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April 19, 2017

**Via ECF**
Hon. Analisa Torres
United States District Court
Southern District of New York
500 Pearl Street
New York, NY 10007

Re: *Floyd v. City of New York*, 08 Civ. 1034 (AT)
*Davis v. City of New York*, 10 Civ. 699 (AT)

Dear Judge Torres:

Pursuant to Fed.R.Civ.P. 53(f) and this Court's February 3, 2015 Order, *see Floyd* Dkt # 476, we write on behalf of Plaintiffs in the above-entitled actions to respond and object to the Independent Monitor's April 11, 2017 Memorandum approving the New York Police Department's (NYPD) operations order setting forth the policies and procedures that will govern the year-long body worn camera (BWC) pilot program ordered by this Court. *Floyd* Dkt # 545.[1] For the reasons set forth below, *Floyd* and *Davis* Plaintiffs submit that the sections of the operations order referenced in the Monitor's Memorandum must be approved by the Court before the order can be implemented. We also object to several of these sections as currently drafted and request that the Court direct that they be modified as set forth below.

As a threshold matter, we express our deep reservations about the Monitor's approval of an operations order which misstates the rationale relied on by the Court in ordering the BWC pilot project and diminishes the importance of body worn cameras as a remedy to prevent future constitutional violations. The Court ordered the NYPD to institute a BWC pilot project, "(b)ecause body worn cameras are uniquely suited to addressing the constitutional harms in this case . . ." *Floyd* Dkt # 372 at. 27. In doing so, the Court set out several "useful functions" of the BWC. These included providing a "contemporaneous, objective record of stops and frisks," encouraging "lawful and respectful interactions" on the part of both the police and the public, and level the playing field for those who file complaints against the police. *Id.* at 26-27. However, the opening paragraph of the Operations Order states that the "pilot program" will be "examined to determine whether BWCs contribute to officer safety, *provide evidence for criminal prosecutions*, help to resolve civilian complaints, reduce Terry stops, and foster positive relations with the community." (emphasis added). Nowhere in the Court's Remedial Order is this program directed to "provide evidence for criminal prosecutions," nor is the Monitor directed to evaluate it as such. We ask that this line be struck from the operations order and that the pilot program not be used for this purpose. The NYPD is free to conduct its own separate BWC pilot program for this purpose if it sees fit – and indeed, it has already conducted a small voluntary BWC pilot program. But this Court-ordered pilot should be focused on the purpose for which the Court ordered it. There are already myriad issues and data that need to be collected and analyzed from this pilot, per the Court's order. It is best not to cloud that already-

[1] In compliance with ¶ 3 of the Court's February 3, 2015 Order, Plaintiffs notified the Monitor and other parties of our intent to file this response and objection within five days of receiving the Monitor's April 11 Memorandum, and this response and objection is filed within fourteen days of our receiving the Monitor's Memorandum.

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complicated process with additional issues, unrelated to the purpose of this pilot.[2]

### A. Court Approval of the BWC Operations Order is Required

In his Memorandum, the Monitor makes much of the fact that the BWC pilot is discussed in a separate section of the Court's August 2013 Remedial Order, section II.B.3, from the Court-ordered Immediate Reforms, which are discussed in section II.B.2., and that, unlike section II.B.2, section II.B.3 does not expressly mention "court approval." *Floyd* Dkt # 545 at 2. However, the Monitor fails to mention that section II.B.1 of the Remedial Order, which sets forth his role, duties, and responsibilities with respect to all of his work under sections II.B.2, 3, *and* 4 of the Remedial Order, specifies that (1)"[t]he Monitor will be subject to the supervision and orders of the Court," and (2) the Court "retains jurisdiction to issue orders as necessary to remedy the constitutional violations described in the [*Floyd*] Liability Opinion." *Floyd* Dkt # 372 at 12. Thus, under any reasonable reading of section II.B.1. of the Remedial Order, the Court must have the ability to review and, if necessary, modify or reject *any* Court-ordered reform measure approved by the Monitor- including the procedures governing the BWC pilot required by Section II.B.3 of the Remedial Order- so that the Court can insure that such remedial measure furthers the goal of remedying, rather than perpetuating or exacerbating, the constitutional violations identified in the Court's Liability Opinion.

