

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

<b>JAMES MORROW, et al. and a</b>	:	
<b>Certified Class of Other Similarly</b>	:	
<b>Situated Persons,</b>	:	
<b>Plaintiffs</b>	:	
:		
v.	:	<b>Civil Action No. 2:08-cv-288-JRG</b>
	:	<b>Judge Gilstrap</b>
<b>CITY OF TENAHA DEPUTY</b>	:	
<b>CITY MARSHAL BARRY</b>	:	
<b>WASHINGTON, in his individual</b>	:	
<b>and official capacity, et al.,</b>	:	
<b>Defendants</b>	:	

**JOINT MOTION FOR PRELIMINARY APPROVAL OF THE  
CLASS ACTION CONSENT DECREE, APPROVAL OF NOTICE,  
AND FAIRNESS HEARING**

This Joint Motion for Preliminary Approval of the Class Action Consent Decree, Approval of Notice, and Fairness Hearing is respectfully filed, through counsel, by Plaintiffs James Morrow, Javier Flores and William Parsons, the Court-designated class representatives, and the class certified by this Court’s Order dated August 29, 2011 (collectively, “Plaintiffs”), and Defendants the City of Tenaha Deputy City Marshal Barry Washington, in his individual and official capacities (who has since resigned from office), the City of Tenaha Mayor George Bowers, in his official capacity only (who is the former mayor), the Shelby County District Attorney Lynda K. Russell, in her individual and official capacities (who has since resigned from office), the Shelby County District Attorney Investigator Danny Green, in his individual and official capacities (who has since retired), and the Shelby County Precinct 4 Constable Randy Whatley, in his individual and official capacities (who has since resigned from office) (collectively, “Defendants”). For purposes of this Joint Motion and the proposed Consent

Decree, Shelby County is bound as a Defendant via the County Judge Rick L. Campbell, or his successor, in his official capacity; the City of Tenaha is bound as a Defendant via the Mayor Orinthia Johnson, or his successor, in his official capacity; and the Shelby County District Attorney's Office is bound as a Defendant via (resigned) Shelby County District Attorney Lynda K. Russell, or her successor, in her official capacity, only to the extent permitted by the Texas Constitution and Texas law. The parties respectfully request that the Court:

- (a) Grant preliminary approval of the proposed Consent Decree (attached hereto as Exhibit 1);
- (b) Approve the Notice to the Certified Class about the proposed Consent Decree (attached hereto as Exhibit 2), and the method of notifying the class of the proposed Consent Decree;
- (c) Schedule a hearing on this Joint Motion, if the Court deems appropriate<sup>1</sup>;
- (d) Set a schedule for the Fairness Hearing and other appropriate dates; and
- (e) After the Fairness Hearing, grant final approval to the proposed Consent Decree.

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<sup>1</sup> Please note that counsel for the parties do not believe that a hearing on this Joint Motion is necessary, but counsel would of course be willing to participate in any hearing set by the Court.

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<b>WASHINGTON, in his individual</b>	:	
<b>and official capacity, et al.,</b>	:	
<b>Defendants</b>	:	

**MEMORANDUM IN SUPPORT OF THE  
JOINT MOTION FOR PRELIMINARY APPROVAL OF THE CLASS ACTION  
CONSENT DECREE, APPROVAL OF NOTICE, AND FAIRNESS HEARING**

Plaintiffs and Defendants<sup>2</sup> jointly submit this Memorandum in Support of the Joint Motion for Preliminary Approval of the Class Action Consent Decree, Approval of Notice, and Fairness Hearing. For the reasons articulated in the motion and this supporting memorandum, the parties respectfully request that the Court promptly grant preliminary approval of the Consent Decree, approval of class notice procedures, and an order establishing dates for a Fairness Hearing.

**STATEMENT OF FACTS**

**A. Nature of the Case**

Plaintiffs filed this case in 2008 to challenge the Defendants’ alleged illegal “stop and seize” practice of targeting, stopping, detaining, searching, and often seizing property from

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<sup>2</sup> Unless otherwise noted, capitalized terms have the same meaning as defined in the Consent Decree.

individuals who are, or appear to be, members of a racial or ethnic minority and their passengers. (Class Certification Opinion and Order, Aug. 29, 2011, Dkt. 233, p. 2.) The evidence demonstrates that this “interdiction program” began in 2006, and Plaintiffs allege that it is ongoing. (*Id.* at 3.) According to Plaintiffs, Defendants targeted members of the proposed class for traffic stops because of their race or ethnicity and then subjected them to detention, arrest, or search and seizure without legal justification and in violation of their constitutional rights. (*Id.*) Plaintiffs further allege that Defendants instituted the interdiction program, not for legitimate law enforcement purposes, but in order to enrich their offices and themselves by seizing and converting cash and other valuable personal property they could find during the course of the illegal stop and seize practice. (*Id.*)

The Defendants deny these allegations and deny that they violated the constitutional rights of the named Plaintiffs or the class as a whole.

Plaintiffs initially sought class treatment of Fourth Amendment search and seizure claims, Fourteenth Amendment Equal Protection claims, and claims for monetary relief. The Court only certified the plaintiff class for Fourteenth Amendment Equal Protection claims for injunctive and declaratory relief. (*Id.* at 57.) The Defendants sought a discretionary interlocutory appeal of the class certification pursuant to Federal Rule of Civil Procedure 23(f) which was denied, and then denied again when the Defendants asked the Fifth Circuit Court of Appeals to rehear the request.

### **B. Proposed Settlement Agreement**

After extensive negotiations—including but not limited to three full-day mediation sessions conducted by Kip Glasscock (a professional mediator) and multiple full-day all-counsel meetings—which spanned about five months from October 2010 to July 2012, the parties

reached a settlement that will dispose of this action. The terms of the parties' settlement are embodied in the Consent Decree. *See* Exhibit 1. The purposes animating the Consent Decree include efficiency, avoiding uncertainty, ending alleged racial profiling (including any alleged incentives and alleged practices that may result in alleged racial profiling), and concluding the litigation. *Id.* at § II. The Consent Decree provides Plaintiffs and the Certified Class with complete injunctive relief and confers significant benefits on the Plaintiffs and the Certified Class. The Consent Decree also benefits Defendants by requiring accurate records of traffic stops that will readily contradict any false accusations that an officer abused his or her authority or violated constitutional rights. The key terms of the Consent Decree include the following:

- Any evidence gathered in a way that does not comply with all the provisions of the Consent Decree shall be presumptively inadmissible as evidence in any court or other proceeding adverse to the person stopped. *Id.* at § III.B.3.
- Defendants shall adopt an impartial policing policy. *Id.* at § III.A.
- All traffic stops conducted by Defendants shall be mechanically recorded by both video and audio recordings, including: the use of the pre-event capabilities to capture the reason for the stop, and record the location, time, date, speed, the identity of the officer(s) and agency operating the vehicle, and any radar readings pertinent to the stop. The recordings shall also capture any canine sniffs, searches, seizures, detentions, and to the extent reasonable, arrests, resulting from a traffic stop. All oral communication and interaction with the person being stopped must be captured in the recordings. If Miranda rights are required in a specific situation by federal law, the recitation of his or her Miranda rights shall be mechanically recorded. *Id.* at §§ III.B.5, III.G.4.

- Defendants shall maintain written documentation with details about the traffic stop, detention, canine sniff, search, seizure, and/or forfeiture. *Id.* at §§ III.B.6, III.C.2, III.D.7, III.E.4, III.F.3, III.G.3, III.H.1.
- Defendants shall make contemporaneous reports to dispatch for traffic stops, detentions, canine sniffs, searches, seizures, and arrests. Officers must report the basis for their actions before making contact with a motorist and request back-up before conducting any search. *Id.* at §§ III.B.8, III.C.1, III.D.4, III.E.1.
- Traffic stops for violations punishable by issuance of a traffic ticket are presumed to be 15 minutes or less. *Id.* at § III.B.10.
- Defendants stipulate that they do not utilize canines for any aspect of traffic stops. If a Defendant wants to use a canine, that defendant must first notify the Monitor and Plaintiffs' counsel. *Id.* at §§ III.D.1, III.D.10
- A canine sniff is allowed only when supported by reasonable suspicion of criminal activity. *Id.* at § III.D.3.
- If a Defendant uses a canine, certification and training requirements apply for use of the canine, and performance reviews are required for the canine and canine handlers. *Id.* at §§ III.D.8, III.D.9.
- Written notice shall be provided to a person before a canine sniff, before a consent search, and before the seizure of any property. *Id.* at §§ III.D.5, III.E.2, III.F.4.
- Before conducting a consent search, an officer must provide oral and written advisement of rights, and obtain written and video and audio recorded consent for the search. *Id.* at §§ III.E.2, III.E.3.

- The responsible defendant shall pay a person for the full costs of property damage resulting from a search, unless the search results in the discovery of contraband. If a defendant disputes whether the damage was caused by a search, the Monitor makes a determination about liability. *Id.* at § III.E.6.
- Officer must provide motorist with an inventory of all property seized. *Id.* at § III.F.6.
- Protections apply for an individual whose assets are seized, including prohibitions on officers requesting that an individual waive his or her interest in the property, allowing individuals a meaningful opportunity to retain counsel to contest seizure, and permitting waiver of interest in property only in the presence of judicial officer or following representation by counsel. *Id.* at §§ III.H.2, III.H.3, III.H.4, III.H.5.
- Defendants agree to track all revenue and donations from asset forfeiture incident to traffic stops. *Id.* at § III.I.2.
- Shelby County Auditor will confirm that each expenditure of forfeiture revenue is compliant with Texas law. If an expenditure is deemed non-compliant, the Auditor will notify the County Commissioner's Court and the Monitor. *Id.* at § III.I.3.
- The Tenaha City Council, before the expenditure of any forfeiture revenue, shall confirm compliance with Texas law. *Id.* at § III.I.4.
- All asset forfeiture revenue incident to traffic stops shall be donated to non-profit organizations, used for the audio and video equipment required by the Consent Decree, or used for training to meet the requirements of the Consent Decree. *Id.* at § III.I.5.
- Defendants' officers shall undergo 4 hours of agreed upon/appropriate training within ninety (90) days of the entry of the Consent Decree and 4 hours of training per calendar

year. The training shall cover compliance with racial profiling laws, search and seizure law, and provisions set forth in the Consent Decree. *Id.* at III.J.

- Defendants shall institute internal review procedures every quarter to ensure compliance with Consent Decree. *Id.* at § III.K.
- An impartial Monitor will address Defendants' compliance with the Consent Decree and all relevant laws. *Id.* at § IV.

In addition to these terms, the Consent Decree provides that Defendants settle this case without an admission of liability, *id.* at § I.D; that the certification of the class in this case is not admissible for any purpose in any other litigation, *id.* at § VI.A; and that the Consent Decree may not be introduced as evidence for any purpose in any other proceeding other than the enforcement of the Consent Decree, *id.* at § VI.E.

In a separate agreement dated June 15, 2012, Defendants agreed to pay, and Plaintiffs' attorneys agreed to accept, \$520,000 as attorneys' fees to Plaintiffs' attorneys, Timothy B. Garrigan, David J. Guillory, and Stephanie K. Stephens. This payment covers work performed by those attorneys as of June 15, 2012, as well as their best efforts to negotiate a settlement agreement and obtain court approval of that agreement pursuant to Rule 23(e). The June 15 agreement also requires Defendants to pay the costs of providing notice to the Certified Class in the event of a settlement, which costs will not exceed \$30,000. *See Exhibit 3; see also* Consent Decree at § V.B. The parties' dispute over attorneys' fees was resolved as a result of a mediator's proposal that was accepted by the parties. Plaintiffs' counsel represents that the payment of \$520,000 was a substantial discount in Plaintiffs' counsel's lodestar.

Pursuant to Rule 23(e)(3), the parties hereby notify the Court that, other than as stated in the Consent Decree and the agreement dated June 15, 2012, there are no agreements requiring



disclosure that were “made in connection with the propos[ed] [settlement].” *See* Fed. R. Civ. P. 23(e)(3).

### **C. Proposed Notice to the Class**

The proposed notice form (the “Notice”) is attached as Exhibit 2. The Notice contains a summary of the terms of the Consent Decree, a description of the Certified Class, instructions on how to obtain further information about the Consent Decree, and procedures for objecting and appearing at the fairness hearing. The Notice (in both English and Spanish) will be mailed to members of the Certified Class. It also will be prominently displayed at the Tenaha City Office, located at 122 North Center Street, Tenaha, Texas, and the Shelby County Courthouse, located at 200 San Augustine Street, Center, Texas. In addition, the Notice will be distributed to local community groups and disseminated to publications that may have an interest in the settlement of the case, and posted on the website for the American Civil Liberties Union (ACLU).

## **ARGUMENT**

### **I. Standard of Review**

Settlements are “highly favored” and “will be upheld whenever possible because they are a means of amicably resolving doubts and preventing lawsuits.” *Miller v. Republic Nat’l Life Ins. Co.*, 559 F.2d 426, 428 (5th Cir. 1977) (quoting *Pearson v. Ecological Sci. Corp.*, 522 F.2d 171, 176 (5th Cir. 1975)). The public policy favoring settlement agreements is particularly strong in complex class action litigation, where voluntary pretrial settlements obviate the need for expensive and time-consuming litigation. *See Bass v. Phoenix Seadrill/78, Ltd.*, 749 F.2d 1154, 1164 (5th Cir. 1985); *Maher v. Zapata Corp.*, 714 F.2d 436, 455 (5th Cir. 1983); *Manchaca v. Chater*, 927 F. Supp. 962, 966 (E.D. Tex. 1996).

