Nos. 14-2829-(L)

14-2848(Consolidated) & 14-2834(Consolidated)

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*,**

– v. –

(***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 APPELLANTS – PUTATIVE INTERVENORS DETECTIVES' ENDOWMENT ASSOCIATION, INC., LIEUTENANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., and the NYPD CAPTAINS ENDOWMENT ASSOCIATION

Joseph A. DiRuzzo, III
Jeffrey J. Molinaro
FUERST ITTLEMAN DAVID & JOSEPH, PL
1001 Brickell Bay Drive, 32nd Floor
Miami, FL 33131
305.350.5690 (O)
305.371.8989 (F)

Attorneys for the Detectives' Endowment Association, Inc., Lieutenants Benevolent Association of the City of New York, Inc., and the NYPD Captains Endowment Association.

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,

– v. –

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, 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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GLOSSARY

BCB……New York Board of Collective Bargaining

CBL……New York City Collective Bargaining Law

CEA……NYPD Captains Endowment Association

DEA……Detectives' Endowment Association, Inc.

Doc. #.....District Court docket entries below

JA……..Joint Appendix

LBA……...Lieutenants Benevolent Association of the City of New York, Inc.

NYPD……New York Police Department

PBA……..Patrolmen's Benevolent Association

PERB……...Public Employment Relations Board

SBA……..Sergeants Benevolent Association

SPA. . . . . Special Appendix

TAP……...Trespass Affidavit Program

The City……City of New York

The Unions……...the DEA, CEA, and LBA

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ARGUMENT

The District Court erred in denying the Unions' motion to intervene, both as of right and permissively. The Appellees' arguments to the contrary are not persuasive and should be rejected in full.

I. THE UNIONS ARE ENTITLED TO INTERVENE AS A MATTER OF RIGHT

The City argues (Br. p. 22 fn. 6) that it did not waive its right to contest that the Unions should be permitted to intervene. As an initial matter, arguments raised only in footnotes are deemed waived. *See Norton v. Sam's Club,* 145 F.3d 114, 117-18 (2d Cir. 1998). Thus, this Court should find that the City has waived any counter-argument to the Unions' position. *See Clem v. Lomell,* 566 F.3d 1177, 1182 (9th Cir. 2009) ("where appellees fail to raise an argument in their answering brief, they have waived it") (internal citation omitted); *United States v. Ford,* 184 F.3d 566, 577 fn. 3 (6th Cir. 1999) ("[e]ven appellees waive arguments by failing to brief them") (internal citation omitted).

Assuming, *arguendo,* that this Court will address the merits of the City's position, the City's brief attempts to distance itself from the letter it filed with the District Court (JA-969) consenting to the intervention as the letter did "not bind the City as to the present appeals in any way." City Br. p. 22 fn. 6. However, it is well established that a statement by counsel in the scope of his/her representation binds his/her client, and courts "can appropriately treat statements in briefs as binding judicial admissions of fact." *Purgess v. Sharrock,* 33 F.3d 134, 144 (2d Cir. 1994) (internal

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citation omitted). And because "[f]acts admitted by a party are judicial admissions that bind th[at] [party] throughout th[e] litigation," *Gibbs ex rel. Estate of Gibbs v. CIGNA Corp.*, 440 F.3d 571, 578 (2d Cir. 2006), including appeals, *Glick v. White Motor Co.*, 458 F.2d 1287, 1291 (3d Cir. 1972), the City is bound by its admission that the Unions meet all the criteria for intervention.

The Ligon Plaintiffs argue (Br. p. 10) that the Unions have waived any claim to intervene in *Ligon*. They are mistaken. The PBA and the Unions collectively moved for leave to intervene in both *Floyd* and *Ligon* because the Remedial Order (entered in both cases) "touch[es] upon the rights and interests of the members of the NYPD, including rights subject to existing collective bargaining with the City[,]" Doc. # 392 p. 6, and "may have an impact upon the safety of officers as well," *id.* at p. 15. Since the Remedial Order implicated the Unions' collective bargaining rights in both cases, the Unions properly intervened in both cases by making reference to the one, and only, Remedial Order at issue.

The District Court openly acknowledged that:

> In a January 8, 2013 Opinion and Order, amended on February 14, 2013, [the District Court] granted the *Ligon* plaintiffs' motion for a preliminary injunction, and proposed entering several forms of preliminary relief. [The District Court] postponed ordering that relief until after a consolidated remedies hearing could be held in *Ligon* and *Floyd*. . . . The purpose of consolidating the remedies hearings in *Ligon* and *Floyd* was to avoid inefficiencies, redundancies, and inconsistencies in the remedies process.

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Floyd-Remedies, 959 F. Supp. 2d at 688-89 (footnotes omitted). When the District Court inextricably tied the Remedial Order in *Floyd* to *Ligon* (and vice versa), the Unions' identical motion to intervene in both *Floyd* and *Ligon* made perfect sense as the Remedial Order at issue was identical as well. Thus, the Ligon Plaintiffs' argument that the Unions have waived any arguments as to intervention in *Ligon* should be rejected.

