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*,**

(*For Continuation of Caption See Inside Cover*)

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

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

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– v. –

DAVID FLOYD, LALIT CLARKSON, DEON DENNIS, DAVID OURLICHT, JAENEAN LIGON, individually and on behalf of her minor son, J.G., FAWN BRACY, individually and on behalf of her minor son, W.B., A.O., by his parent DINAH ADAMES, JACQUELINE YATES, LETITIA LEDAN, ROSHEA JOHNSON, KIERON JOHNSON, JOVAN JEFFERSON, ABDULLAH TURNER, FERNANDO MORONTA, CHARLES BRADLEY, individually and on behalf of a class of all others similarly situated,

Plaintiffs-Appellees,

– 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,

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.

FED. R. APP. P. 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants-Putative Intervenors, the Detectives' Endowment Association, Inc., the Lieutenants Benevolent Association of the City of New York, Inc., and the NYPD Captains Endowment Association, Inc. hereby state that they are non-stock, non-profit corporations and, therefore, there are no parent corporations or publicly held corporations that own their stock.

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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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JURISDICTIONAL STATEMENT

The United States District Court for the Southern District of New York ("District Court"), had jurisdiction pursuant to 28 U.S.C. § 1331, and 28 U.S.C. § 1343(a)(3). This Court has jurisdiction pursuant to 28 U.S.C. § 1291. *See Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 377 (1987) (denial of intervention subject to immediate review).

Appellants, Detectives' Endowment Association, Inc. ("DEA"), Lieutenants Benevolent Association of the City of New York, Inc. ("LBA"), and the NYPD Captains Endowment Association ("CEA") (collectively the "Unions") appeal from the orders of the District Court, Hon. Analisa Torres, *J.*, denying the Unions' motions for leave to intervene, entered on July 30, 2014, in the cases of *David Floyd, et al. v. City of New York, et al.*, case no. 08-cv-1034 and *Jaenean Ligon, et al., v. City of New York, et al.,* case no. 12-cv-2274.

On August 6, 2014, the Unions filed their Notices of Appeal. JA-1209-1213.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in denying the motion to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a).

2. Whether the District Court erred in denying the request for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b).

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INTRODUCTION

This is an appeal from the civil rights litigation challenging the City of New York Police Department's "stop and frisk" policy.

On August 12, 2013, the District Court held that the City of New York ("the City") had violated the Plaintiffs' Fourth and Fourteenth Amendment rights. As particularly relevant for this appeal, the District Court entered a Remedial Order[1] appointing a Monitor and requiring, *inter alia*, the City to carry out unprecedented changes in the way that the New York City Police Department's ("NYPD") employees conduct their day-to-day business of protecting and serving the millions of residents, commuters, and tourists in the five boroughs. However, in the District Court's desire to remedy the perceived constitutional shortcomings of the City, the Remedial Order changed not only the working conditions under which the fine men and women of the NYPD toil, it also emasculated the Unions' ability to collectively bargain with the City.

The unintended consequence of the Remedial Order is that when the Monitor requires the NYPD to put in place changes that the Unions oppose (because it

[1]The District Court also entered an order as to the City's liability. Although the Unions have limited their appeal of the denial of the motion to intervene to the Remedial Order, that does not mean that they agree that the Liability Order should be upheld upon appellate review. Because the Unions have substantially less monetary resources than the Patrolmen's Benevolent Association of the City of New York, Inc., ("PBA") or the Sergeants Benevolent Association ("SGA"), the Unions have determined that the best use of their limited resources is to contest the Remedial Order as that order has the greatest impact upon the general welfare on the Unions' members.

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negatively impacts the police officers' general welfare, including officer safety), the Monitor has *ipso facto* created an impasse in the collective bargaining process because the City cannot negotiate on these issues with the Unions in good faith. Instead, the City's hands are tied as it must comply with the Remedial Order. This problem is further magnified because the Unions have a right to appeal an adverse decision of the New York City Board of Collective Bargaining ("BCB") to the Supreme Court (New York). Accordingly, the Unions' ability to collectively bargain on behalf of their membership has been eviscerated, and their First Amendment right to seek redress in a judicial forum has been infringed.

The Unions sought to intervene in the litigation below to protect their interests only after the District Court entered its unprecedented orders. Initially, the City did not oppose the intervention recognizing that it and the Unions "may differ on collective bargaining issues, because of the widespread potential impact of the [District] Court's August 12, 2013, Liability Opinion and Remedies Opinion and subsequent related orders on the City and police officers…." JA-969. However, on January 30, 2014, after the new Mayor took office, the City announced it would no longer be prosecuting the appeal.

The resolution of this case does not require this Court to review either the Liability Order or the Remedial Order; rather this appeal requires this Court to determine if the Unions meet the standard for either mandatory or permissive intervention. To that end, the District Court erred when it determined that the

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Unions' motions to intervene were not timely, that the Unions do not have a protectable interest in the litigation, and that the Unions lacked Article III standing.

The District Court's factual findings, analysis, and ultimate conclusions were wrong on numerous levels. The District Court failed to take into account that there was a presumption of adequate representation by the City on behalf of, *inter alia*, the Unions. The presumption of adequate representation precluded the Unions from intervening until it was clear that the City's interests diverged from the Unions. Because the District Court failed to take this presumption into account, it likewise failed to analyze the timeliness of the respective intervention motions vis-à-vis the date that the presumption was clearly rebutted.

Further, the District Court fabricated, out of whole cloth, a new legal standard for litigants seeking to intervene in governmental litigation. The District Court improperly concluded that because elections always take place, and by extension, because the City's litigation strategy *might*, at some point, change because of a new administration, putative intervenors *must* intervene at the earliest point possible notwithstanding the presumption of adequate government representation. This error was compounded when the District Court measured the timeliness of the intervention, not from the facts of the case below, but instead from another case that had already been resolved before either the *Floyd* or *Ligon* cases had been filed. This was error under any standard of review. Thus, this Court should reverse the decision and remand with instructions to the District Court to grant the motions to intervene.

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STATEMENT OF THE CASE

I. BACKGROUND

In 1999, a class action was brought against the City, alleging unconstitutional practices in the NYPD's use of *Terry*[2] stops. *See Daniels v. City of New York*, 198 F.R.D. 409 (S.D.N.Y. 2001). The *Daniels* case was settled and dismissed with prejudice in 2003. By the terms of settlement in *Daniels*, the City agreed to, *inter alia*, cease to use race to profile individuals as a basis for a *Terry* stop. The *Daniels* settlement agreement provided that the data collected by the NYPD regarding *Terry* stops would be produced to counsel for the Plaintiffs in *Daniels*. However, the temporal reach of the *Daniels* settlement agreement was limited to the end of 2007.

II. PROCEDURAL HISTORY & RELEVANT FACTS

A. *Floyd v. City of New York*

In January 2008, the Plaintiffs in *Floyd* filed their case against the City, the then Mayor of the City, the then Police Commissioner of the City, and named and unnamed police, pursuant to 42 U.S.C. § 1983, Title VI of the Civil Rights Act of 1964 – 42 U.S.C. § 2000(d), *et seq.*, and a host of state law causes of action. The substance of the *Floyd* allegations was that the City and the NYPD implemented, enforced, encouraged, and sanctioned a policy, practice and/or custom of effectuating *Terry* stops without constitutionally required reasonable suspicion. The *Terry* stops

[2] *See Terry v. Ohio*, 392 U.S. 1 (1968).

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were alleged to have been founded upon race and/or national origin with the main targets being African-Americans and Latinos.

B. *Ligon v. City of New York*

In March of 2012, the Plaintiffs in *Ligon* filed their case against the City, the then Police Commissioner of the City, and named and unnamed police officers, pursuant to 42 U.S.C. § 1983, the Fair Housing Act – 42 U.S.C. §§ 3601-3617, and a host of state law causes of action. The allegations in *Ligon* mirrored those in *Floyd* but focused on alleged unlawful suspicion-of-trespass stops based on the individual's mere presence in or proximity to a Trespass Affidavit Program ("TAP") building.

On September 24, 2012, Plaintiffs in *Ligon* moved for a preliminary injunction based on stops supported on suspicion of trespass. The District Court granted the motion on January 8, 2013 (but issued a superseding opinion on February 14, 2013). *Ligon v. City of New York*, 925 F. Supp. 2d 485 (S.D.N.Y. 2013). While the *Ligon* Plaintiffs' motion for a preliminary injunction was granted, consideration of the appropriate remedies was deferred pending the *Floyd* trial. *Ligon*, 288 F.R.D. at 76.

