Joint Comment from the *Floyd*, *Davis,* and *Ligon* Plaintiffs

in Response to the

Report to the Court on Police Misconduct and Discipline

by the Honorable James Yates

December 25, 2024

The Department Advocate's Office must improve its procedures for imposing discipline in response to the Civilian Complaint Review Board's ("CCRB") findings of substantiated misconduct during stops. This improvement must include increased deference to credibility determinations by the CCRB, an evidentiary standard that is neutral between the claims of complainants and officers, and no general requirement of corroborating physical evidence.

Floyd Remedial Order at 684

[E]xcusing established misconduct, such as a stop or frisk without objective reasonable suspicion, merely because the Police Commissioner declares that the officer meant well or acted in good faith, is in clear defiance of the opinions in *Floyd*.

The Honorable James Yates,
Report to the Court on Police
Misconduct and Discipline
September 19, 2024

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I. Introduction

Over eleven years ago, after a months-long trial, this Court found that the New York City Police Department ("NYPD") maintained a policy and practice of engaging in unconstitutional stop, question, and frisk ("SQF"). The Court found that the NYPD's SQF policies and practices condoned racially profiling Black and Latino New Yorkers in violation of the Fourteenth Amendment and stopping and frisking them without appropriate justification in violation of the Fourth Amendment. The Court explained the bases for these findings in a detailed Liability Opinion.[1] Simultaneously, the Court issued a Remedial Order directing the NYPD to take specific steps to bring its SQF policies and practices into compliance with the law.[2]

That Remedial Order required, among other things, that the City and the NYPD hold officers who commit SQF-related misconduct accountable by imposing meaningful discipline on them. To implement that remedy, the Court ordered the NYPD to improve its discipline processes and specifically ordered the NYPD to give more deference to the investigations being conducted by the Civilian Complaint Review Board ("CCRB"), an independent City agency staffed with experienced lawyers and investigators.

But the NYPD has failed to comply with this order, as is made clear in Judge James Yates's Discipline Report.[3] In the Discipline Report, Judge Yates found, among other things, that CCRB findings are not given the deference required by this Court's order and instead are often ignored; that NYPD police commissioners have consistently exercised their unfettered authority over discipline to excuse officers of SQF misconduct by determining they acted in "good faith," even

[1] *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) ("Liability Opinion").
[2] *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) ("Remedial Order"). The Remedial Order was later incorporated into the settlement agreement with the plaintiffs in the Stipulation of Settlement and Order, *Davis v. City of New York*, No. 1:10-cv-00699-AT (S.D.N.Y. Apr. 28, 2015), ECF No. 339 ("*Davis* Settlement").
[3] Report to the Court on Police Misconduct and Discipline, *Floyd et al. v. City of New York et al.* ("*Floyd*"), No. 1:08-cv-1034-AT, (S.D.N.Y. 2023), ECF No. 936 ("Discipline Report").

when the misconduct is confirmed by independent investigation and the officers have long disciplinary histories; and that officers found to have repeatedly broken the law and violated NYPD policy are promoted more often than punished. Indeed, while the Discipline Report was being finalized, it was reported that former Commissioners Sewell and Caban swept misconduct under the rug even more often than their predecessors.[4] And even now, with the evidence before it and a reasonable road map provided by Judge Yates after years of in-depth study, the City refuses to take responsibility for its failures, choosing instead to focus on meritless procedural challenges to the Discipline Report.[5]

The Court has the power to take action in response to the Discipline Report's findings. As a starting point, the Discipline Report provides 51 recommendations aimed at specific disciplinary failures. The Court can and should so-order those recommendations by directing the parties and the Monitor to meet and confer on a proposed order implementing them. To that end, this comment proceeds in three parts: First, Plaintiffs place the factual conclusions of the Discipline Report in the broader context of the history of these cases and more recent developments in NYPD disciplinary practices, in order to further inform the Court's consideration of the Report's recommendations. Second, Plaintiffs outline the Court's legal authority to order the Discipline Report's recommendations, which is grounded in the Court's power to respond to the City and the NYPD's long failure to comply with the Remedial Order, as well as its power to modify the original Remedial Order and order new relief. Third, Plaintiffs present the case that the Discipline Report's

[4] Eric Umansky, *The NYPD Is Tossing Out Hundreds of Misconduct Cases—Including Stop-and-Frisks—Without Even Looking at Them*, PROPUBLICA (Sept. 11, 2024), https://www.propublica.org/article/nypd-tossed-out-police-misconduct-discipline-cases-edward-caban.

[5] *See* Ltr. from T. Zimmerman to J. Torres, (Dec. 9, 2024), *Floyd*, ECF No. 946 ("Zimmerman Letter"); Order (Dec. 22, 2024), *Floyd*, ECF No. 948.

recommendations should be ordered by the Court because they are well-supported measures to remedy ongoing causes of violations of the law.

Even should the Court so-order the Discipline Report's recommendations, that will not finish the job. The evidence establishes that the absolute authority of the Police Commissioner over discipline will remain a major obstacle to compliance. Plaintiffs hope that the new Commissioner—who Plaintiffs acknowledge enters the role with a reputation for efficiency and innovation—will see in the Discipline Report an opportunity to repair a broken system. Perhaps, while working to implement the remedies ordered by the Court, she will even exceed Judge Yates's recommendations. Perhaps she will recognize that imposing accountability on employees who break the law and violate NYPD policy is not only a way to end the City's decades-long practice of unconstitutional SQF but is also an effective management tool. We sincerely hope so. But the long historical record across numerous commissioners demonstrates that vesting the power of discipline solely in the commissioner impedes accountability even if the occasional commissioner proves an exception to the rule. The culture within the NYPD of failing to hold police officers accountable for their violations of the rights of the Plaintiff class has deep roots, no matter who the commissioner is. And previous commissioners have also begun their tenures promising reform. Meaningful disciplinary reform requires a court order implementing the Discipline Report's recommendations as a first step and may require more fundamental reform and further court orders before the City is able to achieve compliance with the discipline-related court orders, and before the City is able to achieve substantial compliance overall.

II. The Discipline Report Reflects the NYPD's Decade-Long Failure to Comply with the Remedial Order

A. The Court Ordered Changes to NYPD Systems for Investigating and Disciplining Misconduct Due to Failures Tantamount to Condoning Racial Profiling

From the outset of this litigation, Plaintiffs linked the NYPD's racial profiling of Black and Latino people in violation of the Fourth and Fourteenth Amendment to its "failure to properly and adequately monitor and discipline [its] officers." 2d Am. Compl., *Floyd*, ECF No. 50 at 35–36*; see also* Am. Compl., *Davis*, ECF No. 69 at 46, 48. While encouraging officers to stop and frisk increasing numbers of people in the early 2000s, the NYPD was simultaneously failing to properly discipline officers who stopped people unlawfully, even when independent investigations by the CCRB identified unconstitutional stops. As the number of stops conducted by the NYPD surged, from 98,000 in 2002 to over 500,000 in 2006,[6] the CCRB substantiated allegations of improper stops or frisks at nearly double the rate of any other allegations of officer misconduct.[7] At the same time, the NYPD was disposing of substantiated CCRB findings by issuing "instructions" at an unprecedented rate. In 2006, 70% of the allegations of abuse of authority substantiated by the CCRB resulted only in "instructions,"[8] which in practical terms means an officer is simply provided additional training, such as being directed to re-watch a training video. Discipline Report at 55 fn. 241.

