

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW MEXICO**

**UNITED STATES OF AMERICA,**

**Plaintiff,**

**v.**

**1:14-CV-1025 RB/SMV**

**CITY OF ALBUQUERQUE,**

**Defendant.**

***AMICUS CURIAE BRIEF OF APD FORWARD*  
REGARDING COURT APPROVAL OF THE SETTLEMENT AGREEMENT  
BETWEEN THE CITY OF ALBUQUERQUE AND  
THE UNITED STATES DEPARTMENT OF JUSTICE**

Frances Crockett Carpenter  
Law Office of Frances Crockett  
118 Wellesley Dr. SE  
Albuquerque, NM 87106-1444  
Phone: (505) 314-8884  
Fax: (505) 265-1319  
[frances@francescrockettlaw.com](mailto:frances@francescrockettlaw.com)

Phillip B. Davis  
Phillip B. Davis Attorney at Law  
814 Marquette Ave. NW  
Albuquerque, NM 87102-1959  
Phone: (505) 242-1904  
Fax: (505) 242-1864  
[davis@swcp.com](mailto:davis@swcp.com)

Shannon Kennedy  
Kennedy Kennedy & Ives  
1000 Second St. NW  
Albuquerque, NM 87102  
Phone: (505) 244-1400  
Fax: (505) 244-1406  
[slk@civilrightslawnewmexico.com](mailto:slk@civilrightslawnewmexico.com)

Nancy Koenigsberg, Legal Director  
Disability Rights New Mexico  
1720 Louisiana Blvd. NE, Suite 204  
Albuquerque, NM 87110  
Phone: (505) 256-3100  
Fax: (505) 256-3184  
[nkoenigsberg@drnm.org](mailto:nkoenigsberg@drnm.org)

Randi McGinn  
McGinn Carpenter Montoya & Love P.A.  
201 Broadway Blvd. SE  
Albuquerque, NM 87102-3424  
Phone: (505) 843-6161  
Fax: (505) 242-8227  
[randi@mcginnlaw.com](mailto:randi@mcginnlaw.com)

Alexandra Freedman Smith  
Legal Director  
ACLU of New Mexico Foundation  
P.O. Box 566  
Albuquerque, NM 87103-0566  
Phone: (505) 266-5915 Ext. 1008  
Fax: (505) 266-5916  
[asmith@aclu-nm.org](mailto:asmith@aclu-nm.org)

**INTEREST OF *AMICUS CURIAE***

APD Forward is a coalition of sixteen community organizations and concerned Albuquerque citizens dedicated to seeking sensible reforms necessary for the Albuquerque Police Department to become a responsible, community-friendly police department. The organizations that comprise APD Forward are:

- 1) Albuquerque Health Care for the Homeless – The only organization in Bernalillo County dedicated exclusively to providing comprehensive and integrated medical, dental, behavioral health, prevention and social services to the population experiencing homelessness in the county;
- 2) The American Civil Liberties Union of New Mexico – A litigation and advocacy organization whose goal is to maintain and advance the cause of civil liberties, civil rights and constitutional freedom in the state;
- 3) El Centro de Igualdad y Derechos – An Albuquerque-based immigrants' rights and workers' justice organization;
- 4) Common Cause New Mexico – An advocacy organization dedicated to restoring the core values of American democracy, reinventing an open, honest and accountable government that serves the public interest, and empowering ordinary people to make their voices heard in the political process;
- 5) Disability Rights New Mexico – An organization whose mission is to protect, promote and expand the rights of persons with disabilities;
- 6) The Mission to the Homeless of the Episcopal Diocese of the Rio Grande – Provides pastoral care and spiritual support to people experiencing homelessness throughout the Diocese of the Rio Grande;

- 7) Equality New Mexico (EQNM) – The state's lesbian, gay, bisexual, and transgender civil rights organization, which seeks to build a more fair and inclusive New Mexico through education to change hearts and minds, advocacy for those treated unfairly, empowering communities and individuals, and convening to achieve collective impact;
- 8) The League of Women Voters of Central New Mexico – A nonpartisan political organization which encourages informed, active participation in government;
- 9) The National Association of Social Workers, New Mexico Chapter – The state's largest professional social work organization, offering a variety of services including education and advocacy;
- 10) NAVA Education Project – Organizing Native American people to take action on issues that will improve the quality of life for our communities and to protect the continuity of Native American cultures;
- 11) The New Mexico Conference of Churches – A community of Christians throughout the state that works to build relationships across denominational borders in order to respond together to those in need and to advocate on issues of importance;
- 12) The New Mexico Criminal Defense Lawyers Association – Supporting more than 550 members who represent persons accused of crime, NMCDLA advocates for fair and effective criminal justice in the courts, the legislature and in the community;
- 13) Street Safe New Mexico – An advocate for the health and safety of all marginalized women, especially the homeless, addicted and those doing street-based sex work;
- 14) Strong Families New Mexico – A state-based project of Forward Together working to shift culture and create new policies that recognize the many kinds of families in our state;

15) Transgender Resource Center of New Mexico – Dedicated to serving the transgender communities in the state of New Mexico and providing a clearing house for resources which support, assist, educate, and advocate for the transgender population of this state and their families and loved ones;

16) YWCA New Mexico – An organization dedicated to eliminating racism and empowering women, by giving women the tools to advocate for themselves.

