UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 13-3123-cv | Caption [use short title]: Ligon v. City of New York

Motion for: reconsideration en banc

Set forth below precise, complete statement of relief sought:

That en banc court direct -- either by full court or a new panel -- reconsideration with full and fair process of panel's sua sponte determination that District Court Judge engaged in misconduct

MOVING PARTY: Jaenean Ligon et al.
- [x] Plaintiff
- [ ] Appellant/Petitioner
- [ ] Defendant
- [x] Appellee/Respondent

OPPOSING PARTY: City of New York et al.

MOVING ATTORNEY: Christopher Dunn
[name of attorney, with firm, address, phone number and e-mail]
New York Civil Liberties Union
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(212) 607-3300; cdunn@nyclu.org

OPPOSING ATTORNEY: Celeste Koeleveld
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100 Church Street
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Court-Judge/Agency appealed from: N/A

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
- [x] Yes
- [ ] No (explain):

Opposing counsel's position on motion:
- [ ] Unopposed
- [x] Opposed
- [ ] Don't Know

Does opposing counsel intend to file a response:
- [x] Yes
- [ ] No
- [ ] Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? [ ] Yes [ ] No

Has this relief been previously sought in this Court? [ ] Yes [ ] No

Requested return date and explanation of emergency:

Is oral argument on motion requested? [ ] Yes [x] No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? [ ] Yes [x] No If yes, enter date:

Signature of Moving Attorney: /s/ Christopher Dunn **Date:** 11/08/13

Service by: [x] CM/ECF [ ] Other [Attach proof of service]

ORDER

IT IS HEREBY ORDERED THAT the motion is **GRANTED DENIED.**

FOR THE COURT:
CATHERINE O'HAGAN WOLFE, Clerk of Court

Date: By:

Form T-1080 (rev. 7-12)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAENEAN LIGON, et al. Plaintiffs-Appellees, -versus- CITY OF NEW YORK, et al. Defendants-Appellants.	13-3123-cv

DECLARATION IN SUPPORT OF MOTION TO RECONSIDER BY *EN BANC* COURT THE *SUA SPONTE* HOLDING THAT DISTRICT COURT JUDGE VIOLATED JUDICAL ETHICS

Christopher T. Dunn declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. I am the associate legal director of the New York Civil Liberties Union and am co-counsel in this case on behalf of the plaintiffs-appellees. I submit this declaration in support of the plaintiffs' request, pursuant to Second Circuit Local Rule 27.1(g), that the full Court direct reconsideration of a panel's *sua sponte* ruling that a District Court judge engaged in ethical misconduct in this case and in *Floyd v. City of New York* 13-3088 (a second case being heard in tandem with this case). Specifically, the plaintiffs request that the full Court vacate the panel's ruling concerning the judge's alleged ethical violations and direct that the issue of the District Court judge's actions be set down for review, with notice

to the parties and the judge, a briefing schedule in which the judge and *amici* can participate, and argument.[1] The plaintiffs further request that the full Court assign this review to a different panel or that the full Court hear the matter itself.[2]

2. In summary, the plaintiffs base their request on the fact that no notice was given to the parties or to the District Court judge that the panel was considering an allegation of ethical misconduct by the District Court judge or that the panel was considering removing the judge from this case as a result of that alleged misconduct. Rather, without any record, briefing, or argument (and no request from the City for its action), the panel *sua sponte* found the District Court judge to have engaged in unethical conduct and removed her from two major cases to which she had been assigned for years. For a panel in these circumstances to find a District Court judge to have engaged in unethical conduct and to remove her from the cases is such an extraordinary act as to warrant action by the full Court.

3. This case, filed in March 2012, presents a challenge to stops, frisks, and arrests related to an NYPD program -- the Trespass Affidavit Program ("TAP") -- in which owners of private residential buildings can enroll their

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[1] Given that the District Court judge has now filed papers in this matter, it is apparent that she would want to participate in any process directed by this Court.

[2] At this time the plaintiffs seek no relief with respect to the reassignment of this case to another District Court judge. They respectfully submit that any such relief should be left to this Court, following appropriate proceedings addressing the actions of the District Court.

buildings and thereby authorize NYPD officers to enter their private property and conduct enforcement action. In an amended opinion, the District Court in February 2013 granted the plaintiffs' motion for a preliminary injunction concerning trespass stops taking place outside of TAP buildings in the Bronx. On August 12, 2013, the District Court issued an order concerning the development of remedies in this case and in *Floyd*, in which the District Court had entered a liability ruling that same day.

