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October 29, 2013 Motion

1 MAN 1: Judges of the United States
2 Court of Appeals for the 2nd Circuit. Oh yea, oh
3 yea, oh yea all persons having business before
4 this, a stated part of United States of [UNINTEL]
5 2nd Circuit call near, give your attention and ye
6 shall be heard. God save the United States of
7 America and this honorable forum.

8 JUDGE JOSE A. CABRANES: All right,
9 we're here the pending motions in Floyd against
10 City of New York and Ligon v. City of New York.
11 Miss Koeleveld?

12 CELESTE KOELEVELD: Good morning, Your
13 Honors. May it please the court--?

14 JUDGE JOSE A. CABRANES: Miss Koeleveld,
15 let me just as a preliminary matter try to
16 organize this a bit and give you fair warning. As
17 a preliminary matter as you see we've given this
18 motion much more time than usual and we're going
19 to give both sides all the time they need and in
20 particular I would like to give you a couple of
21 uninterrupted minutes to summarize your position
22 before we start jumping up and down.

23 I can't speak for my colleagues, we
24 hold the same commission, but I hope you can take
25 a few minutes to press your case. I might mention

1 that I intend to follow up with a number of quite
2 specific questions about why I think your office
3 has proceeded at a snail's pace to get this
4 matter before the Court of Appeals. But I don't
5 want to do that until--we've been working on
6 timelines, looking at the record with care and I
7 want to go through that with you. But I want to
8 give you some time to make your pitch first.

9 MAN 2: Yes, Your Honor. Thank you. Your
10 Honor, the City asks for it to stay the decision
11 in the District Court, the remedial orders,
12 pending review in this Court of the District
13 Court's liability decisions which the City
14 submits are deeply flawed and which merit review
15 by this Court before the City is required to take
16 any action based on those orders.

17 Both the Fourteenth and Fourth
18 Amendment determinations by the District Court
19 are seriously flawed. The Fourteenth Amendment
20 finding by the District Court of racial
21 profiling, inappropriate use of race in stop
22 decisions is based on a single anecdote by
23 Cornelio McDonald and that stop alone cannot bear
24 the weight that the District Court assigned to
25 it.

1 The District Court also ignored the
2 most appropriate benchmark in its analysis of
3 racial profiling and that appropriate benchmark
4 is crime suspect description--realtime crime
5 suspect data that the New York City Police
6 Department relies on in determining how to deploy
7 its resources.

8 The District Court ignored that
9 benchmark for the improper reason and the unsound
10 reason that that benchmark--because primarily 90
11 percent of the people stopped are innocent and
12 analyzing stops based on outcome as opposed to
13 analyzing an appropriate benchmark that sets
14 forth the pool of people and is a relevant
15 consideration in the analysis.

16 The Fourth Amendment analysis is also
17 deeply flawed. There is no sufficient evidence of
18 a pattern and practice of inappropriate stops not
19 based on reasonable suspicion city-wide. The
20 District Court report its analyzed 4.43 million
21 stops over the course of eight years by relying
22 on the UF-250 database, the database of the forms
23 that the Plaintiff's expert analyzed, to try to
24 determine whether the stops were justified or
25 not.

1 Whether a stop is justified cannot be
2 determined based on a single form and what cannot
3 be done based on a single form cannot be done on
4 4.4 million forms either. The essentially
5 analysis is to look at the totality of the
6 circumstances of each particular stop and when
7 the District Court did that as to the 19
8 incidents that Plaintiffs presented it turned out
9 that 10 of those 19 incidents were actually
10 justified in her view and those were the stops
11 that the Plaintiffs chose to put forward. So
12 there simply is not sufficient evidence of a
13 pattern and practice, a widespread pattern and
14 practice of illegal stops.

15 The [ORDER IS THE?] Court in different
16 findings found there is inadequate analysis
17 causation in their [UNINTEL] difference analysis
18 and that [STRANGE AND?] standard of fault simply
19 was not met by the proof the Plaintiffs put
20 forward.

21 In considering the irreparable harm
22 that the City will suffer if the remedial relief
23 goes forward the City is asking the Court to stay
24 these decisions, to stay the remedial relief, the
25 process that is now underway pending review by

1 this Court of these decisions.

2 JUDGE JOHN M. WALKER, JR.: Okay, would
3 you elaborate just a little bit, now that you're
4 taking a breath between your argument, as to what
5 you see the impact of the remedial relief be on
6 the City and the Police Department?

7 CELESTE KOELEVELD: The impact of the
8 remedial relief is enormous, Your Honor. The
9 remedial relief that has been ordered is
10 widespread, multi-faceted and it breaches into
11 every aspect of policing from how to make stop
12 decisions to how to train on those stop
13 decisions, how to supervise on them, what kind of
14 a form to fill out.

15 JUDGE JOHN M. WALKER, JR.: But as I
16 understand it some of this is deferred pending
17 further processes. That is the monitor's
18 recommendations, the town hall meetings, that
19 kind of thing. So, what I'm talking about is the
20 immediate impact which it seems to me--the order
21 itself in ordering these things would seem to me
22 to have an impact. I don't know. Maybe you could
23 enlighten me on that. As a judge I don't really
24 know much about policing compared to the
25 department. Maybe you can help me.

1 CELESTE KOELEVELD: Yes, Your Honor. As
2 the District Judge herself recognized, the
3 opinions have already had an effect on the police
4 and the City of New York. She herself said that
5 their decision has had an effect because she
6 noted that stops are down in the city, down
7 citywide. In fact they're down 50 percent and she
8 denied the stay saying that she didn't want the
9 City to go back to its old ways so to speak. So
10 she implicitly acknowledged that there is an
11 effect, a chilling effect, that these decisions
12 have on the policing in the City.

13 JUDGE JOHN M. WALKER, JR.: Is that do
14 you think due to the fact that she has said in
15 effect your practices are unconstitutional and
16 policemen do not want to be targeted themselves
17 for engaging in what now is thought to be
18 unconstitutional conduct?

19 CELESTE KOELEVELD: I think that's
20 right, Your Honor. I mean, I think certain it's
21 common sense to assume and to recognize that
22 police officers aren't ignorant or immune from
23 what they read and what they hear and that they
24 see in the papers. A decision like this is issued
25 and they essentially are now hesitant

1 unfortunately to use a very, very important part,
2 a tool that they need to use in proactive
3 policing. They have now been told that the way
4 they employ the stop and frisk, the way they do
5 this preliminary investigation, it's a part of
6 the continuum of police work, they're told the
7 way that they're doing that is flawed. They're
8 told that the types of furtive movements that
9 they have relied on in the past to make those
10 kinds of decisions to stop someone that the Court
11 has criticized those. They're told that using
12 crime suspect data, which includes racial
13 descriptions, it is illegal and that generates
14 confusion amongst the rank and file, Your Honor.

15 JUDGE JOHN M. WALKER, JR.: The problem
16 you have, ma'am, is that we have a record here in
17 which the District Court made exhaustive findings
18 that certain practices of your client were
19 illegal. I certainly understand that you disagree
20 with them and that if you were the fact finder
21 you would have resolved those questions
22 differently. But what you've got to address to us
23 is the rather substantial burden you have of
24 demonstrating a panel of this Court that all
25 these findings are erroneous. That's a heavy

1 burden for you. Your disagreement, which is all
2 I've heard this morning, doesn't really shoulder
3 that burden, doesn't it?

4 CELESTE KOELEVELD: Well, Your Honor, I
5 respectfully disagree that we're simply
6 challenging factual findings here. I believe that
7 we are challenging legal conclusions that are
8 deeply flawed. For example, the District Court's
9 Fourteenth Amendment analysis she has a novel
10 concept of indirect racial profiling which
11 borrows bits and pieces from established
12 Fourteenth Amendment types of improper use of
13 race, equal protection violations. She has a
14 smattering of intentional discrimination which is
15 based really on nothing more than disparate
16 impact and it cannot be--she imports a selective
17 prosecution, selective enforcement idea. The case
18 was not tried as a selective enforcement case so
19 that analysis does not belong in her analysis at
20 all. And she criticizes the City for having a
21 suspect classification based on its reliance on
22 prime suspect data and her analysis on that
23 score, since they cannot square it with this
24 Court's decision on *Brown v. Oneonta*. So, those
25 are all serious legal problems with her

1 Fourteenth Amendment analysis to begin with.

2 I think similarly, the Fourth Amendment
3 analysis also suffers from a very serious legal
4 flaw which is ignoring the totality of the
5 circumstances of each stop to make sweeping
6 conclusions based on checkboxes on a form.

7 JUDGE JOSE A. CABRANES: Miss Koeleveld?

8 CELESTE KOELEVELD: Yes, Your Honor.

9 JUDGE JOSE A. CABRANES: We're going to
10 have a lot of substantive questions.

11 CELESTE KOELEVELD: Sure, absolutely.

12 JUDGE BARRINGTON D. PARKER: Let me
13 begin with the most modest procedural questions
14 because I think it's important. You're asking for
15 a stay and you've come in here two and a half
16 months after this decision you're concerned about
17 was issued. Now, let me just say by way of
18 preface, you appeared before us many times and I
19 recorded the distinguished service as an AUSA
20 before you went to the City. I have the greatest
21 respect for you and for your boss Mr. Cardozo and
22 for the staff of the corporation counsel so I
23 don't want you or anyone else to misunderstand my
24 comments or questions as expressions of personal
25 or institutional hostility.

1 But I do think this has to be said for
2 starters. A reasonable observer reviewing this
3 record, the record of this appeal, could think
4 that the City government has been speaking out of
5 two sides of its mouth--its proverbial or
6 metaphorical mouth. It's been castigating the
7 District Court publicly and forcefully for its
8 orders while actually pursuing this appeal at
9 what I regard as a glacial pace, at a painfully
10 slow pace. Indeed it's [UNINTEL] to me that you
11 are at least four to six weeks late in bringing
12 this motion and I say this because that has
13 something to do with our exercise of our informed
14 discretion as to whether a stay is appropriate.

15 Now, the City's leaders, your bosses,
16 have every right to speak frankly about the way
17 the District Court has handled this case. But
18 speaking for myself only, it seems to me that for
19 whatever reason the City has been dragging its
20 feet and dragging its feet quite deliberately. I
21 am not saying that the New York City Police
22 Department, your client, has been moving at a
23 glacial pace. I am saying that the City's lawyers
24 for whatever reason have been moving at a glacial
25 pace.

1 Now, I want to hear from you in a
2 moment as to why these tentative conclusions of
3 mine, and I emphasize they are tentative, upon a
4 review of the record are wrong. Perhaps you're
5 pursuing what Muhammad Ali used to call a rope a
6 dope strategy. That is, a mere pretense of
7 ineffectiveness or lassitude before you spring to
8 life with a burst of energy toward the victory
9 line.

10 So, I want to go over this timeline
11 with you and just make sure that I've understood
12 this record and I want to be told if at all
13 possible why I am wrong.

14 Now, first of all the District Court
15 entered both the liability opinion and remedy's
16 opinion on August 12th. Is that right?

17 CELESTE KOELEVELD: That's correct, Your
18 Honor.

19 JUDGE JOSE A. CABRANES: And you filed a
20 notice of appeal four days later on August 16,
21 which seems to me entirely a plausible schedule.
22 But you waited over two weeks before seeking a
23 stay in the District Court. You sought that on
24 August 27. Is that right?

25 CELESTE KOELEVELD: That's correct, Your

1 Honor.

2 JUDGE JOSE A. CABRANES: So after a
3 leisurely three week period the District Court
4 denied your stay motions on September 17. I think
5 that's right. I have the record citations here.

6 CELESTE KOELEVELD: Yes, Your Honor.
7 That's correct.

8 JUDGE JOSE A. CABRANES: During that
9 time the District Court appointed the facilitator
10 on September 4 and the day after that denied the
11 stay appointing an academic advisory council on
12 September 18th. After the District Court's denial
13 of your stay you waited until the following week,
14 on September 23, to seek a stay here. You didn't
15 ask to be heard promptly by a motions panel and
16 of course a person of your experience would know
17 that you could have done that. You could have
18 gone to the clerk's office and said we need to be
19 heard right away. This is an important matter. We
20 need a stay. But you didn't do that.

21 So, while all of this is going on you
22 filed a motion to expedite the appeals on
23 September 11. That was almost a full month after
24 you had filed your notice of appeals. You moved
25 to expedite 26 days after filing a notice of

1 appeal and 13 days after filing the so-called
2 Form C and D and then you, as the Defendant
3 appellant, you asked for a so-called expedited
4 schedule. That expedited schedule that you asked
5 for was denied by our applications judge, Judge
6 Wesley.

7 The so-called expedited schedule that
8 you proposed would have given the City a full two
9 months until November 12 to perfect and then,
10 this is again your proposal, then given the
11 Plaintiffs two months until January 13, 2014 to
12 file and then you would have another leisurely
13 two weeks until January 28, 2014 to reply. I
14 can't speak for Judge Wesley, he's the
15 applications judge, he exercises informed
16 discretion, but I can imagine that Judge Wesley
17 looking at your so-called expedited schedule
18 could deny it for a very simple reason--it wasn't
19 a particularly expedited schedule. The schedule
20 that would have been enforced by the Court in the
21 normal course was roughly the same schedule.

22 So, your motion to expedite the appeal
23 was denied on September 19th and you still didn't
24 seek a stay here. Ordinarily, as you know, a
25 motion to expedite is accompanied by a motion for

1 a stay and very often a panel like ours sees such
2 questions might well say well, we're not going to
3 stay the matter, but we'll expedite it because
4 the party at least gets half a loaf and can move
5 the case quickly. But you didn't put these two
6 together. You filed a motion to expedite the
7 appeal. It was denied on September 19th. You
8 still didn't seek a stay here.

9 And you filed another scheduling
10 notification, and I'm emphasizing this, you filed
11 the scheduling notification that gave you two
12 months until November 29 to perfect. Now, given
13 our normal court rules that would mean, and you
14 of course would know that and the City's lawyers
15 would understand this, that would mean that if
16 the parties took the time allotted to them under
17 our rules the appeal would not be resolved until
18 at the earliest March of 2014.

19 Now, it seems to me it's safe for me to
20 conclude, and I'm not trying to foreclose in any
21 way consideration of your application which may
22 have its merit in any event, but it seems to me
23 safe to say that if you had acted with real
24 urgency at certain points you could have been
25 before this Court asking for a stay a long time

1 ago.

2 CELESTE KOELEVELD: Your Honor, I
3 disagree with some of the premises in your
4 timeline of events.

5 JUDGE JOSE A. CABRANES: But you don't
6 disagree with any of the times to which I
7 referred?

8 CELESTE KOELEVELD: Well, just a couple
9 of points and additions to the timeline that Your
10 Honor has outlined. First of all, I think it is
11 public knowledge that the first meeting with the
12 monitor took place in early September, on
13 September 4th. Now, the proceedings before the
14 monitor are private so I'm somewhat constrained
15 in how much detail I can go into with respect to
16 what's going on there.

17 JUDGE JOSE A. CABRANES: It doesn't much
18 matter to the legal question of whether you
19 should get a stay. It supports the proposition
20 you should get a stay because you're being forced
21 to deal with this monitor.

22 CELESTE KOELEVELD: When we filed the
23 motion to expedite, Your Honor, on September 11th
24 the stay petition or application was still
25 pending in the District Court so at that point we

1 could not really have--

2 JUDGE JOSE A. CABRANES: Did you ask the
3 District Court to act expeditiously?

4 CELESTE KOELEVELD: Yes we did, Your
5 Honor. When we filed our stay application on
6 August 27th we asked that the Plaintiffs be
7 required to respond in a few days to keep that
8 going quickly.

9 JUDGE JOSE A. CABRANES: And if the
10 District Court didn't act really quite quickly
11 you could have come [UNINTEL]. Indeed you would
12 say in your papers the matter is pending in the
13 District Court, the District Court hasn't acted
14 on it. We've acted in good faith. We need relief.
15 You didn't do that.

16 CELESTE KOELEVELD: No, Your Honor we
17 didn't. But we did come within a couple of
18 business days of when the District Court denied
19 our stay application and we did then ask actually
20 for an expedited order.

21 JUDGE JOSE A. CABRANES: Expedite its
22 schedule which was roughly what the Court of
23 Appeals would have given you anyway.

24 CELESTE KOELEVELD: Well, on the motion,
25 Your Honor, we actually were trying to have it

1 argued a number of weeks ago, but because of
2 various scheduling issues--Plaintiff's counsel
3 wasn't available last week--we tried to have that
4 briefing done as quickly as possible and the
5 motion to be argued two weeks ago, but that
6 didn't happen and so it was schedule for today.
7 So we were actually were trying to get it before
8 you earlier.

9 JUDGE JOSE A. CABRANES: To give you an
10 idea, this is a case in which you may not have
11 been involved, but the case last week decided by
12 this Court in the campaign financing case roughly
13 was decided in this way--there was an application
14 to this Court on a Wednesday two weeks ago. On
15 Friday the panel heard argument after briefing.
16 It set a schedule of the next day and the day
17 after that because of course in these cases
18 counsel have more than enough time. They have in
19 their computers copies of their earlier briefs.
20 The panel that heard that case on an urgent basis
21 resolved it by a published opinion the following
22 Wednesday--that was a week.

23 I have no views on that case. I know
24 nothing about it. All I know is that was a case
25 in which there was an urgency on the part of the

1 Appellants for a decision and they moved quickly,
2 they had their hearing and you do that of course
3 by consulting with the clerk's office and saying
4 this is urgent, we need to be heard as soon as
5 possible, you know that, and the clerk's office
6 will accommodate you and put you before the first
7 available panel. That's what happened in that
8 case. They filed on Tuesday or Wednesday. They
9 were before the panel with a full briefing and
10 argument by Friday and the following Wednesday
11 the Court of Appeals acted.

12 Now, forget the merits of that case.
13 That's just an example of a procedure for acting
14 with urgency of which you and the City's lawyers
15 are fully aware. Now, I'm not certain, well I'm
16 quite certain that your client couldn't possibly
17 be happy with this kind of schedule, this kind of
18 approach, this rope a dope approach. But I'm not
19 certain--I don't know whether your other clients
20 were fully aware of the painfully slow way in
21 which your office was proceeding.

22 CELESTE KOELEVELD: Your Honor, my
23 perception of it really has been different from
24 yours over time. Our perception has been that
25 we've been trying to move matters along and that

1 at every turn of the way the other sides are
2 delaying and are taking extra time.

3 JUDGE BARRINGTON D. PARKER: That
4 doesn't stop you from moving expeditiously to--

5 CELESTE KOELEVELD: Well, we did ask for
6 an expedited briefing. We did ask to have this
7 motion heard earlier in this month. For various
8 reasons it kept being pushed back.

