No. 14-2829(L)

14-2834 (con), 14-2848 (con)

IN THE 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,

(C*aption continued on inside cover*)

On Appeal from a Final Judgment of the
United States District Court for the Southern District of New York

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BRIEF OF *AMICI CURIAE* LAW PROFESSORS
IN SUPPORT OF PLAINTIFFS-APPELLEES

Jonathan Romberg
Seton Hall University School of Law
Center for Social Justice
833 McCarter Highway
Newark, New Jersey 07102
(973) 642-8700
Attorney for Amici Curiae Law Professors

v.

DAVID FLOYD, LALIT CLARKSON, DEON DENNIS, DAVID OURLICHT, JAENEAN LIGON, individually and on behalf of her minor son, J.G., FAWN BRACY, individually and on behalf of her minor son, W.B., A.O., by his parent DINAH ADAMES, JACQUELINE YATES, LETITIA LEDAN, ROSHEA JOHNSON, KIERON JOHNSON, JOVAN JEFFERSON, ABDULLAH TURNER, FERNANDO MORONTA, CHARLES BRADLEY, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellees,

v.

THE CITY OF NEW YORK, COMMISSIONER WILLIAM J. BRATTON*, NEW YORK CITY POLICE, in his official capacity and individually, MAYOR BILL DE BLASIO*, in his official capacity and individually, NEW YORK CITY POLICE OFFICER RODRIGUEZ, in his official and individual capacity, NEW YORK CITY POLICE OFFICER GOODMAN, in his official and individual capacity, POLICE OFFICER JANE DOE, NEW YORK CITY, in her official and individual capacity, NEW YORK CITY POLICE OFFICERS MICHAEL COUSIN HAYES, SHIELD #3487, in his individual capacity, NEW YORK CITY POLICE OFFICER ANGELICA SALMERON, SHIELD #7116, in her individual capacity, LUIS PICHARDO, SHIELD #00794, in his individual capacity, JOHN DOES, NEW YORK CITY, #1 through #11, in their official and individual capacity, NEW YORK CITY POLICE SERGEANT JAMES KELLY, SHIELD #92145, in his individual capacity, NEW YORK CITY POLICE OFFICER CORMAC JOYCE, SHIELD #31274, in his individual capacity, NEW YORK POLICE OFFICERS ERIC HERNANDEZ, SHIELD #15957, in his individual capacity, NEW YORK CITY POLICE OFFICER CHRISTOPHER MORAN, in his individual capacity,

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.

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INTEREST OF AMICI CURIAE

The undersigned law professors are prominent authorities in the areas of civil procedure, federal jurisdiction, and constitutional law. They hereby submit this brief *amici curiae*, pursuant to Federal Rule of Appellate Procedure 29, in support of Plaintiffs-Appellees, David Floyd, et al., and in opposition to the appeals of the district court's Order denying intervention filed by the Patrolmen's Benevolent Association ("PBA"), the Sergeants Benevolent Association ("SBA"), and the Detectives' Endowment Association, Inc., the Lieutenants Benevolent Association of the City of New York, Inc., and the NYPD Captains Endowment Association (collectively, the "Unions").[1]

Collectively, these academics represent many decades of experience as professors of civil procedure, federal jurisdiction, and constitutional law at leading law schools. *Amici* share a common interest in ensuring that the judiciary operates within its well-established borders, which includes respecting the case or controversy requirement at the heart of federal jurisdiction. *Amici* believe that their

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[1] Pursuant to Federal Rule of Appellate Procedure 29, the parties have consented to the filing of this amicus brief. Also pursuant to Rule 29, undersigned counsel for *amici curiae* certifies that: (1) no counsel for a party authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund the preparation or submission of this brief; and (3) no person or entity—other than *amici curiae*, its members, and its counsel—contributed money intended to fund the preparation or submission of this brief.

collective and collaborative experience as educators, researchers, and practitioners in federal practice provides this Court with a beneficial perspective that will assist in resolving this important constitutional question. *Amici* file this Brief in their personal capacity, not as representatives of the schools with which they are affiliated.

Erwin Chemerinsky is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, at the University of California, Irvine School of Law.

Michael C. Dorf is the Robert S. Stevens Professor of Law at Cornell University Law School.

Brandon L. Garrett is Professor of Law at University of Virginia School of Law.

Suzanne B. Goldberg is the Herbert and Doris Wechsler Clinical Professor of Law, and Director, Center for Gender and Sexuality Law, at Columbia Law School.

Jamal Greene is Vice Dean and Professor of Law at Columbia Law School.

Jonathan Hafetz is Associate Professor of Law at Seton Hall University School of Law.

Aziz Huq is Professor of Law and the Herbert and Marjorie Fried Teaching Scholar at the University of Chicago Law School.

