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**Testimony of Allie Bohm
On Behalf of the New York Civil Liberties Union
Before the New York City Council Committees on Health and Hospitals
Regarding Oversight of NYC's COVID-19 Testing and Contact Tracing
Program, Part II**

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The New York Civil Liberties Union (NYCLU) is grateful for the opportunity to submit the following testimony regarding New York City's COVID-19 testing and contact tracing program. The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and over 180,000 members and supporters. The NYCLU defends and promotes the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution through an integrated program of litigation, legislative advocacy, public education, and community organizing.

Virtually all New Yorkers share the fervent desire to safely re-open the City, and there is broad consensus that contact tracing is an essential component to doing so.¹ Unfortunately, a necessary ingredient for effective contact tracing – community trust – is still missing.

In March, New York had the unenviable task of pivoting on a dime to try to save lives and stem the spread of the worst pandemic this country has experienced in a century. Unfortunately, in that process, too little attention was paid to cultivating community trust. And, this trust deficit has not been remedied since. Indeed, New York City, like New York state, has doubled down on the very tactics that undermine trust and community participation in the COVID-19 response.

From the outset of the pandemic, Governor Cuomo has called on police to enforce coronavirus-induced social distancing restrictions.² Mayor de Blasio has repeatedly echoed

¹ See *Regional Monitoring Dashboard*, NEW YORK FORWARD, <https://forward.ny.gov/regional-monitoring-dashboard> (last visited May 26, 2020).

² Nathaniel Weixel, *Cuomo Says NYPD Needs to Enforce Social Distancing Rules*, THE HILL, Apr. 1, 2020, <https://thehill.com/homenews/state-watch/490623-cuomo-says-nypd-needs-toenforce-social-distancing-rules>.

this call, and his administration has insisted that the appropriate response to issues ranging from overcrowding in grocery stores³ to the opening of city streets for pedestrian and bicycle traffic is heavy police presence and enforcement.⁴ More recently, Mayor de Blasio has deployed law enforcement to implement quarantine checkpoints at the City’s major bridges and tunnels,⁵ and Governor Cuomo announced that restaurants in New York City would be permitted to open for indoor dining “if NYPD can enforce compliance.”⁶ Just last week, in response to “the Ocean Parkway [coronavirus] Cluster,” police told the Daily News that the NYPD will monitor and break up large gatherings in Hasidic communities in Brooklyn in the midst of the Jewish High Holidays.⁷

Unfortunately, if unsurprisingly, law enforcement’s role at the forefront of social distancing enforcement has resulted in racially disparate patterns of enforcement and criminalization of communities that have long been subject to aggressive over-policing.⁸ According to data released by the NYPD, more than 80 percent of those ticketed for social distancing-related enforcement are Black and Latinx.⁹

Police are not the public officials best suited to respond to COVID-19 related restrictions for two reasons. First, the NYPD is not – nor should it endeavor to be – a public health agency. Second, the communities most impacted by the virus do not have sufficient trust in the NYPD – or in law enforcement in general – for its officers to function as effective public health messengers. This is true for Black, brown, and immigrant communities, who, thanks to a toxic cocktail of socioeconomic factors, physical environment, and inferior access to

³ Dave Goldiner, *De Blasio Asks NYC to Rat Out Coronavirus Crowders*, N.Y. DAILY NEWS, Apr. 18, 2020, <https://www.nydailynews.com/coronavirus/ny-coronavirus-de-blasio-nyc-social-distancing-police-20200418-kidh4tqokzavbojoknoej2mv5y-story.html>.

⁴ Julia Marsh & David Meyer, *De Blasio Calls Off Coronavirus Street Closures, Citing Lack of NYPD Resources*, N.Y. POST, Apr. 6, 2020, <https://nypost.com/2020/04/06/coronavirus-in-ny-de-blasio-calls-off-street-closures/>.

⁵ Eyewitness News, *Reopen NYC: Travelers face COVID-19 quarantine checkpoints at major entry points*, ABC7, Aug. 6, 2020, https://abc7ny.com/health/nyc-establishing-coronavirus-quarantine-checkpoints/6355344/?fbclid=IwAR1t3M_XcKETfw8TX8dilLNgbHNkWqh1HbiZT5nMDEok6-1pEgw7Rik8qqI.

