UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

– X

DAVID FLOYD, *et al.*,

Docket No. 13-3088

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant

– X

JAENEAN LIGON, *et al.*, **Docket No. 13-3123**

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK, *et al.*,

Defendants-Appellants

– X

FLOYD AND LIGON PLAINTIFFS' JOINT REPLY IN SUPPORT OF APPELLANT CITY OF NEW YORK'S MOTION FOR A LIMITED REMAND

By: Counsel for *Floyd* Plaintiffs
Counsel for *Ligon* Plaintiffs
(Listed on signature page)
February 14, 2014

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PRELIMINARY STATEMENT

On November 22, 2013, the panel assigned to hear motions in these two highly contentious stop-and-frisk cases denied the City's motion to vacate the District Court rulings and invited an application "to us for a return of the cases to the District Court for the purpose of exploring a resolution." Three days later the full Court issued an order holding in abeyance pending intervention motions by the police unions so as "to maintain and facilitate the possibility that the parties might request the opportunity to return to the District Court for the purposes of seeking a resolution."

The parties now have taken the precise step suggested by both the panel and the full Court, with the City seeking a remand to the District Court to negotiate and memorialize an agreement with the plaintiffs about the duration of court monitoring. Following that, the City will dismiss its appeal, and the parties have agreed to resume the consultative process set out in the initial remedial order, which would culminate in a set of remedial measures that would ultimately be submitted to the District Court for review and approval.

The police unions,[1] which are not parties to these appeals and did not seek to

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[1] A brief was filed on behalf of the Patrolmen's Benevolent Association, Detective's Endowment Association, Lieutenant's Benevolent Association and the Captain's Endowment Association (hereinafter "PBA Br.") and another filed by (continued…)

intervene in this highly-publicized litigation until years after it was brought, vehemently object to this process, arguing that their intervention motions should be granted now or that the District Court orders should be summarily vacated. Setting aside that the full Court has ordered that the Unions' intervention motions be held in abeyance, the appropriate course of action is as the panel and full Court suggested and as the parties now specifically propose. The Unions will remain free, if they choose, to pursue intervention in the District Court, where intervention motions are pending. Should the Unions be dissatisfied with the District Court's ruling on intervention, they remain free to seek recourse – with respect to the Liability and Remedial Orders – in this Court once the District Court enters a final appealable order.

BACKGROUND

Floyd and *Ligon* were filed in 2008 and 2012, respectively. In January 2013, the District Court found liability on the *Ligon* plaintiffs' motion for a preliminary injunction. In August 2013, following a nine-week trial, the district court issued a decision on liability in *Floyd*, and a joint opinion on remedies (the "Remedial Order") in both cases. One month later, despite never having appeared in either case, the Unions filed motions to intervene in the district court. Those

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the Sergeant's Benevolent Association (hereinafter "SBA Br."). Collectively, these parties are referred to as the "Unions."

motions remain *sub judice* with the District Court.

Following briefing by the parties and by the proposed intervenors as *amici curiae*, this Court granted the City's motion for a stay of proceedings in the district court on October 31, 2013. *Floyd* Dkt No. 247; *Ligon* Dkt. No. 157. On November 7, 2013, the proposed intervenors filed motions to intervene in this Court, *Floyd* Dkt Nos. 252, 282; *Ligon* Dkt. No. 178. The *Floyd* and *Ligon* plaintiffs filed briefs in opposition to those motions on November 25, 2013. *Floyd* Dkt No. 339-1; *Ligon* Dkt. No. 243.[2]

On November 22, 2013, in an order denying the City's motion to vacate the District Court's liability opinions and the Remedial Order, the panel invited an "application to us for a return of the cases to the District Court for the purpose of exploring a resolution." *Floyd* Dkt No. 334; *Ligon* Dkt. No. 238. Three days later, the full Court reiterated this invitation to the parties to seek a resolution when it issued the following order:

> To maintain and facilitate the possibility that the parties might request the opportunity to return to the District Court for the purpose of exploring a resolution, IT IS HEREBY ORDERED, that the motions for en banc consideration, the related FRAP 29 motions and the motions to intervene are held in abeyance pending further order of the Court.

Floyd Dkt. No. 338; *Ligon* Dkt. No. 242.

