UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID FLOYD, *et al.* Plaintiffs, -against- CITY OF NEW YORK Defendant.	08 Civ. 1034 (AT)
KELTON DAVIS, *et al.* Plaintiffs, -against- CITY OF NEW YORK Defendant.	10 Civ. 0699 (AT)
JAENEAN LIGON, *et al.* Plaintiffs, -against- CITY OF NEW YORK Defendant.	12 Civ. 2274 (AT)

DEFENDANT'S MEMORANDUM OF LAW OPPOSING PLAINTIFFS' MOTION FOR EMERGENCY RELIEF

JAMES E. JOHNSON
Corporation Counsel of the City of New York
Attorney for Defendant City of New York
100 Church Street
New York, N.Y. 10007

Of Counsel: David Cooper
Tel: (212) 356-2579
Matter No.: 2008-003588

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SOUTHERN DISTRICT OF NEW YORK

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Plaintiffs,

- against –

08 CV 1034 (AT)

CITY OF NEW YORK, et al.,

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DEFENDANT'S MEMORANDUM OF LAW OPPOSING PLAINTIFFS' MOTION FOR EMERGENCY RELIEF

PRELIMINARY STATEMENT

Plaintiffs in the above referenced matters jointly seek an Order directing Defendant City of New York ("City") and its agency, the New York City Police Department ("NYPD") to, among other things, completely cease enforcement of the social-distancing and face covering protocols enacted to halt the spread of the dangerous novel coronavirus ("COVID-19"). Plaintiffs contend that the enforcement of emergency measures to combat COVID-19 violate the Remedial Orders entered in *Floyd v. City of New York*—a case which was directed at the legality of NYPD's stop-and-frisk policy, and did not (indeed, could not) contemplate the extraordinary conditions now giving rise to a declared citywide and statewide state of emergency. The relief requested has even less connection to the agreements that the City negotiated in *Davis* and *Ligon* concerning trespass arrests at or near New York City Housing Authority ("NYCHA") and Trespass Affidavit Program ("TAP") buildings.

The motion is procedurally deficient. In the Remedial Order, the court appointed a Monitor precisely to avoid burdensome and inefficient motion practice between the parties, and provided no mechanism for Plaintiffs to seek their current relief before the Court. Plaintiffs concede that they made their broad discovery request directly to NYPD via email with the Monitor's knowledge and he did not take action. The motion should be denied on those grounds alone.

Regardless, the motion plainly falls outside the scope of this litigation. Plaintiffs seek relief for a litany of complaints concerning various forms of alleged police misconduct in COVID-19 and "COVID-19 related" enforcement, none of which were remotely the subject of

the Liability Opinion or Remedial Order. Even the court, when acknowledging its power to order broad equitable relief, created a monitorship that was specifically and narrowly focused on the City's compliance with reforming NYPD's use of stop–and-frisk and did not, in fact, could not assert broad jurisdiction over NYPD's enforcement practices generally.

Despite this limited scope, Plaintiffs' current allegations run a broader gamut: instances of excessive force; pretextual stops based on marijuana possession, fare evasion, and jaywalking; retaliation against those seeking to record police action; and violations of social distancing by police officers thereby putting members of the public at medical risk. *See* Pls.' Mem. of Law, *Floyd v. City of New York*, No. 08 CV 1034 (AT) (S.D.N.Y. May 26, 2020), ECF No. 760, [hereinafter "Pls.' Mem."] at 2, 14-15. It is crystal clear that the underlying litigation does not concern, nor does the Remedial Order, address such allegations. Plaintiffs' allegations of racial discrimination in the enforcement of social-distancing regulations far exceeds the finding that NYPD had a policy of "indirect racial profiling" that was found after trial. In short, the recent emergency policies to fight the spread of COVID-19, enacted in the wake of an unprecedented public-health crisis and under the government's authority to declare and remediate emergencies, does not violate a Remedial Order that could not have contemplated anything of the kind and was, by its own terms and by necessary legal constraints, narrowly tailored to address specific constitutional problems with former stop-and-frisk policies. Thus, all the relief requested exceeds the Court's jurisdiction.

Moreover, the most extreme relief Plaintiffs seek would amount to a halt to enforcement of the social-distancing requirements that is helping to bring the COVID-19 crisis under control. The relief requested is not only far beyond the scope of the Remedial Order, but could have

potentially disastrous effects on the ability to contain the spread of a deadly and highly contagious virus—especially among groups who are reportedly the most vulnerable to the effects of the virus. An order ceasing all enforcement of social distancing, face covering, and curfew requirements[1], in this context, allowing them to avoid a baseline requirement that the policies be shown to be unconstitutional on their face, and in doing so distorting the Remedial Order beyond its four corners. Prohibiting enforcement of social distancing and face mask orders issued by the Governor and Mayor would also upend the work of public health policymakers who are in the best position to advise on social-distancing guidelines. As such, Plaintiffs' motion must be denied in its entirety.

PROCEDURAL HISTORY

The underlying litigation that was the genesis of the Order that Plaintiffs seek to enforce began in 2008 when they filed complaints alleging they were "stopped, questioned, and frisked by the NYPD without reasonable suspicion." *Floyd v. City of New York* [hereinafter "*Floyd I*"], 813 F. Supp. 2d 417, 423 (S.D.N.Y. 2011) (summary judgment opinion). The district court certified a class consisting of "[a]ll persons who since January 31, 2005 have been, or in the future will be, subjected to the New York Police Department's policies and/or widespread customs or practices of *stopping*, or *stopping and frisking*, persons *in the absence of 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

[1] By N.Y.C. Emergency Executive Order (de Blasio) No. 122, dated June 7, 2020, Mayor de Blasio revoked the prior emergency executive orders that imposed a citywide curfew.

Amendment." *Floyd v. City of New York* [hereinafter "*Floyd II*"], 283 F.R.D. 153 (S.D.N.Y. 2012) (emphasis added) (class certification order).

At the conclusion of the lengthy nine-week trial, the Court found that NYPD's policies led to unconstitutional stops that lacked individualized reasonable suspicion and constituted a policy of indirect racial profiling with deliberate indifference to constitutional parameters. *See Floyd v. City of New York* [hereinafter "*Floyd III*"], 959 F. Supp. 2d 540, 578-84 (S.D.N.Y. 2013) (liability opinion). The court also found that NYPD had a policy of "indirect" racial profiling, which violated the Fourteenth Amendment in the manner in which it targeted members of the Class for stop-and-frisk activity, notwithstanding their correlation to reported crime data. *See id.* at 602-06. Finally, the court found that the NYPD showed deliberate indifference in training and discipline as to stop-and-frisk, and "pressured" officers to conduct many stops and frisks with deliberate indifference to constitutional constraints. *See id.* at 589-603. The Court then entered the Remedial Order requiring NYPD to work with an appointed independent Monitor, whose responsibilities are "specifically and narrowly focused", to implement reforms related to its stop-and-frisk policies. *Floyd v. City of New York* [hereinafter "*Floyd IV*"], 959 F. Supp. 2d 668, 677 (S.D.N.Y. 2013).

Meanwhile, in the related *Davis* action, the Court certified a class consisting of "[a]ll African-American and Latino NYCHA residents and/or family members, authorized guests or visitors of NYCHA residents, who, since January 28, 2007, have been or will be unlawfully stopped, seized, questioned, frisked, searched, and/or arrested for trespass by [NYPD] officers in or around NYCHA residences, including on the basis of race and/or ethnicity," along with a subclass of that class consisting of "authorized NYCHA residents." *See Davis v. City of New*

York, 296 F.R.D. 158, 161 (S.D.N.Y. 2013). After additional litigation, the *Davis* Plaintiffs reached a settlement agreement with the City which provided, *inter alia*, that the *Davis* Plaintiffs would participate in the monitorship ordered in *Floyd*. *See* Stipulation of Settlement and Order § H, Davis v. City of New York, No. 10 CV 699 (AT) (S.D.N.Y. Feb. 4, 2015), ECF No. 330.

Finally, in *Ligon*, the Plaintiffs have participated in the same monitoring process as *Floyd* since 2013. *See Floyd IV*, 959 F. Supp. 2d at 688-89. In 2017, the parties settled and agreed to a settlement class which consisted of "[a]ll individuals who have been or are at risk of being stopped, frisked, arrested, searched, or issued a summons inside or outdoors within the vicinity of apartment buildings enrolled in a Trespass Affidavit Program—defined as any program through which NYPD officers gain permission to patrol in and around privately-owned residential apartment buildings for the purpose of combating criminal activity—without legal justification by NYPD officers on suspicion of trespassing in said buildings." *See* Stipulation of Settlement and Order [hereinafter "*Ligon* Stipulation"] ¶ C(2), Ligon v. City of New York, No. 12 CV 2274 (SAS) (S.D.N.Y. July 19, 2017), ECF No. 296. The parties also agreed that *Ligon* would continue to participate in the monitoring ordered in *Floyd*. *Ligon* Stipulation ¶ H(1).

Since the monitorship began in 2014, the Monitor has released ten reports documenting the Monitor's efforts and NYPD's progress towards a finding of substantial compliance.

