Court of Appeals of the State of New York

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

– against –

NICHOLAS HILL,

Defendant-Appellant.

APL-2017-00182

MOTION BY THE BRONX DEFENDERS, THE CENTER FOR CONSTITUTIONAL RIGHTS, NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, AND NEW YORK CIVIL LIBERTIES UNION FOR LEAVE TO FILE AS AMICI CURIAE

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Dated: March 8, 2018

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*, – against – NICHOLAS HILL, *Defendant-Appellant*.	:	**APL 2017-00182** **NOTICE OF MOTION**

PLEASE TAKE NOTICE that, upon the accompanying affirmation of Shakeer Rahman, sworn to on March 5, 2018, and the accompanying proposed letter brief, the undersigned will move this Court on the 12th day of March, 2018, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an Order, pursuant to 22 N.Y.C.R.R. § 500.23(a)(1), granting the Motion by The Bronx Defenders, The Center for Constitutional Rights, NAACP Legal Defense and Educational Fund, and New York Civil Liberties Union for Leave to File As *Amici Curiae* in support of Defendant-Appellant in the above-captioned action.

Dated: Bronx, New York

March 8, 2018

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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*, – against – NICHOLAS HILL, *Defendant-Appellant*.	:	**APL 2017-00182** **AFFIRMATION OF SHAKEER RAHMAN IN SUPPORT OF MOTION FOR LEAVE TO FILE AS AMICI CURIAE**

Shakeer Rahman, an attorney admitted to practice in the State of New York, affirms under penalty of perjury the following statements to be true:

1. I submit this affirmation in support of a Motion by The Bronx Defenders, The Center for Constitutional Rights, NAACP Legal Defense and Educational Fund, and New York Civil Liberties Union for Leave to File as amici curiae, pursuant to 22 N.Y.C.R.R. § 500.23(a)(1), in support of the Defendant-Appellant in the above-captioned action.

2. The proposed amici were counsel for the plaintiffs in three citywide lawsuits that secured federal injunctions to change the New York City Police Department's (NYPD) stop-and-frisk practices. Due to that experience along with the proposed amici's other work representing clients in matters involving the law

of policing, proposed amici have a strong interest in safeguarding constitutional protections against unreasonable seizures, especially when those protections govern the scope of NYPD authority to stop and question people.

3. The proposed amici seek leave to submit the attached letter brief to inform the Court of witness testimony, statistical analyses, and factual findings from the federal stop-and-frisk lawsuits that help establish whether a reasonable person in Defendant-Appellant's position would have felt free to safely disregard police and leave. Amici's proposed letter brief also offers a presentation of legal precedent and scholarship surrounding this issue.

4. The proposed amici are actively involved in ongoing court-ordered efforts to implement the federal injunctions against the NYPD's stop-and-frisk practices. Those efforts include work to develop new training, monitoring, and disciplinary practices. This work has given proposed amici unique insight into how NYPD officials perceive this Court's precedent on police encounters, as well how the ruling in this case might affect future NYPD training and policies. The proposed amici believe this information will assist this Court in analyzing the issues raised in this case.

5. Attached to this motion is the proposed amici's letter brief.

6. The proposed amici are not aware of any previous application for the relief requested here.

WHEREFORE, the proposed amici respectfully request that this Court grant their Motion for Leave to File as Amici Curiae along with such other and further relief as this Court deems just and proper.

Dated: Bronx, New York
March 5, 2018

Respectfully submitted,

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The Bronx Defenders | Redefining public defense.

February 13, 2018

John P. Asiello, Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12207

RE: The People, Respondent, v. Nicholas Hill, Appellant (APL-2017-00182).

Dear Mr. Asiello:

A divided First Department panel ruled in this case that Nicholas Hill was not seized when police approached him outside a public housing building, directed him to "stand right there," and left the scene with his identification. The majority reached this conclusion without properly analyzing whether a reasonable person would feel free to leave in these circumstances. Amici submit this letter brief to respectfully urge this Court to (1) rule that taking a person's identification under the circumstances here was a seizure, (2) recognize that, due to the history of biased and oppressive policing in New York City, a person's race and presence in public housing can be important factors in whether they feel free to disregard police, and (3) reverse a trend in lower court precedent that has been undermining the critical protections established in *People v. De Bour*.[1] As counsel on three citywide class actions that secured federal rulings and injunctions against unlawful stop-and-frisk and trespass enforcement practices, amici are uniquely suited to explain the need for this Court to reverse the First Department in this appeal.

INTRODUCTION

Courts determining whether police seized a person must "consider[] all of the circumstances of the encounter" and decide whether "'the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.'"[2] The First Department erred in failing to consider all of the circumstances that made Mr.

[1] 40 N.Y.2d 210 (1976).
[2] *People v. McIntosh*, 96 N.Y.2d 521, 530 (2001) (quoting *Florida v. Bostick*, 501 U.S. 429, 439 (1991)).

Hill's encounter a seizure. A reasonable person in Mr. Hill's position would likely not have felt free to leave after police walked away with their identification and said to "stand right there," but two additional aspects of the circumstances in this case — Mr. Hill's race and his presence in a New York City Housing Authority (NYCHA) building — only increased that likelihood.

