



September 21, 2020

**Via Electronic Mail** ([Fergusonmonitor@hoganlovells.com](mailto:Fergusonmonitor@hoganlovells.com))

The Honorable Catherine D. Perry  
Thomas F. Eagleton U.S. Courthouse  
111 South 10 Street  
St. Louis, MO 63102

**RE: *United States v. City of Ferguson*, Case No. 4:16-cv-0180-CDP,  
Comments on Implementation of the Consent Decree**

Dear Judge Perry:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (LDF), we submit the comments below concerning the implementation of the above-captioned consent decree pursuant to the Court's order filed on July 10, 2020. First and foremost, we wish to convey our sense of urgency. Although it is now five years since the approval of the consent decree, much of the work remains undone. We are also concerned that several actions taken or contemplated by Ferguson officials are inconsistent with the letter and spirit of the consent decree.

Since its founding in 1940, LDF has partnered with federal and local policymakers to advance laws, policies, and practices to improve police accountability in cities across the country. Additionally, for the past six years, LDF has supported the police accountability and public safety efforts of community members, activists, and civil rights attorneys in Ferguson and St. Louis, Missouri<sup>1</sup> including monitoring the consent decree's implementation. It is with this wide-ranging experience and specific local engagement that we make the following comments and recommendations.

**1. After Five Years, Ferguson City Officials Have Failed to Meet Many of the Consent Decree's Requirements**

As noted by the Monitor, "[w]ith the exception of the [Ferguson Municipal Courts], much of the implementation of the Consent Decree remains to be completed."<sup>2</sup> Specifically, the following critical areas remain incomplete five years after the consent decree's Effective Date:

- a. **Comprehensive Amnesty Program (CAP)**— The Monitor's final audit of the CAP is incomplete, and it is unclear how many pre-2014 cases were not dismissed, and why. We urge Ferguson officials to dismiss all pre-2014 cases identified in Paragraph 326 of the consent decree to prevent unnecessary incarceration or fines.
- b. **Community Engagement Plan**— The community engagement plan is at the center of the consent decree's requirements, yet there are no public-facing updates on its progress. Though the Parties have sought input from the Neighborhood Policing Steering Committee (NPSC), this does not replace wide-spread community engagement and release of a final plan.

- c. **Incomplete Policies**—The Parties and Monitor have not completed the revision process for the following policies: Fair and Impartial Policing; Policies relating to First Amendment Activity; Search Warrant and Warrantless Searches; and Powers of Citation and Warrantless Arrest.
- d. **Training**—Paragraph 48 of the consent decree requires all training be “fully delivered within two years of the [consent decree’s] Effective Date.” However, in Year Five the Ferguson Police Department (FPD) has not completed rollcall or in-service training, or developed a robust training program to do so. To encourage progress, in the Year Three Workplan the Monitor required FPD to create a training schedule by February 28, 2019. As of the Monitor’s January 2020 report, FPD still had not finalized a comprehensive training schedule and to date, has not presented a completed schedule to the public.<sup>3</sup> The City’s failure to hire a Training Consultant has also contributed to the backlog of policies awaiting training and implementation.

## 2. Ferguson Officials Have Not Complied with the Community Engagement Provisions of the Consent Decree

Since the Monitor’s community forum on February 12, 2020, neither the Parties nor the Monitor have meaningfully engaged with residents regarding the implementation of the consent decree. While residents nationwide participated in mass demonstrations protesting police violence and demanded accountability measures, Ferguson residents remained unsure of the status of their own consent decree, whose goal, in part, is to end needless police use of force and dismantle the racial inequities in Ferguson’s policing and court practices. As one Ferguson resident wrote to the Court:

[A]nother challenge during this pandemic time is keeping up with the progress being made – if any, regarding the Consent Decree. . . . Even before the pandemic, we were struggling to be ‘in the know.’ . . . Frankly, we remain really reliant on this status hearing to learn of the current progress on the many tasks that were not yet accomplished by our City since the last status hearing.<sup>4</sup>

Paragraph 438 of the consent decree requires the Monitor to file a public report every six months detailing and assessing the Parties’ past and upcoming work, but the Monitor has failed to do so since January 2020. The Monitor assured the Court, at the June 4, 2020 status hearing, that she and the Parties would “keep[] the community up to date and in the know on the progress that’s being made,” but more than three months later, Ferguson residents<sup>5</sup> and members of the public still have not received the Monitor’s semiannual report or an updated Monitoring Plan informing residents how and when the Parties will fulfill their obligations under the consent decree.

