14-2829-cv(L)

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

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

DETECTIVES' ENDOWMENT ASSOCIATION, INC., LIEUTENANTS BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., NYPD CAPTAINS ENDOWMENT ASSOCIATION, PATROLMEN'S BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC., SERGEANTS BENEVOLENT ASSOCIATION,

Appellants-Putative Intervenors,

(*Caption continued on inside cover*)

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

REPLY BRIEF FOR APPELLANT
SERGEANTS BENEVOLENT ASSOCIATION

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—against—

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

Plaintiffs-Appellees,

—against—

THE CITY OF NEW YORK, COMMISSIONER WILLIAM J. BRATTON*, NEW YORK CITY POLICE, in his official capacity and individually, MAYOR BILL DE BLASIO*, in his official capacity and individually, NEW YORK CITY POLICE OFFICER RODRIGUEZ, in his official and individual capacity, NEW YORK CITY POLICE OFFICER GOODMAN, in his official and individual capacity, POLICE OFFICER JANE DOE, NEW YORK CITY, in her official and individual capacity, NEW YORK CITY POLICE OFFICERS MICHAEL COUSIN HAYES, SHIELD #3487, in his individual capacity, NEW YORK CITY POLICE OFFICER ANGELICA SALMERON, SHIELD #7116, in her individual capacity, LUIS PICHARDO, SHIELD #00794, in his individual capacity, JOHN DOES, NEW YORK CITY, #1 through #11, in their official and individual capacity, NEW YORK CITY POLICE SERGEANT JAMES KELLY, SHIELD #92145, in his individual capacity, NEW YORK CITY POLICE OFFICER CORMAC JOYCE, SHIELD #31274, in his individual capacity, NEW YORK POLICE OFFICERS ERIC HERNANDEZ, SHIELD #15957, in his individual capacity, NEW YORK CITY POLICE OFFICER CHRISTOPHER MORAN, in his individual capacity,

Defendants-Appellees.

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* Pursuant to Federal Rules of Appellate Procedure 43(c)(2), New York City Police Commissioner William J. Bratton and New York City Mayor Bill de Blasio are automatically substituted for the former Commissioner and former Mayor in this case.

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STATUTES

I. PRELIMINARY STATEMENT

The SBA[1] satisfies all elements of the standard for intervention under Rule 24. The District Court abused its discretion by imposing higher burdens on the SBA than Rule 24 requires. The District Court also erred when it concluded that the SBA lacked standing.

The Opinions and Orders of the District Court are based on flawed legal reasoning, and they unfairly malign the reputations of the SBA's members (among others), threaten to affect officer and public safety, and direct how the SBA's members must perform their duties without regard to their collective bargaining rights. The City, after winning a stay pending appeal that required a showing of likelihood of success on the merits, has reversed its position in this litigation and abandoned the defense of its NYPD officers. Once the City abandoned its prior position, its interests clearly diverged from those of the SBA's members and it left them unprotected. While the City did not act illegally, its flip-flop should not be permitted to leave the SBA's members' affected rights without protection, where (as here) the SBA has sought to timely intervene under the circumstances of this case in order to prosecute the appeal, and safeguard the SBA's collective bargaining rights.

[1] Capitalized terms used in this Reply were defined in the SBA's opening brief.

II. ARGUMENT

A. The District Court Abused Its Discretion When It Failed to Grant the SBA's Motion to Intervene as of Right Pursuant to Rule 24(a).

The SBA satisfied all four factors of Rule 24(a) regarding intervention as of right. Its motion was timely; it has a direct, protectable interest in the District Court matter; the outcome of the District Court matter will impair that interest; and no existing party will adequately protect that interest. Fed. R. Civ. P. 24(a); *D'Amato v. Deutsche Bank,* 236 F.3d 78, 84 (2d Cir. 2001).

1. The SBA's Motion Was Timely.

In evaluating the timeliness of a post-judgment application to intervene for the purposes of participating in the appellate phase of a litigation, "[t]he critical inquiry . . . 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, 395-96 (1977).

Here, the SBA's motion to intervene in the District Court was timely because it was filed promptly after the entry of the Liability and Remedies Opinions below, within the 30-day period for filing a notice of appeal, and as soon as it became evident to the SBA and all parties involved that the City would likely discontinue prosecuting the appeal and reverse positions in the remedial phase. *See McDonald*, 432 U.S. at 396 ("[T]he respondent filed her motion within the time period in which the named plaintiffs could have taken an appeal. We

therefore conclude that the Court of Appeals was correct in ruling that the respondent's motion to intervene was timely filed and should have been granted."); *Drywall Tapers & Pointers of Greater New York, Local 1974 v. Nastasi &Assocs. Inc.*, 488 F.3d 88, 95 (2d Cir. 2007) (same); *see also Yniguez v. Arizona*, 939 F.2d 727, 734 (9th Cir. 1991) (noting that the "general rule [is] that a post-judgment motion to intervene is timely if filed within the time allowed for the filing of an appeal"); *see also Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004) (finding timely, and reversing denial of, motion to intervene filed within two weeks after entry of judgment), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

