No. 17-____

IN THE

Supreme Court of the United States

ANDREW JONES, ROBERT E. BUCKTOOTH, JR., CHERYL BUCKTOOTH, ROBERT BUCKTOOTH, DEBBY JONES, KAREN JONES, NIKKI JONES, KARONIAKATA JONES, SHAWN JONES, KAHENTINETHA HORN, DYHYNEYYKS, AKA ALFRED LOGAN, JR., TEKARONTAKE, AKA PAUL DELARONDE, ROSS JOHN, RONALD JONES, JR., NADINE O'FIELD / GANONHWEIH, FKA NADINE BUCKTOOTH,

Petitioners,

v.

JAMES J. PARMLEY, GEORGE BEACH, PAMELA J. MORRIS, DENNIS J. BLYTHE, INV., JOHN F. AHERN, INV., JOSEPH W. SMITH, SGT., JEFFREY D. SERGOTT, TRP., MICHAEL S. SLADE, TRP., JAMES D. MOYNIHAN, TRP., JAMES K. JECKO, TRP., ROBERT HAUMANN, SGT., MARK E. CHAFFEE, TRP., CHRISTOPHER J. CLARK, TRP., PAUL K. KUNZWILER, TRP., DOUGLAS W. SHETLER, TRP., PATRICK M. DIPIRRO, GREGORY EBERL, TRP., GARY A. BARLOW, MARK E. LEPCZYK, TRP., MARTIN ZUBRZYCKO, TRP., GLENN MINER, GARY DARSTEIN, TRP., KEVIN BUTTENSCHON, CHRIS A. SMITH, SGT., NORMAN J. MATTICE, SGT., JOHN E. WOOD, THOMAS P. CONNELLY, JERRY BROWN, HARRY SCHLEISER, SGT., NORMAN ASHBARRY, INV., JOHN DOE, 1-100, JANE DOE, 1-100, PETER S. LEADLEY, TRP., GLORIA L. WOOD, TRP., DAVID G. BONNER, TRP., DENNIS J. BURGOS, TRP., JOHN P. DOUGHERTY, TRP., DAVID V. DYE, TRP., DARYL O. FREE, TRP., JAMES J. GREENWOOD, SGT., ROBERT B. HEATH, TRP., ANDREW HALINSKI, TRP., ROBERT H. HOVEY, TRP., ROBERT A. JURELLER, TRP., STEPHEN P. KEALY, TRP., EDWARD J. MARECEK, TRP., RONALD G. MORSE, TRP., PAUL M. MURRAY, TRP., ANTHONY RANDAZZO, TRP., ALLEN RILEY, TRP., FREDERICK A. SMITH, TRP., STEVEN B. KRUTH, SGT., TROY D. LITTLE, TRP.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Supreme Court must finally set a precedent for the courts in the United States to ensure all pro se civil litigants have the right to "Equal Justice Under Law," "procedural Due Process," and "a fair Trial."

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PETITION FOR WRIT OF CERTIORARI

The Onondaga 15 respectfully request that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

Jones v. Parmley, 16-3603-cv (2d Cir. 2017), subject of this petition; Appendix A.

Jones v. Parmley, 465 F.3d 46 (2d Cir. 2006, Sotomayor, J.), interlocutory Opinion; Appendix B.

Jones v. Parmley, 5:98-CV-0374 (District Court NDNY, 2015), Order allowing withdrawal of Petitioners' lawyers 17 years after filing complaint; Appendix C.

JURISDICTION

The Second Circuit decided this case November 2, 2017. Supreme Court jurisdiction is under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth [Seventh, Fourteenth] Amendment: procedural Due Process Clause "no person shall be deprived of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

This civil case proves that a pro se party cannot get "Equal Justice Under Law," "procedural Due Process," and "a fair trial" in the courts of the United States!

Every person has the natural right to have their voice heard and respected. The Supreme Court has the absolute responsibility to protect and respect this right to be heard. The natural right of everyone's voice to be heard and respected must be followed as sure as the sun rises each day.

11 years ago [2006], Second Circuit Judge (now Supreme Court Justice) Sotomayor provided a perfect summary of the facts and binding law of this case in her Opinion issued on an interlocutory appeal to the Second Circuit. *Jones v. Parmley*, 465 F.3d 46 (2d Cir. 2006). Videos establishing these facts were filed as exhibits in the District Court and the Second Circuit, and posted on YouTube. [Appendix B]

An unconscionable 20 years ago, on May 18, 1997, the Onondaga 15 [Petitioners] were attacked by the New York State Police "I-81 Indian Detail"

An unconscionable 19 years ago, on March 3, 1998, this [42 U.S.C.] section 1983 civil rights Complaint related to First and Fourth Amendment claims was filed by two sets of lawyers on behalf of 91 Plaintiffs in the District Court in Syracuse.

17 years later, in 2015, 76 Plaintiffs settled for money. The Onondaga 15 would not settle because they wanted a fair trial. As a result, the lawyers abandoned the Onondaga 15. Despite objections by each, the District Court allowed the lawyers to withdraw. A hearing to protect the 15 clients was required for Due Process. Inexplicably, there was no hearing! As a result, after 17 years of litigation and discovery, each of the Onondaga 15 was forced pro se to conduct a jury trial. [Appendix C]

An unconscionable 19 years after the attack, the jury trial finally commenced on September 20, 2016, against 51 members of the "I-81 Indian Detail." [Respondents].

Because each of the Onondaga 15 was pro se, each was denied procedural Due Process and a fair trial.

A. The Facts

20 years ago, the racial profiling "I-81 Indian Detail" closed down the I-81 freeway to traffic. Dressed in full riot gear, approximately 39 of the 120 "Detail" troopers then lined up on the shoulder of I-81. They descended on the 91 peaceful and unarmed women, men, and children of the rotino'shonni:onwe [Iroquois Confederacy] who had assembled on private property. The Native people were gathered at a sacred ceremony and picnic to peacefully protest a tobacco tax proposed by New York state. The fully-armed "I-81 Indian Detail" had lined up to clear the I-81 of pedestrians. While a few of the 91 assembled had earlier ventured onto the roadway, the vast majority had not. The undisputed trial evidence confirmed that none of the Onondaga 15 had ever been on the road at any time. Nonetheless, the Supervisors of the "I-81 Indian Detail" had determined beforehand that there would be "no negotiation." With that in mind, the Supervisors had given the Order to the "I-81 Indian Detail" to "advance and commence arrests." At the time of the "commence arrests" command, nobody was on the road except the "I-81 Indian Detail," as seen in the video exhibit. The troopers proceeded with batons to assault, terrorize, disperse, and indiscriminately physically arrest 24 of the 91 assembled, as seen in the video! Judge Sotomayor's binding law of this case, *supra*, established that the Onondaga 15 had an excellent First Amendment case regarding "no clear and present danger." Judge Sotomayor ruled that "I-81 Indian Detail" had no qualified immunity defense to the First Amendment claims, and confirmed by the video exhibits and facts introduced at trial.

B. Issues Raised on Appeal to the Second Circuit

The Jury Verdict on October 11, 2016, against 12 of the Onondaga 15, and the Rule 50 directed verdicts against the remaining 3 were appealed to the Second Circuit with the following issues:

1. 20 years is "Justice Delayed is Justice Denied."

2. The District Court erred in not conducting a hearing regarding the objections of each of the Onondaga 15 to the lawyers' withdrawal motions. Without a Due Process hearing, each was forced to go pro se by the District Court Order allowing the lawyers to withdraw. After 17 years of litigation and discovery, retaining other lawyers was impossible.

3. The District Court denied Due Process and a fair trial for the Onondaga 15 because they were pro se.

4. The District Court erroneously ignored and denied Judge Sotomayor's binding law of this case and "roadmap" for the Jury instructions.

The Second Circuit erroneously sanctioned the District Court's egregious errors through its recent Summary Order on November 2, 2017 [Appendix A].

This Petition for Certiorari follows.

REASONS FOR GRANTING THE PETITION

I. COMPELLING REASONS

The Supreme Court must grant certiorari to address the fact that a pro se civil party cannot get Due Process and a fair trial in the United States.

Every person without a lawyer should have "Equal Justice Under Law" in the civil and criminal courts of the United States. The Supreme Court is responsible

to do this. The Supreme Court must find a way to eliminate the procedural swamp that drowns the merits of every pro se civil case.

The pro se Onondaga 15 were denied "Equal Justice Under Law."

"Equal Justice Under Law" is the cornerstone to the foundation of the Supreme Court. The Supreme Court violates this fundamental principle and Due Process by its own Rule 28.8 that prohibits pro se parties to argue before it! ["Oral arguments may be presented only by members of the Bar of this Court."] The voices of the pro se Onondaga 15 were silenced in the lower courts. Rule 28.8 silences pro se in the Supreme Court. Rule 28.8 requires the Supreme Court to invalidate the rule or recuse itself.

This 20 year "miscarriage of justice" is the precedent for "Justice Delayed is Justice Denied," "denial of Due Process," and "unfair trial."

After 17 years with lawyers, the District Court erroneously allowed the lawyers to withdraw without conducting a hearing where each of the Onondaga 15 could express their strong objections. The Onondaga 15 say: "We were forced to proceed in a pro se canoe without a paddle."

18 ½ years after filing the Complaint, the forced pro se Onondaga 15 went to jury trial without lawyers. They had no courtroom experience. The District Court crossed the line from being an impartial referee and became an advocate and participant in the trial because the Plaintiffs were pro se. The District Court forfeited its role as an impartial, neutral, and unbiased referee because the Plaintiffs were pro se.

First, the District Court erroneously created and conducted the direct examination questioning of the "I-81 Indian Detail" defendants called by the pro se Onondaga 15. The Court thereby erroneously participated in "creating" rather than merely "clarifying" the evidence. The District Court denied each of the 15 pro se their right to conduct "direct examination."

Second, the District Court erroneously ruled that only 1 Plaintiff out of the 15 could ask limited follow-up questions, and censored by the Court. This eliminated the fundamental Due Process right for each of the pro se Plaintiffs to ask their own questions. The Jury was thereby unable to connect the answers to individual Plaintiffs.

Third, the District Court, in addition, erroneously ruled that all proposed follow-up questions must be filed in writing for review. This prejudgment review by the Court was done *in camera*, without objection, without argument, and without giving reasons necessary for appellate review. Culturally most of the Onondaga 15 communicate orally and not in writing. The Court refused to hear from the pro se Plaintiffs regarding its rulings.

Fourth, the District Court denied each Plaintiff his or her right of "direct examination," "cross-examination," "re-direct," and "re-cross." The District Court was determined to move the case along at lightning speed at the expense of Due Process and fair trial rights. Without allowing each of the pro se to question, the Court summarily and without any supporting reasons treated the 15 pro se as a group and erroneously ruled that none of them could form probative and relevant questions. The District Court told the Jury so, tainting it.

No pro se party, whether forced to be pro se or voluntarily pro se, should ever endure this denial of procedural Due Process and unfair trial again in the courts of the United States.

A witness is always questioned on a blank canvas. One question leads to an answer that leads to another question [or not]. It is impossible to write out questions before an answer is given.

The District Court has the power and obligation to control the proceedings. The Court can only ask questions that *clarify* not *create* evidence. Federal Rules of Evidence 611(c) applies to each of the Onondaga 15. It provides: "Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." The District Court denied this most important right to each Plaintiff. Rule 607 also applies to each, providing: "Any party, including the party that called the witness, may attack the witness's credibility." The District Court denied this crucial right. The District Court erroneously treated the Onondaga 15 as one unit where one selected Plaintiff could question on behalf of all. This denied each of the 15 their individual right to question and present their own case. The Second Circuit has held in *United States v. Filani*, 74 F.3d 378 (2d Cir. 1996):

> [The District Court] may actively participate and give its own impressions of the evidence or question witnesses, as an aid to the jury, so long as it does not step across the line and become an advocate for one side * * * In its participation at trial a District Court should

> ask those questions necessary for such purposes as "clarifying ambiguities, correcting misstatements, or obtaining information needed to make rulings." *United States v. Pisani*, 773 F.2d 397, 403 (2d Cir. 1985). Where the questions are designed simply to clarify testimony, there is no reversible error.

Filani also states: "Our decisions further make clear that a trial court 'should exercise self-restraint and preserve an atmosphere of impartiality and detachment.'" Pro se parties are entitled to the fundamental right to Due Process and "the right to a meaningful opportunity to be heard." *Procedural Due Process Rights of Pro Se Civil Litigants*, 55 University of Chicago Law Review 659, 670 (1988); and *Judicial Abdication and Equal Access to the Civil Justice System*, 60 Case Western Reserve L. Rev. 325 (2009); Legendary Detroit College of Law Professor Harold Norris and "*Due Process*"; Fifth Amendment and Seventh Amendment. [Fourteenth Amendment, Due Process Clause applies to the states.]

In addition, the District Court, *sua sponte*, without any objection, without allowing any argument, and without reasons, erroneously made constant evidentiary rulings against the Onondaga 15. "Due Process" and a "fair trial" were denied.

The District Court also erroneously refused to follow Judge Sotomayor's binding precedential law in this case, *supra*, that Second Circuit Judge Pooler at the recent oral argument in this case described: "[Judge Sotomayor] gives a roadmap. She tells them what to do." [15:42-15:46 of oral argument on September 19, 2017]. Inexplicably, by Summary Order, the Second Circuit nevertheless sanctioned this erroneous ruling. The Onondaga 15 were unfairly denied their right to

participate in formulating the Jury Instructions because they were pro se.

Certiorari should be granted to preserve and protect "Equal Justice Under Law" as the fundamental cornerstone to the foundation of the United States.

Certiorari should be granted because it is a case of first impression on the current "equal access to justice crisis" regarding "pro se" civil parties in the courts of the United States.

Certiorari should be granted so that every "pro se" civil party [whether forced or voluntarily] in the courts of the United States is never denied fundamental "procedural Due Process" and a "fair trial."

Certiorari should be granted for the "compelling reason" that the Second Circuit has "sanctioned" the District Court's legally unconscionable delay, violation of Due Process, and unfair trial against pro se civil parties that "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this [Supreme] Court's supervisory power." Supreme Court Rule 10(a).

Certiorari should be granted because there is no consensus on how to proceed with pro se civil litigants in the courts of the United States.

The Supreme Court must finally set a precedent for all courts in the United States to follow that ensures that all pro se civil litigants have the right to "Equal Justice Under Law," "procedural Due Process," and "a fair Trial."

Pro se has never had her or his day in the Supreme Court.

"Equal Justice Under Law" is a myth for most people.

A pro se party cannot have "equal access to justice," "Due Process," and a "fair trial."

The time has come for the highest court to make "Equal Justice Under Law" a reality for all pro se whether or not they voluntarily are pro se or are forced to be!

The Second Circuit says this is an "exceptional case" because of the 15 pro se Plaintiffs. As a result, the Second Circuit erroneously held that the District Court "did not abuse its discretion in making these changes to standard trial procedure." The Court therefore erroneously sanctioned the District Court's unfair trial, and brushed aside this "exceptional case" in a non-precedential Summary Order with virtually no meaningful analysis [Appendix A] [Local Rule 32.1.1]. The Summary Order, however, is persuasive authority in the other Circuits, sanctioning unfairness and violation of Due Process against pro se parties. [Federal Rules of Appellate Procedure 32.1]. This is another compelling reason for intervention here.

The Second Circuit also erroneously sanctioned the District Court's unfair process as a way to control "an unwieldy trial." This erroneously sanctioned unfairness allowed an estimated 1 year trial with lawyers to be condensed into a 1 week trial with pro se Plaintiffs – at the expense of violating Due Process and a fair trial!

This is an "exceptional case" that requires granting certiorari.

II. TRIAL RECORD EXCERPTS PROVE THE DENIAL OF DUE PROCESS AND UNFAIR TRIAL AGAINST PRO SE PLAINTIFFS

At the pretrial held August 18, 2016, the Onondaga 15 appeared without lawyers for the first time after 19 years of litigation. The District Court immediately bullied the pro se Onondaga 15 with the following dismissal Order:

> THE COURT [8 minutes late and opening the Court at 11:08 a.m.]: For the record, the court issued an order on July 8th, 2016 directing that counsel for all defendants and that all pro se plaintiffs to attend in person this pretrial conference today being August 18, 2016, at 11 a.m. in Syracuse, New York. The court in its order advised the plaintiffs that the court would dismiss with prejudice the claims of any pro se plaintiff who failed to attend this pretrial conference. It is now 11:15, and there are a number [5] of pro se plaintiffs who are not here. So pursuant to my order, those who are not present [5], the cases are dismissed.
>
> CHERYL BUCKTOOTH: Just like that? After 20 years?
>
> THE COURT: Now –
>
> RONALD JONES, JR.: Excuse me, sir. After 20 years of us waiting for this justice system to see that we get justice, are you allowed to do this?
>
> THE COURT: Your name, sir?
>
> RONALD JONES, JR.: Ronald Jones.

> THE COURT: Mr. Ronald Jones, when I have a question for you, I'll ask you a question.
>
> RONALD JONES, JR.: I have a question.
>
> THE COURT: I don't care if you do have a question.
>
> RONALD JONES, JR.: I'm sorry –
>
> THE COURT: This will be done pursuant to the court's direction and not yours.
>
> RONALD JONES, JR.: I didn't say it was my direction, I just asked a question.
>
> THE COURT: You're in a federal courtroom here, you're going to respond according to the rules of this court.
>
> RONALD JONES, JR.: Yes, ma'am [*sic*].
>
> THE COURT: Your rules do not apply here.
>
> RONALD JONES, JR.: You're on Onondaga land, though, sir.
>
> THE COURT: Mr. Jones, again, either you respond pursuant to the rules of this court or you will not be allowed to go forward to go forward with your action. Do you understand?
>
> RONALD JONES, JR.: Yes.
>
> THE COURT: All right. Then just abide by my direction. If you fail to do so, I will dismiss your case, it's plain and simple as that.

[Pretrial transcript, 7-9]

This unfair dismissal only happened because they were pro se.

A few minutes later 4 of the 5 dismissed Plaintiffs walked into the Courtroom having been delayed

getting through security into the Courthouse. As a result, the District Court "retracted" its unfair dismissal orders as to the 4 – but could not "retract" its unfairness exhibited toward pro se Plaintiffs.

The District Court then described the procedure to be followed at the trial commencing in one month on September 20, 2016: [transcript 9]

> THE COURT: Now as to the first order of business here, I understand that there are groups here and Jones family is one group, is that correct?
>
> RONALD JONES, JR.: Yes.
>
> THE COURT: In essence. So you have one person asking questions at our trial and on behalf of all of you, will that be right?
>
> ANDREW JONES: No, each of us because we're each our own and you said we could not represent one another.
>
> THE COURT: I'm talking about asking questions, that's all, you don't want to do that?
>
> ANDREW JONES: We'll do it on our own.
>
> THE COURT: All right.