9 JUDGE BARRINGTON D. PARKER: When did
10 you ask for the motion to be heard? Today is the
11 29th.

12 CELESTE KOELEVELD: I think we were
13 initially trying to have the motion heard--

14 JUDGE BARRINGTON D. PARKER: Are you
15 saying two weeks ago?

16 CELESTE KOELEVELD: At least two,
17 perhaps three weeks ago we were trying to get it
18 heard and the other side wanted to have more time
19 to put their papers in and there were
20 conversations with the clerk's office. I wasn't a
21 party to those conversations, but we were trying
22 to have it argued as early as October 15th.

23 JUDGE BARRINGTON D. PARKER: Was Judge
24 Cabranes correct that on a motion schedule that
25 you proposed this case would have been heard in

1 March of 2014?

2 CELESTE KOELEVELD: Ultimately that is
3 correct because we asked for an expedited
4 briefing in a case that has a 25,000 page record
5 and a 200 page liability finding--it's an
6 enormous record. In a case like this sometimes
7 the parties ask for more time to brief and we
8 also--

9 JUDGE BARRINGTON D. PARKER: That
10 response is that when you made your presentation
11 at the beginning of your remarks what you said
12 was that the District Court's opinion was seeding
13 uncertainty and chaos and trouble among the New
14 York City Police Department. So it's hard for me
15 to square those assertions with a schedule that
16 by your choosing would not have teed this case up
17 for a decision by our Court until the end of the
18 spring of next year.

19 CELESTE KOELEVELD: I believe the
20 schedule that we proposed, Your Honor, initially
21 on our motion to expedite would have brought it
22 up in January, but once the Court denied the
23 motion to expedite we proposed a schedule that
24 would tee it up by March.

25 JUDGE JOSE A. CABRANES: We're focusing

1 now on the stay.

2 CELESTE KOELEVELD: That's right, Your
3 Honor.

4 JUDGE JOSE A. CABRANES: You filed your
5 motion for a stay four business days after the
6 District Court denied the motion.

7 CELESTE KOELEVELD: That's correct, Your
8 Honor.

9 JUDGE JOSE A. CABRANES: And it's now
10 roughly a month after that now.

11 CELESTE KOELEVELD: That's right, Your
12 Honor.

13 JUDGE BARRINGTON D. PARKER: And you say
14 in the middle of the month you had oral argument.
15 That's when you wanted to have oral argument.

16 CELESTE KOELEVELD: We did. We had
17 conversations pressing for oral argument at least
18 two weeks ago. We can certainly move to expedite
19 again and move the matter for the Court's
20 consideration sooner. Again, we believe the
21 decisions need to be stayed because that will
22 have a beneficial effect on the officers and we
23 think that given the serious issues that we've
24 raised that go to the merits of the appeal that
25 the merits of the appeal should be heard before

1 those effects are further felt and before we're
2 further required to engage in this monitoring
3 facilitator, academic panel, etcetera process.

4 JUDGE BARRINGTON D. PARKER: I want to
5 go back, because we've been talking about
6 something else now, about the impact. I take it
7 that apart from the chilling effect there are
8 certain practices that have been worked having to
9 do with the forms, the forms have to be revised.

10 CELESTE KOELEVELD: That's right, Your
11 Honor. The District Court was quite clear about
12 that. She wants a narrative added to the form now
13 and the tear off so the form needs to be
14 completely revised.

15 JUDGE BARRINGTON D. PARKER: As I
16 understand it it's more than a narrative. It's a
17 narrative of the circumstances and then it's a
18 further narrative or description of the reasons
19 in a written format for the stop.

20 CELESTE KOELEVELD: That's right.

21 JUDGE BARRINGTON D. PARKER: And she
22 wants them to be separate as I read it.

23 CELESTE KOELEVELD: Currently, Your
24 Honor, there are two places. There is a memo book
25 entry that can describe the circumstances of the

1 stop and officers are required to do them in the
2 memo books. And so she wants to add it to the
3 form as well and whether ultimately it will be
4 part of the form and in the memo book both can be
5 decided. But the bottom line is that the
6 narrative has to be part of the form in some
7 form.

8 JUDGE BARRINGTON D. PARKER: I see. And
9 this narrative, presumably, couldn't be cryptic.
10 It would be in the nature of a little essay or a
11 little writing of some kind. It might be four or
12 five sentences.

13 CELESTE KOELEVELD: I think that's
14 right, Your Honor. I think to capture all the
15 nuanced reasons why a stop might occur you can
16 imagine that an officer may have to go on for
17 quite some time to explain why he engaged in a
18 stop. That's part of the problem.

19 JUDGE BARRINGTON D. PARKER: Checking
20 the boxes is insufficient so of course you would
21 have to feel that that was wrong and therefore
22 would have to fully explain the stop.

23 CELESTE KOELEVELD: Well, it depends on
24 what the purpose of the checkboxes is, Your
25 Honor. It's never been the Police Department's

1 position that the checkboxes are the be all and
2 the end all. A prosecutor or somebody justifying
3 a stop would not walk into court waving the
4 [EFD50?] form with its checkboxes and say I
5 checked off furtive movement in a high-crime area
6 and I'm done. Nobody would ever do that. You
7 would have the person testify about what
8 happened, what they saw, what somebody else saw
9 as was done in this case. We had weeks of
10 testimony from witnesses explaining what happened
11 during these stops.

12 JUDGE BARRINGTON D. PARKER: The other
13 question I have, and I'm going to ask the other
14 side this so this is kind of a forecast of that,
15 is the breadth of the order, [READING THE?]
16 order, which is bringing in outside experts, a
17 monitor, a facilitator, town hall meetings and
18 the like, it seems to me is a broad step that one
19 would take in a situation where you have total
20 hostility on the part of the authorities or the
21 police. It's the kind of remedy that one would
22 expect, and we're familiar with--those of us who
23 are old enough--would be necessary to desegregate
24 in the face of overt hostility on the part of its
25 state towards desegregation--an Orval Faubus or a

1 George Wallace standing at the courthouse steps
2 and standing at the schoolhouse steps and that
3 kind of thing.

4 Implicit in that remedial order, to me
5 at least it seems, is the finding that the police
6 have acted in total bad faith and with deliberate
7 disregard of rights here in the same way that was
8 done in the deep south in the 1950s. That's one
9 of my concerns here because if you're going to
10 proceed in a measured prudent way to try and
11 resolve these problems I would normally expect to
12 go to the police and ask them to institute these
13 reforms without involving the outside experts and
14 so forth. It does much less to disrupt what goes
15 on in the Police Department. It also is less
16 costly and it's a way of also expressing open
17 confidence that if there are problems the police
18 will address them.

19 So, I just wondered what your views
20 were on that.

21 CELESTE KOELEVELD: I'm in agreement
22 that the--certainly in a agreement, Your Honor,
23 there is a serious concern with encroachment by
24 the judiciary via this remedial process into the
25 executive functions of the Police Department and

1 that it's bringing a sledgehammer to a problem,
2 an alleged problem, that far exceeds what would
3 be necessary. The Department itself has
4 demonstrated responsiveness to the needs of the
5 community and to the need to clarify orders and
6 to make sure that its officers are behaving
7 lawfully.

8 For example, in the Ligon situation
9 itself where the Department clarified its
10 procedures for making stops in and out of
11 buildings for trespass and went through a very
12 long process of revising the procedures, engaging
13 in training on those new procedures, it developed
14 a whole training program at Rodman's Neck. It
15 cycled thousands of officers through that
16 training to make sure they understood the
17 circumstances under which they were supposed to
18 make stops and not make stops, that they
19 understood the four level of De Bour and all
20 those things, Your Honor, I think are completely
21 antithetical to the notion that the Department is
22 deliberately indifferent to the need to behave
23 lawfully.

24 JUDGE BARRINGTON D. PARKER: Let me ask
25 you this. We all read the newspapers and there's

1 going to be an election in New York City next
2 week and we've read comments that the individual
3 who apparently is leading in the polls is making
4 about this matter. Are we going to be faced with
5 the situation where within the near-term your
6 marching orders on this matter are going to
7 change? How should we think about that?

8 CELESTE KOELEVELD: Well, Your Honor, I
9 read newspapers too and I'm fully aware of the
10 political process which at times bleeds into the
11 legal process. But I think the problem is that
12 this case is here now, is here today, it raises
13 very, very important issues about [NON-?]
14 liability, about pattern and practice, about
15 equal protection claims made in the case and
16 those issues, in our view, need to be addressed
17 and need to be corrected. I think in a court of
18 law where we have to address those issues head on
19 from a legal perspective and we need to do our
20 best to separate the other things we hear in the
21 public about what's happening--

22 JUDGE JOSE A. CABRANES: Your argument
23 on the remedy phase that the District Court has
24 invaded the political process in effect, invaded
25 normal processes that operate like elected

1 officials or individuals appointed by elected
2 officials and that that essentially is a public
3 policy arena that the Court is invading. If
4 that's so then I don't think this is totally out
5 of the question, the question that Judge Parker
6 just asked, and I would ask the question further
7 that if the case were on hold and were stayed
8 until some schedule could be made and it were
9 resolved in early January then at that point
10 there would be a decision or resolved at some
11 point down the road thereafter, there would be a
12 decision made, but there would also be given an
13 opportunity for the policymakers to also weigh
14 in.

15 CELESTE KOELEVELD: Well, yes, Your
16 Honor, there is certainly a political process
17 that we believe is the appropriate forum for
18 certain issues to be addressed and that process
19 is moving forward. It can continue absent, in
20 addition to or alongside the legal process. The
21 problems is that the legal process that we're
22 having now is focused on these rulings that are
23 flawed and if they stay in place they will hamper
24 the Department in its efforts to police and
25 enforce the law going forward.

1 The rulings that the use of crime
2 suspect data, for example, or the reliance on the
3 totality of the circumstances in the Fourth
4 Amendment context and the allegation of a
5 widespread pattern and practice, those are
6 problematic rulings that if they stay in place
7 will actually hamper the Department going forward
8 and that's why--

9 JUDGE JOSE A. CABRANES: Your position
10 essentially is that if the District Court's
11 decision is left undisturbed that alone would be
12 a problem as far as you're--even if it's
13 supervened by subsequent events that would be the
14 law.

15 CELESTE KOELEVELD: That's right, Your
16 Honor, exactly. Again, I think the political
17 process, and we have a fascinating process going
18 on where 12 years of one mayor will have a change
19 and sure, the community meetings and the
20 [UNINTEL] from the community, all that can
21 continue. There's no reason why it can't, but we
22 have a legal process.

23 JUDGE JOSE A. CABRANES: Let me go back
24 to my pedestrian concern with dates because it
25 seems to me you indicated in your response to a

1 question by Judge Parker earlier that somehow you
2 had wanted--your expedited schedule would have
3 been completed--you could have argument in
4 January. That's not entirely accurate. That is
5 your briefing would have ended on January 28,
6 2014 which would mean in the normal course that
7 argument couldn't be held before then and so it
8 would be at least February and by my own
9 calculation your own alleged expedited schedule
10 would have put this matter before the Court of
11 Appeals in March of 2014.

12 Now, there's no [MORAL?] fault in that,
13 I'm just pointing out, as Judge Parker did and
14 Judge Walker, that there is indeed a specter
15 haunting this appeal and that is the specter of
16 the mayoralty election. So you probably had that
17 in mind I suppose by kicking this can down the
18 proverbial road into early 2014. There's nothing
19 wrong with that. I'm just saying if that's the
20 case what's the urgency of giving you a stay in
21 these circumstances?

22 CELESTE KOELEVELD: Your Honor, we
23 actually wanted to try to get the appeal heard as
24 soon as possible and by the end of the year--

25 JUDGE JOSE A. CABRANES: You would

1 prefer to have this Court decide this case on
2 some kind of expedited schedule? We are, of
3 course, a three judge panel and we can modify the
4 schedule. So your view is that we should modify
5 the briefing schedule so that this can be argued
6 on the merits and decided before the end of the
7 year?

8 CELESTE KOELEVELD: If that were
9 possible that's what we would have preferred.

10 JUDGE JOSE A. CABRANES: Well, of course
11 it's possible.

12 CELESTE KOELEVELD: Your Honor, the
13 realities of the situation were that the decision
14 was in August--

15 JUDGE JOSE A. CABRANES: What reality?

16 CELESTE KOELEVELD: --so it's a huge--

17 JUDGE BARRINGTON D. PARKER: I thought
18 you just told us that you were laboring under a
19 voluminous record that had to be digested and
20 managed before the City could move forward.

21 CELESTE KOELEVELD: I'm sorry, I was
22 responding to the idea that we were kicking the
23 proverbial can down the road.

24 JUDGE BARRINGTON D. PARKER: That was
25 the reason that you gave, one of the reasons that

1 you gave me, as to why the schedule was
2 elongated.

3 CELESTE KOELEVELD: Right. So just sort
4 of just to try to put it all in nutshell. And I'm
5 sorry, you're right, Your Honor, the briefing
6 would have concluded in the end of January by our
7 schedule and would have had to be argued somewhat
8 later. I misspoke on that. But the point I'm
9 trying to make is the decision came out in August
10 and it is indeed voluminous and it raises a lot
11 of issues that need to be addressed and the
12 reality of it is that we need to brief it and the
13 Plaintiffs need to respond and they're asking for
14 at least 60 days if not 90 to respond. They
15 wanted 90 to respond to our briefing even if we
16 had gotten 60. We're also faced with--

17 JUDGE JOSE A. CABRANES: I'd asked for
18 300 days.

19 JUDGE BARRINGTON D. PARKER: You always
20 have the option of saying no.

21 CELESTE KOELEVELD: Well, we actually
22 did ask--we did say no to the 90 days and we
23 proposed 60. But we didn't believe that we could
24 compress it more than that. The reality of it
25 given the four months from August--

1 JUDGE JOSE A. CABRANES: The case which
2 I referred to earlier which is New York Progress
3 and Protection PAC against Walsh, number 13-
4 3889CV, that's the election finance. That's a
5 pretty complicated subject. A lot of raw Supreme
6 Court and otherwise, not an easy issue at all. As
7 I told you, the Plaintiffs filed their petition
8 for writ of mandamus on October 16. By October
9 24th the Court of Appeals had rendered a decision
10 reversing the denial of the District Court order.

11 CELESTE KOELEVELD: I don't know if that
12 case had a nine week trial record with 25,000
13 pages in the record with a multi-faceted, a 40
14 page remedy decision with a 200 page liability
15 order with a preceding 145 page liability order
16 in Ligon.

17 JUDGE JOSE A. CABRANES: Each of you
18 have many lawyers working on this. We live in a
19 computer age in which there are briefs that have
20 been written on virtually every one of these
21 questions with a little of the proverbial cutting
22 and pasting you could have moved fast. But
23 certainly you could have placed it before a
24 motions panel for this particular motion much
25 earlier.

1 CELESTE KOELEVELD: I think that none of
2 that, Your Honor, takes away from our arguments
3 that our basis for requesting the stay, our basis
4 for irreparable harm, our basis for [UNINTEL] on
5 the success on the merits are all set forth as
6 I've argued them and I think they all warrant a
7 stay on the part of the City. Again, these are
8 important questions that we believe ought to be
9 addressed by this Court before the City is
10 required to move forward with any of the remedial
11 steps of the District Court.

12 JUDGE JOSE A. CABRANES: Let me ask you
13 a couple of questions from the record which are
14 just to supplement the good questions from my
15 colleagues. But again, my questions are somewhat
16 procedural. There is this matter in the record of
17 this case about the related case rule of the
18 Southern District of New York. As you say, we all
19 read newspapers and we read the newspaper of
20 record on which so many people rely and I am led
21 to believe, but I don't know this for certain,
22 that this case began because the District judge
23 on the record asked Plaintiff's counsel or
24 suggested to Plaintiff's counsel that it bring it
25 and that by checking the box that's it's a

1 related case it would come to that District
2 judge. Is that accurate?

3 CELESTE KOELEVELD: Yes, Your Honor,
4 that was accurate.

5 JUDGE JOSE A. CABRANES: Now, you
6 haven't raised that on appeal. But of course we
7 can read the record for ourselves and draw
8 whatever conclusions we want on it. Does that
9 raise any questions for you or any concerns? I
10 know it's difficult to be [TO STRIKE?] as it were
11 at the king without knowing what the result will
12 be. So I understand that it's difficult to
13 confront the District judge. We've all been
14 District judges so we know that the District
15 judge is all powerful in that courtroom until of
16 course the District judge is stopped.

17 So I understand why you would be
18 reluctant to raise this, but you haven't raised
19 it. You do feel that it's a matter of concern how
20 this case came to be assigned to this District
21 judge?

22 CELESTE KOELEVELD: Well, purely as an
23 issue of the assignment process it was in our
24 view inconsistent with the random assignment
25 rules. The case had closed, the Daniels case, it

1 had been settled, but within a settlement
2 agreement years before and in 2007 the parties
3 were arguing over an interpretation of that
4 agreement and what should happen as the
5 settlement agreement closed.

6 The case was closed on the docket. It
7 was over and the District judge said well, why
8 are you worrying about--I'm paraphrasing, but
9 this is on the record--why are we worrying about
10 this provision in the settlement agreement and
11 what it means? Why don't you just file a new
12 case, mark it related to this one, I'll take it
13 and whatever records you're looking to hang onto
14 you can just get as part of the new case?

15 JUDGE JOSE A. CABRANES: You're
16 referring to the hearing of December 21, 2007.

17 CELESTE KOELEVELD: That's correct, Your
18 Honor.

19 JUDGE JOSE A. CABRANES: Daniels case
20 which is public record and something we can take
21 judicial notice of.

22 CELESTE KOELEVELD: Right. And sure
23 enough that's what Plaintiffs did. They filed a
24 new lawsuit in 2008 and marked it related to
25 Daniels and it was referred to Judge Scheindlin

1 and she accepted it as related.

2 JUDGE JOSE A. CABRANES: You didn't
3 object to that?

4 CELESTE KOELEVELD: I don't believe that
5 we objected to that, Your Honor, but there
6 actually is not a formal objection process in the
7 Southern District to the assignment system. The
8 case is sent to the judge for a decision and it
9 is up to the judge to accept or reject and there
10 is no recourse.

11 JUDGE JOSE A. CABRANES: Well there is
12 recourse obviously. You can file a motion saying
13 it's not related and it really needs to go back
14 in the wheel. That's like asking for mandamus and
15 it's very--from the point of view of a lawyer
16 it's a very dangerous thing to do.

17 CELESTE KOELEVELD: Yes. That process
18 Your Honor has just alluded to is actually not in
19 the rules. The rules simply describe the
20 assignment process as I've outlined it. So, as a
21 result the City ended up before a single judge
22 from 1999 to today on the stop and frisk issues
23 and ended up also having--

24 JUDGE JOSE A. CABRANES: How many years
25 has this case been going?

1 CELESTE KOELEVELD: 2008 for Floyd. The
2 Daniels litigation began in 1999.

3 JUDGE JOSE A. CABRANES: But this
4 particular case has been going five or six years?

5 CELESTE KOELEVELD: Yes, Your Honor.

6 JUDGE JOHN M. WALKER, JR.: Ligon?

7 CELESTE KOELEVELD: I'm sorry, which
8 one?

9 JUDGE JOHN M. WALKER, JR.: Ligon.

10 CELESTE KOELEVELD: Ligon is since 2012,
11 Your Honor and Davis is since 2010. Davis was
12 marked related to the Floyd case when it was
13 filed in 2010. The City actually objected then
14 and did send a letter and the judge took it
15 anyway and then Ligon ended up being related to
16 that.

