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 DAVID FLOYD, LALIT CLARKSON, DEON DENNIS, AND DAVID OURLICHT

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– 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,

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 OFFICER ERIC HERNANDEZ, Shield #15957, in his individual capacity, NEW YORK CITY POLICE OFFICER CHRISTOPHER MORAN, in his individual capacity,

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

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

The Mayor of the City of New York – alongside the Commissioner of the New York Police Department – and the Plaintiffs representing hundreds of thousands of New Yorkers in *Floyd v. City of New York*, have agreed to resolve a long-running and highly contentious litigation and work together to bring about reforms to unconstitutional and controversial stop-and-frisk practices and to improve police-community relations. The City's decision to withdraw its appeal in this case is a litigation decision of the kind regularly made by cities and states alike, based on its judgment about the best interests of its constituents – a judgment that is rarely disturbed by the courts. *See Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

Yet, as their heated rhetoric toward the District Court in *Floyd* has consistently revealed, the leadership of New York police unions[1] strongly disagrees with the considered judgment of the Mayor and the Police Commissioner and seek, at this eleventh hour, an "appeal the City no longer wants to pursue in order to vindicate a policy the City no longer wants to implement." SPA-47. Nevertheless, throughout this litigation the Unions have repeatedly failed to articulate – with any concreteness, explanation or imminence – any *bona fide* legal

[1] The Patrolmen's Benevolent Association ("PBA"); the Detective's Endowment Association, Lieutenants Benevolent Association, and NYPD Captains Endowment Association ("DEA"); and the Sergeants Benevolent Association ("SBA"), hereinafter collectively referred to as the "Unions."

injury stemming from the district court's liability judgment against the City or its remedial order contemplating reforms to stop-and-frisk practices similar to the kind the City has already unilaterally imposed on Union members for over a decade, without apparent objection. Had there been a genuine interest at stake for the Unions in this litigation, they would not have sat on their rights for so many months and years before now attempting to effectively collaterally attack this sensible resolution to a long-standing legal dispute. Ultimately, the Unions' deep-seated ideological disagreement with the district court's findings are insufficient to create a legally cognizable injury by this Court. The parties should be permitted to pursue reforms ordered by the district court – and desired by the People of New York – without further delay.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Do the Unions have Article III standing to appeal the *Floyd* Liability and Remdial Orders in the City's absence, where their asserted "reputational injury" from the Liability Order is conclusory and conjectural, where their asserted collective bargaining injuries from the Remedial Order are not "certainly impending," and where neither injury is likely redressable by the relief requested?

2. Did the district court abuse its discretion in denying the Unions intervention as of right to appeal the *Floyd* Liability and Remedial Orders and to participate in the remedial phase of the case where the district court found that:

a. the Unions failed to timely intervene in the case despite being put on actual or constructive notice of the risk to their litigation interest months or years earlier prior to issuance of the Liability and Remedial Orders, and where such delayed intervention would substantially prejudice the parties?

b. the Unions have no protectable interests in vindicating a "reputational harm" assertedly implicated by the Liability Order or in safeguarding collective bargaining interests in policy, training, supervision, and disciplinary reforms implicated by the Remedial Order and the remedial processes established thereunder, all of which are subject to exclusive management prerogative?

3. Did the district court clearly abuse its discretion in denying the Unions permissive intervention to appeal the *Floyd* Liability and Remedial Orders and participate in the remedial phase of the case?

STATEMENT OF THE CASE

A. Litigation and Stop-and-Frisk Reforms Emerging from *Daniels v. City of New York*

On March 8, 1999, *Daniels v. City of New York*, 99 Civ. 1695 (SAS) (S.D.N.Y.), was commenced as a putative class action alleging that NYPD's Street Crimes Unit implemented a policy and practice of suspicionless and race-based stops-and-frisks in violation of the Fourth and Fourteenth Amendments, alleged

that individual Union members engaged in unconstitutional conduct, and sought virtually identical categories of injunctive relief to those ultimately ordered in *Floyd*. 99 Civ. 1695 (SAS)(S.D.N.Y.), Dkt ## 1, 8, 24, 36. Despite nearly five years of intensive litigation, the Unions at no point attempted to intervene in *Daniels*.

On January 13, 2004, the district court so-ordered a stipulation of settlement requiring the City, then under the leadership of Mayor Michael Bloomberg and Police Commissioner Raymond Kelly, among other reforms to:

(i) implement stop-and-frisk audits creating new duties and workload for certain NYPD sergeants and lieutenants, A-1024-25, 1054-63;

(ii) revise trainings for newly-promoted NYPD sergeants and lieutenants to address racial profiling and improve supervisory techniques, A-1027;

(iii) provide all NYPD commands with annual training on the NYPD's Racial Profiling Policy, A-1025; and

(iv) ensure that all stop-and-frisk incidents be documented on a revised version of the UF250 form, which changed the "reasons for stop" section from a narrative to a check-box format, A-1027, 1041-42, 1064-67.

The stipulation of settlement was effective until December 31, 2007, A-1035, yet there is no indication in the record that, at any point before or during the stipulation's pendency, any of the Unions attempted to intervene as parties. Moreover, there is no indication that any of these reforms were subject to

collective bargaining, or that the Unions ever attempted to collectively bargain over them.

B. The City's Subsequent, Unilateral Changes to Stop-and-Frisk Policies and Procedures

Between 2009 and 2013, the City, under the leadership of Mayor Bloomberg and Police Commissioner Kelly, voluntarily instituted several changes to its stop-and-frisk policies and procedures, which, although deemed inadequate to remedy the widespread practice of unconstitutional stops, altered the duties and responsibilities of NYPD personnel at various ranks. These changes include:

(i) 2009 and 2010 revisions to the NYPD Patrol Guide, requiring officers to provide a stopped civilian with an explanation of the reasons for the stop, and an information card entitled "What is a Stop, Question, and Frisk Encounter," A-1068-73;

(ii) a 2011 revision to the UF250 form, requiring officers to provide the reason(s) for force used during a stop-and-frisk encounter. A-1064-65, 1075-76;

(iii) a 2012 revision to the Patrol Guide section on the duties of executive officers (who have the rank of captain) requiring them to conduct stop-and-frisk self-inspections in each precinct, A-1078; and

(iv) a March 5, 2013 memorandum from NYPD Chief of Patrol requiring all NYPD patrol officers to provide additional narrative details about the reasons for stops in both their activity logs and on the UF250 forms they complete and to staple copies of the activity log entries to each completed UF250 form, A-1080-82.

In addition, in 2012 and 2013, the NYPD required more than 6,000 officers to attend off-site (albeit legally inaccurate) stop-and-frisk training. *Floyd* Trial Tr.

5121. There is no indication in the record that any of these changes were collectively bargained.

C. Procedural History of *Floyd* in the District Court

1. Pre-Trial Proceedings

Plaintiffs commenced the *Floyd* litigation on January 31, 2008. In their original and amended complaints, Plaintiffs named the City and several individual NYPD officers and sergeants as defendants, alleged that the City has implemented a policy or practice of suspicionless and race-based stops-and-frisks, and requested class-wide injunctive relief, including changes to the NYPD's stop-and-frisk policies, training, and supervisory, disciplinary, and monitoring systems. *Floyd v. City of New York*, 08 Civ. 1034 (S.D.N.Y.), Dkt (hereinafter "*Floyd* Dist. Ct. Dkt") # 1. During the two-and-a-half years of discovery, dozens of individual Union members were deposed regarding their involvement in allegedly unconstitutional stops of Plaintiffs and other New Yorkers, but at no point during that period did the Unions seek intervention. A-1015.

On August 31, 2011, the district court denied the Defendants' summary judgment motion, holding that Plaintiffs could proceed to trial on whether the stops-and-frisks of the named plaintiffs conducted by certain individual Union members were unconstitutional and whether current NYPD policies and practices governing training, supervision, monitoring and discipline were adequate to

prevent a widespread practice of unconstitutional stops. *See Floyd v. City of New York*, 813 F. Supp. 2d 417, 456, *partial reconsideration granted*, 813 F. Supp. 2d 457 (S.D.N.Y. 2011). This ruling received extensive press coverage. A-1084-89.

On April 16, 2012, following briefing by the parties and a thorough evidentiary hearing, the district court ruled that Plaintiffs' expert could testify at trial about his statistical analysis of data from 4.4 million recorded NYPD stops-and-frisks in support of Plaintiffs' claim that the NYPD had engaged in a widespread practice of unconstitutional stops. *See Floyd v. City of New York*, 861 F. Supp. 2d 274 (S.D.N.Y. 2012).

On January 4 and 31, 2013, during on-the-record hearings, the district court held that the liability and remedial issues would be tried at once and together with the remedial issues raised by the court's January 8, 2013 preliminary injunction ruling in *Ligon v. City of New York*, 12-2274 (S.D.N.Y.), and that the remedial portion of the trial would most likely start in April 2013. A-277-278, 673-74, 678.

On March 6, 2013, *Floyd* Plaintiffs filed their brief in support of permanent injunctive relief, proposing :

(i) a range of specific changes to the UF250 form and the standards for evaluating police officer performance,

(ii) the appointment of an independent court monitor, and

(iii) creation of a joint remedial process to help develop changes to the NYPD's systems for training, supervising, monitoring, and

disciplining officers with respect to stop-and-frisk and racial profiling. A-467-502.

On the same date, Communities United for Police Reform, a coalition of New York City non-profit organizations, and the Black Latino and Asian Caucus of the New York City Council each submitted amicus briefs on remedies which also argued for impacted communities' involvement in developing remedies. *Floyd* Dist Ct Dkt # 377-78. In its April 11, 2014 opposition brief on injunctive relief, the City (still under Mayor Bloomberg and Commissioner Kelly), made no mention of the collective bargaining interests of the Police Unions. *Floyd* Dist Ct. Dkt # 274. At no time prior to trial did the Unions seek leave to respond to the parties or amici's briefs on remedies or to intervene as parties.