C. Liability Opinion – *Floyd*

The District Court conducted a nine-week trial during March through May of 2013. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 557 (S.D.N.Y. 2013) ("*Floyd-Liability*"), *appeal dismissed* (Sept. 25, 2013). The District Court found the City liable,

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pursuant to 42 U.S.C. § 1983 and *Monell v. Dep't of Soc. Services*, 436 U.S. 658 (1978), for:

> violating plaintiffs' Fourth and Fourteenth Amendment rights. The City acted with deliberate indifference toward the NYPD's practice of making unconstitutional stops and conducting unconstitutional frisks. Even if the City had not been deliberately indifferent, the NYPD's unconstitutional practices were sufficiently widespread as to have the force of law.

Floyd-Liability, 959 F. Supp. 2d at 562.

D. Remedies Opinion – *Floyd* & *Ligon*

The District Court addressed the remedies in one opinion, entered in both *Floyd* and *Ligon* "because the remedies necessarily overlap. Each requires that the NYPD reform practices and policies related to stop and frisk to conform with the requirements of the United States Constitution." *Floyd v. City of New York*, 959 F. Supp. 2d 668, 671 (S.D.N.Y. 2013) ("*Floyd-Remedies*"), *appeal dismissed* (Sept. 25, 2013), *appeal withdrawn* (Sept. 26, 2013).

The District Court acknowledged that while "the costs of complying with the permanent injunction in *Floyd* will be significant, they are clearly outweighed by the urgent need to curb the constitutional abuses described in the Liability Opinion." *Floyd-Remedies*, 959 F. Supp. 2d at 672–73.

Of particular relevance to the instant case are the following requirements the District Court imposed in *Floyd*:

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1. The appointment of a Monitor. *Id.* at 676. The role and function of the Monitor includes "develop[ing], based on consultation with the parties, a set of reforms of the NYPD's policies, training, supervision, monitoring, and discipline regarding stop and frisk…. They will be developed as soon as practicable and implemented when they are approved by the Court." *Id.* at 677. In aid of effectuating the District Court's remedies order, "[t]he Monitor will work with the parties to address any barriers to compliance. To the extent possible, the Monitor should strive to develop a collaborative rather than adversarial relationship with the City." *Id.* at 678.

2. Immediate reforms regarding *Terry* stops. *Id.* These immediate reforms include:

- "revis[ing] its policies and training regarding stop and frisk to adhere to constitutional standards as well as New York state law." *Id.* at 679.
- "revis[ing] its policies and training regarding racial profiling." *Id.* at 680.

3. Requiring police officers to wear "body worn cameras." *Id.* at 684. Additionally, the Monitor will:

- "establish procedures for the review of stop recordings by supervisors and, as appropriate, more senior managers." *Id.* at 685.
- "establish procedures for the preservation of stop recordings for use in verifying complaints in a manner that protects the privacy of those stopped." *Id.*
- "establish procedures for measuring the effectiveness of body-worn cameras in reducing unconstitutional stops and frisks." *Id.*

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- "work with the parties to determine whether the benefits of the cameras outweigh their financial, administrative, and other costs, and whether the program should be terminated or expanded." *Id.*

4. Implementing a "Joint Remedial Process for developing supplemental reforms." *Id.* at 686.

Further, the District Court ordered that "all parties participate in a Joint Remedial Process, under the guidance of a Facilitator to be named by the Court." *Id.* at 687. At the center of the remedial process will be the input of the individuals and organizations that the District Court identified as stakeholders. *Id.* After the proposed reforms have been drafted, "they will be submitted to the Court and the Monitor. The Monitor will recommend that the Court consider those Reforms he deems appropriate, and will then oversee their implementation once approved by the Court." *Id.* at 688.

Importantly, "[i]n the event that the parties are unable to agree on Joint Process Reforms, the Facilitator will prepare a report stating the Facilitator's findings and recommendations based on the Joint Remedial Process, to be submitted to the parties, the Monitor, and the Court. The parties will have the opportunity to comment on the report and recommendations." *Id.* The Remedial Order, however, does not provide a mechanism for affected stakeholders to petition a judicial forum for relief in the event that the proposed reforms infringe upon any of the rights of a

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stakeholder, nor does it allow a stakeholder to petition a judicial form if the proposed reforms create a legal obligation not previously borne by the affected stakeholder.

In *Ligon*, the District Court imposed a final order of preliminary injunctive relief pursuant to Fed. R. Civ. P. 65. *Id.* at 688. The District Court appointed the same Monitor in *Ligon* in order "to avoid inefficiencies, redundancies, and inconsistencies in the remedies process," however, as in *Floyd*, in the event that the *Ligon* Plaintiffs and the City disagree "the Monitor is authorized to resolve the dispute by submitting a proposed order for the [District] Court's approval." *Id.* at 689–90.

In respect to training, the City had to revise the NYPD training materials and required, *inter alia*, "[t]raining regarding stops outside TAP buildings must also be provided to new recruits, as well as any officers who have already attended the Rodman's Neck[3] refresher course and are not scheduled to do so again." *Id.*

E. Intervention Motions

The Unions moved to intervene on September 11, 2013 (JA-650) both as of right and permissively. On September 12th, the Unions appealed both the Liability Order and the Remedial Order and also filed a memorandum of law in support of their motion to intervene.

The basis for the motion to intervene was multifaceted, however at the heart of the motion was the well-founded claim that the Remedial Order "touch[es] upon the

[3] The Rodman's Neck course was a one-time training for all members on patrol on (1) reasonable suspicion, (2) the common law right of inquiry and (3) police officers' authority to stop, question and possibly frisk.

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rights and interests of the members of the NYPD, including rights subject to existing collective bargaining with the City…." Doc. # 392[4] at 2. Specifically, "the remedies ordered by the [District] Court will touch upon matters of training, supervision, monitoring, and discipline that are subject to collective bargaining with the City." *Id.*

The intervention motion argued that under the New York City Collective Bargaining Law ("CBL") the City is required to negotiate in all matters which touch upon topics such as wages, hours, and working conditions, including "the *practical impact* that decisions on [certain matters of policy] have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety." *Id.* at 5 citing N.Y.C. Admin. Code § 12-307(6)b (emphasis added). The motion further argued that "Section 12-306 of N.Y.C. Administrative Code, [] makes it an improper practice for a public employer or its agents to 'refuse to bargain collectively in good faith on matters within the scope of collective bargaining with certified or designated representatives of its public employees and 'to unilaterally make any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in prior contract, during a period of negotiations with a public employee organization as defined in subdivision d of section 12-311 of this chapter.'" Doc. # 392 at 5. The motion then detailed each of the areas that the remedial order affected, such as training, recordkeeping, body cameras, and discipline. *Id.* at 5-8.

[4] All District Court docket entries are in *Floyd*.

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The Plaintiffs opposed the intervention motions, asserting that the Unions had no legal interest in either the Liability Order or the Remedial Order, that the City adequately represented the Unions, and that the intervention motion was untimely. In respect to the City's governmental representation, the Plaintiffs contested any "suggestion that the City may drop these concerns is ahistorical given the last the 14 years of this case and Daniels." Doc. # 412 at 7.

In contrast to the Plaintiffs, the City affirmatively stated that it did not oppose the intervention and recognized the divergence of interest from, and the practical impacts on, the Unions. JA-969.

In November 2013, the Unions moved to intervene before this Court in the direct appeals (case nos. 13-3088 & 13-3123), and the City did not oppose the motion. On February 21, 2014, this Court issued its mandate and relinquished jurisdiction to the District Court to, among other things, resolve the pending motions to intervene.

In response to this Court's mandate, on February 25, 2014, the District Court ordered supplemental filings regarding intervention. The Unions and the PBA complied, and the SBA did as well. The Plaintiffs again opposed the intervention motions. The Unions replied and provided excerpts (JA-1185-1191) of the most recent CBA between the City and the PBA, noting that the other Police Unions had equivalent provisions in their respective CBAs.

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II. RULING PRESENTED FOR REVIEW

On July 30, 2014, the District Court entered its order and 108 page Memorandum Opinion denying the respective motions to intervene in both the *Floyd* and *Ligon* cases. SPA-1. The District Court denied the motions to intervene because "(1) the motions are untimely; (2) the Unions have no significant protectable interests relating to the subject of the litigation that would warrant intervention; and (3) even if their alleged interests were cognizable, the Unions lack standing to vindicate those interests on appeal." SPA-2.

However, because all four Rule 24 factors are interrelated, the failure of the District Court to address two of the four factors was legal error. Specifically, the District Court failed to analyze how the City adequately represented the Unions, which in turn, lead the District Court astray in evaluating whether the motion to intervene was timely. Further, the District Court opined, without any citation to authority, that the Unions "should have proactively moved to intervene," and "if the motion had been denied as premature, it would have put the Court and the parties on notice," permitting a subsequent motion to intervene to be deemed "timely." SPA-25.

In respect to the Unions' argument that there was no need to intervene during the Bloomberg administration, the District Court concluded that since it "come[s] as no surprise that, as a risk inherent in a democratic election, the candidate who

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supports one's preferred policing policies might not win," and because a "particular outcome of an election may be unforeseeable, [but] that elections occur is foreseeable," that the Unions should have intervened earlier (although how much earlier it did not say). SPA-26.