17 JUDGE JOHN M. WALKER, JR.: The record
18 closed for facts in Floyd, was it 2009?

19 CELESTE KOELEVELD: 2011 I believe, Your
20 Honor.

21 JUDGE JOHN M. WALKER, JR.: The record
22 is up to 2011, the testimony and the evidence?
23 The records--

24 CELESTE KOELEVELD: Actually, Your
25 Honor, in 2010 discovery was closed and the

1 [FILE?] was proceeded to motion practice summary
2 judgment motions. But after those motions were
3 decided and class cert was decided there was
4 additional discovery after the classification
5 motion was decided. So in 2012, the second half
6 of 2012, we spent quite a bit of discovery time
7 doing class member witnesses that the Plaintiff
8 wanted to identify and locate and then possibly
9 call at trial. So there was in a sense a limited
10 reopening of discovery.

11 JUDGE JOHN M. WALKER, JR.: Okay, but
12 the stops that were alleged to be at issue here,
13 when did that period end?

14 CELESTE KOELEVELD: Well, Your Honor,
15 there are two phases of the analysis of the stop.
16 So the initial reports that Professor [FAGAN?]
17 prepared and the initial database he examined
18 which stops with 2004 to 2009. But he then
19 updated his analysis and added in stops from 2010
20 to 2012.

21 JUDGE JOHN M. WALKER, JR.: I see.

22 CELESTE KOELEVELD: So it's eight years
23 of stops that totaled out to 4.4 million. His
24 initial amount was 2.8 million and then 1.6 were
25 added on when he did the second round of his

1 analysis. So it's 4.4 million. He put them in
2 those buckets and concluded that only five
3 percent were apparently unjustified. So even
4 accepting his analysis it's one in 20.

5 JUDGE JOSE A. CABRANES: That's fine. Do
6 you want to take 30 seconds to wrap up or if you
7 think you're fine you'll come back, you reserved
8 some time.

9 CELESTE KOELEVELD: Yes, I've reserved
10 some time for rebuttal. Thank you, Your Honors.

11 JUDGE JOSE A. CABRANES: Thank you.
12 We'll hear now from counsel for amicus. I'd be
13 grateful if each of you could identify which
14 amicus you are representing.

15 STEVEN A. ENGEL: Sure. Thank you, Your
16 Honor. Steven Engel on behalf of the Patrolman's
17 Benevolent Association and the Detectives,
18 Lieutenants and Captains Union.

19 The police unions taken together
20 represent 29,000 of the 35,000 uniformed members
21 of the NYPD. The unions strongly support the
22 City's request for a stay because the District
23 Court found system wide violations where there
24 were none and the complex and burdensome remedial
25 process is likely to prove entirely unnecessary.

1 In the decision below the District
2 Court purports to assume control over the Terry
3 stop policies of the NYPD. With the assistance of
4 an ever expanding cast of judicial appointees the
5 Court plans to rewrite police manuals, subject
6 officers to new training and change their
7 mandatory paperwork among a long list of other
8 things.

9 Such burdensome and complex remedies
10 will all prove unnecessary should this Court
11 reverse the liability decision. At a minimum
12 however, given that these cases have been pending
13 for years they should not be imposed upon the 35-
14 -these remedies should not be imposed on these
15 35,000 uniformed members based on the views of a
16 single District judge and before this Court has
17 the opportunity to address the entire record.

18 And if I may start with, I think the
19 first question about, which I know just Judge
20 Cabranes and the panel was quite interested in,
21 the urgency of this case. From our point of view
22 this case and this appeal needs to be decided
23 soon. There are real harms that are going on now
24 to the police and to the City and there is a
25 complicated process that's going to move forward.

1 Understand the complicated procedural history and
2 of course folks have different views about the
3 many balls in the air that the City has had to
4 keep up throughout the multiplicity of
5 proceedings. But as a condition of granting the
6 stay there really is no reason why the Court
7 could not grant an expedited briefing schedule
8 which would allow a panel of this Court to hear
9 the case before January.

10 I think from the standpoint of the
11 political process, the elephant in the room or
12 the specter that's haunting this case, it would
13 actually be good for the City and the police, and
14 frankly even the new administration, to have this
15 case decided before then. The new mayor can set--

16 JUDGE BARRINGTON D. PARKER: Who are you
17 speaking for? Are you speaking for the
18 Association or the other eight parties?

19 STEVEN A. ENGEL: Other that disagree
20 with me, Your Honor. I'm speaking for my client
21 which is 29,000 of the uniformed men and women of
22 the New York City Police Department.

23 JUDGE JOSE A. CABRANES: You're
24 suggesting, if I understood and this is what
25 prompted Judge Parker's inquiry, you're

1 suggesting that despite the fact that you're
2 supporting the City here, in the nature of things
3 if there's a new mayor it's in the interest of
4 the new mayor to have a stay even though the new
5 mayor may not say that aloud.

6 STEVEN A. ENGEL: I fully believe that
7 both the appellees in this case and the new mayor
8 may take a different view from myself, my
9 clients. But the point--

10 JUDGE JOSE A. CABRANES: And that
11 [UNINTEL] in favor of a stay.

12 STEVEN A. ENGEL: A stay and potentially
13 an expedited appeal. I'm sorry, this is the
14 motion for a stay, but the matter of the timing
15 of this appeal was put on the table and so I'm
16 just responding to that. The new mayor would be
17 entitled through the political process to adopt
18 whatever policies he sees fit. The police unions
19 have their own rights vis-à-vis collective
20 bargaining agreements against the City and those
21 may be implicated in some of the remedies and
22 reforms the mayor seeks, but--

23 JUDGE JOSE A. CABRANES: Are you
24 suggesting that a new mayor wouldn't want to have
25 the Police Department run by a United States

1 District Judge?

2 STEVEN A. ENGEL: One of the problems
3 with District judges taking over the executive
4 functions in this way is there's a real
5 diminishment of political accountability from
6 that happening. So a new mayor who pursues
7 policies only because the judge and the academic
8 advisory council and the monitor and the
9 facilitator require them is not forced to answer
10 to the people of the City of New York as well as
11 to the Police Department.

12 JUDGE JOSE A. CABRANES: And you're
13 suggesting that District judges can't run police
14 departments?

15 STEVEN A. ENGEL: [LAUGHS] Some have,
16 some might. Judge Mukasey did a good job as
17 attorney general, but he had a different hat on
18 at the time. We're referring to the [ROCKMAN?]
19 case from the 7th Circuit, Judge Walker, his
20 dissent in the Nicholson case kind of identified
21 these issues. In the Nicholson dissent Judge
22 Walker observed that the District judge's order
23 read like a management consultant's report. You
24 know, frankly in this case, this 95 page order or
25 the hundreds of pages written, read more like--it

1 contemplates administrative committee hearings
2 where everybody gets their say, there's a
3 negotiated process and then at the end of the day
4 the District judge makes the decision that she
5 sees fit.

6 There are real political process issues
7 here. Another question that Judge Parker raised
8 was with respect to isn't this just an ordinary
9 trial, not that that was the judge's words, but
10 aren't we reviewing a trial decision with
11 findings of facts that must be reviewed for clear
12 error?

13 There really is no sense in which the
14 proceedings below was an ordinary trial. The
15 District judge, by her own admission--

16 JUDGE JOSE A. CABRANES: Every trial is
17 special.

18 STEVEN A. ENGEL: Every trial is
19 special, but some trials are more special than
20 others. The District Court, by their own
21 admission, purported to evaluate 4.4 million
22 individual stops. She recognized that it was
23 impossible to actually do this and so she allowed
24 the Plaintiffs to pursue a shortcut. But there's
25 no sense. This is a case in which there were 19

1 or 20 stops that were actually evaluated in front
2 of the Court. The rest of it was simply a matter
3 of experts presenting statistical evidence in
4 aggregated form.

5 JUDGE JOSE A. CABRANES: 19 actual
6 stops?

7 STEVEN A. ENGEL: Yes.

8 JUDGE JOSE A. CABRANES: Over what
9 period of time?

10 STEVEN A. ENGEL: Over an eight year
11 period during which there were--

12 JUDGE BARRINGTON D. PARKER: Which half
13 were found to be justified.

14 STEVEN A. ENGEL: Which half were found
15 to be justified. So, the notion here that there
16 was an adjudication by a trier of fact that has
17 been found and is bereft of, you know, is a
18 matter to be reviewed for clear error is just
19 incorrect, let me say that.

20 The District judge made highly
21 contestable conclusions based on her assessment
22 of statistical evidence. But this case just never
23 should have gone forward in the trial. Again,
24 with respect to the City, sure there is a
25 voluminous record, but I would submit that there

1 are some pretty big glaring errors that call out-
2 -

3 JUDGE BARRINGTON D. PARKER: Findings of
4 fact are based on statistical inferences every
5 day. That's what we do.

6 STEVEN A. ENGEL: Only if it is
7 appropriate for the Court to get to the point of
8 entering those findings of fact based upon the
9 record. Frankly, some of these findings of fact
10 which [MET?] are clearly erroneous. But the point
11 is if you take the Supreme Court's decision in
12 Wal-Mart, we just don't get there in this case.
13 This is an action which the District judge
14 allowed the Plaintiffs to put together through
15 anecdotal reports and statistical evidence of
16 experts a class that just didn't exist on its own
17 right.

18 Every one of these Plaintiffs is
19 entitled to remedies under Section 1983 if they
20 can prove their case and, of course, some of them
21 could not. Their attorneys are entitled to be
22 paid under Section 1988. Those are the remedies
23 that congress saw fit here. But class actions are
24 reserved for Plaintiffs that truly can proceed on
25 a class-wide basis, that there is common proof

1 that the Defendant did something wrong to all the
2 Plaintiff's class once. Here even the District
3 judge didn't believe fundamentally that that's
4 what this case was about.

5 She required the experts to review
6 every individual stop as written on every UF-250
7 form and to decide whether there was sufficient
8 information in that or whether there wasn't, is
9 the stop apparently justified, is it apparently
10 unjustified and then we put them on a chart and
11 we decide that lo and behold the NYPD has
12 violated 200,000 people's individual rights. I
13 mean, this is just far afield from where District
14 Courts apply the law to the facts of a particular
15 case.

16 JUDGE JOSE A. CABRANES: You've reserved
17 one minute. Thanks. We'll hear from Mr. Connolly
18 speaking on behalf of Mayor Giuliani, former
19 Mayor Giuliani and former Attorney General
20 Mukasey.

21 DANIEL S. CONNOLLY: Thank you, Your
22 Honor. Daniel Connolly on behalf of Judge Mukasey
23 and former Mayor Giuliani. I'd like to briefly
24 speak to really four points that were all raised
25 by the Court. First, Your Honor, with respect to

1 Judge Cabranes' concern about the timing, we
2 agreed that this has taken a long time. It has
3 probably taken too long a time. I used to be a
4 city attorney and I appeared in an emergency
5 panel in front of you many, many years ago
6 involving the Ku Klux Klan and I know how this
7 can be done quickly and it should be done
8 quickly.

9 I would ask, however, the Court not to-

10 -

11 JUDGE JOSE A. CABRANES: That was two
12 days.

13 JUDGE BARRINGTON D. PARKER: It was two
14 days. Two days a long time ago.

15 DANIEL S. CONNOLLY: Yeah, the decision
16 of the District Court and then to the Court of
17 Appeals the next day.

18 DANIEL S. CONNOLLY: That is correct.

19 JUDGE JOSE A. CABRANES: And a stay was
20 granted.

21 DANIEL S. CONNOLLY: That's correct and
22 obviously a less voluminous record and different
23 circumstances. But I would ask the Court two
24 things with respect to that. Number one, to not
25 infer that somehow the urgency here is somehow

1 lacking because the City did not move with the
2 alacrity that perhaps it ought to have under
3 those circumstances, and secondly, and perhaps
4 more importantly, not to allow the citizens of
5 this city to suffer as a result. So assuming, to
6 the next point I want to make, assuming there is
7 in fact irreparable harm, to which we strongly
8 believe there is, in allowing this decision to go
9 forward without a stay pending the review of this
10 Court then the citizens, the police officers, the
11 City of New York ought not suffer as a result of
12 that and so I'd ask the Court to take those two
13 things into consideration in connection with that
14 important point.

15 Judge Walker asked, I think, the
16 critical question at the very beginning of this
17 which is what is the impact of the immediate
18 relief? What is the harm? And it can be simply
19 stated the following way--the harm is confusion
20 and uncertainty in highly volatile, highly
21 dynamic, complex interactions that occur and must
22 occur each and every single day in this city. I'd
23 like to quote the words of Judge Jacobs from this
24 Court in a concurrence in *Brown v. the City of*
25 *Oneonta*, words that are fully applicable here.

1 These circumstances, meaning where we
2 are right now by inference, these circumstances
3 would impose paralyzing inhibitions on law
4 enforcement. That is because of fear of lawsuits,
5 investigations and departmental discipline will
6 tend to make police in minority communities
7 defensive, passive and scarce. No doubt some
8 people will think that that is a good idea, but
9 no community has yet elected to rely on police
10 protection furnished by a core of federal judges.

11 Those are the words of Judge Jacobs and
12 that, Your Honor, is the harm that we're talking
13 about here. What is going to occur--

14 JUDGE BARRINGTON D. PARKER: Hold on
15 just a second. Let me ask you assume
16 hypothetically that the findings of fact were
17 correct. Everything you've said might be true,
18 but that's not what the business of courts is.

19 DANIEL S. CONNOLLY: Of course.

20 JUDGE BARRINGTON D. PARKER: Your
21 hypothetical leaves out the possibility that
22 there are demonstrate, demonstrated documents
23 documented violations of the Constitution in this
24 case and that's what the courts are dealing with.

25 Adhering to Constitutional rules might

1 complicate the lives of police officers, I don't
2 [GAIN?] say that, but that's not what we're all
3 about.

4 DANIEL S. CONNOLLY: First of all, I
5 agree with that point, Your Honor, but I don't
6 believe there is any, any rational view that
7 would be done by a panel of this Court of this
8 record that will allow this decision of the
9 District Court to stand. There is no review that
10 will permit that. Now, having said that, what
11 we're talking about here today is a stay and
12 whether or not, not on their overall
13 righteousness of what's been imposed.

14 Two more quick points in response to
15 questions that were made. First of all, although
16 I used to be a city lawyer, I am not nearly as
17 fettered as they are, and so I will say it out
18 loud. I believe the decision by Judge Scheindlin
19 to encourage the Plaintiffs to bring this case
20 and then direct that they mark it related to her
21 should give this Court grave pause in evaluating
22 the decision. Evaluating the decision in how this
23 Court interpreted the facts. How she created an
24 interpretation of Constitutional law that is
25 brand new and I think it is a very significant

1 issue.

2 JUDGE BARRINGTON D. PARKER: The
3 interpretation of Constitutional law that you're
4 talking about is not a--you're talking about the
5 equal protection Fourth Amendment.

6 DANIEL S. CONNOLLY: Equal protection.

7 JUDGE BARRINGTON D. PARKER: Equal
8 protection using statistics. I have a question on
9 the Fourth Amendment question and that is that it
10 seems to me that Judge Scheindlin played lip
11 service to the idea of a person not--the usual
12 rule that it's a stop when a person doesn't feel
13 free to leave. But that begs the deeper question,
14 it seems to me, is what are the circumstances
15 that raise a fear of leaving and how have the
16 courts treated that.

17 It seems to me that she draws the line
18 a little differently than the courts have in this
19 area by saying that virtually every confrontation
20 has the potential because of the authority of the
21 police, the fact that the police wear uniforms,
22 the fact that they have weapons and so forth,
23 that there's going to be almost automatically a
24 fear of leaving or not feeling free to leave.

25 But the cases don't go that way. The

1 cases say that a policeman can go on a bus and
2 can start asking questions on the bus and if the
3 person, even though the person would have to go
4 around the policeman to leave, that's not a stop.
5 And so what I'm wondering is you've argued the
6 Fourteenth Amendment point, but I'm wondering
7 about the Fourth Amendment point.

8 DANIEL S. CONNOLLY: I think that's
9 exactly right, Your Honor. I think that she is
10 treading in new ground. She is essentially
11 eschewed the common law right of inquiry, the
12 first level of De Bour. I mean, there is
13 significant case law that supports the Police
14 Department's right to engage in initial stops and
15 once reasonable suspicion attaches to engage in a
16 custodial stop for the time being and all of
17 that, you're exactly correct, she gives very
18 short shrift to that and basically, in my view,
19 rewrites the law which is why I say so boldly--

20 JUDGE BARRINGTON D. PARKER: The fact is
21 there's a progression.

22 DANIEL S. CONNOLLY: Correct.

23 JUDGE BARRINGTON D. PARKER: There's the
24 encounter and then the encounter may or may not
25 yield reasonable suspicion which may or may not

1 yield probable cause.

2 JUDGE BARRINGTON D. PARKER: The record
3 in this case though documented thousands and
4 thousands and thousands of stops and searches in
5 which, from the record, you can't really
6 determine the--in a great many of these cases the
7 presence of any factors that justify a Terry
8 stop. The vast majority of these cases nothing
9 was found. So thousands of citizens are subject
10 to stop virtually at the whim of police officers.

11 DANIEL S. CONNOLLY: Well first of all,
12 Your Honor, with all due respect to Judge
13 Scheindlin, it's a complete false premise. She is
14 making these determinations based upon a single
15 document, right, A 250 form which was not every
16 envisioned to be the whole story. This is a
17 totality of the circumstances, all facts
18 considered analysis. So it fails in that regard.

19 Secondly, no one would argue that if a
20 police officer did not have reasonable suspicion
21 to stop somebody, but recovered a gun, in fact a
22 positive hit, that that would somehow negate the
23 impropriety of the stop in the first instance.
24 The reverse is the same. The District Court makes
25 a very big deal about the fact of what the hit

1 rate is. That is, I submit, a complete straw man.
2 That is not--

3 JUDGE BARRINGTON D. PARKER: That was
4 one percent for guns?

5 DANIEL S. CONNOLLY: The hit rate,
6 meaning how many guns--exactly, it's 1.5 percent
7 for guns. And somehow suggestion that that speaks
8 to the Constitutionality of the stop in the first
9 instance is also a brave new world.

10 Two more real quick points in response
11 to what Judge Walker asked. I think that's
12 exactly part of the analysis that the type of
13 remedy that's being sought here and the harm
14 that's being visited immediately and the absolute
15 need for a stay under these circumstances
16 evidences a hostility from the Court to the City
17 that would be akin to Governor McGovern standing
18 on the steps and blocking people from the
19 courthouse.

