United States Court of Appeals

FOR THE

SECOND CIRCUIT

In re Reassignment of Cases

Jaenean Ligon, et al.,

Plaintiffs-Appellees,

v. 13-3123

City of New York, et al.,

Defendants-Appellants.

David Floyd, et al.,

Plaintiffs-Appellees,

v. 13-3088

City of New York, et al.,

Defendants-Appellants.

BRIEF OF *AMICI CURIAE* SIX RETIRED UNITED STATES DISTRICT COURT JUDGES AND THIRTEEN PROFESSORS OF LEGAL ETHICS IN SUPPORT OF PLAINTIFFS-APPELLEES' MOTION FOR RECONSIDERATION BY THE *EN BANC* COURT

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LIST OF *AMICI CURIAE* RETIRED JUDGES AND PROFESSORS OF LEGAL ETHICS

Amici file this Brief in their individual capacities – not as representatives of the institutions or firms with which they are affiliated – and in support of Plaintiffs-Appellees' request for *en banc* reconsideration of the October 31, 2013, Order and the November 13, 2013, Opinion of the Second Circuit Panel.

Retired Federal Judges

Robert J. Cindrich was appointed to the federal bench in 1994 and served as a United States District Court Judge for the Western District of Pennsylvania for ten years.

David H. Coar was appointed to the federal bench in 1994 and served as a United States District Court Judge for the Northern District of Illinois for sixteen years.

William Royal Furgeson, Jr. was appointed to the federal bench in 1994 and served as a United States District Court Judge for Western District of Texas and the Northern District of Texas for nineteen years.

Nancy Gertner was appointed to the federal bench in 1994 and served as a United States District Court Judge for the District of Massachusetts for seventeen years.

Richard J. Holwell was appointed to the federal bench in 2003 and served as a United States District Court Judge for the Southern District of New York for ten years.

Stanley Sporkin was appointed to the Federal Bench in 1985 and served as a United States District Court Judge for the District of Columbia for fourteen years.

Professors of Legal Ethics

Anita Bernstein is the Anita and Stuart Subotnick Professor of Law at Brooklyn Law School. She has taught legal ethics at Brooklyn, Michigan, Chicago-Kent, and Cornell Law Schools. From 2000-2007, she held an endowed

chair at Emory University in Professional Responsibility. Her scholarship focuses on lawyer and judicial ethics.

Carol Buckler is a Professor of Law and the Director of the Center for Professional Values and Practice and Director of Pro Bono Initiatives at New York Law School. She teaches legal ethics among other courses.

Monroe Freedman is a Professor of Law and the former Dean at Hofstra University Law School. He has spoken before judicial conferences in the United States and Canada, has written articles and book chapters on judges' ethics, and has qualified as an expert witness on judges' ethics before the Judiciary Committees of the United States Congress.

Bennett L. Gershman is a Professor of Law at Pace Law School. He is a former Assistant District Attorney in Manhattan and a Special State Prosecutor in New York State. He has spoken on judicial ethics at judicial conferences, professional panels, and legal symposia and has written numerous law review and other articles on judicial conduct and ethics. His treatise, "Trial Error and Misconduct" (Lexis-Nexis 2d ed., 2007, annually supplemented), focuses extensively on judicial responsibilities in the courtroom.

Bruce Green is the Louis Stein Professor and Director of the Louis Stein Center for Law and Ethics at Fordham University School of Law. He has spoken on judicial ethics at programs for judges and lawyers, has written several scholarly articles on judicial ethics, and was responsible for the chapter on "Special Ethical Rules: Prosecutors and Judges" in his co-authored casebook, Professional Responsibility: A Contemporary Approach (West 2011).

Mark I. Harrison is a legal ethics expert at the Arizona law firm, Osborn Maledon, PA and has taught legal ethics at the University of Arizona and Arizona State Law Schools. He chaired the ABA Joint Commission to Revise the Model Code of Judicial Conduct and currently chairs the national Board of Directors of Justice at Stake. He has served on numerous committees to draft legal ethics codes. Mr. Harrison has been the recipient of several awards for his work on legal and judicial ethics.

Richard Klein is the Bruce K. Gould Distinguished Professor of Law at the Touro Law Center. He has served on the New York Committee to Preserve the Independence of the Judiciary and other professional ethics committees. His scholarship, lecturing, and teaching has a focus upon judicial ethics and independence.

