

**Testimony of Michael Sisitzky
On Behalf of the New York Civil Liberties Union
Before the New York City Council Committee on Public Safety
Regarding the City Council’s Police Reform Proposals**

February 16, 2021

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following testimony regarding the police reform measures under consideration by the Committee on Public Safety. The NYCLU, the New York affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with eight offices throughout the state and more than 180,000 members and supporters. The NYCLU’s mission is to promote and protect the fundamental rights, principles, and values embodied in the Bill of Rights of the U.S. Constitution and the New York Constitution.



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The police killings of George Floyd, Breonna Taylor, Daniel Prude, and too many Black and Brown people sparked uprisings throughout the country and across the state. The mass mobilization of New Yorkers demanding justice for Black lives propelled New York lawmakers to finally act on long-overdue police reform measures to increase transparency and accountability. Important as these measures are, it is clear that reforms alone are not sufficient to address the structural and cultural problems inherent in law enforcement.

On June 12, 2020, Governor Cuomo issued Executive Order 203, directing every local government entity with a police agency to create a Police Reform and Reinvention Collaborative tasked with developing additional reform plans for adoption by local legislatures no later than April 1, 2021.¹ As we noted in our testimony before this committee in January, New York City has made appallingly little progress in complying with this executive order.² With six weeks remaining until that April 1st deadline, neither the public nor City lawmakers have seen any draft proposals or even outlines for proposals. The process thus far has been subject to far too much control by the New York Police Department (“NYPD”), an agency that has made clear time and time again that it is incapable of reforming itself. If New York City is to accomplish anything meaningful as part of this process, it will require

¹ N.Y. Exec. Order No. 203 (June 12, 2020), <https://www.governor.ny.gov/news/no-203-new-york-state-police-reform-and-reinvention-collaborative>.

² NYCLU, *Testimony Before the New York City Council Committee on Public Safety Regarding the City’s Policing Reform Process*, Jan. 11, 2021, https://www.nyclu.org/sites/default/files/field_documents/20210111-testimony-nypdreformprocess_0.pdf.



the City Council to assert real leadership and to center the demands of communities most impacted by police violence.

To that end, the NYCLU is encouraged to see the Council acting independently of the administration and the NYPD's process by putting forward its own legislative agenda. We offer comments on three of these measures, in particular, as well as suggestions for additional items for the Council to consider. We note, however, that no legislative package, no matter how ambitious, will suffice to fully address the fundamental flaws with our current approach to public safety: namely, our continued overinvestment in policing and underinvestment in the types of services that are actually capable of meeting people's basic needs and enabling communities to thrive. Much can be accomplished through legislation, but until the Council commits to dramatically reduce the NYPD's budget and invest in Black and Brown communities, we will only be addressing the symptoms of our current approach, rather than treating the underlying problems inherent therein.

Res. 1538

The NYPD is fundamentally incapable of policing itself. Yet current law establishes this approach as the paradigm for holding officers accountable for misconduct. The City Charter and Administrative Code vest the police commissioner with full authority over all disciplinary matters, including complete discretion to accept, modify, or outright reject recommendations from the Civilian Complaint Review Board ("CCRB").³ In practice, this has allowed NYPD commissioners to downgrade or completely ignore CCRB recommendations in the overwhelming majority of serious misconduct cases, with one recent analysis finding that the NYPD rejected CCRB recommendations in around 71 percent of serious misconduct cases over the past two decades.⁴

Civilian oversight of policing is an empty exercise if the police commissioner has the authority to reject unilaterally the findings and recommendations of the very agency specifically entrusted to engage in that oversight. For these reasons, the NYCLU has long called for the removal of the commissioner's exclusive authority to decide disciplinary outcomes and for the transfer of that power to an

³ N.Y.C. Charter §§ 434(a), 440; N.Y.C. Admin. Code §§ 14-115, 14-123.