James Sample is Associate Professor of Law at Maurice A. Deane School of Law at Hofstra University.

SUMMARY OF THE ARGUMENT

All government actors, including state and local authorities such as the City of New York, are tasked with upholding the Constitution and laws of the United States. How cities and localities carry out that obligation in practice, and what they are and are not permitted to do, is often resolved by way of court cases brought by individuals who allege that they have suffered concrete harm caused by the government actor. In litigating these difficult and important constitutional questions, governments sometimes decide to settle a case, or to recognize the validity of a claim by a litigant or a judgment by a court entered against them and accordingly decline to oppose it.

These decisions can be motivated by any number of considerations, including a moral or legal change of heart, the cost and burden of litigation, or—as here—the result of a democratic process in which a broad political mandate was granted to the newly elected leader of the City to reform what was widely perceived as an unlawful and unwise policy of stop-and-frisk policing. Decisions about how to resolve litigation against the government are properly, and entirely, within the prerogative of the government, and may not be usurped by private citizens such as the would-be intervenors who do not have a direct interest in the lawsuit, but who disagree with the City's legal position and the court's factual conclusions.

Consistent with these principles, the City of New York has determined to accept the ruling against it by the district court and has filed a request to withdraw its appeal. As with the recent decision by the State of California to decline to challenge a ruling voiding its same-sex marriage prohibition, the City's choice to withdraw its appeal in the stop-and-frisk litigation was likely motivated by a host of moral, legal, and political factors. Our legal system is designed to accept and respect a litigant's choice about whether and how to litigate by limiting the ability of individuals who disagree with that decision to take up their political or ideological disagreements in courts of law.

Under well-established Article III standing doctrine, the federal courts simply do not have jurisdiction over an appeal that a non-party wishes to litigate, absent a genuine case or controversy that presents an actual injury-in-fact to that non-party, caused by the conduct complained of, that may be redressed by a court. A third party's disagreement with a ruling, no matter how intense, does not serve as a substitute for these essential requirements for litigation in federal court.

In litigation such as this, shaped by the democratic, political choices of the people and their elected leaders, courts must be especially cautious not to step outside of their own limited role in our constitutional system, and must be vigilant about the bedrock requirement of standing that undergirds courts' power to alter the results of the political process. As the Supreme Court recently reminded the federal

courts, the doctrine of standing "serves to prevent the judicial process from being used to usurp the powers of the political branches," serving as an "overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere . . . ." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013) (citations omitted).

Here, where "[t]he Unions seek to force the City into another round of litigation that the City does not want to pursue in order to vindicate on appeal a policy the City does not want to implement," *Floyd v. City of New York*, --- F.R.D. ---, 2014 WL 3765729, at *57 (S.D.N.Y. July 30, 2014) (Torres, J.), judicial restraint is especially important because of the palpable separation of powers concerns at stake. "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013).

The Unions in this case do not have Article III standing to pursue the City's appeal on behalf of the City because they have not suffered any concrete, imminent injury-in-fact from the district court's legal judgment. "The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements. [T]he party seeking judicial resolution of a dispute [must] 'show that he personally has suffered some actual or threatened injury as a

result of the putatively illegal conduct' of the other party." *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (citation omitted).

The Unions in this case assert two sorts of injuries as the basis for standing. One of those injuries is reputational, grounded on the district court's legal conclusion that *the City*—not the Unions, or their members—acted unconstitutionally in imposing the stop-and-frisk policy, and on the district court's underlying factual findings supporting that legal judgment, some of which mention members of the Unions. The second asserted injury is based on theoretical, unspecified future infringement of the Unions' collective bargaining rights that might possibly arise from a process initiated by the district court's Remedial Order. Neither of these asserted injuries is sufficiently concrete or immediate to satisfy Article III. Moreover, these asserted injuries cannot be redressed on appeal. There is no legal basis on which the Unions can insist that the NYPD reinstate the status quo ante, *i.e.*, the stop-and-frisk practices challenged in the underlying litigation that the City has since decided to abandon.

The Unions do not have a concrete, immediate injury that provides them with the standing necessary to carry this appeal. They are simply very unhappy with the implications of the district court judge's decision, a pronouncement they do not like and think is mistaken. The Unions' passionate but abstract interest in reversing a decision with which they disagree does not, however, confer standing upon them,

nor does it confer jurisdiction upon this Court. For these and the reasons set forth below, *amici curiae* urge this Court to affirm the district court's denial of intervention.

I. THE PROPOSED INTERVENORS HAVE NO TANGIBLE PERSONAL INTEREST IN THE LITIGATION AND MAY NOT ASSERT THE CITY'S RIGHT TO APPEAL AS A SUBSTITUTE FOR ARTICLE III STANDING.

