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

BRIEF FOR APPELLANT
SERGEANTS BENEVOLENT ASSOCIATION

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Sergeants Benevolent Association

—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.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Appellants-Putative Intervenor, the Sergeants Benevolent Association, hereby states that it is a non-stock, non-profit corporation and, therefore, there are no parent corporations or publicly held corporations that own its stock.

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I. JURISDICTIONAL STATEMENT

Jurisdiction in the District Court was based on 42 U.S.C. § 1983. This Court has jurisdiction over the appeal from the District Court's denial of the motion of Appellant the Sergeants Benevolent Association (the "SBA") to intervene pursuant to 28 U.S.C. § 1291. *See New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992) ("Because a district court's order denying intervention is a final order, we have appellate jurisdiction.").

The appeal is timely. The District Court denied the SBA's motion to intervene on July 30, 2014, and the SBA filed its Notice of Appeal on August 7, 2014. (A-1213–14.) *See* Fed. R. App. P. 4(a)(1)(A).

II. STATEMENT OF THE ISSUES

1. Did the District Court abuse its discretion by denying the motion of the Sergeants Benevolent Association (the "SBA") to intervene in the matter below?

2. Did the District Court err in holding that the SBA lacks standing to pursue an appeal of the District Court's Opinions and Orders?

3. Did the District Court err in finding that the SBA's request to participate in the remedial phase of the matter below was moot?

III. STATEMENT OF THE CASE

This an appeal from an Opinion and Order dated July 30, 2014, issued by the Honorable Analisa Torres in the United States District Court for the Southern District of New York, *Floyd, et al. v. City of New York, et al.*, --- F. Supp. 2d ----, Nos. 08 Civ. 1034(AT), 12 Civ. 2274(AT), 2014 WL 3765729 (S.D.N.Y. July 30, 2014) (the "Intervention Decision"), denying the Motion of the SBA to Intervene Pursuant to Federal Rule of Civil Procedure 24. (SPA-107–08.)

A. The Litigation and the Appeal

On August 12, 2013, the District Court issued two Opinions (*Floyd*, 959 F. Supp. 2d 540 (S.D.N.Y. 2013) (the "Liability Opinion"); and *Floyd*, 959 F. Supp. 2d 668 (S.D.N.Y. 2013) the ("Remedies Opinion"); collectively, the "Opinions") and accompanying Orders (the "Liability Order" and the "Remedies Order"; collectively, the "Orders") regarding the claims of Plaintiffs-Appellees ("Plaintiffs") that they and similarly situated individuals were stopped or frisked, or both, by New York City Police ("NYPD") officers in a manner that violated the Fourth and Fourteenth Amendments of the United States Constitution. The Liability Opinion found the City of New York (the "City") liable for the constitutional violations, and the Remedies Opinion ordered a permanent injunction requiring the City to conform its stop, question, and frisk practices to the United States Constitution. Liability Opinion, 959 F. Supp. 2d at 660-67;

Remedies Opinion, 959 F. Supp. 2d 676-88. The Remedies Opinion also directed a process (the "Remedial Proceedings") under which, subject to the "guidance" of a court-appointed "Facilitator," two stages of reforms to NYPD practices are to be made. Remedies Opinion, 959 F. Supp. 2d at 677-78, 687-88. First, specific reforms (referred to by the District Court as "Immediate Reforms"), such as revisions to policies and training materials relating to stop and frisk, changes to the documentation of stop and frisk, and changes to the system of supervision, monitoring, and discipline, must be implemented by the City. Remedies Opinion, 959 F. Supp. 2d at 679-86. Second, broader categories of reforms (referred to by the District Court as "Joint Process Reforms") are to be identified and implemented through a collaborative process involving the parties to the action, during which "stakeholders may be heard." Remedies Opinion, 959 F. Supp. 2d at 686-88. The Remedies Opinion also ordered the appointment of an independent Monitor to oversee both stages. Remedies Opinion, 959 F. Supp. 2d at 676-78.

On August 16, 2013, the City filed a Notice of Appeal seeking this Court's review of the Opinions and Orders (the "Appeal"). (Dkt. No. 441 at A-24149.) The Notice of Appeal was filed by the Bloomberg administration, which was nearing the end of its final term.

In order to protect the interests of the SBA members affected by the Opinions, especially in light of the fact that the likely new mayor would reverse the

City's position in this litigation (resulting in alignment of interests between the City and Plaintiffs), on September 11, 2013, the SBA timely sought to intervene in this matter both in the Remedial Proceedings and in the Appeal, and simultaneously filed a timely Notice of Appeal. (A-641–49; A-657–63.) On September 12, 2013, a group of other police unions also moved to intervene. (A-650–56.)

On September 23, 2013, the City filed a motion in this Court to stay all proceedings in the District Court pending a decision in the Appeal. (Dkt. No. 72.) On September 27, 2013, the SBA sought leave to file papers in support of the City's motion for a stay, which this Court granted on October 10, 2013. (Dkt. Nos. 105, 158.) On October 18, 2013, the City filed a letter with the District Court consenting to the intervention of the SBA and the other police unions. (A-969–70.) In that letter, the City stated, in relevant part:

> Recognizing that the interests of the City and the Unions may differ on collective bargaining issues, because of the widespread potential impact of the Court's August 12, 2013 Liability Opinion and Remedies Opinion and subsequent related orders on the City and police officers, the City consents to the Unions' motions to intervene.

(*Id.*) On October 31, 2013, this Court issued an Order granting the City's motion for a stay pending appeal. (Dkt. No. 247.) That Order also directed the removal of the District Judge from the proceedings below, because the appearance of impartiality surrounding the litigation was compromised. and the reassignment of

the case to a different judge. (*Id.*) Plaintiffs moved for *en banc* review of this Court's October 31, 2013 Order (Dkt. No. 267), and the City moved to vacate the Opinions and Orders (Dkt. No. 265).

On November 12, 2013, in light of this Court's Order staying all proceedings in the District Court, the SBA moved to intervene directly in the Appeal. (Dkt. No. 283.) On November 25, 2013, this Court issued an Order that all of the pending motions—including the SBA's motion to intervene, the request for *en banc* review of the October 31, 2013 Order, and the City's request for vacatur—be "held in abeyance pending further order of the court." (Dkt. No. 338.) This Court stated that the purpose of that Order was "[t]o maintain and facilitate the possibility that the parties might request the opportunity to return to the District Court for the purpose of exploring a resolution." (*Id.*)

Meanwhile, without the SBA's involvement, after Mayor de Blasio took office, the City and Plaintiffs engaged in negotiations to terminate the Appeal and resolve this matter by implementing the District Judge's ordered remedies.[1] On January 30, 2014, the City filed a motion for "a limited remand for the purpose of

[1] While the parties did not disclose that they intended to take such steps, Mayor de Blasio openly announced, just before he took office, "We will drop the appeal on the stop-and-frisk case, because we think the judge was right about the reforms that we need to make." Annie Correal, *De Blasio Names City's Top Lawyer, Appearing to Signal a Further Shift in Policy*, N.Y. Times, Dec. 29, 2013 (quoting Mayor de Blasio's statements at a press conference).

exploring a resolution." (Dkt. No. 459.) On the same date, the City and the Plaintiffs announced publicly that they had resolved all of Plaintiffs' claims.[2]

On February 21, 2014, over the objections of the proposed intervenors and amicus parties, this Court granted the motion for limited remand "for the purpose of supervising settlement discussions among such concerned or interested parties as the District Court deems appropriate, and resolving the motions to intervene." (Dkt. No. 479.) On February 25, 2014, the District Court directed the proposed intervenors to submit supplemental moving papers on their motions to intervene. (A-971.)

On March 4, 2014, the parties submitted to the Court a joint settlement status report in which they stated, in relevant part:

> Under [the settlement] agreement, the parties will make our best efforts to submit to this Court within approximately two weeks a joint application to modify the District Court's August 12, 2013 Remedial Order . . . by specifying that the term of the Court-appointed monitor be limited to three years, provided that the City can show by the end of that term that it has substantially complied with all Court-ordered injunctive relief.

(A-972–74.)

Thus, pursuant to its purported settlement with Plaintiffs, the City agreed to concede liability on behalf of the NYPD and its officers, including SBA members,

[2] Benjamin Weiser and Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. Times, Jan. 30, 2014.

as found by the District Court; to implement all of the remedies ordered by the District Court; and to relinquish any right to challenge the District Judge's rulings on appeal. The only limitation to be placed on any of the District Court's reforms was that the Monitor ordered by the District Judge's Remedies Opinion would serve for a term of three years (rather than indefinitely), but that limitation was to be conditioned on the City achieving substantial compliance with all of the District Judge's ordered reforms within that three-year period.

