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**NEW YORK SUPREME COURT**  
**APPELLATE DIVISION—FIRST DEPARTMENT**

Index No.: 150556-2011

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WALTER VARGAS,

*Plaintiff-Appellant,*

-against-

THE CITY OF NEW YORK,

*Defendant-Respondent.*

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**BRIEF OF THE LEGAL AID SOCIETY, BRONX DEFENDERS,  
BROOKLYN DEFENDER SERVICES, COMMUNITY SERVICE SOCIETY  
OF NEW YORK, CENTER ON THE ADMINISTRATION OF CRIMINAL  
LAW AT NEW YORK UNIVERSITY SCHOOL OF LAW, CENTER ON  
RACE, LAW AND JUSTICE AT FORDHAM UNIVERSITY LAW  
SCHOOL, KATAL CENTER FOR HEALTH, EQUITY, AND JUSTICE,  
AND BROOKLYN COMMUNITY BAIL FUND IN SUPPORT OF  
PLAINTIFF-APPELLANT**

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## INTEREST OF AMICI CURIAE

The amici include (1) public defenders, (2) public policy organizations, (3) university research centers (4) a community bail fund.

The **Legal Aid Society**, the nation's oldest and largest not-for-profit legal services organization, is an indispensable component of the legal, social and economic fabric of New York City – passionately advocating for low-income individuals and families across a variety of criminal, civil and juvenile rights matters, while also fighting for legal reform. The Society's Criminal Practice is the primary public defender in the City of New York. During the last year, the Criminal Practice represented over 220,000 indigent New Yorkers accused of unlawful or criminal conduct on trial, appellate, and post-conviction matters. In the context of this practice the Society represents people accused of crimes from their initial arrest through the post-conviction process. The Legal Aid Society represents individuals charged with transit offenses, and those designated by the NYPD as transit recidivists which is a central issue in this litigation.

The **Bronx Defenders** (BxD) is a nonprofit provider of criminal defense, family defense, immigration defense, civil legal services, and social work support and advocacy to low-income Bronx residents. In addition to representing roughly 30,000 people a year, BxD has litigated several systemic challenges to NYPD

practices, including a lawsuit that won an injunction against the widespread use of unlawful stops to investigate trespassing around Bronx apartments.<sup>1</sup>

**Brooklyn Defender Services** (“BDS”) is one of the largest legal services organizations in Brooklyn, New York, providing criminal defense representation to approximately 30,000 low-income people each year who are accused of crimes and cannot afford an attorney. BDS attorneys have represented many thousands of clients charged with transit offenses that have been subjected to the practices at issue in this case, and we have witnessed first-hand the racially disparate outcome of NYPD’s “transit recidivist” policy. BDS therefore has a strong interest in ensuring that our clients receive the absolute protections of the Federal and State Constitutions and of New York law, and receive due process of law during encounters with law enforcement in the New York City transit system.

For 175 years the **Community Service Society of New York** (“CSS”) has led the fight against poverty in New York City. Addressing root causes of poverty necessarily includes addressing mass imprisonment and the challenges of reentry: CSS litigates on behalf of individuals and groups who experience labor market discrimination because of their convictions and provides direct “rap sheet” related services for more than 700 people per year, in the process tackling conviction-based barriers to employment, housing and civic participation. Because the high

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<sup>1</sup> *Ligon v. City of New York*, 925 F.Supp.2d 478 (S.D.N.Y. 2013).

cost of public transit is a serious problem for low-income New Yorkers, CSS also advocates for transit affordability through our Fair Fares campaign, and recently released a report, “The Crime of Being Short \$2.75,” focusing on disparate enforcement of fare evasion in low income communities of color.

The **Center on the Administration of Criminal Law** (the “Center”), based at New York University School of Law,<sup>2</sup> is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and public policy. The Center supports challenges to practices that raise fundamental questions of defendants’ rights or that the Center believes constitute a misuse of government resources in view of law-enforcement priorities.

The **Center on Race, Law and Justice** at Fordham University Law School engages both domestic and global issues of race, law, and equity to generate the critical insights and solutions necessary to achieve meaningful and positive change. The Center on Race, Law and Justice considers the role of law in structuring racial inequality and disadvantage; intervenes in current debates about race and democracy; and works to directly influence legal pedagogy and praxis

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<sup>2</sup> No part of this brief purports to represent the views of New York University School of Law, or New York University, if any.

concerning race as well as matters of diversity, access, and opportunity in legal institutions and programs.

The **Katal Center for Health, Equity, and Justice** is a state-based organization, strategy hub, and collaborative partner with a mission to advance practical and transformative reforms to systems, policies, and processes to strengthen health, equity and justice for all. Katal is focused on three big, inter-related goals: 1) Ending mass criminalization, mass incarceration, and the war on drugs; 2) Advancing health, equity, and justice in public safety and drug control; and 3) Building leadership and organizing capacity among local leaders, advocates, and community groups to effectively work for social change.

The **Brooklyn Community Bail Fund** (the “Fund”) pays bail for New Yorkers who cannot afford even modest amounts, and who would be jailed or forced to plead guilty just to go home. The Fund operates pursuant to the New York Charitable Bail Act of 2012, which allows non-profit organizations in New York to pay bail of \$2,000 or less for misdemeanor defendants who cannot otherwise afford it. The Fund partners in New York City with every public defender agency in Brooklyn, Manhattan and Staten Island, and is the largest bail fund in the country, having paid bail for over 3,000 individuals in need. The Fund works with allies here in New York and across the country in the fight to end cash bail, which is just one aspect of a criminal legal system that treats people

differently based on wealth, skin color and influence. We have paid bail for scores of individualized who were arrested simply because they could not afford to pay entrance into the subway. Over 90% of these clients are people of color. The Fund advocates for the end of “fair evasion” arrests, a practice that effectively criminalizes race and poverty.

