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Via Electronic Mail

H.E. Michelle Bachelet
United Nations High Commissioner for Human Rights
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Re: Implementation of Human Rights Council Resolution 43/1

Dear High Commissioner:

On behalf of the NAACP Legal Defense and Educational Fund, Inc. (“LDF”), we write in response to the call for input for the preparation of a report requested by the United Nations Human Rights Council (Council) Resolution [43/1](#). Specifically, the Resolution invites the Council to create a report on “systemic racism, violations of international human rights law against Africans and people of African descent by law enforcement agencies, especially those incidents that resulted in the death of George Floyd and other Africans and people of African descent, to contribute to accountability and redress for victims.”¹ Addressing the systemic issues relating to law enforcement’s unnecessary violence and misconduct towards Black people in the United States will require **(1)** policies creating a national use of force standard that limits the use of force and allows officers to use force only as a last resort; **(2)** strategies to identify and remove those who hold white supremacist views from law enforcement; **(3)** laws and policies that prohibit racially biased policing strategies and hold law enforcement accountable for violating this prohibition; **(4)** national data collection systems that track officer misconduct and identify disparate impact of agencies’ policing practices; **(5)** independent and transparent investigations of police misconduct; and **(6)** elimination of legal barriers to accountability such as Law Enforcement Officers Bills of Rights and the judicial doctrine of qualified immunity.

LDF is the nation’s first and premier civil rights legal organization devoted to racial justice. Founded in 1940 by Thurgood Marshall, who later became the nation’s first Black U.S. Supreme Court Justice, LDF’s mission is to achieve racial justice, equality, and an inclusive society and to fulfill the promise of full and equal citizenship for Black people and other people of color guaranteed by the 14th Amendment to the United States Constitution. In 2015, LDF launched a Policing Reform Campaign in the aftermath of the police killings of Eric Garner,

Michael Brown, Sandra Bland, Walter Scott, and Freddie Gray— and public demands for police accountability. That campaign has transformed into LDF’s Justice in Public Safety Project, which uses litigation, policy, advocacy, research, community organizing, and strategic communications to: (1) ensure accountability for police brutality and misconduct through community oversight and changes to laws, policies, and practices; (2) promote policing and public safety practices that eliminate the harmful influence of racial and other biases; and (3) support a new paradigm of public safety that ends police violence and drastically reduces the presence of armed law enforcement in communities of color. It is with this decades-long experience and commitment that we provide information and suggestions for the proposed United Nations report.

As detailed below, there are over 18,000 independent law enforcement agencies that function primarily at municipal and county levels with little to no oversight from communities, or state and federal governments. These law enforcement agencies also have a history of engaging in racially-biased practices—dating back to the enforcement of the [black codes](#) and [Jim Crow laws](#)—that have resulted in systematic violations by law enforcement officers of the rights of Black people and communities throughout the U.S., in violation of the U.S. Constitution and international law.²

I. United States Law Enforcement Agencies Use Force More Frequently Against Black People, Including Peaceful Protesters.

Under international human rights principles, law enforcement officers may use force only when necessary.³ The use of deadly force is permitted only as a last resort to protect themselves or others from death or serious injury.⁴ In the United States, an officer’s use of force is governed by the Fourth Amendment to the U.S. Constitution. The constitutionality of an officer’s use of force depends on whether it was “objectively reasonable” in light of all the facts and circumstances at issue, including the severity of an offense a person has committed.⁵

Studies show that police in the United States kill and use force against Black people relative to white people at a higher rate. Between [2015-2019](#), Black people accounted for 24.2% of people shot and killed by police despite representing only 13.2% of the population.⁶ In [Tulsa, Oklahoma](#), while Black people constitute only 15% of the city of Tulsa’s total population, in 2019, they comprised 37% of people against whom Tulsa Police Department officers used force.⁷

Federal investigations have also shown a pattern or practice of excessive force by law enforcement officers against people who pose no threat to officers or the public. For example, [in New Orleans](#), a U.S. Department of Justice (“DOJ”) investigation found “officers use force against individuals, including persons in handcuffs, in circumstances that appeared not only unnecessary but deliberately retaliatory.”⁸ In [Baltimore, the DOJ determined](#) that BPD officers used “unreasonable force against people who are already restrained,”⁹ and those who were running *away* from officers,¹⁰ neither of whom presented any threat to officers or the public. In both cities, officers were found to have engaged in a pattern or practice of excessive force under the U.S. Constitution, these patterns also violate international human rights principles.

This summer, the deaths of Breonna Taylor and George Floyd are among the latest in a long, uninterrupted history of police killings that sparked nationwide protests against police violence and systemic racism.¹¹ In response to these peaceful protests, law enforcement agencies, [including federal law enforcement agencies](#),¹² responded by using excessive force against protesters in cities nationwide.

