# 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 APPELLANT PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.

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*Attorneys for Appellant Patrolmen's Benevolent Association of the City of New York, Inc.*

– 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.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the Patrolmen's Benevolent Association of the City of New York, Inc. hereby states that it is a non-stock, non-profit corporation and, therefore, there are no parent corporations or publicly held corporations that own its stock.

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This case concerns the District Court's effort to rewrite the rules governing how the 35,000 members of the New York City Police Department ("NYPD") conduct themselves on a day-to-day basis. Appellant-Putative Intervenor the Patrolmen's Benevolent Association ("PBA") is the largest police union in the nation's largest city, representing the more than 22,000 police officers employed by the NYPD. The PBA represents the officers whose conduct was directly placed at issue in the trial below, whose reputations were unfairly marred by that decision, and whose daily activities and bargaining rights will be directly affected by the remedial order entered by the District Court. At issue on this appeal is whether these officers may challenge these patently flawed decisions now that the City has reversed itself and abandoned its prior defense of the officers' conduct.

The extraordinary proceedings at issue are well-known to this Court. The District Court permitted the trial of an amorphous class of millions purportedly stopped unlawfully by the NYPD. The court allowed Plaintiffs to pursue City-wide injunctive relief even though none could show an imminent threat that he would be unlawfully stopped again. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). Although the District Court admitted that the constitutionality of each *Terry* stop must necessarily be judged according to its individual facts and

circumstances, the court nonetheless swept that bedrock precept aside and relied upon statistical evidence purporting to place 4.4 million stops at issue.

This Court has recognized that "[e]xcept in highly unusual circumstances, it is the business of cities, not federal courts or special masters, to run police departments." *Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 476 (2d Cir. 2010) (Parker, J.). Nonetheless, having found system-wide violations where there were none, the District Court determined to place the NYPD under judicial tutelage for years. *See Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) (hereinafter "*Remedies Op.*"). The court ordered wide-ranging modifications "to the NYPD's policies, training, supervision, monitoring, and discipline," *id.* at 678-85, and ordered that the NYPD's officers be tutored in Fourth Amendment rules that diverge from controlling precedent and reflect one district judge's opinion of what the law should be. *Id.* at 689.

The District Court did not stop there. Rather, the court empowered a "Facilitator" to organize a "Joint Remedial Process," *id.* at 686-87, with the help of a hand-picked "Academic Advisory Council." S.D.N.Y. Dkt. Nos. 384, 403 (*Floyd*), 128, 144 (*Ligon*). The Facilitator will organize "representatives of religious, advocacy, and grassroots organizations," "local elected officials and community leaders," and "the lawyers in this case," among others, to recommend additional changes. *Remedies Op.*, 959 F. Supp. 2d at 686. The court has thus

ensured that police policies will not only be written by a federal judge, but that they will be politicized as well. This cumbersome, resource-intensive, and distracting process will be justified, not as the policy choice of a new mayor, but as a constitutionally required remedy for systematic violations, even though those violations simply did not, and do not, exist.

Under the prior administration, the City prosecuted this appeal and won a stay pending appeal. *See Ligon v. City of New York*, 538 F. App'x 101 (2d Cir. 2013), *superseded in part*, 736 F.3d 118 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014). This Court took the extraordinary step of disqualifying the district judge, who had sat as both the finder of fact and the author of the remedies. 736 F.3d at 124. The City filed a 110-page appeal brief that demonstrated, beyond any reasonable question, that the orders could not withstand appellate scrutiny. *See* Defendant-Appellant's Brief, 2d Cir. Dkt. No. 347-1 (*Floyd*).

While the appeal was pending, a new mayor was elected. Despite the likelihood of success on appeal, the City now has reversed itself and turned its back on the officers of the NYPD. The City will acquiesce in the injunction, leave the highly prejudicial findings unreviewed, and burden the NYPD with the cumbersome remedial processes authored by the prior district judge.

Because the police officers will bear the brunt of these orders, the PBA and other police unions moved to intervene. This Court granted a limited remand for

the purpose of allowing the new District Court to decide the intervention question. Without conducting any evidentiary hearing or even allowing oral argument, the District Court denied intervention, on the grounds that the unions' motions were untimely and that the unions ostensibly had no interest in the sweeping changes ordered by the District Court.

The court's decision was incorrect as a matter of law. The PBA's request was timely because the PBA reasonably could rely upon the City's vigorous defense up through the trial. It would have been neither efficient nor cost-effective for the PBA to have sought to participate earlier. The PBA did not intervene for the purpose of asking the District Court to redo any prior rulings, but to participate on appeal and in any future remedial proceedings. No party was prejudiced in the slightest by the PBA's decision to wait on intervention until it was clear what the District Court had decided, and worse, that the City intended to reverse itself and acquiesce in those determinations.

The District Court also erred because the PBA has multiple interests directly implicated by the orders below. While the injunction formally binds the City, it imposes practices that will directly affect and burden the daily activities of the officers. These are not the discretionary choices of the NYPD brass; they are remedies imposed by the District Court. In the ordinary course, the unions have "state-law rights to negotiate about the terms and conditions of [their] members'

employment." *United States v. City of Los Angeles*, 288 F.3d 391, 400 (9th Cir. 2002). Yet the District Court found that those rights must yield when a federal court exercises its remedial authority. SPA-82. The PBA thus has a direct interest in challenging the liability findings that authorize the court potentially to abridge the unions' state law rights.

The PBA's interests, however, do not merely stop with the injunction's impact upon their daily activities. The PBA also has an interest in challenging the District Court's finding that the NYPD's officers engaged in more than 200,000 discrete constitutional violations. *See City of Los Angeles*, 288 F.3d at 399 (unions may intervene because plaintiffs "raise[] factual allegations that [the unions'] officers committed unconstitutional acts in the line of duty"). The District Court dismissed such severe reputational harm on the ground that individual officers were not directly bound by the judgment. This ignores reality. The court's misconduct findings were the predicate for the injunction against the City, and if the City will not challenge them, then the PBA may do so. It is ironic, to say the least, that the District Court allowed private plaintiffs the right to litigate for millions of absent New Yorkers, yet denied the police unions any right to speak when its members' actions and rights were at issue.

At bottom, the question here is not whether a new Administration may change the NYPD's policies on "stop, question and frisk." The City may pursue

whatever policies its leadership deems wise and expedient, so long as it does so consistent with the rights of the police unions. The City should not, however, be able to avoid public scrutiny of such policy choices under the guise of acquiescing to the demonstrably erroneous decisions below. Because the challenged orders directly burden the legal rights of the PBA and its members, the PBA is well-situated to prosecute this appeal and it has the right to do so. The District Court erred by denying intervention.

## JURISDICTIONAL STATEMENT

The District Court exercised jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiffs do not have standing to pursue the claims in this matter, and therefore, the court lacked subject-matter jurisdiction. *See infra* Point IV. This Court has jurisdiction pursuant to 28 U.S.C. § 1291 "because a district court's order denying intervention is a final order." *Bridgeport Guardians*, 602 F.3d at 473 (internal quotations and alteration omitted). The District Court denied the police unions' motion to intervene on July 30, 3014. SPA-1. The PBA timely filed its Notices of Appeal on August 6, 2014. A-1209-1212.

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in finding that the PBA's motion to intervene was untimely, when the PBA sought to intervene promptly after the

court's remedial decision and after it became apparent that the City might reverse its litigation position and not adequately defend the PBA's interests on appeal.

2. Whether the District Court erred in finding that the PBA lacked any direct, cognizable interest in the proceedings below when the orders were based upon findings of allegedly rampant lawlessness by New York police officers and when the ordered remedies would directly affect the daily activities of the union's members as well as their collective bargaining rights.

3. Whether the PBA has standing to pursue this appeal in the City's absence because it and its members will suffer concrete, direct, non-attenuated harms if the opinions below are permitted to stand.

4. Whether Plaintiffs had standing to seek and obtain injunctive relief against the City when they did not, and could, plausibly allege that they would be unlawfully stopped and frisked in the future.

## STATEMENT OF THE CASE

The PBA appeals the order of the District Court (Torres, J.) denying the Police Unions' motions to intervene for purposes of appeal and for remedial proceedings. The District Court's order is available at 2014 WL 3765729 and is attached in the Special Appendix beginning at SPA-1.

### A. The District Court Conducts A Questionable Trial And Holds That The NYPD Must Be Subjected To Judicial Supervision.

The procedural history of this case is as extraordinary as the trial that the District Court conducted below. On August 12, 2013, following a bench trial in *Floyd*, the District Court (Scheindlin, J.) found that the City had violated Plaintiffs' constitutional rights and issued an injunction aimed at rewriting the NYPD's policies regarding stop, question and frisk.[1] *See Floyd v. City of New York*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (hereinafter "*Liability Op.*"); *Remedies Op.*, 959 F. Supp. 2d 668.