[6] *See Stop, Question and Frisk Data*, NYPD, https://www.nyc.gov/site/nypd/stats/reports-analysis/stopfrisk.page (last visited Dec. 24, 2024); *Stop-and-Frisk Data*, NYCLU (Mar. 14, 2019), https://www.nyclu.org/data/stop-and-frisk-data.

[7] CCRB substantiated 18.3% of the "frisk and/or search" allegations it investigated between 2002 and 2006, compared to 10.8% of all allegations. The only types of complaints substantiated at a higher rate were retaliatory arrest (25.5%) and retaliatory summons (24.6%). *See* New York City Civilian Complaint Review Board, *January-December 2006 Status Report*, 96 (May 2007), https://www.nyc.gov/assets/ccrb/downloads/pdf/policy_pdf/annual_bi-annual/2006_annual.pdf.

[8] *Id*. at 44.

The failure of the NYPD to punish officers appropriately for stopping people without reasonable suspicion and frisking them without reasonable suspicion of being armed or dangerous was integral to the NYPD's policy of racial profiling Black and Latino New Yorkers. Officers who conducted large numbers of stops were rewarded for productivity even when many of those stops were illegal. And officers were emboldened by that encouragement, dramatically increasing the number of stops nearly every year until the *Floyd* lawsuit was filed in 2008. As the Court wrote at the summary judgment stage, "it is difficult to imagine how the Department's disciplinary practices would be adequate . . . to ensure that its officers are conducting constitutional stops." *Floyd v. City of New York*, 813 F. Supp. 2d 417, 454 (S.D.N.Y. 2011).

The Court identified the NYPD's failure to discipline officers for unlawful SQF activity as one of the engines of its unconstitutional practices, writing that when "confronted with evidence of unconstitutional stops, the NYPD routinely denies the accuracy of the evidence, refuses to impose meaningful discipline, and fails to effectively monitor the responsible officers for future misconduct." Liability Opinion at 617–20. The Court specifically singled out the NYPD office that handled discipline at that time. In its Remedial Order, the Court ordered that the "Department Advocate's Office *must improve* its procedures for imposing discipline in response to the [CCRB's] findings of substantiated misconduct during stops. This improvement *must include increased deference to credibility determinations by the CCRB*, an evidentiary standard that is neutral between the claims of complainants and officers, and no general requirement of corroborating physical evidence." Remedial Order at 684 (emphasis added).

B. The NYPD Has Thwarted Meaningful Discipline By Ignoring External Recommendations and Undermining Independent Oversight

Over the past decade, the NYPD has undermined the Court's order on discipline by establishing a redundant investigative unit that delays the disciplinary process, backtracking on an

agreement granting the CCRB greater authority, failing to substantiate a single instance of racial profiling, and strategically ignoring and weakening its disciplinary matrix. These actions demonstrate that the failure to discipline is not the inadvertent result of a bureaucratic process. Instead, that failure stems from intentional institutional resistance to independent oversight built up over decades, whether that oversight comes from the CCRB, the City Council, the Monitor team, or ultimately this Court.

Three years after the Court ordered that more deference be shown to CCRB findings, the NYPD established the Force Investigative Division ("FID"), an investigative unit within the NYPD that has repeatedly contested CCRB findings.[9] While FID only investigates force cases, many street stops and investigative encounters escalate to a use of force, as the Discipline Report makes clear. *See* Discipline Report at 102–03. The FID has re-investigated cases already substantiated by the CCRB or launched parallel investigations into the same incidents—including the deaths of Kawaski Trawick and Allan Feliz—and reversed, rather than deferred to, the CCRB's findings.[10] The duplicative investigations conducted by FID also result in the NYPD delaying to provide the CCRB with much-needed evidence,[11] all but ensuring that investigations extend beyond the 18-month statute of limitations[12] and providing yet another obstacle to imposing meaningful discipline.

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[9] When it established FID, the NYPD suggested the reason was that "officers often don't trust investigators from the department's Internal Affairs Bureau." John M. Annese, *Exclusive: NYPD Poised to Create Special Unit to Investigate Officer-Involved Shootings, Sources Say*, STATEN ISLAND ADVANCE (Mar. 17, 2015), https://www.silive.com/news/2015/03/exclusive_nypd_poised_to_creat.html.

[10] *See* Mike Hayes and Eric Umansky, *Video Showed an Officer Trying to Stop His Partner From Killing a Man. Now We Know Police Investigators Never Even Asked About the Footage*, PROPUBLICA, (May 11, 2023), https://www.propublica.org/article/nypd-kawaski-trawick-killing-investigation-questions; Maria Cramer and Olivia Bensimon, *5 Years After Killing Driver, Officer Fights at Trial to Keep His Job*, NEW YORK TIMES (Nov. 12, 2024), https://www.nytimes.com/2024/11/12/nyregion/nypd-shooting-trial-allan-feliz.html.

[11] *See* Thomas Tracy, *Excessive Force or a Justified Shooting? A Fatal NYPD Encounter Nears a Long-awaited Resolution*, NEW YORK DAILY NEWS, (Nov. 13, 2024), https://www.nydailynews.com/2024/11/13/excessive-force-or-a-justified-shooting-a-fatal-nypd-encounter-nears-a-long-awaited-resolution/.

[12] N.Y. Civ. Serv. Law § 75(4).

The NYPD has also backslid in its agreement to allow the CCRB to prosecute misconduct hearings. As litigation against the NYPD's SQF policy and practices was ongoing, the NYPD and the CCRB signed a Memorandum of Understanding providing that attorneys from the CCRB's Administrative Prosecution Unit ("APU") would prosecute officers against whom the CCRB had substantiated misconduct allegations in the NYPD Trial Room.[13]

While the CCRB's prosecutors soon showed themselves capable,[14] the NYPD has recently slowed down APU prosecutions and, in a growing number of cases, simply denied the CCRB the right to prosecute cases at all. For example, the APU MOU requires that "[i]n order to formally commence the administrative prosecution of a substantiated civilian complaint, Charges and Specifications shall promptly be drafted by CCRB and thereafter be served upon the subject officer by the DAO on behalf of CCRB." (APU MOU ¶ 15). Although the APU MOU provides that the CCRB must draft charges "promptly," the NYPD has no complementary requirement to serve them "promptly" on officers. Consequently, the NYPD has delayed the ministerial process of serving these charges, sometimes failing to serve officers for multiple years.[15] And while the APU MOU contains a limited provision allowing the NYPD to "retain" or strip the CCRB of the right to prosecute cases in which there "are parallel or related criminal investigations" or when an officer has no disciplinary history (APU MOU ¶ 2), the Commissioner has stripped jurisdiction from the

[13] CCRB Administrative Procedure Unit, *Memorandum of Understanding Between the CCRB and NYPD Concerning the Processing of Substantiated Complaints* ("APU MOU") (April 2, 2012), https://www.nyc.gov/assets/ccrb/downloads/pdf/about_pdf/apu_mou.pdf. Prior to the decision in *Lynch v. Giuliani*, 301 A.D. 351 (1st Dep't 2003), cases against Police Officers were tried at the neutral Office of Administrative Trials and Hearings ("OATH"), while higher-ranking officers were tried in the trial room. As the Discipline Report makes clear, the decision requiring all trials to be held in the NYPD trial room is highly questionable. *See* Discipline Report at 178–79.