When considering whether to grant preliminary approval to a class action settlement, the

Court's role is to review the proposal preliminarily to determine whether it suffers any obvious defects that would preclude final approval and is otherwise sufficient to warrant public notice and a hearing. *McNamara v. Bre-X Minerals Ltd.*, 214 F.R.D. 424, 427 n.2 (E.D. Tex. 2002); Manual for Complex Litigation Fourth §§ 13.14, 21.633 (2004) (explaining that class notice under Rule 23(c)(2) and settlement notice under Rule 23(e) may be combined). "If the proposed settlement discloses no reason to doubt its fairness, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, does not grant excessive compensation to attorneys, and appears to fall within the range of possible approval, the court should grant preliminary approval." *In re OCA, Inc. Sec. & Derivs. Litig.*, No. 05-2165, 2008 WL 4681369, at \*11 (E.D. La. Oct. 17, 2008).

## **II. The Proposed Consent Decree Is Fair, Reasonable, and Adequate**

The Court should preliminarily approve the Consent Decree because its terms are fair, reasonable, and beyond adequate. While the Court has discretion in evaluating preliminarily the settlement's fairness and reasonableness, courts are generally guided at this stage by the same factors that govern final approval of class action settlements: (1) the potential "existence of fraud or collusion behind the settlement; (2) the complexity, expense, and likely duration of the litigation; (3) the stage of the proceedings and the amount of discovery completed; (4) the probability of [the] plaintiffs' success on the merits; (5) the range of possible recovery; and (6) the opinions of class counsel, class representatives, and absent class members." *Reed v. Gen. Motors Corp.*, 703 F.2d 170, 172 (5th Cir. 1983). These factors weigh in favor of the proposed Consent Decree in this case.

### **A. There Is No Fraud or Collusion Behind the Consent Decree**

The Consent Decree was negotiated between the parties at arm's length, and there

is no suggestion of fraud or collusion. “As a general principle, ‘the courts respect the integrity of counsel and presume the absence of fraud or collusion in negotiating the settlement, unless evidence to the contrary is offered.’” *Hemphill v. San Diego Ass’n of Realtors, Inc.*, 225 F.R.D. 616, 621 (S.D. Cal. 2005) (citing A. Conte and H. Newberg, *Newberg on Class Actions* § 11.51 (4th ed. 2002) at 158-59). This case has been vigorously contested by both sides. The parties engaged in extensive briefing and discovery and have negotiated at arm’s length a resolution of the action, which resulted in the Consent Decree. Furthermore, because the Consent Decree provides for only injunctive relief and not monetary damages, there is no danger that the named Class Members colluded with the Defendants to sacrifice the interests of the Certified Class for their own monetary gain.

As this Consent Decree was the result of the fair functioning of the adversarial process, the first factor clearly supports preliminary approval.

**B. The Complexity, Expense, and Likely Duration of Litigation Favors the Consent Decree**

This action presents several complex factual and legal issues that favor resolution of this litigation through a class-wide settlement. Early settlement in civil rights actions for injunctive relief is generally favored because it avoids potentially protracted litigation involving remedial decrees and reduces transaction costs. *See Ayers v. Thompson*, 358 F.3d 356, 369 (5th Cir. 2004).

Plaintiffs’ counsel have undertaken significant factual and legal investigation to develop the claims here, and full prosecution of a class action through trial would generate massive costs for both sides. Moreover, this litigation has already lasted more than four years, and without a settlement it could last many more months (and possibly years if there are appeals). Obtaining

timely relief is particularly important to the Certified Class to avoid subjecting the alleged harms on themselves and others.

In sum, the Consent Decree allows both sides to obtain an expeditious resolution of this case, saves the parties the needless expense of continued litigation, and provides benefits to the Certified Class. Accordingly, this factor weighs in favor of approving the Consent Decree.

**C. Proceedings Are Advanced Sufficiently to Warrant Settlement**

The Court should approve a settlement agreement if a case has advanced far enough to enable the parties to assess the strength of their litigating positions. *See In re Chicken Antitrust Litig. Am. Poultry*, 669 F.2d 228, 241 (5th Cir. 1982) (suggesting settlements should be approved unless “the record shows unmistakably that the settlement was the product of uneducated guesswork”). In this case, the parties have delved into extensive discovery, including eleven depositions and the exchange of nearly 35,000 documents and video recordings of several hundred traffic stops. The parties have discussed the contested issues at length as part of their settlement negotiations. Critical legal issues in the case also have been litigated in pretrial motions to dismiss, on various discovery issues, and on class certification. Accordingly, both sides are well-informed about their case and in a position to negotiate a fair settlement. Consequently, this factor warrants preliminary approval of the Consent Decree.

**D. The Probability of Success on the Merits Favors Settlement**

“[A]bsent fraud or collusion, the most important factor [in evaluating settlements] is the probability of the plaintiffs’ success on the merits.” *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir. 1982). This factor requires the Court to assess whether, in light of the inherent risks of litigation, the proposed settlement is reasonable. *Reed*, 703 F.2d at 172. Plaintiffs believe that

the evidence would allow them to prove that Defendants violated the Fourteenth Amendment Equal Protection rights of the Certified Class. While Plaintiffs believe they have a strong case, they also recognize the potential legal and factual defenses asserted by Defendants in the case. Accordingly, Plaintiffs believe a negotiated settlement that provides immediate relief is more favorable to protracted litigation and an uncertain result in the future. Similarly, Defendants have asserted numerous defenses and have not admitted or conceded any wrongdoing, but they also recognize the risks inherent in proceeding to trial.

**E. The Range of Possible Recovery Strongly Favors Settlement**

The benefits for the Plaintiffs and Certified Class are well in line with the range of possible recovery in light of the limited scope of the class certification. (*See Class Certification Opinion and Order*, Dkt. 233, p. 57.) In an action for declaratory and injunctive relief, the range of possible recovery is generally limited by the specific forms of relief requested in the complaint. *See Ault v. Walt Disney World Co.*, 254 F.R.D. 680, 688 (M.D. Fla. 2009). The Consent Decree provides the Certified Class with the most important relief sought by the Third Amended Complaint. Specifically, in the Consent Decree, Defendants agree to implement or modify various policies and procedures relating to traffic stops, detentions, canine sniffs, searches, seizures, and forfeitures to ensure compliance with the Fourteenth Amendment Equal Protection Clause.

Accordingly, the Consent Decree falls within the reasonable range of possible recovery for Plaintiffs, and this fifth factor counsels for preliminary approval of the agreement.

**F. Class Counsel Favors Settlement**

Class counsel is of the opinion that this Consent Decree is a favorable outcome for the class. Class counsel arrived at this conclusion after extensive investigation and negotiations with

Defendants' counsel. Class counsel have experience litigating class actions and, based on their expertise, believe that the Consent Decree provides a favorable result to the class.

Thus, the sixth factor favors preliminary approval of the Consent Decree.

### **III. The Court Should Approve Parties Proposed Form and Method of Class Notice**

Rule 23(e)(1) requires that the court "direct notice in a reasonable manner to all class members who would be bound by the proposal." The Court has complete discretion in determining what constitutes reasonable notice of a class settlement under Rule 23(e), in form as well as method, particularly in a Rule 23(b)(2) class. *Fowler v. Birmingham News Co.*, 608 F.2d 1055, 1059 (5th Cir. 1979); 7B Fed. Prac. & Proc. Civ. § 1797.6 (2009). "A class settlement notice need only properly identify the plaintiff class and generally describe the terms of the settlement so as to alert members 'with adverse viewpoints to investigate and to come forward and be heard.'" *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 298 (W.D. Tex. 2007) (citation omitted).

Here, the proposed notice procedures involve mailing the Notice (in both English and Spanish) to all reasonably identifiable members of the Certified Class; prominently displaying the Notice at the Tenaha City Office and the Shelby County Courthouse; distributing the Notice to local community groups; disseminating it to publications that may have an interest in the settlement of the case; and posting it on the ACLU's website. These notification procedures are specifically tailored to ensure that all reasonably identifiable members of the Certified Class will be informed of the Consent Decree and their rights to object. In particular, the parties believe

that efforts to mail the Notice to members of the Certified Class are reasonably calculated to inform them of the Consent Decree.<sup>3</sup>

Despite these extensive proposed notice procedures, counsel for the parties are aware that each and every member of the Certified Class is unlikely to actually receive the Notice. The parties' records of class members' addresses are several years old, exhaustive records of all class members' addresses may not have been maintained, and the class members are now spread out across the country. These practical difficulties should not pose an obstacle to this Court's approval of the proposed notice procedures. See *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1099, 1103-04 (5th Cir. 1977) ("Rule 23[] mandate[s] that absentee class members be given the best notice practicable under the circumstances . . . .") (internal quotation and citation omitted); *DeHoyos*, 240 F.R.D. at 296 ("Individual notice is not required when there is no reasonable way to sufficiently identify the class members."). The extensive notice procedures that the parties intend to undertake are reasonably calculated to reach as many members of the Certified Class as possible.

The contents of the Notice are adequate to inform members of the Certified Class of their rights. The Notice contains a description of the Certified Class, a summary of the litigation and the proposed Consent Decree, a discussion of how to obtain more information, and instructions about how to file an objection. Class notices should generally provide only limited information so as not to confuse or overwhelm class members, and a simple summary of the settlement is particularly appropriate in class actions certified under Rule 23(b)(2). *Id.* at 301. The proposed Notice here provides ample information to enable members of the Certified Class to what relief

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<sup>3</sup> "[S]ending notice by mail is preferred when all or most of the class members can be identified." *DeHoyos*, 240 F.R.D. at 296.

the Consent Decree will provide, how to file an objection, and how to obtain more information.<sup>4</sup>

The Notice is therefore reasonable and satisfies Rule 23(e)'s requirements.

**IV. The Attorneys' Fees and Expenses Provided for by the Consent Decree Are Reasonable**

In an agreement dated June 15, 2012, and as part of the Consent Decree, Defendants have agreed to pay \$520,000 in attorneys' fees to Plaintiffs' attorneys, Timothy B. Garrigan, David J. Guillory, and Stephanie K. Stephens. *See* Exhibit 3; *see also* Consent Decree at § V.B. The Court may award reasonable attorneys' fees and nontaxable costs that are authorized by the parties' agreement in a class action settlement. *See* Fed. R. Civ. P. 23(h). The negotiated fee award of \$520,000.00 is entirely reasonable, and fully consistent with the law of this District, given the complexity of this case, the substantial work and time invested to litigate and ultimately negotiate a settlement, and the significant benefits and relief provided to the Certified Class as a result. The parties thus submit that the award of fees and costs provided by the Consent Decree should be preliminarily approved by the Court.

**CONCLUSION**

For the foregoing reasons, the Court should preliminarily approve the Consent Decree, approve the form and method of notice to the Certified Class, and schedule appropriate dates for a fairness hearing and other proceedings necessary to give final approval to the Consent Decree. Following the fairness hearing, the Court should enter final judgment.

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<sup>4</sup> The Notice also informs the Class Members, pursuant to Rule 23(h)(1), of the attorneys' fees that are included as part of the settlement.



Dated: August 3, 2012

**Counsel for Plaintiffs  
and Plaintiffs' Class**

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

<b>JAMES MORROW, et al. and a</b>	:	
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<b>WASHINGTON, in his individual</b>	:	
<b>and official capacity, et al.,</b>	:	
<b>Defendants</b>	:	

**DRAFT SETTLEMENT AGREEMENT AND CONSENT DECREE**

**I. Introduction**

A. Description of the case

Plaintiffs filed this case in 2008 to challenge the Defendants’ alleged illegal “stop and seize” practice of targeting, stopping, detaining, searching, and often seizing property from individuals who are, or appear to be, members of a racial or ethnic minority and their passengers. (Class Certification Opinion and Order, Dkt. 233, p. 2.) The evidence demonstrates that this “interdiction program” began in 2006, and Plaintiffs allege that it is ongoing. (*Id.* at 3.) According to Plaintiffs, Defendants targeted members of the proposed class for traffic stops because of their race or ethnicity and then subjected them to detention, arrest, or search and seizure without legal justification and in violation of their constitutional rights. (*Id.*) Plaintiffs further allege that Defendants instituted the interdiction program, not for legitimate law enforcement purposes, but in order to enrich

their offices and themselves by seizing and converting cash and other valuable personal property they could find during the course of the illegal stop and seize practice. (*Id.*)

The Defendants deny these allegations and deny that they violated the constitutional rights of the named Plaintiffs or the class as a whole.

Plaintiffs initially sought class treatment of Fourth Amendment search and seizure claims, Fourteenth Amendment Equal Protection claims, and claims for monetary relief. The Court only certified the plaintiff class for Fourteenth Amendment Equal Protection claims for injunctive and declaratory relief. (*Id.* at 57.) The Defendants sought a discretionary interlocutory appeal of the class certification pursuant to Federal Rule of Civil Procedure 23(f) which was denied, and then denied again when the Defendants asked the Fifth Circuit Court of Appeals to rehear the request. The parties then negotiated and agreed to propose this Consent Decree.