Myles V. Lynk is the Peter Kiewit Foundation Professor of Law and the Legal Profession at the Arizona State University College of Law. He serves on the American Bar Association's Standing Committee on Ethics and Professional Responsibility which drafts the Model Code of Judicial Conduct, is the immediate past Chair of the ABA's Standing Committee on Professional Discipline which co-sponsored the Model Rules for Judicial Disciplinary Enforcement, and has participated in a consultation to a state supreme court on its judicial discipline rules and process.

Peter Margulies is a Professor of Law at Roger Williams University School of Law. He has taught legal and judicial ethics for almost twenty years and has written more than thirty law review articles on professional responsibility and legal ethics. He was a member of the Rhode Island Supreme Court's Committee to Revise the Rules of Professional Conduct.

Lawrence Raful is a Professor of Legal Ethics and the former Dean at Touro College Jacob D. Fuchsberg Law Center. He has authored many articles focusing upon legal and judicial ethics.

Deborah L. Rhode is the Ernest W. McFarland Professor of Law and the director of the Center on the Legal Profession at Stanford University. She is the founding president of the International Association of Legal Ethics, the former president of the Association of American Law Schools, the former chair of the American Bar Association's Commission on Women in the Profession, a former trustee of Yale University, and the former director of Stanford's Institute for Research on Women and Gender. She is the author or co-author of over twenty books and over 250 articles and serves as a columnist for various newspapers. She has received numerous awards for her legal ethics scholarship and contributions to the field of professional responsibility.

Rebecca Roiphe is a Professor of Law at New York Law School where she is affiliated with the Center for Professional Values and Practice. She teaches professional responsibility, legal history, and criminal procedure. Her scholarship focuses on the history of the legal profession. She has also written and spoken on the judicial ethics and judicial independence.

W. Bradley Wendel is a Professor of Law at Cornell Law School where he teaches a range of legal ethics courses. He is the author or editor of several books and over fifty articles on legal ethics and professional responsibility, including several articles on judicial ethics. He frequently is a speaker in programs on judicial ethics.

STATEMENT AND INTERESTS OF *AMICI CURIAE*

The undersigned Retired Judges of the United States District Courts and Professors of Legal Ethics seek to appear as *amici curiae*[1] because of their concern with the policy ramifications flowing from the Second Circuit's peremptory decision to remove Judge Shira Scheindlin as the presiding trial court judge in *Floyd, et al. v. City of New York, et al.* and *Ligon, et al. v. City of New York, et al.*[2] The Court's treatment of Judge Scheindlin was inconsistent with the statutory procedures governing disqualification and reassignment, and was fundamentally unfair not only to the Judge, but also to the litigants, the federal courts, and the public. By circumventing the usual procedures for judicial disqualification, the Court's decision undermines public confidence in the federal courts, as well as the principles of comity between superior and inferior courts. Even more significant, *what* the Court did, and *how* the Court did it, chills the judicial independence on which our judicial system relies.

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[1] Plaintiffs-Appellees and Defendant-Appellant City of New York have consented to the filing of this brief.

[2] Pursuant to Fed. R. App. P. 29(c)(5) and Second Circuit Local Rule 29.1, *amici* state that *amici* and their counsel authored this Brief in whole; no counsel for a party authored this Brief in any respect; and no person or entity as defined in Fed. R. App. P. 29(c)(5) made a monetary contribution to the preparation or submission of this Brief.

PROCEDURAL BACKGROUND

District Court Judge Shira A. Scheindlin (hereafter the "District Court," the "District Court Judge," or "Judge Scheindlin") served as the presiding judge in *David Floyd et al. v. City of New York, et al.* (13-3088) ("*Floyd*") and *Jaenean Ligon, et al. v. City of New York, et al.* (13-3123) ("*Ligon*"). The District Court held an extensive hearing on a Motion for a Preliminary Injunction in *Ligon* from October 15, 2012, to November 7, 2012, issuing an opinion finding a likelihood of success on the merits on January 8, 2013, amended on February 14, 2013, but granting Defendants' Motion to Stay any remedies pending the outcome of the *Floyd* matter, which proceeded to trial in March 2013, with evidence closing nine weeks later. *See Floyd*, No. 08-cv-1034 (S.D.N.Y. Aug. 12, 2013) (Dkt. No. 373); *Ligon*, No. 12-cv-2274 (S.D.N.Y. Jan. 22, 2013) (Dkt. Nos. 96 & 105).