Amici have significant experience litigating the constitutionality of police encounters. They collectively litigated a series of lawsuits that secured federal injunctions to remedy the unlawful stop-and-frisk and trespass enforcement practices of the New York City Police Department (NYPD).[3] The evidence presented in these cases includes testimony from people of color, including NYCHA residents and visitors, about why they do not feel free to disregard police requests. This evidence demonstrates the need to recognize race and location in the analysis of whether a person was seized.

As amici explain below, courts have recognized that people of color reasonably fear they will suffer harm if they disobey police, due to a well-documented history of harassment and intimidation by officers. Similarly, police encounters in public housing tend to be more intrusive and less justified than elsewhere. Testimony and data from the stop-and-frisk cases confirm this. Indeed, the City of New York agreed in one of those cases that a plaintiff who police questioned about trespass in a NYCHA building "was not free to leave because the officer had taken his identification."[4] Mr. Hill also argued that he was seized once police retained his identification. Amici agree and add that Mr. Hill's race and location are two additional crucial factors establishing that a reasonable person in his position would not have felt free to leave.

Moreover, recent First Department decisions have applied *De Bour* narrowly by focusing on what information police intended to learn, rather than whether the person felt free to leave. This trend conflicts with established Fourth Amendment jurisprudence and risks contributing to widespread constitutional violations. As demonstrated by amici's experience working with NYPD officials to implement court-ordered reforms, this trend can lead police to distill shorthand rules that

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[3] *See Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013); *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013); *Davis v. City of New York*, 902 F. Supp. 2d 405 (S.D.N.Y. 2012) (*Davis I*).

[4] *Davis I*, 902 F. Supp. 2d at 416.

misapply *De Bour* and undermine its crucial protections. This appeal presents an opportunity to correct that trend.

STATEMENT OF INTEREST

The Bronx Defenders (BxD) is a nonprofit provider of criminal defense, family defense, immigration defense, civil legal services, and social work support and advocacy to low-income Bronx residents. In addition to representing roughly 30,000 people a year, BxD has litigated several systemic challenges to NYPD practices, including a lawsuit that won an injunction against the widespread use of unlawful stops to investigate trespassing around Bronx apartments.[5]

The Center for Constitutional Rights (CCR) is a national, nonprofit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the U.S. Constitution and international law. Founded in 1966, CCR has litigated numerous cases challenging the constitutionality of stop-question-and-frisk and other policing tactics employed by law enforcement officers in New York State and around the country.[6]

The NAACP Legal Defense & Educational Fund, Inc. (LDF), is the nation's first and foremost civil rights law organization. Since its incorporation in 1940, LDF has fought to eliminate the arbitrary role of race in the administration of the criminal justice system by challenging laws, policies, and practices that discriminate against African Americans and other communities of color. In *Davis v. City of New York*,[7] LDF has been challenging the NYPD's unlawful trespass enforcement practices in NYCHA residences. LDF has also served as counsel of

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[5] *See Ligon*, 925 F. Supp. 2d at 485.

[6] *See, e.g.*, *Daniels v. City of New York*, 99-cv-1695 (S.D.N.Y.) (Fourth and Fourteenth Amendment challenge to the stop-question-and-frisk practices of the NYPD Street Crimes Unit); *Bandele v. City of New York*, 07-cv-3339 (S.D.N.Y.) (First, Fourth, and Fourteenth Amendment challenge to arrest of civilians for video recording pedestrian stops conducted by NYPD officers); *Hassan v. City of New York*, 12-cv-3401 (D.N.J.) (First and Fourteenth Amendment challenge to NYPD surveillance of Muslim student organizations, businesses, and places of worship in New Jersey); *Floyd*, 959 F. Supp. 2d 540 (Fourth and Fourteenth Amendment challenge to NYPD stop-question-and-frisk practices); *Furlow v. Belmar*, 16-cv-254 (E.D. Mo.) (Fourth and Fifth Amendment Challenge to the widespread use of warrantless investigatory arrests and detentions).

[7] 902 F. Supp. 2d 405.

record or amicus in cases including *People v. Boone*,[8] *Brown v. City of Oneonta*,[9] *Buck v. Davis*,[10] *Johnson v. California*,[11] and *McCleskey v. Kemp*.[12]

The New York Civil Liberties Union (NYCLU) is the New York State affiliate of the American Civil Liberties Union. NYCLU is a nonprofit, nonpartisan organization committed to the defense and protection of civil rights and civil liberties, with over 100,000 members across the State. NYCLU has filed amicus curiae briefs in numerous cases before this Court involving criminal justice issues.[13]

Many of amici's clients live in or visit NYCHA residences, where they — like all new Yorkers — have the right to be free of unreasonable government seizures. Amici's stop-and-frisk lawsuits showed that the NYPD systematically violated that right. When this Court crafted the prevailing framework for reviewing the legality of police encounters in *De Bour*, it observed that "the right to be left alone is 'too precious to entrust to the discretion of those whose job is the detection of crime.'"[14] With that warning in mind, amici submit this letter to protect the public's right to go about life safe from unwarranted police intrusion.

