

**Testimony of Michael Sisitzky  
On Behalf of the New York Civil Liberties Union  
Before the New York City Council Committee on Public Safety  
Regarding NYPD Enforcement of Social Distancing**

**May 22, 2020**

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following testimony regarding the New York Police Department’s (“NYPD”) enforcement of COVID-19 related social distancing measures. The NYCLU, the New York affiliate of the American Civil Liberties Union, is a not-for-profit, non-partisan organization with eight offices throughout the state and more than 180,000 members and supporters. The NYCLU’s mission is to promote and protect the fundamental rights, principles, and values embodied in the Bill of Rights of the U.S. Constitution and the New York Constitution.



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Defending New Yorkers' right to be free from discriminatory and abusive policing is a core component of the NYCLU's mission. Protecting this right requires robust systems for ongoing oversight of police practices and meaningful checks to guard against abuse of the expansive authority afforded to police officers. It also requires the proper funding of and support for public health and social service agencies so that we can reduce the overall number of interactions in which we rely on armed police officers to respond to non-criminal law-related issues.

The NYPD has played an outsized role in the response to the pandemic, and its overall approach has been cause for concern. We note, in particular, the stark racial disparities, use of force, and lack of transparency that have emerged in the Department’s enforcement of COVID-19 related social distancing measures. The NYCLU is dismayed by the NYPD’s stubborn defense of behavior that has generated legitimate public outcry about excessive force, racial bias, and increased health risks to police and the public alike.

While we recognize the need to ensure public health and safety as the city responds to the pandemic, the NYPD’s actions are—and must be—bound by the Constitution. A pandemic calls for many measures that would be unacceptable under other circumstances; but it does not justify measures that are not required to protect the public health like discriminatory policing or excessive force.

Our testimony will address the problems we have witnessed with the NYPD's approach to social distancing enforcement and will recommend measures that the City Council can pursue, both legislatively and through budget negotiations with the mayor’s office, to reduce and reverse the harms being done by aggressive policing tactics masquerading as public health enforcement.



## I. Criminalization and Racially Disparate Enforcement are Not the Answer to Public Health Crises

The pandemic has created a challenging dynamic for all New Yorkers, with new restrictions being placed on what would otherwise be mundane aspects of daily life. Because of the ways in which the coronavirus spreads, many of these restrictions relate to social distancing, including limits on gatherings and requirements for people to wear face coverings while in public. From the outset, Governor Cuomo has called on police to enforce these restrictions.<sup>1</sup> This call has been repeatedly echoed by Mayor de Blasio, whose administration has insisted that the appropriate response to issues ranging from overcrowding in grocery stores<sup>2</sup> to the opening of city streets for pedestrian and bicycle traffic is heavy police presence and enforcement.<sup>3</sup>

But criminalization in the name of public health enforcement is still criminalization, with all of the collateral consequences that too often result from contact with the criminal legal system. Unfortunately, if unsurprisingly, the NYPD's role at the forefront of social distancing enforcement has resulted in racially disparate patterns of enforcement and criminalization of communities that have long been subject to aggressive over-policing. According to data released by the NYPD, more than 80 percent of those ticketed for social distancing-related enforcement are Black and Latinx.<sup>4</sup> Beyond the disparities in the numbers themselves, the images of NYPD officers handing out masks to white sunbathers in a crowded West Village park juxtaposed with video of officers without masks violently arresting three people of color in the East Village for allegedly violating social distancing is striking.<sup>5</sup>

When confronted with the racial disparities in NYPD enforcement, Commissioner Shea responded that they resulted from existing socioeconomic

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<sup>1</sup> Nathaniel Weixel, *Cuomo Says NYPD Needs to Enforce Social Distancing Rules*, *The Hill* (Apr. 1, 2020), available at <https://thehill.com/homenews/state-watch/490623-cuomo-says-nypd-needs-toenforce-social-distancing-rules>.

<sup>2</sup> Dave Goldiner, *De Blasio Asks NYC to Rat Out Coronavirus Crowders*, *N.Y. Daily News*, Apr. 18, 2020, <https://www.nydailynews.com/coronavirus/ny-coronavirus-de-blasio-nyc-social-distancing-police-20200418-kidh4tqokzavbojoknoej2mv5y-story.html>.