A. The Existing Parties Do Not Adequately Represent the Unions' Interests.

The City and the Ligon Plaintiffs, in their respective briefs, fail to address the adequacy of representation, and, as stated above, Appellees waived arguments to the contrary when they failed to address the issue within an answering brief. *See Clem*, *supra; Ford, supra.*

Turning to the Floyd Plaintiffs, the substance of their contention is that the Unions' position "makes no sense." (Floyd Br. p. 38 fn. 8). This assumes their desired conclusion, i.e., the District Court's failure to address the adequacy of representation was of no moment. In the unlikely event that the Unions' position did in fact make no sense to the Floyd Plaintiffs, the undersigned will attempt to articulate the position in clearer terms.

Every trial court that makes factual findings does so within the context of the applicable law, and not in a vacuum. Accordingly, if a trial court's understanding of the law is incorrect this will, in turn, cloud the trial court's review of the record and

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taint the trial court's fact finding process and the ultimate factual findings. So, when the Fifth Circuit states that "[f]indings of fact influenced by an erroneous view of the law are entitled to no deference," *G.M. Trading Corp. v. Comm'r*, 121 F.3d 977, 980 (5th Cir. 1997), this statement is nothing more than a common sense view that a trial court's factual finding can, at times, be flawed so that an appellate court need not give the factual findings any deference. And for the reasons stated in their Initial Brief the Unions assert that this Court need not give any deference to the District Court's factual findings.

The Floyd Plaintiffs (Br. p. 45) aver that the presumption of adequate governmental representation "cannot apply when, as here, the governmental party to the litigation is the employer of the putative intervenor" (citing *United States v. State of N.Y.,* 820 F.2d 554 (2d Cir. 1987) and *United States v. City of Los Angeles, Cal.,* 288 F.3d 391 (9th Cir. 2002)). However, even a cursory review of this Court's decision in *State of N.Y.* refutes this contention. That decision was clear:

> It believed that when the State is a party to a lawsuit, it is presumed to represent the interests of its citizens. That analysis does not apply in this case. *A state is presumed to represent the interests of its citizens only when it is acting in the lawsuit as a sovereign. In the matter at hand the State of New York is a party to the lawsuit in its capacity as employer, not as a sovereign.* Thus, the representation presumption is inappropriate.

Id. at 558 (internal citation omitted, emphasis added). The Ninth Circuit likewise shares the same view. *See City of Los Angeles*, 288 F.3d at 402 ("[t]he presumption has not been applied to parties who are antagonists in the collective bargaining process.

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The Police League is the designated representative of its members in that endeavor; the City is not.").

Here, because the City was acting not as a mere employer (this is not an employment discrimination case) the presumption of adequate representation attached from the outset and was only rebutted once the City demonstrated its nonfeasance[1] or, at the earliest, when the Remedial Order was issued crystalizing the diversity of interests between the Unions and the City.

The Floyd Plaintiffs (Br. p. 47) and the City (Br. p. 43) rely heavily on this Court's decision *Farmland Dairies v. Comm'r of New York State Dep't of Agric. & Markets,* 847 F.2d 1038 (2d Cir. 1988). But *Farmland Dairies* provides no shelter to the Appellees because of the fundamentally different facts of that case. In *Farmland Dairies*, a group of New York milk dealers sought to protect their statutorily created milk monopoly. *Id.* at 1041. The relief to the plaintiffs in *Farmland Dairies* did not impose any right, duty, or obligation on the milk dealers/putative intervenors; instead the milk dealers where free to act, or not, in their commercial enterprise as they saw fit. *Accord Local Number 93, Int'l Ass'n of Firefighters v. City of Cleveland,* 478 U.S. 501, 528–30 (1986) (noting that parties settling their own dispute cannot impose

[1] The District Court should have, but did not, consider the case below as restructured rather than on the original pleadings when it ruled on the Unions' motions to intervene. *See City of Los Angeles* 288 F.3d at 399

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obligations on third parties and that "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree").

In this case, however, the membership of the Unions, i.e., the individual Detectives, Captains, Lieutenants, Sergeants, and Patrolmen, will be the individuals who will effectuate the District Court's Remedial Order. In contrast to the putative intervenors in *Farmland Dairies,* their failure to act will subject the Police Unions' membership to contempt sanctions (the milk dealers faced no such threat or potential injury in *Farmland Dairies*). Furthermore, this case is different from *Farmland Dairies* because the milk dealers "intervened and participated fully in the state administrative hearings" and there was no reason why the milk dealers could not have acted similarly in the subject litigation, *id.* at 1044. Here, however, there were no administrative hearings and there was no prior adjudicative process in which the Unions had the opportunity to participate but elected not to.