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[8] No. 55 (N.Y. Dec. 14, 2017) (permitting jury instructions on cross-racial eyewitness identifications).
[9] 235 F.3d 769 (2d Cir. 2000) (challenging the role of race in police stops).
[10] 137 S. Ct. 759 (2017) (challenging the explicit use of race in capital sentencing).
[11] 543 U.S. 499 (2005) (challenging the discriminatory exercise of peremptory challenges).
[12] 481 U.S. 279 (1987) (challenging the role of race in the imposition of capital punishment in Georgia).
[13] *See, e.g.*, *People v. Reid*, 24 N.Y.3d 615 (2014) (holding search incident to arrest exception to warrant requirement inapplicable where officer had no intent to arrest); *People v. Dunbar*, 24 N.Y.3d 304 (2014) (holding that scripted preface to *Miranda* warning rendered subsequent advisal of Fifth Amendment right against self-incrimination inadequate and ineffective); *People v. Johnson*, 22 N.Y.3d 1162 (2014) (holding that police lacked probable cause to arrest defendant for disorderly conduct); *People v. Weaver*, 12 N.Y.3d 433 (2009) (holding that placement and monitoring of GPS device on vehicle constituted search requiring warrant issued upon probable cause).
[14] *De Bour*, 40 N.Y.2d at 219.

ARGUMENT

I. THE CIRCUMSTANCES SURROUNDING MR. HILL'S POLICE ENCOUNTER ESTABLISH THAT HE WAS SEIZED.

A. The First Department failed to consider "all of the circumstances surrounding the encounter."

This Court has "not required that an individual be physically restrained or submit to a show of authority before finding a seizure."[15] Rather, the question is "whether, considering all of the circumstances of the encounter, 'the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.'"[16] Likewise, "the voluntariness of an apparent consent" turns on several factors, including "the background of the consenter."[17] These tests are no less protective under federal law, which also requires courts to "tak[e] into account all of the circumstances surrounding the encounter" to determine if a person has been seized.[18]

The First Department panel held only that police had justification to ask Mr. Hill questions, not reasonable suspicion of a crime. But police did far more than just pose questions. Two officers first asked Mr. Hill to turn over his identification outside a NYCHA building. After Mr. Hill complied, a third officer took the identification into the building and up to the eleventh floor. With Mr. Hill's identification gone beyond his control, officers told him to "stand right there." The panel majority ruled that this entire encounter was consensual. In other words, the majority determined that Mr. Hill was free to: (1) ignore the police questions, (2) refuse to turn over his identification, (3) leave after police walked away with his identification, and (4) not "stand right there" with the officers as instructed.

The circumstances surrounding Mr. Hill's police encounter establish that he was seized for several reasons. First, retaining a person's identification makes an

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[15] *People v. Bora*, 83 N.Y.2d 531, 534 (1994).
[16] *McIntosh*, 96 N.Y.2d at 530 (quoting *Bostick*, 501 U.S. at 439).
[17] *People v. Gonzalez*, 39 N.Y.2d 122, 129 (1976).
[18] *Bostick*, 501 U.S. at 437; *see also Schneckloth v. Bustamante*, 412 U.S. 218, 229 (1973) (requiring courts to "examin[e] all the surrounding circumstances to determine if in fact the consent to search was coerced")

encounter more forcible, as the U.S. Supreme Court has long recognized.[19] The First Department's requirement that people object when police try to retain their identification places an affirmative burden on people to know and enforce the limits of police authority. Worse, that requirement forces people questioned by police to unwittingly lose everything that an identification card is essential for, including driving, financial services, and verification of immigration status.

Second, the police officers walked away from the scene with Mr. Hill's identification while instructing him to stand in a particular spot with other officers. An officer then took Mr. Hill's identification up to the eleventh floor of the building, ensuring that the encounter would not be brief. This retention of identification away from the scene of the initial encounter would make a reasonable person feel that they are not free to disregard police and leave.

Further, because of a well-documented history of aggressive and unjustified policing in New York City — policing that has unfairly targeted people in NYCHA housing and people of color in particular — Mr. Hill's location and race both increase the likelihood that a reasonable person in his position would not have felt free to terminate the encounter and walk away. Amici address these two additional factors and their relevance to the analysis below.[20]

B. The analysis of whether a person was seized should consider the fact that the police encounter occurred in public housing, where police actions tend to be more intimidating and less justified.

"Determining whether a seizure occurs during the course of a street encounter between the police and a private citizen . . . involves a consideration of

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[19] *See Florida v. Royer*, 460 U.S. 491, 501 (1983); *see also* Aidan Taft Grano, Note, *Casual or Coercive? Retention of Identification in Police-Citizen Encounters*, 113 Colum. L. Rev. 1283, 1311 (2013) ("Read together, [*Mendenhall* and *Royer*] demonstrate how the mere retention of an airline ticket and driver's license can transform the same request to accompany officers to a room fifty feet away from casual to coercive."). Mr. Hill's letter discusses this factor in greater detail.

[20] These factors are central to the question raised in Mr. Hill's First Department brief, that is "whether a reasonable person would have believed, under the circumstances, that the officer's conduct was a significant limitation on his or her freedom." Br. for Defendant-Appellant at 20, *People v. Hill*, 150 A.D.3d 627 (2017) (quoting *Bora*, 83 N.Y.2d at 534). *See People v. Romero*, 91 N.Y.2d 750, 754 (1998).

all the facts," including "where the encounter took place."[21] The evidence and findings from the stop-and-frisk lawsuits show that New Yorkers do not feel free to leave when police question them about trespassing in or around residential buildings. Instead, "based on the experiences of their families, friends, and neighbors, the residents of these buildings" and their guests "fully appreciate the consequences that will follow if they attempt to walk away from the police during questioning."[22] Courts should not ignore this reality when reviewing whether a police encounter in a NYCHA complex was voluntary.

