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

United States Court of Appeals

for the

Second Circuit

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

Appellants-Putative Intervenors,

(For Continuation of Caption See Inside Cover)

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

BRIEF FOR *LIGON* PLAINTIFFS-APPELLEES

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Dated: September 24, 2014
New York, New York

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– v. –

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

Plaintiffs-Appellees,

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

Defendants-Appellees.

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

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INTRODUCTION

Ligon v. City of New York challenges police practices in and around a set of buildings enrolled in a distinct NYPD program, the Trespass Affidavit Program. Despite its substantial differences from *Floyd*—including its parties, lawyers, procedural history, underlying facts, and scope of remedial relief—the putative intervenors ("the Unions") have repeatedly failed, in both the District Court and this Court, to address *Ligon*'s unique facts, issues, and circumstances, or make any arguments for intervention specific to *Ligon*. By virtue of these recurring omissions, the Unions have waived any arguments for intervention in this case.

The District Court correctly concluded that the Unions could not meet their burden under Rule 24 in this case by merely alluding to *Ligon*, and remarkably the Unions do not even mention that ruling in their opening briefs, let alone challenge it. As such, they have forfeited their opportunity to seek reversal on that basis. In addition, by failing to make any argument to this Court as to why the District Court abused its discretion in denying the intervention motion in this case, they have waived the opportunity to seek reversal.

But even were this Court to examine *Ligon*'s unique facts and circumstances despite the Unions' failure to do so, it would find that the Unions cannot meet the requirements of Rule 24. Thus, far from abusing its discretion, the District Court properly denied the motion to intervene. This Court should affirm that decision.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether, because the Unions make no arguments to this Court about intervention in this case—as opposed to in *Floyd v. City of New York*—and made no such arguments in the District Court, the Unions have waived any challenge to the District Court's denial of their intervention motion in this case.

2. To the extent this Court wishes to consider arguments the Unions might have made to this Court and to the District Court to support their intervention motion in this case, whether the Unions could have met their burden under Rule 24 given the particulars of this case, as opposed to the very different particulars of *Floyd v. City of New York*.

3. Whether the Unions have standing to appeal the *Ligon* preliminary injunction decision or Remedial Order.

STATEMENT OF THE CASE

A. Initiation of *Ligon v. City of New York* and the City's Unilateral Changes to the Trespass Affidavit Program.

More than four years after *Floyd v. City of New York* was filed, the *Ligon* plaintiffs, represented by different lawyers, brought their separate suit 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 Trespass Affidavit Program ("TAP"). Although *Ligon* and *Floyd* were deemed related cases and were heard by the same District Court judge, the cases were never consolidated.

Soon after filing, the District Court permitted the *Ligon* plaintiffs to pursue a preliminary injunction to address the practice of NYPD officers stopping people outside of TAP buildings without legal justification. *See Ligon v. City of New York*, 910 F. Supp. 2d 517 (S.D.N.Y. 2012). In the spring and summer of 2012, the *Ligon* parties completed expedited discovery concerning the plaintiffs' preliminary injunction motion. *See* Scheduling Order, dated Apr. 20, 2012, Dist. Ct. Dkt. # 14.

In the spring of 2012, while that expedited discovery was underway, the City took several steps to reform TAP. In particular, the NYPD promulgated Interim Orders 22 and 23, which address both enforcement activity and the administration of TAP. *See* JA 373-78. Interim Order 22 amends the NYPD Patrol Guide and instructs NYPD officers on stop and arrest activity inside TAP buildings. *See* JA 373-75, 522-25. Interim Order 23 amends the NYPD's Administrative Guide and addresses the administration of TAP. *See* JA 374 (describing contents).

To secure compliance with these interim orders, in June 2012 the Chief of Patrol sent two memoranda to the commanding officers of all Patrol Boroughs ordering quarterly reviews containing, *inter alia*, information about all activity at each TAP location and directing the commanding officers to ensure that members

of their commands were apprised of the orders. JA 374. A third such memorandum in August 2012 mandated that supervisors review the circumstances of arrests made in connection with TAP, and ensure that UF250 forms were completed if required. *See* JA 376, 611.

The NYPD also undertook efforts to train NYPD officers about the standards for stopping individuals in and around TAP buildings. For example, the Deputy Commissioner for Training instituted a full-day "refresher" course on stop, question, and frisk practices at Rodman's Neck, an NYPD training center, which addressed the legal standards for stops outside of TAP buildings. JA 378, 777. As of August 12, 2013, 8,231 officers had completed the training. JA 777. In addition, the Chief of Patrol ordered that all precinct-based officers receive training at their respective precincts concerning Interim Orders 22 and 23. JA 376.

There is no evidence in this case suggesting that the Unions ever asserted that the City's unilateral adoption of these reforms infringed on their collective bargaining rights.

B. *Ligon* Preliminary Injunction Proceedings.

Months before the *Floyd* trial began, the *Ligon* preliminary injunction proceedings culminated in October 2012 with a widely publicized seven-day

evidentiary hearing.[1] See JA 1103-04 On January 8, 2013, the Court issued a 157-page ruling granting the preliminary injunction motion; ordering the NYPD "immediately to cease performing trespass stops outside TAP buildings in the Bronx without reasonable suspicion of trespass;" and proposing additional relief. Op. & Order at 142, Dist. Ct. Dkt. # 96, dated Jan. 8, 2013 (the "January Opinion").[2]

The proposed additional relief included six specific remedies concerning the NYPD's practice of stopping people outside of TAP buildings (collectively, the "*Ligon* Remedies").[3] It delayed ordering changes, however, "until the parties . . .

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[1] For an example of the publicity surrounding the preliminary injunction hearing, *see* JA 1103-04.

