No. 21-963

In The

Supreme Court of the United States

NEIL MCNAUGHTON,

Petitioner,

v.

BILL de BLASIO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner Pro Se

QUESTIONS PRESENTED

This is petitioner's attempt to address through legal action persistent harassment by the New York City Police Department ("NYPD") and others that was started in response to false allegations made to the police by petitioner's mentally ill sister, now deceased, and that has been occurring in New York City since the summer of 2011. As is set forth more fully below, this is petitioner's second such attempt. These are the questions presented in this petition:

1. As demonstrated by the rulings of the district court and the circuit court in this action and in a prior related action, does the persistent misapplication of the *Twombly* plausibility test by Federal judges invariably lead to a violation of this Court's mandate in *Erickson v. Pardus* regarding the proper judicial treatment of well pleaded factual allegations?

2. Does the repeated failure of the presiding judges herein and in a prior related action to accurately describe the factual predicates and claims contained in the *pro se* petitioner's complaint constitute an issue that needs to be specifically addressed by this Court?

3. Should the use of memorandum opinions and summary orders by members of the Federal judiciary be sharply curtailed because of its tendency to promote and sanitize irrational reasoning and shoddy jurisprudence, and in furtherance thereof should this Court issue clear guidelines regarding the appropriate employment of these widespread violations of judicial accountability?

PARTIES TO THE PROCEEDING

Petitioner Neil McNaughton was the plaintiff in the district court proceeding and appellant in the court of appeals proceeding. Because the petitioner's complaint was dismissed *sua sponte* by the district court before issue had been joined, no other parties have participated in this action.

Respondents the City of New York; the New York Police Department; the New York City Department of Parks and Recreation; New York City Mayor Bill de Blasio; then Commissioner of the New York Police Department Dermot Francis Shea; then Commissioner of the New York City Department of Parks and Recreation Mitchell J. Silver; police officers, police supervisors and detectives Jane and John Doe 1-200; civilian police employees Jane and John Doe 1-200; Estate of Laura G. McNaughton; Fern Lee; Galen J. Criscione; Criscione Ravala LLP; David L. Moss; David L. Moss & Associates, LLC; 5 West 14th Owners Corp; Century Management Services; Norma Bellino; Lisa Golub; and civilians Jane and John Doe 1-200 all were originally named as defendants in petitioner's complaint in this action.

RELATED CASES

- McNaughton v. de Blasio, No. 20-cv-06991, U.S. District Court for the Southern District of New York. Judgment entered October 8, 2020.
- McNaughton v. de Blasio, No. 20-03778-cv, U.S. Court of Appeals for the Second Circuit. Judgment entered August 27, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Neil McNaughton petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The Second Circuit's denial of petitioner's motion for a hearing *en banc* is reproduced at Appendix (hereinafter "A") 5-6. The Second Circuit's Summary Order affirming the district court's dismissal is reproduced at A1-4). The Second Circuit's denial of petitioner's motion for reconsideration and rehearing *en banc* is reproduced at A23-24. The opinions of the District Court for the Southern District of New York are reproduced at A9-22 and A7-8.

JURISDICTION

The Court of Appeals entered judgment on August 27, 2021. (A1-4). The court denied a timely petition for rehearing *en banc* on October 7, 2021. (A23-24). This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case does not involve interpretation of statutory or constitutional provisions.

STATEMENT OF THE CASE AND EXPLANATION OF THE FORMAT

Petitioner has adopted a somewhat unorthodox format in his petition. Petitioner in this petition is asserting two claims: not merely that the legal issues were wrongly decided as relates to the individual causes of action contained in the complaint, but also that the Federal judicial decision-making process with regard to *pro se* litigants is flawed and essentially nonfunctional. In petitioner's personal experience as a *pro se* litigant, comprised of three actions brought and three appeals taken during the last quarter century, justice is never rendered. To address both points simultaneously, petitioner has elected to reproduce a petition and portions of a brief submitted to the court below in the instant action. The portions of the brief submitted here adequately address most of the individual legal issues raised herein (obviously that is petitioner's personal opinion), if at a much more pedestrian level than this Court usually encounters.

These legal issues are simple. It is the application of the law to the facts by the members of the federal judiciary that is suspect. It is petitioner's belief that by examining what petitioner argued before the court

below, and then examining the rulings of the court, the validity of petitioner's second claim will be clearly apparent.

The factual predicates underlying petitioner's claims are simple to state. Since 2011, petitioner has been stalked by members of the New York City Police Department ("NYPD") and hundreds of civilian vigilantes, presumably because of his sister's false claim to the NYPD in 2011 that petitioner is a pedophile. With regard to this untrue contention, petitioner would note that he has lived in the same apartment in New York City since 1985; no one has ever seen him approach a child during that entire time; and no one has ever suggested that petitioner might be a pedophile before his sister started spreading her untruthful claim (Com. ¶ 52; A62).

Since March of 2020, virtually every time petitioner steps outside his apartment building, he sees a "stroller stalker" or a police car as he leaves the building. (Com. ¶ 152; A94). Petitioner's trips on nice days to a local park are fraught with stroller stalkers, punctuated with stalking by New York City Department of Parks and Recreation ("Parks") employees, other civilians, as well as by members of the NYPD. On a half dozen occasions, petitioner has looked up from a book he was reading while sitting in the park only to see the naked genitals of a young child that a nanny or parent had placed on a blanket on the ground in front of where petitioner was sitting. (Com. ¶187; A110).

Nearly every business in the neighborhood has been told that the petitioner is a pedophile, as petitioner can ascertain from their behavior towards him (*see*, *e.g.*, Com. ¶ 162; A98), and petitioner's ability to hire an attorney and to prosecute his legal actions has been interfered with in almost every way possible. (Com. ¶ 13; A45).

REASONS FOR GRANTING THE PETITION

The reasons for granting this petition are set forth in the following reproduction of a petition for hearing *en banc* that petitioner filed as part of his appeal to the Second Circuit from the district court's *sua sponte* dismissal of petitioner's complaint before issue had been joined. This petition was denied by order entered March 1, 2021. (A5-6).

