# 24-0695-cv,
# 24-1334-cv, 24-1339-cv, 24-1443-cv

## United States Court of Appeals

*for the*

## Second Circuit

IN RE: NEW YORK CITY POLICING DURING SUMMER 2020 DEMONSTRATIONS

*(For Continuation of Caption See Inside Cover)*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK IN CASE NO. 1:20-CV-8924, HONORABLE COLLEEN MCMAHON, JUDGE

**BRIEF FOR PLAINTIFFS-APPELLEES JARRETT PAYNE, ANDIE MALI, CAMILA GINI, VIDAL GUZMAN, VIVIAN MATTHEW KING-YARDE, CHARLIE MONLOUIS-ANDERLE, JAMES LAUREN, MICAELA MARTINEZ, JULIAN PHILIPS, NICHOLAS MULDER, AND COLLEEN MCCORMACK-MAITLAND**

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THE PEOPLE OF THE STATE OF NEW YORK, ADAM GRAY, JARRETT PAYNE, KAYLA ROLON, COREY GILZEAN, MICHAEL HERNANDEZ, CHRISTOPHER HUSARY, KEITH CLINGMAN, JONATHAN PECK, JASON DONNELLY, DIANA ZEYNEB ALHINDAWI, JEMELL D. COLE, AMR ALFIKY,

*Plaintiffs-Appellees,*

– v. –

BILL DE BLASIO, CITY OF NEW YORK, DERMOT F. SHEA, TERENCE A. MONAHAN, LARS FRANTZEN, FIERRO, JON BRODIE, PICHARDO, ALTAMIRANO, ROBERT DIXSON, SCOTT HALDEMAN, EDUARD LUCERO, BRITNEY OWENS, HEMME, ANTHONY POLANCO, ERIK RODRIGUEZ, PATRICK GROSS, LUIS E. ORTIZ, N. CANALE, MIGUEL CRUZ, JOSEPH A. TAYLOR, NEW YORK POLICE DEPARTMENT, THEODORE WELLS, JOHN DOES 1-38, JANE DOES 1-38, SEAN P. ROBINSON, BRIANNA CARLO, NICHOLAS TERRETT, LUIGI TIRRO, ADAM MUNIZ, LEONEL GIRON, KEITH GALLAGHER, GZIM PALAJ, DANIEL SLEVIN, KEITH HOCKADAY, DANIEL GALLAGHER, ROBERT CATTANI, CHRISTOPHER RADZINSKI, STEPHEN SPATARO,

*Defendants-Appellees,*

POLICE BENEVOLENT ASSOCIATION OF THE CITY OF NEW YORK, INC.,

*Intervenor-Defendant-Appellant,*

SERGEANTS BENEVOLENT ASSOCIATION,

*Intervenor,*

– v. –

JOHN DOES 1-20, JANE DOES 1-20,

*Defendants.*

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## PRELIMINARY STATEMENT

This appeal arises out of challenges to the New York City Police Department's brutal response to the 2020 George Floyd protests. After lengthy negotiations—including over 50 mediation sessions—the plaintiffs in these consolidated cases (including the New York Attorney General), the defendant City of New York, and two defendant-intervenor unions (the Sergeants Benevolent Association and the Detectives' Endowment Association), reached an agreement to resolve the claims for injunctive relief ("the Settlement"). The Settlement memorializes certain existing NYPD practices concerning the policing of demonstrations, implements new practices consistent with current research on protest policing, and creates oversight and accountability for the NYPD's decisions to deploy officers, issue dispersal orders, and make arrests at protests.

The only party that did not sign onto the Settlement was defendant-intervenor the Police Benevolent Association ("PBA"), the union that represents NYPD members with the rank of police officer. Having been able to participate fully in the litigation and settlement negotiations, and voice its objections in the district court, the PBA now appeals to this Court to reverse the order approving the Settlement and thrust the parties back into litigation. But as the Supreme Court explained in a case that squarely forecloses the PBA's effort, its appeal "misconceives the Union's rights in the litigation." *Loc. No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v.*

*City of Cleveland*, 478 U.S. 501, 528 (1986). Simply put, the PBA has no grounds for contesting the Settlement in this Court, as the Settlement imposes no obligations on the PBA and compromises no legal rights it possesses or claims it has asserted (because it asserted none), and because its baseless concerns about the policies embodied in the Settlement were taken into account when the district court weighed various relevant factors and properly exercised its discretion to approve the Settlement.

The PBA attempts to create a dispute over the proper standard for review of consent decrees and voluntary motions to dismiss. There is none. The district court identified the controlling legal authority governing its review of the Settlement as a consent decree and the plaintiffs' motion to voluntarily dismiss their claims, and faithfully and correctly applied that authority, taking into account the objections raised by the PBA, including its concerns about officer and public safety.

Nothing in the PBA's submission provides any basis for concluding that the district court abused its discretion in approving the Settlement. The PBA asserts that the reforms embodied in the Settlement are novel and ill-advised, but the record does not support this concern. As the district court carefully concluded, the record "is overwhelmingly to the effect that the procedures proposed here – most especially tiered response – are neither novel nor untested, and are consistent with what is considered best practice policing at FAAs today." Special Appendix (SA) 38.

In essence, the PBA's argument is that its status as an intervenor provides it with veto power over the Settlement, allowing it to force the settling parties to bear the time, expenses, and risks of continuing litigation. This assertion is wrong. Neither the standard for approving a voluntary dismissal under Federal Rule of Civil Procedure Rule 41 nor the standards for approving a consent decree allow the PBA to block this Settlement based on its speculative and policy-based concerns.

Accordingly, this Court should affirm the district court's approval of the Settlement and dismissal of the plaintiffs' claims.

## ISSUE PRESENTED

Did the district court act within its discretion by granting the settling parties' motion for voluntary dismissal and approving the Settlement?

## STATEMENT OF THE CASE

### A. The 2020 Murder of George Floyd and Widespread Protests in New York City Seeking Racial Justice and Police Accountability

On May 25, 2020, Derek Chauvin, a white police officer in the Minneapolis Police Department, kneeled on the neck of George Floyd, an unarmed Black man lying face down with his hands handcuffed behind his back. SA 1. As Floyd lay dying, he pled for Chauvin to remove his knee because he could not breathe. *Id*. After over eight minutes of gasping for air and pleading for his life, George Floyd was dead. *Id*.

The cumulative effects of Floyd's murder and the similar high-profile murders of Black people at the hands of law enforcement[1] generated significant public frustration. Shortly after Floyd's death, citizens of all races and backgrounds nationwide took to the streets to call for reforms to policing. SA 1. New York City was no different. Over several months, thousands of New Yorkers and millions of Americans protested to demand police accountability and racial justice. SA 2.

As alleged in the complaints in this case and confirmed by reports from governmental and independent agencies, these New Yorkers were met with extraordinary brutality and violence by the NYPD. During the protests, NYPD police officers were observed using egregious acts of force including a "tactic called 'kettling' to surround, trap, and eventually arrest protesters, without first providing a warning or opportunity for them to leave the area . . . beat[ing] protesters with batons, spray[ing] them with pepper spray, shov[ing] them with bicycles and pinn[ing] them to the ground, injuring many." *Id.* The NYPD also made mass arrests, with at least 889 individuals arrested through June 6, 2020. *Id.*

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[1] This murder of an unarmed Black person at the hands of a police officer was not an aberration. Only a few months earlier, a Black woman named Breonna Taylor was shot six times in her home by Louisville police officers. In New York, a Black man named Eric Garner was strangled to death in 2014 after being placed in a chokehold by white NYPD officer. In the years prior to Floyd's death, Black men Freddie Gray, Michael Brown, Tamir Rice, Philando Castile, and Alton Sterling met similar fates at the hands of officers.