<sup>3</sup> Julia Marsh & David Meyer, *De Blasio Calls Off Coronavirus Street Closures, Citing Lack of NYPD Resources*, *N.Y. Post*, Apr. 6, 2020, <https://nypost.com/2020/04/06/coronavirus-in-ny-de-blasio-calls-off-street-closures/>.

<sup>4</sup> Erin Durkin, *Black and Latino New Yorkers Get Vast Majority of Social Distancing Summonses*, *Politico*, May 8, 2020, <https://www.politico.com/states/new-york/albany/story/2020/05/08/black-and-latino-new-yorkers-get-vast-majority-of-social-distancing-summonses-1283223>.

<sup>5</sup> Poppy Noor, *A Tale of Two Cities: How New York Police Enforce Social Distancing by the Color of Your Skin*, *The Guardian*, May 4, 2020, <https://www.theguardian.com/world/2020/may/04/coronavirus-new-york-police-enforce-social-distancing>.



disparities.<sup>6</sup> But while it is certainly true that many people of color experience discrimination and disadvantage rooted in social and economic circumstances, mistreatment by the police cannot be justified in those terms. Nor do “socioeconomic” realities begin to justify the clear examples of the NYPD’s remarkably different approaches in policing New Yorkers of different races and neighborhoods.

As public criticism over these disparities and the growing number of videos of violent social distancing-related arrests continued to mount, the mayor announced that the city would expand the number of non-NYPD “social distancing ambassadors” to engage New Yorkers and seek compliance with these measures.<sup>7</sup> On May 15, the mayor announced that the NYPD would alter its approach and that, “absent a serious danger to the public,” officers would not take enforcement action related to face coverings and would prioritize dispersing groups with at least six adults present.<sup>8</sup>

While these measures are welcome, they are by no means sufficient. As temperatures continue to warm and New York moves closer toward an eventual reopening, we must continue to demand rigorous oversight of NYPD practices going forward. It is also worth emphasizing that, while the Department has said they are taking a new approach to social distancing enforcement, the Department has so far refused to disavow its commitment to pre-pandemic criminal enforcement priorities. Officers have continued to make arrests for marijuana offenses, and even took to social media to boast of an arrest for marijuana possession and turnstile jumping.<sup>9</sup> The Department has also given no indication that it intends to step back from its continued participation in “sweeps” or “clean-ups” that threaten unsheltered homeless New Yorkers with the destruction of their belongings if they do not leave the

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<sup>6</sup> Ashley Southall, *NYPD Commissioner Denies Racial Bias in Social Distancing Policing*, New York Times, May 13, 2020, <https://www.nytimes.com/2020/05/13/nyregion/nypd-social-distancing-race-coronavirus.html>.

<sup>7</sup> *NYC to Expand Number of Non-NYPD “Social Distancing Ambassadors” to 2,300 Following Viral Videos of Arrests*, CBS 2 New York, May 10, 2020, <https://newyork.cbslocal.com/2020/05/10/social-distancing-ambassadors/>.

<sup>8</sup> Ben Kessler, *NYPD to No Longer Enforce Wearing Masks Absent “Serious Danger,” Mayor Says*, NBC News, May 15, 2020, <https://www.nbcnews.com/news/us-news/nypd-no-longer-enforce-wearing-masks-absent-serious-danger-mayor-n1207931>.

<sup>9</sup> Poppy Noor, *A Tale of Two Cities: How New York Police Enforce Social Distancing by the Color of Your Skin*, The Guardian, May 4, 2020, <https://www.theguardian.com/world/2020/may/04/coronavirus-new-york-police-enforce-social-distancing>; NYPD Transit (@NYPDTransit), “Some people may disagree - but transporting ziplock bags of marijuana & a digital scale in your backpack does not make you an essential traveler in the eyes of the Transit police. Hopping a turnstile while doing so didn’t help either. Nice grab by our District 1 team!” May 2, 2020, Tweet, <https://twitter.com/nypdtransit/status/1256594296230330369?s=21>.



public spaces where they have been sleeping. These tactics are also directly contrary to CDC guidance, which advises that sweeps should not be used unless private, individual rooms are offered for temporary shelter,<sup>10</sup> which the de Blasio administration has forcefully resisted.<sup>11</sup> An announced “reset” on social distancing enforcement is meaningless if the NYPD will continue to engage in broken windows tactics as if this were business as usual.