⁴ Ashely Southall, et al., *A Watchdog Accused Officers of Serious Misconduct. Few Were Punished*, N.Y. Times, Nov. 15, 2020, <https://www.nytimes.com/2020/11/15/nyregion/ccrb-nyc-police-misconduct.html>.



independent, civilian oversight agency.⁵ As a statewide organization, we also note that these issues are not unique to New York City. Communities across the state, from Long Island to Syracuse to Buffalo are currently grappling with these very issues as they consider how best to investigate and hold officers accountable for misconduct. In 2019, our office in Rochester supported the creation of a new Police Accountability Board that would be empowered to take disciplinary authority away from the Rochester Police Department and exercise independent control over disciplinary outcomes. Unfortunately, that board is currently blocked from exercising its full authority owing to police union litigation, which challenged Rochester’s ability to enact such reforms through local legislation.⁶ This case makes the need for state-level action all the more important.

The NYCLU supports Res. 1538 and welcomes the City Council’s advocacy with the State Legislature to clarify the authority of local legislatures to create and implement truly independent mechanisms for police accountability. We urge the Council to ensure that its advocacy takes stock of the statewide nature of this problem and does not leave other municipalities facing these same challenges behind.

Moreover, while the independent administration of police discipline is a critically important issue, we must emphasize that the best way to protect New Yorkers from police abuse is to reduce the number of contacts between police and the public that lead to such abuse in the first place. Disciplinary authority and meaningful accountability matter, but the point at which they matter is after the harm has already been caused. To drive down the number of abusive encounters at the front end, the Council must commit to reducing the size, scope, and power of the NYPD and investing in non-law-enforcement alternatives where licensed, trained professionals can better provide needed interventions. Creating independent systems for the administration of police discipline does not itself reduce the instances of police harm and violence, and it cannot serve as a substitute for shifting resources away from the police and into non-punitive models of community safety.

⁵ NYCLU, *Testimony Before the New York City Council Committee on Public Safety and the Committee on Civil Rights regarding the Civilian Complaint Review Board and Civilian Oversight of Policing*, March 9, 2007, <https://www.nyclu.org/en/publications/civilian-complaint-review-board-and-civilian-oversight-policing>.

⁶ David Andreatta & Jeremy Moule, *Court Ruling Temporarily Hobbles Police Accountability Board*, Rochester City News, Jan. 28, 2020, <https://www.rochestercitynewspaper.com/rochester/court-ruling-temporarily-hobbles-police-accountability-board/Content?oid=11348030>.

Intro. 1671

Data on police enforcement activity can be a powerful tool for unearthing and challenging abusive and discriminatory practices. However, New York City does not collect or comprehensively report on the NYPD's handling of vehicle stops and traffic enforcement, making it challenging for the public and lawmakers alike to assess the full impact of these practices on communities throughout the city.

Studies have found that many of the same disparities we have witnessed in pedestrian stops are present in vehicle stops.⁷ The potential for quick escalation and violence in vehicle stops has even led to calls from the New York State Attorney General Letitia James to remove police from routine traffic enforcement altogether.⁸



While reporting along will not solve the underlying issues with police involvement in vehicle stops, it is crucial for filling gaps in existing data and allowing for increased scrutiny of these practices. The lack of transparency and potential for escalation in these encounters has long been of concern to the NYCLU. Indeed, a key reason we withdrew support for the Right to Know Act's police identification bill in 2017 was a last-minute deal to strike traffic stops from the list of activities in which NYPD officers would be required to identify themselves and provide information on the reasons for the encounter.⁹ Intro. 1671 is an important first step toward increasing transparency in these encounters.

The NYCLU encourages the Council to strengthen the bill's reporting requirements by providing a more detailed accounting of the types of vehicles stopped, including ensuring that bicycles and e-bikes are covered. In recent years, we saw repeated, aggressive crackdowns on enforcement of vehicle and traffic infractions against immigrant delivery workers on e-bikes, all while lacking regular, comprehensive reporting on the full extent of these stops.¹⁰ We also recommend that

⁷ Emma Pierson, et al., *A Large-Scale Analysis of Racial Disparities in Police Stops across the United States*, NAT. HUM. BEHAV. 4, 736 (2020), <https://doi.org/10.1038/s41562-020-0858-1>.

⁸ Michael Sisak, *NYPD Should Stop Making Traffic Stops, Attorney General Says*, Associated Press, Sept. 25, 2020, <https://apnews.com/article/bronx-arrests-traffic-archive-new-york-c93fa5fc03f25c2b625d36e4c75d1691>.

