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SOUTHERN COALITION
for SOCIAL JUSTICE

March 10, 2014

Mr. William V. Bell
Mayor of Durham

Ms. Cora Cole-McFadden
Mayor Pro-Tempore

Mr. Jose L. Lopez, Sr.
Durham Chief of Police

Mr. Patrick W. Baker
Durham City Attorney

Mr. Ricky L. Hart
Chair, Human Relations Comm'n

Mr. Thomas Bonfield
City Manager

Mr. Eugene Brown
Durham City Council

Ms. Diane Catotti
Durham City Council

Mr. Eddie Davis
Durham City Council

Mr. Don Moffitt
Durham City Council

Mr. Steve Schewel
Durham City Council

Re: Ending Unconstitutional Drug Enforcement Practices

Mr. Bell, Ms. McFadden, Mr. Lopez, Mr. Hart, Mr. Baker, Mr. Bonfield, and City Council,

In recent months, the Southern Coalition for Social Justice ("SCSJ" or "Southern Coalition") has been an active participant in the ongoing community discussion over racial profiling by the Durham Police Department ("DPD" or "Durham PD"). We have engaged in this process because we believe the city and DPD have a moral and constitutional obligation to reverse the alarming racial disparities in traffic enforcement, which statistics show are increasing each year, and which disproportionately burden innocent black motorists at a rate greater than occurs nearly anywhere else in the state. Over the course of eight special hearings on racial profiling before the city Human Relations Commission, we and our partners in the FADE Coalition and NAACP have advanced concrete policy recommendations that, if adopted, would help mitigate these disparities and bring Durham PD back in line with the statewide averages.

We believe the residents of Durham, a city noted for its progressive politics, deserve better from their police department. Whether it be racially disparate drug and traffic enforcement practices,[1] the mean-spirited treatment of the city's homeless population,[2] the tear-gassing of women and

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[1] *See* Presentation by Daryl Atkinson, Civil Rights Attorney, FADE Coalition/Southern Coalition for Social Justice, to the Durham Human Relations Comm'n (January 14, 2014) (racially disparate marijuana enforcement) (data and slideshow on file with commission); Presentation by Ian A. Mance, Soros Justice Attorney-Fellow, Southern Coalition for Social Justice, to the Durham Human Relations Commission (January 22, 2014) (racially disparate traffic enforcement) (data and slideshow on file with commission).
[2] *See, e.g.*, Mark Schultz, *Group Protests Homeless Beggar's Arrest*, THE DURHAM NEWS, July 28, 2013.

children at a community vigil,[3] or the refusal to share information about the in-custody death of a teenager,[4] Durham PD's actions in recent months have, in the words of NAACP Legal Redress Chair Irv Joyner, created a "mistrust gap between the Durham community and the Durham Police Department [that] has . . . become intolerable."[5] The NAACP has made the argument that Durham City Council has "absolutely abdicated its responsibility to oversee, [and] hold accountable, the Durham Police Department for actions it has taken."[6] We remain hopeful, however, that this does not prove to be the case and that City Council will, in the coming weeks, take concrete steps to restore community trust—first and foremost by voting to adopt the FADE policy recommendations,[7] which enjoy a broad base of community support from neighborhood groups, faith leaders, and civil rights advocates alike.[8]

<u>We view racial profiling and racially disparate search practices as symptoms of a broader issue facing the department—namely, the agency's disturbing willingness to engage in unconstitutional conduct in its prosecution of the Drug War.</u> As we demonstrated in our presentations to the city's Human Relations Commission in January, these practices have had a pronounced disparate impact on the city's African-American population and are in many cases fueled by perverse financial and institutional incentives. Some of the department's practices are outright unconstitutional and indicate Durham PD lacks the sort of internal controls and oversight necessary to catch and rectify misconduct when it occurs. Specifically, we are referring to what we have learned in recent months about DPD's practices of (1) paying undisclosed "conviction bonuses" to undercover informants in drug cases, after the conclusion of criminal prosecutions; (2) erecting license checkpoints for drug interdiction and/or drug deterrence purposes; and (3) using federal grant money to fund hundreds of small undercover marijuana buys in black neighborhoods.