On March 8, 2013, the Court so-ordered a stipulation between the parties withdrawing all of Plaintiffs' claims against the individual Union-member defendants. A-503-09.

2. Trial and Post-Trial

During the nine-week trial, which lasted from March 18 to May 20, 2013 and received extensive press coverage, 12 named plaintiffs and class members and numerous Union members testified about 19 allegedly unconstitutional stops-and-frisks which Plaintiffs claimed these Union members had either conducted or supervised. *Floyd* Dist. Ct. Dkt # 366 at 5-8, 18-19. These and other Union members also testified about their job duties and workload and the ways in which

stops are documented, stop-documentation is reviewed, officers are trained, supervised, and monitored on stop-and-frisk and racial profiling. *See Floyd* Dist. Ct. Dkt # 363 ¶¶23, 25-33, 43-49; Dkt # 366 ¶¶ 86-107, 122-136. In addition, several senior NYPD officials and the City's remedies expert testified about asserted burdens on NYPD officers from revising the UF250 form to include a narrative section on the basis for a stop. *See Floyd* Trial Tr. 3008, 3012-13, 7757:2-7761:15; 7787:14-18; 7804:7-19; 7805:5-7807:4. However, at no point during the trial did the Unions attempt to intervene as parties. A-1015.

Following trial, on June 12, 2013, the parties submitted proposed findings-of-fact and conclusions-of-law, as well as post-trial briefs, on liability and remedial issues. *See Floyd* Dist. Ct. Dkt ## 363, 364, 366, 367. In its post-trial brief, the City, still under the leadership of Mayor Bloomberg and Commissioner Kelly, denigrated the character and credibility of three NYPD officers, two of whom were Union members, for testifying about the existence of officer-enforcement quotas, an allegation which the PBA itself has lodged repeatedly since at least 2005. *Floyd* Dist. Ct. Dkt # 364 at 9-10; Trial Tr. 885-889, 6790-91. In addition, the United States Department of Justice filed a Statement of Interest on the remedial issues in the case, arguing that the district court had the power to order broad injunctive relief upon a finding of widespread unconstitutional stops, including the

appointment of an independent monitor to oversee the City's compliance with court-ordered remedies. *Floyd* Dist. Ct. Dkt # 365.

Yet, at no time during trial or in the post-trial proceedings on the scope of remedial relief, did the Unions seek intervention, let alone seek leave to respond to, any party's or non-party's submissions. A-1015.

D. Liability and Remedial Orders

In its August 12, 2013 Liability Order, the district court found only the City, but not any Union members, liable for violating the Fourth and Fourteenth Amendment rights of the Plaintiff class. *See Floyd v. City of New York*, 959 F.Supp.2d 540, 667 (S.D.N.Y. 2013). In its Remedial Order, the court held that it had the power to order injunctive relief against the City necessary to remedy the finding of widespread unconstitutional stops, and directed the City and Plaintiffs, together with a court-appointed monitor, to develop and submit to the court proposed changes to NYPD policies, training, documentation, supervisory, monitoring and disciplinary systems for stop-and-frisk and racial profiling, and a proposed FINEST message. *Floyd v. City of New York*, 959 F.Supp.2d 668, 678-84 (S.D.N.Y. 2013). The district court specified that none of these proposals would be implemented unless and until they are approved by the court in a subsequent order. *Floyd v. City of New York*, 959 F.Supp.2d 691, 694-95 (S.D.N.Y. 2013).

The Remedial Order further requires that the City conduct a 1-year pilot project for body-worn cameras in five NYPD precincts, which will not begin until the court monitor develops guidelines and procedures, and that the City and Plaintiffs engage in a Joint Remedial process, guided by a court-appointed facilitator, to develop a series of supplemental reforms that *must* incorporate the input from a variety of stakeholders, including "NYPD personnel and representatives of police organizations." *Floyd*, 959 F.Supp.2d at 684-88. The Remedial Order does not require the Unions or their members to do anything.

E. The City's Appeals and the Unions' Intervention Motions

On August 16, 2013, the City filed a notice of appeal of the *Floyd* Liability and Remedial Orders. *See Floyd* Dist. Ct. Dkt # 379. On September 11 and 12, the Unions filed notices of appeal indicating that they were appealing the same two orders, and, for the first time, moved to intervene as defendants in *Floyd*. *Floyd* Dist Ct. Dkt ## 388, 390, 391, 395. On October 31, 2013, this Court stayed the Liability and Remedial Orders, the *Ligon* Injunction, and all other district court proceedings in both *Floyd* and *Ligon* pending the disposition of the City's appeals. *Floyd v. City of New York*, 13-3088, Dkt # 247.

On November 7 and 12, 2013, the Unions moved directly in this Court to intervene as parties to the City's appeals. However, on November 25, 2013, the full Court held those motions in abeyance "to facilitate the possibility that the parties

[to the City's appeals] might request the opportunity to return to the District Court for the purpose of exploring a resolution." *Floyd*, 13-3088, Dkt # 338 at 2.

On January 30, 2014, the new Mayor of New York City, Bill de Blasio, publicly announced that the City and the *Floyd* and *Ligon* plaintiffs had reached an agreement in principle for resolving the City's appeals. A-1095-99. Under this agreement, the parties would jointly ask the district court for a single modification to the August 12, 2013 Remedial Order, namely, a three-year time limit to the tenure of the Court-appointed monitor conditioned upon the City's substantial compliance with court-ordered remedies and, upon approval of this modification, the City would withdraw its appeals in both *Floyd* and *Ligon* and participate in the remedial processes established by the Remedial Order. A-972, 1095-1099. That day, the City filed a motion for limited remand with this Court for the purpose of exploring a resolution of the pending appeals. *Floyd*, 13-3088, Dkt # 459.

On February 21, 2014, this Court granted the City's motion and remanded *Floyd* and *Ligon* to the district court "for the purpose of supervising settlement discussions among such concerned or interested parties as the District Court deems appropriate" and, consistent with this Court's strong preference that intervention motions be decided first in the district court, to resolve the Unions' intervention motions. *Floyd*, 13-3088, Dkt # 476-1, at 8-9.

On March 5, 2014, the Unions filed supplemental motions to intervene in the district court. A-123-26. On April 3, 2014, the City and *Floyd* and *Ligon* plaintiffs jointly filed a motion to modify the August 12, 2013 Remedial Order in the manner described by the Mayor on January 30. *See Floyd* Dist Ct Dkt ## 456-58.

On July 30, 2014, the district court granted the parties' joint motion to modify the Remedial Order. On August 6, 2014, the City, with *Floyd* and *Ligon* plaintiffs' consent, filed a motion with this Court under Fed.R.App.P. 42(b) to voluntarily dismiss its appeals with prejudice in both *Floyd* and *Ligon*. *See Floyd*, 13-3088, Dkt # 484. That motion is fully briefed and pending before this Court.

F. District Court Ruling Denying Intervention

In a 108-page Opinion and Order also issued on July 30, 2014, the district court denied the Unions' motions for intervention as of right under Fed.R.Civ.P. 24(a) and permissive intervention under Fed.R.Civ.P. 24(b). *See* SPA-1-108.

1. Denial of Intervention As of Right For Purposes of Appeal

With respect to intervention as of right to appeal the Liability and Remedial Orders in the City's absence, the district court held that: (1) the Unions' motions were untimely, (2) the Unions lacked any significant protectable interests relating to the subject of the litigation, and (3) even if their interests were cognizable, the Unions lacked standing to vindicate those interests on appeal.

a) Timeliness

The district court ruled that the timeliness of post-judgment motions to intervene is not measured from the date of the judgment as the Unions urged, but is determined by when the putative intervenors were on actual or constructive notice that they had interests not otherwise protected by the existing parties. SPA-18-28. Conducting a thorough review of the records in *Floyd*, *Ligon* and *Daniels*, and applying long-standing Second Circuit precedent, the district court concluded that numerous developments that had occurred months or years before the issuance of the Liability and Remedial Orders should have put the Unions on notice of their purported legal interests in *Floyd*, and that such interests were not adequately represented by the City. SPA-28-46.

The district court further held that Union intervention at this juncture would cause the *Floyd* Plaintiffs "self-evident" prejudice, after Plaintiffs had prevailed on liability and the City had agreed to implement the "very reforms the plaintiffs have been fighting" to obtain for years, and would prejudice the City by impinging on its right to "end the years-long legal battle" it no longer wants to pursue and to exercise its prerogative to reform policing policy. SPA-47-48. In contrast, denying the Unions intervention now would cause them "no tangible prejudice" because the Unions lack any "legally colorable interest" in the litigation. *Id.*

b) Legal Interest

The district court also held that the Unions had failed to establish a legally protectable interest in either the Liability or Remedial Orders. With respect to the Liability Order, the supposed "reputational harm" to Union members caused by the district court's findings that some of them had participated in or contributed to unconstitutional stops-and-frisks, the district court made the discretionary determination based on ample legal authority that: (1) the Unions' allegations were too conclusory; (2) Union members had no protectable reputational interest in a judgment against their employer, even where that judgment is based on findings that criticize their behavior; (3) their asserted reputational interests were too remote from the subject matter of the *Floyd* litigation; and (4) the facts of the principal out-of-circuit case relied on by the Unions, *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), were readily distinguishable. SPA-52-67.

