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BY HAND AND FAX TO 646-610-5865

William Bratton
Police Commissioner
New York City Police Department
One Police Plaza
New York, New York 10007

Re: *The NYPD's Use of Long Range Acoustic Devices for Crowd Control*

Commissioner Bratton and Deputy Commissioner Byrne:

We are attorneys representing several people who were injured around or after 1:00AM on December 5, 2014 when unidentified New York City Police Department (“NYPD”) officers deployed a device appearing to be a LRAD Corporation-manufactured 100X Model Long Range Acoustic Device (“LRAD”) in the vicinity of 57th Street around Madison Avenue and in nearby New York City streets.

Our clients were participating in, observing, or documenting anti-police brutality protests in the wake of the Staten Island grand jury’s failure to indict NYPD Officer Daniel Pantaleo in connection with the death of Eric Garner when officers from the Department’s Disorder Control Unit (“DCU”) deployed the LRAD. The officers utilized it as a weapon against our clients by operating it as if it were a megaphone at unsafe distances and volumes, and by repeatedly firing its so-called deterrent feature at unsafe distances and volumes.

In light of our clients’ experiences, discussed more below, we write to raise concerns with you now in anticipation of ongoing mass protests tonight, tomorrow, and for the foreseeable future, which our clients would like to participate in, observe, or document without fear of being assaulted and further injured by the LRAD.

As articulated by the Canadian Civil Liberties Association (“CCLA”) in a letter written to Canadian government officials in advance of potential Canadian LRAD use to police anticipated mass protests in connection with the G8 and G20 in 2010:

The introduction of any new weapon into police arsenals requires a process of objective scientific research into the short-term and long-term physical effects of the weapon’s use, consultation with the public who are

the potential targets of such weapons, and policy debates. Reliance on research by the manufacturer is insufficient. . . .

Simply put, new weapons such as the LRAD should not be employed without prior independent assessment and study. Protocols regarding deployment and use should be developed with reference to independent science, not on the basis of manufacturer's claims and should incorporate public consultation and participation. Finally, comprehensive reporting, monitoring and oversight mechanisms must be established to account for how any approved weapons are actually used in the field.¹

We have reason to believe that the Department has not conducted adequate studies in connection with its LRAD uses, has not developed and trained its officers in appropriate, written protocols regarding deployment and use, and has not established appropriate reporting, monitoring, and oversight mechanisms.

For example, as a result of a New York State Freedom of Information Law request seeking disclosure of records including policies regarding LRAD use and operation through 2011, ending in September of 2012, the NYPD disclosed a total of seventeen pages of product descriptions and other manufacturer's advertising materials and press clippings, as well as an eight-page briefing on the LRAD prepared by the DCU.

The Department represented that those 25 pages constituted "all of the records that were located as a result of a diligent search that was conducted pursuant to [the] request." Therefore, as a result of the Department's response to that request and appeal, we understand that the Department had no policies pertaining to the operation of LRADS or describing the circumstances under which LRADS were to be operated or the chain of command through which authority with respect to LRAD placement and operation was granted, and no records reflecting the Department's uses of LRADs, between at least 2004 and September 11, 2012. Yet the Department admittedly deployed LRADs during that time period.

Additionally, we know that the Department purchased two LRAD Model 3300 devices in 2004, in advance of the Republican National Convention ("RNC") in New York City in August of 2004. Then-NYPD spokesman Paul Browne cited two possible uses for them to the Associated Press ("AP") in 2004: "directing crowds to safety following a terrorist attack or other calamity, and reminding protesters where they're allowed to march and rally."² According to the AP, the Department "insist[ed that] the [warning tone] feature [would not] be used at the convention" and then-DCU

¹ Letter of Canadian Civil Liberties Association to Chief of Police William Blair, dated June 1, 2010 ("CCLA Letter"), at p. 3.

