Gender Justice GU4506
Spring 2020
Professor Katherine Franke
Jerome Greene Hall, Room 546

Course Reader – Volume 3

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APRIL 6TH: SEX WORK

URL: https://www.villagevoice.com/2016/11/22/the-nypd-arrests-women-for-who-they-are-and-where-they-go-now-theyre-fighting-back/

The NYPD Arrests Women for Who They Are and Where They Go — Now They're Fighting Back

by MELISSA GIRA GRANT

NOVEMBER 22, 2016

When two officers of the New York Police Department came for her, Sarah Marchando was on a moving bus.

It was May 7, 2015, around 7:30 in the morning. Marchando, who was 27 at the time, had just boarded the B6 in East New York after seeing her boyfriend. He watched her get on the bus. She swiped her MetroCard and took her seat with the morning commuters. "Then, five minutes later, I get a phone call," Marchando told the *Voice*. It was her boyfriend, "telling me, 'You know you have got a detective car behind the bus?' "

Moments later, "they cut the bus off," Marchando says. "It wasn't like the bus was at a stop." Two officers in plainclothes rushed on. They wouldn't tell her why they were there when she asked, according to a recent lawsuit detailing her arrest. When Marchando didn't immediately go with them, Officer Joseph Nicosia grabbed her and pulled her down the stairs. She tried to stop him from grabbing her arm, the suit says, and one of the officers put her in a chokehold. Six officers ended up involved in the scene. Officer Michael Doyle, the suit states, remarked to the others, "She's back," and "we got her."

“It was just a complete struggle,” Marchando said. Cops had wrestled her to the ground. Passersby recorded her arrest as she told police she couldn’t breathe.

Describing the scene when we met last month, Marchando sounded steady but exasperated, her ornate white nails flashing in the light. “You refuse to take me to the hospital because I can’t breathe and I am throwing up on top of that and I am still sitting in the cell with handcuffs on. I sat in the cell for two and a half hours with handcuffs on before they went and found a female officer.” The arrest left her with a sprained wrist, she said, and nerve damage in her right arm.

Marchando was charged with violating a vaguely worded New York law prohibiting “Loitering for the Purpose of Engaging in a Prostitution Offense,” a misdemeanor she had been arrested for seven times between 2013 and 2015 in that same precinct. In one loitering case in 2012, she served 45 days on Rikers Island.

“It has been to a point where I have come home from Rikers Island and caught a case less than two days later,” she said. “I felt like I was being watched.”

That’s because she was. Officers in the 75th Precinct knew Sarah Marchando, who is Latina and cisgender, from prior arrests. According to a sworn court complaint, Officer Kelly Quinn said police had observed her for forty minutes that morning before they arrested her, and claimed they saw her “beckon to multiple vehicles passing by with male drivers,” “approach a vehicle,” and “engage in conversation with a male inside of said vehicle.” This was all supposed to be evidence of her “purpose” to commit a prostitution offense. Marchando and her attorneys contest this. She was waiting for a bus. If she was loitering for the purpose of prostitution, she was not engaged in prostitution at the time of her arrest, much less loitering when two officers grabbed her off public transit.

Sarah Marchando had lived in a few places in the 75th. For a short time, she was in hotels around an area police told her — after an arrest — was “the Combat Zone.” That’s the same nickname the police in Cambridge, Massachusetts, where she grew up, used for the old red-light area in Downtown Boston. “Then I moved to Dorchester, started messing with the bad boys. Started getting in trouble.” She said Massachusetts was boring, though, and so she came to New York. But now she’s had to leave Brooklyn, too.

“It is enough for me to know this is not a safe situation. This is not an OK situation,” Marchando said. “I can’t continue to be intimidated to come outside, to know that even at seven o’clock in the morning, I am still a target and a priority.”

These targeted and repeated arrests are part of a much larger pattern within the NYPD. From 2012 through 2015, nearly 1,300 individuals were arrested in New York City and charged with loitering for the purposes of prostitution. The vast majority are women. Such arrests are not the result of stings, in which undercover officers attempt to solicit sex for money. Neither are they the result of investigations that produce evidence — emails, text

messages, online ads — that the women had intended to sell sex. With a loitering arrest, a woman's crime need only exist in the arresting officer's head.

Whether or not she was engaging in prostitution in that moment, or in the past, Marchando still has constitutional rights. So she, along with seven other plaintiffs backed by the Legal Aid Society of New York (which has represented them in loitering cases), filed a class-action civil rights suit this past September, challenging the constitutionality of New York's law on loitering for the purposes of prostitution. Enforcement of the statute, they state, is "based solely on a police officer's subjective determination that the activity was 'for the purpose' of prostitution." That is, if police believe a woman's "purpose" is to sell sex, they will arrest her.

"This is a law that is four decades old," said Kate Mogulescu, a supervising attorney in the Legal Aid Society's Criminal Defense Practice, adding that enforcement is "arbitrary and targeted and abusive." Asked about its enforcement of the loitering statute, the NYPD referred the *Voice* to the Law Department, which is defending against the Legal Aid suit. "We are not discussing any aspect of this matter while litigation is pending," Law Department spokesman Nick Paolucci said.

Community and legal advocates have likened the ways police enforce laws against loitering for the purposes of prostitution to stop-and-frisk. But the consequences under the loitering law are steeper. Under stop-and-frisk, Mogulescu said, "many of the police interactions did not lead to an arrest. So although harmful, and a violation of the Constitution and the law, people weren't being swept, necessarily, into the criminal legal system.

"But with the loitering law," she continued, "we have arrests. And we have people who are marked then in the criminal legal system." Overwhelmingly, those people are women of color, cisgender and transgender alike.

"There is no other law that I can think of that gives the police that much power and discretion," Mogulescu said. "What you see is simply identity-based policing."

Anti-loitering policing is highly concentrated in five precincts, according to arrest data from Legal Aid and the New York State Division of Criminal Justice Services' arrest statistics. Between 2012 and 2015, the majority of the arrests — 68.5 percent — were made in Bushwick, Belmont/Fordham Heights, East New York, Hunts Point, and Brownsville, neighborhoods where residents are predominantly people of color. In a Brooklyn court where prostitution cases end up, 94 percent of the defendants facing charges of loitering for the purposes of prostitution were black, according to a court monitoring project conducted by the Red Umbrella Project in 2013 and 2014. Overall, according to the State Division of Criminal Justice Services, 85 percent of those arrested for loitering for prostitution between 2012 and 2015 were black or Latina.

Police say these neighborhoods are "prostitution prone." Mogulescu believes that designation is "a self-fulfilling cycle. They make an arrest in a place, therefore that place becomes 'prostitution prone' — and they can make more arrests in that place, because they have already identified it as prostitution-prone." Loitering arrests don't reveal the places sex work happens in the city, only the places where women are most likely to be arrested, whether they are engaged in sex work or not.

Police also cite the women's clothing as evidence of their "purpose" to engage in prostitution: Is it "revealing" or "provocative" clothing? How tight are their leggings? Can you see their cleavage? Officers document this on preprinted supporting depositions, which also ask: How many people was a suspect "engaged in conversation" with? How much currency did she have at the time of arrest? How many condoms? On sworn depositions provided to the *Voice* by Legal Aid, officers itemized the following attire as evidence:

PO Telesca, September 14, 2016, said the woman he arrested was wearing "tight black leggings";

Lieutenant Dave Sieve, March 10, 2016, said a woman he arrested was wearing a "pink + blue sweater hoodie";

PO Figaro said on August 23, 2015, he arrested a woman wearing "mini dress, bra strap showing";

and PO Sieger, in another August 2015 arrest, said the woman was wearing "tight jeans and tight tank showing clevage [*sic*]."

Such attire or behavior is not at all unusual in New York City. But such arrests are part of routine anti-prostitution enforcement. Police and prosecutors can also be confident that women do not often fight these charges. Of the close to 1,300 loitering cases between 2012 and 2015, according to Legal Aid, "nearly 400 of the arrests did not lead to convictions." This could mean charges were never filed, or a case was dismissed, or the accused was acquitted. But, as Sarah Marchando and others point out, even if their record is sealed, police do not expunge from their memory the face of a woman they have previously arrested. As a result, they say, they are unable to go out in public without fear of another arrest.

Which is why the Legal Aid suit contends that the city of New York "chooses to enforce" the loitering law "in an unconstitutional manner by using it to police expressions of gender identity and sexuality based on outdated and paternalistic notions of what clothing NYPD officers deem 'revealing' or 'provocative,' with a disproportionate impact on women of color."

"When you have factors like an article of clothing, or the fact that you are one gender and you are talking to people of another gender," Mogulescu said, "you have to expand your view and ask, where is this happening that's *not* being policed? And our answer with the loitering case is, *everywhere*, except these places when the police decide these are the arrests they are going to make."

Tiffaney Grissom first saw jail for prostitution arrests more than a decade ago in the West Village. "That was the beginning stages of the cleanup," she told the *Voice* in October. Her long dark hair was pulled back, her smooth leather purse on her lap. We were in the Lower Manhattan offices of Legal Aid, not far from where the piers on the city's West Side once stood.

"It was still pretty rough out there. There was no Gansevoort there," Grissom added dryly, referring to the luxury hotel that opened in 2004. As she was growing up in the Village as a young, transgender black woman, the neighborhood she hung out and worked in gentrified around her. "Half the stuff that was out there when I was out there is no longer there. The pizza shops are gone; the sex shops are gone. It is all gone. The bars are gone and going. If they are not gone yet, they are going."

In those days in the Village, Grissom said, it was different: You would make enough money that sitting in jail for a night wasn't the worst thing. "Initially, it was routine. It was kind of like paying your dues." She would plead guilty to the prostitution or loitering charges, get time served or community service, go home, and be back out. "I was just like, 'Oh, in jail again,' " she added with a sigh. "I had a girl who got arrested every single Friday. Every single Friday! It was literally like we knew them by name, they knew us by face, sometimes by name."

Once she got older, Grissom stuck to the Bronx, where she lived. She first moved there at 21, after she got kicked out of her sister's place, she said, and needed a place to live. "The Bronx would never be my ideal choice of places to move to. It was just convenient. Then I kind of got stuck in the Bronx." Her boyfriend was there, she said, pausing before going on a highlight-reel recollection of those times. "Living stuff started going up/down. All this ridiculousness."

Her record from the Village remained with her. But between Fordham and Kingsbridge roads, for about a three- or four-block radius, she said, she could go out, maybe pick someone up, see what happened, make some money. "When you go to the area," she said, "it is kind of like the Village outside of the Village.

"It is like you go out there and you don't have to be closeted," she continued. "The girls that are trans don't have to live their closeted trans life. …In those places, you can be free. …You don't have to bite your tongue."

Grissom added, “The men that come there…they appreciate trans women. …Sometimes they have money, sometimes they don’t have money.” She wouldn’t always go out to work; it could be just to hang out, and some of the people she was hanging out with could be working, too.

For a while, Grissom felt like police left her alone, or maybe they just didn’t know her yet. “I didn’t get arrested until I was standing next to somebody who had frequently gotten arrested in the Bronx,” she recalled. That was in 2011. Then the arrests started stacking up again. It was like “guilty by association,” she said. “That is not a reason to arrest somebody.”

One night in October 2013, she was leaving the Twin Donut on Fordham Road, “where everybody goes…one of the only places you can just go in and sit down when you don’t have money.” She walked for a while, speaking with a man along the way. After about 30 or 45 minutes, they went their separate ways. It was then that an unmarked police car pulled up alongside her. Officers Bryan Pocalyko and Christopher Savarese demanded she stop and placed her under arrest.

Only after Grissom was arrested and loaded into a police van with another woman who had been arrested that night did she learn that she was charged with loitering for the purpose of prostitution, though she says that at no time had she tried to solicit money for sex.

According to the lawsuit, when Grissom was brought to the 52nd Precinct, Officer Pocalyko refused to believe she was a woman.

“[Officer] Pocalyko unlawfully ordered Ms. Grissom to be strip-searched by a female police officer even though she was not suspected of possessing any drugs or contraband,” the suit reads. “The female officer took Ms. Grissom into a bathroom and ordered her to lift her shirt, shake out her bra, and pull her shorts down. This search was for the purpose of confirming whether or not she was female, as her identification indicated.”

Later in court, the Legal Aid suit says, one of the officers “alleged that Ms. Grissom’s purpose was prostitution because she was observed at a location ‘frequented by people engaged in prostitution’ and was wearing ‘tight short shorts [and a] tight tank top.’ ”

If Tiffaney Grissom had been doing the same thing, in the same outfit, but in, say, Times Square, would she have been arrested? It depends: In what decade?

New York’s law criminalizing loitering for the purpose of engaging in a prostitution offense only dates to 1976. Before the law was passed, the NYPD would use the existing, general anti-loitering laws to target women it wanted to keep off the streets. In one infamous six-month wave of sweeps in 1967 and 1968, police arrested more than three thousand women who either were or were profiled as sex workers, mostly centering on Times Square, driven by panic about street crime. Police said they would charge the women with

loitering or disorderly conduct offenses because it was easier than trying to prove they were engaged in prostitution. The Legal Aid Society along with the New York Civil Liberties Union intervened to have some of the loitering cases dismissed.

This crackdown came as the NYPD began to pressure the state to add loitering for the purposes of prostitution to the penal code. "The actions of these individuals have always had a deleterious effect on the business and social life of the community," wrote the department in a 1967 memo. But at the time, civil rights attorneys were testing loitering statutes in the courts. In 1972, the U.S. Supreme Court ruled that a law prohibiting loitering, "vagrancy," and "nightwalking" was unconstitutionally vague. It was after all this that loitering for the purpose of prostitution was added to the New York State penal code. To this day, the NYPD continues to make a few thousand prostitution arrests each year under a variety of statutes, with several hundred for loitering for prostitution.

Women targeted under these laws have tried to challenge them before. When transgender activist Monica Jones was arrested under a similar law in Phoenix against "manifesting prostitution" after accepting a ride one night from a man who turned out to be an undercover cop, she launched a national campaign against the law. She and her supporters described it as making a crime out of "walking while trans" — very similar to how women describe the NYPD's enforcement of the loitering law. Jones's conviction was overturned on appeal, but the law in Phoenix still stands.

Eight days after she was pulled off the bus in East New York, Sarah Marchando was arrested again. "I caught that case at five o'clock in the morning," she said, "with overalls on and a pair of shoes. It doesn't matter what I have on or how I am dressed."

Marchando said she would have to plan ahead about when to go out just to try to avoid arrest. "You have to keep in the back of your mind that, 'OK, what is the day?' Because if it is that type of day, like on Friday nights or Saturday mornings, they are doing prostitution sweeps."

According to Tiffaney Grissom, "The only thing that you can do to avoid it is just not go outside."

But she would have to leave the house for court appearances, and a lot of them. At one point, Grissom said, she was dealing with loitering charges in both Bronx and Queens courts. In addition, she had to show up for court-mandated therapy sessions, meant as a prostitution diversion program. "It was literally a whole-week schedule," she recalled. "It was like Tuesdays and Wednesdays it would be Brooklyn. Then, get up on Wednesdays and Thursdays and go to the Bronx. It would be excessive."

"We were always in court," longtime community advocate Lorena Borjas told me. She's the founder of the Lorena Borjas Community Fund, a legal fund for transgender New Yorkers in immigrant communities, which has offered assistance to trans women in Queens targeted

in loitering arrests. “I can say that four years ago we were having arrests about every fourteen days,” she recalled. “They were specifically focused on the trans community that crosses the Jackson Heights area. Especially with all of the trans girls that this was happening to who were undocumented, they were, of course, running the risk of being deported. When people had to appear in court, they would say, ‘Well, I saw you out here last Friday, so now this Friday I am going to arrest you.’ ”

Borjas explains that what makes Jackson Heights different from East New York or the Bronx is that there, the women most likely to be targeted in anti-loitering policing, members of the Latina trans community, were visible and organized. Borjas did street outreach, sharing “Know Your Rights” cards so they knew how to protect themselves during police encounters. Groups like Make the Road New York have documented the policing of Jackson Heights’ LGBTQ Latinx community, highlighting the use of anti-loitering laws to sweep trans Latinas off the street.

“The police were saying a while ago that they wanted to change the face of Jackson Heights,” Borjas said. “They wanted to stop drug sales, they wanted to stop people from selling tacos and food in public.” All this came at the same time as crackdowns on trans women. “They were saying, ‘The face of Jackson Heights is something we are going to change.’ According to them, the mentality was that they were going to do this by arresting the whole world.”

As in the West Village when Tiffaney Grissom worked and hung out there, police used anti-loitering laws to “change the face” of neighborhoods. “This kind of policing is very much tied into the gentrification and sort of economic shift in certain areas,” said Legal Aid’s Mogulescu. “The call for a kind of ‘cleanup’ of the streets that accompanies that — this is not the only law that’s used to do that, but it’s a pretty striking example. And because the law allows for such abuse — it’s part of the law itself — there’s no check on that. So it becomes a very useful tool for getting people off the street.” Mogulescu’s voice softened. “And we have to think about who those people are.”

After all her arrests, Sarah Marchando ended up leaving Brooklyn. She told me she’s still trying to keep a steady place to live, still trying to find work. “It wasn’t like I could just say, ‘Hey, let me go get a job,’ because I am not stable. I can’t get stable if every time I turn around I am in jail again.”

Tiffaney Grissom left the Bronx, too. She estimates that of all her arrests for loitering, about 80 percent of the time, she wasn’t even out doing sex work. “Whether you are ‘hoing or not ‘hoing,” she said, “even if you look like you might be trans, you are going to jail.”

What she remembers from all the arrests is, “They always give you this whole speech of ‘high prostitution-prone area.’ ” After a while, it was like police thought that was just anywhere she was. “It is a stigma that comes with being trans. You are automatically a sexual object or a sex worker. You are no longer just a normal person.

“And on top of that,” she said, “you don’t want to go back and tell your mother or whoever you live with, ‘Hey, just got arrested for ‘hoing.’ ”

In Jackson Heights, the loitering crackdowns on the community, in some ways, made it all the more determined, said Borjas. “Two years ago we started to do protests and to become more visible so that we could tell the police and the neighborhood, ‘We are here. We are not going anywhere. We are your neighbors and your friends. We are your clients. We are the ones that come to buy a cup of coffee in the morning. We go to the supermarket and we, too, need protection, just like you.’ ”

Tiffaney Grissom didn’t have that. After she got arrested twice in the same week, she said, police scolded her. “They were like, ‘You are just not getting it through your head.’ It is not that I am not getting it through my head; it is, regardless of however many times I get arrested, I still need to eat. This is my livelihood.” So she kept working. As a result of one prostitution arrest, she ended up at Rikers. “It was the day before Thanksgiving that I got out. I had on a minidress. It was ridiculous. A minidress, no money….When I had gotten there, I had just shut down. I didn’t pee; I didn’t eat. I didn’t do anything for four days.”

After years of this, both women told me, they were done with pleading guilty. They were done with Rikers. They signed on to be plaintiffs in the case challenging the law itself.

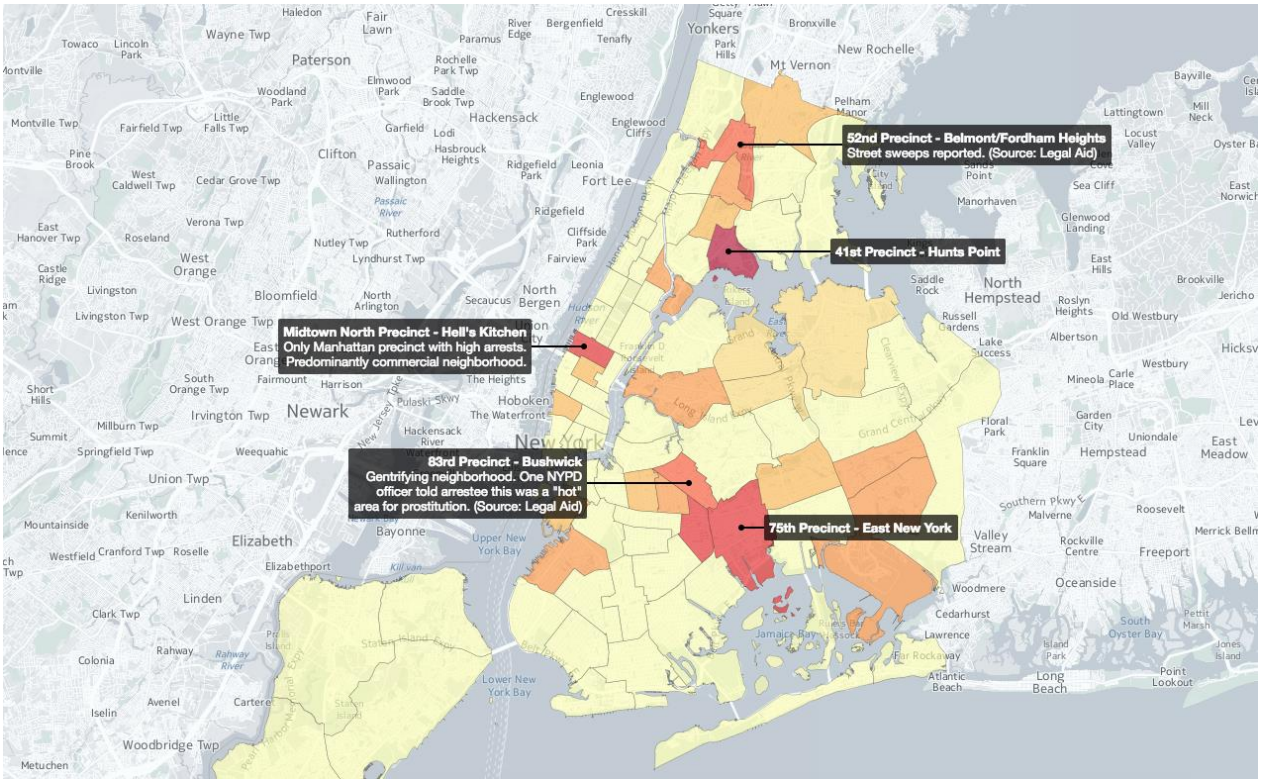
“It took a lot to get here,” Marchando told me. “A lot of cases.” For one, she needed support to fight her charges. But now, as part of the legal challenge, if they are successful, this could mean the end of so many women ending up in the system in the first place. “I was just going to jail and there were no questions asked,” Marchando said. “It needs to change. It is a targeting thing that has to stop, and if nobody says nothing, it is not going to be dealt with.”

URL: https://www.villagevoice.com/2016/11/22/interactive-map-see-where-the-nypd-arrests-women-who-are-black-latina-trans-andor-wearing-jeans/

Interactive Map: See Where the NYPD Arrests Women Who Are Black, Latina, Trans, and/or Wearing Jeans

by MELISSA GIRA GRANT

NOVEMBER 22, 2016



Since 1976, it's been a crime to "loiter for the purposes of engaging in a prostitution offense" in New York City. That might sound like the kind of thing that went out of fashion along with XXX marquees in Times Square. But between 2012 and 2015, the NYPD arrested and charged 1,300 people with this misdemeanor.

The Voice obtained arrest data from Legal Aid and the New York State Division of Criminal Justice Services Arrest Statistics for the past three years. This data was then mapped by John Keefe.

The vast majority of those charged with this offense (81%) are women. Overall, according to New York State Division of Criminal Justice Services Arrest Statistics, 85% of those arrested for loitering for prostitution between 2012 and 2015 were black or Latina.

How exactly do police think they can tell when women are doing something "for the purposes of" prostitution? The law gives the NYPD very wide discretion. From the supporting depositions officers file with each arrest, police list as evidence such wholly innocent behaviors as waving at passers-by, having conversations with someone of a different gender, or wearing tights jeans or baring cleavage.

This September, eight women of color, including cisgender and transgender women, filed a civil rights suit with the support of The Legal Aid Society of New York, challenging the constitutionality of the loitering law. They describe a pattern of targeted and yet arbitrary policing, sweeping women of color from their neighborhoods into jails, sticking them with prostitution records that police then use as evidence against them to make arrests again and again.

But loitering arrests don't reveal the places sex work happens in the city, only the places where women are most likely to be policed based on their presence alone, whether they are engaged in sex work or not. Between 2012 and 2015, 68.5% of arrests for loitering for the purposes of prostitution were made in just five neighborhoods: Bushwick (83rd Precinct), Belmont/Fordham Heights (52nd Precinct), East New York (75th Precinct), Hunts Point (41st Precinct), and Brownsville (73rd Precinct), neighborhoods where residents are predominantly people of color.

Police say these neighborhoods are "prostitution prone," but as Kate Mogulescu, a supervising attorney in the Legal Aid Society's Criminal Defense Practice, points out, "this is based on a self-fulfilling cycle. They make an arrest in a place, therefore that place becomes 'prostitution prone' – and they can make more arrests in that place, because they have already identified it as prostitution prone."

"It is easier to prove somebody is guilty when it is already on their record," said Sarah Marchando, one of the women suing over the loitering law. "There is really no fight," You can't say, 'Hey, I wasn't doing this!' if you are dressed a certain way."

“The only thing that you can do to avoid it,” Tiffaney Grissom, another plaintiff on the suit told me, “is just not go outside.”

Read the entire report on the women’s lawsuit against the practice here. [URL: https://www.villagevoice.com/2016/11/22/the-nypd-arrests-women-for-who-they-are-and-where-they-go-now-theyre-fighting-back/]

JUDGE CASTEL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

16 CV 7698

D.H., N.H., K.H. f/k/a J.H., Natasha Martin, Tiffaney Grissom, R.G., A.B. and Sarah Marchando, individually and on behalf of a class of all others similarly situated;

Plaintiffs,

-against-

THE CITY OF NEW YORK, SEAN KINANE, JOSEPH MCKENNA, KAYAN DAWKINS, THOMAS KEANE, MARIA IMBURGIA, KEVIN MALONEY, JOEL ALLEN, DAVE SIEV, BRYAN POCALYKO, CHRISTOPHER SAVARESE, THOMAS DIGGS, JOEL GOMEZ, KEITH BEDDOWS, CHRISTIAN SALAZAR, HENRY DAVERIN, JOSEPH NICOSIA, KELLY QUINN, ALEXIS YANEZ, MICHAEL DOYLE, JOHN/JANE DOE NYPD POLICE OFFICERS #1-14;

Defendants.

COMPLAINT AND
DEMAND FOR A JURY TRIAL

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PRELIMINARY STATEMENT

1. Plaintiffs D.H., N.H., K.H. f/k/a J.H.,[1] Natasha Martin, Tiffaney Grissom, R.G., A.B. and Sarah Marchando ("Named Plaintiffs") bring this civil rights action on behalf of themselves and a class of similarly situated women of color, some of whom are transgender, who have been and may in the future be subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained under New York Penal Law Section 240.37 ("Section 240.37") (the "Plaintiff Class," and together with Named Plaintiffs, "Plaintiffs"), and allege the following on information and belief:

2. This is a civil rights class action that challenges the constitutionality of Section 240.37, Loitering for the Purpose of Engaging in a Prostitution Offense, under which New York City Police Department ("NYPD") officers target and arrest women—primarily women of color, including transgender women—engaged in wholly innocent conduct based on their race, color, ethnicity, gender, gender identity and/or appearance.

3. Since 1976, New York has criminalized loitering in a public place by persons whom the police selectively and subjectively determine are present for the purpose of prostitution.

4. New York enacted Section 240.37, along with several other anti-loitering laws, at a time when street crime was rampant, in order to provide police officers with a "tool to curtail the proliferation of prostitution" and other "maladies" throughout New York.[2]

[1] K.H. is in the process of legally changing her name from J.H.

[2] Letter from N.Y.C. Office of the Mayor to Hon. Hugh L. Carey (June 10, 1976) [hereinafter Letter from N.Y.C. Office of the Mayor to Hon. Hugh L. Carey]; see Murray Schumach, Major Drive on Illicit Sex is Being Drafted by City, N.Y. Times (Sept. 1, 1975), http://www.nytimes.com/1975/09/01/archives/major-drive-on-illicit-sex-is-being-drafted-by-city-city-is.html; see also Tom Goldstein, Experts Say 2 Laws Proposed to Clean Up Times Square Face Constitutional Problems, N.Y. Times (Nov. 3, 1975), http://www.nytimes.com/1975/11/03/archives/experts-say-2-laws-proposed-to-clean-up-times-square-face.html.