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[2] These filings are referred to hereinafter as "*Floyd* Br." and "*Ligon* Br.", respectively.

Since then, the parties have taken the very steps contemplated by the Court's orders and engaged in discussions regarding the potential resolution of these cases. On January 30, 2014, having reached an agreement in principle with the plaintiffs on a process for resolving these cases, the City filed the instant motion to remand. Contrary to the Unions' speculation and mischaracterizations, PBA Br. 4; SBA Br. 1, 3-4, the parties have not reached a "settlement agreement." Instead, the parties have agreed to proceed towards resolving this litigation by negotiating the terms of the independent monitor. The parties have not yet, however, negotiated the substantive details of any remedial measures, nor entered any written agreement. The parties now seek a remand to the District Court so that they may memorialize a negotiated agreement regarding the duration and terms of the monitorship. Upon the District Court's approval of that modification to the remedial order, the City intends to return to this Court to withdraw the appeal, and proceed in the District Court to develop remedial reforms.

ARGUMENT

I. Pursuant to the En Banc Court's November 25 Order, the Intervention Motions Should Be Decided in the District Court.

This Court has ordered that the Unions' appellate intervention motions be held in abeyance to "maintain and facilitate" the possibility of a remand to explore a resolution in the District Court. Nevertheless, the Unions have responded to the parties' request for just such a remand with the demand that this Court adjudicate and grant its intervention motions. In its November abeyance order, the Court plainly signaled that it did not intend to follow the course demanded by the Unions, and this is the prudent and legally correct thing to do given that the Unions will have a full opportunity in the District Court to pursue intervention.

As explained in Plaintiffs'-Appellees' briefs opposing the intervention motions, intervention at the appellate level is highly unusual. *See Floyd* Br. at 8-9; *Ligon* Br. at 3-8. In this Court's only case discussing the question of intervention at the appellate level at length, the Court remanded, holding that it was the "better practice" to seek intervention in the district court first. *Drywall Tapers & Pointers of Greater New York v. Nastasi & Assocs., Inc.*, 488 F.3d 88, 94 (2d Cir. 2007).[3]

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[3] This Court has permitted appellate intervention in only one reported case, where attorneys who were fired by their client after trying the case, intervened on appeal for the sole purpose of addressing the award of their fees, an issue which did not surface until the appeal was instituted. *Goodman v. Heublein, Inc.*, 682 (continued…)

Given that the Unions will have every opportunity to have their motions adjudicated and may then pursue appeals on the merits, no such "imperative reasons" are present here.[4]

Further, after waiting more than five years to notify the Court of their claimed interest in this widely publicized litigation, the Unions cannot plausibly rely upon "judicial efficiency" to justify immediate action on their request. PBA Br. 9-11. The posture in which they find themselves is a direct result of their inexcusably late attempt to join these cases and should not inure to their benefit. This Court declined to consider an intervention motion in virtually the same situation in *Drywall Tapers*, and declined to consider the motion. In that case, the union had waited only months—not years—after its interest in the litigation was apparent before filing its motion. 488 F.3d at 91-92. By delaying its motion, the putative union intervenor in *Drywall Tapers* "appear[ed] to have contributed to its own predicament," *id.* at 94, and thus this Court refused to consider the motion, instead remanding to the district court for a decision on intervention. The Unions' invocation of "judicial efficiency" thus is unavailing. The *Drywall Tapers* Court

F.2d 44, 45 (2d Cir. 1982). Other circuits rarely permit such intervention, and then only for "imperative reasons." *See Ligon* Br. 3-4 (collecting cases).

[4] As the *Floyd* plaintiffs have previously explained, the District Court's orders on liability are not final judgments or injunctions and thus are not appealable at this time pursuant to 28 U.S.C. §§ 1291, 1292(a)(1). *See Floyd* Dkt. No. 76-3.

specifically contemplated the prospect of an appeal following the district court's decision, but remanded nonetheless. *Id.* at 95. That approach is appropriate here.