On August 12, 2013, the District Court issued a 198-page opinion with respect to liability in the *Floyd* matter and a second thirty-nine page opinion concerning remedies in that matter (*Floyd*, Dkt. Nos. 372 & 373) (collectively with the *Ligon* decision, the "Opinions"). Defendants (collectively, the "City") filed an appeal from the Opinions on August 16, 2013, and on August 27, 2013, moved in the District Court to stay the remedies in *Floyd* and *Ligon*, pending the outcome of the appeals process. (*Floyd*, Dkt. No. 380.) The District Court denied the stay

motions, and the City then filed a motion in this Court on September 23, 2013, asking the Court to stay the remedial order pending the outcome of the appeals.

On October 31, 2013, a motions panel of this Court (Hon. Cabranes, Walker, Parker, JJ.) (the "Panel") ruled on the Motion to Stay the remedies (the "October 31 Order"). Notwithstanding the fact that no party at any time throughout the six years of litigation in the *Floyd* and *Ligon* matters had sought to disqualify the District Court Judge, the Panel in its October 31 Order, *sua sponte*, found that the District Court Judge "ran afoul" of the Code of Conduct for United States Judges. In two opaque footnotes, the Panel found an "appearance of impropriety" stemming from media interviews the District Court Judge held during the *Floyd* case – interviews in which she assiduously declined to comment on the pending litigation – and from the District Court's suggestion at a motion hearing in another matter *six years earlier* that plaintiffs could potentially file a new case and mark it as related to the case then before her.

Because no party had moved for disqualification, there was no record before the Panel justifying its actions. Nor did the October 31 Order provide any analysis as to how a routine colloquy at a hearing six years earlier, coupled with the media interviews, supported the Panel's unprecedented decision to summarily remove a judge the Panel has since described as "long-serving and distinguished."

On November 8, 2013, Judge Scheindlin sought to be heard through counsel willing to appear either directly on her behalf or as *amicus curiae*. (Request for Leave to File Motion to Address Order of Disqualification (Dkt. No. 261) (the "District Court's Motion").) The District Court's Motion was aimed at providing the Judge with the process judges are generally accorded when a disqualification issue is raised on mandamus. The Panel denied the District Court's Motion on November 13, 2013. (Dkt. No. 301.) In addition, the Panel issued a separate *per curiam* opinion (the "November 13 Opinion") superseding its October 31 Order. (Dkt. No. 304.) The November 13 Opinion sought to explain the basis for the Panel's decision to remove the District Court but, critically, did not alter the October 31 Order removing Judge Scheindlin, concluding that "reassignment is advisable to preserve the appearance of justice." (November 13 Opinion at 15.)

ARGUMENT

While the November 13 Opinion ostensibly addresses the Panel's initial failure to explain the basis for its unprecedented removal of the District Court Judge, it falls far short of addressing the fundamental unfairness and procedural shortfalls accompanying the Judge's removal. In fact, the November 13 Opinion could not have repaired those deficiencies because, as with its initial October 31 Order, it was issued without according the District Court Judge (or the parties) an opportunity to be heard, and without the development of a record.

The Panel grounds its removal decision on 28 U.S.C. § 455(a), but ignores the fact that removal under § 455(a) typically comes after a party has requested removal, motion practice has developed a record, the trial court has decided the motion – a decision left to the trial court's discretion[3] – and the appellate court has considered the issue after briefing. Instead, in a mere two sentences in its original October 31 Order, the Panel found the District Court Judge had "run afoul" of the Judicial Canons of Ethics and, further, that the purportedly improper conduct was of such significance and materiality that the Panel had to remove the District Court Judge immediately – before briefing of the merits – and notwithstanding six years of oversight by the District Court Judge without any party raising even a perception of partiality.

