14-2829(L)

14-2834(CON), 14-2848 (CON)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DETECTIVES' ENDOWMENT ASSOCIATION, INC., LIEUTENANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., NYPD CAPTAINS ENDOWMENT ASSOCIATION, PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., SERGEANTS BENEVOLENT ASSOCIATION,

Appellants - Putative Intervenors,

(For Continuation of Caption See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES CITY OF NEW YORK, COMMISSIONER BRATTON, MAYOR DE BLASIO, POLICE OFFICERS BIASINI, LOMANGINO, KOCH, RAMDEEN, BERMUDEZ, AND SANTIAGO

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September 24, 2014

v.

DAVID FLOYD, LALIT CLARKSON, DEON DENNIS, DAVID OURLICHT, JAENEAN LIGON, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, J.G., FAWN BRACY, INDIVIDUALLY AND ON BEHALF OF HER MINOR SON, W.B., A.O., BY HIS PARENT DINAH ADAMES, JACQUELINE YATES, LETITIA LEDAN, ROSHEA JOHNSON, KIERON JOHNSON, JOVAN JEFFERSON, ABDULLAH TURNER, FERNANDO MORONTA, CHARLES BRADLEY, INDIVIDUALLY AND ON BEHALF OF A CLASS OF ALL OTHERS SIMILARLY SITUATED,

Plaintiffs - Appellees,

v.

THE CITY OF NEW YORK, COMMISSIONER WILLIAM J. BRATTON*, NEW YORK CITY POLICE, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY, MAYOR BILL DE BLASIO*, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY, NEW YORK CITY POLICE OFFICER RODRIGUEZ, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, NEW YORK CITY POLICE OFFICER GOODMAN, IN HIS OFFICIAL AND INDIVIDUAL CAPACITY, POLICE OFFICER JANE DOE, NEW YORK CITY, IN HER OFFICIAL AND INDIVIDUAL CAPACITY, NEW YORK CITY POLICE OFFICERS MICHAEL COUSIN HAYES, SHIELD #3487, IN HIS INDIVIDUAL CAPACITY, NEW YORK CITY POLICE OFFICER ANGELICA SALMERON, SHIELD #7116, IN HER INDIVIDUAL CAPACITY, LUIS PICHARDO, SHIELD #00794, IN HIS INDIVIDUAL CAPACITY, JOHN DOES, NEW YORK CITY, #1 THROUGH #11, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITY, NEW YORK CITY POLICE SERGEANT JAMES KELLY, SHIELD #92145, IN HIS INDIVIDUAL CAPACITY, NEW YORK CITY POLICE OFFICER CORMAC JOYCE, SHIELD #31274, IN HIS INDIVIDUAL CAPACITY, NEW YORK POLICE OFFICERS ERIC HERNANDEZ, SHIELD #15957, IN HIS INDIVIDUAL CAPACITY, NEW YORK CITY POLICE OFFICER CHRISTOPHER MORAN, IN HIS INDIVIDUAL CAPACITY, POLICE OFFICER JOHNNY BLASINI, POLICE OFFICER GREGORY LOMANGINO, POLICE OFFICER JOSEPH KOCH, POLICE OFFICER KIERON RAMDEEN, JOSEPH BERMUDEZ, POLICE OFFICER MIGUEL SANTIAGO, POLICE OFFICERS JOHN DOES 1-12,

Defendants - Appellees.

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*Pursuant to Federal Rules of Appellate Procedure 43(c)(2), New York City Police Commissioner William J. Bratton and New York City Mayor Bill de Blasio are automatically substituted for the former Commissioner and former Mayor in this case.

TABLE OF CONTENTS

Page

Page

Page

TABLE OF AUTHORITIES

Pages

CASES

STATUTES

OTHER AUTHORITIES

RULES

PRELIMINARY STATEMENT

The Mayor, Corporation Counsel, and Police Commissioner have determined that the City's interests are best served by reform of the NYPD's stop-and-frisk practices and discontinuance of the City's previously filed appeals in these cases. Reasonable people may disagree with that judgment, but one of the important consequences of elections is to determine who will make such decisions on behalf of the City. The present appeals concern the efforts of five police unions to intervene for the purpose of prolonging a legal fight that the City's duly elected and appointed officials have decided to press no further.

The United States District Court for the Southern District of New York (Torres, J.) exercised sound discretion in denying the unions' motion to intervene. The district court's intervention ruling followed this Court's grant of a limited remand in the City's appeals to allow the parties to pursue a resolution of the litigation. After the remand, the district court also granted a joint request of the City and the plaintiffs to modify the existing remedial order to limit the duration of a court-appointed independent monitor's supervision of the NYPD's stop-and-frisk practices. With that modification to the remedial order, the City would like to move forward with reforming the NYPD's practices, rather than continuing to litigate issues surrounding the liability and remedial orders in these cases.

This Court should affirm the denial of the unions' attempts to intervene to press appeals that the City does not wish to pursue. The unions failed to meet the core requirement for intervention as of right under this Circuit's precedents: they did not show that they have any direct, substantial, and legally protectable interest that is implicated by the orders in question. The unions' requests to intervene for the purpose of appealing the district court's earlier orders also fail for the additional reason that the unions have not established that they would have standing to maintain such an appeal.

The *Floyd* liability order adjudicates causes of action against the City alone, not claims against the unions or their members, and the remedial order, too, is directed solely at the City and the NYPD. The unions are mistaken in arguing that the remedial order will impair their collective bargaining rights. That order addresses areas of managerial prerogative: the NYPD's practices in conducting stops and frisks of members of the public and its policies regarding the supervision, training, and discipline of officers as to such practices. These areas are not subject to collective bargaining under well-established state and local law.

Nor is there merit to the unions' argument that the liability order impairs a protectable reputational interest of their members. The liability order focuses on the City's policies and practices, not illegality by particular officers. The district court's statements in the liability order discussing the conduct of a handful of

identified officers provide no basis for the unions to intervene to challenge the findings of liability against the City or the resulting remedial order directed at the City and NYPD alone.

The district court also reasonably denied the unions' distinct requests to intervene for the purpose of participating in the process under which a court-appointed independent monitor will develop supplemental remedies in areas described in the district court's remedial order. Here, too, the unions lack any protectable legal interest that could support intervention as a party in the remedial process, particularly because the remedial order already affords the unions the opportunity to participate in that process.

QUESTIONS PRESENTED

1. Did the district court act within its discretion in denying the unions' motions to intervene for the purpose of pursuing appellate challenges to the district court's liability and remedial rulings as to the NYPD's stop-and-frisk policies and practices, when no legally protectable interest of the unions is implicated by those rulings, and the City's representatives have determined not to pursue appeals challenging those rulings?

2. Did the district court act within its discretion in denying the unions' request to intervene as a party in the remedial process under which a court-

appointed monitor will develop supplemental reforms of the NYPD's stop-and-frisk practices?

STATEMENT OF THE CASE

A. The *Daniels* Litigation

The dispute over the constitutionality of the NYPD's stop-and-frisk practices traces back to *Daniels v. City of New York*, a class action filed in federal district court in 1999. About four years after its filing, *Daniels* was resolved by a stipulation of settlement that was so-ordered by the district court (Joint Appendix ["A"] 1020-37). Under the settlement, the City agreed (1) to conduct stop-and-frisk audits; (2) to provide supervisory training programs for newly promoted sergeants and lieutenants; and (3) to provide all NYPD commands with annual in-service training on the NYPD's policy barring racial profiling (A1025-1027). The City also agreed to maintain its anti-racial profiling policy and to continue recording stop-and-frisk activity in a form known as the UF-250 and producing the resulting data to plaintiffs' counsel (A1027).

No police union ever sought to intervene in *Daniels*. The stipulation of settlement in the case expired by its terms on December 31, 2007 (A1035).

B. The Present Stop-and-Frisk Lawsuits

1. The *Floyd* Action

In January 2008, shortly after the *Daniels* settlement expired, a new group of plaintiffs filed *Floyd v. City of New York*, a class action alleging that the City had a policy and custom of conducting suspicionless and race-based stops and frisks. The *Floyd* plaintiffs sought citywide injunctive relief, including changes to the NYPD's policies and practices governing training, supervision, discipline, and monitoring of officers as to stops-and-frisks and racial profiling.