B. Parties:

1. The Plaintiffs are James Morrow, Javier Flores and William Parsons, the Court designated class representatives, and the certified class as defined below in Sections I.E and I.F.
2. The originally named Defendants include: the City of Tenaha Deputy City Marshal Barry Washington, in his individual and official capacities (who has since resigned from office); the City of Tenaha Mayor George Bowers, in his official capacity only (who is the former mayor); the Shelby County District Attorney Lynda K. Russell, in her individual and official capacities (who has since resigned from office); the Shelby County District Attorney Investigator Danny Green, in his individual and official

capacities (who has since retired); and the Shelby County Precinct 4 Constable Randy Whatley, in his individual and official capacities (who has since resigned from office).

3. The parties agree to realign the defendants as follows: Shelby County will be bound as a Defendant via the County Judge Rick L. Campbell, or his successor, in his official capacity; the City of Tenaha is bound as a Defendant via the Mayor Orinthia Johnson, or his successor, in his official capacity; and the Shelby County District Attorney's Office is bound as a Defendant via (resigned) Shelby County District Attorney Lynda K. Russell, or her successor, in her official capacity.
4. Russell resigned from the Shelby County District Attorney's Office on July 19, 2011 effective December 31, 2011. As of the date the parties sign this Consent Decree and submit it to the Court for approval, Ms. Russell's successor in the office of the Shelby County District Attorney has not been appointed by the Governor of the State of Texas, as required by the Texas Constitution, art. 4, sec. 12. In the absence of the Governor's appointment, and until a new District Attorney for Shelby County is duly qualified, Russell continues to have such authority to bind the Shelby County District Attorney's Office in her "official capacity" as may be provided by Tex. Const., art. 5, Sec. 21; Tex. Const., art. 16, Sec. 17. All parties recognize that Russell has in fact resigned from the Shelby County District Attorney's Office, that her resignation was accepted by the Governor of Texas, that she ceased serving as District Attorney on

December 31, 2011 and has received no pay from the State of Texas or Shelby County, Texas regarding her resigned position, that she has not yet been replaced by the Governor, and that she is not responsible or personally liable for any actions that the Shelby County District Attorney's Office has taken since her resignation. Russell is a Defendant in her official capacity on behalf of the Shelby County District Attorney's Office only to the extent permitted by the Texas Constitution and Texas law.

5. For purposes of this Consent Decree, the term "Defendants" shall include the aforementioned Defendants, their successors, employees, agents, and/or contractors. Where this Consent Decree uses the terms officer or officers, such terms refer to certified law enforcement officers employed by, contracted by, or otherwise working on behalf of Defendants to conduct traffic stops.
6. Defendants Washington, Green, and Whatley remain defendants in their individual capacities solely for purpose of Section VI.F of this Decree.

- C. Plaintiffs' claims: Plaintiffs claim that Defendants' conduct violates Plaintiffs' Fourteenth Amendment rights to equal protection and due process. (Dkt. 233, p. 2-3.) Plaintiffs seek classwide declaratory and injunctive relief. (*Id.* at 3.)
- D. Defendants' claims: Defendants deny the allegations made by the Plaintiffs, both individually and as a Class. Defendants settle this case without an admission of liability and to avoid the further time and expense associated with protracted litigation of this nature.

E. Certified Class: The parties acknowledge that by Order dated August 29, 2011, the Court certified the plaintiff class pursuant to Federal Rule of Civil Procedure 23(b)(2), to include:

1. People who are, or appear to be, members of racial or ethnic minority groups and those in their company, and
2. Were, or will be, traveling in, through, or near Tenaha at any time after November 1, 2006, and
3. Were, or are, subject to being stopped by one or more Defendant for an alleged traffic violation.

F. The Court limited the claims for class treatment to whether the Defendants' interdiction program targeted apparent non-Caucasians for traffic enforcement in violation of the Equal Protection Clause of the Fourteenth Amendment, and limited the available relief to injunctive and declaratory relief. (Dkt. 233, p. 42-43.)

G. Mutual recognition of principles

All parties to this Settlement Agreement and Consent Decree recognize the need for (1) diligent law enforcement, (2) the proper use and implementation of legitimate police practices, and (3) compliance with the requirements and mandates of the Equal Protection clause of the Fourteenth Amendment.

## II. Purpose of Consent Decree

- A. Efficiency: The parties' agreement to this Consent Decree provides efficiencies for the parties and the Court. The parties avoid the considerable costs and efforts of pretrial preparations, trial presentations, and possible appeals. The Court avoids expending considerable effort to resolve all of the disputes associated with the parties' efforts and the difficult task of determining liability and possibly formulating injunctive relief that would grant the plaintiff class relief balanced with the governmental interests claimed by the Defendants.
- B. Avoiding uncertainty: The parties avoid the uncertainty of trial and any subsequent appeals. With this Consent Decree, the parties have greater input and control over the settlement than would be possible with court-ordered injunctive relief resulting from trial.
- C. Ending alleged racial profiling: The parties seek to prohibit alleged racial profiling that allegedly violates the Equal Protection Clause of the Fourteenth Amendment. The parties agree that the Defendants will prohibit any alleged incentives and alleged practices that may result in alleged racial profiling, in a manner that can be verified by the parties, the Monitor, and the Court.
- D. Concluding litigation: The parties seek to resolve all remaining issues in this class action by entry of this enforceable Consent Decree.

In furtherance of these purposes, the parties have agreed to the following binding and enforceable prescriptions, which shall be enforced by this Court, and are hereby ORDERED:

**III. Provisions Regarding Traffic Stops and Practices Incident to Traffic Stops:**

A. Impartial policing policy: On the date this Order is entered, the Defendants will implement written policies and practices, requiring that the Defendants comply with all federal and state laws, rules, and regulations relating to alleged racial profiling and the prohibition of alleged racial profiling to ensure that traffic stops, searches, and seizures are not conducted on the basis of the apparent race or ethnic origin of the suspect, except where the law permits race or ethnic origin to be considered in determining whether a person shall be stopped (e.g., where a suspect has been described by his or her race). These policies shall include the information in the model set forth in Appendix A to this Consent Decree.

B. Provisions for traffic stops:

1. Definition: A traffic stop occurs whenever an officer observes a reason to initiate the stop of a vehicle based on an alleged violation of traffic laws or any other violation alleged to have been observed by the officer conducting the stop, and continues until the person stopped is free to leave or, if arrested, until the person is presented to a jail for booking.
2. "Person" or "persons," as used in this Consent Decree, refers to the drivers and passengers subject to traffic stops by an officer.
3. Any traffic stop that does not strictly comport with all applicable state and federal laws and the provisions of this Consent Decree is prohibited. Any evidence gathered as a result of a non-compliant stop, made after the entry of this Consent Decree, shall be presumptively inadmissible as evidence in



any court or other proceeding adverse to the person stopped. If such evidence is submitted, it must be accompanied by an explanation of this provision. In considering whether to admit evidence from a non-compliant stop, the relevant tribunal may consider the facts surrounding the non-compliant nature of the traffic stop in determining whether the evidence should be admitted. Among the factors considered are the fact and purposes of this provision, whether the non-compliance could have been avoided, and whether the officer took immediate steps to correct the situation or repair the malfunction.

4. Equipment required: All vehicles used by Defendants to conduct traffic stops shall be equipped with appropriate video and audio recording devices that have pre-event features and other capabilities necessary to make the recordings required by this Consent Decree.
5. Audio and video recording requirements: All traffic stops conducted by Defendants shall be mechanically recorded by both video and audio recordings, including: the use of the pre-event capabilities to capture the reason for the stop, and record the location, time, date, speed, the identity of the officer(s) and agency operating the vehicle, and any radar readings pertinent to the stop. The recordings shall also capture any canine sniffs, searches, seizures, detentions, and to the extent reasonable, arrests, resulting from a traffic stop. All oral communication and interaction with the person being stopped must be captured in the recordings. If a stop results in an arrest, the recordings shall continue until the subject is

transported inside the jail. During the stop, the officer shall contemporaneously orally state on the recording his or her reason for the stop, the basis for any suspicion of any other criminal activity or probable cause to believe an offense has been or is being committed, including the offense suspected, and any reason to believe any currency or property constitutes contraband or that there is probable cause for a seizure. The recordings must not be obscured by conducting matters outside of the range of the recording device(s) or in any other avoidable manner. If the officer has made a good faith attempt to comply with this provision, and the audio and video recordings are obscured or impaired due to unforeseeable and unavoidable events, the officer shall document in writing the reason for the failure to record all relevant events. All video and audio recordings shall be preserved unedited and in their native format, or in some other form that can be readily authenticated as valid and unaltered, for at least four years.

6. Documentation required, including profiling information: An officer shall prepare a report under his or her name and badge number that complies with Texas Code of Criminal Procedure Article 2.133 and this Consent Decree. This written documentation shall be preserved unedited, or in some other form that can be readily authenticated as valid and unaltered, for at least four years.
7. Whenever an officer documents the race or ethnicity of a person in accordance with this Consent Decree, he or she must do so on the basis of

the officer's perception of the person's race or ethnicity to the best of the officer's ability.

8. Reporting to dispatch: All traffic stops shall be reported to dispatch before the officer makes contact with the driver, except in emergency situations. Except in emergency situations, the officer shall report, and the dispatcher shall log, the identity of the officer, the location of and reason for the stop, and a description of the vehicle including its license number.
9. Pretext stops prohibited: All pretextual stops are prohibited.
10. Duration of stop: A stop must be no longer than necessary to accomplish the purpose of the stop, presumptively 15 minutes or less for a traffic violation punishable by issuance of a traffic ticket. For other situations, such as a driver possibly impaired by alcohol or drugs, the presumptive 15 minute time limit need not apply.

C. Provisions for detentions incident to traffic stops

1. Reporting to dispatch: All detentions resulting from traffic stops shall be reported to dispatch, along with the officer's claimed reason(s) for the detention, as soon as reasonably possible after the initiation of the detention(s). The term "reasonably possible" is meant to take into account the surrounding circumstances at the time and should take into account officer, suspect and public safety.
2. Any detention resulting from a traffic stop must be properly documented according to Texas Code of Criminal Procedure Article 2.133 and this Consent Decree.

D. Provisions for canine sniffs incident to traffic stops

1. The Defendants to this Consent Decree will stipulate that they currently do not utilize canines for any aspect of traffic stops.
2. Definition: The term “canine sniff” means any situation in which a canine is called upon to smell the area of a vehicle or person for the purpose of detecting contraband as the result of a traffic stop.
3. Requires reasonable suspicion of criminal activity: A canine sniff shall only be initiated when it is supported by reasonable suspicion that a crime has been or is in the process of being committed.
4. Reporting to dispatch: At the time the officer requests a “canine sniff,” he or she shall report the request, and basis for the request, to dispatch. The dispatcher shall log that information.
5. Explanation for person: Before the initiation of any canine sniff, an officer shall provide written notice to the person whose property or person will be subject to the sniff. This written notice shall be in both English and Spanish and substantially similar to the model set forth in Appendix B to this Consent Decree.
6. Audio and video recording requirements: Any canine sniff shall be mechanically recorded as required by this Consent Decree and any applicable state and federal law.
7. Documentation required: For any traffic stop in which a canine sniff is conducted, the officer conducting the stop shall make a written report, including: the name, identification number, and agency of the dog handler;

identification information for the canine; a description of the circumstances that prompted the canine sniff; whether any alerts were made by the canine; whether the proximity of the canine sniff was physically searched and whether any contraband was located; a thorough narrative description of the use of the canine, including, if an alert was given, a detailed description of where and how the alert was given, how many times the canine circled the vehicle or other property or person searched, how long it took for the canine to alert, and whether the canine exhibited any behaviors inconsistent with its training or otherwise unusual. These reports shall be preserved unedited, or in some other form that can be readily authenticated as valid and unaltered, in a Canine Performance Log kept by the pertinent agency and retained for at least four years. The Canine Performance Log shall also include records of any complaints about the canines used for sniffs and the responses to those complaints; these records shall be preserved for at least four years.

8. Certification and training requirements:
  - a. All canines used in canine sniffs shall meet Scientific Working Group on Dog and Orthogonal Detector Guidelines (“SWGDOG”) certification guidelines before being utilized in any canine sniff. All canine handlers must be certified in accordance with SWGDOG guidelines prior to participating in a canine sniff. Training shall be required for all officers and canines in accordance with SWGDOG guidelines and the

requirements set forth in this Consent Decree. The SWGDOG guidelines referred to in this Consent Decree are available at [www.swgdog.org](http://www.swgdog.org) and included in Appendix C to this Consent Decree.

- b. The Defendants shall conduct an annual review of the utilized certification and training guidelines and update their guidelines in accordance with industry standards, provided that those standards do not fall below the standards set out for the protection of individuals in the SWGDOG guidelines. Defendants conducting canine sniffs shall annually certify their review, including a description of any updates, to the Court and other parties during the duration of the Consent Decree.

9. Performance records for canine handlers: Any Defendant(s) using a canine shall document, monitor and investigate all complaints regarding the use of canines by that agency. Such Defendant shall produce a quarterly performance report, compiling information from written reports and mechanical recordings and complaints, to the designated officer with final decision-making authority over the use of canines. Such Defendant shall provide copies of these reports to the Monitor on a quarterly basis during the duration of the Consent Decree.

10. Certification of compliance: On the date this Order is entered, the Defendants will certify to the Court that they are not using canines for any aspect of traffic stops. Each Defendant's certification will constitute that

Defendant's compliance with all the canine-related provisions of this Consent Decree. Should any Defendant seek to use a canine for any aspect of traffic stops, that Defendant shall first notify the Monitor and Plaintiffs' Counsel.