Even the passage of substantial time does not necessarily render intervention untimely so long as post-judgment remedies remain be resolved in the case. For example, in *Hodgson v. United Mine Workers*, the D.C. Circuit found that a union's application to intervene was timely even though the intervention was sought "after the action was tried, and some seven years after it was filed." 473 F.2d 118, 129 (D.C. Cir. 1972), *cited with approval in McDonald*, 432 U.S. at 395 n.16. The proposed intervenors "sought only to participate in the remedial, and if necessary the appellate, phases of the case," and thus, timeliness posed "no automatic barrier to intervention in post-judgment proceedings where substantial problems in formulating relief remain to be resolved." *Id.*

Likewise, in *United States v. City of Detroit,* the Sixth Circuit held that the district court abused its discretion by denying intervention motions filed by certain municipal employees' unions that challenged a remedial order issued after 30 years of litigation. 712 F.3d 925, 926-27 (6th Cir. 2013). The Sixth Circuit held that the unions' motions were *not* untimely, stating "[t]he mere passage of time—even 30 years—is not particularly important to the progress-in-suit factor," and that "the proper focus is on the stage of the proceedings and the nature of the case[.]" *Id.* at 931 (emphasis added). "Where future progress remains and the intervenor's interests are relevant, intervention may be the most effective way to achieve a full and fair resolution of the case." *Id.*

In addition, the SBA did not know until the issuance of the Liability Opinion that the Court would criticize several SBA members, find their conduct to have violated the law, and articulate unclear standards for constitutionally acceptable stops and frisks. And the SBA did not know, and could not have known, of the particular interest it would have in the separate remedies (which had not yet been awarded and were not reasonably foreseeable) until after the Remedies Opinion and Order had been issued. And, up until the election of Mayor de Blasio, the SBA's interests were protected in this litigation by the City.[2]

[2] Amici Curiae, the Public Advocate for the City of New York and members of the New York City Council argue that because of the "nature of the relationship between the unions and the Mayor," the SBA's interests in this litigation were never protected. (Public Advocate Br. 8.)

Courts have routinely found that a motion for intervention is timely where a party moves to intervene soon after finding that an existing party elects not to appeal a judgment. *Acree*, 370 F.3d at 50 ("In particular, courts often grant post-judgment motions to intervene where no existing party chooses to appeal the judgment of the trial court[.]")); *see also Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001) (permitting intervention when proposed intervenor's interest did not crystallize until after government party decided not to pursue appeal); *Dow Jones & Co. v. U.S. Dep't of Justice*, 161 F.R.D. 247, 252-53 (S.D.N.Y. 1995) (Sotomayor, J.) (finding intervention timely where the movant sought to intervene only after "she realize[d] that the [defendant] might not fully exercise its right to appeal"). The District Court abused its discretion by narrowly focusing on the

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While it is true that there may be circumstances under which the SBA's interests are not aligned the Mayor's (as evidenced by the current posture), the fact remains that throughout the District Court proceedings, the City's and the SBA's members' interests were aligned in all material respects. Amici's argument that the City can never have the same litigation interests as its police is belied by the facts.

An additional group of Amici, led by Communities United for Police Reform ("CPR"), argue that the fact that CPR has been "actively engaged in *Floyd* since 2011" is evidence that the SBA's motion was untimely. (CPR Br. 7.) That the CPR was advocating for the interests of its members at an early date does not change the fact that the SBA was not aware of its interests until the entry of the Liability and Remedies Opinions, and that, in any event, the SBA's interests were protected by the City during the litigation before the District Court.

The CPR also notes that the Joint Remedial Process ordered by the District Court will help improve relations between the NYPD and the community, but argues that any delay in this process will have a negative impact on its legitimacy. (*Id.* at 11.) However, the legitimacy of the remedial process is also contingent upon the full and fair participation of the SBA, which would not necessarily result in delay. Any associated delay would be justified by the legitimate interests of the SBA, and can only be achieved if the SBA is granted intervention as a party to advocate on behalf of its members. Protection of legitimate interests, as a general matter, should not be sacrificed for expediency.

passage of time, rather than the totality of the circumstances and the stage of the case.

Plaintiffs and the City rely heavily on this Court's decision in *Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric. & Mkts.*, 847 F.2d 1038, 1044 (2d Cir. 1988), but that reliance is misplaced.

First, unlike the SBA's request, in *Farmland Dairies*, the proposed intervenors sought to revisit earlier rulings in the matter, rather than participate prospectively. After the parties reached a settlement and the Court "marked the case 'settled and discontinued with prejudice,'" the intervenors moved to intervene for "reargument" and "if necessary… [to] pursue an appeal." *Id.* at 1042.

