TESTIMONY

The New York City Council
Committee on Public Safety

Re: A Local Law to amend the administrative code of the city of New York, in relation to providing notice to minors included in the criminal groups database.

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Educational Fund, Inc.
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The Bronx Defenders
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June 27, 2019

Dear Chairperson Richards and Councilmembers of the Committee on Public Safety:

My name is Liliana Zaragoza, and I am an Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc. (LDF). I want to thank Chairperson Richards for holding this critical hearing and submit the following testimony.

I.   Introduction

LDF is the nation's first and foremost civil rights and human rights law organization. Since its founding nearly eighty years ago, LDF has worked at the national, state, and local levels to pursue racial justice and eliminate structural barriers for the Black community in the areas of criminal justice, economic justice, education, and political participation.[1] As part of that work, LDF has also forged longstanding partnerships with local advocates, activists, and attorneys to challenge and reform unlawful and discriminatory policing in New York City. In 2010, LDF, with co-counsel the Legal Aid Society and the law firm Paul, Weiss, Rifkind, Wharton & Garrison, LLP, filed *Davis, et al. v. City of New York, et al.*, on behalf of plaintiffs challenging the New York City Police Department's (NYPD) policy and practice of unlawfully stopping and arresting New York City Housing Authority (NYCHA) residents and their visitors for trespass without the requisite level of suspicion.[2] In 2015, the *Davis* plaintiffs reached a settlement with the City that included full participation in the federal court monitoring of the NYPD that the court ordered in *Floyd, et al. v. City of New York*, the historic lawsuit that successfully challenged the NYPD's unconstitutional stop-and-frisk policies and practices.

The Bronx Defenders is a community-based and nationally recognized holistic public defender office dedicated to serving the people of the Bronx. The Bronx Defenders provides innovative holistic client-centered criminal defense, family defense, immigration representation, civil legal services, social work support, and other advocacy to low-income people in the Bronx. Its staff of over 300 represents approximately 28,000 individuals each year. In the Bronx and beyond, The Bronx Defenders works to transform how low-income people are represented, and to reform the system they face.

The Center for Constitutional Rights (CCR) works creatively to advance and defend the constitutional and human rights of social justice movements and communities under threat and helps them build power. CCR is committed to dismantling systems of oppression and fighting for justice through litigation, advocacy, and narrative shifting. CCR is lead plaintiffs' counsel in *Floyd, et al. v. City of New York*.

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Last year, almost to the day, LDF and CCR testified before this Committee to share our concerns regarding the NYPD's gang enforcement strategies. As we testified then, the NYPD maintains a gang database (or "criminal groups database") that indiscriminately designates

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[1]   LDF, *About Us*, https://www.naacpldf.org/about-us/ (last visited June 26, 2019).
[2]   LDF, *Davis v. City of New York,* https://www.naacpldf.org/case-issue/davis-v-city-new-york/ (last visited June 26, 2019).

thousands of New Yorkers as members of gangs or local street "crews"; disproportionately confers such affiliation on Black and Latinx New Yorkers; lacks transparency; and provides no due process protections to those individuals indiscriminately included in the database. This remains true today.

Indeed, "[t]he NYPD's gang database leaves thousands of New Yorkers of color vulnerable to heightened police harassment or scrutiny, and it's unclear whether the NYPD has any legitimate reason for targeting them."[3] For that reason, in August 2018, LDF and CCR sued the NYPD for information requested under the New York Freedom of Information Law (FOIL) and which the NYPD denied without basis.[4] While we were ultimately successful, shedding light on this secretive database should not require months of negotiation, filing administrative appeals, and filing suit. Transparency regarding the gang database should be the norm, not the public's burden.

While we thank the City Council for holding this hearing, we remain troubled by the NYPD's gang enforcement practices, including its reliance on the gang database, and the bill under consideration today (T2018-2223). Instead of eliminating the City's reliance on an inherently discriminatory gang database, the proposed local law would further entrench the database by codifying its existence and the NYPD's definition of a "gang" with little, if any, real protections.

