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.

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PLAINTIFFS-APPELLEES' MOTION FOR RECONSIDERATION BY THE EN BANC COURT OF THE OCTOBER 31, 2013 MANDATE

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PRELIMINARY STATEMENT

Plaintiffs-Appellees ("Plaintiffs") brought this action – perhaps one of the most significant civil rights cases in a generation – to challenge a policy and widespread practice of suspicionless and race-based stops and frisks by Defendant-Appellant the City of New York (the "City"), and the City's deliberate indifference to these mass constitutional violations for a decade. After presiding over a nine-week trial and hearing testimony from over 100 witnesses (resulting in an 8,000 page trial transcript), the district court (Hon. Shira A. Scheindlin, J.) issued a 198-page opinion finding the City liable under the Fourth and Fourteenth Amendments. Judge Scheindlin separately ordered the parties to engage in a process to develop remedies, subject to the district court's future review and approval.

On October 31, 2013, in the context of ruling on a motion for a stay of the remedial process pending appeal, a motions panel of this Court (Hon. Cabranes, Walker, Parker, JJ.) (the "Panel") issued an apparently unprecedented and procedurally defective order removing the district judge. Without briefing from the parties, the Panel found that Judge Scheindlin "ran afoul" of the Code of Conduct for United States Judges (the "Mandate", attached to Declaration of Jenn Rolnick Borchetta, Esq., dated November 11, 2013 ("Borchetta Decl."), as Ex. A). In two footnotes in its summary mandate, the Panel without explanation found that an "appearance of impropriety" stemmed from: (1) the judge's routine suggestion, six

years ago (at a conference in which she denied the plaintiffs' contempt motion against the City), that if the plaintiffs had evidence of continuing constitutional violations they could file a new case as "related" to *Daniels v. City of New York*, a case then before her that also challenged the constitutionality of the NYPD's stop-and-frisk practices; and (2) media interviews the judge gave during the pendency of *Floyd*, in which she refused to discuss the merits of that case, but did defend herself against attacks during the trial by the Defendant.

The Panel's decision is a perfect storm of procedural irregularity. The Panel (1) raised the removal issue *sua sponte*, without notice to the parties or the district court judge, without any request or complaint from the parties, and long after the City waived an opportunity to seek removal; (2) based its decision impermissibly on matters outside the appellate record; and (3) denied the parties an opportunity to be heard on alleged improprieties, even though Plaintiffs may suffer prejudice from reassignment to a judge unfamiliar with the complexities of this case. Given the Panel's stay of all proceedings before the district court and the opportunity to consider alleged improprieties in the ordinary course of merits briefing, the removal of Judge Scheindlin appears gratuitous and deeply flawed.

This extraordinary action merits review by the full court. First, in its haste to remove the district judge, the Panel exercised appellate jurisdiction in contravention of strict congressional prohibitions against piecemeal appellate

review and long-standing precedent in this Court. Because this Court lacks jurisdiction over the City's underlying appeal, the Panel entered the Mandate without authority.

Second, impugning the ethics of a district court judge who for years presided over a significant proceeding, when the parties themselves never raised the issue, must follow appropriate procedural rules to ensure any resulting removal or reassignment is fair, warranted, and just. The Panel here dispensed with even the most basic procedures – notice and an opportunity to be heard – without evident need, and offered no explanation for such extraordinary action. Plaintiffs – and the hundreds of thousands of New Yorkers they represent – may and have already suffered substantial prejudice by the unprecedented actions of a panel of this court and by reassignment to a judge unfamiliar with the complicated and extensive facts of this case – familiarity that is necessary to ultimately impose fair and effective relief. It is not apparent that the Panel even considered this potential prejudice.

The rules of procedure and the principles of due process must have meaning in this Court. Accordingly, to "correct clear error" and "prevent manifest injustice," *Doe v. New York City Dep't of Social Serv's*, 709 F.2d 782, 789 (2d Cir. 1983), this Court should recall the Mandate and review and reconsider the Panel's rulings en banc. *Calderon v. Thompson*, 523 U.S. 538, 549-50 (1998) ("[T]he courts of appeals are recognized to have an inherent power to recall their

mandates, subject to review for an abuse of discretion." (citation omitted)); *see also Sargent v. Columbia Forest Prods., Inc.*, 75 F.3d 86, 89 (2d Cir. 1996) ("Our power to recall a mandate is unquestioned." (citation omitted)).