The Liability Opinion declared that over an eight-year period, NYPD officers had made "*at least* 200,000 stops . . . without reasonable suspicion," and that "blacks are likely targeted for stops based on a lesser degree of objectively founded suspicion than whites." *Liability Op.*, 959 F. Supp. 2d at 559, 560. These conclusions were based exclusively on statistical analysis of the UF-250 forms the NYPD uses to document stops, despite the absence in the form of anything like a comprehensive account of a stop, and without any consideration of the totality of

[1] Plaintiffs initially sued individual officers, as well as the City, and sought damages for their claims. However, after Defendants requested a jury trial, Plaintiffs made the strategic choice to dismiss the individual claims so as to allow the prior district judge to sit as the finder of fact. *See* A-504 ("Plaintiffs . . . expressed their desire . . . to withdraw their respective Individual Damage Claims and as a result the parties and the Court agreed . . . that this case must be tried to the Court.").

the unique circumstances of each of the 4.4 million stops, as required by Supreme Court precedent. *See, e.g.*, *Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013); *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

The court also made the highly injurious finding that the officers' stops amounted to intentional racial discrimination. *Liability Op.*, 959 F. Supp. 2d at 583-90. That finding, too, was based upon statistical data showing that black and Hispanic New Yorkers were stopped in close proportion to their appearance in crime suspect data, rather than to their numbers in the neighborhood. *Id.* at 584-85, 590-606. The legal import of the District Court's conclusion, if applied beyond race, is breathtaking: The NYPD apparently should have been stopping not only black and Hispanic New Yorkers, but also women, children, and the elderly, in proportion to their appearance in the population. To state the proposition is to refute it.

The Remedies Opinion declared that these allegedly pervasive practices required the Court to appoint a Monitor to oversee the implementation of an array of reforms. *Remedies Op.*, 959 F. Supp. 2d at 674-79, 686-89.[2] The Remedies

[2] 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

Opinion mandated "[b]road [e]quitable [r]elief" that, as the Court recognized, would "inevitably touch on issues of training, supervision, monitoring, and discipline." *Id.* at 671, 677. The Opinion required "an initial set of reforms," including "Revisions to Policies and Training Materials," *id.* at 679, "Changes to Stop and Frisk Documentation," *id.* at 681, "Changes to Supervision, Monitoring, and Discipline," *id.* at 683, a "FINEST message" describing these reforms to officers, *id.* at 684, and a pilot program for "body-worn cameras," a reform the Plaintiffs had not even requested, *id.* at 684-86. The Court further ordered a "Joint Remedial Process for Developing" additional reforms. *Id.* at 686. Later orders installed a Facilitator and an Academic Advisory Council in this cumbersome process, one more consistent with an administrative agency than an Article III court. S.D.N.Y. Dkt. Nos. 384, 403 (*Floyd*), 128, 144 (*Ligon*).

### B. The Police Unions Move To Intervene And The City Wins A Stay Pending Appeal.

The City appealed the orders on August 16, 2013. S.D.N.Y. Dkt. Nos. 379 (*Floyd*), 123 (*Ligon*). With the City's consent, the PBA and other unions moved promptly to intervene for the purpose of participating in remedial proceedings and on appeal. A-644-649, A-652-659. The motions were fully submitted to the

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in *Ligon* tracked those in *Floyd*, the PBA has moved to intervene and appeal in *Ligon* as well. A-1211-1212.

District Court as of October 25, 2013. S.D.N.Y. Dkt. Nos. 401, 415, 416 (*Floyd*), 140, 155 (*Ligon*). Meanwhile, the City moved to stay proceedings pending appeal. On October 31, 2013, this Court "stay[ed] all proceedings" pending "further action by the Court of Appeals on the merits of the ongoing appeals" and ordered these cases reassigned to a different district judge. 2d Cir. Dkt. Nos. 247 (*Floyd*), 174 (*Ligon*).

Because this Court had stayed the District Court's consideration of the unions' intervention motions, the PBA thereafter filed a motion to intervene directly in this Court. 2d Cir. Dkt. Nos. 252 (*Floyd*), 178 (*Ligon*). Again, the City consented to the motion. On December 10, 2013, the City filed a 110-page appeal brief, demonstrating that this Court's prior decisions were premised on numerous errors of law. *See* 2d Cir. Dkt. No. 347-1 (*Floyd*). These errors included, but are hardly limited to, the following:

- The District Court should never have certified a class action challenge to 4.4 million *Terry* stops. City Appeal Br. at 30-34. That erroneous class certification decision led to a fundamental distortion of the trial process. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011); *Rahman v. Chertoff*, 530 F.3d 622, 626 (7th Cir. 2008).
- The District Court erred by permitting Plaintiffs to challenge millions of *Terry* stops based on statistical evidence derived entirely from the UF-250 forms, which were not, and never have been, used as the sole evidence to justify the constitutionality of a particular stop, much less 4.4 million. City Appeal Br. at 35-49.

- The District Court erroneously found that the City's use of crime suspect data in making stops constituted intentional racial discrimination, even though the statistics demonstrated that the percentage of black and Hispanic persons stopped on suspicion closely tracked the actual demographics of crime suspects. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000); City Appeal Br. at 49-50, 55-62, 66.

- The District Court erred in concluding that the City had demonstrated "deliberate indifference" to its constitutional obligations because the City had repeatedly taken affirmative measures to ensure that its stops and frisks were conducted in accord with constitutional principles. City Appeal Br. at 68-85.

- The District Court's sweeping remedy, which provides for federal judicial management of the NYPD's training, supervision, monitoring, discipline, and equipment policies, is dramatically overbroad, even if the findings of liability were defensible. *Id.* at 85-92.

- The district judge's own actions had created an appearance of partiality that violated the City's due process rights and warranted vacatur of the decision. *See, e.g.*, *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988); City Appeal Br. at 92-100. The questions raised by the district judge's actions were particularly harmful to the process, since she also sat as the trier of fact.

There can be no serious doubt that the City's appeal brief, and the record before this Court, present compelling arguments that the District Court's decisions were fatally flawed.

### C. Under A New Mayor, The City Reverses Its Prior Litigating Position And Seeks To Acquiesce In The District Court's Rulings.

Without withdrawing its own brief or questioning its legal arguments, the City now has reversed itself and seeks to acquiesce in this flawed injunction. Following the change in Administration, on January 30, 2014, the City moved this

Court for a limited remand "for 45 days to permit the parties to explore a resolution." 2d Cir. Dkt. Nos. 459 (*Floyd*), 274 (*Ligon*). While the City's motion expressed an interest in "explor[ing] a resolution," the City was more candid about its intentions with the press. The purpose of remand was to "fully embrace [the] stop-and-frisk reform" ordered by the Court. City Press Release, *Mayor de Blasio Announces Agreement in Landmark Stop-And-Frisk Case* (Jan. 30, 2014), *available at* http://www1.nyc.gov/office-of-the-mayor/news/726-14/mayor-de-blasio-agreement-landmark-stop-and-frisk-case#/0. To that end, the City announced that it had reached "a historic agreement" with Plaintiffs and that "[u]nder the agreement with plaintiffs announced [that day], a court-appointed monitor will serve for three years, overseeing the NYPD's reform of its stop-and-frisk policy." *Id.*

The City thus embraced the District Court's liability findings and the full scope of the now-stayed injunction. The City agreed to all of the specific policy revisions that were decided by the prior district judge and accepted that the NYPD should be supervised by a federal monitor empowered to report to the court "on the city's progress meeting its obligation to abide by the United States Constitution." *Id.* That monitorship would last for a minimum of three years, at which point the City may petition to end the monitorship if it can show that the NYPD is "in substantial compliance with the decree." *Id.* "Once that resolution has been

confirmed by the District Court," the City announced, it intended "immediately [to] move to withdraw its appeal." *Id.*[3] In agreeing to drop this meritorious appeal, the City will further expose itself to millions of dollars in attorneys' fees, which the prevailing plaintiffs will be able to seek under 42 U.S.C. § 1988.

This Court granted the City's request for a limited remand so that the District Court could "supervis[e] settlement discussions among such concerned or interested parties as the District Court deems appropriate" and also to permit the court to "resolv[e] the [pending] motions to intervene." 2d Cir. Dkt. Nos. 426 (*Floyd*), 166 (*Ligon*) at 8-9.