Indeed, the modest notice requirement for minors would impact fewer than 10% of those listed in the database. And those 10% who are minors will receive little protection since the notice and the final determination of inclusion in the database are within the sole discretion of the NYPD with no oversight. While we applaud efforts aimed at increasing Departmental transparency and accountability, subsection (d) of the proposed bill, particularly in the context of the bill at large, is insufficient.

In sum, the provision under consideration today fails to adequately remedy the constitutional concerns we raised last year, cementing the gang database as the Department's "stop-and-frisk 2.0." We renew those concerns today and urge the City Council to eliminate this constitutionally untenable database; study and invest in community-based programs shown to reduce the violence that the NYPD's database and gang enforcement tactics purport to address; and reaffirm its commitment to constitutional, race-neutral policing by holding the NYPD accountable for its gang policing strategies.

The City Council must reaffirm its commitment to constitutional, race neutral policing policies and practices. That goal cannot be accomplished by passing this bill as currently drafted.

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[3]   Marne Lenox, *NYPD Hasn't Come Clean on its Gang Database*, N.Y. DAILY NEWS, (Aug. 8, 2018, 4:05 PM), https://www.nydailynews.com/new-york/ny-oped-nypd-lies-gang-database-20180808-story.html.

[4]   Graham Rayman, *Exclusive: Civil Rights Groups Sue NYPD for Gang Database Guidelines*, N.Y. DAILY NEWS, (Aug. 7, 2018, 3:40 PM), https://www.nydailynews.com/new-york/ny-metro-civil-rights-gang-database-lawsuit-20180807-story.html; *see also* Alice Speri, *New York Gang Database Expanded by 70 Percent Under Mayor Bill de Blasio*, THE INTERCEPT, (Jun. 11, 2018, 10:49 AM), https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio/.

II.   The NYPD's Gang Policies and Practices Are "Stop-and-Frisk 2.0."

The NYPD's operation of gang policing and practices is akin to the unconstitutional, racialized policing tactics challenged in *Davis* and *Floyd*. Masquerading as "precision policing," the NYPD's gang database is the functional equivalent of the Department's racially discriminatory and unconstitutional stop-and-frisk policing tactics. The Department's aggressive, vastly over-inclusive, military-style gang raids primarily have targeted public housing residents, the overwhelming majority of whom are Black and Latinx.

The NYPD has used the gang database to justify the mass raids of public housing developments and to target social-media surveillance on the same population of New York City residents that suffered the indignity of its unconstitutional and racially discriminatory stop-and-frisk practices. While a small number of people arrested in gang takedowns are believed to have committed violent or otherwise serious offenses, most are accused of only low-level misconduct—where misconduct exists at all.[5] Indeed, criminal conduct is not a prerequisite to entry into the gang database or being identified as a gang member.[6] But the ramifications of such designation are serious for any New Yorker and range from reputational harm to life-altering prosecution and lengthy imprisonment stemming from mass conspiracy indictments.[7]

While police stops under stop-and-frisk may have decreased (and the extent of that decrease is unknown given the documented problem of underreporting of stops),[8] the number of individuals identified as gang members in New York City has skyrocketed. This is not a coincidence. The boys and young people of color subjected to the degradation of unlawful stops and frisks are now stigmatized as dangerous gang members. Over the past five years, the NYPD has designated more than 17,000 individuals as gang members.[9] Significantly, more than 99% of these alleged gang members are people of color, while white individuals comprise only 0.8% of the database. Yet 31.8% of New York City residents are white, 29.2% are Hispanic or Latino, and 22% are Black.[10] These statistics strongly suggest that the NYPD continues to engage in police practices that use race as a proxy for crime.

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[5]   Ben Hattem, *How Massive Gang Sweeps Make Growing Up in the Projects a Crime*, GOTHAMIST (Oct. 24, 2016, 11:02 AM), http://gothamist.com/2016/10/24/gang_sweeps_public_housing.php#photo-1; *see also* Babe Howell & Priscilla Bustamante, *Report on the Bronx 120 Mass "Gang" Prosecution* 11, Apr. 2019, https://bronx120.report/the-report/ (indicating that 38% of the individuals indicted following the "Bronx 120" raid—45 of 117 individuals—had no prior criminal history); *id.* at 9 (indicating that 44% of those ultimately indicted as a result of the Bronx 120 raid of Eastchester Gardens had gang membership).

