IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAVID FLOYD, et al.,	:	
Plaintiffs/Appellees,	:	Docket No. 13-3088
-against-	:	
CITY OF NEW YORK, et al.,	:	
Defendants/Appellants.	:	

OMNIBUS MEMORANDUM OF LAW OF SERGEANTS BENEVOLENT ASSOCATION IN OPPOSITION TO THE DISTRICT JUDGE'S REQUEST FOR LEAVE TO FILE MOTION AND THE MOTION OF PLAINTIFFS-APPELLEES FOR RECONSIDERATION BY THE *EN BANC* COURT

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Proposed Intervenor/Appellant the Sergeants Benevolent Association (the "SBA") submits this omnibus memorandum of law in opposition to both the Request for Leave of the Honorable Shira A. Scheindlin (the "District Judge") to file Motion to Address Order of Disqualification, and to the Motion of Plaintiffs-Appellees for Reconsideration by the *En Banc* Court of the October 31, 2013 Mandate.

I. INTRODUCTION

In its Corrected Mandate dated October 31, 2013 (the "Mandate"), this Court correctly found that the District Court "ran afoul of the Code of Conduct for United States Judges" and properly exercised its authority to reassign the case to a different district judge. The Plaintiffs-Appellees and the District Judge fail to provide any persuasive reason to vacate the decision or reconsider it *en banc*.

First, Plaintiffs-Appellees' request for reconsideration of this Court's Mandate by the court sitting *en banc* should be denied. Plaintiffs-Appellees' arguments that this Court lacked jurisdiction over both district-court opinions dated August 12, 2013 (the "Liability Opinion" and the "Remedies Opinion") and that the disqualification and reassignment were without authority are meritless.

Second, the District Judge's request for leave—which relies on inapplicable Federal Rules of Appellate Procedure and seeks to create a due process right where none exists—is procedurally improper and unsupported by any authority. The

Mandate, which directed the removal of the District Judge as the presiding judge in both *Floyd, et al. v. City of New York, et al.* (No. 13-3088) and *Ligon, et al. v. City of New York, et al.* (No. 13-3123), was not a decision on any party's petition for mandamus and, therefore, it does not implicate any of the provisions of Federal Rule of Appellate Procedure 21. Moreover, Rule 21 does not provide a judge with any right to participate in an appellate court's determination of a party's mandamus petition, nor does it create any "due process" right for judges found to have engaged in judicial misconduct. Simply put, the District Judge's request has no legitimate basis, and it should be denied.

II. ARGUMENT

A. This Court was Correct to Remove the District Judge.

"Any justice, judge, or magistrate judge of the United States *shall* disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a) (emphasis added). This Court correctly determined that the District Judge "ran afoul of the Code of Conduct for United States Judges" and that "the appearance of impartiality surrounding this litigation was compromised by the District Judge's improper application of the Court's 'related case rule,'" and by a "series of media interviews." (Corrected Mandate at 1-2.) Thus, disqualification under § 455(a) was warranted. The Court then properly exercised its authority, under 28 U.S.C. § 2106, to reassign a case to a

different district court judge on remand. *See Liteky v. U.S.*, 510 U.S. 540, 554 (1994) ("Federal appellate courts' ability to assign a case to a different judge on remand rests not on the recusal statutes alone, but on the appellate courts' statutory power to 'require such further proceedings to be had as may be just under the circumstances[.]'") (quoting 28 U.S.C.A. § 2106); *see also U.S. v. Toohey*, 448 F.3d 542, 546 (2d Cir. 2006) ("Although we ordinarily remand for resentencing to the same district judge who conducted the initial sentencing proceedings . . . due to the circumstances presented in this case, we conclude that it is necessary that the matter be reassigned on remand to another district judge for resentencing.").

Moreover, the right to trial by an impartial judge "is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). "To fulfill this requirement—and to avoid both bias and the appearance of bias—this court has supervisory authority to order cases reassigned to another district court judge." *Haines v. Liggett Grp. Inc.*, 975 F.2d 81, 98 (3d Cir. 1992), *cited in In re Int'l Bus. Machines Corp.*, 45 F.3d 641, 645 (2d Cir. 1995). Under all of the above principles, this Court correctly removed the District Judge, and it should not grant Plaintiffs-Appellees' request for rehearing *en banc* on the issue.

Canon 2 of the Code of Conduct for United States Judges provides that "a judge should avoid impropriety and the appearance of impropriety in all activities." *See also* Canon 3(C)(1) ("A judge shall disqualify himself or herself in a

proceeding in which the judge's impartiality might reasonably be questioned[.]"). And, in addition, Canon 3(A)(6) of the Code of Conduct for United States Judges instructs that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." The District Judge ran afoul of these canons.