As for the Unions' asserted interest in protecting their state-law collective bargaining rights, which they alleged "could" be threatened by the Remedial Order, the district court held, among other things: (1) the Unions failed to describe this interest with sufficient particularity; (2) they failed to identify a state law supporting their right to bargain over the reforms identified in the Remedial Order; (3) the right to bargain over the "practical impact" of certain changes to NYPD stop-and-frisk policies did not confer the right to bargain over the changes

themselves; (4) the federal cases, including *City of Los Angeles*, and city and state administrative decisions cited by the Unions did not support their right to collectively bargain over the reforms; and (5) the Unions' previous inaction with respect to stop-and-frisk policy reforms implemented voluntarily by the City under the *Daniels* settlement was "circumstantial evidence" that their collective bargaining rights were not impacted by the Remedial Order. SPA-68-82.

c) Lack of Standing to Appeal

In concluding that the Unions lacked Article III standing to appeal the Liability Order in the City's absence, the district court held that: (1) the Unions' asserted reputational harms were too hypothetical and attenuated to establish a concrete injury-in-fact; (2) the purported injuries were caused by the district court's underlying findings, not the liability judgment; and (3) the injuries suffered by each individually-identified Union members were so individualized as to defeat the Unions' claim of associational standing. SPA-86-101.

As for standing to appeal the Remedial Order, the district court: (1) recognized that the Order did not require the Unions or their members "to do or refrain from doing anything" (quoting *Hollingsworth*,133 S.Ct. 2652, 2662 (2013)); (2) reiterated that none of the reforms contemplated by the Remedial Order implicated the Unions' collective bargaining rights; and (3) held that the

claim that yet-to-be developed reforms could harm their members' collective bargaining rights was too speculative. SPA-101.

2. Denial of Permissive Intervention to Appeal

The district court also denied the Unions permissive intervention to appeal the Liability and Remedial Orders on the same three bases on which it denied intervention as of right. SPA-48 n.13; SPA-82 n.23; SPA-103 n.31.

3. Denial of Intervention to Participate in Remedial Proceedings

Finally, the district court denied the Unions both intervention as of right and permissive intervention in the remedial phase of *Floyd* because intervention was untimely, and the Unions' collective bargaining rights were not implicated by the Remedial Order. The court also held that the demand to participate in the remedial processes was moot since the Order itself already provided the Unions with the opportunity to meaningfully participate in the Joint Remedial Process. SPA-106-07.

G. The Police Unions' Collective Bargaining Agreements

The collective bargaining agreements under which the Unions are currently working – and which the Unions have asked this Court to take judicial notice of – make no mention of officer training, supervision, discipline, stop-and-frisk documentation, or any other remedial issue identified in the Remedial Order. *See, e.g.*, PBA Collective Bargaining Agreement with the City of New York, *available at* http://www.lris.com/wp-content/uploads/contracts/newyork_ny_police.pdf; SBA

Collective Bargaining Agreement with the City of New York, *available at* http://www.nyc.gov/html/olr/downloads/pdf/collective_bargaining/Police%20Sergeants_ExecutedContract_06-01-2005%20-%2008-29-2011.pdf; LBA Collective Bargaining Agreement with the City of New York, *available at* http://www.lris.com/wp-content/uploads/contracts/newyork_ny_police_lts.pdf; CEA Collective Bargaining Agreement with the City of New York, *available at* http://www.nyc.gov/html/olr/downloads/pdf/collective_bargaining/Captains,%20CBU%2017,%20Captains%27%20Endowment%20Association,%20Executed%20Contract,%2011-01-03%20to%2003-31-12.pdf

As the agreements show, the Unions have all been working under expired CBA's for several years and, as has been widely reported, they are in the midst of negotiating new agreements with the current mayoral administration. A-1110-1115. Several Union leaders have in turn publicly acknowledged they are willing to link their decisions whether to pursue intervention in *Floyd* and *Ligon* to the outcome of their contract negotiations with the City. *Id*.

SUMMARY OF ARGUMENT

First, the Unions cannot satisfy the constitutional demands of standing in order to bring this appeal in the City's absence. Because the Liability Order runs exclusively against the City for violations of its distinct duties under *Monell v. New York City Dep't of Social Services*, 436 U.S. 658 (1978), and does not bind Union

members or otherwise expose them to concrete legal jeopardy, the Unions are left to invent a theory of "reputational harm" flowing from *judicial* (not executive or legislative) findings of wrongdoing against anonymous non-party officers and a handful of non-party Sergeants. These "speculative, abstract, and amorphous" injuries, SPA-102, do not state a sufficiently concrete and injury-in-fact – nor could they without opening judicial floodgates to disgruntled litigants who find offense in a myriad of adverse district court determinations.

Similarly, the asserted future injuries to the Unions' collective bargaining rights that might flow from stop-and-frisk reforms contemplated by the Remedial Order – framed as they are by the Unions in the hypothetical – are, on their own terms, not "certainly impending." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). Unlike cases relied upon by the Unions, the Remedial Order does not actually implicate any collective bargaining agreement or rights. Further, neither reputational harm nor collective bargaining injuries would be "redressable" by the reversal the Unions seek: this Court will only review the district court's *judgment*, so it is speculative in the extreme that even the desired reversal would address (let alone reverse under a "clear error" standard) the myriad fact-findings the Unions find offensive. Similarly, the City has on numerous occasions, independent of the Remedial Order, required Union members to undergo stop-and-frisk training and

supervision and reporting changes without apparent Union objection, demonstrating that such injuries – if any – are not caused by the Remedial Order.

Second, because the district court's 108-page opinion nowhere applied the wrong legal standard or made clearly-erroneous factual findings, the court did not abuse its discretion in denying the Unions intervention as of right under Fed. R. Civ. P. 24(a). The court's conclusion that the Unions were on actual or constructive notice for months (or years) prior to the issuance of the Liability and Remedial Orders that their purported interests may not be adequately represented was consistent with this Circuit's presumption against permitting post-judgment intervention; and it was otherwise within the court's sound discretion, grounded as it was in an intensive review of the factual records in *Floyd*, *Ligon* and *Daniels*, and straightforward application of *this* Circuit's precedent that the Unions would no doubt prefer did not govern. Nor did the district court abuse its discretion in concluding that the prejudice to the Plaintiffs (in obtaining long-sought relief) and to the City (in its litigation preferences and policing prerogatives) from these eleventh-hour interventions outweighed the asserted – but nonexistent – harms to the Unions from non-intervention.

The district court also did not abuse its discretion in concluding the Unions had no "direct" legally cognizable interests at stake in the Liability or Remedial Orders. There is no reputational harm to individual employees that flows from

judgments against an employer, and the district court did not abuse its discretion in finding the Ninth Circuit decision in *City of Los Angeles* readily distinguishable on the facts. As more fully discussed in the brief of the *Ligon* plaintiffs, the Unions have consistently failed to identify any concrete collective bargaining provisions or interests that will be directly – as opposed to conceivably or hypothetically – implicated by the remedies contemplated here, as governing case law conclusively establishes that these areas are the exclusive prerogative of management.

Additionally, the reality that the Unions never sought to bargain over similar, unilaterally-imposed stop-and-frisk reforms, or more recently announced NYPD policing reforms, fatally undermines their claim that they have a *bona fide* interest in the remedial process. Indeed, Union leadership has publicly proclaimed that they would like to use that process as a leverage point to bargain over new contracts with the Mayor – a strategic interest that is not legally cognizable here and that threatens to interfere with the reform-driven goals of the remedial process. Thus, the Unions similarly lack a legally protectable interest entitling them to intervene into the remedial phase of this case.

Third, the reasons supporting its denial of Rule 24(a) intervention conclusively establish that the district court did not abuse its even wider discretion in denying the Unions permissive intervention under Rule 24(b).

Finally, while the district court's decision finding that Plaintiffs possess standing to obtain injunctive relief was thorough, reasoned, and based on extensive record evidence, it would be jurisdictionally inappropriate – and otherwise highly imprudent – for this Court to address that complicated and fact-laden question in connection with an unrelated appeal of an intervention denial.

ARGUMENT

I. THE UNIONS LACK STANDING TO APPEAL THE LIABILITY AND REMEDIAL ORDERS

Contrary to the Unions' claims, PBA Br. 52; SBA Br. 52; DEA Br. 52, Supreme Court precedent clearly commands that Unions satisfy the rigorous constitutional demands of standing in order to intervene in this appeal. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986); *Schulz v. Williams*, 44 F.3d 48, 52 (2d Cir. 1994) (Cabranes, J.). Because the City seeks to withdraw from these pre-existing cases and is functionally no longer an appellant before this Court, the Unions may no longer "piggyback" on the City's prior-existing standing to appeal. *Diamond*, 476 U.S. at 64. Simply put, "[i]n the absence of [the City] in that capacity, there is no case for [the Unions] to join." *Id.*

To establish the "constitutional minimum of standing," a party must "specifically set forth facts sufficient" to show: (1) that it has suffered an "injury in fact" that is "concrete and particularized," and also "actual or imminent"; (2) causation – *i.e.* that the injury is "fairly . . . trace[able] to the challenged action of

the defendant"; and (3) redressability – *i.e.*, that it is "likely," and not merely "speculative," that the injury will be "redressed by a favorable decision." *Whitmore v. Arkansas*, 495 U.S. 149,155 (1990); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

As the district court observed, and as revealed by the antipathy the Unions continue to display toward the district court, the "gravamen of the Unions' motions is that they disagree with the Court for ruling against the City and the City for refusing to appeal." SPA-102. Yet, the "presence of a disagreement, however sharp and acrimonious it may be, is insufficient" to confer standing. *Diamond*, 476 U.S. at 62. Likewise, the right to judicial review cannot be "placed in the hands of concerned bystanders who would seize it as a vehicle for the vindication of value interests." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64-65 (1997) (internal quotations omitted).

Such disagreements and value disputes are to be left to the political process such as the recent Mayoral election, which produced a strong mandate to forego the instant appeal and change the NYPD's stop-and-frisk practices. *See Clapper*, 133 S. Ct. at 1146 (adherence to constitutional strictures embodied by standing doctrine prevents the "judicial process from being used to usurp the powers of the political branches"). Accordingly, no matter the importance of or interest in the issues raised in an appeal, the Court "must put aside the natural urge to proceed

directly to the merits of an important dispute and to 'settle' it for the sake of convenience and efficiency." *Raines v. Byrd*, 521 U.S. 811, 820 (1997).

