



January 25, 2017

Robert D. White, Chief of Police  
Denver Police Department  
1331 Cherokee Street  
Denver, CO 80202

**Re: Preliminary Analysis of the Denver Police Department's Draft Use of Force Policy**

Dear Chief White:

I write to provide you with my preliminary analysis of the document that the Denver Police Department ("DPD") released on January 4, 2017, as its draft Use of Force Policy ("Draft Policy").<sup>1</sup> I commend you for identifying the need for a revised use of force policy to better serve officers and the community. By including principles of de-escalation and force avoidance, the Draft Policy makes admirable statements about the DPD's philosophies associated with the use of force. Yet, there are also noteworthy deficiencies in the Draft Policy. First, some of its key provisions are vague and poorly defined, including its overall standard for when force may be used. Second, notwithstanding that ambiguity, the Draft Policy's overall use of force standard is less restrictive than the standards of a number of other large U.S. police agencies. Third, other key provisions in the Draft Policy do not adhere to national standards, including the definition of "deadly force."

Finally, while I commend you for welcoming feedback about the Draft Policy, the opportunities for informed public comment are compromised by the lack of information that has been provided by the DPD to date. Namely, the Draft Policy omits substantive discussion of numerous topics that, per national standards or law, must be included within use of force policies. This includes when and how Tasers may be used, how uses of force are to be reported and investigated, and chokeholds, which are currently restricted by Colorado statute but not addressed in the Draft Policy. Without more information about the DPD's plans to address these and other critical issues, the opportunity for meaningful and informed public feedback is very limited. I believe that these issues can all be remedied through a more robust partnership between the DPD command, rank-and-file officers, community members, the Office of the Independent Monitor ("OIM") and Citizen Oversight Board ("COB"), and I again extend an invitation to partner with you to fix them.<sup>2</sup>

## **1. Notable Improvements in the Draft Policy**

### **a. Philosophies and Focus**

The Draft Policy includes strong statements about the DPD's articulated philosophies regarding the use of force. This includes, for example, its expression of overall goals of force avoidance and de-escalation. It also recognizes the inherent value of human life, and the right of the public to be free from the use of inappropriate force. The Draft Policy further acknowledges that officers may permissibly use force when their safety or the safety of others is threatened, which is also critically important. The addition of a duty to intervene for officers who witness any use of inappropriate force is also a notable improvement. These are all important concepts that align with national best practices for use of force policies.

### **b. Enhanced Policy on Shooting into Moving Vehicles**

The Draft Policy also improves upon the DPD's standards for shooting into moving vehicles. As reported in the OIM's 2015 Semiannual Report, there were four shootings between July 2014 and January 2015 involving officers shooting into moving vehicles.<sup>3</sup> Troubled by the shootings, and in response to community concerns, the OIM announced on January 27, 2015—one day after the officer-involved shooting that resulted in the death of Jessica Hernandez—that it was launching an evaluation of the DPD's policies, practices, and training on shooting into moving vehicles.<sup>45</sup> On June 8, 2015, the DPD published a revised firearm discharge policy that generally prohibited shooting into moving vehicles.<sup>6</sup>

In its 2015 Semiannual Report, the OIM praised this revised policy, while also raising concerns about its exception to the general prohibition on shooting into moving vehicles.<sup>8</sup> Specifically, the Policy asserted that, "like all written policies, [the policy] may not cover every situation. Any deviations shall be examined rigorously and on a case-by-case basis."<sup>9</sup> The OIM believed that this exception could undermine the prohibition on shooting into moving vehicles, and seemed broad enough to ultimately "swallow the rule."<sup>10</sup> The Draft Policy has addressed this concern by eliminating the exception,<sup>11</sup> and it now unequivocally prohibits shooting into moving vehicles, as national standards recommend.<sup>12</sup>

### **c. Prohibition on Use of Force to Prevent Arrestees from Swallowing Contraband**

The Draft Policy also prohibits physical force to prevent persons from swallowing contraband, a notable improvement. As the OIM discussed in its 2015 Annual Report, the DPD's use of force policy was "almost entirely silent on whether physical force is authorized to remove potential contraband from an arrestee's mouth and, if so, what kinds of force are permitted."<sup>13</sup> The OIM thus recommended that the DPD revise its use of force policy to "prohibit the use of strikes to force persons being placed under arrest to spit out potential contraband."<sup>14</sup> The Draft Policy now prohibits strikes, and indeed, all "physical force" to stop persons from swallowing contraband.<sup>15</sup> This aspect of the Draft Policy is consistent with the policies of some other jurisdictions on this issue, and is a significant step forward.<sup>16</sup>