E. Provisions for searches incident to traffic stops

1. Report to dispatch and request for back-up: Before any officer conducts a search resulting from a traffic stop, the officer will report the event and his or her intention to dispatch. The officer will also request that dispatch send back-up officers, if available, to the scene to observe any search resulting from a traffic stop. The dispatcher shall log this information.
2. For all consent searches, officers must first orally and in writing advise a person of his or her right to refuse consent to search and obtain written consent for that search using a Consent to Search form. That Consent to Search form shall be in both English and Spanish and substantially similar to the model provided in Appendix D to this Consent Decree.
3. Audio and video recording requirements: Any search resulting from a traffic stop and the basis therefor shall be mechanically recorded, as required by Section III.B.5. If a search is allegedly based on consent, the officer's request to search and the person's consent to the same must be captured on the mechanical recording required by Section III.B.5 and in writing. The consent recorded under this section shall include: (a) a statement that the person subject to search fully understands that he or she may refuse to give the officer consent to search; (b) a statement that the

person subject to search is freely and voluntarily giving the officer consent to search; and, (c) a statement that the person subject to search may withdraw the consent at any time during the search.

4. Any search incident to a traffic stop must be documented consistent with Texas Code of Criminal Procedure Article 2.133 and this Consent Decree.
5. Duration: No search shall prolong the detention any longer than necessary to effectuate the search based on the reasons for the search.
6. Responsibility for damage: The responsible Defendant(s) shall pay a person for the full costs and expenses of any property damage that may result from a search as required by state law. This provision shall not apply to any damage reasonably caused during a search that results in the discovery of contraband. The responsible Defendant(s) shall pay or reimburse the costs and expenses resulting from a search within thirty (30) days of receipt of written notice and reasonable substantiation of such damage. If a Defendant contests that the damage was the result of a search, the Monitor shall be the final arbiter of disputes under this provision, utilizing a preponderance of the evidence standard. All persons subject to a search will be provided with written notice of this provision at the time of the search. That written notice shall be in both English and Spanish and substantially similar to the model provided in Appendix E to this Consent Decree.



F. Provisions for seizures incident to a traffic stop

1. "Property" refers to any tangible thing, including currency or other monetary instrument. No property shall be seized unless the seizing officer advises the person of the basis for believing the property is subject to seizure. Prior to seizing any property, an officer must report the intended seizure to dispatch. The dispatcher shall log the information.
2. Audio and video recording requirements: Any seizure shall be mechanically recorded, as required by Section III.B.5.
3. Any seizure must also be documented in accordance with Texas Code of Criminal Procedure Article 2.133 and this Consent Decree. If a safety issue prevents an officer from reciting the basis for a seizure, the officer shall promptly, and as soon as reasonably possible, provide a detailed written narrative description of the search which resulted in the seizure, the safety concern that prevented an oral recitation of why the officer thought that seizure was legal, and a description of the property seized.
4. Before an officer seizes any property during a traffic stop, the officer must provide written notice to the person subject to seizure of his or her rights and the procedures for return of the seized property. The written notice shall be in both English and Spanish and substantially similar to the model provided in Appendix F to this Consent Decree.
5. Documentation required: Any Defendant(s) seizing property or in control of seized property shall keep and maintain full and complete records of any property seized, including the officer(s) who seized the property; the

name of the person from whom the property was seized; a description of the property seized, including the exact kinds, quantities, and forms of the property; if the property is deposited in an interest-bearing account, the location of the account and the amount of interest; the judicial order or statute allowing the disposal of the property; to whom the property was delivered; and the state and manner of the destruction or disposition of the property, if any.

6. Provide inventory: For all traffic stops that result in the seizure of any property, the officer must record the exact location from which the assets were obtained; a description of the property, including the exact kinds, quantities, and forms of the property. Upon the seizure of property, the officer shall supply the person with an inventory of all property seized.
7. Safekeeping: Safe storage of all seized property shall be governed by Texas Code of Criminal Procedure Article 59.
8. Return of Property: If a determination is made that seizure is improper, the Defendant(s) in possession of the property shall return to a person all property seized within thirty business days.

G. Provisions for arrests incident to traffic stops

1. Back-up: Before any arrest incident to a traffic stop, to the extent possible, the officer shall report the intent to arrest to dispatch and request back-up, if back-up is available. The dispatcher shall log the information.

2. Audio and video recording requirements: To the extent reasonably possible, any arrest resulting from a traffic stop shall be mechanically recorded as required by Section III.B.5.
3. Documentation required, including profiling information: For any arrest resulting from a traffic stop, the officer must record all information as required by Texas Code of Criminal Procedure Article 2.133 and this Consent Decree. All records of arrests shall be preserved unedited and in their native format, or in some other form that can be readily authenticated as valid and unaltered, for at least four years.
4. *Miranda* rights: If *Miranda* rights are required in a specific situation by federal law, the recitation of his or her *Miranda* rights shall be mechanically recorded as required by Section III.B.5.

H. Provisions for forfeitures incident to traffic stops:

1. A sworn statement shall be made by the seizing officer as required by Texas Code of Criminal Procedure Article 59.03, including stating with particularity which provisions of the Penal Code are violated.
2. No person with an interest in any asset subject to a forfeiture proceeding can be requested to waive formal service of the forfeiture action or compromise his or her interest in such an asset until after a response to formal service is due, unless the person is being represented by counsel regarding the matter.
3. In addition to the requirements of CCP Art. 59.03(d), an officer shall not induce or accept a person's waiver, in any form, of interest in seized

property unless the person is represented by counsel in the matter or until the person has had a meaningful opportunity to seek counsel and more than thirty (30) days have passed after the due date for a response to the properly served notice of forfeiture.

4. No unrepresented defendant may sign an agreed judgment in any asset forfeiture case until at least thirty days after service.
5. No unrepresented defendant may waive service or any interest in any asset forfeiture case in exchange for an agreement not to prosecute a criminal matter unless represented by counsel or the waiver occurs in the presence of a judicial officer.

I. Provisions for use of forfeited property seized incident to a traffic stop:

1. The Defendants will strictly abide by Texas Code of Criminal Procedure Article 59.06.
2. Defendant(s) in receipt of asset forfeiture revenue incident to a traffic stop agrees to track such revenue and donations.
3. The Shelby County Auditor shall confirm Shelby County's and its District Attorney's compliance with Texas Code of Criminal Procedure Article 59.06. Before expenditure of any forfeiture revenue incident to traffic stops, the Auditor shall confirm whether such expenditure is compliant with Texas Code of Criminal Procedure 59.06. If the Auditor determines that an expenditure is not compliant with the Texas Code of Criminal Procedure, the Auditor shall notify the Shelby County Commissioner's Court and the Monitor.

4. The Tenaha City Council, before the expenditure of any forfeiture revenue incident to traffic stops, shall confirm compliance of such expenditure with Texas Code of Criminal Procedure 59.06.
  5. All asset forfeiture revenue incident to traffic stops, including any such revenue presently existing in any Defendants' asset forfeiture account, shall be (1) donated to non-profit organizations that provide mental health, drug, or rehabilitations services, or services for victims or witnesses of criminal offenses, in accordance with Texas Code of Criminal Procedure Article 59.06; or (2) used for the audio and video equipment necessary to comply with this Consent Decree and/or to pay the costs of law enforcement training to meet the educational requirements of this Consent Decree. Defendants and/or Plaintiffs' Counsel may suggest recipient organizations for donations under this provision. The Monitor shall approve each recipient organization before any donations are made.
- J. Training: Defendants' officers shall undergo 4 hours of agreed upon/appropriate training within ninety (90) days of the entry of this Consent Decree and 4 hours of training per calendar year. The training shall cover compliance with racial profiling laws, search and seizure law, and provisions set forth in this Consent Decree.
- K. Internal review procedures: Within sixty (60) days of the entry of this Consent Decree, each Defendant shall establish and enforce policies and procedures governing quarterly supervisory review of traffic stops including (1) a review of all records made in accordance with Texas Code of Criminal Procedure Article

2.134; (2) a review of all written and mechanical records of stops involving searches, seizures, or arrests to determine whether they state legal grounds for a stop and actions incident to a stop; (3) review of relevant data to determine whether there are impermissible racial disparities in stops; and (4) use of canine forms and data, if any, and other relevant data or documentation. These reviews and audits shall be made available to the Monitor, who shall provide copies of such reviews and audits to the Plaintiffs' attorneys. The purpose of these procedures shall be to ensure compliance with the terms of this Consent Decree and all other pertinent constitutional and state legal standards.

#### **IV. Monitoring and Compliance**

- A. Selection of Monitor: Within sixty (60) days of the entry of this Consent Decree, the parties shall agree on a Monitor to nominate to the Court for appointment. The Monitor shall be a peace officer or have comparable relevant experience. The Monitor shall be impartial. Absent the parties' agreement to a Monitor within sixty (60) days, Plaintiffs' and Defendants' Counsel shall each nominate two monitor candidates for the Court's consideration. From the four nominees, the Court shall select one Monitor to carry out the responsibilities set forth in this Consent Decree.
- B. Defendants' duty of disclosure: During the term of this Consent Decree, each Defendant shall quarterly make available to the Monitor all written documentation required by Texas Code of Criminal Procedure Articles 2.133, 2.134, 59.03, and 59.06, and this Consent Decree. Each Defendant also shall quarterly make available to the Monitor all unedited audio, video, and written records of any

traffic stops as requested by the Monitor. Each Defendant shall provide the Monitor with any other relevant and necessary information, data analysis, and documents within thirty days of receiving a written request from the Monitor for the same.

- C. Monitor's duties: The Monitor shall, at a minimum, review a random sample of ten percent of all stops in a given month, or ten stops, whichever is greater, unless there are fewer than ten stops in which case all stops will be reviewed. The Monitor shall review all searches and seizures that result from traffic stops in a given month to assess each Defendant's compliance with this Consent Decree and the Fourteenth Amendment; these reviews will be credited toward the ten percent, or ten stop, minimum review requirement. The Monitor may review the records generated in compliance with Texas Code of Criminal Procedure Articles 2.133, 2.134, 59.03, and 59.06, and this Consent Decree. The Monitor may conduct an independent analysis and review of vehicular stops resulting in searches, seizures or arrests as a basis for the Monitor's Report and Recommendations. The Monitor shall provide a quarterly Report and Recommendation to the Court during the term of this Consent Decree. The Monitor shall have the authority to recommend to the parties and to the Court practices, policies and other measures that are appropriate or necessary to ensure that each Defendant's stop, search, and seizure practices and policies are in compliance with this Consent Decree, the Fourteenth Amendment, and Articles 2 and 59 of the Texas Code of Criminal Procedure. The Monitor shall bring to the attention of the Court any policies, practices, and other measures necessary for each Defendant's compliance with

this Consent Decree only after the Monitor first brings such policies, practices, and other measures to the attention of each Defendant pursuant to Section IV.D of this Consent Decree. The Monitor shall review any Complaints (as defined by Section 614.021 of the Texas Code of Criminal Procedure) or reports of non-compliance, investigate the same, and report the Monitor's findings of non-compliance, if any, to the Court.

- D. Responses to Monitor's reports: At least thirty (30) days before the Monitor submits any quarterly Report and Recommendation to the Court pursuant to Section IV.D of this Consent Decree, the Monitor shall provide a draft of such Report and Recommendation to the parties. The parties shall have thirty (30) days to review and confer regarding any aspect of the draft Report and Recommendation, and to provide comments regarding same to the Monitor. Following the Monitor's submission of each quarterly Report and Recommendation to the Court, the parties shall have an additional thirty (30) days to provide comments, including formal objections, if any, to the Court on that Report and Recommendation.
- E. Benchmarks: In determining whether the Defendants are in compliance with constitutional standards with respect to stop, search, and seizure policies and practices, the Monitor and the Court may consider among other factors, (1) the number and nature of stops, searches, and seizures that do not comply with constitutional standards under the Fourteenth Amendment; (2) all information regarding the reasons provided for stops, searches, and seizures, the resultant hit rates (i.e., the rate at which stops, searches, and seizures result in the identification



of contraband) and arrest data; and (3) racial disparities in stops, searches, and seizures. Non-compliance under the Fourteenth Amendment may be found where the evidence proves that there are substantial racial disparities in stops, searches, and/or seizures that are not explained by non-racial factors for such disparities, including but not limited to crime rates, suspect-descriptions that have been relied on for stops, police deployment patterns, racial percentages of the underlying population or other non-racial factors.

**V. Fees and Costs**

- A. The Defendants shall be responsible for reasonable costs and fees of the Monitor. Each Defendant shall be responsible for the costs attributable to that Defendant. The Monitor will not bill twice for the same work.
- B. The Defendants shall pay counsel fees and costs to the Plaintiffs' attorneys as previously agreed to by the parties. Payment due shall be paid within thirty (30) days of the entry of this Consent Decree. At that time, Plaintiffs' Counsel shall execute a release of all claims for attorneys' fees and expenses relating to this class action suit through the date of said release.

**VI. Miscellaneous**

- A. The parties jointly agree to defend the certification of this class and this Consent Decree against collateral attack in this case and in any appeal taken from this case. The parties further jointly agree that the certification of this class in this specific case is not admissible for any purpose in any other litigation.
- B. All parties agree to exercise their best efforts and to take all reasonable steps necessary to effectuate the Consent Decree.

