



**Written Testimony of the
American Civil Liberties Union**

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For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, DC, for the principle that every individual's rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, disability, or national origin. Consistent with this mission, I am honored to have this opportunity to provide testimony on building trust and legitimacy between law enforcement and the communities they serve.

Recent incidents across this country – from Los Angeles to Cleveland, and from Ferguson to New York City – offer an opportunity to change the culture of policing. This culture, as it currently exists in some cases, results in a relationship based on mistrust between law enforcement and our low income communities and communities of color. Such a culture results in police killing unarmed black men with little accountability. And such a culture generates rallying cries of “black lives matter.” The controversies of the past few months have focused on the errors and malfeasance of a few individuals – and that is a necessary process that must occur regardless of whether we agree with the specific results or not. But recent events, as tragic and controversial as they are, also provide America a sea-change opportunity to go beyond just dealing with a few bad apples and to reform and refresh an entire system. Fairness and justice demand that we seize this opportunity.

The State of Policing in the 21st Century

One only needs to paint a quick picture of the state of policing to understand the dire need for reform. First, there are local and federal incentives that instigate arrests. At the local level, cities across the country generate much of their revenue through court fines and fees, with those who can't pay subject to arrest and jail time. These debtors' prisons are found in cities like Ferguson, where the number of arrest warrants in 2013 – 33,000 – exceeded its population of 21,000. Most of the warrants were for driving violations.¹ At the federal level, arrests can be incentivized through the Edward Byrne Memorial Justice Assistance Grant (Byrne JAG) and other federal dollars that give the appearance that grant performance is tied to arrest statistics. Consequently, local law enforcement may target the easiest violators – low-level drug offenders – to increase their arrest numbers.²

Such a push for arrests has resulted in over-policing and biased policing of our most marginalized communities – communities of color and low income communities – often to carry out the so-called “War on Drugs.” In these communities, policing looks like racial profiling. In New York City, the number of stops of young black men in 2011 – 168,000 – exceeded the city's population of young black men – roughly 158,000.³ It looks like the racial profiling in Maricopa County, Arizona, where Latino drivers were up to nine times more likely to be stopped than whites in 2011.⁴ It looks like biased policing for low level drug offenses in the nation's capital, where 91% of those arrested for marijuana possession in 2010 were black.⁵ Policing in schools looks like the criminalization of youth of color and students with disabilities, who are disproportionately subjected to school-related arrests and pushed into the juvenile justice system.⁶

Policing looks like militarization – a grenade tossed into a crib critically injuring a sleeping child just to execute a search warrant for \$50 worth of drugs in small-town Cornelia, Georgia.⁷ It looks like big-brother surveillance where automated license plate readers record the whereabouts of millions each week in Los Angeles.⁸ Too often policing reinforces gender-bias, where officers refuse to enforce established laws against domestic and sexual violence, dismiss or misclassify such complaints, and ignore domestic and sexual abuses committed by officers within the force. And across this country, policing looks like excessive and deadly use of force, used against people of color, including children and the mentally ill. In recent months, policing looks like its most visible victims: Dontre Hamilton, Eric Garner, John Crawford, Michael Brown, Ezell Ford, and 12-year-old Tamir Rice.

Recommendations for Policing in a Democratic Society

This is not what policing in the 21st century should look like. As we determine best practices that will build trust and legitimacy between law enforcement and the communities they serve, the focus of this statement will be on solutions that will better define the role of police in a democratic society; build a culture of transparency; engage all community residents, including youth; and advance the pillars of procedural justice – respect, legitimacy, transparency, and fairness – that will ultimately result in law enforcement treating the communities they serve as they would want to be treated.

The recommendations put forward today are ones that state and local law enforcement can implement unilaterally. The Administration and Congress can support such local police reform through investigations and federal grant program requirements; and federal law enforcement agencies, including Customs and Border Protection and the FBI, must lead in implementing best practices.⁹ Just as this White House Task Force demonstrates, efforts must come from every level given the crisis this country is facing. The good news, however, is that there is no shortage of solutions; and the recommendations highlighted below are in no way exhaustive of the reforms that are needed. Police reforms have been considered for decades, and the ACLU's reports, litigation, and local and national advocacy attest to that. What we need now is nationwide implementation of these solutions.