The Court was hoping the pro se Onondaga 15 would relinquish their individual right to ask questions. They emphatically refused.

At the final pretrial on September 13, 2016 [transcript 68, emphasis added], the Court warned that it was joining the trooper defendants in keeping the Plaintiffs "on track," thus forfeiting its impartiality:

> THE COURT: Now keep in mind that [New York State Police] have a right to object to anything you're testifying to which is not admissible or relevant or probative. That occurs because *we're* going to keep you on track.

The District Court later correctly emphasized the following to each of the pro se Onondaga 15: [transcript 35]

> THE COURT: It's your responsibility to prosecute your own case, not the court's, keep that in mind, even though you're pro se.

This did not happen!

The District Court again inquired about one representative questioning all witnesses: [September 13, 2016, transcript 73-74]

> THE COURT: * * * Now when the defendants testify, again, the order of questioning of the defendants, you haven't agreed on representation by groups, everybody wants to ask questions, nobody wants to, I mean, for example, Jones family.
>
> ANDREW JONES [Budgie]: I want to do my own questioning.
>
> RONALD JONES: Same.
>
> KARIONIAKATA JONES: Same.
>
> RONALD JONES: Individually.
>
> THE COURT: If you want someone to ask, let me make clear if they do, you do have a right to ask your own questions but sometimes it makes a better point if you – well –

> ANDREW JONES: We'll get together.
>
> THE COURT: All right. Questions can't be repetitious, all right. So if they've been asked already by a number of plaintiffs, we're not going to ask the same question over again, so that's why I want to make it clear insofar as – so you can decide who's going to ask what, might be a better way to handle it. But that's up to you, you'll have a chance to question the witnesses. All right. I think I covered that. Any questions about the trial procedure?

From then on the District Court reversed the correct procedure. The trial practice rule book was thrown out. The Court became an advocate and participant in the proceedings, ruling out a fair trial.

14 of the Onondaga 15 completed their testimony in unprecedented lightning speed on the first day of evidence. Their testimony was unfairly limited by interruptions and narrow questioning by the District Court. The District Court erroneously did not give each Plaintiff his or her right to question the other Plaintiffs. The Record shows:

> PAUL DELARONDE [tekarontake]: Could I ask him questions?
>
> THE COURT: Well, you didn't call him as a witness. You – he wasn't on your witness list. All right. You may stand down [pro se Robert Bucktooth, Jr.], thank you.

[Trial Day 3, September 22, 2016, transcript 373], hereinafter [373]]

The District Court made the following erroneous ruling on the second day of evidence:

> THE COURT: * * * You're going to use one person from now on to ask questions so get together, figure out what you want to ask.
>
> ALFRED LOGAN, JR. [dyhyneyyksa]: We're not a group, all pro se by ourself. * * *
>
> THE COURT: * * * Whether you agree with it or not, it's not for argument, all right. All right.
>
> ROSS JOHN: Thank you, sir.

[405-406]

At pretrial the District Court correctly ruled that each Plaintiff could prosecute his or her own case. At trial he reversed his ruling.

On day 3 of evidence, the District Court emphasized its erroneous ruling:

> THE COURT: In the future, one person for each witness * * * one person asks the questions per witness from now on.

[560]

Shortly thereafter, the District Court errors became worse in the following exchange [567-572] where the Court interrupted and asked the follow-up questions:

> Q [CHERYL BUCKTOOTH to a defendant trooper]: On May 18 [1997], are you aware *** of a sacred fire burning on the private property of Andrew Jones on the Onondaga Nation territory?
>
> MR. MULVEY [Assistant Attorney General, attorney for 50 of 51 defendants]: Your Honor, I'm going to object to form that it hasn't been established it was private property.

THE COURT: Exactly. But the only thing, tell us what you know about that. That day. I'm going to ask the question here, tell us what you recall about that day, what you did, when you got there, what you observed.

Q [CHERYL BUCKTOOTH]: Can you spell injustice? * * *

THE COURT: Mrs. Bucktooth, I've asked a question now, he's going to answer my question.

CHERYL BUCKTOOTH: So you're going to be our pro se –

THE COURT: I'm asking the question now.

CHERYL BUCKTOOTH: – lawyer for us, is that what you're doing?

THE COURT: You may follow up with another question.

* * *

(Jury Excused)

* * *

CHERYL BUCKTOOTH: I was asking you a question, are you planning to be our *pro se* lawyer –

THE COURT: I know what you are doing.

CHERYL BUCKTOOTH – because you seem to be asking the questions of the troopers, that are our witnesses that we're trying to cross-examine and you seem to be putting yourself in that position and not being impartial by sitting there trying to oversee it.

> Instead you're being lenient on one side and not on the other.
>
> THE COURT: You may have your opinion. * * * And whatever you wish to do after this trial is over, you may appeal it –
>
> CHERYL BUCKTOOTH: It's your trial.
>
> THE COURT: * * * I'll ask a question of this witness, have him explain what he saw, what he did that day and then you may ask a question based upon what he said, relevant to that day, and what his testimony was. That's the way it's going to work, because you're wasting a lot of time here.
>
> * * *
>
> What is it you don't understand? One person from all the plaintiffs questions each witness.
>
> KAHENTINETHA HORN: So that means the same person –
>
> THE COURT: We had this – we got together yesterday and went over all this, you get together, you decide who that person's going to be, you submit the questions to that person, that person asks the questions on behalf of all the plaintiffs. That's the way we're going to proceed.

The District Court admitted its errors and tainted the Jury against the Onondaga 15 with the following instruction [573]:

> THE COURT: * * * Ladies and gentlemen, as I mentioned to you at the beginning of this trial, we have to make some modifications in the way that procedure is followed here, to

> accommodate pro se plaintiffs * * * because we have 15 pro ses and having so many defendants involved here, we came up with some modifications on how the procedure, what procedure would be followed, how we would do this, and I'm continuing to change that, so that we can get the evidence in that is relevant and probative and admissible, and try to eliminate as much as we can of that that is not probative and not admissible. Lot of stuff that's come in now probably shouldn't have come in but we'll try to focus on what is relevant and admissible from this point on.
>
> I decided the best way to do that, there's been some difficulty getting questions formulated and answers given to relevant information, that I would ask the witness questions at the beginning, please direct your attention to date, time, what they experienced and saw and et cetera, and then let the plaintiff's representative, whoever they choose is going to ask the questions, then ask questions about what the witness has testified to * * * It's really not cross, it's examination by both sides here which is a little different than normal procedure as well.

The Trial was now whizzing forward with the District Court erroneously doing the "direct examination" of each witness [with some cross and leading], and sanctioned now by the Second Circuit.

On the 4th day of evidence, the following exchange continues the "unfairness":

> PAUL DELARONDE: Excuse me, sir, now, I've had questions.

* * *

> The thing is I would have had an important question to ask this witness.
>
> THE COURT: Excuse me, we talked about that, we're going to select one person to represent you in asking questions, that's the way we're going to proceed, it was out of control before.
>
> ANDREW JONES: I didn't agree to anything that was submitted.
>
> THE COURT: Okay.
>
> ANDREW JONES: Andrew Jones is my name. I didn't agree with nothin'.
>
> * * *
>
> THE COURT: Okay, let me have your questions, pass them up. All these witnesses you propose to ask questions let me have all the questions you have, let me take a look at them.
>
> * * *
>
> KAHENTINETHA HORN: Can I ask why you're not asking for him [Assistant Attorney General] to submit his questions to you?
>
> THE COURT: I haven't had a problem with his questions yet, I'm having a problem with your questions, that's why I want to review them for relevancy, all right.

[758-760]

The District Court interrupted the sole questioner with the following exchange on day 4 of evidence:

> THE COURT: So let me take a look at the proposed questions so save some time on that.
>
> * * *
>
> CHERYL BUCKTOOTH: Sir, I'm representing 15 people that handed me questions. * * * I have to read everybody's questions.
>
> THE COURT: You cannot read everybody's questions if it's not relevant.
>
> CHERYL BUCKTOOTH: How do I represent them, then? How do I represent putting these questions forward to asking these people if I can't get them in?
>
> * * *
>
> THE COURT: Let me see the questions, I'll decide without going through all your questions whether there's any relevant questions there.

[726, 737]

The Court then recessed and reviewed the written questions *in camera*. Reconvening, without permitting any argument, the District Court continued to taint the Jury with his erroneous procedure [738-739]:

> THE COURT: * * * I will tell the jury that I found very few of your questions to be relevant to your claims, so I'm going to ask questions of this witness, you may ask follow-up questions, we'll proceed that way. And of course you have your right to appeal my decisions when the case is over. * * * Mark it as an exhibit and file it.
>
> (Jury called in)

> THE COURT: All right, ladies and gentlemen, as I just told the parties, I found very few of the questions to be relevant to the claims in this case, so what I'm going to do is to proceed this way. I will ask this witness questions, and I'll allow questions to be asked relevant to what I asked, follow-up questions, because I want to focus just on these claims that we have before us that you're going to have to decide the facts on, and that alone. We've been all over the lot here, so I will proceed that way, and I told the plaintiffs they preserve their right to appeal my decisions of course, I will take their questions they have, we're going to ask – I'll receive them as part of the record, they're not as evidence, all right. We'll do that with other witnesses that come forward, I'm going to look at the questions ahead of time, try and move this along a little bit.

A short time later this exchange took place showing unfairness toward pro se:

> THE COURT: I know you object. Mr. Delaronde. What is it you wanted to bring to the court's attention?
>
> PAUL DELARONDE: What I want to bring to the court's attention is that I'm supposed to be pro se, I'm supposed to be looking out for my interests, I'm not here to look out for everybody else's interests, okay, because this is what you've told us, that we all represent ourselves. And I've had questions that I wanted to ask last week and even today, but my hands are tied, I can't.

> THE COURT: I said submit them to Mrs. Bucktooth and she'll ask.
>
> PAUL DELARONDE: I have given them my questions but they've never asked my questions the way I wanted them to be asked.
>
> THE COURT: Well, as far as the way, the court has to rule on the proper way to ask a question, and I have to rule on the relevancy. So I'm ruling on that as it comes forward and that's the only thing we can do and that's the best way to proceed, so just submit your questions to whomever is going to be your spokesperson and I –
>
> PAUL DELARONDE: That means I can't represent myself.
>
> THE COURT: That doesn't mean that at all.
>
> PAUL DELARONDE: What does it mean?
>
> THE COURT: That's the way we're proceeding, that's what it means, that's the procedure we're following. All right. We're on break now, if you want to go to lunch, but let me see the proposed questions, I'll take a look at them during the lunch hour.

[760-761]

The egregious errors against the pro se Plaintiffs are summed up here:

> CHERYL BUCKTOOTH: I believe that during some of our testimony we kept getting interrupted by you, so that would be – as we're trying to – train of thought, you would derail us so in order for getting our stories told, some of us had had notes that were just

handwritten, trying to get those things in and by you interrupting us as we were telling our stories, we were not able to get those types of things into our – as our evidence. And as we came off the stand, a lot of us were dumfounded – stupefied that you could even do that to us and that we were not able to actually enter all of those facts into evidence, because you would badger us while we were on the stand telling our story because you would not allow us to tell our story.

THE COURT: That has nothing to do with the motions here, but all right, you may file your complaints and all you wish and you may appeal whatever my decisions are once this trial is over but that's not for discussion.

[1189]

Then this shocking exchange in front of the Jury:

THE COURT: So I have to assure that only proper questions, legally admissible evidence is received by this court so the jury can base a decision upon that.

* * *

ROSS JOHN: We should be able to ask questions and then you can object to them after they're asked, not beforehand.

THE COURT: We're not spending all day long asking questions.

ROSS JOHN: That's not proper form for this court, your Honor.

* * *

ROSS JOHN: Ask the questions.

THE COURT: No. They're not relevant, and not probative, I'm not going to allow them to go forward, but you may have that as part of your appeal.

ROSS JOHN: All of them, you're saying every one of these questions I asked –

THE COURT: These ones right here you submitted to me * * * I've gone through them.

ROSS JOHN: Every one of them?

THE COURT: Except the ones she's asked already or the ones I've asked, covered a lot of them, but the ones I haven't allowed to go forward aren't going to go forward. You have a right to appeal my decision in that regard but you have to –

ROSS JOHN: So when can I start my appeal to the way this court is acting?

THE COURT: Not yet, the trial has to go through its completion.

* * *

(Jury Excused)

* * *

ROSS JOHN: Here's the thing, your Honor. So please don't talk while I'm talking. If I'm – if you excuse me, because it looks like we're gonna have a problem by the way you're running this court, if you're going to excuse me, then I have a right to appeal your judgment in all these things that have happened before us and I just wanna get that going because I know now that there isn't anything that we're going to be able to do in this court

> that is fair to my interest. * * * I'm going to object.
>
> THE COURT: You may object.
>
> ROSS JOHN: Because I do not believe that this is a fair process. So would you listen to me, how we gonna deal with the fact that I don't respect or understand what you're saying and that I don't – that you're contaminating, you're leading the witness, you're probe – this whole process, I doubt if you have ever done this ever before in this kind of situation. And I don't know any judge anyplace that would have put anybody in the situation, pro ses, that you put us in, and I need to somewheres go after this court for the behavior that they're going into and I just want to get to that.
>
> THE COURT: You may not do that now. You may not stand, and you may not continue these outbursts so you'll have to leave the courtroom now.
>
> * * *
>
> THE COURT: All right. I would ask the court security officers to remove Mr. John from the courtroom, please.

[783-789]

The prejudicial errors by the District Court as an advocate and participant were routine. The District Court finally recognized its own error when conducting the direct examination of the Attorney General's only witness:

> THE COURT: First of all, why am I doing the questioning? It's your witness.

> MR. MULVEY [Assistant Attorney General]: Well, I certainly wasn't going to interrupt you, your Honor. Thank you.
>
> THE COURT: I was in a rut here.

[1139]

Furthermore, the Assistant Attorney General should have objected every time the District Court became a questioning participant.

The District Court recognized his errors as an advocate and participant, while tainting the Jury against pro se with the following:

> THE COURT: As I mentioned in my opening remarks, this case is a little unique insofar as the procedure employed in the production of evidence, given the fact that the plaintiffs are representing themselves. * * * Again, the plaintiffs, not being lawyers, often were not able to form proper questions that would lead to admissible evidence. I attempted to assist them in this regard by asking questions myself so that relevant, probative information could be elicited from the various witnesses.

[1283-1284]

In addition, the District Court raised virtually all objections and evidentiary rulings *sua sponte*, without objection from the "I-81 Indian Detail," without allowing objection or argument by the pro se, and without providing reasons for effective appellate review. The following examples of unfairness were constant:

> KAHENTINETHA HORN: Objection, sir, I'm objecting.

THE COURT: Overruled. Overruled.

KAHENTINETHA HORN: Well, can I explain why I'm objecting?

THE COURT: Overruled. No.

KAHENTINETHA HORN: Okay.

[transcript 702]

This unfairness at 802:

KAHENTINETHA HORN: Object. Object to that.

THE COURT: Again, the objection can be to the question but not to the answer, all right.

This unfairness:

THE COURT: I've considered that [jury instruction] request and I've denied it.

KAHENTINETHA HORN: Can you tell me why?

THE COURT: No, it's just been denied.

[1217]

These constant unfair rulings happened because the Plaintiffs were pro se. The District Court caused each of the Onondaga 15 to be forced pro se without conducting a hearing. The Record is revealing:

KAHENTINETHA HORN: Can I ask a question? In the beginning these people were allowed to ask questions because they are all lawyers here, pro se lawyers, as a result of an order that was made by you so that we ended up being dumped [by our lawyers]. Now –

THE COURT: I'm sorry, you had –

> KAHENTINETHA HORN: We have a right to ask questions.
>
> THE COURT: You had lawyers, you decided to proceed pro se. Understand that.
>
> KAHENTINETHA HORN: No, we didn't decide that, we didn't even know, we were told afterwards.
>
> THE COURT: There's a whole history –
>
> KAHENTINETHA HORN: We weren't asked about that.
>
> THE COURT: That's something you can appeal later on. That was long before this court saw it – [District Court Magistrate issued the withdrawal Order – but same court].
>
> KAHENTINETHA HORN: And you're the one that gave them the right to do that.
>
> THE COURT: It was another judge that did that. In any event – * * * Yes, so it wasn't me.
>
> KAHENTINETHA HORN: But it's your court, it's your institution here.

[376-377]

In addition, the District Court erroneously granted the "I-81 Indian Detail's" Rule 50 Motion to Dismiss Onondaga 15's Shawn Jones, Nadine O'Field Bucktooth, and Robert Bucktooth III. They were children when they attended the assembly 20 years ago. The following discourse is instructive:

> KAREN JONES: Excuse me, objection. My brother [Shawn Jones] is here, he's mentally

> handicapped, he can't take – put him up there, badger him like you do, he'd shut down.
>
> * * *
>
> ANDREW JONES: He was not able to show his evidence.
>
> * * *
>
> THE COURT: * * * Whatever, the motion has been made. Is there an argument against it?
>
> KAREN JONES: Yeah, I'm arguing against it, he was there with me and he didn't go on the stand because the way they were conducting themselves, he would have problems, and if he were to shut down or anything, he was afraid that the way the bailiffs were around here, he doesn't – didn't know what would happen to him, so he sat here quietly.

[1161]

The District Court did not inquire at all. The Court granted the directed verdict against the 3 children that had waited 20 years for their day in Court! It does not get more unfair.

After being dismissed, Shawn Jones got up on his feet in front of the Jury. Despite his challenges, Shawn presented the following compelling submissions: [1263-1265]:

> SHAWN JONES: I'm not sure how to say this, um, anyway. I'll do the best I can. I'm here because of my family, my friends. I know that they put a lot of their time, a lot of their lives into what – into what they're fighting for, and I wish I could help them more, but my stupid head doesn't always work when I want it to,

> and I've had that – I've had to apologize for that all my life and my family knows that well.
>
> THE COURT: All right, Mr. Shawn Jones, I appreciate your comments, but –
>
> SHAWN JONES: But –
>
> RONALD JONES: He has a right to speak, it's been 20 years.
>
> THE COURT: Excuse me, Mr. Ronald Jones, I've already ruled upon his cause of action
>
> * * *
>
> SHAWN JONES: I just – the safety and well-being of my family, my friends are what's important to me * * * all of this, what's putting in jeopardy which is what's making us live in fear * * * not only our own government, but this –
>
> (Jury Excused)

This is the height of unfairness and injustice. The District Court allowed the lawyers to withdraw from representing Shawn!