The effects of COVID-19 necessitate a complete reexamination of existing priorities across all levels of government. Changes to policing must be part of that conversation. At a fundamental level, New York City must rethink its approach to public health and safety and prioritize investments in agencies and programs that are better suited to respond to public health crises and better equipped to help those impacted by the coronavirus to be able to rebuild and recover.

## II. Recommendations

The NYCLU offers the following recommendations with the goal of curtailing the NYPD's role in social distancing, increasing investments in public health and social services, and passing a number of overdue legislative measures to increase police transparency and accountability.

### A. New York City Must Pass a Budget that Increases Investment in Public Health and Decreases Misguided Overreliance on Law Enforcement

New York's current reliance on police officers to enforce social distancing is, in part, a consequence of city budgeting priorities that have allowed the department to expand so dramatically compared to other agencies. But police officers are not the public officials best suited to respond to COVID-19 related restrictions for two critical, but related reasons. First, the NYPD is not—nor should it endeavor to be—a public health agency. Second, the communities most impacted by the virus do not have sufficient trust in the NYPD for its officers to function as effective public health messengers.

Despite the progress that has been made in recent years to move beyond the era of mass stop and frisk and racial profiling, the NYPD has not done enough to build relationships with the communities most impacted by abusive and discriminatory policing. In recent years, the NYPD's continuing embrace of broken windows policing tactics, its push to dramatically expand the reach

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<sup>10</sup> Centers for Disease Control and Prevention, Interim Guidance for Homeless Service Providers, <https://www.cdc.gov/coronavirus/2019-ncov/community/homeless-shelters/plan-prepare-respond.html> (last accessed May 20, 2020).

<sup>11</sup> Joe Anuta, *De Blasio Pushes Hard against Moving All Homeless to Hotels*, Politico, May 20, 2020, <https://www.politico.com/states/new-york/albany/story/2020/05/19/de-blasio-pushes-hard-against-moving-all-homeless-to-hotels-1284548>.



of Section 50-a, and its reflexive fear mongering in response to historic bail reform measures have undercut any efforts to establish trust and credibility in these communities. The same low-income communities of color that have been impacted the most by this abusive and discriminatory policing are now the communities with the highest rates of infection and death from COVID-19.<sup>12</sup> The ensuing lack of trust and credibility makes the NYPD an entirely inappropriate messenger for delivering public health information or encouraging compliance with public health directives in this time of crisis.

The enforcement of public health restrictions should be the responsibility of public health agencies like the Department of Health and Mental Hygiene, whose officers and inspectors have enforcement authority under city and state law.<sup>13</sup> To the detriment of our residents, the city has invested much less in public health and other social service providers than it has in the NYPD. The unfortunate result is that far more NYPD personnel are available for enforcement than professionals from agencies that are not driven by a punitive, criminal law enforcement approach. While these unequal levels of investment and staffing may explain the current reliance on police officers to enforce social distancing, it cannot be an excuse for keeping this paradigm in place moving forward.

While the current crisis has made the issue of overinvestment in police at the expense of other agencies that much more obvious, the problems are not limited just to the public health arena. For years, the NYPD's role in non-criminal law-related functions has been allowed to expand areas like in homeless outreach, public schools, and mental health responses. These expansions are the result of deliberate decisions to invest financial resources into the Police Department. The City Council has the opportunity to chart a new path forward as it works to negotiate and pass a budget for FY 2021. The NYCLU urges the Council to prioritize investments in the city's public health infrastructure and social safety net and to significantly reduce the NYPD's footprint in areas like physical and mental health responses, homeless outreach, youth services, and other areas where officers are currently responding to non-law enforcement needs and where investments could instead be made more directly in agencies better suited to the delivery of those services. As New York braces for the full economic impact from the coronavirus, the paltry cuts so far proposed by the NYPD are insulting to New Yorkers who will be more dependent than ever on many of the agencies facing far deeper cuts. There is no justification for moving forward with a proposed

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<sup>12</sup> Sanya Mansoor, *Data Suggests Many New York City Neighborhoods Hardest Hit by COVID-19 are also Low-Income Areas*, Time, Apr. 5, 2020, <https://time.com/5815820/data-new-york-low-income-neighborhoods-coronavirus/>.