- C. This Consent Decree shall remain in effect for four years from the date of the entry of this Consent Decree; however, upon motion of a party, the Court may extend or shorten the four-year period.
- D. Reports and recommendations of the Monitor and any Orders of the Court shall be filed of public record with the Court. All filings will redact personal information of any law enforcement officers and any persons subject to stops, searches, and seizures in this proceeding and the parties agree to keep information regarding the identities of the officers or persons stopped, searched, or subject to seizures in this proceeding confidential, unless the Court orders otherwise or unless otherwise required by the Texas Open Meetings and Records Act or the Federal Freedom of Information Act.
- E. This Consent Decree may not be introduced as evidence for any purpose in any other proceeding other than the enforcement of the Consent Decree.
- F. The defendants originally sued in their individual capacities—namely Barry Washington, Lynda K. Russell, Danny Green, and Randy Whatley—shall each provide a copy of this Consent Decree to any and all future employers for whom they may carry out law enforcement duties during the term of this Consent Decree.
- G. Any notice, request, instruction, or other document to be given under this Consent Decree by any Party or by the Monitor to the Plaintiffs shall be in writing and delivered personally or sent registered or certified mail, postage prepaid, to the Parties as follows:

To: Class Counsel and Plaintiffs or class members:

Timothy Borne Garrigan  
Class Counsel  
Stuckey Garrigan & Castetter  
2803 North Street  
PO Box 631902  
Nacogdoches, TX 75963-1902

Elora Mukherjee  
Class Counsel  
American Civil Liberties Union  
125 Broad Street  
New York, NY 10004

To: City of Tenaha via its Mayor:  
122 North Center Street  
Tenaha, Texas 75974

To: Shelby County via the Shelby County Attorney:  
518 Nacogdoches Street  
Center, Texas 75935

To: Shelby County District Attorney  
200 San Augustine Street  
Suite 12  
Center, Texas 75935

H. To further serve the purposes of this Decree, the Shelby County Commissioner's Court has entered into an interlocal agreement with Shelby County Precinct Constables Zack Warr (Pct. 1), Shad Sparks (Pct. 2), Billy Hearnberger (Pct. 3) and Stanley Burgay (Pct. 5), and their offices. The Plaintiffs have not made any allegations of racial profiling or other allegations of improper conduct against these non-parties or any of their employees. Section VI.H is the only section of this Consent Decree that is applicable to the aforementioned non-parties or any of their employees. In the interest of resolving this litigation, saving the Shelby County Tax Payers additional costs and fees, and instilling confidence in law

enforcement among the general public, these elected officials have agreed to enter into the interlocal agreement. The Parties to this litigation thank these public officials for their cooperation. The interlocal agreement will provide that these elected officials and their offices will:

1. Adopt an Impartial Policing Policy that includes a written Consent to Search form;
2. Use mechanical recording equipment for traffic stops and maintain the recordings of such stops for four years;
3. Comply with Art. 2.133 of the Texas Code of Criminal Procedure and Chapter 59 of the Texas Code of Criminal Procedure;
4. Affirmatively state that they are not presently utilizing a canine for vehicle searches and provide the Shelby County Commissioner's Court with 90 days' notice if they intend to start using such a canine;
5. Attend training furnished by Shelby County on search and seizure and forfeitures that the County has agreed to furnish pursuant to Section III. J of this Decree;
6. Allow the Monitor appointed under this Decree to review the documents and mechanical recordings of all traffic stops.

Dated: August 2, 2012

**Counsel for Plaintiffs  
and Plaintiffs' Class**

/s/ Timothy Borne Garrigan

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/s/ Elora Mukherjee

Elora Mukherjee  
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/s/ Stephanie Kay Stephens

Stephanie Kay Stephens  
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## **Appendix A**

**Policy for Addressing Racially Biased Policing**  
**and the Perceptions Thereof<sup>1</sup>**

Purpose: This policy is intended to reaffirm this department's commitment to unbiased policing, to clarify the circumstances in which officers can consider race/ethnicity when making law enforcement decisions, and to reinforce procedures that serve to assure the public that we are providing service and enforcing laws in an equitable way.

Policy:

A) Policing Impartially

1. Investigative detentions, traffic stops, arrests, searches, and property seizures by officers will be based on a standard of reasonable suspicion or probable cause in accordance with the Fourth Amendment of the U.S. Constitution. Officers must be able to articulate specific facts and circumstances that support reasonable suspicion or probable cause for investigative detentions, traffic stops, arrests, nonconsensual searches, and property seizures.

Except as provided below, officers shall not consider race/ethnicity in establishing either reasonable suspicion or probable cause. Similarly, except as provided below, officers shall not consider race/ethnicity in deciding to initiate even those nonconsensual encounters that do not amount to legal detentions or to request consent to search.

Officers may take into account the reported race or ethnicity of a specific suspect or suspects based on trustworthy, locally relevant information that links a person or persons of a specific race/ethnicity to a particular unlawful incident(s). Race/ethnicity can never be used as the sole basis for probable cause or reasonable suspicion.

2. Except as provided above, race/ethnicity shall not be motivating factors in making law enforcement decisions.

B) Preventing Perceptions of Biased Policing

In an effort to prevent inappropriate perceptions of biased law enforcement, each officer shall do the following when conducting pedestrian and vehicle stops:

- Be courteous and professional.
- Introduce him- or herself to the citizen (providing name and agency affiliation), and state the reason for the stop as soon as practical, unless providing this information will compromise officer

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<sup>1</sup> Source: Lorie Fridell, et al., Police Executive Research Forum, Racially Biased Policing: A Principled Response 51-53 (2001).

or public safety. In vehicle stops, the officer shall provide this information before asking the driver for his or her license and registration.

- Ensure that the detention is no longer than necessary to take appropriate action for the known or suspected offense, and that the citizen understands the purpose of reasonable delays.
- Answer any questions the citizen may have, including explaining options for traffic citation disposition, if relevant.
- Provide his or her name and badge number when requested, in writing or on a business card.
- Apologize and/or explain if he or she determines that the reasonable suspicion was unfounded (e.g., after an investigatory stop).

Compliance:

Violations of this policy shall result in disciplinary action as set forth in the department's rules and regulations.

Supervision and Accountability:

Supervisors shall ensure that all personnel in their command are familiar with the content of this policy and are operating in compliance with it.



## **Appendix B**

### **NOTICE OF USE OF A POLICE DOG**

A police officer has determined that there is reason to conduct a “canine sniff,” during which a dog will be permitted to sniff the perimeter of your person, your vehicle, and/or your property to detect contraband.

A police officer may only initiate this canine sniff if he or she has reasonable suspicion to believe that a crime has been committed or is in the process of being committed.

### **AVISO SOBRE EL USO DE PERROS POLICÍA**

Un oficial de policía ha determinado que hay razón para realizar un “olfateo por canino adiestrado,” durante el cual se le permitirá a un perro oler alrededor del perímetro de su persona, su vehículo, y/o sus bienes para detectar contrabando.

Un oficial de policía sólo puede iniciar este “olfateo por canino adiestrado” si él o ella tiene una sospecha razonable de que un delito se ha cometido o está en proceso de cometerse.

## **Appendix C**

## **SWGDOG SC2 - GENERAL GUIDELINES**

Posted for public comment 12/16/06 – 2/16/06. Approved by the membership 4/2/2006.  
**1<sup>st</sup> - Revision** - Posted for Public Comment 6/24/09 – 8/22/09. Approved by the membership  
9/15/2009.

**Statement of Purpose:** To establish consensus-based best practice general guidelines for training, certification, and documentation pertaining to all canine disciplines. Discipline specific guidelines are found within the corresponding subcommittee documents.

### ***1. INITIAL TRAINING***

- 1.1. The handler training shall be conducted by a competent trainer from an entity that utilizes a structured curriculum with specific training and learning objectives.
- 1.2. The canine training shall be conducted by a competent canine trainer from an entity that utilizes a structured curriculum with specific training and learning objectives.
- 1.3. Initial training shall include sufficient obedience training to ensure the canine will operate effectively based on mission requirements.
- 1.4. The canine shall be trained to perform an effective and controlled search.
- 1.5. The initial training of the canine shall include training of a determined specific final response (active or passive alert).
- 1.6. Initial training shall include exposing the canine team to a variety of locations, expected situations and searches.
- 1.7. The training shall be structured to meet the typical mission requirements of the canine team's department/organization.
- 1.8. The canine team's training shall be continued to achieve a level of operational proficiency until certification evaluation.

### ***2. CANINE TEAM ASSESSMENTS***

- 2.1. Assessments are part of certification, maintenance training and proficiency testing.
- 2.2. Each assessment is the evaluation of a search.
- 2.3. The canine team shall be assessed in the following ways:
  - 2.3.1. Odor recognition assessment.
    - 2.3.1.1. The handler shall be advised of the parameters of the search.

- 2.3.1.2. The handler may know the number of target objects, but not the placement.
- 2.3.1.3. The evaluating official shall know the desired outcome of the search.
- 2. 3.2. Comprehensive assessment (single-blind assessment).
  - 2.3.2.1. The handler shall be advised of the parameters of the search, yet shall not know the desired outcome.
  - 2.3.2.2. The handler shall not know the number or placement of the target objects.
  - 2.3.2.3. The evaluating official shall know the desired outcome of the search.
  - 2.3.2.4. The assessments shall include a blank search.
- 2. 3.3. Double-blind assessment.
  - 2.3.3.1. The handler shall be advised of the parameters of the search.
  - 2.3.3.2. No participant or observer present at the assessment location(s) shall be aware of the desired outcome of the search.
  - 2.3.3.3. The assessments may include a blank search.
- 2.4. Each assessment will address the following areas:
  - 2. 4.1. Demonstration of the canine's ability to perform a systematic search.
  - 2. 4.2. Demonstration of the handler's control of the canine during the execution of a systematic search.
  - 2. 4.3. Demonstration of the handler's ability to accurately interpret the canine's changes in behaviors associated with odor detection and identification.
  - 2. 4.4. Demonstration of the handler's ability to determine whether or not the canine has made a final response.
  - 2. 4.5. In a double blind assessment it may not be possible to include all of the handler and canine assessment areas listed above.

### **3. CANINE TEAM CERTIFICATION**

- 3.1. Certification for the named canine team shall be valid for one year.
  - 3.1.1. Certification does not relieve the canine team from regular maintenance training, periodic proficiency assessments, and following other recommended SWGDOG guidelines.
  - 3.1.2. The certifying official(s) shall not be routinely involved in the day to day training of the canine team being evaluated.
  - 3.1.3. For successful certification, the canine team shall achieve at least a 90 % positive alert rate, unless otherwise dictated by the specific discipline, combined with a false alert rate as identified by the sub-disciplines (distinct objects search versus continuous area search). Positive and false alerts are defined and calculated as follows:
    - 3.1.3.1. A positive alert is defined as the trained detection alert in the presence of the target odor. The rate is calculated as the number of positive alerts divided by the number of available targets. For example, if the certification has ten target odors and the canine team identifies nine odors, it will have achieved a 90 % positive alert rate.

- 3.1.3.2. A false alert is defined as an alert in the absence of the target odor. This is determined in one of 2 ways and shall be defined before the evaluation, depending upon the nature of the detection task involved in the certification (distinct objects search versus continuous area search):
  - 3.1.3.2.1. In sub-disciplines in which certification involves searching a defined number of distinct objects (i.e., pieces of luggage, odor recognition cans, scent boxes, parcels, persons, vehicles) the false alert rate is calculated as the number of false alerts divided by the number of non-target objects, not to exceed 10 %. For example, if the certification test involves searching a set of 24 pieces of luggage in which 4 pieces contain targets and 20 are non-target objects, and the canine team exhibits one false alert on a non-target piece of luggage, then the team's false alert rate is calculated as 1/20, or 5 %.
  - 3.1.3.2.2. In sub-disciplines in which certification primarily involves searching continuous areas (i.e., warehouses, vehicle lots, aircraft, buildings) the number of distinct search objects within the continuous search area is immeasurable. The number of false alerts should not exceed one per continuous searchable area as defined by the specific discipline (refer to SC8 and SC9 documents).
- 3.1.4. Handler errors, when excessive may result in failure of the team.
- 3.1.5. A mission oriented test environment shall be used.
- 3.2. Certification shall consist of a number of assessments that together form the full test.
  - 3.2.1. Each assessment is the evaluation of a search.
  - 3.2.2. Aids and/or targets used in the day to day training activities of the team being certified should not be used in the certification process.
  - 3.2.3. The certification shall be comprised of a comprehensive assessment together with either an odor recognition assessment or a double-blind assessment, or both.
- 3.3. A canine team that fails the certification process shall complete a corrective action plan before making another attempt to certify.

#### **4. MAINTENANCE TRAINING**

- 4.1. The canine team shall conduct regular objective-oriented training sufficient to maintain and enhance operational proficiency. Maintenance training shall include the following:
  - 4.1.1. Correcting identified deficiencies or operational concerns.
  - 4.1.2. A variety of search locations, location sizes and environmental conditions.
  - 4.1.3. Varied duration of search times.
  - 4.1.4. Varied times of day/night.
  - 4.1.5. A variety of blank searches.
  - 4.1.6. A variety of distractions in the search area.
  - 4.1.7. A variety of set times.
  - 4.1.8. A variety of target odors, amounts, number of targets and different sources of targets where applicable.

