



February 25, 2021

Sent via Email

The New York City Police Department
1 Police Plaza
New York, NY 10038
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Re: Public Comment on the NYPD's Draft Impact & Use Policies for the Criminal Group Database and Social Network Analysis Tools

To Whom It May Concern,

On behalf of The Bronx Defenders (“BxD”), Center for Constitutional Rights (“CCR”), The Legal Aid Society (“LAS”), and NAACP Legal Defense and Educational Fund, Inc. (“LDF”), we submit this public comment on the NYPD’s draft Impact & Use Policies for its Criminal Group Database (“Gang Database”) and Social Network Analysis Tools (“Social Media Surveillance Tools”). The NYPD’s gang enforcement policies and practices result in imprecise policing, racial profiling, and sweeping civil liberties violations that disproportionately harm communities of color, including many NYCHA public housing residents.¹ The NYPD’s Criminal Group Database Impact & Use Policy (“Gang Database IUP”) and Social Network Analysis Tools IUP (collectively, “IUPs”) do not mitigate or resolve any of these concerns. Moreover, under the Public Oversight of Surveillance Technology Act (“POST Act”), the NYPD is required to assess each of its surveillance technologies for any disparate impact on protected classes.² Despite significant, publicly available evidence that both the NYPD’s Gang Database and Social Media Surveillance Tools have a disparate impact on young people of color, the NYPD failed to provide any meaningful demographic analysis required by the law. For reasons described below, the NYPD must eliminate its Gang Database, end its policies and practices that rely on the Gang Database or underlying criteria, and end digital surveillance policies and practices that disproportionately impact youth of color.

¹ *Hearing on A Local Law to Amend the Administrative Code of the city of New York, in Relation to Providing Notice to Minors Include in the Criminal Groups Database Before the Comm. on Public Safety of the NYC Council*, (June 27, 2019), (written testimony of LDF, BxD, and CCR), <https://www.naacpldf.org/wp-content/uploads/2019-06-27-LDF-City-Council-Hearing-Testimony-Complete.pdf>; *Hearing on the NYPD’s Gang Takedown Efforts Before the Comm. on Public Safety of the NYC Council*, (June 13, 2018), (written testimony of LDF and CCR), http://www.naacpldf.org/files/case_issue/City%20Council%20Testimony%20combined%206.13.18.pdf.

² N.Y.C. Admin. Code § 14-188 [hereinafter “POST Act”].

I. The NYPD's Gang Enforcement Practices are "Stop and Frisk 2.0."

The NYPD's gang policing practices are the functional equivalent of its unconstitutional stop-and-frisk policing tactics challenged in the *Davis, et al. v. the City of New York, et al.*, *Floyd, et al. v. the City of New York, et al.*, and *Ligon, et al. v. the City of New York* lawsuits.³ In the context of gang policing, the NYPD conducts criminal investigations, relying, in part, on a secretive database and racially discriminatory criteria that provide it unfettered discretion to indiscriminately target Black and Latinx people, particularly youth and public housing residents, to designate thousands of them as members of gang or local street "crews."

Yet, tellingly, under the Gang Database IUP, being identified as a gang member does not require criminal activity. Instead, the NYPD relies on a set of criteria that allows it to designate people as gang or crew members simply because of who they hang out or live with, where they live, or how they dress. Among the criteria NYPD officers rely on are "association with known criminal group members," "frequent presence at known criminal group location," and "frequent wearing of the colors and frequent use of hand signs that are associated with particular criminal groups."⁴ These criteria, for example, allow the NYPD to designate someone a gang member if they are hanging out in front of a bodega or NYCHA building deemed a known gang location by the NYPD and are wearing the colors black, gold, yellow, red, purple, green, blue, white, brown, khaki, gray, orange, or lime green.⁵ Black and Latinx youth who attend the same schools, play basketball together, or communicate with friends or even acquaintances on social media are faced with the stark reality that socializing within their community, or even with their own family, could lead to a designation as a gang member in the NYPD's database without notice or recourse of their alleged gang or crew designation.

Equally problematic is the broad and arbitrary definition of what constitutes a "gang." While the Gang Database IUP fails to describe how the NYPD defines a gang, in its own presentations, the NYPD has defined a "gang" as "a group of persons with a formal or informal structure that includes designated leaders and members, that engage in or *are suspected to engage* in unlawful conduct."⁶ This definition, combined with the racially discriminatory gang identification criteria, drives the increased surveillance, over-policing, and mass criminalization of Black and Latinx youth who are labeled as gang members and considered suspect without proof of criminal conduct.