BACKGROUND

The motion currently before the court concerns police enforcement actions that did not exist at the time of the underlying litigation. In fact, it was not until the end of 2019 that news broke of a novel, highly infectious strain of coronavirus. By February 2020, the virus had spread across the globe, including to the United States. *See Who's on the U.S. Coronavirus Task Force*,

N.Y. TIMES (Feb. 29, 2020), https://www.nytimes.com/2020/02/29/health/Trump-coronavirus-taskforce.html. The first case of COVID-19 was reported in New York, on March 1, 2020. As the severity of the COVID-19 pandemic became apparent, elected officials took a series of actions to safeguard the public health. On March 7, 2020, Governor Cuomo issued the first of many executive orders addressing the emergent COVID-19 crisis. *See* N.Y. Executive Order (Cuomo) No. 202, annexed to the Declaration of David Cooper dated June 8, 2020 ("Cooper Decl.") as Exhibit D. On March 12, 2020, Mayor Bill de Blasio issued Emergency Executive Order No. 98, declaring a State of Emergency in the City.[2] *See* N.Y.C Emergency Executive Order (de Blasio) No. 98, annexed to the Declaration of David Cooper dated June 8, 2020 ("Cooper Decl.") as Exhibit H. Governor Cuomo continued attempts to protect the State of New York from this unprecedented pandemic through a series of executive orders, which were subsequently adopted by Mayor de Blasio. On March 20, 2020 the Governor announced his most drastic measures, 'New York State on PAUSE' and issued Executive Order 202.8. Executive Order 202.8, a "stay-at-home" order, instructed all non-essential businesses to reduce in-person workforce by 100% and banned all public gatherings. *See* N.Y. Executive Order (Cuomo) No. 202.8, annexed to the Declaration of David Cooper dated June 8, 2020 ("Cooper Decl.") as Exhibit E. New York on PAUSE was extended via executive order until May 28, 2020. *See* N.Y. Executive Order (Cuomo) No. 202.35.

During this time, there was great anxiety throughout the State and City regarding the safety and health of all New Yorkers. Many temporary hospitals were created including one

[2] Mayor de Blasio reviewed his order every five days pursuant to N.Y.C. Admin. Code § 3-104, and the City's State of Emergency remains active. *See* N.Y.C. Emergency Executive Order (de Blasio) No. 118, Ex. L.

constructed in the Javits Center in midtown Manhattan and a field hospital in Central Park. On March 18, 2020 Governor Cuomo announced the deployment of a 1,000-bed hospital ship, the USNS Comfort, to New York Harbor. At that point there were 1,339 cases, 695 of which were newly discovered, in New York City alone. *See Amid Ongoing COVID-19 Pandemic Governor Cuomo Announces Deployment of 1,000-Bed Hospital Ship 'USNS' to New York Harbor*, N.Y. STATE (Mar. 18, 2020), https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-deployment-1000-bed-hospital-ship-usns. Further adding to the widespread unease, the shortage of Personal Protective Equipment ("PPE") for health care staffs and ventilators left the state scrambling for this necessary medical equipment. *See Amid Ongoing COVID-19 Pandemic Governor Cuomo Announces Executive Order Allowing State to Redistribute Ventilators & Personal Protective Equipment to Hospitals with Highest Needs*, N.Y. STATE (Apr. 3, 2020), https://www.governor.ny.gov/news/amid-ongoing-covid-19-pandemic-governor-cuomo-announces-executive-order-allowing-state.

Despite the governor's and the mayor's best efforts to protect its citizens, the COVID-19 virus hit the dense population of New York City exceptionally hard. In early April, the peak of the health crisis, the City had a daily count of 6,367 new cases, 1,689 new hospitalizations, and 590 new deaths caused by the virus. As of June 2, 2020, New York City had a total of 201,123 COVID-19 cases, 52,441 hospitalizations and 16,892 deaths. *See COVID-19: Data Summary*, NYC HEALTH (last visited June 7, 2020), https://www1.nyc.gov/site/doh/covid/covid-19-data.page. Against this backdrop, NYPD was tasked with enforcing the executive orders aimed at reducing the spread of this potentially fatal disease. *See* N.Y.C. Admin. Code § 3-108; *see also,*

Declaration of Chief Pichardo ("Pichardo Decl."), annexed to the Declaration of David Cooper dated June 8, 2020 ("Cooper Decl.") as Exhibit B.

Then in June, following a day of peaceful protests concerning the death of George Floyd and with tensions already running high, overnight on May 30, 2020, there were many reported instances of rioting, vandalism, and looting of several high-end stores in the New York City. Debora Fougere et al., *NYC Officially Under Curfew; Second Set for Tuesday Night, de Blasio Says*, SPECTRUM NEWS NY1 (June 7, 2020), https://www.ny1.com/nyc/all-boroughs/news/2020/06/01/new-york-city-curfew-protests. In response, the Mayor imposed a curfew for New York City residents – the first time since 1943. Spencer Kimball, *George Floyd protests: Photos and Videos of New York City*, CNBC (June 6, 2020, 12:50 PM), https://www.cnbc.com/2020/06/06/new-york-george-floyd-protest-photos-video.html. The curfew was originally imposed beginning from 11:00 p.m. through 5:00 a.m. beginning Sunday, May 31 until Tuesday, June 2.[3] However, as the riots and looting continued further endangering the safety and well-being of New York City residents and business owners, on June 2, 2020, the Mayor extended the curfew from 8:00 p.m. to 5:00 a.m. until June 8, 2020. *See* N.Y.C. Emergency Executive Order (de Blasio) No. 119, annexed to the Declaration of David Cooper dated June 8, 2020 ("Cooper Decl.") as Exhibit M. Enforcement of the curfew exempted police officers, peace officers, firefighters, first responders and emergency medical technicians, individuals traveling to and from essential work and performing essential work, people experiencing homelessness and without access to a viable shelter, and individuals seeking medical treatment or medical supplies. *Id.* The Mayor ended the curfew on the morning of June

[3] The curfew began at 8:00 p.m. on second day.

7, 2020. *See* N.Y.C. Emergency Executive Order (de Blasio) No. 122, annexed to the Declaration of David Cooper dated June 8, 2020 ("Cooper Decl.") as Exhibit N.

STANDARD OF REVIEW

The equitable relief granted by a court must be "no broader than necessary to cure the effects of the harm that caused the violation." *Forschner Grp., Inc. v. Arrow Trading Co.*, 124 F.3d 402, 406 (2d Cir. 1997) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971)). Courts should not hesitate to decline to grant relief addressing conduct that was "not fairly the subject of litigation." *See City of New York v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 145 (2d Cir. 2011). Although "federal courts have broad discretion in fashioning equitable relief" in cases where a constitutional violation is at issue, "the Second Circuit has emphasized that "injunctive relief should be *narrowly tailored* to fit *specific* legal violations." *Id.* at 144 (emphasis added) (quoting *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 50 (2d Cir. 1996)); *see also Ass'n of Surrogates & Supreme Court Reporters v. New York*, 966 F.2d 75, 79 (2d Cir. 1992); *Missouri v. Jenkins*, 515 U.S. 70, 88 (1995).

The "narrow tailoring" inquiry requires courts to identify the "specific legal violations" in a particular case before entering injunctive relief. *Peregrine Myanmar*, 89 F.3d at 50. The Court's scope of authority to grant equitable relief is, if anything, even more limited where a party seeks to enforce a prior order. Then, the Court's authority is cabined both by the narrow tailoring requirement and the specific language in its prior order. *See Herrick Co. v. SCS Comm'ns, Inc.*, 251 F.3d 315, 327 (2d Cir. 2001) (explaining that a court's jurisdiction to enforce a prior order must "serve or connect to" the prior "exercise of the courts authority").

A preliminary injunction represents "one of the most drastic tools in the arsenal of judicial remedies," and "should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Grand River Enter. Six Nations Ltd., Inc. v. Pryor*, 481 F.3d 60, 66 (2d Cir. 2007). Typically, a preliminary injunction that "will affect government action taken in the public interest pursuant to a statute or regulatory scheme" requires the movant to show "(1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Friends of the E. Hampton Airport, Inc. v. Town of E. Hampton*, 841 F.3d 133, 143 (2d Cir. 2016). However, "[a]n even more rigorous standard--requiring a 'clear' or 'substantial' showing of likelihood of success--applies where . . . an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 149-50 (2d Cir. 1999).

ARGUMENT

By their motion filed on May 26, 2020, Plaintiffs propose that the Court issue an order declaring the City in violation of the Court's post-trial orders in Floyd; compelling certain discovery related to COVID-19 social distancing directives; mandating expedited investigation of police practices also related to the COVID-19 pandemic; and temporarily enjoining NYPD from enforcing the COVID social distancing directives. *See* Pls.' Mem., *passim*. In their supplemental motion filed on June 3, 2020, Plaintiffs further propose that the Court compel the production of discovery concerning NYPD's curfew enforcement and seemingly suggest that the Court declare the City in violation of the Liability Opinion based on NYPD's curfew enforcement. Rather than seek relief focused on the true scope of the Remedial Order, Plaintiffs

seek to make this Court and the monitor responsible for overseeing all police enforcement activity or, at the very least, all police enforcement activity with which they disagree. Without question, the causes of action in the complaints in these actions, the Liability Opinion, the Remedial Order and the Stipulations of Settlement do not justify such a breathtaking expansion of the Court's jurisdiction.

Moreover, the motion is procedurally defective, as the Remedial Order specifically provides that the Monitor—not the Plaintiffs' counsel—shall have the authority to determine what steps NYPD needs to take to address the constitutional violations found by the Court, provided that the steps taken are no broader than necessary to remedy the Fourth and Fourteenth Amendment violations relating to the NYPD's stop-and-frisk policies and practices.

Even assuming that the Plaintiffs could overcome this procedural hurdle, as noted above, the relief that the Plaintiffs request is well beyond the scope of the narrowly tailored injunctive relief ordered by this Court on the specific violations regarding NYPD's "stop-and-frisk" policies, and it does not have any connection to the agreements that the City negotiated with *Davis* and *Ligon* concerning, respectively, trespass arrests at or near NYCHA and TAP buildings. Moreover, Plaintiffs fail to make a sufficient showing that they would suffer irreparable harm absent a granting of their relief, that they could show clear or substantial likelihood of success on the merits, or that the public interest weighs in favor of granting their request for relief. Accordingly, Plaintiffs' motions must be denied.

