



July 5, 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 pursuant to the Court’s order filed on May 17, 2021.¹ Since its founding in 1940, LDF has partnered with federal and local policymakers to address police violence and misconduct and achieve racial justice and equity for Black people across the country.² For the past seven years,³ LDF has worked with and supported community members and activists in Ferguson and St. Louis, Missouri to advance laws, policies, and practices that improve police accountability and public safety, including the creation, implementation, and monitoring of the consent decree. It is with this wide-ranging experience and local engagement that we make the following comments and recommendations.

1. The Parties' Lack of Notice and Transparency in Its Recent Policy Revisions Undermines the Purpose and Spirit of the Consent Decree and Sows Mistrust in its Processes

The consent decree is “designed [] to increase transparency, strengthen accountability measures, and increase community [] confidence that [Ferguson’s] systems are fair and consistent.”⁴ The consent decree requires the City of Ferguson (“the City”) to solicit “meaningful civilian oversight”⁵ and “increase opportunities for community engagement”⁶ during the revision and review of Ferguson Police Department’s (“FPD”) policies and practices. In 2018, when the U. S. Department of Justice (“DOJ”) and the City (“the Parties”) began to conduct the revision of FPD policies as required by the consent decree, Ferguson residents and advocates⁷ pushed the Parties and Monitor to incorporate a 30-day public review and comment period. Understanding the importance of community input, the Parties and Monitor agreed.⁸ Later that year, the Monitor memorialized this agreement in her Semiannual Report, clarifying that every FPD policy would be subject to a 30-day public review and comment period (the “public comment period”), and afterward, the Parties and Monitor would finalize the revised FPD policy, post the final version of the policy on the Ferguson website for public view, and implement the policy with FPD roll-call training.⁹

The public comment period provided community members with an opportunity to carefully review, understand, and make meaningful comments and edits to FPD’s policies. Though not explicitly required by the consent decree’s terms, the Parties’ and Monitor’s inclusion of the 30-day comment period adhered to the purpose and spirit of the consent decree¹⁰ and followed best practices¹¹ because it prioritized transparency in the City’s processes and the inclusion of residents’ input. During the first 30-day public comment period, residents reviewed and submitted detailed feedback on 11 FPD Use of Force (“UOF”)

policies and accompanying appendices.¹² The Parties and Monitor then incorporated the community's recommendations and finalized the UOF policies.¹³ FPD officers eventually conducted roll-call training on the policies, at which point the policies were implemented and published on the Ferguson website.¹⁴

At the January 12 and April 8, 2021 status hearings, Nicolle Barton, the Consent Decree Coordinator, and the DOJ¹⁵ informed the public that the Parties made "minor language changes" to the previously finalized and implemented UOF Policies.¹⁶ However, when community members sought clarity on the extent and substance of the Parties' changes, the Parties provided vague and conflicting responses. Given this, the Neighborhood Policing Steering Committee ("NPSC") invited the Parties to the June 17, 2021 NPSC meeting to explain the policy changes. During this meeting, the DOJ and Ms. Barton revealed that within the last six months, the Parties made 1) technical and potentially substantive changes to multiple UOF policies, including changes that define which officer actions constitute a UOF and changes to UOF reporting requirements, and 2) changes to multiple other core consent decree policies, including FPD's citations and arrests policy and the stop, search, and arrest policy.¹⁷

The NPSC meeting revealed that, except for the minor changes to the UOF policies, the Parties had not notified the community about the policy changes or discussed their extent or nature. The Parties also had not solicited community feedback on any of the substantive changes. And despite residents' clear and strong frustration at this revelation and subsequent requests for more information, to date, the Parties have not specified which changes they made and to which policies, published the updated policies online, or created a process for community feedback on the revised policies.

