IN THE 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.	:	

OPPOSITION OF SERGEANTS BENEVOLENT ASSOCIATION TO MOTION OF CITY OF NEW YORK FOR LIMITED REMAND TO THE DISTRICT COURT FOR THE PURPOSE OF EXPLORING A RESOLUTION

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Proposed Intervenor the Sergeants Benevolent Association (the "SBA") hereby opposes the Motion of the City of New York (the "City") for Limited Remand to the District Court for the Purpose of Exploring a Resolution.

PRELIMINARY STATEMENT

The proposed "resolution" of the City and Plaintiffs would effectively terminate this appeal. All of the parties' public representations regarding the alleged resolution suggest that the City has simply agreed to concede liability on behalf of the New York Police Department (the "NYPD") and its officers, including SBA members, as found by the District Court; to implement the remedies ordered by the District Court; and to relinquish any right to challenge the District Judge's rulings on appeal. The City, in effect, seeks to abandon the appeal, which would leave in force the two grossly flawed Opinions—the preordained end result of trial proceedings that were tainted from start to finish by the appearance of partiality by the District Judge on behalf of Plaintiffs—in a case where the plaintiffs lacked standing to seek injunctive relief.

Although this Court's November 25, 2013 Order contemplated remand to the District Court for the purpose of "exploring a resolution," the City and Plaintiffs have made clear that the purpose of the requested remand is *not* to explore a resolution, but simply to seek court approval of an agreement already reached; one that entails no compromise by Plaintiffs and effectively gives the

District Judge's challenged rulings the full and final force of law. The District Court's erroneous Opinions should be reviewed by this Court, and the City and Plaintiffs should not be permitted to avoid review and reversal of the Opinions.

The SBA has been and remains prepared to file briefs on the merits in this appeal, and has sought intervention for that purpose. *See* Dkt. No. 448. This Court should therefore deny the request for a limited remand, allow the appeal to proceed on the merits, and grant the SBA's motion to intervene. In the alternative, this Court should vacate the District Court's Opinions and related Orders as part of any remand. The Court should also, in any event, grant the SBA's motion to intervene or, at a minimum, make clear to the District Court that it may consider the SBA's still-pending motion to intervene below.

BACKGROUND

After eight years of litigation, on August 12, 2013, the District Court issued two Opinions regarding the claims of Plaintiffs-Appellees ("Plaintiffs") that they and similarly situated individuals were subjected to "stop, question, and frisk" encounters initiated by NYPD officers that violated the Fourth and Fourteenth Amendments of the United States Constitution. Those decisions were wrong. The District Court misconstrued applicable burdens of proof, misapplied Fourth Amendment jurisprudence, applied a Fourteenth Amendment theory that Plaintiffs

never even presented, and accepted evidence that was insufficient as a matter of fact and law to prove Plaintiffs' claims.

Following the issuance of the two Opinions, then-mayoral-candidate Bill de Blasio engaged in "a relentless critique of the [NYPD's] stop-and-frisk tactics."[1] He promised that he would drop the City's appeal of the Opinions "on Day 1" of his administration.[2] Candidate de Blasio also filed papers in this Court in his capacity as Public Advocate in support of Plaintiffs and in opposition to the City's motion to stay the remedial proceedings in the District Court. *See* Dkt. Nos. 175, 205. After Mr. de Blasio was elected Mayor of the City, he stated unequivocally, "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."[3]

On January 30, 2014, the City, under Mayor de Blasio's administration, filed the instant motion seeking "a limited remand for the purpose of 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 in an agreement under which the City promised to implement all of the District Judge's ordered

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[1] Michael Barbaro, *Luck and a Shrewd Strategy Fueled de Blasio's Ascension*, N.Y. Times, Sept. 10, 2013.
[2] *See* Kate Taylor and Joseph Goldstein, *Despite Stance, de Blasio, if Elected, Could Find a Police Monitor Intrusive*, N.Y. Times, Nov. 1, 2013.
[3] 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 press conference to introduce new City Corporation Counsel).

reforms to NYPD practices and not to challenge either of her Opinions on appeal.[4] While the SBA has not reviewed any written agreement[5] between the City and Plaintiffs and was not included in the negotiation, public statements made by Mayor de Blasio and the Center for Constitutional Rights indicate that the only limitation to be placed on any of the District Court's reforms is that the monitor ordered by the District Judge's Remedies Opinion will serve for a term of three years.[6] Even that limitation is apparently conditioned on the City achieving substantial compliance with all of the District Judge's ordered reforms (to be set forth in a consent decree alluded to by the City) within three years.[7] Based on the public representations of the parties, the City's request for a remand to explore a resolution appears to be, in reality, an attempt to drop this appeal.