Given this, there is no need to address the arguments regarding the merits of the Unions' intervention motions. The Plaintiffs-Appellees' briefs in opposition to those motions do, however, explain at length why they lack merit and why the unions would lack standing to maintain the appeals even if they were permitted to intervene. *See Floyd* Br. 4-10; *Ligon* Br. 17-20.[5]

For these reasons, the Court should grant the City's motion for a remand to the District Court, where the parties can explore a resolution of these cases and the

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[5] The Unions' new emphasis on a claim that the District Court's Liability Decisions have caused their members "grave reputational harm," PBA Br. 12-13, also does not establish their standing to pursue the present appeal. The Liability Orders lay the blame for widespread unconstitutional stops squarely on the NYPD's policies and institutional indifference, not the malice or racism of individual police officers. Moreover, while this Court and the Supreme Court have recognized certain reputational injuries as sufficient to confer Article III standing, those injuries themselves harmed or were likely to harm the victims' economic interests or ability to pursue their livelihoods. *See*, *e.g.*, *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 162 (2d Cir. 2003) (reputational injury was "death knell" to plaintiff's career as a manager of federally-insured credit union); *ACORN v. United States*, 618 F.3d 125, 135 (2d Cir. 2010) (challenged congressional legislation harmed plaintiff non-profit organization's reputation with potential federal, state, and private funders); *Meese v. Keene*, 481 U.S. 465, 473-74 (1987) (government's classification of foreign films as "political propaganda" harmed film distributor's "political and professional reputation" and "impaired" his "ability to obtain re-election" as state senator). In contrast, the Unions have failed to identify any individual NYPD officers who the District Court found had conducted unconstitutional stops-and-frisks that has suffered or is likely to suffer a financial penalty, discipline, or other adverse employment action as a result of such findings.

District Court can address the Unions' pending motions for intervention.

II. The Unions' Challenges to the District Court's Liability Ruling Are Irrelevant to the Present Motion for Remand and Entirely Premature.

The Unions spend over three pages of their respective opposition briefs attacking the merits of the District Court Liability and Remedies Orders by repeating arguments contained in the City's December 10, 2013 merits brief. PBA Br. 4-7; SBA Br. 8-11. However, the merits of the appeal are irrelevant to the City's right to cease prosecuting this appeal if it wishes. The Unions cite no authority to the contrary. The Unions will also have ample opportunity to make these arguments and their additional arguments about plaintiffs' alleged lack of standing, *see* PBA Br. 6-7; SBA Br. 8, when briefing the merits of the appeal should they be granted intervention (which, as discussed above, they should not).[6]

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[6] The District Court's thorough rulings on both of these standing issues are well-founded. *See Floyd* Liab. Ord. at 188 n. 772; *Floyd* Rem. Order. at 3 n.3; *Floyd v. City of New York*, 283 F.R.D. 153, 169-170 (S.D.N.Y. 2012); *Ligon v. City of New York*, 925 F. Supp. 2d 478, 522 (S.D.N.Y. 2013); *Ligon v. City of New York*, 288 F.R.D. 72, 80-81 (S.D.N.Y. 2013). *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the case relied upon by the unions for their injunctive relief standing argument, is readily distinguishable from the cases at bar, where there is extensive evidence in the District Court record establishing the likelihood of future constitutional violations, including: (i) the fact that several of the named plaintiffs and class members were subjected to multiple illegal stops-and-frisks during the class period while engaged in every day, lawful activities, (ii) the hundreds of thousands of such stops during the class period of people engaged in every day, lawful activities, and (iii) the fact that the NYPD policies and procedures that authorized and encouraged such stops were ongoing throughout the class period. As for the Unions' Fourteenth Amendment standing argument, the Supreme Court (continued…)

Accordingly, this Court should disregard these arguments in ruling on the present motion for remand and need not schedule expedited briefing on the standing issue.

III. Vacatur is Not Permitted Where the Routine Withdrawal of an Appeal Prejudices No Party and is Sought by a Non-Party in a Case that is Not Moot.

The Unions each contend that, should there be a remand to the District Court to permit the parties to resolve these cases, this Court should vacate the District Court's Liability and Remedy Opinions because, the Unions claim, these cases are moot. In taking this position, the Unions misapprehend vacatur doctrine.