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs filed this action almost six years ago following the City's failure to comply with a settlement agreement in *Daniels v. City of New York*, No. 99 Civ. 1695 (S.D.N.Y. filed Mar. 8, 1999), a putative class action alleging, as this case does, that the City's stop-and-frisk policy and practice violated the Fourth and Fourteenth Amendments. The City's failure to comply with the *Daniels* settlement that had been so-ordered by Judge Scheindlin in part formed the basis of the *Floyd* complaint, *see* 08 Civ. 1034, Dkt # 50 ¶¶ 5, 120, 128 (S.D.N.Y. Oct. 20, 2008) (alleging City's failure to abide by the terms of the *Daniels* settlement), and was found at the *Floyd* trial to be evidence of the City's deliberate indifference to racial discrimination. *See* Dkt # 22 (Civil Appeal Pre-Argument Statement ("Form C")) at 224. The attorneys representing the parties in both cases are the same. *Compare* No. 99 Civ. 1695 (Attorney Jonathan C. Moore appearing on behalf of plaintiffs; attorney Heidi Grossman appearing on behalf of defendants), *with Floyd v. City of New York*, No. 08 Civ. 1034 (S.D.N.Y. filed Jan. 31, 2008) (same). When Plaintiffs filed *Floyd*, they marked it as a related to *Daniels* pursuant to governing local rules, and Judge Scheindlin accepted *Floyd* as related. Dkt # 22 (Form C) at 34; *see*

also Civil Cover Sheet, No. 08 Civ. 1034, Borchetta Decl., Ex. C. In almost six years of litigation, the City never questioned the marking of these cases as related.

Floyd went to trial in March of 2013, and evidence closed nine weeks later. Dkt # 22 (Form C) at 89, 114. It was perhaps the most highly publicized civil rights trial in a generation. In the midst of trial, media suggested that Judge Scheindlin harbored bias against law enforcement based on a report from the office of Mayor Michael Bloomberg. *See, e.g.*, Ginger Adams Otis & Greg B. Smith, *Federal Judge to Rule on Stop-and-Frisk Case Bias Against Cops: Report*, N.Y. Daily News, May 15, 2013 ("An internal report by Mayor Bloomberg's office paints the judge who will soon rule on the NYPD's stop-and-frisk policy as biased against law enforcement . . . .").

Two months after evidence closed, Judge Scheindlin issued a finding of liability and an order directing the parties to participate in a process to develop remedial proposals. *See* Dkt # 22 (Form C) at 129-365. On August 16, 2013, the City noticed its appeal of the liability and remedies orders. *See* Dkt # 22 at 4. In its statement of issues to be presented on appeal, the City did not include a question concerning judicial bias or an appearance of impropriety. Dkt # 22 at Addendum B. The City thereafter moved this Court for a stay of remedies pending appeal, but it did not include in its motion an argument concerning Judge Scheindlin's

acceptance of *Floyd* as related to *Daniels*, judicial bias, or an appearance of impropriety. Dkt # 72, 206.

Despite this, at oral argument on the stay application, Judge Cabranes *sua sponte* queried of the City whether comments Judge Scheindlin made during a court conference in *Daniels* and comments attributed to her in news articles raised an appearance of impropriety, although no questions were asked of Plaintiffs' counsel on this point by anyone on the Panel. He suggested to the City that they might include such an argument in their appeal. Two days later, the Panel stayed proceedings in the district court, removed Judge Scheindlin, and assigned itself to hear the merits of this appeal. *See* Dkt # 247; Borchetta Decl., Ex. A. Plaintiffs were provided no opportunity to brief this issue and no advance notice that the Panel would raise the issue at oral argument.

The Mandate explains the basis for removing Judge Scheindlin in one paragraph and two footnotes. The Panel held that Judge Scheindlin "ran afoul of the Code of Conduct for United States Judges . . . ." It cites the canons related to disqualification and the appearance of impropriety. It does not cite Canon 3(A)(6), which regulates judicial comments to the public.