I. PETITION SUBMITTED TO THE SECOND CIRCUIT

The only changes made to the original petition are that the citations to the record have been changed to citations to the appendix herein and certain case citations have been cleaned up. Here is that petition:

RULE 35(b)(1) STATEMENT

In my honest opinion, the questions presented by this petition satisfy the criteria of Federal Rule of Appellate Procedure ("FRAP") 35(b)(1). The use and misuse of memorandum opinions and decisions at both the

district court and the appellate court level and the attitude, both conscious and unconscious, of the members of the Federal judiciary towards *pro se* litigants and how it affects their treatment of these litigants are two questions of exceptional importance that, as appellant's litigation history shows, are impacting the ability of Federal courts to render justice. As stated herein, in the instant action and in an earlier action appellant had brought complaining of the same wrongs, *McNaughton v. de Blasio*, 14-cv-221 (KPF), *app. den.*, 15-629, each of the district court judges made approximately one dozen material misstatements of fact or material omissions of fact in the opinion dismissing appellant's complaint. Not only does this practice result in skewed decisions, it also is not efficient.

For these reasons, appellant *pro se* Neil McNaughton urges this court to hear this appeal *en banc*.

ARGUMENT

> "[W]hether the fact that a victim of one of the largest cases of police corruption in this city in this century has had his truthful complaint accurately describing the situation dismissed by a Federal district court, twice, constitutes conclusive proof that America currently lacks a functioning Federal system of civil justice[?]"

This quote from appellant's Statement of Issues in his brief in this appeal highlights the two related questions of exceptional importance raised in appellant's

complaint for which appellant is respectfully requesting *en banc* consideration. First, the use and misuse of memorandum opinions and decisions at both the district court and the appellate court level. Second, the attitude, both conscious and unconscious, of the members of the Federal judiciary towards *pro se* litigants and how it affects their treatment of these litigants.

The district court, the Honorable Jesse M. Furman presiding, apparently recognizing the importance of these questions, graciously dismissed appellant's complaint by the attached Memorandum Opinion and Order filed October 8, 2020 (the "Opinion"), thereby transforming appellant's theoretical objection into a legal matter ripe for adjudication by this court. Indeed, the lower court appeared to be so attuned to the importance of these issues that it even went so far as to dismiss appellant's complaint *sua sponte* before issue had been joined, undoubtedly so that this court could address these important questions on a clean record, uncluttered by adversarial cavils.

Please don't throw this opportunity away. Appellant would guess that many members of the Federal judiciary probably believe that these memorandum opinions are primarily used because there might be one legal sticking point in an otherwise meritless action that clearly deserves dismissal, and that this mechanism is a necessary evil caused by limited judicial resources which does no real harm to the underpinnings of Federal civil jurisprudence. Appellant's experience is not that.

Appellant is a long-retired lawyer, with a fair amount of experience in Federal practice, at one point admitted to practice before the United States District Courts in the Southern and Eastern Districts of New York, as well as briefly before this court. He received his legal education at the New York University School of Law, and his initial work experience as an associate at Skadden, Arps, Slate, Meagher & Flom. To the extent that the members of this court see anger or bitterness in appellant's submissions, it is based upon the fact that he worked in the legal system for years, and that he believed in it.

En banc consideration of the instant appeal would allow the members of this court to see its current system of Federal jurisprudence from the point of view of one of its casualties. It is not a pretty sight. The system is not working now, and it's only going to get worse. It is not possible to properly handle twenty-first century legal throughput with an eighteenth century legal system. It is not only *pro se* litigants who suffer from this untenable situation, they simply suffer the most.[1]

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[1] An analysis of the specific changes that will be required to restore Federal civil jurisprudence to working order is far beyond the parameters of this appeal, but appellant will summarily address the issue, because he believes that many judges might believe that currently there is no viable alternative to the overuse of memorandum opinions and decisions. They're probably right. That's why "sea change" modifications to the system eventually will be needed. At the least, the antiquated "motion-opposition-reply-decision-reargument-opposition-reply-decision" cycle needs to be abandoned, and the six month or year-long time penalty that

The court undoubtedly is aware that the legal profession in general is suffering serious economic hardship and decline. The reason is that it costs too much money and takes too much time to bring lawsuits generally, and to bring one in Federal court in particular.

It should be noted that attorneys who contemplate representing a client must do a cost/benefit analysis that has little to do with the ultimate merits of the client's claims and much to do with the time and expense it will be necessary to expend in order to prove those merits. Some years ago, I had an attorney friend who specialized in dental malpractice tell me that because the dental malpractice insurance companies had as a matter of policy simply stopped settling dental malpractice cases, he would refuse to take a case where the estimated recovery was under one hundred thousand dollars, because it was not economically feasible to bring those cases: he would end up losing money.

While this court naturally is most concerned with the efficient use of judicial resources, the amount of time and expense parties expend is an even greater reason why Federal practice is collapsing. Where the court may spend a day, counsel for the parties are often spending weeks or months, and their clients must pay for that time.

Right now the only person or business in this country who can afford to bring a counseled action not on a contingent fee basis in this country is a very rich

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virtually every Federal action suffers while a motion to dismiss is made and decided needs to be eliminated, to the extent possible.

person or business. Since the treatment of *pro se* litigants that appellant describes in his complaint and appeal falls below any acceptable standard of justice, this means that as a practical matter absent physical injury or where the evidence is overwhelming, meaningful access to Federal courts is not available to the poor or the middle class in America.

Before appellant submits for the court's review his analysis of this problem, he wishes to direct the court's attention to a not unrelated issue.

