14-2829-cv(L),
14-2834-cv(CON), 14-2848-cv(CON)

United States Court of Appeals

for the

Second Circuit

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

Appellants-Putative Intervenors,

– v. –

(For Continuation of Caption See Inside Cover)

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

BRIEF OF *AMICI CURIAE* GRAND COUNCIL OF GUARDIANS, INC., NATIONAL LATINO OFFICERS' ASSOCIATION AND 100 BLACKS IN LAW ENFORCEMENT WHO CARE IN SUPPORT OF APPELLEES

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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 OFFICER MICHAEL COUSIN HAYES, Shield #3487, in his individual capacity, NEW YORK CITY POLICE OFFICER ANGELICA SALMERON, Shield #7116, in her individual capacity, LUIS PICHARDO, Shield #00794, in his individual capacity, JOHN DOES, New York City, #1 through #11, in their official and individual capacity, NEW YORK CITY POLICE SERGEANT JAMES KELLY, Shield #92145, in his individual capacity, NEW YORK CITY POLICE OFFICER CORMAC JOYCE, Shield #31274, in his individual capacity, NEW YORK POLICE OFFICER ERIC HERNANDEZ, Shield #15957, in his individual capacity, NEW YORK CITY POLICE OFFICER CHRISTOPHER MORAN, in his individual capacity,

Defendants-Appellees.

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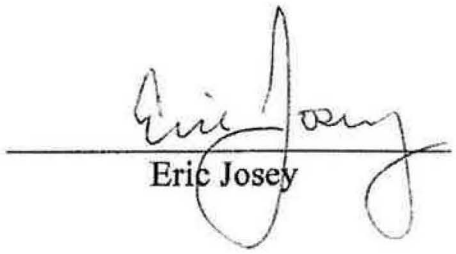
*Pursuant to Federal Rules of Appellate Procedure 43(c)(2), New York City Police Commissioner William J. Bratton and New York City Mayor Bill de Blasio are automatically substituted for the former Commissioner and former Mayor in this case.

CORPORATE DISCLOSURE STATEMENT OF 100 BLACKS IN LAW ENFORCEMENT WHO CARE

Eric Josey, under penalty of perjury, states as follows:

1. I am a Co-Founder and the Director of Legal Affairs of 100 Blacks in Law Enforcement Who Care ("100 Blacks").

2. 100 Blacks has no parent corporation, and no publicly held corporation owns 10% or more of its stock.



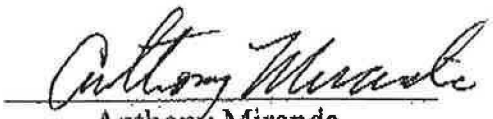
Eric Josey

CORPORATE DISCLOSURE STATEMENT OF NATIONAL LATINO OFFICERS' ASSOCIATION

Anthony Miranda, under penalty of perjury, states as follows:

1. I am the Executive Chairman of the National Latino Officers' Association ("NLOA").

2. The NLOA has no parent corporation, and no publicly held corporation owns 10% or more of its stock.



Anthony Miranda

CORPORATE DISCLOSURE STATEMENT OF GRAND COUNCIL OF GUARDIANS

Charles Billups, under penalty of perjury, states as follows:

1. I am the ~~President~~ Chairperson of the Grand Council of Guardians ("Grand Council").

2. The Grand Council has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Charles Billups

Charles Billups
Chairperson

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STATEMENT OF INTEREST PURSUANT TO FRAP 29(c)(4)

The Grand Council of Guardians, Inc., the National Latino Officers' Association and 100 Blacks In Law Enforcement Who Care (collectively "*Amici*") submit this brief pursuant to FRAP 29[1] in opposition to the appeals by the Patrolmen's Benevolent Association, Sergeants Benevolent Association, Detectives' Endowment Association, Inc., Lieutenants Benevolent Association of the City of New York, Inc. and NYPD Captains Endowment Association, Inc. (collectively "Appellants," "Police Unions" or "Unions") from the July 30, 2014 Order and Opinion of the District Court denying their motions to intervene in appeals before this Court in *Floyd v. City of New York*, No. 13-3088, and *Ligon v. City of New York*, No. 13-3123, and in remedial proceedings before the District Court in *Floyd v. City of New York*, No. 08 Civ. 1034 (AT) (S.D.N.Y.), and *Ligon v. City of New York*, No. 12 Civ. 2274 (AT) (S.D.N.Y.).[2] *See Floyd v. City of New York*, 2014 WL 3765729 (S.D.N.Y. July 30, 2014). All parties to the intervention-

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[1] No counsel for any party authored this brief in whole or part. No party or party's counsel contributed money that was intended to fund preparing or submitting the brief. No person other than counsel for *Amici* contributed money which was intended to fund preparation or submission of this brief.