Significantly, because of its constitutional origins, standing doctrine imposes a higher threshold on the Unions than Fed. R. Civ. P. 24(a), such that "an interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by other parties." *Schulz*, 44 F.3d at 52 n. 3.

A. The PBA and SBA Lack Standing to Appeal the Liability Order.[2]

1. The PBA and SBA's Asserted Reputational Harms are Too Conclusory and Conjectural to Satisfy the Injury-in-Fact Requirement.

The injury-in-fact showing demands precise articulation. An asserted injury "must be concrete in both a qualitative and temporal sense." *Whitmore*, 495 U.S. at 155. It must be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), as opposed to "abstract," "hypothetical" or "conjectural," *Whitmore*, 495 U.S. at 155; and it must be "directly affected, *apart from* their special interest in the subject," *Lujan*, 504 U.S. at 563 (emphasis added). As the district court found, the injuries the Unions have asserted to their members are nothing more than "speculative, abstract, and amorphous." SPA-102.

[2] Likely realizing the weakness of this argument, the DEA does not seek to appeal the Liability Order.

The PBA asserts that the district court's findings of constitutional violations "inflict serious reputational harm," PBA Br. 50-51, but it simply fails to explain who of its members will suffer reputational harm (other than an undifferentiated whole of thousands of anonymous members), in what form, in whose eyes their reputation will suffer and what, if any, concrete consequences might flow from the court's findings. Similarly, the SBA claims the findings "accusing" sergeants of "violating the Constitution, not telling the truth, and other disparaging conclusions" caused them "publicly tarnished reputations and careers derailed." SBA Br. 50-51. Yet, these utterly conclusory assertions remain unexplained and undefined on appeal. *See* SPA-61 (the Unions offer "no examples of officers having been fired, demoted, denied promotions, reprimanded, disciplined, or having lost pay or pensions" and provide "no description of how police interaction with the public has been altered or hampered.").

Not only do the PBA and SBA fail to meet their burden of "specifically set[ting] forth facts," *Whitmore*, 495 U.S. at 155, demonstrating concrete injury, they can marshal no case in support of their vaguely articulated claim. To begin, the Unions cannot identify (and Plaintiffs cannot either) a single case concluding that a *non-party witness* to a litigation – let alone anonymous non-parties – suffer a reputational injury from a judicial opinion (as opposed to adversarial executive or legislative action) sufficient to confer standing. That is not surprising, given the

sweeping nature of this proposition and its invitation to open judicial floodgates to aggrieved bystanders in litigation. *See* SPA-63.

In addition, none of the cases relied upon by the Unions involves such attenuated and abstracted assertions of reputational harm. In *Meese v. Keene*, 481 U.S. 465 (1987), executive officials denominated the plaintiff's films as "political propaganda," and the plaintiff submitted "detailed affidavits" documenting diminution of viewership, which supported allegations that "his ability to obtain re-election and to practice his profession would be impaired." *Id*. at 473-74. In *ACORN v. United States*, 618 F.3d 125, 134 (2d Cir. 2010), the NGO-plaintiff was specifically targeted by federal agency funding restrictions that affected its "reputation with other agencies, states, and private donors" in a clear and concrete way: it made it calculably harder for the organization to fund its work. In *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155 (2d Cir. 2003), a regulatory board found plaintiff to have engaged in financial misconduct and effectively "unfit to be involved in the affairs of a credit union," which indisputably represented "a death knell for Gully's career in an industry dependent on security and reliability." *Id*. at 162; *see also NCAA v. New Jersey*, 730 F.3d 208, 220-21 (3d Cir. 2013) (concluding that evidence from academic studies and congressional studies demonstrated that athletic league's concern about the stigma from association with gambling was "based in reality").

In contrast to these cases, the Unions are not subject to administrative regulation or sanction and cannot identify any specific facts to suggest concrete harm (*e.g.* pay or promotion) flowing from the court's findings.[3] In effect, the Unions propose an attenuated "group libel" theory of standing that has no precedent or limiting principle. SPA-98 ("it is less clear how anonymous officers with no connection to this litigation might suffer reputational injury from a finding that their employer's policy violates the Constitution.").

The SBA's additional focus on the sergeants singled out by name does them no more good. The SBA's heavy reliance on *Camreta v. Greene*, 131 S.Ct. 2020 (2011), only proves the point. In *Camreta*, the Supreme Court held that a prevailing defendant in a Section 1983 action had standing to appeal a finding that he violated the plaintiff's constitutional rights even though the was dismissed on grounds of qualified immunity (because those constitutional rights were not clearly established). Thus, the defendant in *Camreta* faced a prospective, collateral estoppel-effect in future Section 1983 actions brought against him personally (relating to child removal activities that he regularly conducted). *Id.* at 2033-34. In contrast, the named sergeants here, as merely *non-party witnesses* in a case against another defendant, *do not face any* concrete legal jeopardy arising from the

[3] The Unions' likening of the findings of constitutional violations to "being put on a blacklist," SBA Br. 51 (quoting *United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999)), cannot be taken seriously.

district court's findings against them.[4] And, this Court has made clear that "a party not bound by a judgment cannot appeal a district court's decision on the sole ground that the decision sets a precedent unfavorable to the would-be appellant." *Tachiona v. United States*, 386 F.3d 205, 211 (2d Cir. 2004).

Moreover, as the district court emphasized, the Unions' theory has no limiting principle. SPA-92-93. It would permit individual non-party officers in every *Monell* case brought in this Circuit to intervene and/or take over an appeal against the City and would permit individual non-party employees in a Title VII case to appeal a judgment against an employer. Thus, if accepted, the Unions' theory leaves "no principled basis for distinguishing between a chastised attorney and other participant in the judicial process who becomes the target of the presiding judge's opprobrium." *In re Williams*, 156 F.3d 86, 91 (1st Cir. 1998); *Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984) (Posner, J.) (same).

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[4] Indeed, *Camreta* is expressly limited to an appeal to the Supreme Court because the plaintiff (the losing party) there had appealed the district court's judgment to the Ninth Circuit and district court opinions – like the Liability Order here – "do not necessarily settle constitutional standards or prevent repeated claims of qualified immunity" and thus do not implicate non-parties like Union members. *See Camreta*, 131 S.Ct. at 2033 & n. 7. In addition, because the City has agreed to enact changes to stop-and-frisk policies pursuant to the district court order, Union members could not commit the kind of stops the district court found unconstitutional without violating City policy – which they do not suggest members would do.

In sum, the "policy implications of [the Unions'] view are stunning: a judge's opinion could not discuss non-party participants without inviting endless litigation." SPA-93.

2. The Unions' Asserted Injury Is Not Caused by the Liability Order and Not Redressable by the Relief Requested.

The judgment the Unions seek to appeal runs only against the City for violating its distinct obligations under *Monell*. Plaintiffs did not pursue and the district court did not adjudge any individual liability against any individual Union members. Contrary to the Unions' bald assertion, there is no injunction against any officer that could subject them to a contempt order. Accordingly, as the district court concluded, any asserted reputational injuries to individual officers are not "fairly traceable" to the district court's judgment against the City. SPA-87. Put another way, because granting the Unions the relief they seek on appeal – *i.e.* reversal of the Liability Order – will not likely remedy asserted injuries from subsidiary fact-findings, their injuries are not "redressable" by this Court.

It is black-letter law that a court of appeals "reviews judgments, not opinions." *Accra Pac*, 173 F.3d at 632. Thus, the Unions must show their asserted injury was "caused by the judgment rather injury caused by the underlying facts." *Tachiona*, 386 F.3d at 211 (internal quotation omitted).[5] The Supreme Court has

[5] The SBA quotes this standard, but later ignores it, apparently unaware that it is fatal to their position.

expressed "grave doubts" about whether "nonparties in the District Court [who] were not bound by the judgment" below have standing to appeal. *Arizonans for Official English*, 520 U.S. at 67 (dismissing appeal on alternate, mootness grounds); *see also Nisus Corp. v. Perma-Chink Sys., Inc.*, 497 F.3d 1316, 1321 (Fed. Cir. 2007) (non-party lacked standing to challenge "subsidiary findings made in support of the court's ultimate . . . legal conclusion that [a] patent was unenforceable"); *Warner/Elektra/Atl. Corp. v. Cnty. of DuPage*, 991 F.2d 1280, 1282 (7th Cir. 1993) (courts lack jurisdiction to review subsidiary findings).

Likewise, as the district court concluded, "construing reputational injury as a taint owing to a finding of liability against an employer has been rejected as too generalized." SPA-99. *See also Perry v. Schwarzenegger*, 630 F.3d 898, 903-904 (9th Cir. 2011) ("[w]hile *being bound by a judgment* may be a[] concrete and particularized injury sufficient to confer standing to appeal" the asserted injury from an injunction, "if any, would be to the [employer] not [the employee]" so that a government employee "may not rely upon the [employer's] injury to assert her own standing to appeal") (emphasis added).

Moreover, it is unlikely in the extreme that the relief sought – reversal of the Liability Order – would change the findings the Unions claim injure them. First, nearly all of the findings (or legal conclusions as the SBA now takes to calling them) that officers made unconstitutional stops are thoroughly bound up in the

district court's detailed *factual* findings – which this Court could only reverse under the nearly insurmountable appellate standard of "clear error." *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).[6] Second, it is pure speculation that reversal of the Order – on any number of grounds the Unions press, including lack of injunctive standing – would even address the subsidiary factual findings. *See Lujan*, 504 U.S. at 569 (no standing where resolution by court "would not have remedied respondent's injury anyway").

3. The Unions' Individualized Harms Do Not Support Associational Standing.

Associational standing is foreclosed where "the fact and extent of injury would require individualized proof" from the association's individual members. *Warth*, 422 U.S. at 515-16. As the SBA admits, the allegedly injurious findings are particularized to a tiny fraction of officers singled out for untruthful testimony, unlawful stops or inadequate supervision. In other words, "[t]here is no singular reputational injury that all the named officers share in common." SPA-97. Such particularized and discrete injuries preclude the Unions from standing in for all of its members.