[2] The January Opinion is not included in the Joint Appendix for this appeal, but is part of the record in this case. On February 14, 2013, the District Court made minor changes to the January Opinion, but did not amend the discussion of the additional relief in any way. *See* Order, dated Feb. 14, 2013, Dist. Ct. Dkt. # 106 (describing changes to January Opinion). The amended opinion is reprinted in the Joint Appendix at 289-446.

[3] They included: (1) a policy addressing the limited circumstances under which outdoor trespass stops at TAP buildings are permissible and related training; (2) revisions to the section of the NYPD Field Training Unit guide addressing TAP; (3) supervisory review of stops made on suspicion of trespassing outside TAP buildings in the Bronx; (4) a set of steps to ensure that NYPD officers complete UF-250 forms for all trespass stops outside of TAP buildings in the Bronx (5) revisions to the training on legal standards concerning stop and frisk conducted at Rodman's Neck; and (6) revisions to the NYPD's Stop, Question, and Frisk Video No. 5, describing the legal standards for stops. January Opinion at 145-48 (identical language at JA 434-37).

have had the opportunity to participate in a hearing at which they may present evidence or argument as to whether the proposed relief is insufficient or too burdensome or otherwise inappropriate, as well as regarding the appropriate timeline for relief." January Opinion at 144 (identical language at JA 433).

The PBA immediately reacted to the decision by issuing a press release. *See* JA 1108. Neither the PBA nor any other union moved to intervene or otherwise sought to be heard by the District Court.

In the months following the ruling, the parties submitted five briefs detailing proposals and counterproposals aimed at fine tuning the six proposed remedies. *See* JA 447-66, 510-17, 518-88, 589-615, 616-40. The District Court also conducted a hearing for the purpose of addressing the proposed remedies. *See* JA 627-32.

In one of those briefs, submitted on April 11, 2013, the City informed the District Court that, while it intended to appeal the preliminary injunction decision, it did not otherwise object to the remedial measures contemplated in the court's ruling. *See* JA 510-17. Thus, while the parties continued to quibble over certain details, they shared a mutual understanding of the nature of the reforms.[4] At no

[4] To take one example, the parties agreed that the language on the PowerPoint slides used during the training program at Rodman's Neck on the legal standards that apply to the NYPD's stop-and-frisk practices should be modified to better describe the degree of suspicion of trespass that an officer must have in order to

point during the months-long exchange of proposals regarding the court's described relief did the Unions weigh in to assert their purported interests.

C. The Remedial Order and the Unions' Motion to Intervene.

On August 12, 2013, the District Court issued a remedial order, the first substantive order to address *Ligon* and *Floyd* at the same time. *See Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (the "Remedial Order"). As to *Ligon*, the court largely adopted the proposed relief from the January Opinion. The Court finalized one of the six *Ligon* Remedies, *i.e.*, the formal written policy concerning the circumstances under which officers may conduct stops outside of TAP buildings, and delegated oversight of the details of implementation of its order to a court-appointed monitor. *See id.* at 689-91.

Just under one month later, the Patrolmen's Benevolent Association ("PBA"), Detectives' Endowment Association ("DEA"), Lieutenants Benevolent Association ("LBA"), and Captains Endowment Association ("CEA") (collectively, the "Unions")—but not the Sergeants Benevolent Association ("SBA")—moved to intervene in *Ligon*. Notice of Mot. to Intervene, Dist. Ct. Dkt. # 133; *see also* SBA Notice of Motion to Intervene in *Floyd* (JA 641).[5] Following

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justify a *Terry* stop on that basis, but disagreed over the precise wording. *See* JA 454-60, JA 511-14, JA 627-40, JA 518, 528-55, JA 595-99, JA 619-21.

[5] Because the SBA has never sought to intervene in *Ligon*, references to the "Unions" concern the PBA, LBA, DEA, and CEA.

numerous submissions to the District Court and this Court, their motion was finally submitted on March 14, 2014. *See* Dist. Ct. Dkt. # 136, 155, 176, 184.

With respect to *Ligon*, the Unions' four briefs on intervention in the District Court did little else but acknowledge the case's existence. In the Unions' final reply brief, they admitted—in a footnote—that they had not specifically addressed *Ligon* in their arguments.[6]

On July 30, 2014, in a 108-page opinion, the District Court denied the Unions' motions to intervene in both *Ligon* and *Floyd*. The District Court concluded that the Unions had not made a sufficient showing to meet their burden under Rule 24 regarding the *Ligon* preliminary injunction order because the Unions had submitted the same briefs in *Floyd* and *Ligon*, which did not address the facts and circumstances of *Ligon*. *See* SPA 15-16.

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[6] That footnote stated as follows:

> Plaintiffs contend that the motion to intervene in *Ligon* should be denied because the Police Intervenors focus their arguments on *Floyd*. The Remedies Opinion, however, is a joint opinion issued in both cases, and the appeals similarly have traveled together. The *Ligon* preliminary injunction opinion, like the *Floyd* Liability Opinion, contains findings of unconstitutional conduct by particular members of the Police Intervenors, *see Ligon v. City of New York*, 925 F. Supp. 2d 478, 498-510 (S.D.N.Y. 2013), and rests in part on the same expert's analysis of the UF-250 forms as in *Floyd*, *id*. at 510-16. The unions' arguments in favor of intervention on remedies and appeal thus apply to both cases.

Supp. Reply Mem. of Law, dated Mar. 14, 2014, at 2 n.2 (Dist. Ct. Dkt. # 184).

