



## Written submission of the American Civil Liberties Union on Failures of the U.S. Department of Justice to Address Police Violence

### Hearing on Police Violence and Structural Racism in the United States

Inter-American Commission on Human Rights 177th Period of Sessions, October 7, 2020

The American Civil Liberties Union (ACLU) welcomes this opportunity to submit written testimony to the Inter-American Commission on Human Rights for its hearing on police violence and structural racism in the United States. This submission focuses on actions by the Trump Administration that eliminate or roll back federal oversight and investigation of alleged police killings thus increasing police militarization and violence, among other human rights abuses and police misconduct.

The Inter-American Commission on Human Rights plays a critical role in highlighting extrajudicial killings by law enforcement agents in the United States<sup>1</sup> and the lack of effective individual and institutional legal remedies to combat racist police violence. This submission updates previous ACLU written statements to the Commission.<sup>2</sup> It is critical to review the troubling record of Attorney General William Barr and his curtailing of civil rights protections in favor of increasing police militarization, furthering the devastating war on drugs, and failing to hold police departments accountable for continued abuse and fatal shootings.<sup>3</sup>

At least 781 people have been shot and killed by law enforcement officers in 2020 alone, which does not include the more than 6,552 deaths from 2014 through 2019.<sup>4</sup> Compared to white men, Black men are almost three times as likely, and Latinx men are almost twice as likely, to be killed by police use of force.<sup>5</sup> The overwhelming majority of law enforcement officers are never charged, let alone convicted, for using excessive force against civilians.<sup>6</sup>

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<sup>1</sup> *Police Violence Against Afro-descendants in the United States*, Inter-Am. Comm'n on H.R., OEA/Ser.L/V/II. Doc.156 (2018) available at <https://www.oas.org/en/iachr/reports/pdfs/PoliceUseOfForceAfrosUSA.pdf>.

<sup>2</sup> *Human Rights Hearing on Police Killings in U.S.*, ACLU (Dec. 5, 2017), <https://www.aclu.org/cases/human-rights-hearing-police-killings-us>.

<sup>3</sup> NAACP Legal Defense and Educational Fund, Inc., *What You Should Know About the Civil Rights Record of William Barr*, <https://www.judiciary.senate.gov/imo/media/doc/LDF.pdf> (last visited Sep. 21, 2020).

<sup>4</sup> *Police Violence Map*, Mapping Police Violence, <https://mappingpoliceviolence.org/> (last visited Sep. 28, 2020).

<sup>5</sup> James W. Buehler, *Racial/Ethnic Disparities in the Use of Lethal Force by US Police, 2010–2014*, 107 *Am. J. of Pub. Health* 2 (2017), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5227943/pdf/AJPH.2016.303575.pdf>.

<sup>6</sup> *supra* at n. 4 (finding that 99% of cases in 2015 have not resulted in any officer(s) being convicted of a crime); see also Philip Stinson, *Cops shoot and kill someone about 1,000 times a year. Few are prosecuted. What can be done?*,

Tragedies from police violence persist, like the killing of Breonna Taylor, a 26- year-old unarmed Black woman who was shot 8 times and killed by Louisville, Kentucky police officers in her own apartment on March 13, 2020,<sup>7</sup> and Tony McDade, a black trans man killed on May 27, 2020 in Tallahassee, Florida where witnesses said they never heard any warnings, “I never heard, ‘Get down, freeze, I’m an officer.’ I never heard nothing. I just heard gunshots.”<sup>8</sup>

## **Trump Administration Continues to Limit Oversight and Enforcement of Police Misconduct Laws—Including Pattern or Practice Investigations**

Recent actions by this Administration indicate at best ignorance, and at worst willful disregard and denial of the extent of police brutality in the United States, a failure to adequately respond to police killings and other violence, and in some instances, even instigating such violence. On Friday, January 20, 2017, Inauguration Day, the White House published an issue statement advising the country that “[t]he Trump Administration will be a law and order administration.”<sup>9</sup> The brief states that “[t]he dangerous anti-police atmosphere in America is wrong” and promises to “end it.”<sup>10</sup> On April 17, 2017, then-Attorney General Jeff Sessions published an op-ed, calling for “proactive policing” and ending “harmful federal intrusion in the daily work of local police.”<sup>11</sup> When questioned on why Black Americans are “dying at the hands of law enforcement,” President Donald Trump went on to say, “So are white people. What a terrible question to ask... More [white] people, by the way,” effectively negating the disproportionate impact of police brutality on Black Americans.<sup>12</sup>