The plaintiffs also initially asserted claims for money damages against the City and against individual NYPD officers. But in advance of trial, plaintiffs withdrew all claims for money damages and consented to the dismissal of all claims against individual defendants (A503-09). Thereafter, only the plaintiffs' claims against the City for injunctive relief remained in the case. *Floyd*, ECF Nos. 244, 270.

On January 31, 2013, the district court held a joint hearing in *Floyd* and *Ligon v. City of New York*, a related but narrower class action.[1] The court asked the parties to brief the appropriate scope of injunctive relief in the event of a finding of

[1] The joint hearing also involved a third class action, *Davis v. City of New York*, 10 Civ. 699 (S.D.N.Y. filed Jan. 28, 2010), which alleges constitutional violations in the NYPD's trespass enforcement policies as to public housing. There have been no findings of liability or remedial orders entered in *Davis*.

liability (A664-690). In that briefing, the *Floyd* plaintiffs specifically argued that an injunction should include the appointment of an independent monitor and changes to the NYPD's policies and practices regarding training, supervision, monitoring, and discipline of officers as to stop-and-frisk and alleged racial profiling. *Floyd*, ECF No. 268.

2. The *Ligon* Action

The class action captioned *Ligon v. City of New York*, filed in early 2012, involves allegations that the NYPD had a practice of making unlawful stops based on individuals' mere presence in or near buildings enrolled in the "Trespass Affidavit Program" or "TAP," a program under which private building owners give the NYPD permission to patrol the property for criminal activity.

In September 2012, the district court held a hearing on the *Ligon* plaintiffs' motion to preliminarily enjoin the City and NYPD from making suspicionless stops outside TAP buildings in the Bronx. The City introduced evidence of ongoing changes in the NYPD's stop-and-frisk training, including training of sergeants and lieutenants on new procedures contained in certain NYPD interim orders, and requirements that those supervisors, in turn, train patrol officers at the precinct level (*Ligon* Appendix pp. 1348-53, 1368-71, 1887-90, 2258). The NYPD had also developed and begun to implement a new all-day refresher course on Stop, Question and Frisk, which included training on proper preparation of the UF-

250 (*Ligon* Appendix pp. 1228-29). All uniformed personnel would ultimately be required to take the course (*Ligon* Appendix pp. 1545-54, 1612, 1628, 2482-2520).

On January 8, 2013, the district court granted a preliminary injunction in *Ligon*, which the court later amended by order dated February 14, 2013 (*Ligon*, ECF Nos. 96, 105).[2] In its preliminary injunction order, the district court proposed that further injunctive relief in *Ligon* would require revision of the NYPD's trespass enforcement policy as to TAP buildings and revision of its policies as to training and supervision of officers. The Court then consolidated the hearing on permanent remedies in *Ligon* with the remedies proceedings in *Floyd*.

Through the spring and summer of 2013, the parties submitted detailed proposals and counterproposals on appropriate forms of remedial relief (*Ligon*, ECF Nos. 108, 109, 112, 117, 118). In April 2013, the municipal defendants told the district court that, while they intended to appeal the court's underlying liability ruling, they did not otherwise object to the remedial measures contemplated in the district court's preliminary injunction ruling (*Ligon*, ECF No. 109).

C. The *Floyd* Liability Order and Joint Remedial Order

On August 12, 2013, a few months after the conclusion of a nine-week bench trial in *Floyd*, the district court issued its liability order in the case. The

[2] The City filed a notice of appeal from the preliminary injunction, but later withdrew that appeal after the district court stayed the order. *See Ligon*, ECF Nos. 98, 99, 101.

district court found the City liable under 42 U.S.C. § 1983 for violating the Fourth and Fourteenth Amendment rights of the members of *Floyd* plaintiff class. 959 F. Supp. 2d 540 (S.D.N.Y. 2013). The court found that the NYPD had engaged in a widespread pattern or practice of conducting stops and frisks without reasonable suspicion; operated under an unwritten policy of "indirect racial profiling" in violation of the Equal Protection Clause; and was deliberately indifferent to these widespread unconstitutional practices, especially through the use of performance goals and quotas to maximize the number of stops without equal attention to their legality. *Id*. at 658-667. The court relied heavily on a statistical analysis of the success rate and racial breakdown of the NYPD's 4.4 million stops and frisks over an eight-year period. *Id.* at 589-591, 660. The court also cited certain limited anecdotal evidence, finding that nine of nineteen stops as to which such evidence was received had been conducted without the proper level of individualized suspicion and that one of those stops illustrated racial profiling. *Id*. at 624-58.

On the same day that it issued the liability order in *Floyd*, the district court issued a separate order addressing remedies in both *Floyd* and *Ligon*. In this joint remedial order, the court (1) directed certain "Immediate Reforms" to be implemented in the short term, (2) ordered the development of additional "Joint Process Reforms" through a longer process; and (3) appointed an independent

monitor, former Corporation Counsel Peter Zimroth, to coordinate both categories of reforms. 959 F. Supp. 2d 668 (S.D.N.Y. 2013).

The Immediate Reforms directed in the joint remedial order included: (1) changes in the NYPD's documentation of stop-and-frisk activity, especially the form UF-250; and (2) revisions to the NYPD's policies regarding stop-and-frisk and racial profiling, including training, supervision, monitoring, and discipline policies, to conform to federal and state law. The court also ordered the NYPD to institute a pilot program for use of body-worn cameras by its officers. The Joint Process Reforms were to be developed through a consultative process overseen by the independent monitor, under which the parties would propose a series of supplemental reforms with cooperative input from a variety of stakeholders, specifically including "NYPD personnel and representatives of police organizations." *Floyd v. City of N.Y.*, 959 F. Supp. 2d 668, 686 (S.D.N.Y. 2013). The remedies order also ordered the implementation of certain reforms described in its preliminary injunction order in *Ligon* and delegated oversight of those reforms to the court-appointed monitor. *Id.* at 688-90.

D. The City's Previously Filed Appeals From the Joint Remedial Order

The City filed timely notices of appeal from the remedies order.[3] On October 31, 2013, this Court granted the City's request for a stay of the liability and remedial orders in *Floyd* and *Ligon*. The Court also directed the reassignment of the cases from District Judge Shira A. Scheindlin, who had presided over them to that point. *See Floyd v. City of New York*, 13-3088 (2d. Cir. 2013) ("*Floyd* Appeal") ECF No. 246.

On November 5, 2013, the City's voters elected Bill De Blasio as Mayor. Two days later, on November 7, the PBA, DEA, LBA, and CEA filed a motion to intervene in the City's appeals. *Floyd* Appeal, 13-3088, ECF No. 252; *Ligon* Appeal, 13-3123, ECF No. 178. On November 12, 2013, the SBA filed a motion to intervene in the *Floyd* appeal. *Floyd* Appeal ECF No. 282. In late November, the Court ordered those intervention motions to be held in abeyance "[t]o maintain and facilitate the possibility that the parties might request the opportunity to return to the District Court for the purpose of exploring a resolution." *See Floyd* Appeal ECF No. 338; *Ligon* Appeal ECF No. 242. The City thereafter filed its opening brief in each appeal on December 10, 2013, well ahead of the date required by the

[3] On September 11, 2013, the Sergeants Benevolent Association (SBA) filed a notice of appeal in *Floyd*. On September 12, 2013, the Patrolmen's Benevolent Association (PBA), Detectives' Endowment Association (DEA), Lieutenants Benevolent Association (LBA), and Captains Endowment Association (CEA) filed notices of appeal in *Floyd* and *Ligon*. Subsequently, all the Unions except for the SBA withdrew their notices of appeal.

Court's scheduling order. *See Floyd* Appeal, ECF No. 347-1; *Ligon* Appeal, ECF No. 262-1.

After Mayor De Blasio took office, on January 30, 2014, the City moved the Court for a limited remand in *Floyd* and *Ligon* to allow the parties to explore the possibility of settlement. The Mayor, Corporation Counsel, and Police Commissioner thereafter publicly announced that the City had reached an agreement with the plaintiffs to settle the cases by imposing a three-year limit on the oversight of the independent monitor, and that the City would seek to withdraw its previously filed appeals once the district court had modified the remedial order to conform to the parties' agreement (A1096-1099).

