No. _____

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 a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *United Airlines v. McDonald*, 432 U. S. 385, 394 (1977), this court held that an intervention motion under FRCP Rule 24 (a) was timely after it became clear to the would-be intervenor that her claims as an unnamed class representative would not be protected by the named plaintiffs. That decision has been followed by all of the courts of appeals, but The Seventh Circuit decided to change the test for when the time should run by using the word might which creates a more stringent standard for persons who have been deceived in believing that their interests would not be impaired or affected in the context of consent decree litigation. This test has not been followed by other circuit courts of appeals.

In contradiction with well established law of the circuits, the Court did not credit petitioner's claims that the state deceived it into believing that its interest would be protected and that there was no need to intervene.

The questions presented are:

Whether a motion to intervene is timely when it is filed shortly after a would-be intervenor learns that the existing parties misrepresented that the would-be intervenor's rights would not be affected.

Whether an unrebutted statement of facts submitted in support of a motion to intervene must be accepted as true and considered by the district court.

Whether the prejudice test under FRCP Rule 24 (a) begins to run when the would-be intervenor clearly knows its interests will be affected after learning of a deception used to discourage intervention.

Whether a consent decree may affect statutory rights that are not specifically protected by a provision of the consent decree.

RULE 29.6 STATEMENT

Fraternal Order of Police Chicago Lodge No. 7 is an Illinois not-for-profit corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Fraternal Order of Police Chicago Lodge No. 7 respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A-1) is reported at *State of Illinois v. City of Chicago,* 912 F. 3d 979 (2019). The February 4, 2019 order of the court of appeals denying the petition for rehearing and rehearing en banc is unreported.

The memorandum and order of the district court denying the Lodge's motion to intervene is reported at 2018 WL 3920816.

Jurisdiction

The judgment of the court of appeals was entered on January 2, 2019. On February 4, 2019, the Seventh Circuit denied the Lodge's petition for rehearing or rehearing en banc. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Statutes and Ordinances Involved

The Illinois Public Labors Relations Act, 5 ILCS 315/15, provides in pertinent part:

> . . . [N]othing in this Act shall be construed to replace the necessity of complaints against a sworn peace offer, as deferred in Section 2(a) of the Uniform Peace Officer Disciplinary Act, from hearing a complaint supported by a sworn affidavit.

The Uniform Peace Officers' Disciplinary Act, 50 ILCS 725/3.8 (b).

The Police and Community Relations Improvement Act, 50 ILCS 727/1-10 (b).

The Law Enforcement Officer—Worn Body Camera Act, 50 ILCS 706/10-2d (7) (B).

The Chicago Municipal Code, Chapter 2-84, Department of Public Section 2-84-330(D) provides in pertinent part:

> No anonymous complaint made against an officer shall be made the subject of a complaint register investigations unless the allegation is of a criminal nature.

Section 2-84-330(E) provides in pertinent part:

> Immediately prior to the interrogation of an officer under investigation, he shall be informed in writing of the nature of the complaint and the names of all complainants.

STATEMENT OF THE CASE

Once it became clear to the petitioner ("the Lodge") that the Illinois Attorney General ("the OAG") was actually going to affect collective bargaining agreement provisions, it filed its motion to intervene. Up to that point, the OAG had misled the Lodge into believing that no harm would befall the contract provisions that go back to the early 1980s and which had been negotiated under the Illinois Public Labor Relations Act. ("IPLRA") 5 ILCS 315/1 et seq. [Doc 51 at 5]; Graham Declaration ¶ B. App. E.

At the commencement of the OAG's complaint, the Lodge's primary concern in this case was that a consent decree resulting from the lawsuit would be a unilateral tool used to abrogate the hard fought provisions of the collective bargaining agreement

and benefits obtained by Illinois law. After the complaint was filed, the Lodge and the OAG began discussions on these issues, and that concern was allayed when the OAG advised the Lodge that it was not seeking to change collective bargaining rights. However, the Lodge subsequently learned from confidential sources that the OAG had seriously misrepresented this position and in fact was negotiating consent decree provisions with the City that would affect such rights. In effect, the City was hoping with the OAG's assistance to use the consent decree to nullify or minimize provisions of the collective bargaining agreement, state laws and ordinances that are not labor laws and which provide important benefits to police officers. Shortly after the Lodge learned of this deception, it filed a motion to intervene. The Seventh Circuit did not follow a key FRCP Rule 24 (a) decision of this in Court in, *United Airlines Inc. v. McDonald*, 432 U. S. 385 (1971), which has been followed by all of the Circuit Courts of Appeals in judging the timeliness of the motion from the filing of the complaint.

On August 29, 2017, the State of Illinois filed a complaint against the City of Chicago for the purpose of seeking reforms in the Chicago Police Department ("the CPD"). Within a few days, the parties agreed to stay the litigation, and the State and the City commenced settlement discussions. [Docs. 15 and 16], Memorandum and Order, App. A-1 at 4. No motion to dismiss was filed nor was an answer filed. The Lodge was not named as a defendant in this case. The complaint alleged claims under 42 U.S.C. Sec. 1983, the U.S. and Illinois Constitutions, the Illinois Civil Rights Act and the Illinois Human Rights Act, and sought to enjoin the CPD from engaging in a pattern of excessive force and other misconduct that allegedly

disproportionally impacts Chicago's African-American and Latino residents. [Doc. 1].[1]

The relief sought in this complaint was to declare the City has a policy that deprives persons of their constitutional rights and to order the City to adopt and implement policies and procedures to identify and correct unlawful conduct. There is no specific request in the complaint or the prayer for relief to change or modify a provision in the collective bargaining agreement between the Lodge and the City, or statutes or ordinances which protect police officers with non-collective bargaining rights.

Shortly after the complaint was filed in this case, the Lodge publicly criticized the OAG for filing the complaint and stated that a consent decree might seriously threaten officers' collective bargaining rights. In response to this criticism, the OAG contacted representatives of the Lodge to inquire if they would be willing to discuss the Lodge's concerns. Graham Declaration, App. E, ¶ D. The Lodge agreed, and thereafter they met. The Lodge was regularly led to believe by the OAG that the consent decree would not impact bargaining rights, but rather would address issues important to Lodge members and would better prepare officers to make communities safer. *Id.*, ¶¶ E, K, M. On or about September 18, 2017, Lodge representatives began what would become a months-long series of meetings with representatives of the OAG. *Id.*, ¶ E. At the parties' initial meeting, the OAG representatives assured the Lodge that the OAG wanted an open exchange of information and that they were there to help the officers and not hurt them. *Id.*, ¶ I. The representa-

[1] Citations to the docket of the U. S. District Court for the Northern District of Illinois are shown on [Doc. ____] and can be found on the docket for that case as Case No. 17-cv-6260.

tives of the OAG also indicated a concern about possible intervention by the Lodge and attempted to discourage such an action. *Id.* In fact, the Lodge's subsequent conversations with the OAG indicated the OAG's willingness to protect the interests of the officers' CBA. This turned out to be false and merely a veiled attempt to persuade the Lodge not to intervene in this case. *Id.*

Throughout these consent decree discussions, attorney Gary Caplan from the OAG repeatedly represented to the Lodge that its members' collective bargaining rights would in no way be impacted by the consent decree. *Id.*, ¶¶ H, I, J, M, N, X, DD, FF. The Lodge president, Kevin Graham, indicated the desire of the Lodge to use a consent decree as a vehicle by which the police department operations would be improved and that citizens would be made safer. *Id.*, ¶ K. The OAG and its representatives were anxious to hear the perspective of the Lodge with respect to problems within the police department. *Id.*, ¶ L. To that end, the Lodge presented to the OAG a list of "Issues for Discussion." App. E, ¶ M. This three and a half page list of 22 items includes provisions, inter alia, to protect the CBA from being overridden by the consent decree and outlining the several problems in the Police Department.

On September 29, 2017, the Lodge discussed with the OAG the items on this list and emphasized the opposition by the Lodge to any changes in the CBA, as well as its opposition to the police department's unilateral actions with respect to the release of videos, the introduction of body cameras, and disciplinary matters involving the use of force. *Id.*, ¶ N. Mr. Caplan indicated that the OAG shared many of the goals that the Lodge has in this process. *Id.* The Lodge also spoke about the high suicide rate among Chicago police officers, and the OAG indicated it wanted to support the

officers in a number of ways. *Id.*, ¶ O. The Lodge and the OAG resumed discussion of these issues on October 25, 2017, and further exchanged information on November 2 and 13, 2017, *Id.*, ¶¶ Z and AA.

On October 6, 2017, a Lodge attorney requested the OAG to provide the Lodge with any proposals being discussed with the City on the consent decree. *Id.*, ¶ V. The Lodge was never given any such proposals to review and in fact neither the OAG nor the City would allow the Lodge representatives to observe the settlement conferences that were conducted by the district court on the consent decree issues. *Id.* and ¶ GG.

The Lodge and the OAG resumed discussion of these issues on October 25, 2017, and exchanged information on November 2 and 13, 2017. *Id.*, ¶¶ Z and AA. The responses from the OAG at the October 25 meeting were favorable to most of the issues that were raised by the Lodge. *Id.*, ¶ V. The OAG indicated that it supported the efforts of the Lodge to increase staffing of the CPD and the need for time off and noted that the time off issue related to wellness, which is a serious issue. *Id.* The OAG indicated that it supported the need for more training for police officers and agreed that promotions are a problem and that unqualified people have been promoted. *Id.* The OAG noted the CPD process of unilateral changes in policies and the Lodge's objections to it. *Id.*

The next meeting was on November 27, 2017, at which the Lodge and the OAG continued to talk about the issues raised on the Lodge's "Issues For Discussion." *Id.*, ¶ X. Mr. Caplan indicated that the OAG was not intending to get involved in police officer discipline issues and that he wanted to focus on the first two issues on the Lodge's list, which deal with the protection of the provisions of the CBA and any conflicts

with the consent decree. *Id*. This subject came up when the Lodge indicated that it had significant discipline issues to discuss with the City at the bargaining table, and the Lodge wanted carve out protection for this and other subjects. *Id*. Mr. Caplan indicated that the OAG did not want to deal with "core mandatory matters," which Mr. Graham understood to be meaning subjects of bargaining. *Id*.

Nonetheless, the proposed consent decree that was made public in July 2018 contains a number of provisions on discipline that conflict with the CBA, bargaining obligations under the labor law and other state laws that protect officer rights on issues of use of disciplinary history of an officer and the creation of a disciplinary system, App. C, ¶¶ 492, and the investigation of police officers' alleged misconduct. App. C, ¶ 425

Discussions between the Lodge and OAG appeared to have been making progress. The OAG indicated support for Lodge proposals concerning understaffing, promotions, equipment and safety problems, issues related to the wellness of officers, and more. *Id.*, ¶ V. At one point, Mr. Caplan stated, "We think this is progressing well and we had not had this relationship with the other groups" and wanted to continue to meet with the Lodge. *Id*. ¶ W. The Lodge agreed to continue to meet and was under the belief at the time that negotiations were for the betterment of officers and the communities they protect, that they were productive and that their collective bargaining agreement's terms and conditions would be left untouched by provisions of the consent decree. *Id*.

Between January 5, 2018, and March 19, 2018, the Lodge and the OAG exchanged drafts on specific language that would protect provisions of the collective bargaining agreement, and in a meeting on March 19,

2018, the OAG through Mr. Caplan stated, "We believe that the City and the OAG are not impacting your rights." *Id.*

In another meeting on March 27, 2018, the Lodge mentioned the importance of the Illinois collective bargaining law to the rights and interests of the Lodge and its members. App. E, ¶ DD. Mr. Caplan once again told Lodge representatives that the OAG was not working with the City to impact the collective bargaining rights of the police officers. *Id.*

Finally, on May 31, 2018, the OAG, the City, and Lodge representatives met to discuss the issues raised under a proposal for the consent decree on protection for collective bargaining agreement rights, and in this discussion, Mr. Caplan stated that the carve-out concept works in principle, and specifically noted, "We have been consistent and do not believe that there are provisions we have drafted which conflict with the CBA." *Id.* ¶ FF. Mr. Caplan also declared that if any consent decree provisions conflicted with the CBA, the CBA would control. *Id.* However, the parties did not reach final agreement on the carve-out language that had been discussed. *Id.*

Shortly after the May 31, 2018 meeting, Mr. Graham learned from confidential sources that the final draft of the consent decree provisions would, in fact, conflict with the collective bargaining agreement. *Id.*, ¶ HH. The OAG had not presented to the Lodge any specific provisions that had been negotiated either with the City or with interested community groups to indicate that there would be a conflict, and up to this point, the Lodge president had relied upon the OAG's representations that the consent decree would not interfere with the collective bargaining agreement. *Id.* To protect its interests, the Lodge filed a motion to

intervene pursuant to Fed. R. Civ. P. 24(a) (2) on June 6, 2018. *Id.* ¶ HH; [Doc. 51].

Almost two months later, a draft consent decree negotiated between and OAG and the City was made public by the OAG on July 27, 2018. It contained numerous provisions that conflict with the disciplinary and investigation provisions of the CBA, creates new job duties without requiring collective bargaining negotiations with Lodge, a new shift and furlough assignment system for patrol officers, a crisis intervention plan and wellness plan for officers, and new job duties without requiring collective bargaining negotiations with Lodge. [Doc. 81-2; Doc. 81-1] (identifying various paragraphs of the consent decree which conflict with collective bargaining rights). In addition to these conflicts with the CBA and the bargaining obligations of the IPLRA, the consent decree also conflicts with several provisions of other Illinois laws and the Chicago Municipal Code that were enacted to protect the work related interests of police officers. App. C ¶¶ 238, 425, 429, 431, 462, 475, and 492.

On August 16, 2018, the district court entered a Memorandum Opinion and Order denying the Lodge's motion to intervene, based solely on a finding that the intervention was untimely. App. A-1. An agreed upon consent decree was filed in the district court by the OAG and the City on September 13, 2018, and it is 226 pages long with 799 paragraphs. There has been no judicial finding by the district court as to constitutional violations committed by either the City or the Lodge to justify the numerous paragraphs that interfere with the police officers' collective bargaining rights and Illinois statutes that provide benefits for police officers. Most important to this point is that paragraphs 701 and 707 contain non-admission claus-

es that the consent decree is not to be construed as an admission of liability. App. C. The district court approved the consent decree on January 31, 2019. [Doc. 702 and 703].

Reasons for Granting the Petition

A. The Seventh Circuit Creates A New Time Standard For Rule 24(a) Intervention That Conflicts With McDonald And The Decisions Of All The Courts Of Appeals.

There is no absolute measure of timeliness in intervention litigation, *Edwards v. Houston* 78 F.3d 983,1001 (5th Cir. 1996), and the Seventh Circuit's decision does not follow this key principle as it was first articulated in this Court's opinion in *United Airlines, Inc. v. McDonald*, 432 U. S. 385, 394 (1977) and followed by decisions of all the Circuit Courts of Appeals holding that the time for intervention under FRCP Rule 24(a) is to be measured when it becomes evident or clear that a would-be intervenor's interests could be impacted by the actions of the existing parties to the litigation. The Seventh Circuit has departed from these decisions and has created a conflict in Rule 24(a) jurisprudence. In *McDonald*, this Court held that intervention was timely after a district court entered final judgment in a class action case. At that point, it became clear to the individual claimant that her individual claims, based on United's no marriage rule for stewardesses, would not be pursued because the named plaintiffs had decided not to appeal the district court's final judgment. Once it became clear that the interests of unnamed class representatives would no longer be protected by the named class representatives, McDonald, the respondent and an unnamed class member promptly moved to protect her interests in the case by filing a motion to intervene within the

time period in which the named plaintiffs could have taken an appeal.

Instead of relying on the central words of *McDonald*, "as soon as it became clear" the "interests . . . would no longer be protected," the Seventh Circuit focused on the time the lawsuit was filed as the point to determine a timely filing. It held that prospective intervenor must move to intervene ". . . as soon as it knows or has reason to know that its interests *might* be adversely affected by the outcome of the litigation." *State of Illinois v. City of Chicago*, Case No: 18-2805, slip op. at 8 (7th Cir. Jan 2, 2019). App. A-2. The Seventh Circuit rejected the use of the word clear in formulating the word might as key word for a standard that does not follow this Court's decision and those of many other circuit courts of appeals. The word might does not appear in the *McDonald* test. The Seventh Circuit approved of the district court's finding that the "Lodge should have known of its interest in the suit from the time the State filed suit." *State of Illinois* slip op. at 8. This is not the standard that was adopted by this Court and is much more restrictive than the Rule 24 (a) decisions of all of the circuit courts of appeals. It is for this reason that this petition should be granted.

In *Stallworth v. Monsanto Co.*, 558 F.2d 257, 265 (5th Cir. 1977), a key Rule 24 (a) case, followed by many courts of appeals, the Fifth Circuit rejected the notion that a would-be intervenor should file a motion to intervene when he became aware of the pendency of the action instead of the date on which he learned of his interest in the case. The court relied on *McDonald* as not judging the time for filing when the would-be interviewed first learned that the lawsuit was pending *Id.* The *Stallworth* court reversed a district court's denial

of a motion to intervene which had been filed less than three weeks after a settlement was incorporated in the district court's final judgment. 558 F. 2d at 267. An important consideration in Stallworth is the policy of conserving judicial and litigation resources.

> [A] rule making knowledge of the pendency of the litigation the critical event would be unsound because it would induce both too much and too little intervention. It 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. Often the protective step of seeking intervention will later prove to have been unnecessary, and the result will be needless prejudice to the existing parties and the would-be intervenor if his motion is granted, and purposeless appeals if his motion is denied. In either event, scare judicial resources would be squandered, and the litigation costs of the parties would be increased. Such a rule would also mean that many individuals who excusably failed to appreciate the significance of a suit at the time it was filed would be barred from intervening to protect their interests when its importance became apparent to them later on. These effects would be inconsistent with two important purposes of Rule 24: to foster economy of judicial administration and to protect non-parties from having their interest adversely affected by litigation conducted without their participation. 558 F. 2d at 265.

