



# NYCLU

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**Testimony of the New York Civil Liberties Union  
Before City Council Public Safety Committee  
In Support of the *Right to Know Act***

**June 29, 2015**

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following testimony in support of Intro. 182 and Intro. 541, collectively known as the Right to Know Act. We also include comments on several of the other bills being considered today.

The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and nearly 80,000 members and supporters. The NYCLU's mission is to defend and promote the fundamental principles, rights, and constitutional values embodied in the Bill of Rights of the U.S. Constitution and the Constitution of the State of New York.

Protecting New Yorkers’ rights to be free from discriminatory and abusive tactics in law enforcement is a core component of our mission, and we advocate for these rights through our legal, legislative, and advocacy work. In 2013, the City Council took an important step toward improving the quality of policing in New York City with the passage of the Community Safety Act. By creating an Office of the Inspector General for the New York Police Department (“NYPD”) and establishing a strong and enforceable ban on profiling by NYPD officers, the City Council brought much-needed oversight, transparency and accountability to our police force.

Despite this historic victory, the Council’s work remains unfinished, as this body failed to act on two related bills that would improve communication, transparency, and accountability in everyday interactions between police officers and civilians. These bills are now before the Council as the Right to Know Act. Intro. 182 will require NYPD officers to identify themselves at the start of a law enforcement encounter and provide an explanation as to why the encounter is taking place. Intro. 541 will require officers to obtain proof of informed consent before searching a person without legal justification.

It is time for the City Council to complete the work that it began in 2013 by passing the Right to Know Act. From New York to Ferguson, Missouri, the issue of police-community relations has taken center stage. In New York City, the tragic deaths of Eric Garner, Ramarley Graham, and Akai Gurley at the hands of law enforcement have re-ignited the call for police accountability and have served as tragic demonstrations of how simple police-civilian encounters have the potential to escalate into situations involving the use of deadly force. After years of aggressive and selective enforcement practices that drove a wedge between police and communities of color, New Yorkers are demanding a different approach to safety.

New Yorkers are not alone in calling for these reforms. In order to identify solutions to restore trust and heal the rifts between police officers and the communities they serve, President Obama established the *Task Force on 21st Century Policing* to hear from stakeholders across the country and make recommendations for improving policing practices. In its final recommendations, the Task Force endorsed—nearly verbatim—the policy objectives contained in the Right to Know Act. Stressing the importance of clearly articulated and transparent policies, the Task Force recommended that police officers “be required to seek consent before a search and explain that a person has the right to refuse consent when there is no warrant or probable cause,” and that officers be required “to identify themselves by their full name, rank, and command,” and “state the reason for the stop and the reason for the search if one is conducted.”<sup>1</sup> This endorsement solidifies what we already know: the Right to Know Act is neither radical nor dangerous, but simply good policing.

By enacting the Right to Know Act’s commonsense reforms, New York City has the opportunity to become a national leader in the movement to change the culture of policing, and to begin to rebuild trust between police and the communities they serve.

### **I. Intro. 182: Requiring NYPD Officers to Act in a Transparent Manner**

Intro. 182 will bring about greater transparency in policing practices by ensuring that residents know with whom they are interacting when they are stopped by the police, as well as the reason why that law enforcement encounter is taking place. Too often, New Yorkers are subjected to police encounters in which they are provided no information about the person stopping them or the basis for the interaction. Even something as simple as asking for an officer’s name can feel too daunting a request to make, given the stark power imbalances inherent in any such encounter. It is impossible to restore trust between the NYPD and communities when communication between the two is so lacking in basic clarity and mutual respect.