Numerous lawsuits were filed against the City of New York, former Mayor Bill de Blasio, individual police officers and high-ranking members of the police department, including the four consolidated here that sought injunctive relief. *Id.*

These civil rights actions alleged that the City of New York, the former mayor, and certain NYPD leadership and personnel (collectively, "City Defendants"), violated the First, Fourth, and Fourteenth Amendments in their response to the protests and that officers used excessive force and false and retaliatory arrests against nonviolent protestors, legal observers and journalists. SA 30; *see also* Joint Appendix (JA) at 1253 (Payne Second Amended Complaint).

### B. The PBA's Participation in Litigation and Mediation

Following this Court's decision in *In re New York City Policing During Summer 2020 Demonstrations*, 27 F.4th 792 (2d Cir. 2022), allowing the intervention of the PBA, that union and two other officer unions—the Sergeants Benevolent Association (SBA), and the Detectives' Endowment Association (DEA)—intervened in the consolidated cases seeking injunctive relief, ECF Nos. 468, 474, 729, 730. The PBA filed its answers to the complaints on May 31, 2022. *See* ECF Nos. 562–65. In its answers, the PBA did not raise any counterclaims against any of the dozens of plaintiffs in the consolidated cases, or any crossclaims against any of the defendants. *Id*.

On July 8, 2022, Magistrate Judge Gabriel Gorenstein referred the parties to mediation through the Mediation Program of the United States District Court for the Southern District of New York. ECF No. 643. On July 28, 2022, the first session began with Mediation Supervisor Rebecca Price. JA at 149. There were well over 50 mediation sessions held over the course of a year. These meetings were attended by representatives from the plaintiffs, as well as the City of New York, and all three unions, including the PBA. The parties exchanged dozens of drafts of the settlement agreement. The PBA had access to these drafts of the agreement and the opportunity to comment.

While mediation continued, the plaintiffs and the City Defendants engaged in vigorous discovery, taking 140 depositions, producing and reviewing thousands of pages of documents and terabytes of video footage and engaging in extensive motion practice. The record developed in this litigation process informed the parties' understanding of the case and shaped the various settlement proposals that were exchanged through the mediation process. Meanwhile, the PBA attended no court conferences following its intervention, noticed no depositions, and designated no expert witnesses, despite having every opportunity to do so.

### C. The Plaintiffs, the City Defendants, and Two Union Interveners Reach a Settlement After Over a Year of Mediation and Good Faith Negotiations

On September 5, 2023, the individual plaintiffs, the Office of the Attorney General of New York, the City of New York, and two police unions (the SBA and the DEA), came to an agreement on the final settlement terms for all injunctive relief claims. The terms of the Settlement are tailored to ensure protestors, protest observers, and journalists' constitutional rights are protected while allowing the NYPD the ability to protect the safety of its officers and the general public. JA at 383–84. The Settlement terms represent policies that are based on sound policing principles used in other jurisdictions, memorialize policies and practices that the NYPD had previously developed for managing large-scale protests, and better incorporate those policies into new training for all police officers. For example, the Settlement memorializes existing NYPD policies on dispersal orders and certain uses of force, including pepper spray, baton strikes, and the use of bicycles to strike individuals. JA at 393–96 ¶¶ 61–68. This memorialization allows the plaintiffs to monitor the NYPD's adherence to those policies in oversight and bring appropriate court action if the NYPD does not substantially comply.

The Settlement also includes and updates the practice already in use by the NYPD of restricting lower-ranking officers' discretion to execute certain arrests at protests, known as "red-light/green-light." JA at 386–87 ¶¶ 28–29. As explained at a deposition of former Chief Stephen Hughes, the commanding officer of the Patrol *Borough of Manhattan South, the NYPD first implemented the red-light/green-

light practice in 2015, and Chief Hughes subsequently brought it to Manhattan in 2018. JA at 917, 934–38. It was implemented citywide after the initial week of George Floyd protests. JA at 938–40. Under this policy, line officers may only make "red-light" arrests, meaning arrests for low-level offenses like disorderly conduct, "[w]here a Captain (or individual of higher rank) makes the decision to authorize." JA at 386–87. For "green-light" offenses, including any felony offense and a wide array of misdemeanors including all misdemeanors involving violence, any NYPD officer can still arrest without prior authorization. *Id*. As Chief Hughes explained, this policy helps bring "clarity to the police officers when they take action and when they don't." JA at 938–39. The Settlement explicitly defines the offenses governed by the red light/green light approach and provides for updated training on it.[2]

The linchpin of the Settlement is the tiered approach to deploying officers to police protests. JA at 388–94. The tiered approach is based on best and current policing practices that utilize social scientific research on crowd psychology. Researchers and experts have recognized that sending too many police to peaceful protests can have the undesirable effect of escalating tensions between protestors and police leading to possible violence for both officers and protestors. JA at 464–67.

[2] The Settlement modifies which offenses constitute green-light and red-light offenses.

Under the tiered approach, protests presumptively start out in Tier One. JA at 389 ¶ 38. In Tier One, the NYPD shall only deploy protest liaisons—trained police officers selected from the NYPD's Community Affairs Bureau—who are responsible for "communicating with protesters, understanding the aims of protest organizers, communicating with protesters about how officers can facilitate those aims and the circumstances in which they cannot, and explaining to protesters any police action that is anticipated, imminent, or undertaken." *Id*. However, if a protest blocks traffic or temporarily blocks sidewalks, the NYPD may send patrol officers that are not protest liaisons to reroute traffic. JA at 390 ¶ 41.

The NYPD may either begin at, or move to, Tier Two if the NYPD official responsible for overseeing the protest response "reasonably believes that Green Light violations are imminent but have not yet occurred or that the FAA is so large or occurs in such a manner that creates a risk of obstructing access to critical infrastructure." *Id*. At this tier, "NYPD may station additional officers nearby but off-scene, and to the extent possible, out of view of protesters." JA at 391. In certain circumstances NYPD officials may also authorize the "stationing of additional resources on scene [if they] would deter the threat of property damage and/or violence." *Id*.

A protest begins at, or moves to, Tier Three "if there is individualized probable cause to arrest individuals who are engaged in Green Light offenses or authorized

Red Light offenses." *Id*. In this tier, officers may make targeted arrests of people involved in such criminal activities. *Id*. Here, specialized units, like the Strategic Response Group, can be utilized if necessary to conduct the targeted arrests. JA at 392.

Finally, a protest response can move to Tier Four if "protesters are seeking to gain unauthorized entry, or physically blocking others' entry, into a sensitive location or engaged in a criminal offense of trespass in the third degree or higher." *Id*. It is at this tier that NYPD officers can order the dispersal of the entire protest. JA at 393. Tier Four is the tier of last resort and can be triggered when de-escalation or targeted enforcement have been tried and have failed to work. JA at 392–93 ¶ 57.

The tiered system is flexible in that protests may start at Tier One, Two, or Three and can move upward or downward within the tiers based on the circumstances of the protest. JA at 388 ¶ 36.

Additionally, the Settlement provides for revised training and policies to improve the treatment of members of the press and legal observers. JA at 399–402. The Settlement also creates new requirements for written after-action reports for protests where significant enforcement activity occurs and a collaborative oversight committee to review the NYPD's response to protests and make recommendations on NYPD policies and procedures. JA at 403–16.