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[6] Similarly, the finding crediting Plaintiffs' testifying expert, who concluded that the NYPD committed not less than 200,000 unconstitutional cannot be disturbed on appeal absent an abuse of discretion. *United States v. Wexler*, 522 F.3d 194, 204 (2d Cir. 2008).

B. The Unions Have No Standing to Appeal the Remedial Order.

1. Any Purported Injury from the Remedial Order is Conjectural and Not Imminent.

In seeking to appeal and up-end the Remedial Order, the Unions all assert that it may produce possible burdens on their members' workload, conceivable threats to their safety, and potential hindrance of their collective bargaining rights. Yet "allegations of *possible* future injury are not sufficient" to constitute an injury-in-fact. *Clapper*, 133 S.Ct. at 1147 (emphasis added). Instead, a threatened harm need be "certainly impending" to confer standing. *Id*.

Significantly, the Unions concede that there are contingencies to their collective-bargaining injuries. *See e.g.*, SBA Br. 41 (point heading: "The SBA's Interests ***May*** Be Impaired by the Disposition of This Action.") (emphasis added); PBA Br. 39 (point heading: "The ***Possibility*** That the District Court's Order ***Could*** Impact the Union's Collective Bargaining Rights Suffices for Intervention") (emphasis added); DEA Br. 50-51 (concluding that ability to grieve "City's methods of implementation of the Remedial Order . . . ***may*** be impaired as a practical matter"). The Unions apparently do not recognize that by framing their injuries as so contingent, they effectively concede they lack standing under *Clapper*. In any event, none of the Unions' variously imagined injuries can meet the "certainly impending" standard or confer jurisdiction over a case that otherwise does not exist.

To begin, the Remedial Order only binds the Plaintiffs and the City, not the Unions. Thus, the Unions cannot overcome the strong presumption against permitting intervenors to appeal nonbinding judgments. *See Tachiona*, 386 F.3d at 211. Moreover, the Remedial Order only requires the actual *parties* to this case to confer with the Independent Monitor to develop and propose reforms which are to be submitted for future court approval; it also only requires the *parties* to engage in a Joint Remedial Process to identify other desired policing reforms, to be implemented only if approved by the court. The Unions are thus in a similar position as the sponsors of California Proposition 8 were in *Hollingsworth v. Perry*, who were denied standing to appeal a decision invalidating their ballot initiative because the "district court had not ordered them to do or refrain from doing anything." 133 S. Ct. at 2662.

In addition, the fact and extent of any potential burdens on training, supervision and discipline are speculative, particularly because they ultimately depends on a process involving the district court, the Independent Monitor, the Plaintiffs, the City and a variety of stakeholders (including the Unions who are invited, but not required to participate). *See Clapper*, 133 S.Ct. at 1149-50 (standing cannot be based on "a speculative chain . . . that require[s] guesswork as to how independent decision makers will exercise their judgment."). And, beyond its rank conjecture, the hysterical claim that reforms will endanger officers' lives,

SBA Br. 41, rests on the troubling proposition that training and supervision on the appropriate *constitutional* policing requirements threatens safety or is a cognizable constitutional injury – a conclusion a court of law should be loath to ratify.

Finally, the Unions suggest that the Remedial process *could*, in some as-yet-unknown iteration, implicate some as-yet-unspecified collective bargaining rights. *See, e.g.*, PBA Br. 42-43 (analogizing to cases in which collective bargaining "could" be implicated). Yet, as the district court concluded, "the Unions' allegations regarding their collective bargaining interests are so conclusory as to evade any meaningful court analysis." SPA-69. In other words, their utterly conjectural and undefined collective bargaining injuries are insufficient to confer standing.[7]

In any event, because all training, supervision and discipline decisions are the exclusive prerogative of management, *see infra* Section III, SPA-74, *see also Ligon* Br. Section II.B, there is no injury to any bona fide right stemming from the Remedial Order. This case is also nothing like *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 456-58 (5th Cir. 2005), because, as the PBA itself admits, that case dealt with a court ruling "affecting [union]-members' *wages*," PBA Br. 49

[7] The PBA's reliance on *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469 (2d Cir. 2010), PBA Br. 50, is inapposite because the case dealt with Rule 24 intervention, not the higher constitutional requirements of standing. *See Schulz*, 44 F.3d at 52 n.3.

(emphasis added) – a matter that is plainly bargainable, and not implicated by the Remedial Order.

2. Any Alleged Collective Bargaining Injuries are Not Caused by the Remedial Order or Redressable by this Court.

As set forth in Section II.B of the *Ligon* Plaintiffs' Brief, which *Floyd* Plaintiffs adopt and incorporate by reference, the Unions' claim that the Remedial Order would itself impinge on existing collective bargaining rights is also conclusively undermined by the fact that the Unions have neither collectively bargained nor attempted to collectively bargain a number of reforms already undertaken, *see supra* pp.4-6 – and about to be independently undertaken – by the City – which all parallel changes contemplated by the Remedial Order.

All of these developments are fatal to the Unions' standing to appeal because they either: (1) confirm the district court's conclusion that collective bargaining rights are not implicated by NYPD decisions regarding training, supervision, recording requirements, or even body worn cameras, or (2) demonstrate that any diminution in asserted collective bargaining rights is occurring independently of – and not caused by – the Remedial Order and is thus not redressable by a proposed invalidation of the Remedial Order. *See Lujan*, 504 U.S. at 573.

The Unions' failure to demonstrate standing to appeal the relevant orders is dispositive of their attempt to intervene, regardless of whether they can satisfy the requirements of Fed. R. Civ. P. 24(a). *See Schulz*, 44 F.3d at 52 n.3.

II. THE DISTRICT COURT'S DENIAL OF INTERVENTION UNDER RULE 24 IS REVIEWED FOR ABUSE OF DISCRETION

In this Circuit, it is beyond peradventure that denials of intervention as of right under Rule 24(a)(2) are "to be reviewed under an abuse of discretion standard." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 990-91 (2d Cir. 1984); *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994). "Because of the variety of factual circumstances that face a district court called upon to decide whether to grant or deny a motion to intervene, and the close proximity of that court to the case's nuances, it has the advantage of having a better 'sense' of the case than" the appellate court. *Pitney Bowes*, 25 F.3d at 69.

An abuse of discretion only "occurs when the district court bases its ruling on an incorrect legal standard or on a clearly erroneous assessment of the facts." *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 348 (2d Cir. 2003). Thus, this Court cannot reverse the district court's determination where it "applied the correct legal standard and offered substantial justification for its finding," *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990), or where the state of the law on the issue under review is "unsettled" and there is an "absence of any clear

indication that the district court employed an incorrect standard." *McCann v. Coughlin*, 698 F.2d 112, 127 (2d Cir. 1983).

A decision denying permissive intervention is granted even more deference and "may only be disturbed for clear abuse of discretion." *United States Postal Service v. Brennan*, 579 F.2d 188, 192 (2d Cir. 1978). "Reversal of a district court's denial of permissive intervention is a very rare bird indeed, so seldom seen as to be considered unique." *Pitney Bowes*, 25 F.3d at 73.

No doubt recognizing this abuse-of-discretion mountain is too steep for them to climb, the Unions propose to replace this well-established standard with *de novo* review – based on the observation that "this Court assumed jurisdiction before the current district judge, who ruled solely on a paper record." PBA Br. 22 n.4. However, this argument – offered without any legal support – overlooks the fact that this Court has not yet examined the merits of the Liability or Remedial Orders nor addressed any of the issues raised by the Unions' intervention motions, *see Floyd*, 13-3088, Dkt # 247 at 3, Dkt # 476-1 at 7-8, while the district court conducted an in-depth review of the records in both *Floyd* and *Ligon* in deciding intervention. Moreover, that the district court held no evidentiary hearings prior to

rendering its decision is of little moment since the Unions do not dispute any of the court's factual findings.[8]

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE UNIONS INTERVENTION AS OF RIGHT

Under Federal Rule of Civil Procedure 24(a)(2), intervention as of right is permitted only if the putative intervenor demonstrates all of the following: (1) its motion for intervention is timely; (2) it has an interest relating to the property or transaction which is the subject of the litigation; (3) its interest would be impaired by the outcome of the litigation; and (4) its interest is not adequately protected by the existing parties. *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001); *Catanzano v. Wing*, 103 F.3d 223, 232 (2d Cir. 1996) ("Failure to satisfy *any one* of these requirements is a sufficient ground to deny the application.") (emphasis in original).

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[8] Meanwhile, the DEA's unsupported contention that the district court's "error of law" in analyzing the adequacy of the City's representation of the Unions' interests somehow diminishes the court's factual findings on timeliness "to no deference," DEA Br. 28, makes no sense and misapprehends the clear law of this Circuit. For not only did the district court never reach the adequacy of representation factor in its Rule 24(a) intervention analysis, it didn't have to. *See Farmland Dairies, Inc. v. Comm'r of the N.Y. State Dep't of Argic. and Mkts.*, 847 F.2d 1038, 1045 (2d Cir. 1988) ("Since the district court did not abuse its discretion in denying Appellants' motions to intervene as untimely, we have no occasion to consider the other requirements. . . for Rule 24(a)(2) intervention.").

A. The District Court Did Not Abuse Its Discretion In Ruling That the Unions' Motions Were Untimely.

As the Unions must concede, "[t]he timeliness requirement is flexible, and the decision is one entrusted to the district judge's sound discretion." SPA-18; *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 594-95 (2d Cir. 1986); *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 198 (2d Cir. 2000) ("A district court has broad discretion in assessing the timeliness of a motion to intervene"); PBA Br. 22; SBA Br. 22. A district court "should base its determination upon all the circumstances of the case." *Yonkers*, 801 F.2d at 595; *see also Farmland Dairies*, 847 F.2d at 1044 (same).