[6]   K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 UNIV. DENVER CRIM. L. REV. 1 (2015).

[7]   *See* Howell & Bustamante, *Report on Bronx 120*, *supra* note 5.

[8]   Fourth Report of Independent Monitor at 24-25, *Davis v. City of New York,* No. 1:10-cv-00699 (Nov. 18, 2016), ECF No. 362.

[9]   Speri, *New York Gang Database Expanded, supra* note 4.

[10]   *2016 American Community Survey Estimates 1-Year Estimates for NYC & Boroughs*, U.S. CENSUS   BUREAU,   https://www1.nyc.gov/assets/planning/download/pdf/data-maps/nyc-

III. **The Proposed Bill Does Not Remedy Serious Concerns About the NYPD's Gang Policies and Practices.**

    A. *Entrenching Reliance on the Gang Database and Codifying the NYPD's Definition of a "Gang"*

In testimony submitted to the City Council last year, LDF and CCR raised concerns regarding the secretive, extra-legal nature of the NYPD gang database. In answer to that call, this body now considers a bill which would bring the database out of the shadows, but which would, ironically, codify the gang database into formal existence and accept the NYPD's flawed definition of the term "gang."

Critically, the definition of the term "gang" in the proposed bill is copied almost verbatim from the NYPD Patrol Guide on "Reporting Gang-Related Criminal Activity." Exhibit A. Not only does this proposed bill's definition of "gang" accept the NYPD's definition to the exclusion of input from concerned citizens, the proposed definition conflicts with the criteria for admission into the gang database and the reality of how the gang database works. Whereas the proposed bill suggests, as defined, that "the commission of one or more criminal acts" must be an animating principal or "primary activit[y]" of a "gang," the criteria for admission into the database reflects no such requirement. *See supra* at 3. This disconnect between the bill and the reality of individuals designated as "gang" and "crew" members highlights the need for robust discourse and consistency about what properly constitutes a "gang" and how that definition affects official gang-related policies throughout City agencies, including the NYPD.

    B. *Failure to Remedy Discriminatory Impact on Black and Latinx New Yorkers Due to Sweeping Criteria for Database Admission*

The substantive provisions of the bill under consideration today focus on minors impacted by the NYPD gang database. While the NYPD's targeting and monitoring of New York City's youth under the auspices of gang policing is deeply troubling, the database's racially disproportionate sweep and unchecked subjectivity is no less troubling. Yet the proposed bill fails to address these and other constitutionally suspect aspects of the gang database.

First, the NYPD's gang enforcement practices, as evident from the database, almost exclusively target people of color. Even though white residents comprise 31.8% of New York City's population, they represent *under* 1% of the NYPD's gang database.[11] The existence of an almost-exclusively Black and Latinx gang database not only invites racial profiling of communities of color by the NYPD, it also perpetuates pernicious stereotypes of Black and Latinx youth and young adults as criminals, gang members, and "thugs."

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population/acs/demo_2016acs1yr_nyc.pdf (estimating based on one-race populations that 31.8% of New York City residents are white, 29.2% are Hispanic or Latino, and 22% are Black).

[11]   K. Babe Howell, *Gang Policing, supra* note 6, at 16 (noting of database entries, 48% were Black and 42% were Latino; only 1% of the individuals added to the NYPD's gang database were white).

Second, the gang database raises numerous individual due process concerns extending beyond the lack of notice to minors. Among them are the vague and overinclusive contours of the criteria for admission to the gang database—defects that enable the introduction of police officers' bias and provide inadequate notice to at-risk New York City residents.