There are also several concerned citizens who are members of APD Forward including:

1) Fabrizio Bertoletti – A former member of the Police Oversight Task Force and a former City of Albuquerque administrator;

2) Kenneth Ellis II – The father of Kenneth Ellis III, an Iraq War veteran who was shot and killed by an APD detective on January 13, 2010;

3) Michael Gomez – The father of Alan Gomez, who was shot to death by an APD officer on May 10, 2011;

4) Stephen M. Torres – The father of Christopher M. Torres who was attacked, beaten, shot and killed by two APD detectives on April 11, 2012.

## INTRODUCTION

APD Forward, a coalition of sixteen organizations and four individuals representing the breadth and diversity of the Albuquerque community, is cautiously optimistic that the proposed settlement presented to this Court for its review is a new beginning that signals the City of Albuquerque's willingness to effect the change it must make in order to maintain a constitutional police department. While the settlement agreement is meant to produce meaningful reform, there is a tremendous amount of work that must be done to get there. Many people in the Albuquerque community have lost trust in the Albuquerque Police Department ("APD"), and with good reason.

APD officers have shot forty one Albuquerque citizens since 2010, *see* Pat Holmes, *Past 41 APD-Involved Shootings in Order*, KOAT News 7 (July 22, 2014), <http://www.koat.com/news/past-38-apdinvolved-shootings-in-order/25406384> and have killed two-thirds of the people shot. *DOJ Report on APD: By the Numbers*, <http://krqe.com/doj-apd/numbers/>. This is a shockingly high number of police shootings. Albuquerque is a City of 557,417 and its rate of police shootings is 4 per 100,000 people. *See id.* New York City has a population of 8.3 million people and a rate of 0.4 police shootings per 100,000. *See id.* Other cities in close proximity to Albuquerque also have much lower rates of police violence. El Paso has a population of 672,538, yet its rate of police shootings is 0.7 per 100,000 people. APD's high rate of violence against civilians is particularly troubling considering that "both violent crime and assaults on officers have been on a downward trend" in Albuquerque. Police Executive Research Forum, *Review of Use of Force in the Albuquerque Police Department* (June 23, 2011) p. 2, available at

[https://d3n8a8pro7vhmx.cloudfront.net/apdforward/pages/33/attachments/original/1406915102/PERF\\_Report\\_\(2011\).pdf?1406915102](https://d3n8a8pro7vhmx.cloudfront.net/apdforward/pages/33/attachments/original/1406915102/PERF_Report_(2011).pdf?1406915102). The rampant police violence in APD attracted the attention of the United States Department of Justice (“DOJ”), which conducted a seventeen-month investigation.

DOJ concluded there was a “pattern or practice of use of excessive force, including deadly force.” Letter from DOJ, Civil Rights Division to Mayor Berry, Mayor of the City of Albuquerque, p. 1 (April 10, 2014) (“DOJ Findings Letter”). The findings stated that APD had “insufficient oversight, inadequate training, and ineffective policies” that “contribute[d] to the use of unreasonable force.” *Id.* “Albuquerque police officers often use deadly force in circumstances where there is no imminent threat of death or serious bodily harm to officers or others.” *Id.* at 3. An “aggressive culture that undervalues civilian safety” was found to be a major cause of excessive use of force by APD officers. *Id.* at 23.

The City of Albuquerque has never acknowledged the serious, longstanding constitutional problems with its police force. Tacit or overt approval of APD's unconstitutional conduct within the police department and by city administrations past and present have continued despite over twenty years of civil rights litigation and attempts by community organizations to bring these endemic problems to the attention of the City. Until the DOJ intervened, the City ignored APD's problems, or worse, endorsed APD's unconstitutional misconduct.

Only when a homeless man with longstanding mental health issues was shot to death by APD in the foothills of Albuquerque and the video of his shooting death went viral did the Mayor make any acknowledgment that the time had come for the City to address the problem.

Even then, and despite the pending DOJ's investigation into APD's systemic use of unconstitutional force on its citizens, the City's chief of police chose to pronounce the Boyd shooting as "justified" within days of the incident, although he later changed his position after the community responded with shock and outrage to the shooting.

The City's decades-long refusal to reform APD's unconstitutional policing means the proposed agreement must be clear, strong, and enforceable. Building greater accountability into its provisions will make this agreement more successful. The settlement agreement needs: (1) provisions that will promote better enforcement of terms of the agreement; (2) a stronger policy regarding body-worn cameras; (3) more concrete limitations on the use of specialized units; (4) provisions that promote better treatment of the people who are the most vulnerable to police violence—those suffering from mental illness, the homeless, and Native Americans; and (5) better civilian oversight. Revising the provisions of the agreement to address these issues will guide APD into this new era of constitutional policing and help the community to regain trust in its police force.

## **ARGUMENT**

### **I. The Settlement Agreement Needs Stronger Enforcement Provisions.**

The settlement is laudable in that it includes many policies aimed at reducing the violence that has plagued APD and changing the culture of violence within the department. Good written policies only work to create meaningful reform if they are enforced. APD has a long history of deciding not to enforce its policies. In the vast majority of civil rights cases involving police shootings and other excessive force claims, the officers involved were never disciplined for violating APD policies designed to prevent excessive use of force or record citizen encounters.

This is true even when the officer has been found by a court to have used excessive force and in cases where officers admitted they violated policies in depositions or in trial.