The amici submit this brief because of their commitment to protecting the rights of New Yorkers’ from unlawful police practices, and to combatting the racial disparities in our criminal legal system. The amici urge the Court to reject the lawfulness of the NYPD’s transit recidivism policy, the unreasonably large transit recidivist database it has created, the racial disparities it magnifies, and the unauthorized prolonged detention it imposes on subway riders, and find in favor of Mr. Vargas.

## INTRODUCTION

In upholding the constitutionality of the officers' prolonged detention of Mr. Vargas, the lower court inaccurately assumed that Mr. Vargas was labeled a "transit recidivist" by the New York City Police Department (NYPD) as a result of either an open warrant or a prior conviction.<sup>3</sup> The amici submit this brief to correct this misconception.<sup>4</sup> The NYPD actually labels New York subway riders "transit recidivist" based on a much broader, constitutionally compromised database that includes prior arrests and summons that have been dismissed, declined prosecution or otherwise terminated in favor of the accused.

This brief will outline why the NYPD's reliance on prior arrests and summonses to compile its transit recidivist database (the "Database") is unconstitutional, unlawful and perpetuates racial disparities. Part I will discuss why the reliance on arrests and summonses is unconstitutional and unlawful under Criminal Procedure Law 160.50. Part II will discuss why reliance on prior arrests and summonses results in disparate racial impact which violates New York City Human Rights Law, and undermines well established City policy objectives to remedy the harms of overpolicing in communities of color.

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<sup>3</sup> *Vargas v. City of New York*, 56 Misc. 3d 523, 525 (N.Y. Sup. Ct. 2017).

<sup>4</sup> "No reason or explanation for [the transit recidivist] designation was provided to Officer Buith." App.'s Br. at 6 citing A143:23-144:24.

“[The] degree of community resentment aroused by particular practices is clearly relevant [sic] to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices.”<sup>5</sup> The amici – public defenders, reentry advocates, a community bail fund, university research centers dedicated to combatting racial injustice, and a public policy organization dedicated to restoring the health and equity in historically disenfranchised communities – witness the damage and resentment caused both by broken windows policing broadly and by the overly broad and compromised transit recidivist database specifically.

Amici urge this Court to consider the community resentment this unreasonably large transit recidivist database arouses and reject the attenuated logic the government is offering to justify the inclusion of all arrests and summons, which potentially led to the unconstitutional full custodial arrest of Mr. Vargas.

### **BACKGROUND**

The subway system is the lifeline of New York City. On average, 5.6 million riders enter the system on a weekday, and 1.7 billion enter in a year.<sup>6</sup> The NYPD has taken advantage of New Yorkers’ reliance on the subway as an opportunity to

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<sup>5</sup> *Terry v. Ohio*, 392 U.S. 1 (1968). See also *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013).

<sup>6</sup> William J. Bratton, New York City Police Department, Broken Windows and Quality-of-Life Policing in New York City at 14 (2015), available at [http://www.nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/qol.pdf](http://www.nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/qol.pdf) (last accessed March 3, 2018).

target station entrances for aggressive policing and surveillance efforts. In 1998, William Bratton described the rationale behind aggressively targeting turnstile jumping and other low level offenses: “Every arrest was like opening a box of Cracker Jack. What kind of toy am I going to get? Got a gun? Got a knife? Got a warrant? Do we have a murderer here?”<sup>7</sup>

Not everyone stopped for a transit offense is arrested.<sup>8</sup> Fare evasion, like waking between subway cars, is one of the many offenses for which the NYPD has been granted a range of enforcement options.<sup>9</sup> For fare evasion, for example, an NYPD officer can issue an informal warning, write a civil summons to the Transit Adjudication Bureau (TAB) for a \$100 fine for a first time offense,<sup>10</sup> or perform a custodial arrest for the criminal offense of Theft of Services under Penal Law Section 165.15(3).<sup>11</sup> For transit offenses like walking between subway cars, for which there exists no corollary in the penal law, an accused rider either receives a TAB summons, or else faces criminal penalties in the form of a \$25 fine or 10 days

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<sup>7</sup> WILLIAM BRATTON & PETER KNOBLER, *THE TURNAROUND: HOW AMERICA’S TOP COP REVERSED THE CRIME EPIDEMIC*, 141 (1998).

<sup>8</sup> Transit offenses are codified in 21 NYCRR § 1050.

<sup>9</sup> 21 NYCRR § 1050.10. *See also* N.Y. Pub. Auth. Law § 1204(5-a) (vesting power in the New York City Transit Authority to “make ... rules ... Violations of such rules shall be an offense punishable by a fine of not exceeding twenty-five dollars or by imprisonment for not longer than ten days, or both, or may be punishable by the imposition by the transit adjudication bureau ... a civil penalty not to exceed one hundred dollars...”).

<sup>10</sup> 21 NYCRR § 1050.10.

<sup>11</sup> *Id.*

of imprisonment, or both.<sup>12</sup> The NYPD’s “transit recidivist policy” (the “Policy”) requires officers to arrest any rider for a transit offense if she has been classified a “transit recidivist,” in the NYPD’s eponymous database. The arrest precludes a TAB summons, and triggers prosecution in criminal court, after a custodial arrest and search.