On February 21, 2014, this Court granted the City's motion for a limited remand of *Floyd* and *Ligon* to permit the parties to explore settlement and to allow the district court to supervise settlement discussions "among such concerned or interested parties as the District Court deem[ed] appropriate." *Floyd* Appeal, ECF No. 476; *Ligon* Appeal, ECF No. 288. In the same order, the Court directed the district court to resolve motions to intervene previously filed by the police unions in the district court. The Court reiterated that the unions' circuit-level motions to intervene would be held in abeyance, noting that it was preferable for the motions to be addressed by the district court in the first instance. *Floyd* Appeal, ECF No. 476; *Ligon* Appeal, ECF No. 288.

E. The District Court's Modification of the Remedial Order and Denial of Intervention

Following the limited remand, the City and the plaintiffs in *Floyd* and *Ligon* submitted a joint request asking the district court to modify the remedial order to impose a time limit on the monitor's supervision of the NYPD's stop-and-frisk policies and practices (*see* A1192-1206). That agreement provided that the monitor's supervision would expire at the end of three years following the entry of a final remedial order, so long as the City demonstrated that it was in substantial compliance with the terms of the order by that time.

The district court also ordered supplemental briefing on the police unions' previously filed motions to intervene in the district court (A971). The unions had filed those motions in September 2013, after the district court's entry of both the joint remedial order and the liability order in *Floyd*, and many months after the court's entry of the preliminary injunction order in *Ligon*.[4] The plaintiffs had opposed the motions to intervene at that time, whereas the City had initially consented to the unions' intervention during the Bloomberg administration (*see* A969). After the remand, the unions filed supplemental motions to intervene in both *Floyd* and *Ligon*, but did not specifically address the circumstances of the

[4] On September 11, 2013, the PBA, DEA, CEA and LBA filed a joint motion in the district court to intervene in *Floyd* and *Ligon* (A650-652). The next day, the SBA moved to intervene in *Floyd* alone (A657-771).

Ligon proceeding (A977-88; 1010-13). The *Floyd* and *Ligon* plaintiffs and the City filed separate memoranda of law opposing the unions' intervention motions (A1014-1142; *Floyd*, ECF No. 447; *Ligon*, ECF No. 180).

By opinion and order dated July 30, 2014, the district court (Torres, J.) denied the unions' motions to intervene and modified the remedial order as jointly requested by the City and the plaintiffs. The district court denied the unions' motions to intervene for the purpose of appealing the liability and remedial orders on three independent grounds: (1) the motions were untimely; (2) the unions lacked significant protectable interests in the litigation; and (3) even if the unions had any protectable interests, the unions lacked standing to pursue them on appeal in the City's absence (Special Appendix ["SPA"] 2). The court also denied the unions' request to participate in the remedial phase in *Ligon* (SPA2-3; 15-16). The court further denied the unions' request to intervene in the ongoing remedial phase in *Floyd* as moot, because the remedies order already granted the unions the opportunity to participate in the joint remedial process (SPA3).

As an initial matter, the district court noted that the unions, while having sought to intervene in *Ligon* as well as *Floyd*, had submitted motion papers that in substance discussed only the *Floyd* action (SPA15-16). Because no issues specific to *Ligon* had been briefed, the court declined to analyze them separately (SPA16).

With respect to timeliness, the court rejected the unions' argument that they were unaware of their interests in the litigation until August 2013, when the liability and remedies orders were issued (SPA18-20). The court found that the unions should have known of the existence and scope of the litigation for years, or at the very latest by March 8, 2013, when the claims against the individual *Floyd* defendants were formally dismissed (SPA18-46). The court rejected the unions' contention that their motions were timely because they could not have anticipated the City's change in position arising from the results of the 2013 mayoral election, and further found that granting intervention at such a late stage would greatly prejudice the existing parties by delaying plaintiffs' relief and frustrating the City's prerogative to control policing policy and litigation strategy (SPA46-47).

Next, the court held that the unions lacked protectable interests in the litigation (SPA67-68, 82). The court rejected the unions' claimed interests in the merits based on alleged harm to their members' reputations (SPA49-54, 59-64). The court found such interests too speculative and remote to support intervention (SPA54-59).

The court also rejected the unions' contention that their collective bargaining rights conferred a protectable interest in the court-ordered remedies (SPA68-82). The court observed that the contemplated reforms—covering training, discipline, body-worn cameras, and supervision—were matters of managerial prerogatives not

subject to collective bargaining (SPA74-75). And the court noted that nothing in the remedial order barred the unions from bargaining over any "practical impacts" on the terms and conditions of their employment, such as affects on workload and wages, that might someday result from the remedial process (SPA74-75). The court held that the unions' right to bargain over any such practical affects of reforms, which was not impaired by the remedial order or joint remedial process, did not entitle the unions to bargain over the underlying policies that led to such affects (SPA74-75).

Finally, because the City had made clear its intention to withdraw its previously filed appeals, the court held that the unions' motion to intervene for the purpose of appeal failed for the additional reason that the unions lacked associational standing to appeal the liability order or the remedies order (SPA101-03). As to the liability order, the court found that the unions could not establish standing based on claimed reputational harm to officers identified by name in the orders as having committed unconstitutional conduct or based on general reputation harm to NYPD officers as a category (SPA88-89; 101-02). The allegations of reputational harm were too speculative to establish an injury-in-fact, and the unions further failed to show any particular harm caused by the liability order (SPA94-97). Moreover, as to the officers identified by name, the alleged harm was not equally shared by the entire membership, as required to support

associational standing (SPA96-97). The court held that the unions could not show injury-in-fact as to the remedial order, because the order did not direct the unions to do anything (SPA101). Thus, the district court denied the unions' motion to intervene for the purpose of appeal on the additional ground that the unions lacked standing, given that granting intervention would be futile where the unions lacked standing to maintain the appeals (SPA101-03).

The district court also granted the joint request of the City and the plaintiffs in *Floyd* and *Ligon* to modify the remedial order to impose a limit on the duration of the court-appointed monitor (SPA2). By separate order, the court modified the remedies order by limiting the court-appointed monitor's term to three years from the entry of the final remedial order, provided that the City was in substantial compliance with its obligations under the order (A1207-08).

Thereafter, on August 6, 2014, the City moved in this Court for the voluntary dismissal of its previously filed appeals. *Floyd* Appeal, ECF No. 484; *Ligon* Appeal, ECF No. 295. The police unions filed notices of appeal from the district court's denial of their motions to intervene (A1209-13).

STANDARD OF REVIEW AND SUMMARY OF ARGUMENT

This Court reviews the district court's denial of the motions to intervene for abuse of discretion. *DSI Assocs. LLC v. United States*, 496 F.3d 175, 182-83 (2d Cir. 2007). The police unions have failed to establish any abuse of discretion here.

This Court should affirm the district court's order denying the unions' requests to intervene for the purpose of pursuing appeals challenging the liability and remedial orders in this action—appeals that the Mayor, Corporation Counsel, and Police Commissioner have determined that it is not in the City's best interests to pursue. The liability and remedial orders address the NYPD's policies and practices in conducting stops and frisks of members of the public and direct reforms of those policies and practices. The City Charter expressly provides that the Police Commissioner "shall have cognizance and control of the government, administration, disposition, and discipline of the [police] department, and of the police force of the department." New York City Charter § 434(a). And the Charter further provides the Corporation Counsel "shall be attorney and counsel for the city and every agency thereof and shall have charge and conduct of all the law business of the city and its agencies and in which the city is interested." New York City Charter § 394(a).

Acting pursuant to their charter authority, the City's representatives have determined to settle this case, reform the NYPD's stop-and-frisk practices, and

discontinue the City's appeals. Governmental officials regularly make such judgments, and the fact that the decision of the City's officials here came shortly after a citywide election only confirms the decision's legitimacy, rather than detracting from it, as the unions seem to suggest. Now that the district court has modified its remedial order, pursuant to the parties' agreement, to impose a durational limit on the independent monitors' oversight, the City would like to move forward with reforms of the NYPD's stop-and-frisk policies and practices. The police unions have shown no basis for their efforts to intervene to frustrate city officials' judgments as to the handling of these actions.

The unions' motion to intervene was properly denied, first, because they have failed to show that they possess any substantial protectable interest that is impaired by the liability and remedial orders. Contrary to the unions' contentions, the remedial order does not abrogate or limit their members' collective bargaining rights. Under settled state and local law, the subject matters addressed by the order—the NYPD's practices in stopping and frisking members of the public and its policies regarding documentation, supervision, discipline, and training as to stops and frisks—are matters of managerial prerogative under the control of the Police Commissioner and not subject to collective bargaining.