In 2013, the NYPD disclosed that it may certify an individual as a gang member if she meets two of the following six criteria: (1) spends time in a gang-prone location; (2) has scars/tattoos associated with gangs; (3) has gang-related documents; (4) wears colors associated with gangs; (5) associates with known gang members; and (6) uses hand signs associated with gang members.[12] Notably, inclusion in the gang database does not require criminal activity.[13]

These criteria are equally as emblematic of innocence as they may be of gang membership. Yet they provide the Department with unfettered discretion to identify and certify any young person in predominantly Black and Latinx neighborhoods as gang members. Last year we offered the example of a 16-year-old high school student who has never committed a crime, has no control of her residence in a gang-prone neighborhood, and happens to know "gang-affiliated" people living in her neighborhood—innocent facts that may lead to her inclusion in the database. But this example is not limited to young people. A 45-year-old father or a 25-year-old cousin may similarly have no control over their residence or the family members and neighbors around them. Indeed, at last year's hearing, NYPD Chief of Detectives Dermot Shea conceded that Chairperson Richards could be identified as a gang member by simply wearing red colors while standing at a corner store.

The NYPD's gang membership criteria can easily serve as pretextual justifications for surveilling and monitoring large swaths of individuals who engage in innocent and lawful behavior. The proposal under consideration today does nothing to address these issues. Nor does the proposed legislation provide any redress or remedy to the 92% of the individuals who will not be notified of their inclusion in the gang database and who remain subject to a substantial risk of racial profiling and individual due process violations.

C.   Failure to Provide Meaningful Notice to the Limited Beneficiaries

The proposal under consideration today zeroes in on one of the gang database's many grave individual due process concerns: the lack of notice regarding inclusion in the database or a mechanism by which to contest such designation. But this limited notice and process mechanism may be a hollow victory, even if passed.

At face value, today's proposal regarding notice and process stands to benefit around 8.3% of the individuals in the NYPD gang database (about 1,400 of the approximately 17,000 New Yorkers in the database). However, even this impact stands to be severely undercut by the exception to the notice requirement and deficiencies in the process to be provided. Critically, under the provision at issue, the NYPD would be required to "provide written notice to any minor under

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[12]   *Id*.
[13]   *Id.*

the age of 18 who has been entered into the criminal groups database . . . *unless* providing such notification would compromise an active criminal investigation or the department has specific reason to believe that providing such notification would compromise the health or safety of the minor or another person." T2018-2223 (N.Y.C. 2019). Because the instant gang policing regime has been characterized by mass indictments, which have included in their sweep individuals guilty of no or low-level crimes, *see supra* at 2, the reach of the "active criminal investigation" exception may swallow the rule. This risk is especially substantial given that the NYPD has complete discretion to make this determination and is not required to base its determination on credible and articulable facts.

In addition, even if a minor and her family or attorney is notified of her inclusion in the database and the basis for that inclusion, the proposed bill places the burden on the minor child and her family to contest the designation. Not only does this framework rear the presumption of innocence over guilt on its head, it also requires minors and their families to overcome an asymmetry of information and contest an inherently overbroad, vague, and subjective set of criteria for admission in the database. Moreover, the proposed legislation offers no process for—or even a right to—an appeal, thereby creating substantial risk of delay and obfuscation.

IV.   The Proposed Public Reporting of Gang Database Information Is Essential But Must Be Expanded.

In light of grave concerns regarding the database, LDF and CCR served the NYPD with two FOIL Requests seeking records concerning the NYPD's gang policing tactics in December 2017 and February 2018. The Requests sought information about whether and how the NYPD protects New Yorkers from arbitrary designation as gang members. The NYPD responded to the Requests and provided *some* minimally responsive information but refused to disclose the vast majority of the requested records. We successfully received the requested information in October 2018, eight to ten months later and only after filing suit over the NYPD's unfounded refusal.

For this reason, although subsection (d) of the proposed bill is only a small first step toward transparency and accountability, we do not oppose that subsection's requirement to report certain gang database metrics to the City Council and to report the information on an annual basis on the NYPD website. But, so long as the NYPD continues to employ the gang database, the City Council should expand upon this section and require full transparency and disclosure of information along additional demographic, geographic, and other lines regarding the NYPD's secretive database.

