UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DAVID FLOYD, *et al.*,

Plaintiffs, 08 Civ. 1034 (AT)(HBP)

-against-

THE CITY OF NEW YORK,

Defendant.

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JAENEAN LIGON, *et al.*,

Plaintiffs 12 Civ. 2274 (AT)(HBP)

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants.

– – – – – – – – – – – – – – – – – – – – – – – – – X

**_FLOYD_ AND _LIGON_ PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW IN OPPOSITION TO POLICE UNIONS' MOTIONS TO INTERVENE**

*(Attorneys set forth on signature page)*
March 10, 2014
New York, New York

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## INTRODUCTION

Over the last fifteen years, highly publicized litigation about the NYPD's stop-and-frisk practices has played out in this Court without any participation by the Police Unions that now seek to intervene. First in *Daniels v. City of New York*, and then in *Floyd* and *Ligon*, plaintiffs have challenged the NYPD's unconstitutional conduct time and again, yielding a settlement with the City in 2004, a challenge to the sufficiency of that settlement in 2007, the NYPD's adoption of new policies and procedures, and ultimately a verdict for the *Floyd* plaintiffs following a nine-week trial in 2013. Numerous interested parties—including members of the New York City Council, community groups, and the U.S. Department of Justice—have all participated, sharing their perspectives on the actions necessary to remediate the challenged conduct. The Police Unions,[1] however, never appeared before judgment in August 2013. Now, when the parties are on the brink of resolving this litigation, they seek to intervene and join the litigation as parties.

Although the Police Unions cannot satisfy Federal Rule of Civil Procedure 24's requirements for intervention for any purpose, their attempt to continue the appeals on both the liability and remedial orders is particularly unjustified. They do not have standing to maintain the City's appeals, and there can be no serious argument that their attempt to intervene for the purpose of addressing liability issues has been made in a timely fashion. In addition, because they have failed to demonstrate that they have any legally protectable interest in these actions and their entry into the case would severely prejudice both the City and the plaintiffs, allowing them to intervene for any purpose is not permitted by Rule 24. For these reasons, their motions to intervene should be denied.

[1] Throughout this memorandum of law, *Floyd* and *Ligon* plaintiffs refer to putative intervenors the Patrolmen's Benevolent Association (PBA), the Lieutenants Benevolent Association, the Captains Endowment Association, the Detectives Endowment Association and the Sergeants Benevolent Association (SBA) as the "Police Unions" or "Unions."

## BACKGROUND

### A. Daniels v. City of New York

*Daniels v. City of New York*, 99 Civ. 1695 (SAS) (S.D.N.Y.), was commenced as a putative class action on March 8, 1999, alleging that the City of New York had implemented a policy, custom and practice, carried out by the NYPD's Street Crimes Unit, of suspicionless and race-based stops-and-frisks in violation of the Fourth and Fourteenth Amendments. 99 Civ. 1695 (SAS), Dkt # 1 (S.D.N.Y. Mar. 8, 1999). The *Daniels* plaintiffs sought class-wide injunctive relief, including changes to the NYPD's policies and practices concerning the training, supervision, discipline and monitoring of officers on stop, question, and frisk and racial profiling. *Id.* Plaintiffs eventually amended the complaint to add several individual NYPD personnel who were members of the Police Unions as named defendants. *Daniels*, Dkt # 36 (S.D.N.Y. April 12, 2000). The litigation continued for almost five years, during which time this Court issued decisions on both a motion to dismiss and on class certification, both of which would have presumably been of some interest to the Police Unions, but at no point did the Police Unions attempt to intervene as defendants. *See* Docket in *Daniels v. City of New York*, 99 Civ. 1695 (S.D.N.Y.).

On January 13, 2004, this Court so-ordered a stipulation of settlement between the *Daniels* plaintiffs and defendants, *see* Daniels Dkt # 152, which required the City, among other things, to:

- Implement stop-and-frisk audits creating new job duties and additional workload for certain sergeants and lieutenants in NYPD Commands, *Daniels*, Dkt # 152 (attached as Exhibit A to the Declaration of Darius Charney), at 5-6; Charney Decl., Ex. B
- Revise the required supervisory trainings for newly promoted NYPD sergeants and lieutenants to address racial profiling and supervisory techniques for promoting integrity and preventing misconduct, Charney Decl., Ex. A at 8;

- Provide all NYPD commands with annual in-service training on the Department's Racial Profiling Policy, *id*. at 6;

- Ensure that all stop-and-frisk incidents be documented on the 2002 revised version of the UF250 form, which changed the "reasons for stop" section of the form from a narrative to a check-box format. *Id*. at 8, Exhibit B; *see also* Charney Decl., Ex. C, Ex. D.

The stipulation of settlement was in effect until December 31, 2007, Charney Decl., Ex. A at 16, and there is no indication anywhere in the record that, at any point prior to or during the stipulation's pendency, any of the Police Unions attempted to intervene as parties to the case. Moreover, there is no indication that any of the aforementioned reforms or any other reforms mandated by the stipulation were subject to collective bargaining between the City and the Police Unions, or that the Police Unions even attempted to collectively bargain any of these reforms.

**B. The City's Voluntary Changes to Stop-and-Frisk Policies and Procedures**

The City has on its own instituted several changes to its stop-and-frisk policies and procedures since 2009 which, although inadequate to remedy the widespread practice of unconstitutional stops, have altered the duties and responsibilities of NYPD personnel at various ranks. These changes include: (i) 2009 and 2010 revisions to the NYPD Patrol Guide section on stop-and-frisk 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," Charney Decl., Exs. E and F ; (ii) a 2011 revision to the UF250 form which now requires officers to provide the reason(s) for any force used during a stop-and-frisk encounter, *id*., Exs. C and G; (iii) a 2012 revision to the Patrol Guide section on the duties and responsibilities of executive officers (who have the rank of captain) requiring them to now conduct the stop-and-frisk self-inspections in each precinct, *id*., Ex. H ; and (iv) a March 5, 2013 memorandum from NYPD Chief of Patrol Hall 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 requisite activity log entries to each UF250 form they submit. Charney Decl., Ex. I. In addition, in 2012 and 2013, the NYPD required more than 8,000 officers to attend an off-site stop-and-frisk training course (that was legally inaccurate). *Floyd* Trial Tr. at 5121. There is no indication that any of these changes were collectively bargained.

**C. Procedural History of Floyd**

*(1) Pre-Trial Proceedings*

Plaintiffs commenced the present *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, custom and/or practice of suspicionless and race-based stops-and-frisks, and requested class-wide injunctive relief, including changes to the NYPD's policies and practices governing training, supervision, discipline and monitoring of officers with respect to stop, question, and frisk and racial profiling. *Floyd v. City of New York*, 08 Civ. 1034 (S.D.N.Y.), Dkt ## 1, 11, 50. Fact discovery proceeded for more than two-and-a-half years, during which time dozens of individual Police Union members were deposed, but at no point during that period did the Police Unions seek to intervene as parties. *See* Charney Decl. ¶ 3.