The evidence and findings in the stop-and-frisk lawsuits demonstrate that police intrusion in the everyday life of NYCHA residents and their guests is constant, inescapable, and too often physically violent. This climate of pervasive policing has influenced how free people feel to disregard officers who stop and question them about trespassing. The *Davis* case included testimony from NYCHA residents that police stopped them during activities as routine as walking "to the store to get milk and cookies for your kids."[23] The president of a citywide resident leadership group used the term "penal colony" to describe how oppressive these stops felt, testifying that "it's almost like we have been colonized.'"[24]

Other resident leaders echoed the view that police scrutiny in NYCHA housing was excessive and inescapable: residents had experienced "police officers stopping young children, as young as eight to ten years old, and asking them for ID" and believed that "officers often stop, question, and harass people based on what they are wearing, and not because they are doing anything illegal."[25] As a result, many residents felt "they need to carry their identification with them at all times or else risk being stopped, questioned, and even arrested by the NYPD."[26]

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[21] *Bora*, 83 N.Y.2d at 535-536; see also *Bostick*, 501 U.S. at 437-38 (ruling that "[w]here the encounter takes place is one factor" in whether taking into account all of the circumstances surrounding the encounter, the police conduct would 'have communicated to a reasonable person that he was not at liberty to ignore the police presence'").

[22] *Ligon*, 925 F. Supp. 2d at 537 n.421. *Ligon* is the stop-and-frisk lawsuit challenging NYPD trespass stops in private apartment buildings. These buildings are similar to NYCHA complexes because police are authorized to conduct interior patrols within them, and the federal court ruled that the City had also systemically engaged in unconstitutional conduct during those patrols.

[23] *Davis v. City of New York*, 959 F. Supp. 2d 324, 333 (S.D.N.Y 2013) (*Davis II*).

[24] *Id.* at 334.

[25] Doc. No. 252 at 89, *Davis v. City of New York*, No. 10-cv-699 (S.D.N.Y. Jan. 7, 2013).

[26] *Id.* at 88.

The *Davis* plaintiffs also presented data showing that NYCHA residents and their guests have good reason to fear unjustified police scrutiny. This data demonstrated that unjustified *Terry* stops for suspicion of criminal trespass around NYCHA residences were the worst of a widespread problem of unlawful and discriminatory NYPD stops. The *Davis* court referenced evidence that "there were roughly 200,000 stops on suspicion of trespass in NYCHA buildings between 2004 and 2011"[27] and "only fifty percent of the NYCHA trespass stops between 2009 and 2011 were apparently justified."[28] These stops were especially likely to be discriminatory against Black people, with data showing that "the racial composition of NYCHA buildings is a better *predictor* of trespass enforcement disparities than any racially neutral policy-rationalizing variables, including crime, policing activity, vertical patrols, or socioeconomic conditions."[29]

The testimony in the stop-and-frisk cases further demonstrates that New Yorkers reasonably fear harm from disregarding officer requests during police patrols of residential buildings. For example, when police asked plaintiff Abdullah Turner if he lived inside the building he was standing in front of, he answered yes and obeyed the officer's request for identification.[30] Mr. Turner "testified that he did not feel free to leave while the officer talked to him: '[S]he had my ID, and I don't know anyone . . . who ever just walked away from a cop in the middle of a conversation.'"[31] Mr. Turner, a Black twenty-four year old, had not heard of a single person safely walking away from police questioning of this kind. In situations like that, the "more realistic outcome would be for the person to assume that if he refused to answer, walked away, gave the wrong answers, or made a false move, serious consequences would follow."[32]

Some of amici's clients experienced those serious consequences. Plaintiff Ian Provost was leaving his girlfriend's NYCHA apartment when officers asked if he "was from around there, where he was going, and where he was coming from."[33] After Mr. Provost explained where he was coming from, an officer again "asked where he was going."[34] Mr. Provost said this "was not the officer's

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[27] *Davis II*, 959 F. Supp. 2d at 353.
[28] *Id*.
[29] *Id.* at 361.
[30] *See Ligon*, 925 F. Supp. 2d at 502.
[31] *Id*.
[32] *Id.* at 537.
[33] *Floyd*, 959 F. Supp. 2d at 637-638.
[34] *Id.* at 638.

business" and the officer told him "he was being stopped for criminal trespass."[35] Mr. Provost then tried to use his phone, at which point the officer "grabbed his right hand, which was holding the cell phone, handcuffed him, and pushed him up against [a] fence."[36]

Along similar lines, *Davis* plaintiff Rikia Evans was in a NYCHA lobby waiting for a friend to walk her home when an officer said, "either in or out."[37] Once Ms. Evans "complied with his directive by walking into the building," the officer said, "hey, come back."[38] Although Ms. Evans, who was 17 at the time, told the officer that her aunt lived inside, she did not want to volunteer the apartment number. She testified that she thought if she "didn't say anything that he would leave me alone."[39] She was wrong. The officer "started screaming at her that she was trespassing."[40] When she tried to walk away, the officer's supervisor "pushed her against a wall."[41] Ms. Evans told the officers that she could call [her] aunt to come down, but the officers told her to hang up the phone and arrested her.[42]