The District Court ultimately concluded that the Unions had constructive notice of the filing of the complaint in *Daniels*, *Floyd*, and *Ligon* (SPA-29), and because the Plaintiffs in all three cases alleged § 1983 liability under *Monell*, and its progeny, all of the Unions were on notice as of 2008. SPA-30. As an alternative basis, the District Court concluded that class certification was sufficient to put the Unions on notice to intervene. SPA-33. A second alternative basis was the litigation of "important motions and issues," which, in the view of the court below, included the U.S. Department of Justice's ("DOJ") attempt to intervene in *Daniels*. SPA-34. A third alterative basis was that the "resolution process" was sufficient to trigger notice, and that notice began to run from not only the *Daniels* settlement agreement, but the remedial orders in both *Floyd* and *Ligon*. SPA-41-42.

The District Court was of the view that while the "Unions seemed to have missed the Court's cue," the DOJ apparently "got the message," when it filed a "Statement of Interest" in Floyd. SPA-43. Finally, the District Court concluded that because there was such wide-spread publicity in *Daniels*, *Floyd*, and *Ligon*, that was sufficient to put the Unions on notice. SPA-44-45.

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In respect to the perceived prejudice to existing parties, the court below noted that "the most significant criterion in determining timeliness is whether the delay in moving for intervention has prejudiced any of the existing parties." SPA-46-47 (internal citations omitted). The District Court concluded that the "prejudice to the *Floyd* plaintiffs and the City is self-evident." SPA-47. This was so, reasoned the District Court, because the "Plaintiffs have invested significant time and resources in these cases," and "plaintiffs face significant prejudice if previously uninterested late-comers are permitted to prolong the legal wrangling and further delay plaintiffs' hard-won relief." SPA-47. In respect to the City, the District Court reasoned that "[g]ranting intervention would permit the Unions to infringe upon the City's prerogative to determine policing policy as manifested in its litigation strategy." SPA-47-48. Finally, the District Court concluded that it would be highly prejudicial to allow the intervention on the part of the Unions. SPA-48.

In respect to the prejudice to the Unions, the District Court concluded that the Unions would suffer "no tangible prejudice" as they had "no legally colorable interest" in the case below. SPA-48. The District Court found that the intervention was not timely.

The court below then shifted gears and addressed whether the Unions had a significant protectable interest in the litigation below. SPA-49. The District Court addressed the Unions' interests in the merits of the case, concluding that they lacked any cognizable interests in the merits phase. SPA-67. In respect to the interest in the

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remedies portion of the case below, the District Court rejected the Unions' position that the Remedial Order practically impacts employment practices that would otherwise be subject to collective bargaining under state law because: (1) the Unions' allegedly infringed rights under the CBL were too conclusory in nature, and (2) that the Unions overstated their rights under the CBL. SPA-69.

While acknowledging that the remedial order "will change daily practices related to stops-and-frisks," it concluded that "Unions fail to explain how the Remedial Order will prevent or limit them from doing something they currently have the right to do." SPA-71. In respect to the CBL, the District Court acknowledged that the Unions have the right to collectively bargain, and the BCB reviews union bargaining grievances, which, are subject to subsequent judicial review. SPA-72. But the District Court ultimately erroneously concluded that "the changes to stop-and-frisk policies, procedures, supervision, training, and monitoring outlined in the Remedial Order are precisely the kind of management prerogatives courts have held are not subject to collective bargaining." SPA-74. The District Court rejected the Unions argument that they have the right to bargain over the practical impact of the Remedial Order, characterizing the argument as "miss[ing] the mark." *Id.* According to the District Court, nothing prevented the Unions from bargaining over the impact of the Remedial Order with the City. *Id.*

Further, and importantly for this Court's consideration, the Unions raised the issue that "[w]ithout formal intervention, the [Remedial Order] would provide the

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[Unions] with no forum to ensure that they might object to any changes that would contradict the [collective bargaining agreement] or existing procedures subject to bargaining." SPA-75. To that end, "[t]he Unions also argue[d] that they have a right to ask the [BCB] to make determinations regarding any of the myriad subject matters contemplated by the Remedi[al] Order and to appeal that determination where necessary, through the state courts or to the [PERB]." *Id.* Again the District Court rejected these arguments as being both "collateral" and "miss[ing] the mark." *Id.*

The District Court rejected any notion that its Remedial Order could be subject to any type of state level administrative or judicial review. Rather, it reiterated that the Remedial order was a binding court order imbued with the power and authority that federal courts have to fashion equitable remedies to fix constitutional violations. SPA-76. And, since the Unions had failed to timely intervene in either the cases below, or in *Daniels* for that matter, then this was evidence that the Unions lacked a protectable interest in the ligation below. SPA-76-77.

Moreover, according to the court below, all the cases cited by the Unions were inapposite, because in those cases it was acknowledged that the implementation of the relief at issue interfered with the statutory or contractual rights of the would-be intervenors. SPA-78. The District Court rejected the notion that the Remedial Order impacted either the Unions' rights to collectively bargain under New York law or impacted any provision of any of the Unions' contracts. *Id.* At bottom, the District

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Court found no significant legally protectable interest and, as such, declined to address the other factors under Rule 24(a). SPA-82.

The District Court next addressed Article III standing, concluding that the Unions have no constitutional ability to defend the actions and policies of the City when the City has elected not to prosecute its appeal. SPA-82-83.

Turning to the liability and remedial orders, the District Court concluded that because the Unions suffered no injury in fact, had no direct stake in the outcome of the litigation (especially since the City had announced its attention to abandon its appeal), and because any alleged harm was too speculative in nature, the Unions lacked standing below. SPA-101.

This appeal followed.

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SUMMARY OF ARGUMENT

The decision below resulted from numerous errors and defects in the litigation. The welter of errors warrants this Court to vacate the decision and remand with instructions to grant the Unions' intervention motions.

The District Court erred in denying the Unions' motions to intervene as of right.

First, the District Court erred by failing to take into account that there was the presumption that the City would adequately represent the Unions in the litigation below. However, that presumption of adequate governmental representation was rebutted when the City announced on January 30, 2014 when that that it intended to change its litigation strategy and abandon the appeal of both the Liability Order and the Remedial Order. In the alternative, the presumption of adequate governmental representation was rebutted, at the earliest, when the District Court issued its unprecedented Remedial Order that had the practical impact of compromising the Unions' collective bargaining rights and infringing on the Unions' First Amendment right to contest adverse decisions of the BCB to the New York State Courts.

Second, the Unions' motions to intervene were timely when measured from the appropriate date, *viz.:* January 30, 2014 (the date that the City demonstrated its nonfeasance) or August 12, 2013 (the date the District Court issued its Remedial Order). When measured from the moment that the City's and the Unions' respective interests decoupled, the intervention was timely.

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Third, the Unions had a significant protectable interest in its collective bargaining rights under the CBL. The Remedial Order contemplated changes that addressed both officer training and safety, with the practical impact that the City now cannot bargain in good faith, which in turn will result in an impasse. However, the unintended result of the Remedial Order is that any relief that the Unions could normally have before the BCB or, if necessary, before the New York State Courts, is prohibited as the Remedial Order (as a federal district court order) cannot be collaterally attacked in a state forum.

Fourth, the District Court erred in concluding that absent intervention the Unions' ability to protect its interests would not be impaired. The District Court erroneously required the Unions to demonstrate that the Remedial Order actually conflicted with the Unions' collective bargaining rights instead of merely requiring that the Unions demonstrate that the Order could, as a practical matter, conflict with the CBA. It erred by discounting, in full, that the Unions' members (as employees of the City) are subject to contempt sanctions for violating the injunction relief provided in the Remedial Order. At bottom, the Remedial Order undermined the well-established federal labor policy that each party to a collective bargaining agreement is assured that the agreement will be respected.

Fifth, the District Court erred in requiring that the Unions demonstrate that they have Article III standing in this Court as a necessary condition in order to intervene below. However, assuming Article III standing is a requirement, by virtue

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of the Unions demonstrating that they satisfied Rule 24(a)'s interest requirement, they did in fact have standing below.

The District Court also erred in concluding that the Unions did not meet the requirements for permissive intervention. Permissive intervention was appropriate because the intervention was both timely and the Unions' claims share obvious common questions of both fact and law.

The decision below must be reversed.

STATEMENT OF THE STANDARD AND SCOPE OF REVIEW

This Court reviews the denial of a motion for intervention as of right under Fed. R. Civ. P. 24(a) for an abuse of discretion. *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 128 (2d Cir. 2001) (internal citation omitted). A trial court by definition abuses its discretion when it makes an error of law, *Koon v. United States*, 518 U.S. 81, 100 (1996), and may do so when it make an error of fact, *Brennan*, 260 F.3d at 128 (internal citation omitted).

