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Statement at Hearing regarding inadequate Handschu Agreement modifications June 2016 The proposed modifications are Unfair and Unreasonable



The proposed modifications now before Judge Haight are Unfair and Unreasonable and therefore fail to satisfy the standards he articulated at the first hearing as necessary to earn the approval of the Court. For those reasons, we ask this Court to use its power to protect the Handschu plaintiff class¹ to reject this settlement as unfair and unreasonable and ask the parties to negotiate a proposed settlement that will both remedy injustices and will prevent their repetition. Such a better Handschu settlement would also include acknowledgement by the perpetrator of past wrongs.

Unfair

The current proposed Settlement before the Court is Unfair because the process prevented those class members and advocates who sought to strengthen the proposed settlement from communicating their concerns with proponents in open Court. For instance, those collecting the emails for the speaker RSVP's at the previous Hearing and for the Court obviously arranged that the proponents of the proposed settlement spoke first and that only then those concerned with its serious shortcomings would be heard. As a result, many of the proponents left the hearing room and never heard the points they – along with the court – were being asked to consider in evaluating the effect ratification of the proposed settlement would have on targeted communities.

The current proposed Settlement before the Court is Unfair because the targets have been injured by having their deeply private life events – thoughts shared in confidence when a person was going through a crisis, a celebration of a wedding or a birth, and a prayer to the Lord for help or guidance – all these intimate and irreducibly private moments have been intruded upon by informants and agent provocateurs insinuating themselves into their communities. And yet this proposed settlement would compound the injury by leaving it uncertain by allowing the NYPD to avoid necessary steps towards healing. The proposed settlement is unfair because the injury inflicted would remain, if this court approves it, diffused, half-secret, and unspecified.

The current proposed Settlement before the Court is Unfair not only because the NYPD has not confessed to the extent of their privacy-intruding practices, leaving particular targets ignorant as to the particular private moments that were witnessed, captured and documented by these unconstitutional NYPD operations. It is also unfair because the injured New Yorkers have not been compensated for those injuries. The injuries inflicted by the NYPD against already maligned and marginalized communities, includes sowing mistrust within those communities, the collection of personal, private, and deeply personal information and sharing this information with an unspecified number of other government agencies including perhaps foreign governments. Not only are victims of these practices left without any NYPD public acknowledgement or apology for the damage done to our civil society and the fundamental principle of equality under the law for breaches of the *Handschu* guidelines and the constitution but the NYPD has not allowed targeted New Yorkers to view collected information or

¹ Note: "Judge Jed Rakoff Courageously Strikes Down SEC Citigroup Settlement"
retrieved on May 30, 2016 from https://www.washingtonpost.com/blogs/post-partisan/post/judge-jed-rakoff-courageously-strikes-down-sec-citigroup-settlement/2011/11/28/gIQA1paS5N_blog.html

to know with whom the information has been shared. A settlement wherein the NYPD is allowed to have performed blanket surveillance of ethnic and religious minorities and political activists and advocates without admission of wrongdoing or punishment and no record of condemnation by a Federal court is not “fair” to the victims of the NYPD’s scofflaw behavior.

The current proposed Settlement before the Court is Unfair because the perpetrators have added insult to injury by refusing to admit guilt or remorse. The court must not ratify their intransigence.

The current proposed Settlement before the Court is Unfair because not only are many in the targeted community unaware of the extent of the violations inflicted upon them by the NYPD, they have been informed – falsely – that this deeply unfair and unreasonable proposed settlement is the best that the courts of justice of our country and the constitution has to offer. Victimized communities have been misinformed that this is a landmark settlement – a done deal before members of the target communities and plaintiff class members (Muslims and activists) have even been heard.²

The process by which this proposed settlement was shared with the affected parties is also unfair. Advocates for these community members who recognized the grossly inadequate nature of the proposal expended significant resources attempting to obtain an extension of time and a second hearing. Advocates rallied members of the targeted communities and Handschu class members to obtain counsel and/or provide declarations informing the court of the insufficient Court-approved time for consulting with independent counsel, becoming informed and being able to respond adequately.³ But these efforts were largely focused on the proposed settlement’s procedural shortcomings and not