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[3] *See, e.g.*, Adam Owens, *Arrests, Tear Gas End Durham Vigil*, WRAL, Dec. 19, 2013.
[4] *See, e.g.*, Steve Sbraccia, *City Asks Public to be 'Patient' in Wake of Durham Police Incidents*, WNCN, Nov. 25, 2013.
[5] *See* Jim Wise and Jonathan Alexander, *Durham Police: Officer Missed Gun that Killed Durham Teen*, NEWS & OBSERVER, January 10, 2014.
[6] *Id*.
[7] The FADE recommendations are explained at length in the coalition's first letter to the Durham Human Relations Commission. *See* Fostering Alternatives to Drug Enforcement ("FADE"), *FADE Coalition Policy Recommendations to the Durham Human Relations Commission* (Oct. 17, 2013), *available at* http://www.southerncoalition.org/wp-content/uploads/2013/11/FADE-Coalition-Policy-Recommendations-Final.pdf. FADE and its allies have advocated for (1) mandatory written consent for all consent searches; (2) mandatory racial equity training for DPD; (3) making marijuana enforcement the City of Durham's lowest law enforcement priority; (4) mandating periodic review of individual officer stop data; and (5) strengthening and expanding the scope of authority of the Durham Civilian Police Review Board.
[8] *See, e.g.*, FADE Policy Recommendation Endorsement Letters from Durham Congregations in Action (DCIA); George H. White Bar Ass'n (Durham Co. Black Lawyers Professional Ass'n); Durham Branch of the NAACP; and American Civil Liberties Union of North Carolina (ACLU-NC).

In the pages that follow, we explain why each of these practices fails to meet existing constitutional requirements imposed on police departments. Before now, some of these practices were likely unknown to city officials. We ourselves learned about each of them inadvertently while conducting an investigation into broader allegations of racial profiling. Now that we have brought them to city leadership's attention, we hope and expect that Council will take the necessary action to bring the department into compliance with the law. We will be closely monitoring the city's response.

"CONVICTION BONUSES"

Last fall, Southern Coalition submitted a public records request to the Durham Police Department pursuant to N.C.G.S. § 132-1, asking for documents relating to the city's expenditure of federal Byrne Justice Assistance Grant ("JAG") funds. Among the thousands of pages we received in response were hundreds of pages of forms labeled "Request and Expenditure Fund Report" ("REFP"). Most of these REFPs reflected approval of officer requests for cash withdrawals from the department's Informant's Fund, with the money to be used to make undercover drug purchases. Presumably, the department considered them responsive to our request because federal JAG money had been used to pay for these operations.

Most notable among this particular subset of documents were seven forms, perhaps inadvertently disclosed, which suggested DPD has repeatedly paid secret "conviction bonuses" to informants whose testimony or promise of testimony helped obtain a criminal conviction. The dates on the documents, when cross-referenced with publicly-available court records, indicate that officers within the Durham PD made these payments *post*-conviction. The clear implication is that officers made these payments pursuant to a pre-arranged payment plan.

Alarmed at what these documents suggested, and curious to learn more, we submitted a follow-up request on December 19, 2013. That request specifically asked for copies of the following records:

> *All "Request and Expenditure Fund Report" forms filed by Durham police officers between January 2007 and the present relating to the department's drug enforcement efforts, including all forms authorizing the use of money to purchase narcotics, to pay informants, and to pay testimony or conviction bonuses to witnesses.*

On Monday, January 21, 2014, one day before we were scheduled to present to the Durham Human Relations commission on the department's drug enforcement practices, we received two boxes of records in response to this request. These records, which numbered in the hundreds, if not thousands, had been largely redacted. Specifically, the fields labeled "Suspect," "OCA #," and "Informant #" had all been blacked out. Many of these very same records had been produced in unredacted form to Southern Coalition just months earlier in response to our first request seeking documentation relating to Byrne JAG funds. No explanation was provided for the decision to conceal information the department had previously produced in unredacted form.

It is our position that the content of these records—and the suspect names field, in particular—did not merit redaction under public records law.

In the weeks since receiving the records, Southern Coalition has tracked down and communicated with defense attorneys who represented some of the convicted men, some of whom have been deported or remain incarcerated. Each of the defense attorneys we spoke with indicated they were unaware of any such payment arrangement. <u>We also spoke with the Durham County District Attorney's Office, which disavowed any knowledge of these payments.</u>[9] Assistant District Attorney Roger Echols told us that he regards undisclosed payment arrangements to constitute a *Brady* violation.[10]

There is case law on the propriety of these so-called "conviction bonuses," wherein an informant is paid after trial or plea based on the *outcome* of the prosecution, as opposed to their willingness to participate. Courts are hostile to these sorts of arrangements and thus the practice itself is quite rare. Those courts that have addressed the issue are clear that a "defendant's right to be apprised of the government's compensation arrangement with [a] witness . . . and to inquire about it on cross-examination . . . must be vigorously protected."[11] The U.S. Court of Appeals for the Fourth Circuit, which has jurisdiction over North Carolina, has explained that "because of the vulnerability of . . . contingent-payment arrangements to corruption, they may be approved only rarely and under the highest scrutiny."[12]