[2] The Sergeants Benevolent Association moved to intervene only in the *Ligon* appellate and trial court proceedings. The other Police Unions sought intervention in both *Floyd and Ligon*. *See* 2014 WL 3765729, at n. 1.

related appeals consolidated herein consented to the filing of a brief by *Amici*. The instant brief is being filed on or before September 29, 2014.[3]

The Grand Council of Guardians, incorporated in 1974, is a not-for-profit umbrella organization for numerous organizations composed of African-Americans in the law enforcement field, including groups composed of police, corrections, parole or probation personnel. One of the Grand Council's constituent organizations, the NYPD Guardians, has more than 500 members who are current or retired New York City police officers. Other constituent organizations include groups composed of New York State police personnel or Nassau County police personnel. The National Latino Officers' Association is a national fraternal and advocacy membership organization composed of more than 6,000 uniform and civilian employees of city, state and federal law enforcement agencies. A majority of its members are current or former employees of the NYPD. 100 Blacks In Law Enforcement Who Care, founded in 1995, is composed of several hundred African Americans involved in law enforcement. A majority of its members are current or retired NYPD officers.

Each of the *Amici* has long been concerned about the relationship between law enforcement agencies and minority communities, as well as the

[3] All parties except the appellants in Nos. 14-2829-cv and 14-2834-cv consented unconditionally to such filing. The latter consented on the condition that *Amici* file their brief on or before September 29, 2014.

treatment of minority personnel in law enforcement agencies. *Amici* believe it is important to make known that the arguments expressed on these appeals by the leaderships of the Police Unions do not represent the views of many rank-and-file members of those unions, particularly minority union members. In particular, the conclusory "safety" rationale advanced by Appellants as a justification for intervention has it completely backwards with respect to both the public and individual police officers. It is NYPD adherence to the commands of the Fourth Amendment and the Equal Protection Clause when interacting with the public, not systemic and widespread violations of those constitutional guarantees, which will best advance both public and police safety.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT APPELLANTS FAIL TO POSSESS A DIRECT, SUBSTANTIAL AND LEGALLY PROTECTABLE INTEREST IN A SUBJECT OF THE REMAINING LITIGATION IN *FLOYD* OR *LIGON*.

The Police Unions sought intervention as a right in the remaining appellate and trial court proceedings in *Floyd* and in *Ligon* pursuant to Fed. R. Civ. P. 24(a)(2). Accordingly, they were obliged to show, *inter alia*, they possess an interest relating to property or a transaction that is the subject of those proceedings. The burden of proof on intervention under Rule 24(a)(2) lies with the movant. *United States Postal Service v. Brennan*, 579 F.2d 188, 191 (2d Cir. 1978). The

District Court denied the Unions' motions on the grounds that their motions were untimely, the Unions failed to demonstrate a direct, substantial and legally protectable interest relating to property or a transaction that is a subject of the appeals in Nos. 13-3088 or 13-3123 or of the outstanding remedial proceedings in the court below, and the Unions lacked standing to intervene.

Because of the variety of circumstances presented on motions to intervene and the close proximity of a district court to a case's nuances, such a court has a better sense of a case than an appellate court. For that reason, a denial of an application to intervene as of right is reviewable only for an abuse of discretion. *E.g.*, *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994); *New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992). The District Court did not abuse its discretion in denying the applications to intervene. While *Amici* believe the District Court's denial of intervention under Rule 24(a)(2) was correct for each of the separate reasons relied upon by that Court, *Amici* focus principally on the following point: The interests on which Appellants would rely, to wit, (a) the alleged right of the Unions to bargain over the terms of the District Court's remedial orders said to arise from the New York City Collective Bargaining Law ("CBL"), N.Y.C. Admin. Code § 12-301 *et seq.*, (b) the interest in avoiding undue interference with the City's running of the NYPD, (c) the reputational injury ostensibly suffered by the individual members of the Unions

either as a consequence of certain non-party Union members being found not credible as witnesses or as a consequence of the Court's finding that the NYPD was responsible for more than 200,000 unconstitutional stop-and-frisks, and (d) the threat to public and/or police safety purportedly arising from the NYPD having to comply with the Fourth Amendment and the Equal Protection Clause do not constitute interests relating to property or a transaction that was a subject of the *Floyd* or *Ligon* actions within the meaning of Rule 24(a)(2).[4]

A. The New York City Collective Bargaining Law Did Not Provide The Police Unions With A Sufficient Interest To Intervene As Of Right In The Merits Appeal Or The Remaining Remedial Proceedings.

