UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

MEMORANDUM OF LAW OF THE PATROLMEN'S BENEVOLENT ASSOCIATION, THE LIEUTENANTS BENEVOLENT ASSOCIATION, AND THE CAPTAINS' ENDOWMENT ASSOCIATION IN OPPOSITION TO THE CITY OF NEW YORK'S MOTION FOR REMAND

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The Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA"), the Lieutenants Benevolent Association of the City of New York, Inc. ("LBA"), and the Captains' Endowment Association of New York, Inc. ("CEA," and collectively, the "Police Intervenors") respectfully submit this memorandum in opposition to the Motion to Voluntarily Dismiss the Appeals filed by Appellant the City of New York (the "City").

1. This is no ordinary case. In the decision below, the District Court took actions that compromised the appearance of impartiality and conducted a "trial" that purported to review millions of discrete and individual actions. As a result of these irregular proceedings, the District Court reached a predetermined result and purported to find that the New York Police Department ("NYPD") had committed hundreds of thousands of constitutional violations. The court entered findings that unfairly besmirched the reputations of the men and women of the NYPD, imposed facially overbroad remedies, and exposed the NYPD to an unwarranted and indefinite period of federal supervision.

2. This is also no ordinary judgment. The City is not seeking to dismiss an appeal of a money judgment with limited impact on third parties. Rather, the judgment concerns the "broad equitable relief" ordered by the District Court. *Floyd v. City of New York*, 959 F. Supp. 2d 668 (S.D.N.Y. Aug. 12, 2013) ("Remedies Opinion"). The Remedies Opinion required "an initial set of reforms

to the NYPD's policies, training, supervision, monitoring, and discipline regarding stop and frisk," including "Revisions to Policies and Training Materials," *id.* at 678-79, onerous "Changes to Stop and Frisk Documentation," *id.* at 681, "Changes to Supervision, Monitoring, and Discipline," *id.* at 683, and a pilot program for "Body-Worn Cameras," *id.* at 684-85. The District Court required that NYPD officers be specifically instructed in the requirements of the Fourth Amendment based upon rules that diverge from controlling precedent and reflect instead one district judge's opinion of what the law should be. *Id.* at 689.

3. The Court further ordered a "Joint Remedial Process for Developing" additional reforms. *Id.* at 686-87. To lead this "Joint Remedial Process," the District Court named a "Facilitator" and an "Academic Advisory Council." Dkt. Nos. 384, 403 (*Floyd*), 128, 144 (*Ligon*). The Facilitator is charged with soliciting community input for further policing reforms, including input from "representatives of religious, advocacy, and grassroots organizations," "local elected officials and community leaders," and "the lawyers in this case." *Floyd*, 959 F. Supp. 2d at 686. The Remedies Order thus ensures that future police policies will not simply be written by a federal district judge, but that they will be politicized as well, and that everyone from department leaders to the officers on the street, will be obliged to participate in a cumbersome, resource-intensive, and distracting process. This process will be publicly justified—not as the policy

choice of a new administration—but as a process that the federal courts have ordered to remedy systematic constitutional violations, even though those violations simply did not, and do not, exist.

4. The District Court's wide-ranging supervision of the NYPD will plainly burden the officers' daily work. By requiring the police to adopt policies by judicial fiat, the order will completely remove all such matters from the realm of negotiation, directly impairing the police unions' collective bargaining and other rights. Under such circumstances, the City cannot credibly contend that the Police Intervenors have no right to have their arguments considered. Indeed, the Ninth Circuit has held directly to the contrary. *See United States v. City of Los Angeles*, 288 F.3d 391 (9th Cir. 2002). More broadly, this Court has the right, as well as the duty, to ensure that the injunction will not cause harm to the interests of other parties, and that the injunction will not disserve the public interest.

A. The City Itself Has Demonstrated That The District Court's Opinions Are Legally Infirm.

5. Under the prior administration, the City prosecuted this appeal and won a stay of the District Court's order. *See Ligon v. City of New York*, 538 F. App'x 101 (2d Cir. 2013), *superseded in part*, 736 F.3d 118 (2d Cir. 2013), *vacated in part*, 743 F.3d 362 (2d Cir. 2014). Given the irregular proceedings below, the Court further determined *sua sponte* that judge who sat as the finder of

fact and the author of the remedies should be disqualified. *Id*. The City filed a 110-page appeal brief that demonstrated, beyond any reasonable doubt, that the District Court opinions were premised upon numerous errors of law and could not withstand appellate scrutiny. *See* Defendant-Appellant's Brief, Dkt. No. 347-1 (*Floyd*) ("City Appeal Br.").