As explained in the declaration of Hassan Aden, a former police chief with over 36 years of law enforcement experience as an officer, on federal monitoring teams, and in nonprofit positions, JA at 460–62, the Settlement and its tiered approach incorporate advances in the standards for and latest research on policing mass demonstrations. JA at 464. The Settlement reflects "nationally accepted policing practices" including "engaging the community before and during the events [and] emphasizing de-escalation." JA at 463–64.

### D. The PBA Objects to the Proposed Settlement

After reaching agreement, the settling parties filed a Joint Motion to Dismiss with Prejudice pursuant to Fed. R. Civ. P. 41(a)(2), attaching the Settlement and asking the court to retain jurisdiction for the limited purpose of enforcing its terms. ECF No. 1099. The PBA opposed the motion to dismiss as well as the approval of the Settlement. ECF No. 1118. The PBA argued that because the settling parties asked the court to retain jurisdiction, the district court should apply the standard used to approve "consent decrees – that is, whether the terms are fair, reasonable and in the public interest." JA at 445.

In support of its objections, the PBA relied solely on the declaration of former NYPD Chief of Department Louis Anemone; it presented no other record to the district court. JA at 425–38. Chief Anemone was a member of the police department for 35 years and has been retired from policing for over two decades. JA at 427.

Chief Anemone speculated that the terms of the Settlement, in particular the tiered approach and the red light/green light policy, would increase safety risks to protestors, police officers, and the public. JA at 425–26. Beyond citing sources that generally explain two concepts—the Seven C's of Critical Incident Management and the Use of Force Continuum—Chief Anemone cited no research to support his conclusions. In response to the district court's order asking whether an evidentiary hearing was necessary, the PBA answered, "Chief Anemone's Declaration is sufficient to warrant rejection of the Proposed Settlement without a hearing." JA at 449–50.

On April 17, 2024, after hearing oral argument and giving the parties the "opportunity to say anything" relevant to the matter, JA at 989, the district court approved the Settlement as a consent decree, entered the stipulation of dismissal, and dismissed the plaintiffs' injunctive relief claims. SA 44–45. In May of 2024, the individual plaintiffs in the *Payne*, *Rolon* and *Gray* cases also settled their monetary claims with the City Defendants, and those claims for monetary damages were subsequently dismissed in each case. SA 46–58.

## SUMMARY OF ARGUMENT

The district court did not abuse its discretion in approving the Settlement and dismissing the plaintiffs' claims with prejudice. The district court considered the PBA's objection to the Settlement under each applicable standard, first, applying the Rule 41(a)(2) standard to determine if the PBA could establish legal prejudice

necessary to block a voluntary dismissal of claims (it could not); and second, separately and independently determining that the Settlement is a consent decree and considering whether it is fair, reasonable, and in the public interest in accordance with this Court's precedents in *Kozlowski v. Coughlin*, 871 F.2d 241 (2d Cir. 1989) and *S.E.C. v. Citigroup Global Mkts.*, 752 F.3d 285 (2d Cir. 1989).

The Supreme Court's decision in *Loc. No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501 (1986) ("*Firefighters*"), makes clear that the existence of the PBA's policy-based objections to the Settlement are not a basis to reject it. *Id.* at 529–30. As the Supreme Court explained, in examining a non-settling party's objection, be it an intervenor or original party, the question is whether the consent decree imposes duties upon the objecting party without its consent or disposes of any its claims. *Id.* The PBA does not even attempt to argue that the Settlement does so here.

For the same reasons, the PBA has not established the type of formal legal prejudice that would block a dismissal under Rule 41(a)(2). This Court has consistently defined prejudice sufficient to block a settlement in terms of the parties' legal rights and the costs of continuing litigation. The Settlement does not dispose of any of the PBA's claims (it did not bring any) or impose any additional legal duties or obligations on the PBA or its members. Nor does it adjudicate or determine the

lawfulness of any policies related to the conduct of officers during the summer 2020 protests, the very issue the PBA intervened to protect.

The district court diligently examined each of the considerations for the entry of a consent decree, carefully assessed the evidence of the public interest—including the PBA's concerns about officer and public safety—and concluded that the Settlement should be approved. In doing so, it reviewed the paltry record put in by the PBA that the Settlement would endanger officer and public safety and found it lacking. The PBA had the opportunity to ask for an evidentiary hearing and it expressly declined.

The district court's conclusion that the Settlement is fair, reasonable, and in the public interest is well-supported by the record. As the numerous studies from national policing organizations and experts and the deposition of NYPD officials in the consolidated cases made clear, the evidence in the record provided no basis to reject the Settlement on the basis of officer or public safety. *See, e.g.*, SA 34–38. The detailed agreement negotiated by the New York Attorney General, private plaintiffs, the City Defendants, including the NYPD, and two intervenor-defendant officer unions does not disserve the public interest and advances the parties' interests in public safety, the right to peaceful protest, the building of consensus between the members of the public and the NYPD, ensuring public safety, and protection of the public fisc.

Accordingly, this Court should affirm the district court's entry of the Settlement and voluntary dismissal.

## STANDARD OF REVIEW

This Court reviews the denial of a settlement agreement and dismissal under Rule 41(a)(2) for abuse of discretion. *S.E.C. v. Citigroup Global Mkts.*, 752 F.3d 285, 291 (2d Cir. 2014) (consent decree); *Camilli v. Grimes*, 436 F.3d 120, 123 (2d Cir. 2006) (dismissal).

## ARGUMENT

### I. The PBA Has Identified No Legal Error in the District Court's Approval of the Settlement

The PBA attempts to manufacture a legal error to disguise its request for this Court to override the district court's proper exercise of its discretion in approving the Settlement. But there is none. The district court applied the PBA's requested consent decree standard and determined that the Settlement is fair, reasonable, and in the public interest. The Court also independently considered the settling parties' request for dismissal under Rule 41(a)(2). In applying both standards, the district court followed this Court's precedent faithfully and fully considered the PBA's objections based on officer and public safety. This two-step analysis was favorable to PBA because it had a chance both to show legal prejudice (it could not) and to argue that the settlement is unfair, unreasonable or not in the public interest for reasons of

officer safety or any other reason (again it could not). There is no error for this Court to correct.

### A. The District Court Applied the Correct Legal Standard for a Consent Decree, Which Does Not Entitle the PBA to a Veto

In the district court, the PBA argued that the Settlement is a consent decree, *see* JA at 445, and the district court agreed.[3] Accordingly, the court considered the Settlement under the applicable standards set forth in both *Kozlowski v. Coughlin*, 871 F.2d 241 (2d Cir. 1989), and *Citigroup*, 752 F.3d at 285. SA 5 ("I conclude that the Settlement satisfies the standards of both *Kozlowski* and *Citigroup*, which means it should be approved notwithstanding the objections of the PBA.").[4]

*Kozlowski* instructs that a consent decree should be approved if it 1) "spring[s] from and serve[s] to resolve a dispute within the court's subject-matter jurisdiction," 2) "come[s] within the general scope of the case made by the pleadings," and 3) "further[s] the objectives of the law upon which the complaint was based." 871 F.2d at 244 (quoting *Firefighters,* 478 U.S. at 525). The district court held that the Settlement plainly meets this standard, SA 5, 30 n. 9, and the PBA does not even address the *Kozlowski* standard in its brief or argue otherwise.

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[3] In the district court, the Payne plaintiffs-appellees argued that the Settlement is not a consent decree, *see* SA 21, but do not renew that argument here.

[4] Because the district court considered the propriety of the Settlement under both *Kozlowski* and *Citigroup*, its decision should be affirmed even if this Court determines that *Citigroup* does not apply.