[14] The CCRB's APU successfully prosecuted Daniel Panteleo for using an illegal chokehold on Eric Garner. *See* Ashley Southall, Daniel Pantaleo, *Officer Who Held Eric Garner in Chokehold, is Fired*, NEW YORK TIMES (Aug. 19, 2019), https://www.nytimes.com/2019/08/19/nyregion/eric-garner-daniel-pantaleo-fired.html.

[15] *See In Re Harvin*, 156887/2024 (July 29, 2024), NYSCEF Doc. No. 3 (detailing failure to serve charges for over two years).

CCRB in alarmingly high numbers, even when neither of these factors is met.[16] The NYPD publicly claims that an investigation by FID or the Internal Affairs Bureau—even one long closed—allows the Commissioner to retain a case because there "are parallel or related criminal investigations."[17] This willful misreading of the APU MOU reveals what is really going on: multiple police commissioners have chosen to remove cases from the jurisdiction of an independent agency in order to not punish officers even in the face of overwhelming evidence.

Perhaps nowhere is the NYPD's institutional reluctance to investigate and discipline more transparent than in its failure to substantiate *even one single instance of racial profiling* against an officer when it was responsible for these investigations, despite receiving thousands of racial profiling complaints. In 2019, the Office of the Inspector General for the NYPD released a report finding that the NYPD had never substantiated a single case of biased-based policing (out of 2,500 complaints), nearly five years into this monitorship.[18] The outcry over this notable failure was immediate: the City Council amended the City Charter to empower the CCRB to investigate allegations of "racial profiling and bias-based policing" under its "abuse of authority" jurisdiction.[19]

To exercise its new authority, the CCRB created the Racial Profiling and Bias-Based Policing Unit ("RPBP") in October 2022.[20] By May 2023, the unit had more than one hundred open investigations of biased-based policing,[21] but the NYPD has stymied these investigations at

[16] Umansky, *supra* note 4. The NYPD utilizes the term "retain" to describe the process in which the Commissioner assumes control over a matter, thus effectively ending the disciplinary process. *Id.*
[17] Memorandum of Law in Response, *In re Harvin*, No. 156887/2024, at 2–3 (describing a closed IAB investigation as grounds to "retain" a case).
[18] NYPD Office of the Inspector General, *Complaints of Biased Based Policing in New York City: An Assessment of NYPD's Investigations, Trainings, and Policies*, June 2019 at 17–19, https://www.nyc.gov/assets/doi/reports/pdf/2019/Jun/19BiasRpt_62619.pdf.
[19] *See* Local Law 47 of 2021, https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-132892.
[20] Monitor's Twenty-first Report at 50 (September 4, 2024).
[21] *Id*.

every turn. For example, the NYPD refused to provide certain evidence to CCRB that the agency needed to complete comprehensive investigations.[22] Eventually, the Monitor was forced to intervene, and the NYPD and the CCRB executed another Memorandum of Understanding on June 8, 2023 ("RPBP MOU"), requiring that the NYPD provide the CCRB with data relevant to its investigations into allegations of racially-motivated and bias-based policing.[23] Further negotiations between the agencies resulted in an agreed-upon addendum to the RPBP MOU regarding the specific data fields to be shared by the NYPD with the CCRB.[24]

The preliminary results of the NYPD response to this expansion of the CCRB's jurisdiction are not encouraging. As of December 17, 2024, the CCRB has substantiated all 67 of the bias-based policing allegations it has investigated. While the majority of the cases are still pending an administrative trial, twelve cases have been resolved so far. Among them, two of the subject officers resigned prior to discipline, one resulted in a "DUP" without discipline, and the rest were "retained" by the Police Commissioner. Of the nine "retained" cases, two resulted in no discipline, five resulted in a CD-A (only two of which included a three-day penalty), one resulted in a CD-B (without any penalty days), and one resulted in the officer forfeiting three vacation days.[25] Under the current version of the disciplinary matrix, the mitigated penalty for racially biased policing is forced separation and the presumptive penalty is termination. Also of note is that the Police Commissioner had used the "retention" provision in the APU MOU to prevent the CCRB from

[22] *Id.*
[23] Additional discussions between the NYPD and CCRB resulted in an addendum to the Memorandum of Understanding on the exact data fields that NYPD would share with CCRB. *Id.*
[24] *Id*.
[25] City of New York, *NYC Open Data: Civilian Complaint Review Board (CCRB) Datasets*, https://data.cityofnewyork.us/browse?Dataset-Information_Agency=Civilian+Complaint+Review+Board+%28CCRB%29 (last visited Dec. 17, 2024).

prosecuting substantiated RPBP allegations. The first APU prosecution for RPBP misconduct to actually proceed to the NYPD Trial Room began on December 18, 2024.[26]

Finally, the NYPD has consistently revised the disciplinary matrix that the City Council required it to create in a manner that undermines its goal of meaningful progressive discipline.[27] At the press conference celebrating the creation of the matrix, then-Mayor de Blasio held up a copy of the document and said, "after a two-year process, including the Blue Ribbon Commission, then organized by Commissioner O'Neill, the NYPD is fully committed to this."[28] But future commissioners were not so committed. Commissioner Sewell dismissed a large number of cases outright and imposed a lower level of discipline than the matrix recommended more often than not in the rest.[29] And just before his own resignation under the shadow of criminal investigation, Commissioner Caban released a new, watered-down version of the disciplinary matrix that reduced the penalties for a wide variety of offenses, including for racial slurs.[30] Incredibly, these downgrades took place after the Discipline Report had been shared with Defendants for comment. It is concerning and telling that the NYPD responded to findings by this Court's appointed representative that it was failing to discipline officers by further lowering discipline standards.

These institutional actions provide context for the Discipline Report's core finding: the reason the NYPD has rarely, if ever, punished an officer for unlawful SQF activity is that the

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[26] *See* Tandy Lau, *Three Officers Face Termination As First CCRB Racial Profiling Unit Investigation Reaches NYPD Disciplinary Trial*, AMSTERDAM NEWS (Dec. 22, 2024), https://amsterdamnews.com/news/2024/12/22/ccrb-racial-profiling-unit-investigation-reaches-nypd-disciplinary-trial/.
[27] *See* Local Law 69 of 2020, https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCadmin/0-0-0-124304.
[28] Gloria Pazmino and Anna Lucente Sterling, *De Blasio Touts New NYPD Disciplinary Guidelines, but Critics Say It Lacks Legally Binding Power*, SPECTRUM NEWS (Jan 21, 2021), https://ny1.com/nyc/all-boroughs/news/2021/01/21/nypd-launches-public-disciplinary-matrix.
[29] Annie McDonough, *Under Adams and Sewell, Advocates Allege Rollbacks in Police Accountability*, CITY AND STATE (June 15, 2023), https://www.cityandstateny.com/policy/2023/06/under-adams-sewell-advocates-allege-rollback-police-accountability/387600.
[30] Reuven Blau, *Caban Watered Down NYPD Misconduct Rules as Final Act*, THE CITY (Sept. 13, 2024), https://www.thecity.nyc/2024/09/13/caban-watered-down-nypd-punishments-as-final-act/.

