14-2829-cv(L)

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

IN THE

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,

(complete caption and list of amici inside)

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

MOTION OF THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK AND MEMBERS OF NEW YORK CITY COUNCIL FOR LEAVE TO FILE AS *AMICI CURIAE* IN OPPOSITION TO APPELLANTS' MOTION TO INTERVENE

LETITIA JAMES, AS
PUBLIC ADVOCATE FOR THE CITY OF NEW YORK
JENNIFER LEVY, ESQ., GENERAL COUNSEL
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(212) 669-2175

For amici curiae

-against-

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,

-against-

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 capacity and individually, POLICE OFFICER JANE DOE, NEW YORK CITY, in her official capacity and individually, 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 OFFICERS ERIC HERNANDEZ, SHIELD #15957, in his individual capacity, NEW YORK CITY POLICE OFFICER CHRISTOPHER MORAN, in his individual capacity,

Defendants-Appellees.

---

*Pursuant to Federal Rule 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.

MOTION OF THE PUBLIC ADVOCATE FOR THE CITY OF NEW YORK AND VARIOUS MEMBERS OF NEW YORK CITY COUNCIL FOR LEAVE TO FILE AS *AMICI CURIAE* IN OPPOSITION TO APPELLANTS' MOTION TO INTERVENE

Pursuant to Federal Rule of Appellate Procedure 29(b) prospective *amici curiae* respectfully move for leave to file the attached BRIEF OF AMICI CURIAE IN OPPOSITION TO APPELLANTS' MOTION TO INTERVENE. The full list of *amici* is set out in the Brief. *Amici* sought and obtained the consent of all parties with the exception of the Sergeants Benevolent Association.

INTEREST OF *AMICI*

1. *Amici* are elected officials in the City of New York vested with oversight responsibility over City agencies, including the New York City Police Department.

2. The Public Advocate for the City of New York is charged with monitoring New York City agencies, fielding constituent complaints about their performance, and recommending measures to remedy systemic problems. New York City Charter ("Charter") § 24. New York City Council, of course, has legislative authority over the New York City Police Department.

3. The Office of the Public Advocate and New York City Council have been engaged in police reform efforts for many years. In 2004, City Council passed the `Racial or Ethnic Profiling Prohibition Law', its first legislation aimed at eradicating bias-based enforcement activities.

4. When it became clear that the anti-profiling legislation was not sufficient

to deter what appeared to be a pervasive pattern of harassment aimed at communities of color, in 2013, the City Council enacted the Community Safety Act, Local Laws 70 and 71.

5. The Office of the Public Advocate has been actively engaged in efforts to Reform `stop and frisk', including publishing a report in 2013 titled *"Stop and Frisk and the Urgent Need for Meaningful Reforms"* and, most recently, advocating for the NYPD's use of body cameras to increase accountability. *See, The Cost of Improper Procedures: Using Police Body Cameras to Reduce Economic and Social Ills,* Office of the Public Advocate for the City of New York, August 2014.

6. Moreover, New York City Council and the Public Advocate are both stakeholders identified in the District Court's Order, who will have a seat at the table when the much-anticipated remedial process begins. *Floyd v. City of New York*, 959 F.Supp.2d 668, 686 (S.D.N.Y. 2013).

CONCLUSION

7. The Public Advocate and New York's City Council have a longstanding interest in the reforms contemplated in the District Court's Order and are well-

situated to describe the prejudice that would result by granting the Putative Intervenors' motion.

Dated: September 26, 2014
New York, N.Y.

/s/

____

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
--X
DAVID FLOYD, *et al.*, Docket No. 14-2829

Plaintiffs,

-against-

CITY OF NEW YORK,

Defendant.
--X
JAENEAN LIGON, *et al.*

Plaintiffs,

-against-

CITY OF NEW YORK, *et al.*,

Defendants.
--X

DECLARATION OF JENNIFER LEVY

JENNIFER LEVY, an attorney duly admitted to practice in the United States Court of Appeals for the Second Circuit, declares pursuant to 28 U.S.C. § 1746, as follows:

1. I am the General Counsel in Charge of Litigation for the Public Advocate for the City of New York. I submit this declaration in support of the Public Advocate and twenty-seven individual Members of New York City Council's motion for leave to file a brief as *amici curiae* in the above-captioned action.