These glaring failures to prioritize community engagement are not new. When assessing the implementation of the consent decree in Year Three, the Monitor rightly recognized, that while “[c]ommunity engagement remains a critical aspect of the decree” the City of Ferguson had not “adequately contemplated or resourced [it]” and “[o]ne of the most important areas of the Consent Decree continues to see little progress and attention.”<sup>6</sup> As the Parties have sought to implement the consent decree for five years now, this failure to accomplish this basic task of merely communicating with the community that bore the brunt of Ferguson’s racially discriminatory police department, municipal courts, and jails, is unacceptable.

### **3. The FPD’s Apparent Circumvention of the Consent Decree’s Requirements to Protect Protestors’ First Amendment Rights by Relying on Outside Law Enforcement Agencies is Disturbing**

FPD’s response to protests in 2014 following former officer Darren Wilson’s killing of Michael Brown included “violations of constitutional rights, escalation and use of excessive force, use of military-style weapons and gear[,] . . . indiscriminate use of tear gas on crowds, which is banned by international law” and “the lack of an appropriate plan for dealing with demonstration[s].”<sup>7</sup> The Ferguson consent decree includes several provisions intended to address these findings. Recent actions taken by Ferguson officials, however, suggest that little progress has been made to protect protesters.

#### **a. Ferguson Officials Should Not Solicit Assistance from Outside Agencies That Engage in Conduct Prohibited by the Consent Decree**

The consent decree requires FPD to “request other law enforcement agencies responding [to protests] within Ferguson” be trained on de-escalation techniques, key concepts of the National Incident Management System command and management, including Incident Command Systems, multiagency coordination systems and policing consistent with the First Amendment.<sup>8</sup> This summer, however, FPD routinely asked multiple nearby law enforcement agencies, who are not bound by the consent decree, to assist with monitoring protests in Ferguson. By engaging these outside agencies, the City of Ferguson and FPD permit entry to agencies that previously avoided Ferguson because they did not want to adhere to the decree’s requirements, (as Ferguson’s City Manager admitted to this Court at the June 2020 status hearing).<sup>9</sup> But this invitation is problematic.<sup>10</sup> It results in multiple supervising officers in one area, conflicting orders, and an influx of officers who are unfamiliar with FPD’s revised policies or the consent decree’s mandates. Consequently, protestors are not always able to identify the agencies present, determine which agency is in charge, or identify the agency or officer responsible for unlawful or problematic conduct. This creates a large gap in officer accountability and simultaneously exposes protestors to the same constitutional violations that FPD engaged in 2014—only this time, by law enforcement agencies from nearby jurisdictions.

Additionally, FPD should not request assistance from agencies which have a history of civil rights violations and other unlawful conduct.<sup>11</sup> This is a public safety issue that threatens demonstrators’ ability to safely protest. Accordingly, we respectfully urge the Court to clarify the City’s requirements under the consent decree and ensure its adherence to them, including to Paragraphs 119 (f) and (g) by creating a:

[p]lan for clearly communicating to all law enforcement agencies participating in any response to a public demonstration in Ferguson the limitations and requirements for such participation, including limitations and requirements related to force, arrests, and . . . officer identification, [and a]... “[c]entralized complaint intake process for use by individuals . . . regarding an officer of any agency during a multijurisdictional response.

We also urge the Monitor, in her capacity as assessor of FPD’s compliance with the consent decree,<sup>12</sup> and the DOJ to evaluate whether the City or outside agencies have violated any of the consent decree’s provisions regarding First Amendment Protected Activity, and if so, inform residents and identify what actions will be taken to prevent future violations.<sup>13</sup> This will require the Parties and Monitor to solicit residents’ accounts and video footage of recent protests that included outside law enforcement, arrests, deployment of OC spray, use of force, and/or orders to disperse.

b. The Monitor and DOJ Must Evaluate Whether FPD’s Uses of Force Against, and Arrests of, Protestors on August 9, 2020 Violated the Consent Decree

On August 9, 2020, the sixth anniversary of the police shooting of Michael Brown, cell phone video footage shows FPD officers and other officers violently charging at a crowd of protestors.<sup>14</sup> Amidst public outcry, FPD justified its actions<sup>15</sup> by stating a “small group” of protestors made hostile remarks towards the officers, threw a stick and screw, and removed a bike rack barricade. The Monitor and DOJ must thoroughly evaluate whether FPD’s actions violated any of the consent decree’s provisions, especially in relation to protected First Amendment activity.<sup>16</sup> To do so, the Monitor and DOJ should identify and speak with individuals who were arrested, subjected to force, or witnesses at the scene.