Second, in *Farmland Dairies*, the relationship between the proposed intervenor and the existing party for whom it sought to take over in an appeal was vastly different from the relationship between the SBA and the City here. In *Farmland Dairies*, proposed intervenors were private New York milk dealers that sought to intervene in a suit between their competitors and the state Attorney General, after the case had settled. This Court affirmed the denial of the milk dealers' motion because it was untimely. *Id.* at 1042-44. The Court explained that the milk dealers should "have been aware . . . that the interests represented by the [state Attorney General were] not coterminous with their own." *Id.* at 1044. The Court noted that the state Attorney General "'represents the whole people and a

public interest, and not mere individuals and private rights.'" *Id.* at 1044 (quoting *People v. Brooklyn, Flatbush & Coney Island Ry. Co.*, 89 N.Y. 75, 93 (1882)). Here, in contrast, the City is the *employer* of all SBA members, who are *public* employees engaging in a dangerous profession who seek intervention to protect their *physical safety* and reputations, among other things. Because of that relationship, there was no reason whatsoever for the SBA to "have been aware . . . that the interests represented by the [City were] not coterminous with their own." *Id.* 1044. In fact, the interests in the litigation were coterminous up until the time the City reversed course in this litigation, at which point the SBA immediately sought to intervene.

Finally, the SBA's intervention will not prejudice existing parties to the appeal. Both the Appeal and the Remedial Proceedings are in their earliest stages. To the extent the SBA seeks intervention in the remedial proceedings, it is for the purposes of protecting its collective bargaining rights and for ensuring that the proposed reforms do not endanger officer safety. The SBA only requests to that its rights under the York City Collective Bargaining Law ("NYCCBL"). N.Y. City Admin. Code § 12-307(4) be recognized. The SBA sought to intervene before any discussions among the parties about a potential settlement. The timing of that motion, thus, caused no cognizable prejudice.

2. The SBA Has Direct, Protectable Interests in This Action.

The District Court also abused its discretion when it found that the SBA lacked a protectable interest in the matters decided in both the Liability and Remedies Opinions. First, the Liability Opinion labeled SBA members as lawbreakers and unconstitutional actors, and found that the NYPD's institutional indifference was the result of widespread unconstitutional stops conducted and supervised by SBA members. Second, the SBA's collective bargaining interests are implicated by the Remedies Opinion in this matter, which provides that the Remedial Proceedings will result in reforms that will have practical impacts on the terms and conditions of the SBA members' employment and will occur without any meaningful involvement by the SBA. Accordingly, the SBA has protectable interests stemming from both the Liability and Remedies Opinions and Orders.

a. The SBA Has a Direct, Protectable Interest in Vindicating the Reputational Harm Inflicted on Its Members by the Opinions.

The City and Plaintiffs wrongly assert that the SBA's legally protectable interests are not implicated by the District Court's Liability Opinion.[3] First, the City argues that the SBA has not "substantiated" such harm with "supporting

[3] Amici Council of Guardians, Inc., et al. argue that the police unions do not have a reputational interest arising from the District Court's determination that witnesses, who are SBA members, were not credible. (Council of Guardians Br. 19-21.) But the reputational harm sustained by the SBA's members arises from the District Court's ruling that the SBA members were lawbreakers and unconstitutional actors who perpetuated institutional indifference toward potential constitutional violations.

affidavits" and states, citing to two out-of-circuit cases (one a concurring opinion), that "conclusory allegations of reputational harm cannot establish a right to intervene." (City's Br. 38 (citing *Flynn v. Hubbard*, 782 F.2d 1084, 1093 (1st Cir. 1986) (concurring op.); *Edmondson v. Nebraska*, 383 F.2d 123, 127 (8th Cir. 1967)). Contrary to the City's argument, evidence of collateral damage to one's prospects is not required to establish the existence of reputational harm. *See United States v. Accra Pac, Inc.* 173 F.3d 630. 633 (7th Cir. 1999) ("being put on a blacklist . . . is treated as immediately redressible harm because it diminishes . . . the opportunity to practice one's profession *even if the list . . . does not impose legal obligations*." (emphasis added)). This Court, in *Gully v. NCUA*, cited with approval to a D.C. Circuit opinion holding that a reprimand of a judge published on the Fifth Circuit's website established an injury-in-fact under a standing analysis, despite the fact that the reprimand had no legal effect. 341 F.3d 155, 162 (2d Cir. 2003) (citing *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States*, 264 F.3d 52, 57 (D.C. Cir. 2001)); *Peters v. District of Columbia*, 873 F. Supp. 2d 158, 211 (D.D.C. 2012) (noting that injury in fact showing is closely related to Rule 24(a)'s requirement of an interest). Where the reputational harm is inseparable from adverse legal findings and effects, reputational harm may give rise to an interest under Rule 24(a). *Sierra Club v. U.S. Army Corps of Engineers*, 709 F.2d 175, 177

(2d Cir. 1983) (observing that intervention to address reputational harm may be permitted if the court's order rested upon findings that an employer could not hire or rely upon the prospective intervenor because he was "professionally incompetent."). That interest is created by the harm to reputation itself, not the collateral effects of the harm.