The Database is queried by police officers who call into a central operator who consults “a variety of databases from the state . . . internal arrest databases that contribute” to a single transit recidivist database.”<sup>13</sup> The Database includes individuals who have: (1) a prior felony or misdemeanor **arrest** in the transit system in the past two years; (2) any **arrest** for murder, rape, robbery, felony assault, burglary, grand larceny, a sex crime, or weapons possession within New York City in the last four years; (3) three or more violation level **arrests** in the transit system in the past five years; (4) three or more TAB **summons** in the past two years; (5) or is on probation or parole.<sup>14</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> Transcript of the Minutes of the Committee on Public Safety, City Council of NY, Intro No. 1664 (2017) 56-57 (statement of Oleg Chernyavsky, the Director of Legislative Affairs for the New York City Police Department).

<sup>14</sup> *See* Bratton, *supra* note 6, at 15. At a press conference in February 2018, Assistant Chief of the NYPD Transit Bureau Vincent Coogan described the second category as including only sex crime arrests in the transit system. *See* Transcript: Mayor de Blasio, Commissioner O’Neill Host Press Conference to Discuss Crime Statistics (February 26, 2018), <http://www1.nyc.gov/office-of-the-mayor/news/084-18/transcript-mayor-de-blasio-commissioner-o-neill-host-press-conference-discuss-crime-statistics#/0>.

In 2014, the NYPD reported stopping 95,000 persons for allegedly evading the fare. Out of the 95,000 people stopped in 2014, 26,000 were arrested, searched, fingerprinted, held in custody, and then arraigned on criminal charges for Theft of Services.<sup>15</sup> Even as the number of stops for fare evasion have decreased, since Mr. Vargas was arrested, the NYPD has continued to arrest roughly one out of four of those stopped for fare evasion, possibly based on their prior arrest or summons history.<sup>16</sup>

The record below is silent as to why Mr. Vargas was deemed a transit recidivist. Riders are not informed which previous contact with law enforcement triggered their designation in the Database. The NYPD also does not give riders advance warning of their inclusion in the Database, nor is any process afforded for individuals who may be listed in the Database to challenge their inclusion.

The cost of arresting, detaining and prosecuting riders for one such transit offense alone—Theft of Services, costs the City an estimated \$50 million dollars

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<sup>15</sup> See Bratton, *supra* note 6, at 14. “Transit officers regularly issue TAB notices in lieu of C-summonses. In 2014, transit officers issued 87,420 TAB notices (including 67,587 for fare evasion) and only 4,630 C-summonses. That is nearly 23,000 fewer TAB notices and 4,700 fewer C-summonses than in 2009.” *Id.* at 29.

<sup>16</sup> In the first six months of 2017, the NYPD stopped 30,000 people for alleged fare evasion, and arrested 8,625 of them for the misdemeanor charge of theft of services. Vincent Barone, *Turnstile Jumping Data on Arrests, Summonses Could Be Made Public Under City Council Bill*, AM New York (Dec. 7, 2017), <https://www.amny.com/transit/turnstile-jumping-city-council-1.15355536> (last accessed March 3, 2018).

each year.<sup>17</sup> This is a staggering amount, matched only by the harmful and wide-ranging consequences being criminally prosecuted takes on an individual, many of whom simply could not afford transit fare.

## ARGUMENT

### **I. THE RELIANCE ON SUMMONS AND ARREST HISTORIES TO JUSTIFY MORE PUNITIVE TREATMENT IMPLICATES STATE SEALING PROTECTIONS AND FUNDAMENTAL CONSTITUTIONAL GUARANTEES**

The Database relies on information likely illegally accessed and collected in violation of state sealing statutes and constitutional principles. When Mr. Vargas was arrested in 2011, the NYPD relied on arrests and summonses dating to the 1980s to target him as a “transit recidivist.”<sup>18</sup> Arresting officer Buith testified to the fact that Mr. Vargas was in the Database, but he did not explain why he was included.<sup>19</sup> According to the NYPD, the Policy was thereafter updated to allow consideration of only more recent contacts.<sup>20</sup> While the NYPD has limited the historical reach of the arrests it considers, the fundamental problem with the Policy persists: its use amounts to violation of state sealing statutes and riders’ constitutional rights to due process and the presumption of innocence.

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<sup>17</sup> Harold Stolper and Jeff Jones, Community Service Society, *The Crime of Being Short of \$2.75: Policing Communities of Color at the Turnstile at 2* (2017), available at [http://lghhttp.58547.nexcesscdn.net/803F44A/images/nycss/images/uploads/pubs/Fare\\_Evasion\\_FINAL\\_10\\_6\\_17\\_smaller.pdf](http://lghhttp.58547.nexcesscdn.net/803F44A/images/nycss/images/uploads/pubs/Fare_Evasion_FINAL_10_6_17_smaller.pdf).

<sup>18</sup> See Bratton *supra* note 6, at 15.

<sup>19</sup> App.’s Br. at 6 citing (A143:23-144:24).

<sup>20</sup> *Id.* at 17.

### A. Undermining the Protections Enshrined in State Sealing Statutes

With the exception of the parole or probation category, prior arrest and summons histories compiled in the Database are nothing more than a collection of past police suspicion. By compiling these histories, the Database may run afoul of state sealing statutes designed to protect individuals from the stigma of arbitrary arrest or from accusations, which did not result in any findings of guilt.<sup>21</sup>

Sections 160.50, 160.55, 170.55 and 170.56 of the Criminal Procedure Law require that records from any criminal prosecution terminated in an individual's favor or by way of a noncriminal conviction be sealed.<sup>22</sup> In the case of matters terminated in an individual's favor, the sealing applies to all records in the possession of District Attorney, the criminal court and the police that relate to the arrest or prosecution.<sup>23</sup> Records sealed after an individual's conviction for a noncriminal offense include those held by the District Attorney and the police.<sup>24</sup> Unless otherwise allowed by law,<sup>25</sup> no one, including a private or public agency, can access a sealed record, unless with a court order, upon a showing that "justice requires that such records be made available to it."<sup>26</sup> But the NYPD does not apply

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<sup>21</sup> See *Matter of Joseph M. (New York City Bd. Of Educ.)*, 82 N.Y.2d 128, 131–32 (1993); *Hynes v. Karassik*, 47 N.Y.2d 659, 662 (1979).