The District Court further concluded that the Unions' motion was untimely, in part because "[t]he Unions . . . ignored the proceedings in *Ligon* and the pretrial proceedings in *Floyd*, where, as early as January 2013, the Court discussed the scope of the remedies under consideration for both cases," SPA 46. It also concluded that the Unions did not have any legally protectable interest in either any merits opinion or the Remedial Order warranting intervention, SPA 67-68, 82, and that the Unions lacked Article III standing to appeal the merits opinions or Remedial Order. SPA 101-03. Finally, it determined in its discretion that the Unions were not entitled to permissive intervention. SPA 103 n.31.

SUMMARY OF ARGUMENT

The Unions' repeated and ongoing failure to address any of their arguments to the facts and circumstances of *Ligon* constitutes waiver of any claim that the District Court abused its discretion in denying their motion to intervene. Because the Unions have never made any arguments specifically concerning intervention in *Ligon* rather than *Floyd*, the District Court correctly concluded that they failed to meet their burden under Rule 24. *See Catanzano v. Wing,* 103 F.3d 223, 232 (2d Cir. 1996) ("Failure to satisfy any one of [Rule 24's] requirements is a sufficient ground to deny the application." (emphasis in original; quoting *Farmland Dairies v. Comm'r of the N.Y. State Dep't. of Agric & Markets*, 847 F.2d, 1038, 1043 (2d Cir. 1988)).

In this Court, the Unions offer no response to that ruling, thereby waiving any right to challenge it. Moreover, because their opening briefs again offer no discussion of *Ligon*'s facts or circumstances, they have forfeited their opportunity to seek reversal of the District Court's ruling on any other basis.

But even if this Court does not conclude that the Unions have waived their arguments with respect to *Ligon*, this Court should affirm the District Court's denial of their application for two reasons. *First*, the Unions' motion was untimely. *Second*, the *Ligon* Remedies do not infringe on the Unions' bargaining rights under New York law. This Court should therefore affirm.

ARGUMENT

I. THE UNIONS HAVE WAIVED ANY CLAIM TO INTERVENE IN *LIGON*.

As discussed above, the claims and proceedings in this case differ significantly from those separately litigated in *Floyd v. City of New York*. Because of this, the Unions' right to intervene in this case under Rule 24 of the Federal Rules of Civil Procedure must entail an examination of the particular circumstances of this case, separate and apart from *Floyd*. Nonetheless, the Unions have never made any effort—in this Court or in the District Court—to address why they are entitled under Rule 24 to intervene in this case, focusing instead on *Floyd*. Given that, they have waived any right to intervene in *Ligon*.

In the District Court the Unions made no arguments about this case. Rather, they simply filed the briefs they had filed in *Floyd* and substituted the *Ligon* caption for the *Floyd* caption. The *Ligon* plaintiffs argued that the Unions' failure to address the very different facts of *Ligon* meant that their motion to intervene in *Ligon* should be rejected, and the District Court agreed:

> Before turning to each of these issues, the Court shall address a preliminary matter raised by Plaintiffs. Plaintiffs argue, and the Court agrees, that the Unions have not adequately addressed two issues, the timeliness of the Unions' motion and the nature of their alleged interests in the merits of *Ligon*. Notwithstanding the fact that *Ligon* raises distinct liability and remedial issues and has a unique procedural posture, the Unions filed the same intervention briefs in *Ligon* as they filed in *Floyd*. However, the briefs discuss only *Floyd*. When Plaintiffs pointed out the oversight, the Unions responded with a footnote, "[t]he *Ligon* [Injunction Order], like the *Floyd* Liability [Order], contains findings of unconstitutional conduct by particular members of the [Unions] ... and rests in part on the same expert's analysis of the UF–250 forms as in *Floyd* ... The [U]nions' arguments in favor of intervention on remedies and appeal thus apply to both cases." PBA Reply Mem. 2, *Floyd,* ECF No. 453. This footnote concludes what it presumes; it does not, however, explain why the Unions' motions are timely with respect to intervening to appeal the Injunction Order, which was issued eight months before the Liability and Remedial Orders. Moreover, the Unions offer no explanation of their interest in the merits of *Ligon,* except to say that it is identical to their concerns in *Floyd*. Where the Unions do not see fit to address these issues, the Court will not do their work for them.

SPA 15-16.

In the appellate briefs filed with this Court, the Unions do not even mention this finding, much less do they contest it or provide any argument as to why the

District Court abused its discretion in finding that that the Unions had waived their arguments about intervention in this case. Rather, as in the District Court, their briefs barely mention *Ligon* and offer no arguments about *Ligon*.[7]

The Unions' conduct waives their claim to intervention in two independent ways. First, by failing to make any arguments in this Court about their right to intervene in this case—including failing to contest the District Court's finding they had not made arguments in the lower court—the Unions have waived any claim they might have to assert that the District Court erred in denying their motion to intervene in this case. *See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A.*

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[7] The attention *Ligon* receives is a short recitation of its procedural history in the DEA brief and a single footnote in the PBA's brief, which essentially admits that the PBA moved to intervene in *Ligon* only because the caption on the Remedial Order identifies both *Floyd* and *Ligon*. That footnote states:

> While the District Court's Liability Order was entered in the *Floyd* case, the court also applied the Remedies Order to the *Ligon* case, which challenged police practices in and around buildings enrolled in the Trespass Affidavit Program. *See Remedies Op.*, 959 F. Supp. 2d at 688-90. Inasmuch as the Remedies Order purported to apply to both cases, and the remedies ordered in *Ligon* tracked those in *Floyd*, the PBA has moved to intervene and appeal in *Ligon* as well. A-1121-1212.