POINT I

THE MOTION IS PROCEDURALLY AND JURISDICTIONALLY DEFECTIVE BECAUSE THE RELIEF REQUESTED HAS NO CONNECTION TO THE COURT'S REMEDIAL ORDER, AND THE COURT CANNOT GRANT RELIEF THAT IS OUTSIDE THE SCOPE OF THE REMEDIAL ORDER

The Plaintiffs have made a sweeping request for relief that finds no support in the text of the Remedial Order itself or the prior history of this litigation. The Court must deny the relief that Plaintiffs seek for two reasons. First, the relief sought does nothing to address the matter that was fairly the subject of litigation previously – namely, the Fourth and Fourteenth Amendment violations presented by the NYPD's former stop-and-frisk program. Second, the Plaintiffs have no procedural claim to the information sought.

A. Plaintiffs' motion is jurisdictionally defective.

The policies Plaintiffs seek to challenge now have nothing to do with the stop-and-frisk policies they challenged over a decade ago, beyond the fact that both involve NYPD, and, alleged racial disparities. But that alone does not bring these requests for emergency relief within the scope of the Court's previous Remedial Order. The Court's Remedial Orders was not based on racial disparities in all categories of law enforcement, nor could they have been. Indeed, the Court's Remedial Order was necessarily limited by the "essence of equity jurisdiction" to grant relief "no broader than necessary to cure the effects of the harm caused by the violation." *Forschner Grp., Inc. v. Arrow Trading Co.*, 124 F.3d 402, 406 (2d Cir. 1997).

The remedies granted in *Floyd* were, in fact, "as narrow and targeted as possible" to address the violations resulting from the conduct of stops and frisks without reasonable suspicion or based on "indirect racial profiling," *Id.* at 671; *Floyd*, 959 F. Supp. 2d 540, 660, and the Court

retained jurisdiction "to issue orders as necessary to remedy the constitutional violations *described in the Liability Opinion*." *Floyd*, 959 F. Supp. 2d at 677 (emphasis added). Neither the Remedial Order, nor the court's continued jurisdiction in these cases, extend so far as to encompass NYPD's enforcement, based on probable cause, of public health and safety measures issued during a state of declared emergency. *Cf. id. passim*.

The limitation on the Court's equitable jurisdiction is fundamental to the adversarial process. The Court's orders were based on the evidence presented and its evaluation of the legality of the policies challenged by the Plaintiffs' complaints. If the court were to consider the legality of enforcement of the social-distancing and curfew orders, it would require an entirely new legal analysis, and a plenary development of a complete and distinct factual record. In fact, limitations imposed during a state of emergency have to be analyzed under a different and more deferential standard than government actions in the normal course. *See, e.g.*, *In re Abbott*, 954 F.3d 772, 784 (5th Cir. 2020) (holding that "when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights"); *In re Rutledge*, 956 F.3d 1018, 1028 (8th Cir. 2020) (same); *Smith v. Avino*, 91 F3d 105, 109 (11th Cir 1996) ("Cases have consistently held it is a proper exercise of police power to respond to emergency situations with temporary curfews that might curtail the movement of persons who otherwise would enjoy freedom from restriction").

Rather, the Remedial Order issued in *Floyd* is "specifically and narrowly focused on the City's compliance with reforming the NYPD's use of *stop and frisk*," – *not* the enforcement of social distancing efforts and citywide curfews that the Plaintiffs now challenge. *See Floyd v. City*

of New York, 959 F. Supp. 2d 668, 677 (S.D.N.Y. 2013) (emphasis added). None of these police practices that form the core of this litigation and the trial are referenced in Plaintiffs' papers.

Furthermore, in the Remedial Order, the Court focused, inter alia, on the UF-250 form that it found "facilitat[ed] post-hoc justifications for stops." *Id.* at 681. The Court noted that justifications for stops such as "furtive movements," "suspicious bulges," or presence in a "high crime area" were insufficient to support individualized reasonable suspicion, *id.* at 679, which is also not at issue here. And while Plaintiffs now seemingly complain of racial inequities in other police practices, they do not remotely limit themselves to the policy of "indirect racial profiling" in the "stop-and-frisk" that gave rise to the *Floyd* Remedial Order, or trespass enforcement policies that led to the Stipulations of Settlement in *Davis* and *Ligon*.

Instead, Plaintiffs attempt to shoehorn other types of complaints about police practices into the Court's Remedial Order—including instances of alleged excessive force. Their attempt should be rejected. If Plaintiffs have concerns about the constitutionality of police policies and practices that are designed to contain the spread of an unprecedented public health crisis and a looting rampage, they have a variety of avenues for redress, including, but not limited to, dialogue with government unrelated to these lawsuits, or filing a new matter with the courts.

The Plaintiffs are also wrong as a matter of law as to which party bears the burden of showing "that any racial disparities are unrelated to the Court findings of discriminatory practices and policies in order to be fully compliant with this Court's orders." Pls.' Mem. at 14. The police practices discussed in the Plaintiffs' memorandum of law bear no plausible relation to the stop-and-frisk policies at issue in *Floyd*. Thus, it is the Plaintiffs who must prove that any alleged racial disparities in enforcement of social distancing and curfew orders are somehow

connected to *Floyd*'s finding of indirect racial profiling with respect to stop-and-frisk, which was based on a factual record that was fairly litigated by the parties in an adversarial proceeding. Plaintiffs' attempt to shoehorn a variety of NYPD enforcement practices into this Court's remedial jurisdiction should not be countenanced.

The challenges of the COVID-19 pandemic and the vandalism and violence perpetrated by individuals who unscrupulously used the cover of the peaceful protesters throughout the City following the murder of George Floyd to wreak mayhem have dramatically changed the City's landscape in every conceivable way, presenting new challenges that were never the fair subject of this litigation (or any other). *See City of New York v Mickalis Pawn Shop, LLC*, 645 F.3d 114, 145 (2d Cir. 2011). State and local authorities enacted extreme emergency policies necessary to limit the spread of COVID-19 and to limit the potential for violence and property damage, requiring individuals to wear masks in public places, limiting the size of public gatherings, and, eventually, instituting a citywide curfew. What was not litigated by the parties in prior litigation was whether "observing people gathering or individuals lacking masks" may suffice to establish probable cause, given the exceptions "embedded in the COVID-19 directives." Pls' Mem. at 2. Neither these directives nor any exceptions existed at the time of trial, and probable cause was not the question before the court.

The monitorship is not the proper forum to delve into the merits of NYPD's actions regarding enforcement of social distancing and the curfew.. In order to evaluate those actions, the Court would of necessity need to apply a completely different analytical framework than it applied in its Liability Opinion, which of course did not concern emergency orders during twin crises of an ongoing pandemic and widespread demonstrations and unrest. Plaintiffs' attempt

goes well beyond the scope of this Court's Remedial Order and, therefore, its equitable jurisdiction. Plaintiffs' requests should be rejected.

B. Plaintiffs' motion is procedurally defective.

The Court should deny the relief requested even if it were to set aside the jurisdictional defects. First, the *Floyd* Plaintiffs cannot make claims for relief on behalf of parties that they do not represent. Second, neither the *Ligon* nor *Davis* Plaintiffs have any independent right to obtain the discovery sought based on the terms of their respective settlement agreements.

1. The *Floyd* Plaintiffs, as representatives of a class pertaining to stop-and-frisk, cannot seek relief on behalf of people affected by COVID-19 enforcement.

Plaintiffs are not entitled to the discovery they request concerning NYPD's social distancing enforcement because the *Floyd* class does not even encompass persons affected by social distancing enforcement. The clearly-defined class consists of:

> All persons who since January 31, 2005 have been, or in the future will be, subjected to the New York Police Department's policies and/or widespread customs or practices of *stopping, or stopping and frisking*, persons *in the absence of 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.

Floyd v. City of New York, 283 F.R.D. 153, 160 (S.D.N.Y. 2012) (emphasis added). Therefore, persons who may be harmed by police COVID enforcement encounters that progress to summonses and arrests, even if allegedly not based on probable cause, are outside the scope of *Floyd*'s Fourth Amendment class. Similarly, the *Davis* and *Ligon* classes are limited to select individuals subject to trespass enforcement in and around NYCHA and TAP buildings.

This divergence is a critical difference between these cases and *Handschu v. Police Department of the City of New York*, 219 F. Supp. 3d 388 (S.D.N.Y. 2016). In 2011, *Handschu* class counsel moved for an order to show cause because they suspected that NYPD's "investigation of the Muslim communities *that form a part of the plaintiff class*" resulted in the retention of "information about class members' political activity that does not relate to potential unlawful or terrorist activity." *See id.* (emphasis added). *Floyd* class counsel, however, seek relief on behalf of individuals whose potential claims are based on a completely different set of factual circumstances and legal theories than the *Floyd* certified Class. And, the *Floyd* named representatives, who are not reported as "injured" by police enforcement of social distancing, do not have standing to seek relief on behalf of those who have been so "injured" as they "cannot represent a class of whom they are not a part . . . ." *See Irvin v. Harris*, 944 F.3d 63, 71 (2d Cir. 2019) (quoting *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 660 F.2d 9, 17 (2d Cir. 1981)).