III. JUDGE SOTOMAYOR'S BINDING "LAW OF THIS CASE" AND "ROADMAP" FOR JURY INSTRUCTIONS WERE ERRONEOUSLY IGNORED BY DISTRICT COURT BECAUSE PLAINTIFFS WERE PRO SE.

The Onondaga 15 raised and filed Judge Sotomayor's law of this case to be the "roadmap" for the Jury Instructions. The District Court refused to include Judge Sotomayor's binding law without comment. The District Court and the Assistant Attorney General were obligated to include Judge Sotomayor's law of

this case in the Jury Instructions. The pro se were prevented from arguing. This denied Due Process and a fair trial to the pro se Plaintiffs' right to formulate jury instructions. The Second Circuit sanctioned this egregious error. The unfairness toward the pro se continued:

> THE COURT: * * * Having had some time now to review the proposed instructions and verdict form –
>
> KAHENTINETHA HORN: Before you do that, your Honor, we first of all, we were not given very much time to look at your documents [and there were not enough copies for all 15 Plaintiffs to review], 20 minutes is hardly enough for us as we're pro se, as you know, and we don't have any training in law.

[1213-1214]

The Onondaga 15 were not included in formulating the instructions because they were pro se.

The unfairness toward the pro se continued. The District Court ignored giving a jury instruction regarding the issue of the "easement." Throughout the trial, the "I-81 Indian Detail" focused upon a fictional red-herring defense to disperse the Onondaga 15 from an undefined "easement" adjacent to the I-81 highway. The Trial Record is illustrative:

> KAHENTINETHA HORN: There is some information that must be entered into the record, we at least want to do that.
>
> THE COURT: Do what?
>
> ANDREW JONES: Can I enter something in? You may throw it out but may I read it to you, just a little paragraph?

THE COURT: All right.

ANDREW JONES: [reading from Judge Sotomayor's Opinion]

" * * * The protest was held on private property belonging to plaintiff Andrew Jones, an Onondaga who opposed the agreement. Jones' property includes the paved portion of Interstate 81, I-81, or the interstate which is the state, which the state has a nonexclusive right to use under a limited easement granted to the Department of Public Works ['not the State Police' – (added by Andrew Jones)], as well as acreage to the highway on which his house and yard are located."

KAHENTINETHA HORN: The – so on the First Amendment, you have made your rulings on it, but I would continue, like to continue to put into the record more of the –

THE COURT: You may not continue to put anything more in the record. We have ruled upon that, that is it. You may appeal my decision, but that issue is closed. All right. Now do you have objections to the proposed instructions?

[1214-1216]

The District Court ignored this crucial "easement" request without comment because they were pro se. Judge Sotomayor had confirmed there was "no easement" beyond the "paved highway" from which the "I-81 Indian Detail" could disperse the assembly. Common sense tells you that New York State Police provided the definition of "easement" to Judge Sotomayor. In addition, the Assistant Attorney

General injected "easement" into the trial and never objected to the proposed Judge Sotomayor definition. Public records could have easily resolved any dispute.

The Assistant Attorney General made the "easement" an issue in his unsupported argument to the Jury:

> MR. MULVEY: We're never going to resolve factually exactly from the centerline of the highway what the easement was, how far it was, when it was established, who has title to what land. It's complicated, admittedly from what the plaintiffs have told you by the fact that the interstate highway goes through the Onondaga Nation Territory. What I asked you initially and I'll just repeat very briefly is consider what a reasonable state trooper would have believed who had been patrolling Interstate 81 and who had been called in to address what he or she believed was an illegal assembly on the shoulder, the right-of-way, side of the interstate. Not a property dispute, that's not really what the issues are in this case.

[1278]

On the third day of deliberations, the Jury highlighted the error when it asked for the definition of "easement." The District Court refused to provide Judge Sotomayor's definition because the Plaintiffs were pro se. The District Court instructed them instead with unsupported misleading definitions of "easement" and to use "common sense":

> THE COURT: Well, good morning, ladies and gentlemen. Hopefully I can help you here a little bit but I'm not sure I can. Your question,

parties are aware of the question, "Based upon property lines of Jones, we're looking for definition legal of easement, looking for clarification on use of easement by owner/ state."

The difficulty is there's nothing really in the record, the evidence, as to exactly what the easement right-of-way is. It is, I think parties all agree that New York State has that right-of-way where 81 is as they normally do on any highway, combination of proceedings that go on, maintaining and that type of thing and they claim the land and they have that easement right-of-way for public use, and right to maintain it. Mr. Jones has also claimed that he had private property there, I think we would agree from the fence line on would be your –

ANDREW JONES: No, sir, no, sir I even claim the road.

THE COURT: I see. He claims the road as well.

ANDREW JONES: Because Mrs. Sotomayor wrote –

THE COURT: All right. All right, please, I just asked you a question, that's all I want you to do.

ANDREW JONES: May I show it to the jury so they can understand?

THE COURT: You may not.

ANDREW JONES: It is evidence.

THE COURT: It is not evidence, please. Have I answered your question? Anyway, he claims everything, but there is a right-of-way the state has and you don't have any document in evidence, but I think the parties would have to agree that is a – New York State has – actually interstate highway, but it has an area fenced off and has right-of-way or easement through it. I don't know, I'm not sure what you're looking for other than that.

KAHENTINETHA HORN: I object, your Honor.

THE COURT: All right. We have your objection on the record.

ANDREW JONES: It's a limited easement, your Honor.

KAHENTINETHA HORN: Yes, and he has the Sotomayor document.

THE COURT: I'm not going to entertain argument now, please. You have your right to appeal my rulings.

A JUROR: What we're looking for, your Honor, is common definition of easement that most of us are familiar with, and we want to know in this particular case, is it the common definition of easement or is there some special definition?

JUROR NO. 2: For example, he discusses that there's an easement on his land at his house where the Niagara Mohawk or National Grid has wires and he cannot dig in that easement because their wires are there.

> JUROR NO. 7: But I can be on it, and put tables on it and entertain on it.
>
> THE COURT: I think you have to use own common sense, whatever's in the record, evidence, rely upon that. All right. I cannot give you any more information than that. Okay. Thank you.

[1323-1325]

The Plaintiffs would have won if Judge Sotomayor's definition of "easement" was given to the jury and if they had lawyers. The "I-81 Indian Detail" were in fact trespassers on private property. [The video confirms this.]

The District Court refused to give Judge Sotomayor's "roadmap" to the Jury regarding "clear and present danger," "never leaving private property," "never being on the highway," and "never losing their right to First Amendment assembly protection."

The following discourse shows the futility that the pro se 15 encountered when preserving Judge Sotomayor's binding law of this case: [1213-1214, 1280-1281]

> KAHENTINETHA HORN: [Judge] Sotomayor has ruled that qualified immunity is not available in this case as a matter of law on the First Amendment.
>
> * * *
>
> THE COURT: That was a decision that was some time ago, 2005. * * *
>
> KAHENTINETHA HORN: There's been no law since.

> THE COURT: I'm sorry, but it is something I reserved on, qualified immunity. * * * I have submitted some information to them [Jury] to decide certain facts, I cannot decide that at this time.
>
> * * *
>
> KAHENTINETHA HORN: Well, one of the questions I wanted to ask is if it was possible for – if you could include [Judge] Sotomayor's easement paragraph into your instructions, so that the jurors know that it was for only the Public Works people, that it was not for the police, and that that property that we keep talking about belongs to Andrew Jones, so – and the other one is, with the qualified immunity, which is the law of the case, and I don't think according to that case, that decision by [Judge] Sotomayor, that they are entitled qualified immunity. That's – it's a law, that's a law.
>
> THE COURT: I have your argument on that, I understand your position. Your request to include it in the charge is denied, however.

The District Court and the Second Circuit refused to follow Judge Sotomayor's binding law of this case. The Second Circuit said the pro se Plaintiffs "did not preserve their objection to the First Amendment instruction," when, in fact, they did [above]. It is also binding with or without a request.

The following is another example regarding denial of Due Process for pro se. The Onondaga 15 had the right to determine what witnesses to call. The District Court, however, erroneously decided it was going to

make that call as though the pro se did not exist [1047-1049]:

> MR. MULVEY [ASSISTANT ATTORNEY GENERAL]: Judge, I have . . . 24 more troopers who . . . strictly are First Amendment defendants and so I would like the court's view of how many you want to hear.
>
> THE COURT: I think a half dozen tops, five or six would be sufficient to – without being more cumulative and repetitive.
>
> MR. MULVEY: Your Honor, I'm willing to stipulate on their behalf they were present and we don't have to establish that. I mean, I can do that on behalf of all 33, they were present that day.

In light of all the unfair rulings, tekarentake stated:

> PAUL DELARONDE: I've been giving this whole situation a lot of thought, and I believe that I may have some form of a solution to try to bring this agonizing exercise to an end.

The Onondaga 15 were only going to call 3 more witnesses [and only 1 trooper]. The pro se knew they could not beat the unfair rulings. The stipulation by the Assistant Attorney General that the non-testifying troopers were present was useless in light of the following erroneous instruction [2016, 1293]:

> THE COURT: And although there are many defendants in this action, it does not follow that from that fact alone that, if one of the defendants are liable, all the defendants are liable. Each defendant is entitled to fair consideration of his own defense, and is not to be prejudiced by the fact, if it should become

> a fact, that you find against another defendant. * * * As I previously stated, you may not hold any defendant liable for what other defendants did or did not do.

In effect, the District Court, by his unfairly ruling that 27 troopers would not be needed to testify, directed verdicts in favor of those troopers!

IV. SUMMARY

A pro se civil party cannot get Due Process and a fair trial in the United States! The Supreme Court must address this national crisis to finally make "Equal Justice Under Law" more than just a myth for most people and make it a reality for everyone's voice to be heard and respected. The International Court of Justice in The Hague and the people of turtle island respect the natural right of everyone's voice to be heard and respected.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioners

December 22, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

[Filed 11/02/2017]

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16-3603-cv

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ANDREW JONES, ROBERT E. BUCKTOOTH, JR., CHERYL BUCKTOOTH, ROBERT BUCKTOOTH, DEBBY JONES, KAREN JONES, NIKKI JONES, KARONIAKATA JONES, SHAWN JONES, KAHENTINETHA HORN, DYHYNEYYKS, AKA ALFRED LOGAN, JR., TEKARONTAKE, AKA PAUL DELARONDE, ROSS JOHN, RONALD JONES, JR., NADINE O'FIELD / GANONHWEIH, FKA NADINE BUCKTOOTH,

Plaintiffs-Appellants,

v.

JAMES J. PARMLEY, GEORGE BEACH, PAMELA J. MORRIS, DENNIS J. BLYTHE, INV., JOHN F. AHERN, INV., JOSEPH W. SMITH, SGT., JEFFREY D. SERGOTT, TRP., MICHAEL S. SLADE, TRP., JAMES D. MOYNIHAN, TRP., JAMES K. JECKO, TRP., ROBERT HAUMANN, SGT., MARK E. CHAFFEE, TRP., CHRISTOPHER J. CLARK, TRP., PAUL K. KUNZWILER, TRP., DOUGLAS W. SHETLER, TRP., PATRICK M. DIPIRRO, GREGORY EBERL, TRP., GARY A. BARLOW, MARK E. LEPCZYK, TRP., MARTIN ZUBRZYCKO, TRP., GLENN MINER, GARY DARSTEIN, TRP., KEVIN BUTTENSCHON, CHRIS A. SMITH, SGT., NORMAN J. MATTICE, SGT., JOHN E. WOOD, THOMAS P. CONNELLY, JERRY BROWN, HARRY SCHLEISER, SGT., NORMAN ASHBARRY, INV., JOHN DOE, 1-100, JANE DOE, 1-100, PETER S. LEADLEY, TRP., GLORIA L. WOOD, TRP., DAVID

G. BONNER, TRP., DENNIS J. BURGOS, TRP., JOHN P. DOUGHERTY, TRP., DAVID V. DYE, TRP., DARYL O. FREE, TRP., JAMES J. GREENWOOD, SGT., ROBERT B. HEATH, TRP., ANDREW HALINSKI, TRP., ROBERT H. HOVEY, TRP., ROBERT A. JURELLER, TRP., STEPHEN P. KEALY, TRP., EDWARD J. MARECEK, TRP., RONALD G. MORSE, TRP., PAUL M. MURRAY, TRP., ANTHONY RANDAZZO, TRP., ALLEN RILEY, TRP., FREDERICK A. SMITH, TRP., STEVEN B. KRUTH, SGT., TROY D. LITTLE, TRP.[1],

Defendants-Appellees.

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York on the 2nd day of November, two thousand seventeen.

Present: JON O. NEWMAN,
JOHN M. WALKER,
JR., ROSEMARY S. POOLER,
Circuit Judges.

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE

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[1] The Clerk of the Court is directed to amend the caption as above.

32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

Appearing for Plaintiffs-Appellants:	John R. Mann, III, Paisley, Ontario, Canada (appearing pro hac vice)
Appearing for Defendant-Appellee Joseph W. Smith:	Brittany E. Lawrence, Barclay Damon, LLP (Gabriel M. Nugent, *on the brief*), Syracuse, NY
Appearing for 50 Defendants-Appellees:	Frederick A. Brodie, Assistant Solicitor General (Barbara D. Underwood, Solicitor General, Andrew Bing, Deputy Solicitor General, *on the brief*) *for* Eric T. Schneiderman, Attorney General of the State of New York, Albany, NY

Appeal from the United States District Court for the Northern District of New York (Scullin, *J.*, Dancks, *M.J.*).

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Appellants (hereinafter "Onondaga 15") appeal from the October 12, 2016 final judgment of the United States District Court for the Northern District of New York (Scullin, *J*). We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

The Onondaga 15 are members of the Onondaga Nation whose political protest was disbanded by New York State Troopers on May 18, 1997. The dispersal was captured on video by news crews on the scene, who documented a chaotic and sometimes violent encounter. Nearly twenty years of litigation ensued, including one previous trip to this Court, when appellees challenged the district court's denial of qualified immunity. We affirmed, allowing the case to proceed to trial. *Jones v. Parmley*, 465 F.3d 46 (2d Cir. 2006).

In 2015, the majority of the nearly 100 plaintiffs chose to settle with defendants. The individuals who raise this appeal represent a group of fifteen plaintiffs who chose to reject the settlement offer and proceed to trial. The Onondaga 15 were represented by two different sets of counsel throughout most of the pre-trial litigation, but those attorneys were permitted to withdraw prior to the start of trial. As a result, the Onondaga 15 proceeded to trial pro se. The order permitting withdrawal is one of many issues the Onondaga 15 raise in this appeal.

Trial Management

The bulk of the Onondaga 15's briefing and oral argument before this Court focused on their claim that their procedural due process rights were violated by the district court's unusual trial management procedures. The Onondaga 15 specifically allege that the

district court denied their right to a fair trial by limiting the time allotted for opening and closing statements, by actively questioning witnesses, by requiring the fifteen plaintiffs to appoint one spokesperson to question a witness, and by requiring the plaintiffs to submit written questions to the presiding judge to be screened for admissibility before questioning witnesses.

We review trial management claims for abuse of discretion. *U.S. v. Yakobowicz*, 427 F.3d 144, 149-50 (2d Cir. 2005). Though the presiding judge must be sure not to convey partiality, as long as the court remains within those bounds the trial court is given "great leeway" to conduct the trial in the most efficacious manner. *U.S. v. Filani*, 74 F.3d 378, 386 (2d Cir. 1996). In this exceptional case, the district court was tasked with managing a jury trial with fifteen pro se plaintiffs and more than fifty defendants. Under such unusual circumstances, the district court is permitted—and indeed, obligated—to make decisions that will keep the trial on track and ensure that the jury hears only admissible evidence. We think it is clear that the district court acted well within its bounds by managing the questioning of witnesses in a way designed to elicit relevant testimony without permitting the jury determination to be tainted by the consideration of inadmissible evidence. The district court was faced with a formidable task in managing this unwieldy trial and did not abuse its discretion in making these changes to standard trial procedure.

Bias

The Onondaga 15 also alleged that the district court was biased and appeal on the basis of both bias and the denial of a recusal motion before the start of trial. This Court reviews denials of recusal motions and

allegations of bias for abuse of discretion. *U.S. v. Arena*, 180 F.3d 380, 398 99 (2d Cir. 1999).

In *U.S. v. Filani*, we noted that it is "extraordinarily hard" to determine whether a trial judge was biased and that such questions require a "searching examination of the entire trial transcript" in order to "assess their validity." 74 F.3d at 386. This thorough examination is required because "an appellate court too is charged with a duty—one that may not be abdicated—to ensure that the trial it is reviewing was conducted impartially." *Id*; *see also U.S. v. Messina*, 131 F.3d 36, 39 (2d Cir. 1997) (holding on the trial court's partiality only after reviewing the trial transcript).

The Onondaga 15 hinge much of their bias argument on one exchange of the district court with appellant Ross John, which the Onondaga 15 argue "topped them all" in demonstrating "bias and unfairness." During this exchange, Mr. John expressed frustration with the district court's management of the case, particularly the court's refusal to permit admission of the 1794 Canandaigua Treaty and the procedure of having the questions for direct and cross examination pre-screened by the judge. The tone of the exchange became heated, but there is no evidence of bias in the record. The only other specific example of bias alleged by the Onondaga 15 regards the presiding judge's demeanor at the August 18, 2016 pretrial conference, which the Onondaga 15 argue cast an "aura of intimidation" over the impending trial.

The trial transcript reveals that the trial was at times contentious. There are numerous examples of individual members of the Onondaga 15 heckling the presiding judge by calling him "racist," "prejudiced," a "little baby," and a "racist pig." One plaintiff sent a bill for $535 to the presiding judge for expenses incurred

when the district court postponed a scheduled meeting. This trial featuring 15 pro se plaintiffs and more than 50 defendants presented extreme logistical challenges. Yet there is simply no evidence in the record to support a claim for bias. Nor does the letter motion from Kahentinetha Horn requesting recusal of the presiding judge allege any facts that would support recusal, much less a reversal of the decision due to an abuse of discretion.

Jury Instructions

The Onondaga 15 argue the district court provided erroneous jury instructions regarding the personal involvement of defendants, the easement, and the First Amendment.