The SBA is the nation's largest superior officers union, and its fifth largest police union. The SBA's membership consists of approximately 13,000 active and

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

[5] The City represented to the SBA that there was not yet a written agreement and directed the SBA to the City's press release.

[6] *See* Weiser and Goldstein, *supra* n.4 (("Mr. de Blasio said that as part of the new agreement, the monitor's role would be limited to three years, 'contingent upon us meeting our obligations.'").

[7] *See* Press Release, New York City, *Mayor de Blasio Announces Agreement in Landmark Stop-And-Frisk Case* (Jan. 30, 2014) (on file with author) ("Both the city's law department and the plaintiffs have agreed to recommend to the District Court that the monitor supervision will have oversight for three years, on the condition that the NYPD is in substantial compliance with the decree."); Press Release, Center for Constitutional Rights, *City of New York and Center for Constitutional Rights Announce Agreement in Landmark Stop and Frisk Case* (Jan. 30, 2014) (on file with author) ("Under the agreement, the monitor will serve a term of three years, conditional on the City substantially complying with the remedies, and the parties will begin the process for stakeholder input as soon as the paperwork is completed.").

retired NYPD sergeants, and it is recognized by the City as the sole and exclusive bargaining representative for all NYPD sergeants. In part because it has been clear for some time that the City may seek to drop this appeal, the SBA timely sought to intervene in this matter at every level to protect the interests of its members by ensuring that the deeply flawed District Court Opinions received a review on their merits. *See Floyd v. City of New York*, S.D.N.Y., No. 08 Civ. 1034, Dkt. Nos. 387, 388; Dkt. No. 283. To that end, on September 11, 2013, the SBA timely moved to intervene at the district court level, and simultaneously filed a timely Notice of Appeal. *See Floyd* , Dkt. Nos. 387, 388. On October 31, 2013, this Court issued an Order staying all proceedings in the District Court. *See* Dkt. No. 247. That Order also directed the removal of the District Judge from the proceedings below and the reassignment of the case to a different judge, and stated (in part):

> Upon review of the record in these cases, we conclude that the District Judge ran afoul of the Code of Conduct for United States Judges, Canon 2 ("A judge should avoid impropriety and the appearance of impropriety in all activities."); see also Canon 3(C)(1) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ."), and that the appearance of impartiality surrounding this litigation was compromised by the District Judge's improper application of the Court's "related case rule," see Transfer of Related Cases, S.D.N.Y. & E.D.N.Y. Local Rule 13(a), and by a series of media interviews and public statements purporting to respond publicly to criticism of the District Court.

Dkt. No. 246.

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 these

appellate proceedings. Dkt. No. 283. On November 25, 2013, this Court issued an Order that the SBA's motion (as well as that of a group of other police unions seeking intervention, which was filed on November 7, 2013) be "held in abeyance pending further order of the court." Dkt. No. 338. The purpose of that Order, as this Court stated, 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*.

As discussed above, on January 30, 2014, the City filed a motion for "a limited remand for the purpose of exploring a resolution," which, from the parties' public statements regarding the resolution, appears to be an attempt to drop the appeal. This Court then ordered the proposed intervenors to respond to that motion. As a result, the SBA respectfully submits this opposition.

ARGUMENT

Mayor de Blasio has fulfilled his campaign promise to stop pursuing this appeal, under the guise of a "resolution." From the public representations of the parties, it appears that the resolution is that the City has effectively abandoned the appeal, conceded to Plaintiffs the liability of the City and NYPD police officers, adopted and accepted all of the District Judge's rulings, and essentially committed to implement all of her ordered reforms—over the objections and without the

participation or input of the SBA or the other police unions that have sought to intervene both in this appeal and in the lower-court remedial proceedings.