In any event, as noted above, nothing in the Remedial Order entitles the Plaintiffs to discovery independent of the Monitor, whose authority extends only to ending constitutional violations in the NYPD's stop-and-frisk practices. *Floyd*, 959 F. Supp. 2d at 677. Yet, the City was not asked by the Monitor in *Floyd* to provide this discovery to Plaintiffs. Rather, the *Floyd* Plaintiffs directly requested it from the City by email (copied to the Monitor). Electronic Mail from Jonathan Moore to Jeffrey Schlanger dated April 22, 2020, annexed to the Declaration of David Cooper dated June 8, 2020, as Ex. C. While this may appear on its face to be a matter of form over substance, the method by which Plaintiffs choose to seek this discovery is particularly important in this monitorship, where for six years requests for discovery from NYPD are made through the Monitor.

In the cases cited by the Plaintiffs, access to remedial phase discovery was afforded to those plaintiffs (typically the federal government) as part of consent decrees negotiated by the parties or part of the court's Remedial Order. *See United States v. City of New Orleans*, 12-CV-1924, Dkt# 159-1 ¶ 473 (E.D. La. Jan. 11, 2013) (pursuant to Consent Decree, for the purpose of implementing the Agreement, DOJ has access to documents and data); *Vulcan Society, Inc. et al. v. City of New York*, No. 07-CV-2067, 2013 WL 4042283, *11 (E.D.N.Y. June 6, 2013) (pursuant to Court's Remedial Order, City was directed to make available to U.S. and Subclass records related to dispute arising from that Order); *Melendres v. Arpaio*, 07-CV-2513, 2013 WL 5498218, *36 ¶ 147 (D. Ariz. Oct. 2, 2013), *aff'd and vacated in part on other grounds*, 784 F.3d 1254 (9th Cir. 2015) (pursuant to Supplemental Permanent Injunction/Judgment Order, Plaintiff's representatives had access to documents and data relevant to enforce the Order); *United States v. City of Newark*, 16-CV- 1731, Dkt # 4-1, ¶ 202 (D.N.J. Apr. 29, 2016) (Consent Decree provided that DOJ have access to relevant documents consistent with DOJ's responsibilities to enforce the agreement); *United States v. Baltimore Police Dep't*, 17-cv-0099, Dkt # 2-2, ¶ 485 (D. Md. Jan. 12, 2017) (Consent Decree provided that Monitor and DOJ have access to "documents and data that the Monitor and DOJ reasonably deem necessary to carry out their duties"). Here, Plaintiffs have no independent right to unilaterally access records under the *Floyd* Remedial Order.

2. The *Ligon* and *Davis* Plaintiffs have no right to discovery independent of the Monitor, much less discovery related to COVID-19.

As for the *Ligon* Plaintiffs' separate request by letter application dated June 2, 2020, the relief to which they are entitled is limited by the Stipulation of Settlement. Consent decrees originate in settlement agreements, and a district court cannot "expand or contract the agreement

of the parties as set forth in the consent decree." *See Berger v. Heckler*, 771 F.2d 1556, 1558 (2d Cir. 1985). The contractual nature of a consent decree requires that "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *See id.* at 1568 (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)). A district court can enforce the terms of the agreement, but has no authority to alter the agreed-to terms of the consent decree itself, and "one party cannot unilaterally rewrite the agreement over another party's objections, in order to pursue a course of action . . . not authorized by the consent decree." *See Crumpton v. Bridgeport Educ. Ass'n*, 993 F.2d 1023, 1030 (2d Cir. 1993) (citing *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 575-76 (1984)). Additionally, as a consent decree is "the sole source of the parties' rights, a district court may not impose obligations on a party that are not unambiguously mandated by the decree itself." *See King v. Allied Vision, Ltd.*, 65 F.3d 1051, 1058 (2d Cir. 1995) (cleaned up).

A review of the agreement between the City and the *Ligon* Plaintiffs provides no support for the *Ligon* Plaintiffs claim for discovery. In Paragraph M(2) of the Stipulation of Settlement, the parties agreed that the City would disclose to *Ligon* class counsel any information that "the Monitor determines should be disclosed to Class Counsel, and such information shall be disclosed at intervals determined by the Monitor." Stipulation of Settlement & Order [hereinafter "*Ligon* Stipulation"] ¶ M(2), *Ligon v. City of New York*, No. 12 CV 2274 (AT) (S.D.N.Y. July 19, 2017), ECF No. 296. Paragraph J(3) of the Stipulation provides that, *after* the monitorship has ended, *Ligon* class counsel would be entitled to receive specific sets of data related to the remedies ordered in the Stipulation (further described in Paragraph M(1)), so that *Ligon* class counsel can review compliance with the Stipulation. *Ligon* Stipulation, ¶ J(3). Neither provision

applies to the *Ligon* Plaintiffs' request: the Monitor has not determined that the COVID-19 material should be disclosed to *Ligon* class counsel pursuant to Paragraph M(2) (and in reality *cannot* for reasons explained in Point IV), and the monitorship is still active, so Paragraph J(3) is inoperative at this time. Accordingly, the *Ligon* Plaintiffs'[4] reliance on the consent decree to obtain discovery is unavailing.

POINT II

NYPD'S ENFORCEMENT OF COVID-19 RESTRICTIONS AND CURFEW ORDERS DOES NOT VIOLATE THE REMEDIAL ORDER

The crux of Plaintiffs' argument is that NYPD's COVID-19 and curfew enforcement violates the *Floyd* Order's Fourteenth Amendment mandates in two ways. First, plaintiffs allege that NYPD lacked "reasonable suspicion or justification" in "stopping" Blacks and Latinx compared to "whites" and often "use[d] [] force in enforcement of social distancing . . . among Black and Latinx persons only." *See* Pls.' Mem. at 14-15. Second, the Plaintiffs allege that NYPD's use of crime suspect data in COVID-19 enforcement created racial disparities in the stops of the affected individuals. *See* Pls.' Mem. at 16-17. However, Plaintiffs' arguments miss the mark for several reasons.

[4] The City notes that the *Davis* Plaintiffs do not appear to make a claim for information independent of the *Floyd* Plaintiffs, as the *Floyd*/*Davis* proposed order to show cause is based exclusively on the *Floyd* action. However, the same analysis would apply in the *Davis* Plaintiffs' case as well. Paragraph L(3) of the Stipulation of Settlement requires the City to disclose material to *Davis* class counsel "that the Monitor determines should be disclosed to Class Counsel, and such information shall be disclosed at regular intervals determined by the Monitor." Stipulation of Settlement and Order ¶ L(3), Davis v. City of New York, No. 10 CV 699 (AT) (S.D.N.Y. Feb. 4, 2015), ECF No. 330. Therefore, *Davis* class is also not entitled to this discovery for the same reasons as *Ligon* class counsel.

A. Probable cause – not reasonable suspicion – is the proper standard for assessing the constitutionality of the NYPD's COVID-19 and curfew enforcement efforts.

The Plaintiffs must show that the Remedial Order was violated in order to succeed on the merits. The Remedial Order addressed certain police practices pertaining to stop-and-frisk, and reasonable suspicion was at the heart of those practices. COVID-19 enforcement, however, is squarely governed by probable cause. Because the Remedial Order did not involve probable cause at all, the Plaintiffs cannot show that the order was violated.

In an attempt to link their lawsuits to the unprecedented, ongoing COVID-19 crisis, Plaintiffs conflate probable cause with reasonable suspicion of suspected criminal activity. The prior litigation, and the resulting Remedial Order, addressed whether NYPD properly applied the reasonable suspicion standard in connection with its stop-and-frisk policies as they existed at the time. Summonses issued and arrests effected based on probable cause, were not the subject of the litigation. In the present case, observation of a violation of any of the executive orders by a police officer would constitute probable cause, not reasonable suspicion.

"[R]easonable suspicion – a concept generally associated with investigative stops – has been held . . . to be satisfied when specific and articulable facts taken together with rational inferences from those facts provide detaining officers with a particularized and objective basis for *suspecting* legal wrongdoing." *United States v. Bohannon*, 824 F.3d 242, 255 (2d Cir. 2016) (emphasis in original). In contrast, "probable cause to arrest exists when the officers have knowledge or reasonably trustworthy information of facts and circumstances that are sufficient to warrant a person of reasonable caution in the belief that the person to be arrested *has committed* . . . a crime." *See Dufort v. City of New York*, 874 F.3d 338, 348 (2d Cir. 2017) (emphasis added).

Probable cause embodies a "practical" and "common-sensical" standard. *Zalaski v. City of Hartford*, 723 F.3d 382, 390 (2d Cir. 2013). Probable cause is not an exacting standard, because "while probable cause requires more than 'mere suspicion' of wrongdoing, its focus is on 'probabilities,' not 'hard certainties.' " *Davis v. City of New York*, 902 F. Supp. 2d 405, 412 (S.D.N.Y. 2012). Once officers possess facts sufficient to establish probable cause, they need "not [] explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Caldarola v. Calabrese*, 298 F.3d 156, 167-68 (2d Cir. 2002).

1. Social distancing and face-covering violations are immediately apparent to the observing officer.

With respect to COVID-19 enforcement, the two executive orders at issue are fashioned in such a way that a violation of either, under § 3-108 of the Administrative Code, would be readily apparent to an observing police officer; thus, probable cause – *not* reasonable suspicion – is the relevant standard to apply to social distancing and face covering violations because it would be readily apparent that an offense has been committed. *See* N.Y.C. Admin. Code § 3-108 (criminalizing "[a]ny knowing violation of a provision of any emergency measure established" pursuant to the mayor's power to declare a state of emergency).

By way of example, Executive Order No. 202.17 requires the vast majority of people to wear masks in public settings:

> [A]ny individual who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance.