On August 31, 2011, this Court denied the defendants' summary judgment motion, holding, among other things, that the plaintiffs could proceed to trial as to whether current NYPD policies and practices governing officer training, supervision, monitoring and discipline were adequate to prevent a widespread practice of suspicionless and race-based stops. *See Floyd v. City of New York*, 813 F. Supp. 2d. 417, 456 (S.D.N.Y. 2011). This ruling received extensive press coverage. *See* Charney Decl., Exs. J and K.

On March 4, 2013, plaintiffs filed their brief in support of permanent injunctive relief, in which they asked for (i) specific changes to the UF250 form and the standards for evaluating officer performance, (ii) the appointment of an independent 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. *See Floyd*, Dkt # 268. However, at no point prior to trial did the Police Unions respond to, or seek leave to respond to, plaintiffs' brief or seek to intervene as parties with respect liability or remedial issues. Charney Decl. ¶ 4.

On March 8, 2013, the Court so-ordered a stipulation between the parties withdrawing *all* of plaintiffs' claims against the individual defendants who were members of the Police Unions. *See Floyd*, Dkt # 270.

*(2)* *Trial*

During the nine-week trial, thirty police officers, ten sergeants, ten lieutenants, three captains, four deputy inspectors, and seven inspectors testified, describing in detailed fashion their job duties, responsibilities 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, and civilian complaints about improper stops are investigated and disposed of. *See Floyd* 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 burdens that would supposedly be imposed on NYPD officers if the UF250 form is revised to include a narrative section on the basis for a stop. *See Floyd* Trial Tr. at 2901-05, 3008, 3012-13, 7757:2-7761:15; 7787:14-18; 7804:7-19 7805:5-7807:4. At no point during the trial did the Police Unions attempt to intervene as parties with respect to liability or remedial issues. Charney Decl. ¶4.

Following completion of the trial, on June 12, 2013, the parties each submitted to the District Court proposed findings of fact and conclusions of law, as well as post-trial briefs, on liability and remedial issues. *See Floyd* Dkt ## 363, 364, 366, 367. At no point, did the Police Unions respond to, or seek leave to respond to, any of these submissions. Charney Decl. ¶ 4.

**D. Procedural History of the *Ligon* Proceedings**

The *Ligon* plaintiffs brought their lawsuit in March 2012, challenging the NYPD's practice of stopping, questioning, frisking, summonsing, and arresting people on suspicion of trespass without any lawful basis in and around buildings enrolled in the NYPD's Trespass Affidavit Program ("TAP"). Shortly after filing, plaintiffs informed the District Court that they would move for a preliminary injunction to remedy the problem of unconstitutional trespass stops outside of TAP buildings in the Bronx. The parties engaged in extensive discovery and briefing, culminating in October 2012 in a seven-day evidentiary hearing. In a widely publicized 157-page ruling in January, 2013, the District Court found the City, but not any individual police officers, liable on the preliminary injunction and proposed relief (*Ligon* Dkt. # 96, referred to herein as the "January Opinion"). The City promptly moved to stay implementation of the January Opinion and filed a notice of appeal.[2]

In the January Opinion the District Court proposed specific remedies regarding policies and procedures, supervision, and training, as to which it ordered the parties to submit briefs addressing "whether the proposed relief is insufficient or too burdensome or otherwise inappropriate." January Opinion at 145. On February 14, 2013, the District Court issued a slightly modified amended opinion (*Ligon* Dkt. # 105, referred to herein as the "Amended

[2] After the district court granted the City's motion for a stay (*Ligon* Dkt. # 99), the City withdrew its notice of appeal.

Opinion"). The Court's instruction regarding briefing on the proposed remedial relief remained the same. Amended Opinion at 145-46.

The parties thereafter submitted detailed proposals and counterproposals aimed at fine-tuning the Court's proposed relief. This process unfolded throughout spring and summer 2013 and included oral argument and two rounds of briefing. *See* Pls.' Post-Hearing Br. on Proposed Remedial Relief, dated Mar. 4, 2013 (*Ligon* Dkt. # 108); Defs.' Br. on Proposed Remedial Relief, dated Apr. 11, 2013 (*Ligon* Dkt. # 109); Defs.' Proposed Remedial Relief, dated July 8, 2013 (*Ligon* Dkt. # 112); Pls.' Br. Concerning Defs.' Remedial Proposals, dated July 24, 2013 (*Ligon* Dkt. # 117); Defs.' Reply Mem. on Proposed Remedial Relief, dated Aug. 2, 2013 (*Ligon* Dkt. # 118). In a memorandum of law submitted in early April, the defendants informed the district court that, while they still intended to appeal the underlying liability judgment, they did not otherwise object to the remedial measures contemplated in the Court's preliminary injunction ruling. Defs.' Br. on Proposed Remedial Relief, dated Apr. 11, 2013 (*Ligon* Dkt. # 109). At no time during the months-long exchange of proposals regarding the court's proposed relief, did the Police Unions weigh in to protect their purported interests.[3]

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

In its August 12, 2013 *Floyd* Liability Order, the District Court found only the City, but not the Police Unions or any of their members, liable for violating the Fourth and Fourteenth Amendment rights of the *Floyd* Plaintiff class. *See Floyd*, Dkt # 373 at 192. In its Remedies Order, the Court held that it has the power to order injunctive relief against the City necessary to

[3] In 2012, the NYPD made other changes to policies and training related to TAP that were not ordered by the Court. Soon after the initiation of this lawsuit, the NYPD promulgated Interim Orders 22 and 23, which instruct officers on TAP enforcement and administration. Amended Opinion at 82-93. As the Court has already found, however, these measures failed to address unlawful outdoor TAP stops. Amended Opinion at 90. There is no indication that any of these changes were collectively bargained.

remedy the widespread practice of unconstitutional stops that it found in its Liability Order, 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, none of which will be implemented unless and until approved by the district court in a subsequent order. *Floyd* Dkt # 372 at 2-8, 13-25; Dkt # 402 at 6-7. The Remedies Order further requires that the City conduct a 1-year pilot project for body-worn cameras on officers in five NYPD precincts, and that the City and plaintiffs engage in a Joint Remedial process, guided by a facilitator, to develop a series of supplemental reforms based on input from a variety of stakeholders, including "NYPD personnel and representatives of police organizations." *Floyd* Dkt # 372 at 25-30. The Remedies Order does not require the Police Unions or their members to do anything.

With respect to *Ligon*, the Remedies Order essentially adopted the approach proposed in the January Opinion. In consideration of the parties' submissions concerning the remedies, it ordered the implementation of certain reforms. Remedies Order at 32-36 (*Ligon* Dkt # 120).It also delegated to a court-appointed monitor oversight of the fine details of the remaining proposed relief. *Id.* The *Ligon* remedies described in the Remedies Opinion do not require anything of Police Unions, nor does it purport to bind them in any way.