The Unions plainly and vehemently disagree with the rulings below. PBA Br. 3 (asserting that the constitutional "violations simply did not, and do not, exist"); PBA Br. 50 (objecting to "the District Court's view of the law and the ostensibly appropriate remedies"); SBA Br. 34 ("The Liability Opinion likewise (wrongly) held that approximately 200,000 stops were unconstitutional . . . ."); *see also* the district court's opinion denying intervention below, *Floyd*, 2014 WL 3765729, at *57 ("Although framed as a concern over reputational harm and collective bargaining rights, 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.").

Without a showing of concrete injury-in-fact, the Unions' vigorous disagreement does not establish standing under Article III of the Constitution. *Diamond*, 476 U.S. at 62. Standing requires that a would-be intervenor assert "an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (citations and internal quotation marks omitted). Granting intervention here, in the absence of any cognizable injury, would permit "a private party to defend the constitutionality of a state statute when state officials

have chosen not to," in direct contravention of *Hollingsworth v. Perry*, 133 S. Ct. at 2658.

A. The Unions Do Not Have A Concrete and Immediate Injury In Fact And Therefore Lack Standing.

The Unions do not possess the Article III standing required for them to prosecute an appeal the City does not wish to bring. "The standing Article III requires must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance. The decision to seek review 'is not to be placed in the hands of 'concerned bystanders,' persons 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) (quoting *Diamond*, 476 U.S. at 62).

The Unions rely on *United States Postal Svc. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) for their purported right to intervene in this case, but *Brennan*—while *rejecting* intervention—expressly disavowed any need to assess standing for the intervenors precisely because both original parties *remained* in the litigation: "The existence of a case or controversy having been established as between the Postal Service and the Brennans, there was no need to impose the standing requirement upon the proposed intervenor." *Id.* By contrast, the City here has elected to forgo the appeal and is withdrawing from the case. The Unions seek to pick up the reins and drive a case that the original parties—the entities as to whom a case and controversy exists—have openly expressed no interest in pursuing. The Unions therefore must

have standing in their own right to intervene and drive the appeal in this case. *Hollingsworth*, 133 S. Ct. at 2661; *Diamond*, 476 U.S. at 68; *Sprint Commc'n. Co. L.P. v. APCC Serv. Inc.*, 128 S. Ct. 2531, 2535 (2008); *Schulz v. Williams*, 44 F.3d 48, 52-53 (2d Cir. 1994).

The Unions do not meet the requirements for standing. The "irreducible constitutional minimum" for standing requires "an invasion of a legally-protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560-61. An injury is "particularized" where it is "personal and individual" to the plaintiff. *Id.* at 560 n.1. "To have standing, a litigant must seek relief for an injury that affects him in a 'personal and individual way,' [and] must possess a 'direct stake in the outcome' of the case." *Hollingsworth*, 133 S. Ct. at 2662 (quoting *Lujan*, 504 U.S. at 560 n.1, and *Arizonans for Official English*, 520 U.S. at 64). The Unions "have set forth no specific facts," as they must, demonstrating that their asserted injuries are personal and direct, nor that they are "imminent," or anything other than "conjectural" or "speculat[iv]e." *Clapper*, 133 S. Ct. at 1149.

"The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561. The Unions fall far short of satisfying their burden. Their two supposed harms, one reputational and the other concerning

potential implications for their collective bargaining rights, do not provide the concrete, imminent, and redressable injuries necessary to confer standing.

1. The Purported Reputational Harm Suffered by Union Members Does Not Constitute Injury in Fact.

According to the Unions, the "reputational findings" that are contained in the district court's opinion finding the City liable for constitutional violations (the "Liability Order") "have directly impacted individual officers." PBA Br. 43; *see also* SBA Br. 36. This conclusory declaration of direct impact is unsupported by any asserted specific, cognizable harm to union members (on whose behalf the Unions assert associational standing). The Unions do not allege that any of their members, named or unnamed, have suffered particular adverse consequences as a result of the district court's legal judgment or factual findings, such as demotion or termination, or impairment of future job prospects. The SBA's assertion of "careers derailed," SBA Br. 55, is unaccompanied by any specific claim of any harm experienced by any individual, or any reasonable basis to believe that any such career derailment is likely, let alone imminent or certainly impending, as Article III requires. This is not surprising, as the district court's legal judgment was that the *City* was liable for constitutional violations, given the City's stop-and-frisk policy, which union members implemented as directed by the City.

The Unions (and their constituent members) fail to assert any specific, tangible injury, other than disagreement and hurt feelings, that result from the district

court's legal conclusion concerning the City, or from the district court's underlying factual findings. This sharply distinguishes the Unions' assertions from cases in which standing has been found given the existence of specific legal injury, or of incontrovertible reputational injury arising from a *personalized* finding of malfeasance accompanied by a compelling inference of immediate, tangible harm.