As the Attorney General's office is involved as a plaintiff, the district court also applied the analysis in *Citigroup*, which provides that approval of a consent decree involving a government enforcement agency "requires that the district court determine whether the proposed consent decree is fair and reasonable, with the additional requirement that the public interest would not be disserved, in the event that the consent decree includes injunctive relief." 752 F.3d at 294 (cleaned up). "Absent a substantial basis in the record for concluding that the proposed consent decree does not meet these requirements, the district court is required to enter the order." *Id.* In considering fairness and reasonableness, district courts should determine the "basic legality of the decree," the clarity of the decree's terms, "whether the consent decree reflects a resolution of the actual claims in the complaint," and whether there was any improper collusion among the settling parties. *Id.*

The district court faithfully applied this standard here, reviewing the legality of the decree, SA 27–28; finding that its terms are clear and detail both the City's responsibilities under the decree and the enforcement mechanisms, SA 28–29; and that the Settlement resolves the claims in the consolidated complaints and was not tainted by improper conclusion or corruption. SA 30. Further, as detailed below, the Court extensively considered the public interest, including, among other factors, public and officer safety, and protection of the public fisc from the mounting costs

of litigation and risk of significant money judgments and the imposition of a possible monitor.

The PBA contends that the district court should not have applied *Citigroup* as that case did not involve an intervenor-defendant objecting to settlement, but its argument is misplaced. Br. for Intervenor-Defendant-Appellant (PBA Br.) at 34–35 The fact that an intervenor is involved does not create a different standard for reviewing entry of a consent decree. *Firefighters*, 478 U.S. at 528. In *Firefighters,* the Supreme Court considered an intervenor-union's objections to a proposed consent decree between the plaintiffs and the municipal defendant in a Title VII discrimination case, holding that "while an intervenor is entitled to present evidence and have its objections heard . . . on whether to approve a consent decree," it cannot block a decree merely by withholding its consent. *Id.* at 528; *Kirkland v. New York State Dep't of Corr. Servs.,* 711 F.2d 1117, 1128 (2d Cir. 1983) (intervenors in Title VII have right "to be heard on the reasonableness and legality of the agreement" but objections cannot block entry). As the Supreme Court explained: "It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation." *Firefighters,* 478 U.S. at 528–29. Applying that standard, the Court held that because the union had not brought any cross- or

counter-claims, its policy-based objections to the consent decree could not prevent its adoption. *Id.* at 529–30.

Significantly, the Supreme Court made clear in *Firefighters* that the threshold question for a court in examining a non-settling party's objection is whether the consent decree imposes duties upon the objecting party without its consent or disposes of any its claims. *Firefighters*, 478 U.S. at 529–30; *see also Texas v. New Mexico,* 144 S. Ct. 1756, 1765 (2024) (explaining that in deciding "whether to approve the States' proposed consent decree over the Federal Government's objection[], [t]he relevant questions under our precedents are whether the United States has valid Compact *claims* and whether the proposed consent decree would dispose of those *claims*") (emphasis supplied). In *Firefighters*, the union's objections were to the "wisdom" and "necessity of the consent decree," 478 U.S. at 512, but not with respect to any claims that the union had, as it did not press any, *id.* at 530, and thus could not block the entry of the decree.

Further, the cases the PBA cites in support of its claim that the district court misapplied *Citigroup* are from outside of this Circuit and, in any case, none support its point.[5] In *United States v. Miami*, 664 F.2d 435 (5th Cir. 1981), the Fifth Circuit

[5] The PBA's citation to *United States v. Albuquerque*, No. Civ. 14-1025, 2020 WL 3129825, at * 69 (D.N.M. June 12, 2020), is particularly misplaced as the *dicta* quoted by the PBA related to intervention under Rule 24 and not the entry of a consent decree.

considered a proposed consent judgment under Title VII and concluded that it caused legal prejudice to the defendant police union members' legally protected interests in the promotion procedure that was part of the police union's contract with the City and therefore modified the consent decree to exclude the provision that implicated the police promotion and otherwise entered the decree without a finding of liability. *Id.* at 447–48. *Williams v. Vukovich*, 720 F.2d 909 (6th Cir. 1983), involved a class action with requirements for the approval of settlement not at issue here. But even so, the Sixth Circuit's conclusion that "[j]udicial approval, therefore, may not be obtained for an agreement which is illegal, a product of collusion, or contrary to the public interest" is not in conflict with this Court's standard in *Citigroup* and the PBA does not argue that the Settlement is illegal or a product of collusion. 720 F.2d at 920.[6]

[6] The PBA also cites *Frew ex. rel. Frew v. Hawkins*, 540 U.S. 431, 441 (2004), a case in which the Supreme Court held that a consent decree validly entered under federal law may be enforced against state officials consistent with the Eleventh Amendment, to suggest that courts should be concerned about decrees that constrain executive officials. PBA Br. 37. Significantly, the *Frew* court invoked the same standard for the *entry* of consent decrees, at issue here, explaining that a "federal consent decree must spring from, and serve to resolve, a dispute within the court's subject-matter jurisdiction; must come within the general scope of the case made by the pleadings; and must further the objectives of the law upon which the complaint was based." *Id.* at 437. As this Court has observed, "[t]hese three conditions are sufficient even if the decree contains broader relief than the court could have awarded after trial." *Kozlowski*, 871 F.2d at 244.

The PBA further attempts to muddy the waters as to the standard for review of a consent decree by wrongfully relying on *dicta* in cases that discuss the standards by which *permanent injunctions* should issue. PBA Br. 31 (citing *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010) and *Ebay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006)). Consent decrees are of a different nature than permanent injunctions imposed by a court. In the latter, remedies are designed by the court and function directly as an exercise of judicial power. By contrast, "[a] consent judgment, though it is a judicial decree, is principally an agreement between the parties." *S.E.C. v. Levine*, 881 F.2d 1165, 1178 (2d Cir. 1989)*; see also Firefighters*, 478 U.S. at 519 (emphasizing that consent decrees "closely resemble contracts" and are not to be treated as "judicial decrees in all respects and for all purposes"); *S.E.C. v. Wang*, 944 F.2d 80, 84 (2d Cir. 1991) (discussing that "while a consent judgement is a decree of a court, it represents the parties' agreement"). The Court should not permit the PBA to conflate consent decrees with permanent injunctions when this Court and the Supreme Court have been clear that they are treated differently.

Here, as in *Firefighters*, the Settlement "does not bind [the PBA] to do or not do anything. It imposes no legal duties or obligations on the Union at all" and does not "purport to resolve any claims the [PBA] might have." 478 U.S. at 529–30; *see also Sierra Club v. North Dakota*, 868 F.3d 1062, 1067 (9th Cir. 2017) (finding that

consent decree did not dispose of intervenor-States' claims and noting "[n]owhere in the Consent Decree are the States' claims or grievances identified or even referenced"); *Johnson v. Lodge #93 of Fraternal Ord. of Police*, 393 F.3d 1096, 1107 (10th Cir. 2004) (finding that union-intervenor could not show that the consent decree "adversely affects any of its legal rights" as it "does not bind FOP to do or not to do anything, nor does it impose any legal obligations on FOP"). The PBA had the opportunity to participate in the settlement process and present its evidence and objections to the district court. It did so, and the district court, applying this Court's relevant precedent under *Kozlowski* and *Citigroup*, found those objections lacking. There was no error of law.