On March 6, 2014, the SBA submitted its supplemental motion to intervene. (A-1010–12.) On March 10, 2014, the City and Plaintiffs both opposed the supplemental motion.

On April 3, 2014, the City and Plaintiffs jointly moved the District Court for "an order modifying the remedies opinion issued on August 12, 2013." (A-1192–1206.) As the parties had indicated, the requested modification was a single change to the Remedies Order that would limit the duration of the court-appointed Monitor's term to three years, subject to a requirement that the City show "substantial compliance with all Court-ordered remedies" at the end of the term. (A-1199.)

On July 30, 2014, the District Court issued the Intervention Decision, which denied the motions to intervene and granted the joint motion for modification. (SPA-1–108.)

On August 6, 2014, the City moved to dismiss the Appeal with prejudice. (Dkt. No. 484.) On August 8, 2014, the SBA opposed the City's motion and asked that this Court decide the pending intervention motions before deciding the City's motion for dismissal or, in the alternative, expedite the instant appeal. (Dkt. No. 487.) On August 14, 2014, this Court expedited the instant appeal. (Dkt. No. 494.)

B. The SBA and the Opinions

The SBA is a an independent municipal police union whose membership consists of approximately 13,000 active and retired sergeants of the NYPD. (A-660 ¶ 2.) The SBA is the collective bargaining unit for those sergeants in their contract negotiations with the City. The SBA's central mission is to advocate for, and protect the interests of, its NYPD police sergeant members. (*Id.* ¶ 3.)

NYPD police sergeants are at the front line of police services in the City. (A-661 ¶ 7.) Among other things, a sergeant is responsible for supervising patrolmen and other subordinate officers and implementing policies of the NYPD on the street level. (*Id.*) A sergeant is required to train, instruct, monitor, and advise subordinates in their duties, and is held directly responsible for the performance of those subordinates. (*Id.*) Failure to carry out any of the above responsibilities can result in the imposition of disciplinary sanctions against the

sergeant, who is the front-line supervisor responsible for carrying out the mission of the NYPD during thousands of street-level encounters. (A-662 ¶ 12.)

In addition to supervisory responsibilities, a sergeant also routinely performs field police work, which typically consists of relatively complex law enforcement activities with which only sergeants are entrusted. (A-661 ¶ 8.) Some sergeants spend the entire work day patrolling streets, either in uniform or in plain clothes conducting surveillance. (*Id.* ¶ 9.) Sergeants are directly dispatched to more complex calls, are expected to determine and verify probable cause in all arrests in their units, and are the only police officers authorized to use certain types of non-lethal weapons such as Tasers. (*Id.* ¶ 10.) Sergeants are also required to prepare various reports and are ultimately responsible for all paperwork in their units. (A-662 ¶ 11.)

In the matter below, the District Court examined the constitutionality of a policing tool referred to as "stop, question, and frisk," whereby a police officer may briefly detain an individual upon reasonable suspicion that criminal activity "may be afoot" and may, in connection with the detention, perform a protective frisk of the individual if the officer reasonably believes that the person is in possession of weapons. Liability Opinion, 959 F. Supp. 2d at 565-70. Plaintiffs in the matter below (characterized by the Court as "blacks and Hispanics who were stopped"), individually and on behalf of a class, argued that NYPD's use of stop,

question, and frisk (1) violated their Fourth Amendment rights because they were stopped without a legal basis; and (2) violated their Fourteenth Amendment rights because they were targeted for stops based on their race. *Id.* at 556-57. On August 12, 2013, following a nine-week bench trial, the Court issued the Liability Opinion, finding the City liable for violating Plaintiffs' Fourth and Fourteenth Amendment rights; and the Remedies Opinion, which ordered a permanent injunction requiring the City to conform its stop, question, and frisk practices to the United States Constitution. Liability Opinion, 959 F. Supp. 2d 540; Remedies Opinion, 959 F. Supp. 2d 668. The Remedies Opinion also ordered the appointment of an independent Monitor to oversee the implementation of reforms that would bring the stop and frisk practices into compliance. Remedies Opinion, 959 F. Supp. 2d at 676-78.

The Remedies Opinion contains the following specific statements and findings regarding sergeants and supervising officers generally:

- "An essential aspect of the Joint Process Reforms will be the development of an improved system for monitoring, supervision, and discipline," *Id.* at 683;
- "[C]omprehensive reforms may be necessary to ensure the constitutionality of stops, including revisions to written policies and training materials, improved documentation of stops and frisks, direct supervision and review of stop documentation by sergeants," *Id.* at 683;
- "[B]ased on the findings in the Liability Opinion, there is an urgent need for the NYPD to institute policies specifically requiring

sergeants who witness, review, or discuss stops to address not only the effectiveness but also the constitutionality of those stops, and to do so in a thorough and comprehensive manner," *Id.* at 684; and

- "Because body-worn cameras are uniquely suited to addressing the constitutional harms at issue in this case, I am ordering the NYPD to institute a pilot project in which body-worn cameras will be worn for a one-year period by officers on patrol in one precinct per borough — specifically the precinct with the highest number of stops during 2012. The Monitor will establish procedures for the review of stop recordings by supervisors and, as appropriate, more senior managers," *Id.* at 685.

The Liability Opinion also specifically mentions sergeants in numerous places, highlighting the role of sergeants in carrying out and supervising stop, question, and frisk practices. For example, the District Court notes that Sergeant Jonathan Korabel was one of two officers who conducted one of the stop-and-frisk incidents held unconstitutional in this matter. Liability Opinion, 959 F. Supp. 2d at 629 n.463. Similarly, the District Court identified Sergeant James Kelly as one of three officers involved in what the Court determined was an unconstitutional frisk of Plaintiff Floyd. *Id.* at 649. The District Court noted as to one of the incidents at issue that, after conducting what the Court determined was an unlawful stop and recovering a knife, two officers called Sergeant Daniel Houlahan to the scene to assist them in the field. *Id.* at 637.

C. The SBA's Collective Bargaining Rights

Because the SBA is a recognized bargaining unit representing employees of New York City (*i.e.*, police officers), its bargaining authority is defined by the New

York City Collective Bargaining Law ("NYCCBL"). N.Y. City Admin. Code § 12-307(4). The NYCCBL provides:

> [A]ll matters, including but not limited to pensions, overtime and time and leave rules which affect employees in the uniformed police, fire, sanitation and correction services, or any other police officer as defined in subdivision thirty-four of section 1.20 of the criminal procedure law who is also defined as a police officer in this code, shall be negotiated with the certified employee organizations representing the employees involved.

Id.

The SBA is a certified employee organization representing police sergeants, and is recognized by the City as the exclusive collective bargaining representative for all employees of the NYPD with the title of sergeant.[3] Therefore, the City is required to negotiate with the SBA all matters within the scope of collective bargaining under the NYCCBL. The NYCCBL circumscribes the scope of collective bargaining as follows:

> **Scope of collective bargaining; management rights. a.** Subject to the provisions of subdivision b of this section and subdivision c of section 12-304 of this chapter, public employers and certified or designated employee organizations shall have the duty to bargain in good faith on wages (including but not limited to wage rates, pensions, health and welfare benefits, uniform allowances and shift premiums), hours (including but not limited to overtime and time and leave benefits), working

[3] *See* Sergeants Benevolent Association June 1, 2005 – August 29, 2011 Agreement, *available at* http://sbanyc.org/documents/resources/2005-2011SbaContract.pdf.

> conditions and provisions for the deduction from the wages or salaries of employees in the appropriate bargaining unit who are not members of the certified or designated employee organization of an agency shop fee to the extent permitted by law. . ., except that:
>
> * * *
>
> **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 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 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*.

N.Y. City Admin. Code § 12-307(6)b (emphasis added).

While the City retains discretion under the NYCCBL to make high-level policy decisions regarding how public employees such as police officers are to perform their work, the practical impact resulting from those decisions remains the subject of collective bargaining. *Id.* Unions such as the SBA have authority to negotiate with the City regarding matters that have a practical effect on their

workload, staffing, safety, and other matters that may be affected by City decisions. *Id.* The City is required to negotiate with the SBA all matters within the scope of collective bargaining under the NYCCBL. *Id.*

IV. SUMMARY OF THE ARGUMENT

This Court should reverse the Intervention Decision and allow the SBA to intervene in the matter below, both for the purpose of participating in the appeal of the District Court's Opinions and Orders in the underlying *Floyd* matter, *see Floyd, et al. v. City of New York*, 2d Cir. No. 13-3088 (the "Appeal"); and for the purpose of participating in the Remedial Proceedings that will be conducted in the District Court. The District Court abused its discretion when it denied the SBA's motion to intervene, and it erred in finding that the SBA lacked standing to appeal and that the SBA's request to intervene in the remedial phase was moot.