³ *Davis et al. v. City of New York et al.*, <https://www.naacpldf.org/case-issue/davis-v-city-new-york/>; *Floyd et al. v. City of New York, et al.*, <https://ccrjustice.org/home/what-we-do/our-cases/floyd-et-al-v-city-new-york-et-al>; *Ligon et al. v. City of New York, et al.*, <https://www.bronxdefenders.org/ligon-v-city-of-new-york/>.

⁴ Criminal Group Database: Impact & Use Policy, NYPD 1, 2 (Feb. 2021), <https://www1.nyc.gov/site/nypd/about/about-nypd/public-comment.page> [hereinafter Gang Database IUP]; see also Alice Speri, *New York Gang Database Expanded by 70 Percent Under Mayor Bill de Blasio*, The Intercept (June 11, 2018), <https://theintercept.com/2018/06/11/new-york-gang-database-expanded-by-70-percent-under-mayor-bill-de-blasio/>. [hereinafter Speri].

⁵ *Id.*

⁶ Speri, *supra* n. 4.

The inevitable result of these overbroad criteria is a disproportionate representation of Black and Latinx youth in the Gang Database. As of June 27, 2019, more than 98% of the Gang Database are people of color.⁷ Yet 31.8% of New York City residents are white, 29.2% are Hispanic or Latinx, and 22% are Black. And while research has found that, on average across the nation, 25% or more of gang members are white,⁸ white people are almost entirely absent from the NYPD's database. The Gang Database IUP neither includes the Gang Database's demographic data nor addresses these severe racial disparities. Instead, that IUP asserts, in a conclusory manner, that no collateral consequences to the database exist, despite significant indications to the contrary.

II. Gang Designations Carry Devastating Consequences.

A simple gang designation has far-reaching collateral consequences, which include, but are not limited to, deportation, increased bail, enhanced sentencing, loss of housing, street harassment from police encounters, restrictive conditions of confinement, and increased supervised release restrictions.⁹ Due to its secretive nature, there is no way for accused individuals to challenge the reliability of the techniques used in compiling the Gang Database. As public defenders have observed, this operates to inoculate the gang designation from scrutiny, in contrast with traditional tools such as witness identifications, where defendants can assess and bring to the court's attention weaknesses or lack of reliability with the identification. Equally problematic, the secretive nature of the Gang Database and gang designations allows prosecutors' offices to have information that is not shared with defense counsel but nevertheless disclosed to the court, which influences court decisions in ways that accused individuals and their counsel do not know and therefore cannot rebut.

The NYPD's Gang Database IUP failed to comply with the POST Act's requirement to provide information about "whether entities outside the department have access to the information and data collected by" through the Gang Database.¹⁰ Such information must include "whether the entity is a local government entity, state governmental entity, federal government entity or a private entity;" "the type of information and data that may be disclosed by such entity;" and "any safeguards or restrictions imposed by the department on such entity regarding the use or dissemination of the information collected by" the Gang Database.¹¹ Although the Gang Database IUP includes a process for disclosing identifying information, it does not provide to which entities outside NYPD, the names and types of entities, nor the information shared to those entities. Failing

⁷ June 27, 2019 City Council Hearing, 00:42:50–00:44:30, <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=705149&GUID=01CD31DF-1B5B-4C8E-A54B-34A755291A39&Options=&Search=>.

⁸ K. Babe Howell, *Gang Policing: The Post Stop-and-Frisk Justification for Profile-Based Policing*, 5 Univ. Denver Crim. Law Rev. 1, 16 (2015); K. Babe Howell, *Fear Itself: The Impact of Allegations of Gang Affiliation on Pretrial Detention*, 23 St. Thomas Law Rev. 620, 627-643 (2011) [hereinafter Howell].

⁹ Josmar Trujillo and Alex S. Vitale, *Gang Takedowns in the de Blasio Era: The Dangers of 'Precision Policing,'* Policing & Social Justice Project at Brooklyn College 1, 13-21 (2020), <https://static1.squarespace.com/static/5de981188ae1bf14a94410f5/t/5df14904887d561d6cc9455e/1576093963895/2019+New+York+City+Gang+Policing+Report+-+FINAL%29.pdf>.

¹⁰ POST Act, *supra* n. 2.

¹¹ *Id.*

to disclose this information prevents further assessment and review of how and with whom the NYPD shares information contained in its Gang Database, especially in coordination with other law enforcement agencies and operations like the large-scale military raids in collaboration with federal law enforcement agencies. Nor does the Gang Database IUP provide any information about the data-sharing guidelines and procedures about how the NYPD assesses and decides exchanges of information with other federal, state, and local government agencies, including employees within those agencies who may provide the NYPD with information that is used to designate someone as a gang member. As one disconcerting example, then-Chief of Detectives and now Commissioner Shea publicly testified that teachers could identify gang members to the NYPD from among their students.¹²

III. The NYPD Gang Database Raises Significant Due Process Concerns and Lacks Transparency.

The Gang Database IUP provides no constitutional protections for people ensnared by it. People on the database have no right to be notified that they have been included, no right to challenge their entry, and no right to be removed.