N.Y. Executive Order (Cuomo) No. 202.17 (incorporated by N.Y.C. Emergency Executive Order (de Blasio) No. 115 § 4), annexed to the Declaration of David Cooper dated June 8, 2020

("Cooper Decl.") as Exhibit F. The overall text of the executive order mirrors Center for Disease Control ("CDC") guidelines. *See About Cloth Face Coverings*, CTR. FOR DISEASE CONTROL (May 22, 2020), http://cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html. Thus, an officer who observes an individual without a mask in a public place within less than six feet of another would have probable cause to believe a violation has been committed.

Plaintiffs argue that probable cause does not automatically exist where the police observe an individual without a mask because the individuals may fall within an exception – those who cannot "medically tolerate" a face mask. (Pl. Memo. of Law at 13). But the existence of potential exemptions does not defeat probable cause—even before making an arrest or issuing a summons, the officer have no duty to "investigate exculpatory defenses offered by the person being arrested or to assess the credibility of unverified claims of justification before making an arrest." *Jocks v. Tavernier*, 316 F.3d 128, 135–36 (2d Cir. 2003).

Similarly, and perhaps ironically demonstrated in cases under New York's "anti-mask" statute which contains an exemption for "masquerade part[ies]," the existence of potential exemptions does not defeat probable case. In *People v. Bull*, 5 Misc. 3d 39 (N.Y. App. Div. 1st Dep't 2004) (per curiam) several protesters were arrested at a May Day demonstration for gathering in public while covering their faces with bandannas in violation of N.Y. Penal Law § 240.35(4). *See Bull*, 5 Misc. 3d at 40. The First Department affirmed the validity of the accusatory instruments, characterizing the "masquerade party or like entertainment" language as a proviso that the People had no burden to prove. *See id.* at 41-42. Although *Bull* addressed the facial sufficiency of an accusatory instrument filed in a criminal proceeding, the court measured

facial sufficiency by the same standard used for assessing the constitutionality of an arrest: probable cause. *See* N.Y. Crim. Proc. Law § 100.40(4) (a misdemeanor complaint is facially sufficient when its factual allegations "provide reasonable cause to believe that the defendant committed the offense charged . . . ."). [5]

The governor's Executive Order No. 202.17 mirrors the structure of the anti-mask statute in a key respect—an officer's personal observation of a person without a face covering would provide probable cause to arrest or issue a summons, since the vast majority of people are expected to wear face coverings by default, with only minimal exceptions. The language addressing whether a person can "medically tolerate" a face covering operates much like the limitation in the anti-mask statute that the First Department specifically held was *not* the People's burden to prove, especially since the "medically tolerate" language can only be given effect by reference to an outside source (i.e., the CDC guidelines), and is a fact that only the accused would be aware of. *See Bull*, 5 Misc. 3d at 41-42 (emphasis added); *see also People v. Davis*, 13 N.Y.3d 17, 32 (2009) (affirming that "information . . . uniquely within a defendant's knowledge" is the criminal defendant's responsibility to prove).[6] Similarly, it is not for the observing officer to establish that a civilian cannot medically tolerate a mask or safely and

[5] Although the statute refers to the standard as "reasonable cause," courts in New York use "reasonable cause" and "probable cause" interchangeably. *See People v. Maldonado*, 86 N.Y.2d 631, 635 (1995) ("Reasonable cause means probable cause.").

[6] The fact that these cases address the People's burden of proof, rather than the constitutionality of an officer's investigation, is of no moment here: the prosecutor relies on the evidence gathered by the police in order to meet the People's burden of proof at arraignment. *Cf. Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (recognizing role of prosecutor as an advocate "evaluating evidence" post-arrest and role of police officer as "searching for the clues and corroboration" to provide probable cause for arrest).

properly maintain social distance pursuant to the COVID enforcement exceptions. The burden rests with those individuals to provide proof of their status in order to dispel the probable cause possessed by the officer.

Therefore, because probable cause is the applicable standard for reviewing the constitutionality of arrests or summonses that occur pursuant to a violation of these executive orders, and, by contrast, the "reasonable suspicion" standard is what governed the conduct in the underlying lawsuits – specifically as they relate to the NYPD's stop-and-frisk policies, or trespass enforcement in and around NYCHA and TAP buildings – the Plaintiffs will be unable to succeed on the merits. Conduct involving probable cause activity cannot be found to violate an order that governs reasonable suspicion activity.

2. Curfew violations are similarly apparent to the observing officer.

Plaintiffs also seek to challenge the previous enforcement of the now-expired executive order pertaining to the citywide curfew in effect during the week of June 1, 2020, suggesting that it is somehow related to the court-ordered monitoring in the *Floyd* and *Davis* cases. *See See* Pls.' Supp. Mem. of Law, *Floyd v. City of New York*, No. 08 CV 1034 (AT) (S.D.N.Y. June 3, 2020), ECF No. 768, [hereinafter "Pls.' Supp. Mem."] at 2-3. More specifically, the Plaintiffs' allege that "police will encounter certain people who are lawfully in public during the hours between 8:00 pm and 5:00 am, requiring application of the *De Bour* framework for police investigative encounters," thus implicating the distinction between probable cause and reasonable suspicion. *See* Pls.' Supp. Mem. at 3.[7]

[7] Plaintiffs also allege concerns that enforcement of the curfew "facilitat[ed] discrimination against Black and Latinx people, including those encountered in and around public housing residences, through racial profiling and/or selective enforcement in violation of the *Floyd* and

Last week, the mayor imposed a citywide curfew, between 11:00 p.m. and 5:00 a.m. beginning June 1, 2020 through June 2, 2020 and, when that failed to curb the looting and vandalism that the curfew was meant to address, the curfew hours were expanded to 8:00 p.m. to 5:00 a.m. beginning June 2, 2020 to June 8, 2020. N.Y. Emergency Executive Order (de Blasio) Nos. 117, 118, and 119, annexed to the Cooper Declaration as Exs. K through M. Notwithstanding the New York City Charter and Administrative Code section 3-104, which confers on the mayor the authority to enact such executive orders, control of civil disorders that may threaten the very existence of the State or municipality is certainly within the police power of the government. *Stotland v. Pennsylvania,* 398 U.S. 916, 920 (1970). An observed violation of a valid curfew order provides probable cause at the outset of a police encounter. *Cf. In re Juan C.*, 28 Cal. App. 4th 1093, 1097, 1100-03 (1994) (court affirming constitutionality of a nighttime curfew, issued after widespread looting and violent riots in Los Angeles, which authorized arrests of individuals for refusing to obey after oral or written notice is given, thereby upholding the lawfulness of an arrest that occurred when petitioner was outside his home at night, in violation of the curfew's provisions).

Here, the temporary, city-wide curfew imposed by the Mayor was similar to those imposed in *Juan C* as a rare and extraordinary but necessary measure and provided the requisite probable cause to arrest anyone who violated it.

The curfew was narrowly tailored to exempt police and peace officers, firefighters, first responders and emergency medical technicians, individuals seeking medical treatment or

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Davis orders." *See* Pls.' Supp. Mem. at 3. Notwithstanding the gravity of the Plaintiffs' allegations, other than their own self-serving assertions, they offered no evidentiary support whatsoever for their concerns.

medical supplies, individuals traveling to and from essential work and performing essential work, and people experiencing homelessness. *See* N.Y.C. Emergency Executive Order (de Blasio) Nos. 118 and 119, Exs. L through M. As of June 7, 2020, the temporary curfew has been lifted. *See* N.Y.C. Emergency Executive Order (de Blasio) No. 122, Ex. N. Accordingly, the imposition and enforcement of a city-wide curfew did not violate any of the Court's prior orders and was not applied in a discriminatory manner.

Accordingly, here, similar to *Juan C.*, because probable cause to arrest existed based on observed curfew violations, Plaintiffs cannot demonstrate a clear or substantial likelihood of success on the merits concerning their challenge to the City's curfew enforcement.

Therefore, because probable cause is the applicable standard for reviewing the constitutionality of arrests or summonses that occur pursuant to a violation of these executive orders, and, by contrast, the "reasonable suspicion" standard is what governed the conduct in the underlying lawsuits – specifically as they relate to the NYPD's stop-and-frisk policies, or trespass enforcement in and around NYCHA and TAP buildings – the Plaintiffs will be unable to succeed on the merits. Conduct involving probable cause activity cannot be found to violate an order that governs reasonable suspicion activity.

B. Enforcement of social distancing and masking requirements was not based on selective enforcement.

Plaintiffs implicitly concede that the scope of Fourteenth Amendment selective enforcement finding of the Court in *Floyd* was narrowly tailored to the "selective enforcement of the law in the *pervasive targeting of Black and Latinx people for stops, frisks, and searches*." *See* Pls.' Mem. at 17. In other words, COVID-19 enforcement deals with officers' responses to their own observations and to complaints of concerned citizens of social distancing violations of

the two executive orders (including 311 calls). These encounters sometimes, but rarely, resulted in either summonses or arrests based on a probable cause standard. In contrast, NYPD's "stop-and-frisk" practices were based on individualized reasonable suspicion, which was the central issue in *Floyd*. *See* Day Decl. ¶ 9.[8] As such, for similar reasons set forth in II.A, *supra*, Plaintiffs' arguments conflate the necessary legal standards of stop-and-frisk with the legal standards in the enforcement of COVID-19 Executive Orders, and their arguments are without merit.

Often, when NYPD had to take enforcement actions in accordance with COVID-19 Executive Orders, it has been to break up large gatherings in response to complaints received from members of the public. Though they have been few in number, large gatherings have represented a disproportionate share of the summons and arrest numbers. A small number of incidents through May 17, 2020, accounted for approximately 40% of all COVID-related summonses. *See* Pichardo Decl., Ex. B, ¶ 10. Sixty-three of the City's seventy-seven police precincts have recorded fewer than 10 summonses each through May 17, 2020. *Id.* ¶ 10.