With respect to the *Daniels* conference, the Mandate quotes Judge Scheindlin and cites "generally" to a *New York Times* article. But the Panel in part relies upon a conference colloquy that does not appear in the cited *Times* article, or

any other article cited. The transcript of the December 21, 2007 court conference (the "*Daniels* Transcript") (Borchetta Decl., Ex. B), containing those comments is nowhere in the record on appeal, was not submitted with the stay application, and is not available on the electronic docket of the *Daniels* action.

With respect to press statements, the panel does not identify the comments it found improper and instead cites news articles. None of the comments in those articles concerned the merits of any pending or impending action. Given its directive staying all proceedings in the district court, the Panel had no appropriate reason to immediately remove Judge Scheindlin.[1]

ARGUMENT

1. The Panel Lacked Appellate Jurisdiction.

The Panel lacked jurisdiction to enter the Mandate. The City concedes that no final order has issued in this action and invokes appellate jurisdiction for interlocutory review of grants of injunctions under 28 U.S.C. § 1292(a)(1). *Id.*; *see also* Dkt # 44 at n.1. This Court has repeatedly and unequivocally held that "Section 1292(a)(1) functions only as a narrowly tailored exception to the policy against piecemeal appellate review." *Sahu v. Union Carbide Corp.*, 475 F.3d 465,

[1] The Panel directed a briefing schedule under which the City is afforded 148 days to prepare its 28,000-word opening brief and Plaintiffs are afforded 35 days to prepare their responsive brief. Plaintiffs reserve the right to seek the entire 91 days afforded them under the rules. *See* Local Circuit Rule 31.2(a)(1)(B).

467 (2d Cir. 2007) (citations and internal quotation marks omitted); *Henrietta D. v. Giuliani*, 246 F.3d 176, 181 (2d Cir. 2001). The City concedes that appealing now will result in piecemeal appeals, including an appeal of any subsequent remedial order. Dkt # 143 at 13. This concession alone confirms the absence of jurisdiction.

The liability order is a declaratory judgment, and the remedies order compels the City to engage in a process for developing remedial proposals and nothing more.[2] *Floyd v. City of New York*, No. 08 Civ. 01034 (SAS), 2013 U.S. Dist. LEXIS 132881, at *6-8 (S.D.N.Y. Sept. 17, 2013); *see also* Dkt ## 76, 170, 171, 208. This Court and others have long held that, in complex institutional reform cases such as this, appellate courts should avoid interfering with a district court's development of remedies until completed, and that jurisdiction is absent when parties are compelled only to submit remedial proposals. *See, e.g.*, *Taylor v. Bd. of Educ.*, 288 F.2d 600, 602 (2d Cir. 1961) (Friendly, J.); *Spates v. Manson*, 619 F.2d 204 (2d Cir. 1980) (Friendly, J.); *Henrietta D.*, 246 F.3d 176; *Bridgeport v. Bridgeport Guardians Inc.*, No. 05-2481-cv, 2007 U.S. App. LEXIS 28662 (2d Cir. Dec. 11, 2007); *Jackson v. Fort Stanton Hosp. and Training Sch.*, 964 F.2d

[2] For this reason, there is unquestionably no irreparable harm to the City from the liability and remedies orders. The Panel found only that the orders will have the "effect of causing" the City's "actions." Borchetta Decl., Ex. A at 2. A finding of *irreparable harm*, not mere effect, is necessary to obtain a stay. *Nken v. Holder*, 556 U.S. 418, 435 (2009); *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 22 (2008).

980, 988-89 (10th Cir. 1992); *Groseclose v. Dutton*, 788 F.2d 356 (6th Cir. 1986); *Hoots v. Pennsylvania*, 587 F.2d 1340 (3d Cir. 1978).

The district court's remedies order compels only participation in a process to develop remedial proposals that would be binding *if and only if* the court agrees with their scope and content *and* obligates compliance pursuant to subsequent court order. This Court therefore lacks jurisdiction over the appeal, and accordingly lacked authority to enter the Mandate. *See Kamerling v. Massanari*, 295 F.3d 206, 212 (2d Cir. 2002); *Henrietta D.*, 246 F.3d at 179; *Ammi v. Holder*, 326 Fed. Appx. 483, 484 (10th Cir. 2009) (summary order) ("a prerequisite for consideration of a motion for stay pending appeal is appellate jurisdiction over the underlying appeal."). *See also Taylor*, 288 F.2d at 601-02 (raising jurisdictional question and dismissing appeal *sua sponte* in context of stay application).