## **2. Deficiencies in the Draft Policy**

### **a. Key Provisions are Vague and Poorly Defined**

While the Draft Policy has made several advances, some of which are discussed above, it does not adhere to national best practices in other important ways. For example, national standards require use of force policies to be “plainly written . . . and use terms that are clearly defined.”<sup>17</sup> Certain key terms and concepts in the Draft Policy are neither plainly written nor clearly defined, which will both limit its usefulness to officers in the field, and its effectiveness at holding officers accountable should there be uses of inappropriate force in the future.<sup>18</sup>

#### **i. The Use of Force Standard is Ambiguous and Poorly Defined**

It is well-settled that use of force policies must provide a clear and consistent standard for when force may be used.<sup>19</sup> Indeed, the United States Department of Justice (“DOJ”) has emphasized that use of force policies must provide particularized guidance “on when and how it is appropriate and lawful to use force.”<sup>20</sup> Heeding the DOJ’s guidance, many police departments have sought to clearly define their overall use of force standards, and often, the most significant terms within those standards.<sup>21</sup>

The Draft Policy expresses the DPD’s general use of force standard as follows: officers will be permitted to use force when force is, “. . .*reasonable and necessary* under the totality of the circumstances” (emphasis added).<sup>22</sup> Without further explanation, this is ambiguous at best. Yet, instead of a clear definition, the Draft Policy defines its reasonable and necessary standard as a requirement that officers “use only that degree of force that is *reasonable and necessary* under the totality of the circumstances to safely accomplish a legitimate law enforcement function” (emphasis added).<sup>23</sup> Using the phrase, “reasonable and necessary” to define the phrase “reasonable and necessary” is circular—and not really a definition at all, particularly when other police departments have provided far clearer explanations.<sup>24,25</sup>

Adding to the lack of clarity, the Draft Policy includes various formulations of the use of force standard, sometimes asserting that force must be “reasonable and necessary,”<sup>26</sup> while at other times, stating that force must be “necessary, reasonable and *appropriate*” (emphasis added).<sup>27</sup> The Draft Policy does not explain this discrepancy, nor is any explanation obvious from the context. It is thus unclear if this is intentional or a drafting error, which adds further ambiguity to the use of force standard.<sup>28</sup>

#### **ii. Other Important Sections of the Draft Policy are also Unclear**

Several other important sections of the Draft Policy also fail to provide clear guidance on what conduct is required or prohibited. For example, the Draft Policy states that, “[u]nnecessarily or prematurely drawing or exhibiting a firearm limits an officer’s alternatives . . . creates unnecessary anxiety on the part of community members, and may result in an unwarranted or accidental discharge of the firearm.”<sup>32</sup> Notwithstanding this assertion, the Draft Policy does not actually *prohibit* the unnecessary or premature drawing or exhibition of firearms, as a number of other police departments have done.<sup>33</sup> This could create confusion for officers about when they can and cannot draw their firearms.

Several other definitions or standards are also vague or potentially confusing. For example, “imminent” is used multiple times in the Draft Policy to define possible threats that might trigger officers to use particular kinds of force, including deadly force.<sup>34</sup> “Imminent” is defined in the Draft Policy as “ready to take place; *hanging threateningly over one’s head*. An anticipated danger that is likely to happen, is impending” (emphasis added).<sup>35</sup> In the context of a policy that describes when force may be used in response to various potential threats to one’s body, the use of the metaphor, “hanging threateningly over one’s head” may be unnecessarily confusing.

Also potentially confusing, the Draft Policy states that “[a]erosol and gas munitions” may be used for a variety of reasons, including “any situation where the officer can clearly articulate the need for deployment.”<sup>36</sup> Yet, there may be situations where an officer believes that s/he can “clearly articulate the need for deployment” of aerosol and gas munitions, but where deployment is not “reasonable and necessary”—the test for *any* use of force under the Draft Policy. The Draft Policy provides little guidance for addressing this potential ambiguity.