⁹ NYCLU, *NYCLU Statement on Current Status of the Right to Know Act*, Dec. 14, 2017, <https://www.nyclu.org/en/press-releases/nyclu-statement-current-status-right-know-act>.

¹⁰ Christopher Robbins, *De Blasio Says E-Bike Crackdown is Based on Something "Better than Data. It is Common Sense,"* Gothamist, Jan. 7, 2020,

the bill be amended to require reporting on all summonses and arrests “in connection with” vehicle stops, roadblocks, and checkpoints. The bill’s language is currently limited to summonses and arrests for “traffic infractions,” which leaves out any reporting on non-traffic criminal enforcement that takes place in connection with these encounters. This amendment is necessary to capture reporting on the number of vehicle stops that result in summonses or arrests for, among other things, marijuana possession or other drug charges. Any reporting bill on vehicle and traffic stops must require a full accounting of all of the ways in which NYPD enforcement manifests.

Intro. 2220



Federal law provides people with the right to sue government officials, including police officers, for violating their constitutional rights. Qualified immunity, a judicially created defense in such lawsuits, lets countless officials off the hook for these violations, and it has stymied the development of the law in police accountability cases.

In short, a police officer is entitled to qualified immunity – and thus, not liable for money damages – if the constitutional right they violated was not “clearly established” at the time. Courts have essentially required that a near identical fact pattern in a previous case holding that a constitutional right was violated be required to demonstrate that the right was clearly established. But courts often refrain from ruling on whether there was a constitutional violation in the first place, instead dismissing cases on qualified immunity grounds because no prior case was directly on point, setting up a catch-22 in which it is exceedingly difficult to establish any new precedent. In the policing context, qualified immunity has essentially transformed “into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.”¹¹

Ultimately, either Congress or the Supreme Court must act to fully resolve and remove the harms caused by this doctrine, but state and local laws like Intro. 2220 can provide separate pathways to accountability that do not allow for the doctrine’s application, but the scope of such measures should not be narrower than the scope of police

<https://gothamist.com/news/de-blasio-e-bike-crackdown-common-sense>; Christopher Robbins, *NYPD Ignored the Mayor and Its Own Policy Memo so it Could Fine E-Bike Delivery Workers*, Gothamist, Mar. 27, 2019, <https://gothamist.com/news/nypd-ignored-the-mayor-and-its-own-policy-memo-so-it-could-fine-e-bike-delivery-workers>.

¹¹ *Kisela v. Hughes*, 138 S. Ct. 1148, 1162, 200 L. Ed. 2d 449 (2018) (Sotomayor, J., dissenting).



violations of New Yorkers' constitutional rights. We note that Intro. 2220 directly incorporates the Fourth Amendment into the New York City Administrative Code, but the rights violated by NYPD officials are not limited to those encompassed in the Fourth Amendment. For example, racial profiling by NYPD officers implicate the 14th Amendment's guarantee of equal protection; and the aggressive policing of protest, retaliation against journalists, and interference with the recording of police activities implicate the First Amendment. A broader approach, encompassing all of the rights and protections of the state and federal constitution and laws, will ensure that this new private right of action provides a fuller measure of accountability. We also note that the standards for awarding attorney's fees to a prevailing plaintiff under this proposed bill are narrower than similar provisions in the Administrative Code's private right of action for bias-based profiling.¹² We recommend the Council conform the language in this bill to the language contained in Section 8-502(g).

Intro. 2220 also includes a structure for personal liability and only partial indemnification for the award of money damages or settlements. While we would hope that this structure might deter individual officers from engaging in misconduct, it raises a number of questions that merit further consideration. In place like Colorado, where a similar measure passed last summer, police unions have begun to acquire liability insurance policies on behalf of their members and to ensure that most officers will not face much in the way of direct financial costs.¹³ While there have a number of arguments advanced in support of requiring officers to carry liability insurance, the Council should consider what this type of system might mean in practice here, including whether the costs for such insurance policies will still be passed on to taxpayers via police union contracts with the city. And even if there are some direct costs for officers, we note that New York City pays out and taxpayers will remain on the hook for hundreds of millions of dollars each year in police misconduct cases and settlements.¹⁴ These monies will be paid out of the city's general fund and will not directly be tied to the Police Department itself. The NYCLU urges the Council to do more to ensure that these costs are

¹² N.Y.C. Admin. Code § 8-502(g).