Scrutiny, of course, requires that defense attorneys, district attorneys, and courts have some knowledge of the arrangement. The available evidence, however, suggests that neither the court nor defense counsel nor the district attorney's office had any such knowledge. The law on this point is clear. "The police are . . . part of the prosecution," and when "police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, [the] officers are practicing deception not only on the State's Attorney but on the court and the defendant."[13] Durham PD's decision to black out arrestee names on conviction bonus vouchers in the second batch of records remitted to SCSJ makes it impossible to identify other individuals against whom officers may have resorted to

[9] Assistant District Attorney Roger Echols provided Southern Coalition with the following statement: "[T]he D.A.'s office was not aware of any agreement to pay confidential informants at the completion of cases. We were also not aware of, if there were any, payments to confidential informants for bonuses. If we had that information or known it existed we would have provided it to the defendant in discovery. We are continuing to look into the matter regarding payments to confidential informants." E-mail from Roger Echols, Assistant District Attorney, Durham County District Attorney's Office, to Ian A. Mance, Soros Justice Attorney-Fellow, Southern Coalition for Social Justice (Feb. 28, 2014).

[10] *See generally* Brady v. Maryland, 373 U.S. 83 (1963) (landmark case establishing that suppression of evidence favorable to an accused violates due process irrespective of the good faith or bad faith of the prosecution).

[11] United States v. Anty, 203 F.3d 305, 311–12 (4th Cir. 2000).

[12] United States v. Levenite, 277 F.3d 454, 462 (4th Cir. 2002).

[13] Boyd v. French, 147 F.3d 319, 329–30 (4th Cir. 1998) (quoting Barbee v. Warden, Md. Penitentiary, 331 F.2d 842, 846 (4th Cir. 1964)).

illegal means in building their cases. Some of these individuals may still be sitting in prison. It is critical that the city undertake a review of such cases and demand the department release the full set of unredacted records. The "name . . . of a person arrested, charged, or indicted" is a public record,[14] so there is no obvious legal justification for such redaction, particularly when the records were created post-conviction.

It is true that the manner in which a contingency payment is structured is important and can, in rare cases, save it from a finding of unconstitutionality. However, courts have been very clear that where "payment is conditioned upon a conviction as the 'outcome,' then this sort of arrangement is clearly impermissible . . . ."[15] Specifically, it is a defendant's right to due process that prohibits states from engaging in "criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions."[16] Such an "agreement with [a] key witness hamper[s] the truth-finding function of the jury to a degree which cannot be reconciled with the fair procedures guaranteed by the due process clause of the fifth amendment."[17] This is the case whether the undisclosed payment is made before or after the conviction is obtained.[18] "At the very least, the court must tell a jury that the words of a witness have been in a sense purchased if he will be paid, more or less, depending upon how effective his putative truth-telling sells itself to the jury."[19] In North Carolina, our Supreme Court has long held that a "jury should be directed to . . . make proper allowance for the bias likely to exist in one having [a financial] interest in the outcome of [a] prosecution . . . ."[20]

We have identified nine individuals thus far who were convicted in part on the basis of evidence obtained by informants whom officers remitted payment to *after* the resolution of the criminal cases against them. All of these individuals—Fernando Alvarado-Paz, Alan Figueroa-Agurcia, Moises Hernandez, Dennis Cates, Tony Fisher, Nakiel Clemons, Justiniano Rodriguez, Roberto Belmonte-Ayala, and Jose Rogelio Lemus—are black or Hispanic. Almost all of them are drug

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[14] *See* Gannett Pac. Corp. v. N. Carolina State Bureau of Investigation, 164 N.C. App. 154, 158, 595 S.E.2d 162, 164 (2004) (citing N.C.G.S. § 132-1.4(c)(2) (2003)).

[15] United States v. Cervantes-Pacheco, 800 F.2d 452, 457 (5th Cir. 1986) *on reh'g*, 826 F.2d 310 (5th Cir. 1987) (emphasis added); *cf.* United States v. Baxter, 342 F.2d 773, 774 (6th Cir. 1965) (finding no reversible error because informant "payments were made prior to trial and not based on convictions").

[16] *See, e.g.*, State v. Glosson, 462 So. 2d 1082, 1085 (Fla. 1985); *see also* State v. Hunter, 586 So. 2d 319, 321 (Fla. 1991) ("[A]n agreement giving someone a direct financial stake in a successful criminal prosecution . . . is so fraught with the danger of corrupting the criminal justice system through perjured testimony that it cannot be tolerated.").

