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

REPLY BRIEF FOR APPELLANT PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.

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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 OFFICERS ERIC HERNANDEZ, Shield #15957, in his individual capacity, NEW YORK CITY POLICE OFFICER CHRISTOPHER MORAN, in his individual capacity, POLICE OFFICER JOHNNY BLASINI, POLICE OFFICER GREGORY LOMANGINO, POLICE OFFICER JOSEPH KOCH, POLICE OFFICER KIERON RAMDEEN, JOSEPH BERMUDEZ, POLICE OFFICER MIGUEL SANTIAGO, POLICE OFFICERS JOHN DOES 1-12,

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

The City does not deny the sweeping impact that the District Court's injunction will have upon the NYPD and its officers. The City contends, however, that if the Mayor wishes to drop a meritorious appeal and subject the NYPD to the supervision of the federal judiciary, then the unions and their members must bear its burdens as well. Thus, the 35,000 persons most directly affected by the injunction would be left without any legal recourse.[1]

The City, as well as the private plaintiffs, misread Federal Rule of Civil Procedure 24. That rule provides the PBA and the other unions with the right to intervene where the judgment "may as a practical matter impair" their ability to protect their legal interests. Fed. R. Civ. P. 24(a)(2). The District Court's orders will directly affect the PBA's members' day-to-day activities and their reputations, and will impair the unions' collective bargaining rights. Those interests justify the PBA's intervention to prosecute the pending merits appeals, thereby ensuring that the District Court injunction receives review and that the PBA's members are not burdened by a protracted remedial process lacking any support in the law.

1 Terms are as defined in the PBA's Appellant's Brief ("PBA Br.").

The City tells the Court that its acquiescence in the injunction reflects the policy choice of the new Mayor. Yet the City's request that the District Court run the NYPD constitutes the antithesis of a policy judgment. It is an abdication of responsibility. The Mayor undoubtedly may set policies for the NYPD, but those policy decisions are circumscribed by the collective bargaining rights of the police unions and the Mayor's ultimate accountability to the electorate. The District Court's remedial powers are not subject to either check.

Under the prior Administration, the City won an appellate stay and filed a 100-page appeal brief. Even as it now seeks to acquiesce in the judgment, the City does not suggest that it would lose the appeal. Indeed, if Appellees here believe the decisions below are legally sound, then they should welcome appellate review to ensure the public acceptance of the decisions' legitimacy. The City also previously consented to the unions' intervention motions and acknowledged that the unions had cognizable interests at stake. Invested as it is in avoiding appellate scrutiny, the City now asks the Court to disregard this prior consent.

In opposing intervention, the City and the private plaintiffs conflate what the PBA *could* have done in this case with what it is required to do. Thus, they rely upon the District Court's conclusion that the PBA could have intervened earlier,

and therefore, was obliged to do so. No rule obliges an applicant to intervene at the earliest possible opportunity. To the contrary, this Court has recognized that the "timeliness requirement" is "flexible." *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 594-95 (2d Cir. 1986). Where the applicant seeks to intervene for appeal, the "critical inquiry" is whether the intervenor acted "promptly" after the judgments. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977).

The PBA here reasonably relied upon the City's vigorous defense of this case up through the District Court's August 2013 orders. At that time, the impact of the District Court's orders had become evident, and the PBA determined that with the election approaching, it could not rely upon the City to "adequately represent" their interests through the appeal. Fed. R. Civ. P. 24(a)(2). The District Court did not identify any reason why the PBA would have chosen to intervene earlier, and the parties have not pointed to any prejudice resulting from the PBA's reliance upon the City to defend its interests through trial. The timeliness issue here is nothing more than a makeweight to avoid addressing the police unions' arguments on the merits.

Appellees' argument that the PBA's interests are not cognizable under Rule 24 is equally meritless. Appellees cannot dispute that this Court has recognized

that an applicant may intervene without being formally bound by the judgment, or that employees may intervene to prevent their employer from being compelled to take an action contrary to their interests. *See Bridgeport Guardians, Inc. v. Delmonte*, 602 F.3d 469, 475 (2d Cir. 2010); *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984) (Friendly, J.). And Appellees cannot deny that many other courts, such as the Fifth, Sixth and Ninth Circuits, have permitted public employee unions to intervene to raise objections to injunctions that would impair their interests, including injunctions against police departments much like the present one. *See, e.g.*, *United States v. City of Detroit*, 712 F.3d 925, 932 (6th Cir. 2013); *United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002); *Edwards v. City of Houston*, 78 F.3d 983, 989 (5th Cir. 1996) (en banc).