### D. The District Court Accepts The City's Acquiescence And Denies The Unions' Intervention Motions Without A Hearing.

In granting the limited remand, the Court held the appellate intervention motions in abeyance pending the District Court's adjudication of similar motions because "if necessary, the District Court may hold hearings and take evidence in order to provide this Court with a more complete record," and the "District Court is better positioned to deal with the complexities that might arise during multi-faceted settlement negotiations in which a variety of interests must be accommodated." *Ligon v. City of New York*, 743 F.3d 362, 365 (2d Cir. 2014). On limited remand,

[3] The parties confirmed this understanding in the status report filed with the Court on March 4, 2014 and, ultimately, in the motion to modify the Remedies Order. *See* A-972-974, A-1192-1206.

however, the District Court did not hold any hearings, supervise settlement negotiations, or permit the PBA or other unions to play any role in the proceedings. Instead, the District Court denied the intervention motions solely on a paper record, without taking any evidence or even hearing oral argument.

Following the PBA and the other unions' timely appeal of the intervention decision, on August 14, 2014, the Court consolidated these appeals with the City's prior merits appeals and ordered expedited briefing on the intervention appeal. 2d Cir. Dkt. No. 21 (No. 14-2829). The Court also directed that the police unions' appellate intervention motions and the City's motion to dismiss the merits appeals be heard at the same time as these appeals. *Id.*

## STATEMENT OF FACTS

The PBA represents more than 22,000 of the 35,000 members of the NYPD. *See* A-981 (Alejandro Decl. ¶¶ 6-7). Their members stand at the front line of police services in the City. Members perform the core function of enforcing state and New York City laws and thereby ensuring public safety. A-982 ¶ 12. They perform field police work, including patrolling, surveillance, and the stop, question and frisk procedures at issue in this action. A-982-983 ¶¶ 13, 14.

The PBA is the designated collective bargaining agent for the more than 22,000 police officers employed by the NYPD. The PBA negotiates on Police Officers' behalf with the City on matters of policy, terms and conditions of

employment, and all matters relating to the Officers' general welfare. A-981 ¶ 7. The mission of the PBA and the other unions that seek to intervene is to protect the interests of their respective NYPD members. A-982 ¶ 11.

Under the New York City Collective Bargaining Law ("NYCCBL"), the City must negotiate with the PBA regarding all matters within the scope of collective bargaining, such as wages, hours, and working conditions, including "the practical impact that decisions on [certain policy matters] have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety." N.Y.C. Admin. Code § 12-307(b). The Administrative Code makes it an improper practice for a public employer or its agents to "refuse to bargain collectively in good faith on matters within the scope of collective bargaining" with certified public employees unions and "to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in prior contract." *Id.* § 12-306(4), (5).

## SUMMARY OF ARGUMENT

The District Court erred in denying the PBA's motion to intervene under Rule 24 for purposes of appeal and for subsequent remedial proceedings.

*First*, the District Court misread the timeliness requirement under Rule 24(a). The PBA filed its motion "promptly after the entry of final judgment,"

*United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977), and promptly after it became aware "that [its] interest would no longer be protected by the existing parties to the lawsuit." *Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (en banc). The District Court did not identify any prejudice to the existing parties as a result of the timing of the PBA's motion, nor did it suggest why the PBA's earlier presence would have been necessary to vindicate its interests. Absent any such prejudice, the PBA could reasonably have waited to intervene until after the District Court issued its orders and the mayoral election loomed.

*Second*, the PBA has significant, direct interests "in the merits phase of [this] litigation" because Plaintiffs seek "injunctive relief against its member officers and raise[] factual allegations that [the union's] member officers committed unconstitutional acts in the line of duty." *City of Los Angeles*, 288 F.3d at 399-400. The PBA has an interest in an injunction premised upon the harmful findings against its members of widespread, routine unlawful activity. The PBA also has an interest in challenging liability findings that may significantly narrow its collective bargaining rights. *See id.* at 400. The District Court dismissed this concern on the ground that every one of the expansive remedies fell under the "management rights" provisions of the City Code, but that conclusion misreads state labor law and short-circuits the well-established state procedures for

determining what matters are subject to bargaining. As a result, the District Court would allow a bilateral relationship between the City employer and its employee officers to be turned into a political circus of a remedial process, injecting into policy decisions third parties who are not accountable for the public safety and who have their own separate stakeholders.

*Third*, the PBA also should have been permitted to intervene under Federal Rule of Civil Procedure 24(b) because it satisfies all the requirements for permissive intervention. The legal interests discussed above, as well as the public interest in subjecting the District Court's orders to appellate scrutiny, weigh in support of permissive intervention.

*Fourth*, the District Court erred in finding that the PBA lacked Article III standing to pursue the merits appeal. The requirement of injury in fact is readily met by the burdens and harms caused to the PBA and its members from the injunction. And the reputational harm to the PBA's members from the District Court's findings of systemic unconstitutional conduct also suffices for Article III standing.

*Finally*, without regard to the intervention question, the District Court's orders should be vacated because Plaintiffs lacked standing to obtain the sweeping injunction the prior District Judge ordered. This is a fundamental issue that the Court is obliged to raise *sua sponte* and that may not be waived. The Supreme

Court has made clear that a plaintiff injured by an unlawful seizure may not pursue injunctive relief absent a showing that he or she would subjected to the illegal seizure again. Yet that is precisely what Plaintiffs were allowed to do here. In addition, Plaintiffs lack standing to obtain an injunction regarding alleged Fourteenth Amendment violations because no named Plaintiff proved any injury from any racial discrimination.

## ARGUMENT

The PBA has moved to intervene to ensure that the City's abandonment of this appeal does not adversely affect the interests of its members. The City is not pursuing a private settlement with Plaintiffs. Rather, the settlement will saddle the PBA's members with a burdensome process that will last for years. The PBA filed its motion "promptly after the entry of final judgment." *United Airlines*, 432 U.S. at 395-96. It did so soon after the District Court had entered its extraordinary orders and after the leading Mayoral candidate had disclosed that, under his watch, the City might terminate the vigorous defense that it had pursued for years.

The PBA's interests in the District Court's orders are no mystery. The District Court assumed the right and the duty to wreak fundamental changes to police policies, training, supervision, and discipline. If these changes are implemented, then police officers will have to live with them on a daily basis for years. Further, they are policy changes that, when ordered by a federal court

pursuant to a liability finding, would impair the officers' ability to negotiate over mandatory or permissive subjects of bargaining concerning the terms and conditions of their employment.

The PBA's officers are equally concerned about the highly injurious findings of the District Court that the officers of the NYPD had engaged in sustained unlawful conduct over an eight-year period. While this period saw an unprecedented drop in crime in the City, the verdict of the now-disqualified district judge calls this achievement into question and threatens to leave a black mark on the reputations of all officers. Yet the District Court's ruling is legally unsound, and the reputational harm is entirely undeserved. For these reasons, the PBA seeks to intervene in this matter and hold those findings up to the scrutiny of this Court.

## POINT I

## THE DISTRICT COURT ERRED IN DENYING THE POLICE UNIONS' MOTIONS TO INTERVENE

Under established law, the PBA has a right to intervene because it "ha[s] a protectable interest in the merits" ruling and Plaintiffs seek "injunctive relief against [its] member officers and raise[] factual allegations that [its] member officers committed unconstitutional acts in the line of duty." *City of Los Angeles*, 288 F.3d at 399. The PBA also has a protectable interest in any decree that would implement the Remedies Order, setting the rules for its members' day-to-day

activities and abridging its "state-law rights to negotiate about the terms and conditions of [their] members' employment." *Id.* at 400.

To intervene as of right under Rule 24(a), an applicant must demonstrate that (1) the motion is timely, (2) the applicant has a legal interest in the subject matter of the litigation, (3) that interest may be impaired by the outcome of the litigation, and (4) the applicant's interest may not be adequately represented by the existing parties. *See, e.g.*, *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 128-29 (2d Cir. 2001).

The PBA readily satisfies all four elements. Indeed, numerous courts have permitted police unions to intervene in civil rights litigation that touches upon the interests of their members. *See, e.g.*, *City of Los Angeles*, 288 F.3d at 398 (reversing denial of police union's motion to intervene as of right for all purposes); *Edwards v. City of Houston*, 78 F.3d 983, 989 (5th Cir. 1996) (en banc) (reversing denial of police union's motion to intervene for purposes of opposing proposed consent decree and appeal, vacating approval of consent decree, and ordering new fairness hearing regarding proposed consent decree); *United States v. City of Portland*, No. 12-cv-02265 (D. Or. Feb. 19, 2013), A-989-1009 (granting police union's motion to intervene as of right in the remedy phase of a proceeding regarding a proposed settlement agreement between the United States and the City of Portland).

