13-3088-cv(L),

13-3461-cv(CON), 13-3524-cv(CON)

United States Court of Appeals
for the Second Circuit

DAVID FLOYD, LALIT CLARKSON, DEON DENNIS, DAVID OURLICHT,
Individually and on behalf of all others similarly situated,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant,

SERGEANTS BENEVOLENT ASSOCIATION,

Proposed Intervenor-Appellant,

(*For Continuation of Caption See Inside Cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

DEFENDANT-APPELLANT'S BRIEF

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December 10, 2013.

NEW YORK CITY POLICE OFFICER RODRIGUEZ, in his official capacity, NEW YORK CITY POLICE OFFICER GOODMAN, in his official capacity, NEW YORK CITY POLICE OFFICER SALMERSON, Shield #7116, in her official capacity, NEW YORK CITY POLICE OFFICER PICHARDO, Shield #00794, in his official capacity, NEW YORK CITY POLICE SERGEANT KELLY, Shield #92145, in his individual capacity, NEW YORK CITY POLICE OFFICER JOYCE, Shield #31274, in his individual capacity, NEW YORK POLICE OFFICER MORAN, in his individual capacity, NEW YORK CITY POLICE OFFICERS JOHN AND JANE DOES, NEW YORK CITY POLICE OFFICER HERNANDEZ, Shield #15957, in his individual capacity, MICHAEL BLOOMBERG, Mayor in his official capacity and individually, RAYMOND KELLY, Commissioner New York City Police, in his individual and official capacity,

Defendants.

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SUMMARY OF THE ARGUMENT

"Stop, question and frisk" has been endorsed by the Supreme Court since its landmark ruling in *Terry v. Ohio*, 392 U.S. 1 (1968), and is widely credited as a vital law enforcement tool. In this class action, the United States District Court for the Southern District (Scheindlin, U.S.D.J.) indicted the New York City Police Department ("NYPD") for purposefully fostering the widespread misuse of stop-and-frisk, and for engaging in a newly-minted form of race discrimination, denominated by the Court as "indirect racial profiling." Nothing could be further from the truth. In fact, the overwhelming majority of *Terry* stops comport with constitutional principles, and the District Court's findings are wholly unsupported in fact and law.

The Court's analysis founders at every stage. It ignores the bedrock principle that police action may only be assessed by the totality of the circumstances; and, with respect to equal protection, relies on baldly skewed statistics, which consciously misrepresent the most obvious policing realities and otherwise lack practical significance. Anecdotally, the few instances of unconstitutional police conduct were never causally linked to a municipal pattern-or-practice; indeed, this paltry showing belies the finding of rampant infringements. And, far from "deliberate indifference," the record revealed the City's unflagging efforts to prevent such violations through a synergy of training, supervision, monitoring, and discipline.

Lacking any valid finding of municipal liability, the Remedial Order demands reversal. It also represents an unwarranted incursion by the federal judiciary into affairs traditionally reserved to the locality, which are the province of local officials, answerable to the electorate through the political process. Moreover, the City's due process rights were compromised by the District Judge's pronounced appearance of partiality, discernible in both judicial and extra-judicial acts. At the least, a new trial is necessary to restore public faith in the judiciary.

STATEMENT OF THE CASE

This is a class action filed under 42 U.S.C. §1983, alleging violations of the Fourth and Fourteenth Amendments to the U.S. Constitution. Plaintiffs allege that, between January 2004 and June 2012, the NYPD engaged in a pattern or practice of stopping and/or frisking them, and others similarly situated, without reasonable suspicion. The plaintiff class also includes a subclass of blacks and Hispanics whose stops not only allegedly lacked reasonable suspicion, but were also purportedly based on their race or national origin. *See Floyd v. City of New York*, 283 F.R.D. 153, 160 (S.D.N.Y. 2012).

After a bench trial, the District Court found the City liable under *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The Court found that the NYPD engaged in a widespread pattern or practice of conducting stops and frisks without reasonable articulable suspicion ("RAS"), operated under an unwritten policy

of "indirect racial profiling" in violation of the Equal Protection Clause ("EPC"), and was "deliberately indifferent" to such widespread unconstitutional practices.

The City appeals from the District Court's order, entered August 12, 2013 (the "Injunction") (SPA1-37),[1] which also brings up for review the decision and order of the same date, imposing liability ("Liability Order") (SPA40-236).

JURISDICTIONAL STATEMENT

Jurisdiction in the District Court was based on 42 U.S.C. § 1983. This Court has jurisdiction of the appeal from the Injunction under 28 U.S.C. § 1292(a)(1). The supporting Liability Order is also properly before the Court. *See Merritt v. Shuttle, Inc.*, 187 F.3d 263, 268-69 (2d Cir. 1999); *Myers v. Hertz Corp.*, 624 F.3d 537, 553 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 368 (2011).[2]

The appeal is timely. The Injunction was issued on August 12, 2013; the City filed its notice of appeal on August 16, 2013 (A24149). *See* Fed. R. App. Proc. 4(a)(1)(A).

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[1] Unless otherwise indicated, numbers in parentheses following "A" refer to pages in the Joint Appendix, and those following "SPA" refer to pages in the Special Appendix.

[2] The City also asks this Court to exercise pendent appellate jurisdiction over the order granting class certification (*see* Point I-A, *infra*).

STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion in certifying the plaintiff class?

2. Did the District Court err in finding that plaintiffs met their burden of showing widespread Fourth Amendment or EPC violations?

3. Did the District Court also err in finding the City to be deliberately indifferent to either purportedly unconstitutional practice?

4. Does the Injunction otherwise represent an abuse of discretion?

5. Does the District Judge's egregious appearance of partiality require vacatur?

STATEMENT OF FACTS

(A)

Background

On March 8, 1999, a class action entitled *Daniels v. City of New York*, No. 99 Civ. 1695 (S.D.N.Y.) was commenced, alleging unconstitutional practices in the NYPD's use of stop-and-frisk. The case, which had been randomly assigned to Judge Scheindlin, was settled and dismissed with prejudice in 2003 (A11572-89).

By the terms of settlement, the City agreed to continue recording stop-and-frisk activity in a form known as the UF-250; to continue producing the data from those forms to plaintiffs' counsel; and to maintain its policy barring racial

profiling. The stipulation ended by its terms on December 31, 2007. Enumerated remedies for non-compliance only allowed plaintiffs to seek specific performance and/or move for contempt. Nevertheless, just weeks before expiration, the *Daniels* plaintiffs essentially moved to extend the stipulation, alleging that the City had failed to comply with its terms.

Recognizing that the stipulation did not entitle plaintiffs to the relief they sought, the District Judge repeatedly urged plaintiffs' counsel to bring a new lawsuit and mark it "related" to *Daniels* under Local Rule 13 ("related-case rule"), so that it would be assigned to her. She also assured plaintiffs that they would prevail on a discovery dispute in the new action.[3]

Accordingly, on January 31, 2008, plaintiffs instituted this action against the City and marked it "related" to *Daniels*. The case thus bypassed the random assignment "wheel" and was assigned to Judge Scheindlin. Plaintiffs later filed a second amended complaint, the operative pleading here (A89-135). Although plaintiffs originally sought damages as well as equitable relief, they withdrew their damages claims shortly before trial, thereby ensuring a bench trial (A2438-44).

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[3] The foregoing colloquy is set forth in the December 21, 2007 transcript of proceedings in *Daniels* (ECF #304, Appendix B). Because it is an official court record, this Court may take judicial notice of the transcript's contents. *E.g.*, *Shuttlesworth v. Birmingham*, 394 U.S. 147, 157 (1969); *Jacques v. United States R. Retirement Bd.*, 736 F.2d 34, 40 (2d Cir. 1984).

(B)

Class Certification

On November 7, 2011, plaintiffs moved for class certification pursuant to Fed. R. Civ. Proc. 23(b)(2) (A160-576). The City opposed, arguing, *inter alia*, that plaintiffs' putative class failed to satisfy the commonality requirement (A594-636; A1219-29; Dist Ct. Dkt. #176).

In granting certification, the District Court recognized that "the legality of an individual stop cannot be determined on the basis of the corresponding UF-250 alone…." *Floyd*, 283 F.R.D. at 167 n.75. Nevertheless, the Court found sufficient commonality on the theory that the NYPD's stop-and-frisk practices were "unitary," "centralized," and "hierarchical." *Id*. at 173-74. At plaintiffs' request, the class was defined as follows (*id*. at 160, emphasis added):

> All persons who since January 31, 2005 have been, or in the future will be, subjected to the [NYPD]'s policies and/or widespread customs or practices of stopping, or stopping and frisking, persons in the absence of a reasonable, articulable suspicion that criminal activity has taken, is taking, or is about to take place in violation of the Fourth Amendment, *including* persons stopped or stopped and frisked on the basis of being Black or Latino in violation of the Equal Protection Clause of the Fourteenth Amendment.[4]

[4] The City unsuccessfully petitioned for leave to appeal the certification order under Fed. R. Civ. P. 23(f). *Floyd v. City of New York*, Case No. 12-2206.

(C)

The Trial

Thereafter, a nine-week bench trial was held. In support of their claims, plaintiffs presented statistical evidence of 4.4 million stops, and adduced anecdotal proof of 19 stops.[5] The City countered with its own statistical analysis, as well as comprehensive evidence regarding the NYPD's stop-and-frisk practices, including supervision, monitoring, training, and discipline.

(1)

The Statistical Evidence

As to both the Fourth and Fourteenth Amendment claims, plaintiffs' proof consisted largely of statistical analyses performed by their expert, Jeffrey Fagan, a professor of criminology (A14287; A14475-75). Based solely on the UF-250 database, Fagan opined that roughly 88% of the stops were "apparently" supported by RAS, 6% were not, and another 6% were undeterminable (A4595; A14753-59; A14900-01). As to equal protection, Fagan presented a regression analysis ostensibly designed to assess whether the City disproportionately stopped black and Hispanic subjects, yet he used a statistical "benchmark" that did not consider crime-suspect description.

[5] One additional encounter (Clive Lino) was presented solely in ostensible support of the EPC claim (A6588).

Significantly, the two analyses performed by Fagan were never linked. Despite their defined subclass, plaintiffs presented no evidence addressing the number of stops that were both unsupported by RAS and also indicated racial motivation (A4980-81; A8387).

Fagan's analyses were challenged by City experts, Drs. Dennis Smith and Robert Purtell, who reviewed all of Fagan's analyses and conclusions and conducted their own analyses of the database. They opined that Fagan's results on both claims were incorrect and unsupported by the data (A23107-13; A21561-67; A21574-82; A23092-94).

(a)

Fourth Amendment Statistics

Each side of the double-sided UF-250 contains checkboxes in which the stopping officer indicates general factors prompting him to conduct the stop (A11038-40; A22253-54; A22258-61; SPA236).[6] Two separate groupings of boxes on Side Two similarly document factors leading to a frisk and/or search (*id.*). Most of the boxes are phrased in commonly-used shorthand, such as "Furtive Movements," "Suspicious Bulge," or "Fits Description" (*id.*). Certain checkboxes

[6] For ease of reference, a blank UF-250 was appended to the Liability Order (SPA236).

marked "Other" allow the officer to briefly "specify" or "describe" observations in his own words (*id*.).

The database reflected more than 4.4 million UF-250s prepared between January 2004 and June 2012 (A4570; A14363; A14729). Fagan, who is not an attorney, purported to gauge whether each stop was legally sound under the Fourth Amendment, by applying his understanding of legal standards to each form (A14304-14; A14390-97; A14521). He never interviewed a single NYPD officer, and considered no factual information outside the database (A4891-93).

Fagan developed a complicated scheme to classify stops as "Apparently Justified," "Apparently Unjustified," or of "Ungeneralizable" legality under the Fourth Amendment (A14305-06; A14389-97; A14521-22). He judged a stop as Apparently Justified when one or more of the following Side One boxes are checked: (1) "Actions Indicative of Casing Victim or Location," (2) "Actions Indicative of Engaging in Drug Transaction," and (3) "Actions Indicative of Engaging in Violent Crimes" (*id*.). Fagan dubbed the following Side One items "Conditionally Justified": (4) "Carrying Objects in Plain View Used in Commission of Crime," (5) "Fits Description," (6) "Actions Indicative of Acting As a Lookout," (7) "Suspicious Bulge/Object," (8) "Furtive Movements," and (9) "Wearing Clothes/Disguises Commonly Used in Commission of Crime." When any combinations of the "Conditionally Justified" boxes were checked, the stop was Apparently Justified only

if one of the Side Two "Additional Circumstances/Factors" boxes was also checked (*id*.).

Stops were Ungeneralizable when any combination of the Conditionally Justified boxes on Side One were checked without a box checked on Side Two (*id*.). Consequently, for example, a stop based on "Fits Description," "Actions Indicative of Acting as a Lookout," as well as "Suspicious Bulge/Object," was deemed Ungeneralizable. Also, if the box "Other Reasonable Suspicion of Criminal Activity (Specify)" was checked on Side One, the stop was deemed Ungeneralizable regardless of the contents of the provided narrative (*id*.).

A stop was Apparently Unjustified if no box was checked on Side One, and any one box was checked on Side Two – unless the Side Two box was "Other," in which case the stop was Ungeneralizable (*id*.). Thus, for example, a stop based only on "Report from Victim/Witness" counted against the City. Also deemed Apparently Unjustified was any form in which only a single Side One box was checked, if that factor was only "Conditionally Justified," and if no Side Two boxes were checked – unless the Side One circumstance was "Other," in which case the stop was Ungeneralizable (*id*.).

Fagan's scheme disregarded all UF-250 data aside from the checkboxes, including duration of observation, and stop location (A1481-82; A4891-93). He did not consider whether the listed locale was well-known to be drug-prone, or had seen

a recent spike in a particular crime, unless "High Crime Area" was checked (A1498-99).

As noted, two checkboxes allow an officer to describe "other" RAS factors in narrative form. Fagan did not review those narratives in his initial analysis of stops dating from 2004-09 (A14305). Thus, where a narrative was included, it could never help establish a lawful basis for a stop. Fagan conceded that this was a flaw (A14522), but said interpreting different officers' language choices would be "unreliable" (A1478; A14575). It was only after the *Daubert* hearing that Fagan undertook a sample analysis of narrative "text-strings" culled from his Ungeneralizable category. He incorporated that into his analysis of the 2010-12 stops, thereby moving some portion from Ungeneralizable to Apparently Justified or Unjustified (A14754-59).

However, the City's experts identified significant failings in Fagan's sampling methodology, rendering his "text-string" analysis unreliable (A8400-09; A23143-47). First, Fagan sampled 3,710 UF-250s out of a universe of 84,000, yet failed to demonstrate that the sample was of an adequate size, or materially representative of the whole (A2336; A4996, A8402-03). Further, Fagan's sampling did not include a margin of error, so he essentially represented that it was perfect – when it demonstrably was not (A8405).

Curiously, Fagan made no attempt to gauge whether any frisks or searches were Apparently Justified, although the basis for each is provided separately on the UF-250. Instead, he maintained that the NYPD's one-in-ten "hit rate" suggested that the stops (but not the frisks) largely lacked RAS (*e.g.*, A14761-62).[7] He conducted no empirical research to support that opinion, and had previously acknowledged that a one-in-nine rate was not indicative of unconstitutionality, because RAS is a lower standard than probable cause (A14112).

Even using this methodology, Fagan assessed almost 88% of all stops to be "apparently" supported by RAS (A4595; A14753-59; A14900-01). Further, Fagan's tally of Apparently Justified stops steadily increased between 2004 and 2012, even as the number and rate of Apparently Unjustified stops steadily decreased, from 9.7% in 2004 to less than half that rate, 3.9%, in 2012 (A4867-70; A5007-08; A8675-77; A8692; A14311-14; A14753-59; A14900-01; A23141). Because he aggregated eight-and-a-half years of data, those improvements were obscured.

