UNITED STATES COURT OF APPEALS
for the
SECOND CIRCUIT

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In re Re-Assignment of Cases

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In re Motion of District Judge

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David Floyd,
Plaintiffs-Appellees 13-3088
v.

City of New York,
Defendants-Appellants

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Jaenean Ligon, et al.,
Plaintiffs-Appellees 13-3123
v. (Corrected)

City of New York, et al.,
Defendants-Appellants

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Joint Supplemental Submission in Connection With
Pending Requests for En Banc Reconsideration of Motion Panel's
Decision and Order, dated November 13, 2013

The undersigned are: (a) six retired United States District Judges and thirteen Professors of Legal Ethics who have filed a brief *amici curiae* in support of appellees' pending motion for rehearing en banc; and (b) five members of the

bar of the Second Circuit Court of Appeals who seek leave to appear as counsel for the District Judge, or as *amici curiae* on her behalf.

In light of the Motion Panel's November 22, 2013 per curiam opinion and order, a copy of which is annexed hereto, both sets of *amici* jointly submit this statement supplementing their pending requests for en banc reconsideration of the Motion Panel's opinion and order dated November 13, 2013.

On November 18, 2013, six retired Federal District Judges and thirteen Professors of Legal Ethics filed a brief *amici curiae* in support of appellees' motion for en banc reconsideration of the Motion Panel's November 13, 2013 order and opinion.

On November 18, 2013, the five undersigned members of the bar of the Second Circuit moved pursuant to Rule 35 Fed. R. App. P. for en banc reconsideration of the amended order and decision of the Motion Panel herein, dated November 13, 2013, denying the undersigned leave to appear as counsel for the District Judge, or as *amici curiae* on her behalf, in order to present objections to the *sua sponte* order of the Motion Panel directing removal of the District Judge in *David Floyd v. City of New York* (13-3088), and *Jaenean Ligon, et al. v. City of New York et al.* (13-3123).

Among the issues raised by *amici* was whether the Motion Panel had access to a formal transcript of a December 21, 2007 colloquy between counsel and the

District Judge in *Daniels v. City of New York*, an earlier case challenging NYPD's stop and frisk practices, when the Panel issued its first opinion and order on October 31, 2013 directing removal of the District Judge, in large part because of comments she made during the colloquy.

*Amici* noted that the October 31, 2013 order and opinion cited to a newspaper article purporting to describe the colloquy, rather than the transcript itself. On November 22, 2013, the Motion Panel issued a per curiam order and opinion supplementing its November 13, 2013 order and opinion stating that the Panel was, in fact, in possession of a transcript of the colloquy at the October 29, 2013 oral argument. The Motion Panel noted that members of the Panel had referred to the *Daniels* colloquy during oral argument, and had referenced and quoted from it in its October 31, 2013 opinion, albeit without citing to the transcript itself.

1. In view of the supplemental information in the Panel's November 22, 2013 order and opinion, *amici* withdraw any suggestion that the Panel acted on October 31, 2013 without having access to a transcript of the colloquy in question.
2. Unfortunately, however, the Panel's assurance that it was in possession of a transcript of the crucial colloquy at oral argument on October 29,

2013, illustrates the procedural unfairness of acting *sua sponte* to remove a District Judge pursuant to 28 U.S.C.§2106, with no process whatever.

3. Despite the critical role the colloquy would come to play in the removal process, the appellees in *Floyd* and *Ligon* did not possess a transcript of the *Daniels* colloquy at oral argument, and had no notice that the Motion Panel would find a six-year old colloquy in an earlier case relevant to a motion for a stay pending appeal in *Floyd* and *Ligon*.
4. The documents constituting the record before the Motion Panel did not contain a transcript of the colloquy, nor did the City raise its relevance in briefing or oral argument concerning the motion for a stay.
5. The colloquy in question occurred almost six years ago in *Daniels v. City of New York.* The records of the Southern District Court Reporters indicate that a copy of the transcript was ordered by the City of New York on December 26, 2007. Because the transcript was never docketed, it was not made part of the record in *Daniels*, and was not publicly available.
6. Upon information and belief, the City of New York, which was under no legal duty to do so, did not make a copy of the transcript available to plaintiffs in *Daniels*, *Floyd*, or *Ligon*.