This bill would change these encounters to more respectful interactions by requiring law enforcement officials to identify themselves at the outset with their name, rank, and command, as well as the specific reason for the stop. At the end of an encounter that does not result in an arrest or summons, the police officer will provide the civilian with a written record of the encounter and information on how to share a comment or file a complaint. This law puts into practice the NYPD’s motto of “courtesy, professionalism, and respect,” and could lead to an important change in officers’ tenor when relating to the public. Similar legislation has been adopted in Arkansas, Minnesota, and Colorado.<sup>2</sup> As noted above, the President’s Task Force on 21st Century Policing has endorsed this approach to street encounters, and the Federal Department of Justice, the nation’s top law enforcement agency, has required police departments in New Orleans and Puerto Rico to adopt similar policies.<sup>3</sup>

Intro. 182 does not impose a substantial burden on officers above and beyond their responsibilities under existing NYPD policy: officers are already required to provide their name, rank, shield number, and command upon request.<sup>4</sup> What Intro. 182 does, however, is to eliminate a major source of tension and potential for escalation in police-civilian interactions. Too often, New Yorkers are afraid to ask for officers’

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<sup>1</sup> President’s Task Force on 21st Century Policing, *Final Report of the President’s Task Force on 21st Century Policing*, 27 (2015), available [http://www.cops.usdoj.gov/pdf/taskforce/TaskForce\\_FinalReport.pdf](http://www.cops.usdoj.gov/pdf/taskforce/TaskForce_FinalReport.pdf).

<sup>2</sup> See Ark. Code Ann. § 12-12-1403; Minn. Stat. Ann. § 626.8471; Colo. Rev. Stat. § 24-31-309.

<sup>3</sup> Consent Decree Regarding the New Orleans Police Dep’t, 12cv1924, Rec. Doc. 2-1, ¶ 386 (E.D. La. July 24, 2012); Agreement for the Sustainable Reform of the Puerto Rico Police Dep’t, 12cv2039, Rec. Doc. 2-1, ¶ 169 (D. P.R. Dec. 21, 2012).

<sup>4</sup> NYPD Interim Order 203-09 (2003).

identifying information out of concern for potential retaliation, fearful that the encounter will become hostile if the officer were to assume the requester intends to use the information to file a complaint. Encounters like this can quickly escalate, transforming routine interactions into physically dangerous situations for both the officer and the civilian. The NYCLU and our partners in Communities United for Police Reform frequently hear of cases in which officers have refused to identify themselves, attempted to obscure their badges, or worse, became aggressive upon being asked for their information. By shifting this burden, requiring officers to identify themselves at the outset rather than making it the responsibility of the person stopped, and by enshrining this requirement in law as opposed to Department policy, the Right to Know Act removes this source of tension.

It is also important to point out what this bill will not do. Intro. 182 will do nothing to prevent officers from making stops and taking enforcement actions. This bill does not restrict or alter in any way the circumstances that permit officers to conduct investigations or enforce existing laws, and a brief introduction by the officer at the outset of these encounters will not impede the performance of the officer's duties. Nor does this law put officers in danger during such interactions; this bill only applies to uniformed and plainclothes officers in the course of their regular duties.

Improving communication between police officers and the public will help to promote understanding and trust between the two and will further the Council's goals of enhancing community policing in our city.

## **II. Intro. 541: Protecting New Yorkers' Privacy Rights During a Consensual Search**

The second component of the Right to Know Act, Intro. 541, will better protect New Yorkers' privacy rights if they are subject to a search without probable cause. By clarifying the existing legal standard, this bill will reduce the number of unlawful searches, something the Civilian Complaint Review Board recently identified as a troubling and persistent pattern.<sup>5</sup> Specifically, this bill will allow all New Yorkers to be better informed about their rights by making sure that so-called "consensual" searches are truly voluntary and informed—just as the Constitution intends.

Under the Constitution, there are only a few exceptions to when a police officer can search an individual without probable cause or a warrant.<sup>6</sup> One of these exceptions permits an officer to search an individual when the individual has given his permission. The Supreme Court has interpreted the law of consent according to the concept of "voluntariness," ruling that, when a subject of a search is not in custody, the Constitution requires "that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied."<sup>7</sup> However, while this is the standard under which officers are supposed to be operating, in reality, the concept of voluntariness is actually not understood by most civilians: "instead, a police 'request' to search a bag or automobile is understood by most persons as a command."<sup>8</sup>

As a result, New Yorkers have often misunderstood the extent of their privacy rights during a consensual search, and police officers exploit that misunderstanding. Intro. 541 will put an end to the practice of coercive searches by ensuring that a search based solely on the legal concept of "consent" is

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<sup>5</sup> *Id.* at 73-85.