First, the SBA meets the standards for intervention pursuant to Federal Rule of Civil Procedure 24. The SBA's motion was timely because the SBA moved to intervene as soon as it learned of its unprotected interests and before the period for appealing the Opinions expired. The SBA could not have foreseen earlier the vitriolic statements about SBA members that pervade the Opinions, the breadth of the Remedial Order, or the abandonment of the Appeal by the City, and it acted promptly in the circumstances to intervene for the purpose of addressing the erroneous rulings.

In addition, the SBA has direct protectable interests in the litigation: specifically, an interest in defending its members against accusations of constitutional violations found in the Opinions and an interest in protecting its

collective bargaining rights, which may be violated by reforms the City agrees to implement consistent with the Remedies Opinion. The SBA's interests will be impaired if the SBA is not permitted to intervene because the City has determined to abandon the Appeal, concede liability, and implement the remedies ordered. Without intervention, the SBA's members' reputations will remain tarnished, the flawed Opinions will remain and threaten officer and public safety by curtailing the lawful use of the technique, and the SBA's collective bargaining rights will be unlawfully impaired. The U.S. Courts of Appeals for the Ninth and Third Circuits have held that unions like the SBA have a right to intervene in analogous cases, for the very purposes for which the SBA seeks to intervene here. *See, e.g.*, *United States v. City of Los Angeles*, 288 F.3d 391, 404-05 (9th Cir. 2002) (permitting intervention by police union for purpose of participating in merits phase of litigation involving factual allegations of unconstitutional conduct by police officers); *EEOC v. AT&T*, 506 F.2d 735, 741-42 (3d Cir. 1974) (permitting union to intervene to contest proposed consent decree between government and employer with potential to affect the terms of collective bargaining agreement).

The SBA's interests will not adequately be represented by the current parties, which now have agreed to drop the Appeal, with the City conceding liability outright and acceding to every reform. Only the SBA can ensure full and fair review of the Opinions by prosecuting the Appeal, and continuation of the

Appeal is necessary for the SBA to vindicate the harm to its members' reputations caused by the opprobrious language and findings directed at them in the Opinions. Because the SBA satisfied the requirements of Rule 24(a), it was entitled to intervene as of right, and the District Court abused its discretion by denying the SBA's motion to intervene. In the alternative, because the SBA satisfied the requirements of Rule 24(b), the District Court abused its discretion when it failed to permit intervention.

Second, the District Court erred by requiring the SBA to establish independent Article III standing in order to intervene in this matter, when this Court has held that such a showing is unnecessary. *U.S. Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978). And, in any event, the SBA in fact meets all of the standards necessary to establish standing here. Accordingly, the District Court must be reversed.

Finally, the District Court incorrectly determined that the SBA's request to intervene with respect to the remedial phase was moot because the Remedies Order invites "stakeholders," including "police organizations," to participate in one phase of the Remedial Proceedings. The limited role contemplated for "stakeholders" in those proceedings is not adequate to enable the SBA to advocate for its interests in the reforms, and it will not enable the SBA to protect its members' collective

bargaining rights. Therefore, the SBA's request to intervene is not moot and the District Court must be reversed.

V. 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)

This Court should reverse the District Court's Intervention Decision because the District Court abused its discretion by denying the SBA's motion to intervene as of right pursuant to Rule 24(a) when the SBA had satisfied the requirements of that Rule. *Brennan v. N.Y.C. Bd. of Educ.*, 260 F.3d 123, 128 (2d Cir. 2001) (citing *Kheel*, 972 F.2d at 485) (holding that this Court reviews the denial of a motion to intervene as of right under Rule 24(a) for abuse of discretion). Rule 24(a) provides for non-party intervention as of right. Fed. R. Civ. P. 24(a). A court must grant a non-party's motion to intervene as of right if (1) the motion is timely; (2) the putative intervenor has an interest in the existing litigation; (3) the intervenor's interest would be impaired by the outcome of the litigation; and (4) the intervenor's interest will not be adequately represented by the existing parties. *Brennan*, 260 F.3d at 128-29; *D'Amato v. Deutsche Bank*, 236 F.3d 78, 84 (2d Cir. 2001). Courts construe these requirements liberally in favor of intervention because "[b]y allowing parties with a *practical* interest in the outcome of a particular case to intervene, [the court] often prevent[s] or simplif[ies] future litigation involving related issues; at the same time, [the court] allow[s] an additional interested party to express its views . . . ." *City of Los Angeles*, 288 F.3d at 397-98 (emphasis in original) (internal quotation marks and citation omitted);

see also Feller v. Brock, 802 F.2d 722, 729 (4th Cir. 1986) ("[L]iberal intervention is desirable to dispose of as much of a controversy 'involving as many apparently concerned persons as is compatible with efficiency and due process.'") (quoting *Nuesse v. Camp*, 385 F.2d 694, 700 (D.C. Cir. 1967)); *United States v. Ritchie Special Credit Invs. Ltd.*, 620 F.3d 824, 831 (8th Cir. 2010) ("We construe Rule 24 liberally and resolve any doubts in favor of the proposed intervenors."); 6 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE 24.03[1][a] (Matthew Bender 3d ed.) ("Rule 24 is to be construed liberally . . . and doubts resolved in favor of the intervenor."). Here, all four factors were met, and the District Court was required to grant intervention under the rule.

1. The SBA's Motion Was Timely.

The SBA's motion was timely because it moved to intervene immediately upon learning of its unprotected interests in this matter. Indeed, the SBA acted as quickly as was practicable in the circumstances extant at the time: an unforeseeably broad and erroneous set of Opinions, issued in the context of a rapidly changing political situation that could not have been forecast in the years leading up to the Opinions.

Courts determine the timeliness of a motion for leave to intervene by examining the totality of the circumstances, with a particular emphasis on four factors:

> (1) how long the applicant had notice of its interest in the action before making its motion; (2) the prejudice to the existing parties resulting from this delay; (3) the prejudice to the applicant resulting from a denial of the motion; and (4) any unusual circumstance militating in favor of or against intervention.

In re Holocaust Victim Assets Litig., 225 F.3d 191, 198 (2d Cir. 2000); *accord Farmland Dairies v. Comm'r of N.Y. State Dep't of Agric. & Markets*, 847 F.2d 1038, 1044 (2d Cir. 1988). In evaluating the timeliness of a post-judgment application to intervene, "[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). The timeliness requirement of Rule 24 is a *lenient* one. *See, e.g., Cook v. Bates*, 92 F.R.D. 119, 122 (S.D.N.Y. 1981) ("In the absence of prejudice to the opposing party, even significant tardiness will not foreclose intervention."). Thus, even when a motion to intervene "was filed *several years* after the underlying matter had been pending in [the district] court, mere lapse of time does not render it untimely." *Id.* (emphasis added).

In deciding timeliness, "[t]he district court is not given free rein: it must not consider merely the length of time the litigation or proceeding has been pending, but should base its determination upon all of the circumstances of the case." *United States v. Yonkers Bd. of Educ.*, 801 F.2d 593, 595 (2d Cir. 1986) (citing *NAACP v. New York*, 413 U.S. 345 (1973)). "A *proper* timeliness evaluation

entails examining *all* the circumstances of the case," and "[t]he timeliness requirement is a *flexible* one[.]" *Wilder v. Bernstein*, No. 78 CIV 957, 1994 WL 30480, at *3 (S.D.N.Y. Jan. 28 1994) (emphasis added) (citing *Farmland Dairies*, 847 F.2d 1038 and Spirt *v. Teachers' Ins. & Annuity Ass'n*, 93 F.R.D. 627, 637 (S.D.N.Y. 1982)).

Here, the SBA satisfied the timeliness requirement with respect to both the Appeal and the District Court's post-judgment phase. The SBA first became aware of its unprotected interests when the Opinions were issued and it first saw the expansive, disparaging, and erroneous rulings contained therein, which turned directly on alleged conduct of SBA members, among other NYPD officers, as well as the sweeping and disruptive remedies set forth in the Remedies Opinion. At the same time, it was becoming increasing likely that the potential new mayoral administration would not continue to pursue the Appeal.[4] As a result, the SBA filed its initial motion to Intervene on September 11, 2013, within the 30-day period for filing a Notice of Appeal (and it simultaneously filed its own Notice of Appeal) and within a reasonable amount of time of the notice of its unprotected interests.

[4] Michael Howard Saul, *DeBlasio Leads in Latest Mayoral Poll*, Wall Street Journal, Aug. 13, 2013 (stating that "[a]mong the leading Democratic contenders, Mr. de Blasio has been the most outspoken against the New York Police Department's controversial stop-and-frisk policies"). *See also*, Michael M. Grynbaum and Kate Taylor, *Quinn Seeks Distance From Mayor on Police Stop-and-Frisk Strategy*, N.Y. Times, Aug. 16, 2013 (stating that former leading candidate Christine Quinn had been referred to "as a supporter of the stop-and-frisk tactic").