When an instruction is properly objected to at trial, the instructions are reviewed de novo and will be held "erroneous if they mislead the jury as to the correct legal standard or do not adequately inform the jury of the law." *Hudson v. New York City*, 271 F.3d 62, 67 (2d Cir. 2001) (internal punctuation omitted) (quoting *Hathaway v. Coughlin*, 99 F.3d 550, 552 (2d Cir. 1996)). The reviewing court must reverse the trial court when "the error was prejudicial or the charge was highly confusing." *Id.* at 68 (quoting *Terminate Control Corp. v. Horowitz*, 28 F.3d 1335, 1345 (2d Cir. 1994)).

When an instruction is not properly objected to at trial, a reviewing court may consider "plain error" if that error "affects substantial rights." Fed. R. Civ. P. 51(d)(2). This Circuit has defined "plain error" as one that was "fatal to the integrity of the trial." *Hudson*, 271 F.3d at 70.

The Onondaga 15 properly preserved their objection to the charge regarding the personal involvement of

defendants, but this objection is without effect because the jury charge was correct. It is well settled in this Circuit that the "personal involvement of defendants in alleged constitutional deprivations is a prerequisite to an award of damages under § 1983." *Farrell v. Burke*, 449 F.3d 470, 484 (2d Cir. 2006) (quoting *Wright v. Smith*, 21 F.3d 496, 501 (2d Cir. 1994)).

The Onondaga 15 also properly preserved their objection to the lack of instruction on the easement, but this objection is also meritless. The Onondaga 15 requested admission of the 2006 decision on qualified immunity as evidence of the boundaries of the easement. The Onondaga 15 seem to misapprehend the significance of that earlier decision—which accepted the plaintiffs' facts as true solely for the purposes of the qualified immunity appeal—but their misapprehension of the law does not give rise to a right that the jury be instructed in "facts" that are not actually undisputed facts. Deciding those facts was the purpose of the jury trial and the district court was correct to deny that request.

Appellants did not preserve their objection to the First Amendment instruction, which is thus reviewed for plain error. Though the district court improperly incorporated a First Amendment retaliation test into its instruction, *see Curley v. Village of Suffern*, 268 F.3d 65, 73 (2d Cir. 2001), this instruction was not "fatal to the integrity of the trial" because the district court properly instructed on the Onondaga 15's right to protest limited by the threat of imminent harm. *Hudson*, 271 F.3d at 70.

Withdrawal of Counsel

The magistrate judge granted withdrawal of counsel on the bases of disagreements between the attorneys

and the Onondaga 15 regarding litigation and/or settlement strategies and a general breakdown in the attorney-client relationship. The original group of nearly 100 plaintiffs were represented by two separate firms, Hoffmann, Hubert & Hoffmann, LLP and Morvillo, Abramowitz, Grand, Iason, & Anello, P.C.. After a subset of the plaintiffs refused to accept a settlement offer, both firms filed motions to withdraw. The Hoffmann firm filed a motion to withdraw from representation of twelve specific plaintiffs; the Morvillo firm filed a motion to withdraw from representation of all plaintiffs.

"We review a district court's denial of a motion to withdraw only for abuse of discretion." *Whiting v. Lacara*, 187 F.3d 317, 320 (2d Cir. 1999). In making that determination, this Court has noted that "[d]istrict courts are due considerable deference in decisions not to grant a motion for an attorney's withdrawal" in consideration of the trial court's need to manage its own calendar and in recognition that "[t]he trial judge is closest to the parties and the facts." *Id*. These considerations apply with equal force to decisions to *grant* a motion for withdrawal.

Withdrawal in the Northern District of New York is governed by Local Rule 83.2(b), which provides in relevant part that withdrawal may be granted "upon a finding of good cause." N.D.N.Y. R. 83.2(b). Counselors were permitted to file documents under seal explaining their reasons for withdrawal. The magistrate judge reviewed the public record and the documents under seal and held that withdrawal from representation of the plaintiffs who refused the settlement offer was proper, but denied withdrawal as to the remaining plaintiffs who accepted the settlement. The magis-

trate judge also declined to exercise ancillary jurisdiction over one attorney's motion for an attorney charging lien.

The magistrate judge properly noted that refusal to accept a settlement offer is not a sufficient basis for a withdrawal of representation. There is an admittedly fine line between a request for withdrawal because of a refusal to settle and a request to withdraw because the attorney-client relationship has broken down due to the refusal to settle. In this case, however, the magistrate judge relied upon the correct Local Rule in making the determination on the basis of both public and in camera review of submissions from the attorneys. The magistrate judge did not abuse her discretion in granting withdrawal under these facts.

We have considered the remainder of appellants' arguments and find them to be without merit or relating to harmless error. Accordingly, the order of the district court hereby is AFFIRMED.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket Nos. 05-1830-cv (L) & 05-2035-cv (XAP)

August Term, 2005

KENT PAPINEAU,

Plaintiff,

NEDRICK ASHTON, CLAY ROCKWELL, ABILENE ROCKWELL, HOUSTON ROCKWELL, ONENHAIDA ROCKWELL and JUANITA LEWIS,

Plaintiffs-Counter-Defendants,

SHAWN JONES, ANDREW JONES, STONEHORSE GOEMAN, MARIE PETERS, WEALTHY BUCKTOOTH, *individually and as guardian ad litem for* HOLLY LYONS, ROBERT E. BUCKTOOTH JR., CHERYL BUCKTOOTH, *individually and as guardian ad litem for* NADINE and ROB BUCKTOOTH, MARTHA BUCKTOOTH, ROBERTA BUCKTOOTH, JORDAN BUCKTOOTH, ROBERT BUCKTOOTH, RONALD JONES SR., RUTH JONES, DEBBY JONES, KAREN JONES, NIKKI JONES, KARONIAKATA JONES, TRACY KAPPELMEIER, *individually and as guardian ad litem for* ADAM KAPPELMEIER AND MATTHEW KAPPELMEIER, SHIRLEY SNYDER, ANDREA POTTER, SAMANTHA THOMPSON, MARTHA J. SKYE, STEVEN LEE SKYE, CARA SKYE, ANDREW SKYE, STORMY SKYE, VERNA MONTOUR, SESILEY R. SNYDER, ALICE THOMPSON, MINNIE GARROW, FRANCES DIONE, WENTAWAWI DIONE, JOELY VANDOMMELEN, DARONHIOKWAS HORN, A'ANASE HORN, TEKAHAWAKWEN RICE, KAHENTE HORN

MILLER, KAHENTINETHA HORN, KARONHIOKO'HE HORN, MALCOLM HILL, KATHY MELISSA SMITH, WILLIAM GREEN III, KEVIN HENHAWK, DYHYNEYYKS, MONA LOGAN, GERALD LOGAN, ANTHONY KLOCH JR., FRANK BISTROVICH, BRENT LYONS, BRAD COOKE, JANET CORNELIUS, JINA JIMERSON, DUANE BECKMAN, CHAD HILL, DONNA HILL, STEVE STACY, DALE DIONE, ROBIN WANATEE, JOSHUA WANATEE, ALLY M. WANATEE, ESTHER SUNDOWN, SHELLEY GEORGE, SHEENA GREEN, SHIELA FISH, GARRETT BUCKTOOTH, JOE STEFANOVICH, TYLER HEMLOCK, HAYDEN HEMLOCK, SKRONIATI STACY, KAKWIRAKERON, TEKARONTAKE, TEYONIENKWATASEH, DANIEL MOSES, ANDREW MOSES, ROSS JOHN, BARRY BUCKSHOT, SETH TARBELL, DEIRDRE M. TARBELL and ANDREW BUCKSHOT,

Plaintiffs-Counter-Defendants-Appellees-Cross-Appellants,

v.

JAMES J. PARMLEY, GEORGE BEACH, PAMELA R. MORRIS, DENNIS J. BLYTHE, JOHN F. AHERN, JOSEPH W. SMITH, JEFFREY D. SERGOTT, MICHAEL S. SLADE, JAMES D. MOYNIHAN, JAMES J. JECKO, ROBERT HAUMANN, MARK E. CHAFFEE, CHRISTOPHER J. CLARK, PAUL K. KUNZWILER, DOUGLAS W. SHETLER, PATRICK M. DIPIRRO, GREGORY EBERL, GARY A. BARLOW, MARK E. LEPCZYK, MARTIN ZUBRZYCKO, GLENN MINER, GARY DARSTEIN, KEVIN BUTTENSCHON, CHRIS A. SMITH, NORMAN J. MATTICE, JOHN E. WOOD, THOMAS P. CONNELLY, JERRY BROWN, HARRY SCHLEISER, NORMAN ASHBARRY, PETER S. LEADLEY, MARTIN J. WILLIAMS, GLORIA L. WOOD, DAVID G. BONNER, DENNIS J. BURGOS, JOHN P. DOUGHERTY, DAVID V. DYE, DARYL O. FREE, JAMES J. GREENWOOD, ANDREW HALINSKI, ROBERT B. HEATH, ROBERT H.

HOVEY JR., ROBERT A. JUREI J FR, STEPHEN P. KEALY, TROY D. LITTLE, EDWARD J. MARECEK, RONALD G. MORSE, PAUL M. MURRAY, ANTHONY RANDAZZO, ALLEN RILEY, FREDERICK A. SMITH and STEVEN B. KRUTH,

Defendants-Cross-Defendants-Appellants-Cross-Appellees,

COUNTY OF ONONDAGA, ONONDAGA COUNTY SHERIFF'S DEPARTMENT, KEVIN WALSH, ONONDAGA COUNTY SHERIFF, *in his official and personal capacity,*

Defendants-Cross-Appellees,

JAMES W. MCMAHON, SUPERINTENDENT OF NEW YORK STATE POLICE, *in his official and personal capacity,* TOWN OF ONONDAGA, *and the following persons in their personal and official capacities as New York State Troopers,* ALLEN V. SVITAK JR., MICHAEL L. DELORENZO, JAMES A. ARMSTRONG, MARK WILLIAMS, CLIFFORD A. HEASLIP, EDWARD C. FILLINGHAM, KIMBERLY A. FILLINGHAM, JEFFREY D. RAUB, MARK BENDER, PETER OBRIST, ERIC D. PARSONS, ROBIN PALMER, MICHAEL GRANDY, THOMAS IRWIN, GEORGE MERCADO, FRANK JEROME, JAMES ROGERS, ART BROCOLLI, JOHN DOE, WILLIAM M. AGAN, WILLIAM M. AMBLER, DONALD W. BARKER, MARK A. CAPORUSCIO, MICHAEL G. CONROY, PETER A. KALIN, MATTHEW J. NAVIN, WILLIAM J. ARMSTRONG, GEORGE M. ATANASOFF, DAVID R. BARRY, PETER J. BERATTA, STEVEN M. BOURGEOIS, GEORGE W. BROWNSELL, ROBERT M. BURNEY, RODNEY W. CAMPBELL, MARY A. CLARK, MARK DEMBROW, GERALD J. DERUBY JR., MICHAEL L. DOWNEY, GARY W. DUNCAN, JOHN EVANS, JOHN J. FITZGERALD, ROBERT GARDNER, JOHN E. GIDDINGS, DOUGLAS R. GILMORE, GARY L. GREENE, ANDREW A. LUCEY, JAMES MARTIN, JAMES W. O'BRIEN,

GARY OELKERS, DERRICK A. O'MEARA, RICHARD J. SAUER, MICHAEL H. SCHEIBEL, GARY S. SCHULTZ, TIMOTHY G. SIDDALL, ROBERT J. SIMPSON, KATHERINE SMITH, JAY STRAIT, MICHAEL R. TINKLER, MICHAEL J. WHITE, DONALD M. DATTLER, THOMAS E. ELTHORP, HARRISON GREENEY, MATTHEW A. TURRIE, DENNIS J. CIMBAL and KENNETH KOTWAS,

Defendants-Cross-Defendants.

Argued: June 5, 2006 Decided: October 4, 2006

Before: WALKER, *Chief Judge,* NEWMAN and SOTOMAYOR, *Circuit Judges.*

Individual state defendants-appellants appeal from the denial of their summary judgment motion for qualified immunity on plaintiffs-appellants' claims of First and Fourth Amendment violations stemming from defendants' alleged misconduct in dispersing plaintiffs' demonstration. We affirm the denial of the motion on the free speech claim because under plaintiffs' facts it was not objectively reasonable as a matter of law for defendants to believe that the demonstration presented a "clear and present danger" after several protesters had walked onto an interstate freeway. We further hold with respect to the excessive force claims that although the district court erred in applying our precedent in *Atkins v. New York City,* 143 F.3d 100 (2d Cir. 1998), to say that any force used in connection with an arrest that lacked probable cause is by definition excessive, the denial of qualified immunity was proper because material issues of fact remain as to the reasonableness of the force applied. We also hold that

while the district court erred in concluding that New York law does not provide for qualified immunity on state-law claims, defendants are not entitled to qualified immunity as a matter of law because the same unresolved factual questions that precluded the court from granting defendants qualified immunity on the federal claims apply equally to plaintiffs' state-law claims. Finally, we lack appellate jurisdiction over plaintiffs' cross-appeal because it does not present questions "inextricably intertwined" with defendants' appeal.

AFFIRMED.

FRANK BRADY, Assistant Solicitor General (Eliot Spitzer, Attorney General of the State of New York, Daniel Smirlock, Peter H. Schiff, Nancy A. Spiegel, *on the brief),* Albany, NY, *for defendants-cross-defendants-appellants-cross-appellees.*

JODI PEIKIN, Morvillo, Abramowitz, Grand, Iason & Silberberg, P.C. (Robert J. Anello, *on the brief),* New York, NY, for *plaintiffs-counter-defendants-appellees-cross-appellants.*

Anthony P. Rivizzigno, County Attorney (Carol L. Rhinehart, *on the brief),* Syracuse, NY, *submitted brief for defendants-cross-appellees.*

SOTOMAYOR, *Circuit Judge:*

Individual state defendants-cross-defendants-appellants-cross-appellees James J. Parmley et al. (the "defendants") appeal from the March 28, 2005

order of the United States District Court for the Northern District of New York (Scullin, C.J.), *Jones v. McMahon,* No. 98-CV-374, 2005 WL 928667 (N.D.N.Y. Mar. 28, 2005), which denied defendants' summary judgment motion for qualified immunity on plaintiffs-counter-defendants-appellees-cross-appellants Andrew Jones et al.'s (the "plaintiffs") claims of First and Fourth Amendment violations stemming from defendants' alleged misconduct in dispersing plaintiffs' demonstration in May 1997. Specifically, defendants contend the district court's denial was flawed because (1) even under plaintiffs' facts, it was objectively reasonable as a matter of law for defendants to believe that the demonstration presented a "clear and present danger" after several protesters had entered the roadway of an interstate freeway and (2) the court misconstrued our precedent in *Atkins v. New York City,* 143 F.3d 100 (2d Cir. 1998), in holding that any force used in connection with an arrest that lacked probable cause is by definition excessive. Defendants also appeal the district court's refusal to recognize their assertion of qualified immunity on plaintiffs' state-law claims.

Plaintiffs cross-appeal the district court's March 28 and April 20, 2005 rulings that granted summary judgment to all defendants on some of their claims and to defendants New York State Police ("NYSP") Superintendent James W. McMahon and Onondaga County Sheriff Kevin Walsh on all claims; granted *sua sponte* summary judgment on all claims to the County of Onondaga, the Onondaga County Sheriff's Department ("Sheriff's Department"), and NYSP troopers Mark Bender and Peter Obrist; and denied plaintiffs Marissa Horton and Verna

Montour's motion for reconsideration of the dismissal of their excessive force claims.

For the reasons that follow, we AFFIRM the district court's decision denying qualified immunity to defendants, and DISMISS plaintiffs' cross-appeal for lack of jurisdiction because it presents no issues that are "inextricably intertwined" with defendants' appeal.

BACKGROUND

On October 7, 2005, this Court denied plaintiffs' motion to dismiss this appeal, which had contended that the order appealed from was a non-final denial of a motion for summary judgment. We held that although the district court's rejection of the defendants' motion for summary judgment on qualified immunity grounds was based on the court's determination that there were genuine issues of material fact still to be resolved, this appeal could go forward because defendants had stipulated to plaintiffs' facts for the purposes of this appeal. *See Salim v. Proulx,* 93 F.3d 86, 89 (2d Cir. 1996) (holding that, where a district court rejects a defense of qualified immunity based on disputed issues of fact, "an appeal is available where the defendant accepts, for purposes of the appeal, the facts as alleged by the plaintiff"). Thus, for the purposes of this appeal, we accept the facts as alleged by the plaintiffs.

I. The Facts

In May 1997, plaintiffs, several dozen members of the Onondaga Nation and their supporters, organized a protest to express their opposition to an agreement between the chiefs of the Onondaga Nation and the State of New York that would permit the State to tax tobacco products sold to non-Native Americans on land belonging to the Onondagas. The protest was held on private property belonging to plaintiff Andrew Jones,

an Onondaga who opposed the agreement. Jones's property includes the paved portion of Interstate 81 ("I-81" or the "Interstate"), which the State has a non-exclusive right to use under a limited easement granted to the Department of Public Works, as well as acreage adjacent to the highway on which his house and yard are located.

The protest began on May 8, 1997, with the lighting of a ceremonial fire. Shortly thereafter, law enforcement officers from the Sheriff's Department visited the protest and allowed it to proceed. The protest continued, peacefully and with the consent of the Sheriff's Department, for ten days; the protesters were at all times orderly and peaceful and did not disturb nor harass neighbors, motorists or passersby who witnessed the demonstration. On May 18, the protesters circulated a flyer announcing that a "media event" would be held that day to protest the tobacco agreement. The Sheriff's Department became aware of these plans, and heard rumors that the protesters planned to block I-81 temporarily to draw attention to their cause.

The May 18 gathering was attended by men, women and children of all ages. At approximately 1:45 p.m., a small group of Onondaga protesters, possibly including some plaintiffs,[1] briefly entered the I-81 roadway to distribute literature pertaining to their protest; the group's presence on the highway caused traffic to slow down. Meanwhile, the NYSP took over the job of monitoring the protest from the Sheriff's Department, and at a at a "staging area" north of Jones's property on 1-81, they began assembling what they referred to

[1] As the district court correctly noted, it is a material issue of fact which, if any, of the plaintiffs actually entered the roadway. *Jones,* 2005 WL 928667, at *11. It is undisputed that the majority of people at the demonstration did not enter the roadway.

as the "Indian Detail." This group consisted of seventy State troopers dressed in full not gear and bearing riot batons. A videotape made at the time reveals some troopers joking about their "sticks" and how every trooper has "gotta have a stick." One trooper is heard loudly informing another that the protesters needed "to get their asses kicked." Another trooper is recorded saying that he intended to stay behind because "no one's getting me on some federal process."[2] Troopers in the "Indian Detail" had removed their name tags, even though the State Police Manual requires name tags to be worn at all times.

