No. 18-1395

In The
Supreme Court of the United States

FRATERNAL ORDER OF POLICE
CHICAGO LODGE NO. 7,

Petitioner,

v.

STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE NATIONAL FRATERNAL ORDER OF POLICE, AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The National Fraternal Order of Police ("NFOP") is the world's largest organization of sworn law enforcement officers, with more than 350,000 members in more than 2,100 lodges across the United States. The NFOP is the voice of those who dedicate their lives to protecting and serving our communities, representing law enforcement personnel at every level of crime prevention and public safety nationwide. The NFOP offer their service as *amicus curiae* when important police and public safety interests are at stake, as in this case.

The NFOP's perspective on the issue presented in this case is both timely and significant given the sensitive issues shaping law enforcement and our communities. The consent decree era has directly impacted officers in the communities they serve. The goal of the consent decree is to achieve better policing policies and practices. The NFOP supports that desired outcome. The NFOP and its more than 2,100 local lodges across the country must be afforded the opportunity to protect the rights of officers and assist in the development of

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[1] In accordance with Rule 37.6, the FOP and undersigned counsel make the following disclosure statements. The submission of this Brief was consented to by all parties hereto. The Office of General Counsel to the National Fraternal Order of Police authored this Brief in its entirety. There are no other entities which made monetary contributions to the preparation or submission of this Brief. The parties' counsel of record received timely notice of intent to file this brief. Counsel for the parties have consented to the filing of this brief.

better community policing. All parties—but most importantly, the public—benefit when there is collaboration between the state, city, and union representatives in cities where the Department of Justice ("DOJ") engages in pattern and practice investigations.

The NFOP's local lodges act as the designated collective bargaining agent. In cities where DOJ investigates the patterns and practices of the local police department, it is the responsibility of the local lodge to participate and offer solutions toward improved policing. The object is not to stymie reform, but rather ensure that the officers protecting our communities are protected themselves and have a voice to contribute their expertise.

If the Seventh Circuit's decision is left to stand, the same scenario may be replayed in the next consent decree in another city. During consent decree negotiations, the federal government or state attorney general can effectively run out the clock on law enforcement unions by assuring them that their rights will not be impacted until negotiations are too far along to intervene. The lower courts' decisions to deny FOP Chicago Lodge No. 7 ("FOP") *meaningful* participation is before this Court today. Procedurally, the standard for intervention warrants clarification by this Court. Practically, consent decree language can strike a serious blow to hard-fought collective bargaining efforts undertaken throughout the country by law enforcement members. The boots-on-the-ground officers have a lot at stake; they deserve to contribute to decisions and reform that lead to better policing. It is with this

backdrop in mind that the NFOP respectfully seeks to be heard in this matter.

SUMMARY OF ARGUMENT

The Seventh Circuit's decision ties both hands of our police officers. Consent decrees too often tie the left hand of officers by impinging rights they collectively bargained for or were promised by statute. Now, the State of Illinois has tied the right hand by *initially* assuring the officers that their rights would *not* be affected before ultimately denying the officers the opportunity to materially contribute to improved community policing. This Court should grant the petition to encourage *meaningful* collaboration with law enforcement members whose main goal is improved community policing and safety of officers.

The discourse surrounding race, crime, and policing in the United States at this time is divisive. Rather than focus on collaboration with boots-on-the-ground officers to implement better policing, too much has been invested in a course of dealing, recently through consent decrees, that diminish the working conditions and safety of police. If law enforcement collective bargaining agreements are continually viewed as shields of police misconduct and roadblocks to improved practices and policies, meaningful and sustained reform will be delayed and unrealized. This case presents an opportunity for this Court to shape a new discourse in the era of consent decrees.