#### **b. The Proposed Overall Use of Force Standard is Less Restrictive Than the Use of Force Standards of Other Police Departments**

In keeping with a philosophy of de-escalation and force avoidance, some police departments have adopted use of force standards that are not only clearer than the one in the DPD’s Draft Policy, they are also more restrictive. For example, the Seattle Police Department’s Use of Force Policy (“Seattle Policy”) was adopted under the auspices of the DOJ and a federal judge. The Seattle Policy states that officers may only use physical force when “no reasonably effective alternative appears to exist.”<sup>37</sup> The Baltimore Police Department’s Use of Force Policy (“Baltimore Policy”), adopted after intervention by the DOJ, uses similar language.<sup>38</sup> Other agencies have quantified the amount of force that may be used within their use of force standards. This includes the Miami Police Department, which requires officers to use only the “minimal amount of force” necessary.<sup>39</sup> Similarly, the Chicago Police Department’s proposed use of force policy requires that officers use only “the least amount” of force that is objectively reasonable, necessary, and proportional.<sup>40</sup> Although the Draft Policy’s vague definition of “reasonable and necessary” makes it difficult to ascertain the precise meaning of the DPD’s standard, it is less restrictive than the standards adopted by these other police departments. While this may seem an abstract or technical difference, it is likely to have significant real-world implications on the kinds of force used by DPD officers in their interactions with the public.

Further, the use of force standard in the Draft Policy appears to be no more restrictive than the one in the DPD’s prior policy (“Prior Policy”).<sup>41</sup> The Prior Policy included the following standard: “an officer shall use only that degree of force *necessary and reasonable* under the circumstances” (emphasis added).<sup>42</sup> Neither switching the order of the words “reasonable” and “necessary,” nor adding “the totality” has any appreciable effect on the meaning of the use of force standard. Thus, notwithstanding the philosophies of force avoidance and de-escalation expressed in the Draft Policy, the actual use of force standard appears to be largely unchanged from the DPD’s Prior Policy.<sup>43</sup>

#### **c. Other Parts of the Draft Policy do not Align with National Best Practices**

Several other parts of the Draft Policy are not aligned with national best practices, including its definition of “deadly force.” The International Association of Chiefs of Police (and 11 other leading law

enforcement organizations) recently released a National Consensus Policy on Use of Force (“IACP Consensus Policy”) as a model for U.S. police departments. The IACP Consensus Policy defines deadly force as “[a]ny use of force that creates a substantial risk of causing death or serious bodily injury.”<sup>45</sup> Similarly, the Seattle Policy defines deadly force as, “the application of force through the use of firearms or any other means reasonably likely to cause death, great bodily harm or serious physical injury.”<sup>46</sup> The DPD Draft Policy uses a far narrower definition, “[t]hat force, the intended, natural, and probable consequence of which is to produce death *and which does, in fact, produce death*” (emphasis added).<sup>47,48</sup> Thus, under the Draft Policy, force is considered to be “deadly force” only when it actually results in death, not just when the force is potentially lethal. But regardless of whether someone who is shot dies or is merely wounded, that shooting should be deemed and treated as an application of deadly force.

Similarly, the DOJ has made it clear that use of a firearm as an impact weapon (commonly known as “pistol-whipping”) “is never an authorized tactic. . . use of a firearm as an impact weapon could result in death to suspects, bystanders, and [officers].”<sup>49</sup> Yet, while the Draft Policy generally “discourages” officers from pistol-whipping due to “the inherent danger of an accidental discharge,” and because, “the firearm is generally an ineffective impact weapon due to its construction and weight,”<sup>50</sup> it does not actually *prohibit* pistol-whipping, even in situations that require less than deadly force.<sup>51</sup>

Additionally, the IACP Consensus Policy prohibits the use of deadly force against persons whose actions only threaten property, as do the policies of the Baltimore and Miami Police Departments.<sup>52</sup> While the DPD’s Draft Policy prohibits the use of deadly force against individuals who only present a danger to themselves, it does not explicitly prohibit its use simply for the protection of property as it should.<sup>53</sup>

### **3. The Opportunities for Informed Public Feedback on the Draft Policy are Undermined by the Lack of Information that has been Disclosed to Date**

One of my most significant concerns is that the opportunities for informed feedback on the Draft Policy are undermined by its failure to address a number of essential topics for use of force policies. To build public legitimacy and trust, police departments must engage the community in the process of developing policy. To do that effectively, departments must transparently communicate the content of their policies to the public. According to the Final Report of former President Obama’s Task Force on 21<sup>st</sup> Century Policing (“Obama Task Force”), police policies “must be reflective of community values . . . [and] also need to be clearly articulated to the community and implemented transparently so police will have credibility with residents.”<sup>54</sup>