As the NYSP began leaving the staging area, plaintiff Stonehorse Goeman, a leader of the protest and resident of the Onondaga reservation, attempted to persuade those on the roadway to leave the Interstate and return to the main demonstration on Jones's private property. Goeman also attempted to communicate the protesters' peaceful intentions to NYSP officers at the scene, but his attempts were met by silence or threats of arrest. After the Onondagas had left the highway, the NYSP closed off the north-bound lanes of 1-81 for several hundred feet. The State troopers began marching towards Jones's property, where they assembled on the eastern shoulder of the roadway, forming a "skirmish line" facing the protesters, who were gathered approximately seventy feet off the highway. At the time the troopers formed their skirmish line, none of the protesters was located on or near the highway; they were all peacefully assembled around the ceremonial fire on Jones's private property.

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[2] The Onondagas allege that this hostility was due in part to an earlier and unrelated incident in which Native American demonstrators injured several NYSP troopers during a protest in Buffalo.

They allege they made no threats, engaged in no violent behavior, displayed no weapons and made no effort to move toward the line of troopers.

The NYSP troopers remained on the skirmish line for no more than thirty-five seconds, at which point they received a "go ahead" order from Major Parmley. Parmley acknowledges that at the time he gave this order, he was located at the staging area north of Jones's property, where he could not see the protesters and did not know what they were doing. As soon as the troopers received the "go ahead" order, the defendants charged into the demonstration and began arresting protesters allegedly indiscriminately, assaulting plaintiffs, beating them with their not batons, dragging them by their hair and kicking them. Defendants also allegedly threw one man, who was praying, to the ground and choked him. Plaintiffs further assert that the police manhandled an eleven-year-old girl and an elderly medicine woman and even tossed an infant in a double leg cast from his stroller.

Prior to these actions, the troopers allegedly did not order the protesters to disperse or provide them with any warning or justification for their actions. Defendants concede that they had no idea, when making these arrests, which of the protesters had entered the roadway. Much of what plaintiffs allege was captured on videotape, although, plaintiffs assert, the NYSP attempted to prevent people with cameras from recording all of the events by putting their hands over the lenses and threatening cameramen with arrest.

II. Litigation Resulting from the May 18 Arrests

The demonstrators who were arrested were charged with various state law crimes, and in a September 9, 1997 decision, Justice Philip Miller of the Town of

Onondaga Justice Court dismissed all charges against plaintiffs except for a disorderly conduct charge against medicine woman Marie Peters, finding the informations legally insufficient to establish the charged offenses and raising "serious questions" about the troopers' hearsay testimony that several plaintiffs refused to move from the roadway, were intentionally or recklessly creating a risk of public inconvenience or disregarded a lawful order of the police to disperse. Justice Miller subsequently dismissed the remaining claim against Peters on the merits.

Similarly, on March 5, 1998, Onondaga County Court Judge William Burke dismissed all of the State's initial charges against plaintiff Kenneth Kappelmeier, rejecting defendants' allegation that Kappelmeier was acting with intent to cause public disruption or interfere with the troopers; finding that no evidence supported defendants' allegation that Kappelmeier was on the roadway; and holding that the evidence showed that the confrontation between Kappelmeier and the troopers occurred not on the roadway but on Jones's property, which Jones's invitees had a right to use. The State thereafter produced new facts and new charges against Kappelmeier, largely supported by testimony from a NYSP trooper who testified for the first time before a second grand jury that Kappelmeier was running back and forth in a provocative manner. The jury subsequently acquitted Kappelmeier of all charges.

The case now before us originated in the United States District Court for the Northern District of New York. The plaintiffs alleged that the defendants, *inter alia,* violated their rights to freedom of speech, religion and assembly, used excessive force, engaged in a conspiracy to violate their rights, violated their

right to equal protection, were deliberately indifferent to plaintiffs' medical needs and inflicted severe emotional distress. They also filed claims against NYSP Superintendent James W. McMahon, Onondaga County Sheriff Kevin Walsh, the County of Onondaga and the Sheriff's Department.

After several years of litigation, the district court denied the defendants' motions for summary judgment on the basis of qualified immunity on plaintiffs' First Amendment and excessive force claims, finding that disputed factual issues remained to be resolved before the court could rule on the qualified immunity issue. *Jones,* 2005 WL 928667, at *9-*12. The court granted Walsh and McMahon's respective motions for summary judgment. *Id.* at *6. The court also granted summary judgment *sua sponte* in favor of Onondaga County and its Sheriff's Department, dismissed several of plaintiffs' other claims and dismissed several defendants from the lawsuit. *Id.* at *2-*7. The defendants timely appeal from the district court's denial of their motions for summary judgment based on qualified immunity and its decision not to apply the qualified immunity defense to dismiss plaintiffs' state-law claims.

The plaintiffs timely cross-appeal from the district court's grant of summary judgment to Walsh and McMahon, the court's dismissal of their equal protection, conspiracy, indifference to medical needs and infliction of emotional distress claims, and the court's *sua sponte* dismissal of several defendants and other legal claims.

DISCUSSION

I. Jurisdiction over Defendants' Appeal

The denial of a motion for summary judgment is normally not "immediately appealable because such a decision is not a final judgment." *O'Bert ex rel. Estate of O'Bert v. Vargo,* 331 F.3d 29, 38 (2d Cir. 2003) (citing 28 U.S.C. § 1291). "Under the collateral order doctrine, however, the denial of a qualified-immunity-based motion for summary judgment is immediately appealable to the extent that the district court has denied the motion as a matter of law, although not to the extent that the defense turns solely on the resolution of questions of fact." *Id.* (citing *Behrens v. Pelletier,* 516 U.S. 299, 313 (1996)). Indeed, where, as here, defendants have accepted the plaintiffs' version of the facts for purposes of the appeal, they may challenge the district court's rejection of a qualified-immunity-based motion for summary judgment by arguing that the facts asserted by the plaintiffs "entitle [them] to the defense of qualified immunity as a matter of law." *Salim v. Proulx,* 93 F.3d 86, 91 (2d Cir. 1996). We accordingly have appellate jurisdiction over the limited question of law presented by defendants' appeal.

II. Qualified Immunity

Against this backdrop, we review *de novo* a district court's denial of a summary judgment motion based on a defense of qualified immunity. *Savino v. City of New York,* 331 F.3d 63, 71 (2d Cir. 2003). Our review at this juncture is limited to "circumstances where the qualified immunity defense may be established as a matter of law." *Cartier v. Lussier,* 955 F.2d 841, 844 (2d Cir. 1992). Although we must examine "whether a given factual dispute is `material' for summary judgment purposes, we may not review whether a dispute of fact

identified by the district court is 'genuine.'" *Escalera v. Lunn,* 361 F.3d 737, 743 (2d Cir. 2004) (internal citation omitted).

Qualified immunity "shields police officers acting in their official capacity from suits for damages . . . unless their actions violate clearly-established rights of which an objectively reasonable official would have known." *Thomas v. Roach,* 165 F.3d 137, 142 (2d Cir. 1999). This is a doctrine that seeks to balance the twin facts that civil actions for damages may "offer the only realistic avenue for vindication of constitutional guarantees," and that such suits nevertheless "can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Andersen v. Creighton,* 483 U.S. 635, 638 (1987) (internal citation omitted); *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.) ("There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the answer must be found in a balance between the evils inevitable in either alternative.").

The Supreme Court has established a two-part inquiry to determine when a district court should hold that the doctrine of qualified immunity bars a suit against government officials: (1) the court must first consider whether the facts alleged, when taken in the light most favorable

to the party asserting the injury, demonstrate a violation of a constitutional right, *Saucier v. Katz,* 533 U.S. 194, 201 (2001); and (2) the court must then consider whether the officials' actions violated "clearly

established statutory or constitutional rights of which a reasonable person would have known," *Hope v. Pelzer,* 536 U.S. 730, 739 (2002).

Defendants have assumed, for the purposes of this appeal that "as a threshold matter, plaintiffs have shown a deprivation of a constitutional right." We need only, therefore, concern ourselves with the second part of the qualified immunity inquiry – the determination whether "[t]he contours of the right [allegedly violated are] sufficiently clear that a reasonable official would understand that what he [or she] is doing violates that right." *Anderson,* 483 U.S. at 640; *Luna v. Pico,* 356 F.3d 481, 490 (2d Cir. 2004) ("[E]ven assuming a state official violates a plaintiff's constitutional rights, the official is protected nonetheless if he objectively and reasonably believed that he was acting lawfully."). Finally, we are mindful that the right at issue in a qualified immunity case need not be limited to the specific factual situation in which that right was articulated. Indeed, "the Supreme Court has declined to say that 'an official action is protected by qualified immunity unless the very action in question has previously been held unlawful,' and has, instead, chosen a standard that excludes such immunity if 'in the light of pre-existing law the unlawfulness [is] apparent.' *Back v. Hastings on Hudson Union Free Sch. Dist.,* 365 F.3d 107, 129 (2d Cir. 2004) (quoting *Hope,* 536 U.S. at 739).

A. The First Amendment

The First Amendment declares in part that "Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble." U.S. Const. amend. I. The Amendment embodies and encourages our national commitment to "robust political debate," *Hustler Magazine v. Falwell,*

485 U.S. 46, 51 (1988), by protecting both free speech and associational rights. *See, e.g., id.* (freedom of speech); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-61 (1958) (freedom of association); *De Jonge v. Oregon,* 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to . . . free speech and . . . is equally fundamental.").

The Supreme Court has declared that the First Amendment protects political demonstrations and protests – activities at the heart of what the Bill of Rights was designed to safeguard. *See Boos v. Barry,* 485 U.S. 312, 318 (1988) (calling organized political protest "classically political speech" which "operates at the core of the First Amendment"). Indeed, the Court has repeatedly held that police may not interfere with orderly, nonviolent protests merely because they disagree with the content of the speech or because they simply fear possible disorder. *See Cox v. Louisiana,* 379 U.S. 536, 550 (1965) *("Cox I")* (noting that "constitutional rights may not be denied simply because of hostility to their assertion or exercise" and overturning convictions of individuals protesting arrest of civil rights activists) (quoting *Watson v. City of Memphis,* 373 U.S. 526, 535 (1963) (internal quotation marks omitted)); *Edwards v. South Carolina,* 372 U.S. 229, 237 (1963) (political protest speech is protected even though it invites dispute and may stir people to anger). First Amendment protections, furthermore, are especially strong where an individual engages in speech activity from his or her own private property. *See, e.g., City of Ladue v. Gilleo,* 512 U.S. 43, 58 (1994) (striking down a city ordinance that banned nearly all residential signs, noting that "[a] special respect for individual liberty in the home has long been part of our culture and our law" and "has special resonance when

the government seeks to constrain a person's ability to *speak* there") (emphasis in original).

That said, First Amendment protections, while broad, are not absolute. *Regan v. Boogertman,* 984 F.2d 577, 579 (2d Cir. 1993) (citing *Elrod v. Burns,* 427 U.S. 347, 360 (1976)). It is axiomatic, for instance, that government officials may stop or disperse public demonstrations or protests where "clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears." *Cantwell v. Connecticut,* 310 U.S. 296, 308 (1940). Indeed, where a public gathering threatened to escalate into racial violence and members of a hostile crowd began voicing physical threats, the Supreme Court expressly sanctioned police action that ended the demonstration and arrested the speaker, who defied police orders to cease and desist. *Feiner v. New York,* 340 U.S. 315, 317-21 (1951). The police, the Court reasoned, were not "powerless to prevent a breach of the peace" in light of the "imminence of greater disorder" that the situation created. *Id.* at 321.

1) *Plaintiffs' Free Speech Rights Were Clearly Established.*

Defendants concede that plaintiffs had a constitutional right to protest but instead argue that the contours of the right were not sufficiently clear because of the absence of "decisional law supporting the existence of a right to continue with a demonstration after some of the participants create a public safety hazard." While we recognize that to be clearly established, the right "must have been recognized in a particularized rather than a general sense," *Sira v. Morton,* 380 F.3d 57, 81 (2d Cir. 2004), we disagree for the reasons that follow with defendants' contention

that the right at issue in this case was too general to be clearly established.

Defendants misapprehend the nature of the inquiry here. They essentially argue that we should find qualified immunity unless a Supreme Court or Second Circuit case expressly denies it, but that standard was rejected by the Supreme Court in favor of one in which courts must examine whether in "the light of pre-existing law the unlawfulness [is] apparent." *Back,* 365 F.3d at 129 (quoting *Hope,* 536 U.S. at 739). As we established in the previous section, the Supreme Court has long applied the "clear and present danger" test to protest cases to determine when police interference is constitutional. Moreover, although defendants make much of the fact that some demonstrators had allegedly violated the law, transforming the peaceful demonstration into a potentially disruptive one, the Supreme Court has expressly held that "[t]he right to associate does not lose all constitutional protection merely because some members of the group may have participated in conduct or advocated doctrine that itself is not protected." *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 908 (1982). Were we to accept defendants' view of the First Amendment, we see little that would prevent the police from ending a demonstration without notice for the slightest transgression by a single protester (or even a mere rabble rouser, wholly unconnected to the lawful protest). We see no need to deviate from the "clear and present danger" analysis as established by the Supreme Court[3]

[3] This approach would still provide police officers ample authority in certain circumstances to stop or prevent demonstrations that had turned, or threatened to turn, unduly disruptive or violent.

In the protest context, the Supreme Court has already well articulated the contours of the right and made clear that the police may not interfere with demonstrations unless there is a "clear and present danger" of riot, imminent violence, interference with traffic or other immediate threat to public safety. *Cantwell,* 310 U.S. at 308-309 (finding no imminent violence where anti-Catholic diatribe angered listener and provoked suggestion of violence). Neither energetic, even raucous, protesters who annoy or anger audiences, nor demonstrations that slow traffic or inconvenience pedestrians, justify police stopping or interrupting a public protest. *Cox I,* 379 U.S. at 546-47, 549 n.12 (group of protesters who provoked a visceral, angered response and slowed traffic did not jeopardize their speech rights); *Edwards,* 372 U.S. at 232, 237 ("clear and present danger" means more than annoyance, inviting dispute or slowing traffic).

Plaintiffs allege that they posed no "clear and present danger" of immediate harm or violence at the time the police arrested them. Plaintiffs also allege that they made no threats of physical harm to police or members of the public, did not incite violence or disorder and displayed no dangerous weapons. *See Cox I,* 379 U.S. at 546-47. They claim instead to have gathered on private property to exercise their speech rights peaceably, *see Ladue,* 512 U.S. at 58, a fact that the police knew (because they had monitored the protest from May 8) and implicitly condoned. Members of the protest had even attempted to speak to the NYSP to let them know of their intentions, but the troopers ignored them. Finally, plaintiffs contend that only a few protesters demonstrated on the Interstate; that their activities did not affect the peaceful tenor of the main protest; and that the few protesters who did enter the highway desisted from their conduct before

the police broke up the demonstration. Taken as a whole, the facts as alleged by plaintiffs reveal an orderly, peaceful crowd, the overwhelming majority of whose members had not entered the 1-81 roadway. Given the above, it is clear to this Court that a reasonable factfinder could determine under plaintiffs' version of events that the demonstration did not constitute a "clear and present danger" and thus that the NYSP's actions violated a clearly established constitutional right to protest.

2) *No objectively reasonable officer would have believed that he or she could have as a matter of law dispersed the demonstration under plaintiffs' facts.*

Even if the protesters' First Amendment rights in this case are clearly established, defendants argue that an objectively reasonable officer would not have known that his dispersal of the demonstration was unlawful because the demonstration "had transformed from a peaceful gathering into one posing a clear and present danger to public safety, . . . that was harboring several unidentified persons who had just committed . . . criminal offense[s]." Defendants contend that through that lens, the facts, even as asserted by plaintiffs, required the district court to have granted them summary judgment as a matter of law. We disagree.

We have already concluded that we cannot say as a matter of law that under plaintiffs' facts, their actions presented a "clear and present" danger or immediate harm such that a reasonable officer would have believed he or she could have dispersed the protest. We are mindful that the First Amendment does not insulate individuals from criminal sanction merely

because they are simultaneously engaged in expressive activity. *See Cox 1,* 379 U.S. at 554 ("One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest."). Defendants have alleged that it was reasonable for them to disperse the crowd after members of the crowd had committed crimes on the public highway. As the district court noted, however, there remain questions of material fact regarding whether defendants' purported bases for dispersing the crowd – that some protestors had violated state law that forbids unlawful assembly, N.Y. Penal Law § 240.10, and disorderly conduct, N.Y. Penal Law § 240.20(5) – actually justified their actions. Indeed, under plaintiffs' facts, it is clear that plaintiffs had not violated the law forbidding unlawful assembly. It is equally clear that a serious issue remained as to whether the protesters had engaged in disorderly conduct and whether even if some had, the police could identify those who had entered the roadway in contravention of the disorderly conduct statute. We examine each law in turn as well as the evidence relating to the alleged violation of that law.

Section 240.10 of the Penal Law states that four or more persons assembled for purposes of engaging in violent and tumultuous conduct likely to cause public alarm constitutes an unlawful assemblage. N.Y. Penal Law § 240.10. Conviction under this law requires "an incitement which is both directed towards and likely to produce imminent violent and tumultuous conduct." *Jones,* 2005 WL 928667, at *10 (citation omitted). Plaintiffs acknowledge that some protesters entered the roadway to distribute literature to passing motorists. The facts plaintiffs allege, however, show no incitement to, or threat of, imminent violence and they deny that they were involved in, or intended, such

conduct. We therefore cannot say that a reasonable police officer would as a matter of law have believed that anyone in the crowd had violated this law or that this law gave him or her the right to disperse the demonstrators.[4]

Section 240.20(5) of the Penal Law states that "[a] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, [h]e [or she] obstructs vehicular or pedestrian traffic." N.Y. Penal Law § 240.20(5). New York courts have interpreted this statute to permit punishment only where the conduct at issue does more than merely inconvenience pedestrian or vehicular traffic. *People v. Pearl,* 321 N.Y.S.2d 986, 987 (1st Dep't 1971) ("Something more than the temporary inconvenience caused to pedestrians by the demonstrators' blocking of the west crosswalk, requiring them to enter the roadway to get to the other side, was required to sustain a conviction for obstructing pedestrian traffic."); *see also People v. Nixon,* 248 N.Y. 182, 185, 187 (1928) (overturning disorderly conduct conviction where protesters who occupied the entire sidewalk forced pedestrians out into the street), *overruled on other grounds by People v. Santos,* 86 N.Y.2d 869, 871 (1995). There is, then, a serious question of fact whether the protesters, who allege that they merely walked onto the Interstate to distribute leaflets explaining their protest, had the intent to obstruct or in fact obstructed traffic in such manner as to have violated state law. Assuming, *arguendo,* that the individuals who protested on 1-81's

[4] As plaintiffs note, both sections of the Penal Law were considered and rejected by Justices Miller and Burke when they dismissed the State's charges against some of the plaintiffs for alleged misconduct during the May 18 demonstration.

roadway had violated § 240.20, an issue of fact also nevertheless exists as to whether a reasonable police officer would have believed that he or she could disperse the otherwise peaceable demonstration because a few individuals within that crowd had violated the law at an earlier time and desisted before the dispersal. This is especially the case where, as here, the officers concede for purposes of this appeal that "[n]one of the troopers could identify any person at the gathering as having been on the road." Defendants could not, then, have reasonably thought that indiscriminate mass arrests without probable cause were lawful under these circumstances. *See United States v. Perea,* 986 F.2d 633, 642-43 (2d Cir. 1993) ("A warrantless arrest is unlawful absent probable cause."). Without the ability to identify those individuals who had entered the 1-81 roadway, defendants cannot rely on § 240.20 to justify their actions.