**F. Second Circuit Appeal**

On August 16, 2013, the City filed a notice of appeal indicating it was appealing the District Court's Liability and Remedies Orders. *See Floyd*, Dkt # 379. On September 11 and 12 respectively, the Police 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 the case. *See Floyd* Dkt ## 388, 390-393, 395-397.

In pursuing the appeal, which it has now indicated it wishes to withdraw, the City sought and obtained a stay of the District Court's liability orders in *Floyd* and *Ligon,* and the Remedies Order. *See Floyd v. City of New York*, 13-3088 (2d. Cir.) ("*Floyd* Appeal") Dkt # 72. The City in its stay motion and the Unions in their amici briefs in support of that motion advanced the same arguments about potential threats to public and officer safety and administrative burdens that they claimed would be caused by the reforms to be developed through the consultative processes set forth in the District Court's Remedies Order. *See Floyd* Appeal, Dkt # 72 at 28-29, 333-35, 339-43; Dkt # 107-2 at 8, 30, 32, 33; Dkt # 169 at 4-5, 7.

On January 30, 2014, the new Mayor of the City of New York, Bill de Blasio, publicly announced that the City and the *Floyd* and *Ligon* plaintiffs had reached an agreement in principle for resolving the appeals pending in the Second Circuit. *See* Charney Decl., Ex. L. Under this agreement, the parties would jointly ask this Court for a single modification to the August 12, 2013 Remedies Order—namely, a three-year time limit to the tenure of the Court-appointed monitor provided that the City substantially complies with all Court-ordered injunctive relief-and, upon this Court's approval of that modification, the City would withdraw its appeal of the Liability and Remedies Orders and the parties, the monitor, and Court-appointed facilitator would proceed with the consultative processes set forth in Sections II.B and III of the Remedies Order to develop substantive injunctive remedies to be submitted to this Court for approval in subsequent Court orders. *See id*. at 1-2; *Floyd* Dkt # 440 at 1.

**G. Police Unions' Motions to Intervene**

As noted above, the Police Unions moved to intervene in these matters for the first time in September 2013. Before the District Court ruled on the motions, the Second Circuit granted the City's stay motion. The Police Unions next moved to intervene in the Second Circuit for the purpose of maintaining the appeals. The Second Circuit rejected their application and indicated that the District Court should consider their motions in the first instance. *Floyd* Appeal Dkt. # 476.

Just last week, Capital New York, an online news publication, published an article indicating that Roy Richter, the president of the Captain Endowment Association, indicated that this litigation is "something you bring to the bargaining table," Sally Goldenberg, Police Unions Link Contract Talks to Stop-Frisk Litigation, Capital New York, Mar. 5, 2014.[4] The article further states as follows:

> When asked if he would agree to drop his appeal if the de Blasio administration offered him a suitable contract, Richter indicated he might. "To the extent that the city is open to discussing it outside the courtroom and include that as part of ongoing labor negotiations, I think that's appropriate and I'm open to that," he said.

*Id.* The president of the Sergeants Benevolent Association made a similar statement. *Id.* On March 5, 2014, the Police Unions renewed their motions to intervene in this Court.[5]

**ARGUMENT**

The parties agree that under Federal Rule of Civil Procedure 24(a)(2), intervention as of right is permitted only if the putative intervenor meets its burden of demonstrating all of the following: (1) its motion for intervention is timely; (2) it has an interest relating to the property

[4] Attached as Exhibit N to Charney Declaration.

[5] A March 7, 2014 article in Capital New York included similar statements. *See* Charney Decl. Ex. O.

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); *see also In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 197 (2d Cir. 2000) (citing *Catanzano v. Wing,* 103 F.3d 223, 232 (2d Cir. 1996)). Denial of the motion to intervene is proper if the proposed intervenor fails to prove any of these requirements. *See In re Holocaust Victims Assets Litig.*, 225 F.3d at 197; *Wash. Elec. Co-op., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 96 (2d Cir. 1990). This Court "is entitled to the full range of reasonable discretion in determining whether these requirements have been met." *Rios v. Enter. Ass'n Steamfitters Local Union No. 638 of U. A.*, 520 F.2d 352, 355 (2d Cir. 1975); *see also Patricia Hays Assocs., Inc. v. Cammell Laird Holdings U.K.*, 339 F.3d 76, 80 (2d Cir. 2003) (holding that denial of intervention will not be reversed absent district court's abuse of discretion). As detailed below, the Police Unions fail to meet any—let alone all—of these requirements.

## I. BARELY ACKNOWLEDGING THE EXISTENCE OF THE *LIGON* CASE, THE POLICE UNIONS HAVE NOT DEMONSTRATED THAT THEY ARE ENTITLED TO INTERVENE IN *LIGON*.

As an initial matter, the SBA has not moved to intervene in *Ligon*, and the PBA et al. have simply filed a copy of their *Floyd* brief in *Ligon*. Nothing in their brief is addressed to the facts, legal issues, or proceedings in *Ligon*. However, both as a legal and practical matter, *Ligon* is based on its own unique and narrow set of facts and is a distinct case. Given that their moving papers say nothing about the case, the Police Unions simply cannot meet their burden of proving that they meet the requirements of Rule 24. Their motion should therefore be denied with respect to *Ligon*.

## II. THE POLICE UNIONS ARE NOT ENTITLED TO INTERVENE AS OF RIGHT IN THESE ACTIONS.

The Police Unions, except for the SBA,[6] seek to intervene in these actions for two different purposes: (1) to continue the appeals of the Liability and the Remedies Orders, even though the City now wishes to drop its appeals; and (2) to participate in the remedial proceedings, including by presenting their views about proposed remedies. PBA Br. at 3. As the Police Unions cannot meet Rule 24's requirements for either of these purposes, their motions should be denied.

### A. The Police Unions Have No Right to Continue the Second Circuit Appeals in the City's Absence.

#### *1. The Unions Lack Standing to Appeal the District Court's Orders in the City's Absence.*

The Police Unions have no legal right to intervene for the purpose of continuing to prosecute the Second Circuit appeals in place of the City because none of them has standing to continue the appeals in the City's absence. "[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986); *see also Schulz v. Williams*, 44 F.3d 48, 52 (2d Cir. 1994) (same) (citing *Diamond*). To establish Article III standing to prosecute an appeal, a litigant must show: (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury was caused by the judgment being appealed from, not the underlying facts; and (3) it is likely, not merely speculative, the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *In re Joint Eastern and*

[6] The SBA seeks to intervene for the sole purpose of participating in the remedial proceedings. SBA Br. at 1, or "in the event [the cases] return to the Second Circuit, for participating in the appeals," which could only happen if the City had not already decided to withdraw the appeals.

*Southern Dist. Asbestos Litig.*, 78 F.3d 764, 779 (2d Cir. 1996); *Tachiona v. United States*, 386 F.3d 205, 211 (2d Cir. 2004). The Unions have not, and cannot, satisfy these requirements.