- 4.1.9. A variety of methods of concealment.
- 4.2. Training conducted solely by the handler to maintain the canine's proficiency is acceptable, but should be periodically combined with supervised training.
  - 4.2.1. Supervised training, by a qualified trainer/instructor, is recommended in order to monitor and improve performance, identify and correct training deficiencies, and perform proficiency assessments.
- 4.3. A canine team shall complete a minimum of sixteen (16) hours of training per month to maintain and improve the proficiency level of the team.
- 4.4. The canine team shall undergo periodic proficiency assessments as outlined in section 2 of the Canine Team Assessments. These assessments should include a variety of odor recognition assessments, comprehensive assessments and/or double-blind assessments.

## **5. RECORD KEEPING AND DOCUMENT MANAGEMENT**

- 5.1. The handler/department/organization shall document training, certification, proficiency assessments and discipline-related deployment data.
  - 5.1.1. Training and proficiency assessment records may be combined or maintained separately.
  - 5.1.2. Discipline-related deployment records shall be maintained separately from training, certification and proficiency assessment records.
  - 5.1.3. Training and discipline-related records should be standardized within the department/organization.
- 5.2. Training records may include, but are not limited to, the following data:
  - 5.2.1. Name of handler and canine.
  - 5.2.2. Name(s) of individual(s) conducting/assisting training.
  - 5.2.3. Time and date training took place.
  - 5.2.4. Location and environmental conditions.
  - 5.2.5. Training design (non-blind, single-blind or double-blind).
  - 5.2.6. Description and number of target(s).
  - 5.2.7. Location of target(s).
  - 5.2.8. Set time.
  - 5.2.9. Size of search area.
  - 5.2.10. Length of session.
  - 5.2.11. Search results.
  - 5.2.12. Deficiencies and corrective measures implemented.
  - 5.2.13. Other information required by department/organization.
- 5.3. Certification records shall be maintained by the certifying authority and the handler, and include the following information:
  - 5.3.1. Name of canine and handler.
  - 5.3.2. Date team certified.

- 5.3.3. Certification authority, i.e., agency, professional organization, and/or individual(s).
  - 5.3.4. The standard or guideline under which the canine team is certified.
  - 5.3.5. Name of individual(s) awarding certification.
  - 5.3.6. Search area types included in certification assessment.
  - 5.3.7. Type and amount of materials included in certification assessment.
  - 5.3.8. Location of certification.
  - 5.3.9. Set time.
- 5.4. Proficiency assessment records maintained by the handler/department/organization may include, but are not limited to, the following data:
- 5.4.1. Name of handler and canine.
  - 5.4.2. Name(s) of individual(s) conducting assessment.
  - 5.4.3. Time and date assessment took place.
  - 5.4.4. Location and environmental conditions.
  - 5.4.5. Assessment design (single-blind or double-blind).
  - 5.4.6. Search area types included in the proficiency assessment.
  - 5.4.7. Type(s) and amount(s) of material included in the proficiency assessment.
  - 5.4.8. Set time.
  - 5.4.9. Size of search area.
  - 5.4.10. Proficiency assessment results.
  - 5.4.11. Other information required by department/organization.
- 5.5. Supervisory review of all records is recommended.
- 5.6. Digital format is recommended to facilitate compiling and analyzing data.
- 5.7. Records may be discoverable in court proceedings and may become evidence of the canine team's reliability. Record retention policy shall be determined by department/organization guidelines.
- 5.8. Training records are necessary to illustrate the type and amount of training that the team has experienced before and after certification.
- 5.9. Confirmed operational outcomes can be used as a factor in determining capability.
- 5.10. Unconfirmed operational outcomes shall not be used as a factor in determining capability in that they do not correctly evaluate a canine team's proficiency, i.e., residual odor can be present or concealment may preclude discovery.
- 5.11. Training Aid Records
- 5.11.1. Training aids shall be clearly labeled in a manner to support accountability.
  - 5.11.2. Appropriate records shall be maintained by the handler/department/organization in accordance with federal/state/local requirements.
- 5.12. Veterinary Records



- 5.12.1. Veterinary records shall be maintained in a manner such as they are accessible to the handler/department/organization.
- 5.12.2. Vaccinations required by state or local law should be documented in the veterinary record of the canine.

## **SWGDOG SC8– SUBSTANCE DETECTOR DOGS**

### **Narcotics Section**

Posted for Public Comment 5/10/07 – 7/8/07. Approved by the membership 8/15/2007.

**Statement of purpose:** To provide recommended guidelines for training, certification and documentation pertaining to **narcotic** detector canines.

#### **1. Initial Training**

- 1.1. Training shall be conducted by a competent, qualified narcotic detector canine trainer from an entity which utilizes a structured curriculum with specific training and learning objectives.
- 1.2. The narcotic detection training course shall include training the canine to detect marijuana, cocaine, heroin, methamphetamine and other substances as required to meet the mission, regional and operational deployment needs.
- 1.3. Training shall include varying quantities (typically varying by factors of ten) of the substances listed in 1.2.
- 1.4. Training shall include exposing the canine to a variety of different types of searches and locations.
- 1.5. The initial training should continue until the narcotic detection canine team is certified or deemed not certifiable.
- 1.6. Initial training shall represent all conditions that could be encountered during a certification process.

#### **2. Canine/Handler Team Certification**

- 2.1. Parameters of test
  - 2.1.1. The narcotic detector canine shall be tested on the substance odors for which it is trained.
  - 2.1.2. All odors for which the dog will be certified must be tested.
  - 2.1.3. The test shall be designed to resemble normal operational searches by using vehicles, buildings, parcels, luggage, etc. to conceal substances.
  - 2.1.4. Certification testing shall be conducted with no less than 5 grams of the actual substance to be detected.
  - 2.1.5. The test shall include a variety of searches designed to evaluate the canine's ability to recognize the odor, respond to the odor and the handler's ability to recognize this response.
  - 2.1.6. The test shall include scenarios resembling searches within the normal operational environment and include at least 3 different searches (see categories below) designed to evaluate the canine's ability to recognize

the odor, respond to the odor and the handler's ability to recognize this response. Not all odors will necessarily be in each type of search and some search areas shall contain no odors (blanks). Types of searches and suggested maximum search times are listed below:

- 2.1.6.1. Parcels searches with 2-6 articles per odor should take 1 minute to search 2-6 parcels.
  - 2.1.6.2. Baggage searches with 2-6 articles per odor should take 1 minute to search 2-6 bags.
  - 2.1.6.3. Person/crowd searches: as permitted by state and federal law, with 2 persons per odor should take 1 minute per person.
  - 2.1.6.4. Building/room searches (the room may contain zero to three aids depending upon the size and environmental conditions. Rooms that are 18.6 – 111.5 m<sup>2</sup> (200-1200 sq. ft.) with furniture should take 1.5 minute per 9.3 m<sup>2</sup>/ 28 m<sup>3</sup> (100 sq.ft./1000 cu. ft.).
  - 2.1.6.5. Motor vehicle searches including interiors and exteriors (3-6 vehicles per search using passenger cars and trucks, 3 minutes per vehicle).
  - 2.1.6.6. Open area/perimeter searches of 93 – 930 m<sup>2</sup> (1,000-10,000 sq. ft.) per search, should take 1-3 minutes per 93 m<sup>2</sup> (1000 sq. ft.).
  - 2.1.7. The dog/handler team must demonstrate the ability to detect all trained odors.
  - 2.1.8. For successful certification, the canine/handler team shall achieve at least a 90% confirmed alert rate for certification, and a false alert rate not to exceed 10%, as defined and calculated in SC 2.
  - 2.1.9. Excessive handler errors, as defined by the certifying authority, shall result in failure of the team.
  - 2.1.10. Disqualification due to time should be left to the discretion of the certifying authority. The test should end if the certifying authority determines that the dog/handler team is no longer working (e.g., Observable behaviors to be added in final annotated version).
- 2.2. Use of distracters
    - 2.2.1. Natural distracters are normally present in the testing area.
    - 2.2.2. Placement of distracters in the certification area is required when no natural distracters are present.
    - 2.2.3. Care must be taken not to place artificial distractions in a manner that causes contamination of the test substance odor.
  - 2.3. Proofing/Verification of certification area should be conducted prior to the actual certification using a certified canine team who is not participating in the certification. This practice is designed to show that the trained odor is present in the target locations and nowhere else, including the blank areas.
  - 2.4. Certification should not be conducted in areas in which narcotics detection canine teams have recently trained or certified.

- 2.5. Certification for narcotic detection dogs should be comprised of a comprehensive assessment, which includes elements of odor recognition as outlined in SWGDOG General Guidelines.
  - 2.5.1. Odor recognition assessment
    - 2.5.1.1. The handler shall be advised of the parameters of the search.
    - 2.5.1.2. The handler shall know the number of target objects, but not the placement.
    - 2.5.1.3. The evaluating official shall know the desired outcome of the search.
  - 2.5.2. Comprehensive assessment
    - 2.5.2.1. The handler shall be advised of the parameters of the search, yet shall not know the desired outcome.
    - 2.5.2.2. The handler shall not know the number or placement of the target objects.
    - 2.5.2.3. The evaluating official shall know the desired outcome of the search.
    - 2.5.2.4. The assessments shall include a blank search.
  - 2.5.3. Double-blind assessment
    - 2.5.3.1. No participant or observer present at the assessment location(s) shall be aware of the parameters of the search.

### **3. Maintenance Training**

- 3.1. The canine team shall conduct regular objective-oriented training sufficient to maintain operational proficiency on all trained odors.
- 3.2. Training is meant to sustain and enhance the performance of the handler, canine and the canine team.
- 3.3. In training, situations are purposely sought where the capabilities of the canine team is challenged within the operational environments for which the team may be deployed.
- 3.4. Teams shall be challenged to improve and enhance their abilities.
- 3.5. Training shall include:
  - 3.5.1. A variety of locations.
  - 3.5.2. A variety of training material amounts (no less than 1 gram).
  - 3.5.3. A variety of heights, depths, containers and distraction odors.
  - 3.5.4. Various types of searches (e.g., vehicles, building, parcels, luggage, blank areas and persons depending on local, state and federal law).
  - 3.5.5. A varied duration of set times.
  - 3.5.6. Varied duration of search times.

- 3.6. The canine team shall spend an average of 4 hours per week in routine training to maintain the proficiency level of the team.
- 3.7. Routine training, conducted by the handler to maintain the dog's proficiency and to reinforce odor recognition, is an acceptable form of training but shall be combined with supervised training on a regular basis. Supervised Training is conducted by a qualified trainer other than the handler, in order to improve performance, identify and correct training deficiencies. Performing proficiency assessments is considered a best practice.

#### **4. Training Materials**

- 4.1. The training materials shall be packaged in a manner safe for the canine throughout training.
- 4.2. The training materials shall be maintained in a manner to avoid loss or destruction
- 4.3. Materials shall be stored in a manner that prevents odor contamination or physical contamination, i.e., the materials shall be stored in separate labeled containers.
- 4.4. Training materials shall be obtained from a reliable and documented source such as the DEA lab.
- 4.5. Required security procedures pertaining to the training materials shall be followed according to local, state and federal laws.
- 4.6. Required substance registrations shall be current and accurate records maintained.
- 4.7. Training materials shall be replaced every 1-3 years, sooner if contaminated or compromised.
- 4.8. Disposal/destruction of the training aids shall follow local, state and federal guidelines.

#### **5. Documentation**

- 5.1. The handler, department and organization shall maintain training records, certification records, proficiency assessments and seizure records.
- 5.2. Deployment/utilization records may be kept in accordance with agency policy.

- 5.3. Records shall contain discipline-related specifics.
- 5.4. Records shall be standardized within the department, agency and/or organization.
- 5.5. Documents shall be retained in accordance with state and federal and unit guidelines. Records shall contain but are not limited to the following:
  - 5.5.1. Training records kept by the handler and/or the department shall contain the following information:
    - 5.5.1.1. Date training held.
    - 5.5.1.2. Name of individual conducting training.
    - 5.5.1.3. Type and amount of training aid used.
    - 5.5.1.4. Length of training session
    - 5.5.1.5. Location of training.
    - 5.5.1.6. Type of training (e.g., vehicle, luggage, building, open area).
    - 5.5.1.7. Number of searches and results.
    - 5.5.1.8. Name of canine and handler.
  - 5.5.2. Seizure records kept by the handler shall include:
    - 5.5.2.1. Date of seizure.
    - 5.5.2.2. Location of seizure.
    - 5.5.2.3. Length of search
    - 5.5.2.4. Description of activity.
    - 5.5.2.5. Results of search
    - 5.5.2.6. Name of canine and handler.
    - 5.5.2.7. Non-productive responses (i.e., dog alerts with no detectable or seizable amounts of narcotics).
    - 5.5.2.8. Seizure substance type.
      - 5.5.2.8.1. Narcotics.
      - 5.5.2.8.2. Currency.
      - 5.5.2.8.3. Currency non-seizures.
    - 5.5.2.9. Other information as required by the organization and/or agency.
  - 5.5.3. Certification records kept by the certifying authority and handler shall include the following information.
    - 5.5.3.1. Date team was certified.
    - 5.5.3.2. Certification authority i.e., agency or professional organization.
    - 5.5.3.3. Name of certified individual.
    - 5.5.3.4. Type of materials.
    - 5.5.3.5. Location of certification
    - 5.5.3.6. Name of canine and handler.
- 5.6. Deployment/utilization/seizure information shall be kept separate from training and testing information
- 5.7. Supervisory review is recommended.