Although the November 13 Opinion contains the Panel's analysis, it cannot change the factual and procedural shortcomings in the Panel's initial decision. No party had moved for disqualification. The matter of the District Court Judge's disqualification had not been briefed or argued at any level. The District Court had not been given – and still has not been given – an opportunity to respond, despite the fact that § 455(a) proceedings at the appellate level often result in the appointment of counsel to represent the judge. *See In re German and Austrian*

[3] *See, e.g.*, *In re Aquinda*, 241 F.3d 194 (2d Cir. 2001); *In re Drexel Burnham Lambert*, 861 F.2d 1307 (2d Cir. 1988).

Banking Litig., 250 F.2d 156 (2d Cir. 2001) (authorizing appointment of counsel in Rule 21 mandamus proceeding).

Further, apart from the merits of the Panel's analysis (discussed below), there was no reason for the Court's peremptory action, not to mention its uncharacteristic haste: the cases were on appeal, the merits had not yet been briefed, and the Panel had decided to stay the remedial relief pending the outcome of the appeal. No matters of substance would be pending before the District Court while the appeal progressed.

Although the November 13 Opinion "emphasized at the outset that we make no findings of misconduct, actual bias, or actual partiality" (November 13 Opinion at 6), and hastened to recognize the District Court Judge's distinguished career, the Panel stood by its substantive determination to remove Judge Scheindlin and the extraordinary procedure it had followed in deciding the Motion to Stay on October 31. The Panel reiterated that (a) there was an appearance of impropriety under 28 U.S.C. § 455 stemming from the assignment of the cases to the District Court Judge and the Court's media contacts; and (b) the "appearance of impropriety" somehow justified the Court's immediate removal without further briefing, or without according the Judge an opportunity to be heard.

I. The Motion Panel's Decision Was Inconsistent With 28 U.S.C. § 455 Procedures

Where the 28 U.S.C. § 455 findings cast aspersions on the trial court, as even an "appearance of impropriety" finding plainly does, the parties, the judge, and indeed, the public are entitled to a fair process – a motion for disqualification, briefs on the side of those moving for and those opposing disqualification, a record of the conduct ostensibly justifying disqualification, and an opportunity for the judge to respond. If the judge declines disqualification, a mandamus proceeding may follow governed by Rule 21(b)(4) of the Federal Rules of Appellate Procedure, during which the judge's decision would be reviewed on an "abuse of discretion standard." *See In re Aquinda*, 241 F.3d 194.

The § 455 case law emphasizes the importance of that motion practice. For example, courts have rejected disqualification motions made years after the alleged disqualifying facts became known and have taken care to specify factors that inform whether parties have waived the disqualification issue. *See United States v. Brinkworth*, 68 F.3d 633, 639 (2d Cir. 1995) (holding that a motion filed "over three years" after the movant was aware of the basis for disqualification was untimely); *see also Apple v. Jewish Hosp.*, 829 F.2d 326, 333 (2d Cir. 1987) ("It is well-settled that a party must raise its claim of a district court's disqualification at the earliest possible moment after obtaining knowledge of facts demonstrating the basis for such a claim.").

Likewise, the decisional law emphasizes the importance of giving trial judges the first opportunity to review recusal motions. *See In re Drexel Burnham Lambert*, 861 F. 2d at 1312 ("Discretion is confided in the district judge in the first instance to determine whether to disqualify himself . . . . The reasons for this are plain. The judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion."). Had the usual procedures – motion practice, a decision, followed by a mandamus petition – been followed, Rule 21 of the Federal Rules of Appellate Procedure would have provided a procedure for the judge to be heard. *See* Fed. R. App. P. 21(a)(1), 21(b)(4). The Rule contemplates notice and an opportunity to be heard through counsel, especially when a petition challenges the appearance of a district court judge's impartiality. In addition, both judicial courtesy and comity between superior and inferior federal courts commend extending an invitation to be heard precisely to these circumstances. Since no such invitation was extended to Judge Scheindlin, the Panel was deprived of her explanation of the circumstances of reassignment, the context of the media interviews, and her views on whether there could reasonably be an appearance of her impartiality.

While the Panel described the District Court Judge's motion to appear and seek reconsideration of assignment as unprecedented, what was in fact unprecedented was the October 31 Order to remove the District Court Judge under

these circumstances. Having deprived the District Court Judge of the opportunity to rule on the issue of disqualification in the usual course, the Panel denied her an opportunity to participate at all.