[17] United States v. Waterman, 732 F.2d 1527, 1528 (8th Cir. 1984).

[18] *See, e.g.*, United States v. Key, 65 M.J. 172, 177 (C.A.A.F. 2007) (Ryan, J., concurring in part and dissenting in part) ("I am not prepared to say that evidence that an informant was offered payment before trial . . . and then . . . accepted it after trial, could not cast doubt upon her credibility, let alone her entire testimony.").

[19] *Cervantes-Pacheco*, 800 F.2d at 460–61.

[20] State v. Boynton, 71 S.E. 341, 344 (N.C. 1911); *see also* State v. Love, 47 S.E.2d 712, 715 (N.C. 1948) ("It is universally recognized . . . that the testimony of witnesses . . . who participate in the offense and receive remuneration therefor should be scrutinized as to its credibility.").

defendants. Some of them have been deported. We have also identified additional cases involving unknown defendants where we have reason to believe such bonuses may also have been paid after-the-fact. The bulk of these cash payments were around $300 in value, more than three times the typical fee paid to informants for a drug transaction. All of the payments appear to have received the signed approval of a supervising Sergeant.

Most of the defendants we have identified appear to have taken plea bargains in an attempt to avoid a trial in which they likely would have unknowingly faced paid-for testimony. While it is true that "[w]hen a defendant pleads guilty he or she . . . forgoes not only a fair trial, but also other accompanying constitutional guarantees,"[21] it is also the case that "the Constitution insists . . . that the defendant enter a guilty plea that is 'voluntary' and that the defendant must make related waivers 'knowing[ly], intelligent[ly], [and] with sufficient awareness of the relevant circumstances and likely consequences.'"[22] Courts have repeatedly held that "a guilty plea is not knowingly and voluntarily made when the defendant has been misinformed as to a crucial aspect of his case."[23]

Where they are so misinformed, a defendant seeking "to set aside a plea as involuntary. . . must show that (1) 'some egregiously impermissible conduct . . . antedated the entry of his plea' and (2) 'the misconduct influenced his decision to plead guilty or, put another way, that it was <u>material</u> to that choice.'"[24] With respect to the first point, the records clearly support a reasonable inference that any payment arrangements promising informants a "bonus" in the event their testimony and/or cooperation led to convictions would have preceded entry of any pleas. If this were not the case, there would be no reason for the department to expose itself to the risk and expense of engaging in such a practice. <u>We cannot conceive of any other rational explanation for a police officer making a large undisclosed cash payment to an informant in relation to an already-resolved criminal investigation.</u>

As for the second point, the nondisclosure in these cases would clearly be material. As our courts have explained, " '[e]vidence is considered 'material' if there is a 'reasonable probability' of a different result had the evidence been disclosed.' "[25] The fact that an informant stands to profit from an accused's conviction would certainly bear heavily on that individual's credibility. Nevertheless, materiality does not require a "demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal."[26] In certain instances, police misconduct, "which inform[s] [a] defendant's decision to plead guilty . . . [will] render[] the defendant's plea involuntary and violate[] his due process rights."[27]

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[21] United States v. Ruiz, 536 U.S. 622, 628 (2002).
[22] *Id.* (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).
[23] United States v. Fisher, 711 F.3d 460, 462 (4th Cir. 2013) (internal quotations and citations omitted).
[24] *Id.* at 465 (citations omitted) (emphasis added).
[25] State v. Williams, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008) (quoting State v. Berry, 356 N.C. 490, 517, 573 S.E.2d 132, 149 (2002) (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)).
[26] State v. Williams, 362 N.C. 628, 636, 669 S.E.2d 290, 296 (2008) (internal citations omitted).
[27] United States v. Fisher, 711 F.3d 460, 462 (4th Cir. 2013).

Moreover, numerous courts have recognized that an informant or "a government employee . . . earn[ing] a bonus by facilitating a conviction . . . [is] relevant to . . . witnesses' potential biases[and] their credibility."[28] Due process violations can lie where police make payments to informants that are not disclosed to or discoverable by defense counsel.[29] Simply put, the police cannot pay witnesses contingent upon the effectiveness of their testimony or cooperation and not disclose such a payment arrangement to defense counsel.

In light of the aforementioned facts and cases, Southern Coalition requests that the Durham Police Department: (1) release, in unredacted form, all records pertaining to the use of conviction or contingency bonuses; (2) explain to the public why defendants, their lawyers, and the District Attorney's Office were not made aware of such contingency arrangements; (3) immediately bring the department into compliance with all state and federal law governing payments to informants, confidential or otherwise; (4) adopt a written policy explicitly instructing officers not to engage in such a practice; and (5) appropriately discipline any officers who were complicit in facilitating undisclosed cash payments to undercover informants.