The District Court's assertion, echoed by Plaintiffs, that other circuit courts of appeal have cast doubt on intervention based on what the District Court termed "indirect reputational harm" conflicts with this Court's reasoning in *Sierra Club* , 709 F.2d at 176 . In that case, this Court held that a government contractor's reputational interest did not relate to the subject of contempt proceedings, which was whether government agencies obeyed relevant court orders. *Id.* This Court premised its denial of intervention under those facts on a finding that there had not yet been any finding by the court that could affect the proposed intervenor's reputation, and that, "if and when the stage is reached that specific consideration is being given to any order which expressly details the activity of [the contractor] . . . consideration will be given to a renewed application by [the contractor] for limited intervention." *Id.* at 177 (noting that "a different case would be presented" if the proceedings involved express allegations of wrongdoing by the contractor itself). The situation contemplated by this Court in *Sierra Club* is precisely the situation here. The subject of this action, whether there were constitutional violations by the

City, turns directly on the police work of the members of the SBA, and the District Court's rulings denigrated that work. Accordingly, under the analysis set forth by this Court in *Sierra Club*, the reputational harm suffered by the SBA and its members was not indirect.[4]

Second, the City argues that, because the Liability Opinion was entered against the City, rather than the SBA, the rulings do not inflict reputational harm on the SBA members. That position is belied by this Court's discussion in *Sierra Club*, discussed immediately above. That the City was harmed as a result of the Liability Opinion does not mean that the SBA was not also harmed. The only case law the City cites in support of its argument is a D.C. District Court case holding that an employer's violation of the law does not automatically impugn the character of an employee. *See Mahoney v. Donovan*, 824 F. Supp. 2d 49, 68 (D.D.C. 2011). The SBA does not contend, however, that it has suffered reputational harm as a result of its employer's violation of the law. Rather, its reputational harm stems from the lower court's rulings that the SBA members themselves are lawbreakers and unconstitutional actors.

[4] Plaintiffs argue that the SBA's argument is based on mere dicta. Plaintiffs are wrong. In fact, this Court in *Sierra Club* stated that the contractor could not intervene because the resolution of the case "in the present posture" would only indirectly effect the proposed intervenor. *Sierra Club*, 709 F.2d at 177. However, the Court's holding that the effect would be indirect was explicitly premised on its reasoning that "[w]hether or not there has been contempt of the district court's orders does not turn on [proposed intervenor's] professional reputation." *Id.* at 176.

The District Court wrongly held, and Plaintiffs argue here, that *United States v. City of Los Angeles*, 288 F.3d 391, 399-401 (9th Cir. 2002), in which a police union was granted intervention to defend its members against allegations of unconstitutionality in their law enforcement work, is distinguishable from the present litigation because intervention in that case rested on the fact that the union-member officers were potentially exposed to liability. While it is true that the district court in *City of Los Angeles* premised its denial of the police union's intervention on the fact that it intended to approve a consent decree that would "obviate the need to prove liability," the Ninth Circuit, in overturning the district court's decision, stated expressly that "[t]he Police League claims a protectable interest because the complaint . . . raises factual allegations that its member officers committed unconstitutional acts in the line of duty. *These allegations are sufficient to demonstrate that the Police League had a protectable interest in the merits phase of the litigation*." *Id.* at 399 (emphasis added). Regardless of its criticism of the district court's assumptions regarding the approval of the consent decree and its reasons for finding error in that court's decision, the Ninth Circuit unequivocally stated that the labelling of the Police League's members as unconstitutional actors gave the union a protectable interest in the litigation. *Id.* *See also Foretich v. United States*, 351 F.3d 1198 (D.C. Cir. 2003) (holding that plaintiff suffered injury-in-fact sufficient for Article III standing because an act

passed by Congress "embodie[d] a congressional determination that he engaged in criminal acts of child abuse"). Likewise, the SBA has a direct, protectable interest in vindicating the reputational harm inflicted on its members, the City's and Plaintiffs' arguments to the contrary are meritless, and the District Court abused its discretion by holding otherwise.

b. The SBA Has a Direct, Protectable Interest Arising From Its Collective Bargaining Rights.