The Unions have not demonstrated the showing necessary for standing, i.e., "a 'legal injury, actual or threatened,' as a result of the judgment." *Tachiona v. United States*, 386 F.3d 205, 211 (2d Cir. 2004) (quoting *Edward Hines Yellow Pine Trs. v. United States*, 263 U.S. 143, 148 (1923)). The district court's order does not require them to do something unlawful or prevent them from doing something they are legally entitled to do, *compare Edward Hines*, 263 U.S. at 148, or impose "a concrete invasion of the [party's] legal interest," as when the district court's judgment "placed the United States in violation of certain international treaties," *Tachiona*, 386 F.3d at 211-12; *see also ACORN v. United States*, 618 F.3d 125, 134 (2d Cir. 2010) (concluding that plaintiff ACORN had "standing to sue a government agency constrained to enforce a law that specifically names ACORN and prevents the plaintiffs from receiving federal funds"); *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 474 (2d Cir. 2010) (permitting intervention to contest "a settlement agreement that [the intervenors] assert infringes their statutory and constitutional rights").

Direct, tangible reputational harm is similarly lacking—even as to the small number of individual union members specifically named by the district court in its factual findings. First, as a threshold matter, the Unions do not have the right to assert associational standing based on the distinct and varying interests of the very small subset of their members who are specifically mentioned in the factual findings. Even assuming those individuals themselves would have standing, arising from the purported concrete injuries imposed upon them by the particular factual statements concerning each of them as individuals, each individual would be required to participate personally in the lawsuit to protect their distinct interests, and thus one of the fundamental requirements for associational standing is lacking. An association is not permitted to assert claims on behalf of a small subset of its individual members if those "claims are not common to the entire membership, nor shared by all in equal degree. To the contrary, whatever injury may have been suffered is peculiar to the individual member concerned, and both the fact and extent of injury would require individualized proof." *Warth v. Seldin*, 422 U.S. 490, 515-16 (1975).

In such circumstances, "each member of [the association] who claims injury . . . must be a party to the suit," and the association cannot represent them collectively. *Id.* This prudential limitation on associational standing bars the Unions' standing here because "Congress [has not] abrogate[d] the impediment" to associational standing "sufficient to rebut the background presumption . . . that

litigants may not assert the rights of absent third parties." *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 557-58 (1996).

Second, even apart from the bar to associational standing, the particular individual officers named in the district court's factual findings do not actually have the concrete, imminent injury necessary for standing. Standing based on legal or reputational harm to a non-party has ordinarily been found in the context of specific *executive* or *administrative* actions or orders specifically directed at that individual. *See, e.g.*, *Meese v. Keene*, 481 U.S. 465 (1987); *ACORN*, 618 F.3d at 134; *Gully v. National Credit Union Administration Board*, 341 F.3d 155, 161-62 (2d Cir. 2003).

Factual findings by a *court*, subsidiary to an ultimate legal conclusion directed to some other party, are not subject to challenge by those who are unhappy with, or who believe they have been besmirched by, such assessments. *See, e.g.*, *Horizon Bank & Trust Co. v. Massachusetts*, 391 F.3d 48, 53 n.1 (1st Cir. 2004); *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1199-1200 (9th Cir. 1999); *Warner/Elektra/Atl. Corp. v. Cnty. of DuPage*, 991F.2d 1280, 1282 (7th Cir. 1993). There may be a basis for standing in the unusual context of a court's order specifically directed against a non-party, such as when a court "expressly impos[es] a reprimand" upon a lawyer, *In re Williams*, 156 F.3d 86, 92 (1st Cir. 1998), or when a court enters a similar direct and tangible *judgment* imposing concrete harm on a particular person, such as the

imposition of a fine, *id.* There is, however, no basis for standing, as claimed here, derived from subsidiary factual findings relating to a judgment directed at another entity. *See id.* at 91; *accord Bolte v. Home Ins. Co.*, 744 F.2d 572, 573 (7th Cir. 1984) (Posner, J.).

The cases upon which the Unions rely to suggest that reputational harm warrants standing in this case are not on point. For example, in *Gully*, the plaintiff was permitted to challenge an administrative board's "official finding that she engaged in misconduct and is unfit to be involved in the affairs of a credit union" because this Court recognized that "the Board's findings are a death knell for [her] career in an industry dependent on security and reliability." *Gully*, 341 F.3d at 161-62. The administrative body's official finding was directed specifically at the plaintiff, not at her employer, and that administrative judgment presented a concrete and imminent harm to her that was "self-evident." *Id.* at 162. Here, the officers who are individually (albeit incidentally) mentioned in the district court's factual findings as having in some instances implemented the City's unconstitutional policy are not similarly situated to Gully; there is no official finding that they have engaged in personal malfeasance providing *any* realistic basis to conclude that the challenged legal judgment will be the death knell for their career or otherwise impose the requisite imminent, material harm.