<sup>6</sup> See, e.g., *Horton v. California*, 496 U.S. 128 (1990); *U.S. v. Santana*, 527 U.S. 38 (1976); *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>7</sup> *Schneekloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

<sup>8</sup> Tracy Maclin, "The Good and Bad News About Consent Searches in the Supreme Court," 39 MCGEORGE L. REV. 27 (2008).

truly voluntary. This bill will make sure that New Yorkers are equipped with the same knowledge of their constitutional rights as the officer who is stopping them.

With regard to this narrow category of searches, Intro. 541 will require two things: first, officers will have to explain that the person is being asked to voluntarily consent to a search and that he has the right to grant or refuse that request. Second, in order to shield police officers from false claims of wrongdoing, create greater transparency, and resolve questions as to the admissibility of evidence in later criminal prosecutions, Intro. 541 will require that police officers create a record of the person's consent. It will be up to the Police Commissioner to determine how best to operationalize the requirement to capture objective proof.

Nothing in Intro. 541 will prevent the NYPD from investigating criminal activity. This bill would not apply when an officer has probable cause to believe that a person is involved in criminal activity. It does not limit in any way an officer's ability to conduct a frisk for weapons. An officer will never have to inform someone of the right to refuse a consensual search if that officer has a legal justification to search. Officers will still be able to approach and ask questions of individuals whenever they have an objective credible reason to do so or a founded suspicion that criminal activity is taking place. Special needs exceptions to the requirement that officers have a warrant may also be invoked when the NYPD needs to operate security checkpoints at large-scale public events, thus obviating the need to advise and obtain objective proof of consent from tens of thousands of New Year's Eve revelers seeking entry into Times Square. The Right to Know Act does not give criminals an "out" by allowing them to refuse consent to be searched; the law on conducting justifiable searches is entirely unchanged by this bill.

This bill will improve police-community relations by ensuring that officers request consent in such a way that it is not taken unilaterally as a command. Similar laws have been passed and implemented in West Virginia for all consensual searches during traffic stops and in Colorado for all consensual searches, regardless of the context.<sup>9</sup> As already noted, the President's Task Force on 21st Century Policing—with several police chiefs as members—recommends the adoption of these policies as an effective means of improving community policing. The Department of Justice has also required departments in New Orleans and Puerto Rico to adopt similar measures pursuant to consent decrees.<sup>10</sup>

Some states have gone even further than the modest reforms contained in Intro. 541. Recognizing the racial disparities and arbitrary enforcement practices that pervaded law enforcement use of consensual searches, Rhode Island, New Jersey and Minnesota have abolished consent as a valid basis for a search altogether, instead requiring officers to always have an independent legal justification before being able to conduct a search.<sup>11</sup> Intro. 541 would not nearly go so far; it will not deprive law enforcement of the ability to use consensual searches, but it will ensure that consensual searches are done right in that they will be truly consensual and not based on coercion or unlawful profiling.

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<sup>9</sup> See W. Va. Code Ann. §§ 62-1A-10, 62-1A-11; Colo. Rev. Stat. Ann. § 16-3-310.

<sup>10</sup> Consent Decree Regarding the New Orleans Police Dep't, 12cv1924, Rec. Doc. 2-1, ¶¶ 128-29 (E.D. La. July 24, 2012); Agreement for the Sustainable Reform of the Puerto Rico Police Dep't, 12cv2039, Rec. Doc. 2-1, ¶ 77 (D. P.R. Dec. 21, 2012).