Exercising appellate authority where none exists was the Panel's first error.

2. <u>The Panel Effectively Disqualified Judge Scheindlin Without Authority</u>.

At the time the panel issued its order removing Judge Scheindlin from this case, the City had no right to seek disqualification. "It is well-settled that a party must raise [a] claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim." *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333-34 (2d Cir. 1987) (citations omitted); *see also United States v. Brinkworth*, 68 F.3d 633, 640 (2d Cir.

1995). Timeliness ensures fair invocation of the disqualification rules. *Apple*, 829 F.2d at 334 ("A movant may not hold back and wait, hedging its bets against the eventual outcome."); *see also LoCascio v. United States*, 473 F.3d 493, 497-98 (2d Cir. 2007).[3] The City never sought recusal or reassignment at any point: Not when *Floyd* was accepted as related to *Daniels*; not in the almost six years since *Floyd* was filed; not when articles forming the basis of the Mandate were published; not in the two months thereafter before issuance of the liability ruling; not in its statement of issues on appeal; not in its stay application. The City's failure to seek reassignment or recusal when *Floyd* was accepted as related raises not merely a matter of laches: it constituted a waiver of any right to recusal. *See United States v. Bayless*, 201 F.3d 116, 127 (2d Cir. 2000).

Even assuming, *arguendo*, that the City had not waived a right to seek recusal, the Panel could not properly disqualify Judge Scheindlin. The standard for disqualification of a judge based on an alleged appearance of impropriety "is whether an objective and disinterested observer, knowing and understanding all of

[3] Indeed, circuit courts across the country emphasize that timeliness is a critical element of an application for recusal. *In re Abijoe Realty Corp.*, 943 F.2d 121, 126-67 (1st Cir. 1991); *In re Kensington Int'l Ltd.*, 368 F.3d 289, 312 (3d Cir. 2004); *United States v. Owens*, 902 F.2d 1154, 1155-56 (4th Cir. 1990); *Travelers Ins. Co. v. Liljeberg Enter's*, 38 F.3d 1404, 1410 (5th Cir. 1994); *Callihan v. E. Ky. Prod. Credit Ass'n*, 895 F.2d 1412 (6th Cir. 1990); *United States v. Patrick*, 542 F.2d 381, 390 (7th Cir. 1976); *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003); *E. & J. Gallo Winery v. Gallo Cattle Co.*, 967 F.2d 1280, 1295 (9th Cir. 1992); *Willner v. Univ. of Kan.*, 848 F.2d 1023, 1028-29 (10th Cir. 1988); *United States v. Barrett*, 111 F.3d 947, 952-53 (D.C. Cir. 1997).

the facts and circumstances, could reasonably question the court's impartiality." *SEC v. Razmilovic*, 728 F.3d 71, 86 (2d Cir. 2013) (citations omitted); *In re IBM Corp.*, 45 F.3d 641, 643 (2d Cir. 1995). Because the Panel did not seek to obtain, nor did it know, all relevant facts and circumstances, it could not have made this determination. The opinions of pundits and politicians are notably irrelevant to this inquiry. *Cf. Bayless*, 201 F.3d at 126-27 ("[T]he existence of the appearance of impropriety" is not to be determined "by considering what a straw poll of the only partly informed man-in-the-street would show . . . .").

(A) Acceptance of *Floyd* as Related Is Not a Basis for Disqualification.

Intrajudicial events – that is, comments and decisions made in the course of judicial proceedings – are almost never a basis for disqualifying a judge. *Liteky v. United States*, 510 U.S. 540, 556 (1994). Intrajudicial events are not a basis for recusal unless the judge considers extrajudicial material or evinces a "deep-seated and unequivocal antagonism that would render fair judgment impossible." *Id*. at 556. The Panel clearly erred in hinging recusal on intrajudicial comments and decisions.