On May 31, 2020, officers from the Philadelphia Police Department (PPD) [arrived en masse in armored vehicles](#), in response to limited reports of isolated looting, and without provocation repeatedly unleashed a variety of dangerous military style munitions launching tear gas and firing rubber bullets at residents and passersby sitting on their porches and walking home from work.¹³ Some residents were forced to evacuate their homes due to tear gas used by police which entered their homes.¹⁴ The PPD targeted a predominantly Black neighborhood for this treatment even though predominantly white neighborhoods also experienced alleged looting.¹⁵

Similarly, in response to protests calling for an end to police brutality and systemic racism in Louisville, Kentucky, and justice for Breonna Taylor,¹⁶ Louisville police officers used [tear gas, flash bangs, pepper balls, and other forms of military-grade technology](#) against demonstrators.¹⁷ This combat-style response led to yet another senseless death: on May 31, 2020, when Louisville police and the National Guard [fired eighteen live rounds at David McAtee](#), a local Black restaurant owner, killing him, after he appeared to point a gun at officers to protect protesters seeking shelter in his restaurant from police violence.¹⁸ Since then, countless peaceful protesters—including elected officials and local educators—have been shot, gassed, beaten, and arrested solely for making their voices heard.¹⁹ Louisville police officers also abused the city’s curfew order while it was in effect, employing force to arrest or disperse people hours before the curfew order required them to clear the streets.²⁰

LDF filed lawsuits, on behalf of protesters, against the [Louisville Metro Police Department](#) (“LMPD”) and [Philadelphia Police Department](#) for their use of military-style weapons in violation of the protesters’ constitutional rights. LDF’s lawsuit on behalf of protesters alleges violations of the U.S. Constitution’s First Amendment for retaliation against protesters exercising their rights of speech and assembly, Fourth Amendment for unwarranted seizures and excessive force, and Fourteenth Amendment for discriminatory conduct. These suits remain pending.

To stem this tide of excessive force, the United States Congress must pass a national use of force standard that is more stringent than the constitutional standard and allows officers to use force only as a last resort.

II. The Infiltration of White Supremacists into Law Enforcement Organizations, and the Tacit Support of Racist Militia Groups by Law Enforcement Raises Grave Concerns.

Federal and state governments have failed to address documented evidence that the Federal Bureau of Investigation found in a 2006 report showing persons associated with white supremacists groups [infiltrating or otherwise influencing law enforcement agencies across the country](#). Law enforcement agencies have also tacitly supported unauthorized militias, [who often](#)

[hold white supremacist views](#), and present a threat to Black communities. For example, this summer [Jacob Blake, a 29 year-old Black man, was shot at close range by an officer](#) in Kenosha, Wisconsin. The community was understandably outraged by yet another incident of police violence against a black man and protests ensued. Several self-appointed and unauthorized “militia” members traveled to the Wisconsin protests from other states, armed and creating an additional threat to the protesters.²¹ Kyle Rittenhouse, a teenager who [considers himself a militia member](#),²² responded to calls for additional militia and traveled to the protests in Kenosha. Mr. Rittenhouse [shot three individuals—killing two of them](#).

The response of Kenosha Police Chief Miskinis was extremely troubling. He [described the shooting](#) victims, who were protesting police violence, as “[p]ersons who were out after the curfew[, who] became engaged in some type of disturbance and persons were shot,” and that had they “not been in violation of that, perhaps the situation might not have happened.”²³ Regarding Mr. Rittenhouse, Chief Miskinis described his shooting of three people as “[resolv\[ing\] whatever conflict](#) was in place.”²⁴ This was problematic because the Chief Miskinis – who is charged with protecting all members of the public – appeared to paint Mr. Rittenhouse’s fatal shooting of two protestors as a positive resolution of a problem while painting the protestors, who were exercising their fundamental rights, as criminal, demonstrating a bias in favor of Mr. Rittenhouse.

The need for greater oversight and accountability of law enforcement officers, leaders, and agencies in the United States is clear. Federal and state governments must develop a national strategy to identify and remove individuals who support white supremacist views from law enforcement.

III. U.S. Law Enforcement Over-Police Black Communities Leading to Violations of National and International Law

The United States has the [highest rate of incarceration per capita](#) in the world.²⁵ Within this system of incarceration, Black people are grossly overrepresented due, at least in part, to [over-policing](#) of Black communities.²⁶ Various policies and practices by a number of governmental actors perpetuate these racial disparities at every stage of the criminal justice system, including more frequent [stops](#), [searches](#), and [arrests](#) by law enforcement officers;²⁷ more aggressive [prosecutions](#) and [plea negotiations](#) by local and federal prosecutors,²⁸ and [longer sentences](#) by judges for Black people than their white counterparts for similar crimes.²⁹ “African Americans are more likely than white Americans to be arrested; once arrested, they are more likely to be convicted; and once convicted, they are more likely to experience lengthy prison sentences.”³⁰ By failing to address and remedy widespread practices by local and state law enforcement agencies that unjustifiably target Black people, the United States is in violation of its obligations under Article 2 of the [Universal Declaration of Human Rights](#),³¹ which prohibits discrimination based on race; Articles 2 and 26 of the [International Covenant on Civil and Political Rights](#),³² which ensure that all its residents—regardless of race—are treated equally under the law; as well as Articles 1, 2, and 5 of the [International Convention on the Elimination of All Forms of Racial Discrimination](#),³³ which condemn racial discrimination and require parties to enact policies eliminating it in all its forms, in addition to creating a specific obligation ensuring equality of all before the law regardless of race.

A. Though Data is Limited, Where it is Available, it Demonstrates Officers Stop and Search Black People More Frequently, and with Less Justification, than other Groups.