II. The Decision of the Motion Panel Was Inconsistent With 28 U.S.C. § 2106

While this Court has the power to reassign under 28 U.S.C. § 2106, that power is typically invoked after a full appellate hearing – which did not happen here. Indeed, the Panel's cursory reassignment of the case belies the careful fact-finding process that the Second Circuit's § 2106 precedent requires: "Whether to remand a case to a new district judge is a fact specific determination that we believe to be an extraordinary remedy . . . [to] be reserved for the extraordinary case." *United States v. Jacobs*, 955 F.2d 7, 10 (2d Cir. 1992) (quoting *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 37 (2d Cir. 1988) (citation omitted), *cert. denied*, 490 U.S. 1105 (1989)) (alteration in original). Where, as here, there is no evidence of personal bias against a party in the case – no party alleged such bias below or sought to show such bias to the Panel – the appellate court considers judicial economy before reassigning the case to a new judge. *United States v. Robin*, 553 F.2d 8, 11 (2d Cir. 1977) ("Where the original judge has gained familiarity with a detailed factual record . . . and the reversal is not based on erroneous findings or the admission of prejudicial evidence that would be difficult to erase from the mind, the case may properly be remanded to the original trial judge, since

assignment to a different judge would only entail wasteful delay or duplicated effort."); *see also, e.g.*, *Jacobs*, 955 F.2d at 10 ("We believe that it would be inappropriate to remand to a new judge . . . . [The district court judge] has not demonstrated any bias against [the defendant] and is familiar with the voluminous record . . . it would be a poor use of judicial resources to require another district judge to take on the resentencing task.")

In the case at bar, because the District Court Judge has presided over these cases for six years without any objection as to her partiality raised by a party to the litigation, judicial economy plainly points in favor of her continued assignment.

Moreover, a § 2106 reassignment typically does not cast opprobrium on the district court – as is the case with the decisions here. Reassignment may take place for a host of reasons, often out of an abundance of caution. While the Panel sought to clarify that its reassignment decision "does not imply any personal criticism of the trial judge" (November 13 Opinion at 13), under the circumstances of this appeal – the Panel's unilateral raising of the issue, its remarkable (and absolutely unnecessary haste), and its substantive findings of the "appearance of impartiality" – that assurance is unfortunately hollow.

III. The Cases Cited by the Court to Justify Its Extraordinary Processes Are Inapposite

The Panel recognized that it was unusual to consider removal when the issue was not raised below and sought to justify its departure from well-settled standards

by citing cases in which an exception has been made. (November 13 Opinion at 14.) The cases could not be more inapposite. In *Hormel v. Helvering*, 312 U.S. 552 (1941), for example, the Supreme Court considered an argument that had not been presented to the Board of Tax Appeals because that argument was based on a case decided *after* the Board's consideration. The Supreme Court's decision in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), is equally unavailing because it involved a significant preemption issue that, while raised generally by the defendants at the outset of the litigation, had in the Supreme Court's view (although not in the Ninth Circuit's view) been waived.[4]

The instant case is not remotely comparable. Not only was the District Court's disqualification not raised, briefed, or argued below, the Panel itself acted without briefing from any quarter and without a full record when issuing its October 31 Order. Plainly, the Panel – particularly *sua sponte* – lacks the fact-finding capacity needed to deal with this issue. *See Boumediene v. Bush*, 553 U.S. 723, 771-792 (2008) (stressing limited fact-finding capacity of Circuit Courts).

[4] Although the November 13 Opinion cites *Exxon* in support of the premise that appellate courts have the discretion to address issues not raised by the District Court, the Supreme Court was quite critical of that practice. "We do have to say, though, that the Court of Appeals gave short shrift to the District Court's commendable management of this gargantuan litigation, and if the case turned on the propriety of the Circuit's decision to reach the preemption issue, we would take up the claim that it exceeded its discretion. Instead, we will only say that to the extent the Ninth Circuit implied that the unusual circumstances of this case called for an exception to regular practice, we think the record points the other way." *Id.*, 554 U.S. at 487 n.6.