Nor do the unions' contentions regarding the reputational interests of their members establish a basis to intervene. The district court's liability order focuses

on the causes of action against the City itself, and does not purport to adjudicate claims against individual officers. The statements in the liability order discussing a handful of particular stops by identified officers, and concluding that some of those stops were unconstitutional, do not impair any protectable interest of the particular officers in question. The unions have not substantiated their contentions that the district court's statements have resulted or are likely to result in any harm to the officers involved, and they have not shown that the officers' professional standing or pecuniary interests have suffered in any way. And even if the unions had substantiated their claims of reputational harm to any member, they have not explained how the district court's statements discussing a small number of identifiable officers could justify their efforts to intervene to challenge the liability findings against the City or to challenge the remedial order directing the City and the NYPD to reform departmental policies and practices.

The district court also acted within its discretion in determining that the unions' motions to intervene were untimely. As the district court observed, the unions have been aware or should have been aware of this high-profile litigation for years. The unions do not dispute this point, but rather contend that their motions were timely because they could not have anticipated the City's change of position as a result of the 2013 mayoral election. But the unions offer no persuasive response to *Farmland Dairies v. Comm'r of the N.Y. State Dep't of*

Agric., 847 F.2d 1038, 1043 (2d Cir. 1988), where this Court rejected a private party's argument that its attempt to intervene at a late stage in litigation was timely because the defendant state official had only recently declined to appeal a holding that his official actions were unconstitutional. The Court held that the private party should always have been on notice that the governmental defendant represents the public interest, not the private party's interest.[5]

The court also correctly denied the unions' request to intervene for the purpose of appeal on the additional ground that they would lack standing to maintain an appeal challenging the liability order and remedial order in the City's absence. This Court reviews the Court's finding as to standing de novo. *Kreilser v. Second Avenue Deli*, 731 F.3d 184 (2d Cir. 2013), *cert denied*, 2014 U.S. LEXIS 3408 (2014). The unions cannot show that those orders have caused them injury—as discussed above, their collective-bargaining rights are unimpaired and their contentions that their members have suffered reputational harms are unsubstantiated. The unions' claims regarding members' alleged reputational harms further fail to establish appellate standing because (1) any such harms result solely from the liability order, which is a non-injunctive interlocutory order that is not itself appealable, and (2) claims that particular individuals were harmed by

[5] The district court further exercised sound discretion in rejecting permissive intervention—an area in which the Court affords especially strong deference to the trial court.

erroneous findings that they engaged in unconstitutional stops are the individuals' claims to raise, not the unions'.

Finally, the court properly denied the unions' distinct attempt to intervene for the purpose of participating as a party in the remedial process overseen by the court-appointed independent monitor. For the same reasons set forth above, the unions lack any substantial and legally protectable interest in that process. And as the district court observed, the terms of the remedial order expressly afford the unions the opportunity to participate in the remedial process in any event, such that the unions' intervention as a party is not necessary.

ARGUMENT

POINT I

THE DISTRICT COURT PROPERLY DENIED THE UNIONS' ATTEMPTS TO INTERVENE FOR THE PURPOSE OF APPEALING THE LIABILITY AND REMEDIAL ORDERS

This Court should affirm the district court's order denying the police unions' application to intervene for the purpose of pursuing appeals challenging the liability and remedial orders in these actions.

To establish a right to intervene under Rule 24(a) of the Federal Rules of Civil Procedure, the unions must show that (1) they timely sought to intervene; (2) they have an interest in the litigation; (3) their interest may be impaired by the

disposition of the action; and (4) their interest is not adequately protected by the parties to the action. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001). "Failure to satisfy *any one* of these requirements is a sufficient ground to deny the application." *Farmland Dairies v. Comm'r of the N.Y. State Dep't of Agric.*, 847 F.2d 1038, 1043 (2d Cir. 1988).

The district court properly rejected the unions' attempt to intervene as of right. As the court held, the unions have failed to show that they had any substantial and legally protectable interest that is implicated by the liability and remedial orders. The district court also reasonably determined that the unions' request to intervene was untimely, and further exercised sound discretion in rejecting the unions' request for permissive intervention. And the court correctly held that the unions' attempt to intervene to pursue appeals challenging the liability and remedial orders in the City's absence failed for the additional reason that they lack standing to pursue such appeals.[6]

[6] There is no merit to the DEA's contention (Br. at 22-23) that the City's initial consent to the unions' motions for intervention constitutes a binding judicial admission. Judicial admissions are limited to statements of fact. *Craft v. Covey*, 2011 U.S. Dist. Lexis 22182, *9 (D.Vt. 2011). The short letter in which the City initially consented to the unions' intervention contains no relevant factual admissions (*see* A969), and thus does not bind the City as to the present appeals in any way. Indeed, after this Court's limited remand, and before the district court ruled on the unions' intervention motions, the City submitted a memorandum of law opposing the motions.

A. The Unions Have Not Shown That They Have Any Legally Protectable Interest That Is Impaired By The Liability or Remedial Orders.

This Court has made clear that a movant claiming the right to intervene bears the burden of demonstrating an interest that is "direct, substantial and legally protectable." *Washington Elec. Coop, Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 96-97 (2d Cir. 1990). "An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *Id.*; *accord St. Johns Univ. v. Bolton*, 450 Fed. App'x 81, 83 (2d Cir. 2011) (summary order). The district court correctly held that the unions failed to demonstrate that they had any direct, substantial, and legally protectable interest implicated by the liability and remedial orders, so as to warrant their intervention for the purpose of pursuing an appeal challenging those orders.

1. The remedial order does not impair the unions' collective bargaining rights, because the subjects addressed in the order are matters of managerial prerogative.

The unions contend that they have a legally protectable interest in pursuing an appeal to challenge the remedial order because that order may impair their members' collective bargaining rights. PBA Br. at 30-41; SBA Br. at 40-44; DEA Br. at 42-51. The unions do not claim or attempt to show that the remedial order

conflicts with or abrogates any provision of their existing collective bargaining agreement with the City. Rather, they argue more generally that the subject matters addressed in the remedial order invade or might invade areas that are subject to collective bargaining. But the subject matters covered by the remedial order—the NYPD's stop-and-frisk practices and the NYPD's policies regarding supervision, documentation, training, and discipline as to stops and frisks—are matters under the control of the Police Commissioner that are not subject to collective bargaining. The unions' fears that the remedial process might someday spill over into an area that is subject to collective bargaining are purely speculative, and so are insufficient to establish the direct, substantial, and legally protectable interest necessary to warrant their intervention to pursue an appeal challenging the existing remedial order and the liability findings underlying it.

The district court here reviewed the New York City Collective Bargaining Law (CBL) and the New York City Admin. Code §§ 12-302 *et seq.*, and properly determined that the remedial order does not impair any legally protectable interest of the unions as to collective bargaining (SPA60-73). The court's decision is firmly grounded in decisions of the New York State Court of Appeals, the New York City Board of Collective Bargaining (BCB), the neutral and independent tribunal vested with the authority to administer and interpret the CBL (*see* New York City Charter

§ 1171), and those of the New York State Public Employment Relations Board (PERB), the corollary body entrusted with interpreting state labor laws.

