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COMMENT TO THE CIVILIAN COMPLAINT REVIEW BOARD July 11, 2022

Comment of the Center for Constitutional Rights and Beldock Levine and Hoffman LLP (Plaintiffs' Counsel in *Floyd v. City of New York*) Regarding Rule Changes to CCRB Abuse of Authority Jurisdiction and Investigations of Past Conduct

We welcome the Civilian Complaint Review Board's (CCRB) efforts to incorporate the reality of racial bias in policing into their mandate through the newly formed Racial Profiling and Biased Policing (RPBP) Investigations Unit and believe this work falls squarely within the CCRB's statutory mandate. CCRB was founded in 1953 in response to the demands of a civilian coalition committee which was formed to deal with "police misconduct in their relations with Puerto Ricans and Negroes specifically."¹ Nearly 70 years later, Black and Latinx communities still experience disparate treatment at the hands of the NYPD, and evidence continues to show that the NYPD has consistently avoided ensuring adequate investigations of, and accountability for, instances of racially-biased policing.² Incorporating rules recognizing CCRB's authority to investigate acts of bias and bias-based policing is long overdue, especially considering the historical origins and mandate of the CCRB.

We thank the CCRB for the opportunity to provide testimony on the proposed rule changes made in response to the January 2022 amendments to the CCRB's Charter governing investigations of racial bias, biased-policing, and improper use of a body-worn camera (BWC) under the Board's "abuse of authority" jurisdiction.

We are civil rights attorneys from the Center for Constitutional Rights and the law firm of Beldock Levine and Hoffman LLP who have represented victims of police misconduct in New York state and federal courts for several decades. We have also served for the past 14 years as plaintiffs' counsel in *Floyd v. City of New York*, the landmark civil rights class action that successfully challenged the New York City Police Department's (NYPD) racially discriminatory and unconstitutional stop, question, and frisk practices. The suit resulted in a federal court injunction that mandated reforms to the NYPD's procedures for disciplining officers found by the CCRB to have committed misconduct during police stops of citizens under *Terry*.

The CCRB's proposed changes are especially pertinent given the fact that within the past eight years of the *Floyd* post-trial monitorship, the NYPD has failed to reach full compliance with the federal court's remedial order. Specifically, in August 2013, the Court in *Floyd* ruled that the NYPD engaged in widespread, racially-discriminatory stop, question and frisk practices over many years in violation of the

¹ Civilian Complaint. Rev. Bd., History, (last visited Jun. 29, 2022)

<https://www1.nyc.gov/site/ccrb/about/history.page>

² NYC Dept. of Investigation, Complaints of Biased Based Policing in New York: An Assessment of NYPD's Investigations, Policies, and Training, (last visited July 8, 2022)

https://www1.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf

Fourteenth Amendment. The Court found that the City adopted a “policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data [which] resulted in the disproportionate and discriminatory stopping of Black and Latinx in violation of the Equal Protection Clause.”³ The *Floyd* litigation—along with successful litigations in *Davis* and *Ligon*—against the NYPD led to a series of court-mandated reforms and a federal monitorship designed to reduce racial discrimination and otherwise unconstitutional actions during police stops of civilians.

I. CCRB’s authority to investigate allegations of “bias-based policing” and “racial profiling” is important to reduce the continuing racial disparity between the subjects of police stops.

Through decades of work in this area, we have witnessed how, despite a dramatic reduction in the number of reported stops following our successful litigation in *Floyd*, the racial disparity between the subjects of police stops has remained largely unchanged. In 2013, for example, the total number of reported stops of Black and Latinx citizens was, respectively, 5.0 and 2.6 times higher than that of the reported stops of white citizens, while in 2019, Black and Latinx stops were 6.6 and 3.2 times higher than the total number of stops of white citizens.⁴ Thus, if anything, the court-mandated monitorship has shown that the racial disparity among those stopped by the NYPD may have increased in the years since 2013. This is especially significant because the monitorship has long identified that the NYPD has been underreporting the frequency of stops officers undertake.⁵ The Monitor’s 13th report found that the underreporting of stops raises concerns about the ability to “draw strong conclusions about the NYPD’s compliance with the Fourteenth Amendment and concerns about Blacks and Hispanics not being treated similarly to Whites when stopped by the NYPD.”⁶ The report further noted that using a higher estimate of underreported stops also results in a higher estimated racial disparity.⁷

We hope that the CCRB’s involvement in this issue will result in more robust and credible investigations of allegations of police misconduct, and a reduction in biased policing practices. We believe that the CCRB’s newly established ability to self-initiate investigations into misconduct will also help in this regard. We affirm, however, that neither the *Floyd* monitorship nor the CCRB’s expanded mandate will be able to fully address the issue of unconstitutional, racially biased policing unless the NYPD leadership resolves the issue of underreporting of stops by their officers.