PBA Br. at 9 n.2. Beyond the fact that this is no argument, arguments raised only in footnotes are deemed waived. *See Norton v. Sam's Club*, 145 F.3d 114, 117-18 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal. Pursuant to this rule, we have held that an argument made only in a footnote was inadequately raised for appellate review.") (citations omitted).

de C.V., 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived . . . ."). Simply put, the Unions in this Court have failed to do what any appellant must do: provide to the appellate court arguments why the District Court erred in the case before the Court.[8]

Moreover, by failing to make arguments in the District Court about their right to intervene in this case, the Unions are now precluded on appeal from making any arguments they could have made in the District Court but did not. *See, e.g., Greene v. United States,* 13 F.3d 577, 586 (2d Cir.1994) ("[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal."). For these reasons alone, this Court should affirm the ruling of the District Court denying intervention in this case.

II. TO THE EXTENT THIS COURT WISHES TO CONSIDER ARGUMENTS THE UNIONS MIGHT HAVE MADE TO THIS COURT AND TO THE DISTRICT COURT TO SUPPORT THEIR INTERVENTION MOTION IN *LIGON*, NO BASIS EXISTS FOR FINDING THAT THE UNIONS COULD HAVE MET THEIR BURDEN UNDER RULE 24 GIVEN THE SPECIFIC FACTS OF THIS CASE.

To the extent this Court wishes—despite the Unions' waiver of their arguments—to consider the merits of the Unions' motion to intervene in this case, that puts it in the position not of evaluating arguments made by Appellants but

[8] Nor can the Unions make such arguments for the first time in a reply brief. *Knipe v. Skinner,* 999 F.2d 708, 711 (2d Cir.1993) ("Arguments may not be made for the first time in a reply brief.").

instead in the position of having to address arguments that the Appellants might have made about the merits of their motion. The *Ligon* Plaintiffs-Appellees strongly urge the Court not to engage in this exercise, but they note that a serious examination of the merits of the Unions' motion in this case reveals that no basis existed for granting it, given the Unions' failure to file a timely motion and the Unions' lack of any legal interest in this case.

Intervention as of right under Federal Rule of Civil Procedure 24 is permitted only if a 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 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. *See, e.g.*, *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001).

This Court may reverse the District Court only if it finds that the District Court abused its discretion in applying Rule 24. *See United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 69 (2d Cir. 1994) (intervention decisions are "reviewed under an abuse of discretion standard"). There is no basis for such a finding here. Accordingly, this Court should affirm.

A. The Unions' Motion to Intervene in *Ligon* Was Untimely.

This Court has held that the following circumstances are relevant to the timeliness inquiry: "(1) how long the applicant had notice of the interest before [he] made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness." *D'Amato* 236 F.3d at 84. All of these factors lead to the conclusion that the Unions' motion in *Ligon* was untimely.

The Unions were first put on notice of the *Ligon* in March 2012, when *Ligon* was filed. Over the next seven months, the parties engaged in expedited discovery and ultimately completed a highly publicized seven-day preliminary injunction hearing in October 2012. In January 2013, the District Court issued a 157-page opinion granting the *Ligon* plaintiffs' preliminary injunction motion and proposing six very specific remedies, 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 144 (identical language at JA 433). The PBA immediately responded by issuing a press release. JA 1108.

Over the next eight months, the parties sought to reach agreement on the fine points of the six *Ligon* Remedies, which included proposed policies, training materials, and a supervisory plan concerning when police officers are permitted to

stop people outside of TAP buildings on suspicion of trespassing. They submitted detailed proposals and counterproposals through briefing and oral argument, paying meticulous attention to the language and details.[9] This process culminated in the Remedial Order, which largely adopted the relief proposed in the District Court's earlier opinion and delegated oversight of the fine details of implementation to a monitor. 959 F. Supp. 2d at 689-90.

These facts leave no question that the Unions' motion was inexcusably late. This Court's decision in *United States v. Yonkers Board of Education*, 801 F.2d 593, 596 (2d Cir. 1986), provides a useful point of comparison. There, the district court had found the City of Yonkers liable for housing discrimination and began to craft remedies in collaboration with the parties. *Id.* at 594. Three months later, the court issued a remedial order that ordered new housing construction on specified sites. *Id.* Less than two weeks after that order, a group of Yonkers homeowners living near one of the sites moved to intervene, and the court rejected their motion as untimely. *Id.* In affirming, this Court stated that while in certain circumstances post-liability intervention may be warranted for purposes of the remedy phase, "such a holding would be in appropriate . . . [where] the Homeowners did not seek

[9] *See* Plaintiffs' Br. on Proposed Remedial Relief, dated Mar. 3, 2013 (JA 454-60); City Br. on Proposed Remedial Relief, dated Apr. 11, 2013 (JA 511-14); Tr. of District Court Proceedings, dated June 5, 2013 (JA 627-40); City Mot. on Proposed Remedies, dated July 8, 2013 (JA 518, 528-55); Plaintiffs' Response to City's Mot. on Proposed Remedies, dated July 24, 2013 (JA 595-99); City Reply Mem. On Proposed Remedial Relief, dated Aug. 2, 2013 (JA 619-21).

intervention until after the Housing Remedy Order was entered, more than three months after the remedy proceedings were underway." *Id.* at 596.

Like the homeowners in *Yonkers*, the Unions were on notice of the *Ligon* Remedies well before they intervened. But worse than waiting three months, and much to the detriment of "the orderly administration of justice," *id.*at 597, the Unions waited over eight months while the District Court and the parties expended much ink and effort fine-tuning the details of the remedies.