Section 12-307(a) of the CBL provides that the City and the unions have the duty to bargain in good faith on "terms and conditions of employment" such as wages, hours, and working conditions. The next subsection, CBL § 12-307(b), declares that matters of managerial prerogative are excluded from collective bargaining, expressly granting the City the right to "exercise complete control and discretion" over the organization of all City agencies, as well as the technology to be used in performing a given agency's work. The statute specifically excludes from collective bargaining the City's authority to (1) determine the standards of services to be offered; (2) determine the standards of selection for employment; (3) direct its employees; (4) take any appropriate disciplinary actions; and (5) determine the methods, means and personnel by which government operations are to be conducted. *Id*. The statute provides that the "practical impact" on employees of such decision-making, such as "questions of workload, staffing and employee safety," may be subject to collective bargaining. *Id.*[7]

[7] The PBA (Br. at 34) wrongly maintains that there is an "open question" in New York whether CBL § 12-307(b) is preempted by the Taylor Law, the state statute governing collective bargaining for public employees, except where a local law governing collective bargaining affords substantially equivalent rights. In fact, the Court of Appeals has expressly observed that the provisions of CBL § 307 are consistent with those of the Taylor Law. *Levitt v. Board of Collective Bargaining*, 79 N.Y.2d 120, 126-27 (1992). Moreover, as discussed in the text, the Court has recognized that the strong public policies implicated by the organization and

Independently of the express managerial-rights exclusion set forth in the CBL, the New York courts have recognized that the strong public policy favoring preservation of official authority over the police is a sufficient basis to exclude matters involving the organization, control, and discipline of police forces from collective bargaining. Thus, in its 2006 decision in *PBA v. PERB*, the New York Court of Appeals held on public policy grounds that the police disciplinary policies of the City of New York and another municipality were not mandatory subjects of collective bargaining. 6 N.Y.3d 563, 571-72 (2006) (collecting cases); *see also Lynch v. City of N.Y.*, 737 F.3d 150, 163 (2d Cir. 2013), *cert. denied*, 134 S.Ct. 2664 (2014) (recognizing the important public interests in the "NYPD's ability both to manage its personnel effectively and to assure the public that it is doing so"). The *PBA* decision specifically cited the provision of the City Charter vesting the Police Commissioner with "cognizance and control of the government, administration, disposition, and discipline of the department, and of the police force of the department." *See PBA*, 6 N.Y.3d at 574 (also citing N.Y.C. Admin. Code § 14-115(a), which authorizes the Police Commissioner to punish officers for police misconduct).

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management of police forces may operate to exempt matters such as police discipline from collective bargaining, even in the absence of an express statutory exemption.

In the face of these statutory provisions and precedents recognizing that the organization and control of the NYPD is a matter of managerial prerogative, the unions' various arguments attempting to show that the remedial order implicates their collective-bargaining rights cannot withstand scrutiny. *See Sheppard v. Phoenix*, No. 91 Civ. 4148 (RPP), 1998 U.S. Dist. LEXIS 10576 (S.D.N.Y. Jul. 15, 1998) (rejecting intervention by unions to challenge consent decree requiring changes to Department of Correction's policies as to investigations, discipline, and transfers of staff as to incidents involving use of force).

(a) The use of body-worn cameras is an equipment decision that is not subject to collective bargaining.

The unions argue that the provision in the remedial order requiring the use of body-worn cameras by police officers is subject to collective bargaining because it might affect officer safety. But the BCB has consistently determined that decisions regarding the selection or use of equipment "involve the City's discretion over the methods, means and technology" of performing police work, and thus ordinarily are not subject to collective bargaining. *City of N.Y. v. Law Enforcement Employees Benevolent Ass'n ("LEEBA")*, 3 OCB2d 29, 43-44 (BCB 2010) (collecting cases holding that selection of equipment is a managerial prerogative).

The BCB has recognized that, in narrow circumstances, managerial decisions about equipment might present a safety impact "so serious" as to require

collective bargaining over the practical impact of the policy. *LEEBA*, 3 OCB2d at 44. But the unions have presented nothing to suggest that the use of body-worn cameras will have such effects on officer safety. The BCB has rejected a union's demand to bargain over NYPD decisions regarding body armor, weapons, transportation vehicles, and other equipment—matters that bear a far more direct connection to officer safety than the use of body-worn cameras. *Id.* In another decision, PERB determined that the NYPD had to bargain over a decision to issue new bullet-resistant vests to officers, based on its finding that the "paramount purpose" of the vests was officer safety. *City of N.Y.*, 40 PERB ¶ 3017, Case No. DR-119, 2007 WL 7565480 (PERB Aug. 29, 2007). In sharp contrast, the principal purpose of the use of body-worn cameras is to record officers' interactions with the public, not to serve officer safety objectives.

The decisions of the BCB and PERB demonstrate that speculative and conclusory allegations about officer safety, like those advanced by the unions here, will not require bargaining over the practical impact of decisions about equipment required for use on the job. The remedial order's requirement as to use of body-worn cameras, like the other elements of the order, addresses the management and supervision of police officers and provision of police services to the public, and does not fall within the scope of collective bargaining.

(b) The training reforms contemplated by the remedial order are not subject to collective bargaining.

Nor are the training reforms envisioned by the remedies order subject to mandatory collective bargaining. As a general matter, training falls squarely within the City's managerial prerogatives. CBL § 12-307(b). This is because the City has the right to determine the quantity and quality of services to be delivered to the public, and the training needed for its officers to carry out those services. *CWA v. City*, 9 OCB 7, at 6 (BCB 1972). It is thus well settled that the City has the managerial right to train its employees on their job duties. *See id.*

Such ordinary job-related training is not subject to collective bargaining. To be sure, collective bargaining may be required where an employer establishes new training requirements "as a qualification for continued employment or for improvement in pay or work assignments." *City of N.Y. v. Uniformed Firefighters Association*, Decision B-43-86, 37 OCB 43, at 15 (BCB 1986). But this principle applies only in limited situations—typically, where the employer imposes new certification or licensure requirements for incumbent employees as a qualification of their position or prerequisite to eligibility for promotional opportunities. *See, e.g.*, *DC 37*, 6 OCB 2d 24 (BCB 2013) (new requirement that incumbent employees obtain commercial driver's licenses is subject to bargaining); *DC 37*, L. 2906, 4 OCB 2d 62, at 8-11 (BCB 2011) (new requirement that incumbent sludge boat captains acquire an additional pilot license for certain waters is subject to

bargaining); *see also Uniformed Firefighters Ass'n* v. *City of N.Y.*, Decision No. B-20-92, 49 OCB 20, at 8-9 (BCB 1992) (noting that new requirement of CPR certification as qualification for continued employment may be subject to bargaining).

There is no basis for the unions' arguments (PBA Br. at 37-38, DEA Br. at 46) that the reforms to the NYPD's stop-and-frisk training contemplated by the remedial order would impose a new "qualification for continued employment," so as to be potentially subject to collective bargaining. Nothing in the remedial order suggests that the district court envisions the imposition of new certification or licensure requirements as a qualification for eligibility for certain NYPD positions. The contemplated reforms would constitute standard job training designed to improve officers' understanding of the constitutional standards for stop-and-frisk practices.

Indeed, the NYPD's stop-and-frisk training programs have undergone numerous changes outside of the collective bargaining process. As the district court noted, when the NYPD has in the past updated or revised training and documentation requirements on its officers as to stop-and-frisk practices, such as in the *Daniels* settlement, collective bargaining issues did not arise (SPA77-78; *see also* A1020-37 [*Daniels* stipulation of settlement requiring use of UF-250 form, stop-and-frisk audits, and supervisory and in-service training, among other things).

Similarly, the preliminary injunction record in *Ligon* established that the NYPD had exercised its prerogative to retrain NYPD supervisors and patrol officers—e.g., by mandating updated training on certain interim NYPD orders and requiring attendance at a refresher course on stop-and-frisk practices. *Supra*, at 6. The unions have not given any reason to expect that the training reforms contemplated in the remedial order will be different in kind from these other revisions and updates to NYPD's stop-and-frisk training programs.

(c) There is no merit to the PBA's arguments that the remedial order will likely result in changes to performance-evaluation procedures that are subject to collective bargaining.

The PBA contends (Br. at 36) that the remedial order is likely to result in changes to the NYPD's performance evaluation program that would be subject to collective bargaining. But the substantive criteria for performance evaluations are not subject to collective bargaining. Only certain procedural changes to the performance evaluations program, such as a requirement of increased officer participation in the evaluation process, are subject to collective bargaining. *See PBA v. City of N.Y.*, 6 OCB2d 36 (BCB 2013). There is no reason to believe that the remedial order will result in changes to performance evaluation procedures, as opposed to changes in certain substantive criteria for performance evaluations.

The PBA's argument improperly conflates the substantive criteria for performance evaluations and the procedural requirements for such evaluations. The PBA cites portions of the liability order that criticize the NYPD's "Quest for Excellence" program on the ground that it encourages officers to make unconstitutional stops (Br. at 36). The district court leveled these criticisms at the substantive criteria for evaluating employee performance under Quest for Excellence, not the procedural aspects of performance evaluations. There is thus no relevance to the PBA's citation of a BCB decision holding that changes to certain procedural aspects of the Quest for Excellence program are subject to collective bargaining. *See PBA v. City of N.Y.*, 6 OCB2d 36, at 5, 19-20 (BCB 2013).[8]

(d) The unions have no support for their assertion that the remedial order will impair their rights to bargain over the "practical impact" of managerial decisions.