In this Circuit, "the following four factors should guide the district court's determination: (1) the length of time the applicant knew or should have known of his interest before making the motion; (2) prejudice to existing parties resulting from the applicant's delay; (3) prejudice to the applicant if the motion is denied; and (4) the presence of unusual circumstances militating for or against a finding of timeliness." *Farmland Dairies*, 847 F.2d at 1044. In addition, "post-judgment intervention is generally disfavored" in this Circuit "because it usually creates delay and prejudice to existing parties." *Yonkers*, 801 F.2d at 596 (listing cases); *Farmland Dairies*, 847 F.2d at 1044 (same).

The district court's 30-page discussion of timeliness was based on a close review of the district court records in *Floyd* and *Ligon* (and *Daniels*) and its

judgment was tied to legal precedent from this Circuit. SPA-4-14, 18-48. As such, the district court cannot have abused its discretion.

1. The District Court Did Not Abuse Its Discretion In Assessing the Length of Time Unions Knew or Should Have Known of their Interests in *Floyd* and *Ligon*.

Based on detailed record review, the district court concluded that the Unions had actual or constructive knowledge of their purported legal interests in the *Floyd* litigation long before the City announced it would drop its appeals on January 30, 2014, or the issuance of the Liability and Remedial Orders on August 12, 2013. Seeking a way around the presumption against post-judgment intervention, *see Yonkers*, 801 F.2d at 596, the Unions make two arguments – neither of which is supported by this Court's precedent or the record in *Floyd* and *Ligon*.

First, relying on out-of-circuit case law[9] and the Supreme Court's decision in *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), the Unions argue that post-judgment motions to intervene for the purposes of appeal are timely as long as the applicant moved to intervene promptly after judgment. PBA Br. 23-24; SBA Br. 24-27; DEA Br. 31-32. However, it is by definition not an abuse of discretion to choose not to apply out-of-circuit case law. As for *United Airlines*, the district

[9] The *only* Second Circuit decision cited by the Unions, *Drywall Tapers and Pointers of Greater New York v. Nastasi & Assocs.*, 488 F.3d 88 (2d Cir. 2007), *see* SBA Br. 24, deals only with the timeliness of a notice of appeal of an injunction filed by a non-party, not the timeliness of that non-party's post-judgment intervention motion. *Id.* at 95-96.

court correctly explained that post-judgment intervention there was timely because it was the issuance of the judgment *itself* – which, for the first time, created and notified the putative intervenor of her legal interest in the case. SPA-20-21; 432 U.S. at 394 n.15 (unnamed putative plaintiff class member's interest in class determination in Title VII suit only became actionable upon issuance of final judgment denying class certification). In contrast, as discussed below, the Unions purported interests in *Floyd* and *Ligon* arose and became actionable long before the August 12, 2013 Liability and Remedial Orders.

The district court's interpretation of *United Airlines* is supported by extensive post-*United Airlines* precedent in *this* Circuit holding that post-judgment motions to intervene to appeal or otherwise challenge a liability judgment or remedial order are untimely even when filed promptly after the judgment or order where the putative intervenor should have known of their interest before the judgment's or order's issuance. *See Farmland Dairies*, 847 F.2d at 1042-44 (motion to intervene brought four days after issuance of judgment untimely where putative intervenors "were aware of this and related litigation" for at least six months); *Yonkers*, 801 F.2d at 594-97 (motion to intervene brought thirteen days after issuance of remedial order untimely where objectionable provisions were proposed at beginning of remedy trial and discussed in local media three months earlier); *Catanzano*, 103 F.3d at 227-28, 232-34 (motion to intervene to appeal

remedial order filed 34 days after issuance of order untimely where the issue putative intervenors sought to litigate on appeal "was clearly present in the [six-year-old] litigation from the very beginning" and remedy to which they objected "has been contemplated from very early on in the litigation"); *see also Dow Jones & Co., Inc v. United States Dep't of Justice*, 161 F.R.D. 247, 251, 252 (S.D.N.Y. 1995) (Sotomayor, J.) (*United Airlines* requirement that putative intervenor file post-judgment intervention motion "promptly" after issuance of judgment supplements, not supplants, Second Circuit's four-part timeliness test). Thus, far from an "unsupported legal conclusion," DEA Br. 29, the constructive notice standard which the district court applied in this case, SPA-22-23, scrupulously follows this Court's precedent and could not conceivably be classified as an abuse of discretion.

Applying this standard to the facts of *Floyd* and *Ligon*, the district court's conclusion that the Unions were on notice of their purported interests long before the issuance of the August 12, 2013 Liability and Remedial Orders was well within its broad discretion, based on its review of the totality of the circumstances in this case. To summarize:

- The complaint in *Floyd*, filed in 2008, alleging unconstitutional stops by specific Union members and requesting department-wide stop-and-frisk policy, training, supervisory, monitoring and disciplinary reforms. *Supra* p.6.

- During three years of pre-trial discovery in *Floyd*, depositions of dozens of Union members about their roles in the allegedly unconstitutional and discriminatory stops-and-frisks of plaintiffs. *Supra* p.6.

- The August 2011 decision denying the City summary judgment in *Floyd* was widely reported on in the press and held that the constitutionality of certain Union members' stops of plaintiffs and the need to reform the NYPD's stop-and-frisk policies, training, supervision, monitoring, and disciplinary systems were triable issues. *Supra* pp.6-7.

- The April 16, 2012 district court decision permitting *Floyd* plaintiffs' expert to present at trial his statistical analysis of the NYPD's stop-and-frisk data showing that approximately 200,000 stops recorded by NYPD officers appeared to lack reasonable suspicion. SPA-34-35; *supra* p.7.

- *Floyd* Plaintiffs' March 6, 2013 briefing on injunctive relief proposing the very same relief discussed in the Remedial Order. A-467-502.

- A highly-publicized trial in *Floyd* from March-May 2013 in which twelve plaintiffs and class members testified that specific Union members had unconstitutionally stopped them, dozens of Union members testified about their involvement in these stops, and numerous other NYPD officials testified about the need for, and potential burdens of, reforms to NYPD stop-and-frisk policy, training, supervision, documentation, monitoring, and disciplinary systems. *Supra* pp.8-9.

In addition, if the above left any doubt the Unions members' purported reputational and collective bargaining interests were at stake in the *Floyd* litigation, that doubt was conclusively erased by the district court's January 8, 2013 preliminary injunction ruling in *Ligon*. There, the same district court which would issue the Liability and Remedial Orders the Unions now find so broad and shocking: (i) made specific findings of unconstitutional stops by Union members, (ii) relied on a similar statistical analysis of NYPD stop data from *Floyd* Plaintiffs'

expert to conclude that NYPD officers had engaged in a widespread practice of unconstitutional trespass stops in the Bronx, and (iii) proposed reforms to NYPD trespass stop-and-frisk policies, training and supervisory practices that it directed be finalized through a consolidated remedies hearing with the parties in *Floyd*. *Ligon v. City of New York*, 12 Civ. 2274, 2013 U.S. Dist. LEXIS 2871 (Jan. 8, 2013).

Given this record, the Unions' claims that they could not have known the nature and extent of their members' supposed reputational and collective bargaining injuries until the August 12, 2013 Liability and Remedial Orders, SBA Br. 25; DEA Br. 30, are not credible. *See Catanzano*, 103 F.3d at 232-233 (order triggering motion to intervene not a "total surprise" to putative intervenors where record showed that issue addressed in order "was clearly present in the litigation from the very beginning"); *Yonkers*, 801 F.2d at 595-97.[10]

Second, the Unions argue that regardless of when their interests in *Floyd* and *Ligon* first arose, the intervention clock did not start until it became clear to them

[10] The PBA's citation to an excerpt from a 37 year-old Fifth Circuit decision, *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977), PBA Br. 23-24, does not compel a different conclusion. Besides being non-binding out-of-circuit authority, *Stallworth* distinguished an intervenor's notice of the existence of a lawsuit from his notice of that lawsuit's potential "ramifications" for his legal interests. 558 F.2d at 264-65. As the district court correctly found, the aforementioned litigation events and media reports clearly provided the Unions with notice of both.

that the City would not adequately represent their interests, which they argue did not occur until Mayor de Blasio's January 30, 2014 appeal-dropping announcement or, at the earliest, August 2013 when then-candidate de Blasio announced his position on the City's appeals and became the mayoral frontrunner. PBA Br. 25-26; SBA Br 23; DEA Br. 28-29, 33-36. These arguments have no support in law or the factual record.

In order to ensure that litigants do not sit on their rights or roll the trial dice, this Circuit measures timeliness from when the putative intervenor should have known its interest "*might* not be adequately represented." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 182 (2d Cir. 2001) (emphasis added), and not when it becomes absolutely certain that the interests have been lost.

Moreover, DEA's unsupported reliance on an asserted "presumption of adequate governmental representation," DEA Br. 29, cannot apply when, as here, the governmental party to the litigation is the employer of the putative intervenor. *United States v. New York*, 820 F.2d 554, 558 (2d Cir. 1987); *City of Los Angeles*, 288 F.3d at 401-02. Indeed, the Unions themselves argued below and in this Court that they "have never been aligned" with the City on the collective bargaining issues which the Unions now claim are implicated by the Remedial Order. PBA Br. 45; *Floyd* Dist. Ct. Dkt # 442 at 20, Dkt # 445 at 19.

