

January 8, 2021

Via Electronic Mail (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,
Written 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 following comments on the implementation of the above-captioned consent decree between the City of Ferguson and U.S. Department of Justice (“DOJ”).

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, including the creation, implementation, and monitoring of the consent decree.¹ It is with this wide-ranging experience and specific local engagement that we make the following comments and recommendations.

1. The Parties and Monitor Must Do More to Meaningfully Engage Community Members, Particularly Through the Challenges Presented by COVID-19

Since the beginning of the consent decree’s implementation nearly six years ago, one challenge has remained constant: The Parties and Monitor have struggled to meaningfully engage with the Ferguson community in a consistent, comprehensive, and transparent way. This struggle is documented through community member and stakeholder testimony to the Court, and the Parties’ and Monitor’s own admissions.² The Parties and Monitor must commit to meaningful engagement with community members, despite the inability to hold in-person gatherings during the pandemic.

a. The Monitor Has Not Released a Public Report and Work Plan Since January 2020

As we detailed in our September 21, 2020 letter to the Court, despite the consent decree’s requirement that the Monitor file a detailed report and work plan every six months, the Monitor has not

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

² See e.g., Monitor’s Report and Work Plan for Year 3 and 4; see also June 4, 2020 Status Hearing Tr. at 11, Monitor stating “we identified . . . the implementation of community engagement and policing practices as [one of] the most critical areas of needed focus.”

done so since *January 2020*.³ While we understand the monitoring team lost a staff member in 2019 and had to adjust to COVID-19 restrictions, this lack of compliance with one of the most basic requirements of the consent decree, is unacceptable. The Monitor’s reports are the most accessible method for the public to receive detailed updates on the progress of the consent decree’s implementation. To address this gap in communication, we recommend that the Monitor’s website be updated with the date the community can expect a detailed report and work plan. If the monitoring team cannot meet the stated deadline, it should update its website to advise the public of the delay, the reason for it, and the revised deadline.

b. The 2019 Community Survey Should be Deemed Invalid; The 2021 Survey Must Capture the Perspective of Ferguson’s Black Community to Be Valid

Paragraphs 429-30 and 433 of the consent decree require the Monitor to annually survey a “representative sample of Ferguson residents” to review the community’s experiences with and perceptions of the Ferguson Police Department (“FPD”). Analysis of the survey results “may be used to demonstrate sustained continuing improvement” with the consent decree.

In April 2019, the Monitor released the first survey (“2019 survey”). Despite Department of Justice (“DOJ”) findings and numerous community stories documenting FPD’s extensive history of excessive force and unlawful practices targeting Black residents,⁴ the monitoring team failed to meaningfully solicit survey responses from Black residents. Consequentially, 76.25% of the 2019 survey responses were from white residents and only 12.50% were from Black residents⁵—though Black residents make up nearly 70% of Ferguson’s population.⁶ Because Ferguson’s racial discrimination has indisputably favored white residents by using force against, arresting, ticketing, and charging Black residents at a higher rate, even for the same behaviors as white residents,⁷ using survey results that overwhelmingly depict white residents’ interactions with FPD as a baseline to evaluate FPD conduct and community sentiments presents an inaccurate view of FPD, disregards countless Black experiences and voices, and is not representative of the community—as Paragraph 429 requires.

Even the National Police Foundation, who assisted in constructing and administering the survey, agreed that “[t]he sample of individuals who chose to take the survey do not reflect the demographic makeup of the community of Ferguson, with an overrepresentation of affluent, educated, white residents.”⁸ Accordingly, we strongly urge the Court, Monitor, and Parties to officially disregard the 2019 survey and not use its results as a baseline for the community’s sentiments or FPD’s actions. The perspectives of Black community members are critical to understanding perceptions of FPD and

³ See LDF’s written comments at <https://www.naacpldf.org/wp-content/uploads/9.21.2020-LDF-FINAL-Comment-Letter-on-Ferguson-Consent-Decree-Implementation.pdf>; see also Monitor’s last Report and Work Plan, filed Jan. 31, 2020.

⁴ See e.g., U.S. Dep’t. of Justice., *Investigation of the Ferguson Police Department*, 62-70 (Mar. 4, 2015), available at https://www.justice.gov/sites/default/files/opa/pressreleases/attachments/2015/03/04/ferguson_police_department_report.pdf, noting in part that “Ferguson’s police and municipal court practices disproportionately harm African Americans;” and “African Americans experience disparate impact in nearly every aspect of Ferguson’s law enforcement system. Despite making up 67% of the population, African Americans accounted for 85% of FPD’s traffic stops, 90% of FPD’s citations, and 93% of FPD’s arrests from 2012 to 2014;” and finding “substantial evidence that [Ferguson’s] harm stems in part from intentional discrimination . . .” [hereinafter “*DOJ Report*”].