First, the District Judge's misapplication of the related case rule to assign *Floyd*, at a minimum, created a strong appearance of impropriety. By making comments in proceedings in another matter suggesting that the attorneys could initiate a new case and mark it as related, the District Judge actually prompted a violation of the related case rule, which requires (among other things) that cases marked as related both be "pending" at the same time. *See* Southern District Rules for the Division of Business Among Judges, Rule 13(c) (directing that "[a] case designated as related shall be forwarded to the judge before whom the earlier-filed case *is then pending*") (emphasis added). The earlier case in which the District Judge made those comments was no longer pending when *Floyd* was filed. Courts have recognized that such manipulation of the procedure by which cases are assigned to judges is a troubling matter that can damage both the actual and perceived partiality of the court—potentially at great cost to a party. *See, e.g.*, *Cruz v. Abbate*, 812 F.2d 571, 574 (9th Cir. 1987) (noting that "[w]hile a defendant has no right to any particular procedure for the selection of the judge . . . he is entitled to have that decision made in a manner free from bias or the desire to

influence the outcome of the proceedings," and that courts "must take great pains to avoid any inference that assignments are being made for an improper purpose," because "[t]he suggestion that the case assignment process is being manipulated for motives other than the efficient administration of justice casts a very long shadow").

Second, the media interviews and public statements made by the District Judge both during and after the *Floyd* trial likewise created, at a minimum, an appearance of impropriety that was sufficient to warrant her removal from the case. Even to the extent that the comments the District Judge made are subject to reasonable differences in interpretation, they must be evaluated "in the context in which they were issued." *In re Boston's Children First*, 244 F.3d 164, 168 (1st Cir. 2001). The context of the remarks only serves to highlight their impropriety.

In the District Judge's comments, which appeared in news stories specifically addressed to the stop-and-frisk litigation pending before her, the District Judge described herself as "not afraid to rule against the government." *See* Jeffrey Toobin, *A Judge Takes on Stop-and-Frisk*, The New Yorker, May 27, 2013, Declaration of Courtney G. Saleski, Ex. A. The District Judge also responded publicly to a study regarding her rulings, which showed that she had ruled against law enforcement in 60% of the cases in which she had published a written decision—double the rate of the next-highest judge on the list, whose percentage

was 30%. *See* Larry Neumeister, *NY "Frisk" Judge Calls Criticism "Below-the-Belt,"* The Associated Press, May 19, 2013, Declaration of Courtney G. Saleski, Ex. B. The District Judge called that challenge to her impartiality a "below-the-belt attack." *Id.*; *see also* Mark Hamblett, *Stop-and-Frisk Judge Relishes her Independence*, N.Y. Law Journal, May 5, 2013, Declaration of Courtney G. Saleski, Ex. C.

Public reactions of this nature are not permitted and are not justified by references to perceived "attacks." *See, e.g.*, *In re Boston's Children First*, 244 F.3d at 170 ("The fact that [the district judge's] comments were made in response to what could be characterized as an attack by counsel on the procedures of her court did not justify any comment by [the district judge] beyond an explanation of those procedures."). A reasonable person could perceive such remarks as "creating an appearance of partiality." *Id.* at 171. Moreover, comments like the District Judge's, in the midst of a highly publicized case involving a matter of great national concern, as well as recent public statements in response to the Mandate, are similar to public comments that other courts have found sufficient to require removal of judges pursuant to 28 U.S.C. §455(a). *See, e.g., U.S. v. Microsoft Corp.*, 253 F.3d 34, 112-14 (D.C. Cir. 2001); *In re IBM Corp.*, 45 F.3d at 645-46; *U.S. v. Cooley*, 1 F.3d 985, 992-96 (10th Cir. 1993).

In short, ample authority and factual support exist for this Court's decision to remove the District Judge from these proceedings. Reconsideration, reversal, and further briefing on the issue are all unwarranted remedies in the circumstances.

B. This Court had Jurisdiction to Remove the District Judge.

Plaintiffs-Appellees are wrong to assert that this Court lacked jurisdiction over this matter when it directed the removal of the District Judge. The effect of the City's appeal of the Liability Opinion, a final order, was to divest the district court of jurisdiction over all matters addressed in that opinion and vest this Court with exclusive jurisdiction. *See Negron v. United States*, 394 F. App'x 788, 792 (2d Cir. 2010) (noting that "[t]he filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal") (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, (1982)) (internal quotation marks omitted).

And, as to the Remedies Opinion, while an order requiring a party only to submit a remedial plan, without more, may not be appealable in some circumstances (and thus the appellate court may lack jurisdiction over the case), there are "two situations in which the normally non-appealable order to submit a plan may be appealable: when the order contains other injunctive relief, or when

the content of the plan to be submitted has already been substantially prescribed by the district court." *Spates v. Manson*, 619 F.2d 204, 209 (2d Cir. 1980).

Both circumstances exist here. First, the Remedies Opinion mandates "Immediate Reforms," and it directs the City to take certain immediate steps, including reforming the NYPD's policies and training regarding stop and frisk practices. The Remedies Opinion's direction requiring the NYPD to institute reforms constitutes an injunction appealable under 28 U.S.C. § 1292(a)(1) because it requires the City to do more than submit a plan.

Second, the "content of the plan to be submitted has already been substantially prescribed by the district court." *Spates*, 619 F.2d at 209. The Remedies Order mandates the inclusion of specific components as part of the "Immediate Reforms" to be "developed" by the Monitor in collaboration with the parties.