A Word About Appellant's Rule 59 Motion

On November 2, 2020, appellant filed a motion to reargue pursuant to Rule 59 of the Federal Rules of Civil Procedure with the district court (the "Rule 59 affidavit"). That motion was denied two days later, by district court order filed November 4, 2020, unbeknownst to appellant. Since appellant's reading of FRAP 4(a)(4) was that the lower court's action was stayed by his appeal, he did not look at PACER to discover whether action had been taken. Appellant did not receive a mailing from the district court containing the order denying his motion. Indeed, appellant also did not receive a recent "defective filing" mailing from this court, and only learned of the problem when he happened to call his case manager. If the named defendant David L. Moss, who briefly was admitted *pro hac vice* to practice before this court and then requested termination, submitted a certificate of service stating that he sent his

letter requesting termination from the appeal to appellant, appellant also did not receive that letter.

Appellant lives in a relatively upscale doorman building in Chelsea, and the mailbox bank in the mail room is often left open by the mailman for long periods of time during the day. Unfortunately, when a party is suing the co-op in which he lives, and the members of the support staff have already committed many crimes against him, including dozens of incidents of burglary and trespassing and illegal entry, the barrier to further illegal activity is lowered. The last time appellant had this sort of problem with his mail was three years ago, when he never received notice of a letter from a Massachusetts attorney sent by registered mail of his late sister's death and the subsequent probate hearing.

Since appellate time limitations are jurisdictional, and appellant first learned of the district court's action a few days ago, months after it occurred, obviously this court will not be reviewing the dismissal of appellant's Rule 59 motion on appeal. However, the motion is part of the record on appeal (Appendix (hereinafter "A") 25-38 [without exhibits]), and this court certainly has the power to take judicial notice of it, and of the order dismissing it (A7-8). Since the court's review of the instant appeal is *de novo*, appellant's motion nonetheless may provide some guidance to this court as to how to rule on the appeal.

For example, in paragraph 186 of his complaint appellant describes a series of interactions with a "Caucasian gentleman" and his nephew on May 4th

and 5th of 2020 in Washington Square Park (A109-110). As part of Exhibit 2 to appellant's motion (Photo 1), appellant provides a photograph of the gentleman in question and his nephew, date stamped May 4, 2020.[2] At the least this is one indication that the allegations in appellant's complaint are truthful and accurate.

The date stamp is very relevant to appellant's claims, since in paragraphs five through eleven of his affidavit in support of the Rule 59 motion (A-28-31), appellant states under oath that he had set the camera to include both a date and time stamp, and had never changed it, and that all of the photographs he had viewed throughout the spring and summer, and there were hundreds of such photographs, none had contained only the date stamp. All had contained both the date stamp and the time stamp.

This is probative evidence that someone is tampering with appellant's camera data chips. And in appellant's sworn testimony, since one of the data chips that was tampered with went with appellant whenever he left the apartment, in his camera, the fact that the photographs on it had been altered is a clear indication that the tampering had been done at night when appellant was sleeping. (¶7; A-29). Further, appellant's affidavit notes that many other pictures of the "Caucasian gentleman" that he had taken were missing from

[2] No exhibits of the affidavit are included in the record for this petition for a writ of certiorari. Petitioner is not rich, and he was constrained to limit the financial burden of making this petition.

the data chip. (¶ 11; A-30-31). In addition, other photographs appellant had taken were missing from a computer that is not connected to the internet. (¶ 8; A-29).

Appellant's conclusion that this activity was police related of course is an inference. But it behooves someone who is challenging this inference to provide another inference as to what caused the time stamp to disappear from the photographs.

Appellant's affidavit in support of the Rule 59 motion also contains, *inter alia*, probative evidence of further attempts to interfere with appellant's ability to prosecute his Federal claims, in particular, two defective *jurats* from a notary that might have prevented the court considering his affidavit in support. (¶¶ 28-30; A-36-37).

In the first action appellant brought complaining of these matters, he specifically notes that one of the ways the police harass him is interference with his ability to have affidavits notarized. *See*, Appellant's Brief on Appeal in 15-629, pp.9-11. Appellant repeated those claims in the complaint in the instant action. (Com. ¶¶ 11-13; A-44-45).

In his Rule 59 motion, appellant provides actual evidence of what has been occurring, including appellant's sworn testimony that the notary in question told appellant he had fifteen years experience and had never had a notarization rejected. So, obviously, the defective notarizations were intentional.

Thus, appellant in his Rule 59 motion provides probative evidence of Fourth Amendment, First Amendment and Fourteenth Amendment violations of appellant's constitutional rights, including numerous warrantless searches. But the lower court denied it in a one page order. (A7-8).

Appellant's Rule 59 motion and the district court's order denying it also are relevant to the instant appeal and appellant's instant petition notwithstanding that appellate review is unavailable, because together they provide a perfect illustration of one of the two important questions for which appellant is requesting *en banc* consideration: the attitude of the members of the Federal judiciary towards *pro se* litigants and how it affects their treatment of those litigants.

I don't know how to say this politely, but after reviewing the affidavit in support of appellant's Rule 59 motion and reading the district court order, it does not appear that the district court judge even read appellant's affidavit in support before deciding the motion. The members of this court have access to both documents and certainly will make their own determinations in this regard. But appellant views both rulings of the lower court in the instant action as prime examples of how it is virtually impossible for a *pro se* litigant to receive justice in Federal court. Hundreds of times during his legal career appellant has read cases with judges criticizing and bemoaning the use of conclusory statements in complaints. But how much worse is the use of conclusory statements in judicial opinions?

In each of the two related actions that appellant has brought in a futile attempt to receive relief from this police harassment, the district court opinion dismissing the plaintiff's complaint contains approximately one dozen material misstatements of fact or material omissions of fact. *See, e.g.*, appellant's brief on appeal, Point II, This is Jurisprudence?; appellant's brief on appeal in the first action 15-629, Point IV, The District Court Misapplied the "Plausibility" Standard, pp. 22-29.

Here are two examples of this, as seen through the lens of appellant's briefs, respectively, from each of the two appeals in those actions. From appellant's brief in the instant action, Point IV:

"In its examination of appellant's claims against Mayor Bill de Blasio, for example, the court below claimed that appellant's complaint failed to meet the required standard under *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) because "Plaintiff does not allege any facts showing how Mayor de Blasio . . . was personally involved in the events underlying his claims." (Op. at 6; A17).