NYPD is historically resistant to holding officers accountable and refuses to respond to independent oversight or critique. This reluctance is fueled by the Police Commissioner's unilateral authority to impose or not impose discipline, which may be the single biggest obstacle to reform. As the Discipline Report notes, "the level of cooperation and response is ultimately up to the discretion of the Commissioner." Discipline Report at 460. The Discipline Report details prior, unsuccessful efforts to remove such authority and explains how that authority remains a final stumbling block for meaningful discipline regardless of the discipline recommendation's path to the Commissioner's desk.

C. The Discipline Report Documents the Internal Mechanisms of the NYPD's Systemic Failure to Discipline Officers

The NYPD's failure to punish officers who conduct unlawful stops and frisks or violate policies designed to prevent such unlawful actions—and consequently its failure to abide by the Remedial Order—has been a consistent theme in the Monitor's publicly-filed reports.[31] The Discipline Report, which documents in great detail the system's numerous interlocking failures, provides a comprehensive and in-depth review as to how and why. The Discipline Report relies on the "clear import of the Liability Opinion and the Remedies Opinion," namely that "findings of fact by CCRB should not be disregarded absent good cause." Discipline Report at 367. The Discipline Report concludes that such findings have clearly been disregarded: "officers rarely, if ever, receive a penalty for unconstitutional stops/frisks/or searches, even when substantiated by CCRB." *Id*. at 480 (cleaned up). To assist in laying the foundation for a Court order addressing the Discipline Report, Plaintiffs highlight the Report's key themes here.

[31] *See* Monitor's 1st Report, *Floyd*, ECF No. 513 at 62; Monitor's 4th Report, *Floyd*, ECF No. 536 at 36–45; Monitor's 7th Report, *Floyd*, ECF No. 576 at 48, 54–55; Monitor's 9th Report, *Floyd*, ECF No. 680-1 at 56–58; Monitor's 10th Report, *Floyd*, ECF No. 754; Monitor's 11th Report, *Floyd*, ECF No. 795-1 at 94.

1. The NYPD Discipline Process Lacks Transparency and Deprives Stakeholders of Pertinent Officer Misconduct Records

The Discipline Report exposes the NYPD discipline process as one in which secrecy reigns. The NYPD hides critical information from the public and from key decisionmakers. For example, the City must make the NYPD Patrol Guide publicly available but is not required to release the NYPD Administrative Guide. Thus, evading disclosure of Patrol Guide provisions, the NYPD has moved sections of the Patrol Guide related to discipline, along with its policy against racial profiling that was developed as part of the remedies in *Floyd,* to the Administrative Guide. *Id*. at 33. Moreover, it did so without consultation with the Monitor or the parties to this litigation. Other internal NYPD publications that codify the NYPD's rules and regulations are similarly unavailable to the public, including the Detective Guide, FINEST Messages, and Reference Guides that the NYPD provides to members on an electronic portal. *Id*. at 33 fn. 150. The Patrol Guide and Administrative Guide are written and amended at the Police Commissioner's sole discretion, and the definitions of key terms differ from those used by the CCRB in ways that pose "significant risk of confusion." *Id*. at 42–46.

Furthermore, the Discipline Report highlights that the NYPD publishes a very limited subset of officer misconduct records on its "Officer Profile" website. *Id*. at 12, fn. 27. These records are limited to the rare instance when an officer is found guilty in the NYPD's Trial Room and a penalty was imposed by the Police Commissioner. *Id*. Rather than providing much-needed transparency about the misconduct histories of individual officers, the NYPD's "Officer Profile" website misleads the public by concealing the existence of a significant amount of substantiated misconduct as well as the fact that such misconduct more often than not is punished lightly or not at all.

The NYPD also prohibits the CCRB from gaining access to the full disciplinary files of the officers it investigates. This denies the CCRB evidence it needs to assess credibility, such as adverse credibility findings and previous interviews available only to the NYPD. *Id*. at 280–81, *see also id*. at 430–31 (noting the Department's "historical reluctance to substantiate false statement findings"). The Deputy Commissioner of Trials ("DCT") is similarly denied comprehensive access to an officer's misconduct history. When evaluating a case, the DCT is not provided complete records of allegations of prior misconduct that was not formally charged. Nor is the DCT provided access to records of allegations of misconduct investigated by the CCRB. *Id*. at 164. This leads to penalty recommendations based on an incomplete picture of officers' past actions and complaints lodged against them. *Id*.

Multiple police commissioners have also undermined transparency by publishing cursory deviation letters—letters required by law to inform the public and stakeholders of the reasons for any deviation by the Commissioner from CCRB findings or recommendations—or by refusing to publish them at all. *Id*. at 360, fn. 1518.[32] The few letters that have been published are "conclusory," "boiler-plate," and a "far cry from the 'detailed explanation'" required by the City Charter. *Id*. at 415.

2. The NYPD Undermines CCRB Findings

The Discipline Report establishes that many deviation letters from NYPD Commissioners discount or overrule CCRB findings by concluding, without evidence, that officers who broke the law had made "good faith mistakes." *Id*. at 366. As the Discipline Report makes clear, these summary conclusions violate the Remedial Order:

[32] The Discipline Report quotes the 2019 Independent Panel report, which found that conclusory departure letters "undermine the confidence of the public and other constituencies in the integrity, fairness, and robustness of the NYPD's disciplinary system." Discipline Report at 403.

> Frequent disregard for CCRB determinations simply because the Police Commissioner, without the benefit of hearing testimony, elects to arrive at a different factual finding or because the Police Commissioner believes the officer acted in good faith, or acted with good intent, *continues the very flawed process that underpinned the holding in Floyd*.

Id. at 368 (emphasis added). This conduct is not isolated. In a sample of 91 substantiated SQF investigations, the Discipline Report found that "no officer received penalty days for an A-CD recommended by the [CCRB] Board and no officer has received the presumptive three-day penalty for SQF misconduct." *Id*. at 389. This pattern, Judge Yates concluded, "is in *clear defiance* of the opinions in *Floyd*." *Id*. at 368 (emphasis added).

The consequences of the NYPD's failure to defer to CCRB credibility findings are dire. For example, determining whether an officer made a false statement is "inextricably intertwined" with evaluating the officer's explanation for the stop. *Id*. at 149. And credibility determinations are particularly critical in the racial profiling and bias-based policing investigations discussed above.