The Panel committed extraordinary error in removing Judge Scheindlin based on trivial intrajudicial comments plucked out of context without regard to the fairness she exhibited during years of litigation. *Id*. ("A judge's ordinary efforts at courtroom administration . . . remain immune."); *see also Razmilovic*, 728 F.3d

at 86. The record does not support the notion that Judge Scheindlin caused Plaintiffs to file *Floyd* and mark it as related to *Daniels*. At the *Daniels* conference, Judge Scheindlin was considering the plaintiffs' motion to modify a settlement agreement, compel the City's specific performance of certain terms, and extend the agreement's expiration date. Judge Scheindlin sided with the City, denied the plaintiffs' motion, and noted proper procedures for plaintiffs to follow (procedures obviously known to the plaintiffs' attorneys) should they have evidence supporting new claims against the City for racial profiling and unconstitutional stop-and-frisk practices. *See* Borchetta Decl., Ex. B at 3-11, 14-15, 41-42. A full reading of the *Daniels* Transcript, *see id*., leaves no question that Judge Scheindlin's comments were impartial. This demonstrates the importance of process. *See Andrade v. Chojnacki*, 338 F.3d 448, 459-60 (5th Cir. 2003) (opining, where party moved for recusal for the first time at the appellate level, that "these circumstances emphasize the wisdom behind the procedural rules – limiting supplementation of the appellate record; deeming waiver or forfeiture of issues not raised in the trial court; and restricting the scope of appellate review – that are designed to confine appellate review to fact finding that occurs in the trial court.").

Regardless, accepting *Floyd* as related to *Daniels* is not a basis for removal. The local rules on relatedness compel judges to accept cases as related where it would serve judicial efficiency, and "district court[s] should be accorded

considerable latitude in applying local procedural rules . . . ." *Dedji v. Mukasey*, 525 F.3d 187, 192 (2d Cir. 2008) (Cabranes, J.); *see also* 28 U.S.C. § 137; *Buck v. Cleary*, No. 07-1753-cv, 2009 U.S. App. LEXIS 20384, at *2-3 (2d. Cir. Sept. 14, 2009) ("We accord 'considerable deference' to a district court's interpretation and application of its own local rule, and review such rulings for abuse of discretion." (citing *LoSacco v. City of Middletown*, 71 F.3d 88, 92 (2d Cir. 2001))); *Whitfield v. Scully*, 241 F.3d 264, 270-71 (2d Cir. 2001). There can be no reasonable doubt that it served judicial efficiency to mark *Daniels* and *Floyd* as related given the congruence of parties, attorneys, discovery, and claims. The City's failure to ever take issue with the cases being marked as related indicates that it was apparent to all that the cases were in fact related.

Plaintiffs have not found a single case in which this Court predicated an appearance of impropriety on application of the related case doctrine. The Panel's opinion threatens to transform routine, discretionary decisions into a basis for judicial disqualification. Indeed, this is already happening. *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 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).

(B) Press Statements Were Not a Basis to Disqualify.

Judges are free to speak publicly, and the fact of press interviews is not itself improper. *See Andrade*, 338 F.3d at 459-60; *United States v. Haldeman*, 559 F.2d 31, 36 (D.C. Cir. 1976) (en banc) (per curiam). Judge Scheindlin expressly refused to comment on the merits of *Floyd*, and instead spoke only to illuminate her practices. The public had an interest in understanding the jurist overseeing the trial of this historic proceeding, particularly in light of the attacks Defendant released against her through the media. *Cf. In re Marshall*, 721 F.3d 1032, 1043-44 (9th Cir. 2013). Once media began questioning Judge Scheindlin's impartiality during the trial, she arguably had an obligation to educate the public on her judicial approach. *See* ABA Model Code of Judicial Conduct Canon 1.2 cmt. 6 (2011) ("A judge should initiate and participate in community outreach activities for the purpose of promoting public understanding of and confidence in the administration of justice.").

3. Reassignment Would Not Be Appropriate Under Supervisory Authority.

Under 28 U.S.C. § 2106, this Court has authority to reassign cases on remand, but "[t]hat is an extreme remedy, rarely imposed." *United States v. City of New York*, 717 F.3d 72 (2d Cir. 2013) (citations omitted) (hereinafter "*Vulcans*"); *see also United States v. Awadallah*, 436 F.3d 126, 135 (2d Cir. 2006) (Parker, J.) ("Remanding a case to a different judge is a serious request rarely made and rarely

granted."). It is reserved for "unusual circumstances where both for the judge's sake and the appearance of justice, an assignment to a different judge is salutary and in the public interest, especially as it minimizes even a suspicion of partiality." *United States v. Robin*, 553 F.2d 8, 10 (2d Cir. 1977) (en banc) (internal citations and quotation marks omitted); *see also Mackler Prod's Inc. v. Cohen*, 225 F.3d 136, 146-47 (2d Cir. 2000). Surely, the Mandate fails to serve these purposes.

