

**Case Nos: 18-3472; 18-1343; 12-4764**

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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CLAUDIA GAYLE, Individually and  
On Behalf of All Others Similarly Situated  
and as Class Representative, et. al.  
Plaintiffs

**MEMORANDUM OF LAW  
IN SUPPORT OF MOTION  
TO REINSTATE APPEAL  
AND RECALL THE MANDATE  
AND TO FILE OVERSIZE BRIEF**

v.

HARRY'S NURSES REGISTRY, INC. and  
HARRY DORVILIER  
Defendants

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**18-3472 2d Cir Court of Appeals  
Summary Order Mandate**  
(issued 02/14/2020)

ROSELYN ISIGI,  
Plaintiff-Appellee

**18-1343 2d Cir Court of Appeals  
Summary Order Mandate**  
(issued 02/07/2020)

v.  
HARRY DORVILIER, HARRY'S NURSES REGISTRY  
Defendants-Appellants

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CLAUDIA GAYLE Individually and  
On Behalf of All Others Similarly Situated  
and as Class Representative, et. al.

**12-4764 2d Cir Court of Appeals  
Mandate** (issued 07/06/2011) and  
**Summary Order** (filed 12/8/2014)

v.

HARRY'S NURSES REGISTRY, INC.,  
Defendant

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### **Cases**

#### **Gradsky v. United States**

376 F.2d 993 (5th Cir. 1967) Cited 30 times

Showing of good cause expressed through likelihood of injustice

#### **Cord v. Smith**

370 F.2d 418 (9th Cir. 1966) Cited 25 times

#### **Greater Boston Television Corp. v. F.C.C**

463 F.2d 268 (D.C. Cir. 1971) Cited 145 times

#### **Hines v. Royal Indemnity Company**

253 F.2d 111 (6th Cir. 1958) Cited 30 times

#### **Lanteri v. Credit Prot. Ass'n L.P.**

Cause No. 1:13-cv-1501-WTL-MJD (S.D. Ind. Aug. 22, 2017) Cited 2 times

#### **Linda W. v. Indiana Dept. of Educ., (N.D.Ind. 1996)**

927 F. Supp. 303 (N.D. Ind. 1996) Cited 7 times

#### **Ngabirano v. Wengler**

Case No. 1:11-cv-00450-BLW (D. Idaho Mar. 19, 2013)

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### **Statutes**

#### **29 U.S.C. § 201**

#### **28 U.S.C. § 2106**

#### **28 U.S.C. § 452**

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### **Other authorities**

Fed. R. App. P. 27.1

## **I. PRELIMINARY STATEMENT**

This Memorandum Of Law (hereinafter referred to as “the Memorandum”) is submitted to the U.S. Court of Appeals for the Second Circuit (hereinafter referred to as the “Court”) in support of the following two motions filed with the Court on behalf of Harry’s Nurses Registry, Inc. and Harry Dorvilier (hereinafter referred to as the “Defendants”):

1. Motion to Reinstate Appeal and Recall the Mandate orders issued in Gayle v. Harry’s Nurses Registry, Inc. and Harry Dorvilier (18-3472) on 02/14/2020; Isigi v. Dorvilier, Harry’s Nurses Registry (18-1341) on 02/07/2020; and Gayle v. Harry’s Nurses Registry, Inc. (12-4764) on 07/06/2011 (hereinafter referred to as the “Motion to Reinstate and Recall”), pursuant to Rule 27 of the Court’s Federal Rules of Appellate Procedure (FRAP); and
2. Motion For Leave to Submit Oversized Memorandum of Law to Support Motion to Reinstate Appeal and Recall the Mandate (hereinafter referred to as the “Motion to Submit Oversized Memorandum”), pursuant to FRAP, Rule 27.1(e).

This Memorandum is submitted in support of the above referenced Motions in accordance with Local Rule 27.1(a)3 of the Court.

The case law governing the review of a Motion to Reinstate and Recall provides that such relief is justified in cases where (1) the motion made is timely; (2) the moving party can demonstrate that he will be unjustly prejudiced or suffer a grave injustice if such relief is not granted; or (3) special circumstances exist that warrant such relief. Defendants submit that all of these criteria are met in this case and the Motion to Reinstate and Recall should be granted.

Regarding Defendants' Motion to Submit Oversized Memorandum, this request is governed by Local Rule 27.1(a)3. The Court may grant this relief in its discretion, and typically will grant such relief if the moving party can demonstrate that such relief is reasonable under the circumstances. Defendants further submit that the facts presented by Defendants satisfy the foregoing legal standard.