This Court should deny the City's motion and allow this appeal to proceed. If this Court grants the City's motion, however, it should also vacate the Opinions and the accompanying Orders, which could no longer serve any purpose in the context of a negotiated consent decree and were infected by (at least) the appearance of partiality. In any event, the SBA asks that this Court grant its motion to intervene before any remand of this matter to the District Court. In the alternative, the SBA respectfully submits that this Court should include in any remand order an express provision permitting the district court to decide the SBA's motion to intervene in the district court, which remains pending but is stayed pursuant to this Court's Order dated October 31, 2013.

I. This Appeal Should Proceed on the Merits and the Court Should Grant the SBA's Motion to Intervene.

The SBA opposes the City's motion for a limited remand. The parties' public statements about the resolution suggest that it involves the City admitting liability as stated in the Liability Opinion and submitting to the reforms from the Remedies Opinion. That, in effect, is abandonment by the City of the appeal.

The SBA should be made a party to this appeal to enable this Court to engage in a full review of the Opinions on the merits. The SBA has been and remains ready, willing, and able to submit briefing and prosecute this appeal to a

final conclusion. The SBA's members, who were among the most harshly criticized individual NYPD officers mentioned in the Opinions and whose collective bargaining rights will be affected by the imposition of the remedies outlined, deserve the opportunity to defend and vindicate themselves through this appeal and have met the standard for intervention.

The Opinions should not be permitted to stand. The District Court failed at almost every turn in this litigation, including its decision at the outset to direct the plaintiffs' attorney to mark the case as related to one of the District Judge's cases (which was no longer pending), its incorrect certification of the class, and its final Opinions, which are erroneous in numerous respects.

First, as a threshold matter, Plaintiffs lacked standing to seek injunctive relief 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).

Second, the Opinion violates due process because the District Judge's conduct before, during, and after trial created an appearance of partiality. In failing to recuse herself, the District Judge violated 28 U.S.C. § 455(a), which warrants

vacatur or reversal of the Opinions. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 862 (1988).

Third, the District Court erred in certifying this matter as a class action because Plaintiffs' entire case rested on claims that are highly individualized and impossible to resolve en masse. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (holding that a question allegedly common to a class must be such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke").

Fourth, the District Court issued two remarkably flawed Opinions. For example, in the Liability Opinion, the District Court improperly allocated the burden of proof under 42 U.S.C. § 1983 by forcing the City to establish the constitutionality of over four million stops, rather than requiring Plaintiffs to establish their unconstitutionality. *See Ruggiero v. Krzeminski*, 928 F.2d 558, 563 (2d Cir. 1991) (holding that allocating burden of proof to plaintiff in Section 1983 action is "in accordance with established principles governing civil trials."). On the basis of this incorrect analysis, the District Court erroneously found that the City's police officers had violated the Fourth Amendment through a widespread practice of conducting stops without reasonable suspicion. For almost all of the stops it reviewed, the District Court relied solely and improperly on UF-250 forms, which are filled out by individual officers after each "stop and frisk" procedure is

carried out, and did not consider officer testimony and other factors to ascertain the totality of the circumstances for the stop or frisk in question. Moreover, the District Court made false assumptions when interpreting the data from those forms, such as assuming that the absence of narrative detail on the form meant that the police action was unconstitutional.

Likewise, the District Court wrongly found that NYPD stop, question, and frisk practices violated the Fourteenth Amendment, based on its novel "indirect racial profiling" theory. The District Court erroneously hinged that finding on the testimony of a *single* unnamed class member whose lack of credibility was established at trial. (Liab. Op. 86-86.) Moreover, the District Court's conclusion failed to recognize that the applicable law requires *intentional* discrimination. *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009).

These erroneous findings were based on a purported statistical analysis by Plaintiffs' expert, Jeffrey Fagan, that failed to consider suspect description data, the most important driver of implementation of the stop, question, and frisk policy. In addition to the fact that this analysis did not fit the subclass that Plaintiffs themselves defined and that was certified, Plaintiffs did not dispute that members of minority groups were stopped in close correlation to criminal suspect description data culled from reports made by members of the public—*not* based on

any stereotypes allegedly embraced by the City. The District Court erred by disregarding suspect description data and relying on Fagan's flawed analysis.