As the largest representative group for the country's law enforcement officers, the NFOP is knowledgeable as to what motivates officers to embrace comprehensive reform. From the officer perspective, consent decrees can be burdensome and ultimately exacerbate problems between the police and communities they serve. However, the officers have intricate knowledge of the culture, resources, and needs of their communities. Moreover, they *want* better policing to be a collaborative effort and must be afforded a meaningful opportunity to contribute. The Illinois Attorney General and the City of Chicago kept the officers in this case from having such a meaningful impact by requiring the officers to waive intervention and barring them from observing the court's settlement conferences with the existing parties. Such practices are detrimental to the ultimate goal of reform and why *amici* has a substantial interest in the Court hearing this case.

ARGUMENT

I. EARLY SETTLEMENT DISCUSSION AND NEGOTIATION WITH LAW ENFORCEMENT UNIONS SHOULD BE ENCOURAGED DURING INVESTIGATION INTO POLICE DEPARTMENT PATTERNS AND PRACTICES. NOT EARLY INTERVENTION.

Reform aimed at improving deficiencies in training and accountability deserves input from law enforcement unions that engage in a variety of collective

bargaining activities focused on officer and public safety. Law enforcement supports better policing. The officers simply seek opportunity to share their relevant experience in hopes of shaping improved policing practices. This is not only sensible policy, but one that should be promoted at all levels of government.

Where intervention by a third party is sought—especially in consent decree litigation and by law enforcement unions—the rules must be consistent. As it stands, it is unclear when or how certain a third party must be that its interests will be impacted to intervene in such cases. There is too much at stake for officers and communities for such uncertainty to persist.

A. Intervention under Fed. R. Civ. P. 24 is not required until a third party knows its interests will not be adequately protected by the parties to the litigation.

According to the Seventh Circuit, the FOP should have known its interests might be affected as soon as the case was filed because "the complaint emphasized the need for increased accountability and other significant reforms." *Illinois v. City of Chicago*, 912 F.3d 979, 985 (7th Cir. 2019). The Seventh Circuit also suggested that the FOP should have known its interests were not being protected from the start because "[t]he Lodge's very existence is rooted in the competing interest between its members and the City." *Id.* The position adopted by the Seventh Circuit is problematic for several reasons. First, a review of the Complaint does

nothing to shed light on the potential impact to *non*-bargained-for rights of the officers, which are equally impacted. Second, even if the FOP were to accept as true—which it does not—that the language of the Complaint makes clear that the decree "might" impact certain provisions of the CBA, the Complaint nevertheless does not make clear that the FOP's interests would not be protected by the original parties. Indeed, as noted throughout its petition to this Court, the FOP received repeated assurances from the Illinois Attorney General that its interests would be protected. (Pet. at 2, 3, 4–8). When the FOP realized they had been duped, they immediately moved to intervene.

Moreover, by measuring timeliness from the moment the mere *possibility* existed that the FOP's interests "might" be affected, the Seventh Circuit breaks with other courts that measure timeliness from the moment the intervenor knows its interests will be affected or will no longer be adequately represented. *See, e.g.*, *U.S. v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1182 (3d Cir. 1994) (holding motion to intervene in CERCLA action timely—even though it was filed over 4 years after litigation began—where government attorney led intervenors to believe their interests arising from a related consent decree would not be affected, and intervenors filed a motion to intervene 43 days after they learned they had been misled); *Corley v. Jackson Police Dept.*, 755 F.2d 1207, 1209 (5th Cir. 1985) ("We must consider [a] 'movant's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case . . . or knew that his interests

were no longer adequately represented'.") (citing references omitted); *U.S. v. City of Detroit*, 712 F.3d 925, 931–32 (6th Cir. 2013) (holding that a union timely moved to intervene 30 years after a lawsuit was filed against Detroit and its Sewage Department where the union moved to intervene two weeks after the district court entered an order abrogating portions of the union's CBA); *Bates v. Jones*, 127 F.3d 870, 873 (9th Cir.1997) ("In analyzing timeliness, we focus on the date the person attempting to intervene should have been aware his interest[s] would no longer be protected adequately by the parties, rather than the date the person learned of the litigation."); *Walters v. City of Atlanta*, 803 F.2d 1135, 1151 n.16 (11th Cir. 1986) ("Mere knowledge of the pendency of an action, without appreciation of the potential adverse effect an adjudication of that action may have on one's interests, does not preclude intervention.").