It is the responsibility of the Attorney General and the Department of Justice (DOJ) to actively enforce all U.S. laws, including 42 U.S.C. § 14141, which gives the DOJ the authority to

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L.A. Times (Dec. 15, 2016), <https://www.latimes.com/opinion/op-ed/la-oe-stinson-cop-shootings-20161215-story.html>.

<sup>7</sup> Richard A. Oppel Jr., Derrick Bryson Taylor and Nicholas Bogel-Burroughs, *What We Know About Breonna Taylor’s Case and Death*, The N.Y. Times, <https://www.nytimes.com/article/breonna-taylor-police.html>.

<sup>8</sup>EJ Dickson, *Another Black Man, Tony McDade, Was Shot and Killed by Police Last Week*, Rolling Stone (June 1, 2020), <https://www.rollingstone.com/culture/culture-news/tony-mcdade-shooting-death-tallahassee-1008433/>.

<sup>9</sup> Dara Lind, *Trump’s White House site promise to end the “anti-police atmosphere” in America*, Vox (Jan. 20, 2017) <https://www.vox.com/2017/1/20/14338632/trump-whitehouse-gov-blue-lives-matter>.

<sup>10</sup> *Id.*

<sup>11</sup> Atty. Gen. Jeff Sessions, *Avoid harmful federal intrusion*, USA Today, Apr. 17, 2017, <https://www.usatoday.com/story/opinion/2017/04/17/jeff-sessions-avoid-harmful-federal-intrusion-editorialsdebates/100579848/>.

<sup>12</sup> Press Release, Jeffrey Robinson, *ACLU Statement on President Trump’s Dismissal of the Disproportionate Police Killings of Black People*, ACLU (July 14, 2020), <https://www.aclu.org/press-releases/aclu-statement-president-trumps-dismissal-disproportionate-police-killings-black>; Jeffrey Robinson, *Trump efforts to protect cops doesn’t match facts: Column*, USA Today (Feb. 16, 2017), <https://www.usatoday.com/story/opinion/policing/spotlight/2017/02/16/trump-effort-protect-cops-doesnt-match-facts-column/97871792/>. (President Trump has also signed Executive Orders directing the Department of Justice to expand the criminal code and establish “new mandatory minimum sentences for existing crimes of violence against law enforcement officers,” even though laws already exist imposing the strictest penalties for violence against police officers).

investigate police departments with a pattern or practice of police misconduct, and 18 U.S.C. §§ 241 and § 242, which requires the DOJ to prosecute those, including law enforcement, who deprive a person of his or her civil rights and liberties.<sup>13</sup> This responsibility is a critical tool for reforming the police departments that are the most persistent abusers of the communities they are supposed to protect. Since 2009, the DOJ opened 25 investigations into law enforcement agencies and has been enforcing 14 consent decrees.<sup>14</sup>

Despite this obligation, on November 7, 2018, then Attorney General Jeff Sessions issued a policy that sets unprecedented barriers for DOJ attorneys to negotiate settlement agreements and consent decrees. Attorney General William Barr has continued this approach, refusing to use Section 14141 (now codified at 34 U.S.C. § 12601) to mandate reforms and prevent police killings.<sup>15</sup>

For example, in 2017, the DOJ attempted to postpone the implementation of Baltimore’s carefully-negotiated consent decree despite support from the city itself<sup>16</sup> and accepted the City of Chicago’s decision to abandon the consent decree process,<sup>17</sup> in spite of overwhelming evidence uncovered by the DOJ that the police departments in those cities had engaged in a pattern of discrimination that harmed the safety and civil rights of their residents.<sup>18</sup> Further, even though Sessions had abandoned DOJ’s earlier investigation and findings of policing failures at the Chicago Police Department (CPD), and the CPD consent decree was between the state of Illinois and Chicago as a result of this abandonment, Sessions still weighed in. In filing the statement of opposition, then Attorney General Jeff Sessions declared that “[t]here must never be another consent decree that continues the folly of the ACLU settlement,”<sup>19</sup> with Sessions referencing a 2015 settlement<sup>20</sup> between the ACLU of Illinois and CPD to end the department’s unconstitutional stop and frisk practices.