Further, a denial of a motion pursuant to Rule 24(a) may be reversed if the [district] court "has applied an improper legal standard or reached a decision that we are confident is incorrect." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 992 (2d Cir. 1984). And in case where the First Amendment is implicated, this Court engages in "close appellate scrutiny" to determine if a trial court abused its discretion. *United States v. Erie Cnty., N.Y.*, __F.3d__, 2014 WL 4056326 at *3 (2d Cir. Aug. 18, 2014).

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ARGUMENT

The District Court erred in denying the Unions' motion to intervene, both as of right and permissively.

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

Pursuant to Rule 24(a)(2), a proposed intervenor must satisfy four criteria for intervention as of right:

> (1) the motion is timely; (2) the applicant asserts an interest relating to the property or transaction that is the subject of the action; (3) the applicant is so situated that without intervention, disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the applicant's interest is not adequately represented by the other parties.

MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc., 471 F.3d 377, 389 (2d Cir. 2006). The four factors are intertwined, *United States v. Territory of Virgin Islands*, 748 F.3d 514, 519 (3d Cir. 2014) (internal citation omitted), and courts construe Rule 24 broadly in favor of proposed intervenors, *United States v. City of Los Angeles, Cal.*, 288 F.3d 391, 397 (9th Cir. 2002) (internal citation omitted).

As an initial matter, the City has waived any right to contest that the Unions should not be permitted to intervene. On October 18, 2013, the City consented to the Unions' motions to intervene recognizing the widespread impact of the District Court's liability and remedial orders, and recognized that the interests of the City and the Unions may diverge regarding the CBA. JA-969. Since "[f]acts admitted by a party are judicial admissions that bind th[at] [party] throughout th[e] litigation," *Gibbs*

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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 District Court erred in making findings of fact that were directly contradicted by the City's judicial admission. This was especially true as the City was in the best position to assess whether the presumption of adequate governmental representation existed below.

The Unions address the factors out of order because the District Court's errors in concluding that the City adequately represented the Unions directly affected its timing analysis.

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

The District Court mentioned the adequacy of representation in passing, but failed to provide any substantive discussion of this factor in its analysis. Because the District Court did not make any factual or legal findings regarding adequacy of representation the Court should review the record *de novo*. A *de novo* review supports the Unions' contention that the City did not adequately represent the Unions in the litigation below (or before this Court for that matter).

The Supreme Court has held that the burden of making this showing is "minimal"; the movant must simply show that representation "may be" inadequate. *Trbovich v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972).

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This Court has "demanded a more rigorous showing of inadequacy in cases where the putative intervenor and a named party have the same ultimate objective." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 179 (2d Cir. 2001). And "a presumption of adequate representation generally arises when the representative is a governmental body or officer charged by law with representing the interests of the absentee." *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976). "Arguably, this principle is nowhere more applicable than in a case where [a governmental agency] deploys its formidable resources to defend the constitutionality of a [governmental policy]." *California ex rel. Lockyer v. United States*, 450 F.3d 436, 444 (9th Cir. 2006). Indeed, this Court has held, in respect to governmental litigation, that "[t]he proponent of intervention must make a particularly strong showing of inadequacy in a case where the government is acting as *parens patriae*." *United States v. City of New York,* 198 F.3d 360, 367 (2d Cir. 1999). Such is the case here.

The City's representation stopped as of January 20, 2014, when Mayor de Blasio announced that the City would no longer prosecute the appeal of the District Court's liability and remedial orders. There can be no dispute; at this point any presumption of adequate representation was fully rebutted. This Court has "generally agree[d] with the holdings of other courts[5] that evidence of collusion, adversity of interest, nonfeasance, or incompetence may suffice to overcome the presumption of

[5] *See, e.g., Brody By & Through Sugzdinis v. Spang*, 957 F.2d 1108, 1123 (3d Cir. 1992) (discussing inadequate representation as (1) divergence of interest(s), (2) collusion between the existing parties, or (3) failure to diligently prosecute the suit).

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adequacy." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 180 (2d Cir. 2001). Any of these factors would be sufficient, but here at least two are present.

First, the City's and the Unions' interests were similar insofar as all contested that the NYPD had violated the Plaintiffs' constitutional rights. However, these interests diverged only once the District Court's Remedial Order implicated the collective bargain procedures between the City and its employees. By operation of the Remedial Order, the City cannot devote proper attention to its employees; instead its attention is turned to compliance with the District Court's Remedial Order. Indeed, the City admitted as much in its October 2013 letter to the District Court. JA-969.

However, this Court does not write on a blank slate in labor union intervention cases. The Southern District has observed, in the context of alleged racial discrimination in New York City fire departments, that:

> it could hardly be said that all the interests of the union applicants are the same as those of the municipalities. This court would be hard pressed to find that the employers of the unions, with whom the collective bargaining is done, would represent the interests of the unions in these agreements and otherwise with the same vigor and advocacy as would the unions themselves.

Vulcan Soc. of Westchester Cnty., Inc. v. Fire Dep't of City of White Plains, 79 F.R.D. 437, 441 (S.D.N.Y. 1978).

The Eighth Circuit addressed whether a teachers union was adequately represented by the school districts employing the teachers union's membership, and pointedly noted that the school district "can hardly be expected to litigate with the

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interests of their employees uppermost in their minds." *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1*, 738 F.2d 82, 84 (8th Cir. 1984). Accordingly, the Unions here have an interest in the case below as representatives of their respective members that has now diverged from the City as it relates to the conditions of employment of the NYPD police officers, including officer safety, training, and discipline.

The Seventh Circuit addressed an analogous situation in *United States v. City of Chicago*, 870 F.2d 1256 (7th Cir. 1989), where a remedial order in a discrimination operated to "not merely eliminate the discrimination against blacks and Hispanics but introduce blatant discrimination against whites." *Id.* at 1263. In that case, Judge Posner in writing for the court held that the intervention motion filed after the remedial decree was entered was timely, because the intervenors could not have been expected to anticipate the scope of the remedial decree. *Id.* Moreover, in the view of the Seventh Circuit:

> They could not at that same time have satisfied the additional requirement of showing that the representation of their interests by parties to the suit was inadequate, *see* Fed. R. Civ. P. 24(a)(1)—or even have shown that they had standing to complain about the decree; the injury would have been too speculative. They would have been laughed out of court on either occasion.

Id.

This case is similar to *City of Chicago*, as the Unions could not have demonstrated that the City did not adequately represent their interests, and without having the Remedial Order in hand (to review its contours and impacts) the Unions'

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claims would have likewise been too speculative. The Unions would have been caught in a prototypical "Catch-22." Just as the intervenors were allowed to intervene in *City of Chicago* so too should have the Unions in the case below.

The Third Circuit has held that when the proposed Intervenors' interests were personal to it, the burden on the putative intervenor to demonstrate satisfaction with Rule 24 is "comparatively light." *Kleissler v. United States Forest Serv.*, 157 F.3d 964, 972 (3d Cir. 1998). "[W]hen the proposed intervenors' concern is not a matter of sovereign interest" to the government that is already a party, "there is no reason to think that the government will represent" the concern of the proposed Intervenors. *Id.* Such a compelling case exists here. As the point of collective bargain agreements between employers and unions is to create a balance in the bargain position between the two adverse interests, and since the City's interest are adverse to the Unions' members, the District Court erred in concluding that the Unions failed to carry the comparatively light burden under Rule 24.

Second, the City, by virtue of its recent abandonment of the litigation, is obviously not diligently prosecuting the suit. To that end, when a putative intervenor attempts to intervene in a case to defend a governmental action or policy, there is the natural assumption, "that the government will adequately defend its actions, at least where its interests appear to be aligned with those of the proposed intervenor." *Maine v. Dir., United States Fish & Wildlife Serv.*, 262 F.3d 13, 19 (1st Cir. 2001).

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In this case, the presumption of adequate governmental representation is belied by the City's recent change in litigation position, and because the City is no longer defending its actions, it is likewise not diligently prosecuting the appeal of either the liability or the remedial orders.

The lack of adequate representation below was patent.

B. The Motion to Intervene was Timely.

The District Court misconstrued the timeliness requirement. Timeliness is not just a function of counting days; it is determined by the totality of the circumstances. *See NAACP v. New York*, 413 U.S. 345, 366 (1973). Although the point to which the litigation has progressed is one factor to consider, it is not dispositive, *id.* at 366, "there is no litmus paper test for timeliness." *United States v. Hooker Chems. & Plastics Corp.*, 749 F.2d 968, 983 (2d Cir. 1984).