Additionally, the Third Circuit has observed that a larger number of individuals' interests may be infringed during the remedies phase of litigation, in contrast to the individuals responsible for the offending conduct. *Harris v. Pernsley,* 820 F.2d 592, 599 (3d Cir. 1987). The Appellees offer no principled response to this commonsense view of institutional litigation, and this Court should adopt in full the Third Circuit's reasoning articulated in *Harris.*

The Unions observe that none of the Appellees addressed the Seventh Circuit's decision in *United States v. City of Chicago*, 870 F.2d 1256 (7th Cir. 1989) (Posner, J.)

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even though the Unions relied heavily on that non-binding yet persuasive opinion. *City of Chicago* illustrates the problem employees of governmental bodies have with meeting Rule 24's strictures, and fully supports the Unions' position that the inadequacy of representation only became clear upon the issuance of the Remedial Order. *Id.* at 1263.

Finally, in response to the Floyd Plaintiffs' *ad hominem* attack (Br. p. 48), who the Unions hire to represent them should have no impact on this Court's analysis and there has never been an argument that the Unions are poor or ignorant.[2]

B. The Motion to Intervene was Timely.

By definition an inquiry into timeliness begs the question: When? The Unions submit that the clock only began to run when the presumption of adequate government representation by the City was fully rebutted. Try as they may, the Appellees make no compelling argument that the proverbial clock began to run long before either the de Blasio administration demonstrated its nonfeasance or from the date of the issuance of the Remedial Order. Nor do the Appellees cite to cases that address governmental/institutional litigation in which the governmental body has abandoned its appeal mid-litigation. The Supreme Court has instructed that question of timeliness must be viewed holistically and under the totality of the circumstances,

[2] As an aside, the firm representing the Unions is not large under any stretch of the imagination as it employees a mere 18 attorneys.

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see NAACP v. New York, 413 U.S. 345, 366 (1973). An analysis of the totality of the circumstances here leads to only one conclusion is possible – the motion was timely.

The Unions argued in their Initial Brief that the City's litigation position induced the Unions into refraining from intervening. *See* Br. p. 29 citing *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181-82 (3d Cir. 1994). The City offers no response (*see* City Br. p. 41-45) to this argument and, as such, it should be estopped from arguing that the Unions' intervention was untimely under the circumstances as it has waived any argument to the contrary. *See Clem*, *supra; Ford, supra.*

Turning to the four factor test, each factor militates in favor of finding that the intervention below was timely.

1. Length of Notice.

The Floyd Plaintiffs argue that this Court measures timeliness from the time a putative intervenor *might* not be adequately represented (Br. at p. 45, citing *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171 (2d Cir. 2001)). While that is normally the case, *Butler* did not address governmental litigation, nor did it address when the presumption of adequacy of representation fell by the wayside. The District Court erred in failing to harmonize these conflicting principles, but when this Court does so it should hold that the totality of the circumstances justifies the conclusion that the Unions' intervention was timely.

The Ligon Plaintiffs argue (Br. at 15) that the Unions were on notice from the date of the filing of the *Ligon* complaint, and "the Unions' motions was inexcusably

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late" (Br. p. 16), but provide no discussion on the presumption of adequacy of representation, relying instead on this Court's decision in *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593 (2d Cir. 1986). However, as stated in the Unions' Initial Brief (p. 32-33), *Yonkers Bd.* addressed timing vis-à-vis available funding, which is not implicated here.

The Floyd Plaintiffs further argue (Br. p. 39) that post-judgment intervention is disfavored in this Circuit. The Floyd Plaintiffs attempt to artfully, yet improperly, erect a near insurmountable burden as to almost make post-judgment intervention categorically impossible. The Third Circuit has observed[3] in another context that "rarely if ever does not mean never." This is one of those rare cases where a timely post-judgment intervention is appropriate given the nature, extent, effect, and duration of the District Court's Remedial Order and the shifting litigation position of the City.

The Floyd Plaintiffs contend that the Unions' claims of surprise as to the scope of the Remedial Order were "not credible." Floyd Br. p. 44. Tellingly, even the District Court acknowledged that:

> The subject of police officers wearing "body-worn cameras" *was inadvertently raised* during the testimony of the City's policing expert, James K. Stewart. The following discussion took place:
>
> A.... But what happens is the departments a lot of times may not have ... expertise and they may need some technical assistance like body worn cameras is an example and how much technology and where you

[3] *See In re United States*, 273 F.3d 380, 385 (3d Cir. 2001).

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> store the information and stuff like that. They may not have it. And there may be other issues like psychological ideas about—
>
> THE COURT: What do you think of body worn cameras?
>
> THE WITNESS: I think it's a good idea. We recommended it in Las Vegas. And we're doing it in Phoenix as well.
>
> THE COURT: Thank you.
>
> ...
>
> A. But I have no opinion in this case with respect to body worn cameras.