The Unions have no standing to appeal the District Court's Liability Orders in *Floyd* and *Ligon* because those orders did not hold them or any of their members liable for any constitutional violations. *See Floyd,* Dkt # 373 at 192; *Ligon* Dkt # 105 at 118-20. The Unions claim that their members have supposedly suffered "reputational harm" as a result of the District Court's factual findings that certain individual Union members participated in or otherwise contributed to unconstitutional stops-and-frisks of plaintiff class members. *See* SBA Br. at 11-14; PBA Br. at 22. However, such injury, to the extent it actually occurred, was caused by the underlying facts, rather than the ultimate holdings, of the Court's Liability Orders, as the Orders themselves lay the blame for widespread unconstitutional stops squarely on the NYPD's policies and institutional indifference, not the malice or racism of individual police officers. *See Floyd*, Dkt # 373 at 60-117, 177-92; *Ligon* Dkt # 105 at 118-34. Thus it is unclear what if any reputational harm individual Union members actually suffered as a result of the Liability Orders.

Moreover, while the Second Circuit and the Supreme Court have recognized certain reputational injuries as sufficient to confer Article III standing in some limited circumstances, those injuries themselves harmed or were likely to harm the victims' economic interests or ability to pursue their livelihoods. *See*, *e.g.*, *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 162 (2d Cir. 2003) (reputational injury was "death knell" to plaintiff's career as a manager of federally-insured credit union); *ACORN v. United States*, 618 F.3d 125, 135 (2d Cir. 2010) (challenged congressional legislation harmed plaintiff non-profit organization's reputation with potential federal, state, and private funders). In contrast, the Unions have failed to identify any individual NYPD officers who the District Court found had conducted unconstitutional stops-

and-frisks and who has suffered or is likely to suffer a financial penalty, discipline, or other adverse employment action as a result of such findings. "[C]onjectural" and "speculative" harms are not sufficient to confer Article III standing on the Unions or its members. *See Lujan* , 504 U.S. at 560. Similarly, the purported (and imagined) chill on lawful police officer conduct which the other Police Unions claim has been caused by the Liability Orders, *see* PBA Br. at 14, aside from being pure conjecture,[7] does not by itself confer standing. *See Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1152 (2013); *Laird v. Tatum*, 408 U.S. 1, 11-16 (1972); *see also Tachiona*, 386 F.3d at 211 ("[I]t is well established 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.") (citation omitted).[8]

The Unions have also not established Article III standing to appeal the District Court's Remedies Order. They do not dispute that they are not bound by the directive to engage in a consultative process to develop remedies, which is all the Remedies Order compels. *See Floyd*

[7] Importantly, the July 9, 2013 notice sent by the PBA leadership to its membership advising officers to limit the situations in which they engage in stop-and-frisk activity pertained to City Council legislation, not the Liability and Remedies Orders of the District Court in *Floyd* and *Ligon*. *See* Engel Decl., Ex. B.

[8] The Unions' citation to *Camreta v. Greene, see* PBA Br. at 22*,* is also inapposite. *Camreta* involved an appeal by the prevailing defendant in the case of a non-dispositive lower court ruling against him, 131 S. Ct. 2020, 2027 (2011), not an application by a non-party to appeal an adverse lower court ruling against someone else. In addition, the district court's ruling that Mr. Camreta's prior conduct had violated the Constitution had a prospective effect on him because, as a state child protective services worker, he was likely to engage in that same conduct again in the future and was thus at risk of a future meritorious damages action. *Id*. at 2029. Here, in contrast, because the (i) District Court has found that the unconstitutional stops-and-frisks by Union members were conducted pursuant to City policies which the Court had ordered be changed, *Floyd* Dkt # 372 at13-36; Dkt # 373 at 60-117, 177-192, and (ii) the City has now indicated its willingness to enact such changes, Charney Decl., Ex L, the Unions' members are unlikely to conduct in the future the kinds of stops which the District Court found unconstitutional unless they intend to violate NYPD policy, which the Unions do not suggest their members will do.

Dkt # 372, at 13-36. This should end the inquiry. *See Hollingsworth v. Perry*, 133 S.Ct. 2652, 2662 (2013) (holding that intervenor sponsors of state ballot initiative lacked standing to appeal district court decision that initiative was unconstitutional where "[d]istrict [c]ourt had not ordered them to do or refrain from doing anything"); *Tachiona*, 386 F.3d at 211 (noting that a litigant who is not bound a judgment will "in the usual case have difficulty showing that it meets the Article III standing requirement."). Instead, the Unions argue that yet-to-be developed reforms to stop-and-frisk policies, training, and supervisory, monitoring, disciplinary, and documentation procedures designed to bring police officer stop-and-frisk activity into compliance with the Constitution will somehow "impair" their members' day to day activities and unidentified collective bargaining rights. SBA Br. at 17-18; PBA Br. at 14, 22. Yet, "allegations of *possible* future injury are not sufficient." *Clapper,* 133 S. Ct. at 1147 (citations omitted). A party's standing cannot be based upon "speculative chains [] that require guesswork as to how independent decision makers [in this case, the parties and court-appointed monitor and facilitator] will exercise their judgment," *id*. at 1150 (internal quotations and citations omitted), particularly since, as discussed below, the decision makers in this case are likely to exercise that judgment in a manner that protects the interests of the Unions.

In sum, outside of cases directly challenging a defendant employer's labor or employment practices, there is no precedent for the proposition that a union has standing to appeal a liability determination or remedies order against its employer.[9] Accordingly, the Unions

[9] The rare cases in which unions had standing to appeal involved appeals from the entry or rejection of consent decrees in employment discrimination cases whose terms directly infringed upon union members' contractual employment rights. *See Vanguards of Cleveland v. City of Cleveland*, 753 F.2d 479, 482-84 (6th Cir. 1985); *Howard v. McLucas*, 782 F.2d 956, 959 (11th Cir. 1986); *Black Fire Fighters Ass'n of Dallas v. City of Dallas, Tex*., 19 F.3d 992, 994 (5th Cir. 1994); *United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177 (2nd Cir. 1991).

lack standing to intervene for the purpose of continuing the appeals of the Liability and Remedies Orders in the City's absence.

2. *The Police Unions' Motions to Intervene for the Purpose of Continuing the Appeals Are Extremely Untimely.*

Even if the Police Unions had standing to maintain the appeals, they would be unable to satisfy the timeliness requirements of Rule 24(a), because the only excuses they offer for their failure to join the litigation over the many years it unfolded have been rejected by the Second Circuit in similar circumstances.

The timeliness inquiry is committed to the sound discretion of the district court, which should be guided by the following four factors: (1) the length of time the applicant knew or should have known of his interest before making the motion, (2) prejudice to the existing parties resulting from the applicant's delay; (3) prejudice to applicant if the motion is denied, and (4) the presence of unusual circumstances militating for or against a finding of timeliness. *Farmland Dairies and Fairlawn Dairies, Inc. v. Comm'r of the N.Y. State Dep't of Agric. and Mkts.*, 847 F.2d 1038, 1044 (2d Cir. 1988). "In addition, post-judgment intervention is generally disfavored because it fosters delay and prejudice to existing parties." *Id*. (citing *United States v. Yonkers Bd of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986)).