Here, the PBA has "a protectable interest in the merits phase of the litigation," because plaintiffs "raise[] factual allegations that its member officers committed unconstitutional acts in the line of duty." *City of Los Angeles*, 288 F.3d at 399. And it has protectable interests in the remedies because its "state-law rights to negotiate about the terms and conditions of its members' employment" may be

diminished "as part of court-ordered relief after a judicial determination of liability." *Id.* at 400.

Appellees admit that the District Court's sweeping injunction affects policies relating to training, supervision, monitoring, and discipline. Yet they argue that none of these matters do, or can, affect the unions' collective bargaining rights. Their own briefs demonstrate, however, that the state law questions about what practices may, must, or may not be subject to bargaining involve conflicting policies, exceptions, and balancing tests. These questions are determined by bilateral negotiations between the unions and their employer, with a state administrative and judicial process available to resolve disputes.

The District Court's regime does not permit this longstanding state law process to coexist with the federal remedial process. If there is a dispute as to the scope or subjects of bargaining, the state administrative body—not a federal judge—should decide bargainability. The parties in *City of Los Angeles* sought to recognize this by including an escape valve for the collective bargaining process, but the Remedies Order here contains no such mechanism. The District Court could not reasonably conclude that its injunction will not have any cognizable impact on the police unions' bargaining rights.

Appellees also urge that the PBA should not be permitted to intervene because it would lack Article III standing to appeal. While Article III's requirements are not identical to Rule 24's, they do overlap, and the PBA's demonstrated interests readily create a case or controversy. The PBA does not seek to intervene to object to a credibility judgment or to litigate a generalized grievance. Rather, the PBA seeks to appeal opinions that have directly impugned the integrity of its members (both named and unnamed), that will alter the daily terms of their employment, and that will impair the unions' collective bargaining rights. All of these interests establish Article III standing.

Ironically, the real standing question in this appeal concerns the standing of the private plaintiffs to pursue institutional reform through a private action to challenge individual stops. Under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the District Court did not have subject-matter jurisdiction under Article III. Appellees urge this Court to avoid this jurisdictional issue as collateral to the intervention order, but this Court has ruled precisely to the contrary, holding that there is a "special obligation" to review the District Court's subject-matter jurisdiction over the underlying action, even on an interlocutory appeal from an intervention order. *See Am. Lung Ass'n v. Reilly*, 962 F.2d 258, 262 (2d Cir.

1992). Whether the Court addresses this issue on this appeal or on the merits appeal may be a matter of judicial discretion, but Plaintiffs are mistaken to think that the issue may be avoided entirely.

ARGUMENT

POINT I

THE DISTRICT COURT ERRED IN DENYING THE PBA'S MOTION TO INTERVENE AS OF RIGHT

A. The PBA's Motion Was Timely

In finding the PBA's motion untimely, the District Court reasoned that as soon the PBA was on notice its interests were implicated, it was obliged to move to intervene, even though the City was vigorously defending the PBA's interests up through the end of trial. That is simply not the legal standard.

The Supreme Court has made clear that when an applicant seeks to intervene for purposes 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. Applying *United Airlines*, courts "often permit intervention even after final judgment, for the limited purpose of appeal, or to participate in future remedial proceedings." *City of Detroit*, 712 F.3d at 932 (citation omitted); *see also* PBA Br. 23-25 (citing cases from the Fifth, Sixth,

Tenth and D.C. Circuits). For instance, in *Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972), a case approved by *United Airlines*, 432 U.S. at 395 n.16, the application was timely even though the union members sought to intervene "after the action was tried, and some seven years after it was filed." *Hodgson*, 473 F.2d at 129. The proposed intervenors "sought only to participate in the remedial, and if necessary the appellate, phases of the case," and thus, timeliness posed "no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved." *Id.*

Because these cases are clearly on point, Appellees argue that the District Court could ignore them because "it is by definition not an abuse of discretion to choose not to apply out-of-circuit case law." Floyd Br. 40. The *Floyd* Plaintiffs do not cite any authority for such a curious rule of law. Plaintiffs do not argue that *United Airlines* applies differently in this Circuit than in others, or that this Circuit's intervention law differs from others in any material respect. To the contrary, this Court also has acknowledged that applicants may intervene for purposes of appeal. *See Bloom v. FDIC*, 738 F.3d 58, 62 (2d Cir. 2013) (recognizing that *United Airlines* provides for a motion to intervene after final

judgment for purposes of appeal); *Drywall Tapers & Pointers v. Nastasi & Assoc., Inc.*, 488 F.3d 88 (2d Cir. 2007) (recognizing that a non-party may move to intervene and take an appeal after the entry of a consent decree).