Floyd-Remedies, 959 F. Supp. 2d at 684 (emphasis added). So contrary to the Floyd Plaintiffs' contention that the scope of the Remedial Order came as no surprise, the Remedial Order itself acknowledges that the relief was an idea of the District Court that it inadvertently stumbled upon.

2. Prejudice to Existing Parties.

The Floyd Plaintiffs rely (Br. p. 49) on *Garrity v. Gallen*, 697 F.2d 452 (1st Cir. 1983) for the proposition that allowing the Unions to intervene would prejudice the existing parties who have decided to settle the case below. The First Circuit in *Garrity* stated that: "[i]ntervention to contest provisions of the implementation order would obviously be highly detrimental to members of the plaintiff class; the substantial relief afforded them by the order would probably be delayed—and, if applicants were successful in their challenge to the order, denied." *Id.* at 457. This Court should reject the logic of *Garrity* because it appears that the *Garrity* court was concerned that the putative intervenors would be successful, resulting in the plaintiffs' relief being denied. However, the entire point in moving to intervene in order to prosecute an appeal is to deny the plaintiff the relief won at the trial court. To credit the circular

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logic of *Garrity* would make the goal of intervention the very reason for the denial of intervention. Such logic cannot stand.

Similarly, the Floyd Plaintiffs (Br. p. 50) and the Ligon Plaintiffs (Br. p. 17) cite to *In re Holocaust Victim Assets Litig.*, 225 F.3d 191, 199 (2d Cir. 2000) for the proposition that undue prejudice accrues to the existing parties when the grant of a motion to intervene will lead to the destruction of a settlement agreement and result in additional settlement talks. But *In re Holocaust Victim* did not involve a prospective injunction affecting individuals who were not named in the case, nor did it address the unique concerns involved in institutional litigation, *see Harris, supra.* Accordingly, *In re Holocaust Victim* does not control the outcome of this case.

In respect to the Floyd Plaintiffs' (Br. p. 49) and the Ligon Plaintiffs' (Br. p. 17) reliance on this Court's decision in *Farmland Dairies,* there is no limiting principle to the position the Plaintiffs advance. Every case is potentially subject to settlement, and that being so, every original party to a case has an interest in avoiding continuing litigation. Taking the Plaintiffs position to its natural conclusion means that every case would pose undue prejudice to existing parties. That cannot be the law. To that end, prejudice must be viewed through the lens of alleged untimeliness, not the intervention itself. *United States v. City of Detroit*, 712 F.3d 925, 933 (6th Cir. 2013). In this case, given that until recently the City was proceeding with its appeal of both the liability and the remedial orders (indeed, before the change in administrations, the City

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filed its opening brief contesting both orders) there is no undue prejudice to the existing parties.

Tellingly, the City's brief (*see* Br. p. 41-45) makes no argument that the City would be prejudiced in any way by the Unions' intervention.

3. Prejudice to Appellants.

The Ligon Plaintiffs (Br. p. 18), the Floyd Plaintiffs (Br. p. 51) aver that the Unions have no direct, substantial, and legally protectable interests in the cases below.[4] They are mistaken. For the reasons stated below and in the Unions' Initial Brief, the Unions and the individual Union members will suffer prejudice by operation of the denial of the intervention motion.

4. Unusual Circumstances.

The District Court did not address whether this case presented unusual circumstances, and, although argued in the Unions' Initial Brief, neither the City (*see* Br. p. 41-45), nor the Floyd Plaintiffs (*see* Br. p. 51-53), nor the Ligon Plaintiffs (*see* Br. p. 15-18) attempt to refute the Unions' position that this case presents unusual circumstances which render the District Court's order denying intervention an abuse of discretion. Thus, Appellees waived any counter-arguments by failing to raise those counter-arguments in an answering brief. *See Clem*, *supra; Ford, supra.*

[4] The City makes no argument as to prejudice to the Unions (*see* City Br. p. 41-45) and it has waived any arguments to the contrary. *See Clem*, *supra; Ford, supra.*

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C. The Unions have a Significant Protectable Interest.

At bottom, each of the three Appellees' take on the facts of this case suffers from the same myopic point of view. Each argues that because neither the Unions nor the Unions' membership is named in the Remedial Order the Unions have no interest in the case below. *See* Floyd Br. p. 29 ("[c]ontrary to the Unions' bald assertion, there is no injunction against any officer that could subject them to contempt."); Ligon Br. p. 18; City Br. p. 23. However, it is beyond cavil that the City and the NYPD as entities do not act, or fail to act, by themselves. Instead, the City and the NYPD act, or fail to act, only through their representatives and employees.