Pay particular attention to consent decrees and other agreements in cities across the country – including Los Angeles, Seattle, Cincinnati, New Orleans, Newark, and New York City, as well as Puerto Rico. They offer explicit and precise examples of what police reform should look like.¹⁰ Because these detailed agreements are publicly available, no police department in this country should be confused about what model policing should look like. These agreements, several of which the ACLU was instrumental in constructing, offer guidance on the issues with which we are confronted today – a lack of data, biased policing, excessive and deadly use of force, and a mistrust between law enforcement and communities.

1. Police departments should collect and report data in a uniform manner and provide this data to a national federal database to build a culture of transparency.

Data collection and reporting is the easiest single thing any police department can do starting today. And it will offer the best depiction of what policing in the 21st century looks like

and allow the statistics to better shape tactics. It is emblematic of our inattention to the problems of policing when you realize that we know the number of hogs and pigs living on U.S. farms (66.1 million), but we do not know how many police shootings there are in a year.¹¹ Some numbers are available for fatal police shootings and the FBI Uniform Crime Report indicates that there were 461 justifiable homicides by law enforcement in 2013 – the highest in two decades.¹² However, these numbers fail to represent the complete universe of police killings because only a small number of police departments report this data. And with respect to stops and searches, only 17 states collect data.¹³

Police departments should collect data on stops, frisks, searches, citations, arrests, excessive uses of force, and justifiable homicides. Data should be collected and reported in a uniform manner and be publicly accessible. Additionally, this data should be submitted to a national federal database.

The 2012 New Orleans consent decree, which the ACLU of Louisiana described as “long-awaited improvements,”¹⁴ provides a model for data collection. The agreement requires the New Orleans Police Department (NOPD) to collect comprehensive data on all investigatory stops and searches. The data is subjected to supervisory review and the decree mandates that the department take appropriate action to address improper stops and searches. NOPD must issue a publicly accessible annual report summarizing, analyzing, and responding to the data.¹⁵ The NOPD also is required to strengthen its system of classifying and tracking domestic and sexual violence complaints.¹⁶ And in New York, one of the outcomes of the stop and frisk litigation is that New York Police Department (NYPD) officers must articulate the basis for a stop in narrative form rather than by checking boxes, which significantly improves the quality of the data collected.¹⁷

Additional recommendations for best practices to collect and report data include:

a. Police departments should publish electronic data on a quarterly basis about all stops, frisks, non-consensual searches, observations, and consensual interrogations and searches, including a breakdown by race, gender, age, outcome, and the officer’s basis for the encounter and action.¹⁸ Data collection and reporting should also be instituted for policing activity in schools.

b. Police departments should measure community safety and police-community relations with data on things such as the number of citizen complaints. Police departments should rely less on the raw numbers of stops, citations, summons, and arrests to measure their productivity and effectiveness.¹⁹

2. Police departments should prohibit racial profiling and gender bias to advance racial reconciliation.

Racial profiling and gender-biased policing cause targeted communities to mistrust the police. Such practices reduce public safety as communities are less likely to cooperate with police to address serious crime. Profiling leads to the aggressive enforcement of minor offenses in communities of color. Members of these communities, particularly youth, are then

disproportionally subjected to the criminal justice system. And gender-biased policing undermines confidence in the system and perpetuates sexual violence by discouraging victims from coming forward. Indeed, the two issues – racial and gender bias – are intertwined because few women of color who experience domestic or sexual violence will reach out to police when there is a history of brutality and profiling in their communities.

Police departments must adopt model policies that strictly prohibit law enforcement from profiling drivers, passengers, and pedestrians on the basis of race, ethnicity, national origin, sexual orientation, gender, and gender identity. Police departments must provide training to end discriminatory and biased policing; investigate complaints of racial profiling in a thorough and timely manner; and take appropriate disciplinary measures when police officers discriminate. Similarly, there should be policies on responding to domestic and sexual violence that address bias that women, particularly women of color, too often experience from law enforcement when reporting these crimes.