"DRUG DETERRENCE CHECKPOINTS"

In his presentation to the Durham Human Relations Commission ("HRC") during the third special hearing on racial profiling, Deputy Chief Anthony R. Marsh made the following remark:

> *"The general license checking stations that officers put together . . . . If you've got a known drug area, . . . that's a good way to at least deter it—if you put it up in that area."*[30]

Deputy Chief Marsh's remarks about checkpoints require no parsing.[31] The deputy chief stated that Durham police officers put together license checkpoints in "known drug areas" in order to

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[28] United States v. Zidar, 178 F. App'x 673, 676 (9th Cir. 2006); *see also* United States v. Nagi, 11-1170, 2013 WL 5433464 (6th Cir. Sept. 30, 2013) (characterizing as "impropriety" an allegation that a witness "was promised a bonus that was contingent upon conviction") *cert. denied*, 134 S. Ct. 668 (2013); United States v. Gray, 626 F.2d 494, 499 (5th Cir. 1980) ("[A]n informant's testimony will not be rejected unless there is evidence that he was promised payment contingent upon conviction of a particular person." (citing United States v. Garcia, 528 F.2d 580 (5th Cir. 1976), *cert. denied*, 426 U.S. 952, *cert. denied*, 429 U.S. 898.)).

[29] *Cf.* Lynn v. Tarney, 405 F. App'x 753, 755 (4th Cir. 2010).

[30] Durham Deputy Chief of Police Anthony R. Marsh, Sr., Presentation to the Durham Human Relations Commission (Nov. 12, 2013) (recording on file with author).

[31] Shortly before this letter was to be mailed, Durham PD's Executive Command Staff issued a statement retracting Deputy Chief Marsh's remarks and claiming it "was not the Deputy Chief's intention to imply or infer that Durham Police Officers initiate license checking stations for the purpose of deterring drug activity." *See* Executive Command Staff of the Durham Police Department, *Durham Police Department Response to Allegations of Racial Profiling and Bias-Based Policing: Follow-up Report to the Durham City Manager*, at 38 (February 17, 2014). We believe Deputy Chief Marsh's statement to the HRC was unambiguous and clearly indicated that the department has sited checkpoints for this reason. Even though

"deter" persons involved in the illegal narcotics trade from replenishing their supply. He went on to explain that the department views such checkpoints as an effective strategy to employ when officers are "having difficulty getting to the sellers."

Numerous members of the FADE Coalition have reported encountering these checkpoints repeatedly in their majority black neighborhoods. In addition, during the Human Relations Commission's final public hearing on profiling, multiple women unaffiliated with FADE rose and spoke during the public comment section about the frequency with which they are stopped and questioned at checkpoints near their homes while simply coming to and from work.[32] This should not happen if the department is in compliance with state statutes instructing "agencies [to] avoid placing checkpoints repeatedly in the same location or proximity."[33]

As Southern Coalition highlighted to the HRC during its January 22, 2014 hearing, while police may have noble goals in setting up drug deterrence checkpoints, this practice is unconstitutional. It has been settled law in both state and federal courts for the better part of a decade that "checkpoints set up for general crime prevention, including drug interdiction, do not pass constitutional muster under the Fourth Amendment."[34] "[A]lthough traffic regulation [is] a permissible primary purpose for suspicionless checkpoints, deterrence of drug activity and general drug enforcement [is] not."[35] This is because "the government's general deterrence interest is not substantial enough to outweigh the seized individuals' liberty interests."[36] Time and again, courts—including the U.S. Supreme Court—have reached this same conclusion.[37] <u>Accordingly, there is no lawful authority for Durham PD's operation of drug deterrence checkpoints. The practice is unconstitutional and needs to stop.</u>

As is the case with the department's traffic enforcement, undercover marijuana enforcement, and conviction bonuses practices, these checkpoints are often racially discriminatory in effect. They also impose a special burden on large numbers of innocent people who happen to live in these neighborhoods. Just as "a curfew limited to black neighborhoods . . . would be 'immediately

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the department now claims this practice is "unacceptable," the department continues to maintain a policy of leaving the decision of "where such license checking stations are implemented at the discretion of . . . officers." *Id.* at 39.

[32] *See* Audio Recording of February 4, 2014 hearing of the Durham Human Relations Commission (on file with Southern Coalition).

[33] *See* N.C.G.S. § 20-16.3A(d) (2011).