[7] Out of 4.4 million stops, 51.5%, or 2.28 million, led to frisks; and only 8.3%, or approximately 367,000, were followed by a search (A4880-82; A23525-28). Weapons were recovered after 9.2% of searches, and other contraband was recovered after 14% (*id.*). Arrests and summonses were each made in approximately 6% of stops (A4888). Thus, enforcement action is taken in 12 of 100 instances, a rate slightly higher than one-in-ten.

Fagan acknowledged that his Apparently Unjustified stops were not evenly distributed across the City (A5003-08). He also admitted that his scheme oversimplified the data, because the enormous permutations on a UF-250 made legal analysis of individual cases "extremely difficult, unwieldy," and, in his view, "uninformative" (A14305; A21571-73).

(b)

Fourteenth Amendment Analysis

According to Fagan, race was a statistically significant determinant of the number of stops that might be made in a geographic location (A8314). He claimed that this hypothesis was supported by his "regression analysis," a statistical process for estimating the relationships among variables.

Regression analysis attempts to gauge how the typical value of the dependent variable (here, the number of stops) changes when any one of the independent variables (such as racial composition of a census tract) is varied, while all other independent variables (such as patrol strength, crime rates, and socioeconomic factors, etc.) are held constant. Fagan varied, or increased, the percentage of a certain race in a census tract and determined the likelihood that a stop of any person, regardless of race, would take place (A4947-49; A14289; A14745). He used a "population average" regression model, which combines data at broader population groups across the City (A8393-94; A9385-86). Accordingly, his reported

results represented an average for all census tracts and all time periods, obscuring specifics (*id.*).

To conduct his analysis, Fagan had to describe the situation he was trying to test, including possible alternative theories, a process known as "modeling" (A8314-15). He was thus obliged to choose a standard unit to use as the basis for comparison, known as a "benchmark," to determine whether race was a causative factor (A8637-38; A23101-02).

Statistical literature identifies no prevailing benchmark for racial-disparity regression analysis (A4712; A4938; A4941-42; A6877-78; A8647; A9668-69; A21265; A21287-88). However, Fagan conceded that a benchmark including suspect race would produce the most reliable results, yet still chose to exclude that data from his benchmark (A4944).

Fagan conducted separate regression analyses for seven suspected crime categories (A14793, Table 1-2). They included violent felony crimes, where suspect description is known in 86% of cases; weapons crimes, where the figure is 98%; and drug offenses, where the figure is 99% (A14289; A14745). Still, Fagan refused to include suspect description data even for those categories (A4944-46; A4949-52), ostensibly because the suspect's race is described in only roughly 63% of *all* crime complaints, and he insisted that such data was too incomplete to be reliable (A4759-60; A4949-52).

Application of the suspect description benchmark reveals a far closer correlation to stops by race and ethnicity (A8660-63; A21713-99; A23163-66; A23279-365). In 2011 and 2012, 87% of stop subjects were black and Hispanic, as were approximately 83% of all known crime suspects and approximately 90% of all violent crime suspects (A21717; A23283). Defendants' experts ran several alternate regressions which included suspect race data, and evidence of disproportionate racial impact either disappeared, or the size of the disparity was greatly reduced (A4935-36; A8354; A8359-62; A8658-60; A21558-60; A23159-61). Other trial evidence strongly undermined plaintiffs' benchmark as producing an unwarranted inference of discrimination (A6877-78; A8641-46; A8650-51; A8362-63; A8703; A8723; A9668-69; A9832-35; A21287-93).

The benchmark issue was not the only disputed point in the statistical analysis. Fagan's model did not reliably reflect reality, both because he omitted key variables and because the variables he included were improperly specified, operationalized, and estimated (A8314-15; A8362-63; A8366-67; A8391-99). Consequently, the City's experts opined that Fagan's analysis did not adequately separate effects of race from other components of crime patterns (A8382; A8393-94).

Further, while Fagan's regression analysis predicted the likelihood of stops increasing with a stronger concentration of minority residents, he did not predict the rate or number by which they would increase, nor the race of the

additional stop subjects (A4981-82). And although Fagan claimed that the predicted increase in stops was "statistically significant," he utterly failed to demonstrate practical significance. Indeed, the odds that an increased concentration of minority residents would cause an increase in stops was nearly even with the odds that stops will decrease – a virtual "coin-toss" (A3475-81; A8330-36; A8522; A9427-29; A23177; A23383; A23593; A15806; A23383).

In rebuttal on this issue, Fagan attempted to predict specific counts of additional stops in specific census tracts with certain concentrations of minority population (A9395-99; A15825-27). He thus abandoned all standard statistical practices regarding use of results from a population average model, without justification (A9442-45). Worse, Fagan's "predictions" were belied by the actual rate of stops in the many City neighborhoods having higher concentrations of minority residents (A9446; A9457-59).

(2)

Anecdotal Evidence

Anecdotally, plaintiffs adduced evidence of 19 stops. In seven of their encounters, no officer testified because plaintiffs did not identify them, despite the City's diligent efforts to assist, and no UF-250 was found. In two encounters, plaintiffs adduced no evidence that the putative officers wore NYPD

uniforms or drove marked NYPD vehicles (A2737-40; A2772; A5208; A5219; A8040-112).

Cornelio McDonald, who was neither a class representative nor a named plaintiff, testified that he was stopped in an area where residents on one side of the street were mostly white, while those on the other side were largely black (A6250-51). He also asserted that the stopping officers had not stopped other people emerging from a nearby bowling alley, who, he believed, "could have been" Asian or white (A6261). Although Officer French, who conducted the stop, testified at trial regarding the stop, plaintiffs never asked him whether he had noticed other people on the scene (A6287-326). McDonald admitted on cross-examination that he had previously filed two race discrimination cases, both of which had been dismissed (A6262-64). He believed that any time a police officer spoke to or greeted him, he had been "stopped" (A6281).

During Leroy Downs' testimony, the District Court conducted a *sua sponte* in-court "show-up" to help Downs identify the officers who stopped him, although he had previously failed to identify the same officers in a CCRB photo array, and although plaintiffs had never sought to conduct another identification procedure during discovery (A6691-94; A6740; A6908; A12799-803). The Court dismissed objections of suggestiveness (A6800). Documentary evidence showed that the officers had effected an arrest elsewhere around the same time that Downs

claimed to have been stopped (A6439-40; A6446; A6464; A12693-94). Nevertheless, because the officers disclaimed any memory of stopping Downs, the Court suggested that they committed perjury (A6691-95).

THE LIABILITY ORDER

(A)

Fourth Amendment

(1)

Anecdotal Evidence

Of the 19 specific encounters presented on the Fourth Amendment claim, the Court found ten stops to be supported by RAS (SPA198-219). In five of those stops, the frisk was found to be unwarranted, while five were wholly consistent with Fourth Amendment precepts (*id.*).

Two of the remaining nine encounters presented what the Court conceded was a "close" question of law, which it resolved by crediting the plaintiffs' account and rejecting the police officers' (SPA195; SPA178). Downs' and McDonald's stops were among those found to lack RAS (SPA161-66; SPA170-75). Three of the encounters found to lack support were those in which plaintiffs never identified the officers, despite the City's concededly diligent efforts (SPA180-82; SPA196-98; SPA203-05). These included stops of Clarkson and Floyd, where no evidence was adduced that the putative officers were NYPD. As to Floyd's stop, the Court found that it was conducted by "officers" in "uniform,"

without discussing whether plaintiffs had proved they worked for the NYPD (SPA203-05).

(2)

Statistical Evidence

Relying heavily on Fagan's analysis, the Court found a widespread practice of conducting stops and frisks absent RAS (SPA222-23). While recognizing the "inherent difficulty" in drawing legal conclusions about so many stops from the UF-250 database, the Court reasoned it was the only expedient way for plaintiffs to prove their wide-ranging claims (SPA49).

Although the Court purported not to judge the inherent validity of stop-and-frisk, its analysis began with a disapproving tally of the raw numbers. The Court found it pertinent that, between January 2004 and June 2012, the NYPD conducted 4.4 million stops, with the number increasing each year until 2011; and that frisks were conducted in 52% of those stops, with 8% resulting in a search (SPA48-49).

The Court rejected Fagan's concession that only 6% of stops, or 200,000, were Apparently Unjustified (SPA49-50). It rationalized that on several grounds: (1) that Fagan was somehow too conservative in his approach; (2) that the "central flaws" in the database skewed exclusively toward undercounting unsupported stops; (3) that many UF-250s did not specify a suspected crime; (4)

that officers often must not fill out a UF-250 after conducting what the Court believed to be a stop; (5) that "hit rates" were too low; and (6) that "Furtive Movements," "High Crime Area," and "Suspicious Bulge," even taken together, were too "vague and subjective" to justify a stop without an accompanying narrative (*id*.).

The Court relied extensively on Fagan's "hit rate" theory (SPA74-79; SPA90; SPA108). Even while avowedly refusing to consider whether the City's stop-and-frisk practices were "effective" in fighting crime, the Court found that they "ha[d] not been particularly successful" (SPA44; SPA80; SPA56, n.28). The Court did not comment on Fagan's utter lack of analysis on whether RAS supported frisks or searches.

(B)

Equal Protection

The Court also ruled that plaintiffs proved a widespread pattern of EPC violations. Permeating its analysis were references to materials never entered in evidence, including opinion polls, news articles, editorials, sociological studies, commentary on Trayvon Martin's Florida shooting, and similar sources (SPA86-87; SPA98-99; SPA234; SPA232-35).

(1)

Anecdotal Evidence

Despite finding that the City impermissibly relied on race throughout eight-and-a-half years, the Court did not find any of the named plaintiffs' stops to illustrate this practice. The only stop found to violate EPC was that of Cornelio McDonald, an unnamed class-member. Based solely on McDonald's conclusory assertions, the Court concluded that his stop was motivated by race, finding that he was stopped on a "racially stratified street" where "non-black individuals were present" and were "presumably" behaving just as he was (SPA175).

(2)

Statistical Evidence

The Court conceived a new type of equal protection violation, "indirect racial profiling," and found that the City engaged in it by focusing too much stop activity on minorities (SPA223-30). To reach this conclusion, the Court willfully disregarded the racial breakdown of crime suspects during the period in question (SPA50-51; SPA91-100). Also, despite the definition of the certified subclass, the Court's EPC analysis never differentiated between stops that were supported or unsupported by RAS.

The Court accepted Fagan's benchmark: "a combination of local population demographics and local crime rates," as "the most sensible" (SPA51; SPA101). While reluctantly acknowledging that roughly 83% of all known crime

suspects, and 90% of all violent crime suspects, were described as black or Hispanic in complaint and arrest reports; and that blacks and Hispanics represented 87% of those stopped (SPA93), the Court still found a racial disparity indicative of race discrimination by using a non-sequitur that even Fagan never advanced: "because the stopped population is overwhelmingly innocent—not criminal" (SPA50-51).

In the Court's view, the City's policy of "indirect racial profiling" violated the EPC in two ways: (a) as the application of facially neutral policy in an intentionally discriminatory manner, and (b) as an express classification based on race (SPA223-30). Under the first approach, the Court relied on Fagan's regression analysis to find discriminatory effect, coupled with "stark racial disparities" in the UF-250s prepared by two officers – Dang and Gonzalez – and the stop of McDonald (SPA225). The Court inferred discriminatory intent based on the statistics, the NYPD's policy of "targeting the right people, at the right place, at the right time," and on Commissioner Kelly's purported statement in the presence of State Senator Eric Adams and then-governor David Paterson that "the NYPD focuses stop and frisks on young blacks and Hispanics in order to instill in them a fear of being stopped" (SPA123-30).

For the second approach, the Court found that officers were specifically directed to target "male blacks 14 to 21" for stops based on local crime

suspect data, and ruled that the reference to "blacks" was an express racial classification that did not survive strict scrutiny (SPA227). Declaring that *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000), should be "strictly limited it its facts," the Court declined to apply its central holding here, in the belief that the City used an "established profile" in conducting stops (SPA229).

(C)

Deliberate Indifference

The Court next found that the City was deliberately indifferent to frequent Fourth and Fourteenth Amendment violations, despite notice of the foregoing widespread patterns (SPA231-234). In the Court's view, early notice of Fourth Amendment violations took the form of the Attorney General's 1999 report ("AG's Report") (SPA103-105, SPA153). Additional notice included media reports, community members who "felt they were stopped for no reason," individual police officers, and allegations made in the instant action as well as *Daniels*, *Ligon*, and *Davis v. City of New York* (SPA153-157).

The Court also found that the AG's Report provided notice that stops were being conducted in a "racially skewed manner," and that "[n]othing was done in response" (SPA52). The Court rejected the RAND report – commissioned in 2007 to examine racial bias in NYPD stop-and-frisk practices – and its conclusion that they were racially neutral. According to the Court, City officials should have

"questioned" RAND's use of the suspect description benchmark that the Court found lacking (SPA157-59).

In the Court's view, the NYPD "pressured" officers to increase enforcement activity, without "equivalent" pressure to do so legally (SPA112-13). The Court believed that NYPD officers "risk[ed] negative consequences" if they failed to submit a certain number of UF-250s (SPA52), and characterized all quantitative focus on officer work-product – CompStat, alleged quotas, and performance goals – as a "predictable formula" for producing unconstitutional stops (SPA123). The Court also located deliberate indifference in a survey of recent NYPD retirees, where participants indicated that NYPD decision-makers increasingly stressed the importance of measurable enforcement activity, but also emphasized the need to follow legal and constitutional restraints (SPA109-12).

Next, the Court found "institutional pressure to increase enforcement numbers" in the 81st, 41st, and 40th precincts in secret recordings made by Officers Polanco, Schoolcraft, and Serrano (SPA113). The Court gave "great weight" to the contents of the tapes, even while acknowledging that they likely presented an "incomplete picture," since each officer chose what not to record (SPA113).

Additionally, the Court found that the NYPD instituted inadequate systems for monitoring and supervision. A cornerstone of this ruling was the Court's belief, based on the City's supposed concession, that a UF-250 alone could

not establish the constitutionality of a stop (*e.g.*, SPA131). Thus, despite relying exclusively on the UF-250s to find that plaintiffs had met their burden of proof, the Court characterized the NYPD's administrative reliance on them as "willful disregard" of constitutionality (SPA135).

The Court recognized at least "two concrete mechanisms" for identifying unsupported stops: (1) that sergeants routinely witness stops made by officers, and (2) that sergeants frequently review and discuss their officers' UF-250s. But the Court decided that these mechanisms provided no "meaningful" constitutional review (SPA135-38).

As to training, the Court conceded that the NYPD's programs were "largely adequate" in instructing recruits on applying the law of RAS (SPA141-42). Still, it identified several shortcomings in the training materials, including the definitions of "Furtive Movements" and "Suspicious Bulges" (SPA142). The Court inferred that such training deficiencies likely caused several of the plaintiffs' unconstitutional frisks, as well as generally low "hit rates" (SPA53). Further, the Court faulted NYPD training materials for emphasizing the four-part test of *People v. DeBour*, 40 N.Y.2d 210 (1976), in the belief that *DeBour* standards do not consistently incorporate those set forth in *Terry* and its progeny (SPA68).

As to the recent Rodman's Neck refresher course on stop-and-frisk, the Court did not consider whether the undertaking in itself militated against a

finding of deliberate indifference. Instead, the Court incorporated its previous findings in the *Ligon* litigation concerning purported shortcomings in the definition of a stop (SPA146-47).[8] Despite all the supposed "pressure" to conduct more stops, the Court found that the Rodman's Neck training encouraged officers to conduct stops without documenting them (*id*.).

