

**Comments of the New York Civil Liberties Union
Regarding the New York Police Department’s Draft Policy on
Response to First Amendment Activities**

June 30, 2021

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following comments regarding the draft New York Police Department (“NYPD”) Patrol Guide policy on Response to First Amendment Activities. 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 125,000 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. Defending New Yorkers’ right to be free from discriminatory and abusive policing and to exercise their right to demonstrate against police brutality are core components of the NYCLU’s missions.



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Last summer, as New Yorkers exercised their First Amendment rights to demonstrate and demand justice for Black lives, NYPD officers responded with shocking displays of escalation and abuse. The violence that New Yorkers witnessed was overwhelmingly carried out by police officers and directed against the public. From the many documented incidents of excessive force, the arrests of journalists and legal observers, the interrogations of protesters’ political beliefs, and the contempt shown by officers attempting to evade accountability by concealing their own identifying information, the NYPD’s actions reflect an approach that is fundamentally hostile to the public’s right to engage in First Amendment-protected protest.

The NYPD’s actions last summer have been widely condemned and have been the subject of numerous investigations and ongoing litigation. Although not clearly indicated in the document, it appears that this draft policy has been developed in response to a recommendation from the city’s Department of Investigation (“DOI”), which found several structural and operational flaws in the NYPD’s response to the George Floyd protests, specifically, as well as with the Department’s overall approach to responding to protest and to holding officers accountable for misconduct.¹ The DOI report’s first

¹ New York City Dep’t of Investigations, *Investigation into NYPD Response to the George Floyd Protests*, Dec. 2020,



recommendation was for the NYPD to “draft a Patrol Guide policy specific to policing protests and protected First Amendment activity,” and to consult on this policy with individuals and entities outside of the Department, including civil rights attorneys, community organizations, and police reform experts.”²

The NYPD Should Further Reduce the Scope of its Response to First Amendment Activities, Starting with the Removal of the Strategic Response Group from the Policing of Protest

While it is, of course, important that any actions that NYPD officers take be governed by transparent and accessible policies that are responsive to public concerns, the draft policy skips over and presumes the answer to an even more foundational line of inquiry: is this an appropriate area in which police should have primary responsibility at all, or is the facilitation of New Yorkers’ right to engage in First Amendment activity an area where unarmed, civilian agencies can better take the lead on any necessary governmental response?

Rather than grappling with that question, the draft policy further entrenches a policing response to First Amendment activities in New York City at a time when we should be looking for ways to reduce our overreliance on police officers and invest in more accommodating and less militant approaches. While a broader shift of responsibilities outside of the Police Department necessitates a broader commitment from city leaders and is beyond the scope of what can be accomplished through any one Patrol Guide policy, the Department can and should do more to reduce the scope of its response to First Amendment activities and to more squarely address some of the most harmful practices that too often are the reason for escalation in the first place.

Chief among the necessary structural changes that appears to be left largely unaddressed in the draft policy is removing the Strategic Response Group (“SRG”) from the handling of protests. While not primarily directed to or governing the actions of the SRG during First Amendment activities, the draft policy clearly envisions a continued role for the unit in the policing of protest. Based on their track record at protests since the unit was first formed in 2015, it is clear that SRG should play no such role.

<https://www1.nyc.gov/assets/doi/reports/pdf/2020/DOIRpt.NYPD%20Reponse.%20GeorgeFloyd%20Protests.12.18.2020.pdf>.

² *Id.* at 68.



From the outset, the SRG’s dual role of being responsible for counterterrorism and the policing of protest has been deeply problematic. The heavily militarized unit reportedly attracted officers looking for “more action,”³ and many of its members have substantial histories of serious misconduct.⁴ SRG officers have been involved in violent arrests of protesters demonstrating against the attempted deportation of an immigration activist,⁵ deployed their bicycles as weapons with which to bludgeon demonstrators during the George Floyd protests,⁶ and violently cleared out Washington Square Park and pursued people through the West Village while tasked with enforcing a 10pm curfew.⁷ They are trained in aggressive forms of crowd control and mass arrests, including – despite the semantic gymnastics of NYPD officials⁸ – the use of kettling to entrap and facilitate the mass arrest of protesters.⁹

The DOI report called on the NYPD to “reevaluate the central role of the Strategic Response Group and Disorder Control Unit response to large protests given their orientation to handle counterterrorism, riots, and other serious threats,”¹⁰ and found that the SRG’s deployment at the George Floyd protests “likely exacerbated tension” and “may have unnecessarily provoked confrontations between police and protesters, rather than de-escalation tensions.”¹¹ So long as the SRG continues to play a role in the policing of protest, we will be leaving in place one of the most glaring and harmful flaws in the Department’s approach to First Amendment activities. It is time for the Department to admit that its approach to marrying protest policing and counter-terrorism was a

³ John Bolger & Alice Speri, *NYPD “Goon Squad” Manual Teaches Officers to Violate Protesters’ Rights*, *The Intercept*, April 7, 2021, <https://theintercept.com/2021/04/07/nypd-strategic-response-unit-george-floyd-protests/>.