Applying these criteria, the Unions' motions to intervene for purposes of continuing the appeals in the City's absence are extremely untimely. First, to the extent that the *Floyd* and *Ligon* actions had the potential to negatively impact Union members' reputations, their day-to-day job duties and/or collective bargaining rights—which as discussed above, they do not—the Unions knew or should have known this months, if not years, before the Liability and Remedies Orders issued. The *Floyd* complaint, filed in January 2008, and the *Ligon* complaint, filed in March 2012, alleged that certain individual police officers had conducted unconstitutional stops-

and-frisks and indicated that the plaintiffs in both cases were seeking department-wide changes to NYPD stop-and-frisk policies, training, and supervisory, monitoring, documentation, and disciplinary procedures. *Floyd* Dkt # 1 ¶¶ 20-22, Prayer for Relief ¶ (b); *Ligon* Dkt # 1 Prayer for Relief ¶ 6. *See Catanzano v. Wing*, 103 F.3d 223, 233 (2d Cir. 1996) (rejecting, as insufficient justification for delay, argument that delay occurred because order triggering need to intervene came as "total surprise" and reasoning that applicants should have known that issue addressed by order had been "clearly present in the litigation from the very beginning"); *S.H. v. Stickrath*, 251 F.R.D. 293, 299-300 (S.D. Ohio 2008) (correction officer union's motion to intervene in class action challenging unconstitutional conditions of confinement in state juvenile prisons to block parties' stipulated injunction was untimely where original pleadings' allegations of systemic constitutional violations three years prior put union on notice that remedy would alter union members' duties, training and supervision).

The very high-profile pretrial publicity surrounding both cases gave notice to all interested stakeholders of the pendency and nature of these actions. *See* Charney Decl. Exs. J, K, M. Indeed, the *Floyd* plaintiffs and other stakeholders on the stop-and-frisk issue, including members of the New York City Council, organizations representing communities heavily impacted by stop-and-frisk, and the U.S. Department of Justice, each filed submissions with the District Court either before or immediately after the *Floyd* trial (and before the August 12, 2013 Liability and Remedies Orders) on the very remedial issues discussed in the Remedies Order. *See* Floyd Dkt ## 268, 365, 377-378. Yet, all the while, the Unions remained silent. They attempt to explain their inaction by arguing that they chose to "await the outcome of the Floyd trial- which could have resulted in no finding of liability and no City-wide remedial order- before investing their limited resources in seeking to intervene." PBA Br. at 12; SBA Br. at 25. But the

Unions, whose dues-paying members number in the tens of thousands and who apparently have the resources to retain teams of lawyers from large, prominent New York law firms to represent them on the present intervention motions, clearly "are not poor, ignorant people whose rights have to be protected." *Farmland Dairies*, 847 F.2d at 1044 (finding post-judgment intervention motions untimely where companies "were aware of this and related litigation" years before the district court injunction they sought intervention to appeal) (internal quotations omitted).

The Unions' remaining argument—that their intervention motions are timely because they moved to intervene promptly after learning that the incoming mayoral administration was likely to stop pursuing the City's appeals and thus would no longer adequately represent their interests, SBA Br. at 24-25; PBA Br. at 12—also fails. The Second Circuit squarely addressed and rejected this very argument in *Farmland Dairies*. There, after a New Jersey milk producer was awarded summary judgment in its federal constitutional challenge to a New York State statute prohibiting it from selling milk in New York City, the defendant, New York State, decided not to appeal the district court summary judgment and instead negotiated a settlement with the plaintiff under which it would grant the plaintiff a license to sell milk in New York City. *Farmland Dairies*, 847 F.2d at 1042. Immediately following a public announcement of the settlement by New York's governor, a group of New York state milk producers, who opposed the challenge to the statute and whose economic interests stood to suffer under the settlement because the plaintiff could now compete with them in the New York City milk consumer market, moved to intervene in order to appeal the district court's summary judgment decision, arguing that their motion was timely because they had "moved to intervene promptly after learning that [State] would not appeal district court's injunction order, and . . . up to that time [intervenors] had every reason to believe that the State would defend the constitutionality of [the state statute]

. . . as it always had in the past." *Id*. at 1044. In upholding the district court's denial of intervention, the Second Circuit squarely rejected this argument, noting, among other things, that the intervenors "were aware of this and other litigation" and that "[n]o reason appears why" they could not have intervened earlier in the litigation. *Id*.[10]

Further, intervention by the Unions to continue the appeals would also severely prejudice the plaintiffs and the City, who, after years of very contentious and resource-intensive litigation, have agreed to resolve the liability issues and proceed with the Court-supervised remedial processes outlined in the Remedies Order, which can only occur if the appeals are withdrawn and the Second Circuit's stay is lifted. In comparable circumstances, the Second Circuit has made clear that a late-moving party is not entitled to intervene. *See Farmland Dairies*, 847 F.2d at 1044 (denying intervention where "there is no question that the settlement concluded by [plaintiff] and the state would be jeopardized"); *In re Holocaust Victims Assets Litig.*, 225 F.3d 191, 199 (2d Cir. 2000) (denying intervention that "would prejudice the existing parties by destroying their Settlement and sending them back to the drawing board"); *D'Amato v. Deutsche Bank*, 236 F.3d at 78, 83-84 (2d Cir. 2001) (upholding denial of intervention because intervention "would potentially derail the settlement and prejudice the existing parties"). After fifteen years of litigation and highly-charged, often bitter, debate over controversial stop-and-frisk practices that have caused severe rifts between the NYPD and many of the communities it serves, *see Floyd* Dkt ##385-2 through 385-5, 386, the new Mayoral Administration, like the State in *Farmland Dairies*, has "determined that the public interest would be best served by

[10] Conversely, *United Airlines, Inc. v. McDonald*, 432 U.S. 385 (1977), the principal case relied on by the PBA in support of their argument, is factually distinguishable from the present case because, unlike the Police Unions, the intervenor in *United*, an individual member of a putative Title VII plaintiff class, could not as a practical matter have taken any action to protect the legal interest she was seeking to vindicate on appeal even if she had intervened in the case prior to the district court judgment. 432 U.S. at 394 n.15.

foregoing appeal" and attempting to remedy the constitutional violations found by the District Court. *Farmland Dairies*, 847 F.2d at 1044. As for the *Floyd* and *Ligon* plaintiff classes, which number in the hundreds of thousands, the Unions' continuation of the appeals would delay and potentially deny them the "substantial relief" they stand to receive through the processes set forth in the Remedies Order, which strongly weighs against intervention. *See Garrity v. Gallen*, 697 F.2d 452, 457 (1st Cir. 1983) (listing cases).

On the other hand, the Unions will not be prejudiced by denial of intervention for the purpose of appeal because, as discussed above, the orders they seek to challenge on appeal have not caused them or their members any legally cognizable injury and because they will have the opportunity through the joint remedial process to help shape the stop-and-frisk reforms that will ultimately be ordered by this Court and implemented by the City. *See Floyd* Dkt # 372 at 29. Given that the prejudice to the plaintiffs and the City far outweighs any prejudice to the Unions, "intervention on the part of the late arrivers must yield." *See Farmland*, 847 F.2d at 1044.