At the outset, because the District Court committed an error of the law (*see* discussion *supra* regarding adequacy of representation), the factual finding as to when the Unions were on sufficient notice to require their intervention is entitled to no deference. *See G.M. Trading Corp. v. Comm'r*, 121 F.3d 977, 980 (5th Cir. 1997) ("[f]indings of fact influenced by an erroneous view of the law are entitled to no deference.").

The Unions direct the Court's attention to the following sentence in the District Court's Memorandum Opinion: "[i]n all cases, whether pre- or post-judgment, Rule 24(a) requires courts to measure timeliness from the moment when

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the applicant had actual or constructive notice of its unrepresented interest, not from the moment a judgment was issued or from the moment when the existing parties decided not to appeal that judgment." SPA-22-23. This unsupported legal conclusion was incorrect and, as a result, the District Court abused its discretion in denying intervention as it both made errors of law and fact. *See Koon, supra; Brennan, supra.* As detailed below, some cases (including this one) require the measurement of timeliness from when the presumption of adequate governmental representation is fully rebutted.

"Moreover, the timeliness requirement is an elemental form of latches or estoppel. As such, timeliness should not prevent intervention where an existing party induces the applicant to refrain from intervening." *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181-82 (3d Cir. 1994) (internal citation and quotation omitted). In this case, because the City had (up until the January 2014 announcement) lead all to believe that it would contest both the Liability Order and the Remedial Order, there was no reason for the Unions to intervene in the case below (including the nine week trial) because the City adequately represented their interests. The Unions could have intervened earlier if they had known that the City was going to abandon this case, but if any blame is to found for the belated intervention, it lies at the feet of the City. This Court should estop the City from arguing that the Unions' intervention was untimely.

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This Court has explained that timeliness requires consideration of all the facts of the case including "(1) how long the applicant had notice of the interest 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." *United States v. Pitney Bowes, Inc.*, 25 F.3d 66, 70 (2d Cir. 1994). All four factors support the Unions contention that their intervention was timely.

1. Length of Notice.

The threshold question that the District Court answered incorrectly was from what date to measure the intervention. The Unions submit that date was January 30, 2014, when the City demonstrated its nonfeasance. As of January of this year, the interests of the City and the interest of the Unions, to the extent that they were coextensive, decoupled. Indeed, as the City has now abandoned the prosecution of its appeal, it is left to the Unions to pick up the mantle and bear the burden of litigating this case as the practical effects impact the individual police officers of the NYPD.

However, at the earliest, the date to measure intervention was August 12, 2013, the date that the District Court issued its unprecedented Remedial Order. It was only then did the nature, extent, and duration of the Remedial Order's impact on the individual police officers of the NYPD become known to the Unions.

Measured from either date - January 30, 2014 or August 12, 2013 - the Unions demonstrated utmost punctuality in moving to intervene, as the motion was filed on

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September 12, 2013, exactly one month after the Liability Order and Remedial Order were issued.

In addressing timeliness for the remedial phase of litigation, the Supreme Court has instructed that the appropriate analysis is "whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396 (1977). Taking a holistic view of the facts, the Unions acted promptly as their motion was made within one month after intervention.

The Eighth Circuit reached the same conclusion in *Little Rock Sch. Dist.*, 738 F.2d 82. There, the teachers unions moved to intervene in order to be part of the remedial phase of the litigation shortly after an order holding the defendants liable for alleged unconstitutional conditions. *Id.* at 83-84. The district court denied the teachers unions' intervention based on untimeliness, and the Eighth Circuit reversed. *Id.*

The Sixth Circuit likewise reached the same conclusion in *United States v. City of Detroit*, 712 F.3d 925 (6th Cir. 2013). In that case, the Sixth Circuit reversed a district court's decision to deny a city unions' motion to intervene acknowledging that, in certain circumstances, allowing intervention after the entry of a final judgment is appropriate for, e.g., the purpose of taking an appeal, "or to participate in future remedial proceedings." *Id.* at 932 (internal citations omitted).

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Additionally, the D.C. Circuit in *Acree v. Republic of Iraq*, 370 F.3d 41 (D.C. Cir. 2004), *abrogated by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009), reversed a district court's denial of United States' motion to intervene where the motion came after the court had already entered judgment in the case, but the case had a undeniable impact on government's interest. Tellingly, the *Acree* court pointed out that:

> Post-judgment intervention is often permitted, therefore, where the prospective intervenor's interest did not arise until the appellate stage or where intervention would not unduly prejudice the existing parties. *In particular, courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court.*

Id. at 50 (emphasis added).

The District Court relied heavily upon this Court's decision in *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593 (2d Cir. 1986), for the proposition that "where an applicant obtains notice of an unrepresented interest long before the issuance of the order the applicant seeks to appeal, a motion to intervene in order to vindicate that interest on appeal could be untimely even if it were filed within thirty days of the order." SPA-21-22. The facts of *Yonkers Bd. of Educ.* renders the holding inapposite to the case at bar.

In that case, the putative intervenors were homeowners who intended to object to and contest any attempts to build public housing near the putative intervenors' homes. *Yonkers Bd. of Educ.*, 801 F.2d at 594. The district court "was also concerned that available federal funds from HUD for public housing in Yonkers ($7 million) not be jeopardized." *Id.* at 595. Accordingly, the timeliness decision in *Yonkers Bd. of Educ.*

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was driven by a very limited scope of the availability of federal funding. Here, however, no such considerations are present. Thus, the District Court's reliance on *Yonkers Bd. of Educ.*, while not totally inappropriate, was still erroneous.

The District Court also rejected that the Unions' interests had not "crystallized" to warrant intervention. Specifically, the District Court rejected the argument as "not supported by intervention case law." SPA-24. However, as discussed above, the presumption of government representation did not fall by the wayside until either January 2014 when the de Blasio administration abandoned the appeal, or when the unprecedented Remedial Order was issued. None of the cases cited by the District Court address the presumption of adequate governmental representation and, consequently, the conclusion that the Unions should have intervened earlier was flawed.

The District Court created a new rule of law that requires putative intervenors to "proactively" move to intervene, as "[e]ven if the motion had been denied as premature, it would have put the Court and the parties on notice that at a later stage in the litigation the Unions might seek intervention…. [I]ntervention law required them to move at the first instance that there was some doubt." SPA-25. This is an incorrect statement of the law. The undersigned has been unable to find any case - let alone a case from this Court[6] - that requires "protective" intervention motions. And

[6] The District Court's cited to both *Yonkers Bd. of Educ.*, and *Pitney Bowes*, expressing that this Court has approved of premature motions. *See* SPA-24. Neither of the

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for good reason, a litigant should not have to file a motion that does not meet Rule 24's strictures (including the presumption of adequate governmental representation) in order to be able, in the future, file a motion that would be granted. The District Court's opinion requires meritless motion practice, which would subject that movant's attorney to potential Rule 11 sanctions. At minimum, this Court must correct this error of law requiring "protective" filings.

Further, the District Court rejected the argument that intervention was not needed until the newly elected Mayor decided to abandon the appeal of the Liability Order and Remedial Order. SPA-25-26. The District Court concluded that "the fact that a new mayor may have litigation priorities that differ from those of his or her predecessor" meant that the Unions should have intervened earlier. SPA-26. However, the District Court's conclusion turns the presumption of adequate governmental representation on its head. Instead of the presumption of adequate representation, taking the District Court's logic to its natural extension, we have a presumption of *inadequate representation* because mayoral administrations change, potentially, with each election.

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holdings, nor the dicta, in those two cases supports such a sweeping statement. Instead, both cases stand for the unremarkable fact that intervention is appropriate when all four factors are present, including traditional notions of timeliness. Indeed, the District Court acknowledged this when it stated that "courts should not encourage premature motions to intervene." SPA-24 citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977).

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This conclusion must be rejected in full because there is no limiting principle in applying the same conclusion to state or federal elections. The natural extension of the decision below is that when a city, State, or Federal Government is litigating on behalf of its residents/citizens, now an individual who is potentially impacted by the litigation *must* intervene as soon as possible because an upcoming election *might* result in a change in the government's litigation strategy. This is not the law, and the District Court's conclusion was erroneous under any legal standard.

The District Court then justified its decision denying the motions to intervene for the next 18 pages. SPA-26-45. The District Court addressed the measurement of delay between the time from when the Unions were supposedly on notice to the date of Unions' intervention motions (SPA-28). The significant facts the District Court discussed included: (1) the filing of the complaint in *Daniels, Floyd,* and *Ligon* (SPA-29), (2) the date of class certification in *Daniels, Floyd,* and *Ligon* (SPA-32), (3) the litigation of important motions and issues (SPA-33)(including the DOJ's attempt to intervene in *Daniels,* the discovery in *Floyd,* summary judgment in *Floyd,* the *Ligon* injunction order, and the dismissal of the individual defendants in *Floyd*), (4) the resolution process (SPA-41)(including the *Daniels* settlement and the fact that the Remedial Order "was the product of months of input from the parties and other stakeholders"), and (5) the publicity surrounding in *Daniels, Floyd,* and *Ligon* (SPA-44). However, each of these afore-mentioned reasons that the District Court provided suffers from the same basic defect that tainted the District Court's entire analysis, i.e., that timeliness

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needed to be measured against the date that the presumption of adequate governmental representation was rebutted.