Just one example comes from the April 12, 2011 shooting death of Christopher Torres, an unarmed 26-year-old, who was shot three times in the back in his own backyard. The two officers involved in that shooting violated numerous APD Standard Operating Procedures (SOPs), including those requiring them to turn in a recording of their encounter with Mr. Torres, to use a holster with a retention device, and to de-escalate rather than escalate encounters with citizens. Despite a court finding they had violated APD SOPs, neither officer was ever disciplined for their misconduct.

APD's decision not to enforce its own SOPs, particularly in officer vs. citizen encounters, has significantly contributed to its culture of violence because officers know they will face no consequences for violating the rules designed to prevent excessive use of force. This historic failure to discipline officers should be addressed in any settlement agreement between the City and the DOJ.

Unfortunately, this settlement agreement does not ensure that officers who violate its terms will be disciplined. The settlement agreement is filled with language stating that discipline will be imposed, *see e.g.* Settlement Agreement ¶ 43 (“failure to report a use of force or prisoner injury by an APD officer shall subject officers to disciplinary action.”); ¶ 45 (“[O]fficers who do not record use of force encounters shall be subject to discipline, up to and including termination.”); ¶ 56 (“Where a supervisor repeatedly conducts deficient supervisory force investigations, the supervisor shall receive appropriate corrective and/or disciplinary action...”); ¶74 (“Where a member of the Internal Affairs Bureau repeatedly conducts deficient use of force

investigations, the member shall receive the appropriate corrective disciplinary action...”) ¶ 77 (“where, after an administrative force investigation, a use of force is found to violate policy, the Chief shall direct and ensure appropriate discipline and/or corrective action.”). The settlement agreement also provides that “APD shall establish a discipline matrix.” Settlement Agreement, ¶ 202. However, the agreement does nothing to ensure that these provisions will be enforced.

**A. The settlement agreement should contain provisions that ensure discipline will be enforced.**

We recommend built-in discipline within the settlement agreement. For example, the agreement currently requires APD to create a discipline matrix at some undesignated point in the future. *See* Settlement Agreement, ¶ 202. This matrix should be created now and included in the agreement. This would provide clear disciplinary guidelines for everyone involved. As it stands now, the Court, the DOJ, community organizations, and members of the public have no way of knowing if the disciplinary guidelines ultimately set forth in the matrix will be sufficient to ensure compliance with the policies. Given APD’s historic failure to discipline its officers, it is crucial that the guidelines for discipline are laid out in the settlement agreement.

The settlement agreement could also specify the discipline for particular violations. For example, while the agreement states that supervisors and internal affairs officers who repeatedly conduct deficient investigations shall be disciplined, *see* Settlement Agreement, ¶¶ 56, 74, it is unclear what this discipline will be. It seems obvious that supervisors and internal affairs officers who *repeatedly* conduct deficient investigations should not be permitted to remain in a role that requires them to perform this duty. These investigations are a crucial part of the settlement agreement’s goal of reforming APD’s use of force. Demotion, removal, or termination are appropriate consequences for repeatedly choosing not to adequately investigate

situations where APD uses force, and these consequences should be clearly stated in the agreement.

Where the use of force is found, after proper investigation, to be unjustified and results in death or serious bodily harm, discipline should be swift and immediate. Since this is exactly the kind of conduct the settlement agreement seeks to prohibit, termination in this situation would be appropriate. In order to ensure that officers turn on and turn in evidence from their body-worn cameras, there must be severe consequences if they decide not to do so and those consequences should also be spelled out in the agreement as discussed in section II of this brief.

**B. Better reporting requirements in the agreement would lead to better enforcement.**

The settlement agreement currently does not require APD or the monitor to conduct adequate reporting. Reporting on APD's use of force and its enforcement of the terms of this settlement agreement is needed to make sure meaningful reform occurs. It is the best way for the public to determine if APD is actually changing. Reporting on each use of force would provide APD with the means to determine how well the department is implementing the changes in this settlement agreement. Finally, the requirement for public reports also places pressure on APD to ensure meaningful reform because it will come under public scrutiny if it is failing. There are two categories of reporting in the settlement agreement that need modification to ensure enforcement of this agreement: (1) APD's Annual Use of Force Report; and (2) the monitor's reports.

**1. The Annual Use of Force Report**

Currently, the settlement agreement only requires APD to release an Annual Use of Force Report. *See* Settlement Agreement, ¶ 79. This annual report requirement is insufficient for two

reasons. First, it lacks adequate content. The agreement does not require APD to report how many investigations found instances of use of force to be unnecessary and excessive. This information is crucial. The report should also include the number of incidents of use of force deemed “serious” as defined in ¶ 12(qq), versus the uses of force deemed not serious. The report should note whether an investigation was performed according to settlement agreement guidelines for each use of force, whether the investigation was sufficient, whether each investigation was timely, whether there was body-worn camera footage of the incident, and the outcome of each investigation.

The annual report not only lacks any way to evaluate whether APD is adequately investigating use of force incidents, but also whether it is adequately disciplining officers who use excessive force. The report should include a description of the discipline given for violating the use of force policies, failing to conduct adequate and timely investigations, failing to use body-worn cameras, and other violations of the settlement agreement. The report must identify repeat offenders, officers who are repeatedly violating policies. This information is necessary to assess whether the discipline given is appropriate considering the officer’s history. Without this information, it is impossible for the public to know if the settlement agreement is being properly enforced.