<sup>22</sup> C.P.L. §§ 160.50, 170.55, 170.56.

<sup>23</sup> C.P.L. § 160.50

<sup>24</sup> C.P.L. § 160.55

<sup>25</sup> In the case of employment as a peace officer, application for a gun license and certain other limited categories. See C.P.L. § 160.50(1)(d);

<sup>26</sup>

for a court order to unseal prior arrest histories any time one of its officers performs a “10-75”<sup>27</sup> check in the subway system to determine whether someone is classified as a transit recidivist, a process which by the NYPD’s own account takes only a few minutes.<sup>28</sup>

The Database is likely contaminated by sealed arrests and summonses. In 2016 alone, over fifty percent of all criminal cases arraigned in New York City Criminal and Supreme Courts were terminated in favor of the accused, and were thus entitled to sealing.<sup>29</sup> Similarly, from 2007 through 2015 an average of 23

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CPL 160.50(d)(ii) and CPL 160.55(d)(ii) authorize law enforcement to gain access to records sealed pursuant to each statute if the applicant “demonstrates . . . that justice requires that such records be made available to it.” Procedurally, this subdivision previously provided that law enforcement’s ex parte application for such records had to be made and decided by a judge of a “superior court” (i.e., supreme or county court), regardless of whether the records had been sealed by that court. Believing that the statutes were “needlessly restrictive” in limiting the courts to which the application could be made, the Legislature in 2015 amended the statute to provide concurrent jurisdiction to a district court, city court, or the criminal court of the city of New York which had sealed the records in question to receive and decide the ex parte application to unseal the records.

William C. Donnino, 2014 Supp Practice Commentaries, McKinney’s Cons Laws of NY, C.P.L. § 160.50.

<sup>27</sup> See Exhibit G, NYPD Transit Bureau Memo on Transit Recidivist Policy Prior to January 27, 2012.

<sup>28</sup> Defendant’s Memorandum of Law in Support of Its Cross-Motion for Summary Judgment and In Opposition to Plaintiff’s Motion for Summary Judgment at 34 (“The whole encounter lasted, at most, six minutes from start to finish.”). See Chernyavsky, *supra* note 13, at 55-56. (“[W]hat happens is that the officer making the stop for fare evasion would simply run the individual much like a warrant check.”).

<sup>29</sup> Criminal Court of the State of New York, Annual Report 2016 at 17, <https://www.nycourts.gov/COURTS/nyc/criminal/2016-Annual-Report-Final.pdf> (last accessed March 3, 2018) (“In 2016, out of a total of 286,905 case dispositions city wide, 52,618 or 18% of cases in criminal court were dismissed, 287 resulted in acquittal, and 67,224 or 24% were Adjournments in Contemplation of Dismissal (ACDs).”). In total, in New York City Criminal Court, roughly 42 percent of criminal court cases were terminated in favor of the accused and sealed. This does not include the countless cases that result in non-criminal offenses, like

percent of all criminal summonses were dismissed for facial insufficiency each year.<sup>30</sup>

## B. Constitutional Violations

The Database not only implicates state statutes, but also riders' rights to the presumption of innocence, due process and finality, which are frustrated when they are repeatedly punished for allegations that may well have been unsubstantiated or otherwise dismissed. In the absence of a finding beyond a reasonable doubt, an individual is presumed innocent of the charges.<sup>31</sup> Relying on the mere existence of a prior accusation to label certain subway riders as "transit recidivists" to single them out for harsher enforcement in the form of an arrest followed by a search erodes their presumption of innocence and subverts the guarantees of due process. The decision to arrest or to issue a summons at best represents merely probable cause, and at its worst reflects the pressure of police department quotas.<sup>32</sup> It does

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disorderly conduct under Penal Law Section 240.20. Similarly, in 2016 in Supreme Court, there were 20,830 cases were resolved by a disposition in 2016, of which 1,934 resulted in dismissals. Thus, roughly 9 percent of all felony cases are dismissed. Neither of these figures includes those arrests that result in no charges and were sealed, either because the police department voided the arrest or because the District Attorney declined prosecution.

<sup>30</sup> Between 17-27% of all C-summonses docketed by OCA were dismissed from 2007 through 2015. Stipulation and Proposed Preliminary Approval Order at ¶ 5, *Stinson v City of New York*, 282 FRD 360 (S.D.N.Y. 2012), [https://nypdsummons.com/Portals/0/Documents/ExhibitA\(SettlementAgreement\).pdf](https://nypdsummons.com/Portals/0/Documents/ExhibitA(SettlementAgreement).pdf) (last accessed March 3, 2018)(breaking down dismissal percentages by year).

<sup>31</sup> *In re Winship*, 397 U.S. 358 (1970).

<sup>32</sup> Complaint at ¶5, *Stinson v City of New York*, 282 FRD 360 (S.D.N.Y. 2012) ("Proof of the existence of the NYPD's illegal quota policy comes not from a single source, but rather, from multiple and varying sources. Specifically ... (1) tape recordings of commanding officers at the 41st Precinct; (2) tape recordings of commanding officers at the 81st Precinct; (3) an arbitrator's

not reflect a prosecutor’s evaluation of the evidence underlying the arrest, nor her appraisal of the merits of the prosecution, let alone the result of adversarial testing under the confrontation clause of the constitution.

