UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DAVID FLOYD, *et al.*,

Plaintiffs-Appellees,

v.

CITY OF NEW YORK, *et al.*,

Defendants-Appellants.

Docket No. 13-3088

BRIEF *AMICI CURIAE* OF MICHAEL B. MUKASEY AND RUDOLPH W. GIULIANI IN SUPPORT OF PROPOSED POLICE INTERVENORS' OPPOSITION TO THE CITY OF NEW YORK'S MOTION FOR REMAND

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Pursuant to Rule 29 of the Federal Rules of Appellate Procedure, Michael B. Mukasey and Rudolph W. Giuliani ("Amici") submit this memorandum, as *amici curiae,* in support of (i) the memorandum of law in opposition to the City of New York's ("City") motion for limited remand ("Remand Motion") filed by the Patrolmen's Benevolent Association of the City of New York, Inc. ("PBA"), the Detectives Endowment Association, Police Department, City of New York, Inc., the Lieutenants Benevolent Association of the City of New York, Inc., and the Captains' Endowment Association of New York, Inc. ("PBA Opposition") and (ii) the opposition of Sergeants Benevolent Association ("SBA") to the Remand Motion ("SBA Opposition"), and respectfully request that the Court deny the Remand Motion.

INTERESTS OF THE *AMICI*

The Amici have served in several of the highest public offices concerned with law enforcement and governance of the City of New York and the United States; they have served as United States Attorney General, Chief Judge of the United States District Court for the Southern District of New York, Mayor of the City of New York, and United States Attorney for the Southern District of New York, among other offices.

In light of their substantial experience across several decades, including significant involvement with the New York City Police Department ("NYPD"), the

Amici are uniquely suited to provide insight into the City's Remand Motion, which in fact seeks to implement the district court's Remedies Opinion and Order, dated August 12, 2013 ("Remedies Order"), and Liability Opinion issued on the same date ("Liability Order") (collectively, "Orders"), and the standing of the PBA, the SBA and other proposed intervenor police associations ("Police Intervenors") to address these issues. The Orders suffer from serious errors of law, all of which were previously and extensively briefed and argued before the Court in the context of the City's motion for a stay pending appeal, which the Court granted, and as set forth in the City's appeal and 88-volume appendix. The Orders should be reviewed in full by the Court in light of their legal infirmities and important constitutional issues at stake.

A full review, rather than a remand resulting in a consent decree effectuating the Orders, is also imperative, especially given this Court's decision to disqualify the district court judge who issued the Orders due to an appearance of partiality. To grant remand would effectively sanction the district court judge's rulings notwithstanding this Court's determination that she be removed from the case.

Instead, the Court should grant the fully-briefed motions to intervene filed by the Police Intervenors so that they may prosecute the appeal of this case of extreme public importance and permit this Court to rule on the merits, which we believe they are well suited to do.

As described below, the Amici are currently employed in the private sector and have no interest in the outcome of this case aside from the continued effective and constitutional operation of the NYPD and the safety of the residents of the City of New York.[1]

Individually, the Amici are as follows:

Michael B. Mukasey served for more than 18 years as United States District Judge of the United States District Court for the Southern District of New York, six of those years as Chief Judge. He also served as Attorney General of the United States, the nation's chief law enforcement officer. As Attorney General from November 2007 to January 2009, Mukasey oversaw the U.S. Department of Justice and advised on critical issues regarding all areas of the law. He is the recipient of several awards for his work, most notably the *Learned Hand Medal* of the Federal Bar Council. Mukasey is currently a partner at the international law firm Debevoise & Plimpton LLP.

Rudolph W. Giuliani served two terms as Mayor of the City of New York, from 1994 to 2001. Prior to serving as mayor, Giuliani was the Associate Attorney General of the United States and, for six years, United States Attorney for the Southern District of New York. Giuliani is widely credited with improving the

[1] The Amici's status as *amici* curiae has already been confirmed by the Court. *See* Dkt. No. 160. Pursuant to Local Rule 29.1(b), the Amici hereby confirm that no party, or its counsel, has contributed money that was intended to fund the preparation or submission of Amici's proposed brief. In addition, no non-party other than the Amici or their counsel has contributed such funds. Counsel for the parties did not author the proposed brief in whole or in part.

quality of life in the City, in large part due to the significant drop in crime under his administration. Over Giuliani's eight years in office, New York's crime rate fell by 57 percent and the Federal Bureau of Investigation rated New York City as America's safest large city. Many of the City's law enforcement strategies implemented during Giuliani's administration, including the CompStat program that won the 1996 Innovations in American Government Award from the Kennedy School of Government at Harvard University, have become models for other cities around the world. Giuliani is currently a partner at the law firm of Bracewell & Giuliani LLP.

ARGUMENT

I. Remand Should Be Denied To Permit This Court To Review The District Court's Flawed Orders

The Court should deny the Remand Motion and permit the appeal to proceed so that this Court may review the district court's Orders, which are deeply flawed and center on issues of great public interest and constitutional concern. If the Remand Motion is granted, according to numerous recent reports and statements, the City's new administration will fully implement the district court's Orders notwithstanding the court's misapplication of law and this Court's decision to disqualify the district court judge who issued them due to an appearance of partiality. To best ensure judicial integrity and sound precedent, this Court should deny the Remand Motion and retain jurisdiction to review the Orders.