Because this Court has properly exercised jurisdiction over this appeal, it acted within its jurisdiction to remove the District Judge.

C. The District Judge's Request for Leave is Meritless.

In seeking leave, the District Court relies on inapplicable Federal Rules of Appellate Procedure and seeks to create a due process right where none exists. The District Judge's request is procedurally improper and unsupported by any authority.

1. Federal Rule of Appellate Procedure 21 Does Not Apply Here.

The District Judge asks this Court to fashion a completely novel remedy that has no support or precedent, and relies on the facially inapplicable Rule of Appellate Procedure 21. That rule, which applies to writs of mandamus and prohibition and other extraordinary writs filed by a party with a court of appeals—and has no provision allowing filings of petitions by judges—sets forth, among other things, the procedures a court of appeals may follow for directing respondents to submit answers to a petition for an extraordinary writ. It contains one sub-provision that contemplates the participation of a judge to address such a petition. Fed. R. App. P. 21(b). Rule 21(b) reads, in full, as follows:

> (b) Denial; Order Directing Answer; Briefs; Precedence.
>
> (1) The court may deny the petition without an answer. Otherwise, it must order the respondent, if any, to answer within a fixed time.
>
> (2) The clerk must serve the order to respond on all persons directed to respond.
>
> (3) Two or more respondents may answer jointly.
>
> (4) *The court of appeals **may** invite or order the trial-court judge to address the petition* or may invite an amicus curiae to do so. *The trial-court judge may request permission to address the petition **but may not do so unless invited or ordered to do so by the court of appeals***.
>
> (5) If briefing or oral argument is required, the clerk must advise the parties, and when appropriate, the trial-court judge or amicus curiae.

(6) The proceeding must be given preference over ordinary civil cases.

(7) The circuit clerk must send a copy of the final disposition to the trial-court judge.

Id. (emphasis added).

By its terms, Rule 21 does not apply here. No petition for mandamus has been filed. The District Judge has not been invited or ordered to address any petition for mandamus. Finally, and perhaps most importantly, even if there were a mandamus petition pending before this Court, it would remain completely within this Court's discretion to "invite" or "order" the District Judge to address the petition before the Court issued a decision. Even assuming *arguendo* the relevance of this rule, the Court already has decided the issue of the District Judge's conduct below and reasonably chose not to invite the District Judge to address the issue.

Accordingly, no basis exists for the District Judge's request. Contrary to the District Judge's assertion, Rule 21 does not "carefully assure that where a district judge is charged with conduct amounting to judicial misbehavior, the judge will receive notice of the allegations and an opportunity to seek leave to be heard." Dist. Judge's Mot. for Leave ¶ 16. Nowhere does such a concept appear in Rule 21 or in any other procedural rule or case law.[1]

[1] The District Judge asserts that "the practice in this Circuit is to grant a district judge's request to be heard . . . prior to issuing an order [regarding misconduct by the judge]." Dist. Judge's Mot. for Leave ¶ 19. The cases the District Judge cites do not appear to support this proposition. One of them is apparently unpublished, and the District Judge provides no reference to a written

The District Judge's filing effectively attempts to simulate, or invoke by analogy, a scenario in which a party's request for disqualification of a trial-court judge is denied, and then the party applies to an appellate court for a writ of mandamus directing the trial-court judge to recuse herself. Such a procedural posture theoretically would trigger the application of Rule 21(b)(4), which permits this Court to "invite" or "order" the trial-court judge to address the merits of the petition. Again, however, whether to invite such participation by the trial-court judge is wholly within the discretion of the court of appeals and it does not, as the District Judge asserts, amount to "formal protections" extended to a trial-court judge.

2. The District Judge Has No Protectable Right to "Due Process of Law" in This Context.

The District Judge also argues, without citation to any case law, that Rule 38, which addresses sanctions against parties for bringing frivolous appeals, addresses a situation that is "analogous" to this one. Dist. Judge's Mot. for Leave ¶ 24. Because Rule 38 contemplates notice and an opportunity for a party to be heard before the court issues sanctions, the District Judge maintains that the District Judge should have received such due process protections in the form of "notice and an opportunity to defend herself." *Id.* ¶ 25.

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order or disposition that would enable the SBA to evaluate the principle she claims it supports. The other, *In re Austrian, German Holocaust Litig.*, 250 F.3d 156 (2d Cir. 2001), says nothing whatsoever about misconduct or bias by a judge, nor does it in any way support the notion that a judge has any personal rights in mandamus proceedings.

Rule 38 is inapplicable and no rule or other authority gives the District Judge "due process" rights in this context. The District Judge is not a party, the District Judge has not been sanctioned, and this Court was not required either to notify District Judge that it was considering the Judge's misconduct or give the Judge an opportunity to defend it. The District Judge's reliance on Rule 38 is misplaced.

III. CONCLUSION

For all of the above reasons, the SBA respectfully requests that the Court deny the District Judge's Request for Leave to File Motion to Address Order of Disqualification, and deny Plaintiffs-Appellees' Motion for Reconsideration by the *En Banc* Court of the October 31, 2013 Mandate.

Dated: New York, New York.
November 13, 2013

Respectfully submitted,

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