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<sup>13</sup> 18 U.S.C § 242 makes it a crime for any person acting under color of law, statute, ordinance, regulation, or custom to willfully deprive or cause to be deprived from any person those rights, privileges, or immunities secured or protected by the Constitution and laws of the U.S.

<sup>14</sup> *Justice Department Releases Report on Civil Rights Division’s Pattern and Practice Police Reform Work*, U.S. Dep’t. of Just. (January 4, 2017), <https://www.justice.gov/opa/pr/justice-department-releases-report-civil-rights-division-s-pattern-and-practice-police-reform>.

<sup>15</sup> Erwin Chemerinsky, *Op-Ed: Trump and the Supreme Court have gutted the legal tools for fighting police abuse*, L.A. Times (Jun. 5, 2020), <https://www.latimes.com/opinion/story/2020-06-05/op-ed-trump-and-the-supreme-court-have-gutted-the-legal-tools-for-fighting-police-abuse>.

<sup>16</sup> Alan Neuhauser, *Sessions slams Baltimore consent decree*, U.S. News and World Report (April 7, 2017), <https://www.usnews.com/news/national-news/articles/2017-04-07/attorney-general-jeff-sessions-slams-baltimore-consent-decree>.

<sup>17</sup> Dan Hinkel, Dan, et al., *Emanuel backs off from commitment to court oversight of Chicago police reform*, Chicago Tribune (June 2, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-chicago-policeindependent-monitor-met-20170602-story.html>.

<sup>18</sup> Civil Rights Division, *Investigation of the Chicago Police Department*, U.S. Dep’t of Just. (Jan. 13, 2017), <https://www.justice.gov/opa/file/925846/download>; Civil Rights Division, *Investigation of the Baltimore City Police Department*, U.S. Dep’t of Just. (Aug. 10, 2016), <https://www.justice.gov/crt/file/883296/download>.

<sup>19</sup> Press Release, Department of Justice, *Attorney General Sessions Announces New Chicago Gun Crimes Prosecution Team, Files Brief to Stop Dangerous Consent Decree* (Oct. 12, 2018), <https://www.justice.gov/opa/pr/attorney-general-sessions-announces-new-chicago-gun-crimes-prosecution-team-files-brief-stop>.

<sup>20</sup> Press Release, ACLU of Illinois, *Landmark Agreement Reached on Investigatory Stops in Chicago* (Aug. 7, 2015), <https://www.aclu-il.org/en/press-releases/landmark-agreement-reached-investigatory-stops-chicago>.

Attorney General Barr further demonstrated his apprehension to police oversight saying that communities that do not give support and show respect to their local law enforcement may “find themselves without the police protection they need.”<sup>21</sup> These actions suggest that the Trump Administration is seeking to modify or undo existing consent decrees that were hard-fought by previous administrations, and refusing to hold law enforcement officers accountable to rampant constitutional violations reported and litigated in court by the DOJ itself.

The DOJ must not abandon reform efforts, as it has a critical role to play to ensure that law enforcement across the country are following the Constitution and that reforms are implemented effectively and efficiently under existing consent decrees. Consent decrees can remedy these violations at a systemic level, with implementation overseen by a court-appointed monitor until the agency has successfully carried out the required reforms. The policy changes made by then Attorney General Sessions make it very difficult for the federal government to pursue pattern or practice<sup>22</sup> investigations and hold state and local law enforcement agencies accountable for any systemic unconstitutional and unlawful policing that is found after such an investigation. Now, as “the department failed to prosecute police officers involved in patently racist violence”<sup>23</sup> the DOJ under Attorney General Barr’s leadership continues to refuse the use of pattern or practice investigations or consent decrees, having brought just one pattern or practice investigation during its tenure.<sup>24</sup>

Since Trump took office, DOJ has not sought to enter into any consent decrees for unconstitutional policing.<sup>25</sup> Even after the killing of George Floyd—an unarmed black man who pleaded for his life while Officer Derek Chauvin kept his knee on Mr. Floyd’s neck for eight minutes and 46 seconds—Attorney General Barr refused to allow a pattern-and-practice investigation into the Minneapolis Police Department for systemic racial discrimination.<sup>26</sup> The DOJ must immediately resume oversight and enforcement of police misconduct laws.