Courts also consider whether the applicant sought to intervene promptly after "it became clear . . . that the interests of the [intervenors] would no longer be protected by" the existing parties. *United Airlines*, 432 U.S. at 394; *see also Edwards*, 78 F.3d at 1000 (timeliness should be measured "from the time [proposed intervenors] became aware that [their] interest would no longer be protected by the existing parties to the lawsuit"); *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 where the movant "had some basis for believing that [defendant] would adequately protect her interest" and only intervened after "she realize[d] that the [defendant] might not fully exercise its right to appeal").

Here, the City vigorously defended against the liability and remedies orders that the Plaintiffs sought, including defending the actions of the individual officers who were the subject of the anecdotal evidence at trial. *See, e.g.*, S.D.N.Y. Dkt. No. 364 (*Floyd*) at 2-4 (City's post-trial brief). Appellees have never explained how the proceedings below might have differed if PBA had intervened sooner, nor

have they identified any prejudice from the PBA's reasonable decision to intervene only after the trial. At that time, the impact of the District Court's orders had become manifest, and the impending election raised the possibility that, months down the road, the City might change its position and stop defending the appeal. The PBA then moved to intervene "promptly" after the judgment and for "the limited purpose of appeal, [and] to participate in future remedial proceedings." *City of Detroit*, 712 F.3d at 932.

In response, Appellees rely upon several decisions where this Court denied intervention by applicants who had waited to intervene until the eve of a fairness hearing or even after the case had been terminated. As discussed in the PBA's Appellant's Brief, none of those cases presents circumstances remotely comparable. *See* PBA Br. 26-27 & n.5. Appellees rely heavily upon *Farmland Dairies v. Commissioner of the New York State Department of Agriculture & Markets*, 847 F.2d 1038 (2d Cir. 1988), but there, the applicants sought to intervene after the case had been terminated and marked "'settled and discontinued with prejudice.'" *Id.* at 1042.

While that by itself would distinguish *Farmland Dairies*, the case stands even further afield. Farmland Dairies, a New Jersey milk distributor, had pursued

a state administrative challenge and a federal constitutional challenge against the State of New York, which had restricted its distribution rights. The distributor's competitors actively participated in the state administrative hearing, but chose not to do so in the federal case. After the federal court granted Farmland Dairies a preliminary injunction, it entered into arm's length negotiations with the State and agreed to drop its still-pending damages claims in return for the State's agreement not to appeal. *See id.* at 1044. That settlement was announced by the Governor and read into the court record several days later, and the case was marked terminated with prejudice. Only *then* did the competitors move to intervene for "reargument" and "if necessary, . . . [to] pursue an appeal." *Id.* at 1042.

Farmland Dairies thus does not resemble this case. Here, the PBA sought to intervene promptly after the District Court's orders and at a time when the case was very much alive and the PBA's interests defended—long before the City began to discuss a potential settlement. Moreover, in contrast to *Farmland Dairies*, intervention would not "jeopardize" any arm's length "settlement." *Id.* at 1044. The City has acquiesced in the injunction in its entirety, subject only to the proviso that after three years, it may ask the District Court for relief from the monitor if it can prove "substantial compliance."

At bottom, Appellees do not identify a single case in which this Court or any other has denied a request for post-judgment intervention filed promptly after the judgment at a time when the controversy remained pending. Rule 24 does not require a party to intervene at the earliest possible time, but requires only that the timing of intervention be reasonable and not cause unnecessary prejudice to the existing parties. *See e.g.*, *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977) ("[P]rejudice 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"). Where, as here, the applicant promptly seeks to intervene for purposes of appeal and remedial proceedings, timeliness is no bar.

B. The PBA Has A Direct, Protectable Interest In These Actions

In its Appellant's Brief, the PBA demonstrated that it has a protectable interest because the District Court's injunction "may as a practical matter impair or impede" the officers' collective bargaining rights, Fed. R. Civ. P. 24(a)(2), and because the injunction depends on findings that directly impugn the officers' conduct.[2] In addition, because the injunction would not exist except as a remedy

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[2] In fact, PBA members with actual notice of the Remedies Order may well be bound by the injunction when they carry out their policing duties. *See* Fed. R. Civ. P. 65(d)(2)(B); *People of State of N.Y. by Vacco v. Operation Rescue Nat.*, 80 F.3d 64, 70 (2d Cir. 1996) ("An injunction issued against a

for the violations found in the Liability Opinion, the PBA has an interest in challenging those findings themselves.