The 2013 Puerto Rico consent decree offers an approach to eradicating racial profiling and gender bias. It addresses the ACLU's concerns regarding biased policing against Dominican immigrants, Black Puerto Ricans, and victims of domestic and sexual violence.²⁰ The agreement provides comprehensive equal protection provisions that promote equitable, respectful, and bias-free police services. One provision makes the protection of civil rights a central part of the Puerto Rico Police Department (PRPD) mission. Officers must receive annual training on biased-free policing that includes community perspectives. The training includes identification of key decision points where prohibited discrimination can take effect at both the incident and operational planning levels.²¹

Additional recommendations for best practices to prohibit racial profiling include:

a. Police departments should establish explicit guidelines outlining the specific circumstances under which the Fourth Amendment permits a stop, frisk, and subsequent search, and train officers on the guidelines annually.²²

b. Police departments should provide documentation – i.e., a receipt – to any civilian involved in an interrogation, stop, frisk, or search, no matter whether it was consensual or not;²³ and those encounters that are consensual should be in accordance with model consent search policies²⁴ that may require written or video-recorded consent.²⁵

c. Police departments should adopt the policies and procedures articulated in the End Racial Profiling Act.²⁶

3. Police departments should adopt a comprehensive use of force policy, schedule routine and adequate training on that policy, and implement a review process for use of force incidents which advances procedural justice.

Excessive and deadly use of force, disproportionately against people and communities of color, drives today's conversation. Choking a man to death for allegedly selling untaxed

cigarettes is unacceptable. Shooting an unarmed teen to death for walking in the middle of the street is unacceptable. Killing a 12-year old child for playing with a toy gun is unacceptable.

All police departments should have a thorough use of force policy that emphasizes de-escalation techniques. There should be regular and proper training that includes officer certification on each type of weapon or force. A department should have an early intervention system in place to identify officers who present the greatest risk of using excessive force. And there should be a review process for use of force incidents that includes a force review board.

Consent decrees in Cincinnati, Los Angeles, Washington, D.C., and other cities have required early intervention systems. The Puerto Rico Police Department has developed policies that require officers to rely primarily on non-force techniques, use force only when necessary, and de-escalate the use of force at the earliest possible moment. PRPD and other jurisdictions have developed a policy on sharing use of force information with the public and the family members of civilians involved in a use of force incident. Uses of force are investigated by Force Investigation Teams comprised of specially trained people.²⁷ Departments in New York, Los Angeles, Philadelphia, and other cities have even implemented systems to make use-of-force reports available online.²⁸

Additional recommendations for best practices around use of force include:

a. Police departments should implement body-worn cameras with appropriate privacy protections and ensure that all camera policies are transparent to the public.²⁹

b. Police departments should make detailed use of force reports available online.

4. Police departments should enable oversight by a civilian review board to promote community policing and ensure community engagement and dialogue.

In many American cities, there is a disconnect between law enforcement and the communities they serve. Some observers point to an “us versus them” mentality as the cause for this disconnect. Though many police departments promote a community policing model, police-community relations often fall far short of that, lacking communication, trust, and accountability. A civilian review board is one response to this.

The ACLU described the 2002 collaborative agreement in Cincinnati as “engag[ing] both the police and everyday citizens to invest in the neighborhood and make their environment a better place for both groups.”³⁰ In addition to better community policing practices, like regular police foot patrols and weekly community meetings, the collaborative agreement established a citizen review board. The success of Cincinnati’s Citizen Complaint Authority³¹ arises out of due process for officers and community members, speedy results, independence from the police department, and transparency to the community.

Seattle’s memorandum of agreement which accompanies its consent decree also provides for a community police commission. The commission allows “Seattle’s diverse communities to participate in the implementation of the MOU and certain aspects of the Settlement Agreement,

and to promote greater transparency and public understanding of the Seattle Police Department.”³² The Community Police Commission (CPC) is made up of law enforcement, faith communities, minority, ethnic, and other community organizations, and youth groups. The success of this commission has resulted in the CPC becoming the permanent civilian oversight body for police accountability in the city.³³

Additional recommendations for best practices around a civilian review board include:

a. Police departments should empower a civilian review board with substantial authority, which could include subpoena power and independent disciplinary authority,³⁴ and civilian review boards should also accept complaints regarding school safety officers.