With regards to certain police departments, it is critically important to have the independent and well-resourced oversight that comes from a DOJ investigation in order to achieve systemic reform

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<sup>21</sup> Joshua Clark Davis, *William Barr’s Police-Fueled War on Civil Rights*, *The Nation* (Dec. 27, 2019), <https://www.thenation.com/article/archive/barr-police-civil-rights/>; *Third Annual Attorney General’s Award for Distinguished Service in Policing*, U.S. Dep’t of Just. (Dec. 3, 2019), <https://www.justice.gov/opa/video/third-annual-attorney-general-s-award-distinguished-service-policing>.

<sup>22</sup> 34 U.S.C. § 12601.

<sup>23</sup> Michael German, *Hidden in Plain Sight: Racism, White Supremacy, and Far-Right Militancy in Law Enforcement*, Brennan Center for Justice (Aug. 27, 2020), <https://www.brennancenter.org/our-work/research-reports/hidden-plain-sight-racism-white-supremacy-and-far-right-militancy-law>.

<sup>24</sup> Jack Date, *Springfield, Mass. police narcotics squad routinely used excessive force*: *Justice Department*, ABC News (July 9, 2020), <https://abcnews.go.com/Politics/springfield-mass-police-narcotics-squad-routinely-excessive-force/story?id=71695924>.

<sup>25</sup> Ian Millhiser, *Trump’s Justice Department has a powerful tool to fight police abuse. It refuses to use it*, *Vox: System Failure & The Ctr. For Pub. Integrity*, (Jun. 30, 2020), <https://www.vox.com/2020/6/30/21281041/trump-justice-department-consent-decrees-jeff-sessions-police-violence-abuse>.

<sup>26</sup> *Transcript: Attorney General William Barr on Face the Nation*, CBS News: Face the Nation (Jun. 7, 2020), <https://www.cbsnews.com/news/bill-barr-george-floyd-protests-blm-face-the-nation-transcript/>.

of policing. It is equally important to have court oversight of the consent decrees that typically follow these investigations, to ensure that both the DOJ and the local law enforcement agencies are accountable to an independent entity—the judge—for the reforms they have promised to undertake, despite changes in administration over time.

## **DOJ is failing to enforce the Death in Custody Reporting Act.**

On August 29, 2018, DOJ announced a 30-day comment period on its proposed implementation for the Death in Custody Reporting Act (DCRA), having just closed a 60-day comment period regarding DCRA implementation on August 10, 2018.<sup>27</sup> DOJ’s action further delays compliance with the law, which requires all states and police departments to report all police caused fatalities and other deaths in custody. In September 2019 a spokesperson for the DOJ said that “At this time, BJA does not have a plan to make the data collected under DCRA available to the public.”<sup>28</sup> The DOJ delayed implementation of DCRA until Fiscal Year 2020, a full five years after it was signed into law and two years after DOJ last published its near-final compliance plan and guidelines.<sup>29</sup> A failure to enforce DCRA is consistent with DOJ’s failure to properly collect and report data on the spread of COVID-19 in prisons, jails, and detention centers—known for becoming hotspots of spread.<sup>30</sup>

Knowing the number and circumstances of police-caused fatalities is crucial to developing policies that could reduce the number of such fatalities. This data is also critical to providing the public and DOJ the information needed to ensure law enforcement agencies are complying with civil rights laws, and to assisting DOJ with fulfilling its enforcement responsibilities. DCRA enforcement would also provide data that could be compared to data resulting from investigations, monitoring, and/or settlements of DOJ’s Civil Rights Division.<sup>31</sup>

DOJ’s delayed implementation of DCRA is unacceptable, as there continues to be an unreliable national census of custodial and arrest-related deaths, including national statistics on mortality rates, demographic impact, circumstances of these deaths, and implicated law enforcement agencies. Simply put, the federal government still does not know how many people are killed by law enforcement every year.