The Database is not the first NYPD database to include an unlawfully broad spectrum of information that should have been sealed, and thus inaccessible to law enforcement. The NYPD previously recorded the name of every individual stopped and frisked as recently as 2010, until a federal lawsuit, which resulted in a settlement that required the NYPD to remove all personal identifying information from its database.<sup>33</sup> Similarly, the NYPD conducted dragnet surveillance of Muslim associations, businesses and individuals in New York, New Jersey and Pennsylvania, systematically compiling undercover officers’ observations in dossiers, without the requisite factual justifications for these investigations.<sup>34</sup> It

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ruling, dated January 14, 2006, which expressly found that the NYPD had an illegal quota policy which violated Labor Law § 215-a; (4) statistical evidence from the New York State Office of Court Administration (‘OCA’), demonstrating that an overwhelming percentage of the summonses filed in Court by the NYPD—over 50%—are ultimately dismissed; and (5) empirical evidence... which confirm the NYPD’s relentless obsession with crime ‘numbers’ exerts enormous pressure on commanding officers and has resulted in the unethical manipulation of crime statistics by such officers, and in furtherance of that manipulation, officers constantly issue summonses to individuals in the absence of probable cause in order to artificially create the statistical appearance of increased “activity.”).

<sup>33</sup> See *Lino v. City of New York*, 101 A.D.3d 552 (1st Dept 2012).

<sup>34</sup> See also Complaint, *Raza v City of New York*, 998 F. Supp. 2d 70 (E.D.N.Y. 2013) (lawsuit alleging violations of the First and Fourteenth Amendments as a result of NYPD’s Intelligence Division singling out Muslim religious and community leaders, mosques, organizations, businesses, and individuals for pervasive surveillance that is not visited upon the public at large or upon institutions or individuals belonging to any other religious faith). This *Raza* lawsuit resulted in a settlement which amended rules for surveillance. The surveillance and notes about it were extensively documented in the NYPD’s own records and published by the Associated

continues this history with its unlawful use of its arrest and summons histories in the transit recidivism database. Those unfortunate enough to be caught in this system face serious, ongoing consequences for the mere suspicion of a minor violation of law.

## **II. THE NYPD’S INCLUSION OF ARREST AND SUMMONS HISTORIES RESULTS IN DISPARATE RACIAL IMPACT THAT CANNOT BE JUSTIFIED**

The Policy creates a disparate impact on Black and Latinx New Yorkers. Such an impact alone, as a policy matter, is troubling because it perpetuates the City’s long history of overpolicing communities of color, which is now slowly being remedied.<sup>35</sup> Furthermore, the Policy’s disparate racial impact violates the New York City Human Rights Law.<sup>36</sup>

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Press. Associated Press, *Highlights of the AP’s Pulitzer Prize-Winning Probe into NYPD Intelligence Operation*, <https://www.ap.org/about/awards-and-recognition/highlights-of-aps-pulitzer-prize-winning-probe-into-nypd-intelligence-operations> (last accessed March 3, 2018). See also New York City Department of Investigation, Office of Inspector General for the NYPD (OIG-NYPD), *An Investigation of NYPD’s Compliance with Rules Governing Investigations of Political Activity* (Aug. 23, 2016), available at [http://www1.nyc.gov/assets/oignypd/downloads/pdf/oig\\_intel\\_report\\_823\\_final\\_for\\_release.pdf](http://www1.nyc.gov/assets/oignypd/downloads/pdf/oig_intel_report_823_final_for_release.pdf) (last accessed March 19, 2018).

<sup>35</sup> See e.g., *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013); City Council of NY, Intro No. 1080 (2013) (legislative history for amendment to New York City Human Rights Law Administrative Code Section 14-151 to cover biased based policing). “The City Council expresses deep concern about the impact of NYPD practices on various communities in New York City. In particular, the Council expresses concern about the NYPD’s growing reliance on stop and frisk tactics and the impact of this practice on communities of color... Bias-based profiling by the police alienates communities from law enforcement, violates New Yorkers’ rights and freedoms, and is a danger to public safety. It is the Council’s intent that the provisions herein be construed broadly, consistent with the Local Civil Rights Restoration Act of 2005, to ensure protection of the civil rights of all persons covered by the law.” City Council of NY, Intro No. 1080 (2013).

<sup>36</sup> Administrative Code of the City of NY § 14-151.

## A. Disparate Impact

Using contaminated information from the arrest and summons databases produces clear discernable harm —chiefly, it exacerbates a clear racial fault line: Black and Latinx subway riders accused of transit offenses are arrested and searched, while their White counterparts are either given verbal warnings or, at most, issued summonses.

In essence, the NYPD’s policy creates an unreliable feedback loop resulting in today’s police judgment of a person being determined by a potentially faulty judgment years ago. Even if the NYPD were capable of eliminating the racial bias in its policing decisions, reliance on prior arrest data would undermine that achievement, because Black and Latinx riders would still be more likely to be arrested on the seemingly racially neutral factor of prior arrests. The reliance today on past arrests and summonses virtually ensures that Black and Latinx communities continue to bear the brunt of aggressive order-maintenance policing.

The arrest and summons histories bake in these disparate racial outcomes. The “10-75 check” carries past racially biased decisions into the future, trapping a class of people in an endless cycle of arrests. After one arrest in the subway system, any subsequent police contact in the subway system within the next four years is automatically an arrest, even for a civil infraction, like walking between subway cars.