The reasoning of the *Stallworth* decision has been followed by the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh

and D.C. Circuits. *Banco Popular de Puerto Rico v. Greenblatt*, 964 F. 2d 1227, 1231 (1st Cir. 1992) (knowledge of the lawsuit does not start the clock or trigger obligation to seek intervention); *U. S. v. Pitney Bowes, Inc.*, 25 F. 3d 66, 70 (2nd Cir. 1994) (timeliness defies precise definition, and it is not confined strictly to chronology); *Alcan Aluminum Inc. v. AT & T Technologies*, 25 F. 3d 1174,1182 (3rd Cir. 1994) (timeliness should not prevent intervention where an existing party induces the applicant to refrain from intervening); *Hill v. Western Electric Co.*, 672 F. 2d 381, 386 (4th Cir.1994); *Sierra Club v. Espy*, 18 F. 3d 1202, 1206 (5th Cir.1994) (a better gauge of promptness is the speed with which the would-be intervenor acted when it became aware that its interests would no longer be protected by the original parties); *Edwards v. City of Houston*, 78 F. 3d 983 (5th Cir. 1996); *Davis v. Lifetime Capital, Inc.*, 560 Fed. Appx 477, 490 (6th Cir) (2014); *Reich v. ABC/York-Estes Corp.*, 64 F. 3d 316, 332 (7th Cir. 1995) (party should not be expected to intervene where it has no reason to believe its interests are not being protected); *Liddel v. Caldwell*, 546 F. 2d 768, 770-71 (8th Cir. 1976) (intervention motion was granted even though the intervenor declined an opportunity to seek intervention at the beginning of the lawsuit); *Legal Aid Society of Alameda County. v. Dunlop*, 618 F. 2d 48, 50 (9th Cir. 1980); *Oklahoma ex rel. Edmonson v. Tyson Foods, Inc.*, 619 F. 3d 1223, 1232 (10th Cir. 2010) (a potential party could not be said to have unduly delayed in moving to intervene if its interest had been adequately represented until shortly before the motion to intervene); *San Juan County Utah v. U. S.*, 503 F. 3d 1163, 1203 (10th Cir. 2007) (plurality opinion) (we join other circuits that measure delay from when the movant was on notice that its interests may not be protected by a party in the case); *Howard v. McLucas*, 782 F. 2d 956, 959 (11th Cir. 1986) (potential intervenors cannot very well judge

whether their interests are in jeopardy until they know what particular remedies are being contemplated).

The Seventh Circuit's decision is at odds with these and its own opinions, and the facts of this case indicate that the Lodge was deliberately deceived in its discussions with the OAG and filed its motion to intervene as soon as it learned of the misrepresentation and that its interests would not be secure. In *Edwards*, *supra*, the Fifth Circuit held that the time clock also runs from the time the intervenor "became aware that his interest would no longer be protected by the existing parties to the lawsuit." 78 F. 3d at 1000. That is exactly what happened here when the Lodge first became aware that the OAG was actually negotiating with the City a consent decree that would nullify some contract provisions. It then filed its motion to intervene, and that was done about eight months before the district court approved the consent decree.

Two circuits, the Third in *Alcan* and the Fifth in *Stallworth,* have held that timeliness should not bar intervention when an existing party, here the OAG, induces the applicant, here the Lodge, to refrain from intervening. *Alcan*, 25 F. 3d at 1182; *Stallworth*, 558. F.2d at 266, 267. Both courts noted that timeliness is an elemental form of latches or estoppel. In *Stallworth*, the court held that an existing party should not be heard to complain about timeliness where it had made it more difficult for the would-be intervenor to acquire information about the lawsuit early on. 558 F.2d at 268. Therefore, the Lodge had a good reason not to intervene right after the filing of the complaint.

B. The Seventh Circuit Did Not Follow Well Established Law Of Its Own And Of Other Circuits That Facts In A Motion To Intervene Are To Be Accepted As True.

The Lodge's declaration that the OAG was deceptive on the issue of no harm to its collective bargaining rights was not rebutted by the OAG, and the Seventh Circuit did not follow the well-established rule that the facts as asserted in a motion to intervene must be accepted as true. Most significant to this issue is that the district court did not even consider the Lodge's claims of deception which had been argued to the court. No attempt was made by the OAG to seek permission of the district court to submit a counter declaration to that of the Lodge president. *Reich v. ABC/York-Estes Corp*., 64 F.3d 316, 321 (7th Cir. 1995); *Lake Investors Development Group v. Egidi Development Group*, 715 F. 2d 1256 1258 (7th Cir. 1983); *United States v. AT & T*, 642 F. 2d 1285, 1291 (D.C. Cir. 1980). Here, the conflict is between its own circuit's law and that of the D.C. Circuit. The Seventh Circuit's decision dismisses that Lodge's claims that it was misled into believing that the OAG had no interest in interfering with the Lodge's collective bargaining rights. After the Lodge's initial public criticism of the lawsuit, it met with the OAG and over a period of months was induced to believe that its collective bargaining interests would be protected by the provisions of the consent decree being negotiated with the City.

This case is more like *Alcan Aluminum*, where the Third Circuit relied on *Stallworth* to hold that ". . . timeliness should not prevent intervention where an existing party induces the applicant to refrain from intervening." 25 F. 3d at 1181-82 citing *Stallworth*, 558 F. 2d at 267. The declaration of the Lodge's pres-

ident submitted to the district court was not rebutted by the OAG. Its prime theme is that the OAG repeatedly stated it was not seeking to damage the Lodge's collective bargaining rights. The OAG admitted to the Lodge president that the OAG did not want the Lodge to intervene, so accordingly, the misrepresentations were made. Therefore, The Lodge had good and sufficient reason to rely on these inaccurate statements because they came from the State's highest ranking legal officers. The Lodge's motion to intervene is timely because it was filed once it learned that its interests would no longer be protected in the litigation. *Cf. Geiger v. Foley Hoag LLP Retirement Plan*, 521 F. 3d 60, 65 (1st Cir. 2008) (allowing intervention by ex-wife in former husband's ERISA action against retirement plan, in which husband sought to block transfer of retirement assets to ex-wife, even though ex-wife knew of the suit for nine months before seeking intervention, where ex-wife reasonably believed her interests would be protected by retirement fund).

Based on the declaration of the Lodge's president, the Seventh Circuit erred by not finding the Lodge's unrebutted declaration as to the facts of this case to be true. Graham Declaration, App. E. The court claims that the Lodge knew its interests were "pitted against" those of the State, but the facts in the declaration, which must be taken as true do not support that assertion. The Lodge was told by the OAG:

> "We [OAG] believe the City and the OAG are not impacting your rights." *Id*. at ¶ CC.
>
> Mr. Caplan [OAG] also indicated that the OAG was trying hard to work with the City not to impact the collective bargaining rights of police officers." *Id*. at ¶ DD.

> "We have been consistent and do not believe that there are provisions [consent decree] we have drafted which conflict with the CBA." *Id*. at ¶ FF.

These comments gave the Lodge an impression that its interests would be safe. Given the assurances from the OAG, no reasonable understanding of these statements leads to a conclusion that the parties' interests were "pitted" against each other in the OAG negotiations with the City on the terms of the consent decree. The obvious deception of the OAG was incorrectly missed by the court in not accepting the declaration as being true, and were not even considered by the district court. *State of Illinois*, Memorandum Opinion and Order, (N.D.Ill. August 16, 2018), App. 1a

In *Alcan*, the Trustees of a hazardous product site waited more than four years to intervene and had kept in touch with the government's counsel to learn about the discussions leading up to the consent decree. They were concerned about the consent decree destroying the Trustees' contribution right. Like the OAG here, the "government's attorney assured him [Trustees' counsel] that the consent decree would not compromise the Trustees' claims." *Alcan*, 25 F. 3d at 1182. The Third Circuit held that the Trustees had no reason to intervene because the government led them to believe their interests were not at stake. *Id*. Intervention was allowed, even though it was filed more than four years after the start of the litigation. The court held that this led the Trustees not to intervene early and that the government could not credibly complain that the motion was untimely. *Id*. 25 F. 3d at 1182.

> [T]o the extent there is a temporal component to the timeliness inquiry, it should be measured from the point at which an applicant knows, or should know, its rights are directly affected by the

> litigation. In so holding we are breaking no new ground. The Court of Appeals for the District of Columbia Circuit came to the same conclusion in *National Wildlife Federation v. Burford*, 878 F. 2d 422 (D.C. Cir. 1989), *rev'd on other grounds, sub nom. Lugan v. National Wildlife Fed'n*, 497 U.S. 871 (1990).

The Seventh Circuit decision also conflicts with *Stallworth* in not recognizing that the exclusion of the Lodge from observing the settlement conferences is a significant reason why the Lodge did not have sufficient information on which to determine whether it should have intervened. Contemporaneous with the Lodge being assured that its rights were not being impacted by the consent decree, the existing parties objected to allowing the Lodge an opportunity to observe the settlement conferences being held by the court. In *Stallworth*, the court noted that the plaintiffs there had ". . . urged the district court to make it more difficult for the appellants to acquire information about the suit early on." *Stallworth*, 558 F.2d at 267.

The Lodge attempted to gain information about the case by 1) asking the OAG for information about the draft consent decree proposals, which was rejected, and 2) appearing in the district court's court room and on two occasions asking the court for permission to observe the settlement conferences. The court's court room deputy advised the Lodge's representatives that the court would allow this request if the existing parties agreed. App. ¶¶ E, and GG. They did not. So making having made it more difficult for the Lodge to acquire information about the case, according to the *Stallworth* court, the OAG should not be heard to complain that the Lodge should have known about the

case or appreciated its significance sooner. *Id. Acccord, Smith v. Los Angeles Unified School District*, 830 F.3d 843, 858 (9th Cir. 2016). Had the Lodge been allowed to observe or review draft documents, it would have been able to determine the extent of the impingement on the collective bargaining agreement's provision and the Lodge's statutory rights, according to the Lodge's president. *Id.*

Upon learning that the OAG was preparing a consent decree whose provisions would adversely affect the Lodge's collective bargaining rights, the Lodge quickly filed its motion to intervene. The Seventh Circuit improperly rejected these facts on the basis that the ". . . Lodge never identifies the specific information that these sources provided" and assumes the Lodge prior to the confidential tips could have "intuited from the complaint or discussions with the State" that its interests would be affected. *State of Illinois* slip op. at 12. App. A-2. Does the Circuit realistically believe that a confidential source should be revealed by a police officer—the president of the Lodge? That is simply not realistic.

To the contrary, the Lodge was not reasonably going to identify its source, and the confidential information only stated that contract rights would be impaired. No other details were needed to sound the alarm bell for the Lodge. That source turned out to be correct. The proposed consent decree filed two months later did in fact contain provisions that would interfere with Lodge's collective bargaining rights. The Seventh Circuit strains the boundaries of the rule that the facts in the motion to intervene are to be taken as true. This is especially the case given the provisions of the consent decree that adversely affect the officers' collective bargaining rights. To its detri-

ment, the Lodge was induced and misled by the OAG not to file a motion to intervene and only did so when it learned the OAG actually planned to affect collective bargaining rights.

A review of the complaint and its remedial provisions does not show any contract provision that the OAG sought to change, and the Lodge reasonably could not have assumed that its contract and non-collective bargaining rights would have been impinged, as they were. The Seventh's Circuit's handling of this issue is directly contrary to that of the Tenth and Eleventh Circuits where the both courts held a party should not be expected to seek intervention if it has no reason to believe its interests would not be protected. *San Juan County Utah v. U.S.*, 503 F. 1163, 1203 (10th Cir. 2007); *Howard v. McLucas*, 782 F 2d. 956, 959-60 (11th Cir. 1986) (court would not impute knowledge in the present case from the complaint's prayer for broad relief). The Lodge as per the reasoning of the Tenth Circuit in *San Juan*, 503 F. 3d at 1203, had every reason to believe that the OAG would protects its collective bargaining interests, and, therefore, it had no reason to intervene earlier than it did. However, once it learned that was not the case, it moved quickly to intervene. If little is known about the ramifications of the lawsuit, intervention should not be advanced. *U. S. v. Yonkers, Board of Education* 801 F. 2d 593, n. 7 (2nd Cir. 1986) (relying on *McDonald*, the court stated that it would be unwise to allow putative class members to intervene immediately to appeal the denial of class certification, where little is known about the ramifications of the lawsuit).

An objective review of the complaint does not leave the impression that contract provisions were going to

be affected, especially in light of the OAG'S statements to the contrary. The Eleventh Circuit contrary to the Seventh's Circuits handling of the Lodge's declaration has held that

> [a] court cannot impute knowledge that a person's interest are at stake from mere knowledge that an action is pending 'without appreciation of the potential adverse effect an adjudication of that action might have on one's interests . . .' *Howard v. McLucas*, 782 F. 2d at 959. (citation omitted).

A would-be intervenor cannot realistically judge if its interests are in serious jeopardy until it knows what remedies are being contemplated. *Id*. (citing to Schwarzschild, *Public Law by Private Bargain: Title VII Consent Decrees and the Fairness of Negotiated Institutional Reform*, 1984 Duke L.J. 887, 921).

The Lodge would reasonably not have known precisely how the OAG complaint would have affected its interests, but any concern was mitigated by the OAG's subsequent assurances of non-interference, and the Seventh Circuit did not follow the rule on accepting as true the Lodge's claims that the OAG's representations led it to conclude that its contract rights were not endangered. The Seventh Circuit does not accept that information. That is directly contrary to established law. By not applying this rule of law, the Court improperly held that the time clock for the intervention motion began to run from the filing of the complaint, and that is contrary to how a majority of the circuit courts of appeals have ruled on this issue. Once the Lodge learned of the deception, it shortly thereafter filed its motion to intervene and that was eight months before the consent decree was approved. Therefore, it was timely.

C. The Seventh Circuit Did Not Apply The Proper FRCP Rule 24(a) Standard In This Case And Conflicts With The Fifth Circuit On This Issue

1. Rule 24 (a) Was Not Properly Applied.

The Seventh Circuit applied a standard for measuring prejudice that conflicts with FRCP Rule 24 (a) and the other circuit courts' handling of this issue, and this Court should grant the petition in order to resolve this conflict. In affirming the district court, the Seventh Circuit focused on the amount of time and resources the City and the State have spent negotiating the consent decree language since the suit was filed. State of Illinois, slip op. at 12, App. A-2. In reaching that conclusion, the court appears to have applied the standard for prejudice under Rule 24(b)(3), governing permissive intervention, which requires the court to consider whether intervention would "unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). However, that permissive prejudice standard does not apply to a Rule 24(a) motion for intervention as a matter of right.

The Fifth Circuit held in *Stallworth*, 558 F.2d at 265, that for purposes of the timeliness of a Rule 24(a) motion to intervene, the only prejudice to be considered is that which would result from any delay in filing once the proposed intervenor knew or should have known its interests would be negatively impacted. Under Rule 24(a), the court is not to consider any and all prejudice that may arise from the commencement of the litigation until the filing of the motion to intervene:

> Although it is sometimes suggested that any prejudice that would result by virtue of intervention is relevant, . . . this is incorrect. Whether allowing in-

> tervention will delay the progress of the case or prejudice the rights of the original parties is a factor which the district court must consider in exercising its discretion to permit intervention under section (b) of Rule 24. . . .
>
> Since a similar provision is not included in section (a) of the Rule, it is apparent that prejudice to the existing parties other than that caused by the would-be intervenor's failure to act promptly was not a factor meant to be considered where intervention was sought under section (a). Therefore, to take any prejudice that the original parties may incur if the intervention is allowed into account under the rubric of timeliness would be to rewrite Rule 24 by creating an additional prerequisite to intervention as of right. *Id*.

The Court in *Stallworth* concluded that "the district court should apply a more lenient standard of timeliness if the would-be intervenor qualifies for intervention under section (a) than if he qualifies for intervention under section (b). The rule arose out of a concern that a section (a) intervenor 'may be seriously harmed if he is not permitted to intervene.'" *Id.* (citation omitted). Accord, *Edwards,* 78 F. 3d at 1001 (the same analysis applies in respect to *Edwards*, in which motions to intervene were filed by two different police unions 37 and 47 days (respectively) after publication of the notice of the official decree). The Fifth Circuit did not find these delays to be unreasonable. *Id.* Importantly, the Court noted that the unions' motions for intervention were filed prior to the entry of judgment, which the Court recognized as a factor that favored timeliness. *Id.* The Court noted that at no time prior to the filing of the official notice of the decree did the union representatives have knowledge of the specific terms of the proposed consent decree. *Id.*

Thus, the applicable standard for determining prejudice to the original parties in this case under Rule 24(a) is only any prejudice caused by any delay between when the Lodge first knew that its interest would not be protected by the OAG and when it sought intervention. The Lodge learned that its interests were no longer protected in late May 2018. App. E, ¶ HH. The motion to intervene was filed just one week later, on June 6, 2018. [Doc. 51]. The original parties failed to show any prejudice suffered during this one-week period.

In the instant case, not only had the consent decree not been submitted by the parties for review and approval by the lower court, the parties' negotiations had not even been completed before the Lodge filed its motion to intervene on June 6, 2018. [Doc. 51]. In fact, on the day after the Lodge filed its motion to intervene, the State and the City filed their fourth joint status report in which they reported that "[w]hile the Parties have made considerable progress in these negotiations, many issues remain unresolved. The Parties intend to continue these negotiations to try to resolve their differences and document their proposed agreement. . ." [Doc. 53 at ¶ 11]. Clearly, the parties still had a lot of work left to do, and the decree was not at the point of completion by the time the Lodge sought to intervene. In fact, a draft copy of the decree was not made available to the public, including the Lodge, until July 27, 2018. [Doc. 81-2; Doc. 81-1].

2. Without Intervention, The Lodge Does Not Have A Right To Appeal From The Consent Decree.

The Seventh Circuit conflicts with decisions of other circuit courts by not fully considering prejudice to the Lodge as a result of denying the motion to intervene. It dismissed the prejudice factor, but acknowledged that

the district court found that there "was 'some evidence that parts of the current consent decree may conflict with the CBA, the [Illinois Pubic Labor Relations Act], or other state laws.' For the purpose of this opinion, we will assume that certain provisions of the draft consent decree conflict—on their face—with the CBA and Illinois law." State of Illinois, slip op. at 13. A consent decree is not a matter of mere minor impact on employee rights, as noted by the Eleventh Circuit in *U.S. v. City of Hialeah*, 140 F.3d 968, 982 (11th Cir. 1998). In responding to a concession by the government—plaintiff that "incumbent employees may even be slightly diminished in their rights," the court wrote the government's response "is akin to saying that the rights of a pedestrian in a crosswalk may be slightly diminished by a runaway truck." *Id.* at 982. Here the rights of the police officers under non-collective bargaining statutes that are not covered by the carve out clause are in jeopardy. The absence of a right to appeal on this issue means that there is no other relief available.

One of the most important factors absent from the Seventh Circuit's decision is recognition of the extreme harm to the Lodge that results from an inability to appeal the decree as a non-party. *See Edwards*, 78 F.3d at 1002-03. The court looks at the carve out clause as a source of protection, but it does not cover rights in statutes other than the Illinois Public Labor Relations Act.