In particular, the lower court cites Second Circuit authority stating that actionable personal involvement, *inter alia*, may consist of: " . . . (2) the defendant, after being informed of the violation through a report or appeal, failed to remedy the wrong, (3) the defendant created a policy or custom under which unconstitutional practices occurred, or allowed the continuance of such a policy or custom, [. . .] or (5) the defendant

exhibited deliberate indifference to the rights of [the plaintiff] by failing to act on information indicating that unconstitutional acts were occurring." *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995).

As appellant noted in his complaint and as the lower court quoted in its opinion, in this action the "'persistent police stalking and harassment that I complained about in my action before Judge Falla [sic.] have continued until the present day in a significantly increased manner' Compl. ¶ 162." (Op. at 3; A12).

Mayor Bill de Blasio was served with a verified complaint in that first action before Judge Failla on May 6, 2014 (Docket #4), and was represented by his attorney, the Corporation Counsel, for the entire two year pendency of the litigation.

Personal service upon a defendant of a verified complaint complaining of a wrong, as well as service of a verified amended complaint, apparently does not constitute adequate notice under *Colon* for the lower court, nor for it apparently does the five year failure to rectify the wrong after notice implicate liability under *Colon*, but appellant would respectfully note that this is error. *Okin v. Vill. of Cornwall-on-Hudson Police Dep't*, 577 F.3d 415 (2d Cir. 2008); *Vann v. City of New York*, 72 F.3d 1040, 1049 (2d Cir. 1995).

From appellant's brief on appeal in the first action commenced before Judge Failla, pp. 24-25:

"• "The process server Plaintiff employed in this litigation, which experienced certain

non-fatal difficulties with serving the Complaint." (Op. at 17; A27).

- The process server in question was Robert Lawson, a process server doing business as Lawson Legal Services. As is set forth more fully in appellant's Show Cause Affidavit (docket # 8; A66) (incorporated by reference) and amended complaint, paragraph 34 (A58-9), after being sent an email addressed to "Mr. Naughtiness," "[p]laintiff was emailed two separate sets of affidavits that clearly were insufficient: the first set because it stated the process server had served the defendants on April 29, 2014, whereas the sworn to date contained in the jurat was April 1, 2014 . . . [t]he second . . . since instead of a proper jurat, the sworn to date was simply stamped." (Show Cause Affidavit, ¶ 7 (Dkt. #8; A68)). Mr. Lawson then falsely told appellant that the corrected affidavit had been mailed when it was not mailed until three days later, (Show Cause Affidavit, ¶ 9 and Exhibit 4; A68) which meant that appellant would have received it after the 120 day limit for filing proof of service. [footnote omitted]."

To flesh out the situation for this court from that rather dense paragraph, the situation was that because of the problems with this process server, and appellant's mistaken belief that service before the deadline without immediate filing was acceptable, Judge Failla issued an Order to Show Cause as to why appellant's complaint should not be dismissed, which appellant successfully opposed through a "show cause

affidavit." However, in spite of the fact that the actions of the process server in question, Lawson Legal Services, caused the court to issue an Order to Show Cause that nearly resulted in appellant's complaint being dismissed, and in spite of the fact that appellant submitted sworn testimony of the inexplicable lies and prevarications of the process server principal, Robert Lawson, including the famous "Mr. Naughtiness" email, rather than find the clear violation of appellant's constitutional right to court access that such behavior represents, Judge Failla simply characterized the whole episode, quoted above, as "certain non-fatal difficulties with serving the complaint." So the fact appellant was successful in opposing this blatant attempt to prevent him from asserting his claims in Federal court means that it is not actionable? Hopefully this type of jurisprudence will never transfer to the criminal side of the court, or we'll hear about attempted murder convictions being set aside because they are based solely on "certain non-fatal injuries."

It will be noted that what is going on, in both this example and the example appellant cited earlier in connection with the discussion of his Rule 59 motion, are repeated attempts to prevent a party with a Federal claim from properly prosecuting that claim in Federal court. Further, probative evidence of this behavior was submitted to the presiding district court judge in each of these two actions, only to have it completely ignored. This judicial behavior cannot be considered merely an accident or a coincidence, since in the first action the district court action was reviewed and

sanctioned by an appellate panel. Given the fact that it obviously doesn't bother Federal judges when the police blatantly interfere with the prosecution of Federal civil rights actions, this question poses itself: Do the members of the Federal judiciary have no self respect, or is it that they just don't care?

The reasoning and rulings of the lower court herein are typical of the treatment a *pro se* litigant receives in Federal court and point to a persisting, material defect in current Federal jurisprudence. What the members of the Federal judiciary have created is a self-referential system that does not need a foundation in factual reality to survive. Appellant understands the Federal judges involved in these behaviors are not acting from improper personal desires but on the contrary are engaging in a desperate attempt to save an overwhelmed judicial system. But, as it says in appellant's brief, altruistic corruption is still corruption. In particular, the blatant incompetence that generally accompanies rampant corruption has been amply present in every one of these actions.

In appellant's career as a *pro se* litigant, spanning approximately twenty-five years and involving three actions and nine different Federal judges, justice has yet to be rendered. It is respectfully suggested that the members of this court turn the lens they usually focus on other government actors upon themselves, and analyze their own actions for equal protection, First Amendment, and due process violations. Indeed, the very concept of memorandum opinions and decisions

seems to constitute an equal protection and due process violation.

As noted above, while appellant believes that the members of the Federal judiciary have created an "urban myth" that views the practice of issuing memorandum opinions as a necessary evil that does no real damage, the reality is not that. The truth is that memorandum opinions and decisions are used to sanitize indefensibly irrational reasoning and pathologically shoddy jurisprudence.

Put another way, Federal judges currently are not doing the job for which they swore a solemn oath. It is time to change that. Long term, this will involve scary, substantive modifications to the way cases are litigated. The current eighteenth century system of Federal jurisprudence is incapable of handling the current twenty-first century volume of cases. That is why the current untenable situation obtains. It's not primarily the fault of the *pro se* litigants, as many members of the Federal judiciary apparently believe.