5. Many of these loitering statutes have since been struck down as unconstitutional. Section 240.37 remains in force, and the pattern of unlawful arrests under this statute demonstrates that the fears and doubts expressed at the time of its passage about its unconstitutionality and potential for abuse were entirely warranted.[3]

6. Section 240.37 provides in relevant part:

> Any person who remains or wanders about in a public place and repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, for the purpose of prostitution, or of patronizing a prostitute as those terms are defined in article two hundred thirty of the penal law, shall be guilty of a violation.

7. On its face, Section 240.37 is unconstitutionally overbroad. It criminalizes many forms of constitutionally protected expressive activity, such as attempting "to engage passers-by in conversation," based solely on a police officer's subjective determination that the activity was "for the purpose" of prostitution.

8. The statute is also void for vagueness because it lacks objective criteria and guidelines for determining what conduct is "for the purpose of prostitution." It therefore fails to provide adequate notice of the conduct that will be deemed criminal and gives police officers unfettered discretion to arrest individuals based on subjective determinations of an individual's "purpose," leading to inconsistent and arbitrary enforcement. Consequently, a person of

[3] See, e.g., Letter from Harold Baer, Jr. to Hon. Judah Gribetz, Counsel to the Governor (June 15, 1976) [hereinafter Letter from Harold Baer, Jr. to Hon. Judah Gribetz] (writing on behalf of the State Legislation Committee of the New York State Bar Association and the New York County Lawyers' Association, and noting that although the "prostitution problem . . . has reached critical proportions," Section 240.37 is "unconstitutional" and would invite arbitrary and discriminatory enforcement); N.Y. State Bar Ass'n, Legislation Report, No. 84 (1976) [hereinafter N.Y. State Bar Legislation Report] (demonstrating that Section 240.37 has "deficiencies . . . so glaring as to require our disapproval without regard to questions of the efficacy and underlying policy," and declaring that the law provides a "shortcut" for police, whereby the "standards of probable cause" are "dropp[ed]" and "[w]omen who are suspected of being prostitutes are arrested on sight, not because they are committing any unlawful act but because they are considered 'undesirable'").

ordinary intelligence cannot know if, for example, by speaking to acquaintances on the street or engaging in similarly innocent activity, she risks arrest under Section 240.37.

9. Further, the City of New York (or the "City," and together with all other named individual and Doe defendants ("Individual Defendants"), "Defendants"), through the NYPD, enforces Section 240.37 in a way that impermissibly targets Plaintiffs because of their race, color, ethnicity, gender, gender identity and/or appearance. Specifically, the City has adopted numerous policies, widespread practices and/or customs that result in arbitrary and discriminatory enforcement of Section 240.37 in violation of Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution and Article I, §§ 8, 11 and 12 of the New York Constitution, including by:

- Deploying groups of NYPD officers to arrest multiple Plaintiffs under Section 240.37 in "sweeps" that target certain public areas where women of color, and in particular transgender women, are known to gather and socialize;
- Arresting Plaintiffs under Section 240.37 without probable cause, including based merely on the fact that a Plaintiff has been arrested in the past for a prostitution-related offense (even if the charge was dismissed) or that the Plaintiff was present in an area that the NYPD has designated as "prostitution-prone";
- Arresting women of color under Section 240.37 at a higher rate than men or white women because of their race, color, ethnicity, gender, gender identity and/or appearance; and
- Failing to adequately train, monitor, supervise or discipline NYPD officers involved in the enforcement of Section 240.37 to prevent or mitigate these abuses and constitutional violations.

10. Defendants' conduct results in a pattern and widespread practice of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of women of color, including transgender women, engaged in wholly innocent conduct, such as walking in public spaces or speaking with other pedestrians.

11. The overwhelming majority of arrests under Section 240.37 are of women of color, including significant numbers of transgender women. In many instances, charges are eventually dismissed, but the injurious legal, financial, emotional and physical effects of the arrests on Plaintiffs' lives remain.

12. Defendants implement the NYPD's policies, widespread practices and/or customs in an intentionally discriminatory and race-based manner by focusing their enforcement efforts on communities of color. Defendants also discriminatorily acquiesce in, ratify and fail to monitor or rectify these unlawful practices because the victims are transgender and/or women of color.

13. The enforcement of Section 240.37 intimidates, threatens and interferes with Named Plaintiffs' enjoyment of their homes and neighborhoods and their right to associate freely with others. The enforcement is so arbitrary and discriminatory that many Named Plaintiffs are afraid to leave their homes, particularly at night.

14. As examples, on June 6, 2015, Named Plaintiff D.H., an African-American woman who is transgender, was arrested walking in her neighborhood in the Bronx while trying to hail a cab to get home. D.H. is deaf and communicates primarily through typing and sign language. During her walk, she did not interact with anyone or engage in any behavior related to the solicitation of prostitution or other unlawful conduct. She was nevertheless stopped, harassed, arrested and detained by the police as part of a "sweep" of transgender women in the area, and eventually charged with loitering for the purpose of prostitution.

15. Similarly, on June 6, 2015, Named Plaintiff N.H., an African-American woman who is transgender, was arrested in her neighborhood on her way home from buying food and cigarettes at a nearby store. Like D.H., N.H. was arrested as part of a sweep of transgender

women, and one of the arresting officers told those women that if they saw "girls like them"—meaning transgender women—outside after midnight, they would arrest them.

16. On June 13, 2015, Named Plaintiff K.H., an African-American woman who is transgender, was walking home to her apartment when she met another transgender woman. As they walked together, NYPD officers jumped out of an unmarked police car and accosted them. The officers arrested both women on the spot without probable cause.

17. Section 240.37 is unconstitutional, and, as evidenced by the experience of these and the other Named Plaintiffs, including as set forth more fully below, Defendants' policies, widespread practices and/or customs in enforcing it have violated and continue to violate Plaintiffs' rights secured by the constitutions and laws of the United States and the State and City of New York.

18. Plaintiffs seek declaratory relief striking Section 240.37 as unconstitutionally vague and overbroad and declaring that the City's policies, widespread practices and customs in enforcing Section 240.37 in an arbitrary and discriminatory manner violate Plaintiffs' constitutional and statutory rights under federal, state and local law. Plaintiffs also seek injunctive relief prohibiting future enforcement of Section 240.37. In addition, Named Plaintiffs seek compensatory and punitive damages, an award of attorneys' fees and costs and such other relief as this Court deems equitable and just.

JURISDICTION

19. Jurisdiction is conferred upon this Court under 28 U.S.C. §§ 1331, 1343(a)(3) and 1343(a)(4), as this is a civil action arising under 42 U.S.C. § 1983 and the United States Constitution.

20. Plaintiffs' claims for declaratory and injunctive relief are authorized by 28 U.S.C. §§ 2201 and 2202.

21. This Court has jurisdiction over the supplemental claims arising under the laws of the State and City of New York pursuant to 28 U.S.C. § 1367(a), as they are so related to the claims within the original jurisdiction of this Court that they form part of the same case or controversy.

22. This case is brought to vindicate the public interest, and the resolution of this case will directly affect the rights of all New Yorkers, particularly women of color. Therefore, to the extent that the notice of claim requirement of N.Y. Gen. Mun. Law §§ 50-e and 50-i would otherwise apply to any of the claims stated below, no such notice is required because this case falls within the public interest exception to that requirement.

VENUE

23. Venue is proper in the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1391(b), because a substantial part of the events that gave rise to the claims alleged in this complaint occurred in the Counties of Bronx and New York. In addition, Defendants conduct business and maintain their principal place of business in the Counties of Bronx and New York. The NYPD maintains its headquarters at 1 Police Plaza, New York, NY 10007, where many of its policies are created.

PARTIES

I. PLAINTIFFS

24. The Plaintiff Class comprises women of color, some of whom are transgender, who have been or will be subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained pursuant to Section 240.37, including based on their race, color, ethnicity, gender, gender identity and/or appearance.

25. Named Plaintiff D.H. is a 26-year-old deaf African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.

26. Named Plaintiff N.H. is a 36-year-old African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.

27. Named Plaintiff K.H. is a 32-year-old African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.

28. Named Plaintiff Natasha Martin is a 38-year-old African-American woman who is transgender and at all relevant times was a resident of Brooklyn, New York.

29. Named Plaintiff Tiffaney Grissom is a 30-year-old African-American woman who is transgender and at all relevant times was a resident of Bronx, New York.

30. Named Plaintiff R.G. is a 59-year-old Latina woman and at all relevant times was a resident of Bronx, New York.

31. Named Plaintiff A.B. is a 44-year-old African-American woman and at all relevant times was a resident of Brooklyn, New York.

32. Named Plaintiff Sarah Marchando is a 28-year-old Latina woman and at all relevant times was a resident of Queens, New York.

II. DEFENDANTS

33. The City is a municipal entity created and authorized under the laws of the State of New York to maintain, operate and govern a police department, the NYPD, which acts as its agent in the area of law enforcement and for which the City is ultimately responsible. The City assumes the risks incidental to the maintenance of a police force and the employment of police officers. The law enforcement activities of the NYPD are supported, in part, by federal funds.

34. At all relevant times, all Individual Defendants were members of the NYPD, acting in the capacity of agents, servants and employees of the City, and within the scope of their employment as such. At all relevant times, Defendants JOSEPH MCKENNA, KEVIN MALONEY, DAVE SIEV, BRYAN POCALYKO, HENRY DAVERIN, KEITH BEDDOWS, MICHAEL DOYLE and Doe NYPD Officer #13, and potentially one or more of Defendants Doe NYPD Officers #1-12, were sergeants, lieutenants, captains and other high-ranking officials of the NYPD with training, supervisory and policy-making roles.

35. Defendants JOSEPH MCKENNA, KEVIN MALONEY and DAVE SIEV (collectively, the "Sweep Supervisor Defendants") participated in planning, ordering, staffing, supervising and/or approving[4] the sweeps described below which resulted in the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions of D.H., N.H, K.H. and/or Natasha Martin, and failed to monitor or reprimand officers involved in those sweeps. Defendants SEAN KINANE, KAYAN DAWKINS, THOMAS KEANE, MARIA IMBURGIA, JOEL ALLEN, DAVE SIEV and Doe NYPD Officers #1-7 (collectively, the "Sweep Officer Defendants") were involved in the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions of D.H., N.H, K.H. and/or Natasha Martin as part of a sanctioned sweep, as described in greater detail below. The Sweep Supervisor Defendants and Sweep Officer Defendants are sued in their individual, official and supervisory capacities.

36. Defendants BRYAN POCALYKO, HENRY DAVERIN, KEITH BEDDOWS, MICHAEL DOYLE and Doe NYPD Officer #13 (collectively, the "Non-Sweep Supervisor

[4] Per the 2015 edition of the NYPD Patrol Guide, to approve an arrest, the arrest paperwork and supporting deposition must be reviewed for completeness and accuracy by the desk officer. NYPD Patrol Guide, Arrests – General Processing, Desk Officer, PG 208-03, ¶¶ 26-34 (2015-A Ed.) [hereinafter NYPD Patrol Guide].

Defendants") participated in planning, ordering, staffing, supervising and/or approving the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions of Tiffaney Grissom, R.G, A.B. and Sarah Marchando, and failed to monitor or reprimand the officers involved. Defendants CHRISTOPHER SAVARESE, THOMAS DIGGS, JOEL GOMEZ, BRYAN POCALYKO, CHRISTIAN SALAZAR, JOSEPH NICOSIA, KELLY QUINN, MICHAEL DOYLE, ALEXIS YANEZ, and Doe NYPD Officers #8-13 (collectively, the "Non-Sweep Officer Defendants") were involved in the unlawful surveillance stops, questioning, frisks, searches, seizures and/or arrests and detentions of Tiffaney Grissom, R.G, A.B. and Sarah Marchando. The Non-Sweep Supervisor Defendants and Non-Sweep Officer Defendants are sued in their individual, official and supervisory capacities.

37. At all relevant times, Defendant Doe NYPD Officer #14 was an officer in the 52nd precinct. Defendant Doe NYPD Officer #14 was involved in the refusal to provide D.H. with a sign language interpreter in violation of her rights under the Americans with Disabilities Act, New York State Human Rights Law and New York City Human Rights Law.

38. At all relevant times, Individual Defendants were acting under color of state law, including under color of the statutes, ordinances, regulations, policies, customs and/or usages of the City and State of New York.

CLASS ACTION ALLEGATIONS

39. Named Plaintiffs bring this action on behalf of themselves and all others similarly situated pursuant to Federal Rule of Civil Procedure 23.

40. Named Plaintiffs are D.H., N.H., K.H., Natasha Martin, Tiffaney Grissom, R.G., A.B. and Sarah Marchando.

41. This action is properly maintainable as a class action because the requirements of Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure are satisfied, as shown below.

42. The class is so numerous that joinder of all members is impracticable. From 2012 through 2015, nearly 1,300 individuals were arrested in New York City under Section 240.37.[5] During those same years, nearly 400 of those arrests did not lead to convictions. In some cases, charges were never filed; in others, charges were dismissed; and in others, the accused was acquitted.

43. Joinder is also impracticable because many members of the Plaintiff Class are not aware that their constitutional and statutory rights have been violated and that they have the right to seek redress in court. Further, many Plaintiff Class members cannot be joined individually because they have been unlawfully surveilled, stopped, questioned, frisked, searched and/or seized by NYPD officers but ultimately were not arrested and detained, and are therefore unknown. There is no appropriate avenue for the protection of these Plaintiff Class members' constitutional and statutory rights other than by means of a class action.

44. The claims alleged on behalf of Named Plaintiffs as Plaintiff Class representatives raise questions of law or fact common to all Plaintiffs, and these questions predominate over individual questions. These common questions include, but are not limited to:

- Whether Section 240.37 is void for vagueness as a result of its failure to provide adequate notice to individuals of objective conduct that would subject them to arrest under the statute and/or guidance to officers;
- Whether Section 240.37 is unconstitutionally overbroad, impermissibly infringing Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 8, 11 and 12 of the New York Constitution;

[5] See N.Y. State Div. of Criminal Justice Servs., New York City Arrests by Precinct for Loitering for Prostitution: PL 240.37 (2012-2015) (unpublished spreadsheet) [hereinafter DCJS Arrest Statistics 2012-2015].

- Whether the City engages in arbitrary and discriminatory enforcement of Section 240.37 in violation of Plaintiffs' rights under the First, Fourth and Fourteenth Amendments to the United States Constitution, and Article I, §§ 8, 11 and 12 of the New York Constitution;

- Whether the City has violated Plaintiffs' rights to free speech by consciously choosing to enforce Section 240.37 based in large part on protected conduct, including conversations in public and/or Plaintiffs' expression of gender or gender identity;

- Whether the City has consciously chosen to enforce Section 240.37 in violation of Plaintiffs' right to be free from unreasonable searches and seizures by unlawfully surveilling, stopping, questioning, frisking, searching, seizing, and/or arresting and detaining Plaintiffs without reasonable suspicion or probable cause;

- Whether the City has consciously chosen to enforce Section 240.37 in a discriminatory manner based on the race, color, ethnicity, gender, gender identity and/or appearance of Plaintiffs in violation of the New York State Civil Rights Law, the New York State Human Rights Law (the "NYHRL"), the New York City Bias-Based Profiling Law and the New York City Human Rights Law (the "NYCHRL");

- Whether the City knew or should have known that, as a direct and proximate result of such policies, widespread practices and/or customs, the constitutional rights of Plaintiffs would be violated; and

- Whether the City acted with deliberate indifference to Plaintiffs' constitutional rights in failing to rectify such arbitrary and discriminatory enforcement policies, widespread practices and/or customs, including by failing to adequately train, monitor, supervise or discipline officers engaged in the enforcement of Section 240.37.

45. The claims of Named Plaintiffs are typical of the Plaintiff Class they seek to represent, as each Named Plaintiff alleges violations of her federal and state constitutional and statutory rights in connection with law enforcement actions undertaken by NYPD officers pursuant to Section 240.37.

46. The Named Plaintiffs are adequate Plaintiff Class representatives. The violations of law that Named Plaintiffs allege stem from the same course of conduct by Defendants that violated and continues to violate the rights of Plaintiff Class members, and the legal theories under which Named Plaintiffs seek relief are the same as or similar to those on which the

Plaintiff Class will rely. In addition, the harm suffered by Named Plaintiffs is typical of the harm suffered by absent Plaintiff Class members.

47. Named Plaintiffs have the requisite personal interest in the outcome of this action and will fairly and adequately protect the interests of other Plaintiff Class members. Counsel for Named Plaintiffs includes attorneys from The Legal Aid Society and the law firm Cleary Gottlieb Steen & Hamilton LLP who are experienced in federal class action litigation, including constitutional and civil rights litigation, and have the resources necessary to pursue this litigation. Counsel for Named Plaintiffs knows of no conflicts among Plaintiff Class members.

48. This action is properly maintainable as a class action under Rule 23(b)(1) of the Federal Rules of Civil Procedure because prosecuting separate actions by individual Plaintiff Class members would create a risk of adjudications with respect to individual Plaintiff Class members that (a) would be inconsistent or varying, and thus establish incompatible standards of conduct for the parties opposing the Plaintiff Class, and/or (b) as a practical matter, would be dispositive of the interests of non-parties or would substantially impair or impede non-parties' ability to protect their interests.

49. This action is properly maintainable as a class action under Rule 23(b)(2) of the Federal Rules of Civil Procedure because Defendants have acted and/or refused to act on grounds generally applicable to the Plaintiff Class, thereby rendering final declaratory relief and corresponding injunctive relief appropriate with respect to Named Plaintiffs and the Plaintiff Class as a whole. Plaintiffs are entitled to injunctive relief to end Defendants' policies, widespread practices and/or customs of surveiling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs for loitering for the purpose of prostitution under Section 240.37, including, and especially, based on impermissible and/or insufficient grounds.

FACTUAL ALLEGATIONS

I. SECTION 240.37 IS UNCONSTITUTIONALLY VAGUE AND OVERBROAD, WHICH LEADS TO ARRESTS FOR CONSTITUTIONALLY PROTECTED BEHAVIOR

A. Section 240.37 Is Void for Vagueness

50. Section 240.37 is unconstitutionally vague under the Due Process clause of the Fourteenth Amendment because it is a criminal statute that fails to give citizens notice of the specific conduct it prohibits. Furthermore, Section 240.37 fails to provide law enforcement with clear guidelines or standards to prevent arbitrary policing.

51. Section 240.37 fails to provide any objective criteria to determine what conduct is for the "purpose" of prostitution. Absent objective criteria, such determinations are based entirely on a police officer's subjective views, making it all but impossible for an individual to know when "beckon[ing] to" or "engag[ing] passersby in conversation," or other commonplace, innocent conduct enumerated in the statute, may be deemed for the "purpose" of prostitution, and to conform her behavior accordingly.

52. Section 240.37 also gives police officers unfettered discretion in determining whether conduct—otherwise innocent and/or constitutionally protected—is carried out for the "purpose" of prostitution. "Purpose," unlike "criminal intent," is not defined in New York's Penal Law, affording the NYPD immense discretion to assume an individual's "purpose" without ever having to prove a *mens rea* element. Thus, Plaintiffs are subjected to the whims of police officers who may determine that their conduct is for the "purpose" of prostitution for any of a substantial number of reasons not enumerated in the statute and unascertainable by Plaintiffs.

53. By allowing officers' subjective views to be determinative of whether a person's actions demonstrate a specific intent to engage in prostitution, Section 240.37 fails to provide

individuals with the notice required under the Due Process Clause to tailor their conduct to the confines of the law and avoid arrest.

54. Furthermore, the purported guidance provided in the NYPD Patrol Guide is equally vague and otherwise flawed, thereby increasing arbitrary enforcement. For instance, the NYPD Patrol Guide instructs officers that an arrestee's "clothing" is "pertinent" to the probable cause inquiry. At the same time, the NYPD Patrol Guide does not provide any objective criteria regarding what types of attire may or may not have probative value for purposes of establishing probable cause, thus encouraging officers to make arrests based on individual, subjective opinions regarding what clothing someone who might be "loitering for the purpose of prostitution" would wear. In pre-printed affidavits provided by prosecutors (also referred to as supporting depositions), which prompt the arresting officer to describe "revealing" or "provocative" clothing, officers often respond by citing a wide range of innocuous attire, such as "jeans," a "black pea coat" or a pair of leggings.

1. *Legislative History and Previous Legal Challenges to Section 240.37*

55. The broad discretion afforded to police officers in effecting arrests under Section 240.37 has given rise to substantial constitutional concerns and controversy since the law's adoption. Section 240.37 was enacted by the New York Legislature in 1976 as a means of eradicating what were then high rates of prostitution by making it easier for police to arrest potential prostitutes.[6]

56. At the time Section 240.37 was first proposed, numerous commentators, including politicians, bar and other legal associations and advocacy groups expressed grave concerns that

[6] Letter from N.Y.C. Office of the Mayor to Hon. Hugh L. Carey, supra note 2; Schumach, supra note 2; Goldstein, supra note 2.

the statute would be unconstitutional. See, e.g., Thomas Poster, Fears About Police Abuses Keep Prostie Bill on Hook, N.Y. Daily News, Mar. 18, 1976, at 41 (reporting that New York senators "have raised serious civil liberty questions" about a proposed draft of Section 240.37 and expressed concerns that the law "contains police powers that are too sweeping"); Schumach, supra note 2 (quoting executive director of NYCLU's concern that Section 240.37 would enable police to "set up a dragnet of the streets"); N.Y. Civil Liberties Union, 1976 Legislative Memorandum 20-A (arguing Section 240.37 is "far too vague and thus susceptible of arbitrary and selective enforcement"); N.Y. State Bar Legislation Report, supra note 3 ("By giving the police discretion to arrest anyone whom they think manifests such intent [to engage in prostitution] the bill attempts to make it a crime to be 'undesirable'. . . . It thus oversteps several constitutional bounds at once."); Letter from Harold Baer, Jr. to Hon. Judah Gribetz, supra note 3 (writing on behalf of the State Legislation Committee of the New York State Bar Association and the New York County Lawyers' Association that Section 240.37 is "unconstitutional" and would be "difficult to enforce"); see also Hechtman, Practice Commentaries, N.Y. Penal Law § 240.37 (McKinney Supp. 1978) ("Critics have argued that the proscribed conduct, such as beckoning to, stopping or engaging passersby in conversation, is a trap into which unwary innocent persons, particularly women, may fall."); Letter from Michael R. Juviler, New York Office of Court Administration, to Hon. Judah Gribetz, Counsel to the Governor (May 20, 1976) (expressing concern that the term "for the purpose of" in Section 240.37 is "not a defined culpable mental state").

57. Shortly after Section 240.37 was enacted, its constitutionality was challenged on the limited grounds that it "encourag[ed] police to use unfettered discretion in making arrests based solely on circumstantial evidence [and] require[ed] them to infer criminality from wholly

innocent or ambiguous activity in which free citizens must necessarily engage to lead normal lives." People v. Smith, 44 N.Y.2d 613, 619 (1978) (internal quotation marks omitted). While the New York Court of Appeals ultimately rejected that challenge, it made clear that it was not addressing a due process claim for lack of notice. Nor was it possible for the Court of Appeals to evaluate the subsequent four decades of evidence demonstrating arbitrary and discriminatory enforcement of the statute.

2. *Constitutional Developments Since Section 240.37 Was Last Challenged*

58. In the intervening four decades since Smith, several of New York's "loitering-plus" statutes,[7] even those purporting to "detail[ ] the prohibited conduct and limit[ ] [themselves] to one crime," id. at 620, have been declared unconstitutional. See, e.g., Davis v. City of New York, 902 F. Supp. 2d 405, 421-22 (S.D.N.Y. 2012) (striking down as unconstitutionally vague a public housing rule prohibiting loitering by residents in the lobby, roof, hallway or stairs because it "prohibits a vast swath of 'conduct that is inherently innocent,' it fails to give [public housing] residents notice of what precise conduct is prohibited, and it 'places complete discretion in the hands of the police to determine whom they will arrest'" (quoting People v. Bright, 71 N.Y.2d 376, 383 (1988))); Loper v. N.Y.C. Police Dep't, 802 F. Supp. 1029, 1048 (S.D.N.Y. 1992) (holding that a statute that prohibited loitering, remaining or wandering in public for the purpose of begging impermissibly chills a person's First Amendment rights); Bright, 71 N.Y.2d at 382 (striking down as unconstitutionally vague a statute prohibiting

[7] In 1972, the Supreme Court struck down as unconstitutionally vague a law prohibiting loitering, holding that the ordinance "makes criminal activities which by modern standards are normally innocent," such as "[n]ightwalking," "loafing," or "wandering or strolling from place to place." Papachristou v. Jacksonville, 405 U.S. 156, 162-64 (1972). Shortly thereafter, the New York State Legislature passed a series of "loitering-plus" laws, including Section 240.37, nicknamed as such because they included additional elements beyond simple loitering in order to avoid the constitutional deficiencies identified in Papachristou.

loitering "in any transportation facility, or . . . sleeping therein" for failure to provide notice or sufficient police enforcement guidelines).

59. Further, courts in six other states (Florida, Nevada, Alaska, Oklahoma, Missouri and Virginia) have held that statutes nearly identical to Section 240.37, proscribing loitering for the purpose of prostitution, are unconstitutionally vague and/or overbroad. For example, in striking Alaska's loitering-plus statute, the Supreme Court of Alaska wrote that, given the statute's "excessive discretion, inviting by its inexactitude arbitrary enforcement and uneven application," the court could "think of no construction which will save the statute from this infirmity." Brown v. Municipality of Anchorage, 584 P.2d 35, 38 (Alaska 1978). See also Silvar v. Eighth Jud. Dist. Ct. ex rel. Cty. of Clark, 129 P.3d 682, 684 (Nev. 2006); Wyche v. State, 619 So.2d 231, 234 (Fla. 1993); West Palm Beach v. Chatman, 112 So.3d 723, 725 (Fla. Dist. Ct. App. 2013); Coleman v. City of Richmond, 364 S.E.2d 239 (Va. Ct. App. 1988); Christian v. Kansas City, 710 S.W.2d 11 (Mo. Ct. App. 1986); Profit v. City of Tulsa, 617 P.2d 250 (Okla. Crim. App. 1980).

3. *New York Courts Have Been Unable to Remedy Violations of Plaintiffs' Constitutional Rights Attributable to Section 240.37's Infirmities*

60. When processing Section 240.37 arrests, officers and prosecutors rely on a pre-printed affidavit in which officers simply "check the boxes" that apply, indicating whether: the arrest location is known for prostitution; the defendant was on the street; the defendant was in close proximity to stores or restaurants (either open or closed); the defendant stopped motorists who were not livery, taxi or bus drivers; the defendant was standing somewhere other than a bus stop or taxi stand; the officer has previously seen the defendant in the same location engaged in the same conduct; and/or the officer has previously arrested the defendant for prostitution-related offenses.

61. The pre-printed affidavits filled out by arresting officers typically fail to articulate allegations sufficient to conclude that a female defendant was in fact loitering for the purpose of prostitution. None of the choices on the pre-printed affidavit from which an arresting officer can select reflects any criminal activity, much less activity that is indicative of prostitution. New York courts have expressed exasperation at the NYPD's "slavish reliance" on this "pre-printed, check-off-type supporting deposition to expedite the processing" of a Section 240.37 accusatory instrument, which often "render[s] the accusatory instrument a legal nullity." People v. Perry, Dkt. No. 2014CN003368, at *1 (N.Y. Crim. Ct. 2014) (quoting People v. McGinnis, 972 N.Y.S.2d 882 (N.Y. Crim. Ct. 2013)).[8]

62. Courts have also emphasized that the government's reliance on the fact that a defendant has previously been arrested for loitering for prostitution amounts to "emblazon[ing]" a "scarlet letter" on the defendant, thus violating core principles of a "free society."