According to the DOJ, police use of force policies must clarify a number of critical subjects, including general use of force standards, as well as when and how specific force options may be used, including firearms, Tasers, Oleoresin Capsicum Spray (“OC” spray), and impact weapons.<sup>55</sup> Use of force policies must also explain a department’s reporting requirements for uses of force, and the processes by which uses of force are administratively investigated and reviewed.<sup>56</sup> They must also “specify that the unreasonable use of force will subject officers to discipline, possible criminal prosecution, and/or civil liability.”<sup>57</sup> The DPD’s prior use of force policy was a lengthy document, at over 30 pages, and included 11 separate sub-sections (DPD Operations Manual §§105.01 – 105.11) that discussed many of these subjects.<sup>58</sup>

At only ten pages, and labelled “§105.01,” the Draft Policy appears to be a re-write of only a single section of the Prior Policy.<sup>59</sup> The Draft Policy thus fails to address numerous topics that can have a significant impact on officers and the public. For example, there is no discussion of the standards for using Tasers, including when Tasers may be used, or whether Taser use is restricted on pregnant females, the elderly, or handcuffed prisoners. These omissions are significant, since the DPD’s own data demonstrate that Taser use can lead to injury.<sup>60,61</sup> Further, the Draft Policy does not state when officers are required to report uses of force, even though the DOJ has repeatedly noted that stringent use of force reporting and investigation standards are key to ensuring accountability and institutional control over the use of force by police officers.<sup>62</sup> Similarly, the Draft Policy does not include a section on prohibited types of force, as a number of other major metropolitan police agencies do.<sup>63</sup> Nor does it cover, in detail, how and when uses of force will be administratively reviewed for compliance with department policy or the appropriateness of tactical decisions.<sup>64</sup>

In fact, the following essential topics are not substantively discussed in the Draft Policy:

- Clear notice that the use of inappropriate force may subject officers to discipline, possible criminal prosecution, and/or civil liability;<sup>65</sup>
- A specific explanation of when each less-lethal force option may be employed, including Tasers, police service dogs, 40 mm projectiles, and Orcutt Police Nunchaku, and when their use is prohibited;<sup>66</sup>
- Comprehensive guidance on what kinds of force must be reported, the level of detail expected within force reports, and particulars about the processes by which uses of force will be administratively investigated and reviewed;<sup>67</sup>
- Guidance related to “positional asphyxia,” including instructions for ceasing the use of restraint positions that may increase the risk of asphyxiation once time and circumstances permit;<sup>68</sup>
- A prohibition on the use of chokeholds, which are restricted by Colorado Statute,<sup>69</sup> but not discussed in the Draft Policy;
- A prohibition on the use of force against persons who are only verbally confrontational and do not impede legitimate law enforcement functions;<sup>70</sup>
- A requirement that, when time and circumstances permit, officers allow individuals the opportunity to submit to arrest before force is used;<sup>71</sup>
- A disclosure of what types of information will be released, and when, in response to police shootings, which the Obama Task Force made clear must be included in any use of force policy;<sup>72</sup>
- A prohibition on the use of force in retaliation or to punish;<sup>73</sup> and
- Definitions of numerous terms that are used in the Draft Policy, including “force,” “use of force,” “de-escalation,” “inappropriate force,” “chemical agents,” “environmental factors,” “impact tool,” “dangerous animal,” “tactical options,” “less lethal munitions,” and “turtling,” among others.

Some of these subjects are addressed in other sections of the DPD’s Prior Policy, which the DPD has said will be revised at some point in the future. The DPD has also indicated that it plans to finalize the Draft Policy by March 1, 2017, with a goal of having all officers trained by mid-summer.<sup>74</sup>

Notwithstanding my overall concern that the plan to train officers on a new use of force standard before these essential topics have been addressed in policy seems potentially ill-conceived, the current process also compromises the opportunities for informed public feedback. Without an understanding of whether

the DPD plans to address the above essential subjects in its use of force policy—and if so, how—the possibility of meaningful and informed public feedback is compromised.