Turning to EPC training, the Court found that NYPD did not "clearly define" the difference between the permissible use of race in a stop based on a specific suspect description, and the impermissible targeting of racially defined groups for stops in general (SPA146). The Court recognized that the Police Student's Guide had a section devoted to "Policing Impartially," which drew attention to latent bias even among well-intentioned officers, but declared that it offered an "inadequately narrow definition of racial profiling" (SPA146).

NYPD discipline was also found to evidence deliberate indifference. The Court took issue with the NYPD's Department Advocate's Office ("DAO") and its interactions with the Civilian Complaint Review Board ("CCRB") (SPA147-153). It derided DAO for considering the officer's "good faith" in mistakenly applying the often confusing law of RAS, and for imposing less severe penalties than those recommended by CCRB (SPA151). The Court did not deny

[8] *See Ligon v. City of New York*, 2013 U.S. Dist. LEXIS 2871, 156-57 (S.D.N.Y. Jan. 8, 2013).

that the NYPD tracked and imposed increasingly severe sanctions on officers who were the subject of multiple CCRB complaints, but criticized such progressive discipline as erosive of the public's confidence in police discipline (SPA147-153).

The Court also found the NYPD deliberately indifferent to Fourteenth Amendment concerns, even while acknowledging that CCRB complaints of racial profiling were "very few" (SPA153). The Court found this evidenced by the lack of discussion at CompStat of racial disparities in stop activities, and believed that high NYPD officials displayed "willful blindness" to Fagan's statistical conclusions (SPA232). The Court also condemned the City for failing to perceive the dangers of "selective enforcement" in advocating the "unsupportable position" that racial profiling was not a concern as long as stop was supported by RAS (SPA233).

THE INJUNCTION

Under the aegis of a Monitor, the Injunction requires both "Immediate Reforms," to be developed in the short-term, as well as "Joint Process Reforms," which involve a longer process.

1. Immediate Reforms. Details of the Immediate Reforms are to be devised by the Monitor and approved by the Court. Although some particulars remain to be fleshed out, the following reforms must be implemented "as soon as practicable":

(a) The NYPD must transmit a FINEST message summarizing the standards set forth in the Liability Order "in simple and clear terms," and order all NYPD personnel to comply with those standards "immediately" (SPA25).[9]

(b) The NYPD must institute a pilot program for use of body-worn cameras, which shall be worn for one year by all patrol officers in one precinct per borough where the greatest number of stops occurred in 2012 (SPA25-26).

(c) The NYPD must amend its method of documenting stop-and-frisk activity, especially the UF-250. These amendments must include the addition of a narrative, as well as a "tear-off" section to be provided to the subject at the end of any stop (SPA21).

(d) The NYPD must revise its policies regarding both stop-and-frisk and racial profiling, including training, supervision, monitoring, and discipline, to accord with the interpretation of federal and state law as set forth in the Liability Order (SPA14-18).

2. Joint Remedial Process Reforms. The Joint Remedial Process for developing supplemental reforms requires extensive community input, to be overseen by a Facilitator in conjunction with the Monitor. Along with the parties, a wide array

[9] A "FINEST message" is typically a brief teletype announcement distributed Department-wide at roll-calls when promptness is necessary.

of individuals and entities will be granted a say in the reform process, including representatives of religious, advocacy, and grassroots organizations; individual community members; prosecutors; elected officials; and the Black, Latino, and Asian Caucus of the City Council (SPA29). The Court also appointed an "Academic Advisory Council," consisting of law professors from area law schools, to aid in overhauling the NYPD's practices (Dist. Ct. ECF #403).

THE STAY PENDING APPEAL

By order dated October 31, 2013, this Court granted the City's motion to stay both Orders pending resolution of the appeal (ECF #247). In granting the stay, this Court determined that the District Judge failed to avoid "the appearance of impropriety" in its conduct of this action, and directed that the case be randomly reassigned to a new judge (*id*., at 2-3). By way of clarification (ECF #304), this Court cited 28 U.S.C. §455(a), finding that the Judge compromised the appearance of impartiality during the *Daniels* conference, and "exacerbated" the appearance of partiality by making a series of public statements during trial (*id*. at 7-12).

POINT I

THE DISTRICT COURT IMPROVIDENTLY CERTIFIED THE PLAINTIFF CLASS UNDER RULE 23(b)(2).

Plaintiffs did not and cannot demonstrate that common issues of fact or law apply to all, or even most, of 4.4 million stops. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2553-56 (2011); *Rahman v. Chertoff*, 530 F.3d 622, 626-27 (7th Cir. 2008). Further, their negligible anecdotal showing was far "too weak to raise any inference that all the individual, discretionary" decisions to stop and frisk uniformly resulted from a City policy. *Wal-Mart*, 131 S. Ct. at 2556.

(A)

Pendent Jurisdiction

As a threshold issue, this Court should exercise pendent jurisdiction and review the order granting class certification (A1620-76), which is "inextricably intertwined" with the appealable order, and review of which "is 'necessary to ensure meaningful review' of the appealable order." *Myers*, 624 F.3d at 552. Where a structural injunction grants class-wide relief, review of the remedy is "meaningless" absent parallel scrutiny of class certification. *Jamie S. v. Milwaukee Public Schools*, 668 F.3d 481, 492 (7th Cir. 2012).

Here, class certification review is particularly necessary because the District Court found that none of the named plaintiffs established an EPC violation.

Only the stop of McDonald purportedly violated the Fourteenth Amendment (SPA-230, n. 772). As noted, the EPC class was certified as a subclass of the larger class (*Floyd*, 283 F.R.D. at 160); and, as set forth below, the larger class was improperly certified. Since the named plaintiffs failed to establish an EPC violation, the Court erred in imposing *Monell* liability against the City on this claim. *City of L.A. v. Heller*, 475 U.S. 796, 799 (1986) (unless a plaintiff has suffered constitutional injury "at the hands of the individual police officer," the merits of the municipal policy are "quite beside the point"), *cert. denied*, 476 U.S. 1154 (1986); *accord*, *Segal v. City of New York*, 459 F.3d 207, 219 (2d Cir. 2006).

(B)

In the Absence of Commonality, the District Court Abused its Discretion in Certifying the Class.

Under Fed. R. Civ. P. 23(a), a party seeking class certification must satisfy a four-part test that includes the crucial factor of commonality. That requirement must be strictly followed, because the "class action device … [is] an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979). Here, plaintiffs failed to demonstrate commonality by a preponderance of the evidence, because they asserted highly individualized claims. Thus, class certification was an abuse of discretion.

The District Court certified a Rule 23(b)(2) class of "all persons who since January 31, 2005 have been or in the future will be" stopped and/or frisked absent RAS. *Floyd*, 283 F.R.D. at 160. The certified subclass included persons stopped and/or frisked without RAS *and* on the basis of being black or Latino. *Id*.

In *Wal-Mart*, the named plaintiffs attempted to certify a 23(b)(2) class of female Wal-Mart employees who alleged gender discrimination in employment decisions. They attempted to demonstrate commonality through a statistical analysis showing gender-based pay disparities, anecdotal incidents of gender-based discrimination, and a sociological expert who opined that Wal-Mart's corporate culture made it vulnerable to gender stereotyping.

Ruling that the class was improvidently certified, the Court stressed that commonality is not established simply because the putative class members "have all suffered a violation of the same provision of law." *Wal-Mart*, 131 S. Ct. at 2551. Rather, the common contention "must be of such a nature that it is capable of classwide resolution," meaning that determination of its truth or falsity will resolve a central issue to each of the claims "in one stroke." *Id.*

Here, the District Court identified four questions that it concluded would "generate common answers" (A1665, n.138):

> (1) Whether [the] City had a Policy and/or Practice of conducting stops and frisks without [RAS]? (2) Whether the City has a policy and/or Practice of stopping and frisking Black and Latino persons on the basis of race

> rather than [RAS]? (3) Whether the NYPD's department-wide auditing and command self-inspection protocols and procedures demonstrate a deliberate indifference to the need to monitor officers adequately to prevent a widespread pattern of suspicionless and race-based stops? (4) Whether the NYPD's Policy and/or Practice of imposing productivity standards and/or quotas on the stop-and-frisk, summons, and other enforcement activity of officers is a moving force behind widespread suspicionless stops by NYPD officers?

However, the underlying premise for all four questions required plaintiffs to establish that each putative class-member was stopped without RAS. Every stop was conducted by a different officer acting on on-the-spot observations, not by a centralized policymaker. And whether RAS supported any or all of those stops requires a classically individualized inquiry into the "totality of the circumstances." *E.g.*, *United States v. Cortez*, 449 U.S. 411, 417-18 (1981); *see infra*, at Point II(A). Thus, their validity cannot be determined "in one stroke." *Wal-Mart*, 131 S. Ct. at 2551.

The series of mini-trials needed to establish individual class-members' claims reveals that class certification was an abuse of discretion. As the District Court noted, the "City does not have a written policy requiring or permitting stops and frisks of persons without [RAS], nor do plaintiffs allege that it does." *Floyd*, 813 F. Supp. 2d 417, 446 (S.D.N.Y. 2011). Quite simply, no unitary course of municipal action, such as enforcement of a statute previously declared unconstitutional, eliminates the need to examine the circumstances surrounding

each encounter to establish the threshold constitutional violation. *Cf. Brown v. Kelly*, 609 F.3d 467, 484 (2d Cir. 2010). Rather, examination of each set of unique circumstances was absolutely necessary.

Indeed, the District Court was obliged to conduct such "mini-trials" both at summary judgment and at trial, analyzing each anecdotal incident individually for RAS (SPA159-219; *Floyd*, 813 F. Supp.2d at 442-446; *Floyd*, 813 F.Supp.2d 457 [S.D.N.Y. November 23, 2011]). Similarly, each class-member was required to demonstrate a causal link between his individual constitutional harm and an unlawful policy, custom or practice. There was simply no common question producing a common answer to the crucial question of whether, or why, each class-member was disfavored. *Wal-Mart*, 131 S. Ct. at 2552. Thus, class certification was an abuse of discretion.

Finally, where, as here, the fact-specific inquiries necessary to assess the alleged harms belies that the City engaged in any unitary course of conduct applicable to the class, 23(b)(2) injunctive relief cannot obtain. *Rahman*, 530 F.3d at 626-27. Moreover, plaintiffs' failure to satisfy 23(b)(2) certification does not leave them without redress, as damages actions provide an adequate remedy at law. *Id.*

POINT II

THE DISTRICT COURT ERRED IN FINDING A WIDESPREAD PRACTICE OF CONSTITUTIONAL VIOLATIONS.

The grant of injunctive relief is reviewed for abuse of discretion, which encompasses relief resulting from an error of law or clearly erroneous factual findings; or where the supporting decision simply "cannot be located within the range of permissible decisions." *ACORN v. United States*, 618 F.3d 125, 133 (2d Cir. 2010) (citations and internal quotation marks omitted), *cert. denied*, 131 S. Ct. 3026 (2011). Issues of law are reviewed *de novo*. *Id*.

(A)

Fourth Amendment

Here, the District Court found a widespread pattern of unconstitutional stop activity first by allowing plaintiffs to sidestep the fundamental totality test of the Fourth Amendment with their statistical evidence, and by shifting the burden of proof to the City to disprove generalized allegations of illegal policing by contemporaneous documentation. Further, plaintiffs' statistical proof concededly could not challenge the validity of 94% of the stops at issue, and their flimsy anecdotal showing established, at most, a smattering of poor judgment calls by individual officers.

(1)

Inadequacy of Statistical Evidence

The validity of a *Terry* stop may only be determined upon consideration of "the totality of the circumstances – the whole picture," which cannot be "readily, or even usefully, reduced to a neat set of legal rules." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (internal quotation marks omitted), quoting *Cortez*, 449 U.S. at 417 and *Illinois v. Gates*, 462 U.S. 213, 232 (1983); *accord, e.g., United States v. Banks*, 540 U.S. 31, 36 (2003). Accordingly, "rigid rules, bright-line tests, and mechanistic inquiries" must be rejected "in favor of a more flexible, all-things-considered approach." *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013).

These axioms fell by the wayside here, at the City's expense. Plaintiffs' statistical proof derived solely from the UF-250, a single double-sided form containing a series of checkboxes where an officer indicates general categories of factors giving rise to the stop and/or frisk (SPA236). While these broad categories provide a useful starting point for inquiring into the legality of a stop, plenary judicial analysis requires examination of a wealth of information that cannot be captured in documentary evidence alone, much less checkboxes. *E.g.*, *United States v. Arvizu*, 534 U.S. 266, 273-77 (2002); *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996); *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). Police paperwork, by necessity, only provides

a general record of the rationale for police action, and cannot satisfy a plaintiff's judicial burden.

Although plaintiffs conceded that checkmarks for "Furtive Movements," "High Crime Area," and "Suspicious Bulge" together could indicate a stop supported by RAS, the Court rejected that concession due to the absence of a narrative explaining the officers' reliance on what the Court termed "vague" and "subjective" categories. Accordingly, the Court impermissibly presumed that such stops should be counted as unconstitutional (SPA50).

This analysis was faulty in one of two ways. To the extent that the Court rejected such factors as contributing to the basis of a valid stop, it plainly disregarded well-settled precedent. Courts, like police officers, have articulated RAS in such terms for decades. *E.g.*, *Wardlow*, 528 U.S. at 124; *Florida v. Rodriguez*, 469 U.S. 1, 6 (1984); *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977); *United States v. Paulino*, 850 F.2d 93, 94, 97 (2d Cir. 1988), *cert. denied*, 490 U.S. 1052 (1989); *People v. Allen*, 42 A.D.3d 331, 331-32 (1st Dept. 2007), *aff'd*, 9 N.Y.3d 1013 (2008).

Alternatively, the Court construed the brevity of the UF-250 as evidence of a widespread pattern of unconstitutionality. But it was plaintiffs who chose to rely on the forms to establish their case. It was hardly incumbent on the City to disprove their document-based allegations. And no legal imperative requires police

documentation to establish the legality of police conduct to the degree necessary for a judicial finding.

Nor would the addition of a few lines of narrative cure this problem. To carry the burden of proof in a Fourth Amendment claim, live testimony is essential. A trial court must consider an officer's "experience and specialized training to make inferences from and deductions about the cumulative information available to [him] that might well elude an untrained person." *Arvizu*, 534 U.S. at 273 (citation and internal punctuation omitted); *accord, United States v. Singh*, 415 F.3d 288, 294-95 (2d Cir. 2005). And RAS must be "weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Cortez*, 449 U.S. at 418; *United States v. McCargo*, 464 F.3d 192, 197 (2d Cir. 2006), *cert. denied*, 552 U.S. 1042 (2007).

The District Court clearly erred in closing its eyes to such critical background, all the more so by speculating that "[t]he central flaws in this database all skew toward underestimating the number of unconstitutional stops" (SPA49). Any fact-finder would have been less skeptical about officers' reliance on "vague and subjective" categories upon a fully developed record. Also, an officer's haste or simple neglect in box-checking does not detract from a well-supported stop.

Indeed, the Court recognized the failings of cold statistical evidence in evaluating 4.4 million stops, but allowed it as the only conceivable way to entertain

plaintiffs' sprawling claims (SPA82). However, expediency cannot displace necessary legal analysis, especially where it results in prejudice to one party. *Cf. Wal-Mart*, 131 S. Ct. at 2551-52. Plaintiffs' attempt to challenge millions of discretionary determinations over most of a decade hardly vitiates the need to examine all the circumstances for each scenario, which volumes of precedent demand. Absent evidence or stipulation that each encounter was materially identical, certainly not the case here, plaintiffs' Fourth Amendment claim should have failed. *Cf. City of Indianapolis v. Edmond*, 531 U.S. 32, 35-36 (2000); *see Brown v. State of New York*, 45 A.D.3d 15, 24-25 (3d Dept.), *lv. denied*, 9 N.Y.3d 815 (2007).