Quite simply, on the facts alleged, we cannot say as a matter of law that the police had an objectively reasonable basis to conclude that the plaintiffs presented a clear and present danger of imminent harm or other threat to the public at the time of the arrests. Defendants were accordingly not entitled to qualified immunity.

3) *The absence of a dispersal order violated First Amendment rights.*

Plaintiffs' facts, as alleged, would also give rise to a separate First Amendment violation even if the NYSP had a lawful basis to interfere with the demonstration. Indeed, while defendants repeatedly invoke the need to disperse the crowd as their *coup de grace* – even claiming that "dispersal [is] the essence of plaintiffs' First Amendment claims" – they completely ignore an important predicate of their defense: the order to

disperse. Here, defendants concede that they issued no dispersal order and instead stood in a "skirmish line," waited thirty-five seconds, and then charged into the crowd, arresting protesters indiscriminately.[5] They further concede that most demonstrators (including many, if not all, of the plaintiffs) had not ventured out onto the Interstate and that they could not identify any of the demonstrators who had. As we noted earlier, plaintiffs had an undeniable right to continue their peaceable protest activities, even when some in the demonstration might have transgressed *the law*. *Claiborne Hardware,* 458 U.S. at 908. Plaintiffs still enjoyed First Amendment protection, and absent imminent harm, the troopers could not simply disperse them without giving fair warning. *City of Chicago v. Morales,* 527 U.S. 41, 58 (1999) ("[T]he purpose of the fair notice requirement [in disorderly conduct statutes] is to enable the ordinary citizen to conform his or her conduct to the law."); *Feiner,* 340 U.S. at 321 (finding no First Amendment violation where imminence of disorder was "coupled with petitioner's deliberate defiance of the police" and their orders to disperse); N.Y. Penal Law § 240.20(6) (failure to heed lawful police order to disperse gathering in public place constitutes disorderly conduct); *accord Dellums v. Powell,* 566 F.2d 167, 181 n.31 (D.C. Cir. 1977) (Where "[t]he record . . . indicates that not all of the arrestees were violent or obstructive or noisy . . . [and] only a small minority of the demonstrators were

[5] The NYSP argues that they confronted a situation of imminent harm. As we have repeatedly stated, however, our limited appellate jurisdiction here precludes us from viewing the facts as defendants assert them. We thus have no occasion to determine whether police would be permitted to disperse without warning a crowd more akin to a mob than the peaceful protest plaintiffs describe.

involved in any mischief," notice and time to comply with a dispersal order is required.).[6] To the extent there was no imminent harm, plaintiffs' version of facts does not give rise to circumstances that would have suggested police need not have given a dispersal order as a matter of law.

In the end, the district court properly concluded that the facts as alleged by plaintiffs demonstrate that defendants violated plaintiffs' clearly established First Amendment rights "of which a reasonable person would have known." *Hope,* 536 U.S. at 739. Accordingly, defendants are not entitled to qualified immunity as a matter of law on plaintiffs' First Amendment claim.

B. The Fourth Amendment

The Fourth Amendment protects individuals from the government's use of excessive force when detaining or arresting individuals. *See Thomas,* 165 F.3d at 143. When determining whether police officers have employed excessive force in the arrest context, the Supreme Court has instructed that courts should examine whether the use of force is objectively unreasonable "in light of the facts and circumstances con-

[6] In some cases, the Supreme Court has recognized that even an order to disperse would not divest demonstrators of their right to protest. In *Cox v. Louisiana,* 379 U.S. 559 (1965) *("Cox II"),* the police knew of and explicitly permitted a civil rights demonstration to gather near the municipal courthouse. Minutes after the protest had started, however, officials attempted to disperse the crowd and arrested those who did not comply with the order. The *Cox II* court reversed the convictions of those arrested, noting "it is clear that the dispersal order did not remove the protection accorded appellant by the original grant of permission." *Id.* at 573.

fronting them, without regard to [the officers'] underlying intent or motivation." *Graham v. Connor,* 490 U.S. 386, 397 (1989). The touchstone of the inquiry, then, is reasonableness, and in measuring it, "we consider the facts and circumstances of each particular case, including the crime committed, its severity, the threat of danger to the officer and society, and whether the suspect is resisting or attempting to evade arrest." *Thomas,* 165 F.3d at 143. We are, of course, mindful that the reasonableness inquiry does not allow us to substitute our own viewpoint; we must judge the officer's actions "from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Graham,* 490 U.S. at 396. Indeed, the Supreme Court has cautioned that in analyzing excessive force claims, courts must make "allowance for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 397.

At the outset, defendants argue that the district court did not apply the reasonableness test as announced in *Graham* in evaluating whether they were entitled to qualified immunity on plaintiffs' excessive force claims, but rather examined only whether defendants had probable cause to arrest plaintiffs. The court's analysis was based, defendants contend, on a misreading of this Court's decision in *Atkins v. New York City,* 143 F.3d 100 (2d Cir. 1998). The court below appears to have extrapolated from *Atkins* the legal proposition that "unless State Defendants had probable cause for the arrests that they made, any force that they used in making those arrests was excessive." *Jones,* 2005 WL 928667, at *9. Because factual questions regarding whether the NYSP had

probable cause to arrest defendants remained in dispute, the court denied summary judgment on plaintiff's excessive force claims. Defendants claim that given this misreading of *Atkins,* the district court's analysis was flawed and the issue of qualified immunity for plaintiffs' excessive force claim should be remanded for determination under the reasonableness test.

There has been disagreement among the lower courts about the breadth and scope of our *Atkins* decision.[7] In that case, the jury returned a verdict in favor of the plaintiff on both his excessive force and false arrest claims and awarded him $1 in nominal damages, but nothing in compensatory damages despite the undisputed fact that plaintiff had been hurt during the arrest. *Atkins,* 143 F.3d at 102. The Court determined that Atkins would be entitled to compensatory damages for his excessive force claim only if he could prove that his "injuries were proximately caused by the constitutional violation." *Id.* at 103. Because "there was never a moment when force applied by [the police officer] could have been found to be lawful," given the jury's verdict on excessive force and false arrest, this Court reasoned, Atkins was entitled to some amount of compensatory damages for his inju-

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[7] *Compare Zellner v. Summerlin,* 399 F. Supp. 2d 154, 164 (E.D.N.Y. 2005) (finding no bright-line rule in *Atkins* that any force used in an arrest that lacked probable cause is excessive) *with Frobel v. County of Broome,* 419 F. Supp. 2d 212, 220 (N.D.N.Y. 2005) ("Any force used in effecting an unlawful seizure of the person is considered excessive and unlawful."); *Black v. Town of Harrison,* No. 02 Civ. 2097, 2002 WL 31002824, at *6 (S.D.N.Y. Sept. 5, 2002) (same); *LaLonde v. Bates,* 166 F. Supp. 2d 713, 719 (N.D.N.Y. 2001) (same); *Scott v. Sinagra,* 167 F. Supp. 2d 509, 515 (N.D.N.Y. 2001) (same).

ries. *Id.* In explaining this reasoning, the Court suggested that "if the jury believed Atkins started to swing at [the officer] (for which he was arrested), the force used in connection with the arrest was unlawful because the arrest was found to be unlawful." *Id.*

This latter sentence has engendered undue confusion. *See supra at* n.7. The issue in *Atkins* was the incongruity between the jury verdict and the damages awarded. Given the jury's determination that Atkins did not use force sufficient to justify the police using force against him and that he had in fact suffered injuries during his encounter with the police, the primary and necessary holding in our decision was that Atkins' injuries were at least in part proximately caused by the unconstitutional application of force by the police. As such, Atkins was entitled to some award of compensatory, rather than nominal, damages. There was accordingly no need for this Court in *Atkins* to reach the question of whether any force used in an arrest lacking probable cause is *per se* excessive. Such a construction would read the highly fact-specific situation in which *Atkins* arose too broadly because it would appear to suggest that any force employed by a police officer would be unlawful so long as probable cause did not exist, even if the detainee had threatened the officer with significant harm. We are further mindful that the Supreme Court held in *Graham* that "*all* claims that law enforcement officers have used excessive force . . . should be analyzed under the . . . 'reasonableness' standard" of the Fourth Amendment, thereby establishing a general requirement. 490 U.S. at 395 (emphasis in original). The *Atkins* court clearly did not intend to create or substitute a new standard for arrests lacking probable cause, and the reasonableness test established in *Graham* remains the applicable test for determining

when excessive force has been used, including those cases where officers allegedly lack probable cause to arrest.

This Court has remanded cases where a district court failed to reach an issue of qualified immunity, *see Francis v. Coughlin,* 849 F.2d 778, 780 (2d Cir. 1988), but we have also addressed the merits of the issue itself on appeal, especially "where the record plainly reveals the existence of genuine issues of material fact relating to the qualified immunity defense." *Hurlman v. Rice,* 927 F.2d 74, 82 (2d Cir. 1991). Because the extensive factual record reveals that material issues already exist concerning the excessive force claims which the district court did not dismiss,[8] we see no reason to remand this issue here, where as a matter of law, defendants would not be entitled to qualified immunity on the facts as alleged by plaintiffs.

Because no party has contested that plaintiffs' version, if true, would establish a constitutional deprivation, our analysis on the qualified immunity defense for the excessive force claim rests solely on the reasonableness of defendants' actions. Under plaintiffs' view of the record, the State troopers indiscriminately arrested some, but not all, plaintiffs and broke up the May 18 demonstration on private property; in the course of these actions, they allegedly employed excessive force against certain plaintiffs, some of whom were arrested and some of whom were not. Our review of the record shows that each plaintiff who has brought an excessive force claim has alleged sufficient facts

[8] The district court dismissed plaintiffs Marissa Horton and Verna Montour's excessive force claims in its March 28 decision. *Jones,* 2005 WL 928667, at *1 n.1, *reconsideration denied,* 2005 WL 928666, at *2 (N.D.N.Y. Apr. 20, 2005).

from which a reasonable factfinder could find that the NYSP employed excessive force in arresting and dispersing members of the demonstration. For example, plaintiffs allege that without provocation, the NYSP threw several plaintiffs to the ground, including an eleven-year-old girl and an elderly medicine woman; beat various plaintiffs with batons; kicked and punched several of them; and pushed at least one man, who was praying, to the ground and choked him.

In sum, after conducting a *de novo* review, we hold that the district court's ultimate determination in denying defendants' motion for summary judgment on the excessive force claims was correct despite its understandable reliance on dicta in *Atkins.*

III. Qualified Immunity under State Law

The district court held that because "state law governs a defendant's entitlement to qualified immunity with respect to state-law claims, *see Napolitano v. Flynn,* 949 F.2d 617, 621 (2d Cir. 1991) (citation omitted), and current New York law does not provide police defendants with a qualified immunity defense with respect to state-law claims, the Court may only consider the issue of qualified immunity with regard to Plaintiffs' federal-law *claims." Jones,* 2005 WL 928667, at *6 n.8. New York law, however, does grant government officials qualified immunity on state-law claims except where the officials' actions are undertaken in bad faith or without a reasonable basis. *See Blouin ex rel. Estate of Pouliot v. Spitzer,* 356 F.3d 348, 364 (2d Cir. 2004) ("The New York courts recognize the defense of qualified immunity to shield the government official from liability unless that action is taken in bad faith or without a reasonable basis."); *Arteaga v. State,* 72 N.Y.2d 212, 216-17 (1998). The district court thus erred in holding the contrary.

Plaintiffs do not attempt to defend the district court's interpretation of New York law, but rather contend that "[e]ven if the [qualified immunity] defense did apply to Plaintiffs' state claims, defendants' defense would necessarily depend on the same 'reasonableness' at issue with respect to Plaintiffs' federal claims." We agree.

As with our determination on defendants' assertion of qualified immunity on plaintiffs' excessive force claims, we see no reason to remand where, as here, "the record plainly reveals the existence of genuine issues of material fact relating to the qualified immunity defense." *Hurlman,* 927 F.2d at 82. New York courts are no different in this regard. *Simpkin v. City of Troy,* 638 N.Y.S.2d 231, 232 (3d Dep't 1996) ("Clearly, without a factual resolution of the sharply conflicting versions of these events, it is not possible to determine whether defendants are qualifiedly immune."); *Hayes v. City of Amsterdam,* 770 N.Y.S.2d 138, 141 (3d Dep't 2003) (same).

Plaintiffs' remaining state-law claims focus on the reasonableness of the State troopers in arresting and detaining them, including whether the defendants' actions resulted in false arrest and imprisonment, malicious prosecution, assault, battery or the intentional or negligent infliction of emotional distress. The resolution of these claims rests heavily on the same facts that form the heart of the federal claims. For instance, under New York law, qualified immunity in the context of a claim of false arrest depends on whether it was objectively reasonable for the police to believe that they had probable cause to arrest. *Simpkin,* 638 N.Y.S.2d at 232; *see also Boyd v. City of*

New York, 336 F.3d 72, 75 (2d Cir. 2003). This question was at the center of the district court's Fourth Amendment excessive force analysis, *see Jones,* 2005 WL 928667, at *9-*12, and that court's conclusions were correct: the numerous disputed material facts precluded the grant of qualified immunity. This analysis also applies to, and controls, the qualified immunity questions presented under New York law.

Because the remaining state-law claims present similar unresolved issues, we need not remand the state-law qualified immunity question here.

IV. Pendant Jurisdiction over Plaintiffs' Cross-Appeal

Having dealt with the merits of defendants' appeal, we turn now to plaintiffs' cross-appeal. Plaintiffs ask this Court to exercise pendent jurisdiction over a number of claims, including the dismissal of their First Amendment conspiracy, equal protection and Fourth Amendment false arrest and imprisonment claims; the grants of summary judgment to defendants Walsh and NYSP Superintendent McMahon; the *sua sponte* rulings dismissing all claims against Onondaga County, its Sheriff's Department, and NYSP troopers Bender and Obrist; and the grant of summary judgment to all defendants with respect to plaintiffs Marissa Horton and Verna Montour's excessive force claims. Under the collateral order doctrine, "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law [and not of fact], is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment." *Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985). When we take such an appeal, we may exercise pendent jurisdiction over other issues that are not ordinarily subject to interlocutory review only when:

(1) they are "inextricably intertwined" with the determination of qualified immunity; or (2) their resolution is "necessary to ensure meaningful review" of the district court's ruling on qualified immunity. *Swint v. Chambers County Comm'n,* 514 U.S. 35, 51 (1995); *see also id.* at 49 (cautioning that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay [appealable] collateral orders into multi-issue interlocutory appeal tickets"). Finally, we are mindful that "[p]endent appellate jurisdiction is a procedural device that rarely should be used because of the danger of abuse" and that accordingly, we must exercise such jurisdiction "[o]nly in exceptional circumstances." *Natale v. Town of Ridgefield,* 927 F.2d 101, 104 (2d Cir. 1991) (citation omitted).

Each finding on which plaintiffs seek to cross appeal involves issues entirely separate and distinct from the qualified immunity analysis at issue here, including the district court's determinations on the subjective intent in plaintiffs' conspiracy claims, *see Crawford-El v. Britton,* 523 U.S. 574, 588 (1998) (articulating a "single objective standard" for evaluating qualified immunity and stating that "[e]vidence concerning the defendant's subjective intent is simply irrelevant to that defense"); on plaintiffs' failure properly to include defendants in their captions; on claims of parties who are not before this court on appeal, *see Kaluczky v. City of White Plains,* 57 F.3d 202, 207 (2d Cir. 1995) (IA] claim involving a 'pendent party' is an 'unrelated question' that cannot be resolved under pendent jurisdiction."); and on issues of respondeat superior and supervisor liability, *see Swint,* 514 U.S. at 51 (finding no pendent jurisdiction over county commission's appeal where "[t]he individual defendants' qualified immunity turns on whether they violated clearly

established federal law [while] the county commission's liability turns on the allocation of law enforcement power in Alabama"). Thus, we have no jurisdiction over plaintiffs' cross-appeal because there are no issues before us "inextricably intertwined" with our qualified immunity analysis.

CONCLUSION

For the foregoing reasons, we AFFIRM the judgment of the district court denying qualified immunity and DISMISS plaintiffs' cross-appeal for lack of jurisdiction.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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5:98-CV-0374
(FJS/TWD)

———

ANDREW JONES, *et al.*,

Plaintiffs,

v.

JAMES PARMLEY, *et al.*,

Defendants.

———

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THÉRÈSE WILEY DANCKS, United States Magistrate Judge

MEMORANDUM-DECISION and ORDER

I. INTRODUCTION

This case has a long, complicated, and varied litigation history. According to the Court's docket, there are ninety-two named Plaintiffs in all, and fifty-one named Defendants. Many additional individuals were named in the suit when it was commenced, but have since been terminated as parties for various reasons. According to the docket, the law firm of Hoffman, Hubert & Hoffman ("Hoffman"), by counsel Terrance J. Hoffman, Esq., represents forty-nine Plaintiffs; the law firm of Morvillo, Abramowitz, Grand, Iason & Anello, P.C. ("Morvillo"), through several individual attorneys, represents forty-three Plaintiffs. [1] The

[1] There are some discrepancies in the motion papers as to the exact number and representation of parties when compared to the Court's docket. *See* Dkt. No. 495-3 ¶¶ 2, 23 (Hoffman indicates that firm represents fifty-two Plaintiffs. However, Martha Bucktooth, whom Hoffman lists in the moving papers as being represented by that firm, is listed on the docket as being represented by Morvillo. Margerete Skye, Holly John, and Leighann Neff are not listed as parties on the docket, but Hoffman lists them as clients in the moving papers. Mona Logan is listed on the docket as being represented by both Hoffman and Morvillo. Steven Lee Skye and Francis E. Kloch, as Executor of the Estate of Anthony J. Kloch, Jr., are listed on the docket as being represented by Hoffman, but are not named as being represented by Hoffman in the moving papers.); Dkt. No. 510 ¶ 3 (indication of fifty-one Plaintiffs

Attorney General of New York State represents fifty of the named Defendants, and the law firm of Hiscock & Barclay, LLP, represents one Defendant, Joseph W. Smith.

