IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAVID FLOYD, et al.,	:	
Plaintiffs-Appellees,	:	Docket No. 13-3088
-against-	:	
CITY OF NEW YORK, et al.,	:	
Defendants-Appellants.	:	

REPLY MEMORANDUM OF LAW OF SERGEANTS BENEVOLENT ASSOCATION IN FURTHER SUPPORT OF MOTION TO INTERVENE

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Proposed Intervenor the Sergeants Benevolent Association (the "SBA") submits this reply memorandum of law in support of its motion to intervene in this matter as appellants. The SBA meets the requirements for mandatory and permissive intervention in this appeal. Appellees' arguments to the contrary are unavailing and the SBA's Motion should be granted.

I. THE SBA SATISFIES THE STANDARDS FOR INTERVENTION.

A. The SBA Satisfies the Standard for Intervention as of Right Pursuant to Rule 24(a).

The SBA has interests in the subject of this appeal; an adverse disposition will impair those interests; its representation by existing parties will not adequately protect those interests; and its application is timely. *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 129 (2d Cir. 2001) (quoting *Oneida Indian Nation of Wis. v. State of New York*, 732 F.2d 261, 265 (2d Cir. 1984)). Thus, the SBA has satisfied all requirements for intervention as of right pursuant to Federal Rule of Civil Procedure 24(a), which is the applicable standard here.[1] *Int'l Union, United Auto.,*

[1] Appellees attempt to impose a standard inconsistent with the federal rules, suggesting that the SBA must show "imperative reasons" for the intervention. *See* Appellees' Br. in Opp. to Union's Mot. to Intervene in *Ligon v. New York*, 13-3123 ("*Ligon* Br."), 3-8. First, the Second Circuit has never adopted an "imperative reasons" standard, despite the fact that this Court has addressed intervention on appeal in other cases. Second, appellees selectively quote a case from the Tenth Circuit as setting forth an "imperative reasons" standard in an appeal, *see id.* at 4, without acknowledging that the Tenth Circuit only used that language because intervention was not "sought in the district court." *Hutchinson v. Pfeil*, 211 F.3d 515, 519 (10th Cir. 2000) (citation and internal quotation marks omitted) (cited in *Ligon* Br. at 4). Here, the SBA sought intervention in the district court and, therefore, even assuming *arguendo* that the Second Circuit would adopt that requirement, it is inapplicable in this matter.

Aerospace & Agric. Implement Workers of Am. AFL-CIO, Local 283 v. Scofield, 382 U.S. 205, 217 n.10 (1965).

1. The SBA Has Direct, Protectable Interests That Will Be Impaired if the District Court's Orders Are Affirmed.

To intervene, a party must have a "direct, substantial, and legally protectable" interest. *Brennan*, 260 F.3d at 129. The party seeking to intervene "must show *only an interest within the context of the case*, and . . . demonstrate that its interest *may be* impaired by an adverse decision in the case." *Bridgeport Guardians v. Delmonte*, 227 F.R.D. 32, 34 (D. Conn. 2005) (emphasis added) (citing *Brennan*). The SBA has satisfied these standards.

The SBA has direct and protectable interests in the matters decided in both the Liability and Remedies Opinions, as reflected by the extensive findings the district court made concerning the conduct of police sergeants, the adequacy of their performance and supervision, and the constitutionality of practices they follow in enforcing the law. *See* SBA's Br. 12-14. Those interests include defending its members that were accused of violating the U.S. Constitution; seeking clarity of the standards for constitutional stops and frisks because the district court's articulation of the standards was in many respects vague, ambiguous, or difficult to apply in practice; and protecting the SBA's collective bargaining rights. *See id.*; *see also United States v. City of Los Angeles*, 288 F.3d 391, 399-401(9th Cir. 2002) (finding that state-law collective bargaining rights

gave union a protectable interest in the consent decree at issue and "factual allegations that its member officers committed unconstitutional acts in the line of duty" gave the union a protectable interest in the merits);[2] *CBS, Inc. v. Snyder*, 798 F. Supp. 1019, 1023 (S.D.N.Y. 1992) (recognizing that a union had a legally protectable interest in participating in proceedings that may have affected the interpretation or enforceability of a collective bargaining agreement), *aff'd,* 989 F.2d 89 (2d Cir. 1993).

Relying on this Court's decision in *Washington Elec. Co-op., Inc. v. Massachusetts Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97-98 (2d Cir. 1990), the appellees argue that the interests the SBA seeks to protect are "speculative" and "remote." *Washington Electric*, however, involved an alleged interest of the proposed intervenor that was "based upon a double contingency" because it required first the disposition of a contract dispute between two other parties and then a finding by a separate tribunal that that disposition affected any rights of the proposed intervenor. *Id.* This Court denied the motion to intervene because the

[2] The appellees misleadingly attempt to distinguish *City of Los Angeles* on the basis that the plaintiffs in that case "sought injunctive relief against individual union members." Appellees' Br. 13 (emphasis removed). But the proposed intervenors in that case sought to intervene in relation to a proposed consent decree and that "proposed consent decree's injunctive provisions *pertained only to the City defendants*" and not to any individual officers. *City of Los Angeles*, 288 F.3d at 399 (emphasis added). No individual officers were even named as defendants in that case. Moreover, the *Los Angeles* court held that it was the factual allegations of unconstitutional conduct, not the injunctive relief sought, that created the protectable interest for the police union. *See id.* ("*These allegations* [that the union's member officers committed unconstitutional acts in the line of duty] are sufficient to demonstrate that the Police League had a protectable interest in the merits phase of the litigation.") (emphasis added).

proposed intervenor could not show a direct interest due to the "double contingency." *Id.* at 98.