The FOP moved to intervene before it even had a draft of the consent decree. Notably, the existing parties would not give the FOP copies of the draft proposals of the consent decree they exchanged. Other courts have found FOP motions to intervene timely where the FOP sought intervention *after* a consent decree had been filed with the court—where the FOP was certain as to how its interests would be impacted. For example, in *Johnson v. City of Tulsa*, the FOP's motion to intervene was granted after the original parties submitted a proposed consent decree to the court and *over eight years* after the complaint was filed. *Johnson v. City of Tulsa*, No. 94-CV-39-H(M), 2003 WL 24015151,

at *3 (N.D. Okla. May 12, 2003), *aff'd sub nom. Johnson v. Lodge #93 of Fraternal Or. of Police*, 393 F.3d 1096 (10th Cir. 2004). Similarly, in *U.S. v. City of Steubenville*, the court found that the FOP's motion to intervene was timely where it was filed six weeks after the consent decree was approved by the court. *See* Opinion and Order at 3, *U.S. v. City of Steubenville*, No. CV-C2-97-966 (S.D. Ohio July 23, 1998).

B. Applying the FOP position to the present case.

The NFOP is uniquely positioned to weigh in on the issue of police reform and actively seeks opportunities to help develop policies that will lead to better policing throughout the country. During this era of consent decrees, however, the rules governing law enforcement union participation have been inconsistent. This inconsistency will affect the NFOP in every city where consent decrees are negotiated in the future. With the Seventh Circuit's decision, local lodges—like FOP Lodge No. 7—are held to an inconsistent measure of timeliness throughout the country.

If the goal of consent decrees is to promulgate policies that lead to better policing, then who better to help craft these agreements than representatives of the police themselves? As the representative of officers who serve our communities and put their lives at risk to ensure our protection, the NFOP is an expert on the issues that undermine public safety and contribute to community mistrust of law enforcement. Officers are

on the frontlines implementing these reforms. They should not have to guess if they will be included in negotiations or be punished for relying on assurances from the parties who initiate reform. Instead, courts should actively encourage law enforcement to participate in shaping the policies that govern their relationships with their communities.

On the other hand, local lodges should not be forced to intervene early at the expense of participating in informal, cooperative discussions about matters affecting police officers' livelihoods and community relations. Intervention is a burden and expense for lodges. Smaller lodges may not possess the same resources to intervene, foreclosing their ability to protect officer interests. Also, intervention may create an unnecessarily adversarial process.

The Seventh Circuit would have had the FOP formally enter the case as an adversarial intervenor from the outset instead of engaging in early negotiation with the existing parties to the case. But this rule would "encourage individuals to seek intervention at a time when they ordinarily can possess only a small amount of information concerning the character and potential ramifications of the lawsuit, and when the probability that they will misjudge the need for intervention is correspondingly high." *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977). The FOP—and all parties who seek intervention under FED. R. CIV. P. 24(a)—should not be punished for seeking resolution in a manner that preserves judicial resources and reduces the litigation costs of the parties. *See id.*

(encouraging individuals to intervene upon "knowledge of the pendency of litigation" would squander "scarce judicial resources" and increase the litigation costs of the parties).

II. BETTER POLICING WILL BE ACHIEVED THROUGH COLLABORATION WITH LAW ENFORCEMENT UNIONS.

Officers support reform. Input from boots-on-the-ground officers in implementing new policies and practices will accomplish two goals these officers view as paramount: (1) improved community policing and (2) officer safety. The narrative that police collective bargaining agreements impede reform efforts in the consent decree era is deceptive. Rights collectively fought for are aimed at boots-on-the-ground officer safety such as working conditions, equipment, and safety procedures. But states and cities charged with implementing consent decrees often see these officers as an avoidable hurdle to desired reform. That is a mistake.