The district court's factual findings here served to support its legal judgment that the City was liable for its unconstitutional stop-and-frisk policy. There is no official legal judgment that particular officers, in contravention of the desires and directives of their employer, had gone rogue and committed acts that would as a practical matter self-evidently preclude their continued career in law enforcement.

Fundamentally, Article III courts "review judgments, not statements in opinions." *California v. Rooney*, 483 U.S. 307, 311 (1987). This rule implements the prohibition against advisory opinions, which prohibits federal courts from opining on issues divorced from the ability to grant concrete relief. Were it otherwise, the courthouse doors could be forced open to any number of witnesses, experts, lawyers, and others whose credibility or conduct was passed upon by the judge. It cannot be that anyone displeased by factual findings in a case in which he or she is not a party, and does not have a concrete interest arising from the judgment, nonetheless has standing to intervene and drive an appeal. *Bolte*, 744 F.2d at 573. Appellate review of the actual judgment of the district court—that the City violated the Fourth and Fourteenth Amendments through its stop-and-frisk policy—could not possibly provide legal redress to individual police officers, simply because they are upset with the legal or factual conclusions drawn by the district court, and would be happy if the decision went away. *See Lujan*, 504 U.S. at 573 (concluding that no standing

exists where resolution by the court "would not have remedied respondent's injury anyway").

Finally, the thousands of officers not individually mentioned by the district court have an even more attenuated claim to standing, and thus associational standing based on those members' interests is palpably lacking. Vague "stigmatic" harm that arises from an individual's association with a larger group does not amount to an injury in fact unless it is "direct result of having *personally* been denied" a right or benefit. *Allen v. Wright*, 468 U.S. 737, 755 (1984) (emphasis added). Having been one of many thousands of employees of a party found to have acted unlawfully is not even plausibly the sort of concrete and tangible injury sufficient to confer standing to appeal when the governmental employer does not wish to do so.

2. The Remedial Order Does Not Impair the Unions' Collective Bargaining Rights in any Cognizable Way.

The Remedial Order, issued in connection with the Liability Order, imposes on the City certain equitable relief, but does nothing to impair or alter the Unions' existing collective bargaining rights vis-à-vis the City. Specifically, the Remedial Order sets in motion a process—one in which the Unions are not required to participate, but one in which they are invited to participate. This process *may* in the future affect officers' daily activities, such as "changes" to paperwork, training, and supervision, that may result from reforms to stop-and-frisk policies and the proposed body-worn camera pilot program, PBA Br. 33, SBA Br. 41, and it is theoretically

possible that the process might ultimately not respect the Unions' collective bargaining rights.[2] The Unions, however, have been unable to point to any particularized, non-speculative, imminent harm imposed by the Remedial Order. The district court "has not ordered them to do or refrain from doing anything," with regard to the CBA or otherwise. *Hollingsworth*, 133 S. Ct. at 2662. In other words, neither the Unions nor their members are currently bound by anything in the Remedial Order, nor does the Remedial Order preclude them from exercising their collective bargaining rights if and when those rights are implicated. The Unions have therefore not asserted the requisite concrete, immediate injury.

The Unions argue that the Remedial Order might set in motion a process that could result in changes to policing practices that could affect collective bargaining rights and might possibly not respect such rights. This assertion is entirely too speculative to confer Article III standing. As the Supreme Court explained in

[2] It is worth noting that the City's settlement in the *Daniels* litigation, a precursor to the current case, was a voluntary and mutually agreeable conclusion that required the NYPD to implement training and monitoring procedures, conduct additional training, maintain and provide documentation on stop-and-frisk activity, and engage in various public outreach initiatives. Similarly, the City, under the Bloomberg administration, settled the *Ligon* litigation, a companion to this case, requiring similar reforms. Despite the theoretical possibility that these settlements might involve conduct implicating the CBA, the Unions did not see the need to seek intervention, presumably because any issue that might later arise would be susceptible to ready resolution through a legal challenge to a violation of the CBA, as would be readily available in this case if such a situation ever arose.

Clapper, 133 S. Ct. at 1150, it has been "reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment." It is entirely uncertain whether and how the suggested changes will be implemented, whether the Unions will find them objectionable in practice, whether the Unions have the right to bargain collectively over them, and whether those rights will go unrespected. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) (requiring that the party asserting standing "has sustained or is immediately in danger of sustaining some direct injury") (citation omitted). The Supreme Court has "repeatedly reiterated that 'threatened injury must be certainly impending to constitute injury in fact,' and that '[a]llegations of possible future injury' are not sufficient." *Clapper*, 133 S. Ct. at 1147-48 (citation omitted).