20 JUDGE JOSE A. CABRANES: Not McGovern,
21 Wallace.

22 DANIEL S. CONNOLLY: My apologies to
23 McGovern.

24 JUDGE JOSE A. CABRANES: You just wanted
25 to call America back.

1 DANIEL S. CONNOLLY: That is correct.

2 But I want to quote also from the Nicholson V.
3 Scoppetta decision, the dissent by Judge Walker,
4 but Judge Walker was quoting the Supreme Court
5 decision in Milliken v. Bradley when he wrote
6 quote wholly absent from the Court's reasoning is
7 respect for the principle that an injunction must
8 take into account the interests of state and
9 local authorities in managing their own affairs.
10 This Court goes way beyond, even with the
11 immediate reforms, put aside this plan with a
12 federal monitor and a federal facilitator and an
13 academic panel, none of whom have actual law
14 enforcement experience--some who aren't even from
15 New York. That bringing together all these
16 experts has completely disregarded the interests,
17 the fundamental core interests of a municipality
18 and the public health and safety of its citizens.

19 Finally, the issue that the Court
20 raises, that Judge Parker raises, regarding the
21 election. The politics aside, this decision is
22 bad law. I would, even though it's not for me to
23 do it, I would accept the notion of expediting
24 this appeal and getting a decision from this
25 Court before December 31st and take this and send

1 this because politics can't allow there to be bad
2 law. The next mayor, whoever that is, can do
3 politically whatever he chooses and will be held
4 accountable. That's the biggest problem.

5 No one is ever going to hold Judge
6 Scheindlin in the streets accountable, other than
7 this Court, for her mistakes. No one's counting
8 on federal judges, to answer an earlier question,
9 no one's counting on federal judges to keep us
10 safe while we're on the streets. We're counting
11 on the men and women of the NYPD. This is the
12 insidious nature of these--we talk about this in
13 our brief and it's talked about in the Rockman
14 case, the insidious nature of these consent
15 decrees that have been going on for a long--but
16 this is not a consent decree. This is an imposed
17 order based upon bad law.

18 JUDGE JOSE A. CABRANES: That's very
19 much.

20 DANIEL S. CONNOLLY: Thanks, Your Honor.

21 JUDGE JOSE A. CABRANES: We'll hear from
22 Miss Saleski on behalf of the Sergeants.

23 COURTNEY G. SALESKI: Good afternoon,
24 Your Honors. May it please the Court, my name is
25 Courtney Saleski. I represent the Sergeants

1 Benevolence Association. Thank you for hearing us
2 today.

3 The Sergeants Benevolence Association
4 is comprised of 13,000 sergeants and the reason
5 why their voice is special is because not only do
6 they conduct the stop, questions and frisks on
7 the ground, but they also are the supervisors and
8 they're the people who review the paperwork and
9 they're the people who are training the officers
10 who are on the street.

11 The sergeants, the SBA, is here to
12 support the application of stay because its
13 members are in the situation that Judge Walker
14 was talking about and that is that they are
15 looking at this decision, which is unclear, and
16 if we focus on the Fourth Amendment just for a
17 second, has changed what they can do.

18 Now, it says in the decision that
19 officers do not have to specifically in an
20 encounter say you're free to leave. But the judge
21 suggests that would be the best practice and the
22 judge's ruling that just the presence of the
23 police, because of their uniforms, because of
24 their authority, somehow is itself coercive
25 really puts us in a situation where our sergeants

1 and the other officers on the street have no
2 other choice.

3 And what is happening in the real world
4 as a result of this, which is the irreparable
5 harm that we'd ask you to focus on, is that
6 encounters are down. So encounters, which should
7 not implicate the Constitution at all, just where
8 officers can talk to people on the street,
9 they're not doing it. They're not using this
10 proactive tool.

11 The other thing that's down is Terry
12 stops.

13 JUDGE JOSE A. CABRANES: And why is that
14 in your view?

15 COURTNEY G. SALESKI: The encounters?
16 It's the complete confusion that has been caused
17 by these opinions that has resulted in the
18 chilling of proactive policing. And so the
19 officers are in this situation where they don't
20 know what the right thing to do is anymore.

21 JUDGE BARRINGTON D. PARKER: What's
22 going on here? Are the encounters down because
23 the officers on the street are doing this
24 spontaneously or are they down because the unions
25 are telling them to cut back? Are they down

1 because the sergeants and the commanders are
2 telling them to cut back? What's your view on
3 this?

4 COURTNEY G. SALESKI: So, I think that
5 there is some evidence that some of the unions
6 have instructed their members to take every
7 precaution.

8 JUDGE BARRINGTON D. PARKER: Which
9 unions are these?

10 COURTNEY G. SALESKI: So in the brief
11 further, the Patrolman's Benevolence Association
12 there is a reference to some papers that were
13 published to the patrolmen to say don't go above
14 and beyond at this point. I don't have any
15 information that the other unions are doing that,
16 but I know that what information we have is that
17 the sergeants and the officers and the
18 lieutenants are all aware of these decisions and
19 the jeopardy that they're in if they do--

20 JUDGE BARRINGTON D. PARKER: Well, they
21 know that there are 1983 actions that can be
22 brought against them. I mean, you know, cases can
23 be filed and they can be tied up in litigation.
24 Whether or not they've violated the Constitution
25 they'd be tied up in litigation. That's always

1 been true that they face the specter of personal
2 liability. There may be indemnity provisions or
3 there may not be under certain circumstances, but
4 all of these are open questions about whether in
5 a particular situation the officer might be
6 indemnified so naturally there's some hesitation.

7 Also, there is the view, ultimately not
8 terribly naïve, that the police do try and figure
9 out what they're permitted to do and what they
10 aren't permitted to do whether it be from reading
11 actual cases or from what they read in the paper
12 and that that could cause a diminishment of
13 police activity.

14 COURTNEY G. SALESKI: That's right, Your
15 Honor. What we have here though is the confusion
16 that was caused by an opinion is making it even
17 worse, right? So the officers are chilled. They
18 don't know what they can do. They don't know if
19 they can rely on old policies. They're waiting
20 for new training and what they don't want to do
21 is violate the Constitution. These are public
22 servants. They want to protect the community and
23 they want to do it in a way that brings them home
24 to their family too, but they need to be careful
25 and they need to be careful in light of these

1 confusing opinions.

2 So, we mention in our brief that Terry
3 stops are down. We mention that the District
4 Court viewed this as a good thing, but I would
5 just point out to Your Honors that if you look at
6 the numbers that the District Court relied on,
7 the District Court said look, this is great,
8 Terry stops are down 50 percent this first
9 quarter of 2013 as compared to 2012.

10 But if you look at the opinion of the
11 District Court, assuming that everything that she
12 said was correct, which we completely and totally
13 disagree with on the numbers, she only found
14 about four or five percent of the stops that were
15 occurring over a long period of time
16 unconstitutional. So, mathematically and
17 logically the fact that Terry stops are down 50
18 percent right now is not a good thing. That means
19 Constitutional stops by her view are being
20 chilled and that affects the safety of the
21 community.

22 JUDGE BARRINGTON D. PARKER: Is there
23 some optimum number of Terry stops that should be
24 occurring? What's your preferred number?

25 COURTNEY G. SALESKI: No, Your Honor,

1 there is not some optimum number that I can give
2 to you. When the officers are in a position where
3 there's reasonable suspicion based on articulable
4 facts they should be able to conduct the Terry
5 stop.

6 JUDGE JOSE A. CABRANES: Of course race
7 and ethnicity are all over this case. This may
8 not be entirely relevant, but what's the
9 percentage of New York Police Department officers
10 today from discreet or insular minorities?

11 COURTNEY G. SALESKI: Your Honor, I
12 don't have those numbers.

13 JUDGE JOSE A. CABRANES: Maybe later
14 we'll hear from counsel and he'll tell us
15 something about that. Just to get a sense of what
16 the situation is. All right, let's hear from--

17 COURTNEY G. SALESKI: Thank you, Your
18 Honor.

19 JUDGE JOSE A. CABRANES: --from Mr.
20 Dunn. Is it Mr. Dunn? Yes.

21 CHRISTOPHER DUNN: Your Honor, Mr.
22 Charney is going to start.

23 JUDGE JOSE A. CABRANES: That's fine.
24 Great. I'm sorry. I have two different--oh I see.

25 DARIUS CHARNEY: Two different

1 Plaintiffs. Good afternoon, Your Honors. May it
2 please the Court, my name is Darius Charney. I'm
3 arguing on behalf of the Plaintiffs in the Floyd
4 case.

5 There was a lot said on the arguments
6 of the City and the amici which are--

7 JUDGE JOSE A. CABRANES: I don't wish to
8 interrupt you, but this confusion may have been
9 mine as much as anyone else's, but these are
10 consolidated appeals. I don't think we're going
11 to be hearing--I'm going to give each of you as
12 much time as you need really. But in principle
13 we're not having 25 minutes from Mr. Dunn and 25
14 minutes from Mr. Charney, all right?

15 DARIUS CHARNEY: I understand.

16 JUDGE JOSE A. CABRANES: Go ahead.

17 DARIUS CHARNEY: But I wanted to bring
18 it back to the focus of this, or what should be
19 the focus of this, stay motion which is the
20 remedial order itself. The City is asking this
21 Court to grant what this Court has said many
22 times is an extraordinary remedy which is a stay
23 of a remedial order that requires the City to do
24 nothing more than participate in a consultative
25 process along with the Plaintiffs, a court

1 appointed monitor who himself is a former
2 corporation counsel, as well as numerous
3 stakeholders on this issue including police
4 officers themselves to develop a set of proposed
5 reforms to the stop and frisk practices of the
6 Police Department which the District Court after
7 a nine week trial and a careful review of an
8 8,000 page record--

9 JUDGE JOHN M. WALKER, JR.: Right, but
10 that's a remedy that is broad, to say the least.

11 DARIUS CHARNEY: Mm hmm.

12 JUDGE JOHN M. WALKER, JR.: And the
13 question I would ask is: is it necessary? Given
14 the comity questions, given the federalism
15 questions, is it necessary? Normally, when you've
16 got a party before you and you issue an
17 injunction, you issue an injunction to that
18 party. You ask them to come in with a plan.

19 DARIUS CHARNEY: Mm hmm.

20 JUDGE JOHN M. WALKER, JR.: Themselves,
21 to remedy the situation. That's one thing. But
22 that's not what was done here. No, we've got to
23 have meetings; we're going to have town hall
24 meetings; we're going to have monitors. The ideas
25 that she has set forward, which in many cases are

1 put in a--to say they're urged is not accurate.
2 They're really required.

3 But then they have to be refined in
4 this process that you're talking about. And
5 that's different, too, from some other immediate
6 things, which are--it seems to me, anyway; it
7 depends on how you read the order--which are the
8 remodeling of the forms, the U--the 252 forms--

9 DARIUS CHARNEY: Mm hmm.

10 JUDGE JOHN M. WALKER, JR.: And the
11 body-worn cameras and--

12 DARIUS CHARNEY: Mm hmm.

13 JUDGE JOHN M. WALKER, JR.: Various
14 things of that sort. So, we're--these orders are
15 taking effect now, it seems to me. Yes, there
16 will be more later. But they're taking effect
17 now. They have an impact now, apart from the
18 chilling effect of [UNINTEL].

19 DARIUS CHARNEY: Well, Judge Walker, you
20 raise several good questions, which I want to
21 address. In terms of the taking effect now, as
22 this Court is well aware, the burden is on the
23 City to show imminent and irreparable harm.

24 Now, the only thing that is taking
25 effect now--and the District Court has said this

1 repeatedly, both in its Remedies decision and in
2 its September 17th decision, denial of stay, the
3 only thing that the city is required to do now is
4 participate in this consultative process. They
5 are not required to change any forms, to train
6 any officers, to buy or put any cameras on a--

7 JUDGE JOHN M. WALKER, JR.: That's not
8 an accurate way of putting it, it seems to me,
9 because what's out there now is an order. It's
10 saying that what they're doing is
11 unconstitutional. And so, the City can't--because
12 they are--I believe they're law-abiding--

13 DARIUS CHARNEY: [UNINTEL]

14 JUDGE JOHN M. WALKER, JR.: The City is
15 law-abiding--

16 DARIUS CHARNEY: Mm hmm.

17 JUDGE JOHN M. WALKER, JR.: Go back to
18 business as usual. And you wouldn't want them to.
19 So, they are making changes. If they go back and
20 they lose on the appeal, and if that's the case,
21 then they would be required to make all these
22 other changes.

23 Obviously they're going to have to
24 address these issues. They're going to have to
25 address these issues now. It's not like they can

1 wait until the monitor--just pretend nothing--
2 there's no order out there and pretend there's no
3 decision out there, and then wait for the monitor
4 to order something. There are the practical
5 consequences of this decision.

6 DARIUS CHARNEY: Well, I would like to
7 focus on what those practical consequences are at
8 this time, because that's really the standard.
9 What are the practical impact on the city at this
10 time, not six months from now or a year from now,
11 at this time?

12 Now, you mention the chilling effect,
13 which I would rule--I want to clear up the record
14 for the Court, which is that this decrease of 50
15 percent of staffs, which is being talked about
16 here, is for the first half of 2013. That's
17 before the judge's decision was issued in August.

18 So, in other words, the police
19 department was already significantly decreasing
20 its stop-and-frisk activity before this Court
21 ever ruled on that, on the questions in this
22 case. So, that's important to consider when
23 trying to figure out what the impact of this--

24 JUDGE BARRINGTON D. PARKER: Does the
25 record indicate why that occurred?

1 DARIUS CHARNEY: You know what? It's
2 hard to say. I mean, I know the newspapers have
3 reported about it a lot. But, you know, there was
4 a decrease in the first half of 2013. As the
5 panel is well aware, this issue has been
6 discussed in the public sphere for many years.
7 There have been a lot of activity in the city
8 council on this issue. So, there's a variety of
9 factors that could have contributed to that.

10 But the important point here is that
11 the chilling effect we're talking about predates
12 this Court's decision. And I point that out
13 because I want to come back to the burden on the
14 City, which is that they have to make--

15 JUDGE JOSE A. CABRANES: How does that
16 come? Isn't it possible to conclude that this
17 trial, which has gained--which has enormous
18 publicity over time, if something was happening
19 before the--her order was filed, it might reflect
20 everyone was well aware of what was going on and
21 they intuited the result? More than one public
22 official openly and publicly stated for the
23 record that they knew how this was going to be
24 decided. And if they knew it, certainly the
25 policemen knew it.

1 DARIUS CHARNEY: Judge Cabranes, are you
2 referring to police officials when you say public
3 officials?

4 JUDGE JOSE A. CABRANES: Yes. Yes.

5 DARIUS CHARNEY: Well, again--

6 JUDGE JOSE A. CABRANES: They don't
7 count?

8 DARIUS CHARNEY: No, this counts, but I
9 guess they're not the judge, so how they knew how
10 it would be decided--

11 JUDGE JOSE A. CABRANES: I understand
12 that. Your point was that some of these stops--
13 there was a reduction of some of these stops even
14 before she acted.

15 DARIUS CHARNEY: Yes.

16 JUDGE JOSE A. CABRANES: But my point is
17 that there were many people publicly stating they
18 knew exactly where she was--what she was going to
19 decide, many months before she decided it. So
20 that why would you be surprised that members of
21 the public, and particularly police officers,
22 would begin to act on the basis of the presumed
23 action of the District Court?

24 DARIUS CHARNEY: Well, I guess that goes
25 back to this question of harm and [UNINTEL]

1 speculative harm. I mean, if the city officials
2 surmised in the first half of this year that they
3 were going to lose their trial and instructed
4 their officers accordingly, I don't see how that
5 weighs in favor of granting a stay now for a
6 decision that didn't come out until after those
7 instructions may or may not have been given.

8 But I want to go back to, again, the
9 burden on the City. They have to provide specific
10 factual support for their claim of irreparable
11 harm here. I mean, that's something the Supreme
12 Court has said in the [MCCANN?] versus [QUALTER?]
13 case. This Court made it very clear 18 years ago
14 in the [JAI RAJ?] versus [SKUPINA?] case. The
15 harm must be imminent and certain, not merely
16 speculative or possible.

17 And I also want to point out--

18 JUDGE JOHN M. WALKER, JR.: You know,
19 with public safety here, it seems to me that this
20 is a very--this isn't a normal case in that
21 sense.

22 DARIUS CHARNEY: Mm hmm.

23 JUDGE JOHN M. WALKER, JR.: It's not a
24 question of 1983 action, class action against
25 postal inspector or post office workers or

1 something of that sort.

2 DARIUS CHARNEY: Mm hmm.

3 JUDGE JOHN M. WALKER, JR.: You're
4 dealing with people who have to make difficult
5 decisions.

6 DARIUS CHARNEY: Absolutely.

7 JUDGE JOHN M. WALKER, JR.: At night,
8 often, or, you know, under stressful
9 circumstances, with people they don't know, whom
10 they may suspect of committing a crime. I think
11 that it's a given that these are all in high-
12 crime areas.

13 DARIUS CHARNEY: Mm hmm.

14 JUDGE JOHN M. WALKER, JR.: So, this is
15 not--it's not just irreparable harm to the police
16 that's at stake here. It's irreparable harm to
17 the community as well. And so, one has to take
18 into consideration if that's the case. I mean,
19 you know, so--and the other question I have is
20 the--and that's one aspect of it.

21 The next aspect of it is the breadth of
22 the order, which could have been directed at the
23 Police Department but, directly, as an order, it
24 wasn't. Mechanisms were set up, as I've said.

25 DARIUS CHARNEY: Mm hmm.

1 JUDGE JOHN M. WALKER, JR.: You know,
2 one would expect this, and it did have to come to
3 pass, because earlier unsuccessful measures had
4 been tried in the desegregation cases of the
5 South. But we're not dealing with that situation
6 here. You would agree with that. Whatever
7 violations may have occurred here are not of the
8 magnitude or of the apparent flagrancy that
9 occurred in those states.

10 DARIUS CHARNEY: But, Judge Walker, I
11 think you raised two very good questions, and I
12 want to take them in order. The first is the
13 public safety question, which you raise and which
14 we could not agree more that public safety is
15 paramount and that we believe Constitutional
16 policing is in no way irreconcilable with
17 effective policing.

18 And you will hear later on today from
19 amicus former attorney general Bill Lee, who, in
20 contrast to anyone else who's arguing before you,
21 actually has practical experience implementing
22 reform similar to what may come to pass in this
23 case. And he will talk to you about what effect,
24 if any, that has on public safety.

25 JUDGE JOSE A. CABRANES: Former

1 assistant attorney--

2 DARIUS CHARNEY: Yes, for civil rights,
3 and he was involved in many reform cases in large
4 departments around this country, raising similar
5 issues.