So, when the District Court entered its Remedial Order, the question that necessarily followed was: who will put the Remedial Order into effect? The answer is clear – the individual Detectives, Captains, Lieutenants, Sergeants, and Patrolmen of the NYPD. Indeed, for all intents and purposes, to the public the NYPD is the police officers that interact with the public on the streets, in the police stations, and over the telephone. For this reason any individual member of the NYPD who fails to comply with the District Court's Remedial Order will be subject to the District Court's contempt power. Accordingly, when the Appellees advance a theory that the Unions and the Unions' membership are not affected by the District Court's Remedial Order (and, by extension, have no interest in the order or the cases below) they are advancing a theory that improperly atomizes the Remedial Order without looking at how the it will be put into effect. *See City of Los Angeles*, 288 F.3d at 401 ("the relevant

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inquiry is whether the consent decree 'may' impair rights 'as a practical matter' rather than whether the decree will 'necessarily' impair them. Fed. R. Civ. P. 24(a)(2).").

A hypothetical illustrates this point. If the Unions' membership refuses to wear the body cameras as required by the Remedial Order (or refuse to do anything else contemplated by the Remedial Order, or the Monitor for that matter) because that condition was not bargained for, or approved by, the Unions' leadership, what will the Plaintiffs do? Surely, the Plaintiffs who have obtained "hard fought relief" will move the District Court to hold the City and the individual police officers in contempt (and perhaps the Unions as well). And when the Unions (as the authorized labor representatives for the individual police officers) advance the position that the imposition of the body cameras is not authorized under the CBA, will the District Court assume the role of the BCB or adjudicate the merits of the dispute, or will it use its contempt power to force through the change? Any reasonable view of the case leads to one conclusion – a contempt hearing will be had and a contempt hearing is no substitute to the normal bargaining process of bargaining to impasse, review by the BCB, and review by the New York State Courts.

Here, the Unions only want a place at the table to ensure that their collective bargaining rights and the CBAs will be honored, *see W.R. Grace and Co. v. Local Union* 759, 461 U.S. 757, 771 (1983), but the only place where all the parties are present is before the District Court. Indeed, because that is the only place, by virtue of the Remedial Order, that the Unions can be assured that their voice will be heard and

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subject to the appropriate level of judicial review, they were entitled to intervene and the decision to the contrary was erroneously entered.

1. The Unions' collective bargaining rights.

The Appellees do not dispute that the Unions have collective bargaining rights, but they do dispute whether any part of the Remedial Order (as currently envisioned or as may be implemented) is subject to mandatory bargaining. For the reasons stated in the Unions' Initial Brief, and for the additional reasons stated herein, the District Court's conclusion that the Unions had no protectable interest, and the Appellees attempts to buttress the District Court's logic, must be rejected.

2. The Remedial Order addresses training which will be required by the Unions members' employer as a qualification for continued employment. Thus, it is matter over which the City is required to collectively bargain in good faith.

The Plaintiffs and the City contend that the training ordered by the lower court in its Remedial Order is not the subject of collective bargaining because training is only subject to collective bargaining when it is required for a Union member to obtain a license or certification or as a prerequisite for an increase in pay or promotion. Ligon Br. at p. 23; City Br. at pp. 29-30. The Appellees misstate the law.

The law is not a narrow as the Appellees and the lower court perceive. There is no *per se* rule that a license or certification must be at issue for training to be considered a subject of mandatory collective bargaining. Instead, as explained in the Unions' Initial Brief, the law is clear: where management prerogatives, such as

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training, are established and "required by the employer as a qualification for continued employment" or "where it is demonstrated that there exists a practice and tradition of the employer encouraging and supporting employee participation in such training," the management prerogative will be considered a subject of mandatory bargaining. *Uniformed Firefighters Ass'n*, Decision No. B-43-46, 37 OCB 43, *15 (BCB 1986); *District Council 37, et al v. City of New York*, Decision No. B-20-2002, 69 OCB 20, *5-6 (BCB 2002).

The City concedes that when training constitutes a qualification for continued employment, it may be the subject of collective bargaining. City Br. p. 29. Further, the Ligon Plaintiffs admit that additional training is subject to collective bargaining when the "participation in training programs will be tied to pay or promotions." Ligon Br. p. 24. However, the City attempts to argue that such training (though required and as raised in the Unions' Initial Brief and conspicuously ignored by all Plaintiffs), which is fully enforceable against the Unions' members via a contempt sanction as City employees, would constitute standard job training and is thus exempt from collective bargaining. Such a position is disingenuous at best. The Unions find it hard to believe that the requirement to undergo additional training as contemplated by the Remedial Order will not be a condition precedent for a salary increase or a promotion. In other words, undoubtedly the additional training will be a condition of an individual police officer's employment such that it must be completed before he/she is retained, and/or promoted, and/or is entitled to a pay increase. *See* City Br.

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at p. 31 ("[T]he preliminary injunction record in *Ligon* established that the NYPD had exercised its prerogative to retain NYPD supervisors and patrol officers—e.g., by mandating updated training on certain interim NYPD orders and requiring attendance at a refresher course on stop-and-frisk practices."). Moreover, the Unions anticipate that the failure to attend the additional training will result in sanctions by the NYPD and/or the City because each will need to ensure its compliance with the Remedial Order.