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

The PBA plainly would have a cognizable interest if the Remedies Order invaded matters that would be subject to collective bargaining. Absent a judicial determination of liability, a public employer may not accede to an injunction that has alters a collective bargaining agreement. *See, e.g.*, *Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland*, 478 U.S. 501, 529 (1986); *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 771 (1983). A union has an interest in intervening to protect the rights secured by the collective bargaining process itself, where the proposed injunction threatens to compel the employer to undertake actions that would otherwise be subject to the state law bargaining process. *See, e.g.*, *Bridgeport Guardians*, 602 F.3d at 474; *City of Los Angeles*, 288 F.3d at 400; *EEOC v. AT&T*, 506 F.2d 735, 741-42 (3d Cir. 1974).

Under Rule 24, the question is whether the Remedies Order "may" impair the PBA's rights "as a practical matter," rather than whether it necessarily would

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corporation or association binds the agents of that organization to the extent they are acting on behalf of the organization.").

do so. Fed. R. Civ. P. 24(a)(2); *accord Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001) ("whether [the proposed intervenors] lack a cognizable interest" cannot be determined by evaluating whether the intervenor's arguments on the merits will ultimately prevail).

Appellees argue that the District Court's Remedial Order will not have any cognizable impact on the collective bargaining process or the officers' terms and conditions of employment. City Br. 24; Ligon Br. 19-20. While the District Court's order addresses "the NYPD's policies regarding supervision, documentation, training and discipline as to stops and frisk," Appellees claim that all of these matters are covered by the "management rights" provision of the NYC Collective Bargaining Law, and so do not implicate the PBA's collective bargaining rights. City Br. 24; Ligon Br. 20.

This claim is untenable. Appellees do not dispute that the "management rights" clause involves a complex series of rules, conflicting rules, and exceptions whose boundaries are ultimately determined by bilateral negotiations and the decisions of administrative labor boards.[3] New York embraces a "strong and

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[3] This of course assumes that the so-called "management rights" provision is a proper exercise of the authority granted to the City. *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). Contrary to Appellees' contention,

sweeping" policy in favor of collective bargaining. *Watertown v. N.Y.S. Pub. Emp. Relations Bd.*, 95 N.Y.2d 73, 78 (2000).[4] New York law calls on the BCB to determine bargainability in the first instance under a "case-by-case . . . balancing test." *City Employees Union, Local 237 v. N.Y.C. Dep't of Homeless Servs.*, 2 OCB2d 37, at 14 (BCB 2009).

Indeed, the City's own description of this complex body of law demonstrates that the District Court could not reasonably determine that the remedy "may" not "as a practical matter impair or impede" the unions' state law rights. Fed. R. Civ. P. 24(a)(2). The City contends that managerial policies are not subject to mandatory bargaining, but the "practical impacts" of those policies are. City Br. 25. The City has "discretion over the methods, means and technology," except where "managerial decisions might present a safety impact 'so serious' at to require collective bargaining." *Id.* at 27-28. "[A]s a general matter, training falls squarely within the City's managerial prerogatives," but "[t]o be sure," that is not

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that question has not been answered by the state PERB nor decided by any state court.

[4] Like the District Court, Plaintiffs misquote *In re PBA v. PERB*, 6 N.Y.3d 563, 576 (2006), by simply eliding the court's discussion of the union's collective bargaining interests, even though the PBA pointed out the District Court's omission in its opening brief. *See Ligon* Br. 21; PBA Br. 36 n.7.

the case "where an employer establishes new training requirements 'as a qualification for continued employment or for improvement in pay or work assignments.'" *Id.* at 29. And while "substantive criteria for performance evaluations" are not mandatory subjects, "certain procedural changes" would be. *Id.* at 31.