3. The Seventh Circuit's Decision Impairs The Lodge's Non-Collective Bargaining Rights.

The Court agreed that certain provisions of the consent decree conflict with Illinois law, but there is no protection for these conflicts in the carve out clause that is relied upon by the Court as the salvation for the Lodge. State of Illinois, slip op. 13. "For the purposes

of this opinion, we will assume that certain provisions of the draft consent decree conflict—on their face—with the CBA and Illinois law." *Id.* The district court had concluded that there is some evidence that the current, proposed draft of the consent decree "may conflict with the CBA, IPLRA or other state laws." The Seventh Circuit's analysis that the carve out language in consent decree paragraphs 710 and 711, identified in the Court's opinion as paragraphs 686 and 687 from an earlier draft of the consent decree, misses the point that only one statute, the Illinois Public Labor Relations Act, 5 ILCS 315/1 is the collective bargaining link to the consent decree. Consent Decree, Paras 710 and 711, App. C. "Nothing in this Consent Decree is intended to (a) alter any of the CBAs between the City and the Union; or (b) impair or conflict with the collective bargaining rights of employees in those units under the IPLRA." *Id.* Para. 711, The consent decree carve out language refers only to conflicts between the proposed consent decree, the CBA and bargaining rights under the IPLRA. State of Illinois, slip op. at 13, App A-2. There is nothing in the carve out language that refers to other state statutes or the Chicago Municipal Code, all of which also provide for work-related rights for police officers. This failure to provide protection for these rights defies the Court's recognition that a consent decree "cannot accidentally eliminate the rights of third parties." *Id*. at 14.

Prejudicial to the Lodge's rights under non-collective bargaining statutes are affected by the following consent decree paragraphs:

> Uniform Peace Police Officers Disciplinary Act, 50 ILCS 725/3.8 (b), and IPLRA Section 15(a), App. D (requirement for sworn affidavits to conduct a preliminary investigation) affected by Paras. 431

and 462, which will not require sworn complainant affidavits. App. D;

Police and Community Relations Improvement Act, 50 ILCS 727/1-1, App. D; (requirement that a state certified homicide investigator be assigned to an officer involved shooting where there is a fatality) affected by Para. 492, which will not require investigations shall be done by state certified investigators. App. D;

Law Enforcement Officers-Worn Camera Act, 50 ILCS 706, App. D (requirement that unflagged videos be destroyed after 90 days) affected by Para. 238 (g), which allows random review of videos with no reference to the destruction requirement. App. D;

Chicago Municipal Code, Chapter 2-84-330(D) and (E), Department of Police Article IV-Sworn Member Bill of Rights, App. D (prohibits the use of anonymous complaints to be used against police officers and requires disclosure of the complainants' names) affected by Para. 425 and 475 and which will allow the use of anonymous complaints and shall allow the CPD not to reveal the manner of complainants in officer investigations. App. D

These statutory and municipal code provisions stand apart from the labor relations provisions of the IPLRA, and the proposed consent decree directly conflicts with them in a matter not noted by the court in finding no prejudice to the Lodge. The court mistakenly believed this could be accommodated by the carve out language. That is clearly not the case given the limited nature of the carve out language, which only refers to the CBA and the IPLRA.

There has been no court finding to support these alterations of state law and ordinance rights, nor

could there be given the two broad non-admission clauses in the consent decree. Consent Decree Paras. 701 and 707. App. C. This is not a matter of speculation as found by the Court, because it actually assumed the conflict for purposes of its opinion. However, it inexplicably did not grant intervention to protect the rights of police officers under these statutes and ordinances.

D. The Court of Appeals Admitted That The District Court Did Not Consider All Four Factors Of The Timeliness Test And Conflicts With Other Circuits.

The Seventh Circuit clearly found that that the district court did not consider the unusual circumstances factor that would mitigate the delay in the filing of the motion to intervene. State of Illinois, Slip op. at 16. App. A-2. A district court is required, as in must, consider all four factors in assessing the timeliness of intervention. *Walker v. Jim Dandy Co*. 747 F. 2d 1360, 1366 (11th Cir. 1984). Jim Dandy "reiterate[d] the former Fifth Circuit's pronouncement that the four factors enunciated by the *Stallworth* court '*must* be considered in passing on the timeliness of a petition to intervene.' [emphasis added]. *Stallworth*, 558 F.2d at 264 (citing *United Airlines, Inc. v. McDonald*, 432 U.S. 385 387, 387; *SEC v. Tipco*, 554 F. 2d 710,711 (5th Cir. 1977); *Smith Petroleum Service, Inc. v. Monsanto Chemical Co*., 420 F. 2d 1103, 1115 (5th Cir.1970)." The failure of the Seventh Circuit to follow this rule is a basis for this Court to grant the petition. The Court notes that it reversed a district court decision on this issue in *Heartwood, Inc. v. U.S. Forest Serv., Inc*. 316 F. 3d 694, 701 (7th Cir. 2003) due to the district court not analyzing the timeliness factors in a corresponding manner to the four factors. It did not do the same here.

Contrary to the Seventh Circuit's decision, this issue of an unusual circumstance was not only raised in the timeliness issue but also argued by the Lodge as an unusual circumstance. The issue was raised by the Lodge at the district court in a reply brief filed with the district court, and the Lodge argued:

> At no time when the Lodge and the OAG were discussing the consent decree did the OAG reveal the serious contract impingements that it was contemplating agreeing upon with the City. To the contrary, the OAG through its representatives advised the Lodge that it was not going to affect the provisions of the CBA and that the OAG was not going to get involved in police disciplinary issues or deal with "core mandatory matters," which Lodge President Graham understood to mean subjects of bargaining. Graham Declaration, ¶¶ X, Y, CC, DD, and FF. The Lodge was advised by the OAG, "We believe the City and the OAG are not impacting your rights." Id. CC. The Lodge attempted to review the issues being discussed in the drafts that had been exchanged, but those attempts were rejected by both the OAG and the City when the Lodge was in court prior to settlement conferences. Id. GG. Had the Lodge been able to examine the drafts that had been exchanged, it would have been able to determine earlier the need for filing a motion to intervene. Lodge Reply Brief, at 11-12, [Doc. 81 at 12-13] filed on August 7, 2018.

This argument provided the district court with sufficient information to conclude that the Lodge had been seriously misled and accompanying this reply brief was the declaration of the Lodge's president. The Lodge had a right to present this in the reply brief to address argument that had been raised by the OAG

for the first time. *Matter of Waldman*, 859 F.2d 553, 556 n.4 (7th Cir. 1988). The existing parties did not move to strike, and instead responded to this reply argument, so it was properly before the district court. The Seventh Circuit should have reversed the district court on the ground that this unusual circumstance had not been considered. A careful review of the decision of the district court shows that it did not even consider this matter under any factor of the four part test for timeliness under Rule 24. *State of Illinois,* Memorandum Opinion and Order, *supra*, App. A-1.

E. The Decision Below Is Very Important.

The decision below warrants this Court's review for the following reasons:

1. Consistency in the Rule 24(a) intervention litigation is important to the potential litigants in consent decree litigation, as police associations around the country are being challenged by federal and state lawsuits. Representatives of police associations would prefer to protect established contract and statutory rights by following the directions of Stallworth and Edwards to try and resolve the matter. This would afford the opportunity to learn more about the existing parties' plans for remedial action that might affect contractual statutory rights rather than jump into the case at its commencement and use up judicial and litigation resources unnecessarily.

The Seventh Circuit's decision requires early intervention and in this case such action would have disrupted the existing parties' agreement to stay litigation and discovery. The Lodge's intervention would have led to full scale litigation at a time when the existing parties were hoping to reach an agreement.

Accordingly, the Seventh Circuit has made working out any settlement agreement in consent decree matters much more problematic.

2. The Seventh Circuit did not follow the fundamental rules under intervention law by changing McDonald's timeliness test, changing the prejudice standard in Rule 24(a) cases, not accepting well pleaded facts and not requiring the district court to analyze all four timeliness factors. This inconsistency with its own decision and those of other circuits will lead to confusion and unnecessary intervenor litigation.

3. Finally, the Seventh Circuit decision invites existing parties to mislead potential intervenors and thereby corrupt the litigation process.

For these reasons, this Court's review is essential to resolve these conflicts and to avoid unnecessary litigation.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A-1

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

STATE OF ILLINOIS,

Plaintiff,

v.

CITY OF CHICAGO,

Defendant.

Case No. 17-cv-6260
Judge Robert M. Dow, Jr.

MEMORANDUM OPINION AND ORDER

On August 29, 2017, the State of Illinois ("State") filed this lawsuit against the City of Chicago ("City") pursuant to 42 U.S.C. § 1983, the U.S. Constitution, the Illinois Constitution, the Illinois Civil Rights Act of 2003, the Illinois Human Rights Act, and the *parens patriae* doctrine "to ensure the City enacts comprehensive, lasting reform" of the Chicago Police Department ("CPD"), the Independent Police Review Authority ("IPRA"), and the Chicago Police Board ("Police Board"). [1] at 1. Currently before the Court is the Motion to Intervene [51] filed on June 6, 2018, by the Fraternal Order of Police Chicago Lodge No. 7 ("FOP"). For the reasons explained below, the FOP's motion [51] is respectfully denied and the FOP's motion to hold proceedings in abeyance pending ruling on motion to in-

tervene [65] is denied as moot. This case remains set for status hearing on August 30, 2018 at 10:30 a.m.

I. Background

The State filed this lawsuit against the City to enjoin the CPD "from engaging in a repeated pattern of using excessive force, including deadly force, and other misconduct that disproportionately harms Chicago's African American and Latino residents." [1] at 1, ¶ 2. As evidence of this pattern, the complaint points to reviews of CPD's policing practices over the last fifty years, including most recently two separate reports issued by the U.S. Department of Justice ("DOJ") (the "DOJ Report") and Chicago's Police Accountability Task Force ("Task Force") concluding that "CPD has continued to engage in a repeated pattern of using excessive force and racially discriminatory policing practices." [1] at 2, ¶ 3; see also *id.* at 13-29 (detailing the DOJ Report's findings). The State contends that CPD's "policy, custom, or practice" of police misconduct is reflected in and caused by "the City's failure to effectively train, supervise, and support law enforcement officers, and the City's failure to establish reliable programs to detect and deter officer misconduct and administer effective discipline." *Id.* at 7, ¶ 33. The State asserts that these failures have created "profound mistrust between many Chicago communities and CPD," which "reached its most recent flashpoint in late November 2015, following the release of a videotape depicting the fatal shooting of Laquan McDonald, a 17-year old African American, by a CPD officer." *Id.* at 2, ¶ 5. According to the State, the City has spent approximately $662 million on settlements, judgments, and outside legal fees for police misconduct cases between 2004 and early 2016.

The DOJ Report acknowledges that the City has announced a number of reforms to CPD but opines that

necessary reforms "will likely not happen or be sustained without the reform tools of an independent monitoring team and a court order." [1] at 3, ¶ 10 (quoting the DOJ Report). The DOJ Report advises that "[a] court-ordered, over-arching plan for reform that is overseen by a federal judge will help ensure that unnecessary obstacles are removed, and that City and police officials stay focused on carrying out promised reforms." *Id.*

The State brings this lawsuit in response to the DOJ Report "to obtain injunctive relief that will finally enable the City to eliminate unconstitutional conduct that has plagued CPD for decades." *Id.* at 4, ¶ 11. The State alleges that it is authorized to bring suit on behalf of the People of Illinois based on the doctrine of *parens patriae* and the Illinois Human Rights Act, 775 ILCS 5/10-104(A)(1), to defend its "quasi-sovereign interest in the prevention of present and future harm to its residents, including individuals who are, have been, or would be victims of the City's unconstitutional law enforcement practices." [1] at 5, ¶ 21. The State also seeks to protect its proprietary interests. According to the complaint, "[m]ultiple persons injured as a result of excessive force by CPD officers have incurred medical care costs that Illinois has paid for" through its Department of Healthcare and Family Services ("DHFS") and Medicaid. [1] at 6, ¶ 29.

The State's complaint contains four counts. In Count I, the State alleges that the City and its agents maintain a policy, custom or practice of using force against persons in Chicago without lawful justification, in violation of the Fourth Amendment to the United States Constitution and 42 U.S.C. § 1983. Count II alleges that these practices also deprive persons in Chicago of their rights under Article I, Section 6 of the Illinois Constitution. In Count III, the State alleges that the

City and its agents have violated the Illinois Civil Rights Act of 2003, 740 ILCS 23/5(b), by engaging in law enforcement practices that have a disproportionate impact on African Americans and Latinos in Chicago. Finally, Count IV alleges that the City and its agents have violated the Illinois Human Rights Act, 775 ILCS 5/5-102(C), by engaging in a pattern or practice of discrimination that denies African Americans and Latinos in Chicago the full and equal enjoyment of the privileges of the City's law enforcement services.

As relief, the State seeks a consent decree covering "several substantive reform areas to address the critical deficiencies at CPD, including departmental policies and practices, such as use of force, accountability, training, community policing and engagement, supervision and promotion, transparency and data collection, and officer assistance and support." [1] at 31, ¶ 201. The State requests that the Court appoint an independent monitor to measure and test these reforms. *Id.* at 31, ¶ 199.

Since the lawsuit was filed approximately one year ago, counsel for the State and City have engaged in extensive negotiations to arrive at a draft consent decree. The draft consent decree has been released to the public for comment and ultimately will be presented to the Court with a request for approval. According to the State, there have been 250 hours of face-to-face negotiation thus far between the City and State. [73] at 6. The State reports that it has a team of nine attorneys working on the case and has retained a team of six experts who have conducted site visits, meetings, and interviews with City and CPD personnel. The State also represents that, since the complaint was filed, its counsel have had eight in-person meetings with the FOP's President, Kevin Graham, to discuss, among other things, provisions that might be included in the consent decree.

See *Id.* at 5. The State advises that the Office of the Illinois Attorney General ("OAG") "sought and obtained input on reform of the Chicago Police Department from CPD officers through 13 focus groups." "Chicago Police Consent Decree," http://chicagopoliceconsentdecree.org/ (last visited Aug. 15, 2018).[1]

The State and City also have engaged in public outreach to obtain the input of community groups and other stakeholders on the contents of the consent decree. The OAG held fourteen consent decree community roundtables "to ensure that interested Chicago residents had a meaningful opportunity to provide their input on reform of CPD." "Chicago Police Consent Decree," http://chicagopoliceconsentdecree.org/ (last visited Aug. 15, 2018). In March 2018, the State and the City entered into a memorandum of agreement ("MOA") with a coalition of community groups ("Coalition") that "afford[s] the Coalition certain rights to raise objections and provide input regarding any consent decree proposed to the Court before the Court decides whether to approve and enter a final consent decree." [73] at 5. According to the State, it "offered FOP the same rights provided to the Coalition in the MOA, but FOP refused this offer." *Id.* (The FOP does not dispute that it refused the State's offer.)

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[1] The web page maintained by the OAG contains a link to a document entitled "Opinions of Officers of the Chicago Police Department on the Upcoming Consent Decree," http://chicagopoliceconsentdecree.org/wpcontent/uploads/2018/07/Opinions-of-Officers-of-the-Chicago-Police-Department-on-the-Upcoming-Consent-Decree-Final.pdf (last visited Aug. 15, 2018), which was compiled by the Police Foundation and dated July 2018. According to its authors, the document summarizes the input from focus groups with a total of 170 CPD officers who were asked about "their perceptions of the department's challenges and areas of change needed under a consent decree." *Id.* at 6.

On June 6, 2018, the FOP filed a motion to intervene in the lawsuit. The FOP is the "exclusive representative for the purpose of negotiating with the City of Chicago for wages, hours and working conditions of Chicago police officers pursuant to Sections 3 and 7 of the Illinois Public Labor Relations Act, ('IPLRA')." [51] at 1 (citing 5 ILCS 315/3 and 7). According to the motion to intervene, the "FOP has the right to bargain collectively and negotiate in good faith with the City of Chicago with respect to wages, hours and other conditions of employment, to bargain about matters that may be covered by other laws that pertain in part to a matter affecting wages, hours and other conditions of employment, and to enter into collective bargaining agreements containing causes which either supplement, implement or relate to the effect of such provisions in other laws." [51] at 5. The most recent collective bargaining agreement ("CBA") between the FOP and the City has a term of July 1, 2012, to June 30, 2017, but remains in full force and effect during the negotiation of a successor agreement.

The FOP asserts that it has a "substantial interest in the subject of this litigation which may, as a practical matter, impair or impede the [FOP's] ability to protect its collective bargaining representational interests of the Chicago police officers it represents." [51] at 1. According to the FOP, "[t]he CBA contains provisions addressing a number of the subjects raised in the complaint filed by the [OAG] in this case," including "the investigation of allegations of police officer misconduct and related discipline, the field training officer program, police officer promotions, officer mental health and support programs, including the performance recognition system, behavioral intervention system, personal concerns program, and the requirement that allegations of misconduct by police officers be supported by affidavits." [51] at 6. The FOP also attaches to its

motion a draft answer to the complaint and a draft motion to dismiss, in which the FOP asserts that the State lacks standing to sue the City under 42 U.S.C. § 1983. See [51-1] & [51-2].

The FOP, City, and State agreed to extend the briefing schedule on the motion to intervene by a couple of weeks to allow for "discussions concerning the motion." [61] at 1 (agreed motion); see also [63] (order granting motion). Once it became apparent that those discussions would not moot the motion, the FOP filed a motion to hold proceedings in abeyance pending a ruling on the motion to intervene [65] and the parties agreed to a new briefing schedule on both motions. See [68]. The City and State filed responses to both motions on July 24. See [73] & [75]. Both oppose intervention, for reasons explained in the analysis section below.

On July 27, 2018, the State and City released a draft consent decree for public review. It is posted online at http://chicagopoliceconsentdecree.org/wp-content/uploads/2018/07/Illinois-v.-Chicago-Consent-Decree-Draft-for-Public-Review-2018-7-27.pdf (last visited Aug. 15, 2018). See also "Chicago Police Consent Decree," http://chicagopoliceconsentdecree.org/ (last visited Aug. 15, 2018). The 232-page, 775-paragraph document covers a broad range of topics, including community policing; impartial policing; crisis intervention; use of force; recruitment; hiring and promotion; training; supervision; officer wellness and support; accountability and transparency; data collection, analysis and management; and implementation, enforcement and monitoring. Most notably for purposes of the instant motion, the draft consent decree acknowledges that the City is subject to several CBAs into which it has entered with the FOP and other police officers' unions. In particular,

paragraphs 686 and 687 of the draft consent decree provide:

> 686. The Parties acknowledge the City has entered into four collective bargaining agreements effective July 1, 2012 (individually, and collectively, the "CBAs") with unions representing sworn police officers ("Unions"). The Parties further acknowledge that the City and the Unions are currently negotiating successor agreements to the CBAs ("Successor CBAs"). The Parties further acknowledge that the Unions and the City have certain rights and obligations under the Illinois Public Labor Relations Act, 5 ILCS 315 ("IPLRA") and that the IPLRA contains provisions for the City and the Unions to enforce their respective rights and obligations, including a process, set forth in Section 14 of the IPLRA and Section 28.3 of the current CBAs, for resolving bargaining impasses between the City and the Unions over issues subject to a bargaining obligation under the IPLRA ("Statutory Impasse Resolution Procedures").
>
> 687. Nothing in this Consent Decree is intended to (a) alter any of the CBAs between the City and the Unions; or (b) impair or conflict with the collective bargaining rights of employees in those units under the IPLRA. Nothing in this Consent Decree shall be interpreted as obligating the City or the Unions to violate (i) the terms of the CBAs, including any Successor CBAs resulting from the negotiation process (including Statutory Impasse Resolution Procedures) mandated by the IPLRA with respect to the subject of wages, hours and terms and conditions of employment unless such terms violate the U.S. Constitution, Illinois law or public policy, or (ii) any bargaining obligations under the IPLRA, and/or waive any rights or obligations thereunder. In negotiating Suc-

> cessor CBAs and during any Statutory Resolution Impasse Procedures, the City shall use its best efforts to secure modifications to the CBAs consistent with the terms of this Consent Decree, or to the extent necessary to provide for the effective implementation of the provisions of this Consent Decree.