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<sup>27</sup> Agency Information Collection Activities; Proposed eCollection eComments Requested; New Collection: Death in Custody Reporting Act Collection, 83 Fed. Reg. 27,023-024 (June 11, 2018), <https://www.gpo.gov/fdsys/pkg/FR-2018-06-11/pdf/2018-12503.pdf>.

<sup>28</sup> Ethan Corey, *How the Federal Government Lost Track of Deaths in Custody*, The Appeal, (Jun. 24, 2020), <https://theappeal.org/police-prison-deaths-data/>.

<sup>29</sup> Agency Information Collection Activities; Proposed eCollection eComments Requested; New Collection: Death in Custody Reporting Act Collection, 83 Fed. Reg. 44,064-065 (Aug. 29, 2018), <https://www.govinfo.gov/content/pkg/FR-2018-08-29/pdf/2018-18700.pdf>.

<sup>30</sup> *supra* at n. 28.

<sup>31</sup> *Comments in Response to Notice Regarding “Agency Information Collection Activities; Proposed eCollection eComments Requested; New collection: Death in Custody Reporting Act Collection*, 83 Fed. Reg. 27023 (June 11, 2018), ACLU (Aug. 7, 2018), available at [https://www.aclu.org/sites/default/files/field\\_document/aclu\\_dcra\\_letter\\_2018\\_aug\\_10\\_comments.pdf](https://www.aclu.org/sites/default/files/field_document/aclu_dcra_letter_2018_aug_10_comments.pdf).



## The Current Administration Perpetuates Police Militarization and Violence

On August 28, 2017, President Donald Trump rescinded Executive Order (EO) 13688.<sup>32</sup> This order created a federal agency working group tasked with implementing oversight and protocols around the military weapons provided to police by the federal government.<sup>33</sup> This means that weapons of war will be used to police local communities with little accountability from the federal agencies providing these weapons.<sup>34</sup> Included in the rescinding of EO 13688 is the reversal of the prohibition on bayonets and grenade launchers.<sup>35</sup> And without interagency coordination, it is now possible that the Department of Defense could provide an MRAP—a light tactical military vehicle—to a police department subjected to Department of Justice complaints of police misconduct.<sup>36</sup> As the ACLU’s report, *War Comes Home: The Excessive Militarization of American Policing* found, militarized policing increases the risk of violence and harm to both law enforcement and civilians. Based on our findings, the ACLU called for oversight of the federal programs that incentive militarized policing.<sup>37</sup> Militarized policing is not “effective policing,”<sup>38</sup> as it does not deescalate, reduce bias, or improve police-community relations.

The avalanche of nationwide police militarization has continued under Attorney General Barr. Barr has authorized the deploying of hundreds of heavily armed riot police and unmarked federal officers in military-style uniforms who engaged in the suppressing of anti-police violence protests.<sup>39</sup> Department of Defense 1033 transfers continue even in the face of nationwide protests and calls for further demilitarization. Since 2017 the Department of Defense’s 1033 program has facilitated the transfer of over \$760 million worth of military equipment to local law enforcement agencies.<sup>40</sup>

Militarized policing’s propensity to escalate violence was witnessed during the national protests against police violence and the outcry from the extrajudicial killings of George Floyd, and Breonna Taylor among others. Military weaponry and tactics were also used during the winter of 2016, at

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<sup>32</sup> *Presidential Executive Order on Restoring State, Tribal, and Local Law Enforcement’s Access to Life-Saving Equipment and Resources*, The White House (Aug. 28, 2017), <https://www.whitehouse.gov/the-press-office/2017/08/28/presidential-executive-order-restoring-state-tribal-and-local-law>.

<sup>33</sup> Law Enforcement Equipment Working Group, *Recommendations Pursuant to Executive Order 13688, Federal Support for Local Law Enforcement Equipment Acquisition* (May 2015), [https://www.bja.gov/publications/LEEWG\\_Report\\_Final.pdf](https://www.bja.gov/publications/LEEWG_Report_Final.pdf).

<sup>34</sup> *War Comes Home: The Excessive Militarization of American Policing*, ACLU (June 2014), [https://www.aclu.org/sites/default/files/field\\_document/jus14-warcomeshome-text-rell.pdf](https://www.aclu.org/sites/default/files/field_document/jus14-warcomeshome-text-rell.pdf).