The Ligon Plaintiffs and the City argue that no collective bargaining right exists regarding the stop-and-frisk training revisions mandated by the Remedial Order because the Unions have not raised collective bargaining issues during previous reforms to the City's training policies on the matter. However, the mere failure to assert a right does not correlate to a right not existing; nor does it correlate to the ability of another to strip away that right. Neither the City nor the Ligon Plaintiffs have cited, or can cite, anything which supports the proposition that collective bargaining rights on an issue are forever waived/lost/abandoned by the mere failure to assert such rights during previous reforms. Such a conclusion would have perverse effects on the collective bargaining process and should be rejected by this Court.

Here, as a result of the Remedial Order and the ever present threat of contempt which comes with its enforcement, it is evident that any and all mandated training will be "required by the employer as a qualification for continued employment," *Uniformed Firefighters Ass'n, supra,* and thus the condition falls under the

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ambit of the collective bargaining laws. The District Court's conclusion to the contrary must be rejected.

D. Without Intervention the Unions' Ability to Protect their Members' Interests will be Impaired.

1. The Remedial Order frustrates the collective bargaining process by which the City is obligated to negotiate in good faith on the practical impacts of the reforms implemented. Thus, absent intervention, the Unions' collective bargaining rights cannot be ensured, will be infringed, and are nullified.

In its Brief, the City argues that "[t]he unions have produced nothing suggesting that, in the event that bargainable practical impacts were to arise, the [R]emedial [O]rder would prevent the unions from bargaining over those issues." City Br. p. 33.[5] However, the City's logic ignores the fact that due to the District Court's supervision of any proposed reforms and that Court's accompanying contempt sanctions powers, the Remedial Order not only jettisons the traditional collective bargaining judicial review process under New York law but also eliminates the duty of the City to negotiate in good faith. This, in turn, frustrates the collective bargaining process as a whole. Absent intervention, the Unions' collective bargaining rights will be a nullity.

As explained within the Unions' Initial Brief (Br. p. 49), New York law governs the collective bargaining process. However, the Remedial Order fundamentally alters

[5] The Floyd and Ligon Plaintiffs have not addressed this argument in either of their briefs. Thus, this Court should deem any argument in opposition to the Unions' position waived. *See Clem*, *supra; Ford, supra.*

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these procedures. Under New York law, the practical impacts of managerial decisions are bargained in good faith to impasse, disputed before the BCB, and ultimately resolved in the state courts. The Remedial Order fundamentally alters this process in several ways notwithstanding the fact that the Unions never consented to these changes to their collective bargaining rights. Now, should an impasse arise, such an impasse will stem from a federal court ordered remedy, thus placing any such impasses outside the review of state courts. *See Stoll v. Gottlieb*, 305 U.S. 165, 170-172 (1938). As in *City of Los Angeles*, the Unions will be forced to resolve bargaining disputes in federal court in the context of contempt proceedings instead of the detailed process provided by New York law. *Cf. City of Los Angeles*, 288 F.3d at 401 (reversing denial of a motion to intervene where "the consent decree by its terms purports to give the district court the power. . .to override the [union's] bargaining rights under California law and require the City to implement the disputes provisions of the consent decree.").

In addition, rather than answering to the give and take of the Unions, the City is placed in a take it or leave it position of superiority in the bargaining process because the City must implement the policies of the Monitor or face the threat of contempt. Moreover, as the Unions' members are employees of the City, the Unions' members are exposed to the same threat of contempt for violating the injunction regardless of whether the Unions have bargained in good faith to impasse on the practical impacts of its implications. *See generally*, Fed. R. Civ. P. 65(d)(2)(b). Thus, it is

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not highly speculative to envision a situation where two organizations, especially two organizations currently in the protracted throes of negotiating new collective bargaining agreements and which have been operating on expired CBAs for a period of years, would be forced to impasse on yet another issue. Here, however, in such a situation the Unions and their members will be forced into capitulation without receiving the benefits and protections granted to them under law. Without intervention, the Unions' ability to air its grievances with regard to the practical impacts of the City's methods of implementation of the Remedial Order will be frustrated and stifled. Thus, the lower court's decision should be reversed.

Finally, to the extent that the City argues that Remedial Order is not likely to result in bargainable "practical impacts" on the Unions' members, such an argument is specious at best. It cannot seriously be maintained that widespread reforms to training, supervision, policies and procedures, and safety equipment will not result in practical impacts on workplace conditions, thus affecting the Unions' collective bargaining rights. Simply put, intervention is warranted where a remedial order, could, *as a practical matter*, conflict with the CBA and/or the Union's collective bargaining rights. That is the case here. *See City of Los Angeles*, 288 F.3d at 400.

In this case, the only way to ensure that the continued meaningfulness of the collective bargaining and First Amendment rights of the Unions is by allowing them to intervene in the remedial stages of the case.

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2. Participation in the Joint Remedial Process is insufficient to ensure the collective bargaining rights of the Unions.