**B. The Unions Have No Right to Intervene into the Remedial Phases of *Floyd* and *Ligon*.**

1. *The Police Unions Possess No Direct, Legally Protectable Interest in these Matters*.

To intervene as of right, a movant must show that it possesses "an interest relating to the property or transaction that is the subject of the action." Fed. R. Civ. P. 24(a)(2). This interest must "be direct, substantial, and legally protectable." *Wash. Elec. Co-op., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 96-97 (2d Cir. 1990); *accord Donaldson v. United States*, 400 U.S. 517, 531 (1971) (requiring "significantly protectable interest"). The Police Unions possess no such interest.

The Police Unions claim that they have two interests: (1) one because the plaintiffs "seek injunctive relief against [their] member officers and raise[] factual allegations that [the union's]

member officers committed unconstitutional acts in the line of duty," PBA Br. at 13 (internal quotation marks and citation omitted), *see also* SBA Br. at 12-14, and (2) the possibility that the district court will "set employment practices that would otherwise be subject to bargaining under state law." PBA Br. at 14; *see also* SBA Br. at 14-16. Neither of these interests is a legally protectable interest that justifies intervention.

First, the SBA's claim that the factual allegations against its members create a legally protectable interest should be rejected because it does not seek to intervene for the purpose of challenging those allegations or the liability findings in *Floyd*. Instead, it seeks to intervene "for the purpose of participating in the court-supervised settlement discussions regarding the parties' proposed resolution of this matter or, in the event that this matter returns to the Second Circuit, for the purpose of participating in the appeal currently pending the Second Circuit." SBA Br. at 1. If the SBA truly seeks only to participate in the development of remedies—which will be systemic and not directed against particular members of the NYPD—its supposed interest in the factual allegations made against its members is completely irrelevant to the reason it claims to want to join the *Floyd* litigation as a party. This interest does not, therefore, justify intervention by the SBA.

To the extent that the PBA and other Unions, which do seek to appeal the liability rulings in both *Floyd* and *Ligon*, claim that the plaintiffs' pursuit of "injunctive relief against their members" creates a legally protectable interest, they are incorrect. The *Floyd* plaintiffs have dismissed their claims against individual members of the NYPD and instead seek injunctive relief against only the City. *See Floyd* Dkt # 270. As such, the plaintiffs' pursuit of injunctive relief does not create a legally protectable interest under Rule 24.

In addition, the Police Unions' reliance on *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), to support the notion that the plaintiffs' allegations against officers create a protectable interest is misplaced. There, unlike here, the Ninth Circuit easily concluded that the police union seeking to intervene had a legally protectable interest where it cited specific sections of its collective bargaining agreement that would be implicated by a proposed consent decree. *Id.* at 399-400. The Ninth Circuit's additional conclusion—made without citation to any precedent—that allegations against officers and the pursuit of injunctive relief are sufficient to create a protectable interest applied to the Unions' efforts to intervene in the merits, not remedial phase, of the litigation, and rested in large part on the fact that the merits had not yet been litigated, and they might be litigated in the future. *Id.* at 399. Of course, those are not the circumstances here, where the merits have already been litigated. This Court should not, therefore, follow the Ninth Circuit here.[11]

The Police Unions' other claimed interest rests on their rights under New York law to bargain with the City about the terms and conditions of their members' employment. PBA Br. at 14-18; SBA Br. at 14-16. This claim fails because none of the contemplated relief is within the scope of mandatory bargaining under New York law. This conclusion is underscored by the fact that the Police Unions fail to cite any contract provision that conflicts with the remedies at issue, instead relying on the claim that "New York's public policy in favor of collective bargaining is 'strong and sweeping.'" PBA Br. at 15. They also argue that the mere "possibility" of abridgment of their bargaining rights, PBA Br. at 14; *see also* SBA Br. at 15, constitutes a legally protectable interest here.

[11] The Police Unions' reliance on the allegations in the plaintiffs' complaints—which were filed in March 2008 in *Floyd*, and in March 2012 in *Ligon*—to establish an interest in this action only underscores their inexcusable delay in moving to intervene. As noted above, the Police Unions waited years before attempting to enter the cases.

These arguments should be rejected because none of the topics implicated by the Remedies Opinion is subject to mandatory collective bargaining under New York law. *See Sheppard v. Phoenix*, No. 91 Civ. 4148, 1998 WL 397846 (S.D.N.Y. July 16, 1998) (denying union's application for intervention where settlement provisions were covered by management rights provisions of the New York City Collective Bargaining Law). The New York City Collective Bargaining Law requires the City to engage in collective bargaining about the "terms and conditions of employment," N.Y. City Admin. Code § 12-307(b), but it provides that certain decisions about the operation of government entities are reserved for decision by management and do not require bargaining.[12] As the Court of Appeals of New York has explained with reference to state law, "decisions are not bargainable as terms and conditions of employment where they are inherently and fundamentally policy decisions relegating to [its] primary mission." *In re: County of Erie v. PERB*, 12 N.Y.3d 72, 78 (2009) (internal quotation marks and citation omitted).[13] This principle is particularly important for police departments:

> As long ago as 1888, we emphasized the quasi-military nature of a police force, and said that "a question pertaining solely to the general government and discipline of the force . . . must, from the nature of things, rest wholly in the

[12] In a footnote, and citing only a dissent from a majority opinion of the New York City Board of Collective Bargaining, the Police Unions claim that there is an "open question" as to whether the New York City Collective Bargaining Law's designation of "management prerogatives" is preempted by state law. PBA Br. at 16 n.2. The Police Unions do not, however, seem to believe that this "open question" is a serious one, as they cite other decisions by the Board of Collective Bargaining in which they argued about whether certain changes made by the NYPD constituted management prerogatives or topics subject to mandatory bargaining. *See, e.g.*, PBA Br. at 16.

[13] The Taylor Law, N.Y. Civ. Serv. Law §§ 200-14, the state law providing rules and procedures governing collective bargaining, allows public employers like the City of New York to enact "provisions and procedures" regarding bargaining as long as they are "substantially equivalent to the provisions and procedures" in the Taylor Law. N.Y. Civ. Serv. Law § 212(1). Because the New York City Collective Bargaining Law is, by definition, "substantially equivalent" to the Taylor Law, interpretations of the Taylor Law by the Court of Appeals of New York are relevant authority here.

> discretion of the commissioners." . . . [T]he public interest in preserving official authority over the police remains powerful.

*In re: PBA v. PERB*, 6 N.Y.3d 563, 576 (2006) (internal citation omitted).