While Rule 24 does not set forth a specific time for seeking intervention for the purpose of appealing a judgment, courts that have examined this issue have held that, if the motion to intervene is filed within the 30-day period for filing a notice of appeal, it is timely. *See McDonald*, 432 U.S. at 396; *Drywall Tapers & Pointers of Greater New York, Local 1974 v. Nastasi & Assocs. Inc.*, 488 F.3d 88, 95 (2d Cir. 2007). For example, the U.S. Supreme Court held in *McDonald* that a motion to intervene filed after judgment, but within the 30-day period for parties to the litigation to appeal the judgment, was timely. *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."). Similarly, in *Drywall Tapers*, this Court held that a notice of appeal filed by a non-party within 30 days of entry of an order, after the non-party moved for leave to intervene, but before the court had ruled on the motion, was not untimely. 488 F.3d at 95.

The District Court incorrectly found that the SBA untimely moved to intervene for purposes of the Appeal. Relying on *United States v. Yonkers Board of Education*, the District Court improperly analogized this case to a scenario where homeowners seeking to challenge a site selection for public housing project did not move to intervene until well after the sites had been proposed, and thus

were on clear notice of their interest for months but nevertheless sat on their hands. (SPA-18, 24 (citing *Yonkers*, 801 F.2d 593 (2d Cir. 1986).) But the existing parties in *Yonkers* had no relationship with the homeowners, had no particular incentive to oppose the site selection, and were not soon to be replaced by a new party that was antagonistic to the interests of the homeowners. *Yonkers*, 801 F.3d at 594. Moreover, "the Homeowners did not seek intervention until after the Housing Remedy Order was entered, more than *three months* after the remedy proceedings were underway." *Id.* at 596 (emphasis added). The sites were static during that time and the homeowners were aware of the locations. *Id.* at 595.

Here, in contrast to the static site selections in *Yonkers* that were clear from the time of selection, the breadth and incorrectness of the District Court's Opinions and Orders in this matter were not apparent until they were issued. Moreover, historically throughout this litigation, the City was an advocate for the NYPD, including SBA members, during the events in the proceedings below that the District Court incorrectly identified as providing notice to the SBA of the necessity of intervention. (*See* SPA-28–46.) The change in position of the City (*after* the SBA had already moved to intervene), had the effect of replacing a party whose interests largely *aligned* with the SBA—the City, under Mayor Bloomberg—with a party whose interest directly *conflicted* with those of the SBA—*i.e.*, the incoming administration led by Bill de Blasio, who campaigned on "a relentless critique of

the [NYPD's] stop-and-frisk tactics,"[5] and promised that he would drop the City's appeal of the Opinions "on Day 1" of his administration.[6]

Candidate De Blasio first overtook the lead in the mayoral primary election shortly before the election was held in September 2013.[7] It was around the same time that Christine Quinn, the previous front-runner, first publicly voiced her support for reforms to stop-and-frisk practices.[8] As soon as the SBA had any indication that the possible predecessor to Mayor Bloomberg may not pursue the Appeal, it moved to intervene and initiated its own appeal. In light of these circumstances, the SBA's motion was as prompt as could reasonably have been expected.

Courts have held that, when a party seeking to intervene in a district court case that has proceeded to judgment acts promptly after finding out that an existing party will not or may not appeal the judgment, its motion for leave to intervene is timely. *See, e.g.*, *Stallworth v. Monsanto Co.*, 558 F.2d 257, 268-69 (5th Cir.

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[5] Michael Barbaro, *Luck and a Shrewd Strategy Fueled de Blasio's Ascension*, N.Y. Times, Sept. 10, 2013.

[6] *See* Kate Taylor and Joseph Goldstein, *Despite Stance, de Blasio, if Elected, Could Find a Police Monitor Intrusive*, N.Y. Times, Nov. 1, 2013.

[7] Henry Goldman, *De Blasio Takes Lead Among Democrats in New York Mayoral Race*, Bloomberg News, Aug. 13, 2013, available at http://www.bloomberg.com/news/2013-08-13/de-blasio-takes-lead-among-democrats-in-new-york-mayoral-race.html ("'A few weeks ago, De Blasio looked like an also-ran and today, he's the leader of the pack,' said Maurice Carroll, director of the Hamden, Connecticut-based university's polling institute.").

[8] *See* Grynbaum, *supra* note 4 (stating that Ms. Quinn had been referred to "as a supporter of the stop-and-frisk tactic").

1977) (noting that "whether the request for intervention came before or after the entry of judgment, [is] of limited significance," and intervention motion filed weeks after entry of consent judgment was timely because judgment affected intervenors' employment rights); *Smoke v. Norton*, 252 F.3d 468, 471 (D.C. Cir. 2001). The D.C. Circuit explained:

> [T]he appellants claim that in moving to intervene they were prompted by the post-judgment prospect that the Government might not appeal. Prior to the entry of judgment, the appellants say, they had no reason to intervene; their interests were fully consonant with those of the Government, and those interests were adequately represented by the Government's litigation of the case. We agree. In these circumstances a post-judgment motion to intervene in order to prosecute an appeal is timely (if filed within the time period for appeal) because "the potential inadequacy of representation came into existence only at the appellate stage." *Dimond v. District of Columbia*, 792 F.2d 179, 193 (D.C. Cir. 1986); *see United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977).

Id.; *see also Acree v. Republic of Iraq*, 370 F.3d 41, 50 (D.C. Cir. 2004) ("Post-judgment intervention is often permitted . . . where the prospective intervenor's interest did not arise until the appellate stage or where intervention would not unduly prejudice the existing parties."), *abrogated on other grounds by Republic of Iraq v. Beaty*, 556 U.S. 848 (2009).

Contrary to the District Court's reasoning, the SBA could not have had the clairvoyance necessary to anticipate years in advance of the 2013 mayoral election that a newly emerged candidate would win the election and abandon the City's

defense of NYPD officers, including SBA members, in the matter below. The District Court thus abused its discretion by finding that the SBA's motion was untimely for purposes of pursuing the Appeal.

The SBA's motion to intervene also was timely to the extent that it sought intervention in the matter below for the purpose of participating in the Remedial Proceedings. Courts have held that intervention after the liability phase of a litigation is timely when a yet-to-be-determined remedy will affect the rights of the intervening third party. *See, e.g.*, *Spirt*, 93 F.R.D. at 637 (noting that a motion to intervene is timely when "intervention is sought with respect to a post-judgment proceeding that seeks to resolve a substantial problem in formulating the relief to be granted on account of the judgment"), *aff'd in part and rev'd in part on other grounds*, 691 F.2d 1054 (2d Cir. 1982), *vacated on other grounds*, 463 U.S. 1223 (1983); *see also United States v. Hooker Chems. & Plastics Corp.*, 540 F. Supp. 1067, 1082-83 (W.D.N.Y. 1982); *Fleming v. Citizens for Albemarle, Inc.*, 577 F.2d 236, 237-38 (4th Cir. 1978); *Liddell v. Caldwell*, 546 F.2d 768, 771 (8th Cir. 1976). Accordingly, courts have permitted parties to intervene at the post-judgment remedy phase. *See, e.g.*, *Ctr. for Biological Diversity v. Delgado*, 61 F. App'x 381 (9th Cir. 2003); *see also United States v. Covington Techs. Co.*, 967 F.2d 1391, 1394 (9th Cir. 1992) (holding that court may permit intervention at any stage in the proceeding, including post-judgment).

In granting a party's post-judgment motion for leave to intervene for certain purposes, the *Spirt* court noted that:

> [I]t is beyond peradventure that post-judgment intervention motions are, in certain circumstances, "timely," *see, e.g., United Airlines, Inc. v. McDonald*, 432 U.S. 385, 396, 97 S.Ct. 2464, 2471, 53 L.Ed.2d 423 (1977), and that such circumstances may be presented where, as is the case here, intervention is sought with respect to a post-judgment proceeding that seeks to resolve a substantial problem in formulating the relief to be granted on account of the judgment, *see Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C.Cir.1972).

93 F.R.D. at 637. Courts have recognized as timely post-judgment intervention for the purpose of having a voice in shaping the relief to be granted. *See N.R.D.C. v. Costle*, 561 F.2d 904 (D.C. Cir. 1977); *Hodgson v. UMW*, 473 F.2d 118 (D.C. Cir. 1972); *see also Werbungs Und Commerz Union Austalt v. Collectors' Guild, Ltd.*, 782 F. Supp. 870 (S.D.N.Y. 1991) (holding that motion to intervene was timely even though filed almost two years after notice of interest in case, because motion was filed shortly after interest became direct).