Without access to the Database itself, we are forced to hypothesize about its likely composition, by looking at the racial composition of the population of individuals who are arrested and issued summonses. In addition, examining the demographics of those targeted by enforcement actions comparable to transit policing, such as stops, frisks, and marijuana arrests, also provides a more complete picture of the racial composition of the Database. Extrapolating from the known racial disparities manifest in each of these categories of enforcement actions, it is more likely that the NYPD is singling out Black and Latinx for arrests in transit context as well. Such a prediction is borne out by the data thus far available.

i. Demographics of Arrests

Black and Latinx are more likely to targeted for arrests. According to the NYPD, in 2016, 40.6 percent of arrestees were African American, despite making up only 22.8 percent of the City's population.<sup>37</sup> Thirty-six percent of arrestees were Hispanic, despite only making up 28.6 percent of the City's population.<sup>38</sup>

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<sup>37</sup> James P. O'Neill, New York Police Department, Crime and Enforcement Activity in New York City (2016) at 6, [https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis\\_and\\_planning/year-end-2016-enforcement-report.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2016-enforcement-report.pdf) (last accessed March 3, 2018).

<sup>38</sup> *Id.*; see also Preeti Chauhan et al., *Trends in Misdemeanor Arrest Rates in New York*, 62 (Oct. 28, 2014) available at [http://johnjay.jjay.cuny.edu/files/web\\_images/10\\_28\\_14\\_TOCFINAL.pdf](http://johnjay.jjay.cuny.edu/files/web_images/10_28_14_TOCFINAL.pdf) (last accessed March 3 2018) (“The arrest rate for Black males displayed the most volatility during this period [1990-2013], starting at 6.4 percent in 1990, rising sharply to 14.0 percent in 2010, and dropping to 11.8 percent in 2013.” By 2013, 11.8 percent of Black men were arrested. The arrest rate for Hispanic men also showed a significant increase over these years, from 4.2

## ii. Demographics of Summons Enforcement

Black and Latinx New Yorkers are also more likely to be issued summonses than be let go with a warning. In the most comprehensive study of 1.5 million of the total 6 million summonses issued by the NYPD between 2002 and 2013, nearly 85 percent of summons recipients were [B]lack or Latino.”<sup>39</sup> More summons are issued in neighborhoods with high concentrations of Black and Latinx residents, a fact the NYPD concedes.<sup>40</sup>

It is precisely concerns about the disparate racial impact of low level policing that have motivated legislation in the New York City Council to monitor the demographics of all NYPD summons activity, including those returnable to TAB.<sup>41</sup> The recently passed Criminal Justice Reform Act of 2017 mandates data

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percent in 1990 to 7.6 percent in 2013. Finally, the misdemeanor arrest rate for White men also increased, doubling from 1.0 percent in 1990 to 2.1 percent in 2013. In New York City, in 2013, White men age 16 or older had 23,075 misdemeanor arrests up from 15,337 in 1990. From 1990 to 2013, as expected, there was increase in the number of arrests for Hispanic men [from 24,720 to 64,911] and Black men [from 43,041 to 84,006.”]

<sup>39</sup> Sarah Ryley, *EXCLUSIVE: Daily News Analysis Finds Racial Disparities in Summonses for Minor Violations in 'Broken Windows' Policing*, Daily News (Aug. 4, 2014), <http://www.nydailynews.com/new-york/summons-broken-windows-racial-disparity-garner-article-1.1890567> (last accessed March 3, 2018) (“The most common offenses were: consumption of alcohol [1.6 million], disorderly conduct [1 million], public urination [334,000], bicycling on the sidewalk [296,000] and operation of a motor vehicle in violation of the safety rules [213,000]. The *News* found the correlation between race and summonses was not strong for offenses like motor vehicle violations and unlawful possession of alcohol for a minor. But others—like spitting, disorderly conduct, loitering, open container and failure to have a dog license—were more likely to be doled out in predominately black and Hispanic precincts.”).

<sup>40</sup> According to the NYPD, “the locations of concentrated summons activity coincide highly with the locations of violent crime.” See Bratton, *supra* note 6, at 30. Summons activities also coincide with where proactive arrests occur. *Id.* at 33.

<sup>41</sup> The City of New York does not collect data on the number of people stopped, issued summons, or arrested for what are termed by the City “quality of life” offenses, including for

collection for certain offenses which have been decriminalized, but is not comprehensive of all civil summonses.<sup>42</sup> In December 2017, the City Council passed Intro. 1664, which requires the NYPD to report the number of arrests and summonses issued for subway fare evasion on a quarterly basis. The legislation mandates the NYPD to disclose the subway station where the enforcement action took place, and the race, sex, and age of the individual who was arrested or issued a TAB summons.<sup>43</sup> The first report has not yet been issued.

### iii. Demographics of Stop and Frisk

The taint of racial bias continues to infect even police stop and frisks, despite the scrutiny of a federal monitor following a court finding a clear pattern of discrimination. Black New Yorkers are still stopped at a higher rate than their White counterparts. In 2013, 2014 and 2015, the monitor concluded that “there were more stops on average in census tracts with a greater concentration of Black

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offenses that are eligible for the TAB. Currently, “[d]etailed information on summonses is difficult to obtain, as the only comprehensive summons database is maintained by the Office of Court Administration (OCA), which is not subject to Freedom of Information requests.” Press Release, New York Civil Liberties Union, NYC Must Reform Aggressive Policing of Low-Level Offenses and Summons Court Operations (Dec. 15, 2014) <https://www.nyclu.org/en/press-releases/nyc-must-reform-aggressive-policing-low-level-offenses-and-summons-court-operations> (last accessed March 3, 2018). The Administrative Code of the City of NY § 14-172 seeks to fix these gaps by requiring the NYPD to report on the number of arrests and summonses returnable to the Transit Adjudication Bureau for subway fare evasion.