We acknowledge the Parties' authority to review and update FPD policies as needed¹⁸ However, when making changes to these policies,, the Parties must be transparent and meaningfully incorporate community input.¹⁹ By not promptly complying with residents' requests for transparency in the FPD policy revision, particularly for FPD's UOF policies, the Parties trivialize the role of residents in responding to FPD's violence and racially discriminatory policing²⁰ that sparked public outcry and led to the DOJ's investigation. The DOJ's investigation itself found that FPD disproportionately deployed "routinely unreasonable[,] and sometimes clearly punitive" force on Ferguson's Black residents, noting that in "[n]early 90% of documented force used by FPD officers was used against African Americans" and "[i]n every canine bite incident for which racial information is available, the person bitten was African American."²¹ Additionally, the DOJ report lists numerous examples of FPD violence on Black residents without consequence.²² Ferguson residents have the biggest stake in ensuring every FPD policy is fair, mandates bias-free policing, takes into account FPD's past racially discriminatory conduct, and includes accountability and transparency measures. Further, the Parties' opacity endangers the integrity of the consent decree process by sowing mistrust and is inconsistent with the Parties and Monitor's stated commitment to prioritizing community engagement and transparency.²³ For example, at the April 8, 2021 status hearing, the consent decree coordinator promised to "upload all [] revised use-of-force policies onto our post-consent decree policy page for the public to review."²⁴ Yet, nearly three months later, these revised policies still have not been posted to the website or otherwise shared with Ferguson residents.

We urge the Parties and Monitor to prioritize community engagement and transparency by immediately: 1) listing all policies the Parties have amended after they were initially finalized; 2) specifying all technical and substantive changes within each policy and the basis for such changes; 3) updating the Ferguson website to include the latest version of all finalized policies, including date of finalization, and archiving prior policy versions; and 4) establishing a clear process by which the public is notified when policies are changed and informed of when and how they will be able to review and/or comment on those changes.

2. To Restore Community Trust, the Parties and Monitor Should Establish a Clear Process that Ensures Residents May Access the Latest Version of FPD Finalized Policies and Have a Designated Timeframe to Review and Provide Comments on Recent and Future Changes to Policies

The Parties' lack of transparency regarding their recent changes to finalized policies comes on the heels of 1) the Monitor's failure to release a detailed status report on the implementation of the consent decree for over a year,²⁵ 2) the Court permitting residents to speak directly to the Court only twice a year²⁶ and then the elimination of residents' speaking to the Court entirely,²⁷ 3) the Parties and Monitor's utilization of a Ferguson "community" survey that failed to include input from nearly 60% of Ferguson's Black residents,²⁸ and 4) five years of implementing consent decree requirements without FPD ever receiving in-service training on any of the revised policies, despite many policies—including the UOF policies—being finalized years ago, and much more.²⁹ While we commend the Parties and Monitor's progress on the consent decree's implementation thus far, it is undeniable that Ferguson residents have patiently waited through many delays, hurdles, and opposition. It is more than understandable that residents expect a basic level of transparency and inclusion in a process as consequential as the revision of FPD's UOF policies. The Parties' and Monitor's failure to acknowledge or remedy this only continues to sow mistrust.

To restore community trust, we urge the Parties to establish a clear process that specifies: how residents will be informed of technical and substantive policy changes in a timely manner (with an explanation of why such technical or substantive changes were necessary) and critically, how and when residents will be able to view and provide comments on each changed policy. The Parties have indicated that the next opportunity for residents to provide comments on the revised policies will be during the consent decree mandated Annual Review for all implemented policies.³⁰ But the consent decree only requires the *City* to "review each policy or procedure within one year of its implementation." We agree that the Parties should permit the public to participate in the Annual Review process by establishing an annual public comment period, with sufficient advance notice, which allows the public to comment on the Parties' proposed changes and identify any additional changes to the policy and/or its implementation.

Additionally, the Parties must clarify when a policy is deemed "implemented," beginning the one-year clock towards the Annual Review. The DOJ has clarified that, based on the Monitor's 2018 Report,³¹ it interprets a policy's date of implementation as the date FPD officers receive roll-call training on the policy. However, it is unclear if that interpretation is shared by the Monitor, FPD, or the Court. Accordingly, we ask that all Parties and the Monitor clarify these uncertainties.

3. FPD's Failure to Implement Any In-Service Trainings In The Five Years since the Consent Decree's Implementation Indicates a Failing Training Process that Mandates Revision and Court Intervention

Paragraph 48 of the consent decree requires all training to be "fully delivered within two years of the [consent decree's] Effective Date." The effective date of the consent decree was April 19, 2016.³² In the five years since the implementation of the consent decree, FPD has not completed *any* in-service training on any FPD policy. In fact, FPD has not even completed roll-call training on all of the finalized policies—despite the FPD's description of the roll-call training as a "brief" overview of the revised policies, completed in less than 30 minutes.³³ We acknowledge that COVID-19 may have delayed some progress. However, in the Year Three Workplan, the Monitor required FPD to create a training schedule by February 2019. As of the Monitor's Winter 2021 report, the FPD had still not finalized a comprehensive training schedule, and, to date, FPD has no Training Coordinator.