² Tom Hays, "Authorities to Turn up the Volume for GOP Convention: A 150-decibel Megaphone," *Associated Press* (Aug. 19, 2004).

Commander Thomas Graham guaranteed the public that the LRAD was “only to communicate in large crowds.”³

According to the Department itself, the NYPD only used the LRAD in connection with the 2004 RNC “as loudspeakers.” Also according to the Department, “[b]oth devices were used sporadically in Manhattan at protests outside of the convention site (Madison Square Garden), including those in the Union Square area . . . as a loudspeaker to make announcements to the crowd of protesters, with mixed results.”⁴

The Department has deployed and used LRADs in connection with First Amendment assemblies and other events since the 2004 RNC. Upon information and belief, the NYPD used an LRAD in connection with the physical eviction of persons and property associated with the Occupy Wall Street (“OWS”) movement from Zuccotti Park on November 15, 2011, and again in connection with OWS policing on November 17, 2011.⁵ Additionally, at least one LRAD was observed deployed by the Department in 2013, in connection with a protest in the East Flatbush area of Brooklyn after plainclothes NYPD officers shot and killed 16-year-old Kimani Grey.⁶ Counsel are not aware of any instance prior to November 28, 2014 in which the NYPD fired an LRAD warning tone in connection with policing duties.

More recently, an LRAD was observed deployed, and its warning tone was used at least briefly within a few feet of a group of people, on Friday, November 28, 2014, near the Macy’s in midtown Manhattan.⁷ LRADs have frequently been observed since then in connection with ongoing anti-police brutality protests, which had begun just days before in the aftermath of the November 24, 2014 announcement that the Ferguson, Missouri grand jury considering charges against Darren Wilson, the law enforcement officer who shot and killed Mike Brown, had voted no true bill, and resurged in the wake of the Staten Island grand jury’s failure to indict NYPD Officer Pantaleo on December 3, 2014.

The increased frequency of these LRAD deployments and threatened uses - at least with respect to protests of this content - coupled with our clients’ experiences, and

³ *Id.*

⁴ The source of the information is a January 2010 NYPD Special Operations Division Disorder Control Unit “Briefing on the LRAD (Long Range Acoustical Device)” (“DCU LRAD Briefing”).

⁵ Heather Chin, “NYPD Launches Early Morning Raid and Eviction of Occupy Wall Street Protesters,” *The Queens Courier* (Nov. 15, 2011) (noting that an LRAD may have been used in connection with the eviction of OWS on November 15, 2011); “NYPD Blast Sound Cannons at OWS,” *Russian Television (RT)* (Nov. 17, 2011) (documenting the use of an LRAD on OWS protesters on November 17, 2011).

⁶ John Knefel, “NYPD Brandishes ‘LRAD X’ at Kimani Grey Protest in Brooklyn,” *Gothamist* (Mar. 25, 2013).

⁷ Luke Rudkowski, “Blackout Black Friday Arrests and LRAD by the NYPD,” *WeAreChange.Org* (Nov. 28, 2014).

the proof that the Department had no written policies or practices regarding LRAD use as of September 2012, though LRADS were deployed by the Department in connection with crowd control between 2004 and September of 2012, lead us to the troubling conclusion that the Department's illegal LRAD uses against our clients, discussed below, are the result of the Department's policies, practices, and customs with respect to LRAD deployment and use and related training and oversight.

