

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK

NEW YORK CIVIL LIBERTIES UNION,

Petitioner,

vs.

NEW YORK CITY POLICE DEPARTMENT,
and RAYMOND KELLY, in his official capacity
as Commissioner of the New York City Police
Department,

Respondents.

Index No. 07/115154

Judge Marilyn G. Diamond

**NOTICE OF MOTION FOR
PERMISSION TO FILE AN
AMICUS CURIAE BRIEF**

PLEASE TAKE NOTICE that, upon the affirmation of Duane L. Loft, dated the 27th of December 2007, and annexed hereto as Exhibit A, the undersigned will move this Court, at the Motion Support Office Courtroom, Room 130, at the Courthouse thereof, located at 60 Centre Street, New York, New York 10007, on January 22, at 9:30 o'clock in the forenoon of that date, or as soon thereafter as counsel may be heard, for an order granting permission to the Association of the Bar of the City of New York to file an Amicus Curiae brief in the above-referenced matter, and for such other and further relief as the Court may deem just and proper. A copy of the proposed Amicus Curiae brief is annexed hereto as Exhibit B.

January 3, 2008

CRAVATH, SWAINE & MOORE LLP

by



Duane L. Loft

Attorneys for Amicus Curiae
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(212) 474-1000

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK

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**AFFIRMATION OF
DUANE L. LOFT**

Duane L. Loft, and attorney duly admitted to practice before the courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am associated with Cravath, Swaine & Moore LLP and a member of the Bar of the State of New York. I make this affirmation in support of the motion of the Association of the Bar of the City of New York (the "Association") to file an amicus curiae brief in the above-referenced matter. As Secretary to the Association's Civil Rights Committee, I am authorized by the Association to bring this motion and to submit the proposed brief filed together with this motion.

2. Founded in 1870, the Association is a professional organization of more than 22,000 attorneys. Through its many standing committees, such as its Civil Rights Committee, the Association educates the Bar and the public about legal issues relating to civil rights, including the right to equal protection under the law and the right to remain free from unreasonable searches and seizures. The Association also seeks to promote transparency and accountability in New York City government, and is especially concerned with the public's right

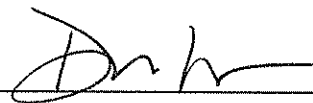
to access governmental information affecting civil liberties. The Association has been active in the debate over the policies and practices of the New York City Police Department ("NYPD"), including the NYPD's regulations concerning parade permits.

3. The Association respectfully submits that it may assist the Court by filing an amicus brief in order to highlight the key civil liberties issues at stake in this matter, that the filing of such brief will not prejudice the parties, and that the Association has a unique perspective that should be heard. A copy of the proposed brief is annexed to the Notice of Motion filed herewith.

4. I am informed that counsel for Petitioner consents to the filing of the proposed amicus curiae brief. On December 19, 2007, I contacted counsel for Respondents to request consent and was told that consent could not be given at this time.

WHEREFORE, I respectfully request that this Court issue an order granting the Association permission to file an amicus curiae brief in the above-referenced matter.

Dated: December 27, 2007



Duane L. Loft

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK

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Index No. 07/115154

**MEMORANDUM OF LAW OF AMICUS CURIAE NEW YORK CITY BAR
ASSOCIATION IN SUPPORT OF PETITIONER**

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December 27, 2007

*Attorneys for Amicus Curiae New York City
Bar Association*

The New York City Bar Association (the “Association”) respectfully submits this brief as amicus curiae in support of the Article 78 petition filed by the New York Civil Liberties Union (“NYCLU”).

I. STATEMENT OF INTEREST OF AMICUS CURIAE.

Founded in 1870, the Association is a professional organization of more than 22,000 attorneys. Through its many standing committees, such as its Civil Rights Committee, the Association educates the Bar and the public about legal issues relating to civil rights, including the right to equal protection under the law and the right to remain free from unreasonable searches and seizures. The Association also seeks to promote transparency and accountability in New York City government, and is especially concerned with the public’s right to access governmental information affecting civil liberties. The Association has been active in the debate over the policies and practices of the New York City Police Department (“NYPD”), including the NYPD’s regulations concerning parade permits.

II. ARGUMENT

The Association joins the NYCLU in demanding the release of the NYPD’s electronic database containing information about the more than 850,000 police stops of civilians over the past two years. Despite public outcry and legal demands, the NYPD has chosen not to release this database. Instead, the NYPD hired the RAND Corporation, a private entity, to analyze the data and issue a report¹ that purports to study the racial disparities among persons who are stopped by the NYPD.

