UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Docket No. 13-3088

DAVID FLOYD, *et al.*,

Plaintiffs-Appellees,

-against-

THE CITY OF NEW YORK,

Defendant-Appellant.

---X

PLAINTIFFS-APPELLEES' SUPPLEMENTAL MOTION FOR RECONSIDERATION BY THE EN BANC COURT

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Pursuant to Local Circuit Rule 35.1(d), Plaintiff-Appellees ("Plaintiffs") respectfully submit this supplemental memorandum of law in further support of their Motion for En Banc Reconsideration[1] of the October 31, 2013 Mandate (the "Mandate") issued by a three judge panel of this Court (Hons. Cabranes, Parker, Walker, JJ.) (the "Panel") in response to the Panel's supplemental opinion explaining and superseding that portion of the Mandate removing the District Judge. *See In re Reassignment of Cases*, Nos. 13-3123; 13-3088 (2d Cir. Nov. 13, 2013), Dkt. # 304 (the "Opinion").

ARGUMENT

The Panel's November 13, 2013 per curiam opinion does not address the Court's lack of jurisdiction to hear the appeal in the first instance. The Opinion does not cure the procedural irregularities or appearance of overreaching accompanying the Mandate.[2] Further, the Opinion does not and cannot explain, particularly given the issuance of a stay, why a decision to remove Judge Scheindlin could not await full and fair consideration in the normal course of merits briefing (which is scheduled to occur after the inauguration of the new Mayor). Nor does the Opinion consider the prejudice to thousands of New

[1] Plaintiffs incorporate herein by reference the arguments made in, and the exhibits annexed to, Plaintiffs' November 11, 2013 Motion for En Banc Reconsideration (Dkt # 267).

[2] The Opinion attaches excerpts from a transcript of a court colloquy in the related case of *Daniels v. New York*, No. 99-cv-1695 (S.D.N.Y. Dec. 21, 2007), even

Yorkers – who have been subjected to widespread constitutional violations by the NYPD for over a decade – that will result from delaying development of remedies and from having this action reassigned to a judge unfamiliar with the complexities of this matter. As much as before, this Court should grant Plaintiffs the relief sought in their prior motion.

A. THE PANEL LACKED JURISDICTION OVER THE APPEAL

The Panel Opinion did not address the fundamental threshold issue of the lack of jurisdiction over this appeal, pursuant to 28 U.S.C. § 1292(a)(1). The District Court, consistent with myriad other institutional reform cases, did not order the City to do anything other than to participate in a process that would *eventually* propose specific reforms for subsequent district court approval. *See* Pls.' Mot. En Banc Reconsideration 7-9; *see also see also* Dkt ## 76, 170; Brief Amici Curiae Law Professors, Dkt # 296-1 (2d Cir. Nov. 12, 2013). Because there has been no "coercive relief" yet ordered, *Henrietta D. v. Giuliani*, 246 F.3d 176, 181 (2d Cir. 2001), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003), and because accepting jurisdiction would result in a congressionally-prohibited piecemeal appeal of a subsequent remedial order, *Sahu v. Union Carbide Corp.*, 475 F.3d 465, 467 (2d Cir. 2007), the Mandate should be recalled and vacated for lack of jurisdiction. *See Henrietta D.*, 246 F.3d at 179.

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though the transcript was not in the record of this appeal at the time the Panel issued the Mandate.

B. THERE IS NO LEGAL AUTHORITY TO SUPPORT THE PANEL'S REMOVAL DECISION.

While the Opinion invokes supervisory authority to monitor the district courts and reassign cases in the interest of justice, *see* Op. at 12-13, the Panel does not rely on the grant of remedial authority under 28 U.S.C. § 2106. Under Section 2106, the Panel should have but did not consider that reassignment would cause undue waste of judicial resources and prejudice to Plaintiffs. *See* Pls.' Mot. En Banc Reconsideration at 14-16.