Thus, police enforcement of COVID-19 was not based on race or lack of "reasonable suspicion" but rather on the discretion of the individual officer involved who observed unlawful conduct which provided the requisite probable cause to arrest or issue summonses. Simply put, there is nothing to suggest that the exercise of that discretion was based on the race of the

[8] Despite evidence to the contrary that COVID-19 enforcement involved issuance of summonses or arrests, Plaintiffs' Memorandum of Law deliberately mischaracterizes COVID-19 enforcement, resulting in either a ***summons*** or ***arrest*** under a ***probable cause*** analysis, as one where a "stops [under a reasonable suspicion analysis] have been conducted against Blacks and Latinx persons" in an effort to improperly extend the Court's jurisdiction under the *Floyd*. *See* Pls.' Mem. at 17; *cf*. Day Decl. ¶ 9.

individual violator, much less that there was any Departmental policy which sanctioned disparate treatment indirectly connected with race. Instead, there is every indication that the Department discouraged all enforcement action with respect to this type of violation and that summonsing and/or arrest were only to be used as a last resort.

C. Enforcement of social distancing and masking requirements was not based on the use of crime suspect data to justify racial disparities.

Unlike *Floyd* where the Court found that the City had an unwritten "policy of indirect racial profiling by targeting racially defined groups *for stops based on local crime suspect data*," *see Floyd III*, 959 F. Supp. 2d at 562 (emphasis added), the "evidence" relied upon by Plaintiffs here does not support their argument that NYPD ever used any crime suspect database for COVID-19 enforcement. *See* Day Decl. ¶ 46. Rather Plaintiffs engage in rank speculation in implying that NYPD used the race of the individuals arrested or issued summonses for COVID-19 related enforcement to justify racially discriminatory policing and related racial disparities. *See* Day Decl. ¶ 46. Indeed, Plaintiffs' own "evidence" supports the City's position that COVID-19 enforcement through arrest or summonses did not involve NYPD's use of the stop-and-frisk practices found unconstitutional in *Floyd*. *See* Day Decl. ¶ 46 (citing Anthony M. DeStefano, *COVID-19-related arrests in the city not racially motivated, NYPD says*, NEWSDAY (May 12, 2020, 6:34 PM) available https://www.newsday.com/news/health/coronavirus/nypd-social-distancing-minorities-arrests-1.44590671).

Accordingly, NYPD's regarding enforcement of COVID-19, unlike the findings in *Floyd*, was not related to the use of any racial prevalence in any crime suspect database justifying any alleged racial disparities in COVID-19 enforcement. Rather, it was based on attempts to slow the spread of a novel disease that sparked a global pandemic.

D. NYPD'S COVID-19 policing does not establish deliberate indifference.

Plaintiffs continued proposition that NYPD's COVID-19 enforcement was performed in a racially discriminatory manner similar to *Floyd* so as to constitute deliberate indifference, Pls.' Mem. at 19, fail for several reasons.

To show deliberate indifference, a plaintiff must allege facts plausibly showing that (1) a policymaker knew to a moral certainty that city employees will confront a particular situation; (2) the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or there is a history of employees mishandling the situation; and (3) the wrong choice by the city employee will frequently cause the deprivation of a citizen's constitutional rights. *Wray v. City of New York*, 490 F.3d 189, 195-96 (2d Cir. 2007). Here, it cannot be over-emphasized that COVID-19 is a novel virus at the center of one of the worst pandemics in a century, with no known cure or containment protocol. *See* Lisa Lockerd Maragakis, *Coronavirus Disease 2019 vs. the Flu*, JOHNS HOPKINS MED. (last visited June 7, 2020), https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu; *see also* Mark Terry, *Compare: 1918 Spanish Influenza Pandemic Versus COVID-19*, BIOSPACE (Apr. 2, 2020), https://www.biospace.com/article/compare-1918-spanish-influenza-pandemic-versus-covid-19/; *see also* N.Y. Executive Order (Cuomo) No. 202.17, Ex. F, N.Y.C. Emergency Executive Order (de Blasio) No. 108 annexed to the Declaration of David Cooper dated June 8, 2020 ("Cooper Decl.") as Exhibit I.

It is beyond debate that COVID-19 information about the nature and spread of the disease has been evolving since early this year and the medical community has frequently updated its

guidance to health professionals and the public and such that no "policymaker" or "public official" would be in a position to fully comprehend the various range of individualized situations that NYPD officers will be forced to confront when enforcing COVID-19 restrictions passed by the executive branches in the past few months. The kind of deliberation needed for a showing of deliberate indifference—a stringent standard of fault—was not possible given the sudden and urgent need to stop the spread of a highly contagious and potentially fatal disease.

Plaintiffs' attempt to use select quotes or public statements of NYPD Police Commissioner "denying [] even the possibility of [racial] discrimination" in COVID-19 enforcement as evidence of deliberate indifference by NYPD officials to racial disparities, is baseless. *See* Pls.' Mem. at 19; *see also* Day Decl. ¶ 48. Given the unanticipated and unprecedented global pandemic – the novel COVID-19 – that has rapidly plagued New York City the past few months and kept health professionals revising their advice NYPD did not have the time or luxury to adequately prepare for the role it would be asked to take on during this pandemic through pre-planned classroom training and orchestrated scenarios and roleplaying exercises as proper means of enforcement of the emergency COVID-19 executive orders. *See* N.Y. Executive Order (Cuomo) No. 202.17, Ex. F; *see also* N.Y.C. Emergency Executive Order (de Blasio) No. 108, Ex. I.

Lastly, although it goes without saying that the decision about whether or not to use excessive force on individuals does not, standing alone, present a "difficult choice," as the United States Supreme Court has cautioned, "a municipality may not be held liable under § 1983 solely because it employs a tortfeasor. . . . We have consistently refused to hold municipalities liable under a theory of *respondeat superior*." *Bd. of the Cnty. Comm'rs v. Brown*, 520 U.S. 397,

403 (1997). Thus, to the extent that Plaintiffs request to hold the entire NYPD liable for actions of a few police officers such as those identified in their motion, it should be rejected. *See* Pls.' Mem. at 19; *see also* Day Decl. ¶¶ 43, 47.

Indeed, the Court cannot, as Plaintiffs appear to assume, somehow take judicial notice of highly-publicized episodes of alleged police misconduct, assume without any evidentiary record that these episodes all involved wrongful police behavior and a failure to take action, and/or extrapolate from those assumptions a deliberate indifference to racial discrimination in COVID-19 enforcement. *Hickey v. City of New York*, No. 01 CV 6506 (GEL), 2004 U.S. Dist. LEXIS 23941, at *72 (S.D.N.Y. Nov. 24, 2004). In other words, Plaintiffs have not presented a factual record that would support their theory of liability, nor should that be allowed in these cases. Therefore, NYPD did not enforce COVID-19 policing in a racially discriminatory manner so as to constitute deliberate indifference similar to the one found in the *Floyd* case.

E. The evidence proffered by Plaintiffs does not support their claims of racial disparities.

As previously mentioned, NYPD's COVID-19 enforcement resulting in summons and arrest is substantially dissimilar to the NYPD stop-and-frisk practices which underpinned the *Floyd* Liabilities Order. *See* Day Decl. ¶ 49; *cf. Floyd III*, 959 F. Supp. 2d at 556-63. Indeed, Plaintiffs appear to initially concede this point in their motion by citing to instances involving alleged use of excessive force – *not* stops, frisks, or searches. *See* Pls.' Mem. at 20; *see also* Ex. 2, Pope Decl., Ex. 3, Merete Decl.

Plaintiffs' evidence also grossly mischaracterizes the record. None of the examples of news clips or news articles cited indicate racially discriminatory application of "stop-and-frisk" activity related to this Court's Liability and Remedies opinions and orders. *See* Jen Carlson,

Photos Show NYC Parks Still Bustling During The Global Pandemic, GOTHAMIST (Mar. 28, 2020, 11:44 AM), https://gothamist.com/arts-entertainment/photos-show-nyc-parks-still-bustling-during-global-pandemic (a series of 14 still-photos taken on March 28, 2020 – prior to the passage of the April 19th Mayoral Executive Order 108 requiring mandatory face coverings and social distance in public places – of individuals at various parks throughout New York City, some of whom were white and Latinx not wearing masks or practicing social distancing); *see also Coronavirus Cabin Fever: Crowds Flock To Central Park Even As Social Distancing Enforcement Remains In Effect*, CBS N.Y. (April 25, 2020, 11:50 PM), https://newyork.cbslocal.com/2020/04/25/coronavirus-central-park-long-beach-crowds/ (a 1 minute and 56 second news clip where the CBS2's Nick Caloway reported that he observed the vast majority of people wearing masks and maintaining social distance – six days after the passage of the April 19th Mayoral Executive Order 108 requiring mandatory face coverings and social distance); Joseph Goldstein & Corey Kilgannon, *Balmy Weekend Presents a Challenge: New Yorkers Rushing to Parks*, N.Y. TIMES (May 2, 2020), https://www.nytimes.com/2020/05/02/nyregion/weather-parks-nyc-nj-coronavirus.html (photo and news article recounting individuals at parks, some of whom were maintaining social distance and others who were not, without any clear indication of whether any summons were issued or arrests were made); *see also* Sarah Dorn, et al., *People flock to NYC-area bars, beaches as 'quarantine fatigue' intensifies*, N.Y. Post (May 16, 2020), https://nypost.com/2020/05/16/people-flock-to-nyc-area-bars-beaches-as-quarantine-fatigue-intensifies/ (photos and a short video clip, presumably taken on May 16, 2020, of individuals who appear to be white and other races, some of whom were wearing masks and maintaining

social distance and others who were not, without any clear indication of whether any summonses were issued or arrests were made); Ex. 5, Reese Decl. ¶¶ 1-5 (a 28-year old white woman riding her bike near a park in the Red Hook neighborhood of Brooklyn where she observed police asking a Hasidic family to disperse and the family complying and then proceeding to a black family and they too dispersed without incident). In fact, as conceded by Plaintiffs, NYPD has also enforced social distancing in white communities where it was observed or brought to their attention through 311 calls. *See NYPD: Teen Taken Into Custody at Scene of Borough Park Funeral* (May 1, 2020) available at https://www.ny1.com/nyc/brooklyn/news/2020/05/01/nypd-breaks-up-another-large-funeral-in-brooklyn; *see also* Tim Stelloh, *NYPD breaks up massive crowd gathered for rabbi's funeral in Brooklyn* (April 28, 2020) available at https://www.nbcnews.com/news/us-news/nypd-breaks-massive-crowd-gathered-rabbi-s-funeral-brooklyn-n1194966; *see also* Pls.' Mem. at 18.