The Court also erred in deeming the NYPD's "hit rates" to be at all relevant to the determination at hand. Reasoning backward from negative "hits" to find unconstitutionality is just as fallacious as deciding that a search was constitutional merely because it successfully recovered contraband. "The question is not what was ultimately found, but whether there was a right to find anything." *People v. Rivera*, 14 N.Y.2d 441, 447 (1964), *cert. denied*, 379 U.S. 978 (1965).

In any event, RAS is a "minimal" standard of proof, even lower than probable cause, which in turn falls "considerably" short of a preponderance of the evidence. *Wardlow*, 528 U.S. at 123; *McCargo*, 464 F.3d at 197; *Arvizu*, 534 U.S. at 273. The concept of RAS "does not deal with hard certainties, but with probabilities" (*Cortez*, 449 U.S. at 418), and may arise from conduct that is "as consistent with

innocence as with guilt[.]" *United States v. Padilla*, 548 F.3d 179, 187 (2d Cir. 2008) (citations omitted). A low percentage of "hits" is therefore only to be expected.

The error in relying on "hit rates" is highly significant, because it was solely from that evidence that the Court inferred a pattern of unconstitutional frisks. Fagan performed absolutely no UF-250 analysis to determine what portion of frisks (or searches) was "apparently" justified or unjustified; but instead relied on the NYPD's one-in-ten "hit rate" (*e.g.*, A14761-62). He conducted no empirical research to support that opinion, and never articulated a basis for concluding that a one-in-nine rate met constitutional standards, but one-in-ten did not (A14112).

The "hit rate" theory also does not allow for the fact that, as various witnesses testified, stops often interrupt a crime from occurring (A5455-56; A5487; A5555-56). Nor does it consider that a single report of a crime perpetrated by a group or gang generates stops of multiple people; or that, when police search for a single suspect, multiple stops may be conducted before the culprit is found (A9046-49). Indeed, the police operation at issue in *Brown* produced zero "hits," yet that fact played no part in the Fourth Amendment analysis. *Brown*, 221 F.3d at 334, 339-41.

Fagan also omitted information captured in the UF-250 in areas other than checkboxes, such as the stop location (A1479-83). The NYPD classifies certain areas, including some entire precincts, as "impact zones" or "mega-zones," indicating a persistently high level of crime (A645-46). An officer might therefore

neglect to check the "High Crime Area" box on the supposition that a knowledgeable police supervisor would recognize that fact. Unless the corresponding box was checked, Fagan's narrow approach failed to take this factor into account, which would have tipped tens of thousands of stops into the Apparently Justified category (*id.*).[10]

The Court's censure of two "top-stopping" officers and their consistent use of certain UF-250 checkboxes was prejudicial error, since the Court precluded Officer Dang from explaining the specific basis for any of his stops (A8988-96). It also disregarded important explanatory record evidence. Dang frequently checked "High Crime Area," because he was assigned to patrol areas where crime patterns or spikes were reported, including Fort Greene Park (A8941-43; A8954-57; A8998-99). Since a "pattern" is a group of crimes that are similar in nature, be it by time of day, date of occurrence, type of victim, or the perpetrator's *modus operandi*, it is not surprising that Dang's UF-250s reflected similar rationales for his stops. Also, Dang's specialized knowledge included familiarity with local gang members, whom he often scrutinized for "Furtive Movements" with special care (A8955-58, A8963-65).

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[10] Reasonable suspicion is an objective standard, and does not depend on the officer's subjective state of mind. *United States v. Bayless*, 201 F.3d 116, 133 (2d Cir. 2000). Whether a certain area has a high incidence of crime depends on objective facts, not on whether the officer had the presence of mind to check the appropriate box.

Notably, plaintiffs framed a plainly insufficient challenge to the constitutionality of 94% of the City's stops. Fagan conceded that, based only on the UF-250 checkboxes, 88% of the stops and frisks conducted between January 2004 and June 2012 were likely supported by RAS, while an additional 6% were Ungeneralizable. Only 6% were Apparently Unjustified (SPA83). A 94% success rate is hardly sufficient to establish a widespread municipal pattern or practice, especially for such a large organization as the NYPD. *See Mortimer v. Baca*, 594 F.3d 714, 722 (9th Cir. 2010). The Court's imposition of liability, and especially its reliance on two "top-stoppers," is tantamount to *respondeat superior*, which is unavailable under §1983. *Monell*, 436 U.S. at 691. And if Fagan's "Apparently Unjustified" stops were tested by live testimony and reduced by more than 50%, as occurred with plaintiffs' anecdotal evidence, the NYPD's record would unquestionably set the gold standard for law enforcement nationwide.[11]

Fagan further acknowledged that his Apparently Unjustified stops were unevenly distributed across the City at borough, precinct, and even census-tract levels

[11] Nor does the hard number of stops support a different conclusion. On average, an officer makes about two stops per month (A23100; *see also* A21600). Under plaintiffs' assessment, perhaps 200,000 stops out of 4.4 million, or approximately 1 in 20, lacked sufficient basis during an eight-and-a-half-year period (SPA50), which reduces to about 26,500 per year. As the NYPD currently employs some 34,500 police officers, nearly 19,800 of whom are on patrol, this rate could easily be attributable to sporadic lapses in judgment, which cannot be attributed to the City. *See Mortimer*, 594 F.3d at 722.

(A5003-08), which undercuts attribution to a centralized policy. *See Wal-Mart*, 131 S. Ct. at 2556. He also conceded that his scheme oversimplified the data, and believed that individualized legal analysis of stops was "uninformative" (A14305; A21571-73). In a Fourth Amendment case, reliance on such an "expert" is error by any standard.

Indeed, it was manifestly erroneous on two separate grounds for the District Court to admit Fagan's Fourth Amendment analysis. First, while Fagan is a professor of criminology at Columbia Law School, he is not an attorney and has no formal legal training (A14847-899). Interpretation of legal precedent lies outside of his area of expertise. *See Morse/Diesel, Inc. v. Trinity Indus.*, 67 F.3d 435, 444 (2d Cir. 1995). Second, this Court has repeatedly held that witnesses may not present evidence in the form of legal conclusions. *Cameron v. City of New York*, 598 F.3d 50, 62 (2d Cir. 2010); *Densberger v. United Techs. Corp.*, 297 F.3d 66, 74 (2d Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2d Cir. 1991), *cert. denied*, 502 U.S. 813 (1991). Yet Fagan expounded at length on whether factors on a given UF-250 amounted to RAS – a quintessential legal conclusion. *Cf. Cameron*, 598 F.3d at 62.

(2)

Shortcomings in Anecdotal Evidence

Tellingly, to the limited extent that live testimony was presented, the Court found that RAS supported 10 out of 19 of the stops put forth (SPA54, 198-219). It was plaintiffs' burden to show that any constitutional violations were attributable to the City, not to mistaken judgment calls by individual officers. *Monell*, 436 U.S. at 691. Plaintiffs were afforded every opportunity to present the most compelling encounters they could find to further their cause (A2020-35). If the NYPD were truly engaging in a pattern of suspicionless stops over the better part of a decade, it should have been a simple matter to adduce many clear-cut examples of it.

Yet the anecdotal evidence was remarkably weak. In two of the encounters found to be unsupported, plaintiffs offered only conclusory assertions that the stops were conducted by NYPD officers (A5206-13; SPA197; A2332-44; SPA203-05). And, despite the City's diligent efforts to find these "John Doe" officers, plaintiffs were never able to identify them (SPA160; SPA197, n.623; SPA203, n.652). Thus, plaintiffs did not even establish a prima facie case as to those encounters. *Corbett v. City of New York*, 2013 U.S. Dist. LEXIS 136526, 6-9 (E.D.N.Y. Sept. 24, 2013).

In two other encounters, the Court was admittedly presented with a "close" question as to the legality of the stop, and only resolved the issue by refusing

to credit the officers' testimony. While credibility determinations are usually beyond appellate review, this Court should scrutinize them with special care here (*see* Point V, *infra*).

One "close" question was the August 5, 2006 stop of Nicholas Peart. It arose from a 911 call made minutes before, reporting that three men matching the description of Peart and his two associates were carrying a gun in the vicinity (SPA175-80). Primarily, the Court determined that the call was "anonymous" and therefore needed corroboration (SPA178-79, citing *Florida v. J.L.*, 529 U.S. 266, 270 [2000]). However, the UF-250 memorialized only that the information originated from a "Victim/Witness;" no proof was adduced that the caller was anonymous (A8790; A8799-800; A8810-13). Here, again, the Court impermissibly shifted the burden to the City by finding otherwise, or simply engaged in rank speculation.

Moreover, the Court refused to believe that the bulge the officer observed, later determined to be a cell phone, was "suspicious" enough to provide corroboration (SPA179). This was part of an across-the-board determination that a "ubiquitous" cell phone can *never* create a suspicious bulge (*id.*), violating the totality test and undervaluing legitimate safety concerns in one stroke. *See Bayless*, 201 F.3d at 133 (standard to be applied is that of the reasonably "cautious" officer); *and see* A8947-48 (officer explaining that safety concerns include whether a suspect may possess brass knuckles or other small metal weapons). Further, as the Court

obliquely recognized, Peart initially refused to show his hands or get down on the ground when directed to do so, both of which lend support to the frisk (SPA176). *See United States v. Brockington*, 378 Fed. Appx. 90, 92 (2d Cir. 2010).

Notably, the CCRB concluded that Peart's August 2006 stop was not the product of police misconduct (A2916). Furthermore, Peart admittedly lied under oath to the CCRB, falsely claiming that his lip was split during the encounter (A2933-35). That undisputed fact did not affect the District Court's assessment of his credibility. Indeed, solely by crediting Peart's testimony, the Court found a Fourth Amendment violation as to his April 13, 2011 stop, where no officer could be identified (SPA180-82).

The other "close" question was the February 5, 2008 stop of Clive Lino. It arose from an armed robbery pattern in the area; Lino and his friend wore clothing that matched photographs of the two suspects (SPA191-96). Also, the officers twice observed the men loitering on a cold night on a high-crime corner, near a check-cashing location, even after taking the time to circle the block (A6054-58). At trial, Lino confirmed that they were indeed lingering there, but said that they were waiting for a take-out order at a nearby restaurant (A4301-02).

The District Court declared that the officers "could easily have observed for a few minutes longer to determine whether there was an innocent explanation for this conduct — namely obtaining the food — at no cost to their safety or law

enforcement objectives" (SPA196). Thus, with the benefit of hindsight, the Court second-guessed the officers' lawful discharge of their deterrent function. The Court also credited Lino's testimony that the officers told him they "had orders to stop anyone on that corner whenever they felt like it," using that to discredit the officers' testimony as a whole (*id.*). Yet here, again, the CCRB had found that the stop did not constitute an abuse of authority, or police misconduct of any kind (A4310; A6064).

Even encounters which the Court deemed clearly violative of the Fourth Amendment were questionable. For instance, officers stopped 13-year-old Devin Almonor in response to no fewer than nine 911 calls reporting a large gang of youths fighting, throwing garbage cans, activating car alarms, dispersing when patrol cars arrived, only to return and continue to wreak havoc (SPA166-67). Some callers indicated "the possibility that weapons were involved" (*id.*).

To be sure, the only description of the guilty parties was that they were young black males, which did not provide particularized suspicion standing alone. However, when the officers arrived at the scene, they observed garbage cans in the middle of the street, car alarms still ringing, and Almonor walking away from the crime scene with another individual, jaywalking, looking furtively over his shoulder, and touching a bulge in his waistband in a manner that made them suspect he might have had a weapon secreted (A3687-91; A3723; A3761). The Court discredited the officers' observations, which, taken together, surely established RAS. Instead, all

credibility inferences favored plaintiffs, even though Almonor initially gave a false name to the officers, refused to give his address, and was walking away from his residence when he was stopped, while claiming to be headed home (A2716-17).[12]

As to Downs, the District Court permitted him to identify the officers who purportedly stopped him by arranging an in-court "show up" identification procedure (A6910), a practice that has been "widely condemned" as "inherently suggestive." *Stovall v. Denno*, 388 U.S. 293, 302 (1967); *Brisco v. Ercole*, 565 F.3d 80, 88 (2d Cir. 2009), *cert. denied*, 558 U.S. 1063 (2009). It was also completely unnecessary (*see id*.). Downs had previously failed to identify the same officers from the CCRB's photo array, despite his claim that he "would never forget [the] faces" of the officers who allegedly stopped him (A6691-94; A6717; A6908; A12799-803); and plaintiffs never sought another identification procedure, either during discovery or at trial (A6740).

Made in open court before members of the press, nearly five years after the fact, the show-up was virtually guaranteed to produce a positive identification. Further, documentary evidence showed that the officers had effected an arrest elsewhere near the same time as the purported stop (A6439-40;

[12] The District Court even credited the notion that, when asked for identifying information by a police officer, a youth would provide a "nickname" ("Devin Al") rather than his full name (SPA168).

A6464; A12693-94). Yet the Court credited Downs' testimony, brushed aside concerns of suggestiveness, and even intimated that the officers committed perjury by disclaiming any memory of the stop (SPA163-64; A6691-95; A6738-44). Notably, the officers' trial testimony was fully consistent with their previous statements (A6420-22; A6447-48).

In short, plaintiffs' only probative evidence of Fourth Amendment violations was confined to a handful of anecdotal incidents out of 4.4 million, which prove "nothing at all." *Wal-Mart*, 131 S. Ct. at 2556. Many of their examples were constitutional even by the District Court's assessment, while other adverse findings stemmed from legal errors and dubious credibility determinations. Moreover, those few stops were conducted at the discretion of individual officers over an eight-and-a-half year period. This meager anecdotal showing was not only legally insufficient to impute municipal liability, but affirmatively tended to disprove a widespread pattern.

(B)

Fourteenth Amendment

The Court's weighty finding of persistent and wide-ranging Fourteenth Amendment violations hangs precariously on the conclusory testimony of a single witness. The finding moreover misconceives the very definition of "intentional" discrimination, and stems from a grossly unreliable statistical

analysis, which, among many flaws, is not tailored to the certified subclass. Although it was undisputed that members of minority groups were stopped in close correlation to their appearance in crime suspect reports, the Court irrationally dismissed the significance of that fact. Whether couched in terms of selective enforcement (a theory waived by plaintiffs from the inception of this action), a facially suspect classification, or the discriminatory application of a facially neutral policy, the Court's postulation of "indirect racial profiling" fails.

(1)

Inadequate Anecdotal Showing

Monell liability under the Fourteenth Amendment requires the plaintiff class to demonstrate at least one instance in which the NYPD's practices denied them equal protection. *City of L.A.*, 475 U.S. at 799; *Segal*, 459 F.3d at 219. The District Court found that *only one* of the incidents presented at trial, the stop and frisk of Cornelio McDonald, illustrated the purportedly widespread practice of "indirect racial profiling." But McDonald's testimony was insufficient on many grounds to bear the weight of *Monell* liability.

First, this Court has held a single stop suggesting that police overemphasized a suspect's race insufficient to support *Monell* liability on an EPC

claim. *Brown*, 221 F.3d at 338-39. That conclusion is all the more compelling here, where 4.4 million stops are at issue. *See Wal-Mart*, 131 S. Ct. at 2556.[13]

Second, McDonald's testimony was legally insufficient to show an EPC violation even as to his own stop. The District Court relied solely on McDonald's assertion that the officers did not also stop other people emerging from a nearby bowling alley who, he offered, "*could have been* Asian, white" (A6261; SPA175) (emphasis added). Such testimony is far too speculative and conclusory to support an inference of discriminatory intent. *Jones v. Town of E. Haven*, 691 F.3d 72, 83 (2d Cir. 2012), *cert. denied*, 187 L. Ed. 2d 255 (2013); *see Allen v. Murray-Lazarus*, 463 Fed. Appx. 14, 17 (2d Cir. 2012). Plaintiffs chose not to explore these issues when they cross-examined the stopping officer; consequently, they failed to establish whether he was even aware of those people. *See Patterson v. County of Oneida*, 375 F.3d 206, 226 (2d Cir. 2004) (plaintiff alleging EPC violation must establish that the allegedly discriminatory act was not merely the result of negligence).