Implementing reform with *meaningful* collaboration with law enforcement representation will have a positive impact on the officers *and* the community. That *meaningful* collaboration sought by law enforcement was not present in this case before this Court. While the FOP met with the State in early negotiation, those meetings ultimately proved misleading. The existing parties wanted the FOP to waive its right to intervene. The FOP, unsurprisingly, declined. When

the district court held settlement meetings, the FOP sought permission to observe. The FOP was met with opposition from the existing parties and were ultimately locked out of those meetings.

The officers provide a unique and critical perspective to achieve better policing. There is no active resistance from the NFOP, state or local lodges, or individual officers toward sustained reform. Officers simply want *meaningful* involvement in the discussion. Organizations such as the FOP frequently engage in bargaining to promote improved policing and protect officer safety. Their insight is essential to shape reform.

A. Collective bargaining agreements are not a barrier to reform.

Collective bargaining agreements are not in place to stymie reform efforts. Rather, they are intended to serve as guideposts to those charged with protecting their communities. However, those responsible for initiating systemic police reforms via consent decrees—here the State of Illinois—often unfairly point to these union contracts as a barrier to meaningful reform.

These "barriers" serve as incentives for DOJ, state, and city officials to block out union participation. To be certain, these "barriers" are only perceived. Law enforcement unions such as the FOP do not oppose reform. Officers oppose reform where they have no input. Any broad stroke pronouncement that police block

reform by calling on the collective bargaining agreement is misleading.

Here, the Illinois Attorney General saw the inherent conflict in the consent decree and the collectively bargained-for or statutorily-protected rights of officers. Rather than *meaningfully* collaborate with the FOP, the Illinois Attorney General assured them that their rights would not be impacted by the consent decree in early meetings until it was too late—according to the lower courts—to intervene in the litigation. This scenario is repeatable across the country.

Law enforcement unions such as the FOP engage in a variety of collective bargaining activities aimed at officer and public safety. These efforts evidence meaningful reform focused on improved policing and officer safety absent a consent decree. The FOP expends its own resources to monitor and advocate for pressing officer safety issues.

1. Police officers have dealt with faulty, deficient, or inadequate bulletproof vests resulting in officer injuries and fatalities. Organizations such as the NFOP have applied pressure and litigation to protect officers from faulty equipment. The NFOP's request for an investigation led to a federal lawsuit brought by the Department of Justice, which alleged that Second Chance Body Armor and manufacturer Toyobo Company provided defective Zylon bulletproof vests to federal, state, and local law enforcement agencies despite having knowledge that the strength and bullet stopping

capacity of the vests were substantially weaker than represented. *See United States ex rel. Westrick v. Second Chance Body Armor, Inc.*, 685 F. Supp. 2d 129 (D.D.C. 2010).

2. Police vehicles have similarly experienced defects causing fatalities. The most infamous example of this is the Ford Crown Victoria police interceptors, which suffered from a design flaw putting the fuel tank behind the rear axle of the vehicle. Consequently, these vehicles, which were used by police throughout the country for decades, would explode when impacted at moderate speed from behind. *See generally Jablonski v. Ford Motor Co.*, No. 5-05-0723 (Ill. App. Ct. 5th Dist. Feb. 1, 2010). As early as 2003, the NFOP began urging Ford to install a fire-suppression system on its Crown Victoria Police Interceptor to make vehicles safer.

3. Police radio equipment has historically failed precisely when first responders need to communicate most. This was true during the September 11th terrorist attacks when radio equipment failed, preventing key personnel from communicating with police and firefighters in the towers. *See, e.g.*, Brendan Sasso, *Why Police and Firefighters Struggle to Communicate in Crises*, The Atlantic (Sept. 18, 2005) https://www.theatlantic.com/politics/archive/2015/09/why-police-and-firefighters-struggle-to-communicate-in-crises/457443/. Organizations such as the NFOP and other collective bargaining agents help combat these critical problems in a variety of ways. For example,

> when acting as a collective bargaining agent for broader groups, the NFOP can negotiate for uniform radio equipment purchases across an entire bargaining unit.