If the Unions are to have the Court believe that collective bargaining over training, supervision and discipline are *bona fide* concerns, they must surely concede that they were put on notice numerous times over the past decade – from the *Daniels* settlement to subsequent, voluntary stop-and-frisk reforms, *see supra* pp.3-6 – that the City might unilaterally accede to such changes and thereby not adequately represent their collective bargaining interests. Similarly, in the Spring of 2013, during post-injunction remedies briefings in *Ligon*, the Bloomberg administration effectively agreed to undertake stop-and-frisk policy, training, supervisory and monitoring changes proposed by the *Ligon* Plaintiffs. A-510-88. Yet, despite the similarity of the cases, the remedial concessions the City made, and the consolidation of *Floyd* and *Ligon* remedial proceedings, A-664-770, the Unions did not bother to intervene in the upcoming *Floyd* trial or remedial briefing.[11]

As for the Unions' purported interests in *Floyd* liability issues, the district court correctly noted that *Floyd* Plaintiffs' dismissal of all claims against individual Union member defendants on March 8, 2013 ended the City's obligation to legally represent those officers and reestablished the inherent conflict between

[11] The inadequacy of the City's representation was further demonstrated in its April 2013 brief in opposition to the *Floyd* plaintiffs' motion for permanent injunctive relief, in which the City made no mention of the Unions' collective bargaining rights in responding to plaintiffs' request for the very categories of reform that ultimately appeared in the August 12, 2013 Remedial Order. *Floyd* Dist. Ct. Dkt # 274.

the City and its employees that exists in every Section 1983 *Monell* case. SPA-38-41; *Dunton v. Suffolk Cnty.*, 729 F.2d 903, 907 (2d Cir. 1984); *Patterson v. Balsamico*, 440 F.3d 104, 114 (2d Cir. 2006). In addition, the Unions should obviously have known before and throughout the trial that the City was diametrically opposed to them on a central liability issue in the case because the City defended officer-enforcement quotas and "performance goals" in court, and in post-trial briefs denigrated the character and credibility of three Union members who had been critical of such quotas —which the PBA itself had repeatedly grieved and arbitrated since at least 2005. *Floyd* Dist. Ct. Dkt # 364, at 9-10; Trial Tr. 885-889, 6790-91; SPA-41.

Ultimately, despite feeble attempts to distinguish the directly governing Second Circuit case, the Unions cannot get around the binding force of *Farmland Dairies*. There, as here, the putative intervenors did not intervene until after a final judgment of liability against the government defendant and after learning that the government would accede to plaintiff's remedial demands instead of appealing. 847 F.2d at 1041-42. There, as here, the government defendant was not obligated by law to protect the putative intervenors' purported legal interests. *Id.* at 1044. This Court there rejected reliance on the very same excuse proffered here for the Unions' delay – *i.e.*, that the putative intervenors "had every reason to believe that the State would defend the constitutionality of [the challenged policies] as it had

always done in the past." *Id*. *Farmland Dairies* conclusively disposes of the Unions' arguments.

Finally, as the district court concluded, the Unions' choice to sit on their rights is obviously more glaring given the participation of the Department of Justice, police accountability NGOs, and a component of the City Counsel in the pre- and post-trial briefing around remedies. *See* SPA-45. The Unions, whose dues-paying members number in the tens of thousands and who apparently have the resources and wherewithal to retain teams of lawyers from large, prominent New York and Miami law firms to represent them, clearly "are not poor, ignorant people whose rights have to be protected" by eleventh-hour intervention. *Farmland Dairies*, 847 F.2d at 1044. To permit intervention in such a case would undo decades of Circuit precedent, encourage potential intervenors to sit on their rights, and invite numerous last minute intervention appeals.

2. The District Court Did Not Abuse Its Discretion in Assessing the Prejudice to Existing Parties Caused by the Unions' Delay.

The district court also did not abuse its discretion by holding that Union intervention at this stage of this long-running litigation would severely prejudice the existing parties; nor did it run afoul of this Circuit's adoption of a presumption that post-judgment intervention prejudices existing parties. *See Yonkers*, 801 F.2d

at 596 (generally discouraging post-judgment intervention because it "causes delay and prejudice to existing parties").

In addition, this Court's analysis in *Farmland Dairies* demonstrates the district court acted well within its discretion in assessing prejudice. There, the proposed intervenors waited to intervene until after the State decided not to appeal an unfavorable decision and had reached agreement with the plaintiffs on injunctive relief. 847 F.2d at 1042. This Court concluded that, "if [putative] intervenors were permitted to intervene at this late date, there is no question that the settlement concluded by [plaintiff] and the state would be jeopardized," which would in turn prejudice plaintiff's "substantial" interest in the injunctive relief it had obtained through that settlement and the state's "substantial" interest in avoiding continuing litigation and the potential imposition of additional court-ordered relief against it. *Id.* at 1044.

Similarly, in *Garrity v. Gallen*, 697 F.2d 452 (1st Cir. 1983), the First Circuit, in evaluating prejudice to plaintiffs from an intervenor's attempt to appeal a decision the state defendant had abandoned in favor of settlement, *id.* at 454-55, concluded:

> Intervention to contest provisions of the implementation order would obviously be highly detrimental to members of the plaintiff class; the substantial relief afforded them by the order would probably be delayed and, if applicants were successful in their challenge to the order, denied. Courts have not hesitated to give great weight to such potential adverse effects in denying leave to intervene.

Id. at 457.

As in *Farmland Dairies* and *Garrity*, the district court here recognized that allowing the Unions to intervene now to prosecute the appeal in the City's place would prejudice both the Plaintiffs, who have already won a judgment of liability and obtained an agreement from the City to develop and implement the very stop-and-frisk reforms they fought so long for, and the City, which wishes to "end the years-long legal battle" and exercise its "prerogative to determine policing policy" by moving forward with stop-and-frisk reforms. SPA-47-48.

The Unions argue that the prejudice to *Floyd* Plaintiffs and the City is not attributable to the Unions' obvious delay because an earlier intervention would still have produced "delay inherent in an appeal." PBA Br. 28-29 (citations omitted); DEA Br. 37-38. But that excuse was certainly present in *Farmland Dairies* and *Garrity*, and did not alter the courts' prejudice analysis. Moreover, given the agreement to proceed with reforms, there is greater prejudice to Plaintiffs and the City because they have a lot more at stake now than prior to the August 2013 rulings. *See In re Holocaust Victims Assets Litig.*, 225 F.3d at 199 (denying

intervention that "would prejudice the existing parties by destroying their Settlement and *sending them back to the drawing board*") (emphasis added).[12]

Accordingly, the district court's prejudice determination was clearly "within the range of permissible decisions" that it could make. And, given the district court's findings that the Unions' delay was unjustified, *see supra* Section III.A.1, even to conclude that the parties were not prejudiced "is insufficient to render the [d]istrict [c]ourt's [denial of intervention] an abuse of discretion." *In re N.Y. Bank Derivative Litig.*, 320 F.3d 291, 301 (2d Cir. 2003).

3. The District Court Did Not Abuse its Discretion in Finding No Prejudice to the Unions Caused by Denial of Intervention.

The district court's finding that the Unions suffer no prejudice because they "assert no legally colorable interest" is not an abuse of discretion. SPA-48.

Moreover, any imagined – but heretofore unspecified and unsupported – prejudice to the Unions' collective bargaining interests will be ameliorated by the Unions' right to participate as stakeholders in the Joint Remedial Process (JRP). Their stakeholder status in development of remedies is more substantial than a mere amicus submission, DEA Br. 52, because while a court is free to ignore an amicus submission, the Remedial Order provides that any JRP proposals made to

[12] The SBA argument that it sought to intervene at the "earliest stages" of the appellate phase, SBA Br. 30, was also true – and to no avail – in *Farmland Dairies* and *Garrity*.

the court monitor and the district court must include Union input. *Floyd*, 959 F.Supp.2d at 686-88. The Remedial Order also requires that reforms to performance evaluations have the input of the Unions. *Id*. at 680-81.[13]

The district court also took notice of statements from Union leaders suggesting that they intend to use their intervention as bargaining leverage in contract negotiations with the City. SPA-63 n.17. Being denied this strategic opportunity, unrelated as it is to the merits of issues before the court, cannot be cognizable prejudice.

In light of the foregoing, the district court did not abuse its discretion in concluding that "'intervention on the part of the late-arrivers must yield' to the existing parties' desire for finality." SPA-48 (quoting *Farmland Dairies*, 847 F.2d at 1044-45).

[13] Because the district court considered the totality of the circumstances — including the Unions' asserted legal interests and the scope of the remedial process — in deeming their stakeholder status as a reasonable alternative to intervention as of right, the law of this Circuit requires deference to that discretionary determination. *See, e.g.*, *Hooker*,749 F.2d at 992-93; *see also SEC v. Charles Plohn & Co.*, 448 F.2d 546, 549 (2d Cir. 1971).

B. The District Court Did Not Abuse Its Discretion In Holding that the Unions Lack Legally Protectable Interest in the Merits or the Remedies.

1. The District Court Did Not Abuse Its Discretion in Concluding that the Unions' Claims of Reputational Harm Do Not Constitute a Direct, Substantial, Legally Protectable Interest Under Rule 24(a).

The PBA and SBA argue that they have an interest in vindicating their reputational interests that were besmirched by certain findings in the Liability Order. To begin, the district court concluded that these assertions were so vague and conclusory they could not even permit a meaningful Rule 24 analysis. SPA-53. As described above, the Unions' failure to articulate concrete reputational injury defeats their claim for standing and disposes of this appeal.

But even if this Court determines that the Unions did adequately articulate their so-called reputational interest, it was not an abuse of discretion for the district court to conclude that (i) they fail to assert interests that actually belong to their members and (ii) that any asserted interests "are too indirect to be colorable on a motion to intervene." SPA-54. In support of the first conclusion, the district court cited extensive case law in the Rule 19(a) joinder context — which this Court has held and the PBA concedes involves an analysis that "mirror[s]" the Rule 24(a) intervention analysis, *MasterCard Int'l, Inc. v. Visa Int'l Serv. Ass'n*, 471 F.3d 377, 390 (2d Cir. 2006); PBA Br. 43 — holding that agents suffer no legally protectable reputational harm merely because their principal is found liable in a

lawsuit, even if such liability judgment depends on a finding of misconduct by the agent. SPA-55-56 (citing cases).