Instead, the Opinion invokes the disqualification statute, 28 U.S.C. § 455(a). The Panel's attempt to cast its action as routine is belied by the very cases cited for this proposition. First, in the vast majority of the cases cited, *see* Op. n. 29, 30, 31, reassignment occurred *after* a full decision on the merits of the appeal.[3] By addressing the merits before considering disqualification, these decisions ensured

[3] *See United States v. Steppello*, 664 F.3d 359 (2d Cir. 2011); *United States v. Hernandez*, 604 F.3d 48 (2d Cir. 2010); *United States v. DeMott*, 513 F.3d 55 (2d Cir. 2008); *United States v. Hirliman*, 503 F.3d 212 (2d Cir. 2007); *Armstrong v. Guccione*, 470 F.3d 89 (2d Cir. 2006); *Mackler Prods., Inc. v. Cohen*, 225 F.3d 136 (2d Cir. 2000); *United States v. Padilla*, 186 F.3d 136 (2d Cir. 1999); *United States v. Clawson*, 650 F.3d 530 (4th Cir. 2011); *John B. v. Goetz*, 626 F.3d 356, 365 (6th Cir. 2010), *remanded sub nom. John B. v. Emkes*, No. 98-cv-0168, 2011 WL 795019 (M.D. Tenn. Mar. 1, 2011), *subsequent determination*, 825 F. Supp. 2d 944, *and aff'd*, 710 F.3d 394 (6th Cir. 2013); *United States v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001), *aff'd sub nom. Mass. v. Microsoft Corp.*373 F.3d 1199 (D.C. Cir. 2004); *United States v. Tucker*, 78 F.3d 1313 (8th Cir. 1996); *United States v. Cooley*, 1 F.3d 985 (10th Cir. 1993), *aff'd sub nom. United States v. Turner*, 44 F.3d 900 (10th Cir. 1005); *United States v. Torkington*, 874 F.2d 1441 (11th Cir. 1989); *Brown v. Baden*, 815 F.2d 575 (9th Cir. 1987) (enforcing reassignment decision previously explained by *In re Yagman*, 796 F.2d 1165 (9th Cir. 1986)); *Cullen v. United States*, 194 F.3d 401 (2d Cir. 1999); *United States v. Londono*, 100 F.3d 236 (2d Cir 1996); *Sobel v. Yeshiva Univ.*, 839 F.2d 18 (2d Cir. 1988).

that the public could not unfairly question the soundness of the ruling on review, and that any concerns about the propriety of those rulings were immediately eliminated. The only cited cases that did *not* discuss the merits before addressing reassignment are those in which the sole question on appeal was disqualification of the district court judge (and which otherwise provided a full panoply of procedural protections, including pre-recusal briefing). *See, e.g.*, *In re: Boston's Children First*, 244 F.3d 164 (1st Cir. 2001). In stark contrast, the Panel here removed Judge Scheindlin before briefing on the merits and in an opinion divorced from the merits.

Second, in a vast majority of cited cases, the reassignment was pursuant to and in accordance with the familiar Section 2106 standard, even if some of the opinions do not expressly cite that statute.[4] In most of those cases, reassignment was based on consideration of the difficulties remand would present to the original judge, which is inapplicable here because there has not yet been a decision on the merits, and the Panel in any event does not purport to invoke this consideration.[5]

[4] *See Steppello*, 664 F.3d 359 (2d Cir. 2011); *Hernandez*, 604 F.3d 48 (2d Cir. 2010); *DeMott*, 513 F.3d 55 (2d Cir. 2008); *Hirliman*, 503 F.3d 212 (2d Cir. 2007); *Armstrong,* 470 F.3d 89 (2d Cir. 2006); *Mackler*, 225 F.3d 136 (2d Cir. 2000); *Padilla,* 186 F.3d 136 (2d Cir. 1999); *Clawson,* 650 F.3d 530 (4th Cir. 2011); *John,* 626 F.3d 356, 365 (6th Cir. 2010); *Tucker*, 78 F.3d 1313 (8th Cir. 1996); *Torkington,* 874 F.2d 1441 (11th Cir. 1989); *Yagman*, 796 F.2d 1165 (9th Cir. 1986); *Cullen*, 194 F.3d 401 (2d Cir. 1999); *Londono*, 100 F.3d 236 (2d Cir 1996); *Sobel*, 839 F.2d 18 (2d Cir. 1988).