Moreover, while the Monitor is technically correct that "[b]ody-worn cameras are not included as an 'immediate reform' in Part II.B.2," Dkt # 545 at 2, it is clear from the face of the BWC operations order itself that several of its sections, which are the focus of Plaintiffs' objections below, will directly and significantly impact several specific immediate reform measures required by Section II.B.2 of the Remedial Order which the Court has already approved or will soon be asked to approve, including policies and procedures for (i) recording and documenting stop- and-frisk encounters, *see* Dkt # 372 at 18-23, Dkt # 527 at 18-19; (ii) supervisory review of stops, Dkt # 372 at 24; Dkt # 527 at 19-20 (iii) monitoring and auditing of officer stop-and-frisk activity; Dkt # 372 at 2; Dkt # 527 at 21-22; and (iv) investigations and dispositions of civilian complaints about bad stops and/or racial profiling. Dkt # 372 at 24. Because all material changes to previously Court-approved immediate reforms also require Court approval, *see Floyd* Dkt # 509, the sections of the BWC operations order discussed below likewise require the Court's approval before they can be implemented.[3]

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[2] Along the same lines, Plaintiffs are concerned about the lack of guidelines and safeguards in the BWC operations order concerning the usage of BWC recordings and related data by the NYPD. There should be specific language prohibiting BWC recordings from being used to create databases of individuals or for police photo arrays or mug shots, and express safeguards against recordings being run through facial recognition software. Such uses risk violating civilians' privacy rights and civil liberties and go well beyond the purposes for the BWC pilot program articulated by the Court. The Baltimore County, MD body-worn camera policy contains some suggested language that could be used as a starting point: "Stored video and audio data from a BWC shall not: 1) be used to create a database or pool of mug shots 2) be used as fillers in photo arrays 3) be searched using facial recognition software." *See* http://www.baltimorecountymd.gov/Agencies/police/bodycameras/usepolicy.html

[3] Plaintiffs are also confused and troubled by the Monitor's contention that while the parties are not prohibited from petitioning the Court to seek relief from his decisions, "this is not the same as subjecting the monitor's every decision regarding the [Court-ordered BWC] pilot to the possibility of a formal court review process," which would undermine the flexibility the pilot requires. Dkt # 545 at 2-3. Seeking court approval of the central component of a court-ordered reform at the outset of the implementation of that reform is far from "subjecting the monitor's every decision" to court review. Moreover, Plaintiffs do not understand how they would be able, as the Monitor suggests,

There is another important reason why this Court's approval of the BWC pilot operations order is essential. It has recently been reported that the supervisory unions in the NYPD are contemplating a legal challenge to the Court-ordered BWC pilot.[4] Although no such action has yet been brought, it is important for this Court to protect its jurisdiction over the remedial process by subjecting the BWC pilot operations order to Court approval. Without Court approval, these unions would be free to challenge the pilot in a separate state court proceeding, which could lead to conflicting rulings on how an important remedy in this case has and will be implemented. Court approval of the pilot project will make clear that all challenges to the pilot from whatever source will be decided by this Court.

**B. Plaintiffs' Objections to Certain Substantive Sections of the BWC Operations Order**

Plaintiffs object to several sections of the BWC operations order and request that they be modified before the operations order is so ordered by this Court and implemented by the NYPD.

1. Mandatory recording of Some But Not All *DeBour* Levels of Investigative Encounters

As currently drafted, the BWC operations order mandates recordings of arrests (i.e., Level 4 *De Bour* encounters) and "[i]nteractions with persons suspected of criminal activity," Dkt # 545, Att. 1 ¶ 5(d), which the NYPD and the Monitor claim encompasses all *Terry* stops (*De Bour* Level 3) and *De Bour* Level 2 encounters. Dkt # 545 at 6, Att 3 at 12. However, because the *Floyd* trial evidence demonstrated that NYPD officers often did not clearly understand the differences between Level 2 and Level 3 *De Bour* encounters, *see* Dkt # 373 at 104-05 n. 375, and because most if not all of the officers who will participate in the Court-ordered BWC pilot have not yet received the new investigative encounters in-service training being developed that clarifies these differences, there is a significant risk that the vague language of paragraph 5(d) of the operations order will result in officers failing to record many Level 2 and 3 encounters. Thus, at a minimum, paragraph 5(d) should specify that officers are required to record interactions that involve both forcible stops/detentions and encounters where the civilian is free to end the encounter and walk away.

