

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiffs</p> <p>v.</p> <p>CITY OF CLEVELAND,</p> <p>Defendant</p>	<p>Case No. 1:15-CV-01046</p> <p>Judge Solomon Oliver</p>
<p>BRIEF OF <i>AMICI CURIAE</i> THE CLEVELAND BRANCH OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP); COLLABORATIVE FOR A SAFE, FAIR AND JUST CLEVELAND; AND THE OHIO CHAPTER OF THE NATIONAL LAWYERS GUILD REGARDING THEIR CONCERNS WITH THE PARTIES' SETTLEMENT AGREEMENT</p>	

*Amici curiae* the Cleveland Branch of the National Association for the Advancement of Colored People (“NAACP”); the Collaborative for a Safe, Fair and Just Cleveland (“the Collaborative”); and the Ohio Chapter of the National Lawyers Guild (“NLG”) respectfully offer the Court the following concerns on whether the Parties and the Court should amend the Parties’ Settlement Agreement and the Court’s Order. After the Agreement was made public, *Amici curiae*, and other concerned community members, had orally presented many of these concerns to the Department of Justice and had been led to believe at that time that time remained for the Parties to engage on the concerns and address them before the Court issued the order adopting the Agreement.

That did not happen.

*Amici curiae* appreciate the Department of Justice Civil Rights Division's efforts to hold the City of Cleveland Division of Police and its leadership to account for significant systemic deficiencies and to push for accountability and cultural change. As explained below, however, certain aspects of the Settlement Agreement should be improved to ensure that the Agreement reforms Cleveland policing.

**I. Issues presented**

**A. The inspector general's independence is undermined when that person reports to the very police chief whose policies that person should critique.**

The police inspector general, although appointed by the mayor, *reports* to the police chief, which would seem to put the chief in the position of being responsible for the IG's performance evaluation and salary adjustments. Yet the IG is expected to comment on the chief's own performance as a policymaker. Should the Court, if it wishes to avoid the appearance of impropriety, tolerate such a questionable arrangement?

**B. The police are permitted to police themselves regarding the most serious uses of force that result in homicides or grievous bodily harm.**

The Agreement proposes that the City's police division police itself by investigating even its officers' most serious "level 3" uses of force that result in homicide or grievous bodily harm. Should the Court tolerate such an arrangement that would undermine public confidence, or should it order that a highly competent independent agency investigate such level-3 incidents?

**C. The Agreement praises "bias-free" policing, but fails to collect some critical demographic data for investigations.**

The Agreement seeks to ensure bias-free policing. Yet the Agreement does not expressly require collecting demographic data such as race or gender of complainants who seek redress for alleged police misconduct. Should the Court address this failure?

**D. The Agreement fails to address issues regarding police interactions with youth.**

DOJ's Investigation into the Cleveland Police Division highlighted multiple examples of excessive force involving juveniles. Community stakeholders have rallied around the need for youth-specific police training and policies. But the Agreement fails to ensure that the Division's policies and procedures incorporate principles of developmentally informed policing. Should the Court tolerate this Agreement shortcoming?

**E. The Community Policing Commission does not have the necessary tools to conduct its job.**

The Agreement proposes the creation of a Community Policing Commission to help create community trust, but it does not equip it with the necessary powers, resources, and organization to inspire community belief in its effectiveness. Should the Court permit the creation of a Commission without support or authority?

**F. Bestowing the Monitor with blanket testimonial immunity regardless of evidence the Monitor might possess.**

The public is entitled to every person's evidence, with rare exceptions like attorney-client privileged information. Paragraph 381 of the Parties' Settlement Agreement claims sweeping, virtually absolute testimonial immunity for the Monitor in any proceeding, regardless of relevant evidence the Monitor might possess. No legal authority or "monitor" privilege exists justifying this overreach, which would pre-emptively curtail the rights of third parties unable to defend themselves before this Court. Should the Court approve the blanket immunity of a critical public official?

**II. Statement of interest of *Amici curiae***

As explained in more detail in the motion for leave to file, *Amici curiae* are all organizations whose members and constituencies are directly affected by the current deficient state of Cleveland policing and by the Court's Order and the Parties' Agreement. The NAACP, Collaborative, and NLG's purposes, goals, and initiatives as civil-rights organizations place these organizations in a unique position to provide continued recommendations and assistance to the Court in its continued consideration of the Settlement Agreement resolving the Department of Justice's lawsuit against the City. Although presently, the only parties to the lawsuit are the United States of America, represented by the Department of Justice, and the City of Cleveland, represented by its Law Department, neither party has the extensive or focused involvement with *Cleveland's* community stakeholders regarding civil rights and liberties as do the NAACP, the Collaborative, and the NLG.