The IUP asserts the NYPD may “self initiate” review or review entries only every three years or on the 23rd and 28th birthdays of individuals. However, this invalid process does nothing to provide individuals notice, an opportunity to challenge their designation, or otherwise mitigate due process concerns. Moreover, although the Gang Database IUP states that individuals labeled as gang members are reviewed every three years, it omits the NYPD’s elsewhere-stated policy that any arrest—or even police contact unrelated to gang activity—in the prior three years is grounds to remain in the database.¹³ In overpoliced neighborhoods, where it may be impossible for individuals to avoid police contact, these overbroad criteria likely result in most—if not all—individuals put in the database to remain there permanently. Moreover, as noted further below, the NYPD’s reliance on arrests, rather than convictions, penalizes people, who are presumed to be innocent, based on information which ought to be sealed and prior to any finding of guilt.

Additionally, the NYPD both denies individuals their own information and continues to obfuscate information at a broader level. The NYPD fails to comply with the Freedom of Information Law (“FOIL”), which is a mechanism for public access to information about the database, when New Yorkers seek information about their possible inclusion in the Gang Database. For example, LAS has assisted New Yorkers who submitted FOIL requests demanding to know if they were included in the Gang Database, and the NYPD has denied 350 of those requests relying on boilerplate language without any specific reason for the denial. The NYPD’s refusal to comply with FOIL triggers a lengthy appeal process that is excessively burdensome and inaccessible to most people. These abuses of the FOIL process further shroud the Gang Database in secrecy,

¹² Alice Speri, *New York Schools Gang Unit Pushes the Criminalization of Children*, The Intercept (Feb. 13, 2020), <https://theintercept.com/2020/02/13/new-york-city-schools-gang-law-enforcement/>.

¹³ Response to a Freedom of Information Law Request filed on behalf of a Legal Aid Society client (on file with LAS).

leaving thousands of people, including children, to navigate their lives with the significant harms of a gang designation unbeknownst to them.

IV. The Gang Database Has Inadequate Protocols to Protect Sealed Information.

The Gang Database IUP provides inadequate oversight and protocols as to who may access the database, allowing the NYPD's gang policing practices to continue operating in the shadows. Although the IUP states that "[a]ccess to the database is limited to personnel who have an articulable need for access in furtherance of lawful duty," there is no accountability or oversight into how many NYPD personnel have access to the database, how many have sought access, how often it is granted, and for what purposes. There is no indication that the NYPD employs any measures to limit approval of personnel's "articulable need[s]" for access, which risks dissemination of the Gang Database data across a wide array of police investigations and interactions. Moreover, the authorization process set forth in the Gang Database IUP (that authorization "must be requested by a Commanding Officer, and approved by the Information Technology Bureau") provides no criteria for authorization and is thus limitless with unfettered discretion.

The Gang Database also lacks safeguards to ensure that it does not rely upon or contain information that has been sealed. The Gang Database IUP asserts that the Gang Database contains only "lawfully obtained information previously collected by NYPD personnel." But many people arrested in gang raids ultimately are neither prosecuted nor convicted of criminal conduct. Those records may have been "lawfully obtained" at the time of an arrest but subsequently are sealed under CPL 160.50 and 160.55 and may not be used by the NYPD without a court-approved unsealing order. Yet, this IUP not only fails to include a clawback provision to ensure subsequently sealed information is removed from the Gang Database, but also expressly confirms that "Court authorization is not required to use the Criminal Group Database."¹⁴ Together, these policies permit improper access to sealed arrest information.

V. The NYPD's Social Media Surveillance Tools and Gang Database Facilitate the Criminalization of Digital Identities and Behaviors of Youth.

As detailed above, the NYPD's criteria for gang designations promotes and facilitates the criminalization of people based on who they live or spend time with, where they live, and how they interact in public spaces. These same concerns regarding undue criminalization are equally applicable in digital spaces, where the NYPD's social media surveillance tools capture and funnel information that is used for gang designation. In what can be understood as a virtual stop-and-frisk, the NYPD gathers information about individuals from their social media activity and uses that information to classify young people as gang or crew members divorced of any evidence of actual crime.

¹⁴ Gang Database IUP, *supra* n. 4.

The Social Network Analysis Tools IUP fails to address the POST Act’s requirement to disclose relevant information related to “any potentially disparate impacts of surveillance technology.”¹⁵ In 2016, research revealed that approximately 48% of all evidence in New York City criminal indictments was attributed to social media.¹⁶ Despite the breadth of the NYPD’s social media surveillance tools, it provides no demographic information on the current number of people whose social media accounts are actively surveilled under the program, demographic information on arrests related to social media surveillance, or any other relevant analysis of the disparate impact of its social media surveillance tools.