This information should not be difficult to collect because the Early Intervention System already collects the data regarding discipline. *See* Settlement Agreement, ¶ 215(h). The Force Review Board already collects information regarding whether incidents involving the use of force violated APD policy, and whether the investigations were adequate. *See* Settlement Agreement, ¶ 78(a), (c), and (e).

The second reason the annual report is insufficient is that it is too infrequent—only once a year. The infrequency of the reporting takes pressure off of APD to comply quickly and consistently with the settlement agreement because of the lack of public scrutiny. The citizens of Albuquerque should not have to wait an entire year to see if any meaningful reform is occurring. The community needs to see that the City is making progress toward police reform to regain trust in its police force.

The changes to the reporting requirements we are requesting are not novel. In other cities in which consent decrees have been implemented, more frequent and thorough reporting has been required. For example, in the consent decree from 2001 governing the Los Angeles Police Department, quarterly reports from the chief of police were required. *See United States v. City of Los Angeles*, Consent Decree at ¶ 88, available at [http://assets.lapdonline.org/assets/pdf/final\\_consult\\_decree.pdf](http://assets.lapdonline.org/assets/pdf/final_consult_decree.pdf). The Los Angeles consent decree also required reporting of any imposition of discipline on LAPD officers. *See id.* The Los Angeles Police Department has been able to meet these requirements, and APD should be able to as well.

## **2. Reports by the Monitor**

One key means of enforcing the terms of the settlement agreement is having an independent monitor oversee its implementation. The means by which the monitor communicates whether the agreement is being successfully enforced is through his or her public compliance reports. *See Settlement Agreement*, ¶ 308. The monitor issues these reports on a quarterly basis for the first two years, and twice a year thereafter, an acceptable reporting requirement. *See id.* However, the contents of the monitor's reports are inadequate and make it

impossible for the Court, the parties, or the public to evaluate whether meaningful reform is occurring.

Although the settlement agreement requires the monitor to conduct outcome assessments and includes a long list of information which the monitor must consider, it does not include whether any discipline was imposed on officers who violated APD policies, the terms of this agreement, or were found to have used excessive force. *See* Settlement Agreement, ¶ 298. Nor is discipline of officers included as a factor in the monitor's compliance review or audits. *See* Settlement Agreement, ¶ 297. Information regarding discipline of officers is essential to enforcement of the agreement because real reform requires direct consequences to the officers for failure to comply and that information should be included in the monitor's reports.

The lack of transparency in the monitor's reports is also concerning. The settlement agreement currently states that "the underlying data for each review shall not be publicly available but shall be retained by the Monitor and provided to either or both Parties upon request." *See* ¶ Settlement Agreement, 308(c). This language is unclear as to whether it means that underlying data, such as names and personal identifying information for people involved in altercations with APD, will be withheld, or more problematically, whether the information and descriptions of incidents leading to the monitor's conclusion will be withheld from the public. If the latter interpretation is the case, it would mean that the public will be left to simply take the monitor's word for it that his or her conclusions are accurate. This information should be publicly available.

The secrecy of the monitor's findings is also troubling. The settlement agreement states that "the Monitor (including...any agent, employee, or independent contractor thereof) shall not

make any public statements or issue any findings with regard to any act or omission of the City, its agents, representatives, or employees; nor shall it disclose any non-public information provided to the Monitor pursuant to this agreement.” *See* Settlement Agreement, ¶ 312.

APD’s problems with use of force are of great concern to the organizations in APD Forward, the family members of people who have been killed or hurt by APD officers, and the community as a whole. Requiring secrecy in the monitoring process hampers the ability of the public not only to scrutinize its police department, but to determine that things are improving. Our community has lost trust in the police force and it is essential that this trust be restored. The lack of transparency poses a significant obstacle. There is no reason this process should be carried out in secret and APD Forward urges this Court to require greater transparency in the monitor’s reports and its ability to communicate with the public.

**II. A Watched Cop Doesn’t Boil: A Stronger Policy Regarding Body-Worn Cameras is Necessary for Effective Reform.**

The use of body-worn cameras is an increasingly important tool in promoting police accountability. A year-long study was done on the effects of introducing body-worn cameras into the Rialto, California police department. *See* Rory Carrol, *California Use of Body Cameras Cuts Violence and Complaints*, *The Guardian*, November 4, 2013, available at <http://www.theguardian.com/world/2013/nov/04/california-police-body-cameras-cuts-violence-complaints-rialto>. The study found that complaints against officers fell by 88% compared to the previous year before the cameras were implemented. *See* Ian Lovett, *In California, A Champion for Police Cameras*, *N.Y. Times*, August 21, 2013, available at <http://www.nytimes.com/2013/08/22/us/in-california-a-champion-for-police-cameras.html?pagewanted=all> (“Lovett”). “Use of force by officers fell by almost 60 percent

over the same period.” *Id.* In Mesa, Arizona, a study was conducted that followed fifty police officers who were given body-worn cameras, and fifty similarly situated officers who were not. *See* Lindsay Miller, Jessica Toliver, & Police Executive Research Forum, *Implementing a Body-Worn Camera Program* (2014), available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> (“PERF Camera Report”). Officers who did not wear cameras had three times as many complaints as the officers with the cameras. *See id.* “The study also found the officers assigned body-worn cameras had 40 percent fewer total complaints and 75 percent fewer use of force complaints during the pilot program than they did during the prior year when they were not wearing cameras.” *Id.* According to Rialto Police Chief William A. Farrar, “When you put a camera on a police officer, they tend to behave a little better, follow the rules a little better....And if a citizen knows the officer is wearing a camera, chances are the citizen will behave a little better.” Lovett, *supra*. The studies show that not only do the cameras document police behavior, but they actually change both police and civilian behavior for the better and have the added benefit of protecting police from fraudulent reports of misconduct. *See* PERF Camera Report at 6.