With one exception, none of the cases the District Court relied on (SPA-28-29) involved intervenors moving to intervene on the side of either the Federal Government or a State Government (or political subdivision thereof) that had demonstrated nonfeasance by announcing that it would abandon its litigating position. Further, none of the cases involved a union's intervention in some type of governmental litigation. Thus, the reliance on these inapposite cases by the District Court in reaching its decision to deny the interventions was erroneous.

The only exception is this Court's decision in *Farmland Dairies v. Comm'r of New York State Dep't of Agric. & Markets,* 847 F.2d 1038 (2d Cir. 1988). In *Farmland Dairies*, a group of New York milk dealers who had a license to distribute milk in the New York metropolitan area moved to intervene in order to appeal the district court's decision that protectionist New York laws violated the Commerce Clause. *Id.* at 1041. This Court affirmed the denial of the intervention because it was untimely in light of the fact that the New York milk dealers "intervened and participated fully in the state administrative hearings on Farmland's four-county application. No reason appears why they could not have acted similarly in this litigation." *Id.* at 1044. Accordingly, the fact that the Unions had no opportunity to participate in any type of administrative hearing, in contrast to the appellants in *Farmland Dairies,* should inform this Court's analysis that the Unions' intervention was timely.

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2. Prejudice to Existing Parties.

The critical factor is whether any delay in moving for intervention will prejudice the existing parties. *NAACP*, 413 U.S. at 366. The District Court concluded that the prejudice was "self-evident" because the "Plaintiffs have invested significant time and resources in these cases." SPA-47. While possibly true, one could say that of almost every case since most, if not all, plaintiffs would contend that they have invested significant time and resources. Put differently, the amount of time and resources a plaintiff expends is not outcome determinative. Rather, to "extent the assertion of the Unions' relevant interests may cause delay, such a consideration is not grounds for denial of intervention—the analysis must be limited to the prejudice caused by the *untimeliness*, not the intervention itself." *City of Detroit*, 712 F.3d at 933 (emphasis in original).

Simply stated, the Unions' attempt to prosecute the appeal before this Court does not cause undue prejudice to the Plaintiffs as, until just recently, the City was going forward with its appeal of both the liability and the remedial orders. In essence, the Unions will step into the shoes of the City in order to prosecute the appeal. In this context, there has been no prejudice caused by the Unions perceived untimeliness, rather all of the prejudice was related to the intervention itself. *See Id.*

Additionally, while the District Court may have wanted to see an "end the years-long legal battle," explicit in its consideration was that the intervention would unduly delay the resolution of the case. SPA-47 ("previously uninterested late-comers

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[cannot be] permitted to prolong the legal wrangling and further delay plaintiffs' hard-won relief."). Any prejudice that the Plaintiffs may suffer comes not from the fact that the Unions intervened a month after the Liability Order and Remedial Orders, instead the prejudice is from having to litigate the appeal. This purported prejudice comes not from the untimeliness; rather it is from intervention itself. As the Sixth Circuit held in *City of Detroit* that is an improper consideration to deny an intervention motion, this Court should as well.

Further, the District Court observed that "[t]he right to decide whether to settle a lawsuit against the City or to prosecute an appeal is vested in the City's chief lawyer, the Corporation Counsel, and its chief executive, the mayor." SPA-47. While that is undoubtedly so, it fails to take into account that the Unions were lead to believe - for years – that the City would defend against the Plaintiffs' allegations. Accordingly, the new Mayor's prerogative cannot now be used to justify that the interventions were untimely; the City's litigation prerogative cannot be used as both shield and sword. The Unions were induced by the actions of the City from intervening; the City cannot now take shelter in its change in litigation policy. *See Alcan Aluminum, Inc., supra.* Thus, the District Court's decision that both the City and the Plaintiffs would be prejudiced was incorrect, and the intervention was, in all events, timely.

3. Prejudice to Appellants.

In a mere two sentences, the District Court rejected that the Unions would suffer any prejudice because they have "no legally colorable interest[s]" and "they lack

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standing to appeal." SPA-48. Contrary to the District Court's conclusion, for the reasons set forth below, the Unions have both legally protectable interests and Article III standing.

4. Unusual Circumstances.

The District Court did not address whether this case presented unusual circumstances, as such this Court should review the record *de novo* and conclude that this case is atypical and the intervention of the Unions to protect their members' interest in respect to the Remedial Order and the CBA presents unusual circumstances.

The weight of authority recognizes that when litigation against state or local governments affects the state or local governments' employees (who are not a party to the lawsuit) intervention is appropriate when a remedial order or consent decree will impact the putative intervenors. For that reason, the Sixth Circuit in *City of Detroit, supra*, the Seventh Circuit in *City of Chicago, supra*, and the Eight Circuit in *Little Rock Sch. Dist., supra*, each reversed the denial of mandatory intervention because of the practical impact the remedial orders would have on the putative intervenors. Further, the Ninth Circuit in *City of Los Angeles* recognized that "when an existing party expressly and unequivocally disclaims the right to seek certain remedies, the court may consider the case as restructured rather than on the original pleadings in ruling on a motion to intervene." 288 F.3d at 399. So when the City disclaimed any intent to contest either the Liability Order or the Remedial Order, this presented an unusual

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circumstance that the District Court should have, but did not, take into account in determining whether the intervention motions were timely. That sentiment is echoed by the Third Circuit, which uses equitable principles to determine if it would be unfair to a putative intervenor that was lead to believe that intervention was not needed. *See Alcan Aluminum, Inc., supra.*

At bottom everything about the case below was unusual, and the unusual facts, procedural posture, and Remedial Order all militated in favor of finding that the Unions' intervention was untimely under a holistic view of the case. The decision below must be reversed.

C. The Unions have a Significant Protectable Interest.

The District Court erred in failing to grant the Unions' motion to intervene because a significant protectable interest is implicated in this matter. Here, the collusive effect of the Remedial Order ensures that the City can no longer negotiate in good faith on numerous mandatorily negotiable decisions. In addition, the failure of the Unions to abide by the Remedial Order (if a break down in the collective bargaining regarding the practical impacts of the City's decisions occurs) would result in liabilities beyond those traditionally associated with bargaining to impasse. Further, to the extent that the Joint Remedial Process allows for the Unions' participation, such participation is inadequate to protect the Unions' collective bargaining rights. Accordingly, the Unions' collective bargaining rights become a nullity.

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Moreover, traditionally under state law, the collective bargaining process has a series of steps which culminate in the Unions' right to seek review of impasses and grievances before the New York State Courts. However, here, such review would be stymied because a federal court order cannot be collaterally attacked in the state courts. Thus, the Unions' and its members' First Amendment right to petition for redress of grievances have been infringed.

In order to intervene, a proposed intervenor must establish that it has a "significantly protectable interest in the litigation that will be impaired by the disposition of the action." *H.L. Hayden Co. of New York, Inc. v. Siemens Med. Sys., Inc.*, 797 F.2d 85, 88 (2d Cir. 1986) (internal citation omitted). "[T]o be 'significantly protectable', a would-be intervenor's interest must be 'direct and immediate', not 'remote or contingent.'" *Id.* at 85 (internal citation omitted).

"An applicant has a significant protectable interest in an action if (1) it asserts an interest that is protected under some law, and (2) there is a relationship between its legally protected interest and the plaintiff's claims." *California ex rel. Lockyer,* 450 F.3d at 441 (internal citation omitted). "Rule 24(a)(2) directs the court to consider the practical consequences of the litigation in passing on an application to intervene as of right." *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987); *see also* Fed. R. Civ. P. 24 Advisory Committee Notes of 1966 Amendments ("[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene. . . ."). "[T]he court is not limited to

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consequences of a strictly legal nature . . . [but] may consider any significant legal effect on the applicant's interest. . . ." *Natural Res. Defense Counsel, Inc. v. United States Nuclear Regulatory Comm'n*, 578 F.2d 1341, 1345 (10th Cir. 1978). Thus, courts have found that an applicant has a sufficient interest to intervene when the action will have significant *stare decisis* effect on a proposed intervenor's rights, *see New York Pub. Interest Research Grp., Inc. v. Regents of Uni. of State of N.Y.*, 516 F.2d 350, 352 (2d Cir. 1975), or "where the contractual rights of the applicant may be affected by a proposed remedy." *Harris*, 820 F.2d at 601 (internal citation omitted).