At the outset, it must be noted that neither the City, nor the Floyd Plaintiffs, nor the Ligon Plaintiffs addressed this issue in their briefs. Thus, it has been waived. *See Clem*, *supra; Ford, supra.*

Briefly, as explained in the Unions' Initial Brief, the District Court erred for the following reasons. *First*, the Unions seek to intervene in the complete remedial phase of the litigation. As the "immediate reforms" may, and the practical impacts of those reforms certainly will, affect the collective bargaining rights of the Unions, the Unions are entitled to intervene. *Second*, participation in the Joint Remedial Process does not grant the same rights as party status. Here, there is no guarantee the Monitor will consider the Unions' "particularly valuable perspective" in adopting reforms. Further, is there no requirement that the City or the Monitor negotiate in good faith with the Unions regarding the proposed Joint Reforms as there would be under the CBL. *Third*, the Unions are without an avenue to challenge such a position as they would be when directly negotiating in a collective bargaining setting or as a party to the litigation. *See City of Los Angeles*, 288 F.3d at 400 ("amicus status is insufficient to protect the Police League's rights because such status does not allow the Police League to raise issues or arguments formally and gives it no right of appeal.").

Thus, the effect of not allowing the Unions to participate as a party would be to strip away their rights to petition the courts for redress of its grievances in violation

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of the First Amendment and the CBL. Therefore, the District Court's order should be reversed.

E. The District Court erred in its standing analysis.

Contrary to the Floyd Plaintiffs' (Br. p. 22) and the City's (Br. p. 46) respective contentions, the Unions have established Article III standing. As explained in the Unions' Initial Brief because: (1) subjects of the Remedial Order are topics of mandatory collective bargaining, and (2) practical impact negotiations over non-mandatory collective bargaining topics will be stifled, the Unions have suffered an injury-in-fact that can only be redressed through intervention in the remedial phase of this case.

It cannot be credibly argued by either the Appellees or *Amici* that the Unions and their members, do not "have a direct stake in the outcome," *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972), so as to lack Article III standing because they will be the individuals to bear the burdens, and shoulder the responsibilities, of carrying out the District Court's Remedial Order. Unlike the petitioners in *Hollingsworth v. Perry* (proponents of Proposition 8), who lacked standing because the "District Court had not ordered them to do or refrain from doing anything," 133 S. Ct. 2652, 2662 (2013), the Unions are directly affected by, and the injury is directly traceable to, the District Court's Remedial Order. To that end, under no circumstances are the Unions mere "concerned bystanders, who will use it simply as a vehicle for the vindication of value interests," *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (internal quotations and citation

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omitted). Instead they have a very real stake in the case below. Indeed, as the Remedial Order impacts officer training and safety, the officers whose lives are potentially put in harm's way every time they show up to work have the most at stake in the case below (in contrast to the employees of the City who work in comfort at City Hall). The Appellees' assertion to the contrary is an affront to the Unions' members and marginalizes the commitment and risks inherent in being a NYPD police officer.

The Floyd Plaintiffs focus (Br. p. 23) on the Supreme Court's decision in *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013), but *Clapper* bears no resemblance whatsoever to the facts of the case below.[6] Indeed *Clapper* stands for the unremarkable proposition that court "often f[inds] a lack of standing in cases in which the Judiciary has been requested to review actions of the political branches in the fields of intelligence gathering and foreign affairs." *Id.* at 1147. *See also id.* at 1148 ("respondents have no actual knowledge of the Government's § 1881a targeting practices. Instead, respondents merely speculate and make assumptions about whether their communications with their foreign contacts will be acquired under § 1881a.").

Moreover, contrary to *Amicus* Law Professors' assertions the injuries suffered by the Unions are both concrete and can only be redressed through intervention. In

[6] The City mentions in passing (Br. p. 47) this Court's decision in *In re Joint E. & S. Dist. Asbestos Litig.*, 78 F.3d 764, 779-80 (2d Cir. 1996) but that case reiterated that an insurer who has not paid an insured's claims has no subrogation rights and no right to intervene in litigation against third parties.

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their brief, the Law Professors rely upon *Martin v. Wilks*, 490 U.S. 755 (1989) for the proposition that the Unions are free to file a subsequent lawsuit if their collective bargaining rights are infringed upon as a result of the Remedial Order's mandated reforms. That case is distinguishable and reliance upon it demonstrates a gross misunderstanding of the collective bargaining process. *Martin* dealt with discriminatory hiring practices. There the court found that the consent decree in which the City promised to hire more black officer firefighters did not preclude a subsequent challenge by white firefighters that promotions based on decree of less qualified minority candidates constituted reverse discrimination. *Martin v. Wilks*, 490 U.S. at 758-759.