Considering the proven benefits of body-worn cameras, the settlement agreement should include provisions that require their consistent use. While APD has had body-worn cameras and has had policies requiring their use, unfortunately, APD’s use of body-worn cameras has been inconsistent and has eroded public trust in the police force. In many police shooting cases, the police have not turned in audio or video recordings despite policies requiring officers to record these encounters – no one can say whether this is because of an officer’s claim they did not turn on the tape or because they destroyed damning evidence of an improper shooting. Until

December of 2014, officers were not disciplined for violating the APD SOP on body-worn cameras.<sup>1</sup>

APD's spotty history of enforcing its body-worn camera policy makes it particularly important that discipline for failing to use the cameras or turn in video evidence of an encounter is built into this agreement. Officers who do not turn in a lapel camera video when they use force on a citizen should be suspended for a first violation and terminated for a second violation. These concrete consequences are the only way to change the behavior of APD officers and make sure there is video evidence when an officer uses force on a citizen. In addition, each police report and use of force report should indicate whether there is body-worn camera footage and, if not, the reason it is not available. APD should track whether failure to use the cameras leads to discipline and the type of discipline used.

#### **IV. More Concrete Direction and Thorough Reporting is Needed for Specialized Units.**

Another significant problem in APD has been its use of specialized tactical units, particularly SWAT. The DOJ report recognized that the SWAT team lacked adequate training, leadership, and "did not have clear command structure of deployment guidance." DOJ Findings Letter, 35. This "contributes to the pattern of unreasonable use of force." *Id.* The settlement agreement calls for clearly defined missions and duties, and requires APD to establish policies and procedures for use of specialized units, including SWAT. *See* Settlement Agreement, ¶¶

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<sup>1</sup> On December 1, 2014, APD Officer Jeremy Dear was the first APD officer ever terminated for failing to use his body-worn camera in at least four incidents including the fatal shooting of a nineteen year old woman in April of 2014. *See* <http://www.koat.com/news/apd-fires-officer-jeremy-dear/30004296>.

93-94. However, the settlement agreement lacks guidance as to when the SWAT team should be deployed.

In a June 2014 report, the ACLU analyzed more than 800 SWAT deployments conducted by 20 law enforcement agencies during 2011-2012. ACLU Foundation, *War Comes Home: The Excessive Militarization of American Policing*, 10 (2014) available at <https://www.aclu.org/criminal-law-reform/war-comes-home-excessive-militarization-american-police-report>. The report found that although SWAT teams were created in the late 1960s to address serious violent situations that presented imminent threats such as riots, barricade and hostage scenarios, and active shooter or sniper situations, today's police agencies primarily deploy SWAT units to execute search warrants in drug investigations. *See id.* at 2-3. Seventy-nine percent of the incidents ACLU studied involved the use of SWAT teams to search a person's home, usually for drugs. *See id.* at 3. Although the use of SWAT teams for this purpose could be justified if there were reason to believe that the situations were truly dangerous to officers, that did not appear to be the case from the documents the ACLU examined. *See id.* at 4. "[O]f the incidents in which officers believed a weapon would be present, a weapon was actually found at the scene in only 35 percent of cases. Even when officers believed a weapon was likely to be present, that belief was often unsubstantiated." *Id.*

The aggressive, often violent tactics employed by SWAT units were found to escalate situations unnecessarily, too often with disastrous consequences. In the deployments the ACLU studied, seven civilians died and 46 were injured in the course of deployment. *See id.* at 39. Many of the reports that the ACLU studied did not indicate whether children were present. However, using conservative calculations, it estimated that children were present in 14 percent of

the 818 deployments studied. Another 35 percent were unknown. *See id.* at 40. While the ACLU didn't cite specific numbers, it also noted that domestic animals are frequently killed in the course of SWAT deployments. *See id.* 19, 23.

Given the strong tendency of SWAT teams to escalate violence, we believe the settlement agreement should limit SWAT deployment to only those situations which present an imminent threat to the lives or safety of civilians and/or police personnel so that the public is not unnecessarily exposed to this risk.

The settlement agreement requires APD to track and analyze its specialized unit deployments. *See* ¶ 105. APD Forward requests that, in addition to the information already required, post-deployment analysis of SWAT deployments should include the following information: (1) the purpose of the deployment; (2) the specific reason for believing that the situation for which the specialized tactical unit was being deployed presented an imminent threat to the lives or safety of civilians and/or police personnel; (3) whether a distraction device was used and, if so, what type and for what purpose; (4) the race, sex, and age of each individual encountered during the deployment, whether as a suspect or bystander; (5) a list of any controlled substances, weapons, contraband, or evidence of crime that is found on the premises or on any individuals; and (6) a brief narrative statement describing any unusual circumstances or important data elements not captured in the list above. We believe this data should be included in the APD's reports so that the Court, the monitor, and the public can judge whether APD is making accurate assessments about the need to deploy SWAT.