<sup>42</sup> Administrative Code of the City of NY § 14-157.

<sup>43</sup> Josh Levitt, New York City Council, City Council Passes Lancman’s Bill to Require NYPD to Report Number of Arrests and Summonses Issued for Subway Fare Evasion (Dec. 11, 2017), <https://council.nyc.gov/rory-lancman/2017/12/11/city-council-passes-lancmans-bill-to-require-nypd-to-report-number-of-arrests-and-summonses-issued-for-subway-fare-evasion> (last accessed March 3, 2018). This piece of legislation amended is Administrative Code of the City of NY § 14-172.

residents.”<sup>44</sup> These stark disparities emerge even when contextual variables, such as the crime rate, socioeconomic characteristics of the area, the reason for the stop, and the precinct in which the stop occurred are controlled for.<sup>45</sup> Even in low crime blocks, “Blacks and Hispanics relative to Whites have significantly higher stops per crime ratios at all levels of reported crime.”<sup>46</sup> The racial disparities continued from 2013 through 2014 and 2015, although the extent of the disparities decreased.<sup>47</sup> Research conducted for this brief by the Community Service Society of New York, one of the amici, demonstrates that across station areas citywide, increases in the crime rate are associated with increases in the frequency of stop, question, and frisks, but much more so in and around subway stations that are predominantly Black or Hispanic than non-Hispanic White.

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<sup>44</sup> Peter L. Zimroth, Fifth Report of the Independent Monitor: Analysis of NYPD Stops Reported, 2013-2015, 18 (May 30, 2017), <http://nypdmonitor.org/wp-content/uploads/2017/06/2017-05-30-MonitorsFifthReport-AnalysisofNYPDStopsReported2013-2015-Asfiled.pdf> (last accessed March 3, 2018) (“This analysis assesses whether the rate of stops is significantly higher depending on the Black and Hispanic population of residents, holding constant the number of crimes in the month before and the socioeconomic status of the census tract, precinct location, and monthly trends in the number of stops.”).

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* There is “[a] body of research literature on police stops of civilians uses hit rates, or the percentage of searches that turn up contraband, as a test of racial disparities.” *Id.* at 37.

By 2015, the disparities no longer existed for recovery rates for weapons for Blacks and Non-Hispanics all stops and for stops when a search occurred. However, there was still a significant disparity in hit rates for Blacks compared to Non-Hispanics in 2015 for stops when a frisk was conducted.... Overall, the data show that disparities in hit rates diminished over time.

*Id.* 6-7.

<sup>47</sup> *Id.* at 33.

#### iv. Demographics of Marijuana Arrests

Similarly, in the marijuana enforcement context, despite research which suggests that its use is more prevalent among White people than people of color, “Black and Latino New Yorkers comprise 86 percent of those charged with misdemeanor marijuana offenses in New York City.”<sup>48</sup>

#### v. Demographics of Theft of Services Arrests

The cumulative disparate impact of targeting transit recidivists for arrest is clear when we look at who is arrested for theft of services. Black men are most likely to be arrested for fare evasion than anyone other racial category, even controlling for poverty levels.<sup>49</sup> Based on the most robust study to date on the racial impact of transit enforcement in New York, which relies on Brooklyn arrest data, fare evasion arrests are “concentrated at subway stations in and around the poorer neighborhoods of Brooklyn, but much more so at stations near high poverty

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<sup>48</sup> New York Civil Liberties Union, Testimony Before City Council Public Safety & Courts And Legal Services Committees on Summons Court Operations and Impact (Dec. 15, 2014), <https://www.nyclu.org/en/publications/testimony-city-council-public-safety-courts-and-legal-services-committees-summons-court>; *see also* Drug Policy Alliance & Marijuana Arrest Research Project, Unjust and Unconstitutional (July 2017), [http://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017\\_2.pdf](http://www.drugpolicy.org/sites/default/files/Marijuana-Arrests-NYC--Unjust-Unconstitutional--July2017_2.pdf) (last accessed March 3, 2018) (finding that the targeting of Black and Latinx youth for marijuana and other low-level arrests has persisted at the citywide level for thirty years); Erin Durkin, *NYPD Under Fire After Stats Reveal 86% of Marijuana Arrests in City Are of Black or Latino People*, Daily News (Feb. 26, 2018), <http://www.nydailynews.com/new-york/nypd-fire-massive-racial-gap-city-marijuana-arrest-article-1.3842903> (last accessed March 3, 2018).

<sup>49</sup> Stolper and Jones, *supra* note 17, at 2.

[B]lack neighborhoods.”<sup>50</sup> “Blacks make up less than one-third of poor adults in Brooklyn but almost two-thirds of those arrested for fare evasion.”<sup>51</sup>

#### B. The Policy Does Not Serve a Significant Law Enforcement Objective

There is a clear continuity between present and past policing patterns. While there were fewer arrests, summonses, stops and frisks in 2017 than there were in 2011, when Mr. Vargas was arrested, racial disparities persist in each area of enforcement.<sup>52</sup> As a result, an entire class of people, New Yorkers of color with certain prior contacts with the transit police, navigate the subway system in fear that a minor infraction could land them cuffed, searched, held in police custody and arraigned in court. This pattern is troubling alone. But even more so, in light of the collective realization that broken windows policing simply does not work. After two decades of broken windows policing, its empirical predictions have been

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<sup>50</sup> *Id.* (“The final dataset of fare evasion arrests includes 4,054 arrests occurring across the 157 subway stations located in the borough of Brooklyn during 2016. Focused on the most severe penalty—custodial arrests. Most of our analysis is based on individual client records from the two public defender organizations operating in Brooklyn—Brooklyn Defender Services [BDS] and The Legal Aid Society [LAS]—for clients arrested on TOS charges during 2016 (TOS was the initial top charge.”).