7. The records of the Southern District Court Reporter further indicate that no other order for the transcript was placed prior to oral argument on October 29, 2013.
8. Thus, while the Panel obtained a copy of the *Daniels* transcript prior to oral argument, the appellees in *Floyd* and *Ligon* lacked a copy, and had no notice that the *Daniels* transcript might be relevant.
9. When a member of the Motion Panel raised the *Daniels* colloquy *sua sponte* during oral argument, appellees' counsel in both *Floyd* and *Ligon*, lacking a transcript of their own, and presumably having relied on the City's briefing to define the relevant issues before the Motion Panel, were taken completely by surprise by the Panel's questions.
10. Lacking a copy of the transcript, and with no notice of its relevance, it would have been impossible for counsel in *Floyd* and *Ligon* to place the language contained in a six-year old colloquy in another case in context in response to the concerns voiced by the Motion Panel.
11. Nor, given the Motion Panel's refusal to permit *amici* to appear on behalf of the District Judge, has it been possible for the District Judge to inform the Motion Panel of the colloquy's context subsequent to the oral argument.

12. Two days after the oral argument, on October 31, 2013, the Motion Panel relied heavily on quotations culled from the colloquy to make a determination that the District Judge had misapplied Local Rule 13 governing related cases.

13. On November 1, 2013, one day after the Motion Panel's initial ruling, the appellees in *Floyd* ordered a transcript of the *Daniels* colloquy. Appellees made a copy available to Burt Neuborne, counsel of record for five *amici* herein, on November 2, 2013.

14. A review of the entire 42 page transcript has led both sets of *amici* to believe that the Motion Panel, lacking: (a) information concerning the transcript's context: (b) a copy of the settlement agreement in *Daniels;* and (c) any factual information concerning the prevailing application of Local Rule 13 in the Southern District of New York, misunderstood the import of the quoted language.

15. Accordingly, both sets of *amici* have filed requests for en banc reconsideration in order to provide the Court, for the first time in this proceeding, with an explanation of the factual context of the transcript needed to understand the import of the quoted language. The explanation is set forth at paragraphs 8-31of the Neuborne *amici*'s November 18, 2013 motion for en banc reconsideration.

16. *Amici* believe that once the colloquy's context is understood, an observer *in possession of the facts* would not view it as a misapplication of Local Rule 13, or as evidence of a lack of neutrality within the meaning of 28 U.S.C §455(a).

17. This Court clearly possesses the power to utilize the procedural protections afforded by Rule 21(b) (4) F. R. App. P. to assist the judges of this Circuit in making necessary factual determinations in proceedings pursuant to 28 U.S.C § 2106. Cases are legion in which courts imply procedural protections in order to assure accurate fact-finding. And where, as here, the issue arises in connection with consideration of the procedures to be utilized in this Circuit in §2106 reassignment cases involving contested issues of fact, there is no doubt that the Circuit sitting en banc possess the power to adopt appropriate procedural safeguards.

18. The Motion Panel closed its November 22, 2013 per curiam opinion with the following statement:

> "In sum, the Panel was in possession of the relevant facts, including the transcript, when it issued its orders dated October 31, 2013 and November 13, 2013. Any assertion to the contrary is unfounded."

19. With respect, thirty-eight years ago, an iconic judge of this court, Henry J. Friendly, explained that no finder-of-fact can be confident that it is in possession of the relevant facts when it insists upon acting *sua sponte*

with no process whatever, especially where, as here it acts: (a) in reliance on a transcript available only to some of the interested parties; (b) without having provided notice of the transcript's relevance; and (c) without permitting the District Judge an opportunity to explain the colloquy's context.[1]

20. Given the procedural history of this matter, en banc reconsideration is particularly appropriate to assure the existence of procedural norms of fairness and accuracy governing an important aspect of this Circuit's relationship with District Court colleagues.

