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August 10, 2015

Via ECF

Hon. Analisa Torres
United States District Court
Southern District of New York
500 Pearl Street
New York, New York 10077

Re: *Davis, et al. v. City of New York, et al.,* 10 Civ. 0699 (AT)

Dear Judge Torres:

Plaintiffs in the above-referenced matter respectfully submit this letter regarding revised Patrol Guide Section 212-11, "Stop and Frisk" ("PG 212-11"), which the Monitor submitted for this Court's review and approval on August 7, 2015. Plaintiffs do not object to the revised PG 212-11, but write to notify the Court of two concerns for which we reserve our rights to continue developing reforms with the Monitor and Defendant City of New York ("City"): (1) the problem of including Level 2 consensual searches in PG 212-11 without guidance or limitations; and (2) the need for documentation of encounters that New York City Police Department ("NYPD") officers assert to be a "request for information" (Level 1 encounter) or a "common law right of inquiry" (Level 2 encounter) pursuant to *People v. De Bour*, 40 N.Y.2d 210 (1976).

The revised PG 212-11 instructs NYPD officers, for the first time, that "[u]pon a founded suspicion of criminality, the officer may approach a person to ask accusatory questions and may seek consent to search; however consent must be voluntarily given." (Revised PG 212-11, p. 2, par. 3.) Unfortunately, no guidance is offered in the revised PG 212-11 as to the scope of the requested search, the timing of the request during the encounter, the voluntariness of the consent, or the relationship between the request to search and the founded suspicion of criminal activity. The revised PG 212-11 presently instructs officers that, under a Level 1 request for information, a police officer may seek information "if those questions are related to the objective credible reason for the approach," (Revised PG 212-11, p. 2, par. 1), and PG 212-11 should similarly instruct officers that a request to search under Level 2 must be related to the founded suspicion of criminality. The lack of guidance regarding consensual searches can be especially

injurious to public housing residents and guests who are often subjected to unwarranted searches in the common areas of public housing residences.

Moreover, purported Level 1 and Level 2 encounters should be documented in order to capture instances when, for example, a reasonable person would not feel free to leave irrespective of what level the officer believes the encounter to be. As noted by the Court in this case, "An officer could conceivably comply with *De Bour* but violate the Fourth Amendment by, for example, approaching and questioning a NYCHA resident, without reasonable suspicion, in a hostile, aggressive manner that would make a reasonable person not feel free to terminate the encounter—but asking only questions concerning identity, address, and destination." *Davis v. City of New York*, 959 F. Supp. 2d 324, 342 n.75 (S.D.N.Y. 2013). It is, therefore, important to have some documentation of Level 1 and Level 2 encounters in order to assess compliance with PG 212-11 and ensure that public housing residents and guests are not subject to unlawful seizures.

Plaintiffs look forward to continue working with the City and the Monitor to address these concerns and hope to reach a satisfactory resolution.

Respectfully submitted,

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