**a. The Deficiencies in the Draft Policy and Gaps in Transparency can be Remedied**

The process of developing the Draft Policy can evolve, and the issues discussed above can be remedied. Under your leadership, the DPD has had many successes in community engagement in recent years, and has often relied upon research and best practices to inform its new policies. The process for revising the Draft Policy can be similarly successful. The Obama Task Force emphasized that police leaders must be willing to reexamine police policies and practices in partnership with the community, specifically noting that police agencies “should collaborate with community members to develop policies and strategies.”<sup>75</sup> Officers, too, must play an active role in the development of the policies that they will ultimately be charged with carrying out in the field.<sup>76</sup>

To achieve that goal, I recommend that the DPD convene a working group of rank-and-file officers, community members, subject matter experts, and the OIM and COB to troubleshoot the issues identified above, and any others that may be raised. The Denver Sheriff Department (“DSD”) recently completed such a process through a robust partnership between command staff, rank-and-file deputies, community members, the OIM, and other subject matter experts. Such a collaborative process for the DPD would not only enhance the perceived legitimacy of the resulting policy, it would also result in a clearer document that adheres to national standards more closely than does the Draft Policy. Most importantly, I believe it would also help to enhance trust in the DPD, and thus improve the safety of officers and the public in the future.

Thank you for the opportunity to provide this preliminary feedback for your consideration. I look forward to seeing the next iteration of the Draft Policy, and I again extend an invitation to assist you in producing that revision in whatever way would be most helpful.

Sincerely,



**Nicholas E. Mitchell**  
**Independent Monitor**

cc: Ms. Stephanie O’Malley, Executive Director of Safety  
Citizen Oversight Board Members

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<sup>1</sup> A copy of this Draft Policy was also given to me on January 4<sup>th</sup> (email on file with author). This is not a comprehensive list of all OIM feedback, but instead a summation of high-level observations about the Draft Policy in its current form. These recommendations will likely be supplemented at a later date.

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<sup>2</sup> By ordinance, the OIM makes “recommendations regarding policy issues; and address[es] any other issues of concern to the community.” See D.R.M.C. Art. XVIII § 2-371.

<sup>3</sup> OFFICE OF THE INDEPENDENT MONITOR, 2015 SEMIANNUAL REPORT 57.

<sup>4</sup> Letter from Independent Monitor Nicholas E. Mitchell to Denver Police Chief Robert White (Jan. 27, 2015) (on file with the author).

<sup>5</sup> The DPD subsequently announced that it would be conducting a review of the same subject matter. See Marshall Zelinger & Phil Tenser, *Denver Conducting Two Reviews of Police Department Policies for Shooting at Suspects in Moving Cars*, DENVER CHANNEL (Jan. 28, 2015); See also Noelle Phillips, *Chief: Denver Cops Asked teens to Get Out of Car Before Fatal Shooting*, Denver Post (Jan. 28, 2015).

<sup>6</sup> OFFICE OF THE INDEPENDENT MONITOR, 2015 SEMIANNUAL REPORT 3.

<sup>8</sup> OFFICE OF THE INDEPENDENT MONITOR, 2015 SEMIANNUAL REPORT 10.

<sup>9</sup> DENVER POLICE DEPARTMENT, OPERATIONS MANUAL § 105.05(5)d.

<sup>10</sup> OFFICE OF THE INDEPENDENT MONITOR, 2015 SEMIANNUAL REPORT 10.

<sup>11</sup> DENVER POLICE DEPARTMENT, DRAFT USE OF FORCE POLICY § 105.01(13) [hereinafter DPD Draft Policy], (Jan. 4, 2017).

<sup>12</sup> See, e.g., INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, MODEL POLICY – USE OF FORCE 1 (2006); POLICE EXECUTIVE RESEARCH FORUM, MIAMI BEACH POLICE DEPARTMENT: REVIEW AND ASSESSMENT 17 (2014).

<sup>13</sup> OFFICE OF THE INDEPENDENT MONITOR, 2015 ANNUAL REPORT 24.

<sup>14</sup> OFFICE OF THE INDEPENDENT MONITOR, 2015 ANNUAL REPORT 25.

<sup>15</sup> DPD DRAFT POLICY § 105.01(15)(c) (Jan. 4, 2017).

<sup>16</sup> See, e.g., SEATTLE POLICE DEPARTMENT MANUAL § 8.200(2) (detailing when uses of force are prohibited).

<sup>17</sup> *United States v. City of Ferguson*, 16-CV-00180, at 11 (E.D. Mo., April 19, 2016).

<sup>18</sup> According to the DOJ, “The components of an effective use of force accountability system are well known . . . Departments must also provide their officers clear, consistent policies on when and how to use and report force.” U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE CLEVELAND DIVISION OF POLICE 28 (Dec. 4, 2014).