Collective bargaining agreements also provide broader protections to boots-on-the-ground officers. These officers do not hire, fire, train, or discipline. Those decisions are left to management. The broader purpose behind collective bargaining for law enforcement is to allow union representation to protect the rights of officers including working conditions, safety, training, staffing, discipline, and job security while management operates the department as smoothly as possible.

Here, what the officers ask is simple: they want the opportunity to collaborate on matters that encourage good policing. These matters include but are not limited to working conditions, hours and overtime, and equipment such as vehicles, vests, and tasers.

In the era of consent decrees, collective bargaining agreements are unfairly blamed as barriers of reform. For example, in Chicago a task force employed by the mayor claimed collective bargaining agreements "make it harder to identify misconduct" and "discourage citizens from coming forward with complaints." Police Accountability Task Force, Recommendations for Reform: Restoring Trust between the Chicago Police and the Communities they Serve, 70 (2016). Such discourse is untrue and disruptive to the overall reform effort. Moreover, pressure on cities from the media contribute toward the effort to ignore law enforcement

unions such as the NFOP. *See* The Editorial Board, *When Police Unions Impede Justice*, N.Y. Times, Sept. 3, 2016, https://www.nytimes.com/2016/09/04/opinion/sunday/when-police-unions-impede-justice.html.

Here, the Court has an opportunity to change the current course and promote open dialogue with officers in a joint effort to achieve better policing.

B. Consent decrees will continue to implicate police officers' collectively bargained-for rights.

To date, including the City of Chicago, there are fifteen (15) agreements in place in various cities across the United States aimed at police reform. Pittsburgh was the first city to agree to certain reforms for its police department in the form of a consent decree in 1997. Since the Pittsburgh consent decree, different presidential administrations have used consent decrees to varying degrees. Under President Barack Obama, consent decrees were a crucial component of his administration's approach to police reform. Conversely, under the Trump Administration, then-Attorney General Jeff Sessions issued a memorandum sharply limiting the use of consent decrees. *See* Jeff Sessions, Principles and Procedures for Civil Consent Decrees and Settlement Agreements with State and Local Governmental Entities (2018).

Unique to the case now on petition to this Court, DOJ—likely in response to the current administration's rollback of federal oversight—declined to seek

court oversight following its investigation of the Chicago Police Department ("CPD"). In response, the Illinois Attorney General filed a federal lawsuit for court oversight of CPD, demonstrating how state and local jurisdictions may step into DOJ's shoes when it declines to pursue enforcement of consent decrees. *See* U.S. Commission on Civil Rights, Police Use of Force: An Examination of Modern Policing Practices, 94 (2018). Even though the federal government has limited its use of consent decrees, states (like Illinois) appear determined to seek them and continue their enforcement.

Many of the existing consent decrees and agreements with DOJ contain carve-out language indicating that the consent decree is not "intended" to alter collectively bargained-for rights. *See, e.g.*, Consent Decree, *U.S. v. City of Pittsburgh*, No. 97-CV-00354, at 4 (W.D. Pa. Feb. 26, 1997) ("Nothing in this Decree is intended to alter the collective bargaining agreement between the City and the Fraternal Order of Police. . . ."); Consent Decree, *U.S. v. City of Detroit*, No. 03-72258, at 6 (E.D. Mich. June 12, 2003) ("Nothing in this Agreement is intended to alter the Collective Bargaining Agreements or impair the collective bargaining rights of employees under State and local law."); Consent Decree, *Illinois v. City of Chicago*, No. 17-CV-6260, at ¶ 687 (N.D. Ill. Jan. 1, 2019) ("Nothing in this Consent Decree is intended to (a) alter any of the CBAs between the City and the Unions. . . ."). DOJ or the states use this language to argue that no matter the reform, the bargained-for rights of officers will not be impacted. However, in

reality, these consent decrees—despite their *intent*—often do impair, impinge, or alter the officers' collectively bargained-for and/or statutorily-protected rights. As discussed above, these rights are critical to better policing and officer safety.