By way of background, the LRAD was developed as a sound weapon designed for military applications in the wake of the 2000 attack on the USS *Cole* in Yemen. Upon information and belief, until its recent use in Ferguson, Missouri,⁸ the only time that the LRAD's "deterrent" tone was used against a civilian population was in 2009, when the Pittsburgh Police Department deployed and fired LRADs in connection with crowd control policing around the G-20 Summit. The DCU LRAD Briefing favorably cites the Pittsburgh Police Department's use of the LRAD in connection with crowd control policing.⁹ However, after the G-20 the City of Pittsburgh was sued by numerous individuals in connection with the Pittsburgh Police Department's violations of their constitutional rights, including but not limited to, regarding constitutional violations arising from the police use of LRADs. In one case, a plaintiff obtained a \$72,000 settlement for what she described as permanent damage to her hearing caused by police use of an LRAD.¹⁰

Scientifically, the LRAD does not function like a traditional loudspeaker or megaphone. A traditional loudspeaker or megaphone, including the familiar police megaphone typically used by the Department in connection with crowd control, amplifies sound by use of a diaphragm. In contrast, the LRAD technology uses piezoelectric transducers to concentrate - and direct - acoustic energy. According to the manufacturer, in ideal conditions, sound amplified by the LRAD is directed in a 30-to-45-degree, cone-shaped beam emitting from the front of the LRAD.¹¹ Also according to the manufacturer, "LRAD broadcasts have been optimized to the 1 – 5 kHz range where human hearing is most sensitive."¹²

⁸ At approximately 10:00PM on August 18, 2014 in Ferguson, Missouri, law enforcement activated the LRAD and operated it for approximately fifteen minutes. "On the Streets of America: Human Rights Abuses in Ferguson," *Amnesty International Report* (Oct. 24, 2014), <http://www.amnestyusa.org/research/reports/on-the-streets-of-america-human-rights-abuses-in-ferguson?page=show> ("Amnesty International Ferguson Report").

⁹ See DCU LRAD Briefing at p. 2, stating that the "LRAD devices (newer versions) were used successfully by the Pittsburgh, (Pennsylvania) Police Department during the G-20 Summit Conference in 2009."

¹⁰ Joe Mandak, "ACLU Settles Two More Pittsburgh G20 Suits for \$215,00," *Daily Report Online* (Nov. 14, 2010).

¹¹ See, e.g., LRAD 100X Datasheet; description of LRAD 100X on LRAD Corporations website, <http://www.lradx.com/site/content/view/207/110/>.

¹² Roger Cook, "LRAD Bridges the Communication Gap in Civil Emergency Situations," *LRAD Corporation White Paper* (May 2011), at p. 3.

While the modern-day, commercially available LRADs used by the Department can indisputably be used as communication tools – perhaps even safely, under some limited circumstances – they are designed to perform crowd control and other functions - to modify behavior, and force compliance, by hurting people. Put another way, “New technology that is designed to induce individual compliance through human discomfort and pain cannot be defined solely as a communication tool.”¹³

LRADs are immensely loud. As an “emergency mass notification” solution, the manufacturer’s materials boast that “LRAD systems blow away bullhorns by being 20-35 dB louder and allowing law enforcement personnel to quickly communicate instructions and directions to large groups. LRAD can be heard clearly through buildings or moving vehicles...”¹⁴ The LRAD 100x manufacturer’s product sheet specifically boasts that it can provide “powerful, intelligible communication up to 600 meters” with a maximum continuous output of 136 dB at 1 meter maximum continuous output, A-weighted, and the capacity to overcome 88dB of background noise at 250 meters, which is “10-20 decibels . . . louder than the most competitive megaphones [and] four to six times louder [than] . . . [s]ystems of comparable size and power.”¹⁵

According to Amnesty international:

LRADs emit high volume sounds at various frequencies, with some ability to target the sound to particular areas. Used at close range, loud volume and/or excessive lengths of time, LRADs can pose a serious health risks which range from temporary pain, loss of balance and eardrum rupture, to permanent hearing damage. LRADs also target people relatively indiscriminately, and can have markedly different effects on different individuals and in different environments. Further research into the use of LRADs for law enforcement is urgently needed.¹⁶

According to the DCU itself:

Although it can be thought of as a ‘loudspeaker’, it actually works differently and may also be used as an ‘area denial’ device for crowd control management purposes. . . . [I]n a special mode, to propel piercing sound at higher levels (as measured in decibels) than are considered safe to human ears. In this dangerous range (above 120 decibels), the device can cause damage to someone’s hearing and may be painful.¹⁷

¹³ CCLA Letter at p. 2.