<sup>13</sup> See N.Y. Pub. Health L. § 12-b (willful violation of health laws, and the enforcement provision for many of Governor Cuomo's executive orders in response to the coronavirus); NYC Admin. Code § 17-138 (designating NYC Department of Health and Mental Hygiene officers and inspectors as peace officers).

budget that cuts only around one percent of the NYPD's funding, while the budgets of agencies like the Department of Youth and Community Development are being halved.<sup>14</sup>

New Yorkers will not need more policing to help them recover from the impacts of the coronavirus. Instead, they will need a robust public health infrastructure and a strengthened social safety net. It is oft said that budgets are moral documents. Continuing to overinvest in policing and criminalization at the expense of the communities currently being devastated by the coronavirus would send a dismal message about New York's moral priorities.

### **B. Pass Resolution 750 in Support of Repealing Section 50-a**



An unfortunate consequence of the increased reliance on police officers to enforce our public health response to COVID-19 is that the city is giving even more power to the very officials subject to the least amount of transparency and oversight. Unlike other public employees, police officers are entitled to near total state secrecy when it comes to official records related to their misconduct. Civil Rights Law Section 50-a makes police disciplinary records exempt from public disclosure, even when those records relate to egregious misconduct involving abuse of authority and excessive force.

The successful push by the de Blasio administration, the NYPD, and police departments throughout the state to expand 50-a's reach and to keep this information secret undermines any efforts to build trust and confidence in the communities they are sworn to protect and serve. Worse, it sends a message to the communities who experience police abuse that officers are not accountable to them.

Police officers are already unique in the powers they can exercise over New Yorkers, including the legal authority to use deadly force as part of their jobs. It has long been a point of shame that New York law prevents the public from knowing whether departments take abuse of this incredible authority seriously. And when we are now expanding police officers' authority and placing even more responsibility on them to enforce public health directives, this level of secrecy is unconscionable.

We have already seen deeply disturbing examples of what abuse of authority looks like in the context of social distancing enforcement and its impact on people of color. What's more, it has been reported that the officer who carried out one of the too many violent social distancing-related arrests

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<sup>14</sup> Joe Anuta, *Police Commissioner on Defense during Council Budget Hearing*, Politico, May 14, 2020, <https://www.politico.com/states/new-york/city-hall/story/2020/05/14/police-commissioner-on-defense-during-council-budget-hearing-1284067>.



has a long history of alleged misconduct and has been the frequent subject of civil litigation.<sup>15</sup> Because of 50-a, we know nothing about whether these past allegations were investigated by the NYPD, and we will be entitled to no information about how the Department responds to this particular incident.

To the extent that any police officer abuses their already expansive authority during this crisis, the Department must commit to holding them accountable through meaningful disciplinary investigations and consequences. But the public will never learn the outcomes of those processes without legislative action to remove the barrier imposed by 50-a.

The power to repeal Section 50-a obviously rests with the State Legislature but New York City-based actors bear no small part of the responsibility for the provision's shameful expansion. It is imperative that city lawmakers join in the statewide movement to push back on this anti-democratic provision by passing Res. 750 and calling for full repeal of 50-a.<sup>16</sup>

### **C. Require Comprehensive Data Collection and Reporting on All NYPD Enforcement Practices and on the Department's Response to Officer Misconduct**

The NYPD cannot ask for the public's trust without a commitment to greater transparency. This is as true for social distancing enforcement as it is for police practices and policies writ large. The Department's recent release of summons and arrest data was an important first step, but it is worth emphasizing that this data was made public only after it was leaked.<sup>17</sup> It is also worth noting that the summons data only reflects those charged with violations of emergency procedures and acts likely to spread disease, and may not capture the full universe of social distancing enforcement. It has been reported, for example, that arrests for social distancing violations have involved charges for disorderly conduct, obstructing governmental administration, unlawful assembly, and resisting arrest.<sup>18</sup>

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<sup>15</sup> Jake Offenhartz, *NYPD Officer Seen Beating Man in Social Distancing Arrest has a History of Alleged Brutality*, Gothamist, May 4, 2020, <https://gothamist.com/news/nypd-officer-seen-beating-man-social-distancing-arrest-has-history-alleged-brutality>.