In *Davis*, the City of New York even conceded that a person was not free to leave under facts very similar to this case. Just like Mr. Hill, *Davis* plaintiff Lashaun Smith was asked for identification as he exited a NYCHA building.[43] Mr. Smith handed police an expired New York identification and a current Virginia one, at which point an officer asked him to step into a lobby.[44] When Mr. Smith sued the City, "both parties agree[d] that Smith was seized once the officer returned Smith's expired New York ID, held on to Smith's Virginia ID, and asked him to step into the lobby."[45] The court agreed too, ruling that Mr. Smith "was not free to leave because the officer had taken his identification."[46] The same is true

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[35] *Id.*
[36] *Id.*
[37] *Davis I*, 902 F. Supp. 2d at 423.
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] *Id.* at 415.
[44] *Id.*
[45] *Id.* at 416.
[46] *Id.*

for Mr. Hill: he too "was seized once the officer . . . held on to [his] ID, and asked him to step [over to a nearby gate]."[47]

C. The analysis of whether a person was seized should consider the fact that a person's race can lead them to reasonably fear disobeying police, given the history of aggressive and racially biased policing.

The U.S. Supreme Court explained in *United States v. Mendenhall*[48] that race is among "the circumstances surrounding the incident" that factor into whether "a person has been 'seized' within the meaning of the Fourth Amendment."[49] *Mendenhall* examined whether a Black woman was forcibly seized after federal agents patrolling an airport "asked to see her identification and airline ticket."[50] Even though the Supreme Court ultimately ruled that Sylvia Mendenhall was not seized in light of the other circumstances of the encounter (for example, she was "questioned only briefly, and her ticket and identification were returned to her"), it observed that she "may have felt unusually threatened by the officers" because she was "a female and a Negro."[51] The Supreme Court explained that "these factors were not irrelevant" to whether Ms. Mendenhall would have felt free to leave.[52]

Following this precedent, courts have recognized the need to factor race into the determination of whether a person's response to police is suspicious. The most recent and prominent example of this is *Commonwealth v. Warren*,[53] where Massachusetts's highest court held that a Black man's flight from police cannot alone establish reasonable suspicion of a crime, since this choice can be explained by reasonable fear of police bias. The court explained:

> [W]here the suspect is a black male stopped by the police on the streets of Boston, the analysis of flight as a factor in the reasonable suspicion calculus cannot be divorced from the findings in a recent Boston Police Department [] report documenting [that] . . . black men

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[47] *Id.*
[48] 446 U.S. 544 (1980).
[49] *Id.* at 554.
[50] *Id.* at 548.
[51] *Id.* at 558.
[52] *Id.*
[53] 58 N.E.3d 333 (Mass. 2016).

> in the city of Boston were more likely to be targeted for police-civilian encounters such as stops, frisks, searches, observations, and interrogations.[54]

The court ruled that a "judge should, in appropriate cases, consider the report's findings in . . . the reasonable suspicion calculus."[55]

The *Floyd* trial proved that New York City is home to equally troubling racial disparities. Of the more than 1.6 million *Terry* stops that the NYPD recorded between January 2010 and June 2012 — the time period when Mr. Hill was arrested — 52% were of Black people, while only 9% were of white people.[56] During that period, white residents of New York City outnumbered Black residents approximately 3 to 2.[57] The *Floyd* trial established that even after controlling for differences in "racial composition, crime rate, patrol strength," and other relevant socioeconomic variables, "the *best predictor for the stop rate* in a geographic area is the racial composition of that area."[58] Indeed, the fact that over 90% of NYCHA residents are Black and Latino[59] undoubtedly contributes to the problem of excessive and biased policing around these residences.

Not only were Black people stopped more often, these stops were more often violent and more often unjustified. Black people were more likely to have force used against them during *Terry* stops even "after controlling for suspected crime and precinct characteristics."[60] These stops rarely revealed crime: Nearly 90% of Black people stopped were released without charges, while 98% of those stops uncovered no weapons or contraband of any kind.[61] In fact, the odds of a stop resulting in a summons or arrest were "*lower* if the person stopped was black than if the person was white," as well as lower for stops made in neighborhoods with high Black populations.[62] Together, this data "show[ed] that blacks are likely

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[54] *Id.* at 342.
[55] *Id.*
[56] *See* Second Supplemental Report of Jeffrey Fagan at 11 [https://goo.gl/ZsCF1i] (cited in *Floyd*, 959 F. Supp. 2d at 572, 574 nn.104, 113).
[57] *See Floyd*, 959 F. Supp. 2d at 574.
[58] *Id*. at 589.
[59] Special Tabulation of Resident Characteristics (Resident Data Summary), NYCHA, http://www1.nyc.gov/assets/nycha/downloads/pdf/res_data.pdf.
[60] *Floyd*, 959 F. Supp. 2d at 589.
[61] *Id*. at 573-74.
[62] *Id.* at 589.

targeted for stops based on a lesser degree of objectively founded suspicion than whites."[63]

These statistical findings only confirm what Black and Latino people both in New York and across the country have known and experienced for years.[64] This reality cannot be separated from the question raised in this appeal. People of color are often taught from a young age to expect grave harm if they disobey police: "For generations, black and brown parents have given their children 'the talk' — instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger — all out of fear of how an officer with a gun will react to them."[65] Across the country today, "it is no secret that people of color are disproportionate victims of this type of scrutiny."[66] Even New York City's mayor has shared that he had to "train" his biracial son "in how to take special care in any encounter" with police, noting that "families have all over this city for decades" done the same.[67] If courts are blind to this reality, they ignore what both police and the general public know well.[68]