As such, the Unions' intervention at this late date would cause significant prejudice to the *Ligon* Plaintiffs-Appellees. Allowing the Unions to intervene now would threaten to render idle the District Court's and parties' careful consideration of, and dialogue concerning, the appropriate remedies. *See D'Amato*, 236 F.3d at 83-84 (upholding denial of intervention where applicant had notice of interest in action and intervention "would potentially derail the settlement and prejudice the existing parties, who had been engaging in settlement negotiations for several months"); *In re: Holocaust Victims Assets Litig.*, 225 F.3d 191, 198-99 (2d Cir. 2000) (same); *Farmland Dairies*, 847 F.2d at 1044 (same); *Catanzano*, 103 F.3d at 233 (rejecting, as sufficient 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"). In stark contrast, the Unions

would suffer no prejudice if this Court affirms the District Court's denial of their application to intervene in *Ligon*. As explained Section II.B, *infra*, they have no direct, substantial, legally protectable interests implicated by *Ligon*.

In sum—and although this Court need not reach the issue—even if the Unions did not waive their arguments both in the District Court and here, they cannot demonstrate that their motion to intervene was timely in *Ligon*. If any Union attempts, on reply, to engage with the facts of *Ligon* for the first time, this Court should reject any such attempt as unfair and incompatible with Circuit precedent. *See Norton*, 145 F.3d at 117-18 (holding that "raising an issue for the first time in a reply brief" constitutes waiver).

B. The District Court Did Not Abuse Its Discretion in Finding That the Unions Do Not Have a Direct, Substantial, Legally Protectable Interest Because the Remedial Order Does Not Infringe on the Unions' Bargaining Rights.

The Unions cannot sustain their burden of demonstrating that the District Court abused its discretion in finding that the Unions do not possess a cognizable interest in the Remedial Order. 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" for intervention). The District Court correctly concluded that the Unions possess no such interest.

The Unions claim that their interest in the Remedial Order rests on their collective bargaining rights under New York law. PBA Br. at 30-42, DEA Br. at 40-47; SBA Br. at 37-41. The PBA further claims that a mere "possible conflict between a remedial order and the unions' collective bargaining rights" establishes a direct, legally protectable right entitling it to intervene. PBA Br. at 39. Following a thorough review of New York law, the District Court rejected these arguments because "the changes to stop-and-frisk policies, procedures, supervision, training, and monitoring outlined in the Remedial Order are precisely the kind of management prerogatives courts have held are not subject to collective bargaining." SPA 74. This Court should affirm that ruling.

1. The Policy Issues Identified in the Remedial Order Are Not Subject to Mandatory Bargaining under New York Law.

The District Court correctly concluded that the topics covered by the Remedial Order concern management prerogatives about which the City is not required to bargain with the Unions. SPA 75. The Unions' claims to the contrary—that they have a right to bargain about a small number of policies identified in the Remedial Order—is not supported by New York law and should be rejected.

The New York City Collective Bargaining Law (the "CBL"), the City's analog to the state collective bargaining law (the "Taylor Law"), requires the City to engage in collective bargaining about the "terms and conditions of employment," N.Y. City Admin. Code § 12-307(a), but it provides that certain decisions about the operation of government entities are reserved for decision by management and are not subject to bargaining.[10] As the Court of Appeals of New York has explained, "decisions are not bargainable as terms and conditions of employment where they are inherently and fundamentally policy decisions relating to the primary mission of the . . . employer." *In re: County of Erie v. PERB*, 12 N.Y.3d 72, 78 (2009) (internal quotation marks and citation omitted).[11] The Court

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[10] Section 12-307(b) of the New York City Administrative Code provides in relevant part as follows:

> 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. . . .

[11] The Taylor Law, N.Y. Civ. Serv. L §§ 200-14, the state law providing rules and procedures concerning collective bargaining by public employees, allows public employers such as the City to enact "provisions and procedures" regarding bargaining only if they are "substantially equivalent" to the provisions and

of Appeals has also emphasized that 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 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).

While the Unions have the right to bargain over some of the secondary impacts of policies set by the City, they have no right to bargain about the policies themselves. *See* N.Y. Admin. Code § 12-307(b) (unions entitled to bargain about "practical impact that decisions on [certain matters of policy] have on terms and conditions of employment"). Thus, in a comparable example, while class size is not subject to bargaining, its impact on teachers, *e.g.*, variance in compensation based on class size, is bargainable. *See In re: W. Irondequoit Teachers Ass'n v. Helsby*, 35 N.Y.2d 46, 51-52 (1974).

None of the six *Ligon* Remedies discussed in the Remedial Order, or for that matter any remedies relevant to *Floyd*, implicates mandatory subjects of bargaining, because they address the NYPD's policies and other management prerogatives. One of the *Ligon* Remedies expressly concerns the adoption of

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procedures of the Taylor Law. N.Y. Civ. Serv. L. § 212(1). Judicial decisions regarding the Taylor Law are therefore persuasive authority for the purpose of interpreting the scope of the CBL.

policies that address the circumstances under which trespass stops may be conducted and related training. JA 434-35. Another two address supervisory review of stops made on suspicion of trespassing outside TAP buildings in the Bronx. JA 435. The remaining ones concern training programs, namely: revisions to the discussion of TAP in the NYPD's Field Training Guide, revisions to a training video shown to officers at precincts, and revisions to a portion of the training program on the legal standards for stop-and-frisk at Rodman's Neck. JA 436-37. All of the *Ligon* Remedies thus fall within the core of management prerogatives identified in the CBL, as they are "policy decisions relating to the primary mission of the . . . employer," *In re: County of Erie*, 12 N.Y.3d at 78. The Unions offer no argument undermining this conclusion.