5.8. Digital format is recommended to facilitate compiling and analyzing data.

**6. Use of records/documentation**

- 6.1. Reliability of the canine team shall be based upon the results of certification and proficiency assessments.
- 6.2. Training records do not necessarily reflect reliability of the team.
- 6.3. Training records are necessary to illustrate the type and amount of training that the team has experienced before and after certification.
- 6.4. Confirmed operational outcomes may be used to determine capability.
- 6.5. Unconfirmed operational outcomes shall not be used to determine capability in that they do not correctly evaluate a canine team's proficiency.

## **Appendix D**



**NOTICE OF RIGHTS – CONSENT SEARCH**

If an officer asks for your permission to conduct a search during a traffic stop:

- **YOU HAVE THE RIGHT TO REFUSE A SEARCH.**
- If you allow an officer to search your vehicle, your property, or yourself, you may withdraw your consent to the search at any time.
- If you give your consent today, it cannot be used to conduct a search at a later time.
- If you agree to a search of your vehicle and/or property, the [insert agency name] is required to pay you for the costs to repair any damage caused by the search if the search does not result in the seizure of contraband. In order to receive compensation, you must provide written notice of any damage to the [insert agency name] at [insert address to send notice].

I, \_\_\_\_\_, have received notice of my rights and

\_\_\_ I CONSENT TO A SEARCH.

Driver's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

**OR**

\_\_\_ I DO NOT CONSENT TO A SEARCH.

Driver's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

Driver's Name: \_\_\_\_\_

Driver's License No.: \_\_\_\_\_

Vehicle License No.: \_\_\_\_\_

Officer's Signature: \_\_\_\_\_ Date: \_\_\_\_\_

*Certifying that you orally explained and obtained consent in addition to the submission of this form.*

Officer's Name (printed): \_\_\_\_\_ ID# \_\_\_\_\_

Agency of Affiliation: \_\_\_\_\_

**Appendix D**  
**Spanish Translation**

**AVISO DE DERECHOS – CONSENTIMIENTO PARA UN REGISTRO**

Si un oficial le pide permiso para realizar un registro durante una parada de tráfico:

- **USTED TIENE EL DERECHO DE NEGARSE A SER REGISTRADO.**
- Si usted deja que un oficial revise su vehículo, sus bienes, o su persona, puede revocar su consentimiento en cualquier momento.
- Si da consentimiento hoy, éste no se puede usar para realizar un registro en otro momento.
- Si accede a un registro de su vehículo y/o sus bienes, [inserte el nombre de la agencia] está obligada a pagar todos los costos necesarios para reparar cualquier tipo de daño causado por el registro si este no resulta en la incautación de contenedor. Para solicitar esta indemnización, hay que redactar un informe escrito detallando cualquier tipo de daño y entregarlo al [inserte el nombre de la agencia], ubicada en [inserte dirección de la agencia donde hay que enviar el informe].

Yo, \_\_\_\_\_, he recibido un aviso sobre mis derechos y

\_\_\_\_\_ **CONSIENTO A SER REGISTRADO.**

Firma del/de la conductor/a: \_\_\_\_\_ Fecha: \_\_\_\_\_

**O**

\_\_\_\_\_ **NO CONSIENTO A SER REGISTRADO.**

Firma del/de la conductor/a: \_\_\_\_\_ Fecha: \_\_\_\_\_

Nombre del/de la conductor/a: \_\_\_\_\_

Número de licencia de conductor: \_\_\_\_\_

Número de licencia del vehículo: \_\_\_\_\_

Firma del oficial: \_\_\_\_\_ Fecha: \_\_\_\_\_

*Certificando que usted explicó verbalmente y obtuvo consentimiento además de entregar este formulario.*

Nombre del oficial (letra de imprenta): \_\_\_\_\_ # de Cédula \_\_\_\_\_

Agencia de afiliación: \_\_\_\_\_

## **Appendix E**

**NOTICE OF RIGHTS**  
**FOR PROPERTY DAMAGE INCIDENT TO SEARCH**

A police officer has determined that there is reasonable suspicion of criminal activity requiring a search of your vehicle and/or property.

The [insert agency name] is required to pay you for the costs to repair any damage caused by the search if the search does not result in the seizure of contraband.

In order to receive compensation, you must provide written notice of any damage to [insert name of the agency] at [insert appropriate address].

You are entitled to receive reimbursement within 30 days of a determination that the [insert agency name] is liable for damaging your vehicle and/or property.

[Translate to Spanish.]

**AVISO SOBRE DERECHOS**  
**A INDEMNIFICACIÓN POR DAÑOS A BIENES CAUSADOS DURANTE**  
**UN REGISTRO**

Un oficial de policía ha determinado que existe una sospecha razonable de actividad criminal, la cual requiere un registro de su vehículo y/o sus bienes.

La agencia [insertar el nombre de la agencia] está obligada a pagar los costos necesarios para reparar cualquier daño causado por el registro si el registro no resulta en la incautación de contrabando.

Para recibir esta indemnización, usted debe proveer un informe escrito del daño causado a [insertar el nombre de la agencia], ubicada en [insertar dirección correspondiente].

Usted tiene el derecho a recibir esta indemnización dentro de un plazo de 30 días desde el momento que se establezca que [insertar el nombre de la agencia] es responsable de dañar su vehículo y/o sus bienes.

## **Appendix F**

**NOTICE OF SEIZURE OF PROPERTY AND POSSIBLE FORFEITURE**

This is to serve as official notice that the items of property listed below have been seized from your possession, and may potentially be subject to forfeiture under Texas Code of Criminal Procedure (“TXCCP”) Art. 59.03.

**An officer may seize your property ONLY if the officer has reason to believe it has been used in, is intended to be used in, or was gained from the commission of a criminal offense. TXCCP Art. 59.01(2). The officer must explain to you the basis for seizing your property.**

- Before seizing your property, an officer must provide ALL the information included in this form for each and every item of property seized (including currency) before you review and sign this notice.
- You are entitled to a formal notice that forfeiture proceedings are being instituted against you within 30 days of the seizure. TXCCP Art. 59.04.
  - An officer cannot ask you to waive formal notice unless you are represented by an attorney.
  - An officer cannot ask you to waive any interest in any asset forfeiture case in exchange for an agreement not to prosecute you for a criminal violation unless a judge is present.
  - An officer cannot accept a voluntary waiver from you (if you are not represented by an attorney) until 30 days have passed after proper service of a notice of forfeiture.
- State law requires that your seized property be stored safely pending a final forfeiture verdict. If it is determined that seizure was improper, you are entitled to have your property returned to you within 30 business days of a decision not to prosecute a forfeiture claim or a forfeiture verdict in your favor, whichever occurs first.

Description of Item (including quantity)	Location of item upon seizure	Basis for seizure	Was the item seized for evidence or for forfeiture?

\_\_\_\_\_  
Name of property owner

\_\_\_\_\_  
Seizing officer’s name and identification #

\_\_\_\_\_  
Date

\_\_\_\_\_  
Seizing officer’s signature

**Appendix F**  
**Spanish Translation**



**AVISO DE INCAUTACIÓN DE BIENES Y SU POSIBLE DECOMISO**

Éste sirve como aviso oficial de que los bienes detallados abajo han sido incautados de su posesión, y podrían ser sujetos a un decomiso bajo el Código de Procedimiento Criminal de Texas (“TXCCP”) Art. 59.03.

**Un oficial puede incautar sus bienes SÓLO si el oficial tiene razón para creer que han sido usados en, están destinados para ser usados en, o fueron adquiridos en la comisión de un delito. TXCCP Art. 59.01(2). El oficial debe explicarle la razón por la cual ha incautado sus bienes.**

- Antes de incautar sus bienes, un oficial debe proveer TODA la información contenida en este formulario para cada uno de sus bienes incautados (incluyendo dinero) antes de pedir que usted revise y firme este aviso.
- Usted tiene el derecho a un aviso formal de que un procedimiento de decomiso será aplicado contra usted dentro de un plazo de 30 días del momento de la incautación. TXCCP Art. 59.04.
  - Un oficial no le puede pedir renunciar a su derecho a un aviso formal a menos que usted esté representado legalmente por un/a abogado/a.
  - Un oficial no le puede pedir que renuncie a ningún interés en ningún caso de decomiso de bienes a cambio de un acuerdo de que no será procesado legalmente por una infracción penal a menos que esté presente un/a juez/a.
  - Un oficial no puede recibir una renuncia voluntaria de sus derechos (si usted no está representado por un/a abogado/a) hasta que hayan pasado 30 días después de que haya sido presentado, de manera adecuada, con la notificación de decomiso.
- La ley estatal dicta que sus bienes incautados deben ser guardados de manera segura hasta que se reciba una decisión final sobre su decomiso. Si se decide que la incautación fue ilegal, tiene derecho a que se le devuelvan sus pertenencias dentro de 30 días hábiles desde que se decida no continuar con el procedimiento de decomiso o desde una decisión judicial en favor suyo, lo que suceda primero.

Descripción del artículo (incluyendo la cantidad)	Ubicación del artículo cuando fue incautado	Razón por la incautación	Fue confiscado el artículo como evidencia o para ser decomisado

\_\_\_\_\_  
Nombre del dueño de los bienes

\_\_\_\_\_  
Nombre y numero de identificación del oficial que realizó la incautación

\_\_\_\_\_  
Fecha Firm

\_\_\_\_\_  
a del oficial que realizó la incautación

## **NOTICE OF PROPOSED CONSENT DECREE AND HEARING IN A CLASS ACTION**

### ***Morrow v. City of Tenaha*, No. 2-08-cv-288-TJW, in the United States District Court for the Eastern District of Texas, Marshall Division**

#### **Please Read this Legal Notice – It May Affect Your Rights**

**TO:** All persons who (1) are, or appear to be, members of racial or ethnic minority groups and those in their company, and; (2) were, or will be, traveling in, through, or near Tenaha at any time after November 1, 2006, and; (3) were, or are, subject to being stopped by one or more Defendant for an alleged traffic violation.

You are hereby notified that a hearing has been scheduled for [insert day], 2012, at [time], before the Honorable Rodney Gilstrap of the U.S. District Court for the Eastern District of Texas, 100 East Houston Street, Marshall, Texas, for consideration of a proposed Consent Decree of the claims that have been brought on your behalf in this lawsuit.

#### **THE PURPOSE OF THIS NOTICE:**

This Notice has three purposes: (1) to tell you about the proposed Consent Decree and the fairness hearing; (2) to tell you how to obtain more information, including a copy of the full proposed Consent Decree; and (3) to explain how you may object to the proposed Consent Decree if you disagree with it.

#### **THE BASIS FOR THIS CASE:**

A class action lawsuit alleged that the City of Tenaha Deputy City Marshal, the City of Tenaha Mayor, the Shelby County District Attorney, the Shelby County District Attorney Investigator, and the Shelby County Precinct 4 Constable engaged in an illegal “stop and seize” practice of targeting, stopping, detaining, searching, and often seizing property from individuals who were, or appeared to be, members of a racial or ethnic minority and their passengers. Defendants denied these allegations. The class action lawsuit was settled in August 2012 via a proposed Consent Decree. The Court has preliminarily approved the proposed Consent Decree. The proposed Consent Decree is not an admission of wrongdoing or an indication that any law was violated. The proposed Consent Decree provides remedies for the Plaintiffs’ complaints. The proposed Consent Decree does not address any claims for monetary damages that an individual may have.

#### **A DESCRIPTION OF THE PROPOSED CONSENT DECREE:**

The following description is only a summary of the key points in the proposed Consent Decree. Information on how to obtain a copy of the full proposed Consent Decree is provided after this summary.

- Defendants have agreed to adopt an impartial policing policy.
- Defendants have agreed to make audio and video recordings of all traffic stops and all searches, seizures, detentions, and arrests that result from traffic stops.
- Defendants have agreed to maintain written documentation about the details of all traffic stops.
- Defendants’ police officers will report to dispatch the basis for all traffic stops and will request backup before conducting a search pursuant to a traffic stop.

- Defendants have agreed that traffic stops are presumed to take 15 minutes or less.
- Defendants have agreed that they do not intend to use canines during traffic stops and that if any Defendant wants to use canines, that Defendant will first notify Plaintiffs' Counsel.
- If a Defendant uses a canine, a canine sniff will only be allowed when a police officer has reasonable suspicion of criminal activity. All canines and canine handlers must meet certification and training requirements and must undergo periodic reviews.
- Defendants have agreed to provide written notice to any person before a canine sniff is used at a traffic stop and before seeking consent to conduct a search. A police officer must provide motorists with a written inventory of all property seized. A police officer cannot ask a motorist to waive his or her interests in property, and a waiver in an individual's interest in property can only be obtained before a judge or after the individual is represented by an attorney.
- The responsible defendant shall pay a person for the full costs of property damage resulting from a search, unless the search results in the discovery of contraband.
- Defendants have agreed that any evidence gathered in a way that does not comply with the Consent Decree will be presumed to be inadmissible as evidence in any court or in any proceeding adverse to the person stopped.
- Defendants agree to track all revenue from and donations of asset forfeitures incident to traffic stops. All asset forfeiture revenue incident to traffic stops will be donated to non-profit organizations, used for the audio and video equipment required by the Consent Decree, or used for training to meet the requirements of the Consent Decree.
- Defendants have agreed to undergo training that covers compliance with racial profiling laws, search and seizure law, and the provisions set forth in the Consent Decree.
- Defendants have agreed to institute internal review procedures every quarter to ensure compliance with the Consent Decree.
- An impartial Monitor will address Defendants' compliance with the Consent Decree and all relevant laws.
- The Consent Decree provides that the certification of the class in this case is not admissible for any purpose in any other litigation, and that the Consent Decree may not be introduced as evidence for any purpose in any other proceeding other than the enforcement of the Consent Decree.
- The Consent Decree resolves all claims by Plaintiffs' Counsel for an award of attorneys' fees.