[34] United States v. Henson, 351 F. App'x 818, 820 (4th Cir. 2009); State v. Veazey, 191 N.C. App. 181, 185, 662 S.E.2d 683, 686 (2008) ("[A] checkpoint with an invalid primary purpose, such as checking for illegal narcotics, cannot be saved by adding a lawful secondary purpose to the checkpoint, such as checking for intoxicated drivers.").

[35] Mills v. D.C., 571 F.3d 1304, 1312 (D.C. Cir. 2009), *cited with approval in* United States v. Henson, 351 F. App'x 818, 820 (4th Cir. 2009).

[36] Galberth v. United States, 590 A.2d 990, 998 (D.C. 1991).

[37] *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 45–46 (2000); *Henson*, 351 F. App'x at 820; State v. Gabriel, 192 N.C. App. 517, 520–21, 665 S.E.2d 581, 584–85 (2008); State v. Rose, 170 N.C. App. 284, 293, 612 S.E.2d 336, 341–42 (2005).

suspect' because of the possibility of racial discrimination,"[38] so too should a concentration of such checkpoints in predominately black neighborhoods provide reason for concern. It is well-established that mere presence in a high crime area does not give police license to treat individuals with extra suspicion.[39] Nevertheless, Southern Coalition has received many complaints and documented numerous examples of black residents and motorists who have been stopped, questioned, and in some cases searched, in Durham's "known drug areas" simply for walking or driving down the street. We brought some of these individuals to share their stories at the January 22nd HRC hearing, which the department declined to attend.

In light of Deputy Chief Marsh's statement to the Human Relations Commission acknowledging the department's establishment of drug deterrence checkpoints, we call upon city leadership to commit to bringing the department's checkpoint practices into compliance with existing constitutional law. Given Durham County's well documented racial disparities in drug prosecutions and arrests—the very worst in North Carolina[40]—the mingling of drug and license enforcement poses unique dangers to black motorists. These checkpoints only serve to exacerbate Durham PD's highly-racialized traffic enforcement disparities, which are also among the very worst in the state and problematic in their own right.[41]

MARIJUANA ENFORCEMENT AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

In its written response to the FADE Coalition's October 17, 2013 letter to the Durham Human Relations Commission, Durham PD flatly asserted that "the department doesn't specifically engage in marijuana enforcement" and doesn't "pursue marijuana arrests."[42] However, the department's own records reflect that between 2011 and 2013, DPD spent in excess of $30,000 making over 330 undercover marijuana purchases with a typical street value of just $10 or $20. This $30,000 figure accounts only for dollars spent purchasing small amounts of marijuana and paying undercover informants their transaction fee. It does not include the hundreds of thousands of dollars the city likely spends annually paying police officers to investigate

[38] United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir. 1971).
[39] *See, e.g.*, Illinois v. Wardlow, 528 U.S. 119, 124 (2000); United States v. Lender, 985 F.2d 151, 154 (4th Cir. 1993); *In re* I.R.T., 184 N.C. App. 579, 585, 647 S.E.2d 129, 135 (2007).
[40] *See, e.g.*, Dr. Frank Baumgartner & Derek Epp, North Carolina Advocates for Justice Task Force on Racial and Ethnic Bias, *Executive Summary*, at 2 (January 12, 2012) (noting that African-Americans in Durham County are nearly nine times as likely as whites to be incarcerated for drug crimes). These disparities cannot be justified by pointing to disparate drug usage rates, as all available data indicates that blacks and whites use drugs at approximately the same rates. *See, e.g.*, U.S. Dep't of Health and Human Servs., Substance Abuse and Mental Health Servs. Admin., Results from the 2012 National Survey on Drug Use and Health: Summary of National Findings, Figure 2.12, *Past Month Illicit Drug Use Among Persons Aged 12 or Older, by Race/Ethnicity: 2002-2012* (Sept. 2013).
[41] *See, e.g.*, Dr. Frank Baumgartner & Derek Epp, University of North Carolina at Chapel Hill, *North Carolina Traffic Stop Statistics Analysis, Appendices*, at 2–12 (observing that Durham generates some of the highest black-to-white search disparities in the state of North Carolina).
[42] *See* Durham PD, *FADE Coalition Response*, at 10, 13 (available on DPD website).

marijuana offenses, paying officers to testify in marijuana-related cases, jailing marijuana offenders, and paying the District Attorney's Office to prosecute marijuana offenses.