To obtain intervention under Rule 24(a)(2), an applicant must demonstrate that, *inter alia*, (s)he/it has a "direct, substantial, and legally protectable" interest relating to property or a transaction that is a subject of the action. *Brennan*, 260 F.3d at 129; *accord*: *Donaldson v. United States*, 400 U.S. 517, 530-531 (1971). The Unions' assertion that New York City had a statutory

[4] In *Ligon*, the Unions failed to address the alleged interests at stake in that case which might justify intervention as of right. Because "the Unions d[id] not see fit to address these issues," the District Court denied their motions without further ado on the reasonable basis that the Court was not obliged to do the Unions' work for them. 2014 WL 3765729, at * 9. Clearly, the Court did not abuse its discretion in denying intervention in *Ligon* on this basis. Accordingly, in the remainder of this brief, *Amici* will address only Appellants' attempted intervention in *Floyd*.

duty to bargain with them over the activities which are the subjects of the District Court's remedial orders did not satisfy that criterion.

In order for the Police Unions to possess a right to bargain with New York City over a particular subject, there must be a concomitant duty on the part of the City to bargain with said unions over that topic. The scope of the City's duty to bargain with the Unions is very narrow, as a consequence of the broad exemptions from such a duty expressly set forth in the CBL. Admin. Code § 12-307(a) states that any duty of New York City to bargain is "[s]ubject to provisions of subdivision b of this section…." Subdivision b provides:

> b. *It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies*; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; *maintain the efficiency of governmental operations*; *determine the methods, means and personnel by which government operations are to be conducted*; determine the content of job classifications; take all necessary actions to carry out its mission in emergencies; *and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining...*

(Emphasis added). The only caveat is that New York City would be obliged to bargain over the "practical impact" that a unilateral municipal decision on the foregoing matters would have on terms and conditions of employment, if any:

> [N]ot withstanding the above, questions concerning the practical impact that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.

(Id).

After finding the City liable for violating the Fourth and Fourteenth Amendment rights of the plaintiff class in *Floyd*, the District Court ordered the City and plaintiffs, together with a monitor appointed by the Court, to submit to the Court proposed changes to NYPD policies, training, documentation, supervisory monitoring and disciplinary systems for stop-and-frisks and racial profiling. The Remedies Order also requires that the City undertake a one-year pilot project for body-worn cameras on officers in five NYPD precincts, once the monitor develops project guidelines and procedures. The Court further directed the City and plaintiffs to engage in a joint remedial process under the guidance of a court-appointed facilitator to develop supplemental reforms incorporating input from a variety of sources, including NYPD personnel and representatives of police organizations.

The remedial activities covered by the Court's orders thus relate directly to or involve the standards of services to be offered by the NYPD, the efficiency of NYPD operations, the methods, means and personnel by which NYPD operations are to be conducted and/or the organization of NYC police work

and the technology of the performance of that work. Clearly none of the remedial activities called for by the Court would have been subject to mandatory collective bargaining under the terms of § 12-307(b) *even had the NYPD sought to undertake them without the compulsion of a court order*. In this regard, it has been reported that on September 4, 2014, the NYPD announced it had begun a pilot program to test 60 cameras worn by officers in five precincts. Police Commissioner William Bratton was reported to have made the point that the cameras "would soon become as commonplace as police radios and bulletproof vests." In a joint statement issued with Public Advocate Letitia James, Mayor Bill de Blasio stated: "This pilot program will provide transparency, accountability and protection for both the police officers and those they serve, while reducing financial losses for the city." Commissioner Bratton was quoted as saying that the wearing of cameras by police officers "is the next wave. It is going to be an essential part of what an officer wants to wear on patrol." PBA President Patrick Lynch was also quoted regarding the pilot program. *See* Tom Hays, "City Goes Ahead With Cameras for Police Without Stop-and-Frisk Court Remedy," New York Law Journal, September 8, 2014, p. 2. As far as *Amici* are aware, as of the filing of this brief, neither the PBA nor any of the other Unions has filed an improper practice charge with the New York City Office of Collective Bargaining ("OCB") alleging the City's unilateral

implementation of this program, which was not implemented pursuant to any court order, violated a duty to bargain collectively under § 12-307.

As Plaintiffs-Appellees have also pointed out, in the period 2009-2013, the City implemented a number of changes to the stop-and-frisk procedures of the NYPD, including changes which affected the duties of police officers in respect to the conduct of stop-and-frisks. There is no record evidence that any of these changes was bargained for with any of the Unions or that they were compelled by a court order. Yet there is also no record evidence that any of these changes was challenged before the OCB by any of the Unions as an improper practice violative of the duty to bargain set forth in § 12-307. The plain language of § 12-307 and the Unions' failures in the real world even to file challenges to the foregoing activities of the NYPD demonstrate that the activities ordered by the Court as remedial measures in *Floyd* would be exempt from any duty to bargain even if undertaken in the absence of the orders in *Floyd*.