6 The other thing I'd point out on the
7 public safety point, and then I want to turn to
8 your very good question about comparing this to
9 the desegregation situation, is the other thing
10 to note about the decrease in the stops, the 50
11 percent decrease, there has been, at the same
12 time, a decrease in crime, which is, again,
13 widely reported in the public.

14 So, this notion that [UNINTEL]
15 officers' stop activity, if that is even
16 happening, which we of course think is not true,
17 would somehow compromise public safety is not
18 supported by the facts of the record and the
19 facts in the public record.

20 JUDGE JOHN M. WALKER, JR.: That's--
21 there we go again. I mean, that's using
22 statistics in a way that is interesting. I mean,
23 might crime have been chilled--have gone down
24 even more? We don't know. There's no way you can
25 measure that in that sense. Yes, there are

1 statistics out there that indicate that. But is
2 there a causal effect? It's very hard to judge
3 that.

4 DARIUS CHARNEY: Absolutely. But I
5 guess--

6 JUDGE BARRINGTON D. PARKER: Let me ask
7 you this. Can you tell us what you think would be
8 helpful on this--you know, the elephant in the
9 room, these political issues?

10 DARIUS CHARNEY: Mm hmm.

11 JUDGE BARRINGTON D. PARKER: There's
12 going to be an election next week. There'll be a
13 new mayor. And the new mayor has shared with us
14 what he--his views in this case, should he be
15 elected.

16 DARIUS CHARNEY: Yes. Well, I think
17 that, Judge Parker, your question is a very good
18 one, and goes both to the [STAY?] and also to the
19 other issue we've raised and which we had asked
20 and been given time to argue here, which is the
21 jurisdictional issue for this appeal.

22 This Court has made it very clear over
23 the past 50 years that, in order for the--what is
24 a very narrow exception under the 1292-228 USC
25 1292 to apply, that, in order for the Court to

1 kind of bypass its final judgment ruling and take
2 an appeal early, it really only does so in a case
3 where there is not going to be a change of the
4 appellate perspective down the road while the
5 appeal is pending.

6 JUDGE JOSE A. CABRANES: Well, on that
7 question, on August 12, the District Court held
8 that certain practices of the NYPD were
9 unconstitutional, right?

10 DARIUS CHARNEY: Yes.

11 JUDGE JOSE A. CABRANES: Flat-out
12 finding order. So, help me along on this question
13 of appealability. So, the question of liability
14 was that there existed unconstitutional conduct
15 by the NYPD.

16 DARIUS CHARNEY: Mm hmm.

17 JUDGE JOSE A. CABRANES: That was
18 resolved by the District Court on August 12,
19 2013, right?

20 DARIUS CHARNEY: Yes.

21 JUDGE JOSE A. CABRANES: So, on that
22 question, nothing more needs to be said about the
23 District Court's determination or order.

24 DARIUS CHARNEY: Well, I guess I would
25 answer that in two ways. One is that the

1 liability order on its own cannot be appealed. It
2 can only be appealed as--because it's intertwined
3 with the remedy order. And we would say that, the
4 remedy order, there's [UNINTEL] that's still left
5 to be [UNINTEL].

6 JUDGE JOSE A. CABRANES: All right. All
7 right, so let's assume for the argument,
8 hypothetically--I understand that argument; I'm
9 not sure it's [UNINTEL]--that an order
10 determining that a practice is unconstitutional
11 can't be appealed, absent consideration of the
12 remedy. But I want to understand what's going on
13 in the District Court. The District Court's
14 further work, as we understand it, would be
15 remedial. That's what--

16 DARIUS CHARNEY: Yes.

17 JUDGE JOSE A. CABRANES: We're now in
18 the so-called remedial stage.

19 DARIUS CHARNEY: Yes.

20 JUDGE JOSE A. CABRANES: And is it your
21 position that her order didn't require any--her
22 immediate orders up to now have not required
23 anything and have not prohibited anything?

24 DARIUS CHARNEY: Well, Your Honor, in
25 the remedial order, on page 13, the Judge says

1 very explicitly, "I am not imposing any reforms
2 on the City at this time," and she believes that
3 that's unwise to do so. She believes it would be--
4 -it would not be the right thing to do. And
5 instead, what she is doing is she has set up a
6 process where she is--

7 JUDGE JOSE A. CABRANES: Establishing
8 malleable parameters, right?

9 DARIUS CHARNEY: Yes. We think this case
10 is very similar to a case decided by this Court
11 in 1980, which was the Spates versus Manson case,
12 which is a prison reform case. And we want to
13 talk about public safety; I think prisons is
14 obviously another area that states and local
15 governments are given wide latitude in.

16 JUDGE JOSE A. CABRANES: And I want to
17 hear more on that.

18 JUDGE BARRINGTON D. PARKER: But if
19 we're going to have a new political regime in the
20 next few weeks or few months, what in your view
21 is the justification for having a--this satellite
22 regime that the remedial order constructs?

23 DARIUS CHARNEY: Well, I think, as
24 amici--

25 JUDGE BARRINGTON D. PARKER: You're

1 going to have a new mayor; you're going to have a
2 new cooperation council, perhaps; you're going to
3 have other new officials whose views are very
4 different. So, isn't that the preferred avenue
5 for correcting these problems?

6 DARIUS CHARNEY: But I would say two
7 things to that question. The first is--and amicus
8 public advocate who's going to be arguing as well
9 in a few minutes will, as stated in his brief,
10 and he'll say more about it--he views this
11 process as it's been set up with a monitor and a
12 facilitator to oversee it and push the parties to
13 come to agreement is a beneficial thing. And so,
14 I guess my first answer would be it absolutely
15 will move the ball along and make the progress
16 that needs to be made.

17 But the second point, I guess, would be
18 that I think your question actually supports our
19 argument that for this Court to act now would be
20 incredibly premature, given that we could see a
21 very different position on the appeal from the
22 City in seven months, particularly since, again,
23 I go back to the harm that's happening today.

24 We in no way are trying to minimize the
25 impact that changes to training would have or

1 that changes to [UNINTEL] would have that--

2 JUDGE JOSE A. CABRANES: I want to take
3 you back to the question that I asked before,
4 which I'm not sure I had an answer to. Maybe you
5 did answer it. Is it your position that the
6 remedial orders to date do not prohibit or
7 require anything?

8 DARIUS CHARNEY: Well, they definitely
9 require the parties to participate in a
10 structured, consultative process to address each
11 of the areas, the remedial areas, the Court set
12 up.

13 JUDGE BARRINGTON D. PARKER: What about
14 the cameras?

15 DARIUS CHARNEY: Yes. So, the Court has
16 directed the NYPD to implement a pilot project.
17 However, again--

18 JUDGE JOSE A. CABRANES: Right, this is
19 not optional.

20 DARIUS CHARNEY: The project is not
21 optional, but the title of it--

22 JUDGE JOSE A. CABRANES: Does the Police
23 Department or the City want to do this?

24 DARIUS CHARNEY: From my understanding--
25 I mean, you'd have to ask them. But--

1 JUDGE JOSE A. CABRANES: The record will
2 reflect laughter.

3 DARIUS CHARNEY: I'm sorry. I'm not
4 sure. I'm not sure. But what I will say is the
5 timing of those cameras has in no way been set.
6 And, more importantly--

7 JUDGE JOSE A. CABRANES: That's not the
8 question.

9 DARIUS CHARNEY: Yes.

10 JUDGE JOSE A. CABRANES: Judge Parker's
11 question was what, in effect--I mean, is it or is
12 it not the case that a body camera pilot program
13 for one year has been ordered?

14 DARIUS CHARNEY: It has been ordered,
15 but the--it's the nature and extent of it, which
16 is the standard in the Second Circuit. In other
17 words, a remedy order has to define the nature
18 and extent of the remedies, has not been
19 [UNINTEL].

20 JUDGE JOSE A. CABRANES: Well, that's
21 par of the nature and extent.

22 DARIUS CHARNEY: It's part of it, but
23 it's--

24 JUDGE JOSE A. CABRANES: It's a one-year
25 body camera pilot program.

1 DARIUS CHARNEY: True. But--

2 JUDGE JOSE A. CABRANES: Hasn't she--
3 hasn't the District Judge prescribed many details
4 of that program?

5 DARIUS CHARNEY: Actually, Your Honor, I
6 would disagree. She said that it has to be
7 implemented for a year in five particular
8 precincts.

9 JUDGE JOSE A. CABRANES: It hasn't
10 described any--yes, in five precincts, and what
11 else?

12 DARIUS CHARNEY: She hasn't--but she has
13 no--well, nothing else. She has not set any rules
14 for when the cameras must be turned on and off,
15 how the information should be [UNINTEL]--

16 JUDGE JOSE A. CABRANES: I understand.
17 She's not micromanaging. We understand that. How
18 about revisions to training materials and
19 programs? Hasn't the District Court ordered
20 specific revisions to training materials and
21 programs?

22 DARIUS CHARNEY: Well, she said that--
23 she set, again, some pretty broad parameters. She
24 says that the training materials must instruct
25 officers that stops must be based on

1 individualized, reasonable suspicion, which has
2 been the standard in this Court and in the United
3 States for 40 years.

4 She said that a stop--officers must be
5 trained that a stop occurs, a forceable [UNINTEL]
6 stop occurs when the civilian does not
7 reasonably--have any reason to--

8 JUDGE JOSE A. CABRANES: These are
9 restatements of the law.

10 DARIUS CHARNEY: Exactly. [UNINTEL]

11 JUDGE JOSE A. CABRANES: All right,
12 these are restatements of the law. She has
13 concluded that the Police Department was not
14 following what we--what you and I believe to be
15 restatements of the law. But surely she's made
16 quite specific orders to that effect. Correct?

17 DARIUS CHARNEY: Well, she said that
18 there--

19 JUDGE JOSE A. CABRANES: In other words,
20 having found that they were acting in a certain
21 way--

22 DARIUS CHARNEY: Yes.

23 JUDGE JOSE A. CABRANES: She now expects
24 them to act in another way, right?

25 DARIUS CHARNEY: Yes. But that is true

1 of all of the institutional reform cases that
2 have been cited.

3 JUDGE JOSE A. CABRANES: Of course. Of
4 course.

5 DARIUS CHARNEY: And this Court has
6 chosen, in many of those cases, not to--

7 JUDGE JOSE A. CABRANES: In many of
8 those cases. Yes. Now, what about mandatory
9 revisions to the UF-250 forms? The Court has made
10 quite particular--as ordered, very particular
11 changes, has she not, in the implementation of
12 disciplinary measures for inadequate activity
13 logging? Is that right?

14 DARIUS CHARNEY: So, she has said that
15 the--

16 JUDGE JOSE A. CABRANES: I didn't hear
17 the word yes or no.

18 DARIUS CHARNEY: Yes, Your Honor. I'm
19 sorry.

20 JUDGE JOSE A. CABRANES: Yeah.

21 DARIUS CHARNEY: She said that there
22 need to be disciplinary measures. She has not
23 prescribed what those should be.

24 JUDGE JOHN M. WALKER, JR.: Oh, as far
25 as those forms are concerned, if I'm reading it--

1 I've got the opinion in front of me.

2 DARIUS CHARNEY: Yes.

3 JUDGE JOHN M. WALKER, JR.: The UF-250
4 must be revised to include a narrative section
5 where the officer must record, in her own words,
6 the basis for the stop.

7 DARIUS CHARNEY: Mm hmm.

8 JUDGE JOHN M. WALKER, JR.: And then it
9 goes on to say it has to be revised for a
10 separate explanation. And that's what I wondered,
11 whether that was the same as the narrative
12 section, a separate explanation of why pat-down,
13 frisk, or search was performed, as opposed to a
14 narrative section which describes the basis for
15 the stop. Now, I don't know what--you know, how
16 to read that.

17 DARIUS CHARNEY: [UNINTEL]

18 JUDGE JOHN M. WALKER, JR.: One or two.
19 But--and then it also says that it has to be
20 revised to simplify and improve the check box
21 system.

22 DARIUS CHARNEY: Mm hmm.

23 JUDGE JOHN M. WALKER, JR.: And then,
24 finally, it says all uniform officers are
25 required--in fairly mandatory language--to

1 provide narrative descriptions of stops in their
2 activity logs whenever a 250 is prepared. These
3 sound like they--they're--this is what she's
4 ordering.

5 DARIUS CHARNEY: It is, Your Honor. But
6 I guess, again, going back to the standard, and
7 what the cases on these issues where there's
8 remedial process that has been set up--

9 JUDGE JOHN M. WALKER, JR.: Right.

10 DARIUS CHARNEY: If there are
11 substantive questions regarding the nature and
12 the extent of the remedy still left open that
13 could change through the process, it is premature
14 for the Court to hear it now.

15 JUDGE JOHN M. WALKER, JR.: Anything
16 could change, but she's saying now--that's like
17 saying you were ordered to do something but, on
18 the other hand, I'm going to put in a remedial
19 process and I may want to change my order later.
20 That doesn't change the order that's in effect
21 now. It says that the NYPD is directed to--and
22 presumably they've got the monitors in place; we
23 know who it is right now--

24 DARIUS CHARNEY: Mm hmm.

25 JUDGE JOHN M. WALKER, JR.: Is directed

1 to revise the forms to address the criticisms
2 addressed in the liability opinion. And there are
3 lots of criticisms in that opinion.

4 DARIUS CHARNEY: Absolutely. But I would
5 submit, again, that that type of directive has
6 been used by District Courts in this and other
7 Circuits many times. And the Appeals Courts have
8 held that that is not a specific enough remedial
9 order for them to assume jurisdiction now and
10 make decisions--

11 JUDGE JOSE A. CABRANES: [UNINTEL
12 PHRASE]

13 DARIUS CHARNEY: When things could
14 change down the road.

15 JUDGE JOSE A. CABRANES: Our Court has
16 said that in the case that you adverted to, the
17 Spates, because Judge Friendly wrote, quote, "The
18 order neither prohibited nor required anything
19 other than the submission of a plan." That's not
20 the situation here. We--

21 DARIUS CHARNEY: That's true.

22 JUDGE JOSE A. CABRANES: Judge Walker
23 has just noted, and I have noted, a whole bunch
24 of things. These are not optional measures, are
25 they?

1 DARIUS CHARNEY: No. But in--

2 JUDGE JOSE A. CABRANES: They have to
3 follow these orders, right?

4 DARIUS CHARNEY: But the orders
5 themselves are not prescribing specific enough
6 [UNINTEL].

7 JUDGE JOSE A. CABRANES: No, wait a
8 minute. Hold on, not so fast. There are orders
9 that have been given by the Court, remedial
10 orders, which must be obeyed. Is that right?

11 DARIUS CHARNEY: But, again, that's true
12 of the order in Spates.

13 JUDGE BARRINGTON D. PARKER: Spates
14 [UNINTEL].

15 DARIUS CHARNEY: No, but that's true of
16 the order in Spates. It said--the order in Spates
17 actually set--prescribed four separate categories
18 of remedial action, which the state prison system
19 was required to take under the District Court
20 decision in Spates.

21 They said you have to increase the
22 number of law books in your prison library, that
23 you have to increase the access to the library
24 for prisoners, that you have to increase the
25 legal services provided to prisoners in your

1 facilities, and that you have to increase the
2 further copying access for--in both the prison
3 library and the state law library for prisoners.

4 How you do that, in other words, the
5 way that happens, what books you have, how many
6 lawyers, those things were left up to the prison,
7 using its own expertise, as the Police Department
8 here would have the opportunity to weigh in on
9 all of these remedies as to how it should be
10 implemented.

11 JUDGE JOSE A. CABRANES: It's not being
12 left up to the Police Department.

13 DARIUS CHARNEY: Well, how they
14 implement it is very much being left up to the
15 Police Department.

16 JUDGE JOHN M. WALKER, JR.: It's being
17 left up to the town meetings, essentially.

18 DARIUS CHARNEY: Your Honor, I would
19 disagree with that, because the town meetings--

20 JUDGE JOHN M. WALKER, JR.: [UNINTEL]
21 well, all the town meetings will have
22 participation of the Police Department.

23 DARIUS CHARNEY: Yes.

24 JUDGE JOHN M. WALKER, JR.: As one among
25 a number of effective people.

1 DARIUS CHARNEY: But the town meetings
2 are actually not for the categories of reform
3 that are listed.

4 JUDGE JOHN M. WALKER, JR.: This is
5 these specifically [UNINTEL].

6 DARIUS CHARNEY: Yes, or the City. And
7 the City is actually explicitly allowed and
8 encouraged, in his remedial order, to submit its
9 own proposals on each of these categories. And
10 that's, in fact, how it was done up to this point
11 in the [UNINTEL] case. The City is explicitly
12 given the opportunity, encouraged, and I would
13 say required to weigh in and give its own input.

14 JUDGE JOSE A. CABRANES: [UNINTEL] not
15 to do it. It's not just input. Input is one of
16 these technological computer terms which is
17 confusing to me. How about the word "must"?

18 DARIUS CHARNEY: Yes, they're required--

19 JUDGE JOSE A. CABRANES: They must
20 include certain remedies. And they've got to
21 respond to this. I mean, if they were to go limp
22 and do nothing, they'd be in violation of this
23 order. Is that right?

24 DARIUS CHARNEY: In other words, if they
25 didn't participate in the remedial process?

1 JUDGE JOSE A. CABRANES: Right.

2 DARIUS CHARNEY: I would say they would
3 be. But, I guess, what's the impact of that? The
4 impact of it, again--

5 JUDGE JOSE A. CABRANES: The impact of
6 that is that you would be very upset.

7 DARIUS CHARNEY: Yes.

8 JUDGE JOSE A. CABRANES: And you would
9 go into the District Court and ask for an order
10 requiring compliance. And if they didn't comply,
11 they would be in contempt of Court. That's the
12 impact of that.

13 DARIUS CHARNEY: But that is, again, the
14 situation which Judge Friendly referred to in the
15 [TERRA?] case, which is the one from 1961, that--

16 JUDGE BARRINGTON D. PARKER: Let me ask--
17 -

18 DARIUS CHARNEY: Yes?

19 JUDGE BARRINGTON D. PARKER: Under Judge
20 Scheindlin's remedial order--

21 DARIUS CHARNEY: Mm hmm.

22 JUDGE BARRINGTON D. PARKER: Who is
23 running the New York City Police Department?

24 DARIUS CHARNEY: The commissioner. And
25 it says very explicitly the monitor is not

1 intended--well, currently it's Commissioner
2 Kelly. And if we have a new commissioner in
3 January, it will be the new commissioner. It says
4 very explicitly in here two things that I think
5 are very important to point out. I do want to get
6 back to Judge Walker's very important question
7 about the breadth of the remedy.