⁵ Police Foundation (2019), National Law Enforcement Applied Research and Data Platform Report: Ferguson Community Survey at 1, available at <https://ecf.moed.uscourts.gov/doc1/10719032320>, Dkt. 128, App’x. 2 [hereinafter Police Foundation (2019)]; see also Tr. of Jan. 8, 2020 status hearing at 12.

⁶ Data USA, Ferguson Demographics, available at <https://datausa.io/profile/geo/ferguson-mo/#demographics>, noting that as of 2018 Black residents made of 69.8% of Ferguson’s population and white residents 23.1%.

⁷ DOJ report at 64-68, 74.

⁸ Police Foundation (2019) at 1.

measuring consent decree progress. Without them, the results of the 2019 survey cannot be deemed valid. The survey cannot “be used to demonstrate sustained continuing improvement” by the Ferguson police if the perspectives of the community members who have historically been most harmed are not accurately represented.

The Monitor plans to conduct a second survey in 2021. We have serious concerns about whether the Monitor’s efforts will be sufficient to engage with Black residents and gain their participation in the survey, particularly in light of new barriers to engagement due to COVID-19, which has also disproportionately harmed Black residents. We are also concerned that the Monitor’s planned new engagement efforts will again miss many Black residents because they will require access to and knowledge of modern technology such as QR codes and online survey links. Under the Monitor’s stated plan for survey engagement, large populations of elderly and disabled residents, residents without access to smart phones or laptops, and residents not registered to vote may all be left without notice of, or access to, the survey. We therefore recommend:

- Mail residents a paper copy of the survey in a self-addressed envelope with paid postage.
- Ensure paper surveys are distributed to all residences in low-income or predominately Black neighborhoods, as these areas generally experience higher FPD presence and fewer resources.⁹
- Engage and support Black clergy leaders, Black council members, Black community stakeholders, and principals of middle schools, high schools, and colleges with predominantly Black populations to help ensure that their respective communities receive, understand, complete, and return the survey.
- Use prior and ongoing consent decree work to identify additional residents to receive paper copies of the survey, including residents with court contact, jail time, or amnesty program cases and all youth involved in the supplemental bias-free policy review.
- Display survey links on the Monitor and City’s¹⁰ websites, as well as popular social media platforms.
- Prioritize the 2021 survey by dedicating the funds needed to ensure *all* residents have a chance to participate in such a critical and consequential survey.

c. The Parties and Monitor Must Ensure the NPSC Has Sufficient Resources

Despite paragraphs 21-23 clarifying the crucial advisory and community engagement functions of the Neighborhood Policing Steering Committee (“NPSC”), during the November 17, 2020 PROUD event, an NPSC member revealed that the NPSC had only met once since February 2020. Neither the Monitor, Ferguson Consent Decree Coordinator (“CDC”), nor the DOJ were aware of this extended halt in this NPSC function.¹¹ NPSC members later explained that they had difficulty meeting given a lack of resources and technology, and other health and subject matter challenges. While we are encouraged by the CDC offering the NPSC access to the City’s Zoom account, this does not address the lack of proactive NPSC supports that led to this oversight. Because the consent decree requires the City to “designate a City employee to provide administrative support necessary for the NPSC to effectively perform its advisory function,” the City should explain how it will ensure this function is being fulfilled effectively.

Any structures to support the NPSC’s work should consider the age, health, resources, technological abilities, and other key elements of the NPSC members. For example, some members are older and have difficulty understanding Ferguson ordinances or accessing technology. As an initial

⁹ Ideally, the Monitor would send a paper survey to all Ferguson residences. However, if there is concern about cost, Black neighborhoods should be prioritized as this community has borne the brunt of decades of FPD’s racist policing.

¹⁰ But the City should be precluded from administering the survey, collecting its results, or viewing identifying information in connection with the survey—it should only advertise the survey on its website to ensure maximum community engagement.

¹¹ Some NPSC subcommittees continued to meet during this time.

solution, the NPSC should be given its own account for holding virtual meetings without time restrictions, either via Zoom or an equivalent platform.¹² Additionally, the Monitor should also reach out to NPSC members to verify that the City has indeed provided them all necessary supports and resources.

d. The DOJ and Monitor Must Seek Information from the Public about FPD's Handling of 2020 Protests and Not Rely Solely on Officers' Reports for their Evaluations

The DOJ and Monitor have not comprehensively sought public input about law enforcements' response to protests in 2020, despite FPD's history of abuse of Black residents during First Amendment activities. In fact, the DOJ and Monitor have each stated their plan to evaluate officers' actions and response to protestors by reviewing law enforcement-created documents alone. Any investigation that omits the voice of community members subjected to law enforcement activity from an evaluation of officers' conduct risks omitting critical information, particularly where body-worn camera video and/or audio is unclear, incomplete, or entirely missing. Furthermore, it ignores FPD's dangerous history of abuse of Ferguson's Black residents. The DOJ and Monitor should evaluate any complaints already filed related to the protests and issue a public call¹³ seeking information from the public related to officers' conduct during protests sparked by the death of George Floyd and during the anniversary of Michael Brown's killing. The perspectives of the public, especially those subjected to law enforcement activity, are critical to evaluating officers' conduct in response to protests. The evaluation of officers' conduct in response to protests in 2020 should also be shared with the public so that residents can understand and evaluate how the Parties and Monitor are responding to this critical aspect of FPD's activity.