<sup>11</sup> R.I. Gen. Laws Ann. § 31-21.2-5 (no consent searches in motor vehicles); *Minnesota v. Mustafaa Naji Fort*, 660 N.W.2d 415 (Minn. 2003) (evidence obtained through consent search in the absence of reasonable suspicion inadmissible); *State v. Carty*, 170 N.J. 632, 790 (2002) (requiring reasonable suspicion before seeking consent to search).

### III. City Council's Authority to Pass the Right to Know Act

Contrary to concerns that were raised by the Bloomberg administration, the City Council clearly has the authority to pass the Right to Know Act. The Act does not create structural changes in city government and does not curtail the Police Commissioner's authority over police officers. In the few cases where New York courts have found curtailment of the Police Commissioner's authority, the legislation at issue interfered with the Commissioner's right to discipline police officers.<sup>12</sup> The bills that comprise the Right to Know Act cause no such interference and, instead, involve what the New York Court of Appeals has described as merely the regulation of the "operations of city government," which as a general rule, "is not a curtailment of an officer's power."<sup>13</sup> Any limitation on the Police Commissioner's freedom to act is a permissible "consequence of legislative policymaking."<sup>14</sup>

The Right to Know Act creates generalized standards for officers to identify themselves and their actions to the public and to advise New Yorkers of their constitutional rights, but the bills leave the particulars of how to operationalize these standards to the Commissioner to regulate. This is similar to other provisions of the New York City Administrative Code, which instructs city officials to follow generalized standards but leaves the details regarding implementation to the relevant commissioner.<sup>15</sup> Indeed, it is only when laws have attempted to regulate individualized determinations of officer discipline and similar baseline decisions that New York courts have found curtailment.<sup>16</sup> The police Commissioner will continue to retain control over the Department, including the authority to create rules and regulations implementing the new standards as he sees fit and to discipline officers as he sees fit.

Bloomberg's claims that the State Criminal Procedure Law (CPL) preempts the Right to Know Act are similarly unfounded. The New York Constitution explicitly allows local government to adopt or amend laws consistent with "[t]he powers, duties, qualification, number, mode of selection and removal, terms of office, compensation, hours of work, protection, [and] welfare and safety of its officers and employees."<sup>17</sup> There is no conflict with State law, as the Right to Know Act does not prohibit conduct that State law explicitly permits. The CPL is entirely silent on the matter of police identification and consensual searches, so there is nothing to present a conflict. As a reiteration of long-established constitutional law, Intro. 541 is entirely compatible with the manner in which State courts have interpreted the "voluntariness" standard of assessing consensual searches.<sup>18</sup>

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<sup>12</sup> See, e.g., *Patrolmen's Benevolent Ass'n of the City of New York v. New York State Public Employment Relations Bd.*, 13 A.D.3d 879, 881-882 (3d Dep't 2004).

<sup>13</sup> *Mayor of City of New York v. Council of City of New York*, 874 N.E.2d 706, 711 (N.Y. 2007).

<sup>14</sup> *Id.*

<sup>15</sup> See N.Y.C. Code §§ 24-105, 24-108(d) (requiring Department of Environmental Protection employees to provide receipts for samples taken from a premises and entrusting the Commissioner with the authority to implement the requirement through necessary rules, regulations, and procedures).

<sup>16</sup> See, e.g., *Giuliani v. Council of the City of New York*, 688 N.Y.S.2d 413, 417 (Sup. Ct., N.Y. Co. 1999) ("The City Council's role is to create generalized standards while the Mayor's or his appointee's role, *inter alia*, is to enforce those standards in making individualized determinations . . .).

<sup>17</sup> N.Y. Const. art. IX, § 2(c)(i).