In the United States, a law enforcement officer may briefly stop an individual without “probable cause” to arrest, if he or she has a “reasonable suspicion”³⁴ that the person has committed or is in the process of committing a crime; this seizure may only last as long as necessary to confirm or rebut the officer’s suspicions.³⁵ An officer may “frisk”³⁶ a person for weapons if they “reasonably believe[]” that the person is “armed” and “dangerous.”³⁷ Law enforcement officers may only conduct a search upon a showing of probable cause and the issuance of a warrant or pursuant to one of a number of exceptions to the warrant requirement.³⁸

There is no federal law requiring all law enforcement agencies to document, report, or make public the data regarding every stop, search, or use of force by officers, much less requiring agencies to do so in a consistent manner nationwide. Thus, systematic data regarding officer activity is not widely accessible to the public. However, a patchwork of data is available through states and cities that provide public access to selective data, through federal agencies that conduct analyses of the criminal justice system, and through litigation brought by private actors and the federal government. These data demonstrate the disparities in officers’ stops and searches by race, including at times, the weaker justification for stops and searches of Black people as compared to their white counterparts.

For example, a [study](#) of traffic stop outcomes by the United States Bureau of Justice Statistics revealed that “Black drivers (4.5%) were twice as likely as white drivers (2.1%) to be arrested,” while “whites (18.6%) were more likely than [B]lacks (13.7%) to simply receive a verbal warning by police during a traffic stop.”³⁹ Similarly, the New York Police Department’s (NYPD) “Stop and Frisk” policy, had a [clear discriminatory impact on Black New Yorkers](#).⁴⁰ In [2011](#), of the 685,724 stops, 350,743 (52.9 percent) were of Black people, despite their comprising only 23 percent of New York City’s population.⁴¹ Conversely, white people accounted for only 61,805 (9.3 percent) of stops, though they comprise 33 percent of the city’s population.⁴²

Although the rate of unlawful stop-and-frisks decreased after a [federal judge found the policy unconstitutional](#) in 2013,⁴³ Black people are still stopped at a higher rate than any other racial group.⁴⁴ This was so even though they accounted for only 22 percent of the city’s population between 2016-2019.⁴⁵ For instance, in [2016](#), the NYPD stopped 12,404 people.⁴⁶ Of that number, 6,498 were Black (52%).⁴⁷ In [2017](#), there were 10,861 stops. Of those stops, 6,277 were Black (58%).⁴⁸ In [2018](#), 11,008 NYPD stops were recorded; 6,241 were Black (57 percent).⁴⁹ And in [2019](#), 13,459 stops were recorded of which 7,981 were Black (59 percent).⁵⁰

Federal investigations by the DOJ of law enforcement agencies have also revealed stark disparities in officers’ stops, searches, and arrests of Black people.⁵¹ A DOJ [investigation of the Baltimore Police Department](#) (“BPD”) conducted after the death of Freddie Gray, a Black man, found that BPD “intrudes disproportionately upon the lives of African Americans at every stage of its enforcement activities.”⁵² The data from BPD officers’ stops demonstrated that:

BPD disproportionately stops African Americans standing, walking, or driving on Baltimore streets. The Department's data on all pedestrian stops from January 2010 to June 2015 shows that African Americans account for 84 percent of stops despite comprising only 63 percent of the City's population. Expressed differently, BPD officers made 520 stops for every 1,000 black residents in Baltimore, but only 180 stops for every 1,000 Caucasian residents.⁵³

The investigation further found that "searches of African Americans have significantly lower hit rates than other searches," which suggests that officers searched Black residents with less justification than people of other racial groups.⁵⁴

Similarly, [in Ferguson, Missouri, a DOJ investigation](#) conducted after the shooting of Michael Brown, a Black man, found that:

[T]raffic stops of black drivers are more likely to lead to searches, citations, and arrests than are stops of white drivers. Black people are significantly more likely to be searched during a traffic stop than white people. From October 2012 to October 2014, 11% of stopped black drivers were searched, whereas only 5% of stopped white drivers were searched.

Despite being searched at higher rates, African Americans are 26% less likely to have contraband found on them than whites: 24% of searches of African Americans resulted in a contraband finding, whereas 30% of searches of whites resulted in a contraband finding. This disparity exists even after controlling for the type of search conducted, whether a search incident to arrest, a consent search, or a search predicated on reasonable suspicion. The lower rate at which officers find contraband when searching African Americans indicates either that officers' suspicion of criminal wrongdoing is less likely to be accurate when interacting with African Americans or that officers are more likely to search African Americans without any suspicion of criminal wrongdoing. Either explanation suggests bias, whether explicit or implicit.⁵⁵

Unsurprisingly, law enforcement officers also disproportionately arrest Black people. City officials in [Tulsa, Oklahoma have documented racial disparities in policing practices](#). While Black Tulsans account for just 14% of the population, they account for 41% of Tulsa Police Department ("TPD") arrests for traffic offenses, 38% of TPD arrests for disorderly conduct, 46% of TPD arrests for arrest warrants, and 40% of TPD arrests and criminal citations for narcotics.⁵⁶

Law enforcement agencies must identify and remedy their policing strategies which lead to over-policing of communities of color and the disproportionate incarceration of Black and Brown people, often for low-level, quality of life offenses.