<sup>16</sup> For previous testimony addressing these issues, see NYCLU, *Testimony Regarding New York City Police Discipline*, Feb. 7, 2019, <https://www.nyclu.org/en/publications/testimony-regarding-new-york-city-police-discipline>.

<sup>17</sup> Jake Offenhartz, *De Blasio Shrugs Off Leaked Data Showing Massive Racial Disparities in NYPD's Social Distancing Arrests*, Gothamist, May 8, 2020, <https://gothamist.com/news/de-blasio-shrugs-leaked-data-showing-massive-racial-disparities-nypds-social-distancing-arrests>.

<sup>18</sup> Alice Speri, *NYPD's Aggressive Policing Risks Spreading the Coronavirus*, The Intercept, Apr. 3, 2020, <https://theintercept.com/2020/04/03/nypd-social-distancing-arrests-coronavirus/>.



The Council should consider legislative action to require a more accurate and comprehensive accounting of what social distancing enforcement looks like, including mandating complete demographic and geographic information to allow for ongoing oversight of any disparate enforcement patterns. We also reiterate past recommendations we have made to the Council to pass legislation requiring the comprehensive collection and reporting of data on all levels of police investigatory and enforcement encounters, including so-called Level 1 and Level 2 interactions not covered by current reporting on stop and frisk activity, and to pass Intros. 1671 and 1551, which would expand the NYPD's reporting on traffic stops and consent searches, respectively.<sup>19</sup> The more proactive the Council can be about requiring data reporting across all categories of NYPD enforcement, the less catching up we will have to do when new concerns about disparate enforcement arise going forward.

We also note that there are a number of bills pending before the Council related to the Department's systems for investigating and holding officers accountable for misconduct. These include Intros. 1105, 1309, and 1391, each of which will deepen the public's understanding of whether and how the NYPD disciplines officers who engage in misconduct.<sup>20</sup> Although, as noted above, Section 50-a blocks the level of reporting to which the public should rightfully be entitled, these measures will provide baseline data on the outcome of all NYPD disciplinary investigations.

New Yorkers have seen far too many videos of officers engaging in excessive force and other misconduct, whether in the context of social distancing enforcement or otherwise, while being given far too little information on whether officers are ever held accountable. The City Council must stop delaying action on these crucial transparency measures.

#### **D. Pass the Right to Record Act**

Thanks to bystander recordings, the public has been able to witness examples of what abusive and discriminatory social distancing enforcement by the NYPD looks like. While the experiences captured in footage of violent arrests of Black and Latinx people and photographs of officers handing out masks to white sunbathers could not be more different, the people who took these photos and videos shared in the protection of the First Amendment right to document and record police activity.

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<sup>19</sup> For previous testimony addressing these issues, see NYCLU, *Testimony Regarding Implementation of the Right to Know Act*, Apr. 29, 2019, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3919296&GUID=72163C46-3A06-408D-AA81-E349FE242548&Options=&Search=>.

<sup>20</sup> For previous testimony addressing these issues, see NYCLU, *Testimony Regarding New York City Police Discipline*, Feb. 7, 2019, <https://www.nyclu.org/en/publications/testimony-regarding-new-york-city-police-discipline>.



While the Constitution protects the public’s right to monitor and document police activity, we know the reality is that rights are not always respected in practice, and that the NYPD has a long history of interfering with the exercise of this right.<sup>21</sup> In recent weeks, NYPD officers were recorded punching a young man in the head in East New York, in what began as a social distancing related encounter; the footage ends with officers taking the person who filmed the encounter into custody.<sup>22</sup> NYPD officers also recently arrested a public defense attorney who was recording a police investigation and charged her with obstructing governmental administration.<sup>23</sup>

With so many New Yorkers spending more of their time inside, photos and videos documenting the realities of police encounters in public spaces have never been more important for bringing awareness to abuses that may have otherwise gone unseen. The City Council has the opportunity to further strengthen and clarify the right to record police activity by passing the Right to Record Act, Intro. 721. This measure will declare, unambiguously, that this right exists in local law and make it easier for New Yorkers to seek redress for violations.