**4. The Parties Should Consider the Racial Impact of the Use of ShotSpotter and Include Mechanisms to Prevent its Abuse**

On July 28, 2020,<sup>17</sup> the Ferguson City Council passed Resolution 2020-29, approving a six-month pilot installation of ShotSpotter, a gunshot detection technology.<sup>18</sup> To detect gunshot sounds, ShotSpotter places live sound-monitoring microphones throughout neighborhoods, recording residents’ sounds and movements.<sup>19</sup> The placement of ShotSpotter technology is determined by police data borne from decades of FPD’s targeting and over-policing Black neighborhoods. And because the captured audio ultimately is under FPD’s control, it reportedly gives law enforcement the power to listen to residents’ conversations, from the moment they leave their homes.<sup>20</sup> Not only does this intrude on residents’ privacy and erode community trust, it places too much power in the hands of the same police department whose racially discriminatory practices led to federal monitoring.

Paragraphs 36, 39, and 40 of the consent decree require the Ferguson Municipal Code (Code) and ordinances to “adequately protect[] the public health, safety, and welfare,” “comply with th[e] Agreement,” and ensure “the Code’s design and enforcement are not unnecessarily burdensome on members of the Ferguson community.”<sup>21</sup> The Parties and Monitor should extend this framework to the ShotSpotter Resolution. Though it is not an ordinance or code, the ShotSpotter Resolution’s passage is inconsistent with the spirit of the consent decree; the Parties and Monitor should listen to residents and evaluate its impact on their safety and wellbeing before the City commits to long-term use.

Additionally, though lauded as a public safety tool, ShotSpotter does not prevent gun violence.<sup>22</sup> As the DOJ’s 2015 report, countless community stories, and extensive data make clear, increased police presence in Black neighborhoods itself poses a great risk to the residents’ public safety, health, and welfare.<sup>23</sup> The City must not implement technologies like ShotSpotter at the expense of addressing the socioeconomic issues that contribute to violence, or investing in low-income neighborhoods’ schools, affordable housing, access to quality food, or jobs. Doing so continues Ferguson’s legacy of choosing over-policing, hyper-criminalization, and incarceration of Black people over true community support.

We strongly urge the Parties and Court to review the use of ShotSpotter technology, and any future purchases of technology for FPD similarly, through racial, historic, and community safety lenses.

Thank you for considering these recommendations. If you have any questions, please contact Katurah Topps at 212-965-2200.

Sincerely yours,

Katurah Topps, Policy Counsel  
Puneet Cheema, Manager, Policing Reform Campaign  
Monique Dixon, Director of State Advocacy

cc: Ferguson City Attorney, Apollo Carey and DOJ Civil Rights Division, Jude Volek

<sup>1</sup> See <https://tminstituteldf.org/ldf-action/fergusonst-louis-county-missouri/>.

<sup>2</sup> Monitor's Winter 2020 Semiannual Rpt, Dkt. #128, at 7 (Jan. 31, 2020) [hereinafter Monitor's 2020 Rpt].

<sup>3</sup> The City only provided residents with an outdated roll call training schedule, <https://www.arcgis.com/apps/MapSeries/index.html?appid=7aed307d6ad94f22a6cfb046644f2597>; see also Monitor's 2020 Rpt at 3 (noting the training plan "ha[s] failed to progress year after year" and "remained largely stagnant during Year Three").

<sup>4</sup> June 2, 2020 public comment letter to the Court, from long-term Ferguson resident Cassandra Butler.

<sup>5</sup> Because there are over 20,000 residents in Ferguson, individual communications with the NPSC or a handful of Ferguson Collaborative members is not sufficient communication with the "Ferguson community."

<sup>6</sup> Monitor's 2020 Rpt at 4 and 9.

<sup>7</sup> The Ferguson Commission Report, *Forward Through Ferguson: A Path Toward Racial Equity*, at 30 (Oct. 14, 2015) [https://3680or2khmk3bzpk33juiea1-wpengine.netdna-ssl.com/wp-content/uploads/2015/09/101415\\_FergusonCommissionReport.pdf](https://3680or2khmk3bzpk33juiea1-wpengine.netdna-ssl.com/wp-content/uploads/2015/09/101415_FergusonCommissionReport.pdf); see also U.S. Dep't. Of Justice, *After-Action Assessment of the Police Response to the August 2014 Demonstrations In Ferguson, Missouri* (2015).