B. Anti-Black Bias in Policing Must be Understood and Prevented from Effecting Officers' Decisions.

Anti-black bias and the false and dangerous association of Blackness with criminality⁵⁷ in the United States must be considered in understanding the causes of these disparities. The [roots](#) and [evolution](#) of this false and dangerous association have been [documented and rebutted by historians](#).⁵⁸ In practice today, however, [American researchers have demonstrated](#) that the “automatic stereotyping process” operates such that “the mere presence of a person can lead one to think about the concepts with which that person’s social group has become associated.”⁵⁹ “The mere presence of a Black man, for instance, can trigger thoughts that he is violent and criminal.”⁶⁰ Disturbingly, “[n]ot only are Blacks thought of as criminal, but also crime is thought of as Black,”⁶¹ and law enforcement officers are not immune to this bias. In one [study](#), “[w]hen officers were given no information other than a face and when they were explicitly directed to make judgments of criminality, . . . Black faces looked more criminal to police officers; the more Black, the more criminal.”⁶²

Bias has been identified as a potential cause of law enforcement officers’ more frequent and excessive use of force against Black people. Research shows that police officers are more likely to falsely perceive predominantly Black communities as inherently dangerous, threatening, and violent due to stereotyping and racial bias.⁶³ Implicit racial biases “can cause individuals to interpret identical facial expressions as more hostile on Black faces than on white faces, and to perceive identical ambiguous behaviors as more aggressive when engaged in by [B]lacks as opposed to whites.”⁶⁴ In addition, “implicit biases explain the tendency to unconsciously associate blacks with danger.”⁶⁵ A related but separate phenomenon known as, “implicit dehumanization” creates a further “tendency to unconsciously associate [B]lacks with beasts, particularly apes.”⁶⁶ “Disturbingly, in two recent studies, [researchers] found that implicit dehumanization not only facilitates hegemonic racial violence, but also helps people feel more comfortable with it.”⁶⁷

The implications of this bias must be considered in identifying solutions to the disparities in officers’ stops, searches, and arrests of Black people. Law enforcement agencies must implement strategies that interrupt this racial bias and prevent it from effecting officers’ decision-making, such as requiring documentation of whether a stop is based on specific information tying a particular individual to an actual crime.

IV. Insufficient Internal Accountability Systems Compounded with External Barriers to Accountability Result in Officers Acting with Impunity.

Unfortunately, barriers to accountability within United States’ law enforcement agencies, and external barriers created by state laws and judicial doctrine, impede accountability for officers’ violations of international norms, U.S. law, and departmental policy.

A. Law Enforcement Agencies Frequently Fail to Adequately Investigate Officers' Misconduct and Hold Officers Accountable.

Prior DOJ investigative findings expose the ways in which failures in internal accountability systems within law enforcement agencies create a culture of impunity for their officers. For example, in Chicago, after the 2014 killing of Laquan McDonald by Chicago Police Officer Jason Van Dyke, the [DOJ found that the Chicago Police Department](#) (“CPD”) failed to conduct investigations into nearly half of the misconduct complaints.⁶⁸ Where actual investigations did occur, CPD demonstrated a consistent pattern of “egregious investigative deficiencies,”⁶⁹ such as not interviewing witnesses and accused officers or doing so “long after the incident when memories [] faded,”⁷⁰ “routinely fail[ing] to collect probative evidence,”⁷¹ and “allow[ing] . . . collusion among officers.”⁷² For interviews that were conducted, the DOJ found “prevalent and unimpeded” “witness coaching by union attorneys.”⁷³ The DOJ investigative findings noted that the city of Chicago had “paid over half a billion dollars to settle or pay judgments in police misconduct cases since 2004 without conducting disciplinary investigations in over half of those cases, and it recommended discipline in fewer than 4% of the cases it did examine.”⁷⁴ Investigative failures such as these contribute to an environment in which [officers who do report misconduct experience retaliation](#), further entrenching a culture of impunity.

In Baltimore, after the 2015 killing of Freddie Gray while in BPD custody, [the DOJ found that BPD “discourage\[d\]”](#) the public from filing complaints; “improperly” categorized complaints to cover-up misconduct; unnecessarily delayed investigations of complaints; applied “poor investigative techniques” to collect evidence regarding misconduct; and failed to “consistently document” investigation results.⁷⁵ Notably, the DOJ found that BPD commanders regularly approved investigative findings, in spite of investigative files being “deficient or incomplete.”⁷⁶ The DOJ determined that “[t]he longstanding deficiencies in BPD’s systems for investigating complaints has contributed to a cultural resistance to accountability that persists in the Department.”⁷⁷ The report detailed the experience of [one officer who reported misconduct and subsequently experienced retaliation](#) which eventually led him to retire.⁷⁸

Such widespread failures by law enforcement agencies to hold officers accountable—for minor and major misconduct—often contribute to officers’ systemic violations of people’s rights under the U.S. Constitution and international principles.⁷⁹ These systemic failures by law enforcement agencies are unacceptable and must be remedied by the agencies themselves. This will require that law enforcement agencies readily receive complaints, thoroughly and efficiently investigate them, and discipline officers fairly and consistently. Law enforcement agencies must be transparent about their investigations so communities can exercise oversight over their investigative practices and ensure their fairness and thoroughness. A national misconduct database is also necessary to ensure that officers who are terminated from one law enforcement agency are not simply hired by another law enforcement agency.