3. Disciplinary Failings Regarding Stops and Frisks Are Particularly Acute

In addition to ordering Defendants to defer to the CCRB, the Court ordered that every *Terry* stop conducted by the NYPD be documented. Remedial Order at 681–83. But the NYPD does not punish officers if they fail to complete a stop report, so underreporting rates continue to be unreasonably high.[33] As the Discipline Report found, "reported discipline is practically non-existent for the many cases where a stop or frisk occurred but was not reported." Discipline Report at 131. This encourages officers to conceal their illegal stops and only report their legal ones, as failing to report a stop is an "easy way for misconduct to be veiled." *Id*. at 429. Bolstering this assertion are the CCRB's own statistics: the agency substantiates allegations of SQF misconduct

[33] *See* Monitor's Twenty-second Report, *Floyd*, ECF No. 937-1 at 1 ("The Monitor team's audit of BWC videos found that only 59% of identified *Terry* stops were documented with stop reports in 2023. This is an even lower compliance rate than revealed in the Monitor team's 2022 audit, finding that 69% of identified stops were documented.").

at much higher rates when officers fail to file a stop report compared to when they properly document stops. *Id*. at 129–30. And despite knowing that it is failing to comply with several aspects of the Remedial Order, the NYPD does not proactively monitor or investigate street encounters to detect SQF-related misconduct, even if it engages in proactive efforts to identify other forms of misconduct. *Id*. at 141.

In addition, supervisors rarely identify officers who should have prepared stop reports or who engaged in related misconduct. The Discipline Report found no instances where supervisors initiated meaningful discipline for officers who conducted bad stops. *Id*. at 125. Instead, supervisors and internal audits sometimes "correct" the forms of an officer who conducted an illegal stop but take no further remedial action. *Id*. And supervisors almost never received discipline for their own SQF misconduct, including failures to identify illegal SQF activity when reviewing stop reports and failures to supervise subordinates who conduct improper SQFs or who failed to document their SQF activity. *Id*. at 132–134.

Even when officer misconduct is substantiated by a CCRB investigation, or in the rare instances identified by a supervisor, the current NYPD Discipline Matrix provides only minimal penalties for improper stops or frisks. The Discipline Report notes that, in the entire matrix, "the lowest range of penalties are reserved for stop/frisk/search related violations." *Id*. at 358. And as discussed above, even this minimal penalty—a loss of three vacation days for a bad stop—has apparently never been imposed. *Id*. at 389.

D. The NYPD's Failures Have Continued Since Receipt of the Discipline Report Draft

The NYPD's refusal to punish officers who break the law or department policy, as detailed in the Discipline Report, is a core reason that Defendants are still not in compliance with other aspects of the Remedial Order more than ten years into this process. The fact that officers know

they will not be punished for illegal stops, including for racial profiling—and can disguise unlawful conduct behind a lack of documentation—is one of the most important reasons the NYPD has failed to remedy the constitutional violations identified by the Court and achieve the substantial compliance required to end the monitorship. These shortcomings have continued since the Defendants first received a draft of the Discipline Report in February 2023.[34] The Monitor highlighted the NYPD's continued failure to discipline officers in its Twenty-first and Twenty-second Reports.[35] In the Twenty-first Report, the Monitor raised particular concern over the NYPD's failure to discipline officers who filed incomplete or misleading stop reports. It noted that the failure to discipline officers for underreporting stops was serious and pervasive:

> The Monitor team is unaware of any cases in which a member received penalty days or time *solely* for the failure to complete a stop report. Given the increase in underreporting, this is problematic: officers who fail to report should be disciplined for their failure to report, not only for a bundle of infractions.

Monitor's Twenty-first Report at 52 (emphasis in original).

In addition, the Monitor found that the NYPD improperly dismissed complaints of misconduct simply because they were near, rather than beyond, the statute of limitations, even though they could have been resolved before the statute expired.[36] In 2022, the NYPD dismissed at least 425 such cases even though it had received complete investigations from the CCRB, including 48 cases where the CCRB made findings of improper stops, questions, or frisks.[37] Of the 425 cases the NYPD dismissed, 65 included a finding by the CCRB that an officer had failed to file a stop report. Instead of treating these findings with "increased deference to credibility

[34] *Floyd*, ECF No. 948 at 2. While Defendants claim that a March draft was given to "the parties," in fact it was only provided to Defendants; Plaintiffs first received a draft on June 1, 2023.
[35] *See Floyd*, ECF No. 934-1 (Monitor's Twenty-first Report); *Floyd*, ECF No. 937-1 (Monitor's Twenty-second Report).
[36] *See* Monitor's Twenty-first Report at 47.
[37] *Id.*

determinations," as the Court ordered, the NYPD dismissed them without reviewing their contents at all.[38] As flagged by the Monitor, CCRB's referrals of cases involving a failure to file a stop report are examined by the precinct or command, and these investigations can be (and should be) conducted quickly without being dismissed on statute of limitations grounds.[39]

In its Twenty-second Report, the Monitor found that the "NYPD appears to be headed in the wrong direction and must take immediate steps, including discipline when appropriate, to correct this failure to properly document *Terry* stops."[40] And it noted that the NYPD continues to (1) ignore the importance of tracking and reporting on discipline for stop report failure, and (2) seldomly issue penalty days for documentation failures even though the failure to file a stop report leads to community distrust in the NYPD.[41]

While these failures pre-date the issuance of the final Discipline Report, they do not pre-date the City and the NYPD's knowledge of the Report's clear findings, which were set out in the preliminary drafts of the Discipline Report that were made available to the City and the NYPD, demonstrating it will not take serious steps to address the failings outlined in the Discipline Report without the Court's intervention.

E. The NYPD's Non-Disciplinary Accountability Systems Are No Substitute for Effective Discipline

In response to long-standing critique that it fails to discipline officers, the NYPD has regularly touted non-disciplinary programs that it claims will increase compliance with the law, including an "Early Intervention System" ("EIS"), the Remediation of Identified Situations Key to Success ("RISKS") program, and its most recent iteration "ComplianceStat." All of these

[38] Remedial Order at 684; Monitor's Twenty-first Report at 47.
[39] *Id.* at 48.
[40] Monitor's Twenty-second Report at 2.
[41] *Id.*

programs involve identifying officers, supervisors or precincts with records of misconduct and telling them not to do it again. But, as the history of this remedial process has established, that is not sufficient.

The Monitor noted in its review of the EIS that "some officers reviewed by the Committee have exhibited deeply troubling conduct. The interventions recommended (training, guidance, mentoring) were woefully inadequate." Monitor's Twenty-First Report at 40–41. During RISKS reviews, the NYPD used to meet regularly with commanding officers to review data in order to improve compliance in their command. But as the Monitor observed in September 2024, "without any notice to the Monitor, the NYPD discontinued RISKS Reviews in September 2022" and provided no immediate replacement.[42] After the NYPD discontinued RISKS, no entity within NYPD proactively pursued investigations for stop and frisk misconduct. Discipline Report at 141. The NYPD claims that its latest effort, called ComplianceStat, will be more effective. ComplianceStat was created nearly sixteen months after abruptly jettisoning RISKS, and was presented as a replacement.[43] According to the Monitor, ComplianceStat meetings are modeled after CompStat and attended by four Patrol Borough commanding officers and the precinct commanding officers from those Patrol Bureaus.[44] Beyond that, Plaintiffs still do not know the details of ComplianceStat firsthand, even as we near the one-year anniversary of its rollout: unlike with RISKS, Plaintiffs have been prohibited from observing even a recording of these meetings. There is, therefore, no basis at this stage to conclude that it will prove more effective than its failed and cancelled predecessors.