8 And the first is that it says the
9 monitor's powers are limited to reform of stop-
10 and-frisk. They are not to be any broader than
11 that. They are not to go into areas that don't
12 relate to stop-and-frisk. The second thing it
13 says is the monitor is not given the power to in
14 any way replace the authority or the powers of
15 the police commissioner to run his or her police
16 department. The Court made it very clear--and
17 has, I think, sent that message very clearly--
18 that this is not--

19 JUDGE BARRINGTON D. PARKER: [UNINTEL]
20 disagreements between the monitor, oh, and the
21 police commissioner over whether a particular set
22 of reforms is efficacious--

23 DARIUS CHARNEY: Mm hmm.

24 JUDGE BARRINGTON D. PARKER: In
25 reforming stop-and-frisk, who breaks the tie?

1 DARIUS CHARNEY: Well, the monitor can
2 make a recommendation to the Court, and the City
3 has the opportunity, as we would have the
4 opportunity, to provide our position on that.

5 JUDGE JOHN M. WALKER, JR.: And then the
6 judge disregards the--

7 DARIUS CHARNEY: Judge would break the
8 tie. But I guess, again, going back to the timing
9 here, we are nowhere near any of that happening
10 at this point. So, again, I want to say, for stay
11 purposes, that's irrelevant. But if I can turn
12 back to Judge Walker's--

13 JUDGE JOSE A. CABRANES: If you just do
14 that, and I'm happy to give you the extra time I
15 have given you, and actually the full time that
16 originally was claimed, and more.

17 DARIUS CHARNEY: Okay.

18 JUDGE JOSE A. CABRANES: But take a
19 minute, and then we'll want to hear from Mr.
20 Dunn, who I know is anxious to be heard.

21 DARIUS CHARNEY: I am sure he is. I want
22 to come back to this, I think, very important
23 question about the breadth of the remedy, what
24 the judge's order here, and isn't this case a
25 very different one than the desegregation cases

1 in the South. I think that's a very good
2 question. And I want to answer it this way.

3 I will say, first of all, yes, this is
4 different. We're not claiming that Commissioner
5 Kelly or anybody in the Police Department is
6 George Wallace.

7 JUDGE JOHN M. WALKER, JR.: Are you
8 claiming that they're acting in bad faith in any
9 way?

10 DARIUS CHARNEY: What we are claiming is
11 that--and as the Court found--is that, for 14
12 years--

13 JUDGE JOHN M. WALKER, JR.: No.

14 DARIUS CHARNEY: This police department--
15 -

16 JUDGE JOHN M. WALKER, JR.: Bad faith in
17 terms of how they run the department, is that
18 your claim?

19 DARIUS CHARNEY: Our claim is that they
20 have engaged in deliberate and different policy
21 failures and have implemented affirmatively
22 policies and practices for 14 years that have
23 caused a widespread pattern of unconstitutional
24 stops. And they have done this in the face of
25 complaints by the New York State Attorney

1 General's office in 1999--

2 JUDGE JOHN M. WALKER, JR.: Can you
3 point to one statement by any police officer, any
4 leader in the Police Department, that indicates
5 that they are acting in a discriminatory way?

6 DARIUS CHARNEY: I refer you [TO FOUR?],
7 Your Honor.

8 JUDGE JOHN M. WALKER, JR.: In which
9 they say, "We will no--we're going to enforce the
10 law; we don't care what color their skin is;
11 we're going to enforce the law against a certain
12 group in a way that's different from another
13 group"? Is that--

14 DARIUS CHARNEY: Yes. Yes, Your Honor.

15 JUDGE JOHN M. WALKER, JR.: Who said
16 that?

17 DARIUS CHARNEY: Commissioner Kelly did.

18 JUDGE JOHN M. WALKER, JR.: In what way?

19 DARIUS CHARNEY: He said--

20 JUDGE JOHN M. WALKER, JR.: Did he says--
21 -other than going into high-crime areas?

22 DARIUS CHARNEY: Yes. I will read to you
23 from the trial transcript. I'm sorry, from the
24 judge's decision. She cites to the trial
25 transcript.

1 JUDGE JOHN M. WALKER, JR.: Go ahead.

2 DARIUS CHARNEY: "There is unrefuted
3 evidence presented at trial that Commissioner
4 Kelly, in 2010, in July of 2010 at a meeting with
5 no less than three state elected officials of
6 this state, stated unequivocally that the New
7 York Police Department targets its stop-and-frisk
8 practices at young black and Latino men, because
9 they want to instill fear in them that they could
10 be stopped at any time." Secondly, the chief of
11 the Department--

12 JUDGE JOSE A. CABRANES: What was the
13 context in which they would do that?

14 DARIUS CHARNEY: I can tell you the
15 context of the meeting and the statements. This
16 was a meeting in which a state assemblyman, two
17 state senators, and the Governor of the State of
18 New York were discussing with Commissioner Kelly
19 a bill that was before the state legislature to
20 expunge names from the Police Department's stop-
21 and-frisk database.

22 During that meeting, one of those
23 elected officials expressed his concerns to the
24 Police Department about the high,
25 disproportionate number of black and Latino New

1 Yorkers who were being stopped and frisked by the
2 NYPD. And, in response to those concerns,
3 Commissioner Kelly made that statement.

4 JUDGE BARRINGTON D. PARKER: And it's
5 your position that that is record evidence?

6 DARIUS CHARNEY: It is absolutely.

7 JUDGE BARRINGTON D. PARKER: That a lot
8 of these stops were--you know, were not really
9 legitimate tarry stops; it's just a way of
10 policing these communities?

11 DARIUS CHARNEY: Absolutely. And I--
12 again, to Judge Walker's question--

13 JUDGE JOHN M. WALKER, JR.: And I assume
14 you're saying that--you have to imply in your
15 statement that he's talking about
16 unconstitutional stops.

17 DARIUS CHARNEY: It's a--yes.

18 JUDGE JOHN M. WALKER, JR.: I didn't
19 hear that word.

20 DARIUS CHARNEY: Your Honor, the word--
21 but you also didn't hear the words "reasonable
22 [UNINTEL]."

23 JUDGE JOHN M. WALKER, JR.: Yeah, well,
24 we target--we target crime in different ways. You
25 know, and if you target, you know, certain

1 activities, certain areas where there may be
2 crime, it seems to me that then you're going to
3 have an impact.

4 DARIUS CHARNEY: Absolutely.

5 JUDGE JOHN M. WALKER, JR.: [UNINTEL] in
6 different groups.

7 DARIUS CHARNEY: I think that's a very
8 important point. And--

9 JUDGE JOHN M. WALKER, JR.: But that's
10 not so much a function of--it seems to me a
11 function of the socioeconomic reality as much as
12 anything.

13 DARIUS CHARNEY: Well, let me answer.
14 That's a very good point, and we couldn't agree
15 more. Your Honor, there are two things I will say
16 to that. The first is that we have never
17 challenged, in this case or otherwise, the NYPD's
18 decision to deploy its resources more heavily in
19 high-crime communities which happen to be
20 majority minority. We have never [CLAIMED?] that.

21 JUDGE BARRINGTON D. PARKER: Your
22 position is that race-based stops to instill
23 fear--

24 DARIUS CHARNEY: Yes.

25 JUDGE BARRINGTON D. PARKER: Deserve

1 sanction and control by the--

2 DARIUS CHARNEY: Not only that, but that
3 using race outside of the circumstances which
4 this Court found in Brown, which--Brown versus
5 City of Oneonta, which the District Judge very
6 explicitly says she is not in any way disagreeing
7 with. Outside of that context, using race
8 explicitly--which, again, based on the record
9 evidence, she found the NYPD did--that is
10 prohibited by the Equal Protection Clause.

11 But the second thing I will say to your
12 question--

13 JUDGE JOSE A. CABRANES: If race is the
14 only factor.

15 DARIUS CHARNEY: Well, no, that's not
16 the standard under Arlington Heights or this
17 Court's decision in Hayden versus Paterson. If it
18 is one of several mitigating factors--

19 JUDGE JOSE A. CABRANES: You're not
20 suggesting that the compilation of statistics,
21 which include identifiers, racial identifiers, is
22 inappropriate.

23 DARIUS CHARNEY: I'm not sure if I
24 understand your question, Your Honor.

25 JUDGE JOHN M. WALKER, JR.: Well, if the

1 statistics--

2 DARIUS CHARNEY: Yes.

3 JUDGE JOHN M. WALKER, JR.: If the
4 statistics show, based on police reports--

5 DARIUS CHARNEY: Mm hmm.

6 JUDGE JOHN M. WALKER, JR.: That a
7 number of crimes have been committed by certain--
8 people of a certain race, then, at that point--
9 and they--and in a particular area where those
10 individuals live, because that's the nature of
11 that community, that the police can't take that
12 into account in deciding whether they should
13 allocate resources to that community?

14 DARIUS CHARNEY: They can definitely
15 take into account, yes, exactly, where crime is
16 happening and when it's happening. They
17 definitely and should take that into account. And
18 we have never suggested otherwise.

19 JUDGE BARRINGTON D. PARKER: [UNINTEL]
20 the answer, because that would seem to suggest
21 that, if you had a neighborhood that was all
22 black, you could stop anybody.

23 DARIUS CHARNEY: But here's--this is why
24 I want to answer Judge Walker's question, and
25 I'll answer it this way, the one about sending

1 more officers and making more stops in high-crime
2 neighborhoods. We don't have an issue with that.

3 Our evidence--and what the evidence
4 showed at trial is that, even after you control
5 for the very real fact that you send more
6 officers to high-crime areas, that you make more
7 stops where there's more crime, even after you
8 control for those two things, using the NYPD's
9 own data, the disparity by race in not only who's
10 being stopped by in terms of where they're being
11 stopped based on racial composition of
12 neighborhoods, those are large and significant
13 and cannot be explained away by crime rates.

14 So, at the end of the day, after you
15 control for crime, after you control for
16 deployment of police resources, race is driving
17 the stop activity of the Police Department. And
18 that's just the--

19 JUDGE BARRINGTON D. PARKER: And those
20 are the findings that are reviewed for whether or
21 not they're clearly [UNINTEL].

22 DARIUS CHARNEY: Absolutely. And, on the
23 point--I think this is Judge Cabranes's very good
24 question about--I think you asked is it the
25 proper benchmark, in other words, should the

1 benchmark be who the race of crime suspects--

2 JUDGE JOSE A. CABRANES: No, not a
3 benchmark, but rather the compilation and
4 maintenance of records.

5 DARIUS CHARNEY: Yes.

6 JUDGE JOSE A. CABRANES: Of stops, et
7 cetera, which include a box or some indication of
8 what the race or ethnic group is of the person
9 being stopped. In fact, I would guess that these
10 statistics are maintained today precisely because
11 plaintiff's counsel or similarly situated counsel
12 want these statistics to be kept.

13 DARIUS CHARNEY: Mm hmm.

14 JUDGE JOSE A. CABRANES: Is that--"Mm
15 hmm," does that mean yes?

16 DARIUS CHARNEY: Meaning that the
17 statistics of who the crime suspects are, or--

18 JUDGE JOSE A. CABRANES: Yes, and all of
19 these statistics. I mean, policemen in New York
20 in the modern era are statisticians.

21 DARIUS CHARNEY: Yes.

22 JUDGE JOSE A. CABRANES: Among other
23 things. They maintain records of stops. They're
24 required to maintain. And among the things
25 they're required--correct me if I'm wrong--is an

1 indication of the race of the person whom they've
2 stopped.

3 DARIUS CHARNEY: Yes.

4 JUDGE JOSE A. CABRANES: And the
5 plaintiff's counsel, and others who are of a like
6 perspective, want such statistics and want such
7 forms to be filled out. And they want the
8 indication of race to be indicated. They want
9 race indicated, right?

10 DARIUS CHARNEY: Yes, because we want to
11 track the--

12 JUDGE JOSE A. CABRANES: Yeah.

13 DARIUS CHARNEY: Demographics of who's
14 being stopped to see if there is a problem.

15 JUDGE JOHN M. WALKER, JR.: Of course,
16 [UNINTEL] you'd have had a problem here, a
17 greater problem.

18 DARIUS CHARNEY: Yeah.

19 JUDGE JOHN M. WALKER, JR.: If there
20 were--if race was not indicated on the UF-250s.

21 DARIUS CHARNEY: That's true. But we've
22 never contested that they [UNINTEL]. Yeah.

23 JUDGE JOHN M. WALKER, JR.: I'm just
24 driving that straight. I'm not saying you--

25 DARIUS CHARNEY: Yes.

1 JUDGE JOHN M. WALKER, JR.: I just want
2 to confirm that's your view.

3 DARIUS CHARNEY: Yes. We think that, at
4 least for now, they should be--

5 JUDGE JOSE A. CABRANES: All right.

6 DARIUS CHARNEY: Tracking this
7 information.

8 JUDGE JOSE A. CABRANES: We've given you
9 a good deal of time, and Mr. Dunn is ready to go.

10 CHRISTOPHER DUNN: Good afternoon,
11 Christopher Dunn with the New York Civil
12 Liberties Union. Judge Cabranes, let me start
13 with the confusion about the connection between
14 the two cases.

15 JUDGE JOSE A. CABRANES: Confusion?

16 CHRISTOPHER DUNN: The [UNINTEL]. We
17 have a completely separate case. And the
18 differences in our case, actually, I think are
19 quite material to this discussion.

20 JUDGE JOSE A. CABRANES: All right.

21 CHRISTOPHER DUNN: So, let me just take
22 one minute to--

23 JUDGE JOSE A. CABRANES: Please.

24 CHRISTOPHER DUNN: Summarize our case.
25 The Police Department has this discrete program

1 now called the Trespass Affidavit Program,
2 referred to as the Clean Halls Program in the
3 Bronx. Private property owners can enroll in the
4 program; that gives the Police Department
5 permission to come into their private property to
6 patrol. And they put a sign up on the outside of
7 the building saying, "Trespass Affidavit
8 Building: No Trespassing."

9 Police officers, over the course of
10 time--and this program has been in effect since
11 the early '90s--have come to believe that, by
12 virtue of the fact that someone is in or seen
13 coming out of a building, they can be stopped and
14 questioned. And we represent a class of people
15 who, not surprisingly, are residents of buildings
16 where they are getting stopped or even arrested
17 on suspicion of trespass.

18 We brought a preliminary injunction on
19 one particular issue, namely people getting
20 stopped and even arrested on public sidewalks
21 outside of Clean Halls buildings in the Bronx.

22 You know, I have to have a [UNINTEL
23 PHRASE] to realize that someone who lives in a
24 building or is a bona fide guest in a building
25 can't be a trespasser in the building. And we are

1 dealing with one specific problem we are trying
2 to get rectified, which is to deal with this
3 issue of police officers wrongly believing that
4 merely seeing someone walk out of a Clean Halls
5 building provides them a basis to stop the
6 person.

7 JUDGE JOHN M. WALKER, JR.: [UNINTEL]
8 the forms that were used there related to the
9 moment of the stop, is that correct, where it
10 was, whether it was outside?

11 CHRISTOPHER DUNN: Are you talking about
12 the police forms or the district attorney forms
13 here?

14 JUDGE JOHN M. WALKER, JR.: I'm talking
15 about the police forms.

16 CHRISTOPHER DUNN: The police forms,
17 yes. The police form is completed by the officer
18 to describe the circumstances of the stop.

19 JUDGE JOHN M. WALKER, JR.: Yeah.
20 Whether it occurred--the stop occurred, but the
21 activity in question could have occurred
22 elsewhere. Is that right?

23 CHRISTOPHER DUNN: In theory, it could
24 have, yes.

25 JUDGE JOHN M. WALKER, JR.: In theory.

1 CHRISTOPHER DUNN: Yes.

2 JUDGE JOHN M. WALKER, JR.: There's
3 nothing to prevent it, then. I mean, it's just
4 the moment of the stop. And these are facts that
5 have to do with each individual case. It may be
6 that the person was, you know--suspicious
7 activity was encountered, if there was suspicious
8 activity there. It may have been that there was
9 suspicious activity elsewhere and then a stop
10 occurred there.

11 CHRISTOPHER DUNN: That certainly is
12 theoretically possible, Your Honor. But, again, I
13 note everyone is being stopped solely on
14 suspicion of trespass, having walked out of or
15 being right next to a building.

16 JUDGE JOHN M. WALKER, JR.: Mm hmm.

17 CHRISTOPHER DUNN: A Trespass Affidavit
18 building. Okay. So, we have a discrete program.
19 We have a very narrow claim. It's [UNINTEL] claim
20 on the preliminary injunction.

21 JUDGE JOSE A. CABRANES: Is your case
22 the one that was--that flowed directly from the
23 Daniels case? Or is that the other case?

24 CHRISTOPHER DUNN: It was not, Your
25 Honor. There was Daniels. There was since Lloyd.

1 JUDGE JOSE A. CABRANES: That's the
2 other case.

3 CHRISTOPHER DUNN: That's correct. And
4 then there's the Davis case, which you don't know
5 about yet, which is a case like ours, which is a
6 trespass case in public housing, which Judge
7 [UNINTEL] ended up with. And we filed our case--
8 we related our case not to Floyd but to the Davis
9 case, because that was a trespass stop case just
10 like our case.

11 So, understanding that that's the
12 particular set of issues that we have, I want to
13 start, Judge Cabranes--

14 JUDGE JOHN M. WALKER, JR.: You're not
15 arguing that the police can't go talk to somebody
16 who's coming out of a building. That's not what
17 you--

18 CHRISTOPHER DUNN: Actually, Your Honor,
19 the City agrees that they cannot just go talk to
20 somebody generally because they saw them exit a
21 building.

22 JUDGE JOHN M. WALKER, JR.: Can't there
23 be a normal police encounter with somebody?

24 CHRISTOPHER DUNN: They can certainly
25 say, "How'd the Red Sox do last night?" Of

1 course.

2 JUDGE JOHN M. WALKER, JR.: But they're
3 not allowed to say, "What are you doing here?"

4 CHRISTOPHER DUNN: Yeah, that's correct.
5 That's exactly right. And the City agrees that
6 they cannot do that.

7 JUDGE JOHN M. WALKER, JR.: Do they?

8 CHRISTOPHER DUNN: Yes.

9 JUDGE JOHN M. WALKER, JR.: We're going
10 to hear from them in a moment.

11 CHRISTOPHER DUNN: Okay. [UNINTEL]

12 JUDGE JOHN M. WALKER, JR.: That's fine,
13 yes.

14 CHRISTOPHER DUNN: And they certainly
15 can't stop the person. So--

16 JUDGE JOSE A. CABRANES: An unusually
17 mild response from the City. But go ahead.

18 CHRISTOPHER DUNN: Your Honor, there are
19 some things--we don't have a legal dispute in
20 this case. We have a factual dispute. But in
21 terms of timing [UNINTEL]--

22 JUDGE JOSE A. CABRANES: Well, that's
23 not what I heard about a half an hour ago.

24 CHRISTOPHER DUNN: Well, you heard a lot
25 of discussion about Floyd, Judge Parker.

1 JUDGE JOSE A. CABRANES: Yeah.

2 CHRISTOPHER DUNN: Excuse me, Judge
3 Walker. You did not hear [UNINTEL] discussion of
4 Ligon. On respect of timing, Judge Cabranes, I
5 have been here in two days, [UNINTEL] the
6 applications on either side. These things can
7 happen very quickly.