63. Despite these decisions by courts expressing concern about the NYPD's arrests under Section 240.37, the NYPD has not reformed its policing practices with respect to Section 240.37, and the statute continues to give rise to improper and unconstitutional policing of women of color.

B. Section 240.37 Is Unconstitutionally Overbroad

64. The right to speak freely with others—whether the speaker be wealthy or poor, the listener a man or woman, and the conversation in a classroom or on a street corner—is a fundamental freedom in this country. So too is the freedom to express one's gender identity

[8] Additionally, check-box forms "[facilitate] post-hoc justifications for stops where none may have existed at the time of the stop . . . . '[T]he overwhelming belief of experts [is] that a narrative field in which the officers describe the circumstances for each stop would be the best way to gather information that will be used to analyze reasonable suspicion' and, relatedly, 'prevent[] racially biased policing.'" Floyd v. City of New York, 959 F. Supp. 2d 668, 681 (S.D.N.Y. 2013) (quoting Susan Hutson, Independent Police Monitor, Review of the New Orleans Police Department's Field Interview Policies, Practices and Data: Final Report 45 (Mar. 12, 2013)).

through her attire, without fear of police surveillance or arrest. Section 240.37 interferes with Plaintiffs' exercise of these fundamental freedoms through the statute's overbroad criminalization of constitutionally protected expression.

65. By its plain terms, Section 240.37 criminalizes protected expressive activity by prohibiting individuals from repeatedly "attempt[ing] to engage passers-by in conversation." While courts have interpreted the prohibitions on "conversation" to be limited to those conversations that are "for the purpose of prostitution," the vagueness of that phrase, see supra Section I.A., renders it meaningless and ineffective as a limiting construction. The lack of objective criteria as to what constitutes activity "for the purpose of prostitution" effectively sweeps *all* conversations that occur in a public place as falling within the ambit of the statute. Because an officer may determine that a conversation is "for the purpose of prostitution" for any one of countless reasons having nothing to do with the content of the conversation—such as the neighborhood in which it takes place or the speaker's attire or gender, among others—merely talking to others in public becomes an activity in which Plaintiffs no longer feel free to engage, fearing that doing so may put them at risk of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained.

66. A sampling of supporting depositions filled out by NYPD officers following arrests of Named Plaintiffs under Section 240.37 validates these concerns. As grounds justifying the arrests, many of the supporting depositions include allegations that the defendant engaged in conversation with male passersby—yet *none* lists any information regarding the content of those conversations. Plainly then, *any* conversation may be used to justify an arrest, making it all but certain that a substantial number of arrests involve conversations wholly unrelated to prostitution. Moreover, the simple fact that Plaintiffs *can* be arrested under Section 240.37 for

conversations unrelated to prostitution based on other attendant circumstances, including those over which Plaintiffs have no control (such as the neighborhood or time of day), serves to chill protected expressive activity by Plaintiffs.

67. The expression of Plaintiffs' gender identity through their choice of dress and hair style is similarly chilled by Section 240.37. Plaintiffs have a liberty interest in their personal appearance, including in deciding what clothes to wear and how to style their hair, nails and other physical attributes. Yet, Plaintiffs' clothing choices, and officers' subjective interpretation of those choices, have been and continue to be the basis for arrests under Section 240.37. Transgender Plaintiffs in particular have a constitutionally protected interest in communicating their gender identity to the public, including through grooming and clothing decisions that send a message to the world that they are female regardless of the sex they were assigned at birth. By choosing to dress and present themselves in a manner that expresses their gender identity as women, transgender Plaintiffs are engaging in expressive conduct protected by the First Amendment. The NYPD's decision to enforce Section 240.37 by arresting transgender Plaintiffs on the basis of these choices impermissibly infringes on and chills transgender Plaintiffs' protected First Amendment conduct. As the New York Times succinctly put it: "If you are a 35-year-old biological woman wearing the $715 metallic platform peep-toe pumps you just bought at Barneys to lunch at Café Boulud, you are well-dressed; if you were born Joaquin, have changed your name to Marisol and put yourself together with a similar verve, you are a prostitute."[9]

[9] Ginia Bellafante, Arrests by the Fashion Police, N.Y. Times (Apr. 5, 2013), http://www.nytimes.com/2013/04/07/nyregion/arrests-by-the-fashion-police.html.

68. Further, Section 240.37 is overbroad for the additional reason that any legitimate application of the statute is merely duplicative of preexisting criminal prohibitions. New York separately prohibits prostitution and, under various provisions of New York Penal Law, officers may arrest individuals for solicitation of prostitution (P.L. § 230.00) and for attempted prostitution (P.L. § 110.00). Rather than addressing independent, additional criminal activity, Section 240.37 serves only to chill constitutionally protected expressive conduct.

II. THE CITY HAS POLICIES, WIDESPREAD PRACTICES, AND/OR CUSTOMS OF DISCRIMINATORY AND ARBITRARY ENFORCEMENT OF SECTION 240.37

69. The City consciously chooses to enforce Section 240.37 and to do so in an unconstitutional manner by using it to police expressions of gender identity and sexuality based on outdated and paternalistic notions of what clothing NYPD officers deem "revealing" or "provocative," with a disproportionate impact on women of color. The City's unconstitutional enforcement of Section 240.37 in this manner takes many forms. For example, the City uses unconstitutional sweeps to enforce Section 240.37; unlawfully surveils, stops, questions, frisks, searches, seizes and/or arrests and detains Plaintiffs for constitutionally protected conduct; routinely engages in unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs without reasonable suspicion or probable cause and discriminates against protected classes in its enforcement of Section 240.37.

70. Furthermore, the City has failed to curtail policies, widespread practices and/or customs that contribute to the constitutional violations, such as maintaining performance goals and arrest quotas for officers and sanctioning arrest sweeps in minority neighborhoods. It has also failed to take corrective action in the hiring, retention or supervision of its officers despite notice of their routine violations of individuals' constitutional rights. The City has also failed to

adequately train, audit, monitor, supervise and discipline police officers engaged in law enforcement actions pursuant to Section 240.37 to prevent constitutional violations and discriminatory enforcement.

A. The City Engages in Discriminatory Enforcement Practices Against Transgender Women of Color, Including by Using "Sweeps," Performance Goals and Arrest Quotas to Unlawfully Target Transgender Women of Color for Arrest Under Section 240.37

71. Transgender individuals experience high levels of discrimination in places of public accommodation. Studies show that over half of transgender individuals nationwide report being verbally harassed and disrespected in public, with 22% of African-American respondents reporting having been a victim of physical assault.[10] Transgender women of color are often unlawfully subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained pursuant to Section 240.37 under circumstances in which men, white women and cis-gender women are not subjected to such law enforcement actions.

72. As a result of this ongoing discrimination, many transgender individuals live, work and/or socialize near one another. The communities they create are safe spaces in which they can socialize with minimal harassment and discrimination. One such community exists in the catchment of the 52nd precinct in the Bronx, in the neighborhood surrounding the intersection of 192nd Street and Davidson Avenue, which borders Monroe College. The NYPD is aware that this area is inhabited and/or frequented by many transgender individuals.

73. The City has a policy, widespread practice and/or custom whereby its officers conduct "sweeps" in which a particular precinct deploys a group of officers to a particular

[10] Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 5, 124 (2011).

location to arrest as many women as possible—in particular, women of color and transgender women—for Section 240.37 offenses.

74. Two such sweeps were conducted in the 52nd precinct on June 6-7 and 13-14, 2015. In a span of just over two hours on June 6, 2015, Defendants Keane, Dawkins, Kinane and Doe NYPD Officers #1-3 arrested at least eight transgender women, including D.H. and N.H. Defendant McKenna approved the arrests of D.H. and N.H. At the precinct, one of the arresting officers told the women that they had been conducting a sweep to let "girls like them" and their friends know that if the police saw them outside after midnight, they would arrest them.

75. One week later, in the same location, on the night of June 13, 2015, Defendants Imburgia, Doe NYPD Officer #4, Doe NYPD Officer #5 and non-party Officer Monge arrested at least six transgender women in a span of 25 minutes, including Plaintiff K.H. At least seven similar sweeps—and potentially many more—have been conducted by NYPD officers in the past three years in Brooklyn, the Bronx and Queens as a result of the City's policies, widespread practices and/or customs.

76. The City further has a policy, widespread practice and/or custom of enforcing performance goals and arrest quotas that cause officers to arrest Plaintiffs under Section 240.37 without probable cause.

77. The use of performance goals and quotas pushes officers to aggressively, and often unlawfully, undertake law enforcement activity in order to be considered for promotions and other career incentives. Indeed, the City imposes requirements that officers issue, make or fill out a certain number of summons, arrests and stop forms within specified time periods.[11]

[11] See Floyd, 959 F. Supp. 2d at 599-600.

78. These policies lead to disproportionate enforcement of Section 240.37 against marginalized groups such as Plaintiffs. As described by a former NYPD officer, these policies impact "the most vulnerable . . . [members of the] LGBT community, . . . the black community, . . . those people that have no vote, that have no power."[12] As another officer explained, "when you put pressure on cops to come up with numbers . . . it's the black, it's the Hispanic, it's the LGBT community. We go for the most vulnerable."[13]

79. Officers are warned that failure to comply with numerical activity standards will result in adverse employment actions.[14]

80. Once arrested, transgender women of color endure further discriminatory and unlawful treatment at the hands of the NYPD, including verbal abuse by officers and other detainees. Moreover, once these women have been arrested under Section 240.37, they are subject to a higher risk of re-arrest, as shown below.

81. Plaintiffs have repeatedly been victims of this practice. They experience heightened police surveillance and activity, false arrests and discrimination. Many transgender Plaintiffs fear leaving their homes, particularly at night, due to the City's policy, widespread practice and/or custom of targeting them for arrest under Section 240.37.

[12] Sarah Wallace, I-Team: NYPD Lieutenant Latest Cop to Say Department Enforces Quota, NBC News (Apr. 1, 2016), second video at 2:16-2:24, http://www.nbcnewyork.com/investigations/NYPD-Lieutenant-Says-There-Are-Quotas-I-Team-Wallace-374307721.html. See also Am. Compl., Raymond v. City of New York, No. 15-CV-6885(LTS) (S.D.N.Y. filed Aug. 31, 2015), ECF No. 31.

[13] Alison Fox, Edwin Raymond, NYPD officer: Department quotas dangerous, AM N.Y. (Mar. 1, 2016), http://www.amny.com/news/edwin-raymond-nypd-officer-department-quotas-dangerous-1.11527625.

[14] Floyd, 959 F. Supp. 2d at 599-600.

B. The City Has a Policy, Widespread Practice and/or Custom of Unlawfully Arresting Plaintiffs Under Section 240.37 Without Probable Cause

82. In addition to targeting transgender Plaintiffs for arrest under Section 240.37 without probable cause in sweeps, the City has a policy, widespread practice and/or custom whereby its officers unlawfully arrest Plaintiffs without probable cause by, inter alia, (1) arresting individuals based on a prior arrest under Section 240.37 and P.L. § 230.00 (prostitution), regardless of the outcome of the prior charge; (2) arresting individuals for being present in areas the police arbitrarily designate as "prostitution-prone"; and (3) arresting Plaintiffs after observing them for short periods of time and while Plaintiffs are engaged in innocent conduct.

83. The NYPD Patrol Guide instructs officers effecting arrests under Section 240.37 to "[i]nform [the] assistant district attorney of actions or any additional pertinent information," including whether the defendant is a "known prostitute" or "[c]onsorts with known prostitutes or pimps."[15] By including an arrestee's status as a "known prostitute" among the categories of "pertinent information" showing an intent to engage in prostitution, the NYPD has unlawfully created a policy, widespread practice and/or custom of arresting individuals for loitering for the purpose of prostitution merely because they have previously been arrested for the same offense or another prostitution-related offense, *even if charges were ultimately dismissed.* As a result of this perverse practice, Plaintiffs who have been wrongfully arrested under Section 240.37 in the past are more vulnerable to additional unlawful arrests in the future, despite the fact that "all official records and papers . . . relating to the arrest" in connection with a dismissed charge are to

[15] NYPD Patrol Guide, supra note 4, at PG 208-45, ¶ 3.

be "sealed and not made available to any person or public or private agency" under Criminal Procedure Law § 160.50.

84. NYPD officers recognize Plaintiffs whom they have previously arrested for prostitution-related charges and arrest those women again without probable cause based merely on the prior arrest, in violation of Plaintiffs' right to be free of unreasonable seizures.

85. Additionally, NYPD officers typically approach women, and in particular women of color, including transgender women, while they are lawfully present in public and request their identification. The officers then use the NYPD database to determine if a woman has previously been arrested for a prostitution-related offense. If she has, the officer will arrest the woman based on the arrest history alone, without any facts suggesting that she was loitering with the intent to engage in prostitution. This self-perpetuating cycle unlawfully prejudices any woman who has ever been arrested, even if the charges underlying her original arrest were dismissed.

86. NYPD officers also make unlawful arrests under Section 240.37 based on Plaintiffs' appearance. For example, when filling out pre-printed affidavits after arrests, officers frequently check the box that the arrestee was "dressed in provocative or revealing clothing . . . ." But often, officers' reliance on a woman's clothing for probable cause is entirely pretextual. NYPD officers cite countless types of clothing in their supporting depositions to justify arrests, many of which are far from "provocative" or "revealing." For instance, descriptions of such "provocative" or "revealing" clothing have included jeans, a black pea coat, a white jacket and a blue and white jump suit.

87. Moreover, in today's cultural and legal landscape, which has changed significantly from that in which the New York Court of Appeals decided Smith, and in which

people freely and frequently express their identity through clothing and appearance, so-called "revealing" clothing has little, if any, probative value. The NYPD's enforcement practices with respect to Section 240.37 highlight this fact: even if an arrestee's clothing actually were "revealing," this type of "dress code" is not policed against men or white women. Only women of color are systematically arrested for wearing clothing that emphasizes their femininity, making clear that "revealing" clothing is used simply as a pretextual justification for arrests without probable cause based on race, color, ethnicity, gender, gender identity and/or appearance. See infra Section II.C.

88. NYPD officers similarly make unlawful arrests under Section 240.37 on the basis of arbitrary designations that an area is "prostitution-prone," even though that designation is based on the NYPD's own dedication of resources to make high numbers of arrests in that area, not how much crime or prostitution actually occurs in that area as compared to another.

89. As a result, the areas where police have previously made prostitution arrests become the same areas that police then characterize as "prostitution-prone" to justify future arrests.

90. Finally, NYPD officers frequently make arrests after observing Plaintiffs engage in lawful conduct for very brief periods of time. For example, Defendant Keane observed N.H. for only five minutes before arresting her. During such brief observation periods, officers cannot establish probable cause to conclude that an individual is loitering, much less to determine whether that individual's conduct is "for the purpose" of engaging in prostitution.

C. The City Has a Policy, Widespread Practice and/or Custom of Discriminating Against Women of Color

91. The City has a policy, widespread practice and/or custom whereby women of color are arrested under Section 240.37 at a much higher rate than men or white women.[16] Women of color are commonly unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 under circumstances in which men and white women are not subjected to such law enforcement activity, such as for merely engaging in conversation with individuals of the opposite gender. Moreover, the unconstitutional policing practices described above occur almost exclusively in low income communities of color.

92. Defendants utilize Section 240.37 to unlawfully effect arrests based on gender. While Section 240.37 is gender- and race-neutral on its face, the discriminatory manner in which it is enforced leads to a significantly disproportionate impact on women of color. Even more telling, women of color are commonly arrested under Section 240.37 based on allegations that they were repeatedly beckoning to, stopping or attempting to stop or engaging in conversation with male passersby. Men engaged in similar behavior are not arrested under the statute. Men commonly attempt to speak to women passing by, attempt to engage those women in conversation and even make comments related to sexual conduct. However, NYPD officers discriminate based on gender by concluding that women engaged in such conduct are seeking to offer sex in exchange for money, and therefore are subject to arrest, while men doing so are merely paying a compliment.

93. Women's liberty interest in making choices about their personal appearance is also disproportionately impacted by the NYPD's enforcement of Section 240.37 as compared to

[16] NYPD identified 85% of the arrestees under Section 240.37 as Black or Latina. DCJS Arrest Statistics 2012-2015, supra note 5.

that of men. While the NYPD commonly arrests women under Section 240.37 for wearing clothing that highlights their femininity, no arrests are made of men for wearing clothing that highlights their masculinity, or based on any aspects of their personal appearance at all.

94. Women of color are disproportionately subject to arrests based on so-called "revealing" clothing as compared to white women who are similarly attired. Indeed, disproportionately arresting women of color for wearing "revealing" clothing is merely one of a number of discriminatory practices by the NYPD, along with labeling heavily minority neighborhoods as "prostitution-prone," that causes Section 240.37 to be used to unlawfully effect arrests based on race.

95. The NYPD's disproportionate targeting of people of color was thoroughly documented in the court's findings in Floyd v. City of New York.[17] In Floyd, the court made numerous findings demonstrating the NYPD's practice of discriminating on the basis of race when implementing its stop-and-frisk policy. First, the court found that the NYPD carried out more stops in areas with a higher percentage of African-American and Hispanic residents.[18] Second, even controlling for the racial composition of the area, African-Americans and Hispanics were more likely to be stopped than whites.[19] Third, African-Americans were more likely to be arrested after a stop for the same suspected crime.[20] Fourth, African-Americans and Hispanics were more likely than whites to be subjected to the use of force.[21]

[17] Floyd, 959 F. Supp. 2d 540.

[18] Id. at 589.

[19] Id.

[20] Id.

[21] Id.

96. In addition to these findings, the court in Floyd also found that the most common reason given for a stop was that it was in a "high crime area."[22] The court recognized that this was a weak indicator of criminal activity, noting that stops were *more* likely to result in arrest where "high crime area" was *not* given as a reason for the stop.[23] As shown above, the City employs substantially the same tactic in designating areas as "prostitution-prone." This practice contributes to the discriminatory enforcement of Section 240.37 in communities of color which have traditionally experienced higher concentrations of law enforcement than other communities.

97. Further illustrating this point, Section 240.37 arrests in New York City are clustered in several particular neighborhoods whose residents are largely people of color. For example, the five NYPD precincts with the most Section 240.37 arrests between 2012 and 2015, accounting for 68.5% of all Section 240.37 arrests during that period, are Bushwick, Brooklyn; Belmont/Fordham Heights, Bronx; East New York, Brooklyn; Hunts Point, Bronx; and Brownsville, Brooklyn, neighborhoods where residents are predominantly people of color.[24]

98. The result of this unlawful enforcement of Section 240.37 is that women of color are subject to arrest for innocent conduct in a manner and with a frequency that others not belonging to this group are not. Specifically, men engaging in the same conduct are much less likely to face unlawful arrest and prosecution under Section 240.37, as are white women. This unequal and discriminatory enforcement violates Plaintiffs' right to equal protection of the laws under the Fourteenth Amendment.

[22] Id. at 574-75.

[23] Id. at 575.

[24] The 41st, 52nd, 73rd, 75th, and 83rd precincts largely encompass the above-mentioned neighborhoods. DCJS Arrest Statistics 2012-2015, supra note 5. Cf. Sharing NYC Police Precinct Data, johnkeefe.net (Apr. 29, 2011), http://johnkeefe.net/nyc-police-precinct-and-census-data.

D. The City Knew or Should Have Known of the Need for Corrective Action to Prevent Constitutional Violations of Plaintiffs' Rights to Free Speech, Equal Protection of the Laws and Freedom from Unreasonable Seizures and False Arrests, and Failed to Take Corrective Action to Prevent Such Violations, Including by Failing to Adequately Train, Monitor, Supervise or Discipline Responsible Officers

99. The City has a policy, widespread practice and/or custom whereby it provides guidance that lacks any objective basis for determining whether conduct is "for the purpose" of prostitution. It affords officers extraordinary discretion in making such determinations that unconstitutionally infringe on Plaintiffs' First, Fourth and Fourteenth Amendment rights without sufficient training, guidelines, monitoring, supervision and accountability to ensure that officers do not abuse their discretion. Further, it is obvious that the failure to take such action will result in such violations of Plaintiffs' rights, especially in light of the "performance goal" and quota policies encouraging aggressive law enforcement activities.

100. As to certain Individual Defendants, prior to the unlawful conduct alleged in the present action, the City had notice that many of these Individual Defendants had engaged in misconduct while carrying out surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of various individuals. For example, Defendants Imburgia, Diggs, Gomez, Nicosia and Yanez, allegedly abused their discretion while carrying out surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of other individuals, prior to the unlawful surveillance, stops, questioning, frisks, searches, seizures, and/or arrests and detention of Named Plaintiffs K.H., R.G. and Sarah Marchando in the present action.[25]

[25]For example, Defendant Imburgia is a named defendant in Cruz v. City of New York, No. 0302146-2015, 2015 WL 3383188 (Sup. Ct. Bronx Cty. May 13, 2015) (false arrest and assault); Defendants Diggs and Gomez are named defendants in Annunziata v. City of New York, No.13-cv-05610-RMB-GWG, at 16-32 (S.D.N.Y. Aug. 12, 2013) (unlawful stop, search, harassment and assault) and a class action, Quinonez v. City of New York, No. 16-cv-04275-KBF (S.D.N.Y. June 8, 2016) (false arrest and imprisonment, malicious prosecution, fabrication of evidence, conspiracy to violate civil rights and failure to intercede); Defendant Diggs is additionally a named defendant in Paniagua v. City of New York , No. 0309159-2011, 2011 WL 5186247 (Sup. Ct. Bronx Cty. 2011) (Trial Pleading)

101. Additionally, the City was aware through multiple lawsuits filed against it that NYPD officers falsely arrested and maliciously prosecuted multiple persons for loitering for the purpose of prostitution with less than probable cause.[26]

102. The City nonetheless failed to adequately train, monitor and supervise NYPD officers making arrests under Section 240.37 or to discipline officers enforcing Section 240.37 in an arbitrary and/or discriminatory manner in violation of Plaintiffs' rights. Instead, the City allowed, and continues to allow, officers to abuse their discretion, resulting in the unlawful and discriminatory targeting of Plaintiffs for law enforcement action on the basis of Plaintiffs' speech or other protected conduct or Plaintiffs' race, color, ethnicity, gender, gender identity and/or appearance, and unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs without reasonable suspicion or probable cause under Section 240.37 in violation of Plaintiffs' rights.

103. For instance, Defendant Imburgia's paperwork regarding the arrests she made in connection with the sweeps conducted by the 52nd precinct on June 13-14, 2015 places her at

(false arrest, settled in exchange for the payment of $40,000); Defendant Gomez is additionally a named defendant in Haynes v. City of New York , No. 11-CV-4347 (DLC) (S.D.N.Y. June 27, 2011) (false arrest, settled in exchange for the payment of $7,500) and Rodriguez v. City of New York, No. 0302229-2013, 2013 WL 1655517 (Sup. Ct. Bronx, Cty. 2013) (false arrest), and a criminal court judge also granted suppression when Defendant Gomez unlawfully stopped and seized the accused in People v. Pinckney, 32 Misc. 3d 1240(A) (Sup. Ct. Bronx Cty. 2011) (crediting Defendant Gomez's testimony only on cross-examination); Defendant Nicosia is a named defendant in Chavez v. City of New York, No.15-cv-01232-SJ-VMS (S.D.N.Y. Mar. 10, 2015) (unlawful force, search and false arrest), Lebron v. City of New York, 15CV 05008(MKB)(PK) (S.D.N.Y. Feb. 26, 2016) (unlawful seizure and false arrest), and Anderson v. City of New York, 16-cv-00150-ERK-LB (unlawful seizure and entry); and Defendant Yanez is also a named defendant in Anderson.

[26] See Jones v. City of New York, No.11-cv-05735-PGG (S.D.N.Y. Feb. 3, 2012) (transgender woman falsely arrested under Section 240.37 on November 4, 2010 by 52nd precinct officers after leaving a restaurant); Gonzalez v. City of New York, 08-CV 2699 (JBW)(CLP) (E.D.N.Y. Dec. 4, 2008) (woman falsely arrested under Section 240.37 on November 18, 2007 by 72nd precinct while walkiug to the hospital by officers who falsely stated plaintiff had previous loitering arrest); Gonney v. City of New York, No. 11-cv-00298-RRM-MDG (E.D.N.Y. Jan. 20, 2011) (woman falsely arrested under Section 240.37 on August 29, 2010 while walking in the vicinity of her home in the 73rd precinct).

different locations at the same time. By her own accounts, Defendant Imburgia was arresting an individual at one location at a certain time while simultaneously observing K.H. in a wholly separate location. Nonetheless, Defendant Maloney approved K.H.'s arrest. Similarly, non-party Officer Monge's sworn statement in one case from the same sweep indicates he observed an individual he believed to be loitering from 2:40 a.m. through 3:10 a.m., while arrest paperwork from another case shows that during that same time period, he effectuated the arrests of two other women. With appropriate monitoring and supervision, such abuses could be identified and discouraged by means of appropriate discipline for the officers responsible.

104. The City is also aware—because, among other reasons, it maintains law enforcement activity statistics and records—that transgender women of color are targeted for arrest under Section 240.37 and are systematically discriminated against and mistreated by NYPD officers.

105. Indeed, the City amended the NYPD Patrol Guide in June 2012 "follow[ing] years of complaints about police mistreatment [of transgender women]."[27] However, these amendments have proven insufficient and, in the years since, widespread police abuse and mistreatment of transgender women has continued largely unabated. Plaintiffs have suffered, and continue to suffer, from the deprivation of rights that flows from being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37.

106. Despite its own knowledge of unlawful law enforcement actions under, and discriminatory enforcement of, Section 240.37, the City has failed to take sufficient corrective action to rectify these violations of Plaintiffs' rights, including by: failing to sufficiently train

[27] Noah Remnick, Activists Say Police Abuse of Transgender People Persists Despite Reforms, N.Y. Times (Sep. 6, 2015), http://www.nytimes.com/2015/09/07/nyregion/activists-say-police-abuse-of-transgender-people-persists-despite-reforms.htm.

officers in enforcing Section 240.37 in a non-discriminatory manner and in making arrests under Section 240.37 only where there is probable cause; failing to monitor, supervise and, when appropriate, take disciplinary and/or remedial action against officers who make arrests under Section 240.37 without probable cause on the basis of past arrests or after insufficient periods of observation, or who disproportionately arrest women of color, including transgender women of color engaging in protected First Amendment activity under Section 240.37 or otherwise violate Plaintiffs' rights to free speech, free association or equal protection of the laws; failing to audit arrests under Section 240.37 to determine whether they are made in violation of Plaintiffs' rights to free speech, free association, equal protection of the laws or freedom from unreasonable searches and seizures; and failing to adequately monitor officers who are the subject of multiple civilian complaints.

107. The City's deliberate indifference in failing to take such corrective action was and continues to be a direct and proximate cause of past and ongoing violations of Plaintiffs' rights to free speech, free association and equal protection of the laws, and freedom from unreasonable searches and seizures.

III. NAMED PLAINTIFFS HAVE BEEN TARGETED FOR UNLAWFUL SURVEILLANCE, STOPS, QUESTIONING, FRISKS, SEARCHES, SEIZURES, AND/OR ARREST AND DETENTION UNDER SECTION 240.37

A. Named Plaintiffs Arrested During Sweeps Targeting Transgender Women of Color

1. Named Plaintiff D.H.

108. D.H. is a 26-year-old African-American woman who currently resides in the Bronx. D.H. is deaf and communicates through sign language, writing or texting on her phone.

109. D.H. is a transgender woman. D.H. communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

110. In the early morning on June 6, 2015, D.H. was walking near the corner of Fordham Road and Jerome Avenue and trying to hail a cab to get home. At the time, she was living with her sister in the neighborhood. She was walking with her phone in her hand when she saw an unmarked police car pull up next to her.

111. At no time on June 6, 2015 did D.H. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

112. Defendants Kinane, Doe NYPD Officer #1 and Doe NYPD Officer #2 exited the vehicle and approached D.H. She pointed to her ear to indicate that she was deaf and tried to also tell the officers by typing in her phone that she was deaf. Without reading what D.H. had typed on her phone, the officers grabbed her bag and began searching its contents. D.H. could not understand what the officers were saying to her and did not consent to the search.