Here, the District Court ruled first that the PBA's motion to intervene for purposes of appeal was not timely because the police unions could have intervened sooner. The court then went on to find that the PBA did not have a legal interest in the subject matter of the litigation. As a result, the District Court did not analyze the remaining two factors under Rule 24(a).[4]

## A. The District Court Erred In Holding That The Police Unions' Intervention Motions Were Untimely

As the District Court recognized, the "timeliness requirement" under Rule 24(a) must be "flexible" and take into account each case's particular factual circumstances. SPA-18 (quoting *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 594-95 (2d Cir. 1986)); *see also In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 198 (2d Cir. 2000). In so doing, the court may consider "(1) how long the applicant had notice of its interest in the action before making its motion; (2) the

[4] This Court generally reviews a denial of a motion to intervene for abuse of discretion because district courts ordinarily have "proximity to the dispute" and "usually have a better sense of the case's factual nuances." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 176 (2d Cir. 2001). In the unusual posture of this appeal, however, *de novo* review is appropriate because this Court assumed jurisdiction before the current district judge, who ruled solely on a paper record. In any event, a district court abuses its discretion, where, as here, it "applies legal standards incorrectly or relies upon clearly erroneous findings of fact, or proceed[s] on the basis of an erroneous view of the applicable law." *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 119 (2d Cir. 2007) (internal quotations omitted).

prejudice to the existing parties resulting from this delay; (3) the prejudice to the applicant resulting from a denial of the motion; and (4) any unusual circumstance militating in favor of or against intervention." *Id.* The timeliness requirement is liberally construed. *See, e.g.*, *City of Los Angeles*, 288 F.3d at 398.

### 1. The District Court Erroneously Failed To Consider The Nature Of The Intervention In Evaluating Timeliness

Far from engaging in a "flexible" or "liberal" analysis, the District Court concluded that "the intervention clock started to run from the moment the Unions became aware or should have become aware that they had interests in the subject matter of the litigation not otherwise protected by the existing parties to the lawsuit." SPA-19. The court then inquired at length into whether the unions should have known that their interests were implicated by each and every proceeding in this matter, and even in its predecessor, the *Daniels* case. Concluding that the unions were on notice, the District Court observed that the PBA should have sought to intervene at each of those points, without regard to the efficiencies of doing so or the adequacy of the City's prior defense of the case. *See* SPA-18-48.

The District Court misconstrued the timeliness requirement of Rule 24(a). Where, as here, the would-be intervenor does not ask the district court to reconsider prior determinations, "the time that the would-be intervenor first

became aware of the pendency of the case is not relevant to the issue of whether his application was timely." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977). Under these precedents, the PBA and the other unions reasonably could determine to await the outcome of the *Floyd* trial—which could have resulted in a judgment for the defense or a narrow remedy—before investing their limited resources in seeking to intervene and participate in future proceedings.

Indeed, the Supreme Court and numerous appellate courts have recognized that when the applicant seeks to intervene for the purpose of appeal, "[t]he critical inquiry . . . is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines*, 432 U.S. at 395-96. Thus, courts "often permit intervention even after final judgment, for the limited purpose of appeal, or to participate in future remedial proceedings." *United States v. City of Detroit*, 712 F.3d 925, 932 (6th Cir. 2013) (permitting a union to intervene as to future remedial proceedings in an environmental case that had been pending for 30 years) (internal citations omitted); *see also Edwards*, 78 F.3d at 1000 (permitting police unions to intervene prospectively in a civil rights case, where the motions to intervene were filed 37 and 47 days after the publication of a consent decree); *Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972) (permitting intervention "in the remedial, and if necessary the appellate, phases of [a] case" that had been pending for seven years).

The District Court described the unions as arguing for a "thirty-day rule" that would permit any form of intervention so long as the order to be challenged was issued within 30 days of the application. SPA-20. While the Supreme Court in fact has upheld intervention for purposes of appeal when filed within 30 days, *see United Airlines*, 432 U.S. at 394, the unions' position does not turn on any bright-line rule. Rather, the motion's timeliness must be measured "from the time [prospective intervenors] became aware that [their] interest would no longer be protected by the existing parties to the lawsuit." *Edwards*, 78 F.3d at 1000; *see also United Airlines*, 432 U.S. at 394 ("[A]s soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests."); *Dow Jones & Co. v. U.S. Dep't of Justice*, 161 F.R.D. 247, 252-53 (S.D.N.Y. 1995) (Sotomayor, J.) (finding intervention timely because movant intervened only after "she realize[d] that the [defendant] might not fully exercise its right to appeal"); *see also Elliott Indus. Ltd. P'ship v. BP Am. Prod. Co.*, 407 F.3d 1091, 1103 (10th Cir. 2005) ("Prior to the district court's entry of final judgment it was reasonable for [proposed intervenor] to rely on Appellees to argue the issue of subject matter jurisdiction.").

Beginning in the summer of 2013, then-Public Advocate de Blasio made a number of statements aligning himself with the Plaintiffs in this litigation. On

September 6, 2013, Mr. de Blasio filed an *amicus* brief in the District Court opposing a stay of the Remedies Order. S.D.N.Y. Dkt. No. 386 (*Floyd*), 131 (*Ligon*). On September 10, 2013, Mr. De Blasio won the Democratic mayoral primary. Accordingly, by September 2013, it had become increasingly likely that the next mayor might drop the City's defense of the case.

The District Court observed that the electoral process always presents the risk of a change in policy, SPA-26, yet taking this observation to its logical conclusion would mean that no party with an interest currently aligned with the government could ever be said to be adequately represented by the government. In this case, the PBA and the other unions plainly sought to intervene promptly after they "realize[d] that the [defendant] might not fully exercise its right to appeal." *Dow Jones*, 161 F.R.D. at 252-53.

Ultimately, the District Court erred because it relied upon cases in which the movants asked the court to revisit prior rulings or undo a *fait accompli*. By asking the trial court to redo already decided motions or to expand a closed record, the applicants caused prejudice that would have been avoided by an earlier application. For instance, in *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 596 (2d Cir. 1986), a residential segregation case, the trial court had ruled against the city on liability and then conducted a three-month proceeding to determine the location of a new multifamily housing site. Subsequently, nearby homeowners moved to

intervene to ask the court to redo the completed proceeding, and it was for that reason the motion was untimely.

Likewise, in *Farmland Dairies v. Commissioner of the New York State Department of Agriculture & Markets*, 847 F.2d 1038 (2d Cir. 1988), the prospective intervenors had actively participated in a state administrative proceeding prior to the litigation and had made a decision not to participate in the district court. The State and the defendant subsequently negotiated an arm's length compromise, which was presented to and approved by the district court. It was only after the Court "marked the case 'settled and discontinued with prejudice'" that the intervenors moved to intervene for "reargument" and "if necessary, to pursue an appeal." *Id.* at 1042. The court's decision that, under those circumstances, intervention was untimely is both unremarkable and completely distinguishable from this case. *See id.* at 1044.[5]

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[5] The other cases relied upon by the District Court are to the same effect. *See, e.g., D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001) (motion to intervene, filed three days before fairness hearing, was untimely); *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 194-95, 198-99 (2d Cir. 2000) (motion to intervene filed on last day to object to settlement, where negotiations and court proceedings about the settlement had been ongoing for months, was untimely); *Catanzano v. Wing*, 103 F.3d 223, 233-34 (2d Cir. 1996) (movants waited for "months (probably years)" before raising new arguments).

The District Court also suggested that the unions' motion was untimely when compared with the motion filed in *City of Los Angeles*, SPA-31-32,

### 2. The District Court Did Not Identify Any Cognizable Prejudice From The Timing Of Intervention

Despite devoting substantial analysis to the question of whether the PBA and the other unions could have intervened earlier, the District Court failed to identify any genuine prejudice caused "to the existing parties resulting from this delay." *Holocaust Victims Assets Litig.*, 225 F.3d at 198. Here, the PBA and the other unions sought to intervene shortly after the decisions were entered, well before any settlement negotiations, and with ample time to participate in the City's appeal on its original schedule.

Tellingly, the District Court devoted nearly thirty pages of the slip opinion to evaluating the notice question, but fewer than two pages to discussing prejudice. As one district court has recognized, "[i]n the absence of prejudice to the opposing party, even significant tardiness will not foreclose intervention." *Cook v. Bates*, 92 F.R.D. 119, 122 (S.D.N.Y. 1981). Yet the District Court treated prejudice almost as an afterthought and based it solely upon the "the legal wrangling and further delay" that the parties would face if forced to continue the merits appeal despite their wish to resolve this matter. SPA-47.

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which was filed shortly after the filing of the complaint. *City of Los Angeles*, 288 F.3d at 396. There, however, the complaint was filed "on the same day" as the proposed consent decree. *Id.* Thus, the union there intervened, as here, upon learning of the proposed remedy.

The District Court's prejudice analysis, howover, neglects the fact that "prejudice to the existing parties other than that caused by the would-be intervenor's failure to act promptly [is] not a factor meant to be considered" under Rule 24(a). *Stallworth*, 558 F.2d at 265. Indeed, "Plaintiffs are in the same position they would have been in if [the proposed intervenor] had intervened in an earlier stage of the litigation process, *i.e.*, they would be subject to the delay inherent in an appeal." *Dow Jones*, 161 F.R.D. at 253.