Here, the SBA first moved to intervene on September 11, 2013. The SBA filed that motion promptly after the Opinions were issued, and thus promptly after it learned of the reforms to be implemented pursuant to the Remedies Opinion, which reforms will affect the collective bargaining rights and safety of SBA members. Therefore, the SBA timely moved for intervention in the Remedial Proceedings.

Finally, the timing of SBA's intervention does not prejudice the existing parties, and denying intervention would prejudice the SBA. The SBA seeks the right to participate only in prosecuting the Appeal and becoming a party to the Remedial Proceedings. Because both proceedings were in their earliest stages at the time the SBA first sought to intervene, the SBA's addition as a party to this matter cannot result in any prejudice to any party.

On the other hand, if the SBA is excluded from the participation in the post-judgment phase here, it will be severely prejudiced because the erroneous Liability Opinion will remain in place and the SBA will be shut out of the Remedial Proceedings—proceedings that will change the way in which sergeants do their jobs and thereby directly affect the SBA members' terms and conditions of employment.

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

The SBA has two direct protectable interests here: (1) an interest in defending its members against accusations of constitutional violations found in the Opinions, a defense the City now abandoned; and (2) an interest in protecting its collective bargaining rights, which may be violated by reforms the City agrees to implement consistent with the Remedies Opinion. The City has conceded liability (and acquiesced to the rulings about officers' conduct on which both liability and remedies were directly based) on behalf of the NYPD and its officers, including

the members of the SBA. Moreover, the City has agreed, without any input from the SBA or other police unions, to adopt *all* of the reforms set forth in the Remedies Opinion, including the prescribed changes to monitoring, supervision, discipline, and equipment. Both of these aspects of this matter create direct, protectable interests that entitle the SBA to intervention under Rule 24(a).

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

Regarding the SBA's first interest, the Opinions characterized various actions of SBA members as violating the United States Constitution. Liability Opinion, 959 F. Supp. 2d at 596-612; 658-67. The Liability Opinion accuses the entire NYPD of such violations, and identifies sergeants by name, asserts that they are untruthful, and concludes that numerous stops that they supervised, approved, or conducted broke the law. For example, the District Court noted that Sergeant Jonathan Korabel was one of two officers who conducted one of the unconstitutional stop-and-frisk procedures at issue in this matter. *Id.* at 629 n.463. The Court stated that not only did Korabel violate the Fourth Amendment rights of an individual, but that he also "used the most intrusive methods at [his] disposal, thereby exacerbating the violation of his rights." *Id.* at 630. Similarly, the District Court identified Sergeant James Kelly as one of three officers involved in what the Court determined was an unconstitutional frisk of Plaintiff Floyd. Liability

Opinion, 959 F. Supp. 2d at 651. The District Court noted as to one of the incidents at issue that, after conducting the stop and frisk that the District Court determined was unconstitutional and recovering a knife, two officers called Sergeant Daniel Houlahan to the scene to assist them in the field. *Id* at 638-39. The Liability Opinion likewise (wrongly) held that approximately 200,000 stops were unconstitutional, based on a review of the paperwork alone—paperwork that sergeants must review and approve. *Id.* at 578-83. In addition, the Liability Opinion derogates the general practices and performance of NYPD sergeants, including findings that assert the creation of "a culture of hostility" perpetuated by Sergeant Raymond Stukes, *id.* at 597-98; inadequate supervision of stops by Sergeant Charlton Telford[9]; *id.* at 605-606; insufficient record-keeping by Sergeant Michael Loria; *id.* at 607-608; and various examples of allegedly poor supervision by sergeants generally, *id.* at 610-612 ("[T]he evidence showed that sergeants do not effectively monitor the constitutionality of stops even when they are present."). The Remedies Opinion sets forth reforms that are based on and allegedly flow directly from the above findings.

[9] The District Court included in its opinion statements that Telford supervised an officer that checked "Fits Description" on 132 of his 134 UF-250s, despite the fact that "not a single one of those stops was based on an ongoing investigation, a report from a victim, or a radio run." Liability Opinion, 959 F. Supp. 2d at 605. The Court stated that 93% of the individuals stopped by the officer were black or Hispanic, a percentage "far exceed[ing] the percentage of blacks and Hispanics in the local population." *Id.* at 606.

Such findings are sufficient to establish a direct, protectable interest in the merits. *City of Los Angeles*, 288 F.3d at 399 (finding "protectable interest in the merits" for police union based on "factual allegations that its member officers committed unconstitutional acts in the line of duty"). In fact, in *City of Los Angeles*, the Ninth Circuit reversed the district court's decision to the extent that it found that such an interest was insufficient to intervene in the merits. *Id.*at 402. In the Intervention Decision, the District Court sought to distinguish *City of Los Angeles* on the basis that, in that case, there remained a possibility that individual officers who were members of the intervening union could be subjected to individual liability, whereas here Plaintiffs have relinquished their claims against any individual defendants. (SPA-67.) That purported distinction, however, is irrelevant to the reputational interests of SBA members described above because it is the disparaging statements in the Opinions that caused the reputational harm, not whether actual individual liability was imposed. Moreover, the injunctive relief the District Court imposed, while nominally directed at the City and the NYPD, in fact was based directly on the District Court's allegations that specific SBA members and other police officers acted unconstitutionally. Therefore, there is a direct relationship between what the District Court said about SBA members and other officers and the District Court's ruling, which turned squarely on the District Court's characterization of individual officers as unconstitutional actors.

Similarly, there is a direct relationship between the reforms mandated in the Remedies Opinion and Order and the District Court's statements about the bad acts of police officers, which formed the very basis of the reforms the District Court ordered.

Ignoring this fact, the District Court incorrectly characterized the SBA's interest in vindicating its members' reputations as "not directly related to the underlying action." (SPA-60.) In support of this conclusion, the District Court primarily relied on *Sierra Club v. U.S. Army Corps of Engineers*, 709 F.2d 175 (2d Cir. 1983), which in fact supports *the SBA's* argument that it has a protectable interest. In *Sierra Club*, an engineering firm contracted by a state agency for a mitigation study sought to intervene in a pending trial on a motion for civil contempt against the state agency. *Id.* at 176. The engineering firm sought to intervene on the basis that "its professional reputation [wa]s under attack" in the contempt proceedings. *Id.* The district court denied the intervention motion, stating "[w]hether or not there has been contempt of the district court's orders does not turn on [the engineering firm's] professional reputation." *Id.* As this Court noted in *Sierra Club*, however, the district court below had stated that "if and when the stage is reached that specific consideration is being given to any order which *expressly details the activity of [proposed-intervenor] LMS* . . . consideration will be given to a renewed application by LMS[.]" *Id.* at 177.

Here, unlike *Sierra Club* and as contemplated by the district court in that case, the Liability Opinion plainly "details the activity of" SBA members, branding them lawbreakers and unconstitutional actors, and the findings of unconstitutional acts directly turn on the SBA's members' professional reputations. Thus, the District Court erred in relying on *Sierra Club* and similar cases for the proposition that "reputational harm [is] not directly related to the underlying action" here. (SPA-60.) On the contrary, the reputational harm suffered by SBA members as a result of the aspersions cast in the Liability Opinion is at the very heart of the Liability Opinion's erroneous conclusions, and the reforms identified in the Remedies Opinion, which were the end result of the District Court's conclusions.

The District Court further relied for its erroneous conclusion that the SBA's reputational harm is not related to the underlying action on *New York News Inc. v. Newspaper & Mail Deliverers' Union*, the facts of which bear no resemblance to the facts of the present litigation. In *New York News*, the proposed intervenor "[wa]s not seeking to join [the] action as either a plaintiff or a defendant," but rather sought "to intervene solely for the purpose of bringing a Rule 11 motion for sanctions against plaintiffs' counsel," not to contest the merits of the underlying case. 139 F.R.D. 291, 292 (S.D.N.Y. 1991). *New York News* is plainly distinguishable from the present litigation, in which the SBA seeks to intervene as

a defendant, and the liability of the City below turned directly on whether members of the SBA had acted in an unconstitutional manner.