Finally, this case is not just about the scope of issues to be considered on appeal; it also raises fundamental questions about a judicial decision-maker – questions that require careful consideration under any circumstance, and unquestionably when, as the Panel recognizes, the judge at the center of the removal issue is a "distinguished" and "long serving" jurist. Indeed, the standard as articulated in the very cases relied on by the Panel – whether an exception to the usual rule of waiver is necessary to avoid a "plain miscarriage of justice," *Helvering*, 312 U.S. at 558 – hardly applies to the case at bar. If there were any miscarriage of justice here, it points in the opposite direction – the justice of the Court's order seeking the immediate removal of a judge without a motion seeking such relief from any party, without briefing, and without the trial court judge's opinion or analysis of the alleged impartiality question.

IV. What the Motion Panel Decided and How the Panel Reached That Decision Has a Substantial Impact on Judicial Independence

What the Panel did – its substantive findings – and *how* the Panel did it – in a peremptory, emergency order – has an impact not only on the District Court Judge whose voice was not heard, but also on other judges laboring in controversial and high-profile cases. The Panel's decisions are fundamentally inconsistent with fair judicial process, bypassing all of the usual procedures in disqualification or reassignment cases. Moreover, taken together, these Opinions

are so dismissive of the considerable work of the District Court Judge as to undermine the fundamentals of comity between the superior and inferior courts.

Perhaps even more important to the judicial branch, these decisions, in a high-profile and hotly-contested case, effect a body blow to an independent judiciary. *See* Irving R. Kaufman, *Chilling Judicial Independence*, 88 Yale L.J. 681, 714 (1979) ("No matter how strong an individual judge's spine, the threat of punishment – the greatest peril to judicial independence – would project as dark a shadow whether cast by political strangers or by judicial colleagues."); Bruce A. Green & Rebecca Roiphe, *Regulating Discourtesy on the Bench: A Study in the Evolution of Judicial Independence*, 64 N.Y.U. Ann. Surv. Am. L. 497, 536 (2009) ("Judges have expressed concern that an overly broad interpretation along with excessive enforcement of the courtesy rules may encroach on individual judges' independence from the judiciary as an institution by chilling their ability to address legitimate ends through individual styles and through the expression of individual personality."); *see also McBryde v. Committee to Review Circuit Council Conduct & Disability Orders of the Judicial Conf. of the U.S.*, 264 F.3d 52, 77 (D.C. Cir. 2001) (Tatel, J., dissenting) (discussion on the chilling effects of over-enforcement of judicial conduct codes).

The only particularized challenge to the District Court Judge's impartiality was mounted by New York's Mayor, Michael Bloomberg, in sustained personal

attacks on the Judge and her rulings on the eve of the *Floyd* trial. *See* Ginger Adams Otis & Greg B. Smith, "Judge vs. The NYPD," New York Daily News, May 15, 2013, at 8, *available at* 2013 WLNR 11940000. His remarks betrayed a lack of respect for the bench in general, and Judge Scheindlin in particular. The net effect of the Panel's ruling – though surely not its intent – is to legitimize these rebukes, and to make judges hesitate to issue rulings that may well invite a politician's ire.

V. The Motion Panel's Haste in Removing the Trial Judge Is Reflected in Substantial Errors in Its Substantive Findings

The limitations of the Court's *sua sponte* and hasty decision are nowhere more apparent than in the substantive findings the Panel did make. The Panel based its determination of an "appearance of impartiality" on: (1) statements made by the District Court six years earlier during a colloquy in a related case that were never challenged by any party; (2) alleged statements identified in three news articles that are not in fact statements from the District Court Judge, but are either the writers' subjective summaries or subjective opinions of certain of Judge Scheindlin's cases; or (3) alleged quotes from others.

As an initial matter, in describing the colloquy with counsel concerning the related case doctrine on which the Panel's ruling rested, the Court relied on an inaccurate press account. *Amici* understand that the colloquy was not available to the Panel at the time it ruled on October 31, 2013. Nor did the Panel consider

factual information of the related-case practices of judges in the Southern District of New York during the period in question to put these issues in context.