A. The City's Remand Request Seeks To Implement The District Court's Orders

The Remand Motion purportedly seeks remand "so that the parties may explore a resolution." Remand Motion at 1. According to several public statements by newly-elected Mayor William de Blasio, however, the "resolution" the City seeks to achieve will effectively implement the overreaching remedies contained in the Orders over the course of the next three years. For example, Mayor de Blasio recently said, "[w]e will drop the appeal on the stop-and-frisk case, because we think the judge was right about the reforms that we need to make." Annie Correal, *De Blasio Names City's Top Lawyer, Appearing to Signal a Further Shift in Policy*, N.Y. TIMES, Dec. 29, 2013. Indeed, the City filed its Remand Motion shortly thereafter and immediately announced a settlement with Plaintiffs "by agreeing to reforms that [the district court] judge ordered in August." Benjamin Weiser and Joseph Goldstein, *Mayor Says New York City Will Settle Suits on Stop-and-Frisk Tactics*, N.Y. TIMES, Jan. 30, 2014.

Further, while serving as the City's Public Advocate, de Blasio appeared as an amicus in this case in opposition to the City's request for a stay pending appeal, arguing that the remedial process outlined by the district court is a "careful and deliberate policy planning process" that is "essential and beneficial for New York's future." Mem. of Law of Office of Public Advocate for City of New York as Amicus Curiae in Opposition to Defendants-Appellants' Mot. for Stay, Dkt. No.

205, at 4. Thus, it is clear that the "resolution" the City seeks is nothing short of the full implementation of the Orders, including the remedies outlined therein.

B. Appellate Review Is Crucial Due To The District Court's Erroneous Application Of Constitutional Principles

This Court should deny the City's request for remand so that it may carefully review the Orders, which gravely distort existing case law and were issued by a district court judge this Court disqualified. The underlying cases, which are a decade in the making, and the resulting Orders, implicate vitally important issues of public safety, civil rights and constitutional law that impact the City's eight million residents. As such, they are deserving of close appellate review regardless of the political preferences of any party to this case.

As discussed in the Amici's brief in support of the City's stay motion, Dkt. No. 174, the Orders impermissibly infringe on the NYPD's legitimate consideration of race in conducting police activities within constitutional bounds and seek to radically alter existing constitutional law, which in fact provides that police may consider a person's race in conjunction with other descriptive characteristics when investigating and preventing crime. As this Court has stated, while courts may be mindful of the impact of police activities on community relations, the court's "role is not to evaluate whether the police action in question was the appropriate response under the circumstances, but to determine whether what was done violated the [constitutional provision at issue]." *Brown v. City of*

Oneonta, New York, 221 F.3d 329, 339 (2d Cir. 1999). Here, however, the district court disregarded this Court's exhortation and imposed its own view on how the NYPD should be policing the City.

In finding that "the City adopted a policy of indirect racial profiling by targeting racially defined groups for stops based on local crime suspect data," Liability Order at 13, the district court ignored bedrock constitutional law providing that police may consider a person's race while conducting police work without offending the Constitution. For example, where police stop and question an individual based on "a description that include[s] race as one of several elements [] defendants d[o] not engage in a suspect racial classification that would draw strict scrutiny" under the Equal Protection Clause. *Brown*, 221 F.3d at 337-38; *see United States v. Brockington*, 378 Fed. App'x 90, 92 (2d Cir. 2010) (affirming district court's finding of reasonable suspicion for stop based in part on description of suspect as "a black man wearing a red shirt"). This is because "[t]he Equal Protection Clause . . . has long been interpreted to extend to governmental action that has a disparate impact on a minority group *only* when that action was undertaken with discriminatory intent." *Brown*, 221 F.3d. at 338 (emphasis added).

As Chief Judge Walker explained in response to the argument in *Brown* that *any time* police use a racial descriptor they are using a suspect racial classification

subject to strict scrutiny:

> I have little doubt that the rules of constitutional law proposed . . . would weaken police protection within all communities. . . . In my view, it is a grave mistake to seize upon an idea that would alter police work and law enforcement procedures fundamentally without considering its effect on those most vulnerable to crime.

Brown v. City of Oneonta, New York, 235 F.3d 769, 771 (2d Cir. 2000) (Walker, J., concurring in denial of rehearing in banc).

The district court's disavowal of the location of a stop as a factor that may contribute to the stop's reasonableness is also contrary to established case law. For example, the Liability Order characterized the methodology of Plaintiff's expert, Dr. Jeffrey Fagan, as "unnecessarily conservative" in part because Dr. Fagan's study did not classify a UF-250 form checked with only "Furtive Movements" and "High Crime Area" as "apparently unjustified." Liability Order at 8. However, the Supreme Court has held that "the fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis." *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). Moreover, the district court's repeated invocation of the purportedly low "hit rate" of stops that resulted in summonses or arrests fails to appreciate that "*Terry* accepts the risk that officers may stop innocent people." *Id.* at 126.