6. These errors included, but are hardly limited to, the following:

- The District Court should never have certified a class action challenge to 4.4 million *Terry* stops, given that the lawfulness of each stop turned upon its own individual facts and circumstances. City Appeal Br. at 30-34. That erroneous class certification decision led to a fundamental distortion of the trial process. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011); *Rahman v. Chertoff*, 530 F.3d 622, 626 (7th Cir. 2008).
- The District Court erred by permitting Plaintiffs to mount a challenge to millions of *Terry* stops through statistical evidence derived entirely from the UF-250 forms, which were not, and never have been, used as the sole evidence to justify the constitutionality of a particular stop, much less 4.4 million stops. City Appeal Br. at 35-49.
- The District Court erroneously found that the City's use of crime suspect data in making stops constituted intentional racial discrimination, even though the statistics actually demonstrated that the percentage of black and Hispanic persons stopped on suspicion closely tracked the actual demographics of crime suspects. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009); *Brown v. City of Oneonta*, 221 F.3d 329 (2d Cir. 2000); City Appeal Br. at 49-50, 55-62, 66.
- The District Court erred in concluding that the City had demonstrated "deliberate indifference" to its constitutional obligations because the City had repeatedly taken affirmative measures to ensure that its stops and frisks were conducted in accord with constitutional principles. City Appeal Br. at 68-85.

- The District Court's sweeping remedy, which provided for federal judicial management of the NYPD's training, supervision, monitoring, discipline, and equipment policies, was dramatically overbroad, even if the findings of liability had any basis. *Id.* at 85-92.

- The district judge's own actions had created an appearance of partiality that violated the City's due process rights and warranted vacatur of the decision. *See, e.g.*, *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988); City Appeal Br. at 92-100. The questions raised by the district judge's actions were particularly harmful to the process, since she sat as the trier of fact, as well as the judge in the case.

7. In addition to these and other arguments that the City has advanced and not withdrawn, Plaintiffs' claims suffer from a fundamental jurisdictional flaw. Article III standing is an issue that the Court may raise *sua sponte* at any time, and that ***may not be waived by the parties***. *See, e.g.*, *United States v. Hays*, 515 U.S. 737, 742 (1995) ("The question of standing is not subject to waiver . . . ."). Accordingly, the Court is "required to address the issue even if the courts below have not passed on it, and even if the parties fail to raise the issue before us." *Id.* (internal quotations omitted); *see also Cooper v. U.S. Postal Serv.*, 577 F.3d 479, 489 (2d Cir. 2009).

8. Under *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), Plaintiffs lacked Article III standing to proceed with their claims. Like the plaintiffs there, the fact that the named plaintiffs had previously suffered an alleged constitutional injury because of a police stop does not itself establish a sufficiently plausible threat of future injury so as to justify an injunction. *See id.* at 105 ("That Lyons

may have been illegally choked by the police . . . , while presumably affording Lyons standing to claim damages against the individual officers and perhaps against the City, does nothing to establish a real and immediate threat that he would again be stopped for a traffic violation, or for any other offense, by an officer or officers" who would engage in the same unconstitutional conduct at issue.); *see also* Katherine Macfarlane, *New York City's Stop and Frisk Appeals Are Still Alive*, Practicum, Brooklyn Law School (Dec 26, 2013), *available at* http://practicum.brooklaw.edu/articles/new-york-city%E2%80%99s-stop-and-frisk-appeals-are-still-alive. Plaintiffs lacked Article III standing to seek judicial resolution of their Fourteenth Amendment claim for the additional reason that no named class members had suffered intentional racial discrimination. *See* City Appeal Br. at 51 n.13.

9. There can be no serious doubt that the City's appeal brief, as well as the record before this Court, have offered compelling arguments that the District Court's decisions were fatally flawed. Nonetheless, without replacing its own brief or questioning its own legal arguments, the City now has reversed itself and chosen to acquiesce to this flawed injunction.