The Ninth Circuit previously held that a labor union, such as the FOP, has a legally protectable interest in both the merits and remedies of litigation between the government and a public employer when that litigation impacts state-law collective bargaining obligations. *See U.S. v. City of Los Angeles*, 288 F.3d 391, 397 (9th Cir. 2002). In that case, the court explained that a police union had a separate, independent protectable interest in the remedy sought by the United States because the proposed consent decree conflicted with provisions of the labor agreement between the City of Los Angeles and the police union and also infringed on state-law bargaining rights:

> The Police League has state-law rights to negotiate about the terms and conditions of its members' employment as LAPD officers and to rely on the collective bargaining agreement that is a result of those negotiations. These rights give it an interest in the consent decree at issue. Thus, the Police League's interest in the consent decree is two-fold. To the extent that it contains or might contain provisions that contradict terms of the officers' [collective bargaining agreement], the Police League has an interest. Further, to the extent that it is disputed whether or not the consent decree conflicts with the [collective bargaining

> agreement], the Police League has the right to present its views on the subject to the district court and have them fully considered in conjunction with the district court's decision to approve the consent decree.

Id. at 400 (citation omitted).

While the dispute before this Court is on the issue of timeliness, and not whether or not the FOP has a protectable interest in the subject matter of this litigation, the FOP's position still rings true. The State of Illinois claimed the FOP's interests were protected, but as negotiations developed, it became clear that was not the case. In fact, when the district court held settlement meetings with the existing parties, the FOP sought permission to observe. The existing parties denied the FOP that opportunity. And now, with Seventh Circuit approval, the FOP will not be able to protect its interests on the back end (via intervention in litigation). This scenario is repeatable across the country and must be discouraged.

In 2003, the United States District Court for the Northern District of Oklahoma approved a consent decree for the City of Tulsa. In that case, the court granted FOP Lodge #93's motion to intervene, which was filed *eight years* after the complaint was filed. In support of its intervention, FOP Lodge #93 attached numerous examples of the changes to departmental practices that would go into effect under the consent decree, which were proposed without any negotiation with Lodge #93. Mot. Intervene at 11, *Johnson, et al. v. City of Tulsa*, (2002) No. 94-CV-39-H. Specifically, the

consent decree's proposed method of data collection sidestepped the lodge's CBA to impose discipline based upon undetermined standards. *Id*. at Ex. C. The consent decree also required officers to submit use of force reports each time an officer "uses a physical control hold." *Id.* That requirement was much broader than the use of force reports collectively bargained-for and violated the Lodge #93's bargaining status. *Id.*

Similarly, in Portland, the Portland Police Association ("PPA")—the union representing the city's police officers—emphasized a list of provisions of the city's proposed consent decree in its motion to intervene that violated specific provisions of the CBA. Mot. Intervene at 13, *U.S. v. City of Portland*, (2012) No. 3:12-CV-02265-SI. For example, the City agreed to implement widespread changes to its "Taser and Electronic Control Weapons" policies and standards. *Id.* at 14. These changes implicated mandatory bargaining subjects without any input from the PPA. *Id.* Furthermore, the City agreed to audit use of force incidents based on new policies and standards. *Id.* at 15. For instance, because the City reserved the right to discipline employees for any perceived patterns of policy violations or unsatisfactory performance revealed through use of force audits, that created change in disciplinary standards and job security, which are mandatory bargaining subjects. *Id.* The Oregon District Court ultimately granted PPA's motion to intervene.

The argument from the Illinois Attorney General is that, as a general rule, the consent decree cannot alter the lawful terms of a CBA relating to proper

subjects of collective bargaining. *See Illinois v. City of Chicago*, 912 F.3d 979 (7th Cir. 2019). Even if we accept that argument as true, it misses the point. In cities where comprehensive reform is sought by DOJ or the state, those instituting said reform *perceive* conflict from law enforcement unions. Perceived conflict creates incentive to either (1) provide false assurances to the union that interests of the officers will be protected (as the State of Illinois did here) or (2) exclude the union from the conversation entirely.