4. The City appealed in this case and in *Floyd* and sought a stay pending appeal.

5. In an order issued on October 31, 2013, a panel of this Court stayed the District Court's liability opinions and remedial order. In doing so, it stated that the District Court judge "ran afoul" of the Code of Conduct for United States Judges. Specifically, the panel found that Judge Shira A. Scheindlin had acted improperly in its "application of the [Southern District's] 'related case rule'" and "by a series of media interviews and public statements purporting to respond publicly to criticism of the District Court":

> Upon review of the record in these cases, we conclude that the District Judge ran afoul of the Code of Conduct for United States Judges, Canon 2 ("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 that the appearance of impartiality surrounding this litigation was compromised by the District Judge's improper application of the

Court's "related case rule," *see* Transfer of Related Cases, S.D.N.Y. & E.D.N.Y. Local Rule 13(a),[1] and by a series of media interviews and public statements purporting to respond publicly to criticism of the District Court.[2]

[1] In a proceeding on December 21, 2007 involving the parties in *Daniels v. City of New York*, No. 99 Civ. 1695 (S.D.N.Y. filed Mar. 8, 1999), the District Judge stated, "[I]f you got proof of inappropriate racial profiling in a good constitutional case, why don't you bring a lawsuit? You can certainly mark it as related." She also stated, "[W]hat I am trying to say, I am sure I am going to get in trouble for saying it, for $65 you can bring that lawsuit." She concluded the proceeding by noting, "And as I said before, I would accept it as a related case, which the plaintiff has the power to designate." Two of the attorney groups working on behalf of plaintiffs in *Daniels*, a case challenging the New York Police Department's stop-and-frisk practices, helped file *Floyd* the next month. *See generally* Joseph Goldstein, *A Court Rule Directs Cases Over Friskings to One Judge*, N.Y. Times, May 5, 2013.

[2] *See, e.g.*, Mark Hamblett, *Stop-and-Frisk Judge Relishes her Independence*, N.Y. Law Journal, May 5, 2013; Larry Neumeister, *NY "Frisk" Judge Calls Criticism "Below-the-Belt,"* The Associated Press, May 19, 2013; Jeffrey Toobin, *A Judge Takes on Stop-and-Frisk*, The New Yorker, May 27, 2013.

6. I am familiar with all proceedings in this Court and the District Court in this case. At no time did the City ever raise an issue about the conduct of Judge Scheindlin with respect to the Southern District's related-case rule or about statements attributed to her in press reports. Further, at no time did the panel put the parties on notice that it was considering whether Judge Scheindlin had engaged in misconduct or that it was considering removing her from these cases. There was no briefing and no record before the Court about these issues.

7. I argued the plaintiffs' position on the City's stay motion when the panel heard argument on October 29. At no time during those arguments, which lasted approximately two hours and forty minutes, did any member of the panel

suggest that the panel was considering making findings about alleged misconduct by Judge Scheindlin. At one point near the end of the City's main argument, one member of the panel asked counsel for the City about the related-case rule and whether the City had objected to Judge Scheindlin's acceptance of the case (it had not). At a later point of the argument, I briefly addressed the judge's acceptance of *Floyd* as a related case and explained that our case (*Ligon*) was filed much later and had been accepted as related to a separate trespass-stop case involving public-housing buildings, which was already before Judge Scheindlin as related to *Floyd*. And at a later point in the argument the panel member who had raised the related-case issue asked another lawyer about press reports concerning Judge Scheindlin. Despite these issues having been raised expressly, the panel never suggested it was considering finding that Judge Scheindlin had engaged in ethical misconduct or that the panel was considering removing her from this case and *Floyd* (and the City did not, in response to these comments, suggest any such action).

8. The plaintiffs respectfully submit that the panel should not have entered findings of misconduct about a District Court judge and removed the judge from this case and *Floyd* without giving the parties notice and an opportunity to be heard on the matter. They also submit that it was fundamentally unfair to Judge Scheindlin that this action be taken without any notice to her.

9. Before judgment can be rendered about the District Court judge's

conduct, a factual record needs to be developed about the circumstances of the judge's actions in accepting *Floyd* as a related case and about the media interviews cited by the panel. Moreover, there are substantial legal issues presented by the panel's determination that the judge engaged in ethical misconduct that need to be briefed once a full factual record is established. The plaintiffs respectfully submit that allegations of unethical conduct by the District Court judge raise substantial factual and legal questions that must be the subject of a full and fair process, which simply did not happen here.

10. To the extent the full Court agrees to direct a full and fair process concerning the District Court judge's alleged misconduct, the plaintiffs respectfully submit that that process should be overseen by a new panel or by the full court. Given the original panel's actions, fairness and the appearance of fairness dictate that review of the District Court judge's actions should not be undertaken by the original panel.

11. For all of the foregoing reasons, the plaintiffs ask that the full Court direct the following: (1) vacate the panel's findings about the alleged misconduct of District Judge Shira Scheindlin and recall the mandate; (2) establish a schedule that affords the parties a full opportunity to develop an appropriate factual record, to file briefs, and to present oral argument; (3) provide notice to Judge Scheindlin of these proceedings and afford her and *amici* an opportunity to participate; (4)

assign this review to a new panel or to the full Court; and (5) take whatever administrative actions are necessary to allow this process to proceed.

/s/ Christopher Dunn
CHRISTOPHER DUNN

Dated: November 8, 2013
New York, N.Y.