2. Appended as Exhibit A hereto is a true and correct copy of movants' Brief as *Amici Curiae* in opposition to 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., and Sergeants Benevolent Association's appeal of the denial of their motion to intervene in this action.

3. No party's counsel authored the within brief and no party made any monetary contribution in furtherance of its preparation.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: September 26, 2014
New York, N.Y.

/s/

____

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EXHIBIT A

14-2829-cv(L)

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

IN THE

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,

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LETITIA JAMES, AS
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For amici curiae

-against-

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,

-against-

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 capacity and individually, POLICE OFFICER JANE DOE, NEW YORK CITY, in her official capacity and individually, 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 OFFICERS 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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INTRODUCTION

Pursuant to Fed. R. App. Proc. 29, the Public Advocate for the City of New York and New York City Council request leave to file the accompanying amici curiae brief in support of the Plaintiff class, and in opposition to the Detectives' Endowment Association, Inc., the 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., and the Sergeants Benevolent Association's (collectively "putative intervenors') appeal of the District Court's denial of their motion to intervene. A full list of proposed *amici* is annexed.

The parties' consent to the instant filing was sought. Counsel for the *Floyd* Plaintiffs, the *Ligon* Plaintiffs, the City of New York, the Detectives Endowment Association, Inc., the Lieutenants Benevolent Association of the City of New York, In., NYPD Captains Endowment Association, and the Patrolmen's Benevolent Association have consented. Counsel for the Sergeants Benevolent Association has not responded.

IDENTITY AND INTEREST OF AMICI

New York City Council ("City Council") and the Public Advocate for the City of New York, Letitia James, ("Public Advocate") have long been engaged in efforts to identify, investigate, and remedy, police conduct that disproportionately

impacts communities of color in New York City. The City Council and the Public Advocate have been key players in the tireless fight for reforms, from passing New York's first law prohibiting racial profiling in 2004, holding an oversight hearing on the use of excessive force just this past September, to passage of the Community Safety Act (Local Laws 70 & 71). Further, the City Council and the Public Advocate are stakeholders with an interest in seeing the remediation process, outlined in the District Court's Remedial Order, move forward without any further delay; therefore, they are entitled to voice their opinion and in this process.

Interests of New York City Council Members

For over a decade, the City Council has been an active advocate for the reformation of police practices that have a discriminatory effect. The City Council passed the Racial or Ethnic Profiling Prohibition Law ("Local Law 30") in 2004. N.Y.C., N.Y., Local Law No. 30 Int. 142-B (2004). Local Law 30 prohibits officers from engaging in profiling "that relies on race, ethnicity, religion or national origin as the determinative factor in initiating law enforcement action against an [individual]…." *Id.*

As is evident from the instant litigation, Local Law 30 did not eradicate bias-based police abuse. "Stops" of a disproportionate number of African-Americans and Latinos, the overwhelming majority of whom were never charged with a

crime, continued to increase. Declaration of Legis. Intent and Findings, Int. 800 (2012). The number of stops rose from 470,000 in 2007 to over 680,000 in 2011. *Id.* More than eighty-seven percent of those stopped were African-American and Latino. *Id.* While this demographic represents just over fifty percent of the population, approximately ninety percent of those stopped were neither ticketed nor arrested. *Id.*

In an effort to alleviate this apparent pattern of harassment by the NYPD aimed at communities of color in New York City, the City Council introduced legislation that would prohibit the NYPD from engaging in bias-based profiling, which is defined by the bill as reliance on an individual's "actual or perceived defining characteristics *to any degree* when initiating law enforcement actions…." N.Y.C. Comm. Pub. Safety, Governmental Affairs Div. Rep., Proposed Int. 800-A at 16 (2012) (emphasis added). The proposed law would have given standing to organizations to sue for discrimination. *Id.* at 17. The law was opposed strongly by the Bloomberg Administration and did not pass.