The SBA has direct protectable interests arising from the entry of the Liability and Remedies Opinions and Orders because the Remedies Order mandates a process that will affect the terms and conditions of the employment of the members of the SBA, and that Order is predicated on the Liability Opinion and Order. *See* N.Y. City Admin. Code § 12-307(6)b ("questions concerning the practical impact that decisions . . . have on terms and conditions of employment . . . are within the scope of collective bargaining").[5] Excluding the SBA from remedial proceedings mandated by the Remedies Opinion will affect its ability to

[5] Amici Curiae, Council of Guardians, Inc. et al. argue that because the SBA has not challenged certain NYPD reforms unrelated to this litigation it does not have a protectable interest in this litigation arising from its collective bargaining rights. (Council of Guardians Br. 8-9.) The fact that the SBA has not brought an improper practice charge in response to a pilot program to test body-worn cameras on police officers or what amici alleges were reforms to stop-and-frisk practices between 2009 and 2013 does not defeat the SBA's collective bargaining interests affected by the Remedies Opinion.

Amici also argue the SBA's collective bargaining interests cannot limit the District Court's broad discretion to remedy purported constitutional violations. (*Id.* at 13.) To be clear, of course the District Court is not bound by the collective bargaining agreement, but the City is and, consistent with the NYCCBL, it has certain collective bargain rights that satisfy the protectable interest requirement of Rule 24.

collectively bargain with respect to the reforms to police practices that are set forth in the Remedies Opinion. *See City of Los Angeles*, 288 F.3d at 399-401 (finding that state-law collective bargaining rights gave union protectable interest in consent decree); *CBS, Inc. v. Snyder*, 798 F. Supp. 1019, 1023 (S.D.N.Y. 1992) (recognizing that union had legally protectable interest in participating in proceedings that may have affected the interpretation or enforceability of its collective bargaining agreement), *aff'd* 989 F.2d 89 (2d Cir. 1993).

As the District Court acknowledged in the Opinions, sergeants play a major role, both directly in the field and indirectly as supervising officers, in the administration of stop, question, and frisk policies. *Floyd v. City of New York*, 959 F. Supp. 2d 540, 610-13 (S.D.N.Y. 2013). Indeed, sergeants are primarily responsible for carrying out the street-level practices of the NYPD's administration, including the implementation of its stop, question, and frisk policy. (*Id.*) The Opinions specifically note numerous instances of stops that were either conducted personally by sergeants or reviewed or supervised by sergeants. *See, e.g.*, *Floyd*, 959 F. Supp. 2d at 629 n.463, 638-39, 650. And any violation by an officer of the Remedies Opinion and Order could subject the officer to contempt of court. Fed. R. Civ. Pro. 65(d).

Thus, many of the proposed remedies will have practical impacts on SBA's members' workload, staffing, and safety (among other things), including changes

to training, forms and other paperwork, discipline, supervision, and qualifications for continued employment (among other things). These impacts will require collective bargaining. *See* N.Y. City Admin. Code § 12-307(6)b. In addition, the Remedies Opinion imposes mandatory training that will become a qualification for continued employment, a routine subject of collective bargaining.[6] *See City of New York v. Uniformed Firefighters Ass'n*, Decision No. B-43-86, 37 OCB 43, at 15 (BCB 1986); *Uniformed Firefighters Ass'n v. City of New York*, Decision No. B-20-92, 49 OCB 20, at 8 (BCB 1992). Failure to make the SBA a participant in the Remedial Proceedings will prejudice the SBA's collective bargaining rights.

Although Plaintiffs and the City call the SBA's interest speculative, they do not disagree that its collective bargaining rights may be impaired. That concession is enough under Rule 24's standard, which requires only a showing that rights "may" be impaired. Fed. R. Civ. P. 24(a)(2). The City specifically appears to concede, at a minimum, that the Remedies Order and the Remedial Proceedings it directs may create bargainable practical impacts at a later date, when the Immediate Reforms and the Joint Process reforms ultimately approved and ordered

[6] The City argues in its brief that this principle typically applies in circumstances where an employer imposes new certification requirements. (City's Br. 29.) The City does not and cannot argue, however, that the requirement that the City bargain over training that serves as a condition for continued employment is limited *only* to situations where a new certification requirement is imposed. *See Uniformed Firefighters Ass'n*, Decision No. B-43-86, 37 OCB 43, at 15 ("A further exception [to management's prerogative over training procedures] may be found where it is demonstrated that there exists a practice and tradition of the employer encouraging and supporting employee participation in such training.").

by the court bring all practical impacts to the forefront. (*See* City's Br. 33.) And, as Plaintiffs note, it is impossible for anyone to say with total certainty the extent to which the reforms will implicate collective bargaining because "none of [the District Court's] proposals [will] be implemented unless and until they are approved by the court in a subsequent order." (Plaintiffs' Br. 10 (citing *Floyd v. City of New York*, 959 F. Supp. 2d 691, 694-96 (S.D.N.Y. 2013).). The City (relying on the reasoning of the District Court below) asserts in this regard that, "in the event that bargainable impacts were to arise, the remedial order would [not] prevent the unions from bargaining over those issues." (*Id.*) But under the standard set forth by Rule 24, intervention as of right is required now because the specter of that order containing provisions that implicate the SBA's collective bargaining rights is more than sufficient to create a protectable interest. *See City of Los Angeles*, 288 F.3d at 400. Accordingly, the City is wrong to argue that the SBA's interest are insufficient because they are speculative; that very argument concedes that the final court order may affect the SBA's collective bargaining rights. (City's Br. 24.) *See Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 130 (2d Cir. 2001) ("An interest that is otherwise sufficient under Rule 24(a)(2) does not become insufficient because the court deems the claim to be legally or factually weak.").