¹ See RAND Corporation, *Analysis of Racial Disparities in the New York Police Department’s Stop, Question, and Frisk Practices*, available at http://www.rand.org/pubs/technical_reports/2007/RAND_TR534.pdf (last visited Dec. 17, 2007).

The Association submits this brief to highlight the important public interests at stake in the present FOIL request and emphasize in particular why the RAND Report cannot serve as a substitute for full public disclosure of the NYPD's electronic stop-and-frisk data. *See The New York Times Co. v. City of New York Fire Dept.*, 4 N.Y. 3d 477, 485-86 (2005) (holding that any asserted privacy interests cited as a basis for denying a FOIL request must be balanced against the public interest in disclosure of the information). *First*, and most importantly, the analysis outlined in the Report raises a number of concerns that cannot be resolved without broader access to the underlying electronic data. *Second*, because the NYPD's stop-and-frisk practices directly impact the civil rights of New York City residents, complete transparency with respect to those practices is vital to uphold the trust and cooperation of the communities served by the Department.

A. **The RAND Report Does not Resolve Concerns About Racial Disparities in the NYPD's Stop-and-Frisk Practices.**

Although the NYPD is to be commended for securing an external review of its stop-and-frisk practices, the RAND Report raises more issues that it resolves and should serve as the beginning, not the end, of the process for reviewing the NYPD's methods relating to investigatory detentions. In particular, the RAND Report is problematic for at least the following reasons.

First, the RAND Corporation solicited virtually no public input in conducting its study. If the Report was meant to serve as the final word on the NYPD's stop-and-frisk practices, RAND should have solicited input from the community in structuring and conducting its analyses. Broader *ex ante* public participation would have been the only way for the report to have legitimacy.

Second, the RAND Report does not attempt to answer—or even address—significant questions that are raised by the data analyzed by RAND. Perhaps as a result of limited public participation, the RAND Report notes but fails to confront several large issues that plainly must be addressed as part of any effective dialogue about the NYPD’s stop-and-frisk practices. For example, the data, in an apparent paradox, show a dramatic overall increase in the number of police stops during a period in which the crime rate has fallen consistently. The Report offers no explanation for this paradox. In addition, the Report does not explain why, as indicated by the data, only one stop out of every ten resulted in an arrest or summons—a ratio that on its face raises doubts about whether the Fourth Amendment’s restrictions are being consistently followed. The RAND Report merely speculates on potential answers to these important questions and therefore cannot be considered an adequate substitute for public disclosure of the data.

Third, there is a significant lack of transparency in the methodology used by RAND. By omitting key information about the details of its analysis, the Report makes it difficult to understand how its authors reached their conclusions. Without this critical substantiating information, outside experts cannot evaluate the quality of RAND’s analysis and thus the reliability of its results.

Fourth, the Report seems to go to great lengths to offer innocent explanations for the racial disparities that emerge from the data. For example, the Report speculates that the reason why number of stops has increased over a period when the crime rate has declined is because there has simply been a larger police presence during this period. Later, in attempting to explain racial disparities in weapons-related stops and in the use of force during stops, the Report posits, without support, that African-Americans may both be likelier to have additional criminal

involvement beyond possession of an illegal firearm and to flee or resist arrest. On the other hand, the Report discounts the possibility that racial bias could explain the fact that stopped whites were more likely than nonwhites to receive a summons instead of being arrested. Of course, it is impossible to test the validity of these hypotheses without access to the electronic data in its native format.

Fifth, the data reviewed by RAND was admittedly unreliable. The authors of the Report acknowledge that “there is no auditing process to ensure that officers complete a UF250 for every police-initiated contact”. (Report at 4.) As such, there is the distinct possibility that reportable stops occur more often than is reflected by completed UF250 forms and that, as a result, the data upon which Rand based its findings are incomplete.

Sixth, the RAND Report failed to include several key data points its analysis. For instance, the review excluded a group of 15,855 officers who were responsible for 46 percent of all stops in 2006. (Report at xiii.) To be sure, the fact that the remaining 54 percent of all stops were performed by only 2,756 officers is significant on its own. However, it is troubling that the Report excluded almost half of all the stops for which data was collected. Also, Rand’s analysis of post-stop outcomes excluded or discounted thousands of stops of nonwhites because, in the researchers’ judgment, they were not sufficiently similar to stops of whites.

Seventh, the Report fails to acknowledge in any meaningful way the differences that emerge in the treatment of whites versus minorities by the NYPD. Even where the authors of the Report find disparities, they minimize the significance of their findings and make tepid recommendations to address them. For example, even after controlling for numerous factors related to the time, place and manner of stops, the Report still finds statistically significant racial differences in post-stop outcomes, including frisks, use of force, and issuance of a summons.