10. Although the City previously suggested that it was seeking a limited remand for "settlement discussions," the sole modification that the City obtained is that, after three years, the City has the right to seek relief from the court-

appointed monitor, which should be granted if the City can demonstrate "substantial compliance." *Floyd v. City of New York*, No. 08 Civ. 1034, 2014 WL 3765729, at *58-59 (S.D.N.Y. July 30, 2014) (the "Intervention Order"). The City has agreed simply to accept the liability findings below, to acquiesce to federal judicial supervision of the NYPD, and to all of the specific policy revisions that were decided and set forth by the prior district judge. By agreeing to drop this meritorious appeal, the City will further expose itself to millions of dollars in attorneys' fees, which the prevailing plaintiffs will be able to seek under 42 U.S.C. § 1988.

B. The Intervention Question Should Be Decided Prior To The Motion To Dismiss.

11. While the City contends that it has the right to voluntarily dismiss the appeal at this stage, its actions state otherwise. This Court has exercised its equitable powers to grant a stay of this matter, and the Court currently has before it the motions to intervene that the Police Intervenors and the Sergeants Benevolent Association ("SBA") filed on November 7 and 12, 2013. *See* Police Intervenors' Motion to Intervene, Dkt. Nos. 82 (*Floyd*), 178 (*Ligon*); SBA's Motion to Intervene, Dkt. Nos. 282-83 (*Floyd*). The intervention motions are fully briefed and remain pending. They were filed long before the City's August 6, 2014 motion, and logically, should be decided first.

12. As expressed in detail in the motions themselves, the intervention motions are also well-grounded in the law. *See, e.g.*, *City of Los Angeles*, 288 F.3d at 399 ("[T]he Police League claims a protectable interest because the complaint seeks injunctive relief against its member officers and 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."); *United States v. City of Detroit*, 712 F.3d 925, 926-27, 929-30, 932 (6th Cir. 2013) (permitting unions to intervene to object to judge's order that mandated changes that affected the unions' rights). The Police Intervenors have demonstrated that they have sustained a concrete injury as a result of the District Court's rulings because, *inter alia*, their daily work lives will be changed substantially if the remedies embodied in the District Court's Order—now to be embodied in a consent decree—are ever to be implemented, and because their collective bargaining rights are implicated by the District Court decision. *See* Police Intervenors' Reply in Support of Motion to Intervene, Dkt. Nos. 342 (*Floyd*), 246 (*Ligon*), at 8-10.

13. In addition, the soundness of the liability findings is itself an issue that could affect the scope of any consent decree. A federal court remedial order, when issued pursuant to a liability finding, may permit the District Court to order changes in employment practices that would otherwise be subject to bargaining

under state law. *See City of Los Angeles*, 288 F.3d at 400 (holding that police unions' state law rights may not be abridged "[e]xcept as part of court-ordered relief after a judicial determination of liability"). Thus, whether or not the liability determination stands may have a significant impact on the scope of any consent decree that the District Court might ultimately issue, as well as on the Police Intervenors' state law collective bargaining rights. *See* Motion to Intervene, Dkt. Nos. 252 (*Floyd*), 178 (*Ligon*), at 15.

14. The Police Intervenors also have a concrete interest here because the Liability Order causes them grave reputational harm and may affect their future conduct. "The Supreme Court has long recognized that an injury to reputation will satisfy the injury element of standing." *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 161-62 (2d Cir. 2003) (citing cases). Thus, in *Gully*, this Court found that the appellant had standing to challenge findings that she had engaged in misconduct, even though no other punishment had been imposed on her. *Id.* at 162. Similarly, in *ACORN v. United States*, 618 F.3d 125 (2d Cir. 2010), this Court found that even a memorandum that was purportedly rescinded but which contained restrictions on the plaintiff that remained in force provided the plaintiff with standing to challenge the reputational harm done by the memorandum. *Id.* at 134-35; *see also Camreta v. Greene*, 131 S. Ct. 2020, 2029 (2011) (finding standing where the "judgment may have prospective effect," since "the official

regularly engages" in the acts found unconstitutional). These cases underline the grave and direct harm that the men and women of the NYPD have suffered as a result of the District Court's findings. It is vital that those rulings be reviewed on the merits, with the Police Intervenors added as appellants.

15. If the Court were to grant the intervention motion, then the Police Intervenors would proceed with this appeal and ensure that the District Court's fundamentally flawed decisions obtain full review on the merits.