As the City's "on the one hand," but "on the other hand" description makes clear, the District Court could not reasonably conclude that the sweeping remedial order would not impair the PBA's state law rights. The introduction of body cameras, changes to police training procedures, and changes to disciplinary processes are all matters likely subject to mandatory bargaining. *See* PBA Br. 34-39. The practical impacts of those changes are unquestionably so. But what is critical for purposes of intervention is that the PBA has the state law right to address the subjects of bargaining bilaterally with the City and to submit any disputes to the BCB for resolution, including in some instances, balancing the City's interests against the officers' interests. *See id.* at 38, 40-41.[5]

[5] Appellees contend that the PBA's failure to file grievances in the past undermines the argument that the Remedies Order implicates their collective bargaining rights. There is frankly no precedent for the Remedies Order, and the law is clear that the PBA does not waive its collective bargaining rights through acts of omission. *See In re Superior Officers Ass'n of Police Dep't, County of Nassau, N.Y., Inc.*, 33 PERB ¶ 4568, 2000 WL 35899581

It is the province of the BCB to decide whether policies and "procedures" like those the Remedies Order requires the City to adopt, *Floyd v. City of New York*, 959 F. Supp. 2d 668, 683-84 (S.D.N.Y. 2013) ("*Remedies Op.*"), are mandatorily bargainable. *See* PBA Br. 35-39. For instance, "where training is required by the employer as a qualification for continued employment," *Uniformed Firefighters Ass'n v. City of New York*, Decision No. B-20-92, 49 OCB 20, at 8 (BCB 1992), such training is mandatorily bargainable (no matter whether the training is necessary for a license). Here, the City has been ordered to conduct new training concerning stops and frisks, one of the most basic job functions of a police officer; the District Court plainly intends that the PBA's members will be obliged to participate in such training if they wish to keep their jobs or be eligible for promotion.

Moreover, the PBA's rights are not limited to *mandatory* subjects of negotiation, but also include those where "negotiation is permissive." *E.g.*, *Watertown*, 95 N.Y.2d at 79. The City concedes that the injunction will remove its

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(PERB May 24, 2000). Similarly, the *amici* get nowhere by faulting the PBA for not yet challenging the NYPD's pilot body-camera program, because the City announced the program less than a month ago, and to the PBA's knowledge, the NYPD has not yet ordered it or begun to implement it.

discretion to engage in *permissive* bargaining on the matters within its scope. *See* City Br. 32 n.8. Although the City claims that the PBA lacks a cognizable interest in permissive bargaining, the law is to the contrary. *See United States v. City of Hialeah*, 140 F.3d 968, 982 (11th Cir. 1998) ("Seniority rights subject to the City's exercise of some discretion in certain circumstances are neither the same as no seniority rights at all, nor are they the same as seniority rights subject to additional exceptions."). Because the District Court's orders will limit the City's discretion to bargain on certain permissive subjects, the PBA is entitled to intervene.

Appellees also argue that the PBA cannot show a cognizable interest unless it can identify a particular provision of the collective bargaining agreement ("CBA") that conflicts with the Remedies Order. They are incorrect. The City has the duty to bargain over *any* change to mandatory subjects, not only over those already contained in the agreement. *See, e.g.*, N.Y. Civ. Serv. Law § 204(2); *see also* N.Y.C. Admin. Code § 12-306(a)(5) (prohibiting the public employer from "unilaterally mak[ing] any change as to any mandatory subject of collective bargaining").

Moreover, if the District Court ordered the City to take actions that would violate the CBA or unilaterally alter the terms and conditions of employment, those

violations would impair the CBA's grievance and arbitration procedures. The PBA thus would be deprived of its contractual remedy, as well as its statutory right to petition state labor boards. *See* PBA CBA, Art. XXI, A-1187-91.[6] Similarly, any changes to the terms and conditions of employment negotiated with the "stakeholders" identified in the Remedies Opinion—including community leaders, religious groups and plaintiffs' attorneys—would completely undermine the PBA's CBA right to be "the sole and exclusive bargaining representative" for the NYPD's 22,000 officers. *See id.* Art. I, § 1, A-1186.

Appellees seek to distinguish cases at odds with their position on the ground that they presented starker conflicts with the collective bargaining agreements. But that is simply not the case. Notably, in *City of Los Angeles*, the consent decree contained an explicit safety valve for the collective bargaining process. The United States argued that that safety valve, by permitting bona fide disputes to be submitted to state labor boards, would preserve the unions' rights to bargain with

[6] The District Court described this section of the CBA as "cover[ing] procedures for employees to file grievances against the NYPD for labor law violations" but mistakenly concluded that it did not implicate the Remedies Order. SPA-71 n.22. On the contrary, this article provides the PBA with a contractual right that applies when the City alters the terms and conditions of employment. Thus, if a reform arising out of the remedial process includes a provision that the PBA believes violates its CBA, the PBA's right to this grievance process would be short-circuited.

the City and thus render it "purely speculative that the parties will not agree on what provisions are subject to collective bargaining and on how any disputes over those provisions should be resolved." 288 F.3d at 401. Because Rule 24's standard is whether the order "'may' impair rights 'as a practical matter'" not "whether the decree will 'necessarily' impair them," the Ninth Circuit rejected that reasoning. *Id.* The proposed consent decree required the district court to determine the subjects for bargaining and thus purported to federalize an otherwise state-law process. *See id.* Here, there is not even a safety valve. The District Court thus has not only federalized these subjects, but held the City to be prohibited from bargaining over them.