II. The definition of “abuse of authority” in §1-01 can be more expansive regarding Body Worn Cameras.

We would like to offer a few suggested adjustments to the definition of “abuse of authority” in §1-01, which we believe will better facilitate accountability around biased policing, abuse of authority, and racial profiling.

³ *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (*Floyd* Liability Opinion)

⁴ Monitor’s 13th Status Rep., at 7, Sept. 1, 2021

⁵ Monitor’s 16th Status Rep., at 27, May. 6, 2022

⁶ Monitor’s 13th Status Rep., at 7, Sept. 1, 2021

⁷ *Id.* (“This is particularly the case for comparisons of frisks, arrests, and uses of force for Blacks, as the estimated disparities in stop outcomes increase if one uses a larger estimate of undocumented stops.”).

We welcome the CCRB’s incorporation of “improper use of BWCs” into the definition of “abuse of authority,” expanding its ability to investigate another significant aspect of police misconduct. The proposed rule amendment defines the term “Improper Use of BWC” as “when a member of service fails to turn it on, turns it off prematurely, or fails to record an incident in violation of the NYPD Patrol Guide.” We propose that CCRB add “when a member of the service fails to turn it on at the start of an encounter or as required by the Patrol Guide” to the definition of improper use. In a 2020 report, the CCRB stated that during its review of BWC footage, “the CCRB found that officers often failed to properly use their cameras by *turning on the BWC late*, turning the BWC off early, or not turning the BWC on at all, in violation of PG § 212.123.⁸ BWCs are meant to serve as a tool for transparency. When BWC footage begins halfway through an encounter, it can be impossible to recognize whether the stop was constitutionally compliant. We hope that the CCRB’s new definition and future investigations will encourage better BWC practices within the NYPD.

III. The definition of “abuse of authority” in §1-01 should be expanded to include investigation of “improper reporting of stops.”

We encourage the CCRB to consider including the review of “improper reporting of civilian stops” to its jurisdiction under “abuse of authority” in its future amendments to §1-01. Much like improper use of BWCs, the underreporting of stops serves as a significant roadblock to evaluating constitutional compliance or investigations into the lawfulness of individual stops. The *Floyd* Monitor’s recent reports have identified “substantial evidence” suggesting that many NYPD officers did not submit reports documenting all of their stops which led to a significant underreporting of stops.⁹ The report found these undocumented stops may undermine the reliability of statistical analyses to identify racially disparate stop report patterns and practices in New York City.¹⁰ Underreporting not only impacts the ongoing evaluation of constitutional compliance, but also impacts CCRB’s investigations into biased policing more generally. While the department has conducted its own investigation into the issue of underreporting among its officers, it has not resulted in meaningful improvement in reporting practices.¹¹ The CCRB is well-situated to review this issue much like it will begin doing with improper BWC use, especially given the fact that the CCRB can now initiate its own investigations into abuse of authority. This would both benefit the CCRB’s own investigation processes as well as accountability efforts by other entities.

Conclusion

We believe that these above suggested revisions will clarify and reinforce the Board’s

⁸ Civilian Complaint. Rev. Bd., *Strengthening Accountability: The Impact of the NYPD’s Body-Worn Camera Program on CCRB Investigations*, at 8 (2020).

⁹ Monitor’s 13th Status Rep., 7, Sept. 1, 2021

¹⁰ *Id.*

¹¹ *See* Monitor’s 13th Status Rep., 22, Sept. 1, 2021 (“For years 2018-2019, the RAND audits showed that approximately 36 percent of stops were not documented that should have been.”).

commitment to use its expanded jurisdiction under the City Charter amendments to investigate acts of bias and bias-based policing as well as other forms of misconduct that have historically hindered police accountability and transparency efforts in New York City. We hope that the newly formed RBPB Investigations Unit will meaningfully consider and incorporate the voices and experiences of impacted communities of color into their work, especially with respect to the Board's ability to self-initiate investigations into acts of bias. These communities hold crucial insight into the ongoing reality of racially biased policing that must serve as a guide within any and all efforts to eradicate discriminatory police conduct, including the CCRB's expanded mandate.

Sincerely,

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