### B. The District Court Was Not Required to Make Factual Findings in Support of its Approval of the Settlement Agreement

The PBA complains that the district court approved the Settlement without a finding that the NYPD's conduct at the 2020 demonstrations and prior policies were likely to lead to constitutional violations. PBA Br. 36. But this Court has expressly rejected such a requirement, holding that it is an abuse of discretion for a court to require parties to establish the truth of any allegations as a condition for approval of a consent decree. *Citigroup*, 752 F.3d at 295. This is for good reason because it is the "the agreement of the parties, rather than the force of law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Firefighters*, 478 U.S. at 522; *see also U.S. ex rel. Anti-Discrimination Ctr. of*

*Metro New York, Inc. v. Westchester Cnty.*, 712 F.3d 761, 772 (2d Cir. 2013) ("In entering into the consent decree, the County chose to bind itself to these terms rather than have the District Court adjudicate the merits.") (internal quotation marks and citation omitted).

Further, in this context and especially given that the PBA had the opportunity to contribute to the factual record undergirding the mediation process that led to the Settlement, it was not entitled to an evidentiary hearing. SA 8–9, 35; *Firefighters*, 478 U.S. at 528–29; *Citigroup*, 752 F.3d at 296 (holding that the parties' "copious submissions," including written and oral answers to the court's questions regarding the proposed settlement, constituted a sufficient record for the district court to find the proposed decree was "fair and reasonable"); *United States v. Wood, Wire & Metal Lathers Int'l Union, Loc. Union No. 46*, 471 F.2d 408, 415–16 (2d Cir. 1973) (holding union party "suffered no unfairness" in the absence of an evidentiary hearing because it presented affidavits and documents and then "declined the court's invitation to submit further documentary evidence"). The cases the PBA cites, *see* PBA Br. 46, are inapposite, as those cases concern neither consent decrees nor settlement agreements.

In fact, the district court asked the PBA whether it wanted an evidentiary hearing. ECF No. 1109. The PBA expressly declined to ask for one. JA at 445–50 ("[W]e believe the PBA's showing [in this brief] and in Chief Anemone's Declaration is

sufficient to warrant rejection of the Proposed Settlement without a hearing."). This constitutes waiver. *See Doe v. Hotchkiss Sch.*, No. 20-2778-CV, 2022 WL 211699, at *2 (2d Cir. Jan. 25, 2022) (holding party waived evidentiary hearing regarding settlement agreement when his attorney disclaimed need for hearing when asked by the court).

Neither this Court nor the Supreme Court require district courts to put on evidentiary hearings for a party that has declined to request such a hearing. *See, e.g.*, *Spallone v. United States*, 487 U.S. 1251, 1254 (1988) (holding the district court did not abuse its discretion by not holding an evidentiary hearing where the proponent party had previously rejected the court's offer for one); *Compania Del Bajo Caroni (Caromin), C.A. v. Bolivarian Republic of Venezuela*, 341 F. App'x 722, 726 (2d Cir. 2009) (holding district court did not err where the proponent party failed to request an evidentiary hearing, further noting that the decision to hold evidentiary hearing in the first instance is left to the district court's discretion); *Wubayeh v. City of New York*, 320 F. App'x 60, 62 (2d Cir. 2009) (holding party waived argument regarding evidentiary hearing when they "failed to request such a hearing prior to district court's ruling").

### C. The District Court Was Correct to Hold that Rule 41(a)(2) Does Not Grant the PBA Veto Power Over the Settlement Based on Its Interest in Officer Safety

The PBA's attempt to manufacture legal error fares no better under Rule 41(a)(2). As this Court has explained, a non-settling defendant generally does not have standing to object to a court order approving a voluntary settlement, except "where it can demonstrate that it will sustain some formal legal prejudice as a result of the settlement." *Zupnick v. Fogel*, 989 F.2d 93 (1992) (quoting *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 (9th Cir. 1987)). "This rule advances the policy of encouraging the voluntary settlement of lawsuits." *Bhatia v. Piedrahita*, 756 F.3d 211, 218 (2d Cir. 2014). In considering the objections of the PBA, the district court properly analyzed whether the Settlement would subject it to "legal prejudice," SA 13–14, and concluded that it did not, as it does not extinguish any claims by the PBA (it did not bring any) or prevent the later assertion of any claims it might have. SA 15–16. Nor does the Settlement infringe on the union's contract or collective bargaining rights in any way. *Id.* at 15.

Despite clear legal precedent to the contrary, the PBA argues that its ongoing concerns about officer safety qualify as legal prejudice but they do not. PBA Br. 20. The PBA's attempt to analogize its policy preferences and its disagreement with the voluntary adoption of certain policies by the NYPD to "formal legal prejudice" under Rule 41(a)(2) is radical and lawless. This Court has consistently defined prejudice sufficient to block a settlement in terms of the parties' legal rights and costs of continuing litigation. *See Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 92 (2d

Cir. 2019) (holding that a third party defendant did not have standing to appeal a dismissal pursuant to Rule 41(a)(2) because the settlement had not "formally strip[ped]" the third party of any claim or defense"); *Bhatia*, 756 F.3d at (holding that "a settlement which does not prevent the later assertion of a non-settling party's claims . . . does not cause the non-settling party 'formal' legal prejudice"); *Kwan v. Schlein*, 634 F.3d 224, 231 (2d Cir. 2011) (concluding that there was no legal prejudice to dismissal of counterclaims because it did not foreclose determination of ownership, which already had been made). This reasoning is consistent with the reasoning of its sister circuits that have considered the standard under Rule 41(a)(2), finding that "legal prejudice" relates to the impact the dismissal has on any claims or defenses of the non-settling party. *See, e.g.*, *Pedreira v. Sunrise Children's Servs., Inc.*, 79 F.4th 741, 751 (6th Cir. 2023) (finding no legal prejudice to non-settling defendant where "Sunrise has not identified any claims or defenses that would be foreclosed by dismissal"); *Kellmer v. Raines*, 674 F.3d 848, 851 (D.C. Cir. 2012) (losing the opportunity for a favorable final disposition of the case is not legal prejudice); *Cnty. of Santa Fe, N.M. v. Pub. Serv. Co. of New Mexico*, 311 F.3d 1031, 1048 (10th Cir. 2002) (finding legal prejudice where settlement would eliminate the intervenor-plaintiff's ability to prosecute the claim); *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 248 (7th Cir. 1992) (rejecting argument that public policy concerns could create plain legal prejudice).

The adoption of certain policies— particularly those that are within the labor management rights of the NYPD and do not implicate any of the union's contractual rights— does not dispose of any claims of the intervenor PBA (it did not raise any) or impose any additional legal duties or obligations on the PBA's members. There has been no adjudication or determination of liability related to the conduct of officers during the summer 2020 protests and the dismissal here puts the PBA in the same position as if no cases had been filed—there is no judgment declaring certain policies or conduct unlawful and the PBA retains whatever legal rights it might have to bring claims related to those policies.

Unable to point to any legal prejudice as defined by this Court or any other court, the PBA attempts to argue that *any* cognizable interest for purposes of intervention is sufficient to establish formal legal prejudice, PBA Br. 28–29, but this proves too much as it would allow any intervening party to block a settlement. Courts have resisted expanding the concept of formal legal prejudice to encompass other legal injuries. *See generally Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir. 1983) (explaining that injury in fact for purposes of standing, "such as the prospect of a second lawsuit or the creation of a tactical advantage is insufficient to justify denying the plaintiff's motion to dismiss" under Rule 41). The focus on the legal prejudice to possible claims and legal rights to a non-settling defendant makes sense, as to hold otherwise would impose significant costs and prejudice to the other

parties, forcing them to spend massive amounts and undertake litigation risks for claims they seek to settle. The settling parties have already expended significant resources in the discovery phase. They have also engaged in a years-long mediation process in which the PBA had the opportunity to participate at every stage. SA 35; JA at 904–05. Here, the district court properly accounted for prejudice to other parties if the case is not dismissed—by compelling the City to defend at trial and parties to incur significant additional unnecessary litigation risks and costs—which PBA does not address.