Beyond the foregoing hole in Appellants' theory lie even more fundamental flaws. The Unions proffer nothing from the language or legislative history of § 12-307 nor from any case law to show that in enacting that provision the New York City Council intended to impose limits on the remedies which federal courts might impose for constitutional violations committed by the NYPD or other NYC agencies. In short, there is no evidence that the City Council

intended to make a statutory duty to bargain a precondition to any federal court's exercise of its equitable remedial authority over the City. In *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), after noting the established breadth of a federal court's remedial discretion, the Supreme Court stated: "Of course, Congress may intervene and guide or control the exercise of the courts' discretion, but we do not lightly assume that Congress has intended to depart from established principles." *A fortiori* this Court should not lightly assume that the City Council intended to depart from these established remedial principles, particularly given that the CBL makes no reference whatsoever to judicial remedies for constitutional violations committed by the City.

Even assuming *arguendo* that (a) § 12-307 did purport to impose a duty on the City to bargain over the sorts of activities the NYPD has been ordered to undertake and (b) the City Council intended performance of such a duty to bargain to limit the District Court's exercise of its remedial authority over the City, consistent with the Supremacy Clause, Art. VI, Cl. 2 of the U.S. Constitution,[5] such assumptions would not operate to create a direct, substantial and legally protectable interest on the part of the Unions. It is well established that once a

[5] "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, *any Thing in the Constitution or Laws of any State to the Contrary notwithstanding*." (Emphasis added).

federal court or jury has found that governmental conduct violates the U.S. Constitution, the Court has broad equitable discretion to fashion a decree to remedy the constitutional violation(s). *See, e.g.*, *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 15 (1971); *Hecht Co. v. Bowles*, 321 U.S. 321, 329-330 (1944). Such broad discretion is not limited by any state law, much less any local ordinance, which would interfere with or obstruct a federal court's provision of redress otherwise thought to be appropriate. To illustrate this point, we need only reference the Supreme Court's consistent response when state laws were invoked to obstruct the fashioning of federal remedies for the redress of public school segregation found violative of the Equal Protection Clause. *See Griffin v. County School Board of Prince Edward County*, 377 U.S. 218 (1964) (federal court's authority to remedy public school segregation includes discretion to override Virginia statute mandating closure of schools whenever black and white children enrolled therein); *Monroe v. Bd. of Commissioners*, 391 U.S. 450 (1968) (Tennessee pupil placement law continuing previously segregated pupil assignments absent school board approval of transfer requests could not limit federal court's discretion to fashion remedy for school segregation); *Green v. County School Board*, 391 U.S. 430 (1968) (Virginia "freedom of choice" pupil placement statute could not limit authority of district court to fashion plan remedying state-mandated public school segregation); *North Carolina State Bd. of*

Education v. Swann, 402 U.S. 43 (1971) (North Carolina statute prohibiting busing of public school children on basis of race could not be invoked to limit federal court's authority to remedy unconstitutionally segregated schools).

The key to the outcome in each of the foregoing cases was the breadth of a federal court's discretion to fashion a remedy which would bring to an end a practice found violative of the Equal Protection Clause and the supremacy of that judicial discretion pursuant to Art. VI, Cl. 2 of the U.S. Constitution over any state law which purports to bar relief the court believes is otherwise warranted. Because each court was exercising discretion to fashion a remedy for a federal constitutional violation and such authority was supreme over any state law purportedly limiting such authority, segregationist parents of white school children could not have claimed they possessed a *legally protectable* interest arising from such a state law.

Similarly, once the District Court here found in an indisputably adversary proceeding that the stop-and-frisk policies and practices of the NYPD violated the Fourth Amendment and the Equal Protection Clause, it had broad equitable discretion to award the relief it ordered. This would have been so even had the CBL purported to bar relief the Court ordered on the basis that actions mandated by the Court had not been bargained for. As the District Court had ample authority to enter the orders it did notwithstanding an assumed applicability

of § 12-307, the City's ordinance did not create a substantial and legally protectable interest on the part of any Union, even assuming for the sake of argument that bargaining over the activities which are the subjects of the Remedial Order would have been required had those activities been undertaken by the NYPD without compulsion of a federal court order. If the state laws referenced above could not have created a legally protectable interest on the part of parents of white school children to oppose desegregation remedies being imposed by federal courts, *a fortiori* the local ordinance invoked here does not suffice to create a legally protectable interest in the face of the Supremacy Clause and the District Court's broad remedial discretion. To put it succinctly, an interest is not substantial and legally protectable where, as here, that interest is subject to a federal court's virtually boundless remedial discretion.