Courts that have considered this issue in analogous contexts have opined that it is enough to establish a protectable interest that the reforms developed and approved through such processes *might* or *could* contradict terms of a collective bargaining agreement. *City of Los Angeles*, 288 F.3d at 399-400 ("To the extent that [the consent decree] contains *or might contain* provisions that contradict terms of the officers' [collective bargaining agreement], the Police League has an interest.") (emphasis added); *see also United States v. City of Portland*, No. 12-cv-02265, at 7 (D. Or. Feb. 19, 2013) (holding that if a proposed remedial order "contains—*or even might contain*—provisions that contradict the terms" of the collective bargaining agreement, the union members have "a protectable interest.") (emphasis added); *Vulcan Soc. of Westchester Cnty., Inc. v. Fire Dept. of City of White Plains*, 79 F.R.D. 437, 441 (S.D.N.Y. 1978) (finding protectable interest for union seeking to intervene in action seeking to remedy discriminatory practices because "the application is prior to an order or possible consent decree which *could* affect the rights of the unions") (emphasis added). Here, it is clear that the remedial measures in this case at least might or could (and likely will) affect the collective bargaining interests of SBA members. The mere "threat" that such collective bargaining rights will be impaired creates a substantial interest, and the SBA is "not required to prove with certainty that particular employees would lose

contractual benefits." *United States v. City of Hialeah*, 140 F.3d 968, 982 (11th Cir. 1998).

In *City of Los Angeles*, for example, the Ninth Circuit rejected the government's argument that a union's assertion of a collective bargaining interest arising from a consent decree regarding police practices was "purely speculative," because Rule 24 is satisfied if such an order "'may' impair rights 'as a practical matter.'" 288 F.3d at 401 (quoting Fed. R. Civ. P. 24(a)(2)). Thus,

> [T]o the extent that it is disputed whether or not the consent decree conflicts with the MOU, ***the Police League has the right to present its views on the subject to the district court and have them fully considered in conjunction with the district court's decision to approve the consent decree***.

Id. (citing *EEOC v. AT&T*, 506 F.2d 735 (3d Cir. 1974) (emphasis added)).

Other courts have recognized the appropriateness of intervention in like circumstances. Contrary to the City's argument (City's Br. 35-36), this case is strikingly similar to the institutional police reform cases heard by federal courts in Los Angeles, California, and Portland, Oregon. With regard to the unions' interests in the remedies in the various cases, the only factor distinguishing this case is that the final order implementing the remedies has not yet been agreed to or entered—and that is only because the Remedies Order provides for multiple phases of reform approval and implementation, whereas the reforms in *City of Los Angeles* and *City of Portland* were agreed to before the litigation even began in

earnest. *See City of Los Angeles*, 288 F.3d at 396 ("Before filing this suit, the United States discussed the issues with the City defendants. The parties agreed to enter into a consent decree that would resolve the suit."); *City of Portland*, No. 12-cv-02265, at 2 (D. Or. Feb. 19, 2013) ("At the same time the complaint was filed, the parties filed a Joint Motion to Enter Settlement Agreement and Conditional Dismissal of Action[.]").

Here, the process that will generate the final reforms has yet to begin, but the end result likely will be the same as that reached in Los Angeles and Portland – a consent decree or other court order formalizing the reforms developed by the parties through the Joint Process. The SBA seeks intervention now so that it can participate as a party during the discussion of those reforms, which are likely to implicate collective bargaining, rather than being relegated to the sidelines. *See City of Los Angeles*, 288 F.3d at 400 ("To the extent that [the consent decree] contains *or might contain* provisions that contradict terms of the officers' MOU, the Police League has an interest.") (emphasis added). Immediate participation by the SBA as a party is particularly important because the Remedies Opinion provides for no mechanism for the SBA to challenge the reforms or otherwise assert its collective bargaining rights, either before or after the reforms are made permanent by a court order or consent decree.

3. The SBA's Interests May Be Impaired by the Disposition of This Action and Will Not be Adequately Protected by the Parties to This Action.

If the SBA is not permitted to intervene in this matter, the discontinuance of the Appeal will impair the SBA's interests by leaving in place a Liability Opinion that besmirches the members of the SBA by labeling them lawbreakers and unconstitutional actors who furthered a culture of institutional indifference in the NYPD, and a Remedies Opinion that would allow the District Court to set employment practices that would otherwise be the subject of routine collective bargaining. In effect, therefore, the Remedies Opinion supplants and circumvents collective bargaining by making any deviation from the District Court's ordered remedies subject to contempt proceedings rather than ordinary collective bargaining dispute resolution processes.