⁶ Governor Andrew Cuomo, Press Conference Call (Sept. 3, 2020). In response to questioning at a later press conference, Governor Cuomo did concede that “inspectors do not have to be police.” Governor Andrew Cuomo, Press Conference Call (Sept. 9, 2020).

⁷ Thomas Tracy & Shant Sahrigian, *COVID spike in south Brooklyn prompts warning of ‘lockdown-type situation’: de Blasio official*, N.Y. DAILY NEWS, Sept. 23, 2020, <https://www.nydailynews.com/coronavirus/ny-coronavirus-ocean-parkway-cluster-bill-de-blasio-20200923-76jpcggrnrgejh6pliudp2uni-story.html>.

⁸ *E.g. Stop-And-Frisk in the De Blasio Era (2019)*, NYCLU, Mar. 14, 2019, <https://www.nyclu.org/en/publications/stop-and-frisk-de-blasio-era-2019>; *New York Should Legalize Marijuana the Right Way*, NYCLU, Apr. 25, 2019, https://www.nyclu.org/sites/default/files/field_documents/20190425_marijuana_onepager_final.pdf.

⁹ Erin Durkin, *Black and Latino New Yorkers Get Vast Majority of Social Distancing Summonses*, POLITICO, May 8, 2020, <https://www.politico.com/states/new-york/albany/story/2020/05/08/black-and-latino-new-yorkers-get-vast-majority-of-social-distancing-summonses-1283223>.

health care,¹⁰ are disproportionately likely to suffer from COVID-19.¹¹ They are also disproportionately likely to be alienated from and distrustful of our health care system as a result of the racial biases that pervade that system.¹² This is also true of religious enclaves, such as New York City's Hasidic community, which has also been ravished by COVID-19,¹³ still harbors deep distrust of the public health system and government after last year's bruising battle over the repeal of religious exemptions for vaccines,¹⁴ and feels singled out by Mayor de Blasio for pandemic-related enforcement.¹⁵

As our nation stands in the midst of a long-overdue reckoning on racism, police brutality, and white supremacy, any distrust New Yorkers, particularly Black and brown New Yorkers, might have of contact tracers, who may, like law enforcement and many in the health care system, carpetbag in from outside of the community, feels understandable.

Both anecdotal evidence and New York City's own contact tracing data illustrate this distrust. In the wake of George Floyd's murder in Minnesota, law enforcement there began using contact tracing techniques to track individuals protesting white supremacy and police brutality, and public health officials immediately lamented that the involvement of police hampered their efforts to build trust and participation in COVID-19 contact tracing.¹⁶

¹⁰ *NCHHSTP Social Determinants of Health*, CENTERS FOR DISEASE CONTROL, <https://www.cdc.gov/nchhstp/socialdeterminants/index.html> (last visited May 14, 2020); see also Ibram X. Kendri, *Stop Blaming Black People for Dying of the CoronaVirus*, ATLANTIC, Apr. 14, 2020, <https://www.theatlantic.com/ideas/archive/2020/04/race-and-blame/609946/>.

¹¹ *Fatalities*, NYS DEP'T OF HEALTH, <https://covid19tracker.health.ny.gov/views/NYS-COVID19-Tracker/NYSDOHCOVID-19Tracker-Fatalities?%3Aembed=yes&%3Atoolbar=no&%3Atabs=n> (last visited May 26, 2020); see also *The Color of Coronavirus: COVID-19 Deaths By Race And Ethnicity in the U.S.*, AMP RESEARCH LAB, May 20, 2020, <https://www.apmresearchlab.org/covid/deaths-by-race>; John Eligon, Audra D.S. Burch, Dionne Searcey, & Richard A. Oppel Jr., *Black Americans Face Alarming Rates of Coronavirus Infection in Some States*, N.Y. TIMES, Apr. 14, 2020, <https://www.nytimes.com/2020/04/07/us/coronavirus-race.html>.

¹² Khiara M. Bridges, *Implicit Bias and Racial Disparities in Health Care*, 43 ABA HUMAN RIGHTS MAGAZINE (2018).

¹³ Joseph Goldstein, *N.Y.C. Warns About Rising Virus Cases in Hasidic Neighborhoods*, N.Y. TIMES, Sept. 22, 2020, <https://www.nytimes.com/2020/09/22/nyregion/coronavirus-Orthodox-Jewish-neighborhoods.html> ("In late April, roughly 700 members of New York City's Hasidic community were believed to have been killed by the disease, and few families have been spared . . . In some areas with significant Hasidic populations, more than 40 percent of people being tested were found to have antibodies.").