The PBA and the other unions did not impose any prejudice on the parties by waiting to intervene until the District Court had issued its decisions. Whether the police unions had moved to intervene at the start of the case, prior to class certification, or following the August 2013 orders simply does not have any bearing on how this case would have proceeded on appeal. The PBA sought to intervene on the same track as the City's appeal and before any discussions among the parties about a potential settlement. The timing of that motion caused no cognizable prejudice, and the court erred in deeming the application untimely.

**B. The PBA Has Direct, Protectable Interests In the Orders Below**

The District Court also erred in finding that the PBA and the other unions lack a direct interest in this action. The District Court took pains to emphasize that the injunction applied only to the City, but this Court has recognized that a party need not be bound by a judgment to seek intervention. *See United States v. Hooker*

*Chems.*, 749 F.2d 968 , 983 (2d Cir. 1984) (Friendly, J.). An intervenor is obliged to show a "direct, substantial, and legally protectable" interest, *Brennan*, 260 F.3d at 129, and an employee's interest may satisfy this standard when it stems from actions detrimental to the employee that the employer is bound by the court's order to take. *See Bridgeport*, 602 F.3d at 475. The District Court's formalistic analysis disregarded both the PBA and its officers' multiple interests in the outcome of this proceeding.

### 1. The PBA Has A Direct Interest In The Liability Findings And In Protecting Its State-Law Collective Bargaining Rights

As the Ninth Circuit has held, a police union has a "protectable interest in the merits phase of the litigation" where plaintiffs seek "injunctive relief against its member officers and raise[] factual allegations that [the union's] member officers committed unconstitutional acts in the line of duty." *City of Los Angeles*, 288 F.3d at 399-400. The PBA thus has an interest in challenging the injunction because it is premised upon the harmful findings against its members. The police officers' interests are likewise impaired by the sweeping reforms contemplated by the Remedies Opinion, which directs numerous acts that will have a direct impact upon the officers' day-to-day activities.

The PBA also has an interest in challenging the Remedies Opinion because it subverts the rights provided by state collective bargaining laws and threatens

decades of history and the past practice of bilateral collaboration between the City and its police unions. This interest, too, extends to the PBA's challenge to the liability findings because the validity and breadth of the remedies depend on the Liability Opinion. *See id.*; *see also Black Fire Fighters Ass'n of Dallas v. City of Dallas, Tex.*, 19 F.3d 992, 994 (5th Cir. 1994) (allowing intervenor fire fighters' association to challenge underlying issue of municipal liability).

**a. The PBA May Challenge The Liability Findings To Prevent The Remedy From Overriding Its State Law Rights**

The District Court recognized that in *City of Los Angeles*, the Ninth Circuit had permitted police unions to intervene to challenge a consent decree premised upon "allegations of misconduct against police officers," even though "no individual officers were named as defendants." SPA-64.[6] In *City of Los Angeles*, the district court denied intervention because "the injunction, by its plain language, ran only against the City of Los Angeles, not the [union] or its officers," SPA-65, but the Ninth Circuit reversed.

[6] Although the District Court faulted the unions for contending that the court had issued "injunctive relief against their members," SPA-54, the unions never argued that its members were existing parties to the injunction. Ironically, the language quoted by the court came from the Ninth Circuit's recognition in *City of Los Angeles* that an injunction against the City is effectively an injunction against its members as well.

The District Court sought to read *City of Los Angeles* narrowly based upon the fact that the consent decree in that case would have provided for a general release of the officers and so, if the consent decree was not approved, the officers could have been named as defendants in a civil suit. SPA-66. The Ninth Circuit, however, found that the officers had a cognizable interest based upon the allegations in the complaint, which had not named them as defendants. The mere fact that the consent decree, if approved, would have provided the officers with the *benefit* of a release, *see* C.D. Cal. Civ. No. 00-11769, Dkt. No. 123 ¶ 5, hardly provided the officers with an interest in intervening so as to *oppose* the approval of that decree. Rather, the Ninth Circuit approved intervention because the civil rights complaint had called the officers' actions into question and had threatened to burden their employment.

Were that unclear, the Ninth Circuit made this point explicit by also holding that the police unions had a right to intervene because a federal court remedial order, "as part of court-ordered relief after a judicial determination of liability," abridges any state law rights to bargain over the impact of those practices. *City of Los Angeles*, 288 F.3d at 400; *see also W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 771 (1983) ("Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective bargaining agreement without the Union's consent.").

Indeed, the District Court recognized the same point, noting that "[t]o the extent they claim an interest in a state law bargaining process between the Unions and the City, that process is not implicated where the unilateral changes at issue arise from a court order." SPA-82. But the District Court got it exactly backwards when, for this reason, it concluded that the unions' state law interests did not weigh in favor of intervention. Precisely because the orders may impair the unions' state law rights, they have a right to intervene to contest them in this Court.

Thus, as in *City of Los Angeles*, the PBA has a specific interest in appealing and seeking to overturn the District Court's findings that the City engaged in unconstitutional conduct. The PBA has "state-law rights to negotiate about the terms and conditions of [their] members' employment . . . and to rely on the [resulting] collective bargaining agreement[s]." *City of Los Angeles*, 288 F.3d at 400. As the District Court admitted, the Monitor's decisions would "inevitably touch on issues of training, supervision, monitoring, and discipline." *Remedies Op.*, 959 F. Supp. 2d at 677. These changes include the introduction of body cameras; changes to police training procedures; changes to the UF-250 forms and other mandatory paperwork; and alterations to the disciplinary and supervisory processes. These subjects fall within the collective bargaining rights granted to the PBA under state law, whether as mandatory or as permissive subjects of

bargaining. At a minimum, the PBA should be allowed to bargain about the effects of those policies on the terms and conditions of employment.

**b. The District Court Mistakenly Read The "Management Rights" Provision To Override The Unions' State Law Rights**

The District Court also dismissed the PBA's interests by relying upon the so-called "management rights" provision of the New York City Administrative Code. *See* N.Y.C. Admin. Code § 12-307(b). In so doing, the District Court purported to answer questions of state law that are the province of state labor boards or that are at least *permissible* subjects of bargaining, and it did so incorrectly and without a genuine appreciation of collective bargaining practice.

*First*, whether the City's "management rights" provision is preempted by the state labor law is an open question. New York's Taylor Law requires that the procedures of mini-PERBs, such as the Board of Collective Bargaining ("BCB"), be "substantially equivalent" to the Taylor Law and the PERB's own provisions. *See* N.Y. Civ. Serv. Law § 212(1). Because the Taylor Law includes no analogous provision to "management rights" clause in N.Y.C. Admin. Code § 12-307(b), and because that section conflicts with the Taylor Law's policy favoring collective bargaining regarding all terms and conditions of employment, the City's "management rights" clause fails to meet the substantial equivalence standard. *See Uniformed Firefighters Ass'n v. City of New York*, Decision No. B-39-2006, 77

OCB 39 (BCB 2006) (dissenting op. at 2-3, 8-9).

*Second*, even if the "management rights" provision applies, those matters are not necessarily removed from bargaining, but rather may be *permissible* subjects of bargaining. *See, e.g., Watertown v. N.Y.S. Pub. Emp. Relations Bd.*, 95 N.Y.2d 73, 79 (2000) ("[I]f the Legislature has manifested an intention to commit a matter to the discretion of the public employer, negotiation is permissive but not mandatory." (internal quotations omitted)). Ordinarily, where bargaining over a subject is permissive, the City may choose to consult or bargain with the unions to effectuate the most effective policies and to reflect the interests of the employees charged with implementing the policies. The District Court's order seems to leave no room for permissive bargaining or for meaningful bilateral discussions between the City and the unions. Instead, it either compels the City to adopt certain policies that affect the terms and conditions of the officers' employment or leaves those matters to an array of stakeholders (including community groups, academics, and plaintiffs' attorneys) that have no experience with police work or the NYPD's employment practices. The District Court's scheme thus would relegate the unions, despite their statutory negotiation rights, to a few isolated voices in a crowded room of interest groups.

*Third*, the District Court neglected the fact that state law has recognized additional exceptions to the management rights' provision. *See, e.g., L. 2507 & L.*

*3621, DC 367 v. City of New York*, Decision No. B-20-2002, 69 OCB 20, at 5-6 (BCB 2002) (training is a subject for bargaining when it "is required by the employer as a qualification for continued employment or for improvement in pay or work assignments").[7] For instance, the District Court faulted the NYPD's Quest for Excellence Program, "a set of new policies for evaluating the performance of officers and encouraging the use of performance goals," for allegedly encouraging officers to make unconstitutional stops. *See Liability Op.*, 959 F. Supp. 2d at 600. The BCB recently confirmed, however, that "the procedural aspects of employee performance evaluations are mandatory subjects of bargaining," and the procedural aspects include policies that are part of the Quest for Excellence Program. *See Patrolmen's Benevolent Assoc. of the City of N.Y., Inc. v. City of New York*, 6 OCB2d 36, at 5-8, 14, 19-21 (BCB 2013).