B. Provisions Frequently Negotiated into Police-Union Contracts, and Provisions in State Laws Providing Officers with Special Protections Impede Accountability.

In addition to failures within law enforcement agencies' internal accountability systems, police union contracts and Law Enforcement Officer Bill of Rights ("LEOBR")⁸⁰ frequently contain provisions that shield officers from discipline and create barriers to the timely, thorough investigation of police misconduct.⁸¹ The provisions within these contracts and LEOBRs allow officers accused of misconduct to stay employed, promoted and, in some cases, have their disciplinary records erased.

After examining police union contracts in 82 of the country's largest cities, [LDF identified eight key areas that potentially impede investigations](#) of complaints or shield officers from discipline for misconduct: (1) delays in interviewing officers accused of misconduct, (2) limits on time periods for imposing discipline on officers accused of misconduct, (3) prohibition against anonymous complaints or requirement that complaints be signed and attested to on a formal complaint form, (4) expungement of discipline records, (5) disciplinary hearing board that is predominately comprised of law enforcement personnel, (6) use of vacation or other leave time in lieu of suspension, (7) requiring that interviews/interrogations be recorded and/or made available to the officer prior to a hearing/proceeding, and (8) requiring that officers have an opportunity to review, consent, and respond to adverse material before such information can be placed in their file.

LEOBRs provide officers with many of the special protections that have been negotiated into police union contracts as identified above. Because LEOBRs are state laws, they provide these special privileges to law enforcement officers statewide, in states where they exist, and are not subject to negotiation. These laws create barriers for accountability even for law enforcement agencies or leaders wishing to hold officers accountable. Such special privileges for law enforcement officers that impede appropriate accountability must be repealed.

C. Qualified Immunity

Qualified immunity, a judicially created doctrine, is another mechanism that allows officers to evade accountability for wrongful conduct. Under this doctrine, police officers are held accountable only if they violate constitutional rights that are "clearly established" pursuant to existing case law.⁸² The Supreme Court has adopted a "particularized," "fact-specific" approach for deciding whether a right is "clearly established."⁸³ To obtain judicial relief, a plaintiff must show that an officer's challenged conduct was [virtually identical](#) to the factual scenario of a prior Supreme Court or binding decision finding the conduct unconstitutional.⁸⁴ A [minor factual difference](#) can, and often does, result in a lower court finding the constitutional right not "clearly established," leaving the victim with no legal recourse and the officer immune from civil liability.⁸⁵

The difficulty of satisfying the "clearly established" requirement is exacerbated further by the Supreme Court's decision in *Pearson v. Callahan*, allowing courts to grant qualified immunity without ruling on the underlying constitutional violation.⁸⁶ In operation, this discretion

has stunted the development of law regarding the constitutionality of problematic officer conduct because lower courts can grant qualified immunity without ruling on the underlying constitutional claims, thereby preventing the law from becoming “clearly established.” As such, a defendant could continue engaging in the same misconduct if a lower court dismissed the case before deciding the constitutionality of such conduct. The practical result of this has led to outcomes that are glaringly at odds with justice and the protection of civil rights.⁸⁷

Legislative remedies to end the judicial doctrine of qualified immunity have been crafted but have not yet become law. Legislative remedies to end qualified immunity for law enforcement officers in the United States must be enacted.

V. Conclusion

The inequities in the policing of Black communities in the United States are stark, and the lack of oversight and accountability for officers’ misconduct is intolerable. We welcome the Human Rights Council efforts to examine and address law enforcement violence, misconduct and other serious human rights violations against Black people in the U.S. To advance law enforcement accountability and address the influence of racial bias, the following remedies must be implemented:

- Federal policies that set a national use of force standard that limits the use of force and allows officers to use force only as a last resort.
- National strategy to identify and remove individuals who hold white supremacist views from law enforcement.
- Laws and policies that prohibit racially biased policing and policing strategies that lead to over-policing of communities of color.
- Law enforcement agencies must readily receive complaints, thoroughly and efficiently investigate them, and discipline officers fairly and consistently.
- A national misconduct database is necessary to ensure that officers who are terminated from one law enforcement agency for misconduct are not hired by another law enforcement agency.
- Repeal laws and policies that provide special privileges for law enforcement officers that impede appropriate accountability and investigation of misconduct complaints.
- Policies that end qualified immunity.

Sincerely yours,

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¹ G.A. Res. 43/1, ¶3, U.N. Doc. A/HRC/RES/43/1 (June 18, 2020), <https://undocs.org/A/HRC/RES/43/1>.

² See Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III), art. 2 (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2, para. 1; art. 26, para. 1, 999 U.N.T.S. 171; International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. A/RES/2106 (XX) (1966), art. 1, 2, 5.

³ U.N. Code of Conduct for Law Enforcement Officials [hereinafter “UN Code of Conduct”], adopted by General Assembly Resolution 34/169 of 17 December 1979; U.N. Basic Principles on the Use of Force and Firearms by Law Enforcement Officials [hereinafter “UN Basic Principles on the Use of Force”], adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990.

⁴ U.N. Basic Principles on the Use of Force, No. 9.

⁵ *Graham v. Connor*, 490 U.S. 386 (1989).