² NYCLU press release, “Landmark Settlement Protects American Muslims From Discriminatory NYPD Surveillance” published the January 7, 2016 retrieved February 15, 2016 at 10:24 am from <http://www.nyclu.org/news/landmark-settlement-protects-american-muslims-discriminatory-nypd-surveillance>; “A New York City Settlement on Surveillance of Muslims” by Colin Moynihan (referring to “the recent settlement” as adding a chapter to Handschu litigation; cursory mention of Judge’s role; no mention of plaintiff class members’ role in the process), published in The New Yorker, January 7, 2016 retrieved February 15, 2016 at 10:29 a.m. from <http://www.newyorker.com/news/news-desk/a-new-york-city-settlement-on-surveillance-of-muslims>; “NYPD settles lawsuits over Muslim monitoring” by Adam Goldman, (cursory mentioning of Judge’s role in middle of article; no mention of plaintiff class members’ role in approval process), published in The Washington Post, January 7, 2016, retrieved February 15, 2016 at 10:43 a.m. from https://www.washingtonpost.com/world/national-security/nypd-settles-lawsuits-over-muslim-monitoring/2016/01/07/bdc8eb98-b3dc-11e5-9388-466021d971de_story.html?hpid=hp_hp-more-top-stories_nypd-1245pm%3Ahomepage%2Fstory; “New York to Appoint Civilian to Monitor Police’s Counterterrorism Activity” by Matt Apuzzo and Al Baker, (cursory mention of Judge’s role; no mention of plaintiff class members’ role in the process) published in The New York Times, January 7, 2016 retrieved February 15, 2016 10:54 a.m. from http://www.nytimes.com/2016/01/08/nyregion/new-york-to-appoint-monitor-to-review-polices-counterterrorism-activity.html?smid=pl-share&_r=0; “NYPD settles lawsuits over surveillance of Muslims and agrees to reforms” by Amanda Holpuch, ((cursory mention of Judge’s role; no mention of impacted class members role in approving the process) published in The Guardian, January 7, 2016 retrieved February 15, 2016 at 10: 56 a.m. from <http://www.theguardian.com/us-news/2016/jan/07/new-york-police-settlement-muslim-surveillance-program><http://www.theguardian.com/us-news/2016/jan/07/new-york-police-settlement-muslim-surveillance-program>. Cf. I have identified only one article, which mentions both the court’s role and plaintiff class even cursorily: “Settlement Modifies Handschu Surveillance Guidelines” by Andrew Denney, (nevertheless mentioning of Judge’s role buried in middle of article) published in New York Law Journal, January 8, 2016 retrieved February 15, 2016 at 10:40 a.m. from <http://www.newyorklawjournal.com/id=1202746571928?keywords=Handschu&publication=New+York+Law+Journal&slreturn=20160115101814>

³ Submit to court.

its substantive ones. The initial time period approved by the court (April 5 to submit comments and April 19th to testify in court) and the subsequent month and a half extension of time was unfairly short. Organizations and congregations that asked to be allowed until early July or after the month of Ramadan to consider the proposal were unfairly and arbitrarily limited in having an opportunity to consider and review with independent counsel necessary improvements to the proposed settlement.

The restricted time frame is unfair because of the concerted effort by Plaintiffs' counsel, including by Handschu representatives who had a legal and ethical obligation to consider the concerns of all members of the plaintiff class they represented, to celebrate the proposed settlement as historic and a done deal. The restricted time frame was also unfair because the NYPD made clear that no changes would occur to its practices or policies should the settlement as proposed be approved by the court. As a result, plaintiffs' swift pace to obtain a final stamp of approval of this court and the misinformed public was unnecessary to secure gains in police department practices. The Court nevertheless unfairly limited the ability of the impacted communities to become informed by arbitrarily imposing a comment period and hearing time with more than a month less time than plaintiff class members requested.

Unreasonable

The current proposed Settlement before the Court is Unreasonable because it fails to achieve its stated goals. The stated goal of the proposed settlement is to "enable officers to perform their duties with greater certainty, confidence, and effectiveness while at the same time protecting the guarantees of the Constitution." But the lack of clear standards and definitions of key terms makes achieving this goal impossible.