¹⁴ See Bobby Allyn, *New York Ends Religious Exemptions For Required Vaccines*, NPR, June 13, 2019, <https://www.npr.org/2019/06/13/732501865/new-york-advances-bill-ending-religious-exemptions-for-vaccines-amid-health-cris>.

¹⁵ Liam Stack & Joseph Goldstein, *New York Threatens Orthodox Jewish Areas With Lockdown Over Virus*, N.Y. TIMES, Sept. 25, 2020, <https://www.nytimes.com/2020/09/25/nyregion/coronavirus-orthodox-jewish-communities.html>.

¹⁶ Alfred Ng, *Contact tracers concerned police tracking protesters will hurt COVID-19 aid*, CNET, June 1, 2020, <https://www.cnet.com/news/contact-tracers-concerned-police-tracking-protesters-will-hurt-covid-19-aid/>.

Moreover, according to the data New York City Health + Hospitals (H+H) released on September 14th, contact tracers were able to reach 91 percent of cases for a live conversation, and 70 percent of cases completed the intake interview, but only 70 percent of those who completed the interview – note the change in denominator – actually shared their contacts with H+H.¹⁷ This means that a mere 49 percent of COVID-19 cases shared contacts with contact tracers. And this 49 percent presumably includes individuals who only provided contact tracers with partial contacts.¹⁸

Although 49 percent is a slight improvement from the summer,¹⁹ it is still woefully inadequate, particularly given that contact tracers are not only contacting New Yorkers who test positive for COVID, but also contacting individuals who come into the City from out of state and are subject to the Governor’s travel advisory.²⁰ It is unclear whether the increased response rate is a reflection of New Yorkers’ growing participation or simply cooperation from travelers subject to the travel advisory. Similarly, H+H has not released information about contact tracing participation disaggregated by neighborhood, zip code, race, ethnicity, or any other demographic measure that might help New Yorkers to ascertain whether – and why – certain communities are left out. The City Council should use its oversight authority to learn more about who the City’s contact tracing program is reaching and who is still being left behind.

In the meantime, New York City already has the tools at its disposal to build the necessary trust in its contact tracing program – and the public health response more generally – if only it would use them.

In early July, H+H put out a request for proposals for test and trace (T2) community-based organization engagement opportunities. Although the request paid lip service to the importance of cultural and linguistic competency and authentic community engagement, it made clear that it was looking for community-based organizations to deliver the City’s messaging both within their communities and outside of their communities without providing a mechanism for the community-based organizations to offer feedback on the

¹⁷ *Contact Tracing Program Performance Over Time*, NYC HEALTH + HOSPITALS, Sept. 14, 2020, <https://hhinternet.blob.core.windows.net/uploads/2020/09/test-and-trace-data-metrics-20200914.pdf>.

¹⁸ Cf. Suzane Sataline, *Life as a Covid-19 contact tracer: sleuthing, stress, and veering off-script*, STAT, May 18, 2020, <https://www.statnews.com/2020/05/18/coronavirus-contact-tracer-sleuthing-stress-veering-off-script/>.

¹⁹ See Erin Durkin, *Most New Yorkers diagnosed with coronavirus aren’t sharing contacts with tracers*, POLITICO, June 16, 2020, <https://www.politico.com/states/new-york/albany/story/2020/06/16/most-new-yorkers-diagnosed-with-coronavirus-arent-sharing-contacts-with-tracers-1293254>.

²⁰ Joseph Spector, *New York asking airline passengers to fill out questionnaire as part of COVID-19 quarantine*, LOHUD., June 30, 2020, <https://www.lohud.com/story/news/politics/2020/06/30/airline-passengers-new-york-get-covid-19-questionnaire/3284099001/> (quoting New York state health department spokeswoman Jill Montag, “People we have identified from the questionnaires as requiring quarantine will be contacted by Health Department staff and/or contact tracers for follow-up.”)

government’s plans or help to shape those plans to meet community-identified needs.²¹ This is a missed opportunity. Just as community members have been more effective at convincing their neighbors to wear masks and adhere to social distancing,²² community members and organizations are more likely than outsiders to know how to convince their neighbors to identify their contacts, to get tested, and to self-quarantine when necessary. They are also likely to be more attuned to community-specific needs around stigma and safety – whether regarding sensitive associations or regarding immigration enforcement or over-criminalization.²³ H+H should use this opportunity to learn from the community-based organizations it solicits, rather than simply issuing marching orders. The Community Advisory Board the New York City Department of Health and Mental Hygiene convened offers a similar opportunity.