[5] *See Steppello*, 664 F.3d 359 (2d Cir. 2011); *Hernandez*, 604 F.3d 48 (2d Cir. 2010); *DeMott*, 513 F.3d 55 (2d Cir. 2008); *Hirliman*, 503 F.3d 212 (2d Cir. 2007);

Moreover, the Panel does not purport to apply Section 2106, and does not consider the potential waste of judicial resources, prejudice to Plaintiffs, and damage to the appearance of justice that would flow from removal – considerations required under Section 2106 and that, as discussed in Plaintiffs' moving brief, all weigh heavily against removal. These cases therefore do not support the removal of Judge Scheindlin.

Third, of the cited cases in which reassignment was pursuant to Section 455, *all but one* involved an appeal from a motion at the trial court level for disqualification pursuant to that statute,[6] or a timely motion for disqualification to the appellate court.[7] In the single exception, *In re United States*, 614 F.3d 661 (7th Cir. 2010), the appellate court deemed it necessary to suspend the rules pursuant to Rule 2 of the Federal Rules of Appellate Procedure because of the unique emergency presented by the circumstances of that case. Of course, there was no

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Armstrong, 470 F.3d 89 (2d Cir. 2006); *Mackler*, 225 F.3d 136 (2d Cir. 2000); *Clawson,* 650 F.3d 530 (4th Cir. 2011); *Torkington,* 874 F.2d 1441 (11th Cir. 1989); *Cullen*, 194 F.3d 401 (2d Cir. 1999); *Londono*, 100 F.3d 236 (2d Cir 1996); *Sobel*, 839 F.2d 18 (2d Cir. 1988).

[6] *Chase Manhattan Bank v. Affiliated FM Ins. Co*., 343 F.3d 120 (2d Cir. 2003); *Cooley*; *In re School Asbestos Litig*., 977 F.2d 764 (3d Cir. 1992); *Potashnick v. Port City Const. Co*., 609 F.2d 1101 (5th Cir. 1980); *Boston's Children*, 244 F.3d 164 (1st Cir. 2001).

[7] *Microsoft,* 253 F.3d 34, 108 (D.C. Cir. 2001); *Tucker*, 78 F.3d 1313 (8th Cir. 1996).

urgency warranting the absence of process attending the removal of Judge Scheindlin, particularly given the stay.

Despite invoking authority under § 455(a), the Panel disregarded the necessary procedural protections that universally accompany disqualification under this statutory grant, including: (1) a timely motion to disqualify filed in the district court; (2) written opinion by the district judge in the first instance and upon a full record; (3) a timely mandamus petition or appeal and full briefing by the parties; and (4) a decision on the merits of the appeal. This Court should be concerned about the unfortunate appearance created by such a hasty disqualification of a judge who found the City liable for violating the rights of thousands of New Yorkers after a full trial. *See, e.g.*, Linda Greenhouse, *Bring Me a Case*, N.Y. Times, Nov. 17, 2013 (surmising "[t]here must be a back story of some sort, because the facts don't support what the appeals panel did."). This Court must not countenance the Panel's extraordinary action.

C. THE REASONS OFFERED BY THE PANEL OPINION DO NOT JUSTIFY DISQUALIFICATION.

Importantly, disqualification under Section 455(a) requires a review of all facts and circumstances. *SEC v. Razmilovic*, 728 F.3d 71, 86 (2d Cir 2013); *In re IBM*, 45 F.3d 641, 643 (2d Cir. 1995). The Opinion, while purporting to act on a "review of the record," identified two discrete events upon which it based the disqualification: (1) offhand statements made to Plaintiffs' counsel regarding a

routine, administrative related-case issue, and (2) statements made in the press during the trial by mostly people other than the District Judge. Because the Panel isolated these events – which occurred *five-and-a-half years apart* – out of the context in which they occurred and out of the broader context of a multi-year litigation involving thousands of judicial statements and rulings, the Opinion on its face fails to meet the Section 455 standard. In any event, these events, separately or combined, are insufficient to support disqualification.

1. Neither the District Judge's Decision to Accept the *Floyd* Stop-and-Frisk Case as Related to the *Daniels* Stop-and-Frisk Case, Nor the Judge's Offhand Statements in the 2007 Hearing Justify Recusal Now.