[42] Monitor's Twenty-first Report at 35.
[43] *Id.*
[44] *Id.*

In any case, whether or not the NYPD implements a non-disciplinary program aimed, in part, at establishing accountability for misconduct, it remains under Court order to improve its disciplinary system as well.

III. The Court Has Authority to Order Implementation of the Discipline Report Recommendations

Federal courts have broad and flexible equitable power to fashion remedies. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971); *accord Association of Surrogates & Supreme Court Reporters Within City of New York v. State of New York,* 966 F.2d 75, 79 (2d Cir. 1992) ("[F]ederal courts have broad discretion in fashioning equitable remedies for . . . constitutional violations."); *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985); *Hutto v. Finney*, 437 U.S. 678, 696 (1978). These powers include both the equitable authority to enforce court orders, *E.E.O.C. v. Loc. 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Joint Apprentice-Journeyman Educ. Fund*, 925 F.2d 588, 593 (2d Cir. 1991), and the ability to modify injunctions in light of changed circumstances, *United States v. Swift & Co.*, 286 U.S. 106, 114-15 (1932).

The Court should use this power to so-order the recommendations in the Discipline Report because the City has still not implemented the relief ordered by this Court more than a decade ago. Such an order is justified either (i) to enforce the Court's existing orders requiring improvements to the NYPD's discipline system or (ii) to order new relief based on the findings of the Discipline Report and the City's ongoing failure to comply with the Remedial Order.

A. The Court Has the Power to Enforce Its Existing Remedial Order

The City has not met its obligations under the Court's existing orders to remedy its discipline failures that cause unconstitutional policing to persist. "Until parties to [court-ordered reforms] have fulfilled their express obligations, the court has continuing authority and

discretion—pursuant to its independent, juridical interests—to ensure compliance." *E.E.O.C. v. Loc. 580, Int'l Ass'n of Bridge, Structural & Ornamental Ironworkers, Joint Apprentice-Journeyman Educ. Fund*, 925 F.2d 588, 593 (2d Cir. 1991); *see also United States v. Loc.* 359, 55 F.3d 64, 69 (2d Cir. 1995). The Court's power to enforce its orders rests on the principle that "judicial discretion in flexing its supervisory and enforcement muscles is broad." *Davis v. New York City Hous. Auth.*, 278 F.3d 64, 80 (2d Cir. 2002) (internal citations omitted). The City's consistent refusal to improve its disciplinary process, notwithstanding the Court's orders, is precisely the sort of noncompliance that these broad enforcement powers should address.

The Court's prior orders expressly require the City to address the flaws in its discipline system, particularly the NYPD's long disregard for CCRB findings. As the Court's Remedial Order in *Floyd* recognizes, "the development of an improved system for monitoring, supervision, and discipline" is "essential" to Plaintiffs' relief. Remedial Order at 683; *see also Davis* Settlement at H(1)–(2), (5) (incorporating *Floyd*-ordered remedies on discipline and other issues in the *Davis* litigation).[45] As a result, the Remedial Order requires that the NYPD "improve its procedures for imposing discipline" and specifically orders that "[t]his improvement must include increased deference to credibility determinations by the CCRB[.]" Remedial Order at 684.

The Court does not need to conduct a second trial to determine any issue of ongoing liability; the Court's interest in enforcing its existing remedial orders "justifies any reasonable action taken by the court to secure compliance with its orders." *Berger*, 771 F.2d at 1568 (quoting *Gates v. Collier,* 616 F.2d 1268, 1271 (5th Cir. 1980)). The Discipline Report establishes that a general mandate to "improve its procedures for imposing discipline" was not sufficient direction

[45] The parties to the *Davis* litigation stipulated that the provisions of the Remedial Order would be incorporated into the *Davis* case for the purpose of enforcing the settlement stipulation as it pertains to the NYPD's discipline of officers related to trespass enforcement in or around NYCHA residents. *Davis* Settlement at H(5).

for the City to come into compliance. Remedial Order at 684. A more specific order—in the form of the Discipline Report recommendations—is therefore justified. As set forth above, the Discipline Report shows the NYPD fails to identify misconduct, lacks transparency, disregards independent investigative findings, and fails to punish officers who improperly stop, question, and frisk people without legal justification. Because the City has not fulfilled its obligations under the Court's prior orders, the Court can and should take the steps outlined in the Discipline Report to effectuate that relief.

A contempt finding is not necessary for the Court to so-order the Report's recommendations. *See Berger*, 771 F.2d at 1569 ("Ensuring compliance with a prior order is an equitable goal which a court is empowered to pursue even absent a finding of contempt."). Nevertheless, the Court has the power to hold the NYPD in contempt for its failure to take the specific actions directed in the Remedial Order. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827–29 (1994). This Court may find civil contempt for failing to comply with a court order if: "(1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner." *Paramedics Electromedicina Commercial, Ltd. v. GE Med. Sys. Info. Techs., Inc.*, 369 F.3d 645, 655 (2d Cir. 2004); *see Telenor Mobile Commc'ns AS v. Storm LLC,* 587 F. Supp. 2d 594, 615 (S.D.N.Y. 2008) (defining "clear and unambiguous" as language that is "specific and definite enough to apprise those within its scope of the conduct that is being proscribed or required") (quoting *N.Y.S. Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1352 (2d Cir. 1989)).

The Discipline Report presents clear and convincing evidence that Defendants are not in compliance with, at the very least, the Remedial Order's "clear and unambiguous" requirement

that the NYPD provide "increased deference to credibility determinations by the CCRB[.]" Remedial Order at 684. As detailed above, the NYPD frequently overrules CCRB findings of liability, rejecting credibility determinations and other conclusions. *See above* at II.C and II.D; *see also Discipline Report* at 316 ("While a substantiated—or confirmed—stop, frisk, or search-related complaint is not uncommon from the CCRB, NYPD discipline for these confirmed complaints is rare."). This failure to defer to the CCRB's findings is a direct violation of the Remedial Order.

To be clear: although the record may support it, Plaintiffs do not presently seek a finding of contempt at this time. Plaintiffs' hope is that additional clear and unambiguous court orders implementing the Discipline Report recommendations will be a productive first step to reverse the stagnancy and backsliding that has characterized the NYPD's approach to discipline reform in the first decade and more of this remedial process.[46] Plaintiffs reserve their right to seek contempt if Defendants do not take immediate and effective action to come into compliance with existing and future court orders.