[13] As McDonald is not a named plaintiff in this action, it is questionable whether plaintiffs even adequately established the fundamental issue of standing for their equal protection claim. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Cent. States Southeast v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005) (collecting cases). The District Court cited no binding authority for the proposition that an unnamed class member, never substituted as a class representative, may support the award of class-wide relief where the claims of the class representatives have been dismissed on the merits.

Third, the District Court inferred a race-based stop solely by crediting McDonald's testimony, yet his credibility was severely compromised. He acknowledged that he had previously initiated two race discrimination lawsuits, both of which had been dismissed (A6262-64). He also asserted that any time a police officer spoke to him, even to greet him, he had been "stopped" (A6281). In short, it was preposterous for the Court to find this single account illustrative, standing alone, of a citywide multi-year policy.

Fourth, *Monell* does not apply unless the complained-of City policy was the "moving force" that "actually caused" the violation. *City of Canton v. Harris*, 489 U.S. 378, 389 (1989). No evidence supported the District Court's finding that the City's purported policy of "indirect racial profiling" led to McDonald's stop. Also, despite the Court's reliance on racial disparities in the use of force (SPA51; SPA55; SPA102), absolutely no force was used during McDonald's stop, even by his own account.

(2)

Errors in the Legal Analysis

(a)

Selective Enforcement

The District Court found intentional discrimination by purporting to apply a novel theory of "indirect racial profiling" as selective enforcement (SPA223). However, any selective enforcement claim had been forfeited, if not waived. *See*

United States v. Olano, 507 U.S. 725, 733 (1993); *Puffer v. Allstate Ins. Co.*, 675 F.3d 709, 718-20 (7th Cir. 2012).

At plaintiffs' request, the Court expressly defined the plaintiff class of minorities as a subclass of those stopped without RAS (*Floyd*, 283 F.R.D. at 160). Further, the subclass definition mirrored the allegations in the complaint (A124). Indeed, previously recognizing that the presence of RAS nullified this EPC claim, the District Court correctly granted the City summary judgment on the EPC claim as to Floyd's February 2008 stop, once it concluded that the stop was well-supported under the Fourth Amendment. *Floyd*, 813 F.Supp.2d at 444.

Despite the course plaintiffs themselves thus charted, their proof was inapposite to the definition of their subclass. Fagan never purported to calculate how many stops were *both* unsupported by RAS *and* motivated by race (A1511-15). For that reason alone, the EPC claim failed on the merits. Nevertheless, the Court disregarded plaintiffs' utter lack of probative evidence, and suddenly applied a selective enforcement theory in the Liability Order, without notice to the City. It then chastised the City for having argued that RAS served as a complete defense to plaintiffs' EPC claim (SPA233-34).

Nor did plaintiffs otherwise meet the standards for a selective enforcement claim. They conceded the validity of NYPD deployment to high-crime areas (A10539), which tend to have higher concentrations of minority residents; and

never identified similarly-situated non-minorities treated more favorably than minorities due to their race. *E.g.*, *Doninger v. Niehoff*, 642 F.3d 334, 357 (2d Cir. 2011), *cert. denied*, 132 S. Ct. 499 (2011).[14]

(b)

Indirect Racial Profiling

The Court's singular theory of "indirect racial profiling" also cannot be reconciled with axiomatic legal principles. Only intentional discrimination violates equal protection. *Washington v. Davis*, 426 U.S. 229, 239-40 (1976). A finding of discriminatory intent requires proof that a decision-maker undertook a course of action "because of, not merely in spite of, the action's adverse effects upon an identifiable group." *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009) (internal punctuation omitted), quoting *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Disproportionate impact alone is insufficient to show an EPC violation; such impact "must be traced to a purpose to discriminate on the basis of race." *Id.*; *Hayden v. Paterson*, 594 F.3d 150, 162-63 (2d Cir. 2010).

[14] McDonald's testimony certainly did not show that he was similarly situated to the non-minorities allegedly on the scene. By his own admission, he was standing alone between two parked cars, not leaving a bowling alley amongst a crowd (A6252; A6269; A6317-18; A21828-30), and the District Court could only "presum[e]" that the others were behaving just as he was (SPA175). Further, Officer French testified that he suspected McDonald of possessing a weapon based on a suspicious bulge in his left jacket pocket, the unusual way he was walking and shifting his body with his hands in his pockets (also known as "blading"), and his knowledge of patterns regarding a black male with a firearm robbing commercial establishments and a black male burglarizing residences (A6315; A6318-19; *see* A3715-06; A6624; A7609-10).

The District Court found that, despite the NYPD's official policy prohibiting racial profiling, it had an unwritten policy of targeting racial groups for stops "based on the appearance of members of those groups in crime suspect data" (SPA100). In light of *Iqbal*, the fallacy in this ruling is apparent. The City's stop-and-frisk activities fall heavily on minorities because contemporaneous suspect data identifies members of racial minorities as responsible for specified criminal conduct – the very definition of action undertaken "in spite of," rather than "because of," its effect on these groups.

Thus, since the 9/11 attacks were perpetrated by Arab Muslims, the Supreme Court found it "incidental" that "a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks" would produce a disparate impact on Arab Muslims. *Iqbal*, 556 U.S. at 682. Under the District Court's approach, the plaintiff in *Iqbal* set forth a compelling EPC claim, yet the Supreme Court dismissed the complaint on its face.

(c)

Discriminatory Effect

Largely, the Court reached the contrary conclusion here by dismissing the significance of an unpleasant reality: during the period at issue, approximately 83% of all reported crime suspects were black or Hispanic, as were roughly 90% of all violent crime suspects (A9723-24; A21717; A23283; SPA93). Social scientists

may differ over the reasons for those overwhelming statistics, but they are indisputably derived from arrest and complaint report data, not racial stereotypes. That the NYPD stops members of those minority groups in close correlation to these rates (A21717; A23283) invalidates any inference that the stops furthered a policy of targeting racial minorities *because of* their race.

The Court clearly erred in adopting Fagan's EPC analysis. First, as noted, Fagan's pool of stops was broader than the EPC subclass, because it included all stops supported by RAS (*see supra*). An equally prominent error was the use of a statistical benchmark that disregards suspect description data. The lack of a prevailing benchmark for racial disparity regression analysis is not dispositive here, because *Fagan conceded that a benchmark including suspect race would produce more reliable results* (A4944). He purposely excluded suspect description from his analysis on the assertion that such data was too incomplete – 63% across all crime categories – to be reliable (A4759-60; A4949-52; A14793). To determine whether his benchmark produced an unduly skewed result, and was therefore clearly erroneous (*see Forehand v. Florida State Hosp.*, 89 F.3d 1562, 1572-73 [11th Cir. 1996]), this Court must inquire into the validity of that assertion.

Fagan conducted separate regression analyses for seven suspected crime categories. They included violent felony crimes, where suspect description is known in 86% of cases; weapons crimes, where the figure is 98%; and drug offenses, where

the figure is 99% (A14289; A14745). Still, he refused to include suspect description data even for those classifications (A4944-46; A4949-52). The obvious explanation for this conscious omission is that his approach was purely result-oriented.

Moreover, the fact that data is incomplete is not a rational reason to disregard it (*see*, *e.g.*, A5031-32; A8760; A6886-87; A21713-99; A23279-365). Crime suspect description data estimates the available pool of persons likely exhibiting suspicious behavior; while population, Fagan's chosen benchmark, merely estimates the potential number of persons reportedly residing in a given area (A4710-11; A8371; A8637-38; A8655-59). Also, violent felonies and weapons offenses, for which suspect data is unimpeachably complete, pose a pronounced threat to public safety, and generally provide the highest incentive for multiple investigatory stops.

Indeed, the RAND report, commissioned in 2007 to evaluate the racial effects of NYPD stop-and-frisk practices, found it essential to take such data into account, and consequently "found little evidence of pervasive racial profiling in the NYPD's pedestrian stop and frisk activity" (SPA 157). The City's trial experts reached the same conclusions for the more recent data at issue here (A4935-36; A8354; A8359-62; A8658-60; A21558-60; A23159-61).

Eliminating gender from the statistical picture of suspect data highlights the illogic of the approach sanctioned by the Court. While roughly 90% of NYPD stops focus on male subjects (A655), that figure reflects not gender discrimination,

but the simple fact that the vast majority of crimes are reportedly perpetrated by men. It makes little sense from a constitutional or policy perspective to require officers to stop women as often. The same principle governs racial and ethnic groups.

Puzzlingly, the District Court rejected suspect description as a proper benchmark – despite Fagan's concession that it was the best way to test for racial effects – on the ground that most stop subjects prove to be innocent of any crime (SPA50-51). It is beyond question that officers may stop and frisk innocent people without offending the Fourth Amendment, because the compelling governmental interest in protecting citizens from crime balances the limited incursion. *Wardlow*, 528 U.S. at 126. Indeed, the innocent may be subject to the higher intrusion of arrest, provided probable cause is present. *E.g.*, *Jocks v. Tavernier*, 316 F.3d 128, 135 (2d Cir. 2003). Likewise, innocence, known to police only with the benefit of hindsight, cannot establish a valid EPC claim. *See Brown*, 221 F.3d at 339 (targeted stops of young black male subjects were constitutional although "understandably upsetting to the innocent plaintiffs who were stopped…").

Also problematic is the Court's acceptance of Fagan's reliance on census data as a comparator pool, since it is "widely acknowledged" that the census consistently undercounts blacks and Hispanics. *Chavez v. Ill. State Police*, 251 F.3d 612, 643 (7th Cir. 2001). Further, high-crime areas are often those with strong concentrations of transient visitors, such as transit hubs, or the criminal courts of the

88th Precinct (A8943). The use of census data is thus unreliable for Fagan's purposes.

Moreover, while Fagan used census tract data for his analysis, the NYPD is organized by precinct (A4973; A5818-19; A8680-81; A9032-34; A21428-29; A23520). Nor are criminals cognizant of either demarcation. In any given tract or precinct with a low overall crime rate, crime patterns or spikes may emerge in specific neighborhoods, blocks, or buildings. NYPD officers are made aware of such data in daily briefings at the start of each tour (*e.g.*, A5250-51; A6015-19; A6312-13); and, depending on suspect data, that information may affect policing practices while incidentally impacting minorities. Although the Court paid lip service to police deployment, it relied on statistics that failed to take such factors into account.

The City's experts identified additional methodological deficiencies rendering Fagan's conclusions unreliable. For instance, his selection of independent variables created a multicolinearity problem,[15] which skewed his results because he could not distinguish among competing explanations for movement in the outcome variable (A21428; A23161-67); he employed an inaccurate time-lag in controlling for police response to crime patterns and spikes, which failed to reflect the NYPD's

[15] "Multicolinearity" occurs when the explanatory variable of interest in multiple regression analysis (here, population race) is correlated with one or more of the other explanatory variables (*e.g.*, crime rates, socioeconomic factors, patrol strength, etc.).

use of "real crime in real time" (A4218-20; A5000-01; A5816; A6051-21; A6139; A7807; A7910-11; A8117-18; A8391; A8654-55; A8668-69; A9144-45; A21429; A21578-79; A21622-23; A23157; A23384-85); he used logged data, which distorted his measure of crime (A4983; A4999-5000; A21429-30; A23157); he aggregated crime data into crime categories, which falsely assumed that police response – in terms of stops conducted – remains the same regardless of the specific crime (A4984-85; A4993; A8383; A8654-58; A8754-55; A23196); he used unreliable data on patrol strength (A4968-69; A4971-72; A8364; A8368-70; A8460-61; A8682-85; A14266; A14731-32; A21430-31; A23171), which was concededly an endogenous measure (A8579); and his accounting for unemployment data failed to aggregate the data at a level that corresponded to units of police action (A8373-81; A8430-34; A21427). Statistical disparities in the use of force also lacked probative value, as "force" includes the innocuous category of "hands on suspect" (SPA102), and as Fagan made no attempt to analyze whether the use of force in any case was justified.

Finally, *at best*, Fagan's regression only predicted an "even-odds" likelihood that an increase in an area's minority concentration would produce an increase in stops (A3475-81; A8330-36; A8522; A9427-29; A23177; A23383; A23593; A15806; A23383). His misleading claim of "statistically significant" results thus failed to establish any practical import in his regression analyses (A8330-31). Indeed, the City's experts conclusively demonstrated that Fagan's results utterly

lacked practical significance (*e.g.*, A8330-36; A8522; A9427-29; A15806; A23593; A23177; A23383), effectively rendering his central conclusion meaningless.

Confronted with the City's irrefutable proof on this essential issue, Fagan did not seriously dispute the lack of practical significance in his analysis.[16] Instead, he took a new tack. Contrary to prior assertions (A4948; A4981-82), he suddenly claimed that he could decompose the average and predict stop activity in specific, real-world census tracts (A8588-91). When the City decisively refuted that notion, Fagan took the stand for a third time, advancing additional claims regarding the numbers of predicted additional stops (A9395-99; A9442-45). However, his third round of stop "predictions" bore little relationship to real-world stop numbers in largely minority areas, and the discrepancy swelled wherever minority concentrations grew more pronounced (A9420-21; A9446; A9457-59).

Yet, remarkably, the Court justified its reliance on Fagan's conclusions regarding racial bias by proclaiming that "Fagan has a deeper understanding of the practical, real-world meaning and implications of the statistical analyses in this case" (SPA82). The Court never mentioned, let alone resolved, the City's experts'

[16] Fagan was forced to concede that (1) Purtell accurately stated what Fagan was measuring in his regression analyses, (2) Purtell accurately stated how to interpret a regression coefficient, (3) the log odds ratio for Fagan's regression was 1.00887, and (4) a log odds ratio number equal to 1.0 would be considered "even odds" (A8573; A8581-82; A8611-12; A23383).

powerful contrary proof. Review of the foregoing testimony, in particular, creates "the definite and firm conviction" that the District Court was mistaken in its wholesale adoption of Fagan's EPC analysis. *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948).

(d)

Discriminatory Intent

As the foregoing amply demonstrates, plaintiffs' statistics were utterly insufficient to prove discriminatory effect, much less discriminatory intent (SPA224-25). The Court alternatively inferred discriminatory purpose first from its belief that the NYPD encourages its officers to stop "the right people," which it took to be a euphemism for young black and Hispanic men (SPA226-27). But the Court discounted that references to "the right people" were consistently accompanied by "at the right place, at the right time" – an obvious reference to areas with recent spikes in crime, and to reasonably suspicious conduct (A9524-26; A9543-44; A9248-49).

In this respect, the Court relied on Officer Serrano's secret recording. The tape reflected Serrano's appeal of his annual evaluation, during which his supervisor, Deputy Inspector McCormack, discussed a grand larceny and robbery pattern in the Mott Haven public housing development, which was reported as being perpetrated by male blacks, aged 14-21, and questioned what enforcement action Serrano had taken to address it (A13949). The tape contained no suggestion of

stopping all young male blacks for these crimes, nor any hint that enforcement activity in general should be limited to one racial group without regard for suspect information (*id.*). Even Serrano conceded McCormack clearly referenced times and locations where specific crimes were "spiking" (A3289-90).

By way of example, McCormack explained that stopping "a 48-year-old lady [who] was walking through St. Mary's Park when it was closed" was unlikely to effectively curb the crime pattern (SPA126). Inexplicably, the Court interpreted this as indifference to racially discriminatory policing, when McCormack did not refer to this "lady's" race or ethnicity at all (*id.*). Other evidence confirmed that officers are never encouraged to be willfully blind to race-specific suspect information, but are expected to stop only those individuals who exhibit reasonably suspicious behavior (*see* SPA125) (faulting Chief Esposito for stating that "at times" black and Hispanic youths were "the right people" to be stopped, if RAS is present).