The Parties' Settlement Agreement specifically recognized the importance of community input into the way police services are delivered. It also recognized that ongoing community input

is important to developing reforms, establishing police priorities, and promoting mechanisms that increase community confidence. Community input strengthens the Cleveland Division of Police and its community relationship, and promotes public safety. The NAACP, the Collaborative, and the NLG support that proposition and were committed to community input long before the most recent DOJ investigation of the Cleveland police, as well as during the investigative process, and will continue to be committed to community input long after the current Consent Decree.

*Amici curiae* appreciate that the Department of Justice listened to their concerns during the Consent Decree's conception and negotiation; but they also recognize that the Consent Decree, under the best circumstances, will have a limited lifespan. Under these circumstances, community groups like the NAACP, the Collaborative, and the NLG have established a base of knowledge and an interest in the Cleveland Police Division's improvement, and should be provided with a viable opportunity to provide amicus recommendations in this litigation.

*Amici curiae* can help this Court identify certain issues with the Settlement Agreement that the Parties themselves may not draw to the Court's attention.

**III. The Court should be concerned about, and seek to address, certain deficiencies and an illegal provision in the Parties' Settlement Agreement.**

*Amici curiae* generally support the Settlement Agreement as an excellent effort to address Cleveland's policing problems. The Court, however, should engage the Parties to correct certain issues described below that should be corrected.

**A. To promote transparency, integrity, and accountability, the Court should ensure that the police inspector general is independent of the police division—or the IG will be unable to discharge the IG's duties without the appearance of bias or impropriety.**

The Settlement Agreement recognizes the importance of transparency in how police services are delivered to the public and scrutinized. The Parties recognize that transparency would significantly promote community confidence while strengthening Cleveland's police

division. The Parties also recognize that bolstering the police-community relationship is essential to promoting public safety. And this relationship will assist in creating a truly bias-free police division, whose fundamental goal is protecting life and preserving property.

The Settlement Agreement proposes to promote transparency and oversight by retaining a police inspector general's (IG) services. When the Parties were engaged in negotiations, concerned citizens, including *Amici curiae*, recommended establishing an IG. *Amici curiae* support the idea of having an IG and believe that it can only enhance the delivery of police services in an open, transparent manner. The appearance of independence, however, is essential if the community is to have confidence that the IG's duties will be discharged objectively, and dispassionately. For example, a significant part of the problem that the Department of Justice identified in its investigation of the City of Cleveland is the perception that police administrators protected their own officers without regard to community interests and those to whom they were sworn to protect and serve.

An IG would be able to address that perception only if that IG were free to review policies, audit compliance, analyze trends, make specific recommendations, and discharge all of the position's duties without the constraints of being directly answerable to the police administration. Such duties would necessarily include being free to criticize malfeasance, misfeasance, or nonfeasance *by the police chief himself*. The Department of Justice's own investigation suggested this could be an issue.<sup>1</sup>

Even though the Agreement provides for the mayor to *appoint* the IG,<sup>2</sup> the IG *reports* to the police chief.<sup>3</sup> In the natural order and chain-of-command of city government, this would seem to

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<sup>1</sup> Department of Justice Investigation dated Dec. 4, 2014 at 7 (citing *Cleveland Police Chief McGrath overlooks Conflicting Statements in Use of Force Investigations*, PLAIN DEALER, Jun. 5, 2011) (ECF No. #1-1) (PAGE ID# 15).

<sup>2</sup> Settlement Agreement at 58, ¶ 250.

put the chief in the position of being responsible for the IG's performance evaluation and salary adjustments.

The IG should be answerable not to the police chief, however, but to the mayor and the city council. Not only do the mayor's office and city council possess the necessary authority, but also they are democratically accountable in ways that the police establishment is not. If the IG functions under the police chief's direct control, as is current the case, no matter how ethical the IG might be, it would be difficult—if not impossible—for that IG to be openly critical of supervisors.