Courts have built on *Mendenhall*'s recognition that race can make a person feel "unusually threatened by the officers" and should therefore factor into whether a police encounter was consensual.[69] For example, an Indiana court recognized that race was relevant in holding that an officer seized a person by saying he "would be transporting" him to the police station.[70] Citing *Mendenhall*, the court listed race among the factors "relevant . . . to determining whether a reasonable person would feel free to leave."[71] And in *State v. Ashbaugh*,[72] the Oregon

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[63] *Id*.
[64] *See, e.g.*, I. Bennett Capers, Opinion, *Moving Beyond Stop-and-Frisk*, N.Y. Times, Aug. 12, 2013, https://nyti.ms/2kAGx8d; Nicholas K. Peart, Opinion, *Why Is the NYPD After Me?*, N.Y. Times, Dec. 17, 2011, https://nyti.ms/2jWMig1.
[65] *Utah v. Strieff*, 136 S. Ct. 2056, 2070 (2016) (Sotomayor, J., dissenting).
[66] *Id.*
[67] Transcript: Mayor de Blasio Holds Media Availability at Mt. Sinai United Christian Church on Staten Island, http://www1.nyc.gov/office-of-the-mayor/news/542-14/transcript-mayor-de-blasio-holds-media-availability-mt-sinai-united-christian-church-staten (Dec. 3, 2014).
[68] *See Illinois v. Wardlow*, 528 U.S. 119, 132 (2000) (Stevens, J., concurring in part) ("[T]hese concerns and fears are known to the police officers themselves, and are validated by law enforcement investigations into their own practices. Accordingly, the evidence supporting the reasonableness of these beliefs is too pervasive to be dismissed as random or rare, and too persuasive to be disparaged as inconclusive or insufficient.")
[69] *Mendenhall*, 446 U.S. at 558.
[70] *D.Y. v. State*, 28 N.E.3d 249, 258 (Ind. Ct. App. 2015).
[71] *Id.* at 258.

Supreme Court observed that "courts and academics across the country" are recognizing that Fourth Amendment analysis of "encounters between police and black males" should "consider how the race of the person confronted by the police might have influenced his attitude toward the encounter."[73]

Ashbaugh referenced scholarship by Professor Tracey Maclin that examines how race informs responses to police.[74] Maclin has observed that *Terry v. Ohio*[75] – the seminal case governing investigative stops as Fourth Amendment seizures – was a product of "enormous tension between the police and black Americans."[76] The Supreme Court observed in *Terry* that frequent stop-and-frisks "cannot help but be a severely exacerbating factor in police-community tensions . . . particularly . . . where the 'stop and frisk' of youths or minority group members is 'motivated by the officers' perceived need to maintain the power image of the beat officer.'"[77] The Supreme Court further explained that "the degree of community resentment aroused by particular practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices."[78]

Legal scholars have continued to examine this "clearly relevant" reality of "community resentment aroused" by discriminatory police practices. For example, Professor Devon Carbado notes that a Black man today "is likely to have" not one but "several encounters with police" "over the course of his lifetime," during which he may be asked to "produce identification," "justify his presence at a particular location," or "explain where he is traveling to and from."[79] Because "[m]ost, if not all, black people — especially black men — are apprehensive about police encounters," Carbado argues that race should be "explicitly included among the circumstances" that define if a person was free to leave and — contrary to the First Department panel majority's approach — "the absence of overtly coercive police tactics . . . should not end the seizure analysis."[80]

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[72] 244 P.3d 360 (Or. 2010).
[73] *Id.* at 368, 368 n.15
[74] *Id.* (citing Tracey Maclin, "*Black and Blue Encounters" — Some Preliminary Thoughts about Fourth Amendment Seizures: Should Race Matter?,* 26 Val. U. L. Rev. 243 (1991)).
[75] 392 U.S. 1 (1968)
[76] Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 362–63 (1998).
[77] *Terry*, 392 U.S. at 14 n.11 (internal citations omitted).
[78] *Id.* at 17 n.14.
[79] Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 Mich. L. Rev. 946, 977, 984-985 (2002).
[80] *Id.*

Other scholarship has explained how racial disparities in police violence can shape responses to police[81] and confirmed the experiences of amici's stop-and-frisk clients: "Given the history of police brutality against blacks in this country, as well as the present climate of fear and distrust toward police officers," few Black people will "feel free to ignore . . . [or] leave a police officer without considering the possible repercussions — bodily injury or death."[82] Indeed, there is a widespread awareness among Black people that disobeying police commands can provoke a violent response.[83] A Black person's compliance with police commands must be assessed in light of their knowledge of this threat.