Second, effective contact tracing requires individuals to share a wealth of intimate information with contact tracers: their location and movements, their health status, and their associations. H+H cannot – and does not – guarantee that contact tracing information will be shielded from law enforcement and immigration authorities. H+H’s June 12th T2 webinar made clear that “[a]ny information shared with Test & Trace Corps will not be shared with immigration, law enforcement, or justice officials unless required by law.” That “unless required by law” caveat is a big one, and it was repeated on H+H’s original “What is Tracing” webpage.²⁴ H+H’s webpage is now silent on whether and in what circumstances contact tracing information will be shared with law enforcement and immigration authorities.²⁵ If individuals have any reason to believe that sharing the details of their lives will expose them or their loved ones to criminalization or deportation, they simply will not participate.

Fortunately, there is a bill on Governor Cuomo’s desk, A. 10500-C/S. 8450-C,²⁶ that would ensure that law enforcement and immigration enforcement cannot serve as contact tracers or

²¹ *Request for Proposals: T2 Community-Based Organization Engagement Opportunities*, NYC HEALTH + HOSPITALS, July 1, 2020, <https://hhinternet.blob.core.windows.net/uploads/2020/07/test-and-trace-community-based-organization-engagement-opportunities.pdf>.

²² Ashley Southall, *Police Face Backlash Over Virus Rules. Enter ‘Violence Interrupters.’*, N.Y. TIMES, May 22, 2020, <https://www.nytimes.com/2020/05/22/nyregion/Coronavirus-social-distancing-violence-interrupters.html>.

²³ *E.g.* Liam Stack & Joseph Goldstein, *New York Threatens Orthodox Jewish Areas With Lockdown Over Virus*, N.Y. TIMES, Sept. 25, 2020, <https://www.nytimes.com/2020/09/25/nyregion/coronavirus-orthodox-jewish-communities.html> (quoting Avi Greenstein, chief executive of the Boro Park Jewish Community Council, saying, “I have not myself, as the Boro Park Jewish Community Council, been reached out to even once by the city. They’re not working properly with this community.”).

²⁴ *What is tracing?*, NYC HEALTH + HOSPITALS, June 12, 2020, <https://web.archive.org/web/20200712233232/https://www.nychealthandhospitals.org/test-and-trace/what-to-expect/>. (The Internet Archive saves point-in-time snapshots of websites to preserve the history of the internet. See *About the Internet Archive*, INTERNET ARCHIVE, <https://archive.org/about/> (last visited Sept. 24, 2020)).

²⁵ *Tracing: What to Expect*, NYC HEALTH + HOSPITALS, <https://www.nychealthandhospitals.org/test-and-trace/what-to-expect/> (last visited Sept. 24, 2020).

²⁶ A.10500-C/S.8450-C, 2019-2020 Reg. Sess. (N.Y. 2020).

access contact tracing information and that an individual's contact tracing information cannot be used against them in a court or administrative proceeding. The bill would also ensure that contact tracing information will be kept confidential and will only be used for contact tracing purposes, although, importantly, it would permit the use of aggregate, de-identified information to track the spread of the virus and identify disparities among New York communities. City Councilmembers should do everything in their power to urge Governor Cuomo to sign that bill immediately, because information collected to stop a public health emergency has no place in law enforcement or Immigration and Customs Enforcement (ICE) hands.

Finally, on June 17th, the Governor signed a law requiring that contact tracers in New York City be representative of the cultural and linguistic diversity of the communities in which they serve to the greatest extent possible.²⁷ City councilmembers should ensure that this bill is robustly implemented, including by using their oversight authority to find out whether and how the test and trace corps has changed since the law went into effect and where improvements are still needed.

Contact tracing is too important to get wrong. Ensuring that the T2 program is culturally and linguistically competent and that the contact tracing information collected to mitigate a public health emergency is shielded from law enforcement and ICE are not just privacy and civil rights necessities; they are public health imperatives.

The NYCLU thanks the Committees for the opportunity to provide testimony today and for its consideration of this critically important issue.

²⁷ A.10447-A/S.8362-A, 2019-2020 Reg. Sess. (N.Y. 2020).