The Remedial Order specifically recognized that it would be "unwise and impractical" to impose specific reforms "prior to input from the Monitor and the participants in the Joint Remedial Process," *Floyd v. New York*, 959 F. Supp. 2d 668, 678 (S.D.N.Y. 2013), and the PBA acknowledges that changes to existing procedures are merely "contemplate[d]," not actually or imminently required, PBA Br. 36-37. Moreover, Commissioner Bratton's recent announcement that the NYPD will implement the body-worn camera program "independent" from the Remedial

Order[3] means that whatever collective bargaining right the Unions possess concerning the use of such cameras does not arise directly from the Remedial Order; the claim that the Remedial Order in some unspecified way will inevitably result in the elimination of collective bargaining rights is speculative at best.

Cases that have allowed standing to unions based on changes to the terms and conditions of their members' employment involve orders that both directly address union members' concrete interests, such as pay scale or prospects of promotion, and that inevitably directly impair those interests as a result of the court's order. *See, e.g.*, *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453 (5th Cir. 2005) (permitting standing where the challenged decision altered the calculation of wages); *United States v. City of Los Angeles*, 288 F.3d 398, 400-01 (9th Cir. 2002) (permitting intervention to litigate specific provisions that "contradict[ed]" and "alter[ed]" existing rights).[4] The Unions do not have the requisite certainly impending concrete

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[3] N.Y. Times, Sept. 5, 2014, http://www.nytimes.com/2014/09/05/nyregion/new-york-police-officers-to-begin-wearing-body-cameras-in-pilot-program.html?_r=0. Moreover, because the City plans to implement these measures anyway, the Unions' complaint will almost certainly not be "redressed by a favorable decision" by this Court. *Lujan*, 504 U.S. at 561. As Commissioner Bratton stated in discussing body cameras, "That's the direction [ ] American policing is going." Business Insider, http://www.businessinsider.com/nypd-commissioner-police-body-cams-are-the-way-of-the-future-2014-8.

[4] Additionally, *City of Los Angeles*, 288 F.3d 398, upon which the Unions rely heavily, contains no Article III standing analysis at all. The case instead turns on an analysis of intervention rights when the defendant City remained as a party with unquestioned standing. The standing requirements derived from the Constitution are

injury as a result of their nebulous claim of possible future impairment of their collective bargaining rights that might eventually arise from the process implemented by the Remedial Order, a process in which they are invited to participate, and a concern that they would be able to remedy if and when that injury actually came to pass.[5]

Without any concrete or imminent interest, the Unions have no more claim to intervene in this case than any other member of the public at large who may disagree—or agree—with the district court's factual conclusions, or who also may be deeply interested in how the Constitution applies to police practices. *See Diamond*, 476 U.S. at 67 (rejecting standing for a physician to litigate the "standards of medical practice" that applied to him). It is not apparent why the Unions have any

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stricter than the standard for intervention under the Federal Rules. *Schulz v. Williams*, 44 F.3d 48, 52 n.3 (2d Cir. 1994) ("An interest strong enough to permit intervention is not necessarily a sufficient basis to pursue an appeal abandoned by the other parties.") (internal quotations and citations omitted).

[5] If it does turn out that the City eventually for some reason implements reforms in a manner that somehow impairs the Unions' contractual or other rights, the Unions will be free to bring a separate action based on that impairment. The plaintiff firefighters in *Martin v. Wilks*, 490 U.S. 755 (1989), did just that after their motion to intervene to challenge a pending consent decree was denied as untimely. Once the consent decree was final, and the asserted actual violations of the plaintiffs' employment rights had materialized, they initiated a new lawsuit based on the alleged violations. *Id.* at 759-60.

greater claim to standing than, e.g., the NAACP, which might wish to assert the rights of its members to be free from unconstitutional stop-and-frisk policing.

The Unions cite *Camreta v. Green*, 131 S. Ct. 2020, 2029 (2011), for the proposition that they have standing to pursue this appeal because the district court found the City's stop-and-frisk policing that they had engaged in to be unlawful, and because their members will engage in policing in the future. *Camreta* is entirely inapplicable.

First, Camreta was a prevailing party and not an intervenor; he plainly had a personal interest in the case, which had targeted him for individual liability under 42 U.S.C. § 1983. Unlike non-party actors such as the union members in this case, he was subject to the future issue and claim preclusion effects of the legal judgment. Indeed, the decision from which Camreta sought *certiorari* had specifically concluded that his conduct had violated the Constitution, but found him not liable because he was entitled to qualified immunity given the absence of clearly established prior law; the decision he sought to appeal, however, unless vacated, would clearly establish that law governing his future conduct.