Presently pending before the Court is a motion by Hoffman to withdraw as counsel to some of the Plaintiffs that firm represents, namely Plaintiffs Ronald Jones, Jr., Debbie Jones, Nikki Jones, Shawn Jones, Karoniaka (Yackta) Jones, Karen Jones, Karen Jones, as Administratrix of the Estate of Ronald Jones, Sr., Karen Jones, as Administratrix of the Estate of Ruth Jones, Ross John, Tekarontake Paul Delaronde, Kahentinetha Horn, and Gerald Logan, Jr. (Dkt. No. 495). The Hoffman motion also seeks an attorney charging lien. *Id.* The Morvillo firm moves to withdraw from representation of all of the Plaintiffs represented by that firm. (Dkt. No. 498.) Plaintiffs Robert E. Bucktooth, Jr. and Cheryl Bucktooth object to the motion made by Morvillo. (Dkt. No. 501.) Hoffman partially opposes the motion of Morvillo to the extent that the motion seeks withdrawal from representation of all Plaintiffs represented by Morvillo. (Dkt. No. 506.) Plaintiffs Kathy Melissa Smith and Malcolm Hill object to Morvillo's motion. (Dkt. No. 508.) The Defendants, with the exception of Defendant Joseph W. Smith who takes no position on the motions, oppose both motions. (Dkt. No. 510.) Plaintiff Kahentinetha Horn opposes the Hoffman motion. (Dkt. No. 512.) Plaintiff Ronald Jones, Jr., opposes the Hoffman motion. (Dkt. No. 514.) Plaintiff Kenneth Kappelmeier filed a "Petition to Strike" Morvillo's motion, which the Court construes as opposition to that motion. (Dkt. No.

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represented by Hoffman and forty-three Plaintiffs represented by Morvillo). These discrepancies do not affect the Court's determination of the pending motions.

518.) Morvillo filed a reply with permission. (Dkt. No. 522.) Also with permission of the Court, many of these filings were made under seal and/or in redacted format and/or were served on other parties in redacted format due to the sensitive nature of the information contained therein pertaining to the attorney-client relationships at issue.

For the reasons set forth below, the Hoffman motion is granted in part and denied in part, and the Morvillo motion is granted in part and denied in part.

II. CLAIMS AND PROCEDURAL BACKGROUND

Briefly, the Native American Plaintiffs gathered for a ceremonial fire on Plaintiff Andrew Jones' property in May of 1997. Shortly after the gathering commenced, members of the New York State Police came onto Mr. Jones' property, beat many gatherers, and arrested twenty-four people. A civil complaint was filed in March of 1998 alleging, among other claims, civil rights violations. (Dkt. No. 1.) A detailed summary of the legal claims originally asserted in this action, and a detailed description of the incident giving rise to this action, are set forth in District Court Judge Scullin's Memorandum-Decision and Order of March 28, 2005 (Dkt. No. 387, as modified by Dkt. No. 395), and reference is made to that Memorandum-Decision and Order for a summary of those legal claims and a description of that incident. Litigation proceeded for several years. After Defendants' motion for summary judgment on the issue of qualified immunity was decided, and affirmed by the Second Circuit Court of Appeals, *Jones v. Parmley*, 465 F.3d 46 (2d Cir. 2006), the following claims remain: (1) alleged First Amendment violations brought by all Plaintiffs against all Defendants for disrupting the subject gathering; (2) alleged Fourth Amendment violations for excessive

force brought by Plaintiffs Andrew Jones, Holly Lyons, Robert Bucktooth, Jr., Kenneth Kappelmeier, Malcolm Hill, Kathy Melissa Smith, Kevin Henhawk, Gerald Logan, Jr., Anthony Kloch (now deceased), and Marie Peter against Defendants Slade, Jecko, Clark, Barlow, Zubrzycko, Miner, Darstein, Buttenschon, Chris A. Smith, Brown, Scleiser, Ashbarry, Leadley, Williams, Gloria Wood, Bonner, Burgos, Dougherty, Dye, Free, Greenwood, Kealy, Little, Morse, Murray, Randazzo, Riley, and Frederick A. Smith; and (3) state law claims of alleged false arrest, assault and battery, malicious prosecution, intentional infliction of emotional distress, and negligent infliction of emotional distress against all Defendants. (*See generally* Dkt. Nos. 111, 146, 387, and 395; Dkt. No. 510-2 at 2.[2])

Thereafter, settlement discussions began with the consent of all parties and, in an effort to continue the settlement process, former U.S. Magistrate Judge George Lowe conducted a summary trial where the parties presented evidence, but no live witnesses, regarding claims and defenses. (Text Minute Entry 4/9/2008.) Judge Lowe issued an advisory opinion determining that the issue of liability would in all likelihood be decided in favor of the Plaintiffs, but that most Plaintiffs would likely receive nominal damages, while some Plaintiffs should obtain a reasonable settlement. (Dkt. No. 498-3 at 27-64.) Judge Lowe also suggested that punitive damages were unlikely to be awarded. *Id.* Settlement negotiations were more actively pursued by the parties after the advisory opinion was issued.

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[2] Page citations to the Court's docket entries refer to the page numbers automatically inserted by the Court's electronic filing system.

Over the next couple of years, settlement negotiations continued with the knowledge and consent of Plaintiffs and ultimately resulted in a proposed written settlement agreement by approximately February of 2012. (Dkt. No. 498-3 at 10.) Plaintiff's attorneys then obtained written authorization from most of the Plaintiffs to enter into the settlement agreement. The Plaintiffs held meetings and mediation sessions with their attorneys, and the Court appointed mediator, former Magistrate Judge Lowe. (*See generally* Dkt. Nos. 474, 475, 478, 479, and 481; and Text Minute Entries 7/18/2012, 9/4/2012, 11/8/2012, 1/7/2013, 1/28/2013, 3/5/2013, and 7/17/2013.) On consent of the Defendants, the Court also held an ex parte two-day settlement conference with the Plaintiffs, Plaintiffs' counsel, and former Magistrate Judge Lowe as the mediator, but ultimately some of the Plaintiffs would not agree to the settlement. (Dkt. No. 483; Text Minute Entries 10/15/2013 and 10/16/2013.)

During the course of settlement negotiations, differences between Plaintiffs' counsel and some Plaintiffs arose regarding strategy in how the case should proceed, and what issues should be litigated. (*See generally* Dkt. Nos. 495 and 498.) Certain Plaintiffs stopped communications with counsel, and failed to respond to counsel's efforts to contact them about issues relevant to the case. *Id.* Hostility arose between some Plaintiffs and their counsel. *Id.*

Hoffman asserts that a conflict of interest exists because they cannot agree with certain Plaintiffs about litigation and/or settlement strategies, and the attorney-client relationship has broken down between attorney Hoffman and some of the Plaintiffs. (Dkt. No. 495.) Thus Hoffman argues withdrawal from

representation of those Plaintiffs is necessary. *Id.* Morvillo likewise asserts conflicts of interest due to disagreement about litigation and settlement strategies, and argue the firm cannot move forward in good faith with this litigation advancing what Morvillo identifies as claims not asserted in the action. (Dkt. No. 498.) Morvillo also contends that the attorney-client relationship has broken down between that office and certain Plaintiffs, and Plaintiffs have disputes amongst themselves. *Id.* Morvillo notes that these problems, coupled with the failure to be paid by a third party who originally agreed to fund Morvillo's representation of its Plaintiffs in the litigation, are sufficient to permit withdrawal from representation of all forty-three of the Plaintiffs that firm represents. *Id.*

III. LEGAL STANDARD

Withdrawal of counsel in a civil case is governed by Local Rule 83.2(b) which provides:

> An attorney who has appeared may withdraw only upon notice to the client and all parties to the case and an order of the Court, upon a finding of good cause, granting leave to withdraw . . . . Unless the Court orders otherwise, withdrawal of counsel, with or without the consent of the client, shall not result in the extension of any of the deadlines contained an any case management orders . . . or the adjournment of a trial ready or trial date.

N.D.N.Y. L.R. 83.2(b).

"Whether to grant or deny a motion to withdraw as counsel 'falls to the sound discretion of the trial court.'" *Stair v. Calhoun*, 722 F. Supp. 2d 258, 264 (E.D.N.Y. 2010) (quoting *In re Albert*, 277 B.R. 38, 47 (Bankr. S.D.N.Y. 2002)). In determining whether good cause

has been shown for withdrawal, federal courts look to the various codes of professional responsibility, although courts are not bound by the codes. *See Whiting v. Lacara*, 187 F.3d 317, 321 (2d Cir. 1999) (referring to the Code of Professional Responsibility to illustrate both mandatory and permissive situations for withdrawal of counsel); *Heck-Johnson v. First Unum Life Ins. Co.*, No. 01-CV-1739 (GLS/RFT), 2006 WL 1228841, at *4, 2006 U.S. Dist. LEXIS 26265, at *10 (N.D.N.Y. May 4, 2006) (citing to the New York State Code of Professional Responsibility, which is based upon the Model Code). Courts must analyze "the reasons for withdrawal and the impact of the withdrawal on the timing of the proceeding." *Karimian v. Time Equities, Inc.*, No. 10 Civ. 3773 (AKH/JCF), 2011 WL 1900092, at *2, 2011 U.S. Dist. LEXIS 51916, at *3-4 (S.D.N.Y. May 11, 2011). "The court must ensure . . . that the prosecution of the suit is not disrupted by the withdrawal of counsel." *Brown v. Nat'l Survival Games, Inc.*, No. 91-CV-221 (HGM), 1994 WL 660533, at * 3, 1994 U.S. Dist. LEXIS 16572, at *9 (N.D.N.Y. Nov. 18, 1994) (citation omitted).

There is no concrete standard for what constitutes a satisfactory reason for withdrawal, but district courts in the Second Circuit in reviewing reasons for withdrawal have found "the existence of an irreconcilable conflict between attorney and client is a proper basis for the attorney to cease representing his client." *Lan v. AOL Time Warner, Inc.*, No. 11 Civ. 2870(LBS)(JCF), 2011 WL 5170311, at *1, 2011 U.S. Dist. LEXIS 126549, at *3 (S.D.N.Y. Oct. 31, 2011) (citation and punctuation omitted) (collecting cases). Further, an attorney may have valid reasons to withdraw when the client insists that the attorney pursue claims that are not part of a lawsuit or call witnesses the attorney deems detrimental to the case. *See Whiting*, 187 F.3d

317, 322 (citing Model Code DR 2-110(C)(1)(a)). Lack of communication with the client, lack of cooperation, and an "acrimonious relationship" with the client may be good cause for withdrawal. *Munoz v. City of New York*, No. 04 Civ. 1105(JGK), 2008 WL 2843804, at *1, 2008 U.S. Dist. LEXIS 55297, at *2 (S.D.N.Y. July 15, 2008). However, a client's refusal to accept a settlement offer and failure to pay legal fees are not valid reasons on their own to permit withdrawal. *See, e.g., Vaughn v. Am. Tel. & Tel. Co.*, No. 96 Civ. 0989 (LAK), 1998 WL 760230, at *1, 1998 U.S. Dist. LEXIS 17129, at *3 (S.D.N.Y. Oct. 30, 1998) (refusal of a client to accept settlement offer "does not amount to good cause for withdrawal" without further compelling reasons); *Whiting*, 187 F.3d at 321 (nonpayment of certain disputed fees asserted without sufficient particularity not enough to justify withdrawal, but withdrawal permitted on other grounds); *Burack v. Epstein*, No. 88 CIV. 4433 (JES), 1990 WL 129176, at * 1, 1990 U.S. Dist. LEXIS 11497, at *5 (S.D.N.Y. Aug. 30, 1990) (withdrawal not permitted where attorney made insufficient showing of client's failure to pay litigation expenses and agreement was unclear regarding such expenses).

When considering the impact of withdrawal, courts consider the prejudice withdrawal may cause to other litigants, the harm the withdrawal might cause to the administration of justice, and the degree to which withdrawal will delay the resolution of the case. *See Bruce Lee Enterprises, LLC v. A.V.E.L.A., Inc.*, No. 1:10 C 2333(MEA), 2014 WL 1087934, at * 3, 2014 U.S. Dist. LEXIS 37574, at *11 (S.D.N.Y. Mar. 19, 2014) (court must weigh the impact of withdrawal on the progress of the action and take into account the prejudice, harm, and burden to client, the lawyer, and

the judicial system which may be caused by the withdrawal) (citations omitted).

IV. DISCUSSION

A. Hoffman Motion to Withdraw

The Hoffman firm asserts that a conflict of interest exists because they cannot agree with certain Plaintiffs about litigation and/or settlement strategies, and the attorney-client relationship has broken down between attorney Hoffman and some of the Plaintiffs. (Dkt. No. 495.) Thus, Hoffman argues withdrawal from representation of Plaintiffs Ronald Jones, Jr., Debbie Jones, Nikki Jones, Shawn Jones, Karoniaka (Yackta) Jones, Karen Jones, Karen Jones, as Administratrix of the Estate of Ronald Jones, Sr., Karen Jones, as Administratrix of the Estate of Ruth Jones, Ross John, Tekarontake (Paul Delaronde), Kahentinetha Horn, and Gerald Logan, Jr., is necessary. *Id*.

1. Gerald Logan, Jr.

The arguments advanced by Hoffman for seeking to be relieved as counsel to Gerald Logan, Jr. ("Logan"), concerning communication issues are adequate to be relieved as his counsel. (Dkt. No. 495-3 at 8-9.) The Court has not received any communication from Logan indicating he objects to the motion. Without making a specific determination at this time that Logan has abandoned his claims, the Court finds that Hoffman has sufficiently shown that communication problems exist to such an extent that Hoffman's withdrawal from representation of Logan is appropriate. *Munoz*, 2008 WL 2843804, at *1.

2. Ronald Jones, Jr.

Hoffman bases the motion for withdrawal from representation of Ronald Jones, Jr. on a "complete and

utter breakdown of the lawyer/client relationship." (Dkt. No. 495-3 at 10.) Although Plaintiff Ronald Jones, Jr., opposes the application to withdraw (Dkt. No. 514), Hoffman has shown good cause for the withdrawal based upon the rancorous relationship that has developed between the law firm and this Plaintiff. In *Heck-Johnson*, the court granted counsel's motion to withdraw, holding that "[w]hen a client insists on dictating legal strategies to the lawyer to the extent that their relationship significantly deteriorates, the situation may constitute the functional equivalent of a conflict of interest establishing good cause to withdraw." *Heck-Johnson*, 2006 WL 1228841, at *3-4 (citations omitted). "Without revealing privileged confidences, it is readily apparent that there is a fundamental conflict between . . . [Hoffman and Ronald Jones, Jr.] concerning legal strategy that has caused their relationship to deteriorate." *Id.* at *4. Hoffman's submissions, including those filed publically and those submitted under seal with permission of the Court, reveal that Plaintiff Ronald Jones, Jr., insists on pressing claims that are not part of the present lawsuit. The Court finds Hoffman has shown a functional equivalent of a conflict of interest that amounts to good cause for permitting withdrawal. *Id.*

3. Debbie Jones, Nikki Jones, Shawn Jones, Karoniaka (Yackta) Jones, Karen Jones, Karen Jones, as Administratrix of the Estate of Ronald Jones, Sr., and Karen Jones, as Administratrix of the Estate of Ruth Jones

Hoffman's motion regarding the other Jones family member Plaintiffs he represents center on failure to communicate and cooperate with counsel, as well as a

break down of the lawyer/client relationship concerning Karen Jones. (Dkt. No. 495-3 at 13-14.) None of these Plaintiffs have opposed the motion. Hoffman's submissions detail efforts to communicate with these Plaintiffs to no avail. The Court finds that Hoffman has shown evidence of a strained relationship with these Plaintiffs sufficient to grant the motion to withdraw. *Munoz,* 2008 WL 2843804, at *1 (withdrawal permitted where the law firm showed a lack of communication between plaintiff and counsel and an acrimonious relationship that had developed); *Callahan v. Consolidated Edison Co. of New York, Inc.*, No. 00CIV.6542LAKKNF, 2002 WL 1424593, at *1, 2002 U.S. Dist. LEXIS 11791, at *2 (S.D.N.Y. July 1, 2002) ("[f]ailure of a client to cooperate with counsel in the prosecution or defense of an action by, among other things, failing to communicate with counsel, has been found to be an adequate basis . . ." to permit withdrawal by the attorney).

4. Ross John and Tekarontake Paul Delaronde

Plaintiffs Ross John ("John") and Tekarontake Paul Delaronde ("Delaronde") had previously agreed to the proposed settlement, but at an ex parte settlement conference with the Court on October 16, 2013, where Plaintiffs, Plaintiffs' counsel, and mediator George Lowe were present, both of these Plaintiffs withdrew their consent to the settlement. (Dkt. No. 495-3 at 14-15.) In the course of so doing, both of these Plaintiffs expressed a desire to see claims pursued in the litigation that are not part of the Constitutional violations or other claims alleged in the lawsuit. *Id.* Neither John nor Delaronde oppose the Hoffman motion. Similarly as to the Hoffman motion regarding Ronald Jones, Jr., the Court finds Hoffman has shown a functional

equivalent of a conflict of interest that amounts to good cause for permitting withdrawal because this difference of opinion concerning legal strategy has caused their relationship to significantly deteriorate. *Heck-Johnson*, 2006 WL 1228841, at *4. Therefore, withdrawal of Hoffman from representation of John and Delaronde is appropriate.

5. Kahentinetha Horn

Hoffman moves to withdraw from representation of Kahentinetha Horn ("Horn") essentially based upon a fundamental disagreement as to trial strategy, and failure to cooperate. (Dkt. No. 495-3 at 16-18.) Horn has submitted a letter to the Court in response to the motion which is filed under seal pursuant to the Court's permission. (Dkt. No. 512.) Without revealing any specific statements, the Court notes that statements made by Horn confirm that Horn also seeks to pursue claims that are not part of the alleged Constitutional violations and other claims remaining in the case. (Dkt. No. 512 at 2.) Additionally, submissions on the motion by both Hoffman and Horn convince the Court that communication between them has substantially deteriorated and a bitter relationship remains. Thus, Hoffman has shown good cause to permit withdrawal from representation of Horn. *Munoz,* 2008 WL 2843804, at *1.