#### **E. Pass the POST Act**

The NYPD uses numerous forms of powerful, invasive, and covert surveillance technologies to police New York City streets every day, but to date, most of what we know about these technologies has been through what the NYPD chooses to make public or what we have been able to uncover through litigation, investigative journalism, and inquiries by criminal defense attorneys. We know, for instance, that the NYPD has reported using its vast network of surveillance cameras to monitor and enforce social distancing,<sup>24</sup>

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<sup>21</sup> For previous testimony addressing this issue, see NYCLU, *Testimony Regarding the Right to Record Act*, Dec. 14, 2017, <https://www.nyclu.org/en/publications/testimony-city-council-public-safety-committee-re-right-record-act>.

<sup>22</sup> Jake Offenhartz, *De Blasio Defends another Violent Social Distancing Arrest by NYPD: “Respect Goes Both Ways,”* Gothamist, May 5, 2020, <https://gothamist.com/news/de-blasio-defends-another-violent-social-distancing-arrest-nypd-respect-goes-both-ways>.

<sup>23</sup> Noah Goldberg, *Defense Attorney Claims She was Wrongfully Arrested by Brooklyn Cops for Recording them Frisking Suspects*, N.Y. Daily News, May 11, 2020, <https://www.nydailynews.com/coronavirus/ny-coronavirus-legal-aid-attorney-arrest-nypd-record-iphone-dog-20200511-fekxblcgjie3jiglumisjay3sm-story.html>.

<sup>24</sup> Dean Meminger, *NYPD Using Thousands of Cameras to Enforce Social Distancing*, Spectrum News NY1, Apr. 2, 2020, <https://www.ny1.com/nyc/all-boroughs/news/2020/04/02/how-the-nypd-is-using-cameras-to-enforce-social-distancing-during-the-covid-19-coronavirus-outbreak>.

while refusing to answer a reporter’s question about whether they were also deploying drones for this purpose.<sup>25</sup>

With the prospect of expanded contact tracing meant to limit further spread of the coronavirus, New Yorkers need to have confidence in the ways in which government agencies will use and safeguard any personal information that may be collected about their health and their daily lives. This includes whether and through what method this information may be collected by or shared with law enforcement. The public health crisis cannot become an opportunity for the NYPD to further expand its surveillance infrastructure.

Too often, the only meaningful checks on the NYPD's ability to target and surveil New Yorkers have come after incidents where harm has already been inflicted, often against communities of color. That is due to a lack of any meaningful oversight mechanisms that could identify or preempt such harms before they occur. The Public Oversight of Surveillance Technology (“POST”) Act, Intro. 487, will address this lack of oversight directly by requiring the NYPD to engage the public in conversations about what tools officers use to surveil New Yorkers and what safeguards the Department has in place to protect the personal and sensitive information that those tools sweep up.<sup>26</sup> Transparency and fully-informed conversations about police surveillance increase public trust, and right now that's essential to building a public health infrastructure that will save lives. The NYCLU strongly recommends immediate passage of the POST Act.



### III. Conclusion

A pandemic is a novel and challenging dynamic for all New Yorkers, for the NYPD, and public officials. But nothing about this public health crisis justifies discriminatory policing or the use of excessive force. While we are hopeful that the recently announced changes to the NYPD's approach to social distancing enforcement will lead to fewer egregious incidents going forward, the Council must take the proactive steps outlined above to ensure that we do not go down this road again. That starts with passing a city budget rooted in racial and economic justice, and it must include continued demands for transparency and accountability across all NYPD practices.

The NYCLU thanks the Committee for the opportunity to provide testimony today and for its consideration of this critically important issue.

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<sup>25</sup> Ben Yakas, *Videos: The NYPD is Monitoring Social Distancing on the Ground & from the Skies*, Gothamist, Mar. 31, 2020, <https://gothamist.com/news/videos-nypd-monitoring-social-distancing-ground-skies>.

<sup>26</sup> For previous testimony regarding this issue, see NYCLU, *Testimony in Support of Intro. 487 – The Public Oversight of Surveillance Technology Act*, Dec. 18, 2019, [https://www.nyclu.org/sites/default/files/field\\_documents/nyc\\_council\\_post\\_act\\_testimony\\_-\\_2019.12.18.pdf](https://www.nyclu.org/sites/default/files/field_documents/nyc_council_post_act_testimony_-_2019.12.18.pdf).