<sup>35</sup> *supra* at n. 33.

<sup>36</sup> Kanya Bennett, *Trump Just Gave Thousands of Bayonets And Hundreds of Grenade Launchers Back to Police*, ACLU: Speak Freely Blog (Aug. 28, 2017), <https://www.aclu.org/blog/criminal-law-reform/reforming-police-practices/trump-just-gave-thousands-bayonets-and-hundreds>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Garrett M. Graff, *The Story Behind Bill Barr’s Unmarked Federal Agents*, Politico (Jun. 5, 2020), <https://www.politico.com/news/magazine/2020/06/05/protests-washington-dc-federal-agents-law-enforcement-302551>.

<sup>40</sup> American Oversight, *Investigations Update: Militarization of Police, Covid-19 in Migrant Detention Centers, and Barr’s Political Interference* (Jul. 14, 2020), <https://www.americanoversight.org/investigations-update-militarization-of-police-covid-19-in-migrant-detention-centers-and-barrs-political-interference>.

the Dakota's Standing Rock Indian Reservation where law enforcement met protestors with armored vehicles, automatic rifles, concussion grenades, sound cannons, and beanbag bullets.<sup>41</sup> And in July 2016, those organizing around the fatal police shooting of Alton Sterling in Baton Rouge, Louisiana were met with militarization and excessive force.<sup>42</sup> These high-profile militarized incidents continued this year where federal agents were deployed around the country and used extraordinarily brutal tactics to allegedly protect federal property.<sup>43</sup>

The continued militarization of police, rollbacks on safeguards and the escalating of nationwide police violence against protesters has sparked a number of proposals from Members of Congress, including legislation from Representative Nydia M. Velázquez, H.R. 7143,<sup>44</sup> that would end the 1033 program.<sup>45</sup> The only way to fix the brutality and violence of police in America is to divest from it as an institution, which is why Congress must stop providing federal dollars and resources, like 1033, that perpetuate police militarization.

## Conclusion

We commend the Commission's decision to hold this hearing and the Commission's past expressions of deep concern over the issue of extrajudicial killings by law enforcement officials in the United States and the subsequent lack of effective investigations and accountability. We would urge the Commission to include the information presented in this hearing regarding the most current situations of impunity in police killings in any future reports. These reports should complement information presented in other hearings over recent years related to excessive use of force and racism in the criminal justice system of the United States.

We are extremely concerned that the DOJ is acting behind closed doors to dismantle carefully negotiated consent decrees and undermine pattern or practice investigations which further entrenches systemic racism, leading to increased police militarization and violence. We urge the Commission to issue strong recommendations to the government of the United States to reverse recent actions by the Trump Administration that eliminate or roll back federal oversight and investigation of alleged police killings and other misconduct.

We also call on the Commission to continue its human rights monitoring of the situation including through a follow-up fact-finding visit and consideration of other measures to ensure that the United

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<sup>41</sup> ACLU letter to Hon. Vanita Gupta & Hon. Karol Mason, ACLU (Nov. 4, 2016), <https://www.aclu.org/letter/aclu-standing-rock-letter-justice-department>.

<sup>42</sup> Robert Mackey, *Images of militarized police in Baton Rouge draw global attention*, The Intercept (July 11, 2016), <https://theintercept.com/2016/07/11/images-militarized-police-baton-rouge-draw-global-attention/>

<sup>43</sup> Rich Wallace, *Militarizing the police: A long legacy of state violence is what brought us here*, Salon (Sep. 13, 2020), <https://www.salon.com/2020/09/13/militarizing-the-police-a-long-legacy-of-state-violence-is-what-brought-us-here/>.

<sup>44</sup> H.R. 7143, 116th Cong. (introduced June, 8 2020), <https://www.congress.gov/116/bills/hr/7143/BILLS-116hr7143ih.pdf>.

<sup>45</sup> Press Release, Congresswoman Nydia M. Velázquez, *Velázquez Bill Would Demilitarize Police* (June 10, 2020), <https://velazquez.house.gov/media-center/press-releases/velazquez-bill-would-demilitarize-police>.

States complies with its regional and international obligations requiring accountability for police killings and access to justice for victims.

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