Thus, while *Amici curiae* strongly support the police IG concept and laud the Department of Justice for introducing that innovation to the Decree, to be truly effective in the position, the IG would have to be truly independent. Independence can best be obtained if the IG reported to the mayor and city council, not the police chief.

**B. The Court should not order that certain “level 3” uses of force as defined in the Agreement—the most serious of uses of force—be investigated by the same agency whose officers perpetrated the same actions.**

When police officers use a level-3 use of force that results in death or grievous bodily harm to an individual, a highly competent agency outside of the police division, such as the Ohio Attorney General's Office, should carry out all investigations, instead of allowing the Division of Police to decide which investigations should go to an independent investigator. Engaging such an independent agency would enhance the prospects of the “fact and/or the appearance of impartiality of the investigation.”<sup>4</sup> An independent agency would relieve the police division of the public perception that the police cannot impartially investigate themselves.

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<sup>3</sup> *Id.* at 58, ¶ 251.

<sup>4</sup> *Id.* at 27.

The independent investigative agency should cooperate with the police division through a memorandum of understanding. The memorandum would establish investigative protocols that ensure, to the extent possible, thorough, objective and timely administrative and criminal investigations.

The recent Governor's Task Force on Police Accountability adopted a similar recommendation.<sup>5</sup> This Court should engage the Parties accordingly and ensure wholly independent investigations for the most serious uses of force.

**C. The Court should ensure that demographic data regarding complainants, including their race and gender, are consistently collected.**

Although the Agreement seeks to ensure bias-free policing, it does not require that the City's various investigative arms (e.g., internal affairs and the Office of Professional Standards) to collect consistently demographic data such as the complainant's race and gender. At the moment, only certain types of complaints—for example, search-and-seizure complaints—require investigators, like the Office of Professional Standards, to collect demographic data. Accordingly, it will be difficult to assess whether “bias-free” reforms are effective to prevent future complaints against police.

Furthermore, the Data Analysis and Collection Coordinator is required to create and maintain a reliable and accurate electronic system that tracks all data from force-related documents, which includes the race, ethnicity, age, and gender of each subject. But the Use-of-Force reports, which form the foundation for the documents to be included in this system, do not require demographic reporting.

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<sup>5</sup> Ohio Task Force on Community-Police Relations, Final Report, Apr. 29, 2015, *available at* [http://publicsafety.ohio.gov/otfcpr/links/ohtfcpr\\_final\\_report.pdf](http://publicsafety.ohio.gov/otfcpr/links/ohtfcpr_final_report.pdf)

The Court should thus ensure that the City seek to collect complainants' demographic data in all reporting requirements as part of the Agreement and the order.

**D. The Court should ensure that the order addresses issues with police–youth interactions that the Department of Justice investigation identified.**

The DOJ Investigation of the Cleveland Division of Police, dated December 4, 2014,<sup>6</sup> cited several specific incidents involving youth as examples to support its conclusion that “CDP engages in a pattern or practice of excessive force.” Specifically, in one incident,

an officer punched a handcuffed 13 year-old boy in the face several times. Officers had arrested the juvenile for shoplifting. While ‘Harold’ was handcuffed in the zone car, he began to kick the door and kicked an officer in the leg. In response, the 300 pound, 6’4” tall officer entered the car and sat on the legs of the 150 pound, 5’8” handcuffed boy...the officer continued to sit on Harold and punched him in the face three to four times until he was ‘stunned/dazed’ and had a bloody nose....<sup>7</sup>

In another,

an officer used his Taser to drive stun a 127-pound juvenile twice as two officers held him on the ground. Officers believed that “Ivan” matched the description of a possible fleeing suspect wanted for harassing store customers and stealing. Officers chased Ivan on foot, caught up to him, and tackled him. The officers alleged the 127-pound juvenile ‘continued to resist’ as they both held him on ground [sic], prompting one of the officers to deploy his Taser twice in the juvenile’s back in drive stun mode, even though both officers were holding him down. In this incident, the use of the Taser in any mode was unreasonable.<sup>8</sup>

In addition to the DOJ Investigation, community stakeholders have provided commentary concerning police-youth interactions and the need for improved training and practices. In a detailed letter, the Schubert Center for Child Studies at Case Western Reserve University described how its research shows that young people are developmentally less mature than adults and how neurological and psychosocial differences, among others, shed important

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<sup>6</sup> Department of Justice Investigation of the Cleveland Division of Police (ECF No. #1-1).