Plaintiffs then cite "other cases" of police-civilian COVID-19 encounters alleging unconstitutional stops of "people [who] were stopped by the police and asked to prove their status as essential workers," Pls.' Mem. at 20, but these allegations lacks both persuasiveness and candor. The "evidence" of the alleged unconstitutional stops by the police based on essential worker status is without citation and any detailed information such as a single name, time or place of occurrence, and related facts and circumstances of the alleged "stop." *See* Ex.1, CPR Decl. ¶ 16 ("When New York State's "PAUSE" went into effect, we were *notified* of encounters where New Yorkers of color were *stopped* by the police before entering the transit system or as they were leaving and *asked to prove that they were essential workers*.") (emphasis added). Indeed, the CPR Declaration goes further to conflate NYPD's alleged discriminatory COVID-19

enforcement with NYPD's stop-and-frisk practices by self-proclaiming – without any proof – "an uptick in *what sound like* unconstitutional stops and searches" based on interactions escalating into physical violence and "in situations where arrests were made or summons issued" on "charges unrelated to 'social distancing.' " *See* Ex. 1, CPR Decl. ¶ 15. However, as enforcement of the emergency executive orders are based on probable cause, any inquiry to determine the status of an individual as essential workers is not improper.

Another "example" couched as an unconstitutional stop cited by Plaintiffs is that of Kaleemah Rozier at the Barclays Center subway station. *See* Day Decl. ¶ 31 ("On May 13, 2020, Kaleemah Rozier was in the Barclays Center/Atlantic Avenue subway station with her five-year old child" when she was "forcibly arrested."). Neither the news article nor video referenced support Plaintiffs' position of any unlawful "stop" based on a reasonable suspicion standard, but rather an arrest after repeated instructions for face covering on a crowded train. *See* Day Decl. ¶ 31. Other examples relied upon by Plaintiffs for the proposition that NYPD officers discriminatorily enforced social distancing against individuals recording the "stop" also lacks merit. *See e.g.* Day Decl. ¶ 25 (May 4, 2020 incident where police were arresting an individual and after several unsuccessful attempts at issuing dispersal orders to one of the bystanders video recording the incident, arrested the *bystander* for an outstanding I-card). There was simply no "stop" of either of these individuals within the meaning of the *Floyd* Liability Opinion, and they were arrested for reasons unrelated to COVID-19 enforcement.

Additionally, the examples provided by Plaintiffs' declarants do not support their argument alleging racial profiling in enforcement of the Executive Orders. For example, the police encounter involving Crystal Pope on April 4, 2020, from Hamilton Heights, Manhattan,

who seemingly witnessed proper social distancing enforcement by the police who dispersed a large crowd of adolescent boys and then allegedly witnessed and was involved in an excessive use of force by one of the unknown police officers. *See* Ex. 2, Pope Decl. ¶¶ 2, 4. *See also* Declaration of David Kaen, dated June 8, 2020 ("Kaen Decl."), annexed to the Declaration of David Cooper dated June 8, 2020 ("Cooper Decl."), Ex. A, ¶ 10. Ms. Pope stated that she believed the incident was spurred by dispersal orders based on COVID-19 but the body worn camera footage shows that such enforcement efforts ended before the officers entered the building where force was used. *See* Ex. 2, Pope Decl. ¶¶ 2-3; s*ee also* Kaen Decl., Ex. A, ¶ 10.Furthermore, although there was much emphasis about multiple request for business cards, these assertions are not supported by the body worn camera footage. See Kaen Decl. Ex. A, ¶ 12. Also missing from Ms. Pope's narrative is that, other than the dispersal order, there was no attempt to issue summonses or arrest the group of individuals congregated outside and that they dispersed pursuant to the officers' orders. *See* Ex. 2, Pope Decl. ¶¶ 2-3. This is consistent with NYPD's policy to use enforcement as a last resort.

As another example, body camera footage does not support the allegations made by Steven Merete's police encounter on April 28, 2020. The encounter, involves Mr. Merete, a Latinx man residing in the Bronx, who alleges to have witnessed improper social distancing enforcement of a large group of individuals outside of a deli and then him allegedly being subjected to an excessive use of force and arrest for disorderly conduct and resisting arrest. *See* Ex. 2, Merete Decl. ¶¶ 1-3, 5. This incident fare no better in support of Plaintiffs' argument of pretextual stops under the guise of social distancing enforcement by the police. In fact, it appears that, like Pope, the social distancing enforcement involving Mr. Merete ended and was

unrelated to the circumstances of his arrest. Kaen Decl., Ex. A, ¶ 1. After the officers moved away from Mr. Merete and the group (who was also encouraging Mr. Merete to heed the officers' directives), Mr. Merete approached the officers to argue over a ticket. Kaen Decl., Ex. A, ¶ 3. There is a scuffle between the officers and the group and Mr. Merete was subsequently arrested. Kaen Decl., Ex. A, ¶¶ 3-4. Mr. Merete is even seen on the footage refusing attempts to put a mask on him. Kaen Decl., Ex. A, ¶ 6.

[redacted]

[redacted][9]

Contrary to Plaintiffs' misrepresentations, their arrests were not a result of COVID-19 enforcement, nor do they involve the types of circumstances faced by the *Floyd* Class. The only common factor in each these three Declarants was that the individuals involved was Black or Latinx. However, the mere fact that one is either Black or Latinx during a police encounter does not establish that race played a factor in the outcome. *See Miller v. Terrillion*, 391 F. Supp. 3d 217, 223-26 (E.D.N.Y. Jan. 25, 2019) (court rejecting plaintiff's attempt to prove his equal protection claim by incorporating the *Floyd* statistical and anecdotal evidence of racially discriminatory stop and frisk policies and reasoning that the mere arrest of a Black or Latinx individual by an NYPD officer of a different race would not give rise to an equal protection claim); *see also Williams v. Schultz*, No. 06-cv-1104, 2008 U.S. Dist. LEXIS 112729, at *19 (N.D.N.Y. Oct. 16, 2008) (denying plaintiff's equal protection claim noting that "[t]he mere fact that Defendant is white and Plaintiff is black does not mean that Defendant's arrest of Plaintiff was motivated by Plaintiff's race.").

Moreover, Plaintiffs' "evidence" of racial profiling or selective enforcement of COVID-19 is unfounded, as the police have also responded to similar crowd complaints in non-Black or Latinx neighborhoods and issued summonses or made arrests. *See Racial Disparities in NYPD's COVID-19 Policing: Unequal Enforcement of 311 Social Distancing Calls*, LEGAL AID SOC'Y

[9] This information has been redacted pursuant to N.Y. Crim. Proc. Law § 160.50, and in accordance with this Court's Individual Practices in Civil Cases, the City will seek leave to file under seal.

(May 20, 2020), available at https://legalaidnyc.org/wp-content/uploads/2020/05/LAS_Racial-Disparities-in-NYPDs-COVID-19-Policing_5.20.20_5PM_FINAL.pdf.

Accordingly, NYPD'S COVID-19 enforcement practices did not violate any Fourth Amendment rights at issue in the *Floyd* "stop-and-frisk" litigation and thus, Plaintiffs will be unable to show substantial likelihood of success on the merits.

POINT III

PLAINTIFFS DO NOT MEET THE THRESHOLD FOR A "MORATORIUM" ON COVID-19 ENFORCEMENT AND THE TEMPORARY CURFEWS

As an initial matter, given the inapplicability of the underlying cases to the current public health and safety enforcement measures and Plaintiffs' lack of standing, the City believes that the Court should not even consider whether Plaintiffs are entitled to a "moratorium" of COVID-19 enforcement and the now expired curfews. To the extent the Court decides to even consider it – which it should not – Plaintiffs have not carried their burden in making a sufficient showing of a clear and sufficient likelihood of success, irreparable harm, or a public interest in the absence of a moratorium of COVID-19 and temporary curfew enforcement. As such, Plaintiffs' request for a "moratorium" should be denied as a matter of law.

A. Plaintiffs cannot show a clear or substantial likelihood of success on the merits.

As stated previously, the claims associated with the statistics mentioned by Plaintiffs go far beyond the scope of this case and, to the extent they have any merit, they should be addressed in a completely separate forum from *Floyd*, which concerned a narrow band of issues unrelated to Plaintiffs' current complaints. Moreover, because probable cause is the correct standard to assess the constitutionality of the enforcement of the Emergency Executive Orders at issue, and

because Plaintiffs have not established deliberate indifference in the enforcement of the Emergency Executive Orders, they have failed to show a clear or substantial likelihood of success on the merits such that the class representatives lack standing to seek this relief here.