**V. The Settlement Agreement Needs Provisions to Better Protect Those Most Vulnerable to Police Violence.**

The City of Albuquerque Police Chief Eden announced the City of Albuquerque police

officers' killing of a mentally disabled homeless man, James Matthew Boyd, camping in the foothills as a "justified" shooting. He did so while playing a helmet camera video of the shooting showing a person suffering a mental disability being shot in the back while turning away from numerous heavily armed officers. Russell Contreras, *Albuquerque Police Releases New Video of James Boyd Shooting*, The Associated Press (via The Huffington Post) (June 12, 2014), available at [http://www.huffingtonpost.com/2014/06/12/james-boyd-shooting\\_n\\_5490119.html](http://www.huffingtonpost.com/2014/06/12/james-boyd-shooting_n_5490119.html). Chief Eden has acknowledged that he spoke too soon. However, pronouncement that the shooting was justified was the culmination of years of mishandled APD investigations into abusive police tactics deployed against the City's most vulnerable citizens. Crisis intervention training of City of Albuquerque officers should include the viewing of the videotaped lapel camera footage of the four hours standoff in the foothills between over forty City of Albuquerque police officers and James Matthew Boyd as an example of what not to do when confronted with a person suffering a mental disability.

It is not only the mentally ill who have suffered disproportionately from APD violence, but the homeless and Native Americans as well. These three groups represent some of our most vulnerable community members who are in need of the most protection. While the settlement agreement includes measures designed to improve APD's dealings with people suffering from mental illness, it does nothing to address the problems between APD, the homeless, and Native Americans. Providing real protection from police violence to all three vulnerable groups requires the City to provide social services that will reduce the need for police intervention rather than increased law enforcement solutions. Only focusing on law enforcement solutions is like putting a band aid on a wound that needs major surgery.

### A. The scope of these issues in Albuquerque.

St. Martin's Hospitality Center, one of the larger organizations assisting people in Albuquerque who are homeless, estimates that 6,000 people will be homeless in ABQ during 2014.<sup>2</sup> 68% of these are adults between 48 and 60 years old. See <http://www.smhc-nm.org/how-you-can-help/understanding-homelessness> (last visited December 26, 2014). According to the school system's Homelessness Project, Albuquerque's public schools enrolled more than 6,000 homeless students during the 2011-12 academic year. See New Mexico Coalition to End Homelessness, *A Community Response to Homelessness Albuquerque 2013-2017*, updated September 2014, p. 5, <http://tinyurl.com/mv5h6fq>. Of the adult homeless population, 33% have severe or disabling mental illness. See <http://www.smhc-nm.org/how-you-can-help/understanding-homelessness> (last visited December 26, 2014). Extrapolating from this information, there may be as many as 2,000 people who are homeless and living with serious mental disabilities in Albuquerque at this time.

There are also 55,000 Native Americans living in Albuquerque from many different tribes and pueblos from all over the state and the county. See Nick Estes, *You Try to Live Like Me— Looking to Understand ABQ's Homeless Natives*, Indian Country (Sept. 12, 2014) available at <http://indiancountrytodaymedianetwork.com/2014/09/12/you-try-live-me-looking-understand-abqs-homeless-natives-156853>. While Native Americans make up only 4.6% of Albuquerque's population, they are disproportionately represented amongst the homeless, comprising 13% of Albuquerque's homeless community. See *id.*

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<sup>2</sup> It is unclear if this number represents adults only, or includes children as well.

Native Americans are frequent targets of police misconduct. Homeless Native Americans report being stopped by APD officers for no reason, beaten without provocation, beaten while in handcuffs, and receiving serious injuries such as broken bones. They also report that APD officers confiscate their IDs without cause, leaving them without the means to seek housing, obtain medical care, or obtain social services. Often these people are hundreds of miles from reservations and pueblos, unable to obtain new IDs. There are also reports of discrimination by APD officers including telling Native Americans that they did not belong in the City and should return to the reservation.

Homeless people generally are at greater risk of being the victims of police violence because they have frequent contact with police. This is due, in part, to the criminalization of homelessness. Crimes such as public urination, loitering, trespassing, and illegal camping are difficult for homeless people to avoid. These crimes also often bring them into contact with police officers. Unfortunately, because of these frequent and often harassing and violent encounters, homeless people, particularly homeless Native Americans, have lost trust in APD.

**B. The City of Albuquerque must develop community resources to support these vulnerable groups that go beyond law enforcement.**

The mentally ill, the homeless, and homeless Native Americans need both increased social services and police officers who are properly trained to deal with them. In this regard, the agreement is deficient in several ways.

First, it does not even mention the problems APD has with the homeless and homeless Native Americans. The settlement agreement should recognize these deep ongoing issues and require training and monitoring to ensure that APD officers change their behavior toward these groups.

Second, while the agreement provides many provisions designed to help officers become better trained to deal with those suffering from mental disabilities, it does nothing to increase much needed social services that would benefit all three vulnerable groups. As a party to this action, the City can and should be required to make the investment in a social service infrastructure to provide access to adequate mental health care and other needed services such as housing and health care. Investing in these social services would reduce the need for law enforcement intervention. That strategy would more likely achieve the City's obligation to assure constitutional policing and minimize "the necessity for the use of force against individuals in crisis due to mental illness or a diagnosed behavioral disorder" than focusing on law enforcement solutions alone. Settlement Agreement, ¶110.