The unions further contend that, even if the areas of reforms described in the remedial order are not subject to collective bargaining, they have the right to bargain to ameliorate the "practical impact" of those reforms on its members. But

[8] The PBA also points out (Br. at 35) that reforms that are not subject to mandatory collective bargaining may nonetheless be permissible subjects of collective bargaining. But the City's prerogative to bargain over permissible subjects does not create any legally protectable rights on the part of the unions. In any event, nothing in the remedial order precludes the City from bargaining with the unions over implementation of any reforms if it so chooses.

the notion that the remedial order would impair any such bargaining rights is purely speculative.

CBL § 12-307(b) provides that certain "practical impacts" on employees of managerial decisions lie within the scope of collective bargaining, offering as express examples "questions of workload, staffing and employee safety." But before this "practical impacts" provision will come into play, the union must demonstrate that a change in policy affects the "terms and conditions" of employment, such as resulting in increased workload for its members. *See PBA v. Police Dep't of the City of N.Y.*, Decision No. B-39-93, 51 OCB 39, at 9 (BCB 1993) ("the duty to bargain over the alleviation of a practical impact does not arise until we have first determined, on the basis of factual evidence, that a practical impact [exists]"). The unions have produced nothing here to suggest that the remedial order is likely to result in bargainable "practical impacts" on its members. And as the district court recognized (SPA74-77), the unions have also produced nothing suggesting that, in the event that bargainable practical impacts were to arise, the remedial order would prevent the unions from bargaining over those issues. For example, there is no reason to believe that, in the event that reforms ordered in these actions were to result in an additional workload, the unions would be prevented from bargaining over the level of additional compensation that members should receive in light of that additional workload.

* * *

The subject matters covered in the remedies order fall outside of the scope of collective bargaining, and the unions cannot justify the intervention they seek based on mere speculation that the remedial process someday, and in some way, might touch on a matter subject to collective bargaining. The unions are asking to intervene for the purpose of pursuing appeals challenging the existing remedial order and the liability findings that underlie it. The unions have shown no legally protectable interest that would entitle them to such broad intervention. The Court has made clear that intervention as of right may not be supported by "[a]n interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable." *Washington Elec. Coop, Inc.*, 922 F.2d at 97. Because the unions have shown nothing more, the district court correctly denied intervention as of right.

2. The out-of-circuit cases cited by the unions are sharply distinct from this case.

Because the unions' asserted interest springs from the New York City Collective Bargaining Law, their reliance on out-of-circuit cases from other jurisdictions interpreting dissimilar statutes or collective bargaining agreements is misplaced. And in the out-of-circuit cases that they cite, the unions permitted to

intervene demonstrated that specific provisions of their collective bargaining agreements had been abrogated. The unions have made no such showing here.

The unions rely heavily on *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), for the proposition that unions have been permitted to intervene to challenge consent decrees that could undermine the unions' collective bargaining rights. But that decision differs from this one in two major respects. First, in *City of Los Angeles*, a case that had not proceeded to trial and in which no liability finding had been made, the Ninth Circuit found that the unions could intervene as of right before approval of the proposed consent decree because "the complaint [sought] injunctive relief against its member officers." 288 F.3d at 399. Second, the unions identified specific provisions of their collective bargaining agreements that were in conflict with provisions of the consent decree. Br. of Intervenor-Appellant Los Angeles Police Protective League, City of Los Angeles, 2001 WL 34093539, at *20.

Here, in contrast, the remedial order imposed injunctive relief solely against the City, and not against any individual union member, after a trial on the merits and a finding of liability. In addition, the unions have not claimed that the district court's remedial order conflicts with or abrogates any provision of their collective bargaining agreements with the City. And as established above, the areas addressed

in the remedial order are not subject to mandatory collective bargaining under the CBL.

The unions' reliance on *United States v. City of Detroit*, 712 F.3d 925 (6th Cir. 2013), and *United States v. City of Portland*, 2013 U.S. Dist. Lexis 188465 (D. Or. 2013), is similarly misplaced, because in both cases it was undisputed that the ordered remedies interfered with the unions' bargaining rights. In permitting a union to intervene to challenge a remedies order in *United States v. City of Detroit*, the Sixth Circuit noted that the unions' "collective bargaining rights ha[d] been impaired, not just practically, but directly, by the decision of the district court." 712 F.3d at 931. Indeed, the order at issue in that case compelled the defendant city to strike various provisions from its collective bargaining agreements. *Id.* at 929. Nothing similar has occurred here.

In *United States v. City of Portland*, 2013 U.S. Dist. Lexis 188465 (D. Or. 2013), both the federal government and the defendant city conceded that the union had a legally protectable interest that could be impaired. *Id.* at *11. The union in *City of Portland* also identified numerous specific clauses of the proposed settlement agreement in the case that conflicted with its labor agreement with the city. Intervenor-Def. Portland Police Ass'n Mem. at 12-26, *City of Portland*, No. 3:12 Civ. 2265 (D. Or. Dec. 18, 2012) (A829-44). No such circumstances are presented in this case.

Other cases cited by the unions, *CBS, Inc. v. Snyder*, 798 F. Supp. 1019 (S.D.N.Y. 1992), *aff'd*, 989 F.2d 89 (2d Cir. 1993), and *EEOC v. AT&T*, 506 F.2d 735 (3d Cir. 1974), are likewise inapposite. *Snyder* directly involved the interpretation of arbitration provisions governing disputes about the union's collective bargaining agreements. 798 F. Supp. at 1023. The court therefore held that the union had a legally protectable interest sufficient to warrant its intervention. *Id.* And in *EEOC v. AT&T*, the Third Circuit recognized that the consent decree might modify or invalidate provisions of the union's collective bargaining agreements. 506 F.2d at 741-42. No similar contention is made here.

The remaining cases cited by the unions all involved employment discrimination actions cases directly addressing employment practices. *Vulcans Soc'y of Westchester Cnty. v. Fire Dep't of the City of White Plains*, 79 F.R.D. 437, 441 (S.D.N.Y. 1978), involved intervention by a firefighter's union to address changes to the municipal defendant's firefighter hiring and promotion practices following an employment discrimination lawsuit. In *Stallworth v. Monsanto Co.*, 558 F.2d 257, 262 (5th Cir. 1977), the court recognized that individual employees seeking to intervene in a class action challenging the use of seniority for promotions had met the test for permissive intervention, because the relief sought would cause loss of their seniority rights. And in *Edwards v. City of Houston*, 78 F.3d 983, 991-92 (5th Cir. 1996), groups of officers were allowed to intervene

where a consent decree in an employment discrimination case reserved a specific number of promotions to African American and Hispanic-American officers. Each of these cases involved a "zero-sum game" of hiring and promotion, where the remedies sought in the action, by their nature, would adversely affect the employment-related rights of non-party employees. Those cases are not remotely similar to this one.

3. No legally protectable reputational interests of the unions are implicated by the liability order.

The unions have also failed to establish a protectable interest through their claim of reputational harm to their members. The unions note that the liability order describes the nineteen anecdotal accounts of particular *Terry* stops that were aired at trial, and makes findings of constitutional violations as to some of those stops, naming the police witnesses involved. Thus, they assert, the reputations and career prospects of some of its members have been tarnished. PBA Br. at 42-44; SBA Br. at 33-40. But the unions have not substantiated their claims that members have suffered such harm to their reputations. The unions' arguments based on purported reputational harms to members are thus insufficient to serve as a basis for the intervention sought.

Conclusory allegations of reputational harm cannot establish a right to intervene. *Flynn v. Hubbard*, 782 F.2d 1084, 1093 (1st Cir. 1986) (concurring op.);

Edmondson v. Nebraska, 383 F.2d 123, 127 (8th Cir. 1967). Here, not even a single officer who is named in the district court's liability order submitted a supporting affidavit asserting that he or she had suffered damage to his or her reputation, much less providing any allegation that he or she has suffered concrete harms as a result of statements in the liability order. Such supporting allegations are crucial to establishing the limited kinds of reputational injury that are generally cognizable, such as damage to the putative party's livelihood, professional standing, or economic interests. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465, 473-74 (1987) (senator who wished to screen films had standing to challenge a law requiring their identification as foreign "political propaganda" because the label could harm his reputation and hurt his chances at reelection); *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 162 (2d Cir. 2003) (reputational injury was "death knell" to plaintiff's career as a manager of federally-insured credit union); *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (student had standing to challenge a rule requiring that he be identified as disabled, which could sour the perception of him by "people who can affect his future and his livelihood").