More importantly, the Operations Order does not require recording of all *De Bour* Level 1 encounters. While it does require recording Level 1 encounters that take place inside of public housing and privately owned apartment buildings and when officers are responding to radio calls of crimes in progress, *see* Dkt # 545 at 7, Att 1 ¶¶ 5(i),(j), it exempts the same kind of Level 1 encounter that was at issue in the *De Bour* case itself: a self-initiated request for information from a civilian on the street by an officer who, rather than responding to a specific report of a crime, was generally on the look-out for and/or attempting to prevent potential criminal activity in the area. *People v. De Bour*, 40 N.Y. 2d 210, 218-20 (1976).

Mandatory recording and tagging of all *DeBour* levels of investigative encounters is

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to petition the Court for relief from his decision regarding the BWC operations order if, as the Monitor urges, such decision is not subject to Court review.

[4] *See* https://www.nytimes.com/2017/04/16/ nyregion/new-york-body-cameras-police-civil-rights.html?rref=collection%2Fsectioncollection%2Fnyregion&action=click&contentCollection=nyregion&region=rank&module=package&version=highlights&contentPlacement=2&pgtype=sectionfront)

critical to assessing whether officers understand, and abide by, the distinctions between each level of encounter. This will allow the Monitor, the parties, and ultimately the Court, to assess "the effectiveness of body-worn cameras in reducing unconstitutional stops and frisks," which is the primary purpose of the body-worn camera pilot. Dkt # 372 at at 27. If officers do not record all Level 1 encounters, the purpose of the pilot will be substantially undermined by a failure to collect a large body of information on whether officers understand and are following the rules for all of the *DeBour* levels. In addition, not recording self-initiated Level 1 encounters on the street will deprive NYPD managers and the Monitor of a large body of information about the extent to which officers are conducting what they believe are Level 1 encounters – and therefore do not document them – but which are legally Level 3 *Terry* stops. The Monitor recognized this important function of BWC video as a reason to record all Level 2 encounters, *see* Dkt # 545 at 6-7, but it is equally applicable to the recording of Level 1 encounters.

Omitting a potentially large number of Level 1 encounters from mandatory recording will also undermine the BWC's ability to "provide a contemporaneous, objective record of stops and frisks," which the Court identified as one of the primary ways of addressing the issues raised in the Liability Opinion. Dkt # 372 at 26. Because Level 1 encounters can and do often escalate to Level 2 or higher very quickly, failure to record Level 1 encounters will deprive a supervisor, NYPD auditor or court reviewing a Level 3 *Terry* stop that began as a Level 1 encounter of significant information about the basis for the stopping officer's decision to make the stop, which will make it much more difficult to assess the constitutionality of that *Terry* stop. One only need look again to the facts of the *De Bour* case itself, where the self-initiated Level 1 encounter escalated to a search and then an arrest in a matter of minutes, 40 N.Y.2d at 213-14, for a clear illustration of the problem. Moreover, requiring recording of Level 2 and 3 but not Level 1 encounters would force officers to turn on their cameras in the middle of quickly escalating encounters that began at Level 1, which could pose serious safety risks to those officers.

Finally, the results of both the public and police officer NYU BWC surveys show clear majorities of both public and officer respondents support recording all Level 1 encounters.[6] Given the Court's recognition that "no amount of legal or policing expertise can replace a community's understanding of the likely practical consequences of reforms in terms of both liberty and safety," Dkt # 372 at 29, and given police officers' on-the-ground, firsthand experience with the tactical challenges and safety risks of investigative encounters, these survey responses should be afforded significant weight. Accordingly, ¶ 5(d) of the BWC Operations Order should be modified to require recording of all police-civilian interactions where the officer is investigating criminal activity, whether or not the civilian him or herself is suspected of criminal activity and whether or not the interaction involves a forcible stop/detention or the person is free to end the encounter and leave.