Here, in contrast, there are no contingencies in play. The SBA's members have been identified by name in the Liability Opinion and the district court found that they violated the Constitution. *See* Liability Op. 72-74, 86-87, 90-91, 95-98, 125-26 n.463, 164, 142-43. The district court has articulated standards regarding the constitutionality of stops and frisks that are vague and will impact the day-to-day operations of the SBA's members. *See* Liability Op. 177-92; Remedies Op. 13-25. The reforms mandated in the Remedies Opinion will affect the SBA's members' duties, including terms and conditions of employment that are subject to collective bargaining. Simply put, the SBA has direct, legally protectable interests that will be impaired if it is not allowed to intervene in this appeal.

2. The SBA's Interests Are Not, and Will Not Be, Adequately Represented by the City.

The inadequacy requirement of Rule 24(a) "is satisfied if the applicant shows that representation of his interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Trbovich*, 404 U.S. at 538 n.10; *see also City of Los Angeles*, 288 F.3d at 39. Here, the interests of the SBA will not be adequately represented by any current party to the litigation.

Appellees' arguments that the SBA's interests are adequately represented by the City and that the SBA and the City have the same ultimate objective are

disingenuous, in light of the facts that the Mayor-Elect has filed court papers in support of the Appellants, has stated that the district court's orders were correctly decided, and has stated that he will dismiss the appeal upon assuming office.

Under Rule 24, "*no representation constitutes inadequate representation*." *Yniguez v. State of Arizona*, 939 F.2d 727, 730 (9th Cir. 1991) (emphasis added). As numerous cases and legal scholars have recognized in assessing the adequacy-of-representation prong of the test for intervention as of right:

> ***The easiest case*** is that in which the absentee has an interest that may, as a practical matter, be harmed by disposition of the action and the absentee's interest is not represented at all. ***An interest that is not represented is surely not adequately represented and intervention must be allowed***.

7C Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1909 (3d ed. 2013) (emphasis added); *see Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003) (permitting intervention on the ground, among others, that "because Iran failed to appear before the district court, the interest of the United States was not represented by the existing parties").[3]

[3] Appellees' argument that the adversarial stances of the City and the SBA on many issues relating to the members' terms and conditions of employment in collective bargaining does not establish inadequacy is unavailing. The City itself recognized the differing interests at play. *See* Floyd Dkt. No. 414 ("[r]ecognizing that the interests of the City and the Unions may differ on collective bargaining issues"). "The burden of persuasion to demonstrate adequacy of representation falls on the party opposing intervention." *CBS, Inc. v. Snyder*, 136 F.R.D. 364, 368 (S.D.N.Y. 1991). Appellees have not met that burden. *See Vulcan Soc. of Westchester County, Inc. v. Fire Dept. of City 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.")

3. The SBA's Motion Is Timely.

The SBA has at all times acted promptly to participate in this appeal. According to the U.S. Supreme Court, a motion to intervene in an appeal filed after the judgment but within the 30-day period for parties to the litigation to appeal the judgment is timely. *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977). And this court has recognized the propriety of permitting a non-party that did not intervene in district court proceedings to appeal after the district court judgment is issued. *See, e.g., Drywall Tapers*, 488 F.3d at 95 ("Since Local 52 filed a notice of appeal within 30 days of the Order issuing the Consent Injunction, albeit at a time when it was not a party, its status as a party, if intervention is granted, should permit it to renew its appeal."); *West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir. 1934).

Moreover, "[p]ost-judgment intervention is often permitted . . . where the prospective intervenor's interest did not arise until the appellate stage." *Acree v. Republic of Iraq*, 370 F.3d 41, 49-50 (D.C. Cir. 2004). The SBA did not know, and could not have known, the nature and extent of the findings the district court would make regarding its members, their past conduct, and their prospective new obligations, until after the issuance of the Liability and Remedies Opinions. The SBA acted promptly to attempt to intervene in the district court as soon as it became aware of its interests. Likewise, the SBA did not have reason to seek to

intervene directly in this Court until after the stay was granted and the district court divested of jurisdiction. The SBA promptly sought to intervene in this Court after the stay of the district court proceedings. And the SBA did not know, and could not have known, that a new mayoral administration would reverse the City's positions on the Opinions, but promptly sought to intervene when it became clear that the Mayor-Elect would do so.