Further, "[e]xaming an applicant's asserted interest in terms of discrete phases of an action seems particularly appropriate in institutional litigation." *Harris*, 820 F.2d at 599. "In institutional reform litigation, while only some individuals may be held liable for the unlawful conduct, and thus have an interest in the determination of liability, a larger number of persons' interest may be infringed on at the remedial stage of the litigation." *Id.* Such is the case here.

1. The Unions' collective bargaining rights.

The Unions are the certified bargaining units for all Captains, Lieutenants, and Detectives which are employed police officers of the City and their bargaining authority is defined by the CBL. *See* N.Y.C. Admin. Code § 12-307(4). The Unions are recognized by the City as the sole and exclusive collective bargaining

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representatives for the aforementioned employees.[7, 8] As such, the City is required to collectively bargain with the Unions "in good faith on matters within the scope of collective bargaining. . . ." N.Y.C. Admin. Code § 12-306(4). Further, the City is prohibited from "unilaterally mak[ing] any change as to any mandatory subject of collective bargaining or as to any term and condition of employment established in the prior contract. . . ." *Id.* at (5).

The CBL prescribes the scope of collective bargaining. More specifically, N.Y.C. Admin. Code § 12-307, provides in pertinent part:

> a. Subject to the provisions of subsection b of this section . . . public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages . . . , hours . . . , working conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit. . . .
>
> b. It is the right of the city, or any other public employer, acting through its agencies, to determine the standards of services to be offered by its agencies; determine the standards of selection for employment; direct its employees; take disciplinary action; relieve its employees from duty because of lack of work or for other legitimate reasons; maintain the efficiency of governmental operations; determine the methods, means and personnel by which government operations are to be conducted; determine the content of job classifications; take all necessary actions to

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[7] *See* Detectives' Endowment Association 2001-2004 Agreement, *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=6648&context=perbcontracts; Lieutenants Benevolent Association 2009-2011 Agreement, *available at* http://www.lris.com/wp-content/uploads/contracts/newyork_ny_police_lts.pdf; Captains Endowment Association 2003-2012 Agreement, *available at* http://www.lris.com/wp-content/uploads/contracts/newyork_ny_police_cpts.pdf.

[8] The Court can take notice of the respective CBAs as they are publicly available and no one can dispute the authenticity or the accuracy of the information. *See Briscoe v. Ercole,* 565 F.3d 80, 83 fn. 3 (2d Cir. 2009) (where this Court logged on to Yahoo! Maps to determine the distance between two addresses).

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> carry out its mission in emergencies; and exercise complete control and discretion over its organization and the technology of performing its work. Decisions of the city or any other public employer on those matters are not within the scope of collective bargaining, *but, notwithstanding the above, questions concerning the practical impact of that decisions on the above matters have on terms and conditions of employment, including, but not limited to, questions of workload, staffing and employee safety, are within the scope of collective bargaining.*

Id. at (a)-(b) (emphasis added).

Although the City maintains discretion over certain management prerogatives, the law is clear: the City must negotiate in good faith over the practical impacts of these decisions. However, when an employer incorporates a non-mandatory subject into a collective bargaining agreement, that subject "is converted, as a matter of law, into a mandatory subject in subsequent negotiations." *City of New York*, 40 PERB ¶ 3017 (Aug. 29, 2007); *City of Cohoes*, 31 PERB ¶ 3040 (July 23, 1998). Further, in instances where management prerogatives, such as 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. *City of New York v. Uniformed Firefighters Ass'n*, Decision No. B-43-86, 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).

2. The Remedial Order addresses matters over which the City is required to collectively bargain in good faith.

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Within the Remedial Order, the court established a set of "immediate reforms" which "the Monitor will develop, in consultation with the parties" regarding "NYPD's policies, *training*, supervision, monitoring, and discipline regarding stop and frisk." *Floyd-Remedies*, 959 F. Supp. 2d at 678 (emphasis added). As explained above, it is recognized that in instances where training is required by an employer as a qualification for continued employment or where the employer encourages employee participation in training, such training will be considered a mandatory subject of collective bargaining. *See Uniformed Firefighters Ass'n, supra*; *District Council 37, supra.* A similar case exists here.

In its opinion, the District Court found that the training requirements to be implemented by the Remedial Order would not classify as mandatory collective bargaining subjects because the Order does not contemplate imposing a licensing or certification scheme. However, the law does not require that a licensing scheme be implemented. Rather, all that is needed is that the proposed training reforms are "required by the employer as a qualification for continued employment." *See Uniformed Firefighters Ass'n, supra; District Council 37, supra.*

Throughout the Remedial Order, the court references changes to the NYPD's training materials and programs regarding stop and frisk offered at the NYPD's training facility at Rodman's Neck. Completion of the Rodman's Neck course is required of all full duty officers even if not actively on patrol. As stated in the Remedial Order, "[t]raining regarding stops outside TAP buildings must also be

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provided to new recruits, as well as any officers who have already attended the Rodman's Neck refresher course and are not scheduled to do so again." *Floyd-Remedies*, 959 F. Supp. 2d at 690. The Remedial Order is clear - all officers *must* complete the new training regarding stop and frisk in order to achieve compliance with the Remedial Order itself. Any argument that an actual license or certification is required for training to be considered the subject of mandatory collective bargaining is a vastly expansive reading of the current state of the law, at best.

Because the training reforms to be implemented are a qualification for continued employment, they are the subject of mandatory collective bargaining and any implementation of said policies without negotiation with the Unions would violate the City's duty to negotiate in good faith and impacts the Unions' collective bargaining rights. *See District Council 37, supra* (collecting cases). However, federal courts routinely grant intervention to unions where their collective bargaining rights may be undermined. *See Vulcan Society*, 79 F.R.D. at 440-441 (granting intervention when a CBA "may be modified or invalidated by a consent decree or court order"); *Chance v. Bd. of Examiners, et al.*, 51 F.R.D. 156, 158-159 (S.D.N.Y. 1970)(permitting intervention where orders of the court conflicted with provisions of the union's contract); *Little Rock School Dist., supra* (permitting intervention where proposed remedy could have implications to existing contractual arrangement). Thus, the conclusion that the training reforms implemented by the Remedial Order are not the

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subject of mandatory collective bargaining, thereby preventing the Unions to intervene, was an error of law and an abuse of discretion. *Koon*, 518 U.S. at 100.[9]

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

1. The practical impacts of the reforms implemented through the Remedial Order are the subject of mandatory collective bargaining. Absent intervention, the Unions collective bargaining rights cannot be ensured, will be infringed, and are nullified.

While the District Court recognized that N.Y.C. Admin. Code § 12-307(b) requires that the City negotiate on the "practical impacts" on issues of procedures, policies, discipline, equipment, and supervision, it found that the Unions lacked a significant protectable interest because the Remedial Order does not prevent or threaten the ability of the Unions to collectively bargain over the practical impact of these changes. This decision was reached in error.

First, to the extent that the District Court relied on the lack of evidence of actual conflict between the Remedial Order and the Unions' collective bargaining rights, it has erred. Put simply, intervention is warranted even if the Remedial Order could, as a practical matter, conflict with the CBA or the Unions' collective bargaining rights. *See City of Los Angeles*, 288 F. 3d at 400 ("[t]o the extent that [the consent

[9] Moreover, to the extent any of the proposed reforms of the Remedial Order are incorporated into future collective bargaining agreements, these reforms would be considered mandatory subjects of collective bargaining. However, because Remedial Order requires the City to act without regard for the concerns of the Unions and under the threat of contempt, the practical effect of denying the Union's motion to intervene is that the collective bargaining process becomes a nullity to which the City owes no good faith obligation. *See* § I.D.1.

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decree] contains or might contain provisions that contradict terms of the officers' [collective bargaining agreement], the Police League has an interest."); *United States v. City of Hialeah*, 140 F.3d 968, 982 (11th Cir. 1998) ("objectors [are] not required to prove with certainty that particular employees would lose contractual benefits"); *California ex rel. Lockyer*, 450 F.3d at 442 ("[h]aving found that appellants have a significant protectable interest, we have little difficulty concluding that the disposition of this case may, as a practical matter, affect it."). Thus, so long as the collective bargaining rights of the Union may be implicated, intervention should have been granted.

Second, as to the conclusion that the Remedial Order does not threaten any collective bargaining rights, this case is similar to *City of Los Angeles*. In *City of Los Angeles*, the United States brought an action against that city alleging constitutional violations. 288 F. 3d at 396. After negotiations, the parties filed a proposed consent decree. *Id.* Upon the filing of the consent decree, the L.A. Police Protective League intervened arguing that the consent decree conflicted with its collective bargaining rights under the union's contract with the city. *Id.* The district court denied the intervention motion holding that the consent decree adequately protected the union's bargaining and negotiation rights. *Id.* at 400.