WHEREFORE, *amici* jointly renew their respective requests for en banc reconsideration of the Motion Panel's November 13, 2013 opinion and order ordering removal of the District Judge without providing her any opportunity to explain the context of the colloquy in question, and request that this statement be considered as a supplement to the materials

[1] Henry J. Friendly, *Some Kind of Hearing,* 123 U. Pa. L. Rev. 1267 (1975)

filed herein seeking en banc reconsideration of the Motion Panel's order and decision dated November 13, 2013.

Dated: New York, New York
November 25, 2013

Respectfully submitted,

Burt Neuborne

s/ burt neuborne
_____
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13-3123; 13-3088
Ligon; Floyd v. City of New York

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

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August Term, 2013

(Decided: November 22, 2013)

Docket Nos. 13-3123-cv, 13-3088-cv

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Jaenean Ligon, et al.,
*Plaintiffs-Appellants,*

- v. -

City of New York, et al.,
*Defendants-Appellees.*

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David Floyd, et al.,
*Plaintiffs-Appellees,*

- v. -

City of New York,
*Defendant-Appellant*,

Sergeants Benevolent Association,
*Proposed Intervenor-Appellant,*

New York City Police Officer
Rodriguez, in his official capacity, et al.,
*Defendants*.

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Before: WALKER, CABRANES, AND PARKER, *Circuit Judges*

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Alex B. Karteron, Christopher Thomas Dunn, Daniel Mullkoff, New York Civil Liberties Union, New York, NY; Juan Cartagena, Roberto Concepcion, Jr., Latino Justice, New York, NY; Michael Grunfel, John A. Nathanson, Jeffrey J. Resetarits, Sherman & Stearling LLP, New York, NY; Mariana Louise Kovel,

The Bronx Defenders, New York, NY; J. McGregor Smyth, New York Lawyers for the Public Interest, New York NY, *for Jaenean Ligon, et al.*

Darius Charney, Sunita Patel, Center for Constitutional Rights, New York, NY; Jennifer Rolnick Borchetta, Jonathan Clifford Moore, Beldock Levine & Hoffman LLP, New York, NY; Eric Hellerman, Kasey Lynn Martini, Covington & Burling LLP, New York, NY, *for David Floyd, et al.*

Celeste L. Koeleveld, Deborah A. Brenner, Michael A. Cardozo, Kathy H. Chang, Heidi Grossman, Fay Sue Ng, New York City Law Department, New York, NY, *for City of New York, et al.*

Anthony P. Coles, Courtney Gilligan Saleski, DLA Piper, Philadelphia, PA, New York, NY, *for Sergeants Benevolent Association*.

Burt Neuborne, New York, NY, *for Shira A. Scheindlin*.

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PER CURIAM:

Pending before the Court are four motions. The first two, filed by Appellant City of New York (the "City"), seek "modifi[cation] of the Stay Order dated October 31, 2013 to the extent of vacating" the orders of the District Court dated February 14, 2013 and August 12, 2013. *Ligon v. City of New York*, No. 13-3123, Dkt. 190; *Floyd v. City of New York*, No. 13-3088, Dkt. 265.

The City's motions, filed on November 9, 2013, were submitted without the benefit of the legal analysis provided by the Court's two opinions of November 13, 2013, *In re Motion of District Judge*, --- F.3d ----, Nos. 13-3123, 13-3088 (2d Cir. Nov. 13, 2013), and *In re Reassignment of Cases*, --- F.3d ----, Nos. 13-3123, 13-3088 (2d Cir. Nov. 13, 2013), which superseded the Court's order of October 31, 2013, and therefore, we **DENY** the City's motions, without prejudice to consideration as part of the appeal on the merits, or any application to us for a return of the cases to the District Court for the purpose of exploring a resolution.

The third and fourth motions were filed on November 13, 2013, by Burt Neuborne, who had previously sought leave to appear as counsel for Judge Scheindlin or as *amicus curiae* on her behalf, *see Floyd v. City of New York*, No. 13-3088, Dkt. 263; *Ligon v. City of New York*, No. 13-3123, Dkt. 187. These two motions request leave to move for, among other things, an order denying on the merits the City's motions to vacate. *See* Request for Leave to Submit Response to Motion Filed by City of New York to Vacate ("*Ligon* Mot."), No. 13-3123, Dkt. 207; Request for Leave to Submit Response to Motion Filed by City of New York to Vacate ("*Floyd* Mot."), No. 13-3088, Dkt. 299.