## **II. CONCISE FACTUAL AND PROCEDURAL BACKGROUND**

The instant motions relate to three related cases that were filed with the Court over the period 2012 through 2018. All the cases relate to alleged violations by Defendants under the Fair Labor Standards Act, 29 U.S.C. sections 201 et seq. (hereinafter referred to as the "FLSA") and analogue state laws. Though Defendants were initially represented by counsel, for the past several years, due to frustration with their attorneys and what they perceived as counsels' inability to provide effective representation – they determined it was in their best interest to represent themselves *pro se* for the past several years. It should be noted that the instant litigation commenced in 2007 and over the past 13 years the issues addressed therein have been hotly contested.

Mandate orders in the three cases that are the subject of the pending motions, were issued in July 2011 and February 2020. George A. Rusk was retained by Defendants in late 2020. After devoting significant time to understand the Defendants' concerns and the legal issues raised by this long-standing litigation, Defendants' counsel, has identified significant threshold legal issues that merit further attention of the Court. The purpose of the Motion to Reinstate and Recall is to restore these cases to active status and allow counsel for Defendants to raise a number of

important issues that he believes will ultimately provide the legal grounds for vacating 12 different decisions issued by the Court and the U.S. District Court for the Eastern District of New York (hereinafter referred to as “EDNY”). The purpose of the Motion To Submit Oversized Memorandum is to provide the Court with some insight as to the significance of the legal issues identified on behalf of Defendants and to enter that information into the record so that Defendants’ legal position is presented in a transparent manner and can be readily accessed by adverse parties.

### **III. ARGUMENT**

#### **POINT 1**

#### The Recall Mandate Relief Requested By Defendants Is Warranted

Pertinent legal standards applicable to Defendants’ Motion to Reinstate and Recall are summarized in Greater Boston Television Corp. V. F.C.C. , 463 F. 2d 268 (D.C. Cir 1971). In that case the D.C. Circuit Court of Appeals provides a useful review of the legal standards applied by appellate courts in determining when a “recall of appellate mandate” is warranted. The pertinent standards specified there that are applicable to the instant motion are as follows:

1. **Timeliness.** The court clarifies that since the enactment of 28 U.S.C., section 452, it is no longer necessary to consider whether the request for recall of mandate is or is not made during the “term of the court:”

“The continued existence or expiration of a term of court in no way affects the power of the court to do any act or take any proceeding.” While this section of the Judicial code is generally referred to for its provision liberating the courts from an incapacity because of expiration of the term, the provisions flatly states that “the continued existence of a term does not affect the power of the court...Our conclusion is that the continuance of the “term” is without importance, *supra*, page 5

The court concludes that a court's decision on whether to use its power to recall a Mandate may be affected by the timeliness of the request. In this case, Defendants' motion is made within a year of the date that the last decisions in the Gayle and Isigi cases have been decision have been filed. The terms of the Federal Rules of Civil Procedure (FRCP), Rule 60 (which are explicitly referred to in its discussion as relevant to recall mandate motions, establish a presumption that motions made within one year of a decision are to be considered timely. Further, in light of the fact that the Corona Covid 19 Pandemic resulted in massive impacts on the judicial system from March 2020 to present, Defendants request that the Court take judicial notice of those impacts and determine that the instant motions to Recall Mandate be deemed timely submitted.

2. **Prevention of Grave Injustice.** Another factor to be considered in determining whether the instant Motion to Reinstate and Recall, is whether the relief is necessary to prevent serious prejudice and/or a grave injustice to Defendants. In Greater Boston, *supra*, at page 7, the court held that in the absence of express provisions governing recall of appellate mandate in either the Federal Rules of Appellate Procedure or local court rules, general case law doctrine applies:

In our view, [general] doctrine has the same content as the rule of court discussed in Hines v. Royal Indemnity Co., 253 F. 2d 111, 114, (6<sup>th</sup> Cir. 1958): "A mandate once issued will not be recalled except by order of the court for good cause shown." The "good cause" requisite for recall of

mandate is the showing of **need to avoid injustice...**”This court can...recall its mandate to prevent injustice.” Gradsky v. United States, 376 F. 2d 993, 995 (5<sup>th</sup> Cir. 1967)...While the authority of the appellate court to recall a mandate **to prevent injustice** is not expressly set forth in a statute, it has a foundation in statute as well as the inherent power of the court. We refer to 28 U.S.C. section 2106, a longstanding provision that was reiterated... in the enactment of the Judicial Code “[and] expressly authorizes an appellate court to affirm, modify or vacate any judgment or order of a court brought before it for review, and enter such judgment or require such further proceedings **“as may be just under the circumstances.”**”(emphasis supplied)