The parties have invited interested persons and entities to provide comments on the draft consent decree by August 17, 2018. The parties plan to consider these comments prior to filing the proposed consent decree with the Court. Pursuant to their MOA with the Coalition, the State and City have committed to jointly request a fairness hearing on the consent decree, which would provide interested parties and members of the public an opportunity to comment both orally and in writing on the proposed consent decree.

On August 7, 2018, the FOP filed its reply brief in support of its motion for intervention. See [81]. The FOP identifies multiple provisions of the proposed consent decree that allegedly conflict with the CBA, the FOP members' collective bargaining rights, the IPLRA, and other state laws. The FOP also filed a motion for leave to file an appendix, which "outline[s] in great detail" the provisions of the consent decree that allegedly "interfere with the collective bargaining agreement statutory rights." [79] at 1. The Court has granted that motion, see [87], and has reviewed the appendix materials.

On August 8, 2018, after its preliminary review of the opening, response, and reply briefs, the Court ordered supplemental briefing concerning whether paragraphs 686 and 687 of the proposed consent decree would "adequately address the FOP's concerns about the potential effects of the consent decree on its collective bargaining and statutory rights." [82] at 2. The

parties filed their supplemental briefs on August 10. See [84], [85] & [86].

II. Legal Standard

FOP seeks to intervene in this proceeding either as of right under Rule 24(a)(2) or permissively under Rule 24(b). See Fed. R. Civ. P. 24. The rule for intervention as of right provides that, "[o]n timely motion, the court must permit anyone to intervene who *** claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P. 24(a)(2). As the Seventh Circuit has explained, this rule imposes four requirements for intervention of right: "(1) timeliness, (2) an interest relating to the subject matter of the main action, (3) at least potential impairment of that interest if the action is resolved without the intervenor, and (4) lack of adequate representation by existing parties." *Reid L. v. Illinois State Bd. of Educ.,* 289 F.3d 1009, 1017 (7th Cir. 2002); see also *Ligas ex rel. Foster v. Maram,* 478 F.3d 771, 773 (7th Cir. 2007). "The burden is on the party seeking to intervene of right to show that all four criteria are met." *Reid L.,* 289 F.3d at 1017. "A failure to establish any of these elements is grounds to deny the petition." *Ligas,* 478 F.3d at 773. The Court "must accept as true the non-conclusory allegations of the motion" to intervene. *Reich v. ABC/York-Estes Corp.,* 64 F.3d 316, 321 (7th Cir. 1995). A district court's denial of a motion to intervene as of right on timeliness grounds is reviewed for abuse of discretion, *Sokaogon Chippewa Cmty. v. Babbitt,* 214 F.3d 941, 945 (7th Cir. 2000), while the application of the other requirements is reviewed *de novo, Reich,* 64 F.3d at 321; *Ligas,* 478 F.3d at 773.

Even if intervention as of right is not wan-anted, the Court may, "[o]n timely motion, *** permit anyone to intervene who *** has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). "A court may allow intervention under Rule 24(b) only if: (1) a claim or defense of the would-be intervenor has 'a question of law or fact in common' with the main action; and (2) the intervention request is timely." *Kostovetsky v. Ambit Energy Holdings, LLC,* 242 F. Supp. 3d 708, 728 (N.D. Ill. 2017) (quoting *Sokaogon Chippewa Cmty.,* 214 F.3d at 949). "Permissive intervention under Rule 24(b) is wholly discretionary and will be reversed only for abuse of discretion." *Sokaogon Chippewa Cmty.,* 214 F.3d at 949.

III. Analysis

A. Intervention as of Right

1. Timeliness

"The test for timeliness is essentially one of reasonableness: 'potential intervenors need to be reasonably diligent in learning of a suit that might affect their rights, and upon so learning they need to act reasonably promptly.'" *Reich,* 64 F.3d at 321 (quoting *Nissei Sangyo America, Ltd. v. United States,* 31 F.3d 435, 438 (7th Cir. 1994)). "'The purpose of the [timeliness] requirement is to prevent a tardy intervenor from derailing a lawsuit within sight of the terminal.'" *Sokaogon Chippewa Cmty.,* 214 F.3d at 949 (quoting *United States v. South Bend Cmty. Sch. Corp.,* 710 F.2d 394, 396 (7th Cir. 1983)). Thus, "'[a]s soon as a prospective intervenor knows or has reason to know that his interests might be adversely affected by the outcome of the litigation he must move promptly to intervene.'" *Id.* (quoting *South Bend Community Sch. Corp.,* 710 F.2d at 396); see also *Heartwood, Inc. v. U.S. Forest Service, Inc.,* 316 F.3d 694,

701 (7th Cir. 2003); *Kostovetsky,* 242 F. Supp. 3d at 728. The Court considers the following factors to determine whether a motion to intervene is timely: "(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances." *Sokaogon Chippewa Cmty.,* 214 F.3d at 949 (citing *Ragsdale v. Turnock,* 941 F.2d 501, 504 (7th Cir. 1991)); see also *Grochocinski v. Mayer Brown Rowe & Maw, LLP,* 719 F.3d 785, 797-98 (7th Cir. 2013); *Jeffries v. Swank,* 317 F.R.D. 543, 549 (N.D. Ill. 2016).

a. Intervenor's Knowledge of Its Interest

This action was filed on August 29, 2017. The FOP moved to intervene more than nine months later, on June 6, 2018. The FOP argues that it should not be expected to have intervened earlier because it was not given drafts of the consent decree and thus did not know if or how this lawsuit would affect its members' rights. Kevin Graham, the President of FOP, submits an affidavit stating that OAG's representatives advised the FOP that the consent decree "was not going to get involved in police disciplinary issues or deal with 'core mandatory matters,'" which he understood to mean subjects of bargaining. [81] at 12 (citing [81-4] at 8-9). The FOP explains that it "filed this motion for intervention only after it had learned on May 15, 2018, that community groups *** published and undoubtedly submitted to the OAG a report that contains recommendations for the consent decree *** which are extensive and adverse to the interests of the FOP and the employees it represents." [51] at 5.

The City disputes the FOP's position that community groups' publication of recommendations for the consent

decree was "the catalyst for [the FOP's] attempted intervention." [75] at 7. Instead, the City contends that the FOP's motion is untimely because "it has been clear since day one that this action would result in a consent decree that affects CPD"—indeed, the complaint specifically requests a consent decree and outlines topics it should cover. [75] at 1. The State concurs that the motion to intervene is untimely because the FOP has known about its asserted interest in this case since the complaint was filed, as demonstrated by FOP President Graham's public comments immediately following the filing of the suit.

Considering these arguments together, the Court concludes that the FOP must have known about its interest in the case when the complaint was filed, but delayed nine months before filing suit. The FOP did not need a draft consent decree or community groups' recommendations to recognize that this lawsuit "could impact [its members'] interests." *Heartwood,* 316 F.3d 694 at 701. The complaint itself requests a consent decree and details a variety of topics it should cover, including "departmental policies and practices, such as use of force, accountability, training, community policing and engagement, supervision and promotion, transparency and data collection, and officer assistance and support." [1] at 31, ¶ 201. FOP's motion to intervene identifies multiple "subjects raised in the complaint" that are also covered by its "CBA *** provisions," [51] at 6, and thus "might" place the terms of the requested decree in conflict with the CBA or its members' bargaining rights. *Kostovetsky,* 242 F. Supp. 3d at 728. To trigger the obligation to seek intervention, all that the lawsuit needed to do was advise the FOP was that its interests "might be adversely affected" *(Sokaogon Chippewa Cmty.,* 214 F.3d at 949), and the State's complaint clearly did that.

The FOP's own public statements immediately after the complaint was filed confirm that it recognized the profound potential impact of the requested consent decree on the interests of its members. On the day that the lawsuit was filed, the FOP publicly took the position that the consent decree would be "a potential catastrophe for Chicago" and would "only handcuff the police even further." "FOP President Graham Response to Consent Decree," The Watch (Aug. 29, 2017), https://fop7blog.org/news/2017/8/29/fop-president-graham-response-to-consent-decree (last visited Aug. 15, 2018). Even more tellingly, in FOP's September 2017 newsletter, Graham criticized the lawsuit in an article titled "No Reason to 'Consent.'" Graham specifically mentioned that negotiating a consent decree to resolve this case "'*could seriously threaten our collective bargaining rights*' and that '[n]o one in my administration, and few Lodge 7 members, believe that such actions are necessary.'" [73] at 4 (emphasis added) (quoting [73-1] at 13). These statements in August and September 2017 demonstrate that the FOP and its leadership almost immediately recognized that their interests-including in regard to their CBA rights-"might be adversely affected by the outcome of the litigation," thereby triggering the obligation to "move promptly to intervene" if they wished to participate as a party to the litigation. *Sokaogon Chippewa Cmty.*, 214 F.3d at 949.[2]

[2] The more than nine-month delay between the commencement of this lawsuit and the filing of the FOP's motion to intervene stands in stark contrast to the circumstances in *United States v. City of Los Angeles,* 288 F.3d 391 (9th Cir. 2002), cited in the FOP's briefs. In that case, "the motion [to intervene] was filed only approximately one and [a] half months after the suit was filed." *Id.* at 398.

b. Prejudice to the Original Parties

The Court next considers whether allowing intervention would prejudice the original parties. See *Sokaogon Chippewa Cmty.,* 214 F.3d at 950 (district court must "weigh[] the interests on both sides" when faced with a late motion to intervene). The City and State both argue that they would suffer prejudice if the FOP is allowed to intervene at this point in the proceeding. The City explains that "[t]he Parties began negotiating the draft decree shortly after this action was filed and have spent countless hours exchanging proposals and working toward compromise and agreement on the multitude of topics covered by the decree." [75] at 3. The parties have come to agreement on all but one point, concerning whether CPD officers must document every time they point their weapon at an individual. The parties are in the process of gathering written comments from the public. After incorporating these comments into the draft consent decree, they plan to file the consent decree with the Court and request a formal fairness hearing. The State contends that "[i]ntroducing an intervenor on equal footing with the existing parties at this late date—particularly one that has repeatedly stated its public opposition to any consent decree-holds the real danger of undoing much of this work and, at best, substantially delaying the progress the parties have made toward a complete consent decree." [73] at 10.

The Court agrees that the original parties to this lawsuit would experience prejudice if the FOP is allowed to intervene at this advanced date. In the analogous context of settlements, the Seventh Circuit "has held that once complex settlement negotiations that are well publicized begin parties may not be allowed to intervene." *Ragsdale,* 941 F.2d at 504 (citing *City of Bloomington v. Westinghouse Electric Corp.,* 824 F.2d 531, 525 (7th Cir. 1987)). The City and State have deployed vast resources negoti-

ating and drafting the proposed consent decree, which is 232 dense pages covering a wide range of topics. Beyond the attorney hours, the parties have spent time obtaining and incorporating input from community groups and members of the general public on the terms of the proposed consent decree. In March 2018, the parties entered into an MOA with certain plaintiffs in other pending actions in this district pursuant to which those individuals and entities participated more robustly in shaping the contours of the current draft. The FOP declined the parties' invitation to provide input pursuant to the MOA, thereby foregoing an opportunity to provide months ago the input that it now contends is crucial. Yet, despite the FOP's decision to opt out of the MOA, some Chicago police officers—both rank-and-file and upper management—have provided input. See [73] at 5; "Chicago Police Consent Decree," http://chicagopoliceconsentdecree.org/ (last visited Aug. 15, 2018); Police Foundation, "Opinions of Officers of the Chicago Police Department on the Upcoming Consent Decree: A Report to the State of Illinois Office of the Attorney General" (July 2008), http://chicagopoliceconsentdecree.org/wp-content/uploads/2018/07/Opinions-of-Officers-of-theChicago-Police-Department-on-the-Upcoming-Consent-Decree-Final.pdf (last visited Aug. 15, 2018).

The foregoing demonstrates that to the extent the FOP's interests have not been fully vetted in the drafting of the consent decree to date, that deficiency is at least in part a self-inflicted wound. Allowing intervention now would undoubtedly delay the proceedings to the detriment of the original parties' interests. See, e.g., *Sokaogon Chippewa Cmty.,* 214 F.3d at 950 (affirming district court's finding that original parties "would be prejudiced by" late motion to intervene, where "the parties had spent substantial time (nearly six months), effort, and money in settlement negotiations" and "[t]o al-

low a tardy intervenor to block the settlement agreement after all that effort would result in the parties' combined efforts being wasted completely").

c. Prejudice to the Proposed Intervenor

The Court must also consider any prejudice to the FOP. Parties seeking to intervene in the Seventh Circuit must show that "the decision of a legal question involved in the action would as a practical matter foreclose rights of the proposed intervenors in a subsequent proceeding." *Meridian Homes Corp. v. Nicholas W. Prassas & Co.,* 683 F.2d 201, 204 (7th Cir. 1982). The City asserts that the FOP is not likely to suffer significant prejudice if intervention is denied because the State and the City have already committed to requesting a fairness hearing before the Court on the consent decree, where the FOP, like all other interested stakeholders, may present both written and oral arguments concerning the consent decree-perhaps similar to those that it submitted along with its reply brief and appendix. Further, the State explains, the FOP can file a petition with the Illinois Labor Relations Board to challenge changes to CPD policy that FOP believes concern its CBA.

As noted in the Court's August 8 supplemental briefing order [82], the central thrust of the FOP's argument for intervention is that "[t]he [FOP] will have its collective bargaining rights and statutory rights adversely affected by the consent decree which has already been disclosed to the public and which is expected to be filed in this Court." [81] at 1. The FOP elaborates on this argument in detail, setting out on pages 2 through 7 of its reply brief numerous specific provisions of the proposed consent decree that, according to the FOP, "[c]onflict[] with the CBA, statutes, and the IL-PRA bargaining obligation." *Id.* at 2-7.

The City and State respond that the draft consent decree's "carve-out" provisions (paragraphs 686 and 687)-which the FOP inexplicably ignored in its reply brief[3]—adequately address the FOP's concerns about the potential effects of the consent decree on its collective bargaining and statutory rights. The City explains that the carve-out "provides that the Consent Decree does not modify any CBA and will not be interpreted to violate the terms of any CBA, Successor CBA or applicable law." [84] at 6. Thus, the City contends, to the extent that any conflict between the proposed Consent Decree and the CBA does appear to exist, the CBA will govern to eliminate the conflict. The City provides the following example: "[T]he FOP claims that Paragraph 454 of the Proposed Consent Decree conflicts with Section 6.1(E) of the CBA. Section 6.1(E) of the CBA provides that CPD officers under investigation will be informed in writing of the names of the complainants. In contrast, Paragraph 454 of the proposed Consent Decree states that '[t]he City and CPD will undertake best efforts to ensure that the identities of complainants are not revealed to the involved CPD member prior to the CPD member's interrogation.' *** The City and the Attorney General drafted that language of the proposed Consent Decree recognizing that the proposed requirement of not revealing complainants' identity was inconsistent with current CBA obligations. The City intends to (and would be required to) use best efforts in its negotiations with the FOP to modify this requirement under the CBA. If the City's efforts are unsuccessful, however, the CBA Carve-Out language mandates that the CBA govern, and the identities of complainants will

[3] At the very end of its appendix, the FOP included a single, rather cryptic reference to the "[c]arve-out language," noting that it "cuts any reference to direct conflict and protection of successor CBAs." [81-1] at 22, ¶ 84.

continue to be revealed to CPD members prior to interrogation." [84] at 7.

The FOP contends the carve-out language is insufficient to protect its interests for multiple reasons. First, it does not "address[] the various rights adversely affected by the consent decree that arise under statutes other than the IPLRA." [86] at 1.[4] Second, "[w]hile the parties may not intend to change existing contract rights or impair statutory bargaining rights, this provision fails to square with the several provisions of the consent decree *** that already impair the [FOP]'s contractual and statutory rights," and therefore "[t]his statement of intent falls far short of offering the [FOP] and its members a clear assurance that their rights under the CBA and the IPLRA will not be disturbed." [86] at 9.

The FOP has presented some evidence that parts of the current draft consent decree may conflict with the CBA, the IPLRA, or other state laws. The parties dispute whether particular provisions actually "conflict." For several provisions, the State makes a fairly convincing argument that there is no conflict-or at least will be

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[4] The FOP maintains that: (1) The draft consent decree would require the COP to accept complaints that are not supported by a sworn affidavit, which conflicts with a provision of the Uniform Peace Officers' Disciplinary Act, 50 ILCS 725/3.8(b), that requires "[a]nyone filing a complaint against a sworn peace officer [to] have the complaint supported by a sworn affidavit." [86] at 3. (2) The draft consent decree does not require a state certified homicide investigator to investigate officer-involved shootings and deaths, as required by the Police and Community Relations Improvement Act, 50 ILCS 727/1-10. (3) The draft consent decree requires an officer to "immediately notify a supervisor" any time his or her body camera becomes inoperable or damaged, which is stricter than the Law Enforcement Officer-Worn Body Camera Act, which requires notice be given "as soon as practicable," 50 ILCS 706/10-20(a)(10).

no conflict in any final consent decree-due to the inclusion of language deferring to the CBA to the extent that it applies. See [85] at 6. And, as a general concept, the parties have expressed an intent to respect the CBA and the FOP members' collective bargaining rights. Plainly, the parties and the Court will need to be mindful that the final version of the consent decree is properly deferential to the CBA-and state law-in all relevant respects. See *People Who Care v. Rockford Bd. of Educ. School Dist. No. 205,* 961 F.2d 1335, 1337 (7th Cir. 1992) (parties to consent decree "may not alter collective bargaining agreements without the union's assent" or "agree to disregard valid state laws"); *Perkins v. City of Chicago Heights,* 47 F.3d 212, 216 (7th Cir. 1995) (same); *United States v. Board of Educ. of City of Chicago,* 11 F.3d 668, 672-73 (7th Cir. 1993) ("A consent decree entered by a federal court, like any other injunction, can have adverse consequences on third parties without thereby being rendered invalid. But it is not a proper vehicle for extinguishing the legal rights and duties of third parties."). But the Court cannot-and need not-resolve all of these details now, on the limited record and argument before it, in order to decide the FOP's motion to intervene. As the City points out, "any perceived conflict or legal violation the FOP identifies can be addressed prior to the entry of the Consent Decree, either through the public comment process, or in a public fairness hearing, in which comments to the terms of the proposed Consent Decree can be presented to the Court." [84] at 3. The FOP has now placed this issue before the Court front and center and will have a full opportunity to continue to present its views, both in writing and orally, even if it is not a party to the litigation. Moreover, as further explained in the paragraphs that follow, the Court is obligated to uphold the applicable law in resolving any real conflicts between the proposed decree and any existing or future contracts, including the CBAs.