The cases the PBA relies on do not support its radical view of "formal legal prejudice." In *Bangor v. Citizens Communications Co.*, 532 F.3d 70 (1st Cir. 2008), the First Circuit made the unremarkable conclusion that a non-settling defendant in a CERCLA action is affected by a settlement as "potentially responsible parties" subject to specific legal duties under that statute. *Id.* at 93. The Tenth Circuit also considered whether the non-settling defendants had standing in terms of whether they could show "plain legal prejudice," in *New England Health Care Emps. Pension Fund v. Woodruff*, 512 F.3d 1283, 1288 (10th Cir. 2008), and found that they could do so, as the settlement would strip them of their contribution and indemnification rights. *See id.* at 1289 (explaining that "the Bar Orders that eliminate certain independent claims and claims against non-parties, essentially strip, and, in any

event, palpably interfere with, Mr. Nacchio and Mr. Woodruff's preexisting rights and potential legal claims.").

The PBA cites *Zupnick v. Fogel*, 989 F.2d 93 (1992), PBA Br. 24, for the proposition that district courts "have a duty to protect the rights of the parties before them," but omits the end of the sentence that requires a non-settling litigant to show that it "can demonstrate that it will sustain some formal legal prejudice as a result of the settlement." *Zupnick*, 989 F.2d at 98. This is the very standard the district court applied to the PBA's objections. None of these cases expand the scope of "formal legal prejudice" beyond the scope of legal claims and contract or property rights to reach the full breadth of interests that could support intervention under Rule 24.

As in *Zupnick*, there is no legal prejudice to the PBA here as the Settlement does not compromise any claims that the PBA may have against the City or extinguish any other rights it has with respect to its members. *Id.* at 97-98; *see also New Mexico ex rel. Energy & Mins. Dep't, Min. & Mins. Div. v. U.S. Dep't of Interior*, 820 F.2d 441, 445 (D.C. Cir. 1987) (finding no prejudice to intervenor Navajo Tribe of Indians from dismissal under 41(a)(2) of complaint because intervenor "suffered no claim or issue preclusion from the dismissal of the complaint" and noting that while the Tribe's concerns had been ignored by the settling parties, it could bring whatever claims it might have in the future).

Further, although the PBA purports to appeal from the dismissal of the private plaintiffs' damages claims, JA 319–35, it makes no arguments as to how it faces any prejudice, let alone formal legal prejudice, from the dismissal of such claims. *See In re New York City Policing During Summer 2020 Demonstrations*, 27 F.4th 792, 804 n.4 (2d Cir. 2022) (noting that the PBA had not shown a cognizable interest in actions that seek only damages against certain defendants). The PBA did not represent any of the individual defendants and has not alleged that resolution of the monetary claims against them impairs the PBA's interest in officer safety. In fact, it is just the opposite, as the orders of voluntary dismissal expressly disclaim any finding of liability or that any challenged conduct was unlawful. SA 47, 50, 52, 56. As the PBA does not address the dismissal with prejudice of the damage claims in any way, it has waived any objection. *See JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418, 428 (2d Cir. 2005) ("[A]rguments not made in an appellant's opening brief are waived even if the appellant ... raised them in a reply brief . . . .").

The district court ruled correctly that the PBA did not have veto rights over the Settlement. At bottom, that is still what the PBA seeks here. Because it has failed to show *any* legal prejudice from the voluntary dismissal of the claims, the PBA lacks standing to challenge the district court's ruling under Rule 41(a)(2).

### D. The District Court Properly Considered Officer Safety in Approving the Settlement

The PBA falsely claims that the court held that Rule 41(a)(2) "forbade" it from "considering the PBA's interest," PBA Br. 23, and treated officer safety as "irrelevant." PBA Br. 26; *see also id.* at 33. The district court did not do that. In fact, the court did consider the PBA's interest in officer safety in assessing whether the settlement agreement should be approved. SA 34–38.

To support its point, the PBA selectively quotes the opinion below to avoid the court's actual analysis. The court did not decline to consider the PBA's objections but merely explained *how* it would do so: "Thus, the PBA's 'substantive adequacy' arguments are not properly considered by the court, and I decline to consider the PBA's arguments addressed to the substantive merits of the proposed Settlement — except insofar as they are relevant to an assessment of the public interest, an issue to which I now turn." SA 33. If the PBA's complaint is that the district court did not consider officer safety in the precise formulation the PBA would have preferred, it fails to explain how that was reversible legal error. Whether categorized as a factor in the test for consent decrees or as an exercise of the court's residual equitable powers under Rule 41(a)(2), the outcome is the same: the evidence in the record as to the PBA's contention that the Settlement would endanger officer and public safety was weighed, and the district court found it lacking.

That evidence consisted solely of the opinion of former NYPD Chief of Department Louis Anemone. JA at 425. The district court carefully reviewed Chief

Anemone's opinion as well as the evidence submitted by the settling parties: the declaration of Chief Hassan Aden, a former police chief and monitor for several federal settlements; supporting academic literature and exhibits, including reports and studies from the Police Executive Research Forum, National Policing Institute, and the U.S. Department of Justice; and the deposition testimony of NYPD officials in the consolidated cases. *See, e.g.*, SA 34–38. In doing so, the district court weighed both the quantity and the quality of the evidence and concluded that it "is overwhelmingly to the effect that the procedures proposed here – most especially tiered response – are neither novel nor untested, and are consistent with what is considered best practice policing at FAAs today." SA 38. The PBA's failure to establish that the district court abused its discretion in weighing these matters is addressed in Part II, *infra*, but the fact that it did weigh them means that the PBA's primary claim of legal error is an illusion.

## II. The District Court's Decision to Approve the Settlement Was a Proper Exercise of Its Discretion

As there was no legal error, this Court reviews the district court's approval of the Settlement for abuse of discretion. *See, e.g.*, *In re Sept. 11 Prop. Damage Litig.*, 650 F.3d 145, 151 (2d Cir. 2011). Abuse of discretion is a highly deferential standard. *Lore v. City of Syracuse*, 670 F.3d 127, 155 (2d Cir. 2012) ("The hallmark of abuse-of-discretion review is deference." (citing *General Electric Co. v. Joiner*, 522 U.S. 136, 143 (1997))); *Patterson v. Newspaper & Mail Deliverers' Union of New*

*York & Vicinity*, 514 F.2d 767, 771 (2d Cir. 1975) ("[T]he appellate court should intervene only on a clear showing that the trial judge was guilty of an abuse of discretion." (citing *State of W. Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir. 1971))). "When a district court is vested with discretion as to a certain matter, it is not required by law to make a *particular* decision. Rather, the district court is empowered to make a decision—of *its* choosing—that falls within a range of permissible decisions." *Zervos v. Verizon New York, Inc.*, 252 F.3d 163, 168–69 (2d Cir. 2001).