The Court's holding thus turned on the fact that Camreta was in the category of "immunized officials seek[ing] to challenge a ruling that their conduct violated the Constitution . . . ." *Id.* As the Court explained, the judgment Camreta sought to appeal effectively held that: "'Although [Camreta] is immune from damages today,

what he did violates the Constitution and he or anyone else who does that thing again will be personally liable.' If the official regularly engages in that conduct as part of his job (*as Camreta does*), he suffers injury caused by the adverse constitutional ruling." *Id. (emphasis added)*. Here, unlike Camreta, the union members will *not* regularly engage in the same conduct that was found unlawful in the prior lawsuit; they will not engage in conduct pursuant to the City's former stop-and-frisk policy because the City has specifically rejected and disavowed continued use of that policy.

The union members are not subject to future injury from a legal judgment that their employer violated the Constitution in the past, under a practice no longer in place: unlike *Camreta*, there was no finding about any conduct the Union members will be expected—or permitted—to engage in in the future. In *Camreta*, "[s]o long as [the underlying decision] continues in effect, [Camreta] must either change the way he performs his duties or risk a meritorious damages action. . . . Only by overturning the ruling on appeal can the official gain clearance to engage in the conduct in the future." *Id.* at 2029 (citation omitted). Here, the stop-and-frisk policy that union members implemented in the past has already changed, and union members would not be subject to future liability unless they were to violate the City's current policy. The speculative possibility that a future administration or police commissioner might reconsider this position and re-implement the policies

challenged in this case is far too speculative to justify standing based on concrete, imminent injury-in-fact.[6]

B. The Unions May Not Assert the City's Right to Appeal.

The Unions' motivation to appeal the Liability and Remedial Orders is plain: they do not like the decisions, and they do not like the fact that the City, as the result of a democratic process, has decided not to appeal. The Unions, however understandable their desire to eliminate decisions they do not like, may not assert the government's right to appeal when neither the Unions nor their members have suffered the concrete, certainly impending injury-in-fact necessary for them to have standing to do so. As the Supreme Court has repeatedly cautioned, "Article III standing is not to be placed in the hands of concerned bystanders, who will use it simply as a vehicle for the vindication of value interests." *Hollingsworth*, 133 S. Ct. at 2663 (quoting *Diamond*, 476 U.S. at 62) (internal quotations omitted). The Unions, while factually and emotionally close to the contested issues, and confident that the district court was wrong, are legally in a position no different from any other citizen interested "in proper application of the Constitution and laws"—the

[6] Moreover, the Court, in granting Camreta standing, limited the scope of its holding, observing that "qualified immunity cases [are] in a special category" whose features "support bending our usual rule" concerning standing, *id.* at 2030, and the decision expressly "addresse[d] only our own authority to review cases in this procedural posture" of a grant of *certiorari*, suggesting the reasoning might well not apply in an appeal from a district court decision, *id.* at 2033 & n.7, as in this case.

quintessential generalized grievance. *Id. at 2662*; *see also Lance v. Coffman*, 549 U.S. 437, 441 (2007) (*per curiam*) (finding no standing for a claim that a state constitution, as interpreted in another case, violated federal law); *Allen*, 468 U.S. at 754 ("[A]n asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."); *Ex parte Levitt*, 302 U.S. 633, 634 (1937) (no standing to claim that Justice Black's appointment to the Supreme Court violated the Constitution).

The Supreme Court's "refusal to serve as a forum for generalized grievances has a lengthy pedigree." *Lance*, 549 U.S. at 439. Restraint by the federal courts in this area ensures both that "there is a real need to exercise the power of judicial review" in the first place, and that the remedy fashioned by the court is "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221-22 (1974). These principles help maintain the constitutional status of the federal courts as courts of limited jurisdiction.

Moreover, "[t]he law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper*, 133 S. Ct. at 1136. That foundational principle is directly at play here. This case itself became a prominent campaign issue in the most recent mayoral election—with the candidate who vowed to end the stop-

and-frisk policy, and who promised not to appeal the district court's decision, elected by a wide margin. Thus, it is appropriate to conduct an "especially rigorous" standing inquiry where the questions presented relate to the constitutionality of the actions of another branch of government, driven by the democratic process, and respect for "the law of Art. III standing [which] is built on a single basic idea—the idea of separation of powers." *Raines v. Byrd*, 521 U.S. 811, 819-20 (1997) (citation omitted).

Finally, in addition to the constitutional barriers to the Unions' intervention, prudential considerations also militate strongly against finding them to have standing to prosecute this appeal. "[P]rudential standing [is] designed to protect the courts from 'decid[ing] abstract questions of wide public significance even [when] other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.'" *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013).[7]

[7] *Windsor* does not undermine the absence of Article III standing in this case. Although the United States had declined to defend the constitutionality of a federal law, it continued to enforce the law by denying a tax refund based on the law. The *Windsor* Court found standing under Article III because"[a]n order directing the Treasury to pay money is 'a real and immediate economic injury.'" *Id.* (citation omitted).