In New York as elsewhere, race has too often been one of the factors that officers consider when choosing whom to stop,[84] in part because "many police officers share the latent biases that pervade our society."[85] When this happens, an "officer's discriminatory conduct reinforces the minority's negative reaction to the police."[86] Courts should avoid incentivizing those negative reactions and instead ensure that the seizure analysis reflects "the relationship between race and vulnerability to police encounters" as well as "the ways in which race mediates how people respond to such encounters."[87]

* * *

For Mr. Hill to exercise his right to disregard police questioning, he would have had to risk ignoring or declining the requests of three police officers in at least three different instances. He first would have had to risk ignoring police questions about what he was doing at the location. Failing that, he would have had to risk disobeying the request for his identification. And then — if it can even be

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[81] Cynthia Kwei Yung Lee, Race and Self-Defense: Toward A Normative Conception of Reasonableness, 81 Minn. L. Rev. 367, 456 (1996).
[82] Erika L. Johnson, *"A Menace to Society:" the Use of Criminal Profiles and Its Effects on Black Males*, 38 How. L.J. 629, 663 (1995).
[83] *See* Monica C. Bell, Essay, *Police Reform and the Dismantling of Legal Estrangement*, 126 Yale L.J. 2054, 2108 (2017) (observing that "the ritualistic observation of black men and women having unjust, and often deadly, interactions with law enforcement conveys a message to their coethnics and other similarly situated observers").
[84] *Floyd*, 959 F. Supp. 2d at 589, 602-606.
[85] *Id.* at 581.
[86] Randall S. Susskind, *Race, Reasonable Articulable Suspicion, and Seizure*, 31 Am. Crim. L. Rev. 327, 348 (1994).
[87] *See supra*, note 80, Carbado at 976.

assumed that Mr. Hill surrendered his identification voluntarily — he would have had to abandon his identification and risk walking away from officers after being told to "stand right there."

Any person facing those circumstances would not feel free to leave, no matter their race or location. But the stop-and-frisk cases confirm how each of those instances uniquely exposed Mr. Hill — as a Black man in a NYCHA building — to risk of harm. One need only turn on the television, open a newspaper — or for many people of color — look out the window to imagine how this encounter could have escalated if Mr. Hill tried to walk away.[88] Concluding that Mr. Hill's compliance was voluntary because he did not affirmatively object misconstrues the responses that people of color and people in NYCHA buildings have developed to safely handle and survive police encounters.

II. THE *DE BOUR* INQUIRY MUST ASK WHETHER THE PERSON FELT FREE TO LEAVE, AND RECENT FIRST DEPARTMENT DECISIONS FAIL TO PROPERLY ANALYZE THAT QUESTION.

This Court's "purpose in *De Bour* was to provide clear guidance for police officers seeking to act lawfully in what may be fast-moving street encounters."[89] *De Bour* recognized that police need "latitude to approach individuals and request information" during "pursuits unrelated to crime."[90] At the same time, the public's "tendency to submit to the badge" means that "a policeman's right to request information" can easily become "a license to oppress."[91] The Court created a framework to balance those two concerns. Over four decades later, the Court's laudable goal of "clear guidance for police officers" remains incomplete, and deeming Mr. Hill's stop consensual would defy the balance struck in *De Bour*.

De Bour established protections for two levels of police encounters that fall below a Fourth Amendment seizure: police need at least "an objective credible reason" to "request information" or "a founded suspicion that criminal activity is

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[88] *See, e.g.*, Michael Cooper, *Officers in Bronx Fire 41 Shots, And an Unarmed Man Is Killed*, N.Y. Times, Feb. 5, 1999, https://nyti.ms/2jQQAIQ; *see also* Shaila K. Dewan and William K. Rashbaum, *Officer Avoids Indictment in Killing on Brooklyn Rooftop*, N.Y. Times, Feb. 18, 2004, https://nyti.ms/2kwWFaQ; Alan Blinder, *Michael Slager, Officer in Walter Scott Shooting, Gets 20-Year Sentence*, N.Y. Times, Dec. 7, 2017, https://nyti.ms/2AYUzvK.
[89] *People v. Moore*, 6 N.Y.3d 496, 499 (2006).
[90] *De Bour*, 40 N.Y.2d at 218.
[91] *Id.* at 219.

afoot" to exercise their "common-law right to inquire."[92] These two categories of police action — known as Level 1 and 2 encounters — were not meant to include stops that restrict a person's freedom to leave. But recent First Department cases have sometimes treated the *De Bour* inquiry as a substitute for the Fourth Amendment analysis by focusing on what police were trying to learn, rather than on whether the a reasonable person would feel free to leave. The *Davis* court explained the problem with this approach:

> *De Bour*'s largely content-based approach to police questioning is distinct from the more manner-based approach of the Fourth Amendment. An officer could conceivably comply with *De Bour* but violate the Fourth Amendment by, for example, approaching and questioning a NYCHA resident, without reasonable suspicion, in a hostile, aggressive manner that would make a reasonable person not feel free to terminate the encounter — but asking only questions concerning identity, address, and destination.[93]

In order to make sure *De Bour*'s rules for nonforcible encounters do not override the Fourth Amendment's requirements for forcible encounters, this Court should clarify that courts reviewing the legality of a police encounter must always ask whether a reasonable person would have felt free to leave, rather than solely analyzing what inquiries police intended to make. Mr. Hill's case illustrates the need for clarifying that distinction. No one disputes that police were trying to learn why Mr. Hill was in a NYCHA building. But police investigated that question in a manner that "a reasonable person would have believed . . . was a significant limitation on his or her freedom."[94] This fact — not the information police were trying to learn — dictates whether the encounter was forcible.