The Ninth Circuit reversed because "the consent decree by its terms purports to give the district court the power . . . to override the Police League's bargaining rights under California law and require the City to implement disputed provisions of

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the consent decree," the union had a significant protectable interest such that intervention in the remedial stage of litigation was proper. *Id.* at 401. That court opined:

> Normally, California law alone governs the bargaining process between the Police League and the City defendants, and any disputes relating to that bargaining process would be resolved in California courts. The consent decree, however, alters this process in several ways, notwithstanding the fact that the Police League has never consented to these changes.

Id. A similar result occurs in this case.

Here, New York law governs the collective bargaining process and the CBL provides a detailed set of laws and regulations regarding topics such as: (1) notice requirements for bargaining, N.Y.C. Admin. Code § 12-311(a); (2) procedures for the use of mediation in resolving collective bargaining issues, *id.* at (b); (3) impasse procedures and panels, including the review of impasse panel recommendations, *id.* at (c); (4) judicial review and enforcement of final orders of the board of collective bargaining, N.Y.C. Admin. Code § 12-308; and (5) grievance procedures and requirements for impartial arbitration, N.Y.C. Admin. Cod § 12-312. However, as in *City of Los Angeles*, the Remedial Order fundamentally alters these processes.

Traditionally, under New York law, the practical impacts of managerial decisions are bargained to impasse with the ultimate decision maker being the state courts. Here, however, due to the Remedial Order, the City is now able to dictate terms without regard to Unions' positions concerning the practical impacts such

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decisions may have on the day-to-day working conditions of its members. This is true because now, rather than answering to the give and take of the Unions, the City must implement the policies of the Monitor or face the threat of contempt.

As in *City of Los Angeles*, the Unions will be forced to resolve bargaining disputes in the federal courts in the context of a contempt proceeding instead of the normal process – bargain to an impasse, a decision by the BCB, and review before the New York State Courts. However, because an impasse will stem from a federal court ordered remedy, such collective bargaining impasses would be placed beyond the review of the state courts. *See Stoll v. Gottlieb*, 305 U.S. 165, 1700-172 (1938) (where a judgment or decree of a federal court determined a right, that decision was "final until reversed in an appellate court, or modified or set aside in the court of its rendition"). Instead, now the same failure could expose the Unions' members to contempt sanctions for violating an injunction pursuant to Fed. R. Civ. P. 65 regardless of whether an impasse was reached. *See* Fed. R. Civ. P. 65(d)(2)(b) (injunction order binds the parties' employees); *Doctor's Ass'n, Inc. v. Reinert & Duree, P.C.*, 191 F.3d 297, 302-303 (2d Cir. 1999) ("defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors, although they were not parties to the original proceeding.") (internal quotations omitted). Therefore, the Unions' ability to air its grievances with regard to the practical impacts of the City's methods of implementation of the Remedial Order (and thus its collective bargaining rights and its rights under the First Amendment to redress of its grievances), may be impaired as

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a practical matter. The District Court's conclusion otherwise was in err. *See CBS, Inc. v. Snyder*, 798 F. Supp. 1019, 1023 (S.D.N.Y. 1992) *aff'd*, 989 F.2d 89 (2d Cir. 1993) (union had a protectable interest in participating in proceedings that may have affected the interpretation or enforcement of a collective bargaining agreement).

Moreover, and perhaps more importantly, "[p]ermitting such a result would undermine the federal labor policy that parties to a collective bargaining agreement must have reasonable assurance that their contract will be honored." *W.R. Grace and Co. v. Local Union* 759, 461 U.S. 757, 771 (1983). Here, the only way to ensure that the collective bargaining and First Amendment rights of the Unions are meaningful is by allowing them to intervene into the remedial stages of the case.

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

The District Court found that Unions were not entitled to intervene because the "Unions seek to intervene in a process where they have already been permitted to participate. Whether the Unions are labeled intervenors or stakeholders their particularly valuable perspective will be considered by the facilitator and the monitor when crafting the reforms to be proposed [in the Joint Remedial Process]." SPA-107 (internal citation and quotation omitted). The District Court's logic is flawed.

First, the Unions seek to intervene into the complete remedial phase of the litigation. This would include input during the crafting of both the "immediate reforms" and the reforms proposed during the Joint Remedial Process. As detailed

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above, because the "immediate reforms" may affect the collective bargaining rights of the Unions, the Unions are entitled to intervene in the entire remedial process.

Second, participation in the Joint Remedial Process does not grant the same rights as party status. Once again, *City of Los Angeles* is instructive: "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." 288 F.3d at 400. A similar logic applies here. Here, though the Unions' "particularly valuable perspective" may be considered by the Monitor, there is no guarantee that it will. Nor is there a requirement that the City or the Monitor come to the table to negotiate with the Unions regarding the proposed Joint Reforms in good faith as there would be under the CBL. Further, should the Monitor not adopt the proposed positions of the Unions, 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. Thus, the effect of not allowing the Unions to participate as a party would be to strip away their rights to petition the court for redress of its grievances in violation of the First Amendment and the CBL.

E. The District Court erred in its standing analysis.

The District Court held that "[t]he Unions lack standing in their own right to challenge the Remedial Order because they have not been ordered to do or refrain from doing anything. Any future participation in the Joint Remedial Process is voluntary, and any injury based on not yet-developed reforms is speculative." SPA-

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102 (internal citation and quotation omitted). Put simply, the District Court's standing analysis is a clear error of law, and thus an abuse of discretion. Moreover, the Unions have alleged a sufficient injury to establish standing.

First, "[t]he existence of a case or controversy having been established as between the [plaintiff] and the [defendant], there is no need to impose the standing requirement upon the proposed intervenor." *Brennan*, 579 F.2d at 190 (citing *Trbovich*, 404 U.S. at 536-539); *see also Akiachak Native Cmty. v. U.S. Dep't of Interior*, 584 F. Supp 2d 1, 7 (D.D.C. 2008) (citing *Roeder v. Islamic Republic of Iran*, 333 F.3d 228, 233 (D.C. Cir. 2003)) ("[t]he standing inquiry is repetitive in the case of intervention as of right because an intervenor" who has Article III standing will also satisfy Rule 24(a)'s interest requirement.). Thus, to the extent that the District Court required the Unions to have standing in their own right to intervene it has abused its discretion.

Second, assuming that standing is required, the Unions have established standing to intervene. As explained above, 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 can only be redressed through intervention in the remedial phase of this case.

The District Court further erred with regard to its finding that future injury is speculative. As detailed above, because the members of the Unions are employees of the City, each are bound by the injunction entered pursuant to Fed. R. Civ. P. 65 and

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their failure to abide by the order, even if the Unions were to base such actions on grievances for failure to negotiate in good faith in violation of the CBL, would expose the Unions and its members to liability for contempt. Thus, these injuries are far from "speculative" and are clearly "imminent" and "concrete." *See generally, Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).

Therefore, the District Court has committed an error of law and abused its discretion in determining that the Unions lacked standing to proceed.

The decision should be vacated.

II. ALTERNATIVELY, PERMISSIVE INTERVENTION WAS APPROPRIATE.

If this Court determines that intervention as of right is not appropriate, the Unions respectfully requests that this Court hold that permissive intervention under Rule 24(b) was appropriate because the District Court abused its discretion. Rule 24(b) provides:

> On timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact. . . . In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.

Fed. R. Civ. P. 24(b).

Thus, permissive intervention under Rule 24(b) is appropriate where: "(1) an application is timely; and (2) a federal statute confers a conditional right to intervene or (3) an applicant's claim and the main action share a question of law or fact in common." *United States v. City of New York*, 198 F.3d 360, 367 (2d Cir. 1999). But

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Rule 24(b) "plainly dispenses with any requirement that the intervenor shall have a direct personal or pecuniary interest in the subject of the litigation." *SEC v. United States Realty & Improvement Co.*, 310 U.S. 434, 459 (1940).

The principle consideration whether the intervention will unduly delay or prejudice the rights of the original parties. *Pitney Bowes, Inc.*, 25 F.3d at 73. *Accord Appleton v. Comm'r*, 430 Fed. Appx. 135, 138 (3d Cir. 2011) ("any introduction of an intervenor in a case will necessitate its being permitted to actively participate, which will inevitably cause some 'delay.' 'Undue' means not normal or 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, the Unions had Article III standing below and have standing before this Court. Here, for all the reasons discussed *supra* the Unions have claims that are common to both the law and facts in question. Additionally, the Unions' intervention would not cause undue delay, indeed perfecting and litigating an appeal is a normal event and, up until January of this year, both the Plaintiffs and the City had anticipated.

Accordingly, to the extent that mandatory intervention is not available to the Unions, permissive intervention is. This Court should allow Unions to participate as a party in the case below and find that the District Court abused its discretion in denying Unions' request for permissive intervention.

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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,

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Dated: September 3, 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 14,000 type-volume limitation of Rule 32(a)(7)(B)(i). The instant brief is 13,926 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.

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