Indeed, the reforms contemplated by the Remedies Opinion—new policies, training programs, and supervisory practices, including disciplinary policies—are precisely the types of policies for which executive authority is paramount. *See, e.g.*, *In re: County of Erie*, 12 N.Y.3d at 78 (holding that sheriff's policy regarding housing classification for inmates was not subject to bargaining); *In re: PBA v. PERB*, 6 N.Y.3d at 576 (holding that NYPD's disciplinary policies were not subject to bargaining).

Thus, while Police Unions maintain the right to bargain over issues collateral to policies set by management, they have no right to bargain about the policies themselves. *See* N.Y. Admin. Code § 12-307(b) (unions entitled to bargain about "the practical impact that decisions on [certain matters of policy] have on terms and conditions of employment"); *In re: W. Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46, 51-52 (1974) (fixing of class size was policy decision not subject to bargaining, but impact on teachers, *e.g.*, variance in compensation based on class size, was bargainable). The fact that Police Unions do not cite a single contract provision implicated by the Remedies Order and do not claim to have presented any grievance or otherwise to have objected to the steps taken by the NYPD in the long history of *Daniels*, *Floyd*, and *Ligon*, to reform the NYPD's stop-and-frisk practices and the Trespass Affidavit Program underscores their lack of a legally protectable interest in this case.

The Police Unions are therefore left to claim that their legally protectable interest in this case rests on the "possibility" that the remedies ultimately ordered in these cases will interfere with their collective bargaining rights. PBA Br. at 14, *see also* SBA Br. at 15-16. This argument is not, however, supported by Second Circuit precedent, which requires that an interest "must be

direct, as opposed to remote or contingent," to qualify as a legally protectable interest. *Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 874 (2d Cir. 1984).

Further, the authorities the Police Unions cite do not support their position. In the sole Second Circuit case that they cite, the Court's admonishment that "an application to intervene cannot be resolved by reference to the ultimate merits of the claims which the intervenor wishes to assert following intervention," *Brennan v. N.Y.C. Bd. of Educ.*, 60 F.3d 123, 129 (2d Cir. 2001), referred to the merits of the plaintiffs' claims, not the proposed intervenor's interest in the case; there was no dispute that a victory for the plaintiffs would implicate the intervenor's collective bargaining rights. *Id.* at 129-30. The same was true in the remaining cases they cite. *See United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002); *United States v. City of Portland*, No. 3:12-cv-02265 (D. Or. Feb. 19, 2013); *see also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 760-61 (1983); *E.E.O.C. v. A.T.&T. Co.*, 506 F.2d 735, 739 (3d Cir. 1974). For example, in both *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002), and *United States v. City of Portland*, No. 3:12-cv-02265 (D. Or. Feb. 19, 2013), the intervening union set out the specific provisions that would be affected. *See* Br. of Intervenor-Appellant Los Angeles Police Protective League, *City of Los Angeles*, 2001 WL 34093539, at *20 (filed May 8, 2001) (explaining that consent decree conflicted with many specific contract provisions); Br. of Portland Police Ass'n (filed Dec. 18, 2012) (excerpt attached to Charney Declaration as Exhibit Q).

The Police Unions also cite two decisions of the New York City Board of Collective Bargaining for their claim that eventual remedies regarding training programs will be subject to bargaining "to the extent the City requires [it] as a qualification for continued employment." PBA Br. at 17. Those decisions both state, however, "the establishment of training procedures, in

most circumstances, is a matter of management right and not a mandatory subject of bargaining." *Uniformed Firefighters Ass'n v. City of New York*, Decision No. B-20-92, 49 OCB 20 (BCB 1992); *City of New York v. Uniformed Firefighters Ass'n*, Decision No. B-43-86, 37 OCB 43 (BCB 1986)). And, the Police Unions offer no reason to believe that the exception to which they advert—where training is required to obtain a license or certification—will be applicable to any training programs developed pursuant to the Remedial Order.

The Police Unions also cite decisions of the Board of Collective Bargaining and Public Employment Relations Board for the proposition that remedies eventually developed regarding officer performance evaluation procedures and the use of body cameras might be subject to bargaining. *See* PBA Br. at 16-17. This speculation cannot be sufficient to create legally protectable interest. In one case, the Board of Collective Bargaining emphasized that "the imposition of criteria used for evaluation, and substantive changes to that criteria, are not mandatory subjects of bargaining because they fall within an employer's rights under § 12-307(b) to determine the 'methods, means and personnel' by which government operations are conducted." *Patrolmen's Benevolent Ass'n of the City of New York, Inc. v. City of New York*, 6 OCB2d 36, at 15 (BCB 2013). It is precisely these subjects that the Remedies Order addresses. Floyd Dkt # 372 at 17-18. As such, the Police Unions' claim that the remedies developed will go beyond these topics is insufficient to demonstrate that they will be subject of bargaining. Similarly, body cameras are "equipment related directly to the manner and means that police services are provided, thereby constituting a managerial prerogative," *City of New York* 40 PERB ¶ 3017, Case No. DR-119, (PERB Aug. 29, 2007). The Police Unions offer no argument that policies governing the use of body cameras are the subject of mandatory bargaining, instead saying only that "the City's general right to choose technology and equipment may be

outweighed by interests such as officer safety, privacy, and discipline that are implicated by the remedy." PBA Br. at 17 (emphasis added). Again, such speculation that a remedy might concern a topic subject to bargaining cannot be sufficient to create a legally protectable interest.[14]

In sum, the Police Unions have made no showing that they have a direct, legally protectable interest in these cases.

*2. The Unions' Motions Are Untimely and their Intervention at this Stage Would Severely Prejudice the Parties.*

As with intervention to pursue the City's appeals in the Second Circuit, the Unions' motions to intervene as parties to the Court-ordered remedial processes are extremely untimely for several reasons.

First, as discussed at pages 4-7 and 16-17, *supra*, to the extent they and their members have a legal interest in the remedial issues in these two cases—which, as discussed above, they do not—the Unions were on notice of such fact long before the Remedies Orders issued on August 12, 2013. The PBA, for example, issued a press release within hours of this court's January Opinion in *Ligon*.[15] Yet they made no attempt to intervene or otherwise weigh in on these issues in the District Court, even though the district court judge made clear that she was

[14] The other cases Police Unions cite in support of their claim that they have an interest in this case are factually inapposite. In *Stallworth v. Monsanto Co.*, the putative intervenors were not unions but individual employees forced into lower paying jobs. 558 F.2d 257, 262 (5th Cir. 1977). In *CBS, Inc. v. Snyder*, managers sought a stay of arbitration proceedings initiated pursuant to a contract where "interpretation and/or enforceability of the arbitration provisions" was central to the case. 798 F. Supp. 1019, 1021 (S.D.N.Y. 1992), *aff'd*, 989 F.2d 89 (2d Cir. 1993). In *Edwards v. City of Houston*, groups of white, Asian-American, and female officers were allowed to intervene where a consent decree in an employment discrimination case reserved a specific number of promotions to African American and Hispanic-American officers. 78 F.3d 983, 991-92 (5th Cir. 1996). In all of those cases, unlike here, a victory for the plaintiffs would have had obvious, and almost certainly negative, impacts on the intervenors.