The PBA claims the district court incorrectly relied on Rule 19(b) precedent governing "indispensable" parties, yet the majority of the cases it cites did indeed involve Rule 19(a) joinder. In *Pujol v. Shearson Am. Express, Inc.*, 877 F.2d 132, 136 (1st Cir. 1989), the court unquestionably addressed whether a party was "necessary" under Rule 19(a). A careful reading of the Seventh Circuit decision in *Pasco* also reveals consideration of "necessary" party status. *Pasco Int'l (London) v. Stenograph Corp.*, 637 F.2d 496,502 (7th Cir. 1980). Neither Union cites any cases contradicting the district court or otherwise suggesting it applied the wrong legal standard.

The district court's second conclusion, that asserted reputational harms are "too far removed from 'the property or transaction that is the subject of the action,'" SPA-59 (quoting *Pitney Bowes*, 25 F.3d at 70), is similarly supported by extensive precedent from four Circuits refusing to recognize the reputational interest of a non-party witness as sufficient to support intervention, *see* SPA-59-60 (citing cases). The Unions cite no authority to the contrary.

In addition, the Second Circuit precedent cited by the district court, SPA-60, strongly supports its remoteness conclusion. In *N.Y. News, Inc. v. Kheel*, 972 F.2d 482 (2d Cir. 1992), this Court affirmed a district court's conclusion that a non-

party did not possess a legally cognizable interest when he sought to vindicate his reputation by pursuing Rule 11 sanctions against the plaintiff's attorney who had alleged impropriety against the non-party. *Id.* at 486-87. The Unions claim that *Sierra Club v. United States Army Corps of Engineers*, 709 F.2d 175 (2d Cir. 1983), supports the proposition that, "[w]here the reputational harm is inseparable from adverse legal findings and effects, reputational harm may give rise to an interest under Rule 24(a)." PBA Br. 43; SBA Br. 34. But this analysis seriously misreads *Sierra Club*. This Court actually affirmed that the proposed intervenor *did not* have a legally protectable interest because "[t]he subject of the underlying action [wa]s the failure of [government entities] to comply" with certain environmental regulations and a judgment of contempt against those entities would have, at most "an indirect effect on [the putative intervenor]" who would not be bound by such judgment." *Sierra Club* 709 F.2d at 176-77. As such, *Sierra Club*'s observation that "a different case would be presented" if the plaintiff's claim rested on an assertion that the proposed intervenor was "professionally incompetent," *id.* at 177, is dictum that does not support a radically distinct proposition that intervention is appropriate simply because the district court, by necessity, evaluated the constitutionality of stops conducted by NYPD officers.

Finally, the Unions offer no compelling reason why the district court's distinguishing of the Ninth Circuit's decision in *United States v. City of Los*

Angeles, from the present case, SPA-64-67, was an abuse of discretion. As the district court correctly observed, the Ninth Circuit's conclusion that allegations of officer misconduct in the complaint supported intervention rested largely on the fact that the proposed consent decree between the DOJ and the City had not been approved, thus preserving individual officers' potential exposure to future liability based on the alleged misconduct. SPA- 66; *City of Los Angeles*, 288 F.3d at 399. In contrast, all Union members accused of misconduct in Plaintiffs' complaint have been dismissed as defendants, and any future § 1983 claim based on findings against such officers would be barred by the three-year statute of limitations. SPA-67. The PBA does not even bother to address this critical distinction, while the SBA claims it is "irrelevant" because mere "disparaging statements," not potential liability, is what really matters, SBA Br. 33, even though there is no mention of "reputational harm" anywhere in *City of Los Angeles*.

2. The District Court Did Not Abuse Its Discretion in Concluding that the Unions Do Not Have Direct, Legally Protectable Collective Bargaining Interests in the Remedial Order or the Remedial Phase of this Case.

For the reasons set forth in the district court's opinion and in Section II.B of *Ligon* Plaintiffs' Brief, which *Floyd* Plaintiffs incorporate fully here by reference, the district court did not abuse its discretion in concluding that the Unions do not have legally protectable collective bargaining interest in any of the remedies contemplated by the Remedial Order. This precludes them from intervening either

to appeal the Order or to participate in the remedial processes set forth in the Order.

IV. THE DISTRICT DID NOT ABUSE ITS BROAD DISCRETION IN DENYING THE UNIONS PERMISSIVE INTERVENTION.

Because the district court did not clearly abuse its discretion in holding that the Unions' motions were untimely for intervention as of right, the court's denial of the Unions' motion for permissive intervention as untimely, SPA-48 n.13, was also not an abuse of discretion. *See NAACP v. New York*, 413 U.S. 345, 365 (1973) (untimely intervention motion "must be denied" under both Rule 24(a) and 24(b)). Likewise, because the district court did not abuse its discretion in ruling that the Unions lack a legally protectable interest in either the Liability or Remedial Orders, its holding that the Unions "do not possess a claim or defense that shares a common question of law or fact with respect to the Liability and Remedial Orders," SPA-82 n.23 (citing Fed. R. Civ. P. 24(b)(1)(B)), was not an abuse of discretion. This necessarily means the Unions also do not possess such a claim or defense with respect to the *Floyd* remedies phase.

Additionally, the prejudice factor of Rule 24(b)(2) weighs heavily against permissive intervention in the remedies phase because the Unions' vehement disagreement with the Remedial Order and publicly-stated intentions to use intervention as a way to extract collective bargaining concessions from the City strongly suggest they would attempt to obstruct the consultative remedial processes

established by the district court, thereby frustrating Plaintiffs' and City's efforts to develop and implement meaningful injunctive relief.

V. THE UNIONS' CHALLENGE TO PLAINTIFFS' STANDING TO PURSUE INJUNCTIVE RELIEF IS MERITLESS.

Two Unions challenge Plaintiffs' standing to obtain injunctive relief. *See* PBA Br. 53; SBA Br. 48 n.12. This last-ditch argument fails.

First, this Court's jurisdiction over the district court's order denying intervention does not confer jurisdiction over the district court's unrelated decision on standing. *See Merritt v. Shuttle, Inc.*, 187 F.3d 263, 268 (2d Cir. 1999) (appellate jurisdiction in interlocutory appeal does not extend to "unrelated questions"); *In re MTBE Products Liab. Litig.*, 488 F.3d 112 (2d Cir. 2007). The Unions' observation that standing cannot be "waived" provides no support for this Court to examine standing in *this* appeal. The obligation to consider jurisdiction on an interlocutory appeal is confined to those claims giving rise to the appeal. *See Merritt*, 187 F.3d at 269 (examining jurisdiction "only" "over the precise claims that are the basis for this appeal" and declining to address other jurisdictional issues). Here, even the PBA concedes that intervention and standing are "entirely independent" issues. PBA Br. 57.[14]

[14] For the reasons set forth in Plaintiffs' submissions in connection with the City's 2013 appeal (which have not been ruled on), Plaintiffs contend that the Court lacks appellate jurisdiction to review the Liability and Remedial Orders. *See Floyd*, 13-3088, Dkt ## 76, 267, 314.

Second, it would be imprudent – and deeply unfair – for this Court to address this significant question, which necessarily turns on numerous factual issues presented by an 8000-page trial record (and is raised here only cursorily by two of the Unions), without the benefit of full briefing or examination of that record, particularly where resolution is unnecessary for adjudicating intervention. *See Ctr. for Reprod. Law & Policy v. Bush*, 304 F.3d 183, 195 (2d Cir. 2002) (appellate courts should not "adjudicate constitutional matters unnecessarily").

Finally, the district court's determination that Plaintiffs had injunctive standing is thoroughly reasoned, supported by substantial evidence, and entirely in accord with precedent, *see Deshawn E. v. Safir*, 156 F.3d 340 (2d Cir. 1998) (distinguishing *City of Los Angeles v. Lyons*, 461 U.S. 95, 106-06 (1983));[15] *Floyd*, 959 F.Supp.2d at 562, 573 n.112, 575, 603-06, 613-15, 630-37, 658-67 (finding, based on a review of an 8000-page trial record, *inter alia*: (i) nine of twelve testifying plaintiffs were stopped and/or frisked illegally while engaging in lawful activities, some multiple times; (ii) the NYPD has an ongoing policy of targeting "young men of color in their late teens" for stop-and-frisk activity; (iii) the

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[15] *Lyons* is entirely distinguishable. There, the city had an official policy *against* chokeholds in situations like the one in which plaintiff was choked, and plaintiff was not likely be choked again unless he violently resisted arrest. Here, the evidence showed the City has a policy encouraging suspicionless and race-based stops, and Plaintiffs are subject to future violations even when engaging in everyday, lawful activities.

NYPD's current training on reasonable suspicion factors and characteristics of armed suspects contradicts constitutional standards; and (iv) a direct causal link between the aforementioned policy and training and the stops of individual plaintiffs).[16]

CONCLUSION

For the reasons stated above, this Court should affirm the district court's denial of the Unions' motions to intervene in their entirety.

[16] Contrary to the Unions' assertion, a plaintiff need not prove that he was injured multiple times. *Roe v. City of New York*, 151 F. Supp. 2d 495, 503 (S.D.N.Y. 2001). Likewise, the Unions' claim that injuries to class members who are not named plaintiffs are not sufficient to confer standing is incorrect. *See Sosna v. Iowa*, 419 U.S. 393, 399 (1975); *Whitlock v. Johnson*, 153 F.3d 380, 404-05 (7th Cir. 1998); *Melendres v. Arpaio*, PHX-CV-07-2513, 2013 WL 2297173, *59 (D. Ariz. May 24, 2013). *Lewis v. Casey*, 518 U.S. 343, 357-58 (1996), simply held that injuries allegedly suffered – but not proved at trial – by "unidentified" class members are insufficient for standing. Here, Cornelio McDonald was an *identified* class member who proved his injuries at trial. In *O'Shea v. Littleton*, 414 U.S. 488 (1974), the complaint failed to allege that any named plaintiff suffered any injury, and injuries to non-named plaintiffs were not at issue.

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