¹⁴ “Law Enforcement Solutions: Saving Lives Through Clear Communication,” *LRAD Corporation* (Jan. 8, 2014).

¹⁵ LRAD 100X Product Sheet.

¹⁶ Amnesty International Ferguson Report.

¹⁷ DCU LRAD Briefing at p. 2.

And according to the manufacturer in marketing the LRAD as a crowd control device:

When LRAD's deterrent tone is used at close range, protesters sense audible discomfort, cover their ears and move away.¹⁸

Even the LRAD 100x - the smallest LRAD the Department has - can cause serious injury. "The level of sound produced by these devices exceeds both the threshold for human discomfort (between 85 and 95 dB) and the normal human pain threshold (between 120 and 140 dB)."¹⁹ According to the National Institute for Occupational Safety and Health, "exposures [greater than] 85 dB may cause hearing loss."²⁰ According to the National Institute on Deafness and Other Communication Disorders, "any sound over 90 dB can damage a person's hearing. So the LRAD can threaten the hearing of anyone in its path, regardless of whether there is any wrongdoing, even when used only for communication."²¹

Against that backdrop,

The possible health risks are magnified due to the fact that the LRAD is a large-scale device, targeting a large population rather than specific individuals. Pain tolerance varies among the population, and certain groups – including children – are more vulnerable to hearing loss. Moreover, individuals within large crowds may be unable to move out of the LRAD's range due to physical disability or the sheer volume of people in a given area. The indiscriminate nature of this device does not allow the police to accommodate and respond to individuals' differing reactions, increasing the possibility that at-risk populations will be hurt.²²

It is clear that the LRAD was used for crowd control purposes against our clients on December 5, 2014, primarily as a means of force compliance device, and in apparent violation of the manufacturer's recommendations and guidelines. According to video²³ and eyewitness accounts, at around 1:00AM in the vicinity of 57th Street around Madison Avenue and in nearby New York City streets, at least two unidentified DCU officers acting under the apparent direction of a DCU Sergeant fired the LRAD 100x's deterrent

¹⁸ "Law Enforcement Solutions: Saving Lives Through Clear Communication," *LRAD Corporation* (Jan. 8, 2014).

¹⁹ CCLA Letter at p. 2.

²⁰ See <http://www.cdc.gov/niosh/topics/noise/noisemeter.html>

²¹ Tracy V. Wilson, "How LRAD Works," [Science.howstuffworks.com/lrad4.htm](http://www.howstuffworks.com/lrad4.htm) (citing <http://www.nidcd.nih.gov/health/hearing/pages/noise.aspx>).

²² CCLA Letter at p. 3.

²³ Some of the videos of the incident publicly available online include the following:
<https://www.youtube.com/watch?v=OErp0lRkndY>;
<https://www.youtube.com/watch?v=C--TEKAXOhg&feature=youtu.be>;
https://www.youtube.com/watch?v=hA24uwA_mbQ.

tone more than fifteen times within three minutes, frequently in several-second bursts, with some bursts lasting more than ten seconds, while chasing perceived protesters.

In this connection, the manufacturer's recommendations regarding the safe operation of the deterrent feature advise that the function must only be utilized in two to five second bursts.²⁴

The unidentified officers depicted in the videos used the LRAD as if it were a megaphone to amplify confusing orders at unsafe distances and unreasonably high volumes, directing people to get or remain on the sidewalk, while contemporaneously advancing on them and deploying the LRAD's deterrent feature at unsafe distances and unreasonably high volumes. The LRAD was operated in those ways close enough to our clients, other protesters, observers, and bystanders, as well as third parties, that it caused them injuries. Additionally, it is noteworthy that none of the officers operating the LRAD appeared to have been wearing any safety equipment.