The Opinion suggests that the District Judge's impartiality is in doubt because a "reasonable observer" would interpret her suggestion that Plaintiffs file the new *Floyd* action (challenging the City's racially discriminatory practice of stops and frisks) as related to the predecessor *Daniels* case (challenging the City's racially discriminatory practice of stops and frisks), as "intimating her views on the merits" of the potential *Floyd* action. Op. at 7. Indeed, the Panel appears to believe that it was the District Judge's statements (as opposed to evidence the Plaintiffs had and ultimately proved at trial) that *caused* Plaintiffs' counsel to file these cases and direct them to her. Op. at 6.

To begin, the Panel plainly did not conduct a "review of the record," *see* Op. at 6. The 2007 related-case colloquy that the Panel identifies as objectionable was

not actually a part of the record in this appeal. *See* Pls.' Mot. En Banc Reconsideration 6-7. Thus, even though the December 21, 2007 transcript was attached as an exhibit to the Opinion as Appendix B, the Panel could not have properly relied on the transcript at the time it rendered its Mandate removing Judge Scheindlin on October 31, 2013. *See Liteky v. United States*, 510 U.S. 540, 556 (1994); *Razmilovic*, 728 F.3d at 86.

Second, the "reasonable observer" standard referenced by the Opinion could not fairly be met here. *See* Op. at 7; *see also Razmilovic*, 728 F. 3d at 86 ("the question is whether an objective and disinterested observer, knowing and understanding all of the facts and circumstances, could reasonably question the court's impartiality"). Why would an "objective and disinterested" observer believe such an offhand comment uttered nearly six years ago would raise an appearance of bias when the *non-objective* and *interested* party to this case – the City of New York – did not so believe? The City never objected to the filing of the case as related and never raised this as a basis for recusal, even as it now, *six years* hence and after a nine week trial, seeks vacatur. *See Apple v. Jewish Hosp. & Med. Ctr.,* 829 F.2d 326, 333-34 (2d Cir. 1987) (emphasizing requirement to raise objection to impropriety immediately). *See also* Pls.' Mot. En Banc Recon. 4-5.

Nor would a "reasonable observer" perceive impartiality because an "understanding of all the facts and circumstances" reveal that the Court's stray

comments occurred in the context of a ruling that favored the City, denied Plaintiffs' request for a contempt proceeding, and expressed exasperation at Plaintiffs' counsel. *See* Hr'g Tr. 11, 22, 41 (characterizing Plaintiffs' request for relief as trying to fit "a square peg in a round hole," among other comments dismissive of Plaintiffs' strategy).[8] The statement comes nowhere close to the disqualification standard governing intra-judicial statements: a "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Liteky*, at 556.

Despite the consensus among the parties and the District Court about the relatedness of the cases, the Opinion appears to suggest that Plaintiffs' counsel would not have filed the case or marked it as related but for the District Judge's encouragement. Op. at 6-7. Yet, had there been any contemporaneous objection by the City or a motion to disqualify or *pre*-decision briefing on the question, Plaintiffs could have demonstrated just how implausible this inference is. Plaintiffs' counsel, the Center for Constitutional Rights and Jonathan Moore, Esq., who have engaged in complex civil rights litigation for decades and who had

[8] As the transcript reveals, the Plaintiffs sought to hold the City in contempt of the settlement agreement in *Daniels*, on the theory that the settlement agreement required not only promulgation of a racial profiling policy, but *bona fide* efforts to comply with it. Hr'g Tr. 29. The District Judge disagreed with Plaintiffs' reading of the settlement agreement and, among other things, suggested that it would be a waste of both parties' resources and the Court's time to adjudicate the terms of the settlement agreement for months. *Id*. 39-40. Only in that context, did the Court suggest that if Plaintiffs had evidence of racial discrimination by the NYPD, they could file new lawsuit and mark it as a related case to *Daniels*. *Id.* 41-42.

litigated and monitored the settlement agreement in *Daniels* for nearly a decade, understood the obvious.[9]

Moreover, suggesting that a party mark a case as related is one of a number of types of recommendations judges routinely give to litigants in the interests of judicial economy. *See* Op. at 9. For example, in *Panamax Bulk AS v. Dampskibsselskabet Norden AS*, 2010 WL 3431144 (S.D.N.Y. Aug. 23, 2010), in considering a long-standing dispute over an arbitration award, a district judge made a recommendation to a party similar to that made by Judge Scheindlin:

> At that hearing, defense counsel indicated its intention to move for confirmation of the arbitration award. The Court declined to take further action in this closed case but *informed defense counsel that any such new action seeking confirmation of the award ought to be marked as a related case and therefore be assigned to this Court*.