But this conclusion is undercut by exculpatory conjecture—such as the suggestion, noted above, that African-Americans might be more likely to flee or resist arrest. Moreover, as a remedy, the Report suggests merely a “closer review” of certain outcomes in certain boroughs, rather than a more systematic, City-wide approach. In any event, no other outside entity is going to be able to conduct that type of review as long as the NYPD refuses to release the electronic data to the public.

B. Release of the NYPD’s Stop-and-Frisk Data is Necessary to Protect the Constitutional Rights of New York City Residents and to Maintain Public Confidence in the NYPD.

The deficiencies in the RAND Report are especially troubling in light of the important constitutional rights at stake. Under the United States and New York Constitutions, police may not distinguish on the basis of race or ethnicity in deciding whether to stop, frisk or ultimately arrest a criminal suspect.² Further, the Equal Protection Clauses of both Constitutions prohibit any police practice from being applied in a way that results in disparities on the basis of race.³ Courts often emphasize the indispensable role that statistical evidence plays in examining claims of racial bias in law enforcement.⁴ Indeed, without statistical evidence, it is often

² See U.S. Const. amend. IV; *Ramirez v. Webb*, 599 F. Supp. 1278, 1284 (W.D. Mich. 1984) (“[H]ispanic appearance . . . is not a valid reason to stop anyone.”); see also N.Y. Const., art. I, § 12; *Brown v. State*, 89 N.Y. 2d 172, 188-92 (1996) (holding that nonwhites who were stopped and examined by state police had cause of action against state for alleged violations of equal protection and search and seizure clauses of N.Y. Constitution).

³ See U.S. Const. amend. XIV; *United States v. Armstrong*, 517 U.S. 456, 464-65 (1996) (“A defendant may demonstrate that the administration of a law is directed so exclusively against a particular class of persons with a mind so unequal and oppressive that the system of prosecution amounts to a practical denial of equal protection of the law.” (alterations and internal quotation marks omitted)); see also N.Y. Const. art. I, § 11; *Brown*, 89 N.Y. 2d at 188-92.

⁴ *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20 (1977) (“Statistics showing racial or ethnic imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination.” (citations omitted)).

impossible to make any meaningful determination about whether law enforcement is in fact discriminating among suspects on the basis of race.⁵

In light of the core constitutional protections at stake and the importance of statistical review, the NYPD's stop-and-frisk data must be released. The current database is a rich source of information that, as the NYCLU's petition alleges, includes information on the gender, race, age, height, weight and other descriptive features of the person stopped; the location of the stop; and the stated reasons for the stop. Although the RAND Report purports to undertake a statistical analysis of the data, it suffers, as the examples given above point out, from enough obvious flaws that it cannot be considered the definitive explanation of the racial disparities in the proportions of New Yorkers stopped by the NYPD. Rather, this issue can only be resolved by subjecting the NYPD's electronic data to a broad, rigorous review by a wide variety of parties interested in doing so.

In addition to addressing key constitutional concerns, release of the data will improve the relationship between the NYPD and the communities it is asked to serve and protect. In New York City, the issue of racially-motivated police stops became a flashpoint of controversy after the 1999 fatal shooting of Amadou Diallo, an unarmed black man. The issue again came to the fore after the fatal shooting in November 2006 of Sean Bell. Controversy continues over the possible racial motivations of certain police tactics. Releasing the stop-and-frisk data would do much to dispel the distrust and suspicion that cloud the current debate. Indeed, the NYPD has said publicly that it is committed to addressing concerns about possible racial bias in police practices. It is time now for the Department to make good on that

⁵ *Nat'l Congress for Puerto Rican Rights v. City of New York*, 75 F. Supp. 2d 154, 167-68 (S.D.N.Y. 1999) (requiring plaintiffs challenging constitutionality of stops and frisks conducted by NYPD to offer statistical evidence showing differential treatment of similarly-situated persons).

commitment by allowing the public—rather than a private corporation—to access any and all relevant electronic data.

III. CONCLUSION

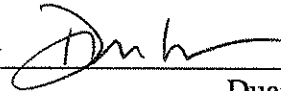
Public confidence in the NYPD depends on transparency and accountability. The RAND Report can serve as an initial step in fostering such confidence but it suffers from numerous apparent flaws and raises more questions than it answers. These questions can only be answered by releasing the data that the NYCLU rightfully is attempting to access through its Article 78 petition. Releasing those data would enable the additional analyses that are needed to shed light on, and improve on, the relationship between the NYPD and the communities it serves.

Dated: December 27, 2007

Respectfully Submitted,

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by



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