Short term, the practice of employing memorandum decisions and opinions needs to be sharply curtailed. They have promoted a type of lazy, incompetent jurisprudence that lies far below any acceptable standard of justice.

In addition, and I'm not even sure this is possible, but somehow Federal judges need to look inside themselves and change what is there. While appellant in his complaint uses the term "visceral hatred" to describe the current judicial attitude towards *pro se* litigants

(Complaint ¶¶ 8,10; A42-44), the attitude actually is analogous to the "but they are inferior" form of racism. One thing is clear from appellant's experience: Federal judges currently are not seeing the *pro se* litigant as he really is, and they are not responding to his claims with rational arguments.

This is the United States of America. I am an American senior citizen who has repeatedly been denied his constitutional rights not just by the police, but also by multiple members of the Federal judiciary. *En banc* consideration of appellant's appeal would be an important first step in understanding this serious problem with Federal jurisprudence, so that eventually it may be solved.

CONCLUSION

Appellant respectfully requests that this court grant his petition for an *en banc* hearing of his appeal on the ground that his appeal raises questions of exceptional importance.

Respectfully submitted,

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II. PORTIONS OF BRIEF SUBMITTED TO THE SECOND CIRCUIT

The following reproduced portions were taken from appellant's brief on appeal to the Second Circuit. Nothing has been altered in these portions except citations to the record have been changed to refer to this petition's appendix, and certain case citations have been cleaned up.

The first portion describes some of the many omissions and misstatements of material facts contained in the district court opinion in this action. The quote from the district court opinion is followed by quotes from the complaint herein that either belie the truthfulness of the district court's statement, or show that the district court statement improperly omitted reference to a properly pleaded fact. Here is that portion:

POINT II

THIS IS JURISPRUDENCE?

A. The District Court Opinion

"The crux of Plaintiff's 74-page complaint . . . is that the NYPD is enlisting parents and their children in **an elaborate scheme to lure him to commit pedophilic acts."** Op. at 2. (A11) (emphasis supplied).

A. The Complaint

"In the early stages of this harassment, the participants could argue that they were

intending to "test" or "trap" the suspected pedophile, because the girls always appeared to be alone . . . But because a baby in a stroller is always pushed by a parent or a nanny, **there can be no argument that this behavior is anything but blatant harassment.**" (Com. ¶ 65; A67-68) (emphasis supplied).

[Regarding t]he facts pertinent to the instant action . . . **[m]ost important of these is the apparent attempt by my late sister to lure me up to Worcester, Massachusetts where she lived in order to entrap me.** (Com ¶ 97; A77) (emphasis supplied).

Nor has the **police interference with my judicial proceedings been limited to corrupting court personnel. . . . numerous attempts to interfere with my ability to notarize affidavits** . . . (Com. ¶ 13; A45) (emphasis supplied).[3]

Certainly the **repeated unlawful incursions into my apartment** that I describe below . . . (Com. ¶ 15; A46) (emphasis supplied).

At this point in time **a member of the police or someone at their behest was routinely entering my apartment at night** when I was sleeping and deleting pictures I had taken with my camera . . . (Com.

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[3] For additional recent evidence of this wrong, the court is directed to appellant's Rule 59 motion, ¶¶ 28-30. (A36-37).

¶ 90; A73-74) (emphasis supplied). *See also*, appellant's Rule 59 Affidavit ¶¶ 5-9 (A95-96).

> **As a result of this lack of personal security . . . all of the half dozen letters from my sister to me that I had kept have gone missing.** File documents from the probate proceeding for my sister's will have gone missing, as have other documents. . . . (Com. ¶ 92; A74) (emphasis supplied).
>
> **Of course, some of the most important evidence that has gone missing over the years are the pictures of police cars and cops who have been stalking me.** (Com. ¶ 95; A76) (emphasis supplied).
>
> **THE PROBLEM WITH EVIDENCE** (Com. at 28, Com. ¶¶ 90-96; A73-77).

"[O]ne of the claims made in the instant action is that **the police have been interfering with my right to choose legal counsel**, as is set forth in more detail below. (Com. ¶ 13; A45) (emphasis supplied).

B. The District Court Opinion

> "**Plaintiff's defamation claims are based on his assertion that** "the presence of the young girls or, more recently, stroller stalkers is a public accusation that [he is] a pedophile," and that "the NYPD or someone at their behest are . . . arranging phony 'traps' with underage children or babies in strollers, and **these 'traps' are understood by the store employees to state that [Plaintiff]**

is a pedophile." (Op. at 5, fn. 5; A14) (emphasis supplied).

B. The Complaint

"A few months ago, **a Caucasian gentleman stalked me** where I was sitting in the northeast corner of the park where I usually sit for two days . . . **This gentleman also called me a "sexual predator" three times during our encounter, in the hearing of Park police officer Henchi**." (Com. ¶ 186; A109) (emphasis supplied).

"**In the letter**, [defendant] Bellino stated that "As it was shared with me, **you took photographs of her two children while she was doing the laundry**." [. . .] **This letter at the least was published** . . . (Com. ¶¶ 159-160; A97) (emphasis supplied).

See also, Appellant's Affidavit in Support of Motion Pursuant to Rule 59, ¶¶ 10-11 (A-30-31).

C. The District Court Opinion

[T]he representation of a defendant by counsel in state proceedings does not constitute the degree of state involvement or interference necessary to **establish a claim under Section 1983** . . . (Op. at 8; A19) (emphasis supplied).

C. The Complaint

The behavior of Criscione . . . cannot be explained simply as a result of greed and incompetence. (Com. ¶ 128; A85) (emphasis supplied).

There are a number of other acts and failures to act by Criscione during the period of representation that in 20-20 hindsight **make clear** Criscione's hostility towards me . . . and **the sabotage of a plan to provide me with further evidence.** (Com. ¶ 134; A87) (emphasis supplied).

D. The District Court Opinion

As defendants . . . [all private party defendants named] **are private parties who do not work for any state or other government body**, Plaintiff fails to state a claim against these Defendants under Section 1983. (Op. at 8; A19) (emphasis supplied).