Indeed, had the Panel read the December 21, 2007, colloquy in the context of practice in the Southern District, it would have been clear that the colloquy does not demonstrate an improper application of Local Rule 13 governing "related cases." In brief, the plaintiffs in *Daniels*, No. 99-cv-1695, an earlier case that involved the same attorneys and the same policy and constitutional issues as *Floyd* and *Ligon*, sought to introduce evidence that they believed supported a contempt finding against the City; the District Court denied the motion and offered routine guidance about how the plaintiffs could proceed *if* they believed they had grounds to bring a new case. That is not an abuse of the related case doctrine – it is instead an efficient use of judicial resources and entirely consistent with local judicial practice. *See* Rule 13(a) of the Local Rules for the Division of Business Among District Court Judges.[5]

Equally troubling is the Court's reliance on unsubstantiated comments in news articles by a reporter and an unidentified former law clerk of Judge Scheindlin's to support a finding of the appearance of impropriety. The standard under § 455 is what a reasonable observer fully informed of all relevant facts and

[5] For a description of comparable practices in other jurisdictions – practices which fully supported the assignment of these cases to Judge Scheindlin, *see* http://herculesandtheumpire.com/2013/11/03/a-cheap-shot/ (blog of Judge Richard Kokpf).

circumstances would conclude. *See United States v. Bayless*, 201 F.3d 116, 126-127 (2d Cir. 2000), *cert. denied*, 529 U.S. 1061 (2000). If the appellate court draws inferences from objectively incomplete (and wholly unexplained) information, filtered through the lens of a reporter, the § 455 standard would cease to be an objective one. Worse yet, anyone unhappy with a judge's decision could use the media to support, without attribution, or to imply, without factual basis, that the judge in question is partial. Ordering the peremptory removal of a district court judge on this thin record, without the procedural protections that precede any such decision, undermines the public's confidence that all litigants will be treated equally and fairly, including those who cannot manage to garner the press' attention. And, by enabling public pressure and public criticism to permeate the appellate process, it undermines judicial independence.

Finally, the *Boston's Children First* decision cited by the Court does not support recusal here. *In re Boston's Children First*, 244 F.3d 164, 170 (1st Cir. 2001). *Boston's Children First* involved case-specific comments made by a judge to the press. *See id.* There are no such case specific comments here. In fact, one of the articles relied on by the Panel here specifically states that Judge Scheindlin made it perfectly clear that "the only subject off the table was the ongoing [Floyd] trial, expected to wrap up on May 20 with closing arguments." (*See* Order, App. E.) *See also In re Boston's Children First*, 244 F.3d at 170 (granting recusal

based on case-specific comments that could be construed as comments on merits of pending case). Although the Court acknowledged this fact, noting that "Judge Scheindlin did not specifically mention the *Floyd* or *Ligon* cases in her media interviews" (Order at 10), it failed to weigh that fact in a manner consistent with the decisional law.

Notably, in *Boston's Children First*, the First Circuit was careful to clarify that its decision should "not be read to create a threshold for recusal so low as to make any out-of-court response to a reporter's question the basis for a motion to recuse." *Id.*, 244 F.3d at 171; *see also United States v. Bauer*, 84 F.3d 1549, 1559-1560 (9th Cir. 1997) (affirming denial of motion to disqualify district court judge from a marijuana prosecution case based on judge's non-case-specific comments expressed in three articles that marijuana distribution is a serious social problem). Should the decision in the case at bar stand, the Second Circuit would have done precisely what the First Circuit cautioned against – setting the bar for recusal so low as to invite recusal motions where the facts do not remotely support it.

Finally, it bears noting that the decision in *Boston's Children First* followed precisely the kind of procedural protections that were not afforded the District Court Judge here – full briefing at the trial and appellate levels, a record, a lower court opinion, and the brief of counsel on the judge's behalf before the First

Circuit. If the substantive holding of *Boston's Children First* is precedent here, then surely its procedural protections should be as well.

CONCLUSION

For the foregoing reasons, the *amici curiae* identified above respectfully request that the Second Circuit, *en banc*, reconsider the Panel's October 31, 2013, Order and the November 13, 2013, Opinion and vacate the Order to the extent it reassigns the *Floyd* and *Ligon* matters from Judge Scheindlin to another judge of the Southern District of New York.

DATED: November 18, 2013

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CERTIFICATE OF COMPLIANCE

I, Brian E. Whiteley, not a party to the action, hereby certify that the foregoing Brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7). The total number of words in the Brief is 4098.

DATED: November 18, 2013

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