V.   Conclusion

The NYPD's gang policing strategy—like its unconstitutional stop-and-frisk and trespass enforcement policies and practices—unduly exposes a disproportionate number of people of color to a host of injustices in our criminal justice system. Individuals who are wrongly presumed to be gang members face heightened police surveillance; elevated aggression during police encounters; enhanced bail recommendations; elevated charges; and, for some, loss of housing and the threat of

deportation.[14] These concerns, and the stories you have heard and will continue to hear today, are familiar to communities of colors throughout the City. Decades of ineffective and unconstitutional stop-and-frisk enforcement have become the NYPD's policing legacy. We must not allow history to repeat itself by solidifying a stop-and-frisk 2.0.

We welcome the opportunity to meet with City Councilmembers to discuss this topic in greater depth, but meaningful reform requires, in the first instance, full transparency from the NYPD. Today, we ask that the New York City Council:

- Create a process to amplify the voices of, and solicit input from, affected community members to gain a greater understanding of the issues described today.
- Ensuring and urging the completion of a thorough, formal investigation by the Office of the Inspector General (OIG) for the NYPD into the NYPD's gang policing practices and hold forums on the OIG findings prior to introducing legislation.
- Consider eliminating the gang database as an imprecise method of policing that harms communities of color, or engaging in discussions with LDF, CCR, The Bronx Defenders, other advocates, and community members for remedying the constitutional harms inherent in the database.

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[14]   *See, e.g.,* Hannah Dreier, *He Drew His School Mascot – and ICE Labeled Him a Gang Member*, PROPUBLICA (Dec. 27, 2018), https://features.propublica.org/ms-13-immigrant-students/huntington-school-deportations-ice-honduras/; Jacqueline Serrato, *Chicago Police Admits Gang Database Error that Enabled ICE Raid*, CHI. TRIB. (Dec. 6, 2017, 1:31 PM), http://www.chicagotribune.com/hoy/ct-chicago-police-admits-gang-database-error-20171206-story.html; Sean Garcia-Leys, Meigan Thompson, & Christyn Richardson, *Mislabeled: Allegation of Gang Membership and Their Immigration Consequences*, UCI SCH. OF L. IMMIGR. RTS. CLINIC (Apr. 2016), https://www.law.uci.edu/academics/real-life-learning/clinics/ucilaw-irc-MislabeledReport.pdf

Exhibit A

PURPOSE

To establish and define the procedures required of uniformed members of the service for reporting gang-related/motivated criminal activity of suspected gangs or gang members.

DEFINITIONS

For the purpose of this procedure, the term "gang" and "crew" are interchangeable and the same protocol will be followed for gang and/or crew members using the following definitions:

GANG - Any ongoing organization, association or group of three or more persons, whether formal or informal, having as one of its primary activities, the commission of one or more criminal acts (including drug dealing), having a common name or common identifying sign or symbol, and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

GANG-MOTIVATED INCIDENT - Any gang-related incident that is done primarily:
a. To benefit or further the interests of the gang, or
b. As part of an initiation, membership rite, or act of allegiance to or support for a gang, or
c. As a result of a conflict or fight between gang members of the same or different gangs.

GANG-RELATED INCIDENT - Any incident of unlawful conduct by a gang member or suspected gang member. All gang-motivated incidents are, by definition, also gang-related incidents.

GANG-RELATED INTELLIGENCE - Information about a gang, suspected gang, an individual gang, or suspected gang member. This includes information about gang meetings, recruiting attempts by gangs, plans by persons affiliated with a gang to organize or take part in public events, "community" events (as defined by a gang), intelligence obtained from social media networks, as well as any information useful in developing profiles and intelligence about gang activities.

PROCEDURE

Upon becoming aware of gang-related intelligence, learning of a possible gang-related or gang-motivated incident, or upon making an arrest of a suspected or identified gang member for any offense:

UNIFORMED MEMBER OF THE SERVICE

1. Take immediate action as necessary.
2. Notify the patrol supervisor.
3. Enter information in **ACTIVITY LOG (PD112-145)**, if appropriate.
4. Contact the Detective Borough Wheel concerned immediately, 24 hours/7 days a week.
   a. Provide all pertinent information to Detective Borough Wheel member accepting the report.

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