Accordingly, the district court's finding of liability in connection with the NYPD's stop-question-and-frisk policies and procedures, and sweeping remedial

order, run counter to substantial constitutional precedent. For this reason and those discussed in the Amici's brief in support of the motion for a stay pending appeal, the Orders deserve a fulsome review and reversal by this Court.

C. Appellate Review Of The Orders Is Further Warranted Because They Issued From A District Court Judge This Court Disqualified

Appellate review of the Orders rather than remand is particularly important in light of this Court's decision to remove the district court judge who issued them due to her appearance of partiality. Although the Court expressly did not find that the district court judge actually harbored bias towards the Plaintiffs, the district court judge's (i) invitation to Plaintiff's counsel to file the *Floyd* case and mark it as related to a case previously before her, (ii) comments in media interviews while the *Floyd* case was pending previously highlighted by this Court, (iii) misapplication of relevant law, novel finding of "indirect racial profiling" and creation of a remedial program granting her significant oversight powers, and (iv) unusual motion practice before this Court following her disqualification,[2] all highlight the importance of appellate review of the district court judge's Orders.

On the other hand, should the Court grant the City's Remand Motion, the Court's disqualification order would effectively become a nullity as the district court judge's Orders would be carried out without reviewing the merits of those decisions notwithstanding the concerning circumstances above. As this Court

[2] *See* Op., Dkt. 303, at 2, 5 n.8 (denying Judge Scheindlin's "unprecedented" motion seeking reconsideration of the Court's order of reassignment) (per curiam).

noted, the purpose of the statute invoked to remove the district court judge, 28 U.S.C. § 455(a), is "to promote public confidence in the impartiality of the judicial process." Op., Dkt. No. 304, at 6 (citation omitted). To permit the changed political preferences of a party to trump concerns of judicial impartiality will not promote confidence in the judicial process but will hinder it. Accordingly, the Court should deny the Remand Motion and permit the appeal of the Orders on the merits to continue.

II. The Court Should Grant The Proposed Intervenors' Motions To Intervene In Order To Prosecute This Appeal

In furtherance of the foregoing, the Amici support the Police Intervenors' requests to grant their motions to intervene so that they may prosecute this appeal. *See generally* PBA Opposition, Dkt. No. 465; SBA Opposition, Dkt. No. 466. The Police Intervenors represent the thousands of members of the NYPD whose actions have been scrutinized by the district court and whose daily conduct – and safety – will be affected depending on the results of this appeal and proceedings below. It is they who must put their lives and safety at risk by submitting to restrictions imposed based on deeply flawed legal analysis; it is they who must try to work in and with minority communities after having been tarred as racists based on a grotesque misreading of the facts. In short, the Police Intervenors have significant interests at stake and thus have a right to intervene. *See generally* PBA Mot. to Intervene, Dkt. No. 252; SBA Mot. to Intervene, Dkt. No. 283.

In addition to the substantive grounds meriting intervention, *see* PBA Opposition at 8-13; SBA Opposition at 7-12, 18-19, the Amici agree that this Court should grant intervention to the Police Intervenors in the interest of judicial efficiency. *See* PBA Opposition at 9-11; *U.S. v. City of Los Angeles, Cal.*, 288 F.3d 391, 397-98 (9th Cir. 2002) ("A liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts. By allowing parties with a practical interest in the outcome of a particular case to intervene, we often prevent or simplify future litigation involving related issues; at the same time, we allow an additional interested party to express its views before the court.") (quotation marks, emphasis and citations omitted); *cf. Novick v. AXA Network, LLC*, 642 F.3d 304, 311 (2d Cir. 2011) ("It does not normally advance the interests of sound judicial administration or efficiency to have piecemeal appeals that require two (or more) three-judge panels to familiarize themselves with a given case in successive appeals from successive decisions on interrelated issues.") (internal quotation marks and citation omitted). Should the Court decline to rule on the fully-briefed intervention motions and grant the Remand Motion, this Court will nonetheless be faced with a merits appeal in the future and an intervention-related appeal should the district court deny the Police Intervenors' motions to intervene below. *See New York News, Inc. v. Kheel*, 972 F.2d 482, 485 (2d Cir. 1992) (a district court's order denying intervention is an appealable final

order). Thus, judicial economy concerns dictate that the Court grant the Police Intervenors' motions for intervention and permit them to prosecute this appeal so that a timely resolution of these critical issues impacting the City, its 8 million residents and police officers can be achieved.

CONCLUSION

For all the reasons set forth above, the Amici respectfully request that the Court deny the Remand Motion and grant the Police Intervenors' motions to intervene, and grant such further relief as the Court deems just and proper.

Dated: February 14, 2014
New York, New York

Respectfully submitted,

/s/ Daniel S. Connolly

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 29 AND 32

1. This memorandum complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B)(i) because it contains 2,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This memorandum complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

Dated: February 14, 2014
New York, New York

/s/ Daniel S. Connolly