b. Police departments should charge its civilian review board with regularly analyzing data on a range of police department practices to determine if there are any unjustified racial disparities in enforcement practices.³⁵

Conclusion

America must seize this moment and address the troubled relationship between police and the communities they serve, particularly communities of color and low-income communities. The current culture of policing demands far-reaching and systemic reform and warrants national attention and investment. The President should be commended for establishing a Task Force on 21st Century Policing. And the Department of Justice should be recognized as well for organizing a series of listening sessions on this issue. Our efforts must go beyond dialogue and the ACLU looks forward to the recommendations and action items that will come out of the Task Force in March. We urge the Task Force to adopt the recommendations offered in this testimony.

¹ Joseph Shapiro, *In Ferguson, court fines and fees fuel anger*, NPR, Aug. 25, 2014, available at <http://www.npr.org/2014/08/25/343143937/in-ferguson-court-fines-and-fees-fuel-anger>. The ACLU’s October 2010 report, *In For A Penny: The Rise of America’s Debtors’ Prisons*, further illustrates this issue and is available at http://www.aclu.org/files/assets/InForAPenny_web.pdf.

² The ACLU’s June 2013 report, *The War on Marijuana in Black and White*, recommends that the federal government not include marijuana possession arrests in its performance measures for Byrne JAG. The report is available at <https://www.aclu.org/sites/default/files/assets/1114413-mj-report-rfs-rell1.pdf>.

³ New York Civil Liberties Union, *Stop-And-Frisk 2011: NYCLU Briefing*, available at http://www.nyclu.org/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

⁴ Richard A. Serrano and Ashley Powers, *Pattern of civil rights abuses alleged in Sheriff Joe Arpaio’s Maricopa County*, Dec. 15, 2011, available at <http://articles.latimes.com/2011/dec/15/nation/la-na-justice-sheriff-20111216>.

⁵ Hearing on District of Columbia’s “Marijuana Possession Decriminalization Amendment Act of 2014” Before the Subcomm. on Government Operations of the H. Comm. on Oversight & Government Reform, 113th Cong. 3 (2014) (statement of the ACLU), available at https://www.aclu.org/sites/default/files/assets/aclu_subcommittee_on_government_operations_2014.pdf.

⁶ U.S. Department of Education-Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot: School Discipline*, March 2014, available at <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>. Police departments should adopt the following policies to address the overcriminalization of youth and improve youth relations: (1) Police departments with personnel assigned to public schools should have minimal enforcement authority and should be held accountable for their actions by oversight mechanisms; (2) Authority over police in schools must be restored to school administrators; (3) The role of police personnel in schools must be limited to legitimate security concerns for children and educators; (4) Where school resource officers (SROs) are being used, SROs should not engage in school discipline; (5) Police personnel must be trained to function in accordance with

sound educational practices and to respect the differences between street and school environments; (6) Students, families, and educators must be given a meaningful mechanism to complain about wrongdoing by school-based police personnel; and (7) Annual evaluations of school safety practices should be conducted and practices with proven success should be adopted.

⁷ Todd C. Duncan, *Grand jury to review raid that disfigured Haberhsam toddler*, ATLANTA JOURNAL-CONSTITUTION, Sept. 9, 2014, available at <http://www.ajc.com/news/news/grand-jury-to-review-raid-that-disfigured-habersha/nhJsh/>.

⁸ Jason Henry, *ACLU: Southern California cops are putting spy tools in place quietly*, SAN GABRIEL VALLEY TRIBUNE, Nov. 15, 2014, available at <http://www.sgvtribune.com/social-affairs/20141115/aclu-southern-california-cops-are-putting-spy-tools-in-place-quietly>.