The City Council then introduced legislation that further defined actionable bias-based profiling as conduct relying on race as "the determinative factor." N.Y.C., N.Y., Local Law No. 71 Int. 1080 (2013) ("Local Law 71"). This law also created a cause of action for disparate impact claims of bias-based profiling. *Id.* City Council voted to pass the law with a super-majority on August 22, 2013.

In September 2013, Mayor Bloomberg filed a lawsuit against City Council seeking to annul Local Law 71 on the grounds that it was preempted by State law and was void for vagueness. *New York, Inc. v. City of New York*, No. 653550 2014 N.Y. Slip Op. 31570(U) (Trial Order) (N.Y.Sup. June 18, 2014). The Patrolmen's Benevolent Association and the Sergeants Benevolent Association filed a similar suit in October 2013. *Id.* at *4.

Mayor Bill de Blasio discontinued the suit initiated by Mayor Bloomberg and joined as a Defendant in the case brought by the unions. *Id.* The City Council defended the lawsuit vigorously, and on June 18, 2014, the case was dismissed with prejudice. *Id.* at *1.

The City Council's persistent efforts to address bias-based misconduct amply demonstrate their interest in the outcome of this motion.

Interests of the Public Advocate for the City of New York, Letitia James

The Public Advocate, one of three city-wide elected officials, is a member of the New York City Council. N.Y.C., N.Y., Charter §§ 10(a), 22, 24(a) (hereinafter referred to as "Charter"). The chief role of the Public Advocate is to monitor City agencies and their compliance with the Charter as well as other laws. *Id.* § 24(i). The Public Advocate is also charged with receiving, investigating, and attempting to resolve constituents' complaints against City agencies. *Id.* §24(h) and (f).

The Office of the Public Advocate has a long history of investigating and working to address abuses of law enforcement. Mark Green, the first public advocate, engaged in litigation to gain access to information that the New York City Police Department refused to release to his office. *Green v. Safir*, 664 N.Y.S.2d 232 (1999), *Green v. Giuliani*, 721 N.Y.S.2d 461 (Sup. Ct. 2000). Bill De Blasio, current Mayor of New York City and former Public Advocate, published a report in May 2013 that called for reforms to the NYPD's "stop and frisk" policies. N.Y.C PUB. ADVOCATE OFFICE, STOP AND FRISK AND THE URGENT NEED FOR MEANINGFUL REFORMS (2013).

Since Public Advocate Letitia James took office in January 2014, she has received more than 200 complaints against the NYPD; a quarter of these complaints alleged harassment or assault. Most recently, in the wake of the death of Eric Garner, the Public Advocate released a report recommending the immediate implementation of a pilot project that would equip fifteen percent of the police on patrol with body cameras to reduce incidents of misconduct and increase accountability. N.Y.C. PUB. ADVOCATE OFFICE, THE COST OF IMPROPER PROCEDURES: USING POLICE BODY CAMERAS TO REDUCE ECONOMIC AND SOCIAL ILLS (2014). Notably, one of the recommendations in the District Court's Remedies Order was to require the use of body cameras. *Floyd v. City of New York,* 959 F.Supp.2d 668, 684 (S.D.N.Y. 2013), *appeal dismissed* (Sept. 25 2013), *appeal*

withdrawn (Sept. 26, 2013). Mayor de Blasio and Commissioner Bratton subsequently announced that a pilot project would be implemented. Hunter Walker, *The NYPD is Going to Start Putting Body Cameras on Police Officers,* BUS INSIDER (Sept. 4, 2014, 6:53 PM), http://www.businessinsider.com/the-nypd-is-going-to-start-putting-body-cameras-on-police-officers-2014-9.

ARGUMENT

I. NEW YORK'S ELECTED OFFICIALS SHOULD BE GRANTED LEAVE TO FILE THE INSTANT MEMORANDUM AS *AMICI CURIAE*

A Memorandum by *amici curiae* may be filed without leave of Court if either the parties consent or the *amici* are units of the federal or state government. Fed. R. App. Proc. 29(a). Where consent is required, the Motion seeking leave must state the interests of the movant, and why the brief is desirable and relevant. Fed. R. App. Proc. 29(b), *Youming Jin v. Ministry of State Sec.,* 557 F.Supp.2d 131 (D.D.C. 2008).