¹³ Elise Schmelzer, *Insurance? Union Plans? Colorado's Cops Weigh Liability Coverage under New Police Accountability Law*, Denver Post, Sept. 4, 2020, <https://www.denverpost.com/2020/09/04/colorado-police-union-liability-insurance-sb217/>.

¹⁴ Graham Rayman & Clayton Guse, *NYC Spent \$230m on NYPD Settlements Last Year: Report*, N.Y. Daily News, <https://www.nydailynews.com/new-york/ny-stringer-report-nypd-payout-settlement-lawsuits-20190415-2zzm2zkhpna63dtlcr2zks6eoq-story.html>.

more directly borne by the NYPD, including by reducing the agency's budget to account for the full costs of police misconduct. The Council's goal must extend beyond holding individual officers accountable; it must also extend to holding the Department as a whole accountable for the culture it promotes and condones among its officers.

Recommendations for Further Legislation

The NYCLU suggests that the Council add the following measures to its overall police reform package, both of which have widespread support from communities most directly impacted by NYPD practices:



- **Intro. 1551:** This bill has already been heard at an April 2019 Public Safety Committee hearing and is ripe for Council action. It would codify expanded reporting on all consent searches and requests for consent searches. While the NYPD has thus far agreed to report on all such data, reporting on declined requests for consent to search was not included in the final legislation passed by Council in the 2017 Right to Know Act. Before passage, the NYCLU urges the Council to first amend this bill to ensure that the NYPD is required to document any instances in which officers collect DNA information on the basis of someone's purported "consent." At the 2019 hearing, NYPD officials confirmed that such searches were not included in the Department's reporting on consent searches, notwithstanding disturbing reports that officers were conducting dragnet DNA searches that included knocking on people's doors and asking people to consent to saliva swabs.¹⁵ The Council must ensure that such searches adhere to the Right to Know Act's requirements for consent searches, including its reporting requirements, and we call on the Council to add specific language concerning these searches to Intro. 1551 and to pass this long-pending bill without further delay.
- **Reporting on Level 1 and Level 2 Investigative Encounters:** The NYCLU recommends that the Council introduce and quickly pass legislation to require that the NYPD report on all police investigative encounters, including those that fall below the level of a formal reasonable suspicion stop. So-called level 1 and level 2 investigative encounters are not recorded in the same manner as stop and frisk activity, despite the fact that many people's experience of these

¹⁵ Allison Lewis, *The NYPD's New DNA Dragnet: The Department is Collecting and Storing Genetic Information, with Virtually No Rules to Curb their Use* <https://www.nydailynews.com/opinion/ny-oped-the-nypds-new-dna-dragnet-20190206-story.html>.

encounters are not meaningfully different in reality. While the total number of stops has undoubtedly fallen sharply since the height of stop and frisk in 2011, the NYPD has been consistently undercounting the total number of stops that its officers carry out.¹⁶ This raises serious questions about the extent to which stop activity – and its attendant racial disparities – is persisting under another name. The only way we will get a full and accurate accounting of police interference with the daily lives of New Yorkers is by requiring that all investigative encounters, including Level 1 and Level 1 interactions, be recorded and reported. The NYCLU calls on the Council to introduce and pass legislation to that effect.

Conclusion

The City Council has an opportunity to fill the leadership vacuum left by this administration when it comes to promoting police accountability and reimagining community safety. The above measures have an important role to play in that process, but they must be viewed as only one step in that process, not the sum total of the Council's advocacy. The NYCLU urges the Council to meet the urgency of this moment with a vision for reducing the size, scope, and power of the NYPD that goes beyond these needed reforms and that fundamentally restructures how our city invests in the well-being of Black and Brown communities.



¹⁶ Al Baker, *City Police Officers are Not Reporting All Street Stops, Monitor Says*, N.Y. Times, Dec. 13, 2017, <https://www.nytimes.com/2017/12/13/nyregion/nypd-stop-and-frisk-monitor.html>.