⁹ The Administration's commendable attention to policing must not neglect putting its own law enforcement house in order. Many of the recommendations elaborated here are sorely needed as reforms to federal police including CBP and the FBI. For example, body-worn cameras and a reformed complaints process are urgently required as a response to CBP's terrible track record of use of force and other abuses. And a complete ban on racial profiling must close ongoing loopholes allowing border enforcement and national security matters to be exempted. The following resources are supportive of this position: ACLU et al., *Recommendations to DHS to Improve Complaint Processing* (2014), available at

https://www.aclu.org/sites/default/files/assets/14_5_5_recommendations_to_dhs_to_improve_complaint_processing_final.pdf; American Immigration Council, *No Action Taken: Lack of CBP Accountability in Responding to*

Complaints of Abuse (2014), available at <http://www.immigrationpolicy.org/special-reports/no-action-taken-lack-cbp-accountability-responding-complaints-abuse>; Hearing on "Open Borders: The Impact of Presidential Amnesty on Border Security," Before the H. Comm. on Homeland Security, 113th Cong. (2014) (statement of ACLU, Southern Border Communities Coalition, and Northern Borders Coalition), available at

https://www.aclu.org/sites/default/files/assets/sbcc-aclu-nbc_statement_house_homeland_security_hearing_12-2-14.pdf; Garrett M. Graff, *The Green Monster: How the Border Patrol became America's most out-of-control law enforcement agency*, POLITICO MAGAZINE, Nov./Dec. 2014, available at

<http://www.politico.com/magazine/story/2014/10/border-patrol-the-green-monster-112220.html#.VHdurIfF8Wk>;

ACLU Response to Revised DOJ Guidance on the Use of Race by Federal Law Enforcement Agencies (Dec. 8, 2014), available at <https://www.aclu.org/criminal-law-reform-racial-justice/aclu-response-revised-doj-guidance-use-race-federal-law-enforceme>; Chris Rickerd, *A Dangerous Precedent: Why Allow Racial Profiling at or Near the Border?*, ACLU BLOG OF RIGHTS, Dec. 8, 2014, available at <https://www.aclu.org/blog/immigrants-rights-racial-justice/dangerous-precedent-why-allow-racial-profiling-or-near-border>.

¹⁰ Consent decrees have been described as fundamental to reform and transforming police departments into "organizations committed to policing constitutionally and with legitimacy among the populations they serve." Joe Domanick, *Police reform's best tool: a federal consent decree*, THE CRIME REPORT, July 15, 2014, available at <http://www.thecrimereport.org/news/articles/2014-07-police-reforms-best-tool-a-federal-consent-decree>.

¹¹ Wesley Lowery, *How many police shootings a year? No one knows*, WASH. POST, Sept. 8, 2014, available at <http://www.washingtonpost.com/news/post-nation/wp/2014/09/08/how-many-police-shootings-a-year-no-one-knows/>; USDA National Agricultural Statistics Service, *U.S. Hogs and Pigs Inventory Up 2 Percent*, Dec. 23, 2014, available at http://www.nass.usda.gov/Newsroom/2014/12_23_2014.asp.

¹² Kevin Johnson, *Police killings highest in two decades*, USA TODAY, Nov. 11, 2014, available at <http://www.usatoday.com/story/news/nation/2014/11/11/police-killings-hundreds/18818663/>.

¹³ Ranjana Natarajan, *Racial profiling has destroyed public trust in police. Cops are exploiting our weak laws against it*, WASH. POST, Dec. 15, 2014, available at <http://www.washingtonpost.com/posteverything/wp/2014/12/15/racial-profiling-has-destroyed-public-trust-in-police-cops-are-exploiting-our-weak-laws-against-it/>.

¹⁴ Marjorie Esman, *Long-awaited improvements coming to New Orleans Police Department*, ACLU BLOG OF RIGHTS, July 26, 2012, available at <https://www.aclu.org/blog/criminal-law-reform-free-speech/long-awaited-improvements-coming-new-orleans-police-department>.

¹⁵ *U.S. v. City of New Orleans*, No. 12-1924, 42-44 (E.D. La. July 24, 2012), available at <http://www.nola.gov/getattachment/NOPD/About-Us/NOPD-Consent-Decree/NOPD-Consent-Decree-7-24-12.pdf/>.

¹⁶ *Id.* at 54-60.

¹⁷ *Floyd v. City of New York*, No. 08 Civ. 1034, 19 (S.D.N.Y. Aug. 12, 2013) available at <http://ccrjustice.org/files/Floyd-Remedy-Opinion-8-12-13.pdf>.