While the PBA indisputably enjoys a state law right to bargain over the procedures related to this program, the Remedies Opinion contemplates significant

[7] The District Court's quotation from *In re PBA v. PERB*, 6 N.Y.3d 563, 576 (2006), *see* SPA-73-74, is incomplete. Just after stating that the police commissioners have, since 1888, had discretion over "a question pertaining solely to the general government and discipline of the force," the New York Court of Appeals noted that "[t]his sweeping statement must be qualified today; as *Auburn* demonstrates, the need for authority over police officers will sometimes yield to the claims of collective bargaining. But the public interest in preserving official authority over the police remains powerful," just as "the Taylor Law policy favoring collective bargaining is a strong one." *In re PBA*, 6 N.Y.3d at 575, 576.

changes to these procedures, as well as other NYPD evaluation and disciplinary procedures, without regard to the PBA's state law rights. *See, e.g.*, *Remedies Op.*, 959 F. Supp. 2d at 683-84 (requiring the NYPD to "improve its *procedures* for imposing discipline in response to the Civilian Complaint Review Board's ('CCRB') findings of substantiated misconduct" and stating that "it may be appropriate" to implement measures such as "direct supervision and review of stop documentation by sergeants, indirect supervision and review by more senior supervisors and managers, improved citizen complaint *procedures*, [and] improved disciplinary *procedures*," among other changes in evaluation procedures (emphasis added)).[8]

The Remedies Opinion also would modify mandatory police training practices, which are a subject of bargaining to the extent the City requires them as a qualification for continued employment. *See Uniformed Firefighters Ass'n v. City of New York*, Decision No. B-20-92, 49 OCB 20, at 8 (BCB 1992); *City of New York v. Uniformed Firefighters Ass'n*, Decision No. B-43-86, 37 OCB 43, at

[8] Notably, the Remedies Opinion purports to expand the CCRB's role without any consideration of state law limits on its authority. The City Charter imposes certain restrictions on the CCRB's power, including that it may not obtain records "that cannot be disclosed by [other] law." N.Y.C. Charter § 440(d)(2). The City Charter also explicitly provides that that section should not be "construed to limit the rights of members of the department with respect to disciplinary action, including but not limited to the right to notice and a hearing." *Id.* § 440(e).

15 (BCB 1986). In addition, 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. *Remedies Op.*, 959 F. Supp. 2d at 681-83.

The Remedies Opinion would also require many officers to wear body cameras while on patrol. These body cameras, which unquestionably are not standard equipment, would record every act and utterance of police officers. The New York Public Employment Relations Board ("PERB"), which has jurisdiction over NYPD scope of bargaining petitions, 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. *See, e.g.*, *City of New York*, 40 PERB ¶ 3017, Case No. DR-119 (PERB Aug. 29, 2007).

In short, there can be little doubt that the Remedies Opinion would impose upon the PBA's members a host of new and burdensome procedures and requirements, many of which are defined and others that remain to be determined. The Opinion thus infringes upon the PBA's state law rights to bargain over these changes to terms and conditions and potentially other rights as well. The Remedies Opinion also threatens to disrupt established practice between the unions and the City, grounded in the New York State Taylor Law—including a history of

productive bilateral negotiations over a host of matters—by replacing it with a system whereby changes to terms and conditions of employment may be imposed by the District Court after negotiations among the various "stakeholders," including community leaders, religious groups and plaintiffs' attorneys. This untested scheme, created without regard for the existing laws of the State of New York, would undermine the unions' rights under the collective bargaining laws and the unions' collective bargaining agreements as "the sole and exclusive bargaining representative" for each of their respective unions, and would threaten a decades-old system that has maintained labor peace in the NYPD. Unless intervention is granted, the PBA would have no forum that would ensure that it can object to changes that would contradict the collective bargaining agreement or alter existing procedures subject to bargaining.

#### c. The Possibility That The District Court's Order Could Impact The Unions' Collective Bargaining Rights Suffices For Intervention

While the District Court clearly misread the state law governing bargaining between the City and its employees, the court also ignored established precedent requiring federal courts to avoid wading into such a quintessentially state law area, where there is a possible conflict between a remedial order and the unions' collective bargaining rights. If a proposed remedial order "contains—*or even might contain*—provisions that contradict the terms" of the collective bargaining

agreement, then the union members have "a protectable interest." *City of Portland*, No. 12-cv-02265, at 7, A-995 (emphasis added). Thus, any impact, or even any arguable impact, upon the PBA's labor rights provides a basis for intervening as of right under Rule 24(a).

The City plainly has a state-law obligation to negotiate with the unions over topics that are bargainable. *See Watertown*, 95 N.Y.2d at 78. New York's public policy in favor of collective bargaining is "'strong and sweeping,'" and to overcome the presumption in favor of bargaining, a statute must be "'plain' and 'clear'" or "leave[] 'no room for negotiation.'" *Id.* at 78-79 (internal citations omitted). The District Court did not point to any such statute unmistakably removing the matters at issue here from collective bargaining. Moreover, if a union and the City disagree over whether or not a particular proposed change is bargainable, then state law provides for a specific process by which the BCB (or, in certain cases, the PERB) will resolve the disagreement.

The unions have a right to ask the relevant labor board, which has the requisite subject matter expertise, to make determinations regarding any of the myriad subject matters contemplated by the Remedies Opinion and to appeal that determination where necessary, through the state courts or to the PERB. *See* N.Y.C. Admin. Code § 12-308 (providing for judicial review of BCB decisions); N.Y. Civ. Serv. Law § 205(5)(d) (providing for PERB review of BCB decisions).

When determining the bargainability of a subject that is asserted to be a working condition, the Board (or PERB where applicable) must weigh the interests of both the employer and the union. *See City Employees Union, Local 237 v. N.Y.C. Dep't of Homeless Servs.*, 2 OCB2d 37, at 14 (BCB 2009) (requiring a "case-by-case determination [that] takes the form of a balancing test" to determine "the extent of the parties' duty to negotiate").

In view of this comprehensive administrative scheme, courts have recognized that consent decrees that touch on labor rights should provide a mechanism to allow the state labor boards to rule on matters within their jurisdiction, *see City of Los Angeles*, 288 F.3d at 400-01, and further should permit unions to intervene so that they may formally present these issues to the District Court as it fashions a remedy and so that they may take an appeal, if necessary. *See City of Los Angeles*, 288 F.3d at 400-01 (rejecting the district court's ruling that *amicus curiae* status would be sufficient "because such status does not allow the [union] to raise issues or arguments formally and gives it no right of appeal"); *see also E.E.O.C. v. A.T. & T. Co.*, 506 F.2d 735, 741-42 (3d Cir. 1974); *Stallworth*, 558 F.2d at 268-69; *CBS, Inc. v. Snyder*, 798 F. Supp. 1019, 1023 (S.D.N.Y. 1992), *aff'd*, 989 F.2d 89 (2d Cir. 1993). Here, the District Court ignored the unions' interests in denying intervention. The PBA has stated a

protectable interest in the content of both the Liability and the Remedies Order, and the District Court erred in ruling to the contrary.

### 2. The PBA Has A Direct Interest In Vindicating Its Members' Reputational Interests

The District Court also erred in holding that the reputational harm caused by the court's orders was insufficient to support intervention. As the District Court recognized, where this Court has "addressed reputational harm as a basis for intervention under 24(a)," it has "rejected it when the reputational harm was not directly related to the underlying action." SPA-60 (citing *Sierra Club v. U.S. Army Corps of Engineers*, 709 F.2d 175, 176 (2d Cir. 1983); and *N.Y. News Inc. v. Newspaper & Mail Deliverers' Union of N.Y.*, 139 F.R.D. 291, 293 (S.D.N.Y. 1991), *aff'd sub nom. N.Y. News Inc. v. Kheel*, 972 F.2d 482, 486 (2d Cir. 1992)).

There is no sense here, however, in which the reputational harm alleged is not "directly related" to the underlying action. Indeed, the District Court's orders against the City depend entirely upon the erroneous findings that countless officers have committed hundreds of thousands of unconstitutional stops and frisks. The extraordinary number of these allegedly unlawful actions was a necessary condition to holding the City liable.

This is similarly not a case in which a general finding of reputational harm would have no impact upon the PBA's members. To the contrary, as discussed

above, these reputational findings have directly impacted individual officers and will require the City to implement policies that will directly affect the officers' daily activities. Thus, this case is much like the factual scenario that this Court addressed in *Sierra Club*. There, the Court observed that intervention to address reputational harm may be permitted if the court's order rested upon findings that an employer could not hire or rely upon the prospective intervenor because he was "professionally incompetent." *Sierra Club*, 709 F.2d at 177. Where the reputational harm is inseparable from adverse legal findings and effects, reputational harm may give rise to an interest under Rule 24(a).