113. As they took her bag, the officers also took D.H.'s phone and cuffed her hands behind her back. In so doing, the officers made it impossible for D.H. to communicate with them. She did not understand why she was being arrested. D.H.'s arresting officers did not appear to care that D.H. was unable to communicate, and laughed at her.

114. D.H. was placed in the unmarked police car and driven a few blocks to a police van. There were three other transgender women in the van who had already been arrested. D.H. had seen the women in the community and recognized them as transgender women.

115. During this ordeal, D.H. began to experience very sharp pain in her shoulder due to the manner in which her hands were cuffed behind her back. D.H. was screaming in pain, but without any means of communication, she was unable to articulate what was wrong. The officers ignored her screams.

116. D.H. and the three other transgender women were taken to the 52nd precinct, where D.H. spent the remainder of the night in a holding cell with the other women. D.H. attempted to get the attention of numerous officers to obtain a sign language interpreter, but was repeatedly ignored. At one point, Defendant Doe NYPD Officer #14 gave D.H. a pen and paper and she wrote that she needed a sign language interpreter. Despite receiving D.H.'s request for an interpreter in writing, Defendant Doe NYPD Officer #14 and the other officers in the 52nd precinct failed to provide a sign language interpreter to communicate with D.H. as they processed her arrest.

117. In the morning, D.H. was transferred to central booking to await arraignment. D.H. was finally provided with a sign language interpreter and only then did she learn the reason for her arrest and the nature of the charges against her. She was arraigned in the evening on June 6, 2015, and then released.

118. D.H. was devastated by her arrest. After her arrest, she worried about being unlawfully arrested again so she stopped going out at night. D.H. moved out of her neighborhood in July 2015. Since she moved, D.H. has started going out again, but she avoids returning to the area of her arrest, which means she is rarely able to visit her sister or friends.

119. After her arrest, D.H. feels that she can no longer contact the police if she is in need of help because she will be unable to communicate with them and because she fears that they will be hostile toward her. D.H. was shocked by the acts of Defendants Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, Doe NYPD Officer #14 and McKenna, and felt violated by their actions.

120. D.H. continued to experience pain in her shoulder for weeks after her arrest.

121. In the supporting deposition accompanying the criminal court complaint charging D.H. with violating Section 240.37, Defendant Kinane falsely alleged that on June 6, 2015, he observed D.H. for 15 minutes "during which time [D.H.] beckoned to passing traffic and stopped or attempted to stop 2 male passersby and 1 male motorist" from "the middle of the street." He also alleged that D.H.'s purpose was prostitution based on her presence at a location "frequented by people engaged in prostitution" and because she was wearing a "short skirt."

122. Defendant McKenna failed to properly review, monitor and supervise Defendant Kinane's, Defendant Doe NYPD Officer #1's and Defendant Doe NYPD Officer #2's unlawful stop, questioning, search and seizure of D.H., and approved D.H.'s arrest.

123. After her initial court appearance, D.H. was forced to return to court three additional times, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against D.H. were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on October 29, 2015. The charges were dismissed and sealed on April 28, 2016.

124. By the actions described above, Defendants Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and McKenna targeted and/or sanctioned the targeting of D.H. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

125. The actions of Defendants Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2, Doe NYPD Officer #14 and McKenna deprived D.H. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

2. **Named Plaintiff N.H.**

126. N.H. is a 36-year-old African-American woman who currently resides in the Bronx.

127. N.H. is a transgender woman. N.H. communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

128. In the early morning of June 6, 2015, N.H. went to a store on Davidson Avenue near her apartment. After purchasing food and cigarettes, N.H. began to walk home. She had walked only a few blocks when Defendants Dawkins, Keane and Doe NYPD Officer #3 pulled up in a marked police patrol car, jumped out and approached her. They ordered N.H. to put her hands behind her back and then handcuffed her.

129. At no time on June 6, 2015 did N.H. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

130. When N.H. asked why she was being arrested, the officers refused to explain and simply said, "you know." Defendants Dawkins, Keane, and Doe NYPD Officer #3 placed her in the patrol car and drove around with her for over one hour, and then arrested a Latina woman who was also transgender and put her in the car with N.H. N.H. learned from this woman that she had been arrested for loitering for the purpose of prostitution.

131. At the 52nd precinct, Defendant Dawkins cut off the hood of N.H.'s sweatshirt and attempted to cut the laces out of her boots, permanently destroying both items of clothing and forcing her to remain in socks the entire time she was detained at the precinct. Defendant Dawkins also forcefully pulled N.H.'s earrings out of her ears and attempted to remove N.H.'s wig. Because the wig was attached to N.H.'s own hair, Defendant Dawkins pulled N.H.'s hair, causing her severe pain.

132. Throughout the booking process, Defendant Dawkins and other non-party officers referred to N.H. as a man. N.H. directed the officers to her identification, which identifies her as

female, but the officers, including Defendant Dawkins, persisted in referring to her as a boy or man.

133. N.H. was kept in handcuffs throughout the booking process—a period of approximately one hour—until she was placed in a holding cell with approximately ten other transgender women who had also been arrested for loitering for the purpose of prostitution. The officers continued to refer to N.H. and the other transgender women in the cell as "boys" and "men."

134. One of N.H.'s arresting officers told the women that the police had been conducting a sweep and that if they saw "girls like them" outside after midnight, they would arrest them. When N.H. stated that she lives in the area, the officer told her that she should not go out on Jerome Avenue.

135. At the time of her arrest, N.H. had approximately $60 in her purse. Although the NYPD Patrol Guide requires arresting officers to return to arrestees all currency less than $100, N.H.'s arresting officers did not return these funds to her. Instead, she was forced to go through the arrest process without any money in violation of the arrest procedures established in the NYPD Patrol Guide.

136. N.H. was taken into custody at 2:15 a.m. on June 6, 2015. She was detained for approximately 40 hours before she was arraigned on the evening of June 7. The court set bail at $50, which N.H. would have been able to post immediately had her arresting officers not denied her the return of her funds. As a result, she was forced to spend over 24 hours in detention at the Vernon C. Bain Correctional Center, a New York City Department of Correction facility for adult men. She was finally released in the early morning of June 9, 2015, three days after her arrest.

137. Upon her release, N.H. went to the 52nd precinct to retrieve her personal property, including the keys to her apartment. At the precinct, she was told that the officer responsible for the property was not present and that she would need to return in the morning. Locked out of her own home, N.H. was forced to find another place to sleep that night. The next day, after returning to the precinct without her property, she learned that her keys had been there the whole time. Her jewelry and other personal possessions were never returned.

138. In the supporting deposition accompanying the criminal court complaint charging N.H. with violating Section 240.37, Defendant Keane falsely alleged that, on June 6, 2015, he observed N.H. for five minutes, "during which time [N.H.] beckoned to passing traffic and stopped or attempted to stop 3 male passersby." He further alleged that N.H.'s purpose was prostitution because she was observed previously at a location "frequented by people engaged in prostitution" and was wearing a "blonde wig, tight pants and shirt." Defendant Keane also alleged that he knew that "other officers have previously arrested [N.H.] for prostitution-related offense(s)."

139. Defendant McKenna failed to properly review, monitor and supervise Defendant Keane's, Defendant Dawkins's and Defendant Doe NYPD Officer #3's unlawful stop and seizure of N.H., and approved N.H.'s arrest.

140. After her initial court appearance, N.H. was forced to return to court four additional times over nearly five months, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against N.H. were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on October 29, 2015. The charges were dismissed and sealed on April 28, 2016.

141. Since her arrest, N.H. has tried to avoid going out late at night because the officers told her explicitly that she would be arrested if she did so. She usually reserves for daylight hours even simple errands, such as going to a store, in order to reduce the risk that she will be improperly arrested. As such, the acts of Defendants Dawkins, Keane, Doe NYPD Officer #3 and McKenna intimidated and threatened N.H.

142. By the actions described above, Defendants Dawkins, Keane, Doe NYPD Officer #3 and McKenna targeted and/or sanctioned the targeting of N.H. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

143. The actions of Defendants Dawkins, Keane, Doe NYPD Officer #3 and McKenna deprived N.H. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

3. **Named Plaintiff K.H.**

144. K.H. is a 32-year-old African-American woman who currently resides in Florida. At the time of her unlawful arrest under Section 240.37, she resided in the Bronx.

145. K.H. is a transgender woman. K.H. communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

146. In the early morning of June 13, 2015, K.H. was walking home to her apartment when she met another transgender woman and started a conversation. As they walked together, K.H. and her friend spoke to only one other person, a woman. As K.H. and her friend continued to walk, Defendants Imburgia, Doe NYPD Officer #4 and Doe NYPD Officer #5 jumped out of an unmarked police car and accosted them. The officers arrested both women on the spot.

147. At no time on June 13, 2015 did K.H. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

148. K.H. and her friend were placed in a van with two other women. Over the course of the next five minutes, more women were arrested and loaded into the van. The officers then brought all of the detained women to the 52nd precinct. Throughout this ordeal, the handcuffs around K.H.'s wrists were pulled so tightly that they left indentation marks on her wrists and caused her pain. Defendants Imburgia, Doe NYPD Officer #4 and Doe NYPD Officer #5 ignored K.H.'s repeated requests to loosen the handcuffs.

149. At the precinct, K.H. was placed in a holding cell. Once inside the cell, she and the other women with whom she was held were not permitted to use the bathroom. Having no other choice, several women urinated on the floor or in bottles that had been left in the cell.

150. At approximately 7 a.m., K.H. was taken to central booking for her arraignment. She was released at approximately 3 p.m.

151. At the time of her arrest, K.H. had expensive make-up (primers, lipsticks and pencils) and other personal items in her purse. When she returned to the precinct to recover her belongings, her personal items, including the make-up, were no longer in her purse.

152. After her arrest, K.H. became estranged from her transgender friends, whom she believes are now afraid to associate with her because they perceive her to be under scrutiny by the police. Fearing another false arrest, she also avoided leaving her house alone and went outside only with her husband. K.H.'s false arrest was a motivating factor in her decision to move to Florida, as she worried about being unlawfully arrested again in another sweep if she

stayed in the Bronx and wished to end "living in fear." Even after moving, she still believes that she cannot trust the police.

153. In the supporting deposition accompanying the criminal court complaint charging K.H. with violating Section 240.37, Defendant Imburgia falsely alleged that, on June 13, 2015, she observed K.H. for a half hour "during which time [K.H.] beckoned to passing traffic and stopped or attempted to stop three male passersby and two male motorists." She further alleged that K.H.'s purpose was prostitution because she was at a location "frequented by people engaged in prostitution" and was wearing a "tight short black dress."

154. Defendant Maloney failed to properly review, monitor and supervise Defendant Imburgia's, Defendant Doe NYPD Officer #4's and Defendant Doe NYPD Officer #5's unlawful stop and seizure of K.H., and approved K.H.'s arrest.

155. After her initial court appearance, K.H. was forced to return to court five additional times, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against K.H. were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on November 12, 2015 and dismissed and sealed on May 11, 2016.

156. By the actions described above, Defendants Imburgia, Doe NYPD Officer #4, Doe NYPD Officer #5 and Maloney targeted and/or sanctioned the targeting of K.H. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

157. The actions of Defendants Imburgia, Doe NYPD Officer #4, Doe NYPD Officer #5 and Maloney intimidated and threatened K.H., deprived her of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

4. Named Plaintiff Natasha Martin

158. Natasha Martin is a 38-year-old African-American woman who currently resides in Brooklyn.

159. Ms. Martin is a transgender woman. Ms. Martin communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing aud general appearance.

160. The night of February 2, 2016, Ms. Martin had visited a friend who lives in Brooklyn. She stayed at her friend's house that evening.

161. The next morning, February 3, 2016, Ms. Martin left her friend's house at approximately 6:30 a.m. She left at the same time as her friend, who had to be at work by 7:00 or 7:30 a.m.

162. Ms. Martin said goodbye to her friend and then walked on the sidewalk for about two blocks before stopping at the corner of Bushwick Avenue and Woodbine Street to smoke a cigarette. She did not encounter or speak to anyone during that time.

163. At no time on February 3, 2016 did Ms. Martin solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

164. Ten minutes later, a marked police van pulled up next to her. Three officers jumped out: two male officers, Defendant Joel Allen and Defendant Doe NYPD Officer #6, both in plainclothes, and a female officer, Defendant Doe NYPD Officer #7, who was wearing a blue uniform.

165. Defendant Doe NYPD Officer #6 asked Ms. Martin what she was doing, and she responded that she was "minding her own business." After the officer told her that her answer

"wasn't good enough," Ms. Martin responded that she was coming from a friend's house.

166. Defendant Doe NYPD Officer #6 then told Ms. Martin that his supervisor, Defendant Dave Siev, had instructed him to arrest her and that the area in which she was standing was a "hot" area for prostitution. Ms. Martin asked him how she was supposed to know that and further asked, "Is it a crime to be on the corner?" Defendant Doe NYPD Officer #6 then asked for her name. When Ms. Martin responded that her name is Natasha, he asked whether that was her "real name." She responded "yes" and gave the officer her driver's license, which says "Natasha Martin" and "female" on it.

167. The officers arrested Ms. Martin and placed her in handcuffs about five minutes after they had first pulled up to her. Ms. Martin's arrest was one of several that were part of a sweep of the neighborhood.

168. As they drove her to the 83rd precinct, Defendant Allen made derogatory comments such as, "which one of you is going to process the he/she?"

169. When they arrived at the precinct, the officers put her in a cell with another woman. There was a third woman in the men's cell nearby. Ms. Martin learned from these women that they had also been arrested in the same sweep for loitering for the purpose of prostitution.

170. Ms. Martin was kept at the precinct for about four hours. Along with the other two women, she was released from the precinct with a desk appearance ticket.

171. In the supporting deposition accompanying the criminal court complaint charging Ms. Martin with violating Section 240.37, Defendant Siev falsely alleged that on February 3, 2016, he "observed [Ms. Martin] . . . remain or wander about in a public place for a period of . . . 8 minutes, during which [Ms. Martin] repeatedly beckoned to passers-by and stopped 3

passers[-]by, engaging in conversation with those passers-by." Ms. Martin did not in fact encounter or speak to anyone after saying goodbye to her friend until she was confronted by Defendants Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7. Defendant Siev further alleged that Ms. Martin's purpose was prostitution because she was at a location "frequented by people engaging in promoting prostitution, patronizing a prostitute, and/or loitering for the purpose of prostitution," was wearing a "white jacket with blue and white jump suit, tight," and because he recovered "8 condoms" from her person.

172. Defendant Siev also noted that his determination that Ms. Martin's purpose was to engage in prostitution was based on the fact that he was "aware that [Ms. Martin] has previously been arrested for violating Penal Law Section 240.37, 230.00, and/or 230.03." However, there are no public records of any previous arrests related to those charges.

173. Defendant Siev failed to properly review, monitor and supervise Defendant Allen's, Defendant Doe NYPD Officer #6's and Defendant Doe NYPD Officer #7's unlawful stop, questioning and seizure of Ms. Martin, and approved Ms. Martin's arrest.

174. Since her arrest, Ms. Martin has been very nervous about going back to the location of her arrest and fears that the police could "jump out at her" at any time. She recalls that the whole experience felt like an "abduction." As such, the acts of Defendants Siev, Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7 intimidated and threatened Ms. Martin, and left her traumatized.

175. After her arrest, Ms. Martin was forced to return to court five additional times under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against Ms. Martin were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on June 1, 2016. The charges are calendared to be dismissed and sealed on December 1, 2016.

176. By the actions described above, Defendants Siev, Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7 targeted and/or sanctioned the targeting of Ms. Martin for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

177. The actions of Defendants Siev, Allen, Doe NYPD Officer #6 and Doe NYPD Officer #7 deprived Ms. Martin of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

B. Named Plaintiffs Targeted for Arrest Under Other Circumstances

178. Defendants have also wrongfully arrested Plaintiffs as part of a general pattern and practice of arbitrary and discriminatory enforcement of Section 240.37. These women were similarly engaging in constitutionally-protected activities or otherwise exercising their rights and not engaging in any prostitution-related activity at the time of their arrests.

5. **Named Plaintiff Tiffaney Grissom**

179. Tiffaney Grissom is a 30-year-old African-American woman who currently resides in New York City.

180. Ms. Grissom is a transgender woman. Ms. Grissom communicates and expresses her femininity through, among other means, her choices in hair, makeup, clothing and general appearance.

181. Ms. Grissom has been repeatedly followed, stopped, questioned, arrested and detained for loitering for the purpose of prostitution. The majority of her arrests have occurred in the West Village in Manhattan, primarily in the 6th precinct, and often by the same officers. Ms. Grissom has also been arrested in the 52nd precinct.

182. On the night of October 3, 2013, Ms. Grissom was walking from Twin Donut on Fordham Road. As she was walking, she spoke with a man for about 30 to 45 minutes, including

near the corner of West 192nd Street and Grand Avenue. Ms. Grissom and the man then walked in opposite directions. Shortly thereafter, an unmarked police car stopped beside her and Defendants Pocalyko and Savarese exited the car, ordered Ms. Grissom to stop and immediately placed her under arrest. Defendants Pocalyko and Savarese did not stop the man with whom Ms. Grissom had spoken and allowed him to leave the scene without questioning him.

183. At no time on October 3, 2013 did Ms. Grissom solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

184. Ms. Grissom was handcuffed and taken to a police van where she was detained for approximately 30 minutes to an hour until the police arrived with another woman who—as Ms. Grissom later learned—had also been arrested for loitering for the purpose of prostitution.

185. At the 52nd precinct, Defendant Pocalyko repeatedly probed Ms. Grissom with questions relating to her gender and her sex organs. When Ms. Grissom answered Defendant Pocalyko's questions by maintaining that she was a woman, Defendant Pocalyko unlawfully ordered Ms. Grissom to be strip-searched by a female police officer even though she was not suspected of possessing any drugs or contraband. The female officer took Ms. Grissom into a bathroom and ordered her to lift her shirt, shake out her bra and pull her shorts down. This search was for the purpose of confirming whether or not she was female, as her identification indicated. She was then put in a holding cell with three other women, including the woman from the police van. She was detained at the precinct for an additional three to five hours.

186. Ms. Grissom provided her address to the officers processing her arrest, making them aware that she was a resident of the neighborhood and lived about 10 blocks from where she was arrested.

187. In the supporting deposition accompanying the criminal court complaint charging Ms. Grissom with violating Section 240.37, Defendant Pocalyko falsely alleged that, on October 3, 2013, he observed Ms. Grissom for twenty minutes "during which time [Ms. Grissom] beckoned to passing traffic and stopped or attempted to stop . . . 3 male motorists" from "the middle of the street." Pocalyko further alleged that Ms. Grissom's purpose was prostitution because she was observed at a location "frequented by people engaged in prostitution" and was wearing "tight short shorts [and a] tight tank top." Additionally, the complaint corresponding to Ms. Grissom's arrest indicated that Defendant Pocalyko believed Ms. Grissom's purpose was prostitution because she had been convicted of loitering for the purpose of prostitution five years earlier, although nothing in the supporting deposition suggests that Defendant Pocalyko knew this at the time of the arrest.

188. Defendant Pocalyko failed to properly review, monitor and supervise Defendant Savarese's unlawful stop and seizure of Ms. Grissom, and approved Ms. Grissom's arrest.

189. Ms. Grissom believes that the police targeted her because she is a transgender woman. She believes the police have imposed a "dress code" for her to be out in public. In addition to her arrests, she is frequently followed and/or stopped and questioned by police when walking or sitting in public areas. As a result of this harassment and her arrests, Ms. Grissom believes she must constantly be on "high alert" for any police presence and avoid the police. As a result of her arrest and after learning of the sweeps conducted by the police in June 2015, she became scared about socializing in her neighborhood with friends—mostly other transgender women of color—and left her house less often. When she did leave her house, she came home early out of fear that she would be arrested again. Ms. Grissom ultimately moved out of the neighborhood; even after moving, however, Ms. Grissom remains anxious about engaging in

conversation in public for more than brief periods of time and avoids speaking to men in the area of the 52nd precinct and other neighborhoods where women of color and transgender women are targeted by the police for arrest under Section 240.37. As such, the acts of Defendants Pocalyko and Savarese caused Ms. Grissom to feel extremely anxious and powerless.

190. Ms. Grissom contested the Section 240.37 charge in Bronx Criminal Court and was forced to return to court at least six additional times under the threat of having the judge issue a bench warrant for her arrest. On August 13, 2015, the Section 240.37 charge against Ms. Grissom was dismissed on motion of the Bronx District Attorney's Office and sealed.

191. By the actions described above, Defendants Pocalyko and Savarese targeted and/or sanctioned the targeting of Ms. Grissom for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

192. The actions of Defendants Pocalyko and Savarese deprived Ms. Grissom of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

6. **Named Plaintiff R.G.**

193. R.G. is a 59-year-old Puerto Rican-American woman who lives in the Bronx. R.G. lives with and cares for her 28-year-old daughter, who is disabled and unable to live or travel by herself. R.G. has previously been employed as a secretary in a variety of industries, including for a police department in Florida and most recently for a large insuranee company in New York.

194. R.G. had never been arrested for any offense before she was unlawfully arrested for loitering for the purpose of prostitution on March 28, 2014.

195. During the afternoon of March 28, 2014, at approximately 2:00 p.m., R.G. was taking a walk less than one mile from her home, which is located in the 41st precinct. As she walked on the sidewalk, smoking a cigarette, an unmarked police car passed her, slowed down to make a U-turn, and pulled up alongside her. Defendants Diggs and Gomez asked her where she was going. They said that they knew what she was doing and that they had seen her stop five cars. R.G. explained to the officers that she was taking a walk and had not stopped any cars. Defendant Diggs told her that if she denied attempting prostitution, he would arrest her for lying. Defendants Diggs and Gomez then asked R.G. whether she had any drugs, and when she replied that she did not, they frisked her and searched her pockets. They then seized R.G.'s purse and began to search its contents without her consent. At the time of the search, R.G. had in her purse some condoms that she had recently obtained for free at her doctor's office. After seeing the condoms, Defendants Diggs and Gomez handcuffed R.G. and placed her under arrest.

196. At no time on March 28, 2014 did R.G. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

197. Also during the arrest, and while still on the street, Defendants Diggs and Gomez asked R.G. for her address, which she provided. R.G.'s apartment building is known to the police as a location for illegal narcotics activity. As soon as Defendants Diggs and Gomez learned her address, they began pressuring her for information about drug sales in her building. When R.G. declined, the officers put her in the patrol car and drove to the 41st precinct. Defendants Diggs and Gomez continued to press R.G. to provide information about narcotics activity in her building while she was in the police car and later detained at the precinct. At one point, Defendants Diggs and Gomez even offered to release her and pay her for information

about crime in her building. R.G. declined and told the officers that she feared for her safety if she were to inform on anyone in her building.

198. At the 41st precinct, R.G. was put on a bench directly next to a men's holding cell and handcuffed to the bench for approximately seven hours. During that time, five or six men inside the cell harassed and taunted R.G. with lewd comments. R.G. did not receive any food or water. She was allowed to use the bathroom only once—under the supervision of an officer who stood in the bathroom stall with her and watched her urinate. R.G. was humiliated and embarrassed by this experience.

199. While processing R.G., Defendants Diggs and Gomez again attempted to solicit information about drug activity in her building. She again refused. In response, Defendant Diggs made offensive comments about her appearance.

200. In the sworn criminal court complaint charging R.G. with violating Section 240.37, Defendant Gomez falsely alleged that, on March 28, 2014, he observed R.G. "beckon to passing motorists and attempt[] to stop five male motorists" and "approach a male motorist, lean her face into said motorist's vehicle and begin speaking to said motorist." Defendant Gomez also falsely alleged that R.G. was wearing "a tight low cut shirt and mini skirt." She was in fact wearing long pants and a long-sleeve blouse. Defendant Gomez did not allege that he observed R.G. for any period of time before arresting her. He further alleged that R.G.'s purpose was prostitution because she was at a location "frequented by people engaged in prostitution."

201. Defendant Beddows failed to properly review, monitor and supervise Defendant Diggs's and Defendant Gomez's unlawful stop, questioning, search and seizure of R.G., and approved R.G.'s arrest.

202. R.G. was eventually released from the precinct with a desk appearance ticket. Her period of unlawful detention left her demoralized, disoriented and worried about her disabled daughter. She could not believe what had happened and thought that it felt like a nightmare. R.G. was distraught and embarrassed by her experience. The arrest had a very harmful impact on her: she suffered depression, anxiety and humiliation that left her feeling helpless, with no energy to find work or even to leave her house much in the weeks after her arrest. Since she was arrested so close to her home, she has also been afraid to leave her home. Approximately one year after her arrest, after the Section 240.37 charge against her stemming from the arrest was dismissed, R.G. saw Defendant Gomez, who indicated that he recognized her and was watching her. R.G. no longer feels like she can trust the police or depend on them for help. As such, the acts of Defendants Beddows, Diggs and Gomez intimidated and threatened R.G.

203. As a result of her arrest, R.G. had to appear in Bronx Criminal Court five times over the course of six months. Each time she was required to be in court, her anxiety and depression around the incident were exacerbated. On November 6, 2014, over seven months after her arrest and after numerous court appearances, the accusatory instrument charging R.G. under Section 240.37 was finally dismissed as facially insufficient pursuant to C.P.L. §§ 100.15(3) and 100.40(1)(c), and R.G.'s case was sealed.

204. By the actions described above, Defendants Beddows, Diggs and Gomez targeted and/or sanctioned the targeting of R.G. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

205. The actions of Defendants Beddows, Diggs and Gomez deprived R.G. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

7. **Named Plaintiff A.B.**

206. A.B. is a 44-year-old African-American woman who currently resides in Brooklyn.

207. On August 13, 2015, an acquaintance of A.B.'s picked her up at around 1:30 a.m. to attend a dance party. The two drove to a local store to buy drinks to take to the party. Afterwards, they got back in the car and resumed driving. Shortly afterward, an unmarked police car pulled them over and three uniformed police officers, Defendants Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9, approached the car in which A.B. was a passenger.

208. The officers opened the passenger door to the car and forcefully removed A.B. from the vehicle by her arm. They asked A.B. how she knew the man with her, and she replied that the man was her acquaintance. The officers apparently did not believe A.B. and told her that he could arrest her for prostitution.

209. The officers asked A.B. if she had ever been arrested. When she replied that she had, the officers returned to their car, apparently to enter A.B.'s name into their computer. While the officers waited for the results, they began questioning A.B.'s acquaintance. He confirmed that A.B. was his acquaintance and that they were going to a party. The officers accused him of being A.B.'s pimp, but they did not arrest him. Instead, they removed A.B.'s belongings from his car without her consent and placed them on the trunk of the police car. A.B. asked the officers to look at the text messages in her phone, which would confirm that she and her acquaintance were planning to go to a party, but the officers ignored her.

210. While A.B. was detained, the officers verbally abused her by using racial slurs and calling her a "prostitute" and a "hooker." A.B. felt emotionally battered, and she informed the officers of her intention to file an official complaint against them. They continued to taunt her.

211. At that point, A.B. asked for the names and shield numbers of Defendants Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9. They laughed at her. The officers then handcuffed her, put her in the unmarked police car, and took her to the 75th precinct for further processing.

212. At no time on August 13, 2015 did A.B. solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

213. In the supporting deposition accompanying the criminal court complaint charging A.B. with violating Section 240.37, Defendant Christian Salazar falsely alleged that, on August 13, 2015, he observed A.B. at the corner of Flatlands Avenue and Alabama Avenue "[stopping] only male passers-by." He further alleged A.B.'s purpose was prostitution because she was at an "industrial location" and that he was "aware that the [NYPD] has made numerous arrests for violations of Penal Law Sections 240.37, 230.00 and/or 230.03 at [that] location."

214. Defendant Daverin failed to properly review, monitor and supervise Defendant Salazar's, Defendant Doe NYPD Officer #8's and Defendant Doe NYPD Officer #9's unlawful arrest of A.B.

215. After her initial court appearance, A.B. was forced to return to court two additional times under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against A.B. were dismissed and sealed on September 16, 2015.