Defendants in this case have invested an inordinate amount of time and money to pursue justice through 13 years of contested litigation. Their efforts to date large have for the most part, not been successful. Not only have Defendants paid judgments totaling over \$930,000 in damages, but in addition Defendant Dorvilier has been accused and convicted of felony criminal conduct despite the fact that the NYS Workmans’ Compensation Board which has primary regulatory oversight of the activities in question, had ruled that the conduct engaged in was lawful. Further, Defendants have submitted pertinent documents into the record on a *pro se* basis, only to see those documents essentially ignored. Nonetheless, Defendants continue to place their faith in the judicial system to sort through the complex facts and laws that will determine the final outcome of these cases and now with the help of counsel, believe that they have finally assembled a cogent, focused legal strategy that will demonstrate to the Court that its decisions in the cases at issue were unfair, did not comport with statutory and regulatory requirements and to some extent involved conduct that constituted a fraud on the Court.



Attached as **Exhibit A** is a Memorandum of Law prepared on behalf of Defendants, that identifies and discusses 10 different legal grounds for vacating the Court's decisions in the three cases at issue. This information is presented not only to demonstrate transparency, but also for the purpose of confirming that Defendants have raised meritorious issues in their *pro se* filings that are in the record and were not addressed by the court; and that they will be seriously prejudiced and will suffer grave injustice if they are denied the relief requested in its Motion to Reinstate and Recall. Unless they are now allowed the opportunity to present the substantive legal arguments to back up the *pro se* filings they previously submitted in the record, the Court will be denying Defendants their due process rights as guaranteed by the 14<sup>th</sup> Amendment of the U.S. Constitution. This would indeed constitute a severe prejudice that this Court can readily remedy by granting the relief requested.

- 3. Special Circumstance.** As noted in the analysis provided in Greater Boston, *supra*, the existence of special circumstances provides the basis for recalling mandate. It notes that the doctrine for recall of mandate allows recall to be granted in cases where Fraud on the Court or other misconduct occurs, citing Cord v. Smith, 370 F. 2d 418 at 423 (9<sup>th</sup> Cir. 1966); and in situations where the court determines that a special reason exists to override the “policy of repose” and litigation finality.

Defendants submit that it has identified instances of fraud and fraud on the court as further described in Exhibit A. It also suggests that Defendants' former *pro se*

status constitutes a special circumstance that further warrants the recall relief requested, particularly in this case where the *pro se* filings were submitted into the record and not addressed in full measure and certainly not to the extent set forth in Exhibit A. To give full credence to the well recognized policy that a party has a constitutional right to defend himself in court, Defendants urge the Court to give meaning to this policy by granting the relief requested.

## **POINT 2**

### **Oversize Brief Relief Is Warranted**

The FRAP and Local Court Rules authorize the Court to grant the relief requested. A review of pertinent case law indicates that such relief is routinely granted upon request. See Ngabirano v. Wengler Case No. 1-11-cv-00450-BLW (D. Idaho March 19, 2013); Linda W. v. Indiana Department of Education (N.D. Ind. 1996); Woodley v. Blades Case No. 1:10-cv-00256-EJL (D. Idaho September 5, 2013); Lanteri v. Credit Prot. Ass'n L.P. Case No. 1:13-cv-1501-WTL-MJD (S.D. Ind. August 22, 2017); and Gallardo v. Saad Civil Action No. 5:17CV106 (N.D.W.Va April 11, 2019).

Further, in the instant case Defendants have identified a number of compelling reasons that constitute good cause for granting the relief requested. Defendants believe that it is important to maintain transparency and to enter Exhibit A into the record. This will allow the Court to consider whether Defendants have raised meritorious issues that warrant the relief requested in its Motion to Reinstate and Recall ; and whether Defendants are committed to providing substantive legal arguments if granted the opportunity to

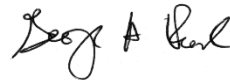
pursue a motion to vacate the three decisions identified in Paragraph 6 of the Affirmation provided in support of Defendants Motion to Reinstate and Recall. It also will provide adverse parties in the litigation timely notice of Defendants concerns and access to the information included in Exhibit A.

#### **IV. CONCLUSION**

Based on the foregoing Defendants respectfully submit that they have demonstrated that the facts of this case and relevant case law warrant the relief requested in their Motions to Reinstate and Recall and to File An Oversized Memorandum. They urge the Court to do so to avoid imposing severe prejudice on Defendants.

Dated: Buffalo, New York  
January 13, 2021

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