<sup>19</sup> See, e.g., *United States v. City of Cleveland*, 15-CV-01046, at 12 (N.D. Ohio, June 12, 2015) (force must be objectively reasonable); *United States v. City of Ferguson*, 16-CV-00180, at 32 (E.D. Mo., April 19, 2016) (force must be objectively reasonable and proportional to the level of resistance); SEATTLE POLICE DEPARTMENT MANUAL § 8.000(3) (force must be objectively reasonable, necessary, and proportional); BALTIMORE POLICE DEPARTMENT MANUAL § 1115(2) (objectively reasonable, necessary, and proportional).

<sup>20</sup> U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 98 (Aug. 10, 2016).

<sup>21</sup> See, e.g., BALTIMORE POLICE DEPARTMENT MANUAL § 1115 (providing specific definitions of “objectively reasonable,” “necessary,” and “proportional.”); SEATTLE POLICE DEPARTMENT MANUAL § 8.200(1) (providing specific definitions of “reasonable,” “necessary,” and “proportional.”).

<sup>22</sup> DPD DRAFT POLICY § 105.01(2) (Jan. 4, 2017).

<sup>23</sup> DPD DRAFT POLICY § 105.01(2) (Jan. 4, 2017) (the definition goes on to provide, “Reasonable and necessary force is an objective standard, viewed from the perspective of a reasonable officer on the scene, without the benefit of 20/20 hindsight.”).

<sup>24</sup> See, e.g., BALTIMORE POLICE DEPARTMENT MANUAL § 1115 (providing specific definitions of “objectively reasonable,” “necessary,” and “proportional.”); SEATTLE POLICE DEPARTMENT MANUAL § 8.200(1) (providing specific definitions of “reasonable,” “necessary,” and “proportional.”).

<sup>25</sup> Further adding to the ambiguity, the document captioned, *New Policy Information, Use of Force Policy Draft – Media Summary*,” and distributed by the DPD to the press and public, discusses using “...the least amount of force possible in those instances where force becomes necessary.” See *New Policy Information, Use of Force Policy Draft – Media Summary* (January 2017) (on file with author). This is not the standard articulated in the DPD’s Draft Policy.

<sup>26</sup> DPD DRAFT POLICY §§ 105.01(2), 105.01(4)(c).

<sup>27</sup> DPD DRAFT POLICY §§ 105.01(1), 105.01(4)(a)(1), 105.01(5), 105.01(7), 105.01(15)(c)(2).

<sup>28</sup> “Appropriate” appears in the Decision-Making Model in DPD DRAFT POLICY § 105.01(2), but no declaratory definition is provided, only a question.

<sup>32</sup> DPD DRAFT POLICY § 105.01(4)(b)(4).

<sup>33</sup> See e.g., SEATTLE POLICE DEPARTMENT MANUAL § 8.300-POL-(5); CLEVELAND POLICE DEPARTMENT PROPOSED USE OF FORCE POLICY, PROCEDURES § III(A)(5).

<sup>34</sup> DPD DRAFT POLICY §§ 105.01(2), 105.01(3)(e), 105.01(5), and 105.01(11).

<sup>35</sup> DPD DRAFT POLICY § 105.01(2).

<sup>36</sup> DPD DRAFT POLICY § 105.01(6)(f).

<sup>37</sup> SEATTLE POLICE DEPARTMENT MANUAL § 8.000(4).

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<sup>38</sup> BALTIMORE POLICE DEPARTMENT MANUAL § 1115.

<sup>39</sup> MIAMI POLICE DEPARTMENT MANUAL § 21.1.1

<sup>40</sup> CHICAGO POLICE DEPARTMENT, DRAFT USE OF FORCE POLICY; *See also*, PHILADELPHIA POLICE DEPARTMENT DIRECTIVE 22 § II.A.

<sup>41</sup> In order to distinguish the two iterations of the use of force policy, I am referring to the old policy as the “Prior Policy.” It is my understanding that the Prior Policy will remain in effect until the DPD formally adopts its new use of force policy.

<sup>42</sup> DENVER POLICE DEPARTMENT, OPERATIONS MANUAL § 105.01(1)(a).