The District Court also erred in subjecting the NYPD to liability based on purported deliberate indifference to its constitutional obligations pursuant to *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978). Plaintiffs failed to meet the "rigorous standards" required to establish such liability and the District Court committed an error of law in determining that the NYPD was deliberately indifferent to the constitutional rights of citizens in the City. *Connick v. Thompson*, 131 S. Ct. 1350, 1360 (2011) ("Deliberate indifference is a *stringent* standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." (emphasis added)); *Bd. of County Comm'rs v. Brown*, 520 U.S. 397, 405 (1997) (citations omitted).

Finally, the SBA meets all requirements for intervention as of right or, in the alternative, permissive intervention. It has direct, protectable interests in this matter that will be impaired if it is not granted party status, not least of which are its collective bargaining rights. *See* Dkt. No. And, to the extent that the City ever adequately represented the SBA's interests, it certainly does not now that it has decided to abandon the appeal. *See, e.g., Yniguez v. State of Arizona*, 939 F.2d 727, 738 (9th Cir. 1991) ("[N]o representation constitutes inadequate representation."); 7C Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE

AND PROCEDURE § 1909 (3d ed. 2013) ("An interest that is not represented is surely not adequately represented and intervention must be allowed.").

II. In the Alternative, the District Court's Opinions Should be Vacated Prior to Any Remand.

In the alternative, this Court should vacate the District Court's Opinions because they will become moot or because they were tainted by the District Judge's appearance of partiality. If this Court remands without vacating the Opinions, then it should direct the District Court to do so.

A. The Appeal Will Become Moot and the Opinions Should be Vacated.

The City's voluntary decision to comply with the district court's Remedies Opinion and forgo prosecution of the appeal will moot the appeal and this Court should vacate the Opinions. The interests of the City now appear to be fully aligned with those of the Plaintiffs and the City apparently intends to accept all of the District Judge's prescribed reforms. Therefore, the dispute between the City and Plaintiffs on appeal appears moot.

This Court has authority to vacate "any judgment, decree, or order of a court lawfully brought before it for review." 28 U.S.C. § 2106. And such a disposition is appropriate in some circumstances "when the matter becomes moot on appeal." *Associated Gen. Contractors of Conn., Inc. v. City of New Haven,* 41 F.3d 62, 67 (2d Cir. 1994). Of course, vacatur is not required where mootness results from a

voluntary settlement reached by the parties. *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18 (1994). In such cases, a court must make an equitable determination whether "exceptional circumstances" justify vacating the lower court's decision. *U.S. Bancorp*, 513 U.S. at 29. However, this case is analogous to *Haley v. Pataki*, where this Court vacated a preliminary injunction on appeal when the government, the enjoined party, agreed to abide by the injunction's terms. 60 F.3d 137, 142 (2d Cir. 1995). As described by the City and Plaintiffs, the resolution reached is not a settlement, but an agreement by the City to abide by the District Judge's Order granting injunctive relief and, therefore, it is akin to the government's "voluntary compliance" with an injunction that was at issue in *Haley*. 60 F.3d at 142. And, in any event, "exceptional circumstances" as contemplated in *Bancorp* exist here, where the termination of the appeal has resulted solely from a change of mayoral administrations and a corresponding shift in political views and otherwise would leave in place deeply flawed Opinions purporting to make rulings on constitutional grounds and impacting the livelihood of SBA members.

Vacatur is particularly appropriate here because the Opinions ultimately will be supplanted by a court-approved consent decree. Collaborative remedial proceedings—like those that would take place in the District Court if the City's motion for remand were granted—nearly always result in a consent decree among

the parties, not a judicial opinion on liability or remedies. In fact, court-approved consent decrees entered in this context routinely include no-admission-of-liability clauses expressly providing that the consent decree cannot be construed as an admission that either party engaged in any wrongdoing.[8] As a result, there is no need for the Opinions here and vacatur is appropriate.

B. Vacatur Is Warranted Because the District Judge's Extrajudicial and Judicial Conduct Violated Due Process.

The Opinions should be vacated for the additional reason that the District Judge's conduct before, during, and after trial created an appearance of partiality, in violation of due process. This Court previously considered the City's motion to vacate the Opinions based on the District Judge's due process violations and denied that motion without prejudice to consideration as part of the appeal on the merits or any application for remand to the District Court for the purpose of exploring a resolution. Any remand order here should include vacatur.