It is telling that in the more than one year since entry of the Remedial Order, it appears that none of the Unions filed an improper practice charge with the OCB alleging that NYC's failure to bargain over a matter which was a subject of the Remedial Order constituted an improper practice violative of § 12-307. If their § 12-307 argument here had merit, one would reasonably expect the Unions to have sought redress against the City in the administrative forum which has jurisdiction to enforce that provision, particularly after this Court stayed proceedings below on October 31, 2013.

B. The Unions Lack A Sufficient Interest Arising From The Asserted Interference With The City's Running Of The NYPD And Lack Standing To Assert Such An Interest.

The PBA quotes *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 476 (2d Cir. 2010), in support of its suggestion that the District Court's remedial orders constitute an undue interference with New York City's running of its police department. The PBA appears to contend that such an undue interference would create an interest on the part of the PBA or its members sufficient to allow the PBA to intervene as of right. This is incorrect both as a matter of Rule 24(a)(2) interpretation and as a matter of standing.

Given the scope and duration of the NYPD's constitutional violations relating to stop-and-frisk and its prolonged and vigorous defense of its policies and practices which caused those violations, the remedies ordered by the District Court do not come close to constituting an undue interference with the City's operation of the NYPD. Moreover, even assuming *arguendo* to the contrary, the Police Unions would not be entitled to intervene as of right on the basis of such an interference. Rule 24(a)(2) demands that an interest claimed by an applicant be a "direct" interest. *Brennan*, 260 F.3d at 129; *United States v. State of New York*, 820 F.2d 554, 558 (2d Cir. 1987). An undue interference with the City's running of the NYPD would not create a direct interest on the part of the PBA or its members justifying intervention as of right.

That a person might be adversely affected by the outcome of an action in the "but-for" sense does not suffice to create an interest belonging to that person for purposes of Rule 24(a)(2). This is demonstrated by *Donaldson*. In that case, a taxpayer sought to intervene in a proceeding to enforce IRS summonses directed to third parties. The taxpayer asserted intervention under Rule 24(a)(2) was warranted because business records produced by the third parties in response to the summonses would adversely affect his tax liability. Observing that the taxpayer had no proprietary interest in the records, which were not the work product of his attorney or accountant and enjoyed no attorney-client or other privilege assertable by the taxpayer, 400 U.S. at 530, the Supreme Court held he was not entitled to intervene. His "only interest" lay in the fact that the records presumably contained details of payments to the taxpayer which possessed significance for purposes of his income tax liability. *Id*. at 530-531. But this adverse consequence "[was] not enough and [was] not of sufficient magnitude" to warrant his intervention. *Id*. at 531.

In order to assert an interest which might qualify as a predicate for intervention under Rule 24(a)(2), an applicant must demonstrate that, *inter alia*, the interest being asserted belongs to the applicant and not just to a third party. *United States v. 936.71 Acres of Land*, 418 F.2d 551, 556 (5th Cir. 1969) (Wisdom, J.) (applicant may intervene only if it is real party in interest within meaning of Fed.

R. Civ. P. 17(a)); *and see In re Penn Cent. Commercial Paper Litigation*, 62 F.R.D. 341, 346 (S.D.N.Y. 1974) (to satisfy Rule 24(a)(2), interest asserted "must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit"), *aff'd w/o op*., 515 F.2d 505 (2d Cir. 1975). To the extent there exists a "right" to avoid undue interference with New York City's running of its police department, such a "right" would belong to the City not to a Police Union or its members. Moreover, this is a particularly unsuitable case in which to permit a Union or its members to assert such an interest given that the City itself, already a party to this action, is intentionally refusing to assert such municipal interest.

As a matter of standing, it is well established that an entity or individual must ordinarily assert his own legal rights and interests, not simply those of a third party. *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citing authorities). The Unions say this rule should not govern here, that they should be permitted to assert New York City's interest in avoiding undue interference with its operation of the NYPD because the City has chosen not to assert that claimed interest. Appellants have it backwards: that the City has deliberately chosen not to assert an interest that belongs to it alone is precisely the reason why the Unions must establish standing in their own right. *See Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (where governmental defendants did not seek to appeal adverse

judgment, private intervenors had to demonstrate their own standing in order to prosecute appeal).

C. The Reputational Interests The Police Unions Assert On Behalf Of Their Members Do Not Create A Right To Intervene Pursuant To Rule 24(a)(2).