2. Viewing of Recordings by Officers

[6] According to the NYU public and police officer surveys, 82% of public respondents and 58% of officer respondents believe officers should be required to activate their cameras "anytime an officer approaches someone as part of investigating criminal activity," *See* NYU Policing Project Report, attached hereto as Exhibit A, at 14; NYU Marron Institute Report, attached hereto as Exhibit B, at 7. Encounters where police officers approach civilians to request information related to their criminal law enforcement- and not their more general public service- function were precisely the kind of encounters the Court of Appeals addressed in *De Bour*. 40 N.Y.2d at 219-20, 223.

Separating an officer's personal recollection of an incident from the narrative on his or her body-worn camera video is of critical importance to the use of BWCs as an accountability tool. This Court observed that "contemporaneous records of the stops in this case were UF-250s and short memo book entries…which are inherently one-sided." Dkt #372 at 26. Whether or not BWC video tells the "whole story" of an encounter, this pilot was specifically proposed as a separate "objective record of stops and frisks, allowing for the review of officer conduct by supervisors and the courts," not a substitute and addendum to an officer's own observations.

Therefore, Plaintiffs object to the aspect of the proposed Operations Order that would permit officers to view their own or other officers' BWC recordings before making statements or writing reports. *See* Dkt # 545, Att. 1 ¶ 17. The current language of the Operations Order is overly permissive in regards to departmental investigations (Section 17c) and use-of-force situations. *Id*. ¶ 17(d). As the Office of Inspector General for the NYPD noted in its 2015 Report on BWCs, "[e]xposing officers to events to which they may not have been privy at the time of the incident affects the ability of investigators to assess the officer's contemporaneous appraisal of the circumstances which led him or her to take the actions under investigation." *See* *http://www1.nyc.gov/assets/oignypd/downloads/pdf/nypd-body-camera-report.pdf*. Additionally, the Department should add language to the Operations Order explicitly prohibiting officers from refreshing their recollections with BWC footage before any interviews with the CCRB, IAB, or any other internal NYPD investigator investigating officer misconduct, including civilian complaints for bad stops or racial profiling.

3. Notice to members of the public who are being recorded

The Remedial Order specifically refers to the importance of officers providing notice that an encounter is being recorded. As the Court noted, "the knowledge that an exchange is being recorded will encourage lawful and respectful interactions on the part of both parties." Dkt # 372 at 26. The language in the BWC Operations Order directing officers to notify members of the public they are being recorded, "[a]s soon as reasonably practical," is substantively unchanged from the previous version, despite overwhelming public response in support of officers giving notice upon activation.[9] The term "reasonably practical" is so vague and can be interpreted in numerous ways that make it virtually meaningless. In addition, since over 60% of officers polled in the NYU survey said they preferred to "never" give notice, *see* Ex B at 5, the current language makes it unlikely officers will feel obligated to.

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Accordingly, for the reasons set forth above, *Floyd* and *Davis* Plaintiffs respectfully request that the Court overrule the Monitor's position that the BWC pilot operations order does not require Court approval, review the operations order approved by the Monitor on April 11, 2017, and direct the NYPD to modify the order as discussed in this letter. In addition, to the extent Your Honor requires some time to resolve Plaintiffs' requests, we respectfully request that the Court enjoin the NYPD from implementing the BWC operations order in its current form and commencing the Court-ordered pilot pending the Court's resolution of the issues raised herein.

[9] *See* Dkt # 545, Att. 3 at 5.The previous draft of the operations order read "Upon activating a BWC for recording, members are encouraged to advise members of the public that they are being recorded as soon as it is safe and practicable to do so."

Thank you for your time and consideration.

Respectfully submitted,

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Encl.

## CERTIFICATE OF SERVICE

I hereby certify that on April 20, 2017, a true and correct copy of the foregoing document was served via the Court's ECF system to all counsel of record.

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