Third, some of the obligations in Section VI of the agreement may increase the likelihood of encounters resulting in excessive use of force. For example, APD is required to "continue to utilize COAST and CIU detectives to follow up with chronically homeless individuals and individuals with a known mental illness who have a history of law enforcement encounters." Settlement Agreement, ¶ 132. Also, APD is required to "utilize protocols for when officers should make referrals with COAST and CIU to provide crisis prevention services and disposition and treatment options." Settlement Agreement, ¶ 134.

However, instead of requiring action by the City, the agreement holds the two entities least equipped to act — namely APD and the newly created Mental Health Response Advisory Committee — as the ones responsible for coordinating and connecting the homeless and/or mentally ill to appropriate services. *See* Settlement Agreement, ¶¶ 115-116. The agreement requires APD and a volunteer advisory group to be responsible for the public function of creating

a safety net and does not require this of the party in the best position to do so, the City of Albuquerque.

The best way to reduce interactions with persons with mental illness or other kinds of disabilities is to get APD out of the social service and mental health business so officers can do what they are supposed to do – respond to and investigate allegations of criminal activity. Crisis prevention services, outreach and making connections to community services should be housed in health service agencies supported by the City, not rest on the shoulders of APD.

To achieve this goal, the City should be required to do two things. First, develop and then implement a strategy to strengthen its community resources. Second, develop a transition plan to shift the COAST functions of connecting people with services from APD to behavioral health care and related organizations. The kinds of organizations which provide Medicaid behavioral health services are: community mental health centers, federally qualified health clinics, Indian health services hospitals and clinics, tribally operated hospitals and clinics, hospitals and their outpatient facilities, the Children Youth and Families Department, and core service agencies.<sup>3</sup> See 8.321.2.9 I NMAC. Outreach and liaison functions could be provided in affiliation with one of the Assertive Community Treatment (“ACT”) teams in Albuquerque. ACT teams are experienced with addressing the needs of people with serious mental illness, making them an

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<sup>3</sup>Core service agencies (CSAs) are “Multi-service agencies that help to bridge treatment gaps in the child and adult treatment systems, promote the appropriate level of service intensity for consumers with complex behavioral health service needs, ensure that community support services are integrated into treatment, and develop the capacity for consumers to have a single point of accountability for identifying and coordinating their behavioral health, health and other social services.” 7.21.1.7 B (9) NMAC

appropriate agency to provide clinical support and possibly supervision.<sup>4</sup>

Finally, there is also a need for provisions that enhance training to provide additional tools in an officer's tool box for dealing with these vulnerable groups in those situations where concern about an individual's conduct still requires a police officer's presence. The Crisis Intervention Unit should expand its staff to the number determined to be appropriate by the required staffing assessment and to train all APD officers to de-escalate encounters with people suffering from mental disabilities. The settlement agreement offers many provisions that will be helpful for achieving this goal. *See* Settlement Agreement, ¶ 135.

**C. The Mental Health Response Advisory Committee should not be dominated by APD officers.**

The Settlement Agreement lists various APD representatives required to be on the Mental Health Response Advisory Committee. *See* Settlement Agreement, ¶ 112. As described, the Committee is significantly populated with police officers. If the purpose is to provide advice *to* APD, APD should be present at each meeting to provide technical assistance to the Committee rather than be committee members who can vote on recommendations made to the Department or exert undue influence on the advisory process. Instead, we recommend that the Committee be comprised of individuals including, but not limited to community members who reflect the diversity of those residing in the City, persons who have used mental health services, behavioral health and homeless services providers, and advocates and others with knowledge of the community.

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<sup>4</sup>ACT teams provide services in the community to individuals who are already Medicaid eligible and are current clients of the team, whereas COAST reaches out to those not currently connected to a service system. However, it seems appropriate to explore whether ACT teams, or other agencies receiving Medicaid funds, could provide COAST-like services.

**V. A Stronger Civilian Oversight Body Would Help Reform APD.**

The civilian oversight ordinance which became effective January 1, 2015 fails to remedy the deficiencies in the civilian oversight process identified in the Department of Justice Findings Letter.<sup>5</sup> The letter cited the importance of effective civilian oversight in contributing to constitutional policing and then noted the failings of the process under the prior ordinance. In fact, the letter said that the failure to have an adequate civilian oversight system contributed to the pattern of unreasonable use of excessive force. *See* DOJ Findings Letter at p. 38. Some of the major failings were that: (1) complainants were not provided opportunities to be heard in the adjudication of his or her complaint; (2) the oversight process did not analyze trends or provide policy recommendations; and (3) a principal staff member was aligned more with the police than with the community. *See id* at 38-39.

**A. Lack of complainant input into complaint adjudication.**

In August 2013, a Police Oversight Task Force (POTF) convened by the City Council to make recommendations for a new police oversight ordinance began its public hearings, study and discussion. The POTF recommended a citizen complaint process which expressly offered a complainant the opportunity for input at the initial complaint adjudication and at appeal. However, the draft ordinance presented to the City Council did not include the adjudicatory process painstakingly crafted by the POTF. Instead, it essentially eliminated the meaningful opportunity for a complainant to be heard.