The Remedies Opinion, which contains no provision regarding collective bargaining, contemplates a reform process that will trample on the rights of the SBA by failing to give it any voice in the reforms to be approved and implemented. The City and Amici recognize that the effects of policy changes made by the City as a result of the Remedies Order are the subject of collective bargaining. But the SBA will have little or no recourse if it is not granted intervention because, once the reforms are formalized in a court order or consent decree, the City will be able to claim that all reforms must be implemented exactly

as the court directs, irrespective of their practical impacts. And violations of the federal court order could result in the City and officers being held in contempt. Fed. R. Civ. Pro. 65(d). But such practical impacts include not only compensation matters that, as the City suggests, can simply be bargained after the fact (City's Br. 33), but also officer safety issues that likely cannot be revisited once the reforms are made permanent by judicial fiat because, in the event that the SBA later seeks review of such dangerous practical impacts before an administrative body, the City can simply argue that the reforms are mandated by a federal court order and thus cannot be changed through negotiation or administrative proceedings. *See Engstrom v. Emergency Med. Servs.*, 31 OCB21, 11-13 (BCB 1983) (dismissing petitioner's NYCCBL claims as not within Board's jurisdiction because claims involved objections to employer's implementation of various orders issued in court proceeding and, therefore, "[petitioner's] remedy, if any, lies in that forum").

The District Court's orders will also have a chilling effect on law enforcement because they will cause officers to hesitate to make necessary street-level judgments about whether to conduct a stop or frisk. Consequently, officer and public safety will be put in jeopardy. The City, which has abandoned all efforts to seek this Court's review of the District Court's unworkably vague standards for constitutional stops, will not adequately protect the SBA in this respect.

Moreover, no existing party to this action will protect the reputational and collective bargaining interests of the SBA or its members. Representation is inadequate when an existing party has chosen not to pursue an appeal and a non-party intervenes for the purpose of prosecuting the appeal. *Yniguez*, 939 F.2d at 730 ("Having decided not to appeal the district court's decision on the merits, the Governor inadequately represents the interests of [proposed intervenors]"). Neither the City nor the Plaintiffs contest the fact that no existing party represents the interests of the SBA.

B. Alternatively, the SBA Should Have Been Granted Permissive Intervention.

In the alternative, this Court should find that the denial of the SBA's Motion to Intervene pursuant to Federal Rule of Civil Procedure 24(b) was an abuse of discretion by the District Court. Fed. R. Civ. P. 24(b). (*See* SBA's Opening Br. 46-47.)

The City argues that the SBA should not be permitted to intervene because it will create a barrier to the resolution of the litigation. (City's Br. 45-46.) But the SBA moved for intervention well before the City acquiesced to the demands of the Plaintiffs and the rulings of the District Court. Accordingly, that acquiescence is not appropriate for consideration of whether the motion should have been granted.

Additionally, Plaintiffs argue that the SBA should be denied intervention because the unions have stated publicly their intention to "use intervention" to

"extract collective bargaining concessions" from the City. (Pl.'s Br. 57.) To the extent that the Plaintiffs thereby concede that the SBA's collective bargaining interests are implicated by the Remedial Opinion, this argument only supports the SBA's protectable interest. But to the extent that Plaintiffs seek to rely on such allegations to portray the SBA as somehow using judicial proceedings to gain a bargaining advantage, their argument is a red herring. The SBA seeks to intervene for no reason other than to protect its members' rights.

C. The SBA Has Standing to Protect Its Interests.

Assuming *arguendo* that independent standing is required here, *see United States Postal Serv. v. Brennan*, 579 F.2d 188 (2d Cir. 1978) (holding there was "no need to impose the standing requirement upon proposed intervenor" where there was standing among the original parties), as discussed in the SBA's opening brief, the SBA meets all of the requirements for organizational standing in this action.[7]

Plaintiffs' arguments to the contrary are flawed because they rely on case law that is inapplicable here. First, for example, Plaintiffs' reliance on *Clapper v. Amnesty International USA* is misplaced because the harm the plaintiffs asserted in

[7] As discussed on its opening brief, the SBA has concrete injuries-in-fact, including the reputational injury caused to the SBA's members by the District Court's Opinions. In *Pearl River Unions Free School District v. Duncan*, which was decided after the SBA filed its opening brief, the district court held that an analogous reputational harm caused by a findings letter from the Department of Education relating to an alleged racial harassment incident was a sufficient injury-in-fact to confer standing on the school district. *Pearl River Unions Free School District v. Duncan*, 2014 WL 4387235, at *1 (S.D.N.Y. Sept. 5, 2014) (The "determination [in a findings letter] that the [racial harassment] incident occurred and that [the district]'s investigation was deficient *clearly* gives [the district] standing in this case," even though the district was not subject to any obligation resulting from the findings letter. (emphasis added)).