Here, even the district court concluded that there is some evidence that the proposed consent decree "may conflict with the CBA, IPLRA, or other state laws." *Illinois v. City of Chicago*, No. 17-CV-6260, 2018 WL 3920816 (N.D. Ill. Aug. 16, 2018). Indeed, there is nothing in the carve-out language of the Chicago consent decree that refers to other state statutes or the Chicago Municipal Code, which promise certain rights to boots-on-the-ground officers. *See* Petition at 26-8 and Appendix D, at 54a-66a.

In support of its position, Petitioner cited several points of interference between contract rights, collective bargaining rights, and the consent decree. For example, the consent decree provides for an Office of Community Policing to assess the needs of communities that have historically experienced challenges with access to police services. Consent Decree, *Illinois v. City of Chicago*, No. 17-CV-6260, at ¶ 26 (N.D. Ill. Jan. 1, 2019). Further, the CPD is to develop and implement a plan to analyze the need for crisis intervention services and to maintain a sufficient number of officers on

duty in each watch of each district. *Id.* at 88. However, excluding officers' input from these proposals makes sound implementation of these programs more difficult because the boots-on-the-ground officers have first-hand knowledge of the communities targeted by such reforms. Additionally, the city, as the officers' employer, has an obligation to bargain with its employees about new job duties, assignments, salaries and terms and conditions of employment.

Also troubling is the fact that Paragraph 176 of the Chicago consent decree contains only one sentence yet implicates several subjects of bargaining:

> *176. CPD officers must recognize and act upon the duty to intervene on the subject's behalf when another officer is using excessive force.*

Id. at ¶ 176. But what is the duty or obligation for a police officer to "intervene" on the subject's behalf when another officer is using excessive force? What are the consequences if a police officer does not intervene? What is the training protocol for such intervention? What are the elements of the intervention that are expected? Is discipline to be expected if an officer does not intervene? *The FOP is entitled to give its input on this subject*.

Consent decrees pose a real threat to law enforcement union collectively bargained-for rights. FOP officers do not hire, fire, or discipline. The collectively bargained-for rights are in place as guideposts for the boots-on-the-ground officers that protect and serve our communities. Despite rollback from the federal

government, states continue to use consent decrees as a sword against law enforcement. Our officers deserve a meaningful opportunity to collaborate in their implementation.

C. Buy-in from police officers is key to successful implementation of a consent decree and true systemic reform.

As a practical matter, engagement from *all* parties is key to sustainable reform. Deceptive practices toward law enforcement (as occurred here) or denying police officers a *meaningful* opportunity to collaborate altogether creates a two-fold problem. First, the consent decree itself will fail to consider the practical nature of policing. Second, officers will be disincentivized to implement change that does not promote better policing.

Pushback from boots-on-the-ground officers is often cited as a barrier and reason for delayed reform. *See, e.g.*, Sarah Childress, Kimbrell Kelly & Steven Rich, *Forced Reforms, Mixed Results*, Wash. Post, Nov. 13, 2015, https://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/?noredirect=on&utm_term=.bc2486736c56; Jacey Fortin, *Jeff Sessions Limited Consent Decrees. What About the Police Departments Already Under Reform?*, N.Y. Times, Nov. 15, 2018, https://www.nytimes.com/2018/11/15/us/sessions-consent-decrees-police.html. However, where officers know their interests are represented at the outset—prior to the implementation of any consent decree—they will more readily embrace the reform. At the

negotiating table, the same officers who patrol the community where reform is desired can breathe life into the practical side of reform.

Consent decrees that fail to consider the realities of police will therefore only create more costs for cities and ultimately stymie true reform. For example, Seattle entered into a consent decree with DOJ in July 2012. Settlement Agreement, *U.S. v. City of Seattle*, No. 12-CV-01282 (W.D. Wash. July 27, 2012). Seattle has a population of 650,000 served by fewer than 1,500 police officers. A. Benjamin Mannes, Opinion, *Jeff Sessions is Right to Roll Back Justice Department Consent Decrees*, The Hill (April 5, 2017), https://thehill.com/blogs/pundits-blog/crime/327457-jeff-sessions-is-right-to-roll-back-justice-department-consent. But the Seattle consent decree required reporting from the officers to include questionnaires that went beyond probable cause necessary for an arrest. *Id.* As a result, the time it took the officers to book a suspect *tripled*. *Id.* This increase in booking time resulted in more officers off the street, leaving more areas vulnerable to crime. *Id.* Early negotiation with boots-on-the-ground officers could have revealed the impracticality of these reporting requirements and led to a workable compromise.