B. The Court Has the Power to Order New Relief Based on the Findings of the Report

Even if the Court considers an order implementing the Discipline Report recommendations as new relief, rather than enforcement of prior orders, such new relief is warranted here. Federal district courts have inherent authority to revise or modify their remedial orders. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 381 (1992) (permitting courts to "exercise flexibility in considering requests for modification of an institutional reform consent decree"). Formal factual findings are not required. A Court may modify its own remedies even in the absence of additional violations or changes in law or fact as "guided by the sound exercise of [the judge's] equitable

[46] Plaintiffs also recognize that additional process may be required for the Court to consider imposing any relief stemming from a finding of contempt. *See Bagwell*, 512 U.S. 821.

discretion," *Bridgeport Guardians, Inc. v. Delmonte*, 248 F.3d 66 (2d Cir. 2001) (quoting *E.E.O.C. v. Loc. 638, Sheet Metal Workers,* 753 F.2d 1172, 1185 (2d Cir.1985)). The Discipline Report and the City's longstanding failures to come into substantial compliance establish more than sufficient grounds for the Court to exercise this discretion. As the Remedial Order recognized, beyond the specific relief contained in that order, "comprehensive reforms may be necessary;" the Discipline Report now confirms that necessity. Remedial Order at 683.

When fashioning a remedy to repair constitutional violations, "[t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann*, 402 U.S. at 15–16. As the remedial order states, "the burden on the plaintiff class of continued unconstitutional stops and frisks far outweighs the administrative hardships that the NYPD will face in correcting its unconstitutional practices." Remedial Order at 672; *cf. Association of Surrogates & Supreme Court Reporters Within City of New York v. State of New York*, 966 F.2d 75, 79, *modified on reh'g*, 969 F.2d 1416 (2d Cir. 1992) (noting that "state budgetary processes may not trump court-ordered measures necessary to undo a federal constitutional violation," provided that the equitable relief is proportional to the constitutional infraction). More than a decade after the Court found liability, the City is still not even close to substantial compliance, meaning that the burden of unconstitutional stops and frisks remains—unjustly—on the Plaintiff class of New Yorkers who experience officers' misconduct during investigative encounters on an all too frequent basis. The Discipline Report demonstrates that flaws in the NYPD's disciplinary process are preventing effective remedies for those unconstitutional acts and establishes with detailed analysis how that relief is proportional to the ongoing constitutional infractions.

Accordingly, the Court can and should order the implementation of the reforms as a modification to the Remedial Order or as enforcement of the Remedial Order itself.

C. The Discipline Report is Final and No Further Process is Required for the Court to Order the Recommendations

As this Court correctly observed, contrary to the City's assertions, the filed Discipline Report is the final report of "five years of committed research by a highly respected former jurist." *Floyd* Doc. No. 948 at 2 (rejecting the City's inaccurate characterization of the Discipline Report as the "Draft Report"). The City and Plaintiffs had the opportunity to comment on multiple drafts of the Discipline Report and its recommendations during a years-long process. The City, like every other stakeholder and every member of the public, now has the opportunity to comment further during the period afforded by the Court, to inform the Court's response to the Discipline Report.

The Court rightly rejected the City's complaint that it has been deprived of sufficient process to contest the factual conclusions of the Discipline Report. *Id.* Due process is not implicated by drafting and submitting the Discipline Report. *See Handberry v. Thompson*, No. 96 CIV. 6161 (CBM), 2003 WL 1797850, at *2 (S.D.N.Y. Apr. 4, 2003) (rejecting City's argument that due process is implicated by a court-appointed monitor's reporting to the court). And, as the preceding sections establish, the Court's equitable authority to determine appropriate remedies is broad and flexible, grounded in the Court's previous finding of liability, and does not require a formal fact-finding process. *See above* at II.A and B.

Beyond its spurious concerns about due process, the City also objects that the Discipline Report and its recommendations go beyond the scope of these cases. Not so. The express provisions of the Remedial Order and *Davis* Settlement addressing the NYPD's discipline system as well as the fact that the Court's liability findings turned, in part, on factual findings that failures of discipline caused the unconstitutional acts at issue, *see* Liability Opinion at 617–20, definitively

refute the City's contention that the Discipline Report and its recommendations go beyond the scope of this litigation. While the Discipline Report necessarily gives an overview of the entire NYPD disciplinary system, its focus and its recommendations are anchored in the four corners of the Liability Opinion and Remedial Order. *See* Part II.A and B, *supra*. The Court directed Judge Yates to create an "in-depth" and "granular" study that sets forth, "in detail, recommendations as to the specific ways in which such policies, practices, and procedures can be improved in order to promote constitutional policing." Discipline Report at 13; *see also Floyd* Doc. No. 948 at 2. Providing necessary context to how the NYPD disciplines officers for SQF misconduct amply complies with the Court's instructions.

Further, the City is wrong to suggest that the Discipline Report's recommendations are not within the scope of this litigation because some of them may impact areas other than SQF misconduct.[47] Each recommendation's effect does not need to be exclusive to SQF to be within the scope of the Monitorship given that the interconnected issues of "accountability, transparency, [and] speed" are germane to how "policies, practices, and procedures can be improved, in order to promote constitutional policing." Discipline Report at 13–14. A recommendation may naturally affect other aspects of the disciplinary process unrelated to SQF investigations. For example, a recommendation stemming from alleged misconduct involving a stop or an investigative encounter may have some effect on how NYPD handles violations of use of force.

Thus, there are no procedural obstacles to the Court exercising its authority to so-order the Discipline Report recommendations.

[47] Zimmerman Letter at 2–3; *See also* Sept. 1, 2023 Ltr. from City Defendants, attached to Zimmerman Letter as Exhibit A, at 2.

IV. The Court Should Order Implementation of the Recommendations to Address the City's Noncompliance and Ensuring Ongoing Monitoring of the NYPD's Discipline System

The Discipline Report includes 51 recommendations targeted to specific findings linked to a lack of meaningful discipline for SQF-related misconduct. Given the NYPD's long-standing resistance to reform, it cannot be entrusted to implement these recommendations on its own. The Court should therefore exercise the powers described above to so-order the recommendations, by directing the parties to meet and confer with the Monitor on a proposed order detailing their implementation.

The Discipline Report characterizes the disciplinary system as a "moving target," and acknowledges that reform efforts must be tailored and re-tailored to hit that target. Discipline Report at 14. For that reason, the Court should in addition ensure that the NYPD's disciplinary system is closely overseen by the Monitor with the input of the Plaintiffs. Should the NYPD fail to abide by an order to follow the recommendations—or if it follows such an order but continues to violate the Remedial Order—further action, as described above, may be necessary.

As set out below, the Discipline Report recommendations represent significant progress toward a more effective NYPD system for imposing meaningful discipline. Effective police accountability systems are proactive, impartial, and consistent.[48] First, potential misconduct must be identified internally and referred for investigation swiftly, or the opportunity to promote behavioral change is lost. Second, investigations must be thorough and impartial: allegations must be adjudicated on findings of fact and conclusions of law. Independent investigative agencies must

[48] *See generally* U.S. DEP'T OF JUST., STANDARDS AND GUIDELINES FOR INTERNAL AFFAIRS: RECOMMENDATIONS FROM A COMMUNITY OF PRACTICE (2009); TIM PRENZLER, POLICE CORRUPTION: PREVENTING MISCONDUCT AND MAINTAINING INTEGRITY (2009); SAMUEL WALKER & CAROL ARCHBOLD, THE NEW WORLD OF POLICE ACCOUNTABILITY (2d ed. 2014).

have adequate staffing, resources, and access to department records to operate effectively.[49] Third, the imposition of discipline and associated penalties must be timely, consistent, and progressive.