⁶ Amnesty International, *The United States is Violating the Human Rights of Black People by Failing to Restrict Use of Deadly Force by Police* (2020), <https://www.amnestyusa.org/issues/the-united-states-is-violating-the-human-rights-of-black-people-by-failing-to-restrict-use-of-deadly-force-by-police/>.

⁷ Tulsa Equality Indicators 2019 Annual Report, Use of Force Incidents (2019) <http://www.tulsacouncil.org/media/12485/csc-handout-071719.pdf>.

⁸ U.S. Dep’t of Justice, *Investigation of the New Orleans Police Department* vi (Mar. 16, 2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/03/17/nopd_report.pdf.

⁹ U.S. Dep’t of Justice, *Investigation of the Baltimore Police Department* 88-91 (Aug. 10, 2016), <https://www.justice.gov/crt/file/883296/download>.

¹⁰ *Id.* at 91-96.

¹¹ See Jamila Michener, *George Floyd’s killing was just the spark. Here’s what really made the protests explode*, Washington Post (June 11, 2020), <https://www.washingtonpost.com/politics/2020/06/11/george-floyds-killing-was-just-spark-heres-what-really-made-protests-explode/>.

¹² Complaint and Demand for Jury Trial, *Black Lives Matter D.C. et al. v. Trump et al.*, No. 1:20-cv-01469 (D.D.C. June 4, 2020), ECF No. 1.

¹³ First Amended Complaint, *Smith et al. v. City of Phila.*, No. 2:20-cv-03431 (E.D. Pa. Sept. 16, 2020) ¶¶ 4-5, ECF No. 13.

¹⁴ *Id.* at ¶5.

¹⁵ *Id.* at ¶9.

¹⁶ Breonna Taylor was killed on March 13, 2020 by Louisville police officers in her own home. Richard A. Oppel Jr., Derrick Bryson Taylor and Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor’s Death*, Washington Post (Oct. 30, 2020), <https://www.nytimes.com/article/breonna-taylor-police.html>.

¹⁷ Complaint and Demand for Jury Trial, *Scott et al. v. Louisville/Jefferson County Metro Government et al.* 2, No. 3:20-mc-99999 (W.D. Ky. July 30, 2020), ECF No. 1.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ One group in particular, the Kenosha Guard—a militia group that started on Facebook—called upon “any patriots willing to take up arms and defend [Kenosha] . . . from evil thugs.” Patrizia Rizzo, *What is the ‘Kenosha Guard*

militia' and what did they do at the Wisconsin protests?, The U.S. Sun (Aug. 26, 2020), <https://www.the-sun.com/news/1374624/kenosha-guard-militia-kyle-rittenhouse-wisconsin-protests-blm/>. The Kenosha Guard created a Facebook event titled “Armed Citizens to Protect our Lives and Property,” calling for its followers to bring their weapons to an upcoming protest at Civic Center Park. Gina Barton, Cary Spivak, Bruce Vielmetti, Kyle Rittenhouse, *Charged in Kenosha Protest Homicides, Considered Himself Militia*, Milwaukee Journal Sentential (Aug. 26, 2020), <https://www.jsonline.com/story/news/2020/08/26/kyle-rittenhouse-charged-kenosha-protest-shootings-militia/5634532002/>.

²² Gina Barton, Cary Spivak, Bruce Vielmetti, Kyle Rittenhouse, *Charged in Kenosha Protest Homicides, Considered Himself Militia*, Milwaukee Journal Sentential (Aug. 26, 2020), <https://www.jsonline.com/story/news/2020/08/26/kyle-rittenhouse-charged-kenosha-protest-shootings-militia/5634532002/>.

²³ Erin Schumaker, *ACLU Calls For Kenosha Police Chief and Sheriff to Resign in Wake of Jacob Blake Shooting*, ABC News (Aug. 29, 2020), <https://abcnews.go.com/US/aclu-calls-kenosha-police-chief-sheriff-resign-wake/story?id=72701649>.

²⁴ Eric Levenson, Alisha Ebrahimji, Christina Maxouris, *Illinois teen arrested in fatal shooting at Kenosha protest, police say*, CNN (Aug. 26, 2020), <https://www.cnn.com/2020/08/26/us/kenosha-wisconsin-wednesday-shooting/index.html>.

²⁵ Peter Wagner, Wendy Sawyer, *States of Incarceration: The Global Context 2018*, Prison Policy Initiative (June 2018), <https://www.prisonpolicy.org/global/2018.html>.

²⁶ The Sentencing Project, *Report to the United Nations on Racial Disparities in the U.S. Criminal Justice System* (April 19, 2018), <https://www.sentencingproject.org/publications/un-report-on-racial-disparities/> [hereinafter *Sentencing Project Report*].

²⁷ *Id.*, see also The Vera Institute, *An Unjust Burden: The Disparate Treatment of Black Americans in the Criminal Justice System* 7-8 (May 2018), <https://www.vera.org/downloads/publications/for-the-record-unjust-burden-racial-disparities.pdf> [hereinafter *Vera Institute Report*].

²⁸ See *Sentencing Project Report*, *supra* note 27; *Vera Institute Report*, *supra* note 28, at 8-9.

²⁹ *Vera Institute Report*, *supra* note 28, at 8-9.

³⁰ *Sentencing Project Report*, *supra* note 27.