Such targeted efforts are hardly improper profiling. They reflect legitimate, logical deployment strategies geared toward promoting community safety, not discriminatory intent. As another hypothetical example, if a Chinese gang were reportedly plaguing businesses in Chinatown, officers may (and should) focus enforcement efforts on Chinese youths in the area who act suspiciously, without implicating EPC rights.

The Court also inferred invidious intent from the testimony of Senator Adams, who believed that Commissioner Kelly twice openly stated that the NYPD targets young[17] black and Hispanic males for stops, to "instill in them a fear" that they could be searched for weapons at a moment's notice (A4158-61; A4187-89). The first statement was allegedly made during a private meeting with then-Governor Paterson, Adams, and two other elected officials; Adams maintained that Kelly repeated the same remark at a large gathering of public officials at Medgar Evers College (*id.*).

It simply strains credulity that Kelly made such statements endorsing racial profiling, as Adams believed. Indeed, if such statements were made in such forums, it is difficult to explain why they were not exposed by other attendees, who presumably had no less interest than Adams in bringing Kelly's supposed racial animus to light. Further, Inspector Holmes, who was present at the Medgar Evers meeting, testified that it was never the policy of the NYPD to target young men of color, or to instill fear in them (A9083-88).[18] The only reasonable inference is that

[17] McDonald was 49 years old when he was stopped (A12911). Any City policy or practice targeting "young" men of any race could hardly have affected him.

[18] Prior to any objection by plaintiffs, the District Court refused to allow Holmes to testify to her understanding of Kelly's comments (A9083-87). The City also tried to elicit evidence from Chief Esposito on this issue; but the Court, having accepted Adams' testimony regarding Kelly's statements, insisted that only the Commissioner could rebut them (A5593-95; A9084-87; *see* A2247). However, the issue was not the truth of the matter asserted, but whether the words were

Adams misinterpreted Kelly's remarks; but the Court accepted his interpretation, largely because he was a former NYPD officer (SPA129). A former employee is no less likely to misinterpret his former employer than anyone else. Most notably, plaintiffs proffered no proof that Kelly's alleged statement was communicated down the ranks. To the contrary, voluminous proof established that commanders and officers alike understood NYPD policy and practice to bar racial profiling (*e.g.*, A5504-05; A6080-81; A7633-35; A7641-57; A7981-82; A9080).

The racial disparities in Dang's and Gonzalez's UF-250s also lacked probative value in discerning discriminatory intent. First, as noted, the Court improperly precluded material testimony from Dang on that issue (A8988-96). Second, the intent of two officers out of tens of thousands cannot be imputed to the City. Third, these officers were frequently addressing crime reports containing suspect descriptions, including wanted posters (A8958; A8967). As Anti-Crime officers, both patrolled areas with crime spikes and patterns (A8940-67; A11755-58). Plainly, it was only the District Court's refusal to consider suspect description that led to the unsound conclusion that these "disparities" evinced discriminatory intent.

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uttered at all. *See United States v. Kanovsky*, 618 F.2d 229, 231 (2d Cir. 1980). Kelly's instructions to his subordinates about racial profiling were likewise improperly precluded as hearsay (*e.g.*, A5595; A9087). *See United States v. Aspinall*, 389 F.3d 332, 340-41 (2d Cir. 2004). Regardless of whether Kelly testified, there was no basis to preclude relevant and competent testimony from other witnesses.

(e)

Suspect Classification

Plaintiffs' complaint contained no allegation of a facially suspect classification; rather, it only alleged discriminatory application of a facially neutral policy (A114). That aside, the Court's finding of a facially race-based classification does not withstand scrutiny (SPA224-30). Such data does not originate with the government, but with victims of and witnesses to criminal activity. *Brown*, 221 F.3d at 338. The City has no control over the description of suspects; thus, the use of such information in fighting crime does not constitute a suspect classification. *Id*.

The central holding of *Brown* is plainly instructive here, notwithstanding that a single manhunt is not at issue. Policing a larger-than-life city, NYPD officers are frequently alerted to, and must address, multiple crime conditions at once. To do this, they use real-time crime data – current reports of crimes needing investigation – which does not remotely resemble the stereotypical criminal profiles disapproved in *Brown*, 221 F.3d at 337 (*see, e.g.*, A3289-90; A6315; A8958; A8967). Troublingly, however, the District Court's reasoning would bar virtually all law enforcement reliance on real-crime suspect descriptions, in contravention of both law and logic.

(f)

Erroneous Evidentiary Rulings

Finally, the Court precluded the City from presenting a full defense to the EPC claim. The Court not only refused to allow Dang to explain the basis for his stops (A8988-96), but also steadfastly refused to hear evidence that the NYPD pursued its stop-and-frisk practices because they proved effective in suppressing and deterring crime (SPA44; SPA80-81). However, race-neutral reasons for challenged actions under the Fourteenth Amendment are integral to rebutting the element of discriminatory purpose. *E.g.*, *Hayden v. Paterson*, 594 F.3d 150, 163 n.11 (2d Cir. 2010); *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 n.46 (1977).

The District Court also deemed the diverse racial composition of the NYPD's ranks to be irrelevant (A7979-80). In fact, approximately 50% of NYPD's officers are non-white (A5602-03), which substantially undermines any inference of generally discriminatory policing. *See Rhodes v. Guiberson Oil Tools*, 75 F.3d 989, 1002 (5th Cir. 1996); *Orgain v. City of Salisbury*, 305 Fed. Appx. 90, 103 (4th Cir. 2008). Were the NYPD all-white, such evidence would have surely been considered highly material. *See Jones*, 691 F.3d at 76; *see also Cromer v. Brown*, 88 F.3d 1315, 1325 (4th Cir. 1996); *and see* A111-12 (alleging that the NYPD's practice of suspicionless stops-and-frisks of minorities began with the now-defunct Street Crimes Unit, "which consisted predominantly of White men").

POINT III

THE DISTRICT COURT ALSO ERRED IN FINDING DELIBERATE INDIFFERENCE.

Also legally insupportable is the Court's conclusion that the NYPD was deliberately indifferent to its constitutional obligations. "Deliberate indifference is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Connick*, 131 S. Ct. at 1360. "Where a plaintiff claims that the municipality has not directly inflicted an injury, but nonetheless has caused an employee to do so, rigorous standards of culpability and causation must be applied" to protect against *respondeat superior* liability. *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 405 (1997) (citations omitted). The District Court distorted all legal standards in concluding that the NYPD evinced deliberate indifference to its citizens' constitutional rights.

(A)

Notice

At the threshold, the Court's finding of notice does not withstand scrutiny. Under the circumstances here, the City was not placed on notice by unsubstantiated reports of constitutional infirmities in its stop-and-frisk practices, be they from members of the public, community groups, press accounts, or pending lawsuits with yet-unproven allegations (SPA153-55; 157). *See Jones*, 691 F.3d at 83-84 (no notice found where decision-maker had no reason to disbelieve officer's

account). As to *Daniels*, that case was settled and dismissed with prejudice, and the District Court readily perceived that the City complied with its obligations under the stipulation of settlement (*see* ECF #304, at 7-8). A bargained-for and court-approved resolution of the issues raised therein should not be held to constitute notice of a subsequent pattern of alleged constitutional violations.

Nor was the 1999 AG's report sufficient (SPA103-05), as any notice was nullified by the *Daniels* settlement, as well as the City's voluntarily enlistment of the well-respected RAND Corporation in 2007 to assess its stop-and-frisk practices (A5378; A6472; A9665; A21265; A21275). As noted, the RAND report revealed that allegations of racial bias were generally unfounded when suspect data was considered (A21266-68). The City was not obligated to "question" RAND's choice of a benchmark (SPA157-59), since ample legal and logical reasons support its use, there is no consensus in statistical literature about the proper benchmark, and Fagan himself conceded that suspect data is the superior benchmark (*see supra*).

(B)

The RAND Recommendations

Leaving notice aside, ample trial evidence demonstrated the NYPD's affirmative steps to ensure that stop-and-frisk activity was conducted in accord with constitutional principles. Insofar as the RAND report identified limited areas for improvement, the City took meaningful action. Most of RAND's recommendations

were implemented, including enhanced audits, and Academy testing regarding the preparation of UF-250s (A5411; A6524; A9675-76; A9681-83; A21269-70). The UF-250 was revised to track the use of force during *Terry* stops (A9680-81). A 2009 pilot program required officers to inform subjects of the basis for the stop, absent exigent circumstances; that policy was permanently implemented citywide in 2010 (A5399-5400; A6528-29; A9676-79). The NYPD developed an informational card for officers to provide to stop subjects where practicable, explaining common reasons for stops and furnishing information on lodging complaints (A5399-5400; A6529). The City also purchased RAND's "benchmarking software," to identify "outliers" whose UF-250s showed a pattern of disproportionately stopping minorities (A6526; A9683). However, when the software was run in 2008, the results found no officers who stopped significantly more minorities than their peers (A5412; A9684-86). Rather, a handful of officers had stopped *fewer* minorities than their comparators – an exercise that was time-consuming and identified no bias issues (*id*.).

Indeed, the City exceeded RAND's recommendations. *Inter alia*, it developed a mandatory five-part video series on stop-and-frisk; re-issued the policy prohibiting racial profiling; emphasized, trained on, and ultimately mandated the need to detail stops in officer's activity logs; continued to report stop data to the City Council; and made that information publicly available on the NYPD website (A5574; A6860; A7335; A7360-61; A7679; A9695-96; A12860-62; A14224-25; A17549-60;

A22212-13; A23218-20). Perhaps most notably, it also instituted the Rodman's Neck refresher course on stop-and-frisk practices (A17881-927).

The District Court's belief that these steps were so inadequate as to constitute deliberate indifference reflects a misapprehension of the applicable "stringent" standard of fault. Where a municipality has taken steps to prevent a particular constitutional violation, it cannot be held deliberately indifferent to such violations unless those steps were "meaningless" or "obviously inadequate" to address the risk, plainly not the case here. *Reynolds v. Giuliani*, 506 F.3d 183, 196 (2d Cir. 2007). Moreover, "[s]uch inadequacy must reflect a deliberate choice among various alternatives, rather than negligence or bureaucratic inaction." *Id.* at 193, citing *Pembaur v. Cincinnati*, 475 U.S. 469, 483-84 (1986). A successful record is thus unnecessary to rebut the claim. Nevertheless, here, plaintiffs mounted no real Fourth Amendment challenge to 94% of the City's stops, and racial stop rates consistently correlated to suspect data. Accordingly, it is difficult to see how the NYPD's efforts were short of admirable, much less deliberately indifferent.

(C)

Pressure

As to "institutional pressure," including CompStat, "quotas," and performance goals, the Court's reasoning contains a significant logical flaw. The Court found that such "pressure" was a "predictable formula" to produce baseless

stops and frisks (SPA52; SPA113-14); but just as staunchly believed that officers often fail to fill out UF-250s after conducting stops, a theory used to support its finding of a widespread practice (SPA74; SPA90; SPA146-47). Clearly, undocumented stop activity would not help an officer avoid the "negative consequences" supposedly risked when his stop numbers are too low (SPA52; SPA113-14). Similarly, "pressure" to inflate the number of UF-250s could not lead to unsupported frisks, since frisks (and searches) are recorded on the same form as the initial stop.

That aside, in concluding that constitutional concerns are consciously disregarded at CompStat meetings, the Court overlooked the complex structure of an organization as large and sophisticated as the NYPD. CompStat exists primarily to maximize the effectiveness of police deployment, and discourse at its meetings thus focuses on efficient and targeted use of scarce resources, methods that have successfully brought crime down to historic lows (A5439-41). Detailed review occurs in a more hands-on setting than CompStat, primarily when sergeants directly supervise the officers in their command (*see* pp. 74-84, *infra*).

As to performance goals, the NYPD certainly expects its officers to carry out their duties by effecting arrests, issuing summonses, and conducting stops (*e.g.*, A3452-54; A5529-32; A8865-67; A9601-02; A10210-12; A13346-50). Performance goals are an important tool for ensuring that police officers are doing

the job entrusted to them – detecting and deterring crime. Even plaintiffs' policing expert conceded that they can be beneficial, so long as they do not devolve into a count of numbers for numbers' sake (A7493-96; A7528-29), just as NYPD commanders consistently said (*e.g.*, A5577-78; A7918-19; A9297; A9601-02).

The Court's notion that such was the case here was largely rebutted by the survey of recently-retired NYPD personnel. Nearly 80% of survey participants reported "high" or "medium" pressure to "obey legal and constitutional rules" during the current mayoral administration (SPA112; A13400). There is no merit to the Court's theory that, unless emphasis placed on performance standards is mathematically equal to the quantum of weight given to legal concerns, deliberate indifference may be found (SPA112). This proof reflected the City's "deliberate efforts to protect plaintiffs' rights," precluding a finding of deliberate indifference. *Reynolds*, 506 F.3d at 197.

Finally, the District Court's finding of "pressure" again overlooked the critical element of causation. Plaintiffs were obligated to demonstrate that "pressure" to make stops not only existed, but actually caused their constitutional deprivations. *See City of Canton*, 489 U.S. at 391; *Jenkins v. City of New York*, 478 F.3d 76, 94 (2d Cir. 2007). Just as no evidence connected McDonald's stop with indirect racial profiling, not a single officer who stopped any named plaintiff or class member testified to doing so for fear of negative consequences, or to satisfy superiors.

Further, despite the District Court's finding of "institutional pressure" in the precincts where secret recordings were made (SPA113), none of the anecdotal incidents presented at trial took place in those precincts.[19]

(D)

"The Right People"

Specifically as to the EPC claim, the Court inferred that, in focusing its officers on "the right people," the NYPD created an environment where general racial crime suspect data alone is used to justify stops (SPA223-30). For all the same reasons set forth above, any such inference derived solely from a mischaracterization of the evidence (*see* pp. 62-63, *supra*).

(E)

Oversight

Although the District Court went on to find shortcomings in the City's training, supervision, monitoring, and discipline, it failed to analyze this record evidence as a whole. This constituted clear error, as the City's various oversight systems are synergistic; they cannot be considered meaningfully in isolation. *See*

[19] Also, as the District Court acknowledged, the three "whistleblower" officers from those precincts selected what to record, which throws significant doubt on the probative value of the taped exchanges (SPA113, n.235). While the City certainly does not endorse the statements made in those recordings, it is noteworthy that all three dated from 2010, before the change in the "Quota Law," and are therefore markedly stale in determining whether injunctive relief is necessary or appropriate.

Doe v. Menefee, 391 F.3d 147, 163-64 (2d Cir. 2004), *cert. denied*, 546 U.S. 961 (2005).

For instance, since training continues throughout officers' careers in various forms, the hands-on training process also serves to supervise and monitor officers' sound understanding of constitutional principles (A7592-690; A17577-83; A17589-93; A17943-8375). As another example, discipline following reports of constitutional violations – even those that prove unsubstantiated – frequently includes heightened supervision and monitoring (A7135-36; A7944-50, A9883-93, A9903-08), and/or remedial training (A7042-44; A7085-92; A7076-77). Far from deliberate indifference, these comprehensive systems demonstrate the NYPD's abiding commitment to ensuring that any constitutional violations are kept to a bare minimum.