216. Since her arrest, A.B. has stopped walking alone in East New York because she fears that she will be wrongfully arrested again. She becomes very anxious whenever she sees police and will often cross to the other side of the street to avoid any contact with them. As such, the acts of Defendants Daverin, Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9 intimidated and threatened A.B.

217. By the actions described above, Defendants Daverin, Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9 targeted and/or sanctioned the targeting of A.B. for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

218. The actions of Defendants Daverin, Salazar, Doe NYPD Officer #8 and Doe NYPD Officer #9 deprived A.B. of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

8. **Named Plaintiff Sarah Marchando**

219. Sarah Marchando is a 28-year-old Latina woman who currently resides in Queens, New York.

220. Ms. Marchando has a long history of prostitution-related arrests, primarily in the East New York neighborhood in Brooklyn. Because of her arrest record, police officers assigned to the 75th precinct, and the related satellite precinct of Police Service Area ("PSA") 2, know Ms. Marchando by face and last name. Because of her criminal record and previous proximity to the precinct, the police target Ms. Marchando for arrest when they see her outside, and she is often arrested for loitering for the purpose of prostitution when engaged in wholly innocent conduct.

May 7, 2015 Arrest

221. For example, on the morning of May 7, 2015, Ms. Marchando met her boyfriend, who was coming home from work, at the BP car wash located on the corner of Flatlands Avenue between Pennsylvania Avenue and Sheffield Avenue. She was wearing a dress that stopped about an inch above her knee-high flat boots. Ms. Marchando and her boyfriend arrived at approximately 7:20 or 7:25 a.m. From there, Ms. Marchando's boyfriend left to run some errands and Ms. Marchando planned to take the bus back to his apartment.

222. At around 7:30 a.m., Ms. Marchando boarded the B6 bus at the corner of Alabama Avenue and Cozine Avenue. Ms. Marchando remained on the bus for five or six stops until it arrived at Wortman Avenue and Ashford Street, approximately 11 blocks from where she had boarded. There, Defendants Nicosia and Doe NYPD Officer #10, dressed in plainclothes, rushed onto the bus. They ordered Ms. Marchando to put her hands behind her back and disembark. Ms. Marchando asked the officers what was happening. They did not answer. After a few seconds, Defendant Nicosia grabbed her by the arm and pulled her down the bus stairs. Ms. Marchando kept asking why she was being arrested but never got a response.

223. At no time on May 7, 2015 did Ms. Marchando solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

224. Once Defendant Nicosia dragged her off the bus, she tried to stop him from pulling on her arm. Defendants Nicosia and Doe NYPD Officer #10 restrained her. One of them put her in a chokehold, which exacerbated her asthma and caused her to vomit. Ms. Marchando repeatedly told the officers that she could not breathe, but they did not release her until two

bystanders who were watching the incident intervened. After she was finally released from the chokehold, her bra was ripped, and she was having trouble breathing and was in substantial pain.

225. Additional police officers arrived at the scene. In total, there were at least six officers involved in Ms. Marchando's arrest, including Defendants Nicosia and Doe NYPD Officer #10 in plainclothes, Defendants Quinn, Doe NYPD Officer #11 and Doe NYPD Officer #12 in uniform, and their supervisor Defendant Doyle, who was dressed in plainclothes. Without telling Ms. Marchando why she was being arrested, the officers placed her in handcuffs and searched her purse. Ms. Marchando requested medical attention, but the officers refused to get her help. Instead Defendant Doyle remarked, "She's back" and "We got her."

226. The officers brought Ms. Marchando to the 75th precinct around 7:45 a.m. where an officer performed a pocket search of Ms. Marchando. She was kept in handcuffs and placed in a holding cell. Still having difficulty breathing, Ms. Marchando asked for her asthma inhaler, but the officers refused to give it to her. At approximately 2:45 or 3:00 p.m., an officer returned and told Ms. Marchando for the first time that she had been arrested for loitering for the purpose of prostitution. She was arraigned around midnight and was finally released after spending approximately 16 hours in custody.

227. After her arrest, Ms. Marchando suffered from ongoing breathing difficulties and pain and swelling in her arm and knee. In addition, the arrest caused Ms. Marchando emotional suffering in that she felt humiliated and unfairly treated. She worried that she would not be able to walk anywhere or utilize public transportation in that neighborhood without facing arrest. Her fears were and are justified, as officers from the 75th precinct arrested her again eight days after this incident, similarly without probable cause or justification.

228. In the sworn criminal court complaint charging Ms. Marchando with violating Section 240.37 on May 7, 2015, Defendant Quinn falsely alleged that he observed Ms. Marchando for 40 minutes, during which time she "beckon[ed] to multiple vehicles passing by with male drivers[,]. . . approach[ed] a vehicle and . . . engage[d] in conversation with a male inside of said vehicle."

229. Defendant Doyle failed to properly review, monitor and supervise Defendant Quinn's, Defendant Nicosia's, Defendant Doe NYPD Officer # 10's, Defendant Doe NYPD Officer #11's and Defendant Doe NYPD Officer #12's unlawful stop, seizure and assault of Ms. Marchando, and approved Ms. Marchando's arrest.

May 15, 2015 Arrest

230. In the early morning of May 15, 2015, Ms. Marchando was on Flatlands Avenue between Pennsylvania Avenue and Sheffield Avenue. She had purchased juice from a nearby store and was listening to music, texting and playing a game on her phone. Defendants Yanez and supervising Doe NYPD Officer #13 approached her and immediately asked if she had ever been arrested for prostitution. When she responded affirmatively, they handcuffed and arrested her.

231. At no time on May 15, 2015 did Ms. Marchando solicit or attempt to solicit money in exchange for sex, trespass onto private property or otherwise engage in any unlawful or criminal conduct related to prostitution.

232. Defendants Yanez and Doe NYPD Officer #13 placed Ms. Marchando in a van with six male arrestees. Ms. Marchando was the only female arrestee in the van and remained handcuffed. She was kept in the van for over one hour.

233. At the 75th precinct, Ms. Marchando was searched by a male officer and put in a holding cell. She remained handcuffed in the cell for approximately two hours. During that time, Ms. Marchando asked three different male police officers to remove her handcuffs because she had lost feeling in her right arm. They told her that the handcuffs were necessary because there was no female officer available to search her, even though a male officer had already searched her when she arrived. Approximately one hour after Ms. Marchando's request, a female officer came into the holding cell. She seemed surprised that Ms. Marchando was still handcuffed and performed a search. Ms. Marchando was finally arraigned and released around 11:30 p.m., after spending approximately 18 hours in custody.

234. In the supporting deposition accompanying the criminal court complaint charging Ms. Marchando with violating Section 240.37 on May 15, 2015, Defendant Yanez falsely alleged that he observed Ms. Marchando for 120 minutes "during which time [Ms. Marchando] repeatedly beckoned to passers-by and stopped five-passers-by, engaging in conversation with said passers-by" and that she was "standing in the middle of the road." Yanez further alleged that Ms. Marchando's purpose was prostitution because "the above area is an industrial location" "frequented by people engaging in promoting prostitution" and that he is "aware that [Ms. Marchando] has previously been arrested for violating Penal Law 240.37, 230.00 and/or 230.03" and because he recovered "10 unused condoms" from her person.

235. Defendant Doe NYPD Officer #13 failed to properly review, monitor and supervise Defendant Yanez's unlawful stop and seizure of Ms. Marchando, and approved Ms. Marchando's arrest.

236. After her arrest, Ms. Marchando continued to suffer pain and discomfort in her right arm and emotional harm. As a result of the May 7 and May 15, 2015 arrests,

Ms. Marchando was afraid to go outside in Brooklyn and when there, tried to stay inside her boyfriend's apartment as much as possible to avoid arrest. Ms. Marchando suffers from an anxiety disorder, and her arrests exacerbated her condition. As a result of the harassment by Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 and other members of the 75th precinct, Ms. Marchando temporarily left New York City in September 2015. When she returned to New York in December 2015, she moved to Queens out of fear that she would be targeted for arrest by officers in the 75th precinct. As such, the acts of Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 intimidated and threatened Ms. Marchando.

237. After her arrests on May 7 and May 15, 2015, Ms. Marchando was forced to return to court two additional times, under the threat of having the judge issue a bench warrant for her arrest. All criminal charges against Ms. Marchando stemming from the two arrests were adjourned in contemplation of dismissal pursuant to C.P.L. § 170.55 on June 10, 2015. Both cases were dismissed and sealed on December 9, 2015.

238. By the actions described above, Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 targeted and/or sanctioned the targeting of Ms. Marchando for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on her race, color, ethnicity, gender, gender identity and/or appearance.

239. The actions of Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13 deprived

Ms. Marchando of her liberty and caused her pain and suffering, as well as psychological and emotional harm.

CLAIMS FOR RELIEF

I. CLASS CLAIMS

First Claim for Relief

Section 240.37 Is Unconstitutionally Void for Vagueness in Violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution[28]

240. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

241. Section 240.37 does not provide citizens with adequate notice as to what type of behavior they must avoid in order to avoid arrest under the statute.

242. Plaintiffs have been and continue to be unlawfully subjected to surveillance, stopped, questioned, frisked, searched, seized and/or arrested and detained for engaging in innocent activities such as walking down the street, sitting on a bench, riding on a public bus and speaking to other individuals on a public street.

243. Section 240.37 lacks adequate guidelines for police, leading to inconsistent and arbitrary enforcement. Neither New York State courts, the City, nor the NYPD have provided adequate guidance to officers as to what type of behavior is criminal under Section 240.37.

244. Section 240.37 is unconstitutionally void for vagueness in violation of the Due Process Clause of the Fourteenth Amendment as applied to Plaintiffs because it provides insufficient notice to citizens of what constitutes illegal behavior under the statute and provides

[28] A copy of this Complaint & Demand for Jury Trial has been served on the New York State Attorney General's Office.

insufficient guidance to law enforcement, resulting in discriminatory and arbitrary enforcement of the statute at the discretion of individual officers.

Second Claim for Relief

Section 240.37 Is Unconstitutional Because It Is Overly Broad, Infringing on the Right to Freedom of Expression Under the First Amendment to the United States Constitution and Article I, § 8 of the New York Constitution, the Right to Due Process Under the Fourteenth Amendment to the United States Constitution and the Right Against Unreasonable Searches and Seizures Under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution

245. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

246. A substantial number of law enforcement activities undertaken pursuant to Section 240.37, including surveillance, stops, questioning, frisks, searches, seizures and arrests and detention under Section 240.37 are unconstitutional.

247. Plaintiffs maintain a liberty interest in self-expression and bodily integrity and privacy.

248. Plaintiffs exercise free speech, including the expression of gender identity through choice of clothing, free movement and free association with other citizens.

249. As a result of the unconstitutionally overbroad provisions of Section 240.37 that implicate a substantial amount of constitutionally protected speech and other protected activity, Plaintiffs are forced to live with a heightened risk of law enforcement encounters and experience a real and substantial deterrent to the exercise of these freedoms.

250. Plaintiffs have been deterred from exercising their rights under the First, Fourth and Fourteenth Amendments by restricting their expression through clothing choices, restricting their movement through public spaces and restricting their associations with other people out of fear of future arrest.

251. The substantial unconstitutional applications of Section 240.37 in unlawfully surveilling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs who are engaged in constitutionally protected speech and other protected activity outweigh any public policy goals of Section 240.37, which are already met through other provisions of New York's Penal Law.

Third Claim for Relief

Municipal Liability for Violations of Plaintiffs' Due Process Rights Under the Fourteenth Amendment to the United States Constitution
(Against the City)

252. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

253. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies and widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner in violation of Plaintiffs' liberty interests in self-expression, bodily integrity and privacy. By unlawfully surveilling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs, including Named Plaintiffs, under Section 240.37 based in large part on Plaintiffs' appearance and their presence in public areas, Defendants, who are state actors, infringed on Plaintiffs' fundamental freedoms.

254. The City has acted with deliberate indifference to Plaintiffs' Due Process rights under the Fourteenth Amendment in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, leading to unlawful infringement of Plaintiffs' liberty interests in self-expression, bodily integrity and privacy.

255. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 if they engage in constitutionally protected conduct in public areas, and their ability to self-determine their personal appearance in public continues to be chilled.

Fourth Claim for Relief

Municipal Liability for Violations of Plaintiffs' Right to Freedom of Speech Under the First Amendment to the United States Constitution and Article I, § 8 of the New York Constitution
(Against the City)

256. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

257. Plaintiffs have a constitutionally protected interest in the exercise of free speech, including the expression of gender identity through choice of clothing, conversations with individuals of any gender and gender identity, free movement and free association with other citizens.

258. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies and widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner in violation of the First Amendment to the United States Constitution and Article I, § 8 of the New York Constitution by unlawfully surveilling, stopping, questioning, frisking, searching, seizing and/or arresting and detaining Plaintiffs for Section 240.37 violations based in large part on protected conduct, *i.e.* their clothing, presence in public areas, conversations with others and/or other First Amendment activity, causing constitutional injury and chilling their First Amendment speech, expressive conduct and ability to freely utilize public space.

259. The City has acted with deliberate indifference to Plaintiffs' rights under the First Amendment and Article I, § 8 of the New York Constitution in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, leading to the unlawful infringement of Plaintiffs' right to engage in free speech and other protected First Amendment activity.

260. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 if they engage in constitutionally protected speech in public areas, and their speech continues to be chilled.

Fifth Claim for Relief

Municipal Liability for Violations of Plaintiffs' Right to Equal Protection of the Laws Under the Fourteenth Amendment to the United States Constitution and Article I, § 11 of the New York Constitution
(Against the City)

261. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

262. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies, widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner against women of color, some of whom are transgender, based on the race, color, ethnicity, gender, gender identity and/or appearance of Plaintiffs under circumstances in which Section 240.37 is not enforced against men or white women, causing constitutional injury by depriving Plaintiffs of equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, § 11

of the New York Constitution. The City has no legitimate interest in enforcing Section 240.37 in this manner.

263. The City has acted with deliberate indifference to Plaintiffs' right to equal protection of the laws under the Fourteenth Amendment and Article I, § 11 of the New York Constitution in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, causing constitutional injury to Plaintiffs in that they have been, and continue to be, unlawfully subjected to law enforcement activities, including surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention based on race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities, in violation of the Fourteenth Amendment to the United States Constitution and Article I, § 11 of the New York Constitution.

264. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 on the basis of race, color, ethnicity, gender, gender identity and/or appearance.

Sixth Claim for Relief

Municipal Liability for Unlawful Discrimination Under 42 U.S.C. § 1981
(Against the City)

265. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

266. Pursuant to certain enforcement policies, widespread practices and/or customs, the City has chosen to enforce Section 240.37 in a discriminatory manner, denying Plaintiffs the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by

white citizens of the United States, and subjecting them to disparate forms of punishment, pains, penalties and exactions as compared to white citizens, in violation of 42 U.S.C. § 1981.

267. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs have suffered constitutional injury.

Seventh Claim for Relief

Municipal Liability for Violation of Plaintiffs' Right Against Unreasonable Search and Seizures Under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution
(Against the City)

268. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

269. By consciously choosing to enforce Section 240.37, and adopting and implementing certain enforcement policies, widespread practices and/or customs, Defendants have chosen to enforce Section 240.37 in an unconstitutional manner, seizing persons in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution. These actions have resulted in constitutional injury in that Plaintiffs have been unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 without the requisite reasonable suspicion or probable cause to believe that a criminal offense has been or is being committed.

270. The City has acted with deliberate indifference to Plaintiffs' right to be free from unreasonable searches and seizures in failing to adequately train, monitor, supervise or discipline NYPD officers, including Individual Defendants, involved in the enforcement of Section 240.37, causing Plaintiffs to be unlawfully subjected to surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention under Section 240.37 without reasonable suspicion or

probable cause in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

271. As a direct and proximate result of the City's policies, widespread practices and/or customs, Plaintiffs continue to face an imminent threat of being unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained under Section 240.37 in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

Eighth Claim for Relief

Claims Under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq.
(Against the City)

272. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

273. The law enforcement services described in this complaint have been funded, in part, with federal funds.

274. Plaintiffs were intended beneficiaries of these law enforcement services.

275. Discrimination based on race in the law enforcement services and conduct described in this complaint is prohibited under 42 U.S.C. § 2000d et seq. The acts and conduct complained of herein by the Defendants were motivated by racial animus and were intended to discriminate on the basis of race, particularly against Blacks and Latinos.

276. As a direct and proximate result of the above-mentioned acts, Plaintiffs have suffered injuries and damages and have been deprived of their rights under the civil rights laws. Without appropriate injunctive relief, these violations will continue to occur.

Ninth Claim for Relief

Respondeat Superior Claim Under New York Common Law
(Against the City)

277. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

278. The conduct of Individual Defendants occurred while they were on duty, acting under the color of law, in and during the course and scope of their duties and functions as NYPD officers and while they were acting as agents and employees of the City.

279. As a result, the City is liable to Plaintiffs for the claims against Individual Defendants under the doctrine of respondeat superior.

Tenth Claim for Relief

Conspiracy to Violate Plaintiffs' Civil Rights Under 42 U.S.C. § 1985
(Against All Defendants)

280. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

281. Defendants from the 52nd precinct agreed to violate certain Plaintiffs' rights by planning and performing sweeps, see supra ¶ 73, during which they planned to arrest certain Plaintiffs for their status as transgender women and deprive them of equal protection under the law. Defendants planned to arrest these Plaintiffs without probable cause to believe they committed a crime, in violation of their First, Fourth and Fourteenth Amendment rights. Defendants from the 52nd precinct took action in furtherance of violating certain Plaintiffs' rights by actually arresting multiple Named Plaintiffs and Plaintiff Class members, as described above, on June 6, 2015 and June 13, 2015, under Section 240.37, and telling them that they were arrested because they were transgender women out in public at night. In taking these actions,

Defendants from the 52nd precinct were motivated by their discriminatory attitudes towards and unlawful bias against transgender women.

282. Unknown high-ranking officers in the NYPD and/or other supervising officers and police officers of other precincts have similar policies, widespread practices and/or customs motivated by discriminatory attitudes and unlawful bias against transgender women of planning and performing sweeps to effectuate Section 240.37 arrests pursuant to which they have agreed to violate transgender Plaintiffs' rights under the First, Fourth and Fourteenth Amendments due to the fact that they are transgender women.

283. As a result of these arrests, Plaintiff Class Members and Named Plaintiffs suffered constitutional injury; were harmed and suffered emotional and psychological distress, deprivation of liberty, embarrassment and shame.

Eleventh Claim for Relief

Violation of the N.Y. Civ. Rights Law §§ 40-c, 40-d and 79-n
(Against All Defendants)

284. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

285. Defendants' prior and continuing acts of discrimination against Plaintiffs, including Defendants' unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37, and/or the sanctioning of those law enforcement acts, were carried out on the basis of Plaintiffs' race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities, and therefore subjected Plaintiffs to discrimination in violation of their civil rights, including their right to equal protection of the laws, in violation of New York State Civil Rights Law §§ 40-c and 40-d.

286. Further, Defendants' prior and continuing acts of discrimination against Plaintiffs, including Defendants' unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37, and/or the sanctioning of those law enforcement acts, constituted the intentional selection of Plaintiffs for harm in whole or substantial part because of Defendants' beliefs or perceptions regarding Plaintiffs' gender, including their actual or perceived sex, gender identity or expression, race and color, in violation of New York State Civil Rights Law § 79-n. Further, Defendants' sanctioning or acts of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37 constituted intimidation of Plaintiffs on the basis of their gender, including their actual or perceived sex, gender identity or expression, race and color.

287. In addition, Defendants have aided and incited others to unlawfully surveil, stop, question, frisk, search, seize and/or arrest and detain Plaintiffs under Section 240.37 on the basis of Plaintiffs' race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities, in violation of New York State Civil Rights Law §§ 40-c, 40-d and 79-n. Defendants' violations of Plaintiffs' civil rights under the New York State Civil Rights Law are the actual, direct and proximate cause of injuries suffered by Plaintiffs, as alleged herein, and Plaintiffs continue to be harmed by Defendants' violations of the New York State Civil Rights Law.

288. Plaintiffs have complied with the procedural requirements of New York State Civil Rights Law § 40-d by serving notice upon the state Attorney General at or before the commencement of the action.

Twelfth Claim for Relief

Violation of the New York State Human Rights Law, New York State Rules and Regulations and New York City Human Rights Law Through Discriminatory Refusal, Withholding and Denial of Public Accommodations, Disparate Impact and Aiding and Abetting Unlawful Discriminatory Practices
N.Y. Exec. Law §§ 296(2), 296(6), 297(9)
N.Y. Comp. Codes R. & Regs. Tit. 9, § 466.13
N.Y.C. Admin. Code §§ 8-107(4)(a), 8-107(6), 8-107(17), 8-502(a)
(Against All Defendants)

289. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

290. The NYPD is a place or provider of public accommodation because it provides services, facilities, accommodations, advantages and privileges through acting in its investigative and custodial capacities, including the supervision and execution of surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention pursuant to Section 240.37. The New York City Commission on Human Rights has not granted the NYPD an exemption to § 8-107(4) based on bona fide considerations of public policy.

291. By sanctioning and/or engaging in sweeps and targeting Plaintiffs for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention pursuant to Section 240.37 on the basis of Plaintiffs' actual and/or perceived race, color, ethnicity and/or gender, including their gender identity, self-image, appearance, behavior, expression and/or transgender status, and/or by aiding, abetting, inciting or compelling such conduct, Defendants have refused, denied and withheld from Plaintiffs the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services. Therefore, the acts of Defendants, who are owners, proprietors, managers, superintendents, agents and/or employees of the NYPD and the City, violated Plaintiffs' rights under the NYHRL, N.Y. Exec. Law §§ 296(2) and

296(6), the N.Y. Comp. Codes R. & Regs. Tit. 9, § 466.13 and the NYCHRL, N.Y.C. Admin. Code §§ 8-107(4)(a) and 8-107(6).

292. Defendants have also violated the NYCHRL, N.Y.C. Admin. Code §§ 8-107(17), because their actions, policies, practices or customs, or a group thereof, have a disparate impact on women of color, including transgender women of color, who are protected under the NYCHRL. By targeting Plaintiffs for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 on the basis of Plaintiffs' actual or perceived race, color, ethnicity, gender and/or gender identity, including self-image, appearance, behavior, expression and/or transgender status, Defendants' actions, policies, practices or customs, or a group thereof, result in the refusal, denial and withholding from Plaintiffs of the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services on the same terms as non-transgender, male and/or white individuals. Therefore, women of color, including transgender women, are disparately impacted to their detriment by Defendants' actions, policies, practices or customs, or a group thereof.

293. The disparate impact of Defendants' actions, policies, practices or customs, or a group thereof, which bear no relationship to a significant business objective of the NYPD, exceeds the mere existence of a statistical imbalance between women of color and transgender women, and the general population.

294. Plaintiffs have not filed a complaint with the New York City Commission on Human Rights, the State Division on Human Rights, any other court of competent jurisdiction, or any other administrative agency based upon the unlawful discriminatory practices alleged herein.

295. Defendants' violations of Plaintiffs' rights under the NYHRL and NYCHRL are the actual, direct and proximate cause of injuries suffered by Plaintiffs, as alleged herein, and Plaintiffs continue to be harmed by Defendants' violations of the NYHRL and NYCHRL.

296. Plaintiffs have served a copy of the complaint upon the authorized representatives of the New York City Commission on Human Rights and Corporation Counsel.

Thirteenth Claim for Relief

Violation of the New York City Bias-Based Profiling Law, N.Y.C. Admin. Code § 14-151
(Against All Defendants)

297. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

298. The City and Individual Defendants who are members of the NYPD police force have engaged, are engaging and continue to engage in bias-based profiling by initiating law enforcement actions against Plaintiffs, including the sanctioning and/or execution of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention of Plaintiffs under Section 240.37, on the basis of and in reliance on Plaintiffs' actual or perceived race, color, gender and/or gender identity as the determinative factor. Therefore, Defendants have engaged and continue to engage in the above-described intentional bias-based profiling of Plaintiffs, in violation of the New York City Bias-Based Profiling Law, N.Y.C. Admin. Code § 14-151.

299. Defendants have intentionally engaged in the above-described bias-based profiling of Plaintiffs. Such bias-based profiling is not justified by factors unrelated to unlawful discrimination, and is instead based on Plaintiffs' actual or perceived race, color, gender and/or gender identity. Defendants' above-described bias-based profiling is neither necessary to

achieve a compelling governmental interest nor narrowly tailored to achieve any compelling governmental interest.

300. In addition, Defendants' actions, policies, practices, or customs, or a group thereof, which result in the above-described bias-based profiling of Plaintiffs by Defendants, have a disparate impact on Plaintiffs, based on Plaintiffs' actual or perceived race, color and/or gender.

301. Further, the disparate impact of Defendants' actions, policies, practices or customs, or a group thereof, exceed the mere existence of a statistical imbalance between women of color and transgender women, and the general population. Defendants' actions, policies, practices or customs, or a group thereof, bear no significant relationship to advancing a significant law enforcement objective.

302. Defendants' violations of Plaintiffs' rights under the New York City Bias-Based Profiling Law are the actual, direct and proximate cause of injuries suffered by Plaintiffs, as alleged herein, and Plaintiffs continue to be harmed by Defendants' violations of the New York City Bias-Based Profiling Law.

II. CLAIMS BY NAMED PLAINTIFFS

303. With respect to each of the following claims, the conduct of Individual Defendants constituted outrageous and reckless conduct and demonstrated a callous indifference to and willful disregard of Named Plaintiffs' federal and state constitutional rights. Their conduct caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

Fourteenth Claim for Relief

Violations of Plaintiffs' Due Process Rights Under the Fourteenth Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983
(Against Individual Defendants)

304. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

305. Individual Defendants unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained Named Plaintiffs in violation of their Due Process rights under the Fourteenth Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983. Individual Defendants arrested Named Plaintiffs in violation of their constitutionally protected liberty interest in self-expression and bodily integrity and privacy.

306. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

Fifteenth Claim for Relief

Violations of Plaintiffs' Right to Freedom of Speech Under the First Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983
(Against Individual Defendants)

307. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

308. The Individual Defendants unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained Named Plaintiffs in violation of their rights under the First Amendment to the United States Constitution, Article I, § 8 of the New York Constitution and 42 U.S.C. § 1983. The Individual Defendants arrested Named Plaintiffs for engaging in constitutionally protected expressive conduct, including communicating with others

in public and/or expressing their gender identity in a public place through their choice of clothing.

309. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

Sixteenth Claim for Relief

Violation of Plaintiffs' Right to Equal Protection of the Laws Under the Fourteenth Amendment to the United States Constitution, Article I, § 11 of the New York Constitution and 42 U.S.C. § 1983
(Against Individual Defendants)

310. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

311. Acting under color of state law, Individual Defendants targeted and/or sanctioned the targeting of Named Plaintiffs for unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on their race, color, ethnicity, gender, gender identity and/or appearance, under circumstances in which men or white women are not subjected to such law enforcement activities. The Individual Defendants had no legitimate interest in targeting Named Plaintiffs in this manner.

312. As a direct and proximate result of such Individual Defendants' law enforcement actions, such Named Plaintiffs have been deprived of their right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, § 11 of the New York Constitution in violation of 42 U.S.C. § 1983.

313. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

Seventeenth Claim for Relief

Violation of Plaintiffs' Right Against Unreasonable Search and Seizures Under the Fourth Amendment to the United States Constitution, Article I, § 12 of the New York Constitution and 42 U.S.C. § 1983
(Against Individual Defendants)

314. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

315. The Individual Defendants intentionally and under color of state law have unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained Named Plaintiffs under Section 240.37 without reasonable suspicion or probable cause in violation of the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

316. As a direct and proximate result of the acts and omissions of Individual Defendants, Named Plaintiffs have been unlawfully surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained, and deprived of their rights under the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution in violation of 42 U.S.C. § 1983.

317. The conduct of Individual Defendants deprived Named Plaintiffs of their liberty and caused Named Plaintiffs pain and suffering, as well as psychological and emotional harm.