Id. at *1 (citing Transcript) (emphasis added). Under the Panel's view, such non-controversial discretionary decisions will now be subject to recusal motions. *See U.S. v. Vilar*, Civ. No. 05-621 (RJS), Dkt 621 (S.D.N.Y. Nov. 7, 2013) (motion seeking recusal of Judge Sullivan "in accordance with" the *Floyd* panel opinion

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[9] The Court suggests that, because by the time the *Floyd* case was filed, the *Daniels* case was administratively closed – the District Judge ran afoul of the requirement that a subsequently filed case be related to a "pending" case. Op. at 9 n. 17. There was no hearing or fact finding on this point, as would be necessary before making an informed judgment on this issue. Nevertheless, as a factual matter, at the time *Floyd* was filed, and as all parties understood, the District Court retained supervisory authority over *Daniels*, in order to manage the terms of the settlement agreement; as such, *Daniels* was then-pending. Even if the Panel's interpretation of this highly discretionary rule were correct, "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion….Almost

because of "impropriety and appearance of impropriety" in an alleged misuse of the related case rule) (quoting *Floyd v. City of New York*, No. 13-3088).

The Opinion's sanction for an offhand intra-judicial comment made in the course of a combined fourteen years of judicial proceedings is not only incorrect in this case, it threatens to do lasting damage to the independence of the judiciary and invites collateral challenges to the soundness of judicial decisions unrelated to the merits of those decisions.[10]

2. Neither the District Judge's Press Statements nor Statements Made About Her by Others Justify Recusal.

The Panel correctly observes that judges are not prohibited from speaking to the press as a general matter, and clarifies the critical finding that "Judge Scheindlin did not specifically mention the *Floyd* and *Ligon* cases in her media interviews." Op. at 10. These observations should conclude the inquiry: there is no breach of the canons of judicial ethics, nor could there be an appearance of impropriety for non case-related comments. *See* Pls.' Mot. for En Banc Reconsideration at 14.

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invariably, they are proper grounds for appeal, not for recusal." *Liteky v. United States*, 510 U.S. 540, 555 (1994).

[10] *See McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conf. of the United States*, 264 F.3d 52, 77 (D.C. Cir. 2001) (Tatel, J., dissenting) (lengthy discussion on the chilling effects of over-enforcement of judicial conduct codes); *Cf.* Duke Law News, *Justice Samuel Alito, Judge Jose Cabranes, and Judge William Pauley visit Duke Law to preside over Dean's Cup competition*, Feb. 12, 2008 (quoting Judge Cabranes as saying, "[a]s a district judge, you make scores of decisions every day about which people are not happy. . . [Thanks to life tenure] you never have to look over your shoulder.").

Judge Scheindlin's comments to the media – predominantly about her background and judicial philosophy – are fundamentally different from those considered in the case the Opinion primarily relies upon, *In re Boston's Children First*, 244 F.3d 164, 167 (1st Cir. 2001). To begin with, *Boston's Children First* involved precisely the type of process and fact-finding conspicuously absent here, including: (i) a timely disqualification motion pursuant to §455(a), directed to the district court, (ii) an opinion by the district court evaluating and rejecting the claims of impropriety, (iii) a timely mandamus petition to the First Circuit, which fully considered the claims of impropriety prior to ordering reassignment. In addition, the media comments at issue in that case concerned the *merits* (and likelihood of success) of a pending motion before the court. *Boston's Children*, 244 F.3d at 166. *Compare also United States v. Microsoft Corp.*, 253 F.3d 34, 108 (D.C. Cir. 2001) (describing multiple interviews given by district judge about the merits of the Microsoft product and the anti-trust controversies under review by the judge).