In one of the Court's *per curiam* opinions of November 13, 2013, *In re Motion of District Judge*, we denied Judge Scheindlin's request to appear in this Court as lacking a procedural basis, and we need not revisit that issue. We now **DENY** these additional motions of Judge Scheindlin, which seek leave to oppose the City's motions, both for the reasons we stated earlier, *see In re Motion of District Judge*, --- F.3d ----, Nos. 13-3123, 13-3088 (2d Cir. Nov. 13, 2013), and because they are moot in light of our denial of the City's motions that she seeks to oppose.

We are, however, prompted to address several characterizations of fact contained in Mr. Neuborne's submissions to the Court. In one of these motions, he asserts that "[i]t now appears that the Motion Panel did not have access to the [December 21, 2007] transcript" of proceedings in *Daniels v. City of New York*, No. 99-1695, when it considered and entered its October 31, 2013 order, because "[u]pon information and belief, the transcript was not part of the record in the *Daniels* case." *Ligon* Mot. ¶ 13. The motion further alleges that "[i]n the absence of the actual transcript, the Motion Panel relied [on] an inaccurate press report of the colloquy as the principal basis for its *sua sponte* decision to order the prospective removal of the District Judge."

*Id*. ¶ 14. In his other motion, Mr. Neuborne reiterates his contention that "it is unclear whether the Motion Panel had access to an actual transcript of the colloquy." *Floyd* Mot. ¶ 14.

These assertions have been echoed by other movants in this case. *See, e.g.*, Br. of *Amici Curiae* Six Retired United States District Court Judges and Thirteen Professors of Legal Ethics, *Ligon v. City of New York*, No. 13-3123, Dkt. 221, *Floyd v. City of New York*, No. 13-3088, Dkt. 313, at 14 ("[I]n describing the colloquy with counsel concerning the related case doctrine on which the Panel's ruling rested, the Court relied on an inaccurate press account. *Amici* understand that the colloquy was not available to the Panel at the time it ruled on October 31, 2013.").

A review of the record of the Court of Appeals, and of the October 29, 2013 extended oral argument in these cases, will reveal that the panel members had the transcript of the December 21, 2007 proceeding in front of them during the hearing, and that they asked questions in open court regarding its substance. For example, during the oral argument, one member of the panel twice referred to the proceedings in detail, and clearly noted that he was quoting from page 42 of the December 21, 2007 transcript. Our October 31, 2013 order specifically cited the transcript by caption, docket number, and date, and it included quotations that had not been reported in the *New York Times* article that was cited, or in any other public news report known to the panel.

In sum, the panel was in full possession of the relevant facts, including the transcript of December 21, 2007, when it issued its orders of October 31, 2013, and November 13, 2013. Any suggestion to the contrary is unfounded.

## CONCLUSION

For the foregoing reasons, we **DENY** the motions of appellant City of New York, seeking to modify the Court's stay order of October 31, 2013 to include vacatur of the District Court's February 14, 2013 order in *Ligon v. City of New York*, 925 F. Supp. 2d 478 (S.D.N.Y. 2013), and August 12, 2013 orders in *Floyd v. City of New York*, --- F. Supp. 2d ----, No. 08-cv-1034, 2013 WL 4046209 (S.D.N.Y. Aug. 12, 2013); --- F. Supp. 2d ----, No. 08-cv-1034, 2013 WL 4046217 (S.D.N.Y. Aug. 12, 2013) without prejudice (as indicated above). We also **DENY** the November 13, 2013 motions by counsel for Judge Scheindlin to appear in order to oppose the City's motions for modification, for the reasons stated in *In re Motion of District Judge*, --- F.3d ----, Nos. 13-3123, 13-3088 (2d Cir. Nov. 13, 2013), and, because in any event, they are moot.