Nor do the district court's observations about certain witnesses who testified below give rise to a legally protectable interest sufficient to support intervention. A judge or jury in a civil action is frequently called upon to draw conclusions about a

witness's conduct that is described in testimony during the litigation, and those conclusions are often negative. But that, without more, is insufficient to command party status. *See Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 798 and n.10 (7th Cir. 2013); *cf. Pujol v. Shearson Amer. Express., Inc.*, 877 F.2d 132, 136 (1st Cir. 1989) (evaluating indispensable party status under Rule 19); *Pasco Int'l (London) Ltd. v. Stenograph Corp*., 637 F.2d 496, 502 (7th Cir. 1980) (same).[9]

As the District Court correctly observed (SPA54-58), the liability findings in this case were entered exclusively against the City. It was the City that was held to have fostered a pattern and practice of unconstitutional stop activity and to have been deliberately indifferent to such violations. These findings in no way inflict reputational harm on the union members that is cognizable under the law. *See Mahoney v. Donovan*, 824 F. Supp. 2d 49, 68 (D.D.C. 2011) ("[T]hat an employer has violated a law says nothing about the character or reputation of any particular employee") (internal quotation marks omitted). Hence, the district court's liability order does not implicate any legally protectable interests of the unions that could support their intervention to pursue an appeal challenging that order.

[9] This Court has held that the standards governing joinder of parties under Rule 19 of the Federal Rules of Civil Procedure are analogous to those governing intervention under Rule 24(a). *Mastercard Int'l, Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 389-90 (2d Cir. 2006).

B. Even if the Unions Had Shown a Legally Protectable Interest, the District Court Reasonably Found that Their Motions To Intervene Were Untimely.

The district court reasonably found that the unions' intervention motions also failed on the additional ground that they were untimely. The determination of timeliness is committed to the district court's discretion. *Farmland Dairies v. Comm'r of the N.Y. State Dep't of Agric. and Mkts.*, 847 F.2d 1038, 1044 (2d Cir. 1988). In resolving the question, the district court should consider (1) the length of time the applicant knew or should have known of his interest before making the motion, (2) prejudice to the existing parties resulting from the applicant's delay, (3) prejudice to applicant if the motion is denied, and (4) any unusual circumstances militating for or against a finding of timeliness. *Id*.

Here, the unions sought intervention only after the district court finally resolved all liability issues in *Floyd* and entered a joint remedial order setting forth the remedial process in *Floyd* and *Ligon*. The district court correctly held that if the unions actually had any legally protectable interests that may be impaired by the remedial order addressing the NYPD's stop-and-frisk practices and directing changes to the NYPD's policies regarding supervision, training, documentation, and discipline, they should have been aware for quite some time that these actions may threaten those interests. As summarized in detail by the district court (SPA18-45), the record is replete with evidence that the unions knew or should have known

for years that the litigation could result in the district court's issuance of an order directing the NYPD to reform stop-and-frisk policies, training, monitoring, documentation, and disciplinary procedures. The plaintiffs sought those very reforms from the outset of the litigation. *See Catanzano v. Wing*, 103 F.3d 223, 233 (2d Cir. 1996) (rejecting argument that order triggering need to intervene came as "total surprise," where issues addressed by order had been "clearly present in the litigation from the very beginning").

Moreover, the district court's January 2013 preliminary injunction in *Ligon* expressly identified revised training, policies and supervision as categories of proposed relief. The parties filed extensive briefing on remedies in the spring and summer of 2013 (*Ligon* ECF Nos. 108, 109, 112, 117, 118), with the City telling the district court in April 2013 that it would consent to the remedies being contemplated, if the court's liability findings were sustained on appeal (A 510-16). It is thus plain that the unions knew or should have known of their purported interests in these cases long before they moved to intervene in September 2013. Thus, the district court reasonably concluded that the unions' intervention motions were untimely. *See United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986) (three-month delay in moving to intervene supported denial of motion); *LaSala v. Needham Co.*, No. 04 Civ. 9237, 2006 U.S. Dist. Lexis 25882, at *25 (S.D.N.Y. May 2, 2006) (five-month delay); *In re NASDAQ Market-Makers*

Antitrust Litig., 184 F.R.D. 506, 514 (S.D.N.Y. 1999) (two-and-a-half-month delay).

The unions' contrary arguments are unsupportable under this Court's precedents. They contend that they moved to intervene as soon they became aware that the City may no longer advocate positions that aligned with theirs—an excuse that was explicitly rejected by this Court in *Farmland Dairies*, 847 F.2d at 1042-44. In that case, after a federal district court struck down a New York statute barring the plaintiff, an out-of-state milk producer, from selling milk in New York City, the State decided not to appeal and to instead negotiate a settlement with the plaintiff. *Id.* at 1042. Immediately after the settlement was announced, a group of New York state milk producers sought intervention to pursue an appeal. *Id.* at 1044.

This Court rejected the producers' argument that their intervention was timely because they had "moved to intervene promptly after learning that the [State] would not appeal the district court's injunction order," and because "up to that time, [intervenors] had every reason to believe that the State would defend the [statute's] constitutionality." *Id.* at 1044. The Court observed that the movants should have been aware that the interests represented by the New York Attorney General were "not coterminous with their own," and that the Attorney General

"represents the whole people and a public interest, and not mere individuals and private rights." *Id.* (internal quotation marks omitted).

So too here. The New York City Corporation Counsel is entrusted with the "charge and conduct of all the law business of the city and its agencies and in which the city is interested." New York City Charter § 394(a). In making litigation decisions for the City and its agencies, the Corporation Counsel considers the public interest, not the interests of one portion of its labor force or any other special-interest group. The unions had no basis to assume otherwise.

The unions offer no meaningful response to *Farmland Dairies*. The PBA barely acknowledges the decision, and the other unions try to distinguish the case on its facts without addressing its reasoning. They point out that the movants seeking intervention in *Farmland Dairies* had participated in an administrative phase of the proceeding before sitting out the litigation phase. But this Court noted that fact in *Farmland Dairies* only to show that the movants were aware that their interests were implicated by the proceeding, not as a reason for rejecting the movant's argument that the state defendant's unforeseen decision not to appeal the order invalidating the statute should reset the movants' intervention clock. *See* 847 F.2d at 1044. Here, the fact that the unions were aware or should have been aware of the potential import of decisions in these actions is well established. And *Farmland Dairies* demonstrates that the unions cannot rely on the City's decision

to pursue the resolution of this matter as a basis for salvaging their untimely attempt to intervene only after the district court's liability ruling in *Floyd* and the after the issuance of the joint remedial order in *Floyd* and *Ligon*.

C. The District Court Also Acted Within Its Discretion in Denying Permissive Intervention.

The district court's decision to deny permissive intervention should also be affirmed. The Court is particularly deferential in reviewing denials of permissive intervention—indeed, "[a] denial of permissive intervention has virtually never been reversed." *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 561 (2d Cir. 2005) (citations and quotation marks omitted).

A court may grant permissive intervention under Rule 24(b) of the Federal Rules of Civil Procedure where a movant's motion is timely and the movant proves that it possesses a claim or defense sharing a common question of law or fact with the main action. Fed. R. Civ. P. 24(b)(1); *AT&T Corp. v. Sprint Corp.*, 407 F.3d 560, 561 (2d Cir. 2005). But the court is not obligated to grant permissive intervention whenever those criteria are satisfied. Rather, the court retains discretion to deny permissive intervention where it will unduly delay or prejudice the adjudication of the rights of the existing parties. *AT&T Corp.*, 407 F.3d at 562. The court is also entitled to consider additional factors, such as "the nature and extent of the intervenors' interests, the degree to which those interests are

adequately represented by other parties, and whether parties seeking intervention will significantly contribute to full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal question presented." *H.L. Hayden Co. of N.Y. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 89 (2d Cir. 1986) (internal quotation marks omitted).

There is ample support for the district court's denial of permissive intervention here: the unions' application to intervene is untimely; they seek to assert claims and defenses that are no longer shared by any party to the litigation; and their intervention would "unduly delay or prejudice the adjudication of the rights of the existing parties." *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 202 (2d Cir. 2000) (internal quotation marks omitted). Granting permissive intervention to the unions at this stage, and then permitting them to pursue an appeal challenging the liability and joint remedial orders, would frustrate the City's and plaintiffs' efforts to bring this litigation to an end. The district court thus reasonably rejected the unions' request for permissive intervention.