<sup>43</sup> In contrast, the Denver Sheriff Department (“DSD”) has specifically defined its “Reasonable and Necessary” standard as requiring the use of de-escalation techniques, when possible. In the DSD, the “Reasonable and Necessary” standard requires a determination of:

A. Whether force can be avoided by utilizing tactical options, de-escalation techniques, or other non-force options and, if so, to use such non-force options and techniques; and

B. If force is to be used, [using] the least amount of force necessary to safely accomplish a legitimate law enforcement or detention-related function. *See* DENVER SHERIFF DEPARTMENT, USE OF FORCE DEPARTMENTAL ORDER 5011 § 4(A)(10).

The DSD’s use of force policy was approved and is on the cusp of being implemented among the sworn staff of that agency. While the differences between the DPD and DSD use of force standards may be a consequence of the different responsibilities and working conditions of DSD deputies and DPD officers, multiple other police agencies have adopted use of force standards that are more restrictive than the one in the Draft Policy.

<sup>45</sup> ASSOCIATION OF STATE CRIMINAL INVESTIGATIVE AGENCIES ET AL., NATIONAL CONSENSUS USE OF FORCE POLICY § III (2017).

<sup>46</sup> SEATTLE POLICE DEPARTMENT MANUAL § 8.050.

<sup>47</sup> DPD DRAFT POLICY § 105.01(2).

<sup>48</sup> The Draft Policy’s definition of “deadly force” is consistent with Colorado Revised Statute § 18-1-901(3)(d). However, other departments within Colorado have adopted a less restrictive definition or used a different term to reference such force. *See, e.g.*, COLORADO SPRINGS POLICE DEPARTMENT, GENERAL ORDER 720.05 (defining “deadly force” as “intentional use of force which can cause death or serious bodily injury, or which creates a degree of risk that a reasonable and prudent person would consider likely to cause death or serious bodily injury”); DENVER SHERIFF DEPARTMENT, USE OF FORCE DEPARTMENTAL ORDER 5011 § 4(A)(8) (using the term “lethal force” and defining it as “force for which the natural and probable consequence is to produce death regardless of whether the force does, in fact, produce death”).

<sup>49</sup> *United States v. City of Cleveland*, 15-CV-01046, at 13 (N.D. Ohio, June 12, 2015)

<sup>50</sup> DPD DRAFT POLICY § 105.01(7)(e).

<sup>51</sup> Policies in other jurisdictions specifically prohibit using a firearm as an impact weapon except in certain situations: SEATTLE POLICE DEPARTMENT MANUAL § 8.300-POL-(4); CLEVELAND POLICE DEPARTMENT PROPOSED USE OF FORCE POLICY, PROCEDURES § III(A)(9).

<sup>52</sup> ASSOCIATION OF STATE CRIMINAL INVESTIGATIVE AGENCIES ET AL., NATIONAL CONSENSUS USE OF FORCE POLICY § IV (2017); BALTIMORE POLICE DEPARTMENT MANUAL § 1115; MIAMI POLICE DEPARTMENT MANUAL § 21.1.2.

<sup>53</sup> The Draft Policy does prohibit the discharge of firearms solely to protect property, but it does not prohibit other forms of deadly force. *See* DPD DRAFT POLICY § 105.01(12)(b)(4).

<sup>54</sup> PRESIDENT’S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING 19 (2015).

<sup>55</sup> *See, e.g.*, *United States v. City of Cleveland*, 15-CV-01046, at 44 (N.D. Ohio, June 12, 2015); *United States v. City of Newark*, 16-CV-01731, at 24-25 (D.N.J., April 20, 2016).

<sup>56</sup> *See, e.g.*, *United States v. City of Cleveland*, 15-CV-01046, at 20-33 (N.D. Ohio, June 12, 2015); *United States v. City of Ferguson*, 16-CV-00180, at 40-45 (E.D. Mo., April 19, 2016).

<sup>57</sup> *United States v. City of Newark*, 16-CV-01731, at 24-25 (D.N.J., April 20, 2016).

<sup>58</sup> *See* DENVER POLICE DEPARTMENT, OPERATIONS MANUAL § 105.01, (sections include Use of Force Policy, Use of Force Procedures, Less Lethal Force and Control Options, Shooting By and/or of Police officers, Discharge of Firearms, Use of Force Review Board, Firearms – Requirements and Inspection, Firearms Section, Denver Police Utility Weapon Program, Tactics Review Board and Crisis Intervention Team).

<sup>59</sup> *See* DPD DRAFT POLICY § 105.01.