6. General Conflict Between Plaintiffs in Agreement with Settlement and Plaintiffs not in Agreement with Settlement

Lastly, Hoffman asserts that hostile sentiments between Plaintiffs who have agreed to the proposed settlement and Plaintiffs who have not agreed create an inherent conflict of interest in the office continuing to represent all of the Hoffman Plaintiffs. (Dkt. No.

495-3 at 18-19.) While the refusal of a single client to accept a settlement offer may not amount to good cause for withdrawal, such good cause has been found where the client's refusal to settle is coupled with other compelling reasons to permit withdrawal. *Vaughn*, 1998 WL 760230, at *1 (motion to withdraw granted where the attorney-client relationship generally broke down, the client refused to settle, and the client insisted that a claim lacking merit be pursued). The Court finds that the disagreement between the Plaintiffs who desire settlement and those Plaintiffs who do not, combined with the significant problematic issues outlined above between Hoffman and Ronald Jones, Jr., Debbie Jones, Nikki Jones, Shawn Jones, Karoniaka (Yackta) Jones, Karen Jones, Karen Jones, as Administratrix of the Estate of Ronald Jones, Sr., Karen Jones, as Administratrix of the Estate of Ruth Jones, Ross John, Tekarontake Paul Delaronde, Kahentinetha Horn, and Gerald Logan, Jr., provide further support to grant the Hoffman motion to withdraw from representation of these specific Plaintiffs, while remaining as counsel to the other forty Plaintiffs.

B. Morvillo Motion to Withdraw

Morvillo moves to withdraw from representation of all of the Plaintiffs represented by that firm. (Dkt. No. 498.) The motion is based upon claimed conflicts between Morvillo and the Plaintiffs they represent, and claimed conflicts among and between the Plaintiffs they represent. Specifically regarding these conflicts, Morvillo asserts that a breakdown has occurred in its relationship with certain clients, that certain clients may assert claims and defenses against one another, and that there are disagreements as to strategy and settlement. (Dkt. No. 498 at 4-11.) Morvillo also argues

that they have not been paid since approximately 2008, and therefore should not be required to underwrite a trial. *Id*. at 13.

1. Breakdown of Attorney-Client Relationship and Disagreement in Strategy and Settlement

Morvillo asserts that the attorney-client relationship has broken down as to certain clients to such a serious extent that withdrawal from representation should be granted. (Dkt. No. 498-3 at 13-14.) With regard to the settlement process, Morvillo notes that thirty-eight of their clients originally agreed to the settlement. *Id.* at 13. The dissenting Plaintiffs include Robert E. Bucktooth, Jr., his children Nadine Bucktooth and Robert Bucktooth, Andrew Jones, and Alfred Logan. *Id*. at 13-14. In their sealed moving papers, Morvillo points out certain interactions between their firm and these five Plaintiffs which the Court agrees show dysfunctional communication issues and substantial disagreement regarding strategy and settlement amounting to good cause for withdrawal from representation of these five Plaintiffs. *Id.* at 13-14, 18-23; *see also Heck-Johnson*, 2006 WL 1228841, at *3-4.

Morvillo also asserts that it has had a fundamental breakdown in trial strategy regarding "many of its clients," yet Morvillo only points to specific instances of fundamental differences of opinion regarding litigation and trial strategy between their office and Andrew Jones, Robert E. Bucktooth, Jr., and Cheryl Bucktooth. *Id.* at 21-23; Dkt. No. 522 at 6-9. Notably, Andrew Jones has not filed any opposition to the motion and has verbally indicated he does not want Morvillo to represent him. (Dkt. No. 498-3 at 14.) Robert E. Bucktooth, Jr., and Cheryl Bucktooth filed opposition to the motion. (Dkt. No. 501.) Information

in their opposition confirms discordant and problematic communication issues with Morvillo. *Id.* As such, the Court finds that Morvillo has shown additional good cause to withdraw from representation of Plaintiffs Robert E. Bucktooth, Jr., and Andrew Jones, as well as Cheryl Bucktooth, based upon the breakdown of the attorney-client relationship and substantial differences of opinion concerning trial strategy. *Whiting*, 187 F.3d at 319; *Heck-Johnson*, 2006 WL 1228841, at *4.

Accordingly, Morvillo has shown good cause supporting withdrawal from representation of Robert E. Bucktooth, Jr., Cheryl Bucktooth, their children Nadine Bucktooth and Robert Bucktooth, Andrew Jones, and Alfred Logan. However, good cause for withdrawal has not been shown regarding any other Plaintiff the Morvillo firm represents.

2. Disagreements Among Plaintiffs Represented by Morvillo

In further support of the motion to withdraw from representation of all of the Plaintiffs it represents, Morvillo asserts that disagreements exist among Plaintiffs which would potentially cause the firm "to engage in cross-examination of former clients, including, at a minimum, Andrew Jones . . . ." (Dkt. No. 498-3 at 20; *see also* Dkt. No. 522 at 5-8.) Morvillo generically asserts that they may need to cross-examine "several former clients" without providing specific information about any specific named Plaintiffs other than Andrew Jones. *Id.; see also* Dkt. No. 522 at 5-8. Morvillo also asserts other conflicts between clients, but again only provides specific information concerning Andrew Jones, Robert E. Bucktooth, Jr., and Cheryl Bucktooth. *Id.* at 90; Dkt. No. 522 at 6-9. Morvillo further claims these conflicts cannot be cured

without complete withdrawal by the firm from representation of all Plaintiffs. *Id.* at 21, 89.

The Court does not agree. First, Morvillo's assertion that it would need to vigorously cross-examine former clients is premature and speculative at this juncture based upon the information provided in the sealed moving papers. Second, Morvillo indicates that if it is relieved as counsel to all Plaintiffs, it will assist any new counsel in getting "up to speed on the matter." *Id*. at 25. These claimed conflicts among the Plaintiffs would then potentially persist with any new counsel. Third, if necessary, the Court could appoint special counsel to conduct any such cross-examination deemed necessary and appropriate under the circumstances. This approach would be much less damaging to the Plaintiffs with whom Morvillo has failed to show any specific instances of significant disagreement.

Most importantly, however, the Court must balance the asserted conflict with the impact of withdrawal on the lawsuit. *See Whiting*, 187 F.3d at 320-21 ("In addressing motions to withdraw as counsel, district courts have typically considered whether the prosecution of the suit is likely to be disrupted by the withdrawal of counsel.") (citation and punctuation omitted). Here, in a case involving fifty-one individually named Defendants and at least ninety-two individually named Plaintiffs, forty-three of whom are represented by Morvillo, permitting complete withdrawal of Morvillo under the circumstances presented is not warranted. Judicial economy and fairness to the Plaintiffs for whom Morvillo has not shown a specific substantial conflict dictate that Morvillo's motion for withdrawal from those Plaintiffs must be denied. While there is still some discovery to be completed and the case is not quite trial ready, this case has had a

long and protracted history in litigation. It was originally commenced in 1998. The vast majority of the very extensive discovery is complete. Even though dispositive motions may be made, relatively speaking in the scheme of this litigation, this case is essentially on the verge of trial. As so aptly stated in their opposition to the Morvillo motion by Kathy Melissa Smith and Malcolm Hill, two of the Plaintiffs Morvillo represents, "The majority of clients that my attorneys represent, including ourselves, on this case have been nothing but cooperative. Everything they have advised we have done. We have never been hostile or threatening toward my attorneys. [ ] Our attorneys should not be allowed to cause us apprehension and unease by leaving us at such a critical time." (Dkt. No. 508 at 1.)

To permit withdrawal of Morvillo from representation of all forty-three of the Plaintiffs it represents would cause significant interference with the trial court's management of its calendar and more importantly cause significant unnecessary hardship on the Plaintiffs who have been cooperative and with whom no conflict or loss of trust has been sufficiently shown by Morvillo. Complete withdrawal by Morvillo from all Plaintiffs is not necessary or warranted under the circumstances. *See, e.g., In re World Trade Ctr. Disaster Site Litig.*, 769 F. Supp. 2d 650 (S.D.N.Y. 2011) (attorney representing clients who had made claims to, gave releases to, and received recoveries from the Victim Compensation Fund ("VCF") found to have conflict of interest by virtue of his representation of other clients in the action who had not given releases; Court found appointment of special counsel was necessary to advise clients who made claims to VCF, but Court did not require attorney withdrawal from representation of all other clients.)

3. Morvillo's Fees and Expenses

Morvillo notes that it hasn't been paid since 2008 for its work on this matter. (Dkt. No. 498-3 at 2, 23-24.) Morvillo was originally retained by the Plaintiffs they represent on the understanding of both Morvillo and the Plaintiffs that the fees and expenses would be paid by a third party. (Dkt. No. 498-1 at 19; Dkt. No. 501 at 1; Dkt. No. 508 at 1.) Apparently, through no fault of the Plaintiffs represented by Morvillo, the third party stopped paying Morvillo's fees in 2008. (Dkt. No. 498-3 at 23-24.) Morvillo argues that the non-payment of fees coupled with the "fundamental differences, conflicts, or difficulties with clients" provide enough support to permit their office to withdraw. (Dkt. No. 498-1 at 19.)

Initially however, the Court notes that Morvillo has offered no proof on the motion that they have billed the third party or any of the Plaintiffs for any fees and expenses since 2008. There has been no showing that the Plaintiffs have deliberately disregarded an obligation to pay the fees and expenses of the litigation as they have been incurred. *See Burack*, 1990 WL 129176, at *1 (motion to withdraw denied where attorney failed to show that clients "deliberately disregarded" an obligation to pay expenses of the litigation) (citing N.Y. Code of Professional Responsibility DR 2-110(c)(1)(f)). Next, as set forth above, Morvillo has only shown satisfactory "fundamental differences, conflicts, or difficulties" and specific problematic encounters with certain Plaintiffs, namely Robert E. Bucktooth, Jr., Nadine Bucktooth, Robert Bucktooth, Cheryl Bucktooth, Andrew Jones, and Alfred Logan. Lastly, Morvillo offers no explanation as to why they waited approximately six years after they stopped getting paid for their work to move to withdraw.

The cases cited by Morvillo on this issue do not compel a different result. In *United States v. Lawrence Aviation Indus.*, No. CV 06-4818(JFB)(ARL), 2011 WL 601415, 2011 U.S. Dist. LEXIS 13777 (E.D.N.Y. Feb. 11, 2011), counsel moving to withdraw represented only two of the named defendants and the court permitted withdrawal of counsel in part because the two corporate defendants did not oppose the motion. *Id.* at *2. In *Diarama Trading Co., Inc. v. J. Walter Thompson U.S.A., Inc.*, No. 01 Civ. 2950(DAB), 2005 WL 1963945, 2005 U.S. Dist. LEXIS 17008 (S.D.N.Y. Aug. 15, 2005), the court permitted withdrawal of counsel, but there was only one corporate plaintiff represented by the moving law firm. *Id.* at *2. Here, as noted above, Plaintiffs are individuals, not corporations; Morvillo currently represents forty-three Plaintiffs, only six of whom have been shown to have substantial disagreements with the firm warranting withdrawal. Several Plaintiffs, the Defendants, and counsel for the other Plaintiffs not represented by the Morvillo firm oppose the motion or partially oppose it. (Dkt. Nos. 501, 506, 508, 510, and 518.)

4. Potential for Delay is Substantial and Supports Partial Denial

Morvillo next argues that the potential for delay should not bar the withdrawal of the firm from representation of all of its Plaintiffs. (Dkt. Nos. 498-1 at 20-22; 498-3 at 24.) While it is true that "there are some instances in which an attorney representing a plaintiff in a civil case might have to withdraw even at the cost of significant interference with the trial court's management of its calendar," *Whiting*, 187 F.3d at 321, this is not such a case. To be sure, permitting Morvillo to withdraw from representation of the six Plaintiffs for whom they have shown good

cause for withdrawal, and permitting Hoffman to withdraw from the Plaintiffs for whom good cause for withdrawal has likewise been shown, will delay the progression of this suit. However, if Morvillo's motion to withdraw were granted in its entirety, all forty-three of the Plaintiffs they represent would be searching for new counsel a daunting task in this complex and already lengthy litigation which would clearly force a stay of the matter for an unacceptable amount of time. As it is, the matter will need to be stayed for some period of time to give the Plaintiffs from whom Hoffman and Morvillo are being permitted to withdraw time to find new counsel. In short, to grant Morvillo's motion in its entirety would harm the Plaintiffs for whom no good cause has been shown; it would harm the judicial system; and it would harm the Plaintiffs who continue to be represented by Hoffman. *See Bruce Lee Enterprises*, 2014 WL 1087934, at *3 ("Based on the record presently before us, it is not apparent that harm would come to the clients, lawyers, or judicial system in this case as a result of *denying* the motion and continuing the representation. The harm, in our view, is the harm done to the judicial system were we to *grant* the motion to withdraw . . . .") (emphasis in original).

C. Attorney Charging Lien

Hoffman also seeks an attorney charging lien in the motion to withdraw. (Dkt. Nos. 495-1 at 7-8; 495-3 at 19-20.) Under New York law, an attorney must have good cause to withdraw or the charging lien may be lost. *Hallmark Capital Corp. v. Red Rose Collection, Inc.*, No. 96Civ.2839 (RPP)(AJP), 1997 WL 661146, at *3, 1997 U.S. Dist. LEXIS 16328, at *8 (S.D.N.Y. Oct. 21, 1997). While this Court has found good cause exists for Hoffman to withdraw under Local Rule 83.2(b),

resolving a charging lien issue may involve more of an investigation into who caused the differences between attorney and client, what may be considered a reasonable fee, and may require a "trial-like hearing" to resolve. *Id.* (citation omitted). Moreover, a federal court may, in its discretion, decide not to exercise ancillary jurisdiction to hear fee disputes and lien claims between lawyers and their clients. *See Marrero v. Christiano,* 575 F. Supp. 837, 839 (S.D.N.Y. 1983); *SEC v. Towers Financial Corp.*, No. 93 Civ. 0744 (WK) (AJP), 93 Civ. 0810 (WK), 1996 WL 288176, at * 3, 1996 U.S. Dist. LEXIS 7450, at *9 (S.D.N.Y. May 31, 1996). At this juncture, the Court chooses not to exercise jurisdiction over the charging lien issue. Therefore, that part of the Hoffman motion seeking an attorney charging lien is denied without prejudice to renew.

V. CONCLUSION

Based on the foregoing, it is hereby

ORDERED that the motion by Hoffman, Hubert & Hoffman, LLP to withdraw and for an attorney charging lien is GRANTED in part and DENIED in part as follows:

1. Pursuant to Local Rule 83.2(b), the motion by Hoffman, Hubert & Hoffman, LLP to withdraw as counsel for Plaintiffs Ronald Jones, Jr., Debbie Jones, Nikki Jones, Shawn Jones, Karoniaka (Yackta) Jones, Karen Jones, Karen Jones, as Administratrix of the Estate of Ronald Jones, Sr., Karen Jones, as Administratrix of the Estate of Ruth Jones, Ross John, Tekarontake Paul Delaronde, Kahentinetha Horn, and Gerald Logan, Jr. is GRANTED;

2. Hoffman, Hubert & Hoffman, LLP SHALL serve a copy of this Memorandum-Decision and Order on

ALL Plaintiffs represented by that firm including, but not limited to, Ronald Jones, Jr., Debbie Jones, Nikki Jones, Shawn Jones, Karoniaka (Yackta) Jones, Karen Jones, Karen Jones, as Administratrix of the Estate of Ronald Jones, Sr., Karen Jones, as Administratrix of the Estate of Ruth Jones, Ross John, Tekarontake Paul Delaronde, Kahentinetha Horn, and Gerald Logan, Jr., by January 14, 2015, at their last known addresses, and SHALL file a certificate(s) of service specifically setting forth those addresses by January 16, 2015;

3. On or before February 13, 2015, Plaintiffs Ronald Jones, Jr., Debbie Jones, Nikki Jones, Shawn Jones, Karoniaka (Yackta) Jones, Karen Jones, Karen Jones, as Administratrix of the Estate of Ronald Jones, Sr., Karen Jones, as Administratrix of the Estate of Ruth Jones, Ross John, Tekarontake Paul Delaronde, Kahentinetha Horn, and Gerald Logan, Jr., SHALL have any new counsel they may retain file a notice of appearance as required by Local Rule 83.2(a), or, if new counsel is not retained, SHALL notify the Court in writing of their intent to proceed *pro se* (without representation); and

4. The motion by Hoffman, Hubert & Hoffman, LLP seeking an attorney charging lien is DENIED without prejudice; and it is further

ORDERED that the motion by Morvillo, Abramowitz, Grand, Iason & Anello, P.C., to withdraw is GRANTED in part and DENIED in part as follows:

1. Pursuant to Local Rule 83.2(b), the motion by Morvillo, Abramowitz, Grand, Iason & Anello, P.C., to withdraw as counsel for Plaintiffs Robert E. Bucktooth, Jr., Nadine Bucktooth, Robert Bucktooth, Cheryl Bucktooth, Andrew Jones, and Alfred Logan is GRANTED;

2. Morvillo, Abramowitz, Grand, Iason & Anello, P.C., SHALL serve a copy of this Memorandum-Decision and Order on ALL Plaintiffs represented by that firm including, but not limited to, Robert E. Bucktooth, Jr., Nadine Bucktooth, Robert Bucktooth, Cheryl Bucktooth, Andrew Jones, and Alfred Logan by January 14, 2015, at their last known addresses, and SHALL file a certificate(s) of service specifically setting forth those addresses by January 16, 2015;

3. On or before February 13, 2015, Plaintiffs Robert E. Bucktooth, Jr., Nadine Bucktooth, Robert Bucktooth, Cheryl Bucktooth, Andrew Jones, and Alfred Logan SHALL have any new counsel they may retain file a notice of appearance as required by Local Rule 83.2(a), or, if new counsel is not retained, SHALL notify the Court in writing of their intent to proceed *pro se* (without representation); and

4. The motion by Morvillo, Abramowitz, Grand, Iason & Anello, P.C., to withdraw as counsel for all other Plaintiffs represented by Morvillo is DENIED; and it is further

ORDERED that all further pretrial proceedings are stayed until further order of this Court.

Dated: January 7, 2015
Syracuse, New York

/s/ Thérèse Wiley Dancks
Thérèse Wiley Dancks
United States Magistrate Judge