Critically, the settlement does not clarify the kinds of facts and circumstances which would provide a reasonable indication unlawful conduct will occur. The settlement must explicitly define the sort of unlawful activity, which would not justify an 18-month investigation replete with undercovers and other intrusive methods. The proposed settlement is unreasonable because it leaves such a vague and undefined term open to the discretion of the NYPD leadership. But this same leadership clearly has a questionable track record of guessing at what is and is not unconstitutional. The NYPD leadership, lower level officers and all New Yorkers deserve the guidance of a Federal court in clearly defining these currently vague terms and anything less is unreasonable given the record of the NYPD as evidenced by the Demographics Unit's practices.

Any reasonable settlement must not only define "unlawful activity" but must also prohibit inquiries or investigations based on mere allegations. A settlement is unreasonable without a standard of credibility for allegations required to launch unlawful and disruptive police practices. Yet this settlement imposes a single vague restriction on such allegations to trigger those practices: namely, that they be "articulable and factual." *Id.* The information does not even need to be "verified as true or accurate." Page 3. Of course, this renders the standard "articulable and factual" practically meaningless and the proposed settlement unreasonable as a result.

The proposed settlement should include example scenarios like those included in the Terrorism Enterprise Investigation section of the Guidelines for Preliminary Inquiries and Full Investigations and should explicitly require only enumerated felonies to suffice as a trigger for any of them.

The proposed settlement is unreasonable because the standard for determining what investigative technique should be allowed under the circumstances is also left completely to the NYPD's discretion. The guidelines state: "When conducting investigations under these guidelines, the NYPD may use any

lawful investigative technique permitted by these guidelines. The choice of investigative techniques is a matter of judgment, which should take account of [a list of factors].” Pg. 12.

The proposed settlement is unreasonable because the Handschu Committee has no mandatory meetings, no mandatory attendance by its members, does not provide an equal balance of civilian and NYPD voices, and has a non-binding advisory role in approving or disapproving opening of inquiries and investigations. Furthermore, the Committee’s sole civilian member replaces what was once a non-NYPD oversight mechanism which though flawed was significantly *more* protective of civil liberties than the mechanism currently proposed. The proposed Committee has the obligation to bring to Judge Haight’s and thus the Federal court’s attention *only* violations that rise to a level of policy and not, as was formerly the case, *each* apparent NYPD violation of the 1st Amendment rights of New Yorkers. As a result of all the above-listed shortcomings of the new Handschu Committee, the oversight function of the Federal court created by the original Handschu settlement has been rendered toothless with *no* obligation on the new gatekeeper to inform the Federal Court or the original Handschu Plaintiff class counsel of violations *as they occur*. Such consequences are exactly the *opposite* of what New Yorkers should reasonably expect from an oversight mechanism supported by a Federal court in the wake of the revelations of the Demographics Unit, one of the greatest civil liberties scandals the NYPD has ever faced. The proposed settlement is unreasonable because it does not institute effective oversight commensurate to the proven track record of the NYPD in violating civil liberties of New Yorkers.

The proposed settlement is unreasonable because the inquiries and investigations have only presumptive end dates, which may be extended at the sole discretion of the Deputy Commissioner of Intelligence. A truly empowered Handschu Committee with a majority of civilian members who are insulated from political reprisal and control should control the extension of inquiries and investigations. A proposed settlement which gives the Deputy Commissioner of Intelligence or any other officer the power to extend intrusive years long investigations without civilian and court oversight is unreasonable in view of the record of the NYPD in trampling on civil liberties of New Yorkers.

NYPD has been shown to continue the expansive and potentially unconstitutional surveillance and monitoring and infiltration of activists and advocates in other cities like Ferguson, and of the Black Lives Matter and Occupy Wall Street movements, among others.

For all the above reasons, the settlement proposed by the Handschu class counsel, the Raza lawyers, and the NYPD is unfair and unreasonable and should be rejected by this Federal court as incommensurate and inadequate to remedy and protect against the continuation of an abominable record of civil liberties abuses by the NYPD.

A federal judge in NY rejected a settlement between the SEC and Citigroup. In that instance, Judge Jed S. Rakoff correctly concluded that it was “neither fair, nor reasonable, nor adequate, nor in the public interest.” We hope you have the courage to do the same in this case. Thank you.