The absence of any meaningful disparate impact analysis is particularly alarming given the almost exclusive focus on young people of color and the significant risks of infringing on their constitutionally protected speech and associational freedoms. Indeed, officers often lack the cultural competency to adequately interpret or assess the language, emoji, gif, meme, and other media use of youth—let alone, Black and Latinx youth—and these misunderstandings can lead to grave consequences for those surveilled. For example, in 2011, Harlem teen Jelani Henry¹⁷ was falsely arrested on gang-violence related charges. Although Jelani had never been convicted of a crime, the district attorney labeled him as a known member of a violent gang based in large part on his social media activity, including “likes” of Facebook posts from some of the gang’s members. This gang designation caused Jelani to be denied bail, resulting in 19 months of pretrial detention.¹⁸ Eventually, his charges were dismissed. Jelani’s experience demonstrates how young men of color, who simply communicate with or engage with posts of other young people in their communities—who are themselves on watch lists or databases—are wrongfully criminalized for these minor associations.

These concerns are equally applicable in the school context, where the NYPD’s school safety agents and Neighborhood Coordination Officers are responsible for gathering intelligence and working with the Department of Education staff to identify alleged gangs and crews. Despite the NYPD’s reliance on school employees, the IUPs notably lack any mention of how its policy of gang surveillance will interact with public schools and whether parents or guardians are even notified of any gang designation of their child.

In an era where social media is virtually inextricable from the lives of young people, basing police intervention on limited social media interactions threatens the safety, freedom, and well-being of young people of color.

¹⁵ POST Act, *supra* n. 2.

¹⁶ Desmond Patton et al., *Stop and Frisk Online: Theorizing Everyday Racism in Digital Policing in the Use of Social Media for Identification of Criminal Conduct and Associations*, Social Media + Society (July 2017), <https://journals.sagepub.com/doi/10.1177/2056305117733344>.

¹⁷ Sara Robinson, *When a Facebook Like Lands You in Jail*, Brennan Center for Justice (July 6, 2018), <https://www.brennancenter.org/our-work/analysis-opinion/when-facebook-lands-you-jail>.

¹⁸ Being labeled as a gang member decreases your likelihood of being granted bail. Howell, *supra* n. 8 at 21 (“In criminal courts, the statement ‘the defendant is in a gang’ often reduces or eliminates the possibility of release on reasonable bail regardless of the merits of the case, or the severity of charges against a defendant. This is because the allegation that a person is affiliated with a gang evokes fear of senseless violence.”).

VI. Conclusion.

In recognition of the systemic failures detailed above, we are calling on New York policymakers to take the following action:

- **Audit NYPD gang policing practices.** We reiterate our requests and those from community members to the Office of the Inspector General for the NYPD to conduct an audit of NYPD gang policing practices. Similar audits and investigations in other jurisdictions have revealed and confirmed the same concerns we raise in this letter, and several jurisdictions have eliminated their gang databases in response to these concerns.¹⁹
- **Eliminate the NYPD Gang Database and related policies and practices.** We call on the NYPD to eliminate its Gang Database, end its gang enforcement policies and practices that rely on the Gang Database, end the designation of people as gang affiliated based on racially discriminatory criteria, cease use of gang labels as the basis for gang raids, and end digital surveillance policies and practices that disproportionately impact youth of color.

As detailed above, the NYPD's Gang Database IUP and gang policing operations fail to address the racial disparities for who is gang labeled, lack constitutional due process protections, and wreak devastating consequences on the lives of the almost exclusively Black and Latinx people marked with the gang label. Similarly, the Department's social media surveillance tools permit the NYPD to surveil the digital lives of Black and Latinx youth in ways that subject these youth to racially discriminatory policing practices.

Altogether, the collection of policing technologies announced by the NYPD presents one of the largest and most aggressive efforts to surveil, police, and criminalize communities of color in this country to date. We urge the NYPD to reassess the role of these technologies of mass criminalization and hyper-surveillance in its policies and practices and to take immediate steps to address and remedy the concerns raised here.

Cc: Mayor Bill de Blasio
City Council Speaker Corey Johnson
City Council Committee on Public Safety Chair Adrienne Adams
Commissioner of the Department of Investigation Margaret Garnett

¹⁹ Letter from Brennan Center for Justice et al., to Philip Eure, Office of the Inspector General, NYPD, September 22, 2020, <https://www.brennancenter.org/our-work/research-reports/coalition-letter-calls-nypd-inspector-general-audit-nypd-gang-database>.