The District Court also relied upon two cases concerning whether a party was "indispensable" under Rule 19(b). But the elements for "necessary parties" under Rule 19(a) (which track the elements of Rule 24(a), *see MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 390 (2d Cir. 2006)), cannot be conflated with the higher threshold for "indispensable parties" under Rule 19(b). Thus, in *Pujol v. Shearson Am. Exp., Inc.*, 877 F.2d 132, 136 (1st Cir. 1989) (Breyer, J.), the First Circuit held that an absent subsidiary was not "indispensable" to litigation against the parent company simply because the parent was alleged to be vicariously liable for the actions of the subsidiary. The court recognized that the parent had "every incentive to bring about findings that would work in the subsidiary's favor." *Id.* (In this case, unfortunately, parallel incentives no longer

exist.) In addition, the District Court relied upon similar facts in *Pasco Int'l (London) v. Stenograph Corp.*, 637 F.2d 496 (7th Cir. 1980), where the defendant employer had argued that its absent employee was an indispensable party. Neither case says anything at all about whether the PBA and its members may assert a relevant interest under Rule 24(a).

In contrast to the District Court's suggestion, the PBA does not seek to intervene here on the ground that a particular witness's testimony was found not credible or that the findings against the City cast officers collectively in a bad light. Rather, the PBA seeks to intervene because the deeply flawed method of proof led the prior district judge to make individualized findings about the actions of both named and unnamed officers, and because the Remedies Opinion will affect these officers' daily activities just as surely as if they had been named in the injunction. Where, as here, reputational injury will have an ongoing impact upon the PBA and its members, the PBA satisfies the legal interest requirement under Rule 24.

### C. The PBA's Motion Satisfied The Other Elements Of Rule 24(a)

The District Court did not decide whether this suit could impair the interests of the PBA or whether the existing parties might adequately protect those interests. However, for the reasons discussed above, the dictates of the Remedies Opinion will affect the PBA's members' day-to-day business in ways that are directly and concretely different from all other non-parties to this litigation. To reiterate

briefly, if the PBA does not intervene, the PBA and its members would effectively be bound in many ways that would adversely affect them. The Remedies Opinion envisions a process in which the NYPD will be ordered to modify its existing policies, training, discipline, equipment, and supervision. Those matters will directly affect the unions' members in their day-to-day activities and collective bargaining rights. *See AT & T*, 506 F.2d at 742; *see also City of Los Angeles*, 288 F.3d at 401. Their reputations are likewise at stake.

Moreover, the PBA easily satisfies the inadequacy requirement of Rule 24(a), which requires only that "the applicant show[] that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972); *see also City of Los Angeles*, 288 F.3d at 398. Unquestionably, the City does not now represent the PBA's interests. In addition, with respect to collective bargaining matters, the City's interests have never been aligned with the PBA's. *See Vulcan Soc. of Westchester Cnty., Inc. v. Fire Dept. of White Plains*, 79 F.R.D. 437, 441 (S.D.N.Y. 1978) ("Although the municipalities involved have the same interest in seeking qualified and efficient fire personnel, it could hardly be said that all the interests of the union applicants are the same as those of the municipalities."). The City acknowledged the same point in previously consenting to the PBA's intervention request. *See* A-969-970.

Finally, the PBA is uniquely situated to provide its members' views on appeal and in any further remedial proceedings. *See Natural Res. Def. Council v. Costle*, 561 F.2d 904, 912 (D.C. Cir. 1977) (granting intervention because "the appellants' interest is more narrow and focu[s]ed than EPA's, being concerned primarily with the regulation that affects their industries"); *N.Y. Pub. Int. Research Grp. v. Regents*, 516 F.2d 350, 352 (2d Cir. 1975) ("[T]here is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the [state authority party]."). The PBA and the other unions have a distinct perspective and strong views on the many issues raised by the District Court's orders. They thus satisfy the requirements for appeal and for participating in future remedial proceedings, if any, following the appeal.

## POINT II

## ALTERNATIVELY, THE PBA SHOULD BE GRANTED PERMISSIVE INTERVENTION

In the alternative, the PBA meets the standard for permissive intervention. Fed. R. Civ. P. 24(b). The threshold requirement for permissive intervention is a "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). In addition, courts may consider factors such as whether the putative intervenor will benefit from the application, the nature and extent of its interests, whether its interests are represented by the existing parties,

and whether the putative intervenor will contribute to the development of the underlying factual issues. *See, e.g.*, *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 191-92 (2d Cir. 1978).

While the District Court has discretion regarding permissive intervention under Rule 24(b), this Court reviews for abuse of discretion. *See, e.g.*, *Restor-A-Dent Dental Labs., Inc. v. Certified Alloy Prods., Inc.*, 725 F.2d 871, 876-77 (2d Cir. 1984) (if the prejudice to the existing parties had been the only reason for denying permissive intervention shortly before trial, then the trial judge would have abused his discretion because the plaintiff had clearly prepared the necessary evidence and would not be prejudiced); *see also Venegas v. Skaggs*, 867 F.2d 527, 530-31 (9th Cir. 1989), *aff'd on other grounds sub nom. Venegas v. Mitchell*, 495 U.S. 82 (1990) (district court abused its discretion in denying permissive intervention where all factors weighed in favor of intervention for particular purpose).

The PBA's appeal of the underlying Orders cannot cause cognizable prejudice, since the parties have no cognizable interest in precluding an appeal of highly questionable findings. Based upon the extraordinary circumstances of this case, including the extent of the harm that the NYPD and its officers will face if the District Court's orders go unreviewed, the PBA meets the standard for permissive intervention. The PBA's members' conduct is directly at issue in the

Liability Order, and the Remedies Opinion, if implemented, would directly affect the members' day-to-day activities and their collective bargaining rights. The PBA's participation would not unduly delay or cause any cognizable prejudice to any parties in this matter. Accordingly, the District Court abused its discretion in denying permissive intervention in this unique case.

## POINT III

## THE DISTRICT COURT ERRED IN HOLDING THAT THE PBA LACKS ARTICLE III STANDING

The District Court also erred in holding that the PBA lacked Article III standing to appeal the Liability and Remedies Orders. *See Diamond v. Charles*, 476 U.S. 54, 68 (1986).[9] As this Court has recognized, "[t]o have standing at the appellate stage . . . a litigant must demonstrate 'injury caused by the judgment rather than injury caused by the underlying facts.'" *Tachiona v. United States*, 386 F.3d 205, 211 (2d Cir. 2004). The litigant need not be bound by the judgment, *id.*, but must demonstrate, *inter alia*, an "injury in fact" that is "concrete and particularized." *Id.* at 210, 212; *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

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[9] The District Court suggests that, as a formal matter, the PBA's standing to appeal would be a matter for this Court. In any event, the dismissal of a claim for lack of standing is reviewed *de novo*. *Wight v. BankAmerica Corp.*, 219 F.3d 79, 86 (2d Cir. 2000).

So long as the applicant can show injury in fact, Article III does not pose a significant bar. Article III requires only a "concrete and particularized" injury, which can be as abstract as seeking to protect "'the aesthetic and recreational values'" of an area the plaintiff uses. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180, 183 (2000). Its "contours" are "very generous" and are satisfied by "'an identifiable trifle of injury.'" *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.*, 730 F.3d 208, 219 (3d Cir. 2013) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 n.14 (1973)). The standing requirement is designed to separate plaintiffs who allege no more than "generalized grievance[s]," such as the referendum sponsors in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013), from those who can demonstrate a concrete stake in the proceeding.

Thus, the Fifth Circuit recognized a union's standing to intervene and challenge on appeal a ruling affecting its members' wages. *See Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 456-58 (5th Cir. 2005). And in a closely analogous case, the Supreme Court found that a government officer had standing to appeal a finding that his actions were unconstitutional, even though he had prevailed on a qualified immunity defense. As the Court explained, the "judgment may have prospective effect," because "the official regularly engages" in the acts found unconstitutional. *Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011).

The PBA has amply demonstrated a concrete and particularized injury caused by the judgment. The PBA has associational standing to represent the interests of its members and to vindicate their collective bargaining rights. *See, e.g.*, *United Food & Comm'l Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 551-53 (1996). Far from positing only a "generalized grievance," the PBA has shown that the judgments would directly impair the police officers' day-to-day activities, including training, discipline, paperwork, and equipment, as well as their professional reputations and their collective bargaining rights. Moreover, the injunction requires the City to compel its officers to comply with the District Court's view of the law and the ostensibly appropriate remedies. *See, e.g.*, *Remedies Op.*, 959 F. Supp. 2d at 684 ("The [mandated FINEST] message should order all NYPD personnel to comply immediately with those standards.").