D. The District Court Also Correctly Denied the Unions' Motion for the Additional Reason that They Lack Standing to Bring an Appeal Challenging the Remedial and Liability Order in the City's Absence.

Because the City has determined to discontinue its appeals from the remedal order, the unions may not pursue the appeals unless they not only satisfy the

requirements for intervention under Rule 24, but also fulfill the standing requirements of Article III. *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997). The SBA wrongly contends that it need not establish standing because there was a case and controversy at the time that it moved to intervene (SBA Br. at 52). To the contrary, "Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2661 (2013).

To establish Article III standing, a party must show that: (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the conduct complained of; and (3) it is likely, not merely speculative, that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *In re Joint Eastern and Southern Dist. Asbestos Litig.*, 78 F.3d 764, 779-80 (2d Cir. 1996) (finding intervenor lacked standing to appeal).

An organization may assert standing in two ways: (1) on its own behalf, to "seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy," or (2) as the representative of all or some of its members, where those members are at risk of "injury as a result of the challenged action of the sort that would make out a justiciable case had the members themselves brought suit." *Warth v. Seldin*, 422 U.S. 490, 511 (1975). To

meet the requirements for associational standing on behalf of its members, the unions must show that: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977).

It is plain that the unions would lack standing to prosecute an appeal from the remedial order under either alternative. First, as established above, the unions lack an interest in this litigation sufficient to warrant intervention, much less an interest sufficient to satisfy Article III. Indeed, because only the City is bound by the injunctive provisions of the remedial order, and the unions are not aggrieved by it, the unions would not be able to appeal from that order even if they had successfully intervened in the actions before the order was entered. *See Hollingsworth v. Perry*, 133 S.Ct. 2652, 2662 (2013).

Moreover, the remedial order plainly creates no harm to the unions' reputations. The police unions are not even referenced in the order, except in the provision affording them the opportunity to participate as stakeholders in the joint remedial process. *Compare Acorn v. United States*, 618 F.3d 125 (2d Cir. 2010) (organization had standing to challenge federal appropriation bills that affected the organization's "reputation with other agencies, states, and private donors"); *Irish*

Lesbian & Gay Org. v. Giuliani, 143 F.3d 638, 649-51 (2d Cir. 1998) (organization that was denied permit had standing to sue on its own behalf because, *inter alia*, the organization itself suffered reputational harm from the City's hostility).

Nor may the unions retreat to a theory of associational standing on the argument that their members have been aggrieved by the supposed reputational harm flowing from the findings of the liability order. The liability order is a non-injunctive interlocutory order that is not itself appealable. The liability order would be reviewable by this Court only in the course of a proper appeal from the remedial order. *See, e.g., Myers v. Hertz Corp.*, 624 F.3d 537, 553 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 368 (2011). But the unions' members are not aggrieved by the remedial order, see, Point I.A.1, *supra*, and so the unions cannot appeal from that order on a theory of associational standing. The unions' contentions as to reputational harms allegedly resulting to certain members from the liability order are thus irrelevant to the question of appellate standing.

In any event, the unions have failed to identify an injury-in-fact caused to their members by the liability order that is concrete and particularized, rather than merely conjectural or hypothetical. The SBA contends that the order misstates the standards as to what constitutes a permissible stop, which may cause "a chilling effect on the lawful use by the SBA members of the stop, question and frisk technique, which adversely affects officer and public safety" (SBA at 45, 58-59).

But the district court properly rejected this contention, because it is the City's duty and responsibility to determine policies as to the use of stop-and-frisk. Neither the unions nor their individual members have an independent interest in effective policing that may trump the determinations of the City and its Police Commissioner as to appropriate policing practices.

As to the police witnesses named in the liability order (*see* SBA Br. at 58-59, PBA Br. at 42-44), those witnesses' purported reputational interests, even if they had been substantiated, fail to confer standing on the unions for the additional reason that those officers' interests are not shared by the entire union membership. *See* SBA Br. at 58-59, PBA Br. at 42-44. Only a handful of 35,000 union members are even identified in the liability order. A determination as to unwarranted reputational harm with respect to the particular officers identified would require analyzing the circumstances of each stop to determine its lawfulness, which in turn would require the involvement of those individual members. The unions thus cannot establish the third prong of the *Hunt* test for associational standing. *Bano v. Union Carbide Corp.*, 361 F.3d 696, 715 (2d Cir. 2004) (noting that even where the lawsuit does not pursue damages, the association lacks representational standing where the "facts and the extent" of the injury asserted require individualized proof); *accord, Warth v. Seldin*, 422 U.S. 490, 516 (1975); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649-51 (2d Cir. 1998) (organization

does not have standing to request damages on behalf of individuals because the injury is not common to all members of the organization).

For all of these reasons, the district court correctly found that the unions failed to establish that they would have standing to pursue appeals challenging the liability and remedial orders, even if they had satisfied the requirements for intervention, which they have not.[10]

POINT II

THE DISTRICT COURT ALSO REASONABLY DENIED THE UNIONS' REQUEST TO INTERVENE FOR THE PURPOSE OF THE JOINT REMEDIAL PROCESS

In addition to seeking to intervene for the purpose of pursuing an appeal challenging the liability and remedial orders, the unions have also sought to intervene in the joint remedial process overseen by the court-appointed independent monitor. They contend that the remedial process will impair their collective bargaining rights. But for many of the same reasons discussed *supra* at I.A.1, the unions lack a legally protectable interest in the joint remedial process.

[10] The PBA asserts (Br. at 15, 53-57) that the unions' appeals from the district court's order denying intervention has been consolidated with the City's previously filed appeals from the remedial and liability orders, and then challenges those earlier orders on various grounds, including as to plaintiffs' standing. In fact, the unions' appeals from the district court's denial of intervention have not been consolidated with the City's appeals. The merits of the City's appeals, which have not been fully briefed by the parties and are the subject of a pending motion for voluntary dismissal, are not currently before the Court.

The subject matters to be addressed in the remedial process are matters of managerial prerogative. The mere speculative possibility that the process might someday touch on a matter subject to collective bargaining is insufficient to justify intervention. *See Washington Elec. Coop, Inc.*, 922 F.2d at 96-97.

In any event, as the district court observed, the remedies order already affords the unions the ability to participate in the joint remedial process as stakeholders. This will afford the union the opportunity to protect their interests if any of their speculative concerns should ever begin to materialize. There is no basis to assume that, if the remedial process began to veer towards a matter subject to collective bargaining, the independent monitor or the district court would fail to take account of the unions' collective bargaining rights. Thus, the court or the monitor may well afford the unions time to demand that the City bargain over the matter, and if that fails, request that the BCB determine whether the matter is bargainable, CBL § 12-309, or file an improper practice petition with the BCB, subject to state-court judicial review, CBL §§ 12-306(e), 12-308. *See also Levitt v. Bd. of Collective Bargaining*, 79 N.Y.2d 120, 128 (1992) (stressing that the "regulatory scheme envisions that in the first instance the threshold issue whether a particular matter is bargainable should be decided by the impartial body with expertise in the area").

The unions have not contended that the remedies order somehow precludes them from exercising their collective bargaining rights during the joint remedial process. Rather, they appear to believe that unless that they are permitted to intervene as a party, the district court and the independent monitor will fail to "heed their concerns and recommendations" (SBA Br. at 60-61) and fail to consider their "particularly valuable perspective" (DEA Br. at 52).

These concerns are baseless. The district court recognized the unions' rights to bargain over the practical impacts of the reforms—to the extent that such reforms affect issues such as workload, hours, and compensation—and noted that there is no reason to believe that any development in the course of the joint remedial process will prevent them from doing so (SPA74, 77). And the court-appointed independent monitor is Peter Zimroth, a former Corporation Counsel who is no stranger to collective-bargaining issues under the CBL. And in the event that the district court were someday to issue an order that abrogated the unions' collective-bargaining rights, the unions could seek intervention to appeal from that particular order. For all of these reasons, the district court reasonably concluded that the unions' ability to participate in the joint remedial process as stakeholders is sufficient to protect their claimed interests, and denied the unions' request to be granted intervenor status for the purpose of the joint remedial process.

CONCLUSION

The district court's denial of the police unions' motion for intervention should be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,562 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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