The Police Unions assert that their members possess reputational interests which would allow those members to intervene in *Floyd* as of right and that they may properly assert those interests on behalf of their members. They argue that the few police personnel whose testimony was proffered at trial who were identified by the trial court as not credible have suffered an injury entitling the Unions to intervene on their behalf. They also contend that the Court's finding that the NYPD had conducted thousands of unconstitutional stop-and-frisks sullied the reputation of every individual police officer and thus entitled each Union to intervene on behalf of all of its members. Neither of these assertions can withstand analysis.

1. The Unions Lack Associational Standing To Represent Their Respective Memberships With Respect To Either Of The Reputational Interests Alleged.

In order to represent its members, an association must seek redress for injuries that are "common to the entire membership" of that association and that

are "shared by all [members] in equal degree." *Warth*, 422 U.S. at 515.[6] Such is not the case here. The Unions do not and cannot assert that testimony by all of their respective members was proffered at the *Floyd* trial and that all such testimony was found incredible. It is undisputed that testimony of only a few members of any of the Unions were found incredible. Thus the reputational injury which could result from a determination that the testimony of a few identified witnesses was not credible could not be "common to the entire membership" of any of the Unions nor could it be shared by the entire membership "in equal degree." Similarly, the Unions do not allege and the record does not show that all of their members conducted stop-and-frisks, much less that all of them conducted stop-and-frisks which the District Court found were conducted unlawfully. Consequently the injury said to result from the finding of unconstitutional stop-and-frisks was not "common to the entire membership" of a Union nor was it shared by a Union's entire membership "in equal degree."

By way of example only, we note that none of the many NYPD officers who are members of the *Amici* organizations was found by the District Court to be an incredible witness or to have conducted an unconstitutional stop-and-frisk. Thus the membership that each Union seeks to represent is

[6] This rule appears to be derived from Fed. R. Civ. P. 23(a)(2) (named plaintiff may not represent class except as to issue common to all members of that class).

overinclusive as to both categories of reputational injury alleged. This circumstance precludes any Union's assertion of an interest premised on alleged reputational injury to all individual members of that Union.

2. Members Of The Unions Lack A Direct, Substantial And Legally Protectable Interest Arising From The Supposed Reputational Injury.

The allegation that the reputational injury said to arise from a finding that proffered testimony was not credible creates an interest in an individual who gave such testimony sufficient to warrant his/her intervention as of right pursuant to Rule 24(a)(2) is truly breathtaking. The logic of the Police Unions' submission knows no bounds. Under their view, *every* person who testifies in *every* civil trial or hearing whose testimony is found not credible would have a right to intervene in the action after such a finding was made. In the numerous cases in which a trier-of-fact is confronted with conflicting testimony, determinations as to witness credibility are frequently required. Under Appellants' theory, regardless who is found incredible when testimony conflicts, such person(s) will be able to intervene so as to take an appeal challenging the finding of incredibility.

Rule 24(a)(2) does not allow witness intervention as of right based merely on a credibility ruling by a trial court. The interest invoked as a predicate for intervention must "relat[e] to the property or transaction that is the subject of the action." This means the interest must directly relate to matters going to the

underlying claim(s). *Brennan*, 260 F.3d at 129 ("An interest that is remote from the subject matter of the proceeding…will not satisfy the rule."). The reputational injury allegedly suffered by non-party witnesses from a finding that their testimony was not credible did not directly relate to the substance or merits of the *Floyd* plaintiffs' Fourth Amendment and Equal Protection Clause causes of action. It related only to the trial court's process for resolving those claims.

The very same persons whom the Unions say should be entitled to intervene as of right are persons who already had the opportunity to convince the trier-of-fact of their credibility when it mattered most, *i.e.*, when they actually testified. Moreover, this Court has held it is "not allowed to second-guess [a] bench-trial court's credibility assessments." *Krist v. Kolombus Rest. Inc.*, 688 F.3d 89, 95 (2d Cir. 2012); *accord*: *Hofmann v. Sender*, 716 F.3d 282, 292 (2d Cir. 2013) ("Decisions relating to the credibility of witnesses and the relative weight of their testimony are properly left to the discretion of the trier of fact."); *see also* Fed. R. Civ. P. 52(a)(6). Thus, a finding that testimony of a witness was incredible is essentially immune from reversal by this Court. Thus, not only is the reputational interest asserted here not directly related to property or a transaction which is a subject of the *Floyd* action, it is not substantial and legally protectable on an appeal.