<sup>60</sup> *See* Marshall Zelinger, *Law Enforcement Nationwide Track ‘Use of Force’ Differently; Based on Self-Reporting by Officers*, DENVER CHANNEL (Nov. 20, 2015) (data reported up to Oct. 16, 2015).

<sup>61</sup> Data on community member injuries extracted from the DPD’s Internal Affairs database on January 17, 2016.

<sup>62</sup> *See generally*, U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE CHICAGO POLICE DEPARTMENT (Jan. 13, 2017).

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- <sup>63</sup> See e.g., SEATTLE POLICE DEPARTMENT MANUAL §8.200(2) (detailing when uses of force are prohibited); PHILADELPHIA POLICE DEPARTMENT DIRECTIVE 22 § III.B (detailing types of force that are prohibited).
- <sup>64</sup> See, e.g., *United States v. City of Cleveland*, 15-CV-01046, at 12-38 (N.D. Ohio, June 12, 2015); *United States v. City of Ferguson*, 16-CV-00180, at 30-48 (E.D. Mo., April 19, 2016). While the Draft Policy does state that Internal Affairs will review every use of force incident, and use of force incidents “may be subject to further review” by other boards and agencies, it provides no detail about those processes. DPD DRAFT POLICY § 105.01(17).
- <sup>65</sup> See, e.g., *United States v. Police Department of Baltimore City, et al.*, 17-CV-00099, at 46 (D. Md., January 12, 2017); *United States v. City of Newark*, 16-CV-01731, at 24-25 (D.N.J., April 20, 2016).
- <sup>66</sup> See, e.g., *United States v. Police Department of Baltimore City, et al.*, 17-CV-00099, at 44 (D. Md., January 12, 2017); *United States v. City of Albuquerque*, 14-CV-1025, at 15-16 (D.N.M. Nov. 14, 2014).
- <sup>67</sup> See, e.g., *United States v. Police Department of Baltimore City, et al.*, 17-CV-00099, at 56-73 (D. Md., January 12, 2017); *United States v. City of Ferguson*, 16-CV-00180, at 40-45 (E.D. Mo., April 19, 2016).
- <sup>68</sup> See U.S. DEP’T OF JUSTICE, POSITIONAL ASPHYXIA–SUDDEN DEATH (June 1995) (regarding avoiding techniques that may lead to positional asphyxia); See also *United States v. City of Albuquerque*, 14-CV-1025, at 19 (D.N.M. Nov. 14, 2014) (train officers to use restraint techniques following use of ECW application to avoid positional asphyxia); see also DENVER SHERIFF DEPARTMENT, DEPARTMENT ORDER 5011 § 9 (avoid techniques that restrict an individual’s ability to breathe).
- <sup>69</sup> COLO. REV. STAT. § 18-1-707.
- <sup>70</sup> See, e.g., SEATTLE POLICE DEPARTMENT MANUAL §8.200(2); *United States v. City of Ferguson*, 16-CV-00180, at 33 (E.D. Mo., April 19, 2016).
- <sup>71</sup> See, e.g., NEW ORLEANS POLICE DEPARTMENT USE OF FORCE POLICY PR300.1(d); *United States v. City of Cleveland*, 15-CV-01046, at p. 12 (N.D. Ohio, June 12, 2015).
- <sup>72</sup> See PRESIDENT’S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING 22 (2015) (“Policies on use of force should clearly state what types of information will be released, when, and in what situation, to maintain transparency. . . The intent of this directive should be to share as much information as possible without compromising the integrity of the investigation or anyone’s rights”).
- <sup>73</sup> See, e.g., *United States v. Police Department of Baltimore City, et al.*, 17-CV-00099, at 45-46 (D. Md., January 12, 2017); *United States v. City of Ferguson*, 16-CV-00180, at 33 (E.D. Mo., April 19, 2016).
- <sup>74</sup> See Noelle Phillips, *Denver Police Department Pursues New Use-of-Force Policy*, Denver Post (Jan. 4, 2017).
- <sup>75</sup> PRESIDENT’S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING, FINAL REPORT OF THE PRESIDENT’S TASK FORCE ON 21<sup>ST</sup> CENTURY POLICING 19-21 (2015).
- <sup>76</sup> See, e.g., U.S. DEP’T OF JUSTICE, INVESTIGATION OF THE BALTIMORE CITY POLICE DEPARTMENT 147 (Aug. 10, 2016).