Southern Coalition has also geocoded the city's marijuana arrests.[43] Using mapping technology, we have demonstrated that the highest percentage of the city's marijuana arrests occur in neighborhoods where the population of African-Americans between the ages of 18 and 34 is greater than 60%.[44] SCSJ Attorney Daryl Atkinson recently presented this evidence to the Human Relations Commission and explained how DPD's enforcement of marijuana laws is highly discriminatory, noting that blacks in Durham remain approximately 300% more likely than whites to be arrested for marijuana,[45] despite using the drug at approximately the same rate.[46] <u>In the first four years after Chief Lopez took office, marijuana arrests in Durham increased by a rate of 71.5%, and "the vast majority of those arrested were black"—to quote the department itself</u>.[47] These arrests, which often have devastating effects on individuals' future ability to secure employment, appear to be animated, at least in part, by the department's desire to generate "higher numbers of arrests"—a key "performance indicator" of the department's success in administering a lucrative federal drug enforcement grant.[48]

We are aware of recent press reports that the Human Relations Commission, in its deliberations, has rejected, by "the narrowest of margins, a 6-5 vote," calls from the FADE Coalition to designate marijuana enforcement the city's lowest law enforcement priority (LLEP).[49] Unless the Commission intends to revisit the issue when all members are in attendance—four members were absent when the 6-5 vote was taken—they appear poised to recommend only that courts "divert those charged with low-level pot crimes into treatment programs instead of convicting them."[50] We would first note that this is already occurring with teenagers in Durham, as part of a recent series of reforms led by Judge Marcia Morey. Expanding it to include adults is certainly a better policy than burdening someone with a criminal record or throwing them in jail. But it also means that spots in rehabilitation clinics, which are already hard to come by for those who need them, will be filled with people engaging in an activity that the President of the United States recently acknowledged is "[no] more dangerous than alcohol."[51]

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[43] *See* Southern Coalition for Social Justice, Graphic, *Durham Marijuana Arrests & African-Americans 18-34*, *available at* http://www.southerncoalition.org/wp-content/uploads/2013/11/Combined_ZIP.jpg.

[44] *See id.*; *see also* FBI and Uniform Crime Report County Arrest Data 2007–10 (Durham County); United States Census Data 2010 (Durham County).

[45] *See* American Civil Liberties Union, *The War on Marijuana in Black and White: Billions Wasted on Racially Biased Arrests*, at 21, 168 (2013).

[46] *See*, *e.g.*, U.S. Dep't of Health and Human Servs., *supra* note 40.

[47] DPD Executive Command Staff, *supra* note 31, at 34 (February 17, 2014).

[48] *See*, *e.g.*, City of Durham, BJA Justice Assistance Grant Program Performance Measures by Activity, at 5 (2009).

[49] *See* Ray Gronberg, *Panel Begins Drafting Durham Police Recommendations*, DURHAM HERALD-SUN, March 3, 2014.

[50] *Id.*

[51] William M. Welch, *Obama: Pot No More Dangerous Than Alcohol*, USA TODAY, Jan. 20, 2014. The President also spoke directly to the racialized aspects of marijuana enforcement, noting that "middle class

Most importantly, the HRC's proposal will do nothing to shrink the enormous racial enforcement disparities that exist with respect to marijuana in Durham. Black youth will continue to become justice system-involved in numbers that greatly exceeds their white peers, even though both groups are engaging in the exact same conduct at the same rates. This pattern and practice of enforcement amounts to racial discrimination. The city's response must address the racial aspects of the department's drug enforcement strategy, not just the collateral consequences that result from an arrest.

We would remind the department and city of its obligations under Title VI of the Civil Rights Act of 1964. Title VI obligates state and local governments to administer federal funds in a non-racially discriminatory manner.[52] Insofar as it concerns use of federal Byrne JAG money to fund marijuana enforcement, the available evidence suggests that the department is not honoring this obligation. A 2012 study by UNC-Chapel Hill Professor Dr. Frank Baumgartner, for example, found that African-Americans in Durham County are nearly *nine* times more likely to be incarcerated for drug crimes than whites,[53] despite relatively equal usage rates.[54] Notably, much of the Byrne JAG money was allocated to the city's "Informant's Fund,"[55] which has since been used to pay for hundreds of low-level undercover marijuana buys.[56]

The department appears to be spending tens, if not hundreds, of thousands of dollars on an annual basis enforcing marijuana laws in what amounts to a racially discriminatory fashion—all while maintaining publicly that it does not "engage in marijuana enforcement" or "pursue marijuana arrests."[57] This enforcement scheme leaves the department potentially vulnerable to liability under Title VI, which "forbids the use of federal funds not only in programs that intentionally discriminate on racial grounds but also in those endeavors that have a disparate impact on racial minorities."[58] We note that when North Carolina police departments have

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kids don't get locked up for smoking pot, and poor kids do. And African-American and Latino kids are more likely to be poor and less likely to have the resources and the support to avoid unduly harsh penalties." *Id.*

[52] *See* Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*.