II. CITIES SHOULD BE FREE FROM INTERFERENCE BY PRIVATE LITIGANTS IN DETERMINING HOW TO RESOLVE POLITICAL DISPUTES AND IMPLEMENT PUBLIC POLICY.

A central ground for the Article III standing requirement is the propriety of insulating the executive's ability to implement its political choices free from judicial scrutiny, absent a live case or controversy. Cities and municipalities frequently implement and revise policing, educational, environmental, and other policies in response to any number of moral, legal, and political considerations, often upsetting some members of the public. This governmental prerogative reflects, at bottom, a balancing of the competing desires of various political constituencies, a central function of the political branches. Intrusion by a private litigant wishing to impose its own personal values would jeopardize the sovereign's ability to decide whether to continue, or to conclude, contentious litigation. Unless private litigants can demonstrate imminent, concrete injury arising from the legal judgment at issue, they may not serve as private attorneys general, intervening in order to overturn legal judgments that the governmental defendant no longer contests—regardless of whether the would-be intervenors, or the appellate court, believes the case to have been rightly or wrongly decided.

In particular, cities and municipalities commonly enter into consent decrees that commit their police departments to reforming practices that may have been judicially determined to be unconstitutional, or, in the judgment of the governmental

entity, were deserving of revision. Recent consent decrees by Seattle, New Orleans, and Philadelphia have addressed such issues as the use of excessive force, unconstitutional searches and seizures, and discriminatory policing tactics—all similar to the City's resolution of this litigation.

Litigation over these issues is best resolved through negotiation and compromise, rather than a private non-party's attempt to intervene to overturn the result of the political process, a context particularly likely to result in tailored and appropriate reforms. The municipality's focus is on an inclusive solution that takes into account various stakeholders, as a government is well-equipped to do, and as it is entitled to do, absent the imposition of concrete injury-in-fact. As the district court ruled in approving the settlement concerning Seattle, "Voluntary and mutually agreeable implementation of reforms is more likely to conserve public resources and result in beneficial change than the uncertainties of litigation or an order of this Court imposed at the end of protracted litigation."[8] Cities quite properly enjoy the right to undertake initiatives they have chosen without interference from private citizens with an interest, but without a direct, imminent, and concrete stake in the outcome of a judicial proceeding.

[8] *United States v. Seattle*, No. 12-cv-1282, Doc. No. 14 ¶ 18 (Sept. 21, 2012 W.D. Wa.), *available at* http://www.wawd.uscourts.gov/special-case-notices.

Allowing intervention in a case such as this subjects the government to the unpredictable timing of non-parties who seek to enter a case after a large expenditure of time and resources. That concern is paramount in this case, which has been litigated through years of discovery and a full trial, only to have a mutually agreeable settlement delayed and made uncertain at the eleventh hour by the Unions' untimely efforts to intervene, usurping the City's right to determine its own practices and its own litigation strategies. The Unions' desire to overturn a decision with which they disagree, and their potential personal motivations, such as a possible desire to influence labor negotiations with the City, distinct from concerns related to the stop-and-frisk litigation,[9] does not confer upon them the standing necessary to achieve those desires.

The instant motions to intervene threaten the authority of the City to implement meaningful policy changes based on a balancing of competing political interests. Such policy decisions, even if controversial or unpopular—and these decisions are not unpopular, given the results of the political process—remain within

[9] Sally Goldenberg, Police Unions Link Contract Talks to Stop-Frisk Litigation, Capital New York, Mar. 5, 2014 ("Richter's union is attempting to appeal a federal court ruling that the NYPD misused stop-and-frisk. . . . When asked if he would agree to drop his appeal if the de Blasio administration offered him a suitable contract, Richter indicated he might."), *available at http://www.capitalnewyork.com/article/city-hall/2014/03/8541355/police-unions-link-contract-talks-stop-frisk-litigation.*

the bailiwick of the political system, unless those choices impose concrete injury-in-fact. Absent such injury, the recourse for those who dissent from the choices of their elected officials lies squarely in the political arena, not in the federal courts.

CONCLUSION

For the foregoing reasons, *amici curiae* join Plaintiffs-Appellees in urging this Court to affirm the district court's decision denying intervention.

Respectfully submitted,

/s/_____
Jonathan Romberg
Seton Hall University School of Law
Center for Social Justice
833 McCarter Highway
Newark, New Jersey 07102
(973) 642-8700
Attorney for *Amici Curiae Law Professors*

Dated: September 29, 2014

CERTIFICATION OF COMPLIANCE WITH RULE 32(a)(7)(b)

I hereby certify that this brief complies with the type-volume limitation stated in Fed. R. App. P. 32(a)(7)(b). Specifically, using the word count feature of Microsoft Word, this brief is comprised of 6,972 words.

/s/_____
Jonathan Romberg

Dated: September 29, 2014