<sup>51</sup> *Id.* at 4 (“The greatest concentrations of theft of service arrests occur around subway stations nearest to the poorest and predominantly black census tracts (and at transit hubs near downtown Brooklyn, and the summer destination Coney Island). This pattern can be seen most clearly as one moves east along the A/C lines traversing Bedford-Stuyvesant and the 3 and L subway lines traversing Crown Heights, Brownsville, and East New York; as well as the poorer areas of Williamsburg and Bushwick by the J/M subway lines.”).

<sup>52</sup> Stipulation and Proposed Preliminary Approval Order at 3, *Stinson v City of New York*, 282 FRD 360 (S.D.N.Y. 2012), [https://nypdsummons.com/Portals/0/Documents/ExhibitA\(SettlementAgreement\).pdf](https://nypdsummons.com/Portals/0/Documents/ExhibitA(SettlementAgreement).pdf) (last accessed March 3, 2018) (Listing the number of C-summonses between 294,683 to 520,295 issued by the NYPD from 2007-2015).

debunked not only by civil society groups, but by actors in City government.<sup>53</sup> It is now well understood that quality of life policing has in practice not improved the lives of New Yorkers, but rather resulted in the collective punishment of communities of color and their neighborhoods throughout the five boroughs.

The New York City Human Rights Law prohibits policing that creates these kinds of disparate racial outcomes. The City cannot defend such policing outcomes, because the Policy does not bear the requisite “significant relationship to advancing a significant law enforcement objective.”<sup>54</sup> The NYPD has not offered any concrete evidence that demonstrates the acute safety risks so called transit recidivists pose to our subway system so as to amount a significant law enforcement objective under City law.

Furthermore, whether someone is included in the Database does not reflect that person’s propensity to commit a transit violation, the stated law enforcement objective. Instead the Database casts a much broader net on all individuals who

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<sup>53</sup> The NYPD Inspector General’s report demonstrates an absence of any correlation between the number of quality of life arrests and felony crime rate, which is key empirical foundation for broken windows policing. *See* New York City Department of Investigation, Office of the Inspector General for the NYPD (OIG-NYPD), *An Analysis of Quality-of-Life Summonses, Quality-of-Life Misdemeanor Arrests, and Felony Crime in New York City, 2010-2015* (June 22, 2016) <https://www1.nyc.gov/assets/oignypd/downloads/pdf/Quality-of-Life-Report-2010-2015.pdf> (last accessed March 3, 2018). J. Phillip Thompson, *Broken Policing: The Origins of the “Broken Windows” Policy*, 24 *New Labor Forum* 42, 46 (2015); Cf. William J. Bratton, *New York City Police Department, Broken Windows Is Not Broken: The NYPD Response to the Inspector General’s Report on Quality-of-Life Enforcement*, [https://www1.nyc.gov/assets/nypd/downloads/pdf/broken\\_windows\\_is\\_not\\_broken.pdf](https://www1.nyc.gov/assets/nypd/downloads/pdf/broken_windows_is_not_broken.pdf) (last accessed March 3, 2018) (responding to the Inspector General’s Report).

<sup>54</sup> Administrative Code of the City of NY § 14-151.

were ever stopped, which is the product of NYPD's dual policies of saturating subway stations in communities of color and officers' targeting of people of color more aggressively for arrests and summons.<sup>55</sup> Finally, the NYPD offers no explanation for why arrests are necessary for deterrence, and why summonses and the schedule of fines, which imposes heavier penalties for multiple offenders, are not a sufficiently substantial financial burden to achieve deterrence.

No one should be arrested for a transit violation simply because of their prior arrest history, particularly since the NYPD's use of such information magnifies disparate racial impact of its transit system policing.

### **CONCLUSION**

The amici witness the devastating human costs of singling out certain individuals for aggressive enforcement of transit violations – arrest, detention, prosecution and sentencing – up close in arraignment interview booths and, later, at our offices and community-based groups as they seek reentry support. And, we stand with them as they advocate for a more humane criminal legal system drawing on their personal experiences.

In exercising its discretion, the NYPD should not rely on information that violates constitutional principles, state sealing statutes and carries a well-

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<sup>55</sup> See Transcript of the Minutes of the Committee on Public Safety, *supra* 13, 57 (Chernyavsky described how the transit recidivist check is conducted as “computerized much like a warrant check, the name is run and it’s a merging of a variety of databases from the state from internal arrest databases that contribute...”).

documented, baked-in history of discriminatory policing forward into the present in order to rationalize the most significant of intrusions—a full custodial arrest and search. The use of arrest histories to justify arresting someone suspected of fare evasion violates the presumption of innocence. It also creates an endless cycle of punishment: A single arrest has consequences long after its final resolution, whether that be a criminal or noncriminal conviction or a dismissal. It can mean a full body search, a night spent in custody, the loss of job, or the loss of a bed in the shelter. All of these harms are more visited upon minority communities in the City, who rely on our subway system to travel safely and with dignity. In its cumulative effect, the NYPD eliminates even the modest gains in reform in the last five years, by singling out Black and Latinx subway riders for arrests. This is an intolerable abuse of police discretion. The amici urge the Court to consider the human and social costs inflicted by the Policy and find in favor of Mr. Vargas.

RESPECTFULLY SUBMITTED,

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**APPELLATE DIVISION—FIRST DEPARTMENT**  
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I hereby certify pursuant to Rule 600.10(d)(1)(v) that the foregoing brief was prepared on a computer using Microsoft Word. A proportionally spaced typeface was used, as follows:

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