[53] *See* Baumgartner & Epp, *supra* note 40, at 2.

[54] *See* U.S. Dep't of Health and Human Servs., *supra* note 40.

[55] *See* E-mail from Jesse Burwell, Assistant Chief, Durham Police Department, to Kisha Ethridge, Grant Manager, City of Durham (May 3, 2010, 13:32 EST).

[56] Evidence of these undercover purchases, reflected in a collection of DPD *Request and Expenditure Fund Report* forms, is on file at Southern Coalition and is available upon request.

[57] *See* Durham PD, *supra* note 42, at 10, 13.

[58] Guardians Ass'n v. Civil Serv. Comm'n of City of New York, 463 U.S. 582, 589 (1983). As the Supreme Court has explained, "Section 602 of Title VI authorizes federal agencies to effectuate the provisions in § 601 by enacting regulations. Pursuant to that authority, the Department of Justice [has] promulgated regulations prohibiting funding recipients from adopting policies that ha[ve] 'the effect of subjecting individuals to discrimination because of their race, color, or national origin.' " Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 177 (2005) (citing 28 CFR § 42.104(b)(2) (1999)). These

engaged in racially discriminatory or disparate enforcement practices in recent years, the U.S. Department of Justice has not been shy about taking action.[59]

In Durham, the evidence of disparate impact is unmistakable. In fact, we have statistical evidence of greater racial disparities in drug enforcement than exist in more than 90% of North Carolina counties.[60] These disparities could be sufficient to make out a case of disparate impact under Title VI, particularly when coupled with Durham's alarming traffic stop-and-search disparities.[61] Making matters worse, Durham County exercises its discretion to designate black defendants as "habitual felons," thus triggering longer sentences, at a rate 13.2 times greater than it does white defendants—the worst racial disparity in North Carolina.[62]

Viewed as a whole, it becomes apparent that at every juncture of the criminal justice continuum—from the decision of who to stop, who to search, who to arrest, who to charge, and how to charge them—Durham officials exercise their discretion in a more racially disparate manner than nearly anywhere else in North Carolina. These disturbing statistics indicate that the city's reputation as a haven for progressive politics and racial equity is undeserved, at least insofar as it concerns its criminal justice apparatus.

CONCLUSION

Every single day in this community, police officers make decisions that will impact the lives of our fellow citizens for decades to come. People in this city have gone to jail, and been deported, without the benefit of knowing the evidence against them—evidence that police withheld even from the District Attorney's Office itself. By the hundreds, innocent motorists, most of them black, have been stopped and pulled out of their vehicles for the most insignificant of infractions, and subjected to all manner of indignities, including illegal searches of their person and property. People who have no connection to the drug trade whatsoever have been burdened with intrusive checkpoints while simply attempting to come to and from work. And the police, lured by the prospect of lucrative federal grants, have targeted young, predominantly black, teenagers and adults by the hundreds, for the purpose of making small undercover drug transactions, in turn

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disparate impact regulations have been upheld by the Supreme Court. *See* Alexander v. Sandoval, 532 U.S. 275, 283 (2001).

[59] *See, e.g.*, Complaint, United States v. Johnson, No. 1:12-CV-01349 (M.D.N.C. Dec. 20, 2012) (Alamance Co. Sheriff's Office); Letter from Jonathan M. Smith, Chief, Special Litigation Section, U.S. Dep't of Justice, Civil Rights Division, to Patricia Corey Bradley, Att'y, Fayetteville Police Dep't, January 30, 2012 (noting that a review of the department's stop and search data suggested FPD "risk[ed] running afoul of the 14th Amendment's protections against discriminatory policing").

[60] *See* Baumgartner & Epp, *supra* note 40, at 2.

[61] *See, e.g.*, Md. State Conference of NAACP Branches v. Md. Dep't of State Police, 72 F. Supp. 2d 560, 567 (D. Md. 1999) ("Since the I–95 plaintiffs are asserting that federal funding is being used to stop minority motorists in a discriminatory fashion, these plaintiffs fall within the 'zone of interests' sought to be protected by Title VI.").

[62] *See id.* Note that Greene County, North Carolina registered a 20:1 disparity on this measure, but the disparity is likely skewed and statistically insignificant on account of the county's small population.

doing significant damage to their lifetime job and educational prospects. DPD's drug enforcement strategy has done significant damage to our community and our institutions, and it has significantly undermined the credibility of our police department, which has repeatedly resorted to unconstitutional measures to achieve its goals. It is past time that city leadership assert itself and take meaningful steps to hold this department accountable.

Respectfully,

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