Moreover, the District Court did not address at all the fact that the PBA's members will be *directly affected* by the imposition and implementation of the Remedies Order, since the City will be bound to impose new training, equipment, forms, and discipline, among other concrete effects, on the PBA's members. This concrete harm also is more than sufficient to show Article III standing and is not attenuated at all. *See, e.g.*, *Bridgeport*, 602 F.3d at 469.

The PBA also has standing because the District Court's orders finding widespread constitutional violations, including intentional racial discrimination,

inflict serious reputational harm. "The Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing." *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 161-62 (2d Cir. 2003) (citing cases). Thus, in *Gully*, this Court held that the appellant had standing to challenge findings that she had engaged in misconduct, even though no other punishment had been imposed on her. *Id.* at 162. Similarly, in *ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010), this Court held that the reputational harm caused by a memorandum that contained restrictions on the plaintiff established standing to challenge the reputational harm done by the memorandum. *Id.* at 134-35. And as the Third Circuit recently held, the NCAA had standing to challenge a New Jersey law that would have allowed increased gambling because that law would "taint" the leagues with an "unwanted association with an activity they (and large portions of the public) disapprove of—gambling." *NCAA*, 730 F.3d at 218, 220. The court found standing even though the law did not restrict the NCAA at all or require it to do anything; rather, the law allowed others to do something that was previously prohibited. *Id.*

The District Court erred in describing the reputational harm visited on the PBA's members as speculative or attenuated. The propriety of years of law enforcement conduct by the PBA's members was the central issue at trial, not a collateral matter, and the Remedies Order plainly affects their day-to-day activities

as well as their labor rights. The District Court suggested that the unions' interests were similar to those of the deputy county clerk in *Perry v. Schwarzenegger*, 630 F.3d 898, 903-04 (9th Cir. 2011), who was charged with issuing licenses for same-sex marriages and sought to appeal the order striking down Proposition 8. But the deputy clerk could hardly claim that Proposition 8 had been invalidated because of the clerk's actions (nor could the clerk allege that any collective bargaining rights were impacted by the order).

Similarly, the District Court erroneously relied upon *Mahoney v. Donovan*, 824 F. Supp. 2d 49, 68 (D.D.C. 2011), *aff'd on other grounds*, 721 F.3d 633 (D.C. Cir. 2013). There, the plaintiff, an administrative law judge, sought to bring claims under the Administrative Procedure Act and argued that he had standing to challenge actions *by others* within the administrative justice system, actions with which he disagreed and that allegedly had besmirched his reputation for judicial independence. *Mahoney*, 824 F. Supp. 2d at 65-68. That indirect theory of reputational harm is hardly comparable to the direct reputational injury caused by the findings against the PBA's member officers.

## POINT IV

## THE DISTRICT COURT LACKED JURISDICTION TO ISSUE THE INJUNCTION

Separate from the merits of the intervention motion, Plaintiffs' claims suffer from a fundamental jurisdictional flaw. Plaintiffs have brought a class action on behalf of individual members who allegedly fear they might be stopped and frisked unlawfully in the future. No single plaintiff, named or unnamed, however, can demonstrate a real and immediate threat of being unlawfully stopped in the future, and therefore no plaintiff in this case has ever had Article III standing to pursue injunctive relief against the City.

The PBA makes this argument last, not because it is unimportant, but because, having consolidated this appeal with the pending merits appeal, the Court may elect to address this issue on the merits appeal, should the Court grant the police unions' the right to intervene. *Cf. Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422 (2007). However, Article III standing is an issue that the Court may raise *sua sponte* at any time and *may not be waived by the parties*. *See, e.g., United States v. Hays*, 515 U.S. 737, 742 (1995) ("The question of standing is not subject to waiver . . . ."). Accordingly, the Court is "required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us." *Id.* (internal quotations omitted); *see also*

*Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 489 (2d Cir. 2009). Thus, at some point, the Court must review the District Court's jurisdiction over this case, whether or not the parties wish it to do so, and without regard to the intervention motions under Rule 24.

The Supreme Court's decision in *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), effectively resolves the question of Plaintiffs' standing. There, the Court held that private plaintiffs, in contrast to the U.S. Department of Justice, do not have standing to leverage past instances of alleged unlawful police conduct into institutional reform litigation. In *Lyons*, the plaintiff alleged that he had been subjected to an unlawful restraint by the LAPD, that the LAPD had a policy of such unlawful restraints, and that he sought to enjoin the City of Los Angeles from engaging in future such restraints against him and others similarly situated. *See id.* at 100. The district court issued the injunction and ordered "[a]n improved training program and regular reporting and record keeping," *id.*, and the Ninth Circuit affirmed.

The Supreme Court reversed and vacated the injunction. The Court held that the fact that the named plaintiff had previously suffered an alleged constitutional injury because of a police stop does not itself establish a sufficiently plausible threat of future injury so as to justify an injunction:

> That Lyons may have been illegally choked by the police . . . , while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers who would engage in the same unconstitutional conduct at issue.

*Id.* at 105; *see also Shain v. Ellison*, 356 F.3d 211, 216 (2d Cir. 2004) (*Lyons* requires a likelihood of future harm and the existence of an unlawful policy); Katherine Macfarlane, *New York City's Stop and Frisk Appeals Are Still Alive*, Practicum, Brooklyn Law School (Dec. 26, 2013), *available at* http://practicum.brooklaw.edu/articles/new-york-city%E2%80%99s-stop-and-frisk-appeals-are-still-alive.

In distinguishing *Lyons* in its opinion certifying the class, the District Court held that David Ourlicht, a named plaintiff, had alleged that he was stopped unlawfully three times. *See Floyd v. City of New York*, 283 F.R.D. 153, 169-70 (S.D.N.Y. 2012). Even if this were true, the fact that a particular individual has been stopped more than once does not by itself create a likelihood of future injury. It does not even establish that the person has been subjected to unlawful conduct. Indeed, after reviewing the facts and circumstances of Mr. Ourlicht's stops at trial, the court concluded that Mr. Ourlicht had been stopped unlawfully only once. *See Liability Op.*, 959 F. Supp. 2d at 657 ("I cannot find that Ourlicht's Fourth or Fourteenth Amendment rights were violated" on February 21, 2008); *id.* ("I cannot

find that the stop and frisk [Ourlicht alleged occurred in June 2008] lacked reasonable suspicion"). And the Court likewise found at trial that named plaintiffs Dennis and Floyd had not been unconstitutionally stopped. *See id.* at 650-52. The District Court did not find that any of the Plaintiffs had demonstrated a sufficiently plausible threat of future injury to justify a City-wide injunction.

Although *Lyons* dooms all of Plaintiffs' claims, Plaintiffs also lacked Article III standing to seek class-wide relief for the purported racial discrimination under Fourteenth Amendment, because no named class members had suffered intentional racial discrimination (let alone proved a likelihood that they would suffer intentional racial discrimination in the future). On the contrary, the only person the District Court found to have suffered racial discrimination was Cornelio McDonald, an unnamed class member. *See Liability Op.*, 959 F. Supp. 2d at 632-33.

As the Supreme Court has held, even a named plaintiff in a class suit cannot obtain injunctive relief on behalf of the class for an injury that the named plaintiff did not in fact suffer. "That a suit may be a class action . . . adds nothing to the question of standing, for even named plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent." *Lewis v. Casey*, 518 U.S. 343, 357 (1996) (internal

quotations omitted; alteration in original). In other words, "if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *see also Cent. States Southeast v. Merck-Medco Managed Care, L.L.C.*, 433 F.3d 181, 199 (2d Cir. 2005) (collecting cases).

Importantly, a plaintiff must establish standing at every stage in the proceedings in accordance with the standard applicable to that stage: At the pleading stage, allegations are sufficient, but at trial, actual proof that the plaintiff suffered an injury is necessary. *Lewis*, 518 U.S. at 358. Thus, in *Lewis*, the Court "eliminate[d] from the proper scope of [the] injunction provisions directed at" problems that did not affect the only named plaintiffs. *Id.* Here, the named plaintiffs had no standing to obtain injunctive relief, particularly as to an injunction that extended to purported racial discrimination. For this reason, too, the District Court lacked Article III jurisdiction to grant injunctive relief. Since this matter may not be waived, it is entirely independent of the PBA's right to intervene in this case.

## CONCLUSION

For these reasons, the PBA respectfully requests that the Court reverse the District Court's denial of its motion to intervene and set a schedule for renewed

merits briefing of the appeals of the District Court's Liability and Remedies Orders.

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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 Roman proportional font and contains 13,792 words and thus is in compliance with the type-volume limitation set forth in Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure.

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