In this case, the Unions cannot simply file a complaint when their collective bargaining rights are infringed. Rather, as detailed above, to challenge any actions of the City in contradiction to the CBL and the Unions' collective bargaining rights the Unions must follow a complex set of procedures outlined by New York law, which include review before the appropriate administrative forum and ultimately the New York State Courts. However, as explained above, such a process is made a practical nullity due to the possibility of contempt which would overhang and taint any such negotiations. Further, even if the Unions did file a grievance against the City, the Law Professors ignore the realistic probability that the Unions will lack the ability to assert any claim in state court as a state court cannot modify the implemented federal court injunction; and thus, the Unions claims would fail for lack of redressibility. As a

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result, the only avenue through which the Unions can effectively assert the collective bargaining rights is through intervention in the remedial phase of litigation.

Here, because the Police Unions' membership, i.e., the individual Detectives, Captains, Lieutenants, Sergeants, and Patrolmen, are all bound by the District Court's judgment and injunction, the burdens and obligations of complying with the judgment and injunction is an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper*, 133 S. Ct. at 1147 (internal citation omitted). So contrary to the District Court's conclusion, a favorable ruling is directly traceable to the District Court's injunction and is founded upon the Unions' particularized interest that their labor contracts will be honored. *See W.R. Grace,* 461 U.S. at 771.

The Floyd Plaintiffs contend that a threatened harm must be "certainly impending" to confer standing. Br. at 32 (citing to *Clapper,* 133 S. Ct. at 1147). However, what the Floyd Plaintiffs conveniently fail to mention is that just last term Supreme Court reiterated that standing is present when the harm is "'certainly impending,' *or* there is a 'substantial risk' that the harm will occur." *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014) (emphasis added, internal citation omitted). For the reasons stated above in the case at bar there is a substantial risk of harm imposed on the Unions and the Unions' membership by the District Court's Remedial Order. However, to be clear, the Unions have established standing under

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either the Floyd Plaintiffs' "certainly impending" standard or the Supreme Court's "substantial risk" standard.

While it is true that the Unions used the word "may," the Floyd Plaintiffs (Br. p. 32) fail to take into account that the word "may" was used by the Unions in accord with precedent which holds that a putative intervenor need only show that "the contractual rights of the applicant *may be* affected by a proposed remedy." *Harris*, 820 F.2d at 601 (internal citation omitted, emphasis added). Accordingly, the Unions have not conceded that they lack Article III standing.

Claims (*see* City Br. p. 48) that the Unions lack organizational standing are easily rejected as the Unions collectively bargain for the respective members. *See* N.Y.C. Admin. Code § 12-307(4). And since the Unions have the authority under the CBL they, by definition, must have organizational standing on issues related to officer training and supervision (stated differently – if the Unions do not have organizational standing here, when would there ever be organizational standing?).

The District Court's conclusion that the Unions lacked Article III standing was incorrect and it should be vacated.

II. ALTERNATIVELY, PERMISSIVE INTERVENTION WAS APPROPRIATE.

The District Court denied permissive intervention for only one reason – lack of appellate standing. SPA-103 fn. 31. However, for the reasons set forth above and in the Unions' Initial Brief, the Unions had Article III standing below and have standing before this Court. This Court should allow Unions to participate as a party in the case

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below and find that the District Court abused its discretion in denying Unions' request for permissive intervention.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and allow Unions to intervene as of right under Rule 24(a) or, permissively under Rule 24(b).

Respectfully submitted,

Joseph A. DiRuzzo, III

Digitally signed by Joseph A. DiRuzzo, III
DN: cn=Joseph A. DiRuzzo, III, o=Fuerst Ittleman David & Joseph, PL, ou, email=jdiruzzo@fuerstlaw.com, c=US
Date: 2014.10.01 15:24:00 -04'00'

Joseph A. DiRuzzo, III
Jeffrey J. Molinaro
FUERST ITTLEMAN DAVID & JOSEPH, PL
1001 Brickell Bay Drive, 32nd Floor
Miami, Florida 33131
305.350.5690 (O)
305.371.8989 (F)
jdiruzzo@fuerstlaw.com
jmolinaro@fuerstlaw.com

Attorneys for the Detectives' Endowment Association, Inc., Lieutenants Benevolent Association of the City of New York, Inc., and the NYPD Captains Endowment Association.

Dated: October 1, 2014

CERTIFICATE OF COMPLIANCE RE: WORD COUNT

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i) counsel certifies that this brief is in compliance with the 7,000 type-volume limitation of Rule 32(a)(7)(B)(i). The instant brief is 6,923 words in length. The brief has been prepared using Microsoft Word, Garamond font in 14 point. In preparing this certificate, I relied on the word count program in Microsoft Word.

Joseph A. DiRuzzo, III

Digitally signed by Joseph A. DiRuzzo, III
DN: cn=Joseph A. DiRuzzo, III, o=Fuerst Ittleman David & Joseph, PL, ou, email=jdiruzzo@fuerstlaw.com, c=US
Date: 2014.10.01 15:23:19 -04'00'

Joseph A. DiRuzzo, III

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