The District Court found that, over several years, the NYPD, which at any one relevant point in time was composed of at least 25,000 people, conducted more than 200,000 unconstitutional stop-and-frisks. The Unions say this sullied the reputations of each and every member of the NYPD and, hence, each would have the right to intervene under Rule 24(a)(2). This confuses individual members of the NYPD with the NYPD itself. It would be one thing to argue that the findings of unconstitutional conduct by the NYPD undermined the reputation of the NYPD. However, presumably aware that the NYPD's reputation is an interest belonging to the NYPD and not to the Unions or their members and that, therefore, the Unions cannot rely on an injury to the NYPD's reputation as a predicate for Union intervention, the Unions do not go down that road. What they are left with is an argument to the effect that although the trial court found only that the *NYPD* was liable for the commission of the aforesaid stop-and-frisks and did not identify any individual police officer as having perpetrated an unconstitutional stop-and-frisk, nevertheless the trial court's finding injured the reputation of each and every police officer and, thus, every individual officer might intervene as of right.

In evaluating this argument, it is helpful to consider the following hypothetical: Suppose instead of appearing in a judicial opinion, the same findings of widespread unconstitutional stop-and-frisks appeared, in precisely the same words, in a newspaper article. Could the author of the article and/or the

newspaper's publisher be liable in a defamation suit brought by an individual NYPD officer based upon such an article? The answer is plainly 'no.' *See Abramson v. Pataki*, 278 F.3d 93, 102-103 (2d Cir. 2002). In affirming rejection of a claim of defamation by individual workers at the Javits Center, this Court stated in *Abramson*: "[W]hile there were repeated references to corruption among Javits Center workers, none of the individual appellants was directly or impliedly identified. The appellants have therefore clearly failed to demonstrate the essential element of specific reference." *Id*. *Accord*: *Gilmer v. Spitzer*, 538 Fed. Appx. 45, 47 (2d Cir. 2013) ("Spitzer refers to 'Marsh' as a company. Such a broad reference to an organization cannot give rise to a defamation claim by one of its constituents.")

The larger the number of persons within an organization, the more difficult it is to show specific reference to an individual based only on a reference to the organization. There do not appear to be any cases under New York law where individuals belonging to a group with a membership greater than 60 persons have been permitted to go forward with a libel claim based upon a criticism of the group. *See Diaz v. NBC Universal, Inc.*, 536 F. Supp. 2d 337 (S.D.N.Y. 2008), and *Anyanwu v. CBS, Inc.*, 887 F. Supp. 690, 692-693 (S.D.N.Y. 1995) (both citing cases). That there were at least 25,000 persons who, in the years at issue in *Floyd*, worked for the NYPD establishes beyond peradventure that any individual

officer's defamation claim predicated only on the findings against the NYPD (in a newspaper article) would fail. For the same reasons, no individual officer can claim a *direct* impairment to his individual reputation based upon the District Court's findings of unconstitutional conduct by the NYPD. In the language of defamation cases, a statement is not "of and concerning" an individual when it does no more than reference an organization to which the individual belongs. And a statement which merely concerns an organization does not create a *direct*, substantial and legally protectable reputational interest on the part of an individual belonging to that organization.

D. The Putative Intervenors Failed To Show A Sufficient Interest Based Upon Their Safety Rationale.

The Police Unions contend the District Court's remedial orders require conduct that will undermine "safety." They argue that this serves to create an interest within the meaning of Rule 24(a)(2) entitling them to intervene as of right. As the District Court found, the "safety" rationale was proffered without specific evidentiary support. This alone forecloses an argument that the District Court's rejection of the "safety" rationale as a basis for intervention was an abuse of discretion. A motion for leave to intervene is no different in relevant respect from a motion for a preliminary injunction, a motion for class certification, a motion to disqualify opposing counsel or a motion to exclude the testimony of an

expert witness. A Rule 24(a)(2) motion, like each of these other motions, cannot succeed simply on the basis of conclusory allegations; it must be supported by specific evidentiary facts. Thus a movant cannot satisfy the interest criterion in Rule 24(a)(2) simply by crying "safety." It must support such a conclusory assertion with specifics. As the District Court found, the Unions failed to do this, and it follows that the Court did not abuse its discretion in denying intervention under Rule 24(a)(2) on this basis, among others.

While this by itself is sufficient to dispose of the Unions' appeals from the denial of Rule 24(a)(2) intervention premised on the claimed "safety" interest, we believe it is important to examine this allegation further. The Unions do not make clear whether they mean to refer only to the safety of the public subjected to stop-and-frisks or also to the safety of police officers conducting stop-and-frisks. Insofar as it is the former, it would suffice to note Appellants could not be heard to raise a "public safety" rationale, even if they purported to provide specifics. This is because the safety of the New York City public is, legally speaking, the City's concern, not that of the Unions or their members. Thus it would not qualify as a direct interest on the Unions' motions to intervene nor would the Unions have standing to advance that rationale. *See* pages 16-17 supra.