As the Discipline Report and prior sections of this comment make clear, the NYPD's current system is not proactive, impartial, or consistent. Without diminishing the full impact of all 51 recommendations, Plaintiffs discuss some of the key recommendations below to set forth how they will specifically address the NYPD's failings, providing more than ample justification for the Court to exercise its authority to order their implementation. In addition, Plaintiffs suggest two areas where the Court's order could improve upon the Discipline Report's important recommendations related to transparency and CCRB investigations.

A. Recommendations to Promote Transparency

Recommendations 1–8 would promote internal and external transparency in what is now a secretive process. They would require the NYPD to post internal rules that have been hidden from the public and disclose more details regarding officer misconduct histories. Plaintiffs recommend expanding these recommendations to include all information about officer misconduct. The NYPD Officer Profile Portal includes a very limited subset of misconduct records and lacks information on the number of separate investigations, the allegation types, findings for each allegation, related disciplinary recommendations, and final penalty imposed by the Police Commissioner. Entire misconduct histories should be easily accessible to the public, including unsubstantiated allegations, via the NYC Open Data Portal. In addition, all procedures regarding discipline could be collected in a single publication, as is done by the Denver Police Department.[50] The Law

[49] *See generally,* MICHAEL VITOROULIS, CAMERON MCELLHINEY, AND LIANA PEREZ, CIVILIAN OVERSIGHT OF LAW ENFORCEMENT: DISCIPLINE REPORT ON THE STATE OF THE FIELD AND EFFECTIVE OVERSIGHT PRACTICES. (Washington, DC: Office of Community Oriented Policing Services 2021).

[50] *See* City of Denver, *Denver Police Department Discipline Handbook: Conduct Principles and Disciplinary Guidelines* (eff. Jan. 12, 2022), https://www.denvergov.org/files/assets/public/v/2/police-department/documents/discipline-handbook/discipline-handbook.pdf.

Department would be required to post more information about misconduct litigation, and communication and notice within the NYPD and with outside agencies would be improved. The Court should order these recommendations be implemented.

B. Recommendations for NYPD to Proactively Investigate Misconduct

Recommendations 33, 36, 37, 38, and 43 would require the NYPD or the CCRB to initiate investigations rather than simply react to civilian complaints. If these recommendations are implemented, the NYPD must proactively investigate when it finds that a stop report should have been created but was not, along with initiating investigations in other specified circumstances. Investigating, rather than correcting, inaccurate or missing stop reports is particularly important: the CCRB substantiates allegations of improper stops and frisks at much higher rates when stop reports are not filed. Discipline Report at 129–30.[51]

These recommendations further require an investigation to consider the total circumstances of the encounter, not merely the discrete act about which a civilian complained, in keeping with best investigative practices. Finally, these recommendations would ensure that supervisors on the scene of an improper stop are investigated to see if they were aware of the improper action and failed to address it.

C. Recommendations to Strengthen CCRB Investigations and Increase Deference to its Findings

Recommendations 10, 12–13, and 17–19 would presumptively provide CCRB access to information—IAB interviews, materials related to civil actions, complete officer disciplinary histories, and adverse credibility findings—that would provide necessary context to its investigations and improve its ability to make decisive findings. These recommendations would

[51] As of 2019, CCRB substantiated 59% of the investigations where an officer made a stop but did not file a report. This is a significantly higher rate of substantiation than the overall 12% substantiation rate of stop, question, and frisk allegations at CCRB in 2019. Discipline Report at 129–130.

provide CCRB with additional evidence to bolster its conclusions, strengthening its investigative findings and potentially increasing the likelihood of deference to the CCRB by the NYPD.

Recommendations 15, 21, 25, and 27 would increase documentation of CCRB findings and the Commissioner's response, creating the potential for greater deference to the CCRB. These recommendations would require the CCRB to issue findings of fact in substantiated stop, question, and frisk cases and require the Police Commissioner to address these findings when drafting a departure letter, deviation memo, or justification for retaining a case.

Recommendations 19 and 24 are aimed more directly at the NYPD's failure to defer to the CCRB as required by the Remedial Order. Recommendation 24 sets forth reasonable and objective criteria for determining whether an officer was acting in "good faith," and Recommendation 19 ensures that the CCRB has access to complete disciplinary histories of officers who claim they acted in good faith. Commissioners repeatedly excuse officers from discipline by claiming, without evidence, that they acted with "good faith;" eliminating this practice would promote compliance with the Remedial Order.

D. Recommendations to Ensure Swift, Consistent, and Appropriate Discipline

Recommendations 49–51 would improve the timeliness of investigations and promote timely discipline. The recommendations would require the CCRB to close stop and frisk investigations within 120 days and close loopholes that have allowed the NYPD to let the statute of limitations expire by failing to act on completed CCRB investigations. While Plaintiffs agree with these recommendations' intent to improve the timeliness of investigations, direct access to BWC footage and other NYPD document databases, considered best practice in the field of civilian

oversight of law enforcement,[52] would also further reduce these delays. *See* Discipline Report at 251.

The City makes little sense when it suggests that the recommendations proposing more coordination between the NYPD and the CCRB during investigations are contrary to the statutory purpose of having an independent review board separate and apart from NYPD.[53] Independence is commonly understood to refer to being free from external influence over decision-making and operations. It has nothing to do with the NYPD refusing to collaborate with other city agencies in a manner needed to conduct thorough and timely SQF misconduct investigations. Completing cases more quickly and ending delay tactics to run out the clock will provide more assurance that officers who commit misconduct are actually disciplined.

Additional recommendations would contribute to a system that imposes consistent and progressive discipline. Recommendation 48 strengthens the definition of progressive discipline, and Recommendations 44–47 make it harder for the NYPD to ignore prior misconduct by the same officer when issuing discipline. These recommendations would address some of the more egregious examples of repeat offenders.

E. Recommendations to Bolster Racial Profiling Investigations

Recommendations 30–31 would require the CCRB to consider past allegations of racial profiling against an officer as a part of its racial profiling investigations even when those allegations were not substantiated. The Court should order these recommendations because it will make it easier to assess when patterns of racial profiling exist, as opposed to only individual instances. Plaintiffs note that when the CCRB uncovers a pattern of racial profiling, previously closed cases should be reopened after notice to the complainant.

[52] *See* Vitoroulis, *supra*, at 94–99.
[53] Zimmerman Letter, Exhibit B at 2–3.

V. Conclusion

For the reasons stated above, Plaintiffs request that the Court so-order the Report's recommendations, with the modification proposed by the Plaintiffs, *see* Part IV.A. *supra*, order the parties to meet and confer with the Monitor to draft a proposed order implementing those recommendations, and instruct the Monitor to continue to actively monitor the NYPD's imposition of discipline in SQF cases and its reforms to its disciplinary system. Without the involvement of the Monitor and the Plaintiffs, the history of these cases has demonstrated that the City and the NYPD cannot be entrusted to faithfully implement the orders of this Court on their own.

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