The NYPD's uses of the LRAD were not in accordance with best practices regarding crowd control and use of force. Those LRAD uses constituted significant uses of force against our clients and caused our clients physical injuries. The LRAD was used as a weapon without reasonable notice and without providing a meaningful opportunity to disperse beyond the range of the LRAD and therefore avoid injury. The LRAD was used in circumstances where there was no imminent threat to public safety or property and where its use was not necessary to protect public safety or property. As uses of force against our clients, the NYPD's uses of the LRAD were unjustified and unreasonable under the circumstances.

Moreover, the NYPD's uses of the LRAD described above appear to us to have been unconstitutional under the First, Fourth, and Fourteenth Amendments to the United States Constitution, as well as the attendant provisions of the New York State Constitution. For example, because the sound of LRAD is designed to reach large areas, it necessarily targets more than one person, if more than one person is within that area. When the LRAD is implemented to force behavior modification or compliance (for example, to compel people to stop moving in a direction or to move in a particular direction), the Department has seized the people within the area of effect for Fourth Amendment purposes.

Beyond that, it has done so treating a perceived group without lawful authority to do so. In other words, even if the Department has the arguable authority to use the LRAD as a weapon to target a particular individual (for example because that individual has used or threatened some serious force), it does not also have the authority to use the LRAD as a weapon against others who have not engaged in or threatened such conduct – at least not without first warning them and giving them a clear and meaningful opportunity to dissociate from any actors who may have violated the law or justified a

²⁴ Ontario Ministry of Community Safety and Correctional Services, "Review of Police Use of Long-Range Acoustic Devices" (Nov. 2011), at p. 5.

particular use of force and to leave the area and avoid being hurt by the use of the LRAD as a weapon against those actors. Put more simply, use of the LRAD as a weapon seizes not just one individual, but all people in an area, and in so doing does away with the requirements of individualized probable cause and individualized justifications for appropriate and proportionate use of force.

Moreover, the Department's use of the LRAD raises First Amendment concerns as a government regulation of protected expressive conduct. For example, even assuming, *arguendo*, that the regulations imposed on a person fired upon by an LRAD are content neutral, absent a very small subset of extremely exigent circumstances, the use of an LRAD for crowd control purposes will almost always result in the unlawful regulation of protected conduct, because the restrictions imposed by the haphazard applications of the LRAD's force are not narrowly tailored to serve significant governmental interests and fail to provide ample alternatives for expression.

Additionally, if we are correct that the Department does not have written guidelines and policies regarding LRAD use and basic use of LRAD force reporting requirements, the Department's practices with respect to LRAD uses fail to provide adequate safeguards to prevent the Department from enjoying and exercising unbridled, unreviewable discretion to suppress protected speech and conduct, thus violating the prohibitions against viewpoint discrimination. These examples are not exhaustive. We also believe that there are further constitutional and policy problems with the Department's LRAD use.

For these reasons, we call on you to direct officers under your command to refrain from using the LRAD for crowd control purposes until thorough, independent testing and review has been conducted; appropriate, written guidelines regarding the use of LRADs, including their use as force tools and their use for crowd control purposes, are promulgated and made public; members of the service authorized to operate LRADs are adequately trained in them; and there are adequate use of force reporting requirements in place to document the circumstances under which the Department's LRADs are utilized.

We also request that you expedite the Department's response to our public records request, submitted contemporaneously herewith, to the extent that it seeks

All records, including training materials, directives, policies, manuals, and/or memoranda, created or adopted by the NYPD pertaining to the operation of LRADs, including any descriptions of who is qualified to operate LRADs, the circumstances under which LRADs are to be operated, and the chain of command through which authority to station, position and operate LRADs is granted.

Please respond in writing as soon as possible, and in no event later than Wednesday, December 17, 2014.

Thank you for your prompt attention to these matters.

Very truly yours,



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