To begin, the Unions' request is premised on the erroneous assumption that the cases are moot. But, pursuant to this Court's invitation to pursue a "resolution," the parties must still negotiate certain terms of a settlement agreement, obtain court approval of those terms, and then engage in a lengthy remedial process to arrive at reforms that the court will later so-order. Indeed, the very basis of any settlement agreement between the parties – and the premise of the Court's invitation for remand – contemplates the viability of the District Court Liability and Remedial Orders, as well as continuing court supervision. Accordingly, the condition that a case be moot prior to vacatur does not exist here. *See Dennin v. Connecticut Interscholastic Athletic Conference Inc.*, 94 F.3d 96,

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has held that the claims of an *unnamed* member of the plaintiff class is sufficient for the purposes of Article III standing and may serve as a basis for liability. *See Sosna v. Iowa*, 419 U.S. 393, 402 (1975).

100 (2d Cir. 1996) ("An appeal becomes moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome.") (internal quotations and citations omitted).

Even setting aside this incorrect assumption, the Unions' understanding of the principles governing vacatur is confused. Vacatur is an "extraordinary remedy," *U.S. Bancorp Morg. Co. v. Bonner Mall Partnership*, 513 U.S. 18, 26 (1994), which is not permitted in the routine situation, such as this, where the appellant chooses to withdraw its own appeal, leaving the appellee's victory below in place. Vacatur is limited to the categorically different instance where "circumstances beyond an appellant's control," causes mootness, *Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 73 (2d Cir. 1991), as that deprives the appellant of its right to challenge an adverse lower court ruling, *see United States v. Munsingwear*, 340 U.S. 36, 40 (1950); *Bancorp*, 513 U.S. at 25 (A party "who seeks review of the merits of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment."). Here, the City is electing to forego its right to appeal, causing no unfairness to any party.[7] Accordingly, there is no legal or equitable basis for this Court to accede to

[7] As non-parties, the Unions do not even have standing to demand vacatur. Vacatur turns on equitable considerations that affect interests of the *actual parties* before the court on appeal. *See, e.g. Bancorp*, 513 U.S. at 24 ("principal condition" in granting vacatur "is whether the *party* seeking relief from the (continued…)

the Union's radical request.

The Unions' misunderstanding of vacatur is exemplified by the PBA's reliance on *al-Marri v. Spagone*, 555 U.S. 1220 (2009), *see* PBA Br. 14 – a case that fatally undermines the Unions' position. Contrary to the PBA's premise, in *al-Marri*, the government *prevailed* below, in en banc proceedings in the Fourth Circuit, on the central question in the case: whether a lawful resident alien can be militarily detained as an "enemy combatant." *See al Marri v. Pucciarelli*, 534 F.3d 213, 217 (4th Cir. 2008). It was Mr. al-Marri, as the losing party – not the government – who successfully petitioned for certiorari review, *see Petition for Cert., al-Marri v. Pucciarelli*, No. 08-368 (S. Ct. Sept. 19, 2009); *al-Marri v. Pucciarelli*, 129 S. Ct. 680 (2008) (order granting cert petition),[8] and it was the government that mooted al-Marri's appeal (by indicting and transferring him to civilian custody). Because the victorious party (the government) deprived the losing party (Mr. al-Marri) of his right to appellate review, vacatur was proper

judgment below caused the mootness by voluntary action"); *id*. at 26 (observing that "[I]t is *petitioner's* burden" to demonstrate "equitable entitlement" to vacatur) (emphases added); *Penguin Books*, 929 F.2d at 73 (vacatur turns on interests of "litigants [who] have the right of appeal").

[8] The Fourth Circuit separately concluded that the procedures the lower court had applied to contest the factual basis of Mr. al-Marri's detention were insufficient. *See al-Marri*, 534 U.S. at 217 (per curiam summary of court's holding). But the government did not appeal this secondary ruling to the Supreme Court.

under *Munsingwear* in a way that would not be if, as the PBA mistakenly believes, the government had lost below and simply withdrawn its appeal.[9] In this case, there is no unfairness in the eventual dismissal of the City's appeal because, unlike Mr. al-Marri, Plaintiffs won below and are not being deprived of a right to appeal.