The District Court also incorrectly held that the SBA and its members have no protectable interest in this litigation because the injunctive relief the District Court awarded runs against the City, not the SBA. Liability Opinion, 959 F. Supp. 2d at 586. The District Court reasoned that it is thus only the City, and not the SBA, that has an interest in "[v]indicating the legality of City policy and City employee conduct." (SPA-54–55.) That the City has such an interest does not vitiate the SBA's independent interest in vindicating the reputational harm of its officers—an interest that is recognized as legally protectable. *City of Los Angeles*, 288 F.3d at 399. As the District Court observed, "the Liability Order lays blame for widespread unconstitutional stops on the City and the NYPD's institutional indifference." (SPA-51.) Because SBA members are the very men and women charged with supervising the officers of the NYPD, allegations of "institutional indifference" are directed squarely at the members of the SBA. *See, e.g.*, Liability Opinion, 959 F. Supp. 2d at 611 ("*[S]ergeants* do not effectively monitor the constitutionality of stops[.]") (emphasis added). Because the City *qua* "institution[ ]" can only act through its employees, a holding that the City acted unconstitutionally is a holding that its officers acted unconstitutionally. *See* Liability Opinion, 959 F. Supp. 2d at 610 ("In fact, the City notes only two

concrete mechanisms for identifying unconstitutional stops: *first*, sergeants 'routinely witness stops made by officers'; and *second*, sergeants review their officers' UF-250s and frequently discuss the underlying facts of stops with officers to determine whether an officer is able to articulate a proper basis for the stop.").

These aspects of the Opinions adversely affect the careers and lives of these SBA members, and cast doubt on the ability of other members to perform their duties effectively while avoiding similar accusations in the future, which in turn affects officer and public safety. Because of that interest in the merits, the SBA's motion should have been granted so that it could protect that interest in the District Court and on appeal to this Court.

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

The SBA also has a second direct, protectable interest in this matter: it is entitled to bargain collectively the terms and conditions of its members' employment, and excluding the SBA from the Remedial Proceedings will preclude such bargaining with respect to the reforms to police practices that are set forth in the Remedies Opinion, based on the rulings in the Liability Opinion. Those reforms are mandatory subjects of collective bargaining because they would have an immediate practical impact on workload, staffing, safety, and other terms and conditions of employment of the SBA's members. For example, the Remedies

Opinion contains directives for "an improved system for monitoring, supervision, and discipline," Remedies Opinion, 959 F. Supp. 2d at 68323; "direct supervision of review of stop documentation by sergeants," *id.*; "policies specifically requiring sergeants who witness, review, or discuss stops to address not only the effectiveness but also the constitutionality of those stops, and to do so in a thorough and comprehensive manner," *Id.* at 684; and, in connection with the Court's order that the NYPD institute the use of body-worn cameras, "procedures for the review of stop recordings by supervisors and, as appropriate, more senior managers," *Id.* at 685.

The reforms also will affect the safety of sergeants who frequently conduct stops themselves and now will be limited in their ability to protect themselves from dangerous situations involving weapons. Furthermore, the reforms entail the creation of new disciplinary procedures for officers who are found to have engaged in unconstitutional stops, which will affect sergeants both in the conduct of stops and in the supervision of subordinate officers who conduct stops.

Many of these reforms will fall within the scope of collective bargaining as set forth in § 12-307(6)b of the NYCCBL. As discussed above, the City is required to negotiate with the SBA regarding such reforms. See *supra* at 16-18. For example, the Remedies Opinion imposes mandatory training directed by the court that will become a qualification for continued employment which, absent

court direction, would be treated as a routine subject of collective bargaining. *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).

In analogous contexts, courts have permitted intervention by unions for the purpose of challenging consent decrees that could undermine the unions' collective bargaining rights. *See AT&T*, 506 F.2d at 741-42; *Stallworth*, 558 F.2d at 268-69. For example, in *City of Los Angeles*, *supra*, the Ninth Circuit concluded that a police union had an interest in litigation involving a proposed consent decree between the City of Los Angeles and the United States, because the consent decree may have been inconsistent with the terms of the memorandum of understanding between the city and the union governing the terms and conditions of the Police League's members' employment. 288 F.3d at 399-400. The court observed, "The Police League has state-law rights to negotiate about the terms and conditions of its members' employment as LAPD officers and to rely on the collective bargaining agreement that is a result of those negotiations." *Id.* The Ninth Circuit reasoned that, to the extent that it was disputed whether or not the consent decree conflicted with the memorandum of understanding, "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.* at 400 (emphasis added).

Other courts have employed similar reasoning in finding a protectable interest for unions seeking to intervene in litigation. *See AT&T*, 506 F.2d at 741-42; *CBS, Inc. v. Snyder*, 798 F. Supp. 1019, 1023 (S.D.N.Y. 1992), *aff'd*, 989 F.2d 89 (2d Cir. 1993). In *AT&T*, a union was granted the right to intervene to contest a proposed consent decree between the government and an employer that could have affected the terms of a collective bargaining agreement. 506 F.2d at 741-42. In *Snyder*, the court recognized that a union had a legally protectable interest in participating in proceedings that may have affected the interpretation or enforceability of a collective bargaining agreement. 798 F. Supp. at 1023.

Like the proposed consent decrees at issue in *City of Los Angeles*, *AT&T*, and *Snyder*, the proposed implementation of the reforms set forth in the Remedies Opinion through the parties' resolution here likely will bear directly on the SBA's collective bargaining rights. The District Court's prescribed changes to supervision, training, discipline, and other policing matters that the parties have jointly adopted nearly wholesale in their settlement (by agreeing to withdraw the pending Appeal subject to the approval by the District Court of the Modification of

the Remedial Order[10]) thus create a protectable interest for the SBA because they interfere with the ability of the SBA to negotiate collectively regarding the practical impact of proposed City reforms—specifically, the way in which those reforms will affect sergeants' ability to perform their primary policing duties while simultaneously managing paperwork concerning stops. Moreover, the practical effect of such reforms could be to discourage officers from performing stop and frisks altogether in order to avoid disciplinary or legal proceedings in the event that a given stop is later determined to have been unconstitutional. Such an impact bears directly on officer safety. Thus, SBA has a protectable interest.

3. The SBA's Interests May Be Impaired by the Disposition of 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 the District Court's erroneous rulings that its members violated the Constitution, and the resulting reforms flowing from the Remedies Order. The City has determined to concede liability and abort the Appeal, which will result in the erroneous and disparaging Opinions remaining in effect. The result will be a chilling effect on the lawful use

[10] *See* Declaration in Support of Motion for Modification of Remedial Order (A-1194 ¶ 5.) ("If the Court approves the parties' proposed modification, the City will then move to withdraw its appeal in *Floyd* and *Ligon* with prejudice. Upon withdrawal of the appeals, the City will proceed with the consultative processes for developing the Immediate and Joint Process Reforms in *Floyd* and injunctive relief in *Ligon* set forth in the Remedial Order.").

by SBA members of the stop, question, and frisk technique, which adversely affects officer and public safety.

Moreover, the result of the Remedial Proceedings here will impair the SBA's interests because it will not have been properly permitted to negotiate collectively in accordance with the NYCCBL. *AT&T*, 506 F.2d at 741-42 (permitting union to intervene for purpose of challenging consent decree approving settlement because "[c]learly [the union] has an interest in the provisions of its collective bargaining agreements with AT&T which may well be modified or invalidated by the memorandum of agreement and consent decree of January 18, 1973 made in its absence and, equally clearly, its continuing ability to protect and enforce those contract provisions will be impaired or impeded by the consent decree"); *see also City of Los Angeles*, 288 F.3d at 401 (permitting intervention of union to challenge consent decree because "the consent decree by its terms purports to give the district court the power, on the City's request, to override the Police League's bargaining rights under California law and require the City to implement disputed provisions of the consent decree"). The City has now promised to implement all of the reforms to NYPD practices that were ordered in the Remedies Opinion.[11] The parties have made only a trifling modification of the Remedies Order, and will otherwise allow it to remain in full force and effect. (A-

[11] *See* Grynbaum, *supra* note 4; Weiser, *supra* note 2.

1192–1206.) The modification does not appear to give any consideration to the practical impact any changes to policy will have on police officers.

4. The SBA's Interests Will Not Be Adequately Protected by the Parties to This Action.

Now that the City has conceded liability, formally abandoned the Appeal, and adopted all of the proposed reforms set forth the Remedies Order, no current party will protect the SBA's interests. To determine whether the existing parties to a matter adequately represent a prospective intervenor's interest, courts consider: (1) whether the interest of a present party is such that it will undoubtedly make all the intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether the would-be intervenor would offer any necessary elements to the proceedings that other parties would neglect. *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 838 (9th Cir. 1996). The requirement of inadequate representation "is satisfied if the applicant shows that representation of his interest [by existing parties] *may be* inadequate." *City of Los Angeles, supra*, 288 F.3d at 398 (quoting *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972)) (alteration in original) (emphasis added) (internal quotation marks omitted). This showing is "minimal." *Trbovich*, 404 U.S. at 538 n.10.