(1)

Training

Setting the foregoing aside, plaintiffs demonstrated no training deficiency that can be responsible for suspicionless or race-based stops. Recruits and impact officers receive extensive training on RAS, including the objective free-to-leave standard, NYS Penal Law, constitutional law, characteristics of armed suspects, the NYPD policy prohibiting racial profiling, impartial policing, discretion, policing a multicultural city, tactics, and activity logs (A16272-17001;

A17561-926; A22214-508; *see, e.g.*, A3221-22; A3433; A3575-79; A3587-88; A3775-76; A3823; A3872-73; A4076-77; A4246-47; A4671; A5246-49, A5261-62; A5285; A5316; A6026; A6325-26; A6390-92; A6602-04, A6657; A7563; A7799-800; A7757-58; A8125-26; A8878-79; A8920; A8948-50; A12860-62). As noted, training continues throughout officers' careers in various forms: roll-call training, legal bulletins, informal on-the-job training, annual in-service training, and promotional training (A7592-690; A17577-83; A17589-93; A17943-8375).

The NYPD even instituted special reinforcement training programs, such as the recent Rodman's Neck refresher course specifically geared toward stop-and-frisk (A17881-927). Any perceived flaws in the Rodman's Neck course stem from the District Court's misapprehension of the free-to-leave standard, and other legal errors. To avoid burdening the Court with unnecessarily duplicative briefing on this issue, the City respectfully refers the Court to its appellant's brief filed in *Ligon* (Dkt. 13-3123), at pp. 31-35; 53-55. In short, the fact that training is "not in the precise form a plaintiff would prefer" cannot establish municipal liability. *Young v. City of Providence*, 404 F.3d 4, 27 (1st Cir. 2005) (citations omitted).

By concluding that the City failed to adequately train its officers on "furtive movements," the Court misconceived pertinent legal standards. The Court took great issue with Officer Moran's attempt to explain the "very broad concept" as encompassing such conduct as "changing direction," "walking a certain way,"

being "very fidgety," "going in and out of his pocket," "going in and out of a location," "looking back and forth constantly," "looking over their shoulder," "adjusting their hip or their belt," "[t]urning a part of their body away from you," "[g]rabbing at a certain pocket or something at their waist," "[g]etting a little nervous, maybe shaking," and "stutter[ing]" (A6619-21; SPA143).

Despite the District Court's outright ridicule of this testimony, it is firmly grounded in state and federal law. Courts routinely characterize such conduct as furtive or suspicious. *E.g.*, *Rodriguez*, 469 U.S. at 6; *Sokolow*, 490 U.S. at 5; *Wiggan*, 2013 U.S. App. LEXIS 14616, 2-3; *United States v. Ozsusamlar*, 278 Fed. Appx. 75, 76 (2d Cir. 2008); *United States v. Thomas*, 184 Fed. Appx. 91, 91-92 (2d Cir. 2006); *United States v. Patton*, 705 F.3d 734, 736 (7th Cir. 2013); *United States v. Mouscardy*, 722 F.3d 68, 76 (1st Cir. 2013); *United States v. Robinson*, 664 F.3d 701, 704 (8th Cir. 2011); *People v. Mack*, 26 N.Y.2d 311, 313, 315 (1970); *People v. Kadan*, 195 A.D.2d 174, 178 (1st Dept.), *lv. denied*, 83 N.Y.2d 854 (1994). It is also noteworthy that the Court omitted the context of the officers' testimony, which was conduct observed *after* the subject noticed an officer nearby (A6619-21).[20]

[20] That aside, the testimony of Moran, plus one other officer who gave similar testimony, out of tens of thousands is legally insufficient to demonstrate a systemic training problem justifying *Monell* liability.

The District Court held the reference to "stuttering" to be especially damning, an outgrowth of its belief that RAS must arise before an officer questions, or even speaks with, a subject (SPA53-54). Again, courts have repeatedly held to the contrary. *E.g.*, *United States v. Drayton*, 536 U.S. 194, 203-04 (2002); *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *United States v. Lee*, 916 F.2d 814, 819 (2d Cir. 1990); *Ozsusamlar*, 278 Fed. Appx. at 76; *Kadan*, 195 A.D.2d at 178; *see People v. Batista*, 88 N.Y.2d 650, 655 (1996) (suspect's "evasive denials" contributed to RAS).

The Court was also misguided in its belief that New York's *DeBour* standards provide a lesser degree of protection than federal law (SPA68; *see* A7094-95). In *DeBour*, the New York Court of Appeals set forth a four-tiered framework for evaluating street encounters: (1) the "request for information," requiring some objective, credible reason not necessarily indicative of criminality; (2) the "common-law right of inquiry," requiring a "founded suspicion that criminal activity is afoot;" (3) the "forcible stop and detention," requiring RAS; and (4) arrest, which demands probable cause. *DeBour*, 40 N.Y.2d at 222-23.

Notably, the third level of *DeBour* tracks *Terry* in all respects. And while the first two levels of intrusion fall short of a *Terry* stop, as the subject is objectively free to leave, they still require justification under New York law. Indeed, in *People v. Hollman*, 79 N.Y.2d 181, 194-96 (1992), the Court expressly declined to

revisit *DeBour*, despite recognizing that the Supreme Court had since clarified that only seizures receive Fourth Amendment protection. Thus, a chief pillar of support for the District Court's finding of inadequate training is undercut by proper analysis of governing legal principles. In light of the interplay between New York state and federal law, the NYPD's emphasis on *DeBour* in training exceeds, and certainly meets, federal requirements.

In particular, the District Court's analysis of purported shortcomings in training lacked any valid finding of notice. In this "most tenuous" kind of §1983 claim, decision-makers can "hardly be said to have deliberately chosen a training program that will cause violations of constitutional rights" without notice "that a course of training is deficient *in a particular respect*…." *Connick*, 131 S. Ct. at 1359-60 (emphasis added). Broad, generalized suggestions that more or better training would be desirable do not satisfy a plaintiff's burden. *Id*. at 1363-64. Rather, plaintiffs were obligated to prove that the City was deliberately indifferent to an identified "specific deficiency" in its training program. *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 129 (2d Cir. 2004). Here, the circumstances giving rise to each stop were varied and dissimilar: reports of crime in progress; anonymous tips; concerted responses to crime patterns and spikes; officer observations during patrol; and infinite permutations of the like. It is difficult to conceive of notice

specific enough to cover this scattershot theory of liability, and plaintiffs made no such showing.

(2)

Supervision and Monitoring

In addition to the foregoing, the record amply established that sergeants routinely witness stops made by their officers, guide them on applying constitutional principles to the varied circumstances they encounter on patrol, and also review their UF-250s after the fact, often inquiring into to the facts and circumstances underlying the stops they reflect (A3759; A3583; A6362; A6656-57; A7839; A8189-93; A8129-43; A8944; A9927-28; A11638-39). There is nothing suspect in this kind of hands-on supervision, and even assuming limited documentation, that is hardly evidence of deliberate indifference. *See Sarus v. Rotundo*, 831 F.2d 397, 401 (2d Cir. 1987) ("formal process" not necessary to disprove deliberate indifference claim). Rather, it is attributable to the mundane, constant context in which it occurs. Despite the District Court's preoccupation with the lack of paper trail, the Constitution does not require such basic supervisory tasks to be reduced to writing.[21]

[21] Indeed, listening to the taped exchange between McCormack and Serrano illustrates a supervisor's attempt to instruct an officer on when a person has been detained, and how changes in tone and inflection may morph a lesser encounter into a RAS stop (A13949; A13962-67). McCormack also reiterated that officers must only stop individuals based on RAS, while noting that officers must be cognizant of known crime conditions during their tour, including suspect descriptions gleaned from victim and witness accounts (*id.*; A9525-26; A9543-46; A13954-62; A13967-74).

Aside from supervision performed by sergeants, the Quality Assurance Division ("QAD") regularly monitors the basis for stops by reviewing officers' UF-250s (A5416-17; A12863-64; A16121-23; A16131-32; A16145, A16179-80). On the theory that the City had "conceded" the inadequacy of the UF-250 in establishing the constitutionality of a stop, the District Court found all such systems deficient (SPA131-37). But the supposed concession was no concession at all. It was instead a challenge to the sufficiency of the forms alone in satisfying the preponderance standard necessary for *judicial* review (SPA72, n.101). The Court inverted basic principles when it ruled that UF-250s could satisfy plaintiffs' stringent burden of proof, yet found that the NYPD willfully disregarded constitutional principles in using those documents as part of its global oversight system.

(3)

Discipline

The Court's finding of deliberate indifference in discipline was likewise unsupported. Indeed, the NYPD has a comprehensive process for disciplining officers who are the subject of civilian complaints, even if unsubstantiated, including the Office of the Chief of Department ("OCD"), Performance Monitoring, borough-level CCRB monitoring, performance evaluations, the Profile and Assessment Committee; and the Career Advancement Review Board ("CARB") (A7944-50, A9883-93, A9903-08).

The Department Advocate's Office ("DAO") receives substantiated referrals of illegal stop activity primarily from the CCRB or Internal Affairs ("IAB"), whether alleging a lack of RAS or racial profiling, and recommends an appropriate form of discipline to the Commissioner (A7025-28; A7037-38; A7175-77; A7189-90). IAB often performs "integrity tests," where an undercover poses as a citizen making a complaint, to see if the officer applies appropriate standards in conducting a stop (A7143-44; A7169-73). Those cases are also referred to DAO for recommended discipline (A7187-88).

The NYPD uses a system of progressive discipline (A7162; A8907). In ascending order, available recommendations by DAO include "no action," instructions, warn and admonish, command discipline, lost vacation days, and termination (A7138-40; A7165; A7177). If the officer will not accept the recommended discipline, DAO must bring formal charges and specifications and prove the misconduct by a preponderance of the evidence (A7036; A7047; A7165-67).

The DAO is staffed with roughly 25 experienced trial attorneys; 90% come from a prosecutor's office or the Legal Aid Society (A7147-48). As a trial unit, DAO depends on the availability, cooperation, and credibility of witnesses (A7035-36). Thus, if DAO determines that the CCRB's results cannot meet the preponderance standard, it recommends no action (A7049-59; 7083). Since 2005,

DAO has performed its sufficiency review early in the process; consequently, charges are preferred less often, but far fewer cases are dismissed after disciplinary hearings (A7155-56). Also, many cases where no action was once recommended now result in instructions (A7157).

Generally, about 70-80% of cases referred by the CCRB result in disciplinary action (A7052; A7069). Even when the officer did not willfully violate the law, but made a good-faith mistake in applying the complex, fact-specific principles of RAS, DAO recommends discipline (A7042-44; A7085-92). In such cases, "instructions" in the relevant area of law are often deemed appropriate for a first substantiated complaint (*id.*). If the officer later reoffends in the same fashion, DAO always recommends a more stringent penalty (A7077; A7116).

Even officers who are the subject of unsubstantiated CCRB cases may be disciplined by being placed on performance monitoring (A7135-36).[22] All officers' disciplinary history is tracked in the Central Personnel Index, which DAO uses along with the CCRB's database in making its determinations (A7161-62). In a recent policy change, if the CCRB and DAO disagree on whether charges should be

[22] The CCRB may deem a complaint "exonerated," "unfounded" or "unsubstantiated" (A7149). Occasionally, if DAO finds a complaint that was wrongly deemed unfounded or unsubstantiated, it will still bring charges against the officer (A7150-52).

brought, the CCRB may prosecute the case provided certain prerequisites are met (A7168-69; A7183-86).

The District Court believed that the use of "instructions" was evidence of deliberate indifference (SPA151-52), but undisputed evidence showed its effectiveness in curbing misconduct. Since 2005, only three officers have reoffended with the same type of misconduct after receiving instructions (A7076-77). The Court also faulted DAO for refusing to rubber-stamp credibility assessments of the CCRB; yet the Court itself did the same, crediting the testimony of various plaintiffs whose complaints had been unsubstantiated (SPA191-96; A6064; SPA175-80; A2916; SPA161-66; A12634-47; SPA187-91; A12965).

Notably, the evidence affirmatively established that disciplinary actions effectively increased from 2008-12 (A7178-79, A23248). To the extent that plaintiffs' police practices expert criticized these systems, he had no familiarity with the underlying incidents, and conducted only a cursory analysis of NYPD disciplinary practices (A7523, A7525-26). Further, plaintiffs identified no individual disposition indicative of deliberate indifference to the need for discipline.

In short, none of the varied ways in which the District Court found deliberate indifference is supported by the law or the record.

POINT IV

EVEN IF THE LIABILITY ORDER IS AFFIRMED, THE INJUNCTION MUST BE VACATED.

It is a "settled rule" in all federal equity cases that "the nature of the violation determines the scope of the remedy." *Rizzo v. Goode*, 423 U.S. 362, 378-79 (1976) (citation and internal quotation marks omitted). The nature and scope of injunctive relief must be narrowly tailored to address the specific constitutional violation found. *Milliken v. Bradley*, 433 U.S. 267, 280-82 (1977). Generally, injunctive relief geared toward institutional reform is imposed only after a history of constitutional violations and resistance to change, or as part of a consent order. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 14-15 (1971); *Hutto v. Finney*, 437 U.S. 678, 687 (1978); *see also* A24069.

Here, the Court cited no evidence necessitating a "comprehensive order to insure against the risk of inadequate compliance." *Hutto*, 437 U.S. at 687. Rather, the Court relied on the City's demurral, at a conference held months before trial, to "engage in a joint attempt to craft remedies," admonishing the City for taking a position that "contrast[ed] with the many municipalities that have reached settlement agreements or consent decrees when confronted with evidence of police misconduct" (SPA7; SPA8, n.20). The Court also noted that the City did not offer a remedial plan in its post-trial briefing (SPA13; A2431-34; Dist. Ct. ECF #27, p.

18). However, it was premature for the City to submit remedial plans prior to any finding of liability, because it had not yet been apprised of the nature, scope or magnitude of the purported constitutional violation. *Rizzo*, 423 U.S. at 378-79; *Milliken*, 433 U.S. at 280-82.

In *Schwartz v. Dolan*, 86 F.3d 315, 319 (2d Cir. 1996), this Court vacated the remedy portion of a judgment, remanding to allow the agency an opportunity to propose an appropriate remedy. This Court also cautioned lower courts to resist the "tempt[ation]," upon finding a constitutional defect, "to right the wrong by assuming control of the entire system in which the offensive condition exists and prescribing a new system deemed to meet constitutional requirements." *Id*. (citation and internal quotation marks omitted). A court must first "give the state a reasonable opportunity to remedy a constitutional deficiency, imposing upon it a court-devised solution *only if* the state plan proves to be unfeasible or inadequate for the purpose." *Id*. (emphasis added, internal quotation marks omitted). Similarly, in *Dean v. Coughlin*, 804 F.2d 207, 213-14 (2d Cir. 1986), a preliminary injunction was set aside because the District Court imposed its own remediation plan rather than using the plan it had directed the offending agency to prepare. Here, the City should have been given a meaningful opportunity to submit a remedial plan following the liability ruling. Because that

opportunity was never afforded, the remedies here were "largely drawn from submissions by plaintiffs and DOJ" (SPA9, n. 27).[23]

As it stands, the Injunction impermissibly intrudes on the NYPD's internal operations. Although a federal court's equitable powers are broad, "appropriate consideration must be given to principles of federalism in determining the availability and scope of equitable relief." *Rizzo*, 423 U.S. at 379; *accord*, *Milliken*, 433 U.S. at 280-82. In crafting a permanent injunction, "federal courts must take care to exercise a proper respect for the integrity and function of local government institutions." *Schwartz*, 86 F.3d at 319 (citation and internal quotation marks omitted). While it is the province of the courts to remedy past or imminent official interference with constitutional rights, "it is for the political branches of the State and Federal Governments to manage [public institutions] in such fashion that official interference with [constitutional rights] will not occur." *Lewis v. Casey*, 518 U.S. 343, 349 (1996).