The Unions' argument to the contrary rests almost entirely on their claim that training is a subject of mandatory bargaining. *See* PBA Br. at 37-38, DEA Br. at 45-46, SBA Br. at 38-39. But training is plainly exempted from mandatory bargaining by the CBL's management rights provision. As the New York City Board of Collective Bargaining (BCB) has explained in an opinion cited by the Unions,[12] "consistent with the statutory grant of management prerogative, the establishment of training procedures, in most circumstances, is a matter of

[12] The BCB is the body charged with determining "whether a matter is within the scope of collective bargaining" under the CBL. *See* N.Y.C. Admin. Code § 12-309(a)(2).

management right and not a mandatory subject of bargaining." *Uniformed Fire Officers Ass'n v. City of New York*, No. B-20-92, 49 OCB 20, at *8 (BCB 1992).

The Unions point to an exception where training is required as a "qualification of continued employment." PBA Br. at 37; DEA at 45; SBA at 38-39. But, as the District Court recognized, and as the cases cited by the Unions confirm, this exception does not apply to the sort of training contemplated by the Remedial Order, but rather applies only where training is required to obtain a license or certification or required for an increase in pay or job title. *See* SPA 79-80 (citing *id.* at *9 (City not required to bargain about training for CPR certification because no evidence that union members "suffered any adverse employment consequence as a result of failing to obtain certification"); *City of New York v. Uniformed Firefighters Ass'n*, No. B-43-86, 37 OCB 43 (BCB 1986) (City not required to bargain about firearms training because "the level of training provided by the City are matters within the City's management prerogatives and are not mandatory subjects of bargaining")).

Tellingly, the Unions cite only one case where the City was required to bargain over training, and that case conforms to the District Court's narrow reading of the exception. *See Dist. Council 37 v. City of New York*, No. B-20-2002, 69 OCB 20 (2002) (finding that City was required to bargain about length of training program that was prerequisite for emergency medical technicians to upgrade to

higher title). In contrast, the BCB rejected the SBA's claim that the City was required to bargain about training under circumstances more analogous to those presented here. *See SBA v. City of New York*, No. B-56-88, 41 OCB 56, at *14 (BCB 1988) ("[T]he obligation to undergo additional training and to acquire new skills during regular working hours at no expense to the employee is not a term or condition of employment.")

Thus, while the Unions may be entitled to bargain about the secondary impacts of new training programs—such as how to schedule the hours of officers who participate in them, *see* SPA 75—they are not entitled to bargain about training programs, such as those contemplated by the *Ligon* Remedies, unless a license or certification is at issue or participation in training programs will be tied to pay or promotions. The Unions would broaden this exception to swallow the general rule that the City is not required to bargain about training, but the text of the CBL and the very BCB decisions they cite foreclose that contention.

Moreover, the Unions do not offer the best evidence they could to claim that the City is required to bargain about the changes to training identified in the Remedial Order: proof that they have bargained about such programs in the past. The stop-and-frisk training at Rodman's Neck, discussed in the Remedial Order, *see* 959 F. Supp. 2d at 680, 690, is a prime example. Thousands of officers have completed the Rodman's Neck training, JA 777, but the Unions offer no evidence

they have bargained about it—or even argued to the BCB that they have the right to bargain about. The same is true of similar programs, such as those adopted by the City in the spring of 2012 concerning TAP, the training reforms adopted pursuant to the City's settlement of *Daniels v. City of New York*, and the NYPD's reforms to its stop-and-frisk practices adopted between 2009 and 2013.[13] In the same vein, the Unions never claimed that the City's unilateral implementation of the *Ligon* Remedies would violate their bargaining rights in the eight months during which the parties submitted numerous briefs, attended oral argument, and negotiated about the details of the training. In short, the Unions have not established that training programs adopted pursuant to the Remedial Order are subjects of mandatory bargaining.

In addition, the PBA alone contends that three additional topics of the Remedial Order—that do not concern *Ligon* in any way—are subject to mandatory bargaining. Specifically, it claims that the City does not have the right to address "procedural aspects of performance evaluations," make changes to the UF-250 form, or order the use of body cameras without bargaining. These claims are wrong.

[13] The training programs regarding TAP are described in Section A of the Statement of the Case, *supra*. The other cited programs are described in the Statement of the Case in the *Floyd* Plaintiffs-Appellees' brief.

The PBA argues that because "the District Court faulted the NYPD's Quest for Excellence Program," the Remedial Order infringes on its right to bargain about the procedures connected to performance evaluations. PBA Br. at 36-37. This claim misses the mark because bargaining rights are extraordinarily limited in these areas. The PBA has no right to bargain about disciplinary policies. *See In re: PBA v. PERB*, 6 N.Y.3d at 576 (2006) (holding that NYPD's disciplinary policies are not subject to bargaining). And their right to bargain about performance evaluations is limited to procedures concerning performance evaluations, whereas any changes to performance evaluations made pursuant to the Remedial Order will concern their content. *See PBA v. City of New York*, 6 OCB2d 36 (BCB 2013) (finding that procedures of performance evaluations, such as whether an officer is required to sign a summary of the evaluations, are subject to bargaining, but that the substance of evaluations is not). Accordingly, as the District Court cogently explained, "the Remedial Order addresses only substantive policy changes, not any of the procedural aspects [of performance evaluations]," SPA 80, and thus does not infringe on the Police Unions' bargaining rights.

The PBA also argues that policies on body cameras that will be adopted pursuant to the Remedial Order are a mandatory subject of bargaining. PBA Br. at 38. This claim is incorrect. As the authority cited by the PBA makes clear, policies regarding the use equipment and technology constitute quintessential

management prerogative about which bargaining is not mandatory. *See City of New York*, 40 PERB ¶ 3017, Case No. DR-119 (PERB Aug. 29, 2007). The PBA states that the New York Public Employment Relations Board "has found that the City's general right to choose technology and equipment may be outweighed by interests such as officer safety, privacy, and discipline," PBA Br. at 38, but offers no explanation as to how that proposition establishes that it has the right to bargain about the NYPD's use of body cameras. As the District Court recognized, some practical impacts related to the use of particular equipment are subject to bargaining, *e.g.*, the frequency of updating bulletproof vests. *See* SPA 81. But the Remedial Order does not address such incidental impacts, and therefore does not infringe on the bargaining rights of the PBA.