The draft consent decree brings into sharp relief two sets of negotiations, proceeding simultaneously, that will shape the future of this case. The first, which going forward will take place under the Court's watchful eye, involves the parties' continuing efforts to incorporate outside input (including from the CPD and the FOP to the extent they are willing to provide it) into the terms of the final proposed consent decree that they will ask the Court to enter. The second, in which the Court has no direct involvement, concerns the successor agreements that will replace the previous CBAs that have expired but still (by agreement) govern the FOP's members' relationship with the City. As both of these negotiations move forward, the parties will be "bargaining in the shadow of the law" (see Robert H. Mnookin & Lewis Kornhausert, *Bargaining In the Shadow of the Law: The Case of Divorce,* 88 YALE L.J. 950 (1979)), with "the prospect of judicial review serving to constrain the range of potential outcomes." Lars Noah, *Administrative Arm-Twisting in the Shadow of Congressional Delegations of Authority,* 1997 WIS. L. REV. 873, 912 (1997).

As the seminal law review article on the topic explains, the parties to these important negotiations come to the bargaining table with "an endowment of sorts" that consists of "the outcome that the law will impose if no agreement is reached." Mnookin & Kornhausert, *supra,* at 968. In regard to any consent decree, the "contractual aspect" follows from the fact that the "source of the obligations in the decree is the parties' will, not federal law." *Kasper v. Bd. of Election Commissioners of the City of Chicago,* 814 F.2d 332, 338 (7th Cir. 1987). But that principle has limits, for "[a] consent decree is not a method by which state agencies may liberate themselves from the statutes enacted by the legislature that created them." *Id.* at 341-

42. In the same vein, the Seventh Circuit has remarked that "[b]efore entering a consent decree the judge must satisfy himself that the decree is consistent with the Constitution and laws, does not undermine the rightful interests of third parties, and is an appropriate commitment of the court's limited resources." *Id.* at 338. Of course, a CBA also must comply with federal law; for example, the parties may not include in their contract an agreement to permit the police department to violate the Fourth Amendment. See *Kaiser Steel Corp. v. Mullins,* 455 U.S. 72, 77 (1982) ("illegal promises will not be enforced in cases controlled by the federal law"); *Stuart Park Associates Ltd. Partnership v. Ameritech Pension Trust,* 846 F. Supp. 701, 707 (N.D. Ill. 1994) ("Ordinarily, a contract whose performance would violate federal law is unenforceable and, therefore, neither party can recover on it."); cf. *People Who Care,* 961 F.2d at 1339 (consent decree may alter contractual or state-law entitlements where the court "find[s] the change necessary to an appropriate remedy for a legal wrong"); *Application of County Collector of County of Winnebago, Ill.,* 96 F.3d 890, 901 (7th Cir. 1996) ("Consent decrees can alter the state law rights of third parties only where the change is necessary to remedy a violation of federal law."). In short, the environment in which the proposed consent decree and the successor CBAs will be discussed and debated is challenging, but it does contain significant legal safeguards that will guide the endeavors and constrain the range of possible outcomes.

In sum, taking into consideration (1) the FOP's delay in moving to intervene, (2) any prejudice to the existing parties, and (3) any prejudice to the FOP in light of the safeguards noted above, the Court concludes that the FOP's motion to intervene is not timely and therefore must be denied. See *Ligas,* 478 F.3d at 773.

2. Other Factors

Although lack of timeliness alone is dispositive under circuit law (see *Ligas,* 478 F.3d at 773; *Reid L.,* 289 F.3d at 1017), the Court briefly addresses the other requirements for intervention as of right. It is beyond dispute that the FOP has an interest in the subject matter of this litigation. Its members would be working under the consent decree, which no doubt would affect their day-to-day work. It is also apparent that a consent decree at least has the *potential* to affect the FOP's ability to protect its interests in the current or successor CBAs. However, this would be the case whether or not the FOP is allowed to intervene, as no consent decree could anticipate every potential conflict that may arise in the years to follow. The City and State have committed in the carve-out language not to alter the CBA or to impair or conflict with collective bargaining rights and the City appears to recognize that it cannot compel the FOP to accept provisions of any decree that conflict with existing rights under a CBA. Rather, to the extent that the City wishes to implement such provisions, it will need to do so in the bargaining process. Finally, and most importantly, the FOP will have multiple opportunities in the course of this proceeding to present its views, including by identifying any provisions of the consent decree that conflict with the CBA and/or collective bargaining rights and proposing alternative language. Before deciding whether to enter a consent decree, and on what terms, the Court will give the FOP and indeed all Chicago police officers every opportunity to be heard-just not as parties to the litigation.

Finally, the Court addresses whether FOP's interests are adequately represented by the existing parties. This requirement for intervention as of right "is satisfied if the applicant shows that representation of his

interest 'may be' inadequate; and the burden of making that showing should be treated as minimal." *Lake Investors,* 715 F.2d at 1261 (quoting *Trbovich v. United Mine Workers of America,* 404 U.S. 528, 538 n. 10 (1972)). The FOP argues that neither the City nor the State adequately represents its interests in this proceeding. The FOP explains that the City "engages in collective bargaining with the [FOP] as the employer, and their interests are most often diametrically opposite and adversarial, especially in [an unfair labor practice case now pending at the ILRB] in which the [FOP] alleged that the City unilaterally without bargaining with the [FOP] implemented a wholesale change in the CPD's discipline system." [51] at 12. The State does not represent its interests either, the FOP explains, because the State "has filed the complaint against the City alleging *** that the current systems and procedures some of which are based on the provisions of the collective bargaining agreement are inadequate, haphazard and need to be replaced." *Id.*

The State responds that "when a party to a proceeding 'is a governmental body charged by law with protecting the interests of the proposed intervenors, the representative is presumed to adequately represent their interests unless there is a showing of gross negligence or bad faith.'" [73] at 14 (quoting *Ligas,* 478 F.3d at 774). The State contends that, by initiating this action as *parens patriae,* it is acting on behalf of all Illinois residents and therefore FOP must, but cannot, show that the State has acted with gross negligence or in bad faith in representing its interests.

The Court is not convinced that the FOP must show that the State has acted with gross negligence or bad faith in order to call into question whether the State can adequately represent the FOP's interests. The

State's interests in this proceeding clearly are at odds with the FOP's expressed views in significant ways. To begin, a premise of the State's lawsuit is that some of the FOP's members have committed constitutional violations. And most fundamentally, the State wants a consent decree; the FOP does not. Further, although the City has taken certain positions in this proceeding that are consistent with-and perhaps even based on-the advice and urging of the FOP, the City's and the FOP's positions also conflict in significant ways. The same probably can be said of other interested stakeholders. It would not be surprising if, even after months of input from a panoply of groups and individuals and months of protracted and sometimes difficult negotiations, many in an incredibly diverse city of 2.7 million people might disagree with one or more provisions of the existing draft consent decree. But it is not necessary for the State, acting in its *parens patriae* capacity, to allege an equal and indivisible injury to every resident in its jurisdiction. Rather, the Supreme Court has emphasized that in a *parens patriae* action the State must allege "injury to a sufficiently substantial segment of its population." *Alfred L. Snapp & Son, Inc. v. Puerto Rico,* 458 U.S. 592, 607 (1982). And the Third Circuit has held that allegations of violations of constitutional rights by police officers clearly suffice in regard to the "sovereign interests" that must be present for a state to invoke a *parens patriae* remedy, notwithstanding the fact that there, as here, the defendant officer and borough officials opposed the action and the Commonwealth's right to bring it. *Commonwealth of Pennsylvania v. Porter,* 659 F.2d 306, 316 (3rd Cir. 1981).

Alfred L. Snapp & Son and *Porter* also answer another of the FOP's principal contentions—namely, that the State of Illinois lacks standing to advance a claim under Section 1983. See [51- 1] (proposed mo-

tion to dismiss); see also [51] at 2 (making argument in support of proposed motion to dismiss Count 1). The FOP's argument appears to be correct as far as it goes, for the Seventh Circuit has observed that "[t]he usual basis of constitutional litigation, 42 U.S.C. § 1983, is unavailable to Illinois, for a state is not a 'person' under that statute." *State of Illinois v. City of Chicago,* 137 F.3d 474, 477 (7th Cir. 1998). But that obstacle is not necessarily fatal, as "states have frequently been allowed to sue in *parens patriae* to enforce federal statutes that *** do not specifically provide standing for state attorneys general." *People by Vacco v. Mid Hudson Medical Group, P.C.,* 877 F. Supp. 143, 146 (S.D.N.Y. 1995). Here, the State has invoked both Section 1983 and the *parens patriae* doctrine in its complaint. See [1], at 1, ¶ 1; 4, ¶ 15. The Court need not definitively resolve at this time any issues regarding Plaintiffs standing, as those issues remain underdeveloped on the current record. Nevertheless, it is worth mentioning that although the Court's initial research has not revealed an on-point Seventh Circuit decision, in *Porter,* the Third Circuit, sitting *en banc,* upheld *parens patriae* standing in a lawsuit brought by the Commonwealth of Pennsylvania seeking an injunction prohibiting police and municipal officials from subjecting residents to "unconstitutional physical violence, mistreatment, threats, or harassment; from unconstitutional detention, searches, seizures, arrests, and imprisonment; and from interference with the free exercise of their rights." 659 F.2d at 310, 314-17.

To sum up, the Court recognizes that the FOP and its members have important interests in this litigation and would be on the front line in regard to carrying out the provisions of any consent decree that the Court may enter. The Court has received-and will continue to encour-

age and consider-input from Chicago police officers as it considers the myriad issues for decision, from the broadest question of whether to enter a consent decree at all to the narrow potential disputes over the language of specific provisions. But the Court need not allow the FOP party status in this litigation when the FOP chose to sit on the sidelines for nine months despite its clear recognition, as reflected in the public statements of its leadership, that the litigation could have a significant effect on policing in Chicago, including the CBAs that contractually govern the relationship between the City and its police force. In truth, the most recent drive to subject the Chicago Police Department to a consent decree predates the filing of this lawsuit, as the United States Department of Justice took the same position at the conclusion of an investigation in 2016 and early 2017. Far from taking CPD and the FOP by surprise with the filing of the August 2017 lawsuit, the State was essentially picking up where the federal government left off, focusing on many of the same allegations and seeking the same prospective injunctive relief in the form of a consent decree. The FOP's decision to publicly oppose that relief-and correspondingly to limit its participation in the negotiation process despite invitations to join in more formally and comprehensively-appears to have been strategic, and it must live with the consequences of that decision as it relates to this belated attempt to intervene as a party in this lawsuit.[5]

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[5] The Court adds this caveat: if the assumptions about the future course of this litigation described above should turn out to be radically incorrect, nothing in the rules or the case law of which the Court is aware would prevent re-examination of the matter of intervention. See *State of Maine v. Director, U.S. Fish & Wildlife Serv.,* 262 F.3d 13, 21 (1st Cir. 2001) (affirming denial of motion to intervene as of right and noting district court's authority "to revisit the matter of intervention" at a later stage of a case).

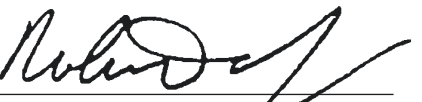
B. Permissive Intervention

The parties spend very little of the briefs arguing about whether the FOP should be granted permissive intervention. The Court need not devote much further attention to this issue, either. Motions to intervene under Rule 24(b) must be timely. In evaluating timeliness, the Court examines the same four factors that it does when a motion to intervene as of right has been filed. See *Kostovetsky,* 242 F. Supp. 3d at 728. The Court concludes that the FOP's intervention under Rule 24(b) is untimely for the same reasons that intervention under Rule 24(a) is untimely.

IV. Conclusion

For the reasons stated above, the FOP's motion to intervene [51] is respectfully denied and the FOP's motion to hold proceedings in abeyance pending ruling on motion to intervene [65] is denied as moot.

Dated: August 16, 2018



Robert M. Dow, Jr.
United States District Judge

Appendix A-2

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No. 18-2805

STATE OF ILLINOIS,
Plaintiff-Appellee,

v.

CITY OF CHICAGO,
Defendant-Appellee,

APPEAL OF:

FRATERNAL ORDER OF POLICE,
CHICAGO LODGE NO. 7,
Proposed Intervenor.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 17-cv-6260—**Robert M. Dow, Jr.,** *Judge.*

ARGUED NOVEMBER 2, 2018—DECIDED JANUARY 2, 2019

BEFORE RIPPLE, KANNE, AND ROVNER, *CIRCUIT JUDGES.*

KANNE, *Circuit Judge.* On August 29, 2017, the State of Illinois filed suit in federal court against the City of Chicago, alleging that the Chicago Police Department's use-of-force policies and practices violate the federal constitution and Illinois law. Two days later, the parties

moved to stay the proceedings while they negotiated a consent decree. Almost immediately after the State filed the complaint, the Fraternal Order of Police, Lodge No. 7, publicly indicated its opposition to any consent decree, citing fears that the decree might impair its collective bargaining rights. For months, the Lodge monitored the ongoing negotiations and met informally with the State's representatives. But the Lodge waited until June 6, 2018, to file a motion to intervene in the suit. The district court denied the motion to intervene as untimely. Because the Lodge knew from the beginning that a consent decree might impact its interests but delayed its motion for nearly a year, and because its allegations of prejudice are speculative, we affirm.

I. Background

In April 2016, the Chicago Police Accountability Task Force issued a report finding that the Chicago Police Department's "response to violence is not sufficiently imbued with Constitutional policing tactics." (R. 1-1 at 14.) In January 2017, the United States Department of Justice released a report concluding that the Chicago Police Department exhibits a pattern or practice of the unconstitutional use of force. The report found that Chicago's inadequate accountability mechanisms are a significant contributor to the repeated constitutional violations. The Department of Justice suggested that effective reform was unlikely without "[a] court-ordered, over-arching plan . . . that is overseen by a federal judge." *(Id.* at 211.)

On August 29, 2017, the State of Illinois filed suit against the City of Chicago, alleging that the City's policing practices involve the repeated use of excessive force. Two days later, the parties moved to stay proceedings while they engaged in consent decree negotiations. The district court granted that motion.

Immediately after the State filed suit, the Lodge publicly expressed its opposition to any consent decree. In a news article published the evening of August 29, 2017, the Lodge's president, Kevin Graham, described a consent decree as a "a potential catastrophe for Chicago." (R. 73 at 4 & n.1.) Mr. Graham elaborated on his opposition to a consent decree in the Lodge's September 2017 newsletter. He voiced the fear that a consent decree might "seriously threaten our collective bargaining rights" and assured the Lodge that no one in his administration believed that a consent decree was "necessary." (R. 73-1 at 13.)

Despite these public concerns over the suit's potential impact on collective bargaining rights, the Lodge did not seek to intervene at that time. Instead, during the subsequent months of negotiation between the State and City, the Lodge repeatedly met separately with the State. At those meetings, the Lodge expressed its concern that the inchoate consent decree might conflict with provisions of the Collective Bargaining Agreement ("CBA") or with Illinois statutes which protect police officers. The State told the Lodge that it did not intend to intrude into matters of police officer discipline or other "core mandatory matters." (R. 81-4 at 6.)

To that end, and to avoid the need for the Lodge to intervene, the State and Lodge focused on creating "carve-out" language that would ensure the consent decree left CBA rights intact. During these informal discussions, which began in the fall of 2017 and continued well into the spring of 2018, the State often assured the Lodge that it was working with the City to avoid any impact on CBA rights. The State never provided the Lodge with copies of the proposed consent decree or with finalized carve-out language. Nevertheless, the State's representative, Gary Caplan, assured the Lodge

that the draft consent decree did not conflict with the CBA and that, if any consent decree provisions did conflict, the CBA would control.

Between March 21, 2018, and May 25, 2018, the district court met four times with the parties to discuss the consent decree negotiations. On two of those occasions, Lodge representatives appeared at the courtroom and requested permission to attend the session. Both times, the City and State refused to consent to the request.

On June 6, 2018, the Lodge moved to intervene. The Lodge has offered a variety of explanations for its decision to seek intervention. In the motion to intervene, the Lodge attributed the motion to its discovery that, on May 15, 2018, a number of community groups "published and undoubtedly submitted to the [State] a report that contains recommendations for the consent decree." (R. 51 at 5.) The Lodge emphasized that the CBA "contains provisions addressing a number of the subjects raised in the complaint filed by the Office of the Illinois Attorney General in this case." *(Id.* at 6.) Because many of the recommendations made by the community groups would require "substantive modifications" to practices or activities covered by the CBA, the Lodge believed that intervention was necessary. The Lodge also argued that the complaint-filed nine months earlier-sought injunctive relief that would conflict with the CBA. Thus, at the time, the Lodge did not cite its exclusion from negotiations as a reason for intervention. Likewise, the Lodge did not move to intervene due to surprise language in the consent decree (because the Lodge had not yet received a copy of the draft consent decree).

In early July 2018, the Lodge filed a motion to hold proceedings in abeyance while the court considered the motion to intervene. In that motion, the Lodge argued that it had "reason to believe that the consent decree will

impact the collective bargaining agreement," but the Lodge based that belief "on the January 2017 Department of Justice report and the representations in the [August 31, 2017] motion to stay concerning the failure of the City to administer effective police discipline." (R. 65 at 2.)

On July 27, 2018, the State and City made the proposed consent decree public. The draft includes numerous provisions which the Lodge believes conflict with the disciplinary and investigative provisions of the CBA. The proposed consent decree also contains a paragraph addressing conflicts between the consent decree and CBAs:

> 687. Nothing in this Consent Decree is intended to (a) alter any of the CBAs between the City and the Unions; or (b) impair or conflict with the collective bargaining rights of employees in those units under the IPLRA. Nothing in this Consent Decree shall be interpreted as obligating the City or the Unions to violate (i) the terms of the CBAs, including any successor CBAs resulting from the negotiation process . . . mandated by the IPLRA with respect to the subject of wages, hours and terms and conditions of employment unless such terms violate the U.S. Constitution, Illinois law, or public policy, or (ii) any bargaining obligations under the IPLRA, and/or waive any rights or obligations thereunder. In negotiating Successor CBAs, the City shall use its best efforts to secure modifications to the CBAs consistent with the terms of this Consent Decree, or to the extent necessary to provide for the effective implementation of the provisions of this Consent Decree.