D. The Complaint

The actions of the defendants named herein were designed and **did deprive plaintiff of his rights** under the Constitution of the United States **to be free from unreasonable search and seizure, to express his thoughts without retaliation, and his rights to privacy and due process.** (Com. ¶ 200; A115) (emphasis supplied).

> **[T]here could be no possible explanation for what went on other than that my sister and Lee were trying to entrap me** . . . (Com. ¶ 101; A78) (emphasis supplied).
>
> " . . . **defendants Bellino and Golub . . . both knew of and supported the recent incident of trespassing on June 6, 2020** . . . (Com. ¶¶ 153; 175-180; A94; A105-107) (emphasis supplied).
>
> **[T]he repeated unauthorized incursions into my apartment by the co-op support staff** over the years initially merely constituted trespassing and burglary and related wrongs and torts, but since the police involvement, **their activities at the behest of the NYPD . . . now are done under color of state law.** (Com. ¶ 203; A116) (emphasis supplied).

The second portion of the brief sets forth reproductions of relevant legal arguments from petitioner's brief:[4] Here is that portion:

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[4] Word count limitations prevent the petitioner from including in this petition the point in his brief on appeal concerning the district court's refusal to grant petitioner the opportunity to amend his complaint. The complaint has some serious faults, for which petitioner apologizes. Omitting the petitioner's analysis in the Preliminary Statement of the defendants' behavior as a social pathology reduces the potential for understanding this pathological behavior, but also removes any justified objection to the complaint on legal grounds. Thus, the district court's refusal to grant leave to amend is a clear abuse of discretion under established Second Circuit standards. *Ronzani v. Sanofi*, 899 F.2d 195 (2d Cir. 1990). *See also Foman v. Davis*, 371 U.S. 178, 83 S.Ct. 227, 9 L.Ed.

POINT III

IS THIS JURISPRUDENCE?

B. The Ostrich Jurisprudence Practiced by the Lower Court Does Not Diminish the Validity of Appellant's Claims Under the Fourth Amendment

The practice of ostrich jurisprudence, where the judge buries his head in the sand and ignores the factual evidence contained in the complaint before him when making a ruling, often by misstating it, seems to be the preferred method for the adjudication of *pro se* claims in the Southern District of New York. *See, e.g.*, Point II, *supra*. Obviously, if a court ignores repeated truthful allegations that illegal intrusions have been made to a party's dwelling, it will not see any violations of that party's Fourth Amendment rights.

"A 'seizure' triggering the Fourth Amendment's protections occurs [. . .] when government actors have 'by means of physical force or show of authority . . . in some way restrained the liberty of a citizen.' *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)." *Graham v. Conner*, 490 U.S. 386, 395 n.10, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989). In making a determination of whether a valid Fourth Amendment claim is presented, "the inquiry is necessarily case and fact specific and requires balancing the nature and quality of the intrusion on the plaintiff's Fourth Amendment interests against the countervailing

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222 (1962); *Cruz v. Gomez*, 202 F.3d 593, 597-8 (2d Cir. 2000); *Gomez v. USAA Fed. Sav. Bank*, 171 F.3d 794, 795 (2d Cir. 1999).

governmental interests at stake. *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 123 (2d Cir. 2004)." *Tracy v. Freshwater*, 623 F.3d 90, 96 (2d Cir. 2006).

In the first action, the district court neglected to properly describe the deletion of emails from appellant's Yahoo! account, but as a warrantless search it clearly is a violation of appellant's rights under the Fourth Amendment. *See Riley v. California*, 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (cell phones); *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) (emails).

In this action, the repeated illegal, warrantless incursions into appellant's apartment for the purpose of stealing or destroying evidence in appellant's possession or for harassing him also are clear Fourth Amendment violations. *Arizona v. Gant*, 556 U.S. 332, 338, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

C. Appellant's First Amendment Rights Have Been Violated in Oh So Many Ways

From January of 2013, when appellant's police harassment increased significantly after appellant filed his CCRB complaint, until October 28, 2020, when a notary furnished appellant with two defective notarizations (Rule 59 Affidavit ¶¶ 28-30; A36-37), the NYPD has violated appellant's First Amendment rights in an impressive demonstration of different actionable styles.

First, we have the numerous attempts to interfere with appellant's ability to file affidavits. *See, e.g.*, Appellant's Rule 59 Affidavit (A27-38) for examples of the two most recent, but there are many others. This constitutes a clear First Amendment violation. *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 91 (2d Cir. 2002) (right to petition the courts and administrative bodies is protected).

The next violation of appellant's First Amendment rights is alluded to above: in destroying much of the evidence that had accumulated, the police have severely hampered appellant's ability to successfully bring a civil action, to file a criminal complaint, to attract media attention, and to obtain legal counsel. In part appellant here is alleging an "access to court" cause of action. *Cf. Graham v. Perez*, 121 F. Supp.2d 317, 323-24 (S.D.N.Y. 2006) (to assert an access to court claim, a plaintiff must show that defendant "took or was responsible for actions that hindered [a plaintiff's] efforts to pursue a legal claim"). *See also*, *Acevedo v. Surles*, 778 F. Supp. 79 (S.D.N.Y. 1991).

As a third violation of appellant's First Amendment rights, a number of courts have held that police stalking in response to a plaintiff's exercise of his or her First Amendment rights states an actionable claim under §1983. *See, e.g., Doe v. City of Hartford*, 2004 U.S. Dist. LEXIS 9824 (D. Conn. 2004) (stalking by police officer in response to filing criminal complaint against him constituted actionable retaliation in violation of plaintiff's First Amendment rights under §1983);

Marczeski v. Brown, 2002 U.S. Dist. LEXIS 22806 (D.Conn. 2002) (same).