Finally, the PBA offers no explanation for its claim that changes to the UF-250 are the subject of mandatory bargaining. It simply states as follows: "the Remedies Opinion requires that the UF-250 form be amended by requiring a separate narrative section, a separate explanation of why any frisk or search was necessary, a tear-off sheet to be provided to the individual stopped, and a revised check-box section." PBA Br. at 38. It is difficult to imagine a policy choice that better exemplifies a management prerogative than the choice about what information employees should collect in the course of completing their jobs.

Given that the PBA presents no argument to the contrary, this Court should reject its claim that the City is required to bargain about changes to the UF-250 form.

2. The Mere Possibility that the Remedial Order Could Impact the Police Unions' Collective Bargaining Rights Is Insufficient to Establish a Direct, Substantial, Legally Protectable Interest.

The PBA argues in the alternative that "even any arguable impact[] upon the PBA's labor rights provides a basis for intervening as of right under Rule 24(a)." PBA Br. at 40; *see also* DEA Br. at 47. To support this claim, it relies on dictum from an unpublished case decided by the District of Oregon and a Ninth Circuit opinion. PBA Br. at 40, 41 (citing *United States v. City of Portland*, No. 12-cv-02265, Opinion & Order (D. Or. Feb. 19, 2013); *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002)). As this argument conflicts with Second Circuit law, it should be rejected.

This Court has held that for a right to be cognizable under Rule 24(a), it must be "direct, substantial, and legally protectable." *Wash. Elec. Co-op., Inc.*, 922 F.2d at 96-97. "An interest that is remote from the subject matter of the proceeding, or that is contingent upon the occurrence of a sequence of events before it becomes colorable, will not satisfy the rule." *Id.* at 97. In accordance with these principles, this Court has rejected the claims of proposed intervenors where there was an insufficiently close nexus between the claimed interest and the subject matter of the litigation. *See, e.g.*, *N.Y. News, Inc. v. Kheel*, 972 F.2d 482,

486 (2d Cir. 1992) (rejecting claimed interest in vindicating reputation through pursuit of Rule 11 sanctions and noting that "[i]ntervention under Rule 24(a)(2) . . . 'cannot be used as a means to inject collateral issues into an existing action'" (quoting *Wash. Elec.*, 922 F.2d at 97)); *Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 261 (2d Cir. 1992) (rejecting claimed interest of utilities in participating in EPA rulemaking process). Appellees are aware of no precedent from this Court, and the PBA cites none, even suggesting that the mere possibility of an impact on a union's bargaining rights is sufficient to establish a direct, substantial, and legally supportable interest.

Applying the principles announced by this Court to this case reveals that the Unions cannot establish that they have a legally protectable interest in the six *Ligon* Remedies because there is no realistic chance that they will infringe on the Unions' bargaining rights. If such a realistic chance existed, one would expect the Unions to have made such a claim during the eight months when the parties briefed and argued about them. But they did not. Moreover, they have never identified a single section of their respective collective bargaining agreements that has any bearing on the *Ligon* Remedies or the Remedial Order generally.

The two primary cases on which the Unions rely, PBA Br. at 39-40, to claim that the possibility of infringement alone is insufficient to establish a legally protectable interest under Rule 24 are thus easily distinguished. In *City of*

Portland, the police union that sought intervention was able to identify specific portions of its collective bargaining agreement would be impacted by a proposed consent decree. *See United States v. City of Portland*, no. 12-cv-02265, slip op. at 7 (D. Or. Feb. 19, 2013) ("The [union] identifies numerous clauses of the proposed Settlement Agreement that it contends conflict with the Labor Agreement.") (JA 813); Mem. of Support of Intervenor-Def. Portland Police Association's FRCP 24 Mot. to Intervene, dated Dec. 18, 2012, at 10-23 (JA 1155-68). Similarly, in *City of Los Angeles*, the Ninth Circuit's conclusion that the Los Angeles Police Protective League had "state-law rights to negotiate about the terms and conditions of [their] members' employment . . . and to rely on the [resulting] collective bargaining agreement[s]," 288 F.3d at 400, turned on a different collective bargaining law and portions of an existing collective bargaining agreement that the union could point to as being undermined by the proposed consent decree. *See* Br. of Intervenor-Appellant, No. 01-55182, 2001 WL 34093539, at *20-22 (9th Cir. May 8, 2001) (describing infringements of union's rights under California law). Accordingly, the unions were easily able to establish a protectable interest under Ninth Circuit law.[14]

[14] Moreover, it is noteworthy that the Ninth Circuit has a "liberal policy" regarding intervention. *City of Los Angeles*, 288 F.3d at 397. Under that Circuit's precedents, "[w]hether an applicant for intervention demonstrates sufficient interest in an action is a practical, threshold inquiry. No specific legal or equitable interest need be established." *Greene v. United States*, 996 F.2d 973, 976 (9th Cir.