Eighteenth Claim for Relief

Unlawful Discrimination Under 42 U.S.C. § 1981
(Against Individual Defendants)

318. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

319. By their above-described actions pertaining to the sanctioning and/or execution of unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrest and detention of

Plaintiffs under Section 240.37, Individual Defendants denied Named Plaintiffs the full and equal benefit of all laws and proceedings for the security of persons as is enjoyed by white citizens of the United States, and subjected them to disparate forms of punishment, pains, penalties and exactions as compared to white citizens, in violation of 42 U.S.C. § 1981.

Nineteenth Claim for Relief

Violation of the Americans with Disabilities Act, the New York State Human Rights Law and the New York City Human Rights Law Through Unlawful Discriminatory Practices on the Basis of Disability, 42 U.S.C. § 12132,
N.Y. Exec. Law §§ 296(2), 296(6), 297(9),
N.Y.C. Admin. Code §§ 8-107(4)(a), 8-107(6), 8-107(15)(a), 8-502(a)
(D.H. Against Defendants Kinane, McKenna, Doe NYPD Officer #1, Doe NYPD Officer # 2, Doe NYPD Officer #14 and the City)

320. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

321. As stated in paragraphs 290-291 above, the NYPD provides services, facilities, accommodations, advantages and privileges by acting in its investigative and custodial capacities. Defendants are managers, proprietors, superintendents, agents and/or employees of the City and the NYPD, a department of local government and a place and provider of public accommodation. As such, Defendants are prohibited from discriminating on the basis of disability under 42 U.S.C. § 12132, N.Y. Exec. Law §§ 296(2)(a), 296(6), 297(9), and N.Y.C. Admin. Code § 8-107(4)(a), 8-107(6), 8-107(15)(a) and 8-502(a).

322. The New York City Commission on Human Rights has not granted Defendants an exemption based on bona fide considerations of public policy.

323. Plaintiff D.H. has not filed a complaint with the New York City Commission on Human Rights, the State Division on Human Rights, any other court of competent jurisdiction, or any other administrative agency based upon the unlawful discriminatory practices alleged herein.

324. D.H., who is deaf and communicates by sign language, writing or text message on her phone, suffers from a physical and medical impairment that substantially limits one or more major life activities, including her ability to hear, and therefore qualifies as a disability.

325. The City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 were therefore required to make a reasonable accommodation to enable D.H. to enjoy the rights or privileges of access to the investigative and custodial services provided by the NYPD during D.H.'s arrest.

326. The City and Defendants McKenna, Kinane, Doe NYPD Officer #1 and Doe NYPD Officer #2 knew or should have known that D.H. was deaf at the time of her arrest, based in part on the fact that D.H. gestured to indicate that she was deaf when Defendants Kinane, Doe NYPD Officer #1 and Doe NYPD Officer #2 approached her during her arrest. Defendant Doe NYPD Officer #14 knew or should have known that D.H. was deaf during her pre-arraignment detention based on the fact that D.H. stated in writing that she needed a sign language interpreter.

327. The City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14, at the time of D.H.'s arrest and throughout her pre-arraignment detention, intentionally and/or with deliberate indifference failed to provide D.H. with a reasonable accommodation, reasonable modification and/or auxiliary aid and service for communicating, insofar as the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 denied D.H. a sign language interpreter, denied D.H. the ability to communicate through a writing or texting instrument and prevented D.H. from communicating with her hands by cuffing them behind her back. As a result of her inability to communicate, D.H. was not able to learn of the reason for her arrest until the day after her arrest, when she was brought to central booking. By intentionally denying D.H. any

means of communication during her arrest and detention, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 intentionally and/or with deliberate indifference, discriminated against D.H. on the basis of her disability and denied her the benefit of the services, programs or activities of the NYPD.

328. In addition, by denying D.H. a reasonable accommodation, reasonable modification and/or auxiliary aid and service for communicating with the police during her arrest, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 denied, refused and withheld from D.H. access to the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services on the same terms as individuals without disabilities.

329. By denying D.H. a reasonable accommodation, reasonable modification and/or auxiliary aid and service for communicating with the police during her arrest, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 refused, denied and withheld from D.H. her right to the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services under N.Y.C. Admin. Code § 8-107(4)(a) and N.Y. Exec. Law §§ 296(2), as well as D.H.'s right to a reasonable accommodation, reasonable modification and/or auxiliary aid and service under N.Y.C. Admin. Code §§ 8-107(15)(a) and N.Y. Exec. Law §§ 296(2). The City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 have also violated N.Y.C. Admin. Code § 8-107(6) and N.Y. Exec. Law § 296(6) by aiding, abetting and inciting others' acts of denying D.H. a reasonable accommodation, reasonable modification and/or auxiliary aid for communicating with police during her arrest, and of

denying, refusing and withholding from D.H. access to the accommodations, advantages, facilities and privileges of the NYPD's investigative and custodial services.

330. By their above-described actions, the City and Defendants McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 also violated D.H.'s right to the benefit of the services, programs or activities of the NYPD, as well as her right to be free from discrimination by Defendants on the basis of disability under 42 U.S.C. § 12132.

331. The City, as the employer of McKenna, Kinane, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 is also liable for those Individual Defendants' unlawful discriminatory practices under 42 U.S.C. § 12132, N.Y. Exec. Law §§ 296(2) and 296(6) and N.Y.C. Admin. Code. §§ 8-107(4)(a), 8-107(6) and 8-107(15)(a), as alleged herein.

332. The City and Defendant McKenna's, Defendant Kinane's, Defendant Doe NYPD Officer #1's, Defendant Doe NYPD Officer #2's and Defendant Doe NYPD Officer #14's violations of D.H.'s rights under the NYHRL, NYCHRL and 42 U.S.C. § 12132 are the actual, direct and proximate cause of injuries suffered by D.H., as alleged herein.

333. Plaintiffs have served a copy of the complaint upon the authorized representatives of the New York City Commission on Human Rights and Corporation Counsel.

Twentieth Claim for Relief

Violation of the Right to Be Free from the Use of Excessive Force Under the Fourth Amendment to the United States Constitution, Article I, § 12 of the New York Constitution and 42 U.S.C. § 1983
(N.H. against Defendant Dawkins)

334. Plaintiffs hereby reallege and incorporate by reference as if fully set forth herein the allegations in the preceding paragraphs.

335. By pulling N.H.'s earrings and jewelry off of her person, forcibly pulling on her wig and verbally abusing her, Defendant Dawkins used excessive force against Plaintiff N.H.

and deprived her of her rights, remedies, privileges and immunities guaranteed to every citizen of the United States, in violation of 42 U.S.C. §1983, including, but not limited to rights guaranteed by the Fourth Amendment to the United States Constitution and Article I, § 12 of the New York Constitution.

336. In so doing, Defendant Dawkins acted intentionally and under color of state law.

337. The conduct of Defendant Dawkins caused N.H. pain and suffering, as well as psychological and emotional harm.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

338. Certify this action as a class action on behalf of the proposed Plaintiff Class pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure: all women of color who have been and/or will be surveilled, stopped, questioned, frisked, searched, seized and/or arrested and detained pursuant to Section 240.37 between September 30, 2013 and the present and the date on which the City is enjoined from or otherwise ceases to enforce Section 240.37.

339. Declare that Defendants' acts, practices, policies, customs and/or omissions have deprived Plaintiffs of their rights under the First, Fourth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. §§ 1983, 1981; Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132; the Constitution of the State of New York; the New York State Civil Rights Law; the New York State Human Rights Law; the New York City Bias-Based Profiling Law and the New York City Human Rights Law.

340. Declare that Section 240.37 violates the United States Constitution and the New York Constitution on its face and as applied;

341. Issue preliminary and permanent injunctions restraining the City and its employees, agents and successors from enforcing Section 240.37;

342. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to D.H. in an amount to be determined at trial against the City and Defendants Kinane, McKenna, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14 jointly and severally, together with interest and costs;

343. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to N.H. in an amount to be determined at trial against the City and Defendants Dawkins, Keane, McKenna and Doe NYPD Officer #3, jointly and severally, together with interest and costs;

344. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to K.H. in an amount to be determined at trial against the City and Defendants Imburgia, Maloney, Doe NYPD Officer #4 and Doe NYPD Officer #5, jointly and severally, together with interest and costs;

345. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to Natasha Martin in an amount to be determined at trial against the City and Defendants Allen, Siev, Doe NYPD Officer #6 and Doe NYPD Officer #7, jointly and severally, together with interest and costs;

346. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to Tiffaney Grissom in an amount to be determined at trial against the City and Defendants Savarese and Pocalyko jointly and severally, together with interest and costs;

347. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to R.G. in an amount to be determined at trial against the City and Defendants Diggs, Gomez and Beddows, jointly and severally, together with interest and costs;

348. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to A.B. in an amount to be determined at trial against the City and Defendants Salazar, Daverin, Doe NYPD Officer #8 and Doe NYPD Officer #9, jointly and severally, together with interest and costs;

349. Award compensatory damages for economic harm, pain and suffering and emotional and mental distress to Sarah Marchando in an amount to be determined at trial against the City and Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13, jointly and severally, together with interest and costs;

350. Award punitive damages to D.H. in an amount to be determined at trial against Defendants Kinane, McKenna, Doe NYPD Officer #1, Doe NYPD Officer #2 and Doe NYPD Officer #14, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of D.H.'s rights as set forth above;

351. Award punitive damages to N.H. in an amount to be determined at trial against Defendants Dawkins, Keane, McKenna and Doe NYPD Officer #3, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of N.H.'s rights as set forth above;

352. Award punitive damages to K.H. in an amount to be determined at trial against Defendants Imburgia, Maloney, Doe NYPD Officer #4 and Doe NYPD Officer #5, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of K.H.'s rights as set forth above;

353. Award punitive damages to Natasha Martin in an amount to be determined at trial against Defendants Allen, Siev, Doe NYPD Officer #6 and Doe NYPD Officer #7, whose

actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of Ms. Martin's rights as set forth above;

354. Award punitive damages to Tiffaney Grissom in an amount to be determined at trial against Defendants Savarese and Pocalyko, whose actions constituted ontrageous conduct, were reckless and showed a callous indifference to and willful disregard of Ms. Grissom's rights as set forth above;

355. Award punitive damages to R.G. in an amount to be determined at trial against Defendants Diggs, Gomez and Beddows, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of R.G.'s rights as set forth above;

356. Award punitive damages to A.B. in an amount to be determined at trial against Defendants Salazar, Daverin, Doe NYPD Officer #8 and Doe NYPD Officer #9, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of A.B.'s rights as set forth above;

357. Award punitive damages to Sarah Marchando in an amount to be determined at trial against Defendants Nicosia, Quinn, Doe NYPD Officer #10, Doe NYPD Officer #11, Doe NYPD Officer #12, Doyle, Yanez and Doe NYPD Officer #13, whose actions constituted outrageous conduct, were reckless and showed a callous indifference to and willful disregard of Ms. Marchando's rights as set forth above;

358. Order reasonable attorneys' fees and costs to be paid by Defendants pursuant to 28 U.S.C. § 2414; 42 U.S.C. § 1988; the Americans with Disabilities Act, 42 U.S.C. § 12133; the N.Y. Civ. Rights Law § 79-n(4); the New York City Bias-Based Profiling Law, N.Y.C. Admin.

Code § 14-151(d)(3) and the New York City Human Rights Law, N.Y.C. Admin. Code § 8-502(g); and

359. Grant such other and further relief as the Court deems just and equitable.

Dated: New York, New York
September 30, 2016

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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D.H., N.H., K.H. f/k/a J.H., Natasha Martin, Tiffaney Grissom, Rosa Gonzalez, Adrienne Bankston, and Sarah Marchando, individually and on behalf of a class of all others similarly situated;

Plaintiffs,

-against-

The City Of New York, Sean Kinane, Joseph Mckenna, Kayan Dawkins, Thomas Keane, Maria Imburgia, Kevin Maloney, Joel Allen, Dave Siev, Bryan Pocalyko, Christopher Savarese, Thomas Diggs, Joel Gomez, Keith Beddows, Christian Salazar, Henry Daverin, Joseph Nicosia, Kelly Quinn, Alexis Yanez, Michael Doyle, John/Jane Doe NYPD Police Officers #1-14,

Defendants.

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16 Civ. 7698 (PKC)(KNF)

ORAL ARGUMENT REQUESTED

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR PARTIAL MOTION TO DISMISS THE AMENDED COMPLAINT PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

ZACHARY W. CARTER
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Attorney for Defendants
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New York, New York 10007

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STATEMENT OF FACTS

Eight named plaintiffs bring this action pursuant to 42 U.S.C. § 1983 and New York State law alleging twenty claims for relief relating to the stopping, summonsing, and arresting of individuals pursuant to N.Y. Penal Law § 240.37, loitering for the purposes of prostitution. Plaintiffs sue on behalf of themselves and "a class of similarly situated women of color, some of whom are transgender, who have been and may in the future be subjected to surveillance, stopped, frisked, searched, and/or arrested and detained under New York Penal Law Section 240.37." Amended Complaint, Annexed to the Declaration of Suzanna Mettham dated March 3, 2017 ("Mettham Dec.") as Exhibit A, at ¶1. Plaintiffs filed the initial complaint on September 30, 2016 and an Amended Complaint on January 19, 2017. The Amended Complaint identifies certain previously-anonymous plaintiffs by name; but in all other respects, the complaints are the same. Plaintiffs N.H., K.H., D.H., Adrienne Bankston, Rosa Gonzalez, and Tiffaney Grissom allege a single unconstitutional encounter each, which they claim occurred between October 3, 2013 and February 3, 2016, while plaintiff Sarah Marchando alleges two unconstitutional encounters that occurred between May 7th and May 15th, 2015. Plaintiffs seek relief pursuant to Fed. R. Civ. P. 23(b)(2) as well as damages for the individually named class representatives.

As discussed more fully below, defendants City, Sean Kinane, Joseph McKenna, Kayan Dawkins, Thomas Keane, Maria Imburgia, Kevin Maloney, Joel Allen, Dave Siev, Bryan Pocalyko, Christopher Savarese, Thomas Diggs, Joel Gomez, Keith Beddows, Christian Salazar, Henry Daverin, Joseph Nicosia, Kelly Quinn, Alexis Yanez, Michael Doyle (collectively "defendants") move for partial dismissal of the Amended Complaint pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure for failing to plead factual allegations sufficient to state a claim that is plausible on its face, and because plaintiffs lack standing to pursue injunctive and declaratory relief either on behalf of themselves or a class.

ARGUMENT

POINT I

N.Y. PENAL LAW § 240.37 IS NEITHER VOID FOR VAGUENESS NOR OVERBROAD

Plaintiffs bring vagueness and overbreadth challenges against N.Y. Penal Law § 240.37, arguing that: (i) the statute is void for vagueness because it fails to provide adequate notice to citizens as to what behavior is proscribed by the statute and provides officers with too much discretion in determining how to enforce the statute, Ex. A at ¶¶ 241-43; and (ii) the statute is overbroad because it ". . . implicate[s] a substantial amount of constitutionally protected speech and other protected activity." Ex. A at ¶ 249. As discussed *infra* at Point II, plaintiffs lack standing to challenge the statute. Even assuming, *arguendo*, that plaintiffs did have standing, their arguments still fail as a matter of law because the statute proscribes limited, clearly defined conduct carried out with a specific criminal intent. Section 240.37 reads, in relevant part:

> Any person who remains or wanders about in a public place *and* repeatedly beckons to, or repeatedly stops, or repeatedly attempts to stop, or repeatedly attempts to engage passers-by in conversation, or repeatedly stops or attempts to stop motor vehicles, or repeatedly interferes with the free passage of other persons, *for the purpose of prostitution as that term is defined in article two hundred thirty of this part*, shall be guilty of a violation and is guilty of a class B misdemeanor if such person has previously been convicted of a violation of this section or of section 230.00 of this part.

N.Y. Pen. Law § 240.37(2) (emphasis added). Importantly, the statutory scheme proscribes specific conduct *only where it is engaged in with a specific criminal intent.*

Where, as here, a statutory scheme bans conduct carried out with a specific intent to engage in certain criminal activity, courts have generally found that the statute is not vague. *See, e.g., Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) ("a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed"); *Colautti v. Franklin*, 439 U.S. 379, 395 (1979)

("the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*"); *United States v. Stewart*, 590 F.3d 93, 116-18 (2d Cir. 2009) (*mens rea* element provided adequate notice of the proscribed conduct and "the heightened scienter requirement . . . constrains prosecutorial discretion, and ameliorates concerns of arbitrary and discriminatory enforcement").

Similarly, a specific intent element saves a statute from an overbreadth challenge, where, as here, it only prohibits conduct engaged in for the specific purpose of criminal activity. *People v. Smith*, 44 N.Y.2d 613, 620 (N.Y. 1978) (rejecting challenge to 240.37 because "the statute, by its terms, is limited to conduct 'for the purpose of prostitution, or of patronizing a prostitute'—behavior which has never been a form of constitutionally protected free speech"); *see also United States v. Williams*, 553 U.S. 285, 297 (2008) ("Offers to engage in illegal transactions are categorically excluded from First Amendment protection").

While plaintiffs argue that the statute does not include a *mens rea* element, Ex. A at ¶ 52, the statute was upheld by the New York State Court of Appeals against vagueness and overbreadth challenges in large part because it "explicitly limits its reach to loitering . . . for the purpose of committing a specific offense." *Smith*, 44 N.Y.2d at 620. The Court of Appeals explained, "[t]he section does not authorize an arrest or conviction based on simple loitering by a known prostitute or anyone else; rather, it requires loitering *plus additional objective conduct evincing that the observed activities are for the purpose of prostitution*." *Id.* at 621 (emphasis added). Plaintiffs also complain that the statute allows "the NYPD immense discretion to assume an individual's 'purpose.'" Ex. A at ¶ 52. Yet, the Court of Appeals in *Smith* rejected a nearly identical argument, explaining that an officer must still have probable cause to be believe that an individual was acting with the specific intent to commit a prostitution-related offense before he

or she could effect an arrest pursuant to the statute, nor could a person be convicted under the statute absent proof beyond a reasonable doubt that the individual acted for the purpose of committing one of the enumerated crimes. *See Smith*, 44 N.Y.2d at 621. The Court of Appeals explained that "[t]here is also a remote possibility that a person involved in innocent conversation, such as a pollster or one seeking directions, might be arrested, but that is not envisioned by the statute and the mere fact that an officer in a particular case did not have probable cause to arrest that defendant would not warrant the invalidation of the statute." *Id.* (citing *Roth v. United States*, 354 U.S. 476, 491-92 (1957)).

Moreover, while plaintiffs argue that "for the purpose of" is impermissibly vague, they offer no alternative for what this could possibly mean other than proscribing conduct engaged in with the intent to commit one of the enumerated prostitution-related offenses. *See* Ex. A at ¶¶ 51-52. Indeed, the court in *Silvar v. Eighth Judicial Dist. Court* noted that "most of the prostitution loitering ordinances that have been upheld clearly require a specific intent element. Those ordinances criminalized loitering . . . 'for the purpose of engaging in, soliciting, or procuring sexual activity for hire' . . . or variations thereof." 129 P.3d 682, 689 (Nev. 2006).

Plaintiffs also fault the statute for failing to "provide any objective criteria to determine what conduct is for the 'purpose' of prostitution." Ex. A at ¶ 51. Ironically, similar attempts to bootstrap a *mens rea* element by allowing an officer to *per se* infer intent through observation of certain enumerated objective criteria have led to invalidation of many of the statutes cited by plaintiff. For example, Anchorage Municipal Ordinance 8.14.110 promulgated that "[n]o person will loiter in or near a thoroughfare or place open to the public in a manner and under circumstances manifesting the purpose of, inducing, enticing, soliciting or procuring another to participate in an act of prostitution." *Brown v. Anchorage*, 584 P.2d 35, 36 (Alaska 1978)

(internal quotations omitted). The ordinance also provided that "[a]mong the circumstances which may be considered in determining whether such purpose is manifested are that such person: is a known prostitute or panderer; repeatedly beckons to, stops, attempts to stop, or engages males passersby in conversation . . . ." *Id.* In striking down the statute, the court noted that "[a]pplying a dictionary definition of the word 'loiter,' one could conclude that the ordinance makes it a crime for a previously convicted prostitute to 'spend time idly;' to 'linger in an aimless way;' or 'to walk or move slowly and indolently, with frequent stop and pauses.'" *Id.* at 36; *see also Coleman v. Richmond*, 5 Va. App. 459, 463-65 (1988) ("[T]he ordinance provides that among the circumstances which may be considered in determining whether the person loitering manifests that intent are three specific circumstances. The role of these enumerated circumstances is central to our decision. . . . It is not clear, however, whether the inclusion of the three particular circumstances was intended to prove that the presence of one or more of those circumstances would sufficiently manifest the intent . . . .").

The "similar" statutes cited by plaintiffs, Ex. A at ¶ 59, were struck down because they either allowed officers to *per se* infer specific intent from enumerated criteria such as being a known prostitute or waving at cars, *see Brown*, 584 P.2d 36-38; *Coleman*, 364 S.E.2d at 242-43; *Christian v. Kan. City*, 710 S.W.2d 11, 13 (Mo. Ct. App. 1986); *Profit v. City of Tulsa*, 617 P.2d 250, 251 (OK 1980), or because the statute was construed by the court to not include any actual specific intent requirement subject to the probable cause requirements of the Fourth Amendment. *See City of W. Palm Beach v. Chatman*, 112 So. 3d 723, 727 (Fla. Dist. Cit. App. 2013); *Silvar*, 129 P.3d at 688-89; *Wych v. State*, 619 So. 2d 231, 235 (Fla. 1993). Section 240.37 does not suffer from these infirmities, and indeed, most closely resembles the ordinance at issue in *Cleveland v. Howard*, which "was patterned after guidelines found in the American Law

Institute's Model Penal Code" and which withstood vagueness and overbreadth challenges. 532 N.E.2d 1325, 1326 (Ohio 1987) ("The ordinance sets forth clear and definite criteria whereby both the citizen and the arresting officer can judge whether the particular loitering involved is unlawful."). Accordingly, Section 240.37 is neither void for vagueness nor unconstitutionally overbroad and, as a result, plaintiffs' First and Second Claims for Relief must be dismissed.

POINT II

PLAINTIFFS LACK STANDING TO PURSUE INJUNCTIVE OR DECLARATORY RELIEF

The named plaintiffs lack standing under Fed. R. Civ. P. 12(b)(1) to pursue injunctive relief on behalf of themselves or the putative class they seek to represent because they failed to plead a sufficient likelihood of future harm from and the existence of an official policy or its equivalent regarding the NYPD's enforcement of Sec. 240.37. Accordingly, plaintiffs' "Class Claims" under their First through Fourteenth Causes of Action, and their individual claims seeking injunctive and/or declaratory relief must be dismissed.

A court's jurisdiction to hear a vagueness challenge is limited to an actual case or controversy. *See* U.S. Const., art. III, § 2. "The doctrine of standing gives meaning to these constitutional limits." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). "An objection to standing is properly made on a Rule 12(b)(1) motion." *Williams v. City of New York*, 34 F. Supp. 3d 292, 294 (S.D.N.Y. 2014) (quoting *Tasini v. New York Times Corp., Inc.*, 184 F. Supp. 2d 350, 354 (S.D.N.Y. 2002)). In fact, "[s]tanding for an equitable claim must appear on the face of the complaint in order to survive a motion to dismiss." *Aiken v. Nixon*, 236 F. Supp. 2d 211, 221 (N.D.N.Y 2002) (citing *O'Shea v. Littleton*, 414 U.S. 488 (1974)). Moreover, "[f]or each form of relief sought, a plaintiff 'must demonstrate standing separately.'" *Nicosia v. Amazon.com, Inc.*, No. 15-423-CV, 2016 U.S. App. LEXIS 15656, at *36 (2d Cir. Aug. 25,

2016) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000)). Additionally, plaintiffs "must allege that they personally have been injured, not that injury has been suffered by other, unidentified members of the class." *MacNamara v. City of New York*, 275 F.R.D. 125, 140 (S.D.N.Y 2011) (citing *Lewis v. Casey*, 518 U.S. 343, 357 (1996).

"In order to establish standing, a plaintiff must prove: (1) injury-in-fact, or a concrete and particularized harm to a legally protected interest; (2) causation, or a fairly traceable connection between the asserted injury-in-fact and the alleged actions of the defendant; and (3) redressability, or a non-speculative likelihood that the injury will be redressed by a favorable decision." *Williams*, 34 F. Supp. 3d at 295 (citing *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche, LLP*, 549 F.3d 100, 106-07 (2d Cir. 2008); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). For the reasons cited *infra*, plaintiffs have not met their burden to prove a non-speculative threat of future injury, or redressability.

A. The Prospect Of Future Harm Is Merely Speculative

1. Past Injuries Do Not Confer Standing for Injunctive Relief

Although past injuries may provide a basis for standing to seek money damages, they do not confer standing to seek injunctive relief unless the plaintiff can demonstrate that she is likely to be harmed again in the future in a similar way. *See, e.g.*, *Marcavage v. The City of New York*, 689 F.3d 98, 103 (2d Cir. 2012); *Harty v. Simon Property Group, L.P.*, 428 Fed. App'x. 69, 71 (2d Cir. 2011). "Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects." *O'Shea*, 414 U.S. at 495-96. "In other words, [a plaintiff] asserting an injunction . . . must allege the probability of a future encounter with the defendant which is likely to lead to a similar violation of some protected right." *Curry v. City of New York*, No. 10-CV-5847

(SLT)(LB), 2010 U.S. Dist. LEXIS 135461, at *8 (E.D.N.Y. Dec. 22, 2010) (internal citation omitted). "[T]he injury or threat of injury must be both 'real and immediate,' not 'conjectural' or 'hypothetical.'" *Shain v. Ellison*, 356 F.3d 211, 215 (2d Cir. 2004) (quoting *O'Shea*, 414 U.S. at 494).

2. The Likelihood of Future Harm Is Too Speculative

"[I]n order to demonstrate that they have standing to pursue claims for injunctive relief, plaintiffs must show a real and immediate threat of repeated injury." *Henry v. Lucky Strike Entertainment*, 10 CV 3682 (RRM), 2013 U.S. Dist. LEXIS 124939, at *42 (E.D.N.Y. Sept. 1, 2013). This possibility of future injury must be particular and concrete. *See O'Shea*, 414 U.S. at 496-97. An "abstract injury is not enough." *Shain*, 356 F.3d at 215.

The seminal case in this regard, *City of L.A. v. Lyons*, 461 U.S. 95 (1983), "occupies much of the territory" related to a citizen's standing to seek an injunction against police practices surrounding arrests. *Williams*, 34 F. Supp.3d at 296 (citing *Shain*, 356 F.3d at 215). In *Lyons*, the plaintiff alleged that he feared again being subjected to an illegal chokehold, and given the extensive use of chokeholds by the Los Angeles police, that he should be afforded standing to seek injunctive relief. *See generally Lyons*, 461 U.S. 95. However, the United States Supreme Court held that the risk that plaintiff himself would come into contact with the police *and* suffer a subsequent unlawful chokehold was speculative in nature and insufficient to confer equitable standing. *Id.* at 109. Courts in this Circuit have repeatedly confirmed that the likelihood of future unconstitutional treatment by the police in the course of an arrest is too speculative to confer standing. *See, e.g.*, *MacIsaac v. Town of Poughkeepsie*, 770 F. Supp. 2d 587, 601 (S.D.N.Y. 2011) (plaintiff's claim that he would be stopped, arrested and subjected to a Taser gun again was speculative, and injunctive relief therefore denied); *McLennon v. City of New York*, 171 F. Supp. 3d 69, 74-76 (E.D.N.Y. 2016) (plaintiffs alleging suspicionless searches and seizures at *de*

facto vehicle checkpoints denied standing for injunctive relief where likelihood of similar alleged constitutional harm by NYPD in future was too speculative); *Williams*, 34 F. Supp. 3d at 294 (plaintiff lacked standing for injunctive relief under the ADA requiring the NYPD to provide accommodations to hearing-impaired persons upon arrest and incarceration because likelihood of future arrest by NYPD too speculative); *MacNamara*, 275 F.R.D. at 140-141 (plaintiffs denied class certification, as they could make only a speculative showing of future harm from alleged NYPD mass protest arrest practices in question).