One reason for these holdings is the intrusive nature of stalking itself. As the court in *Champagne v. Gintich*, 871 F.Supp. 1527 (D. Conn. 1994) wrote in finding that stalking by police in retaliation for filing a court complaint constituted a violation of plaintiff's First Amendment rights under §1983, quoting Judge Douglas Lavine in *State v. Culmo*, 43 Conn. Supp. 46, 52-53 (Conn. Supp. 1993):

> "Providing protection from stalking is at the heart of the state's social contract with its citizens, who should be able to go about their daily business free of the concern that they may be the targets of systematic surveillance by predators who wish them ill. The freedom to go about one's daily business is hollow, indeed, if one's peace of mind is being destroyed and safety endangered by the threatening presence of an unwanted pursuer."

As someone who sees a police car or a stroller nearly every time he leaves his building's Fourteenth Street door, appellant could not agree more with Judge Lavine's assessment. Why don't Federal judges agree?

D. The Actions of the City Defendants Violated Appellant's Right to Due Process in Two Different Ways

An additional actionable §1983 cause of action contained in appellant's complaint involves the due

process clause of the Fourteenth Amendment. This claim is independent of appellant's retaliation claim, and involves the fact that for years the NYPD has been defaming appellant, which defamation then resulted in appellant being stalked almost every time he left his apartment by civilian vigilantes (Com. ¶ 7; A42).

Thus, plaintiff's cause of action herein meets the requirement the Supreme Court states in *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976) that the plaintiff "point to some material indicum of government involvement beyond the mere presence of a state defendant to distinguish his or her grievance from the garden-variety defamation claim . . . ".

In *Doe v. Dep't of Pub. Safety ex rel Lee*, 271 F.3d 38 (2d Cir. 2001), *rev'd on other grounds sub nom. Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 123 S.Ct. 1160, 155 L.Ed.2d 98 (2003), this court used a similar analysis to determine that Connecticut's sex offender registration law was unconstitutional, since it involved the state's public defamation of the plaintiff without an opportunity to contest, and imposed the burden of registration.[5] In the instant action, the state imposed burden was not registration, but rather that virtually

[5] It will be noted that the grounds upon which the Supreme Court reversed the decision was that the list simply constituted a list of convicted felons. Here, appellant not only has never been convicted of any crime, but after nine years of "investigation", he has never even been charged with any crime, yet the police still are engaging in this behavior.

every time the plaintiff leaves his home he is stalked by civilian vigilantes. (Com. ¶ 7; A42).

In addition, defendants' interference with appellant's access to the courts, in addition to stating a valid claim under the First Amendment, also states a valid claim under the Fourteenth Amendment. "As to plaintiff's constitutional right of access to the court, it is well-settled that the due process clause of the Fourteenth Amendment protects an individual's right of access to the civil courts, *e.g.*, *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907); *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), and a deprivation of this right is actionable under §1983." [citation omitted]. *Woodward v. Mennella*, 861 F. Supp. 192, 198 (E.D.N.Y. 1994). *See also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S.Ct. 1148, 1154, 71 L.Ed.2d 265 (1982); *Wolf v. McDonnell*, 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974).

The third portion of petitioner's brief attempts to address what petitioner sees as an egregious error consistently committed in the judicial application of the plausibility test this Court set forth in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007): conflating the facts with the inferences, and then denying the whole bundle as "implausible," when the facts are well pleaded and otherwise cannot be explained away. This practice violates *Erickson v. Pardus*, 551 U.S. 89, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007). Here is that portion:

POINT V

FACTS, LIES AND INFERENCES

> One of the more disturbing aspects of appellant's interaction with the members of the Federal judiciary in the context of these two related actions is the apparent collective inability of the Federal judges to distinguish between facts and inferences, and the concomitant inability to differentiate between judicial challenges made on the basis of the "plausibility" of inferences as opposed to judicial challenges where the judge is basically disputing well pled facts and saying that the *pro se* litigant is a liar. As appellant's complaint states:

"[W]hile both the district court and the appellate court found my inference implausible that the police were causing the repeated phenomena that my undisputed eye witness testimony contained in my verified amended complaint had established, at no point did either court attempt to provide an explanation of how I could be seeing these repeating phenomena every single day. In effect, both found my sworn eye witness testimony of multiple police cars and underage girls implausible." (Com. ¶ 7; A42).

This defect in judicial thinking and analysis will be analyzed in the context of the lower court's dismissal of appellant's claim against defendant attorney Galen Criscione. (Com. ¶¶ 104-136, 199-201, 215-218; A79-87,114-115, 119-120), and then applied more generally.

These are the most important facts and inferences, respectively, that underlie appellant's claims in the instant action against Criscione:

Facts

- Criscione agreed to take appellant's case for $20, 000. (Com. ¶111; A81)

- Criscione was told that to obtain the relevant telephone records was the most important part of the action. (Com ¶ 109; A80-81).

- Appellant mistakenly gave Criscione erroneous telephone numbers to check. (Com. ¶105; A79-80).

- Criscione told appellant he had checked the numbers and they were correct. (Com. ¶113; A82). This is a fact and also a lie (and that conclusion is an inference).

- Criscione changed the period requested on the second set of telephone records from what appellant had instructed him to request. (Com. ¶126; A85).

- None of the telephone records Criscione obtained contained the records for the period appellant was seeking. (Com 127; A85).

- The action appellant brought was barred because long arm jurisdiction over the defendants currently could not be established under New York law, and Criscione failed to inform appellant of that fact (Com. ¶ 120; A83).

- Criscione submitted to appellant a draft complaint intended for verification that if appellant had signed would have constituted perjury under New York law. (Com. ¶¶ 129-130; A85-86).

Inferences

- Criscione knew appellant's action was barred in New York State under New York law. (Com. ¶136; A87).

- Criscione never intended to obtain the telephone records for appellant. (Com. ¶136; A87).

- Criscione intended to defraud appellant. (Com. ¶217; A120).

- Criscione was working for the police. (Com. ¶216; A120).

- Criscione was attempting to harm the appellant by inducing him to perjure himself. (Com. ¶128; A85).