Proposed *amici* have a grave interest in the outcome of this motion. They are City officials who have a long history of involvement in the subject of this litigation. They are intended to be part of the remediation efforts that will move ahead only if the putative intervenors' motion is denied. Further, the decision under appeal here rests, at least in part, on a determination concerning the timeliness of Appellants' motion. The proposed *amici* are uniquely situated to

describe the prejudice that would result to the City of New York if Appellants' motion is granted, which renders their viewpoint relevant and desirable in assessing the timeliness of the motion.

II. THE DISTRICT COURT'S DECISION DENYING INTERVENTION SHOULD BE UPHELD

A motion to intervene as of right under Fed. R. Civ. Proc. 24(a) should be granted only if the following four conditions are met: 1) the application is timely, 2) the applicant claims an interest relating to the property or transaction which is the subject matter of the action; 3) the protection of the interest may as a practical matter be impaired by the disposition of the action; and (4) the interest is not adequately protected by an existing party. *In re Bank of N.Y. Derivative Litig.,* 320 F.3d 291 (2d Cir. 2003). The District Court found that putative intervenors' motion should be denied for lack of standing on appeal due to untimeliness and failure to state a significant, protectable interest. *Amici*, who have a stake in seeing the remedial process move ahead expeditiously, submit this brief in support of the District Court's conclusion that the motion to intervene was untimely.

A. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FINDING THAT THE MOTION TO INTERVENE WAS UNTIMELY

The threshold determination concerning the timeliness of a motion to intervene rests within the sound discretion of the District Court. *In re Holocaust Victim Assets Litig.,* 225 F.3d 191, 198 (2d Cir. 2000). The timeliness of the

motion rests on an assessment of the following factors: (1) how long the applicant had notice of its interest in the action before it made the motion to intervene; (2) prejudice to existing parties resulting from any delay; (3) prejudice to the applicant if the motion is denied; and (4) any unusual circumstances militating for or against a finding of timeliness. *In re Bank of N.Y. Derivative Litig.*, 320 F.3d at 300. All factors militate against permitting intervention in this case.

i. Putative Intervenors Had Notice of Their Interest in the Action From the Suit's Inception

The base date that should be used to determine whether an intervention motion is timely is when the movant learns that her interests are unprotected. *See e.g., Hnot v. Willis Group Holdings*, 241 F.R.D. 13 (2d Cir. 2007). Here, putative intervenors define their interests as being derived from the union's Collective Bargaining Agreement but claim that those interests were "unprotected," or not adequately represented, only when it appeared that a new mayoral administration was unlikely to pursue an appeal. (SBA Br. p. 25, DEA Br. p. 24, PBA Br. p. 25). Contrary to the Appellants assertions, neither the Mayor nor the City were under any obligation to protect the interests of the unions; because of the nature of the relationship between the unions and the Mayor, their interests in collective bargaining were never protected. The Appellants were therefore on notice that their interests were implicated an unprotected from the inception of this suit.

The Appellants describe the previous Mayor as "largely aligned" with the unions. *See e.g.* (SBA Br. p. 25). This characterization of the previous mayoral administration as "largely aligned" with the unions' Collective Bargaining interests is startling. *Id.* In fact, Mayor Bloomberg permitted the putative intervenors' contracts expire between 2009 and 2012; further, many union members have received no raises since 2009. Citizen's Budget Comm'n, Seven Things New Yorkers Should Know About Municipal Labor Contracts in New York City, 1 (2013), *available at* http://www.cbcny.org/sites/default/files/REPORT_7ThingsUnions_05202013.pdf.

