*, Los Angeles implemented requirement to document stops; Cincinnati involved establishment of CCRB type board).

Moreover, the main premise on which Walker opines that NYPD needs an outside monitor is his "understanding" that evidence at trial will show that NYPD failed to comply with several provisions of the stipulation of settlement in *Daniels*, which he does not specify, and that this alleged failure shows that NYPD cannot be trusted to act without outside supervision. Walker at ¶¶32, 37. Walker is wrong about NYPD's compliance with *Daniels*. In fact, the evidence will show that NYPD lived up to the *Daniels* stipulation fully and without the aid of an outside monitor: NYPD agreed to and did continue to train, supervise and monitor its officers on the law of stop and frisk and on its policy prohibiting racial profiling, and agreed to and did continue to require documentation of stops on UF250 forms and in the UF250 database. NYPD also promised to conduct audits and self-inspections related to stop and frisk activity based on protocols agreed to by the *Daniels* Class Counsel -- and not only has NYPD been conducting these audits and self-inspections since 2003, and long after *Daniels* sunset in 2007, but NYPD on its own created new ones over time related to stop and frisk and activity logs; and NYPD promised to and did engage in community outreach, including creation of pamphlets and palm cards and holding high school workshops. NYPD was never found to have failed to comply with the *Daniels* stipulation.

Walker also claims, without explication and non-sensically, that NYPD's formalized Operation Order 52, which requires NYPD supervisors to set productivity goals, and the reissuance of the NYPD Policy Prohibiting Racial Profiling are examples of NYPD being unable to monitor its officers' stop and frisk practices without external oversight. Walker at ¶33.

Walker further bolsters his opinion that NYPD needs a monitor because "several law enforcement agencies subject to judicial oversight [unnamed but not NYPD] failed to meet their original deadlines for compliance with court-ordered remedies." Walker at ¶35. This is hardly "proof" of the kind admissible in a court of law, and far from a remedy narrowly tailored to NYPD. As for Walker's claim that a monitor is needed to ensure transparency and build public trust by posting reports, Walker completely ignores that the raw data of NYPD UF250 database are posted on the NYPD website and reported to the City Council quarterly, along with countless other crime statistics and indicators. Walker at ¶36.

Community Input

The evidence will show that NYPD has a long history of developing community outreach and implementing processes for community feedback, including but not limited to the work of the NYPD Community Affairs Bureau and the required attendance of local commanding officers at regular Community Council meetings. Without noting any of the formal and informal contact points for community involvement in the NYPD, however, Walker recommends community input to "develop an effective plan for reforming NYPD's stop-and-frisk practices," and notes secondly that community input is an "important part of any ongoing monitoring or evaluation of the NYPD's compliance with a court's order." Walker at ¶52. Certainly, any reforms to NYPD's stop-and-frisk practices must be narrowly tailored to any legal deficiency that might be found by the Court. However, Walker generally recommends community input without identifying the legal deficiency about which the community will be providing input. Without more specifics, it is difficult to perceive what the community's role should be. Although an individual who has been stopped would be able to say why, from his perspective, there was no suspicious behavior supporting a particular stop, the community would not be in a position, for

example to provideinput on what generally constitutes reasonable suspicion or a Fourteenth Amendment violation – this is a function of the judicial system. Nor would the community be expected to supply expertise on how NYPD should evaluate officer performance, supervise officers or conduct audits. To the extent that the community can provide input on whether a particular stop and frisk is conducted courteously or respectfully, NYPD already has systems in place to hear such feedback and welcomes it, but it is not the kind of feedback that could inform a remedy for a constitutional violation.

Walker supports his recommendation for the unspecified role of the community by citing six jurisdictions that appear to have reached agreements for community involvement in some aspect of agreed-upon reforms much broader or different from NYPD stop-and frisk practices. *See* Walker at ¶55(a) (Seattle: allegations of pattern and practice of use of excessive force in various circumstances including when impact weapons are used, when force is used on restrained subjects, when multiple officers use force against a single subject; when force is used against persons with mental illness or under the influence of alcohol or drugs; Portland: involved use of force against individuals with actual or perceived mental illness and specifically addressed the use of tasers); ¶55(b) (Cincinnati: involved overhauling the approach to crime fighting and public safety by using "problem-solving policing"; replaced the former Citizen Police Review Panel, which apparently only reviewed some department investigations of complaints, with the Citizen Complaint Authority, to which all Citizen Complaints are directed for investigation); at ¶55(c) (Los Angeles: Walker cites use of focus groups by Harvard University to investigate impact of Consent Decree which addressed numerous aspects of LAPD's enforcement activity and operations including management of gang units, confidential informants, responding to persons with mental illness, improper officer-involved shooting, improper seizures including

stops without reasonable suspicion and arrests without probable cause); ¶ 55(d) (Las Vegas: Walker cites use of focus groups to obtain community perceptions of the police department's performance in a collaborative process focused on Officer-involved shootings); ¶55(e) (New Orleans: Walker cites to unspecified community input in connection with unspecified aspects of fundamentally changing the way the New Orleans Police Department polices throughout New Orleans in areas including: use of force, stops, searches, seizures, and arrests; photographic lineups; custodial interrogations; discriminatory policing; community engagement; recruitment; training; performance evaluations; promotions; officer assistance and support; supervision; secondary employment; and misconduct-complaint intake, investigation, and adjudication).

Walker then lists examples of specific ways to involve the community, but he does not explain how they have been used in particular cases or how they should be used here, nor does he explain how they can further a narrowly tailored remedy to an as yet undetermined violation: telephone and mail surveys; focus groups, noting that it is a valuable way to explore the perceptions and thoughts of community members and to uncover new issues – hardly appropriate for a court-imposed remedy on a found violation; call backs to people who have called for service or have filed civilian complaints to explore how people who had police contact feel they were treated, which the evidence will show that NYPD already does.

Walker also does not recognize the transparency and accessibility of UF250 and crime data on the NYPD website and in reports to the NYC City Counsel. This access invites community scrutiny and study.

Finally, Walker claims that oversight does not cause de-policing because there is no known instance where oversight has directly contributed to increase in crimes. Yet, the one example Walker cites – the experience in Los Angeles – is not enough to draw broad conclusions

about other jurisdictions, including NYPD. It is more reasonable to draw the conclusion that following Walker's recommendations to eliminate performance goals and change the UF250 form to include a narrative will lead to less productivity and officer avoidance of making stops to avoid the work involved in the documentation. Increased crime under these circumstances is reasonable to foresee.

POINT II

IN THE ABSENCE OF A FINDING OF LIABILITY AND ITS POTENTIAL PARAMETERS, PLAINTIFFS' PROPOSAL IS NOT RIPE FOR CONSIDERATION

Defendants respectfully maintain that no injunction is appropriate in this case, and consequently, do not offer a remedy other than to respectfully direct the Court to the trial record for an assessment of the remedies evidence and join in plaintiffs' request to supplement the remedies briefs in light of the full record after the close of evidence. Defendants further note that without a liability finding, and the specific facts upon which it would be predicated and theory of *Monell* liability, plaintiffs' remedy proposal is not ripe for consideration, as it is not narrowly tailored to a finding.

CONCLUSION

For the foregoing reasons, plaintiffs' application motion for injunctive relief should be denied.

Dated: New York, New York
April 11, 2013

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