"In these circumstances a post-judgment motion to intervene in order to prosecute an appeal is timely (if filed within the time period for appeal) because the potential inadequacy of representation came into existence only at the appellate stage." *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (internal quotation marks and citation omitted). It is thus immaterial how long ago the proceedings were first initiated or what Appellees' claims were. The SBA "acted promptly after the entry of final judgment," *McDonald*, 432 U.S. at 395-96, and, therefore, its intervention is timely.

B. Alternatively, the SBA Should Be Granted Permissive Intervention.

In the alternative, and for the same reasons stated above and in the SBA's opening brief, this Court should grant the SBA permissive intervention.

II. INTERVENTION IN THIS COURT FOR THE PURPOSE OF APPEAL IS PROCEDURALLY PROPER.

This Court unquestionably has authority to permit the SBA's intervention in this appeal. *Drywall Tapers and Pointers of Greater New York, Local Union 1974 of I.U.P.A.T., AFL-CIO v. Nastasi & Assocs., Inc.*, 488 F.3d 88, 94 (2d Cir. 2007) ("[T]here is authority for granting a motion to intervene in the Court of Appeals.") (citations omitted).[4] The SBA followed the "general rule" set forth in *Drywall Tapers*, 488 F.3d at 94, by first moving to intervene in the district court and then, only after the proceedings below were stayed, moving to intervene directly in the proceedings before this Court. And, as discussed above, the SBA meets the applicable standards for intervention as of right and permissive intervention. As a result, this Court should grant the SBA's motion to intervene.

Appellees' argument that this motion is not properly before this Court is meritless. This Court may decide—and, in light of the stay of the district court's proceedings, should decide—the SBA's motion to intervene notwithstanding the pendency of a motion to intervene in the district court. *See Park & Tilford v. Schulte*, 160 F.2d 984, 987 (2d Cir. 1947) (noting that this Court had granted non-party intervenor status for purpose of participating in appeal even before reversing

[4] *See also Scofield,* 382 U.S. at 217 n.10 ("[T]he policies underlying intervention may be applicable in appellate courts. Under Rule 24(a)(2) or Rule 24(b)(2), we think the charged party would be entitled to intervene."); *WLNY-TV, Inc. v. FCC.*, 163 F.3d 137, 138-39 (2d Cir. 1998) (permitting non-party cable companies to intervene in broadcast television stations' appeal of FCC decision).

district court's denial of motion to intervene below). Appellees fail to cite any relevant case to the contrary.

III. THE SBA HAS STANDING TO INTERVENE DIRECTLY IN THIS APPEAL.

A non-party has standing to appeal when it has "an interest that is affected by the trial court's judgment." *Aurelius Capital Partners, LP v. Republic of Argentina*, 584 F.3d 120, 127 (2d Cir. 2009), *cert. denied*, 559 U.S. 988 (2010) (quoting *Hispanic Soc'y of the N.Y. City Police Dep't v. N.Y. City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir. 1986)); *West*, 70 F.2d at 624 (2d Cir. 1934) (noting that, where the "decree affects [the non-party's] interests, he is often allowed to appeal"). An interest is sufficient for the purposes of Article III standing to support a non-party appeal if it is "plausible" that the interest will be affected by judgment at issue. *Official Comm. of Unsecured Creditors of World-Com, Inc v. S.E.C.*, 467 F.3d 73, 78 (2d Cir. 2006). Thus, in *United States v. International Brotherhood of Teamsters, Warehousemen & Helpers of America, AFL-CIO*, this Court held that union affiliates had standing to appeal an injunction that changed rules applicable to their umbrella union. 931 F.2d 177, 183-84 (2d Cir. 1991).

Numerous other decisions have held that non-parties have standing to appeal based on any plausible interest. In *Official Committee of Unsecured Creditors*, the Court found that a non-party unsecured creditors committee had standing to appeal simply because the order appealed from might "affect the amount of money

available to" the creditors. 467 F.3d at 79. Similarly, in *Kaplan v. Rand*, this Court found a shareholder's interest in the corporate treasury sufficient to support standing to appeal in a corporate derivative suit. 192 F.3d 60 (2d Cir. 1999).

Appellees' suggestion that the SBA lacks standing is meritless. Like the intervenor in *Schulz v. Williams*, which appellees cite for the proposition that a party seeking to intervene for the purpose of appealing a district court judgment must have Article III standing, the SBA has standing because "[t]he district court's decision could have caused th[e] injury [complained of], and this appeal could have afforded relief that would have redressed that injury." 44 F.3d 48, 53 (2d Cir. 1994). Here, as in *Schulz*, the Liability and Remedies Opinions have caused the injury the SBA seeks to redress on appeal—individual findings of wrongdoing by SBA members and mandated prospective changes to police practices that will directly affect SBA members, including potential impairment of their collective bargaining rights. *See* SBA's Br. 12-16. Like the non-parties in all of the above cases, the SBA has interests that are affected by the Opinions and, therefore, it has standing under Article III to appeal.

IV. CONCLUSION

For all of the above reasons, the SBA respectfully requests that the Court grant 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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Respectfully submitted,

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