(R. 81-2 at 217.)

On August 8, 2018, the district court directed the State, City, and Lodge to submit supplemental briefs addressing the Lodge's contention that the consent de-

cree would adversely affect CBA rights. In particular, the district court directed the Lodge to explain whether ¶ 687 of the draft consent decree ameliorated its concerns. On August 16, 2018, after receiving the supplemental briefing, the court denied the motion to intevene as untimely. The Lodge appealed.

While the Lodge's appeal has been pending, the district court's consideration of the draft consent decree has continued. The Lodge moved to stay review of the consent decree during the pendency of its appeal, but the district court has not yet ruled on that motion. The district court held the fairness hearing on October 24 and 25, 2018. Prior to that hearing, the district court received hundreds of written comments, including one from the Lodge. Given the level of interest, the district court limited participation in the fairness hearing to a randomly selected group of applicants, each of which spoke for five minutes. The record is unclear whether any Lodge members received an opportunity to speak at the fairness hearing. But, in the weeks since the hearing, the Lodge has submitted numerous supplemental comments from its members.

II. Analysis

Because denial of a motion to intervene essentially ends the litigation for the movant, such orders are final and appealable. *Reich v. ABC/York-Estes Corp.,* 64 F.3d 316, 321 (7th Cir. 1995). The Lodge sought to intervene as of right, meaning the requirements of Federal Rule of Civil Procedure 24(a)(2) apply: "(1) timely application; (2) an interest relating to the subject matter of the action; (3) potential impairment, as a practical matter, of that interest by the disposition of the action; and (4) lack of adequate representation of the interest by the existing parties to the action." *Shea v. Angulo,* 19 F.3d 343, 346 (7th Cir. 1994) (quoting *South-*

mark Corp. v. Cagan, 950 F.2d 416, 418 (7th Cir. 1991)). "A motion to intervene as a matter of right, moreover, should not be dismissed unless it appears to a certainty that the intervenor is not entitled to relief under any set of facts which could be proved under the complaint." *Reich,* 64 F.3d at 321 (quoting *Lake Investors Dev. Group v. Egidi Dev. Group,* 715 F.2d 1256, 1258 (7th Cir. 1983)). "[W]e must accept as true the non-conclusory allegations of the motion." *Id.* The district court found that the Lodge's motion satisfied the final three requirements but denied the motion to intervene after concluding it was untimely. For that reason, .we focus solely on the timeliness requirement.

"We look to four factors to determine whether a motion is timely: '(1) the length of time the intervenor knew or should have known of his interest in the case; (2) the prejudice caused to the original parties by the delay; (3) the prejudice to the intervenor if the motion is denied; (4) any other unusual circumstances.'" *Grochocinski v. Mayer Brown Rowe & Maw, LLP,* 719 F.3d 785, 797-98 (7th Cir. 2013) (quoting *Sokaogon Chippewa Cmty. v. Babbitt,* 214 F.3d 941, 949 (7th Cir. 2000)). When the district court denies a motion for intervention as untimely, we review for abuse of discretion. *Id.*

A. Knowledge of Interest

The district court found that the Lodge should have known of its interest in the suit from the time the State filed suit. Because nine months passed before the Lodge sought to intervene, the motion was untimely. Now, the Lodge argues that the district court erred because it did not learn its interests might be impaired until "after the Lodge was shut out of settlement discussions and the Lodge had received information from confidential sources that its contractual rights would be impaired." (Appellant's Br. at 24.)

"A prospective intervenor must move promptly to intervene as soon as it knows or has reason to know that its interests *might* be adversely affected by the outcome of the litigation." *Heartwood, Inc. v. U.S. Forest Serv., Inc.,* 316 F.3d 694, 701 (7th Cir. 2003) (emphasis added); *see also Sokaogon Chippewa,* 214 F.3d *at* 949 (" As soon as a prospective intervenor knows or has reason to know that his interests *might* be adversely affected by the outcome of the litigation he must move promptly to intervene.") (citation omitted) (emphasis added); *Reich,* 64 F.3d at 321 ("[W]e determine timeliness from the time the potential intervenors learn that their interest *might* be impaired.") (emphasis added); *City of Bloomington, Ind. v. Westinghouse Elec. Corp.,* 824 F.2d 531,535 (7th Cir. 1987) (finding a motion to intervene untimely because the movant "had knowledge that its interests could be affected more than 11 months prior to the time it sought intervention"). Thus, we measure from when the applicant has reason to know its interests *might* be adversely affected, not from when it knows for certain that they will be.

The Lodge does not dispute that, immediately after the State filed the lawsuit, it publicly opposed any consent decree. In fact, Lodge President Graham asserted in his September 2017 newsletter article that a consent decree "could seriously threaten . . . collective bargaining rights." (R. 73-1 at 13.) The conclusion that the City, State, and Lodge do not share interests is hardly remarkable. The Lodge's very existence is rooted in the competing interests between its members and the City. And the complaint emphasized the need for increased accountability and other significant reforms which would inevitably impact police officer interests. Thus, the Lodge waited nine months from the time it became clear that the lawsuit might affect its interests. The Lodge's delay renders the motion untimely. *See Westinghouse,* 824 F.2d at 535 ("[A]n examination of the initial factor in our

analysis, the length of time the prospective intervenor knew or reasonably should have known of its interest before it petitioned to intervene (11 months), clearly establishes that [the] motion to intervene was untimely.").

The Lodge argues that the timeliness inquiry should instead run from the time it determined that the State was not protecting its interests. Specifically, the Lodge contends that it reasonably relied on the State's assurances that it was protecting the Lodge's interests.

The cases the Lodge relies on offer it no aid. In several prior cases, we have indicated that intervention may be timely where the movant promptly seeks intervention upon learning that a party is not representing its interests. *See Reich,* 64 F.3d at 321-22 (reversing denial of the motion to intervene because the movants "reasonably believed their employer was representing their interests and, considering the believed adequacy of representation, could not have legitimately petitioned to intervene"); *see also United States v. Alcan Aluminium,* 25 F.3d 1174, 1183 (3d Cir. 1994) ("[W]here a party induces an applicant to refrain from intervening and there is reasonable reliance, the applicant's motion should not fail on timeliness grounds."); *United States v. City of Chicago,* 870 F.2d 1256, 1263 (7th Cir. 1989) ("[W]hen a federal judicial decree unexpectedly impairs settled expectations, and does so on what might appear to be arbitrary and discriminatory grounds, the judge is obliged to listen to the victims of the decree when they make prompt application to intervene."); *Sokaogon,* 214 F.3d at 949 (characterizing *City of Chicago* as a case "where the white female police officers who wanted to intervene could not have anticipated that the new procedures would discriminate against them").

These are all cases where the intervenor could not have reasonably anticipated that its interests were at

issue or unrepresented until immediately prior to the attempted intervention. But where the intervenor "has known all along that its interests are directly pitted against" those of the parties, then the mere fact that the precise outcome of the litigation was unexpected does not restart the timeliness analysis. *Sokaogon,* 214 F.3d at 950. *Reich, City of Chicago,* and *Alcan* support affirmance because the Lodge has not shown that it reasonably believed that its interests were not at issue or protected, much less that those interests were then unexpectedly impaired.

The Lodge emphasizes that State's representatives repeatedly assured them that the consent decree would not impact CBA rights. But the very fact that the Lodge and State were discussing the need for"carve-out" language makes clear that both anticipated that the consent decree would address matters which arguably fell under the purview of the CBA. The State also refused to provide copies of the draft proposals the State and City were exchanging. And the State and City excluded the Lodge from the settlement conferences with the district court, despite the Lodge showing up and asking to be admitted. Thus, there were many indicators that the Lodge's interests were "directly pitted" against the State's and City's.

And, more importantly, the Lodge does not identify an unexpected development which would excuse its delay. The motion for intervention cited the community group recommendations as a threat, but those recommendations were nonbinding. The motion also asserted that the injunctive relief requested in the August 2017 complaint would impair CBA rights. But that argument simply underscores the Lodge's nine-month delay. In fact, in the subsequent motion to hold proceedings in abeyance, the Lodge pointed to the Department of Justice's January 2017 report as the reason it believed its

rights were at issue. We do not dispute that the Lodge could have sought intervention by relying on the complaint and report. But the Lodge's reliance on those documents demonstrates that the justification for intervention did not appreciably change between August 2017 and June 2018.

Even the Lodge's *ex post* reason for intervention (information from confidential sources) suffers from this flaw. Remember that, until July 2018, the Lodge had not received any consent decree draft language or been permitted to participate directly in settlement negotiations. In May 2018, confidential sources allegedly told the Lodge that "there were consent decree provisions that would conflict with the provisions of the collective bargaining agreement." (R. 81-4 at 8-9). But those sources did not provide copies of those provisions (much less copies of any carve-out language). Based on this information, the Lodge determined that the consent decree might impact its interests. But the Lodge never identifies the specific information that these sources provided which the Lodge could not have previously intuited from the complaint or discussions with the State. For these reasons, the district court did not abuse its discretion in determining that the Lodge had notice of its interest beginning in August 2017.

B. Prejudice to the State and City

We next consider "the prejudice caused to the original parties by the delay." *Grochocinski,* 719 F.3d at 797-98. The prejudice here is manifest. "Once parties have invested time and effort into settling a case it would be prejudicial to allow intervention." *Ragsdale v. Turnock,* 941 F.2d 501, 504 (7th Cir. 1991). That is particularly true when the settlement negotiations were complex and well-publicized, as was the case here. *See id.; see also City of Bloomington,* 824 F.2d at 536. The Lodge

argues that the prejudice caused by its delay was minimal because it only waited several weeks from the time it determined its interests were at stake before filing its motion. But if the Lodge's delay began when the State filed the complaint-as the district court properly calculated-then the prejudice becomes significant. The district court did not err in determining that intervention would cause prejudice.

C. Prejudice to the Lodge

The Lodge next argues that the district court erred in finding that the potential for prejudice to the Lodge was insufficient to mandate intervention. When the district court properly denies a motion to intervene, the applicants cannot "attack the fairness of [a] consent decree because they are not *parties* to the agreement." *B.H. by Pierce v. Murphy,* 984 F.2d 196, 199 (7th Cir. 1993) (quoting *City of Chicago,* 908 F.2d at 200)). But the inability to appeal the entry of a consent decree does not always mandate intervention. Rather, when the interested party can adequately convey its concerns to the district court at the fairness hearing, prejudice is often minimal. *See City of Bloomington,* 824 F.2d at 537 ("Because [the proposed intervenor] has already had an opportunity to present its views to the district court, it would suffer little prejudice if it were denied permission to intervene at this late stage in the proceedings."). The Lodge has enjoyed repeated (and continuing) opportunities to do so.

The Lodge believes the draft consent decree will impair CBA rights and displace protections provided by Illinois statutes. The district court found that there was "some evidence that parts of the current draft consent decree may conflict with the CBA, the [Illinois Public Labor Relations Act], or other state laws." (R. 88 at 17.) For the purposes of this opinion, we will assume

that certain provisions of the draft consent decree conflict-on their face-with the CBA and Illinois law.

Notwithstanding that potential for conflict, the Lodge's rights are protected. We begin with the carve-out language included in the decree. That provision expressly confirms that "[n]othing in this Consent Decree shall be interpreted as obligating the City or the Unions to violate . . . the terms of the CBAs . . . with respect to the subject of wages, hours, and terms and conditions of employment unless such terms violate the U.S. Constitution, Illinois law or public policy." (R. 81-2 at 217.) The Lodge argues that this provision is "wholly different from a 'shall not conflict with' prohibition for the City and the [State] to impinge upon the CBA." (Appellant's Br. at 33.) The language speaks for itself. Read as a whole, ¶ 687 makes clear that the parties do not intend for the consent decree to be interpreted as impairing CBA rights.

The Lodge also argues that the exception in ¶ 687, indicating that the decree may displace CBA provisions if they "violate the U.S. Constitution, Illinois law or public policy," swallows the rule. "Public policy" is undefined, and so there is arguably ambiguity regarding what triggers that exception.

But, as the district court recognized, existing law already provides protections for the Lodge. "Before entering a consent decree the judge must satisfy himself that the decree is consistent with the Constitution and laws, does not undermine the rightful interests of third parties, and is an appropriate commitment of the court's limited resources." *Kasper v. Bd. of Election Comm'rs of the City of Chicago,* 814 F.2d 332, 338 (7th Cir. 1987). Similarly, consent decrees "may not alter collective bargaining agreements without the union's assent." *People Who Care v. Rockford Bd. of Educ. Sch. Dist. No. 205,*

961 F.2d 1335, 1337 (7th Cir. 1992). "Neither may litigants agree to disregard valid state laws." *Id.* In other words, because "[c]onsent decrees are fundamentally contracts," the parties to those decrees "'may not impose duties or obligations on a third party, without that party's agreement.'" *Id.* (quoting *Firefighters Local 93 v. Cleveland,* 478 U.S. 501, 529 (1986)).

The parties negotiate and the district court considers the consent decree against this background law, which protects the Lodge even if ¶ 687 contains ambiguities. Simply put, a consent decree cannot accidentally eliminate the rights of third parties. And if the parties interpret the consent decree in a way which violates CBA rights, the Lodge can avail itself of normal remedies for CBA violations. *See W.R. Grace* & Co. *v. Local Union 759, Int'l Union of United Rubber, Cork, Linoleum* & *Plastic Workers of Am.,* 461 U.S. 757, 770 (1983) (affirming the enforcement of an arbitration award for violating the CBA, even though a settlement agreement required the company's violation).

Admittedly, "[c]onsent decrees can alter the state law rights of third parties." *Application of Cty. Collector of Cty. of Winnebago, Ill.,* 96 F.3d 890, 901 (7th Cir. 1996). But that's true "only where the change is *necessary* to remedy a violation of federal law." *Id.* (emphasis added); *see also People Who Care,* 961 F.2d at 1339 ("[B]efore altering the contractual (or state law) entitlements of third parties, the court must find the change necessary to an appropriate remedy for a legal wrong."). The district court has made no finding of necessity. To the contrary, the court emphasized that it "is obligated to uphold the applicable law in resolving any real conflicts between the proposed decree and any existing or future contracts." *Illinois v. City of Chicago,* No. 17-CV-6260, 2018 WL 3920816, at *8 (N.D. Ill. Aug. 16, 2018). The

district court noted that consent decrees typically cannot subvert CBA rights, but reminded the parties that "a CBA also must comply with federal law." *Id.* at *9.

Thus, the Lodge's assertion of prejudice is largely speculative. As things stand now, the consent decree cannot impair the CBA or state law rights enjoyed by Chicago police officers. That will change only if the district court concludes that federal law requires the abrogation of those rights. Even then, the abrogation must be narrowly tailored. We decline to speculate whether federal law will require such a remedy here. On the present facts, the district court did not abuse its discretion in finding that intervention was unwarranted given the minimal prejudice identified by the Lodge.

There is one final matter worth discussing. The district court assured the Lodge that, "if the assumptions about the future course of this litigation described above should turn out to be radically incorrect, nothing in the rules or the case law of which this court is aware would prevent re-examination of the matter of intervention." *City of Chicago,* 2018 WL 3920816, at *11 n.5 (citing *State v. Dir., U.S. Fish & Wildlife Serv.,* 262 F.3d 13, 21 (1st Cir. 2001)). That is correct. The Lodge's allegations of prejudice are presently speculative, and the other factors counsel against intervention. But if the Lodge's fears are substantiated, the balance of interests will shift.

D. Unusual Circumstances

We consider a final factor: whether any unusual circumstances mitigated or aggravated the delay. The district court did not consider this factor in a separate section. The Lodge argues that the failure to consider all four factors mandates reversal. (Appellant's Br. at 15 (citing *Heartwood, Inc. v. U.S. Forest Serv., Inc.,* 316

F.3d 694, 701 (7th Cir. 2003) (reversing because the district court's analysis of timeliness factors did not correspond to the four factors and because other aspects of the reasoning were too conclusory for "us to identify the reasoning behind the holdings"))). The Lodge only identifies one unusual circumstance here: the "reasonable reliance" argument addressed above. But the Lodge never squarely presented that legal theory to the district court. And the district court considered the facts underlying the argument but found them unpersuasive. *See City of Chicago,* 2018 WL 3920816, at *5-6. Our precedent merely requires that the district court consider the appropriate factors and discuss them in detail sufficient for us to review on appeal. *See Heartwood,* 316 F.3d at 701. When a party fails to specifically identify unusual circumstances, the district court does not err in focusing on the disputed factors.

III. Conclusion

The Lodge knew from the filing of the complaint that the consent decree might affect its interests. Indeed, the Lodge tacitly admitted this when it relied on allegations in the complaint—including reports from 2016 and 2017—in arguing to the district court that intervention was necessary. And setting the delay aside, the Lodge's assertions of prejudice are presently unsubstantiated. Existing law provides significant safeguards for the Lodge's interests. If those protections prove insufficient, then a renewed motion for intervention might be appropriate. But on the facts as they currently stand, the district court did not abuse its discretion in finding the Lodge's motion untimely.

Accordingly, we AFFIRM the district court's denial of the motion for intervention.