B. Plaintiffs cannot show that they will suffer irreparable harm.

The City has adapted its COVID-19 and curfew enforcement efforts in an ever-changing emergency situation that reflects the latest medical guidance, flexibility, and adaptation by the Mayor and NYPD. In fact, the Mayor emphasized the strides NYPD has made in repairing community relations in recent years and the need to not revert to times where these relationships were strained. This shift shows, if anything, that Court intervention is not necessary because any potential harm that the Plaintiffs could have alleged has abated. It also shows that the City and NYPD understand the importance of striking the right balance between keeping the community healthy and safe from the COVID-19 crisis and violence and looting and not straining their relationship with the community.

Specifically, on May 15, 2020, Mayor de Blasio announced a shift in the enforcement of these orders to gatherings, particularly large gatherings, with the understanding that summonses and arrests are still tools that can be used "as a last resort." Pichardo Decl., Ex. B, ¶ 9. The Mayor also announced that the NYPD would no longer issue summonses or arrests for violation of the face covering order absent a crime or other violation being committed. However, the intended goal was to ensure that large gatherings do not happen.[10] *See* Pichardo Decl., Ex. B, ¶¶ 4, 12. Instead, other efforts are being employed including education, and providing free face

[10] This shift of enforcement focused on prohibiting large gatherings was issued ten days before the death of George Floyd and the subsequent related protests. In fact, enforcement efforts of large gatherings have drastically changed as many protests are being held all over the City.

coverings to the public. This was tasked to community groups, referred to as civilian ambassadors, in conjunction with NYPD. *See Transcript: Mayor de Blasio Holds Media Availability*, CITY OF NEW YORK (May 15, 2020), *see also* Pichardo Decl., Ex. B, ¶¶ 6-8, 12. Thus, the City has made concerted efforts to shift COVID-19 enforcement and strategy to the ever-changing public health and safety situation and lifted the city-wide imposed curfew such that Plaintiffs fail will be unable to show irreparable harm.

C. Plaintiffs cannot show that a moratorium would be in the public interest.

The relief that Plaintiffs seek would, in fact, be inimical to the public interest. Safety and protection measures for the public health and welfare must include the enforcement of various social distancing measures promulgated by both Mayor de Blasio and Governor Cuomo. This principle is enshrined in the City Charter, which vests NYPD with broad powers to, *inter alia*, "preserve the public peace," "suppress riots," "disperse unlawful or dangerous assemblages," and "guard the public health." N.Y.C. Charter § 435(a). Indeed, not only is it enshrined in the City Charter, but courts have long recognized that states have broad authority to utilize police powers in the event of a public health emergency. *See Jacobson v. Massachusetts*, 197 U.S. 11, 26 (1905) ("[P]ersons and property are subjected to all kinds of restraints and burdens, in order to secure the general comfort, health, and prosperity of the state"); *see also In re Abbott*, 956 F.3d 696 (5th Cir. 2020) (reaffirming that the declaration of a public healthy emergency necessitates some limitation in constitutional rights). As such, it is in the public's interest for the City to utilize NYPD in its efforts to reduce the spread of COVID-19 infection throughout the city.

To be clear, it was under the Mayor's emergency powers under state law and enforced through the Administrative Code, that social distancing and other protective health measures

were put in place by the executive orders to combat the COVID-19 virus that substantially affected the public at large which, in fact, became law enforcement issues. *See* N.Y.C. Admin. Code §§ 3-104 and 3-108. As the legislative history of these Administrative Code sections correctly states, "these measures are intended not to oppress the city's residents but rather to reduce as much as possible the risk to life and property arising in emergency situations. It is most critical that the emergency services of fire, health, police and other municipal departments be allowed to function in a manner free from any encumbrances which decree their effectiveness." *See* Statement of R. Harcourt Dodds, NYPD Deputy Commissioner in charge of Legal Matters, addressed to the City Affairs Committee of the City Council on the Establishment of Emergency Measures for Riots and Other Disorders, April 22, 1968, annexed to the Cooper Decl., at Ex. O.

As of May 17, 2020, the NYPD COVID-19 Task Force had responded to more than 13,000 311 calls for service regarding social distancing. In addition, Patrol Services Bureau officers have visited 397,656 bars and restaurants, 186,286 supermarkets and pharmacies; 68,387 public places and 169,277 personal care facilities during this timeframe. Collectively, NYPD has distributed 373,050 masks as of May 17, 2020. *See* Pichardo Decl., Ex. B, ¶¶ 7-8. Given the magnitude of the number of interactions with the public on COVID, the NYPD has been tremendously restrained in enforcing social distancing and other executive orders issued to combat COVID-19 as evidenced by the minimal number of arrests and summons issued relating to violations of these executive orders. By way of example, with over one million social distancing interactions between March 16, 2020 and May 17, 2020, police officers issued only 444 summonses and made 128 arrests that are related to the pandemic, which represents less than one percent. *Id.* ¶ 9. Similarly, 55 of 77 precincts throughout the City recorded one or no arrests

and 68% of the 128 arrests were only marginally related to COVID-19 in that the arrests were not for social gathering or not wearing a face covering. *Id.* ¶ 11.

Furthermore, the City shares in Plaintiffs' concern that NYPD members, just like the public at large, are susceptible to COVID-19. Public servants, including essential workers throughout the city continued to be afflicted by this illness in devastating numbers. Noah Higgins-Dunn, *NYC presses the state to approve line-of-duty benefits for police and other city employees who died from coronavirus,* CNBC (May 19, 2020, 10:41 AM) https://www.cnbc.com/2020/05/19/nyc-presses-the-state-to-approve-line-of-duty-benefits-for-police-who-died-from-coronavirus.html. NYPD has made a concerted effort to ensure that its policing tactics keep the public safe from COVID-19, including keeping potential suspects and arrestees safe from the rapid spread of COVID-19. For example, pursuant to one directive, officers on patrol are required to wear a face mask or cover when interacting with civilians. *See* Nolan Hicks et al., *NYPS cops ignore directive, abandon masks in clashes with protesters,* N.Y. POST (June 2, 2020, 5:35 PM), https://nypost.com/2020/06/02/nypd-cops-ignore-directive-abandon-masks-during-protester-clashes/. While the City understands that there have been some videos of a few NYPD officers not wearing masks, most officers are following these protocols.. Lastly, another directive mandates NYPD members to receive temperature checks at the start of their shift. *See* Dean Meminger, *NYPD to Begin Officer Temperature Checks Next Week,* SPECTRUM NEWS NY1 (Apr. 17, 2020, 9:27 AM), https://www.ny1.com/nyc/all-boroughs/news/2020/04/17/nypd-to-begin-officer-temperature-checks-next-week. Taken together, these measures help ensure that NYPD continues to enforce the law in the City while also keeping it safe from the spread of COVID-19 at the same time.

As the COVID-19 enforcement continues, the rate of the spread of COVID-19 has steadily declined and should continue to decline, which would serve the public's interest. In fact, because of the enforcement efforts, the spread of COVID-19 has dramatically and steadfastly reduced for several weeks, resulting in a phased opening of the City. *See* Winnie Hu, *New York City Begins Phase 1 of Reopening*, N.Y. TIMES (June 8, 2020, 8:05 PM), https://www.nytimes.com/2020/06/08/nyregion/coronavirus-nyc-reopen-phase-1.html.

Additionally, it is not in the public's interest for the Monitor and his team to be distracted from the important work and obligations under the *Floyd* "stop-and-frisk" orders for which he was court-appointed. At present, the Monitor is in place to ensure that NYPD carries out its obligations in the specific areas of concern addressed in *Floyd*. In fact, over six years of monitorship prior to Plaintiffs' instant allegations of non-compliance, illustrate this point. There still remains work to be done and the Monitor's is presently proposing new studies and initiatives related to his "stop-and-frisk" work, which should continue without the distraction of unrelated matters.

This potential for distraction is further underscored by the *Ligon* Plaintiffs. They have asserted that there has already been substantial delay in several of the Monitor's obligations and responsibilities under the Court's orders. The *Ligon* Plaintiffs, who recently joined the *Floyd* and *Davis* Plaintiffs' proposed order to show cause seeking similar relief for a 30-day investigation and evaluation of NYPD COVID-19 enforcement, ironically also accuse the Monitor of a demonstrated history of delay and non-compliance in responding to Plaintiffs' request for discovery or data. *See* Letter to the Court dated May 1, 2020, *Ligon v. City of New York*, 12 Civ. 2274 (AT), Dkt. Entry No. 412, at pp. 1-2 ("Despite nearly three years having elapsed since this

Court approved and entered the *Ligon* consent decree and despite extensive efforts by Plaintiffs' counsel, the court-appointed monitor has yet to provide meaningful reporting to the Court, the Plaintiffs, and the public about the NYPD's compliance with the decree's central terms").

Accordingly, seeking the Monitor's assistance in obtaining additional and expedited discovery and conducting a separate investigation of COVID-19 enforcement is not in the public's interest and therefore should be denied.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court deny the emergency relief being requested by Plaintiffs.

Dated: New York, New York
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JAMES E. JOHNSON
Corporation Counsel of the City of New York
Attorney for Defendant City of New York
100 Church Street
New York, New York 10007
(212) 356-2579

By: *David Cooper* /s

David Cooper
Nancy Savasta
Genevieve Nelson
Raju Sundaran

cc: All Class Counsel (By ECF)