The Court should consider the nature of the interest protected when considering whether the motion was timely. In this case, any mayoral administration's interests would diverge from Appellants' interests in collective bargaining. Moreover, the nature of the relief sought in this lawsuit from the beginning would have changed police practices, and success at any juncture could have arguably implicated collective bargaining rights. Appellants should therefore have known that their interests were not adequately protected when the case commenced.

ii. The Parties Will be Severely Prejudiced by any Delay

The parties to this case are the class of people who have been, or are likely to be, "stopped and frisked on the basis of being Black or Latino," *Floyd v. City of*

New York, 283 F.R.D. 153, 160 (S.D.N.Y. 2012), those who have been or will be "stopped outdoors without legal justification by NYPD officers on suspicion of trespassing," *Ligon v. City of New York*, 288 F.R.D. 72, 77 (S.D.N.Y. 2013), and the City of New York. The prejudice to the Plaintiff class in delaying the implementation of remedial measures aimed at protecting their civil liberties is self-evident, but there is also harm to the City-Defendant.

The City of New York elected Mayor de Blasio on a platform of reform. Putting an end to "stop and frisk" was one of the pillars of his campaign platform. Jonathan P. Hicks, *In New York City Mayoral Race, Bill de Blasio Rises With Stop and Frisk Criticism*, BET, (Sept. 6, 2013 2:21 PM), *available at* http://www.bet.com/news/national/2013/09/06/in-nyc-mayoral-race-bill-de-blasio-rises-with-stop-and-frisk-criticism.html; Liz Goodwin, *New York City Mayoral Candidate de Blasio Runs Ad Against "Stop and Frisk" Featuring His Son,* YAHOO NEWS (Aug. 19, 2013 12:24 PM), *available at* http://news.yahoo.com/nyc-mayoral-candidate-de-blasio-runs-ad-against-%E2%80%98stop-and-frisk%E2%80%99-featuring-his-son--162424663.html. The City of New York elected a mayor who vowed to withdraw the appeal in this case and will be severely prejudiced if the Appeal is permitted to move ahead due to the Appellants' permitted intervention.

Those communities that have been the demonstrated target of Mayor Bloomberg's "stop and frisk" policies will, however, suffer the most. With every day that passes without beginning a remediation process aimed at reforming abusive and bias-based police practices, the risk of imposing additional harm grows exponentially. Just within the past several months, we have seen the choke-hold death of Eric Garner; a man (twenty-two year old Ronald Johns) apparently being punched in the face at a subway station in Harlem; a woman in Brooklyn allegedly being placed in a chokehold seemingly for barbecuing on a public sidewalk; and, most recently, a Sunset Park vendor being kicked by an officer at a street fair. Dana Sauchelli, *Police Brawling with Street Vendors Caught on Video*, N.Y. POST (Sept. 17, 2014 2:57PM), *available at* http://nypost.com/2014/09/17/cop-suspended-after-kicking-man-being-handcuffed/; Allegra Kirkland, *3 Horrific Incidents of NYPD Abuse Since Eric Garner was Choked to Death,* ALTERNET (Aug. 6, 2014), *available at* http://www.alternet.org/news-amp-politics/3-horrific-incidents-nypd-abuse-eric-garner-was-choked-death. While these recent incidents are not "stop and frisks," they are indicative of the need for the reforms contemplated by the District Court's Remedial Order.

iii. The Appellants' Collective Bargaining Rights are not Prejudiced by Denying Their Motion to Intervene

The putative intervenors' rights to bargain collectively over their contract are not threatened by letting the District Court's decision stand. In fact, as they point out in their own papers, any change in policy brought about through the remediation process contemplated by the District Court's decision is within the scope of "management rights." (SBA Br. p. 13-14, DEA Br. p. 43-44). It is within management's discretion to "determine the standards of services to be offered by its agencies … direct its employees; [and] take disciplinary action." N.Y.C. Admin. Code § 12-307(6)(b). The effect that these standards have on union members remains the subject of collective bargaining. The right of union members to bargain over these impacts will not be compromised if their motion to intervene is denied.

CONCLUSION

For all the reasons stated above, *amici curiae* seek leave to file the above brief in support of Plaintiffs and in opposition to Appellants.

/s/

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that this brief complies with the type volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B), because it was prepared in a proportionally spaced typeface, Times New Roman 14-point font, and according to the word count of the word processing system used to prepare this brief, Microsoft Word 2007, it contains no more than 2600 words, excluding the items permitted to be excluded by Federal Rule of Appellate Procedure 32(a)(7)(B)(ii).

_____/s/____________

Jennifer Levy, Esq.