Appendix B

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

February 4, 2019

Before
KENNETH F. RIPPLE, *Circuit Judge*
MICHAELS. KANNE, *Circuit Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*

No. 18-2805

STATE OF ILLINOIS,
Plaintiff-Appellee,
v.
CITY OF CHICAGO,
Defendant-Appellee,

APPEAL OF:
FRATERNAL ORDER OF POLICE,
CHICAGO LODGE NO. 7,
Proposed Intervenor.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 17-cv-6260—Robert M. Dow, Jr., *Judge.*

ORDER

On consideration of the petition for rehearing and rehearing *en banc,* no judge in active service has requested a vote on the petition for rehearing *en banc* and the judges on the original panel have voted to deny rehearing. It is, therefore, ORDERED that rehearing and rehearing *en banc* are **DENIED.**

Appendix C

Pertinent Provisions of the Consent Decree

238. CPD will continue to maintain a policy regarding body-worn camera video and audio recording that will require officers to record their law-enforcement related activities, and that will ensure the recordings are retained in compliance with the Department's Forms Retention Schedule (CPD-11.717) and the Illinois Law Enforcement Officer-Worn Body Camera Act. At a minimum, CPD's body-worn camera policy will:

a. clearly state which officers are required to use body-worn cameras and under which circumstances;

b. require officers, subject to limited exceptions specified in writing, to activate their cameras when responding to calls for service and during all law enforcement-related activities that occur while on duty, and to continue recording until the conclusion of the incident(s);

c. require officers to articulate in writing or on camera their reason(s) for failing to record an activity that CPD policy otherwise requires to be recorded;

d. require officers to inform subjects that they are being recorded unless doing so would be unsafe, impractical, or impossible;

e. address relevant privacy considerations, including restrictions on recording inside a home, and the need to protect witnesses, victims, and children;

f. establish a download and retention protocol;

g. require periodic random review of officers' videos for compliance with CPD policy and training purposes;

h. require that the reviewing supervisor review videos of incidents involving reportable uses of force by a subordinate; and

1. Receiving Complaints

425. The City, CPD, and COPA will ensure individuals are allowed to submit complaints in multiple ways, including: in person to COPA or at a CPD district station, by telephone, online, anonymously, and through third party representatives. To ensure broad and easy access to its complaint system, within 90 days of the Effective Date:

a. the City, CPD, and COPA will make the process for filing a complaint widely available to the public, including in-person, by telephone, and online;

b. the City, CPD, and COPA will make the process for filing a complaint available electronically;

c. the City, CPD, and COPA will make information on filing a complaint and accompanying instructions accessible to people who speak languages other than English and will provide telephonic language interpretation services consistent with the City's and CPD's existing limited English proficiency policies and this Agreement;

d. the City, CPD, and COPA will ensure individuals may submit allegations of misconduct, regardless of whether the individual is a member or perceived member of an identifiable group, based upon, but not limited to: race, ethnicity, color, national origin, ancestry, religion, disability status, gender, gender identity, sexual orien-

tation, marital status, parental status, military discharge status, financial status, or lawful source of income;

e. the City, CPD, and COPA will continue to ensure that members of the public may make complaints via telephone using free 24-hour services, including by calling 311 and being given the option to leave a voicemail for COPA or speak to a CPD supervisor, and will clearly display this information on their respective websites and other appropriate City and CPD printed materials;

f. the City, CPD, and COPA will ensure that instructions for submitting complaints are available via telephone, on-line, and in-person; and

g. the City and CPD will ensure that complaint filing information is prominently displayed on CPD website's homepage, including by linking to COPA's online complaint form.

429. The City will continue to ensure that a website is made available to CPD members to anonymously report officer misconduct ("anonymous reporting website") and will internally disseminate information regarding the anonymous reporting website to all CPD members. Reports made on the anonymous reporting website will not relieve CPD members of their duties under CPD Rules of Conduct 21 and 22.

431. The City and CPD will undertake best efforts to ensure that the absence of a signed complainant affidavit alone will not preclude an administrative investigation.

462. A signed complainant affidavit will not be required to conduct a preliminary investigation.

475. The City and CPD will undertake best efforts to ensure that the identities of complainants are not revealed to the involved CPD member prior to the CPD member's interrogation.

492. Criminal investigations into the actions of any CPD member relating to any "officer-involved death" will comply with the Police and Community Relations Improvement Act, 50 ILCS 727/1-1 *et seq*. ("PCRIA"). The City will use best efforts to ensure that a "law enforcement agency," as that term is defined under PCRIA, will conduct such investigations. The "law enforcement agency" conducting criminal investigations into the actions of any CPD member relating to any "officer-involved death" will have substantial experience and expertise in criminal homicide investigations.

701. The City's entry into this Agreement is not an admission by the City, CPD, or any agent or employee of either entity that it has engaged in any unconstitutional, illegal, or otherwise improper activities or conduct. The City's entry into this Agreement is not an admission of any of the findings or conclusions contained in the DOJ's Report.

707. No person or entity is or is intended to be a third-party beneficiary of this Agreement for the purposes of any civil, criminal, or administrative action. The Parties agree that this Agreement is not, and will not be construed as, an admission of liability by the City or CPD, or any of their departments, entities, agencies, officials, agents, or employees. Nothing in this Agreement will be used by any third party to create, establish, or support a claim of liability by or against the City or the CPD or any of their officials, officers, agents or employees under any federal, state or municipal law, including, but not limited to, 42 U.S.C. § 1983, the U.S. Constitution, the Illinois Constitution, the Il-

linois Civil Rights Act of 2003, or the Illinois Human Rights Act.

708. This Agreement is an integrated agreement. It contains the entire understanding and agreement of the Parties, and supersedes all prior agreements, understandings, negotiations, and discussion of the Parties, whether oral or written, relating to its contents. There are no other agreements, understandings, restrictions, representations, or warranties other than as set forth in this Agreement. No prior drafts or prior or contemporaneous communications, oral or written, will be relevant or admissible for purposes of determining the meaning of any provisions herein in any litigation or any other proceeding.

R. Other Relevant Agreements

710. The Parties acknowledge the City has entered into four collective bargaining agreements effective July 1, 2012 (individually, and collectively, the "CBAs") with unions representing sworn police officers ("Unions"). The Parties further acknowledge that the City and the Unions are currently negotiating successor agreements to the CBAs ("Successor CBAs"). The Parties further acknowledge that the Unions and the City have certain rights and obligations under the Illinois Public Labor Relations Act, 5 ILCS 315 ("IPLRA") and that the IPLRA contains provisions for the City and the Unions to enforce their respective rights and obligations, including a process, set forth in Section 14 of the IPLRA and Section 28.3 of the current CBAs, for resolving bargaining impasses between the City and the Unions over issues subject to a bargaining obligation under the IPLRA ("Statutory Impasse Resolution Procedures").

711. Nothing in this Consent Decree is intended to (a) alter any of the CBAs between the City and the

Unions; or (b) impair or conflict with the collective bargaining rights of employees in those units under the IPLRA. Nothing in this Consent Decree shall be interpreted as obligating the City or the Unions to violate (i) the terms of the CBAs, including any Successor CBAs resulting from the negotiation process (including Statutory Impasse Resolution Procedures) mandated by the IPLRA with respect to the subject of wages, hours and terms and conditions of employment unless such terms violate the U.S. Constitution, Illinois law or public policy, or (ii) any bargaining obligations under the IPLRA, and/or waive any rights or obligations thereunder. In negotiating Successor CBAs and during any Statutory Resolution Impasse Procedures, the City shall use its best efforts to secure modifications to the CBAs consistent with the terms of this Consent Decree, or to the extent necessary to provide for the effective implementation of the provisions of this Consent Decree.

Appendix D

Illinois Public Labor Relations Act
(pertinent provisions)

Police and Community Relations Improvement Act

Law Enforcement Officer-Worn Body Camera Act

Uniform Peace Officers' Disciplinary Act

Chicago Municipal Code—
Sworn Member Bill of Rights

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 5. General Provisions
Officers and Employees
Act 315. Illinois Public Labor Relations Act (Refs & Annos)

5 ILCS 315/7
Formerly cited as IL ST CH 48 ¶ 1607

315/7. Duty to bargain

Effective: August 18, 2014

Currentness

§ 7. Duty to bargain. A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section.

For the purposes of this Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process, and to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of this Act, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession.

The duty "to bargain collectively" shall also include an obligation to negotiate over any matter with respect to wages, hours and other conditions of employment, not specifically provided for in any other law or not specifically in violation of the provisions of any law. If any other law pertains, in part, to a matter affecting the

wages, hours and other conditions of employment, such other law shall not be construed as limiting the duty "to bargain collectively" and to enter into collective bargaining agreements containing clauses which either supplement, implement, or relate to the effect of such provisions in other laws.

The duty "to bargain collectively" shall also include negotiations as to the terms of a collective bargaining agreement. The parties may, by mutual agreement, provide for arbitration of impasses resulting from their inability to agree upon wages, hours and terms and conditions of employment to be included in a collective bargaining agreement. Such arbitration provisions shall be subject to the Illinois "Uniform Arbitration Act"[1] unless agreed by the parties.

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 5. General Provisions
Officers and Employees
Act 315. Illinois Public Labor Relations Act (Refs & Annos)

5 ILCS 315/15
Formerly cited as IL ST CH 48 ¶ 1615

315/15. Act Takes Precedence

Effective: June 1, 2014

Currentness

§ 15. Act Takes Precedence.

(a) In case of any conflict between the provisions of this Act and any other law (other than Section 5 of the State Employees Group Insurance Act of 1971 and other than the changes made to the Illinois Pension Code by Public Act 96-889 and other than as provided in Section 7.5), executive order or administrative regulation relating to wages, hours and conditions of employment and employment relations, the provisions of this Act or any collective bargaining agreement negotiated thereunder shall prevail and control. Nothing in this Act shall be construed to replace or diminish the rights of employees established by Sections 28 and 28a of the Metropolitan Transit Authority Act,[1] Sections 2.15 through 2.19 of the Regional Transportation Authority Act.[2] The provisions of this Act are subject to Section 7.5 of this Act and Section 5 of the State Employees Group Insurance Act of 1971. Nothing in this Act shall be construed to replace the necessity of complaints against a sworn peace officer, as defined in Section 2(a) of the Uniform Peace Officer Disciplinary Act, from having a complaint supported by a sworn affidavit.

(b) Except as provided in subsection (a) above, any collective bargaining contract between a public employer and a labor organization executed pursuant to this Act shall supersede any contrary statutes, charters, ordinances, rules or regulations relating to wages, hours and conditions of employment and employment relations adopted by the public employer or its agents. Any collective bargaining agreement entered into prior to the effective date of this Act shall remain in full force during its duration.

(c) It is the public policy of this State, pursuant to paragraphs (h) and (i) of Section 6 of Article VII of the Illinois Constitution, that the provisions of this Act are the exclusive exercise by the State of powers and functions which might otherwise be exercised by home rule units. Such powers and functions may not be exercised concurrently, either directly or indirectly, by any unit of local government, including any home rule unit, except as otherwise authorized by this Act.

Credits

P.A. 83-1012, § 15, eff. July 1, 1984. Amended by P.A. 93-839, Art. 10 § 10-52, eff. July 30, 2004; P.A. 93-1006, § 5, eff. Aug. 24, 2004; P.A. 95-331, § 30, eff. Aug. 21, 2007; P.A. 96-889, § 5, eff. April 14, 2010; P.A. 98-599, § 3, eff. June 1, 2014.

Formerly Ill.Rev.Stat. 1991, ch. 48, ¶ 1615.

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 50. Local Government
Police, Fire, and Emergency Services
Act 727. Police and Community Relations Improvement Act

50 ILCS 727/1-10

727/1-10. Investigation of officer-involved deaths; requirements

Effective: January 1, 2016

Currentness

§ 1-10. Investigation of officer-involved deaths; requirements.

(a) Each law enforcement agency shall have a written policy regarding the investigation of officer-involved deaths that involve a law enforcement officer employed by that law enforcement agency.

(b) Each officer-involved death investigation shall be conducted by at least 2 investigators, or an entity or agency comprised of at least 2 investigators, one of whom is the lead investigator. The lead investigator shall be a person certified by the Illinois Law Enforcement Training Standards Board as a Lead Homicide Investigator, or similar training approved by the Illinois Law Enforcement Training Standards Board or the Department of State Police, or similar training provided at an Illinois Law Enforcement Training Standards Board certified school. No investigator involved in the investigation may be employed by the law enforcement agency that employs the officer involved in the officer involved death, unless the investigator is employed by the Department of State Police and is not assigned to the same division or unit as the officer involved in the death.

(c) In addition to the requirements of subsection (b) of this Section, if the officer-involved death being investigated involves a motor vehicle accident, at least one investigator shall be certified by the Illinois Law Enforcement Training Standards Board as a Crash Reconstruction Specialist, or similar training approved by the Illinois Law Enforcement Training Standards Board or the Department of State Police, or similar training provided at an Illinois Law Enforcement Training Standards Board certified school. Notwithstanding the requirements of subsection (b) of this Section, the policy for a law enforcement agency, when the officer-involved death being investigated involves a motor vehicle collision, may allow the use of an investigator who is employed by that law enforcement agency and who is certified by the Illinois Law Enforcement Training Standards Board as a Crash Reconstruction Specialist, or similar training approved by the Illinois Law Enforcement Training and Standards Board, or similar certified training approved by the Department of State Police, or similar training provided at an Illinois Law Enforcement Training and Standards Board certified school.

(d) The investigators conducting the investigation shall, in an expeditious manner, provide a complete report to the State's Attorney of the county in which the officer-involved death occurred.

(e) If the State's Attorney, or a designated special prosecutor, determines there is no basis to prosecute the law enforcement officer involved in the officer-involved death, or if the law enforcement officer is not otherwise charged or indicted, the investigators shall publicly release a report.

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 50. Local Government
Police, Fire, and Emergency Services
Act 706. Law Enforcement Officer-Worn Body Camera Act
(Refs & Annos)

50 ILCS 706/10-20

706/10-20. Requirements

Effective: July 28, 2016

Currentness

§ 10-20. Requirements.

(a) The Board shall develop basic guidelines for the use of officer-worn body cameras by law enforcement agencies. The guidelines developed by the Board shall be the basis for the written policy which must be adopted by each law enforcement agency which employs the use of officer-worn body cameras. The written policy adopted by the law enforcement agency must include, at a minimum, all of the following:

(1) Cameras must be equipped with pre-event recording, capable of recording at least the 30 seconds prior to camera activation, unless the officer-worn body camera was purchased and acquired by the law enforcement agency prior to July 1, 2015.

(2) Cameras must be capable of recording for a period of 10 hours or more, unless the officer-worn body camera was purchased and acquired by the law enforcement agency prior to July 1, 2015.

(3) Cameras must be turned on at all times when the officer is in uniform and is responding to calls for service or engaged in any law enforcement-related

encounter or activity, that occurs while the officer is on duty.

(A) If exigent circumstances exist which prevent the camera from being turned on, the camera must be turned on as soon as practicable.

(B) Officer-worn body cameras may be turned off when the officer is inside of a patrol car which is equipped with a functioning in-car camera; however, the officer must turn on the camera upon exiting the patrol vehicle for law enforcement-related encounters.

(4) Cameras must be turned off when:

(A) the victim of a crime requests that the camera be turned off, and unless impractical or impossible, that request is made on the recording;

(B) a witness of a crime or a community member who wishes to report a crime requests that the camera be turned off, and unless impractical or impossible that request is made on the recording; or

(C) the officer is interacting with a confidential informant used by the law enforcement agency.

However, an officer may continue to record or resume recording a victim or a witness, if exigent circumstances exist, or if the officer has reasonable articulable suspicion that a victim or witness, or confidential informant has committed or is in the process of committing a crime. Under these circumstances, and unless impractical or impossible, the officer must indicate on the recording the reason for continuing to record despite the request of the victim or witness.

(4.5) Cameras may be turned off when the officer is engaged in community caretaking functions. However, the camera must be turned on when the officer has reason to believe that the person on whose behalf the officer is performing a community caretaking function has committed or is in the process of committing a crime. If exigent circumstances exist which prevent the camera from being turned on, the camera must be turned on as soon as practicable.

(5) The officer must provide notice of recording to any person if the person has a reasonable expectation of privacy and proof of notice must be evident in the recording. If exigent circumstances exist which prevent the officer from providing notice, notice must be provided as soon as practicable.

(6) For the purposes of redaction, labeling, or duplicating recordings, access to camera recordings shall be restricted to only those personnel responsible for those purposes. The recording officer and his or her supervisor may access and review recordings prior to completing incident reports or other documentation, provided that the officer or his or her supervisor discloses that fact in the report or documentation.

(7) Recordings made on officer-worn cameras must be retained by the law enforcement agency or by the camera vendor used by the agency, on a recording medium for a period of 90 days.

(A) Under no circumstances shall any recording made with an officer-worn body camera be altered, erased, or destroyed prior to the expiration of the 90-day storage period.

(B) Following the 90-day storage period, any and all recordings made with an officer-worn body camera must be destroyed, unless any encounter

captured on the recording has been flagged. An encounter is deemed to be flagged when:

(i) a formal or informal complaint has been filed;

(ii) the officer discharged his or her firearm or used force during the encounter;

(iii) death or great bodily harm occurred to any person in the recording;

(iv) the encounter resulted in a detention or an arrest, excluding traffic stops which resulted in only a minor traffic offense or business offense;

(v) the officer is the subject of an internal investigation or otherwise being investigated for possible misconduct;

(vi) the supervisor of the officer, prosecutor, defendant, or court determines that the encounter has evidentiary value in a criminal prosecution; or

(vii) the recording officer requests that the video be flagged for official purposes related to his or her official duties.

(C) Under no circumstances shall any recording made with an officer-worn body camera relating to a flagged encounter be altered or destroyed prior to 2 years after the recording was flagged. If the flagged recording was used in a criminal, civil, or administrative proceeding, the recording shall not be destroyed except upon a final disposition and order from the court.

(8) Following the 90-day storage period, recordings may be retained if a supervisor at the law enforce-

ment agency designates the recording for training purposes. If the recording is designated for training purposes, the recordings may be viewed by officers, in the presence of a supervisor or training instructor, for the purposes of instruction, training, or ensuring compliance with agency policies.

West's Smith-Hurd Illinois Compiled Statutes Annotated
Chapter 50. Local Government
Police, Fire, and Emergency Services
Act 725. Uniform Peace Officers' Disciplinary Act

50 ILCS 725/3.8
Formerly cited as IL ST CH 85 ¶ 2561

725/3.8. Admissions; counsel; verified complaint

Effective: August 22, 2011

Currentness

§ 3.8. Admissions; counsel; verified complaint.

(a) No officer shall be interrogated without first being advised in writing that admissions made in the course of the interrogation may be used as evidence of misconduct or as the basis for charges seeking suspension, removal, or discharge; and without first being advised in writing that he or she has the right to counsel of his or her choosing who may be present to advise him or her at any stage of any interrogation.

(b) Anyone filing a complaint against a sworn peace officer must have the complaint supported by a sworn affidavit. Any complaint, having been supported by a sworn affidavit, and having been found, in total or in part, to contain knowingly false material information, shall be presented to the appropriate State's Attorney for a determination of prosecution.

Credits
P.A. 83-981, § 3.8, eff. Dec. 9, 1983.
Amended by P.A. 93-592, § 5, eff. Jan. 1, 2004; P.A. 97-472, § 5, eff. Aug. 22, 2011.

Formerly Ill.Rev.Stat.1991, ch. 85, ¶ 2561.

ARTICLE IV. SWORN MEMBER BILL OF RIGHTS (2-84-330 et seq.)

2-84-330 Conduct of disciplinary investigations.

Whenever a sworn member is the subject of disciplinary investigation other than summary punishment, the interrogation will be conducted in the following manner:

A. The interrogation of the officer, other than in the initial stage of the investigation, shall be scheduled at a reasonable time, preferably while the officer is on duty, or if feasible, during daylight hours.

B. The interrogation, depending upon the allegation, will normally take place at either the officer's unit of assignment, the independent police review authority, the bureau of internal affairs, or other appropriate location.