<sup>7</sup> *Id.* at 20.



light on potential police-youth encounters (*see* Letter from Gabriella Celeste, Dir. of Child Policy, and Dr. Jill Korbin, Dir., dated March 12, 2015) (attached as Exhibit A). The letter further offered specific recommendations concerning recruitment, training, and juvenile-specific policies to be considered for the consent decree and implementation. The Agreement included none of these recommendations—despite DOJ’s own findings.

Moreover, the U.S. Supreme Court, relying on emerging scientific knowledge on adolescent development, has recognized a youth’s unique vulnerability in the context of law enforcement and the criminal-justice system and the fundamental ways in which children are different from adults that make them less culpable, requiring special protections.<sup>9</sup>

Despite evidence cited in its own Investigation that the Cleveland Police Division often engages in excessive force against youth; the concerned community’s recommendation for developmentally informed police policies and practices; and established Supreme Court precedent that the youth are vulnerable, and need special legal protections, the Agreement fails to ensure that the police division’s overall reform plan incorporates principles of developmentally informed policing, beyond engaging with youth community groups. Accordingly, the Agreement should require the police division to develop a comprehensive policy concerning police–youth interactions. This policy should ensure that each interaction is informed by principles of child-and-adolescent development, an understanding of juvenile-specific law, and a commitment to positive role modeling and relationship building between law enforcement and youth. This

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<sup>8</sup> *Id.* at 21.

<sup>9</sup> *See Roper v. Simmons*, 543 U.S. 551 (2005) (youth under the age of 18 may not be sentenced to death); *Graham v. Florida*, 560 U.S. 48 (2010) (life without the possibility of parole for youth under 18 who have committed non-homicide offenses is unconstitutional); *J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011) (age of a child is relevant to the determination of whether or not they are in custody for interrogation purposes and “reasonable juvenile” standard articulated for purposes of *Miranda*); *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (mandatory sentence of life without the possibility of parole for youth under 18 is unconstitutional).

comprehensive policy should be incorporated into the police division's management, policies and procedures, recruitment, training, evaluations, resource deployment, tactics, and accountability systems. Furthermore, the Monitoring Agreement should review these policies and practices, including the training to assess whether it is adequate in quality, quantity, scope, and type.

**E. The Court should ensure that the order creates a Community Police Commission capable of instilling community trust in the Cleveland Division of Police's reforms.**

The Settlement Agreement recognizes the vital role of the community in the success and sustainability of the reform process. The Parties agree that ongoing community input into the reform process is necessary to promote confidence in the Cleveland Division of Police and to strengthen police-community relationships. To meet this goal, the Agreement establishes a Community Police Commission as the central mechanism for community engagement. Yet, as currently stipulated, there are issues that will hinder the Commission's ability to carry out its responsibilities and achieve its mission. These issues should be remedied at the outset to help ensure the success of the Commission:

1. The Commission has heavy responsibilities, but no direct voice before the Court. The Court should grant the Commission Enhanced Amicus Status to give the Commission a voice while preserving judicial efficiency.<sup>10</sup>
2. The Settlement Agreement proposes that the Community Police Commission will consist of thirteen members from eight demographic categories. It does not, however, ensure representation from vulnerable and marginalized communities including: the LGBTQ, rehabilitated formerly incarcerated, differently-abled, and immigrant/refugee communities. Therefore, the number of Commissioners should be increased to a minimum of fifteen and stipulations should be added to ensure that marginalized groups have representation. The number of commissioners should be increased from thirteen to fifteen to ensure diversity and to balance the workload.
3. The Agreement proposes that the Commission will be completely dissolved and reconstituted after a four-year term. But this will disrupt the continuity of institutional memory. The Commissioners' terms of service should be staggered and the Commission

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<sup>10</sup> See *United States v. City of Portland*, No. 3:12-cv-02265-SI, 2013 (D.Or. Feb. 19, 2013).

itself, rather than the selector panel, should be responsible for filling vacancies that occur within the initial four-year term.