C. The Court May Decide The Pending Motion To Intervene Or Expedite Consideration Of The Police Intervenors' Appeal.

16. In the February 21, 2014 order, the Court ordered that the appellate intervention motions be held in abeyance pending the District Court's adjudication of similar motions filed prior to the entry of the stay. *Ligon v. City of New York*, 743 F.3d 362, 365 (2d Cir. 2014). The Court observed that "if necessary, the District Court may hold hearings and take evidence in order to provide this Court with a more complete record," and the "District Court is better positioned to deal with the complexities that might arise during multi-faceted settlement negotiations in which a variety of interest must be accommodated." *Id.* On limited remand, the District Court did not hold any hearings, supervise settlement negotiations, or permit the Police Intervenors to play any role in the proceedings. Instead, the

District Court decided the intervention motions solely on a paper record, without taking any evidence or hearing oral argument.[1]

[1] The District Court devoted a substantial portion of its opinion to the proposition that the Police Intervenors' motion was untimely because they had actual or constructive notice concerning the "stop and frisk" litigation. *See* Intervention Order, 2014 WL 3765729, at *10-19. In so doing, the District Court misapplied the standards under Rule 24. It was plainly efficient and appropriate for the Police Intervenors to rely upon the City to vigorously defend the case until it became apparent that the next mayor intended to reverse the City's prior position and drop any defense of the case. *See Edwards v. City of Houston*, 78 F.3d 983, 1000 (5th Cir. 1996) (en banc) (timeliness is measured "from the time [intervenors] became aware that [their] interest would no longer be protected by the existing parties to the lawsuit"); *see also United Airlines, Inc. v. McDonald*, 432 U.S. 385, 395-96 (1977) ("[A]s soon as it became clear to the respondent that the interests of the unnamed class members would no longer be protected by the named class representatives, she promptly moved to intervene to protect those interests.").

In addition, in assessing timeliness, the District Court relied upon cases in which the proposed intervenors sought to re-open the existing record, rather than to appeal the judgment based upon the previously created record. When the applicant seeks to intervene for the limited purposes of appeal, "[t]he critical inquiry . . . is whether in view of all the circumstances the intervenor acted promptly after the entry of final judgment." *McDonald*, 432 U.S. at 395-96 (a motion to intervene for purposes of appeal filed within 30 days of the judgment would be timely); *United States v. City of Detroit*, 712 F.3d 925, 932 (6th Cir. 2013) (permitting a union to intervene as to future remedial proceedings in an environmental case that had been pending for 30 days); *Edwards v. City of Houston*, 78 F.3d 983, 989 (5th Cir. 1996) (en banc) (permitting police unions to intervene prospectively in a civil rights case involving a proposed consent decree); *Hodgson v. United Mine Workers*, 473 F.2d 118, 129 (D.C. Cir. 1972) (permitting intervention "in the remedial, and if necessary the appellate, phases of [a] case" that had been pending for seven years.).

17. Under the circumstances, it may be most efficient for the Court simply to take up and decide the appellate intervention motions now pending before the Court. *See Drywall Tapers & Pointers of Greater N.Y. v. Natasi Assocs.*, 488 F.3d 88, 94 (2d Cir. 2007). In the alternative, the Police Intervenors have appealed the District Court's Intervention Order. *See Floyd v. City of New York*, No. 14-2829 (2d Cir.); *Ligon v. City of New York*, No. 14-2834 (2d Cir.). Pursuant to the Court's February 21, 2014 order, that intervention appeal is to be referred to the panel hearing this appeal. *Ligon*, 743 F.3d at 365 ("Any appeals of the District Court's further orders are to be referred to this panel."). The Court could order that appeal to be consolidated with this appeal and then proceed to expedite the resolution of the intervention appeal. The parties have already briefed the intervention question on three separate occasions (twice below at the District Court and once before this Court), and the Police Intervenors stand ready to proceed with the intervention appeal on as expedited a schedule as the Court deems appropriate.

CONCLUSION

For the foregoing reasons, the Police Intervenors respectfully request that the Court decide the pending intervention motion, grant the Police Intervenors' motion to intervene, and permit them to prosecute the appeal on the merits. In the alternative, they request that the Court continue the stay on briefing in this appeal,

consolidate the intervention appeal with this appeal, and order an expedited briefing schedule for the resolution of the intervention appeal.

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Respectfully submitted,

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