The press statement by Judge Scheindlin that the Panel criticizes consists of the following quote: "I know I'm not their favorite judge" – referring to government litigants. Op. at 11 (quoting Associated Press article). The Panel also characterizes her statements in the press as signaling that she is "skeptical of law

enforcement." Op. at 12. Her actual statements reflect an important nuance: According to the Associated Press's story:

> "I do think that I treat the government as only one more litigant," she said during the interview that proceeded with a single rule: no questions about the trial over police tactics that reaches closing arguments Monday.

She also said, "I don't think they're entitled to deference," referring to government attorneys. *Id*. In context, such unremarkable statements could not be seen as signaling favoritism. To the contrary, it openly reveals a judicial philosophy that *espouses impartiality* among government and private litigants – and it does so in an attempt to explain why her critics (including those in the City) unfairly construe her impartiality as a lack of respect of law enforcement. It would be darkly ironic if the candor about her philosophy of equal treatment for all litigants resulted in recusal on account of perceived partiality against the government.

Judges routinely do – and should – reveal their judicial philosophies, as long as comments stop short of commenting on a case. *See* ABA Model Code of Judicial Conduct Canon 1.2 cmt. 6 (2011). *See also* Jeffrey Toobin, *Swing Shift: How Anthony Kennedy's passion for foreign law could change the Supreme Court*, The New Yorker, Sept. 12, 2005; Jeffrey Toobin, *Breyer's Big Idea: The Justice's vision for a progressive revival on the Supreme Court*, The New Yorker, Oct. 31, 2005; Jeffrey Toobin, *Heavyweight: How Ruth Bader Ginsburg has moved the Supreme Court*, The New Yorker, March 11, 2013 (describing Justice Ginsburg's

preference for more cautious litigation strategies around social policy); Jennifer Senior, *In Conversation: Antonin Scalia*, NY Magazine, Oct. 6, 2013 (quoting Justice Scalia, in the context of his rulings around gay rights, "I still think it's Catholic teaching that [homosexuality is] wrong. Okay?"); The Blog of Legal Times, *Joyous Justice Thomas Speaks to Federalist Society*, Nov. 15, 2013 (quoting Justice Thomas at a Federalist Society event as being "obligated" to ignore Supreme Court precedent if it contradicts an originalist understanding of the Constitution); David Margolick, *Justice by the Numbers: A Special Report; Full Spectrum of Judicial Critics Assail Prison Sentencing Guidelines*, N.Y. Times, Apr. 12, 1992 (quoting then-District Court Judge Cabranes as being highly critical of the Sentencing Guidelines' fixation on reducing sentencing disparity and limiting judicial discretion).

Perhaps recognizing that Judge Scheindlin's own statements were not enough to reasonably question her impartiality, the Opinion takes the unprecedented step of using an independent writer's commentary *about the judge* as calling into question her integrity. Op. at 11 (quoting at length New Yorker writer's impression about Judge Scheindlin).[11] Under the Panel's view, any high profile case in which a federal judge issues an unpopular decision that is subject to

[11] The Panel also relies upon on the unattributed, anonymous comments of a former law clerk. Op. at 12. Anonymous double hearsay of this sort should not be considered by a court of law on a question so serious as judicial recusal.

press or public vitriol could produce grounds for disqualification. Such a result reflects little confidence in the judiciary and in the public, *see Cheney v. U.S. District Court Proceedings*, 541 U.S. 913, 928 (2004) ("[t]he people must have confidence in the integrity of the Justices, and that cannot exist in a system that assumes them to be corruptible by the slightest friendship or favor, and in an atmosphere where the press will be eager to find foot faults."), and even worse, potentially rewards powerful litigants who wage whisper campaigns attacking district judges in the midst of trial.

CONCLUSION

WHEREFORE, based on the foregoing reasons and the reasons stated herein and in Plaintiffs' Motion for En Banc Reconsideration, Plaintiffs respectfully request that this Court: (1) recall its mandate; (2) reverse the Panel's decision to remove Judge Scheindlin or, in the alternative, direct that the issue be briefed with the merits; and (3) randomly assign a different panel for all further proceedings in this appeal.

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November 18, 2013

Respectfully submitted,

_________/s/__________________

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