Preliminarily, the Panel did not merely reassign this action; the Mandate without serious question constituted a *de facto* disqualification if not an express one. The appropriate inquiry is therefore whether disqualification was proper under the exacting standards of 28 U.S.C. § 455. But even assuming the Panel was acting pursuant to Section 2106, its summary removal of the judge presiding over a highly publicized civil rights case without even an explanation of its reasoning *damaged* the appearance of justice. *See, e.g.*, Editorial Board, *A Bad Ruling on Stop-and-Frisk*, N.Y. Times, Oct. 31, 2013; Emily Bazelon, "*Shut Up, Judge!*", Slate Magazine, Nov. 3, 2013.

In considering whether to reassign *Floyd*, the Panel should have considered "whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." *Robin*, 553 F.2d at 10.[4] The undue

[4] The only other basis for Section 2106 reassignment – when the original judge would have great difficulty applying appellate determinations, *see Robin*, 553 F.2d

waste of judicial resources and potential prejudice to Plaintiffs from a reassignment – after almost six years of litigation, a nine week trial, and a finding of liability, and before remedies have been developed or so-ordered – is tremendous. *Cf. id.* at 11; *Vulcans*, 717 F.3d at 100 n.28; *United States v. Microsoft Corp*., 253 F.3d 34, 108 (D.C. Cir. 2001) (refusing to apply retroactive disqualification after bench trial even where judge "destroyed the appearance of impartiality" because doing so "would unduly penalize plaintiffs . . . ."). Even the most diligent judge might never achieve the same familiarity with the facts necessary to best tailor remedies as the judge who oversaw the lengthy trial in this case. A new judge will undoubtedly require significant time to learn the extensive and complex factual record, and such familiarity must necessarily precede the so-ordering of remedies. Removing the judge familiar with the factual record of this case will delay justice for mostly minority New Yorkers who have already waited too long.

Having left the public to speculate about the basis for removal while simultaneously holding that the "appearance of impartiality" was compromised "*surrounding this litigation*," the Mandate invited the public to unfairly question the soundness of the liability ruling. Indeed, on the morning of Saturday, November 9, 2013, the City moved this Court to "immediately vacate [Judge Scheindlin's] ruling" based on the Mandate. Dkt # 265. Put aside that the City long

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at 11 – is inapplicable here, as the Panel expressed no opinion on the merits of the appeal.

ago waived any right to seek Judge Scheindlin's recusal: the City is by this motion attempting to circumvent procedures – applicable to every other appellant who comes before this Court – that require arguments seeking to overturn district court orders to be presented in merits briefs. Worse still, the City is requesting expedited briefing on their motion, suggesting that Plaintiffs be given three business days, including Veterans Day, to respond, despite that Plaintiffs are entitled to ten days under the motion rules. *See* Fed. R. App. P. 27(a)(3)(A). Undermining the liability ruling in this manner has prejudiced Plaintiffs and deprived them of basic due process.

4. A New Appellate Panel Should Be Randomly Assigned.

Contrary to this Court's customary practices, the Panel assigned itself to hear the merits of this appeal. Yet the Panel rushed to judgment about the district court's purported partiality and took apparently unprecedented action in removing her without basic process and without regard to potential prejudice to Plaintiffs. The Panel further inappropriately considered extrajudicial materials. *See Liteky*, 510 U.S. at 556; *Razmilovic*, 728 F.3d at 86. In so acting, the Panel has undermined the appearance of justice. This Court should therefore randomly reassign a different panel for all further proceedings in *Floyd*. Because the Panel expressed no judgment on the merits and has not yet reviewed the trial record, reassignment would not hinder judicial efficiency.

CONCLUSION

WHEREFORE, based on the foregoing, 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.

Dated: New York, New York
November 11, 2013

Respectfully submitted,

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