**FOR FURTHER INFORMATION:**

This Notice includes a summary of the proposed Consent Decree. To understand it fully, you should read the entire Consent Decree. Copies of the proposed Consent Decree may be obtained from the ACLU's website: [\[insert link\]](#).

**PROCEDURES FOR AGREEMENT OR OBJECTION:**

IF YOU AGREE with the proposed Consent Decree, you do not need to do anything at this time. If you wish to attend, you may be present at the public hearing on the proposed Consent Decree as stated above.

IF YOU DISAGREE with the proposed Consent Decree, you have a right to object to it and to the dismissal of the remaining claims in the lawsuit. Your objections will be considered by the Court as it reviews the proposed Consent Decree ONLY IF you follow these procedures:

1. Objections must be filed in writing by mail with the Clerk of the United States District Court for the Eastern District of Texas, 100 East Houston Street, Room 125, Marshall, Texas 75670. All objections must contain the following information:
  - a. Name, address, and telephone number of the person filing the objection.
  - b. A statement of the reasons for the objection.
  - c. A statement that copies of the objections have also been sent to the attorneys listed at the end of this Notice.
  - d. A statement identifying any documents that you will seek to introduce at the Fairness Hearing and copies of the same, and the names, addresses, and telephone numbers for any witnesses who you will seek to introduce at the Fairness Hearing.
2. You must also send copies of your objections to all attorneys listed at the end of this notice.
3. The deadline for receipt of written objections by the Court and the attorneys listed below is [add date: four weeks from mailing of Notice], 2012. Objections filed by mail must be postmarked on or before [add date], 2012 to be considered timely. Objections filed or mailed after the above date will not be considered. Class members who fail to lodge objections on or before [add date], 2012, will not be permitted to testify at the fairness hearing on [add date], 2012.
4. No later than [add date], 2012, the attorneys for Plaintiffs and Defendants shall file and serve responses, if any, to objections they timely receive from persons opposed to the proposed Consent Decree.

**ATTORNEYS' NAMES AND ADDRESSES FOR PLAINTIFFS AND DEFENDANTS:**

For Plaintiffs:

Morrow Class Settlement  
c/o Timothy Borne Garrigan, Esq.  
Stuckey Garrigan & Castetter  
2803 North Street  
PO Box 631902  
Nacogdoches, TX 75963-1902  
(936) 560-9578 (fax)

Morrow Class Settlement  
c/o Elora Mukherjee, Esq.  
American Civil Liberties Union  
125 Broad Street  
New York, NY 10004

For Defendants:

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Chad Carlton Rook  
Flowers Davis LLP  
1021 E.S.E. Loop 323  
Suite 200  
Tyler, TX 75701

Galen Robert Alderman, Jr.  
Brent Lee Watkins  
Zeleskey Law Firm, PLLC  
1616 S. Chestnut  
Lufkin, Texas 75902

Walter Thomas Henson  
Ramey & Flock  
100 E Ferguson  
Suite 500  
Tyler, TX 75702-0629

**KIP GLASSCOCK, P.C.**

*Mediator and Consulting Attorney*

550 Fannin Street, Suite 1350  
Beaumont, Texas 77701

Office: (409) 833-8822  
Fax: (409) 838-4666

Email:  
kipglasscock@hotmail.com

**MEDIATOR CONFIDENTIALITY PROTECTED**  
**MEMORANDUM**

June 15, 2012

To: Counsel List  
*via e-mail*

Re: Civil Action No. 2:08-CV-00288-TJW; *James Morrow, et al, v. City of Tenaha Deputy City Marshall, et al*; In the United States District Court for the Eastern District of Texas, Marshall Division

Dear Counsel,

I appreciated getting to visit with counsel about the case again. As you know, I've kept abreast of developments on the case with periodic phone calls and have been copied with e-filings through the court. Congratulations for your efforts in the settlement conferences which seem productive. To keep things moving after visiting with both sides, may I suggest the following as a mediator's three part proposal.

Part one: \$520,000 in full settlement on the amount of Plaintiffs' attorney fees. Deadline for reaching such agreement on or before 4:00 pm CDT Wednesday, June 20, 2012. Part two: If parties reach agreement on attorney fees, they will **make best efforts** to negotiate an agreement for **an appropriate** injunctive/consent decree, roughly following terms outlined in Plaintiffs' and Defendants' correspondence of May/June 2012. Deadline for reaching such agreement on or before 4:00 pm CDT **on the fourteenth (14<sup>th</sup>) day following the date of the agreement to part one.** Part three: **The Parties will make their best efforts to** get approval under Rule 23(e). **The Defendants will be responsible for compliance with, and costs of, any Court directives for approval. Defendants have represented that** costs of notices to be incurred by Defendants **will** not exceed \$30,000.

Summarizing, the parties will let the mediator know of their acceptance or rejection of the attorney fees proposal on or before 4:00 p.m. CDT, Wednesday June 20, 2012. If all parties are in agreement at that time, they will be so advised and proceed to finalize the injunctive/consent decree language by 4:00 pm CDT June 27, 2012. If unable to agree, the parties will only be advised that this proposal was unsuccessful. A party who does not accept this proposal will not be able to determine whether any other party has accepted it.

The provision for payment of Plaintiffs' counsel's future (as of this date) work on this case anticipates that future work will include only that reasonably necessary to negotiate on, and agree to, submissions regarding injunctive relief and Rule 23(e) approval. Other efforts by Plaintiffs' Counsel are not covered by the provision and remain billable and/or subject to determination by the Court. In negotiating and drafting documents necessary for settlement and closing of the case, all counsel shall be respectful of all counsel's time and shall use best efforts to work efficiently moving forward. Counsel for Defendants shall minimize the use of Plaintiffs' counsel's time, performing as much of the effort as reasonably possible themselves without unreasonably requiring additional or avoidable effort by Plaintiffs' counsel. Violations of this portion of the agreement may be brought before the Court for resolution.

Respectfully,  
*/s/Kip Glasscock*  
Kip Glasscock

KG/dw

Counsel List:

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Mr. Chad C. Rook  
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Mr. Timothy B. Garrigan  
tim2@sgclaw.org

Mr. David J. Guillory  
david.guillory@lonestarlegal.org

Ms. Stephanie K. Stephens  
stephens\_law@att.net

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

<b>JAMES MORROW, et al. and a</b>	:	
<b>Certified Class of Other Similarly</b>	:	
<b>Situated Persons,</b>	:	
<b>Plaintiffs</b>	:	
:		
v.	:	<b>Civil Action No. 2:08-cv-288-JRG</b>
	:	<b>Judge Gilstrap</b>
<b>CITY OF TENAHA DEPUTY</b>	:	
<b>CITY MARSHAL BARRY</b>	:	
<b>WASHINGTON, in his individual</b>	:	
<b>and official capacity, et al.,</b>	:	
<b>Defendants</b>	:	

**[PROPOSED] ORDER GRANTING PRELIMINARY APPROVAL OF THE  
CLASS ACTION CONSENT DECREE, APPROVAL OF NOTICE,  
AND FAIRNESS HEARING**

Before the Court is the Joint Motion for Preliminary Approval of the Class Action Consent Decree, Approval of Notice, and Fairness Hearing (the “Motion”) filed by Plaintiffs James Morrow, Javier Flores and William Parsons, the Court-designated class representatives, and the class certified by this Court’s Order dated August 29, 2011 (collectively, “Plaintiffs”), and Defendants (collectively, the “Settling Parties”). Whereas the Settling Parties have reached a proposed Consent Decree to settle the case, subject to approval of the Court pursuant to Federal Rule of Civil Procedure 23(e); the Court has read and considered the proposed Consent Decree signed by the Settling Parties, which sets forth the terms and conditions of the proposed settlement of the case; and the Settling Parties have consented to the entry of this Order;

The Court has decided to GRANT the Motion.

**IT IS THEREFORE ORDERED THAT:**



1. This Order (the “Preliminary Approval Order”) incorporates by reference the definitions in the proposed Consent Decree, and all terms used herein have the same meanings as set forth in that Consent Decree, unless otherwise defined herein.
2. The terms of the Consent Decree are preliminarily approved. The Court finds that the Consent Decree has no obvious deficiencies, is within the bounds of a reasonable settlement, and that the amount of attorneys’ fees is within the bounds of a reasonable settlement.
3. The Court approves, as to form and content, the Notice to the Certified Class (“Notice”), attached as Exhibit 2 to the Motion.
4. Within [REDACTED] business days of the date of this Order, Defendants shall ensure that the Notice is translated in Spanish by a certified translator.
5. Within [REDACTED] business days of the date of this Order, Defendants shall ensure that the Notice (in both English and Spanish) is mailed to members of the Certified Class.
6. Within [REDACTED] business days of the date of this Order, Defendants shall prominently display the Notice (in both English and Spanish) at the Tenaha City Office, located at 122 North Center Street, Tenaha, Texas, and the Shelby County Courthouse, located at 200 San Augustin Street, Center, Texas.
7. Within [REDACTED] business days of the date of this Order, Plaintiffs shall ensure that the Notice (in both English and Spanish) is distributed to local community groups and disseminated to publications that may have an interest in the settlement of the case, and posted on the website for the American Civil Liberties Union (ACLU).
8. The Court will hold a Final Settlement Hearing (“Fairness Hearing”) on [REDACTED], 2012 at [REDACTED] to determine whether the terms of the Consent Decree are fair,

reasonable, and adequate and should be approved by the Court, and to rule upon such other matters as the Court may deem appropriate.

9. Any member of the Certified Class may appear at the Fairness Hearing and show cause why the Consent Decree should not be approved as fair, reasonable, and adequate; provided, however, that no member of the Certified Class shall be entitled to contest the approval of the terms and conditions of the Consent Decree unless he or she first submits written objections in accordance with the instructions contained in the Notice.
10. Any member of the Certified Class who intends to make an appearance at the Fairness Hearing, either in person or through counsel at that person's expense, must deliver to Plaintiffs' Counsel and Defendants' Counsel and file with the Court, no later than five (5) business days before the Fairness Hearing, a notice of intention to appear; a statement identifying any documents that the member of the Certified Class will seek to introduce at the Fairness Hearing and copies of the same; and the names, addresses, and phone numbers for any witnesses that the member of the Certified Class will seek to call at the Fairness Hearing.
11. Any member of the Certified Class who fails to comply with paragraphs 9 and 10 shall waive and forfeit any and all rights that he or she may have to appear separately or object, or take any appeals of the orders or judgment in this action, and shall be bound by all the terms of this Consent Decree, and any other orders of the Court, upon final approval of the Consent Decree.
12. The Court may continue or adjourn the Fairness Hearing from time to time and without further notice to the Certified Class. The Court reserves the right to approve or modify

the Consent Decree at any time as may be consented to by the Settling Parties and without further notice to the Certified Class.

13. Without further order of the Court, the Settling Parties may agree to reasonable extensions of time to carry out any of the provisions of this Preliminary Approval Order.

**SO ORDERED**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

**JAMES MORROW, et al. and a** :  
**Certified Class of Other Similarly** :  
**Situated Persons,** :  
**Plaintiffs** :

v. :  
:

**Civil Action No. 2:08-cv-288-JRG  
Judge Gilstrap**

**CITY OF TENAHA DEPUTY** :  
**CITY MARSHAL BARRY** :  
**WASHINGTON, in his individual** :  
**and official capacity, et al.,** :  
**Defendants** :

**CERTIFICATE OF SERVICE**

I certify that on the 6th day of August, 2012, I served copies of all the foregoing documents on all counsel of record via the Electronic Court Filing System.

/s/

Elora Mukherjee  
Elora Mukherjee

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

**JAMES MORROW, et al. and a** :  
**Certified Class of Other Similarly** :  
**Situated Persons,** :  
**Plaintiffs** :

v. :  
:

**Civil Action No. 2:08-cv-288-JRG  
Judge Gilstrap**

**CITY OF TENAHA DEPUTY** :  
**CITY MARSHAL BARRY** :  
**WASHINGTON, in his individual** :  
**and official capacity, et al.,** :  
**Defendants** :

**CERTIFICATE OF CONFERENCE**

Counsel for all parties have conferred in this matter in compliance with Local Rule CV-7(h) and are in agreement that the court action requested is appropriate. The Joint Motion for Preliminary Approval of the Class Action Consent Decree, Approval of Notice, and Fairness Hearing is filed jointly and unopposed.

Dated: August 6, 2012

**Counsel for Plaintiffs  
and Plaintiffs' Class**

**Counsel for Defendants**

/s/ Timothy Borne Garrigan  
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/s/ David Joseph Guillory  
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/s/ Elora Mukherjee  
Elora Mukherjee  
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/s/ Stephanie Kay Stephens  
Stephanie Kay Stephens  
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/s/ Brent Lee Watkins  
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*Attorneys for Defendant City of Tenaha*

/s/ Walter Thomas Henson  
Walter Thomas Henson  
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*Attorneys for Defendant Lynda K. Russell  
and the Shelby County District Attorney's  
Office*