That deference is amplified here by federal policy favoring consent decrees and the general principle that settlements ordinarily should be approved. *Wang*, 944 F.2d at 85 (acknowledging the "strong federal policy favoring the approval and enforcement of consent decrees[]"). Moreover, as the district court correctly held, in determining whether a consent decree disserves the public interest, courts owe some deference to the policy judgments of the settling parties in their conclusions as to which policies *best* serve the public interest. *Citigroup*, 752 F.3d at 296.[7] In agreeing

[7] The PBA claims that the district court's deference in this regard was legal error, but it was not, as this Court made clear in *Citigroup*. 752 F.3d at 296. This is especially true here where the Settlement, which was carefully and rigorously negotiated among the government on both sides, private plaintiffs, and two police officer unions "represents a compromise between parties who have waived their right to litigation and, in the interest of avoiding the risk and expense of suit, have 'give[n] up something they might have won had they proceeded with the litigation . . . .'" *Berger v. Heckler*, 771 F.2d 1556, 1568 (2d Cir. 1985) (citation omitted). Even if the PBA

to the Settlement, the City of New York, including the NYPD, the New York Attorney General, and the two other police union intervenors determined that the Settlement serves the public interest. *Cf. In re Cuyahoga Equip. Corp.*, 980 F.2d 110, 118 (2d Cir. 1992) (holding that, where a consent decree results from negotiations between an administrative agency and private parties, it is owed "twofold deference" on the bases of (i) the agency's expertise and the parties' voluntary agreement and (ii) the informed discretion of the trial court that approved the settlement).

The district court acted well within its discretion in approving the Settlement. The district court's decision was based on a careful and thorough review of the record and a comprehensive assessment of all the relevant factors. As an initial matter, the PBA's narrow focus on officer safety (even with the addition of "public safety" on appeal) provides at best an incomplete assessment of the public interest. On that basis alone, the PBA falls short of meeting its burden to show abuse of discretion. Second, its speculative claims of threats to officer and public safety rest on feeble and flawed evidence and rely on mischaracterizations of the Settlement. Finally, even if the Court could find grounds for disagreeing with the district court's assessment of the merits of the PBA's claims, the substitution of its judgment for both the district court's and the settling parties' would amount to the imposition of the PBA's

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were correct that there was some legal error in affording this degree of deference, however, any error is harmless as the PBA could not meet its burden even in the absence of such deference.

policy preferences on the parties, something this Court has made clear it has no power to do. The PBA thus did not demonstrate any substantial basis for the district court to find the Settlement was unfair, unreasonable, or disserved the public interest, nor did it otherwise provide any compelling reason to reject the Settlement.

### A. The PBA Ignores the Broader Public Interest Served by the Settlement

As the district court correctly observed, the "public interest" is a broad concept that includes but is not limited to officer safety, encompassing "the right to peaceful protest, the building of consensus between the members of the public and the NYPD, ensuring public safety, and protection of the public fisc—from the ever-mounting cost of the current litigation in this case; from the possibility of defeat at trial and the risk of a massive money judgment; from the possible imposition of a monitorship, which would not be out of the question if the plaintiffs were to prevail at trial and which carries considerable cost to implement; and quite possibly from lawsuits down the road, as better trained officers respond more appropriately to demonstrators." SA 38. The district court properly weighed all of these factors—alongside officer safety, *see supra* Part I—in determining that the Settlement was fair, reasonable and in the public interest.

Because of the PBA's myopic (and hyperbolic) focus on officer safety, it failed to engage with any of these other factors in the district court—as that court expressly found, *see* SA 38—and again fails to address them on appeal. The PBA's

incomplete presentation simply does not present any meaningful argument about the public interest to this Court whatsoever, let alone provide a basis for suggesting the district court abused its discretion in weighing the various factors relevant to assessing whether to approve the Settlement. This failure is dispositive of the PBA's abuse of discretion argument. This Court has previously emphasized the importance of deferring to district courts' balancing of various factors relevant to assessing settlements. *See Patterson,* 514 F.2d at 771 ("Nor should we substitute our ideas of fairness for those of the district judge in the absence of evidence that he acted arbitrarily or failed to satisfy himself that the settlement agreement was equitable to all persons concerned and in the public interest."). The same principle applies here.

The blind eye the PBA turns to the public interest as a whole is particularly galling in light of the harms the Settlement is poised to address. The story of this case begins on May 25, 2020, when a police officer knelt on the neck of an unarmed man named George Floyd—arrested on a charge of using a counterfeit $20 bill—until the officer killed him. The plaintiffs in these consolidated actions consist of protestors, protest observers, and journalists who engaged in no wrongdoing and were violently harmed in the NYPD's response to the ensuing protests in New York City during the Summer of 2020. Much of this harm was recorded on video and multiple government investigations—including by the New York Attorney General, the New York City Department of Investigation, and the New York City Corporation

Counsel—confirmed egregious abuses as well as the failures of policy that contributed to them.[8] The PBA's brief does not even gesture at, let alone address, the public interests served by this ensuing Settlement, which is the fruit of negotiations among the New York Attorney General, the Corporation Counsel, the NYPD itself, and two other police unions and memorializes many of the policy changes recommended by the official investigations into the events of 2020. On the basis of the PBA's utter failure to engage with the public interests served by the Settlement, as well as the full breadth of factors relevant to the district court's discretionary ruling, this Court should affirm.

### B. The PBA Cannot Meet Its Burden to Show a Concrete Threat to Officer or Public Safety Sufficient to Disturb the District Court's Exercise of Discretion

[8] Both governmental and non-governmental agencies assessed the NYPD's response to the protests and found it troubling. As an example, the New York City Department of Investigation issued a report on the NYPD's response finding that, in addition to excessively using force, "[t]he Department itself made a number of key errors or omissions that likely escalated tensions" including using "disorder control tactics and methods." The City of New York Department of Investigation, *Investigation into NYPD Response to the George Floyd Protests* (December 2020) at 30, https://www.nyc.gov/assets/doi/reports/pdf/2020/DOIRpt.NYPD%20Reponse.%20GeorgeFloyd%20Protests.12.18.2020.pdf (last accessed August 26, 2024). "These deployments, tactics, and shows of force may have unnecessarily provoked confrontations between police and protesters," including, "instances where NYPD officers acted indiscriminately as between lawful, peaceful protesters and unlawful actors, thereby exercising force beyond what was necessary under the circumstances." *Id.* at 36.

Even if the Court were to replicate the PBA's error and reduce the relevant discretionary factors to an assessment of officer and public safety, the PBA has not met and cannot meet its burden to show any concrete threat sufficient to warrant reversal of the district court's decision. The only record the PBA submitted to the district court was the declaration Chief Anemone, but he offered no empirical grounding for his speculative fearmongering and systematically mischaracterized the terms of the Settlement. Moreover, his conclusions were contradicted by the weight of the evidence. These flaws— each of which are discussed in more detail below— conclusively demonstrate that the PBA failed to provide the district court with a basis for rejecting the Settlement and fails to present any legal basis for reversing the district court's exercise of discretion in doing so.

First, the district court's determination that "Chief Anemone's evidence and opinions are out of date," SA 36, and that his affirmation "evidences no familiarity with how policing has evolved over the past quarter century[—]or with the fact that many of the proposals in the Settlement … reflect procedures that the NYPD adopted in the intervening years since his retirement," *id.*—is dispositive. The PBA's

arguments to this Court rest entirely upon Chief Anemone's flawed declaration and are thus legally insufficient to justify reversal of the district court's decision.[9]

The district court did not abuse its discretion in reaching this determination. As the court below found, Chief Anemone has not served as a police officer for the last twenty-five years, nor did he provide any indication that he has kept current with protest policing best practices. *See* SA 36; JA at 426–27 ¶¶ 7–12. The district court took note of Chief Anemone's numerous false assumptions about and fundamental misunderstandings of the terms of the Settlement, *see* SA 28, 36, 38,[10] as well as his

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[9] On appeal, the PBA attempts to expand its record beyond Chief Anemone's declaration in ways that further underscore the lack of evidentiary support for its positions. For example, the PBA misleadingly quotes statements from this Court's intervention decision that merely describe the PBA's own unsupported characterizations of the 2020 protests, representing them as if they were factual findings of the Court. PBA Br. 9. Flailing, the PBA also cites to *New York Post* articles, *see, e.g.*, PBA Br. 9–10, and other news reports about more recent protests, *id.* at 41, as if these were evidence. But these articles are not evidence. Moreover, the articles were not before the district court and thus give this Court no grounds for reversal of the decision below.