As this Court has ruled, the extrajudicial conduct of the District Judge in the proceedings below, including her statements to members of the press, created at

[8] *See, e.g.*, Consent Decree in *United States v. City of New Orleans*, 2:12-CV-01924, Dkt. No. 2-1 (E.D. La. July 24, 2012) ("Nothing in this Agreement, the United States' Complaint, or the negotiation process shall be construed as an admission or evidence of liability under any federal, state, or municipal law including, but not limited to, 42 U.S.C. § 1983. Nor is the City's entry into this Agreement an admission by the City, NOPD, or any officer or employee of either entity, that they have engaged in any unconstitutional, illegal, or otherwise improper activities or conduct."); Stipulation of Settlement in *Daniels v. City of New York*, 1:99-CV-01695, Dkt. No. 152 (S.D.N.Y. Jan. 19, 2004) ("This Stipulation does not and shall not be deemed to constitute any admission by the defendants as to the validity or accuracy of any of the allegations, assertions, or claims made by plaintiffs…This Stipulation does not constitute an admission, adjudication, or finding on the merits of the above-captioned action.").

least the appearance of partiality. *See* Dkt. Nos. 246, 306. So, too, did her lopsided and erroneous rulings. In an appropriate case like this one, where a judge exhibits extrajudicial bias coupled with questionable acts during the litigation, vacatur is an available remedy. *See In re IBM Corp.*, 45 F.3d 641, 644 (2d Cir. 1995) (granting mandamus of district court judge after consideration of judicial and extrajudicial bias, including newspaper interviews); *see also Liteky v. United States*, 510 U.S. 540, 555 (1994) (noting that ultimate inquiry is whether circumstances create objectively reasonable basis for questioning judge's impartiality by reflecting "a deep-seated favoritism or antagonism that would make fair judgment impossible").

A judge shall disqualify herself "in any proceeding in which [her] impartiality might reasonably be questioned." 28 U.S.C. § 455(a). A violation of § 455 may result in vacatur. *Liljeberg*, 486 U.S. at 862. In determining whether such a remedy is warranted, "it is appropriate to consider the risk of injustice to the parties in the particular case, the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process." *Id.* at 864. Such risk exists when the appearance of partiality is "egregious." *In re Bergeron*, 636 F.3d 882, 884 (7th Cir. 2011).

The District Court's violation of § 455 was egregious, it worked a serious injustice on the SBA in the form of unsupported accusations that such members

violated the Constitution that they have sworn to uphold, and it has undermined public confidence in the integrity of the judiciary. By expressly encouraging counsel in another case before her to file the complaint in *Floyd*, and then funneling *Floyd* onto her docket by treating it as a case that was "related" to the earlier, then-closed case, the District Judge appeared to engineer the pro-Plaintiffs result of *Floyd* from the very outset.

The District Judge's comments to the media and the public at the end of the case confirmed her apparent partiality in favor of Plaintiffs and against the City. In those comments, which appeared in news stories specifically addressed to the stop-and-frisk litigation then pending before her, the District Judge described herself as "not afraid to rule against the government."[9] The District Judge also responded publicly to a study regarding her rulings, which showed that she had ruled against law enforcement in 60% of the cases in which she had published a written decision—double the rate of the next-highest judge on the list, whose percentage was 30%.[10]

The District Judge's rulings during the course of the litigation further reflected her apparent partiality. For example, in addition to her erroneous determinations regarding Plaintiffs' Fourth and Fourteenth Amendment claims,

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[9] *See* Jeffrey Toobin, *A Judge Takes on Stop-and-Frisk*, The New Yorker, May 27, 2013.
[10] *See* Larry Neumeister, *NY "Frisk" Judge Calls Criticism "Below-the-Belt,"* Associated Press, May 19, 2013.

discussed in Section I, *supra*, the District Judge also ordered a highly irregular and suggestive in-court "show-up" procedure for one of the Plaintiffs to identify the officers who had purportedly stopped him, even after he failed to pick them out of a photo array, and forbade a police officer from testifying to explain the procedures he followed during stops. The District Judge also improperly prevented the City from introducing evidence that was highly relevant to Plaintiffs' equal protection claims, including the effectiveness of *Terry* stops in combating crime, the racial diversity of the police force, and the City's efforts to implement recommendations made by the highly regarded RAND Corporation.