In *Rizzo*, 423 U.S. at 366 n.2, the trial court entered a detailed order imposing procedures for the handling of complaints against a police department, mandating the revision of recruit manuals and rules of procedure, and requiring the

[23] Notably, DOJ refused to take a position on whether the NYPD's practices were unconstitutional, and it has never brought suit against the City in this respect. Rather, it weighed in solely on remedial steps, relying largely on those deemed appropriate in the context of consent decrees (A24069).

maintenance of statistical records to allow court monitoring. In reversing, the Supreme Court concluded, *inter alia*, that the trial court's decision to revamp the department's internal procedures "was indisputably a sharp limitation on the department's latitude in the dispatch of its own internal affairs." *Id*. at 379 (internal quotation marks omitted). *See also Rahman*, 530 F.3d at 626 (the "time is past" when broad structural injunctions allowing the judiciary to "tak[e] control of executive functions" were thought to be "sensible").

In fact, equitable relief should not be granted unless the plaintiff has no adequate remedy at law. *Id*. at 626; *see NML Capital, Ltd. v. Republic of Arg*., 727 F.3d 230, 241 (2d Cir. 2013). Where, as here, damages are available to remedy individual wrongs, and a body of precedent will curb unlawful behavior "in the normal way," the judiciary should exercise "modesty" rather than impose wide-ranging injunctive relief encroaching upon duties and expertise of the executive. *Rahman*, 530 F.3d at 626-28.

Judges and commentators frequently raise concerns over institutional reform injunctions such as this one, which may bind officials to judicially-devised policy choices for decades. *See* Ross Sandler & David Schoenbrod, *Democracy By Decree: What Happens When Courts Run Government*, p.139 (2003) ("It goes beyond the proper business of courts; it often renders government less capable of responding to the legitimate desires of the public; and makes politicians less

accountable to the public"); Horowitz, *Decreeing Organizational Change: Judicial Supervision of Public Institutions*, 1983 Duke L. J. 1265, 1288 (finding "[t]he use of litigation to effect change in large, complex, ongoing, public institutions [to be] a more hazardous venture that it is frequently made out to be"); *Brown v. Plata*, 131 S.Ct. 1910, 1955 (2011) (Scalia, J., dissenting) ("…[S]tructural injunctions do not simply invite judges to indulge policy preferences. They invite judges to indulge *incompetent* policy preferences. Three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions.") (emphasis in original).

A prime example of this kind of unwarranted intrusion is the court-ordered body-worn camera pilot program, an issue that was "inadvertently raised" in a stray remark during a City witness' testimony, and never pursued by plaintiffs or addressed by their experts (SPA25-28). The need for body cameras was thus "not fairly the subject of litigation." *City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 144-45 (2d Cir. 2011) (citation and internal quotation marks omitted). It also runs afoul of the precept that "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 765 (1994) (citations omitted).

Indeed, the body-camera program raises many thorny issues that were never explored at trial. If they are to remain on at all times, they will capture far

more than *Terry* stops, including when officers enter private residences in response to calls for assistance, or respond to accidents or crime scenes where victims have been injured or killed. Both scenarios implicate serious privacy concerns. Alternatively, if the officer is expected to activate the camera only when appropriate, that will likely impede quick reaction to fast-developing situations, compromising officer safety. The latter choice will also inevitably lead to accusations of an incomplete video record.

Further, the Injunction provides that, at the end of the year-long program, the "Monitor will work with the parties to determine whether the benefits of the cameras outweigh their financial, administrative and other costs," and recommend to the Court whether the program should be discontinued or expanded (SPA27). Whether performed by the Monitor or the Court, it is inappropriate for the federal judicial branch to engage in such policy judgments, which are properly entrusted to the Police Commissioner.

Another example of the Court engaging in policy-making is the incorporation of "Joint Remedial Process negotiations." A multitude of "stakeholders" have been granted a say in the "negotiation" of reforms (SPA24, SPA28-32). These provisions are based solely on the Court's view as to who should have a direct say in law enforcement policy, not on principles of law. The Injunction even contemplates incorporation of certain Immediate Reforms into the

Joint Remedial Process (SPA24). However, the Police Commissioner – not the Court, the Monitor, the "Academic Advisory Council," or any of the "stakeholders" – has the duty and necessary expertise to choose, in the exercise of his discretion, the best ways to protect public safety while obeying legal restraints.

Although the Injunction purports to forbid the Monitor from undermining the role of the Police Commissioner, that provision is meaningless unless the Commissioner is granted veto power over the legion of parties granted a role in the Remedial Processes, which is plainly not to be. A federal court order is not the appropriate device to achieve the amorphous goal of improved police-community relations; that is the province of the local executive branch, answerable to the people through the political process.[24]

Finally, the duration of the Injunction is impermissibly indeterminate. The Monitor is to remain in place until "the City has achieved compliance with the Immediate and Joint Process Reforms" (SPA12-13). Thus, the federal judiciary will remain involved with critical internal NYPD operations until the Court is satisfied, which could be decades. If this open-ended Injunction were permitted to stand, the Court would take on the role of municipal policy-maker indefinitely.

[24] That process is already well underway here. The Mayor-Elect and his newly appointed Police Commissioner have stated the intent to enhance the public/private partnership in fostering public safety. It is precisely within the elected executive's discretion to choose a preferred mode of policing, without being hamstrung by an overreaching court order.

That is particularly concerning because the District Court believes that stop activity is only consonant with equal protection principles if the rate of stopped pedestrians by race is equal to their racial representation in the local census-tract population (SPA51; SPA101-02).

In sum, even if this Court should affirm the Liability Order, the Court abused its discretion in issuing the Injunction. Absent reversal, the Injunction should be vacated and the matter remanded for the City to submit and institute a remedial plan.

POINT V

THE CITY WAS DEPRIVED OF DUE PROCESS DUE TO THE EGREGIOUS APPEARANCE OF PARTIALITY.

After reviewing a very limited portion of the District Judge's conduct, this Court has already determined that a reasonable observer, informed of all the facts, could question her impartiality. Now, after review of the entire record, and especially in light of subsequent events, the Court should find that the appearance of partiality in this bench trial was so pronounced as to violate the City's due process rights, even without a finding of actual bias. Accordingly, to preserve

public confidence in a detached and neutral judiciary, both orders should be vacated and the City granted a new trial.[25]

A judge shall disqualify herself "in any proceeding in which [her] impartiality might reasonably be questioned." 28 U.S.C. §455(a). The test is whether a reasonable observer, informed of all the facts, might question whether the judge has an interest in the litigation's outcome. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988); *Bayless*, 201 F.3d at 126-27.

Actual bias in the fact-finder is not the only way for a party's due process rights to be abridged. Due process may be impacted even "by judges who have no actual bias" and "would do their very best to weigh the scales of justice equally between contending parties[,]" because "to perform its high function in the best way, justice must satisfy the appearance of justice." *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 825 (1986), quoting *In re Murchison*, 349 U.S. 133, 136 (1955). Indeed, "the *appearance* of evenhanded justice … is at the core of due process." *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, concurring)(emphasis added).

[25] The City's previous motion for vacatur of the orders under review on these grounds was denied without prejudice to renewal upon full briefing (ECF #265, 335).

In a civil action, this Court reviews a §455 claim raised for the first time on appeal for fundamental error, which is error "so serious and flagrant that it goes to the very integrity of the proceeding." *Taylor v. Vt. Dep't of Educ.*, 313 F.3d 768, 795 (2d Cir. 2002) (citation and brackets omitted). At the discretion of the Court, a violation of §455 may result in the vacatur of an order or judgment. *Liljeberg*, 486 U.S. at 862; *Aetna*, 475 U.S. at 828; *United States v. Amico*, 486 F.3d 764, 766 (2d Cir. 2007). The risk of undermining public confidence in the judicial process is a prime consideration in determining whether such a remedy is warranted. *Liljeberg*, 486 U.S. at 864; *Amico*, 486 F.3d at 775 and n.3. That risk, in turn, depends upon whether the appearance of partiality is "egregious." *In re Bergeron*, 636 F.3d 882, 884 (7th Cir. 2011).

The danger of compromised public confidence is particularly acute in a bench trial, or even if the disqualified judge "cast[] the deciding vote" on a multi-member tribunal. *Aetna*, 475 U.S. at 827-28.

(A)

Extrajudicial Acts

First, it is settled that the Judge was improperly involved in the inception of this action (ECF #304). The judge repeatedly urged plaintiffs to bring a racial profiling suit against the City, advocated a basis for the claim, and "suggested that such a claim could be viable" (*id*. at 9; *see also* n.17). Any judge

so drawn into crafting a claim cannot appear, to the reasonable observer, wholly disinterested in its outcome. *Murchison*, 349 U.S. at 137.

Further, the Judge appeared to exploit the related-case rule to steer this case to her courtroom (*id*.). Even if plaintiffs had invoked the rule of their own accord, they could not have properly linked the dismissed *Daniels* case with the nascent *Floyd* action (*id*. at 9-10, n.17); that the Judge suggested the association only magnifies the appearance of impropriety. Simultaneously, the Judge assured plaintiffs that she would rule in their favor on discovery matters even before the suit was filed (*id*. at 9).

During the trial, which engendered intense public scrutiny, the Judge availed herself to several members of the press, making public statements that revealed deep skepticism toward law enforcement (*id*. at 11-12). One article, taken as a whole, implied that the Judge harbored a predisposition against police officers, and otherwise might lead informed observers to question whether she could fairly render judgment in this case (*id*.). *Cf. Liteky v. United States*, 510 U.S. 540, 551 (1994).

Recent events have vastly magnified the effect of the foregoing. During the pendency of this appeal, the Judge repeatedly created the perception that she was allied with plaintiffs' interests.

On November 1, 2013, immediately after the case was reassigned, the Judge made additional statements in the press directly regarding this case (Mark Hamblett, *Circuit Rebuffs Scheindlin on Stop/Frisk*, N.Y.L.J. November 1, 2013). On November 8, 2013, the Judge not only sought permission to appear as a party in this appeal, but submitted an uninvited legal brief seeking *en banc* rehearing (ECF #261). Significantly, she claimed a protected due process interest in the case (*id*. at 9). *See Liljeberg*, 486 U.S. at 860.

On November 10, 2013, the Judge's putative counsel wrote to this Court on the Judge's behalf, urging summary vacatur of its reassignment ruling (ECF #266).[26] On November 12, 2013, the Judge publically commented on the case yet again. *See* http://blogs.wsj.com/law/2013/11/12/a-puzzling-statement-from-judge-scheindlin/. The following day, the Judge filed an opposition to the City's motion to vacate the orders now on review (ECF #299). She launched an adversarial attack on various aspects of the City's motion, challenging, *inter alia*, the very jurisdiction of this Court (*id*. at 5).

On November 13, 2013, this Court decisively denied the Judge leave to appear, holding (a) that "reassignment is not a legal injury to a judge," especially since no judicial misconduct had been found; and (b) that "it is

[26] Before being docketed, the letter was transmitted via email to two of the judges on the panel.

procedurally improper for a District Judge to enter an appearance in an appeal of her own decisions, whether as a party, intervenor, or amicus" (ECF #301, at 6). Nevertheless, on November 18, 2013, the Judge again sought *en banc* review (ECF #311). Then, on November 20, 2013, the Judge responded to the City's opposition to *plaintiffs'* motion for additional time to respond to its vacatur motion (ECF #325). Both motions were denied, with a reminder that the Judge had already been denied party status (ECF #333). Still, on November 25, 2013, the Judge filed a third application for *en banc* review (ECF #336).

Such persistence is, in a word, egregious. In *Amico*, 486 F.3d at 776, this Court found that a district judge's single attempt to respond uninvited to a mandamus petition contributed to the appearance of partiality, and vacated a final judgment. Doubtless, here, the multitude of uninvited and unwelcomed filings by the Judge – especially those addressing the merits, and even scheduling matters between the parties – immeasurably heightened the threat to public confidence in the validity of both orders under review, and similarly mandates in favor of vacatur.

(B)

Judicial Conduct

As noted throughout this brief (*see supra*), the Judge made a host of unorthodox rulings against the City. Especially when viewed against the backdrop

outlined above, each gives rise to still more reasonable questions about her detachment.

On the Fourth Amendment claim, the Judge permitted plaintiffs to ignore the impregnable totality-of-the-evidence standard, and even precluded live testimony by an officer seeking to explain the basis for his stops (A8988-96). She simultaneously allowed plaintiffs' expert to present extensive evidence in the form of legal conclusions, which would be forbidden even if they fell within the scope of his expertise, which they did not.

The Judge *sua sponte* arranged an in-court "show up" identification procedure for Downs to identify the officers who had purportedly stopped him, even after he failed to pick them out of a CCRB photo array; and suggested that the officers perjured themselves in denying any memory of the stop (*see Amico*, 486 F.3d at 776), arguably corroborating her publicized predisposition to disbelieve police officers. Resolutely unaffected by the City's "effectiveness" arguments, she nonetheless accepted plaintiffs' assertions that NYPD stop-and-frisk practices had "not been particularly successful" in producing "hits," and concluded they were therefore unlawful. She also gratuitously declared, again *sua sponte*, that the state statute authorizing police officers to conduct frisks was unconstitutional, despite the judicial imperative to avoid doing so unnecessarily. *E.g.*, *Nicholson v. Scoppetta*, 344 F.3d 154, 167 (2d Cir. 2003).

Examples relating to the EPC claim are also legion. The Judge coined a new type of equal protection violation – "indirect racial profiling" – where no valid basis for such a violation was established at trial. She also applied a selective enforcement theory, which plaintiffs not only never alleged, but had waived by the definition of their class; and strongly condemned the City for arguing against it (SPA233). While proof of non-discriminatory reasons for challenged actions is a vital defense against an intentional discrimination claim, the Judge prevented the City from proving the effectiveness of its stop-and-frisk activity. She also declared the diverse racial demographics of the NYPD's ranks to be irrelevant to the issues presented (A7979-80).

Also noteworthy is the Judge's extensive reliance on materials outside the trial record (SPA4, n.6; SPA5; SPA78-79; SPA87, n.158; SPA98-99, SPA231-235), particularly those used to brand the NYPD as a racist organization (*see* p. 20, *supra*). None of those materials are properly subject to judicial notice. *Cf. United States v. Bari*, 599 F.3d 176, 179-81 (2d Cir. 2010). Reliance on such sources raises legitimate questions of whether the Judge acted as an advocate for the plaintiffs, particularly in a bench trial. *See State v. Gokey*, 14 A.3d 243, 249 (Vt. 2010) ("outside research is especially damaging when the judge sits as finder of fact").

Given the cumulative effect of the foregoing, an informed observer could certainly question whether: (1) the Judge's predisposition against the NYPD helped to begin this action; (2) she improperly caused it to be channeled to her courtroom; and (3) she compromised her role as a neutral fact-finder. This Court recognized that §455(a) was offended simply by the Judge's extrajudicial conduct before and during the trial. Now, in further light of her judicial rulings, coupled with her relentless efforts to oppose the City during the appellate proceedings, the public has ample cause for concern that the Judge aligned herself with plaintiffs' interests, and that the orders under review resulted from that partiality.

In short, the appearance of partiality is so flagrant that it impaired the very integrity of the proceedings. If the appealed-from orders are not reversed on the merits, a new trial is essential to restore public confidence in a neutral and detached judiciary. At a minimum, in view of the foregoing, this Court should decline to afford the usual deference to the lower court's credibility assessments (*see* p. 45, *supra*).

CONCLUSION

THE ORDERS APPEALED FROM SHOULD BE VACATED AND THE COMPLAINT DISMISSED. IN THE ALTERNATIVE, THE ORDERS SHOULD BE VACATED AND THE CASE REMITTED FOR A NEW TRIAL, AND/OR FOR THE CITY TO SUBMIT A REMEDIAL PLAN.

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CERTIFICATE OF COMPLIANCE

This brief complies with this Court's order of September 24, 2013 (ECF #75) because it contains 21,823 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).