³¹ Universal Declaration of Human Rights, G.A. Res. 217(III) A, U.N. Doc. A/RES/217(III), art. 2 (Dec. 10, 1948).

³² International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 2, para. 1; art. 26, para. 1, 999 U.N.T.S. 171.

³³ International Convention on the Elimination of All Forms of Racial Discrimination, U.N. Doc. A/RES/2106 (XX) (1966), art. 1, 2, 5.

³⁴ Reasonable suspicion” is a lower threshold than the “probable cause” required for searches or seizures required under the Fourth Amendment.

³⁵ *Terry v. Ohio*, 392 U.S. 1, 25-27 (1968).

³⁶ A “frisk” occurs when an officer pats down the outside of an individual’s clothing to assess whether he/she is carrying weapons. “If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.” See, e.g. *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993).

³⁷ *Terry*, 392 U.S. at 27; *Arizona v. Johnson*, 555 U.S. 323, 326–27 (2009).

³⁸ “In general, searches and seizures are unreasonable and invalid unless based on probable cause and executed pursuant to a warrant. However, certain kinds of searches and seizures are valid as exceptions to the probable cause and warrant requirements, including investigatory detentions, warrantless arrests, searches incident to a valid arrest, seizures of items in plain view, searches and seizures justified by exigent circumstances, consent searches, searches of vehicles, searches of containers, inventory searches, border searches, searches at sea, administrative searches, and searches in which the special needs of law enforcement make the probable cause and warrant requirements impracticable.” *Warrantless Searches and Seizures*, 35 Geo. L.J. Ann. Rev. Crim. Proc. 37, 37–38 (2006).

³⁹ Bureau of Justice Statistics, *Special Report: Contacts between Police and the Public, 2005*, <https://www.bjs.gov/content/pub/pdf/cpp05.pdf>.

⁴⁰ See Andrew Gelman, et al., *An Analysis of the New York City Police Department's “Stop-and-Frisk” Policy in the Context of Claims of Racial Bias*, Journal of the American Statistical Association (2007), <http://www.stat.columbia.edu/~gelman/research/published/frisk9.pdf>.

⁴¹ New York Civil Liberties Union, *Stop-and-Frisk 2011 Briefing* at 5, https://www.nyclu.org/sites/default/files/publications/NYCLU_2011_Stop-and-Frisk_Report.pdf.

⁴² *Id.*

⁴³ See *Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (ruling that New York City’s stop-and-frisk practices violate both the Fourth and Fourteenth Amendments).

⁴⁴ See Azi Paybarah, et al., *De Blasio on Stop-and-Frisk: ‘We Changed It Intensely,’* Politico (Dec. 8, 2016), www.politico.com/states/new-york/city-hall/story/2016/12/de-blasio-on-stop-and-frisk-we-changed-it-intensely-107886.

⁴⁵ Police Commissioner James P. O’Neill, *2016 Year End Report: Crime and Enforcement Activity in New York City*, Appendix B-1, https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2016-enforcement-report.pdf, Police Commissioner James P. O’Neill, *2017 Year End Report: Crime and Enforcement Activity in New York City*, Appendix B-1, https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2017-enforcement-report.pdf, Police Commissioner James P. O’Neill, *2018 Year End Report: Crime and Enforcement Activity in New York City*, Appendix B-1, https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2018-enforcement-report.pdf, Police Commissioner James P. O’Neill, *2019 Year End Report: Crime and Enforcement Activity in New York City*, Appendix B-1, https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/year-end-2019-enforcement-report.pdf.

⁴⁶ New York Civil Liberties Union, *Stop-and-Frisk Data*, <https://www.nyclu.org/en/stop-and-frisk-data>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Under the Violent Crime Control Law Enforcement Act of 1994, 42 U.S.C. § 14141 (re-codified at 34 U.S.C. 12601), the U.S. Attorney General of the United States Department of Justice (“DOJ”) is authorized to investigate and litigate cases involving a “pattern or practice” of unconstitutional policing. If the DOJ discovers a pattern or practice of police misconduct, “it issues public findings” through a letter or report.

⁵² *Investigation of the Baltimore Police Department*, *supra* note 11, at 47.

⁵³ *Id.* at 48.

⁵⁴ *Id.* at 53.

⁵⁵ U.S. Department of Justice, *Investigation of the Ferguson Police Department* (Mar. 4, 2015) 64-65, https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

⁵⁶ See Melanie Poulter, *Hearing on Racial and Gender Disparities in Police Arrests of Adults Part I*, at 00:16:21, <https://cityoftulsa.viebit.com/player.php?hash=RQ9PMYc8nAwB>, see also John Raphling, *Hum. Rts. Watch, Get on the Ground!: Policing, Poverty, and Racial Inequality in Tulsa, Oklahoma* 85 (2019), https://www.hrw.org/sites/default/files/report_pdf/us0919_tulsa_web.pdf.

⁵⁷ Jennifer L. Eberhardt, et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 6, 876-93 (2004), available at <https://web.stanford.edu/~eberhard/downloads/2004-SeeingBlackRaceCrimeandVisualProcessing.pdf>. [hereinafter “*Seeing Black*”]; see also Brian Keith Payne, 81 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 2, 181-92 (2001) (finding that exposure to Black faces facilitated the categorization of crime-relevant objects.), available at <http://web.missouri.edu/~segerti/capstone/PayneBias.pdf>.