Moreover, throughout the Opinions, the District Judge impugned the character of NYPD officers who have devoted their careers—and risked their safety and their lives—to protect the citizens of New York. Despite the District Judge's statement that she "respect[s] that police officers have chosen a profession of public service involving dangers and challenges with few parallels in civilian life" (Liab. Op. 13), her numerous derogatory statements about the police—many wholly unsupported by the record—suggest otherwise. The District Judge found that the NYPD was influenced by "unconscious racial bias" in conducting *Terry* stops (Liab. Op. 44-45); and that the City and the police oversaw and carried out a "stop and frisk" policy that amounted to "indirect racial profiling" (Liab. Op. 61). In addition to these general findings, the District Judge repeatedly questioned the

motives and integrity of the City's police force, including (1) her implicit comparison of the City's practices to "preventive detention or coerced confessions" (Liab. Op. 2); (2) her citation to sources outside the record, including the Trayvon Martin case and a quote by President Obama about his experiences growing up in the United States; and (3) her reference to a recent request for information on the City's stop and frisk policies by the UN Human Rights Committee, which purportedly demonstrated that "notice of racial bias in NYPD stops has continued since the close of discovery" (Liab. Op. 189 n. 774). Such apparent bias, which can be found throughout the District Judge's Opinions, unquestionably creates the appearance that the District Court proceedings were tainted by partiality. For all of these reasons, the Opinions should be vacated.

III. In Any Event, the Court Should Grant the SBA's Motion to Intervene in This Appeal in Connection with any Remand.

This Court should grant the SBA's motion to intervene, and the SBA should be included as a party in any remand order. The SBA could then participate in the development of a true resolution in this matter in the District Court, including challenging provisions of the "resolution" reached by Plaintiffs and the City to the extent that they insulate the District Judge's flawed Opinions from any meaningful review by accepting all of her recommended findings and reforms wholesale. As discussed above, the SBA has met the standards for mandatory and permissive intervention in this matter. Moreover, police unions and other bargaining units are

frequently allowed to participate in such proceedings to protect their collective bargaining rights and other affected rights. *See United States v. City of Los Angeles*, 288 F.3d 391, 401 (9th Cir. 2002) (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"); *EEOC v. A.T.&T. Co.*, 506 F.2d 735, 742 (3d Cir. 1974) (permitting police union to intervene to challenge consent decree because its "continuing ability to protect and enforce [provisions of its collective bargaining agreement] will be impaired or impeded by the consent decree"). And police labor organizations have been parties to consent decrees in other cases involving institutional police reform.[11]

IV. In the Alternative, This Court Should Expressly Order That the District Court May Decide the Motions to Intervene Pending Before It.

Finally, in the event that this Court orders the remand and does not grant the motion to intervene, the SBA respectfully requests that the Court state in its order that the District Court is empowered to decide the motion to intervene the SBA filed below, and that any stay applicable to those motions is lifted.

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[11] *See, e.g.*, Settlement Agreement in *Allen v. City of Oakland*, 3:00-CV-04599, approved by Northern District of California January 22, 2003 (including Oakland Police Officers Association as party to Settlement Agreement); Collaborative Agreement in *In re Cincinnati Policing*, 1:99-CV-00317 (S.D. Ohio April 11, 2002) (including Fraternal Order of Police as party to Collaborative Agreement).

CONCLUSION

For all of the above reasons, the SBA respectfully requests that this Court deny the City's Motion for Limited Remand to the District Court for the Purpose of Exploring a Resolution and grant the SBA's motion to intervene. If the Court does remand, the SBA respectfully requests that it first vacate the District Judge's Opinions and Orders. In addition, the SBA respectfully requests that the Court grant the SBA's motion to intervene. Finally, and in the alternative, the SBA respectfully requests that the Court expressly state in any remand order that the District Court is permitted to decide the SBA's motion to intervene pending below.

Dated: New York, New York.
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Respectfully submitted,

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