[10] Although it was only one of several such errors, Chief Anemone's inability or unwillingness to comprehend the substantial discretion the police retain under the Settlement to flexibly respond to changing conditions at protests was of particular note to the district court. *Compare* JA at 430, 432–33 (Anemone Decl. ¶¶ 24, 33–34) *with* JA at 485–86 (Settlement ¶¶ 40–41) (discretion to deploy protest liaisons and traffic control officers in any tier); *Id.* at 487 ¶ 46 (discretion to deploy officers "nearby but off-scene" if there is a "reasonable belief" that there will be serious offenses or obstruction of critical infrastructure); *Id.* ¶ 47 (allowing deployment of officers in Tier 2 to address specific risks of property damage or violence); *Id.* at 487–88 ¶¶ 49, 51, 53 (authorizing the deployment of officers needed to make arrests on probable cause including, where necessary, SRG officers); *Id.* at 488–90 ¶¶ 56–

lack of awareness that many of the policies and practices he criticized had long been NYPD policy.[11] Much of his declaration "nitpick[ed]" the wording of several provisions in the Settlement, SA 28, *see, e.g.*, JA at 434–37, but, as the district court noted, "any lack of clarity about the terminology used in the Settlement will be eliminated by the drafting of actual policy directives." SA 29. For all of these reasons, the district court correctly found that Chief Anemone's declaration did not amount to a substantial basis on the record to decline to enter the Settlement. SA 38.

Second, the PBA's position was soundly refuted by the overwhelming weight of the evidence. Chief Aden detailed how community engagement before and during

63 (discretion to deploy officers to disperse a crowd where unlawful acts cannot be controlled through targeted arrests). Some of his more egregious errors suggested he spent little time reading the Settlement. For example, he claimed that paragraph 41 would result in "officers not being allowed to use personal protective equipment without approval," JA at 433–34 (Anemone Decl. ¶ 35), when it merely states that when officers are dispatched for traffic control purposes they should not be equipped with zip-ties and other specialized equipment used for mass arrests.

[11] To provide just one of several examples, Chief Anemone's criticisms evinced a lack of understanding that deployment decisions have long been made by (often off-site) senior leadership in the Operations Division and/or the Chief of Department's Office, including during the 2020 protests. *See, e.g.*, JA at 970-71, 974 (Terence Monahan Dep. 20:18–21:15, 139:3–12, June 9, 2023) (testifying regarding the deployment of personnel during the 2020 protests). The PBA doubles down on this error on appeal, leading their criticism of the Settlement with several pages attacking the red light/green light policy, which requires the approval of someone at the rank of Captain or above before officers may arrest protesters for specified offenses. PBA Br. 38–40. This policy was in place prior to the Settlement, which merely makes adjustments to and clarifications of its scope, a critical distinction that the PBA's broadside attack on the policy overlooks. *See* SA 36

protests, an emphasis on de-escalation, minimizing the use of mass arrests in favor of focused enforcement action, a "graded" or multitiered response system, and a process for review and improving police response to protests are all current, nationally accepted policing best practices reflected in the Settlement. JA at 469–73. These practices foster communication between police and protesters and are aimed at preserving First Amendment rights while avoiding the cycles of tension and violence more commonly associated with the escalated force model the PBA and its expert support.

On appeal, the PBA mischaracterizes the reasoning of the district court, stating that "[b]y forging ahead with the consent decree, the district court merely showed a preference for one piece of paper to another." PBA Br. 46 (citation omitted). Not so. In its order, the district court described at length, not "merely" Chief Aden's opinions, which draw from his broad and deep experience as both a police chief and an expert consultant to departments across the nation, but also a wealth of reports and studies published by the Department of Justice, presidential commissions, and other sources undergirding Chief Aden's assessment of the Settlement, SA 34, 36–38, as well as the Corporation Counsel's own far more credible refutation of the PBA's position on behalf of the NYPD itself, SA 38. Indeed, as the district court noted, not only the NYPD, but also the New York Attorney General and the two other police union intervenors have embraced the Settlement, SA 34, affirming the

merits of these modern policing practices and revealing the PBA as holding fringe positions even amongst its more traditional allies. It was on these many bases that the district court correctly concluded that "[t]he evidence in the record is overwhelmingly to the effect that the procedures proposed here [–] most especially the tiered response [–] are neither novel nor untested, and are consistent with what is considered best practice policing at FAAs today[]" and that Chief Anemone's unsupported insistence to the contrary did not form a "substantial basis in the record" for declining to enter the Settlement. SA 38; *Citigroup*, 752 F.3d at 294. To the contrary, were the district court to have credited the PBA's purely speculative objections over all of the contrary evidence, that likely *would* have been abuse of discretion. *See Citigroup,* 752 F.3d 285 at 297 (holding the district court committed legal error where it made no factual finding that a consent decree's injunctive measures would disserve the public interest but declined to enter the decree based on policy disagreements).

### C. The PBA's Policy Disagreements Are Not Grounds to Reverse the District Court's Decision

Lacking any evidentiary basis for demonstrating that any provision of the Settlement poses a serious threat to the public interest, the PBA ultimately makes a policy pitch, asking the Court to reject the Settlement because it does not reflect the approach to policing protests that the PBA thinks would best serve officer and public safety. PBA Br. 37–42. As this Court has previously recognized, the PBA asks too

much. *Citigroup*, 752 F.3d at 297 (holding that courts should not substitute their judgment for that of the government on matters of policy). Thus, even if the Court did prefer the PBA's approach (and it should not), the Court has no authority to declare that the public interest requires a settlement agreement that aligns with the PBA's preferences.

In any case, the PBA gives the Court no cause to disagree with the policies embodied in the Settlement. Chief Anemone's and the PBA's hyperbole and speculation rely on a false, outdated assumption that the presence of large numbers of police officers at protests inherently reduces violence, *see* PBA Br. 40–42; JA at 431–33, an assumption refuted not just by Chief Aden's own expertise, but also by scholars and institutions such as the United States Department of Justice, the International Association of Chiefs of Police, the National Policing Institute and the Police Executive Research Forum, which have concluded that the opposite is true. JA at 459, 462–67. "The escalated force model … does not improve officer safety. Instead, it puts it at risk." *Id.* at 465. Incredibly, the PBA insists that this consensus, shared among these nationally respected institutions as well as the City of New York, the NYPD, and the New York Attorney General, is a fringe view; in fact, the fringe view is the PBA's dogmatic insistence to the contrary.

For all of these reasons, the PBA fails to provide this Court with any basis to find that the district court abused its discretion in approving the Settlement, just as

it failed to provide the district court any basis for concluding that the Settlement was unfair, unreasonable or contrary to the public interest.

## CONCLUSION

For the foregoing reasons, this Court should affirm the district court's approval of the Settlement and voluntary dismissal of the plaintiffs' claims with prejudice.

Dated: August 29, 2024
New York, New York

Respectfully Submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(A) because it contains 11,135 words, excluding those portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: August 29, 2024
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