4. Although the Agreement provides for a process by which the Monitor oversees the sufficiency of the Commission's budget, the Agreement does not establish a role for the Commission itself in this process. The process provides no concrete assurance that the city government will properly resource the Commission, and indeed diverts funding responsibility to outside philanthropies, whose funding may not be assured. The Agreement should include a baseline minimum budget for the Commission and the Commission should have the authority to hire its own staff and experts.
5. The Agreement proposes that the Commission will only have fifteen days to review and comment on policies before the police division submits the policies to the Monitor and DOJ. This timeframe is completely insufficient and unrealistic and would prevent the Commission from providing a meaningful and substantive review and commentary. The time for the Commission to "review and comment" on CDP policies is should be extended.
6. The Agreement proposes that the City will provide access to all information the Commission requests. No timeliness provision exists, however, in this clause. Therefore, a timeliness clause should be added to the Agreement to ensure that the Commission is provided access to information in a timely manner.

**F. The Court should not grant the Monitor blanket immunity from testifying in this or other proceedings—and this Court has no authority to issue an order granting such sweeping immunity.**

The Court should not exempt the Monitor who will be responsible for ensuring the City's compliance with the Settlement Agreement from ever testifying regarding any matter broadly related to the Agreement or the City's conduct. Paragraph 381, buried in the Agreement, seeks to do just that:

The Monitor, including any agent, employee, or independent contractor thereof, may testify as its/their observations, findings, and recommendations before the Court with jurisdiction over this matter. However, **the Monitor, including any agent, employee, or independent contractor thereof, will not testify in any other litigation or investigative or pre-litigative proceeding with regard to any act or omission of the City, CDP, or any of their agents, representatives, or employees related to this Agreement or regarding any matter or subject of which the Monitor may have received knowledge as a result of his/her performance under this Agreement.**

This paragraph does not apply to any proceeding before a court related to performance of contractors or subcontractors for monitoring this Agreement.<sup>11</sup>

(Emphasis added.)

The public is entitled to every person's evidence.<sup>12</sup> The exceptions to this doctrine are rare and well-established and known—attorney-client privilege, for example. What the Parties are effectively attempting to do here is to grant a form of testimonial immunity to the Monitor, no matter how critical the Monitor's evidence might be in *this* proceeding—to transparently and publicly ensure compliance—or in *other* proceedings. Given the Monitor's broad responsibilities, the Monitor may at times be a vital witness here or for parties in other proceedings, such as cases under *Monell v. New York Dep't of Soc. Services*<sup>13</sup> that explore whether the City is engaged in an unconstitutional custom, policy, or practice. The Monitor would have knowledge about the City's compliance or non-compliance with the Agreement, which seeks to remedy unconstitutional practices identified by the Department of Justice. This Court should not pre-determine whether the Monitor is eligible to testify, setting up a potential conflict between it and other litigants (and possibly judges) in other proceedings. Such issues can be determined on a case-by-case basis affording other litigants due process. Here, due process is pre-empted.

The Agreement cites no authority for the extraordinary provision that the Parties have asked the Court to order. The provision would affect the evidentiary and due-process rights of future parties in other cases who will never have had any opportunity to be heard regarding the limitation on their ability to collect evidence. *Amici curiae* are aware of no civil rule, statute, or case authorizing this Court to exercise proactively such extraordinary power. While the Parties may seek to justify the provision by claiming that the Monitor's role is quasi-judicial, the role is at best

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<sup>11</sup> Settlement Agreement at 92, ¶ 381.

<sup>12</sup> *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (internal quotation marks omitted).

mixed. The Agreement provides the Monitor with sweeping authority, yet prohibits certain activities in which any judge would be free to engage as appropriate (such as issuing public statements<sup>14</sup>). Indeed, the Agreement requires the Parties' *approval* for certain actions by the Monitor.<sup>15</sup>

The Court should reject the judicial overreach represented by Agreement paragraph 381.

#### **IV. Conclusion**

Although the Decree represents a model for the country, this Court should thus reconsider and amend its order and encourage amending the Settlement Agreement until the issues described above are addressed as recommended, to ensure accountability, integrity, and transparency. *Amici curiae* regret that this process afforded community stakeholders no opportunity to be heard before the order was issued, but have done the best they can as quickly as they can to raise these concerns with the Court.

Respectfully submitted,

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<sup>13</sup> 436 U.S. 658 (1978).

<sup>14</sup> Settlement Agreement at 92, ¶ 380.

<sup>15</sup> *Id.*

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing document was electronically filed on this 29th day of June, 2015. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this through the Court's system.

*/s/ Subodh Chandra*  
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