Al-Marri reflects black-letter vacatur law. Contrary to the PBA's suggestion that vacatur is merely a "discretionary" decision of the appellate court, PBA Br. 13, the Supreme Court has expressly held that "mootness by reason of settlement does not justify vacatur of a judgment under review." *Bancorp*, 513 U.S. at 29. Settlement does not justify vacatur because "the losing party has voluntarily forfeited his legal remedy by the ordinary processes of appeal." *Id*. The heavy presumption against vacatur also stems from the Supreme Court's instruction that, "Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants. . . . " *Id*. at 26; *see also MLB Props., Inc. v. Pac. Trading Cards, Inc.*, 150 F.3d 149, 151 (2d Cir. 1998) ("vacatur is usually not justified because the social value in preserving precedents is not outweighed by equitable considerations"). This bright line rule – as well as its underlying principles – proscribes vacatur in this case.

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[9] The PBA's understanding of *Penguin Books* is equally erroneous. *See* PBA Br. 15. In *Penguin Books*, like in *al-Marri*, the *victorious* party below mooted the case, thus "depriving the appellants of their statutory right to review." *Penguin Books*, 929 F.2d at 74. Given that inequity, which is not present here, vacatur was appropriate.

Relying heavily on *Haley v. Pataki*, 60 F.3d 137 (2d Cir. 1995), the Unions argue that any "voluntary compliance" with a preliminary injunction is an "extraordinary circumstance" justifying vacatur. PBA Br. 13; SBA Br. 13. Yet, this case involves the prospect of a settlement and not voluntary compliance with a preliminary injunction. As described, the parties are merely in the process of negotiating a settlement based on bargained-for-exchanges; the result of that settlement will presumptively include a joint-remedial process that will only later produce an injunction with which the City would then comply. Accordingly, *Haley* in no way supports vacatur here. *See Haley*, 60 F.3d at 142 ("vacatur is not required where mootness results from a voluntary settlement reached by the parties").

In addition, the Unions' understanding of *Haley* is over-simplified. A proper reading of *Haley* reveals that the appellant, Governor Pataki, had no choice (short of inviting contempt) but to comply with an injunctive command to appropriate money to state employees by a date certain, particularly where his request for a stay of the injunction was denied. *Id*. at 140. Complying with the injunction mooted his appeal, but it also inequitably deprived the Governor of an opportunity for review of the injunctive decision (and its attendant collateral estoppel effects on future budget disputes), he would have had but for those circumstances outside his control. The decision is thus consistent with the logic of *Munsingwear* and

Bancorp, and in no way supports vacatur here, where the City freely elects to withdraw its appeal to pursue a settlement and causes no prejudice to any party.[10]

The PBA's additional suggestion, that the City's "about face" in this case presents an "even stronger" case for vacatur, PBA Br. 14, is unsupported by law or logic. Under *Bancorp*, the motivations underlying a party's decision to settle and forfeit a statutory right to appeal – be they tactical, political or strategic – are irrelevant to the vacatur inquiry; mootness by settlement does not justify vacatur. 513 U.S. at 27-29. The public interest in preserving this precedential ruling is strong. *Id*. at 26-27. The Unions' request for vacatur should be denied.[11]

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[10] Even in situations involving an injunction (not present here), reading *Haley* categorically to suggest that any "voluntary compliance" justifies vacatur would be inconsistent with *Bancorp* and broader vacatur principles. After all, genuine, voluntary compliance, just as much as settlement, does not constitute "happenstance" or a "vagary of circumstance"; and, voluntary compliance, just like settlement, is a deliberate decision by which "the losing party has voluntarily forfeited his . . . appeal . . . thereby surrendering his claim to the equitable remedy of vacatur." *Bancorp*. 513 U.S at 25; *see also id*. at 26 ("Petitioner's voluntary forfeiture of review constitutes a failure of equity" that forecloses a request for vacatur.). Neither situation would justify vacatur.

[11] The SBA also demands vacatur on the assertion that the District Court's "extrajudicial and judicial conduct violated due process." SBA Br. 14. This Court already rejected this possibility. *See Floyd* Dkt No. 304. There is no basis to reconsider the Court's ruling, particularly absent an opportunity for Plaintiffs to fully refute the SBA's attack on the District Court.

CONCLUSION

For all of the foregoing reasons, the Court should grant the City's motion for remand forthwith and deny the unions' requests for vacatur.

Dated: New York, New York
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