8 JUDGE JOSE A. CABRANES: And you're an
9 expert at that sort of thing.

10 CHRISTOPHER DUNN: Well, I'm an expert,
11 and sometimes we're on the short end and
12 sometimes we're not.

13 JUDGE JOSE A. CABRANES: Yeah, but you
14 know how to do it.

15 CHRISTOPHER DUNN: We know how to do it
16 and the City knows how to do it.

17 JUDGE JOSE A. CABRANES: Yeah.

18 CHRISTOPHER DUNN: And I think the point
19 is less that they somehow did something wrong.
20 I'm not sure you're suggesting that. But what the
21 point is is that the notion that they somehow are
22 being irreparably harmed is completely belied by
23 their actions. Let me tell you, if something bad
24 were happening to the NYPD, Commissioner Kelly
25 would be saying to them, "Get in there

1 immediately." I've seen it many times on far less
2 [UNINTEL].

3 JUDGE JOSE A. CABRANES: He might say
4 that, but maybe, as happens in government,
5 lawyers, for whatever reason, and based on
6 whatever influences, might not do that. Is it not
7 conceivable that Commissioner Kelly wanted them
8 to move faster?

9 CHRISTOPHER DUNN: No.

10 JUDGE JOSE A. CABRANES: And they didn't
11 move faster? Not conceivable?

12 CHRISTOPHER DUNN: That is not
13 conceivable. If Commissioner Kelly said, "We have
14 a serious public safety issue; we have got to
15 deal with this immediately," I am telling you we
16 would have been here that night. And I have been
17 here on cases that night.

18 JUDGE JOSE A. CABRANES: [UNINTEL]

19 CHRISTOPHER DUNN: Right?

20 JUDGE JOSE A. CABRANES: Right.

21 CHRISTOPHER DUNN: So, I'd just say it
22 is--and what that points to is, Judge Cabranes,
23 you elicited some responses from Mr. Charney that
24 I'm not sure I completely agree with, in the
25 following sense. It is certainly true in Ligon,

1 and I believe it is true in Floyd, as we sit here
2 today, the Police Department has not been
3 required, as a result of Judge Scheindlin's
4 order, to do anything, not one thing.

5 They might have their lawyers come to
6 meetings, okay? And if you [UNINTEL] say, next
7 Monday, there's probably going to be a monitor at
8 the meeting, but the Police Department--

9 JUDGE BARRINGTON D. PARKER: Well, I
10 think you have a likelihood of succeeding on the
11 merits.

12 CHRISTOPHER DUNN: I'm sorry, Your
13 Honor?

14 JUDGE BARRINGTON D. PARKER: What do you
15 think is the likelihood of success on the merits?

16 CHRISTOPHER DUNN: Why do I think
17 there's a likelihood? I don't think--I think
18 there's no likelihood at all. Remember, I'm
19 counsel on the Ligon case. I think the City has
20 no likelihood of prevailing on the merits on our
21 case. And the reason is as follows.

22 We're here on a preliminary injunction.
23 We're not here after a third trial on a PI. We
24 have a PI standard, okay? We had this very--

25 JUDGE JOSE A. CABRANES: And you don't

1 doubt that we're effectively reviewing a
2 preliminary injunction?

3 CHRISTOPHER DUNN: And you--effectively
4 and [UNINTEL]. And so, we [UNINTEL]--

5 JUDGE JOSE A. CABRANES: There's no
6 problem with appealability issue.

7 CHRISTOPHER DUNN: No. Now, I don't
8 know--I mean, I think there actually is a
9 question of appealability, given the fact that
10 Judge Scheindlin now has not told the Police
11 Department to do something. Okay? It was one
12 thing to say that you satisfied to us the
13 preliminary injunction standard. I find
14 liability.

15 It's different than, in the critical
16 thing, for purposes of appellate jurisdiction,
17 for her to tell the Police Department, as a
18 result of that liability ruling, to do something.
19 Okay? She has not--

20 JUDGE JOSE A. CABRANES: She didn't tell
21 them to make specific revisions to training
22 materials and programs?

23 CHRISTOPHER DUNN: She said, "I am going
24 to make you do that. I am going to make you do
25 that." And then in our case--

1 JUDGE JOHN M. WALKER, JR.: She said,
2 "You must do it." What was she--

3 CHRISTOPHER DUNN: Judge Walker, she
4 absolutely said--implied that you must do it. But
5 she said, down the road, you're going to have to
6 do it. But she has not required them to do
7 anything yet. They have not identified--

8 JUDGE JOSE A. CABRANES: Are you waiting
9 for them to be held in contempt? Is that--

10 CHRISTOPHER DUNN: No, no, not at all.
11 The only thing that they have to do now that
12 would--

13 JUDGE JOSE A. CABRANES: We have
14 somebody kibitzing here. Yeah.

15 CHRISTOPHER DUNN: Judge Cabranes, the
16 only thing they have to do now that would subject
17 them to potential contempt is participate in the
18 process with the monitor. They do not suggest
19 that's irreparable harm, and it's not. So--and,
20 in particular--

21 JUDGE JOSE A. CABRANES: They have to do
22 a one-year body camera pilot program, right?

23 CHRISTOPHER DUNN: No, that's not in our
24 case.

25 JUDGE JOSE A. CABRANES: That's not your

1 case.

2 CHRISTOPHER DUNN: That's--they have
3 said--she has said, "I'm going to make you do
4 that." Okay? But she has not said to them--and I
5 think this is actually important--"Do the
6 following things now."

7 JUDGE JOSE A. CABRANES: If they do
8 nothing, zero, no problem.

9 CHRISTOPHER DUNN: In regard to the body
10 camera project, that's correct.

11 JUDGE JOSE A. CABRANES: [UNINTEL] They
12 don't do any of it. They don't do the body camera
13 pilot program; they don't revise their materials;
14 they don't revise the UF-250s; they don't improve
15 or act on the disciplinary review procedures,
16 just go limp?

17 CHRISTOPHER DUNN: As I understand it--

18 JUDGE JOSE A. CABRANES: As far as
19 you're concerned, no problem?

20 CHRISTOPHER DUNN: As I understand it,
21 those [UNINTEL] particular things. As I
22 understand it, she has not told them to do any of
23 those things yet. She has put those into the
24 monitor process.

25 JUDGE JOSE A. CABRANES: You don't think

1 they'd be in a little trouble if they didn't do
2 anything?

3 CHRISTOPHER DUNN: Well, Your Honor,
4 they're going to have to do things, to be sure.
5 But they're not going to have to do things for
6 quite some time. No, now, now, all they have to
7 do is go to meetings with the monitor. That's
8 what they have to do now. And they haven't
9 identified anything else they've had to do.

10 What they have complained about, and
11 what they complained about loudly, is what they
12 consider to be the kind of the psychological
13 impact of the liability ruling. And I must say I
14 find it very hard to understand how they could
15 stand up here and make these statements about the
16 alleged impact of the liability ruling without
17 any record whatsoever.

18 I mean, making statements about the
19 impact on sergeants, the impact on police
20 officers, the impact--I mean, there's nothing
21 before you. It's just them saying it.

22 The only thing we have before us,
23 [UNINTEL], the decrease in the stop numbers in
24 the first six months of this year, and the
25 corresponding decrease in the murder and shooting

1 numbers. And, Judge Walker, I hear you saying,
2 "Well, of course, maybe they might have gone down
3 further," but all we have--and we put this in the
4 record--all we have is stops have come down;
5 murders have come down; shootings have come down.

6 Those are the only facts in the record.
7 I do not see how they can stand here and argue
8 that this psychological impact is like having
9 devastating consequences for the City. I cannot
10 believe that police officers are walking around
11 with Judge Scheindlin's 150-page decision
12 changing their behavior. There's just no evidence
13 of that whatsoever.

14 And [UNINTEL], as Judge Parker said, if
15 what is happening here is the City is engaging in
16 less unconstitutional behavior, that's a good
17 thing. It's not a bad thing.

18 Going back to--

19 JUDGE JOSE A. CABRANES: Surely police
20 officers get the message, right? They read
21 newspapers.

22 CHRISTOPHER DUNN: I tell you, Judge
23 Cabranes, I've had a lot of dealings with police
24 officers. They've got a lot of different
25 messages.

1 JUDGE JOSE A. CABRANES: Some of your
2 best friends are police officers.

3 CHRISTOPHER DUNN: Well, you know, we
4 represent cops. I like police officers. I have a
5 case that's coming here shortly with a police
6 officer. We're not the enemies of the police that
7 you might think. But I talk to cops--

8 JUDGE JOSE A. CABRANES: [UNINTEL
9 PHRASE]

10 CHRISTOPHER DUNN: I talk to cops all
11 the time. I am always astonished at the messages
12 that they get.

13 JUDGE JOSE A. CABRANES: Yeah.

14 CHRISTOPHER DUNN: And what I am saying
15 to you is: there is no basis--

16 JUDGE JOSE A. CABRANES: We get the
17 message.

18 CHRISTOPHER DUNN: Well--

19 JUDGE JOSE A. CABRANES: Wouldn't you
20 think one of the messages is, if I don't bother
21 inquiring further, that's not my problem? I would
22 view that as human instinct. You can avoid a
23 Section 1983 action. You can avoid disciplinary
24 proceedings. You can avoid possible criminal
25 investigations. Why bother? Just let them go.

1 CHRISTOPHER DUNN: Your Honor, it's
2 possible that people get that message. What I'm
3 saying to you is--

4 JUDGE JOSE A. CABRANES: There's no
5 basis.

6 CHRISTOPHER DUNN: That's not a basis
7 for granting a stay here.

8 JUDGE JOSE A. CABRANES: Let me ask you
9 about this--I'm not sure which of you really can
10 answer this, the famous "related case" issue.

11 CHRISTOPHER DUNN: Uh huh.

12 JUDGE JOSE A. CABRANES: With [ROSE?]
13 and Daniels, in which famously, on December 21,
14 2007, at page 42, the Court said, "I would accept
15 it as a related case, which the plaintiff has the
16 power to designate." And, as far as I can tell,
17 the District Court incurs the bringing of which
18 of these actions, yours or the Floyd?

19 CHRISTOPHER DUNN: Not ours, Your Honor.
20 It is Floyd.

21 JUDGE JOSE A. CABRANES: Yeah. All
22 right. That's a little eccentric. I mean, I'm
23 asking you to comment on somebody else's case. I
24 understand.

25 CHRISTOPHER DUNN: Well, look, we deal

1 with [UNINTEL] District practice all the time.
2 You have all been District Court judges. If I
3 had--if I were the judge and I had a case for
4 five years, as was the case with Daniels--or I
5 guess that was even nine years--

6 JUDGE JOSE A. CABRANES: You'd go around
7 looking for--you'd go around asking for more
8 cases?

9 CHRISTOPHER DUNN: No, I would not.
10 That's--I mean, you might be a masochist if you
11 did that. If I had a case for nine years, I would
12 examine this in great detail. There's a sunset
13 provision, which the plaintiff asked to have
14 extended. She said, "No, I'm not going to extend
15 a sunset provision." If I'm thinking about
16 judicial economy, I'm thinking that that would be
17 the same parties; it's going to be the same
18 controversy. Clearly it's a related case.

19 JUDGE JOSE A. CABRANES: Just trying to
20 be helpful.

21 CHRISTOPHER DUNN: Well, look, I don't
22 want to get into motives. I'm just saying I'm not
23 sure it's quite as nefarious as perhaps it may
24 appear to some.

25 JUDGE JOSE A. CABRANES: Now, Judge

1 Scheindlin gave a number of interviews to the
2 press, I guess about your case or the other one?

3 CHRISTOPHER DUNN: Well, again--

4 JUDGE JOSE A. CABRANES: [UNINTEL]
5 cases?

6 CHRISTOPHER DUNN: Our case is this
7 literal trespass affidavit case.

8 JUDGE JOSE A. CABRANES: You're the one
9 with trespassing.

10 CHRISTOPHER DUNN: A lot of her
11 interviews, I think, I suspect, are about the
12 much bigger case. And, look, she has been vocal
13 about her concerns about some of this. You know,
14 I think--

15 JUDGE JOHN M. WALKER, JR.: There's no
16 14th Amendment issue in this.

17 CHRISTOPHER DUNN: No, Your Honor. We
18 don't have a 14th Amendment. We have a very
19 simple issue, which is: have we shown, as a
20 matter of fact, that police officers are stopping
21 people merely because they're walking out of
22 buildings enrolled in this program?

23 She found that we had shown that
24 through our [X-RAY?] report. They analyzed
25 department forms, the testimony of the Bronx

1 District Attorney's Office, testimony from our--

2 JUDGE JOHN M. WALKER, JR.: So you're
3 saying it's stopping within the meaning of tarry?

4 CHRISTOPHER DUNN: Within--it's
5 absolutely within the meaning of tarry. We have--

6 JUDGE JOHN M. WALKER, JR.: On an
7 encounter.

8 CHRISTOPHER DUNN: That's correct. We
9 have completed 250s, which the Police Department
10 trains officers to complete only when there is a
11 tarry stop. And all of our stops have 250s. And
12 we have decline-to-prosecute forms, Your Honor,
13 from the Bronx District Attorney's Office where
14 people got arrested.

15 The Bronx District Attorney's Office
16 interviewed the police officers as part of doing
17 the investigative work, and the police officer
18 said, "The only reason I stopped that person,
19 because I saw him walking out of a Clean Halls
20 building." There are 26 decline-to-prosecute
21 forms that are appended to her decision from the
22 Bronx District Attorney's Office as a sample of
23 this phenomenon.

24 So, it's not just encounters. It is
25 stops and it is arrests of people walking out of

1 their own buildings or walking out of buildings
2 where they had visited family or friends.

3 And so, in terms of the likelihood of
4 their prevailing, there's a sort of strong
5 likelihood. Judge Parker, as you have pointed
6 out, the only issue here is: did we prove it is a
7 matter of fact that the subject is clearly
8 erroneous with the preliminary injunction
9 overlay?

10 They simply have not gotten close. You
11 know, they don't like the way our expert did
12 certain things. They don't like the way the
13 District Court read some of the decline-to-
14 prosecute forms. I mean, none of that comes close
15 to the sort of thing that would show clearly
16 erroneous. And therefore, we think there is no
17 basis for granting the stay in Ligon.

18 Judge Walker, I want to point out one
19 final thing, and then I will sit down, which is
20 you expressed a concern about the hostility of
21 the District Court's opinion and what that
22 reflects in terms of her view of the Police
23 Department. I think that [UNINTEL] what that
24 reflects, in significant part, is her judicial
25 frustrations with what she saw before her and the

1 extensive record that she did.

2 But I do want to point out one thing
3 that separates Ligon. In Ligon, we have a
4 different liability decision. It's from January
5 of his year. Okay? In response to that, we, with
6 the City, have been working on a process for
7 coming up with certain forms as she outlined in
8 her opinion.

9 And, in fact, the City agreed to and
10 did draft all of the initial things. So, they
11 drafted [UNINTEL] policy. They drafted training
12 materials. They drafted supervisory [IDS?]. And
13 we are working that through. Okay?

14 But she has said--she, Judge
15 Scheindlin--that she wants some of the minor
16 details that we could not agree on to be worked
17 out by the monitor. But, as Mr. Charney was
18 noting, there has been a process in Ligon where,
19 in fact, the City has been participating in
20 exactly the role that you suggested. It is not
21 something where she is writing things. That is
22 not what's happening.

23 So, for all these reasons, unless there
24 are further questions, we would urge you to deny
25 the stay, as it relates certainly to the Ligon

1 case. Thank you.

2 JUDGE JOSE A. CABRANES: Thanks very
3 much. We have Mr. Brinckerhoff for former
4 Assistant Attorney General Bill Lann Lee.

5 MATTHEW D. BRINCKERHOFF: Your Honor
6 saved me an introduction. I am Matthew
7 Brinckerhoff, with Emery Celli Brinckerhoff and
8 Abady, for the former Assistant Attorney General
9 in charge of Civil Rights from late 1997 until
10 early 2001, Mr. Bill Lann Lee. We've obviously
11 submitted an amicus brief in this case.

12 The reason that Mr. Lee submitted an
13 amicus brief is to gather the materials and
14 provide his insight from his years in pursuing
15 police reform cases on behalf of the United
16 States government and implementing and overseeing
17 the reforms and remedial measures that were a
18 result of those cases, and to point out that that
19 process has gone on in a bipartisan fashion for
20 nearly 20 years now.

21 Many of the major police departments in
22 his country, including the City of Los Angeles,
23 the City of Detroit, the City of Pittsburgh, on
24 and on--they're collected in an appendix to our
25 brief--have been subjected to just the kinds of

1 remedial orders and procedures that are being
2 challenged in this case as being--as constituting
3 immediate irreparable harm, which I would like to
4 address in just a second.

5 The reality is that that experience has
6 shown--and it's collected and analyzed, I think,
7 in detail in two very significant and important
8 reports, one on the L.A. experience that's cited
9 in our brief, another on the Pittsburgh
10 experience, which is also cited in our brief--
11 that not only is there no record support for any
12 of the histrionic kinds of claims that are being
13 made by the defendants in the City of New York in
14 this case, but all of the evidence and the
15 practice and experience from other police
16 departments shows hat not only is there not a
17 problem, not only is there no de-policing, not
18 only does crime continue to go down, but there
19 are huge advantages to be gained in something
20 that is--that has not been addressed here, which
21 is the relations of the community and the
22 citizens of the City of New York with the police
23 department, which, if we're going to be referring
24 to newspaper articles and popular perception, one
25 has to recognize the damage that has been done

1 over these many years based on these policies.

2 And if you look at these reports, what
3 they show is that, in Los Angeles, community
4 relations with the police department increased
5 exponentially. And having a community process and
6 input into the remedial process itself is not
7 unheard of. It's not unprecedented. It happened
8 in Cincinnati in a case brought by the U.S.
9 government, overseen by the government as well,
10 and of course a District judge as well.

11 And we don't even have to ask for--look
12 at Cincinnati, necessarily. Even in this case, in
13 the--it's already in the record below; I think
14 the docket number is 365--the United States
15 submitted a brief on remedies in this case.

16 It was very clear and set out the same
17 kind of information that Mr. Lee is setting out
18 here from the current--at least at that time--
19 Assistant Attorney General in charge of Civil
20 Rights, that having a monitor is not unusual; in
21 fact, it's a very important part of the process;
22 that having the kinds of broad remedies that are
23 contemplated here but not in effect yet is very
24 much part of that process.

25 JUDGE JOHN M. WALKER, JR.: I'm

1 concerned that that, though, is--it seems to me
2 that each situation may be different in one
3 sense, that in some cases, you know, where there
4 has been a flouting of court orders by a police
5 department, then you'd want to take it to the
6 next step. And you'd have to put a--or a
7 recalcitrance on the part of the police
8 [UNINTEL].