⁵⁸ See, e.g., *The Condemnation of Blackness: Race, Crime, and the Making of Modern Urban America*, Khalil Gibran Muhammad (2010); *From the War on Poverty to the War on Crime: The Making of Mass Incarceration in America*, Elizabeth Hinton (2016).

⁵⁹ Jennifer L. Eberhardt, et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 JOURNAL OF PERSONALITY AND SOCIAL PSYCHOLOGY 876 (2004), available at <https://web.stanford.edu/~eberhard/downloads/2004-SeeingBlackRaceCrimeandVisualProcessing.pdf>. [hereinafter “*Seeing Black*”].

⁶⁰ *Id.*

⁶¹ *Id.* at 883.

⁶² *Id.* at 889.

⁶³ See, e.g., L. Song Richardson, *Cognitive Bias, Police Character and the Fourth Amendment*, 44 ARIZ. ST. L.J. 267, 280 (2012) (“The problem with decisions allowing blanket consideration of race and location is that they exacerbate the influence of psychological biases on police judgments of criminality by strengthening the association between race and crime.”).

⁶⁴ L. Song Richardson & Phillip Atiba Goff, *Interrogating Racial Violence*, 12 Ohio St. J. Crim. L. 115, 121 (2014), https://kb.osu.edu/bitstream/handle/1811/73475/OSJCL_V12N1_115.pdf.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 122.

⁶⁸ U.S. Dep't of Justice, *Investigation of the Chicago Police Department* 47 (Jan. 13, 2017), <https://www.justice.gov/opa/file/925846/download>.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 46.

⁷⁵ *Investigation of the Baltimore Police Department*, supra note 11, at 140.

⁷⁶ *Id.* at 145.

⁷⁷ *Id.* at 149.

⁷⁸ *Id.* at 152-53.

⁷⁹ See, e.g., *Investigation of the Baltimore Police Department*, supra note 11, at 139 (“BPD relies on deficient accountability systems that fail to curb unconstitutional policing.”).

⁸⁰ These are state laws that often serve as a basis for police union contract provisions. There are twenty states with LEOBRs: Arizona, Arkansas, California, Delaware, Florida, Illinois, Iowa, Kentucky, Louisiana, Maryland, Minnesota, Nevada, New Mexico, Oregon, Rhode Island, Tennessee, Texas, Virginia, West Virginia, Wisconsin.

⁸¹ See e.g., *Investigation of the Chicago Police Department*, supra note 71, at 47. The DOJ found that CPD’s union contracts “impede the investigative process.” *Id.* For instance, the police union contract requires that complaints be signed and attested to and limits investigations into anonymous complaints as well as the period for imposing discipline on officers accused of misconduct. *Id.* The DOJ determined that the City rarely uses the override provisions in the union agreements to bypass these investigatory obstacles. *Id.*

⁸² *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

⁸³ *White v. Pauly*, 137 S. Ct. 548, 551–52 (2017) (first quoting *Mullenix v. Luna*, 136 S. Ct. 306, 308 (2015); and then quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 742 (2011)).

⁸⁴ *Ashcroft*, 563 U.S. at 741.

⁸⁵ See Amir H. Ali, Emily Clark, *Qualified Immunity: Explained*, The Appeal (June 20, 2019), <https://theappeal.org/qualified-immunity-explained/>; see also Jay Schweikert, *Qualified Immunity: A Legal, Practical, and Moral Failure*, Cato Institute (Sept. 14, 2020), <https://www.cato.org/publications/policy-analysis/qualified-immunity-legal-practical-moral-failure>.

⁸⁶ *Pearson v. Callahan*, 555 U.S. 223 (2009).

⁸⁷ See e.g., *Corbitt v. Vickers*, 929 F.3d 1304, 1323 (11th Cir. 2019), *cert. denied*, No.19-679, 2020 WL 3146693 (June 15, 2020) (granting qualified immunity to a sheriff who shot a 10-year-old child while attempting to shoot a pet dog); *Jessop v. City of Fresno*, 936 F.3d 937, 942 (9th Cir. 2019), *cert. denied*, No.19-1021, 2020 WL 2515813 (May 18, 2020) (granting qualified immunity to an officer who stole over \$225,000 worth of property because it was not “clearly established” that such theft violates the Fourth Amendment); *Kelsay v. Ernst*, 933 F.3d 975, 980 (8th Cir. 2019), *cert. denied*, No. 19-682, 2020 WL 2515455 (May 18, 2020) (holding that an officer who body-slammed a nonviolent, nonthreatening, non-fleeing misdemeanor was entitled to qualified immunity on the basis that the law surrounding the officer’s use of force was not clearly established); *Dukes v. Deaton*, 852 F.3d 1035, 1039 (11th Cir. 2017) (ruling that while it was an unconstitutional use of excessive force when a police officer severely burned a woman after detonating a “flashbang” device in the bedroom where she was sleeping, the officer was still entitled to qualified immunity because the law was not “clearly established”); *Willingham v. Loughnan*, 261 F.3d 1178, 1181 (11th Cir. 2001), *cert. granted*, judgment vacated, 537 U.S. 801 (2002) (Granting qualified immunity to an officer who shot an unarmed woman eight times after she threw a knife and glass at a police dog that was attacking her brother).