e. The Current Format of the Quarterly Status Hearings Prohibits Real Time Community Comments or Questions and Limits the Record to the Parties' and Monitor's Reports

Prior to COVID-19, this Court held four status hearings a year and permitted residents to provide oral testimony at every other hearing. Though limited to speaking to the Court only twice a year, residents would dutifully sign up to inform the Court of their concerns via oral testimony. In 2018, residents repeatedly asked the Court to allow oral testimony at all four status hearings, explaining in a letter that:

During status hearings where only parties speak, members of the public have heard updates that do not accurately or completely reflect the progress of the consent decree. This is detrimental to the faith in the consent decree for at least two reasons. First, the Judge solely relies on these updates and affirm the progress of the parties without knowing whether the update is actually being implemented in the way that the parties presented it. Second, by the time the community can respond to the inaccurate or incomplete portrayal of the progress, several months have passed, and the issue may no longer be ripe for community involvement or court intervention. **Please permit the community to submit written and oral testimony at every status update.**¹⁴

The Court's original orders did not change, and this letter was the last public comment docketed.

When the Court ordered the status hearings be virtual due to COVID-19, it prohibited residents from providing oral comment during any status hearing and only allowed limited written comments to be submitted prior to status hearings. This means that, aside from the January 8, 2020 hearing exactly one year ago, residents have been unable to speak directly to the Court to present their concerns. Also,

¹² NPSC members expressed concern with the CDC's proposition that members share the City's Zoom account and login. The NPSC is not currently using the City's shared Zoom account.

¹³ To be effective, the DOJ should ensure this call extends beyond statements at the quarterly status hearing, as this misses the large portion of the Ferguson community that cannot or do not attend the status hearings, virtually or in-person.

¹⁴ See e.g., Dec. 12, 2018 Ferguson Collaborative Ltr., Dkt. 107 (emphasis added).

because residents are not permitted to provide oral testimony or ask questions during the status hearings, they have had no way to respond to or clarify the Monitor’s or Parties’ representations of consent decree related work, in real time. Instead, residents are forced to merely listen to brief updates the Parties and Monitor chose to present—even if those updates run contrary to residents’ experiences or omit subjects the community would like addressed.

Even community members’ written comments are constrained. Despite the increased limitations in community engagement in 2020, the Court shortened written comments to only 5 pages and prohibited anonymous community submissions.¹⁵ Additionally, community members no longer have the benefit of viewing each other’s filed comments and concerns, as residents’ written comments are no longer docketed online through the Court’s electronic filing system. They are also not made public on the Monitor’s website. Moreover, because oral testimony has been precluded, residents no longer have the benefit of having their comments archived in the Court transcripts. Accordingly, there is currently *no* public record of the public’s comments regarding the implementation of the consent decree from the last 3 status hearings. We therefore propose the following solutions:

- Allow the public to provide oral comments during all status hearings. This oral public comment period should take place *after* the Parties and Monitor make their initial reports to the Court, so residents may respond to the updates presented, clarify any representations the Parties and Monitor make to the Court, and/or ask follow-up or clarifying questions. (Allowing public comments during virtual hearings is not difficult and is routinely done in other jurisdictions.¹⁶ One method requires the Court furnish a “dial-in” number so residents may provide public comment on the phone, while the Court controls when an individual is heard.)
- Ensure all submitted public comments, including public comments from the last 3 status hearings, are docketed for an official record and easily accessible on the Monitor’s website.
- Remove the 5-page written comment restriction and the requirement that residents state their name in written submissions.

Thank you for considering these comments. 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

¹⁵ See the Court’s May 18, July 10, and Nov. 12, 2020 orders announcing upcoming status hearings and stating “written statements will not be docketed in the Court file, placed on the Court’s website for this case, or otherwise read into the record of proceedings at this status hearing.” and “[p]ersons making written submissions must include their full names. No telephone calls, anonymous submissions, or submissions that do not comply with these requirements will be considered.”

¹⁶ Many courts, city councils, and other bodies accountable to the public have recognized the importance of real-time public input and have allowed virtual oral public comments. *See e.g.*, New York City institutions allowing members of the public to testify at virtual public hearings via Zoom <https://ny.curbed.com/2020/4/16/21222743/nyc-coronavirus-city-council-public-hearings> and <https://council.nyc.gov/testify/>; *see also* City of Boise, Idaho <https://www.cityofboise.org/departments/finance-and-administration/city-clerk/virtual-meetings/> and Philadelphia, <https://phlcouncil.com/offering-public-testimony-at-council-public-hearings/>, allowing real-time oral testimony through phone calls.