As one can easily see, the facts listed above, if truthful, clearly establish attorney malpractice and fraud. Also, most of the inferences follow as a matter of course from the facts. The one inference that might be questioned is the one claiming that Criscione was working for the police. However, certain of Criscione's actions can be explained no other way. Simple greed or incompetence could explain Criscione's accepting appellant's money knowing that his claim could not be brought in New York State. But Criscione's shenanigans concerning the subpoenas cannot be explained

solely as a consequence of his greed or incompetence, since failing to properly serve the subpoenas actually caused him to do more work than he otherwise would have been required to do. More importantly, there is no reason for him to fail to obtain the telephone records, particularly if he was defrauding appellant. If you were an attorney bent on taking a client's $20,000 for instituting an action that properly could not be brought, wouldn't you try to do everything possible to make that client happy, since you knew that the complaint was going to be dismissed? A rational sleazy attorney would be worried about a malpractice action and possible disciplinary complaints. Moreover, the apparent attempt to lure appellant into committing perjury (Com. ¶¶ 128-130; A85-86) makes no sense unless Criscione was actively trying to harm appellant.

Without making the inference that Criscione was working for the police, one cannot make sense of the facts. If someone disputes this conclusion, the onus is on them to provide another inference that will explain this puzzling behavior. Absent such other inference, since it has been established, at least for the purposes of deciding a motion to dismiss, that there was some kind of agreement between Criscione and the police, and since many overt acts were performed that violated appellant's constitutional rights, the three prong test of state involvement this court established in *Ciambriello v. County of Nassau*, 292 F.3d 307, 324-25 (2d Cir. 2002) and *McGee v. Doe*, 568 F. App'x 32, 35 (2d Cir. 2014) has been satisfied, and appellant's amended complaint states a valid cause of action

against defendant Gavin Criscione.A similar analysis can be made for named attorney defendant David L. Moss (Com. ¶¶ 141-146; A89-91), who recently made a cameo appearance before this court. There is simply no reason for him not to find the private detective to do the fingerprint work. He makes more money if he does so. The behavior of attorney Heather A. Ticotin (Com. ¶¶ 139-140; A88-89), who was not named as a defendant but who is part of the fact pattern of police harassment alleged in appellant's complaint, also cannot be explained without reference to some other factor that is not normally present. Attorneys don't normally hold a conversation with a prospective client indicating probable representation and then refuse to speak to him again. The inference appellant has drawn from aberrant behavior of these attorneys is that it is evidence of police involvement. Anyone who wants to explain the aberrant behavior of these attorneys as evidence of something else is welcome to try.

Finally, the behavior of the Co-op defendants, whose support staff have been stealing evidence from appellant's apartment for several years (Com. ¶203; A116), also cannot be explained without pointing to the police. Why else, for example, would the support staff steal letters from appellant's sister (Com. ¶92; A74), or even know of them or bother to look for them?

Again, the typical judicial response appellant has received to questions like this is the one Judge Failla gave in the first action when appellant claimed he was missing emails from his apartment:

> "[T]he factual underpinnings of this [Fourth amendment] claim-that the NYPD, over a protracted period of time, monitored Plaintiff's telephone and computer, and repeatedly broke into [appellant's] apartment, each time without leaving a hint of their intrusion-are plainly implausible." (First action: Op. at 27; Appendix at 37).

In other words, Judge Failla discounted (and in fact misrepresented) the sworn testimony of the plaintiff involving those incursions and his later testimony about stolen emails and explicitly claimed that the plaintiff's factual testimony was implausible. To which appellant can only respond: "In an era where Twombly and memorandum decisions and summary orders rule, this means that as a practical matter that "justice" in Federal court for a *pro se* litigant rests upon the Polyanna delusions of a pampered privileged member of a powerful establishment elite." (Com. ¶ 56; A64).

Of course, Judge Failla's opinion was written before Black Lives Matter and the murder of George Floyd. Perhaps she would have a different opinion of plausible police action today.

III. Ich bin nicht der Mund fur disen Ohren

After having read the portions of petitioner's brief submitted to the Second Circuit herein in the preceding pages, the reader is respectfully requested at this point to immediately go read the summary order the Second Circuit panel wrote in response. (A1-4).

I'm not the mouth for these ears. That is the conclusion petitioner must draw after having submitted the above arguments to the Second Circuit, only to have every single argument ignored.

While the repeated failure of the district court noted above to properly describe and address the factual predicates and claims contained in petitioner's complaint is shocking, the treatment by the district court of petitioner's Rule 59 motion (A25-38) is worse. Petitioner provides physical proof of interference with his ability to prosecute his Federal action (the defective notarizations) (Affidavit ¶ 28 and Exhibit 5 (A36), and sworn statements supported by physical evidence of repeated illegal incursions into his apartment as well as the destruction or stealing of evidence (Affidavit, ¶¶ 5-6) (A28).

The district court wrote in response "As Plaintiff presents no valid grounds for reconsideration, the motion is DENIED." (A7-8). The district court then quotes language from a case that has absolutely no relevance to petitioner's motion, since petitioner's motion does provide probative new evidence of his claims not available to the court at the time it dismissed petitioner's complaint *sua sponte*.

The appellate panel deciding this issue was no better. It will be noted, from the lengthy legal points of his appellate brief that petitioner quotes, that petitioner is dutifully arguing the application of established legal standards to the facts of his case. By contrast, in every single determination by a member of the Federal

judiciary in this action, there is absolutely no discussion concerning the application of the relevant legal standards to the facts pleaded in the complaint. There is simply the mindless recitation of undisputed legal standards that have no application to the instant action. Yes, private parties acting alone cannot be held liable in an action brought under 42 U.S.C. section 1983, for example, but why is the support staff of my building stealing every single letter I kept that my sister ever wrote to me? How do they even know that these letters exist? Why are pictures I took of police officers and police cars disappearing from one of my computers that is not connected to the internet?

The failure of the Federal judges herein charged with the responsibility to determine the validity of petitioner's *pro se* complaint to even address these issues is the failure of America's Federal system of civil justice. The question petitioner posed at the start of his petition to the Second Circuit for *en banc* consideration must regrettably be answered in the affirmative.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

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