Finally, Appellees suggest that the PBA's interests may be taken into account in connection with the remedial process. *See* City Br. 52. But the PBA is not required to rely on the goodwill of the City or the Monitor, or to surrender its bargaining rights to the District Court's remedial process. *See, e.g.*, *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 738 F.2d 82, 84 (8th Cir. 1984) (allowing teacher unions to intervene where "[i]t may be true that the successor school district (assuming consolidation is ultimately ordered) will choose to bargain collectively with the appellant organizations, *but there can be no*

assurance of that fact" (emphasis added)). Because the District Court's injunction impairs the unions' collective bargaining rights, they have demonstrated a cognizable interest under Rule 24.

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

A police union also has a "protectable interest in the merits phase of the litigation" where plaintiffs seek "injunctive relief against its member officers" and allege that officers "committed unconstitutional acts in the line of duty." *City of Los Angeles*, 288 F.3d at 399-400. The District Court's Liability Opinion is premised both on findings against individual officers and on the sweeping finding, based on unreliable statistical evidence, that *hundreds of thousands* of unconstitutional stops and frisks were conducted by the PBA's members over a period of years.[7] The actions of the PBA's members have been directly called into question by the finding of liability.

In arguing that such harm is not cognizable, the *Floyd* Plaintiffs cite *News, Inc. v. Kheel*, 972 F.2d 482 (2d Cir. 1992), but there the proposed intervenor

[7] *See Floyd v. City of New York*, 959 F. Supp. 2d 540, 625-35, 637-57 (S.D.N.Y. 2013) ("*Liability Op.*") (finding specific stops and/or frisks by named officers unconstitutional); *id.* at 559, 560 (finding unconstitutional hundreds of thousands of stops by police officers).

sought to intervene on the purely collateral issue of whether Rule 11 sanctions were warranted. *Id.* at 486-87 (cited by Floyd Br. 54-55). By contrast, this Court recognized in *Sierra Club v. U.S. Army Corps of Engineers*, 709 F.2d 175 (2d Cir. 1983), that where a non-party's reputational interest is placed directly at issue by the court's findings, then that may suffice to show reputational injury.

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

The District Court did not decide whether denial of intervention could impair the interests of the PBA or whether the existing parties might adequately protect those interests. None of the Appellees seriously contests that, if the PBA has a cognizable interest, that interest would be impaired in the absence of intervention. Nor could anyone contend that the PBA's interests are adequately represented by the existing parties, all of whom wish to end this appeal and proceed directly to the remedial process that could burden the PBA's members for many years. *See* PBA Br. 44-46.

D. The PBA's Motion Applies To *Ligon* To The Same Extent That The District Court's Order Does

The *Ligon* Plaintiffs argue that the District Court's denial of intervention should be affirmed because the PBA has focused its arguments on *Floyd*. Through its joint Remedies Opinion, however, the District Court, not the PBA, joined *Ligon*

with *Floyd*. The District Court determined that the remedies should apply to both cases, and the two appeals have traveled together.

The *Ligon* preliminary injunction opinion, like the *Floyd* Liability Opinion, contains findings of unconstitutional conduct by particular members of the police unions, *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 UF-250 forms as in *Floyd*, *id.* at 510-16. The District Court did not issue an order that placed the *Ligon* injunction in appealable form until the Remedies Order, and the PBA has sought only to participate prospectively, not to redo any past proceedings. Given that the Remedies Order applies to both cases, the PBA's arguments in favor of intervention apply equally to *Ligon* as well.

POINT II

ALTERNATIVELY, THE PBA SHOULD BE GRANTED PERMISSIVE INTERVENTION

As shown in its Appellant's Brief, the PBA also should have been granted leave to intervene permissively. Fed. R. Civ. P. 24(b). In response, the parties essentially rehash the same arguments in opposing Rule 24(a)(2) intervention. *See* City Br. 45-46; Floyd Br. 57-58. For the reasons discussed above and in the Appellant's Brief, these arguments are incorrect. Particularly given the public

interest at stake in having this Court review the District Court's injunction, permissive intervention is appropriate.