Here, no party will "undoubtedly" make "all" of the SBA's arguments. As a result of the purported settlement between Plaintiffs and the City, *none* of the

SBA's arguments will be made. To the extent that the City does make any arguments in the Remedial Proceedings designed to protect the interests of SBA members—such as their safety and the public's safety—those arguments will be inherently inferior to the arguments the SBA would make, because the City's interest in such issues is not nearly as focused and informed as that of the SBA. *See Costle*, 561 F. 2d at 912 (granting motion to intervene because "the appellants' interest is more narrow and focussed [*sic*] than EPA's, being concerned primarily with the regulation that affects their industries"). This Court held in *Costle* that intervention by a non-party is appropriate in such circumstances. *Id.* Due to its members' narrower and more focused expertise, the SBA is likely to make a more vigorous presentation to the court regarding the discrete details of their supervisory and field work than the City would be able to make. *N.Y. Pub. Interest Research Grp., Inc. v. Regents*, 516 F.2d 350 (2d Cir. 1975) ("[W]e are satisfied that there is a likelihood that the pharmacists will make a more vigorous presentation of the economic side of the argument than would the [state authority party]"). And the City has previously recognized that the SBA and other unions have a collective bargaining interest in this litigation, and had consented to the Unions' intervention because, as the City stated in a letter to the District Court, "the interests of the City and the Unions may differ on collective bargaining issues[.]" (A-969–70.)

Furthermore, because the City has asked the Court to dismiss the Appeal with prejudice (Dkt. No. 484), if the SBA does not intervene, the Appeal will simply end, precluding any review of the Opinions. Representation is inadequate when an existing party chooses not to pursue an appeal and a non-party intervenes for the purpose of prosecuting the appeal. *Yniguez v. State of Arizona*, 939 F.2d 727, 737 (9th Cir. 1991) ("Having decided not to appeal the district court's decision on the merits, the Governor inadequately represents the interests of [proposed intervenors]"). In *Yniguez*, for example, the sponsors of a ballot initiative did not seek to intervene in the district court proceedings, relying on a governmental defendant to represent their interests. *Id.* When they learned that the governmental defendant had opted not to appeal, they sought to intervene to prosecute the appeal themselves. *Id.* The district court denied intervention but the Ninth Circuit reversed, holding (among other things) that the proposed intervenors had established inadequacy of representation because "no representation constitutes inadequate representation." *Id.* at 737; *see also 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."). Likewise here, the City's representation is inherently inadequate because it is has stated that it will not even prosecute the Appeal, a fact that requires the SBA to intervene to preserve its rights.

The SBA thus would not adequately be represented by the current parties in either the Remedial Proceedings or the Appeal. In fact, intervention is the only way for the SBA to ensure participation in the Appeal by at least one appellant. The SBA should be allowed to be heard on the issues in this matter and is entitled to intervene as of right.

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

In the alternative, this Court should find that the District Court abused its discretion in denying the SBA's motion to intervene pursuant to Federal Rule of Civil Procedure 24(b). Fed. R. Civ. P. 24(b). The threshold requirement for permissive intervention is a "claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). Permissive intervention must not "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). In addition, the court may consider factors such as whether the putative intervenor will benefit from the application, the nature and extent of its interests, whether its interests are represented by the existing parties, and whether the putative intervenor will "contribute to the [ ] development of the underlying factual issues." *U.S. Postal Serv.*, 579 F.2d at 191-92 (quoting *Spangler v. Pasadena City Board of Educ.*, 552 F.2d 1326, 1329 (9th Cir. 1977)). "Rule 24(b)(2) is to be liberally construed." *Degrafinreid v. Ricks*, 417 F. Supp. 2d 403, 407 (S.D.N.Y. 2006) .

The District Court should have permitted the SBA to intervene for the purposes stated above. The SBA has various claims and defenses under the NYCBBL and other state and federal laws related to the proposed reforms and their effect on SBA members' duties and obligations. The SBA's participation would not unduly delay either the Remedial Proceedings or the Appeal. Both proceedings would benefit from the SBA's inclusion due to its unique perspective on the relevant issues, as discussed above. Finally, for the same reasons set forth above, the SBA has significant interests in the outcome of the process, its interests would not adequately be represented by any current party, and it is a source of critical factual information regarding the nature of police work that will aid the District Court in determining whether any reforms to police practices should be approved. Accordingly, permissive intervention should have been granted.

C. The SBA Has Standing to Protect Its Interests in the Merits and the Remedies to Be Awarded.

This Court should reverse the District Court's finding that the SBA lacks standing to prosecute the Appeal and participate in the Remedial Proceedings. (SPA-83–101.) A district court's finding that a party lacked standing is reviewed *de novo*. *Thompson v. Cnty. of Franklin*, 15 F.3d 245, 249 (2d Cir. 1994). Here, by requiring the SBA to establish Article III standing, the District Court

contravened the law of this Circuit and, in any event, the District Court erroneously found that the SBA lacked such standing.[12]

As the District Court noted, this Court typically *does not* require that proposed intervenors meet the requirements for Article III standing. (SPA-83 ("The Second Circuit seems not to require a would-be plaintiff-intervenor to satisfy Article III standing." (citing *U.S. Postal Serv.*, 579 F.2d at 190).) In *United Postal Service*, this Court expressly held that "there was no need to impose the standing requirement upon the proposed intervenor" when a case or controversy already existed between the two original parties. *United States Postal Service* is dispositive on the issue of standing because, when the SBA sought to intervene, a case or controversy already existed among the original parties.

In any event, the SBA has Article III standing here. An organization can bring suit on behalf of its members where "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane

[12] In fact, it is not the SBA, but *Plaintiffs* who lacked standing in this case. The harm they alleged—constitutional violations in past encounters with NYPD officers—did not establish a realistic threat that any such violations would occur again in the future. Therefore, their request for injunctive relief did not present a case or controversy under Article III of the United States Constitution. *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," and allegations related to past incidents was insufficient to establish future threat). A court has "a continuing obligation to satisfy [itself] that federal jurisdiction over the matter before [it] is proper." *Filsaime v. Ashcroft*, 393 F.3d 315, 317 (2d Cir. 2004). Therefore, this Court should examine the issue whether Plaintiffs had standing in this matter, which they did not.

to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *United Food*, 517 U.S. at 553 (citations omitted). To establish standing, a litigant must only have "suffered an 'injury in fact'" that is caused by "the conduct complained of" and that "will be 'redressed by a favorable decision.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). This Court has held that there is no "*per se* bar against appeals by parties not bound by the [underlying] judgment," and that the injury must only be "sufficiently concrete to give [the non-party] standing to bring [an] appeal." *Tachiona v. United States*, 386 F.3d 205, 212 (2d Cir. 2004). The Article III standing doctrine's "contours" are "very generous" and are satisfied even by "'an identifiable trifle of injury.'" *Nat'l Collegiate Athletic Ass'n v. Governor of N.J. ("NCAA")*, 730 F.3d 208, 219 (3d Cir. 2013), *petitions for cert. filed*, 82 U.S.L.W. 3515 (U.S. Feb. 12, 2014, Feb. 13, 2014) (Nos. 13-967, 13-979, 13-980) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 690 n.14 (1973)). Under these standards, the SBA unquestionably has Article III standing here.[13]

[13] The District Court begins its standing analysis with a quote from a Chief Justice Roberts opinion gainsaying the right of a "private party" to defend a state statute when the state has decided not to do so. (SPA-82 (citing *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).) In *Hollingsworth*, the Supreme Court held that the citizens who were the official proponents of California's Proposition 8 did not have standing to defend the constitutionality of that law. *Hollingsworth*, 133 S. Ct. at 2659. *Hollingsworth* is inapposite because the basis for the Court's decision was that the individuals seeking to defend the law "have no role—special or otherwise—in the enforcement of Proposition 8." *Id.* at 2663. In this case, however, the SBA

First, the SBA's members have been injured by the Liability Opinion. The District Court in that opinion made specific factual findings regarding individual sergeants, accusing them of violating the Constitution, not telling the truth, and other disparaging conclusions based on limited and unreliable evidence, thereby permanently sullying their reputations and thus damaging their careers. Moreover, the SBA and its members were harmed by the generalized findings of a "culture of hostility," that "sergeants do not effectively monitor the constitutionality of stops," and that there was a pervasive directive to "target the right people." Liability Opinion, 959 F. Supp. 2d at 597, 603, 611. This Court has held unequivocally that "an injury to reputation will satisfy the injury element of standing." *Gully v. NCUA Bd.*, 341 F.3d 155, 161-62 (2d Cir. 2003). And this Court further held in *Gully* that reputational injury can be established without evidence of actual adverse consequences. *Id.* at 162 ("It is *self-evident* that [the party's] reputation will be blackened by the Board's finding of misconduct and unfitness.") (emphasis added). Similarly, in *ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010), this Court found that even a government memorandum regarding an organization's lack of federal funding eligibility that was purportedly rescinded, but which nevertheless contained restrictions on the plaintiff that remained in force, gave the organization standing to challenge the reputational harm caused by the memorandum. *Id.* at

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plainly does have a "special" role in the application of the District Court's Opinions, whose rulings will be put into effect largely by sergeants.