⁴ Ali Winston, *NYPD Unit at Center of Protest Policing has Dozens of Officers with Long Misconduct Histories*, *The Appeal*, Oct. 15, 2020, <https://theappeal.org/nypd-srg-misconduct/>.

⁵ *Id.*; Nick Pinto, *No Sanctuary*, *The Intercept*, Jan. 19, 2018, <https://theintercept.com/2018/01/19/ice-new-sanctuary-movement-ravi-ragbir-deportation/>.

⁶ Winston, *supra* note 4.

⁷ Christopher Robbins, *Will NYC’s Next Mayor Use the “Goon Squad” to Shut Off Parks Access? (Probably)*, *Streetsblog NYC*, June 9, 2021, <https://nyc.streetsblog.org/2021/06/09/will-nycs-next-mayor-use-the-goon-squad-to-shut-off-parks-access-probably/>.

⁸ Alice Speri, *Ambushed by the Cops: When Police Deliberately Trap Peaceful Protesters*, *The Intercept*, June 2, 2021, <https://theintercept.com/2021/06/02/kettling-protests-charlotte-police/>.

⁹ Bolger, *supra* note 3.

¹⁰ DOI Report, *supra* note 1 at 69.

¹¹ *Id.* at 36.

mistake. The Department cannot claim to fully respect the First Amendment rights of New Yorkers so long as the SRG's protest-related responsibilities remain in place.

The Draft Policy Falls Short of Providing Clear and Adequate Protections for the Right to Engage in First Amendment Activities

With respect to the language of the draft policy itself, we note several areas of concern. Many of the terms in the definitions section are vaguely defined, with some too narrow and others overbroad and lending themselves to selective interpretation and implementation. In several places the proposed policy calls for the need to balance First Amendment interests with public safety interests, but the policy never suggests how to strike that balance. Any balancing must recognize the strong constitutional protections for free speech and ensure that any policing activity impacting New Yorkers' right to protest is demonstrably necessary and narrowly tailored.



The definition "First Amendment Activity" as limited to participants who are "lawfully assembled" would appear to exclude a substantial amount of genuine protest activity from falling within the scope of this policy, particularly with respect to spontaneous and unpermitted demonstrations. As one example, the NYPD has frequently justified enforcement action against protesters for conduct as minor as stepping off the sidewalk or not leaving the street quickly enough during unpermitted demonstrations.¹² Despite the fact that this policy is ostensibly being developed in response to the widespread abuses by police at protests last summer, it's not even clear that the clear First Amendment activities of the tens of thousands of New Yorkers who, without permits, took to the streets would fall within this draft policy's scope as a result of this framing.

While "First Amendment Activity" may be overly restrictive, the term "Violent Behavior" is overbroad and vague. It is not at all apparent what the policy means by referring to activity that "causes public unrest" or that "prevent[s] law enforcement from maintaining the peace." Clearer standards are needed to guard against the abuse of

¹² Jake Offenhartz & Gwynne Hogan, *Photos: NYPD Arrests Protesters Marching on MLK Day Near City Hall*, Gothamist, Jan. 19, 2021, <https://gothamist.com/news/photos-nypd-arrests-protesters-marching-mlk-day-near-city-hall>; *NYC Demonstrators Say Video Proves Charges in Protest Against ICE should be Dropped*, NBC 4 New York, Sept. 22, 2020, <https://www.nbcnewyork.com/news/local/nyc-demonstrators-say-video-proves-charges-in-protest-against-ice-should-be-dropped/2629258/>.

discretion by police officers. Last summer, false and inflammatory accusations that protesters in Mott Haven were planning to engage in violence were used as a pretext to justify the abusive kettling and mass arrests of protesters in clear violation of their First Amendment rights.¹³ A policy definition of violent behavior that continues to allow the NYPD wide latitude to sweep in nonviolent conduct can easily become a political tool to discredit those who express unpopular views and provoke inflammatory accusations of violence that may escalate encounters where there is no actual threat to safety. This would only further erode the NYPD’s credibility and undermine any stated goals of de-escalation.



With respect to the definition of “De-escalation,” the draft policy offers little practical guidance to officers on what de-escalation tactics should or could look like in practice. Moreover, the initial framing of de-escalation mainly as a means of securing time for the deployment of additional law enforcement resources skips past the more beneficial goal of obviating the need for *any* additional coercive action by the police and ensuring that any NYPD response offers the least restrictive limitation on First Amendment expression.