For similar reasons, none of the additional cases cited by the Unions supports their position. In each of those cases, there was virtually no doubt that if the plaintiffs prevailed, the remedies would actually infringe on the union's collective bargaining agreement. *See United States v. City of Hialeah*, 140 F.3d 968, 982 (11th Cir. 1998) (settlement agreement would have "a substantial and often decisive impact" on benefits provided by collective bargaining agreement); *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 738 F.2d 82 (8th Cir. 1984) (*per curiam*) (holding that union had cognizable interest where possible remedy was dissolution of school district with which union had contract); *EEOC v. AT&T*, 506 F.2d 735 (3d Cir. 1974) (holding that union had an interest in protecting particular provisions of its collective bargaining agreements that could "be modified or invalidated" by agreement between the parties and consent decree); *CBS, Inc. v. Snyder*, 798 F. Supp. 1019, 1023 (S.D.N.Y. 1992), *aff'd*, 989 F.2d 89 (2d Cir. 1993) (finding that "interpretation and/or enforceability of the arbitration provisions" of collective bargaining agreement were central to case); *Vulcan Soc'y of Westchester Cnty., Inc. v. Fire Dep't of City of White Plains*, 79 F.R.D. 437 (S.D.N.Y. 1978) (citing specific provisions of collective bargaining agreements concerning "salaries, assignments and benefits" to determine that

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1993) . This standard differs significantly from the Second Circuit's, which defines a cognizable interest exclusively as one that is "direct, substantial, and legally protectable." *Wash. Elec. Co-op., Inc.*, 922 F.2d at 96-97.

union had interest).[15] In contrast, in one case cited by the DEA, intervention was denied because the union seeking to intervene did not have a protectable interest. *See Chance v. Bd. of Examiners*, 51 F.R.D. 156 (S.D.N.Y. 1970) (finding that union members did not have cognizable interest because they had already passed licensing requirements at issue).[16]

In sum, this Court should reject the Unions' claim that the mere possibility that the Remedial Order will infringe on their bargaining rights is sufficient to conclude that the District Court abused its discretion in finding that they do not have a direct, substantial, legally protectable interest.

3. The Question of Whether the CBL's Management Rights Provision is Good Law is Not Open.

Finally, a brief response to the PBA's fanciful claim that there is an "open question" as to whether the CBL's management rights provision is preempted by state law because the CBL conflicts with the Taylor Law. PBA Br. at 34 (citing

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[15] Similar circumstances existed in *Bridgeport Guardians v. Delmonte*, 602 F.3d 469 (2d Cir. 2010), where white and Hispanic members of the Bridgeport Police Department had an interest in the department's settlement of a race discrimination case that infringed their statutory and constitutional rights by allowing the department "to alter the scoring of civil-service examinations based on candidates' race or ethnicity," *Id.* at 472, 474.

[16] *Stallworth v. Monsanto Co.*, 558 F.2d 257 (5th Cir. 1977), is not a case in which the court allowed a union to intervene, as the SBA claims. SBA Br. at 39. Instead, the Fifth Circuit decided only that the proposed intervenors—who were individual employees, not a union—had made a timely application to intervene. *Id.* at 262. It further held that it could not decide whether the proposed intervenors possessed a "significantly protectable interest" in the case. *Id.* at 268.

N.Y.C. Admin. Code § 12-307(b)). This claim—which implicitly recognizes that proper application of the management rights provision forecloses their argument that the Remedial Order infringes on their bargaining rights—is implausible. In support of its claim, the PBA cites only a single dissent from a decision of the BCB, a municipal administrative body. *See* PBA Br. at 34 (citing *Uniformed Firefighters Ass'n v. City of New York*, Decision No. B-39-2006, 77 OCB 39 (BCB 2006) (dissenting op.)). The cited dissent is simply incorrect and therefore is entitled to no weight.

When New York adopted the Taylor Law, it provided that local governments could adopt local laws regarding collective bargaining with public employees but required that they be "substantially equivalent to the provisions and procedures applicable to the State set forth in the Taylor Law." *In re: PBA v. City of New York*, 97 N.Y.2d 378, 383 (2001) (citing N.Y. Civ. Serv. L. § 212). New York City's local law was to be deemed effective automatically "unless adjudged otherwise in an action brought by PERB." *Id.*

Given that the same principles underlie both the Taylor Law and the BCL—namely, that certain topics are reserved for decision by management without bargaining, but public employees maintain the right to bargain about the practical impact of such policies, *see* Section II.B.1, *supra*—it is unsurprising that the Court of Appeals noted in 2001 that PERB had never sought a declaration that the BCL

was inconsistent with the Taylor Law in the more than 30 years since it was enacted. *See id.* These circumstances leave no serious question that the CBL's management rights provision reflects the state's public policy that although public employee unions are entitled to bargain about the practical impact of policies, the policies themselves are not bargainable. This Court should reject the PBA's argument.

C. The Unions Have Waived All Remaining Arguments Concerning Application of Rule 24 in *Ligon*.

The Unions have waived all additional arguments concerning application of Rule 24 to the intervention motion in *Ligon*, including any argument for permissive intervention. To the extent that this Court reaches any such issues, despite the Unions' having waived their opportunity to raise them, the *Ligon* Plaintiffs-Appellees adopt and incorporate by reference the arguments set out in Sections III.B.1 and IV of the *Floyd* Plaintiffs-Appellees' Brief pursuant to Federal Rule of Appellate Procedure 28(i).

III. THE UNIONS DO NOT HAVE STANDING TO APPEAL THE *LIGON* PRELIMINARY INJUNCTION DECISION OR THE REMEDIAL ORDER.

For the reasons set forth in the District Court's opinion and in Section I of *Floyd* Plaintiffs-Appellees' brief, which *Ligon* Plaintiffs-Appellees incorporate fully here by reference pursuant to Federal Rule of Appellate Procedure 28(i), the

Unions do not have standing to appeal the *Ligon* preliminary injunction decision, reported at JA 289-446, or the Remedial Order.

CONCLUSION

For all of the reasons above, this Court should affirm the order of the District Court denying the Unions' motion to intervene.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief, according to the word-processing program with which it was prepared, complies with Rule 32(a)(7) of the Federal Rules of Appellate Procedure in that it contains a total of 8,704 words.

/s/ Alexis Karteron
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