C. Prior to an interrogation, the officer under investigation shall be informed of the identity of the person in charge of the investigation, the interrogation officer, and the identity of all persons present during the interrogation. When a formal statement is being taken, all questions directed to the officer under interrogation shall be asked by and through one interrogator.

D. No anonymous complaint made against an officer shall be made the subject of a complaint register investigation unless the allegation is of a criminal nature.

E. Immediately prior to the interrogation of an officer under investigation, he shall be informed in writing of the nature of the complaint and the names of all complainants.

F. The length of interrogation sessions will be reasonable, with reasonable interruptions permitted for personal necessities, meals, telephone calls and rest.

G. An officer under interrogation shall not be threatened with transfer, dismissal or disciplinary action or promised a reward as an inducement to provide information relating to the incident under investigation or for exercising any rights contained herein.

H. An officer under investigation will be provided without unnecessary delay, with a copy of any written statement he has made.

I. If the allegation under investigation indicates a recommendation for separation is probable against the officer, the officer will be given the statutory administrative proceedings rights, or if the allegation indicates criminal prosecution is probable against the officer, the officer will be given the constitutional rights concerning self-incrimination prior to the commencement of interrogation.

J. An officer under interrogation shall have the right to be represented by counsel of his own choice and to have that counsel present at all times during the interrogation. The interrogation shall be suspended for a reasonable time until representation can be obtained.

(Prior code § 11-34.1; Amend Coun. J. 11-13-07, p. 16031, § 2; Amend Coun. J. 11-19-14, p. 98037, §

Appendix E

Case: 1:17-cv-06260 Document #: 81-4 Filed: 08/07/18

DECLARATION OF KEVIN GRAHAM

Kevin Graham pursuant to 28 U.S.C. § 1746, submits the following statement in support of Motion to Intervene filed on behalf of the Fraternal Order of Police, Chicago Lodge No. 7, and states:

A. I am Kevin Graham and state that the following is true and correct to best of my recollection.

B. I am the elected President of the Fraternal Order of Police, Chicago Lodge No. 7, ("Lodge" or "FOP") which is the recognized and exclusive collective bargaining representative of Chicago police officers below the rank of sergeant for the purpose of negotiating with the City of Chicago for wages, hours, and working conditions pursuant to Sections 3 and 7 of the Illinois Public Labor Relations Act, ("ILPRA"). 5 ILCS 315/3 and 7. The Lodge is currently involved in collective bargaining negotiations with the City of Chicago to renew its Collective Bargaining Agreement that was effective on July 1, 2012 through June 30, 2017 and by operation of law remains in effect pending the outcome of these negotiations.

C. The collective bargaining negotiations commenced on October 17, 2017, and have continued to date.

D. Shortly after the complaint was filed in this case on or about August 29, 2017, the Lodge's representatives were contacted by the Office of the Illinois Attorney General ("OAG") to discuss matters of mutual interest about the allegations of the complaint and the desire of the OAG to obtain a consent decree involving the Chicago Police Department.

E. On or about September 18, 2017, representatives of the FOP met with representatives of the OAG. As President of the Lodge, I stated our concerns that the consent decree should not have an effect on the collective bargaining process or key provisions of the collective bargaining agreement, including the provision that requires signed affidavits to be obtained in connection with the investigation of a police officer. I indicated the need for assurance that a complaint against the officer be legitimate and that an affidavit is an essential way in doing this.

F. This affidavit process has been agreed upon by the Lodge and the City of Chicago and placed in the collective bargaining agreement years ago.. In essence, I stated we wanted to avoid false complaints and misidentified police officers.

G. I also indicated that I understood that the new head of the Civilian Office of Police Accountability ("COPA"), had made a public statement of a desire to obtain a ten percent conviction rate in all police officer investigation cases.

H. I further indicated that we opposed any adverse changes in the collective bargaining agreement resulting from the consent decree.

I. We were assured by representatives of the OAG, specifically Gary Caplan, that there were many things in both parties' interests that the OAG would be as cooperative as it could be and that the OAG wanted an open exchange of information. The OAG representatives stated that they were here to help the officers and not hurt them. The representatives of the OAG also indicated a concern about possible intervention by the FOP and attempted to discourage such an action. In fact, our subsequent conversations with the OAG indi-

cated a willingness to protect the interests of the officers' collective bargaining agreement in an attempt to persuade the FOP not to intervene in this case.

J. Mr. Caplan also stated that our concerns would be addressed more broadly than they would be with the other groups that were not yet involved. Unfortunately, the concerns of the FOP addressed in subsequent meetings have not been resolved. A review of the hundreds of paragraphs in the consent decree supports this claim. See Appendix A which is a list prepared by the FOP of the paragraphs of the consent decree that directly conflict with the FOP - City collective bargaining agreement and Illinois statutes on collective bargaining rights and police officer rights.

K. I indicated on behalf of the FOP our desire to use a consent decree as a vehicle by which the police department operations would be improved and that citizens would be made safer.

L. We were advised by the OAG that its representatives were anxious to hear the perspective of the Lodge with respect to problems within the police department.

M. To that end we presented to the OAG a list of "Issues For Discussion", which is attached to the Reply Brief as Appendix C. This three and a half page list of twenty-two items includes provisions, *inter alia,* to protect the collective bargaining agreement from being overridden by the consent decree, the dire understaffing of the police department, the great need for enhanced and improved training, serious problems with the promotion system, unilateral decision making by the department on various policies that affect the wage, hours, and working conditions of officers, including but not limited to body worn cameras, video release policy, and disciplinary guidelines. We also expressed con-

cerns about safety and equipment malfunctions, the field training officer program, the use of non-certified investigators by the COPA in the investigation of officer involved shootings and the violation of State law in that regard, and other matters.

N. On September 29, 2017, we also had a discussion with the OAG about the items on this list and emphasized the opposition by the FOP for any changes in the collective bargaining agreement. We further indicated our opposition to the department's unilateral actions with respect to the release of videos, body cameras and disciplinary matters involving the use of force. Mr. Caplan indicated that the OAG shared many of the goals that the FOP has in this process.

O. We also spoke about the high suicide rate among Chicago police officers, and the OAG indicated it wanted to support the officers in a number of ways. One of our representatives, Pat Murray, a veteran police officer, spoke about how the job has been made more difficult as a result of the cameras and that everyone is looking at the police. He stated, "We see things no human beings should see, when we are working on the streets," he also stated, "The job is far too dangerous for someone to be working and subject to constant video surveillance."

P. I spoke about how the job at each beat is different every day, but we know the people who live on the beat and you solve problems in crime areas by knowing these people. I also indicated we need more people on the streets to serve as police officers, and there are simply not enough to handle all the issues that we are confronted.

Q. I indicated the importance of the patrol officers working on the beats and that they are able to see on a

daily basis those persons who are familiar and not familiar in each area. In order to develop that kind of good, solid policing, I indicated we need more people on the street.

R. On the subject of an officer being investigated for a police involved shooting, I indicated the need to be able to see the camera video in advance of an interview because such an incident is so traumatic that the officer would not be able to adequately remember all of the events and all of the issues that occurred during a particular police shooting.

S. Pat Murry, a representative of the Lodge, indicated his concern about fraud in the promotion process and that test scores were not efficiently processed and that there were problems with the tests. He is aware of cheating that has occurred on promotion tests, and that generally kills morale within the police department. He concluded his comments by stating that the promotion policy is corrupt.

T. I stated that weapons qualifications are totally adequate, and we would prefer qualifying with weapons more often. Significantly, we do not have "shoot and don't," shoot scenarios, under which we could be trained for dealing with difficult incidents. I also stated that we need indoor and outdoor weapons ranges.

U. With respect to tactical response reports (TRRs), I indicated there is simply too much paperwork and that it distracts from the officers being able to be the eyes and the ears of what's happening on the street. One of the OAG representatives agreed that the writing of reports should be minimized. I indicated that we are concerned with personal attacks on police officers and that we wanted to hear from the OAG as to what they believed would be good solutions for dealing with the prob-

lems that we have identified and how do we decrease violence and increase trust within the community.

V. On October 6, 2017, one of the FOP attorneys Pat Fioretto, requested of the OAG whether it would be providing any proposals on the consent decree to the Lodge. The Lodge was never given any such proposals to review. At the October 25, 2017, meeting with the OAG, we discussed significant issues involving the body worn cameras, the use of force, the lack of training on the use of force, the role of a CIT officer, the FTO program, in service training, the need for more police officers, the wellness program, duty trades and problems with promotions, and we worked from the twenty-two point list of "Issues For Discussion" that we had presented to the OAG on or about September 19, 2017. The responses from the OAG at this meeting on these items from our list were:

1-2. Items one and two involve the carve out language, and the OAG indicated that it didn't have an answer yet on these two issues.

3. The OAG indicated it would agree with the request of the Lodge to have a role in the selection of a monitor and that the monitor must have law enforcement experience. Consent decree paras. 590 through 591 state nothing about the role of Lodge 7 in the selection of the monitor, and there is no indication that law enforcement experience will be a required element of the monitor's background. I believe this is a serious oversight that should be corrected.

4-5. For items four and five dealing with understaffing of the CPD and the need for time off, the OAG indicated it supported the efforts of

the Lodge and noted that time off is an issue that relates to wellness, which is a serious issue. The consent decree does not deal with this problem.

6-7. The OAG indicated that it supported the need for more training for police officers, but there is no provision for a specific increase.

8. The OAG indicated promotions are a problem and that unqualified people have been promoted.

9. The OAG noted the CPD process of unilateral changes in policies and the Lodge's objections to it. The OAG indicated that it would try to address this issue.

10. The OAG indicated it supported the Lodge's concerns for correcting equipment and safety problems.

11. The OAG indicated it supported the Lodges concerns about the needed changes in the FTO program.

12. On the question of paperwork required to be completed by the officers, the OAG indicated it was not sure where it was on this issue. However at one point in the discussions at a follow up meeting, one representative of the OAG indicated there was a need to minimize the amount of paperwork required of police officers.

13. On the issue of the Police and Community Relations Act and COPA's use of uncertified lead investigators in police involved shootings, I stated COPA is not complying with the statute. The OAG indicated it is working

on this, and it will be addressed by the OAG. To date, the matter has not been resolved. The applicable paragraph in the consent decree does not resolve the question.

14. The OAG stated it may not take a position on this question concerning false accusations against law enforcement officers, however it said it would be looking into this. The consent decree does not mention this question.

15. On separate legal representation of police officers in Section 1983 cases, the OAG did not discuss this question.

16-17. The OAG noted the Lodge's concern about wrongful prosecutions of police officers but did not take a position.

18. On the Performance Recognition System, Behavioral Intervention Systems and Personal Concerns Programs, the OAG indicated it supported the FOP's requests for improvements.

19. With respect to paragraph 19 and the absence of metrics in the OAG's complaint, the OAG stated it supported the FOP's desire to have more metrics to measure the success of the consent decree and whether its purposes have been fulfilled.

20. The OAG suggested it would probably support the idea of having an active rank and file police officer serving on the Police Board. The consent decree at paras. 508-09 (Police Board) does not contain that suggestion.

21. The OAG noted the Lodge's request for oversight of COPA by a board that includes an

active rank and file police officer, but stated it was not sure that it would agree with this proposal.

22. The OAG understood the Lodge's desire that the consent decree emphasize that the demonization of police officers leads to a less safe environment for citizens in low income areas and for officers responsible for protecting them, but there are lots of common interests between OAG and FOP.

W. At the conclusion of the meeting, the OAG indicated that the conversation on these topics was refreshing and that the other groups were not as clear in their goals as the FOP. Mr. Caplan indicated, "We think this is progressing well and we had not had this relationship with the other groups." He further indicated that he wanted to continue to meet with our group, and we agreed to do that.

X. Our next meeting was on November 27, 2017, at which we continued to talk about the issues raised on the Lodge's "Issues For Discussion," Appendix C. Mr. Caplan indicated that they were not intending to get involved in police officer discipline issues and that he wanted to focus on the first two issues on our list, which deal with the protection of the provisions of the collective bargaining agreement and any conflicts with the consent decree. This subject came up when we indicated that we had significant discipline issues to discuss with the City at the bargaining table, and we wanted carve out protection for this and other subjects. Mr. Caplan indicated that the OAG did not want to deal with "core mandatory matters," which I understood to be meaning subjects of bargaining. We also talked about promotions to the position of field training officer and whether it would become a rank in the police depart-

ment. We also indicated to him that we had presented seventeen collective bargaining proposals to the city at meeting held on the October 17. Among these were the officers' bill of rights, promotions, safety, equipment, overtime, seniority and wellness benefits.

Y. At the conclusion of this meeting, Mr. Caplan indicated that it was very helpful and that "it seems the majority of topics are not of our concern and that we want to focus on a few," he indicated this would make his job easier. He also stated that he was looking to have a collaborative solution to these problems.

Z. On November 2, 2017, the Lodge sent the OAG copies of the CPD changes on the use of force policy, body worn cameras and the topics discussed between the Lodge and CPD on body worn cameras in February 2017.

AA. On November 13, 2017, the Lodge sent to the OAG copies of the recommended decision of the Administrative Law Judge in a disciplinary case in which the department had unilaterally implemented a disciplinary program known as the CR Matrix. On November 27, 2017, the Lodge formally objected to the OAG having individual conversations with police officers on the basis that it was an attempt to bypass the role of the Lodge as the exclusive collective bargaining representative.

BB. On January 5, 2018 in a phone conversation between the Lodge and Mr. Caplan, there was a discussion on the carve out language, the first two paragraphs of the risk discussion topics. The Lodge exchanged drafts on the carve out language between January 5 and January 8 and next met with the OAG on March 19th.

CC. In February and March, the only topic of discussion involved the carve out language. The OAG had nothing to present to the Lodge with respect to the numerous other issues that have been discussed in our earlier meetings. At the March 19 meeting, the OAG and the City of Chicago presented a memorandum of agreement that had been signed between certain community groups, the city and the OAG. The OAG indicated that it would be ready to talk to the Lodge about carve out language, and Mr. Caplan specifically stated, "We believe the City and the OAG are not impacting your rights."

DD. In a meeting on March 27, 2018, discussions focused on proposed carve out language and the importance of the Illinois Public Labor Relations Act to the interests of the Lodge and its members. We were advised by a representative of the police department of its opposition to the FOP intervening in this case. Mr. Caplan also indicated that the OAG was trying hard to work with the City and not to impact the collective bargaining rights of the police officers. The Lodge indicated that it wanted to protect the language of the collective bargaining agreement. Carve out language was exchanged by email in early April between the city and the OAG and a letter suggesting carve out language was sent to the OAG on May 7.

EE. Representatives of the City and the FOP met on April 4 to discuss the carve out language and the position of the OAG concerning that subject. There was no discussion about the other items that remained as open issues from the "Issues For Discussion" document given to the OAG in September. The FOP met again with the city on May 25, 2018, to also discuss a City draft of the carve out language. There also was no discussion on that day about any of the remaining issues. On May 30,

2018, the City agreed to carve out language that had been proposed by the City and that would be placed in the consent decree.

FF. On May 31, the OAG, City and Lodge representatives met to discuss the issues raised with the proposed carve out language. During this discussion, Mr. Caplan stated that this concept works in principle and specifically noted, "We have been consistent and do not believe that there are provisions we have drafted which conflict with the CBA." Mr. Caplan also stated that if any consent decree provisions conflicted with the collective bargaining agreement that the collective bargaining agreement would control. However, the parties did not reach final agreement on the carve out language that had been discussed.

GG. Between March and May, the FOP was aware of settlement discussions between the City and the OAG that occurred at the court with reports to Judge Dow. On two occasions, the FOP advised, while we were in the courtroom on a day the City and the OAG were scheduled to meet with Judge Dow to have a settlement conference, the court's courtroom deputy of our desire to attend these sessions. We were told by the courtroom deputy that the judge would allow this if the City and the OAG agreed. We were advised on both occasions, as we all sat in the courtroom that the City and the OAD did not agree. Had the FOP been allowed to observe or review the draft documents, it would have been able to determine the extent of the impingement on the collective bargaining agreement's provisions and the Lodge's statutory rights. If the FOP had received that information earlier, it would have filed its motion to intervene earlier than it did.

HH. Shortly after the May 31, 2018, meeting, I learned from confidential sources that in fact there

were consent decree provisions that would conflict with the provisions of the collective bargaining agreement. As of that time, the OAG had not presented to the FOP any specific provisions that had been negotiated either with the City or with the community groups. Based on those representations I received from confidential sources, I concluded that the Lodge should intervene in this case. Up to that point, I had relied upon the representations of the OAG that it would not interfere with specific provisions of the collective bargaining agreement.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 07 Aug 2018

Kevin Graham

Case: 1:17-cv-06260 Document #: 81-4
Filed: 08/07/18

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From: Pasquale A. Fioretto
Sent: Friday, September 22, 2017 11:28 AM
To: chendrickson@atg.state.ii.us; cwells@atg.state.il.us; kbassehler@atg.state.ii.us; gcaplan@atg.state.ii.us
Cc: Kevin Graham <kgraham@chicagofop.org>; pmurray@chicagofop.org; Martin Preib <mpreib@chicagofop.org>; D'Alba, Joel <jad@ulaw.com>; Brian C. Hlavin <bhlavin@baumsigman.com>
Subject: Follow up

Good morning

As a follow up to our meeting on Monday, we wanted to let you know that we are still working on topics and language which we would like to share as agenda issues for our next meeting. We hope to finalize by early next week and will forward once complete.

Also, my notes indicate that your office would provide us with some bios of the experts being used by the AG, as well as the current docket of the pending litigation.

Thank you.

Pat Fioretto

p.s. I apologize in advance that I do not have the emails of all AG representatives who attended the meeting on Monday. Please forward accordingly.

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Fri, Oct 6, 2017 at 8:42 AM To: "Wells, Christopher" <CWells@atg.state.il.us>, "Hendrickson, Cara" <CHendrickson@atg.state.il.us>, "Bass Ehler, Karyn" <KBassEhler@atg.state.il.us>, "Caplan, Gary" <GCaplan@atg.state.il.us>

Cc: Kevin Graham <kgraham@chicagofop.org>, "pmurray@chicagofop.org" <pmurray@chicagofop.org>, Martin Preib
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Thank you, Chris.

Any update on our proposals? Should we be looking at confirming another meeting date?

Pat

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Thanks for the follow up.

Gary

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From: Pasquale A. Fioretto [mailto:pfioretto@baum-sigman.com]
Sent: Friday, October 06, 2017 8:43 AM
To: Wells, Christopher; Hendrickson, Cara; Bass Ehler, Karyn; Caplan, Gary
Cc: Kevin Graham; pmurray@chicagofop.org; Martin Preib; D'Alba, Joel; Brian C. Hlavin
Subject: RE: Follow up

Thank you, Chris.

Any update on our proposals? Should we be looking at confirming another meeting date?

Pat

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