Notably, even where plaintiffs have expressed an intention to engage in future, similar activities to those which they allege caused them to be subjected to past harm, courts have denied standing for injunctive relief under Rule 23(b)(2), deeming allegations of future similar harm still too speculative to sustain class certification.[1] For example, in *MacNamara*, class certification under Rule 23(b)(2) was denied due to lack of standing on the grounds that plaintiffs, arrested during the 2004 RNC convention protests, and who sought to enjoin certain allegedly "unconstitutional" practices employed by the NYPD in effecting mass arrests during protests, could make only a speculative showing of future harm from the practices in question. *MacNamara*, 275 F.R.D. at 140-141. This was in spite of the fact that, "[t]o support their assertion of likely future harm, plaintiffs cite[d] the depositions of [putative class members] who have indeterminate future plans to participate in New York City protests," which would presumably bring them into contact with the NYPD and the complained-of practices in the future. There, the court found that plaintiffs' alleged future harm – that they faced potential arrest since several class representatives planned to attend demonstrations in New York in the future –

[1] Plaintiffs admit that plaintiff K.H. moved to Florida following her arrest, where she still resides. Ex. A at ¶152. K.H. has not alleged an intention to return to New York City, but even if she had, it would be insufficient to confer standing since she is not "necessarily or even likely have any contact with the police in the future." *Williams*, 34 F. Supp. 3d at 297.

was "too speculative and conjectural to supply a predicate for prospective injunctive relief." *Id.* at 141 (internal citations and quotations omitted); *see also Liu v. The New York City Campaign Finance Board*, 14 Civ. 1687 (RJS), 2016 U.S. Dist. LEXIS 135687 (S.D.N.Y. Sept. 29, 2016) (plaintiff's statement that he "may run for elective office in New York City in the future" deemed too speculative and lacking the requisite imminence of future harm to support standing to challenge campaign finance provision); *Shain*, 356 F.3d at 216 (denying claim for prospective relief predicated on "an accumulation of inferences" that were "simply too speculative and conjectural" to show "sufficient likelihood of future [injury]").

The speculative future arrests theorized by plaintiffs fail to rise to the level of "certainly impending" and are the very essence of "conjectural or hypothetical." *See, e.g., Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 800 (2d Cir. 2015) ("The Supreme Court has 'repeatedly reiterated that threatened injury must be *certainly impending* to constitute injury in fact,' and that '[a]llegations of *possible* future injury are not sufficient.'") (alteration in original) (quoting *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013)); *Atik v. Welch Foods, Inc.*, No. 15-CB-5405 (MKB)(VMS), 2016 U.S. Dist. LEXIS 136056, at *19-20 (E.D.N.Y. Sept. 30. 2016).

3. One to Two Prior Incidents Are Insufficient to Confer Standing

Where a stop has occurred only once or twice in several years, a plaintiff lacks standing to pursue injunctive relief because it is unlikely that she will be stopped again. *See, e.g., Lyons*, 461 U.S. at 101-02 (one past incident involving a plaintiff and the police was insufficient to confer standing); *Hodgers-Durgin v. De La Vina*, 199 F.3d 1037, 1044 (9th Cir. 1999) (motorists stopped by Border Patrol once in ten years had no standing); *Alvarez v. City of Chi.*, 649 F. Supp. 43, 45 (N.D. Ill. 1986) (no injunction for only two incidents of police misconduct in six years). The *D.H.* plaintiffs fall far short of the standard of showing "certainly impending" future injury,

particularly as seven named plaintiffs allege only one unconstitutional arrest pursuant to Sec. 240.37, and only one named plaintiff alleges two unconstitutional arrests in a five year period.

B. Plaintiffs Have Not Alleged The Existence Of An Official Policy Or Its Equivalent

The Second Circuit in *Shain v. Ellison* established a two prong test by which a "plaintiff seeking injunctive relief must demonstrate *both* a likelihood of future harm *and* the existence of an official policy or its equivalent." *Shain*, 356 F.3d at 216 (emphasis added). For the reasons stated *supra*, plaintiffs cannot meet the first prong of the test; but even if they could, plaintiffs also cannot meet the second prong, and therefore lack standing to seek injunctive relief.

In *DeShawn E. ex rel. Charlotte E. v. Safir*, 156 F.3d 340, 344-45 (2d Cir. 1998), "the Second Circuit distinguished the facts of that case from *Lyons*, noting that in *Lyons*, there was no proof of a pattern of illegality because the police had discretion to decide if they were going to apply a choke hold, and there was no formal policy which sanctioned the application of the choke hold. In contrast, the challenged interrogation methods in *DeShawn* were officially endorsed policies; as a result, there was a likelihood of recurring injury because the police activities are authorized by a written memorandum of understanding between the Corporation Counsel and the Police Commissioner." *Burns v. Warwick Valley Cent. Sch. Dist.*, 166 F. Supp. 2d 881, 888-889 (S.D.N.Y. 2001). The facts in *D.H.* are more similar to those alleged in *Lyons*, as plaintiffs allege that officers' discretion is improperly applied, and not that the officers are enforcing an unconstitutional official policy.

1. Plaintiffs Do Not Allege an Official Policy

The Amended Complaint does not allege that plaintiffs were arrested or that their rights were violated pursuant to an official policy. Instead, plaintiffs allege "a pattern and widespread practice." Ex. A at ¶10. In fact, the thrust of plaintiffs' claims are that "Section 240.37 fails to provide law enforcement with clear guidelines" and that "the Plaintiffs are subjected to the

whims of police officers who may determine that their conduct is for the 'purpose' of prostitution." Ex. A at ¶¶50, 52. The closest plaintiffs get to alleging an official policy is by arguing that the "NYPD Patrol Guide is equally vague and otherwise flawed," but do not allege that the Patrol Guide orders officers to conduct unconstitutional acts. Ex. A at ¶54.

2. Plaintiffs Do Not Plead Deliberate Indifference

Unable to identify an official policy, plaintiffs instead point only to a few complaints in other lawsuits for their conclusion that the NYPD has an actionable municipal "custom or usage."[2] Ex. A, ¶ 101. This is insufficient to confer standing. Although courts can "take judicial notice of documents filed in other courts, again not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings." *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 774 (2d Cir. 1991); *Walker v. City of New York*, No. 14 Civ. 808 (ER), 2015 U.S. Dist. LEXIS 91410 at *24-25 (S.D.N.Y. July 14, 2015) ("[it] is not within this Court's purview to assess the veracity of either the claims of outside plaintiffs, or the defenses presented against them in cases that have settled or are pending before other judges.") (quoting *Kramer*).

The fact that none of the three lawsuits cited by plaintiffs resulted in a finding that the NYPD officers violated the plaintiffs' rights is fatal to plaintiffs' deliberate indifference claim. *See An v. City of New York*, No. 16 Civ. 5381 (LGS), 2017 U.S. Dist. LEXIS 14857, *10-11 (S.D.N.Y. Feb. 2, 2017) (citing *Calderon v. City of New York*, 138 F. Supp. 3d 593, 612-613 (S.D.N.Y. 2015); *Tieman v. City of Newburgh*, No. 13 Civ. 4178, 2015 WL 1379652, at *17 (S.D.N.Y. Mar. 26, 2015)). Simply put, plaintiffs' allegation of an actionable municipal "custom or usage" by citing to three other lawsuits filed in the last ten years cannot confer standing in this

[2] For municipal liability to lie under such a theory, plaintiff must establish the existence of an unlawful practice by subordinate officials so permanent and well settled to constitute a "custom or usage," with proof that this practice was so manifest as to imply the acquiescence of policy-making officials. *Praprotnik*, 485 U.S. at 127-30.

case.[3] In fact, of the three other lawsuits cited by plaintiffs, one voluntarily withdrew the case only two months after bringing it in the first place. *See* Notice of Voluntary Withdrawal, annexed to Mettham Dec. as Ex. B. The other two were settled without admissions of liability by any defendant. *See* Stipulations of Settlements, annexed to Mettham Dec. as Ex. C and Ex. D.

Further, the Amended Complaint has failed to allege sufficiently "that the City, once on notice, failed to take corrective action required to show deliberate indifference." *An*, 2017 U.S. Dist. LEXIS 14857 at *10-11. In fact, plaintiffs admit that the City amended the Patrol Guide in 2012, even though they claim that the amendments "proved insufficient." Ex. A at ¶105. This is hardly sufficient to plead official acquiescence to unlawful behavior by subordinates, as required by *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127-30 (1985) (plurality opinion).

C. The Claimed Injuries Would Not Be Prevented By the Equitable Relief Sought

According to the Amended Complaint, the defendants lied about what they observed. As such, according to plaintiffs, it is not that the officers were unclear about what 240.37 permitted and unconstitutionally enforced the statue based on gender identity, race, or First Amendment factors, but rather simply manufactured allegations. Ex. A at ¶¶121, 138, 153, 171, 187, 200, 213, 228, 234 (defendants "falsely alleged" facts in each criminal complaint). Thus, it is unclear how equitable relief regarding the change in the prosecution of 240.37 would have prevented the injuries alleged. For example, plaintiff Gonzalez denies that she stopped and spoke to anyone on the date of incident; however, plaintiffs allege that defendant Gomez falsely swore in a criminal complaint that she stopped five male motorists. Ex. A at ¶¶ 195, 200. To the extent plaintiffs claim that officers lied under oath regarding their observations, the statutory construction of

[3] Nor can alleging a handful of lawsuits and a newspaper article satisfy the "plausibility" requirement of *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2008). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* As seen, complaints from other lawsuits and newspaper articles are not evidence of municipal wrongdoing. Thus, plaintiff's complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6), as well.

240.37 is irrelevant. Moreover, alleged deficient training regarding the correct constitutional interpretation of 240.37 would not remedy the "isolated misconduct" or "negligent or intentional disregard of their training" that is alleged by plaintiffs. *See, e.g.*, *Stelling v. City of New York, et al.*, 15-CV-0035 (ILG), 2017 U.S. Dist. LEXIS 3566 **5-8 (E.D.N.Y. Jan. 10, 2017) (citing *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 130 (2d Cir. 2004)). For this reason, plaintiffs have not pleaded that injury would be prevented by the equitable relief sought.

POINT III

PLAINTIFFS FAIL TO PLEAD A VIABLE 42 U.S.C. § 1985(3) CONSPIRACY CLAIM

Plaintiffs' attempt to plead a conspiracy claim against "[d]efendants from the 52nd Precinct" pursuant to 42 U.S. C. § 1985(3) in their Tenth Claim for Relief fails as a matter of law. Ex. A at ¶ 281. In order to plead a viable conspiracy claim pursuant to either § 1983 or § 1985(3), a plaintiff must plead sufficient factual allegations to plausibly establish that there was "a meeting of the minds, such as defendants entered into an agreement, express or tacit, to achieve [an] unlawful end." *Romer v. Morgenthau*, 119 F. Supp. 2d 346, 363 (S.D.N.Y. 2000). Where plaintiffs fail to plausibly allege such a meeting of the minds, their conspiracy claim must be dismissed. *See, e.g.*, *Ciambriello v. County of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002); *Leon v. Murphy*, 988 F.2d 303, 311 (2d Cir. 1993); *Corsini v. Bloomberg*, 12 Civ. 8058 (LTS)(MHD), 2014 U.S. Dist. LEXIS 67020, at *36-*37 (S.D.N.Y. May 14, 2014).

Here, plaintiffs' conspiracy claim relates specifically to alleged actions taken by the 52nd Precinct defendants during so-called "sweeps" on June 6, 2015 and June 13, 2015. Ex. A at ¶ 281. Plaintiffs' only factual support for their conspiracy claim appears to be that "[o]ne of N.H.'s arresting officers told the women that the police had been conducting a sweep *and that if they saw* 'girls like them' outside after midnight, they would arrest them." Ex. A at ¶ 134 (emphasis

added); *see also*, Ex. A at ¶ 74. As an initial matter, the factual allegations regarding a single exchange with one police officer fall far short of plausibly establishing a "meeting of the minds" sufficient to support a viable conspiracy claim. Moreover, it is clear that the allegation that the police were conducting a sweep for a specific purpose is nothing more than a conclusory inference drawn by plaintiffs from a single alleged exchange.

In addition, plaintiffs' reference to the alleged statement "girls like you" fails to plausibly establish that sweeps were targeted at transgender women. Even assuming the statement was made, the more likely explanation is that the officer was referring to prostitutes—not transgender women. That inference is bolstered by the fact that other individuals arrested in the same location were also arrested for prostitution-related offenses and that officers allegedly responded to N.H.'s query about the charges by simply stating "you know." *See* Ex. A at ¶ 130. Accordingly, this statement, standing alone, cannot plausibly establish that there was a meeting of the minds to "send a message" to transgender women because there is a more likely explanation for the meaning behind the statement (i.e., that the officers were cracking down on illegal street prostitution). *See Iqbal*, 556 at 681 (although defendants' actions were not inconsistent with plaintiff's alleged improper purpose, there was a more likely explanation for the conduct, and thus plaintiff failed to plausibly establish the improper purpose).

Finally, under the intra-corporate conspiracy doctrine, even if the Amended Complaint plausibly established elements of an otherwise viable conspiracy claim, the claim would still be barred because it alleges a conspiracy within the NYPD itself. *See*, *e.g.*, *Farbstein v. Hicksville Pub. Library*, 254 Fed. Appx. 50, 51 (2d Cir. 2007) (citing *Herrman v. Moore*, 57 F.2d 453, 459 (2d Cir. 1978)). Accordingly, plaintiffs' § 1985(3) conspiracy claim must be dismissed.[4]

[4] Even assuming, *arguendo*, that plaintiffs had plausibly established a meeting of the minds between defendants and their conspiracy claim was not otherwise barred by the intra-corporate conspiracy doctrine, to state a viable claim

POINT IV

PLAINTIFFS' EQUAL PROTECTION CLAIMS SHOULD BE DISMISSED

The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne v. Cleburn Living Ctr*., 473 U.S. 432, 439 (1985). "Proof that discriminatory intent was a motivating factor is required to show a violation of the Equal Protection Clause." *Okin v. Village of Cornwall-on-Hudson Police Dept*., 577 F.3d 415, 438 (2d Cir. 2009) (citing *Arlington Heights v. Metro Hous. Dev. Corp*., 429 U.S. 252, 265-66 (1977)). To allege a denial of equal protection, plaintiffs must show "(1) that [they were] treated differently from other similarly situated individuals, and (2) that such differential treatment was based on impermissible considerations . . . ." *De Santis v. City of New York*, 2011 U.S. Dist. LEXIS 99126, at *27 (S.D.N.Y. Aug. 29, 2011) (citing *Harlen Assocs. v. Inc. Village of Mineola*, 273 F.3d 494, 499 (2d Cir. 2001)). They also must show that the disparity in treatment cannot survive the appropriate level of judicial scrutiny. *See Phillips v. Girdich*, 408 F.3d 124, 129 (2d Cir. 2005). For the reasons stated herein, plaintiffs' Equal Protection causes of action under their Fifth and Sixteenth Claims for Relief must be dismissed.

A. Claims of Selective Enforcement/Treatment Must Plead the Existence of Similarly Situated Individuals

Selective enforcement or selective treatment claims "arise when plaintiffs claim that they were treated differently based on impermissible considerations." *Mosdos Chofetz Chaim, Inc. v. Village of Wesley Hills*, 815 F. Supp. 2d 679, 693 (S.D.N.Y. 2011) (citing *Tasadfor v. Ruggiero*, 265 F. Supp. 2d 542, 551 (S.D.N.Y. 2002)). The Second Circuit has held that "a plaintiff alleging

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for § 1985(3) conspiracy "a plaintiff must plead 'some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." *Blount v. New York Unified Court Sys*., 03-CV-0023 (JS)(ETB), 2005 U.S. Dist. LEXIS 44013, at *14 (E.D.N.Y. March 17, 2005) (quoting *Thomas v. Roach*, 165 F.3d 137, 146 (2d Cir. 1999) (internal quotations omitted). As discussed *infra* at Point IV, plaintiffs have failed to plausibly allege this element of the claim as well.

a claim of selective *prosecution* … must plead and establish the existence of similarly situated individuals who were not prosecuted." *Pyke v. Cuomo*, 258 F.3d 107, 108-09 (2d Cir. 2001) (emphasis in original) (citing *United States v. Armstrong*, 517 U.S. 456, 465 (1996)). Plaintiffs' Equal Protection claims are premised on a theory of selective enforcement/treatment, in that "Defendants targeted and/or sanctioned the targeting of Named Plaintiffs for unlawful surveillance, stops, questions, frisks, searches, seizures and/or arrest and detention under Section 240.37 based on their race, color, ethnicity, gender, gender identity and/or appearance, under the circumstances in which white men or white women are not subjected to such law enforcement activities." Ex. A at ¶ 78.

B. Plaintiffs Fail to Allege Facts Sufficient to Establish Differential Treatment

A selective enforcement claim requires, as a threshold matter, a showing that the plaintiff was treated differently compared to others similarly situated. *See Church of the Am. Knights of the Ku Klux Klan v. Kerik*, 356 F.3d 197, 210 (2d Cir. 2004); *Gagliardi v. Vill. of Pawling*, 18 F.3d 188, 193 (2d Cir. 1994) ("To establish such intentional or purposeful discrimination, it is axiomatic that a plaintiff must allege that similarly situated persons have been treated differently."). To plead the existence of similarly-situated others, plaintiffs must "compare themselves to individuals [who] are similarly situated in all material respects . . . . [and] identify comparators whom a prudent person would think were roughly equivalent." *Best v. New York City Dep't of Corr.*, 14 F. Supp. 3d 341, 352 (S.D.N.Y. 2014) (quoting *Mosdos Chofetz Chaim, Inc.*). Accordingly, because plaintiffs have not set forth facts sufficient to show the existence of similarly situated individuals, their equal protection claims must be dismissed. *See, e.g.*, *Kerik*, 356 F.3d at 211 (denial of a permit did not constitute differential treatment where plaintiff failed to allege any other group who was granted a permit under similar circumstances); *Gagliardi*, 18 F.3d at 193 (affirming dismissal where plaintiff failed to allege that the municipality would have

enforced the zoning code at the request of a resident similarly-situated to plaintiff); *Best*, 14 F. Supp. 3d at 352-54 (dismissing claim in absence of "facts that suggest [plaintiff] was treated differently than were any other similarly-situated individuals").

C. Plaintiffs Fail to Allege Intentional Discrimination

Plaintiffs also fail to adequately plead discriminatory intent based on race, gender, and gender identity. *See Okin*, 577 F.3d at 437 ("Proof that discriminatory intent was a motivating factor is required to show a violation of the Equal Protection Clause."); *Troy v. City of New York*, 2014 U.S. Dist. LEXIS 136339, at *23-*27 (S.D.N.Y. Sept. 25, 2014) (granting dismissal where plaintiff did not allege that differential treatment by police was based on impermissible considerations), *aff'd*, 614 Fed. Appx. 32 (2d Cir. 2015).

First, plaintiffs conclusorily allege that defendants enforce Section 240.37 in a discriminatory manner based on race. Plaintiffs, however, do not allege any specific facts that defendants were motivated by racial animus. Of the eight named plaintiffs in this case, only plaintiff Bankston alleges that "officers abused her by using racial slurs." Ex. A at ¶55. However, plaintiff Bankston does not state what "racial slurs" were said and which officer made such statement. This allegation is vague, speculative, and does not give rise to a plausible inference of purposeful discrimination. *Brodt v. City of New York*, 4 F. Supp. 3d 562, 568-569 (S.D.N.Y. 2014) ("plaintiff's feelings and perceptions of being discriminated against are not evidence of discrimination," even where the conduct alleged is "rude and derogatory").

Second, plaintiffs make conclusory assertions that defendants enforce Section 240.37 in a discriminatory manner based on gender; however, they do not allege any facts or attribute any statements to defendants that plausibly imply that defendants were motivated by gender animus.

Third, plaintiffs made conclusory assertions that defendants have chosen to enforce Section 240.37 in a discriminatory manner based on gender identity. Plaintiff N.H. alleges that

after she was arrested, defendant Dawkins and other police officers continually referred to her as a boy or a man. Ex. A at ¶39. Plaintiff N.H, however, makes no allegations that police officers she encountered made such references in a mocking or dismissive manner. Plaintiff Martin alleges that Defendant Allen made derogatory comments such as, "which one of you is going to process the he/she?" Ex. A at ¶45. These post-hoc gender references, while rude, are not sufficient to nudge her claim of purposeful discrimination from conceivable to plausible and do not give rise to a plausible inference that the decision to arrest any plaintiff was motivated by discriminatory animus regarding that plaintiff's transgender status. *See Brodt v. City of New York*, 4 F. Supp. 3d 562, 569-572 (S.D.N.Y. 2014) (Conduct that is merely "rude and derogatory" does give rise to discrimination in violation of the equal protection clause).

Plaintiff Grissom alleges that a female officer, upon defendant's Pocalyko's order, strip-search her "for the purpose of confirming whether or not she was a female, as her identification indicated." Ex. A at ¶48. However, she merely alleges that defendant Pocalyko asked her questions relating to her gender and sex organs and then ordered a female police officer to strip search her. *Id*. While these comments certainly suggest some degree of confusion on the part of the officer, they are far too vague to give rise to a plausible inference that the search was conducted for the "sole" purpose of assigning plaintiff a gender based on anatomical features.[5]

For the abovementioned reasons, since the plaintiffs have not plausibly pled intentional discrimination, their equal protection claims thus fail as a matter of law.

[5] While Plaintiff Grissom may sincerely believe that the search was conducted to assign her a gender, those beliefs standing alone are not sufficient to prove animus. *See Williams v. Wellness Med. Care, P.C.*, 2013 U.S. Dist. LEXIS 139626, at *18 (S.D.N.Y. Sept. 27, 2013) ("without sufficient facts, even the most sincerely held beliefs [of animus] do not comprise a sufficient basis for withstanding a 12(b)(6) attack.").

D. Defendants Are Entitled to Qualified Immunity

The doctrine of qualified immunity saves public officials from the burden of civil discovery and trial unless they have violated "a statutory or constitutional right that was clearly established at the time of the challenged conduct." *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012). Even assuming, *arguendo*, that plaintiffs could establish a constitutional violation on the facts alleged, the plaintiffs' rights must be "clearly established" at the time of the alleged incident. *Saucier v. Katz*, 533 U.S. 194, 202 (June 18, 2001). The "clearly established" inquiry requires that "if the law did not put the officer on notice that his conduct would be clearly unlawful, summary judgment based on qualified immunity is appropriate." *Id.* For purposes of qualified immunity, in order to be considered "clearly established" the "contours of the right" must be "sufficiently clear" at the time of the challenged conduct so that every reasonable official would have understood that he or she was violating the right. *Terebesi v. Torreso*, 764 F.3d 217 (2d Cir. 2014) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)). "To date, neither the Supreme Court nor the Second Circuit has held that transgender plaintiffs are members of a protected or suspect class whose equal protection claims are entitled to heightened scrutiny. . . . Nor has the Second Circuit held . . . that discrimination against transgender individuals constitutes sex-based discrimination." *White v. City of New York*, 2016 U.S. Dist. LEXIS 123140, at *22-*23 (S.D.N.Y. Sept. 12, 2016) (internal citation omitted).

Because at the time of the conduct at issue, neither the Supreme Court nor the Second Circuit had held that transgender people were a suspect class under the Equal Protection Clause, the named defendants are entitled to qualified immunity on claims of constitutional violations based on the named plaintiffs' identities as transwomen.

POINT V

PLAINTIFFS' 42 U.S.C. §§ 1981, 2000D, AND N.Y. CIV. RIGHTS LAW §§ 40-C, 40-D, 79-N CLAIMS SHOULD BE DISMISSED

To establish claims under 42 U.S.C. §§ 1981 and 2000d, a plaintiff must plead, *inter alia*, "that the defendant discriminated against him on the basis of race, that the discrimination was intentional, and that the discrimination was a substantial or motivating factor for the defendant's actions." *Tolbert v. Queens College*, 242 F.3d 58, 69 (2d Cir. 2001) (internal quotations and citations omitted). New York Civil Rights Law provides, in pertinent part, that "[n]o person shall, because of race, creed color, national origin, sex, marital status, sexual orientation or disability… be subjected to any discrimination of his or her civil rights …." N.Y. Civ. Rights Law § 40-c. New York Civil Rights Law also imposes liability on "[a]ny person who intentionally selects a person or property for harm … in whole or in substantial party because of a belief or perception regarding the race, color, national origin, ancestry, gender, religion, religious practice, age disability or sexual orientation of a person." N.Y. Civ. Rights Law § 79-n. As discussed in Point IV, *supra*, plaintiffs failed to plausibly allege intentional discrimination or that defendants were motivated by discriminatory animus. Since plaintiffs have not plausibly pled intentional discrimination, these claims under their Sixth, Eighth, Eleventh, and Eighteenth Claims for Relief thus fail as a matter of law.

POINT VI

PLAINTIFFS' CLASS CLAIM PURSUANT TO N.Y. EXEC. LAW §§ 296(2), 296(6), 297(9) AND N.Y.C. ADMIN. CODE §§ 8-107(4)(A), 8-107(6), 8-107(17), 8-502(A) SHOULD BE DISMISSED

Under New York State Executive Law and New York City Administrative Code, plaintiffs may only oppose a discriminatory practice by "a place or provider of public

accommodation." *See* N.Y.C. Admin. Code 8-107(4)(a), N.Y. Exec. Law §296(2). Plaintiffs' Twelfth Claim for Relief alleges that "the NYPD is a place or provider of public accommodation because it provides services, facilities, accommodations, advantages and privileges through acting in its investigative and custodial capacities." Ex. A ¶ 73. However, plaintiffs' allegations incorrectly expand the definition of "place of public accommodation."[6] Plaintiffs specifically state that the NYPD is a place or provider of public accommodation during the "supervision and execution of surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detention pursuant to Section 240.37." *Id*. This allegation implies that the NYPD provides a public accommodation to individuals suspected of committing a crime pursuant to Section 240.37. With respect to the enforcement of Section 240.37, the NYPD certainly does not provide a public accommodation to those suspected individuals, as the term is defined in either the Executive Law or Administrative Code. Unlike victims who are reporting crimes, such suspected individuals are not being provided conveniences and services by the NYPD. *See Cahill v. Rosa*, 89 N.Y.2d 14, 21 (1996). Here, plaintiffs are not claiming that they were seeking public services or accommodations of any kind when they were targeted by the NYPD acting in its investigative capacity. Thus, public accommodation laws are inapplicable to plaintiffs' allegations.

Because plaintiffs are improperly expanding the definition of "place or provider of public accommodation," this class claim should be dismissed.

[6] N.Y.C. Admin. Code states that "[t]he term 'place or provider of public accommodation' shall include providers … of goods, services, facilities, accommodations, advantages or privileges of any kind, and places … where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available." N.Y.C. Admin. Code 8-102(9); N.Y. Exec. Law §292(9).

POINT VII

PLAINTIFFS' INDIVIDUAL STATE LAW CLAIMS FOR MONEY DAMAGES MUST BE DISMISSED FOR FAILURE TO COMPLY WITH N.Y. GEN. MUN. LAW

Plaintiffs' state law claims, seeking money damages on behalf of named plaintiffs, must be dismissed due to their failure to comply with New York State notice of claim requirements.