134-35. Here, as in *Gully* and *ACORN*, officers branded in the Liability Opinion as violators of the Constitution will suffer harm to their reputations, impeding their career advancement and otherwise disrupting their livelihoods.

The Liability Opinion contains page after page of findings attributed to individual sergeants, identified by name and singled out as bad actors, as well as findings that sergeants and other officers committed hundreds of constitutional violations. Liability Opinion, 959 F. Supp. 2d at 596-612, 658-67. Contrary to the District Court's reasoning, the interest of the SBA in challenging these findings is by no means "conjectural or hypothetical." (SPA-91) (citing *Lujan*, 504 U.S. at 960.) Rather, its effect is immediate: publicly tarnished reputations and careers derailed. *See Gully*, 341 F.3d at 161-62; *see also United States v. Accra Pac, Inc.*, 173 F.3d 630, 633 (7th Cir. 1999) ("[Be]ing put on a blacklist, or being formally censured for misconduct, is treated as immediately redressible harm[.]")

In addition, SBA members will suffer concrete and particularized injury as a result of the changes to NYPD policy mandated by the Remedies Opinion and Order. The Remedies Order specifies certain remedies that *must* result from that process (e.g., body-worn cameras and various sweeping and detailed changes to supervision, monitoring, and training). These changes, which the City has now fully accepted, with a promise to develop even more specific remedial measures for approval by the District Court, affect legally protectable interests of SBA

members because they will become terms and conditions of their employment with the NYPD, without any corresponding collective bargaining process. Such changes constitute sufficient injury in fact for standing purposes. *See Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457-58 (5th Cir. 2005) ("[A]s the collective bargaining representative of the Kitty Hawk pilots, ALPA has standing to bring this appeal.").

Second, the SBA meets the causation requirement for Article III standing because the District Court's rulings that its members' conduct was unconstitutional will have continuing and prospective effect on their ability to engage in law enforcement activities. As the U.S. Supreme Court recently held in *Camreta v. Greene*, even a government officer who was afforded immunity from alleged constitutional violations nevertheless had standing to challenge findings of unconstitutional conduct because, "as part of his job," the officer "regularly engages" in the conduct found to be unlawful. 131 S. Ct. 2020, 2029 (2011). The scenario here is analogous: even though, as the District Court noted, the findings regarding SBA members were made for the purpose of establishing liability for the City (not the individual police officers), the Liability Opinion nevertheless has "prospective effect" because an SBA member "must either change the way he performs his duties or risk a meritorious damages action"—*i.e.*, a future action in which the SBA member *is* named as an individual—based on the type of conduct

found unconstitutional in the Liability Opinion. *Id.* at 2024. In that same connection, as a result of the erroneous rulings in the Liability Opinion, SBA members will now hesitate to use the techniques that the District Court found unconstitutional, for fear that they will later be accused of breaking the law based on flimsy evidence recreated after-the-fact.

The District Court stated that the SBA failed to show that its injuries were caused by the judgment because it has only alleged injury stemming from the underlying factual findings in the Liability Opinion. Liability Opinion, 959 F. Supp. 2d at 610. The District Court misconstrued the SBA's argument. It is not the underlying factual findings that the SBA asserts caused reputational harm. Rather, it is the Court's legal rulings that the SBA's members acted unconstitutionally and that the NYPD had a culture of indifference to the constitutionality of its police practices, largely perpetuated and instituted by sergeants. *Id.* at 597, 610-13. These are not merely the "underlying facts" (SPA-94); these are the *holdings* of the District Court.

In addition, the harm described above is redressible. "[Be]ing put on a blacklist, or being formally censured for misconduct, is treated as immediately redressible harm because it diminishes (or eliminates) the opportunity to practice one's profession even if the list or the censure does not impose legal obligations." *Accra Pac, Inc.*, 173 F.3d at 633. Here, the stigma resulting from an officer being

accused of racial or other stereotyping in carrying out his or her duties certainly will cause harm to the officer's career. To the extent that a showing of standing is necessary in this context, that harm should permit the SBA to vindicate its members by demonstrating on appeal that the rulings were legally and factually deficient. Similarly, the only way to enable SBA members to continue making lawful use of the stop, question, and frisk technique is for the Liability Opinion to be reversed or vacated, because the standards set forth therein are incorrect with regard to what constitutes an unlawful stop.

Finally, the SBA meets both of the other requirements for organizational standing. *United Food*, 517 U.S. at 553. It is beyond dispute that the defense of the reputations and collective bargaining rights of SBA members is germane to the SBA's purpose. *Id.* Moreover, because the sweeping rulings in the Liability Opinion besmirched the reputation of both the SBA as a whole and each of its sergeant members in particular, the individual participation to the SBA's members in the litigation is not required. *Id.* And, because collective bargaining is just that—collective—the individual participation of the SBA's members in an action to protect collective bargaining is not necessary. *Id.* Therefore, the SBA has associational standing and may constitutionally intervene in this matter for all stated purposes.

D. The SBA's Request to Intervene in the Remedial Proceedings Is Not Moot.

Finally, this Court should reverse the District Court because the SBA's request to intervene in the Remedial Proceedings is not moot. The Remedies Order contemplates that the development of reforms will take place in two stages. In the first stage, the court-appointed Monitor and the parties will develop the "Immediate Reforms," initial reforms regarding stop and frisk policies and practices that are mandated by the Remedies Opinion and Order. Remedies Opinion, 959 F. Supp. 2d at 679. In the second stage, the Facilitator will work with "other stakeholders" through a "Joint Remedial Process" to "supplement, as necessary, the Immediate Reforms" with "Joint Process Reforms." *Id.* The District Court's basis for determining that the SBA's request to be made a party to the Remedial Proceedings is moot was that, because the Remedies Opinion specifically states that "police organizations," among others, may participate in the Joint Process Reforms, *id.* at 680-81, the SBA will have an adequate opportunity to be heard in the Remedial Proceedings.

A case becomes moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Catanzano v. Wing*, 277 F.3d 99, 107 (2d Cir. 2001). The question is "whether decision of a once living dispute continues to be justified by a sufficient prospect that the decision will have an impact on the parties." *Id.* (citing Charles Alan Wright, Arthur Miller &

Edward H. Cooper, 13A FEDERAL PRACTICE AND PROCEDURE § 3533 (2d ed. 1984)). "[W]hen interim relief or events have eradicated the effects of the [party's] act or omission, and there is no reasonable expectation that the alleged violation will recur," a case is moot. *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 647 (2d Cir. 1998) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)). Questions of mootness are reviewed *de novo*. *Comer v. Cisneros*, 37 F.3d 775, 787 (2d Cir. 1994).

The District Court's determination in this regard was erroneous for two reasons. First, if the SBA is permitted to intervene, it will become a party to the Remedial Proceedings. In that capacity, the SBA will participate not only in the Joint Remedial Process, but also in the crafting of Immediate Reforms. As the District Court stated in the Remedies Opinion, "the Monitor will develop, in consultation with the *parties*, [the Immediate Reforms]." Remedies Opinion, 959 F. Supp. 2d at 678 (emphasis added). Thus, parties are permitted to take part in both stages, while non-parties are invited only to take part in the Joint Process Reforms.

Second, although "police organizations" are allowed to participate in the Joint Remedial Process, they are invited only as community stakeholders (as are religious and advocacy organizations, District Attorneys' offices, and other groups), not as *parties* with the ability to influence what reforms are actually

adopted. This distinction is critical, and the District Court was wrong to reject it. There is no requirement that the Facilitator or the District Court heed the concerns and recommendations of the SBA as a "*stakeholder*" in the Joint Process Reforms; only the *parties* will engage in the formal identification, and ultimate request for court approval of, the reforms. *Id.* at 687. Only the parties have a role in either accepting or rejecting the proposed reforms, and the Court has set forth a procedure that will apply *to the parties* in the event that the parties and the Facilitator cannot come to an agreement. *Id.* at 688. Community stakeholders, in contrast, have no role in that procedure. Simply put, the role of a party in both stages of the reforms process is substantively different from, and far more significant than, that of a community stakeholder.

Because the SBA would be able to participate in both stages of the development of reforms only if it is made a party to the Remedial Proceedings, and because anything short of party status would exclude the SBA from meaningful participation in the Remedial Proceedings, its request to intervene as a party in the remedial phase is not moot.

VI. CONCLUSION

For all of the above reasons, the SBA respectfully requests that the Court reverse the Intervention Decision and permit the SBA to intervene for the purposes of appealing the Liability Opinion and of 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 13,549 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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