<sup>18</sup> It also cannot be said that the CPL preempts any regulation of the field of officer-civilian interactions. The CPL is primarily concerned with regulating procedures that take place within the courtroom and not with regulating police-civilian interactions that take place outside the scope of a court setting. *Patrolmen's Benevolent Ass'n of the City of New York v. City of New York*, No. 653550/13, 21 (Sup. Ct., N.Y. Co. 2014). Indeed, the only treatment that such interactions receive in the CPL is a single section reaffirming the constitutional standards governing when Terry stops and frisks are permissible. *Id.* at 23

In dismissing a preemption challenge to the Community Safety Act, the New York County Supreme Court ruled that the CPL does not preempt City Council legislation regulating certain police actions, holding that “[i]nvestigative stops do not occur in Criminal Court and are not criminal proceedings or procedures,” as defined in the CPL. The court found that laws impacting *police procedures* were distinguishable from those that regulated *criminal procedure*, with any infringement on the latter being incidental at best.

Even if a court were to conclude that the field of police-civilian interactions were preempted by the CPL, the Court of Appeals has frequently upheld local ordinances where a “legitimate concern” of the locality lead to an incidental infringement on an otherwise preempted field.<sup>19</sup> Given New York City’s long and well-documented history of police abuses during pedestrian stops, local legislative action to protect New Yorkers’ rights during such encounters would be entirely appropriate.

#### **IV. Qualified Support for Intros 538, 539, 540-A, 606, and 824**

According to data from the Civilian Complaint Review Board (CCRB), the majority of police misconduct complaints involve excessive or unnecessary use of force. Yet many substantiated complaints result in inadequate or no disciplinary action against officers. Intros 538, 539, 540-A, 606, and 824 seek to address some aspects of this problem. While we support the concepts behind these efforts, we also have some policy concerns and suggested amendments.

The fault with Intros 824 and 538 is that they lack a mechanism to force change. Intro. 824 requires the collection of data that would allow public officials to monitor the number and concentration of officers who are the subject of repeated CCRB and civil complaints. This is valuable information, but is of limited utility if the Police Commissioner fails or refuses to act on it. Currently, it is our understanding that the NYPD does not collect or monitor this information, making it difficult if not impossible to keep tabs on “bad” cops. We applaud the Council’s efforts to ensure the NYPD begins to track and report this information. If this bill is to pass, we hope that the Council will also use its oversight authority to urge action with regard to reports under this bill.

Similarly, while well-intentioned, Intro. 538 is unlikely to have an impact on excessive use of force because it merely codifies what is already the standard for police use of force, without raising the standard or providing an enforceability mechanism. In contrast, Intro 540-A seeks to bolster the NYPD’s existing policy prohibiting chokeholds by providing meaningful consequences for violations of this policy. While we support the underlying intent of 540-A, we have constitutional concerns about its impact on separation of powers and due process for the accused.

We support Intros 539 and 606 because they require collection and reporting of information regarding police misconduct, and use of force with regard to quality of life offenses. However, both bills should be strengthened by including demographic data, which is already collected by the CCRB and will be included on new summons forms, and which gives invaluable insight into the disparate impact of police activity in communities of color (and among other marginalized groups).

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<sup>19</sup> See, e.g., *DJL Restaurant Corp. v. City of New York*, 96 N.Y.2d 91, 97 (2001) (holding that local laws of general application aimed at a legitimate concern of local government are not preempted if the infringement is only incidental); *Landsdown Entertainment Corp. v. New York City Dep’t of Consumer Affairs*, 74 N.Y.2d 761, 763 (1989) (laws principally aimed at legitimate concerns of local government will not be preempted if enforcement incidentally infringes on State Alcoholic Beverage Control Law).

## **V. Conclusion**

The NYCLU urges the City Council to pass the Right to Know Act and to take this important step toward improving police-community relationships through increased communication and transparency. The City Council can and should lead the way in helping the New York Police Department (NYPD) engage communities, particularly communities of color, in a way that fosters good relationships, enhances transparency and accountability, encourages respect for constitutional rights, and promotes safety without the price of police abuse or misconduct. We hope you will consider our suggestions for the other bills before you today, in particular Intros 539 and 606, which could be greatly improved by the inclusion of demographic information.