[15] *See* "PBA Reacts to Federal Judge's Stop and Frisk Decision," attached as part of Exhibit M to Declaration of Darius Charney.

considering issues regarding remedies at the same time as liability. Charney Decl. Ex. R, at 76-77; Ligon Dkt. #105 at 145-46. While other non-party stakeholders on the stop-and-frisk issue, including those with much less resources than the Unions, were doing so, the Unions did not attempt to join this litigation. *See* Charney Decl. ¶ 4; Floyd Dkt ## 365, 377, 378 (describing filings of interested parties, including Communities United for Police Reform, made in March 2013).[16]

The Unions' intervention into the remedial phases of these two cases would also severely prejudice the parties because, as their recent court submissions make abundantly clear, they want the Court-ordered remedial processes to fail. They have described the Remedies Order as "capacious" and "erroneous" and the injunctive relief contemplated therein as "wholly unnecessary and unjustified," and they have expressed their vehement disagreement with the liability rulings on which the Remedies Order is based, PBA Br. at 1-2, 7, 12; SBA Br. at 20 (describing current mayoral administration's agreement with plaintiffs on reforms to police practices as "adversarial" to SBA's position).[17] In addition, if there were any doubt that the Unions are motivated by something other than a good faith desire to simply have input into the injunctive remedies to be ordered by this Court, that doubt was erased last week when several Union officials stated publicly that they are using the intervention issue to extract concessions

[16] Moreover, in its January 2013 preliminary injunction ruling in *Ligon*, the District Court proposed the same specific remedial categories which appear in Section III of its August 12, 2013 Remedies Order, *see* Ligon Dkt #96 at 141-48, Dkt #120 at 32-36, and directed the parties to submit briefs addressing "whether the proposed relief is insufficient or too burdensome or otherwise inappropriate." Over the next seven months, per the Court's orders, the parties sought to reach agreement on the fine points of the remedies, submitting detailed proposals and counterproposals with meticulous attention to the language of the remedial provisions and to the appropriate timeline for their adoption, and yet at no point during that time did the Unions even attempt to weigh in on the *Ligon* remedies.

[17] It is also noteworthy that the Police Unions filed amicus briefs in the Second Circuit in support of the motion to stay the Remedies Order. As the Court is aware, that motion was granted and the stay remains in effect, delaying commencement of the Court-ordered remedial process.

from the new mayoral administration in upcoming collective bargaining negotiations. *See* Charney Decl, Exs. N & O.

Finally, as set forth above, the Unions will not be prejudiced if intervention is denied because the remedies that will be developed will not impair their or their members' legal interests or otherwise cause them any legally cognizable injuries, and because they will still have input into the development of injunctive remedies through the Joint Remedial Process.

In sum, the balancing of relevant factors shows that the Unions' motions to intervene into the remedial phase of *Floyd* and *Ligon* are untimely.

*3. The Unions' Interests Will be Adequately Represented in the Remedial Process.*

To the extent that they have legally-protected interests that may be adversely affected by the injunctive relief to be developed through Court-ordered remedial processes, which, as discussed *supra* at pages 20-27, they do not, the Unions have failed to establish that the existing parties cannot adequately represent those interests.

First, the fact that the City intends to withdraw its appeal of the Liability and Remedies Orders, *see* SBA Br. at 20, PBA Br. at 19, is not relevant to the question of whether, in helping to craft Court-ordered reforms to stop and frisk policies and procedures, it will not seek to advocate for police officer safety, workload and other interests which the Unions claim will be implicated by such reforms. Indeed, as the employer of NYPD officers, the City by definition is obligated to consider officer safety and workload when developing and implementing stop-and-frisk policy reforms. *See United States v. City of New York* 2012 U.S. Dist. LEXIS 12085, *8-9 (E.D.N.Y. Feb. 12, 2012). Moreover, Mayor de Blasio has himself stated in a filing in the Second Circuit that concerns about officer safety and departmental resources should be considered in the development the immediate and joint reforms. *See Floyd* Appeal Dkt # 205 at 9, 20-22.

The Unions' argument that the City's adversarial collective bargaining relationship with the Unions automatically renders it an inadequate representative of the Unions' interests as to the remedial issues in these two cases, SBA Br. at 19-20, PBA Br. at 19-20, has no support in law or fact. The only case the Unions cite for this proposition, *Vulcans Society of Westchester Cty v. Fire Dept. of the City of White Plains*, involved intervention by a firefighter union concerned about changes to the municipal defendant's firefighter hiring and promotion practices following an employment discrimination lawsuit. 79 F.R.D. 437, 441 (S.D.N.Y. 1978). Unlike here, the antagonistic employer-employee relationship was at the center of the issues in that case. In addition, the Unions provides no specific examples of how theirs and the City's interests might in fact conflict with respect to the stop-and-frisk reforms to be developed in these two cases, nor how their arguments about officer safety, workload, etc. would in any way differ from those of the City. This dearth of examples is fatal to the Unions' motions. *See*, *e.g.*, *Penick v. Columbus Educ. Ass'n*, 574 F.2d 889, 890-91 (6th Cir. 1978) (denying intervention where teachers union "provided no specific example" to suggest that school board had not adequately represented interests of teachers); *United States v. City of New Orleans*, 12-CV-1924, Dkt #102 at 21-22 (denying police unions intervention into consent decree where disagreements between government and unions were "for the most part unarticulated.").[18]

## III. THE POLICE UNIONS ARE NOT ENTITLED TO PERMISSIVE INTERVENTION.

The Police Unions also argue that, if they are not entitled to intervene as of right, the Court should grant them permissive intervention. PBA Br. at 20-21; SBA Br. at 26-27. Permissive intervention is appropriate where a movant's motion is timely and the movant proves that it possesses a claim or defense that shares a common question of law or fact with the main

[18] The decision in *United States v. City of New Orleans* is attached to the Charney Declaration as Exhibit P.

action. Fed. R. Civ. P. 24(b)(1). Where these requirements are met, permissive intervention is wholly discretionary with the trial court, *Brennan*, 579 F.2d at 191, although the court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(2).

Permissive intervention is not warranted here. First, the Police Unions' application is untimely. In this regard, plaintiffs note that timeliness considerations "apply with even greater force to permissive intervention." Wright & Miller, 7C Fed. Prac. & Proc. § 1916 (3d ed.). Second, the Police Unions present no claims or defenses that share a common question of law or fact with this action. At best, they seek to inject unrelated and erroneous arguments about municipal labor law. Third, intervention would unduly delay the proceedings and cause substantial prejudice to plaintiffs' rights, and thus should be denied in the Court's equitable discretion. Finally, the Police Unions have not articulated the presence of any other fact or circumstance that might weigh in favor of permitting intervention. *Brennan*, 579 F.2d at 191-92. For these reasons, the Court should deny their application for permissive intervention.

**CONCLUSION**

For the foregoing reasons, this Court should deny the Police Unions' motions to intervene.

Dated: New York, New York
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Respectfully submitted,

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