POINT III

THE PBA HAS STANDING TO PURSUE THIS APPEAL IN THE CITY'S ABSENCE

The PBA also has Article III standing to pursue this appeal without the City.[8] The *Floyd* Plaintiffs contend that the police unions are obliged to satisfy what they call the "rigorous constitutional demands of standing." Floyd Br. 22. But this Court has rejected the idea that a putative intervenor's standing to challenge a district court's order on appeal should be "especially rigorous." *Tachiona v. United States*, 386 F.3d 205, 213 (2d Cir. 2004). To the contrary, the "contours" of the required Article III injury are "very generous" and are satisfied by "an identifiable trifle of injury." *Nat'l Collegiate Athletic Ass'n v. Governor of N.J.* ("*NCAA*"), 730 F.3d 208, 219 (3d Cir. 2013) (citing *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 n.14 (1973)).

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8 The *Floyd* Plaintiffs erroneously assert that the PBA has disputed the need to show standing to pursue this appeal absent the City. *See* Floyd Br. 22 (citing PBA Br. 52, which does not make that argument). It is true, however, that the PBA need not show Article III standing to intervene in any remedial process.

The PBA's interests in this case readily satisfy Article III. To demonstrate standing on appeal, a party must show "injury caused by the judgment rather than injury caused by the underlying facts," but it need not show that it is formally bound by the judgment. *Tachiona*, 386 F.3d at 211 (internal quotations omitted). The required showing of "injury in fact" must be "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical," "fairly traceable to the challenged action," and it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81, 183 (2000) (finding injury in fact in the harm to "the aesthetic and recreational values" of an area used by the plaintiff).

The PBA easily meets these requirements. The District Court's orders inflict upon the PBA and its members a "concrete and particularized" injury that is far from "conjectural or hypothetical." Appellees' standing objection depends principally upon the proposition that the Remedial Order "does not actually implicate any collective bargaining agreement or rights," Floyd Br. 19, but as discussed above, *see supra* Point I.B, that is wrong. The PBA and its members are not seeking to intervene to pursue generalized grievances as concerned bystanders.

The District Court has required the City to take actions that will directly affect officers' daily lives and impair their collective bargaining rights. And the Remedies Order turns upon findings of widespread illegality that tar the PBA's members' reputations.[9]

In opposing standing, Appellees rely on cases where the theory of injury relied upon a series of contingent and unlikely events. For instance, in *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1148 (2013), the Supreme Court held that public interest groups lacked standing to challenge the NSA surveillance program because their claimed Fourth Amendment injury depended upon "a highly attenuated chain of possibilities," involving five separate contingencies.

Similarly, in *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990), the Supreme Court held that a convicted murderer did not have standing to challenge a different inmate's death sentence on the theory that the other person's execution could lower the comparative baseline against which a future jury might determine whether he should be sentenced to death. *Id.* at 156-57. In addition to the obvious difficulty in

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[9] The City argues that the Liability Order should be insulated from appellate review because it would not be appealable on its own. *See* City Br. 49. The Remedies Order, however, is intended to remedy the violations found in the Liability Order. Therefore, the PBA plainly has standing to take issue with the injurious findings upon which the Remedies Order depends.

seeking to appeal someone else's sentence, the petitioner himself had already been sentenced to death, and so his claimed injury depended upon the entirely speculative proposition that his conviction would be vacated in the future, and then he would face a new trial for capital murder. *Id*.

The PBA's showing of standing bears nothing in common with the theorized standing in *Clapper* and *Whitmore*. Rather, the District Court's injunction purports to impose actual, imminent, and particularized changes; it specifies "Immediate Reforms" and fashions a complex additional remedial process. Those changes would directly impair the PBA's collective bargaining interests and burden the officers' daily activities.

Appellees get no further in challenging the PBA's reliance on reputational harm as a basis for standing. The City relies upon *Doe v. National Board of Medical Examiners*, 199 F.3d 146, 153 (3d Cir. 1999), City Br. 39, even though the Third Circuit confirmed that a party may predicate standing on stigmatic harm even absent any proof of monetary or career detriment. The court there held that a medical school applicant had standing because "the flag on his test scores identifies him as a disabled person." 199 F.3d at 153. In finding that plaintiff's "fear is based in reality," the court did *not* rest its standing ruling on a finding that

the applicant had *actually* been disadvantaged in applying to medical schools. *Id.* On the contrary, the court rejected the plaintiff's substantive discrimination claims. *Id.* at 158. Yet the plaintiff's claimed injury was sufficient to show an "identifiable trifle of injury," and that showing was all that is required for Article III standing. *Doe* and the cases the PBA cited previously confirm that reputational harm may confer standing, even absent a showing of pecuniary harm. *See* PBA Br. 51-52.