The City's failure to implement even the most perfunctory training requirements paralyzes the consent decree progress in one of its most critical areas—FPD's utilization of the revised policies. Without the implementation of training and established accountability methods, FPD cannot be held accountable for any failures to adhere to the revised policies, risking a continuation of Ferguson's deep and shameful history of violent and discriminatory policing. We urge the Monitor and DOJ to assist FPD in developing the plans, curriculum, and staffing support necessary to implement all roll-call and in-service training, in a timely and effective manner. To avoid any reliance on additional city funding and other city resources to fulfill FPD's training requirements, we urge the Monitor and Parties to identify and utilize pro-bono resources and grant programs³⁴ that may provide FPD with the financial and staffing support it needs to fulfill the consent decree's training requirements.

Conclusion

We urge the Court, Parties, and Monitor to adopt our recommendations to ensure timely and robust community engagement, as the consent decree intends. Thank you for considering these recommendations. If you have any questions, please contact Katurah Topps at ktopps@naacpldf.org or 212-965-2200.

Sincerely,

Katurah Topps, Policy Counsel

Puneet Cheema, Manager
Justice in Public Safety Project

Lisa Cylar Barrett, Director of Policy

¹ See Order, *US v. Ferguson*, 4:16-cv-0180-CDP, Dkt. No.132, at <https://ecf.moed.uscourts.gov/doc1/10719199791>.

² See, e.g., *Shepherd v. Florida*, 341 U.S. 50 (1951) (reversing the convictions of Black men falsely accused of raping a white woman in 1949 after sheriff's deputies brutally beat the men to force them to falsely confess).

³ See <https://www.naacpldf.org/naacp-mission/criminal-justice/ferguson-missouri/> for more details on LDF's Missouri-based work.

⁴ Consent Decree; Dkt. No. 128-1 at 1 (April 19, 2016) [hereinafter CD].

⁵ *Id.* at ¶ 402.

⁶ *Id.* at ¶ 18.

⁷ Among others, the Ferguson Collaborative and LDF collectively advocated for the 30-day comment period.

⁸ Monitor's Fall 2018 Semiannual Report, Dkt. No. 100, at 4 (Nov. 11, 2018) [hereinafter Monitor's Fall 2018 Rpt.].

⁹ *Id.* at 3-4 (Nov. 11, 2018); Monitor's Spring 2019 Semiannual Report Dkt. No. 118, at 5-6 (June 28, 2019) [hereinafter Monitor's Spring 2019 Rpt.]; Monitor's Winter 2020 Status Report, Dkt. No. 128, at 5-6 (Jan. 31, 2020) [hereinafter Monitor's Winter 2020 Rpt.]; Monitor's Winter 2021 Status Report, Dkt. No. 145, at 6 (Feb. 23, 2021) [hereinafter Monitor's Winter 2021 Rpt.].

¹⁰ See CD at 1, requiring the Parties to "reorient their approach to law enforcement to focus on community engagement and collaborative partnerships with groups and individuals throughout Ferguson"

¹¹ See *Final Report of the President's Task Force on 21st Century Policing* at 2, 15, May 2015, available at <https://cops.usdoj.gov/RIC/Publications/cops-p341-pub.pdf>.

¹² The released policies included: General UOF (Policy 4.1.0), UOF Reporting (Policy 4.1.1), UOF Review (Policy 4.1.2), Electronic Control Weapons (Policy 4.3.0), Canines (Policy 4.7.0), Batons (Policy 4.5.0), and Firearms (Policy 4.2.0), Vehicle Pursuits (Policy 4.8.0), OC Spray (Policy 4.6.0), Less Lethal Shotgun Ammunition (Policy 4.4.0), and Critical Incidents Response (Policy 4.2.1).

¹³ Monitor's Spring 2019 Rpt. at 2.

¹⁴ Monitor's Winter 2021 Rpt. at 26.

¹⁵ At the April 8, 2021, status hearing, the DOJ clarified that "the language changes that were made to the use-of-force policies really concerned review and reporting, and we just added more detail about who does what and when."