<sup>8</sup> *U.S. v. Ferguson*, No. 4:16-cv-000180-CDP, (E.D. Mo. 2016), Dkt. #98, ¶¶ 112 and 122 [hereinafter the consent decree].

<sup>9</sup> Transcript of June 4, 2020 status hearing, Dkt. #134, at 33-37.

<sup>10</sup> Consent decree ¶¶ 118 and 123.

<sup>11</sup> See e.g., St. Ann Police—a dep't infamously riddled with unlawful conduct—yet FPD's revised 'Response to 1<sup>st</sup> Am. Protected Activity' policy designates St. Ann police to assist in mass arrests and jailing of protestors; see also *Cops Ousted for Bad Behavior Often Land in One Place: St. Ann* (July 6, 2020), at [https://www.stltoday.com/news/local/crime-and-courts/cops-ousted-for-bad-behavior-often-land-in-one-place-st-ann/article\\_cd3fa355-644c-5b16-8f41-2685c1b71c6d.html](https://www.stltoday.com/news/local/crime-and-courts/cops-ousted-for-bad-behavior-often-land-in-one-place-st-ann/article_cd3fa355-644c-5b16-8f41-2685c1b71c6d.html), and Ferguson Collaborative and LDF's joint comments and line edits to FPD's revised 1<sup>st</sup> Am. policies, at 8 available <https://www.naacpldf.org/wp-content/uploads/2020.07.06-FINAL-LDF-and-FC-Line-Edits-to-FPD-Draft-First-Amendment-Activity-Policies-Appendix-A.pdf>.

<sup>12</sup> Consent decree ¶ 416 requires the Monitor to ensure that the consent decree's implementation results in constitutional and lawful policing, the administration of justice, and increased community trust; see also ¶ 423.

<sup>13</sup> See consent decree ¶¶ 119, 126, and 127.

<sup>14</sup> Cell phone video footage at <https://twitter.com/ChuckModi1/status/1292669449624068096>; see also Alta Spells and Eric Levenson, *Protesters gather outside Ferguson Police Department on anniversary of Michael Brown's death*, CNN (Aug. 11, 2020), <https://www.cnn.com/2020/08/10/us/ferguson-protests-michael-brown/index.html>.

<sup>15</sup> See Ferguson Police Dep't. Press Release, (Aug. 10, 2020), <https://www.facebook.com/CityofFergusonPoliceDept/photos/pcb.734592187102673/734591993769359/>.

<sup>16</sup> Consent decree ¶¶ 111, 118, 120, 124, and 153.

<sup>17</sup> July 28, 2020 Ferguson City Council Agenda, available at <http://www.fergusoncity.com/AgendaCenter/ViewFile/Agenda/07282020-819?MOBILE=ON>.

<sup>18</sup> Ferguson City Council Resolution #2020-29, available at <http://www.fergusoncity.com/DocumentCenter/View/4189/Resolution-No-2020-29-Shot-Spotter>.

<sup>19</sup> See Electronic Frontier Foundation's explanation of Acoustic Gunshot Detection, as used in ShotSpotter, available at <https://www.eff.org/pages/gunshot-detection>.

<sup>20</sup> *ShotSpotter: gunshot detection system raises privacy concerns on campuses*, THE GUARDIAN, available at <https://www.theguardian.com/law/2015/jul/17/shotspotter-gunshot-detection-schools-campuses-privacy>.

<sup>21</sup> Para. 40, requiring the City to "conduct outreach meetings . . . in locations throughout Ferguson, to hear the views of persons within the community, and [] consider and incorporate these views . . ." to ensure public health, safety, and welfare.

<sup>22</sup> Matt Drange, *We're Spending Millions on This High-Tech System Designed to Reduce Gun Violence. Is It Making a Difference?*, FORBES, Nov. 17, 2016, (noting that ShotSpotter only brings officers to gunshot locations, not prevent them).

<sup>23</sup> See e.g., Christopher Ingraham, *Police shootings are a leading cause of death for young American men, new research shows*, WASHINGTON POST, Aug. 8, 2019, <https://www.washingtonpost.com/business/2019/08/08/police-shootings-are-leading-cause-death-young-american-men-new-research-shows/>; see also Sarah Beller, *The American Public Health Association Declares Police Violence a Public Health Issue*, FILTER, Nov. 15, 2018, <https://filtermag.org/the-american-public-health-association-declares-police-violence-a-public-health-issue/>.