The PBA also can show that a favorable litigation outcome would redress the claimed injuries. The *Floyd* Plaintiffs contend that even if this Court vacates the injunction, the District Court's "factual findings" might remain undisturbed. Floyd Br. 30-31. These "factual findings," however, rest on a series of legal errors with respect to standing, class certification, disqualification, and the substantive constitutional standards. This Court's reversal on one or more of these grounds would redress the reputational harm that the Liability Order inflicted on the PBA and its members.

Finally, the City's discretion to adopt new policies on its own, even absent compulsion from the District Court, does not affect the PBA's standing. The District Court's orders compel the City to make widespread changes and, as the District Court ruled, prevent the PBA from bargaining over them. SPA-82.

Should the PBA succeed on the merits appeal, no federal court would be ordering the changes from the Remedies Order, no court judgment would remain to disparage the entire corps of NYPD officers, and the PBA's bargaining rights would stand unimpaired and available to protect their interests through the ordinary process under state law.

POINT IV

THE DISTRICT COURT LACKED JURISDICTION TO ISSUE THE INJUNCTION

Separate from the intervention question, this Court has "'a special obligation' to satisfy [itself] of [its] own jurisdiction as well as that of the district court." *Am. Lung Ass'n*, 962 F.2d at 262. In *American Lung Association*, this Court affirmed the denial of intervention, but recognized that it was obliged to address the would-be appellant's argument that the district court lacked jurisdiction in the first place. *Id.* Here, the plaintiffs lacked standing to obtain the injunctive relief the District Court granted.

While *American Lung Association* is dispositive on this point, the case the *Floyd* Plaintiffs cite, *Merritt v. Shuttle, Inc.*, 187 F.3d 263 (2d Cir. 1999), likewise supports a review of the District Court's jurisdiction. As this Court noted there, "[a] defect in original jurisdiction would be dispositive here because, if the district

court lacked jurisdiction, we would have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Id.* at 268 (internal quotations omitted). This Court explained that reaching the issue of subject matter jurisdiction in the context of an interlocutory appeal did not contravene its own appellate jurisdiction. *Id.* Similarly, in *In re MTBE Products Liab. Litig.*, 488 F.3d 112 (2d Cir. 2007), also cited by the *Floyd* Plaintiffs, this Court ruled that although "the denial of a motion to remand is generally not the proper subject of an interlocutory appeal, . . . review of this [remand] question is required pursuant to our independent obligation to satisfy ourselves of the jurisdiction of this court and the court below." *Id.* at 121. The judicial "obligation" to review subject-matter jurisdiction "is not extinguished because an appeal is taken on an interlocutory basis and not from a final judgment." *Id.* at 122 (citing *Merritt*, 187 F.3d at 268). Indeed, "[b]ecause subject matter jurisdiction goes uniquely to the fundamental power of the federal courts to hear a case, there is no reason why an appellate court should potentially compound an error of the district court by assuming it has jurisdiction." *Id.*

Here, where the decision below speaks so directly to the relationship between federal and state powers, this imperative is all the more powerful. As in

Lyons, 461 U.S. 95, no named plaintiff could show a likelihood of future harm. Contrary to the *Floyd* Plaintiffs' suggestion, *see* Floyd Br. 59 & n.15, the mere fact that Plaintiffs allege that they were stopped pursuant to an undefined, official policy of illegal stops does not establish the likelihood of *future* harm to the individual plaintiffs that is necessary to justify the wide-ranging prospective relief pursued here. *See, e.g.*, *Shain v. Ellison*, 356 F.3d 211, 216 (2d Cir. 2004) (Parker, J.). Indeed, the plaintiff in *Lyons* alleged that he, too, was stopped "pursuant to the authorization, instruction and encouragement" of the defendant city, 461 U.S. at 98, but the Supreme Court made clear that such an injury—while sufficient for individual damages—was insufficient to allow plaintiffs to act as private attorneys general and invoke the judicial power to pursue the broad injunctive relief that the District Court ordered below, *id.* at 105-10.

CONCLUSION

For all of these reasons and those stated in its Appellant's Brief, the PBA respectfully requests that the Court reverse the denial of its motion to intervene as of right under Federal Rule of Civil Procedure 24(a)(2) or, in the alternative, permissively under Rule 24(b).

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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 6,851 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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