The new ordinance adopted by the City Council and signed by the Mayor does not afford a complainant the opportunity for input into the initial complaint adjudication, nor does it allow

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<sup>5</sup> The concerns described here are similar to those offered by the Law Office of the Public Defender.

for a complainant to bring witnesses or challenge the content of the complaint investigation or the manner in which it was conducted.

This ordinance only provides an opportunity for complainant participation at the appeal stage after a decision is issued. Although the ordinance requires that a complainant be given notice of the right to appeal, given the complexities of navigating a bureaucratic appeals process, not all who allege police misconduct have the skills and ability to understand much less exercise their right to appeal. All appeals must be based on the record created at the initial adjudication and a complainant who was not afforded a meaningful right to be heard initially is required to rely on that record upon appeal.

This affront to the concept of a fair process is not addressed in the settlement agreement. A complainant should be given the right to participate, present evidence and have input in the initial investigation and adjudication phase.

**B. Need for trend analysis and ability to make policy recommendations.**

The POTF had significant discussions about the need for the oversight board to have the wide ranging ability to review all types of citizen complaints in order to analyze trends and make policy recommendations. The POTF thought it imperative that the oversight body look at various kinds of concerns, and not limit trend analysis to use of force incidents; its recommendations were consistent with that belief. However, to the dismay of the POTF, the City Council rejected those recommendations. Instead, it adopted an amendment restricting the oversight board's policy work in three ways: (1) the oversight body can only conduct trend analysis on use of force complaints; (2) it can only randomly sample ten per cent (10%) of use of force complaints; and (3) this trend analysis can only be performed if authorized by a majority

vote of the oversight board. The new ordinance requires the oversight board to spend at least half its time doing trend analysis and policy recommendation when it is effectively prohibited from doing so. The ordinance effectively strips the oversight board of the ability to carry out what the POTF and the Department of Justice believed to be essential functions of the civilian oversight process: trend analysis and policy recommendations. *See* Albuquerque, NM, Chapter 9, Article 4, Part 1, ROA 1994.

**C. Ensuring oversight staff represents the community**

The Findings Letter expressed very serious concern that the paid civilian oversight staff “more closely aligned itself with the department rather than with the community.” DOJ Findings Letter at 39. To the community’s detriment, the severe restrictions imposed on the oversight board’s ability to audit civilian complaints may contribute to maintaining this mis-alignment and the community’s mistrust of the oversight process. A robust audit function would allow the oversight board to assess the quality and accuracy of the paid staff’s work. The truncated audit process will not.

**CONCLUSION**

While commending those who negotiated this settlement agreement for a good start, the coalition of Albuquerque citizens and service providers which make up APD Forward, asks that their suggestions be considered and added to the Settlement Agreement to ensure the return of constitutional policing and respect to the Albuquerque Police Department.

/s/ Alexandra Freedman Smith  
Alexandra Freedman Smith  
Legal Director  
ACLU of New Mexico Foundation

P.O. Box 566  
Albuquerque, NM 87103-0566  
Phone: (505) 266-5915 Ext. 1008  
Fax: (505) 266-5916  
[asmith@aclu-nm.org](mailto:asmith@aclu-nm.org)

Frances Crockett Carpenter  
Law Office of Frances Crockett  
118 Wellesley Dr. SE  
Albuquerque, NM 87106-1444  
Phone: (505) 314-8884  
Fax: (505) 265-1319  
[frances@francescrockettlaw.com](mailto:frances@francescrockettlaw.com)

Phillip B. Davis  
Phillip B. Davis Attorney at Law  
814 Marquette Ave. NW  
Albuquerque, NM 87102-1959  
Phone: (505) 242-1904  
Fax: (505) 242-1864  
[davis@swcp.com](mailto:davis@swcp.com)

Shannon Kennedy  
Kennedy Kennedy & Ives  
1000 Second St. NW  
Albuquerque, NM 87102  
Phone: (505) 244-1400  
Fax: (505) 244-1406  
[slk@civilrightslawnewmexico.com](mailto:slk@civilrightslawnewmexico.com)

Nancy Koenigsberg, Legal Director  
Disability Rights New Mexico  
1720 Louisiana Blvd. NE, Suite 204  
Albuquerque, NM 87110  
Phone: (505) 256-3100  
Fax: (505) 256-3184  
[nkoenigsberg@drnm.org](mailto:nkoenigsberg@drnm.org)

Randi McGinn  
McGinn Carpenter Montoya & Love P.A.  
201 Broadway Blvd. SE  
Albuquerque, NM 87102-3424  
Phone: (505) 843-6161  
Fax: (505) 242-8227

[randi@mcginlaw.com](mailto:randi@mcginlaw.com)

**CERTIFICATE OF SERVICE**

I hereby certify that on January 14, 2015, the *Amicus Curiae* Brief of APD Forward Regarding Court Approval of the Settlement Agreement Between the City of Albuquerque and the United States Department of Justice was served via the CM/ECF system causing all parties on record to be notified of this filing.

By: /s/Alexandra Freedman Smith  
Alexandra Freedman Smith  
ACLU of NM Foundation  
P.O. Box 566  
Albuquerque, NM 87103-0566  
Phone: (505) 266-5915 Ext. 1008  
Fax: (505) 266-5916  
[asmith@aclu-nm.org](mailto:asmith@aclu-nm.org)