¹⁶ Transcript of Jan. 12, 2021, status hearing, at 3-4.

¹⁷ June 17, 2021, NPSC zoom meeting, attended by the DOJ and Nicole Barton.

¹⁸ CD at 1 noting, “[t]he Agreement is designed also to increase transparency, strengthen accountability measures, and increase community and officer confidence that these systems are fair and consistent.”

¹⁹ CD ¶ 361; *see also* ¶ 41 noting that “The City agrees to implement policies that reflect its commitment to community policing, procedural justice, and bias-free policing...”

²⁰ *See* U.S. Department of Justice, Civil Rights Division, *Investigation of the Ferguson Police Department*, March 4, 2015, at 2 (“Ferguson’s police and municipal court practices both reflect and exacerbate existing racial bias, including racial stereotypes. Ferguson’s own data establish clear racial disparities that adversely impact African Americans. The evidence shows that discriminatory intent is part of the reason for these disparities.”)

²¹ Civil Rights Division, U.S. Department of Justice, *Investigation of the Ferguson Police Department*, 5, 29 (March 4, 2015), available at https://fergusonmonitor.com/wp-content/uploads/2018/06/ferguson_findings_3-4-15.pdf.

²² *Id.* at 29 (“[I]n August 2010, a lieutenant used an ECW in drive-stun mode against an African-American woman in the Ferguson City Jail because she had refused to remove her bracelets . . . [s]imilarly, in November 2013, a correctional officer fired an ECW at an African American woman’s chest because she would not follow his verbal commands to walk toward a cell.”)

²³ The Monitor requires that the City maintain an Interactive Dashboard that contains the General Orders, their status, and a hardcopy of all finalized policies at FPD. *See* Monitor’s Winter 2021 Rpt. at 6-7.

²⁴ *See* Transcript of April 8, 2021, status hearing, at 13.

²⁵ *See* CD ¶ 438 (requiring the Monitor to file a public report every six months). The Monitor filed the Winter 2020 Status Report on Jan. 31, 2020 (Dkt. No. 128) and filed no subsequent report until Feb. 23, 2021 (Dkt. No. 145).

²⁶ Prior to COVID-19, the Court held four status hearings a year and permitted residents to provide oral testimony at every other hearing, for less than 5 minutes each. *See e.g.*, Dec. 12, 2018, Ferguson Collaborative Ltr., Dkt. No. 107 (“Please permit the community to submit written and oral testimony at every status update.”)

²⁷ When the Court ordered the status hearings be virtual due to COVID-19, it prohibited residents from providing oral comment during any status hearing. This means that, aside from the January 8, 2020 status hearing, residents have been unable to speak directly to the Court to present their concerns. *See* Memorandum and Order Setting Telephonic Status Hearing, (May. 18, 2020).

²⁸ 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. No. 128, App’x. 2; *see also* Tr. of Jan. 8, 2020 status hearing at 12 (noting that only 12.50% of the 2019 survey responses were from Black residents even though Black residents make up nearly 70% of Ferguson’s population).

²⁹ *See* Appendix A, Monitor’s 2021 Rpt. at 10-11, 13 (Feb. 23, 2021) (listing in-service training as incomplete for all use-of-force, body-worn and in-car cameras, and accountability consent decree provisions).

³⁰ CD ¶ 45.

³¹ Monitor’s Fall 2018 Rpt. at 4 “After the Monitor has approved the final policy, officers will be provided roll call training and the policy will be implemented and published.”

³² *See US v. Ferguson*, 4:16-cv-0180-CDP, Dkt. Nos. 41 and 42.

³³ *See* City of Ferguson, City Council Meeting Minutes (March 10, 2020), available at https://www.fergusoncity.com/AgendaCenter/ViewFile/Minutes/_03102020-787.

³⁴ *See e.g.*, ABLE Project, Georgetown Law Innovative Policing Program, <https://www.law.georgetown.edu/innovative-policing-program/active-bystandership-for-law-enforcement/about-us/> and Cincinnati Collaborative Agreement, *In re Cincinnati Policing*, Case No. C-1-99-3170 at 31 (S.D. Ohio Oct. 10, 2002) (requiring plaintiffs to submit grant applications to local and national philanthropic organizations).