The draft policy describes one of the roles of the “protest liaison” as the establishment of a rapport with leaders of the relevant First Amendment activity. While establishing such a rapport may help in facilitating attempts at de-escalation, it is worth emphasizing that there are inherent tensions in this approach. The draft policy notes that goals of establishing a rapport with protest leaders include attempting to “have group leaders intervene before activities become unlawful, and to garner support when police action is necessary[.]” Protest leaders and participants – particularly protesters against police abuse and brutality – often have valid and principled reasons for limiting the degree to which they collaborate with NYPD officials. Language that suggests that protest leaders will be asked to garner support for police enforcement *against* the very protesters with whom they are organizing seems destined to result in organizers refusing such collaboration because of that inherent conflict of interest. This is one more reason for city officials to do the more fundamental work of rethinking the value of having the default response to First Amendment activities being a police response, given the Department’s lack of credibility with so many of the communities that regularly engage in protest activity in New York City.

¹³ Craig McCarthy, *NYPD Commissioner Dermot Shea Ignores His Own “Misinformation” Warnings*, N.Y. Post, June 8, 2020, <https://nypost.com/2020/06/08/nypd-commissioner-ignores-his-own-misinformation-warnings/>.



Relatedly, we note that the draft policy does not contain any mention of the *Handschu* Guidelines, despite the fact that the *Handschu* case and these Guidelines arose from the Department’s history of infiltrating and surveilling groups engaged in First Amendment-protected activities. An NYPD policy that seeks to provide a baseline for the Department’s handling of First-Amendment activities is incomplete without clear reference to the limits imposed on officers under the *Handschu* consent decree, particularly where the draft policy encourages officers to attempt to identify and engage with leaders of protest movements. And to the extent that the draft policy will require officers to prepare a “Digital Activity Log” and a “First Amendment Activity/Citywide Event Report,” it must ensure full compliance with the *Handschu* Guidelines and provide additional information on where such records will be maintained, who will have access to them, and the circumstances under which such access shall be granted.

Lastly, we note the draft policy’s reference to the NYCLU’s protest monitoring program and the legal observer program coordinated by the National Lawyers Guild (“NLG”). For years, the NYCLU has trained and deployed protest monitors to document police activity at large scale protests and demonstrations throughout the city. NYCLU protest monitors have been present to document mass arrests, targeting of journalists, excessive force, and police surveillance at the 2004 Republican National Convention, Occupy Wall Street in 2012, at multiple protests following the NYPD killing of Eric Garner in 2014, during last summer’s protests demanding justice for George Floyd, and during the recent NYPD-enforced curfew at Washington Square Park, among countless other demonstrations.

While we appreciate the draft policy’s statement that NLG and NYCLU legal observers will be extended “every courtesy and cooperation” to engage in this work, we note that this has often not been the experience of our protest monitors. As recently as this month, NYCLU protest monitors have been threatened with arrest for following and documenting police activity at Washington Square Park, despite being clearly identified.¹⁴ And last year’s mass arrest in Mott Haven, at which officers were heard to call for rounding up “all the green hats,” was among the more alarming demonstrations of the Department’s

¹⁴ Isabelle Leyva (@isabelle_leyva), Twitter (June 5, 2021), https://twitter.com/isabelle_leyva/status/1401375479706304517 (“Army of cops chasing protesters (and random citizens) through the streets. I was told that I would be arrested if I continued to follow the police line. I am an identified protest monitor”).

mistreatment of and retaliation against people engaged in the critical work of documenting and exposing police abuse.¹⁵

To the extent that this draft policy reflects a sincere commitment to a less hostile approach, it is a necessary shift. But it is worth emphasizing that anyone who engages in legal observing or protest monitoring activity – whether as part of a coordinated program or not – should be entitled to no less respect. Every New Yorker has the First Amendment right, also codified in local law,¹⁶ to record police activities and to do so without police interference or obstruction. The NYPD should be explicit in its recognition of and its commitment to respecting this right, and the Department should be equally committed – in both its policies and its actions – to holding officers responsible for any failure to do so.



The NYCLU appreciates the opportunity to provide comments on the draft policy on First Amendment activities and welcomes the opportunity for continued engagement on this issue.

¹⁵ Jake Offenhartz, “Round Up the Green Hats”: NYPD Accused of Deliberately Targeting Legal Observers in Brutal Bronx Mass Arrest, Gothamist, June 8, 2020, <https://gothamist.com/news/round-green-hats-nypd-accused-deliberately-targeting-legal-observers-brutal-bronx-mass-arrest>.

¹⁶ N.Y.C. Admin. Code § 14-189.