Recent First Department cases applying *De Bour* have not meaningfully assessed the ways in which a person stopped and questioned by police might have felt seized. In ruling that Mr. Hill acted voluntarily, for example, the First Department observed that it "has repeatedly held that in a trespass situation, a police officer may conduct a brief investigation to ascertain whether a defendant's explanation was credible, and this does not rise to a level three forcible detention." The First Department has similarly held that a person was not forcibly stopped

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[92] *Id.* at 223.
[93] *Davis II*, 959 F. Supp. 2d at 342 n.75.
[94] *Bora*, 83 N.Y.2d at 534.

when "an officer tried to block [his] path and get him to stop"[95] and that a person was not forcibly stopped by an officer "raising his hand to stop [him] from leaving" even though this action resulted in "body contact."[96] Common sense alone suggests that a reasonable person would have felt seized in those encounters. But even putting that aside, these cases collectively imply that a seizure turns on the motivation of officers rather than whether a reasonable person would have felt free to leave, which would be a standard at odds with *De Bour*.

Compounding this threat against *De Bour*'s protections, the stop-and-frisk lawsuits and amici's experience working with police officials to remedy the NYPD's systemic constitutional violations reveal that NYPD training materials tend to construe judicial approval of a specific encounter as blanket approval for using that encounter's tactics in all encounters. A ruling here that police do not need reasonable suspicion to walk away with a person's identification could thereby lead to further constitutional violations.

One example of inaccurate training materials from the stop-and-frisk lawsuits is instructive here. The *Ligon* plaintiffs identified an NYPD training video that told officers they did not always need reasonable suspicion to undertake certain actions, such as "using physical force to subdue a suspect; physically blocking a suspect's path; grabbing a suspect by the arm, shirt or coat; pointing a gun at a suspect; using an ASP or baton to contain a suspect; or placing a suspect against a wall or on the ground."[97] The City responded by citing state cases in which particular stops involving those actions were deemed consensual and arguing that this training "reflect[s] New York state law, and in particular *De Bour* and its progeny."[98] But the *Ligon* court ruled that the actions enumerated in the video went "significantly beyond the level of coercion suggested by the Second Circuit's list of factors that define a *Terry* stop."[99] Because these "training materials misstate[d] what constitutes a stop,"[100] officers who have made unlawful stops "may very well have perceived themselves as not engaged in *Terry* stops."[101]

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[95] *People v. Stevenson*, 55 A.D.3d 486, 487 (1st Dep't 2008).
[96] *People v. Cherry*, 30 A.D.3d 185, 186 (1st Dep't 2006).
[97] *See Ligon*, 925 F. Supp. 2d at 535 (quoting NYPD video).
[98] *Id.* at 538-539.
[99] *Id.* at 536.
[100] *Floyd*, 959 F. Supp. 2d at 616 n.375.
[101] *Ligon*, 925 F. Supp. 2d at 536, 538.

If this Court rules that Mr. Hill was not seized, the NYPD may well reduce that holding into a shorthand rule that reasonable suspicion is never required for officers to leave with a person's identification. The court-ordered changes to the NYPD's training materials, which the federal court approved in December 2017, advise instructors to "acknowledge" that police "frequently convey concerns that the law is confusing" and note that "practitioners share the officers' frustration regarding *De Bour* and its progeny."[102] Although the new training should help reduce some confusion, it still uses shorthand rules. For example, officers are told: "You can always ask for ID, so long as you are at least at Level 1."[103] The footnote accompanying this instruction quotes this Court: "'It is well-settled that when an officer asks an individual to provide identification . . . during a police-initiated encounter, the request for information implicates the initial tier of *De Bour* analysis.'"[104] Although that sentence is true, it has also been interpreted to mean that requests for identification always remain consensual, based on their content alone. Indeed, this is exactly what the panel below suggested, explaining that "in a trespass situation, a police officer may conduct a brief investigation to ascertain whether a defendant's explanation was credible, and this does not rise to a level three forcible detention or seizure." But "a brief investigation" of that kind can easily include coercion that would make a reasonable person feel unable to terminate the encounter.

A rule that turns on the focus or intent of the police inquiry leaves officers uncertain about the limits on their authority. That rule could lead to Fourth Amendment violations in the countless occasions where the police inquiry, whatever its focus, is conducted in a manner that makes a reasonable person feel unable to leave. New York City's own litigation positions illustrate the risk of uncertainty on this point. As summarized above, the New York City Law Department agreed in federal court that Lashaun Smith "was seized once the officer returned Smith's New York ID, held on to Smith's Virginia ID, and asked him to step into the lobby."[105] Yet in Mr. Hill's case the People demand a different result for nearly identical facts.

As the stop-and-frisk lawsuits showed, a rule that "invites officers to approach large numbers of people and question them without reasonable suspicion

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[102] Doc. No. 571-1 at 45, *Floyd v. City of New York*, No. 08-cv-1034 (S.D.N.Y. Nov. 16, 2017) [https://goo.gl/86cbzr].
[103] *Id.* at 19.
[104] *Id*. (quoting *McIntosh*, 96 N.Y.2d at 525 (omission in original)).
[105] *Davis I*, 902 F. Supp. 2d at 416.

will inevitably result in frequent *Terry* stops that lack reasonable suspicion, effectively guaranteeing the commission of widespread constitutional violations."[106] By reminding courts to focus the stop inquiry on whether a person would have felt free to leave in light of all the circumstances of the encounter, including race and location, the Court could prevent further constitutional violations and help restore *De Bour*'s promise.

CONCLUSION

Amici respectfully urge this Court to reverse the First Department's decision and hold that Mr. Hill was unlawfully seized.

Respectfully submitted,

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[106] *Ligon*, 925 F. Supp. 2d at 538.

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