that case is distinguishable. 133 S. Ct. 1138 (2013) The putative plaintiffs in *Clapper*, "*United States persons* whose work, they allege, requires them to engage in sensitive international communications with individuals who they believe are likely targets of surveillance," *id.* at 1142 (emphasis added), argued that they had Article III standing "because there is an objectively reasonable likelihood that their communications with their foreign contacts will be intercepted under [a federal surveillance statute they sought to challenge] at some point in the future." *Id.* at 1147. Here, unlike the nebulously identified "United States persons" who feared that, "at some point in the future," their yet-to-occur international communications might possibly subject them to the provisions of a surveillance statute, the SBA and its members are the *specific targets* of the District Court's findings and proposed reforms, and they will be required to submit to the reforms as soon as the District Court orders them permanently approved. There is no uncertainty whatsoever on this point.

Second, Plaintiffs' argument that the SBA lacks standing because only the City is bound by Remedies Opinion (Pl.'s Br. 28-30) ignores the well-established law in this Circuit of permitting non-party appeals based on an affected interest. As this Court has expressly stated, "[w]e have long adhered to the principle that 'if not a party, the putative appellant is not concluded by [a judgment], and is not therefore aggrieved by it. *But if the decree affects his interests, he is often allowed*

to appeal.'" *Kaplan v. Rand*, 192 F.2d 60, 66 (2d Cir. 1999) (emphasis added) (citing *West v. Radio-Keith-Orpheum Corp.*, 70 F.2d 621, 624 (2d Cir. 1934) (L. Hand, J.)). "Although the general rule," this Court stated, "is that only a party of record may appeal a judgment, *a nonparty may appeal 'when the nonparty has an interest that is affected by the trial court's judgment.'*" citing *United States v. Int'l Bhd. of Teamsters*, 931 F.2d 177, 183-84 (2d Cir. 1991) (quoting *Hispanic Soc'y v. New York City Police Dep't*, 806 F.2d 1147, 1152 (2d Cir. 1986)). Accordingly, a non-party seeking to appeal a judgment need not be bound by the judgment to appeal; the party need only have "an interest that is affected by the trial court's judgment." *Id.* at 183; *see also Doe v. Public Citizen*, 749 F.3d 246, 269 (4th Cir. 2014) ("We have recognized an exception to the general rule that permits a nonparty to appeal a district court's order or judgment when the appellant (1) possessed 'an interest in the cause litigated' before the district court and (2) 'participated in the proceedings actively enough to make him privy to the record.'" (citations omitted)). The SBA clearly has an interest affected by this litigation, since its members were singled out as lawbreakers and will be the ones responsible for carrying out the sweeping reforms directed by the District Court. Moreover, the District Court's orders have a chilling effect on law enforcement because they cause officers to hesitate to make necessary street-level judgments about whether to conduct a stop or frisk, which in turn imperils officer and public safety.

Accordingly, the fact that the SBA is not explicitly bound by the orders does not preclude it from appealing them.

Third, the City's argument that the Liability Opinion is a non-appealable interlocutory order is incorrect. (*See* City Br. 49.) The SBA has properly appealed both the Remedies and the Liability Opinions. The two Opinions are intertwined, and the injunction ordered in the Remedies Opinion is premised on the rulings in the Liability Opinion.

Because the SBA meets all the requirements of associational standing, the District Court erred in holding that it lacked standing.

D. Plaintiffs Lacked Standing in This Case, and This Court Can Properly Examine Plaintiffs' Standing on Appeal

As the SBA stated in its opening brief, it is Plaintiffs, rather than the SBA, who lack standing in this case. (SBA Br. 48 n.12.) Their request for injunctive relief below did not present a case or controversy because it is unlikely that the Constitutional violations they allege create a realistic threat that such violations would occur again in the future. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105-07 (1983) (finding lack of jurisdiction over request for injunctive relief against police officers based on allegedly illegal use of chokehold tactics in past encounters with plaintiff, because "standing to seek the injunction requested depended on whether [plaintiff] was likely to suffer future injury from the use of the chokeholds by police officers"). This Court can, of course, properly examine

the issue of Plaintiffs' lack of standing. *See In re MTBE Products Liab. Litig.*, 488 F.3d 112, 123-24 (2d Cir. 2007) ("[W]e unquestionably have jurisdiction to decide whether there is any further impediment to our exercise of jurisdiction over the subject matter of the case and, by extension, the jurisdiction of the court below."). The SBA welcomes the opportunity to submit supplementary briefing on Plaintiffs' lack of standing.

III. CONCLUSION

For all of the above reasons, the SBA respectfully requests that the Court reverse the Intervention Decision and grant the SBA intervention for the purposes of appealing the Liability Opinion and participating in the Remedial Proceedings.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,942 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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