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- ¹⁸ ACLU of Boston, *Black, Brown and Targeted*, October 2014, 2, available at https://www.aclum.org/sites/all/files/images/education/stopandfrisk/black_brown_and_targeted_online.pdf.
- ¹⁹ ACLU, *The War on Marijuana in Black and White*, June 2013, 120, available at <http://www.aclu.org/files/assets/aclu-thewaronmarijuana-rel2.pdf>.
- ²⁰ Brief of the ACLU as *Amicus Curiae*, *U.S. v. Commonwealth of Puerto Rico and Puerto Rico Police Department*, No. 3:12-cv-2039, 3 (P.R. Apr. 1, 2013), available at https://www.aclu.org/files/assets/amicus_filed.pdf.
- ²¹ *U.S. v. Commonwealth of Puerto Rico and Puerto Rico Police Department*, No. 3:12-cv-2039, 38-39 (P.R. July 17, 2013) available at http://www.justice.gov/crt/about/spl/documents/prpd_agreement_7-17-13.pdf.
- ²² *Supra* note 19 at 118. Explicit guidelines on the Fourth Amendment are critical in various policing contexts, including trespass stops. Outcomes of a New York Civil Liberties Union (NYCLU) litigated case requires adoption of a policy addressing the limited circumstances under which NYPD officers can stop people outside of apartment buildings on suspicion of trespass inside the building, as well revisions to the NYPD training program on the legal standards concerning stop and frisk. *Ligon v. City of New York*, No. 12 Civ. 2274, 145-148 (S.D.N.Y. Jan. 8, 2013), available at http://www.nyclu.org/files/releases/CleanHallsRuling_1.8.13.pdf.
- ²³ *Supra* note 18 at 2.
- ²⁴ *Supra* note 19 at 118.
- ²⁵ *Supra* note 18 at 2.
- ²⁶ S. 1038, 113th Cong. (2013).
- ²⁷ *Supra* note 21 at 17-18.
- ²⁸ Rob Barry and Coulter Jones, *Hundreds of police killings are uncounted in federal stats*, WSJ, Dec. 3, 2014, available at <http://www.wsj.com/articles/hundreds-of-police-killings-are-uncounted-in-federal-statistics-1417577504>.
- ²⁹ Jay Stanley, *Police Body-Mounted Cameras: With Right Policies in Place, a Win For All*, October 2013, available at https://www.aclu.org/sites/default/files/assets/police_body-mounted_cameras.pdf.
- ³⁰ American Civil Liberties Union of Ohio, *The Cincinnati Collaborative Agreement*, Feb. 5, 2013, available at <http://www.acluohio.org/issue-information/the-cincinnati-collaborative-agreement>.
- ³¹ Additional information about the Citizen Complaint Authority that was established in 2003 as a result of the Memorandum Agreement and the Collaborative Agreement can be found online at <http://www.cincinnati-oh.gov/ccia/citizen-complaint-authority/>.
- ³² Memorandum of Understanding Between the United States and the City of Seattle, July 27, 2012, 1-3, available at http://www.justice.gov/crt/about/spl/documents/spd_mou_7-27-12.pdf.
- ³³ Office of Mayor Ed Murray, *Murray and Community Leaders Announce Police Accountability Reforms*, Nov. 12, 2014, available at <http://murray.seattle.gov/murray-and-community-leaders-announce-police-accountability-reforms/>.
- ³⁴ The ACLU of New Jersey is pushing for a strong, independent civilian oversight body that would possess such authority. This recommendation builds upon a 2014 agreement between the Department of Justice (DOJ) and the Newark Police Department (NPD) to impose sweeping reforms within NPD. The agreement was reached in response to a DOJ investigation of NPD that was a result of a petition filed with DOJ by ACLU-NJ in September 2010 that documented more than 400 incidents of abuse and misconduct by NPD and called for DOJ oversight. ACLU of NJ, *Newark Community and Advocacy Organizations Welcome Opportunity for Reform of the Newark Police Department*, July 24, 2014, available at <https://www.aclu-nj.org/news/2014/07/24/newark-community-and-advocacy-organizations-welcome-opportun>. The agreement between DOJ and NPD is available online at https://www.aclu-nj.org/files/9714/0605/3147/NPD_Agreement_in_Principle.pdf.
- ³⁵ *Supra* note 19 at 122.