More importantly and with all respect, any assertion that the safety of the public would be threatened by the measures put in place by the District Court

to end unconstitutional invasions of the privacy, liberty and dignity of those who walk or drive in New York City, particularly the millions of minority persons who are part of the fabric of New York City,[7] truly would be "a fantastic absurdity." *District of Columbia v. Little*, 178 F.3d 13, 17 (D.C. Cir. 1949) (Prettyman, J.), *aff'd*, 339 U.S. 1 (1950). It is the unconstitutional conduct of the NYPD over many years in respect to hundreds of thousands of New Yorkers, as found by the District Court, which threatens the safety of the public. Further, any contention that the safety of the public demands a freedom to conduct stops without reasonable suspicion (including a freedom to conduct stops on the basis of race or color) or a freedom to conduct full-blown search upon stops instead of pat-downs cannot be heard in this Court. That is because such a contention is not a challenge to the rulings of the District Court in this case but rather is an assault upon the ruling of the Supreme Court in *Terry v. Ohio*.

In that case the Court, expressly taking into account the interest of the public in "effective crime prevention and detection," *id.* at 22, and the interests of individual police officers in their own safety, *id*. at 23-24, nevertheless held that a

[7] In *Terry v. Ohio*, the Supreme Court held that the stopping of a person to investigate possible unlawful conduct "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment…" 392 U.S. 1, 17 (1968). "Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." *Id.* at 24-25.

police officer may not stop a person ostensibly to investigate possible criminal behavior in the absence of specific and articulable reasonable suspicion of past, current or imminent unlawful behavior and may then conduct a patdown of the person, rather than a full-blown search, to insure the person is not armed with a weapon that might be used against the officer. In other words, in formulating the rule that has governed police conduct since 1968 *and that governed the police conduct at issue in this case*, the Supreme Court has *already* taken into account both the safety of the public and the safety of the officer. The Unions cannot be heard to argue here that either public or police safety demands a redrawing of the constitutional and safety considerations which the Supreme Court balanced in *Terry*.

A specific word about the pilot program regarding cameras to be worn by officers under the District Court's order is warranted. Rather than threatening either the safety of the public or the safety of the police, such cameras will increase the safety of both. They will discourage unlawful stop-and-frisks. And they will discourage unlawful conduct by the public against, or otherwise in the presence of, police officers. This is why Commissioner Bratton, no novice to police work in the real world, stated that such a camera "is going to be an essential part of what an officer *wants to wear* on patrol." *Op. cit.* (Emphasis added). The views of NYC police officers who are members of the organizations filing this *amicus* brief are in

accord with the Commissioner's judgment. Based upon their substantial experience, the wearing of cameras by officers will be a win for the safety of officers as well as a win for the safety of the public.

In a September 28, 2014 front-page article, the New York Times noted: "In just the last few weeks, law enforcement agencies in at least a dozen cities…have said they are equipping officers with video cameras." After surveying 63 police departments, the U.S. Justice Department was said to have concluded that this technology "ha[s] the potential to 'promote the perceived legitimacy and sense of procedural justice' in interactions between the public and law enforcement." A Pullman, Washington police officer with ten years experience observed that a camera producing

> a video record felt to her almost like another level of protection, a kind of flak jacket of evidence about what happened, even if it was nothing much. "I get nervous when I think it's not on," she said of her camera. "I know its going to document what the truth is, and I want the truth out there."

Kirk Johnson, "Today's Police Put On a Gun And a Camera," N.Y. Times, pp. 1, 24.

E. The Unions May Not Intervene To Challenge The Liability Findings Of The District Court.

In addition to directly challenging the remedies imposed by the District Court, the Unions expend considerable effort seeking to challenge its

liability findings. We have already shown that the findings that the *NYPD* conducted unconstitutional stop-and-frisks do not directly or substantially implicate the reputational interests of any *individual police officers*, because the Court did not identify or otherwise refer to any individual officer as having engaged in unconstitutional conduct. Additionally, neither the purported statutory duty of New York City to bargain over the remedies ordered by the Court, the supposed undue interference with the City's running of the NYPD occasioned by those remedies, the reputational interests of individual police officers said to arise from the determinations that their testimony was not credible, nor the safety rationale they advance are *directly* implicated by those findings. Accordingly, there is no basis in this Court's precedents construing Rule 24(a)(2) which would allow the Unions to intervene in order to challenge the liability findings of the District Court.

CONCLUSION

For the foregoing reasons among others, the judgment of the District Court denying intervention should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, the foregoing brief is in 14 Point Times New Roman proportional font and contains six thousand nine hundred seventy (6,970) words according to the word count of the word-processing system used to prepare the brief and thus is in compliance with the type-volume limitation set forth in Rules 29(d) and 32(a)(7)(B)(i) of the Federal Rules of Appellate Procedure.

Dated: September 29, 2014

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