"[I]n a federal court, state notice-of-claim statutes apply to state-law claims." *Hyde v. Arresting Officer Caputo*, 98 Civ. 6722, 2001 U.S. Dist. LEXIS 6253, at *13 (E.D.N.Y. May 11, 2001). Thus, a plaintiff can proceed in federal court with state law claims only upon compliance with the New York State notice of claim requirements. *See Warner v. Village of Goshen Police Dep't.*, 256 F. Supp.2d 171, 175 (S.D.N.Y. 2003). Under New York state law, a timely notice of claim is a condition precedent to filing an action against a municipal entity. *See Jean-Laurent v. Wilkerson*, 461 Fed. Appx. 18, 24 n.3 (2d Cir. 2012), Pursuant to N.Y. Gen. Mun. Law § 50-i, a plaintiff must affirmatively plead in the complaint that the notice of claim was served. *See Canzoneri v. Inc. Vill. of Rockville Ctr.*, 986 F. Supp.2d 194, 206 (E.D.N.Y. 2013). Plaintiffs bear the burden of pleading and proving compliance with the notice of claim provisions of the General Municipal Law when commencing an action against a municipal actor. *See Davidson v. Bronx Municipal Hospital*, 64 N.Y.2d 59, 61-62 (N.Y. 1984); *O'Connell v. Onondaga County*, 5:09-CV-364, 2012 U.S. Dist. LEXIS 194831, at *39 (N.D.N.Y. Feb. 9, 2012).

Here, plaintiffs tacitly acknowledge that they did not serve a notice of claim upon the City. *See* Ex. A at ¶22. Instead, plaintiffs claim that they should be excused from such a requirement, because, they allege, they are bringing this action to benefit "all New Yorkers," "particularly women of color," and thus they fall within the public interest exception. *Id.*

An exception to the requirement that a notice of claim be filed as a condition precedent to a suit against a municipal actor is made for cases seeking vindication of a public interest. *See Mills v. Monroe Cnty.*, 464 N.Y.S.2d 709, 711 (1983). To merit the exception, the action must be "brought to protect an important right" and "seek relief for a similarly situated class of the public" and the resolution must "directly affect the rights of that class or group." *See id*. This exception is applicable where plaintiffs seek monetary relief, if at all, "only as an incident of prospective declaratory and injunctive relief." *S.W. v. Warren*, 528 F. Supp.2d 282, 300 (S.D.N.Y. 2007); *see also Brooklyn Sch. for Special Children v. Crew*, 96 Civ. 5014, 1997 U.S. Dist. LEXIS 12974, at *1-2, 50-51 (S.D.N.Y. Aug. 28, 1997). Conversely, where a plaintiff seeks money damages to redress her individual injuries, the vindication of public right exception does not apply, even where the lawsuit implicates an important right, with impact on a larger class. Thus, in *Atkins v. County of Orange*, 251 F. Supp.2d 1225 (S.D.N.Y. 2003), a group of mentally disabled prisoners brought suit alleging serious problems with their provided psychiatric treatment. Plaintiffs, who did not file a notice of claim, argued that their state law cause of action should not be dismissed because they sought to vindicate a public interest, "namely, challenging the inhumane mental health treatment at the Jail." *Id.* at 1234. The Court disagreed. While admitting that a victory for plaintiffs may result in changes in the mental health conditions in the prison, the Court found that the relief plaintiffs sought was for their individual injuries. *Id.* at 1235. Therefore, the public right exception did not apply, and, because plaintiffs had not filed a timely notice of claim, their state law claim was dismissed. *Id.* at 1234-35; *see also Mills*, 464 N.Y.S.2d at 711; *O'Connell*, 2012 U.S. Dist. LEXIS 194831.

Plaintiffs' myriad state law claims seek money damages redounding to their benefit only, rather than as a source of "relief for a similarly situated class of the public," as required if the

public interest exception applied. *See Mills*, 464 N.Y.S.2d at 711. Plaintiffs have not sought to certify a damages class pursuant to Fed. R. Civ. P. 23(b)(3); the only injuries for which they seek monetary compensation are their own. Accordingly, plaintiffs' state law claims do not vindicate a public interest, and the failure to file a notice of claim is thus fatal to their state law claims.

POINT VIII

THE SUPERVISORY DEFENDANTS SHOULD BE DISMISSED FOR LACK OF PERSONAL INVOLVEMENT

Plaintiffs allege supervisory liability claims against "Supervisor Defendants" McKenna, Maloney, Daverin and Beddows. However, besides alleging that these individuals "failed to properly review, monitor and supervise" other defendants in the section involving the specific incidents, Ex. A at ¶¶ 139, 154, 201, 214, plaintiffs fail to articulate specific actions undertaken by any of them. Instead, plaintiffs assert in a conclusory manner that the supervisory defendants "participated in planning, ordering, staffing, supervising and/or approving the unlawful surveillance, stops, questioning, frisks, searches, seizures and/or arrests and detentions." Ex. A at ¶¶ 35-36. Without more than vague allegations that they should be responsible for their subordinates, plaintiffs cannot maintain an action against any of the supervisory defendants. *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994) ("personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983.").

CONCLUSION

WHEREFORE, for the reasons set forth above, defendants respectfully request that the Court grant their motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6) together with such costs, fees and further relief as the Court deems just and proper.

Dated: New York, New York
March 3, 2017

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APRIL 16TH: DECRIMINALIZATION OF SEX WORK

August 11, 2015

POLICY ON STATE OBLIGATIONS TO RESPECT, PROTECT, AND FULFIL THE HUMAN RIGHTS OF SEX WORKERS (INTERNATIONAL BOARD)

The International Council

REQUESTS the International Board to adopt a policy that seeks attainment of the highest possible protection of the human rights of sex workers, through measures that include the decriminalization of sex work, taking into account:

1. The starting point of preventing and redressing human rights violations against sex workers, and in particular the need for states to not only review and repeal laws that make sex workers vulnerable to human rights violations, but also refrain from enacting such laws.
2. Amnesty International's overarching commitment to advancing gender equality and women's rights.
3. The obligation of states to protect every individual in their jurisdiction from discriminatory policies, laws and practices, given that the status and experience of being discriminated against are often key factors in what leads people to engage in sex work, as well as in increasing vulnerability to human rights violations while engaged in sex work and in limiting options for voluntarily ceasing involvement in sex work.
4. The harm reduction principle.
5. States have the obligation to prevent and combat trafficking for the purposes of sexual exploitation and to protect the human rights of victims of trafficking.
6. States have an obligation to ensure that sex workers are protected from exploitation and can use criminal law to address acts of exploitation.
7. Any act related to the sexual exploitation of a child must be criminalized. Recognizing that a child involved in a commercial sex act is a victim of sexual exploitation, entitled to support, reparations, and remedies, in line with

international human rights law, and that states must take all appropriate measures to prevent sexual exploitation and abuse of children.

8. Evidence that sex workers often engage in sex work due to marginalization and limited choices, and that therefore Amnesty International will urge states to take appropriate measures to realize the economic, social and cultural rights of all people so that no person enters sex work against their will or is compelled to rely on it as their only means of survival, and to ensure that people are able to stop sex work if and when they choose.

9. Ensuring that the policy seeks to maximize protection of the full range of human rights – in addition to gender equality, women's rights, and non-discrimination – related to sex work, in particular security of the person, the rights of children, access to justice, the right to health, the rights of Indigenous peoples and the right to a livelihood.

10. Recognizing and respecting the agency of sex workers to articulate their own experiences and define the most appropriate solutions to ensure their own welfare and safety, while also complying with broader, relevant international human rights principles regarding participation in decision-making, such as the principle of Free, Prior, and Informed Consent with respect to Indigenous peoples.

11. The evidence from Amnesty International's and external research on the lived experiences of sex workers, and on the human rights impact of various criminal law and regulatory approaches to sex work.

12. The policy will be fully consistent with Amnesty International's positions with respect to consent to sexual activity, including in contexts that involve abuse of power or positions of authority.

13. Amnesty international does not take a position on whether sex work should be formally recognized as work for the purposes of regulation. States can impose legitimate restrictions on the sale of sexual services, provided that such restrictions comply with international human rights law, in particular in that they must be for a legitimate purpose, provided by law, necessary for and proportionate to the legitimate aim sought to be achieved, and not discriminatory.

The policy will be capable of flexible and responsive application across and within different jurisdictions, recognizing that Amnesty entities may undertake work on different aspects of this policy and can take an incremental approach to this work (in accordance with and within the limits of this policy) based on assessments of specific legal and policy contexts.

The International Board will ensure that, following the release of the final research report, Sections and structures have an opportunity to review and give feedback on the final draft policy before it is adopted.

Lambda Legal
making the case for equality

BLOG

LGBT Rights Organizations Join Amnesty International in Call to Decriminalize Sex Work

By Lambda Legal
AUGUST 20, 2015

Comments

Today, several LGBT rights organizations across the country issued the following joint statement in support of Amnesty International's August 11th resolution supporting sex worker human rights.

Joint Statement in Support of Amnesty International Resolution:

As LGBT rights organizations in the United States, we join to applaud and support Amnesty International's recent resolution to protect the human rights of sex workers by calling for decriminalization of sex work, while simultaneously holding states accountable in preventing and combatting sex trafficking, ensuring that sex workers are protected from exploitation, and enforcing laws against the sexual exploitation of children.

For many LGBT people, participation in street economies is often critical to survival, particularly for LGBT youth and transgender women of color who face all-too-common family rejection and vastly disproportionate rates of violence, homelessness, and discrimination in employment, housing, and education.

Transgender people engage in sex work at a rate ten times that of cisgender women, and 13% of transgender people who experience family rejection have done sex work (source). Whether or not they participate in sex work, LGBT people are regularly profiled, harassed, and criminalized based on the presumption that they are sex workers, contributing to the high rates of incarceration and police brutality experienced by these communities. As Amnesty International has clearly set forth, its resolution takes into account the negative impact of criminalization on the safety of sex workers, and furthermore, states remain obligated to protect the human rights of victims of trafficking and can use criminal law to address exploitation (source and source).

When LGBT people are prosecuted for sex work, they face alarmingly high rates of harassment and physical and sexual abuse behind bars. One study found that 59% of transgender people in California men's prisons report having experienced sexual assault while in custody (source). Alternative diversion program alternatives are frequently based on moral judgment, sending the message that there is something wrong with people who are just trying to survive, and do nothing to address the actual needs of sex workers, including those sex workers who might prefer to be doing other kinds of work.

Laws criminalizing sexual exchange—whether by the seller or the buyer—impede sex workers' ability to negotiate condom use and other boundaries, and force many to work in hidden or remote places where they are more vulnerable to violence. Research and experience have shown that these laws serve only to drive the industry further underground, make workers less able to negotiate with customers on their own terms, and put those who engage in criminalized sex work at higher risk for abduction and sex trafficking. And as UNAIDS and the World Health Organization have recognized, criminalization also seriously hampers efforts to prevent and treat HIV/AIDS—efforts in which people involved in the sex trades are crucial partners.

We look forward to working together, with sex workers and sex workers' rights advocates, and with Amnesty International, to replace laws that criminalize sex work with public policies that address sex workers' real economic and safety needs.

In solidarity,

Transgender Law Center

Gay & Lesbian Advocates & Defenders (GLAD)

Lambda Legal

National Center for Lesbian Rights

National Center for Transgender Equality

SEE ALSO: AMNESTY INTERNATIONAL, SEX WORK

Opinion | OP-ED CONTRIBUTOR

Buying Sex Should Not Be Legal

By RACHEL MORAN AUG. 28, 2015

DUBLIN — HERE in my city, earlier this month, Amnesty International's international council endorsed a new policy calling for the decriminalization of the global sex trade. Its proponents argue that decriminalizing prostitution is the best way of protecting "the human rights of sex workers," though the policy would apply equally to pimps, brothel-keepers and johns.

Amnesty's stated aim is to remove the stigma from prostituted women, so that they will be less vulnerable to abuse by criminals operating in the shadows. The group is also calling on governments "to ensure that sex workers enjoy full and equal legal protection from exploitation, trafficking and violence."

The Amnesty vote comes in the context of a prolonged international debate about how to deal with prostitution and protect the interests of so-called sex workers. It is a debate in which I have a personal stake — and I believe Amnesty is making a historic mistake.

I entered the sex trade — as most do — before I was even a woman. At age 14, I was placed in the care of the state after my father committed suicide and because my mother suffered from mental illness.

Within a year, I was on the streets with no home, education or job skills. All I had was my body. At 15, I met a young man who thought it would be a good idea for me to prostitute myself. As "fresh meat," I was a commodity in high demand.

For seven years, I was bought and sold. On the streets, that could be 10 times in a night. It's hard to describe the full effect of the psychological coercion, and how deeply it eroded my confidence. By my late teens, I was using cocaine to dull the pain.

I cringe when I hear the words "sex work." Selling my body wasn't a livelihood. There was no resemblance to ordinary employment in the ritual degradation of strangers' using my body to satiate their urges. I was doubly exploited — by those who pimped me and those who bought me.

I know there are some advocates who argue that women in prostitution sell sex as consenting adults. But those who do are a relatively privileged minority — primarily white, middle-class, Western women in escort agencies — not remotely representative of the global majority. Their right to sell doesn't trump my right and others' *not* to be sold in a trade that preys on women already marginalized by class and race.

The effort to decriminalize the sex trade worldwide is not a progressive movement. Implementing this policy will simply calcify into law men's entitlement to buy sex, while decriminalizing pimping will protect no one but the pimps.

In the United States, prostitution is thought to be worth at least $14 billion a year. Most of that money doesn't go to girls like my teenage self. Worldwide, human trafficking is the second largest enterprise of organized crime, behind drug cartels but on a par with gunrunning.

In countries that have decriminalized the sex trade, legal has attracted illegal. With popular support, the authorities in Amsterdam have closed down much of the city's famous red light district — because it had become a magnet for criminal activity.

In Germany, where prostitution was legalized in 2002, the industry has exploded. It is estimated that one million men pay to use 450,000 girls and women every day. Sex tourists are pouring in, supporting "mega-brothels" up to 12 stories high.

for those who want to get out of it. These women are trapped.

There is an alternative: an approach, which originated in Sweden, that has now been adopted by other countries such as Norway, Iceland and Canada and is sometimes called the "Nordic model."

The concept is simple: Make selling sex legal but buying it illegal — so that women can get help without being arrested, harassed or worse, and the criminal law is used to deter the buyers, because they fuel the market. There are numerous techniques, including hotel sting operations, placing fake ads to inhibit johns, and mailing court summonses to home addresses, where accused men's spouses can see them.

Since Sweden passed its law, the number of men who say they have bought sex has plummeted. (At 7.5 percent, it's roughly half the rate reported by American men.) In contrast, after neighboring Denmark decriminalized prostitution outright, the trade increased by 40 percent within a seven-year period.

Contrary to stereotype, the average john is not a loner or a loser. In America, a significant proportion of buyers who purchase sex frequently have an annual income above $120,000 and are married. Most have college degrees, and many have children. Why not let fines from these privileged men pay for young women's counseling, education and housing? It is they who have credit cards and choices, not the prostituted women and girls.

Amnesty International proposes a sex trade free from "force, fraud or coercion," but I know from what I've lived and witnessed that prostitution cannot be disentangled from coercion. I believe the majority of Amnesty delegates who voted in Dublin wished to help women and girls in prostitution and mistakenly allowed themselves to be sold the notion that decriminalizing pimps and johns would somehow achieve that aim. But in the name of human rights, what they voted for was to decriminalize *violations* of those rights, on a global scale.

The recommendation goes before the board for a final decision this autumn. Many of Amnesty's leaders and members realize that their organization's credibility and integrity are on the line. It's not too late to stop this disastrous policy before it harms women and children worldwide.

Rachel Moran is the founder of Space International, which advocates the abolition of the sex trade, and the author of the memoir "Paid For: My Journey Through Prostitution."

A version of this op-ed appears in print on August 29, 2015, on Page A19 of the New York edition with the headline: Buying Sex Should Not Be Legal.

The antiblackness of 'modern-day slavery' abolitionism

TRYON P. WOODS 10 October 2014

Antiblack racism underwrites the contemporary movement against "modern-day slavery." The anti-slavery movement is haunted by the specter of racial slavery even while it feeds off it parasitically.

The contemporary movement against 'modern-day slavery' makes a grave analytical and political error that, unfortunately, is all too common in our antiblack world. By 'antiblack world,' I refer to how blackness continues to represent danger and sexual savagery. It is the mark of the least desirable, the position against which all other oppressed subjects calibrate their humanity—as in, *as hard as my life may be, at least I am not black*.

Black people collectively generate no respect, honor, or value, let alone 'rights' or power—not because they are poor, live under corrupt governments, or live during a time of population explosion (all leading explanations for the emergence of 'modern-day slavery'), but rather simply because of their existence as such. As much as blackness is the mark of the non-human, it is also the negation of 'womanhood' and 'manhood.' Long after anti-colonial movements the world over have permanently discredited white supremacy, the principle of antiblackness remains stubbornly intact: it is best to be white; but if that proves beyond reach, *at least do not be black*.

Antiblackness is the product of racial slavery. The enduring effect of this is that the slave is both paradigmatically black *and* construed in terms of a bestial and openly vulnerable sexuality. This spectre of blackness, understood as sexual savagery, is present whenever the discourse of 'slavery' is evoked, even when the subjects are racialized as non-black or white. The essential failure of organizations fighting against 'modern-day slavery' to recognize even the basic features of the relationship between antiblackness and slavery produces a

number of serious consequences.

Flagellation of a Female Samboe Slave (1796) by William Blake. Wikimedia/Public domain.

First, the movement against 'modern-day slavery' deploys non-racial language to define the racialized realities that it addresses, an approach that solidifies the existing racial regime. If we situate our analysis within the archive of the black social movement, we learn that the best way to preserve the racial *status quo* is to simply re-present it in non-racial terms. An abundance of empirical evidence reveals that twenty-first century American society is as racially hierarchical as it has ever been. Several recent books demonstrate this well, such as *Racism without racists: Colorblind racism and the persistence of inequality in the United States* by Bonilla-Silva or *The shame of the nation: The restoration of apartheid schooling in America* by Jonathan Kozol. Whites are the single most segregated racial group, and wealth, health, education, and employment disparities have increased rather than diminished in the post-civil rights era.

Yet this evidence remains unpersuasive in the face of the prevailing non-racial logic, which maintains any remaining inequities are due to something other than racism.

The non-racial language of the 'modern-day slavery' discourse is particularly deceptive when it comes to the power relations in which the violent carnality of 'race' is simultaneously the normative process by which 'sex' is conferred.

Given western civilization's basis in the sexual plunder of slavery and colonialism, it is unsurprising that today's anti-slavery movement is inordinately preoccupied with women's sexual victimization. For instance, the focus on white women from eastern Europe working in commercial sex recalls the fight by British and US feminists against trafficking in prostitutes in the late nineteenth and early twentieth century, and what they termed at the time the 'white slave trade.' In both the earlier period and the contemporary one, the name of 'slave' marks these women as socially dangerous because of the implied proximity to blackness. It also labels them as victims undeserving of their plight, all the better to broaden the scope of state surveillance of sexuality.

Second, the anti-slavery movement is ahistorical. Again, black history is a corrective. Abolitionism against racial slavery showed us how 'rescue' movements are always self-referential: they aim at the salvation of the rescuer, not the rescued. White abolitionists frequently argued that slavery was an abomination because it made whites lazy and morally weak. W.E.B. DuBois reminds us that the American Civil War began as a war to *preserve* slavery, to keep it *in* the Union, not to abolish it; and it only *became* a war to end slavery as a result of the self-activity of the enslaved Africans themselves who stole away their labors from the South and forced the issue of abolition on the North. Anti-slavery does not necessarily mean anti-racist, and 'rescue' missions must be politically suspect.

Third, the moral authority that anti-slavery mobilizes today partly stems from the memory of black liberation that it implicitly draws upon—all the while explicitly distancing itself from black historical struggle. The movement often contrasts the 'facts' of 'modern-day slavery' with those of the 'old' (racial) slavery in order to emphasize how much worse the situation is today. The moral imperative of abolitionism today, therefore, rests not simply in objections to human oppression. It is also tied to white people's unconscious memories as the

perpetrators of racial slavery. Anti-slavery today seeks to exorcise this history. As such, it is anything but non-racial, despite its language.

Fourth, while slavery is evoked to cloak contemporary abolitionism with a political saliency and emotional urgency that only memory of *the* foundational institution of the modern world can sustain, there is a decided absence of solidarity with actual black suffering today.

Part of this problem lies with an incorrect understanding of slavery itself. Racial slavery was never simply supreme labor exploitation, or even being held captive. It was foremost about the accumulation and usefulness of black bodies for all manner of desire, whim, fantasy, or need of white society. Racial slavery was primarily a symbolic economy, an arrangement of meanings about who was human, which bodies had integrity, who could deploy violence with impunity, and the interdependence of 'freedom' and slavery.

As the political economy has changed with time, the symbolic economy of antiblackness persists. The ubiquitous spectacle today of the police killing unarmed black people in the street, in their homes, and in stores reiterates the *ongoing* power relations of slavery.

Where is the anti-slavery movement when black people are being gunned down today by both state and civil society? Where are the abolitionists now when the black community endures all manner of premature death? Where is agitation over 'modern-day slavery' when black schools are degraded and then closed altogether?

I suggest that the invisibility of black struggle today highlights how the current anti-slavery movement hinges on assertions of Africans' culpability in both racial slavery and its 'modern-day' version. In this narrative, African agents foist slavery upon an unwilling west and Africa is construed, again, as the locus of criminality and barbarism. In short, the current abolitionists are prosecuting their cause using the original terms of racial slavery, many centuries later.

The primary corrective for the problems of the anti-slavery movement is the same as for the problem of the antiblack world generally: solidarity with black historical struggle. For instance, lessons from black history that are relevant to the 'modern-day slavery' question include: 1) law is not a viable avenue for social redress: reform ends up extending, rather than ameliorating, black suffering; 2) work will not set you free: black people's hard labor had little bearing on black self-efficacy, to the point where now, given the rates of black unemployment and incarceration, black people are more valuable to the economy idled and quarantined in ghettos or prisons; 3) self-defense is a prerequisite for self-determination: the unrelenting public spectacles of black vulnerability at the hands of the law and the unceasing reiteration of black pathology are meant to disqualify any expression of black self-possession.

These lessons directly confront the anti-slavery movement's priority on human rights as the privileged vector for justice; they address the movement's arbitrary distinction between 'slavery' conditions and all other conditions of 'work' under capitalism, including labor that has been rendered surplus altogether from the global economy; and they call into question the implicit requirement that the legitimate subjects of 'modern-day slavery' are passive victims, rather than people engaged in various modes of self-authored activity, including armed resistance.

Ultimately, what is called into question is the very conception of justice on which this movement trades. As a result of *racial* slavery the very existence of the modern era is unjust. The search for justice within an unjust paradigm, therefore, is premature at best, since we have yet to adequately explain the paradigm. Before we can conceive of justice, then, we must focus on *ethics*, on accurately explaining relations of power, including those in which the movement to end 'modern-day slavery' arises.

NewStatesman

JUSTIN TALLIS/AFP/GETTY

FEMINISM 19 OCTOBER 2015

The difference between decriminalisation and legalisation of sex work

There is a crucial distinction between these two terms that is frequently blurred in the debate around the different models.

By Frankie Mullin

Sex work divides feminist opinion like few others issues. The ideological clash – prostitution as violence against women vs simply a job – may never be resolved but where debate coalesces, around proposed legal systems, ideas become concrete and can be logically hashed out.

Largely, both sides agree that criminal sanctions against sex workers themselves should be lifted. At present, while selling sex is legal in the UK, women who work together for safety can be prosecuted for brothel-keeping and thousands end up with criminal records for loitering and soliciting.

Some claim, however, that people (usually men) buying sex should be criminalised, as is the case in Sweden. Others argue that this endangers sex workers, forcing them to work in secluded, dangerous conditions so that clients can go undetected.

Tension is escalating as the English Collective of Prostitutes (ECP) prepares to hold an evidence-gathering symposium in Parliament on 3 November, heralding a campaign for full decriminalisation. The ECP campaign mirrors that of MSP Jean Urquhart who, backed by sex worker organisations and health charities, is calling for sex work to be decriminalised in Scotland. In the other corner will be the End Demand campaign, which wants the government to follow Sweden by implementing a Sex Buyer Law.

So let the battle commence, but let it do so on clearly-defined terms. The ECP and Urquhart are campaigning for *decriminalisation*. This is not – as has been suggested in countless media reports – *legalisation*.

Insisting on clarification isn't petty quibbling. The models are so distinct that when York Union last week changed the title of its debate to "This House believes the legalisation of prostitution would be a disaster", both sides thought they were arguing in favour of the motion. Sex worker and activist Laura Lee, who was up against outspoken abolitionist Julie Bindel at the debate, had to "tear up her notes" when it emerged that York Union actually meant "decriminalisation", something Lee wholeheartedly supports.

The York mix-up wasn't unique. Since Amnesty released its draft proposal for the decriminalisation of sex work, countless articles have conflated the terms, inaccurately holding up Germany and the Netherlands as examples of "decriminalisation gone wrong".

Some clarification: under *legalisation*, sex work is controlled by the government and is legal only under certain state-specified conditions. *Decriminalisation* involves the removal of all prostitution-specific laws, although sex workers and sex work businesses must still operate within the laws of the land, as must any businesses.

Clear examples of a legalised system in Europe come from the Netherlands and Austria; a murkier example from Germany. In the Netherlands, brothels have been legal since 2000, but only if they comply with specific requirements and, in some cases, undergo regular visits from the police. Street workers must operate in designated areas, outside which they will be committing a criminal offence.

In Austria, most regions require sex workers to register, either directly with the police or, via a brothel owner. A national agreement stipulates that every sex worker must undergo a weekly health check, evidence of which must be provided in a compulsory booklet. Both of these measures, says Amnesty International, are human rights violations.

The situation is more confusing in Germany as federal states implement wildly different approaches, ranging from de facto forced registration in Bavaria to Munich's almost city-wide no-prostitution zones. Elsewhere, licensing requirements support the much-publicised "mega brothels" at the expense of smaller operations which don't have the resources to comply. The German government is currently debating bringing in compulsory medical examinations.

For some sex workers, these models of legalisation have brought benefits, including access to the welfare state and better negotiating rights with bosses. For others – and, in particular, those who are already marginalised – life has got harder. State-imposed regulations have created a two-tier system, so that the undocumented or those who use drugs now work in clandestine, almost invariably less safe, conditions. These systems increase the power of managers, who know that women have few options for where they can work.

Accurate trafficking statistics are notoriously hard to come by and definitions can be slippery. In the Netherlands, coercion is more likely to take place outside the regulated spaces, although the Dutch government states:"It also happens that prostitutes who are exploited according to Dutch standards do not see themselves as a victim of exploitation." In Germany, the most reliable figures come from by the Federal Criminal Police Office, which suggests that, since the Prostitution Act, the number of victims has declined. According to Eurostat's latest report, the German per-capita rate of trafficking between 2010 and 2012 was lower than that of Sweden.

But here's the thing: these are not the models that human rights and sex worker-led organisations across the world are advocating. The only country to have fully decriminalised sex work is New Zealand. According to research, both street-based and indoor sex workers there report better relationships with the police and say they feel safer. Indoor workers are protected by employment

laws and can take employers to court. Contrary to fears, decriminalisation has not led to overall growth of the industry and trafficking has not increased.

This, then, is what sex worker-led organisations are calling for. Simply for prostitution-specific criminal law to be dropped and sex work treated as any other business. No one is demanding that the industry be allowed operate in legal grey area. Just as sex workers would be protected by labour, health and safety, human trafficking and other relevant law, so they would have to abide by it.

Crucially, legal systems shape public perception. While any element of an industry is criminalised, stigma is fuelled. One study suggests that men who see prostitution as just another sector of work are less likely to be violent. The ripple effect of legislation becomes "even more" significant in the global south, says Dr Prabha Kotiswaran, Senior Lecturer in Criminal Law at King's College, London.

"Stigma surrounding sexual labour is so strong in an Indian context and the criminal law adds to the stigma," Kotiswaran says. "There's a huge gap between what the law claims to do and what it actually does; how it's used socially if not legally. Criminal law is frequently used to threaten a whole range of marginalised groups: transgender people, young people, gay people, sex workers."

In their warring hearts, those in both camps share concern for the safety of sex workers. What differs is belief on how this can be brought about. It is right that debate should happen – much is at stake – but without clarity as so what each side is calling for, the conversation is nothing but farce. It is decriminalisation, not legalisation, for which sex workers around the world are fighting.

Editor's note, 21 October: this article originally referred to the wrong host for the debate at York. This has been corrected.