Meanwhile, in Pittsburgh, DOJ's Office of Community Oriented Policing Services reviewed the city's experience in the years after its consent decree was finalized. The resulting report offered advice on "what might have been improved in Pittsburgh" where DOJ did not seek officer input in the reform process. Davis, R. C., Henderson, N. J., Mandelstam, J., Ortiz, C. W., &

Miller, J., *Federal Intervention in Local Policing: Pittsburgh's Experience with a Consent Decree* at 37 (2005). No interviews were conducted with union officials or officers during negotiations. *Id.* Consequently, local law enforcement felt alienated from the reform process and various aspects of the decree were unpopular with boots-on-the-ground officers, including a provision that required centralized review of officer actions and encouragement of anonymous citizen complaints. *Id.* Thus, by DOJ's own admission, buy-in from the officers is key to implementation of successful reform.

On the other hand, numerous positive examples demonstrate the benefit of police officer input in consent decree negotiations. In Cleveland, officers invited to participate in negotiations reported that most patrol cars did not have working computers, so that during traffic stops, officers lacked basic information about vehicles and their drivers, including whether the vehicle was stolen or if there was an outstanding warrant for the registered owner. Civil Rights Division U.S. Department of Justice, The Civil Rights Division's Pattern and Practice Police Reform Work: 1994-Present, 17 (2017). This placed officers at risk because traffic stops could escalate unnecessarily or unexpectedly. As a direct result of the officers' input, the final consent decree required the City of Cleveland to equip its patrol cars with reliable, functioning computers. *Id.*

Furthermore, encouraging collaboration with law enforcement unions such as NFOP would help minimize the often-enormous cost of implementing police reform. Where officers' practical concerns and interests

are not considered at the outset of consent decree discussions, however, the already expensive and protracted process of implementing better policing practices may be exacerbated at the taxpayers' expense. In Los Angeles, the 2001 consent decree took nearly 12 years and cost taxpayers an estimated $300 million to develop and implement. *Id*. In Detroit, costs of implementing their consent decree—which was in place from 2003-2014—were projected at $10 million annually. *Id.* Bloomberg Business reported that the New Orleans consent decree cost more than $10 million; Seattle's consent decree cost more than $5 million; and Albuquerque's more than $4.5 million. *See* Matt Stroud and Mira Rojanasakul, *A "Pattern or Practice" of Violence in America*, Bloomberg (May 27, 2015), http://www.bloomberg.com/graphics/2015-doj-and-police-violence/. Those numbers have only increased since then.

Indeed, after the implementation of the consent decree in Seattle, officers became *less* proactive, which in turn affected overall officer morale. Sarah Childress, Kimbrell Kelly & Steven Rich, *Forced Reforms, Mixed Results*, Wash. Post, Nov. 13, 2015, https://www.washingtonpost.com/sf/investigative/2015/11/13/forced-reforms-mixed-results/?noredirect=on&utm_term=.bc2486736c56. The example out of Seattle demonstrates how boots-on-the-ground officers may feel a "stigma" associated with being subject to a consent decree. *Id.* And while that is certainly not the intent of a consent decree, in many cases it is the reality for police officers. Accordingly, to the extent that giving officers a voice in shaping good policing tactics and police reform leads to

increased morale and overall job satisfaction, we owe it to the officers that protect and serve our communities to give them that opportunity.

CONCLUSION

For the foregoing reasons, *amicus* respectfully asks this Court to grant the Petition for Writ of Certiorari and reverse the decision of the Seventh Circuit.

Respectfully submitted,

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