9 Would you need a monitor right away,
10 would be the question I would have. I mean, isn't
11 that--maybe that's a--it seems like--your
12 adversary pointed out it's like a sledgehammer
13 approach. I don't know whether that's accurate or
14 not. It may be that the remedy can be achieved
15 short of broad sort of, you know, steps like
16 this, by just simply asking the police department
17 to submit plans.

18 MATTHEW D. BRINCKERHOFF: And I--

19 JUDGE JOHN M. WALKER, JR.: [UNINTEL]
20 often what happens.

21 MATTHEW D. BRINCKERHOFF: And I
22 understand, Judge Walker, that point. But, in
23 response, I will offer you this. One, all of the
24 circumstances that are raised by the U.S.
25 government in the brief below or raised by my

1 client, Mr. Lee, here, are circumstances where
2 there was no record of findings of disobeying
3 court orders or anything of the like.

4 What there was, as there is in this
5 case, with factual findings, not just
6 allegations, was a strong record of police
7 conduct that unquestionably violated the
8 constitutional rights of hundreds if not
9 thousands of citizens in each of those cities.

10 And the police departments in those
11 contexts, unlike the police department here, the
12 first one ever, instead of entering into a decree
13 with the United States and with the plaintiffs to
14 try to attempt some reform, has resisted every
15 step of the way. You asked for evidence of bad
16 faith; is that some piece of it? I think that it
17 is. This is unprecedented, the resistance that
18 they've made--they've had in this case.

19 And, if you--just to bring up one other
20 point that I think is really quite critical, I do
21 agree with Mr. Dunn. When you look at irreparable
22 harm here, first of all you have to find that
23 they're likely to succeed on the merits. You have
24 to find that [UNINTEL] of the judge's factual
25 findings have to strike you, as Judge Posner has

1 said, with the force of a fish--sorry, a five-
2 week-old, unrefrigerated, dead fish.

3 And that, if you get to that point,
4 they have to prove irreparable harm, and not just
5 irreparable harm at some point in the future
6 after the Court issues an order, which they will
7 be able to then come to this Court and re-seek a
8 stay on.

9 Right now, all they have to do is
10 participate in a process. That's the reason they
11 haven't done anything for two and a half months.
12 That's the reason they have a briefing schedule
13 that is so luxurious. They know that there is no
14 irreparable harm.

15 This Court has held time and time again
16 in provisional remedy cases that the way of
17 bringing a remedy--in the Citibank case; it might
18 have been Citicorp; there are many of them;
19 they're not hard to find--the delay in seeking a
20 provisional remedy is affirmative evidence of a
21 lack of irreparable harm.

22 And what it shows is what the reality
23 is here. The reality is that nothing is happening
24 until there is an order submitted, a proposed
25 order to the judge, even on the cameras, because

1 there have to be details filled in. And when that
2 happens, if the City has a problem with that
3 order, they can seek a stay from the Court so
4 they can seek relief here, if--and that's
5 assuming that there's already been--hasn't been a
6 decision on appeal.

7 What you're considering is whether to
8 issue a stay between now and a decision on the
9 appeal, nothing more. I submit that there's going
10 to be a decision on this appeal way before any
11 order that gets implemented.

12 And even if there is such an order, the
13 City will have an opportunity, in the way that
14 everybody's discussed today. Two days, they can
15 come up and say, "Here is why the camera order,
16 or the nature of the language in the [UNINTEL]
17 message, is objectionable and contrary to law,
18 and we need assistance from the Court of
19 Appeals." Nothing this judge has done is going to
20 go unreviewed here, not one thing.

21 JUDGE BARRINGTON D. PARKER: Thanks very
22 much.

23 JUDGE JOSE A. CABRANES: We appreciate
24 your argument very much, and we'll hear from Mr.
25 Siegal from the Office of the Public Advocate.

1 JOHN SIEGAL: Good afternoon, John
2 Siegal, Baker and Hostetler, representing the
3 Office of the Public Advocate for the City of New
4 York. A great deal has been said. I don't want to
5 belabor any of that [UNINTEL]. The Public
6 Advocate appreciates the invitation for us to
7 appear here and has asked us to address a couple
8 of the practical considerations in this case from
9 a forward-looking perspective.

10 JUDGE JOSE A. CABRANES: Now, let me be
11 clear. I'm not sure there was an invitation
12 [UNINTEL] on the Court. But we're happy to hear
13 from you.

14 JOHN SIEGAL: Well, amicus were invited
15 to appear, and we--

16 JUDGE JOSE A. CABRANES: Absolutely.
17 We're an open system.

18 JOHN SIEGAL: Two procedural issues
19 here: the monitor and what the monitor's going to
20 do in the near future, and the appeal and what
21 the disposition of the appeal will be. We agree
22 with something that the City said and Ms.
23 Koeleveld said: the legal process continues
24 regardless of the political process. So, what's
25 going to happen over the next 63 days and over

1 the four to five months before this appeal is
2 briefed?

3 There is, as Judge Walker indicated at
4 the beginning, a [DEFAULT?] of remedial actions
5 pending further process. That process is the
6 monitor. The monitorship process, in the view of
7 the Public Advocate, is essential to changing the
8 policies and practices of the NYPD that are at
9 issue in this case.

10 JUDGE JOSE A. CABRANES: The Public
11 Advocate is dying to have the police department
12 that the Public Advocate may ultimately be
13 responsible for--he is dying to have the police
14 department run from the United States District
15 Court for the Southern District of New York?

16 JOHN SIEGAL: No, absolutely not. This
17 is a temporary monitorship to facilitate a
18 specific series of reforms that are needed.

19 JUDGE JOSE A. CABRANES: How temporary?
20 I'm not trying to put you on the spot; I
21 understand there's an election going on and I
22 don't want--

23 JOHN SIEGAL: There are--

24 JUDGE JOSE A. CABRANES: [UNINTEL]

25 JOHN SIEGAL: There are two durational

1 aspects of the remedies order. One, a six- to
2 nine-month facilitator process; and two, a one-
3 year camera pilot program. What we'd like to see
4 is for that process to begin instantly so that
5 the monitor can get in, make the recommendations,
6 the Court can issue its further order, the police
7 department can implement it, the monitor can get
8 out, and the City can put this problem behind it.

9 It's a process that's in the public
10 interest regardless of what happens on the
11 appeal. And, interestingly, the City, in their
12 papers, they attack the decision, they attack a
13 lot of things, but there's nothing in the police
14 department declaration submitted in support of
15 the same motion that in any way states that the
16 monitor and the monitorship process will
17 interfere in the commissioner's discretionary
18 ability to run the department or the chief of
19 patrol's ability to command the patrol force.

20 We don't see them--

21 JUDGE JOSE A. CABRANES: The District--

22 JOHN SIEGAL: As saying that the
23 monitorship process itself is [UNINTEL].

24 JUDGE JOSE A. CABRANES: The District
25 Court did respond publicly, did it not?

1 JOHN SIEGAL: I'm sorry?

2 JUDGE JOSE A. CABRANES: The District
3 Court responded publicly in the press, in some
4 interview, indicating that the criticism was a
5 low blow.

6 JOHN SIEGAL: I can't speak to what the
7 District Court said in the press or not. I can
8 speak to what the District Court said in the
9 remedial order and the liability finding, and the
10 reasons that the Public Advocate has asked us to
11 come here and ask that this process go forward.

12 Now, what's going to happen on the
13 appeal? The City's last submission in support of
14 an appeal is not--

15 JUDGE BARRINGTON D. PARKER: You have no
16 idea whether a future mayor's position on these
17 topics is going to be conterminous with the
18 current position of the Public Advocate?

19 JOHN SIEGAL: What we know is this: the
20 appeal will not be completed by the City until
21 significantly into the term of the next mayor.
22 The next mayor and the next administration will
23 have a forced choice about what to do with this
24 appeal.

25 JUDGE JOSE A. CABRANES: Unless we alter

1 the--we telescope the briefing schedule to make
2 it ripe for decision before January 1.

3 JOHN SIEGAL: That's correct. But then,
4 with the current schedule, it's certainly
5 premature to talk about procedural options, and
6 presumptuous.

7 JUDGE JOSE A. CABRANES: [UNINTEL
8 PHRASE]

9 JOHN SIEGAL: But how this appeal is
10 going to be handled under the current schedule
11 will be determined by the next administration.
12 And that's an additional reason that no stay is
13 required at this point. Thank you.

14 JUDGE JOSE A. CABRANES: Thanks very
15 much. It's been a long day, and we actually begin
16 our court day at about 2:00. We haven't begun our
17 court day. So, we want to move quickly and close
18 this up. Ms. Koeleveld has three minutes. Mr.
19 Engel has one minute. And Mr. Connolly has one
20 minute. And we'll limit it to those times.

21 CELESTE KOELEVELD: Thank you, Your
22 Honor. One thing that I did not hear from any of
23 the people representing the plaintiffs and their
24 amici is the harm to them from the Court granting
25 a stay, nothing about that.

1 JUDGE BARRINGTON D. PARKER: Let me--
2 the--this has been adverted to, but has the
3 federal government--has the Department of Justice
4 weighed in on this litigation?

5 CELESTE KOELEVELD: No, Your Honor, no.
6 They have not weighed in, except to say that, if
7 the District judge were to find liability, they
8 think that a monitorship is a good idea. And they
9 base--

10 JUDGE BARRINGTON D. PARKER: Did they
11 say why?

12 CELESTE KOELEVELD: They based that on
13 their experience. They submitted facts about
14 their own experiences with monitorships over the
15 years. And those are all consent degree
16 situations where the Department of Justice came
17 in, made allegations, and the city or the entity
18 at issue then entered into a consent decree to
19 work with the Department of Justice to try to
20 remedy the situation.

21 That situation is very different from
22 our situation, where we believe that we were
23 accused incorrectly and under incorrect
24 interpretation of the law, was engaging in [THE?]
25 legal practices and procedures. And in response

1 to those accusations, we defended ourselves.

2 And it isn't that we did nothing over
3 the years in response to various concerns about
4 racial profiling or a disproportionality in
5 stops. We entered into a stipulation in response
6 to Daniels and settled that litigation. We
7 enhanced our UF-250 reporting to the city council
8 over the years. We issued and reissued our anti-
9 racial profiling policies. We commissioned a
10 [UNINTEL] study of our stopping practices in
11 2007, and they came back with the conclusion that
12 we do not engage in racial profiling.

13 So, it isn't as if we have been
14 deliberately indifferent or acting in bad faith
15 by any stretch of the imagination. So, I would
16 suggest that the situation is very different from
17 what has been posited by the plaintiffs and the
18 amici.

19 JUDGE JOSE A. CABRANES: In response to
20 Judge Walker, Mr. Charney gave us one example of
21 what he thought was inappropriate racial
22 profiling by Commissioner Kelly. We didn't give
23 him a chance to tell us the other two. But I
24 wonder whether you could at least address that
25 whole question of whether there's a stated or

1 articulated policy of a kind that might lead a
2 hearer to think that the police commissioner or
3 the department was acting in bad faith.

4 CELESTE KOELEVELD: Well, in our
5 opinion, Your Honor, that statement by
6 Commissioner Kelly was wrenched out of context.
7 It actually was refuted. He purportedly--he made
8 the same remarks at a different event, and the--
9 we had a witness who interpreted those remarks
10 quite differently.

11 But in any event, there is simply no
12 evidence of race-based stops to instill fear in
13 this case. And that's the issue, right, is: what
14 does the evidence show? So, this idea that there
15 are race-based stops being made at a rampant rate
16 to instill fear in minorities and for no other
17 reason is just not supported.

18 What is supported is that the Police
19 Department uses crime suspect data in real time
20 to decide where to deploy its resources. And Mr.
21 Charney says he doesn't object to deployment
22 decisions. That's what the department is doing.
23 It's a deployment decision based on crime suspect
24 data--in other words, reported by victims who
25 say, "I am the victim of a crime and this is my

1 description of the suspect."

2 JUDGE JOSE A. CABRANES: Let me ask you
3 a question which is not directly relevant, but it
4 [UNINTEL] in the record. What is the current
5 racial and ethnic composition of the New York
6 Police Department?

7 CELESTE KOELEVELD: Your Honor, the
8 department is majority minority. That's the
9 current composition.

10 JUDGE JOSE A. CABRANES: So, more than
11 50 percent are members of discrete [UNINTEL]
12 minorities?

13 CELESTE KOELEVELD: That's correct, Your
14 Honor. It is--

15 JUDGE BARRINGTON D. PARKER: That's too
16 broad. Can you be more specific?

17 JUDGE JOSE A. CABRANES: yeah.

18 CELESTE KOELEVELD: Can I be more
19 specific as to what the breakdown is of--

20 JUDGE BARRINGTON D. PARKER: Yeah.

21 JUDGE JOSE A. CABRANES: Well, Latinos
22 and--

23 JUDGE BARRINGTON D. PARKER: Blacks,
24 Latinos, Asians.

25 JUDGE JOSE A. CABRANES: African

1 Americans.

2 CELESTE KOELEVELD: I don't have those
3 statistics handy, but I can certainly provide
4 them to the Court in a letter afterwards if you
5 would like those statistics. I do know that it's
6 over 51 percent that are various minority groups.
7 I would assume that blacks and Hispanics make up
8 some majority of that minority, but the
9 department prides itself on having a very diverse
10 group of officers on [UNINTEL].

11 JUDGE JOSE A. CABRANES: I have some
12 data that indicates that there are 28.7 percent
13 Hispanic, 17.9 percent black, which would give us
14 46.6 without counting other minorities. But I'm
15 sure you can just send us that, or identify where
16 in the record all of this may be.

17 CELESTE KOELEVELD: There is testimony
18 that--

19 JUDGE JOSE A. CABRANES: Is my data more
20 or less right? Does it sound right?

21 CELESTE KOELEVELD: That sounds right,
22 Your Honor.

23 JUDGE BARRINGTON D. PARKER: Is there a
24 website or something that we can--

25 CELESTE KOELEVELD: I'm sorry?

1 JUDGE BARRINGTON D. PARKER: Is this
2 public--is this--does the NYPD have a website
3 where this information is readily available?

4 CELESTE KOELEVELD: I think it would be
5 readily available. I don't know, Your Honor. And
6 I'm sorry I don't have that information.

7 JUDGE JOSE A. CABRANES: [UNINTEL
8 PHRASE]

9 CELESTE KOELEVELD: I can certainly work
10 on that project.

11 JUDGE BARRINGTON D. PARKER: Give us a
12 letter.

13 CELESTE KOELEVELD: I'm sorry?

14 JUDGE BARRINGTON D. PARKER: Just give
15 us a letter.

16 JUDGE JOSE A. CABRANES: Yeah.

17 CELESTE KOELEVELD: I certainly will,
18 Your Honors.

19 JUDGE JOSE A. CABRANES: Yeah, with a
20 response the day after that letter arrives
21 [UNINTEL]. One minute for Mr. Engel and one
22 minute for Mr. Connolly. Thank you very much, Ms.
23 Koeleveld.

24 CELESTE KOELEVELD: Thank you very much,
25 Your Honors.

1 STEVEN A. ENGEL: Thank you, Your Honor.

2 I think it's evident here that police officers
3 are concerned by the District Court's decision,
4 and that it blinks reality to think that the 39-
5 page remedies opinion did not say where all this
6 is going and have very specific requirements on
7 the department. Likewise, the liability decision
8 makes clear that existing practices are
9 inadequate, and it's having a--it has had a real
10 chill on proactive police contact.

11 [UNINTEL] other point that--

12 JUDGE JOHN M. WALKER, JR.: [UNINTEL]
13 the real question is: is the chill based upon
14 what has been said in the liability opinion
15 sufficient where the remedy--many aspects of the
16 remedy have yet to occur?

17 STEVEN A. ENGEL: I think that the
18 remedy is clear. It's--where it's going is not
19 discretionary. The fact that the District Court
20 did not--this is not a prison library case. This
21 is not about what books should be in the prison
22 library and what lawyers should have access to
23 the prison library. This is the New York City
24 Police Department, 35,000 uniformed officers,
25 eight million people in the City of New York.

1 The District Court has told everyone
2 where she's going. Arguably, she's [UNINTEL]
3 people predicted this beforehand. But, be that as
4 it may, you know, his is having a real impact.
5 And the notion that we should all come back three
6 weeks from now or three months from now and have
7 this hearing again when the order--the remedies
8 opinion has been confirmed by a subsequent order
9 is certainly not required as a matter of
10 appellate jurisdiction or the like.

11 If I may just make one point--

12 JUDGE JOSE A. CABRANES: Quick.

13 STEVEN A. ENGEL: We've heard very
14 little here from Mr. Charney and from the Floyd
15 plaintiffs defending the actual, factual findings
16 that the District Court made here. We have heard
17 no--we've had very little explaining how UF-250
18 forms, these individual checkboxes, can reliably
19 be used to determine the constitutionality or
20 lack thereof of a single search, much less
21 200,000.

22 We've also heard very little about the
23 notion of the racial benchmarks, which, according
24 to the judge's order, would apparently suggest
25 that the NYPD should be stopping people in

1 proportion to the general demographics of the
2 population where they are, and not just without
3 regard to race but without regard to gender and
4 to age, which I think is demonstrably erroneous.
5 Thank you, Your Honor.

6 JUDGE JOSE A. CABRANES: Thanks very
7 much. We'll hear from Mr. Connolly for former
8 Mayor Giuliani and former [UNINTEL PHRASE]. One
9 minute.

10 DANIEL S. CONNOLLY: Thank you, Your
11 Honor. I'll be very brief. I think two critical
12 points. Number one: make no mistake about it, the
13 United States District Court, Judge Scheindlin,
14 has ordered that the NYPD of the City of New
15 York, under [UNINTEL] liability, engages in
16 unconstitutional activity in the performance of
17 its duties. That mandates, no matter how much
18 lawyering is going on here, that absolutely
19 mandates action.

20 They proceed the same way they normally
21 do at their own peril. Whether it's through
22 Section 1983 or contempt or court, there is a
23 final order here determining that the NYPD and
24 its officers and the City of New York have
25 engaged in unconstitutional activity. Make no

1 mistake about it.

2 And, to Judge Parker's question, who's
3 running the NYPD? The tie goes to Judge
4 Scheindlin as it relates to a critical function
5 of the NYPD. And make no question about that.
6 Based upon this current set of circumstances,
7 Judge Scheindlin has control over this aspect of
8 the NYPD.

9 And that, back to Judge Walker's
10 position, that is where the harm comes. That is
11 where the confusion and the uncertainty and
12 police officers are not going to know how to act.
13 And, as a result, they won't act. And every
14 citizen in this city is harmed every single day
15 by that.

16 JUDGE JOSE A. CABRANES: Thank you. Now,
17 let me just say our regular court day is supposed
18 to begin at 2:00. We'll make that at 2:30. I want
19 to thank all counsels, who have been excellent in
20 all respects. We have very much appreciated your
21 argument, which is rather longer than we usually
22 have. Thank you. We're in recess.

23

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13 Sonya Ledanski Hyde
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